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## **The Obligation of Seaworthiness: Shipowner and Charterer**

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## The Obligation of Seaworthiness: Shipowner and Charterer

*Professor Stephen Girvin\**

The obligation to provide a seaworthy ship is core in the carriage of goods by sea, including in charterparties, where the contract of carriage is between a shipowner and a charterer. As seaworthiness is not usually defined in modern standard form charterparties, the meaning of the concept has to be ascertained from cases decided at common law. In charterparties, whether time, voyage or bareboat, it is normal for the obligation to be laid down in express wording, often describing the standard required as one of due diligence. Alternatively, such a due diligence standard is imported into the charterparty by means of a paramount clause, bringing into the charterparty the relevant terms of the Hague or Hague-Visby Rules or some domestic statute giving effect to those Rules.

Keywords: Seaworthiness; charterparty; due diligence; paramount clause

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# 1 Introduction

The focus of this paper is concerned with the nature and scope of the seaworthiness<sup>1</sup> obligation in modern charterparties.<sup>2</sup> Although found in numerous general and specialist standard form charterparties,<sup>3</sup> the character of the obligation expressed in these forms assumes an understanding of the underlying common law, where much of the groundwork has been laid over several hundred years.<sup>4</sup>

This paper begins by considering the historical origins of seaworthiness. Having done that, the paper examines each of the principal features of the common law obligation, also a core component of every contract for the carriage of goods by sea,<sup>5</sup> before turning to the main charterparty forms, voyage, time, and demise. The final part of the paper considers the implications of the due diligence standard in seaworthiness and the effect of incorporation into charterparties of the Hague (and Hague-Visby) Rules in a clause paramount.

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<sup>1</sup> See Malcolm Clarke, 'The Carrier's Duty of Seaworthiness under the Hague Rules' in Francis D Rose, *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP 2000) ch 6; Charles G C H Baker, 'The Wreck of the *Hesperus* revisited: a review of the obligation of seaworthiness in contracts of affreightment' in D Rhidian Thomas (ed), *The Evolving Law and Practice of Voyage Charterparties* (Informa 2009) ch 5. Standard treatments of seaworthiness are to be found in Sir Bernard Eder (gen ed), *Scrutton on Charterparties and Bills of Lading* (23rd edn, Sweet & Maxwell 2015) art 68; Sir Guenter Treitel & F M B Reynolds, *Carver on Bills of Lading* (4th edn, Sweet & Maxwell 2017) para 9-013; Howard Bennett (gen ed), *Carver on Charterparties* (Sweet & Maxwell 2017) para 3-072.

<sup>2</sup> The phrase used throughout this paper is charterparty (plural, charterparties), rather than 'charter party' or 'charter-party', likely a reference to the Latin origins of the word, *carta partita* (*Thornton v Fairlie* (1818) 8 Taunt 354) or *charta partita* (see *Leighton v Green & Garret* (1613) Godbolt 104).

<sup>3</sup> Such as those authorized by BIMCO, the oil majors (Shell, BP), and in the various commodity trades (sugar, grain, coal, wood etc).

<sup>4</sup> Seaworthiness is also important in marine insurance, many older cases treating the concept as being one and the same as cases on the carriage of goods by sea. It is submitted, however, that marine insurance cases should not automatically be assimilated with cases on the carriage of goods by sea: see *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Bhd (The Bunga Seroja)* [1999] 1 Lloyd's Rep 512, [18]; Howard Bennett (gen ed), *Carver on Charterparties* (Sweet & Maxwell 2017) para 3-080. But cf *J & E Kish v Charles Taylor Sons & Co* [1912] AC 604, 611; *Firemen's Fund Insurance Co v Western Australian Insurance Co Ltd & Atlantic Insurance Co Ltd* (1927) 28 Ll L Rep 243, 251.

<sup>5</sup> Typically, because many (most) bills of lading are mandatorily subject to the Hague (or Hague-Visby) Rules: see Art X and see below, text to n 308.

## 2 Historical introduction

### 2.1 Early charterparties

One of the earliest English cases, the *Charter party of the Cheritie* (1531), contains an undertaking that

And the sayd owner shall warant the sayd shyppe stronge stanche well and sufficyentlye vitalled and apparelyd with mastys sayles sayle yerds ancors cables ropes and all other thyngs nedefull and necessarie to and for the sayd shype during this presentt viage And the sayd owner shall ffynd in the sayd shippe xj good and able maryners ...<sup>6</sup>

We can note from this charterparty that, even at this point, the shipowner undertook that its vessel was 'strong and staunch and sufficiently vitalled and apparelled' for the intended voyage, together with 'good and able maryners'.<sup>7</sup> One of the earliest treatises on maritime law in English,<sup>8</sup> *The Sea-Law of Scotland*<sup>9</sup> by William Welwod<sup>10</sup> of St Andrews, states that:

Na schip suld be fraughtit without ane charterparty, beirand that the maister sall provide an sufficient steirseman, timberman and schipmen convenient for the schip, with fyre, water and salt on his awin cost ...<sup>11</sup>

Almost twenty years later, Welwod's more commercially successful treatise, *An Abridgement of All Sea-Laws*, contains a similar, but more elaborate statement:

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<sup>6</sup> Reginald G Marsden (ed), *Select Pleas in the Court of Admiralty*, vol 1 (Selden Society 1892) 35. The High Court of Admiralty is said to have heard its first charterparty case in 1369: see F D MacKinnon, 'Origins of Commercial Law' (1936) 52 LQR 30, 32. For older charterparty examples, see Walter Ashburner, *The Rhodian Sea-Law* (Clarendon Press 1909) clxxix-clxxx.

<sup>7</sup> See also the *Charter party of the George* (1538), *ibid*, 81. This later charterparty also refers to the presence on board of 'an hable maister', *ibid*, 82. See below, text to n 114.

<sup>8</sup> Written in Scottish English and the first treatise on any branch of law to be printed in Scotland: see P G Stein, *The Character and Influence of the Roman Civil Law: Historical Essays* (Hambledon Press 1988) 316.

<sup>9</sup> 'Shortly Gathered and Plainly Dressit for the Reddy Use of All Seafairingmen'. The title page also contains the words of Psalm 107, v 23 ('They that go down to the sea in ships, that do business in great waters ...').

<sup>10</sup> Sometimes written 'Welwood'; John W Cairns, 'Academic Feud, Bloodfeud, and William Welwood: Legal Education in St Andrews, 1560-1611' (1998) 2 Edinburgh LR 158; 255.

<sup>11</sup> (Robert Waldegrave 1590), Tit 2 ('Of fraughting of Schips'). See J D Ford, 'William Welwod's Treatises on Maritime Law' (2013) 34 JLH 172, 174-175.

No ship should be fraughted without a charter-partie written and subscribed, containing both the Master and Merchant, and the name of the Ship, that no doubt may arise; and likewise that the Master shall find a sufficient Steirman, Timberman, Shipman, and Mariners conuenient, Shippetycht, masts, sayles, tewes, strong anchors, and boat fit for the shippe, with fire, water, and salt, on his own expenses.<sup>12</sup>

Over the next two centuries, similar wording continued to be found in charterparties and was reflected in the decided cases, now often supplemented by the word 'tight'.<sup>13</sup> In the leading case, *Lyon v Mellis*,<sup>14</sup> which concerned an action in assumpsit<sup>15</sup> for the recovery of damages for a quantity of yarn, Lord Ellenborough CJ stated that, in relation to the carrier

... it is a term of the contract ... implied by law, that his vessel is tight and fit for the purpose or employment for which he offers and holds it forth to the public: it is the very foundation and immediate substratum of the contract that it is so: The law presumes a promise to that effect on the part of the carrier without any actual proof; and every reason of sound policy and public convenience requires it should be so ...<sup>16</sup>

From this time onwards the use of the phrase 'tight staunch and strong' was in regular usage in charterparty cases.<sup>17</sup>

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<sup>12</sup> William Welwod, *An Abridgement of All Sea-Lawes* (Humfrey Lownes 1613), Tit 7 ('The fraughting of Ships'), 22. Ford, *ibid*, 179.

<sup>13</sup> ie, in the sense of having such construction as to be impervious to fluid, hence 'watertight'.

<sup>14</sup> (1804) 5 East 428.

<sup>15</sup> See David Ibbetson, *A Historical Introduction to the Law of Obligations* (OUP 1999) 130. The rise of assumpsit also coincided with the period when the common law courts took over much of the commercial business of the High Court of Admiralty, issuing many prohibitions in charterparty cases. The common law courts were wont to watch over the Admiralty jurisdiction 'with ... that jealousy and suspicion which they bestowed on all jurisdictions tainted with Romanism': J H Baker, *An Introduction to English Legal History* (4th edn, OUP 2007). 123. For examples of prohibitions, see, eg, *Johnson v Drake* (1661) 1 Keble 176 (1661); *Bushel v Jay* (1663) 1 Keble 153; *Fane v Pennoir & Alios* (1663) 1 Keble 479; George F Steckley, 'Merchants and the Admiralty Court during the English Revolution' (1978) 22 AJLH 137.

<sup>16</sup> (1804) 5 East 428, 437, cited with approval in *Readhead v The Midland Railway Company* (1866-67) LR 2 QB 412, 434-435.

<sup>17</sup> See, eg, *Touteng v Hubbard* (1802) 3 B & P 291; *Christy v Row* (1808) 1 Taunt 300; *Havelock v Geddes* (1809) 10 East 554; *Bell v Puller* (1810) 2 Taunt 285; *Davidson v Gwynne* (1810) 12 East 381; *Harrison v Wright* (1811) 13 East 343; *Levy v Costerton* (1816) Holt 167; *Deffell v Brocklebank* (1817) 4 Price 36; *Hurgar v Morley and the Commissioners of the Transport Board* (1817) 3 Merivale 20; *Ripley v Scaife* (1826) 5 B & C 167; *Porter v Izat* (1836) 1 M & W 381; *Blyth v Smith* (1843) 5 Man & G 405; *Cauvin v Landsberg* (1851) 1 S 86 (Cape SC); *Thompson v Gillespy* (1855) 5 El & Bl 209.

## 2.2 Treatises

In 1802, Charles Abbott, writing his *Treatise of the Law Relative to Ships and Seamen*,<sup>18</sup> noted that ‘in a charter-party the person who lets the ship covenants, that it is tight, staunch and sufficient ...’.<sup>19</sup> It was, moreover, a requirement that the ‘ship, and her furniture, be sufficient for the voyage ... [and] also be furnished with a sufficient number of persons of competent skill and ability to navigate her’.<sup>20</sup> As authority, Abbott cited one case, *Coggs v Bernard*,<sup>21</sup> alongside maritime treatises<sup>22</sup> now generally unfamiliar to modern day practitioners and scholars.<sup>23</sup> As a more recent writer has remarked, ‘so much for those who imagine that the ... obligation of seaworthiness was a common law rule’.<sup>24</sup> The first edition of Abbott may be compared with the last edition,<sup>25</sup> where the discussion of seaworthiness runs to fourteen pages of printed text.<sup>26</sup> In the interim, other treatises on the carriage of goods by sea had also appeared, beginning with David MacLachlan, *A Treatise on the Law of Merchant Shipping*,<sup>27</sup> and followed twenty-five years later by T G Carver, *A Treatise on the Law Relating to the Carriage of Goods by Sea*,<sup>28</sup> and T E Scrutton, *The Contract of Affreightment as Expressed in Charterparties and Bills of Lading*.<sup>29</sup> MacLachlan states that

In making preparation for the voyage, their first duty is to provide a vessel tight and staunch and strong, furnished with all necessary tackle and apparel, and manned with

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<sup>18</sup> This well-known work went through fourteen editions, four editions during the author’s lifetime.

<sup>19</sup> (E & R Brooke & J Rider & J Butterworth 1802) 180.

<sup>20</sup> *Ibid*, 181.

<sup>21</sup> (1703) 2 Ld Raym 909, probably the most famous case on bailment.

<sup>22</sup> These included James Park (*A System of the Law of Marine Insurances* (1789)), Balthazard-Marie Émérigon (*Traité des assurances et des contrats à la grosse* (1783)), Charles Molloy (*De Jure Maritimo et Navali* (1676)), Francesco Rocco (*Notabilia de Navibus et Naulo* (1708)), and the Ordonnance de la Marine (1681).

<sup>23</sup> Some sources, such as the Ordonnance de le Marine (1681), are only available in the original French. See Bernard Allaire, ‘Between Oléron and Colbert: The Evolution of French Maritime Law until the Seventeenth Century’ in Maria Fusaro et al, *Law, Labour and Empire: Comparative Perspectives on Seafarers c. 1500-1800* Palgrave Macmillan 2015) 79, 88.

<sup>24</sup> Stewart Boyd, ‘Shipping lawyers, land rats or water rats?’ [1993] LMCLQ 317, 322.

<sup>25</sup> 14th ed, by James Perronet Aspinall, Butler Aspinall, and Hubert Stuart Moore (Shaw & Sons: Butterworth 1901).

<sup>26</sup> *ibid*, 490-503.

<sup>27</sup> (William Maxwell 1860) 349-353. This work went into seven editions, the last published in 1932 (edited by G St Clair Pilcher & Owen L Bateson). MacLachlan was well-known as editor of *Arnould on the Law of Marine Insurance* (3rd to 6th edns).

<sup>28</sup> (Stevens & Sons 1885) 19-23. The final edition of the composite work (the 13th) was in 1982 (edited by Raoul Colinvaux): see now *Carver on Bills of Lading* (n 1) and *Carver on Charterparties* (n 1). See, further, *Carver on Charterparties* (n 1) vii.

<sup>29</sup> (William Clowes & Sons Ltd 1886) art 29. This famous work is in its 23rd edition today (n 1). See David Foxton, *The life of Thomas E Scrutton* (Cambridge University Press 2013) 138.

a sufficient crew; in one word, seaworthy for the intended voyage. This duty rests upon a fundamental principle of all law.<sup>30</sup>

MacLachlan cites six cases from the law reports, together with the authorities cited in Abbott.<sup>31</sup> Carver only refers to English case law, and Scrutton, writing one year later, does likewise. These treatises are important in showing the development of the seaworthiness doctrine in English law; initially framed by continental works on maritime law, English law had by the mid-nineteenth century developed considerable confidence in its own authorities on the carriage of goods by sea, not least in relation to the obligation to provide a seaworthy ship.<sup>32</sup>

### 3 Term implied by law

The basis for implication, in the absence of an express term,<sup>33</sup> is said, in the case of *Kopitoff v Wilson*, to arise from ‘the nature of the contract’<sup>34</sup> and as a ‘general implication arising in all contracts of shipment’, citing *Gibson v Small*,<sup>35</sup> though that case was concerned with the implied warranty of seaworthiness in a time policy. Such implication is not now doubted, stemming from ‘the high authority of Lord Tenterden, who lays it down in the first edition of his book, published in 1802, and for the correctness of which he vouches Emerigon, Roccus, and other eminent writers and commentators upon the subject ...’<sup>36</sup> and also accepted many

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<sup>30</sup> (William Maxwell 1860) 349. See also the 6th edn (Sweet & Maxwell, 1923) 330, where the above statement is virtually unchanged, save for the addition of ‘and stores’, after ‘apparel’ (line 2), and ‘comprehending in that word both voyage and cargo’, at the end of the first sentence (line 3).

<sup>31</sup> (n 19).

<sup>32</sup> No doubt aided by the fact that charterparty cases were the preserve of the common lawyers throughout the eighteenth and much of the nineteenth centuries, until such claims were restored to the Admiralty in the County Courts Admiralty Jurisdiction Amendment Act 1869, 32 & 33 Vict, c 51, subsequently extended to the High Court by s 5(1) of the Administration of Justice Act 1920, 10 & 11 Geo V, c 81. By this point, the Admiralty Court had been subsumed within the Probate, Divorce and Admiralty Division (PDA) of the Supreme Court of Judicature: F L Wiswall Jr, *The Development of Admiralty Jurisdiction and Practice since 1800* (CUP 1970) 102.

<sup>33</sup> See, for example, *Havelock v Geddes* (1809) 10 East 554, decided five years after *Lyon v Mells* (n 14).

<sup>34</sup> *Kopitoff v Wilson* (1876) 1 QBD 377, 380.

<sup>35</sup> (1853) 4 HL Cas 353.

<sup>36</sup> (1876) 1 QBD 377, 381. The report of the case refers wrongly to p 146 of the first edition; this should be p 181.

times in English law<sup>37</sup> and in other Common Law jurisdictions.<sup>38</sup> It would, nevertheless, be rare to find a charterparty which does not make express provision for seaworthiness in its terms today, particularly when many parties typically contract on one or more standard forms.<sup>39</sup>

## 4 Meaning of seaworthiness at common law

Charterparties and other contracts for the carriage of goods by sea do not usually contain a definition of seaworthiness;<sup>40</sup> indeed, as we already noted,<sup>41</sup> the usual wording provides that the shipowner's vessel is 'strong and staunch'<sup>42</sup> or 'tight and fit'.<sup>43</sup> This is understood as having wide-ranging consequences, which are now explored further.

### 4.1 Structural fitness: loading stage

Every voyage at sea has an antecedent phase, the loading stage.<sup>44</sup> It is established that, during the loading, the vessel must be fit to receive the cargo and to encounter the ordinary perils of the loading stage. In *McFadden v Blue Star Line*, Channell J explained that

the warranty is that at the time the goods are put on board she is fit to receive them and to encounter the ordinary perils that are likely to arise during the loading stage;

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<sup>37</sup> See *Lyon v Mells* (1804) 5 East 428, 437; *Cohn v Davidson* (1877) 2 QBD 455, 461; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 77, 84, 88; *Bank of Australasia v Clan Line Steamers Ltd* [1916] 1 KB 39, 55.

<sup>38</sup> See, eg, *The Niagara* (1858) 62 US 7, 23; *Putnam v Wood* (1867) 3 Mass 481, 485; *Fleming v Ramsay* (1905) 25 NZLR 596, 599; *Canadian Pacific Forest Products Ltd v Belships (Far East) Shipping Pte Ltd* [1999] 4 FC 320, 334-335.

<sup>39</sup> See below, text to n 199.

<sup>40</sup> Cf s 2(1) of the South African Merchant Shipping Act 1951, No 57, which defines unseaworthiness 'used in relation to a vessel [as] mean[ing] that she ... is not in a fit state as to the condition of her hull, equipment or machinery, the stowage of her cargo or ballast, or the number or qualifications of her master or crew, or in any other respect, to encounter the ordinary perils of the voyage upon which she is engaged or is about to enter ...'. Note that there is no similar definition in the Merchant Shipping Act 1995, cap 179 (rev ed 1996), or in the (UK) Merchant Shipping Act 1995, c 21.

<sup>41</sup> See above, text to n 6.

<sup>42</sup> *Charter party of the Cheritie* (1531); *Charter party of the George* (1538), *ibid*. See also, eg, *Behn v Burness* (1862) 1 B & S 877.

<sup>43</sup> *Lyon v Mells* (1804) 5 East 428; *The Silvia* (1898) 19 S Ct 7, 8. See also Abbott (n 18) 180: '... tight, staunch, and sufficient ...'.

<sup>44</sup> In a voyage charterparty, this stage is covered by the laytime bought by the charterer: see, eg, *Novorossisk Shipping Co v Neopetro Co Ltd (The Ulyanovsk)* [1990] 1 Lloyd's Rep 425, 431.



but that there is no continuing warranty after the goods are once on board that the ship shall continue fit to hold the goods during that stage and until she is ready to go to sea, notwithstanding any accident that may happen to her in the meantime.<sup>45</sup>

As Channell J indicates, once the loading stage is complete, this obligation comes to an end; the vessel must forthwith be seaworthy for the next stage, which will usually be the voyage or an intermediate stage where the vessel is lying waiting with the cargo on board.

#### 4.2 Structural fitness: commencement of the voyage

In its most fundamental sense, providing a seaworthy vessel requires the vessel being structurally fit for the intended voyage, 'fit to meet and undergo the perils of sea and other incidental risks to which of necessity she must be exposed in the course of a voyage'.<sup>46</sup> In *Steel v State Line Steamship Co*,<sup>47</sup> a vessel's orlop deck<sup>48</sup> port was insufficiently fastened and water entered through the port during the voyage, damaging a cargo of wheat. The House of Lords unanimously held that there was an implied obligation to tender a seaworthy vessel,<sup>49</sup> remitting the case to the Court of Session<sup>50</sup> to determine whether unseaworthiness had caused the loss.<sup>51</sup> That court subsequently found that the vessel had been proved to be unseaworthy.<sup>52</sup>

Structural unfitness typically entails some attribute of the ship itself which makes her unseaworthy<sup>53</sup> and a vessel will not be seaworthy if she is unable to cope with stormy weather or rough seas.<sup>54</sup> Other incidences of structural unfitness have been held to include defective

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<sup>45</sup> [1905] 1 KB 697, 704-705. See also *A E Reed & Co Ltd v Page, Son & East Ltd* [1927] 1 KB 743, 756.

<sup>46</sup> *Kopitoff v Wilson* (1876) 1 QBD 377, 380; *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 77, 84, 88; *Gilroy, Sons & Co v W R Price & Co* [1893] AC 56, 63; *Virginia Carolina Chemical Co v Norfolk and North American Steam Shipping Co* [1912] 1 KB 229, 243-244.

<sup>47</sup> (1877) 3 App Cas 72.

<sup>48</sup> The lowest deck in a vessel, usually below the waterline, although in this case about one foot above the water line: see, eg, at 80.

<sup>49</sup> See above, text to n 33.

<sup>50</sup> The case was an appeal from the Court of Session: see *Steel & Craig v State Line Steamship Co* (1877) 4 R 657.

<sup>51</sup> See particularly at 90-91 (Lord Blackburn). See also *The Marathon* (1879) 4 Asp MLC 75; *Gilroy, Sons & Co v W R Price & Co* [1893] AC 56.

<sup>52</sup> *Steel & Craig v State Line Steamship Co* (1878) 5 R 622, 623 (this report of the case was primarily concerned with the question whether the defenders were entitled to the expenses of the first trial and the court so held).

<sup>53</sup> See *A Meredith Jones & Co Ltd v Vangemar Shipping Co Ltd (The Apostolis)* [1997] 2 Lloyd's Rep 241, 257.

<sup>54</sup> See *Zuellig (Gold Coin Mills) v MV Autoly (The MV Katang)* [1970] SGHC 17; [1968-1970] SLR(R) 829.

masts and sails;<sup>55</sup> a leaking hull;<sup>56</sup> a defective screw shaft;<sup>57</sup> inadequate ballast;<sup>58</sup> leaking rivets<sup>59</sup> or bolts;<sup>60</sup> holed scupper pipes;<sup>61</sup> leaking hatch covers;<sup>62</sup> fractured shell plating;<sup>63</sup> corroded bottom plates<sup>64</sup> and cargo holds;<sup>65</sup> corroded shell plating and deck plating;<sup>66</sup> a damaged hull, caused by grounding;<sup>67</sup> mechanical damage to wiring, causing fire;<sup>68</sup> and losses caused by the inadequacy of a vessel's stern doors.<sup>69</sup>

If a vessel is structurally fit at the commencement of the voyage, but later gets into difficulty thereafter, she is not unseaworthy.<sup>70</sup> Such damage as has occurred would have to be pleaded as a breach of the shipowner's duty of due care.<sup>71</sup>

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<sup>55</sup> *Cauvin v Landsberg* (1851) 1 S 86 (Cape SC); *Namby v Joseph & Seagar* (1890) 9 NZLR 227.

<sup>56</sup> *Ibid.* See also *Denyssen (Muter's Executor) v McFie* (1860) 3 S 334 (Cape SC); *Cohn v Davidson* (1877) 2 QBD 455; *Ross & Glendining Ltd v Shaw, Savill, & Albion Co Ltd* (1907) 26 NZLR 845; *Charles Goodfellow Lumber Sales Ltd v Verreault* [1971] SCR 522.

<sup>57</sup> *The Glenfruin* (1885) 10 PD 103.

<sup>58</sup> *Leuw v Dudgeon* (1867) LR 3 CP 17n; *Master and Owners of SS City of Lincoln v Smith* [1904] AC 250 (PC) (upholding (1901) 22 NLR 234 (Natal SC)).

<sup>59</sup> *The Christel Vinnen* [1924] P 208; *Charles Brown & Co v Nitrate Producers Steamship Co* (1937) 58 LI LR 188 (but the shipowner was able to rely on a defence of latent defect under the Canadian Water Carriage of Goods Act 1910); *Cranfield Bros v Tatem Steam Navigation Co Ltd* (1939) 64 LI L Rep 264 (leaking rivet caused by corrosion).

<sup>60</sup> *Spillers Milling & Associated Industries Ltd v The Bryntawe* (1928) 32 LI L Rep 155.

<sup>61</sup> *Guan Bee & Co v Palembang Shipping Co Ltd* [1969] 1 MLJ 90.

<sup>62</sup> *Itoh & Co Ltd v Atlanska Plovidba (The Gundulic)* [1981] 2 Lloyd's Rep 418; London Arbitration 11/1983, (1983) 103 LMLN 4; *Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng'* [1998] 6 MLJ 468, 489; London Arbitration 14/2007, (2007) 720 LMLN 3.

<sup>63</sup> *The Toledo* [1995] 1 Lloyd's Rep 40. See also *MV Achilles v Thai United Insurance Co Ltd* 1992 (1) SA 324 (N) (inadequate welding to the vessel's shell plating).

<sup>64</sup> *Wanganui Herald Newspaper Co Ltd v Coastal Shipping Co Ltd* [1929] NZLR 305; *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep 210; *Jerneh Insurance Corp Sdn Bhd v Hai Heng Enterprise Sdn Bhd* [2002] 4 MLJ 332.

<sup>65</sup> *The Owners of the Cargo Lately Laden on Board the Ship or Vessel MV 'Viva Ocean' v The Owners or Demise Charterers of the Ship or Vessel MV 'Viva Ocean'* [2004] 6 MLJ 134.

<sup>66</sup> *PT Soonlee Metalindo Perkasa v Synergy Shipping Pte Ltd* [2007] SGHC 121; [2007] 4 SLR(R) 51.

<sup>67</sup> *Pac-Asian Service Pte Ltd v Westburne International Drilling Ltd* [1982] SGHC 39; [1981-1982] SLR(R) 588.

<sup>68</sup> *The Subro Valour* [1995] 1 Lloyd's Rep 509.

<sup>69</sup> *The Princess Victoria* [1953] 2 Lloyd's Rep 618.

<sup>70</sup> See, eg, *Whybrow & Company Pty Ltd v Howard Smith Co Ltd* (1913) 17 CLR 1.

<sup>71</sup> See further *Carver on Charterparties* (n 1) para 5-048.

### 4.3 Equipment

Closely linked to the vessel's physical structure is her equipment, including her engines,<sup>72</sup> which must be in working order.<sup>73</sup> This requirement has, however, also been held to include having properly functioning scuppers<sup>74</sup> and boilers;<sup>75</sup> the provision of adequate coal<sup>76</sup> and bunkers;<sup>77</sup> lubricating oil;<sup>78</sup> working refrigeration equipment;<sup>79</sup> having equipment which can measure condensation levels or humidity;<sup>80</sup> having provisions<sup>81</sup> and necessaries for the voyage, including medicines<sup>82</sup> and dunnage;<sup>83</sup> and having properly coated tanks.<sup>84</sup> Also within the ambit of the vessel's equipment are cranes used for loading and offloading cargo;<sup>85</sup> functioning ladders<sup>86</sup> and hatch pontoons;<sup>87</sup> sufficient power;<sup>88</sup> and having procedures in

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<sup>72</sup> *The Antigoni* [1991] 1 Lloyd's Rep 209; *The Endurance 1* [1998] SGCA 73; [1998] 3 SLR(R) 970; *Ever Lucky Shipping Co Ltd v Sunlight Mercantile Pte Ltd* [2003] SGHC 80; *CHS Inc Iberica SL v Far East Marine SA (The mv Devon)* [2012] EWHC 3747 (Comm); *MT Cape Bonny Tankschiffarts GmbH & Co KG v Ping An Property & Casualty Insurance Co of China Ltd* [2017] EWHC 3036 (Comm), [118].

<sup>73</sup> Abbott (n 18) 181 states, for example, that the 'ship, and her furniture [must] be sufficient for the voyage ...'.

<sup>74</sup> ie holes on the vessel's deck, allowing water to drain away: see *The Marathon* (1879) 4 Asp MLC 75.

<sup>75</sup> *Seville Sulphur and Copper Co Ltd v Colvils, Lowden & Co* (1888) 15 R 616: 'The power of locomotion on the waters is as much of the essence of a seagoing ship as the capacity of flotation, and a steamer without steam is as little the vessel which the charter-party describes, and which the defenders undertook to furnish, as a sailing vessel without sails would have been' (Lord Moncreiff, Lord Justice-Clerk). See also *Lindsay v Klein (the Tatjana)* [1911] AC 194; *New York & Cuba Mail Steamship Co v Eriksen & Christensen* (1922) 10 Ll L Rep 772; *A/B Karlshamns Oljefabriker v Monarch Steamship Co* 1949 SC(HL) 1.

<sup>76</sup> *Thin v Richards & Co* [1892] 2 QB 141; *Park v Duncan & Son* (1898) 25 R 528; *The Vortigern* [1899] P 140; *Fiumana Società di Navigazione v Bunge & Co Ltd* [1930] 2 KB 47.

<sup>77</sup> *Mclver v Tate Steamers* [1903] 1 KB 362; *Northumbrian Shipping Co Ltd v E Timm & Son* [1939] AC 397; *Westfal-Larsen & Co A/S v Colonial Sugar Refining Co Ltd* [1960] 2 Lloyd's Rep 206 (SC NSW), 209; *The Makedonia* [1962] 1 Lloyd's Rep 316; *E B Aaby's Rederi A/S v Union of India (The Evje No 2)* [1976] 2 Lloyd's Rep 714.

<sup>78</sup> *Westfal-Larsen & Co A/S v Colonial Sugar Refining Co Ltd* [1960] 2 Lloyd's Rep 206; *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex)* [1996] 2 Lloyd's Rep 171, 185.

<sup>79</sup> *Martin v Southwark* (1903) 24 S Ct 1.

<sup>80</sup> *Siderius Inc v M/V Amilla* (1989) 880 F 2d 662 (2nd Cir).

<sup>81</sup> *The Wilhelm* (1866) 14 LT 636.

<sup>82</sup> *Woolf v Claggett* (1800) 3 Esp 257. See also *Upperton v Union-Castle Mail Steamship Co Ltd* (1902) 9 Asp MLC 475.

<sup>83</sup> *The Marathon* (1879) 4 Asp MLC 75.

<sup>84</sup> *The Asia Star* [2007] SGCA 17; [2007] 3 SLR(R) 1.

<sup>85</sup> See *Parsons Corp v CV Scheepvaartonderneming (The Happy Ranger)* [2006] EWHC 122; [2006] 1 Lloyd's Rep 649.

<sup>86</sup> *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53.

<sup>87</sup> London Arbitration 14/2007, (2007) 720 LMLN 3.

<sup>88</sup> *Rey Banano del Pacifico CA v Transportes Navieros Ecuatorianos (The Isla Fernandina)* [2000] 2 Lloyd's Rep 15.

place to check on refrigerated containers.<sup>89</sup> The required equipment also includes having navigational aids in good working order<sup>90</sup> and up-to-date charts.<sup>91</sup>

#### 4.4 Cargoworthiness

A later broader requirement is that the vessel must also be cargoworthy. This was explained as follows in *Stanton v Richardson*:<sup>92</sup>

It is found that the cargo offered was a reasonable cargo, and that the ship was not fit to carry a reasonable cargo ... It seems to me that the obligation of the shipowner is to supply a ship that is seaworthy in relation to the cargo which he has undertaken to carry.<sup>93</sup>

In this case, a vessel was engaged to carry a cargo of sugar in bags but when wet sugar was loaded this gave off such a quantity of molasses that the vessel was rendered unseaworthy. In the case of cargo which needs to be refrigerated, the equipment must be adequate<sup>94</sup> and, where a vessel is contracted to carry live animals, the vessel must be free of disease.<sup>95</sup> Likewise, a cargo which cannot be offloaded because of an infestation of insects, would also render the vessel unseaworthy.<sup>96</sup> A vessel contracted to carry wool is unseaworthy if the holds are insulated for use as refrigerating chambers and unable to provide proper ventilation

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<sup>89</sup> *JP Klausen & Co AS v Mediterranean Shipping Co SA* [2013] EWHC 3254 (Comm).

<sup>90</sup> See, eg, *Edmund Weil Inc v American West African Line Inc* (1945) 147 F 2d 363 (2nd Cir).

<sup>91</sup> Cf *The Torepo* [2002] 2 Lloyd's Rep 535 (although the discrepancy in the charts was not a material defect in the chart portfolio and the disparity was not causative).

<sup>92</sup> (1872) LR 7 CP 421.

<sup>93</sup> At 435 (Brett J). Affirmed (1874) LR 9 CP 390, 392; (1875) 3 Asp MLC 23 (HL), 25. See also *Tattersall v The National Steamship Co Ltd* (1884) 12 QBD 297, 300; *Owners of Cargo on Board SS Waikato v The New Zealand Shipping Co Ltd* [1898] 1 QB 645, 647; *Rathbone Brothers & Co v Maciver, Sons & Co* [1903] 2 KB 378, 386; *Martin v Southwark* (1903) 24 S Ct 1, 3; *Fleming v Ramsay* (1905) 25 NZLR 596; *Virginia Carolina Chemical Co v Norfolk and North American Steam Shipping Co* [1912] 1 KB 229, 243-244; *AE Reed & Co Ltd v Page Son & East Ltd* [1927] 1 KB 743, 754; *MDC Ltd v NV Zeevaart Maatschappij Beursstraat* [1962] 1 Lloyd's Rep 180, 186; *Owners of Cargo carried in the Ship 'Gang Cheng' v Owners and/or Persons Interested in the Ship 'Gang Cheng'* [1998] 6 MLJ 468, 488; *Canadian Pacific Forest Products Ltd v Belships (Far East) Shipping Pte Ltd* [1999] 4 FC 320, 334; *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd's Rep 191, 198; *The Asia Star* [2006] SGHC 115; [2006] 3 SLR(R) 612, [25].

<sup>94</sup> See *Owners of Cargo on the Maori King v Hughes* [1895] 2 QB 550; *JP Klausen & Co AS v Mediterranean Shipping Co SA* [2013] EWHC 3254 (Comm).

<sup>95</sup> See *Tattersall v National Steamship Co Ltd* (1884) 12 QBD 297; *Sleigh v Tyser* [1900] 2 QB 333.

<sup>96</sup> *Empresa Cubana Importada de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586, 592. Similarly, with rats: *Cauvin v Landsberg* (1851) 1 S 86 (Cape SC), 88 ('... infested with rats, had no cat ...'). See also *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774, 780; *BHP Trading Asia Ltd v Oceaname Shipping Ltd* (1996) 67 FCR 211, 229.

for the cargo.<sup>97</sup> Similarly, a vessel chartered for the carriage of refined, bleached, and deodorised palm is unseaworthy where the tank coating had failed by as much as 40 per cent when inspected on delivery by the charterer's surveyor.<sup>98</sup> It has also been held that a vessel is unseaworthy where proper loading instructions were not given, leading to the capsizing of a barge during loading.<sup>99</sup> Thus, in order to be cargoworthy, the vessel must be capable of loading, discharging, and delivering the cargo safely at its destination.<sup>100</sup>

It is also necessary that the cargo is stowed in such a way that it is safe for the vessel to proceed on her journey:

It is the duty of the owner of a ship, and of the master as representing the owner, to take care ... that the ship is not loaded beyond what she can reasonably stow and carry. In this respect, he ... cannot relieve himself from his liability by anything short of showing that the vessel positively and in fact was not overloaded.<sup>101</sup>

A vessel may, therefore, be rendered unseaworthy if there is no system in operation to deal with the need for the cargo to be stowed in a way that does not endanger the ship, bad stowage endangering the safety of the ship being unseaworthiness.<sup>102</sup> If, on the other hand, a vessel is badly stowed but this does not endanger the ship but only other cargo, the vessel will not be rendered unseaworthy.<sup>103</sup>

The carriage of sophisticated cargoes by sea has necessitated the taking of measures to protect the crew and prevent marine pollution; these measures include the International

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<sup>97</sup> *Queensland National Bank Limited v Peninsular & Oriental Steam Navigation Co* [1898] 1 QB 567; *Owners of Cargo on Board SS Waikato v New Zealand Shipping Co Ltd* [1899] 1 QB 56.

<sup>98</sup> *The Asia Star* [2007] SGCA 17; [2007] 3 SLR(R) 1.

<sup>99</sup> *Tahsis Co v Vancouver Tug Boat Co* [1969] SCR 12.

<sup>100</sup> See, eg, where on discharge, flakes of scale fell from hatch coamings and the sides of hatches into a cargo of soda ash: London Arbitration 7/2000, (2000) 539 LMLN 3.

<sup>101</sup> *Denyssen (Muter's Executor) v McFie* (1860) 3 S 334 (Cape SC), 341 (Bell J). Cf also *J & E Kish v Charles Taylor Sons & Co* [1912] AC 604 (deviation to a port of refuge for repairs because of overloading).

<sup>102</sup> See *Kopitoff v Wilson* (1876) 1 QBD 377; *Steel v State Line Steamship Co* (1877) 3 App Cas 72; *Master and Owners of SS City of Lincoln v Smith* [1904] AC 250 (PC) (upholding (1901) 22 NLR 234 (Natal SC)); *Cunningham v The Frontier SS Co* [1906] 2 IR 12; *Ingram & Royle Ltd v Services Maritimes du Tréport Ltd* [1913] 1 KB 538; *Moore v Lunn* (1923) 15 Ll L Rep 155; *Compania Sud Americana de Vapores SA v Sinochem Tianjin Ltd (The Aconcagua)* [2009] EWHC 1880 (Comm); [2010] 1 Lloyd's Rep 1, [367].

<sup>103</sup> See *Bond, Connolly & Co v Federal Steam Navigation Co Ltd* (1906) 22 TLR 685; *The Thorsa* [1916] P 257; *Elder, Dempster & Co Ltd v Paterson, Zochonis & Co Ltd* [1924] AC 522; *Actis Co v Sanko Steamship Co (The Aquacharm)* [1982] 1 WLR 119.

Maritime Dangerous Goods (IMDG) Code,<sup>104</sup> the International Maritime Solid Bulk Cargoes Code (IMSBC Code),<sup>105</sup> and the International Bulk Chemical Code (IBC Code),<sup>106</sup> adherence to which is mandatory under SOLAS 1974<sup>107</sup> and MARPOL 73/78.<sup>108</sup> The obligation to take care to make the vessel seaworthy does not, however, mean that the ship must be immune from the negligence of her crew.<sup>109</sup> In *The Kapitan Sakharov*<sup>110</sup> the court held that under deck stowage of tank containers of isopentane, a flammable liquid,<sup>111</sup> clearly contravened the IMDG Code and rendered the *Kapitan Sakharov* unseaworthy<sup>112</sup> but that the shipowner, even exercising reasonable skill and care, could not have detected the presence of that cargo and had, therefore, exercised due diligence.<sup>113</sup>

#### 4.5 Manning

It is not enough for the vessel to be structurally fit and cargoworthy. She must also have on board sufficient crew for the voyage<sup>114</sup> including, if required, a pilot.<sup>115</sup> What amounts, however, to 'sufficiency' will be a question of fact in each case and, in modern circumstances, will be affected by the requirements of SOLAS 1974, which requires contracting

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<sup>104</sup> See <[www.imo.org/en/OurWork/Safety/Cargoes/DangerousGoods/Pages/default.aspx](http://www.imo.org/en/OurWork/Safety/Cargoes/DangerousGoods/Pages/default.aspx)>, accessed 1 December 2017.

<sup>105</sup> See <[www.imo.org/en/OurWork/Safety/Cargoes/CargoesInBulk/Pages/default.aspx](http://www.imo.org/en/OurWork/Safety/Cargoes/CargoesInBulk/Pages/default.aspx)>, accessed 1 December 2017.

<sup>106</sup> See <[www.imo.org/en/OurWork/Safety/Cargoes/CargoesInBulk/Pages/IBC-Code.aspx](http://www.imo.org/en/OurWork/Safety/Cargoes/CargoesInBulk/Pages/IBC-Code.aspx)>, accessed 1 December 2017.

<sup>107</sup> The International Convention for the Safety of Life at Sea, Ch VII, reg 3 (carriage of dangerous goods in packaged form); reg 7-5 (carriage of dangerous goods in solid form in bulk). For contracting states, see <[www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%20202017.docx.pdf](http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%20202017.docx.pdf)> accessed 30 November 2017.

<sup>108</sup> The International Convention for the Prevention of Pollution from Ships, Annex II (control of noxious liquid substances in bulk); Annex III (prevention of pollution by harmful substances carried by sea in packaged form).

<sup>109</sup> See *Compania Sud Americana de Vapores SA v Sinochem Tianjin Ltd (The Aconcagua)* [2009] EWHC 1880 (Comm); [2010] 1 Lloyd's Rep 1, [366].

<sup>110</sup> *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 255.

<sup>111</sup> IMDG Code, class 3.

<sup>112</sup> [2000] 2 Lloyd's Rep 255, 266.

<sup>113</sup> At 273 (for the purposes of Art III, r 1 of the Hague Rules, incorporated in the contracts of carriage: see below, text to n 307).

<sup>114</sup> Abbott (n 18) 181. See *Northern Commercial Co v Lindblom* (1908) 162 F 250 (9th Cir), 254; *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26, 34. A similar requirement applies in marine insurance cases: see *Tait v Levi* (1811) 14 East 481; *Clifford v Hunter* (1827) Moo & M 193.

<sup>115</sup> See, eg, *Newfoundland Export & Shipping Co Ltd v United British SS Co Ltd (The Framlington Court)* (1934) 69 F 2d 300 (5th Cir), 304. Such an approach has also been adopted in marine insurance cases: see *Phillips v Headlam* (1831) 2 B & Ad 380; *Dixon v Sadler* (1841) 5 M & W 405.

governments<sup>116</sup> to take measures to ensure that all ships are 'sufficiently and efficiently managed'<sup>117</sup> in accordance with the IMO Principles of Minimum Safe Manning.<sup>118</sup>

This requirement further extends to the competence of the vessel's crew,<sup>119</sup> including her master.<sup>120</sup> In the leading case, *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*,<sup>121</sup> the court found that though certain of the vessel's machinery was in a reasonably good condition '... by reason of its age, it needed to be maintained by an experienced, competent, careful and adequate engine room staff'.<sup>122</sup> Salmon J continued that:

... Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this engine room staff? ... I have no doubt that the true answer to this question is 'No'. It is obvious from the owners' associated company's letter ... to the owners' ... agents that the owners were informed that as the engines were very old it was necessary to engage an engine room staff 'of exceptional ability, experience and dependability'.<sup>123</sup>

Competence can also be affected by personality, an aspect of competence which has become much more important as crew numbers on board have diminished:

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<sup>116</sup> See the Merchant Shipping (Training, Certification and Manning) Regulations 2001 Reg 1, pt III. For the UK, see The Merchant Shipping (Standards of Training, Certification and Watchkeeping) Regulations 2015, SI 2015/ 782, reg 46.

<sup>117</sup> See ch 5, reg 14.1.

<sup>118</sup> Resolution A.1047(27) (20 December 2011). For consideration in the context of autonomous ships, see Luci Carey, 'All hands off deck? The legal barriers to autonomous ships' (2017) 23 JIML 202, 203 (also NUS Law Working Paper No 2017/011, available at <<https://law.nus.edu.sg/cml/wps.html>>, accessed 1 December 2017). See also Robert Veal & Michael Tsimplis, 'The integration of unmanned ships into the *lex maritima*' [2017] LMCLQ 304, 317.

<sup>119</sup> *Charter party of the Cheritie* (1531); *Charter party of the George* (1538), above text to n 6; Abbott (n 18) 181. See Roger White, 'The human factor in unseaworthiness claims' [1995] LMCLQ 221.

<sup>120</sup> *Moore v Lunn* (1923) 15 Ll L Rep 155, 156 (master and chief engineer 'habitual drunkards'); *Standard Oil Co of New York v Clan Line Steamers Ltd* [1924] AC 100, 120-121; *The Roberta* (1937) 58 Ll L Rep 231; *The Makedonia* [1962] 1 Lloyd's Rep 316; *Sea-Link Marine Services Ltd v Doman Forest Products Ltd* 2003 FCT 712.

<sup>121</sup> [1962] 2 QB 26.

<sup>122</sup> At 34. It does not follow from the mere fact of a collision between two vessels that the master and crew are incompetent: *State Trading Corp of India v Doyle Carriers Inc (The Jute Express)* [1991] 2 Lloyd's Rep 55, 59.

<sup>123</sup> *Ibid.* See also *Rio Tinto Co Ltd v The Seed Shipping Co Ltd* (1926) 24 Ll L Rep 316; *Newfoundland Export & Shipping Co Ltd v United British SS Co Ltd (The Framlington Court)* (1934) 69 F 2d 300 (5th Cir), 304; *The Makedonia* [1962] 1 Lloyd's Rep 316; *Robin Hood Flour Mills Ltd v NM Paterson & Sons Ltd (The Farrandoc)* [1967] 2 Lloyd's Rep 276; *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep 719.

In considering efficiency, the matters to be considered, in my view, are not limited to a disabling want of skill and a disabling want of knowledge. A man may be well qualified and hold the highest grade in certificates of competency and yet have a disabling lack of will and inclination to use his skill and knowledge so that they are well nigh useless to him. Such a man may be unable efficiently to use the skill and knowledge which he has through drunken habits or through ill-health.<sup>124</sup>

Current law will also be affected by enhanced international regulation on the competency of crew, as laid down in the STCW Convention 1978 (as amended),<sup>125</sup> chapters II and III of which lay down mandatory minimum requirements, respectively, for the certification of the master and deck department and engine department of ships, and which are reflected in the relevant national laws<sup>126</sup> of contracting states.<sup>127</sup> A further factor is the Maritime Labour Convention 2006,<sup>128</sup> which lays down minimum requirements for seafarer's employment and conditions of seafarer's employment, and which must also be expected to impact on the scope of the shipowner's obligation to provide a seaworthy vessel.<sup>129</sup>

#### 4.6 Relevant documentation

A wide range of certificates, papers and documents, are today required on board ship<sup>130</sup> and the absence of such documentation can amount to a breach of the shipowner's obligation to provide a seaworthy ship. Thus, the vessel will be unseaworthy if the necessary health

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<sup>124</sup> *The Makedonia* [1962] 1 Lloyd's Rep 316, 335 (Hewson J).

<sup>125</sup> The International Convention on Standards of Training, Certification and Watchkeeping for Seafarers (amended in 1995, 1997, and 2010).

<sup>126</sup> See the Merchant Shipping (Training, Certification and Manning) Regulations 2001 Reg 1, Pt II. For the UK, cf The Merchant Shipping (Standards of Training, Certification and Watchkeeping) Regulations 2015, SI 2015/782, pt 2.

<sup>127</sup> See <[www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.docx.pdf](http://www.imo.org/en/About/Conventions/StatusOfConventions/Documents/Status%20-%202017.docx.pdf)> accessed 1 December 2017.

<sup>128</sup> In force from 20 August 2013. For signatories, see <<http://www.ilo.org/dyn/normlex/en/f?p=1000:80020::NO:80020::>>, accessed 1 December 2017, implemented in Singapore in the Merchant Shipping (Maritime Labour Convention) Act 2014, No 6. For the UK, see the seven statutory instruments passed pursuant to the Merchant Shipping Act 1995, c 21, ss 85-86, during the period 2010-2014.

<sup>129</sup> See, eg, Pengfei Zhang & Edward Phillips, 'Safety first: Reconstructing the concept of seaworthiness under the Maritime Labour Convention 2006' (2016) 67 *Marine Policy* 54.

<sup>130</sup> See, eg, List of Certificates and Documents Required to be Carried on Board Ships (19 July 2017) FAL.2/Circ.131 MEPC.1/Circ.873 MSC.1/Circ.1586 LEG.2/Circ.3, downloadable from <[www.imo.org/en/Publications/SupplementsAndCDs/Documents/Certificatesonboardships.pdf](http://www.imo.org/en/Publications/SupplementsAndCDs/Documents/Certificatesonboardships.pdf)>, accessed 30 November 2017. Different flag administrations also lay down detailed requirements: see, eg, 2012 List of Certificates, Documents and Publications Required to be Carried on Board Singapore Flag Ships, MPA Shipping Circular No 6 of 2012, available from <[www.mpa.gov.sg/web/wcm/connect/www/9209e424-e98b-4a0d-b4ee-04409cf645c1/shipping-circular-no-6-of-2012.pdf?MOD=AJPERES](http://www.mpa.gov.sg/web/wcm/connect/www/9209e424-e98b-4a0d-b4ee-04409cf645c1/shipping-circular-no-6-of-2012.pdf?MOD=AJPERES)>, accessed 30 November 2017.



certificate from a port health authority<sup>131</sup> or consular manifest<sup>132</sup> is not available. In *The Madeleine*, the ship did not possess a deratisation certificate<sup>133</sup> or an exemption certificate and Roskill J stated that:

There was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel. That right, in my judgment, they possessed, and I think that the umpire was wrong in holding that they did not possess it.<sup>134</sup>

Other cases have, however, held that a vessel will not be unseaworthy where not carrying a deck certificate of clearance,<sup>135</sup> or an ITF Blue Card,<sup>136</sup> or where RightShip approval has not been obtained.<sup>137</sup> Thus, Kerr LJ stated that:

The nature of such certificates may vary according to the requirements of the law of the vessel's flag or the laws or regulations in force in the countries to which the vessel may be ordered, or which may lawfully be required by the authorities exercising administrative or other functions in the vessel's ports of call pursuant to the laws there in force. Documents falling within this category, which have been considered in the authorities, are certificates concerning the satisfactory state of the vessel which is in some respect related to her physical condition, and accordingly to her seaworthiness. Their purpose is to provide documentary evidence for the authorities at the vessel's ports of call on matters which would otherwise require some physical inspection of the vessel, and possibly remedial measures – such as fumigation – before the vessel will be accepted as seaworthy in the relevant respect. The nature of description of such certificates, which may accordingly be required to be carried on board to render the vessel seaworthy, must depend on the circumstances and would no doubt raise issues of fact in individual cases. But I do not see any basis for holding that such certificates

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<sup>131</sup> See *Levy v Costerton* (1816) 4 Camp 389; *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774.

<sup>132</sup> *Dutton v Powles* (1862) 2 B & S 191.

<sup>133</sup> A certificate confirming that the ship is free of rats.

<sup>134</sup> *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd's Rep 224, 241.

<sup>135</sup> *Wilson v Rankin* (1865) LR 1 QB 162; *Chellev Navigation Co Ltd v AR Appelquist Kolimport AG* (1933) 45 LI LR 190.

<sup>136</sup> *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd (The Derby)* [1985] 2 Lloyd's Rep 325.

<sup>137</sup> *Seagate Shipping Ltd v Glencore International AG (The Silver Constellation)* [2008] EWHC 1904 (Comm); [2008] 2 Lloyd's Rep 440.

can properly be held to include documents other than those which may be required by the law of the vessel's flag or by the laws, regulations or lawful administrative practices of governmental or local authorities at the vessel's ports of call.<sup>138</sup>

The standard required has clearly evolved in response to technological and legal change.<sup>139</sup> Indeed, the avalanche of regulation of international shipping has also imposed greater legal requirements on shipowners and this will have an impact on the potential scope of the seaworthiness obligation, although there may be some relief in future, given the current momentum towards the issuing of e-certificates.<sup>140</sup> That said, a vessel will very likely be unseaworthy if not ISM compliant,<sup>141</sup> carrying a valid ISSC certificate required under the ISPS Code,<sup>142</sup> or an International Sewage Pollution Prevention (ISPP) certificate, required under MARPOL 73/78.<sup>143</sup>

Some charterparty standard clauses make specific provision for the evolving scope of this requirement. In *The Elli and the Frixos*<sup>144</sup> the parties included an express clause to the effect that the owners warranted that the vessel complied 'with all applicable conventions, laws, regulations and ordinances of any international, national, state or local government entity ... including ... MARPOL 1973/1978 as amended and extended ...'. The tankers did not have double-bottom tanks but, before the end of the relevant time charterparties, MARPOL

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<sup>138</sup> *The Derby* (n 136) 331.

<sup>139</sup> See, eg, *Martin v Southwark* (1903) 24 S Ct 1, 3.

<sup>140</sup> See, eg, Wei Zhe Tan, 'Denmark, Norway and Singapore port authorities ink pact on E-Certificates', *Lloyd's List* (London, 25 April 2017). See also, 'DNV GL rolls out e-certificates for its classed vessels', *Lloyd's List* (London, 17 October 2017).

<sup>141</sup> The International Safety Management Code (the ISM Code), mandatory under SOLAS 1974, ch IX (as amended): *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep 719, 739. See Hannu Honka, 'The Standard of the Vessel and the ISM Code' in Johan Schelin (ed), *Modern law of Charterparties* (Axel Ax:son Institute of Maritime and Transport Law 2003) 105. It is a breach of the carrier's marine insurance cover not to have such certification: see, eg, the International Hull Clauses (1/11/03), cl 13.1.4 and 13.1.5. For implementation by the Singapore Register of Ships (SRS), see <[www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/flag-state-control/international-safety-management-code](http://www.mpa.gov.sg/web/portal/home/singapore-registry-of-ships/flag-state-control/international-safety-management-code)> accessed 30 November 2017.

<sup>142</sup> An International Ship Security Certificate is issued under the International Ship and Port Facility Security Code (the ISPS Code), mandatory under SOLAS 1974, ch XI-2. See Stephen Girvin, 'Commercial Implications of the ISPS Code' (2005) 330 *Marlus* 307. For implementation by the Singapore Register of Ships (SRS), see <[www.mpa.gov.sg/web/portal/home/port-of-singapore/port-operations/port-security/isps-international-ship-and-port-facility-security-code](http://www.mpa.gov.sg/web/portal/home/port-of-singapore/port-operations/port-security/isps-international-ship-and-port-facility-security-code)> accessed 30 November 2017.

<sup>143</sup> See Annex IV. Cf *Polestar Maritime Ltd v YHM Shipping Co Ltd (The Rewa)* [2012] EWCA Civ 153; [2012] 1 Lloyd's Rep 510 (effect of detention by Port State Control on a sale under the Norwegian Saleform).

<sup>144</sup> *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli and the Frixos)* [2008] EWCA Civ 584; [2008] 2 Lloyd's Rep 119.

Regulation 13H came into force, requiring an oil tanker of 5,000 tons deadweight and above, carrying heavy grade oil as cargo, to be fitted with double bottoms or double-sides not used for the carriage of oil and extending to the entire cargo tank length. The court held that the shipowners were in breach because they had failed to obtain exemption under changes to MARPOL, affecting the vessel's cargo carrying capacity, and that the warranty applied both on and after delivery and expressly referred to MARPOL as amended and extended.<sup>145</sup>

## 5 Scope of seaworthiness at common law

### 5.1 Seaworthiness relative but absolute

The obligation to provide a seaworthy vessel is not demanded in abstract terms,<sup>146</sup> being relative to the nature of the ship,<sup>147</sup> the particular voyage,<sup>148</sup> the time of the year,<sup>149</sup> the stages of that voyage,<sup>150</sup> the cargoes which the shipowner has contracted to carry,<sup>151</sup> and the relevant standards for the carrying of cargoes at the applicable time.<sup>152</sup> The standard required is not an accident-free ship, nor an obligation to provide a ship or gear which might withstand all conceivable hazards.<sup>153</sup> A temporary defect or one which is trivial and can be remedied will

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<sup>145</sup> At [24]; [26].

<sup>146</sup> It has been said that 'there is no positive condition of the vessel recognized by the law to satisfy the warranty of seaworthiness': *Knill v Hooper* (1857) 2 H & N 277, 283.

<sup>147</sup> Lord Esher MR has stated that the vessel must be '... in a condition to bear all the ordinary vicissitudes of the voyage ...': *Thin v Richards & Co* [1892] 2 QB 141, 143. See also *Northern Steamship Co Ltd v Dominion Portland Cement Co Ltd* [1921] NZLR 372, 375; *Actis Co Ltd v The Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 Lloyd's Rep 7, 9.

<sup>148</sup> *Ciampa v British India Steam Navigation Co Ltd* [1915] 2 KB 774, 780; *Charles Brown & Co v Nitrate Producers Steamship Co* (1937) 58 Ll LR 188, 190; *Canadian National Railway Co v E & S Barbour Ltd* [1963] SCR 323; *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd's Rep 191, [18]; *Ever Lucky Shipping Co Ltd v Sunlight Mercantile Pte Ltd* [2003] SGHC 80, [40].

<sup>149</sup> *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 24 Ll LR 446, 458; *Charles Brown & Co v Nitrate Producers Steamship Co* (1937) 58 Ll LR 188, 190; *Edmund Weil Inc v American West African Line Inc* (1945) 147 F 2d 363 (2nd Cir).

<sup>150</sup> *The Vortigern* [1899] P 140. For voyages in stages, see below, text to n 218.

<sup>151</sup> See *Stanton v Richardson* (1875) 3 Asp MLC 23 (HL); *Tattersall v The National Steamship Co Ltd* (1884) 12 QBD 297, 300; *W Angliss & Co (Australia) Pty Ltd v P & O Steam Navigation Co* (1927) 28 Ll L Rep 202.

<sup>152</sup> See *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1927) 27 Ll LR 395, 396; *Empresa Cubana Importada de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586, 592.

<sup>153</sup> *President of India v West Coast Steamship Co (The Portland Trader)* [1963] 2 Lloyd's Rep 278, 280-281 (Dist Ct, Oregon).

not enough to render the vessel unseaworthy to encounter the perils of the voyage.<sup>154</sup> However, a defect which is inaccessible and invisible will not ordinarily render the vessel unseaworthy.<sup>155</sup> A latent defect<sup>156</sup> will, on the other hand, render a vessel unseaworthy, if causative of the unseaworthiness of the vessel,<sup>157</sup> unless within the terms of a clearly worded exception clause.<sup>158</sup>

Though relative, at common law the obligation is an unconditional one: the shipowner will be absolutely liable, irrespective of fault, for any breach of the undertaking:

[The] warranty is an absolute warranty; that is to say, if the ship is in fact unfit at the time when the warranty begins, it does not matter that its unfitness is due to some latent defect which the shipowner does not know of, and it is no excuse for the existence of such a defect that he used his best endeavours to make the ship as good as it could be made.<sup>159</sup>

In *Steel v State Line Steamship Co*, Lord Blackburn described the obligation as amounting to an undertaking 'not merely that they [the owners] should do their best to make the ship fit, but that the ship should really be fit'.<sup>160</sup> In some circumstances, it may be possible for the shipowner to contract out of this absolute obligation, such as by including the wording '... unseaworthiness or unfitness of the vessel at commencement of or before or at any time

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<sup>154</sup> *Steel v State Line Steamship Co* (1877) 3 App Cas 72; *Hedley v Pinkney & Sons Steamship Co* [1894] AC 222, 228; *The Pentland* (1897) 13 TLR 430; *The Stranna* [1938] P 69; *The Diamond* [1906] P 282; *Virginia Carolina Chemical Co v Norfolk & North American Steam Shipping Co Ltd* (1912) 17 Com Cas 277, 278; *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 24 Ll LR 446, 455; *Huddart Parker Ltd v Cotter* (1942) 66 CLR 624, 663-4; *International Packers London Ltd v Ocean Steamship Co Ltd* [1955] 2 Lloyd's Rep 218. See also London Arbitration 2/2005, (2005) 659 LMLN 1.

<sup>155</sup> *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 90-91; *Leonard v Leyland & Co* (1902) 28 TLR 727. Cf, however, *Gilroy, Sons & Co v W R Price & Co* [1893] AC 56, 64; *The Schwan* [1909] AC 450, 464.

<sup>156</sup> See *The Dimitrios N Rallias* (1922) 13 Ll L Rep 363, 365-366; *Charles Brown & Co Ltd v Nitrate Producers' Steamship Co Ltd* (1937) 58 Ll LR 188, 192-192.

<sup>157</sup> *The Glenfruin* (1885) 10 PD 103, 107-108; *London Rangoon Trading Co v Ellerman Lines Ltd* (1923) 14 Ll L Rep 497 (corroded storm valve pipe not a latent defect); *Guan Bee & Co v Palembang Shipping Co Ltd* [1969] 1 MLJ 90. Cf, however, *Charles Brown & Co Ltd v Nitrate Producers' Steamship Co Ltd* (1937) 58 Ll LR 188 (leaky rivets not a latent defect, but shipowner exercised due diligence to make the vessel seaworthy under the Canadian Water Carriage of Goods Act 1910 (9 & 10 Edward 7 c 62).

<sup>158</sup> *The Cargo ex Laertes* (1887) 12 PD 187.

<sup>159</sup> In *McFadden Brothers & Co v Blue Star Line Ltd* [1905] 1 KB 697, 703 (Channell J). See also *Martin v Southwark* (1903) 24 S Ct 1, 3; *Virginia Carolina Chemical Co v Norfolk & North American Steam Shipping Co* [1912] 1 KB 229, 243.

<sup>160</sup> (1877) 3 App Cas 72, 86.

during the voyage ... always excepted'.<sup>161</sup> If, however, the language of such a clause is ambiguous, the shipowner will not be able to rely on it.<sup>162</sup> Indeed, the courts have held that, to exclude seaworthiness, 'the words used must be express, pertinent, and apposite'.<sup>163</sup>

## 5.2 Test for unseaworthiness

The test for determining seaworthiness was laid down in the following terms in *McFadden v Blue Star Line*:

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 ... 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.<sup>164</sup>

Although the standards of seaworthiness may rise with more sophisticated knowledge, for example in shipbuilding, navigation,<sup>165</sup> and equipment,<sup>166</sup> perfection is not required:

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<sup>161</sup> *Wiener & Co v Wilsons & Furness-Leyland Line Ltd* (1910) 11 Asp MLC 413; *Snia Societa di Navigazione Industria e Commercio v Suzuki & Co* (1923) 17 Ll L Rep 78, 86.

<sup>162</sup> *Nelson Line (Liverpool) Ltd v James Nelson & Sons Ltd* [1908] AC 16. Lord Loreburn LC pointed out (at 20) that: 'I am afraid it is useless to draw the attention of commercial men to the risks they run by using confused and perplexing language in their business documents. Courts of law have no duty except to construe them when a question arises; but it is often very difficult. And sometimes what the parties really intended fails to be carried out because ill-considered expressions find their way into a contract.'

<sup>163</sup> *Sleigh v Tyser* [1900] 2 QB 333, 337-338 (Bigham J). See also *The Glenfruin* (1885) 10 PD 103; *Maori King v Hughes* [1895] 2 QB 550; *Queensland National Bank Limited v Peninsular & Oriental Steam Navigation Co* [1898] 1 QB 567; *Owners of Cargo on Board SS Waikato v New Zealand Shipping Co Ltd* [1899] 1 QB 56; *Rathbone Brothers & Co v Maciver, Sons & Co* [1903] 2 KB 378; *Atlantic Shipping and Trading Co Ltd v Louis Dreyfus & Co (The Quantock)* [1922] 2 AC 250, 260; *Westfal-Larsen & Co A/S v Colonial Sugar Refining Co Ltd* [1960] 2 Lloyd's Rep 206 (SC NSW), 209; *The Rossetti* [1972] 2 Lloyd's Rep 116, 118; *Sunlight Mercantile Pte Ltd v Ever Lucky Shipping Co Ltd* [2003] SGCA 47; [2004] 2 Lloyd's Rep 174; *Onego Shipping & Chartering BV v JSC Arcadia Shipping (The Socol 3)* [2010] EWHC 777 (Comm); [2010] 2 Lloyd's Rep 221.

<sup>164</sup> [1905] 1 KB 697, 706 (Channell J); *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 44 Ll LR 446, 454; *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd (The Derby)* [1985] 2 Lloyd's Rep 325, 332; *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd's Rep 191, [18]; *Ever Lucky Shipping Co Ltd v Sunlight Mercantile Pte Ltd* [2003] SGHC 80, [40].

<sup>165</sup> *Burges v Wickham* (1863) 3 B & S 669, 693 (marine insurance).

<sup>166</sup> *Ibid.* See also *Martin v Southwark* (1903) 24 S Ct 1, 3; *Mount Park Steamship Co v Grey* (1910) *Shipping Gazette* (12 March 1910), HL (cited by Scrutton LJ in *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 24 Ll LR 446, 454).

You do not test it by absolute perfection or by absolute guarantee of successful carriage. It has to be looked at realistically, and the most common test is: Would a prudent shipowner, if he had known of the defect, have sent the ship to sea in that condition?<sup>167</sup>

It has, therefore, been said that it is not the duty of a shipowner to adopt all the newest inventions; the 'ship need not be always, in all ways, up to date'.<sup>168</sup> Scrutton LJ held that

[The vessel] certainly need not have fittings or instruments which had not at the time been invented, because by subsequent inquiry a danger has been discovered which these fittings and instruments when invented might avert. While the shipowner may be bound to add improvements in fittings where the improvement has become well known or the discovery of danger established, the position is quite different where at the time of the voyage the discovery had not been made or the danger discovered.<sup>169</sup>

The position is different, however, where there are present defects in the existing equipment on board the ship:

... a prudent owner might well require even a trivial defect to be made good before sending his vessel to sea if, even in a remote contingency, that defect might jeopardise the safety of the vessel or its cargo, upon the basis that every defect, however small, that might do so, must, as a matter of prudence, be corrected before the vessel puts to sea.<sup>170</sup>

### 5.3 Time when the seaworthiness obligation attaches

The absolute obligation of seaworthiness has been held to attach at two points: firstly, at the commencement of loading, when the ship must be fit to receive her cargo and fit as a ship for the ordinary perils of lying afloat in harbour while receiving her cargo,<sup>171</sup> and secondly, on

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<sup>167</sup> *MDC Ltd v NV Zeevaart Maatschappij Beursstraat* [1962] 1 Lloyd's Rep 180, 186 (McNair J).

<sup>168</sup> *Mount Park Steamship Co v Grey* (1910) *Shipping Gazette* (12 March 1910), HL (per Lord Loreburn LC), cited in *FC Bradley & Sons Ltd v Federal Steam Navigation Co Ltd* (1926) 24 Ll LR 446, 454.

<sup>169</sup> At 454-455. See also *Demand Shipping Co Ltd v Ministry of Food Government of the People's Republic of Bangladesh (The Lendoudis Evangelos II)* [2001] 2 Lloyd's Rep 304, [23].

<sup>170</sup> *Athenian Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyd's Rep 376, 389.

<sup>171</sup> See *A E Reed & Co Ltd v Page, Son & East Ltd* [1927] 1 KB 743, 755. There is no implied obligation that the ship must be seaworthy on the approach voyage to the port: see *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA (The Nizeti)* [1960] 1 Lloyd's Rep 132, 137.

sailing, when the ship must be fit in design, structure, condition, and equipment to encounter the ordinary perils of the voyage.<sup>172</sup> At common law,<sup>173</sup> the obligation that attaches at the commencement of the voyage is not a continuing one and only attaches at the time of sailing.<sup>174</sup> The requirements have been construed by Kennedy J as:

... an absolute warranty that the carrying vessel must, at the time sailing with the goods, have that degree of fitness as regards both the safety of the ship and also the safe carriage of the cargo in the ship which an ordinary careful and prudent owner would require his vessel to have at the commencement of the voyage, having regard to the probable circumstances of that voyage and its nature.<sup>175</sup>

#### 5.4 Proof of unseaworthiness

The common law rule is that the burden of proving unseaworthiness falls on the claimant,<sup>176</sup> this going 'further than simply airing possibilities'.<sup>177</sup> In certain instances, however, there may be facts which might give rise to an inference of unseaworthiness and, where this occurs, this will shift the burden of proving that the vessel was seaworthy to the shipowner.<sup>178</sup> Thus, steering gear which broke down after three days of fair weather led to the presumption that the vessel was defective when the voyage commenced.<sup>179</sup> In another case, a vessel developed a sudden list to port because she lacked adequate stability and this was held to have occurred

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<sup>172</sup> *Stanton v Richardson* (1872) LR 7 CP 421; *The Rona* (1884) 51 LT 28, 30-31; *Cunningham v Colvils, Lowden, & Co* (1888) 16 R 295, 314; *McFadden v Blue Star Line* [1905] 1 KB 697, 703-704; *New York & Cuba Mail Steamship Co v Eriksen & Christensen* (1922) 10 Ll L Rep 772, 773; *Svenssons Travaruaktiebolag v Cliffe Steamship Co* [1932] 1 KB 490, 495-496; *Thompson & Norris Manufacturing Co Ltd v PH Ardley & Co* (1929) 35 Ll LR 248, 250.

<sup>173</sup> For time charterparties, see below, text to n 226.

<sup>174</sup> *McFadden v Blue Star Line* [1905] 1 KB 697, 703. The obligation to provide a seaworthy vessel does not apply at discharge: *Inglis Bros & Co Ltd v SS Port Stephens* [1926] NZLR 357.

<sup>175</sup> *Virginia Carolina Chemical Co v Norfolk & North American Steam Shipping Co* [1912] 1 KB 229, 243-244.

<sup>176</sup> *Lindsay v Klein (The Tatjana)* [1911] AC 194, 204; *Uni-Ocean Lines Pte Ltd v Kamal Sood (The Reunion)* [1983] 2 MLJ 189, 192. See, eg, London Arbitration 2/92, (1992) 319 LMLN 3, where the claimant failed to discharge this burden.

<sup>177</sup> London Arbitration 17/93, (1993) 363 LMLN 3.

<sup>178</sup> See *Ross & Glendining Ltd v Shaw, Savill & Albion Co Ltd* (1907) 26 NZLR 845, 854; *Waddle v Wallsend Shipping Co Ltd* [1952] 2 Lloyd's Rep 105, 139; *Lindsay v Klein (The Tatjana)* [1911] AC 194, 205; *Aktieselskabet de Danske Sukkerfabrikker v Bajamar Compania Naviera SA (The Torenia)* [1983] 2 Lloyd's Rep 210. A number of marine insurance cases confirm this: see *Watson v Clark* (1813) 1 Dow 446; *Pickup v Thames & Mersey Insurance Co Ltd* (1878) 3 QBD 594; *Ajum Goolam Hossen & Co v Union Marine Insurance Co Ltd* [1901] AC 362.

<sup>179</sup> *The Assunzione* [1956] 2 Lloyd's Rep 468, 487.

because of a failure to exercise due diligence to make her seaworthy.<sup>180</sup> Other factors might include proof of the age of a defect, such as corrosion.<sup>181</sup>

## 5.5 Causation

In order to succeed in a claim based on the unseaworthiness of the vessel at common law, it has been said that ‘unseaworthiness involves no liability on the shipowner unless it has caused the damage complained of’.<sup>182</sup> The test of causation in these circumstances is whether the act of default complained of is a proximate cause of the alleged damage.<sup>183</sup> Liability will follow where unseaworthiness is one of the causes of the loss, despite the existence of other causes which are covered by an express exception in the charterparty.<sup>184</sup>

## 6 Effect of unseaworthiness at common law

### 6.1 Serious breach of an innominate term?

The effect of a breach of the obligation to provide a seaworthy vessel was considered at length by the Court of Appeal in *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, a case already discussed in this paper.<sup>185</sup> In this case, Devlin LJ pointed out that there were ‘many contractual undertakings of a more complex character which cannot be categorised as being “conditions” or “warranties” ...’<sup>186</sup> and, moreover, that

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<sup>180</sup> *The Friso* [1980] 1 Lloyd’s Rep 469, 475.

<sup>181</sup> *Spillers Milling & Associated Industries Ltd v The Bryntawe* (1928) 32 Ll L Rep 155, 157; *Cranfield Bros v Tatem Steam Navigation Co Ltd* (1939) 64 Ll L Rep 264, 266-267.

<sup>182</sup> *The Europa* [1908] P 84, 97-98; *J & E Kish v Charles Taylor Sons & Co* [1912] AC 604, 608; *Paterson Steamships Ltd v Canadian Co-operative Wheat Producers Ltd* [1934] AC 538 (PC), 546.

<sup>183</sup> *Kamilla Han-Peter Eckhoff KG v AC Oerssleff’s EFTF A/B (The Kamilla)* [2006] EWHC 509 (Comm); [2006] 2 Lloyd’s Rep 238, [15].

<sup>184</sup> See *Smith, Hogg & Co Ltd v Black Sea and Baltic General Insurance Co Ltd* [1940] AC 997, 1004-1005; *Monarch Steamship Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, 226; *Heskell v Continental Express Ltd* (1950) 83 Ll L Rep 438, 458; *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57, 73. See also London Arbitration 22/10, (2010) 809 LMLN 1.

<sup>185</sup> [1962] 2 QB 26. For critique, see Brian Davenport, ‘Some Thoughts on the Classification of Contract Terms’ in Rose (n 1), ch 1; Donal Nolan, ‘*Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd, The Hongkong Fir* (1961)’ in Charles Mitchell & Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart 2000), ch 9.

<sup>186</sup> At 70.



the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise and do not follow automatically from a prior classification of the undertaking as a 'condition' or a 'warranty'.<sup>187</sup>

The case is often been said to characterise the seaworthiness term, whether implied or express, as an innominate term.<sup>188</sup> The effect, however, is that an innocent party, such as a charterer, will only be permitted to repudiate its obligations under the charterparty where the breach deprives it 'of substantially the whole benefit which it was the intention of the parties they should obtain from further use of the vessel...'.<sup>189</sup> A distinction must also be drawn between the situation where the breach is discovered before performance of the charterparty has commenced and where the breach only comes to light once the vessel has sailed. In *Stanton v Richardson*,<sup>190</sup> a case considered elsewhere in this paper,<sup>191</sup> bilge pumps failed to deal with surplus water from a cargo of wet sugar, affecting the safety of the ship on the voyage and requiring that her cargo was immediately discharged. The court held that the charterer was entitled to repudiate the contract as new pumps could not be installed within a reasonable time and the shipowner had failed to provide a vessel which was fit for the carriage of wet sugar.

## 6.2 Damages or other consequences

In the majority of cases, the claimant alleging unseaworthiness will be restricted to a remedy sounding in damages.<sup>192</sup> However, other consequences might also conceivably follow. Thus, if there is delay consequent on the breach,<sup>193</sup> this might frustrate the charterparty.<sup>194</sup> In the *Hongkong Fir*<sup>195</sup> case, however, the absence of a vessel for a period of five months while

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<sup>187</sup> Ibid.

<sup>188</sup> See, eg, *Carver on Charterparties* (n 1) para 3-081. See also *Carver on Bills of Lading* 4th edn (n 1) para 9-026.

<sup>189</sup> [1962] 2 QB 26, 73 (Diplock LJ).

<sup>190</sup> (1872) LR 7 CP 421 (affirmed (1874) LR 9 CP 390; (1875) 3 Asp MLC 23 (HL)).

<sup>191</sup> See above, text to n 92.

<sup>192</sup> See *The Europa* [1908] P 84. Such damages may include damages and costs which a charterer has to pay to other persons, such as stevedores, by reason of unseaworthiness: see *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53.

<sup>193</sup> Such may be exacerbated where, for example, a vessel is detained by a Port State Control officer.

<sup>194</sup> As, for example, in *Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1996] 2 AC 397 (voyage charterparty). For detailed consideration, see *Carver on Charterparties* (n 1), para 10-106.

<sup>195</sup> [1962] 2 QB 26.

undergoing repairs did not frustrate a time charterparty, the duration of which was 24 months. In many charterparties there is an express cancelling clause<sup>196</sup> and, where this is so, the charterer would be able to repudiate the charterparty where this links with an express seaworthiness clause.<sup>197</sup> The right of repudiation may also operate by virtue of the off-hire clause in a time charterparty.<sup>198</sup>

## 7 Seaworthiness in voyage charterparties

### 7.1 Wording in standard forms

Most modern voyage charterparties contain an express clause setting out the obligation to provide a seaworthy ship.<sup>199</sup> These express contractual obligations operate in place of the implied obligation. The Amwelsh 93 form and certain other voyage charterparty forms<sup>200</sup> require the shipowner to provide a vessel which is ‘tight, staunch and strong, and in every way fit for the voyage’.<sup>201</sup> This wording, which has echoes going back hundreds of years, is used frequently in charterparties.<sup>202</sup>

Most standard form voyage charterparties now contain more elaborate seaworthiness wording. The well-known Asbatankvoy form provides that:

The vessel, ... being seaworthy, and having all pipes, pumps and heater coils in good working order, and being in every respect fitted for the voyage, so far as the foregoing conditions can be attained by the exercise of due diligence, perils of the sea and any

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<sup>196</sup> See, eg, *Balttime 1939*, cl 21, lines 346-352; *NYPE 93*, cl 16, lines 205-208; *NYPE 2015*, cl 3, lines 62-66; *Shelltime 4*, cl 4, lines 145-147. For voyage charterparties, see eg *Amwelsh 93*, cl 5, lines 50-58.

<sup>197</sup> See, eg, *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd’s Rep 224.

<sup>198</sup> See, eg, *Stellar Chartering & Brokeage Inc v Efibanca-Ente Fianziario Interbancario SpA (The Span Terza)* [1984] 1 WLR 27; *HBC Hamburg Bulk Carriers GMBH & Co KG v Tangshan Haixing Shipping Co Ltd (The Fu Ning Hai)* [2006] EWHC 3250 (Comm); [2007] 1 All ER (Comm) 1127; *TS Lines Ltd v Delphis NV (The TS Singapore)* [2009] EWHC 933 (Comm); [2009] 2 Lloyd’s Rep 54.

<sup>199</sup> See, generally, Julian Cooke et al, *Voyage Charters* (4<sup>th</sup> edn, Informa 2014), ch 11.

<sup>200</sup> See also *Norgrain 89*, cl 1, line 12; *Synacomex 2000*, cl 2, lines 7-8, and the wording of certain time charterparty forms, discussed below, text to n 226.

<sup>201</sup> Cl 1, line 16.

<sup>202</sup> See the *Charter party of the George* (1538), discussed above, text to n 6 and, eg, *Cauvin v Landsberg* (1851) 1 S 86 (Cape SC); *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53; *A/B Karlshamns Oljefabriker v Monarch Steamship Co* 1949 SC (HL) 1.

other cause of whatsoever kind beyond the Owner's and/or Master's control excepted, shall load ...<sup>203</sup>

There are three elements, the first being that the vessel is 'seaworthy', the second that 'all pipes, pumps and heater coils' should be in 'good working order', and the third, the vessel 'being in every respect fitted for the voyage'. An important qualification of this wording, however, is that the required standard is one of due diligence, reinforcing the incorporation of the Hague Rules elsewhere in this form<sup>204</sup> and confirming that the obligation is not absolute, as it would be at common law.<sup>205</sup>

This wording may be contrasted with the even more elaborate wording in another oil charterparty, the modern Shellvoy 6<sup>206</sup> form:

Owners shall exercise due diligence to ensure that from the time when the obligation to proceed to the loading port(s) attaches and throughout the charter service –

- (a) The vessel and her hull, machinery, boilers, tanks, equipment and facilities are in good order and condition and in every way equipped and fit for the service required; and
- (b) The vessel has a full and efficient complement of master, officers and crew and the senior officers shall be fully conversant in spoken and written English language

and to ensure that before and at the commencement of any laden voyage the vessel is in all respects fit to carry the cargo specified ... For the avoidance of doubt, references to equipment in this Charter shall include but not be limited to computers and computer systems, and such equipment shall (inter alia) be required to continue to function, and not suffer a loss of functionality and accuracy (whether logical or mathematical) as a result of the run date or dates being processed.<sup>207</sup>

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<sup>203</sup> Cf BPVoy4, cl 1, lines 100-111; Vegoilvoy Tanker Voyage Charterparty, cl 1(a). As to the latter, see *The Asia Star* [2007] SGCA 17; [2007] 3 SLR(R) 1.

<sup>204</sup> See cl 20(b)(i). See the discussion below, text to n 334.

<sup>205</sup> Also reinforced in national legislation: see, eg, Carriage of Goods by Sea Act 1972, cap 33 (rev ed 1998), s 4; Carriage of Goods by Sea Act 1971, c 19 (UK), s 3.

<sup>206</sup> 2005 (rev 2007).

<sup>207</sup> Pt II, cl 1, lines 1-11. See also the Shelltime 4 form, discussed below, text to n 258.

A number of features in this clause may be noted. The first is that there is again an express due diligence standard,<sup>208</sup> demanded from the time of loading ‘and throughout the charter service’.<sup>209</sup> This continuing warranty is unusual in voyage charterparties, being more typically found in time charterparties.<sup>210</sup> The detailed scope of the obligation thereafter follows, referencing the master, officers, and crew, and containing a unique requirement that ‘senior officers shall be fully conversant in spoken and written English language’.<sup>211</sup> The cargoworthiness requirement applies ‘... before and at the commencement of *any laden voyage* ...’<sup>212</sup> Thus, not only must the vessel be cargoworthy at the commencement of the initial voyage, but also on any subsequent laden voyage during the course of the charterparty. The final sentence of the clause specifies that the vessel’s ‘computer and computer systems’ are also to be in good order and condition.<sup>213</sup>

The well-known Gencon 1994 form,<sup>214</sup> the leading general voyage charterparty form, adopts a different approach, providing that:

The Owners are to be responsible for loss of or damage to the goods or for delay in delivery of the goods only in case the loss, damage or delay has been caused by personal want of due diligence on the part of the Owners or their Manager to make the Vessel in all respects seaworthy and to secure that she is properly manned, equipped and supplied, or by the personal act or default of the Owners or their Manager.<sup>215</sup>

The clause has been described as ‘an exceptions clause operating in favour of the owners’.<sup>216</sup> After establishing the scope of the owners’ responsibility for loss, damage, or delay in delivery of the goods, the clause, much like the Asbatankvoy clause, provides that such responsibility

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<sup>208</sup> Line 1.

<sup>209</sup> Line 2.

<sup>210</sup> Cf, however, *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53. See also below, text to n 274.

<sup>211</sup> Line 6.

<sup>212</sup> Line 7. Emphasis supplied.

<sup>213</sup> Line 9.

<sup>214</sup> Cf also Gencon 1976, cl 2, lines 22-30.

<sup>215</sup> Clause 2, lines 15-21. See *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd’s Rep 191.

<sup>216</sup> See London Arbitration 7/2000, (2000) 539 LMLN 3.

only falls on the shipowner following a personal want of due diligence<sup>217</sup> for making the vessel 'in all respects seaworthy' and securing that 'she is properly manned, equipped and supplied'.

## 7.2 The doctrine of stages

In many instances there may be different stages in a voyage, some of which occur naturally, as for example when a vessel has to sail along a river to reach the high seas.<sup>218</sup> In *The Vortigern*, a voyage charterparty case, AL Smith JA stated that:

The only way in which this warranty can be complied with is for the shipowners to extend the existing warranty to the commencement of each stage, and I can see no reason why such a warranty should not be implied, and I have no difficulty in making the implication, for it is the only way in which the clear intention of the parties can be carried out, and the undoubted and admitted warranty complied with.<sup>219</sup>

In this type of case<sup>220</sup> the common law requires that the vessel must be seaworthy at the beginning of each stage.<sup>221</sup> There is some controversy as to whether there is an implied warranty at common law during the period before the commencement of loading<sup>222</sup> but it is clear that this will be required where the parties expressly so provide.<sup>223</sup> In the case of bunkering stops, the vessel must take on sufficient fuel to reach 'a particular convenient or usual bunkering port on the way',<sup>224</sup> also having regard to the ordinary incidents of navigation on the voyage at the time of year in question.<sup>225</sup>

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<sup>217</sup> See below, text to n 334.

<sup>218</sup> See *Northumbrian Shipping Co Ltd v E Timm & Son Ltd* [1939] AC 397, 403-404.

<sup>219</sup> [1899] P 140, 155. In this case, the vessel had taken on insufficient fuel to get her to Suez and her cargo of copra had to be burned as fuel. See also *McFadden Brothers & Co v Blue Star Line Ltd* [1905] 1 KB 697, 704; *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd* [1959] AC 133 (consecutive voyage charterparty).

<sup>220</sup> Possibly also in liner trades where a ship calls at ports in advertised sequence: see *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 (PC), 604 (Lord Somervell): 'The doctrine of stages had its anomalies and some important matters were never elucidated by authority'.

<sup>221</sup> See *Cunningham v Colvils, Lowden, & Co* (1888) 16 R 295; *Thin v Richards & Co* [1892] 2 QB 141; *Mclver v Tate Steamers* [1903] 1 KB 362.

<sup>222</sup> See *Compagnie Algerienne de Meunerie v Katana Societa di Navigazione Marittima SpA (The Nizeti)* [1960] 1 Lloyd's Rep 132, 140.

<sup>223</sup> See *New York & Cuba Mail Steamship Co v Eriksen & Christensen* (1922) 10 Ll L Rep 772.

<sup>224</sup> *Thin v Richards & Co* [1892] 2 QB 141, 143; *Northumbrian Shipping Co Ltd v E Timm & Son Ltd* [1939] AC 397, 404.

<sup>225</sup> *Walford de Baerdemaeker & Co v Galindez Bros* (1897) 2 Com Cas 137; *Mclver v Tate Steamers* [1903] 1 KB 362.

## 8 Time charterparties

### 8.1 Wording in standard forms

At common law, the seaworthiness obligation in time charterparties attaches at the commencement of hiring.<sup>226</sup> However, as is the case with voyage charterparties, standard form time charterparties always contain an express seaworthiness clause.<sup>227</sup> Though regarded as outdated,<sup>228</sup> the still heavily utilised New York Produce Exchange form, NYPE 1946, provides in the Preamble that

Vessel on her delivery to be ready to receive cargo with clean-swept holds and tight, staunch, strong and in every way fitted for the service, having water ballast, winches and donkey boiler with sufficient steam, or if not equipped with donkey boiler, then other power sufficient to run all the winches at one and the same time (and with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage)

...<sup>229</sup>

Several features of this clause should be noted. The first is that, as at common law, the obligation applies 'on delivery'.<sup>230</sup> The second is that the wording embraces the main requirements identified at common law, namely, provision of a cargoworthy vessel ('ready to receive cargo with clean-swept holds'),<sup>231</sup> a vessel which is physically able to withstand the perils of the sea ('tight, staunch, strong and in every way fitted for the service'),<sup>232</sup> and one

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<sup>226</sup> *Giertsen v Turnbull & Co* 1908 SC 1101, 1110. It has been suggested that the shipowner's obligation is to exercise due diligence before the start of each voyage (London Arbitration 24/1989, (1989) 259 LMLN 4) but this is yet to be confirmed in any reported case. In any event, the suggestion seems unnecessary in view of the continuing requirement to maintain a seaworthy vessel in most time charterparties: see below, text to n 274.

<sup>227</sup> *Cheikh Boutros Selim El-Khoury v Ceylon Shipping Lines Ltd (The Madeleine)* [1967] 2 Lloyd's Rep 224; *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd (The Derby)* [1984] 1 Lloyd's Rep 635. See, generally, Terence Coghlin et al, *Time Charters* (7th edn, Informa 2014) ch 8.

<sup>228</sup> Often with badly written home-made rider clauses: Grant Hunter, 'Standard Forms – the BIMCO experience' in D Rhidian Thomas (ed), *Legal Issues Relating to Time Charterparties* (Informa 2008) 1, 9.

<sup>229</sup> Lines 21-24.

<sup>230</sup> See below, text to n 274, on the continuing obligation.

<sup>231</sup> Line 22. 'Readiness' here embraces the requirement that the vessel is 'completely ready in all her holds so as to afford the merchant complete control of every portion of the ship available for cargo': *Groves, Maclean & Co v Volkart Bros* (1884) Cab & El 309, 311 (Lopes J).

<sup>232</sup> *Ibid.* The vessel must be 'fit to commence her chartered enterprise, which consists of loading and sailing when loaded': *New York & Cuba Mail Steamship Co v Eriksen & Christensen* (1922) 10 Ll L Rep 772, 773 (Greer J).

properly equipped ('having ballast water, winches ...' etc),<sup>233</sup> and properly manned ('with full complement of officers, seamen, engineers and firemen for a vessel of her tonnage').<sup>234</sup> The wording also emphasises that the vessel must be 'in every way fitted for the service'<sup>235</sup> and this was elaborated as follows in *The Derby*:

To discharge their obligations under this charter-party the owners were bound to provide a vessel which was physically fit to encounter all such perils as would be reasonably foreseeable on any voyage the charterers could legitimately require the ship to make, and to carry safely to its destination any cargo which the charterers could properly specify; they had to man the ship with a master and crew competent and sufficient for the purposes of any such voyages; they had to ensure that the ship was furnished with all such plant, tackle and equipment as might be reasonably necessary for those purposes, all in good mechanical order, and with all appropriate navigational aids, such for example as charts. They had, moreover, to ensure that the ship would be free to sail from any port from which the charterers might require it to set out and to enter any port which they might properly require it to enter without undue interference or delay. For these purposes the owners had to furnish the ship with all necessary documentary certificates or authorizations, or be able to ensure that any necessary document of that nature would be obtainable when required. They were under an obligation to ensure that the ship would be competent to reach a proper point of discharge in accordance with proper instructions from the charterer and to tender the cargo there for delivery to the charterers or their consignees.<sup>236</sup>

The NYPE 93 clause is updated in a number of respects. While the obligation also attaches 'on her delivery',<sup>237</sup> this is no longer in the Preamble to the charterparty but in a 'Delivery' clause requiring the vessel to be 'tight, staunch and strong and in every way fitted for *ordinary cargo service*'.<sup>238</sup> The reference to 'ordinary cargo service'<sup>239</sup> is in the same terms as the *Baltim*

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<sup>233</sup> Lines 22-24.

<sup>234</sup> Line 24.

<sup>235</sup> An express warranty of seaworthiness: see *Alfred C Toepfer Schiffahrtsgesellschaft GmbH v Tossa Marine Co Ltd (The Derby)* [1985] 2 Lloyd's Rep 325, 331.

<sup>236</sup> *Ibid*, 333 (Sir Denys Buckley). See also *Athenian Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyd's Rep 376, 389-390.

<sup>237</sup> Line 33.

<sup>238</sup> Lines 33-35. Emphasis supplied. See *Athenian Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyd's Rep 376.

<sup>239</sup> Similar wording has been interpreted as including the manning of the ship: see *The Roberta* (1937) 58 Ll L Rep 231, 235.

1939 form.<sup>240</sup> Finally, albeit in a different clause, the NYPE 93 form requires the vessel to have a 'full complement of officers and crew'.<sup>241</sup> As with NYPE 1946, the master is not expressly included, but this has been addressed in the new NYPE 2015 form,<sup>242</sup> which provides that

the vessel on delivery shall be seaworthy and in every way fit to be employed for the intended service, having water ballast and with sufficient power to operate all cargo handling gear simultaneously, and, with full complement of Master, officers and ratings who meet the Standards for Training, Certification and Watchkeeping for Seafarers (STCW) requirements for a vessel of her tonnage.<sup>243</sup>

The clause specifically states that the vessel on delivery 'shall be seaworthy',<sup>244</sup> echoing the first paragraph of Article III, r 1 of the Hague (and Hague-Visby) Rules,<sup>245</sup> and requires the vessel to be 'fit to be employed for the intended service'.<sup>246</sup> This replaces previous wording that the vessel is to be 'fitted for ordinary cargo service' and may be a response to a comment of Webster J in *The Arianna* that

... although it seems probable to me that there is rarely any practical difference between seaworthiness and fittedness, this case, it seems, may well be one in which there is, if only in theory, a difference ... And it seems to me that, although in many cases seaworthiness and fittedness for service have been treated as synonymous (where no doubt it has been appropriate to do so), they are not necessarily the same thing.<sup>247</sup>

Then, highlighting the importance of ballasting in shipboard operations,<sup>248</sup> the vessel is required to have 'water ballast', as well as 'sufficient power to operate the cargo handling gear simultaneously'. The latter is important in those cases where the vessel's own gear is used for loading and discharging cargo. The clause also requires a 'full complement of Master,

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<sup>240</sup> See below, text to n 250.

<sup>241</sup> Cl 6, line 82.

<sup>242</sup> Produced by BIMCO in collaboration with the Association of Shipbrokers and Agents (ASBA), copyright holders of the NYPE form, and the Singapore Maritime Foundation (SMF).

<sup>243</sup> Cl 2(b), lines 40-44.

<sup>244</sup> Line 40.

<sup>245</sup> See below, text to n 308.

<sup>246</sup> Lines 40-41.

<sup>247</sup> *Athenian Tankers Management SA v Pyrena Shipping Inc (The Arianna)* [1987] 2 Lloyd's Rep 376, 389-390.

<sup>248</sup> See above, text to n 58 (unseaworthy because of adequate ballast).



officers and ratings', as laid down by the STCW,<sup>249</sup> updating the provision in the earlier NYPE 93 form.

Another well-known general time charterparty form, the *Baltimex 1939 Uniform Time-Charter*,<sup>250</sup> requires in a 'Period/Port of Delivery/Time of Delivery' clause,<sup>251</sup> that the 'Vessel [is] in every way fitted for ordinary cargo service'.<sup>252</sup> This part of the charterparty clearly imports the cargoworthiness requirement, as an absolute standard, not modified by due diligence. However, tucked away in the 'Responsibility and Exemption' clause<sup>253</sup> we find the following:

The Owners only shall be responsible for delay in delivery of the Vessel or for delay during the currency of the Charter and for loss or damage to goods onboard, if such delay or loss has been caused by want of due diligence on the part of the Owners or their Manager in making the Vessel seaworthy and fitted for the voyage or any other personal act or omission or default of the Owners or their Manager.<sup>254</sup>

This provision, which is somewhat like the *Gencon 1994* provision,<sup>255</sup> provides for a duty of due diligence to make the vessel 'seaworthy and fitted for the voyage'.<sup>256</sup> The breadth of this wording appears to cover the full understanding of seaworthiness as understood at common law and it is, therefore, arguable that the standard of due diligence should apply also to cargo operations.<sup>257</sup>

The *Shelltime 4* charterparty, a leading oil form, contains an elaborate seaworthiness undertaking,<sup>258</sup> which applies both 'at the date of delivery and throughout the Charter period'.<sup>259</sup> Apart from confirming that the undertakings apply 'at the date of delivery',<sup>260</sup> the

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<sup>249</sup> See above, text to n 125.

<sup>250</sup> Revised 2001. Usually known as the 'Baltimex' form.

<sup>251</sup> Cl 1.

<sup>252</sup> Lines 25-26. See also *Westfal-Larsen & Co A/S v Colonial Sugar Refining Co Ltd* [1960] 2 Lloyd's Rep 206 (SC NSW) (Sugar Charterparty).

<sup>253</sup> Cl 12.

<sup>254</sup> Lines 163-170.

<sup>255</sup> See above, text to n 214.

<sup>256</sup> Line 168.

<sup>257</sup> As to the approach to be adopted when reconciling charterparty clauses, see *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd's Rep 191, discussed below, text to n 290.

<sup>258</sup> Cl 1 'Description and Condition of Vessel; Safety Management'.

<sup>259</sup> Cl 1, line 6. As to the latter, continuing seaworthiness requirement, see below, text to n 274.

<sup>260</sup> Line 6.

clause states that the vessel must be ‘in every way fit to carry crude petroleum and/or its products’.<sup>261</sup> Additionally, the vessel’s ‘tanks, valves and pipelines’ are required to be ‘oil-tight’<sup>262</sup> and the vessel must ‘in every way [be] fitted for burning ... at sea, fuel oil for main propulsion and fuel oil/marine diesel oil for auxiliaries [and], in port, fuel oil/marine diesel oil for auxiliaries’.<sup>263</sup> The core provisions follow thereafter:

[The vessel shall be] tight, staunch, strong, in good order and condition, and in every way fit for the service, with her machinery, boilers, hull and other equipment (including but not limited to hull stress calculator, radar, computers and computer systems) in a good and efficient state.<sup>264</sup>

This wording requires that the vessel must be ‘tight, staunch, strong’ and ‘in every way fit for the service’<sup>265</sup> and further applies to ‘machinery, boilers, hull and other equipment’.<sup>266</sup> The latter requirement specifically highlights, but does not limit this obligation to, ‘hull stress indicator, radar, computers and computer systems’.<sup>267</sup> This is important elaboration, recognising the increasing amount of automation on board modern vessels. The clause also specifies that the vessel is required to ‘have on board all certificates, documents and equipment required from time to time by any applicable law to enable her to perform the charter service without delay’.<sup>268</sup> Finally, there is explicit provision for a safety management system, in compliance with the ISM Code.<sup>269</sup> A separate clause also sets out detailed requirements as to the vessel’s shipboard personnel.<sup>270</sup>

In *The Fina Samco*<sup>271</sup> this undertaking was considered when a vessel was unable to discharge cargo owing a boiler defect arising after delivery. The main issue was whether another clause<sup>272</sup> in the charterparty required the shipowner to indemnify the charterer for failure to

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<sup>261</sup> Cl 1(b), line 9.

<sup>262</sup> Cl 1(d), line 13.

<sup>263</sup> Cl 1(e), lines 14-17.

<sup>264</sup> Cl 1(c), lines 10-12.

<sup>265</sup> Lines 10-11.

<sup>266</sup> Line 11.

<sup>267</sup> Line 11-12.

<sup>268</sup> Cl 1(g), lines 20-21.

<sup>269</sup> Cl 1(j)(i), lines 29-31.

<sup>270</sup> Cl 2, lines 45-74.

<sup>271</sup> *International Fina Services AG v Katrina Shipping Ltd (The Fina Samco)* [1995] 2 Lloyd’s Rep 344. Upheld on appeal: see [1995] 2 Lloyd’s Rep 344.

<sup>272</sup> Cl 3.

comply with the seaworthiness obligation in the charterparty. In considering this issue, the court had to decide whether the obligation was an absolute one or merely one requiring due diligence. In confirming that the relevant losses were post-delivery losses, Colman J stated that

Ex hypothesi owners were in breach ... in failing to comply with the requirements of that clause at delivery. It would indeed be strange if their remedial obligation in respect of that breach was confined to the exercise of due diligence and no more. A right to be indemnified in respect of post-delivery losses attributable to the continuance, after delivery, of the vessel's physical or personnel deficiencies and which is absolute and does not depend on the exercise of due diligence to remedy those deficiencies is thus consistent with the absolute nature of owner's obligations ... The owner's obligations ... [do] not depend on their exercise of due diligence.<sup>273</sup>

## 8.2 Continuing obligation of seaworthiness

At common law, the shipowner is obliged to maintain the vessel in a seaworthy state, provided that it has a reasonable opportunity of doing so, and so long as this does not cause unreasonable delay or expense to the various interests involved.<sup>274</sup> However, if cargo is damaged by a leak and the master negligently omits to take sufficient steps to stop the leak, causing further damage to the cargo, the shipowner will not be liable if the original and continuing source of the damage is covered by an exception.<sup>275</sup> Even if the damage is covered by an exception, the master will be required to take steps, wherever possible, to remedy it. Thus, in *The Rona*,<sup>276</sup> after leaving her moorings in New York, a wooden vessel stranded in a shoal just off Staten Island and, with initial tug assistance, was able to proceed on her way, although taking in water. Her master chose not to undertake any repairs and proceeded to London, encountering heavy weather en route. The claimant's cargo of flour was damaged by sea water which had come through the vessel's deck and the court held that the master was negligent in not effecting repairs and that the shipowner was liable. Thus, prudent action by

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<sup>273</sup> *The Fina Samco* (n 271), 248.

<sup>274</sup> *Shipton v Thornton* (1838) 9 A & E 314; *Worms v Storey* (1855) 11 Exch 427, 430; *The Rona* (1884) 5 Asp MLC 259, 261-262.

<sup>275</sup> See, eg, *The Cressington* [1891] P 152 (exception of perils of the sea and negligence of the master applied).

<sup>276</sup> (1884) 5 Asp MLC 259.

the master, in such circumstances, might include putting into a port of refuge for repairs<sup>277</sup> or having on board the vessel pumps capable of coping with moisture given off by the cargo loaded.<sup>278</sup>

Putting this common law obligation to one side, a substantial majority of time charterparties<sup>279</sup> also contain wording placing an ongoing obligation on the shipowner to provide a seaworthy vessel. A typical example, in the *Baltim* 1939 form,<sup>280</sup> provides that the shipowner is to 'maintain the vessel in a thoroughly efficient state in hull and machinery during service'.<sup>281</sup> In *Tyndale Steam Shipping Co Ltd v Anglo-Soviet Shipping Co Ltd*, this wording<sup>282</sup> was interpreted as follows:

... [I]t is sufficient to say that in my judgment there is no doubt that this stipulation ... does not constitute an absolute engagement or warranty that the shipowners will succeed in so maintaining her whatever perils or causes may intervene to cause her to be inefficient for the purpose of her services ... The engagement of the shipowners is this: that if accidents happen or events arise to cause the ship to be inefficient or the winches to be ineffective and out of action, they will take all reasonable and proper steps that reasonable men could take to put them back again. There is no evidence whatever ... that there was any such breach of that obligation on the part of the shipowners.<sup>283</sup>

Among the other well-known forms, NYPE (1946) obliges the shipowner to 'keep' the vessel in the same state as on delivery, while both NYPE 93 and NYPE 2015<sup>284</sup> provide that the

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<sup>277</sup> *Phelps, James & Co v Hill* [1891] 1 QB 605 (not an unauthorised deviation); *J & E Kish v Charles Taylor Sons & Co* [1912] AC 604. The vessel must not leave the port of refuge until again seaworthy: see, eg, *Worms v Storey* (1855) 11 Exch 427.

<sup>278</sup> *Stanton v Richardson* (1875) 3 Asp MLC 23 (HL), 24.

<sup>279</sup> Also some voyage charterparties: see, eg, *Scott v Foley, Aikman & Co* (1899) 5 Com Cas 53; *Shellvoy 6*, Pt II, cl 1, line 2. Cf also the seaworthiness obligation in every contract of service between the shipowner and the master and crew of a vessel: Merchant Shipping Act, cap 179 (rev ed 1996), s 112(1); (UK) Merchant Shipping Act 1995, c 21, s 42(1) (previously Merchant Shipping Act 1894, 57 & 58 Vict, c 60, s 458); *Cunningham v The Frontier SS Co* [1906] 2 IR 12, 59.

<sup>280</sup> Rev 2001.

<sup>281</sup> Cl 3, lines 40-41.

<sup>282</sup> Then cl 2 of the *Baltim* (1920) form.

<sup>283</sup> (1936) 54 Ll L Rep 341, 344-345 (Lord Roche). See also *Snia Societa di Navigazione Industria e Commercio v Suzuki & Co* (1924) 17 Ll L Rep 78, 88.

<sup>284</sup> See also *Gentime*, cl 11, lines 265-267: '... shall deliver the Vessel ... in a thoroughly efficient state of hull and machinery and shall exercise due diligence to maintain the Vessel in such Class and in every way fit for the service throughout the period of the Charter Party'. As to due diligence, see below text to n 307.

Owners ‘... shall ... keep her in a thoroughly efficient state in hull, machinery and equipment for and during the service ...’<sup>285</sup> The Shelltime 4 clause provides that

... whenever the passage of time, wear and tear or any event ... requires steps to be taken to maintain or restore the conditions stipulated in Clauses 1 and 2(a), [Owners shall] exercise due diligence so to maintain or restore the vessel.<sup>286</sup>

In *The Trade Nomad*, this wording was interpreted as follows:

‘Maintain’ connotes keeping the vessel in the requisite condition; ‘restore’ connotes putting the vessel back into that condition if it has not been so maintained. Both these verbs are to my mind more apt to refer to supervening defects, i.e. those occurring after delivery at any time throughout the service, rather than those already in existence before that period began. This view is strongly reinforced by the vital phrase ‘whenever (1) the passage of time, (2) wear and tear, or (3) any event require steps to be taken ...’. Criteria (1) and (2) clearly identify external physical occurrences affecting the vessel after delivery, either as a result of the passage of time, or of wear and tear, or perhaps a combination of both.<sup>287</sup>

On the facts, the court therefore decided that failures in a tanker’s crude oil washing system, present also at the date of delivery, were not affected by the clause, which only had application to defects in the vessel which came into existence after her delivery.<sup>288</sup>

### **8.3 Absolute obligation and due diligence**

One of the issues which arises in charterparties is the interface between any express absolute obligation of seaworthiness and a standard of due diligence. This becomes especially pertinent where the charterparty is also subject to the Hague (or Hague-Visby) Rules because

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<sup>285</sup> Cl 6, lines 81-82 (NYPE 93); cl 6(a), lines 94-96 (NYPE 2015). This form of wording is almost exactly the same as in the *Baltimex* (1939) form.

<sup>286</sup> Cl 3, lines 75-78. See also *BPTIME* 3, cl 9, lines 202-203: ‘Without prejudice to Clause 1, Owners shall exercise due diligence to maintain the Vessel in, or restore the Vessel to, the condition required pursuant to Clause 1 throughout the Charter Period’.

<sup>287</sup> *Poseidon Schiffahrt GmbH v Nomadic Navigation Co Ltd (The Trade Nomad)* [1999] 1 Lloyd’s Rep 723, 727. See also *Golden Fleece Maritime Inc v ST Shipping and Transport Inc (The Elli & The Frixos)* [2008] EWCA Civ 584; [2008] 2 Lloyd’s Rep 119 (amended Shelltime 4 charterparty), discussed above, text to n 144.

<sup>288</sup> Upholding [1998] 1 Lloyd’s Rep 57.

of a paramount clause.<sup>289</sup> In the leading case, *The Fjord Wind*,<sup>290</sup> the court had to consider the effect of two clauses in the charterparty, clause 1, which stated that the ‘vessel being tight, staunch and strong and in every way fit for the voyage, shall with all convenient speed proceed to [the river Plate] ... and there load ...’, and a further clause, clause 35, which stated that ‘owners shall be bound before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy ...’. Soon after departure with a cargo of Argentine soya beans, the vessel’s crankpin bearing in her main engine failed. The court noted that, if clause 1 had stood on its own, the required standard was an absolute one. As, however, the clause did not stand alone, it had to be read with clause 35, which Clarke LJ noted applied

‘before and at the beginning of the voyage’ ... [and] must include the loading process. Thus under cl 35 the owners must exercise due diligence to make her seaworthy for the loading process and thereafter they must exercise due diligence to make her seaworthy for the cargo-carrying voyage itself. It follows that cl 35 directly affects the true construction of cl 1 and the question arises whether it was intended to affect the whole operation of the clause. In my judgment, it was. The expression ‘before and at the beginning of the voyage’ is apt to include the whole period before the beginning of the voyage.<sup>291</sup>

Thus, the correct approach in such circumstances was a matter of construction of the charterparty, reading the relevant clauses ‘together in the context of the contract as a whole and in the light of ... commercial considerations to which I have referred’.<sup>292</sup> In these circumstances, the obligation of seaworthiness at each stage was the same, to exercise due diligence to make the vessel seaworthy.<sup>293</sup>

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<sup>289</sup> As to which, see below, text to n 334.

<sup>290</sup> *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd’s Rep 191.

<sup>291</sup> At [11].

<sup>292</sup> At [16].

<sup>293</sup> Reversing [1999] 1 Lloyd’s Rep 307. See also *International Fina Services AG v Katrina Shipping Ltd (The Fina Samco)* [1995] 2 Lloyd’s Rep 344, 352; *The Petroleum Oil & Gas Corp of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd (The Eternity)* [2008] EWHC 2480 (Comm); [2009] 1 Lloyd’s Rep 107, [20] (BPVOY 4 charterparty).

## 9 Demise charterparties

The most widely utilised demise (or bareboat) charterparty standard form, Barecon 1989, contains an express seaworthiness obligation, in the following terms:

The Owners shall before and at the time of delivery exercise due diligence to make the Vessel seaworthy and in every respect ready in hull, machinery and equipment for service under this Charter. The Vessel shall be properly documented at time of delivery.<sup>294</sup>

This clause was considered recently in *The Eye-Spy*.<sup>295</sup> The bareboat charterer alleged that the failure of the *Eye-Spy's* starboard stern tube assembly (SSTA)<sup>296</sup> was caused by the shipowner's failure to exercise due diligence to make the vessel seaworthy. The charterer also argued that the failure of the SSTA was caused by a latent defect and that its obligation to repair the vessel during the course of charterparty did not apply to latent defects. The court confirmed that the defect in the SSTA was a latent defect<sup>297</sup> and that due diligence required the shipowner to consult an expert repairer and have the vessel slipped to pull the shafts so the bearing in the stern seal could be properly examined.<sup>298</sup> The failure by the shipowner to take this step, being on notice about a problem which had not been properly rectified, was a breach of its principal seaworthiness obligation under the charterparty.<sup>299</sup>

In the amended Barecon 2001 form, the clause has been updated,<sup>300</sup> containing a separate sub-clause specifying that the vessel must be 'properly documented on delivery in accordance with the laws of the flag State ... and the requirements of the classification society...'<sup>301</sup>

As will be evident from the wording in Barecon 89 and Barecon 2001, the obligation must be exercised 'before and at the time of delivery', an intention that the obligation is owed also

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<sup>294</sup> Cl 2, lines 11-14.

<sup>295</sup> *Delaware North Marine Experience Pty Ltd v The Ship 'Eye-Spy'* [2017] FCA 708; [2017] 2 Lloyd's Rep 463.

<sup>296</sup> This is a hollow tube at the lower stern part of the vessel, connecting the tail shaft to the propeller.

<sup>297</sup> [2017] FCA 708 at [256].

<sup>298</sup> At [264].

<sup>299</sup> *Ibid* (ie under cl 2, lines 10-13, of Barecon 89 (now cl 3 of Barecon 2001)).

<sup>300</sup> See cl 3(a), lines 18-21

<sup>301</sup> Cl 3(b), lines 26-29.

during the period before the commencement of loading.<sup>302</sup> The required standard of care is due diligence.

The recently issued Barecon 2017<sup>303</sup> makes a number of important changes to the previous Barecon regime. Thus, in place of the wording in the older forms, the new clause provides that the shipowner must deliver the vessel 'in a seaworthy condition and in every respect ready for service'.<sup>304</sup> It is submitted that the effect of this is broader than under the Barecon 2001 form. The sub-clause on documentation is largely the same<sup>305</sup> as in the Barecon 2001 form. The main change, however, is that the required standard of seaworthiness is no longer one of due diligence. Accordingly, the standard is an absolute one, unless modified by the wording of the clause paramount.<sup>306</sup>

## 10 Due diligence and seaworthiness

### 10.1 Seaworthiness under the Hague (and Hague-Visby) Rules

As noted earlier, the standard of seaworthiness in many charterparty forms is one of due diligence.<sup>307</sup> This derives from the obligation in Article III, r 1 of the Hague (and Hague-Visby)

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<sup>302</sup> See *New York & Cuba Mail Steamship Co v Eriksen & Christensen* (1922) 10 Ll L Rep 772, 773.

<sup>303</sup> Issued on 12 December 2017. See 'New Barecon 2017 calculates future trends' <<https://www.bimco.org/news/press-releases/barecon>> accessed 12 December 2017.

<sup>304</sup> Cl 3(a), line 28. Cf the wording in the NYPE 2015 clause, above text to n 242.

<sup>305</sup> Cl 3(b), lines 34-35.

<sup>306</sup> See cl 12(a), lines 140-143.

<sup>307</sup> See above, text to n 289. See Malcolm Clarke, *Aspects of the Hague Rules* (Martinus Nijhoff 1976) 203 and the recently published doctoral study by Víctor Chacón, *The Due Diligence in Maritime Transportation in the Technological Era* (Springer 2017).



Rules and itself originates in the Liverpool Conference Form 1882,<sup>308</sup> which refers to a ‘want of due diligence by the Owners of the Ship’.<sup>309</sup> Article III, r 1 states:

The carrier<sup>310</sup> shall be bound before and at the beginning of the voyage to exercise due diligence to

(a) Make the ship seaworthy.

(b) Properly man, equip and supply the ship.

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

There are several distinctive features of this provision. The first is the period of application, ‘before and at the beginning of the voyage’, which covers the period ‘from at least the beginning of the loading until the vessel starts on her voyage’.<sup>311</sup> If, however, the vessel is unseaworthy owing to some earlier breach of due diligence, the shipowner will be liable on the ground of actual or imputed knowledge of the defects or failure to use due diligence continuing to the date relevant to the particular contract of carriage.<sup>312</sup> Once the vessel starts

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<sup>308</sup> This Form refers to a ‘want of due diligence by the Owners of the Ship’: Michael Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (Fred B Rothman & Co 1990) vol 2, 62. See also the (US) Harter Act of 1893, s 2: ‘It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent, or manager, to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence [to] properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened or avoided.’

<sup>309</sup> See Michael Sturley, *The Legislative History of the Carriage of Goods by Sea Act and the Travaux Préparatoires of the Hague Rules* (Fred B Rothman & Co 1990) vol 2, 62.

<sup>310</sup> ie the shipowner or charterer: see Art 1(a).

<sup>311</sup> *The Steel Navigator* (1928) 23 F 2d 590 (2nd Cir), 591-592; *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 (PC), 603; *Western Canada Steamship Co Ltd v Canadian Commercial Corp* [1960] 2 Lloyd’s Rep 313 (Can Sup Ct), 319; *The Makedonia* [1962] 1 Lloyd’s Rep 316, 338; *CHS Inc Iberica SL v Far East Marine SA (The mv Devon)* [2012] EWHC 3747 (Comm), [43].

<sup>312</sup> *W Angliss & Co (Australia) Pty Ltd v P & O Steam Navigation Co* [1927] 2 KB 456, 463. See also *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (The Kriti Rex)* [1996] 2 Lloyd’s Rep 171, 185.

on the voyage, the obligation no longer applies<sup>313</sup> and the period of coverage, unlike that at common law, is not broken by the doctrine of stages.<sup>314</sup>

The second feature of the provision relates to the extent of the obligation, which, as already noted, is one of 'due diligence'. The common law implied absolute obligation is abolished.<sup>315</sup> Due diligence has been interpreted by the courts as 'indistinguishable from an obligation to exercise reasonable care',<sup>316</sup> and 'lack of due diligence is negligence ...'.<sup>317</sup> The obligation is, however, an overriding one<sup>318</sup> and is not delegable to servants or agents: 'the shipowners' obligation of due diligence demands due diligence in the work of repair by whomsoever it may be done'.<sup>319</sup> If particular responsibilities are delegated to independent contractors or surveyors and such persons are negligent, the shipowner remains liable,<sup>320</sup> it being no defence that reliable experts<sup>321</sup> were engaged or that the shipowner lacked the necessary expertise to check their work.<sup>322</sup> However, the shipowner will not be responsible until the vessel comes under its 'orbit',<sup>323</sup> or its ownership, possession or control.<sup>324</sup> Thus, if a new vessel is commissioned or a vessel is chartered or purchased from another person,<sup>325</sup> the shipowner will not be liable for existing defects rendering the vessel unseaworthy, unless

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<sup>313</sup> See, eg, *Leesh River Tea Co Ltd v British India Steam Navigation Co Ltd* [1967] 2 QB 250, 274-275 (upholding [1966] 1 Lloyd's Rep 450, 457).

<sup>314</sup> See above, text to n 218.

<sup>315</sup> See, eg, Carriage of Goods by Sea Act 1924, cap 33 (rev ed 1998), s 4; (UK) Carriage of Goods by Sea Act 1924, c 19, s 3.

<sup>316</sup> See *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1960] 1 QB 536, 581; *Union of India v NV Reederij Amsterdam* [1963] 2 Lloyd's Rep 223 (HL), 235; *Christian Anderson v Attorney General of New Zealand (The Danica Brown)* [1995] 2 Lloyd's Rep 264, 266; *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep 719, [155].

<sup>317</sup> *Papera Traders Co Ltd v Hyundai Merchant Marine Co Ltd (The Eurasian Dream)* [2002] EWHC 118 (Comm); [2002] 1 Lloyd's Rep 719, [155].

<sup>318</sup> *Maxine Footwear Co Ltd v Canadian Government Merchant Marine Ltd* [1959] AC 589 (PC), 602-603.

<sup>319</sup> *International Navigation Co v Farr & Bailey Manufacturing Co* (1901) 21 S Ct 591; *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 807, 844 (overruling [1959] 1 QB 74; [1960] 1 QB 536 (CA)); *The British Columbia Sugar Refining Co Ltd v The Thor* [1965] 2 Ex CR 469.

<sup>320</sup> See *W Angliss & Co (Australia) Pty Ltd v Peninsula & Oriental Steam Navigation Co* [1927] 2 KB 456, 462; *Eridania SpA v Rudolf A Oetker (The Fjord Wind)* [2000] 2 Lloyd's Rep 191, 199.

<sup>321</sup> A shipowner may be able to cover itself by seeking an indemnity from the independent contractor.

<sup>322</sup> This would not extend further to responsibility for manufacturers, exporters, or shippers: *Northern Shipping Co v Deutsche Seereederei GmbH (The Kapitan Sakharov)* [2000] 2 Lloyd's Rep 255, 272.

<sup>323</sup> *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 807, 867.

<sup>324</sup> *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2006] EWHC 122 (Comm); [2006] 1 Lloyd's Rep 649, [37].

<sup>325</sup> See *W Angliss and Co (Australia) Pty Ltd v Peninsular and Oriental Steam Navigation Co* [1927] 2 KB 456, 461; *Riverstone Meat Co Pty Ltd v Lancashire Shipping Co Ltd (The Muncaster Castle)* [1961] AC 807, 853-854.

these were reasonably discoverable by the exercise of due diligence at the time of takeover.<sup>326</sup> If, however, the defect could have been apparent on a reasonable inspection of the vessel at the time that the vessel was taken over, the shipowner cannot rely for protection even on the certificate of a surveyor or any other classification society.<sup>327</sup> Thus, where a shipowner failed to appreciate that there had been inadequate proof testing of certain crane hooks by a classification society, for whose failings it was responsible, it was held not to have acted with due diligence.<sup>328</sup>

The third feature of the provision is the wording in (a), (b), and (c). This is understood as embracing each of the distinct elements of seaworthiness recognized at common law and does not have an extended or unnatural meaning.<sup>329</sup> However, the provision is then explicit in requiring due diligence as to manning,<sup>330</sup> equipment,<sup>331</sup> and supply of the vessel. Underlying the importance of the vessel also being cargoworthy, 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'.<sup>332</sup>

## 10.2 Paramount clauses

Neither the Hague nor the Hague-Visby Rules apply to charterparties.<sup>333</sup> If the parties wish to apply the Rules to a charterparty<sup>334</sup> this must be effected by means of an incorporating clause, a 'paramount clause' or 'clause paramount'.<sup>335</sup> The effect of such a clause was considered in

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<sup>326</sup> Ibid.

<sup>327</sup> *Parsons Corp v CV Scheepvaartonderneming Happy Ranger (The Happy Ranger)* [2006] EWHC 122 (Comm); [2006] 1 Lloyd's Rep 649.

<sup>328</sup> At [62].

<sup>329</sup> *Actis Steamship Co Ltd v The Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 WLR 119; *Ben Line Steamers Ltd v Pacific Steam Navigation Co (The Benlawers)* [1989] 2 Lloyd's Rep 51, 60; *Empresa Cubana Importada de Alimentos Alimport v Iasmos Shipping Co SA (The Good Friend)* [1984] 2 Lloyd's Rep 586, 592; *The Gang Cheng* (1998) 6 MLJ 468, 488; *Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (The Bunga Seroja)* [1999] 1 Lloyd's Rep 512, [86].

<sup>330</sup> See above, text to n 114.

<sup>331</sup> Above, text to n 72.

<sup>332</sup> Above, text to n 92.

<sup>333</sup> See Article V. This ensures that 'the shipowner retains absolute freedom to conclude charter parties on the terms he wishes and that he can insert whatever clauses he likes, as in the past ...': see *Carver on Bills of Lading* (n 1), para 9-310.

<sup>334</sup> Examples are as follows: Amwelsh 93, cl 24(a), lines 199-208; Asbatankvoy, cl 20(b)(i); Shellvoy 6, cl 37, lines 593-610; NYPE 1946, cl 24; NYPE 93, cl 31(a), lines 318-328; NYPE 2015, cl 33(a), lines 526-538; Shelltime 4, cl 38, lines 666-690.

<sup>335</sup> For fuller consideration, see *Carver on Charterparties* (n 1) para 5-009.

one of the leading cases, *The Saxon Star*.<sup>336</sup> This case arose out of a consecutive voyage charterparty for a tanker and contained a clause that the vessel was ‘tight, staunch and strong and every way fitted for the voyage, and to be maintained in such condition during the voyage’. The shipowner selected and appointed incompetent engine-room staff, the vessel breaking down on the first voyage to her loading port. The charterer lost the services of the vessel for an extended period but the shipowner claimed that its obligation was limited to the exercise of due diligence.<sup>337</sup> The House of Lords found for the shipowner, Viscount Simonds explaining that:

[T]he parties to a charter-party ... agree to impose upon the owners, in regard, for instance, to the seaworthiness of the chartered vessel, an obligation to use due diligence in place of the absolute obligation which would otherwise lie upon them.<sup>338</sup>

The same approach has been applied to trip time charterparties<sup>339</sup> but whether it will also apply to other charterparties, including time charterparties,<sup>340</sup> is yet to be resolved.<sup>341</sup>

## 11 Conclusion

Most aspects of the seaworthiness obligation have been thoroughly tested in the courts over several hundred years. In the charterparty context much of this law continues to apply and, as this paper has shown, many of the seaworthiness cases today require consideration of express clauses in the standard forms, demonstrating the continuing vitality and centrality of the concept. From the shipowners’ perspective, the weight of regulation has been heavy,

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<sup>336</sup> *Adamastos Shipping Co Ltd v Anglo-Saxon Petroleum Co Ltd (The Saxon Star)* [1959] AC 133.

<sup>337</sup> As contained in the US Carriage of Goods by Sea Act 1936.

<sup>338</sup> [1959] AC 133, 154. The House of Lords confirmed, by a majority, that the material provisions of the Act affected the rights and liabilities of the parties in connection with ballast voyages as well as cargo-carrying voyages, and voyages other than those to and from United States ports. See also *Seven Seas Transportation Ltd v Pacifico Union Marina Corp (The Satya Kailash and Oceanic Amity)* [1984] 1 Lloyd’s Rep 588, 593-594; *The Petroleum Oil & Gas Corp of South Africa (Pty) Ltd v FR8 Singapore Pte Ltd (The Eternity)* [2008] EWHC 2480 (Comm); [2009] 1 Lloyd’s Rep 107, [19].

<sup>339</sup> *Aliakmon Maritime Corp v Trans Ocean Continental Shipping Ltd (The Aliakmon Progress)* [1978] 2 Lloyd’s Rep 499, 501.

<sup>340</sup> See, eg, *Nitrate Corp of Chile Ltd v Pansuiza Compania de Navegacion SA (1978 N No 732)(The Hermosa)* [1980] 1 Lloyd’s Rep 638, 647-648.

<sup>341</sup> At 648; London Arbitration 24/1989, (1989) 259 LMLN 4.

particularly since the establishment of the International Maritime Organisation,<sup>342</sup> and continues unabated. This is continuing to have some impact on the seaworthiness obligation, particularly as many charterparty standard forms are revised. Indeed, the notable trend is for these later revisions of the standard forms to embrace more specific detailed seaworthiness requirements. Not all the difficulties have been resolved, however. In particular, the real impact of new challenges, such as autonomous ships<sup>343</sup> and the so-called fourth industrial revolution and ‘smart shipping’, are still to be felt.<sup>344</sup>

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<sup>342</sup> The ‘global standard-setting authority for the safety, security and environmental performance of international shipping’. See <[www.imo.org](http://www.imo.org)>, accessed 7 December 2017, and Agustin Blanco-Bazán, ‘IMO – Historical Highlights in the life of a UN Agency’ (2004) 6 J of the History of International Law 259.

<sup>343</sup> See Carey and Tsimplis & Veal (n 118).

<sup>344</sup> See, eg, Richard Clayton, ‘Outlook 2018: Prologue of a new era’, *Lloyd’s List* (London, 29 November 2017).