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**WORLD MARITIME UNIVERSITY**

Malmö, Sweden

**SEAWORTHINESS IN THE CONTEXT OF THE  
ISPS CODE AND THE RELEVANT  
AMENDMENTS TO SOLAS CONVENTION, 1974**

By

**ANWARI NABIL**

**Morocco**

A dissertation submitted to the World Maritime University in partial  
Fulfilment of the requirements for the award of the degree of

**MASTER OF SCIENCE**

In

**MARITIME AFFAIRS**

**(MARITIME ADMINISTRATION)**

**2005**

## DECLARATION

I certify that all the material in this dissertation that is not my own work has been identified, and that no material is included for which a degree has previously been conferred on me.

The contents of this dissertation reflect my own personal views, and are not necessarily endorsed by the University.

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*Dedicated to the memory of my mother  
Tabaa Fatima.*

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Title of Dissertation: **Seaworthiness under the ISPS Code and the Relevant Amendments to SOLAS Convention, 1974**

Degree: **MSC**

### **Abstract**

This dissertation considers the impact of the emerging security regime enshrined in the ISPS Code and the relevant amendments to SOLAS Convention, 1974 on the doctrine of seaworthiness. The momentary aspect of seaworthiness is reflected in case law, through the position taken by the courts when dealing with claims involving allegations of unseaworthiness and lack of due diligence.

While relevance of the ISM Code to the assessment of seaworthiness of a ship is demonstrated, the undertaking of seaworthiness upon the company as defined in the ISPS Code is analyzed with respect to security requirements. As there has yet to be any ISPS Code related cases, the absolute obligation of seaworthiness according to the English law, is dealt with through a hypothetical scenario.

The concept of due diligence within the security regime is discussed with reference to the development of the Ship Security Plan (SSP). The relevance of the port facility to the equation of seaworthiness is also considered. Other issues considered are the limitation of liability and the relevance of soft law to seaworthiness.

As the breach of the undertaking of seaworthiness may lead to loss of cover, the implications of the security regime are discussed. Pending harmonization of the law in marine insurance law, reference is made respectively to Marine Insurance Act 1906 and to the continental Norwegian Marine Insurance Plan 1996. A few recommendations are made to assist companies in fulfilling their undertaking of seaworthiness.

**KEYWORDS:** Seaworthiness, Due diligence, ISPS Code, Ship Security Plan (SSP), Marine insurance, Limitation of liability, ISM Code, Ship Security Assessment (SSA)

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*Vardinoyannis v. The Egyptian General Petroleum Corporation* [1971] 2 Lloyd's Rep 200

## **LIST OF ABBREVIATIONS**

ABS	American Bureau of Shipping
BIMCO	Baltic and International Maritime Council
CMI	Comite Maritime International
CSO	Company Security Officer
CSR	Continuous Synopsis Record
DNV	Det Norske Veritas
DP	Designated Person
IACS	International Association of Classification Societies
ICA	Insurance Contracts Act
ICC	Institute Cargo Clauses
ICS	International Chamber of Shipping
IHC	International Hull Clauses
IMO	International Maritime Organization
ISM	International safety Management Code
ISPS	International Ship and Port Facility Security Code
ISSC	International Ship Security certificate
IWG	International Working Group
LLMC	Limitation of Liability of Maritime Claims Convention
MIA	Marine Insurance Act 1906
MSC	Maritime Safety Committee
MTSA	Maritime Transportation Security Act
NMIP	Norwegian Marine Insurance Plan 1996
NYPE	New York Produce Exchange Form
PFSO	Port Facility Security Officer
RSO	Recognized Security Organization
SOLAS	Safety of life and Property at Sea convention
SSA	Ship Security Assessment

SSO	Ship Security Officer
SSP	Ship Security Plan
STCW	International Convention on Standards of Training, Certification and Watchkeeping for Seafarers
UK	United Kingdom
USCG	United States Coast Guard

# **CHAPTER 1**

## **INTRODUCTION**

### **1.1 Background**

Paragraph 8 of the preamble of the International Code for the Security of Ships and of Port Facilities (ISPS) Code, which entered into force in July 2004 requires for the implementation of the provisions of the Code an effective co-operation and understanding between all those involved with or using ships and port facilities. Nevertheless, since the inception of the security regime enshrined in the ISPS Code and the relevant amendments to SOLAS Convention 1974, the different operators within the sphere of shipping have expressed their concerns about the various implications that may arise out of the implementation of such a regime. Undoubtedly, the scope of these implications is likely to cover a variety of shipping related activities such as chartering and marine insurance.

With respect to chartering practices, it is of paramount importance to explore the interaction of the main ingredients of charter parties such as seaworthiness, laytime and safety of port with the present security constraints, characterized by potential delays or even denial from entry into ports. Such situations may trigger disputes between the owner and the charterer, in terms of allocation of the additional costs resulting in particular from the non-compliance with the requirements of the security regime, such as with the obligation of holding a valid International Ship Security Certificate (ISSC).

In addition, consideration should be given to ensuring the rights of third parties such as the cargo owners. In fact, non-compliance with the requirements of the ISPS Code may lead to potential delays of the ship in ports. This occurrence may cause damage to the cargo, especially if consisting of perishable goods, as well as loss of market. It could

be argued that the cargo owner may invoke the undertaking of seaworthiness upon the carrier in an attempt to hold the latter liable for any extra sustained expenses. However, it should be noted that the doctrine of seaworthiness as established over the history of maritime law has been mainly interpreted by the courts, in referring to the requirements pertaining to safety of navigation during the intended adventure.

Despite the fact that the literature review related to chartering practices reveals that the security element has been taken in some instances into consideration, in particular when construing the concept of 'safe port' as has been reflected through the case of "*Evaggelos Th.*",<sup>1</sup> the security requirements onboard a ship have never been expressly qualified by the courts as among the vital ingredients that should be referred to when assessing the status of seaworthiness.

In view of the challenges imposed by the new security regime, lawyers and legal scholars dealing with matters pertaining to the carriage of goods by sea have to review the scope of the doctrine of seaworthiness in order to find out whether there is within the body of maritime law room for extending the meaning of seaworthiness of a ship to include the security aspect. Having said that, it is a fact that the operators of the industry, including owners, charterers or cargo owners have always agreed by negotiation on the rights and duties of each party through the contractual arrangements performed. In other words, the market has most of the time imposed on the parties self-regulatory mechanisms, when it comes to the allocation of extra costs incurred as a result of the implementation of new shipping regulations. In this respect, the BIMCO ISM clause for voyage and time charter parties<sup>2</sup> is a practical example, which reflects the self-regulatory force of the market.

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<sup>1</sup> See *Vardinoyannis v. The Egyptian General Petroleum Corporation* [ 1971] 2 Lloyd's Rep 200

<sup>2</sup> See BIMCO, 'ISM Clause' (1998)

< <http://www.bimco.dk/Corporate%20Area/Documents/Clauses/ISM%20CLAUSE.aspx>> (24 August 2005)

Aside from its substantial relevance to charter parties and bills of lading, the undertaking of seaworthiness is one of the vital ingredients of the law of marine insurance. In fact, whatever the applicable law on the subject matter, the undertaking of seaworthiness may be used by the insurer as a valuable defence to be exonerated from liability. There is no doubt that, in view of the potential delays or denial from entry to ports resulting from the implementation of the security regime, it might reasonably be expected from the insurance industry to set additional insurance premiums to cover the new risks incurred. In this respect, it is worth mentioning that prior to the entry into force of the ISPS Code, some Club insurers such as the UK P&I Club have adapted its relevant rules, in order to take into account the requirements of the Code.<sup>3</sup> However, emphasis needs to be particularly placed on the determination of the nature of the undertaking of seaworthiness.

## 1.2 Objectives

The implications of the security regime on maritime law principles are likely to cover various legal concepts. Particularly, the ambit of this dissertation is to determine the impact of the ISPS Code and the relevant amendments to SOLAS Convention, 1974 on the interpretation of the doctrine of seaworthiness. In this context, the following objectives have to be achieved:

- To provide a literature review of the doctrine of seaworthiness;
- To determine what is a seaworthy ship under the security regime;
- To identify the implications of the security regime on some issues related to seaworthiness such as limitation of liability;

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<sup>3</sup> See 'Selected Legal Implications of The ISPS Code' (2003) 3 *BBL Newsletter* < <http://www.bbl-law.com/doc/BBL-Newsletter2003-03%20deutsche%20Version.pdf> > (20 August 2005), where Rule 5(K) now reads: "The owner must...at all times maintain the validity of such statutory certificates as are issued by or on behalf of the state of the ship's flag in relation to such requirements and in relation to the ISM Code and the International Ship and Port Facility Security (ISPS) Code".



- To determine the manner in which the undertaking of seaworthiness may be interpreted by the law of marine insurance under the realm of security, with reference to the relevant English and Norwegian laws.

With respect to the scope of this dissertation, the following considerations are to be taken into account:

- The seaworthiness doctrine is to be thoroughly discussed with respect to the concept of due diligence as prescribed by the Hague/Hague-Visby Rules;
- As the core of this dissertation is based on the concept of due diligence in providing a seaworthy ship, it is sufficient for the purpose of the discussion to make primarily reference to the provisions of the Hague/Hague-Visby Rules.
- The implications of unseaworthiness are mainly examined with regard to the relationship between the disponent owner and the cargo owner;
- Since there have yet to be any ISPS Code related cases, the principle of analogy is used in the discussion of seaworthiness under the security regime, supported by a set of hypothetical scenarios;
- The questionnaire carried out for the sake of this dissertation is based on a random sampling method.

### **1.3 Methodology**

This dissertation is divided into five chapters. The methodology adopted in Chapter 2 is to trace through a review of case law, the manner in which the doctrine of seaworthiness has been interpreted by the courts within the Anglo-American arena. The nature and the effects of the breach of the undertaking of seaworthiness are discussed in the context of the Hague/Hague-Visby Rules, the Hamburg Rules and with respect to the advent of the ISM Code. Also, a general overview of the undertaking of seaworthiness under the law of marine insurance is undertaken.

In chapter 3, the features of the absolute obligation of seaworthiness as well as the due diligence concept in respect of seaworthiness are examined, with reference to the the main requirements of the ISPS Code. The liability of the Recognized Security Organisations is highlighted. Due to the dual aspect of the Code, the role of the port facility in the equation of seaworthiness is discussed. Further, issues related to the breach of the undertaking of seaworthiness such as limitation of liability is dealt with. Finally, the relevance of soft law to seaworthiness is discussed.

In chapter 4, the undertaking of seaworthiness in the context of the security regulations is elucidated with reference respectively to the relevant English and Norwegian laws. This chapter sheds light on the principles of conflict of laws, which should be taken into account in the interpretation of the doctrine of seaworthiness.

In Chapter 5, conclusions are drawn from the discussions undertaken in chapters 2, 3 and 4. A few recommendations are made in order to assist the shipping companies in fulfilling their undertaking of seaworthiness, either in terms of the duty of due diligence as per the Hague/Hague-Visby Rules or in terms of their obligations under an insurance policy.

## **CHAPTER 2**

### **SEAWORTHINESS IN GENERAL**

#### **2.1 Introductory Remarks**

At the outset, it should be remembered that the present dissertation aims to define first what is a seaworthy ship under the security regime, enshrined in the ISPS Code and the relevant amendments to the Convention of Safety of Life at Sea 1974 and thereby determine the potential legal implications of non-compliance of the ship with the security provisions on the performance of some contractual arrangements such as charter parties. Before undertaking a foray into the core part of the subject matter, it is worth tracing in this chapter the way the concept of seaworthiness has been interpreted by the courts in the context of charter parties, especially within the framework of the relevant international legal instruments, such as the Hague/Hague-Visby Rules, the Hamburg Rules and IMO regulations, such as the ISM Code.

Also, it should be pointed out that a part of this chapter will be devoted to discussion about the nature and the extent of the warranty of seaworthiness established under an insurance policy. In this respect, an illustration of the different approaches followed respectively by the common law and the civil law jurisdictions with regard to marine insurance will be carried out.

#### **2.2 Absolute obligation of seaworthiness**

In the context of a charter party, seaworthiness is a standard to which the condition of a ship has to be measured, particularly, before the beginning of a voyage in a voyage charter in case of incorporation of the Hague/Hague Visby Rules through a paramount clause and at the time of delivery of the vessel to a time charterer. In this respect, it is essential to mention two important features that characterize the concept of

seaworthiness. Firstly, it is not absolute, as it depends on the nature of the ship, the particular voyage contracted and the particular cargo carried.<sup>4</sup> Secondly, the duty of the owner<sup>5</sup> to provide a seaworthy vessel may vary from an absolute implied or express obligation to solely a due diligence to ensure the seaworthiness of the ship. In this section, a look will be made into the development of the notion of an absolute obligation of seaworthiness, which is mainly a common law principle, with making a reference to the way the concept has been conceived in some civil law countries.

### **2.2.1 Implied obligation of seaworthiness**

In common law, the owner or the disponent owner,<sup>6</sup> as the case may be, has an absolute undertaking to provide the charterer with a seaworthy ship.<sup>7</sup> This obligation may be implied<sup>8</sup> in the absence of express clauses in the charter party stipulating so. However, it has been established through a set of maritime cases that the implied undertaking of seaworthiness has been mainly interpreted in English law in the technical sense, with regard to its fitness to encounter the perils of the intended voyage and its ability to receive the type of cargo provided by the shipper or what have been respectively referred to as seaworthiness pure and simple and cargo worthiness.<sup>9</sup>

It should be borne in mind that this kind of undertaking does not release the owner from his responsibilities regarding seaworthiness even in the case of detection of deficiencies that were not discovered in the first place through a diligent inspection of the ship. It should be stressed that the Anglo-American courts have been reluctant to construe the concept of the implied seaworthiness in a broad manner, whereas the attitude has been rather different, when it comes to the interpretation of express terms of seaworthiness

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<sup>4</sup> See Scrutton, Thomas E et al, *Scrutton on Charterparties and Bills of Lading*, 19<sup>th</sup> ed (London : Sweet& Maxwell, 1984), 83

<sup>5</sup> Or generally the disponent owner

<sup>6</sup> In case of a vessel chartered by a time charterer.

<sup>7</sup> See Hill, Christopher, *Maritime Law*, 6<sup>th</sup> ed (London, Hong Kong : LLP, 2003), 172

<sup>8</sup> See *Giertsen v. Turnbull* (1908) S.C.1101

<sup>9</sup> See Chorley, Robert S et al, *Chorley & Giles Shipping Law*, 8<sup>th</sup> ed (London : Financial Times/Pitman Publishing, 1987), 187-188

mentioned in the charter parties. Further, a look will be taken at a number of cases reflecting the extensive scope granted by the Anglo-American courts to the doctrine of seaworthiness.

### 2.2.2 Express obligation of seaworthiness

It is worth mentioning that commonly used standard voyage or time charter party forms encompass express terms, placing an absolute obligation on the owner to provide a seaworthy ship in the port of loading in case of a voyage charter party or on delivery when dealing with a time charter party. This section will be dealt with in the context of absence of incorporation of any international or national legal instruments such as the Hague/Hague Visby Rules in the charter party through a paramount clause. The present discussion aims to shed light on the interpretation of some standard clauses of seaworthiness, with reference to numerous Anglo-American cases.

It could be mentioned that the words ‘*being tight, staunch and in every way fit for the voyage*’<sup>10</sup> and ‘*in every way fitted for ordinary cargo service*’<sup>11</sup> are among the standard terms commonly used in charter parties to express the obligation of the owner to provide a seaworthy ship. Although their literal meaning may refer solely to the physical condition of the vessel, they have been subject to a wider interpretation by the Anglo-American courts, as has been demonstrated through case law, such as in “*The Madeleine*”,<sup>12</sup> “*The Hongkong Fir*”<sup>13</sup> and “*The Augvald*”.<sup>14</sup>

The “*Madeleine*” was chartered on a Baltime form, which required the vessel in respect of clause 1 to be ‘*in every way fitted for ordinary cargo service*’. The court held that the obligation of seaworthiness was breached by the owners due to the lack of the certificate of deratisation, necessary for the ship to sail outside India. The inability of the owners to

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<sup>10</sup> NORGRAIN 89.

<sup>11</sup> See Baltime form, clause 1 and NYPE 93, clause 2.

<sup>12</sup> *Cheikh Boutros Selim El-Khoury & Ors v. Ceylon Shipping Lines Ltd* [1967] 2 Lloyd's Rep. 224 QBD (Comm.Ct)

<sup>13</sup> *Hongkong Fir Shipping Company Ltd v. Kawasaki Kisen Kaisha Ltd* [1961] 1 Lloyd's Rep.159 and [1961] 2 Lloyd's Rep.478 (C.A)

<sup>14</sup> *Unimar Seatransport GmbH v. Orient Mid-East Lines Inc.* [1965] AMC 1614 ArbNY

provide this document within a reasonable time had entitled the charterers to cancel the charter party. It should be stressed that the lack of the document of deratisation in this case has been instrumental for the performance of the contemplated trading of the vessel, which amounted to its unseaworthiness. However, the nature of the documents pertaining to the seaworthiness of the vessel depends on the requirements of the law of the flag state or of those enforced by the authorities exercising administrative and other functions in the ship's ports of call, as stated by Kerr, L.J in "*The Derby*",<sup>15</sup> where the court held that the lack of an ITF blue card in respect of the crew pay requirements does not amount to a breach of the undertaking of seaworthiness resting with the owner.

Since the concept of seaworthiness is wide-reaching, it might be found in English case law that aside from the obligation of the owner or the disponent owner to provide an adequate documentation for the performance of the intended charter party, the competence of the crew and their number on board the ship have proved to have relevant materiality to the doctrine of seaworthiness as illustrated in the judgment ruled by the court in "*The Hongkong Fir*". In this case, the vessel which was chartered on the Baltime form was considered unseaworthy with regard to the incompetence of the engine room complement. However, the repudiation of the charter party by the charterers was held wrongfully taken, in the sense that the undertaking of seaworthiness is not a condition of the charter contract<sup>16</sup> and thus repudiation may be a possible remedy only if the breach goes to the root of the contract or deprives the charterer from the whole benefit of the charter party. The American Arbitrators have followed the same principle in extending the interpretation of seaworthiness to other non-technical components as reflected through a number of cases, such as in "*The Augvald*".<sup>17</sup> The ship was held to be unseaworthy for lack of a valid weevil-free certificate, necessary for the transport of its cargo of grain.

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<sup>15</sup> *Alfred C. Toepfer Schiffahrtsgesellschaft G.M.B.H. v. Tossa Marine Co. Ltd* [1985] 2 Lloyd's Rep.325, 331

<sup>16</sup> See supra-note 4, at p.82

<sup>17</sup> See supra-note 14.

In a voyage charter party, it is essential to point out that the implied or express warranty of seaworthiness applies at the beginning of each stage of the voyage according to what is called the doctrine of stages. However, the link is always there between the different stages in the sense that a vessel which is fit for the loading stage, but not fit to encounter the perils of a sea adventure may be considered unseaworthy when presented for loading.<sup>18</sup>

It might be argued that the standard tanker chartering forms are more comprehensive than those used for the dry cargo market, with regard to the formulation of the express terms pertaining to the seaworthiness of the vessel.<sup>19</sup> This exhaustive way in describing the vessel's condition in tanker forms may be explained on the one hand by the specific operational requirements for the ships carrying oil or chemical cargoes and on the other hand by the fact that the tanker markets are deeply influenced by the charterers, rather than by the owners, who have the upper hand in dry cargo chartering. Notwithstanding these considerations, it should be noted that the English courts have not assessed the seaworthiness of a vessel, according to the strict literal requirements enunciated in the charter party,<sup>20</sup> but as a matter of evaluating the influence of the defects detected on a ship, with regard to their commercial significance for the contemplated adventure. In other words, minor defects that may not jeopardize the safety of the ship or the integrity of its cargo are not sufficient grounds for disqualifying the ship as being unseaworthy.

Another instrumental point that should be borne in mind is the distinction made in some judicial circumstances between seaworthiness and fittedness. This latter concept, used mainly when involving the right of the charterer to rescind the contract by relying on the cancellation date, is not necessarily synonymous to seaworthiness.<sup>21</sup>

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<sup>18</sup> *Dixon v. Sadler* (1839) 5 M. & W. 305

<sup>19</sup> See SHELLTIME 4, clause 2; BPVOY 4, clause 1.

<sup>20</sup> It might be referred to the case of "the Arianna" *Athenian Tankers Management S.A. v. Pyrena Shipping Inc* [1987] 2 Lloyd's Rep. 376

<sup>21</sup> *Ibid*, 390

### **2.2.3 Consequences of unseaworthiness**

With regard to time charter parties, it has been established that a breach of the undertaking of seaworthiness by the owner may not, in principle, amount to allowing the charterer to consider the charter party as discharged.<sup>22</sup> In essence, the refusal or the failure of the owner to rectify a deficiency that goes to the root of the contract to the extent that it may frustrate its commercial purpose could be construed by the courts as a repudiation of the contract entitling the charterer to rescind the charter party.<sup>23</sup>

It should also be noted that the charterer may put an end to the contract by virtue of the cancellation clause,<sup>24</sup> in case of the failure of the owner to rectify any arising unseaworthiness by the cancellation date. In principle, this available remedy is not specific to unseaworthiness, but it is granted generally after the breach of any provision of the charter party. Particularly, the level of seaworthiness required for the sake of the cancellation clause is absolute, and not merely limited to a due diligence to make the ship seaworthy even with the existence of a Paramount clause in the charter party incorporating the Hague/Hague-Visby Rules.

Further discussion about the absolute obligation of seaworthiness and its consequences on the parties of the charter party will be carried out within our attempt to review the doctrine of seaworthiness in the context of the security regime.

### **2.3 Seaworthiness under the Hague/Hague-Visby Rules**

Whereas in common law, the shipowner is under an absolute obligation to provide a seaworthy ship, the undertaking of the carrier<sup>25</sup> pursuant to a bill of lading is replaced

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<sup>22</sup> See Wilford, Michael et al, *Time charters*, 5<sup>th</sup> ed (London : Lloyd's of London Press, 2003), 104

<sup>23</sup> According to the holding of Sellers L.J. in "*The Hongkong Fir*" case, discussed earlier.

<sup>24</sup> See *Baltimex*, clause 21 and *NYPE*, clause 16.00.

<sup>25</sup> The determination of the identity of the carrier is of crucial importance when dealing with liabilities pertaining to a contract of carriage of goods by sea, governed by the Hague-Visby Rules. Indeed, the shipper may encounter difficulties in respecting some provisions of the rules, especially, the time-bar of



by a an obligation to exercise 'due diligence' to ensure the seaworthiness of the ship if the Hague/Hague-Visby Rules are incorporated into the charter party through a Paramount clause.<sup>26</sup> In the present discussion, what is relevant is the allocation of liability as between shipowners and charterers of liabilities to cargo owners. In a first step, a look into the way the courts have interpreted the standard of due diligence will be made then later on it will be relevant to highlight the possible defences and the limitation of liability scheme available to the shipowners in this respect.

### 2.3.1 The concept of due diligence

It should be borne in mind that the concept of due diligence is not appropriate in the common law, as there is the absolute obligation of seaworthiness discussed earlier. Generally, the undertaking of exercising due diligence to provide a seaworthy ship before and at the beginning of the voyage as stipulated by article III, rule 1 of the Hague/Hague-Visby Rules has been construed by the courts as ranging from the beginning of loading until the vessel starts on the voyage.<sup>27</sup> The seaworthiness obligation under the 'due diligence' doctrine embraces the three distinct aspects of seaworthiness recognised at common law, namely the physical condition of the ship, the efficiency of the crew and equipment, and the cargoworthiness of the vessel.<sup>28</sup> Moreover, the courts have considered that the duty of due diligence is nearly equivalent to that of the common law duty of care,<sup>29</sup> except that this personal

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12-months for the institution of the cargo claim. Commonly, the shipowner is considered to be the Carrier, even if the bill of lading is signed in some circumstances by the master, according to the order of the charterer by virtue of express terms stipulated by the charter party, such as the ones found in clause 8 of the NYPE. However, the charterer may fill the position of the carrier, pursuant to article I (a) of the Hague/Hague -Visby Rules, mainly if the master in signing the bill of lading was considered as an agent of the charterer. The charterer, in an attempt to transfer liability to the shipowner seeks to include in the bill of lading a demise clause. Moreover, the charterer is required to indemnify the shipowner if he signs a bill of lading, imposing greater liability than that contained in the charter party, according to the holding of Lord Denning MR in *Coast Lines Ltd v. Hudig* [1972] 1 Lloyd's Rep 53, 56

<sup>26</sup> See SHELLTIME 4, clause 38; NYPE 93, clause 31.

<sup>27</sup> *Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.* [1959] AC 589, 603

<sup>28</sup> See Wilson, John F, *Carriage of Goods by Sea*, 3rd ed (London : Financial Times/Pitman Publishing, 1998), 186

<sup>29</sup> As stated by Lord Devlin in *Union of India v. N.V. Reederij Amsterdam* [1963] 2 Lloyd's Rep 223, 235

undertaking can not be delegated. From this standpoint, the shipowner remains liable for any loss, damage or delay of the cargo as a result of the unseaworthiness of the vessel, even if the obligation to exercise due diligence to make the vessel seaworthy is carried out by another person, who may be the servants of the shipowner or even an independent contractor such as a reputable classification society.

In order to illustrate the way the concept of 'due diligence' may be interpreted in a seaworthiness-related dispute, a leading authority may be found in "*The Fjord Wind*" case.<sup>30</sup> The ship was time chartered on the NYPE form and voyage chartered later by the disponent owner on the Norgrain form for the carriage of a cargo of soya beans from the River Plate to Europe. After loading, the vessel suffered an engine failure, needing lengthy repairs, which imposed the need for the cargo to be transhipped. The claimants (cargo owners) made a claim against the owners and the disponent owners for delay and expenses.

The voyage charter party stipulated in clause 1 an absolute obligation of seaworthiness, whereas it imposed by virtue of clause 35 a duty of due diligence to make the ship seaworthy. The claim of the plaintiffs was dismissed in the first instance, but the judgment of the Court of Appeal raised two important issues about the 'due diligence' doctrine, that may serve for guidance in this respect.<sup>31</sup>

Firstly, the conflict between the absolute obligation of seaworthiness (Cl.1) and the obligation to exercise due diligence to ensure seaworthiness (Cl.35), was settled by the court in favour of the latter obligation, in taking as a basis the prominent decision on contract interpretation of Lord Hoffmann in *ICS v. West Bromwich Building Society* where he stated :<sup>32</sup>

Interpretation is the ascertainment of the meaning which the document would

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<sup>30</sup> *Eridania S.P.A. & Ors v. Rudolf A. Oetker & Ors* [2000] 2 Lloyd's Rep.191

<sup>31</sup> See Hooper, James, 'New Guidance for Owners on Issues of Due Diligence' (21 June 2000) *Lloyd's List*

<sup>32</sup> [1998] 1 WLR 896

convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in a situation in which they were at the time of the contract.

Secondly, the matter of whether the vessel was unseaworthy before and at the commencement of the voyage was examined by making reference to the classic standard, based on the answer to the question:<sup>33</sup>

Would a prudent owner require that the defect be made good before sending his ship to sea, had he known of it?

It was concluded by the court that the vessel was unseaworthy, with regard to the adverse consequences that could happen during the voyage if the deficiency were not rectified.

What is interesting in the present case is that the disponent owners were deemed not to have proven that they exercised due diligence to make the ship seaworthy,<sup>34</sup> in relying on the work performed by the engine builders. It was established by the court that the unique way by which the owners can discharge their burden is to show that they delegated to the engine builders the responsibility of carrying out a thorough investigation about the previous failures and that the engine builders exercised due care in doing so. The owners were held liable for failure to perform their duties in this situation, as they were required to show that they and the engine builders between them did not overlook any line of inquiry which competent experts could reasonably be expected to have pursued.<sup>35</sup>

Moreover, it has been established by French and Belgian courts that a surveyor's certificate is not prima facie proof of due diligence.<sup>36</sup> Therefore, a surveyor's certificate of navigability may lose its efficacy when a deficiency is clearly established.

### **2.3.2 Defences of the carrier**

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<sup>33</sup> See *McFadden v. Blue Star Line* [1905] 1 K.B.697, 706

<sup>34</sup> According to the wording of article IV (1) of the Hague-Visby Rules.

<sup>35</sup> *Supra*, note 30, 192

<sup>36</sup> Court d'Appel de Rouen, June 11, 1948, DMF 1950, 65; *Rechtbank van Koophandel te Antwerpen*, October 17, 1995, [1995] ETL 130, as cited by Tetley, William, 'Due Diligence to Make the Vessel Seaworthy' <<http://upload.mcgill.ca/maritimelaw/ch15.pdf>> 40 (25 June 2005)

Apart from a situation where the unseaworthiness of the vessel is a matter of fact, the Carrier is entitled under article IV, rule 2 of the Hague/Hague-Visby Rules to rely upon a list of 17 exculpatory exceptions and defences, including, inter alia, the act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship. In this regard, it should be noted that Art.21 (a) of the French domestic legislation enshrined in the Law No.66-420 of 18 June 1966<sup>37</sup> imposes on the carrier an obligation of due diligence in the same way as in Art.III (1) of the Hague/Hague-Visby Rules, taking into account the intended voyage and the cargo contemplated. In addition, the carrier may exculpate himself from liability, if he proves that the cause of the damage or the loss is among the 9 immunities afforded in Art.27 of the French domestic legislation.

It should be mentioned that the French international carriage law incorporates the spirit of the Hague/Hague-Visby Rules in terms of the available exceptions. The carrier is required to determine the cause of the loss and that it falls within unseaworthiness and is not attributable to want of due diligence or covered by the catalogue of exculpatory exceptions listed in Art.IV (2).<sup>38</sup>

## **2.4 Seaworthiness under the Hamburg Rules**

Under the United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules), the Carrier is defined as any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.<sup>39</sup> Whereas the obligation of 'due diligence to make the ship seaworthy' is expressly stipulated in the Hague and the Hague-Visby Rules in art.III (1), this duty is rather implied in the Hamburg Rules from the wording of art.5 (1).<sup>40</sup> In this context, the responsibility of the carrier consists

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<sup>37</sup> Ibid, 43

<sup>38</sup> Ibid, 45

<sup>39</sup> The definition provided in art.1 is broader than the one given in the Hague/Hague-Visby Rules and may cover any non-vessel owning carrier.

<sup>40</sup> The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in

of ensuring the safe condition of the cargo during the whole period that it is in his custody. Therefore, the issue of seaworthiness under the Hamburg Rules does not seem substantial for a potential liability of the carrier in isolation from the condition of the cargo. In other words, the liability of the carrier rests on the safe and sound condition of the cargo carried, not on the condition of the carrying ship.<sup>41</sup>

It might be argued that this new standard brought in by the Hamburg Rules seems satisfactory for those who considered that the obligations of the carrier under art.III (1) and art.III (2)<sup>42</sup> of the Hague/Hague Visby Rules should be judged on the same basis.<sup>43</sup> The new regime of cargo liability switches the burden of proof onto the carrier to prove that he, his servants or agents including independent contractors, took all reasonable measures required to remedy the circumstances that caused the loss, the damage or the delay in delivery sustained by the cargo owners.

Whereas the Hague/Hague-Visby Rules do not contain provisions regarding loss caused by delay in delivery of the goods, the Hamburg Rules cover this issue,<sup>44</sup> which may cause a loss of market for the shipper. While common law jurisdictions left the matter to the reasonable contemplation of the parties, some continental countries such as Norway covers it in Art.5 (1) and Art.5 (2) of its Maritime Code of 1994.<sup>45</sup>

There is one final point that has to be addressed in this section. The burden of proof is based on fault of the carrier and since there is no catalogue of exceptions as in the Hague/Hague-Visby Rules, the negligence in the navigation or management of the vessel<sup>46</sup> is not considered under the Hamburg Rules as a defence for the carrier.

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his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences’.

<sup>41</sup> See Tilleke & Gibbins, ‘Seaworthiness in Thai Law’

<<http://www.tillekeandgibbins.com/Publications/Newsletters/maritime/seaworth.htm>> (25 July 2005)

<sup>42</sup> Under this provision, the carrier is required to look ‘properly and carefully’ after the cargo during the carriage operation.

<sup>43</sup> See supra- note 28 at p.210

<sup>44</sup> See Art.5.1 of the Hamburg Rules.

<sup>45</sup> As cited in Falkanger, Thor et al, *Introduction to Maritime Law* (Oslo : Tano Aschehoug, 1998), 277

<sup>46</sup> See Art.IV rule 2(a) of the Hague/Hague-Visby Rules

Despite the absence of the catalogue of exculpatory exceptions, one should underline the fact that most of the possible exceptions in these Rules are implied.

## **2.5 Warranty of seaworthiness in marine insurance**

### **2.5.1 Seaworthiness in marine insurance**

The relevance of seaworthiness in marine insurance stems from the fact that if the ship is unseaworthy, a potential loss may be inevitable during the adventure, whereas the function of the insurance is to insure against unexpected risks. In matter of law, the English Marine Insurance Act (MIA) of 1906<sup>47</sup> is considered as the mother of all marine insurance statutes.<sup>48</sup> This instrument has taken the lead in influencing the law of the subject matter in various other jurisdictions. From this perspective, it will be justified to refer from time to time within the discussion to the provisions of the Act as well as to other laws of some civil law countries. In section 39(4) of the MIA, seaworthiness is defined as follows:

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.

At first sight, this definition is in harmony with the meaning of seaworthiness as discussed in the previous sections of this chapter. Despite the fact that the doctrine develops over time to reflect evolving knowledge and standards of ship construction,<sup>49</sup> a ship is not deemed to be perfect but, seaworthy in all respects, including, inter alia, the physical fitness, the crew and the documentation. In the context of marine insurance, the seaworthiness may be used as a warranty, to serve as a defence mechanism for the insurer rather than a liability imposing doctrine, as described earlier.

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<sup>47</sup> Adopted on 21 December 1906 to codify the law of marine insurance

<sup>48</sup> See Tetley, William, 'Marine Insurance and the Conflict of Laws' in Huybrechts, Marc et al (eds), *Marine Insurance at the Turn of The Millennium* (Antwerp, Oxford : Intersentia, 1999), 306

<sup>49</sup> See Bennett, Howard N, *The Law of Marine Insurance* (Oxford : Clarendon Press, 1996), 294

### 2.5.2 Voyage policy

In a voyage policy, there is an implied warranty of seaworthiness by the assured at the commencement of the voyage, according to s. 39(1)<sup>50</sup> of the Act. Moreover, this warranty operates at the commencement of each stage of the adventure if the voyage is divided into several stages. Such a case may be invoked if a ship during the same voyage calls two ports that require different sets of equipment or documentation. This specific situation will be discussed later, when dealing with the doctrine of seaworthiness under the security regime. However, there is no warranty that the vessel will continue to be seaworthy, thus negligence of the master or the crew after the beginning of the voyage will not constitute a defence for the insurer.<sup>51</sup>

### 2.5.3 Time policy

It is an established doctrine that in a time policy, there is no warranty of seaworthiness at any stage of the adventure, but in case of 'privity' of the assured to send an unseaworthy ship to sea, the insurer is entitled to discharge any liability, arising out of a loss caused by unseaworthiness.<sup>52</sup> The interpretation of the concept of 'privity' has given rise to controversial debates within legal circles. In this respect, case law reveals that the wording 'actual fault or privity' existing in the 1924 and 1957 limitation conventions<sup>53</sup> and the term 'wilful misconduct' have been rejected by the courts for not providing valid interpretations of the doctrine of 'privity' as has been reflected in "*The Eurysthenes*".<sup>54</sup> From another perspective, it was held that 'privity' may be

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<sup>50</sup> In a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured.

<sup>51</sup> See Soyer, Baris, *Warranties in Marine Insurance* (London, Sydney : Cavendish Publishing, 2001), 95

<sup>52</sup> Pursuant to section 39(5) of the MIA. The rationale behind this provision may be the fact that the insured vessel may be at sea, when a time policy begins, which does not allow the assured to check the condition of the vessel.

<sup>53</sup> This has been considered as a benchmark in the International Convention Relating to the Limitation of the Liability of Owners of Sea-Going Ships adopted in Brussels in 10 October 1957, to determine if the shipowner is entitled to limit his liability.

<sup>54</sup> See *Compania Maritime San Basilio v. Oceanus Mutual Undertaking Association (Bermuda) Ltd* [1977] 1 QB 49

construed as 'knowledge and consent', especially 'turning a blind eye' to the unseaworthiness of the vessel, including reluctance to carry out an inquiry about the deficiencies. In this respect, Lord Scott provided in the judgment related to "*The Star Sea*"<sup>55</sup> a descriptive holding of the state of mind related to a 'blind eye knowledge', which may prevail where a decision is issued in order not to enquire into an untargeted or speculative suspicion.

Another crucial issue that merits consideration in the present discussion is the identification of the person to whom the 'privity' requirement applies. In this regard, it has been submitted as a matter of English case law that the principle governing the attribution of knowledge to a company<sup>56</sup> requires the search for the company's 'directing mind and will'<sup>57</sup> or what was called 'brains and nerve centre'.<sup>58</sup> However, a precise vision is not efficient unless it is based on the literal construction of s.39 (5). This provision imposes the identification of the persons involved in the decision making process related to sending the ship to sea and whose knowledge is reasonably to count as the act of the company. It is not possible to cover the wide scope of 'privity' in this section, but for the purpose of this dissertation, the concept will be illustrated in the next chapter with regard to its implementation under the security regime.

It should be stressed that the issue of causation is of paramount importance for the determination of the liability of the insurer. In principle, if the unseaworthiness is found as one of the proximate causes<sup>59</sup> of the loss, the assured will be precluded from recovery unless he is not privy to this specific unseaworthiness, when sending the ship

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<sup>55</sup> *Manifest Shipping Co. Ltd v. Uni-Polaris Insurance Co. Ltd and la Réunion Européenne* [2001] 1 Lloyd's Rep.389, 414

<sup>56</sup> The term 'company' will be used in the context of the ISPS Code, referring to the shipowning or the operating company. In addition, it will concern corporate companies, not individual ones.

<sup>57</sup> Such opinion was advocated by Viscount Haldane LC in *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd* [1915] AC 705, 714

<sup>58</sup> As cited by Denning LJ in *HL Bolton(Engineering) Co Ltd v. TJ Graham & Sons Ltd* [1956] 3ALL

<sup>59</sup> The principle of *causa proxima* has been used for a long time in marine insurance, before the emergence of the recent school of thought, based on *the efficient or dominant cause* of the loss.



to sea.<sup>60</sup> However, the insurer may be liable to indemnify the assured for a loss caused apart from the unseaworthiness of the vessel by another proximate cause expressed in the insurance policy as in “*The Miss Jay Jay*”.<sup>61</sup>

Unlike the MIA 1906, the Norwegian Marine Insurance Plan (NMIP)<sup>62</sup> does not distinguish between a voyage policy and a time policy<sup>63</sup> in terms of the nature of the undertaking of seaworthiness. The liability resulting from breach of this warranty will depend on the corrective action carried out by the assured, either before or after the commencement of the voyage. Moreover, the burden of proving that the ship is unseaworthy rests with the insurer, who also has the right to demand a survey of the ship for ascertaining its seaworthiness.<sup>64</sup> It should be noted that unseaworthiness in the NMIP 1996 depends mainly on the time the defects are detected by the assured. It is reasonable with the development of the communication technology at sea these days that the assured can take the necessary steps to rectify the defects unless they are latent and the loss occurs before he has constructive knowledge of the unseaworthiness.

## 2.6 Conflict of laws

It is essential to bear in mind that the interpretation of the concept of seaworthiness as contained in charter parties, bills of lading or insurance policies depends deeply on the conflict of laws rules used in the different legislations. Despite the fact that the majority of the standard forms of the contracts mentioned above encompass an express choice of law clause, there may be circumstances where this provision is not available. In this situation, recourse will be to the rules of conflict of laws enshrined in the national legislation springing from some international conventions. Among the

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<sup>60</sup> See supra-note 51, 111-112

<sup>61</sup> See *The J. J. Lloyd Instruments Ltd v. Northern Star Insurance Co. Ltd* [1987] 1 Lloyd's Rep 32(CA)

<sup>62</sup> The provisions of the Norwegian Marine Insurance Plan (NMIP) of 1996, version 2003 can be found at: <<http://www.norwegianplan.no/eng/index.htm>>

<sup>63</sup> Ibid. section 3-22 provides that *the insurer is not liable for loss that is a consequence of the ship not being in a seaworthy condition, provided that the assured knew or ought to have known of the ship's defects at such a time that it would have been possible for him to intervene.*

<sup>64</sup> Ibid. section 3- 23.

international instruments used for the determination of the proper applicable law of the charter parties is the EC Convention on the Law Applicable to Contractual Obligations called The Rome Convention,<sup>65</sup> which expressly refers in art.4 (b) to single-voyage charter parties. The Convention is enacted by the majority of the European countries, including England, However, the classic English common law rules still have a word to say in the conflict of law arena.

With regard to charter parties, it has been stated in Art.1 (1) of the Rome Convention<sup>66</sup> that the basic rule in choosing the proper law of the contract is the express choice or, in the absence of express choice, the implied choice demonstrated with reasonable certainty. Failing this, the applicable law is that of the country with which the contract is most closely connected. In this situation, Art.4 (2) of the Rome Convention<sup>67</sup> states that the closest and most real connection standard may be construed, for example, from the place of performance of the charter party. It should be noted that the English common law approach gives guidance to the common-law and Commonwealth nations which have not adopted choice of law statutes.<sup>68</sup> Along this dissertation, reference will be made, if necessary to some specific differences that may arise out of the interpretation of the doctrine of seaworthiness by different jurisdictions.

## **2.7 The concept of seaworthiness under the ISM Code**

Before concluding the discussion in this chapter, it is essential to highlight the substantive impact of the recent mandatory IMO regulations, especially the ISM Code on the evaluation of the seaworthiness of a ship. It is reasonable to argue that the standard of seaworthiness with which a vessel must comply is to be tested against the

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<sup>65</sup> See Tetley, William & Wilkins, Robert C, *International Conflict of Laws: Common, Civil and Maritime* (Montréal, Québec: Editions Y. Blais, 1994), 256

<sup>66</sup> Ibid, 256

<sup>67</sup> Ibid,257

<sup>68</sup> Ibid, 260

requirements of the ISM Code, as it has been embedded in some recent judgments issued by the English courts in this regard, particularly in “*The Eurasian Dream*”.<sup>69</sup>

It should be mentioned that the ISM and the ISPS Codes, both based on written procedures, reporting and internal audit, enshrine the same underlying philosophy in terms of involving the ship management in ensuring that a culture of safety and security respectively is prevailing on board a ship. Moreover, there are striking similarities between the codes in the sense that the two instruments represent the two sides of a common management system coin, with ISM directed at internal risks and ISPS at external ones and both have been incorporated into SOLAS Convention as separate chapters.

## **2.8 Concluding Remarks**

The discussion in the present chapter has attempted to shed light on the manner the concept of seaworthiness is dealt with under different legal frameworks, from the absolute express or implied obligation in English common law to the due diligence doctrine dictated by the provisions of the Hague/Hague Visby Rules and the Hamburg Rules. Under this spectrum, it is necessary to stress the fact that the due diligence duty to provide a seaworthy vessel extends to the whole period of the voyage in the case of the Hamburg Rules, whereas it is solely applied before and at the commencement of the adventure with respect to the Hague/Hague Visby Rules.

In addition, an effort has been made to explore the doctrine of seaworthiness within an insurance context, either in voyage or in time policies. In this regard, it has been noticed that the English law in the matter reflected in the Marine Insurance Act 1906 does not impose a warranty of seaworthiness in a time policy as it does in a voyage

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<sup>69</sup>*Papera Traders Co. Ltd & Ors v. Hyundai Merchant Marine Co. Ltd & Another* [2002] 1 Lloyd’s Rep.719. The judgment in this case provides a significant insight into the way the seaworthiness issues will be litigated in courts, having the ISM Code philosophy in mind. The ship was held unseaworthy because of the inadequacy of the documentation, the incompetence of the crew and the deficient condition of the equipment onboard.

policy, but presents the 'privity' of the assured in sending an unseaworthy vessel to sea as a possible defence for the insurer to avoid liability for recovery. From a different perspective, the Norwegian Marine Insurance Plan of 1996 does not distinguish between voyage and time policies with regard to seaworthiness and provides a flexible approach in term of ascertainment of liabilities. The recourse to the rules of conflict of laws is a valuable tool for determining especially the proper law of a charter party and thus interpreting the nature and the extent of the obligation of seaworthiness under the framework of a specific jurisdiction.

Finally, it is to note that the common features of the ISM and the ISPS Codes will be of great assistance in illuminating the manner the standard of seaworthiness of a vessel will be benchmarked under the ISPS Code and the maritime security requirements stipulated by the amendments to the International Convention of Safety of Life at Sea, 1974.

## **CHAPTER 3**

### **SEAWORTHINESS UNDER THE SECURITY REGIME**

#### **3.1 Introductory Remarks**

As has been noted in the previous chapter, the standard of seaworthiness with which a ship must comply will be tested against the requirements of the ISPS Code and the maritime security provisions stipulated by the amendments to the International Convention of Safety of Life at Sea, 1974. Compliance with the security regime is not in itself conclusive evidence of seaworthiness, but a non-compliant ship in respect of the security regime is likely to be considered by the courts as unseaworthy.

Moreover, it is essential to highlight the fact that the implementation of the ISPS Code is based on a documented scheme that may provide valuable pieces of evidence in case of a potential dispute arising out of a security-related incident. This interesting aspect of the code will be discussed in detail at the outset of this chapter.

It should be mentioned that the present chapter will attempt to provide a comprehensive insight into the seaworthiness issue under the security regime, both in the context of a common law perspective characterized by an absolute obligation of the shipowner to provide a seaworthy vessel, and in the context of the Hague/Hague - Visby Rules or the Hamburg Rules which impose on the carrier a duty to exercise 'due diligence' to provide a seaworthy ship. Furthermore, issues such as limitation of liability and the controversial doctrine of 'privity', raised earlier in this dissertation will be examined with respect to the implementation of the security regime.

#### **3.2 The main features of the security regime**

The purpose of this section is not to present the entire scheme of the ISPS Code and the relevant security provisions brought by the amendments to the SOLAS Convention

1974, but rather to point out the key features of the security system that may be significant when ascertaining whether the shipowner has fulfilled his duties with regard to the proper implementation of the security requirements.

### **3.2.1 Main requirements of the security regime**

The company is required under the ISPS Code to establish a security system on board its ships in terms of providing adequate equipment, documentation and personnel. Concerning the first item, the vessel should be equipped with an automatic identification system (AIS),<sup>70</sup> a ship security alert system (SSAS)<sup>71</sup> and a ship identification number to be permanently marked internally and externally on the hull of the vessel.<sup>72</sup> Regarding the documentation, the following items have to be available at any time on board the ship:

- a valid international ship security certificate or a valid interim international ship security certificate;
- a continuous synopsis record (CSR);<sup>73</sup>
- a ship security plan;<sup>74</sup>
- the records<sup>75</sup>

Apart from the content of the records, the master shall have on board the following information<sup>76</sup>:

- The entities responsible for appointing the shipboard personnel, such as ship management companies and manning agents;

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<sup>70</sup> Chapter V, regulation 19.

<sup>71</sup> Chapter XI-2, regulation 6. It is essential to mention that the performance of the SSAS should not be inferior to the standards adopted by the International Maritime Organisation, prescribed in resolution MSC.136 (76).

<sup>72</sup> Chapter XI-1, Regulation 3.

<sup>73</sup> Chapter XI-1, Regulation 5. This record contains details of the ship, such as, the name, flag, and the issuing entity of the international ship security certificate.

<sup>74</sup> ISPS/A/9 and ISPS/B/9.

<sup>75</sup> See sections ISPS/A/10.1 and ISPS/B/10.1. This set of information includes, inter alia, training, drills, exercises; internal audits and review of the security activities carried out on board the ship. They should be kept onboard the ship, for at least the minimum period specified by the Administration, bearing in mind the provisions of regulation XI-2/9.2.3, which require keeping records of the last 10 calls at port facilities.

<sup>76</sup> SOLAS , chapter XI-2/5 and ISPS/B/6.1

- The contact details of the voyage charterer or the time charterer. The charterer will be responsible in this situation for the employment of the vessel.

With regard to personnel, the company is required to have a company security officer who is responsible for ensuring that the ship's security assessment is carried out and that the security plan is prepared accordingly. In addition, a ship security officer should be assigned for each ship to deal with the implementation and the maintenance of the ship security plan and all the security-related functions on board.

It is worthy of mention that the sub-committee on Standards of Training and Watchkeeping of IMO endorsed in its 36th session<sup>77</sup> draft amendments to the STCW convention and to parts A and B of the STCW code, related to the minimum mandatory training and certification requirements for persons to be designated as Ship Security Officers (SSOs).<sup>78</sup> Also, the same sub-committee agreed on a draft MSC circular, providing guidance on training and documentation for Company Security Officers (CSOs) including a table of knowledge, understanding and proficiencies relevant to their duties. Therefore, it will be possible to verify the level of training of the SSOs by means of a certificate of proficiency and not simply through a statement of the company.<sup>79</sup>

Added to the requirements mentioned earlier, a vessel should prior to entry into a port of a contracting government provide a set of information, including the security level at which the ship operated in the 10 previous ports of call.<sup>80</sup> The data received is analysed by duly authorized officers of the government of the port concerned, before deciding whether to allow or to deny entry to the vessel.

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<sup>77</sup> Held between 10 and 14 January 2005

<sup>78</sup> See IMO, 'Training for SSOs- amendments to STCW Convention and Code endorsed' *IMO News* No.1 2005, 19

<sup>79</sup> See International Chamber of Shipping (ICS), *Model Ship Security Plan* (London : ICS, 2003), iii

<sup>80</sup> XI-2/9.2.1 and ISPS/B/4.37- 4.39

### 3.2.2 The management of the security system

It is notable that the compliance of a ship with the substance of the ISPS Code and the relevant regulations may not be fully realized by providing merely the necessary equipment, documentation and personnel, but it is mainly dependent on the way the management of the security system is carried out on board by the company. What should be borne in mind is the fact that the company was required before the advent of the ISPS Code and even the ISM Code to establish a system of management and supervision of the operations onboard its ships. Otherwise, its right to limit liability might be denied, as has been decided by the English courts in “*The Marion*”<sup>81</sup> and “*The Lady Gwendolen*”<sup>82</sup>.

What is interesting about the ISPS Code is its documented and structured scheme, which ensure through the records kept on board ships a follow up of the management of the security system and at the same time a ‘paper trail’ that may serve for valuable documentary evidence in the hands of the litigator in case of a potential dispute between the parties involved in the carriage of a specific cargo.<sup>83</sup>

### 3.3 Absolute obligation of seaworthiness

At English common law, the company is required to provide a seaworthy ship in the absolute sense, in respect of the security matters. Thus, it is evident that the vessel should be fully compliant with the provisions of the ISPS Code and the relevant amendments to SOLAS Convention 1974, with no available defence for the company in case of any damage or loss of the cargo resulting out of a security-related incident caused by the unseaworthiness of the ship. In order to illustrate the way the courts may deal with the absolute obligation of seaworthiness issue, we will consider a hypothetical scenario, in which an explosion of a medium size takes place in a container carried onboard the ship,

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<sup>81</sup> [1984] A.C.563.

<sup>82</sup> [1965] 1 Lloyd’s Rep.335 CA

<sup>83</sup> Usually, disputes arise out of the damage or the loss of the cargo and the plaintiffs contend that the unseaworthiness of the vessel was the cause of the damage or the loss sustained.



causing damage to both the cargo and the vessel. The investigation carried out after the incident reveals that the explosion originated from an odd piece of luggage, which was put inside the container during the cargo handling operation, probably by an unauthorized person, who managed to gain access to the ship.

It would not be surprising if the courts held the company to be liable for non-compliance with the requirements of the ISPS Code, particularly with the measures that should be carried out for the prevention of unauthorized access to the ship<sup>84</sup> and, consequently, consider the vessel to be unseaworthy. In this state of mind, the courts are likely to approve the claims presented by the cargo owners for the damage or the loss sustained. What is specific to the absolute obligation of seaworthiness is the fact that the company will not be relieved from liability towards the cargo owners whatever efforts were deployed in properly carrying out all the required measures for the control of the access to the ship, pursuant to the terms of the ISPS Code, if these efforts failed.

It should be highlighted that the security scheme established onboard the ship may entail some latent failures. These dormant deficiencies, related, inter alia, to the maintenance management and the organisation of procedures, trigger the preconditions that result in the creation of active breaches.<sup>85</sup> The latent deficiencies may not be discovered during a regular inspection of the ship, which exposes the company to an inevitable liability in the context of an absolute obligation of seaworthiness.

### **3.4 The concept of due diligence under the security regime**

Since most of the contracted charter parties such as NYPE 93 and the related bills of lading are subject to the provisions of the various international conventions on carriage of goods by sea such as the Hague/Hague/Hague-Visby Rules, it will be interesting to

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<sup>84</sup> These measures that should be clearly stipulated in the ship security plan are mentioned in sections ISPS/A/9.4 and ISPS/B/9.9

<sup>85</sup> See 'Accidents are They Avoidable?' (November 2004) 17 *UK Club: Loss Prevention News* 1,3

look at the concept of 'due diligence' in providing a seaworthy vessel, under the security regime.

As there have yet to be any ISPS Code related cases, the manner in which the courts have ruled upon disputes in the context of the ISM Code is likely to be a source of inspiration,<sup>86</sup> especially with regard to the seaworthiness issue, which is the core focus of the present discussion. This vision seems to be reasonable, in view of the existing similarities mentioned earlier between both Codes.

However, we might argue that since the ISM Code constitutes merely a framework for the implementation of the existing safety and environment protection regulations embedded in the SOLAS Convention 1974, it may be considered a benchmark for assessing fault or lack of due diligence in connection with cargo claims. It is not a new standard of seaworthiness nevertheless.<sup>87</sup> The ISPS Code, unlike the ISM Code has brought, for the first time, the new leg of security management to the realm of shipping. Moreover, it has been based on a dual structure, involving port facilities as well in the implementation of its requirements.

Therefore, these specific features of the ISPS Code are to be considered when evaluating the seaworthiness of a ship under the security regime. In other words, the review of the way the courts have considered the issues of seaworthiness and due diligence under the scope of the ISM Code will merely provide indications about the future outcome of a dispute, involving allegations of seaworthiness that may arise out of a security related incident.

As was seen in the previous chapter, the courts will probably take into account the practices and the procedures of the industry at the relevant material time,<sup>88</sup> when assessing the seaworthiness of a ship. This attitude was followed in the case of '' *The*

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<sup>86</sup> See Wilson, John, 'The legal implications of the ISPS Code'  
< [http://www.ics.org.hk/talks\\_03.htm](http://www.ics.org.hk/talks_03.htm) > ( 22 July 2005)

<sup>87</sup> See Honka, Hannu, 'Main Obligations and Liabilities of the Carrier' (2004) 27: 7/8  
*Transportrecht* 278-280

<sup>88</sup> See supra-note 69, 736.

*Eurasian Dream*’’,<sup>89</sup> in which consideration by the courts was given to the legal relevance of the ISM code in the context of an assessment as to the owner’s compliance with the obligations of seaworthiness and due diligence under Art. III (1) and Art. IV (1) of the Hague/Hague-Visby Rules.<sup>90</sup>

Since the ISPS Code is today part of the mandatory IMO instruments, that every prudent shipowner has to comply with, it is likely that when considering the relevant duties and obligations of owners, including issues of seaworthiness and due diligence, the English Courts, especially are likely to pay credence to and refer to the ISPS Code.<sup>91</sup> Moreover, a shipowner will not be able to contend that a terrorist attack involving his vessel was unforeseeable and was beyond his control,<sup>92</sup> but he will be required instead to prove that he did whatever he could in order to ensure the effectiveness of the security system onboard his vessel before and at the beginning of the voyage as per the Hague/Hague-Visby Rules. In this respect, the content of the judgment in the case of the “*Fjord Wind*”<sup>93</sup> reviewed in the previous chapter provides valuable guidelines on how a non-delegable duty of due diligence to provide a seaworthy vessel should be fulfilled.

Against that background, it is worth examining first the instrumental documentation forming the core of the Code, in an attempt to show how a company can exercise due diligence before and at the beginning of the voyage to establish a credible security system, then to assess the potential impact of the level of compliance in port facilities on the seaworthiness of a ship.

### 3.4.1 Ship Security Plan (SSP)

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<sup>89</sup> Ibid.

<sup>90</sup> See Michel, Keith, *War, Terror and Carriage by Sea* ( London, Singapore : LLP, 2004), 826

<sup>91</sup> See Clark, Julian, ‘ISPS- another Bur’ (November 2004)

<<http://www.else.co.uk/Documents/The%20Charterer%20November%202004.pdf>> (25 June 2005)

<sup>92</sup> See Carey Christopher E, ‘Maritime Transportation Security Act of 2002 (Potential Civil liabilities and Defense)’ (2004) *Tulane Maritime Law Journal* 5

<sup>93</sup> See supra-note 30.

It should be noted that the Ship Security Plan (SSP) is developed on the basis of a Ship Security Assessment (SSA)<sup>94</sup>, which identifies, inter alia, possible threats to sensitive key shipboard operations<sup>95</sup> and determine the likelihood of occurrence of these threats. The SSA is undertaken by the Company Security Officer, taking into account, in particular the type of the ship, the type of the cargo and the trading routes. Therefore, care and thought needs to go into the performance of the SSA, in order to address the actual hazards that may endanger the security of the vessel. Having said that, it will be of great interest to trace the process through which a SSA is being prepared and to highlight the various challenges that may be faced by the company in this regard.

Basically, the company may produce a generic Ship Risk Assessment of part or the entire of its ships, provided that a specific on-scene survey has been undertaken on each individual ship.<sup>96</sup>

The key phases of the SSA are mainly:

- collection of the information about the vessel and the other contributory factors such as the trading routes;
- assessment of the existing security measures;
- identification of the weaknesses via the on-scene survey and their assessment.

It is not in the ambit of the present discussion to elaborate on the pros and the cons of each step, however, a number of remarks deserve to be made in this respect.

It should be mentioned that many companies have adopted since the inception of the ISPS Code, a generic SSA approach.<sup>97</sup> Hence, it could be argued that the short time allocated for the companies to comply with the provisions of the Code was the driving force behind this strategy. However, as shown above, the risk analysis of the security of

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<sup>94</sup> ISPS/A/8.1

<sup>95</sup> ISPS/A/8.3

<sup>96</sup> See Lloyd's Register & IDS International, 'ISPS Code- Practical Pack' (31 March 2003) < <http://www.marinacivil.com/legislacion/ISPSIntro.pdf> > ( 28 July 2005)

<sup>97</sup> See Magnusson Mads, 'The ISPS Code- The RSO experience', presented on a seminar on maritime terrorism organized by The Norwegian Shipowners' Mutual War Risks Insurance Association and the Norwegian Shipowners' Association ( 28 October 2004) < <http://www.rederi.no/Article.asp?ArticleID=5190> > ( 30 July 2005)

a ship has to be supported by an on-scene survey, in order to confirm the credibility of the information collected about the specific vessel and to identify its actual weaknesses. Otherwise, the proposed countermeasures may not be effective to remedy the detected vulnerabilities.

It is common practice for companies to entrust independent contractors such as Recognized Security Organisations (RSOs) with the performance of the SSA and the development of the SSP. In this respect, it should be borne in mind that a RSO has to demonstrate appropriate knowledge of ship and port operations, including knowledge of ship design and to show expertise in the relevant aspects of security.<sup>98</sup> The general trend is that classification societies, especially IACS members such as Lloyd's Register,<sup>99</sup> dominate the field as RSOs due to the work they have also accomplished under SOLAS. Such entities have included the security services in their process as a complementary to the safety framework already established through the ISM Code. In fact, ISPS security verification audit can be conducted during the same ISM ship visit.

However, it has been found by Lloyd's Register that when the SSA has been carried out by sub-contractors on behalf of the companies, the proposed control options have sometimes been impractical.<sup>100</sup> Certainly, if we are to prevent such unsatisfactory outcomes, the SSA is to be accomplished by the Company Security Officer and his team, due to the fact that the personnel involved in system management are, on the one hand, familiarized with the daily procedures of the company and, on the other hand, capable of injecting much of common sense into the process.

Bearing in mind that the company is under a non-delegable obligation to exercise due diligence in providing a seaworthy vessel, it will be difficult to exculpate itself from

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<sup>98</sup> See for more information section ISPS/B/ 4.5.

<sup>99</sup> It received formal recognition as an RSO from more than 50 States as stated at:  
<[http://www.lr.org/market\\_sector/marine/maritime-security/rso\\_status.htm](http://www.lr.org/market_sector/marine/maritime-security/rso_status.htm)>

<sup>100</sup> See Lloyd's Register, 'Learning from the ISPS Code' (June 2004) 8 *Horizons* 22

liability,<sup>101</sup> once a deficiency is detected in terms of the SSA or the SSP. Moreover, even a highly reputed RSO need not always be absolutely diligent as in the case of “*The Muncaster Castle*”.<sup>102</sup>

Despite the fact that the SSP is a confidential document, the disclosure of a part or the whole of its content<sup>103</sup> during a court proceeding may be necessary in some circumstances, where litigator has clear grounds that the underlying causes of a security-related incident creating damage or loss of a specific cargo were particularly embedded in the inadequacy of the SSP and its inability to address properly and effectively the security matters onboard the ship.

From an ergonomic perspective, it is essential to underline that the SSP and the manuals of the security system should be user-friendly. Otherwise, the personnel who are assigned security matters will not be at ease when implementing the provisions of the plan. Moreover, the courts are likely to consider the vessel in this situation unseaworthy as it has been the case in the context of the ISM Code.<sup>104</sup>

### **3.4.2 International Ship Security Certificate (ISSC)**

Despite the fact that classifications societies were not conceived in the first place as specialists in carrying out security duties, they have been involved in the performance of the statutory surveys pertaining to the implementation of the ISPS Code. It could be

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<sup>101</sup> We may refer to the way the ‘due diligence’ concept was demonstrated through the case of “*The Fjord Wind*”, discussed in the previous chapter.

<sup>102</sup> *Riverstone Meat Co. Pty. v. Lancashire Shipping Co.* [1961] Lloyd’s Rep. 57, [1961] AMC 1357(H.L.). In this case, the carrier was held responsible since the ship repairers had not been diligent.

<sup>103</sup> Despite the confidentiality of the SSP, part or whole of it may be disclosed by the courts at the request of the insurers seeking information to prove the unseaworthiness of the vessel in an attempt to be exculpated from covering any potential damage or loss of the vessel. Such information can be discoverable by the assured in law suits, according to rule 31(6) of the Civil Procedures Rules (CPR) 1998, which came into force in England & Wales on 26 April 1999. The said rule provides: ‘Standard disclosure requires a party to disclose only: a) the documents on which he relies; and b) the documents which— i) adversely affect his own case, ii) adversely affect another party’s case, or iii) support another party’s case; and c) the documents which he is required to disclose by a practice direction’.

<sup>104</sup> We may refer to the case of “*The Eurasian Dream*” discussed earlier. See *Supra*- note 69.

argued that rush of the classification societies to be accredited the status of Recognized security Organisations was motivated by the potential financial earnings.<sup>105</sup> In order to ensure uniformity in terms of the accomplishment of their security services the International Association of Classification Societies (IACS) published its revised procedural guidelines<sup>106</sup> in which they provide the various members and associates of IACS with the methods and the criteria upon which an International Ship Security Certificate may be issued to a ship. It should be noted that if a RSO has been involved in the conduct of the ship SSA or the development of the SSP or any amendments thereto, it should not be allowed to approve the SSP or to conduct the verifications for the certification process in order to avoid any potential conflict of interest.<sup>107</sup> Although, the procedural requirements established by IACS seem to be clearly formulated, a number of issues pertaining to the process of verification and certification may be raised.

According to section 7.1(ii) of IACS procedural requirements, the verification for the issuance or the renewal of the ISSC will be based, inter alia, on the verification through a representative sample of the effectiveness of the security system implemented on board the vessel. Undoubtedly, we may argue whether this sampling approach may provide a credible indicator through which the effective implementation of the whole security system in place could be proved.

In addition, it should be noted that a RSO, intending to carry out verification of the compliance with the requirements of the ISPS Code is required to have a documented system for the qualification and the continuous updating and competence of its auditors who are to perform the verification tasks. Notwithstanding the criteria laid down, the issuance of an ISSC by a highly reputed RSO may not be conclusive evidence that the

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<sup>105</sup> See 'Security Should not be a Class Issue' (03 April 2003) *Fairplay*

<sup>106</sup> See IACS, 'Procedural Requirements for ISPS Code certification' (2003)  
< <http://www.iacs.org.uk/preqs/PR24R5.pdf> > ( 15 July 2005)

<sup>107</sup> The Annex to the Interim Guidelines for the Authorization of Recognized Security Organizations Acting On Behalf of the Administration and /or Designated Authority of a Contracting Government ( MSC/Circ.1074 issued on 10 June 2003) stated therein: " 2 In no instance may the RSO approve, verify, or certify a work product that it has developed" (e.g. preparation ship security assessments, preparation ship security plans or of amendments under review).

company exercised due diligence to provide a seaworthy ship. In this respect, it was held by the Supreme Court of Canada<sup>108</sup> that the production of a certificate of seaworthiness was not sufficient to discharge the statutory onus of proof that due diligence was exercised to make the vessel seaworthy. Following this holding, the ISSC may lose its efficacy, once a deficiency has been clearly detected in the security system established on board the ship. The present situation highlights the issue of the potential liability that the RSO may face, especially due to a potential omission or negligence from their auditors in carrying out their duties.

### **3.4.3 Liability of the Recognized Security Organisations**

It is not in the ambit of this section to cover all that has been said about the sensitive issue of liability of classification societies. However, the present discussion will attempt to point out the most relevant principles upon which a Recognized Security Organisation may be held liable for carrying out its duties pertaining to the security regime in an unacceptable manner. In this respect, it should be noted that, in general, the liability of classification societies has been dealt with from various perspectives.

From a contractual prospective, the Class owes a duty of care in detecting the defects of the vessels surveyed and in notifying the owner or the charterer accordingly as stated by the court in *The Great American*.<sup>109</sup> However, it was contended that the shipowner cannot rely on a deficient survey as a defence for exculpating himself from the obligation to exercise 'due diligence' in providing a seaworthy vessel as per art.III (1) of the Hague/Hague-Visby Rules. Moreover, the court considered in the case of "*The Great American*" that the recognition of liability against the classification societies will have the undesirable impact of placing the ultimate responsibility of seaworthiness of the vessel on these entities that have only brief contact with the ship during the whole year.

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<sup>108</sup> *Goodfellow Lumber Sales Ltd v. Verreault* [1971] S.C.R.522, 541, [1971] 1 Lloyd's Rep185, 194

<sup>109</sup> See *Great American Insurance Co. v. Bureau Veritas* 338 F.Supp.999 (S.D.N.Y.1972)



It therefore follows that the RSO is likely to avoid liability if it has not been informed by the company of the potential security incidents that may happen during the certification period or of the possible amendments to the ship security plan that could be undertaken as a result of the revision of the ship security assessment.<sup>110</sup>

It is interesting to look at the issue of liability of RSOs with regard to third parties such as the cargo owners, especially after a security-related incident causing damage to the cargo. In this respect, case law has demonstrated that it is difficult for the cargo owners to succeed in a claim in tort against classification Societies, where a deficient survey was performed by a class surveyor.<sup>111</sup> In general, it should be noted that the cases against the classification societies have relied on contractual or on tort liability theories. In practice, the majority of the claims are filed under the tort spectrum. In addition, it should be mentioned that the shipowner may be liable in tort to third parties that sustained damage by negligence of independent contractors, if the shipowner is able to control the manner in which the work is done by the independent contractors.<sup>112</sup>

In addition, classification societies may be considered in some jurisdictions as government appointees, immunized from liability for issuing statutory certificates in good faith, such as the case in the “*Sundancer*”,<sup>113</sup> in which the American Bureau of Shipping (ABS) was granted legislative immunity under the Bahamian Shipping Act of 1976. This policy of exemption is perceived by Honka<sup>114</sup> as against the public aims of the maritime community, based on ensuring safety, environmental protection and

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<sup>110</sup> These obligations are clearly stated in the IACS “Procedural Requirements for ISPS Code Certification”, see supra-note 106

<sup>111</sup> The leading authority is the judgment of the House of Lords in “*The Nicholas H*” [1992] 2 Lloyd’s Rep.481 (Q.B.); [1994] 1 Lloyd’s Rep.492 (C.A.); [1995] 2 Lloyd’s Rep.299 (H.L.). In this case the issues of “foreseeability” and “proximity” were considered in relation to the classification society and the Court of Appeal dismissed the claim of the cargo owners upon policy grounds, in the sense that a favorable judgment for the cargo owners would affect greatly the scheme of limitation of liability regulated by the Hague/Hague-Visby Rules.

<sup>112</sup> See Gaskell, Nicholas et al, *Bills of Lading: Law and Contracts* (London, Hong Kong : LLP, 2000), 287

<sup>113</sup> See *Sundance Cruises Corp. v American Bureau of Shipping* 799 F.Supp.363, 1992 AMC 2946 (S.D.N.Y.1992), aff’d, 7 F.3d 1077, 1994 AMC 1(2d Cir. 1993), cert. denied, 114 S.ct. 1399 (1994).

<sup>114</sup> See Honka, Hannu , ‘The Classification system and its problems with special reference to the liability of classification societies’ (1994) 19 *Tulane Maritime Law Journal* 1

currently security at sea. Although this immunity has been challenged by a few decisions, such as the one of the Tribunal de Commerce de Nanterre in “*The Elodie II*”,<sup>115</sup> the entrusted classification society with the statutory duties still enjoys a governmental protection, as reflected in the recent case cited in Lloyds List,<sup>116</sup> where the Dutch Supreme Court contended in its decision related to the case of the river barge “*Linda*” that the Dutch state’s obligation to observe due care when inspecting ships for issuing or renewing certificates of seaworthiness do not purport to protect an unlimited group of third parties against unforeseeable damage, resulting from the unseaworthiness of the vessel, which was not detected during an inspection carried out under the responsibility of the state.<sup>117</sup>

Undoubtedly, the issue of Class liability will be the topic of a continuous debate during the following years. Nevertheless, it is believed that, from a public policy perspective, holding Class liable for unexplained casualties may encourage the shipowners to disregard their obligation to exercise due diligence to provide a seaworthy vessel. Moreover, the courts will be reluctant to impose full liability on Class upon tort principles, whilst the shipowner is entitled to limit his liability in accordance with relevant international conventions.<sup>118</sup> In addition, some scholars think that a trend towards approving the claims of third parties, mainly cargo owners, against the classification societies risks undermining the balance of rights and liabilities between shipowners and cargo owners regulated by the Hague/Hague/Hague Visby Rules.<sup>119</sup> In this regard, the CMI supports a limitation of liability scheme for the classification societies, not based on ship’s tonnage, due to the fact that the fees charged by the class for the services carried out do not depend on the size of the vessel.<sup>120</sup>

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<sup>115</sup> The Tribunal de Commerce de Nanterre, 26 Juin 1992, *Revue Scapel*, 1992, 109, D.M.F.1994, 19. In this case, the court of Appeal confirmed the previous judgment upholding the claim of the purchaser of the vessel, against Bureau Veritas for the prevailing defects of the ship.

<sup>116</sup> See Hill, Helen, ‘When the state is held not liable for survey deficiencies’ (27 July 2005) *Lloyd’s List*

<sup>117</sup> *Ibid.*

<sup>118</sup> See Clark, Peter D, ‘An American Admiralty Law Viewpoint on the Changing Role of Classification Societies’ (2004) < <http://www.navlaw.com/articles/class.htm> > (20 July 2005)

<sup>119</sup> See supra-note 112, 290

<sup>120</sup> See Chaves, Gilberto, ‘The issue of liability’ (1998) *Bimco Review*, 114

It follows, therefore, that any company will have to carry out regular internal audits in order to detect as early as possible any potential failure in the security system that may expose it to liability for a possible damage or loss of the cargo, caused by a security incident. One must, however, underline the instrumental role that may be played by the flag state in ensuring that the delegated statutory duties pertaining to the implementation of the ISPS Code are accomplished by the RSOs in an efficient way. In this respect, some flag states such as Hong Kong have already initiated a quality control system, based on monitoring the delegated functions, including the ISPS Code duties and exercising quality control over the Class Societies surveying ships in their register.

In the same line of discussion, it is to mention that the US Coast Guard has expressed recently their intention to audit RSOs, in particular, with regard to the system of accreditation in the different countries, since there are for the moment no guidelines, pertaining to the criteria upon which an accreditation is granted to an RSO.<sup>121</sup>

#### **3.4.4 The paper trail of the security system**

It was found by the court in the case of "*The Eurasian Dream*", reviewed earlier that the safety management system (SMS) onboard was ineffective, due mainly to the previous manning incidents, the documentary inconsistencies detected and the deficient policy related to supervision and training. These facts had been demonstrated through the examination of the paper trail generated by the ISM system in place, including logbook extracts, hours of work records and training forms. Since the philosophy of the ISPS Code is based on a documented scheme, including record keeping, reporting and internal audit, there are clear indications that the paper trail of the ship security system will be under scrutiny by the courts in seaworthiness related disputes. Thus, it is of paramount importance to look at the main ingredients of the

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<sup>121</sup> See 'USCG to Audit Security Auditors' (27 July 2005) < <http://www.thefreeman.com/local/story-20050727-32756.html> > (20 August 2005)

recording scheme, which forms part of the items dealt with in the Ship Security Plan (SSP).

It should be emphasized that the onboard and the shore-based personnel, who are assigned security matters, including the SSO and the CSO, should have an acceptable level of proficiency and knowledge to deal with their responsibilities.<sup>122</sup> Added to that, the Code stipulates that drills should be conducted at least every three months and exercises every calendar year.<sup>123</sup> These activities allow testing individual items of the ship security plan, including the possible security threats mentioned in the Code in order to identify any security-related deficiency and also make the shipboard personnel conversant with their security duties at all security levels. The activities of training, drills and exercises should be recorded in an electronic format or as entries in the ship log, a copy of which should be sent to the CSO responsible for the particular vessel.<sup>124</sup>

Whilst it is required under the ISPS Code<sup>125</sup> to report any arising breach of security, one may argue that the related records can be used against the company in a trial, related to the seaworthiness of the vessel,<sup>126</sup> unless adequate corrective measures were taken out by the SSO, in liaison with the CSO and recorded accordingly. In this case, the internal audit may be a second defence for the shipowner, if the effectiveness of the remedial actions has been assessed and additional measures have been undertaken.

The paper trail generated by the implementation of the security scheme will have an impact on the way seaworthiness disputes are litigated in courts. In this respect, the recourse to some modern techniques of case management such as the Post Incident Auditing, which can be used for seaworthiness disputes with respect to the ISM Code<sup>127</sup>

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<sup>122</sup> See sections ISPS/B/13.1-13.3

<sup>123</sup> See section ISPS/B/13.6-13.7

<sup>124</sup> See supra-note 96

<sup>125</sup> See section ISPS/A/10.1.3

<sup>126</sup> Especially, if a breach of security of this kind was the proximate cause of a security related incident.

<sup>127</sup> See Spears, Sandra, 'Lawyers advocates a new angle on case management in the post ISM world' (25 May 2005) *Lloyd's List*, where the author presented how the Post Incident Audit could be applied in seaworthiness disputes, with regard to the ISM Code.

are likely to assist the case handlers in planning in a timely manner the strategy which will be followed in dealing with security related cases.

Basically, the Post Incident Auditing mechanism will consist of a review of the manuals related to the ship security plan and all the records kept onboard the vessels, including the logs and the checklists. The purpose of this review is the verification of the compliance with the security requirements and the detection of non-conformities, missing records and conflicts.<sup>128</sup> This approach will permit the litigator to prepare in a structured way the witness-statement taking and to avoid cross examination of documentation irrelevant to the dispute. However, the present technique is likely to be used in any case involving a high value damage or loss.

#### **3.4.5 The port facility in the equation of seaworthiness**

Despite the fact that the security related responsibilities of the Administration and the Contracting Government in respect of the ship and the port facility have been laid down in a separate sets of regulations, there are areas of interaction between the two sides, in particular, with regard to the setting of compatible security levels at the point of ship/port interface. In fact, the Administration and the Contracting Government are required to establish, as stipulated by the provisions of the ISPS Code, efficient procedures in order to ensure security level compatibility in terms of setting the security level for the ship and port facility side. However, any failure on the part of the PFSO properly to implement these procedures might lead to a non-compliance with the security regime on the part of the ship. Such a situation may arise, for example, in case of lack of liaison by the PFSO with the SSO and the consequent difficulties that may appear in the communication of the different measures that should be taken prior entry into the port, especially when it comes to the setting of security levels 2 and 3. Such failures will be particularly relevant when leading to a security related incident, causing damage or loss of life or property. It is not possible to predict with certainty the way the

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<sup>128</sup> Ibid.

courts will rule upon the claims that may arise, but it is of paramount importance to see to what extent the claimants can be successful in a dispute involving allegations of unseaworthiness and lack of due diligence.

The security scheme provides records of the communications between the ship and the port facility, about the arrangements carried out before reaching the point of ship/port interface, including the changes of security level that may be performed. Therefore, the courts are likely to review the recorded information in order to ascertain whether the failure to set compatible security levels is to be assigned to the port facility or to the ship. It could be argued that the records kept onboard the ship will not be sufficient per se to prove the fault and that additional information from the port facility concerned should be provided during the proceedings. It is perhaps uncertain to see that the Contacting Government could easily disclose its records in a law suit. Likely, the SSO and possibly the CSO have to prove that due diligence had been exercised in ensuring that the security level onboard the vessel was compatible with the security status in the port facility.

It should be emphasized that the discussion about the security level in a port facility may extend to other issues related, for example, to charter parties, such as the warranty of the safety of the port, particularly in case of a security level 3 prevailing in the port facility. Such issues may be subject to negotiation between the parties concerned.

According to the findings of a survey carried out by Bureau Veritas,<sup>129</sup> and which were presented at a Conference held in Nantes,<sup>130</sup> many of the questioned shipping companies expressed the fact that their endeavours to improve shipboard security were not followed at the same pace by the ports. Regarding this concern, it is essential to highlight that IMO has not yet established a control scheme in respect of security for port facilities, as has already been done for ships, through certification and regular

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<sup>129</sup> See Spurrier, Andrew, 'Shipowners blast smaller ports over ISPS compliance failures' (27 June 2005) *Lloyd's List*

<sup>130</sup> The Conference held in Nantes between 23 and 24 June 2005 intended to evaluate the implementation of the ISPS Code after its first year of being in force.

inspection. Therefore, it seems relevant to the present discussion to explore the potential impact.

### **3.4.6 The exculpatory exceptions and the burden of proof**

The carrier may extricate himself from liability in case of damage or loss of the cargo if the cause of this occurrence is among the catalogue of the 17 exculpatory exceptions listed in Art.IV (2) of the Hague/Hague-Visby Rules. What seems to be relevant to our discussion is certainly the first immunity related to 'Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship' stipulated by Art.IV(2) (a). The analysis of the wording of this provision will not intend to dwell on the interpretation of the concept of management to its whole extent. Suffice is to say that the meaning of the word 'management' is controversial, in the sense that it is not clear whether a particular act of the master or the other servants is related to the management of the ship or the cargo. In fact it was held by English law<sup>131</sup> that one should distinguish between the management of the cargo alone as stipulated by Art.III (2) and the management of the ship as a whole as prescribed in Art.IV (2(a)).

It is recognized that the advent of the ISPS Code, as was the case for the ISM Code will have an earth-shaking influence on the validity of Art.4 (2)(a) of the Hague/Hague-Visby Rules which have permitted the carrier to avoid liability for error in navigation and management. In this regard, it should be mentioned that the extensive reporting scheme laid down by the ISPS Code and the effective involvement of the company in the management of the security system onboard its ships, via the CSO and the SSO will make the immunity related to the error of management redundant.

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<sup>131</sup> The meaning of the word 'management' is controversial, in the sense that it is not clear whether it is related to the cargo or to the ship. It was held in *Gosse Millerd v. Canadian Government Merchant Marine* [1929] A.C. 726 that it is essential to distinguish between the management of the cargo alone (Art.III r.2) and the management of the ship as a whole(Art.IV r.2(a)).

It should also be noted that the carrier may be exculpated from liability, even if the loss of or the damage to the cargo was a result of the unseaworthiness of the vessel, if he proves that he exercised due diligence to make the ship seaworthy according to Art.IV (1) of the Hague/Hague-Visby Rules. In other words, the company is required in this case to prove through the various kinds of evidence available under the security system, including records and reports that he endeavored to apply as properly as possible the security requirements.

### **3.5 Limitation of liability**

Generally, a terrorist attack or a security related incident onboard a ship may result in potential damage, loss of the cargo, personal injury or death. What should be borne in mind first is the fact that the limitation of liability in cargo claims may be governed by the global limitation regime (often called tonnage limitation) as well as the specific regime for carriage of goods by sea,<sup>132</sup> such as the one stipulated by the Hague/Hague Visby Rules.<sup>133</sup> The present discussion will deal with limitation of liability for cargo claims from a global perspective springing from tort allegations rather than originating from contractual arrangements. At the same time, reference will be made to specific matters pertaining to the claims related to personal injury and death, which are likely to arise after a security related incident on board a ship. In addition, we must underline that the purpose of this section is to determine to what extent the company's non-delegable duty to exercise due diligence in making the ship seaworthy may affect the conduct barring limitation of liability.

It is established as a matter of law that the legal basis upon which the company is entitled to limit its liability will depend on whether reference will be made to the International Convention Relating to the Limitation of Liability of Owners of Sea – Going Ships adopted in Brussels on 10 October 1957 or to the Limitation of Liability of

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<sup>132</sup> See Chen, Xia, *Limitation of Liabilities for Maritime Claims* (The Hague, London, Boston : Kluwer Law International, 2001), 35

<sup>133</sup> See Art.4 (5).



Maritime Claims (LLMC) Convention adopted in London on 19 November 1976. Whilst breaking the limitation of liability under the 1957 Convention is based on proving that the sustained loss was caused by the ‘actual fault or privity’ of the owner<sup>134</sup>, it is based under the 1976 LLMC Convention on proving that the loss sustained resulted from the personal act or omission of the owner, with the intention to cause the loss and the knowledge of its probable occurrence.<sup>135</sup>

### 3.5.1 Limitation of liability under the 1957 Convention

The wording ‘actual fault and privity’ has been used interchangeably with other terms such as ‘privity and knowledge’,<sup>136</sup> to express the behaviour of the shipowner that may deprive him from invoking the limitation of liability regime. For the sake of illustrating the manner in which the test enunciated above may operate in a security context, it is assumed that a company has been held liable of damage caused to a specific cargo, after a security related incident. In this regard, it is assumed that it has been found by the court that the company failed to exercise due diligence in providing a seaworthy vessel, under the security regime and this is ascertained to be the cause of the incident and thus of the sustained damage or loss.<sup>137</sup> In this situation, it might be argued that the failure of the company to perform its non-delegable duty pertaining to seaworthiness could deprive it of limitation of liability. The English courts have attempted in a number of cases to use

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<sup>134</sup> Art.1(1) of the 1957 Convention states: “*The owner of a sea-going ship may limit his liability in accordance with Article 3 of this Convention in respect of claims arising from any of the following occurrences, unless the occurrence giving rise to the claim resulted from the actual fault or privity of the owner*”.

<sup>135</sup> See the wording of art.4 of the Convention on limitation of liability for Maritime Claims., 1976.

<sup>136</sup> Considered as the American version of the wording ‘actual fault and privity’. The wording can be found in the Limitation of Liability Act of 1851 of the United States.

<sup>137</sup> If there is no causal connection between the ‘actual fault or privity’ and the damage or the loss, shipowners may still be entitled to benefit from the limitation of liability regime. This principle has been reflected through the decisions of both English and American courts. It could be referred in this respect to ‘*The Empire Jamaica*’ [1955] 1 Lloyd’s Rep.50 PDAD, where it was held by the Admiralty court that the lack of certification of a second officer was not sufficient as such to deprive the shipowner of limitation of liability, because the lack of the certificate was not the cause of the collision which occurred between the ‘*Empire Jamaica*’ and the Dutch motor vessel “*Garot*”.

the doctrine of the non-delegable duty to deny the right to limitation,<sup>138</sup> but the dominating trend in various cases<sup>139</sup> has been to examine the two issues separately.

Against that background, the company in the present context is required to show that the unseaworthiness of the ship did not originate from its 'privity and knowledge'. The question here is to determine whose knowledge will be imputed to that of the company. In the previous chapter, we have already looked into the English stream, which considers that the knowledge of the 'alter ego' or what is called 'the directing mind and will' of the company such as the managing director, binds the company.

From this perspective and with reference to the set of responsibilities and duties of the CSO under the ISPS Code,<sup>140</sup> it does not seem possible to suggest that the CSO is the 'directing mind' of the company in security matters or even is entitled to have 'direct access' to the top management. However, the findings of questionnaire carried out on a sample of shipping companies reveals that in a considerable number of them, the Designated Person (DP) under the ISM Code is the same person as the CSO, which permits him to be the liaison between the SSO and the top management. In this case, the knowledge of the CSO will be relevant for the limitation purpose, and can amount to the knowledge of the company, as he will be directly responsible for supervising the safety, the environmental protection and the security matters pertaining to the ship(s) of the company, with regular follow-up by the top management, through a reporting scheme. This kind of situation within a company appears to be in harmony with the practices followed by the Recognized Security organizations, consisting of carrying out the ISPS and the ISM Code audits under the same framework.

Whilst the English approach tends to search for the 'directing mind' of the company within the highest level, the American approach has considered that the knowledge of the

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<sup>138</sup> As cited by Chen, Xia, *Limitation of Liabilities for Maritime Claims* (The Hague, London, Boston : Kluwer Law International, 2001), 70

<sup>139</sup> See for example " *The Lady Gwendolen*" [1965] 1 Lloyd's Rep.335 CA

<sup>140</sup> Section ISPS/A/11

employees of the company vested with supervisory and discretionary powers, such as the managing agent, amount to the knowledge of the company itself.<sup>141</sup> According to this scheme, it will be reasonable to assume that the knowledge of the CSO is likely to represent the knowledge of the company, regarding seaworthiness of the vessel, under the security regime.

### **3.5.2 Limitation of liability under the 1976 Convention**

Unlike the test of ‘actual fault or privity’ found in the 1957 Convention, the test enshrined in Art.4 of the LLMC 1976 reduces the chances of the claimants in barring limitation of the shipowner. In this respect, it is extremely difficult to prove that the damage or the loss was caused by the personal act or omission of the person, with the intent to cause the damage or the loss<sup>142</sup>, or with recklessness and knowledge that the damage or the loss was likely to occur,

The determination of the intention of a person needs the exploration of his mind and maybe the use of infallible methods of exposing the true intention of the person concerned.<sup>143</sup> Also, it does not seem reasonable, for example, that the president or board of directors within a company would issue an order to the Company Security Officer, demanding him to lessen the precautionary measures taken in respect of the control of the ship access. It should be borne in mind that, under a structured and documented system, such as the ISPS Code, based mainly on regular reporting and internal audit, the occurrence of any such formal order would be suspicious.

It is submitted that the security system on board a ship is based on risk analysis principles. In fact, the SSO is regularly required to propose to the CSO any possible ramification to the SSP, through updating the SSA. Bearing in mind that the SSO is the

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<sup>141</sup> *American Dredging Co. v. Lambert*, 81 F.3d 127 (11<sup>th</sup> Cir. 1996), where the court stated that when a shipowner is a corporation, the privity or knowledge of this corporation is that of its managing agent, officer or supervisory employee.

<sup>142</sup> The intention to cause damage or loss is envisaged more in criminal liability.

<sup>143</sup> See supra-note 7, 407

individual the most conversant with the hazards that may endanger the vessel and that all the security measures and incidents are recorded, it is unlikely that the top manager would turn a blind eye to providing the necessary resources for the CSO and the SSO to remedy any arising security deficiencies.

Moreover, the cargo claimants in the context of the scenario presented at the outset of this section will have a heavy burden of proof, consisting of proving that the inappropriate personal act of the manager of the company was the cause of the damage or the loss. It is clear that recourse will be to the discovery and the disclosure<sup>144</sup> of the relevant documents forming the paper trail of the security regime, discussed earlier in this chapter.

### **3.6 Relevance of soft law to seaworthiness**

It is a matter of policy of the IMO to issue recommendations and guidelines, if needed when a Convention or a Code becomes mandatory. The purpose of this approach is to facilitate the implementation of the adopted legal instruments by the member States. However, the relevance of the substance of these recommendatory documents to the seaworthiness of a ship may be questioned. This concern is justified, at least in the realm of maritime security, where it has been witnessed that some States, such as the USA, have made the recommendatory part B of the ISPS Code mandatory and enacted it in its national legislation via the Maritime Transportation Security Act of 2002<sup>145</sup>.

Generally speaking, it has been established by case law that the seaworthiness of a ship must be judged by the standards and practices of the industry at the relevant time, at least so long as those standards and practices are reasonable. Thus, it might be argued

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<sup>144</sup> Whilst disclosure of documents in courts is frequent in common law countries, it is not compulsory in many civil law countries.

<sup>145</sup> The Maritime Transportation Security Act adopted by the USA in 2002 have brought security measures more stringent than the ISPS Code itself and has in this respect made part B of the Code mandatory. The integral text of the act may be found at:

<<http://www.uscg.mil/hq/g-m/mp/pdf/MTSA.pdf>>

that the pack of security guidelines issued by IMO<sup>146</sup> since the adoption of the ISPS Code may be among the factors that should be looked at, when assessing the seaworthiness of a vessel under the security spectrum.

Reasonably, the role of the security related guidelines or recommendations may not be relevant in a court proceeding for compensation or limitation purposes, unless the cargo claimant can show that non-compliance with these soft law instruments was the cause of the damage or the loss of his cargo, resulting from a potential security related incident. However, the national security requirements established by some countries, particularly the USA<sup>147</sup> have been taken into account world wide in the trading practices of the industry. In this respect, the revised BIMCO ISPS/MTSA clauses for voyage and time charter parties<sup>148</sup> require the owners, when trading to or from the United States or passing through the United States waters to comply with the requirements of the Maritime Transportation Security Act 2002, relating to the vessel and the “owner”<sup>149</sup> as defined by this instrument.

### **3.7 Issues specific to the Hamburg Rules**

As has been seen in the previous chapter, the seaworthiness of the ship has not been explicitly cited by the provisions of the Hamburg Rules, but the emphasis was put on the condition of the cargo, that should be kept sound during the whole period of time that the goods are in the carrier’s custody. If it has been assumed that a security related incident happened onboard the vessel, causing extensive damage to the cargo, it might be argued that the carrier is liable for the damage unless he proves that he, his servants or his agents acted as any prudent owner will act in such circumstances to avoid the incident and its consequences.

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<sup>146</sup> The set of IMO Guidelines and Circulars related to maritime security can be found at:  
< <http://www.imo.org/home.asp>>

<sup>147</sup> See supra-note 145

<sup>148</sup> See provision (a) (i) of the revised ISPS/MTSA clauses for both voyage and time charter parties established in June 2005. The text of these clauses can be found on the BIMCO website at:  
<<http://www.bimco.dk/Home/Corporate%20Area/Documents/Clauses.aspx>>

<sup>149</sup> See supra-note 145 , chapter 701/ section 70101/4(A)

It must be remembered that, even under Art.3(2) of the Hague/Hague-Visby Rules, the carrier has a continuous obligation for caring properly for the cargo, which seems consistent with the substance of Art.5(1) of the Hamburg Rules, regarding the liability for the damage to the cargo. Moreover, it has been concluded by Bauer<sup>150</sup> after analyzing seven samples of UK and US decisions on pre-voyage unseaworthiness under the Hague/Hague Visby Rules that they are likely to be decided in the same way under the Hamburg Rules. It should be noted that the remainder of the discussion is to be mainly centred on the concept of 'due diligence', in respect of the security matters, which enshrines the same substantial meaning either in the context of the Hague/ Hague-Visby Rules or the Hamburg Rules.

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<sup>150</sup> See Bauer, R. G, 'Conflicting Liability Regimes: Hague-Visby v Hamburg Rules - A Case by Case Analysis' (1993) 24:1 *Journal of Maritime Law and Commerce* 53

**CHAPTER 4**  
**THE SEAWORTHINESS UNDER THE SECURITY REGIME:**  
**FROM A MARINE INSURANCE PERSPECTIVE**

**4.1 Introductory Remarks:**

It has already been mentioned that the undertaking of seaworthiness is relevant in both voyage and time policies of insurance. Under English law, it has been seen that section 39(1)<sup>151</sup> of the Marine Insurance Act 1906 implies in a voyage policy a warranty of seaworthiness at the commencement of the insured voyage and that the breach of this warranty would automatically discharge the insurer from liability as from the date of the breach. In respect of a time policy, there is no implied warranty of seaworthiness at any stage of the adventure, but the privity of the assured to send an unseaworthy ship to sea, would deprive him from the insurance cover, if the damage or the loss is caused by such unseaworthiness<sup>152</sup>.

Unlike the Marine Insurance Act 1906, the Norwegian Marine Insurance Plan of 1996<sup>153</sup>, does not make any distinction between voyage and time policies in respect of the nature of the undertaking of seaworthiness, but imposes on the assured the obligation to rectify any detected deficiency of the ship before or after the commencement of the voyage. In other words, the liability of the insurer for coverage of the damage or the loss related to the unseaworthiness of the ship depends on the moment the defects are detected and on the corrective actions taken by the assured<sup>154</sup>.

It should be borne in mind that compliance with the requirements of the security regime is not conclusive evidence of the seaworthiness of the ship in respect of the relevant

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<sup>151</sup> See supra- note 50.

<sup>152</sup> See supra- note 52.

<sup>153</sup> See supra- note 62.

<sup>154</sup> See supra- note 63.

undertaking of seaworthiness laid down in the provisions of voyage and time policies. Nevertheless, a vessel non-compliant with the security requirements is likely to be considered unseaworthy from a marine insurance perspective. What is of particular interest in the present discussion is to determine the standard of seaworthiness expected from the insurer and the way a company as defined in the ISPS Code may ensure that its ships have onboard a security system able to reach this standard. The examination of the nature and the legal effects of breach of the undertaking of seaworthiness will be made with reference to the English and Norwegian Laws on the subject matter.

## **4.2 Undertaking of seaworthiness under the MIA 1906**

### **4.2.1 Voyage policy**

At the outset, it should be mentioned that time policies are commonly used for insurance on ships, since voyage policies are inappropriate in the case of vessels which are not habitually employed in single voyages.<sup>155</sup> However, it is worth to examine the applicability and the legal effects of breach of the implied warranty of seaworthiness stipulated by section 39(1) of the MIA 1906, under the spectrum of the ISPS Code and the relevant amendments to the SOLAS Convention 1974.

The warranty of seaworthiness as enunciated by section 39(1) is absolute and thus it is not sufficient for the shipowners merely to exercise due diligence to provide a seaworthy vessel as it is envisaged by Art.III (1) of the Hague/Hague-Visby Rules. Consequently, it will make it easier for the insurer to be released from liability in case of a damage or loss attributable to the unseaworthiness of the vessel. In this context, the company as defined in the ISPS code is required at the commencement of the voyage to comply with all the ingredients of the security regime as listed in the previous chapter, including trained personnel, adequate equipment and valid documentation. Obviously, the issue which deserves to be examined in this respect is

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<sup>155</sup> See Rose, Francis D., *Marine Insurance: Law and Practice* (London, Singapore: LLP, 2004) 187



the way through which the insurer can ascertain that the ship is operationally compliant with the security regime. For the sake of illustrating the practices followed by the insurance market prior to the inception of any voyage policy, it might be useful to refer to the sphere of cargo insurance, where voyage policies predominate in practice.<sup>156</sup>

It should be noted that the Institute Cargo Clauses (ICC) 1982, published by the Institute of London Underwriters have gained international currency in the markets of insurance on cargo<sup>157</sup>. According to clause 5.2 of these standard policies, the breach of the implied warranty of seaworthiness and fitness is waived unless the cargo owner or his servants are privy to the unseaworthiness or the unfitness of the vessel at the time of loading.<sup>158</sup> In other words, the cargo owner may lose his insurance cover if he was, or ought to have been aware at the time of loading of the unseaworthiness of the vessel. It could be said that this provision may in some circumstances constitute a prejudice to the rights of innocent assureds, who have to prove that they were not privy to the unseaworthiness of the vessel, through strenuous court proceedings.

In order to deal with such a controversial issue and at the same time to respond to the needs of the contemporary mandatory IMO regulations, in particular the ISM Code, the London insurance market published a few endorsement clauses, such as the ISM Code Endorsement Clause applicable to shipments on board vessels to which the ISM Code applies.<sup>159</sup> It should be noted that this Clause has a twofold purpose. First, it has been established to reinforce the implementation of the ISM Code from its inception and secondly, it has aimed to protect innocent cargo assureds through ensuring that they were not prejudiced by shipments on a non-certified vessel.<sup>160</sup> In principle, the Cargo ISM Endorsement Clause intends to release the insurer from liability for the loss of or

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<sup>156</sup> See Thomas, D.Rhidian (ed), *The Modern Law of Marine Insurance* (London, New York, Hong Kong: LLP, 2002), 15

<sup>157</sup> See Hodges, Susan, *Cases and Materials on Marine Insurance Law* (London, Sydney : Cavendish Publishing Ltd, 2000), 878-888. For a global survey of the clauses, see Hudson, N, G & Allen, J, C, *The Institute Clauses*, 3<sup>rd</sup> Ed (London: LLP, 1999).

<sup>158</sup> *Ibid*, 878, 883, 888.

<sup>159</sup> It was prepared on 01 May 1998 by the joint cargo committee, which was formed of underwriters in both the Lloyd's and company markets. It came into effect on 01 July 1998.

<sup>160</sup> See Felsted, Andrea, 'New ISM Code endorsement clause' (13 May 1998) *Lloyd's List*

the damage to the cargo carried on board a vessel failing to comply with the ISM Code. The exclusion will operate if at the time of loading the cargo, the assured was aware, or in the ordinary course of business, should have been aware that the vessel was not certified in accordance with the ISM Code or that its owners or operators did not hold a Document of Compliance.<sup>161</sup> However, the exclusion does not apply to a bona fide third party to whom the insurance was assigned.

It has been argued that the rationale behind the establishment of the ISM Endorsement Clause was to provide the insurance industry with a tool that may reduce the potential number of claims that may arise out of allegations of unseaworthiness resulting from the non-compliance of the assureds with the ISM requirements. It could be concluded from the preceding discussion that the seaworthiness of a vessel in the context of the ISM Code is evaluated from an insurance point of view on the availability of an ISM certificate or a document of compliance. From this perspective, the effectiveness of the safety management system on board a ship remains questionable and will not be subject of scrutiny unless loss of or damage to the cargo occurs.

Against this background, it would seem, as a matter of analogy that the insurance market is likely to use in the context of the security regime the same line of reasoning followed when dealing with the ISM Code. In other words, it could be argued that an ISPS endorsement clause is likely to be established in an attempt to cope with the potential disputes that may take place between insurers and assureds out of the implementation of the requirements of the security regime. However, it is not possible to predict with certainty which approach the insurance market will follow in this respect. In order to illustrate some of the challenges that may face the cargo insurers in practice, a hypothetical scenario will be thoroughly analysed.

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<sup>161</sup> See Tilleke & Gibbins, 'Impact of the ISM Code on the Marine Insurance Market' (September 1998)  
< [http://www.tillekeandgibbins.com/Publications/Newsletters/maritime/marine\\_insurance.htm](http://www.tillekeandgibbins.com/Publications/Newsletters/maritime/marine_insurance.htm) >  
(01 August 2005)

The present scenario concerns a shipment of a cargo of bananas from a port in Central America to a port in Europe. The shipment is insured under the Institute Cargo Clause (A).<sup>162</sup> Prior to the ship's entry into the European port, the master submits the information required by the provisions of the ISPS Code to the officers duly authorized for this purpose. After evaluation of the data by the competent port officers, the vessel is directed into a waiting area adjacent to the port, where it is later found that it does not hold a valid ISSC. Subsequently, a Declaration of Security<sup>163</sup> is completed by the port facility and the ship, which is not allowed to discharge its cargo before obtaining a valid ISSC. In this situation, the cargo owner suffers a loss caused by the delay in delivery of the cargo. Undoubtedly, it might be relevant to see whether the cost of such delay would be covered by the insurer.

First, it is reasonable to qualify the ship as unseaworthy due to the lack of the ISSC. Moreover, it is worth mentioning that as a matter of English law a ship may not be able to tender a notice of readiness, unless it is ready physically as well as legally to load or discharge.<sup>164</sup> In fact, it has been held by English case law that a vessel needs to acquire the necessary clearances, before being able to tender a notice of readiness, except if these clearances are believed to be just mere formalities as has been demonstrated in "*The Delian Spirit*".<sup>165</sup>

It should be noted that the loss sustained by the cargo owner was proximately caused by the delay at the port. Bearing in mind that clause 4.5 of the Institute cargo policy does not cover any damage, loss or expense attributable to delay, even though the delay is caused by a risk insured against,<sup>166</sup> the cargo owner would not be entitled to an insurance cover for his economical loss. However, in a law suit against the carrier, the court is likely to uphold the claim of the cargo owner, providing that the carriage is governed by the provisions of the Hamburg rules or by any national instrument,

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<sup>162</sup> See, supra- note 157, 877-881.

<sup>163</sup> See ISPS/A/5.

<sup>164</sup> See Cooke, Julian et al, *Voyage Charters*, 2<sup>nd</sup> ed (London : LLP, 2001), 345

<sup>165</sup> See *Shipping Developments Corporation v. V/O Sojuzneftexport* [1972] 1 Q.B. 103

<sup>166</sup> See , supra-note 157 at p.877

incorporating the loss caused by delay of the cargo. In fact, it could be fairly said that the lack of a valid ISSC proves to a great extent that the carrier, his servants or agents did not take all the measures to avoid the occurrence which caused the delay.

It is evident that the implications of a situation such as the one depicted through the present scenario should be addressed by the insurance market, in particular in case of transfer of the ownership of the cargo and assignment of the insurance contract to a third party, which is in fact a common practice in the sphere of shipping. In this respect, it is interesting to look at the way in which the insurance market has dealt with similar situations in the context of the ISM Code.

It is crucial to point out that the Cargo ISM Forwarding Charges Clause<sup>167</sup> was established by the Institute of London Underwriters to deal with cases involving ships which have been subject to arrest, detention or deviation, as a result of law enforcement measures for non-compliance with the ISM Code. The philosophy behind this Clause is to cover the additional expenses incurred by the cargo owner, including loading, storing and forwarding the cargo to its intended destination, in case of its release from the ship.

Although, some surveys related to the implementation of the ISPS Code, in particular, in European ports,<sup>168</sup> reveal that there have been only very few cases of detention of ships for failure to provide a valid ISSC, the establishment of a 'Cargo ISPS Forwarding Charges Clause' would be likely to reduce the economical losses of the cargo owners in case of detention of the vessel in ports for non-compliance with the requirements of the security regime. Despite the additional premium which would be incurred by the cargo owners, the use of such a clause by the insurance market might cover other situations that could arise out of the enforcement of the security provisions, in particular, the denial from entry to ports or the expulsion from ports.

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<sup>167</sup> See, supra-note 161

<sup>168</sup> See 'Survey on implementation of the ISPS Code/EU Regulation in EU ports' <<http://www.espo.be/policy/position%202005/FINAL%20summary%208%20March%202005.pdf>> (12 August 2005).

Last but not least, it should be added that the warranty of seaworthiness is a condition precedent to the liability of the insurer.<sup>169</sup> In other terms, if the assured (shipowner) was proved to be non-compliant with the requirements of the security regime, any subsequent loss, even though not caused by this non-compliance will not be covered by the insurer.

#### **4.2.2 Time policy**

The remit of this section is to examine the effect of the security regime on the defence of unseaworthiness and privity, afforded to an insurer in a time policy by virtue of section 39(5) of the MIA 1906. Basically, before an insurer can avoid liability, the insurer has to establish first, that the vessel is unseaworthy, then to prove that the assured was privy to the unseaworthiness, to which the damage or the loss was attributable.

With regard to the first line of inquiry, it is noteworthy that the seaworthiness of a ship under the security regime for the purpose of indemnity in insurance encompasses the same legal meaning discussed in the previous chapter. Although the wording of section 39(4) of the MIA merely states that a ship is seaworthy, when it is reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured, the reasonable test, pertaining to the attitude of a prudent owner prevails when assessing the status of seaworthiness of a vessel before sending it to sea. Therefore, the present discussion will put more emphasis on the procedural mechanism through which the insurer may establish that a vessel is unseaworthy.

It is a matter of fact that the reporting scheme encapsulated in the ISPS Code is undoubtedly of paramount importance when it comes to the issue of evidential proof in respect of the status of seaworthiness of the vessel within the realm of marine insurance. In this regard, it might be useful to refer to some standard time policies,

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<sup>169</sup> See `Insurance Law is crying out for Reform says Lord Justice Longmore` (10 December 2003) *Lloyd's List*

such as International Hull Clauses (IHC), which have been published by the Joint Hull Committee in November 2003.<sup>170</sup> It should be noted that these clauses may permit the underwriters in some circumstances to exonerate themselves from liability, without the need to rely on section 39(5) of the MIA. This specific feature will be demonstrated through the analysis of the relevant provisions of the abovementioned clauses.

Pursuant to clause 13.1.3 of the IHC, the owner is required to give effect without undue delay to any recommendation or restriction issued by the classification society, pertaining to the seaworthiness of the vessel. Whilst in most cases the vessel's classification society assumes at the same time the duties of the vessel's RSO, and bearing in mind that a security related deficiency may impinge on the seaworthiness of the vessel as was seen, it could be reasonably said that duty of the owner under clause 13.1.3 may be extended to the security related recommendations of RSOs. However, the applicability of this extension should be cautiously assessed in view of the specific international context within which the ISPS Code was adopted. The Code is not likely to be dealt with from an insurance perspective in the same way as the ISM Code, for example, which is covered by the provisions of the IHC.

It is essential to note that according to clause 14.4.2 of the IHC (2003), the underwriters can be released from liability for any loss or damage caused by an unreported defect in the vessel. Assuming that the security leg is part of the ingredients of seaworthiness as defined by the IHC (2003), clause 14.4.2 may apply with regard to the reporting of security deficiencies. In fact, this is in line with the procedural requirements for ISPS Code certification<sup>171</sup>, which require the company to inform the RSO of any arising security incidents or the possible amendments to the SSP, resulting from the revision of the SSA. The issue which springs to mind is the fact that the SSO may find that a minor security defect need not be reported to the RSO. This attitude in itself is a breach of clause 14.4.2, but the loss of the insurance cover by the company is

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<sup>170</sup> These clauses cover hull and machinery losses. It is the second version of the International Hull Clauses issued on 01 November 2002, which are intended to replace the Institute Time Clauses of 01 October 1983 and 01 November 1995.

<sup>171</sup> See supra-note 106.

to be raised, in particular, if this supposed minor deficiency caused a security incident, resulting in damage to or loss to the hull and machinery.

What should also be pointed out is that the qualification of a deficiency as minor is left to the professional judgment of the SSO and possibly the CSO. Whilst the underestimation of a security deficiency by these officials may impinge on the seaworthiness of the ship and engender subsequently a failure of the security mechanism to prevent, in particular, a terrorist attack, the loss of insurance cover will be incurred by the company as a whole. In fact, the disclosure of the paper trail provided by the ISPS Code will permit the underwriter to look into the records related to the deficiencies and the breaches of security, which occurred onboard the ship.

It is to be borne in mind that the insurance cover of a loss or a damage incurred by third parties such as cargo owners, crew or passengers should not be seen in isolation in the context of the present discussion. In other words, throughout a time policy, the insurance of the cargo, in particular, is governed generally by the provisions of a voyage policy. In this respect, the contracting parties use common standard voyage policy contracts such as the ICC, already mentioned in the previous section. Moreover, it is to be noted that, rarely are voyage policies used for insurance of hull and machinery except, for instance, on a last voyage or tow to a scrap yard. With regard to cover related to loss of life or injuries, it is essential to explore the possibilities that may be afforded by the P&I clubs in this regard.

Against this background, it is evident that during the same voyage, the insurance cover pertaining to the hull and machinery, the cargo and the crew or passengers are governed by different schemes. It is interesting to explore where the seaworthiness issue, which is the subject matter of this dissertation fits in, when it comes to the application of these schemes. In order to illuminate some of the issues that may arise in such situations, the study of a hypothetical scenario will be carried out.

If it is assumed that a car carrier is subject to a bombing, a few moments after loading its cargo from port A destined to port B. The explosion leads to a total loss of the ship

and its cargo. Moreover, some members of the crew are killed, whereas others are seriously injured. The investigation that follows revealed that the explosives used in this bombing were put inside the bridge and that the log book designed for accessing the ship via the gangway did not seem to include any abnormalities. It should be noted that the ship is insured under the IHC (2003), whereas the cargo is insured under the ICC (A) (1995).

With respect to the cargo, it is not easy to ascertain whether the explosion was a result of the failure of the security system onboard to control the access to the ship, which can amount to the unseaworthiness of the vessel at the commencement of the voyage. If it is assumed so, the cargo owner may be entitled to the insurance cover under the policy, unless he is privy to this unseaworthiness. In practice, the cargo can be sold even when the ship is at sea, which does not permit the cargo owner to check the status of the ship. However, what seems to be possible is to ensure that the ship holds a valid ISSC. One could argue that the ISSC is not conclusive evidence of the seaworthiness of the vessel, but in view of the practices of the industry, it needs to be mentioned that the establishment of an ISPS Endorsement Clause as already indicated will be useful in terms of facing claims for loss or damage due to security related incidents.

With regard to the issue of loss of life and injury raised in the scenario, it should be borne in mind that the realm of 'individual claims' in general has not yet reached a status of uniformity, but it is still a complex patchwork of legislation and common law principles.<sup>172</sup> In addition, it should be noted that the liability of the company to compensate the crew springs from contractual obligations, and not uniquely from a potential negligence in case of failure of the company to provide a seaworthy ship in all respects, including compliance with the security requirements. In practice, the loss of life or personal injuries incurred by the crew is to be covered by the P& I Clubs. However, the company may lose its P&I Club cover in case of sending, with knowledge, the ship to sea in an unseaworthy condition. In fact, entry in a P& I club is

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<sup>172</sup> See Gold, Edgar, *Gard Handbook on P&I Insurance*, 5<sup>th</sup> ed (Arendal, Norway : Assuranceforeningen Gard, 2002), 229



regarded as a time policy, which is subsequently subject to section 39(5) of the MIA 1906.<sup>173</sup> In this respect, it is to note that P&I Clubs have mainly relied over their existence on classification societies in ascertaining that the ships of its members are complying with the relevant standards. However, the Clubs have experienced a long period of discrepancy between what classification societies contend to consider acceptable standards of seaworthiness of a ship and the stark reality of what is in effect quite rotten tonnage.<sup>174</sup>

In respect of the hull and machinery, there are two issues that should be clarified. First, as the IHC (2003) is subject to English law, the vessel should not be sent to sea in an unseaworthy condition with the privity of the assured as stipulated by section 39(5) of the MIA 1906. Secondly, the vessel should comply with clause 13 of the IHC (2003) related to the classification of the vessel and ISM Code. Also, it is to be recalled that clause 13 of the IHC (2003) may be extended to include the security regime requirements. From this perspective, if the car carrier in the abovementioned scenario was proved to be unseaworthy in terms of the security system on board, the underwriters will have the possibility to exculpate themselves from liability, if they can prove that the company was privy to such unseaworthiness. Despite the fact that the concept of 'privity' has been discussed earlier, it is essential to point out that the literal interpretation of section 39(5) of the MIA 1906 reveals that the act of privity is much related to the person in the company who is involved in the decision making process of sending ships to sea. In view of the structure of most shipping companies, it is in practice the superintendent who is assigned the responsibilities pertaining to the supervision and the monitoring of the operation of the fleet. On the assumption that the CSO is the same person as the DP under the ISM Code<sup>175</sup>, it is clear that prior to sending a ship to sea, the superintendent shall consult with the CSO, with respect to its condition pertaining to safety, environmental protection and security. In order to

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<sup>173</sup> See supra-note 51, 116

<sup>174</sup> See Poulsson, Havar, 'Special Report on P&I Insurance: Co- operation – not war- is the answer' (05 June 1992) *Lloyd's List*

<sup>175</sup> This assumption is based on the findings of a questionnaire addressed to a sample of shipping companies, see p.45.

determine to what extent the privity of the company related to sending an unseaworthy ship to sea may be imputed to the CSO, the SSP shall include provisions, which indentify to what extent the CSO is entitled to have access to the top management of the company.

Added to what has been said so far, it could be argued that the insurance cover of the potential losses that may be attributable to security breaches onboard the vessel, may be found under the cover provided under the Institute War and Strikes Clauses<sup>176</sup> (Hull-Time) published by the Institute of London Underwriters on 01 November 1995. In this respect, it should be noted that clause 1.5 stipulates that a loss or damage to the vessel caused by any terrorist or any person acting maliciously or from a political move is covered by the policy. It is beyond the scope of this section to enter into a discussion on the concept of 'a malicious act', but suffice it to say that the War and Strikes Clauses are not to be used uniquely for deterring the threats coming from pirates, for example, but could generally be applied in case of failure of the security system to prevent a politically motivated terrorist attack, the implications of which are more far-reaching.<sup>177</sup>

It is to note that clause 2.2.4 of IHC (2003) covers the negligence of repairers, or charterers provided that the damage or the loss incurred has not resulted from the want of due diligence of the assured, owners or managers. However, it is not possible to predict with certainty whether the scope of this clause could be extended to cover the negligence of the RSOs in carrying out their security services.

### **4.3 Undertaking of seaworthiness under the NMIP 1996**

It is beyond the scope of this section to provide a detailed background to the Norwegian Marine Insurance Plan 1996, but it is useful to present succinctly some specific features of this instrument, the advent of which was a landmark event both in Norwegian and in Nordic marine insurance law.

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<sup>176</sup> See supra-note 157 , 910-912

<sup>177</sup> See Gold, Edgar et al, *Maritime Law* (Toronto, Ontario : Irwin Law, 2003), 318

On 01 January 1997, this instrument superseded the Norwegian Marine Insurance Plan 1964. It is worth noting that the revision of the latter was motivated by, among other things, the following elements. First, it was necessary to bring the NMIP 1964 in line with the provisions of the Insurance Contracts Act (ICA) of 1989.<sup>178</sup> Second, there were some separate conditions for hull insurance that had been drafted and published on a regular basis as agreed documents, such as those related to the Norwegian P& I club insurers.<sup>179</sup>

Manifestly, the starting point of any discussion about the undertaking of seaworthiness as conceived by the NMIP 1996 is section 3-22 of chapter III, which releases the insurer from any liability for loss that is caused by the unseaworthiness of the vessel, provided that the assured knew or ought to have known of the deficiencies of the vessel at time, when it would have been possible for him to intervene. However, this principle is not applied in case of nautical faults committed by the master or a member of his crew.

In order to determine the manner in which the substance of section 3-22 can be applied in the context of the security regime, the main terms of the whole section need to be thoroughly analyzed.

#### **4.3.1 Unseaworthiness in the context of the NMIP 1996**

Since the NMIP 1996 does not provide any definition of unseaworthiness, it is important to define how the unseaworthiness of a ship is perceived by the Norwegian legal circles. In this respect, it should be noted first that the standard of seaworthiness is benchmarked against the attitude of a prudent owner to send a ship to sea, bearing in mind the potential risks that may be faced during the intended adventure. In other

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<sup>178</sup> This act had superseded the Insurance Contracts Act (ICA) 1930, which was prepared in close cooperation with Denmark and Sweden. This act does not deal only with marine insurance, but its scope covers all different types of insurance. For more information about the ICA 1930 and the ICA 1989, see Bull, Hans J, 'Insurance Law and Marine Insurance Law: The Unequal Twins' in Wahlgren, Peter (ed), *Maritime & Transport Law* (Stockholm : Stockholm University Law faculty, 2004), 12-19

<sup>179</sup> Ibid, 20

words, a deficiency of the ship constitutes unseaworthiness, if it creates a greater risk than normal for the operation in question.<sup>180</sup>

In addition, the seaworthiness issue in Norway is a matter of government control in the sense that the Norwegian maritime authorities supervise the seaworthiness of merchant ships, pursuant to the Act of Seaworthiness established on 09 June 1903. This Act, which has been amended on a number of occasions, in particular following Norway's ratification of international conventions pertaining to safety at sea, has been under scrutiny of a government committee in order to propose a new Act based on modern supervisory principles.<sup>181</sup> From this perspective, if the maritime authorities have found, through inspection, that a ship is seaworthy, one might argue that this finding is to be decisive with regard to section 3-22 of the NMIP 1996.

In principle, section 3-14 of the NMIP 1996 provides that a ship should be classed with a classification society approved by the insurer. Even though the Norwegian insurance market has not issued guidelines on the approval by classification societies, the statistics in practice reveal that the majority of the ocean hull insurance policies cover ships classed with members of IACS, in particular DNV, Lloyd's Register and ABS.<sup>182</sup> Bearing in mind that these classification societies carry out the security duties as part of their tasks, it is logical to consider that a vast majority of ships insured under the NMIP 1996 is likely to hold an ISSC and comply in general with the other formal security requirements. In addition, it is worth mentioning that the insurance may terminate, once a loss of class or a change of classification society takes place. In this

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<sup>180</sup> See Wilhelmssen, Trine L, 'The Norwegian Marine Insurance Plan and Substandard ships' in Huybrechts, Marc et al (eds), *Marine Insurance at the Turn of the Millennium* (Antwerp, Oxford : Intersentia, 1999), 132-133

<sup>181</sup> See The Central Union of Marine Underwriters Norway, 'CEFOR Participates in Government Committee Appointed to Propose a New Act on Seaworthiness' (2003) 1: 2 *CEFOR Newsletter* < <http://www.cefor.no/news/artikler/CEFOR%20Newsletter%202-2003%20word.pdf>> (12 August 2005)

<sup>182</sup> See Lund, Haakon L, 'The Norwegian Classification Clause: Section 3-14 of the Norwegian Marine Insurance Plan 1996' (2003) 1 *Network* < <http://www.cefor.no/news/artikler/Norwegian%20Classification%20Clause.pdf>> (13 August 2005),

regard, the Norwegian insurers have been reluctant to grant their consent to the change of classification societies, even between members of IACS.<sup>183</sup>

It could be added that the safety regulations provision prescribed by section 3-24 of the NMIP 1996 provides another tool for the insurer to ensure that the assured will comply with the national and the international regulations, including the ISPS Code requirements, which fall within the scope of the definition of a safety regulation.<sup>184</sup> However, it should be borne in mind that seaworthiness is not merely synonymous to the observance of the safety regulations, but the breach of a safety regulation may lead to the ship not being seaworthy.<sup>185</sup>

In the light of these considerations, it could be said that the unseaworthiness of a ship as mentioned in section 3-22 should be particularly examined, with respect to the security related deficiencies that may arise between inspections and those which are not discovered during inspections. Regarding the first type of deficiencies, it is to be recalled that the ISPS Code certification is not conclusive evidence of the seaworthiness of a ship. According to the Procedural Requirements for ISPS Code Certification issued by IACS, it has been seen that the company is required to report to the RSO any arising security related deficiency as well as the amendments to the SSP, emerging from the revision of the SSA. What should be underscored here is certainly that the mechanism of reporting and recording upon which the security regime is based is not in favor of any company, which ignores arising security defects.

In order to define accurately the context of the present discussion, it will be assumed that a deficiency regarding the control of the restricted areas arises on board the vessel, after the vessel being ISPS certified. In this situation, one may ask whether the SSO will proceed to a revision of the SSA, and consequently propose amendments to the

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<sup>183</sup> Ibid.

<sup>184</sup> Paragraph 1 of section 3-24 states that : “A *safety regulation* is a rule concerning measures for the prevention of loss issued by public authorities, stipulated in the insurance contract, prescribed by the insurer pursuant to the insurance contract, or issued by the classification society”

<sup>185</sup> See Comite Maritime International (CMI), ‘Marine Insurance: The CMI Review Initiative’ (2000) *CMI Year Book* 112 <<http://web.uct.ac.za/depts/shiplaw/fulltext/singapore.pdf>> (18 August 2005)

SSP. This question will be particularly relevant, in case of a damage or loss caused by the detected deficiency. However, the company may deny any causal link between the defect and the casualty which has occurred. In fact, unlike the position in English Law, sections 2-11 and 2-12 of the NMIP 1996 prescribe that there should be a causation between the unseaworthiness and the casualty, which generated the loss.

#### **4.3.2 Privity under the NMIP 1996**

Whilst under section 39(5) of the MIA 1906, the factor of time has no relevance with respect to the privity of the assured to the unseaworthiness of the vessel for the purpose of the insurance cover of any loss caused by such unseaworthiness, section 3-22 of the NMIP 1996 provides that the privity of the assured to the unseaworthiness of the vessel may not be sufficient for the insurer to exculpate himself from liability, unless such privity has been acquired at a point in time, where it was possible for the assured to rectify the arising deficiencies, amounting to the unseaworthiness of the ship.

From this perspective, it should be mentioned that during a specific voyage, any defect detected can easily be reported to the shore based management, through the various sophisticated communication facilities available onboard. Particularly, with regard to security deficiencies, the communication between the SSO and the CSO is to be reliable. Otherwise, there may be circumstances, where the SSO will know about the deficiencies at an early stage, but his corrective actions will not be sufficient to prevent the occurrence of a security related casualty, for lack of coordination with the CSO.

For the purpose of applicability of section 3-22 of the NMIP 1996, the privity element is not as simple as depicted above through the knowledge of the SSO, but the rules of identification<sup>186</sup> as seen earlier are to be applied when determining whose knowledge is imputed to the knowledge of the company.

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<sup>186</sup> In the present context, these rules aim to determine whose knowledge in a corporate organization could be identified as representing the knowledge of the corporate.

#### 4.4 Conflict of laws in marine insurance

At the outset, it should be noted that the discussion about the conflict of laws with regard to the nature and the legal effects of the undertaking of seaworthiness in marine insurance should be dealt with under a general framework, and not specifically in the context of the security regime. One must bear in mind, however, that conflicts of laws relating to marine insurance occur less frequently than in some other areas of contract law due to the international influence of some national statutes, such as the MIA 1906 and the French Code des Assurances, on the relevant national laws in other countries.<sup>187</sup>

From this perspective, the present discussion seeks to shed light on the attempts that have already been made in order to achieve international harmonization of the law of marine insurance and to look at the methodology used to solve choice of law problems, pertaining to a marine policy.

First, it is useful to refer particularly to the International Working Group (IWG) set up by the Comité Maritime International (CMI), with the mission to find out whether there is a chance to harmonize the rules of marine insurance.<sup>188</sup> In respect of the issue of seaworthiness, it has been found that, even though the common law systems apply the concept of warranty, they meet with the civil system concerning some issues such as classification societies.<sup>189</sup> In practice, it has been witnessed from the experience of civil law systems that the insurance market may function without recourse to the use of warranties, as long as the duty of disclosure provides adequate protection for the insurer. It could be said that the major problem facing the international harmonization of the rules of marine insurance is embedded in how to deal with the existing mandatory regulations, in particular those used in common law systems.

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<sup>187</sup> See supra-note 48, 324

<sup>188</sup> The decision to establish this International Working Group (IWG) originated from a symposium co-organised in 1998 by the CMI, the Norwegian Maritime Law Association and the Scandinavian Institute of Maritime Law

<sup>189</sup> See supra-note 185, 119

Pending harmonization within the sphere of marine insurance, it is essential to use uniform conflicts of law methodologies, in order to make it easier for the courts to decide upon the choice of the law applicable to a marine policy. It has been seen earlier that the Rome Convention,<sup>190</sup> covering the European countries has been a leading instrument in this respect, and which provided a set of standards methods for determining the proper law of a contract, such as the 'the closest and the most real connection' rule that is commonly used in this area of conflict of laws.

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<sup>190</sup> See supra-note 65



## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS

The present dissertation has intended to determine the impact of the security regime enshrined in the ISPS Code and the relevant amendments to SOLAS Convention, 1974 on the doctrine of seaworthiness. Efforts have been made in terms of identifying in the context of the security regime the main challenges facing the applicability of the undertaking of seaworthiness, which is an instrumental ingredient in the performance of some contractual arrangements such as charter parties and marine insurance policies. In addition, an analytical approach has been used in order to determine the manner in which the existing provisions governing the undertaking of seaworthiness, in particular in marine insurance, may be reviewed to accommodate the realities of the security regime.

It could be concluded from the review of English case law, which has been undertaken, that seaworthiness is a momentary concept. In other words, the standards of seaworthiness may vary according to the practices of the industry at the relevant time. In this respect, reference has been made, in particular, to the recent case of the “*Eurasian Dream*”, in which the court has ruled upon matters pertaining to allegations of unseaworthiness and due diligence, having the philosophy of the ISM Code in mind.

Therefore, the courts are likely to pay credence to the security requirements, when it comes to allegations of unseaworthiness and due diligence, arising out of a security incident causing damage or loss. Nevertheless, it should be borne in mind that compliance with such requirements is not conclusive evidence of seaworthiness.

With respect to the duty of due diligence in providing a seaworthy ship as per art.III(1) of the Hague/Hague-Visby Rules, the company is required to put more effort into the performance of the SSA and avoid relying on an “off the shelf” SSP. The choice of a

generic SSP may not be a practical solution towards properly addressing the actual security related hazards to a ship. Added to that, the development of an in-house SSP is likely to enable the company to produce user-friendly manuals for the implementation of the security procedures.

In dealing with seaworthiness of a ship under the security regime, consideration is to be given to the interaction between the ship and the port facility in terms of the compatibility of the security levels of both sides. The lack of liaison by the PFSO with the SSO may lead to the failure of the ship to adapt its security level to the security level prevailing in the port facility. The analysis of this discrepancy and possibly others should be carried out under the global framework pertaining to the administrative and operational duties of port facilities as prescribed by the ISPS Code. In view of the situation in practice, regarding the implementation of the Code, IMO should set a mechanism for monitoring the compliance of port facilities, as has already been done for ships through certification and regular inspection.

Since ISPS certification is mostly carried out by RSOs, the mechanism related to the accreditation of the status of a RSO should be put under scrutiny, particularly by flag states through the development of concise guidelines in respect of the criteria of accreditation in order to avoid a situation of patchwork quilt services. Moreover, as most RSOs are members of IACS, flag states relying upon the services of these classification societies should seek to set in place a quality control scheme as established by some flags such as Singapore. Undoubtedly, such a system is likely to assist flag states in monitoring the performance of the classification societies surveying the ships on their registers.

In case of damage or loss arising out of a security related incident, caused by substantive deficiencies detected onboard an ISPS certificated ship, the issue of liability of the RSO may be highlighted. This sensitive issue, which has been subject of controversial debates within legal circles, is not specific to the realm of the security regime, but it is embedded under the general framework of liability of classification

societies. Based on the review of case law in the subject matter, it has been seen that the courts have not only been reluctant to hold Class liable in disputes related to allegations in tort, but the Class has in some instances been granted legislative immunity when issuing statutory certificates on behalf of the government. One must underscore the decision of the court in the recent tort related case of “*Linda*”, which has reflected the immunity enjoyed by the Class when performing statutory duties.

As there have yet to be any ISPS related cases, it is not possible to determine with certainty the position of the courts, when it comes to tort claims against the RSOs, filed after potential security incidents. However, since most of the RSOs are mainly IACS members, carrying out the ISPS certification as part of their statutory services, the RSOs are likely to avoid liability in terms of tort claims. It follows, that particular emphasis should be placed on the supervision of the manner in which the security services are performed by the RSOs.

In respect of the exculpatory exceptions afforded to the carrier under Art.IV (2) of the Hague/Hague-Visby Rules, suffice it to say that the defence related to the error in management is considered redundant in the context of the ISPS Code, in view of the managerial structure upon which the SSP is based.

With regard to limitation of liability, whatever the legal framework referred to, either the 1957 Convention or the 1976 Convention, it could be said that the security regime has no substantial implications on the regimes of limitation laid down by both Convention as such. Nevertheless, in terms of identification of the knowledge of the company for limitation purposes the following points are to be highlighted:

- Despite the fact that the questionnaire undertaken for the sake of this dissertation reveals that in a considerable number of shipping companies the positions of the CSO and the DP under the ISM Code overlap, the status of the CSO within the company should be clarified, in particular regarding the degree of access to the top management

- It is highly recommended to carry out a thorough study on the status and duties of the CSO in shipping companies, in order to determine the practices of the industry in this respect. Such a study will also intend to determine how the security-related information is handled by the CSO and whether all this information is reported to the top management.
- The degree of access of the CSO to the top management should be reflected in the provisions of the ISPS Code, as it has been done for the DP under the ISM Code;
- On the assumption that the CSO is the same person as the DP, the knowledge of the CSO is likely to amount to the knowledge of the company, at least from an American legal point of view. In such a situation, the knowledge of the CSO is likely to amount to the knowledge of the company with respect to the 'actual fault and privity' standard enunciated by the 1957 Convention as well as with respect to the 'personal act...' standard enunciated by the 1976 Convention.

It should be noted that the relevance of the recommendatory instruments issued by IMO regarding the implementation of the ISPS Code are likely to be taken into consideration by the courts when assessing the seaworthiness of a ship under the security regime. The justification of this holding lies, in particular in the recognition of the market of the stringent requirements imposed on some trades, as reflected in the ISPS/MTSA Clause issued recently by BIMCO, which requires the ships calling US ports to comply with the MTSA 2000 provisions.

Based on the discussion about the undertaking of seaworthiness in the context of marine insurance, the following conclusions could be drawn:

- Despite the fact that section 39(1) of the MIA 1906 implies a warranty of seaworthiness in a voyage policy at the beginning of the voyage, in practice this warranty is waived, as in cargo insurance, unless the cargo owner is privy to the unseaworthiness of the ship. In order to ensure protection for innocent assureds, an ISPS Endorsement Clause may be worthy considering.

- Whereas the MIA 1906 does not take into account the point of time a defect is detected onboard a vessel, the NMIP 1996 adopts a flexible approach, in the sense that the assured could still benefit from an insurance coverage in case of a damage or loss caused by unseaworthiness, providing that he discovers the defect at a point of time, where a possible prevention is not feasible. In the context of the security regime, the professional judgment of the SSO and possibly the CSO with respect to minor defects is relevant in this regard. Undoubtedly, the issue of reporting defects and the assessment of their severity to the senior management as well as to RSOs is to be under scrutiny in this situation.
- Since the ISPS Code was designed in the first place to counter terrorist attacks pertaining to the maritime field, the insurance market approach is focused on the terrorist aspect of the ISPS code, whereas the seaworthiness element, which can prevent to a great extent the occurrence of these attacks, is reflected through the ISSC, which from an insurance point of view is prima facie evidence of seaworthiness. In this regard, the War Risks Clauses are integrated in such an approach.

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