ABSU Journal of Arts, Management, Education, Law and Social Sciences (JAMELSS); Vol 2 (2012); 151-162

An Overview of the Defences Available to Insurer(S) in Marine Insurance Contract

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Abstract
The danger in putting a vessel on the sea is enormous and unpredictable. The unpredictability of such hazard necessitated a comprehensive insurance policy especially in the Marine Insurance Contract. If however the unexpected occurs, the law recognizes some defenses that could mitigate the insurer(s) liabilities. Unfortunately, despite the unpredictability of the sea hazards, the 'act of God' has not been recognized as a legal defence. It is therefore the contention of this paper that considering the fact that most of the hazard on the sea is unforeseeable, the non recognition of the 'act of act of God' as a defence is a minus on the part of the law. It is in the light of this that this paper recommends among others for the inclusion and recognition of 'the act of God' as a good defence for an insurer in the Marine Insurance Contract.

Keywords: Marne insurance, contract, Insurance and Defence

Introduction

Ship or Vessel, in recent times, has occupied a major means of transportation especially when heavy goods or cargo is to be transported through the sea or ocean from one country to another. Before the cargo or goods is transported, the Assured and the Insurer are expected to enter into contract of Marine Insurance. A Contract of Marine Insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incidental to marine adventure[1].

The purpose of entering into marine insurance contract is to indemnify the Assured when any of the uncertainty insured against happened. This uncertainty is usually as a result of marine perils, and the most prominent among the perils are peril of the Seas, Fire and Barratry.

Whenever any of these occurred, the assured is expected to prove, in the case of peril of the sea, that the vessel is seaworthy when it is sent to the sea; the loss was proximate caused by one of the peril insured against[2]. On the other hand, in case of peril of fire, the assured is obliged to prove that the loss was caused by fire, whether started accidentally or deliberately, to establish *prima facie* case and throw the burden of proof upon the insurer to prove that there was connivance on the part of the assured, by which the defence of willful misconduct by the assured

[1] See section 3, Marine Insurance Act, Cap M2 Laws of the Federation of Nigeria, 2004. See also Section 1, Marine Insurance Act 1906 (UK), see

[2] As was held in the case of *Skandia Insurance co. ltd v Skoljarev* (1979) 142 CLR.375, see also *Narumal & Sons v. Niger Benue Transport* (2006) 2 NPMLR 82

could be driven home.[3] While in Peril of Barratry[4] the assured is expected to prove that there was complicity on the part of ship-owner, and that the assured equally have the burden to prove that there was no complicity on his part.[5]

When assured has discharged the burden of proof placed on him by law, and a *prima-facie* case has been made out, the defendant will then be called upon to refute the claim. He could do this either by simple denying or traversing the plaintiff's allegation by calling evidence to show that the loss was not caused by a fortuitous accident- suggesting, perhaps, either sea un-worthless or wear and tear as the cause of loss; or seeking to present and prove an affirmative allegation that the loss was caused by the willful misconduct of the assured.

Due to the gravity and the impact of the allegation on the defence, such a serious allegation has, of course to be specially and properly pleaded. The essence of this is not to allow the defendant at some later stage, spring a surprise which the plaintiff was not previously made aware of. In the light of this, the paper examines some specific defences available to the insurers in the marine contract.

Definition of Operational Key Terms

In consideration of the concept at hand one must note that there are some key words which meaning is to be ascertained from the beginning. The words are: 'Defences' 'Insurer', 'Marine Insurance'

Defences in this paper are the legal protection in term of defence available to an insurer under the marine contract.

Insurer in this paper is the person who agrees to pay compensation in case of injury in the marine contract. While the assured is the person to whom payment will be made in case of injury in the cause of marine insurance contract.

Marine Insurance is the insurance taking to protect the interest of the assured in case of loss and or damages to the chattel of marine in the marine insurance contract.

Defences Available to Insurers

Proof that the Loss Falls within an Exception or exclzude peril(s)

The general rule is that when the assured has proved a *prima-facie* case of loss within the policy, the insurer are entitled to show that the loss falls within an exception.[6] From the provision of the Act, the following losses were excluded:

i) Willful Misconduct of the Assured

[3] *Continental Illinois national bank and trust Co of Chicago and Xenofon maritime S.A v Alliance co. Ltd, Captain Panagaos* DP (1962) ALL ER 525

[4] *In P. Samuel*

[5] *Deermay Shipping Co SA and Brandt's v Chester, Micheal* (1979) 1 Llyod's rep 55 (1979) 2 Llyod's rep 1, CA

[6] *Gorman v. Hand-in-hand Insurance co*. *Supra* at 230

This defence is derived from the general principle of law that no man shall be allow to derive benefit form his own wrong, which is now codified in the latin maxim *ex turpi causa non ortur action.*[7] Thus, where the assured caused a loss by his illegal act, the rule operates to make his claim unenforceable because, on public ground, the court will not give their assistance to someone who has behaved in a criminal or anti-social way[8].

For insurers to succeed, they must prove that the ship or vessel was casted away with the connivance of the assured. For example, the loss of ship's papers may indicate misconduct[9]. In *Johnson v. Marshau son & Co Ltd*[10]per Loreburn defined the term willful to mean misconduct that was deliberate not merely a thoughtless act on the spur of moment. The defence of willful misconduct by the assured is the natural and most commonly used defence available to an insurer who wishes to reject a claim for a loss by perils of the seas, fire and barratry. Once the plaintiff has established a *prima-facie* case, it then falls upon the insurer to dispute the cause of loss.

To debunk the plaintiff's claim, the defendant has merely to cast sufficient doubts in the mind of the judge as to the cause of loss, and he does not even have to go far as to prove affirmative defence. But, should he be in a position to demonstrate scuttling[11] with the connivance of the assured is an equally probable cause of loss, the plaintiff would fail in his action. The court is not obliged, should both accounts of the loss be equally probable, to make a choice.

It would make no difference to the issue of proof whether the defence be one of simple denial or the allegation of willful misconduct, for at the end of the hearing, the court has to be satisfied that the plaintiff has proof his case, and on the balance of probabilities, that the loss was accidental. All that the defendant has to do is to displace the prima-facie case put forward by the plaintiff, by injecting doubts in the minds of the judge as the real cause of the loss. In *Compania Mariartu v. Royal Exchange Assurance Corporation, Arnus*[12], the Arnus sank in calm weather on a voyage from Spain to Rotterdam. The court of Appeal rules that the vessel had been deliberately scuttled with the connivance of the responsible manager. But in passing judgment, Scutton L.J also considered the position of the plaintiff in failing to prove that the loss was caused by a peril of the sea.

Also in *Pateras and others v.Royal exchange Asurance, Sappho*[13], a vessel, Sappho was on a voyage from Algeria to Stettin hen she stuck a rock off the coast of Portugal and was lost. The plaintiffs claim on their policy on insurance, but the underwriters denied liability, alleging that the court ruled that Sappho had been scuttled with the connivance of her owners and that the

[7] Which means no right of action is derivable form the wrongful act for an immoral of illegal or iniquitous contract, an act does not arise. See Bryan A.G *Black's Law Dictionary with Pronunciation* (6th Edition, Paul Minn Publishers, 1990), P 589

[8] See M. Parkington, *Insurance Law Relating to all Risk other than Marine*, (7th edition, Sweet and Maxwell, 1981), p.10. Note that, the *ex turpi causa* does not concern with the lawfulness of the contract itself. See *Glaser v. Cowie* (1813) 1 M& S 52; *Johnson v Driefontein Consolidatein* Consolidated (19020 AC 484, 506; *Beresford v Royal Insurance* (1938) AC 586

[9] As was held in *Societe Advances Commerciales (SA Egyptiienne) v. Marine Ins Co (The Palitana)* (1924) 20 LIL. Rep. 74, pp:140 and 161

[10] (1906)AC 411

[11] This is a deliberately sinking of a ship by letting water into or making holes in its side or bottom as was held in *Palamisto General Enterprises SA v. Ocean Mainne Insurance Co. Ltd* (1972) O.B 625 at 647

[12] (1923)1KB 650 CA

[13] (1986)2 Lloyd's rep 470

insurer is not liable. In a defence of this nature, the defendant must be able to show and proof the following elements:

a) That the assured intended to achieve a loss or damage

b) That the assured was recklessly indifferently whether such loss or damage was caused; and

c) That the assured immediate purpose was to claim on his insurers or that he subsequently advanced such claim[14]

In proving the above elements, the insurers are required to furnish the particular that the assured wants to ripe from hi own wrong as the insurers would not be allowed to surprise the assured.

In *Palamisto General Enterprises, S.A v. Ocean Marine Insurance*[15] where the plaintiff brought an action in respect of a claim for loss of Dias by peril of the sea. The defendant raised an allegation that the loss was caused by the willful misconduct of the plaintiff in procuring or conniving at the casting of vessel. The court held that the defendant would not be allowed to raise and surprise the plaintiff with an allegation of fraud and criminal misconduct, thus the defendant is required to furnish the particulars of willful misconduct o the plaintiff.

Example of actions of assured that will amount to willful misconduct was stated in the case of *Papademitriou v. Henderson*[16], where the court sated thus:

> Where the owner deliberately sends the vessel to run a blockade or fails to avoid a hostile vessel of the location of which he has knowledge, an inference may be drawn that he is endeavouring, not to carry out the voyage, but to procure the capture of the vessel, which would amount to willful misconduct. However, failure of the assured to interrupt a voyage so as to avoid the risk of capture does not constitute willful misconduct on the part of the owner unless the vessel was obviously running in to danger.

ii) Delay

The general principle of rule of law of contract is that parties are free to introduce any clause into the agreement governing their transaction, provided same is not illegal. Be that as it may, parties are at liberty to either consider delay as a defence or any of the insured perils or not.

If delay is considered as a defence against any of the insured perils, it means the parties have aligned with the provisions of the Marine Insurance Act. Thus, in considering delay as a defence, Marine Insurance Act provides:

> Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against[17].
> The Institute Cargo Clause (All Risks) provide:

[14] See *The Popi M* (1985) 2Lloyd's rep 1H.L and *Jackson v. Marshau sons & co* (1906)*supra*
[15] (1972)2 Lloyd's rep 60, see also *Trinder Aderson & co v. Thames and Mersey Insurance co*. (1898) 2QB 114 CA
[16] (1939)64 LIL Rep. 345
[17] See marine Insurance act, section 56(2)(b)(Nigeria)and section 55(2)(b)UK

> This insurance is against all risks of loss of or damage to the subject matter insured but shall in no case be deemed to extend to cover loss damage or express proximately caused by delay….[18]
>
> The Institute Time Clause (Freight) also provides:
>
> Warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise[19]

In *Bensuade & Co. v Thomas and Mersey Marine Insurance Co*[20], a Freight policy in respect of a vessel under a Charter party was executed. The policy contained a clause stating *free from any claim consequent on loss of time, whether arising from a peril of the sea or otherwise*. The vessel broke down while being on sea for a day. On putting back to the port for repair, it was discovered that the time that they would spent would destroy the adventure. Consequently, the charter party was cancelled by the charters. The owners used on the policy for a total loss of freight. The court held that the claim was based on the loss of time, and that the loss of time was occasioned by peril of the sea therefore, insurers were not liable.

Also in *Turnbull, Martin & Co. v Hull Underwriters Association*[21] the policy was upon Freight of frozen meat, chartered or as if chartered. The refrigerating apparatus of the vessel was destroyed by fire before arrival at the port of loading, thereby rendering it impossible to carry the frozen meat. The court held that the claim made under the policy was consequent on loss of time within the meaning of the clause, and the fact that the freight was not chartered freight made no difference having regard to the word *chartered or as if chartered.*

In *St. Margret's Trust Ltd v Navigators & Insurance Co. Ltd*[22] where a Ketch insured under a time policy was put on a mud berth at Lymington. She slipped over and filled with water, and was later raised and towed a Pylewell creek. No further steps were taken, and she gradually deteriorated and had no more than her break value. Morris J. held that the assured was not entitled to indemnity for a total loss under the policy because her eventual deterioration resulted from delay.

iii) Ordinary Wear and Tear

It is impossible for a ship or vessel to navigate the ocean for so many years, even under the most favourable conditions, without suffering certain degree of decay and diminution of value, which we referred to as wear and tear[23]. Be that as it may, the insurers will not be liable for any damage caused as a result of ordinary wear and tear as equally evidenced by the provisions of the Marine insurance.

The marine Insurance Act Provides:

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[18] Clause 5, Institute Cargo Clauses (All Risks)
[19] Clause 8, 12 and 15 of the Institute Clause Freight. See also Clause 11, Voyage Clause Freight.
[20] (1897) A C 609.
[21] (1900) 2Q.B., 402
[22] (1949) 82 LiL.rep.752 K.B. See also *Federation Insurance Co. of Canada v Coret Accessories Inc. and Hirsh Grading as S.A Harish Co* (1968) 2 Lloyd's Rep. 109, *Jackson v. Union Marine Insurance Co. Ltd* (1874)L.R 10 C.P. 125 and *Atlanttic Marine Co. Inc. v. Gibbon* (1953)2L1oyd's Rep.294
[23] *Dodwell v British Dominions Insurance C.* (1955) 2 L1oyd's Rep.391

> Unless the policy otherwise provides, the insurer shall not be liable for ordinary wear and tear.….[24]

Thus in *Wadsworth Lighterage and Coaling Co. Ltd v Sea Insurance Co. Ltd* [25]a 50 years old vessel was insured under a time policy which goes thus:

> This insurance is against the risk of total and/or arranged loss, including general average and salvage and damage to such vessel by collision with any other vessel, or with fixed, floating or other subject, or by fire, lightning, stranding or sinking.

The vessel, with no one on board, later sank in the Coburg Dock, Liverpool, and no evidence leading to the fact that the vessel got accident. The assured claimed for total loss while the insurer denied liability. The court observed and held as follow:

> …the insurer is not liable for ordinary wear and tear, and giving the best consideration I can to the matter, the policy does not seem to provide otherwise; it does not seem to us to provide that the insurer is liable for ordinary wear and tear. It would be very unusual that he should be, and I can find no words which do make him liable for ordinary wear and tear.

The court finally held that the Clause set out above did not cover a loss to wear and tear, therefore the action of the assured to recover damages failed.

iv) Ordinary Leakages and Breakages

The insurance will not be liable for ordinary and inevitable amount of leakage and breakage that happened in the ordinary cause of the voyage. In this regard, the Marine Insurance Act provides:

> Unless the policy otherwise provides, the insurer shall not be liable for ordinary wear and tear, ordinary leakage and breakage.…[26]

In *F.W. Berk & Co. Ltd. V Style*[27], the assured claimed to recover from the insurers the expenses of re-bagging and re-loading a cargo of Kieselguhi packed in paper bags which burst while being transferred from the ship's hold to a lighter. The goods were insured on a voyage from Mostagonem to London against all risks of loss and/or damage from whatsoever cause arising. The policy incorporated the Institute Cargo Clauses which states:

> This insurance shall in no case be deemed to extend to cover damage or expenses proximately caused by delay or inherent vices or nature of the subject matter.

The insurers denied liability on the ground that the Kieselguhr was packed in paper bags which were defective and inadequate to withstand the ordinary incidents of the transit. The court gave judgment in favour of the insurer and subsequently held that the subject matter of the insurance contract were defectively packed and insufficient to endure the ordinary contemplation of handling and carriage of consignment of Kieselguhr.

[24] Marine Insurance Act (Nigeria) section 56 and Marine Insurance Act (U.K) section 55.
[25] (1929)34 LIL. Rep.285 C.A.
[26] Marine Insurance Act (Nigeria) section 56 and Marine Insurance Act (U.K) section 55.
[27] (1955) 2L1oyd's Rep.382. Q.B.D.

v) Inherent Vice

This is another defence often relied on by the insurers. It is available where the goods is unfit to withstand the ordinary incidents of the voyage, given the degree of care which the ship owner is required by the contract to exercise in relation to the goods[28]. This defence is provided for in Marine Insurance Act.

The Marine Insurance Act provides:

> Unless the policy otherwise provides, the insurer shall not be liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of subject matter insured….[29].

In Blower v Great Western Rail Co[30] Willes J. defined the word vice to mean only that sort of vice which by its internal development tends to the instruction of the injury of the animal or thing to be carried[31].

In *C.T Bowrings & Co. Ltd v Amsterdam London Insurance Co. Ltd*[32], some consignments of Chinese groundnuts were insured from Isingtao to European ports. The policies covered the goods against the usual marine risks and contained the clause to pay average and/or damage from sweating and/or heating when resulting from external cause if amounting to three percent on each bag or on the whole.

On arrival at the ports of destination, the groundnuts were found to be damaged by heating due to moisture. The assured made a claim in respect of the losses and the insurer denied liability. The court held that the heating was caused as a result of the internal moisture, that is inherent vice and that the clause set out above protects the insurers from liability, thereby the action of the assured failed.

Also in *Gee and Gramham, Ltd v Whittal*[33] Consignments of 112,000 of Aluminium Kettles were insured under an all risks policy for Harmburg to United Kingdom. In the policy, the following clause was inserted:

> This insurance shall in no case be deemed to extend to cover loss, damage or expense proximately caused by delay or inherent vice or nature of the subject matter.

On arrival of the consignments to the points of destination, some of the kettles were found to be stained and dented. The assured claimed for indemnity while the insurer denied liability on the ground that the damage occurred as a result of the inadequate packaging. The court held that the stains and dents have been caused by the use of the wood wool which was too wet because it had not been properly seasoned and this constitutes inherent vice, hence the action of the assured failed.

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[28] See http:www.informar.org/information/English/Navigation/Cargo/Meaning-of-dangerous-goods/1466.html.accessed on 16 june, 2012

[29] Marine Insurance Act (Nigeria) section 56 and Marine Insurance Act (U.K) section 55.

[30] (1872). L.R7 C.P 65. see also *SoyaGmbH Mainz Kommandit gaselleschaft v White* (1982)1 Lloyd's Rep. 136, CA, (1893) 1 Lloyd's Rep 122, HL

[31] Ibid, see also Boyd v Dubois (1811) 3 Camp 133

[32] 1930 36 LIL Rep. 309 KBD *Nelson Marketing International Inc. v Royal & Sun Alliance Insurance Co. of Canada (*2006) BCCA 327 available at www.admiraltylaw.com/insurance html. accessed on 9/8/09

[33] (1955)2 Lloyd's Rep 562, QBD

It merits mentioning that this defence can only avail the insurer if the inherent vice happened before the consignment is being put on the quay before they were carried into the ship, otherwise this defence will fail.

In *Whitting v New Zealand Insurance Co Ltd*[34], a cargo of paper Hats shipped in wooden cases was insured under a policy containing warehouse clause for a voyage from Kobe, Japan to London. On arrival, some contents of the cases were found to be moldy. The assured under the policy, the insurers denied the insurers denied liability on the ground that the damage was as a result of fresh water damage sustained by the wooden cases on the quay before shipment which affected the cases and setup moist atmosphere which is shown to encourage the growth of fungus and mould and finally held that the insurers are liable for damage occasioned by that cause.

vi) Rat and Vermin

The Marine Insurance Act provides:

Unless the policy otherwise provides, the insurer shall not be liable for ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of subject matter insured, or for any loss proximately caused by rats or vermin or for any injury to machinery not proximately caused by marine perils[35].

From the word of the statute, the action of the rats and vermin can be described as natural consequence arising out of the unprotected wooden vessel sailing through certain seas and not a peril of the sea. Thus, such inevitable damage would not be covered by the modern hulls and freight clauses[36].

Note that where the ship has stranded, the insurer is liable for the excepted losses, even though the loss occasioned is not attributable to the stranding provided that when the stranding takes place the risk has attached and, if the policy be on goods that the damaged goods are on board. See Marine Insurance Act, (n.!). R.14.

On Whom the Burden Lies

The general rule is that the burden of proving that the loss was caused by an excepted peril lies on the insurers. In *T.M. Noten BV. v Harding*[37] the insurers proved that the damage to a cargo of industrial leather goods fell within an exception of inherent vice.

Also in *Ikerigi Compania Naviera S.A. B Palmer, the Wondrous*[38] the insurers showed that the loss of hire fell within the exception of "detainment by reason of infringement of any customs regulation".

However, there is exception to the above general rule that the burden of proving that loss falls within an exception lies on the insurers, may be modified by the terms of policy and the onus may accordingly be shifted so as to require the assured to prove, as paragraph of his case, that the loss does not fail within an exception.

[34](1932) 44 LIL Rep. 179, KBD. See also *Wilson Holgate & Co Ltd v Lancashire and Chesire Insurance Corp. Ltd* (1922) 13 LIL Rep. 486 KBD

[35] Marine Insurance Act (Nigeria) section 56(2) (c) and Marine Insurance Act (UK) section 55

[36] Per lord Halsbury in *Humilton, Fraser & Co v Pandort & Co* (1884)12 App. Case 518 at 524

[37] (1990) 2 Lloyds' Rep 283 CA

[38] (1992) 2 Lloyd's Rep. 566 CA

In *Levy v Assicurazioni*[39], per Luxmoore LJ – stated thus:

> As a matter of agreement between parties, the onus of proof of any particular fact, or of its non-existence, may be placed on either party in accordance with the agreement made between them.

In that case, the policy provided that any loss or damage happening during the existence of abnormal conditions….arising out of or in connection with any of the said occurrences shall be deemed to be loss or damage which is not covered by this insurance, except to the extent that the insured shall prove that such loss or damage happened in dependently of the existence of such abnormal conditions. In any action, suit or other proceeding, where the company alleges that by reason of the provision of this condition any loss or damage is not covered by this insurance, the burden of proving that such loss or damage is covered shall be upon the insured.

It should be noted that the question whether the onus of proof has been shifted, and, if so, to what extent, depends on the language of the particular policy[40]. Sometimes the policy contains a condition by the terms of which the assured is required to prove to the satisfaction of the insurers that the loss was not caused by an excepted peril. In such a case the condition does not directly affect the onus of proof in the event of proceedings being taken to enforce the claim. If the insurers rely on an exception, the onus of proof is not shifted.

The policy, on the other hand, may expressly shifted the onus of proof in any proceedings that may be taken to enforce the claim by imposing on the assured the obligation of proving that the loss was not caused by an excepted peril. The onus of proof may be shifted by an express condition to that effect[41].

Degree of Proof Required

The insurers must produce affirmative evidence of facts supporting their contention, and such evidence must be sufficient to be submitted to jury[42]. If however, the insurers discharge the onus if proof, the onus shifts back to the assures and he must prove either that his claim falls, within an exception to that exception, falls within an exception to that exception[43], or that in the circumstances, the exceptions has no application, e.g. by reason of waiver[44] or that, if it does apply, it does not apply to the whole of the loss[45]. In the latter case, the assured must prove what part of the lose is not cause by the excepted peril, and if he fails to discharge the onus of proof in this respect, the whole of the loss will be regarded as falling as falling within the exception[46].

Un-Seaworthiness as a Cause of Loss

In contract of Marine Insurance, there is implied warranty of seaworthiness of a vessel, and this is applicable at the commencement of the voyage. Once it has been compiled with, there is no continuing warranty of seaworthiness and therefore, any loss arising.

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[39] (1999)AC 791 JP
[40] E.R Ivamy (n 10) at 444-445
[41] *Ibid* at 445
[42] *Re Hooley Hill Rubber and Chemical Co. Ltd v Royal Insurance Co. Ltd* (1920) 1 KB 257, CA
[43] *Starmount v Waterloo life and Casualty Assurance Co* (1858)IF &F22
[44] *Rowertt Leaky & Co Ltd v Scottish Provident Institution* (1927) 1 Ch 55 CA
[45] *Re Hooley Hill Rubber's Case*
[46] *Stanley v Western Insurance Co* (1868)LT 3 Exch at 75

After the commencement of the voyage, the proximately or remotely caused by un-seaworthiness will not affect the warranty which has then already been spent.[47] In the event of breach of this warranty, the insurance can rely and plead the defence of un-seaworthiness of a vessel, if succeed, the insurer would be automatically discharged from the liability regardless of the cause of loss[48]

Unseaworthy has been described as where a vessel is unable to withstand the perils of an ordinary voyage at sea,[49]a condition which arises from a defect in a vessel's hull, gear, appurtenances, and in some circumstances her crew, [50] one that could not reasonably have been expected to make the voyage,[51] and one not manned by a competent crew or not carrying proper navigational chart. But a ship is not unseaworthy where defect in ship is such defect that can be remedied on the spot in a short time by materials available. [52]

Generally, where un-seaworthiness is raised as a defence against loss by perils of the seas, it falls upon the insurer to prove that vessel has to be un-seaworthiness; the loss has to be attributable to un-seaworthiness; and the assured has to be privy to such un-seaworthiness which has caused the loss[53]

However, this general rule may be displaced in certain circumstances. For example, where a vessel is lost in good weather condition or shortly after sailing, and the plaintiff is unable to show that the loss was caused by a peril insured against the presumption is raised that the vessel must have sailed in an unseaworthy condition. This effectively shifts the burden of proof to the plaintiff, who must then rebut this presumption of *un-seaworthiness* by adducing evidence to the contrary.

The circumstances under which the presumption of un-seaworthiness may be leviedagainst the plaintiff which he must rebut were considered in the case of *pickup*

Thoames and merseyt marine lnsurance Co. Ltd[54] The plaintiff ship was seaworthywhen she set sail.

In that case, there was an action, on a voyage policy of insurance, for the recovery of freight on a cargo of rice shipped abroad Diadem on a voyage from Rangoon to the U.K. Eleven days after leaving Rangoon, Diadem encountered heavy weather and such was the concern for her safety after taking in water, the master decided to put back into Rangoon. During the passage back in Rangoon River, Diadem grounded, but was soon refloated. On arrival buck in Rangoon, Diadem was pronounced unseaworthy. The question before the court of appeal was whether the bad weather had caused her leaky condition or whether, at the outset, she had sailed in an unseaworthy condition.

[47] *S. Hodge op.cit at p.291; Redman v Wilson* (1845) 14 M&W 476.
[48] S, Hodge *op.cit at p. 282. see also. The Goodluck (1991) 2 LIoyd's Rep.* 191 HL.
[49]*See fireman's fund Ins. Co. v Compania de Navegacion, Interior,* S.A, C.C.A. La,
[50] *Klarman v Santini, D.C Conn,* 363 F. Supp. 910 at 915.
[51] *IntrlakeIron Corp. v Gortland S.S. Co.* C.C. A. Mich, 121 F. 2d 267, 269 and 270.
[52] *Middleton & Co. (Canada) Ltd. v Ocean Dominion Steamship Corp..,* C.C.A.N.Y., 137 F. 2d 618 at 622.
[53] S. Hodge *op.cit* p. 283.
[54] *E.R. Ivamy* (n. 10)at 446

The court of Appeal decided that there had been misdirection at the trial and there should be a new trial. At the trial and that there should be a new trial. At the trial itself, the jury has been misdirected when they were told that the time which elapsed between sailing from Rangoon and when it had to put back into Rangoon was short enough a presumption of un-seaworthiness, which then shifted the burden of proving seaworthiness upon the plaintiffs. This was erroneous in that it gave the jury the impression that the defendant insures were rel8ieved from proving un-seaworthiness, when the weather condition might also responsible fro the loss. The presumption of un-seaworthiness, it would appears may only drawn when two conditions are satisfied, namely, that the weather-cannot possibly account for the loss and the period of time is shot.

Also in the case of *Anderson .v. Morice*[55] , Brett J. suggested when a ship sinks in smooth water without any apparent cause, and in the absence of any evidence to the country, an irresistible presumption of un-seaworthiness would be raised.

Loss of Something Uninsured

The assured can and will be able to claim indemnity for loss of something insured. Thus, where loss is occasioned as a result of something uninsured, the insurer can raise this as a defence in other to excuse him from paying indemnity.

In *Field steamship Cp. Ltd. v. Burr*[56] in that case, there was a collision occasioning serious damage to the insured vessel and which resulted in petrifaction of the cargo and lawful rejection thereof by the consignee at the point of destination. A claim against hull and machinery underwriters for the cost of unloading and disposal of the putrid cargo failed simply because the claim was not in respect of loss of/or damage to the insured property.

Conclusion and Recommendation

There is no doubt that the purpose of entering into agreement, otherwise in Insurance parlance known as the policy, between two parities is whenever there is conflict between the parties, it is this agreement that will serve as yards tick to measure the extent of indemnity that is payable.

However, before the assured will be entitled to indemnity, he is required to proof any loss suffered whether as a result of perils of the seas, perils of fire, or peril of barratry, as the case may be.

However, if the assured discharges the burden placed on him, the burden will now shift to the insurers to admit or disprove the position of the assured by raising the defence that the loss falls within an excluded or exempted perils; un-seaworthiness of vessel; loss of something uninsured.

With regard to the defence of exempted or excluded peril, ranging from willful misconduct, inherent vice, delay, ordinary wear and tear, ordinary leakage and breakage; and rat and vermin which are statutory in nature because of the statutory backing given to them. It is the defendants, insurers who are expected to prove these defences so as to be exonerated from the liability.

However, ever though the marine insurance Act provides for the above defences, it needs be stated that the Act still give gap for the parties to contract freely by incorporating phrase *Unless the policy otherwise provides thereby* following the general principle of law of contract to the effect that parties are allowed to contract freely. The effect of the above phrase is that the Act

[55] (1874) 10 CP 58, (1876) I APP case 713
[56] (1899) 1 QB 579.

gives option to either comply with the provisions of the Marine Insurance Act or not when drafting the policy.

It should be noted that before the above defences are raised, the insuers are expected to plead the particulars of any of the available defences otherwise the court will not allow the defendants to surprise the plaintiff.

With regard to the defence of un-seaworthiness, the burden of prove is on the defendant to convince the court that the vessel was unseaworthy as at the time the vessel was sent on voyage if this evidential burden is discharged, the will now shift to the plaintiff, assured, to show that the vessel was seaworthy when it was sent to the sea otherwise the deffence will exculpate the defendans. On the defence of loss of something uninsured, the policy will only cover the thing insured in the policy. Thus where the loss occasion is as a result of any peril not insured the plaintiff, assured cannot bring an action for liability against the defendants, insurers for loss of something not insured and if the assured does, the insurers is entitled to raise this defence.

On the whole, even though the above defences are of statutory and common law defences. It is observed that the defences are not all encompassing as the defence of 'Act of God' was not included. It needs be stated that the ships or vessels are plying through the ocean which is the creation of nature. Therefore, anything that is dealing with the creation of nature will certainly bound to surfer loss as a result of that nature. Thus, if this happened, party who surfers the loss will have nothing to remedy the loss, hence the defence of 'Act of God'.

On prove of complicity and/or Non complicity, it is recommended that common law principle of "He *who assert must prove the assertion"* be made to apply, since it is the insurer who will raised the defence of connivance against the assured.

Connivance is synonymous with conspiracy which is criminal in nature; it is therefore desirable that the act of connivance or complicity should totally be made criminal offence which requires criminal standard of proof.