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HOW DOES COVID-19 AFFECT MARINE INSURANCE COVER THROUGH THE REQUIREMENT OF SEAWORTHINESS?

Abstract

This paper addresses the legal implications of COVID-19 upon the procurement of marine cargo insurance cover. It clarifies the relationship between warranty of seaworthiness and duty of disclosure, both of which are imposed upon the insured cargo owner under contract of marine insurance. The paper discusses the effect of COVID-19 that the insured cargo owner may invoke to rebut the allegation of not satisfying the duty of disclosure in terms of the seaworthiness of a vessel, which may deprive the insured cargo owner of compensation. The study deploys qualitative and black letter approaches by analysing English and US law, and the relevant international documents. The authors suggest that US law should adopt the same approach as English law, so that the insured cargo owner will not be forced to prove the relation between the restrictions imposed under COVID-19 and its failure to disclose material facts related to seaworthiness.

Keywords

COVID-19 – marine cargo insurance – seaworthiness – duty of disclosure

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INTRODUCTION

The outbreak of the COVID-19 pandemic forced governments worldwide to undertake various kinds of measures in order to stop or mitigate its effects. This has been performed through the imposition of quarantine, lockdown, ban, curfew, and some other restrictions. The implementation of such restrictions has resulted in several sorts of hindrances that have adversely impacted commitments of contracting parties and commercial transactions. Therefore, international endeavours have been dedicated to avoiding the influence of the COVID-19 on the business and obligations of contracting parties in different sectors of international trade. These efforts have led to legal solutions aimed at discharging the legal liabilities relating to the non-performance of contracts due to the outbreak of COVID-19.

Insurance contracts are also exposed to the lack of performance, as the insured cargo owner's breach of seaworthiness warranty shall deprive him of insurance cover. This paper focuses on the effect the breach of seaworthiness warranty may have on the procurement of the insurance cover and therefore, the authors will emphasize the impact the expiration of classification certificate may have on the duty of disclosing material facts in terms of the seaworthiness of vessel under the circumstances of COVID-19.

This paper will discuss the effect of COVID-19 on the contracts of cargo marine insurance. Namely, the authors will thoroughly explain the impact of a seaworthiness warranty on the right of the cargo owners under both contract of cargo marine insurance and contract of carriage of goods by sea, taking into consideration the vital role COVID-19 may play in affecting the answer of whether or not the insured cargo owner is entitled to be indemnified if the goods are lost or deteriorate, as the insured cargo owners may assert this pandemic so as to exempt themselves from the liability of non-performing the aforesaid warranty owing to the restrictions imposed to stop the spread of COVID-19.

The authors further apply authoritative examination of the relevant rules in English law, US law, and international rules, including the Hague/Hague-Visby rules, and Hamburg Rules as well as the Rotterdam Rules that have not yet entered into force. This analysis will en-

able the study to clarify the legal nature of the COVID-19 pandemic, which the contracting party may invoke, as *force majeure*, so as to negate its liability for non-performance. This paper will also illustrate the key variations between English and US law in terms of the implied relation between the seaworthiness of the vessel and duty of disclosure that the insurer may assert in order to escape the liability of compensation, whereas the maritime carrier may rely upon the restrictions, imposed due to the outbreak of COVID-19, in order to refute the liability for unseaworthiness imposed under the contract of carriage of goods by sea.

II. SEAWORTHINESS OBLIGATION UNDER THE CONTRACT OF CARRIAGE OF GOODS BY SEA

Before addressing the impact that the COVID-19 may have on the rights of contracting parties to a contract of marine cargo insurance, it is necessary to illuminate the legal essence of COVID-19 and clarify the seaworthiness obligation that the insurer may rely on with a view to discharging his liability of compensation towards the insured cargo owner.

1. SEAWORTHINESS OBLIGATION UNDER COMMON LAW

The seaworthiness of vessel is an obligation the marine carrier has to satisfy in accordance with the provisions of the contract of carriage of goods by sea. According to his obligation, the marine carrier will be obliged to furnish a seaworthy ship to safely transport particular goods to an agreed place of destination.¹ This means that the vessel has to be able to navigate, able to cope with ordinary maritime incidents and equipped with necessary equipment, efficient crew, sufficient fuel, and as provided with a number of suitable holds qualifies it to carry specific kind of goods.²

¹ S. Baughen, *Shipping Law*, 7th ed., Routledge 2019, p. 81.

² *Star Sea* [1995] 1 Lloyd's Rep 651,657. *Kopitoff v. Wilson* (1876) 1 QBD 377 at 380; *McFadden v. Blue Star Line* [1905] 1 K. B. 697-706. See Baughen, *supra* note 1, p. 84-85.

The obligation of seaworthiness, under English Law, has to be assessed on the standard of due diligence expected from a reasonable prudent shipowner.³ Namely, the marine carrier's infringement of seaworthiness obligation will be decided on the basis of the negligence of the marine carrier.⁴ However, the seaworthiness of a ship under English law is not a continuous obligation, it does not need to be maintained during the voyage, but rather the shipowner is merely obliged to furnish a seaworthy vessel at the commencement of the voyage.⁵ This can easily be derived from Section III(I) of the Hague Rules, the Rules that have been ratified by the UK. According to this Article:⁶ "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".

The US law adopts the same approach as English law in this regard, as both have ratified the Hague Rules. This has been expressed in definition of seaworthiness provided by the Supreme Court, which stated: "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".⁷

It can be inferred from this judgment that though English and US law are consistent in terms of the time the seaworthiness of vessel has to be met, they are inconsistent as to the required amount of care the marine carrier has to be taken in order to render the vessel seaworthy for

³ *Papera Traders Co Ltd v. Hyundai Merchant Marine Co Ltd* (The Eurasian Dream) [2002E] WHC 118, at p. 127.

⁴ *Union of India v. N. V. Reederij Amsterdam* (The AMSTELSLLOT) (1963) 2 Lloyd's Rep. 223.

⁵ D.A. Laurence Defosse, "Seaworthiness: The Adequacy of the Rotterdam Rules Approach", *U. S. F. Maritime Law Journal*, 2015, Vol. 28, No 2, p. 239; B.B. Shukri, *Research in Insurance*. 1st ed. Dar Al-Thaqafa, 2012, p. 369.

⁶ Y. Baatz, *Maritime Law*, 2nd ed. Sweet & Maxwell, 2011, p. 224.

⁷ *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 Siloia*, 171 U.S. 462, 464 (1898).

navigation, as the US law requires an extra level of care in this respect.⁸ Namely, although that the marine carrier provided a vessel furnished with special apparatuses so as to qualify her to carry particular cargo, the court held the marine carrier liable for the unseaworthiness of the vessel because of the long period of the voyage that resulted in the damage the goods sustained.

2. SEAWORTHINESS OBLIGATION UNDER RELEVANT INTERNATIONAL RULES

The obligation of Seaworthiness has been regulated under Hague, Hague-Visby, Hamburg, and Rotterdam Rules that all are inspired by the industry standards and practices determining the criteria and extent of such obligation.⁹ Therefore, Article III(I) Hague-Visby Rules obliges the marine carrier to exercise due diligence before and at the time of launching of the voyage. This Article also establishes the liability of the marine carrier for unseaworthiness on the basis of its negligence.¹⁰

However, the variation between Hague, Hague-Visby, Hamburg, and Rotterdam Rules lies in the duration of the marine carrier's liability for unseaworthiness, as the Hamburg and Rotterdam Rules both have prolonged the period of responsibility of the marine carrier for the seaworthiness of the ship. This can be inferred from Article 5(1) of the Hamburg Rules, which states that: "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".¹¹

⁸ R.R. Pixa, "The Hamburg Rules Fault Concept and Common Carrier Liability Under U. S. Law", *The Virginia Journal of International Law*, 1978, No 19, p. 433-434.

⁹ T. Aladwani, "Effect of Shipping Standards on Seaworthiness", *European Journal of Commercial Contract Law*, No 3, 2011, p. 34.

¹⁰ *Union of India v. N. V. Reederij Amsterdam* (The AMSTELSLLOT) (1963) 2 Lloyd's Rep. 223.

¹¹ For further discussion see Baughen, *supra* note 1, p. 133.

It can be understood from this article that the Hamburg Rules adopt the principle of presumed fault, as they assume that the marine carrier will be considered liable once the claimant proves that the damage to or loss of goods has taken place while the goods are under the custody of the marine carrier, unless it is proved that the carrier, or its agents or servants have taken all reasonable measures to avoid such risk.¹²

This article also provides a flexible basis for deciding whether or not the obligation of seaworthiness is met under the provisions of the Hamburg Rules.¹³ The Hamburg Rules extended the period during which the obligation of seaworthiness has to be maintained, as it must include navigation time until the conclusion of voyage at the port of destination. Furthermore, this article shows that the marine carriers will be discharged from the obligation of seaworthiness if they prove that the defect has been noted neither by them nor by their employees.¹⁴

Similarly to the Hamburg Rules, the Rotterdam Rules stipulate that the seaworthiness obligation must not only be met at the time of the commencement of navigation, but rather it should cover the whole duration of voyage.¹⁵ According to 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.

It is clearly noted from this article that the Rotterdam Rules apply the same rule as the Hague-Visby Rules, as both determine the obliga-

¹² *Ibid.*, p. 133.

¹³ Defossez, *supra* note 5, p. 243.

¹⁴ *Ibid.*, p. 243.

¹⁵ F. Berlingieri, *International Maritime Conventions: The Carriage of Goods and Passengers by Sea*, 8th ed, Informa, 2014, p.169; A. Diamond QC, "The Next Sea Carriage Convention", *Lloyd's Maritime and Commercial Law Quarterly* 2008, p. 135-50; Defossez, *supra* note 5, p. 244.

tion of seaworthiness on the principle of due diligence.¹⁶ This article also assumes that the obligation of seaworthiness will be continuously maintained.¹⁷ Namely, the marine carrier is obliged to provide a seaworthy vessel as long as the goods are under the custody of the marine carrier. Despite the similarity between these rules, the duration of the seaworthiness obligation is not similar under each, as the marine carrier, under the Hague-Visby Rules, is obliged to maintain this obligation prior to, and at the commencement of the voyage, *i.e.*, this obligation will continue until the termination of the voyage at the destination port. However, the marine carrier's responsibility for unseaworthiness of the vessel, under the Hamburg and Rotterdam Rules, will continue after navigation. This is contrary to the rule under common law, by virtue of which the marine carrier has no responsibility of seaworthiness after the commencement of voyage.

To conclude, the seaworthiness of the ship is deemed to be a fundamental obligation for the contracting parties to the contract of carriage of goods by sea, and the breach of this obligation will render the marine carrier liable for the loss of or damage to the transported cargo resulted from such seaworthiness. The seaworthiness of the vessel can also play a substantial role in the context of the marine cargo insurance contract, but enforcing such obligation might be hindered or deterred owing to *force majeure* such as the COVID-19 pandemic. Therefore, it is necessary to firstly shed light on the nature of COVID-19, and then on the warranty of seaworthiness under the contract of marine cargo insurance.

3. THE LEGAL NATURE OF THE COVID-19 PANDEMIC

In 2019, the World Health Organization (WHO) received various cases 'unusual pneumonia' affected people's health in China.¹⁸ The reports received on this resulted in the recognizing of the disease of Corona-

¹⁶ P. Todd, *Principles of the Carriage of Goods by Sea*. 1st ed, Routledge 2016, p. 366-367; Baughen, *supra* note 1, p. 137-138.

¹⁷ Todd, *supra* note 16, p. 366-367; Berlingieri, *supra* note 15, p. 169.

¹⁸ Timeline: "How the new coronavirus spread", AL JAZEERA (Mar. 12, 2020), available at: <https://www.aljazeera.com/news/2020/01/timeline-china-coronavirus-spread-200126061554884.html> [last accessed 1.9.2021].

virus 2019 (COVID-19) by WHO. COVID 19 is deemed to be a novel aspect of a wider coronavirus family, and this embraces viruses from the common cold to Severe Acute Respiratory Syndrome (SARS), which also reached India and the Philippines and resulted in infecting 80,000 people all over the world. The disease has been declared a 'pandemic'.¹⁹ The transmissions of SARS-CoV and MERS-CoV, among which is COVID-19, have dramatically increased. However, SARS-CoV and MERS-CoV have infected intrapulmonary epithelial cells more than cells of the upper airways and therefore, the transmission has mainly started from patients that have been obviously infected and not from those who have slight or generic indicators.²⁰ As a consequence, further research has been suggested in order to have a comprehensive understanding of the COVID-19 temporal structures.²¹

The effect of the COVID-19 pandemic has not only been noted in the context of the health affairs, but rather it has adversely affected the legal aspect of the transactions concluded between people, and the contract of carriage of goods by sea was one of the commercial transactions that have been exposed to such implications. This can clearly be noted through the warranty of seaworthiness imposed upon the insured by virtue of the marine cargo insurance contract, and in order to explain the legal implications in this context, the study is going firstly, to clarify the legal nature of COVID-19 that may hinder the performance of contracting parties to such contract.

¹⁹ B. Chappell, "Coronavirus: COVID-19 Is Now Officially A Pandemic, WHO Says", NPR (Mar. 11, 2020, 12:30 PM), available at: <https://www.npr.org/sections/goatsandsoda/2020/03/11/814474930/coronavirus-covid-19-is-now-officiallya-pandemic-who-says> [last accessed 1.9.2021]; Timeline, *supra* note 17. The statement of the World Health Organisation regarding the outbreak of COVID-19, available at: [https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov)) [last accessed 1.9.2021].

²⁰ S. Perlman, "Another Decade, Another Coronavirus", *The New England Journal of Medicine*, 2020, p. 382; 8 *nejm.org* (February 20, 2020), available at: <https://www.nejm.org/doi/pdf/10.1056/NEJMe2001126?articleTools=true> [last accessed 4.9.2021].

²¹ G. Li, Y. Fan, Y. Lai, et al, "Coronavirus Infections and Immune Responses", *Journal of Medical Virology*, 2020, No 92, p. 430, available at: <https://doi.org/10.1002/jmv.25685> [last accessed 4.9.2021].

It was argued that COVID-19 can be recognized as *force majeure*, because it shares the same implications of *force majeure* noted under strike, ban, labour disputes, machinery breakdowns, riots, and other similar events that all may impede the contract performance, where the impediments of COVID-19 can be noted in the restrictions, quarantine, and various kinds of precautionary procedures imposed by states to stop the spread of this virus.²² It was further added that COVID-19 shares the characteristic of fortuity enjoyed by *force majeure*, as it can neither be predicted nor avoided by contracting parties.²³ Therefore, it was argued that COVID-19 cannot amount to *force majeure*, unless it has already prevented the party from discharging an obligation imposed under particular contract, who can then rely on such invocation so as to alleviate the influences of COVID-19 on its liability.²⁴

However, the principle of *force majeure* is not completely recognized under English law, because English law does not provide a definition for this term, resulting in the adoption of various approaches in model contracts in order to address such principle.²⁵ It is also noted that neither English nor US law recognizes *force majeure* as a solid legal basis that might be invoked by a contracting party to escape the liability for non-performance, unless the contract itself has recognized the alleged event as a *force majeure* and also explained the legal implications of such

²² M. Irvine, "Force majeure clauses and the coronavirus", *Entertainment Law Review*, 2020, Vol. 31, No 5, p. 156; B. Majumder, D. Giri, "Coronavirus & Force Majeure: A Critical Study (Liability of a Party Affected by the Coronavirus Outbreak in a Commercial Transaction)", *Journal of Maritime Law & Commerce*, 2020, Vol. 51, No 1, p. 56.

²³ *Ibid*, p. 59. See *Great Elephant Corp. v. Trafigura Beheer B.V.* [2013] EWCA Civ 905; *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966).

²⁴ As it can be inferred from general legal principles and standard relevant contracts; Ch. James-Olsen et al, *COVID-19: legal challenges for shipping industry*, available at: 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 [last accessed 1.5.2021].

²⁵ L. Neudorf, G. Hunnisset, "Force Majeure Clauses in Comparative Perspective: The Canadian Common Law Approach in Light of Recent Developments in the Courts in Singapore and the United Kingdom", *The University of New Brunswick Law Journal*, 2014, No. 65, p. 336-337.

event.²⁶ Namely, COVID-19 cannot amount to the principle of *force majeure* – under English and US law – unless the alleged event has been included in the list of *force majeure* clause attached to the contract.²⁷

The court or tribunal may have recourse to different rules of construction with a view to clarifying the clause of *force majeure*, such as commercial usage and foreseeability, where they may consider the event as a *force majeure*, because the parties did not anticipate it at the time of the contract conclusion, as it was beyond the reasonable control of contracting parties.²⁸ The court or tribunal will also seek the ordinary meaning of the words the parties have included into the contract, as the interpretation of the clauses should consolidate the principle of *the parties' autonomy*.²⁹ Though some jurisdictions do not recognize COVID-19 as *force majeure* clause, the legal nature of such pandemic may lead to an assumption that such event can be classified under the concept of *force majeure*, and this can be justified in a twofold reason:³⁰ first, the consequences of this pandemic, which are similar to those which are inflicted under *force majeure*, and secondly, the impossibility of including COVID-19 in the clause of *force majeure* that might be attached to a contract entered into prior to the outbreak of Coronavirus, as the contracting parties cannot predict such an event. This is because COVID-19 has not infected the human being before or at the time of the conclusion of the contract and, therefore, COVID-19 can be regarded as being among those cases that have been indicated under the clause of *force majeure* attached to a particular contract.³¹ In other words, COVID-19 can amount

²⁶ Irvine, *supra* note 22, p. 156. See *United States v. Panhandle E. Corp.*, 693 F. Supp. 88, 96 (D. Del. 1988); *Kel Kim Corp. v. Cent. Mkts, Inc.*, 519 N.E.2d 295, 296 (N.Y. 1987).

²⁷ J. Kelley, "So What's Your Excuse? An Analysis of Force Majeure Claims", *International Texas Journal of Oil, Gas and Energy Law*, 2006, No. 4, p. 98.

²⁸ *Ibid.*, p. 98. See *General Construction Co. Ltd. v. Chue Wing & Co. Ltd.* [2013] UKPC 30; *Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC* [2010] All E.R. (D) 111; *Operating Ltd. P'ship v. Holt*, 984 S.W.2d 277, 288 (Tex. App. Amarillo 1998).

²⁹ Irvine, *supra* note 22, p. 156. See *Seadrill Ghana Operations Ltd v. Tullow Ghana Ltd* [2018] EWHC 1640 (Comm); *Classic Maritime Inc v. Limbungan Makmur SDN BHD* [2019] EWCA Civ 1102.

³⁰ Majumder, Giri, *supra* note 22, p. 56.

³¹ The assumption of considering an event – on the basis of an implied clause – as a *force majeure* has been adopted in *GV Projects & Investments (P) Ltd v. National Highway Authority of India*, (2019) 173 DRJ 717.

to a *force majeure* if the relevant clause has been drafted in a broad formulation enabling such pandemic to stand as *force majeure*, though it has not been incorporated in the list of *force majeure* that has been attached contract, whether by adding the sentence of '*any other similar events beyond the control of the parties*', '*any other causes beyond our control*', '*Acts of God*', or '*unforeseeable or unavoidable event*'.³²

The COVID-19 pandemic could be invoked by a contracting party as *force majeure* in order to escape the contractual liability for non-performance. However, this invocation should be made in the context of a contract concluded prior declaring COVID-19 as epidemic by the World Health Organisation (WHO),³³ as *force majeure* cannot be invoked under international principles of commercial contracts, unless the alleged event was unforeseeable at the time of concluding the contract.³⁴

It can be argued that the defendant cannot avail himself of COVID-19 as *force majeure*, if the contract has been concluded after declaring COVID-19 as an epidemic, which has been declared later as a pandemic, as foreseeability of such event was possible at the time of concluding the contract.³⁵ However, the defendant might discharge its liability for non-performance -under English law- if the case falling within the *doctrine of frustration*. Thus, it is important to distinguish between *force majeure* and *doctrine of frustration of contract*, as the latter is applied under two scenarios: firstly, if COVID-19 has rendered the party's performance impossible *physically nor commercially*, or if it has dras-

³² A.A. Qureshi, "Recent Development Comment", *American Journal of Law & Medicine*, 2020, No 45, p. 134; *Force Majeure clauses in a pandemic: which contracts can be breached due to COVID-19? Idaho. "Business Review"*, 13 Apr. 2020, p. NA. Gale General OneFile, available at: https://link.gale.com/apps/doc/A621102819/ITOF?u=anglia_itw&sid=ITOF&xid=5e1b27b1 [last accessed 29.8.2020]; p. Robertson QC, B. Lynch QC and D. Horowitz, "COVID-19, force majeure and frustration: Key legal principles and industry implication", *New Law Journal*, 2020, No 170, p. 2-3; Irvine, *supra* note 22, p. 156. See *Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC* [2010] 2 Lloyd's Rep 668 at 675.

³³ The statement of the World Health Organisation regarding the outbreak of COVID-19, *supra* note 18.

³⁴ See Article 79 of the CISG 1980 and Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts.

³⁵ A pandemic or epidemic of COVID-19 was declared a pandemic on March 11, 2020. *Force Majeure clauses in a pandemic: which contracts can be breached due to COVID-19?*, *supra* note 32.

tically altered the obligation imposed under the contract.³⁶ However, the inability of availing from the invocation of COVID-19 as a *force majeure*, under US law, may entitle the contracting party to avail himself of the doctrine of impracticability.³⁷ This doctrine provides that the party will be discharged from the liability for non-performance, if he has not taken into consideration the unpredictable circumstances – taking place later – at the time of concluding the contract.³⁸ However, the doctrine of impracticability is not merely applied under the extreme impossibility of performance, rather it is also applied if the enforcement of obligation is not impossible but rather, impracticable.³⁹

It can be concluded from the aforementioned discussion that a contracting party may invoke the declaration that has recognized COVID-19 as an epidemic, as the epidemic has previously been recognized as *force majeure* in the case law.⁴⁰ In addition, COVID-19 can amount to a *force majeure*, because WHO graded this virus in a position more severe than that which the epidemic may enjoy. This can be inferred from *Gardner v. Clydesdale Bank*,⁴¹ and *Tandrin Aviation Holdings Ltd v. Aero Toy Store LLC*,⁴² as both have recognized the epidemic as *force majeure*.

It is logical to conclude that in order for COVID-19 to be treated as *force majeure*, the following requirements must be met.⁴³

³⁶ Robertson, Lynch and Horowitz, *supra* note 32, p. 10. See *Edwinton Commercial Corp v. Tsaviris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517. *Force Majeure clauses in a pandemic: which contracts can be breached due to COVID-19*, *supra* note 32.

³⁷ The doctrine of impracticability has been addressed under Section 261 of Restatement (Second) of Contract (AM. LAW INST. 1981).

³⁸ Qureshi, *supra* note 32, p. 134.

³⁹ Section 261 of Restatement (Second) of Contract (AM. LAW INST. 1981).

⁴⁰ *Lebaupin v. Richard Crispin & Co* [1920] All E.R. 353. Morrison Foerster, *Contract Performance in the Time of Coronavirus: Perspective from Mainland China and Hong Kong*, available at: <https://www.mofo.com/resources/insights/200207-contract-performance-coronavirus-china-hong-kong.html> [last accessed 8.5.2022].

⁴¹ [2013] EWHC 4356 (Ch).

⁴² [2010] All E.R. (D) 111.

⁴³ The Standard Club, *Practical and Contractual Considerations Arising from The Novel Coronavirus Outbreak in China*, available at: <https://www.hellenicshippingnews.com/practical-and-contractual-considerations-arising-from-the-novel-coronavirus-outbreak-in-china/> [last accessed 3.5.2021]; Guard P& I Club, *COVID-19 and force majeure clauses under English law*, available at: <https://www.hellenicshippingnews.com/covid-19-and-force-majeure-clauses-under-english-law/> [last accessed 4.5.2021].

1. Proving the causal relationship between the breach of contract and the outbreak of COVID-19.
2. Proving that the alternatives the party has undertaken could not avoid, mitigate, or overcome the impact of COVID-19.
3. The party at fault has notified the other party through a notice delivered within an agreed time or within reasonable time.

One can argue that a contracting party may avail himself of COVID-19 as *force majeure*, provided that the clause of *force majeure* has already included in the contract and the clause covers COVID-19 pandemic circumstances, otherwise, *frustration of contract* under English law or *Impracticability* under US law might be applied.⁴⁴

It is understood from this discussion that COVID-19 may affect the cover provided under contract of marine cargo insurance, as a contracting party may rely on such a pandemic so as to escape the liability for non-performance. Therefore, the next section is dedicated to addressing the effect of COVID-19 on the warranty of seaworthiness, the breach of which can deprive the insured of the insurance coverage provided under contract of marine cargo insurance.

III. RELATIONSHIP BETWEEN SEAWORTHINESS AND CARGO INSURANCE COVER UNDER COVID-19

As mentioned earlier, seaworthiness of ship is an obligation imposed upon the marine carrier by virtue of the contract of marine carriage entered into with the shipper. However, this obligation impacts not only the contract of marine carriage, but rather the contract of marine cargo insurance can also be influenced by the non-performance of such an obligation, as the requirement of seaworthiness of ship must also be satisfied in order for the insured cargo owner to procure marine insurance cover.⁴⁵ However, this requirement might not be satisfied because potential impediments could be caused by the COVID-19 pandemic. Therefore, it is important to point out the relationship between the seaworthi-

⁴⁴ Robertson, Lynch and Horowitz, *supra* note 32, p. 10.

⁴⁵ This can be inferred from Section 39(1) of the English Maritime Insurance Act (MIA) 1906 and Article 5.1 of the Institute Cargo Clause.

ness of the vessel and the insurance contract covering the transported goods. Through this relationship, the effect of the COVID-19 pandemic upon the procurement of the insurance cover would be illustrated, because the fact of whether or not the cargo owner can obtain the insurance cover is mainly hinged – in some scenarios – on the performance of the shipowner in terms of the obligation to provide a seaworthy vessel.

1. SEAWORTHINESS OBLIGATION UNDER CONTRACT OF MARINE CARGO INSURANCE

In spite of the fact that the seaworthiness obligation is imposed upon a marine carrier according to the contract of carriage of goods by sea, this obligation could adversely affect the right of the cargo owners to attain insurance coverage for the goods shipped onto a designated vessel.

It is admitted that contracts of marine insurance, *inter alia*, contract of marine cargo insurance, involve express and implied warranties. Warranty of seaworthiness in voyage policies is one of the implied warranties which the contract of marine cargo insurance may include. This warranty entails that the insured, under marine cargo insurance, is committed to ensure that the marine carrier has furnished a seaworthy vessel in order to transport the goods-in subject. In other words, the implied warranty of seaworthiness is deemed to be met:⁴⁶

1. If such warranty has been satisfied at the commencement of the voyage, covered by voyage policy, for the purpose of the specific adventure insured.
2. If the vessel is seaworthy to encounter the ordinary perils of the port, when the insurance policy attaches while the vessel is in the port.
3. If the vessel is seaworthy at the commencement of each phase, provided that the policy relates to a voyage which includes various phases, and each one needs different preparation or equipment.
4. Where the vessel is reasonably fit to encounter the ordinary perils of the seas which the insured adventure might face.

⁴⁶ J. Dunt, *Marine Cargo Insurance*, 1st ed., Informa, 2013, p. 283.

5. If the insured – under a time policy – is not privy to the unseaworthiness of the ship which has been sent to sea in an unseaworthy state.

The warranty of seaworthiness in voyage policies has been expressly provided in Section 39(1) of the English Maritime Insurance Act (MIA) 1906, which declares: “In a voyage policy there is an implied warranty that at the commencement of the voyage the ship will be seaworthy for the purpose of the particular adventure insured”.

It can clearly be identified from this section that the seaworthiness of ship under cargo insurance contract governed by the MIA 1906 must be met merely at the commencement of the voyage. However, the seaworthiness obligation under a contract of marine carriage – governed by both English and US law – has to be met prior to, and at the time of commencement.⁴⁷ It has also been argued that the seaworthiness and fitness of ship – stipulated in this section – does not embrace cargoworthiness, but rather it is only confined to the ship seaworthiness.⁴⁸ In other words, this section stipulates the capability of a vessel to confront the normal maritime adventure along with its suitability to transport the goods to the agreed port of destination. However, cargo seaworthiness has been provided in Section 40(2) of MIA 1906, which says: “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 can be concluded from both sections that the seaworthiness of a ship is deemed to be a strictly implied warranty under English law, which is supposed to be the responsibility of the insured in the context of the voyage policy.⁴⁹ If the insured fringed such a warranty, the insurer will be entitled to avoid the contract from the time the warranty has been infringed.⁵⁰

⁴⁷ See Section III(I) Hague Rules that has been discussed earlier in this paper. See *Meredith Jones & Co v. Angemar Shipping Co Ltd* [1997] 2 Lloyd’s Rep 241. Todd, *supra* note 16, p. 313-14.

⁴⁸ H. Bennett, *The Law of Marine Insurance*, 2nd ed., Oxford University Press Inc, 2006, p. 141-43. See, *A. E Reed & Co v. Page, Son & East Ltd.* [1927] 1K. B. 743.

⁴⁹ Defosseze, *supra* note 5, p. 238.

⁵⁰ N.G. Hudson, T. Madge, K. Sturges, *Marine Insurance Clauses*, 5th ed., Informa, 2012, p. 23.

International usage has permitted the waiver of the strict warranty of seaworthiness imposed upon the insured cargo owner, but insurers have encountered a substantial increase in cargo claims resulted from the unseaworthiness of vessels.⁵¹

As a consequence, Institute Cargo Clauses (ICC 1982) have provided that the insurance coverage does not include losses arising from unseaworthiness and unfitness of the vessel if the assured or its servants are aware of unseaworthiness or unfitness at the time of loading.⁵²

According to Rule 5.2 (ICC 1982): “The Underwriters waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination, unless the Assured or their servants are privy to such unseaworthiness or unfitness”.

Institute Cargo Clauses 2009 (ICC 2009) also mitigates the strictness of the seaworthiness obligation and provides that the insurer can waive the obligation of seaworthiness.⁵³ This has been enshrined in clause 5.3 of ICC 2009, which declares: “The Insurers waive any breach of the implied warranties of seaworthiness of the ship and fitness of the ship to carry the subject-matter insured to destination”.

However, these clauses did not explain its position where the assured is privy to the unseaworthiness of the vessel, *i.e.*, will the marine insurer be exempted from payment of compensation when the assured cargo owner breaches the duty of disclosure in terms of the seaworthiness of the vessel. In particular, that these clauses have only confined the exclusion from the insurance coverage to two cases. This can be inferred from Clause 5.1 of ICC 2009:

In no case will this insurance cover loss, damage, or expense arising from:

5.1.1: Unseaworthiness of vessel or craft or unfitness of vessel or craft for the safe carriage of the subject-matter insured, where the insured are privy to such unseaworthiness or unfitness, at the time the subject-matter insured is loaded therein.⁵⁴

⁵¹ Dunt, *supra* note 46, p. 162.

⁵² *Ibid.*, p. 162.

⁵³ Hudson, Madge, Sturges, *supra* note 50, p. 23.

⁵⁴ However, the insurer cannot avail himself of this exclusion vis-à-vis a bona fide policy holder who has bought the subject-matter or agreed to buy it. This can be derived from Clause 5.3 of ICC 2009.

5.1.2 unfitness of container or conveyance for the safe carriage of the subject-matter insured, where loading therein or thereon is carried out prior to attachment of this insurance or by the Assured or their employees and they are privy to such unfitness at the time of loading.

It can be noted from both exclusions that the ICC 2009 adopts the same approach of that which is adopted under the amended version of MIA 1906, as both have disregarded the principle of “utmost good faith”. This is because both exclusions entail that the insured must be aware of unseaworthiness or unfitness at the time of loading, *i.e.*, the insured has no obligation to disclose the material facts of unseaworthiness observed after the loading of goods. However, before enacting the English Insurance Act 2015, which has omitted the principle of “utmost good faith” considered under the MIA 1906, the obligation of seaworthiness used to be an application of the “utmost good faith” principle.⁵⁵ Application of such principle in this context means that, if new circumstances have arisen after the conclusion of the contract and caused a change in the nature of the peril or the degree of its probability, or if such circumstances are deemed to be one of the factors that can increase the amount of damage, the insured will be obliged to notify the insurer as soon as of becoming aware of such circumstances.⁵⁶ The principle of “utmost good faith” was enshrined in Section 17 of the MIA 1906, which has been omitted by virtue of section 14 of the UK Insurance Act 2015.

According to this section: “A contract of marine insurance is a contract based upon the utmost good faith, and, if the utmost good faith be not observed by either party, the contract may be avoided by the other party”. In other words, the principle of “utmost good faith”, which used to be observed under the MIA 1906 before the enactment of the English Insurance Act 2015, has to be maintained before and during the insurance contract.⁵⁷ Namely, the provisions of the MIA related to

⁵⁵ Sections 17, 18, 19, and 20 of MIA 1906 have been omitted by virtue of section 14 of the UK 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 recognize the principle of utmost good faith.

⁵⁶ Shukri, *supra* note 5, p. 715.

⁵⁷ B. Soyer, A. Tettenborn, “Mapping (utmost) good faith in insurance law – future conditional?”, *Law Quarterly Review*, 2016, No. 132, p. 619; R. Thomas, *The Modern Law of Marine Insurance*, 1st ed., Informa Law, 2016, p. 37.

“Disclosure and Representations” is entirely eliminated, which means that the ‘utmost good faith’ will be considered as a main basis of marine insurance.⁵⁸ Therefore, it was assumed that the insured’s fault in not notifying the insurer of the new circumstances observed while on the voyage, is deemed to be an infringement of the “utmost good faith” principle. Accordingly, a non-disclosure of such material facts by a *bona fide* insured would not deprive the insurer of the right to avoid the contract of marine cargo insurance.⁵⁹ However, application of Section 17 of the MIA 1906, requires that a particular test should be undertaken in order to decide the materiality of these facts. Hence, the House of Lords held that the consideration of facts’ materiality requires a clarification for a twofold fact. First, whether the facts can affect the decision of a prudent insurer in terms of both the amount of premium and the risk acceptance and second, whether or not such a non-disclosure can impact the actual insurer.⁶⁰

US law has also adopted the same approach of the old MIA 1906 that both determined to applying the principle of “utmost good faith” in the context of the contract of marine cargo insurance, the principle which is connected to the obligation of representation and disclosure imposed upon the insured by virtue of the contract of marine cargo insurance.⁶¹

⁵⁸ A.M. Costabel, “The UK Insurance Act 2015: A Restatement of Marine Insurance Law”, *St. Thomas Law Review*, 2015, No 27, p. 145.

⁵⁹ E. Germano, “A Law and Economics Analysis of the Duty of Utmost Good Faith (Uberrimae Fidei) in Marine Insurance Law for Protection and Indemnity Clubs”, *St. Mary’s Law Journal*, 2016, No 47, p. 42-44; M. Ababneh, “Underwriting Cargo Risks under the Institute Cargo Clauses 1982 Against the Backdrop of English and Jordanian Marine Insurance Law and Practice”, 1998, PhD thesis, *University East Anglia*, p. 14. This has been expressly stated in *James J. McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 1998 AMC 285, 296 (1828).

⁶⁰ See section 7(3) of the UK Insurance Act 2015. Costabel, *supra* note 58, p. 142. See *Pan At. Ins. Co. Ltd. & Ors v. Pine Top Ins. Co. Ltd.*, [1994] C.L.C. 868 (H.L.) 899 (appeal taken from Eng.); *Assicurazioni Generali SpA v. Arab Insurance Group* [2002] EWCA (Civ) 1642, [62], [2003] 1 W.L.R 577 (Eng.).

⁶¹ A.K. Goldstein, G.B. Howard, “The Marine insurance doctrine of *uberimae fidei* or utmost good faith is it archaic or entrenched federal precedent? Brief”, *Spring*, 2017, Vol. 46, No 3, p. 54, available at: https://link.gale.com/apps/doc/A503308869/AONE?u=anglia_itw&sid=AONE&xid=b0ceed65 [last accessed 29.8.2021]; A.M. Costabel, “Good Faith in Marine Insurance: A Message on the State of the Dis-Union”, *Journal of Maritime Law & Commerce*, 2017, Vol. 48, No. 1, p. 4. See *Catlin at Lloyd’s v. San Juan Towing & Marine Servs.*, 778 F.3d 69 (1st Cir. 2015); *AIG Centennial Ins. Co. v. O’Neill*, 782 F.3d

The interrelationship between obligation of the marine carrier to provide a seaworthy ship and the contract of marine cargo insurance, under both the old MIA 1906 and US law, can obviously be realised when the ordinary prudent insured breaches the obligation of disclosure in terms of material circumstances or facts they know or could have known at the time of concluding the contract of marine cargo insurance.⁶² To recognize them in this sense, the insurer must prove that these material facts have influenced its decision to accept or reject the insurance coverage, or even have influenced its decision in stipulating an additional premium if they accepted such circumstances.⁶³ Precisely, materiality of facts can be determined on the basis of one of the two approaches:⁶⁴ The first approach that has been adopted by the US court, which decides that such materiality will be grounded on the answer of whether or not such facts have a “decisive influence” on the decision of an abstract prudent insurer to take the risk at all, or at that premium,⁶⁵ while the second approach lies in the “mere influence”, which has been adopted by the English courts.⁶⁶ This approach provides that materiality of facts will be decided on the question of whether or not material facts have influenced the abstract prudent insurer regarding the operation of decision-making.⁶⁷

1296 (11th Cir. 2015); *N.Y. Marine & Gen. Ins. Co. v. Cont'l Cement Co., LLC*, 761 F.3d 830, 839 (8th Cir. 2014). *Marine Ins. Co. v. Cron*, 2014 WL 4982418, at *4 (S.D. Tex. Oct. 6, 2014); *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). The same approach has been previously adopted in previous authorities such as *James J. McLanahan v. Universal Ins. Co.*, 26 U.S. 170, 1998 AMC 285; 296 (1828) *Tremaine v. Phoenix Assurance Co.*, 45 P.2d 210, 1935 AMC 753 (Cal. Ct. App. 1935).

⁶² *Citizens Ins. Co. v. Whitley*, 67 S.W.2d 488 (Ky. 1934).

⁶³ *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 section 14 of the UK Insurance Act 2015.

⁶⁴ T.J. Schoenbaum, “The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law”, *Journal of Maritime Law & Commerce*, 1998, Vol. 29, No. 1, p. 19.

⁶⁵ *Marine Service, Inc. v. Rodger Fraser*, 211 F. 3d 1359, 2000 AMC 1817 (11th Cir. 2000).

⁶⁶ *Cas. and General Ins. Ltd. and Others v. Chase Manhattan Bank and Others*, [2003] UKHL 6.

⁶⁷ Costabel, *supra* note 61, p. 7.

Therefore, one may infer from Section 39(1) of MIA 1906 that the breach of the implied warranty of seaworthiness under voyage policy, which requires the insured cargo owner to disclose the material facts relevant to seaworthiness, will exempt the insurer from the liability of compensating the loss of or damage to transported goods. However, the same Section provides that the insured cargo owner is obliged to satisfy this warranty merely at the time of commencement of the voyage, *i.e.*, the insured will not be obliged to disclose the material facts of seaworthiness after the commencement of the voyage. Therefore, this Section proves that the UK law has omitted the principle of utmost good faith, as it does not oblige the insured to maintain such a warranty after the commencement of the voyage.

2. SEAWORTHINESS OBLIGATION UNDER THE CONTRACT OF MARINE INSURANCE INFLUENCED BY COVID-19

The seaworthiness of a vessel can be defined as a promissory warranty, by which the insured affirm that they have furnished a seaworthy vessel for the purpose of transporting particular goods.⁶⁸ It can be argued that the seaworthiness of a ship could be considered a proximate reason for the loss of or damage to the shipped goods.⁶⁹ Unseaworthiness of a vessel might be invoked by the insurer of the goods in order to exempt itself from payment of compensation to the injured party (insured). Although the marine carrier is the party who will undertake the duty of providing a seaworthy vessel, the insured could further be responsible *vis-à-vis* the insurer if they know or could have known about an unseaworthiness of the ship, which will deprive the cargo owner of benefiting from the insurance cover.⁷⁰ According to Section 39(5) of MIA 1906, the privity of the insured is the basis on which the insurer will determine whether or not the insured can be entitled to the insurance cover. The

⁶⁸ This definition is inferred from Section 33 of MIA 1906.

⁶⁹ S.C. Derrington, "Due Diligence, Causation and Article 4(2) of the Hague-Visby Rules", *International Trade & Business Law Annual*, 1997 No. 3, p. 175-176.

⁷⁰ This can be inferred from the principle of sections 39(1) and 40 of MIA 1906; 5.1.1 Institute Cargo Clauses. See also, *Tremaine v. Phoenix Assurance Co.*, 45 P.2d 210, 1935 AMC 753 (Cal. Ct. App. 1935).

meaning of privity of the insured may lie in the insured's personal, actual and positive knowledge of the material facts, or the case in which the insured decides to disregard the obvious facts, *i.e.*, "turning a blind eye", but the Gross Negligence of the insured will not be considered an aspect of the privity.⁷¹

It should also be borne in mind that Section 39(5) of MIA 1906 confines the obligation of privity to *alter ego* of the insured company or to the individual insured itself, not to its servants.⁷² Similarly Section 39(5) of MIA 1906, Clause 5.1.1 of ICC 2009 requires that the breach of the privity obligation – in the context of unseaworthiness – has to be committed by the insured itself, whereas Clause 5.1.2 of ICC 2009 has considered the privity of the insured, as well as the privity of its servants in order to exclude insurance cover as to the unfitness of the container or conveyance.⁷³ Contrary to Clause 5.1.1 of ICC 2009, Clause 5.1 of ICC 1982 has considered the obligation of privity of the insured as well as the privity of its servants in order to exclude the insurance cover because of the unseaworthiness and unfitness of vessel. The distinction between unseaworthiness and unfitness under ICC 2009 is imputable to the fact that the classification of a vessel is considered to be public knowledge which can be recognized by the senior management at the insured, while the condition of a container or vehicle can easily be noted by junior management at the relevant entity, but the expression of the insured employee does not include a chartering agent or freight-forwarder who are not under an employment contract with the insured.⁷⁴

However, the insured might use the invocation of *force majeure* so as to discharge themselves from such liability which in turn, will render them entitled to the insurance cover. Two questions may arise in this regard. First, presuming that the COVID-19 has hindered the contracting party from satisfying the seaworthiness obligation, imposed by virtue of the insurance contract, can the insured invoke such a pandemic to escape its liability for not notifying the insurer about material facts of the

⁷¹ *Compania Maritima San Basilio SA v. Oceanus Mutual Underwriting Association (Bermuda) Limited (The Eurysthenes)* [1976] 2 Lloyds Rep. 171; *Manifest Shipping & Co. Limited v. Uni-Polaris Shipping Co. Limited (The Star Sea)* [2001] Lloyds Rep. 389 (HL).

⁷² Hudson, Madge, Sturges, *supra* note 50, p. 24.

⁷³ *Ibid.*, p. 23–24.

⁷⁴ Dunt, *supra* note 46, p. 164.

seaworthiness arising at the commencement or during the voyage? Second, if the insurer has been notified by the insured about the circumstances of seaworthiness, can the insurer refuse to compensate the insured, avoid the insurance contract, or continue with an extra premium?

The insured cargo owner will be indemnified for the loss of or damage to cargo if they prove that they were not privy to the new circumstances of seaworthiness, *i.e.*, they were not aware of the non-renewal of the classification certificate. However, the marine carrier can negate its liability as to the non-renewal of this certificate if they prove that the classification certificate has not been renewed owing to the lockdown imposed under circumstances of COVID-19.

One of the substantial issues that the insured should consider – with a view to determining the degree of risk – is the class of the vessel carrying the insured's cargo, which must be determined according to the rules of the international classification of ships. Therefore, the failure of the insured cargo owner to comply with requirement of classification of ship, at the time of commencement of the voyage, will exempt the insurer from the obligations imposed upon him by virtue of the contract of marine cargo insurance, as the insured did not notify the insurer of the expiry of the certificate of classification at the time the voyage had started. This is because the infringement of classification requirements can be considered as an aspect of the unseaworthiness of the vessel. However, if classification certificate expired while the vessel was navigating, and the insured did not notify the insurer, the latter cannot avoid the contract, rather they will be obliged to compensate the insured cargo owner under the amended MIA 1906, which has omitted the principle of utmost good faith. The omission of this principle was made through abolishing sections 18, 19, and 20 of the old MIA 1906, all of which were regulating the insured's obligation to disclose. However, the non-disclosure under old MIA 1906, used to entitle the insurer to avoid the contract, as the disclosure obligation was addressed under provisions of sections 18, 19 and 20 of the old MIA 1906.⁷⁵

Contrary to the amended MIA 1906, the insurer can avoid the contract of marine insurance under US law. This is because the infringement of the obligation of disclosure is considered to be a breach of the

⁷⁵ J. Dunt, *International Cargo Insurance*, 1st ed., Informa, 2012, p. 52–54.

duty of “utmost good faith” imposed upon the insured under the US law.⁷⁶ In addition, the consequences of contract avoidance under US law are not similar to those which are prescribed under English law. According to the US courts, a contract of marine insurance will be considered void or voidable if the insured’s breach of its obligation would have led to the acceptance of the contract from the insurer with new terms,⁷⁷ whereas the MIA 1906 provides that the insurer will remain responsible for indemnification, either under new terms that they would have accepted, or with an additional percentage of premium to be added.⁷⁸

It can be concluded that the insurer, under both the US law and the old MIA 1906, will be discharged from the obligation of compensation vis-à-vis the insured cargo owners if the latter did not notify the insurer about the new and material circumstances and facts related to the classification of the vessel transporting the goods.⁷⁹ Therefore, the expiration of a classification certificate is a material fact – related to seaworthiness of vessel – the insured must disclose it to the insurer. The duty of disclosure, imposed upon the insured under US law and the old MIA 1906, entails that the disclosure and privity of the insured will not be considered only at the time of concluding the contract, but rather it should continue during the stage of transportation, *i.e.*, the insured will lose the insurance cover if they do not notify the insurer about the expiration of the classification certificate, not only at the time of concluding the contract rather, but also during the operation of carriage.

According to the Institute Clauses for classification of ships 2001, a materiality of classification of vessel can be imputed to the fact that the rate of premium – imposed by virtue of the insurance of goods – will be determined on the assumption that the goods must be transported aboard a vessel classified by a member of the International Association of Classification Society (IACS), which is supposed to be accepted by the

⁷⁶ See *Catlin at Lloyd’s v. San Juan Towing & Marine Servs.*, 778 F.3d 69 (1st Cir. 2015); *AIG Centennial Ins. Co. v. O’Neill*, 782 F.3d 1296 (11th Cir. 2015); *N.Y. Marine & Gen. Ins. Co. v. Cont’l Cement Co., LLC*, 761 F.3d 830, 839 (8th Cir. 2014). *Tremaine v. Phoenix Assurance Co.*, 45 P.2d 210, 1935 AMC 753 (Cal. Ct. App. 1935).

⁷⁷ J.D. Ingram, “The Duty of An Applicant for Insurance to Voluntarily Disclose Facts”, *Journal of Maritime Law & Commerce*, 2009, Vol. 40, No. 1, p. 129.

⁷⁸ Costabel, *supra* note 58, p. 32.

⁷⁹ This conclusion is inferred from Sections 18-20 of the MIA 1906 which have been mentioned earlier in this paper.

insurer or any local classification society within the same country, in which the shipowner performs its commercial activities in relation to the ships carrying the state flag confined to cabotage activities.⁸⁰ This has been addressed in a judgment of the Milan Court of Appeal, which held:

Notwithstanding the different wording of the clause in the hull and machinery cover and in the Cargo Institute Clauses, in both cases the insured is responsible for ensuring that the vessel is classed with a classification society agreed by the underwriters and that its class within such society is maintained. However, the insured is also responsible for ensuring compliance with recommendations and class restrictions imposed by the classification society before the insured risk begins to run.⁸¹

Clause 5 of the Institute Classification Clause 2001 also obliges the insured to give prompt notice to the insurer regarding classification of vessel if the contract provided so, otherwise no cover will be provided to the insured cargo owner.⁸² The obligation to notify the insurer about the classification of the vessel will be stipulated in the insurance contract in order to not provide the insurance cover to the insured who has failed to give the prompt notice.

As a result, if the goods transported aboard a vessel were not classified by a recognized classification society, the insured should immediately notify the insurer who will determine a reasonable commercial market rate and modifications to the terms of the insurance contract.⁸³ This solution is set out in the Institute Classification Clause 2001 and named "Held covered".⁸⁴ According to the US law and the old MIA 1906,

⁸⁰ B.B. Shukri, *Marine Insurance*, 1st ed., Dar Al-Thaqafa, 2014, p. 47.

⁸¹ See M. Dardani, M. Manzone, L. Dardani, "First interpretation of classification clause in cargo insurance policy", available at: [https://www.lexology.com/commentary/shipping-transport/italy/genoa-chambers/first-interpretation-of-classification-clause-in-cargo-insurance-policy#:~:text=According%20to%20the%20Institute%20Classification,of%20Classification%20Societies%20\(IACS\)](https://www.lexology.com/commentary/shipping-transport/italy/genoa-chambers/first-interpretation-of-classification-clause-in-cargo-insurance-policy#:~:text=According%20to%20the%20Institute%20Classification,of%20Classification%20Societies%20(IACS)) [last accessed 16.4.2022].

⁸² Clause 5 provides: 'Where this insurance requires the assured to give prompt notice to the Underwriters, the right to cover is dependent upon compliance with that obligation'.

⁸³ Shukri, *supra* note 5 at, p. 248.

⁸⁴ *Liberian Insurance Agency Inc. v. Mosse* [1977] 2 Lloyds Rep. 560; *Thames & Mersey Marine Insurance Co Ltd v. H. T. Van Laun & Co* [1917] 2 KB 38 at p. 48. See Dunt, *supra* note 75, p. 56.

the insurer would not be responsible for any loss or damage prior to the conclusion of the amended agreement entered into with the insured, which must be established on the basis of the new material facts the insured had disclosed. However, the insurer under the amended MIA 1906 will be responsible for compensating the insured, even though the classification of vessel has not been maintained during the voyage, because the amended MIA 1906 disregards the obligation of disclosure as a consequence of omitting the principle of utmost good faith. Namely, the insured will not be obliged – under the amended MIA 1906 – to notify the insurer if the classification of the vessel has expired during the voyage. However, such approach contradicts the “Held covered” principle – adopted in Institute Classification Clause 2001 – as well as disagrees with the approach of both US law and the old MIA 1906 in that each determines that the insured will be responsible – according to the principle of “utmost good faith” – for notifying the insurer regarding the new circumstances related to the seaworthiness of vessel, including, inter alia, the expiry of the classification certificate.⁸⁵ The amended MIA 1906, however, is consistent with the ICC 2009 and ICC 1982 both of which stipulate that the insured must notify the insurer about unseaworthiness and fitness of vessel at the time of loading the goods on board the vessel.⁸⁶

However, the question may arise here, whether the insurer would be entitled to avoid the insurance contract, or accept the insurance coverage with some modifications and extra conditions, in particular when the non-renewal of the classification of vessel is attributable to the lockdown of the classification societies due to the restrictions imposed in order to confront the outbreak of COVID-19. In order to answer this question, it is important to distinguish between two potential scenarios. First, when the insurance contract was concluded before the declaration by the WHO of classifying COVID-19 as an epidemic, in which case the insured (cargo owner) would be able to invoke COVID-19 as a *force majeure* in order to escape liability for breach of seaworthiness because of the expiration of the classification certificate, which is deemed to be an implied obligation under the contract of marine insurance. Invoking

⁸⁵ See *Pan Atlantic Insurance Co Ltd and Another v. Pine Top Insurance Co Ltd*, [1994] 2 Lloyd's Rep 427.

⁸⁶ See Clause 5 of ICC 2009 and ICC 1982.

force majeure under this scenario is persuasive even though COVID-19 has not been included into the *force majeure* clause in the contract of marine insurance. The solid ground on which the invocation of COVID-19 stands – under this scenario – can be found in the pretext that such a pandemic could not have been globally recognized before or at the time of the conclusion of the contract of marine insurance. However, the second scenario is noted when a contract of marine insurance is concluded after the declaration of the WHO, in which COVID-19 has been declared an epidemic, in which case the insured would not be able to invoke COVID-19 as a *force majeure*, unless this event has already been indicated in *force majeure* clauses included in the contract of marine insurance.⁸⁷

Assuming that the requirements of *force majeure* are met under the US Law or the old MIA 1906, one can conclude that the aggrieved party (cargo owner) will be compensated by the insurer under the two scenarios, provided that the insured has notified the insurer about the expiration of the classification of vessel.⁸⁸ If the insured proves that the impediment which has prevented the renewal of the certificate of classification is imputed to the COVID-19, the insurer will be obliged to indemnify the injured insured, because the insurer would be entitled neither to the avoidance of the contract of marine insurance nor to the right of fixing of premium.⁸⁹ However, this will not deprive the insurer of having recourse to the shipowner on the basis of the tortious liability, if the insurer proves that the shipowner did not take the necessary procedures with the classification society in order for the classification certificate to be renewed under circumstances of COVID-19.⁹⁰ Howev-

⁸⁷ Ch. James-Olsen et al, *supra* note 24.

⁸⁸ This can be inferred from the provisions of sections 17-20 of the old MIA 1906, which has been omitted by virtue of section 14 of the UK Insurance Act 2015, and also from judgment of the US courts.

⁸⁹ This can be derived from the judgment in *Bunge SA v. Nidera BV* [2013] EWCA Civ 1628.

⁹⁰ The large classification societies- as agents for national maritime authorities – encouraged their clients to accept the COVID-19 as extraordinary circumstances so as to defer surveys, not more than three months, in case of impossibility of performing ordinary surveys in accordance with class rules and designated conventions and also, these societies recommended that the clients may utilise remote survey services, if it is applicable. Concerning statutory certificates issued through national maritime authorities the

er, a non-renewal of certificate of classification during the voyage cannot be invoked by the shipper nor by the consignee under the Hague/Hague-Visby Rules, US law, and MIA 1906. This is because the carrier's obligation of seaworthiness does not extend to the period during which the goods are transported, where English law and US law have both imposed this obligation at the time of the commencement of the voyage,⁹¹ whereas the Hague/Hague-Visby Rules stipulated that such obligation has to be met before or at the commencement of the voyage.⁹² As opposed to the Hague/Hague-Visby Rules, the shipper or the consignee under both the Hamburg Rules and Rotterdam Rules can rely on the fault of the marine carrier (shipowner) for non-renewal of a certificate of classification during the voyage, because both rules expand a seaworthiness obligation to cover the period during which transportation of goods is going on.⁹³ It is worth noting that, a non-renewal of classification certificate might be imputed to the fault or negligence of the classification society, but the liability of the society classification in front of the shipowners and third parties has been regulated neither under English law nor US law, nor under international instruments.⁹⁴ Hence, one can argue that if a non-issuing of a new certificate is attributable to the fault or negligence of the relevant classification society – under COVID-19 pandemic – the marine carrier (shipowner) would not be able to sue them under the aforementioned conditions.

If the failure to renew the certificate of classification is imputable to the fault or negligence of the classification society, the latter might be responsible under these jurisdictions. Hence, the liability of the classification society could be substantiated on the contractual relationship with the shipowner (marine carrier) or on the tortious liability before of the insured (cargo owner) or the insurer.

shipowner should try to solve postponement of surveys in accordance with rules of the relevant flag state. Ch. James-Olsen et al, *supra* note 24.

⁹¹ Section 39(1) of the MIA 1906. For the US perspective see *McAllister Lighterage Line, Inc. v. Ins. Co. of N. Am.*, 244 F.2d 867, 1957 AMC 1774; R. K. Foley, "A Survey of the Maritime Doctrine of Seaworthiness", 1976 *OR law Review*, No. 46, p. 371.

⁹² See Article III(I) of the Hague-Visby Rules.

⁹³ See Article 5(1) of the Hamburg Rules and Article 17 of Rotterdam Rules which both have been discussed earlier in this paper.

⁹⁴ Bruyne, *supra* note 70, p. 241.

Although English law, US law, and relevant international documents did not address the liability of the classification society vis-à-vis shipowner and third parties, the case law under common law (UK and US) has discussed the liability of society classification in front of third parties. This liability has been addressed in the case law on the basis of a duty of care.⁹⁵ Therefore, it was concluded that the classification society will be responsible before of a third party if the following conditions are met:⁹⁶

1. If it is proved that the society can reasonably predict that the third party would rely on such certificate.
2. If the nature of the relationship between a society and third party can justify a duty of care.
3. Application of a duty of care must be exercised in a reasonable, just and fair manner.

Hence, it is logical to conclude that the cargo owner – as a third party – may invoke the liability of classification society arising from non-issuing of certificate of classification. This is to escape liability of non-issuing of this certificate that might be invoked by the insurers to exempt themselves from indemnifying the cargo owner (insured) for the goods damaged or lost.

CONCLUSIONS

It can be concluded from this discussion that the seaworthiness of a ship is a substantial obligation which has to be enforced by the marine carrier according to the contract of carriage of goods by sea. This paper has shown that the importance of seaworthiness is also observed under the contract of marine cargo insurance, which can be clearly noted through the duty of disclosure imposed upon the insured, *i.e.*, disclosing of material facts related to seaworthiness of vessel. The authors found that the insured would be in an infringement of the warranty seaworthiness

⁹⁵ *Ibid.*, p. 223. See *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1994] 1 W.L.R. 1071; *Mariola Marine Corp. v. Lloyd's Register of Shipping* (1990) 1 Lloyd's Rep. 547.

⁹⁶ C.E. Feehan, "Liability of Classification Societies from the British Perspective: The Nicholas H", 1998, *Tulane Maritime Law Journal*, 1998, No. 22, p. 163.

had not they notified the insurer about the expiration of the classification certificate during the carriage operation.

It has also been concluded that the insurers might avail themselves of the invocation of nonrenewal of certificate under the US law, as such invocation will entitled them to escape the liability for compensation *vis-à-vis* the insured, if the latter was privy or could have known about the expiration of the certificate. This is because the obligation to disclose material facts is considered to be a continuous obligation under US law, which must be maintained during the stage of transporting the goods. This proposition is grounded on the principle of 'utmost good faith' adopted by the US courts in the context of the contract of marine insurance.

Contrary to the US law, the insurer under English law will not be exempted from the liability for compensation, even if the insured has not notified them regarding the expiration of the classification certificate that they were aware of. This is because the principle of "utmost good faith" is no longer applied under MIA 1906.⁹⁷ The authors have also concluded that the insurer may have recourse to the marine carrier in order to recover the compensation paid to the insured in accordance with US law, provided that the failure to renew the certificate of classification was proved to be a proximate reason of the compensated damage.⁹⁸ However, the insured under both English and US law cannot resort to the marine carrier to recover the damage resulted from non-renewal of the certificate of classification, because the obligation of seaworthiness has merely been imposed at the time of the commencement of voyage under both laws.

However, the paper has reached the conclusion that a marine carrier might be responsible under some other jurisdictions for a non-renewal of classification of certificate, which has been considered the main reason for the damage that the goods sustained. This liability might be observed under the law of the contracting states to the Hamburg Rules, which have extended the liability of seaworthiness to include the period during which the goods are placed under the custody of the marine carrier.⁹⁹

⁹⁷ The principle of 'utmost good faith' has been omitted and the obligation of disclosure has been amended by virtue of section 14 of the UK Insurance Act 2015.

⁹⁸ This can be impliedly inferred from *Bunge SA v. Nidera BV* [2013] EWCA Civ 1628.

⁹⁹ The Rotterdam Rules have expressly expanded the seaworthiness obligation under article 17 discussed earlier in this paper.

If the failure to renew the certificate of classification is attributed to the fault or negligence of the classification society, the latter might be responsible under these jurisdictions and hence, the liability of the classification society could be substantiated on the contractual relationship with the shipowner (marine carrier) or on the tortious liability before of the insured (cargo owner) or the insurer. However, the authors found that the liability of classification societies has neither been regulated under English law, nor under international instruments. Nonetheless, this liability has been addressed several times under the judgments of the English courts.¹⁰⁰ Presuming that the failure of the society to renew the classification certificate is imputed to COVID-19, the society can then invoke the outbreak of this virus for the purpose of refuting its liability, but this is not effective unless the requirements of *force majeure* have been met and a direct relation between the nonrenewal and COVID-19 has been proved as well.

The authors have also inferred that the insured under contract of marine cargo insurance is more protected under the English law. This is because the nonrenewal of a certificate of classification will not deprive the insured from compensation for the goods which sustained damage or were lost. Therefore, the insured has no obligation to invoke COVID-19 so as to rebut the liability for unseaworthiness, as the duty of disclosure under the amended MIA 1906 has been imposed upon the insured merely at the time of the conclusion of the marine insurance contract.¹⁰¹ However, the US law approach is in favour of the insurer, as the insured will be deprived of such compensation if they have not notified the insurer about the expiration of the certificate of classification while the goods are in transit. This is because the seaworthiness of the vessel is deemed to be a continuous obligation by virtue of the principle of “utmost good faith” which is applicable by the US courts.

¹⁰⁰ See *Marc Rich & Co. AG v. Bishop Rock Marine Co. Limited*, [1994] 1 W.L.R. 1071; *Mariola Marine Corp. v. Lloyd's Register of Shipping* (1990) 1 Lloyd's Rep. 547.

¹⁰¹ This assumption derived from a twofold reason: first, the principle of ‘utmost good faith’ is no more adopted under MIA and second, the rules of disclosure obligation in sections 18-20 of the MIA 1906, which have been substituted with section 2 of the Consumer Insurance (Disclosure and Representations) Act 2012.