LLM MINOR DISSERTATION

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Seaworthiness
- a comparison of standards of seaworthiness
in relation to the carriage of goods by sea
& to marine insurance.

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Research dissertation presented for the approval of Senate in fulfulment of part of the requirements for the degree of Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this degree was the completion of a programme of courses.

I. CONTRACTS OF CARRIAGE :

A. ENGLISH LAW :

1. Common Law position :

(i) General Principles :

(a) Introduction :

At Common Law , every contract of carriage by sea , is subject to an implied undertaking , on the part of the shipowner (or carrier) , to provide a seaworthy vessel . It is , however , submitted that this implied undertaking may be varied or excluded by " clear and unambiguous " terms or words in the contract .

Bartle , (on page 76) [1] states : " it is an implied term , in every contract of carriage by sea , that the shipowner is under an absolute obligation to provide a seaworthy vessel and will be liable , for any breach thereof irrespective of negligence unless such implied undertaking has been expressly excluded . " [2]

In the case of Kopitoff v. Wilson and Others (1876) 1 Q.B. 377 , the Court held :

" ... where there is no agreement to the contrary , the shipowner is , by the nature of the contract , impliedly and necesarily held to warrant that the ship is good , and is in a condition to perform the voyage then about to be undertaken , or , in the ordinary language , is seaworthy , that is , fit to meet and undergo the perils of the sea and other incidental risks to which she must of necessity be exposed in the course of the voyage . "

Furthermore , in the leading case of Steel v. State Line S.S. Co (1877) 2 App. Cas. 72 it was held :

" ... where there is a contract to carry goods in a ship , whether that contract is in the shape of a bill of lading or any other form , there is a duty on the person who furnishes or

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[1] " Introduction to Shipping Law " , 2 nd edition (1963) .

[2] See Scrutton , " Charterparties and Bills of Lading " , 19 th edition (1984) , (on page 82) , in this regard .

supplies that ship , or that ship 's room , unless something be stipulated which should prevent it , that the ship shall be fit for its purpose . That is generally expressed by saying that it shall be seaworthy ... that is properly called a warranty , not merely that they should do their best to make the ship fit , but that the ship should really be fit . "

(b) The Standard of Seaworthiness , required of the ship - owner :

At Common Law , the implied warranty of seaworthiness is absolute in nature i.e. the shipowner (or carrier) is liable , in the event of a breach of the implied warranty , irrespective of pre - cautionary measures or steps that have been taken to ensure that the vessel , concerned is in all respects seaworthy .

Payne and Ivamy , (on page 15) [3] states : " the shipowner undertakes not merely that he has taken every precaution , but that , in fact , the ship is seaworthy . It is no defence that he did not know of the existence of a defect . "

Scrutton , (on page 84) concurs : " The undertaking of sea - worthiness requires not merely that the shipowner will do and has done his best to make the ship fit , but that the ship really is fit in all respects to carry her cargo safely to its destination , having regard to the ordinary perils to which such a cargo would be exposed on such a voyage . "

In the leading case of Mc Fadden v. Blue Star Line (1905) 1 K.B. 697 , the Court stated the following :

" And the rule applicable to the present case is ... that a vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the comm - encement of her voyage having regard to all the probable cir - cumstances of it . To that extent the shipowner ... undertakes absolutely that she is fit , and ignorance is no excuse . If the defect existed , the question to be put is , Would a prudent owner have required that it should be made good before sending his ship to sea had he known of it ? If he would , the ship was not seaworthy within the meaning of the undertaking . "

Thus , according to the above mentioned case , in order to determine , whether a vessel was seaworthy or not , an objective test - in the form of a prudent (reasonable) shipowner - was to be employed .

It is submitted that , the absolute nature of the implied warranty , places an onerous burden on the shipowner (or

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[3] " Carriage of Goods by Sea " , 12 th edition (1989) .

carrier) , who would be liable for any defects or faults in the vessel , equipment or machinery - even if he had been unaware thereof , after having taken all precautionary measures . But , however , the shipowner is not required to supply a vessel , in perfect condition , which is capable of withstanding any peril , however exceptional . [4]

Furthermore , according to Channel J. in the Mc Fadden - case :

" That the warranty of seaworthiness in ordinary sense of that term , the warranty , that is , that the ship is fit to encounter the ordinary perils of the voyage , is a warranty only to the condition of the vessel at a particular time , namely , the time of sailing ; it is not a continuing warranty , in the sense of a warranty that she shall continue fit during the voyage . "

It is submitted , that the standard of seaworthiness does not remain static , but changes i.e. it rises with the modernisation of vessel and improvements in equipment / appliances etc.

In Bradley and Sons Ltd. v. Federal S.N. Co (1926) 24 L.L. Rep. 446 , Lord Scrutton , held :

" The vessel is to be reasonably fit . It certainly need not have fittings or instruments which had not at the time been invented because by subsequent inquiry a danger has been discovered which these fittings and instruments when invented might averted . While the shipowner may be bound to add improvements in fittings where the improvements has become well known or discovery of danger established , the position is quite different where at the time of the voyage the discovery had not been made or the danger discovered . " [5]

Carver , (on page 116) [6] agrees with the above position :
" The required standard of seaworthiness is not absolute . It is relative , among other things , to the state of knowledge and the standards prevailing at the material time . "

(c) The Definition/Meaning of Seaworthiness :

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[4] See Scrutton , (on page 84) .

[5] Lord Shaw in Mountpark S.S. Co. v. Grey , " The Shipping Gazette " (1910) , stated " it is not the duty of the ship - owner to adopt all the newest inventions . His ship need not be always , in all ways , up to date . His duty is to make his ship ' reasonably fit ' . " [Furthermore see Bartle (on pages 87 - 88) and Scrutton (on page 83) .]

[6] " Carriage by Sea " , 13 th edition (1982) .

i.e. what is understood by the term " seaworthiness "

It has been said that the term " seaworthiness " has a dual application : firstly , the vessel must be " capable of complet - ing the voyage undertaken , at the commencement thereof " and secondly , the vessel must be able to " preserve the cargo " , while doing so or , as otherwise stated , the vessel must be " fit in design , structure , condition and equipment to encounter the ordinary perils of the voyage " . [7]

The shipowner is under an obligation to provide a ship , which is seaworthy at the commencement of the voyage - the ship must be able to withstand all conditions (with the exception of " adverse " weather conditions) i.e. the undertaking relates to the " ordinary perils " , likely to be encountered on the voy - age .

It is important to emphasize the fact , that the shipowner cannot plead ignorance of the existence of a defect or that all possible precautionary measures were taken to remedy the defect , due to the fact that the undertaking is absolute in nature . However , the standard or degree of seaworthiness required is not absolute but , in the light of the relevant authority is " relative " .

Prerequisites for the warranty of seaworthiness :

(1) The term " seaworthiness " , requires that , the Master and the crew , concerned , must be " competent and sufficient " i.e. that the Master and the vessel are required to be " reasonably fit " .

Scrutton , (on page 85 - 86) states the following : " Ineffi - ciency of the master or crew may constitute unseaworthiness and this inefficiency may consist of ' disabling want of skill or disabling want of knowledge ' e.g. as to the stability of the vessel [8] or her ballast and fuel system , or in mere shortage of numbers .

In the case of The Makedonia (1962) 1 L.L. Rep. 316 , the Court held , that the shipowners had failed to exercise due diligence before and at the beginning of the voyage properly to man their

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[7] As stated in Carver , (on page 114) - see the relevant cases , in this regard : Dixon v. Sadler (1839) 5 M + W 405 , Seville Sulphur (1888) 15 Sess. Cas. 4 th series 616 , Stanton v.Richardson (1874) L.R. 7 C.P. 390 and Mc Iver and Co , Limited (1903) 1 K.B. 362 . (Furthermore see Bartle , (on page 80) , in this regard .)

[8] The relevant case , in this regard is : Standard Oil v. Clan Line (1924) App. Cas. 100 .

vessel - therefore the Makedonia was unseaworthy , in that she was improperly manned . [9]

Furthermore , in Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd (1962) 1 All ER 474 , the charterers appealed against the decision of Salmon J. , who held that at the date of delivery , the vessel was unseaworthy with regard to her engine - room staff since , applying the test in Clifford v. Hunter (1827) 3 C & P 16 and Rio Tinto Co. Ltd v. Seed Shipping Co. (1926) 134 L.T. 900 , a reasonably prudent owner knowing , as did the owners , that the machinery was old and required maintenance by an experienced and dependable staff , would not have allowed the vessel to put to sea with an engine - room staff which , on the facts , was incompetent and numerically insuffi - cient - thus , according to the learned judge , such a factual situation amounted to a breach of the duty to exercise due diligence .

Unseaworthiness does not arise if the vessel has a defect , which is " merely trivial " i.e. it does not render the vessel unfit for the contemplated voyage . [10]

(2) Cargoworthiness :

The implied warranty of fitness for cargo i.e. " cargoworth - iness " , means that the vessel concerned , must be fit to receive the cargo , in question . (in other words , the vessel must not only be fit to withstand the ordinary perils of the sea but must also be fit to receive the cargo .) As is stated by Carver , (on page 118) " if the ship is to carry goods of a particular kind , the implied warranty requires that the ship and her equipment be fit for the purpose of safely carrying those goods to their destination . "

With regards to the question of improper stowage Bartle , (on page 83) maintains that " improper stowage , so as to conceal a defect in the vessel or to secure , in an inadequate fashion heavy or bulky cargo , may constitute a breach of the warr - anty " i.e. the vessel must be capable of carrying the cargo safely - which implies adequate accommodation and proper equipment , to safely carry the type of cargo contracted for .

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[9] See the relevant cases , in this regard : Clifford v. Hunter (1827) M & M 103 ; Abram Lyle and Sons v. Owners of S.S. Schwan (1909) 450 ; Rio Tinto Co v. Seed Shipping Co (1926) 42 T.L.R. 381 ; Burnard and Algar Ltd. v. Player & Co. (1928) L.L. Rep. 281 ; The Empire Jamaica (1956) App. Cas. 386 ; The Farrandoc (1967) 2 L.L. Rep. 276 etc .

[10] In Steel v. State Line (1887) , the Court discussed the point , in question .

Should damage to the goods arise , due to a failure to satisfy these standards , then the warranty of seaworthiness has been breached .

Carver , (on pages 119 - 120) states , with regards to the issue of improper stowage , that it is necessary , in certain cases , to distinguish between unseaworthiness and bad stowage not amounting to unseaworthiness . [11]

It is submitted that , the possible effect of a breach of the implied warranty of cargoworthiness is that the shipowner (or carrier) would not be able to rely on an exception clause , contained in the bill of lading .

Thus , in reality , the implied warranty of seaworthiness , is twofold in nature :

- the vessel is cargoworthy i.e. is fit to receive the particu - lar cargo , at the time of loading

- the vessel is herself , seaworthy or fit , at the time of sailing .

This conclusion is supported by the case of Rathbone v. D. MacIver , Sons & Co. (1903) 2 K.B. 378 , where the Court held :

" ... that the clause relating to unseaworthiness ... included unfitness of the ship to receive the cargo ... prima facie the term " unseaworthiness " in a bill of lading includes unfitness of the ship to carry the cargo as well as unfitness to encounter the perils of navigation . "

(d) Failure to provide a seaworthy vessel :

i.e. the effect of unseaworthiness

Should the vessel , concerned , not have been in a seaworthy condition , at the commencement of the voyage and the cargo - owner suffered loss or damage due to such unseaworthiness , the shipowner (or carrier) would be liable for such consequential damages , that ensued .

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[11] With regards to the issue of improper or bad stowage , see the leading case of Elder , Dempster v. Paterson , Zachonis (1924) All ER 135 , where the Court held on the facts that the loss of the oil was due to bad stowage and not the unseaworth - iness of the ship . (Reference was made to the cases of Wade and Sons Ltd. v. Cockerline & Co. (1905) 10 Comm. Cas. 115 and Kopitoff v. Wilson (1876) 1 Q.B.D. 455 .)

It is essential , for the cargo - owner , in order to be able to recover , such consequential damages , to establish the follow - ing : .

(i) that the ship , concerned , was in fact unseaworthy

(ii) the loss or damage sustained was caused by such unsea - worthiness [12]

However , it is important to note that although the vessel was unseaworthy , the shipowner could still rely on certain terms contained in the contract of affreightment : so - called " exception clauses " .

In The Europa (1907) All ER 394 , the Court held that a breach of the implied warranty of seaworthiness , does not displace the terms of a special contract of affreightment - which had the result , that the shipowner could still rely on it 's specific terms or clauses . The Court held the following :

" Seaworthiness is not a condition precedent in a contract of affreightment to the extent that , if the ship be unseaworthy , the shipowner is reduced to the position of a common carrier and liable for all damages occasioned to the cargo , even if such damage be soley caused by an excepted peril and not by the unseaworthiness . " [13]

The question , as to whether the aggrieved party would be able to repudiate the contract of carriage, depends on whether the implied warranty of seaworthiness is to be classified , as being either a warranty or a condition . [14]

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[12] According to Scrutton , (on page 106) " ... the goodsowner must , in order to make the shipowner liable , esta - blish both these facts , and cannot recover for the loss or damage merely on the ground that the ship was unseaworthy , unless it is shown that the loss or damage was caused by the unseaworthiness . "

[13] In other words , despite the fact that there had been a breach of the warranty , the exception clauses in the charter - party were still binding , provided that the damages , suffered by the cargo - interests were not caused by the unseaworthi - ness . The Court referred to the following cases : Steel v. State Line Co. (1877) 3 App. Cas. 72 ; The Glenfruin (1885) 10 P.D. 103 ; Kopitoff v. Wilson (1876) and Gilroy v. Price (1893) App. Cas. 56 . [A case , which is also relevant , in this regard , is Tattersall v. The National S.S. Co. Ltd (1884) 12 Q.B.D. 297 .]

[14] See Payne and Ivamy , (on page 16) and Carver , (on page 106) , concerning the issue of whether the implied warranty could be regarded , as being either a condition or a warranty .

The leading cases regarding the issue of " unseaworthiness " , are Kish v. Taylor (1912) A.C. 604 and Stanton v. Richardson (1831) 8 Bing 124 , where the Court concluded that , as the vessel was unseaworthy for the cargo agreed on and as she could not be made fit , within a reasonable period of time , the charterer was justified in refusing to reload i.e. if the defect , arising before the commencement of the voyage , rendered the vessel unseaworthy , which could not be remedied within a reasonable period of time , the contract could be repudiated .

The Court of Appeal , in the case of Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha (1962) All ER 474, concluded that , the unseaworthiness of the vessel , under a time charter , which resulted in a delay , did not constitute a breach of a condi - tion , justifying the rescission of the time charter , by the aggrieved party - only , however , if the delay was such , as to : " frustrate the commercial purpose of the charter ", could the charterparty be rescinded . It is clear from this dicta , that a breach of the implied warranty of seaworthiness , will only amount to a breach of a condition, where it is such , so as to " commercially frustrate the object of the adventure . "

In the event of unseaworthiness , the charterer or the shipper would be entitled to repudiate the contract of carriage either , at the commencement of the voyage or where there is a defect , which cannot be remedied , before the date mentioned in the contract or within a reasonable period of time (in the abscence of such a date) . In other words , a breach of the implied warranty of seaworthiness , is a necessary prerequisite for the carrier 's or the shipowner 's liability . [15]

However , if the defect be remedied without , constituting a " frustration of the commercial purpose of the adventure " , the charterer would not be entitled to repudiate the contract , but could claim necessary compensation for any loss or damage suff - ered due to the delay . Once the voyage has commenced , the charterer would not be able to repudiate or rescind the contract of carriage but would be entitled to institute action for damages suffered , due to the initial unseaworthiness .

(e) The Relevant Time :

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[15] See in this regard Carver , (on pages 107 - 108) , where the learned author , states : " Breach of the implied warranty of seaworthiness entitles the cargo - owner to damages when it causes loss or damage to his goods . But the carrier will only be responsible for such loss or damage if it is caused by the unseaworthiness . " [Reference was then made to cases of Smith , Hogg v. Black Sea and Baltic General Insurance (1940) App. Cas. 997 and The Christel Vinnen (1924) P. 208 .]

i.e. when must the vessel be seaworthy ?

The relevant question is : when or at what stage , does the implied warranty of seaworthiness commence operating or func - tioning ?

It is submitted that the answer to this question , is that the vessel , concerned is required to be seaworthy at the time or moment of sailing i.e. there will be a breach , if the vessel was unfit , at the moment of sailing , even though she was fit at the moment of the loading of the cargo . [16]

Should a defect , however , arise after the vessel has commenced the voyage (i.e. has left port) , no breach of the implied warranty of seaworthiness has taken place - in other words , should loss occur , due to a cause , after the vessel has sailed on the contracted voyage , the shipowner would only be liable if, " the cause was one for which he was answerable ." [17]

Bartle , (on page 77) , is of the opinion , that to simply state , that the warranty must be complied with at the moment of sailing, is not accurate - as it amounts to an " oversimplifi - cation " , as here are certain stages preceding departure , which must also be complied with .

Support for this statement , can be found in the judgement of Lord Scrutton , in the case of Reed v. Page (1927) 1 K.B. 743, where the learned judge held : " There is some confusion in the authorities as to the warranty of seaworthiness ... due ... to two causes : (1) fitness of the ship to enter on the contempl - ated adventure of navigation , and (2) fitness of the ship to receive the contemplated cargo , as a carrying receptacle . "

In Mac Fadden v. Blue Star Line (1905) , where the Court considered the application of the implied warranty to the stage preceding departure , namely the ' loading stage ', Channel J. held : " ... the warranty is that at the time the goods are put on board ... (the vessel) is fit to receive them and to en - counter the ordinary perils that are likely to arise during the loading stage . "

Bartle , (on page 78) provides : " we can see that ' there are previous stages of seaworthiness as a ship , applicable to pro -

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[16] The relevant cases , in this regard , are the follow - ing : The Rona (1884) 51 L.T. 28 ; Quebec Marine Insurance Co v. Commercial Bank of Canada (1870) L.R. 3 P.C. 234 ; Compagnie Algerienne de Meunerie v. Katana Societa (1960) 2 Q.B. 115 etc.

[17] See Carver , (on page 120) , in this regard .

ceeding to loading port , loading , [18] and waiting to sail when loading is completed ' [19] . The juncture with which we are the most concerned , however , is the actual commencement of the voyage . "

The above statement is supported by the dicta of Lord Scrutton in Reed v. Page (1927) 1 K.B. 743 : " Looked at from the point of view of a ship to sail the sea , the highest measure of lia - bility will be when she starts on her voyage , and this is often spoken of as the stage when the warranty attaches ; but what is meant is that it is the time when that highest measure of liabi - lity attaches . "

On the other hand , the highest measure of liability as a cargo - carrying adventure , that is , of " cargoworthiness ", is when cargo is commenced to be loaded . It has been decided that if at this stage the ship is fit to receive her contract cargo , it is immaterial that when she sails on her voyage , though fit as a ship to sail , she is unfit by reason of stowage to carry her cargo safely . " [20]

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[18] Carver , (on pages 122 - 123) states , that it would appear that the loading stage , is regarded as constituting a separate stage : " It follows that the warranty that the ship is fit to receive the cargo attaches at the time it is put on board or , more accurately ... at the time of the start of the loading of the cargo ... as a whole , which is loaded at one place . The warranty is not a continuing warranty after the goods are put on board ; the warranty is that at the time the goods are put on board the ship is then fit to receive them and encounter the ordinary perils during the loading stage ."

[19] This period of time , has been named , as the " lying stage " i.e. it has been accepted that a stage may exist between the loading stage and the actual voyage - which according to the authorities , does not arise until loading has been compl - eted . [See in this regard , the following cases : C. Wilh. Svenssons Travaruaktiebolag v. Cliffe S.S. Co (1932) 1 K.B. 490 ; Argonaut Navigation Co. Ltd. v. Ministry of Food (1948) App. Cas. 871 and Wade v. Cockerline (1905) 10 Comm. Cas. 115 .]

[20] In the case of Cohn v. Davidson (1877) 2 Q.B.D. 455 , the Court held , the following : " The implied warranty of seaworthiness.....attaches at the time when the perils of the intended voyage commence , that is , when she sets sail with the cargo on board for her port of destination ; and this warranty is broken if she is then unfit to encounter these perils , although she may have been seaworthy whilst lying in the port of loading , and also at the times of starting from her anchorage for and arriving at the place of loading appointed by the charterer , and of commencing to take on board her cargo . "

(f) The Doctrine of Stages :

According to the doctrine of stages , the vessel is required to be ' fit ' at the commencement of each stage of the voyage , should the voyage in question , have several stages i.e. it is not sufficient that the vessel was in a seaworthy condition at the commencement of the voyage , but had to be seaworthy at the start of each subsequent stage .

However , in the case of a time charter , the vessel need only be fit at the commencement of the voyage (in other words , the implied warranty of seaworthiness would be complied with , if the vessel was seaworthy at the start of the voyage) . Therefore , the shipowner is relieved of the duty to ensure that the vessel is seaworthy , at the commencement of each subsequent stage of the voyage , provided the vessel was seaworthy , at the comm - encement of the period of hire .

The term " bunkering ", refers to the situation , where the voyage is divided into various stages and the vessel is required to take on the required fuel or provisions (stores) at an intermediate port - the implied warranty is breached should the vessel depart from the intermediate port not having sufficient bunkers or stores for that specific stage , even though , she did not have sufficient bunkers , for the whole voyage , at the commencement of the voyage .

The leading case , regarding the issue of bunkering , is The Vortigern (1895 - 99) All ER 387 , where on the facts of the case , the Court held , that the shipowners could not plead the exception clause , for they had not made the vessel seaw - orthy , at the commencement of each stage of the voyage . [21]

The question arises , as to whether initial unseaworthiness upon departure from the first port of any predetermined bunkering stage , can be cured or rectified by bunkering , at an inter - mediate port - has according to Scrutton , (on page 84) , not yet been decided .

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[21] The relevant cases , regarding the issue of who is responsible for the determination of the bunkering stage (s) are the following : Biccard v. Shepherd (1861) 14 Moore P.C. 471 ; Northumbrian Shipping Co v. Timm (1939) App. Cas. 397 , where Lord Wright held : " Instead of a single obligation to make the vessel seaworthy in this respect , which must be satis - fied once for all at the commencement of the voyage , there is substituted a recurring obligation at each bunkering port at which the owners or those who act for the owners decide she shall bunker , thereby fixing the particular stage of the voyage . "

What is clear , however is that should the vessel commence the voyage with insufficient bunkers , on board , the shipowner would be held liable for ensuing damages . [22]

Bartle , (on page 86) concludes that , if the voyage , in question has been divided into stages , the vessel " ... must be able , at the commencement of each new stage , to complete that part of the journey ... " . [23]

In conclusion , the distinction must be maintained between on the one hand , an undivided voyage , in terms of which the implied warranty of seaworthiness must be complied with at the commence - ment of the voyage and , on the other hand , a voyage which has been divided into stages , in terms of which the vessel is req - uired to be seaworthy , at the commencement of each stage of the voyage .

(g) The Burden of proving unseaworthiness :

At Common Law , the burden of proving unseaworthiness " rests on the party who alleges it . "

Scrutton , (on page 86) states : " The burden of proving un - seaworthiness rests upon the party who asserts it and the party intending to rely upon unseaworthiness must plead it , with sufficient particularity . "

In order , for the aggrieved party to effectively discharge , the burden of proving unseaworthiness , the following must be est - ablished :

a) that the vessel , in question , was in fact unseaworthy at the commencement of the voyage .

b) that the unseaworthiness resulted in loss or damages .

It is submitted , that should the aggrieved party , successfully discharge the burden of proof , the resultant damages would be recoverable . (suject to the requirement of causation)

Carver , (on page 124) provides : " ... there is no pre - sumption of law that a ship is unseaworthy because she breaks

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[22] In the case of McIver and Co. v. Tate Steamers Lim. 1 K.B. 362 , the Court held that the shipowners were not relieved from the obligation of seeing that the ship was in a seaworthy condition in respect of her supply of coal at the commencement of each stage of the voyage .

[23] Reference was made to the case of Thin v. Richards 2 Q.B.D. 141 .

down , or sinks from an unexplained cause , but such facts may in some circumstances raise an inference , or presumption of fact , of unseaworthiness , and so shift the burden of proof . " [24]

(ii) Express exclusion of seaworthiness :

In the leading case of Nelson Line Ltd. v. James Nelson and Sons Ltd. (1907) App. Cas. 16 , the Court held , the shipowners , " may contract themselves out of those duties (i.e. to provide a seaworthy ship and to use reasonable care) , but unless they prove such a contract the duties remain ; and such a contract is not proved by producing language which may mean that and may mean something different . " In other words , in order for the ship - owner , to exclude liability for unseaworthiness " the words used must be express , pertinent and apposite " [as held in Petrofina S.A. v. Compagnia Italiana Trasporto (1937) 42 Comm. Cas. 286 .] [25]

In other words , contracts of carriage , according to English Common Law , very often contain words or terms which " expressly exclude or modify or vary " the implied warranty of seaworthiness - subject however , to the requirement or prerequisite , that such an intention to exclude or vary the undertaking , must be precisely or clearly formulated . [26]

In order to determine , whether the terms or the clauses , contained in the contract of carriage effectively excludes

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[24] The leading case , in this regard is Fiumana Societa Di Navigazione v. Bunge and Co. Ltd. (1928) 2 K.B. 47 . Further - more Scrutton , (page 86 : footnote 84) states , that the obligation , resting on the party , seeking to rebutt prima facie evidence of unseaworthiness (i.e. the shipowner) arises not from the undertaking of unseaworthiness , unless the doctrine of stages applies , but from the duty to take care .

[25] Furthermore see the case of The Rosetti (1972) 2 Q.B.D. 116 , where the Court held that clause 3 of the bill of lading , which provided that the carriers ".....would not be responsible for loss of or damage to any goods however caused which is capable of being covered by Insurance " , was ineffect - ive as there was " no clear and plain exception relieving the shipowners from (such) liabilities . " [And the case of Ingram and Royle Ltd. v. Services Maritimes Du Treport (1913) 1 K.B. 538 .]

[26] See the following cases : The Glenfruin (1885) 10 P.D. 103 ; Gilroy , Sons & Co. v. W.R. Price & Co. (1892) App. Cas. 56 ; Tudor Accumulator Co. v. Oceanic (1924) 41 T.L.R. 81 and Minister of Materials v. Wold S.S. (1952) .

liability for unseaworthiness , depends on the contract itself , to be construed as a whole . [27]

If the contract of carriage , however , contains a clause , purporting to limit the amount of liability of the shipowner or in any way , stipulating a period of prescription - the effect of such a clause is " restrictive " - in the sense that the implied warranty is not varied or excluded thereby (the ship - owner is still subject to the implied warranty of providing a seaworthy vessel .) [28]

It is stated that , where an express warranty of seaworthiness is contained , in a contract of carriage , the implied warranty is superseded thereby and any possible limitation on claims will be effective , to reduce that express undertaking i.e. the ambit of such an express warranty can be effectively limited or restr - icted . [29]

Sometimes the shipowner stipulates that liability for unsea - worthiness would only arise , if the loss or damage suffered is due to personal failure to exercise due diligence , to render the vessel seaworthy . The relevant case , in this regard is Itoh and Co. Ltd. v. Atlantska Plovidba , " The Gundulic " (1981) 2 L.L. Rep. 244 , where the Court held that the " shipowners had failed to discharge the burden of showing that the damage had occurred without any personal want of due diligence on the part of a junior engineer superintendent employed by them . " [30]

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[27] An example thereof could be found , in the case of Master and Owners of S.S. " City of Lincoln " v. Smith (1904) App. Cas. 250 , where the Court held that " Unless the conditions of a charterparty relieve the owner as distinct from his servants and agents from the consequences of personal negligence , he is liable if his ship , in other respects seaworthy , is rendered unseaworthy in being so laden under his orders as to become topheavy at starting , with the result that her deck cargo was partly jettisoned and partly swept overboard in a gale which otherwise could have been weathered in safety . "

[28] See the following cases of : Tattersall v. Nat - ional S.S. Co. (1884) 12 Q.B.D. 297 ; Atlantic Shipping and Trading Co. v. Louis Dreyfus and Co. (1922) All ER 558 ; H. Ford and Co. Ltd. v. Compagnie Furness (1922) 2 K.B. 797 and Baxter 's Leather Co. v. Royal Mail Steam Packet Co. (1908) 1 K.B. 796 .

[29] In this regard see the cases of : Morris v. Oceanic S.N. Co. (1900) 16 T.L.R. 533 ; Bank of Australiasia v. Clan Line Steamers (1915) 1 K.B. 39 etc.

[30] See Carver , (on pages 125 - 127) regarding the various categories of exception clauses i.e. " ineffective words " and " effective exceptions " and a summary of the re - lated cases .

2. Statutory enactments :

i.e. an examination of the relevant English statutory provi - sions , with regard to the concept of seaworthiness , relating to contracts of carriage .

The relevant statute is : The Carriage of Goods By Sea Act (1971)

Contents and Commentaries :

Section 1 (1) provides that the referance to " Rules " means the : International Convention for the Unification of Certain Rules of Law relating to Bills of Lading (1924) , as amended by the Brussels Protocol (1968) .

Subsection (2) states the " provisions of the Rules , as set out in the Schedule to this Act , shall have the force of law . " [Subsection (3) , on the other hand , defines the ambit of the Statute and Subsection (4) effectively restricts the application of the Rules (as contained in the Schedule) to contracts of carriage which " expressly or by implication provide for the issue of a bill of lading or any similar document of title . "]

The important section , however , is Section 3 , which states , that " there shall not be implied in any contract of carriage of goods by sea to which the Rules apply (by virtue of this Act) any absolute undertaking by the carrier of goods to provide a seaworthy ship . "

It is , therefore , necessary to examine the various provisions of the Schedule , in so far as they relate to the concept of seaworthiness , including the relevant English judicial deci - sions , expounding thereupon .

- concerning Article 1 , which is known as the " definition section " , the following subsections are of importance : (a) ; (b) and (e) . [31]

- Article II , which provides :

" Subject to the provisions of Article IV , under every contract of carriage of goods by sea , the carrier , in relation to the

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[31] See Scrutton , (on pages 427 - 431) regarding the interpretation of these relevant subsections .

loading , handling , stowage , carriage , custody , care and discharge of such goods , shall be subject to the responsibil - ities and liabilities , and entitled to the rights and immunities hereinafter set forth ".

It is submitted that this particular Article is most import - ant , in that it applies " the rights and liabilities in the subsequent Articles to the operations it enumerates . " [32]

- Article III (1) , which provides :

" The carrier shall be bound before and at the beginning of the voyage to exercize due diligence to -

(a) Make the ship seaworthy .
(b) Properly man , equip and supply the ship .
(c) Make the holds , refrigerating and cool chambers , and all other parts of the ship in which goods are carried , fit and safe for their reception , carriage and preservation .

" before and at the beginning "

It is submitted that the term used " before and at the beginn - ing " relates to the period of time , commencing from at least the start of loading , until the voyage begins , but does not apply to the period , after the voyage has commenced - such as a call at an intermediate port to further load cargo . [33]

Article III (1) of the Hague Rules , has clearly rendered the doctrine of stages no longer , applicable - thus the duty to exercise due diligence to supply a seaworthy vessel , need only be satisfied , by the carrier , at the port of loading .

Scrutton , (on page 434) states the following : " the shipowner who has exercized due diligence (to make the ship seaworthy , in all respects before she sails on her voyage) will not be held liable if the master negligently fails (before entering on a new stage) to remedy a defect which has developed since sailing on

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[32] See Scrutton , (on page 432) and Carver , (on page 432) , in this regard .

[33] In the case of Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd. (1959) 2 All ER 740 , the Court held that : " ... the obligation under Art. III , rule 1 , to exercise due diligence to make the ship seaworthy " before and at the beginning of the voyage " continued over the whole period from the beginning of the loading until the ship sank . "

the voyage . " [34]

Carver , (on page 358) concurs : " The rule (i.e. Art. III , rule 1) imposes an obligation on the carrier to exercise due diligence before and at the beginning of the voyage to have the vessel adequately bunkered for the first stage of the voyage , and to arrange for adequate bunkers of a proper kind at the first and other intermediate ports on the voyage so that the contract - ual voyage may be performed . "

It is important to note that , according to the position at Common Law , the duty on the shipowner or carrier to make the vessel seaworthy was absolute in nature , however with the pas - sing of the Hague Rules , this absolute obligation , has been superseded by a duty to " exercise due diligence " .

" due diligence "

In order , for the carrier , to rely on the exceptions contained in Article IV , rule 2 , he must first , discharge the burden of proving , that due diligence to make the vessel seaworthy , was exercised . [35] The relevant case in this regard is Maxine Footwear v. Canadian Government Merchant Marine (1959) All ER 740 , where the Court held that " Article III , rule 1 was an overriding obligation . If it is not fulfilled and the non - fulfilment causes the damage , the immunities of Article IV cannot be relied on . This is the natural construction apart from

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[34] See in this regard the case of Northumbrian Shipping Co. v. E. Timm and Sons Ltd. (1939) App. Cas. 397 , where on the facts the Court held that the appellants had failed to exercise due diligence to make the ship in all respects seaworthy on sailing from Vancouver (to the port of Hull) owing to in - sufficient bunkers on board . In The Makedonia (1962) 1 LL Rep. 316 , the Court held : " that , under Article III , rule 1 the obligation on the shipowners was to exercise due diligence before and at beginning of sailing from the loading port to have the vessel adequately bunkered for first stage and to arrange for adequate bunkers at intermediate ports so that voyage could be performed . "

[35] See in this regard Scrutton , (on pages 447 - 448) , where the learned author concludes : " that obligation (i.e. to exercise due diligence) , unlike the obligation in Article III , rule 2 , is not subject to the provisions of Article IV , but is an absolute obligation without exception , and therefore a carrier who has not exercised due diligence to make his ship seaworthy does not enjoy the protection of any of the exceptions in Article IV ... " .

the opening words of Article III , rule 2 . " [36]

With regards to the phrase " to exercise due diligence " , Tetley , (on page 165) states that " due diligence to make the vessel seaworthy , may be defined as genuine , competent and reasonable effort of the carrier to fulfil the prerequisites set out in art. 3 (1) (a) , (b) & (c) of the Rules . Carver , (on page 351) , concludes " that " due diligence " seems to be equivalent to reasonable diligence , having regard to the circumstances known , or fairly to be expected , and to the nature of the voyage , and the cargo to be carried . "

It is submitted that the concept of due diligence is relative in nature i.e. it does not remain static but the standard required of the shipowner increases with the scientific advances in technology and equipment .

The burden of proof :

It is submitted , that the burden resting on the carrier , to discharge the onus of proving , that due diligence was exer - cised (to render the vessel seaworthy in all respects) , does not arise with regard to loss or damages unconnected with the unseaworthiness of the vessel . i.e. the onus need only be discharged , with regards to loss or damage arising from the unseaworthy nature of the vessel .

The Non - delegable nature of the Duty :

It is submitted that the statutory duty resting on the carrier to exercise due diligence is " non - delegable " in nature. Scrutton , (on page 434) declares that : " the due diligence required is due diligence in the work itself by the carrier and all persons (whether servants or agents or independent con - tractors whom he employs or engages in the task of making the ship seaworthy) ; the carrier does not therefore , discharge the burden of proving that due diligence has been exercised by proof that he engaged competent experts to perform and supervise the task of making the ship seaworthy - the statute imposes an

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[36] Article IV , rule 1 , states : " Whenever loss or damage has resulted from unseaworthiness , the burden of proving the exercise of due diligence shall be on the carrier.... " - this subsection has been interpreted as implying that the burden of proving unseaworthiness rests on the cargo - owner who , once having discharged the onus of proving unseaworthiness , thereby shifts the burden to the carrier , to prove that due diligence was exercised . (Tetley , " Marine Cargo Claims " , 3 rd edition (1988) , (on page 155) , however disagrees .)

inescapble personal obligation . " [37]

The above exposition , is reiterated by Carver , (on pages 351 - 352) , where the learned author states : " It is not enough to satisfy the condition that the shipowner has been personally diligent , as by employing competent men to do the work . The condition requires that diligence to make her fit shall , in fact , have been exercised , by the shipowner himself , or by those whom he employs for the purpose . "

The leading case , in this regard is Riverstone Meat Co. v. Lancashire Shipping Co. , The Muncaster Castle (1960) App. Cas. 807 , 1 L.L. Rep. 57 , where the House of Lords , held :

" There is nothing ... 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 . The question ... is not one of vica - rious responsibility at all . It is a question of statutory obligation ... The performance is the carrier 's obligation . " (the Court held that the term " repairers " includes sub - contractors .) [38]

Scrutton , (on page 435) maintains , that : " the standard imposed by the obligation to exercise due diligence appears to be equivalent to that of the common law duty of care . Thus , if an inspection of the vessel 's machinery by or on behalf of the

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[37] In the case of W. Angliss and Co. (Ausralia) Prop. Ltd. v. Peninsular and Oriental Steam Navigation Co. (1927) 2 K.B. 456 , the Court that : " The obligation under these Rules (i.e. the Australian Sea - Carriage of Goods Act (1924)) of a carrier under a bill of lading to exercise due diligence to make the ship seaworthy and fit for the carriage of goods is not limited to his personal diligence ; his responsibilty extends to the acts or default of his agents or servants ... " .) Further - more , see the case of International Packers London Ltd. v. Ocean S.S. Co. Ltd. (1955) 2 Q.B.D. 218 .

[38] On the facts , the Court concluded that the carrier had not discharged the burden of proving that due diligence had been exercised to render a vessel seaworthy , namely " They did not , on the facts of the case , by entrusting the vessel to reput - able ship - repairers , perform their duty to exercise due diligence . They were vicariously liable for negligence of a servant of an independent contractor . " [see Carver , (on page 352) for the author 's summary of the case .] Furthermore see the cases of Maxine Footwear Co. Ltd. (1959) A.C. 589 and Union India v. N.V. Reederij Amsterdam (1963) 2 L.L. Rep. 223 , in this regard .

shipowners fails to reveal a defect , the question whether the failure amounts to want of due diligence must be answered by considering (1) whether the examination was , in the cir - cumstances , of a character such as a skilled and prudent shipowner should reasonably have made , and (2) if so , whether the examination was carried out with reasonable skill , care and competence . There is no failure of due diligence merely because precautions are not taken which susequently experience shows to be necessary . "

- Article IV (with regards to the rights and immunities of the carrier / ship .) , provides :

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

Carver , (on page 377) provides : " The net effect of this rule read with Article III , rule 1 , seems to be that the carrier is liable for the loss or damage resulting from unseaworthiness unless he can prove that he exercised due diligence before and at the beginning of the voyage to make the ship seaworthy . It is difficult to understand why the Rules do not say so . " [39] (The learned author provides that the onus of proving unsea - worthiness and that it was a cause of the loss or damage is on the cargo - referance was made to the cases of : Minister of Food v. Reardon Smith Line (1951) 2 T.L.R. 1158 and The Northumbria (1906) P. 292 , 298 .)

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[39] With regards to the phrase " neither the carrier nor the ship " , the learned author states : " exemption may have been extended to the ship in order to show that it was intended to benefit the shipowners even though they were not parties to the contract of carriage , and make it clear that the exemptions applied in actions in rem . " But then qualifies this conclusion , by stating that in the light of Adler v. Dickson (1955) 1 Q.B. 158 , 182 and Midland Silicones v. Scrutton (1962) App. Cas. 446 , the exemptions , in question , could only be relied upon by a person , who is a party to the contract of carriage . [Scrutton , (on page 446) provides that the effect of Article IV , rule 1 , was probably to extend the protection , to an action in rem .]

Furthermore , Scrutton , (on page 446) maintains that the phrase " before and at the beginning of the voyage " , should be implied , as a qualification to the words " due diligence " (as employed in Article IV , rule 1) , so as " to harmonise the protection given by this Rule with the obligation imposed by Article III , rule 1 . " [40]

This statement , has to be compared with Carver , (on page 377 : footnote 84) , where the learned author states , that due to the fact that Article IV , rule 1 is worded so widely , the phrase " due diligence " is not here (i.e. in the context of Article IV , rule 1) limited to exercise due diligence " before and at the beginning of the voyage ." With the result , that it would include loss or damage caused by a failure to bunker at an intermediate bunkering port , where the exercise of due dili - gence , by the carrier can be proved . Finally , Carver concludes , that there is no reason why these words should be ommitted from the said Article.

" improper stowage "

Article III , rule 2 states that :

" Subject to the provisions of Article IV , the carrier shall properly and carefully load , handle , stow , carry , keep , care for and discharge the goods carried . " [41]

Finally , Article VI , provides that :

" Notwithstanding the provisions of the preceding articles , a carrier , master or agent of the carrier and a shipper shall in regard to any particular goods be at liberty to enter into any agreement in any terms as to responsibility and liability of the carrier in respect of such goods , or his obligation as to sea -

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[40] In the case of Leesh River Tea Co. Ltd. v. British India Steam Navigation Co. Ltd. (1966) 1 L.L. Rep. 450 , the Court held : " That Article IV , rule 1 , only applied to the obliga - tion to exercise due diligence to secure initial seaworthiness at the beginning of the voyage . "

[41] see Scrutton , (on pages 435 - 436) and Carver , (on pages 510 - 518) , for an interpretation of this particular article and the relevant judicial decisions . It is submitted that in order for the carrier to be able to rely on the immun - ities , as contained in Article IV , he must comply with the statutory requirements laid down in Article III , rule 2 i.e. the contractual duties must be performed " properly and carefully " .

worthiness , so far as this stipulation is not contrary to public policy ... etc. "

B. AMERICAN LAW

1. Common Law position :

(i) General Principles :

(a) Introduction :

The American position , with regards to the implied warranty of seaworthiness , is aptly summarized by Schoenbaum , (on page 134) [42] where the author states : " Under the general maritime law , the shipowner or operator of a vessel is held to an implied warranty that the vessel is reasonably fit for it 's intended purposes ... the duty to furnish a seaworthy vessel is absolute and nondelegable and it 's breach gives rise to liability for unseaworthiness which is a species of liability without regard to negligence . "

Knauth , (on page 192) [43] examines the origins of the implied warranty and concludes that : " An historic doctrine of the
English and American admiralty and the Continental maritime law of sea carriage was the rule invented by the judges that the carrier impliedly warrants the seaworthiness of the ship . In absence of any statute , and the bill of lading contract being silent , the courts have read this inescapable implied warranty into every bill of lading . " (including charterparties) [44]

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[42] " Admiralty and Maritime Law " , 1 st edition (1987) .

[43] " Ocean Bills of Lading " , 4 th edition (1953) .

[44] The author continues to examine the implied warranty of seaworthiness , in the light of the Cogsa (1936) and raises the question , as to whether it , could still be regarded as being relevant , especially in the light of Section 3 (1) of the Act - and concludes that " ... the doctrine may be con - sidered as no further effect , insofar as foreign commerce by sea is concerned , or wherever the Cogsa is applied ... " i.e. that the implied warranty has clearly been superseded by the relevant statutory provisions . But , it would appear that the warranty continues to remain applicable , with regards " to domestic commerce conducted under the Harter Act ... " . [In addition , see Chamlee , " The Absolute Warranty of Seaworthiness : A History and Comparative Study " , Vol. 24 Mercer Law Review 519 , in this regard .]

(b) The Standard of Seaworthiness , required of the ship - owner :

It is submitted , that according to General maritime law , the implied warranty of seaworthiness , in the case of contracts of affreightment , is absolute in nature - in other words , there is no distinction between the English and American legal posit - ion , in this regard .

In The Caledonia (1895) 107 S. Ct. Rep. 537 , it was held , regarding the nature of the implied warranty of seaworthiness :

" The implied warranty ... which exists in all contracts for carriage at sea , unless otherwise expressly stipulated , is an absolute undertaking , not dependent on the owner 's knowledge or ignorance , his care or negligence , that the ship is in fact fit to undergo the perils of the sea and other incidental risks ... " . [45]

(c) The Definition / Meaning of Seaworthiness :

As in the case of English Common Law , the concept of " seaw - orthiness " has a dual application i.e. the vessel must be cap - able of completing the voyage undertaken , at the beginning thereof and the vessel must be able to preserve the cargo , while doing so .

Thus , the prerequisites for the implied warranty , as laid down by the English courts of law are equally applicable ,in the American context . Therefore , the warranty of seaworthiness requires that both the master and crew , concerned must be " competent and sufficient " [46] and that the vessel , in question must be capable or " fit " to receive the designated

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[45] With regards to the issue of improvements or modern - isation of the vessel and her equipment , as expounded by the American courts , see the following cases : The Southwark (1903) 24 S. Ct. 1 ; The Manchuria (1929) 34 F. 2d 843 ; T.J. Hooper (1932) 60 F. 2d 737 ; Afran Transport Co. v. The Bergechief (1960) 274 F. 2d. 469 etc.

[46] See the following judicial decisions , for a more comprehensive examination : International Navigation Co. v. Farr & Bailey (1901) 21 S. Ct. 591 ; Standard Oil Co. v. The Clan Line (1924) App. Cas. 100 ; The Elkton (1931) 49 F. 2d 700 ; The Denali (1939) 105 F. 2d. 413 ; Horn v. CIA de Nava - gacion Fruco , S.A. 404 F. 2d. 422 ; Cerro Sales Corp. v. Atl - antic Marine Enterprises , Inc. (1975) 403 F. Supp. 562 etc.

cargo i.e. the vessel must be so - called " cargoworthy " . [47]

Furthermore , in the event of a breach of the implied warran - ty , the shipowner would not be entitled to rely on any exception clause , contained in the contract of carriage .

It is submitted , that in order , to obtain a more complete understanding of the concept of seaworthiness , as formulated by the American judiciary, the following decisions need to be con - sidered : [48]

The Supreme Court in The Southwark (1903) 24 S. Ct. 48 , app - roved the following definition of seaworthiness :

" In maritime law , the sufficiency of the vessel in materials , construction , equipment , officers , men and outfit for the trade or service in which it is employed . "

In the case of The Silvia (1898) 171 U.S. 462 , the Court held :

" The test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport ." This is the commonly accepted definition of seaworthiness . As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea , but upon its character in reference to the particular cargo to be transported , it follows that a vessel must be able to transport the cargo which it is held out as fit to carry or it is not seaworthy in that res - pect . " [49]

(d) Failure to provide a seaworthy vessel :

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[47] In the case of Atlantic Transport Co. of West Virginia v. Rosenberg Bros. & Co. , " The Manchuria " (1929) 34 F. 2d. 843 , the Court concluded that : " the owner of the ship is under a continuing liability to furnish for each voyage , a vessel reasonably fit to carry cargo placed on aboard her . "

[48] See Benedict , " On Admiralty " , 7 th edition (1990) , Chapter VII , for a more detailed discussion of these judicial decisions .

[49] Furthermore , see the cases of Dupont v. Vance (1856) 15 L. Ed. 584 ; Philippine Sugar Centrals Agency v. Kokusai Kisen Kabushiki Kaisha (1939) 106 F. 2d. 32 , " The Naples Maru " ; The T.J. Hooper (1932) 60 F. 2d. 737 etc.

It is submitted , that as in the case of English law , a failure on the part of a shipowner to provide a seaworthy vessel , at the commencement of the voyage (with the result that the goodsowner suffered damages) constitutes a breach of the implied warranty. In order , for liability to ensue , the aggrieved party , has to established the following :

(i) that the ship was in fact unseaworthy
(ii) the loss or damage sustained was caused by such unsea - worthiness

The essential question , as to whether the aggrieved party would be able to repudiate the underlying contract , is to be assessed , according to whether the breach constitutes a " frustration of the commercial purposes of the adventure . " (However , in the event of the voyage having already commenced , the aggrieved party would not be in a position to repudiate the existing con - tract but could claim necessary compensation , for said losses suffered .)

(f) The Relevant Time :

According to English , as well as American legal sources , the vessel is required to be seaworthy at the time or the moment of sailing . [50] If the vessel , in question , is unseaworthy at the time of sailing , a breach of the implied warranty has occurred . (even though she was fit at the moment of the loading of the cargo .) Furthermore , no liability would arise in res - pect of a defect , which has occurred after the vessel has left port - except if the " cause was one for which she was answer - able " . [51]

The dicta found in the English case of Reed v. Page (1927) 1 K.B. 743 is applicable in this situation : " ... the highest measure of liability will be when she (i.e. the vessel) starts on her voyage , and this is often spoken of as the stage when the warranty attaches ; but what is meant , is that it is the time when that highest measure of liability attaches ". (however , with regards to the issue of " cargoworthiness " , the vessel is required to be fit to receive the cargo , at the moment of load - ing .)

Regarding the stages preceding the time of sailing , it is sub - mitted that the English Common Law is relevant , in assessing the corresponding position in the United States .

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[50] See the case of The " Steel Navigator " (1928) 23 F. 2d 590 , in this regard .

[51] As stated by Carver , (on page 120) .

(f) The Doctrine of Stages :

The " doctrine of stages " also forms part of general maritime law , in the United States - in terms of which , the vessel is required to be " fit " at the commencement of each stage of the voyage , should the voyage be divided into various stages . (the exception being , in the case of a time charter , where the vessel is required to be seaworthy , only at the commencement of the voyage .)

With regards to the issue of " bunkering " , it is submitted that the leading English case , of The Vortigern (1895 - 1899) is of relevant in the United States . In the The " Glymont " (1932) 56 F. 2d. 252 , the Court , in discussing the question of bunkering , held on facts , that there was a lack of due diligence in making vessel seaworthy in respect of the fuel oil supply , which precluded recovery against the cargo owner for contribution in general average .

(g) The Burden of proving unseaworthiness :

The burden of proving that the vessel was unseaworthy , at the relevant moment , rests on the party alleging it . For the agg - rieved party to effectively discharge , the burden of proving unseaworthiness , the following aspects must be discharged :

(1) the vessel was unseaworthy at the commencement of the voyage

(2) that the unseaworthiness resulted in loss or damage .

(ii) Express exclusion of seaworthiness :

According to Carver , (on page 113) : " In addition to devel - oping the maritime tort of seaworthiness the United States courts have strengthened the warranty in contracts of affreightment by adamantly refusing to apply English principles of freedom of contract on this matter . "

This statement is confirmed by Knauth , (on page 192) , where the learned author states : " In England , the courts have per - mitted the carrier to avoid the warranty by any clear and explicit statment in the bill of lading disclaiming any such warranty . But in the United States , the courts declined to enforce agreements disclaiming the warranty , however explicitly expressed ; it has been deemed a rule of public policy that a carrier cannot be allowed to contact wholly out of the warr - anty . (By means of the Harter Act , carriers have been allowed to reduce their liability from the absolute warranty to the duty

to use due diligence) but the complete exoneration agreement , which is valid in England , has been invalid here . "

2. Statutory enactments :

i.e. an examination of the relevant American statutory provisions with regard to the concept of seaworthiness , relating to con - racts of carriage .

The relevant statutes are : 1. The Harter Act (1893)

Contents and Commentary :

Carver , (on page 208 - 213) , states that , the Harter Act expresses two main purposes :

1 . that of prohibiting clauses which relieve shipowners from liabilty for consequences of " negligence , fault or failure in proper loading , stowage (etc) of cargo (Sect. 1) or which diminish or avoid the obligation to be diligent to make the vessel fit for the voyage (Sect. 2)

2. that of exempting shipowners from liability for consequences of " faults of errors in navigation or in the management " of vessel , as well as of certain other perils , in cases where they have exercised " due diligence to make the said vessel in all respects seaworthy and properly manned , equipped and suppl - ied ." (Section 3) [52]

In terms of Section 1 and 2 of the Harter Act (1893) [53] , it was unlawful to insert in any bill of lading or shipping

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[52] The learned author , states on page 333 , that " the most important provisions in the Hague Rules first appeared in statutory form in the (United States) Harter Act 1893 . That Act has now been superseded , to a large extent , by the (U.S.) Carriage of Goods by Sea Act 1936 ... Many decisions , both American and English , on the construction of the Harter Act are of assistance in construing the corresponding provisions of the Hague Rules . "

[53] Concerning the application of Section 1 , see the case of Knott v. Botany Worsted Mills (1898) 21 S. Ct. 30 , while with regards to the application of Section 2 , see following cases of The Carib Prince (1898) 18 S. Ct. 753 and Inter - national Navigation Co. v. Farr & Bailey Mfg. Co. (1901) 21 S.Ct. 591 .

document (regarding a vessel transporting merchandise or property from or between ports of the U.S. and foreign ports) any clause , covenant or agreement , which had the effect of (a) relieving the manager , agent , master or owner of any vessel , from liabilty " for loss or damage arising from negligence , fault or failure in proper loading , stowage , custody , care or proper delivery " of the cargo (i.e. all lawful merchandise or property) OR (b) (i) lessening , weakening or avoiding the obligation of owner (s) of said vessel to " exercise due diligence , properly equip , man , provision and outfit said vessel and to make said vessel seaworthy and capable of performing her intended voyage " (ii) or lessening , weakening or avoiding the obligation of master , officers , agents or servants " to carefully handle and stow her cargo and to care for and properly deliver said cargo . "

- Section 3 , provides as follows :

" If the owner of any vessel transporting merchandise or property to or from any port in the U.S.A. shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned , equipped and supplied , neither the vessel , her owner , or owners , agent , or owners , agents , or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of the said vessel ... " [54]

Regarding , the interpretation of Section 3 , Benedict , (on page 2 - 5) states : " This section , read literally states that the carrier may claim exemption from liability for damage or loss occassioned by " faults or errors in navigation or in management " of the vessel if and only if the carrier has used " due dili - gence " to make the vessel seaworthy ; seemingly no causal con - nection between the cargo damage or loss and the ship 's unsea -

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[54] According to Gilmore & Black , (on page 143) " The net position came down to this - the shipowner could not contract out of his duty to use care to put his vessel in good shape for the goods while they were in his hands or aboard . On the other hand if he did use due care to send a seaworthy vessel on the voyage , he could not be held for the voyage , he could be held for the defaults of those he put in charge , in regard to running her . " (Furthermore , in this regard see Benedict , (on page 2 - 4) .)

worthiness need be demonstrated . " [55]

The learned author continues " The Harter Act did not establish an exacting standard by which the due diligence to make a vessel seaworthy was to be measured ; the detailing of the scope of the duty to make seaworthy was left to judicial decision ... the duty to exercise due diligence was not pro forma ; the carrier was held to an extremely high standard of care ... " . [56]

The duty to exercise due diligence to provide a seaworthy vessel in terms of the Harter Act , was relevant at the beginning of the voyage - should the unseaworthiness arise after the vessel left port , this , did not preclude the shipowner from relying on Section 3 - as such incidents were regarded as constituting " an error in navigation or management of the vessel . "

Should , however , an incident occur , before the commencement of the voyage , which had the effect of rendering the vessel unseaworthy , it would be regarded , as constituting a failure to exercise due diligence to provide a seaworthy vessel and thus the shipowner would not be liable to rely on the statutory exemption , contained in Section 3 . [57]

Regarding the burden of proof , in the Wildcroft (1906) 201 U.S. 467 the Court held , that the Harter Act places an affir - mative burden of proving due diligence to make the ship seaworthy , on the carrier - seaworthiness will not be found as a pres -

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[55] In the Supreme Court decision in May v. Hamburg - Amerikanische Packetfahrt A.G. , The Isis (1933) 54 S. Ct. 162 , the following question arose , regarding the issue of causation - namely , whether an owner who negligently omits to make his vessel seaworthy may have the benefit , of section 3 of Harter Act , even if there is no causal connection between the defect and the disaster ? The Court held that : " The martime law abounds in illustrations of the forfeiture of a right or the loss of a contract by reason of the unseaworthiness of a vessel , though the unseaworthy feature is unrelated to the loss . "

[56] The following cases are relevant : Gold Dust Corp. v. Munson S.S. Line (1932) 55 F. 2d 217 and Erie and St. Lawrence Corp. v. Barnes - Ames Co. (1895) 52 F. 2d 217 .

[57] See International Navigation Co. v. Farr and Bailey Mfg. Co. (1901) U.S. Supreme Court 480 and Ralli v. New York and T.S.S. Co. (1907) 154 F. 286 , where the Court held that Section 3 of the Harter Act " applies only to a vessel after the voyage has commenced and cannot be invoked by an owner to relieve him from liabilty for loss of cargo through the careering and sinking of a vessel at the pier before she was fully loaded ."

umption of law . [58] In the case of Schnell v. The Vallescura (1934) 55 S.Ct. 194 , Mr. Justice Stone concluded , that :

" In general the burden rests upon the carrier of goods by sea to bring himself within any exception relieving him from the liability which the law otherwise imposes on him ... In conseq - uence , the law casts upon him the burden of the loss which he cannot explain or , explaining , bring within the exceptional case in which he is relieved from liability . " [59]

It is submitted that although , the Harter Act , has been , in most repects , superseded by The Carriage of Goods by Sea Act , it still remains relevant . However , one of the major defic - iencies of the Harter Act , is the " conditional nature of the exceptions clause ." [60] Gilmore & Black , (on page 145) [61] , concur : " Harter is less comprehensive and in part at least proceeds on a different theory . Its sections 1 and 2 lay down no positive rules of law but simply forbid certain stipulations in the bill of lading contract . "

The Interrelationship between the Harter Act & Cogsa :

It is submitted that , in order to obtain a greater understanding of the American statutory position , the main differences between these two statutes need to be discussed . [62]

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[58] Furthermore , see the following cases : Joseph J. Martin v. S.S. Southwark (1903) 24 S. Ct. Rep. 1 ; The Folima (1909) 29 S. Ct. 363 (where reference was made to the cases of Bradley Fertilizer Co. v. The Edwin I. Morrison (1894) 14 S. Ct. 823) and The Denali (1939) 105 F. 2d 413 .) , in this regard .

[59] However , in the case of loss or damage which fell within a bill of lading exception , the burden to establish that the damage resulted from unseaworthiness , by reason of lack of due diligence , negligence in the care and custody of the cargo or another of the statutory prohibitions , contained in Sections 1 & 2 of the Harter Act , rested on the shipper . [See in this regard Benedict , (on page 2 - 8) .]

[60] See Benedict , (on page 2 - 9) - this criticism is borne out in the case of C.Horn (M/V Heinz Horn) v. CIA de NAVEGACIONE FRUCO , S.A. (1968) 404 F. 2d 422 .

[61] " Admiralty Law " , 2 nd edition (1975) , Chapter II .

[62] Carver , (on page 335 - 337) , provides a complete study of the distinction between Harter Act and Hague Rules i.e. by implication referring to both the U.K. and U.S.A. Cogsa . [Furthermore see Sweeney , J.C. , Journal of Maritime Law and Commerce , Vol. 24 , No. 1 (1993) , on page 36 , in

According to Benedict , (on page 2 - 12) , Cogsa " differs from and improves on " the Harter Act and the Common Law , in sever - ral respects . It is submitted , that the following distinctions can be highlighted :

(1) A contract of carriage , is a prerequisite for the appli - cation of Cogsa between the parties i.e. Cogsa governs the rela - tionship between the parties where a bill of lading has been issued . If Cogsa applies , any provisions in the bill that are inconsistent therewith , are void . [63]

Benedict , (on pages 2 - 14) , states : " the important diffe - rence between Cogsa and the Harter Act was Cogsa 's effect on ocean bills of lading . While the Harter Act permitted carriers to include many differing exculpatory clauses in bills of lading , Cogsa required substantial uniformity . " [64]

(2) Both Schoenbaum , (on page 315) and Gilmore and Black , (on pages 146 - 147) , conclude that Cogsa has effectively re - stricted the contractual freedom of the parties , to the con - tract of carriage . " Gilmore and Black provide : " Cogsa allows a freedom of contracting out of its terms but only in the dir - ection of increasing the shipowner 's liabilities and never in the direction of diminishing them . "

(3) According to Benedict , (on pages 2 - 12) , the main distinction between the Harter Act and Cogsa , relates to the operation of the " exceptions clause " i.e. " under the Harter Act the carrier is never exempted from liability for cargo loss unless he has exercised due diligence to put and maintain the ship in a completely seaworthy condition ; if unseaworthiness is found the carrier cannot invoke the Harter Act exoneration clause even if no connection exists between the event causing the damage or loss and the unseaworthiness ... (on the other hand) if the cause of the cargo damage or loss is one enumerated in the ex - ceptions clause , Cogsa " always operates to exonerate the carrier unless due diligence has not been used in some respects

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this regard .]

[63] As was stated by Schoenbaum , (on pages 314 - 315) .

[64] See Gilmore & Black , (on page 145) . It must be stressed that charterparties are not subject to the provisions of Cogsa - the effect thereof , is that the contractual freedom of the parties to the charterparty are not limited or restricted , as in the case of ocean bills of lading . (In addition , see Schoenbaum , (on pages 315 - 316) regarding the position where the bill of lading is issued under a charter - party .)

proximately causing or contributing to the [damage or] loss ."

(4) The operation / ambit of the two statutes :

(a) Cogsa applies only in " foreign commerce " i.e. it applies to : " every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the U.S. , in foreign trade . " (According to Gilmore and Black , (on page 147) , " the exact period during which the Act defines rights and duties on which liability can be predicated is " from the time when the goods are loaded on to the time when they are discharged from the ship .")

(b) The Harter Act , applies : " in absence of a stipulation ... (1) to all " coastwise " trade i.e. that is , to bills of lading covering shipments by water from one port of the U.S. to another.

(2) To the period , even in foreign trade , during which the carrier has custody of the goods , before they are loaded on the ship and after they are unloaded from the ship . " [65]

(5) Cogsa explicitly abolished the Harter Act burden of proof - rule established by the Supreme Court in the Isis - decision - under Cogsa the burden of proving freedom from fault is always " on the person claiming the benefit of (an) exception " i.e. the carrier must bear the burden of proof and no bill of lading can operate to shift this burden to the shipper . " [66]

2. The Carriage of Goods By Sea Act (Cogsa) :

Contents and Commentary :

It is important to note that the U.S. Carriage of Goods By Sea Act (1936) , initially defines the scope or the ambit of the relevant provisions , by stating :

" That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States , in foreign trade , shall have

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[65] See Gilmore & Black , (on pages 147 - 148) . Furthermore , the article by Sweeney , " Happy Birthday , Harter : A Reappraisal of the Harter Act on its 100 th Anniversary , Journal of Maritime Law and Commerce , Volume 24 No. 1 (1993) , pages 37 - 40 , is also relevant in this regard .

[66] As stated by Benedict , (on pages 2 - 13 to 2 - 14) . Furthermore , see the case of C.Horn (M/V Heinz Horn) v. CIA de Navegacion , S.A. (1968) 404 F. 2d 422 , concerning the distinction between the two Acts with regards to the issue of causation .

the effect subject to the provisions of this Act . "

Furthermore , with regards to the term of " contract of carr - iage " , Section 1 (b) of the Hague Rules provides :

" The term " contract of carriage " applies only to contract of carriage covered by a bill of lading or any similar document of title , insofar as such document relates to the carriage of goods by sea , including any bill of lading or any similar document ... regulates the relations between a carrier and a holder of the same . " [67]

Section 2 of " Rules " states the following , concerning the rights and duties of the carrier :

" Subject to the provisions of Section 6 , under every contract of carriage of goods by sea , the carrier in relation to the loading , handling , stowage , carriage , custody , care and discharge of such goods , shall be subject to the responsib - ilities and liabilities and entitled to the rights and immunities hereinafter set forth . "

As in the case of the English Law , this particular Section is of importance , in that it defines the extent of the carr - ier 's rights and responsibilities , with regards to contracts of carriage .

Main / Relevant Statutory provisions :

- Section 3 (1) : Due diligence to make the vessel seaworthy before sailing : Responsibilities and liabilities -

" The carrier shall be bound , before and at the beginning of the voyage , to exercise due diligence to -

(a) make the ship seaworthy ,

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[67] It is important to note that , as is the case of the United Kingdom , the provisions of Cogsa do not apply to charterparties - which are usually categorised as " private carriage " . According to general maritime law , an absolute warranty of seaworthiness , was read into every charterparty - which was abolished by Cogsa , with regard to public carriers (issuing bills of lading) , to be replaced by an obligation to exercise " due diligence " to make the vessel seaworthy . (See Gilmore & Black , (on pages 207 - 208) ; Benedict , (on pages 1 - 23 to 1 - 28) and Chamlee , " The Absolute Warranty of Sea - worthiness : A History and Comparative Study , Vol. 24 Mercer Law Review (1973) , page 519 for a more detailed discussion of the principles and relevant judicial decisions .)

(b) properly man , equip and supply the ship ,
(c) make the holds , refrigerating and cooling chambers , and all other parts of the ship in which goods are carried fit and safe for their reception , carriage and preservation . "

It is submitted that the above mentioned Section , is to be read with Section 4 (1) of Cogsa , which provides the following : " Neither the carrier nor the ship shall be laible for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy , and to secure that the ship is properly manned , equipped , and supplied ... Whenever loss or damage has resulted from unseaworthiness , the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section ." [68]

It can be concluded that Section 3 (1) modifies or curtails the position at common law (in terms of which the duty to provide a seaworthy vessel was absolute in nature) , by requiring the carrier to exercise due diligence to make the vessel seaworthy .

In the English case of Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd. (1959) 2 LL. Rep. 105 , the Court concluded : " Article 3 , rule 1 , is an overriding obli - gation i.e. if the provisions are not fulfilled and the non - fulfilment causes damage , the immunities of Article 4 cannot be relied on ... ".

The Onus - the burden of proof : [69]

Under , Cogsa if the shipper proves a prima facie case and there is evidence of unseaworthiness , the burden of proof will shift

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[68] Schoenbaum , (on page 340) provides : " The duty of seaworthiness under Cogsa , is generally consistent with the Harter Act ... " . The learned author concludes , that both statutes can be regarded as being similar or identical , reg - arding the duty of seaworthiness , bar one aspect - in the light of The Isis - decision , the Court refused to relieve the ship - owner from liability even though the unseaworthiness was not a cause of the loss . But , in the light of Cogsa , section 4 (1) - the decision of the Court in the Isis is specifically overturned - as a causal connection must be established between the breach of the duty and loss of the carrier to be liable .

[69] For a more detailed examination Section 4 and the burden of proof , see Knauth , (on page 193 - 196) . Furthermore , with regards to the position of charterparties and the burden of proof , see the case of U.S.A. v. M / V Marilena P. (1969) 433 F. 2d 164 .

to the carrier to prove or show , either absence of causation or a failure to exercise of due diligence [70] . It is submitted that , if the carrier , fails to satisfy the above , liability will arise . However , if the carrier proved that a Section 4 (2) - exemption , caused the damage , the burden would shift to the shipper (or alternatively , to the cargo - owner) to establish that unseaworthiness caused the damage . [71]

Furthermore , regarding the issue of causation , the carrier is not obliged to prove that he exercised due diligence to make the vessel seaworthy in any respect unconnected with the loss . [72]

The Non - Delegable nature of the Duty :

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[70] The relevant cases , in this regard are : Nederlandsche Amerikaansche Stoomvaart Maatschappij v. Mediterranean & General Traders Inc. 17 F. 2d 586 ; Standard Oil Co. v. Anglo - Mexican Petroleum Corp. (1953) 112 F. Supp. 630 , the following was stated " (the) provision of Cogsa excepting the carrier from liability for losses from unseaworthiness unless caused by the failure to use due diligence to make the vessel seaworthy , is strictly construed against the carrier (who has the burden of proof of exercise of due diligence) ; Horn v. CIA de Navigacion Fruco (1968) 404 Fed. 2d 422 ; Director General of India Supply Mission For and on Behalf of the President of the Union of India v. S.S. Janet Quinn 335 F. Supp. 1329 and Sanyo Electric Inc. v. M/V Hanjin Incheon (1983) 578 F.Supp. 75 . Furthermore , with regards to the issue of proximate cause and burden of proof , see the article written by Greenwood , " Problems of Negligence In Loading , Stowage , Custody , Care And Delivery Of Cargo ; Errors In Management And Navigation ; Due Diligence To Make Seaworthy ", Tulane Law Review (Vol. XLV) 790 .

[71] The relevant cases are : Isbrandtsen Co. v. Federal Ins. Co. (1952) A.M.C. 1945 ; Firestone Synthetic Fibers Co. v. M/S Black Heron (1964) 324 F. 2d 835 ; Vallescura ; Blasser Brothers Inc. v. Northern Pan American Line (1980) etc. It is submitted that the carrier , may still be exempted from liability , by showing that due diligence was exercised to make the ship seaworthy . But in the case of a failure to exercise due dili - gence and if the require -ment of concurrent causation has been satisfied , the carrier would be liable for the whole loss , unless the requirement of apportionment of loss can be satis - fied . (See Schoenbaum , (on page 341 - 342 , in this regard .)

[72] See Tetley , (on page 153) , in this regard .

As in the case of the English statutory law , the duty to provide a seaworthy vessel is non - delegable , in nature . Schoenbaum , (on page 342) concurs : " The nondelegable nature of this duty was confirmed in the famous English case of The Muncaster Castle , and the doctrine is in accord with applicable American decisions . " The carrier is thus , responsible for the conduct of any person , he employs to fulfil the duty , even if the latter has impeccable credentials . [73]

In the case of Cerro Sales Corp. v. Atlantic Marine Enterprises (1975) 403 F. Suppl. 562 , the Court concluded that :

" ... a shipowner may not escape liability for fire damage simply by delegating its managerial functions to an agent , since the duty to provide a seaworthy ship is a nondelegable one . "

" Before and at the beginning of the voyage "

According to Greenwood 's article : " An analysis of the author - ities reveals that the time when seaworthiness is determined in carriage of goods , not only under the general maritime law , but also under the statutes , is at the commencement of the voy - age . " [74]

This statement is reiterated in C. Horn (M/S Heinz Horn) v. CIA de NAVEGACION , S.A. 404 F. 2d 422 , where the Court held that :

" ... the statutory obligation of carrier to use due diligence to make his vessel seaworthy is either met or not met when vessel " breaks ground " on the voyage ... " .

Thus , the carrier is under a duty to provide a seaworthy vessel , " before and at the beginning of the voyage " - which accords with the position at Common Law and the terms of the Harter

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[73] The relevant case is International Navigation Co. v. Farr and Bailey (1901) 21 S.Ct. 591 , where the Supreme Court held that due diligence to make a vessel seaworthy : " ... means due diligence on the part of all the owner 's servants in the use of the equipment before the commencement of the voyage and until it is actually commenced . " (Furthermore , see Benedict , (on page 8 - 3) .)

[74] See Greenwood 's article for a thorough examination of the relevant judicial decisions , relating to the doctrine of " seaworthiness by stages ". (on pages 793 - 796) . Furthermore see Schoenbaum , (on page 342) , in this regard .

Act . [75] The above position is reiterated by Villareal [76] , where the following was stated : " Due diligence to make the vessel seaworthy must be exercised at the beginning of the voyage , which means just prior to departure with respect to those things which might be affected during the loading or discharging process . Diligence must be exercised before commencement of each leg of a voyage in stages ... " . [77]

In Mississippi Shipping Co. v. Zander and Co. Inc. (1959) 270 F. 2d 345 , " The Del Sud " , the court held :

" The use of " before and at " does not make the commencement of the voyage - whenever it is - any less a beginning ... The dual reference is to make doubly sure that with respect to cargo then being loaded the vessel must be seaworthy at the time of the receipt of cargo and must continue in that state until the ship sails ... " . [78]

" seaworthiness "

Furthermore , it is submitted that the test for seaworthiness , is " whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport " or as was provided in the case of Farrell Lines , Inc. v. Jones , 530 F. 2d 7 (1976) , the ship was required to be reasonably fit " to perform or do the work at hand . "

Schoenbaum , (on page 343) states : " obvisiously a test of such generality can be applied only on a case by case basis , considering the particular and relevant facts of the situation at hand . An extremely broad variety of considerations have been

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[75] See Carver , (on pages 357 - 358) , concerning the distinction between Article III , rule 1 and Section 3 of the Harter Act , with regards to the issue of the relevant period of time for the exercise of " due diligence " . (The following cases are relevant : Angliss and Co. Pty. v. P. + O. SN. Co. (1927) 2 K.B. 456 ,463 ; Northumbrian Shipping Co v. Timm (E .) & Sons (1939) App. Cas. 397 .)

[76] " The Concept of Due Diligence in Maritime Law " , Journal of Maritime Law and Commerce , Volume 2 , No. 4 (1971) 763 .

[77] See pages 770 - 777 , for a more thorough exposition .

[78] With regards to other cases - see American Mail Line Ltd. v. United States (1974) 377 F. Supp. 657 ; E.B. Aaby 's Rederi A/S v. Union of India (1976) 2 L.L. Rep. 714 .

held to render a vessel unseaworthy and this seems to be intended by the breadth of the statutory formulation in Section 3 (1) of Cogsa . "

" due diligence " : [79]

In The " President Monroe " (1971) 1 LL. Rep. 385 , District Judge Carter held :

" ... under this Act (i.e. Cogsa) liability can be imposed upon a common carrier only if the damage to cargo was caused by a lack of due diligence on the part of the shipowner to make the ship seaworthy . There is , therefore , no absolute duty to provide a seaworthy ship . However , the burden of proving that due diligence was exercised to make the ship seaworthy falls upon the owner of the vessel , in terms of Section 3 of Cogsa . "

Knauth , (on page 185) states the following , as to the term " due diligence " : " The courts and the Acts have frankly adopted the Harter Act idea that " due diligence " is the utmost that can be required of the shipowner and the carrier , and losses which occur in spite of " due diligence " shall be borne by the cargo interests ... What is " due diligence ? " The courts have refused to state a definite formula , and judge each case on its facts , keeping the shipowners in the dark until the event is known ... The general statement in the Silvia (1898) 171 U.S. 462 that a ship must be reasonably fit to carry the cargo which she has undertaken to transport ... remains the basis of the extensive gloss developed by the cases . "

In Villareal , D.R. 's article , the following is stated , reg - arding the definition of due diligence : " If there is nothing more to go on , a fair meaning of " due diligence " then might be " sufficient , meticulous care " . But of course there is much more . "

According to the available sources : " the term ' due dil - igence ' , requires the exercise of care to be expected of a reasonably prudent vessel owner - it is submitted that this generality is not particularly helpful but it is probably the only general statement of principle which can be advanced because of the many circumstances which require consideration in dealing with due diligence . " [80] On the other hand , Carver , (on page 351) provides : " due diligence seems to be equivalent to reasonable diligence , having regard to the circumstances known or fairly to be expected , and to the nature of the voyage , and

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[79] For an historical perspective , see the article of D.R. Villareal , JR .

[80] As stated by Benedict , (on pages 8 - 2 to 8 - 3) .

the cargo to be carried . " [81]

The inquiry of whether due diligence has been exercised can be answered , by assessing whether or not the vessel was in a seaworthy condition - which is a question of fact to be determined by the evidence . [82] According to Schoenbaum , (on pages 343 - 344) , what has to be proved : " is exactly what was actually done and that this was all that reasonably could have been done under the circumstances . " [83]

" improper stowage " :

Section 3 (2) expressly provides : " The carrier shall properly and carefully load , handle , stow , carry , keep , care for , and discharge the goods carried ."

According to Tetley , (on pages 162 - 163) , improper stowage can be a cause of unseaworthiness , in two ways :

(a) it may cause instability of the ship

and

(b) it may cause damage to the cargo , so stowed or to other cargo .

Schoenbaum , (pages 344 - 346) , provides the following : " the obligation to " properly and carefully " care for the cargo con - tracted to be carried is codified in both the Harter Act and Cogsa (The duty is not expressed with any degree of precis - ion .) ... the duty of care for cargo is statutorily and con -

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[81] See the following relevant cases : The Southwark (1903) 24 S. Ct. 1 ; Peter Paul , Inc. v. Rederi A / B Pulp (1958) 258 F. 2d 901 ; States S.S. Co. v. U.S.A. & Others (1958) 259 F. 2d. 458 etc.

[82] It is submitted that this conclusion , has to be contrasted with Benedict , (on page 8 - 2) and the case of Waterville Victory , (1952) 195 F. 2d 527 , where the Court held the following : " although the question of whether certain course of conduct constituted due diligence is left to jury in action tried to a jury , upon appeal from decision of a judge , the question will be treated as one of law . "

[83] Cogsa , (1936) provides that the carrier is required to exercise due diligence to " make the ship seaworthy " . It is submitted that the term " due diligence " bears the same meaning in terms of both the Harter Act and Cogsa (1936) . (In addi - tion , the burden rests on the carrier in terms of both stat - utes , to discharge the duty to ensure that due diligence has been exercised .)

ceptually separate from the duty of due diligence to provide a seaworthy vessel , although the two are obviously interrel - ated . " [84]

Gilmore and Black , (on page 155) state with regards to this subsection : " after having provided a vessel seaworthy in the broadest sense , the carrier may still be held liable for fault in any of the repects enumerated , if the goods are consequently damaged . The main problem posed by this subsection is that of how it is to be read with Section 4 ... at least , the sections must be read together . "

" errors in navigation and management "

Section 4 (2) , provides : " Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -

(a) Act , neglect or default of the master , mariner , pilot or the servants of the carrier in the navigation or in the man - agement of the ship ; etc.

In terms of the two relevant statutes , no liabity would ensue for the carrier , in respect of loss or damage due to errors of navigation or management of the vessel . Schoenbaum , (on page 347 : footnote 1) states : " In Cogsa this exoneration is unconditional and absolute ... Harter Act differs from Cogsa on this point , however , in that exoneration is conditional on due diligence to provide a seaworthy vessel ." (It would appear , that this Section could be relied upon by the carrier , even though the damage suffered (by the aggrieved party) , was due to fault or negligence on the part of his servants .) [85]

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[84] See pages 345 - 346 , for a more extensive exam - ination of this subsection . (In addition , the following judicial decisions are relevant : Knott v. Botany Worsted Mills 179 U.S. 69 (1900) ; The Germanic 196 U.S. 589 (1904) 25 S. Ct. 317 ; The Vallescura , 293 U.S. 296 (1934) and Calderon v. Atlas S.S. Co. 170 U.S. 272 (1897) .

[85] The learned author concludes : " The defense of error in navigation normally poses little difficulty , especially when it results in a collision or a stranding . When the defense is an error of management of the vessel , however , it is sometimes difficult to distinguish this type of fault - for which the carrier is responsible - from negligence in loading , stowage , custody , care , or discharge of the cargo - for which the carrier is responsible . The test to differentiate these two categories of fault is whether the negligent act or omission relates primarily to the vessel as such or whether it relates specifically to the cargo . " (See Schoenbaum , (on pages 347 - 348 .)

Gilmore and Black , (on page 156) provide as follows : " the cases which have defined the scope of the exemption from liab - ility for negligence in the navigation and management of the ship have mostly been concerned with deciding whether a given fault is to be classified as of this sort or is to be regarded as one having to do with the custody , care , etc. of the cargo , for which the carrier is liable . [86]

Knauth , (on page 197) states the following : " ... the line between error in navigation and management of the ship and fault in care and custody of the cargo is not a hard and fast one ; the Court will consider all the circumstances of each situation . If there is doubt , it is usually resolved against the ship . " [87] Furthermore , should the carrier successfully discharge the bur - den of proving an error of navigation or management , the ship - per is required to prove that the vessel was unseaworthy and that the damage was caused by unseaworthiness (in terms of Cogsa .) [88]

The relationship between " seaworthiness " and " navigation and management " :

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[86] The learned authors continue : " The difficulty in drawing the line arises from the fact that , read naturally , the two clauses overlap , for many actions which might be spoken of as faults or errors in management or even in nav - igation might equally well be viewed as failures in the duty to use due care with respect to the cargo . " (It is submitted , that the case of Oceanic Steam Navigation Co. v. John W. Aitken (1905) 25 Supreme Court 317 , although referring to the provisions of the Harter Act is relevant , in this reg - ard .)

[87] See pages 197 - 206 , in this regard .

[88] In the case of In the Matter of TA CHI NAVIGATION (PANAMA) CORPORATION , S.A. (1981) 513 F.Supp. 148 , the Court held , that " the carrier has the burden of proof to bring itself within the Cogsa exemption for damage resulting from error of navigation or management of the vessel ; should the shipowner sustain that burden , the burden would then shift to the cargo interest to establish that unseaworthiness was the cause of the damage and , if cargo interest carried that burden , the ship - owner could still be exempted from liability by proving that due diligence was exercised to make the ship seaworthy . Furthermore , the Court held " the fact that seaworthiness of vessel can be labelled as error in navigation does not per se bring shipowner within Cogsa exemption for damage resulting from error of navigation or management of vessel . "

It is necessary to examine the relationship that exists between the provision of Section 3 (1) [read together with Section 4 (1) of Cogsa] and the provisions of Section 4 (2) (a) .

According to Gilmore and Black , in certain situations , Cogsa allows the cargo - owner to recover damages , suffered to goods owned , due to failure on the part of the carrier to exercise due diligence to provide a seaworthy vessel but if the loss is caused by negligence in the navigation and management of the vessel , the former is required to bear his own loss . [89]

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[89] See the cases of The Silvia (1898) ; International Navigation Co. v. Farr and Bailey Mfg. Co. (1901) ; Edmond Weil Inc. v. American West African Line (1945) 147 F. 2d 363 etc. [Furthermore see Greenwood 's article (on pages 802 - 803) .]

C. SOUTH AFRICAN LAW :

1. Common Law position :

(i) General Principles :

(a) Introduction :

It is submitted , that before an examination of the South African Common law position can commence - the question arises of what law is to be applied , with regards to contracts of affreight - ment . This important issue has to be assessed in the light of the relevant provisions of Admiralty Jurisdiction Regulation Act No. 105 of 1983 . [90]

Thus , according to the prevailing common law , every contract of carriage by sea , is subject to an implied undertaking , on the part of the shipowner , to provide a seaworthy vessel - it is , however , possible for the contracting parties to vary or exclude the implied undertaking , by " clear and unambiguous " terms or words in the contract .

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[90] In the light of Section 6 of the Act , it has to be determined whether or not a Court of Admiralty of the Republic " may apply the law which the High Court of Justice of the U.K. in the exercise of its admiralty jurisdiction would have applied with regard to such a matter " . This in turn , depends on whether a court of admiralty of the Republic (as referred to in the Colonial Court Act (1890)) , had the necessary juris - diction in respect of the matter , immediately before the comm - encement of this Act . In the case of bills of lading , it can be concluded , that in the light of Section 6 of the Admiralty Court Act (1861) , the High Court of Admiralty (in the U.K.) , in 1890 , had the necessary jurisdiction to hear disputes relating to bills of lading - by implication the Colonial Courts of admiralty , in South Africa , also possessed such jurisdiction . With the result that the English Common Law , as it existed in 1890 , with regards to bills of lading , can be regarded as being of " binding authority " in South Africa . However , uncertainty exists regarding the position of charterparties - as no reference to charterparties are con - tained in the relevant pre - 1890 English statutes . It is submitted that the argument (s) advanced by Staniland , " What is the law to be applied to a charterparty dispute " , (1992) SALJ 528 - 534 , is to be supported , with the result that the English common law relating to charterparties is " binding " .

(b) The Standard of Seaworthiness , required of the ship - owner :

As in the case of the English Common Law and American maritime law , the implied warranty of seaworthiness is absolute in nature - in other words the shipowner is liable for any damages that may have arisen irrespective of the precautionary steps taken to prevent unseaworthiness . Thus the rule laid down in the leading case of McFadden V. Blue Star Line (1905) is applicable i.e. the vessel " must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of the voyage ..." . It is important to bear in mind that the the undertaking of seaworthiness , does not require absolute perfection or absolute guarantee of safe carriage . Nor is it " a continuing warranty " , in the sense that it must be maintained for the full duration of the voyage - but need only be complied with at the commencement of sailing .

Furthermore , in the light of the decision of Bradley and Sons Ltd v. Federal S.N. Co (1926) , the shipowner is not required to install the latest instruments or fittings , in order to comply with the required standard - the shipowner is merely required to ensure that the vessel is " reasonably fit " .

(c) The Definition / Meaning of Seaworthiness :

According to the South African Common Law , the term " seaworth - iness " has a dual application i.e. firstly , the vessel itself must be capable of completing the voyage undertaken , at the commencement thereof and secondly , the vessel must be " fit " to receive the cargo .

Furthermore , the prequisites for the warranty of seaworthiness , as laid down in the English Common Law , are relevant - i.e. the master and crew must be " competent and sufficient " and the vessel , concerned must be " cargoworthy " at the relevant time of loading (in other words , it must be " fit " to receive the contracted cargo .)

(d) Failure to provide a seaworthy vessel :

In the event of failure , on the part of the shipowner to comply with the warranty of seaworthiness , with the result that the cargo - owners have suffered damages , the former will be held liable for such resultant losses . However , before such liab - ility would arise , the cargo - interests must establish the following :

(i) that the ship was unseaworthy
(ii) that the loss or damage sustained was caused by such un -

seaworthiness

It is submitted , that although a vessel is unseaworthy , the shipowner could still rely on certain " exception clauses " , contained in the contract of carriage i.e. a failure to ensure that the vessel is seaworthy , would not always result in the terms of the contract of carriage being displaced .

The decision of the Court in Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha (1962) , must be considered in determining whether or not the aggrieved party could terminate the contract , in the event of a breach thereof i.e. the contract could be terminated by the aggrieved party in those cases where the breach was of such a nature , as to " frustrate the commercial purpose of the charter " . However , could the defect be remedied , without " frustrating the commercial purpose of the charter " , then , it is submitted the aggrieved party would not be justified in repudiating the charter . "

(e) The Relevant Time :

According to the prevailing common law sources , the vessel , concerned is required to be seaworthy at the time or moment of sailing - thus should the vessel be unseaworthy at the moment of departure , then the undertaking has been breached . On the other hand , should the defect arise after the vessel has departed on her voyage , then no breach of the warranty has taken place and liability would only arise " if the cause was one for which he was answerable . " [91]

With regards to the stages preceding departure , it is submitted the South African Common Law position , is analogous to the corresponding position in the United Kingdom .

(f) The Doctrine of Stages :

Similarly , the common law position in South Africa , with regards the doctrine of stages is to be examined in the light of the prevailing position in England - in terms thereof , the vessel is required to be seaworthy at the commence of each stage of the voyage , should the voyage be divided into various stages . (the exception , being a time charter - in terms of which the vessel need only be seaworthy , at the commencement of the voyage .)

Furthermore , the English authorities and judicial decisions are relevant with regards to the issue of " bunkering " , in terms of the South African Common Law .

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[91] According to Carver , (on page 120) .

(g) The Burden of proving unseaworthiness :

The common law position , with regards to the burden of proving unseaworthiness , corresponds with the prevailing position in the other two countries - namely , the burden of proving a breach of the implied warranty of seaworthiness rests with the party alleging it .

In order , for the aggrieved party to effectively discharge , the burden of proving unseaworthiness , the following facts must be adequately established :

(1) that the vessel was , in fact unseaworthy , at the comm - encement of the voyage

(2) and that the unseaworthiness , gave rise to the ensuing loss or damages .

Furthermore , as was stated by Carver , (page 124) no pres - umption of law arises that a ship is unseaworthy , merely because she sinks or the need arises for necessary repairs , however the facts may raise an inference of unseaworthiness and thus shift the burden of proof .

(ii) Express exclusion of seaworthiness :

It is submitted that the exposition of the English Common Law , with regards to clauses expressly excluding unseaworthiness , is essential to an understanding of the position in South Africa - i.e. contracts of carriage often contain words or terms which " expressly exclude or modify or vary " the implied undertaking of seaworthiness , subject to the requirement that such an intention , must be precisely or clearly formulated . In order to determine whether such terms or words (as contained in the contract of carriage) effectively exclude liability for un - seaworthiness , depends on the contract , construed as a whole .

However , where an express warranty of seaworthiness is contained in a contract of carriage , the implied warranty is superseded thereby and any possible limitation on claims will be effective to reduce or limit the ambit of the express undertaking .

It is submitted , that the South African common law position , as well as the English common law position , regarding the issue of clauses expressly excluding liability for unseaworth - iness , is to be distinguished from the prevailing position in the United States - where such express exclusion clauses are regarded as being contrary to public policy and are thus unen - forceable .

2. Statutory enactments :

i.e. an examination of the relevant South African statutory provisions , with regards to the concept of seaworthiness , relating to contracts of carriage .

The relevant statute is : The Carriage of Goods By Sea Act (1986)

Contents and Commentaries :

Section 1 (1) provides that the reference to " Rules " means the : International Convention for Unification of Certain Rules of Law relating to Bills of Lading (1924) , as amended by the Brussels Protocol (1968) .

And that these " Rules " (as set out in the Schedule) " shall , subject to the provisions of this Act , have the force of law and apply in respect of the Republic in relation to and in conn - ection with -

(a) the carriage of goods by sea in ships where the port of shipment is a port in the Republic , whether or not the carriage is between ports in two different States ... etc ;

(b) any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract ;

(c) any receipt which is a non - negotiable document marked as such if the contract contained in it or evidenced by it or pursuant to which it is issued is a contract for the carriage of goods by sea which expressly provides that the Rules are to govern the contract as if the receipt were a bill of lading ... etc ;

(d) deck cargo and live animals ... etc.

It is submitted that one of the most important provisions of this statute is Section 2 , which expressly provides that an absolute undertaking to provide a seaworthy vessel , on the part of the carrier , shall no longer be implied in respect of contracts of carriage . (which is similar to the corresponding provision of the English law i.e. Section 3 of the U.K. Cogsa) . With the result , that the duty to provide a seaworthy vessel is no longer " absolute " in nature but is rather " relative " .

As in the case of both the U.K. and U.S.A. Cogsa , the equivalent statute in South Africa , has incorporated the Hague Rules , as

amended by the Brussels Protocol (1968) . Therefore , the commentaries (and judicial decisions) regarding the foreign statutes are of " pursuasive value " , to an interpretation of the relevant provisions of the South African statute .

It is important to note that in terms of Article I , subsection (b) , the provisions of Cogsa are restricted to contracts of carriage " covered by a bill of lading ... in so far as such document relates to the carriage of goods by sea , including any bill of lading ... issued under or pursuant to a charter - party ... " .

The contents of Article II are particularly relevant especially with regards to the rights / immunities and the resonsibil - ities / liabilities of the carrier , in relation to " the loading , handling , stowage , carriage , custody , care and discharge of such goods ... " .

Article III , rule 1 provides that " the carrier shall be bound before and at the beginning of the voyage to exercise due dili - gence to -

(a) make the ship seaworthy ;
(b) properly man , equip and supply the ship ;
(c) make the holds , refrigerating and cool chambers ... fit and safe for their reception , carriage and preservation . "

The term " before and at the beginning of the voyage " relates to the period of time , commencing from at least the start of loading , until the voyage begins , but does not apply to the period , after the voyage has commenced . Thus , this particular article has retained the common law principle that the relevant period of time when the warranty attaches is " before and at the beginning of the voyage " . [92]

Furthermore , the Article places a positive duty on the carrier to exercise " due diligence " to provide a vessel , which is seaworthy , in all respects . (Thus , a new criterion has been formulated , in order to determine whether a seaworthy vessel was indeed provided by the carrier .) The requirement of " due diligence " refers to " due diligence " in the work itself , on the part of the carrier and all other persons involved , whether they are servants , agents or even independent contractors . [93]

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[92] Therefore , by implication the doctrine of seaworthiness by stages , has been effectively discarded .

[93] It is submitted , that the English case of The Muncaster Castle (1960) , is relevant in this regard i.e. the duty to exercise " due diligence " is regarded as an " inescapable per -

Article III , rule 2 , provides that " subject to the provisions of Article VI , the carrier shall properly and carefully load , handle , stow , carry , keep , care for and discharge the goods carried . "

Article IV , rule 1 states that " neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy , and to secure that the ship is properly manned , equipped and supplied ... in accordance with the provisions of para. 1 of Art. III . Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article . "

As was stated in the commentary regarding the English Cogsa , the carrier , in order to be able to rely on the exceptions contained in Article IV , must discharge the burden of proving , that due diligence has been exercised to make the vessel seaworthy . The leading case of Maxine Footwear v. Canadian Government Merchant Marine (1959) , is relevant in this regard i.e. where the Court held that the provisions of Article III , rule 1 are " an over - riding obligation . If it is not fulfilled and the non - fulfilment causes the damage , the immunities of Article IV cannot be relied on . " It is essential to emphasize that the burden resting on the carrier , to prove the exercise of " due diligence " , does not arise with regard to loss or damage un - connected with the unseaworthiness of the vessel .

Article IV , rule 2 provides " neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from -

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

It is submitted that the relevant English sources relating to the issue of " the navigation or management of the vessel " , are of " pursuasive authority " , with regards to the prevailing South African statute .

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sonal obligation " - which cannot be discharged , simply by delegating it to another person .

2 . MARINE INSURANCE :

A. ENGLISH LAW :

1. Common Law position :

(i) General Principles :

(a) Introduction :

At Common Law , every voyage policy [94] , is subject to an implied undertaking , on the part of the assured , to provide a seaworthy vessel , at the commencement of the voyage . As in the case of contracts of carriage , this implied warranty , may be varied or excluded by " clear and unambiguous " terms or words in the contract . [95]

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[94] It is important to note , that in the case of marine insurance , a clear distinction is drawn between voyage policies (where a warranty of seaworthiness is implied) and , on the other hand , time policies (where no such warranty of seawor - thiness is implied) . It is submitted , that this clear dis - tinction which exists , in the English Common law , between voyage policies and time policies , regarding the application of the implied warranty of seaworthiness , is not evident in the United States , where different rules have evolved . (see Sect - ion B , for a more detailed exposition of the corresponding pos - ition , in the United States .) [However , according to Ivamy , (on page 306) , " Although neither s 39 (1) nor 39 (5) of the Marine Insurance Act 1906 expressly mentions a mixed pol - icy , nevertheless a warranty of seaworthiness is implied in that type of policy . " (see M Alojil Establishment v. Malayan Motor and Underwriters (Private) Ltd , The Al - Jugail IV (1982) 2 Lloyd 's Rep 637 , in this regard .]

[95] i.e. the implied warranty , can only be excluded by terms in the policy , expressed in the clearest language (the so - called " seaworthiness admitted " clause) .

The above statement , regarding the implied warranty of sea - worthiness , is reiterated by Arnould , (on page 548) , who provides that " Unless the policy otherwise expressly provides , every voyage policy on hull or on goods contains an implied warranty that the ship shall be seaworthy for the voyage when she sails by which is meant that she shall be in a reasonably fit state as to repairs , equipment , crew and all other respects to encounter the ordinary perils of the voyage insured at the time of sailing on it . "

Regarding the extent of the implied warranty , it is submitted that " There is no implied warranty in a policy on goods that the goods are seaworthy for the voyage , but there is an implied warranty that the ship , in addition to being seaworthy as a ship , is also reasonably fit to carry the goods to their dest - ination . " [96] Furthermore , the implied warranty is confined to the vessel insured and does not include smaller craft employed to bring goods to the vessel . [97]

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[96] As stated by Arnould , (on page 550) . Ivamy , (on pages 307 - 308) , concurs " The implied warranty of seaworthi - ness does not extend to goods , for the underwriter is not res - ponsible for their condition , apart from the action of the perils insured against ... " . It is important to note that Section 40 (1) of the Marine Insurance Act 1906 expressly pro - vides that " In a policy on goods or other movables there is no implied warranty that the goods or movables are seaworthy . " . In Sleigh v. Tyser (1900) 2 Q.B. 333 Judge Bigham held that (the implied warranty in a cargo policy) " ... is in my opinion , exactly the same as the warranty in a policy on a ship - that the ship shall be seaworthy for the adventure on which she starts . Stating the warranty with particular reference to a policy on cargo , it may be defined as a warranty - or as a condition that the ship shall be fit for the proposed service - fit , that is , in respect of all those things that appertain to the safe carriage of the cargo in question to its destination . " (In addition , see the case of Blackett , Magalhaes and Colombie v. National Benefit Assurance Co. (1921) 8 LlL Rep 293 , CA .)

[97] See Ivamy , (on page 307) . Furthermore , the learned author concludes " The insurer in a policy on goods ' until the same be safely landed in the port of discharge , including all risks to and from the ship ' , insures the risk of landing by lighters in the manner customary at the port , but the implied warranty of seaworthiness does not attach to the lighters so used . But the insurer will be liable for the loss or damage to the goods if the assured is not privity to the unseaworthiness of the vessel where the policy contains a clause in the form of clause 5 of the Institute Cargo Clauses (A) , (B) or (C) ... " .

(b) The Standard of Seaworthiness , required of the ship - owner / assured : [98]

With regards , to the standard of seaworthiness , the shipowner or assured is required to ensure that the vessel is in a sea - worthy condition for the contemplated voyage , at the moment of sailing , " which is meant that it shall then be in a fit state as to repairs , equipment , and crew , and in all other respects sufficient to take the ship in ordinary circumstances to its port of destination ... " . [99]

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[98] It is submitted that , as in the case of contracts of carriage , the implied warranty of seaworthiness is " absol - ute " in nature i.e. as stated by Carver , (on pages 109 - 110) , " The shipowner is liable at common law for failure to make the ship seaworthy in fact , although he may have taken all reasonable pains and precautions to do so . He undertakes abso - lutely that she shall be fit , on sailing upon the voyage , to carry the cargo which she has on board , and with it to en - counter safely whatever perils a ship of that kind may fairly be expected to be exposed to in the course of that voyage at that season of the year ... It appears , then , that the shipowner undertakes responsibility for any defects in the ship , or her machinery or equipment ; even for defects not discoverable by careful examination ... " . (See Steel v. State Line SS Co. (1877) 3 App. Cas. 72 , 86 ; Burges v. Wickham (1863) 3 B & S 669 ; etc.) However , as was stated by the learned author , " The required standard of seaworthiness is not absolute . It is " relative " , among other things , to the state of knowledge and the standards prevailing at the material time . " Ivamy , (on pages 296 - 297) concurs " There is no absolute condition of a vessel recognised by law as satisfying the warranty of seaworth - iness . The term is a relative one , and seaworthiness is that condition in which a ship should be to enable her to encounter whatever perils of the sea a ship of her kind , and laden as she is , may fairly be excepted to encounter in performing the voyage concerned . " Or as was held in The Vortigern (1899) , " ... the warranty has always been relative . Though absolute when it attached , its precise extent and limitations were relative , and varied according to the standard which the parties must have been supposed to contemplate as applicable to the adventure ... " . Thus , in terms of Section 39 (4) of the Marine Insurance Act 1906 " 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 . "

[99] As was held by the Court of Appeal , in the case of The Vortigern (1899) . Meanwhile Ivamy , (on pages 297 - 298) provides that " Not merely must the vessel be sound in hull and tackle , but she must be well found in everything necessary

It is submitted that , in order to determine , whether a vessel was seaworthy or not , an objective test , in the form of a prudent or reasonable shipowner , is to be employed . [100] Thus the test laid down in the leading case of Mc Fadden v. Blue Star Line (1905) , namely " ... That a vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it ... " , is applicable to marine insurance policies , as it is , with regards to contracts of carriage .

Furthermore , it can be concluded , that the standard of sea - worthiness varies , from country to country , with regards to the degree of equipment and preparation required , in order to render a vessel seaworthy . Arnould , (on page 569) states that " It is obvious that there can be no fixed and positive standard of seaworthiness , but that it must vary with the varying exigencies

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for the voyage insured . Her master must be competent and her crew sufficient . If in any part of the voyage a pilot is requi - red , she must obtain one . The stores must be adequate , and , if the voyage is of such a character as to require the services of a doctor , he should be provided with the requisite drugs and instruments . The vessel must be properly supplied with fuel and her machinery should be sound ... " . However , in the event of a vessel , by reason of her class , being unable to adequately comply with the required standard of seaworthiness for the prop - osed voyage , the implied warranty of seaworthiness , in the opinion of Arnould , (on page 570) , should not be discarded but must be accommodated " to what is reasonably practicable in the particular case . But the underwriter must be informed of the peculiar nature of the risk . " (It is submitted , that in each case , it remains a question of fact , as to whether the vessel was in such a seaworthy condition , as to satisfy the implied warranty .)

[100] Arnould , (on page 562) : Footnote 81 concurs with the above assessment , by stating " ... the standard of sea - worthiness required is that which a careful and prudent owner would require his vessel to have at the commencement of the voyage , having regard to the probable circumstances of it . "

of mercantile enterprise . " [101]

As in the case of contracts of affreightment , the implied war - ranty is " not a continuing warranty " [102] i.e. it is satis - fied if the ship is seaworthy for the voyage insured when she sails on it - the assured does not undertake that the ship shall continue to be seaworthy during the entire voyage . [103] In Bermon v. Woodbridge (1781) 2 Dougl. 781 , Lord Mansfield stated : " every ship must be seaworthy when she first sails on the voyage insured , but she need not continue so throughout the voyage . " [104]

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[101] Thus , as was stated previously , the standard of sea - worthiness does not remain static , but clearly changes , in relation to modernisations and improvements in equipment , gear and appliances . In Burgess v. Wickham (1863) , Judge Blackburn held that " The standard of seaworthiness must rise with the improved knowledge of ship - building and navigation . " While in the case of Mountpark SS Co. v. Grey , " Shipping Gazette " (1910) , Lord Loreburn qualified the above statement , by con - cluding " It is not the duty of an owner to adopt all the newest inventions . His ship need not be always , in all ways , up to date . His duty is to make his ship " reasonably fit ... " . (Furthermore , see F.C. Bradley & Sons Ltd. v. Federal Steam Navigation Co. (1926) .)

[102] As was stated by Channel J. in the case of Mc Fadden v. Blue Star Line (1905) 1 K.B. 697 . Ivamy , (on page 302) concludes " Although the ship must be seaworthy at the commen - cement of the risk , or at the commencement of each stage of the voyage if it is divisible into stages , yet there in no implied warranty that the ship shall continue seaworthy , for the possi - bility of the ship being rendered unseaworthy by certain perils , and of loss accruing thereby , forms the very risk which the insurer takes on himself when he enters into the contract . "

[103] According to Arnould , (on page 552) " It is enough to satisfy this warranty that the ship be originally seaworthy for the voyage insured when she sails on it ... On this ground it has been frequently held that under a policy on a voyage out and home , the risk being entire and indivisible , it is suffi - cient to satisfy the warranty if the ship be seaworthy for the entire voyage when she first sails from the home port of loading ; and it is not necessary that she should be in a seaworthy con - dition on sailing from the outport on her homeward passage , or from any intermediate port . "

[104] According to Anderson , (on page 3) , " in Sadler v. Dixon ... denying the existence of a continuing implied warranty of seaworthiness in a time policy , the court held that the owners were bound only to provide a competent master and crew

According to the relevant sources , it is to be noted that the assured does not warranty the continued good conduct of the master and crew in the course of the voyage . [105] Arnould , (on pages 553 - 554) provides " if the vessel , crew and equipment be originally sufficient , and the master and crew are persons of competent skill , all has been done that the assured warranted should be done ; and although such master and crew should by their acts or ommisions have brought the ship in the course of the voyage and at the time of the loss , into an un - seaworthy state , yet the underwriter is liable for all loss which , though remotely occassioned by such superinduced state of unseaworthiness , is yet proximately caused by the perils

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at the outset and could not thereafter be held responsible for their lack of judgment or ability . The rule applied without any distinction between time and voyage policies . The Court intima - ted that result might have been different had the master 's act - ion been barratrous ; but a loss attributable to an error or defect in judgment or negligence in the ordinary navigation of the vessel was not sufficient to excuse the underwriters , since " the rule is established , that there is no implied warranty on the part of the assured for the continuance of the seaworthiness of the vessel , or for the performance of their duty by the master and crew during the whole course of the voyage ... " .

[105] In terms of Section 55 (2) (a) , the assured cannot recover for a loss brought about by his own wilful act or def - ault . The Court , in the case of Dixon v. Sadler (1839) 5 M & W 405 , held that " the underwriters were liable for the con - sequence of the wilful , but not barratrous act of the master and crew , in rendering the vessel unseaworthy before the end of the voyage , by throwing overboard a part of the ballast . According to Anderson , C.B. , (on pages 3 - 4) , the " court held that the owners were bound only to provide a competent master and crew at the outset and could not thereafter be held responsible for their lack of judgment or ability . This rule applied without any distinction between time and voyage policies . The court intima - ted that the result might have been different had the master 's action been barratrous ; but a loss attributable to an error or defect in judgment or negligence in the ordinary navigation of the vessel was not sufficient to excuse the underwriters , since " the rule is established , that there is no implied warranty on the part of the assured for the continuation of the seaworthiness of the vessel , or for the performance of their duty by the mas - ter and crew during the whole course of the voyage . " (See Redman v. Wilson (1845) 14 M & W 476 , in this regard .)

insured against . " [106]

(c) The Definition / Meaning of Seaworthiness :

i.e. what is understood by the term " seaworthiness " [107]

Concerning the nature of the implied warranty of seaworthiness Arnould , (on page 572) provides that " The implied warranty of seaworthiness , as far as relates to the condition of the ship , requires that when the ship sails on her voyage she should be well - furnished , tight , staunch and strong ; competent , that is , in her hull to resist the ordinary attacks of wind and weather on the voyage insured , and properly rigged , stored and provisioned for such voyage . " [108]

It is submitted , that the term " seaworthiness " , as in the case of contracts of affreightment , has a dual application : firstly , the vessel must be " capable of completing the voyage undertaken , at the commencement thereof " and secondly , the vessel must be able " to preserve the cargo " while completing the voyage undertaken . [109]

Thus , it can be concluded that " As regards the ship , the warranty requires that she shall be fit to encounter the perils of the voyage ; as regards goods , the warranty also requires that the ship shall be fit for the carriage of the particular

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[106] Ivamy , (on pages 297 - 298) concludes that " A ship is not unseaworthy if she is properly found in all requisite appliances , although , through the negligence of the persons responsible , such appliances are not used . " (The relevant cases are Hedley v. Pinkney & Sons SS Co. (1894) AC 222 ; Steel v. State Line SS Co. (1877) ; G.E Dobell & Co. v. SS Rossmore & Co Ltd. (1895) 2 Q.B. 408 etc.)

[107] It is submitted , that in terms of Section 39 (4) of the Marine Insurance Act 1906 , " A ship is deemed to be sea - worthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured . "

[108] In the case of Gibson v. Small , Erle J. concluded that " the term ' seaworthy ' when used in reference to marine insur - ance , does not describe absolutely any of the states which a ship may pass through , from the repairs of the hull in dock till it has reached the end of its voyage ; but it expresses a rela - tion between the state of the ship and the perils it has to meet in the situation it is in . "

[109] Or , as otherwise stated , the vessel must be " fit in design , structure , condition and equipment to encounter the ordinary perils of the voyage " . (per Carver , (on page 115) .)

cargo i.e. fit in respects of all those things which appertain to its safe carriage to its destination . " [110]

Prerequisites for the warranty of seaworthiness :

(1) The term " seaworthiness " , requires that , the Master and the crew , concerned must be " competent and sufficient " i.e. that the Master and the vessel are required to be " reasonably fit " . [111]

Concerning the issue of the master and crew , Parke J. in the case of Phillips v. Headlam (1831) 2 B & Ad. 383 , held that :

" Every ship at the time of sailing must be properly manned , with a master of competent nautical skill , a crew sufficient and competent to navigate her on the voyage insured , and such a pilot on board whenever there is an establishment of pilots at the port and the nature of the navigation requires one . "

It is submitted that the Master , is required to be competent and must be fully instructed and informed regarding all aspects of the vessel , in question . The Master is regarded as being in - competent , if he has a " disabling want of skill or disabling want of knowledge " [112] . Furthermore , it is a question of fact , in each case , as to whether the master is incompet - ent . [113]

Arnould , (on page 577) concludes that " When an officer , though qualified , has performed his duties properly and no loss has taken place which can be imputed to him , a court would probably be justified in refusing to find that his mere lack of qualification had the effect of rendering the vessel unsea - worthy . "

Furthermore , regarding the crew , the owner is obliged to provide a crew which is competent and sufficient - " if the crew be sufficient when the ship sailed on the voyage insured , the implied warranty is fully satisfied unless it be a voyage of

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[110] As formulated by Arnould , (on pages 571 - 572) .

[111] Thus , there is no distinction between contracts of affreightment and marine insurance , in this regard .

[112] See , in this regard , the case of Standard Oil Co. v. Clan Line (1924) A.C. 100 .

[113] Concerning the issue of the competency of the Master and crew , Arnould , (on page 576) provides that the nature of the voyage on which they are employed , in terms of the policy , can be regarded as being of importance .

successive stages differing in degree or kind of risk and con - sequently in the description of crew required . The assured does not contract that the ship shall continue to be properly manned throughout the voyage nor is he responsible for any subsequent negligence or misconduct on the part of the crew . It is , however , indispensably for the voyage at the time she sails on it , if not , the underwriters are not liable . " [114]

Concerning , the issue of a pilot , the learned author concludes (on page 578) that " generally speaking , no ship is seaworthy at the outset of the risk unless she have on board a pilot where requisite for her safe navigation . The law also seems to be , that it is not a breach of the warranty of seaworthiness for a ship to enter a port where it is usual to employ a pilot , with - out having one on board . Consequently , when a ship is lost by a peril insured against , in entering such a port without a pilot , the assured can recover , although the loss might not have occurred if a pilot had been on board , and was remotely caused by the negligence or misconduct of the master in entering without a pilot . "

(2) Furthermore , the term seaworthiness , requires that the vessel must be fit for the carriage of the particular cargo i.e. it must be so - called " cargoworthy " .

It is submitted , that as in the case of contracts of affreight - ment , the implied warranty of fitness for cargo , means that the vessel must be fit to receive the cargo , in question - i.e. the vessel must not only be fit to withstand the ordinary perils of the sea , but must also be fit to receive the cargo . [115]

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[114] As provided by Arnould , (on pages 577 - 578) . (See the case of Forshaw v. Chabert (1821) 3 Brod. & B. 158 , in this regard .)

[115] It is to be noted that Section 40 (2) of the Marine Insurance Act 1906 , expressly provides , with regards to voyage policies on goods or other moveables that " ... there is an im - plied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship , but also that she is reasonably fit to carry the goods or other movables to the destination con - templated by the policy . [In Elder , Dempster v. Paterson , Zachonis (1924) All ER 135 , the Court held the following (albeit with regards to contracts of carriage) , " It is well settled that a shipowner ... who contracts to carry goods by sea thereby warrants not only that the ship in which he proceeds to carry them shall be seaworthy in the ordinary sense of the word - that is to say , that she shall be tight , staunch , and strong , and reasonably fit to encounter whatever perils may be expected on the voyage - but also that both the ship and the furniture and equipment shall be reasonably for receiving the contract cargo and carrying it across the sea . "]

Regarding the issue of cargoworthiness , Arnould , (on page 573) , provides that " If a ship is so heavily or so improperly loaded , when she sails on the voyage insured , as to be incap - able of encountering the ordinary perils of the voyage , that is unseaworthiness . Under a policy " at and from " her place of

loading she may have been fit for the first stage or stages of her insured voyage ... Bad stowage or overloading may make her unfit to encounter the perils of the next stage , her carrying voyage , and so unseaworthy . But , if the bad stowage is such as only to affect the cargo and not the ship as a ship , she will not be unseaworthy , although the effect of bad stowage may be to make it impossible for the cargo to arrive undamag - ed . " [116] In addition , if the vessel concerned is unable to safely carry the kind of cargo on board , without damaging herself , unseaworthiness may arise . [117]

(d) Failure to provide a seaworthy vessel :

i.e. the effect of unseaworthiness [118]

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[116] Ivamy , (on page 298) states that " The mode in which cargo is stowed may sometimes be important , for if , by reason of the adoption of an improper mode of stowage , the ship starts in an unseaworthy condition , the policy may be avoided . Impr - oper or unsuitable dunnage may render the ship unseaworthy for the specific cargo . " .

[117] See Arnould , (on page 574) . Concerning the question of rigging , stores and equipment , the learned author concludes " Besides being competent in hull to resist the ordinary attacks of wind and weather on the voyage insured , the ship must be properly equipped with stores , provisions and all other things which the custom of trade has made requisite for the voyage . " [See the relevant cases of Wedderburn v. Bell (1807) 1 Camp. 1 ; Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) L.R. 3 P.C. 234 , in this regard .]

[118] According to Arnould , (on page 548) : Footnote 11 , the effects of a breach of the implied warranty are tempered by the incorporation of the common clause " Held covered in case of any breach of warranty , etc. , at a premium to be hereafter arranged . " (However , in the opinion of the learned author , " The standard wording of the " held covered " clause in the Institute Clauses is ... confined to breach of warranty " as to cargo , trade , locality , towage , salvage services or date of sailing " .)

Arnould , (on pages 549 - 550) states " As seaworthiness is a condition of the contract of insurance , breach of the condition avoids the contract or , more accurately , discharges the insurer from liability from the date of the breach and deprives the ass - ured of any recourse against the insurer , whether his loss can be traced to such breach or not , even though the unseaworthiness was remedied before the loss . " [119]

It is submitted , that the main distinction between marine in - surance and contracts of carriage , involves the consequences of failure , on the part of the shipowner or the assured , to prov - ide a seaworthy vessel , at the time of sailing . With regards to marine insurance : (a) the implied warranty of seaworthiness is regarded , as constituting a condition of the insurance policy [120] ; (b) a breach of the implied warranty of seaworthiness , would have the effect of avoiding the insurance contract or , more correctly , would entitle the underwriter to avoid the

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[119] Healy , (on page 254) concludes that " The English law on this point is quite clear ; the Marine Insurance Act specifically provides that in the absence of any contrary provision in the policy , a failure to comply strictly with the terms of a warranty ordinarily discharges the underwriter from liability from the date of the breach , although it does not discharge liabilities which have previously accrued . The Act does , however , recognise three exceptions ; (1) when , by reason of a change of circumstances , the warranty ceases to be applicable ; (2) when the warranty becomes unlawful by opera - tion of any law subsequently enacted , and (3) when the breach of warranty has been waived by the underwriter . " (See Section 34 (1) and (3) of the Marine Iinsurance Act (1906) .)

[120] See Arnould , (on page 549) . With regards to con - tracts of carriage , however , the implied warranty of seawor - thiness , is regarded as constituting " neither a condition nor a warranty " (See Scrutton , (on page 82)) According to Payne & Ivamy , (on page 16) , " The undertaking to provide a sea - worthy vessel is one of a complex character which cannot be categorised as being a ' condition ' or a ' warranty ' ... " . While Carver , (on pages 106 - 107) , states " ... the obli - gation of seaworthiness is not , generally speaking , a condition breach of which entitles the party aggrieved , on discovering it , to rescind the contract . On principle therefore it would seem that it should never so operate , but operate only as war - ranty , breach of which would entitle the party aggrieved merely to damages ... " .

policy , from the time of the breach thereof [121] ; (c) no causal connection , between the loss suffered by the assured and breach of the implied warranty ,is required [122] ; (d) the implied warranty is breached , notwithstanding any attempts by the assured to correct or remedy the unseaworthy condition of the vessel , before the loss . [123]

However , as in the case of contracts of affreightment , the assured cannot plead ignorance of the existence of a defect or that all possible precautionary measures were taken to remedy the

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[121] Or as stated by Arnould , (on page 549) , " ... breach of the condition avoids the contract or , more accurately , discharges the insurer from liability from the date of the breach and deprives the assured of any recourse against the insurer ... " . Furthermore , Section 33 (3) of Marine Insurance Act 1906 is relevant , as it provides " A warranty ... is a condition which must be exactly complied with , whether it be material to the risk or not . If it be not so complied with , then , subject to any express provision in the policy , the insurer is discharged from liability as from the date of the breach of warranty , but without prejudice to any liability incurred by him before that date " . However , regarding contr - acts contracts of carriage , Scrutton , (on pages 81 - 82) , provides that " Such breaches of these undertakings as defeat the commercial purpose of the voyage will justify the charterer of the ship or the owner of the goods carried in repudiating the contract to carry and claim damages if he suffers any by reason thereof . Such breaches as do not defeat the commercial purpose of the voyage will give rise only to an action for damages . "

[122] Arnould , (on page 549) , provides that the assur - ed , shall be deprived of his recourse against the underwriter " whether his loss can be traced to such breach or not ... " . (It is to be noted , according to the learned author , that in certain parts of the United States , the law requires that there must be a causal connection between a breach of warranty and the resultant loss and , in addition , should a breach of the policy be remedied ," prior to a loss unconnected therewith " , the policy could not be avoided by the underwriter .) Regarding , contracts of carriage , Carver , (on pages 107 - 108) , con - cludes that " Breach of the implied undertaking of seaworthiness entitles the cargo - owner to damages when it causes loss of or damage to his goods . But the carrier will only be responsible for such loss or damage if it is caused by the unseaworth - iness . "

[123] See Arnould , (on page 549) . However , in the case of contracts of carrige , if the defect causing unseaworthiness is remedied without constituting a " frustration of the commer - cial purpose of the adventure " , the charterer would not be entitled to repudiate the contract , but could claim necessary compensation for any loss or damages suffered .

defect . Arnould , (on page 550) concurs with the above expo - sition , by stating " Whether the assured were ignorant of the unseaworthiness of the ship or not also makes no difference ; if the ship was not , in fact , seaworthy at the outset of the ad - venture , either in the degree commensurate with her then risk , or for the voyage , as the case may be , that state of things never existed which was the foundation for the underwriter 's promise , and he consequently can never be bound thereby against his will . " In other words , if the shipowner is mistaken , as to the unseaworthy state of the vessel , a breach of the implied warranty would still have occured . [124]

It is important to note that the insurers , in the event of a breach of the warranty , have the right to waive the breach - usually by means of a memorandum indorsed on the policy or by some other means . [125]

(e) The Relevant Time :

i.e. when must the vessel be seaworthy ?

As in the case of contracts of affreightment , the question remains : when or at what stage , does the implied warranty of seaworthiness commence operating or functioning ? [126]

It is submitted , that the vessel , in a voyage policy on hull or on goods , is required to be in a seaworthy condition for the whole voyage , at the initial departure from the original port of loading - more specifically , however , in terms of the relevant statutory provisions , as contained in Section 39 (1) and (2) of the Marine Insurance Act 1906 , the vessel , in a voyage policy , is required to be seaworthy at the comm - encement of the voyage " for the purposes of the particular ad -

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[124] In the case of Douglas v. Scougall (1816) 4 Dow 276 Lord Eldon held " It is not necessary to inquire whether the owners acted honestly and fairly in the transaction ; for it is clear law that , however just and honest the intentions of the owner may be , if he is mistaken in the fact , and the vessel is , in fact , not seaworthy , the underwriter is not liable . "

[125] See Section 34 (3) of Marine Insurance Act 1906 . Furthermore see the cases of Weir v. Aberdeen (1819) 2 B & Ald. 320 ; Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) L.R. 3 P.C. 234 etc. , in this regard .

[126] With regards to contracts of affreightment , the vessel is required to be seaworthy at the time or moment of sailing . (According to Bartle , (on page 78) , " ... The juncture with which we are the most concerned , however , is the actual comm - encement of the voyage . ")

venture insured " however , should the policy attach while the vessel is still in port , an implied warranty exists that " she shall , at the commencement of the risk , be reasonably fit to encounter the ordinary perils of the port . " [127]

It is submitted , that the position is still uncertain , regard - ing the situation where the ship is at sea , at the time the policy is effected . The opinion expressed , that in such a case , a time policy would be the most satisfactory policy , in that there would be no warranty of seaworthiness , is to be support - ed . [128]

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[127] In the case of Gibson v. Small (1852) 4 H.L. Cas. 353 , the Court held that " On a voyage policy , ' from ' a port , the ship must be able , if seaworthy , to sustain the ordinary risk on that voyage . If insured ' at and from ' the ship must be seaworthy ' at ' i.e. sufficient for the ordinary risks in port , and seaworthy ' from ' i.e. for the voyage at the time of sailing . " According to Ivamy , (on pages 299) " ... where a vessel is insured ' from London ' , she need only be seaworthy when she sails on her voyage . It is immaterial whether she was seaworthy when she was lying in port ... (see the case of Par - meter v. Cousins (1809) 10 East 143) ... Where a vessel is insured ' at and from ' a certain port , it is not necessary for her to be seaworthy for the voyage at the time when she is lying in port ." . (Or as stated by Arnould , (on page 549) , " If indeed , as in the case of policies " at and from " , the risk attaches before sailing , and the ship while in the port be in a state of seaworthiness commensurate with her then risk , her subsequent sailing in a state of unseaworthiness for the voyage will not avoid the policy ab initio , so as to entitle the as - sured to a return of premium and in the same way , if she be lost in the course of river navigation , the underwriters will be liable , provided her then state of equipment was adequate to her then risk , although it might not be such as to constitute a state of seaworthiness for her then sea voyage . ") [It is submitted that the following cases are relevant : Hoffman & Co. v. British General Insurance Co. (1922) 10 LlL Rep 434 , KBD ; Harocopus v. Mountain (1934) 49 LlL Rep 267 , KBD ; Neue Fischmehl Vertriebs - Gesellschaft Haselhorst mbH v. Yorkshire Insurance Co. Ltd. (1934) 50 LlL Rep 151 , KBD ; Russel v. Provincial Insurance Co. Ltd. (1959) 2 Lloyd 's Rep 275 , QBD etc.)

[128] Arnould , (on pages 568 - 569) states " It may , however , well be , when a ship is insured for a part of a voyage described in the policy (eg. from A to B for 30 days , or " from January 1 at and from A to B ") that the warranty of seaworthi - ness implied in a voyage policy exits , and that the ship must therefore be seaworthy on sailing , though the risk only attaches subsequently . This question is still open . " .

(f) The Doctrine of Stages :

It is submitted that , the doctrine of stages is applicable with regards to policies of marine insurance , as it is with regards to contracts of affreightment . [129]

Arnould , (on page 561) is of the opinion , that the rule est - ablished in the case of policies " at and from " a place is in reality merely an application of the general principle , as for - mulated in the case of Dixon v. Sadler (1839) 5 M & W 405 , namely , that of the doctrine of stages .

The learned author provides , further that " The principle , which is now enshrined in the Marine Insurance Act 1906 [130] is , that if the voyage insured consists of different stages requiring different states of seaworthiness , the warranty is satisfied if the ship be at the commencement of each stage in a fit condition for that stage though not fit for a subsequent one . " [131]

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[129] According to the doctrine of stages , the vessel is required to be " fit " at the commencement of each stage of the voyage , should the voyage be divided into several stages - i.e. it is not sufficient that the vessel was in a seaworthy condition at the commencement of the voyage , but had to be seaworthy at the start of each subsequent stage . (In Greenock Steamship Co. v. Maritime Insurance Co. Ltd (1903) 2 K.B. 657 the Court held that " In the case of a voyage policy upon a steamship , where the contemplated voyage must , from its length , be necessarily divided into stages for coaling purposes , the shipowner is , as between himself and his underwriter , under an implied warranty that the ship shall , at the commencement of each stage of the voyage , be seaworthy for that stage , by hav - ing on board a sufficiency of coal for that stage . ")

[130] In terms of the relevant statutory provision , namely Section 39 (3) , " Where the policy relates to a voyage which is performed in different stages , during which the ship requires different kinds of or further preparation or equipment , there is an implied warranty that at the commencement of each stage the ship is seaworthy in respect of such preparation or equipment for the purpose of that stage " .

[131] In the opinion of Arnould , the above constitutes a modification of the established rule that " the warranty of seaworthiness is not satisfied , and the policy does not attach until the ship is seaworthy for the whole voyage insured . " In addition , the learned author concludes , that " ... a breach of the warranty of seaworthiness at any stage gives the insurer the right to avoid the insurance altogether from the time of the breach , even though the ship be made seaworthy for a subsequent stage . " According to Ivamy , (on pages 301 - 302) , " Where a voyage is divided into stages , and the stages of the voyage

It is submitted , that the principle of bunkering , namely that where the voyage is divided into various stages and the vessel is required to take on the required fuel or provisions at an intermediate port , the implied warranty is breached , should the vessel depart from the intermediate port not having sufficient bunkers or stores for that specific stage , even though , she did not have sufficient bunkers , for the whole voyage , at the com - mencement thereof - is applicable with regards to both contr - acts of affreightment and insurance policies . [132]

In the leading case of The Vortigern (1899) , Judge Smith held " In my judgment , when a question of seaworthiness arises bet - ween a steamship owner and his underwriter upon a voyage policy or between a steamship owner and a cargo - owner upon a contract of affreightment , and the underwriter or cargo - owner establ - ablishes that the ship at the commencement of the voyage was not equipped with a sufficiency of coal for the whole of the con - tracted voyage , it lies upon the shipowner , in order to dis - place this defence , which is a good one , to prove that he had divided the voyage into stages for coaling purposes by reason of the necessity of the case , and that at the commencement of each stage the ship had on board a sufficiency of coal for that stage - in other words , was seaworthy for that stage - and if he fails in this he fails in defeating the issue of unseaworthiness

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require either the same or a different class of equipment, the absence of that equipment at the commencement of any stage will render the ship unseaworthy for that stage . (See Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) LR 3 PC 234 , in this regard .) ... Whether a voyage is one which is capable of being regarded as divided into stages depends upon necessity , and once the insurer has shown that the vessel was unseaworthy for the voyage from its outset , it lies upon the assured to prove the necessity for dividing the voyage into stages . "

[132] As in the case of contracts of affreightment , the following cases are relevant Thin v. Richards (1892) 2 Q.B. 141 ; The Vortigern (1899) P. 140 and Northumbrian Shipping Co. v. Timm (1939) A.C. 397 , where Lord Wright held , with regards to the issue of bunkering " Thus the warranty of seaworthiness is sub - divided in respect of bunkers . Instead of a single obligation to make the vessel seaworthy in this respect , which must be satisfied once and for all at the commencement of the voyage , there is substituted a recurring obligation at each bunkering port at which the owners or those who act for the owners decide she shall bunker , thereby fixing the particular stage of the voyage . "

which prima facie has been established against him . " [133]

It is submitted , that the shipowner is entitled to determine the various bunkering stages - subject to the prerequisite that such stages are " usual and reasonable . " [134]

(g) The Burden of proving unseaworthiness :

The established rule , concerning proof of unseaworthiness , is that the burden of discharging the onus , rests on the party alleging it . [135] Thus , in the case of marine policies the underwriter is required to prove that a breach of the implied warranty of seaworthiness has occurred and " must plead it , with sufficient particularity . " [136] It is submitted that the statement made by Carver , (on page 124) , with regards to contracts of carriage , namely that " ... there is no presumption of law that a ship is unseaworthy because she breaks down , or sinks from an unexplained cause , but such facts may in some circumstances raise an inference , or presumption of fact , of unseaworthiness , and so shift the burden of proof . " , is also

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[133] The learned Judge continues , " The question of divid - ing up voyages into stages , as regards the warranty of seawor - thiness , is by no means destitute of authority ... . " In the case of Quebec Marine Insurance Co. v. Commercial Bank of Canada Lord Penzance concluded " The case of Dixon v. Sadler and the other cases which have been cited leave it beyond doubt that there is seaworthiness for the port , seaworthiness in some cases for the river , and seaworthiness in some cases ... for some definite , well - recognised , and distinctly separate stage of the voyage . This principle has been sanctioned by various dec - isions , but it has been equally well decided that a vessel , in cases where these several distinct stages of navigation involve the necessity of a different equipment or state of seaworthi - ness , must be properly equipped and in all respects seaworthy for each of these stages of the voyage , respectively , at the time she enters upon each stage ; otherwise the warranty of sea - worthiness has not been complied with . "

[134] As stated by Arnould , (on page 567) .

[135] According to Ivamy , (on pages 298 - 299) , " The burden of proving a breach of the implied warranty of seaworthi - ness lies on the insurer where he alleges it . "

[136] As was stated by Scrutton , (on page 86) .

applicable in the case of marine insurance policies . [137]

Arnould , (on page 580) states " It must , of course , be rem - embered that it is always for the assured to prove a prima facie loss by a peril insured against , and until he has done so no question of seaworthiness arises . The underwriter may always rest his defence on the ground that the assured has not made out his case . "

Furthermore , if a marine insurance policy , contained a clause admitting the seaworthiness of the vessel , it would appear that the underwriter would , in the event of a breach of the implied warranty , be effectively prevented from relying on such unsea - worthiness . [138]

(h) Time Policy - no implied warranty of seaworthiness :

As was stated earlier in subsection (a) , English law , with regards to the implied warranty of seaworthiness , distinguishes between voyage policies , on the one hand , and time policies on the other .

With regards to the historical development of time policies , in English law , Anderson , C.B. , (on page 2) states " Alth - ough it is clear that time policies were early on recognised as a distinct class of insurance , and were referred to as such by Lord Mansfield in Loraine v. Thomlinson and Tyrie v. Fletcher 98 Eng. Rep. 369 (K.B. 1781) , English law appears not to have

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[137] Or as was stated by Arnould , (on pages 572 - 573) " In the event of the vessel , after having commenced with the voyage , in the absence of extraordinary peril , founder or return to the port of departure in distress , a presumption of fact arises that the vessel was unseaworthy at the time of sailing . " In the opinion of Ivamy , (on page 298) , " The fact that a ship springs a leak soon after commencing her voyage , although no doubt a matter for the jury to consider when deci - ding whether she was seaworthy at the time of sailing , does not per se affect the general principle that the party alleging un - seaworthiness must prove it , nor does it by itself shift the burden of proof on to the assured . " (See the case of Pickup v. Thames and Mersey Marine Insurance Co. (1878) 3 QBD 594 , CA. , in this regard .)

[138] See Arnould , (on page 555) . Furthermore , in the case of cargo policies , clause 8 of the Institute Cargo Clauses is deemed relevant - in terms of which , the seaworthy condi - tion of the vessel " as between the assured and the underwriters is hereby admitted . " According to Arnould , (on page 550) , the effect thereof being , that unseaworthiness could not be relied upon by the underwriter , as constituting a breach of the implied warranty .

differentiated between time policies and voyage policies with respect to an implied warranty of seaworthiness until the second half of the nineteenth century . " [139]

Prichett , R. W. , (on page 196) concludes " In regard to the implied warranty of seaworthiness , the distinction between voy - age policies and time policies began to take clear shape with the decision of the House of Lords in Gibson v. Small (1853) 4 H.L. Cas. 352 . In holding the insurer liable , the House of Lords declared that there is no implied warranty of seaworthiness at the commencement of a time policy , at least if the vessel is on a voyage at the time . However , several of the court , in dicta , suggested that where the vessel is in port at the time the insurance takes effect , such an implied warranty will lie ... On the other hand , Lord Campbell., C.J. suggested that the rule against an implied warranty of seaworthiness in a time pol - icy should be uniformly applied , regardless of whether the ves - sel was in port when the policy attached , in order to provide a plain and easily applied rule for commerce . " [140]

In the case of Thompson v. Hopper 119 Eng. Rep. 828 (Q.B. 1856) [141] the Court concluded , that there was no implied

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[139] The learned author concludes , regarding the issue of voyage policies , that " the general rule that the ship must be seaworthy at the inception of the risk was seldom a problem in voyage policies , where the policy attached in port or at the moment of sailing , depending on whether the insurance for the voyage was " from " or " at and from " a designated port . " (In this regard , see the cases of Hucks v. Thornton 171 Eng. Rep. (N.P. 1815) and Sadler v. Dixon 151 Eng. Rep. 1303 (Ex. 1841) .)

[140] Regarding the landmark case of Gibson v. Small 117 Eng. Rep. 827 (Q.B. 1849) , Anderson , (on page 4) concludes " The House of Lords held that there was no evidence of custom or com - mercial usage to justify implying a warranty of seaworthiness in a time policy , nor could such a warranty be implied by analogy to a voyage policy , since under the latter the warranty extends only to the commencement of the voyage and can vary according to the nature of the particular voyage . A time policy , however , might embrace many voyages . Thus it would be impossible to determine the voyages to which the warranty might apply . "

[141] Judge Coleridge stated : " But I adhere to the opinion which I expressed in Gibson v. Small ... , that , although the time policy be effected upon an outward bound ship , lying in a British port where the insuring owner resides , a condition of seaworthiness is not to be implied . The Supreme Court of Appeal judicially determined that , with respect to an implied warranty of seaworthiness , there is a difference between " voyage poli - cies " and " time policies " , there being with respect to the one class invariably an implied warranty of seaworthiness , and no such warranty with respect to the other class , at least un -

warranty of seaworthiness in time policies :

" We are now precluded from saying with respect to time policies (as we do say with respect to voyage policies) that , by a general rule , there is an implied warranty of seaworthiness ; and much uncertainty and much litigation would arise from the doctrine that it may be implied from special circumstances . Not only would there be great difficulty in determining what special circumstances shall be sufficient for the purpose , but a long course of decisions would be necessary to ascertain the period at which in time policies the seaworthiness must exist . I conceive that it would be much better to lay down the general rule , that in time policies there is no warranty of seaworth - iness " .

In Fawcus v. Sarsfield 119 Eng. Rep. 836 (Q.B. 1856) the court , concurring with the previous case , stated :

" There is in general no implied warranty of seaworthiness in a time policy ... Where a vessel is sent to sea in a state not fit for the particular voyage , and , without encountering any more than ordinary risk , is obliged , owing to the defective state in which she sailed , to put into port for repair , the ship - owner , though the defects were not known to him and he has acted without fraud , cannot recover against the insurer the expenses of such repairs as were rendered necessary in consequence of the unseaworthy state of the vessel , though there be no warranty of seaworthiness . " [142]

Finally , the issue of the implied warranty of seaworthiness , in time policies , was dealt with by the House of Lords in Dudgeon v. Pembroke (1877) 2 App. Cas. 284 [143] , Lord Pen - zance held , the following :

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less peculiar circumstances are shewn from which the warranty is to be implied ... " .

[142] According to Anderson , (on page 6) , the Court held " that although there was no implied warranty of seaworth - iness , nevertheless the insurers were not liable for the cost of repairs made necessary by the unseaworthy condition of the ship at the commencement of the risk , the initial loss having arisen , not from insured perils , but from the vice of the subject of insurance . "

[143] In this particular case , the insured vessel was lying in her owner 's yard , at the moment the time policy commenced and subsequently set sail , unknown to her owner , in an unsea - worthy condition and , as a result thereof , was lost . On the facts , the Court held that the policy , in question was an ord - inary time policy and not a voyage policy .

" ... because I consider that the case of Gibson v. Small , supplemented as it was by the two cases of Thompson v. Hopper and Fawcus v. Sarsfield , must be considered to have set at rest the controversies on this subject , and to have finally decided that the law does not , in the absence of special stipulations in the contract , infer in the case of a time policy any warranty that the vessel at any particular time shall have been seaworthy . "

Arnould , (on page 558) concludes , that the leading cases of Gibson v. Small and Dudgeon v. Pembroke " conclusively establ - ished the rule that in a time policy on ship a warranty that the vessel is seaworthy will not be implied . Thus the rule holds good even though at the commencement of the risk the ship be lying at a home port . "

It is submitted , that Section 39 (5) of Marine Insurance Act 1906 is applicable , in that it provides :

" 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 " . [144]

In the case of Thomas v. Tyne and Wear S.S. Freight Insurance Association (1917) 1 K.B. 938 , it was held regarding the proper interpretation of the above section :

" ... I think it means that the insurer is not liable for the loss attributable to unseaworthiness to which the assured was privy . In the case of insurance under a time policy the intent - ion was that the assured should be unable to recover in respect of a loss occassioned by his own fault ... It was always neces - sary to show that the loss was the result of some misconduct . Now the statute has defined the degree of misconduct required as sending the ship to sea in an unseaworthy state with the privity of the assured . " [145]

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[144] According to Arnould , (on page 558) " it is not necessary , in order to exonerate the insurer from liability under the above proviso , that the unseaworthiness should be the sole cause of the loss ; it is sufficient that the unseaworthi - ness was a proximate cause of the loss . "

[145] On the facts of the case , the ship which was insured under a time policy , was unseaworthy at the time of her being sent to sea - her hull was in an unfit state for the voyage and her crew was insufficient . The assured knew of the insuffi - ciency of the crew but not of the unfitness of the hull . The ship was lost on the voyage by reason of her unseaworthiness in the latter respect - the court held that subsection 5 , of Section 39 (5) Marine Insurance Act , 1906 , afforded no defense to the insurers .

Anderson , (on page 8) , proceeded to examine the case of Thomas v. London and Provincial Marine Ins. Co. 30 T.L. R. 595 (C.A. 1914) and concluded that " The Court of Appeal affirm - ed , stating that for the defense to hold good the unseaworth - iness need not be the sole cause of the loss , provided that it was the proximate cause . The Thomas case already represented a judicial narrowing of the statute , which Arnould points out , by its literal meaning would exempt the insurer from liability for losses attributable to any kind of unseaworthiness , and not merely to those particular defects of which the insured had knowledge . Whatever ambiguity remained in the first Thomas case , however , was removed in Thomas v. Tyne and Wear Ins. A 'ssn (1917) 1 K.B. 938 , in which it was held that the insurer could be exonerated only for a loss proximately caused by unseaworth - iness to which the insured was privity ... " .

The phrase " with the privity of the assured " was examined , by the Court , in the case of Cia. Naviera Vascongada v. British & Foreign Marine Insurance Co. Ltd. (1936) K.B. 35 , where it was held that : [146]

" The Marine Insurance Act , 1906 contains no definition of the expression " with the privity of the assured " , which is used in Sect. 39 (5) , the subsection upon which the defendants must rely . Nor has its exact meaning been argued or defined in any decided case ... I think that if it were shown that an owner had reason to believe that his ship was in fact unseaworthy , and deliberately refrained from an examination which would have turned his belief into knowledge , he might properly be held privity to the unseaworthiness of his ship . But the mere omission to take precautions against the possibility of the ship being unseaworthy cannot , I think , make the owner privy to any unseaworthiness which such precaution might have disclosed . "

The Court of Appeal in The Eurysthenes (1976) 2 L.L. Rep. 171 , held the following :

" The word ' privity ' in s. 39 (5) meant knowledge and con - currence by the shipowners personally or by their alter ego in sending the ship to sea in an unseaworthy state . The knowledge required was knowledge not only of the facts constituting the unseaworthiness but also knowledge that those facts rendered the ship unseaworthy . Such knowledge had to be either positive or knowledge which could have been acquired if the shipowners had

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[146] On the facts , the vessel in question was unseaworthy when she left Larne . The question arose , as to whether the plaintiff had knowledge of such unseaworthiness . The Court held that in order to prove that they did , the defendants must est - ablish " privity in someone in authority in the plaintiff com - pany . "

not refrained from enquiry when they were suspicious of the truth ; mere negligence in not knowing facts or realising their implication would not be sufficient to make the shipowners ' privity ' to the unseaworthiness . " [147]

Arnould , (on pages 559 - 560) concludes that " Knowledge for this purpose does not merely mean positive knowledge that the ship is unseaworthy , or not reasonably fit to encounter the ordinary perils of the voyage , but also that sort of knowledge express in the phrase " turning a blind eye " . In the words of Roskill L.J. , " if the facts amounting to unseaworthiness are there staring the assured in the face so that he must , had he thought of it , have realised their implication upon the sea - worthiness of his ship , he cannot escape from being held pri - vity to that unseaworthiness by blindly ignoring those facts or by refraining from asking relevant questions regarding them in the hope that by his lack of inquiry he will not know for certain that which any inquiry must be made plain beyond possiblity of doubt ... " . [148]

(ii) Express exclusion of seaworthiness :

It is submitted , that policies of marine insurance , as in the case of contracts of carriage , very often contain words or terms which " expressly exclude or modify or vary " the implied warr - anty of seaworthiness , provided that such an intention to excl -

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[147] According to Anderson , (on page 10) , " The def - inition of privity in Oceanus , which is not entirely free from ambiguity , but which denotes something akin to conscious real - ization or consent as to facts which amount to unseaworthiness , is the most recent example of judicial expansion of English law relating to the implied warranty of seaworthiness in a time pol - icy .

[148] With regards to the question of fault , the learned author states " But " privity " in this subsection does not necessarily carry any connotation of fault ; it is not the same as negligence , nor is it the same as wilful misconduct , al - though in many cases sending to sea in an unseaworthy state may also be either negligence or misconduct . " (Furthermore , see Anderson , (on pages 9 - 10) where the learned author concludes that " Section 55 (2)(a) ... expressly provides that the un - derwriter is liable for losses proximately caused by insured perils , even though such losses would not have happened but for the misconduct or the negligence of the master or crew . If " privity " meant the same thing as " wilful misconduct " , the same language would have been used in both Section 39 (5) and Section 55 (2)(a) . Nor was " privity " the same as negli - gence or fault , personal or otherwise ... " .)

ude or vary the undertaking , must be precisely or clearly form - ulated . [149] Arnould , (on page 548) concurs with the above exposition , by stating that " In voyage policies on hull it is an implied condition precedent to the underwriter 's liability for any loss incurred in the course of the voyage , and can only be excluded by terms in writing in the policy expressed in the clearest language . " [150]

In Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) L.R. 3 P.C. 234 , the Privy Council held that the clause in the policy , excepting losses from " rottenness , inherent defects , and other unseaworthiness , " , did not have the effect of excluding the implied warranty of seaworthiness . [151]

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[149] In other words " To exclude the implied warranty of seaworthiness , the words used must be express , pertinet and apposite . " (per Lord Penzance in Quebec Marine Insurance Co. v. Commercial Bank of Canada (1870) L.R. 3 P.C. 234 and appl - ied in the case of Petrofina S.A . v. Compagnia Transporto (1937) 42 Comm. Cas. 286 .)

[150] With regards to an Inchmaree Clause , the learned author (on page 551) states " A difficult problem is posed by the incorporation of the Inchmaree or Liner Negligence Clause in voyage policies . The clause covers , amongst other perils , loss or damage to the insured property directly caused by latent def - ect in machinery or hull , and it may perhaps be suggested that in a case where damage was occasioned by a latent defect whose existence also constituted a breach of the warranty of seawor - thiness , the underwriter can avoid liability . This point has not yet been considered in the English courts , where the rep - orted decisions have all concerned time policies , but in America where there is a warranty of seaworthiness implied in a time policy , the courts have generally held that the Inchmaree Clause provides effective cover . It is submitted that so far as unseaworthiness is covered by this clause , the express coverage must prevail over the implied warranty and that an underwriter cannot therefore rely on a latent defect as a breach of the war - ranty of seaworthiness in a policy incorporating the Institute Voyage Clauses . "

[151] In the case of Sleigh v. Tyser (1900) 2 Q.B. 333 , the Court held , on the facts , that the ship was unseaworthy (as a result , of both the insufficiency of the appliances for ventilation and the insufficient number of cattle - men appointed to attend to the cattle) , that the implied warranty of seawor - thiness was not excluded by the provision as to the approval of the fittings , and that therefore , the underunderwriters were not liable .

2. Statutory enactments :

i.e. an examination of the relevant English statutory provisions , with regard to the doctrine of seaworthiness , relating to marine insurance .

The relevant statute is : Marine Insurance Act 1906

Warranty of seaworthiness of ship :

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

This particular subsection is most relevant , as it clearly pro - vides that an implied warranty of seaworthiness shall apply , with regards to voyage policies . In addition , it clearly states that the implied warranty must be complied with " at the commen - cement of the voyage " - thus , expressly stipulating the rel - evant time , at which the implied undertaking is to be fulfil - led .

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

According to subsection (2) , should the policy attach while the vessel is still in port - an additional implied warranty arises , in terms of which the vessel , at the commencement of the risk , is to be reasonably fit , in order withstand the " ordinary perils " of the particular port - thus , the assured is required , by statute , to comply with both implied warranties i.e. the vessel is to be seaworthy for the voyage , as well as being " reasonably fit " to encounter the " ordinary perils of the port " .

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

This particular subsection , is regarded as incorporating , the doctrine of stages - in terms of which the vessel is required to be seaworthy , at the commencement of each stage , if the voyage is divided into several stages .

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

The statutory definition for seaworthiness , namely that the vessel is deemed to be seaworthy , if she is capable of en - during the ordinary perils of the sea , is embodied in this subsection .

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

No implied warranty that goods are seaworthy

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

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

B. AMERICAN LAW :

1. Common Law position :

(i) General Principles :

(a) Introduction :

It is submitted that the main distinction , between English and American Marine Insurance law , involves the application of the implied warranty of seaworthiness , with regards to time polic - ies . No such distinction is , however , evident in the case of voyage policies , in terms of which , the assured impliedly undertakes to provide a seaworthy vessel , at the time of sail - ing . [152]

More specifically , Arnould , (on page 555) , provides " The great leading principle , therefore , of the English doctrine of seaworthiness is that there is no implied warranty thereof , ex - cept at the commencement of the voyage . On this point the law in the United States is at variance with our own , and gives a wider extent to the implied warranty ... " . [153]

Furthermore , Schoenbaum , (on pages 576) states " Implied warranties are recognised by statute in England while in the United States they are part of the general maritime law . Of

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[152] Healy , N.J. , (on pages 252 - 253) , states the following " The principle warranties implied in hull policies are those of legality , seaworthiness , and no deviation . The sea - worthiness of the vessel at the beginning of the insured voyage is impliedly warranted in every voyage policy , unless the parties otherwise agree . On this point there appears to be no difference between English and American law . " (It is to be noted , as in the case of contracts of carriage , that the implied undertaking may be varied or excluded by " clear and unambiguous " terms or words , contained in the contract .)

[153] According to Gilmore & Black , (on page 63) , " The warranty is implied in all voyage policies , unless clear lang - uage to the contrary is used ; in England , the courts have held that it is not to be read into time policies , but some American courts seem to have thought otherwise , at least where the in - sured vessel is in port at the time the risk takes hold , though the authority for this proposition is quite slender . "

these warranties the implied warranty of seaworthiness is the most striking and the most distinctively maritime . This warran - ty requires the insured vessel on which insured goods are carried to be seaworthy at the beginning of the voyage and at the incep - tion of the risk . American maritime law implies in every time hull insurance policy a warranty of seaworthiness ... " . [154]

Regarding cargo policies , Gilmore & Black , (on pages 65 - 66) conclude that " In cargo policies , the warranty of sea - worthiness of the vessel comprises fitness to carry the parti - cular cargo ... (however) Cargo policies usually expressly waive the seaworthiness warranty , in recognition of the real - istic fact that the cargo owner cannot control the vessel 's state . " [155]

(b) The Standard of seaworthiness , required of the ship - owner / assured : [156]

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[154] See Subsection (h) , regarding Time policies .

[155] The learned authors conclude , (on page 154) , that " Since the law of marine insurance implies a warranty of sea - worthiness in every voyage policy , including one on cargo , the sealing down of the carrier 's warranty of seaworthiness to an obligation to use due diligence might be thought to put the cargo owner in an unfortunate position , since , if the vessel is act - ually unseaworthy , the marine insurance doctrine voids his ins - urance , though he may have no claim against the carrier , since the latter may have exercised due diligence . For this reason , and because the application of the marine insurance seaworthi - ness doctrine as a whole is unsuitable to the modern position of the cargo owner , marine policies or cargo now commonly con - tain a clause stipulating that " the seaworthiness of the vessel as between the assured and the underwriters is hereby admit - ted . " Cabaud , H.E. , (on pages 995 - 996) provides that " ... The adoption of this clause resulted from an interpretation of the Marine Insurance Act of 1906 to mean that there is an implied warranty of a vessel 's seaworthiness to safely carry cargo . This warranty could work to the disadvantage of the cargo owners , who obviously have nothing to do with the management of the vessel ... " .

[156] Similarly , to the English law , the implied warranty of seaworthiness , with regards to voyage policies on hull or on goods is absolute , in nature - in terms thereof , the assured undertakes to provide a vessel which is seaworthy , in all resp - ects , for the adventure insured , at the time of sailing . Acc - ording to Chamlee , G.H. , (on pages 527 - 528) , " The absol - ute warranty is still implied in hull insurance policies covering a particular voyage and the requirement is that the insured ves - sel be seaworthy at the beginning of the voyage . The warranty is not implied , however , in time policies which may take effect

The assured is required , to provide a vessel which is in a seaworthy condition , at the commencement of the voyage insur - ed , which is meant that " the vessel not only be staunch and strong , but also that the she be fitted out with all proper equipment in good order , and with a sufficient and competent crew and complement of officers . "

In order , to determine whether or not the implied warranty of seaworthiness , has been complied with , an objective test , in the form of the prudent or reasonable shipowner , is to be appl - ied - thus , similarly to the English Common law , the stand - ard of seaworthiness , required of the shipowner , is to be assessed , according to objective criteria . [157]

According to Schoenbaum , (on pages 577 - 578) " The require - ments of the implied warranty of seaworthiness are relative to the voyage or service proposed . The vessel must be strong and fitted with proper equipment and a competent crew and officers

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while the vessel is at sea ... if the vessel is in port when the time policy attaches , the owner may be denied recovery for a loss caused by " want of due diligence " in making the vessel seaworthy . " (Regarding the position of cargo policies , the learned author concludes " Although the shipowner is only obliged to exercise " due diligence " to make the the ship seaworthy as to cargo , the cargo owner is still subject to loss of insurance coverage on his cargo under the absolute warranty if the carrying vessel is not in fact seaworthy . Modern marine policies on cargo usually protect their insureds from this loophole in the law by providing that the seaworthiness of the carrying vessel as betw - een the shipper and his underwriter is admitted . ")

[157] See the relevant English authorities , concerning the required standard of seaworthiness . In the American case of Moores v. Louisville Underwriters (1882) 14 Fed. Rep. 226 , the Circuit Court , W.D. Tennessee , concluded that " The best and most skillful form of construction is not required to meet the warranty of seaworthiness , but only a sufficient construction for vessels of the kind insured and the service in which they are engaged . "

in light of the proposed voyage ... " . [158] Furthermore , Gilmore & Black , (on page 65) provide that " Seaworthiness is a comprehensive term , and a relative one ... But these require - ments are relative to the voyage or service proposed . A ship that is in one or another of these respects unseaworthy for an Atlantic crossing in December may nevertheless be seaworthy for a coasting run to the South in the same season ... " . [159]

In the case of Lemar Towing Co. , Inc. v. Fireman 's Fund Ins - urance Co. (1972) 352 Fed. Suppl. 652 , the Court held " While seaworthiness is a comprehensive term requiring that the vessel be staunch and strong , fitted out with proper equipment and a sufficient and competent crew , it is also a relative term , relative to the type of voyage or service proposed ... " .

Similarly to the English law , the assured impliedly undertakes to provide a vessel which is seaworthy , at the commencement of the voyage or at the inception of the risk , in other words , the implied warranty is not " continuous " in nature , regarding both , the seaworthy condition of the vessel and the good conduct of the crew . However , according to the relevant American auth - orities , the assured , in respect of a time policy , is subject to a " negative warranty " , namely that the " Owner , from bad faith or neglect , will not knowingly permit the vessel to break ground in an unseaworthy condition . " [160]

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[158] Schoenbaum , (on page 578) concludes that the " The burden cast on the owners is a heavy one that requires a complete evaluation of the circumstances and needs of the particular sit - uation . "

[159] According to Gilmore & Black , (on page 152) " The specific content of the term " seaworthiness " seems the same in carriage law as it is in marine insurance . In the chapter on that subject , we called it both " a comprehensive and a relative relative term . " Therefore , as in the case of the English Com - mon law , the standard of seaworthiness is relative - always adapting , in relation to the modernisation of the vessel , gear and equipment . (However , according to Arnould , (on pages 570 - 571) , " ... a degree of equiment and preparation is deemed essential in some countries , which would be considered superfluous in others ; in such cases it has been held in the United States that seaworthiness is to be measured by the stan - dard in the ports of the country to which the vessel belongs , rather than by that in the ports of the country where the ins - urance was made . " - see Footnote 31 , in this regard .)

[160] As was stated in the case of Saskatchewan Government Ins. Office v. Spot Pack Inc. 242 F. 2d 385 . (See Subsection (h) for a more detailed examination of the American law , re - garding Time policies .)

(c) The Definition / Meaning of Seaworthiness :

i.e. what is understood by the term " seaworthiness "

According , to the relevant American sources , the implied war - ranty of " seaworthiness " has been defined as " the sufficiency of the vessel in materials , construction , equipment , officers men and outfit for the trade or service in which it is employ - ed . " [161] It is submitted , as in the case of contracts of carrige , the term " seaworthiness " has a dual application , namely , that the vessel must be " capable of completing the voyage undertaken , at the commencement thereof " and must be able " to preserve the cargo " while completing the voyage un - dertaken . [162]

Furthermore , in terms of the implied warranty , the Master and the crew are required to be " competent and sufficient " - in other words , they must be fully informed and instructed regard - ing all aspects of the vessel . [163] As in the case of English

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[161] As defined in Bouvier 's Law Dictionary and quoted with approval in The Southwark (1903) 24 S. Ct. 48 . In addition the Supreme Court in Dupont v. Vance (1856) 15 L. Ed. 584 held that " To constitute seaworthiness of the hull of a vessel in respect to cargo , the hull must be so tight , staunch , and strong , as to be competent to resist all ordinary action of the sea , and to prosecute and complete the voyage without damage to the cargo under the deck " . Furthermore , in the leading case of The Silvia (1898) , the Court concluded that " The legal test for seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport . " Schoenbaum , (on page 343) is , however , of the opinion that " Obviously a test of such generality can be applied only on a case by case basis , considering the particular facts of the situation at hand ... " .

[162] It is submitted that , as in the case of the English law , there is no difference in the term " seaworthiness ", when applied in the context of either marine insurance or contracts of carriage .

[163] In Lemar Towing Co. , Inc. v. Fireman 's Fund Insurance Co. (1972) 352 Fed. Suppl. 652 , the Court held that " The concept of seaworthiness extends not only to the vessel and its gear but also to its crew ... It is clearly the duty of a ship - owner to not only provide a crew sufficient in number , but also a crew competent for the duties it may be called to perform , including provision for any exigency which is likely to be en - countered . " On the facts , the Court held , that " the crew of

law , the Master and crew are regarded as being incompetent if they have a " disabling want of skill or knowledge " . [164] In addition the vessel must be " reasonably fit " to safely carry the cargo to the designated port . [165]

(d) Effect of breach of the implied warranty :

i.e. the effect of unseaworthiness

Analoguous to the English law , a failure on the part of the assured to provide a seaworthy vessel , either at the commen - cement of the voyage or at the attachment of the risk , const - itutes a breach of the implied warranty - consequently , the

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tug and particularly its captain , was shown by the evidence to be incompetent at the commencement of the voyage , thus rendering the tug unseaworthy at that and subsequent times , and such un - seaworthiness proximately resulted from the owner 's neglect , in failing to determine the qualification and competence of crew to man the tug for the intended voyage before its commencement ; further , such unseaworthiness proximately caused the sinking of the tug ; and since the unseaworthiness was caused by the crew 's incompetence , not by the negligence of the master or the crew , the Inchmaree clause was inapplicable and having so breached the implied warranty of seaworthiness , the owner was not entitled to recover under the ocean marine policy .

[164] It is submitted , that the following English author - ities are relevant - Steel v. State Line (1887) ; The Makedonia (1962) ; Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha (1962) etc. In the American case of Rogers v. Aetna Ins. Co. 76 Fed. Rep. (1896) , the District Court held that " Incompetency of the master is not established as a def - ense against a claim of loss on a marine policy by proof of a single instance of more or less intoxication , where previous good character and competency are established . " According to Arnould , (on page 577) , " When an officer , though unquali - fied , has performed his duties properly and no loss has taken place which can be imputed to him , a court would probably be justified in refusing to find that his mere lack of qualification had the effect of rendering the vessel unseaworthy . " (See the case of Hathaway and Others v. St. Paul & Marine Insurance 1 Fed. Rep. 197 (1880) , in this regard .)

[165] In the case of The Silvia (1903) 24 S. Ct. 462 , the Court held that " ... As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea , but upon its character in reference to the particular cargo to be transported , it follows that a vessel must be able to transport the cargo which it is held out as fit to carry or it is not sea - worthy in that respect . "

underwriter is effectively discharged " from liability from the date of the breach and deprives the assured of any recourse against the insurer ... " . [166]

Gilmore & Black , (on page 63) , conclude that " where the implied warranty is held to exist , and where it is breached i.e. where the vessel is not in fact seaworthy at the beginning of the voyage or at the inception of the risk , then no recov - ery can be held on the policy . This result does not depend on the knowledge or fault of the assured . This warranty is implied in all voyage policies ... " . [167] In Gregoire v. Underwriters at Lloyds (1982) 559 F. Supp. 596 , District Judge Fitzgerald , reiterating the above position , held that , " In a voyage policy , the owner of the vessel warrants the seaworthiness of his vessel at the time it sets out on the voyage . If the vessel is not seaworthy at this time , the entire policy is void and no recovery can be had under the policy even for losses not directly attributable to the lack of seaworthiness ... " . [168]

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[166] As stated by Arnould , (on page 549) . (With regards to cargo policies , the Circuit Court , District Maine , in the case of Morse v. St. Paul Fire & Marine Insurance Co. 22 Fed. Rep. 748 (1903) held that , " The underwriters of a cargo not owned by the owner of the vessel are not discharged from liab - ility because of the negligence of the master in leaving an intermediate port at which he had stopped with his vessel in an unseaworthy condition , instead of waiting to make repairs . "

[167] According to Schoenbaum , (on page 575) , " Breach of warranty allows the insurer to avoid the contract in a manner similar to nondisclosure or misrepresentation . " However , it is important to note , that should the underwriter have actual or constructive knowledge of unseaworthiness - no exoneration from liability would ensue . In the case of Luria Bros. & Co. v. Alliance Assur. Co. Ltd. 780 F. 2d 1093 (1986) , it was con - cluded , on the facts , that the underwriters had constructive knowledge of the unseaworthy condition of the vessel and " this alone was sufficient . " (See Schoenbaum , (on page 577) : Footnote 15) , in this regard .)

[168] In the case of D.J. McDuffie , Inc. v. Old Reliable Fire Insurance Co. 608 F. 2d 145 (1979) , the United States Court of Appeals held , in an action by the insureds against insurers seeking to recover under marine hull policy , that the " evidence was sufficient to support the finding that the ins - ureds breached their implied warranty of seaworthiness at the outset of the policy period , thereby avoiding the policy . "

It is submitted , however , that the effect of a violation of the " negative warranty " of seaworthiness , imposed on the assured in terms of a time policy , " is merely a denial of liability for loss or damage caused proximately by such unseaworthi - ness . " (per Judge Brown in Saskatchewan Government Ins. Office v. Spot Pack (1957) .) [169]

Furthermore , as in the case of the prevailing English law , ignorance of the existence of a defect or , alternatively , that all possible precautionary measures were taken to remedy the de - fective condition , cannot be pleaded upon by the assured , in the event of a breach of the implied undertaking . [170]

It is submitted , that regard must be had to the case of Wilburn Boat Company v. Fireman 's Fund Insurance Company (1954) 348 U.S. 310 [171] , where the Supreme Court held , that state law

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[169] This conclusion is reiterated by Schoenbaum , (on page 577) , namely that " A breach of the implied warranty of unsea - worthiness does not avoid the entire policy , but only exonerates the underwriter for loss or damage proximately caused by the un - seaworthy condition American practice distinguishes between voy - age and time policies in implying the warranty . In time policies the shipowner breaches the warranty only if he had knowledge not only of the facts constituting the unseaworthiness " but also knowledge that those facts rendered the ship unseaworthy , that is , not reasonably fit to encounter the perils of the sea . " In the case of Gregoire v. Underwriters At Lloyds (1982) the Court , applying the English Rule , held that " The rule of time policies is more complex and less certain ... Setting to sea in an unseaworthy state , however , does not void a time policy . It merely prevents recovery for those damages proximately caused by unseaworthiness ... Where , however , the owner of a vessel or those in privity with him send their vessel to sea knowing it to be unseaworthy , the insurer is not liable for damages proxi - mately caused by the unseaworthiness . " It is therefore evident that , regarding time policies , a causal connection between a breach of the warranty and the resultant loss or damage , suf - fered by the assured is a prerequisite . (See the following cases of Insurance Co. of North America v. Board of Commissioners of the Port of New Orleans 733 F. 2d 1161 (1986) ; Austin v. Servac Shipping Line 794 F. 2d 941 (1986) etc .)

[170] i.e. in the event of the assured being misstaken , as to the unseaworthy condition of the vessel at the relevant period of time , the underwriter would be discharged from liability . (subject , however , to the right of the under underwriters to waive the breach , in question .)

[171] Which considered the question of whether state or federal law governs warranties , in contracts of marine insu - rance .

should be applied in the field of marine insurance where entren - ched federal precedent with respect to specific issues is lacking i.e. the Court allowed a state statute to determine the effect of a breach of warranty , in a marine insurance policy . Healy , (on page 254) concludes the following " Before the landmark decision in Wilburn Boat Company v. Fireman 's Fund Ins. Company it was generally thought that the effect of a breach of warranty was the same under American law as under the law of England . The effect of Wilburn , however , appears to be that the courts may apply to marine insurance policies provisions of state statutes relating to warranties in insurance policies generally . " [172]

In the case of Lemar Towing Co. Inc. v. Fireman 's Fund Ins - urance Co. (1972) 352 Fed. Suppl. 652 , the United States District Court of Louisiana , held " State law should should be applied in the field of marine insurance where there is no con - trolling federal authority with respect to the specific issue before the court . Since the standard of seaworthiness is solidly entrenched in federal maritime jurisprudence , federal maritime law was to be applied in determining whether the tug that sank was unseaworthy and whether her owners knowingly sent her to sea in an unseaworthy condition . " [173]

Glone , (on page 970) states that , " However , the Fifth Circuit , ... in an effort to partially whittle away at the Wilburn decision and to keep within the general principles of uniformity and harmony of admiralty law , held in Lemar that state law may not be applied to negate an implied warranty of seaworthiness in a time policy since " the standards of seawor - thiworthiness are solidly entrenched in federal maritime juris -

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[172] According to Glone , M. , (on pages 969 - 970) " This decision , criticized because of its potential destructive effect on the uniformity and harmony of the general admiralty law , could lead to fifty different rules where " entrenched federal precedent is lacking . " ... If state law is continually allowed to determine the effect of a breach of warranty , then an entre - nched federal standard would never be formulated . Under Wilburn , the breach of the implied warranty of seaworthiness should be measured by state law ... State statutes which contain these provisions (i.e. that the insurance policy is required to con - tain the entire contract between the parties) , if they were to be applied strictly to time policies of marine insurance , would effectively negate all implied warranties of seaworthiness . "

[173] In D.J. McDuffie Inc. v. Old Reliable Fire Insurance Co. (1979) , the U.S. Court of Appeals held that " Where there existed a federal maritime rule extending an implied warranty of seaworthiness to a maritime hull insurance policy , federal court , in suit on such a policy was not prevented from deciding the case with reference to established federal maritime rules and was not required to govern its decision on policy coverage by appropriate state law . ")

prudence " ... " . [174]

(e) The Relevant Time :

i.e. when must the vessel be seaworthy :

According , to the relevant authorities , the assured is required to provide a seaworthy vessel , in terms of the implied under - taking , at the commencement of the voyage insured and at the inception of the risk . [175]

Furthermore , according to the relevant sources , " if the time policy attaches while the vessel is at sea , the decisions are uniform in holding that there is no implied warranty of sea -

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[174] The learned author , proceeded to conclude , that although the motives of the Court were commendable , " prior to the decision in Lemar there was no " solidly entrenched " federal maritime jurisprudence to the effect that a time policy of marine insurance contained an implied continuing warranty of seaworthi - ness . Nor had it been held previously that the implied warranty would be breached by an assured who " negligently " as opposed to " knowingly " allowed his vessel to commence a voyage in an unseaworthy condition . (Thus) It is submitted that Lemar does not settle the question of implied warranties for those parties who must deal with marine insurance ... " .

[175] Schoenbaum , (on page 576) provides that " This warranty requires the insured vessel or the vessel on which in - sured goods are carried to be seaworthy at the beginning of the voyage and at the inception of the risk . " Thus , in a voyage policy on hull or on goods , the vessel need only be in a sea - worthy condition , at the initial port of departure . (See the English law regarding the position , where the policy attaches while the vessel is still in port .)

worthiness because the state of the vessel is then unknown . The assured and the insurer have no way of ascertaining the vessel 's actual condition , and both parties enter into the contract with full knowledge of this fact . " [176] In the Rouse v. Insurance (1862) 20 Fed. Cas. 1269 , the Court held " When insurance by a time policy is made on a vessel then in her home port , seaworthiness at the time of the ship 's sailing is an implied warranty , though it would not be implied that the vessel was seaworthy at the moment of effecting insurance in case of a time policy made on a vessel , " lost or not lost " in a distant ocean , and of whose situation or condition the owner could know nothing at the moment he was making this insur - ance . " [177]

(f) The Doctrine of Stages :

According to the doctrine of stages , as expounded in the English law , if the voyage is divided into stages , the assured is req - uired to provide a vessel which is seaworthy , at the commencment

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[176] As stated by Glone , (on page 961) . In addition , Arnould , (on page 558) , Footnote 60 reiterates this concl - usion " If the vessel be at sea when the insurance is effected there is no implied warranty of seaworthiness , and the insurer must take her as he finds her . "

[177] Judge Grier continued , " The distinction between a vessel in her home port , and which , before she sails , the owner has it in his power to render seaworthy , and one in a distant ocean , where neither party can know what her condition is , nor how far the seaworthiness which she had when leaving her home port may have been destroyed or impaired by storms encoun - tered after her departure , and over which the owner may have little or no control , is one which from motives of public policy should be strictly enforced . " (See Capen v. Washington Ins. Co. 66 Mass. (1853) .) According to Arnould , (on page 568) Footnote 17 " In Hucks v. Thornton (1853) ... (it was) held that on a policy for time being taken out while a vessel was at sea she must be in such a state of repair and equipment that she might be safely navigated home , or was competent to pursue any part of her adventure , and this ruling led some American authorities to laying down a further rule , viz . that when the risk attaches after a long voyage , at a distant port , where proper facilities for repairs may not exist , the warranty must be construed with regard to the means of repair and equipment at hand . " - the learned author con - cludes that this particular rule , although favoured in the United States , forms no part of English law .

of each stage of the voyage . [178] It is submitted , that the American position , regarding the " doctrine of seaworthiness by stages " [179] corresponds significantly , with the existing English legal position . Consequently , the principle of bunk - ering , as expounded in the English law , is also applicable with regards to marine policies . [180]

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[178] Thus , it is not sufficient that the vessel was in a seaworthy condition at the commencement of the voyage , but had to be seaworthy at the start of each subsequent stage . It is submitted , therefore , that the doctrine of stages constitutes a departure from the rule that the vessel must be seaworthy , at the beginning of the voyage or at the inception of the risk . Furthermore , it is clear that a breach of the implied warranty at any stage of the voyage , would render the policy void from the moment of the breach . (See the cases of Dixon v. Sadler (1839) ; Quebec Marine Ins. Co. v. Commercial Bank of Canada (1870) ; Greenock S.S. Co. v. Maritime Ins. Co. (1903) 2 K.B. 661 , in this regard .) Thus , there would appear to be no distinction , between marine insurance and contracts of car - riage , with regards to the application of the doctrine of stag - es . (See Arnould , (on pages 262 - 263) .)

[179] As defined by Schoenbaum , (on page 342) , (albeit in the context of contracts of carriage) , namely that " ... where the ship is en route and calls at a port , a substantial and actual intervention by the owner or its agents , as dist - inguished from the master and crew , will revive the duty of seaworthiness , so that the ship must be seaworthy at each part - icular leg or stage of the voyage . In order for the doctrine to apply , the intervention of the shipowner must be real and sub - stantial . " According to Benedict , (on page 7 - 16) , " It is sometimes impractical , if not impossible , for a vessel to take on board at the start of a long voyage , bunkers and other supplies for the whole voyage contracted for . That is the basis for the principle of seaworthiness by stages . The principle was first advanced in two English decisions . (i.e. Thin v. Richards and The Vortigern) ... It is now well - established in our law as well . " [see the cases of United States v. American Trad - ing Co. (The Glymont) 66 F. 2d 617 ; The Steel Navigator 23 F. 2d 590 (2d Cir. 1928) ; The Isis 290 U.S. 333 . 54 S. Ct. 162 . 78 L. Ed. 348 (1933) etc.]

[180] The English judicial decisions , regarding the prin - ciple of bunkering (i.e. The Vortigern (1899) ; Thin v. Richards (1892) ; Northumbrian Shipping Co. v. Timm (1939) etc.) are , therefore , essential for a proper understanding of existing American law .

(g) The Burden of proving unseaworthiness :

It is submitted that , as in the case of the English law , the burden of proving unseaworthiness rests on the party alleging it i.e. the underwriter must prove that the implied warranty of seaworthiness has been breached and must plead it with " suff - icient particularity " . [181]

According to Arnould , (on page 580) " The American courts have applied the following rules in cases where the vessel sinks in calm weather and the cause of loss is unknown : (1) The loss is presumed to be due to unseaworthiness , so as to discharge the underwriters from liability under a marine policy unless (2) the assured can prove that the vessel was seaworthy at the start of the voyage or period of time covered by the insurance in which case (3) there is a counterpresumption that the loss is due to perils of the seas or to a cause covered by the Inchmaree clause , where this is incorporated , which underwriters must rebut if they are to escape liability . These rules only apply where the cause of loss is genuinely unknown . If the cause is known , or if the assured has not called evidence from which it might reas - onably be supposed that the cause might have been ascertained , the ordinary rule applies that the assured cannot recover without proving loss by an insured peril . " [182]

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[181] According to Schoenbaum , (on page 578) : Footnote 18 " From a procedural standpoint , however , general maritime law presumes that every vessel is seaworthy until the contrary is proved , and the burden of proving that a vessel is unsea - worthy is placed upon the insurer . " In Austin v. Servac Shipping Line 794 F. 2d 941 (1986) , the Court held " The law presumes that every vessel is seaworthy until the contrary is proved , and the burden of proving unseaworthiness lies with the insurance company . " (See the case of Hanover Fire Insurance Co. v. Holcombe 223 F. 2d 844 (1955) , in this regard .)

[182] In the case of Capital Coastal Shipping Corp. and Bulk Towing Corp. v. The Hartford Fire Insurance Co. (United States of America , Third Party) , The " Christie " 2 L.L. Rep. 100 , the District Court held " that when a vessel sinks in calm water , a presumption arises that the vessel was unseaworthy in some particulars and once this presumption attaches , coverage must be denied unless (1) the insured can prove that the vessel was seaworthy before the sinking , thus raising the counterpre - sumption that the loss was caused by a fortuitous peril of the sea , or (2) the unseaworthy condition was caused by actions or defects falling within the purview of the Inchmare clause ... In this case the presumption that the vessel was unseaworthy was not satisfactorily rebutted by the plaintiffs and therefore it must govern . " . [It is to be noted that , in terms of the existing English law , in the event of a vessel sinking or en - countering mechanical problems , no presumption of law arises

However , in Moores v. Louisville Underwriters (1882) Fed. Rep. 226 , the Court applying the English rule , concluded that " When a disaster happens in fair weather and without apparent peril of navigation to cause it , there is , in the absence of other proof sufficient to countervail it , a presumption of the fact that the vessel was unseaworthy at the beginning of the voyage , but the assured may show by proof that the vessel was in fact seaworthy , and there then arises a presumption of loss by some peril of navigation covered by the policy unless the insurer can show that it was otherwise caused by some danger not within the pol - icy . " [183]

(h) Time policies :

It is submitted , that the main distinction between English and American law , in respect of Marine Insurance , relates to the issue of time policies [184] - according to Arnould , (on page 547) " In the United States but not in England , there is an implied warranty of seaworthiness in a time policy at the time of attachment , at any rate where the vessel is in port at the beginning of the policy period . " [185]

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that the implied warranty has been breached , but rather an inference of unseaworthiness - see Arnould , (on page 579) .]

[183] Furthermore , the Court held that " If the evidence in the case establish the fact of seaworthiness , there is , where a disaster occurs without any discernible cause , a presumption that the loss was occasioned by some of the perils insured against . "

[184] According to Prichett , R.W. , (on page 195) , " In the United Kingdom , the Marine Insurance Act 1906 clearly dis - claims an implied warranty of seaworthiness in a time policy of marine insurance ... However , across the Atlantic Ocean there has never been a clear American rule as to when , if ever , a warranty of seaworthiness is to be implied into a time policy . In the United States there is no uniform marine insurance leg - islation ; rather , a question such as the existence of an impl - ied warranty can normally be resolved only after decades of sifting through the large number of Federal and State courts . Although still adrift , U.S. Federal maritime law upon the issue generally appears to be moving , albeit in occasionally confused sea , towards a course in line with that set by s. 39 (5) of the 1906 British Act . "

[185] This statement is reiterated by Schoenbaum , (on page 577) , where the learned author holds " American maritime law implies in every time hull insurance policy a warranty of sea - worthiness ... " . However Anderson , C.B. , (on page 11) ,

In the leading case of Union Ins. Co. of Philadelphia v. Smith 124 U.S. 405 (1887) [186] , the U.S. Supreme Court held , the following :

" In the insurance of a vessel by a time policy , the warranty of seaworthiness is complied with if the vessel be seaworthy at the commencement of the risk , and the fact that she subsequently sustains damage , and is not properly refitted at an intermediate port , does not discharge the insurer from subsequent risk or loss , provided such loss be not the consequence of the omiss - ion . A defect of unseaworthiness , arising from bad faith or want of ordinary prudence or diligence on the part of the insured or his agents , discharges the insurer from liability for any loss which is the consequence of such bad faith , or want of prudence or diligence ; but does not affect the contract of ins - urance as to any other risk or loss covered by the policy and not caused or increased by such particular defect . " [187]

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states that " The American law regarding the implied warranty of seaworthiness in time policies represents a significant deviation from the decisions of English courts concerning marine insur - ance . While there seems to be agreement that if the time policy attaches while the vessel is at sea there is no implied warranty of seaworthiness , the American decisions leave considerable doubt as to whether a warranty will be implied when the vessel is in port at the commencement of the risk or subsequently enters a port where repairs can be made . "

[186] With regards to the evolution of the so - called " American Rule " , Anderson , (on page 16) maintains that the " Rule " achieved full definition following the decisions in two cases , Rouse v. Insurance Co. 20 Fed. Cas. 1269 (C.C.E.D. Pa. 1862) and Hoxie v. Pacific Co. 89 Mass. 211 (1863) , which held that a warranty of seaworthiness was implied at the comm - mencement of the risk where the vessels were , respectively , at the home port and at an intermediate port with full repair facilities .

[187] According to Glone , M. , (on page 962) , " In Union Insurance Co. of Philadelphia v. Smith 124 U.S. 405 (1887) , the U.S. Supreme Court seems to have fostered the " American Rule " that the warranty of seaworthiness in a time policy is fulfilled if the vessel is seaworthy at the commencement of the risk . The insurer will not be relieved of his obligation on the policy if the vessel subsequently becomes unseaworthy and the proper repairs are not performed at the next port . In such a case , the insurer is only released from liability to the extent that the loss is the result of the failure of the insured or his agents to remedy the unseaworthiness ; he will remain liable for other losses covered by the policy . " [According to the learned author , it is important to note that in the above case , the

The Federal Second Circuit Court of Appeals , in the case of New York & Porto Rico S.S. v. Aetna Insurance Co. 204 F. 255 2 nd Cir. (1913) , although questioning the decision of Union Insurance v. Smith , nevertheless held that the following prin - ciples were applicable :

" The law in England seems to be very clear that there is no implied warranty of seaworthiness in the case of time poli - cies ... On the other hand , our Courts seem to take the view that although there may be no implied warranty of seaworthiness , still if the vessel is in port where repairs may be made , or equipment and supplies obtained , the insured cannot recover for any loss caused by the want of due diligence in making repairs and obtaining equipment or supplies " . [188]

In the case of Henjes v. Aetna Insurance Co. 132 F. 2d 715 (1943) , the Court held the following , with regards to the implied warranty :

" There is in the United States an implied warranty by the ins - ured in a time marine policy that the ship is seaworthy at the time the policy period begins ... But it is true only when the vessel is in port at the time ... When the insurance is to come into being on a ship on a voyage the insurer takes her as she may be . " [189]

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time policy in question contained an express warranty against unseaworthiness .] Meanwhile Prichett , R.W. , (on page 201) provides that " although subsequent courts have recognised that the quoted language is a dictum quite unnecessary to the part - icular facts reviewed by the Supreme Court , the " American Rule " finds its strongest support in that case . "

[188] According to Anderson , (on page 18) , " The Supreme Court 's version of the rule has generally been accepted as law , even though , as the Court of Appeals for the Second Circuit observed in New York & P.R.S.S. Co. v. Aetna Ins.Co. , it amoun - ted to nothing more than dicta , the policy under consideration having contained an express exception of losses caused by unsea - worthiness . "

[189] As to the time of the commencement of the risk , Prichett , R.W. , (on page 202) concludes " ... the implied warranty was limited to cases where the vessel was in port at the time of attachment in Zillah (1929) A.M.C. 166 ... and again in 1943 in Henjes v. Aetna Insurance Co. 132 F. 2d 715 ... Hence , as to the time of inception of the risk , American courts app - eared to have moved rather solidly into the position advocated in Gibson v. Small by Martin , B. , i.e. that there is no war - ranty of seaworthiness at the time of the risk unless the vessel is in port . However , the other part of the " American Rule " , the continuing warranty , remained uncertain . "

However , according to Prichett , (on page 203) , " In 1957 Judge Frank ... in New York , New Haven and Hartford Railroad Company v. Gray 240 F. 2d 460 (2nd Cir. 1957) , substantially contributed to the move of the rule in the U.S. toward the Brit - ish rule set forth in s. 39 (5) of the Marine Insurance Act 1906 ... After holding that there is no implied warranty of sea - worthiness in a time policy , Judge Frank referred to and impl - iedly adopted the rule stated in s. 39 (5) . In doing so , he distinguished the language of Union Insurance Co. v. Smith , New York & Porto Rico S.S. v. Aetna , and Henjes v. Aetna as all being obiter dicta or the progency of dicta . In rejecting the decision in Henjes v. Aetna and embracing s. 39 (5) , Judge Frank quite clearly disapproved both elements of the rule arti - culated in Union Insurance Co. v. Smith . " [190]

The Fifth Circuit in the case of Saskatchewan Insurance Office v. Spot Pack , Inc. 242 F. 2d 385 , 1957 AMC 655 [191] stated the American rule as follows :

" ... The American Rule ... implies for a time policy , as does the English Rule as of commencement of the voyage for voyage policies ... , a warranty of seaworthiness as of the very moment of attachment of the insurance . And unlike the English Rule which limits the warranty to the voyage , the American Rule takes it somewhat further to extend , in point in time , a sort of negative , modified warranty . It is not that the vessel shall continue absolutely to be kept in a seaworthy condition , or even that she be so at the inception of each voyage , or before de - parture from each port during the policy term . It is , rather , stated in the negative that the Owner , from bad faith or neg -

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[190] However , in McAllister Lighterage Line v. Insurance Co. of North America 244 F. 2d 867 (2d Cir. 1957) , the Court held that " With a term policy of insurance the warranty of sea - worthiness arises at the time when the insurance becomes effect - ive ... It is clear that implied in every policy of hull insur - ance is a covenant of seaworthiness ". (See Prichett , (on pages 203 - 204) , in this regard .)

[191] In the opinion of Judge Brown , " How this came to be the rule of general acceptance for all Time policies is obscure , for traced as it apparently is to expressions in Union Insur - ance Co. of Philadelphia v. Smith ... , there seems to have been slight critical awareness that the policy in Union contained not alone an express warranty of seaworthiness , but an express ex - clusion of losses caused by unseaworthiness or by incompetence of Master and Mariners , which might imply a contractual under - taking for a continuing obligation by the Master and crew members acting generally as agents for the owners to take all prudent requisite steps to keep the ship seaworthy . But we need not determine whether , and to what extent , the rules should be different for a Time policy , as the one here , carrying , at most , an implied warranty , for the Underwriter cannot meet the demands of the Union standard . "

lect , will not knowingly permit the vessel to break ground in an unseaworthy condition . And , unlike a breach of a warranty of continuing seaworthiness , express or implied , which voids the policy altogether , the consequence of a violation of this " negative " burden is merely a denail of liabilty for loss or damage caused proximately by such unseaworthiness . " [192]

Furthermore , in Tropical Marine Products v. Birmingham Fire Insurance Co. of Pennsylvania 247 F. 2d 116 (1957) , the Court , expanding upon the existing principles , held :

" As we ... have recently pointed out , the owner 's obligation under a Time Policy , as was this one , is extremely limited : the vessel is seaworthy at the attachment of the insurance , but henceforth it is a sort of negative warranty , i.e. the owner or those in privity with him will not knowingly send the vessel to sea in a deficient condition . " Furthermore , the Court , in question , went on to conclude that " Where there is no showing that the shipowner or any one in privity with the shipowner knew of the alleged fact that the vessel which sank was in an allege - ly unseaworthy condition , there was no breach of the limited warranty of seaworthiness in the American Institute Time Hull

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[192] The Fifth Circuit test , according to Anderson , (on pages 19 -20) , '" absolves the insured of any affirmative duty of due diligence subsequent to the attachment of the risk , and in its place , as a criterion for breach of the implied warranty of seaworthiness , substitutes a concept akin to " privity " under the English statute , that is , actual knowledge of facts constituting unseaworthiness , though it does not appear to go so far as to require that the knowledge amount to conscious realization of the unseaworthiness . " Furthermore , the court stated : " When Union speaks in terms of " bad faith or want of ordinary prudence or diligence on the part of the insured or his agents " , it refers to those acts in which the owner , if an individual , personally participates , or if a corporation or multiple ownership , in which there is personal participation by those having shoreside managerial responsibilities . " According to Arnould , (on page 560) Footnote 67 , " The American courts have held that the test of whether there has been a breach of the obligation , existing under their law , to ensure the continuing seaworthiness of the vessel , and the test of whether due dilig - ence has been exercised under the proviso to the Inchmaree clause , is whether those having shoreside managerial responsibilities were at fault . " In the case of The " Padre Island " (1971) 2 L.L. Rep. 431 , the Court held , on the facts , that the vessel was " deliberately stranded by her master , rendering her a con - structive total loss - that that stranding was perpetrated by the master at the command and with the knowledge of the port captain (which was to be imputed to the owners) . "

Policy ... , and the insurance was effective . " [193]

In the case of the Pacific Queen Fisheries v. Symes (The Pacific Queen) 307 F. 2d 700 , 1962 AMC 1845 (9 th Cir. 1963) , the Court held :

" The correct and most concise statement of what is meant by " privity " is set forth in M. Thomas and Son Shipping Co. Ltd. v. London and Provincial Marine and General Insurance Co. Ltd. (1914) 30 T.L.R. 595 (C.A.) [194] ... A reading of the facts ... clearly indicates that , within this definition , each time the Pacific Queen was sent to sea from and after May 24 , 1957 , until her loss , she was in an unseaworthy state , to the knowledge and in the privity of the assured owner . This is bec - ause of the knowledge of her condition resting in one or more of the partners , and the manager (also a partner) . The facts substantiate the District Court 's finding that said unseaworth - iness was a proximate cause of the vessel 's loss . " [195]

The United States District Court in Lemar Towing Co. Inc. v. Fireman 's Fund Insurance Company (1972)352 Fed. Supp. 652 , concluded that :

" It is impliedly warranted that the vessel is seaworthy as of the very moment of attachment of the marine insurance policy ; and if the vessel is in fact unseaworthy at the time the insur -

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[193] According to Prichett , (on page 206) , uncertainty arose regarding the term " neglect " , as stated in the phrase that the " Owner , from bad faith or neglect will not knowingly permit the vessel to break ground in an unseaworthy condition " - in the opinion of the learned author " ... Judge Brown 's apparent adoption of the British rule later in the Spot Pack opinion indicates that the proper meaning of the word " neg - lect " is that a shipowner who knows his ship is unseaworthy will not negligently (or in bad faith) allow her to break ground i.e. he must be aware of the unseaworthiness before the policy can be avoided . Such is the holding of a recent case in the Federal Court in Alaska , Gregoire v. Underwriters at Lloyd 's . " [Furthermore , see the case of M/V Papoose (1969) A.M.C. 781 (5 th Circuit 1969) .]

[194] In that case , the Court held , " ... words in Section 39 , subsection 5 , of the Marine Insurance Act , 1906 , " where with the privity of the assured a ship is sent to sea in an un - seaworthy state ... " , meant where the owner was privity to the state of things which in fact rendered the ship unseaworthy . "

[195] On the facts , the U.S. Court of Appeals held that ... (2) that the Pacific Queen was sent to sea in an unsea - worthy condition ; that appellants were privy to the state of facts rendering her unseaworthy ; and that unseaworthiness was a proximate cause of her loss . "

ance is to attach , the breach avoids the policy . " [196]

According to Anderson , (on page 21) " The implied warranty of seaworthiness in time policies also showed renewed vitality in Lemar Towing Co. Inc. v. Fireman 's Fund Insurance Co. 352 F. Suppl. 652 , 1973 AMC 1844 , where the court applied the " modi - fied " warranty against the shipowner in a factual setting where privity appeared far less certain than in the Pacific Queen case ... The Lemar court thus reverted to a negligence standard , requiring the insured to exercise due diligence in the manage - ment and care of the vessel for the duration of the policy , such as was developed in Paddock and the earlier American cases . "

However , in the case of Gregoire v. Underwriters at Lloyds , Combined Companies (1982) 559 F. Supp. 596 , the Court con - cluded that :

" The Supreme Court has stated that efforts should be made in the area of marine insurance to preserve the uniformity between Eng - lish and American law ... Since the great majority of the decided cases in this country are consistent with the English Rule , it should be applied in this case . I , therefore , hold that in a time policy ... there is no implied warranty that a vessel will not break ground in an unseaworthy condition , however , where the owner of a vessel or those in privity with him send their vessel to sea knowing it to be unseaworthy , the insurer is not liable for damages proximately caused by the unseaworthi - ness . " [197]

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[196] In the opinion , of Judge Fitzgerald , in Gregoire v. Underwriters at Lloyds , Combined Companies (1982) , " The actual statement of the implied warranty in Lemar Towing , how - ever , is that " to escape liability by way of this contention the underwriter must prove that the shipowner had knowledge of this unseaworthiny condition , if in fact it did exist , and that said condition was the proximate cause of the loss . "

[197] Prichett , (on pages 206 - 207) concludes that " In Britain , this question in regard to the interpretation of the word " privity " in s. 39 (5) was answered by Lord Denning in The Eurysthenes (1976) 3 All E.R. 234 (C.A.) ... In Judge Fitzgerald 's opinion in Gregoire v. Underwriters at Lloyd 's , he adopted Lord Denning 's reasoning , and declared that at least that part of s. 39 (5) of the Marine Insurance Act 1906 which corresponds to the " negative warranty " is the same as the law of the U.S. ... Judge Fitzgerald made no ruling as to the other portion of the " American Rule " providing for a warranty at the commencement of the risk ... Hence , except for the first part of the " American Rule " (implying a warranty of seaworthiness at the commencement of the risk) the courts in the U.S. have quite clearly moved toward adoption of the rule set forth in s. 39 (5) of the 1906 Act . "

In contrast , in the case of Insurance Co. of North America v. Board of Commissioners of the Port of New Orleans 733 F. 2d 1161 (1984) , the United States Court of Appeals reiterated the decision in the Saskatchewan - case , by holding that :

" A warranty of seaworthiness by the owner is implied in every hull insurance policy unless expressly waived ... The warranty is a continuing obligation that " the owner , from bad faith or neglect , will not knowingly permit the vessel to break ground in an unseaworthiness condition ... " . [198]

It would , therefore , appear , after an examination of the relevant authorities , that the American courts have formulated certain distinct rules , with regards to time policies . It is submitted , that the so - called " American Rule " , can be summarised , as follows : [199]

(1) An implied warranty of seaworthiness , applies at the commencement of the risk - in other words , the " owner " of the insured vessel warrants to the underwriter that the vessel is seaworthy at the commencement of the risk . " [200]

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[198] The above principle was reiterated , by the Court of Appeals , in the case of Austin v. Servac Shipping Line 794 F. 2d 941 (1986) [including , the case of L & L Marine Service v. Ins. Co. of North America 796 F. 2d 1032 (1986) .]

[199] It is clear that , according to existing authorities , no implied warranty of seaworthiness arises , if the vessel is at sea , at the time the policy attaches .

[200] As stated by Prichett , (on page 196) . Schoenbaum , (on page 577) reiterates this conclusion , by providing " there is an absolute warranty by the assured that the vessel is seaworthy at the time the insurance policy attaches ... " . In addition , Arnould , (on page 556) provides " In the United States , but not in England , there is an implied warranty of seaworthiness in a time policy at the time of attachment , at any rate where the vessel is in port at the beginning of the policy period . " (in particular (Footnote 60)) Therefore , it is submitted , that the conclusion reached by Prichett , (on page 208) , namely that the " weight of authority in the U.S. supports the exitence of a warranty at the time of attachment . Although a number of recent cases have broadly set forth the warranty without any qualification as to the location of the vessel at the relevant time , the recent cases almost all deal with fact situations where the vessel was in port at the time of attachment . Hence , the decisions of greatest weight indicate that the insured vessel must be seaworthy at the time the policy takes effect if she is then in port " , constitutes an accurate reflection of the existing American legal position . (See pages 208 - 209 for a more detailed discussion of existing American

(2) A so - called " negative "or " modified " warranty is held to exist , in terms of which " after the policy attaches , the shipowner will not knowingly permit the vessel to break ground in an unseaworthy condition " [201] or , as otherwise stated , " there is a " negative burden " that at the commencement of each voyage , the owner will not knowingly permit the vessel to break ground in an unseaworthy condition " . [202]

However , the uncertainty which still exists , regarding time policies , has in fact given rise to criticism - according to Glone , M. , (on page 964) [203] , " ... Thus , due to the perplexing state of the jurisprudence it is doubtful whether the

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law .)

[201] As stated by Prichett , (on page 196) .

[202] As stated by Schoenbaum , (on page 577) . According to Anderson , (on page 31) , " American decisions ... have developed a modified warranty principle , in which three basic situations are discernible . If the time policy attaches while the vessel is at sea , no warranty of seaworthiness is impl - ied . If the vessel is in port at the commencement of the risk , the warranty applies and , if unfulfilled , voids the policy regardless of the owner 's exercise of due diligence and the lack of a causal connection between the unseaworthiness and the loss . Finally , if the vessel is at sea at the inception of the risk but subsequently enters a port where full repairs can be made , a " modified warranty " is imposed and the owner must not knowingly send his vessel to sea in an unseaworthy condition , lest he be held liable for loss or damage proximately caused by such unseaworthiness . The American rule , however , has failed to achieve certainty and uniformity of application despite the fact that it considerably antedates the Union Insurance case , which is frequently mistaken for its progenitor . This failure is partly attributable to the absence of a definitive Supreme Court ruling and national marine insurance legislation . "

[203] The learned author , held " Although these cases mechanically restated the American rule and are often cited for the proposition that an implied warranty exists in time policies , it does not necessarily follow that this rule is firmly est - ablished in the admiralty law . In Tropical Marine , the Fifth Circuit , explained the " negative warranty " concept of Spot Pack and opined that the owner 's obligation under a time policy is extremely limited ... And Spot Pack , far from accepting the American Rule , found for the assured ... Confusing the issue even further , the Second Circuit in New York , New Haven , & Hartford R.R. Co. v. Gray stated that the " Appellees correctly disclaimed [the] defense of an implied warranty of seaworthi - ness since these are time policies . More recently , the Fifth Circuit , in Gulfstream Cargo Ltd. v. Reliance Insurance Co. , found the implied warranty to exist ... " .)

Supreme Court will continue to abide by the implied warranty in time policies as stated in the American Rule . The scanty auth - ority on which the American Fule is based has led some authors to conclude that there is no implied warranty of seaworthiness in time policies , and especially no implied warranty of con - tinuing seaworthiness . " [204]

Furthermore , Anderson , (on page 22) , concludes that " The lack of clarity in the American decisions as to when and with what effect a warranty of seaworthiness will be implied in a time policy in a sense vindicates the practical solution reached in Gibson v. Small . It is nearly impossible to anticipate a part - icular court 's definition of the duty with which the shipowner must comply in order to avoid the implied warranty defense . "

(ii) Express Exclusion of Seaworthiness :

Gilmore & Black , (on page 63) , expressly provide that the warranty of seaworthiness , according to American law , is im - plied in all voyage policies , unless " clear language to the contrary is used . " [205] However , in the case of contracts of carriage , courts in the United States have refused to uphold clauses , which expressly exclude the implied warranty of sea - worthiness , on the grounds of public policy . [206]

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[204] According to Glone , M. (on pages 965 - 966) , it is important to note that " even if a warranty of seaworthiness is held to apply , not every type of unseaworthiness will vitiate the time policy . Many time policies contain the famous Inchmaree clause ... When the Inchmaree clause is present , unseaworthiness per se will not serve the insurer as a sufficient basis on which to deny liability . Rather , the insurer can prevail only if the unseaworthiness is caused by some element which is not protected by the clause . It is readily apparent , then , that the Inch - maree claues will limit any implied warranties . "

[205] i.e. as the case of the English law , the implied warranty of seaworthiness is only excluded , if the terms or words used in the policy , are clear and unambiguous in nat - ure .

[206] According to Knauth , (on page 192) , the courts have " declined to agreements disclaiming the warranty , how - ever explicitly expressed ; it has been deemed a rule of public policy that a carrier cannot be allowed to contract wholly out of the warranty . " (see Carver , (on page 113))

C. SOUTH AFRICAN LAW :

1. Common Law position :

(i) General Principles :

(a) Introduction :

It is submitted , that before an examination of the South African Common law position can commence - the question arises of what law is to be applied , with regards to marine insurance poli - cies . As in the case of contracts of affreightment , this issue has to be assessed in the light of the relevant statutory pro - visions . As a result of the Pre - Union Statute Law Revision Act 43 of 1977 , all pre - Union legislation [207] relating speci - fically to insurance , has been expressly repealed - with the result that Insurance law , in South Africa , is governed by the Common Law , namely Roman - Dutch law .

Therefore , " where the discussion relates to distinctions bet - ween Roman - Dutch and English law cognizance must be taken of the provisions of the Admiralty Jurisdiction Regulation Act [208] in which it is provided that the governing law for marine insurance is Roman - Dutch law . " [209] The opinion has been expressed that " matters relating to Marine Insurance will be governed by Roman - Dutch law and , presumably , by those " foreign " principles already taken over by our Courts . " [210]

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[207] The Cape General Law Amendment Act 8 of 1879 and Orange Free State General Law Amendment Ordinnance 5 of 1902 .

[208] i.e. specifically Section 6 (1) (b) .

[209] As provided by Gordon & Getz , (page 381) .

[210] As stated by Dillion & Van Niekerk , (on page 107) . Furthermore , it is submitted that the argument advanced by Gordon & Getz , on page 381 , namely that the case of Mutual & Federal Insurance Co. Ltd. v. Oudtshoorn Municipality " be interpeted in favour of the adoption of a broader ius commune approach to insurance law ... " , so as to move away from the prevailing " tendency to resort to Roman - Dutch law in a strict sense " and " attempts to reconstruct a Roman - Dutch law of marine insurance from fragmented sources " , is to be endors - ed . The question , concerning the position of the English law arises - Dillion & Van Niekerk , (on page 112) conclude that " Theoretically our law of marine insurance is the Roman - Dutch law of marine insurance . In practice , however , other factors

Every voyage policy on hull or on goods , is subject to an implied warranty , on the part of the assured , to provide a vessel , which is seaworthy for the proposed voyage . As in the case of contracts of carriage , it is possible for the contract - ing parties to vary or exclude the implied warranty , provided however that " clear and unambiguous " terms or words are em - ployed . [211]

(b) The Standard of seaworthiness , required of the ship - owner : [212]

It is submitted that , similarly to the English Common law , the shipowner or assured is required to provide a vessel , which is seaworthy , for the contemplated voyage , at the moment of sailing . In addition , in order to assess , whether a vessel complied with the implied warranty , an objective test , that of a prudent or reasonable shipowner , was to be applied . Thus the test laid down in the leading case of Mc Fadden v. Blue Star Line (1905) is relevant , namely that the vessel " must have that degree of fitness which an ordinary , careful and prudent owner would require his vessel to have at the commencement of the

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indicate and confirm that English law in particular , although no longer binding authority , will continue to be of great per - suasive authority in determining the principles of South African law of marine insurance ... " . Gordon & Getz , (on page 381) reiterated this conclusion , by providing " ... English law will continue to have considerable persuasive authority ... " . (It is to be noted , that the English law of marine insurance has to a " large extent been codified by the Marine Insurance Act of 1906 and although it was largely declaratory of the existing common law , it did introduce certain alterations . Thus , in stating the South African law , it is intended to refer where possible to the English authorities as they existed prior to 1906 . " (See Gordon & Getz , (on pages 380 - 381) , in this regard .)

[211] It is important to note , that such an implied warranty of seaworthiness does not apply to time policies - it can , therefore be concluded that no distinction exists between English law and South African law , in this regard .

[212] It is submitted , as in the case of the English law , the implied warranty is " absolute " in nature . (see the rel - evant English authorities , in this regard .)

voyage ... " . [213]

Furthermore , the implied warranty is not " continuous " in nature - in other words , the assured undertakes that the ship shall be seaworthy , not for the entire duration of the voyage insured but merely , at the commencement thereof . [214] In addition , the assured does not warranty the continued good conduct of the master and crew in the course of the voyage .

(c) The Definition / Meaning of Seaworthiness :

According to Gordon & Getz , (on page 390) , " There is an implied warranty that the ship shall be seaworthy , by which is meant that she must at the beginning of each stage of the insured venture be in a reasonably fit state as to repairs , equipment fuel , provisions and crew , and in all other respects , to en - counter the ordinary perils of that stage . While the ship is in port , she need be only reasonably fit to encounter the ordinary perils of the port ; but when she sails from the port , she must be reasonably fit to encounter the ordinary perils of the voy - age . " [215]

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[213] It is to be stressed that the standard required , is relative in nature - i.e. it does not remain static but changes according to improvements and adaptions in equipment and in gear . In addition , it varies from country to country , with regards to the standard of equipment and the degree of prepara - tion required , in order to render the vessel seaworthy . Or as was stated by Arnould , (on page 569) " It is obvious that there can be no fixed and positive standard of seaworthiness , but that it must vary with the varying exigencies of mercantile enterprise . " [It remains a question of fact , as to whether the requirements of the implied warranty , have been fulfilled or not .]

[214] Or as was provided , in the English case of Bermon v. Woodbridge (1781) 2 Dougl. 781 , " every ship must be seaworthy when she first sails on the voyage insured , but she need not continue so throughout the voyage . " Gordon & Getz , (on page 390) concur , with the above statement , by providing " But there is no continuing warranty of seaworthiness . If the ship is seaworthy at the beginning of each stage , it does not matter that she subsequently becomes unseaworthy even if the unseawor - thiness is attributable to the negligence or misconduct of the master or crew . "

[215] It is submitted that the term " seaworthiness " , as in the case of contracts of affreightment , has a dual appli - cation - firstly , the vessel must be " capable of completing the voyage undertaken , at the commencement thereof " and sec - ondly , the vessel must be able " to preserve the cargo " while

Furthermore , as in the case of the English Common law , the term " seaworthiness " , requires , that the Master and the crew must be " competent and sufficient " [216] . However , both are regarded as being incompetent , if they have " a disabling want of skill or a disabling want of knowledge " . [217] In addition , the vessel must be fit to receive the cargo , in terms of the warranty of fitness for cargo i.e. the vessel must not only be fit to withstand the ordinary perils of the sea , but must also be fit to receive the cargo . [218]

(d) Failure to provide a seaworthy vessel :

According to Gordon & Getz , (on page 390) " ... breach of any one of these implied terms entitles the insurer to treat the contract as discharged from the time of the breach , irrespective of whether it has any connection with the loss and even if it has been remedied before the loss . " [219]

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completing the voyage undertaken . Or , as was stated , the vessel must be " fit in design , structure , condition and equipment to encounter the ordinary perils of the voyage " .

[216] i.e. the Master and crew are required to be " re - asonably fit " - more specifically , the Master must be fully instructed and informed regarding , all aspects of the vessel , in question .

[217] It is a question of fact , in each case , as to whether the master is incompetent .

[218] Regarding a voyage policy on goods , Gordon & Getz , (on page 391) state " Where the policy is on goods , there is in addition an implied warranty of cargoworthiness , that is , that the ship is reasonably fit to carry the goods to the dest - ination contemplated in the policy . "

[219] In other words , as was provided by Section 33 (4) of Marine Insurance Act 1906 , the implied warranty of seawor - thiness , is regarded as constituting a " ... condition which must be exactly complied with , whether it be material to the risk or not ... " . And , in the event of the implied warranty not being adhered to " ... the insurer is discharged from lia - bility as from the date of the breach of warranty , but without prejudice to any liability incurred by him before that date " . (subject , of course to any express provision in the policy)

In the event , of the assured being mistaken as to the unsea - worthy state of the vessel , no liability would arise for the underwriter - thus it is clear , that there is no distinction between marine insurance policies and contracts of carriage , in this regard . [220] However , the underwriter is entitled to waive any possible breach of the implied warranty , on the part of the assured .

(e) The Relevant Time :

It is submitted that , in a voyage policy on hull or on goods , the vessel is required to be seaworthy , at the commencement of the voyage , insured - in other words , the relevant period of time , is the actual moment of departure , from the original port of loading . In the event , of the vessel being in an unseaworthy condition , at this particular period of time , breach of the implied undertaking would be deemed to have occurred . [221]

(f) The Doctrine of Stages :

As in the case of contracts of carriage , a vessel is required to be , in terms of the doctrine of stages , in a seaworthy condition , at the commencement of each particular stage of the

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[220] i.e. ignorance or mistake , as to the unseaworthy con - dition of the vessel , cannot be pleaded by the assured .

[221] If the policy attaches while the vessel is still in port , the vessel is required to be " reasonably fit to encounter the ordinary perils of the port " i.e an implied warranty exists that , at the commencement of the risk , the vessel shall be in such a seaworthy condition . (see Arnould , (on page 552) and Gordon & Getz , (on page 390) , in this regard .) The un - certainty which exits in the English law , regarding the sit - uation where the ship is at sea , at the time the policy is effected , also prevails in South Africa . Thus , it is submitted , that the opinion advanced by Arnould , (on page 568) , namely that a time policy would possibly be the most satisfactory policy , in this particular situation , constitutes a pragmatic solu - tion .

voyage , should the voyage be divided into various stages [222] i.e. it is not sufficient , that the vessel was in a seaworthy condition at the commencement of the voyage , but had to be seaworthy , at the start of each subsequent stage .

Similarly , as in the case of the English Common law , the prin - ciple of bunkering , is applicable with regards to both contracts of affreightment and marine insurance policies . [223] Thus , where the voyage is divided into various stages and the vessel is required to take on fuel or provisions at an intermediate port , the implied warranty is breached should the vessel depart from the intermediate port not having sufficient bunkers or stores for that specific stage , even though , she did not have sufficient bunkers , for the whole voyage , at the commencement thereof . [224] Furthermore , the assured is entitled to determine the various bunkering stages - subject , to the prerequisite that such stages are " usual and reasonable . "

(g) The Burden of proving unseaworthiness :

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[222] According to Gordon & Getz , (on page 390) , " The voyage itself may be in stages . This occurs where its nature is such that different degrees of seaworthiness are required at different stages , as where it is partly down a river or canal and partly on the open sea ... "

[223] As in the case of contracts of affreightment , the following cases are relevant Thin v. Richards (1892) 2 Q.B. 141 ; The Vortigern (1899) P. 140 ; Northumbrian Shipping Co. v. Timm (1939) A.C. 397 etc.

[224] According to Gordon & Getz , (on pages 390 - 391) , " The fact that the ship is to call at various ports does not make the insured voyage one in stages . Thus , there is no breach of warranty where a ship which was seaworthy on leaving the terminus a quo sails in an unseaworthy state from an intermediate port in the course of her voyage . However , the converse prop - osition that there is a breach of warranty where a ship leaves the terminus a quo in a state of seaworthiness sufficient to enable it to reach an intermediate port but insufficient to enable it to complete the whole voyage , requires qualification in the following respect . There is no breach of warranty in respect of insufficiency of fuel , provisions or the like , if the insured can show that it was intended in accordance with the usual practice to replenish the supplies at intermediate ports and there was at all times sufficient on board to enable the ship to reach the next port of replenishment . "

According to the relevant sources , the burden of proving a breach of the implied warranty of seaworthiness , rests on the party alleging it - who , as in the case of contracts of carriage , " must plead it with sufficient particularity . "

Furthermore , if a vessel breaks down or sinks , after the com - mencement of the voyage , a presumption of fact , as opposed to a presumption of law , arises that the vessel was unseaworthy , at the moment of departure . [225]

In the event , of the marine insurance policy , containing a clause , expressly admitting the seaworthy condition of the vessel , the underwriter would be effectively precluded , from relying on a breach of the implied warranty . [226]

(h) Time Policies :

It is submitted , that the rule of English law , namely that in the case of a time policy , no warranty of seaworthiness shall be implied or as was stated , in Section 39 (5) of the Marine Insurance Act 1906 , " in a time policy there is no implied warranty that the ship shall be seaworthy at any stage of the adventure ... " , is of persuasive authority in South Africa . [227]

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[225] Similarly , to the English Common law , no question of unseaworthiness would arise until the assured has proved , that the loss suffered , was caused by a peril insured against - with the result , that it is always open for the underwriter to plead , as a defence , that the assured has failed to discharge the above onus .

[226] It is submitted , that in the case of cargo poli - cies , regard must be had of the Institute Cargo Clauses (clause 8) - which according to the English authorities , has the effect , that the unseaworthiness of the vessel cannot be relied upon by the underwriter , as constituting a breach of the implied warranty .

[227] Gordon & Getz , (on page 391) concurs with the above statement , by providing that " There is no implied warranty of seaworthiness in a time policy . " Thus it is submitted , that the distinction in the English Common law , which exists between voyage policies and time policies , with regards to the implied warranty of seaworthiness , forms part of South African Common law - with the result that the English authorities (such as Gibson v. Small ; Thompson v. Hopper ; Dudgeon v. Pembroke) are appropriate .

Furthermore , as was stated in the leading case of Gibson v. Small (1853) , this particular Common law rule is applicable " even though at the commencement of the risk the ship be lying at a home port . "

However , in the event of the vessel being sent to sea in an unseaworthy condition , no liability would ensue for the under - writer , if the assured had distinct knowledge thereof - in other words , " ... 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 . " [228]

(ii) Express Exclusion of Seaworthiness :

It is submitted that , as in the case of English law , marine insurance policies often contain words or terms which " expr - essly exclude or modify or vary " the implied undertaking of seaworthiness . In order to determine whether such clauses exclude liability for unseaworthiness , depends on the contr - tract , construed as a whole . [229]

2. Statutory Enactments :

i.e. an examination of the relevant South African statutory provisions , with regard to the concept of seaworthiness , relating to marine insurance .

The relevant statute is : Admiralty Jurisdiction Regulation Act No. 105 of 1983

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[228] As was stated in the English law , " it is not nec - essary , 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 cause of the loss . " (See Arnould , (on page 558) , in this reg - ard .) Furthermore , it is submitted that , the judgment of the Court of Appeal in Compania Mar. San Basilio S.A. v. Oceanus Mutual Underwriting Assn. (The Eurysthenes) (1976) , is relevant , especially , regarding the interpretation of the phrase " privity of the assured " and the " alter ego " test .

[229] According to Gordon & Getz , (on page 390) , " The implied terms ... are implied by law in every voyage policy un - less they are excluded or varied by clear language in the pol - icy ... " .

In terms of Section 6 (1) " Notwithstanding anything to the contrary in any law or the common law contained a court in the exercise of its admiralty jurisdiction shall

(a) with regard to any matter in respect of which a court of admiralty of the Republic referred to in the Colonial Courts of Admiralty Act , 1890 , of the United Kingdom , had jurisdiction immediately before the commencement of this Act , apply the law which the High Court of Justice of the United Kingdom in the exercise of its admiralty jurisdiction would have applied with regard to such matter at such commencement in so far as that law can be applied ;

(b) with regard to any other matter , apply the Roman - Dutch law applicable in the Republic

It is submitted , that in terms of this particular subsection of the Act , the South African Marine Insurance law shall be gov - erned by Roman - Dutch law and according to Dillion & Van Niek - erk , (on page 107) " presumably , by those " foreign " prin - ciples already taken over by our courts .

(2) The provisions of subsection (1) shall not derogate from the provisions of any law of the Republic applicable to any matters contemplated in paragraph (a) or (b) of that sub - section . [230]

In addition , in terms of the Insurance Act No. 27 of 1943 , Section 63 (1) " The owner of a domestic policy issued after the first day of January 1924 , shall notwithstanding any contrary provision in the policy or in any agreement relating thereto , be entitled to enforce his rights under the policy against the insurer concerned in any court of competent jur - isdiction in the Republic , and any question of law arising from any such policy shall be decided according to the law of the Republic ... " . [231]

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[230] Thus , in terms of this subsection , any statute of South Africa , which is relevant to marine insurance law , shall be of binding authority - i.e. Insurance Act 27 of 1943 .

[231] According to Dillion & Van Niekerk , (on page 110) " ... when the owner of a domestic policy enforces his rights in a South African court , the court will apply South African law to any question of law arising from that policy . Section 63 (1) therefore renders ineffective any express (and presumably any implied) choice of a foreign legal system by the parties to a domestic policy which comes before a South African court . "

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