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OCEAN CARRIAGE-WHAT CONSTITUTES SEAWORTHINESS

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ABSTRACT

This paper deals with the interest of cargo owners while their goods are on board the vessels and the direct duty of the shipowners to ensure their vessels are seaworthy in accordance to the relevant laws. The paper discusses in detail what constitutes seaworthiness.

Keywords : Seaworthiness, cargo, shipowner, shipping.

INTRODUCTION

The Key issue to shippers is that their cargoes safely reach the destination Most shippers entrust their cargoes to forwarders or parties, respectively, involved in the Combined Transport Operator (CTO/MTO) where goods are transported in one loading or vehicle via a combination of road, rail and inland waterway modes. The Multimodal Transport Convention (1992) defined a Multimodal Transport Operator (MTO/CTO) as: "...any person who on his own behalf or through another person acting on his behalf concludes a multimodal transport contract and who acts as a principal, not as an agent or on behalf of the consignor or of the carriers participating in the multimodal transport operations, and who assumes responsibility for the performance of the contract."

In order to reach their destination or port traded goods must comply with the laws of the receiving country and also the regulations of the country port of loading. For example, goods leaving Malaysia and subject to specific controls (arms, explosives, motor vehicles, dangerous drugs, chemical, plants, soil, tin-ore, slag or concentrates, certain essential foodstuffs, plastic resins, tobacco, and rice). Ministry of Trade and Industry (MITI 2002) must go through controls, permits, duties, tariffs, quotas and/or licences. Similarly, goods going into other countries must comply with their methods of labelling and marking (Pinnells, 1995). Non-compliance to the rules and regulations may result in goods being delayed or confiscated as contraband items.

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International Trading means contracts and goods are subject to uniform rules. International Commercial Terms (INCOTERMS 2000), applicable for easier transactions, carriage of goods by sea requires the carrie or shipowner to comply with safety rules and regulations. Recognizing the need to regulate traffic in the Straits of Malacca and Singapore, the Malaysian Merchant Shipping Ordinance 1952 empowered the Minister of Transport to make regulations to prevent collisions in Malaysian waterways. The upshot of this was the emergence of the Merchant Shipping (Collision Regulations and Rules for Vessels Navigating through the Straits of Malacca and Singapore) Order 1984. The Malaysian collision regulations are similar to those enacted in British laws and contain regulations stating that while navigating the waterways (Yussof, 1997) lights are to be carried and exhibited, that a fog signal is to be carried and used; and the steering and sailing rules are to be observed by ships. The International Safety Management Mandatory Code (ISM), which came force on the 1st of July 1998, requires shipowners to provide a seaworthy vessel for certification purposes each company or shipowner must ensure that documentation and its procedures are kept and recorded and any actions are planned monitored and verified. Verification in turn has to be taken by a person or authority responsible with clearly defined duties and tasks involved in safe ship management and pollution control (Choon, 1997). Accordingly, the ISM Code is applicable to all passenger vessels, carrier of gas, bulk consignments and chemicals and tankers of over 500 GRT. (MARPOL, 2001).

WHAT AMOUNTS TO SEAWORTHINESS

In the older days where ships were made of woods and planks, shipowners undertook to promise to the cargo owners to ship their cargoes safely to the destination and to care for the consignments while in their possession. In other words, they were considered as bailors carrying goods for the bailees under the bailment contract. In Malaysia, such provisions were governed under Part IX, - Of Bailment-Contracts Act 1950 (Revised 1974). As such the shipowners duty can be considered as one of a strict duty. When damage occurred to the goods, they were liable under the law of torts, i.e., failure to take care of the cargoes. It can be said that bailors were themselves the insurers of the cargoes.

The obligation to provide a seaworthy vessel binds a shipowner under an implied obligation in the absence of "paramount clause" of the Hague-Visby Rules 1971. Prior to 1971 shipowners have the full liberty to contract and therefore in regards to seaworthiness, it is an implied duty to provide a seaworthy vessel referred to as "light", "staunch", and "every way fitted" for the ocean journey. However, these criteria may only apply before or at the beginning of the voyage. Similarly, it could also be said that the carrier undertook that his vessel merely seaworthy. Again, the strict liability to the common carrier can be mitigated and negated by private contracts or even by certain legislation.

With the advent of legislator's intention, some of the freedom that belongs to the shipowners as regards to seaworthiness had been taken way. Clause 2 of the GENCON charterparty imposes liability for unseaworthiness only when it is caused by "personal want of due diligence" on the part of the owners and or managers.

The degree of seaworthiness itself is a question of fact and it varies in the contemplation of each leg a journey. A vessel crossing the Atlantic Ocean or the Pacific Ocean must have stronger equipment than when sailing across the English Channel (Chorley and Giles, 1987). If the 1971 Act is incorporated in the charterparty, the carrier need only exercise due diligence to make the vessel seaworthy. However, there are scores of legislation available on this matter for example, the Malaysian

Merchant Shipping Ordinance 1952, and Oil Pollution Control Act 1994 and SOLAS (Safety of Life at Sea) which requires the shipowner to comply with rules and regulations of ocean-going vehicles. Hence, it is important to distinguish seaworthiness in its proper sense whereby the duty is to provide an efficient instrument of sea-going transport and cargo-worthiness.

According to Section 6 of the United States of America (USA) Carriage of Goods By Sea Act 1999 covering the responsibilities of carrier and ship, a contracting carrier and an ocean carrier shall each exercise due diligence before and at the beginning of a voyage; to make the ship seaworthy; to man, equip, and supply the ship properly; and to make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried fit and safe for the reception, carriage and preservation of the goods. The Act further states that in the receipt, handling and delivery of goods, a carrier shall properly and carefully, receive, load, handle, stow, carry, keep, care for, discharge and deliver goods, Sections 6(b), 6(2) (a) (1) COGSA 1999 (USA).

VESSELS WORTHINESS VERSUS CARGOWORTHINESS

Mac Fadden and Blue Star (1 K.B. 697, 1905) unequivocally stated that a vessel is regarded as seaworthy when it has that degree of fitness, which a careful and prudent owner would require of his vessel prior to the commencement of the vessel's voyage. This common law obligation to provide a seaworthy vessel is 'absolute' in that there is warranty that the vessel is actually fit and not just that the owner has done his best to make it fit. However, this obligation is not a continuing one but only for the commencement of a voyage. Seaworthy in this respect should encompass an obligation to maintain the vessel in a state of seaworthiness throughout a voyage (Chorley and Giles, 1987).

Seaworthiness has a strong regard to the state and fitness of the vessel in question and does not cover other terms which might be associated with the vessel. For example, in not paying full salary to the workers of a particular vessel. The Derby (2 Lloyd's Rep 325 (CA), 1985) illustrated a clear demarcation of reference to the vessel's seaworthiness as opposed to some other interest connected with it. In that case, unless the workers were properly paid at European rates of pay under Portugal ITF "blue card", the vessel would not set sail. Seaworthy does not in this sense affected by this reason. Thus, seaworthy only refers to the well being and physical side of a vessel.

An undertaking is a promise and thereby binding between the parties. It is the duty of the shipowner to provide a seaworthy vessel and it is his duty to ensure that it is in every aspect cargoworthy. Failure to comply by their own words warrants the vessel as unseaworthy; thus the shipowner or carrier would be liable for breach of their undertaking. An example was provided in the Tattersal and National SS Co. (12 QBD 297, 1984) whereby a cattle transport vessel was not disinfected after an outbreak of foot and mouth disease, so that the vessel was not seaworthy in the sense not being cargoworth.

Stanton and Richardson (LR 7 CP 421; (1874) LR 9 CP 390, 1872) further illustrates the distinction between the two questions. In this case, the vessel was perfectly capable of carrying a wet cargo of sugar but the vessel's pumps were not able to deal with the moisture although good for other purposes. As such it was held that the vessel was not cargoworthy and the charterer threw up the charter. However, it must be made clear that cargoworthiness is different from the act of bad stowage because bad stowage in one sense does not effect the seaworthiness of the vessel, but

simply bad stowage. In the Thorsa (P 257 (CA), 1916), chocolate was stowed in the same hold with cheese. On arrival, the chocolate was tainted with the smell of cheese. The decision was clear that the vessel was seaworthy because the stowage was not in any way endangering the safety of the said vessel. The vessel was fit to receive the cargo. The stowage of both items could not constitute a breach of seaworthiness warranty but simply was a bad stowage. In both cases, the shipowners managed to escape liability on the fact that they did not include the 1971 Act, instead incorporated their own provisions, which is an exception clause powerful enough to protect them from liability for bad stowage.

Courts are normally against applying exception clauses to losses caused by unseaworthiness and yet the parties are at liberty to enter into this kind of contract on the precept that the contra-proferentem rule may be made applicable to challenge these clauses. An ill though exception clause to unseaworthy will fail if the expression used were not possible within the comprehension of what the parties intended it to stipulate. Nelson Line (Liverpool) Ltd. and James Nelson and Sons (AC 16, 1908); as per Lord Halsbury observation, "...Lord Blackburn used to say that the contest between the commercial men and lawyers was that the commercial men always wish to write it short and the lawyers always wish to write it long, but the mixture of the two renders the whole thing unintelligible..."

Where the COGSA 1971 applies by Article III Rule 1, the implied term of seaworthiness is abolished and substituted for it is the obligation to exercise due diligence to make the vessel seaworthy, to properly man, equipe and supply the vessel with a proper hold, refrigerating and cooling chambers and other parts of the vessel in which goods are carried, in every way fitted and safe for their reception, carriage and preservation. It is not only the carrier himself that must exercise due diligence. His agents and servants are also expected to exercise the same due diligence in their own capacity. In the Muncaster Castle (1 Lloyd's Rep 57, 1961), the carrier was liable to the cargo owner when goods were damaged although the shipowners had chosen a most refutable firm to repair the vessel. The contention drawn from the case was that the damage was contributed by the shipowners in that they were negligent in employing agents and servants who were themselves negligent in carrying out the repairs.

However, the 1971 Act does not make or render responsibility on the shipowners in relation to latent defects undiscovered by nake eyes or due to fair wear and tear of metal fatigue. The shipowners in this sense would not be held liable. Article IV Rule 2(p) states that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from latent defects not discoverable by due diligence.

WHEN DOES THE OBLIGATION TO PROVIDE A SEAWORTHY VESSEL BIND A SHIPOWNER CHARTERING OUT A VESSEL

When chartering a vessel which is seaworthy by definition under the Mac Fadden and Blue Star (1 KB 697, 1905), the commencement of the exercise of due diligence shall be at the commencement of a voyage as recognized in the earlier case of Rona (5 Asp. M.C 259, 1884). In the words of Viscount Simonds in the Muncaster Castle (5 Asp. M.C 259, 1961), in addressing the question of negligence by a fitter employed to fix defective storm valve inspection covers' "...its solution depends on the meaning of the words in Article III, Rule 1 and repeated in Article IV Rule 1, "due diligence to make ship seaworthy" To understand their meaning it is, in my opinion, necessary to pay particular regard to their history, origin and context and, as I think the courts below have not paid sufficient regard to this aspect of the case, I must deal

with it at some length the Hagne Rules, as is well know, were the result of the Conference on Maritime Law held in Brussels in 1922 and 1923. Their aim was broadly to standardise within certain limits the right of every holder of a bill of lading against the shipowner, prescribing the irriducible minimum for the responsibilities to be undertaken by the latter. To guide them, the framers of the rules had amongst other precedents the American Harter Act of 1893, the Australian Sea Carriage of Goods Act 1904, the Canadian Water Carriage of Goods Act 1910 and though, they had no British Act as a model, they had decisions of the English courts in which the language of the Harter Act had fallen to be construed by virtue of its provision being embodied in bills of lading. In all these Acts, the relevant words, "exercise due diligence to make the ship seaworthy" are to be found. It was in these circumstances that these words were adopted in the Hague Rules. So also Kay L.J (2 Q.B 405, 416, 1895); "it seems to me to be plain on the face of this contract that what was intended was the owner should, if not with his own eyes, at any rate by the eyes of proper competent agents, ensure that the ship was in seaworthy condition before she left port, and that it is enough to say that he appointed a proper and competent agent."

Rule III of the Hague-Visby Rules was applied in the Maxine Footwear (AC 589, 1959), In that the exercise of due diligence shall commence at least when loading begins. This is however treated as an overriding principal obligation although shipowners argue and agreed that they were to escape liability for fire listed under Article IV Rule 2(b).

The doctrine of seaworthiness does apply in the stages of the voyage. It would be the default of the shipowner if they failed to provide proper bunkering at the beginning of the next stage. The Vortigern (P 140 (CA), 1899), aptly described that the court decided that it was not seaworthy of the vessel to commence journey if the above-mentioned bunkering was not properly adhered to at the commencement of the voyage. However, it must be proved that the default, act or neglect must be in the sense that the shipowners were privy to the careless act or neglect.

Despite these, shipowners have their rights against the shipper if the goods carried are dangerous to the safety of the sea-going vessel, for example, flammable items or those given under Article IV Rule 6. Goods of inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods be liable for all charges and expenses directly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship, they may in like manner be landed at any place, or destroyed or rendered innocuously by the carrier without liability on the part of the carrier except to general average, if any. Similar provision to that intent was found under Part III Article 13 of the United Nations Convention on the Carriage of Goods By Sea Act 1978, relating to rules on dangerous goods. Shipowners therefore could refuse to transport the goods of such nature. For the safety of any Malaysian vessel carrying dangerous good, such handling shall be carried out in accordance with the Malaysian Merchant Shipping Ordinance 1952 and International Maritime Dangerour Goods Code.

THE BURDEN OF PROOF

The onus of proving a vessel's unseaworthiness rests clearly on the party alleging it. Never has it been the responsibility of shipowners to

show that their vessels were not seaworthy. Again, how readily can courts be persuaded to accept from the inference that the vessel was unseaworthy due to some unexplained casualty?

In the case called the Torenia (2 Lloyd's Rep 210, 1983) Hobhouse J., considered that the sinking of a vessel in weather conditions which were well within the contemplation and expectation of the vessel's owners and crew as liable to be encountered at some time during the voyage raised an inference of unseaworthiness; "whereas in the days of wooden ships or in the day when the design of steel ships and their construction was less advance or the forces they were liable to encounter were less well know and understood there may have been instances where an unexplained losses at sea gave rise to no inference not to arise in the absence of some overwhelming force of the sea or some occurrence affecting the vessel from outside."

CONCLUSION

Shipowners, therefore, must ensure that their vessels are seaworthy in accordance to the due diligence, otherwise a shipper may terminate a contract of affreightment and claim damages depending on the gravity of each breach. The United Nations Convention on the Carriage of Goods By Sea, 1978- the Hamburg Rules finally came into force on 1st November 1992 known as Carriage of Goods By Sea Act 1992 despite not being ratified by many major maritime countries that were party to the Convention. Malaysia did not ratify the 1992 Convention; however, she is a member to the Carriage of Goods By Sea Act 1971 and follows closely the Hamburg Rules 1978 provisions.

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