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Southern Route or Northern Sea Route

-Whether seaworthiness impacts a ship-owners decision on what route to travel

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Summary

There are two main shipping routes between Europe and Asia, among those the Southern Route through the Suez Canal is by far the most popular route. Due to a decrease in Arctic sea ice, the Northern Sea Route have opened up and is expected to become a viable alternative and a possible competitor to the Southern Route. The purpose of this essay is to contribute by advising ship-owners on what route they should use from a legal perspective.

Both routes have their specific risk, the Southern Route by piracy and the Northern Route by harsh weather conditions, ice and floating icebergs. Both hazards are such that no matter how much precaution is taken, casualties will occur and legal issues on who will be liable for damage and loss will arise and be referred to dispute resolution.

This thesis is limited to whether certainty in providing a vessel that the court will deem seaworthy differs between the two routes and whether it is a relevant aspect to take into account. Seaworthiness derives from the law merchant, it is an implied obligation in contracts of affreightment by common law, an implied warranty in insurance policies and explicitly inserted in most contracts. This thesis will be limited to Hull Insurance regulated in s 39(5) Marine Insurance Act 1906 United Kingdom ('MIA') and Bills of Lading ('BOL') mandatory regulated by the Hague and the Hague-Visby Rules.

Under a Hull Insurance the insurer will be exempted from liability to indemnify the assured for loss if the loss is attributable to unseaworthiness to which the assured is privy. Under the Hague and the Hague-Visby Rules the ship-owner is obliged to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. If cargo is damaged or lost the ship-owner will be liable to the cargo-owner unless he can show that he had exercised due diligence to make the ship seaworthy and the damage or loss was caused by an act for which the ship-owner is exempted from liability.

The applicable test to determine if a vessel is seaworthy and if due diligence has been exercised to make the ship seaworthy is whether a prudent ship-owner in the particular ship-owners place would deem the vessel seaworthy and have done what a prudent ship-owner would have done to ensure its seaworthiness. The tests are objectively measured against standards and knowledge in the shipping industry as a whole. Privy to seaworthiness is a subjective test, based on the ship-owners actual, or blind-eye-knowledge.

Courts don't consider objective standards that are not causative to the casualty or are not adequate because the ship-owner should have known that the ship needed better standards for the intended adventure or certain factors contained risks for defect and needed better surveillance. If there are

objective standards that fit the intended voyage and adventure they are taken into account and if the ship-owner can show he complies with all standards due diligence to seaworthiness is exercised. Objective standards can show the ship-owner is not privy to unseaworthiness.

The International Maritime Organization ('IMO') guidelines are accepted as objective standards, and IMO has issued hazard-specific guidelines both in respect of piracy, harsh weather conditions and ice, the Best Management Practices for Protection against Somali based Piracy ('BMP') and the Guidelines for Ships Operating in Polar Waters ('Polar guidelines'). These guidelines are different in respect of form, scope and content. By comparing the guidelines in the light of factors courts take into account in assessing seaworthiness, it has been concluded that they serve differently in seaworthiness assessments in disputes arising under an insurance contract r under a BOL.

The Polar guidelines are more detailed and comprehensive and certificates are issued to prove compliance in respect of the crew and the vessel and are better for the ship-owner in an insurance claim. The BMP are based on real accidents, the information is practical and more suitable as objective factors for a seaworthiness claim. If a ship-owner complies with these, he will most likely have been deemed to have exercised due diligence to seaworthiness.

The insurer bears the burden of proving privy to unseaworthiness whereas the ship-owner bears the burden of proving he has exercised due diligence to seaworthiness. The claim under the BOL is therefore more difficult to succeed and the advice is for the ship-owner to travel the Southern Route.

However, seaworthiness is a very broad term and relates to every aspect of the adventure; although seaworthy in relation to the specific hazard it may be unseaworthy for a general aspect. Because it is so uncertain and impossible to pre-empt what the court will decide, ship-owners should not place too great reliance on this aspect in deciding whether to travel the Southern Route or the Northern Sea Route.

Sammanfattning

En stor del av världens sjötransporter går mellan Asien och Europa. Idag är den södra ruten genom Suez-kanalen populärast, men efter att isen i Arktis börjat smälta har den norra ruten öppnats upp som en möjlig utmanare till den södra ruten och skeppsägare ställs nu inför ett val.

Sjötransport är en riskfylld verksamhet och både den södra och den norra ruten innehåller områden med ökad risk. På den södra ruten består den ökade risken av risk för piratattacker. På den norra ruten består den ökade risken av is och hårda väderförhållanden. Syftet med denna uppsats är att undersöka om rättsliga förhållanden kan inverka på vilken rutt en skeppsägare väljer. De valda aspekterna är förutsebarhet i domstolars bedömning om ett skepp är sjövärdigt under ett kontrakt att frakta gods styrt av Hague och Hague-Visby reglerna samt under ett sjöförsäkringskontrakt styrt av den engelska sjöförsäkringslagen.

I tvister under båda kontrakten är frågan om sjövärdighet av stor ekonomisk betydelse eftersom den är avgörande för ansvar för lasten och för att försäkringsersättning betalas ut. Skeppsägaren är under Hague och Hague-Visby reglerna skyldig att ha utövat due diligence för att tillse att skeppet är sjövärdigt samt under den engelska sjöförsäkringslagen att han inte har kunskap om att skeppet inte är sjövärdigt.

Standarden för vad som är sjövärdigt skepp, och för vad som krävs för att anses ha utövat due diligence för att tillse att skeppet är sjövärdigt sätts utifrån vad en erfaren och aktsam skeppsägare i den aktuella situationen skulle bedöma som ett sjövärdigt skepp och vad han hade gjort för att tillse att det var sjövärdigt. Det är en objektiv standard som sätts utifrån kunskap i sjötransportbranschen utifrån information i bland annat IMO-instrument. Jurister hävdar att IMO-instrument har inverkan på bedömningen av ett skepps sjövärdighet i en kontraktsrättslig tvist, i vart fall om den aktuella regeln har till syfte att försäkra att skeppet når sin destination.

Domare verkar dock inte använda IMO-instrument i särskilt stor utsträckning. Det beror främst på att informationen de innehåller inte har någon direkt relevans för olyckan. Informationen i IMO-instrument är ofta för generell och innehåller inte vad som behövs för att avgöra vad som orsakade olyckan. Ett certifikat behöver inte innebära att besättningen har den kompetens och erfarenhet certifikatet anger eller att fartyget är i det skick certifikatet anger.

IMO har publicerat riskspecifika rekommendationer både i förhållande till risken för piratattack och att färdas i områden med hårt väder och is. De två rekommendationerna har jämförts utifrån dess lämplighet att användas som objektiva standarder i domstolars avgörande av ett skepps sjövärdighet och följaktligen om en skeppsägare kan vara säkrare på att tillhandahålla ett

sjövärdigt skepp på en av rutterna. Om en skeppsägare kan förutse att fartyget bedöms sjövärdigt vid val av en rutt, så att han inte blir ansvarig för skadat eller förlorat gods och erhåller försäkringsersättning vid skada på eller förlust av fartyget, är det ett incitament att välja den ruten.

IMO:s rekommendationer i förhållande till den norra ruten är mer omfattande och mer detaljerade men saknar ett helhetsperspektiv. Certifikat utges för att bevisa att rekommendationer är uppfyllda. Den norra ruten är lämpligast i ett försäkringsmål eftersom skeppsägaren med hjälp av certifikaten kan bevisa att han trodde att fartyget var sjövärdigt. Rekommendationerna för den södra ruten är mer generella men är baserade på vad som har fungerat tidigare och har ett helhetsperspektiv. Om rekommendationerna för den södra ruten är följda torde skeppsägaren anses ha uppfyllt due diligence för sjövärdighet.

Eftersom skeppsägaren bär bevisbördan i ett mål under Hague och Hague-Visby reglerna och due-diligence är en objektiv standard i motsats till under ett försäkringsmål där försäkringsgivaren bär bevisbördan och måste visa att skeppsägaren har kännedom om att skeppet inte är sjövärdigt är det viktigast att välja den rutt där due diligence lättast kan bevisas.

Om förutsebarhet i den rättsliga bedömningen av sjövärdighet är avgörande bör den södra ruten väljas. Alltför stor tillit bör dock inte denna aspekten tillmätas eftersom sjövärdighet är ett vagt begrepp som aldrig är riktigt förutsebart.

1 Preface

It is both a pleasure and a curse being able to, or forced to, focus on one legal issue for a whole semester. Many assumptions I had proved wrong and I gained much new knowledge.

2 Introduction

There are two different routes to choose between when travelling from Asia to Europe. The most common one is the route south of Asia and through the Suez Canal ('Southern Route'). Due to reduction of sea-ice in the Arctic, the Northern Sea Route has opened up for commercial shipping and is anticipated to become a viable alternative and a real competitor to the Southern Route.¹ The aim of this paper is to find out whether legal issues may influence ship-owners decision to travel the Southern Route or the Northern Sea Route.

Shipping is inherently dangerous and both the Northern Sea Route and the Southern Route contain areas of increased risks, the Northern Sea Route in form of floating icebergs, and the Southern Route in form of pirate attacks. The nature of the hazards are different but both are such that no matter how much precautions are taken, casualties with severe consequences to ship, cargo and crew can never be completely eliminated.

Unaccountable amounts of legal questions are relevant in determining what route to travel. Because the risk of a marine casualty must be acknowledged in these areas of increased danger, not being held liable for loss or damage, and be certain that the insurance cover potential losses is of major importance for the ship-owner. This thesis is limited to certainty in providing a vessel that the court will deem seaworthy in a trial arising under a Hull Insurance Contract subject to s 39(5) Marine Insurance Act 1906 United Kingdom ('MIA') and a Bill of Lading ('BOL') mandatory regulated by the Hague Rules² and the Hague-Visby Rules.³

Under s 39(5) MIA the insurer will be exempted from liability to indemnify the assured for loss if the loss is attributable to unseaworthiness to which the assured is privy. Under the Hague- and the Hague-Visby Rules the ship-owner is obliged to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage. The applicable test to determine if a vessel is seaworthy is whether a prudent ship-owner in the particular ship-owners place would deem the vessel seaworthy. The test is objective

¹Halvor Schøyen, Svein Bråthen *The Northern Sea Route versus the Suez Canal: cases from bulk shipping*, *Journal of Transport Geography* 19 (2011) 977, 977.

² International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924.

³International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, 1924 as amended by the 'Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading' 1968 and further amended by the 'Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading' 1979.

and measured against standards and knowledge in the shipping industry as a whole.⁴

The International Maritime Organization ('IMO') guidelines are accepted as objective standards,⁵ and IMO has issued hazard-specific guidelines both in respect of piracy, harsh weather conditions and ice, the Best Management Practices for Protection against Somali Based Piracy ('BMP')⁶ and the Polar Guidelines.⁷ By comparing these guidelines in the light of courts assessment of seaworthiness, it can be concluded whether it would be easier to provide a vessel that the court will deem seaworthy for one route than for the other. If there is a substantive difference, it can be used as a factor to take into account together with all other aspects in determining what route to travel.

2.1 Purpose and Questions

The purpose of this thesis is to contribute to the ship-owners decision to travel the Southern Route or the Northern Sea Route from a legal perspective. It has been limited to certainty in providing a vessel the court will deem seaworthy.

In order to complete the purpose, the following questions will be dealt with:

- Is certainty in providing a vessel the court will deem seaworthy a relevant aspect to take into account in deciding what route to travel?
- Are there different levels of certainty in providing a vessel the court will deem seaworthy if travelling the Southern Route or the Northern Sea Route?

2.2 Limitation

The focal point of this thesis is courts assessment of seaworthiness under disputes arising from BOL and Hull Insurance contracts, objective factors court's take into account in seaworthiness assessments and the BMP and the Polar guidelines. This thesis is intended to provide a practical advice for ship-owners, a complete advice would need assessment of an unaccountable amount of legal issues but this is not possible due to the scope of this paper. Throughout, limitations have been made to only assess those aspects relevant for advice suitable for ship-owners.

⁴Professor Hannu Honka 'Owners Duties and Liability in Chartering Relating to the ISM Code' in Johan Schelin (eds) *Modern Law of Charterparties* (Jure Forlag, 2003) Chap 3, 110, 114.

⁵Sir Bernard Eder et al, *Scrutton on Charterparties and Bills of Lading* (Sweet & Maxwell 22nd ed, 2011)118 [7.20].

⁶*Piracy and Armed Robbery against Ships in Waters Off the Coast of Somalia* IMO MSC.1/Circ.1339 (14 September 2011).

⁷*Guidelines for Ships Operating in Polar Waters* IMO A 26/Res.1024 (18 January 2010).

BOL and Hull Insurance are chosen because they are both of great monetary value and necessary for a choice to be made. According to ship-owners, the biggest impediments against travelling the Northern Sea Route are availability of an affordable insurance and cargo to carry.⁸ Due diligence to seaworthiness and privity to unseaworthiness relates to persons that can be viewed as alter egos of the company in case the ship is owned by a company.⁹ This paper will not deal with those issues but assume there is only one ship-owner.

Seaworthiness includes all aspects of the equipage including the ship, equipment, crew and documentation.¹⁰ It relates to the intended voyage with the particular cargo and cargoworthiness is a sub-part of seaworthiness thus containing some particular issues.¹¹ This paper is limited to seaworthiness in respect of the crew, equipment and the vessel. Documentation will not be regarded as it is determined by national rules. Cargoworthiness will not be considered because care of cargo is more dependent on the particular cargo than the chosen route.¹²

Perils of the sea is another term of importance under BOL and Hull Insurance because only those perils insured against will be covered and perils of the sea is one of the immunities for the ship-owner obligations under the Hague and the Hague-Visby Rules. For insurance it depends on the terms in the contract but it is discussed whether it falls under any of the immunities under the Hague and the Hague-Visby Rules.¹³ Perils is interrelated to seaworthiness because a seaworthy vessel is a vessel that can meet the expected perils of the voyage, there are also discrepancy in whether piracy can be related to unseaworthiness because some regard it as an extraneous peril.¹⁴ It will be assumed that piracy is a peril relevant in assessing seaworthiness. There are no indications that ice and harsh weather is not a peril of the sea or peril relevant in a seaworthiness assessment.

Objective standards in assessing seaworthiness include information available in the shipping industry as a whole. In the descriptive part, all kinds of objective standards will be considered but the analysis will be limited to IMO instruments due to the limited scope of this thesis. Issues of private guards will not be considered although mentioned in the BMP. It is not comparable to other aspects of seaworthiness because it includes

⁸ Diana L. Torrens, Marine Insurance for the Northern Sea Route - Pilot Study, Summary of Working Paper No. 1-1994,1 August 2013 <<http://www.fni.no/>>.

⁹ Dr Susan Hodges 'The Quest for Seaworthiness: A Study of US and English Law of Marine Insurance Contracts' in Prof. D. Rhidian Thomas(eds) *The Modern Law of Marine Insurance* (Informa, 2002) vol 2, 199, 213 [6.31].

¹⁰ Scrutton, above n 5, 119-120 [7.21-7.23].

¹¹ Ibid 119[7.21].

¹² Ibid.

¹³ Giulia Argano *Pirates...A Charterers' Peril of the Sea* Southampton Student Law Review [2011] vol 1, 169, 174.

¹⁴ Ibid 186.

questions of state sovereignty and plausible illegal acts.¹⁵ It will also be limited to deter the accident from happening and not how crew-members can be saved due to not being relevant under a BOL and due to the limited scope of this paper.

To be relevant for as many ship-owners as possible, the thesis will take an international approach and refer to international conventions and agreements instead of those instruments implemented in national law. International agreements can be implemented differently in different countries; some countries include additional requirements or change the text. Using the international source will surely provide the international uniform standard.

When there are no international sources available, mainly British sources will be used but also other common law jurisdictions where British law maintain great impact will be used. United Kingdom has been chosen because of its pivotal role in the shipping community. United Kingdom has always had a pivotal role in international trade, shipping and maritime law and still has major influence and is used as governing law in many shipping contracts worldwide. Marine Insurance is not governed by international conventions and the United Kingdom Marine Insurance Act 1906 will be used. Case-law is also national and most cases assessed are from the United Kingdom.

There are four conventions imposing mandatory rules for BOL, the Hague Rules, the Hague-Visby Rules, the Hamburg Convention¹⁶ and the Rotterdam Rules.¹⁷ The Hamburg Rules and the Rotterdam Rules were introduced later with an aim to modernise the Hague-Visby Rules but have failed to gain members. Due to its popularity in terms of member states, this paper will be limited to the Hague and the Hague-Visby Rules.¹⁸

2.3 Methodology and Disposition

This thesis is built up by four parts. The first part (chapter three) introduces the agreements, IMO and the hazards in order to familiarize the reader with the topic. The descriptive part (chapter four and five), describes seaworthiness under a BOL and an insurance contract and how it has been applied in court. The descriptive part ends with a conclusion on seaworthiness and a suggestion on what objective standards court will take into account. The third part (chapter six and seven) is case-based analytical. The case is whether the BMP and the Polar guidelines are introduced, compared and analysed in light of the findings from the descriptive part. Lastly the conclusion is presented advising and explaining if ship-owners

¹⁵ *Interim Guidance to Private Maritime Security Companies providing privately contracted armed security personnel on board ships in the high risk area* IMO MSC.1/Circ.1443, 25 May 2012, 1.

¹⁶ United Nations Convention on the Carriage of Goods by Sea, 1978.

¹⁷ United Nations Convention of the Carriage of Goods Wholly or Partly by Sea 2009.

¹⁸ William Tetley, *Marine Cargo Claims* (Thomson Carswell, 4th ed, 2008) vol 1, 6.

should take certainty in providing a seaworthy vessel into account when determining whether they should travel the Southern Route or the Northern Sea Route.

For the descriptive part (chapters four to five) the traditional legal method is used, which means *de lege lata* is discovered by reading and analysing laws, international conventions, contracts, case-law and authority.

Great emphasis is placed on case-law for two reasons. Firstly, maritime law is rooted in the law of merchandise and is developed primarily by case-law.¹⁹ Secondly, seaworthiness is a relative term dependent on the facts in each case because each situation cannot be pre-empted and written down in statutes case-law is the most appropriate source. Analogy is used between precedents on the Hague and the Hague-Visby Rules and the Marine Insurance Act 1906 as it is accepted that seaworthiness has the same meaning in both cases.²⁰

In the case-based and analytical part, (chapter five to seven) the BMP and the Polar guidelines will be presented and compared followed by an analysis on whether a court will take into account those guidelines in a plausible future assessment of seaworthiness. The aim is to give a practical advice on hypothetical situations.

The concluding part will present an advice for ship-owners whether they should use certainty on providing a vessel deemed seaworthy by court as an aspect in their decision to take the Southern Route or the Northern Sea Route and which one they should choose. The conclusion will be based on information from the previous sections.

2.4 Terminology

For ease of understanding, the following subjects will be referred to; ship-owner, cargo-owner, insurer and assured. In reality, the subject entering into a BOL may not be the real ship-owner and cargo-owner. In this paper, ship-owner refers to the party in charge of the management of the vessel and cargo-owner the ship-owners counterpart in a contract of affreightment. For insurance contracts, the insurer is the party providing insurance and assured the party buying insurance. The assured will be referred to both as ship-owner and assured.

All people working on board ships, including the master, will be referred to as crew or crew-members unless there is a particular reason for identifying their position.

¹⁹John F Wilson, *Carriage of Goods by Sea* (Pearson, 7th ed, 2010) 9.

²⁰Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (1998) 196 CLR 161, 174 [27]-[31].

3 Hazards, Agreements and IMO

3.1 Agreements

The agreements that will be discussed in this paper are Hull Insurance Contracts and Bills of Lading ('BOL').

3.2 Hull Insurance

Under a marine insurance contract, the insurer undertakes to indemnify the assured for perils insured against, in exchange for a premium. Contracts can be drafted ad hoc, or standard contracts provided by organisations can be used. Organisations provide both full contracts and voyage specific clauses that can be implemented into the full contracts.

In the United Kingdom, the Marine Insurance Act 1906 (hereafter 'MIA') governs marine insurance contracts. Marine insurance contracts are defined as contracts where the insurer undertakes to indemnify the assured against losses incident to marine adventures.²¹ MIA is not mandatory and will be overridden when the parties' agreement expressly provides other terms.²² Insurance contracts must be embodied in policies in accordance with MIA,²³ referred to as hull policies. Within MIA there are time and voyage policies. Ships are normally insured under time policies,²⁴ where the subject-matter is insured for a definite period of time.²⁵

3.3 Bill of Lading

BOL are evidence of contracts between cargo-owners and ship-owners where the ship-owner undertakes to carry the cargo from one port to another. The BOL has three functions; it is a receipt for goods shipped, evidence of the contract of carriage and a document of the right to possession of the goods.²⁶ By signing the BOL, the master, as agent for the ship-owner, acknowledges that said cargo is placed on board. The right to possession of the goods is important as the BOL can be traded multiple times during the voyage and the ship-owner must discharge the goods to the party showing the BOL to ensure it is delivered to the right person.²⁷

²¹ s 1 Marine Insurance Act United Kingdom 1906.

²² Martin Davies, Anthony Dickey, *Shipping Law* (Thomson Reuters, 3rd ed, 2004) 507-509.

²³ s 22 Marine Insurance Act United Kingdom 1906.

²⁴ Davies and Dickey, above n 22, 501.

²⁵ s 25 Marine Insurance Act United Kingdom 1906.

²⁶ Wilson, above n 19, 118,129, 132.

²⁷ Wilson, above n 19, 132-133.

BOL are subject to mandatory rules introduced by International Conventions, the ones discussed in this paper are the Hague Rules and the Hague-Visby Rules. Mandatory rules were introduced to mitigate the power discrepancy between ship-owners and cargo owners. Before the introduction of mandatory rules the ship-owners undertook to carry the cargo but didn't accept any liability if it was lost or damaged.²⁸ The Hague and the Hague-Visby Rules consist broadly of two parts, one providing minimum obligations on the ship-owner and the other providing maximum immunities from such obligations. The ship-owners primer obligations are to provide a seaworthy ship and carry the goods from loading to discharging port.²⁹

3.4 IMO

The International Maritime Organization, ('IMO') is United Nations specialised agency for marine matters. Its main objective is to implement uniform and universal standards regarding maritime safety and prevention of marine pollution.³⁰

Rules and recommendations are both directed to governments in exercising their state function and upon legal subjects in the marine industry. IMO instruments must be adopted into national legislation to gain effect for private subjects. Member states are responsible to ensure that ships sailing under their flag comply with the IMO instruments they have adopted into national rules. IMO instruments give certificates as proof of compliance, each member state is responsible for issuing certificates.³¹

IMO membership is restricted to states but international non-governmental organisations can obtain consultative status. IMO also cooperate with industry groups and intergovernmental organisations.³²

3.5 Hazards

Piracy-attacks off the coast of Somalia is the major hazard travelling the Southern Route, and harsh weather conditions, ice and floating icebergs are the greatest dangers travelling the Northern Sea Route. The hazards are different in nature, pirate attacks is exercised by humans whereas harsh weather, ice and floating icebergs are a natural part of the Northern Sea Route. Furthermore, some ice and storms are expected in the Polar regions, the dangers arise when it becomes too much, whereas piracy never occurs in small scale, it is either full attack or nothing.

²⁸ Wilson, above n 19, 174

²⁹Ibid 187.

³⁰ About IMO, Brief history of IMO Membership, 1 August 2013
<<http://www.imo.org/Pages/home.aspx>>

³¹ About IMO, Conventions, 1 August 2013 <<http://www.imo.org/Pages/home.aspx>>.

³² About IMO, Membership, 1 August 2013 <<http://www.imo.org/Pages/home.aspx>>.

3.6 Piracy

A piracy attack starts with the pirates coming up close to the vessel, using small fire arms mainly against the bridge and accommodation area in order to force the vessel to reduce speed and to enable pirates to board. Boarding normally occurs by climbing up the shipside by a longweight ladder or rope.³³ Although difficult, and intimidating, it is possible to evade pirate attacks.³⁴ Pirates change their tactics when their victims have invented strong enough combating systems. Previously most pirate attacks occurred close to shore, after the use of navy vessels and ships travelling in convoy in that area, attacks now more often occur further out from shore.³⁵

3.7 Harsh Weather Conditions and Ice

Low temperatures can negatively affect equipments functionality. Floating icebergs and ice-contact constitutes damage ship-hull, machinery and rudder, making vessels un-maneuvrable or sink.³⁶ Vessels with ice-breaking ability travel through ice, the major hazard for them is if the ice suddenly becomes too thick restricting the vessel from proceeding or turning back. However, as oppose to piracy, arctic hazards are consistent, ice conditions are changing rapidly but it is an event by nature that is possible to predict most times with adequate information.

³³Best Management Practices for Protection against Somali Based Piracy, *Piracy and Armed Robbery against Ships in Waters Off the Coast of Somalia* IMO MSC.1/Circ.1339 (14 September 2011). Annex 2, 10 [4.4].

³⁴Ibid 25 [8.3].

³⁵Ibid 3 [2.1].

³⁶*Guidelines for Ships Operating in Polar Waters* IMO A 26/Res.1024 (18 January 2010) Annex, 4.

4 Seaworthiness

Modern maritime law derives from the law merchant that governed in the advent of shipping and international trade. Seaworthiness is one obligation developed then that is still in effect today. Under common law, the obligation of providing a seaworthy vessel is absolute and automatically implemented in each contract of affreightment.³⁷ The obligation is inserted in the Hague and the Hague-Visby Rules but the level of the obligation has decreased to due diligence to seaworthiness.³⁸ Insurance contracts do not contain obligations as such but s 39(5) MIA states that the insurer is not liable for loss attributable to unseaworthiness for which the insurer is privy.

Before looking into the seaworthiness obligations under the contracts, an attempt to define a seaworthy vessel will follow. This definition is relevant for all types of contracts where seaworthiness is prevalent. As commonly done by courts, precedents from trials under different contracts will be considered.³⁹

4.1 Definition of Seaworthiness

There is no abstract definition of what constitutes a vessel seaworthy but there are many definitions saying more or less the same thing. One definition is that the ship is '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.'⁴⁰ Another one is: 'the vessel must have the degree of fitness which an ordinary careful owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it.'⁴¹ Seaworthiness is a very broad concept and 'embraces obligations with respect to every part of the hull and machinery, stores and equipment and the crew itself.'⁴²

Tetley provides a list of examples that makes the vessel seaworthy; tight hull and hatches, proper system of pumps, valves, boilers and engines, that it must be equipped with up-to-date charts, that equipment is properly labelled and that it is supplied with enough bunkers.⁴³ Crew competence is

³⁷Wilson, above n 19, 9.

³⁸Stephen Girvin, *Carriage of Goods by Sea* (Oxford University Press, 2nd ed, 2011) 421 [27.16].

³⁹Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (1998) 196 CLR 161, 174 [27]-[31].

⁴⁰*Kopitoff v Wilson* (1876) 1 QBD 377, 389 (Field J) quoted in Girvin, above n 65, 384 [24.03].

⁴¹*F.C. Bradley & Sones Ltd v Federal Steam Navigation Co.*, (1926) 24 Ll.L.Rep 446 at p. 454 quoted in *Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd's Rep 719, 736.

⁴²*Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26; [1962] (CA) 71.

⁴³Tetley, above n 18, 878.

distinguished from mere negligence,⁴⁴ and includes lack of ability or training, lack of knowledge in relation to a particular vessel, lack of will or inclination, habits and/or characteristics which render a seaman not suitable for his role on board the vessel and temporary incapacity, e.g., illness.⁴⁵

All these aspects are interrelated, seaworthiness, ‘connotes an inherent quality with which the unit comprising vessel and cargo is invested. So long as that unit maintains a constant character, that quality remains inherent in it.’⁴⁶ In *Hongkong Fir*, the engine was old and needed to be maintained by competent and adequate engine staff. Due to not being maintained properly the engine subsequently broke down and the vessel was deemed unseaworthy for supplying inadequate crew, not for the engines condition.⁴⁷

Suggestions are made that if a casualty occurs, the vessel is unseaworthy because it is evidently not fit to meet perils of the sea, but the obligation does not require an accident-free ship,⁴⁸ ‘an incompetent officer is more likely to contribute to the causes of a collision than a competent officer, but it does not follow that if a ship is in collision her master and chief-officer were not competent to hold their positions.’⁴⁹ Deficiencies not impacting a vessels safety are irrelevant.⁵⁰

Seaworthiness is an objective standard, if the ship-owner has done his best to make the ship fit doesn’t mean it is seaworthy.⁵¹ The applicable test is: ‘Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea...’⁵² A prudent ship-owner is one from the industry, his knowledge is based on objective standards being those of the shipping community as a whole.⁵³

*Lydia Flag*⁵⁴ was damaged after losing its rudder during voyage. The loss was due to negligence by repair personnel but how the defect manifested itself and nature of negligence was not clear. Mr. Justice Moore-Bick held ‘In this case it is difficult to see precisely what the nature of deficiency was. It may have been which would have led to the loss of the rudder in a very short time. On the other hand it may have been one which would inevitably not lead to the loss of the rudder for some considerable time. If it were the

⁴⁴ *Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd’s Rep 719, 736.

⁴⁵ Roger White *The human factor in unseaworthiness claims* [1995] Lloyd’s Maritime and Commercial Law Quarterly, 221, 226-228.

⁴⁶ *Actis Co Ltd v The Sanko Steamship Co Ltd The Aquacharm* [1982] 1 Lloyd’s Rep 7, 12.

⁴⁷ *Hong Kong Fir Shipping Co v Kawasaki Kisen Kaisha* [1962] 2 QB 26; [1962] (CA) 71.

⁴⁸ Scrutton, above n 5, 118 [7-20].

⁴⁹ *The Jute Express* [1991] 2 Lloyd’s Rep 55, 59.

⁵⁰ Scrutton, above n 5, 119 [7-20].

⁵¹ *Ibid*, above n 13, 118 [7-19].

⁵² *Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd’s Rep 719, 737 [737].

⁵³ Hoonka, above n 4, 114

⁵⁴ *Martine Maritime Ltd v Provident Capital Indemnity Fund Ltd. The Lydia Flag* [1998] 2 Lloyd’s Rep 652, 658.

latter, then, as it seems to me, the vessel would not by any means necessarily be unseaworthy at the time when this policy incepted.’⁵⁵

In addition to being relative to the adventure, seaworthiness changes over time following advance in shipbuilding industry and increased knowledge on shipping in general. Since the late 20th century when it was acknowledged that human error caused most marine casualties, crew incompetence has increased in seaworthiness claims.⁵⁶

A vessel is hence seaworthy if it is fit for the intended adventure based on the knowledge of the prudent ship-owner. The concept was well summarized in *Bunga Seroja*, ‘The question of seaworthiness, then, may require consideration of many and varied matters.’⁵⁷

4.2 Seaworthiness under s 39(5) MIA

Under an insurance contract, the insurer is obliged to indemnify the ship-owner for loss in accordance with the contract. The ship-owner is not obliged to perform anything and is hence not obliged to provide a seaworthy vessel. Seaworthiness is relevant because it relieves the insurer from liability to pay insurance if the ship is unseaworthy with privity of the ship-owner. Seaworthiness is dealt with in section 39(5) MIA stating:

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

Before the question of seaworthiness arises, the ship-owner must show that the loss was proximately caused by a peril insured against.⁵⁸ If the unseaworthiness is the only cause the ship-owner will not be indemnified because unseaworthiness is not a peril insured against.⁵⁹ If the casualty is proximately caused by a peril insured against and unseaworthiness is within the chain of causation the insurer is not exempted from liability for the whole loss, only the part attributable to the unseaworthiness.⁶⁰

Privity relates to unseaworthiness, not facts leading to unseaworthiness. In other words, it is not sufficient to show the ship-owner is privity to a ship-owners lack of knowledge, it must be shown that the ship-owner knows a crew-member lacks knowledge on a particular fact, the ship-owner must

⁵⁵Ibid 656.

⁵⁶Dr Phil Anderson, *ISM Code a practical guide to the legal and insurance implications* (Informa, 2005) 142.

⁵⁷Great China Metal Industries Co Ltd v Malaysian International Shipping Corp Berhad (1998) 196 CLR 161,174.

⁵⁸Hodges, above n 9, 217 [6.39].

⁵⁹Ibid 6.40.

⁶⁰Lloyd (JJ) Instruments v Northern Star Insurance Co. *The Miss Jay Jay* [1985] 1 Lloyd's Rep 264, 271.

also know that lack of knowledge of the particular fact renders the vessel unseaworthy.⁶¹

The insurer bears the burden of proving unseaworthiness, that the ship-owner is privy to such unseaworthiness and that there is a loss attributable to it.

4.3 Privity

Privity means knowledge or a state of mind by the law recognised equivalent to knowledge, so called blind eyed knowledge.⁶² Blind eye knowledge arises when someone suspects something, firmly grounded and targeted on specific facts, and refrain from asking in order not to gain actual knowledge.⁶³ Blind-eye knowledge has also been referred to as Nelsonian knowledge referring to the following explanation by Lord Scott.⁶⁴ ‘Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye.’⁶⁵ Contrary to due diligence, privity attributes to knowledge and is not synonymous to any form of fault.⁶⁶

That privity is not measured against objective standards was clarified in the *Star Sea*. The insurer argued that the ship-owner was privy to unseaworthiness for failing to address defects despite two ships in the same fleet had previously been lost due to similar deficiencies.⁶⁷ It was acknowledged that the assured may have acted negligently to a high degree in not concluding or suspecting from previous accidents that all vessels might have the same defects, but not that the ship-owner had blind-eye knowledge.⁶⁸ ‘Blind-eye knowledge cannot be based on inadequacy of response to earlier fires or what was learnt by them but must be based upon facts of the ship and casualty subject to dispute.’⁶⁹

In order to establish privity, the ship-owner should be asked why he didn't enquire about a fact. If the answer is that the ship-owner didn't ask because he didn't want to know then it is privity. If the answer is that he was lazy then the ship-owner is not privy. Similarly, an omission to take precaution against the ship possibly being unseaworthy does not amount to privity.⁷⁰

⁶¹ *The Eurysynthesis*, [1976] 2 Lloyd's Rep 171; [1977] 1 Q.B 49.

⁶² *Manifest Shipping Ltd v Uni-Polaris Insurance Ltd. The Star Sea* [2001] 1 Lloyd's Rep 389, 413-414 [112-117].

⁶³ *Ibid* 395-397.

⁶⁴ *Ibid* 413.

⁶⁵ *Ibid*.

⁶⁶ *Ibid* 414 [115].

⁶⁷ *Ibid* 389.

⁶⁸ *Ibid* 409.[89].

⁶⁹ *Ibid* 397 [33].

⁷⁰ *Ibid* [112-117].

4.4 Seaworthiness under the Hague and the Hague-Visby Rules

In entering into a BOL, the ship-owner undertakes to carry the cargo-owners cargo from loading port to discharge port. If the goods are lost or damaged on the way, the ship-owner will be liable for the loss or damage unless he can rely on one of the exemptions from liability found in article IV. In order to raise a claim, the cargo-owner must show that the ship-owner damaged the cargo, which is done by showing that the goods were in a good condition when loaded and in a bad condition when discharged.⁷¹ The relevant rules in the Hague and the Hague-Visby Rules are:

Article III Rule 1

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

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

Article IV Rule 1

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

4.5 Obligations and Immunities

The Hague-Visby Rules contain one part imposing minimum-obligations on the ship-owner and one containing maximum immunities from those obligations. Seaworthiness is included in both.⁷² Due to being an obligation and immunity, authority suggest different ways of interpreting it with relevance for the burden of proof under a claim were unseaworthiness is alleged.

Due diligence to seaworthiness is viewed as an overriding obligation. This conclusion was drawn after comparing article III rule 1 and 2. Article III rule 2 imposes obligations but includes ‘subject to the exemptions in article IV’ and are hence explicitly subject to immunities. Rule 1, the seaworthiness obligation on the other hand doesn’t refer to any immunities at all.⁷³ Based on it being an overriding obligation, it is concluded that after a cargo-owner shows the cargo was in good order in and bad order out, the

⁷¹Girvin, above n 38, 427-428 [27.26-27.30].

⁷²Wilson, above n 19, 187.

⁷³ Girvin, above n 38, 428-429 [27.32].

ship-owner must show that he has exercised due diligence to seaworthiness before he can rely on any immunities from liability.⁷⁴

That the ship-owner should bear the burden of proof of due diligence to seaworthiness is supported by the general principle that the party closest to the facts bears the burden of proving it.⁷⁵ Supporters for a literal interpretation argue the second limb of article IV rule 1 ‘Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article,’ provides that the cargo-owner bears the burden of proving unseaworthiness before the ship-owner must show he exercised due diligence to make the ship seaworthy. It is recognized that it is hard for the cargo-owner to adduce sufficient evidence that the ship is unseaworthy, the courts acknowledge this by accepting as prima facie evidence that the damage shows that it could have been caused by unseaworthiness.⁷⁶

In practice both parties will adduce evidence for their position but the burden of proof is of relevance in the outcome of a claim where not sufficient evidence is adduced to show what caused the casualty. If the ship-owner has a positive obligation of proving due diligence to seaworthiness he will be held liable. If the cargo-owner must show unseaworthiness, the ship-owner will be relieved liability. Regardless, because the courts let cargo-owners easily get away with prima facie evidence of unseaworthiness, in effect the burden is often with the ship-owner.⁷⁷

4.6 Due Diligence

Due diligence is a non-delegable obligation and the ship-owner is responsible that whoever he employs perform a diligent job. If a deficiency amounting to unseaworthiness is caused by negligence by repair personnel, or surveyed by a classification society that says it is in a good condition, he cannot blame them if the vessel is later found unseaworthy by their negligence. This applies no matter how experienced the surveyor is.⁷⁸ There is thus a time-limitation, the ship-owner is not liable for defects from before he acquired the vessel, as long as the defects should have been found when taking over the vessel.⁷⁹ In effect, this only applies to latent defects in the construction of the vessel.⁸⁰

⁷⁴Tetley, above n 18, 882.

⁷⁵Ibid 890.

⁷⁶Wilson, above n 19, 190-191.

⁷⁷Girvin, above n 38, 428 [27.30].

⁷⁸Wilson, above n 19, 188-190.

⁷⁹Girvin, above n 38, 424 [27.23].

⁸⁰Wilson, above n 19, 189.

Courts interpret due diligence similar to the common law duty of care which is a negligence standard.⁸¹ In other words, the ship-owner must diligently ensure the vessel is seaworthy. Similar to seaworthiness, due diligence is relative and change over time, it is not absolute and the ship-owner is not expected to detect all faults.⁸² The applicable test is ‘whether a reasonable man in the shoes of the defendant, with the skill and knowledge which the defendant had or ought to have had, would have taken those extra precautions’.⁸³ Judges stresses that due diligence is based upon ‘its own merits and upon its own facts,’⁸⁴ meanwhile commentators argue that by introducing the ISM Code, IMO has established adequate standards a ship-owner must comply with in order to prove due diligence have been exercised.⁸⁵ The ISM Code will be further discussed below in section 4.4.1.

Due diligence is not to with hindsight see that extra precautions could have been taken but to consider what other skilled men would do.⁸⁶ A prudent ship-owner is one that has ‘Exercised all reasonable skill and care to ensure the vessel was seaworthy...the test to be objective, namely to be measured by the standards of reasonable ship-owner, taking into account international standards and the particular circumstances of the problem in hand.’⁸⁷

Due diligence and seaworthiness overlap and are more clear read together. The ship-owner can either first establish what a prudent ship-owner ought to do to maintain the vessel seaworthy and then apply that to seaworthiness standards in order to find out what he must detect. Or, the other way around, to first establish what a seaworthy ship is then decide what must be done to ensure it. The result should be the same.

4.7 Seaworthiness under s 39(5) MIA and the Hague and the Hague-Visby Rules

After one marine casualty, it can be that the ship-owner is held liable under the BOL for having failed to exercise due diligence to seaworthiness but the insurer will not be relieved from liability because the ship-owner is not held privy to the unseaworthiness.

Due diligence to seaworthiness is an obligation under the BOL, whereas under a hull policy unseaworthiness with the privy of the assured exempts

⁸¹ *Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd’s Rep 719, 735.

⁸² *Martine Maritime Ltd v Provident Capital Indemnity Fund Ltd. The Lydia Flag* [1998] 2 Lloyd’s Rep 652, 658.

⁸³ *The Amselot*, [1963] 2 Lloyd’s Rep 223,230.

⁸⁴ *The Makedonia* [1962] P 190; [1962] 1 Lloyd’s Rep 316, 337.

⁸⁵ Anderson, above n 56, 142.

⁸⁶ *Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd’s Rep 719, 738.

⁸⁷ *Northern Shipping Co v Deutsche Seereederei. The Kapitan Sakharov* [2000] 2 Lloyd’s Rep 255, 255.

the insurer from liability to indemnify the ship-owner. What renders a vessel unseaworthy is similar, but that is how far the similarities go.

Under a BOL the ship-owner must prove he exercised due diligence to seaworthiness before he can claim exemption from liability under one of the immunities in the Hague and the Hague-Visby Rules. In an insurance claim, the ship-owner will get indemnity for the loss unless the insurer can show that the loss was caused by unseaworthiness for which the ship-owner was privy.

There are no conditions determined in law that determines that a vessel is seaworthy, the applicable test is whether a prudent ship-owner in the actual ship-owners place would deem it as seaworthy. A prudent ship-owner is measured against knowledge in the shipping community as a whole.

Due diligence is also an objective test measured against the shipping community as a whole. It is a non-delegable duty so the ship-owner cannot rely on others if they don't come up to the standards of a prudent ship-owner. Privy to unseaworthiness is a subjective standard and the ship-owner can rely on information from others.

4.8 Objective Standards

The same objective standards apply to seaworthiness and due diligence to seaworthiness, the shipping community as a whole. Shipping community as a whole ranges from well-known information to published studies,⁸⁸ standards provided by classification societies and IMO.⁸⁹

Only because information is written down doesn't mean it is an objective standard adequate for a seaworthiness or due diligence assessment. Only those standards that are reasonable and relevant for safe transport of the cargo will be considered. A ship was allegedly unseaworthy for having breached national legislation in not supplying the ship with required numbers of certified crew.⁹⁰ Mr Justice Willmer stated:

I suppose, the owners, could be subjected to criminal proceedings. But I am not concerned with the penal consequences of this breach of the relevant Government legislation. What I am concerned with is the question whether the plaintiffs has satisfied me that the collision and consequent damage happened without their privy.⁹¹

Increased knowledge on shipping in general and advances of science means new standards to seaworthiness and due diligence arise all the time.⁹² It is suggested that new technology must be introduced when the ship is on repair but not that it must be repaired when new technology is introduced.⁹³

⁸⁸*The Toledo* [1995] 1 Lloyd's Rep 40, 52.

⁸⁹Tetley, above n 18, 930.

⁹⁰*The Empire Jamaica* [2002] 1 Lloyd's List Rep 50, 50.

⁹¹Ibid 53.

⁹²Tetley, above n 18, 930.

⁹³Ibid.

It is argued that setting out extreme standards, as may be the case with the ISM Code requiring the ship-owner inter alia to ensure compliance with all codes, regulations and industry practices, will increase due diligence to seaworthiness substantially.⁹⁴

New standards arise with each casualty and ship-owners must pay attention. First time a casualty occurs, the ship-owner is relieved from liability, but after a reasonable time, ship-owners must insure the same casualty doesn't happen to their ship.⁹⁵

Objective standards should be followed if they are reasonable and relevant for the claim. The ship-owner must respond to novelties in the industry and adopt new measures within a reasonable time.

4.9 IMO as a provider of Objective Standards

It is accepted that IMO is included in the shipping industry as a whole and that IMO instruments provide an objective yardstick to the extent it aims to protect the safety of the vessel.⁹⁶ However, what the court is after is applicable standard, not that a particular certificate is obtained.⁹⁷ The status of the IMO instrument is also considered, it is argued that only Conventions provide determinative guidelines and that other recommendations may be considered if relevant.⁹⁸

IMO instruments applicability in determining liability between private parties have been especially discussed in relation to the ISM Code. The ISM Code requires ship-owners to exercise risk assessment and provide a safety management system to inter alia establish safeguards to all identified risks, to continuously improve safety management skills of personnel and ensure compliance with mandatory rules and regulations.⁹⁹ When introduced it was appreciated for setting '... a practical rather than legal standard of what the reasonable ship-owner ought to do...'¹⁰⁰ And although not always mentioned, it is and has been acknowledged by courts in assessing due diligence to seaworthiness.¹⁰¹

IMO instruments are directed to certain vessels, but courts have considered the ISM Code to cases even before it had come in effect but it was well-

⁹⁴Anderson, above n 56, 136.

⁹⁵Tetley, above n. 18, 931.

⁹⁶Honka, above n 4, 114 [3.3.2].

⁹⁷Ibid, 115 [3.3.3].

⁹⁸Scrutton, above n 5, 118 [7-20].

⁹⁹Simon Kverndal 'The ISM and ISPS Codes: Influence on the Evolution of Liabilities' in *Liability regimes in Contemporary maritime law* Prof D. Rhidian Thomas (Informa, 2007) 151-153.

¹⁰⁰Ibid 163.

¹⁰¹Anderson, above n 56, 225.

known what it demanded. This indicates that the information it provides is more important than who it applies to. An arbitral tribunal held that a ship-owner should have been inspired by provisions in the ISM Code requiring specific instructions to crew-members in cargo-handling although the Code was not yet in effect.¹⁰² In the *Eurasian dream*, not having complied with the requirements in the ISM-Code although not being in effect for the vessel was considered in the courts finding that the ship-owner had not exercised due diligence to seaworthiness.¹⁰³

Based primarily on how the ISM Code has been acknowledged by courts. IMO instruments are relevant objective standards in seaworthiness claims but the information is more important than their status in public law. ‘The ISM Code was not developed, and was never intended to be a tool for lawyers and the courts to determine issues of liability...these are byproducts!’¹⁰⁴ With this quote in mind, it should be possible for a ship-owner to acknowledge what IMO instruments he should address and which are not relevant for the vessel regardless of what he is required to comply with according to public law.

¹⁰²Tetley, above n 18, 982.

¹⁰³Papera traders Ltd v Hyundai Merchant Marine. *The Eurasean Dream* [2002] 1 Lloyd’s Rep 719, 739.

¹⁰⁴Dr Phil Anderson in *Liability regimes in Contemporary maritime law* Prof D. Rhidian Thomas (Informa, 2007).

5 Seaworthiness in Case-law

What is legally required by a ship-owner is clear. He must have exercised due diligence to seaworthiness before and at the beginning of the voyage under a BOL and not being privy to seaworthiness under a hull-policy. The difficulty is to anticipate how judges will apply law to facts. This part will deal with what factors a judge actually takes into account and why. In an attempt to not make the information accessible, it has been divided between crew-competence and vessel/equipment and unseaworthiness and due diligence and privy.

5.1 Crew-competence

In assessing crew-competence, courts have placed reliance on certificates, and experience. That a ship-owner is certified indicates that the crew-member is competent, but it is not a determinative factor. Similarly, that a crew-member is uncertified doesn't render him incompetent. Contrary to certificates, relevant experience undoubtedly indicates competence and lack of experience incompetence.

The Torepo grounded whilst under pilotage in a difficult passage and a lookout that was not certified failed to report a lantern.¹⁰⁵ Justice David Steel held that uncertification was immaterial because the requirements in the certification didn't directly deal with the look-out's duties and having the knowledge acquired by the certificate wouldn't had made him more competent to report the lantern.¹⁰⁶ *The Empire Jamaica* collided with another vessel, the other vessel caused the collision but minor negligence was admitted by the *Empire Jamaica's* uncertified officer.¹⁰⁷ Justice Willmer acknowledged that the fact that a crew-member is uncertified doesn't mean he is incompetent, and competence was shown by the officer having long experience at sea.¹⁰⁸

The vessel, *Marina Iris*, sank and the crew perished.¹⁰⁹ Incompetence was determined on the bases that the crew lacked certificates as well as relevant experience for the voyage and there was no reliable evidence showing competence.¹¹⁰ In the *Eurasean Dream* a car-carrier, was lost by fire during unloading of cars while part of the cargo was still on-board.¹¹¹ It started with a small fire that spread, the crew-members made several mistakes and

¹⁰⁵*The Torepo* 2002 lloyds rep vol 2, 535, 535.

¹⁰⁶*Ibid* 547.

¹⁰⁷*The Empire Jamaica* [2002] 1 Lloyd's List Rep 50, 52.

¹⁰⁸ *Ibid* 53.

¹⁰⁹*Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd and another* [2006] 4 SLR(R) 689; [2006] SGCA 28, [1].

¹¹⁰*Ibid* [64].

¹¹¹ *Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd's Rep 719, 719.

failed to stop it, the master failed to use the CO₂ fire-fighting system correctly. The judge found the master and crew-members incompetent for lacking ship and cargo specific knowledge.¹¹²

The Makedonia, broke down mid-Atlantic due to not having enough fuel, after a large amount of the carried fuel was contaminated. The engine-officers inappropriate fuel, fresh water and fuel-equipment handling on numerous occasions had contaminated the fuel.¹¹³ The judge found that the crew-members were unseaworthy, ‘this is a shocking history of feer inefficiency, a succession of negligent acts amounting, in my opinion, to a state of efficiency far beyond casual negligence.’¹¹⁴

5.2 Privity and Due Diligence to Seaworthy Crew

In determining due diligence as to crew competence, factors the court took into account were certificates, knowledge of the individual crew-member, previous accidents and information and training provided. Relevant factors in assessing privity were knowledge of the individual and experts opinions.

Following that certificates doesn’t ensure actual competence, due diligence is not met by proving solely that certificates has been viewed. Similarly, that they are not certified doesn’t mean the ship-owner has failed to exercise due diligence or is privy to unseaworthiness. Genuine knowledge of the individual gained by previous employment or comprehensive interviews and back-ground checks is necessary.

In *Marina Iris*, the ship-owner was not privy to the crews incompetence. The ship-owner knew the crew-members were uncertified but the judge determined that their competence could be trusted as they had worked satisfactorily for the company on other routes and an expert opined that they were competent for the voyage.¹¹⁵ Relevant for the courts determination was that an expert accepted by the insurers had ensured seaworthiness prior to voyage.¹¹⁶

In *Makedonia*, due diligence had not been exercised as to the crew-members competence. One engineer had been employed without proper proceedings, two men had approached the employer and sought the position as chief-engineer. After looking at the certificates of competence, the one with the longest experience was employed without ensuring neither general nor ship-specific competence. No interviews were made and previous employer’s

¹¹²Ibid 742-743 [151].

¹¹³ *The Makedonia* [1962] P 190; [1962] 1 Lloyd’s Rep 316, 334-336.

¹¹⁴Ibid 336.

¹¹⁵ *Marina Offshore Pte Ltd v China Insurance Co (Singapore) Pte Ltd and another* [2006] 4 SLR(R) 689; [2006] SGCA 28, [67-68].

¹¹⁶Ibid 68.

weren't contacted. No control was made regarding the engineers knowledge on use of fuel handling on the particular ship and no plan was provided to inform him how it worked.¹¹⁷

To ensure that the crew-members are competent doesn't mean only employing competent crew. Due diligence is to detect where crew-members lack knowledge and provide training tools or guidelines to ensure they gain it in time for the voyage or at the relevant part of the voyage.

Both *Eurasean Dream* and the *Star Sea* were unseaworthy inter alia due to the masters not knowing how to handle the fire-fighting systems and in both cases the ship-owner had failed to inquire whether they had adequate knowledge or provided adequate information. The difference were that the former was a claim under a BOL and the latter an insurance claim. In the *Eurasean dream* the ship-owner had failed to exercise due diligence because of this. An Emergency Procedural Manual containing information on the fire-fighting system but it was too voluminous and not fitted for the vessel.¹¹⁸ In the *Star Sea* the ship-owner were not held privy to seaworthiness because evidence was adduced that the assured sincerely trusted the masters competence, he had long experience working for the company with a good record of service and held a master certificate.¹¹⁹

5.3 Vessel and Equipment

If a ship is not strong enough or properly equipped for the intended voyage, the vessel is unseaworthy. Factors courts took into account in determining seaworthiness were nature of defect, functionality and industry standards.

Whether a vessel and equipment is seaworthy or not goes down to functionality, if it is fit to meet expected perils. One of the reasons *Star Sea* was unseaworthy was that the engine room sealing didn't work properly.¹²⁰ *Toledo* broke down during voyage in harsh weather conditions after the vessel started taking in water through a cracked shell. Justice Clarke concluded causative unseaworthiness at the beginning of the voyage because of the nature of the defect as the internal structure was not fit to withstand expected stress-exposure during voyage.¹²¹

The *Eurasean Dreams* was unseaworthy for many reasons, inter alia for neither being equipped with enough walkie-talkies for the crew to

¹¹⁷*The Makedonia* [1962] P 190; [1962] 1 Lloyd's Rep 316, 338.

¹¹⁸*Papera traders Ltd v Hyundai Merchant Marine. The Eurasean Dream* [2002] 1 Lloyd's Rep 719, 743 [151].

¹¹⁹*Manifest Shipping Ltd v Uni-Polaris Insurance Ltd. The Star Sea* [2001] 1 Lloyd's Rep 389, 396 [30].

¹²⁰*Ibid* 394 [21].

¹²¹*The Toledo* [1995] 1 Lloyd's Rep 40, 52.

communicate adequately in an emergency situation nor with enough breathing apparatus for the vessel despite following IMO standards.¹²²

5.4 Privity and Due Diligence to Seaworthy Vessel and Equipment

In assessing due diligence, courts has considered knowledge of the vessel, industry practice, proper reporting systems. In assessing privity to unseaworthiness, actual knowledge, expert opinions and classification society's certificates were considered.

Class certificates and completed class surveys are indications that the vessel is seaworthy, but classification societies are not expected to maintain better knowledge than the ship-owner about the condition of vessel or equipment as due diligence is a non-delegable duty. The ship-owners were held not to have exercised due diligence to *Toledo's* seaworthiness. The unseaworthiness, the weak internal structure, arose after frequently being damaged by stevedores and the fact that the ship-owner hadn't repaired them.¹²³ The judge found that a prudent ship-owner at the relevant time would have appreciated the risk and would have an adequate system for 'inspection, ascertainment and repair.'¹²⁴

Toledo's ship-owner argued that due diligence had been exercised, the vessel was in class, it had been surveyed regularly and industry practice was followed. Justice Clarke accepted that the industry practice was not to repair these damages but found that ship-owners should have been aware that they needed to be repaired because of previous accidents and that others negligence doesn't cure this ship-owners negligence.¹²⁵ In response to the vessel being in class and class-recommendations being followed,¹²⁶ the judge merely acknowledged that if classification society had known about the major damages, they would have recommended reparation.¹²⁷

In the *Lydia Flag* it was alleged that the ship-owner hadn't provided an adequate reporting system and the crew-members therefore had not reported that the rudder was lose, it was neglected on the bases that a failure to report may either be caused by inadequate reporting systems or by negligent crew.¹²⁸

The *Star Sea* was unseaworthy inter alia due to the engine room sealing didn't work properly. The assured was not privy to such unseaworthiness,

¹²²Papera traders Ltd v Hyundai Merchant Marine. *The Eurasean Dream* [2002] 1 Lloyd's Rep 719, 742 [151].

¹²³*The Toledo* [1995] 1 Lloyd's Rep 40, 50-52.

¹²⁴*Ibid* 52.

¹²⁵*Ibid*.

¹²⁶*Ibid* 50.

¹²⁷*Ibid* 53.

¹²⁸*Martine Maritime Ltd v Provident Capital Indemnity Fund Ltd. The Lydia Flag* [1998] 2 Lloyd's Rep 652, 657.

he reasonably trusted it was in a good condition as she was surveyed and maintained safety certificates.¹²⁹

5.5 Conclusion Seaworthiness in Case-law

In courts assessment of crew-competence emphasis is placed on competence showed by experience specific to the voyage. If a crew-member is on a ship he has never been before or undertakes a longer trip then before he must acquire special training or get guidance to become competent. If he is on a vessel he has served on before, and has kept a good record of service, he will most likely be deemed competent despite making a mistake on one voyage.

For vessel and equipment to be deemed seaworthy, greatest reliance was put on not containing any defects and that the equipment is adequate for the particular vessel.

Due diligence as to seaworthiness has been exercised if the ship-owner has taken into account all relevant information he should reasonably have access to, ensured seaworthy crew, vessel and equipment are obtained and maintained and that all defects and deficiencies are corrected. In order to ensure this ship-owner must take into account regulations, industry practise, expert opinions and finally assess what needs to be complied with and what additional measures must be taken to make his vessel seaworthy for the ship and the voyage.

Privity, or blind eye knowledge is a very high standard and will depend on available information in each case. Knowing that a crew-member is uncertified or a vessel is certified from a country of convenience doesn't amount to privity to unseaworthiness if other factors show seaworthiness.

Conclusively, the factors courts placed greatest reliance on in determining seaworthiness was crew-members experience and vessel's and equipment's functionality. For due diligence as to seaworthiness relevant factors for crew-members were knowledge of the individual and his skills gained by assessing previous experience and for vessel and equipment how the defects manifested themselves and objective standards. Privity to unseaworthiness was not found in the assessed cases but the court found the ship-owners not being privity to crew-members incompetence for knowing the crew-member and trusting expert opinions and certificates and for vessel and equipment after the vessel being in class.

The factors the courts didn't place such great reliance on were certificates and compliance with laws and regulations, because they were not spot on the negligent act, in other words, had they had the certificates they would

¹²⁹Manifest Shipping Ltd v Uni-Polaris Insurance Ltd. *The Star Sea* [2001] 1 Lloyd's Rep 389, 396 [31].

not have acted differently. Ship-owners cannot trust certificates or information from third parties to escape due diligence because it is a non-delegable duty and the ship-owner is expected to know his ship best.

5.6 Objective Standards a Court will take into Account

Based on what objective standards a court didn't take into account, it could be inferred that a standard that is specific to the vessel and the hazards, contain substantive specific requirements, ensure actual knowledge and is reasonable will be considered.

The next section will present IMO instruments for piracy and polar navigation and analyse on the bases of the above findings whether one contain more adequate information for a seaworthiness assessment than the other.

6 IMO Guidelines on Piracy, Harsh Weather Conditions and Ice

6.1 IMO and Piracy

IMO does not work by themselves to combat piracy but cooperates with numerous organisations throughout the industry. The ultimate goal is to abolish all piracy by establishing effective government and implement the rule of law ashore in Somalia. Meanwhile piracy still exist, the focus is to protect ships and those on board from piracy attacks.¹³⁰

6.2 Best Management Practices for Protection against Somali Based Piracy

The BMP is the result of cooperation throughout the maritime industry providing practical guidelines on how to avoid, deter and delay piracy attacks. IMO has acknowledged the guidelines and urged member states to ensure that owners, operators and managers of ships entitled to fly their flag, as well as the shipboard personnel employed or engaged on such ships comply with the guidelines.¹³¹ The guidelines are not mandatory nor subject to certification. Furthermore, it is emphasised that it is just basic measures that ship-owners are invited to go beyond.¹³² The factors concerned include inter alia route planning, crew training and ship construction. The main advice is that the best way to avoid a pirate attack is to not be near pirates.

Ship-operators and masters are recommended to carry out a ‘ship- and voyage specific’ risk-assessment before entering the high-risk area to identify measures for prevention, mitigation and recovery, which will mean combining statutory regulations with supplementary measures to combat piracy.¹³³

The high-risk area is under constant surveillance and reports on locations of pirate activity are provided. Masters are advised to review this information and re-route if necessary. Group Transit Schemes are provided, where ships

¹³⁰ Our Work, Maritime Security, Piracy, 1 August 2013

<<http://www.imo.org/Pages/home.aspx>>.

¹³¹ *Piracy and Armed Robbery against Ships in Waters Off the Coast of Somalia* IMO MSC.1/Circ.1339 (14 September 2011) 1-2.

¹³² *Ibid* annex 2, v.

¹³³ *Ibid* 5 [3.1].

travel in convoy through the high risk area, which the master is advised to join.¹³⁴

Masters are recommended to conduct crew-training sessions prior to transits in the high-risk areas ensuring that the crew is fully briefed and familiar with their duties in the event of a piracy-attack.¹³⁵ Physical barriers such as water spray are effective to impede boarding.¹³⁶ At the time the guidelines were issued, 2011, there had been no reported attacks where pirates have boarded a ship that has been proceeding at over 18 knots and vessels are therefore recommended to proceed in full speed in the High Risk Area.¹³⁷

6.3 IMO, Harsh Weather Conditions and Ice

IMO are working on a mandatory Polar Code that is expected to be finalized in 2015/2016.¹³⁸ The Polar Code covers both Arctic and Antarctica and includes parts of the Northern Sea Route. In awaiting the Polar Code, the non-mandatory ‘Guidelines for ships operating in Polar waters’¹³⁹ have been introduced. The Guidelines are recommendatory and their wording should be interpreted as providing recommendations rather than mandatory direction.¹⁴⁰

6.4 Guidelines for Ships operating in Polar Waters

The Polar Guidelines consists of 16 chapters canvassing construction, equipment, operational matters and environmental protection.¹⁴¹ Provisions are included for risk assessment, route planning, crew competence and ship construction.

Operations in polar waters should take due account of factors such as: ship class, environmental conditions, icebreaker escort, prepared tracks, short or local routes, crew experience, support technology and services such as ice-mapping, availability of hydrographic information, communications, safe ports, repair facilities and other ships in convoy.¹⁴² Consideration should also be given to carrying an Ice-Navigator when planning voyages into polar

¹³⁴Ibid 14 [6.5-6.6].

¹³⁵Ibid 15 [6.8].

¹³⁶Ibid 32 [8.6].

¹³⁷Ibid 7[3.4].

¹³⁸ Heike Deggim *Ensuring Safe, Secure and Reliable Shipping in the Arctic Ocean*, NATO Advanced Workshop on ‘Environmental security in the Arctic Ocean’ Cambridge, Scott Polar Research Institute, 13-15 Oct 2010, 6-7.

¹³⁹*Guidelines for Ships Operating in Polar Waters* IMO A 26/Res.1024 (18 January 2010).

¹⁴⁰Ibid, Annex, 4[P-1.4].

¹⁴¹Ibid 3.

¹⁴²Ibid 11 [1.1.7].

waters.¹⁴³ Continuous monitoring of ice conditions by an Ice-Navigator should be available at all times while the ship is underway and making way in the presence of ice.¹⁴⁴

All ships operating in polar ice-covered waters should carry at least one qualified Ice-Navigator¹⁴⁵ with documentary evidence of having satisfactorily completed an approved training program in ice navigation and appropriate on-the-job training that may include simulation training.¹⁴⁶ The Ice-Navigator should have knowledge, understanding and proficiency of required for operating a ship in polar ice-covered waters, including recognition of ice formation and characteristics; ice indications; ice maneuvering; use of ice forecasts, atlases and codes; hull stress caused by ice; ice escort operations; ice-breaking operations and effect of ice accretion on vessel stability

The guidelines recommend due consideration to comply with Polar Class in accordance with the International Association of Classification Societies or alike designation should they travel in polar waters where ice is prevalent. There are 7 different Polar Classes ranging from PC 1, year round in all ice-covered waters to PC 7, summer/autumn operation in thin first-year ice which may include old ice inclusions.¹⁴⁷

The guidelines stressed that structures, equipment and arrangements essential for the safety and operation of the ship should take account of anticipated temperatures.¹⁴⁸ All ships should have structural arrangements adequate to resist the global and local iceloads characteristic of their Polar Class.¹⁴⁹ Each area of the hull and all appendages should be strengthened to resist design structure/ice interaction scenarios applicable to each case.¹⁵⁰ All Polar Class ships should be able to withstand flooding resulting from hull penetration due to ice impact.¹⁵¹

6.5 Comparison

The guidelines are similar in that they both require risk-assessment to be carried out to the respective hazards and constant attention to ensure the hazards hasn't change. None of them are mandatory although the Polar guidelines have a more mandatory approach than the BMP that holds a more informative approach.

¹⁴³Ibid 11 [1.2.1].

¹⁴⁴ Ibid 11 [1.2.2].

¹⁴⁵ Ibid 11 [1.2.1].

¹⁴⁶ Ibid 31 [14.2].

¹⁴⁷ Ibid 10, table 1.1.

¹⁴⁸ Ibid 12 [1.1.5].

¹⁴⁹ Ibid 12 [2.1.1].

¹⁵⁰ Ibid 12 [2.1.2].

¹⁵¹ Ibid 13 [3.3.1].

Polar guidelines provide that the ship must be supplied with an Ice-Navigator with particular training evidenced by documentation. The BMP doesn't require a person with special knowledge, however it requires all crew-members to be briefed before entering the high-risk area so that all know what to do in the event of an attack.

Considering ship and equipment, the Polar guidelines are also comprehensive and detailed containing substantial requirements and compliance with class. The BMP informs what ships are best suitable to avoid an attack but doesn't require ships to be reconstructed but that they take additional measures in order to not be attacked. In respect of ship and equipment, the Polar guidelines also contain detailed requirements whereas the BMP are concerned that any vessel should deter a piracy attack.

7 Analysis

The analysis will be based on information and findings from the previous sections. It has been concluded that only objective standards that are reasonable and directly relevant for the casualty are referred to in the courts seaworthiness or due diligence to seaworthiness claims. It has also been concluded that objective standards are acknowledged by court to evidence a ship-owner is not privy to unseaworthiness and that if there are no available objectives standards, the court will look at the nature of the deficiency. If the ship-owner could not reasonable have known the vessel was not fit to meet the hazard, or that there was a new hazard, the vessel is seaworthy and the ship-owner has exercised due diligence to seaworthiness.

The factors that will be considered in the analysis are the guidelines in the IMO context, evidence of compliance and type of requirements relevant for casual connection.

The legal status of IMO instruments may be considered and it is argued that greater reliance is placed on mandatory rules than recommendations. Neither the Polar Code nor the BMP are mandatory. The Polar Guidelines are introduced awaiting a partially mandatory Code, they are written in a mandatory language using words as shall and contains detailed requirements. In effect it seems mandatory rather than recommendatory.

The status of BMP is different, they present best management practices and there are no indications that any of it will be mandatory in the future, adjectives used are recommends and informs and has no mandatory character. The BMP is in fact not an IMO instrument, it was made by cooperation throughout the industry and IMO merely acknowledged them and spread them to their member states. The reasons why the Polar guidelines and BMP should be acknowledge differs, but it seems plausible that in both cases, a judge that got them in his hands would acknowledge them and accept them as providing industry standards.

First time a casualty happens, the ship-owner is excused, but he must ensure it doesn't happen again. The BMP are written in response to pirate attacks and recommendations are based on what has worked previously. If an accident occurs and all BMP are complied with it may be that pirates have introduced new techniques and the casualty occurred for the first time and the ship-owner is hence freed. The Polar Guidelines on the other hand are anticipatory, they are based on calculations and hypothetical and not real accidents. Their relevance in a court assessment can therefore be questioned. It would therefore seem more plausible in a seaworthiness assessment that the BMP are followed than the Polar guidelines.

Documentary evidence or certification is not relevant in proving seaworthiness or due diligence as to seaworthiness but it is relevant in

proving that the ship-owner is not privy to unseaworthiness. The Polar guidelines expects documentary evidence in respect of crew-competence, the BMP does not. Thus being a question only of evidence, objective standards only serves as evidence in determining privy to unseaworthiness which is relevant for the outcome of the case. The Polar guidelines are therefore more adequate than the BMP.

Considering the BMP and the Polar Code in regards of formality only, they are both of relevance for a courts assessment of seaworthiness and due diligence to seaworthiness. Taking into account the factor that the BMP are based on response to real accidents, they would seemingly play a greater importance in a seaworthiness assessment and if a ship-owner complies with them he most probably has done enough to exercise due diligence as to seaworthiness.

The Polar guidelines are much more comprehensive than the BMP. They contain detailed information in what an Ice-Navigator must know, how a ship should be constructed and what equipment should be supplied. The Polar guidelines refer to seven different Polar Classes with different requirements depending on when and where the vessel travels. More objective standards may indicate that more consideration to the casualty and the information provided will have casual connection with the accident. It could be argued that in more situations will the court find that if the crew-members have this knowledge, subsequent mistakes would be of negligence and not incompetence. The BMP applies similarly to all vessels and there are no requirements on hull-strength and alike. It could either mean that it is not relevant for the hazard, or that the ship-owner must figure out himself whether the vessel is seaworthy or not. The Polar guidelines are therefore better for a ship-owner in respect of this factor. But the question is how relevant subjective standards are in a seaworthiness assessment.

If the ship is strengthened in accordance with regulations but sinks after collision with ice the ship-owner may be found to have exercised due diligence to seaworthiness. However, if the ship-hull couldn't handle it because the collision was more severe than anticipated due to the ship steaming too fast, that the ship-hull complies with requirements will be immaterial in the seaworthiness assessment.

Seaworthiness is assessed based on the ship; equipment and crew as a whole, fulfilling all the requirements in the Polar guidelines doesn't guarantee the ship as a whole seaworthy. Also, deficiencies in one aspect can be up filled by acknowledging the deficiency and find a way to get around it. Although the engine broke down in *Hong Kong fir*, the unseaworthiness didn't arise from the condition of the engine but for not supplying adequate crew. The BMP holds a more holistic view than the Polar guidelines.

The BMP informs that no ship travelling faster than 18 knots have successfully been attacked by pirates and ships are recommended to travel

in fast speed. Ships that have a slower maximum speed are not recommended not to travel in the area, but they are instead recommended to travel in convoy. It is doubtful that a ship travelling in a convoy would be argued unseaworthy for slow-steaming.

Conclusively, both the BMP and the Polar Guidelines are hazard specific and should therefore be acknowledged by courts in the subsequent claims.

In assessing seaworthiness and due diligence to seaworthiness, a ship-owner having complied with the BMP are most likely considered to have exercised due diligence to make his ship seaworthy, the same is not true in regards of the Polar guidelines. The BMP are based on previous accidents and deal with the adventure as a whole. The Polar guidelines are more comprehensive but compliance with each requirement doesn't necessarily means the ship is seaworthy in its entirety. This is in line with the ISM Code gaining recognition in courts assessment for providing practical rather than legal standards.

Although the ship may be rendered unseaworthy, what is of importance in an insurance dispute is whether the ship-owner is privy to such unseaworthiness or not. The Polar guidelines contain specific and detailed information and issues certificates to show compliance and are therefore more suitable evidence than the BMP in an insurance claim.

8 Conclusion

The insurer is liable to indemnify the ship-owner unless he can prove that the vessel was seaworthy and the ship-owner was privy to such unseaworthiness. Whether a vessel is unseaworthy or not is based on objective standards, but whether a ship-owner is privy is purely subjective. Nevertheless, certificates proving objective standards are met can evidence that the ship-owner is not privy.

In a cargo-claim under a BOL the ship-owner must prove he has exercised due diligence to seaworthiness in order to be allowed to rely on any immunity from liability for the cargo-loss. The test is the one of the prudent ship-owner in the particular ship-owners shoes. Objective standards should be met, but cannot relieve the ship-owner if he ought to have known additional measures were needed for the particular vessel and adventure.

The Polar guidelines are more detailed and comprehensive and certificates are issued to prove compliance in respect of the crew and the vessel. From a ship-owner perspective, the Polar Guidelines are more suitable in an insurance claim because they contain detailed requirements and compliance is evidenced by documents so the ship-owner can prove that he was not privy to any unseaworthiness.

The BMP are better suited in a claim under a BOL. They are holistic and based on real accidents. If a ship-owner can show he complies with these he can show that he has exercised due diligence to seaworthiness in respect of piracy.

Because only one route can be chosen, the advise would be for the ship-owner to travel the Southern Route because it is easier to defend against being privy to seaworthiness than proving having exercised due diligence to seaworthiness.

However, whether a court will find a vessel seaworthy or unseaworthy is very difficult to predict, it can relate to any aspect of the crew, equipment and vessel. A vessel damaged after a pirate attack may be rendered seaworthy in respect of being prepared for the attack but may be rendered unseaworthy in regards of a general aspect.

Conclusively, it is not advisable to place too much reliance on the aspect of providing a vessel the court will deem seaworthy in choosing whether to travel the Northern Sea Route or the Southern Route between Asia and Europe.

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