The Relevancy of Seaworthiness and its Deviation in the 21st Century

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Abstract
Under the common law, it is stated that the carrier should provide a vessel ‘that fit to meet and undergo the perils of the sea and other incidental risks which of necessity she must be exposed in the course of the voyage’. Also the term of ‘seaworthiness’ is to be described as ‘…that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the probable circumstances of it.’ On the other hand, with respect to the Hague/Visby Rules, further steps have been taken in defining the term. Article III rule 1 contains detailed articles about what factors constitute seaworthiness. From this provision, we can see that the Hague/Visby Rules have replaced the absolute duty to provide a seaworthy vessel by the duty to exercise due diligence to make the vessel seaworthy. It can be said that as the concept of seaworthiness lies between a wide range of scopes, various approaches can be taken in determining its meaning. Accordingly, in order to grasp the extent of such essential term and notion, I will divide this essay into two main parts. Firstly, I will examine thoroughly the legal aspects concerning seaworthiness and deviation. In the second part, analysis will be made with regard to the relevancy of seaworthiness as well as deviation in the 21st Century.

Keywords: Seaworthiness, Hague, Visby Rules, Sales of Goods by Sea, International Commercial Law

Analysis of the distinct features of Seaworthiness and Deviation Prior to the Commencement of the Rotterdam Rules

Definitions
Seaworthiness: As mentioned above, that the concept of seaworthiness lies between a wide range of scopes, various approaches can be taken in determining its meaning. The MIA 1906, in defining the duty to provide a seaworthy vessel, used the ability of the vessel to encounter the ordinary perils of the sea. Whereas, in the context of COGSA, the definition of seaworthiness used by McFadden v. Blue Star, and the definition in Hague/Visby Rules in Art III rule 1, used the conduct of a prudent carrier, which can be tested by asking: ‘Would a prudent owner have required that it (the defect) should be made good before sending his ship to sea had he known of it? If he would, the ship was not seaworthy within the meaning of the undertaking’.

The above definitions of seaworthiness have been reinstated in recent case of The Eurasian Dream. Nevertheless, we will be looking closely into this case in the second part of the essay.
Deviation: It has been established under common law that there is an implied obligation imposed on the carrier or ship owner stating that they shall not voluntarily and unjustifyably depart from the ‘proper course’. The meaning of ‘proper course’ can be defined as the agreed or stipulated contractual route, the direct geographical route, or the unusual, customary or recognized trade route. In Reardon Smith Line Ltd. v. Black Sea, it was held by the court that the extra 200 miles added to the voyage in order for the ship to get fuel did not constitute deviation. It was viewed that such practice was a common practice for many other ocean-going-oil-burning vessels. The court also added that to establish an unjustifyable deviation claim, the departure from the contractual voyage must be the result of a deliberate act on the part of the owner or the ship’s officers.

Nature of the Obligation

Seaworthiness: Regarding seaworthiness, an implied term that a carrier shall provide a seaworthy vessel is stipulated by the common law. Charterparties often contain express terms governing the state of the vessel for the services required and the Hague-Visby Rules, for instance, impose an obligation on the carrier to ensure that the ship is in a seaworthy state. At common law, in Steel v. State Line Steamship Co., Lord Blackburn expressed his view that the implied obligation of owner has done his best to make her fit. Nevertheless, it has to be noted that this obligation attaches only to the commencement of the voyage and it is not a continuing duty. Therefore, once the ship is deemed seaworthy at the time of the sailing, the obligation to provide a seaworthy vessel can be discharged. Channell J also confirmed this view in McFadden v. Blue Star Line.

As mentioned earlier, under the Hague/Visby Rules, the absolute obligation at common law is replaced by the duty to exercise due diligence to make the vessel seaworthy. This is laid down in the Art III rule1 of the Hague-Visby Rules. Accordingly, the carrier will now be liable not only for his own negligence but also for the negligence of any party to whom he has delegated his responsibility for make the vessel seaworthy (The Muncaster Castle, 1961). The duty to exercise due diligence under the Hague-Visby is non-delegable and cannot be excluded.

Deviation: The owner of the vessel impliedly undertakes that his vessel will not deviate from the contract voyage. Therefore, it can be derived that the nature of this is an implied term of the contract of the carriage of goods by sea (Bingham, 1830). It should be highly noted that this particular duty not to deviate is essentially similar to the duty for the carrier to proceed with due dispatch. In other words, these two obligations are the two sides of the same coin. It has been established in many precedent cases that the duty to proceed with due dispatch is at utmost important and any failure to comply with this provision would result in a fundamental breach of the contract. At common law this undertaking applies to every voyage made under the contract for the carriage of goods by sea.

Under the Hague/Visby Rules, the only provision specifically addressing to deviation is laid down in Article IV rule4 which deals with the exception of justifiable deviations. However, we will be looking at this issue in the later part of this essay.

Applications under Different Types of Charterparty

Voyage Charterparty: Concerning seaworthiness, the obligation only attaches at the time of sailing on the charter voyage and therefore will be discharged once seaworthiness is presented at the time of the sailing, irrespective of what happens afterwards either during the voyage or at an intermediate port (Wilson, 2016). In the case of a consecutive voyage charter or where a voyage charter is divided into stages by agreement between parties, the seaworthiness undertaking would
occur at the commencement of each state of the voyage undertaken in performance of the charter (The Vortigern, 1899).

For deviation, because of the fact that the agreed route will form part of the underlying agreement of the contract of carriage, hence, any unlawful deviation will constitute a fundamental breach in the contract. Accordingly, the rule against unjustifiable deviation applied under this type of charterparty is strictly construed and applied by the court.

**Time Charterparty:** The obligation of seaworthiness here is, however, different from the voyage charter. The ship owner only owes this duty to the charterparty up until the time of delivery of the vessel. It is often the case that seaworthiness undertaking under this type of charterparty would be supplemented by certain form of maintenance clause where the ship owner is required to keep the vessel thoroughly in check.\(^4\) Still, it is important to note that such express obligation imposed by the maintenance clause is entirely distinct from the duty of seaworthiness. Regarding deviation, due to the nature of this type of charterparty, as long as the charterparty is completed in time, insignificant deviations are not normally found to constitute a fundamental breach of the contract. Thus, the rule is not as strictly applied as in the above case of voyage charterparty.

**Burden of Proof**

**Seaworthiness:** The onus of proving unseaworthiness is apparently on the party alleging it. Clearly, it is not for the ship owner to prove that his vessel was or was not seaworthy. If the claimant can successfully establish that the vessel is indeed unseaworthy, he would then have to show that the state of unseaworthiness is the cause for the loss of which he complains (Europa, 1908). In the *Hellenic Dolphin* (Lloyd’s Rep., 1978), Lloyd, J stated that a prima facie assumption of unseaworthiness against the ship owner could be established by the cargo-owner where it is found that the goods were in good conditions when shipped but damaged upon arrival. The cargo-owner can then seek to recover damages by claiming that such loss is caused from unseaworthy state of the vessel. Nevertheless, the ship owner can still try to escape this liability by showing the court that the relevant unseaworthiness was not due to any requirement of due diligence on their part or on the part of their servants and agents.

**Deviation:** Once the claim against deviation has been established, it is not for the claimant i.e. the cargo-owner to show that the loss is caused by negligence or any other fault performed on the part of the carrier, his servants or agents. As we will witness in the later part of this essay that any voluntary and unjustifiable deviation is a fundamental breach of the contract, consequently, the cargo-owner will have the right to repudiate the contract leaving the carrier with no immunity to protect him from liability for loss or damages. For the carrier to escape from this liability, he would need to defend himself by proving that the loss or damages would have occurred even if there had been no deviation. In *Joseph Thorley Ltd. v. Orchis Steamship Co.* (1907), it was held that since the ship had deviated, the cargo owner was entitled to terminate the contract of the carriage, which would render the carrier unable to rely on the benefit of the immunity provided in the contract. The only solution for the carrier is to establish that the damage by stevedores in London would have occurred even if the vessel had not deviated in the Eastern Mediterranean. Accordingly, it is apparent that the burden of proof lies on the part of the carrier. Section 4(2) of the COGSA 1936 provides a catchall exception stipulating that anyone who wishes to rely on the defence against the accused liability would need to bear the onus of proof.

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\(^4\) See NYPE 93 form, clause 6: ‘...keep the vessel in a thoroughly efficient state in bull, machinery and equipment for and during the service’.
Exceptions and Defence

Seaworthiness: Once the court has found that the vessel was indeed unseaworthy, the ship owner could still try to escape his liability by invoking the exemption clauses. To a certain extent, the ship owner can draw up a contract, which excludes him from liability regarding seaworthiness. Nevertheless, it is highly significant that such exemption clause must be stated with clear and unambiguous terms or otherwise it would be very unlikely for the court to allow such exceptions. In *Nelson Line (Liverpool) Ltd v. J. Nelson and Sons Ltd.* (1908), the ship owner included the contract with an exemption clause stating that he would not be held liable for any damage, which was capable of being covered by an insurance policy. It was discovered later that the frozen meat had arrived in damaged condition due to the unseaworthiness of the ship and the claimant sued the owner on the ground of unseaworthiness. It was viewed by the court that the exemption clause was not adequately precise and clear therefore, the owner could not rely on his defence and was held liable. Apparently, even an exception that refers specifically to seaworthiness will fail if it is ‘so ill thought out and expressed that it is not possible to feel sure what the parties intended to stipulated’. Also, it should be observed that the court lean strongly against applying exception clauses to loss caused by unseaworthiness, this can be witnessed in *The Christel Vinnen* (1908).

Deviation: At common law, the voluntary departure from the proper route is permissible in the event where its purpose is to save human life or to communicate with a vessel in distress in case lives may be in danger. This notion of justifiable deviation is clearly established in *Scaramanga v. Stamp* (1908) by Cockburn CJ. In this case, the vessel, having been deviated to answer a distress call, could easily have saved the crew from the troubled ship, nevertheless, decided to tow the ship in return for the salvage payment. The vessel, while engaged in this operation, was driven shore, which consequently resulted in the loss of her cargo. Such deviation, coupled with the fact concerning the towing fee in particular, was held unjustifiable and the ship owner was held liable. Interestingly, the decision of this case might have been otherwise had the weather been so adverse that it was necessary for the vessel to rescue the ship in order for it to save the crews on board.

Deviation could also be justified if it has been done so in an attempt to avoid danger to the ship or cargo. Hence, even though the shipmaster might have to deviate from the proper route, provided that he had done so in the attempt to make his vessel and cargo safe, he would be excused from deviation allegation. Deviation could also be justified despite the fact that the cause of the danger is a result from unseaworthiness. In *Kish v. Taylor* (1921), due to the unseaworthy state of the ship, it had to be deviated and put into Halifax for necessary repairs. The House of Lords, nevertheless, held the deviation to be justifiable regardless of the fact that it resulted from initial unseaworthiness. The decision in this case can be viewed as a policy decision-making. That is to say, when the need to deviate in order to prevent danger to life and property occurs, the master should not be left in a dilemma where he would have to make a decision while knowing that he could be faced with allegations of both unseaworthiness and unjustifiable deviation. This would apparently give him disincentive to deviate such decision would then certainly increase the dangers to which life and property are exposed at sea.

Under the Hague/Visby Rules regarding deviation, Article IV rule 4 of stipulates two further heads: ‘deviation in saving or attempting to save... property at sea’, and ‘any reasonable deviation’. However, in order to rely on these exemptions, the Hague-Visby Rules must be expressly incorporated into the contract of carriage as the governing law. It should also be noted that the English courts have given an extremely restricted interpretation to the term ‘reasonable
deviation’ with the result that there are few reported cases in which the concept has been successfully invoked.

**Effect of the Breach**

The common understanding regarding legal effects of a breach in any contract is that a breach of ‘warranty’ does not bring the contract to an end, whereas, a breach of ‘condition’ would certainly bring the contract to its termination. Also, there is a view that a ‘minor’ breach would entitle the parties to seek damages whilst a ‘major’ breach would give parties the right to repudiate the contract. Accordingly, considering the position of seaworthiness, the court would strongly refuse to take the traditional approach by categorising the terms as either a condition or a warranty. As the results of the breach can be so variable, as Diplock LJ pointed out in *Hong Kong Fir Shipping Co. v. Kawasaki* (1926), it would not be reasonable neither to allow parties to repudiate the contract just because a few rivets were missing nor to prevent parties from doing so even when the defects in the ship being irreparable (see Bunge Corp v. Tradax Export (1981).

While the position of seaworthiness is not entirely clear, it has been firmly established that the obligation not to deviate from the proper route is indeed an implied condition. Therefore, deviation would amount to a breach of condition, which constitutes a fundamental breach of the contract. In the event where the injured party elects to terminate the contract, ship owner can no longer rely for protection provided in the terms of the charterparty or bill of lading. In *Orchis* where its approach has been applied in many following cases, it was held that the carriers lose not only the benefit of exemption clauses in the contract, but also the right to enforce contractual provisions regarding laytime and demurrage. On the other hand, in *Hainn SS Co. v. Tate&Lyle* (1936), it was stated that the cargo-owner also entitles to waive the breach and continue with the contract. It has been witnessed in many cases that where deviation results in little or no loss of the cargo-owner, the cargo-owner would tend to ignore the breach thus, all the terms of the contract would continue to apply including the exceptions and provisions relating to the limitation of liability.

**The Rotterdam Rules vis-à-vis the Rules of Seaworthiness and Deviation**

In December 2008, the UNCITRAL adopted the convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules). A number of changes have been implemented into its provisions including issues regarding seaworthiness and deviation. It can be observed that the fast-paced development of the society, especially in the 21st Century, has triggered these changes under this new Convention.

Regarding seaworthiness, the current wording of the Rotterdam Rules is similar to that of Article III rule1, 2 and Article IV rule1 of the Hague-Visby Rules to the extent that the carrier under the obligation to properly and carefully receive, load, handle, stow, carry, keep, care for and unload the goods and to exercise due diligence in relation to the seaworthiness of the vessel, its manning, equipment and fitness for the carriage of cargo. Nevertheless, additional wordings have been incorporated into Article 13 of the Rotterdam Rules. It can be seen from Article 13 that, unlike the existing Hague/Visby Rules regime, the obligation to deliver is express rather than implied and the due diligence obligation is not restricted to the period before and at the beginning of the voyage. Therefore, it follows that under the Rotterdam Rules, the carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to make and keep the ship that, in relation to the obligations of the carrier, the balance of the risk has shifted slightly towards favouring the benefit of the cargo-owner.
In *The Eurasian Dream* (2002), issues regarding seaworthiness have been raised. Briefly, the Eurasian Dream was a car carrier and while discharging a cargo of new motor vehicles, a fire broke out. The crew were unable to contain the fire and the event then led to the abandonment of the ship, which amounts to the total loss of ship and cargo. On the ground of unseaworthiness coupled with due diligence, the cargo-owners sued for damages. The argument of unseaworthiness also the adequacy of document provided on board. All accounts contended by the claimant had been reviewed by the court. On arriving at the decision, the court was very critical of the ship operator as well as the staff, both ashore and on board the ship. Finally, it was concluded that the vessel was unseaworthy on account of an accumulation of serious problems (*'cumulative set of deficiencies'*) as suggested by the claimants. Accordingly, the court allowed the cargo-owners to succeed with their claim.

What interests me most concerning this case is that, in deciding the case, the court seems to have adopted the view that the International Safety Management Code (ISM) had already set the standard as to the minimum level of ship operation and therefore adopted the general principles as a sort of benchmark. To a certain extent, it seems that the court had the ISM Code very much in mind when considering the evidence and the operational practices in this case. However, there is a slight confusion in the judgment of this case. It was said by Cresswell J that *must be judged by the standards and practices of the industry at the relevant time, at least so long , nevertheless, it was clearly recognised that ISM Code was not mandatory for the Eurasian Dream at the time of the fire. This implies that, at the time of the case, ISM Code was not the standard used in the industries. Thus, it seems that the standard the court applied, upon delivering its judgment, was in fact a higher standard comparing to the normal trade practices recognised at such relevant time.*

Another significant Convention which has important impact on the issue of Seaworthiness is the International Convention on Safety of Life at Sea (SOLAS), especially Chapter IX which adapted the ISM regarding in particular the framework for Due Diligence. These two Codes affect the safety and security aspects of the shipping industry and impose certain obligations on shipping companies to comply with their requirements. Basically, under SOLAS, the scope of seaworthiness also extends to cover areas like marine pollution and safety of life.

With regard to deviation, the Rotterdam Rules stipulate that, except for the restrictions provided in Article 61, which include personal act or omission done with the intent to cause loss or recklessly and with knowledge that such loss would probably result, deviation will not deprive the carrier or maritime performing party of any defence or limitation (the Rotterdam Rules, Article 24). Accordingly, it appears that shippers may no longer be protected from unreasonable deviation, unless the carrier is guilty of willful misconduct. And as the Hague/Visby Rules do not contain such provision, this has led to the inconsistency in the approach applied to deviation by courts in different jurisdiction.

There is also another major change which has an impact on seaworthiness and deviation, namely, the extinction of nautical fault. In Hague/Visby Rules, a list of defences, which exempts the carrier from liability arising from any *‘act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management o this ship’* (see the Hague/Visby Rules Article IV, Rule 2(a)), is provided to the carrier who has been alleged to be at fault by the shipper. However, under the Rotterdam Rules, such list of defences has been substantially reduced as a result of the abolition of the nautical fault defence. The abolition can be justified because this defence was originally postulated on the view that once a ship sailed, the owner could not maintain instant contact with the ship and therefore should not be held responsible for
the negligence of an otherwise competent crew, however, with regard to its relevancy in the 21st Century, such proposition is no longer valid as nowadays there are various ways of instantaneous communications available for the communication between ships and shore.

Conclusion
As discussed, with the commencement of the new era, certain changes have been made vis-à-vis seaworthiness and deviation. This produces certain impacts. Nonetheless, the Rotterdam Rules are not yet internationally recognised. Therefore, it would be interesting to see in the future how many nations would ratify and cooperate to this new Convention.

References
The International Convention for the Safety of Life at Sea.
The International Safety Management Code.