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Abstract

This article examines the influence of seaworthiness of ship on the contract of marine insurance. Through the discussion the author will thoroughly analyse the relevant provisions of English, US and UAE Law. The article will start with an introduction on the seaworthiness of vessel and then, the obligation of seaworthiness of ship that will be examined under the rules of the contract of carriage of goods by sea. The examination in this part will be dedicated to the relevant rules of contract of carriage of goods by sea under English law which adopts the Hague-Visby Rules and US law that has been based on the Hague Rules. The discussion will also embrace the relevant provisions of the UAE law. In the next title of this article the author will analyse the rules of disclosure obligation imposed under contract of marine insurance. The analysis under this title will further be devoted to the rules of the contract of marine insurance under the aforementioned jurisdictions. The analysis of the rules of disclosure obligation is undertaken in this article because of the role of this obligation as a point connects contract of carriage of goods by sea with contract of marine insurance. This connection can clearly be identified through obligation of seaworthiness of ship, which is imposed upon the assured under the contract of marine insurance. In the end of this article, the author concluded with some recommendations suggested to be adopted by UAE legislator. These suggestions aiming to harmonise the UAE law with the worldwide and most applicable rules in the maritime insurance industry.

Keywords: Seaworthiness, Marine Insurance, Duty of Disclosure, Contract of Carriage.

1. Introduction

Seaworthiness of vessel is one of the main obligations imposed upon the marine carrier under contract of marine insurance. The commitment of the marine carrier to providing a seaworthy ship is also one of the measures undertaken by virtue of the contract of marine insurance in order to guarantee the safety of the cargo while being transported by the vessel to the agreed port of destination. However, imposition of the obligation of seaworthiness is not only the concern of the goods owner or the shipper under the contract of carriage of goods by sea, but this obligation plays an essential role in the context of the contract of marine insurance. Despite of the substantial role of the seaworthiness of vessel under the contract of carriage of goods by sea and contract of marine insurance, both contracts do not contain a definition of seaworthiness, but they usually provide terms like 'the shipowner should provide strong and staunch vessel' or 'tight and fit' and such expressions would expand the scope of the consequences of seaworthiness.(1) Therefore, this obligation has been considered as an implied warranty imposed upon the assured under the contract of marine insurance.(2) The seaworthiness obligation under the contract of marine insurance has been levied for the interest of the insurer. Through this obligation the insurer will ensure that the insured goods will be transported onboard a vessel capable of safely transporting them to the agreed place of destination. However, legal jurisdictions have adopted different approaches in terms of the time at which the obligation of seaworthiness of vessel has to be met under the contract of marine insurance. Some jurisdictions stipulated that this obligation has to be satisfied at the conclusion of the marine insurance contract, while some other laws provided that the assured should ensure that the vessel is seaworthy at the commencement of the voyage. However, substantial variation between these jurisdictions is noted in the duration during which seaworthiness obligation has to be maintained. This is because some jurisdictions have stipulated that the obligation of seaworthiness of vessel must be met at the commencement time of the voyage and continues to embrace the voyage, i.e., seaworthiness of vessel must be satisfied not only at the time the vessel starts its journey, rather it has to be maintained during the

(1) Stephen Girvin, 'The obligation of Seaworthiness: Shipowner and Charterer', CML Working Paper 2017/019, 17/11, December 2017< https://law.nus.edu.sg/wp-content/uploads/2020/04/019_2017_Stephen-Girvin-CML.pdf> Accessed on 04/11/2020.
(2) See Sections 39(1) and 40 of MIA 1906.

carriage operation until the arrival of the vessel at destination. In contrast, some other jurisdictions have provided that the obligation of seaworthiness of vessel has to be met merely at the time of starting the voyage. Seaworthiness obligation is also imposed upon the assured under contract of goods insurance covering the goods carried by sea. However, two approaches have been adopted in this regard. English law stipulates that the assured is obliged to provide a seaworthy vessel, but the assured shall be committed to this, merely at the commencement of voyage. As opposed to this approach the UAE and US law both provide that assured has to provide a seaworthy ship not only at the commencement of voyage rather this commitment has to be maintained until the ship arrives destination. This can be understood from the obligation of disclosure imposed upon the assured by virtue of contract of marine insurance. Hence, this paper is going to clarify the interrelationship between contract of marine insurance and contract of carriage of goods by sea, which can be found in the obligation of seaworthiness of vessel. Then, the author will analyse implications of such interrelation on the indemnification right of the assured obtained under the contract of marine insurance. These matters are going to be critically examined under US, UAE and English law. In the end, the discussion will be concluded with some results and suggestions that might be adopted in order to consolidate the principle of unity and harmonisation of the rules regulating commercial transactions in international context, in particular that which is related to the contract of marine insurance.

2. The Obligation of Seaworthiness under Contract of Carriage of Goods by Sea

2.1 Concept of Obligation of Seaworthiness

Seaworthiness of ship is one of the most important obligations that have to be met by the marine carrier under the contract of carriage of goods by sea. However, the definition of the seaworthiness obligation has not been provided in the context of the contract of carriage of goods by sea. For the purpose of illuminating the essence of seaworthiness obligation it has been held that the marine carrier is committed to provide a seaworthy ship, which can efficiently navigate and overcome usual maritime perils encountered during voyage and also be furnished with the required equipment, competent staff and adequate fuel and also provided with appropriate holds to competently accomplish the operation of carriage.(1) However, this needs to be standing on a legal principle

(1) *Kopitoff v. Wilson* (1876) 1 QBD 377 at 380; *Mc Fadden v. Blue Star Line* [1905] 1 K. B. 697- 706; `*Star Sea'* [1995] 1 Lloyd's Rep 651,657.

in order to determine whether or not such an obligation is satisfied by the marine carrier. Is the commitment of the marine carrier to providing a seaworthy vessel based on the principle achieving result or on a due diligence principle? According to UAE, US and English law, the obligation of seaworthiness of vessel is based on the principle of a due diligence.(1) This has been enshrined in Article 272(1) of the UAE Maritime Commercial Law (UMCL):(2)

> The carrier shall, before travel and at its inception, exercise a due diligence to render the vessel seaworthy for navigation and to prepare the vessel, its crew and supply in satisfactory manner, and preparing holds, cold chambers and other parts of the vessel to receive, transport and preserve them.

The English law approach can be inferred from Article 3(1) Hague-Visby Rules, as UK is a contracting state to Hague-Visby Rules.(3)This Article provides that:

> The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to: (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

According to this Article, the marine carrier shall exercise a due diligence to provide a seaworthy ship before and at the commencement of the voyage.(4)

(1) This assumption is derived from Article 3(1) Hague-Visby Rules, which is applicable under English and article III(I) Hague Rules, which is ratified by US law and article 272(1) (UMCL).
(2) See Hashim Ramadan Al-Jaza'eri and Al-Shamsi, Analysis of the Maritime Law of UAE. 1st edn, (World of Modern Books for Publishing and Distribution) 2009, 246.
(3) Hague-Visby Convention 1979 has been ratified by UK on 02/03/1982. <https://web.archive.org/web/20120407074328/http://diplomatie.belgium.be/fr/binaries/I-4c_tcm313-79762.pdf Accessed> on 04/11/2020.
(4) Contrary to Article 3(1) Hague-Visby Rules, which provides that the marine carrier has to provide a seaworthy ship prior and at the commencement of the voyage, the Hamburg Rules and Rotterdam Rules both have extended the period during which seaworthiness of ship has to be maintained. The Hamburg Rules has given a flexible legal ground to determining the obligation of seaworthiness, whereas the Rotterdam Rules have expressly provided that the seaworthiness of ship shall be a continuous obligation upon the marine carrier. Delphine Aurelie Laurence Defossez 'Seaworthiness: The Adequacy of the Rotterdam Rules U. S. F. Maritime Law Journal Approach', 28(2) (2015) 243-44; Anthony Diamond QC 'The Next Sea Carriage Convention'

However, the decision of determining whether the marine carrier has infringed the seaworthiness obligation shall be made on the basis of the negligence of the marine carrier.(1) English courts ruled that for the purpose of determining whether or not the obligation of seaworthiness has been satisfied, the marine carrier should prove that they have exercised a due diligence expected from a reasonable prudent shipowner.(2)

Like English law, US law also considered the principle of due diligence in the context of seaworthiness of ship. The principle can be inferred from Article III(I) of Hague Rules, which provides that:(3)

> The carrier shall be bound before and at the beginning of the voyage to exercise due diligence to: (a) make the ship seaworthy; (b) properly man, equip and supply the ship; (c) Make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation.

Although US law adopts the same approach of English law -with respect to the seaworthiness of ship- US courts prescribed a higher standard of care.(4) This can be inferred from the assumption adopted by the Supreme Court:

[2008] LLOYD'S MAR. & COM. L. Q. 135, 150; Francesco Berlingieri *International Maritime Conventions: The Carriage of Goods and Passengers by Sea* (Informa Law-Routledge 2014) 169. See Article 5(1) of the Hamburg Rules states: "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 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". Article 14 of the Rotterdam Rules: "The carrier is bound before, at the beginning of, and during the voyage by sea to exercise due diligence to: (a) Make and keep the ship seaworthy; (b) Properly crew, equip and supply the ship and keep the ship so crewed, equipped and supplied throughout the voyage; and (c) Make and keep the holds and all other parts of the ship in which the goods are carried, and any containers supplied by the carrier in or upon which the goods are carried, fit and safe for their reception, carriage and preservation".

(1) *Union of India v. N. V. Reederij Amsterdam* (The AMSTELSLOT) (1963) 2 Lloyd's Rep. 223.

(2) See *McFadden v. Blue Star Line* (1905) 1 KB 697. at 706; *Paper Traders Co Ltd v. Hyundai Merchant Marine Co Ltd* (The Eurasian Dream) [2002E] WHC 118, at p. 127.

(3) Hague Convention 1924 has been ratified by US on 29.6.1937.
<https://web.archive.org/web/20120407074312/http://diplomatie.belgium.be/fr/binaries/I-4a_tcm313-79747.pdf Accessed> on 04/11/2020.

(4) Rand R Pixa 'The Hamburg Rules Fault Concept and Common Carrier Liability under U. S. Law' (1978) 19 the Virginial Journal of International Law. 433,434.

> As seaworthiness depends not only upon the vessel being staunch and fit to meet the perils of the sea, but upon its character in reference to the particular cargo to be transported, it follows that a vessel must be able to transport the cargo which it is held out as fit to carry, or it is not seaworthy in that respect.(1)

Therefore, it is assumed that the obligation of seaworthiness is deemed to be relative to the nature of the vessel, the specific voyage, the phases of voyage, the transported goods, the relevant norms applicable at the time carriage of goods and the time of the year during which carriage of goods shall take place.(2) However, common law considers that seaworthiness of ship is an absolute commitment, i.e., the marine carrier would be liable for any infringement of the warranty, though that the latent defect was existing and regardless of the efforts made to render the vessel seaworthy.(3) The answer for the question of whether seaworthiness obligation is a relative or absolute commitment -under UAE law- can be derived from article 275 of (UMCL):

> 1- The carrier shall be responsible for the loss or damage caused to the goods in the period between receiving the goods at the port of shipment until delivering them to the rightful holder at the port of unloading, unless it is established that this loss or damage is attributed to one of the following reasons:
>
> a- The unseaworthiness of vessel, provided that the carrier proves that the obligations stipulated in article 272 have been fulfilled. …

It can be derived from this article that the obligation of seaworthiness of ship, under contract of carriage of goods by sea, is a relative commitment under UAE law. Because this article stipulates that the marine carrier shall be exempted from liability for loss of or damage to the carried goods if they fulfilled the requirements of seaworthiness provided in article 272 of UMCL,(4) which all are based on the principle of due diligence. Accordingly,

(1) *Martin v. Southwark*, 191 U.S. 1, 9, 2010 AMC 1493 (1903). The definition provided in this case has illuminated the definition which has been established in The Silvia, 171 U.S. 462, 464 (1898).

(2) Stephen Girvin (n 1).

(3) ibid. This has expressly been stated in *Steel v State Line Steamship Co* (1877) 3 App Cas 72, 86; *McFadden Brothers & Co v Blue Star Line Ltd* [1905] 1 KB 697, 703.

(4) Abu Dhabi Cassation Court – Appeals No 643-year 2014 (Commercial); Abu Dhabi Cassation Court – Appeals No 891-year 2018 (Commercial).

it can be argued that the marine carrier will be exonerated from the liability for loss of or damage to goods if unseaworthiness – resulted in that damage or loss- has been imputable to a trivial defect. Furthermore, the marine carrier could avail from such an exoneration if they proved the exercising of due diligence to rendering the vessel seaworthy, such as preparing the ship, crew, holds, supply, refrigerating and cool chamber and other parts of the vessel to properly receive and safely transport the goods to destination.(1)

2.2 The Extent of Seaworthiness Obligation under Contract of Carriage of Goods by Sea

Regardless of the inconsistency between UAE law and common law as to the scope of seaworthiness, UAE is consistent with the common law in terms of the time at which this obligation must be satisfied. This can be noted in non-continuity of seaworthiness obligation, as both do not expand the obligation of seaworthiness of ship to the stage of carriage of goods, rather they provide that the marine carrier is committed to satisfy such an obligation merely before and at the time of commencing the voyage.(2) However, this approach does not address the case where the unseaworthiness takes place during navigation.(3)

One may conclude that UAE law follows the same approach of the English and US law, which is also consistent with the approach of the Hague rules and Hague-Visby rules, under which the marine carrier abides to maintain the seaworthiness of ship after the commencement of the voyage. In spite of this fact, the implications of seaworthiness obligation under UAE law differ from that which are observed under the common law, in particular when this obligation be imposed in the context of the contract of marine insurance. This can obviously be noted under the obligation of disclosing material facts imposed upon the assured by virtue of the contract of marine insurance. Therefore, it is necessary to clarify the essence of disclosure obligation under these laws and then, the analysis will be dedicated to point out areas of divergence between the aforementioned laws, in particular when seaworthiness obligation overlaps with disclosure obligation.

(1) This has been expressly stated in article 272 of UMCL

(2) Defossez (n 7) 239; Asma'a Ahmed Al-Rasheed, 'Reasons of Exempting the Maritime Carrier from Liability in the UAE Law and Rotterdam Rules', Journal of Al Sharja, 16(2) (2019) 24; Baha'a Baheej Shukri Researches in Insurance (Dar Al-Thaqafa 2012) 369. See Article 272(1) of the UMCL.

(3) Waleed Khalid Atteia, The legal Aspects of Seaworthiness: Comparative study between maritime laws, Journal of Al-Muhaqiq Al-Helli for Legal and Political Sciences, 1(5) (2010) 301.

3. Interplay between Disclosure Obligation and Seaworthiness of Ship

With a view to having a clear idea about the influence that seaworthiness obligation may have on insurance coverage, it is important to firstly illuminate the obligation of disclosing material facts and then, clarifying the way through which seaworthiness can have an impact on such coverage.

3.1 Disclosure Obligation under Contract of Marine Insurance

It is submitted that the seaworthiness obligation is one of the commitments imposed upon the marine carrier under the contract of carriage of goods by sea. However, the contract of marine insurance related to the shipped cargo can adversely be affected by non-performing of this obligation. This is because that the seaworthiness is one of the material facts that must be disclosed by the assured under the contract of cargo insurance. According to Article 385 of the UMCL:

> The Assured shall abide by the following: ……. b. To provide, at the time of the conclusion of the contract, a correct statement of all the circumstances in which it is known that would enable the insurer to assess the insured risks. c. To notify the insurer during the validity of the contract of any increase in the risks insured, within the limits of its knowledge of them

This article stipulates that the disclosure obligation has to be met not only at the time of the conclusion of the contract of marine insurance, rather it must continue until the termination of the contract of marine insurance. It can further be inferred that the stipulation of providing the insurer with the correct facts is important, as such facts will affect the decision of the insurer in assessing the risk. Accordingly, the UAE court of Appeal held that:

> The appellant concealed a substantive statement on the appellee, which affected the risk assessment, because if the appellee had known this statement, they would not have contracted. Hence, the law would have been properly applied if the contested judgement approved this argument.(1)

One could assume that the facts related to the seaworthiness of ship have to be disclosed by the assured at the time of the conclusion of the marine contract, and this obligation must be maintained until the termination of this

(1) Abu Dhabi Cassation Court – Appeals No 434+448-year 2013 (Commercial).

contract. Therefore, the assured under UAE law shall be responsible for not notifying the insurer about the facts related to the seaworthiness of vessel, provided that the assured was aware of unseaworthiness of vessel that may affect the decision of the insurer to accepting, avoiding or terminating the insurance contract covering the shipped cargo. It can safely be concluded from the provisions of Article 385 of UMCL that the facts related to seaworthiness of vessel can be classified under the material circumstances that have to be disclosed by the assured in accordance with the contract of marine insurance.

The English law, however, does not recognise the continuity of seaworthiness as an obligation imposed upon the assured (goods owner) under the contract of marine insurance. This has expressly been provided in Section 39(1) of the English Maritime Insurance Act (MIA) 1906:

> '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'.

According to this Section, the seaworthiness requirement is only confined to the seaworthiness of vessel not to the seaworthiness of the transported cargo.(1) The seaworthiness of ship to carry the cargo has been prescribed in Section 40 of MIA 1906, which declares that:

> 'In a voyage policy on goods or other moveables there is an implied warranty that at the commencement of the voyage the ship is not only seaworthy as a ship, but also that she is reasonably fit to carry the goods or other moveables to the destination contemplated by the policy'.

It is expressly stated in both sections that the English law presumes that a seaworthiness of ship is an implied warranty undertaken by the assured in the context of the voyage policy.(2) Namely, the assured can negate the liability for unseaworthiness even if such a condition has not expressly been included in the contract.

It is worth mentioning that the assured has become in a better position after the enacting of the English Insurance Act 2015. This development is

(1) Howard Bennett *The Law of Marine Insurance* (Oxford 1996) 141. See, A. *E Reed & Co v. Page, Son & East Ltd*. [1927] 1K. B. 743.
(2) Defossez (n 7) 238.

attributable to a new modification brought by this law, which has disregarded the principle of '*uberrimae fidei'*, "The principle which imposes a duty on the parties to act towards each other with utmost good faith by disclosing all material facts and not misrepresenting any fact, either before the contract is formed or while the contract subsists".(1) This principle has been adopted under the MIA 1906, according which the obligation of seaworthiness used to be considered an application of the '*uberrimae fidei'* principle.(2) In other words, the assured was imposed by virtue of the provisions of the MIA 1906 to immediately notify the insurer about the material facts that may affect the nature of the risk, or about the circumstances that could increase potentiality of risk or that may exacerbate the amount of damage observed after the conclusion of the contract of marine insurance.(3) The principle of '*uberrimae fidei'* was set out in Section 17 of the MIA 1906 that has been repealed by the Insurance Act 2015.(4) Section 17 of the MIA 1906 was stating:

> 'A contract of marine insurance is a contract based upon the '*uberrimae fidei'*, and, if the '*uberrimae fidei'* be not observed by either party, the contract may be avoided by the other party'.

(1) Kehinde Anifalaje 'Statutory Reform of the Doctrine of *Uberrimae Fidei* in Insurance Law: A Comparative Review' (2019) 63(2) Journal of African Law 251.

(2) Section 17, 18, 19 and 20 of MIA 1906 have been omitted by virtue of English Insurance Act 2015, where section 17 was modified by section 2(5)(b) of the English Consumer (Disclosure and Representations) Act 2012 which does not recognise the principle of '*uberrimae fidei'*.

(3) Shukri (n 17) 715.

(4) The fact of omitting the principle of *Uberrimae Fidei* from the sphere of marine insurance has been expressly stated in English Insurance Act 2015, which contains the general rules of the insurance contract. This has been provided in section 14 of English Insurance Act 2015, in which it has been prescribed that the provisions of Insurance Act 2015 related to the principle of *Uberrimae Fidei or utmost good faith* have to supersede the relevant provisions of MIA 1906. This section states: '(1) Any rule of law permitting a party to a contract of insurance to avoid the contract on the ground that the utmost good faith has not been observed by the other party is abolished. (2) Any rule of law to the effect that a contract of insurance is a contract based on the utmost good faith is modified to the extent required by the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012. (3) Accordingly— (a) in section 17 of the Marine Insurance Act 1906 (marine insurance contracts are contracts of the utmost good faith), the words from ", and" to the end are omitted, and (b) the application of that section (as so amended) is subject to the provisions of this Act and the Consumer Insurance (Disclosure and Representations) Act 2012. (4) In section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012 (disclosure and representations before contract or variation), subsection (5) is omitted'.

It is understood from this section that the principle of '*uberrimae fidei'* has to be maintained before and within the duration of the marine insurance contract.(1) Hence, one can argue that if the assured has not notified the insurer of the new facts arising during the validity of the insurance contract, the insurer would be in a breach of its obligation to disclose that has been imposed by virtue of the '*uberrimae fidei'* principle. Therefore, it is assumed that a non-disclosure of material facts shall enable the insurer to avoid the contract of marine insurance, even though the non-disclosure has been committed by a *bona fide* assured.(2) However, for the purpose of this section, these facts must influence the decision of a prudent insurer with respect to the premium and the undertaking of risk as well as should affect the interest of insurer.(3)

US law also adopts an approach similar to that which was enshrined under MIA 1906 before enacting English Insurance Act 2015, under which the principle of '*uberrimae fidei'* was applicable on the assured's obligation of representation and disclosure imposed upon them under the contract of marine insurance.(4)

It can be argued from this discussion that the approach of US law and old MIA 1906 of not confining the obligation of disclosure to the time of concluding the contract of marine insurance, is consistent with that which is appliable under the UAE law. However, the new approach of the English law, which has been adopted after the enacting of the Insurance Act 2015, contradicts those laws, as it does not extend the disclosure obligation after the conclusion of the marine insurance contract. Namely, non-disclosing of material

(1) Rhidian Thomas, *The Modern Law of Marine Insurance* (Taylor Francis Ltd 1996) 29.

(2) Elizabeth Germano 'A Law and Economics Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) in Marine Insurance Law for Protection and Indemnity Clubs' (2016) 47 St. Mary's Law Journal 742-44; Mahmoud Ababneh 'Underwriting Cargo Risks under the Institute Cargo Clauses 1982 Against the Backdrop of English and Jordanian Marine Insurance Law and Practice' (PhD thesis, University East Anglia 1998) 14. This has been expressly stated in *James J. McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 1998 AMC 285, 296 (1828).

(3) *Pan Atlantic Insurance Co Ltd and Another v. Pine Top Insurance Co Ltd*, [1994] 2 Lloyd's Rep 427.

(4) *Tremaine v. Phoenix Assurance Co.*, 45 P.2d 210, 1935 AMC 753 (Cal. Ct. App. 1935); *James J. McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 1998 AMC 285, 296 (1828). A. M. Costabel, "Utmost Good Faith in Marine Insurance: A Message on the State of the Dis-Union" (2017) 48(1) J. Mar. L. & Com. 4. See also, *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co.*, LLC (The Mark Twain), 761 F. 3d 830, 837, 839-40, 2014 AMC 2063, 2070, 2073 (8th Cir. 2014); *AIG Centennial Ins. Co. v. O'Neill*, 782 F. 3d 1296, 1302, 2015 AMC 1217, 1224 (11th Cir. 2015).

fact arising after the conclusion of the contract of marine insurance shall not affect the assured's right of indemnification under the new approach of the English law, whereas a non-disclosure of material facts would deprive them from such indemnification under US, UAE and old English approach.

The relationship between obligation of seaworthiness of vessel and obligation of disclosing material circumstances, imposed under contract of marine insurance governed by US law, is noted when an ordinary prudent assured does not fulfil the obligation of notifying the insurer of the circumstances that they know or might have known at the time of concluding of the contract of marine insurance.(1) In order for the circumstances to be considered as material facts such circumstances should have impacted the decision of the insurer to accepting or rejecting the risk, or they must have made the insurer stipulates extra premium in case that they accept to provide the insurance coverage,(2) i.e., materiality of facts might be decided on two basis:(3)

1- The material facts which have a conclusive influence on an abstract prudent insurer to take the risk at all, or at a particular premium.(4)

2- The material facts which have a mere influence, (5) where the materiality shall be considered if it would merely influence the process of the decision-making by an abstract prudent insurer.(6)

3.2 Seaworthiness as a Material Fact in the Contract of Marine Insurance

It is worth mentioning that the law and the appeal court of the UAE have adopted the old approach of the MIA 1906 and US law, which all provide that the obligation of the assured to disclosing material facts has to be maintained

(1) *Citizens Ins. Co. v. Whitley*, 67 S.W.2d 488 (Ky. 1934). This argument is adopted under the English law and UAE in terms of the contract of marine insurance, which will be discussed later in this paper.

(2) *Pan Atlantic Insurance Co Ltd and Another v. Pine Top Insurance Co Ltd*, [1994] 2 Lloyd's Rep 427. This assumption has been adopted in accordance with section 18 of MIA 1906, which has been omitted by virtue of Insurance Act 2015.

(3) Thomas J Schoenbaum 'The Dutyy of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law*'* (1998) 29(1) J. Mar. L. & Com. 19.

(4) This rule has been applied by the US courts. *See Marine Service, Inc. v. Rodger Fraser*, 211 F. 3d 1359, 2000 AMC 1817 (11th Cir. 2000).

(5) This has been adopted by the English courts. See *Cas. and General Ins. Ltd. and Others v. Chase Manhattan Bank and Others*, [2003] UKHL 6.

(6) Costabel (n 29) 7.

during the carriage operation.(1) In analogy with seaworthiness of vessel, one may assume that unseaworthiness can amount to the material facts that might be invoked by the insurer to rebut the liability of compensation imposed under contract of marine insurance, provided that the seaworthiness was a direct cause for loss of cargo or for the damage the shipped cargo has sustained.(2) Hence, it can safely be argued that the liability of the assured, which may deprive them from the compensation, could be incurred under UAE and US has not the assured notified the insurer about a unseaworthiness of vessel that they know or could have known.(3)

According to the new approach of MIA 1906, if unseaworthiness has taken place while the ship is navigating, the insurer would be committed to compensate the injured assured (goods owner), although the assured has not disclosed the new circumstances of seaworthiness. This is because the new approach of MIA 1906 is influenced by English Insurance Act 2015, which omits the principle of '*uberrimae fidei'* from the rules of the insurance contracts.(4) Namely, the assured shall be indemnified because the obligation of disclosing material facts, inter alia, the facts related to seaworthiness of ship, is imposed upon them merely at the time of starting the voyage. In contrast, before enacting English Insurance Act 2015, the insurer was entitled to avoid the insurance contract if the assured did not disclose material facts of seaworthiness, which have taken place during carriage operation. This is because the obligation of seaworthiness has been justified under '*uberrimae fidei'*, which has been prescribed in MIA 1906 prior the enactment of English Insurance Act 2015.(5) It is interesting to say that the old approach of the MIA 1906 is still applicable under US and UAE law, where the infringement of the obligation of disclosure is deemed to be one aspect of the breach of '*uberrimae fidei'* under the US law.(6) However, the US courts held that if the assured

(1) Abu Dhabi Cassation Court – Appeals No 434+448-year 2013 (Commercial).

(2) Sarah C Derrington '*Due Diligence, Causation and Article 4(2) of the Hague- Visby Rules'*(1997) 3 International Trade & Business Law Annual 175-76.

(3) This can be inferred from the principle of sections 39(1) and 40 of MIA 1906; article 385 of the UMCL, 5.1.1 Institute Cargo Clauses. See also, *Tremaine v. Phoenix Assurance* Co., 45 P.2d 210, 1935 AMC 753 (Cal. Ct. App. 1935).

(4) See section 14 of English Insurance Act 2015, which has been discussed earlier in this paper.

(5) This is due to the reason of omitting sections 18, 19 and 20 of the old MIA 1906, which all address the obligation of the assured to disclosing material facts under '*uberrimae fidei'* principle.

(6) *Tremaine v. Phoenix Assurance* Co., 45 P.2d 210, 1935 AMC 753 (Cal. Ct. App. 1935).

breached the obligation of facts disclosure, the insurance contract could be considered void or voidable, provided that this breach has rendered the insurer accepting this contract without imposing new terms.(1) After enacting Insurance Act 2015, the insurer becomes responsible for indemnification whether with new terms or with extra premium, regardless of the fact that the assured has not disclosed the new circumstances related to seaworthiness while the goods being transported.(2) Concerning the UAE law, the insurer can avoid the contract of marine insurance, if the assured infringes the obligation of disclosing the material facts during the validity of the marine insurance contract.(3) According to article 389(1) of the UMCL:

> The assured shall notify the insurer of the circumstances arising during the validity of the contract, which would increase the risks borne by the insurer, within three days from the date of its knowledge after excluding the official holiday days. If the notification has not been made within the aforementioned time, the insured may avoid the contract.

This article provides that the assured's failure of disclosing material circumstances -arising after the conclusion of the conclusion of the marine insurance contract- would stand as a solid ground for the insurer to avoid the contract of marine insurance. It can further be understood from this article that even though the assured has notified the insurer of the new circumstances, the latter can avoid the contract if such a notification has been made after elapsing of three working days from the date the assured has become aware of these circumstances.

However, the UMCL law has distinguished between the case in which the risk has been increased due to the act of the assured, and the case where the risk has been exaggerated by the act of a third party. Article 389(2) of the UMCL provides:

> If the increase in the risks does not arise from the assured's act, the insurance contract shall remain in effect with an extra premium equivalent to the increase in the risk

(1) John Dwight Ingram 'The Duty of An Applicant for Insurance to Voluntarily Disclose Facts' (2009) 40(1) Journal of Maritime Law & Commerce 129.
(2) Costabel (n 29) 32.
(3) The continuity of the disclosure obligation after the conclusion of the marine insurance contract enshrined in article 385(c) of the UMCL,

This paragraph is deemed to be a complementary to paragraph 1 of the same article. Thus, one can infer from both paragraphs that, if the assured notified the insurer -within three working days- about the circumstances that have increased the risk during the validity of the insurance contract, the insurer should be abided by the contract of insurance with an additional premium, provided that the reason of increasing the risk was not attributable to the assured's act. However, this is not the case where the increase of risk has resulted from the act of a third party. According to article 389(3) of the UMCL:

> But if the increase in the risks resulted from the act of the assured, the insurer may be within three days from the date of receiving the notification either terminates the contract while retaining the right to the insurance premium or keeps the contract with the claim to increase the premium to an amount against the increased risks.

It is worth noting that the insurer -by virtue of this article- will be entitled for two options if the increase in the risk is imputable to the act of assured. The first option may the insurer choose lies in right of terminating the contract of marine insurance, which can be used without returning the premium to the assured, while the second observed in the right of retaining the contract of marine insurance, with a demand to increase the premium in exchange for the increased risks. It can be concluded that the insurer, under the US law, UAE law and the old MIA 1906 can escape the liability of compensation in front of the goods owner, provided that the goods owner (assured) has not notified the insurer of the material facts.(1)

It is worth mentioning that as opposed to the US and the old MIA 1906, the UAE did not stipulate that the loss of or damage to goods shall be imputed to the fault of the assured, rather the UAE law provides that the insurer can escape the liability of compensation, even though the damages are not imputed to the assured's failure of notifying material facts, i.e., the insurer would be exempted from liability of indemnification regardless of the fact that the damage has not resulted from a non-disclosure of such facts.(2) This has been expressly stated in article 388(2) of the UMCL, which

(1) See *James J. Manahan v. Universal Ins. Co.*, 26 U.S. 170, 1998 AMC 285, 296 (1828); *Pan Atlantic Insurance Co Ltd and Another v. Pine Top Insurance Co Ltd*, [1994] 2 Lloyd's Rep 427; *AIG Centennial Ins. Co. v. O'Neill*, 782 F. 3d 1296, 1302, 2015 AMC 1217, 1224 (11th Cir. 2015); Abu Dhabi Cassation Court – Appeals No 434+448-year 2013 (Commercial).

(2) This conclusion is inferred from Section 18-20 of the MIA 1906 which have been mentioned earlier in this paper and article 388(2) of the UMCL.

provides that:

> 'The court shall rule for the avoidance of the contract even if the incorrect statement or the silence has not affected the damage caused to the insured object'.

Accordingly, the UAE Court Appeal ruled that:

> The assured is obliged to inform the insurer of all accidents and circumstances related to the insured object, such as the accident of the sinking of vessel and the fact of bringing cases in relation thereto as a result of the accident of the sinking. This would be applicable even if the concealment of the sinking accident has no effect or relationship to the fire accident. Article 388 of the UAE Maritime Commercial Law is explicit by stipulating the avoidance of the contract in the incorrect statement or the silence does not have any effect on the damage.(1)

Hence, one may argue that the assured's failure of notifying the insurer - regarding the material facts related to seaworthiness of vessel- would exempt the insurer from the liability of compensation under UAE law, even though the damage that the goods sustained has not resulted from unseaworthiness of vessel.(2) According to the US law and UAE law as well as the old MIA 1906, the assured would not be indemnified by the insurer unless after the amended contract has been already concluded with the insurer in accordance with the new material facts disclosed by the assured. The scenario, however, is not same under the amended MIA 1906, where the insurer would be obliged to indemnify the assured, although the latter has not disclosed the circumstance related to classification of ship, which has arisen during the voyage. This inference can be referred to the new approach MIA 1906 that has been adopted after the enactment of the English Insurance Act 2015, as explained earlier in this study, the act which has omitted the principle of '*uberrimae fidei'* that used to be applied under the old MIA 1906. The breach of seaworthiness obligation under US law and English law would confer on the insurer the right to escape liability of compensation for the damaged cargo, provided that the damage was proved to be approximate result of unseaworthiness.(3) In spite of the agreement with

(1) Abu Dhabi Cassation Court – Appeals No 434+448-year 2013 (Commercial).
(2) See articles 272, 385 and 388 of the UMCL.
(3) Olsen and others (n 15), "*COVID-19: legal challenges for shipping industry".*

the US and English law -in this regard- the UAE does not stipulate that the damage has to be resulted from a non-disclosure of unseaworthiness.(1)

3. Conclusion

It can be concluded that the seaworthiness of vessel has been imposed upon the marine carrier by virtue of the contact of carriage of goods by sea. According to the provisions of the UAE, US and English law, the marine carrier would discharge this obligation when they prove that they have exercised a due diligence to furnish a seaworthy ship before and at the beginning of its voyage. However, the divergence between these jurisdictions can be noted when the seaworthiness of vessel be addressed in the context of the contract of marine insurance. This paper showed that the seaworthiness obligation is deemed to be one of the material facts that should be disclosed by the assured and also proved that the variation between the rules of disclosure obligation under UAE, US and English law has resulted in an inconsistency between them in terms of the eligibility of the assured to obtaining indemnification for the damages that the transported goods have sustained. This can obviously be noted when the new circumstances of seaworthiness of ship have arisen after the conclusion of the marine insurance contract, or after the commencement of the voyage. The paper found that two key variations can be observed under these jurisdictions. First aspect of difference is observed in the obligation of disclosure, which has to be satisfied at the commencement of the voyage under the English law, while this obligation has to be a continuous obligation under the US and UAE law, i.e., under US and UAE law the obligation of seaworthiness must be maintained during carriage of cargo until the arrival at the port of destination. This divergence has led to a conclusion that the assured would not be entitled for insurance coverage under US and UAE law, if they did not notify the insurer about the new facts related to unseaworthiness of ship, whereas they would be entitled for such indemnification when applying the English law. This is because the English law has provided that the obligation of disclosure has to be met merely at the conclusion time of the marine insurance contract. Therefore, the author reached an inference that the English law approach is more protective to the assured, while the UAE and US law both are in the favour of the insurer, as they confer on them the opportunity to escape liability of compensation when

<https://www.internationallawoffice.com/Newsletters/Shipping-Transport/Norway/Wikborg-Rein/COVID-19-legal-challenges-for-shipping-industry?utm_source=ILO+Newsletter&utm_medium=email&utm_content=Newsletter+2020-04-15&utm_campaign=Shipping+%26+Transport+Newsletter.> Accessed on 19/05/2020.

(1) This can be inferred from the provisions of article 389(2) of the UMCL.

the insured fails to disclose material facts related to seaworthiness after the conclusion of the marine insurance contract. Hence, the author suggests that both of US and UAE law should be amended so as to consist with the new approach of the English law, which is deemed to be one of the most preferable law agreed upon through arbitration clause incorporated by contracting parties to the contract of marine insurance. Besides, the role of the English practices in the insurance industry which have been interpreted the relevant documents produced by Lloyd's Syndicates as well as London Institute Clauses, all of which are globally recognised in the insurance field. However, the second aspect of inconsistency is noted between the US and English law from one side, and the UAE law from the other side. This contradiction lies in the fact that the English and US law, both have stipulated that the failure to disclosing material facts must be the approximate reason for the damages to the cargo and then, the insurer can be exempted from the liability of compensation.(1) In contrast, the UAE did not follow this rule, rather it stipulates that the failure of notifying the insurer about material facts would entitle the insurer the right to escape liability of compensation, even though that the damage has not resulted from the assured failure to disclose.(2) The author also recommends that the UMCL has to adopt the same rule of the US and English law, as both provide that in order for the insurer to be exonerated from a compensation, the should prove a direct causal relationship between the breach of the assured to disclosing material facts and the goods damages. This modification can be rationalised under the argument that the US and the English law both have been developed within series of decades, during which massive number of cases were solved under both jurisdictions. These modifications become more necessary for the UAE law, especially after the great step made by the UAE government of founding the Emirates Maritime Arbitration Centre (EMAC), which aimed to be as a regional and international maritime arbitral tribunal. To sum up, one can infer that the two suggested amendments will be in the favour of the assured, as they will not be abided by the obligation of disclosing material facts arising after the conclusions of the contract of marine insurance. Further, the insurer would not

(1) Derrington (n 37) 175-76; Oslen and Others (n 15), "*COVID-19: legal challenges for shipping industry".*
<https://www.internationallawoffice.com/Newsletters/Shipping-Transport/Norway/Wikborg-Rein/COVID-19-legal-challenges-for-shipping-industry?utm_source=ILO+Newsletter&utm_medium=email&utm_content=Newsletter+2020-04-15&utm_campaign=Shipping+%26+Transport+Newsletter.> Accessed on 19/05/2020.
(2) See article 389(2) of the UMCL.

be exempted from the compensation in case that they could not prove the causal relationship between the failure to disclosing seaworthiness-relevant facts and the goods damages.

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العلاقة بين الصلاحية للإبحار وواجب الإفصاح بموجب عقد التأمين البحري: تحليل لقوانين الإمارات العربية المتحدة والولايات المتحدة الامريكية والمملكة المتحدة

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ملخص البحث:

يناقش هذا البحث تأثير شرط صلاحية السفينة للإبحار على عقد تأمين البضائع البحري. حيث تشمل الدراسة تحليلاً معمقاً للنصوص ذات الصلة في القانون الانجليزي والأمريكي والإماراتي، والتي تبدأ بشرح لمفهوم صلاحية السفينة للإبحار كالتزام يقع على كاهل الناقل البحري وفقاً لأحكام عقد نقل البضائع البحري. حيث يناقش الباحث من خلال هذه الجزئية القواعد القانونية ذات الصلة وفقاً للقانون الانجليزي الخاضع لأحكام اتفاقية لاهاي لسندات الشحن وبروتوكولها لعام ١٩٧٩ وكذلك القانون الأمريكي الذي يخضع لأحكام معاهدة لاهاي لسندات الشحن لعام ١٩٢٤، هذا بالإضافة لمناقشة نفس المسألة في ظل أحكام قانون التجارة البحرية الإماراتي. أما الجزئية التالية من هذا البحث فتتركز على تحليل ومناقشة القواعد القانونية المنظمة لشرط الافصاح عن المعلومات المهمة والذي يفرضه عقد تأمين البضائع البحري على عاتق المؤمن له. حيث تناقش فيه الأحكام القانونية المنظمة لهذا الالتزام المفروض على المؤمنن له بموجب عقد تامين البضائع البحري، وذلك وفقاً للقانون البريطاني والأمريكي والإماراتي. و أهمية دراسة شرط الافصاح تفي هذا السياق تكمن في مدى أهميته كنقطة مفصلية تربط ما بين عقد نقل البضائع بحراً وعقد تأمين البضائع البحري، والذي يتجلى ملياً في شرط صلاحية السفينة للإبحار كالتزام يُفرض أيضاً على عاتق المؤمن له وفقاً لمقتضيات عقد تأمين البضائع. وفي نهاية الدراسة يخلص الباحث إلى مجموعة من النتائج

والتوصيات التي تدفع بأن تجعل قانون التجارة البحرية الإماراتي أكثر موائمة وانسجاما مع النهج الدولي المنظم لعقد التأمين الذي يغطي البضائع المنقولة بحراً.