Seaworthiness in Modern Marine Insurance Cover
Varies interpretations under different marine policies & risk management

Introduction
Seaworthiness and its changing character could best be described from the 19th century statements made by English Judges

“Seaworthiness is word with the import varies with place, voyage, the class of the ship, or even the nature of the cargo” – Earle Cj in Foley v Tanker (1861)
“Where the meaning of seaworthiness in the past judged with available technology
The standard required to satisfy the test of seaworthiness will rise with improved knowledge and experience of shipbuilding and navigation and must be satisfied in the light of modern circumstances.” Case Burges v Wickham 1863

These among many other authoritative statements following in the modern era will affirm that interpretation as to the meaning of seaworthiness vary under the circumstance and the standard apply to judge seaworthiness also vary from time to time depend upon available technology from the industry and all other tools including legislations. The term seaworthiness were known to the maritime industry before the 19th century and disputes as to the meaning existed ever since even today the amount of disputes arising as to the actual meaning of seaworthiness could stand as a testimony to the difficulties face by the industry identifying the meaning and its application.

Nature of Marine insurance cover
Seaworthiness in a marine insurance cover mainly govern by UK Marine Insurance Act 1906, Singapore has enacted this act in full and without any reservations as part of Singapore law this enactment is known as Singapore Application of English Law Act Chapter 7A revised edition 1994. The UK act which also has a highly persuasive effect on other jurisdictions within the global maritime community defines seaworthiness as vessel deemed to be seaworthy when it is reasonably fit in all respect to encounter ordinary perils of the sea. Further meaning to this we gather from the decided cases in the past specific matters relating seaworthiness are
a. her design and construction (Anglis and Co v P & O Steam Navigation 1927; and Derbyshire 1986)
b. her machinery, equipment and navigational aids (The President of India 1963; and The Antigoni 1991)
c. the sufficiency and competence of her crew (Wedderburn and others v Bell 1807; and Hong Kong Fur Shipping Co. v Kawasaki Kisen Kaisha 1962)
d. the sufficiency and quality of her fuel (Luis Dreyfus and Co v Tempus Shipping Co 1931; and Northumbrian Shipping Co v Timm and Son LTD 1939)
e. the stowage of cargo and her stability (The Aquacharm 1982; and The Friso 1980)

From the above it could be said seaworthiness concerns the reasonable fitness of the following items of the ship to withstand ordinary perils of the sea. These include its design and construction, her machinery, equipment, navigational aids, proper manning, sufficiency and quality of fuels, securing of cargo and her stability criteria.
With respect to its interpretation within Singapore jurisdiction there appeared to be no reservations therefore maritime community shall feel comfortable in dealing with it under the Singapore jurisdiction. In other parts of the commonwealth and common law jurisdiction it is believed to be applied in a highly persuasive manner.

**Classification of Ship and Seaworthiness**
Classification society admits a vessel into its class provided the vessel comply with classification society rules. These rules among other things include that the vessel maintained in accordance with standards set up by the class with respect to vessel design and construction, machinery, equipment, maintenance and periodic survey. A vessel in compliance with classification rules could well be said to be in seaworthiness state yet in the context of marine insurance cover seaworthiness certification by Classification Society alone cannot satisfy the requirements under the marine insurance law. This will lead to arguments that to what extent the insurer recognize the seaworthiness which is evidence in accordance with existing certificates also issued in accordance with international maritime law and if it is not what are the reasons.

In order to understand the question we have to know the purpose of insuring the purpose is to hand the liability of the assured (ship owner, cargo owner etc) to the insurer and on the other hand the insurer is there to take the risk and, the UK maritime law allowed him to take such risk even an unseaworthy ship was sent to sea under acceptable exceptions. The Marine Insurance Act do not specifically mention that the vessel has to be under a Classification Society acceptable to insurer vessel under a class said to be good evidence that she is seaworthy with respect to items mentioned in the certificate. If the items not mentioned in the certificate form part of seaworthiness (eg. Crew competence, securing of cargo for the voyage) of the ship those items shall be dealt with separately. Seaworthiness requirements under the institute of clause with respect to Classification and the vessel comply with that clause will affirm the ship is seaworthy in compliance with the clause. Once again if the items not mention in classification clause form part of the seaworthiness of the ship they shall be dealt with separately.

From these analysis it clear that maintaining a vessel in Classification alone will not satisfy the requirements under the Marine Insurance Act however the classification certificate may act as good evidence subject to circumstance of the case.

**Institute of clauses allows deviation from The Act**
It is common in the industry insurance contract will also be attached with relevant institute of clauses these calluses expressly explain requirements for seaworthiness. The analysis of these clauses show:

**International Hull Clauses 1.11.2003. Clause 13 Classification and ISM**
Required the vessel at the beginning and throughout the period of insurance to be classed with a Classification society agreed by the Insurance Underwriters, continue on the same class without any changes whatsoever, shall comply with Class requirements, recommendations which relate to vessel’s seaworthiness by the dates given by the them, valid certification in compliance of chapter IX Safety of Life At Sea (SOLAS) 1974 including International Safety Management (ISM). Failure to comply the above there will be automatic termination of the policy however there are two exceptions to the
above requirements if the vessel is at sea automatic termination shall be deferred until arrival at her next port or the underwriter agree in writing to waive such requirements. Clause 14 Management, required the management at the beginning and throughout the period of insurance comply with the statutory and classification requirement of the vessel, these include matters relating to her seaworthiness. There is no exception to this and in the event of loss arising due to breach of these management requirement the insurer is not liable. It also stated above these clauses the clause 13 and 14 to be paramount in case they are in conflict with any other provisions in the policy. This will clarify the requirements and limits the assured rely on other defense.

Clause 13 paragraph describe that the insurance is automatically terminated when there is a breach regardless whether the claim is arising out that breach therefore could be considered as express warranty. Clause 14 is more lenient to the assured here the policy will not be automatically terminated claim can still proceed if the fault of the management is not attributable to damage thus allowing more defenses to the assured.

Institute of voyage clause (Hulls) 1.1.95. There is an implied warranty of seaworthiness and there is also a clause on classification. The wording of the classification clause here is different from the former the general concept remain the same that is underwriter is not liable from the time of breach of clause.

Institute of Cargo Clause (A) 1.1.2009. Any implied warranty of seaworthiness is not directly waived but a privy rule is expressly stated. Exclude claims arising from a. Unseaworthiness or unfitness of the vessel or craft if the assured was aware (privity of the assured) of the condition at the time subject matter insured is loaded therein.

b. In the case of a container where loading is carried out before attachment of insurance or where the loading is carried out by assured or their employees and they were aware of the unfitness of the container at the time of loading.

The requirements under the institute of cargo clause with respect to vessel and container are expressly stated. This clause will not act as a warranty because breach of which will not automatically terminate the insurance but simply no cover if any breach cause the loss. The assured under this clause will have more defenses if the fault of the assured did not attribute to the loss he can still claim.

Factors to consider when terms are inserted into insurance contract

Insurance contract contain several terms some of the terms are attached as institute of clause and the others terms as the case may be.

In this example the insurer intend to insert a term into his contract it may read as “It is the duty of the assured, owners and managers at the inception of and throughout the period of this insurance to ensure that: The vessel is classed with a classification society agreed by underwriters and that her class within the society is maintained. Any recommendations requirements or restrictions imposed by the vessels classification society which relate to the vessels seaworthiness or to her maintenance in a seaworthiness condition are complied with by the dates required by the society. In the event of any breach of the duties set out in clause above, unless the underwriters agree in contrary in writing, they will be discharged from liability under this insurance as from the date of the breach provided that if the vessel is at sea at such date the underwriters discharge from liability is differed until arrival at her next port.”
The attachment can be made through attaching an institute of clause or separately. The purpose of this is to further elaborate the requirement of seaworthiness where it is allowed under the statute. By inserting terms into the insurance contract will not repeal the Statute The Marine Insurance Act one must note that it can only be done where it is permitted by the statute and within its limits within the insurance law. The Act it mainly allows further negotiations where stated in S55 of The Act “unless the policy otherwise provides” or where a warranty to be expressly started S35 of The Act shall apply. From the above it could be said the term given in the example is acceptable because it is in accordance with S35 which allows for express warranty.

Therefore unlike The Act institute of clause can be modified within the industrially accepted standard and they can do so without the intervention of Parliament and the process of approval at the same time these institute of clauses are legally binding.

The factors to be considered when terms are inserted into a marine insurance contract are they should be within the limitations allowed by the Statute and they shall be drawn within industrial standards. Failure to adhere to these factors could harm respective parties claims. Institute of clause for example drawn in accordance with industrial standard and have he acceptance of the courts for many years.

**Seaworthiness as an implied warranty and consequences**

Maritime warranties are not new to the industry, they existed for centuries, one such warranty is an implied warranty of seaworthiness applicable to voyage policies. Such warranties are implied regardless whether it is expressly stated in the marine insurance contract.

The extent of implied warranty of seaworthiness in a voyage policy there is an implied warranty that at the commencement of the voyage the ship shall be seaworthy for the purpose of the particular adventure insured. There are also provisions in the act under S34 allowing the underwriter to waive breach of an implied warranty and in such case Strict compliance of seaworthiness not required but if the assured or their servants are privity to such unseaworthiness insurer is not liable for claims. The meaning of privity in a marine insurance contract was described in the well known case The Eurysthenes 1976 UK Court of Appeal knowledge of the assured.

The knowledge must be the knowledge of the assured personally or of his alter ego in the case of a company. It may be found from evidence that a reasonably prudent ship owner in his place would have known the facts and have realized that the ship was not reasonably fit to send to sea. Therefore if the ship owner knew the fault and still send the vessel to sea he will not be able to claim. However if the master knew of the fault but did not inform the ship owner ship owner then he still can claim on the cover.

This in summary means the assured (ship owner or others) knew of the unseaworthy state or he ought to have known. In his defense the assured may prove to the court that he has no knowledge of the fact or did not realize that they rendered the ship unseaworthy.

**Risk associated and defenses**

**General risk**

The definition or the meaning has a continuously changing character under varies circumstances and modern development these include places to which the ship sails whether expected during the voyage, classification requirement of the vessel and the type
of the cargo she carries and the standard apply to make the ship seaworthy also changes with modern developments. (Foley v Tanker 1861 and Burges v Wickham 1863). These evidence implies that if we are to rely on one particular meaning or standard there is a greater risk of being liable and loosing claims. To manage such risk continues upgrading of our self new development in the industry such as anti piracy and requirement for arm guard to be on board and compliance of labor laws could be expected to be attached to the meaning of seaworthiness in future.

Unclear policies terms where the terms of the policy is clearly mentioned there is less risk associated however today there are many marine insurance companies compare Lloyds Insurance in the past and with rising demand the companies will adjust the standard terms to customer satisfaction. Recent case in Singapore involving the sinking of vessel “Marine Iris” where the coastal vessel was on delivery voyage from Japan to Singapore, was unseaworthy with recommended items by the attending surveyor some of them to be carried out before departure and the vessel was not under any classification society because she was a coastal ship. Here the policy did not specifically mentioned whether it was a voyage policy or time policy and the other issue the insurer knew the vessel was not under any classification society. Singapore court of appeal overturn the decision of the lower court, appeal court consider the case as the insurer has waived strict requirements on seaworthiness and allowed the ship owner to claim.

Unclear policy types as to voyage or time, the risk issue here having policies open as to voyage or time policy. Where the policy do not mention specifically the courts has to interpret the intentions most likely against the insurer because he is assumed to have made the insurance contract not the ship owner therefore any ambiguity created will be turned against him. The issues with respect to classification is known to the insurer therefore courts consider he was aware of the risk associated and cannot deny liability.

Where ambiguity in the terms exists the courts will consider what is the parties intention with respect to the matter (ambiguity), whether there is any special meaning is provided in the contract or use the contra proferentem rule to resolve the ambiguity. Under the rule the party responsible for making the insurance contract will suffer. In the case of marine insurance contract the ship owner or cargo owner likely to sign the insurance contract made by the insurer therefore if the insurer made any ambiguity relating the seaworthiness issues here he will not be allowed to gain from the ambiguity he created. However this will not give the assured a grantee of a favorable outcome when there is unclear policy term or ambiguity where seaworthiness requirement is not clearly stated in a marine policy their meaning should be clarified before accepting the cover this will avoid delays and unnecessary litigation cost.

Insurer undertaking to notify the mortgage bank
Mortgage banks rely on P & I clubs the risk of P & I club cancellation
There is usually a clause where the P & I club undertaken responsibility to notify the bank in the case of cancellation due to non performance however if the P & I club fail to notify the bank of its cancellation of policy and subsequently the ship is lost the P & I club will still be liable to the mortgage bank. This is known as wavier by conduct this
principle was applied in case “Good Luck” in 1997 by House of Lords. The risk here could be managed by keeping a good line of communications.

Latent defect risk
Ships having latent defects affecting seaworthiness not known to the owner or insurer. In a time policy of hull where there is no implied warranty of seaworthiness the risk factor lies with the insurer as the ship owner is not aware of the latent defect the insurer will be liable in the case of loss due to unseaworthy ship. This principle was recognized in the UK case “Miss JJ” in 1985. The cargo on board the ship having any latent defect will not consider as part of seaworthiness of the ship. This type of risk can be managed by application of clause paramount where by insurer can rely on exclusions under S55 for inherent vice of the subject matter insured where privity of the assured under S39(5) comes in conflict.

Defenses available
Knowledge of the assured
To disprove assureds knowledge on unseaworthiness (disprove privity of the assured) The defense described in the case Eurysthens UK Court of Appeal prove to the court that he has no knowledge of the fact or did not realize that they rendered the ship unseaworthy. The principle found in the case of Star Sea 1995 UK Court of Appeal they have not turned a blind eye knowledge because they neither “suspected nor believed” that the vessel was unseaworthy with respect to the competency of master and crew. The above defense was successful in the given case. In the case of competency matters the owners/managers shall not have any suspicion as to crew competency to handle the ship could be considered the best way to defend. Any evidence of suspension will make it difficult to defend. With respect to machinery equipment and their states facts the courts may apply that he ought to know in the course of his business this will make the assured difficult to defend if that was the ordinary practice in the industry.

Assured privity did not attribute to the loss
The assured can rely on this defense when there are more than one count of unseaworthyness provided he is only privy to one count of unseaworthiness. The case Thomas v Tyne and Wear Steamship Insurance 1917 The vessel was unseaworthy on two counts insufficient crew and hull damage. The loss is held to be due to hull damage for which the owner was not privy therefore the insurer is liable.

Defense as to the meaning of seaworthiness
Although the implied warranty has a strict meaning some even describe this as a absolute requirements and there is a high risk of loosing a claim due to unseaworthiness the legal industry has also developed several methods that even such strict definition or absolute requirement can still be overcome. “Reasonably fit in all respects to encounter the ordinary perils of the sea.” Reasonable fitness in all respect to encounter ordinary perils of the sea shall be at the commencement of the policy and not continues. (Dixon v Sadler 1839). However if the voyage consist of several ports then at each stage of the voyage.
With respect to standard of reasonable fitness, The Act S39 (4) require reasonable fitness and it is not asking for perfect fitness. Temporary matters which could easily be remedied consider within the standard of reasonable fitness. (Roche J Rio Tinto v Seed Shipping 1926). The meaning of ordinary perils of the sea the perils shall be ordinary this include adverse whether conditions that is expected during the course of the voyage any extra ordinary perils, unexpected weather conditions, freak waves, natural disasters are excluded and they could form a defense to the assured. Perils of the sea a ship of that kind and laden in that way may be fairly expected to encounter in crossing the Atlantic (Steel v State Line SS 1877). This include both favorable and adverse weather conditions (Miss JJ 1985) Where the claim rejected on non compliance with respect to perils of the sea the assured shall maintain that vessel and her cargo was secured to overcome only ordinary perils of the sea and nothing more.

Use the prudent uninsured ship owner test to defend The ship owner can defend his action relating to seaworthiness by comparing with another prudent ship owner who is sending the ship to sea without insurance and the type of precautions he take would be the same as in the case Gibson v Small 1853 “a ship before setting out on a voyage is seaworthy if it is fit in the degree which a prudent ship owner uninsured would require to meet the perils of the service it is then engaged in and would continue so during the voyage unless it met with extraordinary damage.”

Risk issues arises from unclear terms, unclear policy types, mainly to the assured he shall avoid the risk in order to avoid unnecessary litigation cost. Although the courts are in favor of the assured in case of ambiguity such risk shall always to be avoided. The management of such risk can be done through professional assistance where required. If the insurer has under taken responsibility to notify the mortgage bank when there is a breach and insurance terms and the cover is no longer applied and the insurer has failed in his responsibility to inform the mortgage bank then the insurer has the risk of accepting liability even though the vessel has breach terms. The risk management is likely to be a good timely and proper system of communication between the parties. The insurer also bears the risk of claims from the time policies of hull due to latent defects and to manage such risk the there shall be a clause paramount indicate exclusion of latent defects regardless of any conflict with other statutory provisions.

Summary
Interpretation under voyage policy strict, because it is an implied warranty but require only reasonable fitness for overcome ordinary perils therefore allowing number of defenses on the assured. Interpretation under time policy very much in favor of the assured, even the assured had some knowledge of unseaworthy condition he could still defend as he did not realize or he did not suspect or believe. Under the institute of clauses implied warranty of seaworthiness may be waived and replaced with a interpretation similar to time policy. Classification certificate may consider as evidence of seaworthiness. The institute of clause also separately contain a classification clause in which if the vessel fail to maintain in the class the assured will automatically loose the cover. However there are several
exceptions (1) they can be agreed to continue if insurer agreed by probably asking for higher premium (2) If the vessel is at sea cover is it allowed until the vessel reach next port (3) insurer has waived the requirements expressly or by conduct.

Policies contain unclear terms and ambiguity the courts will construe the terms in favor of the assured because usually the insurer is responsible of making the terms. Policies do not specifically mention that it is voyage or time policy likely position that courts will see the intention of the parties and construe accordingly. The courts usually in favor of the assured as proved from the past cases, the reason being insurer is there is to take the risk should not look for excuses for avoid the liability.

**Conclusion**
The interpretation is not limited and to understand particular meaning all reference documents and circumstances are taken into consideration these from a difficulty and also a source for disputes. Knowledge of available defenses and risk management in this respect could give the parties better chance of avoiding disputes, reduce legal costs and business confidence.

IUA international Underwriting Association, world largest representative organization for international and wholesale insurance and reinsurance companies

The “London Market” is a distinct separate part of UK Insurance and reinsurance industry centered on the city of London. It comprises of insurance and reinsurance companies, Lloyds syndicates, P & I clubs and the brokers.

AIMU The American Institute of Marine Underwriters has over 100 years of service as the trade association representing the United States ocean marine insurance industry as an advocate, educator and information centre.

AIMU Cargo Clause 1.1.2004 clause 7 Additional Conditions Seaworthiness Free of Particular Average American Conditions / Free of Particular Average English Conditions (FPAAC or FPAEC) clause 7 read same for both.
The seaworthiness of the vessel operating as a common carrier is hereby admitted as between the assured and the company and the wrongful act or misconduct of the ship owner or his servant causing a loss is not to defeat the recovery by an innocent assured if the loss in the absence of such wrongful act or misconduct would have been a loss recoverable in this policy

American Institute Hull Clause September 29 2009

US law on marine insurance is govern by law of each state. Breach of a warranty has automatic termination recognized by federal law. However the state law may have different opinion.