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A critical analysis of the implied obligation against unjustified deviation: Is the rule still relevant to the modern law on carriage of goods by sea?

By

Tariq Alawneh

A Thesis submitted to the University of Huddersfield
In partial fulfilment of the requirements for
The degree of Doctor of Philosophy

Department of Law-Business School

University of Huddersfield

April 2015

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ABSTRACT

The general area of this research is shipping law, more specifically the law governing the carriage of goods by sea. The research has been narrowed down to the implications of terms into contracts of affreightment, and then further narrowed down to the concept of deviation. The specific research question is whether or not the concept of deviation is still relevant to the law governing the carriage of goods by sea in the modern era. While this question has been posed before in the academic literature, it has never been discussed in sufficient depth. The researcher was therefore able to identify gaps in the literature through the literature review which the research has attempted to fill.

The thesis on which the research is based is that the principle of deviation is a long standing and very important rule of law which form an integral part of the law and practice governing the carriage of goods by sea. However, a multi-jurisdictional review of both primary sources (i.e. conventions, statutes and cases) and secondary sources (academic literature) in relation to deviation indicates that there are many conceptual, legal and practical problems associated with the principle.

Adding to this problem is the concept of quasi deviation in some jurisdictions such as the United States where there continues to be conflicting approaches to the concept even within the various federal circuits. Therefore the hypothesis of this study is based on the need for legal reform. Chapters 1 and 2 provide the background to the study as well as the conceptual framework for the research, including the literature review. The main research aims, objectives and research questions are addressed in Chapters 3, 4 and 5. Chapter 6 concludes the research by presenting the findings and recommendations together with an outline of the research contribution.

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I will like to express my sincere gratitude to the University of Huddersfield and the Business School and Law School in particular for giving me this opportunity by allowing me privilege to be the first student to enrol on the full-time PhD course in law, and for their continuing support throughout my time on the course. Finally I wish to thank all of my family members and friends for their moral support and encouragement.

DECLARATION

I, TARIQ ALAWNEH, confirm that the material contained in this thesis has not been used in any other submission for an academic award and that there is full attribution of the work of any other authors.

The word count for this dissertation is 87,843 (without references) to the nearest 500 words.

TARIQ ALAWNEH

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CHAPTER ONE

INTRODUCTION, SCOPE AND HYPOTHESIS OF THE STUDY

1.1 Historical and Economic Background of the Shipping Industry.

Carriage of goods by sea constitutes one of the most important elements of international trade transactions, with the bulk of world trade involving sea transit¹. Historically, carriage of goods by sea constitutes one of the oldest forms of transportation in international commercial transactions.² From a legal perspective sea-borne commerce is regulated by the branch of maritime law known as shipping law. The latter, which is rooted in the general principles of English common law and specific principles derived from the law merchant, mercantile customs and subsequently international conventions, now regulates key aspects of the international carriage of goods by sea. These sources prescribe rules which govern specific types of contracts of carriage or affreightment (from the various types of charterparties to consignment carriage such as carriage under a bill of lading or containerised carriage). They also regulate specific aspects of maritime contracts, from loading to stowage, the execution of the voyage and discharge and delivery of the cargo to the cargo-owner.

From a historical perspective, the first sea trade network was developed 5000 years ago between Mesopotamia, Bahrain and the Indus River in India.³ The Mesopotamians exchanged their oil and dates for copper and possibly ivory from the Indus⁴. These communities were linked by land, but sheltered costal sea routes provided an environment for maritime trade to develop. Bahrain, a barren island in the Arabian Gulf, played a part in this trade, but it was Babylon which grew into the first ‘super-city’, reaching a peak in the eighteenth century BC under Hammurabi, the sixth Amorite King. By this period the Mesopotamians had a well-developed maritime code. The legal code of Hammurabi has been discovered on a diorite column at Susa, the modern Dizful in Iran.⁵ The code required ships

1 Schmitthoff's, (2000), *Export Trade: The Law and Practice of International Trade*, 10th edition, Sweet & Maxwell, London, p 2; See also Chuah, J., (2013), *Law of International Trade: Cross-Border Commercial Transactions*, Fifth Edition, Sweet & Maxwell (London), p.243.

2 Harlaftis, G, A (1996), *History of Greek-Owned Shipping*, Routledge, London p.14.

3 Stopford, M, (2009), *Maritime Economics*, 3rd edition, Routledge, London, p 35.

4 McEvedy, C, (1967), *The Penguin Atlas of Ancient History*, Penguin Books, p 26

5 Stoppard (1996), pp.25 et seq.

to be hired at a fixed tariff, depending on the cargo capacity of the vessel. Shipbuilding prices were related pro rata to size and the builder provided a one year guarantee of seaworthiness. Freight was to be paid in advance and the travelling agent had to account for all sums spent⁶. About this time seagoing ships were starting to appear in the eastern Mediterranean where the Egyptians were active traders with the Lebanese.⁷

The basic economics of the business have not changed all that much over the years. The Mesopotamian maritime code, the Roman bill of lading and the increased volume of sea-borne commerce in the eighteenth century all tell the same story of a business driven by the laws of supply and demand. The ship designs, maritime technology, contracts of carriage, and consumers may have changed, but the basic principles of maritime commerce seem immutable⁸.

The historical development of sea-borne trade is divided into three stages. The first trade started in the Mediterranean, spreading west through Greece, Rome and Venice, to Antwerp, Amsterdam and London. During this phase a global trading network gradually developed between the three great population centres in China, India and Europe. At the beginning this trade was by land and was slow and expensive before the voyages of discovery opened up global sea routes in the late fifteenth century, leading to a fall in transport costs and the escalation of trade volumes⁹.

The second stage was triggered by the industrial revolution in the late eighteenth century. Innovations of ship design, shipbuilding and global communities made it possible for shipping to be conducted as a global industry¹⁰.

The third stage was in the second half of the twentieth century where another wave of economic and technical change was triggered by the dismantling of the colonial empires which were replaced by the free trade economy initiated at Bretton Woods¹¹. During this period the growth of the bulk carrier markets, the containerization of general and specialist shipping operations transporting chemicals, forest products, motor vehicles, and gas evolved

6 Nawwab et al. (1980), *Aramco and its World: Arabia and The Middle East*, Arabian American Oil Company, p 8.

7 Ibid.

8 Stopford, M. (2009), *Maritime Economics*, 3rd edition, Routledge, London, p 44.

9 Braudel, F. (1979), *Civilization and Capitalism, 15th-18th Century*, Harper and Row, New York, p 99.

10 Stopford, M. (2009), *Maritime Economics*, 3rd edition, Routledge, London, p 20.

11 The Bretton Woods system was the first example of a fully negotiated monetary order intended to govern monetary relations among independent nation-states. See Steil, B. (2013), *The Battle of Bretton Woods: John Maynard Keynes, Harry Dexter White, and the Making of a New World Order*, Princeton University Press.

significantly¹². Thus, this revolution saw the move of shipping away from the nation states which had dominated the previous centuries towards flags of convenience. This brought greater economies of scale and changed the financial framework of the industry, but of course it raised regulatory problems. Shipping, trade, and economic development all go hand in hand, and shipping is constantly changing. It is a business that grew up with the world economy.

In the modern shipping industry, the sophisticated transport system for bulk commodities is one of the great innovations in world trade over the last 5 decades. However, the distinction between a bulk cargo and a bulk commodity is that a bulk commodity is a material which can be handled in bulk - i.e. is traded in large quantities and has a physical character which makes it easy to handle such as grain, iron ore and coal. A bulk cargo on the other hand is a 'parcel' actually transported in a single vessel. Generally, bulk commodities are carried in bulk carriers, in which case they are bulk cargo, but if they are shipped in a container they become 'general cargo' - i.e. 'bulk cargo' describes the transport mode not the commodity type.¹³

From a transport viewpoint there are four main characteristics of bulk commodities which influence their suitability for transport in bulk. Firstly, to be shipped in bulk there needs to be enough volume to fill a vessel. Secondly, commodities with a consistent granular composition which can easily be handled for bulk transport such as grain, ores and coal - i.e. its physical handling and stowage characteristics (lumpiness, delicacy, or granularity). The third character is the cargo value, as high value cargoes are more sensitive to inventory costs, which makes them advantageous to ship in smaller parcels, whereas low value commodities like iron ore can be stockpiled. Finally, the regularity of trade flow because cargoes shipped regularly in large quantities provide a better basis for investment in bulk handling systems.

The bulk fleet are divided into tankers, bulk carriers, specialized ships and container ships fleet. The fleet segments with bigger ships grow faster as port improvements and increasing trade volumes widen their market, whilst the segments of smaller ships grow more slowly. It is very difficult to generalize about bulk transport due to the different types of bulk cargo, because there are three classes of bulk cargo (liquid bulk, major dry bulk and the minor bulks) and each commodity needs a different bulk handling system to deal with its physical

¹² Stopford, M, (2009), *Maritime Economics*, 3rd edition, Routledge, London, p 35.

¹³ Stobbard (1996), Parts 3 and 4.

and economic characteristics. Thus, each shipper must select the system which gives the best commercial result for the practical industrial operation.

Carrying specialized cargoes by sea is one of the most challenging segments of the shipping market. The main purpose of designing vessels or whole transport systems to carry specific goods is to offer specialized services which cut costs, improve quality and make it economic to transport cargoes that otherwise could not be trade. There is little carriers can do to differentiate their service, so they rely on the entrepreneurial skills needed to charter and trade the bulk cargoes. But some cargoes such as chemicals, gas, refrigerated cargo, forest products, vehicles, heavy lift and people are more demanding to transport, offering transport providers an opportunity to improve their service by investing in specialized vessels and services.

The specialized trades segments face a degree of competition from other parts of the shipping market as the main focus of the business model is to provide a service in a way which reduces costs of transport and improved service in arias which are importance to the cargo owners. For instance, the chemical business invests in ships and terminals to handle small parcels of liquid cargo while complying with the various regulations for the transportation of hazardous substances by sea. Thus, cargo handling and terminals play an important role in this particular business. Gas transport is also diversified. There is a large LPG (Liquefied Petroleum Gas) trade from the Middle East mainly to Japan, whilst the mid-sized tankers focus on the ammonia trade and smaller ships on ethylene and various chemical gases. This type of tankers which designed to carry chemical gases is pressurized; semi-pressurized or fully refrigerated.¹⁴

The refrigerated cargo is another type of specialised cargoes which needed special way of transportation. The refrigerated cargo trade consists of frozen meat chilled fruit vegetables and fish. Purpose-built reefer vessels are used for all three trades; however, containerization has taken a growing market share. Car carriers move vehicles around the world as part of a tightly integrated transport operation. Nowadays several ships have hoistable decks to carry trucks and large units. In additions to that the heavy lift business which moves very large structures around the world (such as large and awkward cargo) employing several different types of vessels. For instance, the basic heavy lift vessels are open hatch MPP ships with heavy lift gear and possibly a stern ramp. Other more sophisticated vessels allow cargo to be

¹⁴ Ibid. Chapter 12.

floated on. Open hatch bulk carrier are used in the forest products trade where they offer very high productivity for the transport of package lumber, paper and where appropriate, containers, steel products and other small unit cargoes. There are few clear boundaries in specialized shipping markets. Ship owners invest to meet a market need, and many of them work off very tight margins.¹⁵

1.2. Research Statement and Hypothesis

Carriage of goods by sea, by its very nature, is a high risk adventure due to the inherently hazardous nature of sea transport; while safe passage is always a contractual aspiration on the part of shipper and the carrier, the adventure may nonetheless be influenced more than any other form of transportation by factors such as weather and sea conditions, natural hazards, embargos and strikes, military actions and other economic or political factors.¹⁶ The direct and obvious consequence of these factors could be a delay in delivery of the cargo. These factors differ from deviation (discussed below) in that the latter is predictable and depends on the Master's will, whereas natural hazards fall outside the control of the carrier and are likely to be covered by the list of excepted perils included in the terms of the contract of affreightment.¹⁷

At common law, there is an implied undertaking on the part of a carrier or ship owner that there will be no voluntary or unjustified departure by a vessel from its 'proper course' as affirmed in the case of *Bergerco v Vegoil*.¹⁸ This rule was first implied as a matter of law in the case of *Scaramanga & Co v Stamp*.¹⁹ Deviation as a doctrine had its roots in cargo insurance.²⁰ In order for the doctrine to be invoked the deviation must be voluntary and unjustified.²¹ If a ship deviated from its proper course (i.e. the agreed contractual voyage, direct geographical route or customary trade route), this was deemed to fundamentally change the nature and character of the risk for which the voyage and cargo were originally insured and such a departure could invalidate or oust the insurance policy. In other words, as a consequence of deviation the voyage and the risk involved in the commercial adventure become something fundamentally different from that which the parties had envisaged. Thus

¹⁵ Ibid.

¹⁶ An illustrative case law example is the case of *The Sedco, Inc. v. S.S. Strathewe*, 1986 AMC 2801, 2804, 800 F.2d 27, 30 (2 Cir. 1986), which involved a vessel being requisitioned by the UK government during the Falklands conflict.

¹⁷ Wilson, J.F. (2008), *Carriage of Goods by Sea*, 6th edition, London, Longman p. 135.

¹⁸ *Bergerco v Vegoil* (1984) 1 Lloyds Rep 440 at 44.

¹⁹ (1880) 5 C.P.D. 295.

²⁰ John F Wilson, (2010), *Carriage of Goods by Sea*, seventh edition, Pearson Education Limited, Essex, p21.

²¹ See *Joseph Thorley Ltd v Orchis Steamship* [1907] 1 KB 660, CA; *The Dunbeth* [1897] P 133.

one of the consequences of this is that unjustified deviation automatically discharges the insurer from liability under the policy of marine insurance (in addition to invalidating the contract of carriage itself). The strictness of the application of the rule against unjustified deviation at common law partly derives from the need to protect insurers from the unforeseen risk of a voyage that they had not underwritten.

Even before the rule was put on statutory footing through the enactment of the Carriage of Goods by Sea Act (COGSA) 1971, the effect of unjustified deviation at common law was to oust the contract of carriage and thus deprive the ship owner of any exception clauses in the contract of carriage by sea.²² This in turn raises the question as to whether or not unjustified deviation may be considered to be a ‘fundamental breach’ of the contract of carriage – i.e. a more serious type of breach the consequences of which go to the very roots or foundations of the contract. A critical review of both decided cases and academic opinions indicates that there is no common agreement on this question. What remains clear is the fact that unjustified deviation is generally treated as a repudiatory breach of the contract of carriage of goods by sea.

The thesis or hypothesis informing the research is that the principle of deviation is a long standing and very important concept and rule which form an integral part of the law and practice of the carriage of goods by sea. However, a multi-jurisdictional review by the researcher of both primary sources (i.e. conventions, statutes and cases) and secondary sources (academic literature) in relation to deviation indicates that there are many conceptual, legal and practical problems associated with the principle. Although it is clear that the principle was implied into contracts of carriage with the objective of protecting cargo owners and insurers from unanticipated risk which may arise from deviation, a review of sources will seem to suggest that judicial practice in particular has raised and continues to raise many unanswered questions regarding the precise status of the principle and the effect of unjustified deviation on the contract of carriage and the policy of marine insurance. Adding to this problem is the introduction of the concept of quasi deviation in some jurisdictions such as the United States where there continues to be conflicting approaches to the concept even within the various federal circuits. Therefore the hypothesis of this study is based on the need for legal reform. With deviation being such an important principle, there needs to be clarity in the law (both in terms of its content and its interpretation by the courts) as well as

²² James F. Whitehead, (1981), *Deviation: Should The Doctrine Apply to On-Deck Carriage?* 6 *Maritime Lawyer*, 37; and see *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, HL.

international harmonisation across jurisdictions in order to promote and to achieve consistency and uniformity. The various research aims and objectives together with the research questions which have been identified from the literature will thus be used as the basis for conducting the research with a view to filling in the gaps identified in the literature.

1.2.1 Rationale for the rule against unjustified deviation

There are two possible grounds on which the rule against unjustified deviation can historically be sourced.

The first of these is self-evident, i.e. preservation of contract of carriage and not to expose the cargo or the various contractual interests directly involved in the adventure to unanticipated risks – i.e. carrier (both legal and actual), shipper or charterer and underwriters. The second rationale relates to the preservation of the interests of other stakeholders (i.e. cargo owner, consignees/ buyers under the CIF contract, and endorsees of the bill of lading). The principles which govern the effect of deviation apply, not only between the original parties to the contract of carriage, but also between the carrier and an endorsee of a bill of lading. But where the bill of lading is endorsed, difficulties may arise if the original party to the contract of carriage has waived the deviation.

The case of **Hain SS Co LTD v Tate & Lyle Ltd**²³, serves as an illustrative example of how the rule against unjustified deviation has been applied for to the benefit of a stakeholder in the form of the endorsee of the bill of lading. The facts of the case involved a CIF seller of sugar who chartered the vessel “Tregenna” to carry the cargo of sugar from the Caribbean to England. Bills of lading were issued to him, which he endorsed to the buyer. The latter took them without notice of the fact that the vessel had previously deviated. The endorsees commenced an action to recover the deposit they had paid toward general average contributions, and a declaration that they were not liable to contribute in general average in respect of the cargo of sugar. This was on the ground that there had been an unjustified deviation from the charterparty voyage. On the other hand the carrier counterclaimed for proper contribution in general average and for the balance of freight. The court found that the deviation gave the endorsee of a bill of lading the same right to rescind the contract of carriage as it had originally given to the charterer, and this right of the endorsee was not affected by the fact that the charterer had waived and so lost his right to rescind, since waiver

23 (1936) 41 Com. Cas 350.

could not take place in ignorance. The position would be the same even where the original shipper was not a charterer but himself only the bill of lading holder.

In another case, **Leduc & CO v Ward**²⁴, the endorsees of a bill of lading brought an action against the carrier for non-delivery of goods. The carrier pleaded that the goods had been lost through a peril of the sea, and this was exempted by the bill of lading. It was held for the endorsees on the basis that as the bill of lading was in the hands of the endorsees.

These two cases thus provide illustrative examples of the manner in which judicial protection has been extended to the wider interests involved in shipping transactions within the framework of the rule against unjustified deviation, hence reinforcing the rationale for the protection of stakeholders such as an endorsee of the bill of lading.

Furthermore, it could even be argued that the extension of the rule against unjustified deviation to aspects of shipping such as slow steaming has as its rationale the protection of the interests of the global community through preservation of the marine environment.

It is worth noting with regard to the rationale relating to the protection of underwriters the possible impact of deviation on the policy of marine insurance – both from a historical and a contemporary context. Previously the effect of deviation was to oust the policy of marine insurance. However, under the new Insurance Act of 2015 (Part 3, Section 10) a breach of warranty through deviation only leads to a suspension of the policy of marine insurance which is then reinstated once the breach has been corrected. Under this provision, an insurer will no longer be able to rely on non-compliance with a warranty, or any other term relating to loss of a particular kind or at a particular location or time, if the non-compliance could not have increased the risk of loss that occurred in the circumstances that it occurred.

1.3 Conceptual Framework and Research Design

The conceptual framework of the research is represented below in diagrammatic form illustrating the link between the dissertation aims and objectives, the research questions, the methodology and research contribution. These four aspects of the research are then mapped against the various chapters showing where each aspect occurs in the dissertation.

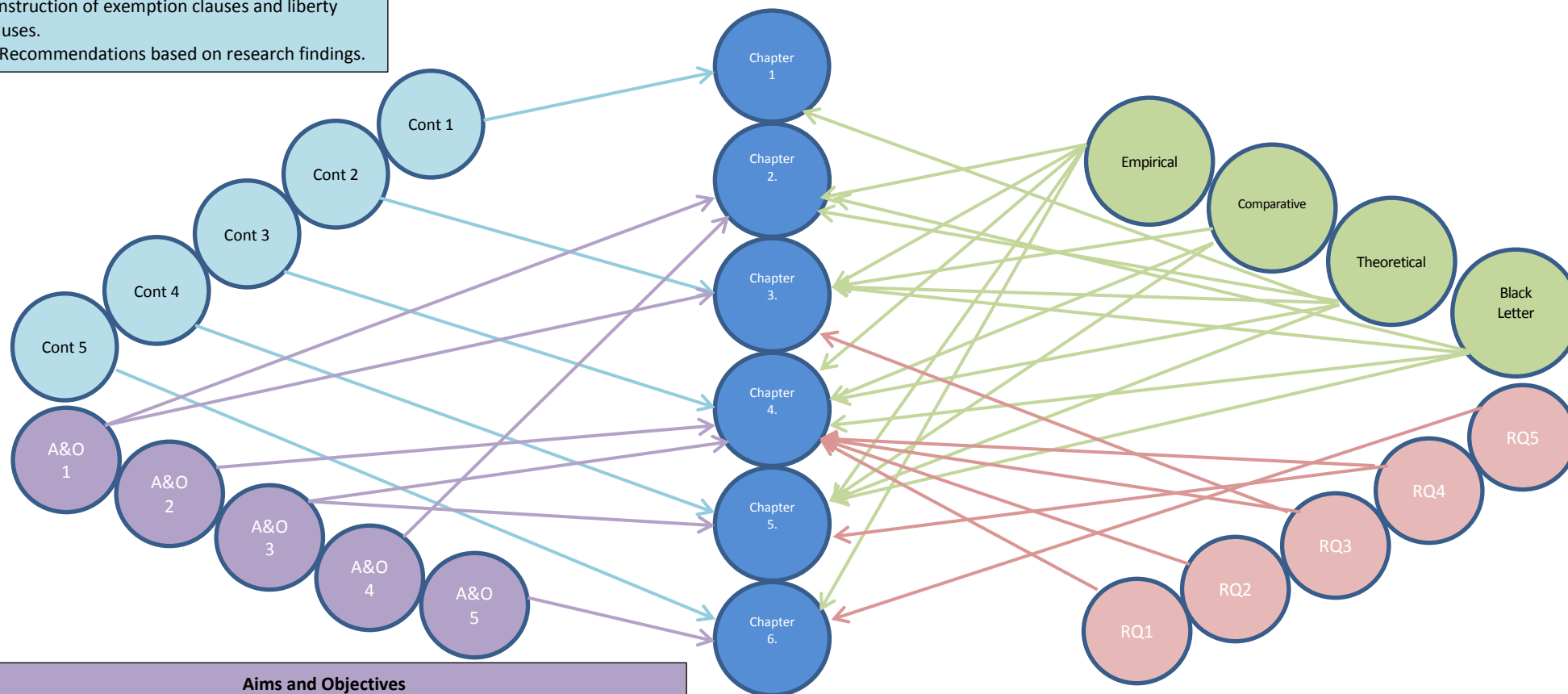
²⁴ (1888) 20 QBD 475.

Contributions

1. Link between deviation, other principles of shipping law and legal philosophy.
2. The link between general contract law and shipping law vis-a-vis techniques of judicial implication of terms.
3. Recommendation of legal reform regarding various aspects of the law on deviation
4. The link between general contract law and shipping law vis-a-vis approaches to judicial construction of exemption clauses and liberty clauses.
5. Recommendations based on research findings.

Chapters

- Chapter 1:** The Scope and Hypothesis of the Study
Chapter 2: An Overview and Appraisal of Implied Terms in Contracts of Affreightment
Chapter 3: A comparative and critical analysis of the ethos, role and function of implied terms in general law of contract and contracts of affreightment
Chapter 4: A Critical Analysis of the Doctrine of Deviation in Contracts of Affreightment
Chapter 5: A Critical Analysis of the Role of Liberty Clauses and Their Impact on the Doctrine of Deviation
Chapter 6: Conclusion: Is Deviation Still Relevant?



Aims and Objectives

- A&O1:** To critically review and analyse the implied obligations governing the carriage of goods by sea, and to critically examine the relationship between the judicial approaches to the implication of terms in general contract law and in shipping law.
- A&O2:** To critically examine the carriers implied obligation not to deviate from the proper course.
- A&O3:** To critically assess the relevance of the rule against unjustified deviation to the modern law governing carriage of goods by sea, including the role and function of liberty clauses within the framework of the law governing contracts of affreightment.
- A&O4:** To review and appraise relevant cases, statutory instruments and academic literature on the subject.
- A&O5:** Finally to generate relevant recommendations based on the findings of the research.

Research Questions

- RQ1:** Is the rule against deviation an absolute obligation? And should unjustified deviation amount to fundamental breach of a contract? Is there something special about the character of a breach involving deviation which might lead to such a breach being considered as a repudiation of the contract of carriage?
- RQ2:** Should the rule against unjustified deviation be treated any differently from other implied shipping terms? And should there not be some degree of flexibility in the judicial approach to the law on deviation?
- RQ3:** Can the current list of exceptions derived from common law, relevant statutes and contractual provisions which justify a departure from the proper course be considered to be a closed list? Or are they open to the addition of new factors which may provide a carrier with new grounds to justify a departure from the proper course?
- RQ4:** Is the rule against unjustified deviation still relevant in the modern context of international carriage of goods by sea? In light of: The development of transport vessels, liberty clauses, different types of charterparties, and held cover clauses?
- RQ5:** Do we need harmonisation, unification in terms of the interpretation of deviation rules?

1.4 Aims and Objectives

In this thesis, the implied obligation against unjustified deviation will be explained, and the purpose, rationale and importance of the rule to the law governing the carriage of goods by sea will be assessed. Moreover, the thesis will critically explain whether deviation is still relevant as a rule in modern shipping contracts, in light of the modern developments of transport vessels.

It seems that everyone is agreed that deviation is a serious matter, and has serious consequences on the performance of the contract of carriage by sea, although there is no consensus on legal implications of these consequences. Some views suggest that deviation displaces the contract, while others believe that deviation mainly eliminates the exceptions clause in the contract on the ground that when deviation occurs, the exceptions clause no longer applies to a voyage as the latter had ceased to be the contract voyage. In some cases, however, deviation is looked upon as if it destroys the right to claim the contract freight, even if the voyage is completed and the goods are delivered at the agreed destination and at the agreed time.²⁵

When recent developments of shipping vessels are taken into account, one can question whether the rule of deviation still applies to modern shipping practice. The problem becomes even more complicated if the shipping is carried out under different types of contracts other than the voyage charter party, such as containers transport, time charter and bare boat charter (charter party by demise).

This study aims to critically analyse the implied obligation against unjustified deviation, and to determine whether the rule is still relevant to the modern law on carriage of goods by sea. The main rationale for this study is informed by recent developments which have witnessed the advent of new types of shipping contracts such as time charters, bare boat charters and containerised transport - hence the need to question the appropriateness of this rule of deviation in the new shipping environment. Moreover, recent developments in shipping building technology have made vessels better equipped and more able to cope with almost all types of perils and dangers. There has even been some speculation regarding the possibility

²⁵ Dockray, M, (2002), "Deviation: a Doctrine all at sea?" 1 Lloyd's Maritime and Commercial Law Quarterly, 76-98, at p.93; See also *Hain SS Co v Tate & Lyle* (1936) 41 Com Cas 350 at p.354 where Lord Atkin said as follow: "The true view is that the departure from the voyage contracted to be made is a breach by the ship owner of his contract, a breach of such a serious character, however slight the deviation, the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms".

of pilotless cargo ships in the future. This thus raises the question as to whether deviation on the grounds of repairing an unseaworthy ship²⁶ can still be considered amongst the list of exceptions for justifying a deviation from the proper course.

Another aim of the thesis is to present a comparative analysis of how the rule is interpreted and applied in various jurisdictions around the world. In addition, the study aims to compare the common law approach and relevant international conventions and instruments. The study will also be focusing on relevant legislation e.g. Carriage of Goods by Sea, Marine Insurance Act 1906, and some conventions such as the International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels (the Hague Rules) 1924, Brussels Protocol Amending the Hague Rules Relating to Bills of Lading (the Hague-Visby Rules) 1968, the Convention on Limitation of Liability for Maritime Claims United Nations Convention on the Carriage of Goods by Sea (the Hamburg Rules) 1978, as well as the United Nations Conventions on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules) 2008.

The aims and objectives of the research can be summarized as follows:

1. To critically review and analyse the implied obligations governing the carriage of goods by sea, and to critically examine the relationship between the judicial approaches to the implication of terms in general contract law and in shipping law.
2. To critically examine the carriers implied obligation not to deviate from the proper course.
3. To critically assess the relevance of the rule against unjustified deviation to the modern law governing carriage of goods by sea, including the role and function of liberty clauses within the framework of the law governing contracts of affreightment.
4. To review and appraise relevant cases, statutory instruments and academic literature on the subject and to identify gaps in the literature which will provide the researcher with the opportunity to make an original contribution to the subject area.
5. Finally to generate relevant recommendations based on the findings of the research.

As the write-up progresses each chapter of this thesis will subsequently be linked to one or more of these aims and objectives, with latter being used as the road map for developing the direction and content of each chapter.

²⁶ *Kish v Taylor* [1912] AC 604, HL.

1.5 Research Questions

The research will seek to provide answers to the following questions with the objective of shedding some light on the problems affecting this area of the law. It is also the hope of the research that the answers will assist in further developing knowledge on the subject which may ultimately lead to the development of legal solutions which can be applied for the benefit of the shipping industry worldwide.

Research Question RQ 1: Is the rule against deviation an absolute obligation? And should unjustified deviation amount to fundamental breach of a contract? Is there something special about the character of a breach involving deviation which might lead to such a breach being considered as a repudiation of the contract of carriage?

RQ2: Should the rule against unjustified deviation be treated any differently from other implied shipping terms? And should there not be some degree of flexibility in the judicial approach to the law on deviation? What has been the judicial approach to the implication of terms in shipping law and what is the relationship between shipping law practice and general contract law in this regard?

RQ3: Can the current list of exceptions derived from common law, relevant statutes and contractual provisions which justify a departure from the proper course be considered to be a closed list? Or are they open to the addition of new factors which may provide a carrier with new grounds to justify a departure from the proper course?

RQ4: Is the rule against unjustified deviation still relevant in the modern context of international carriage of goods by sea? In light of: The development of transport vessels, liberty clauses, different types of charterparties, and held cover clauses?

RQ5: Do we need harmonisation, unification in terms of the interpretation of deviation rules?

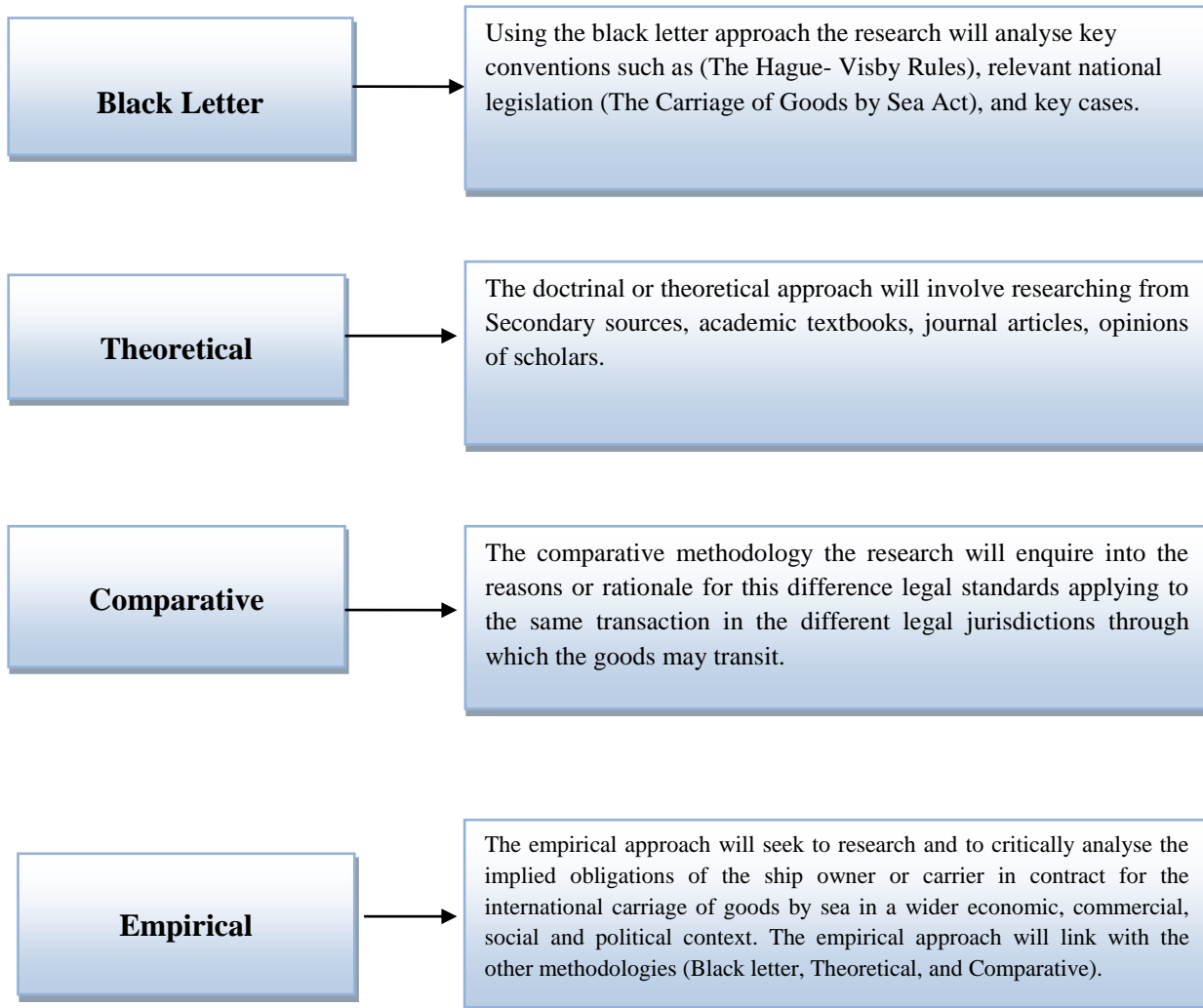
1.6 Methodology

In order to achieve the aims of the study the researcher used the methodology that was based on several research methods. Emphasis will be paid in this thesis on analysing the implied obligations of the carrier – in particular the rules governing the prohibition of unjustified deviation - under the contract of carriage of goods by sea. The methodology that will be used will be mainly analytical – i.e. an approach which will be based mainly on a critical analysis, assessment and appraisal of the theory and practice of the law on implied obligation in shipping contracts. Various resources will be aid the research and a variety of sources will be consulted as part of the analysis; these will include, inter alia, primary sources such as statutes, international conventions and relevant cases as well as the following secondary sources and literature: books on the subjects under discussion, decided cases, journal articles and other scholarly publications will be of particular importance in providing sources for undertaking a comparative analysis of the approach of different jurisdictions to the question under discussion.

The information about implied terms and obligations will be gathered from these resources, and then critically discussed through theoretical and comparative analyses, with a view to highlighting similarities and differences, demonstrating the legal weaknesses and strengths and putting forward recommendations based on the findings of the research.

A review and analysis of the opinions of legal scholars will thus form the basis of the secondary research material. This secondary research which relates to the thesis topic will be conducted with the aim of enriching the discussion and analysing the different opinions on the area of research. The review will include presenting, dissecting, evaluating and synthesising the different scholarly arguments - in addition to presenting the arguments of the researcher and the grounds upon which these arguments were established.

The particular types of methodology to be used are outlined below :



The 'Black Letter' or Legalistic Approach:

Statutes, international conventions and decided cases constituted the primary sources of law on the implied obligations of the carrier or ship owner. Using the black letter approach the research will analyze key conventions such as (The Hague-Visby Rules 1968, The Hamburg Rules 1992, The United Nations Convention on Contracts for The International Carriage of Goods Wholly or Partly by Sea 2008), relevant national legislation (The Carriage of Goods by Sea Act 1971, The Marine Insurance Act 1906); and English common law through a number of key cases, including the landmark cases of Hain Steamship Co. Ltd v Tale & Lyle

Ltd²⁷; *Reardon Smith Line v Sea and Baltic Insurance Co.*²⁸; and *Joseph Thorley Ltd v Orchis Steamship Co. Ltd*²⁹. The main aim of employing the black letter approach³⁰ as part of the methodology for the research will be to provide a critical knowledge and understanding of the implied obligations of the carrier under the contract of carriage of goods by sea as applied recognised through case laws – in other words, the judicial foundations of implied obligations in shipping contracts. This in turn will assist us in answering some key questions which both inform the main themes for the research. These include, inter alia: is the law on deviation outdated or is it still relevant within the modern context of carriage of goods by sea? If it is still relevant, is it in need of reform? Does it provide certainty as to the precise obligations of the carrier, especially in view of the apparent disparity between the provisions of international conventions and those of national law (e.g. English law)? And are the judgments in decided cases consistent with the relevant legislative and conventional provisions? These questions are complementary to the research questions listed in Section 1.4 (above). Informing this black letter methodology will be the critical analysis or legalistic approach to the research and write-up which will be present throughout the various chapters of the thesis.

The Doctrinal/ Theoretical Approach:

The doctrinal or theoretical approach will involve researching from secondary sources such as academic textbooks and journal articles by prominent scholars.³¹ Preliminary research indicates that the doctrinal sources (textbooks, journal articles and opinions of scholars) in this area of the law are relatively few and could be considered in some cases to be rather outdated. Nonetheless such secondary sources contain important views and opinions put forward by academics and practitioners in the field.³² Part of the methodology will involve a critical literature review with a view to identifying any gaps, weaknesses or flaws which

27 [1936] 2 All ER 567 (HL).

28 [1939] AC 562 (HL).

29 [1907] 1 K.B.660.

30 For more on the black letter approach see the following: Salter. M & Mason. J. (2007), *Writing Law Dissertations An Introduction and Guide to the Conduct of Legal research*, Pearson education Limited, Edinburgh, p. 44. See: Morris. C & Murphy. C (2011), *Getting a PHD in Law*, Hart Publishing, Oxford. For further information see: W. Twining, (1994), *The English Law School*, Stevens, London; P. Carrington, (1991), "Aftermath" in *Cane and Stapleton, Essays for Patrick Atiyah*, Oxford: Clarendon, , 144-5; see also: F. Schauer, (1988), "Formalism", 97 *Yale Law Jnl*, 509-48; J. Griffiths, (1991), *The Politics of The Judiciary*, 4th edition, (London, Fontana); M. H. Hoeflich, (1987), "The Americanisation of British Legal Education in the Nineteenth Century", 8 *J. of Legal History*, 244 at 245; and see: D. Lloyd, (1965), *Introduction to Jurisprudence*, 2nd edition, London 262.

31 For a discussion of the doctrinal / theoretical approach, see: Morris. C & Murphy C, (2011), *op. cit.*, p. 37; see also: Salter. M & Mason. J. (2007), *op. cit.*, p. 182; P. Lee, (2005), *Comparative Law Methodology and Sources*, available online at: http://www.okcu.edu/law/lib/pdfs/guide_comparative.pdf; Vivian Grosswald Curran, (1988), "Dealing in Difference: Comparative Law's Potential for Broadening Legal Perspectives", *American Journal of Comparative Law*, 657 Fall.

32 Carr. I. 2010, *International Trade law*, 4th edition, Routledge Cavendish, New York; and see: Baughen. S. (2009), *Shipping Law*, 4th edition, Routledge Cavendish, New York; Carr. I & Goldby. M. (2012), *International Trade Law Statutes and Conventions*, Routledge, London & New York. DeBattista. C. (1989), *Fundamental Breach and Deviation in the carriage of Goods by Sea*, *Journal of Business Law*, J.B.L. 22-36; Mills, (1983), *The Future of Deviation in the Law of Carriage of Goods*, 4 *L.M.C.L.Q.* 587, 589; Clarke, (1978), *Fundamental Breach of Charterparty*, 3 *L.M.C.L.Q.* 472, 474; Peacock. H. (1990), *Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts*, *Texas Law Review*, n189. Sturley, *supra* note 72, at 801.

academic writers have identified in this area of the law, and to provide a critical commentary on these. The gaps so identified will then provide the researcher with the opportunity to make an original academic contribution to the subject area by developing analyses or hypothesis aimed to filling in such gaps. The write-up will also include a critical assessment and appraisal of the problems which have been identified both by other writers and by the present author. One of the disadvantages of having very little written on the subject area lies in the fact that there is less literature to review and thus less secondary sources to research. However, the main advantage of this is the opportunity it offers to the present research to make an original contribution in this subject area.

The Comparative Approach:

International carriage of goods by sea is a commercial activity which is global by its very nature. A single carriage of goods transaction can involve transit through many countries or legal jurisdictions. It is therefore not uncommon to find different legal standards applying to the same transaction in the different legal jurisdictions through which the goods may transit. This problem is made worse by the fact that international conventions and national laws are all potentially the governing law for such transactions. It is frequently the case that international carriage of goods litigation involves a conflict of laws in terms of which court have competent jurisdiction to try the cases and more important which system of law should be the governing law. It is in view of these differences in approach by different legal systems that the research will also employ a comparative approach.³³ The research in this area will examine the law on implied shipping obligations in a number of selected jurisdictions with a view to identifying any differences of approach and the possible reasons for the different approaches.

The choice of particular jurisdictions for the comparative analyses will be guided by two main factors: (1) the popularity of the legal system in question as the governing law where choice of law selection clauses are contained in international contracts of carriage of goods by sea; (2) by the need to compare the approach to implied shipping obligations adopted in countries with different legal traditions; and (3) the ease of access to research materials by the researcher in the particular country in question. The comparative approach to be adopted by

33 For more on the comparative approach, see: O. Kahn-Freund (1974), "On Uses and Misuses of Comparative Law", 37 MLR1; R. Schlesinger, (1995), "The Past and Future of Comparative Law", 43 AJCL 477; P Legrand, (1996), "How to Compare Now", 16 Legal Studies 232; Richard P. Caldarone, (2004), "Precedent in Operation: A Comparison of the Judicial House of Lords and the Us Supreme Court, Public Law 279, (Available in full text via West Law).

this researcher will be both analytical and critical as opposed to a purely descriptive approach.

Research undertaken by the author indicates that the law on international carriage of goods by sea treats unjustified deviation as a far more serious breach of the contract of carriage than, for instance, a breach of the implied obligation of the ship owner or carrier to provide a seaworthy vessel. From a legal perspective, unjustified deviation is treated as a breach of an implied **condition** in the contract of carriage.³⁴ A breach of the implied obligation as to the seaworthiness of the ship, on the other hand, is treated as a breach of an intermediate or innominate term.³⁵ Utilising the comparative methodology the research will enquire into the reasons or rationale for this difference of approach in the law while seeking to understand if there are economic or commercial considerations in treating ‘unseaworthiness’ less severely than unjustified deviation – thus underlining the strong link between the comparative and the empirical methodology as employed in this research.

The comparative methodology will be employed mainly in Chapters 3, 4 and 5 of the thesis.

The Empirical Approach:

The empirical approach will seek to research and to critically analyze the implied obligations of the ship owner or carrier in contract for the international carriage of goods by sea in a wider economic, commercial, social and political context.³⁶ Employing this approach the research will seek to understand the reason for the different approaches to the different types of contracts of carriage by sea vis-à-vis the implied obligations of a carrier. Is there, for instance, a commercial reason or an economic rationale for applying a stricter rule regarding unjustified deviation to voyage charterparties as opposed to all the other types of contracts for the international carriage of goods by sea?

The empirical approach will link with the other methodologies discussed above. For instance, it will seek to understand the political, social or economic factors which influence the design, enactment and application of legislation through cases (black letter methodology). It will also seek to shed light on the economic and political considerations which influence the analysis

34 See: *Connolly Shaw Ltd v A/S Det Nordenfjelske D/S*, (1934) 49 Lloyd’s Rep 183; see: *Stag Line Ltd v Foscolo Mango and Co*, [1931] 2 KB 48; and see: *International Guano Superphosphat-Werken v Robert Macandrew*, [1909] 2 K.B. 306; see also: *James Morrison and Co Ltd v Shaw, Savill and Albion Co Ltd*, [1916] 2 KB 783, CA.

35 *Stanton v Richardson* (1874) LR 7 CP 421; *Moore v Lunn* (1923)38 TLR 649; *Fiumana v Societa di Navigazione v Bunge* [1930] 2 KB 47; see also: *Hong Kong Fir v Kawasaki Kisen Kaisha* [1962] 2 QB 21; *Lyon v Mells* (1804) 5 East 428; *Snia v Suzuki* (1924) 29 Com Cas 284; *Ciampa and Others v British India SN Co Ltd* [1915] 2 KB 774.

36 Morris. C & Murphy. C, 2011, op. cit., p. 35.

of doctrinal writers on the subject (theoretical approach). And finally it will seek to develop an understanding of the factors which influence the different approaches of different jurisdiction vis-à-vis the implied obligations of the parties in a contract for the international carriage of goods by sea (comparative approach).

The empirical methodology will be used to mainly to inform the key findings and conclusions of the thesis in Chapter 6. As part of this the author will attempt to develop a number of hypotheses based on the wider economic, social and political contexts in which the shipping industry and its regulatory framework operate, and the possible impact of this on the development and evolution of the law governing implied obligations.

1.7 Legal Philosophy and Principles Governing the Law on the Carriage of Goods by Sea.

The main objective in this section is to explore the various philosophical schools of thought which underpin legal theory and to seek to identify and to critically explain the link between these theories and some of the key principles which govern the international carriage of goods by sea generally, and in particular the terms and conditions which are implied into shipping contracts. We shall also seek to explore the possible influence of concepts such as legal positivism, interpretivism, legal formalism, natural law theory, morality, etc., on the law and practice of the international carriage of goods by sea. The intention is not to embark on a detail analysis of the legal theory or the various schools of thought, but rather to summarise the main ideas postulated through each of the theories and to try to explain how they may have influenced some of the principles of shipping law. In doing so the researcher is not seeking to find definite outcomes which may influence the findings of the research, but rather to engage in an academic discussion as part of the research exercise.

1.7.1 Legal Positivism within the Context of the Law Governing the International Carriage of Goods by Sea

Positivism in general is a philosophy of science which states that information derived from logical and mathematical treatments and reports of “sensory experience” is the exclusive source of all authoritative knowledge, and that there is valid knowledge (truth) only in this derived knowledge.³⁷ Positivism holds that society, like the physical world, operates according to general laws. Legal positivism in jurisprudence refers to the rejection of natural

³⁷ See Comte A, (2011), *General View of Positivism*, Nabu Press; See also Comte A, (1988), *Introduction to Positive Philosophy*, Hackett Pub Co.

law, thus its common meaning with philosophical positivists is somewhat attenuated. In recent times legal positivism generally emphasizes the authority of human political structures over a scientific view of law.³⁸ It is important to point out that legal positivism is different from positivism. As explained by Toddington, positivism belongs to the philosophy of social science generally and can be said to refer to the “method of scientific explanation”.³⁹

The central claim of legal positivists is that in any legal system, whether a given norm is legally valid (and hence whether it forms part of the law of that system) depends on its sources - not its merits⁴⁰. The law is a social construction according to positivists, i.e. the law is a matter of what has been posited, ordered, decided, practised, etc. This view of the law has interesting implications for the legal framework governing the international carriage of goods. This legal framework, whether in the form of international conventions and legislation (posited or ordered) or common law principles (decided or practised) are generally perceived to suffer from many shortcomings which will be identified in subsequent chapters of this thesis. However, from a legal positivist viewpoint, the legal framework as such still retains its validity due to the fact that it is based on valid sources such as common law precedents, statutes and international conventions.⁴¹ Hence it could be argued that from the perspective of legal positivism the implied terms, norms and principles which make up the legal framework for international shipping law derived their authority not from how efficient the legal framework is, but from the posited nature of the sources which have validly been put in place by formal institutions such as national or international legislative bodies. Viewed from this perspective, any deficiencies and shortcomings in the legal framework have no impact on the validity of the law itself. Take for example the legal classification of unjustified deviation as a condition rather an intermediate/ innominate term or a warranty⁴². Many scholars have been critical of this legal approach in view of its strictness and the potentially disproportionate consequences it could have in the event of a breach. For instance under this strict approach a

38 Mathew H Kramer, (2003), In Defense of Legal Positivism: Law Without Trimmings, Oxford University Press.

39 Toddington, T, (1996), “Method, morality and the impossibility of legal positivism”, Ratio Juris, 9(3), pp.283-7, Examination of logical basis of Weberian and Aristotelian themes in John Finnis's defence of natural law conception of the legal enterprise in Natural Law and Natural Rights, 1980.

40 Smith, D,(2001), “Authority, meaning and inclusive legal positivism”, Modern Law Review, M.L.R, 64(5), 795-808; Himma E K, (2003), Law, Morality, and Legal Positivism, Waterstone; Bix B, (1996), Jurisprudence: Theory and Context, Westview Press, Boulder CO.

41 National statutes such as: Carriage of Goods by Sea Act 1971; Marine Insurance Act 1906; Merchant Shipping Act 1995; International conventions such as: Article IV (1) Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968 (Hague-Visby Rules); United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules); The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules); Common law precedents: see for example Hain Steamship Company Ltd v Tate & Lyle Ltd [1936] 2 All ER 597 as this case is considered as the leading English case in respect of the effects of deviation on a contract of carriage of goods by sea; See also Reardon Smith Line v Black Sea and Baltic General Insurance [1939] AC 562, HL which defined the usual customary route for the vessel.

42 The implied obligation of not to deviate from the proper course is so serious and regarded as a condition of the contract. This entitles the cargo owner or the bill of lading holder to repudiate the contract and to treat it as at an end. The ship owner therefore will not be able to rely on any exception clauses in the contract of carriage. See Hain v Tate and Lyle (1936) 41 Com Cas 350; See also Internationale Guano v MacAndrew [1909] 2 KB 360.

cargo owner could still justifiably refuse to pay freight following an unjustified deviation even if the cargo has been safely delivered on time. This would be on the ground that the effect of the unjustified deviation has been to oust the contract of carriage. To any reasonable person such an outcome would seem to be unjust, leading to the very validity of the rule being questioned. However, to the legal positivist the application of the rule and its consequence is not relevant when considering its validity; the only relevant consideration is the source of the rule.

Furthermore Leslie Green has stated that a legal system depends on the presence of certain structures of governance, not on the extent to which it satisfies ideals of justice, democracy, or the rule of law.⁴³ So the fact that a policy would be just, wise, efficient, or prudent is never sufficient reason for thinking that it is actually the law, and the fact that it is unjust, unwise, inefficient or imprudent is never sufficient reason for doubting it. This positivist point of view further illustrates the arguments made in relation to the example given above. If pursued to their ultimate conclusion, then the call made by some authors for the reclassification of the principle of unjustified deviation from a condition to an intermediate or innominate term would be misguided from the legal positivist point of view. Once again the only relevant consideration as regards the validity of the rule would be its source, not the undesired effect or otherwise of the rule's application.

On the question of the relation between law and morality, H.L.A Hart a leading 20th century positivist offers the essence of positivism. Positivists believe that laws are commands of human beings, and there is no connection between law and morals or law as it is and law as it ought to be. Because of its insistence on separating law and morals, Hart's theory is often called **separation thesis**.⁴⁴ According to this thesis the analysis of legal concepts is worth pursuing and has to be distinguished from historical inquiries into the cause or origins of laws, from sociological inquiries into the relation of law and other social phenomena, and from the criticism or appraisal of law whether in terms of morals, social aims, functions, or otherwise.

It is thus true that positivism draws a distinction between what it is morally right to do and what is legally valid. Hence positivists deny absolutely that legal obligations have anything to

43 See Green L, (1988), *The Authority of the State*, Oxford: Clarendon Press; See also Green L, (1985), "Authority and Convention", *Philosophy Quarterly*, vol 35, no 4,

44 See Moles N R, (1987), *Definition and Rule in Legal Theory: A Reassessment of H.L.A Hart and the Positivist Tradition*, Blackwell; Howard Davies and David Holdcroft, (1991), *Jurisprudence: Texts and Commentary*, p 3; See also Hart, H.L.A., (1958), "Positivism and the Separation of Law and Morals", *Harvard Law Review*, Vol 71, 1958, 593-629, pp 593-94; Hart, H.L.A.,(1994), *The Concept of Law*, 2nd edition, Clarendon Press, Oxford.

do with our moral obligations. However, this view is not without its critics. Priel, for example, identifies a problem arising from positivists' claims that although jurisprudence is evaluative, it is possible to know the law without evaluative considerations, and further suggests that knowledge of the content of legal norms requires moral considerations⁴⁵. Toddington has further argued the impossibility of legal positivism on account of its attempted separation between law and morality, promoting instead natural law theory as an alternative to legal positivism.⁴⁶ From point of view of this research, it is also clearly the case that some of the norms which govern the law governing the international carriage of goods by sea draw their inspiration from and are influenced by moral considerations. A key example is the rule which permits deviation in order to save human life. This rule is embedded in both common law and relevant statutes and international conventions on the carriage of goods by sea.⁴⁷ The dictum of Lindley J in the case of *Scamanaga v Stamp*⁴⁸ clearly points to a connection between legal norms and morals. The legal question which arose in this case was whether or not a deviation from the proper course with the objective of saving human life was justified. In the learned judge,

“... [T]he reasons for holding the master justified in deviating to save life is overwhelming. To deny him this liberty would be to shock the **moral sense** of every right-minded person and to ignore the **clear moral duty** of assisting *fellow creatures in distress*” [emphasis added].

Also worth mentioning here is the concept of legal formalism which is a legal positivist view in the philosophy of law and jurisprudence. Legal formalists argue that judges and other public officials must be constrained in their interpretation of legal texts.⁴⁹ This point of view, for instance would imply judges applying the literal rule of interpretation to statutes. However it could be argued that this is not often the case in real life, as the existence of other

45 See Priel, D. (2006), “Trouble for legal positivism?” *Legal Theory*, L.T., 12(3), 225-263; see also Raz J. (1979), *The Authority of Law: Essays on Law and Morality*, Oxford University Press, Oxford; Roger A Shiner, (1992), *Norm and Nature: The Movements of Legal Thought*, Clarendon Press, Oxford.

46 Toddington. T. (1996), “Method, morality and the impossibility of legal positivism”, *Ratio Juris*, 9(3), 283-299.

47 See *Scamanaga v Stamp* (1880) 5 C.P.D 295; Article IV (4) of The Hague-Visby Rules which were ratified into UK law by The Carriage of Goods by Sea Act (1971) “Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”; Article 5 (6) of Hamburg Rules “the carrier is not liable, except in general average; where loss, damage, or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea; Article 17 of the Rotterdam Rules states that the carrier is relieved of all or part of his liability, if he proves that loss, damage or delay occurred while he was saving or attempting to save life at sea, or when he exercises reasonable measures to save or attempt to save property at sea or to avoid or attempt to avoid damage to the environment; Article 49 (1) (e) and (f) of The Marine Insurance Act 1906 excuses for deviation or delay for the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship.

48 (1880) 5 C.P.D 295.

49 Jean d’Aspremont, (2013), *Formalism and the Sources of International Law, A Theory of the Ascertainment of Legal Rules*, Oxford University Press, Oxford; See also Roy L Brooks, (2002), *Structures of Judicial Decision Making from Legal Formalism to Critical Theory*, Carolina Academic Press, Durham.

rules of interpretation such as the mischief rule, the golden rule the contextual law and the purposive rule clearly illustrate. An illustrative case law example of the latter point in the carriage of goods by sea is the case of *Glynn v Margetson*⁵⁰. In this case, which involved the effect of unjustified deviation on auxiliary contracts such as the contract of marine insurance, Lord Halsbury stated the following view:

*“The only difference between policies of assurance and other instruments in this respect is that the greater part of the printed language of them being invariable and uniform has acquired from use and practice a known and definite meaning, and that the words superadded in writing (subject indeed always to be governed in point of construction by the language and terms with which they are accompanied), are entitled nevertheless, if there should be any reasonable doubt upon the sense and meaning of the whole, **to have a greater effect attributed to them than to the printed words**, inasmuch as the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning, and the printed words are a **general formality adapted equally to their case** and that of all other contracting parties upon similar occasions and subjects.”*

It may thus be argued from the above that contrary to the views of legal formalists there is always scope for judges to seek alternatives to the literal rule of interpretation when they consider the literal rule not to be appropriate tool given the circumstances of the case.

Legal formalism seeks to maintain and to promote the separation theory that law is a set of rules and principles independent of other political and social institutions. Thus legal formalism is closely related to positivism. In the view of legal formalists how the law was made and the directions of human effort that went into its creation are irrelevant. So positivism is understood as an explanation of what is law, and formalism can be said to be a positivist explanation of how law and legal system operate.

Legal Instrumentalism, on the other hand, can be contrasted to legal formalism. Instrumentalism is the view that creativity in the interpretation of legal texts is justified in order to assure that the law serves good public policy and social interests, although legal instrumentalism could also see the end of law as the promotion of justice or the protection of

⁵⁰ [1893] AC 351.

human rights⁵¹. The existence of the various rules of judicial interpretation identified above, together with rules of judicial construction such as the *contra proferentem* rule used in contract law to construe exemption clauses and in shipping law to construe liberty clauses clearly support the position adopted by legal instrumentalists.

1.7.2 Natural Law Theory

Natural law theorists argue that the status of law depends not simply on the fact that it has been laid down in whatever way (or ways) recognised by the legal system of which it is part, but also on some additional factor or factors extended to that system.⁵² Positivist theory, on the other hand, argue that the status of law attaches to anything which has been laid down or posited as law and is recognised by the legal system in question⁵³. Natural law theory is thus the opposite of, or the alternative to, legal positivism. Thus, natural law theories are normative, while positivist theories are analytical. Analytical theories seek to identify the ingredients, which, when they come together, result in something which we call law. Natural law theories may be labelled normative because they deal with what law ought to be, while positivist theories may be labelled analytical because they deal with what law is⁵⁴. In relation to the legal framework for the international carriage of goods, and in particular to the precise legal status of the principle of deviation, it may be argued that those scholars who have advocated a change in the law through the re-classification of deviation as an innominate or intermediate term rather than a condition, are in effect postulating law (legal norm) as it ought to be.⁵⁵ From this point of view this writers could be considered to belong to the natural law school of thought.

Having said this, law as a whole is inescapably a normative undertaking, since it tells people what they ought, or ought not to do.

1.7.3 Legal Realism

The realist emphasis is on what the law is, on taking the law as understood by the lawyers as an object of social scientific. Legal realism is a unified collection of thought. There are four

51 Brian Z. Tamanaha, (2006), *Law as a Means to an End: Threat to the Rule of Law*, first edition, Cambridge University Press.

52 Finnis J, (1011), 2nd edition, *Natural Law and Natural Rights*, Oxford University Press.; See also Toddington T, (1996), "Method, morality and the impossibility of legal positivism", *Ratio Juris*, 9(3), 283-299.

53 See David A J Richards, (1977), *The Moral Criticism of Law*, Dickenson Publishing, Encino CA.; W. J Waluchow, (1994), *Inclusive Legal Positivism*, Clarendon Press, Oxford.

54 Campbell. T, (1989), "The point of legal positivism", *Kings College Law Journal*, 1989/99, K.C.L.J, 9, 63-87, however, Tom in his article argues that legal positivism can be normative theory which seeks to determine what law ought to be in contrast to common view that it can only provide explanation of law as it is.

55 Dockray P.M, (2000), "Deviation: A Doctrine All at Sea?" *Lloyd's Maritime and Commercial Law Quarterly*, 1, 76-98; Baughen S (1991), "Does Deviation Still Matter?" *Lloyd's Maritime and Commercial Law Quarterly*, 1, 70-96.

principal strands of thought predominate in the movement. A fifth strand, known as legal empiricism, consists of a synthesis of realist thought. Legal empiricism has attempted to make the other four strands into single jurisprudence. These four strands are briefly discussed below with a view to exploring their possible impact or influence (if any) on the development and functioning of the law on the international carriage of goods by sea.

1- Power and Economics in Society

The first strand of legal realism is marked by the nihilistic view that law represents the will of society's most powerful members. It postulates that laws are made by the ruling party in its own interest, and the ruling element is always the strongest. In other words, when courts make decisions in terms of what is right and just, they are passing judgements in the interest of those established in power. Justice Holmes echoed these sentiments when he wrote that the law must not be perverted to prevent the natural outcome of dominant public opinion⁵⁶. Realists argued that law frequently equates the dominant power in society with pervasive economic interests. From the perspective of shipping it could be argued that the pervasive influence of liberty clauses on the performance of the contract of carriage echoes the realist view of the societal function of legal norms. Liberty clauses, which permit deviation from the contractual or agreed route by the carrier, are inserted into standard form charterparties by the ship owner or carrier who is clearly the dominant party in the contractual relationship.⁵⁷ An illustrative example of such a provision in a standard form charterparty is the GENCON Clause 3 which states as follows:

“The vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property”⁵⁸

In upholding the validity of this and similar clauses (albeit subject to the contra proferentem rule of construction) it could be argued that the courts are in effect protecting the established interests of the dominant party within the legal framework of the contract for the international carriage of goods.

⁵⁶ *Lochner v. New York*, 198 U.S. 45, 25 S. Ct. 539, 49 L. Ed. 937 [1905].

⁵⁷ *James Morrison Ltd. v Shaw Savill and Albion Company* [1916] 2 KB 783; *Leduc & Co. v Ward* (1888) 20 Q.B.D. 475.

⁵⁸ See also clause 20 Intertankvoy 76 which give the ship owner a freedom to “sail with or without pilots, to tow or go to the assistance of vessels in distress, to call at any port or place for oil fuel supplies, and to deviate for the purpose of saving life or property, or for any other reasonable purpose whatsoever”.

2- The Persuasion and Characteristics of Individual Judges

This strand of realist thought that law is nothing more than what a particular court says it is on a given day, and that the outcome to a legal dispute will vary according to the political, cultural, and religious persuasion of the presiding judge.

For instance, courts are commonly asked to invalidate contracts on the ground that one party exercised duress and under influence in coercing another party to enter an agreement. Cardozo noted that terms such as duress and undue influence are subject to interpretation.⁵⁹ He argued that judges who are inclined to shape the law in favour of society's weaker members will construe them broadly, invalidating many contracts that stem from predatory behaviour. Equally, judges who are inclined to shape the law in favour of society's weaker members will construe standard contract terms narrowly, allowing particular individuals to benefit from their guile and acumen. An example of this can once again be seen in the application of the *contra proferentem* rule of judicial construction. However, there is a danger that if judges base their decision on political, social, cultural or religious persuasion this could lead to inconsistent and contradictory judgements. However, it could equally be argued that the doctrine of judicial precedent which applies under the common law system ensures consistency in that judges in lower courts are bound by the decisions made by the higher courts.

Finally it could also be argued that the existence of dissenting or minority judgements in particular cases serves as an indication of the influence and impact which the persuasion and characteristics of individual judges may have on the outcome of a particular case. In other words a mechanical application of the law should always lead to unanimous judgements in which all judges come to the same decision. However, cases such as *Internationale Guano ES v Robert Macandrew & Co.*⁶⁰ point to the contrary. In this case, the steamship *Cid* was duly loaded at Zwijndrecht with a cargo of superphosphates in bags, part to be delivered at Algeciras and part at Alicante. The vessel called at Corunna to load cattle, and was delayed there by stormy weather for about 7 days, instead of the few hours necessary for the actual loading of the cattle. She then delivered the cattle to Gibraltar and went to Algeciras. From Algeciras, instead of proceeding direct to Alicante, she deviated to Seville to load a shipment

⁵⁹ See Benjamin N Cardozo, (1924), *The Growth of the Law*, Yale University Press.

⁶⁰ [1909] 2 K.B 360.

of ore. The actual time lost by this deviation to Seville was about 6 days. By reason of the various delays the cargo delivered at Alicante was damaged, the damage being due to the action of sulphuric acid in the superphosphates eating away the bags. The court held that the deviation to Seville put an end to the charterparty as from the beginning of the voyage, and therefore the defendants were under the obligation of common carriers. In this case Lord Scrutton and Leck, were for the defendants (ship owners). Their point of view that although the vessel by going to Seville deviated from the chartered voyage, the defendants are nevertheless entitled to rely on the exceptions in the charterparty as a defence to so much of the claim as relates to the damage to the cargo before the deviation occurred. The learned judge relied on his opinion on *Davis v Garrett*⁶¹ and *Lilley Doubleday*⁶². On the other hand Lord Simon and Mackinnon were for the plaintiffs (cargo owners). They stated that the decision in *Joseph Thorley, Ltd v Orchis Steamship Co*⁶³, cover this case. And by not having performed the voyage stipulated for by the contract, the ship owners cannot rely on the terms of the contract, the contract is gone, and it is therefore immaterial at what stage of the voyage the damage occurred.

3- Society's Welfare

This strand of the realist school of thought, seem convinced that common law principles can be manipulated by the judiciary. Instability and chaos would result if every judge followed his own political convictions when deciding the case. This theory of law, which is known as sociological jurisprudence, encourages judges to consult communal mores, ethics, and religion, and their own sense of justice when attempting to resolve a lawsuit in accordance with the collective good.⁶⁴ Jeremy Bentham, for instance, argued that law must serve the interest of the greatest number of people in society. Applied to the legal framework which governs the international carriage of goods by sea, it may be argued that judges in their narrow judicial construction of liberty clauses or through their upholding the legality of deviation only when it serves the general interest of all parties involved in the adventure, are in fact promoting the general welfare of society – i.e. the shipping community of ship owners, cargo owners insurance companies and underwriters, cargo brokers, freight forwarders, etc. In the case of *Glynn v Margetson*⁶⁵, for instance, the court by rejecting the carrier's reliance

61 (1830) 6 Bing 716.

62 (1881) 7 Q.B.D 510.

63 [1907] 1 K B 660.

64 See William W Fisher, (1993), *American Legal Realism*, Oxford University Press, Oxford; See also Dennis Patterson, (1999), *A Companion to Philosophy of Law and Legal Theory*, Wiley-Blackwell.

65 [1893] AC 351.

on a liberty clause which allowed deviation stated that the clause had to be narrowly construed in the general interest of preserving the commercial purpose of the adventure.

On the other hand, some realists turned Bentham's philosophy on its head, arguing that the law should serve the interest of the weakest members in society because they are the least represented in state and federal legislative assemblies). An example of this could be when judges construe implied terms in favour of cargo owners who are deemed to be the weaker party to the contract of affreightment, for example the strict duty imposed on the carrier both under common law and international conventions vis-à-vis care of the cargo during the course of the voyage.⁶⁶ In *Kopitoff v Wilson*⁶⁷, the learned judge stated that "The ship owner is, by nature of the contract, impliedly and necessarily held to warrant that the ship is good, and is in a condition to perform the voyage then about to be undertaken, or, in ordinary language, is seaworthy, that is, fit to meet and undergo the perils of the sea and other incidental risks to which she must necessarily be exposed in the course of the voyage."

4- A Practical Approach to a Durable Result

Whereas sociological jurisprudence sought to utilize the common law as an engine of social reform, the legal pragmatism of realist thought sought to employ common law principles to resolve legal disputes in the most practical and economically efficient way. In some jurisdictions this view has been taken step further in dealing with the unforeseen and undesired consequences of a potential breach of contract of force majeure. In civil jurisdictions such as France, for instance, under the contract law theory of *imprévision* or adaptation of contract, a court may sanction the renegotiation or adaptation of a contract to accommodate unforeseen circumstances with a view to ensuring the completion of performance.⁶⁸ The reason is that this approach is seen to be a more practical and economically durable outcome as opposed to upholding a breach of contract or discharge of contract claim. The adaptation of contract approach has also been adopted by Australian courts and similarly by US courts under the economic analysis of contract doctrine.⁶⁹

⁶⁶ See Article III of The Hague-Visby Rules which is incorporated into the Carriage of Goods by Sea Act 1971: 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 relevant provisions on implied warranties for unseaworthiness is governed by section 39 (1) (2) (3) (4) (5) of the Marine Insurance Act 1906.

⁶⁷ (1876) 1 QBD 602.

⁶⁸ See generally Lando, Ole, (1980), Renegotiation and revision of International Contracts: An Issue of North/ South Dialogue, 23 *Germ. Y.B.Int'l L.* 37.

⁶⁹ See Posner, (2003), E.A. Economic Analysis of contract Law After Three Decades: Success or failure, 112 *Yale L.J.* 829.

Although English courts do not sanction the adaptation of contracts approach (as this would be seen to amount to judicial interference with the freedom of contract doctrine) there are nonetheless cases on the carriage of goods by sea in which it could be argued that the courts have taken a practical approach with a view to achieving a durable result which would not otherwise be the case if a more strict application of the law had been adopted. For example, English courts have ruled that cargo which is not claimed at the port of destination should either be warehoused by the carrier at the cargo owner's expense or trans-shipped back to the port of loading. In the case of *Bourne v Gatliff*⁷⁰, in which the ship owner discharged and then left the cargo at the dockside when the consignee did not turn up to claim the goods, and the cargo was subsequently destroyed by fire, the ship owner was held liable for the loss even though the cargo owner could be said to have been in breach of contract themselves by not claiming the goods when they were tendered at the port of delivery. It could thus be argued that the approach adopted by the court in this case was aimed at producing a result which is both practical and durable in that it is aimed at ensuring the preservation of the cargo in similar cases which may occur in the future. In general contract law courts have been known to imply terms on a similar basis. For instance, the term implied in *The Moorcock* was done on the basis of promoting the "business efficacy" of the transaction by filling in a gap in the contract terms.⁷¹ The fact in this case was that the defendants agreed to allow the Claimant to unload his vessel at their wharf. While the vessel was moored the tide fell and the uneven conditions of the river bed damaged the ship. The court held that the defendant was liable because there was an implied term in the contract that they would take "reasonable care to ascertain that the bottom of the river was in such a condition as not to endanger a vessel using the wharf in an ordinary way". The case was appealed. However, the Court of Appeal assured that there was indeed an implied term in the contract incorporated by the court and that the term was based on the presumed intention of the parties as well as on "reason".

1.7.4 Interpretivism

Interpretivism is a school of thought of contemporary jurisprudence and the philosophy of law. Interpretivism is a kind of natural law or "nonpositivist" theory since it claims that, in addition to institutional practice, certain moral facts necessarily play some role in the explanation. It makes a number of related distinctive claims within that approach. It is usually seen as a third way between natural law and legal positivism. So interpretivism legal theory is

70 (1844) M&G 850.

71 *The Moorcock* (1889) 14 PD 64; See also *Shirlaw v Southern Foundries* [1939] 2 KB 206; *Liverpool City Council v Irwin* [1976] QB 319.

about the nature of law is the view that legal rights and duties are determined by the scheme of principle that provides the best justification of certain political practices of a community.

Interpretivism was first postulated by Dworkin as a criticism of the positivist school of judicial reasoning which focuses on rules in interpretation, and is most closely associated with the work of Austin and Hart. Dworkin rejects the positivist conceptions of law and interpretation, instead theorizing that rights are premised upon a comprehensive set of moral precepts that make individual rights valuable⁷². Interpretative concepts according to Dworkin are special rules whose correct application depend not on fixed criteria or an instance-identifying decision procedure but rather on the normative or evaluative facts that best justify the total set of practices in which that concept is used⁷³.

Unlike the legal positivism, interpretivists claim that law is not a set of given data, conventions, or physical facts, but what lawyers seek to construct or achieve in their practice. Therefore, interpretivism approach about law offers a philosophical explanation of how institutional practice through legally significant action and practices of political institutions amend legal rights and/or obligations. Its main claim is that the way in which institutional practice affects the law is determined by certain principles that explain why the practice should have that role. Interpretation of the practice purports to identify the principles in question and thereby the normative impact of the practice on parties' rights and responsibilities.

As mentioned above legal positivism has been identified that the validity of individual laws depends upon their sources and not their merits. A characteristic model for this approach is provided by Hart's conception of every legal system having a 'rule of recognition', establishing criteria by which standards can be identified as legal standards. The rule of recognition of a particular legal system identifies the sources of law which are valid in that system and laws are valid because they either belong to one of those sources or are validated by other laws which do. The idea that the validity of a legal standard depends upon its sources rather than its merits is not uncontroversial and has been the subject of criticism, since many legal standards in both private and public law seem to derive at least part of their force from their fundamental merits.

72 Dworkin R, (1986), *Law's Empire*, Belknap Press of Harvard University Press.

73 Dworkin. R, (2013), *Justice for Hedgehogs*, Belknap Press.

Dworkin, one of the main critics of legal positivism, holds that positivism cannot be described as “legal principles”, and that principles show that law is not necessarily source-based. Many positivists, on the other hand, think they can, since laws can specify moral conditions for the validity of other legal standards. So far as Dworkin's critique of positivist accounts of validity goes, the original argument merely claims that the positivist account is inadequate. Which leaves the question, what alternative account of legal validity is there? This is the challenge to which Dworkin responded in his work on 'hard cases'. Dworkin argues for a much more liberal conception of the scope of legal considerations than positivists. For Dworkin law encompasses not only court decisions and legislation considered discretely, but the whole of law seen as an internally coherent and consistent set of individual rights and duties. Law has to be seen as an enterprise with underlying values which inform its content and interpretation.

According to Dworkin and other interpretative approaches to law to resolve legal disputes, courts often need to interpret sources of law such as constitutions and statutes and precedents, and they need to interpret the communications by which parties try to order their own and others' legal rights and duties.

Dworkin argues that law is an 'interpretive concept', by which he means that any true statement of law is true because it follows from the best interpretation of the legal practice of the community and that all questions of legal rights and obligations are to be answered by interpreting the community's legal practice. It may be argued that evidence of this approach can be found in the prudent ship owner test which courts use to establish or to determine whether or not a ship is seaworthy⁷⁴. By using a legal criterion based on the practice of a prudent ship owner, it is evident that both the convention and the courts are interpreting and applying the community's legal practice – i.e. the best practice of the shipping community. This being the case, there appears to be a clear link between this legal approach and the interpretive concept as posited by Dworkin. The same can be said for the court's approach to the interpretation and enforcement of 'held cover' clauses and liberty clauses.

⁷⁴ See Article IV (1) of The Hague-Visby Rules which states that “Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to 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 in accordance with the provisions of paragraph 1 of Article III. Whenever loss or damage has resulted from unseaworthiness the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this article”.

Unlike legal positivism, legal interpretivism argues that there is no separation between law and morality, as interpretivism claims that the explanation of rights and obligations in which both moral principles and institutional practice play some role is a kind of interpretation, and that interpretation identifies some moral principles which justify, in some specified sense, the enactment's having the impact in question. Legal positivists, as already discussed, believe that there is no connection between law and morals or law as it is and law as it ought to be⁷⁵, interpretivism claims that the justifying role of principles is fundamental for any legal right or obligation, and moral principles ultimately explain how it is that institutional and other non moral considerations have roles as determinants of the right or obligation. In the order of explanation, morality comes first. However, as argued above, exceptions to the rule against deviation such as a deviation to save life or to land a fugitive from justice could be said to be based on moral considerations. Equally, in the case of *Woolf v Claggett*⁷⁶, the court stated that when sickness of the master or crew is set up as an excuse for deviation, then the plaintiff must show that proper medicines and necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board. The fact in this case was that a Danish vessel directed into Plymouth for medicines and remained there for 14 days, however, on the facts of the case, the deviation was held to be unjustified. In other words it can be argued that the justification of deviation in these circumstances is founded on grounds of morality. Contrary to the view of legal positivists, this provides further evidence of the link between law and morality which many advocates of natural law theory and interpretivism such as Finnis, Toddington, etc⁷⁷ have sought to establish.

It could be argued that interpretivism about law leads to a form of legal anti-positivism, the view according to which the law in a given jurisdiction at a given time is ultimately grounded in moral facts as well as social facts. However, many philosophers have striven to reject legal anti-positivism in favour of legal positivism, the view according to which the law in a given jurisdiction at a given time is ultimately grounded in social facts but not moral facts. Thus positivists claim that the law in a given jurisdiction at a given time does not depend on any facts of moral merit, whether of the moral merit of a law, a set of practice, or anything else.

75 Luc J. Wintgens, (1991), "Law and morality: a critical relation", *Ratio Juris*, 4(2), 177-201.

76 (1800) 3 Esp 257.

77 See Dworkin R, (1985), *A Matter of Principle*, Harvard University Press.; Dworkin R, (1986), *Law's Empire*, Belknap Press of Harvard University Press.; Ronald Dworkin, (1978), *Taking Rights Seriously*, 5th printing edition, Harvard University Press.; See also Tina Hunter, (2005), "Interpretive Theories: Dworkin, Sunstein, and Ely." *Bond Law Review*, vol 17 issue 2, p 78-101.

There is a significant distinction between two ways of understanding the interpretivist claim that institutional practice (i.e. a wide range of legal, and political concepts, including freedom, democracy, and equality⁷⁸) and moral facts both play roles in the explanation of legal rights and obligations. The first way of understanding the claim, institutional practice constitutes by itself part of the law; moral facts constitute by themselves another part; and the final content of the law is some function of the two parts. On the second, institutional practice is one factor in the explanation but does not constitute any part of the law.

In conclusion, it has been established that the law and practice relating to the carriage of goods by sea has more in common with natural law theory and interpretivism through the influence and impact of concepts such morality on the development of its governing principles. The legal positivist view of the separation between law and morality does not seem to be supported by the findings of this research in relation to shipping law. The dictum of Lindley J. in the case of *Scaramanga v Stamp*⁷⁹ provides further support for this finding.

1.8 Literature Review

The literature review will be divided into two main parts. The first part deals with the historical development of the law on deviation by examining the evolution of relevant sources of law. The main aim of this exercise is to try to understand the various factors which have influenced the development of the law on deviation and the principles of shipping law generally. In other words, the context in which these principles have developed and evolved over time. In the second part the secondary sources will be reviewed. Because of the large volume of sources available, the researcher decided to be selective by choosing the most important and significant sources. The main objective of the review of secondary sources is to identify gaps in the literature which the researcher can address as part of the research. The identification help the researcher to development the conceptual framework or the thesis, in particular the dissertation aims and objectives and the dissertation research questions, and then the aims and objectives for each chapter of the dissertation. The ultimate objective of the researcher in identifying and addressing these gaps was to try to make original contributions to the subject area.

⁷⁸ Dworkin. R, (2013), *Justice for Hedgehogs*, Belknap Press.

⁷⁹ (1880) 5 C.P.D 295.

1.8.1 Historical Development and Evolution

Deviation as a doctrine had its roots in cargo insurance. If a ship deviated from its proper course, this was deemed to change the risk for which it was originally insured and as such this would cancel the policy.⁸⁰ It was because of this that the strict rules against unjustified deviation were introduced.⁸¹ To this day, any unjustified deviation automatically discharges the insurer from liability. Of course, in the absence of unjustified deviation, if the goods became either damaged or lost, the policy of marine insurance would cover the loss or damage. Even before the Carriage of Goods by Sea Act [COGSA] was enacted, deviation was held to oust the contract of carriage and thus deprive the ship owner of any exception clauses in the contract of carriage by sea.⁸²

From a historical and legal perspective early mercantile law principles identified two main factors as defining the basis of the law on deviation; these are: **(i)** the specific kind of act of deviation which constitutes breach - i.e. a voluntary and an unjustified departure from the agreed voyage or the 'proper course'. In *Clayton v Simmonds*⁸³, for example, it was held by Lee CJ that if a ship departs from the proper course by calling at an unstipulated port or stays at such a port it amounts to unjustified deviation. And **(ii)** in view of the interrelationship between the various 'cargo interests' and the carrier, the legal nature of this relationship prevents the carrier from embarking on a voluntary and an unjustified deviation the effect of which may be to frustrate the commercial purpose which is common to both parties in the adventure. In the case of *Glynn v Margetson*⁸⁴ it was held that the liberty clause which was included in the bill of lading did not cover this particular deviation. Due to the delay occasioned by the deviation the cargo of oranges belonging to the cargo owner became damaged. It was held that the main object and intent of the charterparty was the carriage of oranges from Malaga to Liverpool, and the deviation was therefore unjustified in view of the fact that the commercial purpose of the adventure had become frustrated.⁸⁵

In considering the term "proper course", historically ships had certain routes that they followed often based upon trade winds and navigational safety. In the days of sailing ships, voyages were subject to innumerable uncontrollable hazards, which frequently resulted in

⁸⁰ Lachmi Singh, (2011), *The Law of Carriage of Goods by Sea*, Bloomsbury Professional, Sussex, p. 192.

⁸¹ G. Gilmore and C. Black, 2nd ed, (1975), *The Law of Admiralty*, 3-40, at 176 [hereinafter cited as Gilmore and Black].

⁸² James F. Whitehead, (1981), *Deviation: Should The Doctrine Apply to On-Deck Carriage?*, 6 *Maritime Lawyer*, 37.

⁸³ (1741) 1 Burr 343.

⁸⁴ [1893] AC 351.

⁸⁵ In relation to voluntary deviation, see *Tait v Levi* K.B [(1811) 14 East 481 9; and for a case relating to the frustration of the commercial purpose of the adventure following a deviation, see *Glynn v Margetson* [1893] AC 351, HL.

delays and deviations.⁸⁶ It is partly because of this unpredictability, that to this day, the Hague-Visby Rules do not cover the liability of the carrier for delay in delivery caused by factors outside the carrier's control. However, as a result of modern shipping technology, the proper charting of the oceans as well as sophisticated and efficient methods of navigation, voyages have become less subject to delays and more predictable. This advancement and historical development in marine technology has led shippers to rely upon and expect compliance with undertakings by carriers to deliver goods within a specified period of time.

In the past carriers used to evade or avoid liability through the insertion of various exculpatory provisions in their bills of lading which purported to reserve to the carrier the right to deviate.⁸⁷ One of the oldest cases of unjustified deviation is *Lavabre v Wilson*,⁸⁸ in which the ship owner claimed money under a marine insurance policy when his ship was lost after being captured by a privateer. The policy gave the ship owner the liberty to touch in the outward or homeward-bound voyage, at the Isles of France and Bourbon, and at all or any other place or places what or wheresoever, without being deemed an unjustified deviation. The ship arrived in Pondicherry after much delay and instead of proceeding to China sailed from there to Bengal. The delay resulted from the fact that on both the outbound and inbound voyages, she either touched at, or laid off, Madras, Masulipatam, Visigapatam, and Yanon, and took on board cargos at all those places. When she set sailed from Pondicherry back to France the vessel was captured en route by privateers. The ship owner argued that the voyage to Bengal was a necessary departure from the 'proper course' for safety reasons, (and that because the risk has not thereby been increased) therefore the deviation to Bengal must be subject to the liberty clause exception stipulated in the contract of carriage. The court held that the delay in going from Pondicherry to Bengal, and the repeated stops by calling at different places, and trading there, were unjustified deviations, and not within the protection which the supposed necessity afforded to the direct voyage.

One of the oldest forms of justifiable deviation is in order to obtain medical aid for a sick master or crew member and to put him ashore at the nearest port. The rules of Oleron,⁸⁹ (written in either the **12th or 13th century** depending upon whose "unproven" viewpoint one

86 UNCITRAL Yearbook, Volume xxxiv b: 2003, UN Publication, A/CN.9/SER.A/2003, (Volume XXXIV B) available online at: http://www.uncitral.org/pdf/english/yearbooks/YB2003_B_E.pdf [Accessed 05-05-10].

87 Roger Lee, (1972), Comment: The Law of Maritime Deviation, Tulane Law Review, Vol. 47, p. 155.

88 *Lavabre v Wilson* (1779) 1 Doug 284.

89 Unknown author, (undated), "The rules of Oleron (circa 1266)" The Admiralty law guide online available at: <http://www.admiraltylawguide.com/documents/oleron.html> [Accessed 16-05-10].

takes) are deemed to be the oldest formal statement of maritime law in northern Europe. Article VII of the Oleron rules stipulates that “If it happens that sickness seizes on any one of the mariners, while in the service of the ship, the master ought to set him ashore, to provide lodging and candlelight for him, and also to spare him one of the ship boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship”. It also says, (which seems very enlightened for the time) that his “full wages” should be paid whilst he is sick.

In **relatively more recent times**, the right to justifiable deviation for a sick master or crew member was in the case of *The Europa*.⁹⁰ In this case it was stated that a master should resort to a port of refuge for shelter, medical attention for crew, make urgent repairs or take on provisions. The judge’s ruling in this case was that a contract of affreightment is not put to an end either by a breach of the warranty of seaworthiness or by a deviation which is in fact necessary for the safety of the ship and crew even where the necessity for the deviation is caused by the unseaworthiness of the vessel.

Unjustified deviation has generally treated in the case law as a particular type of breach of the contract of carriage by sea which has exceptional consequences. The common law decision in *Davis v Garrett*⁹¹ is considered to be the first case to focus directly on deviation as a breach of the contract of carriage, although the case itself is not the oldest case involved with deviation generally. For instance, in **1789**, it was held in a decided case that a deviation by a ship from the direct voyage stipulated under the policy of marine insurance (even if the deviation itself was as a consequence of the ignorance of the captain and free from any intentional or fraudulent motive), had the effect of invalidating the policy of marine insurance⁹². Similarly Lord Mansfield CJ stated in *Hartley v Buggin*⁹³ that it is not material to constitute a deviation that the risk has or should be increased. In this rather old case a vessel was insured to travel from the coast of Africa to the West Indies, with liberty to exchange goods and slaves. The vessel was delayed at the coast of Africa for several months, during which times she was employed as a receiving ship for slaves who were afterwards put on board other ships. It was held that this was an unjustified deviation. The reason for this is that although *Davis v Garrett* was a decision of limited significance as a development in doctrine, it was nonetheless a case with important practical implications in terms of what amounts to an unjustified deviation.

⁹⁰ *The Europa* (1908) P.84.

⁹¹ *Davis v Garrett* [1830] 130 E.R. 1456.

⁹² *Phyn v Royal Exchange Assurance Co* (1798) 7 Term Rep 505.

⁹³ (1781) 2 Park 652.

The facts of the Davis case were that the plaintiff had put on board defendant's barge a cargo of lime to be conveyed from the Medway to London. The master of the barge deviated unnecessarily from the usual course, and during the deviation a tempest wetted the lime. As a consequence of this the barge caught fire and the whole cargo was lost. A verdict having been found for the plaintiff, the defendant was therefore held to be liable. In reaching this judgement the court ruled that the cause of loss was sufficiently proximate to entitle plaintiff to recover under a declaration alleging the defendant's duty to carry and deliver the cargo of lime at its agreed destination without unnecessary deviation.

The same approach was taken in *Freeman v Taylor*⁹⁴ where the vessel went round by Mauritius on her way to Bombay, and arrived at the latter place six weeks later than she would have done if he had proceeded thither directly. It was held by the court that inasmuch as the freighter might bring his action against the owner and recover damages for any unjustified deviation, he could not, for such a deviation, put an end to the contract of carriage. Thus, a deviation of lesser effect does not go to the root of the contract of carriage and therefore the charterer will only have the right to recover the value of the lost goods and claim for damages. In 1702 the court held in *Green v Young*⁹⁵ that the insurance policy is discharged from the time of the deviation only, and therefore the assured will be entitled for recover for what happened before the deviation⁹⁶.

According to *Davis v Garrett* approach if it can be shown that the loss or damage was not the result of the deviation or in other words if the deviation was not the cause of the loss, the carrier and the master are not answerable. Therefore, *Davis v Garrett* created new decision in the carriage of goods by sea law regarding the rule against unjustified deviation that a carrier had a legal obligation to carry the goods by the usual and customary route. It added that a cargo owner will be entitled to recover the value of cargo lost or damaged in the course of deviation without proving that the deviation was the proximate cause of loss unless the ship owner could prove that the loss would have happened whether he deviates or not⁹⁷.

The orthodox view in the period **1830-1890** was that the defendant (i.e. the ship owner) was liable for loss or damage that occurred during an unjustified deviation. Nevertheless, an unjustified deviation did not give the innocent party the right to put an end to the contract of

94 *Freeman v Taylor* (1831) 8 Bingham 124 131 E.R. 348.

95 2 Ld Raym 840, 2 Salk 444.

96 *Ibid.*

97 Dockray, M. (2000) 'Deviation: a doctrine all at sea?' *Lloyd's Maritime and Commercial Law Quarterly* 76 (n1) 98.

carriage unless it prevented him of the whole benefit of it⁹⁸. An example of this approach is evident from the decision in the case of *Freeman v Taylor* (discussed above). To revisit the facts of this case, the plaintiff (the ship owner and the captain) of the *Edward Lombe*, stated in his declaration that he chartered the ship to the defendant under a charterparty which provided that she should proceed to Madera & Cape of Good Hope, and thence to proceed with all convenient speed to Bombay and there load a cargo of cotton to be shipped to England. The vessel arrived at the Cape of Good Hope and discharged her cargo, then proceeded to Mauritius with the captain insisting that she was not out of her prescribed course. The ship then sailed from there for Bombay, arriving seven weeks later than she would have if she had sailed directly from the Cape of Good Hope to Bombay. Accordingly, the defendants refused to load the cargo of cotton for London in view of the delayed arrival of the ship. The plaintiff by his action sought to recover the difference in value between the freight earned and that which would have accrued if the defendant had loaded the cargo of cotton at Bombay. In this case the court left this question to the jury to decide, whether the delay here was of such a nature as to have put an end to the ordinary objects the freighter might have had in view when he signed the contract. The jury found for the defendant and decided that he was entitled to put an end to the contract of carriage⁹⁹.

Post-1890 a new stage of development of a doctrine of deviation was introduced by the verdict of the Court of Appeal in the case of *Balian and Sons v Joly Victoria and Co Ltd*¹⁰⁰ where the court confined itself to stating that the doctrine deprives the ship owner of the protection of, inter alia, exceptions and limitations included in the contract of carriage. This case considered the implied obligation of the carrier to proceed on the voyage without deviation from the proper course as a condition precedent to the right to rely on any term of the contract of carriage. Subsequently the strict approach adopted by courts in *Balian & Sons v Joly Victoria* was followed in a few number of cases where a ‘deviating’ carrier could not benefit from any contractual clauses in the contract of carriage. The court in *Joseph Thorley Ltd v Orchis Steamship*¹⁰¹, for example, followed the approach adopted in *Balian*. The facts in *Joseph Thorley* were that exception clauses were inserted into the bill of lading, including exceptions arising from negligence of stevedores. The cargo had been damaged due to the negligence of the stevedores in discharging the cargo. However, the court decided that the

98 Dockray M, (2004), *Cases and Materials on the Carriage of Goods by Sea*, 3rd edition, Cavendish Publishing Limited, London, p 71.

99 *Freeman v Taylor* (1831) 8 Bing 124.

100(1890) 6 T.L.R 345.

101 [1907] 1 KB 660.

ship owners were prevented from relying on the exception clauses. This was irrespective of the fact that the particular loss has been in no way caused by the unjustified deviation, but has been brought about entirely by the negligence of the stevedores at the port of discharge which came within the terms of the exclusion clause. In *Balian & Sons v Joly Victoria and Joseph Thorley Ltd v Orchis Steamship* the court thought that though the exception clauses in the bill of lading were nullified by the unjustified deviation, there remained an obligation on the part of the cargo owner to pay freight and perform other stipulations which might be implied from the fact of the carriage of the cargo to its destination. The protection therefore to the ship owner was implied from the fact that his status as a common carrier survives the effects of the unjustified deviation.

In the 1932 case of *Foscolo Mango and Company Limited and Others v Stag Line Limited*¹⁰² the ship owners were exempted by the bills of lading from liability for loss due to perils of the sea. However, the Court of Appeal decided that unauthorized deviation from the usual route displaced the exemptions contained in the contract of carriage in favour of the ship owners, and therefore the exemption from liability in respect of loss due to perils of the seas did not protect the ship owners, hence they were liable in damages.

In the event of unjustified deviation the ship owner is not only prevented from relying on the contractual exception clauses; he will not be able to rely on common law exceptions of Queen's enemies, inherent vice and act of God. In an earlier case in 1916 the Court of Appeal held in *James Morrison & Co Limited v Shaw Savill and Albion Company Limited*¹⁰³ that the French port of Havre was not an intermediate port when the steamship was torpedoed by a German submarine and sunk with her cargo there. The court held further that the carrier was liable and he lost his right from relying upon the implied common law exception of the King's enemies¹⁰⁴. They only became common carriers of the goods with the benefit of the common law exceptions if they could prove that the loss would have happened in any event.

The case of *International Guano en Superphosphaatwerkrn v Macandrew & Co*¹⁰⁵, where the carrier could not rely on the exception clauses stated in the bill of lading in respect of damage which occurred before the event of the unjustified deviation. Pickford J considered that the effect of a deviation was to put the ship owner in the position of a common carrier. In this

102 [1932] AC 328.

103 [1916] 2 KB 783.

104 [1916] 2 K.B 783.

105 [1909] 2 KB 360.

case the plaintiffs chartered the defendants' ship to carry a cargo of superphosphates in bags for delivery at Algeciras and Alicante, with leave to call at Corunna. The vessel was delayed at Corunna and Algeciras. On leaving Algeciras she deviated from the chartered voyage by going to Seville, from whence she then proceeded to Alicante. Due to the various delays the cargo delivered at Alicante was damaged, the damage being due to the action of sulphuric acid in the superphosphates corroding the bags. The Court of King's Bench held that the deviation to Seville put an end to the charterparty as from the beginning of the voyage, and that the defendants were therefore, as to the whole voyage, under the obligations of common carriers. It further held that as regards damage to the cargo by the delay at Corunna and Algeciras the defendants were not liable, the damage being due to the nature of the cargo and not to any failure on the part of the defendants to carry the goods with reasonable despatch. However, the court ruled that as regards the increased damage due to the delay occasioned by the deviation itself the defendants were liable under the obligations of common carriers¹⁰⁶.

The verdict in *Balian & Sons v Joly Victoria and Joseph Thorley Ltd v Orchis Steamship* had a significant impact on the development of the law of carriage of goods by sea in the period from **1906 to 1936**. During this period courts held that a ship owner could not benefit from any exception clauses granted to him under the contract of carriage in relation to loss to cargo suffered during or after deviation from the agreed or customary route. Once there has been a deviation the ship owner is reduced to the status of a common carrier and thus the only defences remain are Act of God, act of the King's enemies, inherent vice and of course fault of the consignor. Nevertheless, even these common law defences will be lost if the damage or loss occurred during an unjustified deviation¹⁰⁷.

A new stage of the doctrine of deviation started in **1936** with the decision of the House of Lords in *Tate & Lyle Ltd v. Hain Steamship Co. Ltd*¹⁰⁸. This case is considered as the leading English case in respect of the legal effect of deviation on a contract of affreightment. The facts of this case highlighted new aspects of the law and practice on deviation which had not been taken into consideration before in English courts. Rules which govern the effect of unjustified deviation apply not only between the original parties to the contract of carriage, (i.e. between the ship owner and the charterer in charterparties, and between carrier and the shipper in case of carriage under bills of lading) but also between the carrier and an endorsee

106 [1909] 2 K.B. 360.

107 *James Morrison & Co., Limited v Shaw, Savill, and Albion Company, Limited* [1916] 2 K.B. 783.

108 *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 2 All ER 597.

of a bill of lading. As seen above the Hain case concerned a c.i.f. seller of sugar who had chartered the defendant's steamer "Tregenna" to load the sugar at two ports in Cuba and at one port in San Domingo as ordered. The charterers had chosen two loading ports in Cuba and one in San Domingo. The vessel loaded sugar at the first Cuban port which was stipulated by the charterers and then was sent on by the local agents of the charterers to the second Cuban port. The master had not received a cablegram directing the ship to call at a loading port in San Domingo. He therefore left Cuba for the home-bound voyage without one of the cargos. Shortly afterwards the vessel was recalled by wireless and ordered to proceed to the loading port in San Domingo where she completed loading. On leaving San Domingo on the homeward voyage the vessel became stranded and was badly damaged. The cargo of sugar had to be discharged and part of it was lost, the surviving cargo had to be transhipped by another ship.

In the circumstances the charterer had waived the deviation and so lost his right to rescind the contract of carriage with the ship owner. But the endorsee of the bill of lading (i.e. the cargo owners) had not waived the deviation and they brought an action claiming the return of their deposit under the bond and declaring that they had the right not to contribute in general average in respect of the Cuban sugar on the ground that there had been unjustified deviation. The House of Lords decision was that the deviation gave the endorsee of the bill of lading the same right to rescind the contract of carriage as had been available to the charterer. Thus, in this case the endorsee's right to repudiate the contract of carriage was not affected by the fact that the charterers had waived the deviation.

The House of Lords' approach in the Hain case has had the impact of restricting the consequences in relation to loss or damage occurring after deviation in that the logic used in *Balian & Sons v Joly Victoria and Joseph Thorley Ltd v Orchis Steamship* was abandoned. The House of Lords in Hain established new principles and decided that the contract of carriage is not automatically repudiated or void ab initio from the moment of the deviation.¹⁰⁹ This approach provided that the innocent party has the right of election which includes bringing the contract to an end. Exercising the latter right would thus mean that the ship owner will not be able to rely on any exception or limitation clauses included in the contract of carriage and therefore the innocent party is no longer bound by any of the contract terms. Lord Atkin was of the opinion that deviation falls within the ambit of ordinary contract law.

¹⁰⁹ *Tate & Lyle Ltd v Hain Steamship Co. Ltd* [1936] 2 All ER 597.

In the view of the learned judge, however slight the deviation the other party to the contract is entitled to treat it as going to the root of the contract¹¹⁰ and declare himself as no longer bound by any terms stipulated in the contract. On the other hand the second option available (and which was added to the doctrine of deviation by Hain) is that the innocent party will also have the right to waive the deviation - i.e. to treat the contract as subsisting and to keep it alive, meaning that the carrier will still be entitled to rely on the clauses stipulated in the contract of carriage. In the dictum of Lord Wright stated in the case of Hain:

“the charterers elected to waive the breach with the result that the charterparty was not abrogated but remained in force. The appellants (the ship owners) were thus entitled to rely on the exception of perils of the sea”.¹¹¹

However, a minor or trivial deviation may have no effect at all on a cargo owner or the endorsee. A ship might deviate slightly from the proper course but still arrive on time at the stipulated port. This is line with the ‘*de minimis non curat lex*’ principle of general contract law. In the Hain case, save for an unfortunate accident, no one presumably would have been troubled about the deviation as long as the goods arrived in good condition without delay. But the problem arose when the vessel went aground and was badly damaged.

From a historical perspective, the period between **1967-1980** and beyond raised questions regarding the possible impact of the House of Lords decisions in the *Suisse Atlantique*¹¹² and *Photo Production v Securicor*¹¹³ cases on the concept of ‘fundamental breach’, and consequently on the doctrine of deviation.¹¹⁴ In other words, what is the precise relationship between the doctrine deviation and the concept of fundamental breach of contract, assuming the latter ever existed as a recognised rule of law? In *Suisse Atlantique* the House of Lords ruled that there is no rule restricting the general principle of English law that parties are free to contract as they may see fit pursuant to the doctrine of the freedom of contract. The court also held that there is no rule to the effect that a ‘fundamental breach’ of a contract has an invalidating or nullifying impact on exception clauses. It is thus a matter of construction whether the exception clause applies or not. In the *Photo Production* case a company which owned a factory signed a contract with the defendants, a security company, by which the

110 Ibid. at 601.

111 Ibid. at 608.

112 *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C 361.

113 *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

114 Baughen, S. (1991) ‘Does deviation still matter?’ *Lloyd's Maritime and Commercial Law Quarterly* 70 (n 1) 98.

defendants undertook to provide security services at the factory including night shifts. An employee of the defendants deliberately lit a small fire to warm himself but unfortunately it got out of control. The factory owners brought an action against the defendants for the damage to their premises and stock. The defendants argued that they were entitled to rely on an exception clause in the contract which stipulated that ‘under no circumstances were the defendants to be reasonable for any injurious act or default by any employee’. In its judgement, the House of Lords stated that although the defendants were in breach of their implied obligation to provide their service with due and proper regard to safety and security, the exception clause was obvious and clear and protected the defendants from liability - i.e. they had the right to rely on the clauses included in the contract.¹¹⁵

The ruling in these two cases gave rise to academic debate on the precise legal nature of the doctrine of deviation and the concept of fundamental breach (if any) in the law governing carriage by sea. Should deviation be treated as a sui generis principle of law with special rules derived from and conditioned by historical and commercial circumstances? Or does it fall within the umbrella of the general law of contract? In the *Photo Production* case Lord Wilberforce, referring to the *Suisse Atlantique* case, stated that the cases dealing with deviation can be regarded as “proceeding on normal principles applicable to the law of contract generally, viz that it is a matter of the parties’ intentions whether and to what extent clauses in shipping contracts can be applied after a deviation, i.e. a departure from the contractually agreed voyage or adventure”.¹¹⁶ He continued that “it may be preferable that they should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons”.¹¹⁷

Even before the rule was put on statutory footing through the enactment of the (COGSA) 1971, the effect of unjustified deviation at common law was to oust the contract of carriage and thus deprive the ship owner of any exception clauses in the contract of carriage by sea¹¹⁸. This in turn raises the question as to whether or not unjustified deviation may be considered to be a ‘fundamental breach’ of the contract of carriage – i.e., a **condition** as opposed to a warranty or an innominate term. A critical review of both decided cases and scholarly postulations indicates that there is no common agreement on this question. In *Harbutt’s*

¹¹⁵ *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556, at. 557.

¹¹⁶ *Ibid.* at 563.

¹¹⁷ *Ibid.*

¹¹⁸ *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, HL; See also *James Morrison v Shaw, Savill, and Albion* [1916] 2 KB 783 CA.

*Plasticine Ltd v Wayne Tank and Pump Co Ltd*¹¹⁹, for example, it was held that there are certain fundamental breaches of contract that put an end to the contract, thus invalidating any protection provided by exclusion clauses which may have been available to the party in breach. However, the 10 years later judges overturned the decision in *Harbutt's* in the 1980 case of *Photo Productions Ltd v Securicor Transport Ltd*¹²⁰. By denying that there is a rule of law as to fundamental breach, the court in the *Photo Production* case thus reaffirmed the view adopted in the *Suisse Atlantique* case.¹²¹ In the *Photo Productions* the court was of the view that everything depended on the true construction of the contract terms and that a breach does not automatically deprive the defendant of reliance on exception clauses.

In concluding, it could be argued that even though a historical review of judicial practice would seem to indicate a more flexible by the courts on the question regarding the possible consequences of a breach of contract, the rule in the *Hain* case which upholds a strict interpretation of the rule against unjustified deviation remains valid to the present day.

1.8.2 Review of Secondary Sources

1.8.2.1 Review of Selected Academic Journal Article Writers

A review of the academic journal articles on the law on deviation can be divided two main categories: a) nationality of the writers; and (b) the main focus of the discussion on the subject matter regarding deviation. The two main groups of scholars selected for the review are American writers and English writers. The main reason for choosing these two groups of writers is that each group seems to approach the subject from a different angle by giving particular emphasis to a specific aspect of the law on deviation.

Generally speaking the American writers reviewed turn to approach the subject from the point of view of quasi deviation and the effect of deviation on the carrier's liability, with the particular emphasis being on package limitation.¹²² This focus amongst modern US scholars also extends to indepth discussions in the various articles about the different and sometimes conflicting approaches of the circuit courts which make up the federal jurisdiction. Unlike UK writers, American scholars tend not to discuss in much depth the substantive aspects of

119 [1970] 1 ALL ER 225.

120 [1980] AC 827.

121 [1967] 1 AC 361.

122 Peacock Hoke, (1990), "Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts", *Texas Law Review*, 68 *Tex. L. Rev.* 977; Lennon Margaret M, (200), "Deviation Then and Now – When COGSA's per Package Limitation Is Lost", *St. John's Law Review*: Vol. 76: Iss. 2, Article 6.

the law. The exception in this regard is Simon Crosswell¹²³ whose article in 1881 dealt at some length with conceptual issues such as voluntariness and intention to deviate. On the whole American scholars seem to support the strictness of the rule regarding deviation and quasi deviation.

The UK writers, unlike their US counterparts, tend to approach the subject from a much more conceptual point of view, discussing issues such as the judicial interpretation of deviation clauses¹²⁴, the question of fundamental breach¹²⁵, the legal nature of the doctrine of deviation¹²⁶, and the historical background and continuing relevance of the doctrine in modern shipping law¹²⁷. Each of these sources will be reviewed in turn in the section below.

Selected Authors from the United States

- a) **Hoke Peacock**, in “Deviation and the package limitation in the Hague Rules and the Carriage of Goods by Sea Act: an alternative approach to the interpretation of International uniform acts”¹²⁸ discussed the strict doctrine of deviation under American and English common law. In his view an unreasonable deviation is treated as a gross breach of contract resulting in the carrier’s losing the protection of any exculpatory clauses in the bill of lading and becoming fully liable for any damage to the cargo. The author suggested that by relying on domestic precedent as a basis for ousting the package limitation after an unreasonable deviation, the American courts undermine the goal of international uniformity and fail to do their part to fulfil the promise of Carriage of Goods by Sea Act and the Hague Rules.¹²⁹ The author has discussed the history, development and the goals of the Carriage of Goods by Sea Act and the Hague Rules.¹³⁰ In the author’s view the international framers of the Hague Rules and the domestic framers of the Carriage of Goods by Sea Act believed that a uniform system of legislation in any area of the law would produce significant benefits. In Part III of the article Peacock also examined the judicial interpretation of

123 Crosswell S, (1881), “Deviation”, *The American Law Review* (1866-1906), 1881, 2, American Periodicals pg. 108.

124 Todd, P. (2010) “Excluding and limiting liability for misdelivery”, *Journal of Business Law*, J.B.L 243-266.

125 Debattista, C. (1989) ‘Fundamental Breach and Deviation in the Carriage of Goods by Sea’ *Journal of Business Law* 22 (n 1) 35, 36.

126 Cashmore, (1989) ‘The legal nature of the doctrine of deviation’ *Journal of Business Law* 492 (n 1) 494, 495.

127 Baughen, S. (1991) ‘Does deviation still matter?’ *Lloyd’s Maritime and Commercial Law Quarterly* 70 (n 1) 98; Dockray, M. (2000) ‘Deviation: a doctrine all at sea?’ *Lloyd’s Maritime and Commercial Law Quarterly* 76 (n 1) 76-98; Basijokas, S. (2012) “is the doctrine of deviation only a historical record today”, *UCL Journal of Law and Jurisprudence*, UCL J.L. and J 1(2), 114-141.

128 Peacock Hoke, (1990), “Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts”, *Texas Law Review*, 68 Tex. L. Rev. 977.

129 *Ibid.* p. 986.

130 *Ibid.* pp.981-985.

deviation's effect on the package limitation before the enactment of the Carriage of Goods by Sea Act (where the courts held that unreasonable deviation rendered the protective provisions in the contract of carriage enforceable), and the situation after the passage of COGSA, when American circuits became divided over the meaning and effect of the words "in any event" as used in section 4(5) of the Act. The author found that the majority of the courts in the United States continued to hold that any unreasonable deviation nullifies the contract of carriage including the protection of package limitation. And the minority of the courts reached the opposite conclusion and held that the drafters of The Hague Rule and COGSA intended the package limitation to apply in any event, including those in which a carrier unreasonably deviates. In Part IV of the article he also discussed the intention of the international framers and the interpretation of international uniform statutes. The author suggested that the failure of most United States courts to properly interpret section 4(5) of COGSA is an example of these courts' improper approach to the interpretation of uniform statutes generally¹³¹. In concluding, the author suggested that in order to resolve the problem, the United States should grant certiorari in a deviation case and hold that deviation does not nullify the package limitation protection in COGSA¹³².

b) Margaret M. Lennon, in "Deviation then and now- when COGSA's per package limitation is lost"¹³³ similar to Hoke Peacock's article above, has discussed the effect of unreasonable deviation on the package limitation before and after the enactment of the Carriage of Goods by Sea Act. In Part 1 she discussed the origin of the Carriage of Goods by Sea Act and its relationship to the package limitation. She has also briefly discussed the concept of reasonableness and the liberty clauses in the contract of carriage. The author also mentioned the relationship between the doctrine of deviation and marine insurance.¹³⁴ Quasi deviation and how the notion of unreasonable deviation expanded even after the enactment of COGSA are also discussed in Part IV.¹³⁵ Unlike Peacock above, Lennon believes that the strict doctrine should not just be limited to geographic deviations and unauthorised on-deck stowage of cargo, but it should also include other gross departures from the contemplated voyage that cause damage to the cargo. She also holds the view that because Congress has not clarified

131 Ibid, p. 993.

132 Ibid. pp.1001-1002.

133 Lennon Margaret M, (200), "Deviation Then and Now – When COGSA's per Package Limitation Is Lost", St. John's Law Review: Vol. 76: Iss. 2, Article 6.

134 Ibid. pp.453-454.

135 Ibid. pp. 451-452.

the impact of deviation on the package limitation, there is no compelling reason for courts ‘to so drastically curtail such a long standing doctrine of Admiralty law when the reasons supporting it remain valid today’.¹³⁶

Both these articles were very useful in explaining the concept of deviation and the problems which have arisen in relation to its application in the various circuits of the US.

United Kingdom Authors

- a) **Sarunas Basijokas**, in his article “Is the doctrine of deviation only a historical record today?”¹³⁷ has discussed the voyage charterparty and how the doctrine of deviation applies to such charter. He also showed the correlation between deviation and cargo insurance. The author discussed the liberty clause and the key cases in this area such as *Glynn v Margetson*; *Leduc v Ward*; *Connolly Shaw v A/S Det Nordefjelkske D/S*. The author also discussed how and when a deviation is permissible under the common law and the Hague-Visby Rules. Basijokas, has explained the legal effect and consequences of an unjustified deviation.¹³⁸ The author divides the evolution of the doctrine of deviation into three periods. The first one is from 1830-1890.¹³⁹ In this period he discussed the case of *Davis v Garrett*, which was one of the most important cases at that period. The second period is between 1890-1936,¹⁴⁰ as he said that this period brought a new light to the deviation doctrine. The main cases of this period were *Balian and Sons v Joly, Victoria and Co. Ltd*, and the case of *Joseph Thorley Ltd v Orhis Steamship Co*. The third period is 1936 and beyond¹⁴¹ where he discussed the *Hain Steamship Co Ltd v Tate & Lyle Ltd* which was the first case where the House of Lords thoroughly analysed the deviation doctrine. This is an important case as it gave the innocent party the right of election, whether he wants to terminate the contract or to waive the breach. The author discussed the concept of fundamental breach and argues that there is no relation between the case of *Photo Production v Securicor* and the effect of breach in deviation cases¹⁴². In his view linking both is a wrong

136 Ibid. p.455.

137 Basijokas, S. (2012) “is the doctrine of deviation only a historical record today”, UCL Journal of Law and Jurisprudence, UCL J.L. and J 1(2), 114-141.

138 Ibid. pp.114-117.

139 Ibid. p. 129.

140 Ibid. pp.129-131.

141 Ibid. pp.132-133.

142 Ibid. pp.133-140.

assumption because the *Photo Production v Securicor* had nothing to do with carriage of goods by sea, ships or deviation for that matter. In the concluding part of the article the author also discussed the main English cases dealing with non-geographical deviation (so called quasi deviation) such as *The Antares* and *The Kapitan Petko Voivoda*, and he argued that these cases did not overrule the deviation cases.¹⁴³

Basijokas's article is important because it raises the question as to whether the doctrine of deviation is only a historical record today. He believes that the law community should not dismiss the notion of deviation as it still remains a doctrine worth preserving.¹⁴⁴ He is in agreement with Cashmore¹⁴⁵ (discussed below) that it cannot be that the House of Lords in *Photo Production v Securicor* had meant to overrule the decisions in *Orhis Steamship, Hain and Stage Line* without even referring to them in any way. He concluded that "the ancient roots of the deviation doctrine are still talked about today and it cannot be said that a doctrine which survived for more than three centuries is of no relevance to the modern developments of maritime law".¹⁴⁶

- b) **Martin Dockray**, in "Deviation: a doctrine all at sea?"¹⁴⁷. In Part 1 of his article, Dockray discussed the relationship between the doctrine of deviation and the insurance policy. He also discussed the common law origin of the doctrine of deviation as it applies to carriage contracts is usually traced to the judgement of the court in 1830 in the case of *Davis v Garretta* and he has analysed the case in details. He also discussed a new stage in the evolution of the modern doctrine of deviation began in May 1890 with the decision of the Court of Appeal in the case of *Balian and Sons v Joly, Victoria and Co. Ltd.*¹⁴⁸ The author examined the next stage in this evolution in 1906 after the decision of the court in the case *Joseph Thorley Ltd v Orchis Steamship Co.*¹⁴⁹ The author then discussed the consequences of deviation from the period of 1906-1936, as the decision in the case of *Balian* and the case of *Joseph Thorley* had an important effect on maritime law in this specific period.¹⁵⁰ He

143 Ibid. Part E.

144 Ibid. p.114.

145 Ibid. p.135.

146 Ibid. p.140.

147 Dockray, M. (2000) 'Deviation: a doctrine all at sea?' *Lloyd's Maritime and Commercial Law Quarterly* 76 (n 1) 76-98.

148 Ibid. p.77.

149 Ibid. pp.92-93.

150 Ibid. pp.93-94.

also discussed what he called the modern times, covering the period from 1936 with the decision of the House of Lords in *Hain Steamship Co Ltd v Tate & Lyle Ltd* as this case is generally regarded as the leading English case on the effects of deviation on a contract for the carriage of goods by sea.

On the whole Dockray examined the origin and the history of the traditional doctrine of deviation and traced the evolution of this rule. He argued that the common rules are not quite as important as they used to be due to the liberty clauses inserted into the contract of carriage in the voyage charterparties on one hand, and permission provided to carriers by the Hague-Visby Rules to make reasonable deviation. He also pointed to the fact that unjustified deviation does not deprive the carrier of absolutely all rights. Dockray like Baughen (discussed below) favoured the idea that the law relating to deviation must to be brought into line with the general law of contract and therefore any unjustified deviation caused the loss or damage should be considered as a breach of contract and would be recoverable. In his conclusion he asserted that the best way to achieve this is if the decision in *Hain v Tate & Lyle* is overruled.¹⁵¹

- c) **Simon Baughen**, in “Does deviation still matter?”¹⁵² discusses three basic situations in which a deviation may occur. The first is where a ship strays from her voyage but no damage whatsoever is thereby caused to the goods carried on board the vessel.¹⁵³ The main case which he discusses under this first situation is the case of *Joseph Thorley*. The second situation is where the deviation contributes to but is not the sole cause of damage of damage or loss to cargo carried on the voyage¹⁵⁴. He examines under this situation the case of *International Guano v Robert MacAndrew & Co* case. The third situation is where the cargo is actually lost or damaged during the deviation itself¹⁵⁵, where a further twist in the tale of deviation and the common law exceptions available to a common carrier was thrown up by the Court of Appeal in the case of *James Morrison v Shaw Savill*. In this case the exception under consideration was that of loss caused by acts of the King’s enemies. Baughen further examines the effect of deviation in these three situations.¹⁵⁶ He argues that generally deviation prevents the

151 *Ibid.* p.98.

152 Baughen, S. (1991) ‘Does deviation still matter?’ *Lloyd's Maritime and Commercial Law Quarterly* 70 (n 1) 98.

153 *Ibid.* p.71.

154 *Ibid.* p.72.

155 *Ibid.* pp.73-74.

156 *Ibid.* pp.74-76.

shipowner from relying on the contractual, and common law or statutory exceptions; and that the effect of deviation could also prevent the shipowner from making a claim against the cargo owner for sums or money (e.g. freight or demurrage). The author also discusses the liberty clauses in carriage of goods by sea contracts¹⁵⁷. He also addressed the impact of the Hague Rules on the doctrine of deviation and under the impact of these Rules, he discussed the case of *Stage Line v Foscolo Mango*¹⁵⁸. The authors argues that if the enactment the Carriage of Goods by Sea Act 1924 was intended to alter the substantive law on deviation, it would have expressly said so, as had been the case with the replacement of the absolute warranty of seaworthiness by the qualified warranty provided for in the rules.¹⁵⁹ The author also discussed the *Hain v Tate & Lyle* approach and its impact on the doctrine of deviation. He said that in deciding the entitlement of a shipowner to freight after deviation, the traditional rule can no longer peaceably co-exist with the constructional approach and a clear choice has to be made as to which rule is to be applied. He also examined the issue of repudiatory breach and the effect of such a breach, together with the *Photo Production v Securicor* approach and its impact on the deviation doctrine and quasi deviation.¹⁶⁰ Finally, the author has discussed the Hague-Visby Rules which was incorporated into the Carriage of Goods by Sea Act 1971 and its impact on the deviation doctrine by addressing relevant cases such as *The Antares*¹⁶¹.

The main objective of Baughen's article is to question whether the traditional doctrine of deviation still survived especially after the decision of *Photo Production v Securicor*. In tackling this question he examined several cases such as the decision which was taken in the case of *(The Sara D) Stage Trading Corporation of India Ltd*. He also relied on Lord Wilberforce's expression of his doubts on the matter in the case of *Suisse Atlantique and Lloyd LJ's dicta in The Antares*¹⁶². He follows the views espoused in *Photo Production v Securicor* and supports the amalgamation of deviation rules with general contract law¹⁶³. He also considered the impact of the Hague-Visby Rules on the doctrine of deviation as applied in cases involving "quasi deviation" i.e.

157 Ibid. p76-78.

158 Ibid. pp.79-80.

159 Ibid.

160 Ibid. pp.87-88.

161 Ibid. pp.95-96.

162 Ibid. pp.87-93.

163 Ibid. p.96.

unauthorised on-deck carriage¹⁶⁴. The two main cases examined were *The Chanda* and *The Antares*¹⁶⁵. Baughen argued that the justification for maintaining a separate rule for geographical deviation “has seriously eroded” the reason why the courts are applying judicial canons of construction when they deal with cases involving “quasi deviation”¹⁶⁶. He believes that the separation of this rule is unfair either to the ship owner or to the cargo owner and the traditional doctrine in deviation should now “speedily buried” and should be governed by the ordinary law of contract¹⁶⁷.

- d) **Charles Debattista**, in “Fundamental breach and deviation in carriage of goods by sea”¹⁶⁸ examined the effects of deviation on the exclusion or limitation of liability in contracts for the carriage of goods by sea. He discussed the five common law exclusions (acts of god, acts of the monarch’s enemies, inherent vice, defective packaging of the goods, and the intentional loss of goods jettisoned in a general average sacrifice) and their impact on the deviation doctrine¹⁶⁹. He points out that even the deviating carrier is allowed to rely on the five common law exceptions if he could prove that the loss or damage would have happened even if the deviation had not occurred. The author also examined the contractual exclusions and whether the carrier is entitled to rely on them in the event the deviation. Debattista, discussed the orthodox doctrine (*Harbutt’s case*) and the doctrine of fundamental breach and he stated that there is some difficulty with understanding how it is that the plaintiff retains a cause of action in contract if the whole contract disappears on fundamental breach.¹⁷⁰ The author also examined the *Photo Production v Securicor* approach and the burial of the strict doctrine above¹⁷¹. He holds the view that the rule in *Harbutt’s case* was overruled in the *Securicor* case. He then examined the two approaches and their relation with the doctrine of deviation¹⁷². He argued that all the deviation cases which hold that deviation demolishes exclusion clauses are closer to *Harbutt’s* approach than they are to *Securicor*. The author further discussed the liberty clauses under common law as these liberties are perfectly valid. He then discussed the effect

164 Ibid. p.92

165 Ibid. p.94.

166 Ibid. p.96.

167Ibid. p.98.

168 Debattista, C. (1989) ‘Fundamental Breach and Deviation in the Carriage of Goods by Sea’ *Journal of Business Law* 22 (n 1) 35, 36.

169 Ibid. p.23.

170 Ibid. pp.24-26.

171 Ibid. pp.26-27.

172 Ibid. pp.27-33.

of termination of a contract of carriage through a deviation on the exceptions to liability contained in the Hague-Visby Rules¹⁷³. Finally he discussed the three sets of exceptions in the Hague-Visby Rules (and whether the shipowner loses the protection of those exceptions in the event of deviation), together with the list of exclusions under article IV.2 of the Rules, the package limitation in article IV.5, and the one year time bar in article III.6.

On the whole Debattista is of the view that the old traditional doctrine of deviation is now suspect especially after the court's decision in *The Antares*. He discussed whether the deviation should prevent the carrier from relying on the common law and contractual exceptions included in the contract of carriage particularly after the decision in *Photo Production v Securicor* which showed that exclusion clauses avail even in the event of the most fundamental breaches of the contract. A proponent of the contract theory approach, he strongly argues that the view which is based on bailment theory and thus in favour of separating deviation doctrine from general contract law appears to be "slightly too elegant for comfort"¹⁷⁴

- e) **Paul Todd**, in "Thoughts on deviation"¹⁷⁵ has reviewed the deviation clauses in the standards charterparties such as *Sheltime* 4, clause 27, *Shellvoy* 5, clause 31, *Beepeevoy* 2 83, clause 29, and *Gencon*, clause 3. He also discussed the liberty clause in the contract of carriage and the court's interpretation of such clauses, as at first it would seem that the carrier would be protected against the consequences of any deviation by the wording of such clauses, but the courts do not interpret wide clauses such as *Gencon* clause 3 literally, rather the principle of *contra preferentem* interpretation applies¹⁷⁶. Todd further discusses justifiable and unjustifiable deviations under the common law approach¹⁷⁷. He examined non-geographical deviation, together with the case of *Suiss Atlantique* and the important statements of the House of Lords on the application of exception clauses to fundamental breaches of contract.¹⁷⁸ In his view a deviation outside the main object of the contract may be regarded as a fundamental breach of contract and liberty to deviate may be regarded

173 *Ibid.* pp.34-36.

174 *Ibid.* p.p.35-36.

175 Todd, P. (2010) "Excluding and limiting liability for misdelivery", *Journal of Business Law*", J.B.L 243-266.

176 *Ibid.* p.114.

177 *Ibid.* pp.116-117.

178 *Ibid.* pp.115-116.

as an exemption clause¹⁷⁹. The author then examined the situation where the deviation occurred prior damage to cargo and its effect on the exception clauses in the contract of carriage. He mentioned the two main cases (Joseph Thorley and International Guano) where the deviation puts an end to the charterparty ab initio. The author further discussed the impact of deviation on the shipowners right to claim freight. He argued that because the contract is not rescinded ab initio, it follows that any right acquired by the shipowner prior to the deviation are not divested or discharged by virtue of it.

According to Todd it is possible to exclude and limit liability for even the most serious breaches of contract, by appropriate contractual provisions. Since the demise of a substantive doctrine of fundamental breach in *Suisse Atlantique and Photo Production v Securicor*, whether an exclusion or other exception clause protects the carrier depends on the construction of the clause alone. And the seriousness of the breach will not bar the application of a suitably drafted exclusion clause. The author based his view on the liberty clause which if sufficiently clearly drafted, can protect a carrier even from the consequences of a deviation.¹⁸⁰ He also points out that the development of the doctrine of deviation can be traced back to the first half of the 19th century, when Tindal C.J. stated in *Davis v. Garrett*¹⁸¹ that deviation made by a carrier from an agreed voyage route brings the latter outside of the contract and therefore outside of exceptions or limitation clauses provided by such a contract.

- f) **C. Cashmore** in “The Legal Nature of the doctrine of deviation”¹⁸² takes the view that one cannot depart from general bailment theory when dealing with cases of deviation, whether in relation to carriage of goods on land or by sea, and “the doctrine of deviation is a doctrine of bailment not a doctrine of contract. To draw such a conclusion he went back to the seminal case on the modern law of bailment. As per dicta of Lord Holt in *Coggs v Barnard*¹⁸³ which was many years before any carriage of goods by sea cases on deviation, the learned judge said as below:

179 Ibid. p.115.

180 Ibid. p.115.

181 *Davis v Garrett* (1830) 6 Bing. 716

182 Cashmore, (1989) ‘The legal nature of the doctrine of deviation’ *Journal of Business Law* 492 (n 1) 494, 495

183 (1703) 2 Ld. Raym 909

“as if a man should lend another a horse to go westward for a month, if the bailee go northward, or keep the horse above a month, if any accident happen to the horse in the northern journey, or after the expiration of the month, the bailee will be chargeable, because he had made use of the horse contrary to the trust he was lent to him under, and it may be that if the horse had been used no otherwise than he was lent that accident would not have befallen him”¹⁸⁴.

Cashmore disagreed with the view expressed by Debattista by assuming that contractual principles should apply to a wrongful possessor of goods¹⁸⁵. He suggested that contractual principles would have no application in such an instance. The co-existent of the contract with the bailment is an irrelevance and the relevant principles are those of bailment not contract.

He also suggested that the liability of a deviating bailee, whether he carried by sea or not is not that of a common carrier but rather that of a wrongful possessor¹⁸⁶. He referred to Pickford J in *International Guano v Macandrew*¹⁸⁷ when he merely stated that a deviating carrier cannot “be in any worse position than common carriers¹⁸⁸”. He is of the view that “the common carrier analogy is a false one¹⁸⁹”.

1.8.2.2 Review of Selected Academic Textbook Writers

The review of secondary sources has focus mainly on academic journal articles because there are no specialised or specific textbooks written on the subject. Discussion of the law on deviation is contained in text books only in the form of a chapter in such books. There are a limited number of academic textbooks on the Law of international Trade and very few on the specific area of carriage of goods by sea. As part of the literature review the author consulted three main textbooks.

- a) **Schmitthoff: The Law and Practice of International Trade**¹⁹⁰. This book is generally considered to be one the key textbook on the subject. However, despite the wide and apparently comprehensive coverage of the subject matter in this, the

184 Ibid. p.938.

185 Cashmore (1989), p.494.

186 Ibid. p.494.

187 [1909] 2 KB 360

188 *International Guano v Macandrew* [1909] 2 KB 360 at p 366

189 Cashmore, (1989) ‘The legal nature of the doctrine of deviation’ *Journal of Business Law* 492 (n 1) at p 495

190 Carole Murray, David Holloway and Darren Timson-Hunt, Schmitthoff, (2012), *The Law and Practice of International Trade*, 12th Edition, Sweet & Maxwell (London).

researcher was surprised to find that there is nothing substantial included on the implied terms of the carrier under the contract of carriage of goods by sea. Part III of the book (which is made up of four chapters) deals with 'Transportation of Exports'. Chapter 15 of this Part deals specifically with carriage of goods by sea. The other three chapters deal with container transport, carriage of goods by air and carriage of goods by land respectively.

Chapter 15 which deals with carriage of goods by sea contains very little reference to the implied obligations of the carrier. There is no reference at all to deviation, although the implied obligation regarding the seaworthiness of the vessel is discussed in paragraph 15-045 under the liability of the carrier¹⁹¹. The analysis of seaworthiness is focused almost exclusively on Article III of the Hague Visby Rules with very little reference to the development of the principle under common law. The rest of the chapter deals with excepted perils, limitation of ship owner's liability and general average claims and contributions. It is therefore clear that this particular textbook, although considered by many to be the key text in this area, leaves a gap to be filled in terms of detail analysis on the obligations of the carrier. One of the main objectives of this research is to attempt to fill this gap.

- b) **Jason Chuah, Law of International Trade**¹⁹². The reason for selecting this book for review is because it is also considered to be one of the key textbook on the subject and also one of the most comprehensive and most up-to-date texts. The implied obligations of the carrier are discussed in Chapters 7 and 8 of this book. Chapter 7 examines the obligations of the carrier under common law principles and Chapter 8 then builds on this discussion by examining the obligations of the carrier under international conventions for the carriage of goods by sea. Seaworthiness, cargoworthiness, deviation and liberty clauses are all examined under paragraphs 7-016-7-047¹⁹³

The key advantage which this textbook has over Schmitthoff is that it examines the implied obligations of the parties to the contract of carriage in far more detail and with the use of many illustrative case law examples. The researcher thus found this

191 Ibid, pp.338-342.

192 Jason Chuah, (2013), *Law of International Trade: Cross-Border Commercial Transactions*, Sweet & Maxwell (London).

193 Ibid, pp.254-273.

book to be a very useful resource in conducting the research. However, as with many other secondary sources on the topic, the content of the book did not go as far as to examining the philosophical basis of implied terms nor the historical relationship between general contract law and shipping law principles and their judicial construction. This is one of the gaps which the research will be directed at filling.

- c) **John F. Wilson, Carriage of Goods by Sea** which is an academic textbook dedicated specifically to the carriage of goods by sea¹⁹⁴. Chapter 2 of this book deals with the subject of implied obligations in contracts of affreightment. There is detail discussion of the implied obligations as seaworthiness¹⁹⁵, due despatch¹⁹⁶ and the obligation not to deviate from the proper course together with the effect of liberty clauses on deviation¹⁹⁷. These obligations are further discussed in Chapters 6, 7 and 8 which deal with the Hague Visby Rules, the Hamburg Rules and the Rotterdam Rules respectively.

The researcher also found this book to be a useful research source in view of the fact that it included a lot of case citations and made references to other sources which the researcher could consult as part of further research. However, it also fell short of examining in detail the philosophical basis for the development of implied terms in shipping law and the relationship between general contract law and shipping law in the historical development of these principles. For this reason the researcher was able to identify this aspect as a gap in the literature as it is not covered by any of the other sources. One of the main objectives of the research is therefore to fill in this gap, hence the inclusion of Dissertation Aim 4 which states as follows: **To review and appraise relevant cases, statutory instruments and academic literature on the subject and to identify gaps in the literature which will provide the researcher with the opportunity to make an original contribution to the subject area.**

1.9 Concluding Remarks - Gaps Identified in the Literature

In reviewing the secondary sources the researcher has been able to identify the following gaps in terms of issues which he believes have not been sufficiently addressed in the currently available literature.

194 John F. Wilson, (2010), *Carriage of Goods by Sea*, 7th Edition, Longman/Pearson (London).

195 *Ibid*, pp.9-15.

196 *Ibid*, pp.15-16.

197 *Ibid*, pp.16-25.

- a) None of the writers reviewed seem to have approached the topic from a contextual perspective by examining the underlying philosophy to the law against unjustified deviation and shipping law principles in general. The researcher has attempted to close this gap in Chapter 1 (section 1.7) by analysing the main implied obligations in shipping contracts and linking them to the various philosophical schools of thought from which various legal theories have developed. In doing this the researcher has tried to demonstrate how the law in this area interacts with societal values and belief systems, and how it seeks to protect the interests of the various parties in the shipping industry. The exercise also seeks to demonstrate the way in which the law in this area has evolved over time and the influence of technological developments on this process of evolution.
- b) In the course of the research the researcher also discovered that none of the sources seems to have explored in detail the relationship between general contract law and shipping law and the way in which both have interacted and influenced each other in the course of time. Most writers restrict their analysis to the argument that judicial interpretation of shipping law principles ought to be assimilated to the practice of general contract law, but their analysis have not extended to a discussion of the interaction between the two areas of law and the degree of cross-pollution. The research has attempted to address this gap in Chapter 3 of the dissertation by examining judicial practice in relation to implied terms in general contract law and in shipping law.
- c) In Chapter 5 the researcher has taken this task further by examining the link between the judicial construction of exemption clauses in general contract law and liberty clauses in shipping law, once again examining in detail the way in which practice in general contract law and in shipping law has influenced each other.
- d) The remainder of the contribution has come in the form of recommendations for legal reform which the researcher has made in Chapters 4 and 6 based on the findings of the research.

The next chapter will be aimed at a general overview of the main terms which are implied by law into contracts for the carriage of goods by sea.

CHAPTER TWO

AN OVERVIEW AND APPRAISAL OF IMPLIED TERMS IN CONTRACTS OF AFFREIGHTMENT

2.1 Introduction

The discussion in Chapter 1 was centred mainly on the conceptualization of the research project with regards to its scope. This exercise included the identification of a suitable hypothesis on which to base the conceptual framework for the study. The current chapter seeks to take this process forward with a detail examination of the legal background to contracts for the international carriage of goods by sea.

The main objective of Chapter 2 is to embark on a preliminary appraisal of the various types of contracts of affreightment. This will include a critical analysis of the importance of implied terms to the law of carriage of goods by sea. The discussion in this chapter will extend to a critical review of the sources of the law governing the law of contracts for the international carriage of goods by sea in general, together with a comparative analysis of relevant international conventions (most notably the Hamburg Rules, the Rotterdam Rules, the Hague and the Hague-Visby Rules). The comparative analysis will focus on the applicability and the role of these convention in addressing the obligations and responsibilities of carriers and shippers in transactions for the international contract of carriage by sea. The chapter also aims to critically analyse the principles, statutory provisions and case law relating to the implied obligations of shippers/charterers and carriers under ocean bill of lading and charterparties or similar documents of title.

2.1.1 Aims of the chapter:

In summary, the key aims of Chapter 2 are as follows:

- A critical overview of the various types of contracts for the carriage of goods by sea
- A comparative overview of the various international conventions which govern contracts for the carriage of goods by sea.
- An appraisal of the implied obligations of the charterer/ Shipper

- An appraisal of the implied obligations of the carrier.

In pursuing these aims, Chapter 2 seeks to address the following main aims of the dissertation research as stated in Chapter 1:

- **Dissertation Aim 1:** To critically review and analyse the implied obligations governing the carriage of goods by sea ...
- **Dissertation Aim 4:** To review and appraise relevant cases, statutory instruments and academic literature on the subject.

Previous international conventions like the Hague Rules for example focused on the obligations of the carrier, with minimal references to those of the shipper as the latter was considered to be the weaker party in the contract of carriage of goods by sea. However, under the Rotterdam Rules (2009), there is a noticeable shift to redress the balance by making the shippers liability more onerous and as such altering the relationship between the carrier and the shipper.¹⁹⁸ In this regard the Convention establishes a uniform and modern legal regime governing the rights and obligations of shippers, carriers and consignees under a contract for door-to-door carriage that includes an international sea leg.¹⁹⁹ Although these rules are not yet in force, they nonetheless highlight the change in the previously prevailing view that used to identify the shipper as the weaker party. The Rules also provide a legal framework that considers the many technological and commercial developments that have occurred in maritime transport since the adoption of those earlier conventions, including the growth of containerization, the desire for door-to-door carriage under a single contract, and the development of electronic transport documents.

These evolutionary trends in the sources of law and their impact on the parties' obligations will be considered in more depth in Section 2.3 hereunder.

The methodology to be used in this chapter is doctrinal/ black letter law analytical approach. The focus of the chapter is to further develop the conceptual framework of the research rather than to answer a specific research question. There will be an attempt to address the research questions from Chapter 3 onwards.

¹⁹⁸ Simon Baughen, (2008), Obligations of the shipper to the carrier, *The Journal of International Maritime Law*, 14, p. 555.

¹⁹⁹ Francesco Berlingieri, (2010), Revisiting the Rotterdam Rules, *Lloyd's Maritime and Commercial Law Quarterly*, 4, p. 585-588.

2.1.2 Some Preliminary Considerations

The chartering of vessels that carry goods by sea is not a new phenomenon. But the use of this concept has recently expanded so much that it now affects all aspects of transporting goods by sea, due to the unprecedented growth in the shipping industry and the increasing volume of international trade. Most raw materials such as oil, grain, coal, sugar, lumber, and many manufactured products such as machines, automobiles and frozen foods are largely transported on the basis of bulk carriage charter concept or according to charterparties between affiliated companies, even when ships and cargoes are under common ownership. Modern cargo ships typically operate under one of the three types of charter: voyage, time or demise charterparty.²⁰⁰ The latter is also known as a 'bare boat' charter.

A contract for the carriage of goods by sea is called a contract of affreightment. These contracts, which are usually standard form contracts in practice, are most often expressed in one or other of two types of document known as charterparty and the bill of lading. In some cases the terms of a contract of affreightment are contained partly in a charterparty and partly in a bill of lading. A typical example is where the contract of affreightment is between a carrier and a charterer, with the latter acting on behalf of a number of shippers or cargo-owners. In other words the charterer in this example acts as the legal carrier and the shipowner as the actual carrier, hence the relationship between the two is in the form of a charterparty. Nonetheless the charterer or legal carrier will still require bills of lading to be issued by the shipowner for onward transmission to the various cargo-owners – hence the relevance of both the charterparty and the bill of lading to this transaction.

In English law, there is no requirement for the contract of carriage by sea to be in a written form. However, as seen above, it is more common for the charterparty to be in writing (standard form contract). The charterparty will identify the vessel (type, capacity, etc.), the voyage or voyages (intended time of loading and of sailing, port of shipment, intended port of destination, etc.), the cargo, and the terms in respect of the obligations and liabilities of the ship owner and the charterer.

As time has progressed, the shippers themselves have gained much more bargaining power as the size (i.e., supply) of shipping lines has increased as well as the advent of containerisation. As this situation has progressed over recent decades more often than not the carrier is at a

²⁰⁰ Charles L. Trowbridge, (1975) *Tulane Law Review*, Vol. 49, No. 4, at p. 743.

comparative disadvantage vis-à-vis the bargaining dynamics leading up to the conclusion of contracts of affreightment.

Even though a greater onus is placed on shippers under Rotterdam rules, which is a welcome move for carriers, the carriers themselves still have reservations due to certain additional responsibilities being placed upon them under the rules. For example, the obligation to provide a seaworthy vessel under Rotterdam rules is an on-going responsibility throughout the voyage whereas previously, the carrier had an obligation to exercise due diligence only at the beginning of the voyage.

2.2 International Conventions which Govern Contracts for the International Carriage of Goods by Sea

The main objective in this section is to review the various international sources of law which govern the international carriage of goods by sea. With regard to the Hague Rules, the Hague-Visby Rules and the Hamburg Rules the focus of the discussion will be on the key obligations of the carrier. The analysis will not extend to include the shipper's in view of the fact that generally speaking these three conventions contain only few references to the shipper's obligations with the main focus being on the carrier. The Rotterdam Rules, however, sought to redress this situation with the inclusion of more provisions governing the obligations of the shipper. Hence, our analysis of the Rotterdam rules will extend to both the carrier and the shipper's key obligations.

Before embarking on this exercise the key characteristics of the 3 main sources (Hague and Hague Visby Rules, the Hamburg Rules, and the Rotterdam Rules) are outlined in the table below:

Table 1: Key Characteristics of the main International Conventions Governing the Carriage of Goods by Sea

Applicability	The Hague & Hague-Visby Rules (1924) (1968)	Hamburg Rules (1978)	Rotterdam Rules (2008)
Documents	Apply to bills of lading, waybills and other documents where expressly incorporated. Apply to the charterparties only where there is express incorporation (clause paramount)	Applies to all types of contract of affreightment including bills of lading, waybills and short sea notice. However, it does not apply to charterparties unless expressly incorporated	Applies to all sort of contracts of carriage including electric transport records. These Rules does not apply to charterparties
Electronic shipping documents	Not applicable	The Rules do not address the issue of electronic documents, however the signature on the bill of lading may be by mechanical or electronic means art 14 (3)	The Rules apply to electronic shipping documents
Cargo	Do not apply to particular cargoes such as live animals	Applies to all sorts of goods including live animals and deck cargo	Apply to all types of cargo
Ship owner's/carrier's obligation regarding the vessel	Exercise due diligence to provide a seaworthy vessel before and at the beginning of the voyage	There is a continuing duty to maintain the vessel seaworthy	Exercise due diligence before, at the beginning and during the voyage to make and keep the vessel seaworthy
Voyage (deviation)	Carrier must pursue the voyage stipulated in the contract unless deviation is to save life or property at sea, or any reasonable deviation, otherwise the carrier will not be able to rely on any defence or limitation under the Rules	No specific measure devoted to deviation. A deviating carrier will be liable for loss, damage, or delay, only if the deviation is the cause of the loss	A deviation shall not deprive the carrier of any defence or limitation under the Rules, except to the extent provided in article 61
Deck cargo	Do not apply to deck cargo	Apply to deck cargo, where the goods are carried on deck in accordance with an agreement between the carrier and the shipper	Applies to deck cargo. Where the carriage on deck is allowed the carrier will not be liable for any loss or damage occurred to the cargo
Choice of forum	Not applicable	The Rules provide for a choice of forum for judicial and arbitral proceedings	The Rules provide for a choice of forum for judicial and arbitral proceedings

2.2.1 Hague Rules 1924 and Hague-Visby Rules 1968

The first international convention to promulgate rules to govern the international carriage of goods by sea took the form of the Hague Rules of 1924 (HR). The International Convention for the Unification of Certain Rules Relating to Bills of Lading, drafted in Brussels and subsequently adopted as The Hague Rules, was signed by main trading nations in 1924. The United Kingdom implemented the Hague Rules with the Carriage of Goods by Sea Act 1924. With the passage of time, it however became apparent that the HR had become antiquated and that its provisions were lagging developments in shipping building technology and in international shipping practices.²⁰¹ It was for the reason that the in 1968 the Brussels Protocol Amending the Hague Rules Relating to Bills of Lading, better known as the Hague-Visby

²⁰¹ This is discussed in more detail below.

Rules (HVR) was adopted. In view of these developments the Carriage of Goods by Sea Act (COGSA) 1971 was enacted in the United Kingdom to give effect to the HVR. The COGSA 1971 thus repealed the Act of 1924.

Although charterparties are mainly governed by the common law, most bills of lading issued under charterparties are nowadays subject to international conventions – mainly the Hague Rules, the Hague-Visby Rules (HVR) and the Hamburg Rules. The HVR do not apply to charterparties according to Article I (b) which states that “‘contract of carriage’ applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charterparty from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same²⁰²”.

As stated in Article 1 (b) above the Rules apply where the contract of carriage is covered by a bill of lading or any similar document of title. However, it is not necessary for the bill of lading to exist at the time of the loss or damage to the cargo for the Hague-Visby Rules to apply. This is obvious from the case of *Pyrene Co v Scindia Navigation*²⁰³ where the bill of lading had not yet been issued as at the time the damage to the cargo occurred, but subsequent to the damage. The carrier argued that the damage occurred at a time when it was not covered by a bill of lading. The court, however, ruled that even though the bill of lading was not in existence at the time of damage, the contract was from its creation covered by a bill of lading and therefore the HVR were applicable.

It is not uncommon for charterparties to incorporate the HR and HVR with a “clause paramount” or “paramount clause”. This incorporation will give the Rules contractual force and as such the Rules will prevail over any exceptions in the charterparty²⁰⁴. However, parties do not always stipulate whether they are willing to apply the HR and HVR in their clause paramount. In *Nea Agrex SA v Baltic Shipping Co Ltd and Intershipping Charter Co (The Agios Lazaros)*²⁰⁵ the charterparty contained a clause stating that the paramount clause is deemed to be incorporated to this charterparty. In view of this stipulation, the Court of Appeal decided that the paramount clause incorporated the HR with Lord Denning putting

202 Article I (b) Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968 (Hague-Visby Rules).

203 [1954] 2 QB 402.

204 See *Anglo Saxon Petroleum Co v Adamastos Shipping Co* [1959] AC 133.

205 [1976] 2 Lloyd's Rep 47.

forward the following proposition: “What does paramount clause or clause paramount mean to shipping men? Primarily, it applies to bills of lading. In that context, its meaning is, I think, clear beyond question. It means a clause by which the Hague Rules are incorporated.... we have to see what its meaning in the charterparty.... it brings the Hague Rules into the charterparty so as to render the voyage subject to the Hague Rules”.

The effect of the paramount clause is thus to displace the common law rule deviation. For instance, in a charterparty governed by common law rules, the master may be deviate only to save life but not property²⁰⁶, whereas the effect of a paramount clause incorporate the HR and HVR is to provide the master with more latitude and flexibility in that deviation will be permissible and justified when the objective is to save either property or life, or both – or any reasonable deviation for that matter. The overall effect of the paramount clause is thus to alleviate or water down the stringency and strictness of the common law rule on deviation.

Before the advent of the HR and HVR, reliance on domestic laws as a basis for resolving international commercial disputes led to inconsistencies across jurisdictions - for instance, the moderate English law attitude to disclaimers in bills of lading was not followed in other jurisdictions. The United States Supreme Court, on the other hand, read exemption clauses extremely restrictively and subjected them to a number of overriding obligations, such as the duty to take due care of the cargo and to provide a seaworthy vessel²⁰⁷. In view of these differing and sometimes conflicting approaches, it was felt that an international convention was required to address the imbalance caused by the *laissez fair* philosophy²⁰⁸. Hence the adoption of the HR in 1924, followed by the HVR in 1968. Thus the main objective for putting in place an international legal framework was thus to promote consistency and uniformity in the interpretation and application of what are in effect the rules governing a global industry within a multi-jurisdictional setting.

This reason for the subsequent adoption of the HVR lay in the failings of the HR. These failings had come to light over time as consequences of litigation and developments in shipping technology and international trade and shipping practice. For example, the remedies, defences and limitation of liability granted by the HR did not extend to cover the agent,

206 *Scaramanga & Co v Stamp* (1880) 5 C.P.D. 295.

207 See *Liverpool and Great Western Steam Co v Phoenix Insurance Co* 129 US 397 (1889).

208 The phrase *laissez faire* is French and literally means “let them do” “let it be” “let them do as they will” or “leave it alone”. The words “*laissez fair*” are an abbreviation of a phrase which originally read, “*laissez faire passer le monde de lui meme*” “don’t interfere; the world will take care of itself”. A Scotchman who made the idea of *laissez fair* famous in his book “*The Wealth of Nations*”, Adam Smith argued that all restrictions on business should be removed.

employees and servants of the carrier. Moreover, the calculation of limitation of liability in terms of packages or units was not sufficiently flexible to accommodate the unification of cargo as is in the practice in container transport²⁰⁹. However, the HVR were not adopted by all the previous signatories of the HR. The United States, for instance, is a member of the HR but is not party of the HVR. It is for this reason that the HR and HVR continue to operate simultaneously to this day. Rule 1(2) of the HVR, which is incorporated into English law by Carriage of Goods by Sea Act 1971, provides that the provisions of the Rules shall have the force of law and therefore any contrary intention on the part of the parties will be disregarded²¹⁰.

English courts are aware of the international nature of the HVR as well as other international conventions. However the HVR, unlike other recent international conventions, is silent on the question of their interpretation. By comparison, Article 3 of the United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules) provides that the interpretation and application of the provisions of the convention, regard shall be had to its international character and to the need to promote uniformity. In *Stage Line Ltd v Foscola*²¹¹, the House of Lords stated that the interpretation of the HVR should not be controlled by domestic precedents of antecedent date. In other words, the language of the international convention (HVR) must be construed on broad principles of general recognition. As per the dictum of Lord Denning in a case concerning an international air transport convention, "... even if I disagreed, I would follow decision of the courts in a manner which is international concern. The courts of all countries should interpret the Warsaw Convention in the same way."²¹²

The Hague-Visby Rules defined the goods in Article I (c), it includes, goods, wares, merchandise, and articles of every kind whatsoever except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried. Thus, it is clear that unlike the Hamburg Rules and the Rotterdam Rules, the Hague-Visby Rules do not apply to cargoes carried on deck the vessel. In *Sideridraulic Systems SpA and Anor v BBC Chartering & Logistic GmbH & Co KG*²¹³, a cargo of filter tanks was "deck cargo" because it had been carried on deck and was stated by the contract of carriage in the bill of lading to be

209 *Owners of Cargo Lately on Board The River Gurara v Nigerian National Shipping Line Ltd* [1997] 1 Lloyd's Rep 225.

210 See *Aka The Morviken* [1983] 1 Lloyd's Rep 1.

211 [1932] AC 328.

212 *Corocraft Ltd v Pan American Airways Inc* [1969] 1 QB 616.

213 [2011] EWHC 3106 (Comm); [2012] 1 Lloyd's Rep. 230.

carried on deck. Consequently, The Hague-Visby Rules did not apply compulsorily as the tanks were not "goods" within the meaning of the Rules.

The carrier is under an obligation to proceed on the contract voyage without any unreasonable deviation. Article IV (4) suggests that "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom²¹⁴".

As seen above, this provision signals a departure from the common law position under which deviation could only be 'justified' if the purpose was to save life, not property²¹⁵. At the level of judicial construction this raises a key question: does the use of the word "life" include the life of animals such as pets, or should the provision be restricted to the saving of human life? In the absence case law authorities on the question, it is difficult to envisage how the provision regarding the saving of "life" would be interpreted by the courts. It could be nonetheless being argued that this is an area of vagueness which could lead to difficulties of implementation of this provision in the future.

"Any reasonable deviation..." referred herein depends on the facts in each individual case. In *Stag Line Ltd v Foscolo, Mango & Co*²¹⁶, the vessel deviated to land two engineers who had previously been taken on board for testing the fuel-saving apparatus. On leaving that port she stranded and cargo was lost. The House of Lords held that the deviation was not reasonable and therefore the ship owner lost his right to rely on the Hague rule protection. The question raised was whether a deviation could be reasonable if it was not in the interests of both ship and cargo. Lord Atkin said that "the true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of anyone as conclusive"²¹⁷.

214 Article IV (4) Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968 (Hague-Visby Rules).

215 See *Scaramanga v Stamp* (1880) 5 CPD 295.

216 (1932) A.C. 328.

217 *Stag Line Ltd v Foscolo, Mango & Co* (1932) A.C. 328.

A similar problem which arose at common law related to the prohibition against deviating to save property.²¹⁸ This prohibition led to practical difficulties in the application of the law as people may sometimes take property along with them while leaving a distressed ship. And what about sister ships which may both be carrying part of the same cargo? If one was in distress was it not to be expected that the other ship will provide assistance in order to salvage the other part of the cargo? It is in view of this perceived inflexibility of the common law that the convention rules provision included the saving of property amongst its criteria for reasonable deviation.

Is the carrier in breach of Article IV (4) of the Hague-Visby Rules when he deviates solely for the purpose of saving property when there is no life in danger? I.e. does Article IV (4) provides the carrier a right to conduct salvaging operations or is he only allowed to save property when he deviates to save life. If Article IV (4) is construed as giving the carrier the right to deviate only for the purposes of salvaging property regardless of the circumstances, the cargo owners will be unable to invoke Article IV (5) (e) which stipulates that “neither the carrier nor the ship shall be entitled to the benefit of the limitation of liability provided for in this paragraph if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result²¹⁹”. The better approach, however, is to consider Article IV (4) as a reasonable deviation for the purposes of salvaging property during the course of saving lives or deviation for the purposes of saving the whole adventure²²⁰.

2.2.2 Hamburg Rules

In 1978, the Hamburg Rules came into force through a United Nations convention. The Convention is based upon a draft prepared by the United Nations Conference on Trade and Development (UNCTAD)²²¹. The conference examined the operation of the Hague Rules and Hague-Visby Rules and concluded that there was a need for a new carrier regime. The Hamburg Rules are available in Arabic, Chinese, English, French, Russian, and Spanish which are the official languages recognised by the United Nation. The availability of

218 *Scaramanga v Stamp* (1880) 5 CPD 295, CA.

219 Article IV (5) (e) Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968 (Hague-Visby Rules).

220 Carr I, *International Trade Law*, 4th edition, Routledge Cavendish, New York, 2010, p 244.

221 Established in 1964 under GA Res 1995, 19 UN GAOR Supp (No 15) at 1, UN Doc A/5815.

authentic texts in six languages, other than for political reasons, may also be motivated by the need to promote uniformity²²².

Unlike The Hague and Hague-Visby Rules, one of the most important advances over the system of carrier liability is the mandatory application of the Convention (Hamburg Rules) to both inward and outward voyage - whereas the Hague Rules and Hague-Visby rules applied solely to outwards voyages from the contracting state. Article 2 (1) (a) (b) of the Hamburg Rules shows that this convention applies to all contracts of carriage by sea between different states where the port of loading or the port of discharge as provided for in the contract of carriage by sea is located in a contracting state²²³. It is worth noting, however, that some maritime nations such as Belgium, Japan and the United States (through the Carriage of Goods by Sea Act 1936) had extended the application of the HR and HVR to inwards shipments.

The Hamburg Rules are much less restrictive than the Hague-Visby Rules. The provisions of the Hamburg Rules are applicable to all contracts of carriage by sea such as short sea notes, waybills and other contracts. So the application of the Hamburg Rules is not dependent on the issuance of a bill of lading or similar document of title like the case in the Hague-Visby Rules²²⁴.

The Hamburg Rules cover all kinds of cargo including live animals and the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage as long as the carrier could prove that he has complied with all instructions given to him by the shipper respecting the animals. But the carrier will be liable if there is proof that loss, damage or delay resulting from neglect or fault on his part, his servants or agents²²⁵. While the Hague-Visby Rules do not apply to the live animals due to their peculiar characteristics, accidents and morality, and health requirements. So in this case the carrier is at liberty to negotiate the terms of carriage.

However, the Hamburg Rules do not apply on the charterparties unless a bill of lading is issued pursuant to a charterparty. According to Article 2 (3) the Rules apply where the bill of lading is issued to the shipper who is not charterer. This provision stipulates as follows:

222 Carr, I, International Trade Law, 5th edition, Peter Stone, 2014, p 271.

223 Article (2) (1) (a) (b) United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules).

224 Article (2) (1) United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules).

225 Article 5 (5) United Nations Convention on the Carriage of Goods by Sea 1978 (Hamburg Rules).

“...the provisions of the convention apply to such a bill of lading if it governs the relation between the carrier and the holder of the bill of lading, not being the charterer”²²⁶. Thus the question whether or not the Hamburg Rules apply to a bill of lading issued under a charterparty depends on the precise status of the holder of the bill of lading.

Before considering the substance of the duty of care imposed by the Convention upon the carrier it is necessary to consider the way in which a “carrier” is defined. Unlike the Hague-Visby Rules, the Hamburg Rules make a distinction between carrier and actual carrier for the purposes of liability. According to Article 1 of this convention a carrier is “any person by whom or in whose name a contract of carriage of goods by sea is concluded with any shipper. An actual carrier, on the other hand, is any person to whom the performance of the carriage of the goods or of part of the carriage has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted”²²⁷. Thus, there can be more than one actual carrier. The carrier however is liable for the acts and neglect of the actual carrier under this convention. It could be argued that the use of the word carrier under Article 1 equates to the concept of the legal carrier who acts an intermediary between the shipper and the actually carrier. This includes freight forwarders, cargo brokers, etc.

Article 9 (1) of the Hamburg Rules deals with the liability of the carrier in respect of goods carried on deck. The Rules allow the ship to carry the cargo on deck when it is permitted by the usage of the trade or required by statutory rules or regulations²²⁸. If the carrier and the shipper have agreed that the goods shall or may be carried on deck, the carrier must insert in the bill of lading or other document a statement to that effect. Under Article 9 (2) of the Hamburg Rules the parties may enter into an agreement that the goods “shall or may be carried on deck”²²⁹. Article 1 (c) of the Hague-Visby Rules, on the other hand, makes reference to “cargo which by the contract of carriage is stated as being carried on deck”²³⁰. Thus under the Hague-Visby Rules an express statement that the goods are carried on deck should be endorsed in the bill of lading. But under the Hamburg Rules there does not seem to be a requirement for an express statement in the bill of lading. According to Article 1 (c) the Hague-Visby Rules do not apply when the cargo are stated in the contract of carriage to be carried on deck and are so carried.

226 Article 2 (3) (Hamburg Rules 1978).

227 Article 1 (1) (2) (Hamburg Rules 1978).

228 Article 9 (1) (Hamburg Rules 1978).

229 Article 9 (2) (Hamburg Rules 1978).

230 Article 1 (c) (Hague-Visby Rules 1968).

So under the Hamburg Rules when the goods are carried on deck in accordance with an agreement between the carrier and the shipper, or with the usage of the particular trade or is required by statutory rules or regulations, then the carrier will be able to rely on the limitation of liability set out in Article 6 of the Rules.

The Hamburg Rules contain no specific mention of deviation. Several countries, including the United States, the United Kingdom, and the former Soviet Union, (during the meetings of the UNCITRAL Working Group that prepared the Hamburg Rules), proposed to retain a specific provision on deviation²³¹. The United States draft proposal was similar to Article IV (4) of the Hague Rules and was as follows: “any act in saving or attempting to save life or property at sea or any reasonable departure from the contract of carriage shall not be deemed to be an infringement or breach of this convention or of the contract of carriage and the carrier shall not be liable for any loss or damage resulting therefrom provided, however, that if the departure is for the purpose of loading or unloading cargo or passengers it shall, prima facie be regarded as reasonable”²³².

There was strong opposition to the above US proposal. Thus, the result was a compromise provision in the form of Article 5 (6) which states that “the carrier is not liable, except in general average, where loss, damage, or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea”²³³.

Thus unlike The Hague and Hague-Visby Rules²³⁴, there is no specific measure in the Hamburg Rules devoted to deviation. Instead the concept of deviation is subsumed into the that of general liability, so that a deviating carrier will be liable for loss, damage, or delay, only if the deviation is the cause of the loss and he failed to take all measures that could reasonably be required to avoid the deviation and the loss, damage, or delay, resulting from it. But if he is unable to establish that he took all such reasonable measures, he will still be able to rely on the limitation of liability provision included in Article 6 of the Rules. This protection will only be lost if he intended to cause the loss or was reckless, knowing that such loss would probably result. This would be difficult to demonstrate in most cases. However, ‘reasonable deviation’ as mandated by The Hague and Hague-Visby Rules is clearly within the scope of Article 5 (6) of the Rules although the term ‘reasonable deviation’ is not

231 Sweeney, *The Uncitral Draft Convention on Carriage of Goods by Sea*, 7 J. Mar. L. & Comm. 327, 345-346 (1976).

232 Sweeney, *The Uncitral Draft Convention on Carriage of Goods by Sea*, 7 J. Mar. L. & Comm. 327, p 347 (1976).

233 Article 5 (6) (Hamburg Rules 1978).

234 Article IV (4) (Hague-Visby Rules 1968).

expressly mentioned in this provision. However, the protection offered to the carrier under this exclusion of liability provision would apply to deviation as much as any other cause of loss or damage in so far as the deviation is deemed to be reasonable. It is in view of this protection that it could be argued that deviation provides a further illustration of how in many ways a carrier's life would be made easier under the Hamburg Rules²³⁵.

It is pertinent to end this sub-section with some brief remarks on the position of the Hamburg Rules regarding the question of seaworthiness. According to Article 5 (1) of the Rules, the carrier is liable unless he proves that he took all measures that could reasonably be required to avoid the occurrence and its consequences. This implies, in effect, a continuing duty placed on the carrier with regard to the seaworthiness of the vessel under the Hamburg Rules. The Hague and Hague-Visby Rules, on the other hand, impose an obligation on the carrier to provide a seaworthy vessel only at the beginning of the voyage. It could thus be argued that from a comparative point of view, the Hamburg Rules impose a more onerous duty on the carrier than the Hague Rules and Hague-Visby rules vis-à-vis the implied obligation as to the seaworthiness of the vessel.

2.2.3 Rotterdam Rules

The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules) was adopted by the United Nations in 2008. These Rules required twenty ratifications to come into force and once a country becomes a member to this convention it will have to renounce any other relevant conventions it may be party to - e.g. The Hague Rules, the Hague-Visby Rules, or the Hamburg Rules²³⁶. The aim of the convention is to extend and modernize international rules already in existence with a view to achieving uniformity in the field of international carriage of goods.

The Rotterdam Rules have a wide applicability. Article 5 (1) suggests that the Rules applies to contracts of carriage where the port of loading or place of acceptance of cargo and the port of discharge or the place of receipt or delivery are in different states²³⁷. The phrase 'contract of carriage' is defined widely under the Rotterdam Rules to include carriage by sea as well as carriage by other modes of transport²³⁸.

235 A.J Waldron, (1991), "The Hamburg Rules- a boondoggle for Lawyers?", *Journal of Business Law*, J.B.L. Jul, 305-319.

236 Article 94 & Article 89 The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea 2008 (Rotterdam Rules).

237 Article 5 (1) (Rotterdam Rules 2008).

238 Article 1 (1) (Rotterdam Rules 2008).

Unlike the Hague-Visby Rules, the Rotterdam Rules apply to all transport documents such as waybills and negotiable transport documents (bills of lading) and recognition is given to electronic versions of transport documents²³⁹. Therefore, the Rotterdam Rules do not require any specific document like the bill of lading or any similar document to be issued. This is defined in Article 1 (14) as follows: transport document means a document issued under a contract of carriage by the carrier that: “evidences the carrier’s or a performing party’s receipt of goods under a contract of carriage, and evidences or contains a contract of carriage”²⁴⁰. However, as in the Hague-Visby and Hamburg Rules, charterparties and/or towage agreements are excluded from the Rotterdam Rules²⁴¹.

The Rotterdam Rules apply to all types of cargo including live animals (unlike the Hague Rules and Hague-Visby Rules). The carrier is allowed to ship cargo on deck where it is required by statutory rules or regulation, or where the goods are carried in containers or vehicles and the decks are adequately fitted for carrying these containers and vehicles. Deck cargo is also permitted where there is usage or practice to do so in particular trade, or where there is an agreement between the shipper and the carrier to carry the goods on deck²⁴².

Where carriage on deck is permissible the carrier will not be liable for any loss of or damage to such cargo. But in the event of unauthorised deck carriage the carrier will not be able to rely on the list of defences provided by Article 17 if the loss or damage resulted from the unauthorised method of carriage. Regarding the carriage of live animals, the carrier will lose his right to rely on the limitation and exclusion clauses if the claimant proves that the loss or damage to the goods, or delay in delivery, resulted from an act or omission of the carrier²⁴³.

The Rotterdam Rules imposed an obligation on the carrier to provide a seaworthy vessel. Unlike the Hague-Visby Rules (where the carrier is required to exercise due diligence to make the ship seaworthy only before she set sail), the requirement to exercise due diligence under the Rotterdam Rules is a continuous obligation²⁴⁴. This is similar to the position under the Hamburg Rules. The carrier is thus bound to exercise due diligence before, at the beginning of, and during the voyage to make and keep the vessel seaworthy, properly crewed,

239 See article 1 (17) (18) (19) (20) (21) (22) (Rotterdam Rules 2008).

240 Article 1 (14) (Rotterdam Rules 2008).

241 Article 6 (Rotterdam Rules 2008).

242 Article 25 (a) (b) (c) (Rotterdam Rules 2008).

243 Article 81 (a) (Rotterdam Rules 2008).

244 Thomas H. Belknap, Jr, (2010), “The Rotterdam Rules”, *Blank Rome Maritime*, Jan (No 1), available online at: <https://www.blankrome.com/index.cfm?contentID=37&itemID=2117> .

equipped and supplied throughout the voyage. The holds and all other parts of the vessel must also be kept fit and safe for the reception, carriage and preservation of the cargo²⁴⁵. Seaworthiness is therefore a much more extensive obligation under the Rotterdam Rules in that it covers all stages of the execution of contract of carriage, whereas this is not the case with the Hague-Visby Rules. It could consequently be argued that the onerous provision in respect of seaworthiness contained in the Rotterdam Rules renders carriers in ship owning countries highly likely to press strongly against the adoption of the Rotterdam Rules. This is in view of the fact that the continuous obligation to keep the vessel seaworthy before and during the voyage will be reflected in higher insurance costs, and therefore resulting in higher shipping industry costs.

Article 24 of the Rotterdam Rules makes clear that a deviation shall not deprive the carrier of any defence or limitation under the Rules. When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, under the Rotterdam Rules such deviation of itself shall not prevent the carrier or a maritime performing party from relying on defences or limitations provided in this Convention, except to the extent provided in Article 61 (personal act or omission done with the intent to cause loss or recklessly and with knowledge that such loss would probably result)²⁴⁶. It therefore appears that shippers and/or cargo owners may no longer be protected from unreasonable deviation, unless the carrier is guilty of wilful misconduct. This is in view of the fact that according to this provision a deviation by the carrier, whether geographical or otherwise, does not abolish the protective cover of exclusion clauses or limitations of liability of the carrier or performing parties under the contract of carriage.

The Rotterdam Rules added the defences of war hostilities, piracy, terrorism, and reasonable measures to attempt to save property at sea or to avoid damage to the environment. A carrier is not liable for loss, damage or delay in delivery caused by deviation to save or attempt to save life or property at sea, or by other reasonable deviation. Article 17 of the Rules states that the carrier is relieved of all or part of his liability, if he proves that loss, damage or delay occurred while he was saving or attempting to save life at sea, or when he exercises

²⁴⁵ Article 14 (a) (b) (c) (Rotterdam Rules 2008).

²⁴⁶ Article 24 (Rotterdam Rules 2008).

reasonable measures to save or attempt to save property at sea or to avoid or attempt to avoid damage to the environment²⁴⁷.

2.3 Implied Obligations of the Parties to a Contract of Affreightment

This section examines the main implied obligations of the parties under the contract of carriage, with the main focus being mainly on the rules governing these obligations under English common law. In the first sub-section the obligations of the charterer/ shipper will be critically analysed. This will then be followed by an examination of the implied obligations of the carrier in the next sub-section.

2.3.1 Implied Obligations of the Charterer/ Shipper

The common law implies that the charterer is obliged to nominate a safe port. It has been the duty of a charterer of a vessel to ensure that the port where he is going to send the vessel to is safe for the ship to berth and discharge or receive cargo.²⁴⁸ A port will not be safe unless, in the relevant period of time, the particular vessel can reach it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and steamship.²⁴⁹

Unpredictable weather and the absence of weather reports may render a port unsafe; therefore, the charterers will be liable for not nominating a safe port. An illustrative case law example is *The Dagmar*²⁵⁰. In this case the charterers ordered the ship to Cape Chat, where she went aground. The master had asked for weather reports, but these were not provided. The court held in this case that there was no negligence on the master's part, and the port was unsafe. In another case, *The Marinicki*²⁵¹, the owners chartered the vessel for one time charter trip via safe port from Vancouver to Indonesia. The charterers ordered the vessel to proceed to Jakarta. Prior to the vessel's arrival at her discharge berth in Jakarta she sustained serious bottom damage. The defendants "charterers" argued that the damage occurred when the vessel ran over her own anchor on some occasion prior to entry into the port of Jakarta. But the court found out that there was no proper system in place to investigate reports of obstacles in the channel. Therefore, it was held that the port of Jakarta was unsafe at that time.

247 Article 17 (l) (m) (n) (Rotterdam Rules 2008).

248 Baker and David [1986] L.M.C.L.Q. 112.

249 *Leeds Shipping v Societe Francaise Bunge (The Eastern City)* [1958] 2 Lloyd's Rep 127.

250 *The Dagmar* [1968] 2 Lloyd's Rep 563.

251 *The Marinicki* [2003] 2 Lloyd's Rep 655.

The application of this rule is subject to the proviso that the master will be expected to wait for a reasonable time in the event of a temporary obstacle until it is removed. There will be a breach of a safe port undertaking only where the delay has the effect of frustrating the object of the contract of carriage. The court held in *The Sussex Oak*²⁵² that an icebound port did not render the port unsafe unless it was for a period of time which frustrates the objective of the charterparty. Even if the court finds the master's navigation to be negligent, the court tends to consider the port as unsafe where it remains the real and effective cause of the loss - i.e. the cause of the casualty is the unsafety of the port and not that the master's negligent navigation. In *Grad Marine & Energy Ltd v China National Chartering Co Ltd (The Ocean Victory)*²⁵³, the vessel *Capesize*, a bulk carrier, was time chartered and bound to discharge her cargo at Kashima port. That port was unsafe for the ship because there was a risk at that time that she might have to leave the port due to waves or bad weather when the wind and sea conditions in the channel were such that more than ordinary seamanship and navigation were required to enable her to leave safely. On that basis, the ship's subsequent loss was held to have been caused by the unsafety of the port, and not because of the master's negligent navigation of the vessel. The court had concluded that the port would not be safe if a vessel would be exposed to a danger which could not be avoided by good navigation and seamanship and that the port's unsafety remained the real and effective cause of the loss. The vessel remained exposed to a danger which could not be avoided by good navigation and seamanship. The charterers' warranty was of safety, not of reasonable safety. The cause of the loss was thus the charterer's failure to nominate a safe port, and not that the master's poor navigation.

Political risk may render the port unsafe. In *Kodros Shipping Corp v Empresa Cubana de Fletes (The Evia)*²⁵⁴, the vessel was chartered under a time charterparty where the charterers nominated Basrah (Iraq) as the port of delivery. The vessel was trapped at Basrah in Shatt al Arab waterway after the outbreak of the Iran-Iraq war. The likelihood of war was imminent at that time but the charterers did not order the vessel to leave, which she could have done. The House of Lords decided that the charterers were in breach of the implied obligation to nominate a safe port.

In the event of a breach of the implied obligation vis-à-vis nominating a safe port on the part of the charterer, the charterer becomes liable for damages incurred by the ship owner - e.g.

252 *Grace v General Steam Navigation Co Ltd (The Sussex Oak)* [1950] 2 KB 383.

253 [2013] EWH C 2199 (Comm) 2013 WL 3878761.

254 [1982] 2 Lloyd's Rep 307.

indemnify the carrier for damage to the fabric of the vessel, and for all economic loss (for instance, financial loss relating to hire). However, the carrier will not be entitled to damages where the charterer is able to show that acceptance of the nomination by the carrier amounted to a waiver.²⁵⁵ In *Compania Naviera Maropan SA v Bowaters Lloyd Pulp and Paper Mills Ltd (The Stork)*²⁵⁶ Morris LJ pointed out that “the owners must not throw their ship away. If having the opportunity to refrain from obeying the order, and having the knowledge that the ship had been wrongly directed to run into danger, those responsible for the ship allow her to be damaged, when they could have saved her, it would be contrary to reason if damages could be recovered..... they would not be the result of the breach of contract, but of the deliberate and unnecessary act of those in control of the ship”.

The charterer must also undertake that not to ship **dangerous goods** or any goods might pose a threat or hazard to other goods,²⁵⁷ without expressly giving notice to the ship owner that they carrying goods of an inflammable, explosive or dangerous nature.²⁵⁸ However, the expression “goods of a dangerous nature” should be given a broad interpretation and not be restricted to goods of an inflammable or explosive nature. In the case of *The Giannis NK*,²⁵⁹ a cargo of groundnuts extraction meal pellets had been shipped in Dakar for carriage to the Dominican Republic under a bill of lading incorporating the Hague-Visby Rules. On arrival at the port of destination the cargo was found to be infested with Khapra beetle, although the infection had not spread to a cargo of wheat in an adjacent hold. The authorities in the Dominican Republic and in neighbouring US ports decided that the infestation was such that the ship owner would have to jettison both cargoes at sea. Having complied with these instructions, the ship owner then commenced proceedings against the shippers of the groundnuts cargo under Article IV rule 6 of the Hague-Visby Rules for damages, delays and other costs. Article IV (6) of both The Hague and Hague-Visby Rules provides that “Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place, or destroyed or rendered innocuous by the carrier without compensation and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo,

255 *Pearl Carriers Inc v Japan Line Ltd (The Chemical Venture)* [1993] 1 Lloyds Rep 508.

256 [1955] 2 QB 68.

257 *Effort Shipping Co.Ltd v Linden Management SA and Ors (The Giannis K)* The Times, January 29, 1998.

258 *Mitchell, Cotts & Co v Steel Bros & Co Ltd* [1916] 2 KB 610.

259 [1998] 1 Lloyd's Rep 337.

they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any".²⁶⁰

The House of Lords, having accepted the finding of the trial judge that the infestation of Khapra beetle had originated with the shipment of the cargo of groundnuts, ruled that the shipper was in breach of the implied obligation not to ship dangerous goods. So under both the common law and the Hague-Visby Rules the shipper is likely to find himself liable for damages caused by shipment of dangerous goods whether he was aware that the goods shipped were dangerous or not. In the dictum of Lord Lloyd of Berwick in *The Giannis NK* case, "the liability of a shipper for shipping dangerous goods at common law, when it arises, does not depend on his knowledge or means of knowledge that the goods are dangerous".²⁶¹

The charterer is bound at common law to pay freight at the time when the goods are delivered. The payment which the carrier receives under a contract of carriage is called "freight".²⁶² The term "freight" applies to voyage charterparties and to contracts of carriage under a bill of lading. However, in time charter or bareboat charter the remuneration is normally referred to as charter hire. In voyage charters the owner's freight is calculated by reference to the quantity of cargo carried. The charterer is therefore under an obligation to tender a "full and complete cargo".²⁶³ Freight should normally be paid to the carrier under the relevant contract of carriage - i.e. generally, under a charterparty, to the ship owner.²⁶⁴ Under common law the ship owner can claim a lien only for three classes of payment: freight, if and only where freight is due at the same time as delivery of the goods; expenses incurred in protecting the cargo; and general average contributions. However, no lien can apply for the recovery of other charges such as damages for detention or demurrage.

In some cases the charterer has no personal interest in the cargo as they may be merely agents, or may have chartered the vessel with a view to making a profit upon the bill of lading freight. Therefore, the most common form of express relief from liability for freight is a "cesser clause" which provides that some or all of the charterer's liability will cease on shipment of the cargo.²⁶⁵ The clause will often be worded to exclude the charterers' liability

260 International Convention for the Unification of Certain Rules Relating to Bills of Lading, Brussels, (The Hague Rules 1924); Brussels Protocol Amending the Hague Rules Relating to Bills of Lading (The Hague-Visby Rules 1968).

261 [1998] 1 Lloyd's Rep 337.

262 *Kirchner v Venus* (1859) 12 Moo PCC 361; *Dakin v Oxley* (1864) 15 C.B. (N.S.) 646.

263 See *Wallems Rederij A/S v WM. H. Muller and Company, Batavia* [1927] 2 K. B. 99.

264 *Dry Bulk Handy Holding Inc v Fayette International Holdings Ltd (The Bulk Chile)* [2013] 1 C.L.C. 535.

265 *Milvain and Another against Perez and Others* (1861) 3 El & El 495.

for demurrage and freight. Generally there has been a tendency on the part of the courts to find the cesser clause ineffective and the charterer liable for either demurrage or freight.²⁶⁶

The charter also has a duty to tender the cargo and to load or unload it in the laytime period. To do this the ship must be at the place where she is bound to be ready for cargo and she must be ready to load.²⁶⁷ Where laytime is exceeded, the charterer will generally be in breach of the charter and, in principle, liable in damages “demurrage”. In *DGM Commodities Corp v Sea Metropolitan SA (The Andra)*,²⁶⁸ a charterer could not rely on an event as frustrating a charterparty and relieving it from the obligation to pay demurrage where that event had been caused by a failure by the receivers to discharge a cargo, since discharge remained the responsibility of the charterer even if it had delegated it to the receivers. Furthermore, it was held in *Great Elephant Corp v Trafigura Beheer BV*²⁶⁹ that a ship owner was entitled to demurrage when its vessel was prevented from leaving Nigeria by the actions of the Nigerian authorities because it was delayed "waiting cargo documentation". It would appear from these cases that the charterer’s obligation to abide with laytime stipulations in the contract of carriage, and his subsequent liability for demurrage if he fails to do so, is construed very strictly by the courts.

2.3.2 Implied Obligations of the Carrier

As a general rule, the ship owner is responsible for delivering the goods to the destination safely unless he has been prevented by one of the recognised common law exceptions. These exceptions include acts of god, acts of the crown’s enemies, inherent vice in the goods themselves, etc. In addition in every contract of carriage by sea there are certain implied obligations on the part of the ship owner.

In relation to the implied obligations of the carrier, modern maritime conventions have acquired basic legal concepts and are still influenced by the traditional reasoning of common law traditions. Common law rules, the rules of the various conventions (discussed above in section 3.3) as well as other national laws implementing them have always sought to acquire reasonable balance between the interests of the carrier on the one hand and those of the shipper on the other. With reference to the carrier’s implied obligations, in any contract for the carriage of goods by sea, the ship owner is under an implied obligation to provide a ship

²⁶⁶ *Jennesson, Taylor & Co v Secretary of State for India in Council* [1916] 2 KB 702.

²⁶⁷ *Sueton D Grant & Co. v Coverdale, Todd & Co.* (1884) 9 App. Cas. 470.

²⁶⁸ [2012] 2 Lloyd’s Rep. 587.

²⁶⁹ [2012] 2 C.L.C. 505.

that is reasonably fit to navigate the high seas. It should also be in a state to commence the voyage without any delay. It should subsequently prosecute the voyage without deviation, proceeding on the preliminary voyage with due dispatch. Reasonable care should be taken with respect to the loading, stowing, carrying and preservation of the goods.²⁷⁰ Of all these obligations, the focus of this dissertation in subsequent chapters will be on the aspect of deviation.

The table below gives a brief description of the most essential common law implied duties of the ship owner.

Table 2:

Implied obligation	Nature of Duty	Effect of Breach
Seaworthy ship	It is the ship owner obligation to make sure that the vessel must be fit for the prosecution of the voyage and well equipped to be able to cope with almost all types of perils and dangers at the commencement of the voyage.	The contract is repudiated where the breach is serious and frustrates the commercial purpose. Where the breach is minor the claimants are entitled only for damages.
Due despatch	The ship owner is bound to ensure that the vessel will proceed on the voyage, load and unload at the time stipulated in the contract of carriage. In case of the absence of express agreement, the law implies the performance of the voyage within a reasonable time.	The contract is repudiated where the breach is serious and frustrates the commercial purpose. Where the breach is minor the innocence party is entitled only for damages.
No deviation	The ship owner is not allowed to deviate from the agreed route stipulated in the contract of affreightment, and he ought to take the direct geographical and customary route.	Fundamental breach, which terminate the contract whether the breach is serious or minor. Deprive the common carrier of any exception clauses. He will also lose the right to seek general average contribution. Discharges the insurer from liability.
Reasonable care of the cargo	The ship owner legally required to use due care and skill in navigating the ship and to take a reasonable care of the goods onboard the ship.	The ship owner will be liable for damages.
Delivery of goods	The ship owner is under implied obligation to deliver the goods at the port of discharge to the right person named either, in the bill of lading or the charterparty.	The ship owner will be liable for damages.

The ship owner is legally required in every contract of affreightment to provide a seaworthy vessel at the time of sailing with the goods. The ship must physically capable to cope with the ordinary perils of the sea. This duty of the ship owner i.e. to provide a sea worthy ship

²⁷⁰J.C.T. Chuah (2005) Law of International Trade: 3rd edition, at p. 233.

attaches only at the time when the voyage commences and does not carry on after the ship has set sail.²⁷¹

In *Stanton v Richardson*,²⁷² the ship owner failed to provide a seaworthy vessel due to the problems in the pumping equipment in the ship. According to the court, the vessel must be fit in design and structure and be able to deal with the ordinary perils of the sea. Moreover, the ship owner is under an absolute obligation to provide with the vessel a proper and competent crew. Therefore, the ship may be rendered unseaworthy by the inefficiency of the ship master or the crew.²⁷³

In *McIver co. Ltd v Tate Steamers Ltd*,²⁷⁴ the vessel set out on the voyage with insufficient bunkers which rendered it unseaworthy. Furthermore, in *Louis Dreyfus & Co. v Tempus shipping Co*,²⁷⁵ the court held that the ship was unseaworthy when the coal taken on board. The vessel prior to the outward voyage was not of a standard required in the use of steamships.

The ship owner also undertakes to provide all necessary documents i.e. the legal documentation requirements, (where the ship is unable to sail without it) the lack of such documents could render the vessel unseaworthy.²⁷⁶

The fitness of the ship to receive the cargo (cargoworthiness) is part of the general fitness of the ship, and therefore an aspect of seaworthiness. The ship owner is not only obliged to supply a ship that is fit for its purpose, but he is bound to ensure that the vessel is fit to hold the particular cargo,²⁷⁷ (e.g. if the cargo need refrigeration like meet for instance the ship owner must make sure that the refrigeration system is working properly).

However, the breach of the warranty as to seaworthiness does not allow the cargo owner to repudiate the contract of carriage immediately. The claimant may treat the contract as repudiated where the unseaworthy vessel causes serious damages and frustrate the commercial purpose of the contract of affreightment. On the other hand where the breach is

271 *McFadden v blue Star Line* [1905] 1 K.B. 697.

272 (1875) L.R. 9 C.P. 390.

273 *HongKong Fir Shipping Co. Ltd v Kawasaki Jisen kaisha Ltd* [1962] 2 Q.B. 26.

274 [1903] 1 KB 362 (CA).

275 [1931] AC 726 (HL).

276 *The Madeleine* [1967] 2 Lloyd's Rep 224.

277 *Owners of Cargo on Ship "Maori king" v Hughes* [1895] 2 QB 550 (CA).

minor the plaintiffs are entitled for damages and the repudiation may not exercise.²⁷⁸ Viewed from a contract law perspective, the implied obligation relating to seaworthiness can thus be described as either an innominate or intermediate term, as opposed to a condition or a warranty.²⁷⁹

Common law implies that the ship must be ready to proceed the voyage and complete it with due despatch. The duty to proceed in due despatch is usually expressly stipulated in the contract of affreightment, e.g. c1.1 Asbatankvoy is often combined with the statement specifying when the vessel is "expected ready" to load. It was held the case of *The Mihalis Angelos*²⁸⁰, that the words "expected ready to load" to be a condition of the charterparty so when the term has been breached the charterers will be entitled to terminate the contract of carriage on the basis of a repudiation. In *Evera S.A. Commercial v North Shipping Co. Ltd. (The North Anglia)*,²⁸¹ Devlin J stated that "wherever she may happen to be, at a date when, by proceeding with reasonable dispatch, she will arrive at the port of loading by the expected date."

The legal effect of a breach of the duty to proceed with due despatch is similar to those for the seaworthiness. It depends on the seriousness of the breach; the claimant will be entitled to repudiate the contract where the breach frustrates the commercial purpose of the contract. Otherwise, the cargo owners cannot exercise repudiation. In *Freeman v Taylor*,²⁸² the ship was delayed by seven weeks before arriving at the loading port, thus the charterer was entitled to refuse to load the cargo. The delay of seven weeks was sufficient to frustrate the commercial purpose of the adventure. However, in *MacAndrew v Chapple*²⁸³ where the delay was not too long and did not go to the root of the whole matter, the injured party will be restricted to a claim for damages only.

Charterparties will generally include express terms to the effect that the ship owner ought to exercise due diligence in the care and stowing of the goods. Where the contract of affreightment is silent as to the ship owner's duty to take care of the goods, the latter will be responsible at common law to take reasonable care of the goods and will also be liable for

278 *HongKong Fir shipping Co Ltd v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 62.

279 *Ibid.*

280 [1970] 2 Lloyd's Rep. 43.

281 [1956] 2 Lloyd's Rep. 367.

282 (1831) 8 Bing 124.

283 (1866) LR 1 CP 643.

damage occurring due to his negligence.²⁸⁴ However, the express terms of the contract of charterparty may discharge the ship owner from any responsibility of taking care of the goods by providing that this will be the charterer's responsibility. In *Transocean Liners Reederei gmbH v Euxine Shipping Co. Ltd*²⁸⁵ for example, the contract terms stated that the charterers were disallowed from suing the owners for damage to the goods caused by bad loading and lashing since the loading was done on their instructions. This case has the added significance in view of highlighting the potential conflict which could arise between the express provisions of the contract of carriage and a term implied by law where the objective of the former is to set aside the latter. This then raises the question as to which should prevail in the event of such a conflict – i.e. the express term or the implied term? Whilst the judgement in the *Transocean* case is silent on this matter, we may nonetheless deduce from the practice in other areas of carriage of goods by sea law that the express intention of the parties will take precedence over the implied term. Such is the case, for example, with the liberty clause under which a carrier (by virtue of a term inserted in the contract of carriage) is generally able to set aside the implied obligation against unjustified deviation.

The ship owner is also required to transfer the goods to the right person at the port of discharge. This person, the consignee, is usually named in the contract of affreightment (in the bill of lading or the charterparty itself). On arrival at the port of discharge the carrier must wait a reasonable time to enable the consignee to receive the goods and to arrange for delivery and acceptance. Therefore the carrier will be in breach of their duty regarding proper delivery of the cargo if they were, for example, to leave the cargo by the quayside.²⁸⁶ Where the bill of lading has been issued the ship owner will be under a duty to deliver the goods to the named consignee. On another hand, where there is no bill of lading, the charterer usually is the consignee, thus the goods will be delivered to him.

2.4 Conclusion

The main objective of this chapter was to undertake a critical review of some of the key terms which implied in to contracts for the international carriage of goods by sea, together with the relevant sources from which these terms emanate. These sources included English common law and the various international conventions on the carriage of goods by sea (The Hague, Hague-Visby, Hamburg and Rotterdam conventions). Relevant cases through which

²⁸⁴ *McFadden v Blue Star Line* [1905] 1 K.B. 697.

²⁸⁵ [1999] 1 Lloyd's Rep.

²⁸⁶ *Bourne v Gatcliffe* (1841) 133 E.R. 1298.

these implied obligations have been applied were equally identified and discussed. The various types of contracts for the carriage of goods by sea also formed part of the analysis. The overall objective of the chapter was to advance and develop dissertations Aim 1 and Aim 4. In the next chapter, this theme will be further built on and developed through a comparative analysis of the underlying philosophy for the implication of terms in contract law and shipping law.

CHAPTER THREE

A COMPARATIVE AND CRITICAL ANALYSIS OF THE ETHOS, ROLE AND FUNCTION OF IMPLIED TERMS IN GENERAL LAW OF CONTRACT AND CONTRACTS OF AFFREIGHTMENT

3.1 Introduction

The previous chapter included an overview of the various types of affreightment, the sources of law governing them and the obligations of the parties thereunder. Chapter Four builds on this discussion through an indepth analysis of the role and function of implied obligations in shipping law. The comparative theme is also employed in this chapter by setting the discussion against the background of the role of implied terms in general contract law.

Historically, shipping law, more generally known as the law governing the international carriage of goods by sea, is founded on the doctrine of freedom of contract.²⁸⁷ The advent of the shipping industry can be traced to the era of *'laissez faire'* in which contractual practice was largely free from the regulatory constraints of the state. Cargo owners and carriers negotiated and concluded terms of carriage with little or no intervention by the State. It is for this reason that to this day modern shipping law is still entrenched in the common law and customary trade usages. The influence of statutory intervention has been relatively limited compared to other areas of commercial life. Even so, a review of the key elements of the law governing the international carriage of goods by sea reveals an assortment of terms and conditions which owe their existence not to the free will of parties or to trade usages, but to implication by law. In the course of time some of these implied terms have also found their way into various international conventions and legislative enactments. This is surprising in view of the essentially contractual and *'laissez faire'* background of the early shipping industry. Even more surprising is the fact that this aspect of the development of shipping law does not seem to have attracted sufficient attention from scholars. The literature review clearly indicates that there has been very little research conducted on this seeming paradox

287 Korde R, (2000), "Good Faith and Freedom of Contract", UCL Jurisprudence Review, 7, 142-165; See also Philips Electronique Grand Public SA v British Satellite Broadcasting Ltd [1995] EMLR 472, CA.

whereby an industry practice which appears on the face of it to be so reliant on negotiated settlements seems to have over the years become the subject to a wide range of terms and conditions which are imposed by law and are therefore independent of the parties' free will. It is for this reason that the area of law needs to be studied, hence the main objective of this chapter.

In order to understand the precise role, function and ethos of implied terms in shipping contracts (and in voyage charterparties²⁸⁸ in particular) we need to examine not only the rules and principles of maritime law, but also those of general law of contract. The rules of law and guiding principles which govern the implication of terms by the courts are as applicable to contracts for the international carriage of goods by sea as they are to most other types of contracts. It goes without saying that in many contracts one would expect the primary obligations to be explicitly stated or included as part of the express terms; however, it is also to be expected that the parties will not always have expressly stated all of the key obligations nor will they always be able to provide for every eventuality. The obvious rationale for implying terms is thus to complement a contractual agreement with the view to making the contract more effective for the purpose of performance and to fill in any gaps which may be present. This can be the case with non-negotiated standard form contracts such as modern charterparties for the international carriage goods by sea where the contract terms are pre-drafted by one of the parties to the contract (i.e. the carrier) and presented to the counterpart (the charterer or cargo owner) for adhesion. The ultimate effect of such a standard form adhesion approach to contracting is that the contract is bound to spell out in great and minute detail the rights of the drafter (i.e. carrier) without outlining their obligations; on the other hand, the contract will equally spell out in great detail the obligations of the other party (i.e. the charterer) without outlining what their rights are in the event of a breach by the carrier.

The gaps in the terms in this case could be said to arise because of the absence of the carrier's obligations as well as the absence of the charterer's rights. Hence, the primary purpose and rationale for implying terms such as deviation, seaworthiness and warranties relating to care and preservation of the cargo is to address this perceived imbalance in the expressly agreed terms. It could further be argued that the underlying philosophy for the implication of terms

288 There are four main types of shipping contracts used for the international carriage of goods by sea, to wit: voyage charterparty; time charters; charterparty by demise (also known as 'bare boat' charter); and consignment carriage which includes container transport. Our focus in this paper will be mainly on voyage charterparty from which all of the other three forms of carriage have evolved.

go much deeper in that the process ultimately seeks to address the inequality of bargaining power between the two parties. Viewed from this perspective, it could even be argued that the jurisprudential basis for implying terms founded on the natural law theory as opposed to legal positivism. In other words, when applying the law judges in such cases aim to reach judgments which are based not only on justice (legal positivism or ‘law as it is’); they go much further by seeking solutions and outcomes based on concepts of morality and what is deemed to be fair and just. Viewed from this perspective, it could further be argued that the practice of implying terms is justified - and particularly so in the context of historical trends in the shipping industry which have witnessed a transition from negotiated contracts to standard form adhesion contracts.

Having said this, it can still be argued that the implication of terms into contracts for the international carriage of goods by sea is a judicial practice which is clearly at odds with the ‘*laissez faire*’ ethos of the international shipping industry which has historically relied on negotiated terms and conditions based on the doctrine of freedom of contract. In constructing this argument, this chapter has as its key aims and objectives the following:

- (a) A comparative and critical overview of the various categories of implied terms in general contract law and in shipping law;
- (b) A critical appraisal of the judicial approach to the implication and classification of terms in selected shipping industry cases; and
- (c) A critical assessment of the philosophical basis for implying and classifying terms set against the historical background as well as the modern context of international shipping industry practice.

This chapter will seek to develop the second part of Dissertation Aim which states as follows:

DA1: ... and to critically examine the relationship between the judicial approaches to the implication of terms in general contract law and in shipping law.

In doing this the analysis in this chapter will also seek to answer Research Question 3 which states in part:

... What has been the judicial approach to the implication of terms in shipping law and what is the relationship between shipping law practice and general contract law in this regard?

The following methodology will be used as part of the discussion: comparative, doctrinal/black letter law.

3.2 A Comparative Analysis of Implied Terms: Contract Law versus Shipping Law

Generally speaking implied terms can be divided into three main categories. The first consists of terms implied in fact. This generally applies (but is not limited) to cases in which a contract was agreed by conduct rather than by use of explicit words.²⁸⁹ In terms implied as a matter of fact, the parties must have intended to include the term and they presumably intended this through their tacit understanding (as inferred from their conduct and other relevant circumstances)²⁹⁰. The second category consists of terms implied in law. Some conditions, warranties and promises implied in law are based on judicial decisions (i.e. terms implied by common law)²⁹¹. Others owe their origin to either statutes such as the Sale of Goods Act 1979 (as amended) or in the case of carriage of goods the Carriage of Goods by Sea Act 1924. Terms implied in law usually have nothing to do with the intention of the parties²⁹², but owe their origin to established rules of law as laid down by legislation or binding precedents²⁹³. The third category consists of terms implied by custom or trade usage on the basis of a common custom which is generally accepted in a particular industry. Given the background and history of the international shipping industry and its close associations with the *'laissez faire'* doctrine and freedom of contract, it could be argued that the third category provides a much more acceptable philosophical basis for the implication of terms into shipping contracts. This is much less so for the first two categories. Before examining this aspect in more detail, it is proposed first of all to undertake a comparative overview of the judicial basis for the implication of terms in general contract law and within the legal framework governing the international carriage of goods by sea.

289 *Shell UK Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187.

290 *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108 at 137.

291 *Scally v Southern Health & Social Services Board* [1992] 1 A.C. 294 at 307, where the court held that it was an implied term in a contract of employment that the employer should inform the employees of steps which they were entitled to take to enhance their position rights.

292 See *Dadomar General T.J. Park* [1986] 2 Lloyd's Rep 68 at 70.

293 G.H. Treitel, (1999), *The Law of Contract*, 10th edition, Sweet & Maxwell, London, p 188.

3.3 The factual basis for implying terms: a review of judicial precedents

The common law recognizes terms ‘implied in fact’ as being ones which are recognised and accepted by the courts as being essential in order to supplement the express terms of a particular contract. This would be in circumstances where it is so obvious that the relevance of the implied term to the contract goes "without saying"²⁹⁴. The desired aim of this judicial exercise (i.e. of implying a term as a matter of fact) is to give such a contract ‘business efficacy’, thereby (it is argued) giving effect to the unexpressed intention of the parties²⁹⁵. To achieve this outcome the judicial exercise involves two key tests. The first test used for implying a term implied as a matter of fact is the ‘officious bystander’ test. The nature and scope of this test was elucidated in *Shirlaw v Southern Foundries (1926) Ltd*, by Lord MacKinnon, where the learned judge opined as follows:

*“If I may quote from an essay which I wrote some years ago, I then said: ‘Prima facie that which is any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement they would testily suppress him with a common ‘Oh, of course!’”*²⁹⁶”

Another illustrative case law example is *Gardner v Coutts & Co*²⁹⁷, where a vendor of land undertook that if he ever intended to sell certain adjoining land, he would give the purchaser the first right of refusal. A term was implied by the court to prevent the seller from defeating the buyer’s expectation by disposing of the land to a third party by way of gift.

The second criteria for the implication of a term in fact is ‘business efficacy’ test. This test is in effect founded on an economic motive which holds that it is necessary for the courts to imply such a term in order for the contract or the transaction to be workable and economically efficient as a business proposition. In *Luxor (Eastbourne) Ltd v Cooper*²⁹⁸, Lord Wright explained such a term as one *“of which it can be predicated that it goes without saying, some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended”*. The ‘business efficacy’ test was first laid down in the

294 *The Moorcock* (1889) 14 PD 64.

295 G.H Treitel, (1999), *The Law of Contract*, 10th edition, Sweet & Maxwell, London, p 190.

296 [1939] 2 K.B 206 at 227 ;See also see *Gardner v Coutts & Co* [1967] 3 All E.R 1064.

297 [1968] 1 W.L.R 173.

298 [1941] A.C 108 at 137.

case of *The Moorcock*²⁹⁹. The facts of the case were that the claimant moored his ship at the defendant's wharf on the Thames. The Thames is a tidal river and at low tide the ship would occasionally come into contact with the river bed. Consequently, the ship became damaged due to uneven surfaces and rocks on the river bed at low tide. The claimant sought damages from the defendant and the latter argued that there was no provision in the contract warranting the condition of the river bed. The court implied a term in fact to the effect that the river bed would be safe for mooring. In so doing the court introduced the business efficacy test - i.e. the term must be necessary in order to give the contract business efficiency. If the contract makes business sense without the term, the courts will not imply the term. In the dictum of Bowen LJ:

*“Now, an implied warranty, or, as it is called, a covenant in law, as distinguished from an express warranty, really is in all cases founded on the presumed intention of the parties, and upon reason. The implication which the law draws from what must obviously have been the intention of the parties, the law draws with the object of giving efficacy to the transaction and preventing such a failure of consideration as cannot have been within the contemplation of either side ... In business transactions ... what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are *business men*”³⁰⁰.*

It can thus be surmised from the above cases that the main effect of the ‘officious bystander’ test is to place a restriction on the power of the courts to imply terms at common law. The rationale for this restrictive approach is to ensure that judges do not substitute themselves for the parties by re-writing the contract terms. Their judicial role is thus limited to recognising and implementing the true but unstated intention of the parties in order to fulfil the parties’ contractual expectations and to make the contract workable through a combination of the officious bystander and the business efficacy tests.

In addition to the *Moorcock* case it was held in *Trollope & Colls Ltd. v. North West Metropolitan Hospital Board*³⁰¹ that a contractual term could only be implied if the court found that the parties must have intended that term to form part of their contract.

299 (1889) 14 P.D 64 at 86.

300 *The Moorcock* (1889) 14 P.D 64 at 86.

301 [1973] 2 All E.R 260 at 268.

The Judicial Committee of the Privy Council has further developed the both ‘business efficacy’ and ‘officious bystander’ tests (albeit in the Australian context) in *BP Refinery (Westernport) Pty Ltd. v. President Councillors and Ratepayers of the Shire of Hastings*³⁰². In this case the court outlined the criteria which have to be satisfied for a term to be implied as follows. Thus, a term to be implied, it must be³⁰³:

- (a) Reasonable and equitable
- (b) Necessary to give "business efficacy" to the agreement of the parties
- (c) So evident that it goes without saying;
- (d) Capable of clear expression; and
- (e) Not be out of harmony with any express term of the agreement.

The area of shipping law has not been isolated from these contract law developments relating the judicial practice of implying terms as a matter of fact. It could be argued that implied terms included in charterparties such as proper stowage³⁰⁴, and care and preservation of the cargo³⁰⁵, may owe their origin to the implication of terms as a matter of fact by the courts. The implied duty on the carrier in this case (exercisable through his agents, servants of employees) would include the watering and feeding of live animals³⁰⁶, and airing or cooling of perishable cargos³⁰⁷, heating of oil cargos in winter months³⁰⁸.

One of the problematic aspects when reviewing this area of shipping law has been the absence of prior research on the precise legal character of these implied terms. It is the generally accepted view in general contract law that terms implied as a matter of fact have no precedential value – i.e. the decisions do not bind the courts in any future cases with similar facts which may come before them.³⁰⁹ However, while the examples from shipping law which have been cited above may appear at first sight to belong to the category of terms implied as a matter of fact, they are nonetheless arguably endowed with precedential value.

302 (1977) 16 A.L.R 363 at 376.

303 *BP Refinery (Westernport) Pty Ltd. v. President Councillors and Ratepayers of the Shire of Hastings* (1977) 16 A.L.R 363 at 376.

304 See *Elder, Dempster v Pater Zochonis* [1924] AC 522; *Actis Co Ltd v Sanko Steamship Co Ltd (The Aquacharm)* [1982] 1 WLR 119.

305 *Cargo Per Maori King (Owners) v Hughes* [1895] 2 QB 550.

306 *Vallee v Bucknall* (1900), 16 T. L. R. 362.

307 *Packers v Ocean SS* (1955) 2 Lloyds Rep 218; *Ministry of Food v Lamport & Holt Line Ltd* [1952] 2 Lloyds Rep 371.

308 *The Rio Sun* (1985) 1 Lloyds Rep 350.

309 G.H Treitel, (1999), *The Law of Contract*, 10th edition, Sweet & Maxwell, London, p 184-188.

Hence the question: to which of the two categories of implied terms do they properly belong? This is a question which to our knowledge has not been addressed in previous research. It can nonetheless be argued that these particular types of terms implied into contracts for the international carriage of goods seem to straddle the boundary between terms implied as a matter of fact and those implied as a matter of law by the courts. Initially implied on grounds of business efficacy (i.e. as a matter of fact) it could be argued that terms such as proper stowage and care and preservation of the cargo now form part and parcel of every contract for the international sale of goods (terms implied in law). It may further be submitted that in view of this hybrid character, this particular type of implied terms belong to a sui generis category which is unique to international shipping law.

3.4 Implication of terms through Statutes and Precedents: A Critical Analysis.

As mentioned above, the implication of this category of terms is irrespective of the parties' intentions, the main aim being to secure contractual protection for one of the contracting parties. Unlike the term implied in fact (which is based on the inference that the parties intended to incorporate the term into the contract), no such inference is necessary for the implication of a term implied in law³¹⁰. There are two sub-categories of terms implied in law: i.e. terms implied through legislation and terms implied by the courts at common law (through cases). The key difference between the latter and terms implied in fact is that a binding precedent is often the product of a term implied by the courts at common law.

3.4.1 Terms implied by law (common law, statute and conventions)

Unlike the terms implied in fact, cases involving terms implied in law are often decided at common law exclusively on the basis of judicial precedents. Furthermore, the implication is based on a rule of law rather than to ascertain or give effect to the unexpressed intention of the parties. In *Malik and Mahmud v Bank of Credit and Commerce International SA*³¹¹, for example, the employees claimed damages for breach of employment, arguing that the way in which their employer had behaved during their employment had led to continuing losses. On this basis they claimed 'stigma damages' after the termination of their contract of employment. The House of Lords unanimously held that a provision of mutual trust and confidence would be implied into the contract as a necessary incident of the employment

310 See *McAuley v Bristol C.C* [1992] Q.B 134 at 147. See also *Ali Shipping Corp v Shipyard Trogir* [1998] 2 All E.R 136 at 146-147.

311 [1998] A.C 20 at 46.

relationship. Another example of a term implied in law is the case of *Liverpool City Council v Irwin*³¹², where the House of Lords found it to be an implied term of a tenancy agreement that the lessor was to be responsible for repairing and lighting the common parts of the building of which the premises formed part. The rule of law which formed the basis of the implication of the term in this case was based on the requirement to ensure that the contract was not too one-sided and reflected the rights and obligations of both parties (i.e. the tenant as well as the landlord). Had the court tried to imply the term on the basis of giving effect to the unexpressed intention of the parties this would undoubtedly have led to uncertainty as it would have been difficult to establish with clarity what the parties' intention were in relation to whose duty it was to maintain the common areas of the apartment.

An example of a term implied at common law into shipping contracts include the obligation placed on the carrier not to deviate from the proper course - i.e. the agreed contractual route in a voyage charterparty; or in the absence of an agreed route, then the direct geographical route; or if there are more than one geographical, then the customary route for the particular shipping line of the trade involved³¹³. It is however important to note that the obligation placed on the carrier at common law not to deviate is not an absolute one as there could well be justifiable reasons for the deviating³¹⁴. Such reasons could include to save lives at sea³¹⁵ or to avoid physical or maritime hazards³¹⁶. Other examples include the implied obligation at common law placed on the carrier to provide to seaworthy and cargoworthy vessel³¹⁷.

As with general contract law the basis for implying these terms at common law into shipping contracts is completely independent of the parties' intention. The underlying philosophy and rationale for the implication of such terms has more to do with ensuring that the terms of contract of carriage are not too one-sided with the express terms tilted heavily in favour of the carrier who drafted them in the first place. In other words the charterer who is put in a position whereby they adhere to the standard terms of the charterparty without negotiating them in detail requires some measure of protection from the law. It is therefore to be submitted that the implication of such terms at common law goes some way towards

312 [1977] AC 239.

313 *Frenkel v Macandrews & Co Ltd* [1929] All ER Rep 260; *United States Shipping Board v Bunge Y Born* [1925] All E.R. 173.

314 *Connolly Shaw v Nordenfjedske* [1934] 50 T.L.R. 418.

315 *Scaramanga v Stamp* (1880) 5 CPD 295, CA.

316 *Phelps, James & Co v Hill* (1891).

317 *The Maori King v Hughes* [1895] 2 QB 550 36.

addressing the perception of imbalance in the (express) terms of the contract of carriage by sea.

Most of the terms which are implied in law have now been placed on a legislative footing. For instance, a number of significant terms implied into contracts for the sale of goods are enshrined in section 12 to 15 of the Sale of Goods Act 1979³¹⁸. Similar terms have been extended to all contracts of hire purchase³¹⁹, and the new comprehensive provisions prohibit or limit the power of the seller (owner) to exclude these implied obligations. Generally, terms implied in law can be excluded by express contrary provisions. However, the power to exclude terms implied in law is now to a certain extent restricted by the Unfair Contract Terms Act 1977³²⁰. [This is to be discussed in more detail in Chapter Five.](#)

From a comparative perspective, the implications of terms through statutes (i.e. conventions) into contracts for the international carriage of goods may be distinguished from the general contract law aspect on the basis that the former relates only to contracts for services (i.e. shipping), not the sale of goods. It is for this reason that most of the terms implied by law into shipping contracts relate to the conduct of the carrier as opposed to the tangible aspect or nature of the subject matter of the contract. Examples include: (a) the implied obligation on the part of the carrier not to deviate unjustifiably from the proper course³²¹; (b) to ensure that the ship proceeds with due despatch from its location at the time the contract is agreed to the port of loading³²²; or (c) to ensure that the ship is in a seaworthy and cargoworthy condition throughout the course of the voyage³²³.

3.4.2 The role of custom or trade usage

Any contract (whether written or not) may be deemed to incorporate any relevant custom of the market, trade or locality in which it is made - unless such a custom would be inconsistent with an express or implied term, or with the inherent or essential nature of the contract itself. In *Hutton v Warren*³²⁴, for example, the court implied a term into an agricultural lease to the effect that tenants were entitled to an allowance for seed and labour. This was done on the

318 Some of the implied obligations under the Sale of Goods Act have now been superseded by the Consumer Rights Act 2015.

319 Supply of Goods Act 1973 ss 8-11.

320 Section 6 of UCTA 1977. Some of the provisions of the Act have now been superseded by the Consumer Rights Act 2015.

321 Article IV (4) of Carriage of Goods by Sea Act 1971.

322 In the absence of express agreement, the law implies the performance of the voyage within a reasonable time; See *Hick v Raymond* [1893] AC 22; See also *Freeman v Taylor* (1831) 8 Bing 124

323 Article III (1) of Carriage of Goods by Sea Act 1971.

324 (1836) 1 M & W 466; When the custom is inconsistent with the express terms or with the nature of the contract see *Danowski v Henry Moore Foundation* [1996] E.M.L.R. 364 where the custom was not incorporated in the contract.

basis of a custom that the court recognized is incorporated into all such contracts. But for a custom to be implied it must meet the requirements of certainty, and it must be reasonable³²⁵ and ‘notorious’ - i.e. must be so readily ascertainable that the parties can be taken to have assented to it³²⁶. It must also have been in practice from time immemorial.

Terms may equally be implied by trade usage; however, the relevant market usage must be “universal and acknowledged”³²⁷. In *British Crane Hire Group Ltd v Ipswich Plant Hire Ltd*³²⁸, for instance, the Court of Appeal held that the contract was subject to terms not made available to the offeree before or at the time of contracting. These terms were a version of the “Contractors Plant Association” terms that were customarily used in the particular trade and with which both parties would have been familiar, since they were both in the plant hire business.

In comparison to general contract law practice where terms implied through custom and trade usage are used very sparingly, the law and practice of carriage of goods by sea is deeply rooted in maritime customs and usages. Most aspects of the law merchant from which mercantile and shipping principles were developed are based on customary law. For example, a general duty is placed on the carrier following the reception of the goods from the charterer to “trim, load and stow the goods in the customary manner”³²⁹. Failure to comply with this time honoured custom or trade usage would amount to a breach of the contract of carriage by the carrier. The ascertainment of what is a ‘proper course’ for the purpose of determining the legality of a deviation is equally embedded in customary and trade usage practices. In the case of *Reardon Smith Line v Baltic & Black Sea Insurance*³³⁰, for example, a deviation was held to be justifiable on the basis that the backward sailing of the ship for bunkering purposes was justified on grounds of customary practice and trade usage. This was because it was common practice for vessels loading at Black sea ports to proceed with their cargo to the port of Constanza to obtain cheap coal before embarking on their main contractual voyage.³³¹

Cases relating to unjustified deviation can therefore be grouped into 3 categories -: i.e:

325 See *Robinson v Mollett* (1875) LR 7 HL 802, 863-8, HL.

326 In *Turner v Royal Bank of Scotland Plc* [1999] 2 All ER Comm 664, CA, for instance, it was held that a banking practice was not “notorious”.

327 *Baker v Black Sea & Baltic General Insurance Co Ltd* [1998] 2 All E.R. 833.

328 [1975] Q.B. 303.

329 Lord Wright in *Canadian Transport v Court Line Ltd* [1940] 3 All ER 112 at 118-119.

330 [1939] AC 562; (1939) 64 All Rep 229 (HL).

331 See *infra*, Chapter Five.

- (a) Implication by law: this is where the court relies on a precedent to imply the term. For example, the case of *Scaramanga v Stamp* has served as judicial precedent in a number of subsequent cases in which the principle of saving life (but not property) has been implied in order to determine the legality or otherwise of the deviation. Examples of cases which have cited *Scaramanga v Stamp* include *Hain Steamship Co Ltd v Tate & Lyle*³³², and *Stag Line Ltd v Foscolo, Mango & Co Ltd*³³³.
- (b) Implication by custom: customary practice and trade usage has been relied upon by the courts to ascertain whether or not a particular departure by the vessel from what could be deemed to be its 'proper course' was justifiable under the circumstances or not. The case of *Reardon Smith Line Ltd v Black Sea and Baltic Insurance Co*³³⁴ serves as an illustrative example. As seen above, the court in this case approved of the practice whereby the ship customarily deviated from its course to procure inexpensive coal for bunkering. The rationale for the court's decision was based on trade usage on the ground that the cargo owner should have been aware of the fact that this was the custom of the particular shipping line with which he formed the contract.
- (c) Implication by fact: While this has not been the approach of English courts, it be argued that the American concept on non-geographical or quasi deviation provides an example of implying deviation as a matter of fact. This will involve a process whereby the courts will examine the facts of each particular case (e.g. the manner of stowage) before reaching a conclusion as to whether to imply a term relating to quasi deviation. Where such a term is implied improper stowage could thus amount to quasi deviation.

The research identified very few cases in which deviation has been implied in English law as a matter of fact. One such case is *The Teutonia*³³⁵. Even though the judges in this case were not explicit on the point, it has nonetheless been argued the implied liberty of the master to take the ship to the nearest or most convenient port in

332 [1936] 2 All E.R. 597.

333 [1932] A.C. 328.

334 [1939] A.C. 562.

335 (1872) L.R. 4 P.C. 171.

situations of distress is always to be construed as a question of fact which depends on the reasonable decision and discretion of the master³³⁶.

Of the three approaches above, it could be argued that the best approach would be to imply the rule against deviation a matter of fact because this will lead to more flexibility and judicial discretion in examining the context of the deviation. In other words courts will not be bound by old precedents or outdated rules which tends to be case when terms are implied in law.

3.5 The Judicial Approach to the Classification of Terms in Shipping Cases: A Critical Commentary.

English law has traditionally recognised a distinction between two contractual terms: conditions and warranties. A warranty is an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract. Its breach gives rise to a claim for damages - but not to a right to reject the goods and treat the contract as repudiated³³⁷. A warranty may be defined, as per the dictum of Lord Abinger, as "an express or implied statement of something which the party undertakes shall be part of the contract, and, though part of the contract, collateral to the express object of it"³³⁸. A condition, on the other hand, refers to a contractual term which gives the innocent party who is the victim of a breach the right to rescind the contract and treat it as at end. It is on the basis of this distinction that an attempt to exclude liability for breach of 'warranty' has traditionally not been perceived as extending the protective cover of such a clause to a breach of condition³³⁹. Where there is a breach of condition the injured party nevertheless can, if they prefer, elect to affirm the contract in existence and content themselves with proceedings for damages in respect of the loss suffered. The reason for the rule that termination depends on the injured party's right of election is that the party in breach should not be allowed to rely on his own wrong so as to obtain a benefit under the contract - or to excuse his own failure of further performance, or to prejudice the injured party's legal position under the contract³⁴⁰.

A clause in a contract of carriage by sea may be expressly classified by the contract as a 'condition' or it may expressly provide for an option to the innocent party to terminate the

336 See further J. Chuah, (2013) p.268. See also Phelps, James & Co v Hill [1891] 1 Q.B 605, in relation to which the author argues that judges will normally not assume for themselves the expertise, knowledge and discretion of the master, hence such cases will need to be decided on the basis of the factual circumstances surrounding the event..

337 Section 61 (1) of the Sale of Goods Act 1979.

338 Chanter v. Hopkins (1838) 4 M & W 399 at 404.

339 See Wallis Son and Wells v Pratt and Haynes [1910] 2 KB 1003, CA; revsd [1911] AC 394, HL.

340 See Alghussein Establishment v Eton College [1988] 1 W.L.R 587; See also Cheall v APEX [1983] 1 A.C 180.

contract in the event of certain specified breaches. In these situations, any breach of such a clause, however trivial, will in principle give the innocent party a right to treat the contract as at an end. However, the courts may still interpret the situation differently based on the facts of the case. A critical review of the case law would seem to suggest that the courts are not averse to re-classifying a term on the basis of the consequences of the breach. In the case of *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*³⁴¹, Hong Kong Fir Shipping hired out their vessel under a two year time charterparty to Kawasaki Kisen Kaisha. It was to sail from Liverpool to collect a cargo at Newport News, Virginia, and then to proceed via Panama to Osaka. A term in the charterparty required the vessel to be seaworthy and to be in every way fitted for ordinary cargo service. However the crew was insufficient and incompetent to deal with her old fashioned machinery. On the voyage from Liverpool to Osaka the engine suffered several breakdowns and the ship was off-hire for a total of five weeks, undergoing repairs. On arrival at Osaka, a further fifteen weeks of repairs were needed before the ship was seaworthy again. By this time only seventeen months of the two-year time-charter remained. Once in Osaka freight rates started falling and Kawasaki terminated the contract on grounds of Hong Kong Fir Shipping's breach. Hong Kong Fir Shipping responded that Kawasaki were now the party in breach for wrongfully repudiating the contract.

The Court of Appeal held that the 'seaworthiness' term was not breached in a sufficiently serious way to entitle the charterer to rescind the contract. In the court's view it was an "innominate term". In the dictum of Diplock, LJ,

"The test whether an event has this effect (entitling the innocent party to elect to terminate the contract) has been stated in a number of metaphors all of which I think amount to the same thing: does the occurrence of the event deprive the party who has further undertakings still to perform of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain as the consideration for performing those undertaking?"³⁴²

The Hong Kong Fir Shipping case illustrates that the right of the innocent party to repudiate the contract and treat it as at an end depends on an independent judicial assessment of the

³⁴¹ [1962] 2 Q.B 26.

³⁴² *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 Q.B 26.

seriousness of the consequences of the breach. For this reason, it is doubtful whether ordinary contractual principles would justify the termination of the contract of carriage by a charterer after, for example, an unjustified deviation by the carrier. Even though it is considered in law to be a very serious breach of the contract of carriage (in particular in voyage charterparties where the subject matter of the contract is the contractually agreed or stipulated route), an unjustified deviation may have no serious practical consequences whatsoever if no loss or damage to the cargo is caused³⁴³. Accordingly, it could be argued that deviation should not automatically entitle the innocent party (a charterer, a bill of lading holder, or a cargo owner) to repudiate the contract and treat it as at an end. The court ought first of all to assess the consequences of the unjustified deviation before deciding whether the particular departure from the contractual route is serious enough to give the innocent party the right to repudiate the contract of carriage. In doing this the court could take into consideration the impact of the unjustified deviation on the cargo and the marine insurance policy - i.e. whether the unlawful deviation exposed the cargo to much greater risks than was envisaged by the parties, and its negative impact on the coverage offered by the policy of insurance.

The decision of the Court of Appeal in the Hong Kong Fir Shipping case is noteworthy in another respect. In ruling that a breach of the implied obligation relating to seaworthiness of the vessel does not automatically entitle the innocent party to treat the contract as terminated, the judgment raises an important question of law. This is in view of the fact that a breach of the implied obligation relating to seaworthiness has the potential to impact far more seriously on the performance of the contract of carriage than an unjustified deviation. These potential impacts on performance include both the commercial and practical effects which the unseaworthiness of a vessel may have on the cargo and its value. This notwithstanding, the law governing the international carriage of goods by sea continues to treat unjustified deviation as a far more serious breach than unseaworthiness, even though in most cases the impact of unjustified deviation on the adventure could well be minimal. This clearly raises an important question as to the prioritization of the norms in this area of the law as well as the basis for the implication of terms and obligations governing contracts of affreightment.

Secondly, the decision in the Hong Kong Fir Shipping case also has serious implications for the freedom of contract doctrine within the context of the law governing the international carriage of goods by sea. In the light of this judgment it could be argued that by overriding

³⁴³ Baughen, S (1991), "Does Deviation Still Matter?", *Lloyd's Maritime and Commercial Law Quarterly*, pt 1, 70-96.

the expressly stated intention of the parties that a breach should terminate the contract, the court had in effect re-written the contract terms for the parties. This is a practice which in turn could be perceived as an unwarranted judicial interference with contractual freedom in view of the potentially erosive impact of the judgment on the parties' contractually expressed intentions. Such a tendency, if left unchecked, could ultimately lead to legal and contractual uncertainty if parties to a contract do not have the confidence in knowing that their duly negotiated and agreed terms will be given effect to by the courts.

3.5.1 A Hybrid Category?

The innominate or intermediate term is thus a relatively recent addition to the category of contractual terms which gives the injured party a right to rescind the contract if the breach is sufficiently serious; otherwise they will be entitled to a claim for damages only³⁴⁴. The traditional and somewhat rigid distinction between conditions and warranties offered categories which were neither suitable nor appropriate to the concept of seaworthiness in shipping law. This was in view of the very wide and potentially diverse range of events and situations which could all count towards a claim of unseaworthiness against a particular vessel. Such situations could range from a gaping hole in the side or superstructure of a ship to a minor and easily repairable leakage. It is in view of this that a rigid compartmentalization of such situations into the discreet or exclusive category of either a condition or a warranty was deemed to yield unsuitable results for the contract of carriage - hence, the advent of the more flexible concept of an innominate or intermediate term to apply to such diverse and sometimes hybrid situations. The underlying philosophy and rationale for the innominate or intermediate term revolves around the idea that the effect of the breach should depend on the consequences of the breach³⁴⁵. In other words, a breach which is so serious as to undermine the foundations or the commercial purpose of the contract of carriage ought to discharge the parties from further performance of the contract and should thus be treated as a repudiatory breach. Otherwise, the injured party ought to only claim damages and continue with the performance of the contract as envisaged by the parties.

344 The Effect of a failure to proceed with reasonable dispatch for instance, the injured party has a right rescind the contract if the breach frustrates the commercial purpose of the adventure. See *The Eugina* 1964] 2 O.R. 226. But on the other hand where the breach does not frustrate the commercial purpose of the voyage, then the innocent party can claim damages only for his loss.

345 *Hong Kong Fir Shipping v Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26; *Lorentzen v White Shipping Co* (1943) 74 Lloyd's Rep. 161; *The Pantanassa* [1958] 2 Lloyd's Rep 449 Q.B.D.

It may thus be argued that the Hong Kong Fir Shipping case has made an invaluable contribution to the development not just of shipping law, but also of general contract law in the area of the classification of terms. Through the concept of the innominate or intermediate term it has introduced some measure of required flexibility into what was previously a somewhat rigid conceptual framework for the judicial classification of contract terms with reference to the consequences of a breach.

3.5.2 Repudiatory Breach: Right of Election?

Assuming that the innocent party elected to repudiate the contract, how does that affect the relationship between the contracting parties? Are they discharged from their obligations under the contract from the moment of the election? Or are they discharged from their liability from the moment of the breach?

After repudiation, the injured party is no longer bound to accept or pay for further performance, and is thus entitled to refuse to make payments which had not yet fallen due at the time of repudiation³⁴⁶. However, he remains liable to perform obligations which had accrued before the repudiation³⁴⁷. For instance, where freight under a charterparty is deemed to have been earned on loading (i.e. pre-paid freight), the charterer remains liable to pay it even if he later justifiably rescinds the contract due to a repudiatory breach by the carrier. An illustrative case in point is *Bank of Boston Connecticut v. European Grain and Shipping Ltd (The Dominique)*³⁴⁸. The respondents were charterers under an amended version of the Gencon dry-cargo voyage charterparty. This provided that: "Freight shall be prepaid within five days of signing and surrender of final bills of lading, full freight deemed to be earned on signing bills of lading, discountless and non-returnable, vessel and/or cargo lost or not lost". Bills of lading were signed for a bulk dry cargo of agricultural products and the vessel sailed. Freight had therefore been earned under the terms of the above clause, but before it was paid, the vessel (*Dominique*) called at Colombo en route and was arrested. It became obvious that no funds would become available to procure her release. Accordingly the charterers treated the carrier's conduct as a repudiation of the charterparty and justifiably elected to terminate it, the cargo being transshipped on to another vessel. The appellants were a bank to whom the

346 *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 2 All ER.

347 See *Green v Young* (1702) 2 Ld Raym 840, where the court held that the policy is discharged from the time of the deviation only and therefore the assured shall recover for what happened before the deviation.

348 [1989] 2 W.L.R. 440; [1989] 1 All E.R. 545.

carriers had assigned all their rights. As assignees of the owners they claimed advance freight from the charterers. The then House of Lords held that they were entitled to it.

In the case of *Bank of Nova Scotia v Hellenic Mutual War Risks Association (Bermuda) Ltd (The Good Luck)*³⁴⁹, a vessel (Good Luck) which owned by the Good Faith Group was insured with the defendant P&I Club under a war risk policy. The policy included provision which specified that should the vessel enter an ‘additional premium area’, the insurers should be given prompt notice, and failure to give notice of entering into a prohibited area would result in the rejection of all claims. The insurers had signed a letter of understanding that it would at all times inform the bank (the claimants) should the insurance cover cease. Later, the insurers failed to inform the bank that the vessel had entered prohibited area in the Persian Gulf where it was struck by an Iraqi missile and was deemed to be a total loss. The insurers refused any indemnity and they contended that they had been given no notification of the vessel’s entry into an additional premium area. The bank on the other hand brought an action against the insurers for damages for failing to inform them that the vessel became uninsured. The then House of Lords held that the insurers had failed in their duty to inform the bank that the insurance cover had ceased due to the breach of the warranty.

In insurance law the use of the term ‘warranty’ equates to a condition in general contract law. There is, however, no requirement in insurance law that an insurer who is the victim of a breach of ‘warranty’ must take any steps to exercise a right of election. The court in ‘The Good Luck’ was willing to apply the principle of deviation within the context of the general contract law rules vis-à-vis the effect of the breach on the insurance policy. As with unjustified deviation in shipping law, the effect of breach of a ‘warranty’ under an insurance policy is an automatic discharge rather than dependent on any right of election. This position was explained by Lord Goff in ‘The Good Luck’ when he stated that “fulfilment of the warranty is a condition precedent ...³⁵⁰” Furthermore, Section 33 of Marine Insurance Act 1906 which deals with breach of warranty stipulates that discharge of the insurer from liability is automatic and is not dependent upon any decision by the insurer to treat the contract or the insurance as at an end. Section 33(3) states as follows:

“A warranty ... is a condition which must be exactly complied with, whether it be material to the risk or not. If it be not so complied with, then, subject to any

349 [1991] 2 Lloyd’s Rep 191, HL.

350 *The Good Luck* [1992] 1 A.C 233 at 263.

express provision in the policy, the insurer is discharged from liability as from the date of the breach of warranty, but without prejudice to any liability incurred by *him before that date.*”

Evident in this provision is the difference between the common law approach and the statutory position on the effect of a repudiatory on the contract vis-à-vis the rights of the innocent party.

Similarly, Section 46 of the Marine Insurance Act 1906 deals with the effect of unjustified deviation on a contract of insurance. It stipulates that where a ship, without lawful excuse, deviates from the voyage contemplated by the policy the insurer is discharged from liability as from the moment of the deviation, and it is immaterial that the ship may have regained her route before any loss occurred. However, as per the dicta of the court in ‘The Good Luck’ case, the ship owner remained covered after entry into the restricted area until the insurers turned down the insurance claim, and once the insurers had turned down the claim, the contract was avoided from the moment of breach. In other words, the discharge was not automatic but depended on the right of election. It would thus appear that the court in this case adopted a general contract law approach under which the right of election must be exercised before the termination of the contract can come into effect. It may be argued that this approach is out of step with the provisions of Sections 33 and 46 of the Marine Insurance Act 1906 which make no provision for the right of election.

In the case of *State Trading Corp of India Ltd v M Golodetz Ltd (The Sara D)*³⁵¹ a dispute arose out of a contract for the sale by Golodetz to STC of 12,600 tons of South Korean sugar in December 1985 C&F to an Indian port at a price of \$201.95 per ton. The buyers’ obligation was to open a letter of credit within 7 days of the contract before the 18th of December 1985. The sellers, on the other hand, undertook to open a countertrade guarantee within 7 days of the contract date. On 18th of December 1985 the vessel caught fire in Hong Kong while she was changing crew and became a total loss. Neither the buyers nor the sellers had fulfilled these obligations by the time of the loss. The sellers subsequently claimed damages for the buyers’ breach in failing to open the letter of credit. The buyers, on the other hand, claimed that the sellers’ duty to open a counter-trade guarantee was a condition precedent; hence failure to do so in their view amounted to a breach of condition which entitled the buyers to repudiate the contract and bring it to an end - thus they were not bound

351 [1989] 2 Lloyd’s Rep 277, 287.

to fulfil their obligation by providing a letter of credit. The Court of Appeal held that the buyers could not argue that once they had elected to end the contract, the election related retrospectively to the moment of breach and so excluded them from fulfilling their obligation by not opening a letter of credit (on the basis that at the time of the breach by the sellers the buyers duty had not yet arisen). Even if the provision of the guarantee had been a condition the buyers (had they elected to end the contract) would still have been in breach of their obligation to open the letter of credit, which obligation had arisen before the termination of the contract.

Accordingly, it could be argued that a bill of lading holder would not be obliged to fulfil his duties under a bill of lading by paying freight or demurrage at a port of destination after a deviation (i.e. under a 'freight to collect' as opposed to a 'freight pre-paid' agreement). This is because payment obligations would not have arisen before the automatic discharge of the contract by the act of unjustified deviation.

It is however important to point out that in the Golodetz case, Kerr, LJ, did not accept that deviation and insurance cases could be used to develop principles applicable to the general law of contract. He also commented on the inconsistency between the Hain SS³⁵² case and the general law of contract as follows:

“It may be that it would be safer and better to treat the jurisprudence in both these fields (insurance and deviation) as divorced from the general law concerning the termination of contracts by the acceptance of breaches as wrongful repudiations. As in other problem areas, the correct analysis may lie in a new approach to the contracts in question. Thus, the correct analysis of a breach of warranty in an insurance contract may be that upon the true construction of the contract, the consequence of the breach is that the cover ceases to be applicable unless the insurer subsequently affirms the contract, rather than to treat the occurrence as a breach of contract by the insured which the insurer subsequently accepts as a wrongful repudiation. The same analysis, mutatis mutandis, may explain the law on deviation. However, these

³⁵² Hain Steamship Company Ltd v Tate & Lyle Ltd [1936] 2 All ER.

are obviously not concluded views; the subject is highly complex and was *barely touched upon in argument*"³⁵³.

Lloyd LJ., on the contrary, suggested that the deviation cases should be assimilated to the general contract law. He stated in his judgment as follows:

*"The origin and justification for the rule in deviation cases has always been said to be the need to protect the cargo owner against loss of his insurance cover. So the ship owner assumes the mantle of the insurer, subject only to the exceptions of a common carrier. But with the advent of the held cover clause, this rationale has lost all or much of its force..... so I remain of the view that the deviation cases should now be assimilated to the ordinary law of contract. But if not I am attracted by the suggestion at the end of Kerr LJ judgment that the correct analysis of the deviation cases may lie in a new approach to construction"*³⁵⁴.

Given the peculiarities of the shipping industry with its norms and principles which have evolved under mercantile law and the law merchant, the researcher would agree with Lord Justice Kerr that shipping law and general contract law ought to be considered as two distinct but inter-related categories. This is in order to avoid the potential confusion which could arise from the application of the rules and principles of general contract law to contracts for the international carriage of goods by sea. General contract law by its very nature has a domestic inclination and is specifically designed for the national context. Shipping activities on the other hand are transnational in their dimension and therefore require a legal framework which is either international or quasi-international in its character. For these reasons it would not be advisable to assimilate general contract law rules to those governing the international carriage of goods by sea. However, this is not to say that shipping law and practice cannot be influenced by the rules of general contract law and vice versa. On the contrary, it is to be expected that there will be an ongoing process of cross-pollination between the two systems of law.

³⁵³ State Trading Corp of India Ltd v M Golodetz Ltd (The Sara D) [1989] 2 Lloyd's Rep 277, 287 at p 287.

³⁵⁴ (The Sara D) [1989] 2 Lloyd's Rep 277, 287 at p 287 at p 289.

3.5.3 The ‘Fundamental Breach’ Concept in Shipping Contract: Quo Vadis?

If, as argued above, the law governing the international carriage of goods by sea is a separate legal category from general contract law, then it goes without saying that there will be some concepts and principles which are unique to shipping law. So is the concept of the so-called ‘fundamental term’ (i.e. a term which goes to the very roots or foundation of the international contract of carriage) one such concept? The ‘fundamental term’ would be considered in this context to be a provision which is narrower than a condition of the contract as the breach of such a term has the devastating effect of turning the performance something completely different from that which was envisaged by the parties to the contract. In other words, a breach of such a term renders performance something completely different from the promise – hence the label ‘fundamental breach’ of contract. For instance, a seller of a new car would be considered to be in breach of a fundamental term if he delivered a second hand car³⁵⁵. Another example of the fundamental term is where a person who had contracted to sell peas instead delivers beans. The possibility of the existence of such a term, ranked in status over and above a condition, has effectively been eliminated from the realms of general contract law³⁵⁶. But is there a remnant of such a term still to be found in shipping law?

In contracts for the international carriage of goods by sea, and in voyage charterparties in particular, stipulations relating to the agreed or contractual route are often regarded and treated as if they amount to a fundamental term of the contract – hence the strictness of the rule against unjustified deviation. From both a conceptual and legal perspective the devastating impact of deviation on the performance of the contract of carriage is such that even benefit of an exclusion clause is normally lost by a carrier who has unlawfully departed from the route without justification³⁵⁷. Interestingly, there is judicial authority to the effect that the same scenario would apply where a houseman stored the goods in place other than that agreed by the parties³⁵⁸.

The main difference between the fundamental term and a condition is that the former is subject to a narrower construction than a condition. Admittedly, the two concepts are

355 See the explanation of *Andrews Bros (Bournemouth) Ltd v Singer & Co* [1934] 1 KB 17 in *Karsales (Harrow) Ltd v Wallis* [1956] 1 W.L.R. 17.

356 *Photo Production v Securicor* [1980] AC 827, [1980] 1 All ER 556, [1980] UKHL 2.

357 See *James Morrison & Co., Limited v Shaw, Savill, and Albion Company, Limited* [1916] 2 K.B. 783; *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597; See also *Stag Line Ltd v Foscolo Mango and Co.*, [1931] 2 KB 48; and see: *International Guano Superphosphat-Werken v Robert Macandrew*, [1909] 2 K.B. 306; for the application of the same principle to unauthorized deck cargo see *The Chanda* [1989] 2 Lloyd's Rep 494.

358 *United Fresh Meat Co Ltd v Charterhouse Cold Storage Ltd* [1974] 2 Lloyd's Rep 286.

identical for the purpose of the rule that breaches of both give rise to a right to rescind. However, it could be argued that from a conceptual point of view the breach of a fundamental term does not allow for the possibility of a right of election. In other words, the contract is automatically discharged. A condition on the other hand allows for the possibility of a right of election by the victim of the breach³⁵⁹. When viewed from this perspective it could be further argued that the approach adopted by the courts in ‘The Good Luck’ and the Golodetz cases seem to align more with the concept of a fundamental term or fundamental breach than a breach of condition.

However, there is still a great deal of uncertainty as to whether the concept of ‘fundamental breach’ (which previously seemed to have been applied to deviation) survived the case of *Photo Production v Securicor*³⁶⁰. This state of uncertainty, it should be observed, applies only to the legal framework governing the international carriage of goods by sea. The position of general contract law on the question on fundamental breach was authoritatively settled in the *Photo Production* case in the negative – i.e. there is no place in contract law for such a doctrine. The confusion thus relates mainly to the relationship between unjustified deviation and the concept of ‘fundamental breach’. The vast majority of judgments relating to unjustified deviation as a rule prescribe automatic discharge of the contract without the right as a remedy – an approach which arguably assimilates unjustified deviation to a fundamental term of the contract. However, there are nonetheless a small number of decisions which fall outside his general rule. The case of *The Antares*³⁶¹ is an illustrative example. In this case it was held that the carrying of cargo on deck rather than in the holds of the ship as stipulated in the contract - which technically amounts to deviation - was not a fundamental breach of contract, and therefore did not suspend the operation of the Hague-Visby Rules provisions vis-à-vis a time bar. Lloyd LJ’s view was that the doctrine of fundamental breach is no longer an applicable rule of law, and that in dealing with exclusion clauses in any case of breach of contract the question was merely one of construction.³⁶² However, it is important to point out that the judicial views stated in *The Antares* (and also in the *Suisse Atlantique*³⁶³) cases relate to what may be termed ‘quasi-deviations’ rather than geographical deviations per se. The *Kaptian Petko Voivoda*³⁶⁴ is another case which has further cast doubts on the question and

359 *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 2 All ER

360 [1980] AC 827, [1980] 1 All ER 556, [1980] UKHL 2.

361 *Kenya Railways v Antares Co Pte Ltd (The Antares)* [1986] 2 Lloyd’s Rep 626.

362 *The Antares* [1986] 2 Lloyd’s Rep 626.

363 [1967] 1 AC 361.

364 *Daewoo Heavy Industries Ltd and another v Klipriver Shipping Ltd and another, The Kapitan Petko Voivoda* [2003] 1 All ER (Comm) 801.

shows that the English Courts are willing to prevent the rule against unjustified deviation from applying to cases involving quasi-deviation or non-geographical deviation.

The question regarding the existence or otherwise of the fundamental term/ fundamental breach will be examined in greater detail in the next chapter.

3.6 The Position of Scottish Courts

Scottish courts have adopted a different judicial approach to cases relating to unjustified deviation. Under Scottish law the right of the innocent party to repudiate the contract and treat it as at an end depends on whether a deviation was a condition precedent of the contract, or only a collateral agreement or warranty. The right to repudiate thus has to be determined as a question of intention depending largely on the construction of the contract and on the language used by the parties³⁶⁵ - but also perhaps ultimately on the consideration whether the deviation had the effect of frustrating the whole object of the adventure.

In *Allison & Co v Jacobsen & Co*³⁶⁶, for instance, ship owners in West Hartlepool brought an action against certain merchants (the charterers) in Edinburgh, who chartered one of the plaintiff's vessels to bring home a cargo of phosphate from Algeria to Liverpool. The object of the action was to recover damages from the defendants for refusing to load. The defendants (the charterers) argued that while the vessel was on her outward voyage, it intimated and carried out a deviation which was a breach of condition - and that therefore they were entitled to refuse to load the cargo and rescind the contract of carriage. The charterparty expressly provided that the charterers could cancel the charter if the ship did not arrive at the port of loading before the 15th of January 1903. In breach of this provision, the vessel arrived before that date. In this case the Outer House held that the charterers were not entitled to rescind the contract of carriage, as the ship owners by the deviation had committed no breach of any essential condition of the contract. In the words of Lord Kyllachy:

“Having considered the terms of the charter, and done so in the light of the very full citation of English authorities with which I was favored, I have come

³⁶⁵In *Bentsen v Taylor* (1893) L.R 2, Q.B.D 274 Bowen LJ said about the test of the difference between a contractual condition and a warranty as follow: “There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages or as a condition precedent by the failure to perform which the other party is relieved of his liability”.

³⁶⁶(1903) 11 S.L.T 573.

to the conclusion that there was here no breach of a condition precedent, that *is to say, no breach of any essential condition of the contract*”³⁶⁷.

Under Scottish law, the party who seeks to use deviation as an excuse to repudiate the contract must also prove that the commencement of such deviation frustrated the main object of the adventure. In *M’Andrew v Chapple*³⁶⁸, the question was whether a delay in bringing the vessel directly to Alexandria amounted to a deviation and entitled the charterers (defendants) to refuse to load and to rescind the contract. In this case the ship called at the Port of London which was on its route, as the vessel had to pass by the mouth of the Thames. While in London the vessel took on board cargo for Malta, Syra, Constantinople, Smyrna, and Alexandria. The charterers argued that proceeding to Constantinople was an unjustified deviation and thus they were entitled to refuse to load the cargo. The court, however, held that the charterers were not entitled to do so. The object for which the ship was chartered was not frustrated. Therefore the charterers were not relieved, either by deviation or delay, of their obligation to load a cargo. Furthermore, the court held that a stipulation that the vessel should proceed directly to Alexandria with all convenient speed was not a condition. In addressing this point, Montague Smith J. stated as follows:

*“Here the one question is, whether the stipulation to proceed with all convenient speed direct to Alexandria is a condition precedent or not. I am clearly of that opinion that it is not, and that if we held that it was we should frustrate the intention of the parties. The loss does not go to the whole consideration, but may be compensated in damages, and the question as to what would have been the case if the object of the voyage had been frustrated does not arise”*³⁶⁹.

A review of the Scottish cases leads us to the conclusion that the Scottish position on the question of the effect of unjustified deviation on the contract of carriage seems to be much clearer than the English position, although it is important to point out that these cases related to the preliminary voyage to the port of loading – and not to the main contract voyage itself. To begin with, there is no concept of a fundamental term or fundamental breach under Scottish law in relation to unjustified deviation. It would appear to be the case, based on the

³⁶⁷ *Allison & Co v Jacobsen & Co* (1903) 11 S.L.T 573.

³⁶⁸ (1866) L.R 1, C.P 643; See also *Clipsham v Vertue* 5 Q. B 265, 18 L.J (Q.B) 2; *Tarrabochia v Hickie* 1 H & N 183, 26 L.J (Ex) 26, these two cases shew that the charterer cannot relieve, either by deviation or delay, of his obligations if the main object of the voyage not been frustrated.

³⁶⁹ *M’Andrew v Chapple* (1866) L.R 1, C.P 643.

case law, that deviation under Scottish law amounts to a warranty rather than a condition - or at best an innominate or intermediate term. A great deal seems to depend on judicial construction of the intention of the parties and the language of the contract.

3.7 Conclusion

The key objective of this paper was to undertake a comparative and critical analysis of the rationale and underlying philosophy which inform the judicial approach to implying terms in general contract law and in the law governing the international carriage of goods by sea. This comparative endeavour was extended to include an examination of judicial practice relating to the classification of terms in general contract law and in shipping law. In pursuit of the latter exercise, the traditional categories of conditions and warranties were reviewed and analysed together with the relatively newer concept of the innominate or intermediate term.

The key findings which emerge from this study are thus based on a critical review of the jurisprudence of English (and Scottish) courts in the area under study.

In summing up, it could be argued that there are a great deal of similarities to the judicial approaches to the implication and classification of terms in general contract law and in shipping cases. The key difference, however, lies in the way shipping law and practice have traditionally viewed the concept of deviation. Unjustified deviation, with its potentially devastating impact on the contract of carriage (which includes the automatic discharge of all rights and obligations as well as the ousting of the marine insurance policy) could indeed be argued as representing a shadowy remnant of the concept of the fundamental term (or breach) in all its attributes and ramifications.

Having examined the judicial background to the development of implied terms (and in particular the judicial approach to dealing with cases involving unjustified deviation) in the Chapter Three, the next chapter builds on this research by focusing on the main theme of the thesis. In Chapter Four the substantive aspects of the law on deviation will be examined together with the case law. This exercise is intended to serve as a preliminary first step to tackling the question as whether or not the concept of deviation is still relevant and valid to the modern law on carriage of goods by sea.

CHAPTER FOUR

A CRITICAL ANALYSIS OF THE DOCTRINE OF DEVIATION IN CONTRACTS OF AFFREIGHTMENT

4.1 Introduction

Having examined the background to the judicial implication of terms into shipping contracts in the last two chapters, the current chapter develops the research further by focusing on the main theme of the research with a critical examination of the doctrine of deviation. In pursuing this goal, the chapter has as its main aims the following:

A critical appraisal of the meaning of unjustified deviation in the law and practice of the carriage of goods by sea.

A functional analysis of the role of the doctrine in the performance of contracts of affreightment; and

A comparative analysis involving UK and US practice on the question of deviation, alongside the international approach.

The main objective of this chapter is to develop Dissertation Aim 2 and the first part of Dissertation Aim 3 which state as follows:

DA2: To critically examine the carriers implied obligation not to deviate from the proper course.

DA3: To critically assess the relevance of the rule against unjustified deviation to the modern law governing carriage of goods by sea

In developing these main aims, the chapter will furthermore seek to address Research Questions 1, 2, 3 and 4³⁷⁰. The main methodologies used in this chapter is pursuing these tasks will be qualitative, predominantly the doctrinal, black letter law and comparative themes. To begin with, the meaning of unjustified deviation will be examined with reference to relevant common law and statutory sources.

³⁷⁰ See Chapter 1, p.19

4.2 Meaning of Unjustified Deviation: Theoretical and Practical Perspectives

Under common law, the carrier must ensure that the vessel used for the contract of carriage proceeds on the voyage following the ‘proper course’. Therefore the ship owner will be liable for any unjustified departure from the ‘proper course’, a rule which dates back to the case of *Scaramanga & Co v Stamp*.³⁷¹ The ‘proper course’ is the usually agreed route which is specified in the contract of carriage. But where the contract does not make any express stipulation as to the route, the courts will presume that the ‘proper course’ is the direct geographical route between the port of loading and discharging. But where there is the potential for more than one geographical route, evidence may be adduced as to what constitutes the customary route. The customary route may be the usual route taken by shipping lines in the particular trade, or it could be the route consistently taken by the carriers concerned. If the ship owner alleges that there exists a customary route, he must prove that the custom is both universal and uniform.³⁷² Where such evidence is found to be compelling, the court will be persuaded to accept the customary route as the ‘proper course’ for the purposes of the contract of carriage.³⁷³

Deviation in simple terms therefore represents an unjustified and voluntary departure from the proper course i.e. the contracted, direct geographical or customary route. In the light of this, judges and scholars have defined deviation in a variety of ways. But they all agree that an unjustified deviation is a breach of contract of carriage by sea. In terms of defining deviation John F. Wilson, for example, holds that deviation is “an intentional and unreasonable change in the geographic route of the voyage as contracted.”³⁷⁴ Scrutton’s point of view is that the doctrine of deviation requires that “in the absence of express stipulations to the contrary the owner of the vessel impliedly undertakes to proceed in that ship by a usual and reasonable route without unjustifiable departure from that route and without unreasonable delay”.³⁷⁵ Martin Dockray views the doctrine of deviation as “an implied term of the contract for the carriage of goods by sea that the carrier will not deviate from the proper route without lawful justification”³⁷⁶.

371 (1880) 5 C.P.D. 259; See also the case of *Bergerco v Vegoil* [1984] 1 Lloyd’s Rep 440 at 444.

372 *Reardon Smith Line v Black Sea and Baltic Insurance* [1939] AC 562.

373 *Ibid.*

374 J. F. Wilson, (2010) *Carriage of Goods by Sea*, 7th edition, Longman, p16.

375 S. Boyd, A. Burrows and D. Foxton, (2008) *Scrutton on Charterparties and Bill of Lading* 21st edition, Sweet and Maxwell, 231, 232.

376 Dockray, M. (2004) *Cases and Materials on the Carriage of Goods by Sea*, 3rd edition, Cavendish, p63.

For the deviation to be classed as unlawful the ship owner must have voluntarily departed from the proper course without justification. The effect of the doctrine is thus to impose a contractual obligation upon the ship owner to carry the cargo to the agreed destination directly.³⁷⁷ In the case of *Joseph Thorley Ltd v Orchis Steamship co. Ltd*,³⁷⁸ beans were shipped in a vessel bound for London. However, the ship did not proceed directly to London but to ports in Asia Minor. On arrival in London, the beans were damaged. The ship-owners were held to be liable to the cargo owners for unjustified deviation.

It is important to note that in its meaning and operation the doctrine of deviation goes beyond an actual departure from the ‘proper course’. Sometimes ship owners, for cost saving, environmental and other reasons, may wish to reduce the speed of the vessel or stop at certain points along the route. Charterers may have a similar interest in order to save costs. Even where the owners and charterers have the same interest in ‘slow steaming’ as it is called, the interests of the bill of lading holders in the adventure must be taken into account as well. Deviation therefore is not just straying from the proper route; it may also include a deliberate reduction of speed which causes a delay in fulfilling the very duty to proceed with due or utmost dispatch along the normal and direct route. ‘Slow steaming’ in order to save fuel may thus constitute an unjustified deviation unless the contract of affreightment contains an express liberty to do so. Alternatively, the ship owner who seeks to ‘slow steam’ his vessel should first of all obtain the consent of the cargo owners or at least should make sure that both charterers and bill of lading holders are made aware of this.³⁷⁹

Protection of the marine environment is one of the major challenges facing the shipping industry. It is in view of this challenge that the International Maritime Organization (IMO) has set a goal to reduce greenhouse gas (GHG) emissions from existing vessels by 20–50% by 2050 and develop the Energy Efficiency Operational Indicator (EEOI) as a measure for energy efficiency³⁸⁰. To achieve these targets, IMO has devised a three point strategy: the enlargement of vessel size (hence reducing the number of vessels at sea), the reduction of voyage speed, and the application of new technologies.

377 Carr I, (1996), “International Trade Law”, Cavendish Publishing Ltd, London, pp 93-95 & 123-128.

378 [1907] 1K.B.660.

379 Zerman P, (2011) Deviation: Justified or Allowed and Implications for the P&I Cover: Slow Steaming, Skuld New Perspectives, available online at: <http://www.skuld.com/topics/legal/legal-news/deviation-justified-or-allowed-and-implications-for-the-pi-cover--slow-steaming/>

380 Mckinnon, A, Browne, M, Whiteing, A, Piecyk, M, (2015), Green Logistics: Improving the Invironmental Sustainability of Logistics, Kogan Page Limited, London, pp 185-186; See also Asariotis, R and Benamara, H, (2012), Maritime Transporty and Climate Change Challenge, Earthscan, Oxon, p 150.

To further this strategy, BIMCO has included a 'Slow Steaming Clause' in its standard form voyage charterparties where ship owners shall be entitled to give instructions to the Master to reduce speed (i.e. to slow steam).

That may be especially attractive at a time of overcapacity of tonnage in the market, since slower transit times can increase the employment of vessels. Additionally, if a vessel can arrive at a load or discharge port with reduced waiting time, this may improve or enhance port safety and minimise the time in port³⁸¹ - leading to less congestion. From a costs saving perspective, bunker prices for more specialised bunkers (such as low-sulphur blends) are often higher. From an economic point of view this further increases the incentive for carriers to consider slow steaming.

It could be argued that slow steaming is an environmentally sound practice which ought to be encouraged within the framework of the performance of the contract of carriage. Slow steaming promotes the objectives of environmental protection and preservation of the marine environment, with the global community as the main stakeholder. Hence the question becomes one of prioritization of the competing interests of stakeholders – i.e. the interest of the cargo owner based on safe and timely delivery of the goods against the interests of the global community in protecting and preserving the marine environment. On balance it could be argued that the interests of the global community in protecting the environment should prevail over the narrow individual interest of the cargo owner.

Even so, the liberty to 'slow steam' must be consistent with the main object of the contract of carriage. Therefore the ship owners could not always rely on such liberty clauses if their practical effect is to frustrate the commercial purpose of the adventure.³⁸² In the case of *African Merchants Co v British and Foreign Marine Insurance Co*,³⁸³ the plaintiffs affected a policy of insurance with defendants upon a ship at and from Liverpool to the west or south west coast of Africa and back to a port of call in the United Kingdom. The vessel proceeded to the African coast, and after being loaded for the return voyage, remained at a port there for some weeks for different purposes which were neither relevant to nor consistent with the commercial purpose of the adventure. The vessel was subsequently lost on the voyage home. Defendants brought an action and the court ruled that as the delay had not been made for a

381 Yin, J., Fan, L., Yang, Z., & Li, K. X. (2014). Slow steaming of liner trade: its economic and environmental impacts. *Maritime Policy & Management*, 41(2), 149-158.

382 *Leduc v Ward* (1888) 20 QBD 475 (CA); *Glynn v Margetson & Co.* [1893] AC 351 (HL).

383 (1873) LR 8 Exch 154.

trade purpose, there had been an unlawful and unjustified deviation. The precise role, function and underlying philosophy for the inclusion of liberty clauses in contracts for the carriage of goods by sea will be the subject of a more detail discussion in Chapter Five (infra).

In some countries such as the United States an unauthorised stowage of cargo on deck is in effect treated as a breach of contract under the doctrine of “quasi deviation”. The latter is treated for all practical purposes in the same way as an unjustified deviation. Hence where loss results from such a breach, the ship owner will be unable to rely on any exceptions or limitations in the contract of carriage.

Other aspects of the definition of unjustified deviation such as the concept of ‘voluntariness’ will be discussed in more detail in subsequent sections of this chapter.

4.2.1 Meaning of “Voluntariness”

One of the key pre-requisites for culpable deviation is that the deviation must be voluntary. The law regarding this issue is not well defined due to different interpretations of the meaning of “voluntary”. In *Tait v Levi*³⁸⁴ for example, the court was divided on the question of whether or not there was deviation. The case involved an action on a policy of insurance on the vessel *Catharine*, and goods at and from Cork, to the ship’s loading port or ports on the coast Spain, within the Straits of Gibraltar, including Tarragona, and not higher up the Mediterranean, and from thence to London. The vessel had liberty to discharge and take in goods at any port. At that time Tarragona was safe but Barcelona, another port in Spain, which lies further up the Mediterranean, was under the control of the French enemy. The intention of the captain was to go into Tarragona, but a current carried the vessel beyond it in the night, and the captain being entirely ignorant of the coast, mistook Barcelona for Tarragona. Then the vessel was captured by the French. The two towns were not at all alike in their appearance from the sea.

The case is problematic on two related grounds: firstly because the court could not agree if there had been unjustified deviation; and secondly because the court was not unanimous as to what amounts to “voluntariness” in relation to deviation.

384 (1811) 14 East 481.

In this case Lord Ellenborough C.J was of the opinion that the underwriters were not liable for this *crassa negligentia* or *ignorantia* on the part of the captain, which did not amount to barratry. The deviation did not result from wilful misconduct or fraud on the part of the captain. Per Curiam the court doubted whether this case can be put on the ground of deviation, because there was no intention (voluntariness) on the part of the captain to deviate, his intention being to proceed into Tarragona though he mistook Barcelona for his intended port through his entire ignorance of the coastline. But upon the ground of want of competent skills and knowledge of the coast on the part of the captain, when the very object of the policy required discriminating knowledge in that respect, and there being no other part of the crew capable of supplying that want of knowledge, and the loss happening on that account, the court were of the opinion that the assured is not entitled to recover upon the subsequent deviation. In the dictum of the learned judge, "... the whole and anxious object of the underwriters, for which they expressly stipulated, was that they should not be answerable for any risks higher up the Mediterranean than Tarragona; and therefore the voluntary exceeding of that limit, through the ignorance of the captain, I consider as a deviation from the voyage insured, which discharged the underwriters."³⁸⁵ On the specific question as to whether or not the deviation was intentional, Bayley, J., was of the view that there was no intention on the part of the captain to deviate, his intention being to go to Tarragona, which he mistook for Barcelona.³⁸⁶

So the court stated that if the master is incompetent, to such an extent that he should not be employed by a reasonable ship owner then the ship is unseaworthy. In the words of Le Blanc, J., "... there appears to me to have been an incompetent fitting out of the ship with a proper master for the purpose of the voyage insured."³⁸⁷ However, the consequences of unseaworthiness (as will be demonstrated later) are quite different from the consequences of unlawful deviation, so that whilst such unseaworthiness may give rise to damages the charterparty may not be avoided. It is worth noting, however, that the *Tait v. Levi* case concerned the consequences of a departure from the proper course on the policy of marine insurance, and not its impact on the relationship between the parties to the contract of carriage.

³⁸⁵ Ibid.

³⁸⁶ Ibid.

³⁸⁷ Ibid.

In the case of *Hain Steamship Co. Ltd v Tate & Lyle Ltd*³⁸⁸, on the other hand, the ship owners failed to inform the shipmaster that he had been ordered to the port of San Domingo to load a second cargo. This was due to the default of the agents and post office authorities in Cuba. For this reason the ship's master set sail for England from Cuba without the second cargo belonging to the same charterer. Realising his mistake, the master then returned to San Domingo to pick up the second cargo, during which time the ship ran aground. It was nonetheless held by the then House of Lords that the deviation had been both voluntary and unjustified.

The culpable factor of 'voluntariness' in relation to deviation in the *Hain* case can be traced to the master's intention to return to San Domingo for the second cargo even though his initial failure to load that cargo had not been due to his negligence or any fault on his part. This can thus be contrasted with the *Tait v. Levi* case where the master had no intention of going to the wrong port even though his navigation may have been faulty. The mental element of voluntariness (or '*mens rea*' so to speak) in relation to unjustified or unlawful deviation must therefore be traceable to an intention formed by the master or the ship owner to take a route which is different from the proper course.

Two further cases have dealt with the question relating to the "mental element" of deviation – i.e. voluntariness. In *Rio Tinto v Seed Shipping*³⁸⁹, the master misinterpreted the navigational instructions due to illness, leading to a departure from the prescribed route. It was held that this did not amount to unjustified deviation as there was no intention on the part of the master to depart from the agreed route. Although the rationale in this case may seem obvious, there remains a difficulty in applying the law in this area vis-à-vis the required burden of proof for "voluntariness".

Still on this point, in *Delany v Stoddart*³⁹⁰ it was held that if a vessel is driven out of her loading port into another port, and being there, she does her best to get to her port of destination then she is not obliged to return to the port from whence she was driven. In other words, it is not considered to an unjustified deviation if she completes her loading at the port into which she has been driven.

388 [1936] 2 All ER 597.

389 (1926) 24 LILR 316; 134 LT 764; 17 Asp MLC 21.

390 (1785) 1 Term Rep 22.

The next section seeks to further develop the discussion on the meaning of ‘voluntariness’ by examining cases in which the ship’s master or its crew have gone against the specific instructions of the ship owner or their employer not to deviate from the proper course.

4.2.1.1 Deviation, Barratry and ‘Voluntariness’ under the Marine Insurance Act 1906

Unjustified or unlawful deviation which deprives the assured ship owner of the cover in the policy is a ‘voluntary’ departure from the proper course. Deviation and/or delay, however, are excused under section 49 (1) (b) of the Marine Insurance Act 1906 which states that deviation or delay in prosecuting the voyage contemplated by the policy is excusable where caused by circumstances beyond the control of the master and his employer. Examples include compulsion by the crew³⁹¹ and adverse weather conditions.³⁹² Such incidents therefore constitute involuntary deviations. The rule which is given effect to in section (49) of the Marine Insurance Act 1906 is that a deviation if necessitated either by moral or physical compulsion, or if it is reasonably necessary for the safety of the ship or of the subject matter insured, will not discharge the insurer from their obligations under the policy of marine insurance. Thus when a deviation is required to be justified on the ground of unavoidable necessity, it must be shown that a degree of compulsion was exerted on the captain which he could not resist either physically or which on moral grounds he ought not to resist. However, excuse for ‘involuntary’ conduct under this section does not relieve the assured ship owner from his responsibility towards those to whom he owes a duty under the policy.

Barratry is unlawful conduct by the master or crew in breach of the ship owner’s instructions or wishes³⁹³, and is an insured peril in its own right. In cases of barratry the parties to the dispute are not the carrier and the charterer/ shipper with the former in the role of defendant. Rather, barratry cases involve the carrier in the role of claimant and the insurer in the role of a defendant. In such cases the insurer will normally be arguing that the policy of marine insurance has been invalidated by the act of deviation, whereas the carrier will argue that the purported deviation was a barratrous act in view of its ‘involuntary’ character. In other words, the departure from the proper course in this case was against the instructions and

391 See *Driscoll v Bovil* (1798) 1 B & P 313 where the crew refused to proceed on the voyage insured for fear of Moorish Cruisers; In *Elton v Brogden* (1747) 2 Str 1264 for instance, the crew with the letter of marque insisted to return to a port with the prize captured.

392 See *Delany v Stoddart* (1785) 1 TR 22 where the court held that the insurers were liable under the policy. The deviation was a necessity brought about by stress weather. Furthermore, Lord Mansfield pointed out in this case that whether a vessel is forced to deviate, she is not obliged to return back to the point from whence she was driven.

393 See Marine Insurance Act 1906 Sched, r 11; Postlethwayt in his *Dictionary of Trade and Commerce* Vol 1, p 214 states: “Barratry is when the master of a ship or the mariners cheat the owners or insurers, wether by running away with the ship, sinking her, deserting her, or embezzling the cargo”.

contrary to the wishes of the assured ship owner, hence the absence of the mental element relating to ‘voluntariness’. The validity of the assured ship owner’s claim under the policy for such an unauthorised departure from the proper course is itself strengthened by the fact that such barratrous conduct are usually covered in the policy of marine insurance as a recoverable risk. This is in line with Section 49(1) (g) of the Marine Insurance Act 1906 which states that a deviation is excusable if ‘caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.’

Apart from unauthorised deviation, a barratrous act may also involve scuttling, smuggling or in extreme cases the master and crew running off with the vessel³⁹⁴. In the case where barratry results in delay or deviation, the underwriters remain liable - i.e. the assured ship owner remains covered³⁹⁵. However, fraud by the crew which has been authorised by the charterer is not barratry as far as the ship owner is concerned. Equally, barratry does not extend to situations where the ship owner or his agent is implicated in the unlawful conduct, either because he has authorised it or because he was aware of it and took no steps to prevent further misconduct of that type³⁹⁶. In order to recover for a loss caused by barratry, it is necessary to show that the actions of the master and/or crew are essentially of a criminal nature³⁹⁷. In the case of *Everth v Hannam*³⁹⁸, for instance, a vessel was insured for a voyage at and from Jutland to Leith. At the time, Sweden had mounted a naval blockade of Norway. During the voyage, the insured vessel proceeded too close to the Norwegian coast and was arrested by the Swedes who later condemned the vessel and cargo for violating the blockade. The plaintiff (owner of the ship) alleged that the loss had been caused by the barratrous action of the master in taking the ship too near to the Norwegian coast. The court, however, held that the evidence was insufficient to prove criminal intent, and that the actions of the master could not be held to be barratrous. Thus the underwriters were not liable under the policy.

There is a considerable difference between a deviation ‘proper’ and barratrous deviation. Whether the loss of a vessel which has been taken out of her course by the captain and/or crew is to be attributed to barratry is a question which has arisen on several occasions in some of the old cases. A master and/or crew who deliberately and without the knowledge of

394 Michael Ford, (1994) “Marine Insurance Fraud in International Trade”, *International Insurance Law Review*, 2 (4), 163 – 165.

395 See *Vallejo v Wheeler* (1774) 1 Cowp 143, Lofft 631, 98 ER 1012, [1558-1774] All ER Rep 411.

396 *Panamanian Oriental Steamship Co v Wright* [1971] 1 Lloyd’s Rep 487; *Stamma v Brown* (1743) 2 Str 1173.

397 In *Everth v Hannam* (1815) 6 Taunt 375, p 386, Gibbs CJ stated: “.....we think that this not sufficient to so fix the master with barratry as to entitle the plaintiff to recover, without much more inquiry. The master cannot be fixed with barratry, unless he acts criminally.....”.

398 (1815) 6 Taunt 375.

the ship owner takes a vessel on a course contrary to the one stipulated clearly commits a barratrous act³⁹⁹. In *Mentz Decker & Co v Maritime Insurance Co Ltd*⁴⁰⁰, for example, the captain (in breach of the orders which had been given to him by the ship owner and for his own private benefit) took the vessel several hundred miles off her course. Whilst trading at one of the ports she was stranded and became a total loss. The court in this case held that these acts were acts of barratry and not deviation. Similarly, in *Ross v Hunter*⁴⁰¹, the voyage insured was from Jamaica to New Orleans, which lies up the river Mississippi. The captain proceeded on the voyage as far as the mouth of that river, and then dropped anchor and went up the river in his boat for a fraudulent purpose of his own. The assured ship owner brought an action against the underwriters for loss caused by the barratry of the master. Proof that the person who was described in the policy as master, and who was treated with and acted as such, carried the vessel out of her course for fraudulent purposes of his own, is prima facie, sufficient to entitle plaintiff to recover. The court held that the plaintiff was entitled to recover - i.e. the underwriters were liable as the dropping of his anchor with such fraudulent intent was an act of barratry, and not a deviation. In this case, Mr Justice Buller said that “in one sense of the word, it is a deviation by the captain for fraudulent purposes of his own; and that is the distinction between deviation, as it is generally used, and barratry”⁴⁰².

The circumstances of the *Mentz Decker* and *Ross v Hunter* cases have to be compared with those in *Phyn v The Royal Exchange Assurance*⁴⁰³, where the ship was taken out from the insured voyage by strong current and through the ignorance of the captain, and was later captured. As there was no evidence of criminal intent or fraud, the court held that it was not an act of barratry, and therefore the underwriter was discharged from liability. In addition to this, the act was obviously not wilfully committed, as the vessel was carried by strong currents out of her proper course.

Barratry can therefore be described as every species of fraud or misconduct by the master or mariners of a vessel, by which the ship owners or freighters are exposed to loss. Hence unauthorised deviation is barratry whether the loss occur during such a fraudulent voyage or after. In *Vallejo v Wheeler*⁴⁰⁴, the ship was insured from London to Seville with liberty to call

399 Postlethwayt in Vol 1, p 136 gives a definition of barratrous deviation: “One species of barratry in marine sense is when the master of a ship defrauds the owners or insurers by carrying a ship a different course to their orders”.

400 [1910] 1 KB 133.

401 (1970) 4 Term Rep 33.

402 *Ross v Hunter* (1970) 4 Term Rep 33.

403 (1798) 7 Term Rep 505.

404 (1774) 1 Cowp 143, Lofft 631, 98 ER 1012, {1558-1774} All ER Rep 411.

at some port in the west of Cornwall to take in provisions. The vessel took her cargo aboard, and sailed from London to Downs. While she was anchored there all the other ships sailed away but she stayed till the night after and then proceeded to Guernsey which was out of the course of the voyage. The master went to Guernsey for his own convenience to purchase brandy and wine on his own account, after which he intended to proceed to Cornwall. The night after the vessel left Guernsey but she sprung a leak, which obliged her to put into Dartmouth for repairs. When she was refitted she set sail again and proceeded for Helford in Cornwall, where it was always intended she should stop to take in provisions. However, on her way she received further damage and on her arrival was incapable of proceeding on the voyage and the cargo was damaged. The defendants (the underwriters) argued that going out of the course constituted a deviation and so prevent the plaintiffs from recovering on that count. On the other hand the plaintiffs proved that the going to Guernsey was without the knowledge of the ship owner and therefore it was barratry which entitled them to recover. The court in this case, however, held that the plaintiffs have a right to recover because the act of the master amounted to misconduct, and if the loss is consequential upon such misconduct, it constitutes barratry against which the party is insured.

As already pointed out above, no act can be barratrous to which the ship owner is privy, and for this reason an owner of goods on board the ship cannot recover for a loss by barratry in respect of any act of the master done with the knowledge or authorisation of the ship owner. In *Stamma v Brown*⁴⁰⁵, the conduct of the master in calling at a port out of the direct route, in order to deliver cargo, was held to be an act of (voluntary) deviation and not barratry and the ship owner was not entitled to recover under the policy. The court made this decision on the ground that the master's conduct was not inconsistent with his duty to the ship owners, and was clearly to their knowledge and for their benefit. The principles of this case (i.e. *Stamma v Brown*) apply very strongly to the case of *Vallejo v Wheeler* (above) for here there was an intent to deceive the insured. The master in *Vallejo v Wheeler* did not go to Guernsey (which was out of the proper course) for the benefit of his owners, but for his own benefit only, and in going there he acted inconsistently with his duty to his owners.

However, it is neither a deviation nor a barratry where the ship has been driven out of her proper course by circumstances beyond the control of the ship owner or master, whether due

405 (1742) 2 Stra 1173.

to human or natural causes. In a very old case, *Elton v Brogden*⁴⁰⁶, the act of the crew in forcing the master to go out of the course of the voyage was held to be neither a deviation nor barratry; it was not deviation by reason of its involuntariness and the excuse of necessity; and it did not amount to barratry as the ship was not run away in order to defraud the owners. The plaintiffs were awarded the sum insured, presumably, because the vessel was subsequently captured.

The New Zealand Supreme Court decision in the case of *Tasman Orient Line CV v New Zealand China Clays (The Tasman Pioneer)*⁴⁰⁷ concerned the question whether the owners of deck cargo which was damaged when a vessel ran aground could claim damages against the carriers on the basis that the master of the ship had been at fault. The subject matter in this case was whether the carriers could rely on the exception under The Hague Visby Rules 1968 art IV 2(a) when the master deviated from the safe navigation route and failed to call the coastguard. Under the Hague-Visby Rules art IV 2(a)⁴⁰⁸, ship owners and contracting carriers were exempt from liability for the acts or omissions of masters and crew in the navigation and management of the ship unless their actions amounted to barratry. It was common ground that the art IV 2(a) exemption did not apply in the event of barratry. In this case the master decided to take a short cut through a narrow passage, during which the vessel struck rocks and began to take on water. The master then steamed to a point on his normal course, falsified the course entry, delayed notifying the coastguard and owners, and downplayed the extent of the damage. The test for establishing barratry for the purposes of the exemption was accordingly whether damage had resulted from an act or omission of the master or crew done with intent to cause damage, or recklessly and with knowledge that damage would probably result. The court applied that test to the facts, and found that the master's actions following the grounding, whilst reprehensible, were actions in the navigation or management of the vessel. The ship owners could not be said to have authorised the master's actions or to have acquiesced in them. And the cargo owners could not argue that the master's actions constituted barratry. Accordingly, the Supreme Court held that the ship owner was protected by the art IV 2(a) exemption.

406 (1747) 2 Str 1264.

407 [2010] NZSC 37; [2010] 2 Lloyd's Rep 13.

408 See article IV 2(a) of The Hague Visby Rules 1968: "Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from: (a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship".

The next sub-section is aimed at a critical appraisal of the judicial construction of the word ‘intent’ and ‘intention’ within the context of deviation or abandonment of the voyage.

4.2.2 Intention to deviate or to abandon the voyage within the context of marine insurance.

Should an intention to deviate, which is fully formed but not acted upon, be allowed to have any effect on the insurance policy and the contract of carriage by sea? The courts have steadfastly held to the approach that an intended deviation which is not acted upon is immaterial and does not avoid the contract of insurance. Section 64 (3) of the Marine Insurance Act 1906 states that the intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract. In other words, there must be a coming together of animus and factum. Section 64 (3) is based upon the ruling in the old case of *Wooldridge v Boydell*⁴⁰⁹, where Lord Mansfield observed that a deviation merely intended but never carried into effect does not give rise to a cause of action for unlawful deviation. In all such cases, the terminus a quo and ad quem, were certain and the same. The approach (that a deviation intended but not acted upon is no deviation) was highlighted in the case of *Kingston v Phelps*⁴¹⁰ where the judgement of Lord Kenyon was later cited in *Middlewood v Blakes* as follows:

*“... In the last case (Kingston v Phelps) the insurance was from Cork to London, the captain sailed with an intention of touching at Weymouth on his way, but before he had actually deviated for that purpose, a violent storm arose, and he was ultimately driven by stress of weather into the very port of Weymouth; Lord Kenyon said that the underwriter was bound notwithstanding the intention to deviate inasmuch as the actual deviation arose ultimately from inevitable necessity, and not from choice; and the plaintiff recovered”*⁴¹¹.

Furthermore, a mere intention to deviate without the factum does not entitle the underwriters to discharge the contract of insurance. In the dictum of Lord Ellenborough C.J, “I believe the general opinion now is that a mere irritation of this sort shall not operate as a deviation”⁴¹². However, a significant question then arises as to what is the intent to deviate and what is the intent to abandon the voyage? The intent to deviate is when the ship owner intends to

409 (1778) 1 Doug KB 16, p 18.

410 (1797) 7 TR 165n.

411 (1797) 7 Term Rep 1962, p 165.

412 *Jarratt v Ward* 1 Camp 263, 266.

prosecute the voyage insured but using a different course from that stipulated in the contract of carriage or from the usual course taken by vessels on that voyage, which is to be regarded as the course intended by the parties. On the other hand, the intended abandonment of the voyage (i.e. the contractually agreed destination) occurs when the ship owner intends to give up the particular voyage agreed upon and to substitute another in its place, even though the substituted voyage may coincide in a large part with the voyage originally proposed except for the fact that it ends at a different destination. The distinction between the intention to deviation and the intention to abandon the voyage is that the intent to deviate has no effect on the contract of insurance - i.e. an intention to deviation does not discharge the insurers from their obligation under the policy of marine insurance in the event that the vessel is lost before actual deviation. But it is otherwise if the voyage as prosecuted turns out to be different from that underwritten by the policy (i.e. an abandonment of the voyage). In this case the marine insurance policy would be discharged from the time of the formation of the plan of abandonment⁴¹³ - i.e. from the moment the assured manifests a firm intention to change the vessel's destination. The insurer is thus discharged prospectively⁴¹⁴. However, it may be proper to add that an intended abandonment of the voyage discharges the underwriters only if caused by perils not insured against, but where it is caused by dangers included in the policy, the insured will still be entitled to recover under the policy.

If the voyage had commenced with the avowed intent on the part of the insured to go out of the direct route and stop at another port before proceeding to the port of destination, the voyage is, notwithstanding, the same as the one insured, the termini being in both cases the same; and should the loss happen before the vessel's arrival at the dividing point, there being only an intention to deviate, the underwriters will still be liable⁴¹⁵. An illustrative case in point is *The Lusson v Ferguson*⁴¹⁶, in which the court held that an intention to deviate does not vacate the policy of marine insurance. Many circumstances were identified by the court as indicating intent to abandon, of which are:

- changing the termini of the voyage,
- making an intermediate port the terminus,

413 See *Wooldridge v Boydell* (1778) 1 Doug KB 16; *Henshaw v Marine Ins Co* 2 Caines Rep 274; See Gilman et al., (2008) *Arnould's Law of Marine Insurance and Average*, 17th edn London, para.14-07 (Arnould); *Tasker v Cunningham* (1819) 1 Bli. 87 HL at 100 and 102; 4 E.R. 32 at 36 and 37, per Lord Eldon.

414 Jeffrey Thomson, (2009) "Material changes in risk, or the importance of functioning sprinklers: *Ansari v New India Assurance Ltd*", *Journal of Business Law*, 5, 508 – 514.

415 *Silva v Low* 1 Johns Cas 184.

416 (1780) 1 Doug KB 360.

- putting in other voyages between the termini; or
- clearing for ports not in the policy.

In the case of *Way v Modigliani*⁴¹⁷, for instance, the ship was insured “at and from the 20th of October 1786, from any ports in Newfoundland to Falmouth or her ports of discharge in England, with liberty to touch at Ireland and any points in the Channel”. The ship left Newfoundland on the first of October and after fishing on the Banks till the 7th, proceeded for England, and was lost on the voyage. Buller, J stated as follows: “... the first is the substantial ground, namely, that the policy never attached at all. When a policy is made in such terms as the present, to insure a vessel from one port to another, it certainly is not necessary that she should be in port at the time it attaches; but then she must have sailed on the voyage insured, and no other”⁴¹⁸.

In *Marine Insurance Co v Tucker*⁴¹⁹, a question was clearly presented regarding the different effects of an intended deviation and an intended abandonment. In this case the vessel took clearance papers for Alexandria in Virginia (USA), but afterwards finding a cargo for Baltimore in Maryland (USA), took that on board, and signed bills of lading for that port. On her voyage, before reaching the dividing point (i.e. the point where it would be necessary to deviate from the route for Alexandria to go to Baltimore) the vessel was captured. The court held that this was not a case of deviation, because the intention formed at Kingston in Jamaica (before the voyage commenced) of going to Baltimore, was never carried out into execution. Thus it was merely an intended deviation, not an intended abandonment, and the underwriter was not discharged from liability. Similarly, the court held in the case of *Henshaw v Marine Insurance Co*⁴²⁰ that if the termini of a voyage are preserved, an intention to stop at an intermediate port is merely one to deviate, not an abandonment of the voyage.

Does the knowledge of the underwriter of an intended deviation (at or before signing the insurance policy) estop him from relying on the unlawfulness of the deviation as a ground for avoiding the policy? Several American cases show that knowledge of an intended deviation before signing the insurance policy does not deprive the insurer of this defence⁴²¹.

⁴¹⁷ (1787) 2 TR 30.

⁴¹⁸ *Way v Modigliani* (1787)2 TR 30.

⁴¹⁹ 7 U.S. (3 Cranch) 357.

⁴²⁰ 2 Caines 274.

⁴²¹ See *Wiggin v Amory*, 13 Mass 118, 14 Mass 1, 10; *Haven v Holland*, 2 Mason, 230; See also *Wiggin v Boardman*, 14 Mass 12.

Furthermore, in the case of *Crowningshield v New York Insurance Co*⁴²², for example, it was held that a mere verbal waiver of a previous deviation does not divest the underwriter of his defence. However in *Silloway v Neptune Insurance Co*⁴²³, it seems that knowledge of a previous deviation, if permission to proceed on the voyage is indorsed on the policy, does estop the insurer from such defence. English courts have held that if the underwriters insure a vessel for a voyage after she commences it and deviates, and the assured gives notice of a previous deviation to underwriters, they would be discharged for subsequent losses - i.e. if the deviation occurred before the policy has commenced, the risk never attaches unless the underwriters can be shown to have been aware of the deviation and have agreed to it. In *Redman v Lowdon*⁴²⁴, the policy was “at and from London to Berbice” and was declared to be “on ship”. The plaintiff averred that the ship was in good safety at London, and sailed from thence on the said voyage, during which the vessel was captured. The underwriter contended that the vessel deviated by going to Madeira, having taken on board goods there. The plaintiff rebutted this allegation and proved that at the time of effecting the policy, the broker told the underwriter that the ship was at sea, and brought to his attention a letter dated at sea after the vessel had left Madeira. The plaintiff thus contended that the underwriter had full notice of the ship’s course and situation. The court found in favour of the plaintiff. The fact that whatever deviation might have been made from the usual course to Berbice before the policy was effected was immaterial to this risk because it had been sustained before the risk commenced, and was not included in the insurance policy; or else it might be taken that the underwriter in effect had consented to and ratified the ship’s previous deviation.

From the case law it can be concluded that ‘intention’ in relation to deviation relates to the mental element which is formed independently of external factors with the objective of departing from the agreed or proper course under the contract of carriage. It can also be concluded from the case law that a mere intention to deviate is not of itself sufficient to amount to an unlawful act if that intention has not been acted upon. Hence it can be argued that the criterion of ‘voluntariness’ goes further than that of intention in that it combines both the intention and the subsequent actions of the master and crew in departing from the proper course. In other words, ‘voluntariness’ in relation to unjustified or unlawful deviation signifies a combination of the two elements of animus (intent) and factum (the actual act of

422 3 Johns Cas 142.

423 12 Gray 73.

424 (1814) 5 Taunt 462.

deviation). In the next section the precise nature and scope of the law on deviation is examined in greater detail.

4.3 Meaning of “Justified Deviation” – A Critical Appraisal.

From a legal perspective early mercantile law principles identified main two factors as defining the basis for the law on deviation; these are:

- (i) The specific kind of act of deviation which constitutes breach - i.e. a voluntary and an unjustified departure from the agreed voyage or the ‘proper course’. In *Clayton v Simmonds*⁴²⁵ for example, it was held by Lee CJ that if a ship departs from the proper course by calling at an unstipulated port or stays it is unjustified deviation; and
- (ii) From a legal perspective, the interrelationship between the various ‘cargo interests’ and the carrier: the legal nature of this relationship prevents the carrier from embarking on an unjustified deviation the effect of which may be to frustrate the commercial purpose which is common to both parties in the adventure. In the case of *Glynn v Margetson*⁴²⁶ it was held that the liberty clause which was included in the bill of lading did not cover this particular deviation. Due to the delay occasioned by the deviation the cargo of oranges belonging to the cargo owner became damaged. It was held that the main object and intent of the charter party was the carriage of oranges from Malaga to Liverpool, and the deviation was therefore unjustified in view of the fact that the commercial purpose of the adventure had become frustrated.⁴²⁷

The implied obligation against deviation is not an absolute doctrine. The common law itself introduced a wide range of exception which have been recognised and extended by various statutory and convention sources. In the course of time contractual practice in the shipping industry has also introduced some exceptions, most notably the liberty clause. These exceptions provide carriers with grounds on which a deviation can be justified under the contract of carriage. The successful pleading of an exception will thus discharge the carrier

425 (1741) 1 Burr 343.

426 [1893] AC 351.

427 In relation to voluntary deviation, see *Tait v Levi* K.B [(1811) 14 East 481 9; and for a case relating to the frustration of the commercial purpose of the adventure following a deviation, see *Glynn v Margetson* [1893] AC 351, HL.

from liability for the consequences of the deviation. In the sections below the common law exceptions will be examined first, followed by the statutory and convention sources.

When the goods are carried by sea, carriers may, for various reasons, find their vessels deviating from the proper course agreed upon in the contract of carriage. Some of these acts of deviation, however, are considered justified in law.⁴²⁸ Under common law, one of the most notable exceptions which justify a departure from the proper route is in the case of saving human life.⁴²⁹ In the *Scaramanga* case the defendants' ship was chartered by the plaintiffs to carry a cargo of wheat from Cronstadt to the Mediterranean, the usual perils of the sea excepted. Whilst on her voyage she sighted and went to the assistance of a vessel in distress, called the *Arion*, and the master, in consideration of a payment for his services, agreed to tow her into the Texel, which was out of his direct course. Whilst so doing the defendants' vessel was stranded, and was totally lost with her cargo. The Court of Appeal held that the deviation was unjustifiable, and consequently that the plaintiffs were entitled to recover the value of the cargo against the defendants as owners of the ship.

As seen from the facts of this case, under common law deviation was not considered justified to be justifiable on the grounds of saving the cargo or the ship. However, it is often difficult in practice to separate the crew (human life) from the ship and its cargo. It will be quite often the case that the intention of the master in deviating under such circumstances is to offer protection not just to the crew, but also to the ship and its cargo. Given that the three elements are often inseparable it could be argued that the common law restriction which prescribed only the saving of human life was in practice unworkable.

In *The Farnley Hall*⁴³⁰, Brett LJ asserted that the vessel causes delay and danger to the cargo on board when she deviates from the proper course in order to save property. In this case the Court of Appeal held that rendering a salvage service to save property alone constitutes an unjustified deviation in point of law, however small the deviation may be in point of fact.

But is the ship owner allowed to deviate in order to save cargo on board his vessel? In other words, is it justified deviation to call at ports which are not stipulated in the contract of carriage for the purpose of saving cargo on board the vessel? In the case of *Notura v*

428 *J & E Kish v Charles Taylor Sons & Co* [1912] AC 406.

429 *Scaramanga & Co v Stamp* (1880) 5 CPD 295, CA.

430 (1881) 4 Asp MLC 499, 46 LT 216.

Henderson⁴³¹, the vessel was in good condition but cargo on board the ship became wet. The court held that under such circumstances the captain is bound to take into account the interests of the cargo owners as well as those of the ship owner. To answer the above question it is clearly the case that the master is not only allowed to deviate in order to save cargo on board, but it would have amounted to negligence on the master's to continue on the voyage without attempting to save the cargo⁴³². It can thus be argued that in such situations the carrier's implied obligation relating to care and preservation of the cargo would seem to take precedence over the implied obligation not to deviate.

A deviation is equally justified if the purpose is to communicate with a vessel in distress, avoid danger to the ship or when the deviation is made necessary by some unforeseen eventuality. This would be the case, for example, where there is significant danger of capture of the ship by hostile vessels through acts of warfare or piracy⁴³³. In the case of *The Teutonia*,⁴³⁴ the deviation was justified on the grounds that the intended purpose was to avoid capture by pirates and thus to protect the crew, the ship and its cargo.

A deviation to a port of refuge that is reasonably necessary to save the ship from sea perils is justifiable even though the ship may be unseaworthy, and though, but for that unseaworthiness, she would not have been in any danger. A master is not only justified in deviating but bound to do so if the safety of the adventure is threatened. In *Kish v Taylor*⁴³⁵, the vessel had been excessively overloaded. This is a classic instance of unseaworthiness which amounted to a breach of contract. In the circumstances the master was obliged to deviate. The court held the deviation justifiable even though it was the direct result of the misconduct of the master whose actions had created the danger, which meant that the deviation could well have been regarded as intentional. Atkinson J., stated that "the ship's master should not be put in the position of having to decide on the merits of the situation. He has to be allowed to deviate in order to save the venture." The rationale of *Kish v Taylor* therefore is that the existence of the peril is looked at and not the cause of the peril. Hence, it could be argued that even though the deviation in this case is voluntary, it is nonetheless justified and lawful, as there is a legitimate reason for departing from the proper course. In such cases the proper cause of action for the cargo owner would be to pursue would be a

431 [1870] L.R. 5 Q.B. 354.

432 See *The Rona* 5 Aspinal M.C. 259.

433 *Pacific Basin IHX Ltd v Bulkhandling Handymax AS* [2011] EWH C 2862.

434 (1872) LR 4 PC 171.

435 [1912] A.C. 604.

claim for unseaworthiness, not deviation. However, in *Monarch Steamship v Karlshamns Oliefabriker*⁴³⁶, Lord Porter referred to *Kish v Taylor* and stated that “deviation made to remedy unseaworthiness does not amount to unjustifiable deviation but that it might do so if it was established that the owners knew of the vessel’s state on sailing⁴³⁷”.

In another case, *Anderson, & Co v The Owners of San Roman*,⁴³⁸ the judge held that “an apprehension of capture founded on circumstances calculated to affect the mind of a master of ordinary courage, judgment, and experience, would justify delay [i.e. deviation]”. The effect of this judgment is that where safety is of paramount concern and requires that the master should depart from the agreed or proper course, such a departure would be justified and it would be reckless of the master not to do so. In the case of *Phelps, James & Co. v Hill*,⁴³⁹ on a voyage from Swansea to New York, the ship and the cargo were damaged in bad weather. The ship took refuge at Queenstown and was then sunk in a collision while heading for repair at the ship owner’s yard at Bristol, rather than going back to Swansea which would have been nearer. It was held that proceeding to Bristol was not a deviation, in spite of the objection of the cargo owners, who claimed that there had been no prior consultation. The judgement in the case leaves some unanswered questions as to whose interest is paramount – that of the carrier or the cargo owner? What is good for the ship-owner is not necessarily in the interest of the cargo owner. The difficulty in such cases involves striking an acceptable balance between the conflicting interest of the carrier and that of the cargo owner.

Deviation can also be justified on grounds of seeking medical attention for the crew.⁴⁴⁰ However, when sickness of the master or crew is set up as an excuse for deviation, then the defendant ship owner must show that proper medicines and necessaries for the voyage were on board, in a case where the nature of the voyage requires that there should be a surgeon on board⁴⁴¹.

The ship owner also has an implied right to minimize the damage caused by the charterer’s default and to load additional cargo to fill the space, and will be justified in deviating from the proper course in order to do so. In the case of *Wallems Rederij A/S v WM. H. Muller and*

436 [1949] A.C 196.

437 *Ibid*, p 212.

438 (1873-74) L.R 5P C 301.

439 [1891] 1 QB 605 (CA).

440 *The Europa* [1908] P 84.

441 *Woolf v Claggett* (1800) 3 Esp 257.

Company (The Batavia)⁴⁴², the charterers agreed by the charterparty to load a full and complete cargo at her ports of loading in Java, but failed to do so. Consequently, the ship owners without asking for or receiving the assent of the charterers loaded additional cargo from Alexandria (Egypt). The ship owners sued the charterers to recover dead freight, and the charterers alleged that the ship owners are not entitled to do so by loading the additional cargo at Alexandria without their consent, and that by the consequent delay in her chartered voyage the ship had deviated. The court held that the ship owners had an implied right to minimize the damage caused by the charterers default and to load additional cargo to fill up the space, and therefore there had been no unjustified deviation.

Two more justified circumstances in relation to deviation were added by Article IV (4) of the Hague-Visby Rules:

- To save or attempting to save property at sea; and
- Any reasonable deviation.

In incorporating the HVR, Article IV (4) of Carriage of Goods by Sea Act 1971 provides that any deviation to save or attempting to save life or property at sea, or any reasonable deviation, should not to be considered a breach of the contract of carriage. Such deviation will be considered to be justified in law.

Article IV of Carriage of Goods by Sea Act 1971 permits any reasonable deviation but leaves open the question as to what is a reasonable deviation. English courts have generally experienced difficulties in interpreting the phrase “any reasonable deviation”, although it appears to be generally accepted that whether or not a deviation is reasonable is to be treated as a question of fact. In *Danae Shipping Co v T.P.A.O. & Guven Turkish Insurance Co Ltd (The Daffodil B)*⁴⁴³, for example, the issue was whether or not the shipowners were entitled to claim general average contribution. The question before the court was whether the deviation was reasonable under Article IV (4) of the Rules. In this case the ship owners claimed general average from the defendant and their insurers, the defendant claimed that there had been an unjustified deviation and claimed that Lavrion was not a safe port for a ship of the Daffodil's size. The ship owner admitted deviation but sought protection under Art 4(4). The court held that ships of The Daffodil's size often anchored at Lavioron which was a safe anchorage, that

442 [1927] 2 K. B. 99.

443 [1983] 1 Lloyd's 498 Q.B.

the deviation was reasonable and that the ship owner was therefore entitled to claim general average contribution. In other words, the deviation was both reasonable and justified.

However, this does not mean that all deviations are reasonable under the Hague-Visby Rules and Carriage of Goods by Sea Act 1971. In the case of *Stag Line Ltd v Foscolo Mango*⁴⁴⁴ a vessel deviated to land engineers who had been on board testing a fuel preservation system. The ship struck a rock in the course of the deviation. The House of Lord held that this was not a reasonable deviation and refused to allow the ship owner to rely on the protections provided by the Rules. In the dictum of Greer LJ “I think the words ‘reasonable deviation’ mean a deviation whether in the interests of the ship or the cargo owner or both, which no reasonably minded cargo owner would raise any objection to⁴⁴⁵”. In addition to this, at the Court of Appeal Lord Atkin also opined as follows:

*A deviation “may be reasonable, though it is made solely in the interests of the ship or solely in the interests of the cargo, or indeed in the direct interest or neither: as for instance where the presence of a passenger or a member of the ship or crew was urgently required after the voyage had begun on a matter of national importance; or whether some person on board was a fugitive from justice, and there was urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interests of all parties concerned, but without obligation to consider the interests of any one as conclusive”*⁴⁴⁶.

Another example where the court decided that the deviation was unreasonable was in the case of *Theiss Bros v Australia SS Pty Ltd*⁴⁴⁷, where a bill of lading stated that the vessel was required to deliver goods at Melbourne. The ship changed her route to Newcastle which was four miles off the course stipulated in the contract of carriage, for bunkering purposes. The court held that the deviation was not reasonable according to Article IV (4) of the Rules.

444 [1932] A.C. 328.

445 *Stag Line Ltd v Foscolo Mango* [1931] 39 LILR 101 at p 111.

446 *Stag Line Ltd v Foscolo Mango* [1932] AC 328 at p 343-4.

447 [1955] 1 Lloyd's Rep 459.

It is also worth noting the different judicial approaches to the interpretation of the words “reasonable deviation” within different jurisdictions - i.e. what is considered to be reasonable in one country may not be so considered in other countries. In some English cases such as *The Al Taha*⁴⁴⁸, for example, the issue was whether *The Al Taha* was in breach of the contract of carriage, which was subject to the United States Carriage of Goods by Sea Act 1936, which incorporated Article IV (4) of the Hague Rules. In this case it was held that the deviation planned before the voyage began or the bills of lading were signed was a reasonable deviation and thus the ship owner has successfully invoked the defence provided by the Hague Rules. The United States interpretation of Article IV (4) of the Hague Rules includes the proviso that “if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, prima facie, be regarded as unreasonable”.

The figure below illustrates the connection between deviation, the two main sources of law and the main grounds on which deviation may be justified.

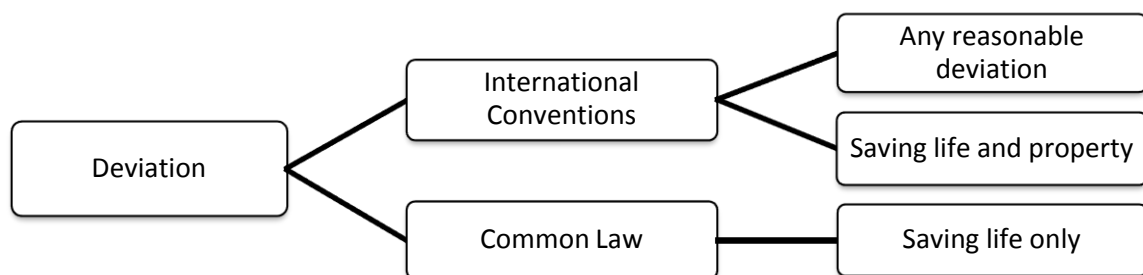


Figure: Main Grounds on which Deviation may be justified (Source: Author)

It can be surmised from the above discussion that there are slightly different positions of common law and relevant conventional and statutory provisions vis-à-vis the relevant criteria for justifiable deviation. The common law position is far more restrictive than the statutory/conventional approach.

But do these various lists of exceptions to deviation comprise in themselves a closed category, or are they amenable to further additions? It has been suggested by some commentators that there are indeed other circumstances in which deviation may be considered to be justifiable. Thus deviation may also be justified by the terms of a specific clause in the bill of lading or charterparty giving the ship-owner a ‘liberty’ to either deviate from the agreed or proper route, or to call at additional ports during the voyage. It is worth

⁴⁴⁸ [1990] 2 Lloyd’s Rep 117; See also *The Iran Bohonar* [1983] 2 Lloyd’s Rep 620.

noting, however, that courts tend to construe such liberty clauses very narrowly. In *Solly v Whitmore*,⁴⁴⁹ the charterparty included a liberty clause permitting the ship to proceed to, touch and stay at any ports whatsoever, for any purpose, particularly Elsinore, without being deemed a deviation. The ship touched and stayed at Elsinore and Danzig to deliver goods. The court held that this was an unjustified deviation. The liberty clause will be examined in more depth in the next chapter together with its relationship to the law on deviation and the judicial approach to the interpretation of such clauses.

4.4 The Meaning of “proper course” as applied to the law on deviation

It is both a common law and a statutory requirement that the directness of the route is an implied condition of the contract of carriage of goods by sea.⁴⁵⁰ However, as seen above in order for the doctrine of deviation to be invoked, the departure from the proper course of the voyage must be voluntary and unjustified – in other words, the deviation must be unlawful. Before unlawful deviation can be established it is necessary first of all to determine the proper course or proper route for the particular voyage in question.

The concept of the proper course serves as the litmus test for unjustified deviation. Only by establishing the proper course for a particular voyage can a rational judgement be made as to whether or not the ship has unlawfully deviated from its route. But what is the proper course or route for this purpose?

The proper course can be defined as the agreed or stipulated route which forms part of the express terms of the contract of carriage (e.g. ‘From Hong Kong to New York calling at Singapore, Suez and Liverpool’). This may be easily ascertainable in a charterparty involving the bulk carriage of goods from its express provisions, but what if no such agreed route has been stipulated by the parties?

In the absence of an express stipulation as to the route, the second proposition is to apply the direct geographical route. However, the problematic aspect of this seemingly obvious solution is that there may be more than one geographical route and the parties may not be in agreement as to which of two or more alternative geographical routes ought to have been used.

449 (1821) 5 B & Ald 45.

450 *Joseph Thorley Ltd v Orchis SS Co Ltd* [1907] 1 KB 660; *Compagnie Primera de Navagazona Panama v Compania Arrendataria de monopolio de Petroleos S.A* [1940] 1 K.B 362.

Hence, where there is more than one geographical route, the final proposition presents itself in the form of the usual route. But even with this proposition we encounter yet another problem. Whose 'usual route'? Is it the usual route for the particular shipping line in question, the particular trade or for the shipping industry as a whole? In other words, is the applicable test to be used in determining the 'usualness' of the route an objective or a subjective test? It is for this reason that we may need to go beyond the concept of a 'usual route' by seeking to establish what is the customary or recognised trade route with a view to injecting some measure of objectivity into the relevant criteria for establishing the proper course in the absence of a contractually stipulated route or an agreed geographical route.

The case of *Reardon Smith Line v Black Sea and Baltic Insurance*⁴⁵¹ is illustrative of the legal problems involved in establishing the proper course for a particular voyage. In this case a vessel chartered to sail from the Black Sea port of Poti to a North American port, but after loading the cargo instead of proceeding directly to its intended destination it instead set sail for Constantza with a view to purchasing cheaper bunkering coal. While in Constantza it was grounded and damaged. The question before the courts was whether or not there had been a deviation from the proper course. The defendants argued that the trip to Constantza constituted part of the proper course as it was customary for ships to undertake this part of the voyage for the purposes of bunkering. The defendants' contention was upheld by the court on the basis that this practice was customary for 25% of ships that sailed this particular route.

In the case of *Frenkel v Macandrews & Co Ltd*⁴⁵², a bill of lading with destination to Liverpool, with liberty to touch at any ports whatsoever, although they may be outside the route. On leaving Malaga the vessel proceeded to Cartagena, facing on the way heavy weather with the result that the oil was lost. She then called at other ports on the Mediterranean east of Malaga, and then turned and sailed for Liverpool. The plaintiffs brought an action claiming that it had been lost during unjustified deviation from the contract voyage. The owner's steamers were accustomed to go from Liverpool up the Mediterranean coast, picking up cargo from port to port, and then return to Liverpool. It was held that the route mentioned in the bill of lading meant the customary route taken by the owner's ships, therefore, there had been no unjustified deviation and the cargo owner was not entitled to recover.

451 [1939] AC 562.

452 [1929] All ER Rep 260.

Symptomatic of the uncertainty in this area of the law are the inconsistent and sometimes conflicting judgements rendered by the courts and international arbitral tribunals in different jurisdictions on cases which share broadly similar facts. Illustrative examples of this can be found in further cases involving departure from the geographical route for the purposes of bunkering in which a US court on the one hand, and an arbitration tribunal on the other, have both arrived at a different conclusion from that in the Reardon Smith Line case.

In the first of these cases, *United States Shipping Board v Bunge Y Born*⁴⁵³ it was held that the carriers could not rely on a liberty clause in the contract to depart from the route for bunkering purposes. Chartered to sail from River Plate in Argentina to Seville via Malaga in Spain, after leaving Malaga the ship deviated first to Gibraltar and then to Lisbon in Portugal for fuel before proceeding to Seville. The court held that the defendants had failed to show that the deviation was reasonably necessary. However the question of whether or not the route taken could be deemed to be the customary route did not arise. Hence, it could thus be argued that this case can be distinguished on this ground from the Reardon Smith Line case.

The second case, that of *Cepheus (MV Cepheus Arbitration)*⁴⁵⁴ is a relatively recent arbitration case on the question of deviation for bunkering purposes. The charter in this case involved a voyage from Freeport, Bahamas to Anchorage in Alaska. The vessel departed from its route and went to Los Angeles to procure inexpensive fuel. The delay occasioned by this deviation meant that the ship arrived late and in very bad weather which caused it to run aground. The arbitration panel held that the deviation to Los Angeles was unreasonable as the ship already had sufficient fuel for the voyage to Anchorage.

If ports of call are named in a policy in a successive order, the vessel must take them in the same succession in which they are named. If they are not named in any order in the policy, they must be taken in the order in which they occur in the usual and most convenient and practicable course of the voyage, not according to the shortest geographical distance⁴⁵⁵. However, the vessel is not restricted to take the ports in the successive order before she has selected her port of discharge. In *Andrews v Mellish*⁴⁵⁶, under a policy from London to the ship's discharging port or ports in the Baltic, with liberty to call at any port or ports for

453 [1925] All E.R. 173.

454 (1990) AMC (1058).

455 *Gairdner v Senhouse* (1810) 3 Taunt 16.

456 (1814) 5 Taunt 496.

orders, or any other purposes. After she has selected her port of discharge, then she must touch and call at ports only in their successive order.

From a critical point of view, the problem of uncertainty in this case stems from the use of different criteria in different jurisdictions. Whereas English law requires voluntary and unjustified deviation, the US approach appears to be based on the criterion of “reasonableness”. The carriage of goods by sea being by its very nature a global cross-jurisdictional activity, there is clearly a need for consistency in the articulation and application of relevant concepts for the governing law. It may be submitted that the judgement of the English court in the *Reardon Smith Line* case gives rise to some measure of uncertainty in view of the fact that it is not clear if the main legal issue is whether there was no deviation (i.e. the ship was on its proper customary route), or if there was indeed deviation but it was justified (i.e. the application of an exception). Given that the ship did in fact depart from the geographical route by sailing backwards to Constantza rather than proceeding forward from Poti to North America, it could perhaps be argued that the correct position would have been that there was in fact deviation, but that this was justified by custom.

Once there has been an unjustified deviation from the contracted route, the ship owner is reduced to the status of a common carrier. The only available defences to a claim for cargo damage are act of god, acts of king’s enemies, inherent vice and fault of the consignor. However, these common law exceptions are not available for the ship owner unless he can prove that the relevant loss would have been occurred irrespective of deviation. In *James Morrison & Co. Ltd v Shaw, Savill, and Albion Co. Ltd*⁴⁵⁷ a voyage was being undertaken by the defendant’s steamship *Tokromaru* which had loaded wool at Napier, New Zealand, for London. The ship was torpedoed by a German submarine when between 7 and 8 miles from Havre. The ship and cargo were total loss. The defendant ship owners argued that the loss was occasioned by an excepted peril – i.e. the King’s enemies. The plaintiffs contended that the defendant could not rely upon the exception because the *Tokomaru* had deviated from the proper course and was proceeding to Havre when the disaster occurred. The court held that the ship owner was liable for unjustifiably deviating from the course, and that he could not therefore rely on the excepted peril of ‘king’s enemies’ where he could not show that the loss or damage would have occurred if the vessel had been on her proper course for London.

⁴⁵⁷ [1916] 2 KB 783 (CA).

In concluding this section it should be noted that in all cases the route taken must be reasonable, practical and commercial and should be aimed at promoting rather than frustrating the commercial purpose of the adventure⁴⁵⁸.

4.5 A Functional Analysis: The Application of the Doctrine at Common Law

Strictly construed, the rule against unlawful deviation applies only to the contract voyage and not the preliminary voyage.⁴⁵⁹ This is because the implied undertaking as to 'due despatch' applies to the preliminary voyage. In voyage charterparties the stipulated route (or proper course) forms part of the subject matter of the contract of carriage. For this reason any unlawful deviation will render the contract of carriage a fundamentally different thing from what the parties had either agreed or contemplated. This in turn provides the rationale as to why the rule against unlawful deviation is very strictly applied to voyage charterparties. In time charterparties the charterer charters the vessel for a specific period of time and therefore the vessel will have liberty to call at all ports on the globe and to sail in every direction, without any limitation except as to time. Time is thus of the essence to the performance of the contract of carriage, thus the rule of deviation is not strictly construed in time charters, in so far as the charterparty is completed in time. However, a departure from the proper course could lead to delay, or loss or damage to the cargo, in which case the carrier would be liable for the loss suffered by the cargo owner. So in this type of charterparty it is obvious from the nature of the contract that the concept of deviation as the basis for a breach of the contract of carriage is not relevant in itself. This is because there is no particular voyage insured and stipulated in the contract of carriage, which means that the concept of a proper course is superseded and replaced by the time factor. This in turn means that the rule against deviation which is based on the concept of the proper course becomes diluted - hence it could be argued that any departure from the proper course would be subject to the de minimis rule.

Because time is the essence of the contract in time charterparties, the construction of such contracts of carriage will be liberal towards the carrier even when the time charterparty includes clauses aimed at restricting the movement of the vessel. This is in contrast to the voyage charterparty under which the carrier must strictly perform the voyage insured and failing to do so will amount to unjustified deviation.

458 *Reardon Smith Line v Black Sea and Baltic Insurance* [1939] AC 562.

459 Ademuni-Odeke, (2012) *Bareboat Charter (Ship) Registration*, Martinus Nijhoff, p 45.

From an insurance point of view, the vessel under a time policy may have a right to visit a port more than once. In *Ellery v New England Insurance*⁴⁶⁰, for example, a time charterparty included the clause “*at and from Boston to all ports and places on the globe, and until her return to Boston, not exceeding two years*”. In this case a vessel sailed from Brazil to Boston. On arriving (the two years not having expired) she was ordered by her owner to Salem for repairs. While repairing the vessel the ship owners realised that she had suffered so much damage as not to be worth repairing. The court held that there was no unjustified deviation by going to Salem and the arrival at Boston before the expiry date was not the final return to Boston which would have ended the risk. Hence, the insurance companies were liable in the view of the time factor which meant the contract of carriage (time charter) was still in existence. Thus unlike the voyage policies⁴⁶¹, under the time policies the ship has a liberty to visit a port more than once (in this case, Boston).

The *Ellery* case can be contrasted with that of *Firemen’s Insurance Co v Lawrence*⁴⁶² which involved a voyage charterparty was from New York to Gothenburg, and from thence to a port of discharge in the Baltic. The ship owners at Gothenburg elected Petersburg as a final port of destination, and actually sailed with the intention of proceeding to that port. But afterwards they changed the port. It was held that the previous election once acted upon bound the ship owners and the act of proceeding to another port was considered as an unjustified deviation.

The deviation rules do not generally apply to charterparties by demise as the charterer has control of the ship and go wherever they please. However, where the charterer employs the ship for the purpose of carrying goods for third parties the rule will apply depending on whether the contract of carriage is a voyage or time charter, or consignment carriage.

4.6 The Legal Consequences of Unjustified Deviation.

Has deviation ever been (and can it still be considered to be) a fundamental breach of the contract of carriage of goods by sea as some of the case law would seem to suggest? Put simply, the concept of a fundamental breach of contract refers to the breach of a fundamental term. It is proposed in this section to review some of the case law on this question.

⁴⁶⁰ Co 8 Pick 14.

⁴⁶¹ See *Hain Steamship Co. Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597.

⁴⁶² 14 Johns 46.

In the Hain case⁴⁶³ Lord Wright indicated that “an unjustified deviation is a fundamental breach of a contract of affreightment”⁴⁶⁴. However, he later said that although the implied obligation not to deviate is considered to be a condition, it may still be waived by the cargo owner⁴⁶⁵. The courts tend to invoke the concept of fundamental breach when the performance of the contract becomes something totally different from that which the contract contemplates. Devlin J. expressed the concept of fundamental breach in *Smeaton, Hanscomb & Co Ltd v Sassoon I Setty Son & Co*⁴⁶⁶ in the following words: “what is a fundamental term has ever been closely defined. It must be something, I think narrower than a condition of the contract, for it would be limiting the exceptions too much to say that they applied only to breaches of warranty. It is something which underlies the whole contract, so that if it is not complied with, the performance becomes something totally different from that which the contract contemplates”⁴⁶⁷. Thus, delay in the performance of a voyage may amount to unjustified deviation and so to a fundamental breach⁴⁶⁸. Also Lord Atkin held in *Brandt v Liverpool* that delays by the ship owners in dealing with a cargo of zinc amounted to a deviation⁴⁶⁹.

According to the approach in the *Harbutt's Plasticine* case⁴⁷⁰, fundamental breach puts an end to the contract and therefore the protection provided under an exclusion clause could not apply. This is because the innocent party would have the right to repudiate the whole of the contract (including any exclusion clauses) due to the fact that he had not received what he bargained for. The *Harbutt's Plasticine* case concerned a plaintiffs' factory in an old mill which was burned down due to the defendant's negligence. The defendants (Wayne Tank) had installed a pipeline made of unsuitable and dangerous plastic material and wrapped in heating tape attached to a broken thermostat. It had been switched on and the plant left unattended. As a result of the fire which led to the destruction of the premises, a new factory had to be built. The installation contract contained an exclusion clause limiting the recovery of damages. The plaintiffs claimed for damages which were much more than the value of the contract. On the other hand the defendants argued that damages should be limited to the difference in the value of the old mill before and after the fire and that the plaintiffs should

463 *Hain Steamship Company Ltd v Tate & Lyle Ltd* (1936) 41 Com.Cas.350.

464 *Ibid.* at 362.

465 *Ibid.* at 363.

466 [1953] 2 Lloyd's Rep 580.

467 *Ibid.* at 584.

468 *Owners of the Cap Palos v Alder Cap Palos* [1921] P. 458; (1921) 8 Ll. L. Rep. 309.

469 *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co* [1924] 1 K.B 575.

470 *Harbutt's Plasticine Ltd v Wayne Tank & Pump Co Ltd* [1970] 1 Q.B 447 C.A.

not be allowed the cost of replacing it with a new building. The question arose whether Wayne Tank could rely on their exclusion or limitation clause. The Court of Appeal held that they could not, because the breach of the contract was so serious and fundamental that the whole contract went including the limitation clause. By so doing the court upheld the existence of the concept of the fundamental breach.

The concept of the fundamental breach can be traced back to the dictum of Lord Denning in *Karsales Harrow Ltd v Wallis*⁴⁷¹ where he stated that however extensive an exemption clause might be, it could not exclude liability in respect of the breach of a fundamental term or of a fundamental breach. What Lord Denning was attempting to do was to establish the concept of fundamental breach as a rule of law which could be applied irrespective of the parties' intention. In the case of *Photo Production*, Lord Reid quoted one passage from the *Karsales* case when he was of the opinion that notwithstanding earlier cases which might suggest the contrary, it is now settled that exempting clauses of this kind, no matter how widely they are expressed, only avail the party when he is carrying out his contract in its essential respects. He is not allowed to use them as a cover for misconduct or indifference or to enable him to turn a blind eye to his obligations. They do not avail him when he is responsible for a breach which goes to the root of the contract.

The traditional rule regarding fundamental breach of contract as stated in the *Harbutt's* case could be welcome from a consumer protection angle. However, according to the subsequent version of the rule, if the innocent party has the right to repudiate the contract this does not necessarily stop the party in breach from relying on the protection offered by exclusion clauses in the contract. This point was raised by Lord Wilberforce in the *Suisse Atlantique*⁴⁷² case when he said "though it may be true generally, if the contract contains a wide exceptions clause, that a breach sufficiently serious to take the case outside that clause, will also give the other party the right to refuse further performance, it is not the case, necessarily, that a breach of the latter character has the former consequence".⁴⁷³

One of the main sources of confusion surrounding the rule was that words such as "termination" and "rescission ab initio" are two separate concepts which are not usually used simultaneously⁴⁷⁴. Judge Wilberforce said in obiter that "it is important to dissipate a fertile

471 [1956] 1 W.L.R 936 C.A.

472 [1967] 1 A.C. 361.

473 *Ibid.* at 431.

474 DeBattista C, (1989) "Fundamental breach and deviation in the carriage of goods by sea", *Journal of Business Law*, J.B.L., 22-36.

source of confusion and to make clear that although the vendor is sometimes referred to (when he accepts a repudiatory breach by the purchaser) as “rescinding” the contract, this so-called “rescission” is quite different from rescission ab initio, such as may arise for example in cases of mistake, fraud or lack of consent. In those cases, the contract is treated in law as never having come into existence. In the case of an accepted repudiatory breach the contract has come into existence but has been put an end to or discharged. Whatever contrary indications may be disinterred from old authorities, it is now quite clear, under the general law of contract, that acceptance of a repudiatory breach does not bring about rescission ab initio”⁴⁷⁵.

Over the course of time, the Photo Production case⁴⁷⁶ became the leading case which seemed to confirm that the term ‘fundamental breach’ should only be used to describe breaches for which the innocent party is entitled under the contract to elect to put an end to all primary obligations of both parties remaining unperformed. This overrules *Harbutt’s* and reaffirmed the principle which was given in *Suisse Atlantique* that the parties are entitled to treat the contract as they see fit. The ratio of the Photo Production case as given by the House of Lords was that although the defendant (Securicor) was in breach of an implied obligation to perform the service with proper regard for the safety and security of the plaintiff’s premises, the exclusion clause was clear and unambiguous and protected them from liability. Lord Wilberforce stated that “the question whether an exceptions clause was applicable where there was a fundamental breach of contract was one of the true construction of the contract”⁴⁷⁷.

The cases discussed above relate to the general law of contract and not necessarily to shipping cases. The section which follows include a brief examination of shipping cases which have sought to apply the concept of the fundamental breach to contracts for the carriage of goods by sea on the basis of using the rule against unjustified deviation as a fundamental term of the contract of affriegment.

In *Astrazeneca UK Ltd v Albemarle International Corp & Anor*⁴⁷⁸ Lord Flaux commented on Lord Wilberforce statement in the Photo Production case that the deviation cases were to be treated as a body of authority sui generis with special rules. In delivering his judgement, Lord

475 *Johnson v Agnew* [1980] A.C. 367, 392, 393; See also *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

476 *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

477 *Suisse Atlantique Societe d’Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361.

478 [2011] EWHC 1574 (Comm) [2011] 2 C.L.C. 252.

Flaux cited from the dicta of Lloyd LJ in *The Antares* case where the latter judge was of the opinion that “the cargo owners can derive no benefit from the supposed principle stated in the deviation cases or, indeed, the warehouse cases. The duty of the court is merely to construe the contract which the parties have made”.⁴⁷⁹ However, in the Court of Appeal both Lloyd LJ in *The Antares*⁴⁸⁰ and Longmore LJ in *Daewoo Heavy Industries Ltd v Klipriver Shipping Ltd (The Kapitan Petko Voivoda)*⁴⁸¹ have doubted whether deviation cases should continue to be so treated and whether they should not be subject to the general law of contract. In the latter case (*The Kapitan Petko Voivoda*), a case of unauthorized carriage on deck, the Court of Appeal overruled an earlier decision of Hirst J in *The Chanda*⁴⁸², which essentially applied the doctrine of fundamental breach (or something very similar to it) to unauthorized carriage on deck and where the defendants were not entitled to benefit from the exclusion clauses in the contract. The case facts of *The Chanda* were that the defendants contended that they were entitled to limit their liability under the Hague-Visby Rules to no more than DM 1250, but the court decided that the damage caused to the control cabin was a result of defendant’s decision to store the cargo on deck in a position where it was exposed to the elements rather than under the deck. This was a contributory cause of damage and therefore the ship owner was not entitled to rely on the package limitation when he was in breach of his obligation to stow packages under the deck.

It should be noted that in a number of shipping cases the authorised storage of cargo in a manner not specified by the contract terms has generally been assimilated by the courts to unjustified deviation from the contract terms.

The case of (*The Kapitan Petko Voivoda*)⁴⁸³ showed that there was no reason for regarding the unauthorized loading of deck cargo as a special case. The innocent party submitted that the duty to carry cargo under deck had the same importance as the duty not to deviate from the contracted voyage, but it was a matter of some controversy whether the deviation cases were still good law. The counsel for the plaintiffs (Hamblen QC) had argued the importance of the carrier’s duty to carry goods under deck, categorizing the breach of the obligation as a very serious matter. He also submitted that the obligation to carry cargo under deck had the same weight as the obligation not to deviate from the proper course, hence a breach of this

479 *The Antares* [1987] 1 Lloyds Rep 424, at 430.

480 [1987] 1 LI Rep 424.

481 [2003] 1 CLC 1092.

482 *Wibau Maschinefabrik Hartman SA v Mackinnon Mackenzie (The Chanda)* Chanda [1989] 2 Lloyd’s Rep 494.

483 [2003] EWCA Civ 451.

obligation regarding stowage could be considered as a ‘quasi deviation’, and that as a matter of construction, it could not have been the intention of the parties to apply the Hague Rules limitation to such a severe breach.⁴⁸⁴

However, Longmore LJ was of the opinion that the seriousness of the breach is no longer a self-sufficient standard for determining whether exception or limitation clauses apply to particular breaches such as carrying goods on deck. He stated that the doctrine of fundamental breach or breach of a fundamental term was discredited in *Suisse Atlantique* and “given its formal burial in *Photo Production Ltd v Securicor Transport Ltd* which decided that the question whether particular clauses applied to excuse or limit liability was solely a matter of construction of the contract”.⁴⁸⁵ He also added that “it has not yet been conclusively decided whether deviation cases must be regarded as dead and buried along with the doctrine of fundamental breach”.⁴⁸⁶

It was therefore held The Hague Rules were an international convention to be interpreted on broad principles of general acceptance. The deviation and warehouse cases did not fall within that category. A matter of interpretation the words “in any event” in article. IV, r. 5 meant what they said⁴⁸⁷. Therefore the limitation provided by art. IV, r. 5⁴⁸⁸ continued to apply to the advantage of the ship owners, despite their breach of contract.⁴⁸⁹

In the case of *Gibaud v Great Eastern Railway Co*⁴⁹⁰, Scrutton LJ., after citing *Lilley v Doubleday*⁴⁹¹, stated as follows: “if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way which you had contracted to do it”.⁴⁹²

484 *Ibid.* at 451.

485 [2003] ECWA Civ at 456.

486 *Ibid.*

487 See *The Happy Ranger* [2003] 1 CLC 122; See also *The Antares* [1987] 1 LI Rep 424.

488 Article IV r, 5 Hague-Visby Rules “Unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading, neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the goods in an amount exceeding the equivalent of 666.67 units of account per package or unit or units of account per kilo of gross weight of the goods lost or damaged, whichever is the higher.”

489 [2003] ECWA Civ at 451.

490 [1921] 2 KB 426.

491 (1881) 7 QBD 510.

492 *Ibid.* at 435.

Debattista suggests that the old deviation authorities are now suspect particularly after the court decision in the *Antares*⁴⁹³. The facts of *The Antares*⁴⁹⁴ were that a cargo was carried on deck by a ship and was damaged during the voyage. The bill of lading was subject to the Hague-Visby Rules and provided for arbitration in London. The arbitrators decided found that the owners of the vessel had committed a fundamental breach of contract in shipping the goods on deck and were not entitled to the benefit of the Hague-Visby Rules limitation period. However, the Court of Appeal had held that the loading of cargo on deck did not amount to a fundamental breach of contract and therefore did not suspend the operation of the Hague-Visby Rules regarding time bar⁴⁹⁵. The case of *Antares* and subsequently that of *State Trading Corporation of India Ltd v M Golodetz Ltd*⁴⁹⁶ has showed that deviation cases should be assimilated into the ordinary law of contract. Lloyd LJ said in *The Antares*: “Whatever may be the position with regard to deviation clauses strictly so called (I would myself favour the view that they should now be assimilated into the ordinary law of contract), I can see no reason for regarding the unauthorized loading of deck cargo as a special case.”⁴⁹⁷

In concluding this section it may be argued that the judicial approach to determining the consequences of deviation on the contract of carriage is now assimilated to that of general contract law, in that the innocent party is given a right of election to either terminate the contract of carriage vis-a-vis any outstanding obligations which are still due after the act of deviation. Alternatively, they can waive the right to repudiate the contract and thus affirm its continuing validity by claiming damages for any loss suffered as a result of the unjustified deviation. It can also be observed from a review of the case law (above) that the majority of cases relate to the consequences of deviation on the policy of marine insurance rather than the contract of carriage itself. It can therefore be seen that the consequences of unjustified deviation can be far reaching, affecting not just the relationship between the parties to the contract of carriage of goods by sea but also auxiliary relationships such that that between the insured party and the underwriter.

4.7 The doctrine of deviation within different jurisdictions

This part of the thesis will critically analyse the way deviation is perceived and interpreted in different jurisdictions, and examine the application of the principle of causation from a multi-

493 Debattista C,(1989) “Fundamental breach and deviation in the carriage of goods by sea”, *Journal of Business Law*, J.B.L., 22-36.

494 [1987] 1 LI Rep 424.

495 *Kenya Railways v Antares Co Pte Ltd (The Antares)* [1987] 1 Lloyd’s Rep 424.

496 [1989] 2 Lloyd’s Rep 277.

497 [1987] 1 LI Rep 424 at 430.

jurisdictional context. For example under English law and American law some of the cases reviewed as part of this research serve to highlight these differences - with American law adopting and promoting a much wider scope for deviation within the context of carriage of goods by sea, as can be seen from the case of *Jones v Flying Clipper*⁴⁹⁸. Under the US law, deviation includes any action leading to a significant new risk not contemplated by the contracting parties for which the cargo owner might have chosen to avoid or to plan for had it been anticipated. Therefore, the stowage of cargo on deck is considered under US law to be a deviation 'quasi deviation' when stowage below deck is called for by custom or is the agreed method of stowage under the contract, whereas under English law deviation is limited to a geographical criterion which involves departure from the contracted route⁴⁹⁹.

The comparative analysis in this section will focus on the judicial practice under English and American jurisdiction. The United States is a signatory to The Hague Rules of 1924 and the UK which also used to be a signatory has since ratified the Hague-Visby Rules (1968) which had been incorporated to the Carriage of Goods by Sea Act 1972 (as amended). The Carriage of Goods by Sea Act stipulates that a causal relationship between unreasonable deviation and the damage to the cargo is now required.⁵⁰⁰

Under the classical doctrine, any unreasonable deviation displaced the contract of carriage, and thus the carrier will be liable whether or not there was a causal relationship between the deviation and damage⁵⁰¹. But in the American case of *Hellenic Lines Ltd v United States*⁵⁰², Friendly J, was of the opinion that the US Carriage of Goods by Sea Act 1936 changed the classical doctrine and he indicated that the absence of a causal relationship between the deviation and damage might be raised by the carrier as a defence⁵⁰³. In *The Banglar Kakoli*⁵⁰⁴, Weinfeld J, also adopted the idea that there must be a causal relationship between the deviation and the loss which occurred, and that the carrier could use the absence of such relationship as a defence in the case of an unreasonable deviation governed by the Carriage of Goods by Sea Act⁵⁰⁵. In this case the court noted as follow: "decisions under the common law

498 (1954) 116 Fed Supp 386; See *The Silver Cypress* [1944] AMC 895.

499 *Jones v Flying Clipper* 116 F Supp 386 (S.D.N.Y 1953); See also *James Morrison & Co., Limited v Shaw, Savill, and Albion Company, Limited* [1916] 2 K.B. 783.

500 See *Hellenic Lines Ltd v United States* 512 F.2d 1196, 1975 AMC 697 (2d Cir. 1975); Julian Cooke, (2014) *Voyage Charters*, 4th edition, Informa Law from Routledge, New York, p. 301.

501 *The Willdomino*, 272 U.S 718 (1927).

502 512 F.2d 1196, 1975 AMC 697 (2d Cir. 1975).

503 *Ibid.* at 715, 716.

504 588 F. Supp. 1134 (S.D.N.Y. 1984).

505 *Ibid.* at 1146-1147.

suggest, although they do not compel, the conclusion that some causal relation to the deviation is required⁵⁰⁶.

Another example in the case of *Tai Shan*⁵⁰⁷, where the court held that the cargo claimant has the burden of proving that there was a causal relation between the fire and deviation, in order to deprive the carrier from relying on the limitation of liability clauses which are stipulated under the Fire Statute⁵⁰⁸. [It is worth noting that the law in this area is now governed by the US Carriage of Goods by Sea Act 1999 and that charterparties fall outside the ambit of the new Act.](#)

If the deviation rule under COGSA is applicable instead of the common law doctrine, then the causation question becomes the usual one: did the deviation itself cause the damage? A further question arises as to whether the UK and the US approaches to causation when applying the law on deviation are consistent in terms of both the principle and judicial practice.

Under American and English common law, an unreasonable deviation is a gross breach of contract of carriage resulting in the carrier's losing the protection of any exclusion clauses in the bill of lading and becoming fully liable for any damage to the cargo. Deviation under English law is limited to geographic departure from the contractually route (proper course)⁵⁰⁹. Whereas American courts have adopted and promoted a much wider scope for deviation within the context of carriage of goods by sea and expanded the concept of unreasonable deviation to include other breaches of the contract of carriage under the concept known as 'quasi deviation'. Under the United State law quasi deviation included reshipment⁵¹⁰, shipping the goods on a different ship⁵¹¹, discharging cargo at the wrong port⁵¹², and over carriage⁵¹³. However, the most common form of quasi deviation is carrying cargo on deck contrary to the terms of the contract of carriage⁵¹⁴. Such conduct has been held to be similar to a departure from the proper course and to constitute a deviation because the cargo have

506 Ibid. at 1147.

507 1953 AMC 887. 111 F. Supp. 638 (S.D.N.Y. 1953). Affid 218 F.2d 822 (2d Cir. 1955).

508 Ibid. at 897.

509 See *Leduc & Co. v. Ward* (1888) 20 Q.B.D. 475; *United States Shipping Board v Bunge Y Born* [1925] Vol 23 L.I.L.Rep 257; *James Morrison & Co., Limited v Shaw, Savill, and Albion Company, Limited* [1916] 2 K.B. 783; See also *Balian and Sons v Joly Victoria and Co Ltd* (1890) 6 T.L.R 345.

510 *Calderon v Atlas Steamship Co* 64 F 874, 877-78 (S.D.N.Y 1894) affd, 69 F 574 (2d Cir 1895) 170 U.S 272 (1898).

511 *Smith Kirkpatrick & Co v Colombian S.S Co* 88 F. 2d 392, 394-95 (5th Cir 1937).

512 See *Dow Chem Pac Ltd v Rascator Mar S.A.*, 782 F. 2d 329, 338-39 (2d Cir 1986).

513 *Niles Bement Pond Co v Dampkiesaktieselskabet Balto*, 282 F. 235, 237 (2d Cir 1922) "carrying the goods beyond their destination is an over carriage and constitutes a deviation".

514 See *St. Johns N.F Shipping Corp v S.A Companhia Geral Commercial Do Rio De Janeiro*, 263 U.S 119 (1923).

been subjected to greater risk not contemplated by the parties under the terms of the contract of carriage, nor by the underwriters under the policy of marine insurance.

U.S courts tend to consider deck carriage as a non-geographic type of deviation the unlawful consequences of which may deprive the carrier from the benefit or protection of the package limitation. However this approach has not been adopted by the English courts as they have not considered “on deck carriage” as a deviation. Therefore according to English courts carrying cargo on deck does not constitute a deviation and thus a carrier will still be able to take advantage of the protection offered by exclusion clauses and any limitation of liability provisions under the contract.

However, the English courts (before the overruling of *The Chanda*) tended to treat unauthorised stowage as a serious matter. The carrier could not rely on the exclusion clauses or limitation of liability at that time when the cargo is carried on deck. In the case of *Royal Exchange Shipping Co Ltd v WJ Dixon & Co*, a carrier who had stowed cargo on deck was held to be unable to rely on an exception of jettison⁵¹⁵. *Scrutton on Charterparties and Bills of Lading* stated that “the ship owner will only be authorised to stow goods on deck by custom or by express agreement with the shipper of the particular goods so to stow them. The effect of deck stowage not so authorised will be to set aside the exceptions of the charter or bill of lading and to render the ship owner liable under his contract of carriage for damage happening to such goods”⁵¹⁶. In *J Evans & Son (Portsmouth) Ltd v Andrea Merzario Ltd*, the Court of Appeal held that the carrier could not rely on his exception clauses including limitation of liability as a result of an express oral undertaking that the goods would be carried under deck⁵¹⁷.

In *The Chanda*⁵¹⁸ where cargo which was stowed on deck became a total loss, the court held that the limitations in *The Hague Rules* did not apply because it could hardly have been intended that the Rules would protect a carrier who wrongfully exposed the cargo to such risk of damage. But *The Chanda* decision failed to address the words "in any event" that appear in Article IV Rule 5. The Court of Appeal recently considered this expression in the case of *The Happy Ranger Parsons Corporation and others v CV Scheepvaartonderneming*⁵¹⁹. In this

515 (1886) 12 App Cas 11; See also *Lilley v Doubleday* (1881) 7 QBD 510, [1881-5] All ER Rep 406.

516 *Scrutton T*, (1974) on *Charterparties and Bills of Lading* 18th ed, p 163-164.

517 [1976] 2 All ER 930 [1976] 1 WLR 1078.

518 [1989] 2 Lloyd's Rep 484.

519 CA, 17 May 2002.

case the court of decided that the Hague-Visby Rules apply to the contract of carriage but the appellants' claim is subject to the limitation of liability imposed by article IV rule 5. Lord Tuckey stressed that the words "in any event" mean what they say and are unlimited in scope and there is no reason for giving them anything other than their natural meaning.

In *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another*⁵²⁰, the contract incorporated the Hague Rules and provided that carriage would be under deck only. Article IV Rule 5 states that "neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100 per package or unit". In addition neither the ship nor the carrier will be responsible for loss or damage resulting from perils of the sea (Article IV Rule 2 (c)) or insufficiency of packing (Article IV Rule 2(n)). In this case the carrier stowed some of the excavators on deck and they were lost overboard in heavy sea. The cargo owners argued that a carrier by carrying cargo on deck breached the contract of carriage and could not rely on article IV rule 5 to limit liability for the loss of the cargo. However the Court of Appeal held that the defendants were not precluded by reason of the unauthorised deck carriage from relying on the limitation provisions of the Hague Rules and held that the limitation provision applied.

The court concluded in the case above that when Hague Visby Rules incorporated into a contract governed by English Law, the international convention had to be construed on broad precedents of general acceptance rather than being strictly controlled by national principles of antecedent date. That approach was very relevant to reliance on the peculiarly common law principle derived from the deviation cases. Although that the principle had been received into United States law it could not be described as being a broad principle of general acceptance. Article IV rule 4 of Hague Visby Rules itself abrogated the common law rule on deviation. Moreover the rule did not apply in France, Italy or the Netherlands where courts had decided that a carrier could rely on the article IV rule 5 to limit liability in deck cargo cases.⁵²¹ Lord Longmore in the *Kapitan Petko Voivoda* case was against what Lord Wilberforce called 'a body of authority sui generis with special rules', holding instead the view that the rules governing deviation were "a peculiar creature of the common law"⁵²².

520 [2003] EWCA Civ 451.

521 See *The Kapitan Petko Voivoda* [2003] 1 All ER (Comm) 801.

522 *Ibid.* at 810.

Before the enactment of COGSA the courts in the U.S had the same opinion that an unreasonable deviation prevented the carrier from relying on any exclusion or protective clauses in the contract of carriage. But after the passage of COGSA United States courts were split over whether deviation ousts the exclusion clauses or the package limitation contained therein. Some of the U.S circuits have considered the unauthorised stowage on deck as a deviation and for that reason they held that article IV rule 5 was inapplicable if the deviation is unreasonable within the meaning of article IV rule 4⁵²³. However, the problem is that Carriage of Goods by Sea Act (which is incorporated into The Hague Rules) does not have a definition for the term “unreasonable deviation” and moreover it does not clarify the effect of such breach on the exclusion clauses and package limitation provided by the Rules.

The majority of the courts in U.S followed the traditional common law “pre-COGSA” and held the view that an unreasonable deviation ousts the contract of carriage including exclusion clauses and the protection of the package limitation in COGSA and The Hague Rules. The Second⁵²⁴, Fifth⁵²⁵ and Ninth⁵²⁶ Circuits have all held that unjustified deviation nullifies the contract of carriage and abrogates the Carriage of Goods by Sea Act package limitation.

Many American courts which deal with maritime cases cite English decisions as persuasive authority although they are not binding in the United States. A leading case which is regularly cited by United States’ courts which adopted the approach that deviation ousts the contract of carriage (including exclusion clauses and package limitation) is *Stage Line Ltd v Foscolo, Mango & Co (The Ixia)*⁵²⁷ where the vessel was out of route, and before she had returned to the usual route, she stranded on the Cornish coast. The House of Lords held that this was an unreasonable deviation which removed all the protections provided by the bill of lading before the enactment of the British Carriage of Goods by Sea Act. In addition, the immunity of the carrier under Article IV r 2 (c) from loss or damage arising from perils of the sea did not apply. However, this was a geographical deviation from the proper course where English common law still applies the rule strictly. The House of Lords could find no indication that the Act’s framers intended to amend the result. Lord Atkin stated: “I pause here to say that I

523 Article IV rule 4 Hague Visby Rules:” Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.

524 *Iligan Integrated Steel Mills Inc. v SS John Weyerhaeuser* 507 F. 2d 68 (2nd CIR 1974).

525 *Searoad Shipping Co. v E.L du Pont de Nemours & Co.* 361 F. 2d 833 (5th CIR 1966).

526 *Nemeth v General Steamship Corp.* 694 F. 2d 609 (9th CIR 1982).

527 [1932] A.C. 328.

find no substance in the contention faintly made by the defendants that an unauthorized deviation would not displace the statutory exceptions contained in the Carriage of Goods by Sea Act. I am satisfied that the general principles of English law are still applicable to the Carriage of Goods by Sea except as modified by the Act: and I can find nothing in the Act which makes its statutory exceptions apply to a voyage which is not the voyage the subject of the contract of carriage of goods by sea to which the Act applies”⁵²⁸.

The first case in the United States concerning the effect of non-geographical deviation on the package limitation is *Jones v The Flying Clipper*⁵²⁹, where a carrier carried the goods on the deck of the ship rather than to carry them under deck as stated in the bill of lading. The Southern District of New York decided that the carrier’s on deck stowage was an unreasonable deviation and determined that such deviation nullifies the contract of carriage including the Carriage of Goods by Sea Act’s package limitation. The United States Supreme Court in *St Johns NF Shipping Corp v SA Companhia General Commercial Do Rio De Janeiro*⁵³⁰ held that a carrier who carries goods on deck becomes liable as for a deviation and will not be able to take advantage of the package limitation liability and exclusion clauses in the contract of carriage.

On the other hand it could be argued that the approach taken by the Seventh Circuit in the United States is more convincing than the majority position as they interpreted the COGSA properly and have not ignored the COGSA’s legislative history and the international framers’ intent⁵³¹. The essential difference between these approaches is the construction that each court gave to the words “in any event” in article IV 4(5). The Seventh Circuit construed “in any event” literally and thus a carrier or a ship owner should not be liable “in any event” even when there is a deviation. However, the majority of the courts have followed *Flying Clipper* and *Stage Line* were unwilling to give the words “in any event” any significance and held that these words do not change the pre-COGSA and that deviation ousts the contract of carriage including exception clauses and limitation of liability contained in the bill of lading.

Apart from the Seventh Circuit all courts in the United States adopted the *Flying Clipper* approach and decided that Carriage of Goods by Sea Act did not change prior domestic law.

528 *Ibid.* at 335.

529 116 F. Supp 386 (S.D.N.Y 1953).

530 263 US 119 (1923).

531 Peacock H, (1990) “Deviation and the Package Limitation in the Hague Rules and the Carriage of Goods by Sea Act: An Alternative Approach to the Interpretation of International Uniform Acts”, *Texas Law Review*, 68*Tex. L. Rev* 977.

For example the Second Circuit in *Encyclopaedia Britannica Inc v SS Hong Kong Producer*⁵³² decided that a carrier would not be able to get benefit from the package limitation due to the unreasonable deviation. The Third and Fourth Circuits indicated that unreasonable deviation ousts the contract of carriage including the package limitation⁵³³. The Fifth Circuit followed the same approach on a number of cases and held that unreasonable deviation nullifies the contract of carriage and ousts the package limitation as well. In *Searoad Shipping Co v E.I du Pont de Nemours & Co*⁵³⁴ the ship owner failed to stowage goods under deck and he carried them on deck instead. The cargo was damaged and lost and the United States Court of Appeal (Fifth Circuit) held that this stowage amounted to a deviation and thus the ship owner could not rely on the exclusion clauses and lost his right to limit his liability. The Ninth Circuit also followed this approach and held that unreasonable deviation ousts the contract of carriage and deprives the defendant of any limitation of liability including Carriage of Goods by Sea Act's package limitation⁵³⁵. Moreover in *C.A La Seguridad v Delta S.S Lines*⁵³⁶ the Eleventh Circuit has indicated in dicta that an unreasonable deviation ousts the contract of carriage and the package limitation.

The minority approach in the United States adopted the Seventh Circuit's position and held that deviation does not abrogate Carriage of Goods by Sea Act's package limitation. Thus a carrier will be able to rely on the protections contained in COGSA including the package limitation. Their argument is based on the fact that the language of section 4(5) clearly suggests that the carrier's liability is limited for each package "in any event" including unreasonable deviation. They construed the words "in any event" in article 4(5) literally and held that package limitation and protection provided by COGSA will prevail even in the event of unreasonable deviation. While most of the United States Circuits have held that the phrase "in any event" was not meant to include unreasonable deviation because the framers of the Act had no intention of changing the pre-COGSA in respect of the effect of unreasonable deviation that it ousts the contract of carriage. But the peculiar thing is how these courts decided that the international framers had no intention of changing the domestic

532 422 F 2d 7 (2d Cir 1969) cert. denied, 397 U.S 964 (1970).

533 For the Third Circuit decision see *De Laval Turbine Inc v West India Indus* 502 F 2d 259 270 (3d Cir 1974); for the Fourth Circuit see *Aetna Insurance Co v M/V Lash Italia* 585 F 2d 190 (4th Cir 1988).

534 361 F 2d 833 (5th Cir 1966); *Spartus Corp v S/S Yafo* 590 F 2d 1310 (5th Cir 1979); See *C.A Articulos Nacionales de Goma Gomaven v M/V Aragua*, 756 F 2d 11156, 1158-59 (5th Cir 1985); See also *Vistar S.A v M/V Sea Land Express*, 792 F 2d 469, 472 (5th Cir 1986).

535 *Nemeth v General Steamship Corp* 694 F 2d 609 (9th Cir 1982) where the court held that Carriage of Goods by Sea Act did not alter pre-COGSA law.

536 721 F 2d 322, 324 (11th Cir 1983).

law regarding the effect of deviation where there is no case which discusses the intention of the international drafters as to how the phrase ‘in any event’ applies to deviation cases.

The leading American case which holds that an unreasonable deviation does not cancel the package limitation is the case of *Atlantic Mutual Insurance Co v Poseidon Schiffahrt*⁵³⁷. In this case the carrier had unreasonably delayed delivery of a cargo by a year and a half after the contemplated delivery date at Antwerp. After discussing the language of section 4(5)⁵³⁸ of U.S Carriage of Goods by Sea Act and the decision in the *Flying Clipper* case, the Seventh Circuit court held that an unreasonable deviation does not oust the Carriage of Goods by Sea Act package limitation.

The District Court for the Southern District of Florida followed the Seventh Circuit’s approach and held that deviation does not void the package limitation. This was in the case of *Nassau Glass Co v Noel Roberts Ltd*⁵³⁹ in which a carrier stowed the cargo on deck and the plaintiff claimed for the resulting damage caused to the cargo. The court found that in *Jones v. Flying Clipper* the District Court had ruled that on deck storage without notation on the bill of lading was a material deviation which ousted the limitation of liability. A contrary conclusion was reached in *Atlantic Mutual*⁵⁴⁰. It appeared to the Court in the *Nassau Glass* case that the reasoning of *Atlantic Mutual* is the more persuasive. In the court’s view, the statute appears obvious that liability is limited to \$500.00 in all cases in which the bill of lading is silent as to the value of the cargo and this applies "in any event" and to "any loss or damage.

Also a Californian Court of Appeal adopted the Seventh Circuit approach and held that deviation does not invalid the package limitation⁵⁴¹. But, in *Francosteel Corp v N.V Nederlandsch Amerikaansche, Stoomvaart Maatschappij*⁵⁴² the Californian court followed *Flying Clipper* and described the Seventh Circuit’s standpoint as a sand castle in danger of engulfment from a rising tide of contrary opinion. The fact was that a cargo was laden on deck contrary to the requirements of the clean bill of lading issued, and by reason thereof the bill of lading and all its clauses were wiped out, and the ship cannot claim the benefits of any

537 313 F2d 872 (7th Cir 1963), cert denied, 375 U.S 819 (1963).

538 "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding \$500 per package lawful money of the United States unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. .".

539 249 F Supp 166, 117 (S.D Fla 1965).

540 313 F2d 872 (7th Cir 1963), cert denied, 375 U.S 819 (1963).

541 See *Varian Assocs v Companie Generale Transatlantique*, 85 Cal App 3d 369, 376, 149 Cal Rptr 534, 539 (1978).

542 249 Cal App 2d 880, 900-01, 57 Cal Rptr 867, 879.

limitations therein contained. To stow the cargo in such a manner was a quasi deviation which changed the character of the voyage so essentially that the ship owner who has so deviated cannot claim the benefits of the terms of the bill of lading. It therefore ought to vitiate and nullify the contract of carriage. The same rule applies in English law but only to geographical deviation cases⁵⁴³. However, the California court followed the holding of the Seventh Circuit and construed the terms of the statute literally without considering the pre-domestic law and held that deviation does not cancel the package limitation.

It is submitted that there is a lack of consistency and international uniformity regarding jurisdictional approaches to the question concerning the legal consequences of unlawful deviation. For instance the French approach holds that the package limitation would apply in all situations except where there has been wilful misconduct by the carrier or fraud⁵⁴⁴. The Belgian approach matches that of the French⁵⁴⁵. Furthermore, German and Dutch courts have examined the consequences of the breach of deviation and they both held that the breach does not nullify the package limitation⁵⁴⁶. Different interpretations of international uniform acts lead to a lack of uniformity between countries which is against the goal of the intent of the international harmonization. This in turn can lead to legal uncertainty which can be a problem in this area of the law.

To summarise: English law considered deviation as a geographic departure from the contracted route. The effect of deviation according to English law is that a carrier would not be able to rely on exclusion clauses in the contract of carriage and will lose all his protections. While American courts have extended the deviation concept to include other material contract breaches. These expansions are sometimes referred to as "quasi-deviations". The most common application involves unauthorized deck stowage of cargo. Delays in carrying the goods, failure to deliver at destination over-carriage of the goods to another port, and return of the goods to the original load port have also been held to be quasi-deviations according to the United States law. Any of these breaches amount to an unreasonable deviation and therefore invalidate bills of lading and strip carriers of their statutory and contract defences, such as the one year suit time or the \$500 package limitation⁵⁴⁷. However,

543 See *Kenya Railways v Antares Co Pte Ltd (The Antares)* [1987] 1 Lloyd's Rep 424 "when the Court of Appeal had held that the loading of cargo on deck did not amount to a fundamental breach of contract and therefore did not suspend the operation of the Hague- Visby Rules time bar".

544 See 1954 DMF 584; See also 1940 DMF 331.

545 7 EUROPEAN TRANSP. LAW 512, 519, 521 (1972).

546 For German case see *E SELVIG* supra at 133- 34; For the Dutch case see id at 133 n 107.

547 Peter D Clark, "Deviation Uncertainties Result in Unpredictable Lawsuits", Clark, Atcheson & Reiser Maritime and Admiralty Law 1989 Vol 1 available online at: <http://www.navlaw.com/articles/v1/deviation-uncertainties-result-in-unpredictable-lawsuits.htm>.

the minority approach in the United States held that deviation does not oust the contract of carriage and does not invalidate the protections contained in the bill of lading and contract defences.

According to Margret M Lennon the doctrine of deviation should not just be limited to geographical deviation and unauthorised on deck stowage of cargo, but it should also cover other gross departures from the contemplated voyage that cause damage to or loss of the cargo. Nowadays with respect to containerized cargo, a different rule has evolved to the effect that even if on deck carriage of a container is a deviation, it does not violate COGSA because it is not unreasonable, given that the container itself protects cargo stowed on deck, and accordingly, there is no increased risk of damage⁵⁴⁸.

With the popularity of containerization in the modern age of sea transport, courts have held that the on-deck storage of containers on a vessel specifically designed and equipped for such carriage, though constituting a deviation, is reasonable and does not preclude Carriage of Goods by Sea Act's limitation of liability. In *Du Pont de Nemours International S.A. v. S.S. Mormacvega*⁵⁴⁹ The Second Circuit Court of Appeals recognized that, despite the issuance of a clean bill of lading, and a request by the shipper to have the containers stowed below deck, the on-deck stowage method employed by the carrier was a safe method of carriage because, in part, the ship was designed specifically for carrying cargo on deck. The Second Circuit also held in *English Elec Valve Co v M/V Hoegh Mallard* that stowage cargo of an open top container on the deck of a cargo vessel was not a deviation, but if it had been, it would have been reasonable due to industry custom and the implicit consent of the shipper⁵⁵⁰.

In *American Home Assurance Co v M/V Tabuk*⁵⁵¹ a suit arises from the shipment by Raytheon of one hundred TOW 2A Guided Missiles to Kuwait through United Arab Shipping Co. (United Arab), operator of a cargo ship known as the M.V. TABUK. The missiles were swept overboard in a storm. The District Court held that on-deck stowage of these missiles was a reasonable deviation from the bill of lading, and that the defendants therefore could avail themselves of the package-limitation defence provided for in the Carriage of Goods by Sea Act.

548 Lennon M, (2002) "Deviation Then and Now When COGSA's per Package Limitation Is Lost" *St. John's Law Review*, Issue 2 Vol 76 437- 456.

549 No 68 CIV 3102, 367 F Supp 793 (1972).

550 814 F 2d 84 89 (2d Cir 1987); See also *Ins Co of N Am v Blue Star (N. Am) Ltd* 1997 AMC 2434, 2452 (S.D.N.Y 1997).

551 170 F. Supp 2d 431, 2002 AMC 184 (S.D.N.Y 2001) aff'd 45 Fed. Appx 12 (2d Cir 2002).

The Ninth Circuit, in 1998, also followed the Second Circuit's holding in *Du Pont de Nemours International S.A. v. S.S Mormacvega in Konica Business Machines v Sea land Consumer*⁵⁵² where the court found that the containership was specifically designed with greater carrying capacity above-deck than below-deck. The court determined that the on deck stowage of containers on containerships was a well-established, worldwide custom of the trade in ocean transportation. Therefore, the court held that the clean bill of lading also applied to carrying cargo on-deck. The court explained that since the containers on-deck aboard the containership were not necessarily subject to greater risks than those stowed under deck, the deviation was reasonable and held for the carrier.

However, the Second Circuit in the United States limited the doctrine of deviation to cases involving geographic deviation and unauthorised on deck stowage which known as “quasi deviation”. And the court indicated that the doctrine of deviation should not be extended beyond that⁵⁵³.

In general there must be a causal relationship between deviation and the loss. Thus, lack of causation seems to be treated as a defence which must be sustained by the carrier. For example, if a shipper contracts with a carrier to deliver meat from New Zealand to the England. The shipper does not declare the value of the cargo in the bill of loading, the cargo being worth several thousand dollars. In the first scenario the carrier fails to put the meat in the freezer. The ship finally arrives in the UK after going off course and the cargo is a total loss. Such negligence is a proximate cause of the damage and is a breach of section 3(2) of COGSA which requires due care of cargo. Although it is very obvious that the carrier's conduct causes the damage and is a breach of section 3(2) he will be able to benefit from the package limitation of liability under Section 4(5) of the COGSA and he is liable to a maximum of 666.67 units of account per package, etc.

In the second scenario, the carrier leaves New Zealand with the refrigeration in proper working order and before going to the UK the captain decides to call at Le Havre in France to discharge some cargo. He arrives in the UK on time. But 24 hours before the vessel arrives in the UK a crew member accidentally turns off the freezer and the meat is damaged. In this scenario the cause of damage is the negligence of the worker as well a breach of section 3(2)

552 47 F 3rd 314, 1995 A.M.C 1065.

553 See C.A Articulos Nacionales de Goma Gomaven v M/V Aragua 756 F 2d 1156, 1986 AMC 2087 (5th Cir 1985) “the court held that misdelivery of goods could not constitute an unreasonable deviation”.

which requires due care of cargo. However, the deviation which preceded the negligent act of crew member would already have ousted the contract of carriage and the package limitation. Therefore the carrier cannot rely on the package limitation of liability contained in COGSA (unlike in the first scenario above).

The terms “effective cause”, “proximate cause” or “dominant cause” are often used to classify the operative cause of damage or loss to cargo. The classification is used to distinguish one event as the cause of the damage or loss from a number of other events that are part of the circumstances in which the damage occurred. In 1947 (*Karlshamns Oljefabriker v Monarch Steamship Co*)⁵⁵⁴ Lord Wright adopted the classification of “dominant cause” and therefore chose unseaworthiness as the cause of the loss. He considered that unseaworthiness caused the admiralty order diverting the vessel. The facts of the case were that the ship owner’s vessel contracted to carry a cargo from Japan to Sweden. The charterparty contained a clause providing that anything done in compliance with the orders of the British government should not be deemed a deviation. The vessel which should have arrived in Sweden before the outbreak of war was at that date still at sea owing to her unseaworthiness where the charterparty warranted the seaworthiness of the ship. The British government put an embargo upon her voyage to Sweden, so she proceeded under orders to Glasgow where her cargo was transhipped by the owners to Swedish ships for carriage to the discharging port in Sweden. The cargo owners brought an action against the ship owners and the court decided that the consequent loss would not have occurred but for the unseaworthiness of the voyage. The court held further that the ship owners were even though the carriers were excused by the war deviation clause they had contributed to the loss and were nevertheless responsible for the non-delivery of the cargo. They were thus liable for the cost of transhipment and further carriage. The decision taken in this case shows that deviation was not the proximate cause of the loss and the unseaworthy state of the vessel caused the loss and therefore the carrier had the right to rely on the exception clauses and liberty clauses in the contract of carriage.

This approach was consistent with the decision had been taken by the Supreme Court in Canada in 1927 when the court held that though there had been an unreasonable deviation in the decision to send the cargo to Hamilton by road the exemption was not lost because the

⁵⁵⁴ (1947) SC 179.

loss due to the fire was not causally connected with the deviation; and held further that the defendants could rely on the general average contribution clause despite the deviation⁵⁵⁵.

A review of the cases on the question of causation shows that there is no general rule as to whether or not deviation takes precedence over other competing causes, with each case being assessed on its own merits.

How have English courts dealt with the question of quasi-deviation?

Non-geographical or quasi deviation concept was established in the United States of America where the majority of the courts treated quasi deviation (e.g. unauthorised carriage) as a serious matter and they came to a conclusion that other types of breaches committed by the ship owner could also amount to a deviation and therefore precluded him from relying on exception clauses and limitation of liabilities⁵⁵⁶.

The English courts take a different approach on this question by treating what would otherwise be called non-geographical deviation as a breach of the contract of carriage – i.e. breach of an express as opposed to an implied term in the form of quasi deviation. In the case of *Kenya Railways v Antares Co Pte Ltd “The Antares”*⁵⁵⁷, the claimants argued that the ship owner had been in breach of the contract by stowing goods on deck and was therefore not entitled to rely on the liability limitation in Art IV 5 (a) of the Carriage of Goods by Sea Act 1971. The court held that the ship owner was entitled to rely on the limitation of liability. Lloyd L.J stated as follow: “whatever may be the position with regard to deviation cases strictly so called, (I would myself favour the view that they should now be assimilated into the ordinary law of contract), I can see no reason for regarding the unauthorised loading of deck cargo as a special case”⁵⁵⁸.

Two years later, the decision in *The Chanda*⁵⁵⁹ differed from *The Antares* above. In *The Chanda* the package limitation in the Hague Rules was construed by reference to the ‘four corners’ rule so that the carrier could not rely on the limitation when the claim arise out of unauthorised stowage on deck.

555 *Drew Brown Ltd v Owners of the Orient Trader (The Orient Trader)* [1973] 2 Lloyd’s Rep. 174.

556 See *Encyclopaedia Britannica v Hong Kong Producer* [1969] 2 Lloyd’s Rep 536; Gaskell 6. 46 ff; See also *Jones v Flying Clipper* [1954] 1 AMC 259.

557 [1987] 1 Lloyd’s Rep 424.

558 *Kenya Railways v Antares Co Pte Ltd “The Antares”* [1987] 1 Lloyd’s Rep 424, p. 430.

559 [1989] 2 Lloyd’s Rep 494, QB.

In 2003 *The Chanda* was overruled by the case of *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The Kapitan Petko Voivoda)*⁵⁶⁰. In this case, a cargo of excavators to be carried from Korea to Turkey and the contract incorporated the Hague Rules and provided that carriage would be under deck only. Article IV 5 (a) of the Hague Rules provided that neither the carrier nor the ship would ‘in any event’ be or become liable for any loss or damage to or in connection with goods in an amount exceeding £100. Some of the excavators were stowed on deck and were lost overboard in heavy seas. The claimants brought an action against the carriers in respect of the loss and damage to the excavators, and they argued that the carriers were precluded by reason of the unauthorised deck carriage from relying upon the limitation provisions of the Hague Rules. The Court of Appeal held that carriage of cargo under deck, in breach of an express undertaking for under deck carriage, will not preclude a carrier from relying on the limitation of liability provisions in the Hague Rules. Longmore L.J opinion was that “the seriousness of the breach is no longer a self-suffice yardstick for determining whether exemption or limitation clauses apply to particular breaches”⁵⁶¹.

What these cases illustrate on the whole is that the concept of non-geographical or quasi deviation has not received judicial recognition in English courts, which continue to treat such instances as simple a breach of the contract of carriage.

4.8 Conclusion - A Preliminary Appraisal of the Doctrine of Deviation

In this summing up this chapter, there are three main conclusions which we may draw from the research. The first conclusion concerns the criteria used for determining what amounts to unjustified deviation, mainly the meaning of ‘voluntary’ and the question of ‘intent’ when used in the context of ascertaining whether a particular act of deviation was voluntary and unjustified. A review of the case law on this leads to the conclusion that there is still a great deal of uncertainty as evidenced by some of the conflicting authorities discussed in the first part of the chapter. It can therefore be submitted that there is a requirement for more clarity in this area of the law, in particular concerning the need for a precise definition of what is meant by ‘intent’ or intention to deviate with regard to voluntary deviation.

Secondly, there is still a great deal of uncertainty as whether unjustified deviation amounts to a ‘fundamental breach’ of the contract of carriage. From an English law point of view, there

⁵⁶⁰[2003] 2 Lloyd’s Rep 1.

⁵⁶¹ *Daewoo Heavy Industries Ltd and Another v Klipriver Shipping Ltd and Another (The Kapitan Petko Voivoda)* [2003] 2 Lloyd’s Rep 1, at p. 10.

is even the question as to whether there ever existed such a concept as the fundamental term/fundamental breach of contract as part of general contract law. The case law appears to be divided on this issue.⁵⁶² Despite the dictum in the *Suisse Atlantique* case which seemed to reject the existence of such a concept in English contract law, later cases including that of *Photo Production v Securicor* appear to suggest that deviation could be treated differently from other breaches of contract in view of the fact that it has special rules derived from its commercial and historical background. This leads to the question whether deviation really ought to be treated any differently not only from other breaches of contract, but from the other terms which are implied into contracts of carriage of goods by sea, such as for example, seaworthiness and due despatch. Is there something special about the character of a breach involving deviation which might lead to such a breach being considered as a repudiation of the contract of carriage? In other words, can deviation be considered to come under the category of a fundamental term?

It could be argued that unjustified deviation in voyage charters does have such a character in view of the fact that the subject matter of the contract is the agreed or stipulated route. But what about a time charter or consignment carriage in which the subject matter of the contract is not the agreed or stipulated route? Should there not be some degree of flexibility in the judicial approach to the interpretation and the application of the law on deviation? Is it time perhaps for deviation to be considered more of an intermediate or innominate term in view of the different situations and contexts to which the principle could be applied? Related to this question is that of whether or not the principle of deviation is still relevant to shipping law in the modern era. These are some of the questions which will be examined as part of the overall conclusion in Chapter 6 of the thesis.

Thirdly, a comparative analysis seems to suggest that there are jurisdictional differences in the way deviation is perceived and interpreted in different jurisdictions, for example under English law and American law. Some of the cases reviewed as part of this chapter serve to highlight these differences, with American law adopting and promoting a much wider scope for deviation within the context of the concept of quasi deviation as opposed to the English law position which is restricted to geographic deviation.⁵⁶³ As seen above, even within the US federal jurisdiction itself the various circuits seem to have adopted different positions

⁵⁶²*Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 and *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2.

⁵⁶³Cf. the US case *Jones v Flying Clipper* (1954) 116 Fed Supp 386; *The Silver Cypress* [1944] AMC 895 and the English case of *Leduc & Co v Ward & Others* (1888) 20 QBD 475.

which determining what amounts to unjustified deviation and its possible impact on the policy of marine insurance. In order to promote greater certainty there is a need for further harmonisation of the law across different jurisdictions both in terms of the substantive content and its judicial interpretation.

Over the years, commercial practice in the shipping industry has led to the prevalence of contractually mandated deviation in the form of liberty clauses inserted into contracts for the carriage of goods by sea, mainly charterparties. Liberty clauses are now seen as one of the most important exceptions to the implied obligation against deviation because such contractual provisions can be said to represent the will of the parties based on the doctrine of freedom of contract. In the next chapter the role and function of liberty clauses is examined within the context of the law on deviation. The discussion will also include a comparative aspect which examines the relationship between liberty clauses and exclusion clauses in general contract law, together with the approaches to judicial construction of both types of clauses.

CHAPTER FIVE

A CRITICAL ANALYSIS OF THE ROLE OF LIBERTY CLAUSES AND THEIR IMPACT ON THE DOCTRINE OF DEVIATION

5.1 Introduction:

In the preceding chapter, a critical examination of the doctrine of deviation was undertaken together with a comparative analysis of the judicial approach in US and English jurisdictions. The current chapter seeks to further develop the main themes of the research by examining the role of liberty clauses within the contract of carriage of goods by sea. The discussion in the chapter will go beyond contractual practice to also examine the various approaches to judicial interpretation of such clauses. The main aims of the chapter are as follows:

A brief examination of the doctrine of laissez faire which forms the foundation of the freedom of contract doctrine, and its influence on the development of shipping law.

A comparative analysis between exclusion clauses and liberty clauses together with the relationship between general contract law and shipping law, and the way in which judicial practice in both areas of law have influenced each other..

A functional analysis of the role and function of liberty clauses within the framework of the law governing the carriage of goods by sea.

The main objective of this chapter is to develop the second part of Dissertation Aim 3 which state as follows:

DA3: ... the role and function of liberty clauses within the framework of the law governing contracts of affreightment.

The chapter will furthermore seek to address Research Question 4 which states:

RQ4: Is the rule against unjustified deviation still relevant in the modern context of international carriage of goods by sea? In light of: The development of transport vessels, liberty clauses, different types of charterparties, and held cover clauses?

The main methodologies used in this chapter will be qualitative, predominantly the doctrinal, black letter law together with the comparative theme which examines the relationship between exclusion clauses in general contract law and the use of liberty clauses in shipping law.

5.2 A brief commentary of the doctrine of Laissez faire and freedom of contract, and its influence on the development of the shipping law:

Laissez faire⁵⁶⁴ is an economic doctrine which was developed during the Enlightenment. The main philosophy behind this idea is that the government should adopt a hands-off approach to business. In the early 1800's many business leaders embrace this idea. Adam Smith, a Scottish economist and moral philosopher, is credited with developing this idea as part of economic ideology in 1776 when he wrote his popular book (*The Wealth of Nations*)⁵⁶⁵. He promoted the idea that a free market, with unregulated exchange of goods and services would be beneficial to everyone, and that the market's invisible hand would lead to proper pricing. This economic philosophy played an important role in his economic policy recommendations. He therefore strongly opposed any government intervention into business affairs. Trade restrictions, minimum wage laws, and product regulation were all viewed as an unnecessary interference with market forces and therefore detrimental to a nation's economic health. Furthermore he supported the idea that competition remained contingent on the fact that it encouraged economic growth, and would benefit all members of society.

The concept of the “invisible hand” is one of the most important ideas in Adam Smith’s book. He claimed that this invisible hand would always guide the selfish acts of individuals to help the country, as he said “by working for own private gain, the businessman must produce as much as he can, and for the lowest price. In order to sell his goods he charges very little. This will help society as a whole, even though that was not his purpose. The invisible hand thus directs selfish acts for the good of the community”.⁵⁶⁶

Furthermore Smith claimed trust in the invisible hand and not in the government; he stated that every person is a much better judge of what is good for him than any government. When the government starts telling people what they should do with their money, they are telling

564 Laissez faire is French and literally means “let them do” “let it be” “let them do as they will” or “leave it alone”. The words “laissez fair” are an abbreviation of a phrase which originally read, “laissez faire passer le monde de lui meme” “don’t interfere; the world will take care of itself”. Adam Smith, a Scotchman who made the idea of laissez fair famous in his book “*The Wealth of Nations*”, argued that all restrictions on business should be removed.

565 Adam Smith, *The Wealth of Nations*, W. Strahan and T. Cadell, London 1777 “Five editions of *The Wealth of Nations* were published during Smith's lifetime: in 1776, 1778, 1784, 1786, and 1789”.

566 Ibid.

people how to mind their own business. This will create more problems than that which they tried to solve.

The laissez-faire policy of government non-intervention remained popular throughout the Victorian Era and still plays an important part in present-day economic policy. Capitalists, in particular, supported Smith's ideas and the laissez faire doctrine is still propagated in the modern area by the neo-liberal economic school of thought. Even though the laissez faire system has many economic advantages, there are also disadvantages – for example an unregulated labour market based on laissez faire can lead to the exploitation of workers by employers. In spite of this fact Smith firmly favoured anti-monopoly laws he was not an apologist for the capitalist group, as he warned once that a group of capitalists rarely gather together under one roof without the discussion turning towards collusion against the public.⁵⁶⁷

The influence of the laissez faire doctrine on English courts in the nineteenth century can be seen from judicial attitudes towards freedom of contract and the lack of judicial intervention in policing contracts. The courts seem to take a narrow view of the ‘good faith’ doctrine. Slade LJ, for example, was of the view that the law cannot police the fairness of every commercial contract by reference to moral principles⁵⁶⁸.

The impact of economic theories based on freedom of contract and the laissez faire doctrines has been felt in many economic sectors including shipping and the international carriage of goods by sea. An example of this is the liberty clause which gives the carrier the freedom to deviate from the proper course (i.e. agreed or recognised contractual route). This link between laissez faire and the development of the legal regime for carriage of goods by sea will be discussed in detail at a later stage in this chapter.

In terms of their origin, a link can be established between exclusion clauses and liberty clauses to the extent that it can be argued that both derive their existence from the laissez faire and freedom of contract doctrines. From a legal point of view, during the laissez faire era of the early nineteenth century, exclusion clauses were tolerated if not actually encouraged under the all-pervasive doctrine of freedom of contract. Exclusion clauses, together with liberty clauses, were thus developed during the golden age of the development

⁵⁶⁷ Peter Gillies, (2004), *Business Law*, 12th edition, The Federation Press, Sydney, p 139; Mayer N David, (2011), *Liberty of Contract: Rediscovering a Lost Constitutional Right*, Cato Institute, p 6.

⁵⁶⁸ Philips Electronique Grand Public SA v British Satellite Broadcasting Ltd [1995] EMLR 472, CA.

of the law of contract when laissez faire principles reigned, as did the notion of equality of bargaining power. Subsequently, however, the emphasis in the twentieth century shifted to the need to protect the consumer and the weakest party, based on the realization that equality of bargaining power was in fact a myth⁵⁶⁹.

The discussion will begin with a brief overview of the two main types of exemption clauses and judicial attitudes towards their use, before moving on to the question of liberty clauses.

5.3 Types of exclusion clauses and their functions:

Many contracts are made in, or incorporate, standard trading forms, (e.g. charterparties, bills of lading, policies of insurance; contracts of sale in the commodity markets)⁵⁷⁰. However, in commercial transactions, standard form contracts are a practical tool for saving time and allocating risk. Such contracts commonly include express provisions concerning the following matters: mechanism for dispute settlement (e.g. arbitration), choice of forum or jurisdictional clauses, choice of law, definitions, exclusion clauses, warranties, force majeure provisions, etc.

Certain types of contractual terms may be referred to as exclusion clauses or (exemption clauses and limitation clauses). Usually these clauses will be written, even in the case where the contract as a whole is not written. Over a period of time English courts have developed rules governing their interpretation.

Some exclusion clauses seek to deny the other party's rights as stated in the contract by exclude their entire liability in respect of a matter, for example a sign at a garage may attempt to exclude all liability for loss or damage to cars left for repairing, however caused.

An alternative approach to the complete exoneration of the defendant from a breach of contract claim may seek just to limit their liability (the so called limitation clause). For instance, package limitation provided in bills of lading attempt to equitably allocate the risk of loss between the carrier and the shipper⁵⁷¹. Nearly all sea carriage, anywhere in the world, is on the terms of either The Hague or Hague-Visby Rules, both of which allow carriers the benefit of a general limit on their potential liability. Each is drafted in the following terms: "Neither the carrier nor the ship shall in any event be or become liable for any loss or damage

569 Richards P, (2008) Law of Contract, 8th edition, Pearson Education Limited, London, p 165.

570 See *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 at 624, [1974] 1 WLR 1308 at 1316, HL, per Lord Diplock.

571 *Daewoo Heavy Industries Ltd and another v Klipriver Shipping Ltd and another, The Kapitan Petko Voivoda* [2003] 1 All ER (Comm) 801.

to or in connection with the goods in an amount exceeding ...”⁵⁷² However, the underlying principles governing both the exclusion clause and limitation clause construction are the same in each case⁵⁷³.

Under English law the courts seem to be more tolerant towards limitation of liability clauses than the exemption clauses which exclude the liability of the defendant completely. This approach is based on grounds of reasonableness of the clause and the contra proferentem rule of construction (i.e. clauses with a limited scope for the limitation or exclusion of liability are seen to be more reasonable than clauses with a very wide scope for exemption). It could be argued that the philosophical basis for this judicial approach is that of contractual risk allocation and sharing (i.e. the risk of damage, loss, negligence or breach of contract ought to be shared fairly evenly between the parties to the contract and not be allowed to fall exclusively on one party). It can thus be argued that the effect of this judicial approach has been to make significant inroads into the freedom of contract doctrine by limiting the unrestrained impact of laissez faire practice. Illustrative case law examples of this judicial approach include the following.

In *EE Caledonia Ltd v Orbit Valve Plc*⁵⁷⁴ the contract contained an indemnity clause which provided that in relation to their respective employees “each party hereto shall indemnify ... the other ... from and against any claim, demand, cause of action, loss, expense or liability ... arising by reason of [the] death of any employee ... of the indemnifying party, resulting from ... the performance of this contract”. The Court of Appeal held that the indemnity clause operated by way of reciprocal exceptions and indemnities and was to be viewed as an agreed distribution or allocation of risks. The CA also found that each party had contractually assumed the risk of his own negligence and could not seek to avoid the consequences of that assumption of risk by seeking to rely on a breach of statutory duty. The dictum of Lord Morton in *Canada Steamship Lines Ltd v Regem*⁵⁷⁵ considered this risk factor when the learned judge opined that “It is well settled that a clause of this nature is not to be construed as extending to protect the person in whose favour it is made from the consequences of the negligence of his own servants unless there is express language to that effect or unless the

572 Article IV (5) Brussels Protocol Amending the Hague Rules Relating to Bills of Lading 1968 (Hague-Visby Rules), The Hague-Visby Rules were given force of law in the UK by the Carriage of Goods by Sea Act 1971.

573 Gillies P, (1988) *Concise Contract Law*, The Federation Press, Sydney, p 95.

574 [1995] 1 All ER 174, [1994] 1 WLR 1515, CA.

575 [1952] 1 All ER 305.

clause can have no operation except as applied to such a case⁵⁷⁶. Furthermore, In *Alisa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*⁵⁷⁷, the House of Lords held that a limitation clause was not to be construed as rigidly and strictly as an exclusion clause since an agreed limitation of liability was more likely to accord with the true intention of the parties.

With respect to exclusion clauses, the case of *L'Estrange v F Graucob Ltd*⁵⁷⁸ involved an action for breach of contract for the sale of a vending machine. The buyer had signed and handed a contract to the seller which contained a clause in small print certain standard terms one of which was to the effect that any express or implied condition, statement, or warranty, statutory or otherwise not stated in the contract was to be excluded. The sellers thereupon signed and handed to the buyer the printed order confirmation assenting to the terms in the order form. The machine was delivered by the sellers to the buyer, who paid to the sellers an installment of the price. The machine did not work satisfactorily, and the buyer brought an action against the sellers claiming damages for breach of an implied warranty and that the machine was not fit for the purpose for which it was sold.

The sellers argued that the contract expressly provided for the exclusion of all implied warranties, and the buyer replied that at the time when she signed the order form she had not read it and knew nothing of its contents, and that the clause excluding warranties could not easily be read owing to the smallness of the print. There was no evidence of any misrepresentation by the sellers to the buyer as to the terms of the contract. It was held by the Divisional Court that as the buyer had signed the written contract, and had not been induced to do so by any misrepresentation, she therefore was bound by the clauses of the contract, and it was immaterial that she had not read it and did not know its contents; and thus the sellers were entitled to judgment.

It could be argued that the judgment in the case in effect promotes and protects the freedom of contract doctrine which itself is based on the *laissez faire* ideology. In other words, the seller was free to exclude or limit his duties and liabilities under the Sale of Goods Act 1893 as part of the freedom of contract doctrine. However, the Act of 1893 was amended and replaced by the Sale of Goods Act 1979 with a view to providing greater legal protection to consumers. The Supply of Goods (Implied Terms) Act 1973, which modified the statutory

⁵⁷⁶ *Ibid.* at 310.

⁵⁷⁷ [1983] 1 All ER 101, [1983] 1 WLR 964, HL.

⁵⁷⁸ [1934] 2 KB 394, DC.

implied terms, equally altered the position of the 1893 Act by abolishing clauses in consumer sale and consumer hire-purchase contracts purporting to exclude or restrict the terms implied under the 1893 Act, and by rendering exclusion of liability clauses unenforceable even in non-consumer transactions to the extent that reliance on them was not fair or reasonable. It could thus be argued that these legislative developments have clearly pushed back the boundaries of freedom of contract and the laissez faire approach to contracting. The possible impact of these developments on the legal framework for the carriage of goods at sea have equally been significant, in particular with reference to the judicial interpretation of exclusion clauses and liberty clauses contained in shipping contracts, as will be seen later on in this chapter.

Judicial recognition of the notion of freedom of contract is perhaps demonstrated by the fact that paternalistic interference has been left to Parliament⁵⁷⁹. In *Photo Production Ltd v. Securicor Transport Ltd*⁵⁸⁰ the then House of Lords reaffirmed their confidence in the freedom of commercial parties to make their own contracts, subject only to the provisions of relevant statutes. Moreover, in another case the House of Lords decided that a general principle of ‘unconscionability’ is not required in order to protect even consumers against unfair contracts⁵⁸¹. Thus, freedom of contract seems to have been re-established as the ideology of the common law. In *George Mitchell Ltd v. Finney Lock Seeds Ltd*, Lord Denning referred to freedom of contract as being an “idol”⁵⁸².

However, despite the opinion of Lord Denning (as stated above), in the case of *George Mitchell v Finney Lock Seeds Ltd*⁵⁸³ the House of Lords intervened in the contract and held that the clause was unreasonable under UCTA. The case involved the sale of cabbage seeds of inferior quality that led to the loss of several thousands of pounds. The contract included a tight limitation clause under which the seller’s liability would have been limited to refunding the initial value of the seeds.

The view of the House of Lords in *National Westminster Bank* case regarding the non-existence of a general principle of unconscionability in English law must now be read in the light of a number of new cases decided by the Supreme Court. In *Rainy Sky & Others v*

579 Korde R, (2011) “Good Faith and Freedom of Contract”, UCL Jurisprudence Review, 7, 142-165.

580 [1980] 1 All ER 556.

581 *National Westminster Bank v. Morgan* [1985] AC 686.

582 [1982] 3 WLR 1360, 1044(E).

583 [1983] 2 AC 803.

Kookmin Bank⁵⁸⁴, for instance, the Supreme Court was of the view that in the event of ambiguity in the wording of a contract, the court ought to interpret the agreement by having regard to “business common sense”. In the *Yam Seng Seng Pte Ltd v International Trade Corp Ltd* case⁵⁸⁵ the court was equally of the view that the principle of good faith, albeit in a limited form, ought to be applied to implied contract terms, while the case of *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafait)*⁵⁸⁶ seems to confirm the obligation of parties for mutual cooperation in the performance of a contract. The net effect of these cases would thus seem to have been to erode the *laissez faire* view based on the unfettered freedom of contract doctrine, and it could therefore be argued that some of the older cases discussed above would probably be decided differently today.

In respect of contracts relating to carriage of goods by sea, the system of risk allocation between the carrier and cargo owner was based upon principles of general maritime law until the adoption of the Hague/Visby Rules. In the early 19th century, under these principles the court would simply impose basic obligations on the carrier to protect the goods. As a result, the carrier was liable for any loss or damage of the cargo, unless the damage resulted from common law exceptions such as acts of God, King’s enemies, and inherent vice in the goods.

As international trade expanded the ship owners, mainly the UK ship owners, began to include exception clauses in the bills of lading which reduced and/or exclude their liabilities for cargo loss or damage⁵⁸⁷. The UK courts gave judicial recognition to the *laissez-faire* approach of contract and allowed carriers to exempt themselves from the basic duties and obligations that were once imposed upon them. However, this notion of freedom of contract was applied inconsistently. In the United Kingdom and Canada, for example, the carrier had the freedom to assume almost no liability, even for negligence⁵⁸⁸. Whereas the U.S, on the other hand, placed more restrictions on carriers' ability to rely on such exemption clauses.

5.3.1 Legal requirements for the validity of exclusion clauses in general law of contract:

An exclusion clause will only be effective to limit the liability of the party seeking to rely upon it when the exclusion clause stipulated and incorporated in the contract and must be

584 [2011] UKSC 50.

585 [2013] EWHC 111.

586 [2012] 2 Lloyd’s Rep 61.

587 Erastus C Benedict, (1995) *Benedict on Admiralty: Carriage of Goods by Sea*, 7th edition, Matthew Bender, New York at 2-3.

588 See *Glengoil SS Co v Pilkington* (1898) 28 SCR 146 (SCC).

wide enough to cover the breach or the even that has occurred⁵⁸⁹. However, such clauses may be required to satisfy certain common law rules, or statutory provisions, or both⁵⁹⁰.

For a limitation of liability or an exclusion clause to be construed as being effective in offering protection to a defendant, three main criteria have to be satisfied: i.e.

- a) Incorporation: i.e. does the clause form part of the terms of the contract?
- b) The statutory test of reasonableness
- c) Judicial interpretation using the contra proferentem rule of construction.

These criteria will now be discussed in sequence.

5.3.1.1 Common law rules on incorporation:

To begin with, a party who wishes to rely on exclusion clauses or to limit his liability must show first that the clause has been incorporated into the contract. An exemption or exclusion clauses can be incorporated in the contract in many ways. It can be by signature, by notice or by course of dealing. So a party who signs a contractual document is bound by its terms even if he has not read them, and it would have no difference if he was a foreigner who could not read English⁵⁹¹. In other words, constructive knowledge of the clause is as good as actual knowledge of its existence.

The general rule is thus to the effect of a signature is that if the plaintiff signs a document having contractual effect containing an exclusion clause, it will automatically form part of the contract, and he is bound by its clauses. This is so even if he has not read the document and regardless of whether he understands it or not. However, a signature cannot apply where the signature was obtained by a misrepresentation, or where the document was not known to be a contract by the party signing it. The courts distinguished between fraudulent and innocent misrepresentations and the effect in either situation on the validity of an exemption clause. In *Curtis v Chemical Cleaning Co* the defendant was not entitled from relying on an exemption clause contained on the back of the cleaning ticket. Lord Denning LJ stated that “When one party puts forward a printed form for signature, failure by him to draw attention to the existence or extent of the exemption clause may in some circumstances convey the

589 See the liberty clause in *Connolly Shaw v Nordenfjedske* [1934] 50 T.L.R. 418 .

590 The Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contract Regulations 1999.

591 *L'Estrange v F. Graucob Ltd* [1934] 2 K.B 394; See also *Singer (U.K) Ltd v Tees & Hartlepool Port Authority* [1988] 2 Lloyd's Rep.

impression that there is no exemption at all, or at any rate not so wide an exemption as that which is in fact contained in the document”⁵⁹².

Incorporation could equally be achieved by the taking of reasonable steps aimed at notifying the public or the other party to the contract of the existence of the exclusion clause and its relevance or application to the contract. An exemption clause is considered to be incorporated through reasonable notice where a contractual document containing the exclusion clause is handed by one party to the other or if the notice is displayed where the contract is made as long as the other party had reasonable notice of the existence of the exclusion clause. However, a party who is relying on the exemption clause must show that the nature of the document is contractual⁵⁹³ and obvious to a reasonable person that it must have been intended to have this effect and contained conditions. Otherwise an exemption clause is not incorporated in the contract if the document which is handed to the other party is not intended to have contractual force⁵⁹⁴.

Where the exemption clauses are set out in a document which is simply handed by one party to the other, or displayed at the time where the contract is made, then it will be effective and incorporated in the contract only if the party was aware that the document contained such clause⁵⁹⁵, or if a reasonable and sufficient notice of the existence of the exclusion clause should be given. However, the clause must be contained in a contractual document, i.e. a document which a reasonable person would assume to contain contractual terms, and not in a document which merely acknowledges payment such as a receipt. Thus, an exemption clause is not incorporated in the contract if the document does not have contractual force. For instance, the court held in *Chappleton v Barry UDC*⁵⁹⁶ that an exemption clause printed on ticket was not a term of the contract as the ticket was a mere voucher or receipt.

In *Parker v. South Eastern Railway*⁵⁹⁷ the issue of the incorporation of printed terms on the back of a ticket and whether or not they were part of a contract and what is required for these printed conditions to be incorporated into the contract upon purchase of the ticket. If a plaintiff does not see writing that contains "conditions" of the contract and no reasonable

592 [1951] 1 KB 805.

593 *Nunan v Southern Ry* [1923] 2 K.B 703 at 707.

594 See *Chappleton v Barry U.D.C* [1940] 1 K.B 532; See also *Henson v London & North Eastern Ry* [1946] 1 All E.R 653.

595 See *Lacey's Footwear (Wholesale) Ltd v Bowler Insurance Ltd* [1997] 2 Lloyd's Rep 369 at 378, the terms failed expressly to link the limit of liability to the requirement to obtain insurance. Therefore, despite the apparently wide wording of the exemption clause "in no case whatsoever shall any liability of the company, howsoever arising..." it did not apply to such a failure.

596 [1940] 1 K.B 532.

597 [1877] 2 CPD 416.

effort was made to ensure he was aware of it, then he is not bound by its terms; if he does see it and either does not read it, or does not think that it contains conditions, then he will be bound by its terms so long as the defendant delivered it in a manner that gave him reasonable notice that there were conditions on the ticket. Thus, an individual cannot avoid a contractual term by failing to read the contract but that a party wanting to rely on an exclusion clause must take reasonable steps to bring it to the attention of the customer.

The notice can only be binding where it was made at the time the contract was formed in order to consider that the exemption clause is incorporated in the contract. So if a notice made by one party after the agreement was made then it cannot become a term of a contract. In *Olley v. Marlborough Court Hotel*⁵⁹⁸ the notice was not communicated before or at the time the contract was made. And the plaintiff only knew about it after the contract was made. In view of this the court held that defendants were liable for the loss as the post-contractual notice did not form part of offer and acceptance and thus had no legally binding effect.. It should be noted that reasonable, not actual notice is required. So the defendant does not need to show that he actually brought it to the notice of the other party, the only thing he needs to prove that he took reasonable actions or steps to do so⁵⁹⁹.

Thus, in *Thompson v LMS Railway*⁶⁰⁰, the claimant asked her niece to buy a railway excursion ticket for her. It was written on the front of the ticket “See back” and on the back was a statement that it was issued subject to terms and conditions displayed on the platform. The claimant was illiterate and could not read. She argued that the exclusion clause was not incorporated into the contract as the railway company had not brought the clause to her attention at the time the contract was made. The Court of Appeal decided that the notice was clear and the ticket was a common form contractual document. Hence the clause held to be incorporated as reasonable steps had been taken to bring it to the claimant's attention.

But an exemption clause written on the back of a document is unlikely to be incorporated if there were no words on the face of the document drawing attention to it. Therefore reasonably sufficient notice is very important in order to incorporate any clause in the contract. Lord Denning stated that “the more unreasonable a clause is, the greater the notice

598 [1949] 1 KB 532.

599 See *Parker v SE Railway Co* (1877) 2 CPD 416; See also *Burnett v Westminster Bank Ltd* [1966] 1 QB 742 Where the court held that the cheque book cover fell within a class of documents which recipients would reasonably assume did not contain conditions varying existing contractual arrangements between themselves and their bankers. And therefore the notice on the cheque book cover did not bind the claimant to the new restricted use of the cheques for only one account, and the bank's defence failed.

600 [1930] 1 KB 41.

which must be given of it. Some clauses which I have seen would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient”⁶⁰¹.

Thirdly, an exemption clauses will be incorporated in the contract where there has been a previous course of dealing between the parties, i.e. parties may for some time have dealt with each other on terms that exempted one of them from liability and which may have been incorporated by signature, or notice⁶⁰². Equally, a term may also be implied into a contract because of a general course of dealing amounting to a trade custom⁶⁰³.

Generally speaking, an exclusion clause may be regarded as being incorporated when it is commercially reasonable or consistent with business sense and where the bargaining power of both parties is equal and such contractual terms are commonly used in that line of business. In *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd*⁶⁰⁴ British Crane supplied a dragline crane to Ipswich Plant. The agreement was made by telephone and nothing was discussed about the conditions of hire. Later, British Crane sent their printed conditions to Ipswich Plant but before they were signed the crane sank in marshy ground. The conditions were similar to those used by all firms in the plant hire business and they stipulated that the hirer was liable to indemnify the owner of equipment against all expense in connection with its use. When sued for the cost of recovering the crane, Ipswich Plant claimed they were not liable under British Crane’s conditions because they had not been incorporated into the oral contract. However, the Court of Appeal held that Ipswich Plant knew that such conditions were in common use in the business. British Crane was therefore entitled to conclude that Ipswich Plant was accepting the crane on their conditions, which had therefore been incorporated into the contract on the basis of the common understanding of the parties.

In *Hollier v Rambler Motors*⁶⁰⁵ a private individual who took his car to be repaired by the defendants had signed forms with conditions on three or four previous occasions. The plaintiff was not of equal bargaining power with the garage company which repaired the car. Thus the Court of Appeal held that a previous course of dealing did not incorporate the term, because there was neither a regular nor consistent course of dealings. It can thus be submitted

601 *J Spurling Ltd v Bradshaw* [1956] 1 WLR 461.

602 See *Henry Kendall & Sons Ltd v William Lillico & Sons Ltd* [1969] 2 AC 31, [1968] 2 All ER 444 HL; *Britain and Overseas Trading (Bristles) Ltd v Brooks Wharf and Bull Wharf Ltd* [1967] 2 Lloyd’s Rep 51

603 *British Crane Hire Corp Ltd v Ipswich Plant Hire Ltd* [1975] Q.B 303 [1974] 1 All ER 1059; *Victoria Fur Traders v Roadline U.K Ltd* [1981] 1 Lloyd’s Rep 571.

604 [1975] Q.B 303 [1974] 1 All ER 1059.

605 [1972] 2 QB.

that consistency and regularity of the course of dealing is a pre-condition for the incorporation of exclusion clauses through this method.

Despite of the fact that the courts have considered exemption clauses extensively, and their effect and use has been greatly restricted by statutes, the courts tend to apply general rules of the law of contract in order to control the possibilities of abuse inherent in complete freedom of contract. Therefore the rule of construction tends to stop the contract being construed so as to prevent one party's stipulations in the contract being used to frustrate the main aims of the contract. As stated by Atkin LJ (obiter) "a contractor may not make a valid contract that he is not to be liable for any failure to perform his contract, including even willful default, but he must use very clear words to express that purpose"⁶⁰⁶.

An exclusion clause must not frustrate the main object of the contract and as such ought to be construed in such a way as to be consistent with the purpose of the contract⁶⁰⁷. Also another principle has established in *Suisse Atlantique* states that an exclusion clause may be deprived of its effect because of repugnancy to another provision of the contract⁶⁰⁸.

Under English law an exclusion clause will not relieve a party who rely on it from liability for his own negligence or his employees and servants unless he could show that the scope and protection offered by the clause extends to these aspects. A clause purporting to exempt a party to a contract from liability for negligence must contain express language to that effect⁶⁰⁹. In *Alderslade v Hendon Laundry Ltd*⁶¹⁰ Lord Greene MR stated that ".....where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because if it were not so construed it would lack subject matter. Where, on the other hand, the head of damage may be based on some ground other than that of negligence, the general principle is that the clause must be confined to loss occurring through that other cause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms, and in the absence of such clear terms the

606 *The Cap Palos* [1921] P 458 at 471-472, CA.

607 *Glynn v Margetson* [1893] AC 351.

608 *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale* [1967] 1 A.C 361.

609 *Canada Steamship Lines Ltd v Regem* [1952] 1 All ER 305.

610 [1945] KB 189.

clause is to be construed as relating to a different kind of liability and not to liability based on negligence”.

5.3.1.2 Judicial approach to interpretation: contra proferentem rule:

Assuming that the exclusion or limitation clauses are incorporated into the contract, where an exemption clause is clear and unambiguous then as a matter of construction it should be given effect and not a strained construction⁶¹¹. In *Alisa Craig Fishing Co Ltd v Malvern Fishing Co Ltd*⁶¹² the appellants were the owners of a fishing boat which sank on 1971 and the ship was a complete loss. Condition 2(a) of the security service contract provided that the respondents' liability was to be totally excluded in certain circumstances, while condition 2(f) of the contract stated that in the event of the respondents incurring liability “for any loss or damage of whatever nature arising out of ... or the failure in the provision of the services” contracted for, such liability was to be limited to £1,000 in respect of any claim arising from a duty assumed by the respondents and £10,000 for the consequences of any incident involving liability by the respondents. The House of Lords decided that liability was limited under condition 2(f) to £1,000 even though there had been a total failure by the respondents to perform the contract. And held further that the issue of whether a condition in a contract limiting liability was effective depended on the construction of the condition in the context of the contract as a whole.

Furthermore, the party seeking to rely on the exclusion clause must show that on its true construction it covers the breach which has happened and the resulting damage or loss as well. So the words used must clearly and unequivocally cover what they are intended to cover⁶¹³. In *Owner OF Steamship Istros v. F W Dahlstroem And Company*⁶¹⁴ Clause 12 stated that the owners will only to be responsible for “delay in delivery of the steamer, or for delay during the currency of this charter, and for loss or damage to goods on board, if such delay or loss has been caused by want of due diligence on the part of owners or their manager, in making steamer seaworthy and fitted for the voyage, or any other personal act, or omission, or default of owners or their manager. Owners not to be responsible in any other case, nor for damage or delay whatsoever and howsoever caused, even if caused by neglect or default by owners' servants”. It was held that provisions included in clauses 12 were

611 *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

612 [1983] 1 All ER 101, [1983] 1 WLR 964, HL.

613 *Pegler -v- Wang (UK) Limited* (2000) BLR 218, where the judge said that if the defendant had wanted to exclude liability for particular matters then it should have done so expressly.

614 [1931] 1 K.B. 247.

sufficiently clear and the language of the exceptions clauses covered the breach, and thus the owner was protected from liability for the delay by the provisions of this clause.

The question for the court, in all cases, is whether the clause, on its true construction, extends to cover the obligation or liability that it seeks to exclude or restrict. Thus, for instance, if a clause aims to exclude liability for negligence, general words such as "any loss" or a reference to loss "howsoever caused" may not be sufficient. Otherwise the plaintiff may find that the clause is invalid or inapplicable and that he will not be entitled to rely on it. For instance, in *Tor Line AB v Alltrans Group of Canada Ltd; The TFL Prosperity*⁶¹⁵ clause 31 provided that (.....The Owners not to be responsible in any other case not for damage or delay whatsoever and howsoever caused by the neglect or default of their servants.....). However, the House of Lords held that on the true construction of clause 13 of the charterparty the phrases "in any other case" and "damage or delay whatsoever and howsoever caused" were not terms of complete and universal exclusion from liability, and the owners were therefore not protected against liability for breach of the warranty as to deck heights in the charterparty.

When a contracting party seeking to rely on an exemption clause to avoid or to limit their liability they must thus be able to prove that the act complained of comes strictly within the terms of the clause. If the language used in the clause is in any way unclear then it will be interpreted against the party attempting to rely on the clause. This is referred to as the *contra proferentem* rule. In *White v John Warwick & Co Ltd*⁶¹⁶, the plaintiff hired a bicycle from the defendant under a written agreement which contained a provision to the effect that 'nothing in this agreement shall render the owners liable for any personal injuries'. The plaintiff was injured when the saddle tilted forward. The Court of Appeal, however, held that the defendant was liable in negligence. The exclusion clause was sufficient to exclude liability for supplying a defective bicycle (i.e. contractual liability), but its scope was not sufficiently wide enough to exclude liability for negligence (i.e. liability in tort).

Denning J. (as then he was) confirmed that the claim for negligence in this case is founded in tort and not on contract. He also said that "the exemption clause exempts the defendants from liability in contract, but not from liability in tort. If the plaintiff can make out his cause of

615 [1984] 1 All ER 103.

616 [1953] 2 All ER 1021.

action in negligence, he is, in my opinion, entitled to do so, although the same facts also give a cause of action in contract from which the defendants are exempt”⁶¹⁷.

An exclusion of liability in respect of implied terms could not cover liability under the express term. In *Andrews Bros. v Singer*⁶¹⁸, there was a contract to purchase new Singer Cars, the contract contained a clause excluding “guarantees or warranties, statutory or otherwise”. One of the cars delivered to the dealer was a used car. The plaintiff sued Singer (the defendants) and they tried to rely on the exemption clause above. The court held that the stipulation as to the suitability of the car was a condition, not a guarantee or a warranty, and therefore was not covered by the exemption clause. The term “new singer cars” was an express term.

Scrutton LJ has stated in this regard that ‘if a person is under a legal liability and wishes to get rid of it, he can only do so by using clear words’⁶¹⁹. So, where there is lack of clarity in the exclusion clause, it will be construed strictly against the party seeking to rely upon it. In *Karsales (Harrow) Ltd v Wallis*, Lord Denning⁶²⁰ was of the opinion that it is necessary to look at the contract separately from the exempting clauses and see what are the terms, express or implied, which impose an obligation on the party. If he has been guilty of a breach of those obligations in a respect which goes to the very root of the contract, he cannot rely on the exempting clauses when he delivers something “different in kind” from that contracted for, or has breached a “fundamental term” or a “fundamental contractual obligation”.

Courts therefore tend to consider the intentions of the parties as embodied in the contract and to ensure that an exemption clause is consistent with the contract’s main purposes. In *Mitsubishi Corp v Eastwind Transport Ltd and Others*⁶²¹ the QBD (Commercial Court) found that the principle that in cases of ambiguity and lack of clarity a contractual provision would be construed against the person who formed it, and for whose benefit it activated, did not extend to construing a contractual provision as widely as possible so as to frustrate the main object of the contract read as a whole when it could be given a meaning consistent with that object. And therefore there was no reason to reject the clause which was contained in a bill of lading and that the clause was effective to except the defendants from any potential liability.

617 *White v John Warwick & Co Ltd* [1953] 2 All ER 1021.

618 [1934] 1 KB 17.

619 See *Alison Ltd v Wallsend Shipway and Engineering Co Ltd* 10.

620 [1956] 2 All ER 866 at 869.

621 [2005] 1 All ER (Comm) 328.

At one time courts believed that there was a rule of law whereby no exception clause could protect a party from liability for a “fundamental breach” or breach of a “fundamental term” of the contract. And it has also been said that a fundamental term is something narrower than a condition and which underlies the whole contract, so that if it is not complied with, the performance of the contract becomes something entirely different from that which the contract considered⁶²². As stated by Scrutton LJ in *Gibaud v Great Eastern Railway*⁶²³, “if you undertake to do a thing in a certain way, or to keep a thing in a certain place, with certain conditions protecting it, and have broken the contract by not doing the thing contracted for in the way contracted for, or not keeping the article in the place in which you have contracted to keep it, you cannot rely on the conditions which were only intended to protect you if you carried out the contract in the way in which you contracted to do it”.

However, it is now obvious that no such rule of law exists and that the earlier cases are only justifiable on grounds of construction of the individual contract involved⁶²⁴. There is no absolute principle that an exclusion clause cannot cover a fundamental breach or a complete non-performance by a party of its duties. It is possible to do so if the terms of the exemption clauses are extensive and clear enough.

These judicial approaches to the interpretation of exclusion clauses based on incorporation and the contra proferentem rule, and the way in which they have influenced the development of shipping law with regard to the judicial construction of liberty clauses and deviation, will be examined in subsequent sections of this chapter.

5.3.1.3 Statutory requirements:

The Unfair Contract Terms Act 1977 and the Unfair Terms in Consumer Contract Regulations 1999 allow consumers to challenge terms in any contract they have signed or entered into if a term seems unfair or unreasonable. They are especially helpful when trying to avoid the impact of exemption clauses that seem to deprive the consumer of their statutory or legal rights. These acts were designed to restrict the use of exclusion clauses. However, UCTA and UTCCR have no impact on the contract of carriage by sea but the Unfair Contract Terms Act 1977 applies to particular parts of contracts of carriage⁶²⁵. The drafters of these Acts did not regulate charterparties since they viewed the parties to such contracts as having

622 HL, per Lord Upjohn in *Suisse Atlantique Société d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361 at 422, [1966] 2 All ER 61 at 86.

623 [1921] 2 KB 426 at 435; See also *Hain Steamship Company Ltd v Tate & Lyle Ltd* [1936] 2 All ER 597; *Davies v Collins* [1945] 1 All ER 247.

624 *Photo Production Ltd v Securicor Transport Ltd* [1980] 1 All ER 556.

625 Richard Stone, (2011) *The Modern Law of Contract* 9th edition, Routledge, p 235, 236.

equal bargaining power. The view that parties to a charterparty are of equal bargaining strength is a legal myth and is dependent on market conditions. For example, if international trade is buoyant, cargo owners are likely to be the weaker of the two parties until saturation point due to an expansion of the shipping sector⁶²⁶.

It could be argued that it is advantageous for the ship owners but disadvantageous for the cargo owners that the Unfair Contract Terms Act and Unfair Terms in Consumer Contracts Regulations) which regulates contracts by restricting the operation and legality of some contract terms does not cover insurance contracts and shipping contracts. Also UCTA does not extend to international supply contracts either unless English law is the applicable law in the contract⁶²⁷.

5.4 The Meaning, Nature and Rationale of Liberty Clauses

Apart from the recognised common law and statutory or conventional exceptions which may be used by a carrier to justify a departure from the proper course, a deviation may also be justified by the terms of a specific clause in the bill of lading or charterparty giving the carrier the liberty to call at additional ports during the voyage. However, the courts in construing the common law tend to interpret such liberty clauses very narrowly.⁶²⁸ Nevertheless, a literal common law interpretation of a liberty clause may be appropriate in some circumstances,⁶²⁹ hence avoiding the rule in *Glynn v. Margetson*⁶³⁰ where the court interpreted the liberty clause very narrowly.

Liberty clauses should be treated with caution and the problem in this area lies in the interpretation of such liberty clauses to deviate. Vague generous clauses will be limited by the courts applying the 'contra proferentum' rule of construction which Lord Denning has called "the secret weapon".⁶³¹ The contra proferentem rule (interpretation against the draftsman), is a doctrine of contractual interpretation providing that, where a promise, agreement or term is ambiguous, the preferred meaning should be the one that works against the interests of the party who provided the wording⁶³². However, the doctrine is not directly

626 Kozolchyk, (1992) "Evolution and present state of the ocean bill of lading from a banking perspective", 23 (2) JMLC 161.

627 Trident Turboprop (Dublin) Ltd -v- First Flight Couriers [2008] 2 Lloyd's Rep 581.

628 Baughen S, (2004) Shipping Law 3rd edition, Cavendish Publishing Limited, London.

629 See *Leduc & Co. v Ward* (1888) 20 Q.B.D. 475 .

630 [1893] AC 351.

631 Lord Denning's judgment in *George Mitchell (Chesterhall) Ltd. Respondents v Finney Lock Seeds Ltd* [1983] 1 All ER. 108, 113j.

632 See *Glynn v Margetson* [1893] AC 351.

applicable to situations where the language at issue is mandated by law, as is often the case with insurance contracts and bills of lading.

5.5 An Overview of Some Illustrative Examples of Liberty Clauses and Similar Provisions in Marine Insurance Policies.

The modern law governing charterparties is very heavily influenced by certain standard form charterparties, such as Barecon 2001 (commonly used for bareboat charters), Gencon 94, Shellvoy 6 and Intertankvoy 76 (commonly used for voyage charters), and Baltime 1939 (revised 2001), NYPE 93 and Shelltime 4 (commonly used for time charters).

All these standard charterparties contain wide drafted liberty provisions which allow the ship owners to deviate from the course. For example Clause 3 in Gencon 94⁶³³ provides that “the vessel has liberty to call at any port or ports in any order, for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property”. It is obvious that this clause is rather to the advantage of the ship owner as it gives him the right to deviate without having to justify himself to the other parties to the contract, such as the charterers or cargo owners. A very similar language can also be found in Clause 20 Intertankvoy 76⁶³⁴ which give the ship owner a freedom to “sail with or without pilots, to tow or go to the assistance of vessels in distress, to call at any port or place for oil fuel supplies, and to deviate for the purpose of saving life or property, or for any other reasonable purpose whatsoever. In addition, Clause 20 (vii) in Asbatankvoy⁶³⁵ states “that the Vessel shall have liberty to call at any ports in any order, to sail with or without pilots, to tow or to be towed, to go to the assistance of vessels in distress, to deviate for the purpose of saving life or property or of landing any ill or injured person on board, and to call for fuel at any port or ports in or out of the regular course of the voyage. Any salvage shall be for the sole benefit of the Owner”. Also NYPE 39 Time Charter which was issued by the association of ship brokers and agents in the U.S includes very similar liberties to the ship owners.

Some liberty clauses tend to be more limited in scope. For example, GENCON has clauses which allow bunkering but others, such as Shellvoy6, expressly exclude bunkering from the liberty to deviate. Liberty clauses should be treated carefully. As seen above, liberty clauses are usually held to be construed and read in such a way that any ambiguity will be construed

633 GENCON 94.

634 Intertankvoy 76.

635 Asbatankvoy Tanker Voyage Charterparty 197.

against the party seeking to avail himself of the clause i.e. the owners. Even a wide liberty clause has been held to provide the carrier with the freedom only to proceed and stay at ports which are in the course of the voyage in a business sense.⁶³⁶ BIMCO have a liberty and deviation clause which allows for a number of deviations for the purpose of taking on bunkers, spares, stores and supplies, effect crew changes, landing stowaways etc.⁶³⁷ However, the use of this clause does not necessarily mean that all deviations are necessarily reasonable deviations. The BIMCO deviation clause prudently suggests that this clause should also be incorporated in the bills of lading issued under the charterparty. It is important to note that when a vessel is making a deviation, its owner loses the protection of the marine insurance policy not just under the charterparty but also under the bills of lading⁶³⁸.

Clause 13 of the Nubaltwood⁶³⁹ gives the ship owner an extreme liberty to go out of the proper course. It also states that the ship owner has a liberty to “call at any port or ports whatsoever in any order in or out of the route or in a contrary direction to or beyond the port of destination”. Such type of wide liberties have been given full effect by the courts which have described them as conferring on the vessel a liberty to go where she pleased and for any purpose whether it is for the benefit of the adventure or not, subject only to the restriction that the essential purpose of the voyage must not be frustrated.⁶⁴⁰

Another type of standard charterparty where deviation is permissible even for bunkering reasons is very obvious in Polcoalvoy clause 26⁶⁴¹ which states that “deviation in saving or attempting to save life or property at sea or for bunkering purposes, or any other reasonable deviation shall not be deemed to be an infringement of this charterparty and the owners shall not be liable for any loss or damage resulting therefrom. The vessel shall be at liberty to take over ship’s mail and stores at sea and to land and/or embark crew members and/or repair gangs”. However, the shipowners shall inform the charterers of any deviation.

The ‘held covered’ clauses came into existence in the late nineteenth century. These clauses protect the assured by extending the cover within the limits of the cover agreed and it works

636 *Glynn v. Margetson* [1893] AC 351.

637 See BIMCO Liberty and Deviation Clause for Contracts of Carriage, available online at:

https://www.bimco.org/Chartering/Clauses_and_Documents/Clauses/Liberty_and_Deviation_Clause_for_Contracts_of_Carriage.aspx.

638 Zerman P, (2011) “Deviation: Justified or Allowed and Implication for the P & I Cover: Slow Steaming”, *Skuld*.

639 See Nubaltwood, Clause 13, the revised Nubaltwood was approved by the Documentary Committee of BIMCO at its meeting on 2 June 1997, and subsequently endorsed by the Timber Federation, the Swedish Wood Exporters Association and the Finnish Industries Federation.

640 *Connolly Shaw v Nordenfjedske* [1934] 50 T.L.R. 418.

641 See Polcoalvoy clause 26.

on the, discretionary right to require an additional premium of the cover. The main object of the clause is to keep the underwriter on risk, notwithstanding that, without this clause, he would be discharged from liability or the risk would fall outside the policy⁶⁴². The departure from the insured adventure agreed to be protected by held cover clause should be viewed strictly in conjunction with the wording of the clause invoked.

Institute Voyage Clauses Hulls IVCH is an insurance policy which is subject to the English law and practice. Clause 2 of this policy states that “Held covered in case of deviation or change or voyage or any breach of warranty as to towage or salvage services, provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed”⁶⁴³. Held covered clauses contain a condition that the assured will provide the underwriters with notice of any deviation or changes of the voyage or other default held covered under the policy within a certain time period of receiving advices. The clause may say that notice must be given immediately or promptly or within a reasonable time or may only require the assured to provide due notice.⁶⁴⁴

The application of the held covered clause when the vessel deviate from the agreed route in the contract of carriage was clear in the case of *Mentz, Decker and Co v Maritime Insurance Co*⁶⁴⁵ where the policies contained a held covered clause which said that any deviation was held covered at additional premium to be arranged “provided due notice be given by the assured on receipt of advice of such deviation”. The plaintiffs informed the underwriters of the deviation as soon as they were aware that the vessel had been lost and the court ruled that the notice given after the loss was sufficient to satisfy the proviso. Likewise, in *McAsphalt Marine Transport Limited v Liberty International Canada*⁶⁴⁶ the arbitrator found out that the held covered clause in the policy would have protected the applicant if it had given the required notice. However, the ship owners could not benefit from the held covered clause in the policies if the notice is not given immediately after receipt of advices⁶⁴⁷.

What may be considered a “reasonable time” for the ship owners or charterers to inform the underwriters of a deviation which is a breach of condition of the contract of carriage under

642 *Liberian Insurance Agency Inc. v. Mosse* (1977) 2 L.L.Rep. 560, 567.

643 Institute Voyage Clauses Hulls, clause 2.

644 Hodges s. (1999) *Cases and Materials on Marine Insurance*, Cavendish Publishing Limited, London.

645 [1909] 1 KB 132.

646 2005 ONSC 13459.

647 *Thames and Mersey Marine Insurance Company Limited v H.T. Van Laun & Co* [1917] 2 KB 48.

the held covered clause? This question has not yet been answered. However, an indication as to what would not amount to a reasonable time was given in the case of *Thames and Mersey Marine Insurance Co Ltd v Van Laun and Co*⁶⁴⁸ where it was held by the House of Lords that 10 days' notice of the delay or deviation to the insurance companies had not been made in a reasonable time and therefore the charterers could not benefit themselves of the held covered clauses stipulated in the policy.

To be able rely on the held covered clause the assured must act with the utmost good faith towards the underwriters, this being an obligation which rests upon them throughout the currency of the policy⁶⁴⁹. However, this duty is limited to the prudent underwriter's assumption in extending the cover under the clause.

Protection and indemnity insurance is a form of marine insurance commonly known as a P&I club. A P&I club is an insurance association that provides cover for its members (ship-owners, ship-operators or demise charterers) and it is governed by the provisions of the Marine Insurance Act 1906. The liability caused by a deviation is excluded from the P&I cover. The Skuld Rule 5.2.11 stipulates that "deviation or departure from the contractually agreed voyage or adventure which deprives the member of the right to rely on defences or rights of limitation which would otherwise be available". However, The Club can offer additional cover for any deviation but this requires notice to the Club, and it is important to ensure that notification to the Club is made before the deviation takes place.

Where the ship owner under the contract of affreightment, whether it is a charterparty or a bill of lading, has been found to be in breach by reason of a deviation he will not be able then to rely on his rights under the contract of carriage and he could lose exemption and limitation clauses under the Hague-Visby Rules or the law govern the case. Thus, most clubs have an open deviation cover placed on the traditional market for the benefit of members who notify the club of an intended deviation. This market insurance covers liability in respect of loss or damages to cargo caused by geographical deviation or other breaches for instance shipment on deck quasi deviation⁶⁵⁰.

648 [1917] 2 KB 48 HL.

649 *Overseas Commodities Ltd v Style* (1958) 1 L L Rep 546, 559.

650 Semark D, (2010) P & I Clubs Law and Practice, 4th edition, Informa Law from Routledge, p 147.

5.6 Judicial Construction of Liberty Clauses in English Law

As seen above, the ship owner has the freedom under common law to include express liberty clauses to deviate from the proper course. These liberties only justified the carrier in calling at ports on the route between the port of departure and the final destination⁶⁵¹. However, such a restrictive interpretation can to some extent be overcome by permitting the ship owner to call at any port although in a contrary direction to the route. In *Connolly Shaw v Nordenfjedske*⁶⁵², the contract contained the following extremely wide 'Liberty to deviate' clause "*Nothing in this bill of lading (whether written or printed) is to be read as an engagement that the said carriage shall be performed directly or without delays, the ship is to be at liberty, either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any backwards or forwards for loading or discharging cargo passengers coals or stores or for any purpose whatsoever whether in relation to her homeward voyage or to her outward voyage or to an intermediate voyage and all such ports places and sailings shall be deemed included within the intended voyage of the said goods*". Due to a deviation to Hull before proceeding to London the cargo owner lost money because of a fall in the market price during the extended period of the voyage. The cargo of lemons however arrived in good condition. The court held that the deviation was within the liberty clause. It confirms in this case that the court applied and interpreted the liberty clause literally as long as the purpose of the voyage (which was to deliver the cargo of lemon in London) had not been frustrated. This being a voyage charter, time was not of the essence and therefore delivery at a particular time was not a relevant factor when determining the purpose of the voyage.

In the case of *Caffin v Aldridge*⁶⁵³, the charterparty contained the usual exception of sea perils and having the liberty to call at any ports in any order. The vessel proceeded to Portsmouth Dockyard, where she discharged some cargo, and was crossing the harbour to Gosport when by an accident arising from sea perils she sprung a leak. The plaintiff claimed against the ship owner that the ship in not proceeding direct to Gosport had deviated. It was held that the liberty "to call at any ports" included liberty to call for the purpose of loading or discharging other cargo there; and further, that the term "ports" include any usual and proper loading or

651 *Glynn v Margetson* [1893] AC 351.

652 [1934] 50 T.L.R. 418 .

653 [1895] 2 Q.B. 366.

discharging places. Therefore, there had consequently been no deviation, and the plaintiff could not recover. The courts apply the liberty clause in a bill of lading where the ship owners can prove that the deviation was via a usual commercial route for the ships to follow. In this case according to the common law the ship owners will be able to rely on the deviation clause included in the contract of carriage⁶⁵⁴.

However, these clauses are construed in the light of the general principle that the liberty clause must not frustrate or defeat the object and commercial purpose of the adventure. Bayley J stated that “a liberty to touch, stay, and trade at any ports or places whatsoever has been held to be confined to a staying or trading at any port for a purpose subordinate to the voyage insured, which is the principal object of the policy. I think the liberty to sail backwards and forwards and forwards and backwards must be construed so as to protect the vessel so long only as she was sailing on a voyage having for its ultimate object the accomplishment of the principal voyage insured”.⁶⁵⁵

Due to the real or assumed importance of the term specifying the route which the vessel must follow, liberty clauses are restrictively construed. In *Glynn v Margetson*⁶⁵⁶ the clause said that the vessel with “liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea or Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland for the purpose of delivering coals, cargo, or passengers, or for any other purpose whatsoever”. In this case the vessel went to north eastern coast of Spain before proceeding on her voyage to the port of discharge in Liverpool. The court construed the clause very narrowly and held that the liberty clause was ineffective because of the damage to the oranges as the transshipment of oranges was the object of the whole adventure.

In addition to above the liberty to deviate provided in the contract of carriage will be ineffective when the ship owners deviate for their own purposes or where the deviation is intended to be for the pursuit of their exclusive interests. Thus in *Thiess Bros (Queensland) Proprietary Ltd v Australian Steamships Proprietary Ltd*⁶⁵⁷ the defendants had contracted to carry a cargo of coal, which was liable to overheat, from Gladstone to Melbourne. The vessel deviated from the direct route to bunker at Newcastle (Australia), where she was held up with the result that the cargo overheated and had to be landed and sold. The Supreme Court of

654 *Frenkel Appellant; v Macandrews and Company, Limited Respondents* [1929] A.C. 545.

655 *Bottomley v Bovill* (1826) 5 B & C 210.

656 [1893] AC 351.

657 [1955] 1 Lloyd's Rep. 459.

New South Wales held that the right to deviate contained in the contract had to be subordinated to the main purpose of the contract, that the deviation was purely for the purposes of the defendants and that they were liable for non-delivery.

Whilst in *Ashley v Pratt*⁶⁵⁸ it seems that the liberty clause had been construed literally. The policy included a clause stating “all or any, during the ship’s safety there, for any purposes, and from thence to her port or ports of calling and discharge in the United Kingdom, with liberty to call and stay at all or any ports or places in either side of, and at the Cape of Good Hope”. The vessel proceeded from Liverpool direct to China, and from thence she sailed to Manila. At Manila the master took on board 230 chests of opium for Tongkoo, another port in China and sailed to there to seek freight for the United Kingdom, but on her voyage to Tongkoo the ship was lost by perils of the sea. Tongkoo is out of the direct course from Manila to the United Kingdom. However, the court held that the words “from thence” in the policy meant not from Manila only but from ports or places in China and Manila, all or any, therefore the sailing from Manila to Tongkoo for the purpose of seeking a homeward cargo was justifiable.

An unusual decision was taken in *James Morrison Ltd. v Shaw Savill and Albion Company*⁶⁵⁹. The bills of lading gave the ship owners extensive liberty to load at any port in New Zealand, and contained the provision that the owners are to be at liberty “to carry the said goods to their port of destination by the above or other steamer or steamers, ship or ships, either belonging to themselves, or to other persons proceeding by any route, and whether directly or indirectly to such port, and in so doing to carry the goods beyond their port of destination.....”. The trip was from New Zealand to London and the master received orders on the voyage to deliver the meat at Le Havre before going to London when it was torpedoed by a German submarine. The court decided that by going to Le Havre which was only 54 miles off course was considered as an unjustifiable deviation. In *Glynn v Margetson*, it was held that a ship owner could not rely on the liberty clause which gave him the right to sail wherever he wanted, when he had called at a port which lay in the opposite direction from the port of discharge. Whereas in the *James Morrison* case it seems that this decision was inconsistent as it could be argued that a departure of 54 miles from the proper course was insignificant taking into account the whole trip from New Zealand to London.

658 (1847) 17 LJ Ex 135, 1 Exch 257.

659 [1916] 2 KB 783.

Where the charter party or the bills of lading include a liberty clause, the ship owners cannot go off the general direction of the voyage. In the case of *Leduc & Co. v Ward and Others*⁶⁶⁰, the bill of lading contained the usual exception of sea perils, stated that the goods were shipped for delivery at Dunkirk on board a vessel lying at Fiume and bound for Dunkirk, with liberty to call at any ports in any order. It was held that Glasgow is not in the ordinary track of the voyage between the port of loading (Fiume) and the port of discharge (Dunkirk), and that the vessel was therefore lost while deviating from the voyage contracted for. The excepted perils clause did not exonerate the defendants from liability in respect of non-delivery of the goods. Similarly, despite the wide liberty in *Hamilton v Sheddon*⁶⁶¹ giving leave to call at all ports and places backwards and forwards, and forwards and backwards, without being deemed any deviation, it was held that the voyage to Cameroons was a deviation. Hence that it was not acting as a tender within the meaning of the policy. In another case Lord Esher's view was that even if the parties agreed to provide the master liberty to proceed to any ports in any order, it was always a question of interpretation of mercantile expression used in a mercantile document.⁶⁶²

On other hand a policy on vessel at and from Antigua to England, with liberty to touch at all or any of the west India islands, Jamaica included. It was held that the vessel under the liberty and protection of this policy might touch and call at any of the West India islands, although not in direct course from Antigua to England and stay there while she complete her homeward cargo.⁶⁶³

The liberty in the policy must be construed with reference to the main scope of the voyage insured. Therefore when a vessel insured to sail with a fleet under convoy and if the captain has wilfully deserted the convoy the liberty clause becomes ineffective and the insurance policy is vacated. In *Williams v Shee*⁶⁶⁴ a ship was insured from London to Berbice, with an extensive liberty "to touch and stay at any ports and places whatsoever and wheresoever, and for all purposes whatsoever, particularly to land, load, and exchange goods, without being deemed a deviation", The court held that by putting into Madeira and staying there after the convoy with which she had proceeded on the voyage, she was guilty of a deviation irrespective of the wide liberty included which discharged the underwriters.

660 (1888) 20 Q.B.D. 475.

661 (1837) LJ Ex 1.

662 *Leduc v Ward* (1888) 20 KBD 482.

663 *Metcalfe v Parry* (1814) 4 Camp 123.

664 (1813) 3 Camp 469 170 E.R. 1449.

Not all ports are specified by name in the policy. For example the liberty contained in *Leathly v Hunter*⁶⁶⁵ was “at and from Singapore, Penang, Malacca, and Batavia, all or any, to ship’s port of discharge in Europe, with leave to touch, stay, and trade at all or any ports or places whatsoever and wheresoever in the East Indies,..... etc”. The ship loaded part of her cargo at Batavia, then proceeded to Surabaya, a port in the East Indies, not in the course of a voyage from Batavia to Europe, and not specified by name in the policy, and loaded other goods, then returned to Batavia, whence she afterwards sailed for Europe, and was lost by perils of the sea. The court decided that going to Surabaya was not an unlawful deviation, and the goods onboard the vessel were protected by the policy.

Some liberty clauses give a right to the ship owner to tow and be towed and assist vessels in all situations, and salvages procured to be for benefit of owners. In the case of *John Potter & Co v Burrell & Son*⁶⁶⁶, a charterparty for five steamers contained a clause excepting perils of the sea, and also a clause giving each steamer liberty to tow and to be towed and assist ships in all situations, and providing that salvages should be for the benefit of ship owners. Clause 26 stated that “Steamer to have liberty to tow and be towed and assist vessels in all situations, and salvages procured to be for benefit of owners.” Vessel number 4 arrived three weeks late at her Australian port after towing a disabled vessel to Mauritius as salvage service. Such towage was out of the course of the voyage. The court found that the delay caused by this towing was not so great as to frustrate the object of the adventure, and that the salvage service was an allowable deviation within the contract between the ship owners and the charterers. However, the court was of the opinion that such a “clause in general terms which taken literally would allow deviation to any extent whatever, and it must accordingly be construed as subsidiary to the main object of the charterparty, and some limit must be put upon its operation”⁶⁶⁷. In its judgment the court also stated that “the main object of the adventure was the arrival of the ships at Noumea in proper time for the loading and no salvage service ought to have been undertaken which would defeat that object by delaying the arrival of the steamers by three weeks”⁶⁶⁸.

Although a vessel insured in *Phillips v Irving*⁶⁶⁹ with a liberty to touch, stay, and trade at several ports. She was ready to take in cargo on the 2nd of September, but owing to the state

665 (1831) 7 Bingham 517 131 E.R. 200.

666 [1897] 1 Q.B. 97.

667 *Ibid.* at 102.

668 *Ibid.* at 103.

669 (1844) 13 LJCP 145.

of the freight market and other difficulties, no cargo was put on board till 10 January. The court held that the delay was not unreasonable, so as to amount to an unjustified deviation.

From the above it can be concluded that the ultimate effect of the liberty clause does not depend on the language used in the clause alone. Rather, very much will depend on the rule of construction used by the courts in interpreting and applying the clause. Application of the literal rule of interpretation will have the effect of validating the clause, whereas the contra proferentem rule would have the opposite effect.

5.7 The Link between Liberty Clauses and Relevant International Conventions.

As seen above, it is common for the contracts of carriage by sea to include clauses that allow the carrier to deviate from the proper course. Various international conventions seem to recognise and to affirm this liberty to deviate, sometimes in the form of provisions which make exceptions to the rule against unjustified deviation. . According to the Hague-Visby Rules the ship owner or the shipper afforded a wide liberty to depart from the agreed route. Under Article IV (4) “Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”.

The reference to ‘reasonable deviation’ in the provision cited above is of course wider than the common law approach and gives the ship owner more freedom to be able to justify the deviation before the court. However, the liberty to deviate must be only to call for a purpose related to the contract voyage and could not reasonably be intended to give the right to call at an intermediate port to land or take on board friends of the ship owners for the purpose of a pleasure trip. A case which relates to the COGSA 1924 (incorporating the Hague Rules) is *Stag Line Limited Appellants v Foscolo Mango and Company Ltd and Others Respondents*⁶⁷⁰. The Hague Rules contain a similar provision to Art IV (4) of the HVR. In the *Stag Line* case, a cargo of coal was loaded on the appellants' steamship *Ixia* at Swansea for carriage to Constantinople under bills of lading which gave the ship owners "liberty to call at any ports in any order, for bunkering or other purposes, all as part of the contract voyage." It was intended to land two engineers with the pilot at Lundy but the two engineers remained on board and were later landed in St. Ives Bay. In proceeding to St. Ives Bay and for some time

⁶⁷⁰ [1932] A.C. 328.

after leaving there, the *Ixia* was off the usual route. Shortly after resuming her voyage from St. Ives Bay, and before she had returned to the usual route, the *Ixia* stranded on the Cornish coast, and both ship and cargo were lost. The House of Lords affirmed that the departure of the *Ixia* from the contract route did not come within the liberty given by the bills of lading, as the words "other purposes" in the context must be construed as meaning the calling at a port for some purpose having relation to the contract voyage. The trial judge, MacKinnon J., had previously ruled that the deviation was not reasonable within the scope of the language used in Article IV (4) of the Schedule to the COGSA 1924.

Article III (8) Hague-Visby Rules states that "any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connection with, goods arising from negligence, fault, or failure in the duties and obligations provided in this article or lessening such liability otherwise than as provided in these Rules, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability". However, no liberty clause in a bill of lading can provide such a wide liberty like the one given by The Hague-Visby Rules themselves in their provision on "reasonable deviation".⁶⁷¹ Thus in *Renton & Co Ltd v. Palmyra Trading Corporation of Panama (The Caspiana)*⁶⁷², though a wide strike clause incorporated in a bill of lading, this was held not to offend Article III (8) above and therefore there was no need to consider whether or not it was a reasonable deviation under the Hague-Visby Rules. It appears that some contracts of carriage contain liberty to deviate for special reasons, for instance to give the owner the liberty to unload the goods elsewhere if the stipulated port of discharge is unavailable by some reason like strikes.

A reasonable deviation within article IV (4) of HR could be a deviation planned before the voyage began or even the bill of lading were issued. In another word the effect of liberty afforded by Article IV (4) in the Rules was obvious in the case of *The Al Taha*⁶⁷³ where a deviation which took place before the bill of lading was signed was held to be reasonable. The facts of the case were that *Al Taha* had sailed from Portsmouth, New Hampshire, for Izmir in Turkey. Three days later it had run aground at Boston, Massachusetts due to the negligence of the docking pilot. The cargo owners (the defendants) contended that in putting into Boston the vessel had unlawfully deviated from the voyage from Portsmouth to Izmir,

671 Baughen S, (2004), *Shipping Law*, 3rd edition, Cavendish Publishing Limited, London.

672 [1957] AC 149.

673 *Lyric Shipping Inc v Intermetals Ltd and Another (Al Taha)* (1990) Times 3 March.

and if that allegation is correct the ship owners' claim for general average contribution must fail. The case was subject to the United States Carriage of Goods by Sea Act 1936, which incorporated article IV rule 4 of the Hague Rules. The fact was that the Al Taha wasn't able to sail without refitting the boom, so a decision was taken on the 15th January to enable the ship to sail on the following day. The alternative would have been to wait at Portsmouth until at least the 18 and maybe longer for the boom to be delivered by road. The vessel deviated to Boston to refit the boom rather than face two or more days delay at Portsmouth, although the ship had not arranged to bunker there. The court held that the deviation that the ship owners have admitted took place was reasonable within article IV (4) of the HR.

5.8 Conclusion:

In this chapter the relationship between exclusion clauses and liberty clauses was examined. Also included in this discussion was the influence of general contract law in the development of the judicial rules of construction which apply to the interpretation of liberty clauses. The analysis extended to illustrative examples of liberty clauses, their construction by the courts and the link between liberty clauses and the various interpretation conventions. The main conclusion drawn from the study is that the effect and consequences of the liberty clause and its effectiveness or otherwise in providing the intended protection for the carrier will very much depend on the rule of interpretation used by the courts. The literal rule of interpretation would be favourable to the carrier, whereas the *contra proferentem* rule would most likely defeat the aims of the carrier as expressed by the liberty clauses. The next chapter contains the overall conclusions, findings and recommendations of the research.

CHAPTER SIX

CONCLUSION: IS DEVIATION STILL RELEVANT?

6.1 A Critical Appraisal of the Continuing Relevance of the Doctrine of Deviation - Is the special status of the rule justifiable?

One of the main objectives of this dissertation was to explore the relationship between the rule against unjustified deviation in modern shipping law and the concept of ‘fundamental’ breach of contract. Is there a recognised doctrine of ‘fundamental’ breach which may be applied to unjustified deviation? And can the strictness of the common law approach to deviation be justified?

These and other questions will be addressed in this final chapter in line with the fifth aim and objective of the dissertation, which is:

DA5: Finally to generate relevant recommendations based on the findings of the research.

It is hoped that the recommendations made in this chapter will address the key doctoral level outcome of original contribution by the researcher to the area of knowledge under study.

Even before the rule was put on statutory footing through the enactment of the Carriage of Goods by Sea Act (COGSA) 1971, the effect of unjustified deviation at common law was to oust the contract of carriage and thus deprive the ship owner of any exception clauses in the contract of carriage by sea.⁶⁷⁴ This in turn raises the question as to whether or not unjustified deviation may be considered to be a ‘fundamental breach’ of the contract of carriage – a condition, as opposed to a warranty or an innominate term. A critical review of both the decided cases and scholarly postulations indicates that there is no common agreement on this question. In *Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd*⁶⁷⁵, for example, it was held that there are certain fundamental breaches of contract that end the contract and invalidate all exclusion clauses available for the party in breach. However, the judges overturned the decision in *Harbutt’s* in the latter case of *Photo Production v Securicor*⁶⁷⁶ and denied that there is a rule of law as to fundamental breach, thus reaffirming the view adopted

674 James F. Whitehead, (1981) Deviation: Should The Doctrine Apply to On-Deck Carriage? 6 *Maritime Lawyer*, 37; and see *Cunard Steamship Co Ltd v Buerger* [1927] AC 1, HL.

675 [1970] 1 Q.B 447 C.A.

676 [1980] 1 All ER 556.

in the *Suisse Atlantique* case⁶⁷⁷. In the *Photo Productions* case the court was of the view that everything depended on the true construction of the contract terms and that a breach does not automatically deprive the defendant of reliance on exception clauses.

Turning now to scholarly opinions, Professor Brian Coote has argued that deviation cases are essentially premised on bailment obligations. In his view the correct interpretation of the rule against unlawful deviation can be said to derive from the relationship between the bailor and the bailee. Another author, C.P Mills, expresses the same view by stating the contract of affreightment can be regarded as being of the same legal status as carriage by land as well as bailment. He further argues that it would be against the spirit of law to say that deviation is still of much relevance given the judgements in *Photo Productions v Securicor*. Christopher M.C Cashmore provides further support for this view by positing that one cannot depart from general bailment theory when dealing with cases of deviation, whether in relation to carriage of goods on land or by sea.

Other authors have adopted a contract law approach to the problem. Examples of this school of thought include Martin Dockray, John Livermore, Stephen Girvin, Charles Debattista and Simon Baughen who all clearly favour the notion that deviation rules should not be separated from the general principles of contract law. Charles Debattista, a proponent of the contract theory approach, strongly argues that the view which is based on bailment theory and thus in favour of separating deviation doctrine from general contract law appears to be “slightly too elegant for comfort”.⁶⁷⁸ Simon Baughen also follows the views espoused in *Photo Production v Securicor* and supports the amalgamation of deviation rules with general contract law. He argues that deviation rules should be “speedily buried” and that any problem concerning geographical deviation “should be dealt with by the ordinary law of contract”.⁶⁷⁹

What impact have advances in shipbuilding technology had on the application of the doctrine of deviation? In considering the term “proper course” historically sailing ships had certain routes which they customarily followed,⁶⁸⁰ such routes were often based trade custom borne out of the influence of trade winds and navigational safety. In the days of sailing ships voyages were subject to innumerable and often uncontrollable hazards which frequently occasioned deviations from the envisaged route and sometimes resulted in delays in the

677 [1967] 1 A.C. 361.

678 Debattista, C. (1989) ‘Fundamental Breach and Deviation in the Carriage of Goods by Sea’ *Journal of Business Law* 22 (n 1) J.B.L. 1989, 22-36.

679 Baughen, S. (1991) ‘Does deviation still matter?’ *Lloyd's Maritime and Commercial Law Quarterly* 70 (n 1) p. 96.

680 *Reardon Smith Line v Black Sea and Baltic General Insurance* [1939] Ac 562, HL.

execution of the voyage.⁶⁸¹ It could be argued that it is in view of this unpredictability associated with maritime adventures that to this day the Hague-Visby Rules do not engage the liability of the carrier for delay in delivery caused by natural factors.

However, as a result of scientific advancement in modern shipping technology, the proper charting of the oceans as well as sophisticated and efficient methods of navigation, voyages have become less subject to unpredictability and consequent delays. This advancement in marine technology has led shippers and cargo owners to rely on, and expect compliance with, undertakings by carriers to deliver goods within a specified period of time. From a legal point of view this raises the question whether such increased party expectation deserves or attracts protection from the law on the basis of the contract law theories of reliance and expectation. From an empirical perspective, this research has thus exposed the link between technological advancement in shipbuilding and the principal evolutionary features of shipping law.

6.2 Research Findings

The key findings which emerge from this research are drawn from Chapters 3, 4 and 5 and can be summarised as follows:

1. Judicial practice in relation to the implication of terms have as a general rule has tended to treat general contract law and shipping law as two separate categories, although jurisprudential practice in the two areas of law have traditionally informed each other (Chapter 3)
2. The key contribution of shipping law to the classification of terms has been through the introduction of the hybrid concept of the innominate or intermediate term (through the judgment in the case of *Hong Kong Fir Shipping v Kawasaki Kaisen Kaisha*). This arguably represents an invaluable contribution in view of the fact that the concept of the innominate or intermediate term has now become an indelible feature of general contract law. However, there remains a key concern which revolves around the potentially erosive impact of this judicial conception on the doctrine of the freedom of contract. (Chapter 3)

⁶⁸¹ Uncitral Yearbook, Volume xxxiv b: 2003, UN Publication, A/CN.9/SER.A/2003.

3. In reviewing the judicial practice in relation to the legal effect of unjustified deviation on the contract of carriage, the question persists as to whether or not the concept of the fundamental term (or breach) remains a part of shipping law even though its existence has been categorically rejected in general contract law. The judicial renderings in cases such as 'The Good Luck' and 'Golodetz' would seem to suggest the lingering existence of the concept, if not in principle, then at least in the judicial practice relating to shipping cases. This is in view of the absence of the right of election by the victim of a breach in cases involving unjustified deviation. (Chapters 3 and 4)
4. There is still some uncertainty surrounding the interpretation of the law on deviation as evidenced by some of the conflicting authorities discussed in the first part of Chapter 4. It can thus be argued that there is a requirement for greater clarity in this area of the law, in particular as regards the need for a precise definition of what is meant by 'intent' or intention to deviate when applied to 'voluntary deviation'. Some of the cases reviewed as part of Chapter 4 serve to highlight these differences, with American courts adopting and promoting a much wider scope for deviation within the context of the concept of 'quasi deviation' as opposed to the English law position which is restricted to geographic deviation.⁶⁸² Within the US federal jurisdiction itself the various circuits have adopted different positions when determining what amounts to unjustified deviation and its possible impact on the policy of marine insurance.
5. With reference to the main findings for Chapter 5, it may be submitted that the concept of liberty clause has made a significant contribution to the development of the law on deviation, in that the implied obligation not to deviate from the proper course can no longer be considered to be the absolute obligation which it was originally intended to be under common law. The development of the law in this area has also been informed by judicial practice with regard to the construction of exemption clauses in general contract law, and what the research has revealed is that over the years there has been a great deal of cross-pollination between general contract law and shipping law with regard to the judicial practice relating to concepts such as that of fundamental breach and the contra proferentem rule.

⁶⁸² Illustrative case law examples include the US case *Jones v Flying Clipper* (1954) 116 Fed Supp 386; *The Silver Cypress* [1944] AMC 895 compared with the English case of *Leduc & Co v Ward & Others* (1888) 20 QBD 475.

Regarding the inroads made by judicial practice into laissez faire practice and the freedom of contract doctrine through the implication of terms, it has to be acknowledged that the trend towards judicial activism which has emerged over the years in this area of the law is hardly surprising, dictated as it is by the evolutionary and increasingly regulatory environment in which shipping law and practice has to operate. If anything it was to be expected that with the passage of time such judicial and legislative constraints to the unfettered freedom of parties to contract as they wish were bound to appear given that the shipping industry (like any other industry) cannot remain isolated from economic, social and technological developments taking place in the wider society. Like any other industry (and given its global span) shipping is subject not only to the influences of judicial practice, but also to historical changes in attitudes taking place in the world. Such changes in attitudes and the social values which they inculcate clearly transcend the narrow interests of ship owners, and the narrow confines of the shipping industry, to include the interests of society as a whole. Hence it was always to be expected that the development of shipping law was never going to be isolated from the emergence of new and socially accepted standards and values such as, for example, the protection of the marine environment.

It is thus in light of the above that concepts such as the implied obligation regarding seaworthiness can be said to transcend the contractual boundaries of the charterparty to include a duty towards the preservation and conservation of the marine environment. By way of example, legislation such as the Oil Pollution Act 1990 (OPA 90) and regulations such as Tanker Management Self-Assessment 2 (TMSA2) have had a significant impact on the duties and obligations of contracting parties in the oil tanker transport industry through the prescription of very high standards of safety and protection of the marine environment.

6.3 Recommendations: The Case for Reform

The following are the main recommendations of the researcher based on the findings of the research which have been highlighted in the section above.

1. In order to promote greater certainty there is a need for further harmonisation of the law across different jurisdictions both in terms of the substantive content and its judicial interpretation. There is also a need perhaps for a new international convention

which brings together all of the previous conventions. Such a consolidating measure can be used to address any shortcomings of the previous conventions and also the interests of all stakeholders in the shipping industry.

2. There needs also to be clarity as to the causal relationship between an unreasonable deviation and the loss or damage to the cargo, and whether or not proof of causation is required is as a pre-requisite for a successful claim against the carrier. The researcher would submit that such proof of causation is required, as otherwise the law against unjustified or unreasonable deviation would be based on a principle of strict liability.
3. The research would recommend that the concept of deviation should be treated more as an innominate or intermediate term (similar to the implied obligation as to seaworthiness), than a condition. This is in view of the way the law has developed over the years. A review of the case law in particular would seem to suggest the originally strict common law concept has been diluted by various common law exceptions and also modified by the various international conventions. Given these developments and the way in which the principle operates nowadays, there would be more clarity from a legal point of view if it was to be treated as an innominate or intermediate term rather than a condition whose breach has the potential to oust both the contract of carriage and the policy of marine insurance. Whereas, the research would argue that cases involving unjustified deviation should be treated on the basis of the seriousness of the breach, i.e. the practical effect of the breach on the performance of the contract of carriage. If, for example, goods are delivered on time⁴ and in good condition following an incident of unjustified deviation, there is no justifiable reason as to why the contract of carriage should be repudiated by the cargo owner on grounds of the unjustified deviation.
4. On the question raised earlier in Chapter 3 of this dissertation as to whether implied shipping terms such as 'proper stowage' and 'care and preservation of the cargo' belong to the category of a condition or a warranty, it may be submitted that in the absence of judicial authority on this particular question such terms ought to be treated with some degree of flexibility and thus assimilated to the category of the innominate or intermediate term.

5. On the question regarding liberty clauses, it is worth noting that the traditional approach which involved carriers drafted standard terms which were generally in their favour has since been the subject of considerable attention from shipping institutions such as the Baltic and International Maritime Council (BIMCO) and the Association of Ship Brokers & Agents (ASBA). These shipping organisations have striven to ensure a fairer and more balanced approach to the conception and drafting of the terms of shipping contracts. In addition important players in the international shipping market such multinational oil and mineral companies have also exerted a significant influence in ensuring the protection of charterer's contractual interests through their involvement as charterers in the oil tanker hire business. In view of these developments, the researcher would argue against judicial intervention in the construction of liberty clauses through the *contra proferentem* rule. In other words, in the light of these developments which seem to counter-balance the bargaining power of the ship owning class, the researcher would submit that the freedom of contract doctrine ought to prevail in the judicial interpretation of the terms of the contract of carriage, including liberty clauses.

6.4 Concluding Remarks

In concluding, the researcher would like to draw attention to some developments in this area of the law which first came to light over 10 years ago.⁶⁸³ The Australian Law Reform Commission (ALRC) is a federal agency that reviews Australia's laws to ensure they provide improved access to justice for all Australians by making laws and related processes more equitable, modern, fair and efficient, with the aim of better protecting the insured.⁶⁸⁴ Several limitations upon an insurer's obligation to pay are not set out in the contract itself but contained in the Marine Insurance Act as implied warranties or situations where the underwriter is automatically discharged from liability. Thus, the most significant recommendations and proposals of the ALRC is that the warranties in shipping contracts will be abolished and to be replaced by express terms, i.e. where the underwriters wish to rely on matters currently the subject of implied warranties in the Marine Insurance Act, they will have to redraft policies and clauses to include express terms to that effect. The aim of those terms being expressly included in the policy means that there is a better chance that the insured will be aware of them. ALRC also proposed that the insurer will be entitled to decline

⁶⁸³ See further Lewins, Kate, Australian proposes marine insurance reform, "Journal of Business Law, J.B.L 2002 292-303.

⁶⁸⁴ John Dunt, International Cargo Insurance, 1st edition, Informa Law from Routledge, Oxon, 2012, p. 171.

a claim on the basis of a breach of the term of the contract only if they can prove that the insured's breach is the proximate cause of the loss or damage.

The ALRC recommended that the harsh consequences of a breach of the warranty (such as the consequences of unreasonable deviation in MIA) should be removed. Recommendation 7 of the ALRC seeks to remove the concept of warranties from marine insurance altogether, replacing them with use of express terms; Recommendation 16 suggests deleting those sections of the Marine Insurance Act which discharge the insurer from liability (such as section 51-55 of Australian Marine Insurance Act which deal with deviation and unreasonable delay). Recommendation 7 also seeks to introduce a requirement that the insurer not be entitled to rely upon the breach of a policy term to refuse to pay a claim unless the breach was the proximate cause of the loss or damage. According to this, the underwriters will not be able to rely on implied warranties in the MIA such as deviation or unreasonable delay and therefore there will be no automatic discharge of the policy in the event of such breaches. However, under the proposed reform, the insurer will have the right to refuse to pay a claim only where the insured breached an express term stipulated in the contract, and where the breach of the express term is found to have the proximate cause of the loss.

The ALRC recommendations also have an effect of the 'held cover clause'. Clause 2 in the Institute Voyage Clauses-Hulls for instance states as follow:

2. CHANGE OF VOYAGE

"Held covered in case of deviation or change or voyage or any breach of warranty as to towage or salvage services, provided notice be given to the Underwriters immediately after receipt of advices and any amended terms of cover and any additional premium required by them be agreed"

According to the proposed reform it could be argued that the effect of abolishing warranties will lead to remove the reason for practicing the held cover clauses, as held cover clause in the case of deviation above will no longer be relevant.

To conclude this point the ALRC recommendations proposed that the insurer will be the drafter of the policy and will bear this onus, thus it will be important for the underwriters not to be "caught napping" as under the proposed reform the insurer who does not do so has much to lose⁶⁸⁵.

685 Lewins. K. (2002) Australian proposes marine insurance reform, "Journal of Business Law, J.B.L. 292-303.

The Terms of Reference for this inquiry required the Commission to review the Marine Insurance Act 1909. If adopted, the Commission's recommendations would have involved significant amendment to the MIA. The Commission had anticipated that the impact in practice on Australia's marine insurance industry would have been less than that which the scale of the changes to the wording of the MIA might have suggested. The amendments would have been made within the existing structure and layout of the MIA, which are familiar to the industry both within Australia and, because of the MIA's similarity to cognate legislation overseas, in foreign jurisdictions.

There has been no formal response to ALRC Report 91 from the Australian Government. The researcher finds this to be a disappointing outcome because the adoption of these recommendations would have been a positive step forward in addressing some of the problems in this area. The researcher hopes that this issue will be revisited in time to come as part of the effort to find lasting legal and practical solutions to the various challenges in this area of the law.

6.5 Table: Mapping of Original Contribution

In line with doctoral assessment guidelines which require original contribution as one of the outcomes of the research, the following table is intended to provide a mapping of the areas where original contribution occurs in this dissertation.

Original Contribution to knowledge in the Field	Chapter of Contribution
1. Link between deviation, other principles of shipping law and legal philosophy (schools of thought).	Chapter 1, Section 1.7
2. Exploration of the link between general contract law and shipping law vis-a-vis techniques of judicial implication of terms.	Chapter 3
3. Recommendation of legal reform regarding various aspects of the law on deviation, in particular the re-classification of deviation as an innominate or intermediate terms, and the consolidation of convention sources with a new convention.	Chapter 4
4. Exploration of the link between general contract law and shipping law vis-a-vis approaches to judicial construction of exemption clauses and liberty clauses.	Chapter 5
5. Recommendations based on research findings	Chapter 6

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