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Safety first: Reconstructing the concept of seaworthiness under the maritime labour convention 2006

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ABSTRACT

The concept of seaworthiness has evolved over many years, and in common with similar concepts (for instance, the definition and application of "prudent seamanship"), its precise meaning has varied considerably. In this context, the Maritime Labour Convention 2006 (MLC 2006) can be regarded as focusing the concept in a manner that is not found elsewhere (whether in treaties or in case law). The implementation of the Convention will change shipowners' obligations to ensure ship safety and constitute an essential element of the standard of seaworthiness. Moreover, it is submitted that the MLC 2006 shifts the centre of emphasis in a manner that is both focussed and necessary. These changes are tracked and critically examined in this paper and conclusions are submitted based on the relevant analysis.

1. Introduction

Seaworthiness deals with the fitness and readiness of a ship and its fundamental ability to sail safely to its destination. Its standard extends to all aspects of a ship-including the human element, physical structure, documentation, cargo worthiness and so on. It is one of the most important concepts in the maritime regulatory regime, and takes many forms.

For instance, Article 94(1) of LOSC 1982 requires that flag States are under a categorical duty to exercise jurisdiction and control in relation to "administrative, technical and social matters" over ships that are permitted to fly its flag. Seaworthiness is clearly a crucial element in relation to this duty and this is further set out in the remainder of the Article, particularly in Article 94 (3) and (4).

Similarly, in the commercial context of the carriage of goods by sea, the Hague/Hague–Visby Rules require that the carrier has the obligation to exercise due diligence to make the ship seaworthy both before and at the beginning of the voyage. In marine insurance law, seaworthiness is an implied warranty of the shipowner, the breach of which results in the loss of insurance cover, even though there is no causal relationship between the breach and the loss [1]. In the law relating to seafarers' employment contract, seafarers are guaranteed of the protection that that originates from the legal implication that the ship on which he is employed to work is, in fact and law, seaworthy. For instance, section 458 of the UK Merchant Shipping Act (MSA) of 1894 has conferred upon seafarers a statutory right to an implied term of seaworthiness, which cannot be displaced or exempted by contractual agreement.

However, seaworthiness is not an absolute concept but a relative one, dependent on the particular context and facts. This is primarily dependent and determined by a variety of different contractual purposes and perspectives. A ship might be seaworthy as between the insurer and the shipowner, though unseaworthy as between shipowner and the shipper of a particular cargo [2]. For instance, frozen cargo requires special freezing apparatus, though that does not affect the safety of the ship although it may impair seaworthiness under a marine insurance policy [3]. This was made clear in The Eurasian Dream, where it was held that "it [seaworthiness] is relative to the nature of the ship, to the particular voyage, or even to the particular stage of the voyage on which the ship is engaged" [4].

It is in this context that the implementation of MLC 2006 will prove of greatest value, in increasing and giving legal backbone to the standards of due diligence and eventually reduce the chances of unseaworthy ships being sent to the sea. The importance of this to the maritime industry cannot be over-estimated. It should be emphasised, however, that this is not merely a case of adding to the bureaucracy of the regulatory frameworks that already exist (for instance in relation to port inspections and the various Memoranda of Understanding (MoUs)) in relation to Port State Control Regimes. The introduction of the doctrine of seaworthiness into the MLC 2006 also has the significant commercial effect of improving productivity and efficiency. It will reduce maritime incidents and avoid damage to ship, cargo and people (including seafarers) on board. Also, it will reduce the insurance premiums

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due to improvement of due diligence standards. In addition, the implementation of MLC 2006 requires shipowners to maintain proper documentation, which can be used by interested parties to prove their claims. This will contribute to the minimisation of exposure to litigation in the event of a maritime incident and has the potential to increase settlement and alternative dispute resolution.

The evidential effect of the enforcement of MLC 2006 will be considerable in establishing the seaworthiness of a ship. It is likely that a finding of compliance with the MLC 2006 will support the necessary evidence required by the shipowner to prove, *prima facie*, that he has exercised the required due diligence. This is important as the normal rules of evidence will impose the burden of proof on the shipowner and proof of compliance will support a contention that due diligence has been legally established. On the other hand, non-compliance with the MLC 2006 requirements is likely to enhance the presumption of fault on the part of the shipowner; a presumption that the shipowner may great difficulty in refuting.

Given the above concerns, this paper has a number of objectives:

1. To review the development of the doctrine of seaworthiness in maritime law, in particular its important role in ensuring safety of ships in the context of the primacy of the human element in assessing seaworthiness of ships;
2. To examine the implications of implementing the MLC 2006, particularly its role in improving ship safety;
3. To analyse the extension of the meaning of seaworthiness under the impact of MLC 2006, in particular the changes of standards under the new requirements of MLC 2006;
4. To assess the criticisms of this extension and an evaluation of the major obstacles that exist in law and practice.

The paper draws the above issues together from a theoretical study to the practical contexts operating in the maritime industry, offering a critical evaluation of the impact of the MLC 2006.

2. Development of the doctrine of seaworthiness in maritime law

In marine insurance, seaworthiness had its origins in the common law at the beginning of 19th century, at least. In the case of Christie v. Secretan [5], the court held that compliance with a requirement of seaworthiness is a condition precedent to the underwriter's liability for a loss. The rationale of an absolute rule of seaworthiness in marine insurance was further expounded in the case of *Wedderburn* v. *Bell* [6]. This rationale almost certainly matured around the mid-nineteenth century. In *Dixon* v. *Sadler* [7], the court held:

> … there is an implied warranty that the vessel shall be seaworthy, by which it is meant that she shall in a fit state as to repairs, equipment, and crew, and in all other respect, to encounter the ordinary perils of the voyage insured, at the time of sailing upon it.

In Quebec Marine Insurance Co. v. Commercial Bank of Canada [8], the court drew the conclusion that "the warranty of seaworthiness is attached to the contract is a law known to the parties who make contracts of this description". In Foley v Tabor [9] and Danniels v Harris [10], the courts further held that the standard of seaworthiness varies according to the different voyages undertaken. In addition, if an adventure is divided into several stages, seaworthiness should be determined according to the circumstances of each stage, at the commencement thereof [11].

The meaning of seaworthiness has also been regulated by a number of national laws and conventions. The US Harter Act of 1893 was the first attempt to balance the power between carriers and cargo owners [12]. The Act set a limit on carriers' liability for loss due to negligence or failure to exercise due diligence to make the ship seaworthy. The significance of this lies in the fact that the principles established in the Harter Act became in many ways the basis of liability in the Hague Rules and then followed by the Hague Visby, Hamburg and Rotterdam Rules.

According to Rule (1) of Article 3 of the Hague Rules and the Hague–Visby Rules, the carrier has the obligations to exercise due diligence before and at the beginning of the voyage. These obligations include:

(1) make the ship seaworthy,
(2) properly man, equip and supply the ship, and
(3) 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.

The Hamburg Rules and Rotterdam Rules have not changed these major obligations. However, the carrier's duty to "make the ship seaworthy" is replaced by "make and keep the ship seaworthy" under the Rotterdam Rules. As a result, the duty is extended to cover the entire voyage.

Despite its important role in maritime law, there is a lack of united definition of seaworthiness. According to section 39(4) of the Marine Insurance Act 1906, "A ship is deemed to be seaworthy when she is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured".

Based on numerous decisions, Tetley described seaworthiness in the following terms:

> Seaworthiness may be defined as the state of a vessel in such a condition, with such equipment, and manned by such a master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage [13].

However, there was no specific statutory definition which received universal recognition in the maritime industry. Therefore, maritime courts have to define seaworthiness on a case-by-case basis [14]. In a number of US and English cases, seaworthiness was defined as the "condition in which a ship should be enabled to encounter whatever perils of the sea a ship of her kind, and laden as she is, may fairly be expected to encounter in performing the voyage concerned". In Australia, the judge in the case of Bunga [15] formulated the definition of seaworthiness through the application of a number of English and US authorities. For example, the vessel must be "fit to encounter the ordinary perils of the voyage"; it must be "in a fit state … to encounter the ordinary perils of the voyage insured"; the state of fitness required "must depend on the whole nature of the adventure" [16].

In addition, the definition of seaworthiness has different meanings in different maritime law jurisprudence or in the admiralty courts in different jurisdictions. For example, a ship considered seaworthy under the UN LOSC might or might not be considered seaworthy under The Hague Visby Rules. In Norway, the Seaworthiness Act, which was replaced by the New Ship Safety Act, defines seaworthiness as follows:

> A ship is considered unseaworthy when, because of defects in hull, equipment, machinery or crewing or due to overloading or deficient loading or other grounds, it is in such a condition, that in consideration of the vessel's trade, the risk to human life associated with going to sea exceeds what is customary.