

**Obligation of the Carrier
to Make and Keep the Ship Seaworthy
Some Comments on Art. 14 of the Rotterdam Rules**

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I. INTRODUCTION

Reflecting its unique characteristic, Shipping Law imposes on the carriers ¹a truly unique obligation, which does not exist in other modes of carriage: *making the ship seaworthy*.

This obligation was initially qualified as an absolute duty, in other words, a warranty obligation and carriers were regarded as guarantors of the seaworthiness of the ship ².

Gradually, however, this obligation was converted into fault liability and the carriers were expected to exercise due diligence in making the ship seaworthy.

In the meantime, seaworthiness was assigned a particular function, almost a pivotal task with regard to the liability of the carriers. Regulating the liability regime of the carrier with the duty to make the ship seaworthy occupying the central role, started with the Harter Act ³.

II. CONFLICTING INTERESTS⁴

The capital invested in maritime enterprises was exposed to more risks than the one allocated to more conventional areas of trade; even carrying goods by land was substantially less risky.

The defining factor in this matter was that the investor (ship owner/carrier), inevitably, had to part with its capital, i.e. its ship (s), and lose its direct and continuous control and supervision over its capital as well as its servants who were employed to manage the capital.

¹ A carrier may also be the shipowner and a shipowner therefore may also be busy with trying to make its ship seaworthy, but it does this in its capacity as the carrier, having taken over this status after concluding a contract of affreightment with a shipper. Moreover, since the Rotterdam Rules regulate carriage by sea and the rights and obligations of the carrier, we shall, in this study, take always the carrier as the main actor.

² SCRUTTON, 90; SCHOENBAUM, 607; TETLEY (M.C.C.), 875; WILSON, 9-10.

³ See, GILMORE & BLACK, 142-143; SCHOENBAUM, 602, 608--609; see also, decision by the U.S. Supreme Court *May v. Hamburg-Amerikanische Packetfahrt AG. (The "Isis")*, 290 U.S. 333.

⁴ For a brief exposé on the subject see, GILMORE & BLACK, 142-143.

The investor was keen to protect its interests to the maximum level possible; and trying to develop legal means to keep the value of the capital intact, as well as save the capital itself -along with its patrimony as a whole- immune from the claims of the third parties.

When this understandable concern of the investor is transposed to the position of the entrepreneur in maritime trade, speaking more specifically, the *carrier of goods by sea*, one of the means, perhaps the major one, the entrepreneur reverts to, to preserve its interests is to make sure that it should be safe from and invulnerable to the damage claims by the shippers, whose goods were either lost or damaged while they were under the custody of the carrier.

The carriers, in their endeavours to fend off the claims brought against them by the cargo interests, found it, understandably enough, more practical to insert exculpatory clauses in the contracts of affreightment and secure their positions before rather than try to defend themselves after suits were filed against them.

The development of the concept of freedom of contract during the nineteenth century, supported by the liberal philosophy of the period, was highly instrumental in offering the carriers huge flexibility in using the exculpatory clauses and thereby excluding their liability as foreseen by the common law ⁵.

Such exculpatory clauses, due mostly to the resourcefulness of the carriers, flourished and grew at such an exponential rate within a shortspan of time and due also being found valid and acceptable by the courts, particularly in England⁶, that finally, the cargo interests left almost with no basis to successfully sue the carriers and receive any compensation to cover their losses.

One may safely suggest that the insurance industry should have, tacitly at least, welcomed this extensive use of the exculpatory clauses, since they were also immune from paying large sums on behalf of the carriers, while they were not much bothered settling piecemeal claims by individual cargo owners.

Financial sector was also much in favour of the exculpatory clauses and thankfully following the rulings of the courts upholding such clauses, because, lesser outflow of capital from the coffers of the carriers meant allocation of more capital to shipbuilding and consequently demands for more loans.

Since the transport industry provides the link between the production and the consumption it plays major role in international trade and therefore provides the carriers with the potential to influence the political authority.

Within such intricacies of economic and financial whirlpool, evidently the shippers became the losing party, in their status as individual consumers vis-à-vis organised suppliers. Alongside the shippers, the producers, who rely first upon imported products to manufacture and subsequently exporting their goods to survive were also having substantial problems ⁷.

⁵ WILSON, 117, 172.

⁶ GILMORE & BLACK, 142; STURLEY, Michael F., "Transport Law for the Twenty First Century", in THOMAS, Rhidian (ed.), *A New Convention for the Transport of Goods by Sea - The Rotterdam Rules*, Lawtext Publishing Ltd., Oxon, 2009, pp. 1-33, at pp. 4-5; WILSON, 172.

⁷ One must never overlook the fact that biggest producers are also the biggest consumers.

It became evident, finally, that the conflicts between several opposing interests can only be solved by the political authority and as a consequence, the United States Parliament passed the *Harter Act of 1893*⁸.

III. THE HARTER ACT

1. The Purpose and Objective of the Act⁹

A brief analysis of the Harter Act shows, at least tacit, approval by the political authority of the -almost- unique situation of the carrier as the investor with only limited opportunity of keeping under direct and continuous control of its major capital, i.e. its ship (s).

Through the relevant provisions of the Harter Act, legislative power of the United States of America endorsed certain categories of the exculpatory clauses. But, on the other hand barred the carriers from inserting certain clauses as well as declaring them to be unlawful and therefore null and void if inserted.

Political authority thought it also appropriate that while allowing the carriers some protection for the periods during which they do not have the means of keeping their capital together with their servants and agents, under their direct control; imposed a particular responsibility for the critical period, i.e. ensuring the safety of the voyage while the ship (the capital) was still under their direct control.

Hence the balance, which the Harter Act created: No liability for damage caused through error in the navigation or management of the ship, as well as damage caused because of fire on board the ship; but no such chance where the cause of the damage was unseaworthiness of the ship or negligence in protecting the cargo.

2. The Hypothesis

The obligation imposed upon the carrier to make ship seaworthy before and at the beginning of the voyage was based upon the assumption that starting point of the contract of affreightment would be the home port of the ship where also the carrier has its place of business and be personally able to -and must- supervise and manage all the preparations and arrangements before and at the commencement of the voyage; in other words, when the carrier begins to perform the contract of affreightment.

One must, nevertheless, admit that while this assumption seems reasonable with regard to outbound voyages, may not be relevant in cases of inbound voyages as well as for voyages starting from any intermediate port.

3. Carriage Under a Bill of Lading

The provision of the Harter Act imposing the obligation to make the ship seaworthy was applicable in respect of carriage performed under a bill of lading. Parties are free to negotiate the terms and conditions of the charter parties.

Here the assumption was that parties to a charter contract, in most cases, are more or less economically equal parties and therefore have comparable negotiating powers; whereas the greater portion of the traffic consists of goods, which belong to average/common merchants, who, more often than not, do not even get into direct contact with the carrier, but transact business with the agents and/or freight

⁸ *An Act Relating to Navigation of Vessels, Bills of Lading, and to Certain Obligations, Duties, and Rights in connection with the Carriage of Property*, 13th February 1893.

⁹ On the subject see GILMORE & BLACK, 142-144.

forwarders and after receiving the bill of lading, endorse it to the retailer where the shipper is the buyer/importer or to the bank where the shipper is the seller /exporter. The objective was, therefore, to promote the reliability of the bill of lading, being actually a piece of paper, nonetheless playing a vital role in international trade.

3. Subsequent Developments

a. International Conventions

Several international conventions adopted the system created by the Harter Act. First one being the 1924 Brussels Convention on carriage performed under a bill of lading, more popularly known as the Hague Rules¹⁰.

The Visby Rules¹¹ did not make any amendment to the provisions of the 1924 Brussels Convention regulating the seaworthiness obligation.

The Hamburg Rules¹² dispensed altogether with seaworthiness obligation, based on the proposition that the Rules covers the whole span of time that the cargo was under the charge of the carrier and the carrier is liable for any loss of or damage to the cargo during that time.

Now, the Rotterdam Rules¹³ reintroduced this familiar concept, but with different content and characteristic.

b. National Laws

Number of states has also adopted the system designed by the Harter Act, either by passing an act based on or inspired by the Hague Rules or its amended version, through the discretion of their political authority or by ratifying or acceding to the relevant international convention(s)¹⁴.

IV. SEAWORTHINESS

1. In General

Seaworthiness¹⁵ of a ship, speaking generally, means, the ship is able to withstand the perils of the sea, save for completely extraordinary ones, taking into regard the

¹⁰ *International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Brussels, 24th August 1924*. The actual Hague Rules was not an international convention, but set of rules of advisory nature discussed and drafted by the International Law Association during a conference held in The Hague at 3rd September 1921

¹¹ Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, 1924, Brussels, 23rd February 1968.

¹² United Nations Convention on the Carriage of Goods by Sea, Hamburg, 31st March 1978.

¹³ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, New York, 11th December 2008, signed in Rotterdam on 23rd September 2009.

¹⁴ For example Turkey, besides ratifying the 1924 Brussels Convention (as of 4th January 1956), incorporated the provisions of the Convention into the previous Commerce Act (dated 29th June, 1956 and nr. 6762) although not directly but by adopting them as they were codified in German Commerce Act of 1937. See also Carriage of Goods by Sea Act 1971 of the U.K., incorporating The Hague/Visby Rules.

¹⁵ Taking into regard the conventional categorisation, as well as following the terminology used in Turkish law, we shall sub-divide the seaworthiness into the following three concepts: (i) Seaworthiness in the narrow sense (art. 3/1 (a) of the Hague Rules and art. 14 (a) of the Rotterdam Rules), (ii) Voyageworthiness (art. 3/1 (b) of the Hague Rules and art. 14 (b) of the Rotterdam Rules) and (iii) cargoworthiness (art. 3/1 (c) of the Hague Rules and art. 14 (c) of the Rotterdam Rules)

particular conditions and nature of the intended voyage as well as the cargo to be carried¹⁶.

2. The Nature of the Obligation

Initially in common law the obligation of the carrier to make the ship seaworthy was absolute. There was an implied warranty of seaworthiness in every contract of carriage. In the event of breach the carrier will be strictly liable irrespective of fault. This obligation, though of absolute nature, could nevertheless be excluded by express and clear terms¹⁷.

Gradually, this absolute undertaking of seaworthiness was replaced with the obligation to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage.

The Harter Act espoused this understanding and imposed on the carriers the duty to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage¹⁸.

The 1924 Brussels Convention (the Hague Rules) also accepted this principle and stipulated that the carrier is under obligation only to exercise due diligence in making the ship seaworthy before and at the beginning of the voyage (art. III/1).

Rotterdam Rules also followed the established principle but with one very significant addition: As a rule the carrier, still, shall have to exercise due diligence to make ship seaworthy before and at the beginning of the voyage; but, in addition to this duty, the carrier is now under obligation to keep the ship seaworthy during the voyage by sea (art. 14).

3. Due Diligence

a. The Concept

The content and standard of due diligence cannot be determined in terms that could be valid and applicable for all contracts of affreightment. On the contrary, this obligation is of relative nature and need to be determined for each individual case. Because, the scope and level of diligence required of the carrier is related to the conditions of the voyage defined in the contract as well as the type and nature of the cargo that the carrier undertook to carry¹⁹. Each cargo may require different level of seaworthiness and regarding a contract involving different goods, each shall be treated individually.

What should be understood from *due diligence* was generally recognised as a level of attention and caution that is equivalent to common law duty of care²⁰. What the carrier must exercise is actually what one expects from a reasonably prudent carrier,

¹⁶ SCRUTTON, 90-94; TETLEY (M.C.C.), 877, fn. 13; WILSON, 9-10.

¹⁷ SCRUTTON, 90; SCHOENBAUM, 607; TETLEY (M.C.C.), 875; WILSON, 9-10, 186.

¹⁸ GILMORE & BLACK, 142-143; SCHOENBAUM, 607.

¹⁹ NIKAKI, Theodora, "The Obligations of Carriers to Provide Seaworthy Ships and Exercise Care", in THOMAS, Rhidian (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, Lawtext Publishing Ltd., 2009, pp. 89-110, at p. 102-103; TETLEY, (M.C.C.), 898.

²⁰ SCRUTTON, 388; WILSON, 187-188. *Union of India v. Reederij Amsterdam* [1963] 2 Lloyd's Rep. 223, at p.235; *Papera Traders Co. Ltd. v. Hyundai Merchant Marine Co. Ltd.* [2002] 1 Lloyd's Rep. 719.

who conducts his business with all reasonable skill and care²¹. However, in order to discharge this duty, what the carrier have done must be "... genuine, competent and reasonable effort ..."²²; therefore, any measure that is not relevant to the contract in question or does not properly address the actual needs of the concrete situation, would be to no avail.

While what was said hereinabove summarises and briefly reflects the generally accepted standard, it is submitted that settling only with such level of care and diligence understates the effort and endeavour the carrier must exercise. The *present writer* is of the opinion that the proper criterion should be *how a person who can be designated as the most meticulous and scrupulous carrier would act*, in other words what would a *model carrier* do and not an ordinarily prudent person²³.

Nevertheless, there is no requirement that the carrier must attain level of absolute perfection in making the ship seaworthy, nor the law requires that the ship should be objectively perfect²⁴. Although carriers may not be expected to take each and every conceivable measure²⁵, it is nonetheless submitted that *utmost care and diligence possible* should be exercised.

This brings us to the question of who should we turn to to name as the carrier ? Conventionally, all the statements, whether made in the academic writings or in the court decisions, give the impression that one *real/physical person* has been taken into regard. However, not only in the contemporary world, but also for at least half a century, meaningful number of carriers are corporate bodies, companies, i.e. *legal persons*. Who, then, should be singled out as the *carrier* ?

On the other hand, this obligation is *non-delegable*. A carrier may not be relieved of liability for unseaworthiness merely because it has engaged the services of a reputable and competent contractor. In this sense, delegating the duty to make the ship seaworthy to a construction company or even the one that has build the ship or a classification society would not save the carrier from liability, who would still be hold accountable for an eventual unseaworthiness, even though the carrier exercised utmost care in appointing the contractor in question²⁶.

b. Time and Place of the Performance of the Obligation

Under the Hague and the Hague/Visby Rules, the ship must be in a seaworthy condition before and at the beginning of the voyage contracted for. Place where the carrier has to discharge this obligation shall be the port of loading.

²¹ SCRUTTON, 388; TETLEY (M.C.C.), 876.

²² TETLEY (Mar. L.), 82; TETLEY (M.C.C.), 876.

²³ There can be cases where prudence requires that a ship should not be sent on a particular voyage, although she is properly maintained and free from defects, see COOKE, Julian *et al.* (eds.), *Voyage Charters*, 3rd ed., Informa Law, London 2007, p. 215.

²⁴ SCRUTTON, 92.

²⁵ BAUGHEN, 121.

²⁶ BAUGHEN, 120-121; TETLEY (M.C.C.), 926.

The term *before the voyage* refers to and should logically cover the period starting with the despatch of the notice of readiness by the carrier²⁷. However, the ship, during this period need not be seaworthy in all respects, but it should be sufficient that she is cargoworthy, i.e. properly equipped and organised to perform the loading operations and the holds are ready and available to receive and protect the cargo²⁸ and can withstand the material conditions prevailing or reasonably expected to prevail during the loading operations²⁹.

The meaning of the term *at the beginning of the voyage* may be more difficult to define.

One point is certain: The voyage is the voyage from the port of loading to the port of discharge as agreed between the parties in the contract of carriage; referred to also as the bill of lading voyage.

Commencement of the voyage cannot be defined by taking into regard one particular act or event, but a series of acts or events as well as some procedures, including fulfilment of some legal requirements bear significance and therefore it should better be called a process.

However, it is submitted that, better way of determining the beginning of the voyage is to relate it to the intention of the carrier: *Is the carrier acting with the intention of pursuing the contractual voyage after having completed all the practical and legal requirements*³⁰.

At this point the ship must be seaworthy in all respects, save where *doctrine of stages* justifies flexibility.

V. ROTTERDAM RULES

1. In General

With the Rotterdam Rules liability regime of the maritime law welcomed back its unique feature, but in a substantially different nature and with drastically extended scope.

The time and venue of the performance of the obligation to make the ship seaworthy are extended and the carrier shall now be responsible to make the seaworthy *not* only before and at the beginning of the voyage, but, additionally shall have to keep the ship seaworthy during the voyage by sea; in other words, *maintain* the vessel in a seaworthy condition throughout the whole voyage.

2. Meaning and Implications of the Term "... during the voyage by sea ... "

a. Meaning of the Term

²⁷There is authority that in voyage charters the ship must be seaworthy on delivery, even though delivery was made prior to the first cargo-carrying voyage, see *Eridania S.p.A. v. Rudolf A. Oetker* (The "Fjord Wind") [2000] 2 Lloyd's Rep. 191 (C.A.).

²⁸ FIO/FIOS/FIOST clauses shall affect the level of cargoworthiness, but I shall not go into the details of this proposition.

²⁹SCRUTTON, 91; WILSON, 187. I would like to propose, if I may, a term for this period: *Lay-time worthiness*.

³⁰Or one may take the point of reference as: *Is the carrier acting with the intention of not remaining in the port any longer*.

We need to define what should be understood by the *duration of the voyage by sea* in order to properly describe the scope of the obligation as foreseen by art. 14. of the Rotterdam Rules.

i. The beginning of the voyage can be defined -as we have suggested hereinabove- by taking the intention of the carrier as the point of reference.

ii. The end of the voyage.

One may simply say that the voyage should mean the contractual voyage³¹ and consequently, it is submitted, it terminates as soon as the ship arrives at the port of discharge as named in the relevant contract of affreightment.

Another view propounds that voyage by sea covers also the time until the cargo was discharged from the ship³² based on the ground that there should be ... *no reason for distinguishing between the loading of the cargo, which falls into the scope of Article 14, and its discharge.*

Tsimplis, while refraining from offering a proposition, expresses concern as to ... *whether the seaworthiness obligation is one to be observed during the unloading operation*³³.

A more solid conclusion may be reached by taking into regard the provisions of arts. 11, 12 and 13 together within a coherent system. Delivery of the cargo is one of the obligations of the carrier and period of responsibility of the carrier terminates after the cargo has been delivered to the consignee. Unloading the cargo and delivery thereof is one of the specific obligations of the carrier, like receiving and loading. The carrier has the duty to make the ship seaworthy during loading, but the diligence expected from the carrier during this stage is limited to the requirements of the loading operations. In a similar fashion, the carrier should be under obligation to make the ship seaworthy during unloading operations, but only to the extent as dictated by the needs of the unloading operations.

Consequently, it is submitted that the obligation to *keep the ship seaworthy* survives until the cargo has been delivered to the consignee, but only within the limits as required by the unloading operations.

b. Implication of the Term

On the other hand, and in a tacit manner, the requirement to keep the ship in a seaworthy condition throughout the voyage by sea, inevitably, also affects the *non-delegable* nature of this duty. The assumption when this nature was attributed to this obligation was that, the carriers start performing contracts of carriage they have concluded with the shippers at their home-port, where, -at least theoretically- they

³¹ See also DELEBECQUE, Philippe, "Obligations of the Carrier", in von ZIEGLER *et al.* (eds.) *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Kluwer Law International, 2010, pp.71-92, at p. 86.

³² NIKAKI, Theodora, "The Obligations of Carriers to Provide Seaworthy Ships and Exercise Care", in THOMAS, Rhidian (ed.), *A New Convention for the Carriage of Goods by Sea - The Rotterdam Rules*, Lawtext Publishing Ltd., 2009, pp. 89-110, at p. 107.

³³ TSIMPLIS, Michael, "Obligations of the Carrier", in BAATZ, Yvonne, *et al.* (eds.), *The Rotterdam Rules: A Practical Annotation*, Informa Law, 2009, pp. 29-43, at p. 39.

have their places of business and are in a position to directly and personally keep all the preparations under control and supervision.

But now, under art. 14, carriers cannot be expected to personally control and supervise the conditions of their vessels while they are ploughing the oceans and shall only be able to take necessary measures through the services of their servants and even learn about what was going on aboard the ship by the messages despatched by the master.

2. Application of Art. 14 - Obligation to Keep the Ship Seaworthy

Pursuant to art. 14 of the Rotterdam Rules, carrier is under obligation to exercise due diligence:

i. To make the ship seaworthy before and at the beginning of the voyage by sea, and

ii. To keep the ship in a seaworthy condition during the voyage by sea, in other words, maintain her seaworthiness throughout the voyage.

It is submitted that, art. 14, while at the first glance may be acknowledged as a reasonable provision, however, completely overlooked and disregarded the reason why such a particular and unique obligation was devised and imposed on the carrier.

The duty to make the ship seaworthy was regarded as an overriding obligation -a condition precedent- and a ground for the carrier to avail itself of the provisions that relieve the carrier from liability for loss of or damage to cargo, since these provisions are conditional upon due diligence being exercised before and at the beginning of the voyage.

Actually, art. 17/5 of the Rotterdam Rules includes this provision also.

The logic of the design was that, if the carrier ignored exercising due diligence while the vessel was under its direct command, then the carrier should not be allowed to take advantage of the provisions that exclude liability.

But, taking into regard art. 14, the carrier's chance to take advantage of the provisions that exclude its liability is related to a factor that is far beyond its direct control.

While the obligation to exercise due diligence to make the ship seaworthy and more importantly, to maintain its seaworthiness throughout the voyage still regarded as an overriding obligation; the carriers are placed under much heavier burden .. or rather are to a substantial degree deprived of taking advantage of the provisions that exclude their liability. In a number of cases, the carrier may not even know where its ship is !!

3. Availability of Modern Communication Equipment

We do not deny the existence and availability of a huge range of and mostly sophisticated equipment carriers can easily and extensively use to communicate with the ship and obtain whatever information they may need and also kept informed about any adverse situation that may develop during the voyage and consequently be able to take any measure that need to be taken and issue instructions to the master. This possibility provides substantial advantage to carriers to perform their obligations to exercise due diligence in keeping the vessel in a seaworthy condition during the voyage by sea.

Nonetheless, it is difficult to make a definite proposition whether or to what extent should a carrier be under obligation to furnish the ship with the most modern equipment.

One view propounds that technical standards, to the extent they are reasonable to adopt, should be taken into regard in determining whether the carrier has exercised due diligence in making the ship seaworthy³⁴.

It is submitted that the provisions of the ISM Code set forth such standards³⁵.

One reasonable solution could be to take as a point of reference the concept of *model carrier* as we have suggested hereinabove and decide whether a carrier of this standard would find it indispensable to install such equipment³⁶.

4. Due Diligence During the Voyage

Under Rotterdam Rules art. 14 the carrier is also under obligation to exercise due diligence in making the ship seaworthy before and at the commencement of the voyage, as well maintaining her seaworthy throughout the voyage; therefore what could lawfully be expected of the carrier throughout the voyage need not exceed whatever may be defined as coming within the scope of due diligence.

In applying this provision, one first must take into regard, that, while in the conventional setting the ship is stationary, immobile in one definable place, i.e. the port, from where the voyage shall begin, which one practically may take as the port of loading; in the new extended obligation, the ship is on the move, *ploughing the oceans*. Therefore, in the conventional setting the carrier discharges its duties in static environment, but in the new setting the obligation has to be performed in a dynamic environment.

When determining whether the carrier properly discharged its obligation to keep the ship in a seaworthy condition during the voyage, the fact that the carrier was not present at or on board the ship ought to be taken into regard. Carriers shall discharge this duty only through *remote control*. Bearing in mind that seaworthiness play vital role within the whole scheme of carrier's liability, it should only be fair to apply more tolerant criteria in assessing the degree of due diligence expected of the carrier during the voyage³⁷.

Consequently, in deciding whether the carrier has exercised required diligence, first of all the distance, as well as whereabouts of the vessel should be taken into regard, together with the time difference. Despite the existence of several modern equipment,

³⁴COOKE, Julian *et al.* (eds.), *Voyage Charters*, 3rd ed., Informa Law, London 2007, p. 214. See also, *Papera Traders Co. Ltd. v. Hyundai Merchant Marine Co. Ltd.* [2002] 1 Lloyd's Rep. 719, at par. 127.

³⁵PING-FAT, Sze, *Carrier's Liability under the Hague, Hague-Visby and Hamburg Rules*, Kluwer Law International, The Hague, 2002, p. 60.

³⁶See particularly ALADWANI, Talal, "Effect of Shipping Standards on Seaworthiness", *European Journal of Commercial Contract Law* 2011-2, pp. 33-45.

³⁷ See also DELEBECQUE, Philippe, "Obligations of the Carrier", in von ZIEGLER *et al.* (eds.) *The Rotterdam Rules 2008: Commentary to the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, Kluwer Law International, 2010, pp. 71-92, at p. 88.

still interruptions in the communication may take place and carriers cannot be compelled to install in their vessels only state-of-the-art gadgets³⁸.

Innumerable problems can take place during the voyage making the vessel unseaworthy and no carrier can be compelled to employ on board at all times persons with different knowledge and skill to cope with different emergency situations. Carriers, equally, cannot be required to keep a retinue of skilled people all the time to immediately intervene and convey instructions to the crew.

Nevertheless, organisation of the carrier's business and particularly how such organisation was structured would be one of the vital yardsticks in determining whether the carrier is a prudent one or not.

This subject brings us to the system/organisation foreseen by the ISM Code³⁹.

Following Tetley, we would like to say that "... there is now a new and demanding *international criterion of seaworthiness in maritime law*." ⁴⁰.

Speaking briefly, the ISM Code establishes safety-management objectives and requires a safety management system (SMS) to be established by "the Company", which term includes shipowners, ship managers, bareboat charterers and therefore the Code applies not only to shipowners, but also to organisations as well as persons, who assume responsibility for operations of ships, such as ship managers (art. 1.1.2).

Carriers now must arrange their organisation (their business) in a manner stipulated by the relevant rules of the ISM Code. The way this particular organisation was structured, specifically, appointment and the powers given to the *designated person* shall be the primary factors in assessing how prudent the carrier was acting; in other words in determining whether the carrier exercised due diligence to maintain the seaworthiness of the ship during the voyage. Where claimants prove that the defendant carrier did not comply with the provisions of the ISM Code, this shall be tantamount to proving that the carrier did not exercise due diligence to make or maintain, as the case may be, the ship in seaworthy condition⁴¹.

5. Delegation of the Duty to Keep the Ship Seaworthy During the Voyage

The other drastic change brought by art. 14 of the Rotterdam Rules is that, the obligation to keep the vessel seaworthy during the voyage shall no longer be non-delegable.

Maintaining the seaworthiness of the vessel during the voyage can only be possible through *direct* services of the master and the crew.

³⁸Suppose communication problems occurred while the ship, laden with cargo, is on her way to a yard where most modern devices shall be installed.

³⁹*International Management Code for the Safe Operation of Ships and for Pollution Prevention* adopted by the International Maritime Organisation on 4th November 1993 as Annex to IMO Resolution A.741 (18), adopted on 24th May 1994 as Chapter IX of the Safety of Life at Sea (SOLAS) Convention, with the title *Management for the Safe Operation of Ships*. The ISM Code, consequently, became mandatory law for the states that are party to SOLAS.

⁴⁰TETLEY (M.C.C.), 945.

⁴¹For the ISM Code see generally, TETLEY (M.C.C.), 938 *et seq.* See also, OGG, Terry, "IMO's International Safety Management Code (The ISM Code)", [1996] *IJOSL* 3, 143-152; SHAW, Richard, "The ISM Code and Limitation of Liability", [1998] *IJOSL* 2, 169-172.

First of all the ability of the carrier to maintain the ship in a seaworthy condition or in other words likelihood for the carrier to exercise the required due diligence depends, almost entirely, on the *due diligence exercised by the crew*, to and communicate to the carrier relevant information; as well as on their capacity to implement the instructions the carrier gives.

No doubt the carrier must show due diligence in selecting and appointing the crew and their training, including how they should conduct communication with the carrier.

But, practically it shall be the crew who shall solely be in a position to do whatever must be done at the relevant time to keep the ship in a seaworthy condition, albeit, in accordance with the instructions from the carrier.

Accordingly, in the final -and the vital- stage, it shall be the crew ⁴² who shall maintain the seaworthiness of the vessel during the voyage.

Taking into regard the probabilities, one may suggest the following three different situations:

i. The obligation to *make* the ship seaworthy before and at the beginning of the voyage shall still be a non-delegable duty.

ii. The obligation to keep the ship in a seaworthy condition during the voyage by sea shall, necessarily, be delegated to the crew. But, the carrier shall nevertheless be under obligation to exercise due diligence in selecting, appointing and training the crew.

iii. Exercising due diligence with regard to setting up the required organisation in the land office, in accordance with the ISM Code would also be non-delegable.

Obligation of the Carrier to Make and Keep the Ship Seaworthy: Some Comments on Art. 14 of the Rotterdam Rules, Studies in Memoriam of Professor Anthony M. Antapassis, Athens, Greece, 2014, pp. 1049-1062

⁴² Or any third party in any port of call, who is employed by the carrier to maintain the seaworthiness of the ship.