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The Effect of Deviation Occurring in the Course of a Maritime Voyage on the Liability of the Carrier under the Hague/Visby Rules And Hamburg Rules, In Relation to certain Countries

By

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A Thesis Submitted for the Degree
of Doctor of Philosophy

The Department of Private Law
The School of Law
The University of Glasgow
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For

my wife, Jehan, sons,

Nawaff & Majid

and

in memory of my parents

who made it all possible

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Finally, I should express my appreciation and deep gratitude to the Iraqi government {Justice Ministry} for their financial support.

ABBREVIATIONS

A.C.	Law Reports, Appeal Cases.
A.M.C.	American Maritime Cases.
Adm.	Admiralty Court.
AJ.	The Advocacy Journal (Egypt).
All E.R	The All England Law Reports.
Am.J.Comp.Law.	American Journal of Comparative Law Quarterly.
Asp.M.L.C.	Aspinal's Maritime Cases.
Asp.M.c.L.	Aspinal's Maritime Cases.
B.C.Ind&Com.L.Rev. ...	Boston College Industrial and Commercial Law Review.
Bligh.	Bligh House of Lords Reports (4ER) 1818-21.
C.A.	Court of Appeal.
C.J.	Cheif Justice.
C.L.R.	Commonwealth Reports.
Can.Sup.ct.	Canadian Supreme Court.
Ch.	Law Reports, Chancery.
Ch.D.	Chancery Division.
Ch.D.	Chancery Division.
CLS	Current Law Statutes.
COGSA.	Carriage of Goods by Sea Act.
Com.Cas.	Commercial Cases.
Com.Cas.	Reports of Commercial Cases.
Ct.	Court.
Ct.J.	Circuit Judge.
Ct.of App.	U.S. Circuit Court of Appeals.
Current.Leg.Prob.	Current Legal Problems.
D.J.	District Judge.
DDECC.	The Digest of the Decisions of the Egyptian Court of Cassation.
Dist.Ct.	U.S. District Court.
Div.Ct.	Divisional Court.
E.L.D.	European Law Digest.

E.T.L.	.....	European Transport Law.
Ex.C.R.	.....	Exchequer Court Reports.
F.2d.	.....	Federal Reporter, Second Series.
F.C.	.....	Federal Court Reports(Canada).
F.Supp.	.....	Federal Supplement (USA) 1932.
Fed.Rep.	.....	Federal Reporter (USA) 1880.
H.L.	.....	The House of Lords.
H.L.R.	.....	Harvard Law Review.
Hastings.L.J.	.....	Hastings Law Journal.
I.C.L.Q.	.....	International and Comparative Law Quarterly.
I.R.	.....	Irish Reports.
IJJ.	.....	The Iraqi Juridical Journal.
J.	.....	Mr. Justice.
J.B.L.	.....	The Journal of Business Law.
J.Mar.L.& Com.	.....	Journal of Maritime Law and Commerce.
Jur.R.	.....	The Juridical Review.
J.World Trade.	.....	Journal of World Trade.
JICCD.	.....	The Journal of Iraqi Cassation Court Decisions.
JNL.Int'l & Econ.	....	Journal of International Law and Economics.
K.B.	.....	Law Reports, King's Bench.
Kelly's.Rep(Georgia)	..	Kelly's Report(1-3 Georgia).
L.C.	.....	Lord Chancellor.
L.J.	.....	Lord Justice.
L.Q.R.	.....	The Law Quarterly Review.
L.R.Ex.	.....	Law Reports Exchequer.
L.T.	.....	Law Times.
L.T.(O.S.)	.....	Law Times. Old Series 1843-59.
LJAC.	.....	The Legal Journal of the Alexandria Court (Egypt).
LL.L.Rep.	.....	Lloyd's List Law Reports (prior to 1950).
Lloyd's Rep.	.....	Lloyd's Law Reports (after 1950).
LMCLQ.	.....	Lloyd's Maritime and Commercial Law Quarterly.

M.L.R.	.....	Modern Law Review.
Macq.	.....	Macqueen's, Appeal Cases (Scotland), H.L.
Mar.Law.	.....	Maritime Law.
McGill Law.	.....	McGill L. J.
N.Y.Sup.2d.	.....	New York Supplement (Second Series) (U.S.).
Ore.L.Rev.	.....	Oregon Law Review.
P.C.	.....	Judicial Committee of the Privy Council.
Para.(s)	.....	Paragraph(s).
Q.B.	.....	Law Reports, Queen's Bench.
Q.B.D.	.....	Queen's Bench Division.
R.	.....	Rettie's Court of Session Cases.
R.	.....	Rettie's Court of Session Cases.
R.S.C.	.....	Rules of the Suppreme Court.
S.C.	.....	Court of Session.
S.C.R.	.....	Supreme Court Reports (Canada).
S.D.N.Y.	.....	Southern District of New York.
S.E.2d.	.....	South Eastern Reporter (Second Series) (U.S.).
S.I.	.....	Statutory Instrument.
S.J.	.....	Scottish Jurist; Solicitors Journal.
S.J.	.....	Scottish Jurist; Solicitors Journal.
S.L.T.	.....	Scots Law Times.
S.R. & O.	.....	Statutory Rules and Order.
S.W.2d.	.....	South Western Reporter(Second Series) (U.S.).
Sch.(s)	.....	Schedule(s).
SCLYB	.....	Scottish Current Law Year Book.
Sh.App.	.....	Shaw's Scotch Appeal Cases, H.L.
Sh.App.	.....	Shaw's Scotch Appeal Cases, H.L.
Sup. Ct.	.....	Supreme Court.

T.L.R.	.....	Times Law Reports.
Tul.L.R.	.....	Tulane Law Review.
U.S.	.....	United States Supreme Court Reports.
W.L.R.	.....	Weekly Law Report.
W.L.R.	.....	Weekly Law Reports.
Williamette.L.J.	....	Williamette Law Journal.

Summary

Deviation occurring in the course of a maritime voyage and its effect on the carrier's liability is a controversial issue whether under the Hague/Visby Rules and the Hamburg Rules or under the COGSA of the United Kingdom and the United States.

International Conventions do not contain any specific provision dealing with unreasonable deviation, except that the Hague/Visby Rules provide a provision for "reasonable deviation".

The problems which arise from deviating ship have been left to the national laws and the experience of the domestic courts which are devoted to their own legal system rather than to the rules of the international conventions. Consequently, the national laws and jurisprudences of the contracting parties or non-contracting parties have discussed the doctrine of deviation in a variety of cases but have presented different solutions and therefore different consequences may result.

This thesis is therefore an attempt to discuss the doctrine of deviation comparatively and shed light on the effect of unreasonable deviation on the liability of the maritime carrier.

I confined the scope of the thesis to the field of bills of lading as an important document for the carriage of goods by sea, and to the relevant points concerning the charterparty when the bill of lading is incorporated into the charterparty. Therefore, I discussed the principles of the bill of lading and the scope of the Rules in the introduction.

The thesis is, however, divided into six chapters.

Chapter one is aimed at defining the concept of "deviation" and clarifying the classification of "deviation". Any attempt to classify the terminology of deviation into reasonable and unreasonable is considered an essential factor in deciding whether the deviation occurred in the course of the maritime voyage is a deviatory breach of contractual obligations or not.

Chapter two is divided into two sections.

The first one is devoted to explaining the main principles of the carrier's liability concerning the seaworthiness and the proper care of the goods by loading, handling, and stowing the goods carried. I also discussed the degree of the seriousness of the carrier's fault or his servant or agent and the effect of serious fault on the doctrine of deviation which might displace the carriage contract when such deviation occurs deliberately.

Whereas, the immunities of the carrier, whether under the International Convention, i.e; The Hague/Visby Rules and The Hamburg Rules or, in the national laws and the immunities which are based on a contractual basis, are the subject of section two.

I have however reached the conclusion, in this chapter, that the carrier's liability, under the Hague/Visby Rules and the Hamburg Rules, is based on the principles of presumed fault or neglect. On the other hand, I have adopted the risk approach as the best theory for introducing an explanation for holding a deviating carrier liable providing that the deviation is wrongful and increasing the risk of loss beyond that permitted by the contract and endeavours to prevent the carrier from creating unauthorized risks.

Chapter three deals with the effect of deviation on the contract of carriage and its characteristics as a serious breach of the contractual obligations. I have therefore divided the chapter into two sections.

Section one is concerned with the characterization of the breach of contract of carriage by explaining the distinction between the conditions and warranties under the general principles of the contract law, and the breach of fundamental term or the fundamental breach, while section two is devoted to explaining the effect of unreasonable deviation on the obligations of the

contracting parties.

I have however tried in this chapter to find out a legal characterization for unreasonable deviation. I believe that such a serious breach is considered a breach of the substantive rules and therefore the doctrine of deviation has still the same effects on the contractual obligations as it was under the pre-Hague Rules regime. I also endeavoured to base such a breach in the carriage contract on the test of reasonableness which determines whether or not a breach of contract is fundamental or material.

Thus, any exaggeration in the drastic effect of an unreasonable deviation should be isolated from the carrier's duties to provide a seaworthy ship and to load, stow, and discharge the cargo properly and carefully. The innocent party has merely a right to compensation for such loss of or damage to the cargo.

Recovery of losses and damages resulting from an unreasonable deviation is the subject of chapter four. This chapter is divided into three sections which deal with the compensatory nature of losses and damages and whether the innocent party is entitled to recover the physical and the economic loss by establishing the causal relationship between the unreasonable deviation and the loss of or damage to the cargo which could be shown by adopting two doctrines, i.e; remoteness and mitigation of

damage, which have tried to limit the damages.

The court is however entitled to have a special method to estimate such loss of or damage to the cargo unless the nature and the value of the goods have been declared by the shipper before shipment and inserted in the bill of lading, the cargo-owner is entitled to recovery for full damages caused to the cargo which may exceed the statutory limitation.

Chapter five is concerned with the procedures of action for lost or damaged cargo. This chapter is divided into four sections. These sections are concentrated on the principles of notice of loss, damage and delay in delivery, time limitation for suit, jurisdiction clauses, and the burden of proof under the International Conventions and COGSA. These four points are, however, classified into formal and substantive conditions.

The first three conditions are formal conditions which the court must enquire as a matter of form that these conditions have been instituted before hearing the case.

The last condition is a substantive condition when the court must show who bears the burden of proof at a particular point in the litigation.

Finally chapter six is devoted to describing and analyzing the main principles of the Iraqi and Egyptian legal systems concerning the liability of the carrier.

Iraq and Egypt have broadened their horizons by adopting the principles of the International Conventions, i.e; Egypt ratified the Hague Rules since may 29th 1944, whereas, the Iraqi Draftsman embodied the principles of the Hamburg Rules in the Iraqi Transport Law in 1983. That indicates that both apply the international rules in order to establish a joint understanding for the principles of carriage of goods by sea and to obtain some benefit of the precedents and experience of the United Kingdom and the United States in the field of maritime law.

CONTENTS

	Page
Dedication	(ii)
Acknowledgements	(iii)
Abbreviations	(iv)
Summary	(viii)
Introduction	1
Chapter One Definition and Classification of Deviation	24
Section One Definition of Deviation	28
i- Theoretical Definition of Deviation	28
1-Definition of Deviation under the Hague /Visby Rules and the Hamburg Rules	32
A-The Hague/Visby Rules	32
B-The Hamburg Rules	33
2-Terms of Deviation Contained in COGSA	35
ii-Practical Definition of Deviation	37
1-United Kingdom Jurisprudence	37
2-United States Jurisprudence	40
Section Two Classification of Deviation	43
i-Reasonable Deviation	44
1-Reasonableness as the Criterion	45
A-United Kingdom Jurisprudence	47
B-United States Jurisprudence	52
2-Liberty Clauses	56
3-Exceptional Perils	66
Comment	71

Page

ii-Unreasonable Deviation 75

United Kingdom and United States Jurisprudence. 77

iii-Geographical Deviation 83

Over Carriage 91

iv-Non-Geographical Deviation 93

1-Stowage Cargoes on Deck 94

2-Dry Docking with Cargo Aboard 99

3-Delay may be Another form of

Non-Geographical Deviation 99

v-Quasi-Deviation 101

Section Three Deviation and Change of Voyage. 102

Section Four Deviation and Delay 106

Conclusion 117

Chapter Two The Basis of Liability of the Carrier in Connection with the Doctrine of Deviation 122

Section One The Basis of Liability under the International Conventions and in Relation to Certain Countries ... 131

i-The Basic Duties to Make the Ship Fit for the Purposes of a Particular Voyage 132

1-Under the Hague/Visby Rules 133

A-Exercise Due Diligence to Make the Vessel Seaworthy 133

B-Load the Cargo Properly and Carefully 142

C-Stow the Cargo Properly and Carefully 150

Page

D-Discharge the Cargo Properly and Carefully . 159

2-Under the Hamburg Rules 168

Comment 182

ii-Serious Fault and the Doctrine of
Deviation 195

1-The Nature and the Degree of the Seriousness
of the Carrier's Fault 198

2-The Actual Fault or Privity of the Carrier . 205

3-Vicarious Liability 207

4-The Effect of Serious Fault on the Doctrine
of Deviation 217

Section Two The Immunities of the Carrier .. 222

i-The Exoneration Principles 223

1-Under the Hague/Visby Rules 223

A-The Error in Navigation or Management 227

B-Fire 229

C-Strikes 233

2-Under the Hamburg Rules 235

ii-Waiver of Deviation 240

Conclusion 242

Chapter Three The Effect of Deviation on the
Contract of Carriage 247

Section One The Characterization of the Breach
of Contract of Carriage 248

i-Conditions and Warranties 251

ii-Breach of Fundamental Term and Fundamental

Page

Breach 256

1-Breach of Fundamental Term 257

2-Fundamental Breach 258

3-Whether the Doctrine of Fundamental Breach is to Operate as a Rule of Substantive Law or as a Rule of Construction 261

4-Fundamental Breach in the United States ... 266

iii-Whether the Doctrine of Deviation is Considered as a Rule of Law or as a Rule of Construction. 268

Section Two The Direct Effect of Unreasonable Deviation on the Obligations of the Contracting Parties 271

i-Depriving the Shipowner's Right to Freight of the Contract of Carriage 272

ii-Cancelling the Protection Terms of the Contract of Carriage 278

1-Preventing a Shipowner from Relying upon Exemption Clauses Contained in the Bill of Lading 279

2-Loss of the Right to Limit Liability 290

1-The General Principles of the Limitation of the Carrier's Liability 291

A-The Single System of Limitation 293

1-Per Package 294

2-Per Unit 297

B-The Effect of Containerization and Palletization

Page

on the "Per Package or Unit" Concept 300

1-The Intention of the Parties 301

2-Facilitation for Transport 303

3-Functional Economic Test 305

C-The Dual System 310

2-How and When does the Carrier loss the Right to limit Liability 314

A-The Rules Apply as a Matter of Contract ... 314

B-The Rules Apply Ex Proprio Vigore 319

iii-Will Unreasonable Deviation Avoid the Cargo Insurance Cover and will the Carrier be an Insurer of the Goods? 322

Comment 329

Conclusion 332

Chapter Four Recovery of Losses and Damages. 336

Section One Compensatory Nature of Damages and Losses 338

i-Physical Damage 339

ii-Delay in Delivery as Non-Physical Damage. 346

Economic Loss 347

Section Two Causation 355

i-Remoteness 357

ii-Mitigation of Damages 361

Comment 366

Section Three Measures of Damages 370

i-Assessment of Damages 371

Page

ii-The Unit of Account in the International Conventions 376

1-The Gold Clause Basis 376

2-The Gold Franc Basis 382

3-The SDR Basis 384

Conclusion 388

Chapter Five Procedures of Action for Lost or Damaged Cargo 393

Section One Notice of Loss, Damage and Delay in Delivery 395

i-Under the Hague Rules and COGSA of the United Kingdom and the United States 396

ii-Under the Hamburg Rules 400

Section Two Time Limitation for Suit 404

i-Under the Hague/Visby Rules 405

ii-Under the Hamburg Rules 417

iii-The Effect of Deviation on the Time Limitation 421

Section Three Jurisdiction Clauses 427

i-Under the Hague/Visby Rules 427

ii-Under the Hamburg Rules 434

Section Four Burden of Proof 438

i-Burden of Proof under the Hague Rules 439

ii-Burden of Proof under the Hamburg Rules .. 445

Conclusion 449

Chapter Six The Iraqi Legal System Concerning the Liability of the Carrier, Compared

Page

with Egyptian Jurisprudence in Certain Points. 453

Section One Basis of the Liability of the Carrier According to the Iraqi Transport Law. 455

i-Basic Elements of the Liability of the Carrier under the Iraqi Transport Law 456

1-Prior to the Voyage 461

A-Acceptance of the Requests of the Loading and Preparation of the Goods for Shipping.. 461

B-Seaworthiness of the Vessel 462

2-During the Voyage 464

1-Proper Care of the Goods 464

A-Stowage of the Goods on Deck 468

B-Dangerous goods 470

C-Live Animals 471

2-Contemplated Voyage 472

A-Deviation 474

B-Change of Voyage 478

3-Subsequent to the Voyage 478

A-Discharging the Goods 479

B-Delivering the Goods 480

ii-Recovery of Losses, Damages and Delay in Delivery 482

1-Losses 483

2-Damages 486

Page

3-Delay in Delivery 487

4-Measures of Damage 490

iii-Immunities of the Carrier 493

Section Two Limitation of the Liability of the Carrier 498

i-Concept of "Per Package or Unit" 499

ii-Dual System of Limitation 501

iii-Special Drawing Rights 504

Section Three Procedures of Action for Lost, or Damaged Cargo 506

i-Competent Court 508

ii-Notice of Loss or Damage 511

iii-Limitation of Actions 514

1-Limitation of Actions under the Egyptian Maritime Commercial Law 517

2-Limitation of Actions under the Hague Rules. 520

Conclusion 523

Final Conclusion 527

Bibliography 538

Table of Conventions and Documents 559

Table of Statutes 561

INTRODUCTION

The satellite navigation system is the most rapid technological development in the navigation system by assuring safety on certain passages and representing continuous economy on any particular voyage even with the use of navigational aids, i.e; RDF, Fathometers, and Raders.

There is no question as to the value of the satellite navigation system aboard a vessel, especially where an accurate position cannot be plotted for reason of bad weather conditions. The satellite system can ascertain the main track at all times. It also can determine the differences in total mileage between one route and another, and the shortest route can be properly evaluated. This system can however give accurate advice to the carrier in case of changing the course of a maritime voyage.

Such technical development in shipping, by using a satellite navigation system, does not decrease the valuation and the importance of the doctrine of deviation in maritime law, but it remains as an enigma under the contract law in general and under the Admiralty law in particular.

Deviation in the course of maritime voyage has however raised and still raises a controversial discussion particularly as to the effect on the contract of carriage by sea, whether it displaces the contract of carriage

automatically or it gives an option to the cargo-owner or any innocent party to treat the contract as still subsisting or to rescind the contract as brought to an end by the fundamental breach, unless such deviation is to be waived.

These questions subsequently have given considerable importance to the notion of deviation in the course of carriage of goods by sea and developed by analogous reasoning to cover all bailment situations[1] whether such deviation occurs in the carriage of goods by Sea, Air, or Road.

The doctrine of deviation extends beyond geographical deviation by covering non-geographical deviation.[2]

The jurisprudence of the United Kingdom and the United States concerning the effect of unjustifiable deviation upon a contract of carriage has been stated in a variety of cases but not in uniform language. The courts have considered the deviatory breach as a serious breach to contractual obligations which goes to the root of contract.[3]

The Hague/Visby Rules were designed to strike a

1-C.P. Mills, "The Future of Deviation in the Law of the Carriage of Goods", [1983] 4 LMCLQ, p 587, hereinafter cited as "Mills, The Future of Deviation".

2-James F. Whitehead, III, "Deviation: Should the Doctrine Apply to On-Deck Carriage?" [1981] 6 Mar. Law. p 37 at p 38, hereinafter cited as "Whitehead, Deviation".

3-Lord Wright, in, Hain S.S.Co. v. Tate & Lyle, [1930] 2 ALL E.R. p 597; Devlin, J, in, Alexander v. Railway Executive [1951] 2 ALL E.R. p 442.

compromise between the conflicting interests of the shipowner and the cargo-owner by creating uniform rules. That does not mean that the Hague/Visby Rules were perfect as far as the deviation's issue was concerned.

Lord Justice MacKinnon[4] has explained the ambiguity surrounding the deviation by saying:

> "The rule as to deviation in the Hague Rules is utterly unintelligible"

The considerable importance and justification either theoretically or practically in choosing the topic of "The Effect of Deviation Occurring in the Course of Maritime Voyage on the Liability of the Carrier" comes out from the lengthy struggle between the conflicting precedents respecting the deviating carrier whether in the United Kingdom or the United States.

Priority was also given to a study on bills of lading and problems which emerged from functions by the United Nations Conference on Trade and Development Secretariat[5] which indicated that the Hague Rules need revision and should take into account the given needs of developing countries.

Any analytic study must however consider the needs of economic development, in particular in developing

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4-Compagnie Primera De Navagaziona Panama v. Compania Arrendataria De Monopolio De Petroleos SA. [1940] K.B. p 362 at p 368 (C.A).

5-United Nations held many conferences as respect as to determine the defects and amendments to the Hague/Visby Rules, i.e; Working Group on International Shipping Legislation, UNCTAD and UNCITRAL.

countries, and make appropriate recommendations by putting forward an integrated theory for the principles of deviation and its consequences on the contract of carriage of goods by sea. Such a study therefore for the deviating vessel and its effect on the liability of the carrier should shed light on the economic and commercial aspects of international legislation, i.e; The Hague/Visby Rules, The Hamburg Rules, and on the practical aspects of the bills of lading which performs a complex set of functions.

"UNCTAD" has made these aspects of bills of lading quite clear in explaining the proposals for a complete revision of the Hague Rules[6].

As far as the economic aspects are concerned UNCTAD has discussed the break down in the balance of the relationship between cargo-owner and carrier in the field of the carriage of goods by sea.

The consequences follow any breach of contract especially when the goods carried are lost or damaged and the best way of recovering such loss of, or damage to, the cargo, taking into account the effect of the economic loss on the contractual relation of the contracting parties or any innocent party who has been involved in such a contract or its consequences[7]. Also, the

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6-United Nations Conference on Trade and Development/ Geneva, Report by the Secretariat of UNCTAD, New York, 1971, TD/B /C.4/ ISL/6/Rev.1/ p 1 at p 17, hereinafter cited as "TD/B/C.4/ ISL/6/ Rev.1".

7-W.E.Astle, The Hamburg Rules, 1981, p 27, hereinafter cited as

commercial aspects of bills of lading broadly discussed by "UNCTAD"[8] is that:

> "The commercial aspects would include the part played by the bill of lading in the course of maritime trade as document of title to and a receipt for goods as well as a memorandum containing either the contract of carriage or its evidence. What requires consideration is whether the bill of lading, as at present formulated, satisfies the expectations of the seller, the carrier, the receiver, the banker and the cargo insurer, all of whom depend upon its contents for their respective needs".

The effect of these aspects of bills of lading on the contracting parties depends upon the way of handling the risks caused to the cargo and distributing such loss of, or damage to, the cargo by the functioning and interpretation of the applicable bill of lading. The phrase bill of lading is used to define a document evidencing the loading of goods on a vessel and by which the carrier undertakes to deliver the goods to the holder of the bill of lading which is signed by the carrier and issued to a shipper of goods[9].

The Hague/Visby Rules do not define the bill of

"Astle, The Hamburg Rules".

[8]-TD/B/C.4/ISL/6/Rev.1 at p 17.

[9]-E.R.Hardy Ivamy, Dicitionary of Shipping Law, 1984, at p 7, hereinafter cited as "Ivamy, Dictionary of Shipping Law"; TD/B/C 4/ISL/6/Rev.1 at p 5; S. Mankabady, "Comments on the Hamburg Rules", Published in the Hamburg Rules on the Carriage of Goods by Sea", 1978, p 27 at p 41, hereinafter cited as "Mankabady, The Hamburg Rules".

lading[10], whereas, Article 1 [7] of the Hamburg Rules defines the bill of lading as:

> "...a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document. A provision in the document that the goods are to be delivered to the order of a named person, or to order, or to bearer, constitutes such an undertaking".

The aim of the definition of the bill of lading under the Hamburg Rules is to clear the ambiguities over those in the Hague/Visby Rules[11]. These ambiguities may be clarified by explaining the functions of the bill of lading and whether the bill of lading is a contract or not. Doubt has been raised whether the bill of lading is a contract of carriage[12] or is merely a piece of evidence

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10-Astle, The Hamburg Rules, at p 12; Article 1[b] of the Hague/Visby Rules defines the contract of carriage which is identical to Article 1 [b] of the United States COGSA and Article 1[b] of the United Kingdom COGSA 1924 and 1971, as following:
"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 a document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforsaid 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 same".

11-George F. Chandler III, "A Compromise of COGSA, The Hague/Visby, and The Hamburg Rules", [1984] 15 J.Mar.L.& Com, p 233 at 238, hereinafter cited as "Chandler".

12-Lord Cottenham L. C. in the Dunlop v. Lambert (1839) 6 C I.& Fin. p 600 at p 627, where he states that:
".. the consignor makes a special contract with the carrier, and the carrier agreed to take the goods from him, and to deliver them to any particular person at any particular place, the special

endeavouring to show what that contract is[13].

The most favoured trend concerning the characterization of the bill of lading is not considered itself as a contract of carriage[14], but it may act as evidence of that contract[15].

Lord Bramwell in Sewell v. Burick[16] has made that quite clear by saying:

> "To my mind there is no contract in it. It is a receipt for goods, stating the terms on which they were delivered to and received by the ship,and therefore excellent evidence of those terms, but it is not a contract".

---

contract supersedes the necessity of showing the ownership of the goods and that... the consignor, the person making the contract with the carrier may maintain the action, though the goods may be the goods of the consignee"

13-Raoul Colinvaux, Carver's Carriage by Sea, {13th,ed,1982}, Vol,I, Para, 84, p 59, hereinafter cited as "1 Carver"; Charles Debattista, " Bill of Lading as the Contract of Carriage",[1982] 4 M.L.R. p 652, hereinafter cited as "Debattista, Bill of Lading".

14-David G. Powles, "Action without Loss: The Consignor's Right against the Carrier", [1977] J.B.L. p 132 at p 135, hereinafter cited as " Powles, Action without Loss", where he expressed the basic elements of the term "special contract" which was used by lord Cottenham in Dunlop v. Lambert as follows:

"First, that privity of contract exists between consignor and carrier; and Secondly, that this is sufficient to prevent the carrier from raising the consignor's lack of title as a defence".

15-Malcolm Alistair clarke, Aspects of the Hague Rules, A Comparative Study in English and French Law, 1976, p 79, hereinafter cited as "Clarke".

16-{1884] 10 App.Cas, p 74 at p 105; Per Lush J, in, Crooks v. Allan {1879} 5 Q.B.D. p 38 at p 40; Moss S.S. Co. v. S.Whinney [1912] A.C. p 254 at pp 261, 264, 270; Goddard, J, in, The Ardennes, [1950] 2 ALL E.R. p 517; Captain v. Far Eastern S.S.Co.[1978] A.M.C. p 2210 at p 2215.

The contract of carriage may be concluded without any writing at all[17], and the bill of lading therefore does not necessarily draw any stage in the development of the contract.[18] The modern form of bill of lading has however different functions depending upon the principal purpose of the bill of lading which may be described as:

"a" An Evidence of the Contract

As we have explained before in characterizating the bill of lading, it is not a contract of carriage but it may be regarded as an acknowledgement of taking over the goods to be carried on a certain vessel.

That means that the bill of lading is considered as prima facie evidence that a contract has been concluded.[19]

17-Per Lord President Clyde, in, Harland & Wolf v. Burns & Laird Lines, 1931 S.C. p 722.

18-Per Devlin, J, in, Pyrene Co.Ltd. v. Scindia Navigation Co. Ltd [1954] 2 Q.B. p 402 at p 419.

19-David M. Walker, Principles of Scottish Private Law, (3rd,ed, Vol, II, 1983), p 341, hereinafter cited as" Walker, Private Law, Vol, II"; Sir Alan Abraham Mocatta, Sir Michael J Mustill, and Stewart C. Boyd, Scrutton on Charterparties and Bills of Lading, (19th, ed, 1984), p 55, hereinafter cited as "Scrutton on Charterparties"; S.S. Ardennes Cargo-Owners v. S.S. Ardennes (Owners), [1951] 1 K.B. p 55, where it is stated:
"The bill of lading not being in itself the contract between shipper and shipowner, though evidence of its terms"; E R Hardy Ivamy, Payne & Ivamy's Carriage of Goods by Sea, (12th, ed, 1985), p 72, hereinafter cited as "Payne & Ivamy", where they state that:
"Where the charterer puts the ship up as a general ship, the contract of carriage will in each case be evidenced by the bill of

Article 1(b) of the Hague/Visby Rules states however that the contract of carriage applies only to a contract of carriage covered by a bill of lading. That indicates that the contract of carriage is always concluded before the bill of lading, which evidences the terms of contract, is issued.

The terms of the bill of lading will then be in force from the inception of the contract of carriage[20], if it were otherwise then the bill of lading would not be evidence of the contract but would be a variation of it, and the parties do not intend that the terms of the contract be changed because the bill of lading does not necessarily mark any stage in the development of the contract.[21]

If there is a discrepancy between the contract of carriage and the terms included in the bill of lading, then priority will be given to the document creating the contract rather than to the document evidence it.[22] For instance, where the contract of carriage did not contain any conditions which allowed the vessel to deviate from the agreed or customary route, then nothing could change

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lading given to each shipper, irrespective of terms of the charter-party, except where there is an express agreement to the contrary".

20-Lush J, in, Crooks v. Allan (1879) 5 Q.B.D. p 38 at p 40; Hamilton J, in, Whinney v. Moss S.S. Co. (1910) 15 Com.Cas, p 114 at pp 122-23.

21-Devlin J, in, The Pyrene Co. Ltd. v. Scindia Navigation Co. Ltd [1954] 2 Q.B. p 402 at p 419; Lord President Clyde, in, Harland & Wolff Ltd. v. Burns & Laird Lines Ltd. 1931 S.C. p 722.

22-Debattista, Bill of Lading, at p 655.

the terms of that contract though such a condition was subsequently printed on a bill of lading[23].

On the other hand, if there is any discrepancy between a bill of lading and a previous oral representation that could not alter the terms of the bill of lading[24].

Lord Goddard L. J. in, Ardennes[25] has resolved such problems by providing:

> "Once the bill of lading was not itself the contract of carriage, oral evidence was admissible to prove the existence of a previous bargain or promise the terms of which were at variance with the terms contained in the bill of lading".

"b" A Receipt for Goods Shipped on Vessel

The bill of lading is also a document which acknowledges receipt of the goods shipped[26]. The carrier, the master, or the agent of the carrier is bound to issue a bill of lading showing:

1- The leading marks necessary for the identification

23-Ibid, p 656.

24-Per Lord Bramwell, in, The Sewell v. Burdick (1884) 10 App.Cas, p 74 at p 105.

25-[1951] 1 K.B. p 55.

26-Article 3[4] of the Hague/Visby Rules, where it is stated:
"Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraph 3 (a, b, and c); Section[3] of the bill os lading Act, 1855; Scrutton on Charterparties, p 111; Paul Todd, Modern Bills of Lading, 1986, p 14, hereinafter cited as "Todd, Bill of Lading", where he states:
"The function of the bill of lading have not altered significantly since 1855 Act".

of the goods[27].

2- Either the number of packages or pieces, or the quantity, or weight, as the case may be, as furnished in writing by the shipper[28].

3- The apparent order and condition of the goods[29].

The bill of lading is prima facie evidence of the receipt by the carrier of the quantity and the apparent order and condition of the goods shipped, and the ship must deliver the same goods as therein described. Whereas it is considered conclusive evidence when the bill of lading has been transferred to a third party acting in good faith[30]. The shipowner is however obliged by the bill of lading which is considered to be conclusive by the contracting parties, unless the shipowner can prove fraud, or the cargoes have not been shipped[31].

The shipowner, or the master is nevertheless not bound to show both the number of packages and the weight. That

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27-Article 3[3] of the COGSA 1971 (Schedule), and the Hague/Visby Rules.

28-Ibid, Article 3[3].

29-Ibid, Article 3[3].

30-Scrutton on Charterparties, p 111; 1 Carver, para, 103, p 74; Pane & Ivamy, p 75; Walker, Private Law, Vol, III, p 340; Fabre S.A. v. Mondial United Corp. [1963] A.M.C. p 946, where it is stated:

"Assuming good order on receipt and bad order on out-turn, the burden is on the carrier to show that the damage was brought about by an excepted cause"; Article 3 [5] of the COGSA 1971.

31-1 Carver, para, 106, p 77; Sugar Commission v. Hartlepools S.S.Co. [1927] 2 K. B. p 49; Goddard, J, in, Lauro v. Dreyfus [1937] 59 Ll.L.R. pp 110,117; Halsbury's Laws of England, Shipping and Navigation, (4th,ed, Vol, 43, 1983), para, 493, p 331, hereinafter cited as " Halsbury, Shipping and Navigation".

indicates that when the master stated in the bill of lading the number of packages, then the phrase "weight unknown" will be inserted in the bill of lading which has full legal effect.[32]

The bill of lading usually describes the condition of the goods by providing a general statement that the goods "shipped in good order and condition" especially when the shipper insists upon inserting such a statement in the bill of lading and the shipowner or his agent had an opportunity to inspect the goods so shipped.[33] That means that the goods shipped were actually in good order and condition when delivered to the ship.[34]

It is nevertheless necessary to distinguish between the external and apparent condition which is easy for the prudent carrier to discover and the non-apparent condition when the skilled carrier cannot findout the condition of these goods.[35] Proof to the contrary, namely

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32-Orican Waren Handels G m b H. v. Intergraan N V.[1967] 2 Lloyd's.Rep. p 82.

33-1 Carver, para,110, p 82; The Isle De Panay [1925] 267 U.S. p 260; Spartus Corp. v. S/S Yafo, 590 F.2d, p 1301 (1979), where it is stated:

"Although a bill of lading can establish prima facie that the merchandise being shipped was in good condition, the "apparent good condition" clause applies only to those portions of the shipment which are visible and open to inspection".

34-Manhattan Fruit v. Royal Netherlands[1959] A.M.C. p 1200; Fabre S.A. v. Mondial United Corp, [1963] A.M.C. p 946.

35-Channell, J, in, Compagnia Naviera Vascongada v. Churchill & Sim [1906] 1 K.B. p 237 at p 245, where he states:

"I think that "condition" refers to external and apparent condition, and "quality" to something which is usually not apparent, at all events to an unskilled person. I think a captain

against the value of the statement concerning the condition of the goods carried which contains on the face of the bill of lading, is not admissible when the bill has been transferred to a third party acting in good faith[36], or the goods have not been inspected by the carrier at the time of loading, or the damage was caused by the inherent vice in the goods.[37]

"c" A Document of Title to the Goods

The bill of lading is considered as a representation of the right of the property in the goods shipped which is described in the bill.[38] The possession of the bill of lading is therefore equivalent to possession of the goods[39], but not the property of the goods which is not

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is expected to notice the apparent condition of the goods, though not the quality"; Ponce [1946] A.M.C. p 1124, where it is stated: "the specification in the "shipped on board in apparent good order and condition, contents unknown" constitutes prima facie evidence that on the exterior there are no signs of damage"; Ciano [1947] A.M.C. p 1477.

36-COGSA 1971, Schedule, Article 1[4]; Anthony Diamond, "The Hague/Visby Rules" Published in the Hague/Visby Rules and the Carriage of Goods by Sea Act 1971, Organised by Lloyd's of London, Ltd, 1977, p 20, hereinafter cited as "Diamond, The Hague/Visby Rules"; Silver v. Ocean S.S.Co. Ltd [1930] 1 K.B. p 416 at p 425.

37-TD/C.4/ISL/6/Rev. 1 at p 25, where it is stated:
"The material available to the UNCTAD secretariat suggests that, so far as commercial aspects of bills of lading are concerned, the main problem is that of the status and function of document as a receipt, for it is this status which frequently affects is negotiability".

38-Halsbury, Shipping and Navigation, para, 494, p 332; Walker, Private Law, Vol, II, p 342.

39-Payne & Ivamy, p 81; Kum v. Wah Tat Bank Ltd. [1971] 1 Lloyd's.

united with the bill of lading.[40]

In sum, it must be admitted that the delivery of the bill of lading, respecting seaborne goods, is deemed a symbolic delivery of the goods.[41] The carrier is then entitled to deliver the goods to the consignee or any person holding a bill of lading.[42] Viz, the latter has a right, on the production of the bill, to delivery of the goods.[43]

That does not mean that the function of the bill of lading, as a document of title to the goods, is normally to give delivery between consignor and consignee which has already taken place on loading. The real function is therefore to give the consignee a document which he can, to some extent, negotiate[44] whether by delivery or

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Rep. p 439 at p 440.

40-Scrutton on Charterparties, p 187; Majid H. K. Al-Anbaki, Passing of Property in C.I.F. & F.O.B. Contracts, A Thesis Approved for the Degree of Ph. D., Glasgow University, 1978, p 29, hereinafter cited as " Al-Anbaki, C.I.F. & F.O.B.", where he states two theories:

"The first depends on the intention of the parties;
The second depends on the unification between the right of possessing the goods and the bill of lading".

41-E. Clemens Horst Co. v. Biddell Brothers [1912] A.C. p 18 at p 21; Walker, Private Law, Vol, II, p 342.

42-Trucks & Spares, Ltd. v. Maritime Agencies, (Southampton), Ltd [1951] 2 Lloyd's.Rep. p 345; Mankabady, The Hamburg Rules, p 43.

43-Barber v. Meyerstein (1870) 2 C.P, p 38, 66; 4 HL, p 317, [1865-90] 3 Law Report Digest, p 6176. ; Lord Denning in Hai Tong Bank Ltd. v. Rambler Cycle Co. Ltd[1959] A.C. p 576 at p 586, where he stated:

"It is perfectly clear that a shipowner who delivers without production of the bill of lading does so at his peril".

44-Kum v. Wah Tat Bank Ltd [1971] 1Lloyd's.Rep. p 439 at p 440;

indorsement and delivery of the bill of lading.[45]

The indorsee or transferee of the bill of lading has the same rights and duties which emerge from the bill.[46] Therefore, he will be subject to the same liabilities as if the bill of lading has been made with himself, and also all rights of suit should be transferred to him. Consequently, the indorsee cannot enjoy better title than the holder of the bill of lading himself, but if the indorser has no title, then he cannot pass one.[47]

The shipowner, sometimes, issues a document called a mate's receipt[48] which acknowledges receipt of the goods and states their quantity and condition and also the name of the owner of the goods.[49] These goods, which have been delivered alongside the ship at the port of loading, will

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Al-Anbaki, C.I.F. & F.O.B. p 37, where he states:
"The word "negotiable" was not used in the sense in which it is used as applicable to a bill of exchange, but as passing the property in goods only".

45-Walker, Private Law, Vol, II, p 342, where he states:
"But a bill is not a negotiable instrument *stricto sensu* and the transfer's title to the bill and his competency to dispose of the goods therein are important factor in the validity of the transaction".

46-Walker, Private Law, Vol,II, p 342; Mankabady, The Hamburg Rules, p 43.

47-Ivamy, Dicitionary of Shipping Law, p 11; Payne & Ivamy, p 81.

48-Scrutton on Charterprties, p 175, Footnote, 46, where he states:
"Thus in the port of London a "mate's receipt" in only given for waterborne goods and not for goods sent to the decks by land. For these latter the corresponding document is the wharfage note issued by the Port Authority, who receive a mate's receipt from the ship".

49-Al-AnbaKi, C.I.F. & F.O.B. p 92; 1 Carver, para, 119, p 89.

be in the shipowner's possession and at his risk[50].

The mate's receipt is however not considered a document of title, but is only deemed as evidence of receiving such goods by the shipowner and giving the cargo-owner a right to have the bill of lading[51]. That means that the main purpose for issuing such a receipt to the cargo-owner is to expedite the preliminary measures of issuing the bill of lading according to the cargo-owner's instructions[52]. Then, it is not negotiable, as the bill of lading is in certain circumstances, unless a custom[53] giving the mate's receipt such effect, or the contracting parties have intended to replace the bill of lading with a mate's receipt[54].

Whatever characterization is made for the functions of bill of lading. It is still considered an important and

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50-British Columbia Co. v. Nettleship (1868) L.R. 3 C.P. p 499, where it is stated:
"The defendant was liable for the loss of the machinary, as delivery to the defendant's servants alongside the vessel was equivalent to a delivery on board".

51-Scrutton on Charterparties, p 176; F.E. Napier v. Dexters, Ltd [1926] 26 Ll.L.R. p 184 at p 189; Per Lord Wright, in, Nippon Yusen Kaisha v. Ramjiban Serowgee [1938] A.C. p 429 at p 445; Jasper Ridley, The Law of the Carriage of Goods by land, Sea and Air, (6th, ed, 1982), p 115, hereinafter cited as "Ridley".

52-Walker, Private Law, Vol, II, p 350.

53-Kum v. Wah Tat Bank Ltd [1971] 1 Lloyd's.Rep. p 439 at p 440.

54-Bryans v. Nix (1839) 4 M & W. p 775, (150 E.R. p 1634), where it is stated:
"Whether a document, similar in form to a bill of lading, but hiven by the master of a boat navigation an inland canal, has the effect of such an instrument in transferring the property in the goods"; Evans v. Nichol (1841) 4 Scott's N.R. p 43, 3 Man & G p 614 (133 E.R. p 1286).

effective document in transporting sea-borne goods.

As far as the course of the carriage of the goods by sea is, however, concerned, the bill of lading contains provisions concerning the contractual voyage, i.e; the port of loading, port of discharge, the destination of the goods and the person to whom delivery is to be made. The contractual voyage is then an important element in limiting liability of the deviatory carrier and the consequences resulting from the fundamental breach by deviation.

The conception of the voyage governed by the Hague Rules is expressed by Article [10] of the Hague Rules which provides that:

> "The provision of this convention shall apply to all bills of lading issued in any of the contracting states".

This Article has endeavoured to widen the scope of the application of the Rules to the outward and inward voyages by applying the Rules to all bills of lading which are issued in any of the contracting states.

Section (1) of the United Kingdom COGSA 1924[55] has restricted the conception of the voyage by providing that the Rules shall apply only to outward voyage. The reason

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55-Section (1) of the United Kingdom COGSA 1924 Provides that: "Subject to the provisions of this Act, the Rules shall have effect in relation to and in connection with carriage of goods by sea in ships carrying goods from any port in Great Britain or Northern Ireland to any other port whether in or outside Great Britain or Northern Ireland".

for limiting the scope of Article (10) of the Hague Rules, by applying the Rules merely to outgoing voyage, because section (1) of the COGSA 1924 applies only to bills of lading issued in Great Britain or Northern Ireland[56].

On the other hand, Article (13) of the United States COGSA 1936[57] has adopted the same attitude of Hague Rules by applying the Rules to inward and outward voyages[58].

The Visby Rules have adopted a new trend concerning the scope of the Rules by widening the concept of the voyage subject to the Rules. Article [5] of the Visby Rules[59]

56-Clark, p 18; Al-Jazairy, p 158.

57-Article (13) of the United States COGSA 1936 provides:
"This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade".

58-D. C. Jackson, "The Hamburg Rules and Conflict of Laws", Published in The Hamburg Rules on the Carriage of Goods by Sea, 1978, p 221 at p 227, hereinafter cited as "Jackson, The Hamburg Rules"; Grant Gilmore & Charles L. Black, Jr., The Law of Admiralty, (2nd, ed, 1975) p 130, hereinafter cited as" Gilmore & Black"; Schroeder Bros Inc v. The Saturina[1955] A.M.C. p 1935.

59-Article [5] of the Visby Rules provides;
"Article (10) of the convention shall be deleted and replaced by the following:
The provisions of this convention shall apply to every bill of lading relating to the carriage of goods between ports in two different states if:
"a" the bill of lading is issued in a contracting states, or
"b" the carriage is from a port in a contracting state, or
"c" the contract contained in or evidenced by the bill of lading provides that the rules of this convention or legislation of any state giving effect to them are to govern the contract. Whatever may be the nationality of the ship, the carrier, the shipper, the consignee, or any other interested person. Each contracting state shall apply the provisions of this convention to Bills of Lading mentioned above.

has amended Article [10] of the Hague Rules and the latter no longer applies unless the ports of loading and discharge are in two different states[60]. Accordingly the Visby Rules shall apply to inward and outward voyages to or from the contracting states as follows:

"a" If the bill of lading is issued in contracting states.

"b" If the carriage is from a port in a contracting state.

"c" If the contract contained or evidenced by the bill of lading provides that these Rules or legislation of any state giving effect to them are to govern the contract[61].

The United Kingdom COGSA 1971 has applied the same attitude as the Hague/Visby Rules which set out in the schedule of this Act. In addition, COGSA 1971 has dealt with two other types of voyages not covered by the Visby Rules as follows:

(I) Section 1 [3] of COGSA provides:

> "Without prejudice to subsection (2) above, the said provisions shall have effect (and have the force of law) in relation to and in connection with the carriage of goods by sea in ships where the port of shipment is a port in the United Kingdom, whether or not the carriage is

This Article shall not prevent a contracting state from applying the rules of this convention to Bills of Lading not included in the preceding paragraphs".

60-Diamond, The Hague/Visby Rules, p 22.

61-Article [5] of the Visby Rules.

between ports in two different states within the context of Article (X) of the Rules".

(II) Section 1 [6] of COGSA provides:

"Without prejudice to Article X [c] of the Rules, the Rules shall have the force of law in relation to
"a" any bill of lading if the contract contained in or evidenced by it expressly provides that the Rules shall govern the contract...."

Consequently, Section 1 [3] of COGSA 1971 purports to apply the Rules to all voyages where the port of loading and the port of discharge are both within the territories of Great Britain and Northern Ireland. Whereas, Section 1 [6] of COGSA purports to apply principles which are similar to Section 5 [6] {a} of the Visby Rules, to the coastal voyages[62].

The Hamburg Rules have made a radical change concerning the application of the Rules by increasing the number of voyages covered by the Rules[63].

Article [2] of the Hamburg Rules does not make any distinction between inward and outward voyages[64] and

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62-For more details as to the scope of the application of the Hague/Visby Rules, see, Hashim R. Al-Jazairy, "The Maritime Carrier's Liability Under the Hague Rules, Visby Rules and Hamburg Rules". A Thesis Approved for Degree of Ph. D., Glasgow University, 1983, pp 156-170, hereinafter cited as "Al-Jazairy"; Diamond, The Hague/Visby Rules, p 23.

63-Joseph C. Sweeney, 'The UNCITRAL Draft Convention on Carriage of Goods by Sea ". Part III, [1975-76] 7 J.Mar.L.& Com, p 487 at pp 501-502.

64-Mankabady, The Hamburg Rules, p 44.

provides that the Rules will be applicable to all voyages which emerge from the contracts of carriage between ports in two different states as follows:

"a" the port of loading is located in a contracting state;

"b" the port of discharge is located in a contracting state;

"c" one of the optional ports of discharge is the actual port of discharge and such a port is located in a contracting state;

"d" the bill of lading or other document is issued in a contracting state;

"e" an agreement is inserted in the bill of lading, or other document, for the application of the provisions of the Hamburg Rules[65].

It is quite clear from the aforesaid Article that the Hamburg Rules have adopted a flexible attitude by using the phrase "contract of carriage" instead of bill of lading. This indicates that all documents which are used in the carriage of goods by sea, i.e; shipping receipt, electronic devices.etc, are subject to the words "contract of carriage"[66].

The Visby Rules and the Hamburg Rules, however, apply merely to contracts of carriage by sea where the port of loading and discharge are in two different states[67]. These

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65-Article [2] of the Hamburg Rules.

66-Mankabady, The Hamburg Rules, p 44.

67-Article [5] of the Visby Rules and Article [2] of the Hamburg Rules.

Rules, then, do not apply to the costal voyage because it is outside the scope of the Rules which purports to apply to the trade between two different countries.

I have therefore confined the field of the study to effect of deviation occurring in the course of the maritime voyage on the liability of the carrier in order to avoid conflict with any rules governing, separately, the different modes of transport, i.e; by Air, Land, or other type of transport such as Multimodal Transport.[68]

I have also endeavoured to avoid any ambiguities or equivocations which might arise, without limiting the scope of the study to the bill of lading.

However, I have referred, to the relevant points, to the charterparty concerning the general principles of the deviation especially when the bill of lading is incorporated into the charterparty.

The International Conventions are an effective element concerning the carrier's liability. As far as the deviation issue is concerned, I have considered the main feature of the liability of the carrier under the Hague/Visby Rules and the Hamburg Rules with reference to the COGSA of the United Kingdom and the United States and their fruitful experience in this field by studying the precedents of the courts in a given point.

I have also discussed the problems which may arise in relation to carriage of goods by sea under Iraqi and

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68-United Nations Convention on International Transport of Goods, [1980] XV European Transport Law, p 488.

Egyptian jurisprudence in order to make a common understanding for laws of these countries which adopt a different type from the International Convention, i.e; Egypt adopts the Hague Rules, whereas, Iraq have approved a modified version of the Hamburg Rules which are embodied in the Iraqi Law of Transport.

I have therefore divided the subject into six chapters:

Chapter One:

Definition and Classification of Deviation

Chapter Two:

The Basis of Liability of the Carrier in Connection with the Doctrine of Deviation.

Chapter Three:

The Effect of Deviation on the Contract of Carriage.

Chapter Four:

Recovery of Losses and Damages.

Chapter five:

Procedures of Action for Lost or Damaged Cargo.

Chapter Six:

The Iraqi Legal System, Concerning the Liability of the Carrier, Compared with Egyptian Jurisprudence in Certain Points.

Conclusion

CHAPTER ONE

DEFINITION AND CLASSIFICATION OF DEVIATION

Deviation is a notion which originated in the law of marine insurance, before the use of "held covered" clauses as liberal clauses and before the use of any terms of stipulation for avoiding the harsh results of deviation in marine insurance.[1] The cargo-owner had lost the benefit of his insurance coverage when the ship deviated.[2] This is made quite clear by what the Lord Chancellor stated:

> "A wilful deviation from the course of the voyage insured is,in all cases a determination of the policy, it being immaterial from what cause, or at what place, a subsequent loss happens; for, from the moment of deviation, the underwriters are discharged".[3]

One of the first instances of the idea of deviation that came into the law of carriage from marine insurance appears to be the case of Max v. Roberts[4].

1-Gilmore & Black, p 176; Sarpa," Note, Deviation in the Law of Shipping", [1976]11 J. of INT'L Law & Economic, p 148, hereinafter cited as "Sarpa".

2-Steven F. Friedell, "The Deviating ship", [1981] 32 Hastings L. J. p 1543, hereinafter cited as "Steven".

3-Wilson & co. v. Elliot [1790] 2 Pat. p 414; Robertson. v. Laird [1790] M. p 7099, the House of Lords held:
"The port must be in the line of voyage, or not materially out of the direct course".

4-[1807] 2 Bos & Pul [N.R] p 455, [127 E.R. p 706]; Arnold W. Knauth, The American Law of Ocean Bills of Lading, {4 th, ed,1953}, p 248, hereinafter cited as "Knauth", where he stated :

Deviation, in the law of carriage by sea, is of primary importance, because many effects are attached to it, whether in the bill of lading or in the contract of carriage.

The carrier attempted to avoid any responsibility or liability through putting many exculpatory terms in the bills of lading. These terms were intended to give the carriers the right to deviate.[5]

The United States Supreme Court laid down the deviation doctrine as early as 1813, in Oliver v. Mary Land Ins. Co.[6] and in 1890 defined unreasonable deviation.[7]

The court subsequently accepted any possible broad interpretation of this concept,[8] when it allowed any departure from the customary route as reasonable deviation.[9]

In 1893, the United States Congress adopted the Harter Act which purported to make some compromise between carriers and shippers interests. It contains certain provisions which limit the use of exculpatory clauses by

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"The history of deviation in the law of transportation is much shorter.It began about 1795 in respect of charterparty disputes....Carver cites on deviation as far back as 1793 but on examination they were all cases of marine insurance"; Compare,Mills, The Future of Deviation, p 587, where he states: "Authority for the doctrine of deviation can be traced back at least to as early as 1800 in sea carriage".

5-Gilmroe & Black, p 177.

6-11 U.S. p 487.

7-Hostetter. v. Park, 137 U.S. p 568 [1890]; Knauth, p 252.

8-J.Roger, "The Law of Maritime Deviation",[1972-1973] 47 Tul.L. R, p 163, hereinafter cited as "Roger".

9-The Malcom Baxter,jr, 277 U.S. p 323 [1928].

the carriers and other provisions which limit the carriers' liability to the cargo-owner.

Due to an universal dissatisfaction with the rules and regulations controlling the common carriage of goods by sea,[10] the International Convention for the Unification of Certain Rules Relating to Bills of Lading, was held at Hague dated Brussels 28th of August, 1924, is usually called the Hague Rules. These Rules were amended by the Brussels Protocol of 23rd of February 1968 to the Visby Rules and by the Brussels Protocol of 1979.[11]

In 1978 a new convention, "The Hamburg Rules", was signed, but it is not valid because the required number of states stipulated in the convention has not yet signed it.[12]

10-Roger, p 154.

11-The amended convention is usually referred to as "The Hague/ Visby Rules"

12-Adib Al-Jadir's, [the director of the shipping division, the United Nations Conference on Trade and Development], letter which was addressed to me,dated the 15th, March 1984 provides:
"A-The following twenty seven countries signed the 1978 United Nations Convention on the Carriage of Goods by Sea[Hamburg Rules]: Brazil, Chile, Egypt, Ecuador, Germany, Fed.Rep, Ghana, HolySee, Madagascar, Mexico, Panama, Portugal, Senegal, Singapore, Venezuela, Philippines, SierraLeon, Czechoslovakia, Pakistan, Denmark, Finland, France, Norway, Sweden, Zaire, Hungary, Austria, and, United States of America.
B-The following seven countries accessed the Hamburg Rules:
Uganda (6 July 1979), Tanzania (24 July 1979), Tunisia (15 september 1980), Barbados (2 February 1981), Morocco (12 June 1981), Romania (7 January 1982), Lebanon (4 April 1983).
C-The following two countries ratified the Hamburg Rules:
"Chile (9 July 1982), and Egypt (23 April 1979).
The convention has not entered into force because (20) countries

The United Kingdom adopted the Hague Rules in 1924 which enacted the carriage of goods by sea act. After that the enactment based on the Visby Rules is known as the Carriage of Goods By Sea Act, 1971, inforce since 23rd, June, 1977.[13] This Act was amended by the Merchant Shipping Act 1981 which implemented the Brussels Protocol of 1979.

The United States elected to adhere by these Rules in 1936 with enactment of the carriage of goods by sea act.

This chapter therefore is divided into four sections:

Section One: Definition of Deviation.

Section Two: Classification of Deviation.

Section Three: Deviation and Change of Voyage.

Section Four: Deviation and Delay.

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have not yet ratified it"; see Article{30} of the Hamburg Rules.

13-Diamond, The Hague/Visby Rules, p 26, footnote, 26.d, where he states the commencement of the COGSA 1971 by order 1977 {S.T. 1977, No. 981}.

SECTION ONE

DEFINITION OF DEVIATION

The Hague/Visby Rules and the Hamburg Rules do not define "deviation" or its effect, but they do explain the meaning of "reasonable deviation". The theoretical and practical definition of deviation will therefore be explained in this section.

i-THEORETICAL DEFINITION OF DEVIATION

The original idea of deviation[14] was a geographical concept in a particular course of the designated voyage[15]. The word deviation was intended to mean any change or modification of the geographical route of the agreed course of voyage.[16]

14-Webster's Third New INT'L Dicitionary (16th,ed, 1971), p 618, where it is stated:
"The lexicographical definition of the deviation is to diverge or turn aside.....from an established way or toward a new course"; Chambers Every Day Dictionary, 1975, p 191, states:
"to deviate: to go from the way, to turn aside (from a course, topic, principle & c.), to diverge, differ, from a standard, norm, & c. to vary from typens. Deviant, that which deviates (from an accepted norm), also adj, deviation-deviation of the compass, deflection of the magnetic needle due to the ship's magnetism. [L-deviare-atum-de, from, via, the way].

15-Knauth, p 250; Sir Frank Mackinnon, "Some Aspects of Commercial Law", A Lecture Delivered at the London School of Economics on 3 March 1926, Oxford University Press, p 20, hereinafter cited as " Mackinnon".

16-William Tetley, "Selected Problems of Maritime Law Under the Hague Rules", [1963] 9 MC GILL L.J., p 53, hereinafter cited as "Tetley, Selected Problems of Maritime Law", where he states :
"A deviation before the Rules was known as a change in the route of

In referring to what the meaning of deviation is, in carriage of goods by sea.

Emerigon[17] stated that:

> "A vessel changes her route when in place of following the customary way or that allowed by her contract she takes a different one, but still without losing sight of the place of her destination".

Payne & Ivamy[18], said that:

> "Departure from the prescribed or ordinary trading route which the ship should follow in fulfilment of a contract of carriage".

Poor[19], said that:

> "A departure from ship's contractual course".

Temperly[20] said that:

> "A departure from the route by which the carrier has expressly or impliedly contracted to carry the goods".

Tetley[21], said that:

> "An intentional change in the geographical route of the voyage as contracted".

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the planned voyage".

17-Emerigon on Insurance [1783], vol 3, pp 15, 94, Meredith's Translation [1850] p 576, quoted by Knauth, p 252.

18-Payne & Ivamy, p 7.

19-Wharton Poor, American law of Charterparties and Ocean Bills of Lading, (4 th, ed, 1964), p 184, hereinafter cited as "Poor".

20-R.Temperly & F. Martin Vaughan, Carriage of Goods by Sea Act, 1924, [4 th, ed. 1932], p 71, hereinafter cited as "Temperly".

21-William Tetley, Marine Cargo Claims, (2nd, ed, 1978), p 350, hereinafter cited as "Tetley, Marine Claim".

Walker[22] said that:

> "A deliberate and unnecessary departure from the due course of a voyage for even the shortest time, or delay in sailing or prosecuting the voyage for unjustified purpose".

The second report of the Secretary-General[23] has defined deviation as:

> "A departure by an ocean vessel from the expected route for the voyage, which is not provided for either by the contract of carriage or by trade customs".

All these definitions of deviation depend upon an intentional departure of the vessel from a geographical route as described in the bill of lading. The meaning of the term "intentional" is very important and it is considered to be the basic factor of the definitions mentioned above.

The second meaning of deviation is the "act of erring or transgressing".

One commentor believes American Courts have relied on this notion of transgression to extend the doctrine beyond its geographical roots[24].

22-David M. Walker, The Oxford Companion to Law, 1980, p 354, hereinafter cited as "Walker, Companion to law".

23-Second Report of the Secretary-General on Responsibility of Ocean Carriers for Cargo: Bills of Lading {document A/CN.9/76/Add, 1}, part three, para, 2, hereinafter cited as "Second Report of the Secretary-General".

24-Sarap, pp 148,156.

The third meaning of deviation is submitted as deviation which occurs when the bailee exceeds any limitation placed upon his rights to possession.

"Coote" has defined deviation depending upon this view of deviation by saying:

> "A bailee{including a carrier}who wrongfully fails to observe a limitation on his right to possession does so at his peril, and will be liable for any loss or damage to the bailed goods which he can not prove affirmatively would have occurred even if that failure had not occurred"[25].

In pursuance of an element of volition one must note the considered terms of the bill of lading and the interests of all parties concerned.

It is also true that damages and losses caused by deviation are deemed one of the basic elements of the definition of deviation, because deviation is not enough ex proprio vigore to establish on behalf of the cargo-owner or either goods which were shipped on the vessel a tortious misconduct on the part of carrier.[26]

The following points then should be discussed :

1-Definition of Deviation under the Hague/Visby Rules and the Hamburg Rules.

2-Terms of Deviation Contained in COGSA.

25-Brian Coote, Exception Clauses, 1964, p 92, hereinafter cited as "Coote"; cf. Lilley. v. Doubleday {1881} 7 Q.B.D. pp 510-511, per Grove J.

26-Willdomino v. Citro Chemical Co, 272 U.S. p 718 {1927}.

1-DEFINITION OF DEVIATION UNDER THE HAGUE/VISBY RULES AND THE HAMBURG RULES

The Hague/Visby Rules and the Hamburg Rules do not define deviation or its effect, but the Hague/Visby Rules do explain the meaning of "reasonable deviation".

A- The Hague/Visby Rules

An examination of the provisions of the Hague Rules did not reveal any definition of deviation, nor did the Hague Rules explain the effect of deviation.[27] The Rules are set out only in Article [4] para [4] 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 this act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom".

This Article has defined merely what is not a deviation?.

The carrier shall not be liable for any loss of or damage to cargo which occurs due to reasonable deviation. The Hague Rules do not supply any criterion of reasonableness of deviation.[28]

The Visby Rules have not amended the Article [4] of the Hague Rules, because it has not purported to change the

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27-W.E.Astle, Shipping and the Law, 1980, p 192, hereinafter cited as "Astle, Shipping Law".

28-Tetley, Marine Claim, p 349.

principle of deviation under the Hague Rules.

The historical meaning of "deviation" is known as any alteration or modification in the geographical route of the planned voyage. This historically-confined interpretation is concordant with a factual point, that many authors have explained their definition of deviation depending upon the intention implies the meaning that any alteration or modification in the usual or customary route of the ship occasioned by negligence or an error of the carrier in the navigation of the vessel will not be enough to establish a deviation.[29]

The pursuance of the Hague Rules must be taken to distinguish an intentional deviation from the case where the master is set an improper course for the ship. The carrier, in fact, is not responsible if the master makes any change, by error or negligence in the course of an agreed voyage according to Article [4] para [a] of the Rules.

"B" THE HAMBURG RULES

The "UNCITRAL" discussions about deviation had separated the conference into two divisions; one of them supported the view that no special provision on deviation would be necessary. This view was adopted by Norway, France, Hungary, Japan, and Australia, but Nigeria's view held that the term of deviation makes a special defence

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29-Tetley & Cleven,"Prosecuting the Voyage",[1970-71] 45 TUL.L.R., pp 810-11, hereinafter cited as "Tetley & Cleven".

for the carrier; and should depend on the general burden of proof. This view is supported by Tanzania.

The other states were in favour of retention of a separate provision on deviation, which was adopted by the United States, the United Kingdom, the Soviet Union, Brazil, Belgium, Argentina, Poland, India, and Singapore[30].

The Draftsman made a compromise of both views in the formulation of the Hamburg Rules. This is shown in Article [5] para [6]:

> "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".

This Article explains the "measures" to save life or reasonable measures to save property at sea. The Hamburg Rules do not define a deviation, nor do they contain a specific provision for deviation, as far as it would depend on the principle of the liability of the carrier in these Rules.

When the vessel makes some change or modification, whether in her particular course or in her obligation for stowage of the goods under deck, that constitutes a known deviation[31] which is a breach in the contract of carriage.

30-Joseph C. Sweeney,"The UNCITRAL Draft Convention on Carriage of Goods by Sea {part 2}", [1976] 7 J.Mar.L.& Com, p 346, hereinafter cited as "Sweeney, part 2".

31-Steven, p 1560.

The Hamburg Rules have confined the meaning of deviation, particularly in case of a departure from the contract of carriage, when there has been a loss, damage, or delay in delivery. Such happenings are sufficient to establish a deviation, unless the carrier can prove otherwise under the general rules on burden of proof[32].

At any rate, the Hamburg Rules did not stipulate any intentional departure from the particular course of a planned voyage, nor did they restrict the meaning of deviation to cover the departure from the geographical route, but they extend their provisions to cover any alteration or modification in the carrier's obligation for stowage of the cargo under deck, when there has been a loss of or damage to the cargo[33].

2-TERMS OF DEVIATION CONTAINED IN COGSA

Deviation is not defined in the carriage of goods by sea act [COGSA]. COGSA's deviation provisions contained in the United Kingdom and the United States Acts, are identical to the deviation provision in Article [4] para [4] of the Hague/Visby Rules[34].

32-Abdul Baki A. Falih, "The Statutory Limitation of the Maritime Carrier's Liability Under the Hague Rules, Visby Rules and Hamburg Rules", A Thesis Approved for the Degree of Ph.D, Glasgow University, 1980, pp 466-467, hereinafter cited as " Falih".

33-Article [5] para[1] of the Hamburg Rules; Anthony. Diamond,"A Legal Analysis of the Hamburg Rules", Published in The Hamburg Rules, A One-Day Seminar Organized by Lloyd's of London Press LTD, 1978, p 16, hereinafter cited as "Diamond, The Hamburg Rules".

34-Roger, p 156.

The United Kingdom COGSA 1971 adds the words "or of the contract of carriage". That means that a deviation permitted by the Rules shall not be considered to be a breach of the contract of carriage and there are no consequences either on the Rules or the contract of carriage of goods by sea.[35]

Whereas, the United States COGSA 1936 adds:

> "provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers, it shall, prima facie be regarded as unreasonable".

This article has set out the meaning of "reasonable and unreasonable deviation". It explains by implication what the consequences of the two are to be.[36]

It seems obvious, that the characterization of deviation which is designed by "COGSA", implies intentional change in the geographical route of the particular agreed voyage.

The wording used by COGSA to explain "deviation" is identical to the wording used by the Hague/Visby Rules for the same purpose, while the COGSA in the United States further defines the term "reasonable deviation" by inserting the additional provision, as mentioned previously.

35-Scrutton on Charterparties, p 453.

36-Gilmore & Black, PP 158-159.

"ii" PRACTICAL DEFINITION OF DEVIATION

The courts from different countries have their own individual definitions of deviation. They have some similarities, as well as, differences in their definition.

I have confined the practical definition of deviation to the practice of the United Kingdom and the United States jurisprudence.

1-United Kingdom Jurisprudence.

2-United States Jurisprudence.

1-UNITED KINGDOM JURISPRUDENCE

The United Kingdom courts have confined their decisions to a definition of deviation in a change in the geographical route.

Departure from the route so ascertained is justifiable if necessary to save life or to communicate with a ship in distress as the distress may involve danger to life.[37] In addition, the United Kingdom judicial attitude is less strict than the American because the latter have extended the concept of deviation to any serious change in the conduct of the ship, for instance, deck cargo...etc.[38]

An intention to deviate does not vacate the policy, when the vessel is lost before actual deviation[39], but if

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37-Scaramanga. v. Stamp (1880) 5 C.P.D, p 295.

38-Tetley, Marine Claim, p 350.

39-Buchanan. v. Hunter Blair (1779) M. , p 7083.

the vessel be lost before she comes to the dividing point between the course to the original and to the substituted port of destination, it is an intention to deviate and nothing more.[40] Namely, if a deviation mere intended but never carried into effect, is as no deviation.

A premeditated intention to deviate, therefore, amounts to nothing unless it be actually carried into execution. This rule is adopted in the United Kingdom and in the courts of the United States[41].

There is a primary important difference between the effect of deviation on bills of lading and on an insurance policy, that mere increase or variation of risk is a deviation and invalidates the policy in marine insurance, but that mere variation of risk is not deviation in the bill of lading and its needs essentially displace the contract of carriage and abrogate the bill of lading exceptions.[42]

If a vessel insured for one voyage sails upon another, and the track in the outset of the voyage is the same, and she be taken before she arrive at the dividing point of the second voyage, the policy is discharged.[43] It is unessential that the insurer may not be prejudiced by the deviation, the important thing is to intensify and

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40-Wooldridge. v. Boydell, 1 Dougl, p 17,[99 E.R. p 14]; James Kent, Commentaries on American Law, (7th, ed, p 1828, vol 3), p 392, hereinafter cited as "Kent".

41-Ibid, p 390; Foster. v. Wilmer (1746) 2 Str, p 1250, [93 E.R. p 1162]; Way v. Modigliani , 2 T.R. p 30.

42-Knauth, p 250; Sarpa, p 147.

43-Wooldridge. v. Boydell, 1 Dougl, p 17,[99 E.R. p 14].

substitute another risk, and the loss of or damage to the cargo must be causally connected with the deviation.[44]

Scots Courts have defined deviation when it was held that deviation of the ship in the course of the voyage insured, must be wilful in order to avoid the policy, and that accidental or involuntary deviation will not have that effect[45], but the House of Lords, as the final court of appeal for England, Scotland, and Northern Ireland, has constituted uniform rules, because the House of Lords system is applicable to the law and usage for all these countries.[46]

For instance, in Tasker v. Cunningham[47], the Scots Court had held three times that the ship, when destroyed, was still under the protection of the policy, but the House of Lords finally reversed their decision on

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44-1973 C.L.Y. P 3093.

45-Grahame Coulter & Ors. v. McNair [1790] 2 Pat, p 244.

46-Walker, On the Scottish Legal System, 1981, pp 257-258, hereinafter cited as " Walker, Scottish system ", where he states: "The House of Lords has been responsible for some of the worst misunderstandings and confused law in the scottish books, over and over again English doctrines have been forced into scots law by English law lords who did not know or realise the fundamental difference of principle and reason which frequently underlie apparent similarities of result, as where remedies are granted in circumstances similar to those justifying the corresponding remedy in English Law".; Lord Watson, in the Currie. v. M'Knight [1897] A. C. p 97 at 105, where it is stated:
"the maritime Code which ought to prevail in both countries, which in my opinion, is neither English nor Scottish, but British Law.The House of Lords has now become the ultimate forum in all maritime causes arising in the U.K".

47-(1819)1 Bligh, p 87.

the ground that a fixed determination had been formed to change the voyage insured before the loss took place[48].

2-UNITED STATES JURISPRUDENCE

The United States Supreme Court has defined deviation as:

> "a voluntary departure, without necessity or reasonable cause, from the regular and usual course of a voyage"[49].

American Courts have not always required "intention" in their criteria for determining deviation[50].

Weingfeld D.J. in The Flying Clipper[51], noted that the carrier's action was "voluntary" as follows:

48-David M. Walker, The Law of Contracts and Related Obligations in Scotland, {2nd, ed, 1985}, hereinafter cited as "Walker, The Law of Contract", where he states:
"In respect of the particular rules applicable only to specific kinds of contract, such as, sale, hire purchase or carriage, the relevant statutes are frequently common to scots law and to English, through sometimes having particular provisions applicable in one legal system and not in the other, and almost invariably having been drafted with the background of English Law in mind and accordingly using terms with the connotations of English Law.In these matters accordingly reference to English books and cases is necessary, though with constant caution lest there be misunderstanding of what is basically a concept of English Law".

49-Hostetter. v. Park, 137 U.S.,p 30,where it is stated:
"The word deviation in the bill of lading, must be held to give to the owner only a limited right of departure from the voyage;and that the limits must be those of necessity, and reasonable regard for the rights of both the shipper and carrier, growing out of the nature of the principal contract".; Constable. v. National S.S.Co.{1884} 154 U.S. pp 51, 66.; The Willdomino, 272 U.S. p 727.

50-Tetley, Marine Claim, p 30.

51-[1954] A.M.C. p 264.

"In my view it is unnecessary to base the voiding of the contract on the ground that it was the result of the carrier's "gross" violation of its terms, or his "misconduct", or that on deck stowage under a clean bill of lading would "work a fraud" or that the carrier "converted" the cargo. It is sufficient that the carrier's voluntary action in unjustifiable deviation so changed the essence of the agreement as to effect its abrogation".

The deviation may thus be an unjustifiable failure of a shipowner to perform the contracted voyage, and may arise not only from a physical departure from the course of the voyage, but also from the other causes, such as, unreasonable delay, or from the failure of a shipowner to furnish a vessel capable of performing, and ready to perform, the voyage.[52]

Deviation is however defined in, The Chester Valley[53], as follows:

"A serious departure from the contract of carriage as to amount to a different venture from that contemplated and, therefore, an abrogation of the contract".

The Courts of the United States have furthered the notion of geographical deviation, when they have extended the concept to any important alteration in the manner of the vessel which has expected cargo to increased risks[54],

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52-Malcolm Baxter,Jr, 277 U. S. pp 320-330 (1927).

53-[1940] A.M.C.P 557.; Shackman. v. Cunard White Star Ltd[1940] A.M.C,, p 971 at 976, where it is defined deviation as follows: ".....any conduct of a ship or other vehicle used in commerce tending to vary or increase the risk incident to a shipment".

54-H.S. Morgan,"Unreasonable Deviation Under COGSA", (1978) 9 J.

such as, over carriage, dry docking with cargo aboard, sending cargo by a different carrier and the failure to provide special stowage as specified by the contract of carriage.[55]

In the Lafcomo[56], the court held that, any departure from the agreed method of transportation by the carrier is sufficient to constitute a deviation.

Likewise, in the Flying Clipper[57], the ocean carrier conceded that the issue of a clean bill of lading obligated the carrier to stow the goods under deck and that stowage of the goods on deck constituted a deviation, but mere negligence with regard to the stowage or handling of the cargo never constitutes a deviation.[58]

Stowage of containers on weather deck without any notation constituted a deviation[59], but on deck stowage of a container on a container ship is not deviation.[60]

Therefore, we could say that deviation is :

> "Any variation in the conduct of a ship in the carriage of goods whereby the risk incident to the shipment will be increased, such as,

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Mar.L.& Com, p 490, hereinafter cited as "Morgan".; Steven, p 1544.

55-Sidevrgica Del Orinoco. v. The North Empress [1977] A.M.C. p 1140.; Morgan,p 49.

56-[1946] A.M.C. p 903

57-[1945] A.M.C. p 259.

58-The Chester Valley[1940] A.M.C. p 555.

59-Encyclopeadia Britannica,Inc. v. Hongkong Producer[1969] A.M.C. p 1744.

60-Dupont De Nemours International S.A. v. The Mormacvega [1972] A.M.C. p 2366.

carrying the cargo on the deck of the ship contrary to custom and without the consent of the shipper"[61].

At any rate, the concept of deviation implies that the deviation causes an additional risk of loss or damage to the cargo not contemplated by the shipper[62]. Where there is no loss resulting from an increased peril, the doctrine should not be applicable[63].

SECTION TWO

CLASSIFICATION OF DEVIATION

There are some complexities involved in explaining the classification of deviation unless some criterion is made in the carrier's act for deviation, i.e; reasonable and unreasonable, geographical and non-geographical deviation.

The following points should then be discussed:

61-Spartus Corp. v. S/SYafo, 590 F.ed, pp 1310-1313[5th.cir.1979], Quoting, G.W. Sheldon & Co. v. Hamburg Amerikanische Packefahrt A.G., 28 F.2d, pp 249, 251, [3rd.cir.1928].

62-Ibid, p 249, where it is stated :
"Deviation is any variation in conduct of ship where by risk incident to shipment will be increased".

63-International Drilling Co. v. M/V Doriefs[1969] A.M.C. p 119, Compare, The Citta Di Messina, 169 Fed.Rep, p 472 [1969.S.D.N.Y.], where it is stated:
"...any deviation from the course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other will cast subsequent loss of, or injury to, either ship or cargo on the shipowner, without any reference to the question whether it had any bearing on the particular loss complained of".

i-Reasonable Deviation.

ii-Unreasonable Deviation.

iii-Geographical Deviation.

iv-Non-Geographical Deviation.

v-Quasi-Deviation.

i-REASONABLE DEVIATION

The main relevant international provision of the deviation and specifically reasonable deviation is Article [4] para [4] of the Hague Rules.

The reasonable deviation doctrine which is adopted by the Hague Rules is, in fact, the same common law principle.[64] The general maritime rules controlling reasonable deviation was illustrated by the United States Supreme Court in The Propeller Niagara v. Cordes.[65] It noted that:

> "when the carrier "having received the goods for transportation, in the absence of any stipulation as to the period of sailing, the master must commence the voyage within a reasonable time, without delay, and as soon as the wind, weather, and tide will permit. After having set sail, he must proceed on the voyage, in the direct, shortest, and usual route, to the port of delivery, without unnecessary deviation, unless there has been an express contract as to the course to be pursued and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited,

64-Tetley, Selected Problems of Maritime Law, p 54.

65-62 U.S. p 24 (1858).

or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage. A deviation from the direct route may be excusable if rendered necessary to execute repairs for the preservation of the ship, or the prosecution of the voyage, or to avoid a storm, or an enemy, or pirates, or for the purpose of obtaining necessary supplies of water and provisions, or, in the case of a steamer to obtain necessary supplies of wood or coal for the prosecution of the voyage or for the purpose of assisting another vessel in distress".

I will discuss therefore the following points:

1-Reasonableness as the Criterion.

2-Liberty Clause.

3-Exceptional Perils.

1-REASONABLENESS AS THE CRITERION

The meaning of the term "reasonable" has aroused real controversy. The Rule as to deviations in the Hague Rules is utterly unintelligible[66], in as far as the word "reasonable" is often used loosely. The criterion which establishes "reasonable deviation" is more complicated to explain and apply, because the particular case has individual circumstances in which deviations can occur.[67]

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[66]-Per Lord Justice Mackinnon, in, The Compagnie Primera De Navage Ziona Panama v. Cpmpanio Arrendataria De Mono Polio De Petroleos S A [1940] 1 K.B, p 368; Mackinnon, p 21, where he states:
"That a deviation to save property, ought not permitted by the contract of carriage, shall not be deemed to be a breach of it, does add a statutory modification to such a contract and is intelligible-and, as I think, is the only intelligible passage in the Rules".

[67]-Erik Chrispeels & Thomas Graham, "The Brussels Convention of

United Kingdom and United States COGSA, are identical to the Hague Rules provision. These Rules give example for the reasonableness provided in Article [4] para [4] that:

> "Any deviation in saving or attempting to save life or property at sea".

This Article has created some controversy, because it will encourage carriers to depart from the contractual route, when it is in their own interests to intensify their own revenues.

There is no specific provision in the Hamburg Rules which is the equivalent of the Article [4] para [4] of the Hague Rules which excuses the carrier from the effect of any reasonable deviation[68]. The Hamburg Rules particularly require that deviation from the contractual course is reasonable when the carrier has adopted measures to save life or attempted to select reasonable measures to save property of third persons.

One can refer to important cases, in the United Kingdom and the United states which act as a guide-line in revealing the criterion of reasonable deviation.

1924 (ocean bill of lading) Further Action Toward Revision", [1973] 7 J.World Trade, pp 692-693, hereinafter cited as "Erik & Thomas".

[68]-David M. Sassoon & John C. Cunningham, "Unjustifiable Deviation and the Hamburg Rules", Published In The Hamburg Rules on the Carriage of Goods by Sea, Edited By Samir Mankabady, 1978, p 167, hereinafter cited as "Sassoon & Cunningham".

A-UNITED KINGDOM JURISPRUDENCE

The United Kingdom Courts are less strict than American Courts[69], because the term reasonable deviation is often used loosely by the courts which attempt to define what establishes a "reasonableness".

The real debate has been rather as to the word reasonable; one commentator has proposed that term reasonable is regarded as the reasonableness of the terms of the contract, which mentions a specific route, not with the reasonableness of a deviation.[70]

Attempting any exhaustive definition of what amounts to necessity, it may however fairly be said necessity does not mean absolute physical necessity only, but a reasonable necessity having regard to the interest of the shipowners and also of the cargo-owners, and to all the other circumstances of the case.[71]

The leading English decision reveals some criteria of reasonable deviation whether it had taken place prior to or after adoption of the COGSA. There is a dichotomy in jurisprudence as to what constitutes deviation by unseaworthiness and which one is justifiable.

In Kish v. Taylor[72], The House of Lords adopted a somewhat rough rule by admitting any departure from the usual and customary course of the voyage which was

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69-Tetley, Selected Problems of the Maritime Law, p 55.

70-Mackinnon, pp 21-22.

71-Phelps. v. Hill [1891] 1 Q.B. p 617.

72-[1912] A.C. p 604.

occasioned by perils of the sea for the safety of the ship and crew, even though such perils may have occurred from the initial unseaworthiness of the ship.

Whereas, Lord Porter, in, Monarch SS.Co v. Karlshamns Oljefabriker[73], said that:

> "Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing".

The carrier, however, is not liable if the vessel becomes unseaworthy and subsequent departs from the usual course into a refuge port, as long as the carrier has exercised due diligence in making the vessel seaworthy.

A deviation for necessity must be justifiable both as to substance and manner. Nothing more must be done than what the necessity requires. The true objection to a deviation is not the increase of the risk. If that were so, it would only be necessary to give an additional premium concerning the marine insurance cases. It is, that the contracting party has voluntarily substituted another voyage for that which has been insured.[74]

Where a master receives credible information that if he continues in the direct course of his voyage his ship will be exposed to some imminent peril, he is justified in pausing and deviating from the direct course, and

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73-[1949] A.C. p 212.; 1949 S.C. (HL), p 1.

74-Per Lord Mansfield, in, Lavabre. v. Wilson, 99 E.R. p 185.

taking any step that a prudent man would take for the purpose of avoiding the danger[75], but where only part of the goods are at risk, the master has no right to depart from the agreed route for the sake of such goods and he should carry on the goods to their destination.[76]

The shipowner through his master is therefore bound to act with prudence, skill, and care in avoiding dangers and in mitigating the consequences of any disaster which may have happened.

The master is bound to take into account the interests of all concerned, cargo-owners as well as those of the shipowners.[77] While the master may deviate to save life, he may not deviate to save property.[78] As Scaramango v. Stamp[79], shows where the ship deviated to assist a ship in distress, but instead of merely saving the crew, attempted to earn salvage by towing the distressed vessel into port, and in the attempt, went ashore herself and was lost with her cargo.

The Court of Appeal held that deviation was not justifiable, and that the shipowner was liable for the loss though it was occasioned by perils of the sea, and those were excepted in the charterparty.

Lord Cockburn has concluded the main principle of saving life as reasonable deviation when he said that:

75-The Tetonia, 17 E.R. p 367.

76-Notara. v. Henderson [1869-70] 5 Q.B. p 345.

77-Phelps v. Hill, op. cit, p 613.

78-Ibid, p 613.

79-(1880) 5 C.P.D. p 295.

"deviation for the purpose of saving life is protected, and involves neither forfeiture of insurance nor liability to the goods owner in respect of loss which would otherwise be within the exception of "perils of the sea. And, as necessary consequence of the foregoing deviation for the purpose of communicating with a ship in distress is allowable, in as much as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off. Deviation for the purpose of saving the ship will carry with it all the consequences of an unauthorized deviation.
Where the preservation of life can only be effected through the concurrent saving of property, and the bona fide purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating"[80].

Where a departure by the vessel from the geographical route to a bunkering port for considerations of cheapness and convenience does not necessarily amount to deviation[81]. If the shipowners show that all necessary steps have been taken to supply the vessel with adequate oil at the commencement of the voyage, then the shipowners have the right to deviate from their prescribed route for the purpose of obtaining the fuel[82].

80-Ibid, p 304; T.T. Bucknill& J.Langley, Abbott's Law of Merchant Ship and Seamen, [13th,ed,1892] p 409, hereinafter cited as "Abbott"

81-Reardon Smith Line v. Black Sea Insurance [1939] A.C. p 562.

82-Per Lord Buckmaster, in, Shipping Board v. Bunge & Born, Ltd (1925) 42 T.L.R. p 175.

It is clear that a deviation would not be reasonable merely because it was convenient to the shipowner.Its reasonableness must depend upon what would be contemplated reasonably by both parties, having regard to the exigencies of the route, known or assumed to be known, to both parties[83].

Whether the question of a deviation is reasonable is then a question of law or fact.

Lord Atkin[84] adopted the tests which indicated to both a question of law and fact.

The majority of Lords said :

> "Whether a deviation is or is not reasonable is a question of fact which must be decided by courts in the light of all relevant circumstances of each case"[85].

Whether deviation is reasonable or not has always been said to be a question of fact. Viz, deviation is governed by the individual circumstances of particular cases.

Lord Atkin has however made that quite clear by explaining which test should be applied in order to constitute a reasonable deviation as follows:

83-Per Lord Wright, J, in, Foreman & Ellams,Ltd v. Federal Steam Navigation Co.[1928] 2 K.B p 424, Per Greer L.J, where he states: "A reasonable deviation is 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 to";Per Slesser, L.J, in, Foscolo Mango &Co,Ltd. v. Stag Line,Ltd[1931] 39 Ll.L.Rep.p101-111.

84-Stag Line Ltd. v. Foscolo, Mango & Co. Ltd [1932] A.C. p 344.

85-Ibid, Per Lord Buckmaster, p 33.

"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"[86].

Deviation should therefore be confined to the interests of both ship and cargo, or it should be contemplated by both shipowner and cargo-owner[87].

B-**UNITED STATES JURISPRUDENCE**

The American Courts have often had a strict definition of what constitutes a reasonable deviation[88]. Judicial controversy has been interested frequently in such general questions as the necessity or reasonableness of a vessel's departure and such particular questions as the amount and purpose of the deviation. Usually the courts have not considered so much the clause admitting deviation as the scope of the deviation itself to decide whether it is reasonable[89].

86-Ibid, at pp 343-344.

87-Temperley, pp 73-78; Slesser, LJ, in, Foscolo Mango & Co. Ltd v. Stag Line,Ltd(1931) 39 Ll.L.Rep. p 101 at 115, where he states: "The criterion of reasonableness depend upon what would be contemplated reasonably by both parties or assumed to be known to both parties".

88-Compare, Knauth, p 255, where he said:
"Under the 1936 Act, it will always be a question whether any deviation is reasonable and hence excusable.The New Act therefore seems to have enlarged the rights of the carrier in this respect".

89-Tetley & Cleven, p 810; Compare, Stephan Dor, Bill of Lading

A consideration of the principal cases in the United States proposes however some guide line in explaining the criterion of the reasonableness; whether the deviation had taken place before the enactment of the carriage of goods by sea or taken place after that.

The early cases extended the United States Supreme Court definition[90], of what constitutes deviation.

The court held in Styria[91], that the master was justified in landing and storing the Sulphur cargo contraband by reason of the outbreak of the war between Spain and the United States after the vessel's master acquired knowledge of a declaration of this war. He knew that the cargo aboard his vessel was contraband, and that he had acted reasonably with due regard to the interest of all concerned, {the cargo-owner and shipowner}.

An emergency sufficient to excuse a departure cannot, however, arise out of circumstances deliberately planned nor from gross negligence[92], for instance, failure to obtain enough supplies of bunkers to carry the vessel to a proper destination.

A causal relation therefore should be shown between the

Clauses and the International Convention of Brussels, 1924 {Hague Rules} 1956, pp 40-42, hereinafter cited as "Dor", where he states:
"Some delegates remarked that:
deviation authorized under the contract of carriage was not really deviation; and that reasonable deviation could exist outside contractual deviation".

90-Hostetter. v. Park, 137 U.S. pp 30-40 {1890}.

91-186 U.S. p 1{1901}.

92-The Willdomine, 272 U.S. 727 {1926}.

emergency circumstances and the disaster which caused the damage to cargo, and, in the absence of such evidence, the carrier is still liable for any loss of or damage to cargo.

The doctrine of deviation should then not be applied in cases where there has been no loss or damage to the cargo[93], such as unseaworthiness alone or deviation caused by it displaces the contract only in so far as damage is caused by the seaworthiness, but all the damages attributed to the placing of an embargo on the vessel's sailing while repairs were in progress for unseaworthiness or discover it, he will not recover these damages. As well as deviation by the vessel's master to a port of refuge to avoid a peril of the sea it does not displace the contract.[94]

Judicial interpretation as to what establishes the concept of the reasonableness after the enactment of the COGSA is more confined than before, but what the court adopted as abroad interpretation of the reasonable deviation in The Malcolm Baxter,Jr[95], would have directly conflicted with this decision in The Louise[96], when it was held that where a vessel sails in flagrantly unseaworthy conditions and is forced to return to port for repairs, she is guilty of a deviation, and is not entitled to retain prepaid freight; the bill of lading

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93-International Drilling Co v. M/V Doriefs, op.cit, p 119.

94-The Malcolm Baxter, Jr, 277 U.S. p 323 (1927).

95-Ibid, at p 323, by adopting somewhat the rule of Kisk v. Taylor [1912] A.C. p 604.

96-[1945] A.M.C. p 363.

providing that freight shall be retained ship lost or not lost is displaced.

Any departure then from the contractual or customary route to the dry dock because of unseaworthiness will be reasonable if the carrier exercises due diligence to make the ship seaworthy prior to sailing from the port of loading and the vessel becomes unseaworthy in her course.[97] On the other hand, the carrier had no reason for deviation after accepting cargo for discharge at a port known to be congested.[98]

The court held in E.C.L.Sporting Goods v. United States Lines, Inc[99], that a deviation from the intended port of discharge is reasonable when the carrier discovers that the specific port would be unable to provide an adequate crew of longshoremen to unload the vessel.

Deviation is however governed by the individual circumstances of a particular case and we have to reveal all the considerations of the concern of all shipowners, carriers, and should consider the interests of all cargo-owners. The court held in The Manx Fisher[100], that the decision of the carrier to divert the vessel must be made with due regard to the interests of all cargo on board the vessel and not with regard solely to any one shipment.

97-Levation v. General Steam Navigation Co [1959] A.M.C. p 2233.

98-Surrendrd (overseas) v. S.S. Hellening Hero [1963] p 1217.

99-]1970] A.M.C. p 400.

100-[1954] A.M.C. p 177.

2-LIBERTY CLAUSES

Deviation is always arising subsequent to the start of the voyage. Merely intention to depart means nothing, unless it is certainly carried into performance[101].

The master must proceed to the place of destination without stopping at any intermediate port, or deviating from the customary and usual course, unless such stopping or deviation be reasonable[102], such as when the ship has liberty to deviate from the contractual or customary route, granted by the bill of lading or by the policy to touch and stay, at an intermediate port on the voyage.

That means that the ship's liberty to call at any ports should be expounded to the vessel's voyage and must be construed as referring to the vessel course of that voyage and not for the purpose of calling at any port.[103] For example, if the vessel loads at "A" and "B" for discharge at "C", then the carrier wants to load the cargo at "A", the bill of lading should be claused via "B", thus,if the vessel loads at "A" for discharge at "B" and "C", the bill of lading for the cargo consigned to "C" must be claused via "B".[104]

If the bill of lading contained therefore a clause

101-Foster. v. Wilmer, 93 E.R. p 1162.

102-Abbott, p 405.

103-Halsbury's Laws of England, Shipping and Navigation, (4th, ed, 1983), vol, 43, para,433, p 265, hereinafter cited as "Halsbury's Shipping and Navigation; Kent, p 389.

104-Dor, p 38; Raoul Collinvaux, Carver's Carriage by sea, (13th, ed, vol 2, 1982), para, 873, hereinafter cited as "2 Carver"

permitting the vessel to "Proceed and sail to, and touch and stay, at any ports and places whatsoever", even though the deviation happened outside the customary, usual and contractual course, it will be of no avail unless the circumstances in the particular voyage, authorize the reasonableness of such a departure[105]. For instance most of the bills of lading contains clauses granting the ship the right to call at a port for bunkers accordingly, if a vessel calls for bunker at ports on the customary route of the agreed voyage, it will be deemed reasonable deviation[106].

As well as, any that stay outside the customary commercial course for bunker in the emergency

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105-The Tai Shan [1953] A.M.C. p 887; Frenkel v. MacAndrews & Co.Ltd [1929] A.C. p 545, where it is held:
"In the circumstances the route via Levants was a usual commercial route for the ship to follow, that she was therefore on the contract voyage at the time when the goods were lost"; Connolly Shaw, Ltd. v. A/S Det Nordenfjeldske D/s [1934] 49 Ll.L.Rep, where it is stated:
"The deviation was justified under the particular clause and it was normal, in view of the type of voyage and the nature of the cargo"; Leduc & Co. v. Ward & Others (1888) 20 Q. B. p 475; Compare, The Foreman & Ellams, Ltd v. Fedral Steam Navigation Co, Ltd [1928] 30 Ll.L.Rep. p 52.

106-The San Cuiseppe [1941] A.M.C. p 315; Compare, The Thiess Bros, Ltd v. Australian Steamship,Ltd [1955] 1 Lloyd's Rep, p 464, where it is held:
"The deviation was for the benefit of the shipowners and the consequent delay was to the detriment of the cargo, since time is especially important where there is a possibility of heating. there was no need to obtain additional coal, which was the only purpose of the deviation, in order to complete the contract voyage safety. The benefit to the defendants was outside the contract voyage. It did not assist or advantage the contract voyage in any way".

circumstances, the carrier will not be responsible for loss or damage caused to the cargo, when the vessel's fuel tanks have leaked in a strong hurricane.[107]

When the ship commenced her voyage with an adequate stock of fuel for a particular stage[108] and subsequently deviated to arrange for adequate bunkers at intermediate ports on the voyage. This kind of departure would be deemed an authorized deviation so that the contractual voyage might be performed.[109]

Mackinnon L.J explained the situation of the vessel's bunker when he said:

> "the intention on sailing definitely fixed the stage of the voyage and that the quantity of bunkers sufficient to make the vessel seaworthy for that stage must be determined in view of all contingencies which a prudent shipowner ought to contemplate; that in fixing that quantity a shipowner was not entitled to take into account the existence of optional bunker facilities en route; and that therefore the vessel could not be held to have been sufficiently supplied with bunkers for the

107-The Walter Raleigh [1952] A.M.C. p 618.

108-The Makedonia [1962] 2 ALL E.R. p 614.

109-Halsbury's Shipping and Navigation,para 433,footnote,2,where he states:

"Where the clause gave liberty to call at any ports in any order for bunkering and other purposes, it was held that the House of Lords that stopping to land engineers who had sailed in order to watch the performance of a "Superheater" was not within the liberty.All their Lordships agreed that the word"bunkering" had some limiting effect on the words "other purposes", but there was difference of opinion as to the nature of this limiting effect"; See, Stag Line Ltd v. Foscolo Mango & Co Ltd[1932] A.C p 328,{H.L}; cf. United States Shipping Board v. Bunge Y Born Lda Sociedad {1925} 16 Asp MLC, p 577, {HL}.

stage from Vancouver to St. Thomas, which was the next bunkering port fixed by the owners"[110].

The clause granting the vessel the right to dry dock with cargo aboard is frequently included in bills of lading.

The American Court considered this clause as it is not abusive dry docking which is permitted by the clause of the bill of lading or by the commercial customary and the carrier will not be responsible in such circumstances[111].

As well as, for the clause which entitles the carrier to carry goods beyond the port of destination which is not provided in the Hague/Visby Rules as specific text[112], but we can reveal a general onus which is mentioned in Article [3] rule [2,8] and Article [4] rule [4] of the Hague/Visby Rules and COGSA[113].

110-E. Timm & Son,Ltd v. Northumbrian Shipping Company,Ltd[1939] 64 Ll.L. Rep. p 33.

111-Dor, op.cit, p 47; 2 Carver, para 1167.

112-Cunard Steam Ship Co. v. Buerger[1927] A.C. p 1, where it is stated:
"The terms of the original bill of lading applied to the carriage to the substituted destinations, but that in the absence of special protective provisions in the bill of lading".

113-Article [3] rule[2] provides:
"Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried".
While Article[3] rule[8] provides:
"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 this convention, shall be null and void and of no effect.A benefit of

The authors have then differed between themselves about the validity of the aforementioned clause.

Accordingly one of them considers this clause to be not valid, that if the carrier undertakes to transport the cargo from the port of loading to the port of discharge, he should load them and be pursued over the usual and customary route between the termini. Other authors, argue that this clause does not contravene the provisions of the Hague/Visby Rules and COGSA.

The court has made that quite clear, in the West Point[114], by saying:

> "The call at Recife was not a deviation; it was permitted by the "liberties" clause-in or out of scheduled itinerary, away from port of discharge for purpose of prior voyage. The reversal of Fortaleza and Tutoya was not a deviation, it benefitted the shippers as well as the ship by decreasing the time of the voyage, and was within the "liberties" clause. If the COGSA sec, 4 {4} applied, the deviations were reasonable, and were not made "for purpose of loading cargo" because the calls had been contracted for, and without reference to the geographical order".

The liberty conferred applies to every case except where it is sought to be exercised out of mere caprice.[115] It applies then only in specified circumstances which are not proved to have occurred.[116]

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insurance in favour of the carrier or similar clause shall be demeed to be a clause relieving the carrier from liability".

114-[1951] A.M.C. p 1505.

115-Per Bray J, in, Broken Hill Proprietary Co,Ltd v. Peninsular & Oriental Steam Navigation Co [1917] 1 K.B. pp 692-694.

116-Per Lord Summer,Cunard Steam Ship Co. v. Buerger[1927] A.C.p 9.

The court might then concede the validity of such a clause, it should be submitted to three conditions:

First: the carrier does not abuse his right.

Second: the carrier applies his right "reasonably".

Third: he is able to prove his absence of fault or of his agents[117].

Many bills of lading contain a specific clause authorizing deck cargo as follows:

> "Steamer has liberty to carry goods on deck and shipowners will not responsible for any loss or damage or claim arising therefrom".

In such cases if the clause has been fixed on the face of the bill of lading, the Hague/Visby Rules[118] and COGSA do not apply[119], but the carrier will not be excused from his obligation under Article 3 {2}.[120]

Then that such clause will be valid when it refers to the goods actually named in the bill of lading and must be construed in the light of the commercial adventure undertaken by the shipowner.[121]

117-Dor, op.cit, pp 66-67.

118-Aetna,Ins.Co v.Carl Mutusek Co[1956] A.M.C. p 400;Shaw,Savill & Albion Co v. Electric Reduction Sales Co {The Mahial [1955] 1 Lloyds.Rep, p 265; Export Project Services v.Steinfels [1975] A.M.C. p 765.

119-Gioandan Delawanna. v. Blijdendijk [1950] A.M.C. p 1235; Globe Solvents Co. v. California [1948] A.M.C. p 622.

120-Blanctard Lumber Co v. S.S. Anthony II,[1967] A.M.C. p 103.

121-Armour v. Leopold {1921] 3 K.B. p 473; per Lord Esher, in, Hamlyn. v. Wood [1891] 2 Q.B. pp 488-91, where he said:
"The court has no right to imply in a written contract any such stipulation, unless, on considering the terms of the contract in a

The carrier could therefore ship goods on deck unless notified by the shipper or his agent[122], but the problem arises when the bill of lading contains a general clause of the following type:

> "The scope of voyage herein contracted for shall include usual or customary or advertised ports of call whether named in this contract or not, also ports in or out of the advertised, geographical usual or ordinary route or order, even though in proceeding thereto the ship may sail beyond the port of discharge or in a direction contrary thereto, or depart from the direct or customary route. The ship may call at any port for the purpose of the current voyage or of a prior or subsequent voyage. The ship may omit calling at any port or ports whether scheduled or not, and may call at the same port more than once, may either with or without the goods on board, and before or after proceeding toward the port of discharge, adjust compasses, dry dock, go on ways or to repair yards, shift berth, take fuel or store, remain in port, sail without pilots, tow and be towed, and save or attempt to save life or property, and all of the foregoing are included in the contract voyage".[123]

It would seem difficult to depart from such voyage, but

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reasonable and business manner, an implication necessarily arises that the parties must have intended that the suggested stipulation should exist. It is not enough to say that it would be a reasonable thing to make such an implication.It must be a necessary implication in the sence that I have mentioned"; Svenska Trakter v. Maritime Agencies [1953] 2 ALL E.R. p 570.

122-Encyclopaedia Britannica,Inc v. Honkong Producer[1969] A.M.C.p 1741.

123-Gilmore & Black, pp 177-178.

when the face of the clean bill of lading does not state deck cargo, then the carrier has not exercised a deck option because such clause will be contradicted with the general principle which mentioned in the Hague/Visby Rules and COGSA in Article [3] para {2,8}, that the carrier must be very careful with the loading, handling, stowage, carriage, custody, care and discharge of such goods.

Any loss of or damage to the cargo during the planned voyage arising from negligence, fault, or failure in the duties and obligations provided in the Hague/Visby Rules or COGSA, the carrier would be responsible for such loss or damage to the cargo in connection with such lack of care, even though the bill of lading contains a specific clause, covenant, or agreement relieving the carrier or the ship from such liability because this clause is null and void.[124]

The actual facts of what constitutes a deviation is thus more important than the clause itself, because the courts have not admitted any general liberties clause more than the Hague/Visby Rules admit at Article 4 {4}, and the courts must interpret such clause as being reasonably construed.[125]

The court, however, in E.C.L.Sporting Goods v. U.S. Lines[126], held that when a deviation is reasonable and is

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124-Tetley, Selected Problems of Maritime Law, p 64.

125-Tetley, Marine Claim, p 356.

126-[1970] A.M.C. p 400; Kroll. v. Silver Line {The Manxfisher}, [1954] A.M.C. pp 177-79

excused by the liberties clause of the bill of lading then it is not considered a deviation. As well as, the purpose and meaning of the stamped clause was not to add to the discretions and power of the master under the liberties clause, but rather to state an essential element of the contract of carriage such as in transport of seasonal goods.[127]

In referring to a clause which permitted deviation "owing to war conditions", the court does not excuse deviation for causes not arising out of war conditions.[128]

Brandon, J, however in The Berkshire[129], did not consider the question of the validity of a general liberties clause but construed it restrictively where he said that:

> "In my view it was, by discharging the goods at an intermediary port and transhipping them into another ship not owned or operated by them, the shipowners were making a fundamental departure from the method of performing the contract contemplated by the parties at the time it was made".

Cargo carried on deck is however subject to the Hamburg Rules when it is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.[130]

127-Singapore Trader [1975] A.M.C. p 883.

128-The Blandon [1923] A.M.C. p 242; Surrendra (overseas) v. S.S. Hellenic Hero [1963] A.M.C. p 1217.

129-[1927] 1 Lloyds, Rep, p 185.

130-Article (9) of the Hamburg Rules provides:

"1-The carrier is entitled to carry the goods on deck only if such carriage is in accordance with the shipper or with the usage of the

Finally, most bills of lading reiterate the clause which grants the vessel the right to save or attempt to save life[131] or property at sea or property at sea and to tow any ship in no matter what circumstances, which is stated in the Article 4 {2,4} of the Hague/Visby Rules and COGSA. The implied meaning in the above clause that the deviation should not be construed more than necessary, otherwise, the exoneration clauses should be lost, such as, when the vessel towed the disaster vessel farther than the safer port.[132] Such clause usually does not expand in the case of substitution of a different vessel, i.e; in the case of a change of voyage.[133]

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particular trade or is required by statutory rules or regulations.
2-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 evidencing the contract of carriage by sea a statement to that effect. In the absence of such a statement the carrier has the burden of proving that an agreement for carriage on deck has been entered; however, the carrier is not entitled to invoke such an agreement against a third party, including a consignee, who has acquired the bill of lading in good faith.
3-Where the goods have been carried on deck contrary to the provisions of paragraph 1, of this article or where the carrier may not under paragraph {2} of this article invoke an agreement for carriage on deck, the carrier notwithstanding, the provisions of paragraph 1 of article 5, is liable for loss of or damage to the goods, as well as, for delay in delivery resulting solely from the carriage on deck and the extent of his liability is to be determined in accordance with the provisions of article [6] or article [8] of this convention, as the case may be.
4-Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article [8]".

131-2 Carver, para, 1174; Dor, p 47.

132-In Re Meyer {1896} 74 F. pp 881-897.

133-William D.Winter, Marine Insurance its Principles and Practice,

3-EXCEPTIONAL PERILS

Article 4 {2}{c} of the Hague/Visby Rules, the COGSA in the United States and in the United Kingdom express the exceptional perils as follows:

> "Perils, dangers and accidents of the sea or other navigable waters".[134]

{3rd, ed, 1952} p 169, hereinafter cited as "Winter".

134-The Hague/Visby Rules have a number of exceptions provide in Article{4} as follows:

"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;

"b" Fire, unless caused by the actual fault or privity of the carrier;

"c" Perils, dangers, and accidents of the sea or other navigable waters;

"d" Act of God;

"e" Act of war ;

"f" Act of public enemies;

"g" Arrest or restraint of princes, rulers of people, or seizure under legal process;

"h" Quarantine restrictions;

"i" Act or omission of the shippers or owner of the goods, his agent or representative;

"j" Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general;

"k" Riots and civil commotions;

"l' Saving or attempting to save life or property at sea;

"m" Wastage in bulk or weight or vice of the goods;

"n" Insufficiency of packing;

"o" Insufficiency or inadequacy of markes;

"p" Latent defects not discoverable by due diligence;

"q" Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect

These accidents are in connection with navigation of a vessel on the sea which are not contemplated at the time the contract was made.[135]

An accident is that which happens without the fault of any body, and was not caused by or contributed to by any negligence or fault or failure upon the part of the carrier or his servants.[136] Consequently a collision which is the fault of somebody is not an accident of the sea,[137] unless there has been some incursion of the seawater, or accidental action of the waves.[138]

When the weather is so exceptionally severe as to show a peril of the sea[139], then it is not sufficient to constitute that weather conditions were severe.[140] Every accident is therefore a thing which occurs, but every occurrence is not an accident.[141]

Namely, the perils which are peculiar to the sea, and which are of an extraordinary nature or arise from irresistible force or overwhelming power, and which cannot be guarded against by the ordinary exertions of human skill and prudence.

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of the agents or servants of the carrier contributed to the loss or damage".

135-1 Carver, para 209; Tetley, Marine Claim, p 195.

136-Medeiros v. Hill (1832) 8 Bing, p 235 [131 E.R. p 391].

137-Brett L.J, in Chartered Merchantile Bank of India v. Netherlands India Steam Navigation Co (1893) 10 Q.B. p 530.

138-Hamilton v. Pandorf (1887) 12 A.C. p 518, per Bramwell, p 527.

139-W.P.Wood & Co v. Hanseatische Reederi Akiengesllschaft [1930] 37 Ll.L.Rep. p 144

140-Astle, Shipping Law, p 143.

141-Fenwick v. Schmalz, L.R. 3 C. P. 313(1868).

American jurisprudence has however been stricter in its definition than English jurisprudence[142] where Hough J. in The Rosalia[143], said:

> "Something so catastrophic as to triumph over these safe guards by which skilful and vigilant seamen usually bring ship and cargo to port in safety".

Whether there is exceptional peril or not is a question of fact.[144]

The exceptions do not describe the damage, they describe the cause of the damage. It is necessary therefore to see whether the cause of the damage is one which is excepted.[145] The causal relation between the damage by the seawater and the exceptional perils must be shown.[146] The carrier should not escape liability for cargo damage without establishing clearly and satisfactorily the cause of damage and their right to exoneration.[147]

If a loss is occasioned by want of due care and diligence of furnishing a seaworthy ship, the shipowner

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142-Tetley, Marine Claim, p 195.

143-264 Fed.Rep. p 285 at p 288; R.T. Jones Lumber Co v. Roen S.S. Co.[1960] A.M.C. p 46 at 49.

144-Tetley, Marine claim, p 198.

145-Lord Esher, in, Pandorf v. Hamilton (1887) 17 Q.B.D. p 675; Leesh River Tea Co. Ltd v. British India Steam Navigation Co [1967] 2 Q.B. p 250.

146-Jahn v. Steam ship Folmina, 212 U.S. p 546; Mr.Justice McNair, in, The Chyebassa [1966] 1 Lloyd's. Rep. p 458.

147-The Caledonia, 157 U.S. pp 124,144; G.H.Renton & Co. Ltd v. Palmyra Trading Corporation Of Panama [1957] A.C. p 149.

is liable even if the loss was occasioned by an excepted peril.[148]

Where the weather was however no more severe than was to be expected at the time of the year on the voyage in question, and the breaking adrift of the barrels was due to bad stowage[149] then the carrier was not exempt.

Deviation from the proper course of the voyage should be commensurate with the necessity which will justify the deviating ship. A deviation for necessity then must be justified both as to substance and manner. Nothing more must be done than that the necessity requires.[150]

The master should take into account the interests of all concerned when the vessel deviated from the customary, usual, and agreed course of the voyage for the purpose of avoiding a danger to both ship and cargo were exposed.[151]

Article 5(1) of the Hamburg Rules provides :

> "The carrier is liable for loss resulting from loss of or damage to the goods, as well as, from delay in delivery, if the occurrence which caused the loss, damage, or delay took place while the goods were in his charge as defined in Article, 4, unless the carrier proves that he, his servants or agents, took all measures that could reasonably be required to avoid the occurrence and its consequences".

148-Walton J, in, Blackburn. v. Liverpool Brazil & River Plake Steam Navigation Co.[1902] 1 K. B. p 290; Notara. v. Henderson (1872) L.R. 7 Q.B. pp 235-36; Gilmore & Black, p 163.

149-Cooper Stewart Engineering Co. Ltd v. Canadian Pacific Railway Co. [1933] 45 Ll.L.Rep. p 246.

150-Lavabre v. Wilson, 1 Dougl, p 291(99 E.R. p 185].

151-The Teutonia, In Re-Duncan v. Kaster, 8 Moo.N.S. p 411[17 E.R. p 366].

Accordingly, the catalogue of exceptions contained in Article 4{2} of the Hague/Visby Rules was not adopted by the Hamburg Rules but an affirmative rule is selected for responsibility based on presumed fault.

The problem has arisen thus where the carrier's negligence combines with excepted peril to cause the damage. The Hamburg Rules state that the carrier will only be liable for that proportion of the damage caused by his fault or negligence when Article 5 {7} provides:

> "Only to the extent that the loss, damage, or delay in delivery is attributable to such fault or neglect that the carrier proves the amount of the loss, damage, or delay in delivery not attributable thereto"[152].

152-J.F.Wilson, "Basic Carrier Liability and the Right of Limitation", Published In The Hamburg Rules on the Carriage of Goods by Sea, Edited By Samir Mankabady, 1978, p 137, hereinafter cited as "Wilson".

COMMENT

One can conclude from the foregoing discussion that both English and American jurisprudence concerning the judicial interpretation of the term reasonable that it is frequently used loosely and governed by the circumstances of the particular case in the light of analogous precedents.

Greer L. J. in Foscolo, Mango v. Stag Line[153], where he said:

> "did not think the words of Rule 4 Article {4} of the COGSA are confined to deviation "reasonably necessary to avoid imminent peril" but he thought that Rule 4 is to be read as enlarging the area in which a deviation will not be deemed to be a breach of the contract".

Whereas Lord Atkin[154] indicated that the "true test" of the reasonable deviation "when the prudent man considers the interest of both the shipowners and the carrier and all the circumstances existing at the time deviation took place".

American courts have nevertheless purported to translate the "Ixia" rationale more narrowly, then such deviation may be construed as unreasonable, where the departure was foreseeable by the carrier at the time of the performance. A new consideration was established by American decisions when the court held that:

153-[1931] 2 K.B. p 68.

154-Foscolo Mango & Co v. Stag Line Ltd [1931] 41 Ll.L.Rep. p 165{H.L}, hereinafter cited as "Ixia".

"The decision of the carrier to divert the vessel must be made with due regard to the interests of all cargo on board the vessel and not with regard solely to any one shipment"[155].

The Hamburg Rules in Article 5{6} provides:

"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".

If we want to apply these Rules on the "Ixia", then, the carrier will be unable to prove that he took all measures that could reasonably be required to avoid the occurrence[156]. Accordingly, whether deviation is reasonable or not has always been said to be a question of fact. That means that deviation is governed by the individual circumstances which actually exist[157] of the particular cases and the carrier must consider the interests of all cargo-owners and benefit both shipowners and cargo interests.

Where the ship deviates from the customary, usual and agreed course of the voyage and such departure is covered by the liberty clause then the deviation becomes part of the contract voyage[158]. The most important thing is

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155-Kroll v. Silver Line {Manx Fisher}, [1954] A.M.C. p 177.

156-Diamond, The Hamburg Rules , p 17.

157-Per Lord Herschell, in, Hick. v. Raymond & Reid [1893] A.C. p 29, where he states:
"When I say the circumstances which actually exist, I, of course, imply that those circumstances, in so far as, they involve delay, have not been caused or contributed by the consignee".

158-Mackinnon J, in, Wallems Rederij A/S v. WM.H. Muller & Co.

therefore not what is the route prescribed by the bill of lading, whether by custom or usual, but whether it is permissible when once that route was ascertained to deviate from it.[159] Viz, that the two parts of the bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled. A liberty to deviate, however generally worded, could not frustrate but must be subordinate to the described voyage.[160]

If there is then a conflict between general printed conditions and special written conditions, the general words must be limited so that they shall be consistent with and shall not defeat the main object of the contracting parties.[161] Generally the courts have not considered so much the clause admitting deviation as the scope of the deviation itself to determine whether it is reasonable or not.

English courts have narrowly construed[162] "liberties" clause more than the American courts which have construed

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Batavia [1927] 2 K.B. p 106; Reardon Smith Line, Ltd v. Black Sea & Baltic General Insurance Co Ltd [1939] A.C. p 562.

159-Leduc & Co v. Ward (1888) 20 Q.B.D. p 475; Glynn v. Margetson & Co [1892] 1 Q.B. p 337; [1893] A.C. p 351.

160-Per Viscount Summer, in, Frenkel v. Macandrews [1929] A.C. p 562; Connolly Shaw, Ltd v. A/S Dep Norden Fjeidske D/S [1934] 49 Ll.L.Rep. pp 183-190.

161-Per Lord Morton of Henryton, in, Renton v. Palmyra Trading Corp [1957] A.C. p 168.

162-Mr. Justice Brandon, in, Berkshire [1974] 1 Lloyd's Rep. p 185, where he gives support to this principle by giving a narrow reading to deviation clauses; Compare, Hadji Ali Akbar v. Anglo-Arabian S.S.Co(1906) 11 Com.Cas, p 219.

the liberties clauses in a broader sense in the light of the carrier's duty to properly and carefully transport the goods.[163] It would appear that even under a voyage clause...a deviation occurs when the liberties conferred by the clause are pushed beyond reasonableness in the light of the carrier's duties to cargo.[164]

An analysis of the exceptional perils leads however one to the conclusion that many of the reasons for deviations correspond to excepted perils[165] under Article 4 {2} of the Hague/Visby Rules and COGSA.

These immunities[166] make the carrier escape from liability for loss of or damage to cargo arising from any cause, except where such damage occurred by the fault of the carrier or his servants and where the cargo has been damaged or lost during the deviation.[167] Consequently any loss caused by unreasonable deviation is not excused by Article 4 {2}.[168]

Finally, the Second Report[169] and its findings, are

163-Hellenic Lines, Ltd v. United States, 512 F.2d, p 1196,{2d cir.1975}; Article 3{2} of COGSA of the United States and the United Kingdom and the Hague/Visby Rules.

164-Gilmore & Black, p 178.

165-Lord Chorly of Kendal & C.T.Bailhache, The Law of Marine Insurance and Average, 1961, vol 9, para, 478, hereinafter cited as "9 Arnould"

166-David M. Walker, Principles of Scottish Private Law, {3rd, ed, vol II, 1983}, p 346, hereinafter cited as "Walker, Private Law".

167-Gilmore & Black, p 180; Lord Chorley & Giles, Shipping Law, {7th, ed, 1980} p 208, hereinafter cited as "Chorley & Giles"; Lord Maugham, in, Hain S.S. Co. v. Tate & Lyle {1936} 52 T.L.R. p 617

168-Gilmore & Black, p 180.

169-Second Report of The Secretary-General, pp 18, 19, 27, 28.

summarized as follows:

> "Second, while the exemption from carrier liability for deviations to save life at sea has created little controversy, the exemption for deviations to save property has been criticized because it might encourage carriers to deviate when it is in their own interests to do so, to the detriment of the cargo.
> Third, the exemption from liability for any reasonable deviation has proved difficult to construe and apply. No specific formulation of what constitutes a reasonable deviation has evolved from case law, largely because of the widely varying circumstances in which deviations can occur. Moreover, it is not clear under Article 4{4} of the Brussels Convention which party should bear the burden of proving the reasonableness of a deviation".

ii-UNREASONABLE DEVIATION

Article 4 {4] of the Hague/Visby Rules implied the meaning of unreasonable deviation by explaining the term "reasonable deviation" without supplying criteria for what constitutes the reasonableness.[170] A proviso which is not mentioned in the Hague/Visby Rules was attached to the Article 4 [4] of the United States Cogsa as follows:

> "Provided, however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable".

170-Atlantic Mutual v. Poseidon [1963] A.M.C. p 665 at 668, where it is stated:
"There is no question about the fact that prior to the enactment of the carriage of goods by sea act, the doctrine of unjustifiable deviation was firmly entrenched in maritime law".

The tacit understanding of this added proviso and the implied duty on the owner of the vessel seems to be that the vessel should proceed without unnecessary deviation in the customary, usual and agreed voyage[171] and the carrier should not permitted to depart from such a course for the purpose of increasing his own profits.

Deviation, which is against the interests of any party to the contract of carriage, prima facie is regarded as unreasonable. The absence of the element of joint interest may well be an important indication of unreasonable deviation without being conclusive.[172]

An unreasonable deviation changes then the nature of the voyage so essentially as to constitute an entirely different venture from that contemplated by the contracting parties,[173] because deviation will change the peculiar nature of a maritime adventure which concern the contracting parties jointly.[174]

Article 5[1] of the Hamburg Rules provides:

> "The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods where in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

171-Davis v. Garrett, 6 Bing, p 715[130 E.R p 1456].

172-Per Lord Macmillan, in, Ixia,[1932] A.C. p 328 at 350 (H.L).

173-Tetley & Cleven, p 818.

174-Tate & Lyle, Ltd v. Hain S.S Co. Ltd [1936] 55 Ll.L.Rep. p 178.

We can reveal that the Hamburg Rules have recovered any loss, damage or delay caused by deviations, which are supposed to be unreasonable unless the carrier can prove otherwise.The Hamburg Rules are, however, more advantageous regime for cargo in the event of carrier misconduct and they are not in fact more favourable to the carrier[175].

The criteria which are made by the carrier's act for reasonable deviation may control an unreasonableness where the deviation is not reasonable. The criterion of reasonableness can sometimes be used to govern an unreasonable deviation but not vice-versa because the carrier's act which is not reasonable should be unreasonable.

UNITED KINGDOM AND UNITED STATES JURISPRUDENCE

The United Kingdom and The United States Courts have already explained the meaning of the term unreasonable deviation in the light of analogous precedents of particular cases.

In the Lousie[176] the court held that where a vessel began her voyage in a flagrantly unseaworthy condition and is forced to return to port for repairs, that is

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175-Sassoon & Cunningham, p 180.

176-[1945] A.M.C. p 363; Lord Porter, in, Monarch S.S Co v. Karlshomns Oljefabriker [1949] A.C. p 196 at p 210, where he said: "Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing"

sufficient to establish a voluntary deviation. The prudent shipowner ought then to contemplate all contingencies of the sufficient quantity of bunkers to make the vessel seaworthy for a specific stage at the time of performance of her voyage.[177]

While the damages were caused by the placing of an embargo on the vessel's sailing where repairs were in progress, the carrier shall not be responsible[178] because it is within the exception of the bill of lading.[179] Whereas any departure from the customary, usual and agreed course of voyage after the United States placed an embargo on cargo shipment to Castro's regime was sufficient to establish an unreasonable deviation because the political situation for Castor's regime was well known to every one concerned when the bill of lading was issued.[180]

Likewise, any deviation in the conduct of the ship and return of the cargo to the port of departure in order to avoid port of discharge because it was too congested would be sufficient to constitute unreasonable deviation where the congestion was well known and expected by both the shipper and the carrier at the time the contract was

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177-Timm v. Northumbrian [1939] 64 Ll.L.Rep. p 33.

178-Republic of France v. French Overseas Corp, Reported by the official report under the title of the "Malcolm Baxter,Jr", 277 U.S. pp 323-333.

179-International Paper, Co v. The Gracie D. Chambers, 248 U.S. p 387; Standard Varnish works v. The Bris, 248 U.S. p 392; Allanwilde Transport Corp v. Vacunm Oil Co, 248 U.S. p 377

180-Ruth Ann [1962] A.M.C. p 117.

made.[181]

The fundamental obligation of a common carrier is,of course, to deliver the cargo to the port of destination set forth in the bill of lading and not to some other place unilaterally selected by it.[182] Viz, in the absence of express liberties the shipowner by his master should be proceeded from the port of departure to the port of destination by the customary, usual, and described course of voyage. Otherwise he will be responsible for any loss and damage to cargo which may be ascertained from it. Deviation then which is not in any way connected with the contract voyage of its purpose can not be said to be a deviation within the terms of the contract.[183]

Lord Macmillan, in, "Ixia"[184] has concluded that:

> "The reasonableness of an act must be judged in relation to the circumstances existing at the time of its commission and not by any abstract standard. The Act, too, must be considered as a whole, in the light of all the attendant circumstances. A conclusion so reached that a particular act was reasonable or unreasonable is in general a conclusion of fact, it is an inference of fact from a given set of facts".

These principles above seem to me leave no room for doubt that whether deviation is or is not reasonable

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181-The Poznan, 276 F.418 (S.D.N.Y.1921); Surrendra Ioverseasl v. S.S. Hellening Hero [1963] A.M.C. p 1217.

182-Fadex Chemical Co v. Lorentzen [1944] A.M.C. pp 940, 941.

183-Kinsella, J, in, Thiess Bros, Ltd v. Australian S.S.Ltd [1955] 1 Ll.L.Rep. p 459 at p 463

184-[1932] A.C. p 328 at 349 (H.L).

appears a question of fact[185], in which both parties, shipowner and cargo-owner have considered all the individual circumstances existing at the time the contract was made. There is no doubt that the intentional or the wilful misconduct should be an essential element in the determining of an unreasonable deviation.[186]

American courts have incorporated intention[187] and it is considered to be the basic factor of the unreasonableness.[188] That means that when the carrier makes some change or modification in the particular course of voyage by error or by negligence or if he even makes a transgression,[189] these will not be considered unreasonable deviation.

Gross failure to exercise due diligence, where the ocean carrier's gross negligence or wilful and wanton misconduct in furnishing an unseaworthy vessel, has been held not to establish an unreasonable deviation.[190]

Whereas, gross failure to stow properly, such as, stowage of goods on deck, has been held to amount to

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185-Ibid, Per Lord Russell of Killowen, p 346.

186-Compare, 1 Carver, para 288, where he states:
"The law applicable to marine insurance is different in this respect, from that applicable to Sea-Carriage deliberation is an unnecessary element in the constitutes of deviation"

187-Walker, Companion to Law, p 628.

188-Compare, The Silvercy Press, [1943] A.M.C. p 510.

189-Compare, Sarpa, p 156, where he stated:
"The transgression aspect of deviation which is considered fundamental departure from the terms of the affreightment contract, to have the some effect as a deviation".

190-Iligan Int, Steel v. John Weyerhaeuser, [1975] A.M.C. p 33.

unreasonable deviation.[191] That does not mean however any goods carried on deck are an unreasonable act where the ocean carrier may justify on deck carriage by showing that such stowage was warranted by universal custom, or the agreement of the shipper, or the reasonableness of the deviation.[192]

The line between the intentional, voluntary and misconduct actions and the negligence, fault and transgressions of the carriers' acts in particular voyage however are very close and important, because any characterization of the carrier's act as intentional or willful misconduct should be the essential element in the determining deviation and would be sufficient to amount to unreasonable deviation.[193]

If the carrier's act was due to negligence of the vessel's master or crew, then it should be classified due to lack of proper and customary care of the cargo and Article 4 [2] of COGSA should have applied.[194] Further more, mere intention or wilful misconduct is not enough to amount to unreasonableness[195] and the causal connection

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191-Morgan, pp 482-83.

192-Dupont Nemours International S.A v. The Marmacvega [1974] A.M.C. p 67.

193-Tetley & Cleven, p 820.

194-See infra chapter II for an explanation of this point in more detail; Roger, pp 181-82.

195-Compare between The Flying Clipper [1954] A.M.C. p 259, where it is stated:
"Carrier responsible for all loss or damage occurring during or after an unjustifiable deviation, whether or not caused by the deviation", and Atlantic Mutule Ins.Co v. Poseiden Schiffahrt [1963] A.M.C. p 665; 375 U.S. p 819 (1963), where it is stated:

between the deviation and loss of or damage to cargo should be shown,[196] and it will be important to notice that loss or damage is suffered by the deviation itself and not by any reason or act independent of the deviation.[197] Then the carrier will be responsible for such loss or damage incurred from the unreasonable deviation except where the carrier showed that the loss or damage must have occurred in any event whether the vessel had deviated or not.[198]

Finally, the Rule of an unreasonable deviation in the United Kingdom courts is quite strict; more so than in American courts.[199] That depends upon individual circumstances in particular cases of geographical and non-geographical deviation, such as, over carriage, dry-docking with cargo aboard and stowage on deck of cargo shipped under clean bills of lading.[200]

"Carrier can in no event, even if he has recklessly violated the contract and such violation caused damage or loss, be held liable above the limits of Article IV[5]".

196-Willdomino, 272 U.S. p 718, where it is stated:
"A causal relation must be shown between the unseaworthiness and the disaster which caused the damage to cargo and in the absence of such showing, the shipowner is still entitled to the protection of the Harter Act";Malcolm Baxter,Jr, 277 U.S. p 323;Davis v. Garrett, 6 Bing, p 715,[130 E.R. p 1456]; Abbott, pp 407-408; Knauth, p 258; Compare, Thorley v. Orchis S.S Co [1907] 1 K.B p 660 at p 664.

197-Poor, p 192.

198-Swinfen Eady L. J. & Phillimore L.J. in, James Morrison & Co. Ltd v. Shaw Savill & Albion, Ltd [1916] 2 K.B. p 783 at pp 795, 800, respectively; The Bark Delaware, 81 U.S. p 779, 14 Wall, p 579 at p 598.

199-Morgan, p 482.

200-Tetley, Marine Claim, p 350.

iii-GEOGRAPHICAL DEVIATION

The United Kingdom jurisprudence has confined the concept of the unreasonable deviation to the geographical departure from the described route of the voyage[201], while the United States jurisprudence has extended the concept of unreasonable deviation to any serious change in the conduct of the vessel.[202]

As a matter of principle, the duty and the implied or the express obligation of the shipowner to carry and to transport the goods which are shipped on his vessel by proceeding from the port of shipment to the port of destination without unreasonable departure, unless he has expressed stipulations[203] to the contrary in the contract or exceptional perils have taken place.[204]

Viz, the shipowner has a fundamental obligation to transport the goods by the usual, customary, and described route. That does not mean geographically the shortest route between two points, instead the carrier is contracted to take the direct route.[205] If the shipping

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201-Sarpa, p 149.

202-Tetley, Marine Claim, p 350, where he states:
"This is a dangerous practice which has no foundation in the Hague Rules and in consequence the American jurisprudence is often confusing and contradictory".

203-The West Point [1951] A.M.C. p 1505.

204-The Maggie Hammond v. Morland, 9 Wall, 76 U.S. pp 435-461.

205-Achille Laure Fu Gioacchino & C. v. Total Societa Italiana Per Azion [1968] 2 Lloyd's.Rep. p 247; Mr. Dickford, in, Evans v. Cunard, [1902] 18 T.L.R. p 374 at p 375; Compare, The Niagara v. Cords, 21 How, 62 U.S. p 7 at 23,where it is stated:
"After having set sail, he must proceed on the voyage, in the

route is not mentioned in the contract that the route is the direct geographical route,[206] then it will be affected by the customary and usual route in both United Kingdom[207] and United States.[208]

It is necessary to inquire what is and what it is not the customary and usual route[209], and if, in some cases, there is more than one usual route between the port of departure and the port of destination, which one will be

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direct, shortest and usual route to the port of delivery, without unnecessary deviation, unless there is an express contract as to the course to be pursued;and where the vessel is destined for several ports and places, the master should proceed to them in the order in which they are usually visited, or that designed by the contract, or, in certain cases, by the advertisement relating to the particular voyage"; Willdomino v. Citro Chemical, Co., 71 L.ed. 272 U.S. pp 717-728; Compare, Yungay [1932] A.M.C. p 123.

206-Lord Porter in Reardon Smith Line,Ltd v. Black Sea & Baltic General Ins. Co. Ltd [1939] A.C. p 562 at p 584, where he said:
"If no evidence be given, that route is presumed to be the direct geographical route".

207-Ibid, p 562 at p 584; Davis v. Garrett {1880} 6 Bing, p 716 at 725 [130 E.R. p 1450], where it was said:
"The word usual and customary being added to the word direct, more particularly when the breach is alleged in "unnecessarily deviatious from the usual and customary way", must be held to qualify the meaning of the word direct, and substantially to signify that the vessel should proceed in the course usually and customary observed in that her voyage".

208-Columbian Ins.Co v. Catlett, 25 U.S. 12 wheat, p 383 at pp 387, 388; Hostetter v. Park, 137 U.S. p 30 at 41; The Hindanger[1935] A.M.C. p 563; The Marianne[1938] A.M.C. p 1327; where it is stated:
"It is equally true that a carrier may justify deviation from the direct practical route by proof of custom or of a contractual liberty to follow the course taken"; The Tai Shan (Firel, [1955] A. M.C. p 420.

209-Tokuyo Maru [1925] A.M.C. p 1420 ; Compare, West Aleto [1928] A.M.C. p 969 at p 973.

reasonable and other will be unreasonable.

The test of what is usual, customary, and reasonable in a commercial sense may arise in very different circumstances and must be decided whenever it arises by the application of sound business considerations and by determining what is fair and reasonable in the interests of all concerned.[210] As well as, it should be noted that the natural way is to find out what is the usual thing in the same line of business[211], which will be having regard to the nature and purpose of the contract of the carriage.

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[210]-Per Lord Wright, in, Reardon Smith Line, Ltd v. Black Sea & Baltic General Ins. Co. Ltd[1939] A.C. p 562 at 576; Per Lord Herschell, at p 585; Lord Esher, in, Leduc v. Ward {1888} 20 Q.B.D. p 475 at 482; W.R.Grace & Co. v. Toyo Kisen Kabushiki Kaisha [1925] A.M.C. p 1420, affirmed, [1926] A.M.C. p 862 at 866, where it is stated:

"In construing bills of Lading, as in construing other commercial instruments, it is the right and duty of the court to look, not only to the language employed, but to the subject matter, and to the surrounding circumstances, in order, to determine the proper effect of the language used, by putting itself, so far as possible, in the place of the contracting parties. It has regard, therefore, to all the prevailing usages and customs of business"; Lord Justice Atkin, in, U.S. Shipping Board v. Bunge & Born. 41 T.L.R. p 73 at p 75.

[211]-Per Lord Radcliffe, in, Taskiroglou & Co. Ltd v. Noblee Thorl. G.M.B.H. [1962] A.C. p 93 at p 122, where it is stated:

"Various objectives or phrases are employed to described the point of reference. I can quote the following from judicial decisions:

"recognised, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety and of course reasonable"; Sanders v. Maclean {1883} 11 Q.B.D. p 327 at 337; Gracie v. Marine. Ins. Co, 12 U.S. 8 cranch, p 75 at p 83.

As a matter of commerce, business sense is frequently limited and designed for the usual and customary route as to all shipping contracts made between the owner and shipper who have knowledge of such a change of route and that all such shippers must be held to make their contracts with reference to the new route and to accept it as implied in all bills of lading of goods to be carried between the termini.[212]

If the shippers were then not aware in fact, nor made aware through notices, that does not establish a custom of departing from the direct shortest route for the next following track.[213]

If the only voyage mentioned is however from the port of departure to the port of discharge, it must be voyage on the ordinary track by sea of the voyage between named points. Viz, it does not mean an exact line, because the ordinary track for a steamer might be different from that for a sailing vessel.

Then it would have to be taken into account all the surrounding circumstances existing according to a reasonable construction of the term of the contract.[214]

Consequently, the question has arisen of the time at which the usual and customary route will be determined.

212-The Tokuyo Maru [1926] A.M.C. p 862 at p 866; Pelotas [1933] A.M.C. p 1188; Leduc v. Ward (1888) 20 Q.B.D. p 475, where it is stated:
"Whether mere Knowledge of proposed indirect route by shippers is binding on consignees of cargo who have no notice, not decided".

213-Frederick Luckenbach [1928] A.M.C. p 1468 at p 1469.

214-Lord Esher, op. cit.p 481.

The decisions in particular cases have differed in this point.

First of all provided that:

> "It is implied term that shipment shall be via a route which is at the date of the sale contract a usual and customary route, and, if there is at that date only one usual and customary route, by that route. Here there is a finding of fact that the usual and normal route was via Suez and that was the only usual and normal route".[215]

Secondly:

> "In principle, it seems to me that where a contract expressly, or by necessary implication, provides that performance or a particular part of the performance, is to be carried out in a customary manner, the performance must be carried out in a manner which is customary at the time when the performance is called for".[216]

215-Mr. Justice Diplock, in, Taskiroglou & Co.Ltd. v. Noblee & Thorl. G.M.B.H.[1958] 2 Lloyd's.Rep. p 515 at p 520; Meissner v. Brun 128 U.S. p 474 at p 487, where it is said:
"The circuit court has found that there existed, at the time of the making of the charter, a general custom in the Atlantic ports of the United States, with reference to charters similarly worded, that a ship may be ordered to any safe port within the range where commerce is carried on, whether she can get into it or not, provided there is an anchorage near the port, customarily used in connection with it, and where it is reasonably safe for the ship to lay and discharge".

216-Mr. Justice McNair, in, Carapanayoti & Co.Ltd v. E.T. Green,Ltd [1958] 2 Lloyd's.Rep. p 169 at p 176; The Eugenia (1964) 2 Q.B. p 226; The Archer [1928] A.M.C. p 357 at pp 358-59, where it is stated:
"It clearly appears that the voyage advertised by the agent for the ship and contemplated by the ship at the time the contract of

Thirdly:

> "The essential comparison is not between the situation existing at the date of the contract and the situation existing at the time of the performance, but between that which the shipowners by their charter party contracted to do and that which, in the event, had to be done in order to carry the goods to Genoa".[217]

I am inclined to believe, as a matter of construction of the contract, that the relevant circumstances should be shown to both parties at the time of contracting and all its terms, express and implied should be taken into account to be considered for determining what constitutes a usual and customary route in particular course of voyage.

Furthermore, if there were two or more routes which were proceeded as a custom to reach a particular destination. The inquiry must always be, what is the usual route, and a route may become a usual route in the case of a particular line though that line is accustomed to follow a course which is not that adopted by the vessels.[218]

It is not the geographical route but the usual route which has to be followed, either alternative routes or a

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affreightment was made, and on the commencement of the voyage, was via Panama".

217-Pearson, J, in, Societe Franco Tunisienne Darmement v. Sidermore S.P.A. [1961] 2 Q.B. p 278 at p 298.

218-Lord Porter, in, Reardon Smith Line Ltd v. Black Sea & Baltic General Ins. Co. Ltd.[1939] A.C. p 562 at p 584.

customary route might displace the geographical route.[219] Then the direct route to the port of destination means the ultimate destination of the goods which may, according to circumstances be the termination of the voyage.[220]

The second report has however concluded that the identification of the usual or expected route must often be based on the customary practices of the carrier as to routing for the particular trade; and such practices are often very flexible.[221]

Finally, the next traditional question arising in this case is upon the nature and position of the route. Is it a question of fact or law in a particular case.

The question of what is or is not the usual and customary route, must be itself resolved largely into a question of fact.[222] That depends on the geographical position of the route, which the vessel deviated to be covered as the result of deviation from the direct, usual, or customary route, which is to be material, but not necessarily the only material matters for considerations.[223]

219-Lord Dunedin & Lord Sumner, in, Frenkel v. MacAndrews & Co [1929] A.C.p 545.

220-Ibid, Lord Warrington of Clyffe, at p 566.

221-Swinfen Eady L. J. in, James Marrison & Co.Ltd. v. Shaw, Savil & Albion, Co.Ltd [1916] 2 K.B. p 783 at 795; Oliver v. The Maryland, Ins.Co. 11 U.S. 7 cranch, p 487 at p 495.

222-Erik & Thomas, p 693.

223-Phillmore J, in, James Marrison & Co. v. Shaw, Savill & Albion, op.cit, p 800.

Lord Radeliffe[224] has concluded the main principle in this point as follows:

> "Whether all necessary facts have been found it remains a question of law for the court what on the true construction of the contract are the obligations imposed or whether, having regard to the terms of the contract and the surrounding circumstances of any particular term is to be implied. But, when the implication of term depends essentially upon what is customary or usual accepted practice, it is inevitable that the findings of fact, whatever they may be, go virtually the whole way towards determining the legal result".

The question which is, of fact or law, governing in construing the contract by all the surrounding circumstances which must be taken into account, such as, the size and class of the vessel, the nature of the voyage, the usual and customary course, the nature and position of destination port in question and the nature of the vessel, as a steamer or as a sailing. All these questions, as I think, are questions of fact in each case[225]. All the facts should then be found out at the beginning and consideration given to all these findings

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224-Taskiroglou & Co.Ltd. v. Noblee Thorl.G.M.B.H [1962] A.C. p 93 at p 122.

225-W. R. Grace & Co v. Toyo Kisen Kabushiki Kaisha [1925] A.M.C. p 1426, where it is stated:
"The propriety of any particular deviation is a question of fact in each case and there in no fixed rule for such determination. It is a question of inherent reasonableness, and pertinent to the inquiry of the surrounding circumstances, namely, the commercial adventure, which is the subject of the contract, the character of the vessel, the usual and customary route, the natural and usual ports of call, the location of the port to which the deviation was made, and the purpose of the call threat".

depend upon the individual circumstances in particular cases according to the COGSA.

OVER CARRIAGE

The Hague/Visby Rules have not provided any specific provision in considering over carriage.

The United States Courts have extended the concept of deviation to any serious change in the conduct of the ship. Over carriage is therefore considered a deviation and it has the same consequences as a deviation[226]. That dose not mean that both deviation and over carriage are identical[227].

Over carriage is enough to constitute a deviation[228] when it has taken place intentionally[229], but mere intention or mere non-delivery does not create a presumption of over carriage resulting in a deviation[230], until the goods are actually carried beyond the particular port of destination. Viz, any other construction would render cargoes subjects to all kinds of hazards which the shippers could not foresee and could

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226-Surrendra (overseas) v. S.S Hellenic Hero, [1933] A.M.C. p 1217 at p 1223, where it is stated:
"The fundamental obligation of a common carrier is, of course, to deliver the cargo to the port of destination set forth in the bill of lading and not to some other place unilaterally selected by it".

227-Tetley, Marine Claim, pp 33,37.

228-Padere Wski [1944] A.M.C. p 1107.

229-Tetley, Marine Claim, p 33; Compare, Atlantic Mutual v. Poseidon [1963] A.M.C. p 665 at p 667, where it is stated:
"a delay of one-half years in delivery is in itself a material deviation, regardless of fact of over carriage".

230-Shakman v. Cunard White Star, Ltd. [1940] A.M.C. p 971.

not be expected to insure against[231].

The following points must therefore be considered in order to render over carriage as a deviation:

1-There must be intent to breach the contract of carriage by changing the course of the voyage.

2-There must be some loss of or damage caused to the cargo. Namely, intent to cause damage or it is done recklessly with knowledge that the damage will probably result[232].

Consequently, the carrier will be responsible for any loss or damage to cargo caused by over carriage[233]. In an agreement between the cargo-owner and carrier, the latter is authorized to carry the goods beyond the port of destination depending upon individual circumstances in particular cases[234]. For instance, where the conduct of the vessel is reasonable and does not defeat the object of the bill of lading to carry the goods to a specific destination[235], or where the vessel was within the limits of the customary, practice and usual route[236].

231-The west Aleta [1924] A.M.C. p 1318.

232-Tetley, Marine Claim, p 37.

233-Silvercy Press [1943] A.M.C. p 510; Fadex chemicale. Co. v. Lorentzen [1944] A.M.C. p 940; The Malcolm Baxter, Jr. 277 U.S. p 323 (1928).

234-Renton v. Palmyra Trading.Corp [1955] 2 Lloyd's.Rep. p 301; Cunard.S.S.Co v. Buerger [1927] p 1 at 2 (H.L), where it is stated: "In the absence of special protective provisions in the bill of lading, the over carriage of the five bales....constituted a deviation".

235-Hadji Ali Akbar & Sons v. Anglo-Arabian & Persian S.S.Co,(1906) 11 Com.Cas; (1906) 95 L.T. p 610.

236-2 Carver, para, 1166; The Blandon [1923] A.M.C. p 242; Eastern

iv-NON-GEOGRAPHICAL DEVIATION

Deviation under the United States jurisprudence is not confined to a geographical deviation. The United States courts have extended the concept of unreasonable deviation farther than those pertaining solely to the change of the geographical route contemplated by the parties, when it is considered that any change in the conduct of the vessel is unreasonable deviation. For instance, stowage cargoes on deck, dry docking with cargo aboard and delay may be another form of non-geographical deviation.[237]

All these carrier misconducts are considered in the recent tendency of American judicial views, as affecting the commercial venture as a whole.[238]

Tempest [1928] A.M.C. p 70; West Aleta [1928] A.M.C. p 969; Liberator [1938] A.M.C. p 141; San Guiseppe [1941] A.M.C. p 315.

237-There are numerous kinds of non-geographical deviation in addition to the kinds above mentioned:

"a-Deviation by carriage on a vessel other than the agreed; Lord Justice Fry in, Balian & Sons v. Joly Victoria & Co. Ltd, 6 T. L.R. p 345, where it is stated:

"There was here a deviation in a double sense. The voyage was different from that agreed upon, and the goods were carried in a ship different from that contemplated"; The Princess Ann, [1925] A. M.C. p 1638; The Haiti, [1937] A.M.C. p 554; Henry N. Longley, Common Carriage of Cargo, 1967, p 111, hereinafter cited as " Longley".

b-Deviation by carriage by Rail; The Jean Jadot, [1936] A.M.C. p 47; Compare, The Ruyfuku Maru [1936] A.M.C. p 1121.

c-Returning cargo to the port of departure; The Pozman, 276 F. p 418 (S.D.N.Y.1921).

238-Roger, p 172.

"a" STOWAGE CARGOES ON DECK

In the pre-existing law, the primary obligation of the shipowner is that the goods should be stowed below deck and not on deck[239], unless the bill of lading contains a special stipulation to stow the goods on deck[240], or it appears that the way of stowage does not cause the goods any loss or damage at any degree[241], or the shipowner notifies the cargo-owner of an on deck shipment.[242]

All these obligations must then be conceived in considering deck cargo in the light of the Hague/Visby Rules[243], because there is no obligation in the latter Rules that the shipowner undertakes to stow the goods under deck even though a clean bill of lading is issued.[244]

The Hague/Visby Rules apply however when the goods are in fact carried on deck if there is no mention in the bill of lading that goods are as being carried on deck. The carrier, in this case, is then responsible for any

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239-Schooner St. Johns N.F [1923] A.M.C. p 1131; Sarnia, 278 Fed p 459, where it is stated:
"Where goods are shipped under a clean bill of lading the obligation is that they are to be put under deck, unless there is an express written agreement to the contrary or a custom to the contrary is proven".

240-The Delaware v. Oregon Iron. Co, 81 U.S. 14 Wall, pp 579-606.

241-St. Johns N.F. Shipping Corp v. Companhia Geral Commercial Do Rio Janiero, 263 U.S. 68 L. ed, p 119 (1923).

242-McCardie, J, in, Armour v. Leopold Walford [1921] 3 K.B. p 473 at p 479.

243-Johnes v. Flying Clipper [1954] A.M.C. p 259.

244-Tetley, Selected Problems of Maritime Law, p 61.

loss of or damage to the cargo and he cannot rely on the exceptions catalogue which is set out in article IV {2}{a} to {q} of the Hague/Visby Rules.[245]

Deck stowage under the American jurisprudence is considered to be a deviation in virtue of Article IV [4][246], because the United States' COGSA which adopted the Hague Rules makes no attempt to define deviation which encouraged the circuits courts to extend the concept of deviation to cover any variation in the conduct of a vessel in the carriage of goods by sea.[247]

Whereas, the deck stowage under the English jurisprudence is deemed a breach of the contract of carriage which involves compensation for loss or damage to the cargo.[248] This attitude is based upon the grounds that the carrier is not entitled to stow goods on deck[249],

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245-James F. Whitehead, "Deviation: Should the doctrine apply to on-deck carriage"?, [1981] 6 Mar. Law, p 37 at p 39, hereinafter cited as "Whitehead".

246-Compare, Tetley, Selected Problems of the Maritime Law, p 63, where he said:
"I believe it is best to consider it as a breach of the contract and to consider deviation as a change in the geographical route of the voyage".

247-Whitehead, pp 39-40.

248-Royal Exchange Co. v. Dixon [1887] 12 A.C. p 11; Ridley, p 126; Ivamy, p 85.

249-Lord Watson, in, Royal Exchange Co. v. Dixon, op. cit, at p 17, where he stated:
"In short, the liability of the shipowner, upon each occasion of deck stowage under admitted practice, is precisely the same with the liability which he would incur, in the absence of any such practice, by stowing goods on deck, on one occasion, in violation of his contract to carry, and without the knowledge of the shipper..".

unless there is an express agreement or industry custom provided otherwise. The customary or usage of the cargo and trade is however involved as a criterion for determining whether deck stowage is reasonable or not.[250] The rational consideration of this criterion depends on the intended use or design of the deck on which the goods were stowed or design of the port where the goods will be discharged.

In the absence of evidence of a contrary usage in the particular trade, the goods should be properly and carefully stowed under deck.[251] If the bill of lading specifically stipulates that the goods shall be under deck stowage, a custom to the contrary would not override the stipulation and on deck stowage in such circumstances would be an unreasonable deviation.[252]

Scrutton[253] concluded that for a custom to be enforced by the courts it must be:

> "a" reasonable; "b" certain; "c" consistent with the contract; "d" universally acquiesced in; "e" not contrary to the law.

Deck carriage under a clean bill of lading on a specialized container ship counts as a deviation[254], unless there is positive evidence of a loading port custom so permitting.[255] The American court in Du Pont De

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250-Whitehead, p 40.

251-The Delaware v. Oregan Iron Co, 81 U.S. 14 Wall, pp 579-606.

252-Encyclopaedia Britannica,Inc. v. The Hong Kong Producer & Universal Marine Corp[1969] 2 Lloyd's.Rep.p 536 at 544,Footnote,12.

253-Scrutton On Charter Parties, pp 15-16.

254-J.Evans&Son[portsmouth]Ltd v. Andrea Merzario Ltd[1976] 1 W.L.R.p 1078.

255-Encyclopaedia Britannica v. Hong Kong Producer (1969] A.M.C. p

Nemours International v. The Mormacvega[256], held that deck of a container ship is exactly where container are reasonably intended to be carried.

It seems to me that container ships are designed to carry containers on deck. A clean bill of lading issued by a container ship does not import that cargo will be carried under deck[257], and it was not a deviation to have stowed the container on the weather deck.[258]

If there is however agreement between the shipowner or the carrier and the cargo-owner or the shipper stated that the goods will be carried on deck, the Hague/Visby Rules and COGSA do not apply[259], but the carrier is still responsible for stowing the goods carried " properly".[260]

1741 at p 1742, where it is said:
"Stowage of containers on whether deck, without any notation of that fact on the face of the bill of lading constituted an unreasonable deviation".

256-[1972] A.M.C. p 2366.

257-J.P. McMahon, " On Deck Stowage of Container on Container Ship not Unreasonable Deviation", [1973] 4 J.Mar.L & Com, p 323 at pp 327-28, hereinafter cited as " McMahon".

258-Rosenbruch v. Amer.Export Isbrandtsen Lines[1976] A.M.C.p 487 at p 493.

259-Deck cargo is particularly excluded by the Hague Rules under Article 1 [c], where goods are defined as:
"goods, wares, merchandise and articles of every kind whatsoever except.... cargo which by the contract of carriage is stated as being carried on deck and is so carried".

260-Royal Exchange Shipping Co. v. Dixion [1887] 12 App.Cas, p 11; Svenska Traktor Aktiebolaget v. Maritime Agencies [Southampton] Ltd. [1953] 2 All E.R. p 570; The Ponce [1949] A.M.C. p 1124, where it is stated:
"Where goods are shipped on deck at shipper's risk, the carrier is not relieved of due care and attention towards the cargo"; Beck v. Steel Voyager [1957] A.M.C. p 1515; Ivamy, p 85.

The shipowner is bound to notify the shippers or cargo-owners of an on deck shipment when the parties have an agreement to stow the goods under deck. Then the shippers or cargo-owners who are aware of the existence of such a practice, and do not object to it, cannot be said to have consented to carry the goods below deck.[261]

The Hamburg Rules modify the COGSA of the United Kingdom, the United States and the Hague/Visby Rules considering deck cargo under the Hamburg Rules, the carriers are authorized to stow and carry the goods on deck only if such carriage is in accordance with an agreement with shipper or with the usage of the particular trade or is required by statutory rules or regulations.[262] Whereas, wrongful stowage on deck will still make the carrier liable for damage resulting from such a voyage.[263]

Where the shipowner has loaded the goods on deck under a privilege reserved for him by the general usage, custom or practice of the voyage that does not mean the shipowner will be excused from his obligation, under Article 3 [2] of the Hague/Visby Rules, to stow the goods properly and carefully.

261-Lord Waston, in, Royal Exchange Shipping Co. v. Dixon, op.cit, at p 18.

262-Article 9 [1] of the Hamburg Rules.

263-Article 9 [3] of the Hamburg Rules; William Tetley, "Article 9 To 13 of the Hamburg Rules", Published in The Hamburg Rules on the Carriage of Goods by Sea, by Samir Mankabady, 1978, p 197, hereinafter cited as"Tetley, Hamburg Rules".

"b" DRY DOCKING WITH CARGO ABOARD

The dry docking of a vessel with cargo aboard without any exoneration clause establishes a deviation depending upon particular circumstances.[264] For instance, the carrier will not liable, if the vessel becomes unseaworthy and is forced into dry dock after having exercised due diligence to make the vessel seaworthy before sailing from the port of departure[265], or if the commercial customary and usage of trade have permitted such deviation.[266]

Whereas, the departure from the customary, usual and agreed course of a voyage into dry deck without any marine necessity is sufficient to constitute a deviation.[267]

"c" DELAY MAY BE ANOTHER FORM OF NON-GEOGRAPHICAL DEVIATION

The implied obligation in the contract of carriage on the carrier, under the common law, is to proceed upon the agreed voyage with reasonable despatch and diligence[268] which is implied in Article 3[2] of the Hague/Visby Rules and expressed in Article 5[1] of the Hamburg Rules.

The ordinary delay does not amount to a deviation[269]

264-2 Carver, para, 1167.

265-Levation v. General Steam Navigation Co.[1959] A.M.C. p 2233.

266-Dor, op.cit, p 47; Indrapura, 238 Fed. p 853 [1916].

267-Poor,op.cit,p193; Indrapura,171 Fed,p929[1909];Compare,Greer L. J.in,Gosse Millard v. Canadian Government[1928] 1 K.B.p 717 at 741.

268-The Maggie Hammond v. Merland, 76 U.S. pp 435-461, 19 L.ed; Walker, Private Law, II, p 333.

269-Memphis Rail Road Co v. Reeves, 77 U.S.10 Wall, pp 176-192,

because it is well known that every delay is not a deviation. Whereas, an unreasonable delay at another port for the purpose of taking the cargo, according to the usage of the trade to go from one port to another to complete her cargo, is considered a deviation.[270]

Delay amounts to a deviation where it makes the voyage a different voyage from the contract one.[271] For instance, when the delay was constituted a different voyage from that contemplated by being postponed rather than prolonged[272], or the delay caused to frustrate the commercial purpose of the contract[273] and when the delay went quite beyond the necessities of the situation.[274]

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where it is said:
"The flood was the proximate cause of the injury, and the delay in transportation the remote one".

270-Oliver v. Maryland Ins Co, 7 Cranch, 3 L.ed, p 414, (1810) 11 U.S. p 487; Atlantic Mutual v. Poseidon [1963] A.M.C. p 665 at 666, where it is stated:
"because the delay was unreasonable, it was a deviation"; The Willdomino, 272 U.S.p 718(1927); Samuel Williston, A Treatise on the Law of Contract, (Revised, ed, Vol, IV, 1936, para, 1079), hereinafter cited as "Williston".

271-Scrutton, in, Verren v. Anglo-Dutch Co [1929] 34 Ll.L.Rep.p 210 at p 212.

272-Per Lord Atkin, in, Brandt v. Liverpool S.N.Co.[1924] 1 K.B. p 575 at p 601, where he said:
"I think this is not a case of prolongation but rather of postponement of the voyage... But if it was prolonged I think the delay was such as to substitute an entirely different voyage for that contemplated by the bill of lading"; 2 Carver, para, 1205.

273-British & Beningtons, Ltd v. N.W. Cacher Tea. Co. [1923] A.C. p 48; Universal Cargo Carriers Corp. v. Citati [1957] 2 All E.R. p 70; Hong Kong Fir v. Kawasaki [1962] 2 Q.B. 26.

274-Knauth, p 263.

v-QUASI-DEVIATION

Deviation, geographical or non-geographical, has always occurred during the voyage between the port of departure and the port of discharge, which voyage should be prosecuted without unreasonable delay or deviation.

Many authors have called non-geographical deviation, Quasi-deviation[275]. Whereas, I have differed with them in that some kinds of deviation which do not occur during a maritime voyage but occur at the destination port after the unloading of the cargo, such as, when the land carriers agree to collect the goods at the destination port and to deliver them to the consignee, or to store the goods until the consignee collects them, the land carriers leaves the goods unguarded, and as a result of this the goods are stolen[276], or if a bailee by mistake sells the goods or stores them in the wrong place, where he has agreed to keep the goods in a specific place[277]. All these misconducts of the carrier are called Quasi-Deviation and have the same effect as any unreasonable deviation[278].

275-2 Carver, para, 1214-1215; Morgan, p 482; Mackinnon, p 20; Falih, p 431.

276-Lord Justice Scott, in, Bontex Knitting Works Ltd v. St.John's Garage, (1943-1944) 60 T.L.R. p 253; [1943] 2 All E.R. p 690

277-Lilley v. Double Day [1881] 7 Q.B. p 510; McNair J, in, Woolmer v. Delmer Price, Ltd[1955] 1 Q.B. p 291; Mills, The Future of Deviation, p 588.

278-Lord Justice Denning, in, Spurling, Ltd. v. Bradshaw [1956] 1 Lloyd's. Rep. p 392 at p 396, where he said:

"The essence of the contract by a warehouseman is that he will

Therefore, one can say that geographical deviation and non-geographical deviation are sui generis and to keep distinct from Quasi-Deviation.

SECTION THREE

DEVIATION AND CHANGE OF VOYAGE

The shipowner is obliged to proceed and perform the precise voyage described in the bill of lading.[279] The termini of contractual carriage, which should be determined by the bill of lading or contract of carriage, should state the ultimate port of destination. If the vessel followed the agreed course of voyage from the *terminus a quo* to the *terminus ad quem*, that means the vessel has been obliged to proceed according to the described course of voyage.[280]

An intent to do an act can never amount to the commission of the act itself. Thus an intention to deviate or change of voyage is irrelevant and must be actually carried into effect.[281]

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store the goods in the contractual place and deliver them on demand to the bailor or his order. If he stores them in a different place, or if he consumes or destroys them instead of storing them, or if he sells them, or delivers them without excuse to some body else, he is guilty of a breach which goes to the root of the contract and he cannot rely on the exempting clause"; Levison v. Patent Steam Cleaning [1978] 1 Q.B. p 69 at p 81.

279-Beatson v. Haworth, 6 T.R. p 531.

280-Simon v. Sedgwick [1893] 1 Q.B.p 303.

281-Marine, Ins. Co. of Alexandria v. John & James H. Tuker, 3 Cranch, p 357, [5-8 U.S. p 466]; Foster v. Wilmer (1746) 2 Str. p 1250, [93 E.R.p 1162]; Heselton v. Allnutt, 1 M & S, p 46 [105

Deviations from the described voyage, arise from after-thoughts, after-interest, and after-temptation.[282] Any actual departures then from the designed course of voyage by the contracting party will constitute a deviation. If the vessel sails however on a different voyage from that described in the bill of lading, then the bill of lading will be displaced.

For instance, if the vessel be taken before the dividing point of the voyages, or if the vessel had discharged her cargo, and taken new freight, that would have been an act sufficient to alter the voyage and it will be established a change of voyage.[283] Depending on the ground that there was no inception of the voyage which the parties contemplated by the contract.[284] Whereas, if the vessel departed from the contractual voyage and proceeded on another one, but the termini of the agreed voyage is the same as which the vessel sailed, that constitutes a deviation.[285]

The change of voyage is however where the vessel sailed on a different voyage from that contemplated by the contracting parties, or where the vessel entirely relinquishes all the intention of prosecuting the contractual voyage after embarkment.[286]

E.R. p 18].

282-Lord Mausfield, in, Wooldridge v. Boydell, 1 Dougl, p 17,[99 E.R. p 14].

283-Tasker v. Cunningham (1819) 1 Bligh, p 87 at 97 [4 E.R. p 32].

284-The Luson v. Ferguson, 1 Dougl, p 360 [99 E.R. p 231].

285-Kent, p 392; Kewley v. Ryan, 2 H.BL. p 343, [126 E.R. p 586]

286-Lord Chorley of Kendal & C.T.Bailhache, The Law of Marine

The deviation is then a change in the customary, usual and agreed course of performing and it has never lost sight of the voyage. Viz, the identity of the voyage depends on its termini and that the intention has been deliberately created of abandoning the *terminus ad quem* of the original voyage.[287]

The *terminus ad quem* does not *per se* amount to a change of voyage, but it is an important factor in deciding whether such a change is a deviation or a change of voyage. For instance, where the described route of the vessel from A, to B, C, and D. The vessel sailed with intention to proceed directly to D, without first visiting her intermediate places.

That means that the vessel never sailed upon the voyage described and also no question was made as to the non-inception of the voyage, but it was a case of deviation because the termini are the same.[288]

Insurance and Average, [1961, vol, 9], p 431 hereinafter cited as "9 Arnould"; Union-Castle Mail.SS.Co. v. Mutual War Risks Assoc [1958] 1 Q.B.p 380, where it is said:
"There may be a change of voyage where the ship is sailing on around voyage, although she still proceeds to the original terminus ad quem"; Compare, The Marine Ins. Co. of Alexandria v. John & James H. Tuker, 3 Cranch p 357 at p 372, (5-8 U.S. p 466), where it is said:
"A voyage may be changed by taking on board a consignment to a different port; and the consignment will be evidence of the change, or it may be changed by varying the plan of the adventure before the commencement of the risk, but a deviation takes place in the execution of the original plan.Therefore,an intention to alter the voyage will destroy the contract".

287-9 Arnould, p 436, Footnote, 47.

288-Lord Ellenborough, in, Marsden v. Reid (1803) 3 East p 571 at

The usual test for distinction between an intention to deviate and a change of the voyage is whether the ultimate *terminus ad quem* remains the same.[289] If the termin of the voyage are the same as these described in the bill of lading, it was held to be the same voyage until the vessel reached the dividing points.[290]

Many marine insurance policies contain a clause stating:

> "held cover in case of deviation or change of voyage provided notice be given and any additional premium required be agreed immediately after receipt of advices".

The reasonableness in such a matter as to the time of giving a notice depends upon the particular circumstances of the case.

Kennedy, J,[291] has concluded this case as follows:

> "It was certainly a deviation from the terms and conditions of the policies, within the

p 577 [102 E.R. p 716], where he stated:
"... the only question is, whether there were any inception of the voyage insured? and I am clear that there was . I think that the voyage insured to Palermo, Messina, and Naples, meant with this reserve only that if the ship went to more than one place she must visit them in the order described in the policy"; Kewley v. Ryan, 2 H. BL, p 343, [126 E.R. p 586].

289-Middle Wood v. Blackes, 7 T. R. p 163 [101 E.R. p 911]; Heselton v. Allnutt, 1 M & S, p 46 [105 E.R. p 18]; Hewitt v. Lodon General, Ins. Co. Ltd. [1925] 23 Ll.L.Rep. p 243 at p 245.

290-Hare v. Travis (1827) 7 B & C. p 14 [108 E.R. p 630].

291-Thames & Mersey Marine Ins. Co. Ltd v. H.T. Van Laun & Co [1917] 2 K.B. p 48 at p 53; Heselton v. Allnutt, 1 M & S. p 46 [105 E.R. p 18].

meaning of those instruments and, I also agree with him that no notice was given to the underwriters of the deviation or change of voyage [if there was one] either immediately or within a reasonable time after the receipt by the respondents of advices as to the ship's movement so as to enable an additional premium to be agreed upon".

Finally, deviation is then not a change of the voyage and should be contrasted with it, but if there is no change of voyage there is a deviation.[292]

SECTION FOUR

DEVIATION AND DELAY

The implied obligation in the contract of carriage by the common law that it is necessary that a ship must follow her course with reasonable despatch and diligence[293], whether it is on a contract of carriage of goods by sea or whether it is proceeding under a charter party.[294] The shipowner and the freighter must both perform their respective duties in loading and discharging the ship diligently.

292-Hewih v. London General Ins. Co. Ltd,[1925] 23 Ll.L.Rep. p 243.

293-Walker, Scottish Private Law, p 333; Chorley & Giles, p 205; Pane & Ivamy, p 95; Dietrich v. U.S. Shipping Board,etc [1925] A.M.C. p 1173 at p 1183, where it is stated:
"In the absence of some agreement to the contrary, a voyage must be commenced without needless delay or deviation, and must be prosecuted with out unnecessary delay or deviation".

294-Anglo-Saxon Petroleum Co. Ltd v. Adamastos Shipping Co. Ltd [1957] 2 Q.B. p 233, reversed on other grounds by (H.L),[1959] A.C. p 133.

The Hague/Visby Rules and COGSA contain no express provision for the delay[295] or its effect.[296] That does not mean that the Hague/Visby Rules leave the cargo-owners unprotected. Then, such an obligation could be implied in Article 3 [2], which imposes a general duty of care in handling the cargo.[297]

Article 5 [2] of the Hamburg Rules defines what is to establish delay when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case".

295-Chambers, p 183, where he stated the definition of delay as follows:
"di- La, v.t. to put off another time, to defer; to hinder or retard- v.i. to pause, linger, or put off time: pr. p. delaying; pa.p. delayed-n. a putting off or deferring: a lingering: hindrance..".

296-Gordon Pollock, "A Legal Analysis of the Hamburg Rules, Part II," Published in The Hamburg Rules, A One Day Seminar, Organised by Lloyd's of London Press Ltd, 1978, pollock, p 1, hereinafter cited as "Pollock, The Hamburg Rules".

297-Wilson, pp 145-147; Renton v. Palmyra [1957] A.C. p 149 at p 150, where it is stated:
"Article 3 Rule 2, which required the carrier "properly" to carry and discharge, for the object of the rules was to define not the scope of the contract service but the manner in which it was to be performed, and "properly" mention accordance with a sound system";
Whereas, Section [48] of the Marine Insurance Act, 1906 declares:
"In the case of a voyage policy, the adventure insured must be prosecuted throughout its, course with reasonable despatch, and if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable".

Miscarriage to deliver the goods within [60] consecutive days following the expiry of the above defined delivery date entitles the consignee to treat the goods as lost[298].

The classification of delay depends on a particular case or situation. Positive and arbitrary rules cannot determine whether a delay is reasonable or unreasonable. The determining factor is the condition of the goods existing at a certain time, when the ship is at a particular port, having considered all the surrounding individual circumstances, and all the possibilities, acknowledged by both parties at the time the contract was made[299].

Mere length of time is not in itself sufficient to constitute unreasonable delay[300]. It is not the nature of the cause of delay which matters so much as the effect of that cause upon the performance of the obligations which the parties have assumed one towards the other[301].

298-Article 5[3] of the Hamburg Rules; Samir Mankabady, "Comments on the Hamburg Rules", Published in The Hamburg Rules on the Carriage of Goods by Sea, Edited by Samir Mankabady, 1978, p 32 at p 54, hereinafter cited as "Samir Mankabady".

299-Societe France Tunisienne D'armement v. Sindermar S.P.A [1961] 2 Q.B. p 278.

300-Lord Ellenborough, in, Grant v. King(1802) 4 Esp. p 175; 170 E.R. p 682.

301-Lord Roskill, in, Pioneer Shipping Ltd v. B.T.D. Tioxide, Ltd [1982] A.C. p 724 at p 754 (H.L); Knauth, p 263, saying that:
"Delay is not actionable unless the customary slowest voyage performance is exceeded negligently; The Naiwa [1925] A.M.C. p 85; The Iossifoglu [1929] A.M.C. p 1157; Michael J, Roche , J, in, Manx Fisher [1954] A.M.C. p 177 at p 180, where they said:
"The decision of a carrier in these circumstances must be made with

The proper test to apply in order to decide whether that delay is reasonable or not depends upon the commercial purpose of the venture[302] and the object of the voyage[303], if such purpose is still the same or is frustrated by delay.[304] Therefore, a mere delay without increased risk does not amount to a variation of risk.[305] The shipowners have an implied right to diminish the damages caused by the charterer's default and to load additional cargo. Then such delay took place to the

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due regard to the interests of all cargo on board and the vessel as well- not with regard solely of any one shipment".

302-Universal Cargo Carriers Corporation v. Citati, [1957] 2 Q.B. p 401; Tokuyo Maru, [1925] A.M.C. p 1420 at p 1425, where it is said:

"The commercial adventure, which is the subject of the contract, the character of the vessel, the usual and customary route, the natural and usual ports of call, the location of the port to which the deviation was made and the purpose of the call threat".

303-Jakson v. The Union Marine Ins. Co. Ltd (1874) L.R. 10 C.P. p 125 at p 129, where it is stated:

"Where a ship is chartered for a voyage without any definite period for the commencement of the voyage, and delay takes place, the question is, whether that delay is so great as to frustrate the object for which the charterer entered into the charter party"; Williston & Thompson", p 1079.

304-Cockburn, in, The Company of African Merchants, Ltd. v. The British & Foreign Marine Ins. Co. Ltd (1873) L.R. 8 EX, p 154, where he said:

"It would be a question of fact for a jury whether the purpose was or was not a trade of purpose"; Lush J, in, Geipel v. Smith. L.R. 7 Q.B. p 404 at p 414, where he said:

"Likely to continue so long, and so to disturb the commerce of merchants as to defeat and destroy the object of a commercial adventure".

305-Keting & Mellor, JJ, in, The Company of African Merchants v. The British & Foreign Marine Ins. Ltd, op.cit, at p 154.

voyage by loading such cargo was impliedly authorized by the charter party.[306] If the permission to delay[307] for a certain length of time is expressed[308], the delay can be lawfully extended.[309]

The intention of the parties when they introduced in the contract the liberty to touch and stay, must not be construed so as to defeat the main object of the contract.[310]

306-Mackinnon, J, in, Wallames Regerij A/S v. W.M.H. Muller & Co. Batavia [1927] 2 K.B. p 99.

307-Section[49] of the Marine Insurance Act, 1906, provided the causes which amount to a lawful excuse as follows:

"1-Deviation or delay in prosecuting the voyage contemplated by the policy is excused,

"a"Where authorized by any special term in the policy;or

"b"Where caused by circumstances beyond the control of the master and his employer;or

"c"Where reasonably necessary in order to comply with an express or implied warranty;or

"d"Where reasonably necessary for the safety of the ship or subject matter insured;or

"e"For the purpose of saving human life, or aiding a ship in distress where human life may be in danger;or

"f"Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship;or

"g"Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

2-When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable despatch".

308-Istros v. Dahl Stroem [1931] 1 K.B. p 247 at p 252; Per Lord Buckmaster, in, Su Zuki v. Beynon[1929] 42 T.L.R.p 269 at p 274; Per Mr.Justice, Mocatta, in, Marifortuna Naviera S.A. v. Government of Ceylon [1970] 1 Lloyd's.Rep. p 247 at p 251.

309-Tully v. Howling [1877] 2 Q.B.D. p 182; Doyle v. Powell [1832] 4 B. & AD, p 265; 11 E.R. p 455.

310-Glynn v. Margetson [1893] A.C. p 351; Sze Hai Tong Bank Ltd v. Rambler Cycle Co. Ltd[1959] A.C.p 576; Hindanger[1935] A.M.C.p 563.

That means that the clauses cover merely delays fairly ancillary to the prescribed voyage[311] and the vessel should not wait more than a reasonable time[312]. The necessity then must be justified both as to substance and manner. Nothing more must be done than what necessity requires[313].

Most bills of lading, however, contain a particular name of port for delivery of the goods to their destination.

Where the carrier shall carry the goods from port to port or from wharf to wharf, an actual or manual tradition of the goods into the possession of the consignee, or at his warehouse, is not required in order to discharge the carrier from his liability[314].

The carrier should be discharged of the goods in the port named or wharf designated in the bill of lading[315], taking into consideration that delivery of the goods from a ship must be according to the custom and usage of the

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311-E.C.I. Sporting Goods v. U.S.Lines[1970] A.M.C. p 400 at p 403.

312-Doyle v. Powell, op.cit, p 267 at p 270, where it is said:
"If the vessel had been at liberty to stay a reasonable time, that would have imported a liberty to stay as long as there was a detention by embargo"; Toyo Kisen Kabushiki Kaisha [1925] A.M.C. p 1420 ; Dietrich v. U.S. Shipping Board [1925] A.M.C. p 1173.

313-Lavabre v. Wilson, 1 Doug, p 284,[99 E.R.p 185]; Phelps v. Hill [1891] 1 Q.B. p 605.

314-Richardson v. Goddard [1859] 23 How, 64 U.S. p 28, where it is said:
"The carrier is not bound to deliver at the warehouse of the consignee, it is the duty of the consignee to receive the goods out of the ship or on the wharf".

315-The Edday [1866] 5 Wall, 72 U.S. PP 481-496.

port[316], unless there is force majeure[317] preventing the carrier from discharging the goods in the agreed port, or wharf, such as, war[318], civil commotion[319], strike[320], detention by ice[321], perils of sea[322], and any delay caused by something outwith their control.[323]

If the delay then is not so great to frustrate the commercial purpose of the venture, it will not constitute an unreasonable delay. Such as when the delay caused by the break downs and repairs[324], or when the delay is

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316-Constable v. The National S.S. Co. 154 U.S. p 51; Halsbury's Shipping And Navigation, p 673, Footnote, 1.

317-Marifortuna Naviera S.A. v. Govt.of Ceylon [1970] 1 Lloyd's. Rep. p 247.

318-The Teutonia (1872) L.R. 4 P.C. p 171; The San Roman, L.R. 5 P.C. pp 301,305 (1873); Metropoliton Water Board v. Dick, Kerr & Co. [1918] A.C. p 119; Westralian Farmers Ltd v. D.S.Orient [1939] 65 Ll.L.Rep.p 105; American Tabacco Co. v. The Katinga Hadj Patera [1949] A.M.C. p 49; Affirmed by [1951] A.M.C. p 1933; The Portmar(on appeal) [1952] A.M.C. p 861; The Styria v. Morgan, 186 U.S. p 1; Enbiricos v. Sydney Reid & co.[1914] 3 K.B. p 45.

319-Longley, p 92; Scrutton, p 92.

320-Ropner v. Ronnebeck (1914) 20 Com.Cas. p 95; Westoll v. Lindsay, 1916. S.C. p 782.

321-Matheos v. Dryfus [1925] A.C. p 654.

322-Thomas v. The Royal Exchange Assurance (1814) 1 Price, p 195; [145 E.R. p 1375]; The Freedome (1871) L.R. 3 P.C. p 594 at p 603; The Assicurazioni Generali v. Bessie Morris [1892] 2 Q.B. p 652; Carras v. London & Scottish Assurance Corp. Ltd [1936] 1 K.B. p 291; Canada Rice Mils v. Union Marine [1941] A.C. p 55; Associated Lead Manufacturers,Ltd. v. Ellerman & Bucknall SS. Co.Ltd [1956] 2 Lloyd's.Rep. p 167; J.Gerber &Co. v. S.S.Sabine How Aldt [1971] A.M. C.p 539;Pincoffs Co.Atlantic Shipping Co.Etc[1975] A.M.C.p 2128; Compare, Yawata I&S.Co. v. Anthony Shipping Co[1975] A.M.C. p 1602.

323-Abbott, p 411; Hellenic Lines v. Embassy of Pakistan [1973] 1 Lloyd's. Rep. p 363 (U.S.A.).

324-Lord Kenyon, in, Smith v. Surridge, 4 Esp. p 25; [170 E.R. p 628]; where he said:

necessary to avoid capture because it will diminish the risk not increase it.[325] If the delay or loss of or damage to cargo on board is however due to unseaworthiness[326], the shipowners will be responsible for such delay or loss of or damage to cargo that has been caused by want of due diligence of the owners in making the vessel seaworthy and fitted for the voyage.[327] Mere existence of unseaworthiness does not prevent a shipowner from relying upon the terms of exceptional clauses in the bill of lading, the charter party and the insurance policy unless some loss or damage is caused by the unseaworthiness itself.[328]

Mere delay, then, is not in itself enough to establish an unreasonableness, but must result in actual loss of or damage to the cargo caused by delay.[329] Delay means however delay of such a serious and extensive character as to cause the performance of a substantially different contract.[330]

"It was not a voluntary delay nor such as amounted to a discharge of the policy"; Kidston v. Monceau (1902) 7 Com, Cas. p 82; Hong Kong Fir Shipping Co. Ltd v. Kawasaki Kisen Kaisha, Ltd [1962] 2 Q.B. p 26.

325-Hughes v. The Union Ins.Co. (1818) 3 Wheat, p 159; [16 U.S. 4 L.ed.p 357].

326-Astel, Shipping Law, p 169.

327-Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha, Ltd. [1962] 2 Q.B. p 26 at p 72.

328-Per Lord, Porter, in, Monarch S.S.Co.Ltd. v. Karlshamns Oljefabriker [1949] A.C. p 196 at p 211; M'Andrew v. Adams (1834) 1 Bing (N.C.) p 29, [131 E.R.p 1028.]

329-Koufos v. C. Czanikow Ltd [1969] 1 A.C. p 350; The Pegase [1981] 1 Lloyd's.Rep. p 175 at p 183; Tetley, Marine Claim, p 135.

330-Hodson L.J, in, G. H. Renton & Co. Ltd v. Trading Corp of

Tindal C.J.[331], has explained the meaning of unreasonable delay as follows:

> "The voyage in the commencement or prosecution, becomes a voyage at a different period of the year, at a mere advanced age of the ship, and in short a different voyage than if it had been prosecuted with reasonable and ordinary diligence; that is, the risk would have been altered from that which was intended by all parties when the policy was effected".

The next question whether the delay is or is not reasonable is a question of law or fact. The court held that:

1-In the Oliver v. The Mary Land Ins. Co:[332]

> "What is a reasonable apprehension of danger is a question of law to be decided by the court".

2-In the Universal Cargo Carriers Corp v. Citati[333], has slightly differed where it is said:

> "The assessment by the arbitrator of the period of delay sufficient to constitute frustration was a question of fact, and could be attacked only if he had applied some wrong principle of law".

3-Lord Denning, in, Pioneer Shipping Ltd v. B.T.P. Tioxide Ltd,[334] concluded that:

> "The assessment of whether a period of delay is sufficient to constitute frustration is one of mixed law and fact".

Panama [1956] 1 Q.B. p 462 at p 510.

331-Mount v. Larkins(1831) 8 Bing p 108 at p 124; (131 E.R. p 342].

332-7 cranch, 11 U.S. p 487.

333-[1957] 2 Q.B. p 401.

334-[1980] 1 Q.B. p 547.

The test of whether the delay is reasonable or is not is however a question of fact[335] having considered all the circumstances surrounding[336] the actual voyage[337].

Before the Hague/Visby Rules and COGSA put in force, the term of deviation had been used to include delay[338]. It may be collected, from numerous cases, that delay before or after the commencement of voyage is not tantamount to a deviation, unless it be unreasonable[339]. As a matter of principle, the term "deviation" implies the notion of space or locality. Whereas, the term" delay", refers to time.

There is frequently misuse of the term deviation to

335-The Company of African Merchants v. The British and Foreign Marine Ins.Co.Ltd{1873} L.R.8 EX. p 154 at p 157, where it is said: "It would be a question of fact for a jury whether the purpose was or was not a trade purpose"; Pearson v. Commercial Union Assurance Co.{1876} 1 App.Cas. p 498.

336-Winter, p 220.

337-Pollock, 2.

338-Hartley v. Buggin {1781} 3 Dougl, p 39;[99 E.R. p 527.]; Hyder Abad v. Willoughby [1899] 2 Q.B. p 530; Thames & Mersey Marine Ins.Co.Ltd v. H.T. Van Laun & Co. [1917] 2 K.B. p 48.

339-Phillips v. Irving {1844} 7 Man & G. p 355; [135 E.R. p 136]; Oliver v. The Mary Land Ins. Co. 7 Cranch, 11 U.S. p 487; Williston & Thompson, 1079, saying that:
"A deviation may arise from inexcusable delay"; Wallems Regerii A.S. v. W.M.H.Muller & Co. Batavia [1927] 2 K.B. p 99; Effingham [1935] A.M.C. p 319; International Drilling Co. v. M/V Doriefs [1969] A.M.C. p 119 at 128, where it is said that:
"Delay in carrying the goods, failure to deliver the goods at the port named in the bill of lading and carrying them farther to another port, or bringing them back to the port of original shipment and reshipping them.Such conduct has been held to be a departure from the course of agreed transit and to constitute a deviation; Steven, p 1540, Footnote, p 24.

describe unreasonable delay[340].

Norway[341] made this clear when it is noted that:

> "Deviation was really a problem in delay and that no special provision on deviation would be necessary".

The Second Report draw however attention to suggestions that the Working Group gave separate consideration to the subject of delay[342].

We can then conclude that every delay is not classed as deviation and there is no need for the fiction that an unjustifiable delay amounts to a deviation[343].

Finally, Knauth[344] suggested to apply Marine Insurance Act on the maritime carriage cases as follows:

> "As the subject is transplanted from the field of marine insurance to that transportation, it would seem proper to consider that the legislative statements of the marine Insurance Act of 1906 ought to be applied as well to transportation delay cases".

Delay has therefore a particular definition which it

340-2 Carver, para, 1205; Poor, pp 189-200; Sarpa, pp 156-157.

341-Sweeney, Part II, p 346, where he stated that:
"This view was endorsed by Hungary, Japan, and Australia. The Norwegian view was also supported by Nigeria which held that deviation presented the carrier on opportunity to make a special defense and that treatment of the subject under the general burden of proof rules was sufficient. The Nigerian view was endorsed by Tanzania".

342-Erik & Thomas, p 694.

343-9 Arnould, p 433, Footnote,29; Morgan, p 483; Hellyer v. N.Y. K. [1955] A.M.C. p 1258 at p 1260.

344-Knauth, p 263.

has excluded from definition of deviation. As provided in Marine Insurance Act {1906} by section 46[345].

CONCLUSION

The deviation issue has a significant impact on the contract of carriage. Any departure from the contemplated voyage, or breach of the contract is therefore not considered a deviation, without taking into account particular elements which constitute the doctrine of an unreasonable deviation.

The following conclusion can then be drawn in explaining the concept of deviation whether under the Hague/Visby Rules and the Hamburg Rules or the COGSA of the United Kingdom and the United States.

1-The Hague/Visby Rules do not define deviation and do not provide any criteria for the term "reasonableness", or "unreasonableness", but the Rules have construed only what constitutes a reasonable deviation. Whereas, a proviso which is not mentioned in the Hague/Visby Rules and the United Kingdom COGSA, is attached to the United States COGSA, Article 4 [4] as a criterion of unreasonable deviation.

2-The Hamburg Rules do not define deviation, but they explain in Article 5 [6] the measures to save life or reasonable measures to save property at sea which depends upon the principle of the liability of the carrier in these Rules.

345-The Citta Di Messina, 169 Fed. Rep. p 472 at p 475 {1909}.

3-The Hamburg Rules are a more advantageous regime for cargo in the event of carrier misconduct and the Rules are in fact more favourable to the carrier when the Rules recovered any loss, damage and delay caused by deviation which are supposed to be unreasonable unless the carrier can prove otherwise.[346]

4-The United Kingdom courts have confined the meaning of deviation in a change in the geographical route. Whereas, the United States courts have extended the concept of deviation to any serious change in the conduct of the vessel which has exposed cargo to increased risks, such as, stowage on deck, dry docking with cargo aboard and delay may be another form of non-geographical deviation.

5-The liberty clauses to deviate are a part of the contract voyage and must be read together and reconciled[347], taking into consideration the main object of the contracting parties and should not defeat the commercial purpose of the venture.[348]

6-There are many reason for deviations according to excepted perils under Article 4[2] in the Rules and COGSA which make the carrier escape from any liability resulting from such reasons, except where such damage occurred by the fault of the carrier or his servants or caused by unreasonable deviation.

346-Sassoon & Cunningham, p 180.

347-Per Lord Viscount Summer, in, Frankel v. MacAndrews, op. cit, p 562; Connelly Shaw v. Det Norden Fjeidske, op. cit, pp 183-190

348-Per Lord Morton of Henryton, in, Renton v. Palmyra, op. cit, p 168; Tokyo Maru, op. cit, pp 1425-1426.

7-The criterion of reasonableness can sometimes be used to govern an unreasonable deviation, but not vice-versa because the carrier's act which is not reasonable should be unreasonable.

8-Both the United Kingdom and the United States jurisprudence concerning the judicial interpretation of the term "reasonable" is frequently used loosely and is governed by the circumstances of the particular case in the light of analogous precedents.

9-The United Kingdom courts are quite strict more than the United States courts in determining what constitutes an unreasonable deviation.

10-Both the United Kingdom and the United States seem to me to leave no room for doubt that whether deviation is or is not reasonable appears a question of fact in which both parties, shipowner and cargo-owner, have considered all the individual circumstances existing at the time the contract was made and not by any abstract standard.

11-There is no doubt that intentional or wilful misconduct should be an essential element in the determining of an unreasonable deviation.

12-any change or modification in the particular course of voyage by error or by negligence or if the carrier makes a transgression[349], these will not be considered

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[349]-Compare, Sarpa, p 156, where he stated:
"Focusing on the " transgression" aspect of deviation, the courts have held various actions, which are considered fundamental departure from the terms of the affreightment contract, to have the

unreasonable, but it should be classified due to a lack of proper and customary care of the cargo and Article 3 [2] of the Hague/Visby Rules and COGSA should have applied.

13-Mere intention or wilful misconduct is not enough to amount to unreasonableness and the causal connection between the deviation and loss of or damage to cargo should be shown and it will be important to note that such loss or damage is not sufficient to constitute an unreasonable deviation and it must be caused by the deviation itself and not by any reason or act independent of the deviation.[350]

14-Geographical or non-geographical deviation has always occurred during the voyage between the port of the departure and the port of discharge which should be prosecuted without unreasonable delay or deviation. The carrier should never lose sight of the intended voyage which differs from the change of voyage where the vessel sails on another voyage contemplated by the contract of carriage.

15-Every delay is not equivalent to a deviation because the term deviation implies the notion of space or locality, where the term delay refers to time. There is no need then for a criterion which deems that an unreasonable delay amounts to a deviation.[351]

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same effect as a deviation".

350-Poor, p 192; Diamond, The Hamburg Rules, p 16.

351-Knauth, p 262; 9 Arnould, op.cit, Footnote, 29.

16-Many commissions of the carrier do not establish a deviation, even though there is a delay in delivery, unless such delay constitutes a different voyage from that contemplated, by being postponed rather than prolonged.

17- I have suggested a thorough universal definition of deviation which absorbs all the elements of the deviation which has been classified as the deviation into reasonable and unreasonable as follows:

> "Deviation is a deliberate and serious departure from the contract of carriage which constitutes a different venture from that contemplated, and causes some loss of, or damage to the cargo without necessity or reasonable cause".

CHAPTER TWO

THE BASIS OF LIABILITY OF THE CARRIER IN CONNECTION WITH THE DOCTRINE OF DEVIATION

The implied obligation of the shipowner, under the common law rules, when he receives goods to be carried for reward, is that he is responsible to transport and discharge the cargoes in good condition, responsible for all loss of or damage to the cargoes while they are under his control, unless the loss of or damage to cargo has been caused by an Act of God, the Queen's Enemies, Inherent Vice, Defective Packing and Jettison.[1]

Thus the carrier will not excuse himself from responsibility if he has not exercised due diligence to make the vessel seaworthy when the vessel started her voyage, or the loss and damage has been due to unfitness of the vessel to carry the cargo.[2]

In 1851, the United States congress enacted the Fire statute which gave the common carrier[3] a limited

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1-Jasper Ridley, The Law of Carriage of Goods by Land, Sea and Air, [6th, ed, 1982], p 85, hereinafter cited as " Ridley".

2-1 Carver, para, 20.

3-The carriers by sea are to be divided into three classes:

"a"-Common Carrier:

is a person who undertakes for hire to transport from a place within the realm to a place within or without the realm the goods or money of all. Such persons as think fit to employ him to render a person liable as a common carrier he must exercise the business of carrying as a public employment and must undertake to carry goods for all persons indiscriminately and hold himself out, either expressly or by course of conduct, as ready to engage in the

transportation of goods for hire as a business, not merely as a casual occupation pro hac vice.

However, should be noted that all the shipping cases of the United Kingdom were governed by the Bills of lading Act, 1855 and the Merchant Shipping Act, 1894, as the subject of common law; [Ridley, p 83; Watkins v. Cottel[1916] 1 K.B. p 10 at p 14; Nugent v. Smith {1875} 1 C.P.D. p 19; Chua, J, in, The "Golden Lake", Singapore High Court, [1982] 2 Lloyd's. Rep. p 632 at p 636].

"b"Private Carrier:

is defined to be a person whose trade is not that of conveying goods from one person or place to another but who undertakes upon occasion to carry the goods of another and receives a reward for so doing, [Watkins v. Cottel, op. cit, p 14; Ridley, p 84].

"c"Public Carrier:

who carries on the profession of carriage of goods by sea and who is not common carrier. A public carrier is not under a duty to accept goods for carriage, and is always entitled to refuse to carry; but if he accepts goods for carriage he is liable, in the absence of a special contract, to the same extent as a common carrier for the safety to the goods. [Ridley, p 84; Lars Gorton, The Concept of the Common Carrier in Anglo-American Law, 1971, p 74, hereinafter cited as "Gorton"].

The real test of what constitutes a common carrier is to be determined by the facts relating to:

1-The business of carrying must be habitual and not causal.

2-The undertaking must be general and for all servants of the public.

3-He holds out, either expressly or impliedly that he will transport for hire as a business the goods of all people indifferently.

4-He is sometimes described as a person who undertakes for reward to carry the goods of such as choose remploy him from place to place.[The Liver Alkali Co. v. Johnson {1872} L.R. 7 EX, p 267; 9 EX, p 338; Bailhache, J, in, Belfast Ropework Co. Ltd. v. Bushell [1918] 1 K.B. p 210 at p 212.; Gorton, p 77.; Robert Hutchinson, A Treatise on the Law of Carriers, vol I,[3rd, ed, 1906], p 47, By S. Matthews and W.Dickinson, hereinafter cited as "Hutchinson, vol,I".

"However, the Rules make no distinction between common carriage and private carriage because the criterion is neither private nor public carriage, but whether there is a contract of carriage covered by a bill of lading or similar document of title".[Tetley,

exception for damage by fire unless there is any neglect on the part of the carrier.

In 1893, the Harter Act purported to make a compromise between carriers and shippers interests by limited exculpatory clauses which were used by the carrier and limited the carriers liability for loss of or damage to the cargo. On the other hand it outlawed any clause in a bill of lading exonerating the shipowner from liability for negligence on proper and careful loading, transporting, and discharging of cargo.

The Harter Act not only interfered to replace the common law, but purported to interfere to control the laws of other countries applying to ocean shipments moving into or out of the United States.[4]

Thus the Harter Act made very important changes in the common law duties, rights and liabilities of the carriers of goods by sea when it intervened to limit the freedom of contract which permitted the carrier to insert an exceptional clause into the contract to relieve himself from liability for loss of or damage to cargo.[5]

The Hague Rules made a compromise for the lengthy struggle between the conflicting interests of the shipowner and the cargo-owner by creating uniform rules and defining the rights and liabilities of shippers and

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Marine Claim, p 4].

4-M. Bayard Crutcher,"The Ocean Bill of Lading as Study in Fossilization"[1971] 45 Tul.L.R. p 697 at 710, hereinafter cited as "Crutcher".

5-Wilson, p 137; Diamond, The Hague/Visby Rules, p 1.

carriers.

The Rules endeavour to limit the rights of the holder of the bill of lading in connection with the carrier and others who are not parties to the original contract. Such as, consignees, bankers etc. In addition the Hague Rules aim to encourage quick settlement of disputes within one year.[6]

The Visby Rules provide that the defences and limits of liability shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort.[7] The Visby Rules also provide that the servant or agent shall be entitled to avail himself of the defence and limits of liability which the carrier is entitled to invoke under this convention. These defences and limits are not available to the servants or agents of the carrier, if it is proved that the damage resulted from an act or omission of the servant or agent done with intent to cause damage or recklessly and with knowledge that damage would probably result.[8]

The Visby Rules state that the carrier and the ship shall in any event be discharge from all liability whatsoever in respect of the goods unless suit is brought within one year of the goods delivery or the date when they should have been delivered, but the difference between the Visby Rules and the Hague Rules is that the

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6-Samir Mankabady, p 30.

7-Article [3] of the Visby Rules.

8-Ibid.

Visby Rules allow that the limited time for suit be extended if the parties so agree after the cause of action has arisen.[9]

Both the Hague and Visby Rules have been criticised by the developing countries because these Rules, especially the Hague Rules were imposed upon them before they had gained their independence and they felt that their interests were not taken into account.[10]

The United Nation Conference on Trade and Development [UNCTAD] secretariat had, however, noted basic weakness in the Hague Rules and indicated the need for a revision of the Rules.

The UNCTAD was expected to take into account the particular needs of the developing countries[11] when it stated:

> "The Working Group shall review the economic and commercial aspects of international legislative and practices in the field of bills of lading from the stand point of their conformity with the needs of economic development in particular of the developing countries and make appropriate recommendations as regards, inter alia, the following subjects"[12]
>
> "a-Uncertainties arising from voyage and

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[9]-Article [1] of the Visby Rules.

[10]-Samir Mankabady, p 30.; Diamond, The Hague/Visby Rules, p 7.

[11]-John D.Kimball, "Shipowner's Liability and the Proposed Revision of the Hague Rules",[1975] 7 J.Mar.L.& Com, p 217 at p 234, hereinafter cited as " Kimball".

[12]-UNCTAD Secretariat, Bills of Lading, U.N. Doc. Td/B/C.4/ISL/6/ Rev 1, [1971] p 1 , hereinafter cited as "TD/ B/ C.4/ ISL/ 6/ Rev 1".; Sinha Basnayaka, Origins of the 1978 Hamburg Rules, [1979] 27 Am. J.Comp.Law, p 353, hereinafter cited as " Basnayaka".

ambiguous wording in certain areas of Rules, which lead to conflicting interpretations, such as, the allocation of responsibility for loss or damage to cargo; and the burden of proof which interested by both the carrier and cargo-owner;

b-The continued relation in bills of lading of exoneration clauses of doubtful validity, and the existence of restrictive exemption and time limitation clauses in the terms under which cargo is deposited with warehouse and port authorities;

c-Exceptions in the Hague Rules which are peculiar to ocean carriage, in cases, where the liability should logically be borne by the ocean carrier, such as those which excuse him from liability in respect of the negligence of his servants and agents in the navigation and management of the vessel, and in respect of perils of the sea.etc.

d-The uncertainties caused by the interpretation of terms used in the Hague Rules, such as," reasonable deviation", due diligence","properly and carefully", "in any event", "loaded on", "discharge".

e-The ambiguities surrounding the seaworthiness of vessels for the carriage of goods;

f-The abysmally low unit limitation of liability;

g-Manifestly unfair jurisdiction and arbitration clauses;

h-The insufficient legal protection for cargoes with special characteristics that the require special stowage, adequate ventilation, etc; and cargoes requiring deck shipment;

i-Clauses which apparently permit carriers to divert vessel, and to tranship or land goods short of or beyond the port of destination specified in the bill of lading at the risk and expense of cargo-owner;

j-Clauses which apparently carriers to deliver

> goods into the custody of shore custodians terms which make it almost impossible to obtain settlement of cargo claims from either the carrier or the warehouse".[13]

The "UNCTAD" Report was adopted in 1971, and invited the United Nations Commission On International Trade Law [UNCITRAL] to determine the defects and the amendments to the Hague/Visby Rules.[14]

In pursuing that task,"UNCITRAL" has regarded the following subjects:

> "a-responsibility for cargo for the entire period it is in the charge or control of the carrier or his agents;
> b-the scheme or responsibilities and liabilities, and right and immunities, incorporated in article [III] and [IV] of the convention as amended by the protocol and their interaction and including the elimination or modification of certain exceptions to carrier's liability;
> c-burden of proof;
> d-jurisdiction;
> e-responsibility for deck cargoes, live animals, and transhipments;
> f-extension of the period of limitation;
> g-definition under article [I]of the convention;
> h-elimination of invalid clause in bills of lading;
> i-deviation, seaworthiness and unit limitation of liability".[15]

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[13]-M.J.Shah, "The Revision of the Hague Rules on Bills of Lading Within the UN System-Key Issues", Published in the Hamburg Rules on the Carriage of Goods by Sea, Edited, By Samir Mankabady, 1978, p 1 at p 8, hereinafter cited as "Shah".

[14]-Kimball, p 234.

[15]-Samir Mankabady, p 31; Shah, p 10.

A draft convention prepared by the Working Group was reviewed by "UNCITRAL" which in may 1976 approved a draft convention on the carriage of goods by sea. This Draft Convention and Draft Provisions, were the basis for consideration at the U.N. conference on the carriage of goods by sea, 1978.[16]

One can reveal from the provisions of the Hamburg Rules in respect of the liability of the carrier that:

1-The Hague Rules "Catalogue" of the carrier's disreputable exceptions has been removed, because the carrier can avoid liability if he proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[17]

This means that the Hamburg Rules depend upon the general rule of liability as a standard of reasonable care instead of the express provisions in the Hague Rules as follows:

a-To exercise due diligence to make the ship seaworthy before and at the the beginning of the voyage;

b-Properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.[18]

2-The Exceptional provision for fire has been displaced in the Hamburg Rules that the carrier is liable if the claimant proves that the fire arose from fault or neglect

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16-Basnayaka, p 355.; Diamond, "The Hague/Visby Rules", p 8.

17-Article 5 [1] of the Hamburg Rules.

18-Article 3 [1](a,2) of the Hague Rules.

on the part of the carrier, his servants or agents.[19]

3-The carrier is liable with respect to live animals, unless the loss, damage or delay arose from any special risks inherent in their carriage.[20]

4-The term "reasonable deviation" has been removed in the Hamburg Rules when it stated that the carrier is not liable, except in general average, where loss or damage or delay in delivery to the goods resulting from measures to save life or reasonable measures to save property at sea.[21]

5-The carrier is liable for loss or damage to the cargo carried on deck contrary to agreement with the shipper, usage or regulation and resulting solely from the deck carriage.[22]

I will explain two of the most important points in more detail as follows:

Section One: The Basis of Liability under the International Conventions and in Relation to Certain Countries.

Section Two: The Immunities of the Carrier.

19-Article 5 [4](a,1) of the Hamburg Rules.

20-Article 5 [5] of the Hamburg Rules.

21-Article 5 [6] of the Hamburg Rules.

22-Article [9] of the Hamburg Rules.

SECTION ONE

THE BASIS OF LIABILITY UNDER THE INTERNATIONAL CONVENTIONS AND IN RELATION TO CERTAIN COUNTRIES

The liability of the carrier extends merely for the period of the carriage, but if the goods are still in the possession of the carrier before the beginning, or after the end of the voyage and the vessel has arrived at the port of destination, especially when the parties have expressed that in the contract, then the common carrier and probably the public carrier, is liable for any loss or damage to the goods, either during the period of carriage or when the goods are in his possession, as an insurer for the safety of the goods unless such damage to the cargo is due either to an Act of God, the Queen's enemies, the Fault of the owner or shipper, the Inherent vice of the cargo, Jettison and in the case of Fraud by the cargo-owner or the shipper[23].

The implied obligation that the carrier will be liable for any loss of or damage to the cargo caused by gross negligence[24], such as unseaworthiness, even though, such loss or damage results from the excepted perils which are mentioned above[25], implies there is warranty in every contract for the carriage of goods by sea when the vessel is seaworthy[26]. The implied warranty is just as binding

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23-Ridley, pp 81-82.

24-Article 3 [8] of the Hague Rules.

25-Siordet v. Hall & Others (1828) 4 Bing, p 607 [130 E.R. p 902].

26-This principle was early established in the United States

as the express warranty[27], unless such warranty is expressly excluded.[28] For instance, the shipowner is bound to supply a ship reasonably fit for the purpose of a particular voyage which has undertaken.[29]

I will however recall the following points:

i-The Basic Duties to Make the Ship Fit for the Purpose of a Particular Voyage.

ii-Serious Fault and the Doctrine of Deviation.

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i-THE BASIC DUTIES TO MAKE THE SHIP FIT FOR THE PURPOSES OF A PARTICULAR VOYAGE

We must first find out the basic duties that make the ship fit for the particular voyage and which exempt the ship from any deviation or delay which may happen during the period of carriage and then make a suitable

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courts, such as, The Edwin I.Morrison, [The Bradley Fertilizer Co. v. The Edwin I. Morrison], 153 U.S. p 199 (1894) p 688; The Caledonia, 157 U.S. p 124, 39 L.ed. p 644 (1895); Josephene W. Wuppermann v.The Carib Prince,170 U.S. p 655(1898), 42 L.ed.p 1181.

27-Bankes L.J.in. Bank of Australasia v. Clan Line Steamers,[1916] 1 K.B. p 39 at p 56.

28-Mathew. J. in. Morris Oceanic SS. Co.,16 T.L.R. p 533 at p 534; Day, J, in, Tattersall v. National S.S.Co.[1884] 12 Q.B.D. p 297 at p 300, where he states:

"Where there is a contract to carry goods in a ship there is, in the absence of any stipulation to the contrary, an implied engagement on the part of the person so understanding to carry that the ship is reasonably fit for the purposes of such carriage".; Compare, Cockburn, C.J, in Stanton v. Richardson (1874) L.R.9 C.P, p 390 at p 391.

29-Stanton v. Richardson(1872) L.R.7 C.P. p 421 at p 426,[affirmed by (1874) L.R. 9 C.P. p 390].

recommendation through the discussion of the following subjects:

1-Under the Hague/Visby Rules.

2-Under the Hamburg Rules.

1-UNDER THE HAGUE/VISBY RULES

The carrier is bound to exercise the following duties under the Hague Rules:

"A"Exercise Due Diligence to Make the Vessel Seaworthy.

"B"Load the Cargo Properly and Carefully.

"C"Stow the Cargo Properly and Carefully.

"D"Discharge the Cargo Properly and Carefully.

"A" EXERCISE DUE DILIGENCE TO MAKE THE VESSEL SEAWORTHY

Article 3 [1] of the Hague/Visby Rules and COGSA of the United Kingdom and the United States provide that:

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

The nature basis of the obligation of the shipowner's duty to furnish a seaworthy vessel, before the Hague Rules came into force, was implied warranty[30], but after

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30-Dewey R.Villareal. Jr,"The Concept of Due Diligence in Maritime Law", [1971] 2 J. Mar. L. & Com, p 763, hereinafter cited as "Villareal".

that becomes the duty of the shipowner to exercise due diligence to make the ship seaworthy.[31]

The phrase "exercise due diligence" to make the ship seaworthy which originated in the Harter Act[32] is adopted by the Hague/visby Rules, because it is clearer than "reasonable diligence" or all "reasonable means".

Cadwallader, is quite right when he makes a distinction between the two words:

> ["due" places a greater burden on the shipowner than "reasonable" in so far as latter term permits the court to look at the surrounding circumstances of the particular case rather than what might have been achieved without impossible efforts by a prudent carrier].[33]

That does not require the shipowner to be personally diligent, but that diligence shall in fact have been exercised by the shipowner or by those whom he employs for the purpose.[34] In addition, that those words are the uttermost that can be required of the shipowner and the carrier to use diligence in inspecting the ship before the start of her voyage[35] and should be given the

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31-Astel, p 52.

32-Villareal, p 765.

33-F.J.J.Cadwallader,"Seaworthiness-An Exercise of Due Diligence", Published in the Speaker's Papers for the BIll of Lading Conventions Conference, Organized by Lloyd of London Press in New York, 1978, p 3, hereinafter cited as "Cadwallader,Seaworthiness"; Compare, 1Carver,para,500.

34-Dobell v. Steam Ship Rossmore Co.[1895] 2 Q.B. p 408; Paterson Steamship, Ltd v. Robinhood Mills, Ltd [1937] 58 LL.L.Rep. p 33 at p 40; The Tolmidis [1913] 1 Ll.L.Rep. p 530 at p 538.

35-Knauth, p 185.

meaning attributed to them prior to the Hague Rules[36].

Due diligence may however defined as follows:

> "All that attention to his duties to provide a seaworthy ship as is properly to be expected of a carrier of goods by sea"[37].

Consequently, the carrier warranted to the shipper that the vessel which has undertaken to carry the goods, was seaworthy[38]. Then, what is the meaning of seaworthy and what constitutes unseaworthy?[39]

The ambiguities surrounding the seaworthiness of a vessel for the carriage of goods means that the judicial definition of many courts can not be specific defining what constitutes a seaworthiness. Thus some courts restrict the meaning of seaworthiness depending upon some elements which constitute a seaworthy as the Supreme Court said:

36-Muncaster Castle [1961] 1 Lloyd's Rep. p 57.

37-Cadwallader, p 3.; Villeareal, p 767, where he states that: "The basic definition of due diligence is the use of all reasonable means to make the vessel seaworthy".

38-The Caledonia, 157 U.S. p 124.

39-The south Warke, 191 U.S. p 1 at p 8, where the supreme court quoted with approval the language of Bouvier's Law Dictionary when it is defined seaworthiness as follows:
"The sufficiency of the vessel in materials, construction, equipment, officers, men and out fit for the trade or service in which it is employed".; Walker, Companion to Law", defines seaworthiness as follows:
"Seaworthiness means that the ship is in a fit state, as to repairs, equipment and crew, and in all other respects, to encounter the ordinary perils of her voyage".

"To constitute seaworthiness of the hull of a vessel in respect to cargo, the hull must be so tight, stanch, and strong as to be competent to resist all ordinary action of the sea, and to prosecute and complete the voyage without damage to the cargo under deck"[40].

Other courts, defined the terms "seaworthy" depending upon a competent and adequate, master and crew[41]. Where crew was both inadequate in number and inadequately trained to handle an emergency fire situation, vessel was unseaworthy[42].

Tetley[43] defines seaworthiness as:

> "The state of a vessel in such a condition, with such equipment, and manned by such master and crew, that normally the cargo will be loaded, carried, cared for and discharged properly and safely on the contemplated voyage".

40-Dupont v. Vance, 60 U.S. [19 How] 162, 15 L.ed. p 584 (1856).; Stanton v. Richardson (1874) L.R. 9 C.P. p 390, where it is said: "The ship would not, without new pumps and with a reasonable cargo of wet sugar on board, have been seaworthy".; The President Moner, [1972] 1 Lloyd's. Rep. p 385 [United States District Court, Northern District of California].; The Acadia Forest [1974] 2 Lloyd's.Rep. p 563 at p 567 [United States District Court, Eastern District of Louisiana].

41-The Hong Kong Fir [1961] 1 Lloyd's.Rep. p 159 [1962] 2 Q.B. p 26.; The Makedonia [1962] 1 Lloyd's.Rep p 316 at p 317.; Union of Indian v. N.V. Reederij Amsterdam [1963] 2 Lloyd's.Rep. p 223, where it is said:
"That defendant had exercised due diligence to make Amstelslot seaworthy because they employed skilled and competent persons to carry out necessary inspections and those persons carried out those inspection carefully and competently".

42-Cerro Sales v. Atlantic Marine Enterprises [1976] A.M.C. p 375.

43-Tetley, Marine Cargo Claims. p 157.

Then, the vessel should be fit in design, structure, condition, equipment and also she should have a sufficient and a competent master and crew.[44] However, the real test of seaworthiness is whether the vessel is reasonably fit to carry the cargo which she has undertaken to transport.[45] That means that an obligation to supply a seaworthy ship is not equivalent to an obligation to provide one that is perfect, but it means a degree of fitness which it would be usual and prudent to require at the start of her voyage.[46]

Seaworthiness does not require that a vessel be of the latest design for "ships well built in their time may still carry cargo unless they become so clearly out of fashion".[47] In other words, to be seaworthy vessel must be kept up to date[48], namely, one can say that a vessel

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44-1 Carver, para, 146.

45-The Silvia, 171 U.S. p 462 at pp 464-465 (1898).; Joseph J. Martin v. Steam Ship South Wark,"SouthWark", 191 U.S. p 1 (1903); The Friso [1980] 1 Lloyd's. Rep. p 469 at p 476, where it is stated that:

"Friso was unseaworthy because she lacked adequate stability"

46-Blackburn, J. in. Readhead v. The Middland Railway Co.(1867) L.R.2 Q.B. p 412 at p 440.; Channell. J. in. McFadden v. Blue Star Line [1905] 1 K.B. p 697.; The statement was also approved by Scrutton L.J. in. Breadley v. Federal S.N.Co [1926] 2 Ll.L.Rep. p 446 at p 454.

47-The Pacific Fir, 57 F.ed. p 965.;[1932] A.M.C. p 738(2d.cir.).

48-United States District Court, Southern District of New York, "Irish Spruce"[1976] 1 Lloyd's.Rep p 63 at pp 69-70, where it is stated:

"The British Admiralty sailing directions with which the vessel was equipped were out of date, and the failure to have the latest edition without the United States publication constituted an unseaworthy condition".; The W. W. Bruce, 94 F.2d, pp 834, 838

is seaworthy if she conforms to the requirements of her class.[49] However, that does not mean any conformation between the seaworthy of the ship and her classification if a vessel's structure, fittings, or stowage do not comply with the measure of proper conditions provided by the classification.[50]

Therefore, it will be noted from the precedents mentioned above that seaworthiness is not an absolute obligation but a relative term[51], in that it depends on the kind of adventure contemplated, particular voyage undertaken, the cargo to be carried and its stowage.[52]

Thus if the ship is reasonably fit to carry the goods agreed upon, then the perfection of the vessel is not necessarily required and in this case, the ship is seaworthy.[53]

{2d.cir.1938}

49-The Advance, 67 F.2d. p 331; [1933] A.M.C. p 1617.

50-The Folmina, 212 U.S. p 354 at p 359, 53 L.ed. 546 (1909), where it is stated that:
"Even had a state of actual seaworthiness been certified in the present case, this court would have been at liberty to disregard it if the certificate showed that actual seaworthiness was merely the inference of the lower court upon insufficient evidence".

51-Longley, p 43.; Readhead v. Midland Railway Co. (1869) L.R. 4 Q.B. pp 379, 383.; Poor, p 166.; Compare, 1 Carver, para, 145.; Astle, p 53.; Malcolm Alistair Clarke, Aspects of the Hague Rules, 1976, p 125 hereinafter cited as "Clarke".

52-Astle, pp 59-60.; Villareal, p 773.; Song-Sang Hyun, A Comparative Study on Maritime Cargo Carrier's Liability in Anglo-American and French Law, 1970, pp 17-19, hereinafter cited as "Hyun".

53-The Sagamore[1924] A.M.C. p 961 (2d.cir).; The Naples Maru [1939] A. M.C. p 1087 (2d. cir).; J.Gerber & Co. v. SS. Sabine

Article [2] of the COGSA 1924, in the United Kingdom provides:

> "There shall not be implied in any contract for the carriage of goods by sea to which the Rules apply any absolute undertaking by the carrier of the goods to provide a seaworthy ship".[54]

Instead of the absolute undertaking at common law which is cancelled by the Hague Rules[55], Article 3 [1] constitutes an obligation to exercise due diligence to make the ship seaworthy.[56]

Since cargo-worthiness is included in the concept of seaworthiness[57] the obligation to exercise due diligence covers the stage from at least the beginning of loading[58] until the vessel starts on her voyage[59], which means at

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Howaldt [1971] A.M.C. p 539.

54-Astle, p 23.

55-Cedric Barclay, "Technical Aspects of Unseaworthiness"[1975] 3 LMCLQ, p 288, hereinafter cited as "Barclay".

56-Scrutton, p 411.; J. Bes, Chartering and Shipping Terms,1975, vol,1, p 166, hereinafter cited as "Bes".

57-Barclay, p 288, states that:
"Cargo-worthiness follows initial seaworthiness of the hull, but also implies seaworthiness in relation to the functions to be performed".; Mao-Ching Huang, "The Impact of Containerization on Carrier's Liabilities and Rate Regulations in International Liner Shipping with Emphases on United States, Japanese Trade", University of Washington, 1975, pp 73-76, hereinafter cited as "Huang".

58-Channell,J, in, McFadden v. Blue Star Line [1905] 1 K.B. p 697.

59-Maxine Footwear Co.Ltd. v. Canadian Government Merchant Marine, Ltd [1959] 2 Lloyd's.Rep. p 105.; [1959] A.C. p 589 at p 603, where it is stated:
["The word"before" can not in their opinion be read as meaning at" the commencement of the loading". If this had been intended it would have been said. The question when precisely the period begins

the departure with respect to those things which might affected during the loading. Thus, if the carrier stops or calls at any intermediate port to load further cargo or if the vessel becomes unseaworthy after she commences of her voyage, then paragraph {I} of Article [3] does not relate to a period after the voyage has started.[60]

The United States courts stated that the failure to inspect the hull and repair the damage before continuing on the voyage could only amount to an error in the management or navigation of the ship.[61]

MacNair J. in the Chyebassa[62], made this clear when he said:

> "That Article IV, Rule I, only applies to the obligation to exercise due diligence to secure initial seaworthiness "before and at beginning of the voyage". In accordance with the provisions of paragraph {I} of Article [III] which occur at the end of the first sentence of Article IV, Rule,I. Exempt that by the Rules

does not arise in this case, hence the insertion above of the words "at least"].; Compare, The Marilyn1,"United States District Court, Eastern District of Virginia,Norfolk Division",[1972] 1 Lloyd's. Rep. p 418 at p 429.; The Hellenic Dolphin [1978] 2 Lloyd's.Rep. p 336 at p 340, where it is stated that:

"The plaintiffs have failed to prove that the vessel was unseaworthy before the commencement of the voyage"; Hashim R. Al-Jazairy, "The Maritime Carrier's Liability Under the Hague Rules, Visby Rules and Hamburg Rules", A Thesis Approved for the Degree of Ph.D. Faculty of Law, University of Glasgow, 1982, p 62, hereinafter cited as "Al-Jazairy".

60-The Maredonia [1962] 1 Lloyd's.Rep. p 316 at p 317.

61-Astle, pp 59, 77, states with approval, The Del Sued.

62-[1966] 1 Lloyd's.Rep. p 450 at p 457. Affirmed on this point by C.A. Sellers, Danckwerts and Salmon, L.JJ.at[1966] 2 Lloyd's.Rep.p 193 at p 194.

the absolute obligation to secure seaworthiness at this stage is altered to an obligation to exercise due diligence to secure seaworthiness, the rules do not, so far as is material for present purposes, alter the position as it existed before the Act at common law".

In other words, the Hague Rules substituted a lower measure of obligation to protect the carrier against latent defects[63] making the vessel unseaworthy[64].

The shipowner's duty to furnish a vessel does not require it to be seaworthy for the whole voyage contracted for. It would be enough if the vessel were, at the start of each stage of the navigation properly manned and equipped for it[65]. Then the principle of seaworthiness by stages is not limited to the bunkering of the vessel[66].

Nevertheless, unseaworthiness is not enough itself to find the carrier responsible[67], but there must be some

63-The Walter Raleigh [1952] A.M.C. p 618 at p 619, where it is stated that:
"A latent defect is one that could not be discovered ".
64-Per Lord Keith of Avonholm, in, Riverstone Meat Co. v. Lancashire Shipping Co.[Muncaster Castle], [1961] 1 Lloyd's.Rep. p 57 at p 87.; Cadwallader, p 8.; Compare, Hobhouse, in, The Torenia [1983] 2 Lloyd's. Rep. p 210 at p 230, where he states:
"The unseaworthiness was not latent nor was it undiscoverable by due diligence.Due diligence was not exercised];1 Carver, para, 162.
65-Dixon v. Sadler, 5 M.& W. p 405 at 414 [151 E.R. p 172 at p 176].; Thin v. Richards & Co (1892) 2 Q.B. p 141 at p 143.
66-Longley, pp 58-59.; The Older [1933] A.M.C. p 936 (2d. cir).; Compare, Lord Wright, in, Northum Brian Shipping Co. v. E.Timm & Son, Ltd[1939] A.C. p 397 at p 404.; Yawata I& S. Co. v. Anthony shipping Co. [1975] A.M.C. p 1602.
67-Huang, p 76, where he stated:

loss of or damage to the cargo resulting from it. The causal relation between the two must be shown and the unseaworthiness must be the cause of the loss of or the damage to the cargo[68].

"B" LOAD THE CARGO PROPERLY AND CAREFULLY

It is clear from Article [1]{b}{e},II,III, rule,{2} that the Rules apply during loading and discharge[69]. A proviso of Article 3 [2] "subject to the provisions of Article [4]", which is mentioned to the original Hague Rules text and the COGSA of the United Kingdom is not attached to the United States COGSA.

It is of first importance in explaining the circumstances which are attached to the shipowner's duty that he shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Lord Somervell, in, Maxine Footwear v. Canadian

"Under the Harter Act the carrier loses the benefit of the exemptions if the vessel is unseaworthy in any particular voyage, even if there is no connection between the seaworthiness and the loss or damage".

68-Gilmore & Black, p 151.; Tetley, Marine Claim, p 156.; 1 Carver, para, 141; Kish v. Taylor [1912] A.C. p 604.; Maxine Footwear Co. Ltd. v. Canadian Government Merchant Marine Ltd.[1959] 2 Lloyd's.Rep.p 105, where it is said:

"Goods were damaged and lost owing to unseaworthiness resulting from the failure to exercise due diligence during the required period and that therefore shipowners were liable".; Hiram Walker v. Dover Nav. Co.[1950] 83 Ll.L.Rep p 84.; The Tolmidis [1983] 1 Lloyd's.Rep p 530 at p 540.; J. Hobhouse, in, The Torenia [1983] 2 Lloyd's Rep. p 210 at p 234.; Mormackite [1958] A.M.C. p 1497.; Hyun, p 19.

69-1 Carver, Para, 349.; Tetley Marine Claim, p 256.

Merchant Marine[70], said:

> "Article [3] rule {1} is an overriding obligation. If it is not fulfiled and the non-fulfilment causes the damage, the immunities of Articile [IV] can not be relied on. This is the natural construction a part from the opening words of Articile [IV], Rule{2}. The fact that that Rule is made subject to the provision of Articile [IV] and Rule {1} is not so conditioned makes the point clear beyond argument".

Accordingly, when the carrier wants to rely on the exceptions in Articile [4] rule [2], he must first show that he has exercised due diligence to make the ship seaworthy and he has been careful in accordance with Articile [3] Rule [2], such as, showing reasonable care in loading.etc. the goods[71]. The carrier or shipowner is responsible for the procedure of the loading.

However, when does loading begin? and when do the Rules begin to apply?

There are important elements between the two points to join them together, because in order to know when the Rules begin to apply we must first know when the loading begins.

There is an opinion that the loading will begin "from the time the goods are received into tackle for lifting on board the vessel and does not cease until the goods are released from the discharging tackle"[72]. That

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70-[1959] 2 Lloyd's.Rep. p 105 at p 113.; Tetley, Marine Claim, p 262.

71-Clarke, p 140; Walker, Private Law, p 352.

72-Astle, p 80.; J. Roche, in, Goodwin, Ferreira & Co. v. Lamport

means that the scope of the carrier's liability is limited to "tackle to tackle" period.[73]

This principle created an important question that which tackle is used to lift the goods?

If the ship's tackle is used or the carrier is doing the loading with shore personnel, then loading will begin and the Rule apply when the tackle is hooked onto cargo. However, if the shore tackle is used then the loading will begin and the Rules apply when the cargo crosses the rail.[74]

Devlin. J. rejected this argument, in order to apply the Rules over the whole period of loading and discharging because the Rules are not restricted the period of time in so far as to apply to the contract of carriage.[75]

That contract is from its creation "covered" by a bill of lading, and is therefore from its inception a contract of carriage within the meaning of the rules and to which the rules apply.[76]

& Holt, Ltd. [1939] 34 Ll.L.Rep. p 192 at p 194.

73-Tetley, Marine Claim, p 256.

74-Pyren Co. Ltd. v. Scindia Navigation Co. Ltd. [1954] 2 Q.B. p 402 at p 403, where it is stated:

"While the tender was being lifted onto the vessel by the ship's tackle and before it was across the rail it was dropped and damaged. It was argued that as it was never loaded onto the ship and therefore, since the accident occurred outside the period specified in Article 1(e), the Rules did not apply".

75-Tetley, Marine Claim, p 256.

76-Devlin, J, in, Pyrene Co.Ltd. v. Scindia Navigation Co. Ltd.[1954] 2 Q.B. p 402 at p 403.

The view of Devlin J. depends on the reasoning of Lord President Clyde in Harland & Wolff Ltd. v. Burns & Laird Lines[77], when he stated:

> ["The bill of lading {which would otherwise have been issued at or after shipment with the agreed on limitations embodied in it} shall not be issued, but that instead there of a non-negotiable receipt, marked as such and embodying the limitations, shall be used. This interpretation- if sound- would leave ample scope for the application of the exemption, and would do no violence either to the definitions or to what is apparently the general scope of the Act].

As far as the question about the beginning-point of the loading is concerned, Devlin, J, has concluded that :

> "The phrase shall properly and carefully load may mean that the carrier shall load and that he shall do it properly and carefully, or that he shall do whatever loading he does properly and carefully. The former interpretation phrase fits the language more closely, but the latter may be more consistent with the subject of the Rules".[78]

One can conclude from the discussion in this case, that the carrier was responsible for loading before the goods crossed the ship's rail.[79]

Therefore, Mr Justice Devlin's view that the whole of

77-1931 S.C. p 722 at p 727.

78-Pyrenc Co. v. Scindia Steam Navigation Co, [1954] 2 Q.B. p 402 at p 417.; G.H. Renton & Co. v. Palmyra Trading Corp. of Panama[1957] A.C.p 149 at p 170; Micheal Wlford, Terence Coghlin & Nicholas, J, Healy, Time Charters, London, 1978, pp 137-38, hereinafter cited as "Wilford, Conghlin & Healy".

79-1 Carver, para, 515.

the contract of carriage is subject to the Rules, but the extent to which stage of the carriage is brought under the carrier undertaking is left to the parties to decide, in depending upon different systems of law, the custom and practice of the port and the nature of the cargo[80].

Then, if loading is from lighters, when does loading begin?

That depends upon whether the carriers own or control the lighters, the terms of the contract of the carriage and the terms of the lighterage contract[81].

According to the "tackle to tackle" definition of ocean carriage in the Hague Rules, in the case of the carrier not owing or controlling the lighters, his responsibility commences at the point when the vessel's tackle is hooked onto cargo[82].

The United States court held that the carrier was responsible for cargo lost when a lighter capsized along side[83].

However, the carrier should be liable for any loss of or damage to cargo at least from the beginning of loading operations until the perfection of discharge unless the carrier agreed upon to extent the period of liability during his control of the goods [at the port of loading

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80-Pyrenc Co. v. Scindia Steam Navigation Co, op. cit, p 417.; G.H.Renton & Co. v. Palmyra Trading Corp of Panama, op. cit. p 170.

81-Tetley, Marine Claim, p 257.

82-The E. T. Barwick Mills v. Hellenic [1972] A.M.C. p 1802.

83-The Scow Steelweld [1968] A.M.C. p 2064 at p 2073.; The Yoro [1952] A.M.C. p 1094 at p 1096.

or discharge] or during his custody of the goods, such as, where the carrier discharged the goods in his warehouse.

Although, Article [VII] of the Hague Rules permits the carrier to contract out of "tackle to tackle" definition of ocean carriage in the Rules, when it states:

> "Nothing here in contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation,reservation or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to, or in connection with, the custody and care and handling of goods prior to the loading on, and subsequent to, the discharge from the ship on which the goods are carried by sea".

Therefore, I am personally in favour of Mr. Justice Devlin's view that the whole of the contract of carriage which is covered by a bill of lading is subject to the Rules[84], but at what point the goods are loaded on and brought within the carrier's obligation that is left to the parties to decide.

Coming now to research of the term which used in Article 3 [2] that is "properly and carefully".

This term originated in the Harter Act which is used these words alternatively[85], that means that the two

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[84]-Goodwin, Ferreira & Co. v. Lamport & Holt [1939] 34 Ll.L.Rep. p 192.

[85]-Section [1] of the Harter Act provides:

"All clauses exonerating the carrier from liability for loss or damage arising out of "negligence, fault or failure in proper

expressions intending to the same meaning, but they are employed jointly in the Hague Rules[86].

Viscount Kilmuir L.C.[87] expressed his opinion as follows:

> "The natural and ordinary meaning of "properly" in antithesis to "carefully" in the phrase "properly, and carefully load, handle, stow, carry, keep, care for and discharge", is in accordance with a sound system. It has not a geographical significance"[88].

The House of Lords accepted such sense of "properly", but showed some differentiation between them when Lord Pearson[89] said that:

> ["properly" meant in an appropriate manner, that if "carefully" meant merely taking care, properly required, in addition, the element of skill or sound system].

Whereas, Lord Pearce[90] added that:

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loading, stowage, custody care, or proper delivery"... are null.
Section 2 of the Harter Act provides:
"The clauses that are designed to lessen the carrier's obligation to exercise due diligence in rendering the vessel seaworthy, and also to"carefully handle and stow her cargo and to care for and properly deliver same..." are equally void.

86-Francesco Berlinieri & Guide Alpa,"Liability of the Carrier's Prospect of Reform", Published in the Studies on the Revision of the Brussels Convention on Bills of Lading, 1974, p 79, hereinafter cited as "Berlingieri & Alpa".

87-Gosse Millard v. Canadian Government Merchant Marine[1927] 2 K.B. p 432 at p 434; 44 T.L.R. p 143.

88-W.Angliss & Co.(Australia) Pty.LD. v. P.& O. Steam Navigation Co.[1927] 2 K.B. p 456.; 43 T.L.R. p 675.

89-Albacora S.R.L. v. Westcott & Laurance Line [1966] 2 Lloyd's. Rep. p 53 at p 54.

90-Ibid, p 62.; Payne & Ivamy, p 79.; Scrutton, p 424.

["The word "properly" presumably adds something to the word "carefully" and means upon a sound system. A sound system does not mean a system suited to all the weakness and idiosyneracies of a particular cargo, but a sound system under all the circumstances in relation to the general practice of carriage of goods by sea].

Thus, the carrier must adopt a system which is sound in the light of all the nature of the goods[91]. Therefore the meaning of the word has been described as "tantamount to efficiency"[92]. Where a vessel's crew went on strike after part of her cargo was loaded, and before a new crew could be obtained perishable cargo spoiled.

Held, on the facts, that the carrier was not liable since it had used reasonable diligence to obtain a new crew, and was warranted in believing a crew would be obtained[93].

However, the duty of the shipper is to bring the goods along side ship and the duty of the carrier to load the goods on to the ship by ship's tackle unless there is a custom of the port of loading to the contrary[94]. Where the shipper has agreed to load the cargo, he has to load them properly and carefully and then the Hague Rules do

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91-TD/B/C.4/ISL/6/Rev.1, p 37.

92-Per Lord Pearce, in, Albacora S.R.L. v. Westcott and Laurance Line LD [1966] 2 Lloyd's.Rep p 58 at p 62.

93-The Maui [1940] A.M.C. p 1299.

94-Per Lord Esher, in, Harris v. Best, Ryley & Co. (1892) 68 L.T. p 76 at p 77,; Per Greer L.J. in, National Steam Ship Co. LD. v. Sociedad Anonima Comercial De Exportaciony Importacion, 37 Com.Cas. p 283 at p 290; Per Bucknill, L.J. in, Argonaut Navigation Co. LD. v. Ministry of Food S.S., "Argobec"[1949] 1 K.B. p 572 at p 580.

not abrogate any agreement transferring the responsibility resulting for any of these operations to the shipper.[95]

Therefore, the shipper will be liable for any damage or loss resulting from his failures to do so[96], whilst loading, damages his own cargo, but if the shipper while loading his own cargo damaged other cargo, then the carrier will be liable to third parties who his cargo was damaged by the loading operations.[97]

"C" STOW THE CARGO PROPERLY AND CAREFULLY

The due diligence to make the vessel seaworthy must be exercised in relation to the ship's worthiness to cargo[98]. That means that the carrier must show reasonable care in preparing the ship[99], that will carry particular goods because the warranty, express or implied of seaworthiness of a vessel, extends to unseaworthiness due to faulty stowage of cargo[100].

This is especially true when certain cargoes need specific considerations in stowage, such as, where the carrier stowed wet cargo in a compartment containing dry cargo[101] or in an unventilated compartment[102] and that

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95-Scrutton, p 424.

96-Ridley, p 123.

97-Tetley, Marine Claim, p 258.

98-Astle, p 59.

99-Clarke, p 140.

100-Oxford Paper Co. v. The Nidarholm (1931) 282 U.S. p 681,75 L.ed. p 614.

101-Knott v. Botany Mills,179 U.S. pp 69, 73.; 45 L.ed.p 90 (1900).

102-Longley, p 75.; Chorley & Giles, pp 174-176.; The American Tabacco Co. v. SS. Katingo Hadsipateras [1949] A.M.C. p 49, where

consequently the cargoes were damaged.

The carrier, therefore, must stow the goods in a proper way and condition in accordance with the nature of the goods.[103] Thus, where two pieces of cargo were lashed and there were gaps in the stowage and it was not sound block stowage[104] then the stowage was deficient within the meaning of Article 3[2].[105]

Part of the shipowner's duty is, however, to stow the goods properly and carefully not merely in the interests of the seaworthiness of the vessel, but also to avoid damage to the cargoes.[106]

Also bad or improper stowage does not in itself constitute unseaworthiness but it may render the vessel unseaworthy.[107] In accordance with the nature of the goods the shipowner has a right to stow the cargoes on deck, such as, railway engine, coaches[108], and timber cargo.

Timber cargo[109] is defined in Timber Regulations 1932[110]

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it is stated:
"Cheese should not be stowed in an unventilated for peak or a lower cross bunker for a voyage from Greece to the U.S.".

103-Walker, Private Law, p 353.

104-Black Wood Hodge (India) Private, Ltd. v. Ellerman Lines, Ltd[1963] 1 Lloyd's.Rep. p 454 at p 467.; Elder Dempster & Co. v. Paterson Zochonis [1924] A.C. p 522.

105-TD/B/C.4/ISL/6/Rev.1, p 37.

106-Per Lord Wright, in, the Canadian Transport C. v. Court Line.LD[1940] A.C. p 934 at p943.

107-Kopitoff v. Wilson (1870) 1 Q.B. p 377.

108-Samir Mankabady, p 75.

109-2 Carver, para, 1142.; R. v. Campbell and Ex Parte Nomikos [1956] 2 All E.R. p 280.

110-The Merchant Shipping (Safety and Load Line Conventions) Act,

as follows:

> "A cargo of Timber carried on an uncovered part of a free board or super structure deck, but does not include a cargo of wood pulp or similar substance".

That does not mean, with regard to stowage, that the shipowner by his master has a right to stow unlimited amount of the Timber cargo on deck, but it is limited by regulation 5{b} of the Timber cargo Regulations 1932 as follows:

> ".... the height of the timber deck cargo above the free board deck shall not exceed one third of the extreme breadth of the ship".

Therefore, any exceeding stowage from the permitted height which is limited to one third of the extreme breadth of the ship is what establishes a contravention of regulation 5[b].[111] In the absence of any contrary usage in the particular trade, it is required that the goods shall be safely stowed under deck and that the master stow the goods on deck. The carrier and the vessel will be responsible for any damage to the cargo.[112]

1932, S. 61{1}, provides:
"The Board of Trade shall make regulations.....as to the conditions on which timber may be carried as cargo in any uncovered space on the deck of any load line ship".
Those regulations have been made and they are known as the Timber cargo Regulations, 1932.

111-Cassels, J, in, R v. Campbell, EX Parte Nomikes [1956] 2 All E.R. p 280 at p 284.

112-Ridley, p 126.; Mr. Justice Clifford, in, the Delaware v. Oregon Iron Co, 81 U.S.p 579 at p 604 {1871} 14 Wall. p 779.;

The ocean carrier failed to establish any custom to carry containerized cargoes on deck[113]. Then stowage of containers on deck, without any notation of that fact on the face of the bill of lading, constituted a breach of the carrier's duty and he will be liable for full amount of damage[114].

However, the stowage of the containers on deck of a container ship was not a breach of the carrier's duty because the deck of a container ship was exactly where containers were reasonably intended to be carried[115].

In so far as, concerns the custom and usage of the stowage on deck, the shipper who is aware of the existence of such practice {by his own knowledge, or he is justifiably ignorant of the practice} and does not object to it, can not be said to have consented to modification of the contract embodied in his bill of lading[116].

Therefore, if the shipper assented by accepting the bill of lading at the carrier's option to stow the goods either on deck or under deck then the shipper has no

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Schooner St. Johns. N.F.[1923] A.M.C. p 1131.; Walker, Private Law, p 353.; Ghorely & Giles, pp 176-177.

113-Whitehead, p 40.

114-Encyclopedia Britannica, Inc v. Hong Kong Producer & Universal Marine Corp.[1969] A.M.C. p 1741 at p 1742.

115-The Mormacvega,(United States District Court, Southern District of New York, 1972),[1973] 1 Lloyd's. Rep. p 267.; Rosenbruch v. American Export Isbrandtsen Lines, [1976] A.M.C. p 487 at p 493.

116-Lord Watson, in, The Royal Exchange Shipping Co.Ltd v. W.J.Dixon & Co (1886) 12 App. Cas, p11 at p 18; Delawanna.Inc v. S.S.Blijdendijk [1950] A.M.C.p 1235.

right to claim for any damage resulting from such goods carried on deck.[117]

Otherwise, if the goods are loaded on deck without the shipper's consent or a clean, unclaused bill of lading calls for under deck stowage, and stowage is on deck, then the shipowner becomes liable for damage occasioned by such stowage.[118] Where goods are, nevertheless, shipped on deck at the shipper's risk, the carrier is not relieved of due care and attention towards the cargo[119], such as, the negligence being inadequate dunnage and not merely the on deck stowage.[120]

The master is bound to stow the cargoes properly and carefully[121] throughout the whole voyage. That means that obligation is a strict obligation[122], but it is not perfect standard of care which is not required for the goods carried during the voyage,[123] but the carrier must show all exercise of due care and stow the goods properly and carefully.[124] While due diligence is only used in Article 3 [1] and Article 4 [1] of the Hague/Visby Rules

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117-Alexander M. Lawrence v. Charles Minturn, 58 U.S. p 100 (1854) 17 How, p 58.; Gould v. Oliver(1837) 4 Bing (N.C.) p 134 at p 139 [132 E.R. p 740 at p 742].; Peter Helms[1938] A.M.C. p 1220 at p 1221.; Walker, Private Law, p 353.

118-Wright v. Marwood(1881) 7 Q.B.D. p 62 at p 67.; Idefjord, [1940] A.M.C. p 1280.; Sealane[1966] A.M.C. p 1405.

119-Ponce [1946] A.M.C. p 1124.

120-Globe Solvents Co v. SS. California[1946] A.M.C. p 674.

121-Scrutton, p 424.

122-Tetley, p 261.

123-Ibid, p 265.

124-Diethelm & Co. Ltd v. Flying Trader[1956] A.M.C. p 1550.

in respect of making the ship seaworthy, it does not refer to care for the cargo. Whereas, there is a number of decisions depending upon the term of "due diligence" for an analysis of the carrier's obligation to exercise only due diligence to care for cargo.[125]

If the shipowners establish however inherent vice or latent defect, it may go some way to negativing a breach[126] of Article 3 [2], also a gradual deterioration is not a latent defect, because a latent defect is one that could not be discovered by any known or customary test.[127] Then such damage would not be apparent on usual examination, but could only have been discovered by a close examination of the shipments; the carrier was under no duty to make that.[128]

The shippers impliedly undertake under the common law and are expressly bound under the Hague Rules[129] not to

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125-American Tobacco Co v. S.S. Katingo Hadji Patera[1949] A.M.C. p 49 at p 57, where it is stated:
"Ordinarily a shipper need prove only that his goods were loaded in good condition and out turned damaged, in order to recover.... The carrier to exculpate itself by proving..... that it exercised due diligence to avoid and prevent the harm".; The Shick Shinny[1942] A.M.C. p 910 at p 915.

126-Sellers L.J, in, Chris Food Stuffs (1963) Ltd. v. Nigerian National Shipping Line, Ltd [1967] 1 Lloyd's. Rep. p 293 at p 297.

127-West Kyska [1946] A.M.C. p 997 at p 998.

128-Lyell.J. in, Chris Food Stuffs (1963) Ltd. v. Nigerian National Shipping Line, Ltd [1966] 1 Lloyd's. Rep. p 677 at p 682.

129-Samir Mankabady, p 82, where he states:
Rule 2[1] of the Merchant Shipping (Dangerous Goods) Rules 1965 makes it unlawful for the shipper to ship dangerous goods unless he "has furnished the owner or master of the ship with a certificate or declaration in writing that the shipment offered for carriage is

ship dangerous goods without declaring to the shipowner all the facts indicating that there is such risk.[130] The goods are not always physically dangerous, such as, when the ship is involved in danger of forfeiture or delay[131], but when the shipowner has consented to ship dangerous goods or the nature of such goods are known to him, the shipper will not be liable for any delay or damage resulting through shipping such goods.[132]

Moreover, when the shipowner fails to prove a custom of the port to stow explosives on deck when shipped upon clean under-deck bills of lading, he will be responsible for any damages or loss to the cargoes.[133]

Lord Justice Sellers has made this clear when he stated:

> "The obligation under Article 3 [2] is to adopt a system which is sound in light of all the knowledge which the carrier has or ought to have about the nature of the goods".[134]

If the shipowner and the cargo-owner have however

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properly marked and labelled in accordance with the provisions of these Rules and is packed in a manner adequate to withstand the ordinary risks of handling and transport by sea having regard to their nature".

These Rules were amended in 1968 and in 1972 (S.I. 1972/666) and gave statutory force to the Blue Book.

130-2 Carver, para, 1108.; Samir Mankabady, p 81.

131-Per Atkin.J. In.Mitchell, Cotts v. Steel [1916] 2 K.B. p 610 at p 614.

132-2 Carver, para, 1113.

133-Sealane [1966] A.M.C. p 1405.

134-Chris Food Stuffs (1963) Ltd v. Nigerian National Shipping Line, Ltd [1967] 1 Lloyd's.Rep. p 293 at p 297.

agreed that the goods will be carried on deck, the Hague/Visby Rules and COGSA do not apply, unless the bill of lading voluntarily adopts the COGSA terms for deckcargo, these will be applied[135].

Section 1[7] of the 1971 Act made some effect when it provided that:

> "If and so far as the contract contained in or evidenced by a bill of lading or receipt within paragraph {a} or {b} of subsection {6} above applies to deck cargo or live animals, the Rules as given the force of law by that subsection shall effect as if Article 1 [c] did not exclude deck cargo and live animals. In this subsection "deck cargo" means cargo which by the contract of carriage is stated as being carried on deck and is so carried".

An analysis of this Article, seems to me to suggest that it has no chance of applying because it stated that " subsection shall have effect as if Article [1] {c} did not exclude deck cargo..", but Article 1 {c} of the Hague Rules defines the "Goods" to include "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".

Diamond[136] believes that the only effect of section 1[7] is:

> "To render it necessary to exercise extreme care in drafting a paramount clause lest inadvertently deck cargo is made subject to the

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135-Uniao De Transportadores v. Acoreanos [1949] A.M.C. p 1161.; Pannell v. S.S. American Flyer [1958] A.M.C. p 1428.

136-Diamond, The Hague/Visby Rules, p 26.

> Rules in circumstances where this was not desired".

On the other hand, Richardson[137] has stated a different view as follows:

> "Section [1] subsection {7} creates a rather obscure situation with Deck cargo and Live stock, which were specifically excluded by the 1924 Act. It now appears that, unless the carrier makes it absolutely clear that he is not applying COGSA 1971 to Deck Cargo or Live Stock in his clause paramount, he will find himself extending COGSA 1971 liabilities to such cargo".[138]

However,when the bad stowage coincides with an excepted peril of sea to cause the damage, the carrier has to show the damage which has occurred from the peril of the sea, otherwise, he will be responsible for all the loss of or damage to the cargo resulting from such a case[139], unless the jeopardises would have occasioned the damage even if

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137-J. W. Richardson, "The Hague/Visby Rules-Carrier's View", Published in the Hague/Visby Rules and the Carriage of Goods by Sea Act 1971.Edited by Lloyd's of London Press. Ltd, 1977, Richardson 2, hereinafter cited as "Richardson".

138-John Maskell, Messrs, Norton, Rose, Botterell & Roche, "The Influence of the New Rule on Contracts of Carriage", Published in the Hague-Visby Rules and the Carriage of Goods by Sea Act 1971, Edited by Lloyd's of London Press, Ltd, 1977, Maskell, 2, hereinafter cited as "Maskell".

139-Scrutton, p 230.; Tetley, Marine Claim, p 275.; Schnell & Co. v. SS. Vallescura [1934] A.M.C. p 1573 at p 1578, where it is stated:

"The carrier must bear the entire loss where it appears that the injury to cargo is due either to sea peril or negligent stowage, or both, and he fails to show what damage is attributable to sea peril".

the goods had been stowed as required by the bill of lading[140].

Nevertheless, where the damage to the cargo results from negligence of the shipowners (including those for whom they are responsible), the shipowners and the ship can not exempt themselves from liability for such damage arising out of negligence[141]. Whereas, mere negligence does not establish liability, the causal relation that the negligence caused or contributed to the damage of the cargoes, must be shown[142].

One can conclude from the foregoing discussion that the concept of the doctrine of deviation is not restricted to the geographical route but it is extended beyond geographical route which conceived that any change in the conduct of the vessel is deviation. That means that any diversion in the system of stowage for the goods which the parties are agreed upon is established a deviation.

"D" DISCHARGE THE CARGO PROPERLY AND CAREFULLY

The scope and the meaning of the term "discharge" is found out through consideration of what is meant by the port or place of discharge, the manner in which discharge is to take place, the party to whom discharge is to be

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140-Cliffor, J, in, The Delaware v. Oregon Iron Co, 81 U.S. p 579,(1871), 14 Wall, p 779.; Compare, Black Wood Hodge (Indial Private, Ltd. v. Ellerman Lines, Ltd[1963] 1 Lloyd's.Rep.p 454.; TD/B/C.4/ISL/6/Rev.1/ p 37.

141-Globe Solvents Co. v. California [1946] A.M.C. p 674.

142-Chester Vally [1940] A.M.C. p 555.

made, and the question of substituted delivery.[143]

First of all, the word "discharge"[144] is used, instead of the word "deliver" because the period of responsibility to which the COGSA and the Rules apply, ends when they are discharged from the ship.[145] The carrier is particularly obliged to play some part in discharging the goods from the ship.[146]

All the bills of lading include the name of the port of discharge. The carrier is bound to discharge the goods at the named port.[147] The term "port or ports"[148] does not mean only those places which are technically called ports, but all the reasonable places within the limits of

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143-Tetley & Cleven, p 824.

144-Walker, The Companion to Law, p 362, where he states:
"Discharge, as noun- the termination of liability by and under contract, a receipt for a payment".

145-Per Lord Wright, in, Gosse Millard Ltd. v. Canadian Government Merchant Marine [1927] 28 Ll.L.Rep. p 88 at p 103.

146-Devlin, J, in, Pyrene Co. Ltd. v. Scindia Steam Navigation Co.Ltd.[1954] 1 Lloyd's.Rep. p 321 at p 329.

147-Walker, Private Law, p 355.

148-John Burke, Jowitt's Dictionary of English Law, vol, II, 1977, p 1384, hereinafter cited as "Burke", where he states:
"Port: a place for the loading or unloading of ships, created by royal charter or lawful prescription. A port is a harbour where goods are either imported or exported to foreign countries, as distinguished from a mere harbour which is simply a place, natural or artificial, for the safe riding of ships. It is said that every port comprehends a city or borough,with a market and accommodation for sailors.No person may land customable goods on his own land or elsewhere than at a port."; 2 Carver, para, 1504, where he states:
".. a place may be a port, it seems that it should have somewhere for vessels to lie safely, and a shore where goods may be safely landed; also that there should be some conveniences for trade, such as, wharves and warehouse; and that it should be a place to which vessels are allowed to come by the government of the country".

the port which ships may be accustomed to resort for the purpose of loading or discharging.[149] However, which port is qualified to accept the vessel for discharging.

Particularly, the port must be one that is usual safe and commercial.[150] A port is usual when it is one of the well-known and recognized ports of substantial size during a particular agreed voyage.[151]

The carrier's obligation, however, is to discharge the cargoes at the named port in the bill of lading. Nevertheless, in the case, where the parties have agreed to discharge the goods in a particular port, and it is revealed that the port is inaccessible or an unsafe port, the carrier has a right to discharge the shipments in any reasonable and safe place which the vessel could safely reach and safely return from[152], having taken into account all the surrounding circumstances in a particular time and a particular case.[153]

149-Lush, J, in, Harrower v. Hutchinson [1867] L.R. 4 Q.B. p 523 at p 534.; Tetley & Cleven, p 824.

150-2 Carver, para, 1538.

151-McCardie, J, in, The Robert Doller Co. v. Blood, Holman & Co.[1920] 4 Ll.L.Rep. p 343 at p 345.

152-Bailhache, J, in, Limerick. SS.Co. v. Stott & Co.[1921] 1 K.B. p 568 at p 575.; G.W.Grace & Co.Ltd. v. General S.N.Co.Ltd.[1949] 66 T.L.R. p 147.; Ronald Bartle, Introduction to Shipping Law, 2nd.ed, 1963, p 6, hereinafter cited as "Bartle", where he states: "A port where she can enter and remain, whether for the purpose of loading or unloading, without danger from either physical or political causes. If such a danger exists the shipowner may require another port to be named and, failing direction by the charterer, should proceed to the nearest convenient port".

153-Morris, L.J. in, The Stork [1955] 2 Q.B.p 105.; [1955] 1 Lloyd's.Rep. p 373.; Sellers, L.J. in, Leeds Shipping Co. v. Societe

That does not mean that the carrier is justified under all the circumstances which indicate his failure to discharge the goods at the port for which they were shipped merely because that port was at the moment of their arrival inaccessible on account of ice for three days only.[154]

Then a mere temporary obstacle will not render a port unsafe[155], unless its duration is such as to subject the ship to inordinate delay.[156]

Coming now to the manner of the carrier's obligation to discharge the goods at their destination.

The Harter Act does not define what constitutes a proper delivery[157], but the judicial interpretation as to what establishes the concept of the proper delivery is defined as a delivery made in accordance with usage or law of the port of destination.[158]

Francaise Bunge [1958] 2 Lloyd's. Rep.p 127 at p 131; Donaldon, J.in, The Hermine [1978] 2 Lloyd's. Rep. p 37 at p 46,[1979] 1 Lloyd's.Rep. p 212 at p 213, where he states:
"It was well settled law that a port was safe if the vessel could reach it, use it and leave it without,in the absence of some abnormal occurrence, being exposed to danger which could not be avoided by good navigation and seamanship"; Kodros Shipping Corp v.Empresa Cubana de Fletes[1983] 1 A.C. p 736.

154-SS. Knutsford, Ltd. v. Tillmanns & Co. [1908] A.C. p 406.

155-2 Carver, para, 1511.

156-Willmer, L.J. in, Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries & Food [1962] 1 Q.B. p 42 at pp 109-110.; 2 Carver, para, 1526.

157-Tokuyo Maru [1925] A.M.C. p 1420 at p 1424, where it is stated: "The Harter Act prohibits the insertion of any stipulation excusing a failure in proper delivery".

158-Astle, p 290.; Tetley, Marine Claim, p 287.

The Hague/Visby Rules have defined the manner of discharging the goods carried to their destination as "properly and carefully". The meaning of the term "properly and carefully" has aroused real controversy as mentioned previously[159]. Nevertheless, there is a particular meaning of such a term in connection with discharge.

The contract of carriage of goods covers the period from the beginning of loading operations until the perfection of discharge[160] unless the carrier has agreed to extend the period of liability during his control or during his custody of the goods[161], because there is no intention to apply the Rules after the goods have been properly discharged from ship's tackle[162] in accordance with the definition of ocean carriage in the Hague/Visby Rules of "tackle to tackle" period.

However, if the goods were put into a lighter while other goods were being discharged into the same lighter then the discharge operations of these goods were not finished.

They were therefore covered and affected by the Rules

159-Supra, chapter, II.

160-Article 1[e] of the Hague/Visby Rules.; Devlin, J, in, Pyrene Co. Ltd v. Scindia Steam Navigation Co. Ltd.[1954] 1 Lloyd's.Rep p 321 at p 329.

161-Compare, East & West. S.S. Co. v. Hassain Brothers [1968] 2 Lloyd's. Rep. p 145 at p 146, (Pakistan Supreme Court), where it is stated:

"The carriage of goods under Hague Rules did not cease when goods were discharged from ship".

162-Article 2,3 [2] of the Hague/Visby Rules.; Astle, p 49.

and COGSA[163], because the Rules apply mere to the contract of carriage than to a period of time[164].

Improper discharging will render the carrier responsible under the Rules for loss of or damage to the cargo[165]. That means that the ocean carrier will be still responsible for damage resulting from the goods discharged into the lighter, unless such damage is occasioned by the negligence of the lighter operators[166].

This does not imply meaning within the Rules that the carrier is not under the duty to redeliver the goods, but only that such obligation does not arise out of the provision relating to the custody of the goods[167].

Lord Wright[168] has however defined a proper discharge as follows:

> "Deliver from the ship's tackle in the same apparent order and condition"[169].

163-Roche, J, in, Goodwin, Ferreria & Co. Ltd. v. Lamport & Holt, Ltd [1939] 34 Ll.L.Rep. p 192 at p 194.; Falcon Bridge Nickel Mines v. Chimo Shipping [1973] 2 Lloyd's. Rep. p 469 at p 472.

164-Goodwin, Ferreria & Co. Ltd. v. Lamport & Holt, op.cit, p 192.; Tetley, Marine Claim, p 279.

165-The Astri [1945] A.M.C. p 1064.

166-Domestic Insurance Co. v. Barber Line[1970] 1 Lloyd's.Rep. p 49 at 50 (Philippines Manila, Court of First Instance).

167-Berlingieri & Alpa, p 119.

168-Gosse Millard, Ltd. v. Canadian Government Merchant Marine[1927] 28 Ll.L.Rep. p 88 at p 103.

169- Tokyo Maru [1925] A.M.C. p 1420 at p 1425, where it is stated: "The words "proper delivery" as used in the Act "Harter Act" can not mean any kind of delivery that may be stipulated for.... it is, perhaps, competent for the parties to make special provisions as to the mode of delivery, having reference to the usual ways of business, and the convenience or necessities of vessels in touching

That implies that where the shipowner puts the goods on the ship's deck or along side for discharging[170], he will be still under a duty to take all proper care of the cargo until the goods are discharged from the ship[171].

The method of discharging is affected by the custom or usage of the port of destination. The custom which is well-known, so clear and so uniform would be necessarily imported into the contract of carriage and then the parties to such a contract would be bound by it[172]. Such as in some cases, the discharge to a terminal operator or to customs authorities may terminate the carrier's liability[173].

The contracting parties are at liberty to stipulate any conditions for the manner of discharging[174]. Non-

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at various ports; and in so far as these stipulations are shown by the circumstances to be reasonable, they may be upheld, as defining what a " proper delivery" shall be and may thus justify what might not otherwise be held to be a proper delivery. Further than this, such stipulations can not go without subverting the purpose of the Act".

170-Ballantyne & Co. v. Paton & Hendry, 1912 S.C. p 246.

171-McNair, J, in, Hang Fung Shipping Co.Ltd. v. Mullion & Co.[1966] 1 Lloyd's.Rep.p 511 at pp 523-524; Roskill, J, in, The Azuero [1967] 1 Lloyd's.Rep, p 464 at p 470.

172-Lush, J, in, Peninsular & Oriental Steam Navigation Co.Ltd. v. Leetham & Sons Ltd.[1915] 32 T.L.R. p 153 at p 155; A/S Samelling v. Grain Importers (EIRE), Ltd [1952] 1 Lloyd's.Rep. p 313.

173-Miami Structural Iron Corp. v. Cie National Belge De T M.[1955] A.M.C. p 1981 (5th.cir.1955).; 2 Carver, para, 1559, where he states:

"A delivery to a certain other particular persons may by virtue of the custom, be equivalent to a delivery to the consignee himself".; Scrutton, pp 293, 299.

174-Reging v. Montreal Shipping Co. [1956] EX.C.R. p 280.

responsibility clauses after discharge are invalid before "proper delivery"[175].

In the United Kingdom non-responsibility clauses are valid after discharge[176].

On the other hand, the United states court of Appeals held that the non-responsibility clause which has excepted the ship from the responsibility when delivery is made from the ship's deck is null and void under the Harter Act, unless the consignee do not immediately receive the goods[177].

That depends upon the position in the United States that where the COGSA's provisions have ceased to apply, the Harter Act continues to operate until "proper delivery" has been effected[178]. However, the bill of lading provides the party who is entitled to receive the

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175-Tetley, Marine Claim, p 282.

176-Anselme Dewavrin v. Wilsons & North-Eastern Railway Shipping Co.[1931] 39 Ll.L.Rep. p 289.; Bank of Indian, Australia & China v. British India Steam Navigation Co. Ltd.[1909] A.C. p 369, where it is stated:

"In all cases and under all circumstances the liability of the company shall absolutely cease when the goods are free of the ship's tackle, and there upon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee".; Scrutton, Note, 4, p 301, where he states:

"In the absence of any such express provision, the question must be decided by the custom of the port of discharge; and, if no such custom can not be proved, the general rule appears to be "that goods are delivered when they are so completely in the custom of the consignee that he may do as he pleases with them".

177-Crystal v. Cunard S.S.Co.[1955] A.M.C. p 39.; Monsieur Henri Wines Ltd. v. S.S. Covadonga [1965] A.M.C. p 740.

178-Astle, pp 290, 292.

goods which are discharged from the vessel.

In practice and when the contracting parties have agreed to take special procedures in case of the discharge of the goods[179], the carrier must notify the consignee when the vessel has arrived and the goods have been discharged. Also the notice should determine the specific wharf, pier, or lighter where the goods are to be collected[180].

Roche[181], J, has made this clear when he stated:

> "It is an implied term in all contracts such as these that the shipowner must wait for the consignee to appear or give orders, for a reasonable time before taking the matter into his own hands and discharging the goods himself. If he does take the matter into his own hands and discharge the goods before the reasonable time has elapsed he is committing a breach of contract".

Whereas, there is nothing in the Hague/Visby Rules supports this a dogmatic view.[182]

Finally, the term "substituted delivery" intends to end the carrier's liability when the shipowner discharges the goods at the end of ship's tackle and are landed into craft or on quay.

Under the Harter Act, a clause of similar nature was

179-2 Carver, para, 1554, where he states:
"It is the duty of the consignee, a part from special custom or contract, to use and reasonable diligence to discover when the ship arrives with his goods on board".

180-Compare, Tetley, Marine Claim, p 286.; Tetley & Cleven, p 825.; Scrutton, p 293.

181-Turner, Nott & Co. Ltd. v. The Lord Mayor, Aldermen & Burgesses of the City of Bristol [1928] 31 Ll.L.Rep. p 359 at p 360.

182-Al-Jazairy, p 132.

held void[183]. It seems quite clear that the "COGSA" governs all the operations of discharging until the goods are discharged into the same craft or lighter[184].

However, when the consignee owns or controls the lighters, the carrier's liability will end at tackle. Otherwise, the carrier will still be responsible until the cargoes have been discharged on land[185] and properly separated and made ready for delivery after the consignee has been given notice to take delivery within a reasonable time for their removal[186].

2-UNDER THE HAMBURG RULES

The Working Group on International Legislation on Shipping which was established by "UNCITRAL", considered two problems concerning the operation of existing Article 1 {e} of the Hague Rules.

1-Doubt as to whether the Rules apply to loss or damage occurring during loading or unloading operations[187].

183-Caterpillor Overseas S.A. v. S.S.Expeditor [1963] A.M.C. p 1662 {2d.cir 1963}.

184-Astle, p 292.

185-Per Lord Denning, M. R. Bridge, L.J. and Sir David Cairns, in, The "Arawa" [1980] 2 Lloyd's.Rep. p 135 at p 136, where they state: " Where the agreement was nothing more than a variation of the bill of lading contract, a variation as to the place at which delivery could be taken, the terms of the bill of lading contract all applied so far as they were applicable and the bills of lading exceptions applied to the whole of the additional transaction".

186-Tetley,Marine Claim, p 284.; Tetley& Cleven,p 826; Astle,p 292.

187-The Report of the Secretary General offered a suggested draft as follows:

2-The fact that the existing Rules do not cover loss or damage occurring prior to loading or subsequent to discharge even while goods are in the charge or control of the carrier or its agents.[188]

The plenary session constituted a consensus on two points:

> "1-The Hague Rules should be extended rather than merely clarified, so that the carrier would be liable for the entire period during which he was actually in charge of goods.
> 2-The period of responsibility under the Hague Rules should not begin prior to carrier's custody at port of loading and should not continue beyond port of discharge".[189]

The Working Group discussion about the precision of the length of the period of carrier responsibility had created a diversity of views at the conference.

Norway[190] noted that the period of carrier

"Carriage of goods covers the period from the commencement of loading operations until the completion of discharge of the goods from the ship".

188-The Report of the Secretary General offered a suggested modification of the above suggested draft, as follows:
"Carriage of goods covers the period from the time the goods are {in charge of} {accepted for carriage} {received by} the carrier to the time of their delivery".

189-Joseph C. Sweeney,"The UNCITRAL Draft Convention on Carriage of Goods by Sea {part I}",[1975] 7 J.Mar.L.& Com, p 78, hereinafter cited as "Sweeney, Part I ".

190-Sweeney, Part I, p 79, where he states:
[Norway, presented a draft proposal as follows:
"Carriage of goods covers the entire period during which the goods are in the custody of the carrier from the time of receipt of the goods at the port of loading until the time of delivery of the

responsibility for the goods, should be extended to cover the periods before the loading and after the discharge during which the goods were in the custody and control of the carrier and his agents.[191]

The United States recommended the deletion of Article 1{e}, the "tackle to tackle" rule, and could not recommend a period of carrier liability any less than that provided in domestic law, Harter Act[192] which extended the carrier's period of liability during his custody of the goods. Namely, that the carrier will be responsible for loss or damage to the cargo resulting during the period when the goods were under the control of the carrier, both before loading and after discharge.[193]

The United Kingdom was convinced that there was no attempt to go beyond purely maritime carriage to some sort of combined transport scheme.[194]

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goods at the port of discharge"].

191-Sweeney, Part I, pp 79-83, where he states also The Argentina, The Chile, The Chana, The Nigeria, and The Soviet Union's view.

192-Sweeney, Part I, op.cit, p 80.

193-Sweeney, Part I, op. cit, p 81, where he states the United States suggest which is reformulation of the carrier's duties to read as follows:
"The carrier shall properly and carefully take over load, handle, stow, carry, keep, discharge, and hand over the goods in his charge".

194-Sweeney, Part I, p 83, where he states:
"The United Kingdom solution to the problem as follows:
Subject to the provisions of Article [V] there shall be no liability on the carrier for loss or damage to goods at the port of loading, during the carriage or at the port of discharge except in accordance with these rules"

The Drafting party reached agreement on the period of responsibility as follows:

> "The responsibility of the carrier for the goods under this convention covers the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge"[195].

The concept of this Article is wider than the concept of Article 1{e} of the Hague Rules which has adopted a narrow concept of the period of the carrier's responsibility. That is quite clear from the provisions of the Hague Rules which are adhered to "cover the period from the time when the goods are loaded on to the time when they are discharged from the ship".

That means this Article covers only the sea carriage, whereas, the new convention the "Hamburg Rules" covers the period during which the carrier is in charge of the goods at the port of loading during the carriage and at the port of discharge. Therefore, the period of the carrier's responsibility under the Hamburg Rules governs different operations of loading and discharge whether on land or waterway[196] which are deemed to be necessary for the carriage of goods by sea[197].

195-Article 4[1] of the Hamburg Rules.

196-Leopold Peyrefitte, "The Period of Maritime Transport Comments on Article [4] of the Hamburg Rules", Published in the Hamburg Rules on the Carriage of Goods by Sea, Edited by Samir Mankabady, 1978, p 125, hereinafter cited as "Peyrefitte".

197-Mr. Gordon Pollock, "A Legal Analysis of the Hamburg Rules, Part II", p pollock 6, Published in The Hamburg Rules, A One Day

The Hamburg Rules rejected the definition of ocean carriage in the Hague Rules which is called "tackle to tackle" rule[198], and it joins the responsibility of the carrier to the period during which he is in charge of the goods.

Article 4 [2] of the Hamburg Rules states:

> "For the purpose of Paragraph 1 of this article, the carrier is deemed to be in charge of the goods:
> a-from the time he has taken over the goods...".

It is first important to reveal the precise moment of taking charge of the goods because the Hamburg Rules do not define the terms "in charge of the goods" or "has taken over the goods".

However, the authors have differed between themselves as to what constitutes "taking over" the goods.

One of them believes that the taking over the goods starts from the moment when the carrier exercises or is able to exercise his right of checking the cargo.[199] Another author believes that the carrier's responsibility is linked with the supervision of the cargo which is an important element in taking charge of the goods.[200]

I personally believe that taking over the goods is a material fact which can be proved by all means, unless

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Seminar, Organized by Lloyd's of London Press Ltd, 1978, hereinafter cited as "pollock".

198-Samir Mankabady, p 49.

199-Peyrefitte, p 130.

200-Samir Mankabady, p 50.

the contracting parties have agreed to determine the moment of taking over the goods. That does not derogate from the provisions of the convention.[201]

It is quite clear from Article [23][202], that the Hamburg Rules have a compulsory character, but it does not prohibit such an agreement which is appointed the moment of taking over the goods which is not relating to the scope of application of the provisions of the convention.[203] Namely, that any clause which derogates the scope of the provisions of the convention is null and void.

Does the convention apply the traditional terms of "a" to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods,"b" to exercise due diligence to make the ship seaworthy before and at the beginning of the voyage[204] or does it not?

The argument in "UNCITRAL" was that the carrier's positive duties should be restated and that his duty to provide a seaworthy ship, should remain throughout the voyage.

201-Peyrefitte, p 131, he states:
"As the provisions of the new convention have a compulsory character (Article 23), clauses which stipulate different places for taking over the liquid will be null and void".

202-Article 23 [1] of the Hamburg Rules states:
"Any stipulation in a contract of carriage by sea in a bill of lading, or in any document evidencing the contract of carriage be sea is null and void to the extent that it derogates, directly or indirectly, from the provisions of this convention".

203-Samir Mankabady, p 52.; Peyrefitte, p 130.

204-Article 3 [1,2] of the Hamburg Rules.

Whereas, the opposite parties claimed that those traditional terms would be subsumed under the general rule of the carrier's liability.[205]

The two sets of basic carrier's duties which extend throughout the vessel, are acknowledgedly subsumed in the text of the convention.[206] Viz, that those positive duties are covered by the term "reasonable measures", throughout the voyage, whether for the exercise of due diligence to make the ship seaworthy or for the undertaking of care for the cargo.[207] Then, if loading is from a lighter[208], when does the exact moment of taking charge of the goods begin?

It depends upon the circumstances whether the carrier own or control the lighterage operations or not. In the first case, the carriage by lighters is deemed part of the commencement of the contract of carriage. In the second case, when the carrier does not own or control the lighters or it is owned or controlled by the independent contractor, then the exact moment of taking charge of the

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205-Report of UNCITRAL Working Group on its Fourth Session (A/CN. 9/74), where it is drafted by Drafting party that:
"perform all his obligations under the contract of carriage with care".

206-Shah, p 19.; Compare, Diamond, The Hamburg Rules, p 7, where he states:
"The absence of any link with traditional terms of reference will seem an added, and perhaps almost gratuitous, obstacle to intelligibility".

207-Samir Mankabady, p 54.; Diamond, The Hamburg Rules, p 11.

208-Samir Mankabady, p 51, where he states:
"Once the carrier takes charge of the goods, he will be responsible for the lighterage operations".

goods begins at the point where the carrier has a right to check the contents of the shipment.[209]

The same question may arise where the containers are involved in carriage by sea, especially, in the case of sealed containers.

However, the criterion of the moment of the taking over the goods by the carrier which states that when the carrier exercises or is able to exercise his right of checking the container. In this case, a partial exercise of this right of checking, either by the carrier himself or by his servants or his agents is sufficient to take the containers in his charge. As result, the carrier will be responsible for any loss of or damage to the container while he takes the containers in his charge even though, it is carried from the shipper's warehouse to the port of loading.[210]

Nevertheless, I am in favour of applying the same criterion that the moment of taking over the goods is a matter of fact which can be proved by all means and there is nothing in the Hamburg Rules preventing the contracting parties from determining which moment of taking over the container is brought under the carrier's undertaking.

The New Convention does not define deck carriage and the cases which mention it do so neither by the Rules nor by practice because it is not valid yet. The

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209-Peyrefitte, p 131.

210-Ibid, p 132.; Samir Mankabady, p 51.

scheme adopted by the Hamburg Rules is that the carrier is entitled to carry the goods on deck only if such carriage is in accordance with an agreement with the shipper or with the usage of the particular trade or is required by statutory rules or regulations.[211]

That means that the carrier will be in breach of the Rules if the goods are carried on deck[212] contrary to the agreement, usage of trade or statutory rules.[213] Therefore, cargo carried on deck is subject to the Rules.[214]

However, the carrier will be responsible for any loss or damage to goods, as well as, for delay in delivery resulting solely from the carriage on deck. Whether it is his fault[215] or an accident.[216] Where the goods have been carried on deck contrary to the provisions of paragraph {1} of Article [9] of the Hamburg Rules[217], even though he

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211-Article 9 [1] of the Hamburg Rules.

212-Samir Mankabady, p 74 at p 76.

213-Pollock, p 7.

214-Tetley, Hamburg Rules, p 198.; Pollock, p 7.

215-Article 5 [5] of the Hamburg Rules provides:
"With respect to live animals, the carrier is not liable for loss, damage or delay in delivery resulting from any special risks inherent in that kind of carriage".
That means that the carrier is not liable in the event of "special risks" associated with the carriage of animals, in the case of loss, damage or delay in delivery without it being the fault of the carrier, see Pollock, p 8.

216-Article 9[3] of the Hamburg Rules; Sassoon & Cunningham, p 182 at p 183.

217-Joseph C. Sweeney, "The UNCITRAL Draft Convention on Carriage of Goods by Sea (Part V)", [1977] 8 J. Mar. L. &. Com, p 167 at p 188, hereinafter cited as "Sweeney, Part V".

shows that he took all reasonable measures to avoid carrying the cargo on deck and the damages resulting from such carriage.[218] Thus, in such a case, merely the fact of carriage on deck is sufficient and the carrier will be an insurer against the risks of on deck carriage.[219]

Article 9 [4] of the Hamburg Rules states:

> "Carriage of goods on deck contrary to express agreement for carriage under deck is deemed to be an act or omission of the carrier within the meaning of article [8]".

In accordance with this Article, if the shipper has agreed with the carrier to ship his goods below decks, and the goods were carried on deck contrary to the agreement, then the shipper will recover for any loss of or damage to the cargo and delay in delivery without regard to the limitation set in Article [6].[220]

Tetley[221] concludes that Article [9] of the Hamburg Rules has done nothing to clarify what deck carriage is, nor when it may take place, nor what the sanction will be for such carriage. He, also, concludes that Article [9] has the right to carry on deck, and has diminished the sanction for improper deck carriage.

However, dangerous goods as cargo had been discussed during the "UNCITRAL" plenary in 1976. There had been

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218-Sassoon & Cunningham, p 184.

219-Pollock, p 7.

220-Sassoon & Cunningham, p 182.

221-Tetley, Hamburg Rules, p 199.; Supra, Chapter I.

some criticism of the Hague Rules, that there is a failure to define the shipper's obligation and when the goods are to be deemed dangerous goods within the meaning of Article [IV] {6}[222].

There was a consensus that it was unnecessary to state a definition of dangerous goods.

The Working Group of UNCITRAL decided to specify the shipper's obligation directly, rather than leave them to be presumed from customary practices. They also decided to limit the master's discretion by the expression "as circumstances may require"[223].

The Hamburg Rules restated the Hague Rules provision with respect to dangerous goods in different languages with many technical changes[224] in Article [13][225].

222-Sweeney, Part V, p 170.

223-Ibid, p 172.

224-Tetley, Hamburg Rules, p 201.

225-Article [13] of the Hamburg Rules states:

"1-The shipper must mark or lable in a suitable manner dangerous goods as dangerous.

2-Where the shipper hands over dangerous goods to the carrier or an actual carrier as the case may be, the shipper must inform him of the dangerous character of the goods and, if, necessary, of the precautions to be taken. If the shipper fails to do so and such carrier or actual carrier does not otherwise have knowledge of their dangerous character:

"a"the shipper is liable to the carrier and any actual carrier for the loss resulting from the shipment of such goods, and

"b"the goods may at any time be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation.

3-The provisions of paragraph [2] of this article may not be invoked by any person if during the carriage he has taken the goods in his charge with knowledge of their dangerous character.

4-If, in cases where the provisions of paragraph [2], sub paragraph

Accordingly, the shipper is obliged to mark or label the dangerous goods and must inform the carrier of the dangerous character of the goods as to the proper precautions to be taken if this is necessary.[226] That probably means that if the precautions are not well-known to the carrier, then the shipper must state those precautions.[227]

The Hamburg Rules, however, do not affect, in respect to dangerous goods, the rights and liabilities of the contracting parties in such a case.[228]

On the other hand, if the shipper fails to inform the carrier of the dangerous character of the goods, then the shipper will be liable to the carrier for the loss of or damage to the cargo resulting from such goods and the carrier is entitled to land, discharge and destroy without indemnity such goods if circumstances may require.[229] Otherwise, if the carrier has taken the goods in his charge with knowledge of their dangerous character

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[b], of this article do not apply or may not be involved, dangerous goods become an actual danger to life or property, they may be unloaded, destroyed or rendered innocuous, as the circumstances may require, without payment of compensation except where there is an obligation to contribute in general average or where the carrier is liable in accordance with the provisions of article [5]".

226-Samir Mankabady, p 81.

227-Tetley, Hamburg Rules, p 202.

228-Mr.J.L. Thomas, "A Legal Analysis of the Hamburg Rules Part III", Published in the Hamburg Rules, A One Day Seminar, Organized by Lloyd's of London Press Ltd, 1978, p Thomas, 6, hereinafter cited as "Thomas, The Hamburg Rules Part III".

229-Ibid, Thomas, p 6; Article 13 [2](a,b) and, para [3] of the Hamburg Rules.

then the carrier will not be recovered from the shipper in such a case unless the fault or neglect on the part of the shipper has caused some loss or damage.

Finally, coming now to the delivery of the goods at a destination which has raised many questions about the precise moment of delivery, the place of delivery and the methods of delivery.

First of all, the operations which take place before delivery are deemed to be part of the achievement of the contract by virtue of article 4 [1], which will be considered when we determine the moment of delivery which depends upon the presentation of the goods to the consignee or his representative and the readiness of the consignee or his representative to check the goods. Therefore any claim for compensation by the consignee, must at first prove that loss or damage to the cargo took place before delivery. Thus the consignee or his surveyor has the right to check the goods prior to delivery.[230]

Generally, the carrier is bound to deliver the goods[231]

230-Peyrefitte, p 133.

231-Walker, Companion to Law, p 349, where he states:
"Delivery: Transfer of the possession of a movable thing from one person to another. It may be actual, by handing over the thing, or constructive, by operations of law; which in turn may be symbolic....; J. B. Sykes, The Pocket Oxford Dictionary, 1978, p 746, hereinafter cited as "Sykes, Oxford Dictionary", where he states:
"Receive = v.t. Accept delivery of, take (proffered thing) into one's hands or possession...Then, the delivery of the goods may be happened where the goods are delivered without being received , whereas, the receiving the goods is a material act".; see also, Peyrefitte, p 133.

at the named port as agreed in the contract and not to some other place which is selected by the carrier himself contrary to the bill of lading.[232]

One can apply here the same rules as those concerning the take over of the goods by the carrier. Having taken into account that the delivery of the goods is a material fact which can proved by all means. Viz, where the carrier is unable to deliver the goods at the named port by reason of force majeure. The carrier has a right to discharge the goods in any reasonable, safe, and nearest convenient port where the vessel can unload the goods without danger from either physical or political reasons.[233]

That could be revealed by Article 4 [2] {b} ii, which it is stated that the carrier is considered to deliver the goods when they are put, by placing them at the disposal of the consignee in accordance with the law or with the usage of the particular trade, applicable at the port of discharge. Thus, in such a case the voyage comes to an end without the approval of the consignee which is equal to delivering the goods to their ultimate destination which is planned in the bill of lading.

232-Fadex Chemical Co. v. Lorentzen [1944] A.M.C. p 940 at p 941.; Ruth Ann [1962] A.M.C. p 117.

233-Bartle, p 6.

COMMENT

The purpose of the basic duties is to make the ship fit for a particular voyage, which is provided in the Hague/Visby Rules as a general principle. In practice this differs from case to case, depending upon the surrounding circumstances in a particular time and a particular case. Such duties are determined not in *abstracto*, but in *concreto*.

Seaworthiness is not therefore an absolute obligation but a relative obligation to make the vessel seaworthy fit to carry the goods agreed upon[234], what Article 3 [1] of the Hague Rules constitutes as an obligation before and at the beginning of the voyage to exercise due diligence to make the ship seaworthy.

The seaworthiness which is restricted in the Hague Rules to exercising due diligence to make the vessel seaworthy before and at the beginning of the voyage, is defined under the new convention {The Hamburg Rules} by virtue of Article 5 [1] which covers the meaning of seaworthiness by the term of "reasonable measures" and the implicit undertaking should be exercised throughout the voyage.

Due diligence and reasonable measures should be however

234-Viscount Summer, in, Bradley & Sons, Ltd. v. Fedreal Steam Navigation Co.Ltd[1927] 27 Ll.L.Rep.p 395 at p 396,where he states: "In the law of carriage by sea neither seaworthiness nor due diligence is absolute. But are relative, among other things, to the state of knowledge and the standards prevailing at the material time".

exercised for each particular stage[235], with respect to the difference between the conventions. The Hague/Visby Rules require that the vessel should be reasonably fit from the moment that loading begins until the vessel starts on her voyage at a particular stage, whereas the Hamburg Rules require that all reasonable measures to make the vessel seaworthy throughout the voyage at a particular stage are exercised.

The principle of the doctrine of seaworthiness by stages is not restricted to the bunkers of the vessel.[236] Such as, when the vessel is supplied with adequate bunkers for a particular stage and there is insufficient bunkering at an intermediate port. Viz, at her destination of a specific stage, then the vessel is in a seaworthy condition at this stage. Also, when the vessel sails seaworthy from one port to others and she needs special equipment at her destination at a particular stage to be seaworthy for the next stage.[237]

Thus, seaworthiness for the whole voyage does not require that the vessel must be bunkered, equipped and supplied with sufficient crew for a specific stage.

The seaworthiness is however not a condition precedent which entitles the party aggrieved, when the unseaworthiness is ascertained to rescind the contract.[238] The seaworthiness, which was absolute warranty at the

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235-Tetley, Marine Claim, p 164.; Longley, p 58.; Clark, p 127.

236-Thin v. Richards [1892] 2 Q.B. p 141.; The Glymont[1933] A.M.C. p 1293 (2d. cir).

237-The Older[1933] A.M.C. p 936 (2d.cir).

238-1 Carver, para, 142, 626.

common law, is cancelled by the Hague Rules. Article 3 [1] constitutes an obligation to exercise due diligence to make the vessel seaworthy and the obligation is confined to the state of the ship before and at the start of the voyage[239].

Then, the incidence of liability will be determined not by reference to the undertaking {to make the ship seaworthy} but by reference to the cause of the loss of or damage to the cargo[240]. That does not mean that the carrier will escape from liability when he does his best to make the vessel seaworthy.

The general test, in English Law is that a prudent shipowner would have required the defect to have been made good before sending ship to sea. Therefore, the carrier will be in breach of the warranty, when he is ignorant of the defect, regardless of whether or not he ought to have discovered it[241]. There are many cases which are proposed that the seaworthiness may sometimes operate as a condition[242] which entitles the other parties to repudiate the contract[243], or all the stipulations in the

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239-Supra, Chapter, II, Section One.; Clark, p 128.

240-Payne & Ivamy, p 17.

241-Clark, p 126; Channell, J, in, McFadden v. Blue Star Line[1905] 1 K.B. p 697.

242-Per Diplock, L.J. in, HongKong Fir Shipping Co. v. Kawasaki [1962] 2 Q.B. p 26 at p 71, where he states:
"The express or implied obligation of seaworthiness is neither a condition nor a warranty but one of that large class of contractual undertakings".

243-Lord Atkinson, in, Kish v. Taylor [1912] A.C. p 604 at p 617.

contract are cancelled and the shipowner's position is analogous to that of a common carrier without condition[244], or entitles the party aggrieved only to obtain a *quantum meruit* for services rendered[245] or to justify that the delay must be so great as to frustrate the commercial purpose of the contract[246], when the shipowners have not provided a seaworthy ship.

What is then the difference between error in navigation or management and unseaworthiness?

The main factor to determine whether the error in management or negligent navigation exemption is applied or not, is whether or not such an error occurred after the commencement of the voyage.

On the other hand, under the Hague/Visby Rules and COGSA the unseaworthiness should have occurred before or at the beginning of the voyage and must have contributed to the loss or damage to the cargo to deprive the carrier of the exemption, because the seaworthiness is a condition precedent to the exemption.[247]

244-Bailhache, J, in, Ford v. Compagnie Furness [1922] 2 K.B. p 797 at p 802, 804.; Lord Summer, in, Atlantic Shipping Co. v. Dreyfus [1922] 2 A.C. p 250 at p 260.

245-Lord Duned, in, Atlantic Shipping Co. v. Dreyfus, op.cit, p 257, where he states:
"It is quite true that the fact of unseaworthiness does not destroy the contract of affreightment into such a doctrine would lead to obscured consequences; the goods might be safely delivered and yet no freight due under the contract, but only a quantum meruit for service rendered".

246-HongKong Fir Shipping Co. v. Kawasaki [1962] 2 Q.B. p 26.

247-El Carol v. Greenwood," Problems of Negligence in Loading, Stowage, Custody, Care and Delivery of Cargo; Errors in Management and Navigation, Due Diligence to make Seaworthy Ship",[1970-71] 45

Then, if unseaworthiness coincides with mismanagement or negligent navigation to cause the damage to the cargo, the shipowner escapes liability for damage to the cargo only if the error in management or negligent navigation occurred following the start of the voyage[248]. Thus, if the carrier can not separate resulting losses to the cargo then he will be liable for resulting cargo damage[249].

If unseaworthiness is not involved in the cause of loss or damage to the cargo, then it is not necessary to determine whether the voyage has started before the accident, whether it was caused by error in management or navigation, or not, then such a exemption would apply[250]. On the whole, seaworthiness is a material fact which can be proved by all means[251].

Unseaworthiness of the ship may however be enough to occasion an unreasonable deviation when the failure to make all the procedures of exercise due diligence to make

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Tul.L.R. p 790 at p 802, hereinafter cited as "Greenwood".; Morris, J, in, Herald & Weekly Ltd. v. New Zealand Shipping Co. Ltd [1947] 80 Ll.L.Rep. p 590 at p 600.

248-The New Port, 7 F.2d, p 452 (1925).; The Willowpool [1936] A M.C. p 1852.; The Del Sud, 171 F. Supp, p 184 at p 192 (1959).

249-The Walter Raleigh [1952] A.M.C. p 618, where it is stated: "When two causes of damage concur and one is due to unexcused unseaworthiness, the vessel is liable for resulting cargo damage".

250-Greenwood, p 804.

251-Lord Wright, in, Canadain Co. Ltd. v. Paterson S.S. Ltd.[1934] 49 Ll.L.Rep. p 421 at p 425.; Compare,Elder, Dempster & Co.Ltd v. Patersons, Zochonis & Co. Ltd [1924] A.C. p 522 ; [1924] 18 Ll.L. Rep. p 319.

the vessel seaworthy before and at beginning of the voyage.[252]

The House of Lords adopted somewhat rough rule in Kish v. Taylor[253], by admitting any departure from the usual and customary route, even though, initial unseaworthiness gave rise to the necessity for the departure, consequently it was held that the carrier was not liable for deviation. Whereas, Lord Porter, in, Monarch SS.Co. v. Karlshamns Objefabriker[254], said that:

> "Undoubtedly deviation necessarily made to remedy unseaworthiness does not amount to unjustifiable deviation or destroy the right to rely upon the terms of the contract of carriage unless it is established that the owners knew of the vessel's state on sailing".

The United States Court has adopted the principle of Kish v. Taylor, in, the Malcolm Baxter, Jr[255], but the supreme court in the Willdomino[256] held that:

> "An emergency sufficient to excuse a departure can not arise out of circumstances deliberately planned nor from gross negligence".

Therefore, any departure from the customary course of voyage for bunker or repair, when the carrier knew that the vessel was unseaworthy prior to sailing from the port

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252-Louise [1945] A.M.C. p 363.; compare, Brian Coote, Exceptions Clauses, 1964, p 84, hereinafter cited as "Coote", where he states: "Neither negligence, unseaworthiness, nor delay is classed as a deviation, nor do they incur the consequences of one".

253-[1912] A.C. p 604.

254-[1949] A.C. p 212.; 1949 S.C. p 1(H.L).

255-277 U.S. p 323, 72 L.Ed. p 901 (1928).

256-272 U.S. p 718 (1927).

of departure, that will be constituted an unreasonable deviation and the carrier will be responsible for deviation.[257] If the ship becomes unseaworthy in her course, and consequently it is forced to deviate from the usual and customary course of voyage into dry dock, then the carrier is not liable when he exercises due diligence to make the vessel seaworthy prior to sailing from the port of departure.[258]

Payne & Ivamy, have adopted a different attitude by saying:

> "Where the ship is seaworthy when she sails, but becomes unseaworthy while at sea, the incidence of liability will be determined not by reference to the undertaking {of which, of course, there has been no breach} but by reference to the cause of the loss. If the loss was due to an excepted peril the shipowner will be protected, otherwise, he will not".[259]

When the delay in the voyage caused by the vessel's unseaworthiness which was attributable to the owner's default, because, he should have expected that war might

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257-Longlely, p 118.

258-Roger, p 170; Theophilus Parsons, A Treatise on Maritime Law, vol, 1, 1859, p 297, hereinafter cited as"Parsons"; Levatino v. General Steam Navigation Co [1959] A.M.C. p 2233; The Liberator [1938] A.M.C.p 141 at p 146.

259-Payne & Ivamy, p 16.; The Torenia[1983] 2 Lloyd's.Rep. p 210 at pp 218-19, where it is stated:
"where the facts disclosed that the loss was caused by the concurrent causative effects of an excepted and a non-excepted peril, the carrier remained liable but only escaped liability to the extent that he could prove that the loss or damage was caused by the excepted peril alone".

breakout and cause loss or diversion of the vessel, that will make the carrier responsible for any loss of or damage to the cargo resulting from such delay[260].

We come now to discuss the scope of the Rules through the duties of the carrier concerning the loading, the stowage and the discharge of the goods properly and carefully and of what constitutes a reasonable deviation or unreasonable deviation.

The period of the ocean carrier's responsibility is limited by Hague/Visby Rules of "tackle to tackle" period, so called "Maritime-Stage". That means that the Hague/Visby Rules have no chance of applying when the loss of or damage to the cargo occurs before the loading or after the discharge even though the goods are still in the control of the carrier or his servants or agents, unless there is an agreement between the contracting parties to extend the scope of the Hague/Visby Rules to apply in such cases.

For that reason, the Working Group and consequently the Hamburg Rules have adopted a criterion which has solved this dilemma, Article 4 [1] of the Hamburg Rules provides that the Rules cover the period during which the carrier is in charge of the goods at the port of loading, during the carriage and at the port of discharge. In accordance with this concept, the scope of the Hamburg Rules is extended beyond the maritime stage and governs all the

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260-Monarch Steam Ship Co.Ltd. v. Karlshamns Oljefabriker[1949] A.C. p 196 at p 197.

operations of loading and discharge whether on land or waterway which are considered to be necessary for the sea carriage.

However, the moment of taking over and handling over the goods is a material fact which can be proved by all means unless the contracting parties have decided to determine the moment of taking charge and handling over the goods which stand by Article [23] of the Hamburg Rules to determine such an agreement which is not related to the scope of the Hamburg Rules which have a compulsory character and any stipulation or clause contrary to the provisions of the Rules to derogate or extend the scope of the Hamburg Rules is null and void.

One can conclude that any breach of the carrier's duties concerning the loading, the stowage, and the discharge of the cargoes properly and carefully or any breach of the reasonable measures which compel the carrier to take care of the cargoes throughout the voyage does not constitute a deviation.

That does not mean that the concept of the doctrine is restricted to the geographical route, but it is extended beyond the geographical route which implies that any change in the conduct of the vessel is a deviation. Viz, that a diversion in the system of stowage for the goods which the parties are agreed upon may constitute a deviation. Such as, in the absence of an agreement or industry custom for the place of the stowage, the carrier must have carried the goods below deck, otherwise it will

have amounted to an unreasonable deviation.

The ocean carrier conceded that the issue of a clean bill of lading has obliged the carrier to stow the goods under deck, and that stowage of such goods on deck constituted a deviation in maritime law[261].

Then when the carrier voluntarily varies from the method or place of carriage contracted for, it will constitute a deviation and it will leave the shipper with unknown risks against which he has not insured [262]. For instance, carrying a deck cargo of lily-of-the valley pipes without tarpaulins, which the contract agreed would be supplied, was a fundamental deviation from the agreed method of transportation[263]. If the term "on deck stowage" is stamped on the face of the bill of lading, it will be excluded from the application of the COGSA, but the Harter Act is applicable to such on-deck cargo because it is stricter than COGSA[264].

Nowadays, the question arises whether the stowage of containers on deck constitutes a deviation or not?

One can reason from the surrounding circumstances that stowage on deck is treated as a deviation or not depending on the intended use, design of the deck on which the goods were stowed, particular trade and the custom of the port.

261-Jones & Guerrero Corp. v. Flying Clipper [1954] A.M.C. p 259.

262-Francosteel Corp. v. N.V.Nederlandsch [1967] A.M.C.p 2440 at pp 2441, 2445.

263-Lafcomc [1947] A.M.C. p 284.

264-Huang, p 198.

However in the leading case of Encyclopaedia Britannica,Inc. v. The Hong Kong Produce[265], it was held that carriage of containerized cargo on the deck of a break-bulk vessel was an unreasonable deviation, unless there is positive evidence of a loading port custom so permitting. This principle was not accepted in, The Mormacvega[266], where the court held that the deck of a containership is exactly where containers are reasonably intended to be carried.

Moreover, if the term "stow under deck only" is stamped on the container bill of lading and consequently, if the stowage of the container is on deck, and the cargoes were damaged during the voyage, that does not constitute deviation under COGSA[267]

Mere negligence with regard to the stowage or handling of the cargo never constitutes a deviation, but it must be shown that the negligence caused or contributed to the loss of or damage to the cargo[268]. Namely, the causal connection between the on-deck stowage and the damage should be proved[269].

Then, the soundest approach may be to recognize that technological developments have rendered the historical presumption of under deck stowage inapplicable to a

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265-[1969] A.M.C. p 1741 at p 1742.

266-[1973] 1 Lloyd's. Rep. p 267.

267-Rosenbruch v. American. Export Isbrandtsen Lines [1976] A.M.C. p 487.

268-Chester Valley[1940] A.M.C. p 555.

269-Whitehead, p 43.

container ship, and the real question is whether the goods have been properly stowed and cared for in the circumstances of the particular case.[270]

Finally, prior to the adoption of COGSA 1936, in the United States, there was little doubt that over carriage beyond and to a different port than the contracted destination was a material deviation.[271]

The fundamental obligation of a common carrier, is, to deliver the cargo to the port of destination set forth in the bill of lading and not to some other place unilaterally selected by him.[272] Either by the COGSA or precedent it has been recognized that over carriage beyond the agreed port of destination is an unreasonable deviation.[273]

Mere non-delivery does not create a presumption of over-carriage resulting in a deviation. There are many things that could have happened to the goods, for instance, they might have been stolen by someone after loading and before sailing.[274] However, a delay of one and one-half years in delivery is in itself a material deviation, regardless of the fact of over carriage.[275]

270-McMahon, p 328.

271-General Electric Co. v. Argonaut S.S. Line, Inc [1934] A.M.C. p 1147.

272-Fadex Chemical Co. v. Lorentzen [1944] A.M.C. pp 940, 941.; Ruth Ann [1962] A.M.C. p 117.

273-Shackman v. Cunard White Star [1940] A.M.C. p 971.; Paderewski [1944] A.M.C. p 1106 at p 1108.;Fadex Chenical Co. v. Lorentzen, op. cit, p 940 at p 941.; The west Aleta [1924] A.M.C. p 1318.

274-Shackman v. Cunard White Stare Ltd, op cit, p 971 at p 977.

275-Citta di Messina, 169 Fed. p 472 (1909).; Hermosa[1932] A.M.C.

If the shipment is not delivered to the consignee until 18 months after the due delivery date then it will be considered an unreasonable deviation.[276] In addition the failure to deliver seasonal cargo promptly has also been held a deviation.[277]

On the other hand, a vessel which was diverted from the agreed route because the intended destination of a particular cargo, was tied up by a "wild Cat" strike of stevedores, while unloading was held at another port thus causing a fire, explosion, and destroying the other cargo on board.

The court held that the proceeding to the other port was reasonable and not a deviation of which the other cargo could take advantage.[278] Also, it is not a deviation, or it is a reasonable deviation where the vessel is prevented from reaching her destination and it has discharged the goods in a particular port in view of war conditions.[279]

However, if the carrier after accepting the cargo for discharge at a port known to be congested, without notice to the consignee, proceeded to another port where the goods were landed, then it constituted an unreasonable deviation.[280]

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p 541.

276-Atlantic Mutual v. Poseidon [1963] A.M.C. p 665.

277-Effingham [1935] A.M.C. p 319.

278-Ocean Liberty [1962] A.M.C. p 1681 at p 1682.

279-The Walter Raleigh [1952] A.M.C. p 618.

280-Surrendra [overseas] v. S.S. Hellenic Hero [1963] A.M.C. p 1217.

If there is a custom or practice permitting the over carriage beyond the agreed port of destination in particular circumstances then such an action establishes a reasonable deviation.[281]

ii- SERIOUS FAULT AND THE DOCTRINE OF DEVIATION

The general principle in the carriage of goods by sea in respect to tortious liability is that the master, crew or independent contractor, must take reasonable care to avoid acts or omissions which they can reasonably foresee as being likely to damage so closely and directly affected by their act.[282]

They have therefore to disclose a sufficient degree of proximity to give rise to a duty of care and disclose nothing which will restrict that duty.[283] As in Lord Macmillan's words:

"The categories of negligence are never closed".

One can reveal that the court should not hesitate to produce a new duty or a new standard of duty in particular cases.[284]

The scope of the duty of care in delict[285] or tort owed

281-San Guiseppe [1941] A.M.C. p 315.

282-Donoghue v. Stevenson [1932] A.C. p 562 at p 580.

283-Junior Books Ltd. v. Veitchi. Co. Ltd. [1983] 2 A.C. p 520.

284-Marshall,J, in, Lee Cooper,Ltd.v.C.H. Jeakins 1964] 1 Lloyd's. Rep. p 300 at p 311; [1967] 2 Q.B. p 1.

285-Delict is used here and throughout the thesis in generic sense as a synonym of tort.;Walker,Private Law,pp521,522,where he states: "Delicts: were harmful conduct, done intentionally (dolo) or culpably (culpa).

by a person doing work is not limited to duty to avoid causing foreseeable harm to persons or property other than the subject-matter of the work by negligent acts or omissions to avoid defects in the work itself.

An analysis of article [3,4] of the Hague Rules, Article [3] of the Visby Rules, and Article [5] of the Hamburg Rules, reveals that there are certain provisions which compel the carrier to take care of the cargo and there are certain exemptions exonerating him from liability.

For instance, Article 3 [2] of the Hague Rules binds the carrier to care for and carry the goods properly and carefully. On the other hand, Article 4 [2] exempts the carrier and the ship from 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;
> "b" Fire, unless caused by the actual fault or privity of the carrier;
> "q' Any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier;

Also, Article 3 [1] of the Visby Rules provides:

Quasi-Delicts: were kinds of conduct similar to delicts, differing as being cases of vicarious liability such as the liability of shipmasters.....The terms delict and Quasi-Delict have been adopted in scots law".

"The defences and limits of liability provided for in this convention shall apply in any action against the carrier in respect of loss or damage to goods covered by a contract of carriage whether the action be founded in contract or in tort".

Finally, Article 5 [1] as mentioned previously and Annex [2] of the Hamburg Rules contain a common understanding that the liability of the carrier under this convention is based on the principle of presumed fault or neglect .

One can conclude from these provisions that the carrier or the shipowner is liable for his own fault or privity and for the fault or neglect of his servants or agents whether the action be founded in contract or in tort {delict}.

I will therefore summarise the following points:

1.The Nature and the Degree of the Seriousness of the Carrier's Fault.

2.The Actual Fault or Privity of the Carrier.

3.Vicarious Liability.

4.The Effect of Serious Fault on the Doctrine of Deviation.

"1" THE NATURE AND THE DEGREE OF THE SERIOUSNESS OF THE CARRIER'S FAULT

The nature and the degree of the seriousness of the carrier's fault have aroused real controversy[286] as to what constitutes a fundamental breach of the contract whether by an act or omission, be it intentional or unintentional such as, wilful misconduct or gross negligence and whether it is an act of erring or transgression.

The "UNCITRAL" discussion about the degree of seriousness of the faults which are committed by the carrier or his servants and agents created a diversity of views at the conference.

The U.S.S.R. delegate was in favour of accepting the proposal of the liability of carriers, their servants and agents for intentionally caused damage but he did not accept the concept of damage caused recklessly.

The French delegate inclined to make a distinction between the intent to cause damage and the degree of the misconduct by servants to impose carrier liability, and also agreed with Nigeria about recklessness and distinguished wilful misconduct from "inexcusable negligence".

The Norwegian delegate offered two alternative drafts, and both alternative proposals concluded as follows:

286-Falih, p 420.

"Nor shall any of the servants or agents of the carrier be entitled to the benefit of such limitation of liability with respect to damage caused by such an act or omission of his part".[287]

The United States delegate opposed any special provision for serious fault in view of the likelihood that there would be temptation to litigate every damage claim as wilful misconduct. He noted that the Hague Rules dealt with the consequences of carrier negligence {or culpa} or simple breach of the conduct of carriage and that there did not appear to be a need to make special provision in international law for the consequences of intentional acts {or dolus}. The number of acts of deliberate damage to cargo must be few and the proof thereof extremely difficult.

Further, the principal area in which intentional torts would be relevant would be with respect to theft, the proof of which was often so difficult that shippers were forced to rely on the presumption of carrier negligence to seek compensation. He noted that with respect to deliberate damage of cargo, shippers would use the traditional common law remedies which would permit punitive damages[288] which would permit punitive damages

287-Sweeney, part II, pp 337-38.

288-Punitive damages or exemplary damages are not allowed in cargo cases and can not be given for breach of contract which constituted on the basis of Article 4 [5] of the United States COGSA which provides:

"In no event shall the carrier be liable for more than the amount of damage actually sustained"; See, Robert B. Acomb, Jr, Damages

and relaxed rules of consequential damages rather than to place any reliance on the Hague Rules"[289].

Thus, the United States delegate wanted the subject to be left to national law and not codified in an international convention[290].

The Visby Rules[291] and the Hamburg Rules[292] apparently provide the same provisions regarding the categories of misconduct as those provisions which require that the act or omission be done "with intent to cause damage, or delay, or recklessly and with knowledge that such loss, damage, or delay would probably result".

In analysing what constitutes and is meant by these two types of misconduct, it seems to me that the criterion which is used by the Rules to define the misconduct is a subjective intention and thereof the misconduct itself is

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Recoverable in Maritime Matters, 1984, p 44, hereinafter cited as "Acomb, Damages Recoverable".; Charleston & W.C.Ry. v. Varnville Furn. Co., 237 U.S. p 597, 59 L.ed. p 1137.; Richard R. Sigmon, Miller's Law of Freight Loss and Damage Claims, 4th, ed, pp 346-347, hereinafter cited as "Sigmon, Miller's Law".; Compare, Lake Shore, R. Co. v. Prentice, 147 U.S. p 101.

289-Sweeney, part II, p 338.

290-Ibid, p 338.

291-Article 3 [4] of the Visby Rules provides:
"the damage resulted from an act or omission of the servants or agent done with intent to cause damage or recklessly and with knowledge that damage would properly result".

292-Article [8] of the Hamburg Rules states:
"Notwithstanding the provisions of paragraph [2] of Article [7], a servants or agents of the carrier is not entitled to the benefit of the limitation of liability provided for in delivery resulted from an act or omission of such servants or agent, done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result".

not enough to determine the liability of the carrier or his servants or agents, but must prove that he has done something wrong[293]. On the other hand, the term "recklessly" is a subjective realization implying a deliberate disregard on the part of the carrier of the consequence on his conduct[294].

Ackner, J, and professor Walker, made that quite clear when they defined the terms "willful misconduct" and "recklessness" respectively as follows:

Ackner[295], J, said that:

> "It is common ground that "wilful misconduct" goes far beyond any negligence, even gross or culpable negligence, and involves
> a person doing or omitting to do that which is not only negligent, but which he knows and appreciates is wrong, and is done or omitted regardless of the consequences, not caring what the result of his carelessness may be".

Professor Walker[296] said:

293-Barry, J, in, Horabin v. British Airway Corp [1952] 2 All E.R. p 1016 at p 1020.; Falih, p 454.; Al-Jazairy, p 261.

294-Diamond,The Hague/Visby Rules, p 15; [1978] 2 LMLQ, p 225 at p 245.

295-Rustenburg v. Pan American World Airways, Inc.[1977] 1 Lloyd's. Rep. p 564 at p 569, affirmed by the court of Appeal [1979] 1 Lloyd's.Rep. p 19.

296-David M. Walker, The Law of Delict in Scotland, 2nd, ed, 1981, p 43, hereinafter cited as "Walker,Delict".; Diamond, The Hague/Visby Rules, p 246, where he states:
"I therefore suggest that :recklessly" involves either;
"i"a high degree of subjective realization that damage will properly occur or
"ii"a deliberate shutting of the eyes to a means of knowledge which if used, would have produced the same realization".

> "A frame of mind in which persons may behave, an attitude of indifference to the realized possible risks and consequences of one's actions, in which consequences are foreseen as possible but are not desired, not a form of negligence but a cause of negligence".

The English writers have differed between themselves as to what constitutes recklessness[297].

Diamond[298] and Mustill[299] have adopted the view that the term recklessness has a subjective realization.

Powles[300] has adopted Megaw J,'s view[301] which construed it as being objective test.

297-The English jurisprudence have their own definition, for example, Humphreys, J, in, John T. Euis, Ltd. v. Walter T. Linds [1947] 1 K.B. p 475 at p 486, where he stated:
"The word reckless means a great deal more than negligence".; Whereas, Lord Herschell, in, Deary v. Peek {1889} 14 App.Cas. p 337 at p 374, where he stated:
"recklessly, careless whether it be true or false".

298-Diamond, The Hague/Visby Rules, p 246.

299-Michael Mustill, Carriage of Goods by Sea Act 1971, vol, II, 1972, p 684 at p 700, hereinafter cited as "Mustill".

300-David G. Powles, "The Carriage of Goods by Sea Act 1971",[1978] J.B.L. p 141 at p 145, hereinafter cited as "Powles", where he states:
"In view of the fact that an objective assessment of knowledge can involve an element of recklessness, it could be argued that these additional words attractive a subjective interpretation".

301-Shawinigan Ltd. v. Vokins & Co. Ltd[1961] 2 Lloyd's.Rep. p 153;[1961] 1 W.L.R. p 1206 at p 1214, where he states:
"Recklessness is gross carelessness- the doing of something which in fact involves a risk, whether the doer realises it or not; and the risk being such having regard to all circumstances, that the taking of that risk would be described as "reckless". The likelihood or otherwise that damage will follow is one element to be considered, not whether the doer of the act actually in ordinary parlance realised the likelihood".

Whereas, the jurisprudence in Scotland has emphazied the subjective element.[302]

The United States adopted Mr. Justice Barrye's view[303], in, Forman v. Pan American Airways, Inc[304], expressed that the meaning of the wilful misconduct is as follows:

> "wilful" ordinarily means intentional: that the fact that was done was what the person doing it meant to do. But the phrase "wilful misconduct" means something more than that. It means that in addition to doing the act in question, that the actor must have intended the result that come about or must have launched on such a line of conduct with knowledge of what the

302-Lord, MacKenzie, in, Callender v. Milligan (1849) 11 D. p 1174 at p 1176, where he stated:
"Under malice I would include gross recklessness, culpa, lata quae equiparatur dolo".; Lord Atkin, in, Donoghue v. Stevenson, 1932, S.C.(H.L) p 31 at p 44, where he stated:
"The liability for negligence, whether you style it such or treat it as in other system as a species of "culpa".; Walker, Delict, p 46, where he defined the term "culpa" as follows:
"The term "culpa" is used in confusingly many senses. In origin it undoubtedly meant moral fault, and subsequently, as in the Lex Aquilia, the mental element which inferred legal liability for conduct by act or omission, intentional or unintentional.
"culpa", in this wide sense covers conduct done dolo (intentional) and also done culpa (in a narrower sense- negligently); Falih, p 461.

303-Horabin v. British Airways Corp, op.cit, p 1020, where he states:
"In order to establish wilful misconduct .... the person who did the act knew at the time that he was doing something wrong and yet did it notwithstanding, or, alternatively, that he did it quite recklessly, not caring whether he was doing the right thing or the wrong thing, quite regardless of the effect of what he was doing".

304-1954, 284 App. Div, p 935, where it is cited by N.R. McGilchrist, "Carriage by Air, Willful Misconduct and the Warsaw Convention",[1977] 4 LMCLQ, p 539 at p 540, hereinafter cited as "McGilchris".

> consequences probably would be and had gone ahead recklessly despite his knowledge of those conditions".

The United States courts in Tuller v. Klm[305], have declared that:

> "Wilful misconduct....may be the intentional performance of an act in some manner as to imply reckless disregard of the consequences of its performance...".

Wilful misconduct and recklessness are therefore something quite different from negligence[306] or carelessness or error of judgment, or even incompetence, where the wrongful intention is absent. All these human failings may give rise to acts which in the judgment of ordinary reasonable people may amount to misconduct, but the element of wilfulness is missing.[307]

One can say that the same act may amount on one occasion to mere negligence, and on another to wilful misconduct depending upon the intention or state of mind of the person who did it.

The COGSA 1971, the Visby and the Hamburg Rules have however confirmed that there is a realization of the probability of damage occurred by such an act or omission when these Rules state that "with Knowledge that damage would probably result" following the word "recklessly". The carrier's malicious intent or recklessness with knowledge of probable consequences apparently may not be

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305-1961. 292 F. 2d, p 775.

306-Walker, Delict, p 43.

307-Horabin v. British Airways Corp, op. cit, p 1020.

presumed from the mere fact that loss, damage or delay occurred[308].

"2" THE ACTUAL FAULT OR PRIVITY OF THE CARRIER

Turning now to the meaning of the actual fault or privity of the carrier from which many special difficulties arise, nowadays, because most vessels are owned by a company.

The words "actual fault" are not restricted to positive acts by way of fault. These words include acts of omission as well as acts of commission[309]. Thus, when the carrier wants to avoid the liability he has to show that he himself is not blamworthy for having either done or omitted to do something or been privy to something. Then it is not necessary to show knowledge or to show that it is the servant's fault, but it must not be the owner's fault[310]. Some decisions held however that the actual fault means that it infers something personal to the owner which is distinguished from constructive fault or privity such as the fault or privity of his servants or agents[311].

308-Sassoon & Cunningham, p 181.

309-Royal Exchange v. Kingsley Navigation Co.[1932] A.C. p 235.; Paterson v. Canadian Wheat [1934] A.C. p 538.

310-Buckley, L,J. & Hamilton L. J. in, Asiatic Petroleum Co.Ltd. v. Lennard's Carrying Co. Ltd.[1914] 1 K.B. p 419 at pp 432-438, affirmed by the House of Lords [1915] A.C. p 705.

311-Buckley, L.J. in, Asiatic Petroleum Co. Ltd. v. Lennard's Carrying Co. Ltd. op.cit, p 432.; Channell, J, in, Smitton v. Orient Steam Navigation Co. [1970] 12 Com.Cas, p 270 at p 276, where he stated:

I find that I do not agree with these decisions because if "actual" meant "personal" then that means that the owner must have caused the fault himself. Whereas, the shipowner would not be entitled to the benefit of the statutory defence, if the shipowner appointed an incompetent person to act on his behalf, and he knew, or ought to have known, at the time of such an appointment that that person was incompetent[312]. The shipowners must then have taken reasonable precautions to make the vessel seaworthy and any failure to do so was his actual fault or privity to render the vessel unseaworthy. Even if the failure in material things, such as, the equipment or the failure to appoint a competent staff or to give them sufficient instructions about the vessel regarding their supervision.

Therefore, whether there is disabling want of skill or disabling want of knowledge, both will render the vessel unfit and unqualified for sailing and the shipowners are guilty of actual fault or privity[313]. Accordingly, the fault must be the actual fault of the shipowner without any ascription to his personal fault or subjective element in any breach of contract in spite of the existence the term "privity" with the term "actual fault"[314].

"If they come within the defendants are not liable unless the loss is occasioned by their personal fault".

312-The Fanny [1912] 28 T.L.R., p 217 at p 218.

313-Viscount Haldane & Lord Atkinson, in, Standard Oil Co. v. Clan Line [1924] A.C. p 100 at p 113.

314-London Rangoon Trading Co. v. Ellerman Lines Ltd [1923] 39

It is submitted that "privity" does not purport to add anything to the word "actual fault" because privity means privity to the breach of contract or to an actionable wrong, not simply privity to the loss. Whether or not there is such a breach must depend upon the standard of duty laid down in Article 3 [2].[315]

However, the courts do not distinguish between those terms. They always ask whether the loss of or damage to cargo has arisen without the shipowner's actual or privity, or not, in order to avail the shipowner of the statutory defences.[316]

"3" VICARIOUS LIABILITY

The trend of current jurisprudence is to make the carrier liable for any loss of or damage to cargo caused by his own fault or neglect or his servant's or agent's fault or neglect during the period of responsibility when the goods are carried in his custody or control.[317] This recent judicial trend has been based on different views of the conventions and the precedents. Then it is necessary to establish the criterion by which the carriers, the servants, and the agents or the independent contractors, can be defined.

The Hague Rules[318] have defined the carrier as follows:

T.L.R.p 284 at p 285.

315-Hyun, pp 61-62.

316-Willmer, J, in, H.M.S.Truculent v. The Divina [1951] 2 All E.R. p 968 at p 981

317-TD/B/C.4/ISL/Rev.1, p 36;The Muncaster Castle[1961] A.C. p 807.

318-Article 1 [a] of the Hague Rules which is identical with COGSA 1936 in the United States and COGSA 1924, 1971 in the UNited

> ["Carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper].

The Hamburg Rules[319] have made two separate provisions for the carrier and the actual carrier as follows:

> "1-Carrier means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper.
> 2-Actual carrier means 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".

No attempt is made to define the concepts of "servants" and "agents". The carrier neither in the bill of lading nor in COGSA means or includes a stevedore[320].

In the United Kingdom the concept of the servants is well defined as:

> "a person usually employed on a regular basis, who as distinguished from an independent contractor, is subject to the command of his employer as to the manner in which he shall do this work"[321].

Kingdom.

319-Article 1 [1,2] of the Hamburg Rules.

320-Viscount Simonds, in, Midland Silicones Ltd. v. Scrutton Ltd.[1962] A.C. p 446 at p 466.; Krawill Machinary corp v. Robert C. Herd & Co.Inc [1959] 1 Lloyd's.Rep. p 305 (U.S. Supreme Court), where it is stated:
"That stevedore could not be brought within the definition of "carrier" in the bill of lading by any natural or reasonable"interpretation".

321-Diamond, The Hamburg Rules, p 13.

Then what is the criterion for deciding whether the stevedore is a servant, agent or independent contractor?

There are two categories to distinguish the act of stevedore from the others as follows:

1-The degree of control and supervision of his work by the principal[322].

2-The work to be done within the scope of his employment[323].

Under the common law when the stevedore is employed by the carrier as a single employee the shipowner is liable to the cargo-owner for any loss of or damage to cargo. Whereas, when the stevedoring firm hires workers at the disposal of the carrier, the stevedores would be considered as servants of this firm[324].

The situation under the Rules and COGSA is different. The stevedores even though a private company are ship's servants or agents when they are controlled by the carrier who is responsible for them[325], because the person who appointed them is vicariously liable for damage done

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322-Lord Atkin, in, Canadian Transport Co. v. Court Line Ltd. [1940] A.C. p 934 at pp 937-38.

323-Samir Mankabady, pp 70-71.; The Eurymedon [1971] 2 Lloyd's . Rep. p 399 at p 408.; United Africa Co. Ltd. v. Saka Owoade [1955] A.C. p 130, where it is stated:
"There is no difference in the liability of a master wrongs whether for fraud or any other wrong committed by a servant in the course of his employment".

324-Stojan Cigoj," Legal Relations of Stevedores in Comparative Law", [1975] 3 LMCLQ, p 296 at p 302, hereinafter cited as "Cigoj".; Serge G. Koushnareff,Liability of Carriers of Goods by Sea, 1st,ed, 1943, p 132, hereinafter cited as "Koushnareff".

325-Tetley Marine Claim, p 387.

by them[326]. According to Article 3 [2] of the Visby Rules[327] the independent contractor should not be protected and should not have the benefits of the Rules.

The attitude towards the independent contractor is changed specifically with regard to the most important obligation of the carrier which is to exercise due diligence to make the ship seaworthy.

The House of Lords held in Muncaster Castle[328] that the carrier was liable for loss of or damage to cargo caused by the negligence of an independent contractor employed by him, even though he has not enough experience to exercise a real control over them[329].

Lord Keith of Avonholm[330] made this quite clear when he stated:

> "The carrier cannot claim to have shed his obligation to exercise due diligence to make his ship seaworthy by selecting a firm of competent ship repairers to make his ship seaworthy. Their failure to use due diligence to do so is his failure ... unless in some very exceptional circumstances their employment can be said to be without any authority, express or implied, of the carrier, a case which can be considered if ever it arises".

326-Chorley & Giles, p 271.; Cigoj, p 302.

327-"If such an action is brought against a servant or agent of the carrier (such servant or agent not being an independent contractor) such servant or agent shall be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this convention".

328-[1961] A.C. p 807.

329-Wilson, p 140.

330-Muncaster Castle, op. cit, at pp 870-72.

Who is a ship's agent and who is the shipbroker and what is the difference between them?

The ship's agents' duties, obligations and liabilities are not in the same legal sphere as a shipbroker. The ship's agent[331] is, in the normal case, the agent of the shipowner at the particular port, and the ship's agent, therefore, at that port stands in the shoes of the shipowner, and it is reasonable to suppose that he has the authority to do whatever the shipowner has to do at that port[332].

Whereas, the shipbroker[333] just receives a commission from the shipowner for effecting the contract when the contract is brought about through the broker's introduction of the parties[334].

The ship's agent legally speaking, signifies more than a forwarding agent[335]. He deals with all administrative matters, cares for the ship's berth, stores and for

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331-Marks S.W. Hoyle, The Law of International Trade, 1981, p 40, hereinafter cited as "Hoyle", where he states:
"Agents who are appointed can, for simplicity, be divided into:
"a"A special agents has limited authority for a particular task.
"b"A general agent has general authority in a particular area or business.
"c"A universal agent has unlimited authority".

332-Pearson, L. J. in, Blandy Bros.& Co. v. Nello Simoni[1963] 2 Lloyd's.Rep. p 393 at p 404.

333-Brokers specialising in insurance, commodities and shipping are very common in trade.

334-1 Carver, para, 593-595.

335-Scrutton, p 41, where he states:
"A person employed by the shipper to enter into contracts of carriage with shipowners, but in the capacity of an agent only, and without personal liability as a carrier".

unloading the cargo, he orders tugs, pilots and stevedores. In fact, the ship's agent does for a shipowner whatever the shipowner has to do at that port.[336]

The Rules and COGSA do not define these terms, namely, the servants, the ship's agents, shipbrokers and the independent contractors. The national law completes the contractual relations where the agency contract has some ambiguities and does not expressly give the solution for the difficulties arising from the performance of such a contract.[337]

The ship agent's acts in the name of the shipowner or the ship's operator when he is authorized to undertake to conclude such a contract.

Then if the ship's agent has no authority from the shipowner to conclude the contract and nevertheless he enters into contract as agent, the shipowner has no liability unless he chooses to ratify such a contract.[338] Therefore, the agent did not act in his own name but as the representative of an owner or of a carrier.[339]

Thus, if the warehouse company wants to contract with the agent himself it should make that expressly clear. Then, addressing the invoice to the agent is not

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336-Johannes Trappe, Hamburg, "The Duties, Obligations and Liabilities of the Ship's Agent to his Principal",[1978] 4 LMCLQ, p 595 at p 596, hereinafter cited as "Johannes".

337-Johannes, p 597.

338-Hoyle, p 40.

339-The Santia Carina [1977] 1 Lloyd's.Rep. p 478.

sufficient to create contractual relations[340].

Mr. Justice Salter made this clear when he stated:

> "Where an agent purports to make a contract for a principal disclosing the fact that he is acting as agent, but not naming his principal, the rule is that, unless a contrary intention appears, he makes himself personally liable on the authorized contract"[341].

However, the agent must exercise the skill, care and diligence which are usually applied in his business and according to his contractual obligations[342]. Then the ship's agents will be liable to their principals for damages occurring by an act or omission committed by their fault or negligence[343]. The servant's or agent's fault or neglect will be ascribed to the carrier where it happened in carrying out their work under the control of the carrier and must have acted during the period of the servants " tackle to tackle"[344].

Moreover, the stevedore owes the same duty of care as

340-1 Carver, para, 604-605.; Johannes, p 601.

341-Benton v. Campbell, Parker & Co. Ltd. [1925] 2 K.B, p 410 at p 414.

342-Mr. Justice Megaw, in, Anglo-African Merchants, Ltd. v. Bayley[1969] 1 Lloyd's. Rep. p 268 at pp 279-280, where he states: "In the absence of express consent by his client with full knowledge of the implications, it would be a breach of duty on part of broker to act on instructions from underwriters".; Donaldson, J, in, North & South Trust Co. v. Berkeley[1970] 2 Lloyd's.Rep. p 467.; F.J.J. Cadwallader, "English Shipping Cases 1970", [1970-71] 2 J.Mar.L.& Com, p 834, hereinafter cited as "Cadwallader, English Shipping Cases, 1970".

343-Hoyle, p 39.

344-Tetley, Marine Claim, pp 97, 373, 387.; The Eurymedon[1974] 1 Lloyd's. Rep. p 534.; The Elbemaru [1978] 1 Lloyd's. Rep. p 206

the carrier's duty under COGSA to exercise reasonable care and due diligence to handle properly and carefully the discharge of cargo[345].

Then, the shipowner's duty is to provide his servants with safe system of work which makes them qualified to carry out their obligations by exercising reasonable care[346]. In the event of evidence to the contrary, the carrier will not be responsible only for himself but also for those whom he engaged to perform the carriage operations as part of his overall responsibility to exercise due care to avoid loss of or damage to the cargo[347]. However, in the absence of evidence to the contrary, namely, where the carrier provides his master and crew with a safe system as any prudent carrier, will do, this does not make the carrier guilty of actual fault or privity[348].

Thus, The shipowner will be responsible for any act or fault or negligence committed by his servants or his agents, during the scope of their employment, on behalf of the shipowner in the fulfilment of the work for which they had been engaged[349].

United Kingdom and United States jurisprudence[350] share

345-Interstate Steel Corp. v. S.S.Crystal GEM.[1970] A.M.C. p 617.

346-Beauchamp. v. Turrell [1952] 2 Q.B. pp 207, 215

347-Kimball, p 236.

348-Beauchamp v. Turrell, op. cit, p 215.

349-Sellers. L.J. in, Leesh River Tea Co. Ltd. v. British India S.N. Ltd [1967] 2 Q.B. p 250 at p 272.

350-Interstate Steel v. S.S. Crystal GEM. [1970] A.M.C. p 617 at p 628, where it is stated:

the view that the stevedore is also responsible for the damage caused by his fault or his negligence.

Moreover, the United Kingdom decisions do not admit to the carrier's servants or agents the right to rely on the Rules or to avail himself of the exemption clauses[351] or the statutory defences [352] in the Rules because he is not a party to the contract of carriage[353] according to the doctrine of "privity of contract"[354] and also the carrier did not contract as agent for the stevedore.[355] In contrast, the United States decisions extended the limitation of liability to independent contractors and stevedores, even though not mentioned expressly in the

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"Stevedore is also responsible for the damage caused by its employees at discharge at the port of chicago. This liability is based both on negligence and breach of warranty to perform it duties in a proper and worthmanlike manner".

351-Cosgrove v. Horsfall [1965] 62 T.L.R. p 140, where it is stated:

"The defendant, a bus driver and a servant of the board, was liable. He could not claim the benefit of the exemption clause as he was not a party to the agreement".

352-Midland Silicones v. Scrutton [1962] A.C. p 446;[1962] 1 ALL E.R. p 1.

353-Adler v. Dickson [1954] 2 Lloyd's.Rep. p 267.; The Suleyman Stalskiy[1976] 2 Lloyd's. Rep. p 609 at p 617 (Canada Supreme Court of British Columbia), where it is stated:

"The exemption clause did not avail the stevedores since, they were not a party to the bill of lading and were therefore not entitled to benefit from them".

354-MP. Furmston, Cheshire & Fifoots Law of Contract, 10th, ed, 1981, p 404, hereinafter cited as "Furmston", where he states:

"No one may be entitled to or bound by the terms of a contract to which he is not an original party".

355-Compare, Elder Dempster & Co. v. Paterson Zochonis & Co.[1924] A.C. p 522 at p 534.; Samir Mankabady, p 66.

bill of lading.[356]

It should be noted that the carrier is bound to show that he has taken reasonable care of the goods while they have been in his custody which of course, it includes the custody of his servants or agents on his behalf.[357]

Then, if insufficiency of packing was one of the causes of damage it is incorporated with the negligence of these for whom the shipowner is responsible. The carrier is still responsible for the damage notwithstanding the exceptions of insufficient packing if the cargo-owner shows that the damage was caused by the negligence of the carrier's servant or his agent.[358]

The Hamburg Rules may be rather stricter on a carrier than the provisions of the Hague Rules, where Article 7 [2] states[359] that the carrier's servants or agents can avail themselves of the defence in the Rules if they prove that they acted within the scope of their employment.[360]

Moreover, it is to be noted that where the contract of carriage wholly or partially is concluded by someone who

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356-Tessler Bros v. Italpacific [1975] 1 Lloyd's. Rep. p 210.

357-Wright, J, in, Gosse Millard v. Canadian Government Merchant Marine, Ltd. [1927] 2 K.B. p 432 at p 436.

358-Greer L.J. in, Silver v. Ocean. S.S.[1930] 1 K.B. p 416 at p 435.

359-Article 7 [2] of the Hamburg Rules provides:
".. such servants or agents, if he proves that he acted within the scope of his employment, is entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this convention".

360-Diamond, The Hamburg Rules, p 14.

is not the contracting carrier or the carriage is performed by such carrier he is called "the actual carrier"[361].

The carrier is responsible for the acts or omissions of the actual carrier and for the acts or omissions of his servants or agents acting within the scope of their employment by virtue of Article 10 [2] of the Hamburg Rules.

The actual carrier will under the New Rules be under a wholly statutory liability, neither contractual nor tortious, regarding the carriage of goods[362]. On the other hand, the statutory protection and defence of the servants and agents of the carrier is extended to the servants and agents of the actual carrier.

"4" THE EFFECT OF SERIOUS FAULT ON THE DOCTRINE OF DEVIATION

The current trend considers that the various types of carrier misconduct are sufficient to constitute a breach in the contract of carriage because the aspects of the commercial venture will be affected as a whole[363]. This does not mean, premeditation or recklessness with intent to cause damage or with knowledge that such damage would probably result, may be presumed from the mere fact the loss, damage, or delay occurred[364].

361-Article 10 [1] of the Hamburg Rules.; Diamond, Hamburg Rules, p 15.

362-Pollock, p 9.; Thomas, p 7.

363-Roger, p 172.

364-Sassoon & Cunningham, p 181.

The intentional or the wilful misconduct should be an essential factor in determining whether or not the deviation is unreasonable. The intention does not always seem to be a category in United States courts in deciding whether or not a particular departure from the contract of carriage, is an unreasonable deviation. For instance, in the Silvercypress[365], the court held that:

> "In the instant case the Respondent was under a duty to deliver the cargo at Manila but negligently carried it on to Iloilo. Such over carriage was held deviation, hence the carrier was liable for loss of the over-carried cargo by fire at Iloilo".

This means, the American jurisprudence in this case did not consider whether the over-carriage was intentional or not and it has credited the negligent act as a cause for the deviation.[366] Therefore, an emergency sufficient to excuse a departure cannot arise out of the circumstances deliberately planned nor from gross negligence.[367]

Also, the court held that the Himalaya clause* in no case would exempt the stevedores and terminal operators from gross negligence, because it was illegal to contract out of the liability resulting from gross negligence.[368]

365-[1943] A.M.C. pp 510, 513.

366-Tetley, Marine Claim, p 30.; Zajicek v. United Fruit Co[1972] A.M.C. p 1746 at p 1755.

367-Ruth Ann [1962] A.M.C. p 117 at p 126

368-Metall A.G. v. Ceres [1977] 1 Lloyd's.Rep. p 665 at p 666.; The Eurymedon [1974] 1 Lloyd's.Rep. p 534.; Midland Silicones, Ltd. v. Scruttons, Ltd. [1961] 2 Lloyd's.Rep. p 365.

*.This clause allows third parties to enjoy the per-package limitation and the one-year delay for suit of the Hague Rules, see Tetley, Marine Claim, p. 373.

Since American courts often overlook the element of intention and focusing on the "act of erring or transgression" aspect of deviation, some commentators believe that American courts have relied on this notion of transgression to extend the doctrine of deviation beyond its geographical roots[369].

However, the element of intentional or wilful misconduct should be the key in determining an unreasonable deviation[370] and it applies to geographical deviation as well as to non-geographical deviation, such as failure in respect to stowage cargoes[371], delay may be another form of non-geographical deviation[372], and dry docking with cargo aboard[373]. All these cases of non-geographical deviation have been held sufficient to constitute an unreasonable deviation.

Then, serious carrier's misconduct[374] or serious violations of the contract of carriage are, nowadays, referring to both geographical and non-geographical

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369-Whitehead, p 47, Sarpa, p 156.

370-Tetley & Cleven, p 820.

371-The Chester Valley [1940] A.M.C. p 555.

372-Atlantic Mut, Inc. Co. v. Poseidon Schiffahart (The Herman Shultel, [1963] A.M.C. p 665.; Compare, David Crystal, Inc. v. Cunard S.S.Co.[1964] A.M.C. p 1328.; Hellyer v. Nippon Yusen Kaisha [1955] A.M.C. p 1258.

373-Indrapura, 171 Fed, p 929 (1909).; Compare, Gosse Millard v. Canadian Government [1928] 1 K.B. p 717 at p 741.

374-Mustill, p 701, where he states:
"On any view it seems plain that the type of misconduct contemplated by Sub-Rule (e) is substantially more reprehensible than the "actual fault or privity" referred to in Article IV Rule 2(q)

deviation.[375] Thus, if any events occurred out of the control of the intentional or wilful misconduct in referring to the conduct of the vessel, it is not enough to constitute an unreasonable deviation.

For instance, if the court had decided that the failure to unload cargo at its destination was done intentionally, this act should have been classified as unreasonable deviation, but if the master or the crew makes such a failure negligently then the act was done due to a lack of proper care and custody of the cargo according to Article 3 [2] of the Hague Rules and COGSA.[376]

However, where a full quantity of the goods was loaded on deck when they should not have been, the court has often held it to be unreasonable deviation[377], for example, on deck stowage, without containers, or the cargoes are carried on a ship which is not prepared for the containers bulk.

Then, with this line of reasoning to determine unreasonable deviation according to the element of intent as it relates to wilful misconduct or fraud.[378]

One can conclude that any potential exaggeration in the drastic effect of an unreasonable deviation should isolated from the carrier's duties provided for in Article 3 [2] of the Hague Rules and COGSA, and should

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375-Sassoon & Cunningham, p 170.

376-Roger, pp 181-182.

377-Morgan, p 483.

378-Tetley & Cleven, p 820.

have precedence over any stipulation in the contract.

The Hague Rules try to compromise between the strict liability which is governing common carrier under general maritime law and the doctrine of freedom of contract[379], when it is stated that the contracting parties have a right to enter into agreement, stipulation, condition, reservation or exemption concerning the custody, care and handling of goods prior to the loading on and subsequent to the discharge from the ship[380]. That does not mean that the Rules allow the contracting parties to derogate the Rules[381] by stipulating any conditions which have defeated the spirit and the common understanding of the Rules or to avoid the main object of the contract of carriage[382], and the parties which will frustrate the commercial purpose of the venture.

379-Sassoon & Cunningham, p 167.

380-Article [7] of the Hague Rules.

381-Article 23 [1] of the Hamburg Rules.

382-Article 23 [3] of the Hamburg Rules.

SECTION TWO

THE IMMUNITIES OF THE CARRIER

The carrier has many immunities throughout the agreed voyage whether in the international conventions, such as, the Hague/Visby Rules and the Hamburg Rules or in the contractual clauses which are governed by the power of will of the contracting parties and the principle of the freedom of contract[383].

These immunities are considered as a part of the contract and should be read together and reconciled with the agreed voyage in the bill of lading, taking into account the main object of the contract and should not frustrate the commercial purpose of the venture, but must be subordinate to fulfil the voyage described[384].

I will then deal with the immunities of the carries as follows:

i-The Exoneration Principles.

ii-The Waiver of Deviation.

383-See, supra Section Two, Chapter I, under the title of reasonable deviation, for an explanation of the liberty clauses and the exceptional perils in more detail.

384-John Morris, Chitty on Contracts, vol, 1, 1961, para, 709, hereinafter cited as "Chitty on Contracts".

i-THE EXONERATION PRINCIPLES

As far as the carriage of goods by sea is concerned the liability regime is based on the "presumed fault or neglect". Then the exclusion principles are established in favour of the carrier or the shipowner, especially when such acts or omissions take place without any commitment on the part of the carrier or his servants or agents.

Thus I will discuss the following points:

1-Under the Hague/Visby Rules.

2-Under the Hamburg Rules.

1-UNDER THE HAGUE/VISBY RULES

The immunities are available to the carrier in the Hague/Visby Rules set forth in Article 4 [2] in a catalogue of exceptions[385]. Several of these exceptions are redundant[386] within the broader meaning of "exception", by mentioning synonymous words whether in the same sub-paragraph, such as, in respect of "perils of the sea"[387] or by repeating the meaning of the exception in other Articles, such as, in respect of "act of war"[388], when the Rules set forth under Article 4 [2] give more

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385-Kimball, p 223.

386-TD/B/C.4/ISL/6/Rev.1,p 39; Berligieri & Alpa, p 129, where they stated:
"These exculpatory causes, are wholly superfluous and merely the cause of judicial complications and difformity of interpretation in the various municipal legislation".

387-Tetley, Marine Claim, p 208.

388-Article 4 [e] of the Hague Rules.

details about the "exculpatory causes". For instance, "act of public enemies"[389], "arrest or restraint of princes, rules, or people"[390], and "riots and civil commotions"[391].

Some of these immunities exempt the carrier for loss or damage resulting from the neglect, or default of the master, or the servants of the carrier in the navigation or in the management of the ship, without drawing any line between them or making any identification or distinction between the "management of the ship" and care of cargo when the exception is read in connection with Article 3 [2][392].

Under Article 3 [2] , a shipowner has to transport cargo with all reasonable care, but any damage or loss to the cargo will make the shipowner responsible. Thus in order to avoid liability he has to bring himself within an exemption and negative negligence[393].

Does Article 3 [1,2] of the Hague Rules consider as a condition precedent to exempt the carrier for loss or damage arising or resulting from causes covered by a catalogue of exceptions which are set forth in Article [4]from {a to p}?

Many authors have been known to say that the carrier

389-Article 4 [f] of the Hague Rules.

390-Article 4 [g] of the Hague Rules.

391-Article 4 [k] of the Hague Rules.

392-TD/B/C.4/ISL/6/Rev.1, p 39.

393-Lord Cameron, in, Albacora v. Westcott & Laurance [1966] 2 Lloyd's.Rep. p 53.

must first show that he has been careful in accordance with Article 3 [1,2], as a condition precedent to rely on the exceptions in Article 4 [2].

For instance, Tetley, in supporting such a view held that the carrier is responsible in all exculpatory exceptions unless he proves that due diligence was exercised to make the ship seaworthy in respect to the loss[394].

Namely, Article 3 [2] which does not require from the cargo-owner proof that the carrier has been negligent in dealing with the goods.

In contrast, the burden of proof is on the carrier to show that he has performed the duties and obligations provided in Article [3][395].

Lord Somervell[396], also made this clear when he stated:

> "Article 3 [1] is an overriding obligation. If it is not fulfiled, and the non-fulfilment causes the damage, the immunities of Article [4] can not be relayed on".

It seems quite clear that the carrier cannot avail himself of the exculpatory causes contained in Article [4] only when the damage or loss results from want of due diligence on the part of the carrier[397].

394-Tetley, Marine Claim, p 142.; Compare, Clark, p 142.; Gilmore & Black, p 156, where he states:
"The Article 4 [2] (a) immunity is not stated in conditional form".

395-Gosse Millard v. Canadian Government Merchant Marine [1927] 2 K.B. p 432.; Bes, p 121.

396-Maxine Footwear Co.Ltd. v. Canadian Merchant Marine,Ltd [1959] 2 Lloyd's. Rep. p 105 at p 113.

397-Berlingieri & Alpa, p 125.

Under the Rules and COGSA the seaworthiness[398] or the proper and careful dealing with the cargo[399] is considered as a condition precedent for the carrier to exempt himself from the responsibility resulting from one of the causes contained in Article 4 [2][400] which contributed to the loss of or damage to the cargo.[401] This does not mean that those terms are a condition precedent for the aggrieved party, when the unseaworthiness or want of due diligence and negligent or uncareful dealing with the cargo are ascertained, to rescind the contract.[402]

Under the Harter Act the unseaworthiness is a condition precedent to the exemption[403], whereas, under the Rules

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398-Article 4 [1] of the Hague Rules provides:
"In accordance with the provisions of para {1} of Article[3], 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".

399-Article 3 [2] of the Hague Rules, where it is stated:
"Subject to the provisions of Article [4], the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried".; Gilmore & Black, p 149, where he states:
"Section 3[1] and 4 [1] must be read together as they both deal with the subject of the carrier's duty with respect to seaworthiness of the vessel".

400-Kimball, p 226.

401-Greenwood, p 802.

402-1 Carver, p 142.

403-May v. Hamburg-Amerikanische Packetfahrt Aktiengesellschaft, 290 U.S. p 333, where it is stated:
"The owner of an unseaworthy vessel is not entitled to the statutory immunity conferred by the Harter Act from liability for negligence in its navigation, or to a general average contribution from cargo-owners, the right of which is conditioned on seaworthiness, though there is no causal relation between the

and COGSA, the causal connection between the unseaworthiness and the loss of or damage to the cargo must be shown.[404]

However, I do not want to become involved in an explanation of all the exceptions which are set forth in Article 4 [2] because it is outside the scope of this study. Therefore, I am restricting this section to an examination of the exceptions which may enforce the vessel to divert to another port through one of the following exception[405] :

A-The Error in Navigation or Management.

B-Fire.

C-Strikes.

A-THE ERROR IN NAVIGATION OR MANAGEMENT

Article 4 [2] sub-paragraph {a} provides:

> "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".

Both the Harter Act[406] and COGSA exempt the carrier from liability for damage or loss to the cargo resulting from errors in management or negligent navigation[407], with

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defect and the disaster".; Mr. Justice. Hobhouse, in, "The Torenia", [1983] 2 Lloyd's.Rep. p 210 at 219.

404-Greenwood, p 803.

405-See supra, chapter 1, Section one, for an explanation of the exception of saving or attempting to save life or property at sea.

406-Louis H. v. Hamburg-Amerikaniche, 290 U.S. p 333, 78 L.ed. p 348.

407-Tetley, Marine Claim, pp 171-72, where he stated:

respect to the considerations of Article 3 [1] which concern the due diligence in making the vessel seaworthy.[408] Thus the main factor to determine whether the error in management or negligent navigation exemption is applied or not, is whether or not such an error occurred after the start of the voyage.

Whereas, unseaworthiness should have occurred before or at the beginning of the voyage and must have contributed to the loss or damage to the cargo to deprive the carrier of the exemption.[409]

If unseaworthiness coincides then with mismanagement or negligent navigation to cause the damage to the cargo, the shipowner escapes liability for damage to the cargo only if such damage was caused by an error in management or negligent navigation.[410] Thus, if the carrier cannot separate resulting losses to the cargo then he will be liable for resulting cargo damage.[411]

"An error in the navigation and management of the ship might be defined as "an erroneous act or omission the original purpose of which primarily directed towards the ship, her safety and well-being, or towards the venture generally. An error in the care of the cargo is an erroneous act or omission directed principally towards the cargo"; TD/B/C.4/ISL/6/Rev.1/p 39.

408-Berlingieri & Alpa, p 131.; Compare, Gilmore & Black, p 156.

409-Morris, J, in, Herald & Weekly Times Ltd. v. New Zealand Shipping Co. Ltd [1947] 80 Ll.L.Rep. p 596 at p 600.; Leesh River Tea Co. Ltd. v. British Indian Steam Navigation Co. Ltd [1967] 2 Q.B. p 250 at pp 270,275.; Greenwood, p 802.

410-The New Port, 7 F.ed. p 452 (1925).; The Willowpool, [1936] A.M.C. p 1852.; The Del Sud, 171 F.Supp. p 184 at p 192 (1959).

411-The Walter Raleigh [1952] A.M.C. p 618, where it is stated: "When two causes of damage concur and one is due to unexcused unseaworthiness, the vessel is liable for resulting cargo damaged".

However, if unseaworthiness is not involved in the cause of loss or damage to the cargo, then, it is not necessary to determine whether the voyage has started before the accident, whether it was caused by error in management or navigation or not, in which case such an exemption would apply.[412]

There is no criterion for the contracting parties to establish a line between what does and what does not constitute an error of navigation and management of the ship within the meaning of the exception.[413]

On the whole, one can conclude that the exception of the error of navigation and management of the ship and what is the distinction from the seaworthiness as a line for applying such exception is a material fact which can be proved by all means.[414]

B-FIRE

The exception for fire under the Hague Rules provides by virtue of Article 4 [2] {b} as follows:

> "2-Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from:
> "b"Fire, unless caused by the actual fault or privity of the carrier".

412-Greenwood, p 804.

413-TD/B/C.4/ISL/6/Rev.1, p 39.

414-Lord Wright, in, Canadian Co. Ltd. v. Paterson S.S.Ltd[1934] 49 Ll.L.Rep. p 421 at p 425,; Compare, Elder, Dempster & Co.Ltd. v. Paterson Zochonis, [1924] A.C. p 522,[1924] 18 Ll.L.Rep. p 319.

The meaning of fire should be a flame and not merely heat.[415] It is a "visible heat or light" or "a flame or a glow" as the United States Fire Statute requires to constitute fire.[416] This does not mean any flame will establish the conditions for applying the fire exception, but the causal connection between the flame and the loss should be shown.[417]

Nevertheless, even the carrier in order to prove that loss or damage is caused by the fire, must show that he exercised due diligence to make the vessel seaworthy[418] during the relevant period {the beginning of loading until the start of the voyage}.

Therefore, if the carrier failed to prove a fire that means that the loss or damage to the cargo is due to lack of due diligence in making the vessel seaworthy[419] or want of performance in the duties which are provided in Article 3 [2].[420]

However, after proving the causal relation, then the fault and privity of the carrier must be proven.[421] The

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415-Tetley, Marine Claim, p 184.

416-The "Santa Malta" [1967] 2 Lloyd's. Rep. p 391.

417-Tempus Shipping Co.Ltd. v. Louis Dreyfus[1930] 1 K.B. p 699, where it is stated:
"The section requires a causal connection between the loss or damage and the fire on board".; TD/B/C.4/ISL/6/Rev.1, p 40.

418-Maxine Footwear Co. v. Canadian Government Merchant Marine[1959] A.C. p 589; [1959] 2 Lloyd's.Rep. p 105 at p 113.; Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd [1979] A.M.C. p 2787.

419-Astle, p 319.

420-The Santa Malta, op. cit, p 319.

421-1Carver, para, 232, where he states:

Rules do not explain which party has the burden of proving the fault or privity of the carrier.[422]

The United States jurisprudence, according to the U.S. Fire statute[423], places the burden of proof on the cargo claimant. On the other hand, the United Kingdom jurisprudence, according to the Merchant Shipping Act[424], has obliged the carrier to prove that there was no fault or privity on his part.[425] If there is nevertheless an exception clause that the carrier will not be responsible for fire, then he is not liable for an accidental fire unless such an accident is caused by his own

"The statutory exception protects the shipowner from fire however caused if it be without his actual fault or privity".; Astle, p 141; Gilmore & Black, p 161.; Ocean Liberty [1952] A.M.C. p 1681, where it is said:
"The chartered-owner and the operating agent were neither of them at fault or privity with the cause, and the chartered-owner was entitled to the defense of the Fire Statute and of the COGSA fire exception".

422-Tetley, Marine Claim, p 185.

423-46 U.S. Code S.182 R.S. 4282.

424-1894,s, 502 (1), where sub-section (1) of section 18 of the Merchant Shipping Act, 1979, does not differ materially from the old section 502, save that it omits the requirement of happening "without his actual fault or privity", which is replaced by subsection (3) similar in meaning to Article [4] of the convention as follows:
"If it is proved that the loss resulted from his personal act or omission, committed with intent to cause such loss, or recklessly and with knowledge that such loss would probably result".; 1Carver, pp 197, 427.; Lennard's Carrying Co. v. Asiatic Petroleum Co. [1915] p 705, where it is stated:
"The owners had failed to discharge the onus which lay upon them of proving that the loss happened without their actual fault or privity".

425-Scrutton, p 236.

negligence[426], or by the negligence of his servants.[427]

Therefore, the carrier will be responsible for the damage resulting or arising from negligence of his servants[428] even though those consequences could not reasonably have been anticipated.[429]

Finally, the carrier cannot avail himself of the Fire

426-Article 3 [8] of the Hague Rules provides:
"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 this convention, shall be null and void and of no effect".; Bes, p 121.; Fagan v. Green & Edwards [1926] 1 K.B. p 102 at pp 108,109.

427-Coot, p 32.; Re Polemis [1921] 3 K.B. p 560.

428-Cerro Sales Corp. v. Atlantic Marine Enterprises[1979] A.M.C. p 375, where it is stated:
"Where crew was both inadequate in number and inadequately trained to handle an emergency fire situation, vessel was unseaworthy. Both shipowner and its managing agent held negligent and liable for cargo damage and loss caused".

429-Re Polemis, op.cit, p 500.; Walker, Delict, p 263 at pp 268-69, where he states:
"It is submitted that it is not possible to deny the dichotomy between liability and compensation and to abolish the problem of remoteness of damage by saying that "liability is in respect of that damage and no other". However, this decision is not binding on any scottish or English court... If this decision should be adopted in Scotland for what it purports to decide it must be appreciated that it makes very substantial changes in the law without adequate consideration of the Scottish cases, and very much narrows down the extent of liability".; Compare, The Wagon Mound[1961] A.C. p 388 at pp 423-26, where it is stated:
"There is not one criterion for determining culpability (or liability) and another for determining compensation; unforeseeability of damage is relevant to liability until the damage has been done; it is not the act but the consequences on which tortious liability is founded".

Statute unless there is some connection with unreasonable deviation. In such a case the deviation will displace the carrier's right to rely upon the Fire exception where the ensuing fire resulting in the loss of cargo was causally connected with that deviation[430].

C-STRIKES

Article 4 [2] {j} of the Hague Rules provides:

> "Strikes or lockouts or stoppage or restraint of labour from whatever cause, whether partial or general".

The strike exception[431] is frequently raised in connection with Article 4 [4] when the carrier makes any deviation or change in the customary or agreed voyage to avoid a strike-bound port[432]. Whether or not the exception of strike will apply depends on the same general

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430-The Orient Trader{Canadian Supreme Court}, [1973] 2 Lloyd's. Rep. p 174.; Ocean Liberty [1952] A.M.C. p 1681 at p 1682, where it is stated;
"Even though stowage on deck of cargo shipped under clean bills of lading constitutes a deviation. This does not deprive the carrier of its right to exoneration under fire provision of the Carriage of Goods by Sea Act, just as it does not deprive the owner of the protection of the fire statute, unless it was a cause of the fire".
431-Scrutton, pp 231-232, where he states:
"The exception "strikes or lockouts" covers refusals of men or master to carry on work or business by reason of and incidental to labour disputes. It does not cover dismissal of men to save expense or {semble} men leasing work for fear of disease".; Whereas, in, the Pinellas [1929] A.M.C. p 1301 at p 1302, said:
"A strike of engineers existing while a vessel in safe in port does not excuse sending her to sea without engineers, in an un-manned condition".
432-TD/B/C.4/ISL/6/Rev.1, p 40.

principle of reasonableness of deviation[433]. If the carrier can prove that the deviation in the course of the voyage is reasonable when he deviates from his customary or agreed course of the voyage for the reason of strike[434], then he is within the exception and has not committed any a breach of his duty and such deviation does not constitute an unreasonable deviation[435] but the carrier can protect himself by applying the strike exception[436].

When the carrier has a right in event of strike to "discharge the cargo at port of loading or any other safe and convenient port", then such discharge being deemed due fulfilment of the contract in circumstances particularly envisaged an agreed substituted method of performance of the contract of carriage[437]. If the carrier wants however to protect himself by such an exception he must exert all reasonable methods to avoid the strike and its consequences[438]. Accordingly, when the carrier fails

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433-Tetley, Marine Claim, p 358.

434-Ocean Liberty[1951] A.M.C. p 1464 at p 1465. Affirmed by the United States court of Appeal, Fourth Circuit, [1952] A.M.C. p 1681.; Manx Fisher [1954] A.M.C. p 177.

435-British West Indian v. Atlantic Clipper[1973] A.M.C. p 163, where it is stated:

"A longshore men's strike anticipated to occur "10" days in the future does not excuse carrier from compliance with its duty under COGSA of safe keeping the cargo"; In the Matter of Singapore Nav. Co.S.A.[1975] A.M.C. p 875. Affirmed by the United States court of Appeals, Second Circuit [1976] A.M.C. p 1512.

436-TD/B/C.4/ISL/6/Rev.1, p 41.

437-G.H.Renton & Co. Ltd. v. Palmyra Trading Corp.[1956] 2 Lloyd's.Rep. p 379; [1957] A.C. p 149.

438-Astle, pp 149-150.

to take such reasonable exertions, then he will not be protected by the strike clause.

The strike must cause delay in order to apply the strike clause because such exceptions will not protect the carrier where the strike at the port of loading does not prevent the cargo being loaded.[439] Also the delay must not be directly attributable to the fault or privity of the carrier.[440]

"2"-UNDER THE HAMBURG RULES

The UNCITRAL discussion about the Hague Rules catalogue of exceptions in Article 4 [2] {a-p} created a diversity of views at the conference. The debate turned into a discussion of the merits of retaining the two-based exceptions to fault liability in the Hague Rules.

1-Errors of navigation and management of the vessel, Article 4 [2] {a}.

2-Fire, Article 4 [2] {b}.

The United States and Japan[441] delegates opposed any changes to the principle of liability scheme in the Hague Rules because that would have inevitably increase the freight rates and such a proposed change would destroy the ancient institutions of salvage and general average.

The Polish, Belgian and U.S.S.R. delegates supported the United Kingdom position to preserve these

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439-2Carver, para, 1056.

440-Ibid, para, 1057.

441-Sweeney, part, 1, pp 104,109.

exceptions.[442]

The United States delegates were in favour of expanding the fire defense to explosions, whereas, Norway supported deletion of the navigation and management error and fire exceptions.[443]

Further more, Egypt submitted a list of exceptions which was criticized by developing countries. It stated that the mentioned list of exceptions were illustrative and not mandatory and after that Egypt came to approve the French proposal which was a single statement of the entire problem of liability, defences, and burden of proof.

However, a survey of the opinions which had been expressed and noted at all the UNCITRAL conference declared that the majority seemed to favour deletion of the Hague Rules catalogue of defences, Article 4[2]{a-p}. The countries supporting these decisions were Argentina, Australia, Brazil, Chile, Egypt, France, Ghana, India, Nigeria, Norway, Singapore, Spain, Tanzania, and United States. Whereas, the countries opposing suppression of the negligent navigation exception were belgium, Japan, Poland, U.S.S.R., and the United Kingdom.[444]

The Hamburg Rules supplied, however, the following provisions as a defense to the carrier from the liability:

442-Ibid, p 104.

443-Ibid, pp 104, 105.

444-Ibid, pp 105, 110, 111.

1-Article 5 [1] provides:

> "Unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences".

2-Article 5 [4] provides:

> "For loss of or damage to the goods or delay in delivery caused by fire, if the claimant proves that the fire arose from fault or neglect on the part of the carrier, his servants or agents".

3-Article 5 [6] provides:

> "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".

The Hamburg Rules are concerned about the fire exception which seems to improve upon the Hague Rules[445]. On the other hand, the exception of negligent navigation or management is eliminated, but most of the other defenses are still valid[446] according to the meaning of the general principle which is based on a rule of determining whether or not the carrier has taken "all measures that could reasonably be required to avoid the occurrence and its consequences[447].

445-Rand R.Pixa, "The Hamburg Rules Fault Concept and Common Carrier Liability Under U.S. Law",[1979] 19 Virgina Journal of International Law, p 433, hereinafter cited as "Pixa"

446-George F. Chandler III, "A Comparison of COGSA, The Hague/Visby Rules, and the Hamburg Rules", [1984] 15 J.Mar.L.& Com, p 233 at p 244, hereinafter cited as "Chandler".

447-Wilson, p 140.

The effect of replacing the list of exceptions is envisaged by the abolition of the exception covering negligence in the navigation or management of the ship which has substantially increased the contingencies of the carrier's responsibility in favour of the cargo interests.[448]

The scope of the norm proposed by the Hamburg Rules seems to accord with the Article 20 [1] of the Warsaw Convention of 1929 which provides that the carrier:

> "Shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures".

The degree of diligence of the air carrier is more strict than the degree of diligence required in the norm of the Hamburg Rules.[449] However, the expression of "reasonable man" and "reasonableness" are understood and applied by Municipal legislations. Authors[450], and jurisprudence which have specified that the measures

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448-Ibid, p 140.; Al-Jazairy, p 111.; Falih, p 468, Hoyle, p 207.

449-Berlingieri & Alpa, pp 147-151.; Samir Mankabady, p 54.

450-Raphael Powell, The Unreasonableness of the Reasonable men, Current Legal Problems, Vol, 10, 1957, p 104 at p 120, hereinafter cited as "Raphael Powell", where he states:
"The truth may be that the ordinary conduct of ordinary men is usually sensible because they do not normally do things which are harmful to themselves or to others".; William L. Prosser, Law of Torts, 1978, p 150, where he states:
"The "reasonable man of ordinary prudence", he is sometimes described as a reasonable man, or a prudent man, or a man of average prudence, or a man of ordinary sense using ordinary care and skill".

required of the carrier are only these that are "reasonable" and "normal".

That means that the burden of proof would lie on the carrier to prove that he took reasonable care of the goods. It requires a higher standard of proof constituted on presumption of liability which would be difficult to refute.[451] In respect of a deviation under the Hamburg Rules, as I mentioned previously, the Rules do not contain a specific provision for deviation. However, it constitutes the liability of the carrier on the principle of presumed fault or neglect.[452]

Then in order to exempt the carrier from liability for loss, damage, or delay in delivery, occurring by the departure from the terms of the contract of carriage, the carrier must establish his lack of responsibility for the "occurrence and its consequences"[453] and he must take all measures to save life or attempt to select reasonable measures to save property of third persons.

451-Patrick J, O'keefe & R.J. Colinard, "The UNCITRAL Draft Convention on the Carriage of Goods by Sea",[1976] 10 Journal of World Trade Law, p 346 at p 347, hereinafter cited as "O'keefe & Colinard".; Diamond, A Legal Analysis of the Hamburg Rules", p 11.

452-Falih, p 467.

453-O'keefe & Colinard, p 346.

ii- WAIVER OF DEVIATION

After the occurrence of the deviation, the innocent party, such as, the cargo-owner, the shipper, or the consignee, may elect to treat the contract as still binding and subsisting.[454]

The general principle to be deduced from the rule of the contract and from the idea of freedom of contract or from privity of contract is that when the contracting parties agree to substitute a new contract or to vary its terms from the original contract, such an agreement must be in writing.[455]

A waiver of deviation may be oral in any event, but any letter[456] or aid issued to the shippers or consignees from the carrier will not be considered as assent to a deviation.[457] For instance, where the consignee's consent was neither sought nor given, their receipt of the carrier's notice that vessel would discharge New York cargo at Detroit does not constitute a waiver of the deviation.[458] Also, acts of shippers in endeavoring to aid

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454-2 Carver, para, 1190.

455-Chitty on Contract, p 1149.; Besseler Waechter Glover & Co. v. South Derwent Coal Co.Ltd.[1938] 1 K.B. p 408.; Walker, Private Law, p 47.; Walker, Contract, p 322.

456-The Archer [1928] A.M.C. p 357, where it is stated:
"Neither the silence of the shipper nor a letter from the shipper assuming that deviation is legally permissible under the bill of lading is a ratification of a deviation".

457-Singapore Trader (Stranding), [1976] A.M.C. p 1512.

458-Compare, Knauth, p 269, where he states:
"A charterer who knows that a vessel has deviated with his cargo but continues to give orders as to the vessel's movement thereby waives the deviation".

progress of voyage after deviation does not amount a waiver of the deviation.[459]

The innocent party may accept the deviation and treat the contract as continuing and still binding, but that does not deprive him of his right to claim from the carrier for any damage or loss to the cargo.

Lord Wright[460] made this quite clear when he said:

> "But however fundamental is the condition, it may still be waived by the goods-owner. For this purpose the case is like any other breach of a fundamental condition, which constitutes the repudiation of a contract by one party; the other party may elect not to treat the repudiation as being final, but to treat the contract as subsisting and to that extent may waive the breach, any right to damages being reserved".

Thus, if the other party such as the shipper requests that he changes the destination of the shipment by deviating to another port, while the carrier was ready and willing to perform his contract, then the carrier would be able to rely on the assent of the shipper to allow him to vary the original destination of the

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459-The Henry W. Cramp [1927] A.M.C. p 1365.

460-Hain S.S.Co. v. Tate & Lyle, Ltd[1936] 2 All E.R. p 597; per Lord Upjohn in the Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale [1967] 1 A.C. p 361; The Tregenna [1940] A.M.C. p 1415, where it is stated:
"A shipper, upon a deviation by a ship, has the right to rescind the contract of shipment or charterparty and treat the goods as converted by the deviator, or to accept the goods, holding the ship responsible for damages subsequent to the warranty broken"; MacKinnon LJ. in, The Compagnie Primera v. Compani Arrendataria [1940] 1 K.B.p 362 at p 375; Scrutton, p 259.

shipment, if the consignees sued the carrier for non-acceptance or non-delivery[461], although the consignees are entitled to rely on the deviation even though the charterer has previously waived a deviation[462].

CONCLUSION

The best analysis of the basis of liability for a deviating carrier is the risk approach, which states that the deviation is wrongful by increasing the risk of loss beyond that permitted by contract and is endeavoring to prevent the carrier from creating unauthorized risks[463].

There are some similarities between the risk approach and the other theories, when it considers the deviating carrier as a wrongdoer and stresses that the carrier is in breach of the terms of the contract of carriage as

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461-Brett, in the, Plevins v. Downing, 1 C.P.D. p 220.

462-2 Carver, para, 1193.; Scrutton, p 265.

463-Steven, pp 1540-47, where he states:

"There are many theories for possible explanation for holding deviating carriers liable as follows:

"a"The Carrier as Wrongdoer:

As a deviation is wrongful, the wrongdoer principle requires that a deviating carrier be liable for losses that might not have occurred had the carrier not deviated.

"b"The Contract Approach:

The parties have contracted only for the agreed voyage therefore the bill of lading does not apply to a new created by a deviation. Consequently, a deviating carrier can not rely on the contract of carriage's exemption from liability and the carrier becomes an "insurer" of the cargoe's safety.

"c"The Insurance Theory:

Deviations deprived cargo-owners of their insurance. This loss of protection justified holding the shipowner liable for any resulting loss that the insurance would no longer cover".

does the contract approach.

Finally, this approach emphasises the creation of risks not contemplated by the contracting parties similar to the insurance theory.

It is important to note that mere deviation or mere loss of or damage to the cargo is not enough to amount to unreasonable deviation. The causal relation between them should be shown.

That means it will be connected with modern tort-delict theory, Especially the view which constitutes the damages or losses plus causation.[464]

There is no doubt that the principle of freedom of contract and the privity of contract have no possibility of applying when the carrier exempts himself and his servants or agents from liability for negligence.[465]

Thus, one can reveal that some jurisprudence such as the United States courts refused to allow exceptions from liability in cases of negligence.

Whereas the United Kingdom courts were more favourable to carriers but they strictly construed stipulations; imposing liability in cases of gross negligence, misconduct, and misfeasance.[466]

However, the aggrieved party may claim a remedy by compensation according to the tort-delict theory by force

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464-Sweeney, part I, p 112.; Lord Migdale Expresses the main elements of the delict, in the, Brown v. North British Steel Foundry Ltd.1968 S.C.p 51 at p 70.

465-Villareal, p 773.

466-Steven, p 1536.

of general legal duty[467] or to the liability in contract[468] such as an infringement of undertaking of the carrier to furnish the ship seaworthy and to load, stow, carry, discharge, and deliver the goods at the port of destination.

Consequently in order to avail the carrier himself of the benefit of the exceptions whether by the catalogue of the exceptions in the Hague/Visby Rules or by the general principles of the Hamburg Rules, all measures to save life or all reasonable measures to save property must be taken.

The carrier must have used reasonable care in dealing with the cargo and he or his servants or agents must have been free of fault.[469]

The liability of the carrier is still based on the principle of presumed fault or neglect.[470] Then one can

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467-Walker, Private Law, pp 522-23.; Villareal, p 770, where he states:
"Under voyage or time charter contracts, the charterer and shipowner are liable to the cargo interests for damages caused by negligence in care of cargo or loss of the goods by conversion".; Marcardier v. Chesapeake Ins.Co. 12 U.S. p 39; 8 Cranch, 3L. ed. p 481.; (1814) Leary v. United States, 81 U.S. p 607, 14 Wall,(1872).

468-Donoghue v. Stevenson, 1932 S.C. p 31 at p 64 (H.L),[1932] A.C. p 562 at p 580, where it is stated:
"There is no reason why the same set of facts should not give one reason a right of action in contract and another person a right of action in tort".

469-Villareal, pp 773-76.

470-Erling Selvig, "The Hamburg Rules, The Hague Rules and Marine Insurance Practice",[1980-81] 12 J.Mar.L.& Com. p 299 at p 305, hereinafter cited as "Selvig".; Samir Mankabady, p 54.; Article 5 [1] of the Hamburg Rules.

deduce from common understanding[471] that the liability under the New Rules is still based on the principle of fault liability and not of strict liability.[472] There is therefore no advantage to reserve certain provisions for duties of the carrier and the long list of exceptions from the liability which now exist in the Hague/Visby Rules.

The real change under the Hamburg Rules is that the vicarious liability of the carrier for his servants and agents is provided in express terms and they will avail themselves of any nautical fault and fire which provided in Article 4 [2] of the Hague/Visby Rules.[473] In addition, the carrier remains responsible for the loss of or damage to the cargo while actual carrier shall be responsible for the carriage performed by him.[474]

However, it must be born in mind that the contingencies for increasing the level of liability of the carriers under the liability regime in the Hamburg Rules should have an economic effect[475].

The United States and the French delegates expressed their view in the UNCITRAL discussions that any attempt to modify the liability regime of the carrier or

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471-Annex II of the Hamburg Rules.

472-Selvig, pp 305, 324.

473-Scrutton, p 249, where he expressed the situation under the Hague Rules as follows:
"Exceptions in the contract of affreightment can not be relied on by a person who is not a party to the contract, such as the master, a member of the crew, or an independent contractor".

474-Selvig, p 306.

475-Ibid, p 311.

the existing distribution of liabilities because of insurance coverage must be rejected and this will consequently increase the costs of shipment, which the United Kingdom has estimated will increase freight costs by one to two percent.[476] The developing countries have contended to remove the Hague/Visby Rules and its liability regime most favourable to carrier by establishing a general rule constituting the liability of the carrier on the presumed fault or neglect. Therefore, the higher standard of care, which is required from the carrier in dealing with the cargo, might reduce net losses and consequently reduce net insurance premiums.[477]

476-Sweeney, part I, pp 104, 108, 110.; Pixa, p 469.

477-Ibid, p 467.

CHAPTER THREE

THE EFFECT OF DEVIATION ON THE CONTRACT OF CARRIAGE

The effect of deviation particularly on the obligations of the contracting parties, which emerge from the contract of carriage, is confined to unreasonable deviation which is considered outside the scope of the criterion of "reasonableness".

This effect has aroused real controversy, especially when one considers that international conventions, such as the Hague/Visby Rules and the Hamburg Rules, and the COGSA of United Kingdom or United States, do not explain the legal consequences of an unreasonable deviation. That results in the interpretation of particular cases being divergent on this point.[1]

For instance, does unreasonable deviation void the contract of carriage as it did under the common law pre-Hague Rules regime and consequently deprive the carrier of the benefit and protecting terms of the contract and the cargo insurance cover, which is based on a characterization of the breach of contract, as a fundamental breach or on the breach of fundamental term.

One can find the answers to all these questions under the subdivided heads as follows:

Section One: The Characterization of the Breach of Contract of Carriage.

1-Erik & Thomas, p 693.

Section Two: The Direct Effect of Unreasonable Deviation on the Obligations of the Contracting Parties.

SECTION ONE

THE CHARACTERIZATION OF THE BREACH OF CONTRACT OF CARRIAGE

There are certain obligations in every contract sometimes expressed but more usually implied concerning the performance of the term of the contract which the parties agreed upon. The rationalisation of the rule is that the concept of the contractual obligation can be divided into primary and secondary obligations.

The primary obligations of the contract are that contracts are made to be performed whereas in case of non-performance, these obligations should be converted into secondary obligations by paying compensation to the aggrieved party.[2] Contracts do not provide any substituted obligation if the primary obligations are not performed because the non-performance is not within the direct intention of the contracting parties at the time the contract is made.

However, if the carrier has violated his primary obligations, especially under the contract of carriage by sea, then the courts can enforce the carrier to pay compensation for non-performance as a substituted

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2-Kenneth Diplock, Breach of the Contract of Carriage by Sea, 1967,p 14, hereinafter cited as "Diplock, Breach of the Contract".

obligation in the case of the innocent party claiming for remedy to pay damages caused by the non-performance of the primary obligation. Also, the aggrieved party has a right to claim or declare that the contract has been rescinded by violating the primary obligation which the parties have undertaken to perform.

This means that there are two aspects of the same matter which entitle the courts either to award damages for the breach of contract or to declare that the contract is cancelled.

The effect of breach of contract of carriage is however not to cancel a contract *ab initio*. Viz, that contract is valid and it is not annulled automatically by the breach nor even to end the contract for the future in case of a failure in performance of a contract is not so material, but may be sufficiently material to withhold counter-performance[3].

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[3]-Gloag, The Law of contract (2nd.ed.1929) p 623; David M. Walker, The Law of Civil Remedies in scotland, 1974, p 59, hereinafter cited as 'Walker, Civil Remedies", where he states:
"Under suitable circumstances, a party to such a contract will be permitted to withhold performance of his obligations unless and until the other party performs his, or to put it from opposite angle, that failure to perform a material part of the contract on the part of one party will disentitle him from demanding performance from the other"; W.W.McBryde, "Breach of Contract", 1979 J.R. p 60 at p 67, hereinafter cited as "McBryde, Breach of Contract", where he states:
"A statement that " I am withholding payment until you perform" is of a different type from, "Because of your breach, I am no longer interested in future performance"; Compare, Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd, [1983] 1 All E.R. p 101, where it is stated:

There is also a reservation in the influence of the effect of the breach on the contract of carriage by sea. It is not every trifling violation which will be considered as a breach of contract in which the aggrieved party is entitled to withhold performance of his part of the contract[4]. This means that a classification and characterization for every breach in the contract could be based on the nature of the term, for instance, whether a breaching term is considered as a condition or as a warranty, or on the nature of the breach such as whether that breach is deemed as a fundamental breach or as a breach of fundamental term[5] as far as the doctrine of deviation is concerned and whether this doctrine is to operate as a rule of substantive law or as a rule of construction.

Therefore, the following points are to be discussed:

i-Conditions and Warranties.

ii-Breach of Fundamental Term and Fundamental Breach.

iii-Whether the Doctrine of Deviation is Considered as a Rule of Law or as a Rule of Construction.

"The limitation of liability is applied not only where there is a partial failure to perform the contracted services but also where there is a total failure to perform the services".

4-McBryde, "Breach of Contract", p 66.

5-Lord Devlin, "The Treatment of Breach of Contract", 1966 J.R. p 192, hereinafter cited as "Devlin, The Treatment of Breach of Contract".

i-CONDITIONS AND WARRANTIES

The distinction between the conditions and warranties under the general principles of law of contract under the English Law is that the condition is considered something more essential to the contract which entitles the innocent party to rescind the contract and also to claim all the loss of or damage which is sustained to the cargo[6].

Whilst, the warranty is to operate as a collateral or ancillary to the contract and if it is broken, then the aggrieved party has a right to recover the damages only[7].

However, in the case of an innocent party wanting to reject the contract which is violated by the breach, such a right depends upon the answers to a series of questions.

The first question is: Does the provisions of the contract expressly provide that in the event of the breach of the term in the contract, the other party is entitled to terminate the contract?

6-Walker, Companion, p 267, where he states:
"..In Scots Law the distinction is between fundamental or material stipulations, usually called warranties, breach of which justifies rescission of the contract and non-fundamental stipulations, sometimes called conditions, breach of which justifies damages only".

7-Devlin, The Treatment of Breach of Contract, p 192.; Walker, Companion, p 149; Lord Scarman, in, Bunge Corpn v. Tradar S.A.{H.L} [1981] 1 W.L.R. p 711 at p 713; Anson's Law of Contract, pp 130-135.

If the answer is no, then the next question is:

Does the contract when correctly construed so provide?

For example, the relevant term may be described as a "condition".[8]

The next question then is: What does constitute a condition under the contract of carriage by sea?

In order to answer the question of what constitutes a condition or a warranty, there is an opinion which indicates that when the breach of the contract goes to the root and consideration of the contract or deprives the contracting parties of the whole of the benefit of the contract, then such a violation of the term of contract is to be deemed as a breach of a condition. Viz, otherwise, it will be a breach of warranty which entitles the innocent party to compensation for the damages caused to the cargo.[9] This means that such a viewpoint depends entirely upon the nature of the breach and its foreseeable consequences rather than the nature of the term.[10]

On the other hand, there is another notion which endeavours to constitute the characterization of the term of contract as a condition depending upon the following

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8-Ormrod LJ., in, Cehave N.V. v. Bremer M.B.H. [1976] 1 Q.B. p 44 at p 84; Compare, Walker, Companion, pp 1290-91, where he states: "In Scotland, on the other hand, warranty always denotes a material or fundamental term, breach of which does justify treating the contract as at an end".

9-Upjohn LJ. in, Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd. [1982] 2 Q.B. p 26 at pp 63-64; Roskill LJ. in, Cehave N.V. v. Bremer. M.B.H.[1976] 1 Q.B. p 44 at p 73.

10-Deviln, The Treatment of Breach of Contract, pp 194-97.

points:

1-The form of the clause itself[11].

2-The relation of the clause to the contract as a whole.

3-General consideration of law[12].

It seems to me that the following considerations are however regarded as being the basic principles in deciding whether the breaching term is to be a condition or a warranty.

1-The intention of the contracting parties[13]

2-The truth of what is promised in the contract.

3-The surrounding circumstances of a particular contract which were prevailing at the time of the breach rather than at the time the contract was made[14].

4-All the factors which are contemplated by the parties at the time the contract was made which would be effective on the substance and foundation of the adventure[15].

11-Ibid, p 203, where he states:
"... If the fault be a breach of an express term in the contract, it is immaterial whether that term is a condition or a warranty".

12-Lord Willberforce, in, Bremer v. Vanden [1978] 2 Ll.L.Rep.p 109 at p 113.

13-Bowen LJ. in, Bentsen v. Taylor, Sons & Co. [1893] 2 Q.B.D. p 274 at p 281, where he states:
"Look at the contract and make up your mind whether the intention of the parties would best be carried out by treating the provisions as a warranty or as a condition".

14-George Mitchetl Ltd. v. Finney Lock Seeds[1983] 2 All E.R. p 737 at p 738; Fixby Engineering Co. v. Auchlochan Sand & Gravel Co.1974 S.L.T. (Sh.Ct.) p 58.

15-Bowen LJ. in. Bentsen v. Taylor, op.cit, p 281.

Nevertheless, Scots Law has never classified the terms of a contract into conditions and warranties.[16] The Scots jurisprudence has adopted a solution, constituent on the material or fundamental terms[17], which entitles the aggrieved party from such a breach to terminate the contract. When the breach is not considered as a breach of material or fundamental terms, then the innocent party is entitled to claim for damages only.[18] This solution is deemed contrary to the attitude of English Law in explaining the sense of the words condition and warranty.[19]

Accordingly, and as far as the deviation cases are concerned, some of the lords[20] referred to the desire that the contractual route should be followed by the vessel as a "fundamental condition of the contract" whether provided expressly or impliedly. Whereas, others

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16-Thomson, Fundamental Breach, p 47; Lord President Dunedin, in, Wade v. Waldon, 1909 S.C. p 571 at p 576.

17-Alexander Stephen (forth) Ltd. v. J.J.Riley (U.K) Ltd, 1976 S.L.T. p 269 at pp 272-73; Smith v. U.N.B.Chrysler (Scotland) Ltd. 1978 S.C.(H.L), p 1.

18-Walker, The Law of Contracts, p 523; Decro Wall International SA. v. Practioners in Marketing [1971] 2 ALL E.R. p 216; [1971] 1 W.L.R, p 361; Compare, Richard Lawson, Exclusion Clauses, [2nd, ed, 1983], p 53, hereinafter cited as "Lawson, Exclusion Clauses", where he states:

"Scottish decisions, which in any case preferred the term material breach of contract, took that everything turned on the construction of the contract, so that liability could always be excluded or limited even in the event of such a breach"; Pollock v. Macrae, 1922 SC (H.L), p 192.

19-Walker, The Law of Contracts, p 337.

20-Lord Wright & Lord Maugham, in, Hain v. Tate & Lyle [1936] 2 All E.R. p 597 at pp 607-608 respectively.

believe that a breach of a condition is merely equivalent to a breach of a fundamental term[21] which prevents the deviating carrier from relying upon the exemption provision and entitles the aggrieved party to repudiate the contract entirely.[22]

Moreover, the term warranty is to be interpreted under the Scots Law as an undertaking for non-performance which entitles the aggrieved party to rescind the contract if a warranty is violated by the other contracting parties.[23]

Deviation still affects thus the contract of carriage by sea, when it constitutes a breach of condition or a breach of fundamental term which is significant for the future as well.[24]

That does not mean that the unreasonable deviation, which is characterized as a breach of condition, is going to cancel the primary obligations automatically without further notice from the innocent party and subsequently

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21-Lord Upjohn, in, Suisse Atlantique Societe D'Armement Maritime S.A. v. N.V. Rotterdamsch Kolen Centrale [1967] 1 A.C. p 361 at p 422; Thomson, Fundamental Breach, p 38.; A,G.Guest, "Fundamental Breach of Contract", 1961, 77 Q.R. p 98, hereinafter cited as "Guest, Fundamental Breach"

22-Guest, Fundamental Breach, p 99.; Brian Coote, "The Effect of Discharge by Breach on Exception Clauses",1970 C.L.Y.p 221 at p 223, hereinafter cited as "Coote, Discharge by Breach"; See infra, I will explain in more detail under the topic of breach of fundamental term and fundamental breach.

23-Walker, Law of Contracts, p 337.; Section 33 (1) of Marine Insurance Act 1906, where it is indicated that the term "warranty" is used as a condition precedent.

24-Coote, p 105.

elect to treat the contract as coming to an end[25] or choose to waive the breach[26] and consider the contract as still subsisting.

ii-BREACH OF FUNDAMENTAL TERM AND FUNDAMENTAL BREACH

Some confusion can be detected in the passage which expresses the breach of fundamental term and fundamental breach, although a great deal of effort has been devoted to finding a rational basis for these terms.

In order to determine whether a party to the contract has committed a fundamental breach or breach of fundamental term, one has to keep in mind what is the fundamental obligation or main object of the contract[27] which constitutes the basis of the contract[28].

I will therefore discuss the following points which form the very core and essence of the contract.

25-Hain v. Tate & Lyle [1936] 2 All E.R. p 597 (H.L.); Heyman v. Darwins [1942] A.C. p 356(H.L]; Coote,p 80.; Diplock, Breach of the Contract, p 17.

26-Per Lord Wright, Per Lord Maugham, in, Hain v. Tate& Lyle, op.cit, at p 608, 614 respectively.

27-Lord Denning, in, the Sze Hai Tong Bank Ltd. v. Rombter Cycle Co.[1959] 3 ALL E.R. p 182 at p 185, where he states;
"It would defeat this object if the shipping company was at liberty, at its own will and pleasure, to deliver the goods to somebody else, to someone not entitled at all, without being liable for the consequences. The clause must, therefore, be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract; G.H.Renton & Co. Ltd. v. Palmyra Trading Corpn. of Panama [1956] 1 ALL E.R. p 222, [1956] 1 Q.B. p 501 (H.L.), [1956] 3 ALL E.R. p 957 at p 961.

28-Devlin, The Treatment of Breach of Contract, p 205.

1-Breach of Fundamental Term.

2-Fundamental Breach.

3-Whether the Doctrine of Fundamental Breach is to operate as a rule of Substantive Law or as a Rule of Construction.

4-Fundamental Breach in the United States.

1-BREACH OF FUNDAMENTAL TERM

The breach of fundamental term is concerned with the performance of contractual undertakings which was contemplated at the time the contract was made which establishes the essential character of the contract[29].

Devlin,J[30]. defined the fundamental term as "something which underlies the whole contract, so that if it is not complied with the performance because totally different from that which the contract contemplates".

Section 12 [1] of the Sale of Goods Act, 1893, implies the meaning of the fundamental term by saying:

> "..total failure of consideration and reckless or grossly negligent misconduct".

Lord Abinger[31] offered quite a famous example of what constituted a breach of fundamental term when he said:

29-David Yates, Exclusion Clauses in Contracts, 1978, pp 119,144, hereinafter cited as "Yates, Exclusion Clauses".

30-Smeaton Hanscomb v. Sassoon I Setty [1953] 2 ALL E.R. p 1471 at p 1473.

31-Chanter v. Hopkins (1838) 4 M. & W. p 399 [150 E.R. p 1484 at pp 1486-1487.; Devlin, J. in, Smeaton Hanscomb v. Sassoon I Stty, op.cit, where he referred to pinewood being delivered instead of mahogany.

> "If a man offers to buy peas of another, and he sends him beans, he does not perform his contract,.... the contract is to sell peas, and if he sends him anything else in their stead, it is a non- performance of it".

Thus, the criterion of the performance of the contractual obligation is considered to be a category in determining whether or not there has been a breach of a fundamental term. This happened when the contracting party had not performed his contract in a fundamental or material respect and such a breach of fundamental term established in his failing to provide the consideration contracted which amounted to a total failure of consideration.

A total failure of consideration is a failure to perform the contract in its essential respects.[32] A total failure of consideration is total non-performance, not giving what has been paid for at all, but something else, or nothing. Such a category depends upon the fault of the defendant which entitles the innocent party to relieve himself from further obligations and to recover the sums paid.[33]

2-FUNDAMENTAL BREACH

A breach of contractual obligations occurs when the contemplated contract is performed in a deficient manner or in a fundamentally wrong manner which has disastrous

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32-Yates, Exclusion Clauses, pp 122-23.

33-Walker, The Law of Contracts, p 524; Yeoman Credit v. Apps [1962] 2 Q.B. p 508 at p 523.; Blackburn Bobbin Co. Ltd. v. T.W. Allen & Sons Ltd. [1918] 2 K.B. p 467.

consequences in terms of loss but it is not like such a breach of fundamental term which goes to the very essence and the root of the contract[34].

The consequent events are necessary to justify a finding of fundamental breach but it is irrelevant to the breach of fundamental term[35]. Then the fundamental breach is not more than a breach of contract having specially serious consequences for the injured party, permitting him to repudiate the contract, and recovering damages caused to the cargo. Whereas, the breach of fundamental term is equivalent to non-performance which terminates the contract automatically[36].

By way of illustrating that the fundamental term was merely equivalent to a breach of condition because both are essential to the essence of the contract which prevents a party, who is violating the contract either by breach of the condition or the fundamental term of the contract, from relying upon the exemption clauses. It has however been argued that the party, who is in breach of fundamental term, is not entitled to avail himself by means of exemption clauses. On the other hand, he can protect himself against liability for the breach of a condition.

One can then say that the differences between them are

34-Yates, Exclusion Clauses, pp 141-42.

35-Megaw L.J. in, Wathes (Western) Ltd. v. Austins (Menswear) Ltd [1976] 1 Lloyd's. Rep. p 14 at p 19.

36-Yates, Exclusion Clauses, p 146.

so small and the fundamental term is more narrow and basic than a condition of the contract[37]. As far as the fundamental breach is concerned, some of the lords referred to the gravity of the event because it was not the breach itself which counted so much, but the event resulting from it[38]. Others believe that one must look at the quality of the conduct and not at the results[39].

However, in order to constitute a real criterion for determining whether a breach is fundamental or not, one must look at the conduct itself and its consequences. That means that they established the interdependence of the objective and subjective elements of a contract. That does not mean that these elements must not separate them, but they must be related to each other in determining whether a party has committed a fundamental or total breach of contract[40].

37-Bowen LJ. in, Bentsen v. Taylor [1893] 2 Q.B. p 274 at p 280, where he defines these terms by their effects as follows:
"A breach of fundamental term or condition affects the substance of the adventure: a breach of the fundamental term destroys it"; Guest, Fundamental Breach, pp 98-99; Yates, Exclusion Clauses, p 119; Smeaton Hanscomb v. Sassoon I Setty [1953] 2 ALL E.R. p 1471; Compare Roskill. LJ. in, Cehave N.V. v. Bremer. M.B.H. [1976] 1 Q.B. p 44 at p 73.

38-Lord Denning, in, Harbutt's Plasticine v. Wayne Tank Co.Ltd. [1970] 1 ALL E.R. p 225 at p 235.

39-Diplock LJ, in, Hong Kong Fir Shipping Co.Ltd. v. Kawasaki Kaisha Ltd. [1962] 2 Q.B. pp 26,68,69; [1962] 1 ALL E.R. pp 474,486,487.

40-Hary Silberberg,"The Doctrine of Fundamental Breach Revisited", 1971 J.B.L. p 197, at p 283, hereinafter cited as "Silberberg, Fundamental Breach Revisited".

3- WHETHER THE DOCTRINE OF FUNDAMENTAL BREACH IS TO OPERATE AS A RULE OF SUBSTANTIVE LAW OR AS A RULE OF CONSTRUCTION

The breach of contract whether it is considered as a fundamental breach or as a breach of fundamental term[41], is only a way of illustrating the destruction of the core and basis of the contract.[42] Therefore, the fundamental breach shall hereinafter include the breach of a fundamental term.[43] This doctrine has developed up and down through the decisions of the House of Lords in determining whether the doctrine is a rule of substantive law or a rule of construction.

The doctrine of fundamental breach was firmly entrenched as a rule of substantive law[44] as applied in Karsales case[45] and Yeoman Credit case[46], whereas, Pearson L. J, avoided that by considering it as a rule of construction based upon the presumed intention of the parties.[47]

However, the entire notion of fundamental breach

41-Hereinafter cited for both of them as fundamental breach.

42-Devlin, The Treatment of Breach of Contract, p 204.

43-Lawson, Exclusion Clauses, p 48, ; Coote, Discharge by Breach, p 237, where he states:

".. in the suisse Atlantique case, the House of Lords categorized fundamental term and fundamental breach as shorthand expressions for the circumstances giving rise to discharge by breach".

44-Lawson, Exclusion Clauses, p 53.

45-Karsales (Harrow) Ltd. v. Wall's [1956] 2 ALL E.R. p 866.

46-Yeoman Credit v. Apps [1962] 2 Q.B. p 508.

47-U.G.S.Finance v. National Mortgage Bank of Greece[1964] 1 Lloyd's.Rep. p 446.

suffered a total failure in Suisse Atlantique case[48], where the House of Lords ruled a new judicial trend to reduce the doctrine from a rule of law to a rule of construction. Viz, it is a matter of interpretation in each case for the court to determine what benefits granted are lost in case of fundamental breach[49] and to consider the intention of the contracting parties in a particular contract.

Nevertheless, a substantial effort to re-establish the rule of the legal approach was made by the Court of Appeal in Harbutt's Plasticine v. Wayne Tank & Pump Co.Ltd[50], when it rejected the idea of the fundamental breach and consequently the exception clauses as a matter of construction, although the court ostensibly followed the reasoning of the Suisse Atlantique case, but it submitted that the doctrine of fundamental breach is a rule of law[51].

This decision caused those who are inclined to view that the doctrine of fundamental breach is considered as a rule of construction to hesitate. They argued that Section [9] of the Unfair Contract Terms Act was very clearly drafted, that if the term was reasonable in the contract, then it must be effective despite the termination by breach or by a party electing to treat it

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48-[1967] 1 A.C. p 361; [1966] 2 ALL E.R. p 61.

49-Tetley, Marine Claim, p 26.

50-[1970] 1Q.B p 447;[1970] 1ALL E.R.p 225; Lawson, Exclusion Clauses, p 56.

51-Siberberg, Fundamental Breach Revisited, p 198.

as repudiated.[52] That means that does not of itself exclude the requirement of reasonableness in relation to any contract term[53] as far as the contract covered by the act is concerned.

Therefore, certain judgments have been overruled by the House of Lords which were irreconcilable with current legal rational of the court, which based on a rule of construction characterized the doctrine of fundamental breach. Viz, that the court always takes the intention of the contracting parties fully into account.

The following cases explain the new judicial trend on various grounds.

The court, in Photo Production Ltd. v. Securicor Transport Ltd[54], held that:

> ".. the question whether an exception clause applied when there was a fundamental breach, breach of a fundamental term or any other breach, turned on the construction of the whole of the contract, including any exception clauses".

That means that the parties to a contract are free to modify their obligations to whatever degree they choose within the limits that the agreement must contain the legal characteristics of a contract.[55]

This view received strong support from Parker, J. in,

52-Section 22[a] of the Unfair Contract Terms Act.

53-Section 9[2] of the Unfair Contract Terms Act.

54-[1980] 1 ALL E.R. p 556.

55-Lord Diplock, in, Photo Production v. Securicor Transport, op.cit, p 567.

George Mitchell v. Finney Lock Seeds[56], when he said:

> "It is making commercial nonsense of the contract to suggest that either party can have intended that it was to operate in the circumstances of this case; for to do so would convert the contract into nothing but a declaration of intention with nothing more".

Lord Denning[57] unusually thought that the exemption clause did cover the breach in the contract which had occurred.

Finally the House of Lords concluded that the exemption clause covered a fundamental breach only in the absence of negligence and when it is treated as a matter of construction.[58]

The main finding from the above mentioned decisions is that a fundamental breach is not a rule of substantive law which disentitles a party from reliance on an exemption clause automatically, but it is a rule of construction only.[59]

Lord Wilberforce[60] has made this point quite clear by

56-[1981] 1 Lloyd's.Rep. p 476 at p 478.

57-George Mitchell v. Finney Lock Seeds [1983] 1 Q.B. p 248 at p 301; [1983] 1 ALL E.R. p 108 at p 115.

58-Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co. Ltd. [1983] 1 ALL E.R. p 101; George Mitchell v. Finney Lock Seeds, op. cit, p 737.

59-Lawson, Exclusion Clause, p 54.

60-Suisse Atlantique Societe D'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale, op. cit, at 432; Harbutt's Plasticine v. Wayne & Pump [1970] 1 Q.B. p 447, where he states:
"In deciding whether a breach of contract is fundamental or not the court should have regard both of the quality of the act which

stating:

> "One must look individually at the nature of the contract, the character of the breach and its effect upon future performance and expectation and make a judicial estimation of the final result"

The clause should however be fair and reasonable in order to apply it in a particular case after determining whether it was in standard form, whether there was equality of bargaining power, the nature of the breach...etc.[61] Thus when a contract contains standard clauses and the contracting party wants to apply it even in the case of an inequality of bargaining power, for instance uses his superior power to impose an exclusion or limitation clause on the weaker party, he will not benefit from reliance upon the exemption or limitation clause if he has committed a breach of contract.

One can then conclude that even though a fundamental breach is based on a rule of construction, an exclusion clause would be normally construed as not applicable to avoid liability for violation of the carriage contract by committing a fundamental breach which goes to the root of a contract.[62]

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constitutes the breach and also its consequences"; Per Kerr LJ, in, George Mitchell v. Finney Lock Seeds [1983] 3 W.L.R. p 163 (H.L).

61-Chandrahasan, p 119.

62-Lord Hodson, in, Suisse Atlantique Societe D'Armement Maritime S.A. v. Rotterdamsche Kolen Centrale, [1967] 1 A.C. p 361 at pp 408-415.

4-FUNDAMENTAL BREACH IN THE UNITED STATES

The legal concept of deviation under the United States jurisprudence has extended to the non-geographical deviation, i.e. stowage on deck, dry docking with cargo aboard...etc. Some commentators believe that the American courts have relied on the principles of fundamental breach in the characterization of both types of deviation.[63]

It is submitted that a breach should be intentionally breached by the wrongdoer's action, which has broken the contract in a manner which goes to the very essence and the root of the contract.[64]

Weinfeld, D.J. in Flying Clipper[65], said:

> "It is sufficient that the carrier's voluntary action in unjustifiably deviation so changed the essence of the agreement as to effect its abrogation".

Therefore, when the breach of the contract of carriage is considered a material or fundamental as to be the equivalent of a deviation, then all the exclusion clauses contained in the Hague Rules or the bill of lading are null and void.[66]

63-Tetley, Marine Claim, p 322; General Electrice Co. v. Argonaut SS. Line [1934] A.M.C. p 1147; Shackman v. Cunard White Star. Ltd.[1940] A.M.C. p 971, where it has been recognized that "over carriage is a material deviation."

64-MacDonald J, in, Dorab H. Captain v. Far Eastern SS. Co [1978] A.M.C. p 2210 at p 2227.

65-[1954] A.M.C. p 259 at p 264.

66-Insurance Company of North American v. The Exminster, 127

Accordingly, an unreasonable deviation should be operated to breach the contract of carriage which makes the contract null in the case of the aggrieved party choosing to treat the contract as being at an end and rendering COGSA's limitation clause inapplicable altogether.[67]

The United States Courts do however not always adopt a criterion of intention in deciding whether a particular act forms a deviation or not.[68] For instance, the court in the Atlantic Mutual v. Poseidon[69] held that when the shipment was not delivered to the consignee until 18 months after the due delivery date, then it was constituted an unjustifiable deviation without reference to the rationale behind their decision and whether the delay happened intentionally or not.

That does not mean that the criterion of intention is not essential in determining whether there has been a fundamental breach large enough to displace the contract of carriage.[70] Therefore the "intention" is still considered as an essential element in determining a fundamental breach in the carriage contract especially when it causes loss of or damage to the cargo.

Finally, one can conclude that an unreasonable

F.Supp, p 541 at p 542 (1954).

67-Spartus Corp. v. S/S Yafo 1979, 590 F.2d, p 1310 at p 1311.

68-Tetley, Marine Claim, p 29; The Silver Cypress [1943] A.M.C. p 510.

69-[1963] A.M.C. p 665.

70-Tetley, Marine Claim, p 30.

deviation which emerges from a fundamental breach is deemed as a rule of substantive law and then the carrier can not avail himself by the exclusion clause under the Rules or the contract[71]. That means that the principle of an unreasonable deviation under the common law is still valid and not changed in the United States since the passage of Carriage of Goods by Sea Act, 1936[72].

We can however find many decisions which try to adopt a new trend which is opposed to the common law principles, in saying that all the exclusion clauses are valid and applicable even in the case where the carrier has committed an unreasonable deviation[73].

iii-WHETHER THE DOCTRINE OF DEVIATION IS CONSIDERED AS A RULE OF LAW OR AS A RULE OF CONSTRUCTION

As we have seen before, the obligation of the carrier to transport the goods according to the advertised or agreed course of the voyage is considered as a material or a fundamental obligation. Therefore, any unnecessary or unreasonable departure from the stated or recognized course of the voyage will constitute a fundamental breach of the contract of carriage.

71-Captain v. Far Eastern SS. Co.[1978] A.M.C. p 2210 at pp 2227-29.

72-Tetley, Marine Claim, p 354; Knauth, p 241; Scrutton, p 440.

73-Atlantic Mutual Insurance Co. v. Poseidon [1963] A.M.C. p 665; De Lavel Turbine, Inc. v. West India Industries Inc, 1974, 502 F.2d. p 259; Spartus Corp. v. S/S Yafo, 590 F.2d, p 1310 at p 1317 [1979] ; Varian Assoc v. C.G.T. [1980] A.M.C. p 450 at p 456; See supra, chapter two.

The court of Appeal in the Albion[74] decided that the concept of fundamental breach was restricted to what are called deviation cases.

Denning LJ. has extended the doctrine of fundamental breach beyond deviation cases into the general field of commercial law.[75]

The House of Lords has now ruled a new judicial trend in a non-deviation admiralty case on the question of fundamental breach of the contract which is considered as a rule of construction.[76] That does not change the legal concept of the doctrine of deviation in carriage by sea as a rule of substantive law for many reasons.

The first reason is that the contract of carriage by sea and its obligations are so complicated. The fundamental {deviation} type must therefore be different from the others, such as, the ordinary discharge by breach i.e, the contract of sale of goods, contract of carriage by land...etc.

Then, one must make his mind up not merely what terms of the contract are lost, but what benefits granted under the law are lost.[77]

The second reason which is arguable, for the survival of the doctrine is that the Unfair Contract Terms Act 1977 is not applicable to contracts of sea carriage,

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74-[1953] 2 W.L.R. p 1036.

75-Karsales {Harrow} Ltd. v. Wallis [1956] 1 W.L.R. p 936.

76-George Mitchell v. Finney Seeds [1983] 1 ALL E.R. p 108; Ailsa Craig Fishing v. Malvern Fishing [1983] 1 ALL E.R. p 101.

77-Tetley, Marine Claim, p 27.

because there is no provision dealing with deviation in carriage by sea, while Section (9) of the Act would be applicable to deviatory breaches in carriage by land[78].

Furthermore, it must be kept in mind that there is a specific provision which is dealing with the doctrine either in the Hague Rules[79], or in the COGSA[80].

The common understanding from such provisions is that an unreasonable deviation is an infringement or breach of the Hague/Visby Rules and of the contract of carriage[81].

The fundamental deviation type under the Visby Rules deprives the carrier of all the benefits granted by the convention and the contract when the carrier deviates from the contracted course of a voyage with intent to cause damage or recklessly and with knowledge that damage would probably result[82]. Whereas, the Hamburg Rules[83] have adopted a new criterion which constitutes the measures to save life or reasonable measures to save property in characterization whether the carrier's act is considered as a breach of the convention or not and consequently whether or not it is considered as an unreasonable deviation.

Also the United Kingdom jurisprudence has stuck to the

78-Mills, The Future of Deviation, p 594.

79-Article 4 [4] of the Hague Rules.

80-Article 4 [4] of the COGSA of the United Kingdom and the United States,1924,1971, 1936, respectively.

81-Tetley, Marine Claim, p 26.

82-Article 3 [4] of the Visby Rules.

83-Article 5 [6] of the Hamburg Rules.

doctrine as a rule of substantive law and it is too firmly rooted in precedent. Therefore, they can not alter these principles except by enactment of an act by parliaman.[84]

SECTION TWO

THE DIRECT EFFECT OF UNREASONABLE DEVIATION ON THE OBLIGATIONS OF THE CONTRACTING PARTIES

It should be borne in mind that the meaning of and what constitutes unreasonable deviation is not confined to geographical deviation as the United Kingdom does, but it is extended, particularly in the United states, to include any serious change or modification in the conduct of the vessel or in the course of carriage contracted for, such as, stowage cargo on deck, dry docking with cargo aboard...etc.

The doctrine of unreasonable deviation has effect on the duties and obligations of many parties and is not just effective in relation to obligations of the contracting parties which emerge from the contract of carriage incorporated in the bill of lading, the insurance policy and charter party. Therefore, in order to complete the theory of the doctrine of unreasonable deviation, I will consider all its legal consequences on the contract of carriage and other documents which are concerned in the field of maritime transport as follows:

i-Depriving the Shipowner's Right to Freight of the Contract of Carriage.

84-Diplock, Breach of the Contract, p 17.

ii-Cancelling the protection Terms of the Contract.

iii-Will Unreasonable Deviation Avoid the Cargo Insurance Cover and Will the Carrier be an Insurer of the Goods?

i-DEPRIVING THE SHIPOWNER'S RIGHT TO FREIGHT OF THE CONTRACT OF CARRIAGE.

The contract of carriage imports particular obligations which have obliged the contracting parties to fulfil the contract for the purposes which were agreed.

For instance, the obligation of the shipowner to perform the contractual course of the voyage with reasonable speed which is usual for this vessel or the speed explicitly or implicitly promised by the shipowner[85] and deliver the cargoes at the contract destination to the consignee safely without loss or damage.

On the other hand, the shipper or cargo-owner is obliged to pay the contract freight. Thus, the freight is a reward to the shipowner when he is performing his duty by carrying and delivering the cargo safely to their destination.[86] Deviation has many influences upon the

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85-T.Falkanger, "The Risk of Delay-Affecting the Cargo", Published in the Ocean Chartering, Organized by the "UNCTAD" Secretariat, 1977, p 124 at p 129, hereinafter cited as "Falkanger".

86-Scrutton, p 329; Hoyle, p 209; F.D.Rose, "Deductions from freight and hire under English Law" [1983] 1 LMCLQ, p 33, at p 38, hereinafter cited as "Rose"; 2 Carver, para, 1661, where he states: "The remuneration payable for the carriage of goods in a ship is called freight. Also, the same word is often used to denote a

contract freight depending on the characterization of the effect of deviation. In the event of a deviation being considered as reasonable[87] or as a waiver[88] by the cargo-owner or the consignee, it seems to be clear that the contractual right to freight remains unaffected and the shipowners would be entitled to full freight on delivery of the cargoes at their destination.[89]

The question still arises however in case of unreasonable deviation of what is the effect of such deviation on the contract freight, and what is the right of the shipowner to freight?

The effect of deviation upon a contract freight has been stated in a variety of cases but not in uniform language. It is quite clear that prima facie freight is deemed as the other face of the contract of carriage which is not payable except upon delivery of the cargo[90], or offered for delivery at the port of destination.[91]

Therefore, many decisions held that unreasonable

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payment made for the use of a ship".

87-Republic of France v. French Overseas Corp. 277 U.S. p 323, 72 L.ed, p 901, where it is stated:
"Deviation by the master of a vessel to a port of refuge to avoid a peril of the sea does not forfeit the contract of affreightment".

88-Scrutton, p 260.

89-Mr.Justice, Greer, in, The Mongaldal Tea Co. Ltd. v. Ellerman Lines, Ltd. [1920] 2 Ll.L.Rep. p 639 at p 642; Bartle, p 102.

90-Collins. M.R. in, The London Transport Co. v. Trechmann Brothers [1940] 1 K.B. p 635 at p 643.

91-H.Tiberg, "The Risk of Having to Pay Additional Freight and Cost", Published in the Ocean Chartering, Practical Aspects, Organized by the UNCTAD Secretariat, 1980, p 65 at p 71, hereinafter cited as "Tiberg".

deviation will deprive the shipowner from his own right to the contract freight even though the voyage is completed and the goods delivered at the contract destination.[92] This means that the performance of the described voyage is considered as a condition precedent to the right of the shipowner to the freight.[93] Consequently, the logic involved is that an unreasonable deviation goes to the root of the contract under which the goods are being carried unlawfully after deviation which neither the shipowner nor the cargo-owner ever asked the shipowner to perform.[94]

Another opinion has distinguished between if the cargoes have been lost after deviation[95] or if they have been delivered at a port other than the agreed destination.[96] The shipowner is entitled, in the latter case, to claim for a reasonable freight equal to the amount of the carriage and delivery of the cargo at the port of discharge even though such a port is other than the described destination.

92-Branson, J, in, Hain S.S. v. Tate & Lyle [1936] 2 ALL E.R. p 597 at p 611; 2 Carver, para, 1194.

93-Collins. M. R. in, the Joseph Thorley, Ltd v. Orchis S.S.Co. Ltd. [1907] 1 K.B. p 656 at p 666.

94-Hain S.S. v. Tate & Lyle, op.cit, p 611.

95-James Morrison v. Shaw Savil [1916] 2 K.B. p 783; Donaldson, J, in, The Montedison S.P.A. v. Icroma S.P.A.[1980] 1 W.L.R.p 48 at p 53, where he states:
"The mere fact that the oil as delivered was not identical commercially with the cargo as loaded did not deprive the shipowners of their right to freight".

96-Branson, J, in, The Hain S.S.Co. v. Tate & Lyle[1936] 2 ALL E.R.p 597 at p 612.

United Kingdom Law has made a distinction between where the freight is payable as a "lump sum"[97] for the use of the ship and some of the cargo is lost and others is delivered. Then the freight is not repayable but could be generally taken to reduce the freight claim proportionally.[98] If all the cargo is, however, lost then the shipowner is not entitled to freight.[99]

Where the freight is payable as an "advance freight" and all the cargoes are totally lost, or even the completion of the voyage is frustrated[100], the freight can not be recovered, because the freight paid in advance is to be deemed as "earned" by the ship and such a risk of paying freight for nothing can be insured. Such a case, nevertheless, has no application unless the freight

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97-Payne & Ivamy's, p 27, where he states:
"To earn lump sum freight, either the ship must complete the voyage, or else the cargo must be transhipped, or forwarded by some means other than the ship in which it was originally loaded, and delivered by the shipowner or his agents at its destination".

98-Compare, Rose, p 41, where he states:
"First and foremost that freight was not subject to abatement by a claim in respect of cargo. Secondly, the charterers could not rely on equitable set-off: short delivery {unless a mounting to repudiation of the contract of carriage} does not impeach the title to the legal demand for freight"; See also, F.J.J. Cadwallder, "English Shipping Cases-1972", [1973-74] 5 J.Mar.L & Com, p 407 at p 432, hereinafter cited as "Cadwallder, English Shipping Cases-1972".

99-Lars Gorton, Rolf Ihre & Arne Sandevarn, Shipbroking and Chartering Practice, 2nd. ed. 1984, p 175, hereinafter cited as "Gorton, Ihre & Sandevarn, Chartering Practice"; Cadwallder, English Shipping Cases-1972, p 433.

100-A.G.Guest, Anson's Law of Contract, 1979, p 520, hereinafter cited as "Anson's Law of Contract".

clause is stated in the contract of carriage or in the charterparty[101] which has incorporated into the bill of lading.[102]

In contrast United States jurisprudence has made notable remarks about prepaid freight, that it is not "earned" until delivery has been made at the destination of the goods where the parties have contracted.

Sometimes, however, the voyage charterparty provides a clause:

> "Freight earned and payable upon shipment, ship and/ or cargo lost or not lost".

The shipowner, in this case, is then entitled to freight and it is not returnable even if the vessel and/ or the cargo are lost.[103] Though the cargo-owner or claimant may be able to maintain a cross-action for damages.[104] The shipowner is therefore entitled to recover either the prepaid freight charges or to require the

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101-Tiberg, pp 71-71; F. J. J. Cadwallder, "Charterparties Distribution of Functions Shipowner and Charterer", Published in the Ocean Chartering, Organized by the UNCTAD Secretariat, 1977, p 94 at p 95, hereinafter cited as "Cadwallder, Charterparties", where he states:
"More recent charterparties provide that the charter is only to be entitled to a reduction in hire in the event of the vessel being only partially able to carry out the immediate task".

102-For more detail and an explanation see, F.J.J. Cadwallder, "Incorporating Charterparty Causes into Bills of Lading", Published in the Speaker's Papers for the Bill of Lading Conventions Conference, Organized by the Lloyd's of London Press, 1978, p Cadwallder 1, hereinafter cited as "Cadwallder, Bills of Lading".

103-Gorton, Ihre & Sandevarn, Chartering Practice, p 175.

104-Cadwallder, English Cases-1972, p 433.

vessel to pay port expenses at ports other than the destination at which the cargo was discharged and reasonable costs of on ward carriage, but not both.[105]

The criterion of a quantum meruit[106] is, however, considered as a rightful freight to the shipowner after deviation, taking into account all the relevant circumstances whether the cargoes have been delivered at the agreed port and without damage[107] or substantial delay.[108] The implied significance of this criterion is not making a balance between the freight and the performance, because the freight may be low or high depending on the amount of performance of the contract by means of a sanction of contracting parties.[109] In addition, the relationship of carrier and cargo-owner still continues despite the deviation and the carrier is carrying the goods as a common carrier.[110]

105-Hellenic Lines,Ltd. v. United States, 512 F.2d, p 1196 at p 1197(1975); Compare,Tregenna[1940]A.M.C.p 1415, where it is stated: "The cargo-owner was liable for the freight, but in as much as the damages to the cargo exceeded the freight owned, this sum should be surrendered as part of the limitation fund".

106-Captain L.F.H. Stanton, The Law and Practice of Sea Transport, 1964, p 148, hereinafter cited as "Stanton, Sea Transport"; Bartle, p 101; Payne & Ivamy's, p 247; Hain SS. Co. v. Tate & Lyle Ltd [1936] 2ALL E.R. p 597 (H.L).

107-Compare, Puerto Madrin S.A. v. Esso Standard Oil Co.[1962] A.M.C. p 147, where it is stated:
"Since damage to cargo does not obviate the shipowner's claim for extra freight, charterer is liable for the reasonable value of transportation to the second port, not the charterer rate".

108-Per Lord Atkin, and per Lord Maugham, in, Hain S.S.Co. v. Tate & Lyle, op.cit, at pp 603, 616.

109-Knauth, p 242.

110-2 Carver, para, 1197; Bankes L.J. in, U.S. Shipping Board v.

ii-CANCELLING THE PROTECTION TERMS OF THE CONTRACT

In pre Hague Rules, the legal situation of unreasonable deviation remains unchanged after the adoption of COGSA whether in the United Kingdom or in the United States, especially when one recalls that neither the Hague/Visby Rules nor COGSA contain any provision concerning the legal consequences of an unreasonable deviation.[111] However, putting the matter inversely, it seems difficult to believe that a deviation which was unreasonable by breaching the fundamental term of contract of carriage[112], ousting the contract, depriving the carrier's right to benefit of protecting terms of both law and bill of lading[113], and consequently, creating liability in the carrier as an "insurer" for any loss of or damage suffered by the cargo[114], could be to change and abolish the harsh effect of the doctrine of deviation since the passage of the COGSA whether in the United Kingdom or in the United States, and the effect of unreasonable deviation will be confined to claiming the loss or damage caused by the cargo in accordance with the liability for damage with which the deviation has some causal

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J.J. Masters & Co. [1922] 10 Ll.L.Rep. p 573 at p 575.

111-Tetley & Cleven, pp 817-818; Astle, Shipping Law, pp 191, 202; Knauth, p 241.

112-Bartle, p 98.

113-St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial, 263 U.S. p 119 at p 124.

114-Willdomino v. Citro Chemical Co. 272 U.S. p 718 at p 725; Roger, p 157 at p 164; Longley, p 118.

relationship.[115]

I will however discuss whether or not the carrier has a right to depend upon the protecting terms in the International Conventions and COGSA and what are the legal consequences in dealing with an unreasonable deviation in the following points:

1. Preventing a Shipowner from Relying upon Exemption Clauses Contained in the Bill of Lading.
2. Loss of the Right to Limit Liability.

1-PREVENTING A SHIPOWNER FROM RELYING UPON EXEMPTION CLAUSES CONTAINED IN THE BILL OF LADING.

An inexcusable deviation from the contemplated course, whether such a deviation is geographical, or ungeographical, exposes the goods to greater risk than has been agreed and consequently may cause the loss of or damage to the cargo. Where the carrier has unreasonably deviated from the agreed or advertised course of the voyage, he is violating the contract of carriage by breaching the fundamental terms of contract which go deeper to the root of venture.[116]

Then, the carrier by having failed to perform his part of the contract must not be given the benefit of any of the exemption clauses contained in the bill of lading.

In respect of an exemption clause, what is the position of the carrier when the contract is repudiated?

The explanation for this phenomenon may have varied

115-Gilmore & Black, pp 180, 246.

116-Knauth, p 240; Coote, 81.

from time to time and case to case depending upon the relevant circumstances of a particular case, especially when one finds out that the effect of an unreasonable deviation on a carrier's right to the statutory exemptions provided by the Hague/Visby Rules or COGSA has not been made clear[117].

In addition, the decisions of the courts of particular cases have varied according to the different theories used by them to show the result of such a deviation.

The common understanding of the position of the carrier is generally recognized to be the same one which would exist in common law[118]. He is thus not entitled to invoke the benefit of the common law exceptions unless he can prove that the loss or damage to the cargo has occurred even if the vessel had not deviated from her course[119].

Carver[120] has made this quite clear when he states:

117-Longley, p 126; Jones v. Flying Clipper [1954] A.M.C. p 259, where it is stated:
"Neither the Brussels Convention nor the COGSA contains any provision concerning the legal result of an unjustifiable deviation".

118-Scrutton, p 440.

119-2 Carver, para, 1196; Temperley, pp 78-79; Tetley, Selected Problems of Maritime Law, p 560; Bartle, p 100; James Morrison & Co. Ltd. v. Shaw Savill & Albion Co. Ltd.[1916] 2 K.B. p 783; Compare, Astle, Shipping Law, p 202, where he states:
"The Shipowner will lose the benefits of the immunities from liability conferred upon the carrier by the Rules, and the only exceptions that the carrier would enjoy would be those that remained under common Law-except, perhaps, the right to limit liability".

120-1 Carver, para, 550.

"It is clear that the Rules have not altered the principle that an unjustifiable deviation deprives a ship of the protection of exceptions from liability, or, indeed, affected in any way the pre- existing position as to the effect of a deviation. In this respect the exceptions in Article 4 [2] and indeed the whole of the Rules, must be regarded as part of the contract which is abrogated by the deviation. For, by Article [2] the provisions of the Rules apply only under a contract of carriage covered by a bill of lading or similar document of title: if that contract goes, so go the Rules with it".

This view has been debated by the judgements of the United Kingdom courts which have generally refused to apply exemption clauses to exonerate a deviating carrier from the contractual obligations in event of an unreasonable deviation.[121] The general principle of the English Law concerning the doctrine of unreasonable deviation Stated by Lord Atkin[122], is that:

"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 for the carriage of goods by sea to which the Act applies".

The line of reasoning as I understood from the said view that the unjustifiable deviation will change the character of the voyage essentially by going to the very

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121-Morgan, p 484; Tetley, Marine Claim, p 354.

122-Foscolo,Mango v. Stag Line [1931] 41 Ll.L.Rep. p 165 at p 170; [1932] A.C. p 328 at p 340.

root of the contract of carriage.[123] As a result of such an abrogation the entire contract which was incorporated into the bill of lading, including all the exception clauses, is annulled.[124]

Thus, if the carrier failed to perform the contracted course of voyage as a condition precedent in a particular case upon which his right to rely on the exception clause, then he cannot avail himself of the exoneration clauses which only exist in the bill of lading for his benefit[125] by permitting himself deliberately to ignore the main object of the contract and disregard the intention of the contracting parties.[126]

By way of illustration one must not confuse between the consequences of a fundamental breach which is characterized on the construction basis and maritime deviation which is based on the substantive rule of law. Then the question of whether there was a fundamental or material breach or not and whether such a breach nullifies an exemption clause would have reference to the question of the construction of an exemption clause[127]

123-Astle, Shipping Law, p 192.

124-Sassoon & Cunningham, p 168; Denning, L.J. in, Spurling v. Bradshaw [1956] 2 ALL E.R. p 121 at p 124.

125-Collins, M.R. in, Joseph Thorley v. Orchis. S.S.[1907] 1 K.B. p 660 at p 668; Compare, Renton v. Palmyra [1957] A.C. p 149 at p 150; Pickford, J, in, International Cuano Ensuper Phosphaat Werken v. Robert MacAndrew [1909] 2 K.B. p 360 at p 365; Temperly, pp 78-79.

126-Sze Hai Tong Bank v. Rambler Cycle [1959] A.C. p 576 at p 588; John Carter v. Hansan Haulage [1965] 2 Q.B. p 495 at p 496.

127-N. Chandrahsan, "Fundamental Obligation Theory", [1979] 5 Colombo Law Review, p 115 at p 117, hereinafter cited

under contract law in general.

The decisions of the House of Lords in given cases move directly towards adopting a universal rule by characterizing the effects of exception clauses depending on their proper interpretation.[128] The general principle of English Law has not prohibited or nullified a clause of exemption of liability for a fundamental breach or breach of fundamental term, which is based upon the principle of freedom of contract.

Lord Wilberforce[129] has made that quite clear by saying:

> "Whether a condition limiting liability is effective or not is a question of construction of that condition in the context of the contract as a whole".

An exclusion clause must be clearly and unambiguously expressed in order to be effective in excluding liability for negligence.[130]

On the other hand the real construction of the exemption clause is that exemption or exclusion clauses are not intended to give exoneration from the consequences of the fundamental breach in the case of fraud, illegality and the like. If there was however a

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as"Chandrahsan".

128-Brian Coote, "The Effect of Discharge by Breach on Exception Clauses", [1970] C.L.J.p 221 at p 238, hereinafter cited as "Coote, Discharge by Breach"; George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd [1983] 2 ALL E.R. p 737.

129-Ailsa Craig Fishing Co. Ltd v. Finney Lock Seeds Ltd & Another [1983] 1 ALL E.R. pp 101-102.

130-Lord Wiberforce, Ibid, at p 102.

clear and deliberate intention when the contract was made that an exemption clause should cover such a material or a fundamental breach, then the law should enforce such clauses[131].

Lord Fraser of Tullybelton[132] has adopted a wide criterion which applies even in the case of negligence, where he states:

> "In my opinion it is. It applies to any liability whether under the express or implied terms of this contract, or at common law, or in any other way liability at common law is undoubtedly wide enough to cover liability including the negligence of the proferens itself, so that even without relying on the final words "any other way". I am clearly of opinion that the negligence of securicor is covered".

I am however inclined strongly in favour of the view which classifies the exclusion clause into fair or reasonable and unreasonable in order to apply it to a particular case after determining whether it was in standard form, whether there was equality of bargaining power, the nature of the breach[133], and the circumstances

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131-Stevenson v. Henderson [1873] 1 R. p 215 at pp 220-221; Compare, Lord Wilberforce, in, Suisse Atlantique [1967] 1 A.C. p 361 at pp 431-32, where he states:
"The parties should not be free to use contract to a mere declaration of intent"; Lord Ordinary (Kincraig), in, Alexander Stephen (forth) Ltd. v. J.J. Riley (U.K) Ltd. 1976 S.L.T. p 269 at p 272.

132-Ailsa Craig Fishing Co. Ltd. v. Malvern Fishing Co.Ltd & Another [1983] 1 ALL E. R. p 101 at p 107.

133-Chandrahasan, p 119.

prevailing at the time of the breach rather than at the time the contract was made.[134]

This attitude tends to restrict or limit the effect of exemption clauses which is based on the rational that there is inequality of bargaining power and that the terms have been imposed on the weaker party.[135]

For instance, if the strong party uses his superior power to impose an exemption clause on the weaker party, he will not be allowed to rely on it if he has himself been guilty of a breach going to the root of the contract. However, such contract is called an adhesion contract because there is an unequal bargaining relationship existing between them when it is drafted by the carrier leaving no real freedom of choice to the shipper.[136]

On the other hand, the doctrine of deviation which is based on the substantive rule of law has considerable effects on the contract of carriage in particular. By way of example, if the result of failure to perform the course of voyage is considered to be completely contrary to the main object of the contract this brings the entire contract to an end including the exemption clauses

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134-George Mitchell (Chesterhall) Ltd. v. Finney Lock Seeds Ltd [1983] 2 ALL E.R. p 737 at p 738.

135-Chandrahasan, p 121.

136-Steven, p 1549; Compare, Griffiths, J, in, R W. Green v. Cade Bros [1978] 1 Lloyd's.Rep. p 602 at p 607, where he states:
"They are therefore not conditions imposed by the strong upon the weak; but are rather a set of trading terms upon which both sides are apparently content to do business".

whether the parties had equal bargaining power or not.[137] This view is however not universally accepted and has been questioned by several critics.[138]

Some courts as well as authors[139] have therefore taken the view which held to retain the legal consequences of the exception clauses which excludes or modifies an obligation whether contractual or statutory and whether primary, secondary or anticipatory, according to the general rules of the freedom of contract that any person capable of making a contract is free to enter into any contract he may chooses[140] unless such a contract is against the equitable rule and penalties.[141]

The American jurisprudence appear to have been supporting this notion, even though, their decisions have been contradicted among circuits about the effect of deviation on the exception clauses.

The first line of cases reveal that a deviation from

137-McNair, J, in, Woolmer v. Delmer Price [1955] 1 Q.B. p 291 at pp 294-95; Lord Reid, in, Suisse Atlantique [1967] 1 A.C. p 361 at p 399; Chandrahasan, p 122; Thomson, "Fundamental Breach and English Law", 1977 J. R. p 38 at p 47, hereinafter cited as "Thomson, Fundamental Breach"; Richard Lawson, Exclusion Clauses, p 52,; Compare, Ailsa Craig Fishing Co. v. Malvern Fishing Co, [1983] 1 ALL E.R. p 101; George Mitchell v. Finney Lock Seeds Ltd. [1983] 2 ALL E.R. p 737.

138-Sassoon & Cunningham, pp 172-73.

139-Gilmore & Black, p 181, where he states:
"Certainly, a construction is appealing which would abolish the drastic effect of deviation, leading the carrier liable for damages caused by the undoubted breach of duty involved"; Whitehead, p 48.

140-Lord Salmon, in, Photo Production v. Securicor, [1980] A.C. p 827 at p 828 (H.L.).

141-Lord Diplock, Ibid, at p 850.

the contract of carriage as amount to an unreasonable deviation will displace the bill of lading and all its terms[142].

MacDonald,J[143], has made this quite clear when he approved the judgment of Lord Denning, M.R. in, Levison v. Steam Carpet Cleaning Co.Ltd[144], about the effect of fundamental breach on the exempting clause as follows:

> "The Court will, whenever it can, construe the contract so that an exemption or limitation clause only avails the party when he is carrying out the contract in substance, and not when he is breaking it in a manner which goes to the very root of the contract".

It is therefore true that COGSA allows a freedom of contracting out of its terms, but only in the direction of increasing the shipowner's liabilities, and never in the direction of diminishing them[145].

Obviously, this line of cases purports to give the innocent party the right to deprive the shipowners from the exempting clauses contained in the bill of lading, resulting from intentional breaches of the contract of carriage which have committed by the shipowner's command with a deliberate intention. Viz, if the deviation was

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142-Jones v. Flying Clipper [1954] A.M.C. p 259 at pp 263-64; In The Matter of Singapore Nav.Co.S.A.[1975] A.M.C. p 875; Ruth Ann [1962] A.M.C. p 117.

143-Captian v. Far Eastern SS.Co.[1978] A.M.C. p 2210 at p 2229.

144-[1973] 3 ALL E.R. p 498 at p 504; [1978] 1 Q.B. p 69 at p 81.

145-Gilmore & Black, p 145; Encyclopaedia Britannica v. HongKong Producer [1969] A.M.C. p 1741 at p 1747; Siderurgica v. North Empress [1977] A.M.C. p 1140 at p 1144.

done intentionally, then the act should have been classified as an unreasonable deviation and the other party to the contract is entitled to treat the contract as at an end and he is no longer bound by these protecting terms from the moment the deviation commences.[146]

This means that the negligence by itself, without more, is not a breach which goes to the root of the contract.[147] It does however not mean that gross negligence can never go to the root of the contract especially when the carrier handled the goods so roughly he was reckless and indifferent to their safety, he would be guilty of a breach of fundamental terms of the contract and could not rely on the exempting clause.[148]

Also, where the neglect caused a fire with causal connection to the deviation, the carrier could be deprived of the benefit of the exemption clauses.[149]

146-Roger, pp 181-82; Morgan, p 493; Lord Atkin, in, Hain SS.Co. Ltd. v. Tate & Lyle Ltd [1936] 41 Com. Cas, p 350 [1936] 2 ALL E.R. p 597 (H.L.), where he states:
"..the breach of deviation does not automatically cancel the express contract, otherwise, the shipowner by his own wrong act get rid of his own contract".

147-WaalHaven [1930] A.M.C. p 27, where it is stated:
"The distinction between a deliberately planned deviation and gross negligence compelling the inference that deviation was intended is tenuous".

148-Captain v. Far Eastern SS. Co. [1978] A.M.C. p 2210 at p 2225, Approved the judgment of Mcnair, J, in, Woolmer v. Delmer Price, Ltd. [1955] 1 ALL E.R. p 377; Scrutton, p 264.

149-Ida [1935] A.M.C. p 302; The Tai Shan (Fire), [1955] A.M.C. p 420; Compare, Indrapura, 171, Fed.Rep. 1909, p 929 at p 930, where

Accordingly, where fire is due to the actual fault or privity of the carrier, the shipowner is not entitled to the defence of the fire statutes and COGSA fire exception.[150] He will therefore be responsible for loss of cargo by fire during such a deviation.[151]

Consequently, if the deviation is not such a departure as could have gone to the root of the contract, then the carrier could rely on the exception of "Fire" either by an exemption in the bill of lading or by COGSA.[152]

However, according to the new line of cases in American jurisprudence which have purported to protect the carrier from the responsibility caused by deviation in enforcing the exception clauses.

The court has made this clear in Herman Schulte[153], as follows:

> "The language of the statute, if it constitutes a change of existing law, according to the rule applied to other statutes, is sufficiently clear and unmistakable".

This trend of view has been criticized by many

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it is stated:
"The owner of a vessel which has deviated from her voyage by his order is not relieved from liability for loss of cargo by fire during such deviation either by an exemption of loss by fire in the bill of lading or by Rev.St. para 4282,4283".

150-Ocean Liberty [1952] A.M.C. p 1681.

151-Indrapura, op. cit, at p 930.

152-Orient Trader {Canada, Exchequer Court, Ontario Admiralty District}, [1972] 1 Lloyd's.Rep. p 35 at p 36.

153-Atlantic Mutual v. Poseidon[1930] A.M.C.p 665 at pp 668-69; Merman Schutle, rational was followed by a Florida District, in, Nassau Class Co. v. Noel Roberts,Ltd, 249 F.Supp, p 116 [S.D.Fla 1955,{Quoted from Roger, p 178, n, 116].

authors[154] who have based their conclusion on the fact that any act which is characterized by the court as unreasonable, the court should declare the contract either void or voidable and such an act would be sufficient to establish a violation of COGSA[155].

The Rules then merely apply if the contract is valid, either by carrying out the terms of the contract or by waiving the deviation and affirming all the contract, including the exemption clauses[156].

Otherwise it would be beyond the scope of the Rules and there is no possibility to apply the Rules in event of an unreasonable deviation[157].

2-LOSS OF THE RIGHT TO LIMIT LIABILITY

In order to reveal the background of the nature and the central purpose behind the carrier's loss of his right to limit liability[158], it is necessary to consider the

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154-Roger, p 179; Morgan, p 493.

155-Roger, p 179; Tetley & Cleven, p 819.

156-Yates, Exclusion Clauses, p 146.

157-Falih, p 439.

158-H.B.Williams, "The Limitation Versus Direct Action Statutes", [1975] 8 Vanderbilt Journal of Transportational Law, pp 815-18, hereinafter cited as "Williams, Limitation", where he states:
"The earliest legislation in the United Kingdom upon the limitation of liability was passed in 1734 which discharged the shipowner from any responsibility for loss or damage to the cargoes on board the vessel sustained by embezzlement of the master or marines or by them without the privity or knowledge of such owner. In 1786, the limitation of liability was covered to losses of robbery even though the master and marines, had no part, to losses by their negligence and to damage done by collision. In 1813, the limitation had been extended to case of loss by negligence of the master or

following points:

1. The General Principle of the Limitation of the Carrier's Liability.
2. How and When Does the Carrier Lose the Right to Limit Liability.

"1"THE GENERAL PRINCIPLE OF THE LIMITATION OF THE CARRIER'S LIABILITY

The carrier is entitled to limit his liability for loss of or damage to the cargo in accordance with international principles in the Hague/Visby Rules, the Hamburg Rules and COGSA as follows:

"i" Article [5] of the Hague Rules provides:

marines and to damage done to other vessels and their cargoes.
The earliest legislation in the United States upon this subject is a Massachusetts Statute, taken substantially from the statute of George II, passed in 1818 and revised in 1836. It was followed by an act of the Marine legislature in 1821, copied from the statute of Massachusetts.
In 1815, enacted the limited liability Act. By the Act of june 26, 1884, it was extended possibility of limitation against all claims except seamen's wages; was extended to non-maritime torts and to claims arising either excontractu or ex delicto.
The Act of 1886 excluding the application of the act to inland vessels and the limitation statutes were applied "to all sea going vessels, and also to all vessels used on lakes and rivers or in inland navigation".
However, the Supreme Court went further and rejected an argument that claims under para 33 of the Merchant Marine Act of 1920 were not subject to limitation and had been decided that an action under this law, to recover damages for the death of a sea-man, may be enjoined in a Federal Court in a proceeding under the admiralty rules for limitation of liability of the shipowner"; East River Towing Co, 266 U.S. p 355; 69 L.ed. p 324.

"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 pounds sterling per package or unit, or the equivalent of that sum in other currency unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading".

"ii" This Article has been deleted by Article [2] of the Visby Rules and replaced by the following:

(a) 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 10,000 Francs per package or unit or 30 Francs per Kilo of gross weight of the goods lost or damaged, whichever is the higher".

"iii" Article [2] of the Brussels Protocol of 1979 to the Hague /Visby Rules provides that:

1. Article 4, paragraph 5(a) of the Convention is replaced by the following:

(a) 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 666.67 units of account per package or unit or 2 units of account per kilogramme of

gross weight of the goods lost or damaged, whichever is the higher".

2. Article 4, paragraph 5(d) of the Convention is replaced by the following:

"(d) The unit of account mentioned in this Article is the Special Drawing Right as defined by the International Monetary Fund".

"iv" COGSA 1971 of the United Kingdom was amended by the Merchant Shipping Act 1981 which implemented the Brussels Protocol of 1979 and substituted special drawing rights for the unit of limitation.*

"v" The Articles of COGSA in the United Kingdom and United States are identical to the Hague/Visby Rules.

"vi" Article 6[1](a) of the Hamburg Rules states:

> "The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of Article [5] is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per kilogramme of gross weight of the goods lost or damaged, whichever is the higher".

The purposes of these provisions purport to protect the carrier or the shipper from the particular packages of unexpectedly high value and to prevent the shipowner from lessening his liability otherwise than as stated in the Rules.[159]

On the other hand, where the Rules and COGSA do not

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*. Chorley & Giles', (8th ed, 1987), p. 170.

159-Article 3 [8] of the Hague Rules; Al-Jazairy, p 190.

apply, the shipowners are entitled to limit their liability to any amount they agreed upon.[160] The yardstick of the calculation of limits based on the Hague/Visby Rules, the Hamburg Rules and COGSA, is totally different depending upon the methods of computing the total sum of damages and the figure of packages or units and weights.

I will therefore discuss the following points:

"A" The Single System of Limitation.

"B" The Effect of Containerization and palletization on the "Per Package or Unit" Concept.

"C" The Dual System of Limitation.

"A" THE SINGLE SYSTEM OF LIMITATION

All the International Rules and COGSA have adopted the single system of the limitation of the carrier's liability based on "per package or unit" even though some ambiguities and equivocations have appeared in the application of several courts which have not interpreted these terms uniformly.

It is therefore necessary to point out the difference between and the definitions of "package" and "unit" in order to draw the carrier's liability[161] as follows:

"1" Per Package.

"2" Per Unit.

160-Payne & Ivamy, p 176.

161-Tallman Bissell, "The Operational Realities of Containerization and Their Effect on the "package" Limitation and the On-Deck Prohibition: Review and Suggestion", [1970-71] 45 Tul.L.Rev, p 902 at p 903, hereinafter cited as "Bissell".

"1" PER PACKAGE

The interpretation of this term has arisen several difficulties in applying it by the courts of various contracting states.[162] This renders it difficult to make a unified law to explain the elements and purposes of this expression.

The term package was not defined in the Article 4[5] of the Hague Rules and COGSA. The Visby Rules and the Hamburg Rules used the same expression, but the latter Rules set forth further explanation by providing Article 6[1](a):

" per package or unit".

Theoretically, the term package includes goods packed up or made up for portability[163], or as Tetley puts it "a wrapper, carton or other container in which cargo has been placed for carriage".[164]

In particular cases, the jurisprudence of various countries has differed on that which constitutes the elements and the purposes of per package limitation.

Goddard, J[165], defined this term as:

162-Erling Selvig, "Unit Limitation and Alternative Types of Limitation of Carrier's Liability", Published in Six Lectures on the Hague Rules, 1967, p 109 at p 110, hereinafter cited as "Selvig, Unit Limitation".

163-Temperley, p79; Selvig, Unit Limitation, p 111; Lexicographical definition of "package" is "a bundle of things packed, parcel, box...etc. in which things are packed"; See, The Pocket Oxford Dictionary, (6th.ed, 1978), p 632, hereinafter cited as "The Pocket Oxford Dictionary".

164-Tetley, Marine Claim, p 435.

165-Feinberg, ct, j, in, Standard Electrica v. Hamburg Sudamerikanische [1967] 2 Lloyd's. Rep. p 193, (U.S.Court of Appeals, Second Circuit); Studebaken Distributors, Ltd. v. Charlton S.S.Co. [1938] 1 K.B. p 459 at p 467; Whaite v. The Lancashire &

"package must indicate something packed".

This means that the lost or damaged goods shipped unpacked, or unboxed, can never be deemed goods in any imagination as packages.

The purposes of Article 4[5] of the Rules or COGSA was to protect cargo. Then the "package" would completely include goods which made up for facilitating the handling of the goods during transport, set a reasonable figure below which the carrier should not be permitted to limit his liability[166] and to protect the shipowner from any excessive or unforeseen claims of high value goods which were not inserted in the bill of lading. This definition of the package does, nevertheless, not reveal how much packaging or covering of the goods is required so as to determine what constitutes a "package".[167]

The United States Courts held that the shape, size, or weight of the cargo has however no effect on the determination of whether the packed goods constitutes package or not.

Judge Moore[168], has made this clear when he concluded:

> "The meaning of "package" which has evolved from the cases can be said to define a class of cargo, irrespective of size, shape, or weight, to which some packing preparation for

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Kirkbank, 9 L.R.Exch, p 67, where it is stated:
"Contained in any parcel or package, unless a greater value was declared for the goods".

166-Chief Judge, Friendly, in, the Mormaclynx [1971] A.M.C.p 476 at p 486.

167-Selvig,Unit Limitation,p 111; Falih,p 95; Samir Mankabady,p 58.

168-Aluminios Pozuelo, Ltd. v. S.S. Navigator [1968] A.M.C. p 2532.

transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods".

Thus, the mere size will never prevent the goods from being a package.[169] For instance, a railway wagon[170], a roll of steel weighing 32.1/2 tons in a wooden case[171],a container[172],a crated machine[173] and a pallet loaded with goods[174], have all been to be packages.[175]

"2"PER UNIT

The Hague/Visby Rules and the Hamburg Rules provide in Article 4[5] and Article 6[1]{a} respectively the phrase "per unit" which it has wider meaning than the term "per package".

One can therefore say that if the damaged cargo does not constitute a "package", then the limitation of liability is based on per unit.[176] Viz, the limitation of liability is extended to goods which are not shipped in "packages".[177]

The "unit" concept may be construed as "shipping unit"

169-Scrutton, p 442.

170-Whaite v. Lancashire & Yorkshire R.Y.Co.(1874) L.R.9 EX.p 67.

171-Mitsubishi International Corp.v.S.S."Palmetto Stute"[1963] A.M.C.p 958.

172-Encyclopaedia Britannica Inc. v. Hongkong Producer[1969] A.M.C. p 1741; [1969] 2 Lloyd's.Rep. p 536.

173-Carle & Montanari Inc. v. American Export Isbrandtsen Lines, 275 F. Supp, p 76 (1967).

174-Standard Electrica S.A. v. Hamburg Sud-Amerikanische [1967] 2 Lloyd's.Rep. p 193.

175-Scrutton, p 442; Tetley, Marine Claim, pp 435-436.

176-Bissell, p 906.

177-TD/B/C.4/ISL/6/Rev.1, p 45.

such as the physical unit as received by the carrier from the shipper, e.g.; an unboxed tractor or yacht, a barrel, a sack...etc; or, it may refer to the "freight unit", i.e; the unit of measurement applied to calculate the freight[178], or it may refer to the "commercial unit" in which the particular commodity is customarily traded, e.g.; timber.[179] The latter unit may be deemed as a freight unit by which the freight of carriage is calculated or it may refer to the unit by which the purchase price is computed.[180]

The distinction between package and unit is of little interest when the "unit" is considered as a "shipping unit" which embraces the term "package".[181]

The position will be different when the "Unit" is considered as a "Freight Unit" which is usually based on the weight or value of the cargo. The calculation based upon "Freight Unit" will be however higher than those based upon "Shipping Unit".[182]

The concept of the "Unit" has been made quite clear under the United States COGSA by using a new phraseology to the "Unit" which is expressed as a "Per Customary Freight Unit".[183] The term "Freight" may refer both to the money paid for the transportation and the goods carried.[184]

178-Scrutton, p 442; Wilson, p 146; Falih, p 128.

179-Selvig, Unit Limitation, p 111; Samir Mankabady, p 58.

180-Falih, p 129.

181-Selvig, Unit Limitation, p 111; Samir Mankabady, 58.

182-TD/B/C.4/ISL/6/Rev.1/ p 45; Selvig, Unit Limitation, p 111; Falih, p 128.

183-Article 4 [5] of United States COGSA.

184-Selvig, Unit Limitation, p 115.

Judge Chestnut, in, the Brazil Oiticia, Ltd. v. The Bill[185], has made this term clear when he said:

> "Generally, in marine contracts the word "Freight" is used to denote remuneration or reward for carriage of goods by ship, rather than the goods themselves".

Then the trend of American jurisprudence seems to accept the unit on which the freight is based as the "Customary Freight Unit" unless the freight unit employed was a mere false.[186]

The COGSA of the United Kingdom in Article 4[5] defines however the term unit as being equivalent to a "Shipping Unit"[187], which is measured by "package". This means that the term "Unit" is extended to cover goods which are not shipped in packages[188] when Article 4[5] added the term "or unit" after the term "per package".

Under United Kingdom COGSA the term "Unit" should thus be construed as the "Shipping Unit" which has the same effect of per packages limitation.[189] Whereas, the COGSA of United States provides a "Customary Freight Unit" which differs from the prevailing view point in the Hague Rules, which refers to "Shipping Units".[190]

185-[1944] A.M.C.p 883 at p 887, affirmed,[1945 A.M.C. p 108 (4th. Cir.1944).

186-George F.Wood, "Damages in Cargo Cases", [1970-71] 45 Tul.L. Rev. p 932 at p 948, hereinafter cited as "Wood, Damages in Cargo".

187-Bissell, p 904.

188-Falih, pp 130-143; Bissell, p 904.

189-Compare, Tetley, Marine Claim, pp 438-39.

190-Chandler, p 268.

B-THE EFFECT OF CONTAINERIZATION AND PALLETIZATION ON THE "PER PACKAGE OR UNIT" CONCEPT

The recent advent of the container[191] and pallet[192] as a modern technological advances in the transportation industry have created various difficulties in explaining the term " Package" and whether it is or not applicable to these types of shipment. Viz, we have to consider how the limitation of liability is to be construed in light of this technological change.

The lacuna of the provisions of the Hague Rules in dealing with the concept of "package" is reflected to the container, pallet-package problem which was unknown when the Hague Rules were enacted. This prevents the courts of various countries to find a criterion for this dilemma.

The following are however the criteria which have emerged the decisions of the courts of different countries.

191-An article of transport equipment other than a vehicle or conventional packaging [which is] ... strong enough to be suitable for repeated use;... specially designed to facilitate the carriage of goods by one or more modes of transport, without intermediate reloading .. [Fitted] with devices permitting its ready handling, particularly its transfer from one mode of transport, and ... so designed as to be easy to fill and empty, See, Proposed Regulation, 49 C. F. R. para, 420. 3 (3), Published at 34 Fed. Reg. 14054 (Sept. 4, 1969). Quoted in, Edward Schmeltzer & Robert A. Peavy, "Prospects and Problems of the Container Revolution", [1969-70] 1 J.Mar.L.& Com, p 203, Footnote, 1, hereinafter cited as "Schmeltzer & Peavy".

192-"A method of stowing general cargo of a fairly homogeneous nature on rectangular wooden cargo trays designed to be transported by means of a fork lift truck"; Bissell, p 907.

1- The Intention of the Parties.

2- Facilitation for Transport.

3- Functional Economic Test.

1- THE INTENTION OF THE PARTIES.

According to this criterion the main factor which determines whether the container or the pallet constitutes a "package or unit" is governed by intention of the contracting parties.

The shipper and the carrier may or may not intend to treat these types of transportation as a "package" depending on the considerations of all the relevant circumstances of a particular case; e.g. previous course of dealings, the descriptions and the types of the goods stated in the bill of lading; the type of container[193] or pallet, who shipped it, who sealed it, if it was sealed on delivery to the carrier.[194]

As a result of technological advances in the transportation industry, the container and the pallet

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193-The types of container may be divided into these classes:
a-Door-to-Door shipment: is a container which loaded and sealed at the supplier's factory and delivered intact to the consignee's warehouse or other place of business.
b-Point-to-Point shipment: is a container loaded by a freight consolidator at an inland point and transported to an inland point overseas.
c-Port-to-Port or Air Terminal-to- Terminal: is the movement of a container consolidated at a port or air terminal and shipped to an overseas port or air terminal where the contents then are sorted for distribution, See, Schmeltzer & Peavy, pp 205-206.

194-Coller, J, in, The"Tindefjell" [1973] 2 Lloyd's.Rep. p 253 at p 258, {Canada Federal Court-Trial Division}.

were used as modern methods for carrying goods. The shipper and carrier recognized the cargo may be packed in a palletized form or containerized form.[195] This means that the contracting parties have taken into account the considerations of the container and the pallet in what constitutes a "package".

Then the court can deduce the characterization of the parties from the material facts and shipping documents, such as, the description of the goods in connection with their actual numeration by the carrier[196] if the individual bales were the packages and not the container.

Also, when the deck receipt and the bill of lading indicated that the parties regarded each pallet or container as a "package".[197]

By contrast, when the bill of lading states the number of packages as "container", and gives no indication that it contains "190 cartons", these cartons are considered as one package and not each carton individually.[198]

One can thus conclude that the surrounding circumstances in each case, and the intention of the contracting parties indicated by the shipping documents and the course of dealing between them[199], are considered

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195-Standard Electrica v. Hamburg Sudamerikanische [1967] 2 Lloyd's.Rep.p 193 at p 195.(U.S.Court of Appeals,Second Circuit).

196-The Mormaclynx [1971] 2 Lloyd's.Rep. p 476 at p 486, (U.S. Court of Appeals, Second Circuit); Falih, p 165.

197-Standard Electrica v. Hamburg Sudamerikanische,op.cit, p 195.

198-The"Bischofstein" [1974] 1 Lloyd's.Rep. p 122 at p 126, (U.S. District Court Southern District of New York".

199-Smith, Dep, J, in, Aleksander 'Serafimovich"[1975] 2 Lloyd's.

the main factors in determining this criterion. This criterion has been criticized for the inequality in bargaining power of the contracting parties to conclude the bill of lading which has made the contract more favourable to carriers and has given them enormous advantages[200]. Viz, the characterization consider it as a contract of adhesion[201] which has made the balance of the bargaining power fruitless and consequently the intention of the contracting parties becomes futile[202].

2-FACILITATION FOR TRANSPORT:

This criterion states that any preparation which makes cargo handling easier will cause that cargo to be designated as a COGSA package[203].

The palletized and the containerized forms in which the

Rep. p 346 at p 354, (Canada Federal Court, Trial Division).

200-Tetley, Marine Claim, p 409.

201-Standard Electrica v. Hamburg Sudamerikanische, [1967] 2 Lloyd's.Rep. p 193 at p 194, where he states:
"When COGSA was enacted in 1936, it had as its central purpose the avoidance of adhesion contracts, providing protection for the shipper against the inequality in bargaining power".

202-Nabob Foods,Ltd. v. Cape Corse (wonersl,[1954] 2 Ll.L.Rep.p 40 at p 43; D.J.Beeks, in, The Aegis Spirit [1977] 1 Lloyd's.Rep. p 93 at p 100 (Exchequer Court of Canada, British Columbia Admiralty District), where he states:
"A further undesirable side effect of a rule based upon the parties intention is its obvious potential for impairing the value and negotiability of ocean bills of lading, due to uncertainty in the allocation of risks with respect to the cargo".

203-George Denegre, "Admiralty-Carrier-Owned Shipping Container Found not to be COGSA "Package", [1981-82] 56 Tul.L.Rev. p 1409 at p 1411, hereinafter cited as Denegre,"Package".

goods were received for shipment are deemed under this criterion as a mechanical aid for loading, unloading and delivery with less damage or loss to cargo and less labor expense over the long course of the voyage[204].

Then these types of carrying the goods have the physical characteristics of a package and are clearly a bundle put up for transportation[205]. They are quite convenient and safe in handling. Viz, the containers, or pallets are actually no more than a handling, loading, stowing and unloading devices of the carrier[206].

In determining whether or not the container or pallet is a COGSA package, the courts in the United States have drawn a distinction between a situation in which the carrier or the shipper who supplies the cargo container or pallet regardless the owns the ship or controls these types of carrying the goods[207].

The Second Circuit, in, Standard Electrica v. Hamburg Sudamerikanische[208], held that per pallet to be considered the COGSA package because it was the shipper and not the carrier who chose to pack up the goods into a pallet. In contrast, Judge Friendly, in, the leather's Best Inc v. S.S. Mormaclynx[209], held that:

204-Chief Judge Lumbard, in, Standard Electrica v. Hamburg Sudamerikanische, op.cit, at pp 194-95.

205-Black, Law Dictionary, Rev. 4th. ed, 1968, p 1262.

206-Seymour Simon, "Latest Developments in the Law of Shipping Containers", [1972-73} 4 J.Mar.L & Com, p 441 at p 442, hereinafter cited as "Simon, Latest Developments"; Denegre, Package, p 1419.

207-Denegre, Package, p 1418.

208-op.cit, p 195.

209-[1971] 2 Lloyd's.Rep. p 476 at pp 485-87.

"When the carrier has made up the cargoes into a container for transport, then a cargo container is not a package for COGSA purposes, because the court does not prefer to find the shipper in a less favourable position as to liability comparing with carrier who chose this type of shipment".

In the same line of reasoning judge Cashing stated however that the wooden sheathing which partially covered the tractor from the skid was placed there for protective purposes[210] and not for facilitating the handling and transporting of the machinery.[211]

3-FUNCTIONAL ECONOMIC TEST:

Under this test, if the inner cartons of the container could feasibly be transported separately or be suitable for break-bulk shipment[212], a presumption would be created that the cartons, or packages rather than the container would be deemed as a COGSA package.

If the container was not presumed to be the COGSA package[213], then this presumption could be rebutted by the

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210-Gulf Italia Co. v. S.S. Exivia [1958] A.M.C. p 439 at p 443, affirmed by the Second Circuit [1959] A.M.C. p 930

211-Middel East Agency, Inc. v. S.S. John B. Waterman,[1949] A.M.C. p 1403.

212-"Break-Bulk",is the term used to refer to traditional non-containerized carriage", See, Matsushita Eles. Corp. of A.M. v. S.S. Aegis Spirit, 414 F.Supp, pp 894, 900, Footnote,4(1976), [1977] 1 Lloyd's.Rep.p 93.

213-John D. Kimball, "Package Limitation-A Container is a "Package" in Re Tug Dorothy H"[1980] 11 J.Mar.L&Com p. 370, hereinafter cited as "Kimball,Package Limitation"; M.E.De Orchis,"The Container and

evidence of the contracting parties intent.[214]

Oakes. Ct. J[215], who has created this criterion after a long struggle rationalized the necessity for such test by saying:

> ["The functional package unit" test we propound to-day is designed to provide in a case where the shipper has chosen the container a "common sense test' under which all parties can allocate responsibility for loss at the time of contract, purchase additional insurance if necessary, and thus, avoid the pains of litigation].

Under this criterion the carrier has however to prove that the parties have intended to treat the container as a package. But when the shipowners own the packaging units, the carrier should prove that his units are packages rather than the container.[216]

The functional economics test does not solve the problems of the limitation of liability created by containers or pallets as a modern technological

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the Package Limitation-the Search for Predictability" [1973-75] 5 J.Mar.L & Com, p 251 at p 256, hereinafter cited as "De Orchis, The Container and the Package Limitation"; Denegre, Package, p 1414; Judge Oakes, in, Royal Typewriter v. M.V. Kulmerland,[1973] 2 Lloyd's.Rep. p 428 at pp 431-32, hereinafter cited as "Kulmerland".

214-Timothy J. Armstrong, "Packaging Trends and Implications in the Container Revolution" [1981] 12 J.Mar.L & Com, p 427 at p 438, hereinafter cited as "Armstrong, Packaging Trends".

215-Kulmerland, op. cit, at p 432.

216-Ibid, p 432; Falih, p 170; The American Legion, [1975] 1 Lloyd's.Rep. p 295 at p 296 (U.S. Court of Appeals, Second Circuit).

methods for carrying goods. consequently, this test has been severely criticized for many reasons:

First of all there is no specific standard of what constitutes a functional economics test which has made the circuits courts of the United States differ widely in the interpretation of this criterion even by the second circuit which is deemed to be the creator of such a touchstone.[217]

For instance, the court mentioned that the standard of usability and suitability for overseas shipment could be considered as functional economics.[218]

Also, the contracting parties' intent, as evidenced by the bill of lading, should have no effect on a COGSA determination.[219]

Judge Anderson[220] argued that:

217-Armstrong, Packaging Trends, p 452.

218-Seymour Simon, "The Law of Shipping Countries", [1973-74] 5 J.Mar.L.& Com, p 507 at p 508, hereinafter cited as "Simon, The Law of Shipping Countries", where he states:
"If a carrier accepts any shipment-whether with packaging, without packaging, or even with obviously frail or inadequate packaging-it is deemed suitable, and the carrier is duty bound to give the shipment such appropriate care... Thus, even a frail or inadequate package or the absence of packaging is functional"; Tyler, Jr. D. J. in, The Brooklyn Maru, [1975] 2 Lloyd's.Rep. p 512 at p 515, where he states:
"Since the individual cases were not suitable for overseas shipment without further packaging or special shipping arrangements the [636] boxes placed in the container failed the "functional economics test" and could not qualify as S. 4 (5) packages"; Falih, p 171.

219-Denegre, Package, p 1416.

220-Atlestate Ins. v. Inversions Navieras Imparce, 646 F.2d, p 169 at pp 171-72 (5th. Cir. 1981), Quoted by Denegre, Packaging Trends,

"Section 4 [5] of COGSA was enacted in response to the superior bargaining power of the carrier, and its purpose was to set a reasonable figure below which the carrier should not be permitted to limit his liability".

One can thus conclude that two factors have expressed the container-packages issue:

"a" Ownership or control of the container.

"b" Disclosure in the bill of lading of the number of inner cartons.

Lastly, this test does not afford the predictability needed for the parties to allocate responsibility for loss at the time of contract and to purchase the necessary insurance, because neither the carrier knows how the cargoes inside a sealed container are packed, nor the shipper gains the benefit of a limitation based on each carton in the container[221].

The courts placed, however, more emphasis on the relevant circumstances in which the cargo was loaded[222] as follows:

1-Whether the carrier actually possesses superior bargaining strength sufficient to coerce the shipper's

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p 1417.

221-De Orchis,The Container and the Packaging Limitation", p 279.

222-There is another criterion for the container-package issue which is called "single shipper package test" that where a container contains goods of a single shipper and has been sealed and packed by the shipper; See, Rosenbruch v. American Export Isbrandtsen Lines Inc.[1974] 1 Lloyd's.Rep. p 119 at p 121.(United States District Court Southern District of New York).

agreement to adhesion contract;

2-Whether the parties treated the container as a single unit in their negotiations, on the documents of contract, and in determining the shipping rate;

3-Whether the shipper, or at least one other than the carrier, chose to ship the goods in container;

4-Whether the shipper or carrier procured the container;

5-Whether the goods were delivered to the carrier previously loaded into the container;

6-Whether the goods were loaded by the shipper or by the carrier;

7-Whether the carrier actually observed the contents of the container before it was sealed for shipment;

8-Whether the container was loaded with the shipper's goods only, and not those of any other shipper;

9-Whether the markings on the container provided a complete accurate indication of the contents or their value;

10-Whether the bill of lading contained any, declaration of the nature of the container's contents and their value;

11-Whether the bill of lading provided the shipper was an adequate opportunity to declare the value of the container and its contents to obtain financial protection for any excess value;

12-Whether the shipper took advantage of this

opportunity[223].

These criteria may help the courts to find out the solution to the dilemma of containerization and palletization when they apply the concept of the "per package or unit" under the Hague/Visby Rules.

The Draftsman of the Hamburg Rules have dealt with this issue in Article 6 [2](a) which states that if the bill of lading recited "one container, said to contain a specific amount of packages", this would constitute the same amount of packages or shipping units which were contained in the container, pallet or similar article of transport used to consolidate goods. Conversely, if the bill of lading recited "one container, said to contain one article" such as machine or yacht, this would constitute one shipping unit[224].

C-THE DUAL SYSTEM

The Hague/Visby Rules and the Hamburg Rules adopted an alternative limitation system which might be called a "mixed" system of limitation which fixed a certain amount per package or unit or a certain amount per kilo of gross weight of the goods lost or damaged whichever is the higher[225].

223-Kimball, Package Limitation, p 374; Armstrong, Packaging Trends, p 441.

224-D.E.Murray, "The Hamburg Rules. A Comparative Analysis", [1980] 12 Lawyer of the Americas (U.S.A.), p 59 at p 86, hereinafter cited as "Murray, The Hamburg Rules".

225-Article 2 [a] of the Hague/Visby Rules and Article 6 [1] (a) of the Hamburg Rules, but the latter Rules are stated that:

The controversy has arisen in the UNCITRAL conference about the merits of retaining the dual system of the limitation of liability in the Hague/Visby Rules or adopting the new system which is based on the weight of the cargo alone as found in the C.I.M.[226], C.M.R.[227], and Warsaw Conventions.

The discussions about this issue had separated the conference into two divisions:

Nigerian and Norwegian delegates endorsed the view of the unit limitation which is based on the principle of the weight alone, but the Australian delegate indicated that he could accept the dual system.

Whereas, the delegates of the United States, the United Kingdom, the USSR and France were in favour of retaining the dual system in the Hague/Visby Rules. This view was endorsed by Belgium, Poland, Singapore, India, Argentina, and Brazil. Japan accepted this system on condition that the container should be governed by weight alone.[228]

The arguments of these delegates are summarized as follows:

"The liability of the carrier for loss resulting from loss of or damage to goods according to the provisions of article [5] is limited to an amount equivalent to 835 units of account per package or other shipping unit or 2.5 units of account per Kilogramme of gross weight of the goods lost or damaged, whichever is the higher".

[226]-International Convention Concerning the Carriage of Goods by Rail.

[227]-Convention on the Contract for the International Carriage of Goods by Road.

[228]-Sweeney, part II, p 329.

"a" The difficulty of establishing weight in cases of partial loss, or broken package.

"b" The dual system is a flexible approach to the problem of the carrier's limitation of liability[229]. For instance, the per package or unit will be applied in case of the weight of cargo is unknown. In contrast, the weight test is only applicable and it is more beneficial to the shipper in case of bulk cargo.

On the other hand the amount of freight will be deemed as a baseline in calculating the limitation amount of the carrier's liability for delay in delivery[230].

The calculation of the amount of limitation of the lost or damaged cargo depending upon the weight or per package or unit, will provide the same amount of limitation[231]. This means when each package or unit weighs [333.3] Kilos or less under the Hague/Visby Rules or [334] Kilos under the Hamburg Rules[232], the limit under the Hague/Visby Rules is 10.000 Francs, per package or unit or 30 Francs per Kilo and it produces the same limit under the Hamburg Rules where the 835 SDR represents the limits of a package or other shipping unit weighing [334] Kilos[233].

When the gross weight of the goods lost or damaged is

229-Ibid, pp 328-29; Samir Mankabady, p 62.

230-Article 6[1] (b) of the Hamburg Rules; Samir Mankabady, p 62.

231-Falih, p 373, where he stated the method of calculation as follows:

"10.000 Francs / 30 Francs= 333.3 Kilos".

232-Diamond, The Hamburg Rules, p 19; Falih, p 374.

233-Falih, p 374, where he stated the following calculation:

835/2.5 SDR per Kilo= 334 Kilos.

however more than [333.3] Kilos under the calculation of the Hague/Visby Rules or more than [334] Kilos under the Hamburg Rules, the alternative limit based on weight will provide a higher limit.

These limits are applied whenever the amounts of the limitation are higher than the per package or unit, according to the provisions of the Hague/Visby Rules[234] and the Hamburg Rules[235].

The Draftsman of the Hamburg Rules clarified the ambiguities with respect to the term "unit" by stating "per package or other shipping unit"[236]. It should be then noted that the term "unit" under the Hamburg Rules means "Shipping Unit". Viz, the calculation method of the weight under "package or unit" concept produces the same standard which is calculated as 334 Kilos.

However, the baseline of the limitation which adjusted by weight will be higher for several cargoes and it will impose limitation upon new items where non-existed before.

Also, the lost or damaged article of a transport {such as a container, pallet.etc.} is recoverable under the Hamburg Rules as one separate shipping unit from the view point of the carrier's limitation of liability[237].

234-Article 2 [a] of the Visby Rules.

235-Article 6 [1] (a) of the Hamburg Rules.

236-Erik & Thomas, p 686.

237-Article 6 [2] (b) of the Hamburg Rules; Chandler, p 271.

2-HOW AND WHEN DOES THE CARRIER LOSE THE RIGHT TO LIMIT LIABILITY

Authors have differed between themselves in relation to the considerations of the characterization of the limitation of the carrier's liability and how the carrier loses his right to limit liability in case of an unreasonable deviation under the Rules and COGSA. Some authors favour however applying the Rules as a matter of contract and the others prefer applying the Rules as *ex proprio vigore*. The subject is thus divided under two headings:

A-The Rules Apply as a Matter of Contract.

B-The Rules Apply *ex proprio vigore*.

A-THE RULES APPLY AS A MATTER OF CONTRACT

According to this theory, that the pre-existing position of the common law as to the effect of an unreasonable deviation is still applicable under the Rules, an unjustifiable deviation deprives the shipowners of the protection provisions from liability including the limitation clauses which incorporates the Rules, as a matter of contract.[238]

Lord Atkin[239] made this quite clear when he said:

> "I am satisfied that the general principles of English Law are still applicable to the

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238-Scrutton, p 440; Knauth, p 241; Tetley, Marine Claim, p 354.

239-Stag Line. v. Foscolo Mango & Co,op.cit, at p 340; 1Carver, para 550.

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".

That means, in respect of the effect of unjustifiable deviation that the whole of the Rules, should be considered as part of the contract of carriage covered by a bill of lading or similar document of title[240] which is cancelled by the unreasonable deviation.

Namely, if the carrier has committed unreasonable deviation then the contract and all the exceptional provision including the limitation clauses will be nullified.

The Rules no longer apply therefore to a voyage which was actually a different one from that to which the bill of lading applied[241]. Thus, if the contract goes, so the Rules go with it[242], where the Rules were applied contractually or on a consensual basis, and were not applicable *ex proprio vigore*[243].

There is however a long series of cases which have explained such a serious effect of an unreasonable deviation, but not in uniform language.

The jurisprudence in the United Kingdom has enunciated

240-Article 1 [b] of the Hague Rules.

241-Sassoon & Cuningham, p 172.

242-1 Carver, para 550; Balian & Sons v. Joly, Victoria & Co. Ltd, (1889-90) 6 T.L.R. p 345.

243-Sassoon & Cuningham, p 174.

in most decisions that unreasonable deviation would be sufficient to constitute the liability which is expressed in the bill of lading.

In general, the effect of unauthorized deviation, as stated by Lord Atkin in The Ixia[244] would displace the statutory exceptions contained in the COGSA which are incorporated in the bill of lading.

This trend is confirmed by a long series of decisions adopting in fact a conclusion that the unreasonable deviation displaces the contract and it abrogates the contractual stipulations including the limitation clauses when the innocent party chose to treat the contract as at an end.[245]

The United States jurisprudence has been in conflict about this issue.

Some of the United States courts have followed the Ixia and hold that the carrier has no right to the COGSA limitation of liability on the ground that the unreasonable deviation is deemed as a fundamental breach of the contract.[246]

The interesting case in the American Courts which emphasises that the main effect of unjustifiable deviation is to deprive the carrier of the limitation clauses and displace the $500 per package of COGSA, is

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244-[1932] A.C. p 328 at p 340.

245-Hain S.S. Co.Ltd. v. Tate & Lyle, Ltd. [1936] 2 ALL E.R. p 597 at pp 600-601.

246-Lafcomo, [1946] A.M.C. p 903 at p 907; Morgan, p 487; Falih, p 431.

Flying Clipper[247]. The authority of the passage of such a view point is the English Ixia[248] case.

Much of the carrier's argument for preserving the principle of the common law is however that there is no indication that the COGSA of 1936 represent any basic departure from the pre-existing law as the Flying Clipper[249] stated:

> "Neither the convention nor the Act contains any provision concerning the legal result of an unjustifiable deviation. There is nothing in the history of the Act to indicate that congress by fixing the limitation of $500 intended to displace the doctrine of unjustifiable deviation which was so firmly entrenched in maritime law, such as a drastic change in the existing law, with its far-reaching consequences in the commercial and financial world would have been expressed in clear and unmistakable terms".

This trend of the effect of an unreasonable deviation has received judicial approval in Encyclopedia Britannica Inc. v. S.S. Hongkong Producer[250], where it is stated:

> "The stowing of the six containers on the weather deck was, therefore, an unreasonable deviation. It is not disputed that the damage to the cargo was caused by sea water to which it was exposed by being stowed on deck. The carrier is liable for the full amount of

247-[1954] A.M.C. p 259 at pp 262-63, 266.

248-op.cit, p 328.

249-op.cit, pp 262-63.

250-[1969] A.M.C. p 1741 at p 1757; Hato La Vergarena, C.A. v. S.S. Susaa [1973] A.M.C. p 195, where it is stated:
"Ocean carrier's unreasonable deviation in stowing cargo on deck deprives it of COGSA Sec. 3 [6]".

damages sustained without the benefit of the $500 limitation per package of COGSA".

The other United States Circuits have however in general accepted the Flying Clipper's viewpoint, this acceptance may be on various rationales. For instance, when the carrier fails to call at a particular port which is stated in the bill of lading, then it constitutes an unreasonable deviation which deprives the carrier not only of its bill of lading defences but also of the right to limit its liability as shipowner[251].

Also, the ocean carrier is not entitled to limit its liability for loss and damage to cargo where it has knowledge and privity as to the cause of shipboard fire. By the way, the negligence of the shipowner's managing agent to provide a proper crew and to train the crew in fire protection, will hold him liable to cargo interests without the benefit of the COGSA limitations available to the ocean carrier[252].

One can therefore say that the trend of this view is that the unreasonable deviation, whether geographical or non-geographical deviation, constitutes a fundamental breach of the contract of carriage which have incorporated the Rules and thus renders COGSA's per package limitation and any limiting clauses inapplicable altogether[253].

251-In the Matter of Singapore Nav. Co.S.A.[1975] A.M. C. p 875.

252-Cerro Sales Corp. v. Atlantic Marine Enterprises, [1976] A.M.C. p 375.

253-Captain v. Far Eastern S.S. Co.[1978] A.M.C. p 2210; Spartus

B-THE RULES APPLY *EX PROPRIO VIGORE*

This opinion has adopted the trend which is stated that the doctrine of unreasonable deviation, under the common law, is displaced by the Hague/Visby Rules and COGSA.

The common understanding of the Hague Rules and the provision of the limitation of liability follows the deviation provision immediately in the same article. All these significant provisions imply that the deviating carrier can no longer be held liable beyond the amount of limit constituted by Article 4 [5] of the Hague Rules.[254]

This means that when the Rules apply by their own force, the deviating carrier is entitled to invoke the statutory limitation to limit his liability within the specified amounts, unless the nature of the goods has been declared by the shipper before shipment and inserted in the bill of lading[255], depending upon the term "in any event" in the case of unjustifiable deviation.[256]

The influence of prefix "in any event" upon the effect of deviation has been discussed extensively by the United States courts, which aim to support their opinion to

Corp. v. S/S Yafo, F.2d, p 1310 at p 1311,(1979); Tetley& Cleven, p 819.

254-Sassoon & Cunningham, p 173.

255-Article 4 [5](a) of the Hague Rules and Visby Rules respectively; De Laval Turbine,Inc. v. West India Industries,Inc, 502 F.2d, p 259 (1974).

256-Scrutton, p 440; Wilson, p 149; Compare, Morgan, p 484, where he states another view as follows:
".. the carrier may be deprived of all other protections, but not of those subject to the "in any event" preamble"; Astle, p 170.

mitigate the drastic effect of deviation.[257]

It is arguable that these words were presumably designed to prevent the limitation provision from being abrogated through unjustifiable deviation and it would be redundant if the statutory limitation was not held to be effective; namely that the Rules were basically enacted to reflect a compromise between cargo-owners and shipowners or carriers interested and consequently, the statutory limitation set forth in the Rules should be deemed an integral aspect of such a compromise[258] which is considered the intent of the contracting states.

The United States circuits, in respect of an unreasonable deviation upon the limitation provisions of the Rules have in general rejected the reasoning of the Flying Clipper[259], but on different grounds.

The seventh circuit in the Herman Schulte[260] has rejected the notion of depriving the carriers of relying upon limitation statutory, where it is held that the congress clearly intended to modify the pre-COGSA law by enacting the phrase "in any event". Thus the $500 per

257-Halsbury's Shipping and Navigation, p 546, Footnote, 3.

258-Roger,p 177;Varian Assoc. v. C.G.T[1980]A.M.C.p 450 at p 456.

259-[1945] A.M.C. p 259.

260-Atlantic Mutual v. Poseidon[1963] A.M.C. p 665 at p 669, where it is stated:

"It appears to this court that the language of the statute, if it constitutes a change of existing law, according to the rule applied to other statutes, is sufficiently clear and unmistakable. No amount of interpolation is required to evaluate the weight of the phrases "in any event"; Nassau Glass, Co. v. Noel Roberts,Ltd [1965] A.M.C. p 1600 at p 1601.

package limitation should apply to any loss, regardless of the case.[261]

A similar theory to defeat limitation of liability under COGSA was rejected by the United States Second Circuit court of Appeals by holding in the Iligan Int.Steel v. John Weyrehaeuser[262] that:

> "..even the holding that a deviation in the geographical sense voids limitations on the carrier's liability seems inconsistent with the language of COGSA".[263]

This means that expansion of the notion of deviation is not to be considered without changes in the Rules.[264] There is however a tendency within this trend, to restrict the "doubtful" effect of unreasonable deviation on the geographical concept and it is not to be extended to the non-geographical deviation[265] [as they called it Quasi-Deviation].[266]

Gilmore & Black[267], have made this quite clear, when they say:

261-Spartus Corp. v. S/S Yafo, 590 F.2d, p 1310 at p 1317 (1979).

262-[1975] A. M. C. p 33 at p 38.

263-Compare, Robert C. Herd & Co. Inc. v. Krawill Machinery, 359 U.S. p 297, 3 Led. 2d, p 820, where it is stated:
"a statute is not to be construed as altering the common law more than the statute's words import, and is not to be construed as making any innovation upon the common law which it does not fairly express".

264-Chandler, p 40.

265-Iligan Int. Steel. v. John Weyerhaeuser, op. cit, p 38.

266-Falih, p 431; 2 Carver, para, 1214-1215; Compare, supra, Chapter I.

267-Gilmore & Black, p 183.

> "It would seem unwise to extend analogically and by way of metaphor a doctrine of doubtful justice under modern conditions, of questionable status under COGSA and of highly penal effect".

It has however been suggested that the drastic effect of unreasonable deviation should be displaced, leaving a carrier entitled to rely upon the statutory limitation under COGSA[268]. This means that the unreasonable deviation or any other breach of a shipowner's duty under this viewpoint, is not going to abolish the limitation of liability under COGSA or the Rule and the carrier is entitled to the benefit of the statutory limitation.[269]

iii-WILL UNREASONABLE DEVIATION AVOID THE CARGO INSURANCE COVER AND WILL THE CARRIER BE AN INSURER OF THE GOODS?

The voyage insured[270] whatever it is called should be defined in the policy, both the commencement of the risk[271] which usually takes place at the port of departure or loading, and the termination of the risk[272], which usually happens at the port of destination or discharge.

268-Whitehead, pp 47-48.

269-A/S J. Ludwig Mowinckels v. Accinanto, 199 F.2d, p 134 (1952); Poor, 1974, Supplement, p 45.

270-There are two types of policies:

"a"Time Policy which is limited by time.

"b"Voyage Policy which is limited by local termini, See, 9 Arnould, para, 428.

271-Terminus aquo.

272-Terminus ad quem.

The underwriter guarantees to compensate the insured cargoes when the expected risk remains precisely the same as the contracting parties have agreed upon and fixed on the face of the policy.[273]

Then what is the effect of unreasonable deviation on the insurance policy?

The legal consequences in pre-Hague Rules were that when the carrier deviated from the contemplated voyage without lawful excuse, then the cargo-owner would lose his cargo insurance cover and the carrier would be treated as an insurer of the carried goods.[274] Obviously the unreasonable deviation exposes the vessel and cargoes to a very much riskier adventure than has been agreed and expected by the underwriter. Thus the motive of making the carrier liable as an insurer is to keep the risk and the premium in balance.[275]

This situation is still effective as the obligations of

273-Kimball, p 231, where he made a distinctions between P.&I. insurance and the normal insurance by saying:
First: P&I insurance is liability insurance, and not insurance designed to cover a property interest.
Second: rather than providing insurance at a fixed rate or premium, a system of "calls" is applied.
At present, the calls are allotted between members on the basis of individual experience, rather than on the basis of equal shares per registered ton, as was the practice at an earlier stage of P&I history".

274-Mark P.Klein, "$500 Per-Package Limitation in COGSA Inapplicable due to Deviation; On-Deck Stowage Construed; Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, F.2d. (2d.Cir.1969), hereinafter cited as "Klein, $500 Per-Package Limitation.

275-Knauth, p 242.

the contracting parties under the Marine Insurance Act, 1906[276], which provides in Section 46 [1] that:

> "Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation and it is immaterial that the ship may have regained her route before any loss occurs".[277]

When the risk of adventure is however just temporary and the insured risk is still precisely the same as before the deviation, then the insurer is discharged from any liability for loss of or damage to the cargo only when such losses or damages are causally related to the existence of the unreasonable deviation.[278]

With respect to the effect of unreasonable deviation, under the Anglo-American jurisprudence concerned, it still considers the carrier as an insurer against any loss resulting directly or indirectly from the deviation.[279] Taking into account, a cargo-owner does not

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276-Ibid, p 263.

277-The Citta Di Messina, 169 Fed.Rep, p 472 at p 475, where it is stated:
"The recent British Marine Insurance Act (1906) has excluded delay from the definition of deviation (Section 46), while giving the insurer by (Section 48) the same release from liability from the time when the delay becomes unreasonable".

278-Theophilus Parsons, A Treatise on Maritime Law, Vol II, 1859, p 278, hereinafter cited as"Parsons, Maritime Law"; Judge, Hays, in, Encyclopaedia Britannica, Inc. v. Hong Kong Producer, [1969] A.M.C. p 1741 at p 1759.

279-Indrapura, 171 Fed.Rep. p 929 at 930 (1909); Willdomino v. Citro Chemical Co, 272 U.S. p 718 at p 725; Hain S.S. v. Tate & Lyle [1936] 2 ALL E.R. p 597 at p 601.

require to lose his insurance cover in order to recover for loss of or damage to the cargo caused by deviation[280].

When the deviating carrier becomes liable as an insurer, it is immaterial to inquire whether loss was due to unseaworthiness, errors of navigation, perils of the sea, or other causes expected by the bill of lading[281].

One can find out that where the carrier has deviated with knowledge and privity that he is at fault, then he becomes an insurer of the cargo[282] and cannot avail himself of any exceptions in the bill of lading[283].

Lord Atkin concluded in Hain S.S.Co. v. Tate & Lyle[284], by saying:

> "no doubt the extreme gravity attached to a deviation in contracts of carriage is justified by the fact that the insured cargo-owner when the ship has deviated has become uninsured".

There is another opinion which endeavours as an insurer of a limited amount which is stipulated in the carriage contract by the parties[285].

This means that agreement between the contracting

280-The Citta Messina, 169 Fed.Rep. p 472 at p 475 (1909).

281-Pelotas [1933] A.M.C. p 1188 at p 1193; Leduce v. Ward, [1888] 20 Q.B. p 475; Longlely, p 120.

282-Davis v. Garret, 6 Bing, p 716; Knox v. The Ninetta, 14 Fed.Cas, p 912.

283-Indrapura, op.cit, p 939; St.John.N.F.Shipping Corp. v. S.A.Companhia Geral Commercial, 263 U.S. pp 119, 124; 68 L.ed, pp 201, 203; Iligan, Int, Steel v. John Weyerhaeuser, [1975] A.M.C. p 33 at p 36.

284-[1936] 2 ALL E.R. p 597 at p 601.

285-Judge Hough, in, De Vascon Ecllos v. The Sarina, NO. 60-374 (S.D.N.Y, May 23, 1919).

parties or the provisions of the limitation of liability in the Rule are still survivals even in the case of deviation and the liability of the carrier is limited to a specific amount of money per package or unit and per Kilogramme of gross weight of the goods[286], unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.

There has been an increasing tendency to limit such a harsh effect of unreasonable deviation to geographical deviation and not to require it to be extended to non-geographical deviation[287].

Some authors have however endeavoured to mitigate such a harsh effect of unreasonable deviation in COGSA by saying that the deviating carrier ought not to be given or avail himself of the benefit of the exemption clauses, because it is not allowed for the carrier to take advantage of his own mistake. An interpretation beyond these legal consequences of an unreasonable deviation holds the carrier liable as an insurer for any loss of or damage to the cargo caused by deviation during the course

286-see supra, chapter III; Article 4 [5] of the Hague Rules which is identical with COGSA of the United Kingdom (1924) and the United States (1936), Article 2 of the Visby Rules which is identical with COGSA of the United Kingdom (1971) and Article 6 [1] (a) of the Hamburg Rules which they are provided the limitation per package or unit.

287-They called it "Quasi-Deviation", Compare, Supra, Chapter I; Iligan Int. Steel v. John Weyerhaeuser, op.cit, at p 38; Tetley, Marine Cargo, p 530.

of the voyage or even after a deviation, makes the provisions of the Rules contradictory with concept of Article 4 [2] of the Rules and COGSA[288].

When the parties {insurer and assured} have agreed to use the "held covered" clauses[289] as liberal clauses for avoiding the harsh effect of an unreasonable deviation in marine insurance[290], it is not unusual to hold that the assured's cover still survives even in the case of deviation, but an additional premium to be arranged[291].

Section 31 [2] of the Marine Insurance Act, 1906, provides:

> "Where an insurance is effected on the terms that on additional premium is to be arranged in a given event, and that event happens but no arrangement is made, then a reasonable additional premium is payable".

The House of Lords held that there is an implied term of the contract indicating that notice of advice of a deviation should be given to the insurer within a reasonable time after the assured had been notified of the deviation[292].

288-Gilmore & Black, p 180.

289-Hood v. West End Motor Car Packing.Co [1917] 2 K.B.p 38, where it is stated:
"Held covered at a premium to be arranged in case of deviation or change of voyage or of any omission or error in the description of the interest vessel or voyage"; Cabaud, Cargo Insurance", [1971] 45 Tul.L.Rev. p 988 at p 990, hereinafter cited as "Cabaud".

290-Mills, The Future of Deviation, p 587.

291-Lord Atkin, in, Hain S.S.Co. v. Tate & Lyle, [1936] 2 ALL E.R. p 597 at p 601.

292-Hood v. West End Motor Car Marine Insurance Co, Op.cit, p 38;

Then, any deviation occurring in the course of a maritime voyage is nowadays invariably covered by insurance with an additional premium to be agreed upon for changing the insured subject and the risk to be encountered which is contemplated by the parties.[293]

Thus the purpose of cargo insurance is to recover against any economic consequences of cargo loss or damage[294], having considered all surrounding circumstances and commercial risk in arranging an additional premium for covering the new adventure occurring in the course of sea carriage and the assured has been advised of the deviation.[295] These considerations do however not appear to diminish the serious nature of the breach of the carriage contract and the subsequent effects of unreasonable deviation on the obligations of the contracting parties.[296]

Thames v. H.T.Van & Co. [1917] 2 K.B. Note (H.L.), p 48 at p 53; 9 Arnould, p 406.

293-Mills, The Future of Deviation, p 595; Cabaud, p 989.

294-Cabaud, p 988.

295-Bigham, J, in, Greenock S.S.Co. v. Maritime Insurance Co. [1903] 1 K.B. p 367 at p 375, where he states:
"The parties must assume that the breach was known to them at the time it happened and must ascertain what premium it would then have reasonable charge"; Ment Z Decker & Co. v. Maritime Insurance Co [1910] 1 K.B. p 132 at p 135; Hewitt v. London General Insurance Co.Ltd [1925] 23 Ll.L.Rep.p 243 at pp 246-47.

296-Bartle, p 99; Selvig, p 313; See infra, Section II.

COMMENT

There is no consensus as to the effect of an unreasonable deviation upon the contract of carriage and particularly upon the protection terms contained in the bill of lading or the Rules, such as exemption clauses and statutory limitation, especially as we have seen that previously neither the Hague/Visby Rules nor the COGSA contains any provision concerning the legal result of an unjustifiable deviation.[297]

This leaves the dilemma still unsolved even though some authors have tried to make a distinction between the situations where the Rules apply as a matter of contract or apply as *ex proprio vigore*.[298]

We can, however, suggest a possible solution, in the case of a breach of the contract of carriage including "unreasonable deviation", based on the degree of seriousness of the faults which is called the criterion of "privity or knowledge".[299] This criterion has

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297-Roger, p 178.

298-Morgan, p 484, where he mentions a third view in this point as follows:
"There is no distinction between the two, and that the same rule ought to apply in both cases".

299-Judge Ainsworth, in, The Greater New Orleans Express Way. v. The Clairbel, 222 F.Supp. p 521,524 (1963), where he defines these words as follows:
"Privity means personal Cognizance or participation in the fault or negligence which causes the accident... the term knowledge as used in the statute has been held to mean not only personal Cognizance but also the means of knowledge of which a party must avail himself in order to prevent a condition likely to produce or contribute to a loss"; Longlely, p 222; Williams, Limitation, p 829; Powles,

replaced[300] the phrase "in any event" which was created by the Hague Rules as a compromise between the carrier and the shipper.

Deviation is of no consequences unless the loss of or damage to the cargo was intentionally or recklessly with knowledge that such loss, or damage would probably result[301]. The carrier is, thus, responsible for showing that the losses of or damages to the cargo have occurred without his actual fault, privity or knowledge. Therefore, when the carrier fails to prove that, then is not entitled to benefit by the protection terms[302].

Also, the carrier's servant or agent might have the same defences and limitations of liability as the carrier and they are entitled to avail themselves of the statutory limitation in the Rules if they show evidence that they acted within the "Scope of their employment"[303]

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p145; See, supra, Chapter II, Section I.

300-Article [3] of the Visby Rules, Article 4 [5] (e) of the COGSA, 1971, and Article [8] of the Hamburg Rules; See, Sweeney, part II, p 338, where he states:

"That the "UNICTRAL" discussion about the proposal to make special provision for serious fault created a diversity of views at the conference".

301-Chandler, p 266.

302-Northern Fishing Co.(Hull) v. Eddom "The Norman"[1960] 1 Lloyd's.Rep. p 1 at p 2; Cerro Sales Corp. v. Atlantic Marine Enterprises[1976] A.M.C. p 375; Grand Champion Tankers Ltd v. Norpipe A/S(H.L.)[1984] A.C. p 563; [1984] 2 W.L.R. p 942; Morgan, p 493.

303-Sweeney, Part II, pp 340-344; Murray, The Hamburg Rules, where he states:

"Warsaw Convention artificial distinction between carrier liability and agent liability, but at the same time it clearly markes the

without an act or omission of such servant or agent, done with the intent to cause damage or recklessly and with knowledge that damage would probably result[304].

However, when the loss of or damage to the cargo occurred through negligence by the stevedores then they may not avail themselves of the benefit of the statutory limitation contained in the Rules or in the bill of lading[305].

The same rules apply in the case of the shipowner's managing agent negligently failing to provide a proper crew. Then the agent will be fully liable to cargo damages without the benefit of the COGSA limitations available to the ocean carrier[306].

Thus, the shipowner can not benefit by the limitation in the case of him ignoring his duty to choose competent crew on the theory that he is without "privity or knowledge"[307].

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carrier liable for the acts of the servants, whereas, the Hamburg Rules have ignored this reality".

[304]-Article [3] of the Visby Rules, Article 4 [5] (e) of the United Kingdom COGSA, 1971, and Article [8] of the Hamburg Rules.

[305]-Herd v. Krawill Machinery Corp, 359 U.S. p 297; [1959] A.M.C. p 879; Erik & Thomas, p 688.

[306]-Cerro Sales Corp. v. Atlantic Marine Enterprises, op.cit, p 375; Compare, Longley, p 222, where he stated:
"Usually, the private or knowledge "of the vessel's master will not defeat the vessel owner's right to limitation".

[307]-Longlely, p 224; Williams, Limitation, p 829; Charles Coryell v. John S. Phipps & George, 317 U.S. p 406; 87 L.ed. p 363.

CONCLUSION

The suggestion that the doctrine of fundamental breach was confined to deviation cases[308], does not affect the doctrine of deviation. Though some authors have tried to establish a strong relation between them dependent upon the idea that deviation equals fundamental breach and discharge by breach equals deviation.[309]

The doctrine of fundamental breach has aroused a real controversy about whether it is to operate as a rule of law or as a rule of construction.

The House of Lords has adopted a new judicial trend which constitutes the doctrine of fundamental breach as a rule of construction and consequently all the exemption clauses contained in the Rules or bill of lading are effective. The attitude of the House of Lords in dealing with the doctrine of fundamental breach does not affect the doctrine of deviation because it still survives as an independent legal concept which is provided by the Hague Rules in an express and a specific provision.

These Rules should be applied to deviation admiralty cases otherwise it will be an infringement of the Rules. Therefore any reference to deviation cases when the court is dealing with doctrine of fundamental breach in non-admiralty deviation cases will be contradictory to general principles of the law in general and contrary to common understanding of the Rules in

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308-The Albion [1953] 1 W.L.R. p 1026.

309-Coote, Discharge by Breach, p 237.

particular.

The doctrine of deviation still then survives as a substantive rule and it has all effects on the contractual obligations of the contracting parties[310].

One can however say that it would be more rational and appropriate with for new judicial trend of the House of Lords to base the characterization of the doctrine of deviation upon the test of reasonableness which determines whether or not a breach of contract is fundamental or material and consequently it is effective in relation to the exclusion clauses[311].

The criterion of reasonableness has already been adopted by the non-admiralty law which is called Unfair Contract Terms Act 1977, Section [11] rules [1] and [3], in Scotland, Section [24] rule [1] where it states the meaning of the reasonableness as follows:

> "...the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made"[312].

The breach is material or not; one should take into account the intention of the contracting parties and all the surrounding circumstances which exist or ought

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310-Stag Line, Ltd. v. Foscolo Mango, Ltd [1932] A.C. p 328.

311-RW Green Ltd. v. Cade Bros Farm [1978] 1 Lloyd's.Rep. p 602; Photo Production Ltd. v. Securicor Transport Lock Seeds [1983] 1 ALL E.R. p 108 at p 117; Lawson, Exclusion Clauses, p 61.

312-Lawson, Exclusion Clauses, p 110.

reasonably to have been known to the parties at the time the contract was made[313].

One must bear in mind that the loss of or damage to the cargo is not enough to constitute the test of reasonableness[314], but it must be caused by the deviation itself and not by any act independent of the deviation.

When we characterize however the deviation as a reasonable deviation in depending upon the criterion of reasonableness or in waiving the unreasonable deviation, then the contract is effective and all the contractual exemptions are valid. On the other hand, the effects of unreasonable deviation, are extremely serious which nullifies all the exclusion clauses and insurance policy.

If the carrier or the shipowner has committed an infringement to the basic duties to make the vessel fit for a particular voyage, such as, a gross lack of due diligence to make the vessel seaworthy or to load, stow and discharge the cargo in wrong manner and caused loss of or damage to the cargo, then the innocent party has merely a right to compensate all the loss or damage while the carrier is entitled to rely upon the exclusion clause, i.e; limitation of liability clause[315], because this case is not considered as a deviation at all.

Finally we must keep in mind that the prefix "in any event" which is provided in the Hague Rules has aroused

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313-Chandrahasan, Fundamental Obligation, p 119; Lord Denning, in, Levison v. Patent Steam Carpet Co. Ltd, op.cit, p 69.

314-Compare, Anson's Law of Contract, p 193.

315-Iligan Int.Steel v. John Weyerhaeuser [1975] A.M.C. p 33 at p 38; Whitehead, p 48.

many problems in relation to applying the limitation clauses when the carrier has committed an unreasonable deviation.

That makes some authors endeavour to adopt the idea that the Rules apply as *ex proprio vigore* and the others attempt to apply the Rules as a matter of contract which makes the situation more complicated and the jurisprudence of the contracting state divergent on this point.

Therefore, the situation which is adopted by the Visby Rules and the Hamburg Rules is quite a reasonable criterion to distinguish between the situation where the exclusion clauses are valid or null.

This criterion depends upon the category of "privity or knowledge" of the wrongdoer. When the carrier commits thus a deviation intentionally to cause damages or recklessly with knowledge that damage would probably result, then he is not entitled to avail himself of the exclusion clauses. Otherwise, he has to rely upon the protection terms contained in the Rules and the bill of lading such as the exemption clause and the limitation clause.

CHAPTER FOUR

RECOVERY OF LOSSES AND DAMAGE

The carrier is liable for a breach of the contract expressly or impliedly as far as losses and damages caused to the cargo while the goods were in his charge.[1] The innocent party is entitled to compensation for all the damage or losses resulting from such a breach of contract whether the action be founded in contract or in tort.[2]

Damages are compensatory in nature either for physical or economic loss. Difficulty which arises from the assessment of the damages does not disentitle the consignee or the innocent party to recover such loss of or damage to the cargo and consequently the court is entitled to have a special method to estimate them.

The causal relationship between the breach of the contract and the loss of or damage to cargo must be shown in order to establish a right to compensate all the damages which were caused by the breach.

The measure of damages depends however upon the basis of the actual loss or damage in recovering the loss of or damage to the cargo regardless of the motive or the nature of the breach of the contract.[3] Then if the carrier has done part of what he was bound to do under

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1- Tetley Marine Claim, p 99.

2 -Article 3 [1] of the Visby Rules.

3-Anson's Llaw of Contract, p 550.

the carriage contract, he may be able to sue upon a quantum meruit[4], when the innocent party has claimed for all the damages caused to the goods. Therefore the rational basis for such recovery is that the compensation is considered as a replacement for an infringement of the contract and places the contracting parties in the same position as if the contract had been performed[5]. Thus the recovery of damages cannot to be used as a punishment to the defendant, but be used as a substitute method for performing the contemplated contract by paying a compensation to the aggrieved party and restoring the contracting parties into the same position when the contract was made and before the damage was done.[6]

I will discuss therefore the following points:

Section one: Compensatory Nature of Damages and Losses

Section two: Causation

Section three: Measure of Damages.

4-Ibid, p 549.

5-Chitty on Contracts, pp 565-566; J. Bond Smith, "Recent Development in the Law of Damages for Breach of the Charter", [1982] 13 J. Mar. L & Com, p 313 at p 314, hereinafter cited as "Smith, Law of Damages for Breach of Charter".

6-Tetley Marine Claim, P 129; lucienne Carasso Bulow," Consequential Damages and the Duty of Mitigate in New York Maritime Arbitrations".[1984] LMCLQ, p 622 hereinafter cited as "Bulow, Consequential Damages; Daniel A. Farber,"Reassessing the Economic Efficiency of Compensatory Damages for Breach of the Contract",[1980] 66 Virginia L.Rev, p 1443 at p 1444, hereinafter cited as "Farber, Compensatory Damages for Breach of the Contract."

Section one

COMPENSATORY NATURE OF DAMAGES AND LOSSES

Damages are the compensatory claim which are confined to the loss of or damage sustained to the cargo from breaching the contract of carriage during the course of maritime voyage. Consequently, damages are the monetary compensation given to the aggrieved party in order to restore the contracting parties into the same position in which the contract had been performed which is called the principle of restituto integrum[7].

The general rule of the contract is that the motive or conduct is not to be deemed as an essential element in assessing damages[8]. Then the aggravated damages and exemplary damages are not to be awarded in case of breach of contract[9]. Many sophisticated and controversial issues fall, however, within the scope of the "damages recoverable" in the maritime transportation matters as far as cargo damages cases are concerned.

I will thus confine my discussion in the following points :

(i) Physical Damage.

(ii) Delay in Delivery as Non-Physical Damage.

7-David M. Walker, Law of Damages in Scotland, 1955, p 24, hereinafter cited as "Walker, Law of Damages"; Chitty on Contracts, p 565; Tetley, Marine Claim, p 129.

8-Walker, Law of Damages, p 36

9-Halsbury's Laws of England, (4th, ed, vol,12, 1975), para, 1187, p 471, hereinafter cited as "Halsbury's Damages"; British Gulana Credit Corp v. Da Silva [1965] 2 WLR, p 248 p 259.

(i) PHYSICAL DAMAGE

Damage is of the essence of the wrong[10]. The carrier is, then, liable for the loss of or damage caused to the cargo in his charge.

The carrier liability regime is based on the principle of the presumed fault or neglect under The Hague/Visby Rules[11], and the Hamburg Rules[12]. That makes out a prima facie that the carrier's failure to rediliver the cargo, which was in his custody, without any explanation as to how the cargo disappeared which renders him liable to the shipper[13].

Physical damages may be, however, caused by the carrier's failure, negligence or by his servants and agents[14]. On the other hand, the goods carried may suffer a minor loss or damage from natural causes during the course of the voyage that are called "Trade Losses in Transit".

As we have seen before, the loss of or damage to cargo mainly sustained from the carrier's failure or his servants and agents during the course of maritime voyage in loading, stowing and discharging[15].

Therefore, I will not go into the details once more and I will confine the discussion to the principles of

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10-Per Lord Keith in B.M.T.A. v. Gray 1951 S.C., p 586 at p 604.

11-Article [3,4] of the Hague Rules.

12-Article 5 [1] of the Hamburg Rules;see,chapter II, section (2).

13-Baker Oil Tools. v. Delta S.S.Lines [1975] A.M.C., p 238.

14-H. A. L. Hart and Tony Honore, Causation in the Law, [1984, 2nd ed], p 314 hereinafter cited as "Hart and Honore".

15-Supra, chapter II, section I.

"Normal deterioration" or "Trade loss in Transit".[16]

These principles indicate that some loss, damage or shortage cannot be claimed where it causes an ordinary minor damage during the course of the voyage.[17]Especially where the carrier shows the evidence that such a cargo inevitably will suffer some deterioration from natural causes, i.e., condensation, staining and wasting...etc.

Certain cargoes may sustain, therefore, such a minor loss. For instance, bulk oil, cement, wheat, flour, rice, coffee, etc. These commodities have a certain packing or have a particular method of transporting which depends upon the custom in the trade.

The U.S. court held in Palmco v. American president[18] and Hokkai Maru[19] that [0.5] per cent of bulk oil would unfavourably adhere to the insides of lines and tanks or be lost through evaporation or handling and such amount was held not recoverable[20], although, where cargoes packed in cartons and bags will sustain a minor amount of damage, i.e., cement, Rice and coffee.

These bags of a shipment are expected to be torn. That does not mean that all damaged bags can be re-bagged and consequently the carrier will be responsible for the

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16-Freinte de route, see jule Jeraute, French-English and English-French Vocabulary of Legal Terms and Phrases , p 71.

17-M. D. C. Ltd. v. N. V. Zeevaart Maatschappij Beursstraat [1962] 1Lloyd's Rep. p 180.

18-[1978] A.M.C. p 1715.

19-[1937] A.M.C. p 280.

20-Robert B. Acomb, Jr. Damages Recoverable in Maritime Matters, 1984, p 31, hereinafter cited as "Acomb, Damages Recoverable.

amount of those commodities which cannot be re-bagged. Then such amount is considered as a damage of trade loss in transit which being computed upon the custom in the particular trade.[21]

If the carrier or the ship owner can not, however, show evidence of the goods being damaged by unavoidable deterioration or wastage in bulk and weight during the course of the voyage, then he will be responsible and all the damages are recoverable.[22]

The test of being considered as a criterion to the "trade losses in transit" is not absolute. Therefore, it has to be looked at realistically and the common or surrounding circumstances of a particular cargo. What is, thus, the criterion of "trade losses in transit" or "normal deterioration"?

We can say that the prudent shipowners criterion[23] is a fair and realistic category, that where the shipowner makes his vessel seaworthy before and at the beginning of

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21-Tetley, Marine Claim, pp 119-122 where he states that "A minor inevitable loss or damage in certain commodities in particular countries, i.e., in the Canadian trade, approximately half of one per cent of the bags of a shipment of cement will be expected to be torn; In France, Tribunal du Commerce de Paris, 1975, [1976] D.M.F., p 748 where it is stated that:
"loss in weight of 0.1%, 0.25% and 0.3% in bags of coffee is an acceptable Freinte de route",and the Court d'Appel de Paris stated: "The carrier is not responsible for the loss of rice packed in single thickness Jute bags"[1975] D.M.F, p 467; Mc Nair,J, in, M.D. C.Ltd. v. N. V. Zeeaart Maatschappij Beursstraat, op.cit, at p 180.

22-Acomb, Damages Recoverable, p 31.

23-Per Mc Nair, J. in M.D.C.Ltd. v. N.V.zeevart Maatschapij Beursstraat [1962] 1 Lloyd's Rep. op.cit., at p. 186.

the voyage in exercising due diligence to supply the ship properly manned, equipped and make the holds, refrigerating and cooling chambers fit and safe for the goods reception, carriage and preservation[24].

Accordingly, if the shipowner had known of the nature of the cargo and the weather conditions during the course of the voyage which made the vessel's hatches closing for longer periods than usual, then he would not be responsible for that wastage in bulk or weight or any other loss or damage arising from inherent defect, quality or vice of the goods[25].

That reveals that such deterioration has taken place beyond the shipowner's liability, because cargoes inevitably suffer some loss or damage from natural reasons, i.e., condensation, staining and wasting, etc. even though the vessel is seaworthy and suitable for the cargo carried.

The carrier is, however, still bound to show the cause of the damage without negligence or fault on his part. Especially where loss of or damage to cargo sustained from unknown causes[26] or from two contribution causes.[27] The carrier is liable for such loss or damage[28] because

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24-Article [3] para (1) of the Hague Rules.

25-Article [4] para (11) of the Hague Rules.

26-Branimir luksic, "Damages of Goods from Unknown Causes in Maritime Transport", 1982, IL Diritto Marittimo. p 567, hereinafter cited as "lusic, Damages from Unknown Causes".

27-Tetley, Marine Claim, p 126.

28-Article [4](2) of the Hague Rules; Acomb, Damages Recoverable, p 31.

these losses should be borne by the carrier, unless he can identify the cause of the damage[29] or to distinguish the damages which were caused by his fault or negligence and that damage which is caused by the sea perils[30].

If the carrier can not separate resulting losses to the goods carried, then he will not exonerate himself from liability in the damages cases, where one cause is the unseaworthiness of the vessel and the other an excepted cause[31].

One can say that carrier is not liable for any loss of or damage to the cargo in the following cases:

(a) When the damage to the cargo results from following the shipper's directions[32].

For instance, where a shipper had known the condition of the weather and loaded his cargo in rainy weather which caused the damage to the cargo by fresh water[33], or where a shipper had inspected and accepted the vessel's tanks prior to loading and then the chemical cargo suffered from discoloration damage by exposure to air[34].

(b) When the damage has been sustained by inherent

29-Luksic, Damage from Unknown Causes, p 568.

30-Harry Schnell v. The S.S.valescura, 293 U.S.p 296 [1934]; where it states that:
". . it is for him (carrier) to bring himself within the exception or to show that he has not been negligent "; Tri-Valley Packing v. States Marine "The Celestial"., [1962] A.M.C. p 1965 at p 1967.

31-The Walter Raleigh [1952] A.M.C. p 618 at p 636.

32-Hutchinson, vol. I, p 682.

33-The Wildwood, 133 F 2d, p 765.

34-Dow chemical co. v. S.S. Giovannella D'Amico, [1970] A.M.C.p 379

vice[35], latent defect[36], fraud or any officious action of the cargo owner[37] which made such damage undiscovered without a close examination of the shipment.

(c) Any consequent damages caused to the perishable cargo, in spite of the care and attention which has been given by the carrier.[38]

In passing, one should mention a phrase of the statement as to "apparent good order and condition".[39]

If the ship had issued a clean bill of lading and stated that goods were in apparent good condition, then consignees could rely on such statements as conclusive proof that no apparent defect existed,[40] especially where those portions of the shipment are visible and open to inspection.[41]

35-Article [4] para (2) (m) of the Hague Rules; Tetley, Marine Claim, p. 219 at p 220, where he states that :
"Nevertheless if one must use a single term in English " inherent defect" seems to cover both "hidden defect" and " inherent vice".

36-Article [4] para (2) (P) of the Hague Rules.

37-Article [4] para (2) (q) of the Hague Rules; Hutchinson, vol.II, p 821, sec.738.

38-Hutchinson, vol.II, p 713, sec. 649.

39-Tokio Marine & Fire Insurance.Co.Ltd. v. Retla.S.S.Co.[1970] 2 Lloyd's. Rep. p. 91; U.S.ct. of Apps."

40-The Carso, 53 Fed. Rep. p 374 (1931); E. T. Barwick Mills v. Hellenic Lines [1972] A.M.C. p 1802; Cehave N. v. U.Bremer Handel Sgesellschaft M.B.H [1976] 1 Q.B. p 44 at p 45, where it is stated that :
"the term 'shipment to be made in good condition' was not a "condition" any breach of which entitled the buyers to reject the goods but an intermediate stipulation which gave no right to reject unless the breach went to the root of the contract...".

41-Spartus Corp. v. S/S Yafo, 590 F. 2d, p 1310 at p 1311 (1979); Aunt Mid, Inc. v. Fjell-oranje lines, ET AL, [1972] A.M.C., p 677

Where the physical damage occurred during the course of the voyage, then the best way of proving the shortage or damage is for the consignee to call a joint survey where both of them are represented, i.e., shipowner, or carrier and consignee or any claimant.[42]

The carrier has the burden of proof to show that he exercised due diligence to make the vessel seaworthy and the damage was due to one of the excepted causes.[43] Otherwise the carrier will be liable for any loss of or damage to the cargo without proof of negligence.[44]

Thus the carrier does not need to show the exact cause of the damage, but he can prove the absence of his negligence by one of the protection of the Article [4] of the Hague Rules[45], i.e., an excepted peril of the sea which protects the carrier from any responsibility has arisen through the damage cases.[46]

Lastly, when the competent court considered the facts and the legal conclusion of the case of the damage, then it will become an adjudication for that case and there is no reason to re-open and consider these facts once more on appeal.[47]

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at p 678.

42-Tetley, Marine claim, p 127.

43-The Walter Ruleigh, [1952] A.M.C. p 618 at p 636.

44-J. Gerber & Co. v. S.S. Sabine Howaldt [1970] A.M.C. p 450.

45- Luksic, Damages from Unknown Causes, p 571.

46-Vallescura, [1934] A.M.C. p 1573, where it is stated that : "Where the efficient cause of cargo damage, for which the carrier is prima facie liable is not an excepted peril, no burden is cast on the shipper to prove negligence on the part of the carrier".

47-Lafcomo, [1967] A.M.C., p 284.

(ii) DELAY IN DELIVERY AS NON-PHYSICAL DAMAGE

An unreasonable delay or deviation may cause physical or non-physical damage to the cargo. The actual loss to the shipper is an important element for the claimant recovering such damage. Therefore, an unreasonable deviation which caused delay in delivery of cargo without loss of or damage to the cargo is not enough.

There is no specific provision in the Hague Rules concerning loss or damage caused by delay in delivery. The pursuance of the Article [3] rule (2) of the Hague Rules reveals that one can find out a general duty of care in loading, handling, stowage, carriage, custody, care and discharge of the goods carried which is imposed on the carrier while the goods were in his charge.[48]

There is however no difficulty in dealing with physical damage caused by delay, but it would be more difficult to apply the same rules to non-physical damage.[49]

I will discuss therefore the attitude of jurisprudence of the United Kingdom and the United States and the International Conventions in respect of economic loss and its consequences.

48-Wilson, p 145.

49-Joseph C. Sweeney, The "UNCITRAL" Draft Convention on Carriage of Goods by Sea, (part II), [1975-76] 7 J.Mar.L.& com, p 487 at pp 489-490, hereinafter cited as " Sweeney, part II.

ECONOMIC LOSS

The general principle of the common law concerning economic loss was that liability did not extend to cover purely economic loss.[50] These rules were applied in cases of carriage of goods by sea which were based upon the principles that carriage of goods by sea was uncertain and consequently the economic loss, i.e., loss of market was irrecoverable as being too speculative.[51]

This situation was changed in respect of economic loss where the court in Dunn v. Bucknall Bros* held that :

> "There is no rule of law that damages cannot be recovered for loss of market on a contract of carriage by sea."

This is well illustrated by the court of Appeal on the grounds that when the claimant had sufficient proprietory or possessory interest in the cargo, which emerged by the contract of carriage of goods by sea, then he has a right to maintain an action for recovering the economic loss.[52]

The economic loss is however still considered an important issue which has created a real diversity especially where the claimant had suffered purely

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50-Atiyah, Economic Loss, p 248; J.W. Davies," Actions in Tort for Damaged Cargo", [1985] 1 LMCLQ, p 1 hereinafter cited as , Davies, Damaged Cargo, where he states that :
"Oliver and Robert Goff, L. JJ, agreed that there is no single general principle which can explain the circumstances in which economic loss is recoverable."

51-Walker, Law of Damages, p 164.

*.[1902] 2 K.B. p. 614 at p. 616; [1900-1903] All E.R. p. 131.

52-The Kehampton, [1913] p 54, at p 173; Elliott Steam Tug Co Ltd. v. Shipping controller [1922] 1 K B. p 127.

economic loss without suffering any physical damage. The general principal of the common law confined the recovering of the loss or damage to the physical damage.

Nevertheless, there has been a restriction on the principle that a claimant who suffers physical damage can maintain an action for recovering some economic loss in addition to the physical damage.[53]

The Hedley Byrne[54] case is the first case which totally abolishes the prevailing view which was considered that the pecuniary loss was not recoverable unless the plaintiff had suffered some physical damages and also cancels the distinction between physical damage or injury and financial loss[55].

As the general principle states that all loss of or damage arising from one cause such as breach of the contract or delict, then the compensation of these damages must be awarded in one action[56]. The law should, therefore, try to channel all the claims, i.e., financial

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53-Atiyah, Economic Loss, pp 251-252; Halsbury's Damage, p 416, para, 1113.

54-[1964] A.C. p 465.

55-Atiyah, Economic Loss ,p 264, where he states that the Hedley Byrne case is that :

". . it no way affects the general principle that pecuniary loss is not recoverable in the law of negligence, but merely illustrates an exception to that general rule."

56-Walker, Law of Damages, p 165; Junior Books Ltd v. Veitch,Ltd. [1983] 1 A.C .p 520, where it is stated that :

"A duty to avoid causing pure economic loss consequential on defects in the work and of to avoid defects in the work itself ... so that the pursuers were entitled to recover their financial loss for repairing the floor. . ."

loss, through that action, viz, through the person who has suffered the physical damage if any.

According to the doctrine of **subrogation** the insurance companies have then a right to claim in the name of the insured for loss arising where they have compensated him[57].

The argument which supports the compensation of economic loss is, however, based on the principle of **restitutio in integrum** which is aimed at restoring both contracting parties to the same position as if the contract had been performed[58].

The loss of the profit is, however, recoverable as damages occurred from the breach of the contract of carriage, which was caused by deviation involving delay, when such loss of profit is not too remote in law, especially in the case when the contracting parties have contemplated such circumstances which caused delay in delivery[59], or when the special circumstances were

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57-Atiyah, Economic Loss, p 274.

58-Tetley Marine Claim, p 129; Walker, Law of Damages, p 121; Lord Wright, in , the Liesbosch Dredger v. The Edison,S.S.[1933] A. C. p. 449 at p 463, where he states that:
"The dominant rule of law is the principle of restitutio in integrum, and subsidiary rules can only be justified if they give effect to that rule."

59-Lord Pearce in the Koufos v. C. CZarnikow,Ltd [1967] 3 ALL E.R. p 686 at p 712, where he states that :
"The loss of market arose naturally. . . according to the usual course of things, from the shipowner's deviation. The sugar was being exported to Basrah where, as the respondents knew there was a sugar market. It was sold on arrival and fetched a lower price than it would have done had it arrived on time. The fall in market price was not due to any unusual or unpredictable factor."Aruna

communicated by the parties, then the damage resulting from the breach of the contract under such circumstances would be recoverable[60].

Thus, whether there is a loss of profit or not depends on the surrounding circumstances of a given case. Then the question of recovering loss of profit on the basis of losing the market is in truth a question of fact.

Nevertheless, the interpretation of international conventions of the carriage of goods by sea concerning the economic loss is not easy to deduce a legal solution of a particular case, especially where the convention did not contain a specific provision for economic loss.

Therefore, the conventions have different attitudes depending upon a particular convention and the surrounding circumstances of a particular case. The Hague Rules contain no specific provision for the economic loss caused by delay in delivery of the cargo[61].

It is silent on that matter as to what loss of or damage to the cargo is the responsibility of the carrier[62]. Some believe that the liability for economic loss suffered by delay exists under the Hague Rules and it is considered as coming within the term "loss or damage"[63].

Mills, Ltd. v. Dhanrajmal Gobindram. [1968] 1 ALL E.R. p 113.

60-Alderson B. in, Hadley v. Baxendale [1843-1860] ALL E.R.p 461 at p 465.

61-Tetley Marine Claim, p 129 ; TD/B/C.4/ISL/ 6/Rev.1, p. 48.

62-Some national COGSA contains a specific provision for delay, i.e., Japan, Art, 3; see TD/B/C.4/ISL/6/ Rev.1, p 48.

63-J.P.Honour, "The P & I Clubs and the New United Nations

There is no authority in Article 4 [1] or Article 4 [2] of the Hague Rules which expressly limits loss or damage to physical loss or damage[64].

Thus the phrase "loss or damage" has a wider meaning than physical loss or damage[65] which mentions in Article 3 [8] of the Hague Rules and shows that the loss or damage contemplated in "loss or damage to or in connection with the goods".

Therefore, such loss or damage is not limited to physical loss or damage, but must arise in relation to the loading, handling, stowage, carriage, custody, care and discharge of such goods[66].

Lord Morton of Henryton[67] said that :

Convention on the Carriage of Goods by Sea 1978," Publish in The Hamburg Rules on the Carriage of Goods by Sea, Edited by Samir Mankabady 1978, p. 239 at p 244, hereinafter edited as "Honour, Carriage of Goods be Sea".

64-Vicount Simond in the Adamstors Shipping Co.Ltd v. Anglo-Saxon Petroleum Co. Ltd. [1959] A.C. p 133 at p 157.

65-Devlin.J, in, The Adamastors Shipping Co.ltd v. Anglo-Saxon Petroleum Ltd.op.cit., at p 144; G.H. Renton & Co.Ltd v. Palmyra Trading Corporation of Panama, [1957] A. C.p 149 at p 150; Satef-Huttenes Albertus S.P.A. v. Paloma Tercera Shipping co. S.A. (The Pegase),[1981]1 Lloyd's Rep. p 175, where the court was held that: ". . . the shipowner was liable to a receiver of cargo , for the receiver's lost profits resulting from a 65 day delay in delivery of the goods caused by deviation"; J.Bond Smith, Jr, "Recent Developments in the law of damages for breach of charter",[1982] 13 J.Mar.L&comm.p 313, hereinafter cited as "Smith, Law of Damages for Breach of Charter".

66-Lord Keith of Avonholm, in The Adamastors Shipping Co.Ltd v. Anglo-Saxon Petroleum Co. Ltd, op cit. p 181.

67-G.H.Renton & Co,Ltd v. Palmyra Trading Corporation of Panama, op.cit, p 169.

"In my view, the phrase "loss of or damage to goods" covers four events :
"a" loss to goods (whatever that may be)
"b" damage to goods ;
"c" loss in connection with goods ;
"d" damage in connection with goods."

Thus the words "loss of or damage to the goods" and words "or in connection with" should be interpreted altogether in order to give wider meaning and scope to the term "loss or damage to the goods and cover economic loss.

That means that the rules do not exclude or restrict recovery of damages from a carrier assessed with reference to an economic loss if on the ordinary principles of law such damages should be recovered[68].

The United States courts have however made quite clear in respect of recovering the economic loss that when the carrier knew or was aware that the goods should be delivered to whom they were addressed at the time which is contemplated by the contracting parties, then he will be liable for any loss of or damage to the cargo caused from delay in delivery[69].

The court in B.F.Mckernin &co.Inc. v. U.S.lines, Inc.[70], held that:

68-The Pegase, [1981] 1 Lloyd's Rep. p 175.

69-Companian Maviera Asiatic, S.A. v. Burmah Oil Co.[1977] A.M.C. p 1538, where the court allowed the time charterer's claim for lost profit.

70-416 F.Supp, p 1068 at p.1072 (S.D.N.Y.1976); Hector Martine Z & Co. v. Southern Pacific Transp, 606 F.2d, p 106 (5th.cir.1979), where it is stated that:
"the "rental value" of capital goods during a delay in shipment

"To establish a right to recover for consequential damages, Mckernin must prove that U.S. lines was aware at the time the parties entered into their contract of the need to deliver the goods in time for Christmas sales".

Whereas, the court in the M/V Antonis P. Lemos[71], held that the lost profit was "a matter of considerable speculation" and therefore dismissed the claim for recovering such loss.

We can then say that the Anglo-American attitude for liability of economic loss caused by delay in delivery is regarded as coming within the scope of the provisions of the Hague Rules and in general all such loss of or damage to the cargo is recoverable.

Nevertheless, the jurisdictions of most countries had not resolved this problem exclusively yet either by court decisions or legislation[72].

Therefore, the "UNCITRAL" conference at the preliminary discussion of carrier liability for non-physical damage caused by delay in delivery has created a real diversity[73].

The subject was handed over to the Drafting party to arrive at a single text in order to produce unanimous

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might be recoverable" ; Acomb, Damages Recoverable, p 44.

71-S.M.A. Award No. 768 t p.12 (1973), where it is quoted from "Smith, Law of Damages for Breach of Charter" at p 318.

72-David K. Schollenberger, " Risk of Loss in Shipping Under the Hamburg Rules"[1981] 10 Denver Journal of International Law and Policy (USA), p 568, at pp 272-273, hereinafter cited as "Schollenberger, The Hamburg Rules".

73-Sweeney part II, p 145.

approval of the delegations and remove all the difficulties and the doubts in applying the rules on the subject.

The Hamburg Rules contain thus specific provisions concerning the liability of the carrier for delay which set forth in Article 5 [1] as following :

> "The carrier is liable for loss resulting from loss of or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in article 4, unless the carrier proves that he, his servants or agents took all the measures that could reasonably be required to avoid the occurrence and its consequences."

Then delay in delivery is defined by article 5 [2] as:

> "Delay in delivery occurs when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea in time expressly agreed upon or on the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case."

Finally, the consignee has been authorized by para [3] to recover for the loss of the goods if they have not been delivered within [60] consecutive days following the expiry of the time for delivery.

These provisions do not mention the clauses providing for damages only if the delay in delivery of the goods is in excess of a certain time limit.

We can however find out in the application of the provisions of the Hague Rules that Article 3 [8], does not permit the carrier to lessen his liability which are set forth under the Rules. Otherwise, these clauses would be considered null and void.[74]

SECTION TWO

CAUSATION[75]

The cargo claimant must prove the causal connection between the loss or damage and the carrier's fault or negligence in order to enable himself to recover such loss of or damage to the cargo[76]. Certain losses may be too remote which makes the causal connection unsustained and, consequently these losses are not compensable.[77]

The courts always use causal terminology in making their decisions for recovering loss of or damage to the cargo.

Therefore the defendant is liable for loss or damage caused by breaching the contract of carriage irrespective of the manner of its occurrence, if it would not have occurred for the breach.[78]

74-Dor, p 146.

75-This topic has been developed in the law of tort, but may arise in the law of contract. See, chitty on contracts, p 570, para, 1342; Hart & Honoré, Causation in the Law (1984), chapter II.

76-Tetley, Marine Claim, p 147.

77-Anson's, Law of Contract, p 554.

78-De La Bere v. Pearson [1908] 1 K.B. 280 ; Ballet v. Mingay [1943] K.B. p 281; Stansbie v. Troman [1948] 2 K. B, p 48; Hart & Honore, pp 321-322.

Then the cargo owner or any claimant can recover loss of the cargo when he shows:-

(1) The physical cause of his losses or damages to the cargo.

(2) Fault on the part of the carrier or shipowner sought to be held responsible.

(3) A causal connection between such fault and the physical cause.[79]

However, the interpretation of the phrases of the causation, such as "proximate cause"[80], "but for"[81], or "sine qua non" test[82] have been expressed in different meaning and the jurisprudence have reached different solutions which showed that the causal terminology had no definite meaning so that it is still as enigma either in law of tort or in law of contract.

We can therefore say that the issue of causation is characterized on the strength of the criterion of remoteness whether loss or damage to the cargo within "the contemplation" of the defendant or within the risk of which he was aware or should have been known to him.[83]

79-The Martello, 153 U.S. p 64 (1894) at p 75.

80- Hart & Honore, p 324.

81-Margaret A. Somerville, "A Diagramatic Approach to Causation", [1978] 24 McGill.L.J. p 442 at P 451, hereinafter cited as, "Somerville, causation", where he states that:
"Thus at this stage , the "but for" test is used to create a causal chain".

82-Joseph H. King, Jr. Causation, "valuation and Chance in Personal Consequences"[1981] 90 Yale.L.J. p 1353 at pp 1355-1356, hereinafter cited as " King , Causation".

83-Hart & Honore, p 107 ; Anson's Law of Contract, p 558.

In addition, we can, however, argue that although a doctrine of mitigation may, in addition to the causation be relevant where the aggrieved party has suffered loss through his own negligence by allowing damages caused from the defendant's breach of contract to be accumulated.[84]

Thus, there are two doctrines which have endeavoured to confine and limit the damages which can be awarded.

(i) Remoteness.

(ii) Mitigation of Damages.

i-REMOTENESS

The test of remoteness is whether the loss of or damage to the cargo may fairly and reasonably be considered as arising naturally or may be supposed to have been in contemplation by the contracting parties at the time they made the contract.[85]

The breach of contract is not sufficient to recover all the loss of, or damages to, the cargo without showing the causal relation between the loss or damage and the breach of contract in which such loss was caused by, or resulted from , the breach of contract.[86]

This causal relationship is not in contradiction with the test of remoteness which depends on the contemplation

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84-Chitty on Contracts, para, 1344.

85-Walker, Law of Damages, pp 22, 48 ; Tetley,Marine Claim, p 132; Victoria Laundary v. Newman,[1949] 2 K. B., p 528;Globe refining Co. v. Landa Cotton Oil Co, 190 U.S, p 540, 47 L.ed. p 117 (1903).

86-Walker, The Law of Contracts, pp 507-508.

of the contracting parties. Then the question may arise: What is the category to show that the consequences were in contemplation of the parties ?

The criterion of a prudent and reasonable shipowner is an important factor to judge the reasonable contemplation of the contracting parties at the time of making the contract.[87] A shipowner must reasonably contemplate the consequences of the breach of contract which causes loss of, damage to, or delay in delivery.

It has been held that such contemplation may prove by any evidence either oral or written to show that the loss or damage claimed is not considered so remote. Remoteness is however a matter of law for the court to deduce which parts of the loss of, or damage to, the cargo are considered legally too remote or not, because the remoteness of damage is considered as a substantive issue. Having regard to the surrounding circumstances of each case when it applies to such a test.[88]

There are many cases that explain that remote damages not within the contemplation of the contracting parties at the time the contract was made cannot be recovered.

The court in Hadley v. Baxendale[89] held that if the special circumstances were wholly unknown to the breaching party, then he could only be supposed to have had in his contemplation the amount of damage which

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87-per Lord Wright, in, Koufos v. C.CZarnikow, Ltd [1967] 3 ALL E.R. p 705; Victoria Laundry (Windsor), Ltd. v. Newman Industries, Ltd, [1949] 1 A LL E.R., p 997.

88-Walker, Law of Contract, p 509.

89-[1843-1860] ALL E. R. Rep, p 461.

arises generally and naturally from such a breach of contract.

Although, where a sub-contract was unknown to the party breaking the contract, then only nominal damages were recoverable because such consequences are not within the contemplation of the breaching party.[90]

Whereas, there are more remote damages recoverable when such damages are within the contemplation of the parties and the breaching party is liable for these consequences which resulted from his breach of contract.

The court in Dunn v. Bucknall Bros[91], held that:-

> "A shipowner who carries goods destined for an alien enemy without the knowledge or consent of shippers, or other goods in the same ship, is prima facie liable to them in damages for late delivery occasioned by the seizure and detention of the ship as a result of enemy goods being on board.."[92]

Also, Asquith, L. J. in, Newman Industries,Ltd.[93], has made that quite clear by saying:-

> "It is important to inquire what information the defendants possessed at the time when the contract was made as to such matters as the time at which, and the purpose for which, the

90-Walker,Law of Damages, pp 48-49; Walton v. Fothergill (1835) 7 C & P, p 392.

91-[1900-1903] ALL E.R. p 131.

92-Aruna Mills, Ltd. v. Dhanrajmal Gohindram, [1968] 1 ALL E.R. , p 1131, where it is stated that :-
"As the contract showed that the parties had contemplated the possibility that late delivery was liable to result in loss to the buyers through revaluation of the rupee."

93-[1949] 1 All E.R. p 997 at p 999.

plaintiffs required the boiler. The defendants knew before and at the time of the contract that the plaintiffs were laundrymen and dryers and required the boiler for purposes of their business as such. They also knew that the plaintiffs wanted the boiler for immediate use."

We can conclude that the defaulting party is liable for the consequences as he ought reasonably to have contemplated such consequences at the time of the contract as a serious possibility or real danger.[94]

Then, the natural consequences of the breach of contract by deviation or delay should be taken into account by the prudent businessman and it does not need generally be the subject of special discussion or communication.[95]

For instance, when the vessel on sailing was unseaworthy and the owner knew of the vessel's state at the commencement of the voyage, then the shipowner ought to have foreseen all the consequences which took place within the course of the contemplated voyage.[96]

Also, where a contract of carriage of goods gives the carrier an option between methods and procedures of transportation, then the carrier should only exercise the option which harmonies and suits with interests of the shipper. Otherwise, it will be against the advantage of

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94-Lord Denning M.R, in, Parsons Ltd. v. Uttley Ingham & Co. [1978] 1 Q. B. p 791 at p 802.

95-Lord Wright, in, A/B Karlshamns Oljefabriker v. Monarch SS, Co. 1949 S.C (H.L) p 1 at p 21

96-Lord Porter, in, A/B Karlshamns Oljefabriker v. Monarch SS, Co. op.cit, at p 9.

the shipper unless it is done in good-faith or notified the shipper for any modification or change in the course of the voyage.[97] That means that all the circumstances, which arise during the commencement of the course of the voyage were known or should have been known to the contracting parties at the date the contract was made.

Although such circumstances may reasonably be presumed to contemplate the estimation of the amount of damages by both parties.[98] Finally, a particular measure of damages in an individual case is not bound to apply by the court in each case but it has to consider all the individual circumstances of the hearing case.[99]

(ii) MITIGATION OF DAMAGES

This doctrine is known the "doctrine of avoidable consequences"[100] of the breach of the contract by the aggrieved party.[101] The general principle of the contract

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97-Hutchinson, vol., I, p 684.

98-Hadley v. Baxendale, 9 ex. p 341 [156 E.R., p 145 at p 151] Richard A. Posner, Economic Analysis of Law, [2d, ed.,1977], p 94, hereinafter cited as "Posner, Economic Analysis of Law"].

99-Walker, Law of Damages, p 42.

100-Bulow, Consequential Damage, p 622.

101-There is a dichotomy in doctrine of mitigation of damage which rests upon the breaching or wrongdoing party and the consignee or the innocent party.
The basic duty of the carrier during the course of the voyage is to exercise due diligence to load, handle, stow, carry, keep, care for, and discharge the goods carried as we have seen previously in chapter II.
Accordingly the carrier must adopt all the reasonable steps to save the goods carried from damage and prevent such damages from spreading. Taking into account the interest of the cargo as well as

indicates that the damages are due from the breaching party in order to release himself from liability by damages in compensation for his failure.[102] That does not mean that the innocent party has a right to remain idle and allow damages to accumulate.[103] Accordingly the aggrieved party must take any reasonable steps which are available to him to avoid and mitigate the extent of the loss or damage to the cargo caused by or consequent upon the breach, viz, mitigation is not required until repudiation is definite.[104]

Then the innocent party is not entitled to be compensated by the party in default for loss of or damage to the cargo which has not been caused by the breach but by his (innocent party) own failure to behave and take reasonable steps to reduce the consequences after the breach.[105]

Therefore the court will confine and limit the recoverable damages resulting from the consignee's negligence to halt the progressive damage to the date when the carrier should be discharged of any consequences

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of the ship, namely he must consider the whole adventure and act accordingly; Halsbury's, Shipping and Navigation, para, 616, p 423.

102-Walker Law of Damages, p 86.

103-Anson's Law of Contract,p 570 ; Smith Law of Damages for Breach of Charter, p 319.

104-Smith Law of Damages for Breach of Charter, p 320 ; Walker Law of Damages, p 174.

105-2 Carver, para 2143 ; Scrutton, 389; Poor, p 50 ; Walker Law of Damages, p 168; Anson's Law of Contract, p. 570; Hato La Vergarena C.A. v. S/S Susaa, [1973] A.M.C. p 195; Compare, Fabre S. A. v. Mondial United Corp. [1963] A.M.C., p. 946 at p 947.

and responsibility upon the breach.[106]

Although the consignee is not entitled to recover any loss or damage where he knew that damage had taken place before shipping the goods to its customers.[107]

The U.S. court held in Ellerman Lines Ltd. v. The President Harding[108] that the standard of reasonableness, which is required in mitigation cases, is set forth as following: -

> "All that is required of the non-defaulting party in measuring his damages is that he act reasonably so as not unduly to enhance the damages caused by the breach. He (the injured party) is required only to use good faith and reasonable diligence in so doing. He is not required to use the best judgement possible or adopt the wisest course which hindsight might have indicated."

The requirement of the "good faith" is implied in every mitigation case. The good faith principles are considered very important elements in governing whether the steps which are set forth by the innocent party are reasonably or not. For instance, the court held that it "was unreasonable to expect from the aggrieved party to avoid harm if he must enter into a risky contract, or put himself in a humiliating position, or one involving loss of honour or respect".[109]

106- Hato La Vergarena, C.A. v. S.S. Susaa, op.cit, p 195.

107-Consolidated Cork. v. Jugoslavenska[1971] A.M.C. p 1195.

108-187. F.Supp, p. 948 (S.D.N.Y.1960) affd. 288 F.2d 288 (2d cir.1961) where it is stated by Bulow, consequential damages, pp 638-639.

109-Christman v. Maristella Compania Naviera, 349 F.Supp, pp 845,

Consequently, the innocent party is not bound to do anything in mitigating damages where to do so would have damaged his commercial situation.[110]

Then the question has arisen whether the steps which should be taken by the innocent party towards mitigation the damage, is it one of fact or of law ?

I am disposed to take a view which depends upon the surrounding circumstances in each case. That indicates that the question is indeed a question of fact and not of law.[111]

The duty of the consignee in mitigating or minimising the loss or damage consequent upon the carrier's breach is that the consignee should be required to act only in good-faith and with reasonable diligence in so doing.

Then the burden of proof rests on the carrier or shipowner to show that the consignee failed to exercise reasonable care to mitigate or avoid its damages.[112] If the consignee has however failed to take reasonable steps

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858 C.S.D.Y 1971), affd. 468 F 2d p 620 (2 d cir.1972), where it is stated by, Smith, Law of Damages for Breach of Charter, pp 319-320.

110- James Finlay & Co, ltd. v. Kwik Hoo Tong, [1929] 1 K.B., p 400, where it is stated that: -

"The buyer was not bound to enforce, for the purpose of minimizing the damages, the contracts with-subpurchasers, as to do so, after he knew that the shipment date was incorrect,might seriously injure his commercial reputation."2 Carver, para, 2143; Scrutton, p. 390.

111- 2 Carver, para, 2143 ; Pay zu v. Sounders,[1919] 2 K.B. p 581.

112-Walker, Law of Damages,p 176; Emmco, Ins.Co. v. Wallenius Caribbean Line [1974] A.M.C. p 2052; Dixie plywood Co. v. S.S. Federal Lakes[1976] A.M.C. p 439; 404 F.Supp, p 461; Bulow, Consequential Damages, p 638; The World Beauty.[1969] 3 ALL E.R. p 158; Halsbury's Damages, para, 1199.

in mitigating damages, then he is not entitled to be awarded more than the actual damages consequent upon the carrier's breach.[113]

Thus any loss of or damage to the cargo sustained from the consignee's failure to mitigate damages is not to be included in the damages recoverable. Moreover, the consignee should adopt reasonable methods and steps to mitigate and avoid such damages.

Therefore, any extensive method or extraordinary cost which is resulting from efforts to lessen the loss cannot be recovered from the breaching party.[114] On the other hand, legitimate expenses of the consignee resulting from mitigation procedure to avoid or minimise damages are the responsibility of the wrongdoing party.[115]

113-Houndsditch Warehouse Co. v. Waltex, [1944] K.B., p 579, where it is stated that:
"The amount of the damages to which the plaintiffs would otherwise have been entitled must be reduced accordingly" ; Walker, Law of Damages, p 177.

114-Walker, Law of Damages, p. 176 ; 2 carver, para 2144.

115-Tetley, Marine Claim, p 136; 2 Carver, para 2143; Bulow, Consequential Damages, p. 638.

COMMENT

According to these criteria which are concerned with the chain of causation in order to recover all loss of or damage to the cargo.

We can conclude that the test of "reasonableness" is the important factor in determining the contemplation of the contracting parties. That means that when the conduct of the contracting parties was reasonable, then the chain of causation will not break, if it was unreasonable, it will[116].

Although, the question of remoteness of damage or in other words, the question of recovering damage is in truth a question of law.[117]

That indicates that there is a different rule of law in respect of causation between the rule of tort or delict and contract which is applied in the contract of carriage of goods by sea, viz, in the case of contract the contracting parties have contemplated their mutual duties, the consequences of breaching the contemplated contract and for what they shall and shall not be liable.

116-Aruna Mills, Ltd. v. Dhanrajmal Gobindtam [1968] 1 All E.R. p 113, where it is stated:
"There would have been causal connection between the breach of contract and the loss due to revaluation, and on that basic the buyers were entitled to recover the amount of the measures in the purchase price as damages for the seller's breach of contract by failure to ship the goods by May 31 as the contract showed"; Mckew v. Holland[1969] 3 All E.R. p 1621 (H.L); Wieland v. Cyril Lord Carpets,Ltd [1969] 3 All E.R.p 1006 (Q.B.); Somervill, Causation, p 450.

117-Walker, Law of Contract, p 509.

On the other hand , in the case of tort or delict, the acts of one person have collided with the rights of the other. Thus, the law has drawn the boundaries between the obligations of the contracting parties and what has been expressed and implied in the contract in case of recovering loss or damage resulting from breaching the contract. While the court has to define the liability for the ensuing damage and how far it extends.[118]

The causal terminology in the Hague Rules is, however, quite clear as far as the exceptional clauses are concerned. Such clauses are not applied if the carrier cannot show or give evidence that loss of damage to the cargo was not caused by his fault or negligence.[119]

Lord Pearson, in, Albacora S.R.L. v. Westcott & Lawrance Line, Ltd,[120] has concluded that:-

> "There is no express provision, and in my opinion there is no implied provision in the Hague Rules that the shipowner is debarred as matter of law from relying on an exception unless he proves absence of negligence on his part. But he does have to prove that the damage was caused by an excepted peril or excepted cause, and, in order that he may in a particular case have to give evidence excluding causation by his negligence."

118-Lord Pearce, in, Koufos v. C.Czarnikow, [1967] 3 ALL.E.R., p 686 at pp 709-710; Compare, Scarman L.J., in, Parsons,Ltd. v. Uttley Ingham & Co.[1978] 1 Q.B. p 791 at p 807. where he states:- "The difference between reasonably foreseeable (the test in tort) and reasonably contemplated (the test in contract) is semantic not substantial."

119-Article [4] para (2) (a) to (q) of the Hague Rules ; Tetley, Marine Claim, p 148; Luksic, Damage from Unknown Causes, p 568.

120-[1966] 2 Lloyd's Rep., p 53 at 64.

The need for a causal connection between the deviation and the loss of or damage to the cargo has been settled by the rules. Then deviation is of no consequences where there was no causal relationship between the two, viz, deviation and loss or damage.[121]

This was made quite clear in the A/S J. Ludwing Mowinckds Rederi v. Accinanto, Ltd[122]. where it is stated that :-

> "Even though stowage on deck of cargo shipped under clean bills of loading constitutes a deviation, this does not deprive the carrier of his right to exoneration under the fire of provision of the carriage of goods by sea. Act, just as it does not deprive the owner of the protection of the fire statute, unless it was a cause of the fire."

However, where the carrier or his servant makes any failure negligently and it appears that negligence caused or contributed to the loss of or damage to the cargo, then the carrier remains liable[123] on the grounds of a

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121-The Citta Di Messina, 169 Fed.Rep (1909), p 472 at pp 475-476; Paterson S.S. Ltd. v. Robin Hood Mills Ltd.[1937] 58 LL.L.R., p 33; Haroco Co. v. The Tai shan, 111 F.Supp. p 638; Searoad Shipping Co. v. E.I.dupont De Nemours &Co. 361 F.2d p 833 (1966); Francosteel Corp. v. N.V. Nederlandsch, [1967] A.M.C. p 2440 at p 2459; Compare, The Tregenna,[1940] A.M.C. pp 1415-1416, where it is stated that :
"When a deviation takes place, and, the shipper affirms the contract...the shipowner becomes an insurer of the cargo, liable for all damages subsequent to the warranty broken, without any reference to the question whether the deviation had any bearing on the particular loss complained of."

122-[1952] A.M.C. p 1681, 199 F (2d) p. 134.

123-Celestial[1962] A.M.C.p 1962; Chester Valley [1940] A.M.C.p 555

lack of proper care and custody of the cargo according to Article [3], rule [2] of the Hague Rules and COGSA. That means that the effect of deviation is applied only in case of unreasonable deviation which occurred intentionally.

We can then conclude that the consignee or claimant can recover all loss of or damage to the cargo resulting from any failure in loading, handling, stowing, caring for, and discharging the goods carried.

Consequently, any loss of or damage caused to the cargo during the course of maritime voyage from an unknown cause should be borne by the carrier, because he is liable for all the goods which were in his charge and he did not succeed in rebutting the presumption of his fault.[124]

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at p 558.

[124]-Luksic, Damages from Unknown Causes, p 568; The Indrapura, 171 Feb.Rep (1909) p 929 at p 930. where it is stated that : -

". . . deviation makes the carrier an insurer against any loss resulting directly or indirectly.

SECTION THREE

MEASURES OF DAMAGES

The basic principle of the measure of the damages is that the monetary position of the aggrieved party should be put in the same position as if the contract had been performed.[125] Namely, enable the innocent party to obtain comparable supplies from the market.[126] That means that any gains have to be considered when assessing the aggrieved party's loss of or damage to the cargo.

The Hague/Visby Rules have referred to these principles in Article 4 [5] subparagraph {b} when it is stated that:

> "The total amount recoverable shall be calculated by reference to the value of such goods at the place and time at which the goods are discharged from the ship in accordance with the contract or should have been discharged. The value of the goods shall be fixed according to the commodity exchange price, according to the current market price, by reference to the normal value of the goods of the same kind and quality."

The Anglo-American jurisprudence confirms the measure of the damages already settled under the Hague/Visby Rules.[127]

125-Davis, Assessment of Damages, p 595; Dodd Properties v. Canterbury City Council, [1980] 1 W.L.R. p 433 at p 434.

126-Stoltar, Damages in Contract. p 68.

127-Compare, Mr Gordon Pollock, "A Legal Analysis of the Hamburg Rules", Published in, The Hamburg Rules A One-Day Seminar, Organised by the Lloyd's of London Press Ltd. 1978, pollock, 1 at pollock, p 11, hereinafter cited as "Pollock, The Hamburg Rules".

Lord Sumner, in The Chekiang[128], has made that quite clear when he stated that:

> "The measure of damages ought never to be governed by mere rules of practice, nor can such rules override the principles of the law on this subject".

Accordingly, the following points will be discussed:-

i) Assessment of Damages

ii) The Unit of Account

i) ASSESSMENT OF DAMAGES

The measure of damages is based on different grounds in estimation of the damages. The dominant rule of law is that the true measure of damages is the difference between the contract price and the market price at the date of arrival.[129]

We should mention that the measures of damages in respect of the goods lost in transit is different from the measure of the damages caused to the cargo from delay in delivery, but the basis of the estimate is still the market value,[130] Especially when the prices in the commodity market are liable to the fluctuate which should be known or are presumed to have been known by the shipowners.[131]

128-25 LI.L.Rep. p 173 at p 175 ; [1926] A.C. p 637 at p 643.

129-Williams Brothers v. E.D.J.Agius, Ltd.[1914] A.C.p 510; Watts v. Mitsui & Co, ltd [1917] A.C. p .227 at p 228; Atlantic Mutual v. Poseidon, [1963] A.M.C. p 665; Stoltar, Damages in Contract, p 7; The Blandon, [1923] A.M.C. p 242; The Archer, [1928] A.M.C. p 357.

130-Tetley, Marine Claim, p 130.

131-Koufos v. C.Czarnikow, Ltd, [1969] 1 A.C. p 350 ; Pollock, The

In case of the loss of or damage to the cargo resulting from deviation or unseaworthiness or in cases of shortage[132], the normal measure of these damages in the absence of special circumstances in the contract[133], are the market value of the goods on the date when they should have been delivered[134], less the sums which the cargo-owner must have paid to the carrier in order to get them.[135]

Whereas, in the case of delay in delivering the goods, the measure is the difference between the market value of the goods on the date they should have been delivered and the market value at the actual date of delivery.[136]

However, these view points aimed to sustain that the consignee or any person who is interested in the arrival of the goods at the time and the place at which they have stipulated in the contract, then they should not recover more than the price they could get if the cargo arrived.[137]

Thus, this trend attempts to enable them to go into the

Hamburg Rules, p 4.

132-Ministry of Food v. Australian Wheat Board[1952] 1 Lloyd's.Rep, p 297.

133-Scrutton, (19th, ed. 1984), p 403.

134-Poor, 1974, Supplement, p 50 ; Sanson's Law of Contract, p 560.

135-Scrutton, (19th, ed. 1984). p 403.

136-Hutchinson, III, 1620 ; Chitty on Contracts, p 588; Anson's Law of Contract, p 560; Poor, 1974, Supplement, p 51 ; Scrutton, (19th, ed. 1984), p 404; Heskell v. Continental Express [1950] 83 LI.L.R., 438; Koufos v. C.Czarnikow, Ltd. [1969] 1 A.C. p 350.

137-Foscolo Mango & Co.Ltd, v. Stag Line,Ltd[1931] 39 LI.L.R. p 101 at p 108.

market and obtain comparable supplies.[138] Then what is the meaning of the market value or what is the criterion of the market value of the goods in question ?

The market value is an important criterion for estimating damages which is considered the commonest basis in this issue and the only one which ascertains the loss to the shipper[139] or consignee, especially in case of short delivery.[140]

There is no difficulty in estimating damages, if there is a market value or price with published listings at the place of discharge.[141] However, when there is no such market price, the value must be ascertained by substituted methods which is called criteria of the market value.

These criteria try to calculate the market price on a different basis in order to recover the actual damages from deviation, delay in delivery or any shortage in the shipment during the course of the maritime voyage. The

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138-Stoltar, Damages in Contract, p 68.

139-Dixie Plywood Co. v. Federal Lakes et al[1976] A.M.C. p 439 at pp 444-445; Samin Corp v. S.S Rivadeluna [1968] A M.C. p 1062; Shackman v. Cunard White Star, Ltd, [1940] A.M.C. p 971, where it is stated that :

"in event of short delivery, the price should be market price at port of destination... so that the plaintiffs were entitled to recover £ 30.396,03 from the defendants in respect of their claim for short delivery and the market value of the delivered cartons."

140-The Queen Dynamic[1982] 2 Lloyd's.Rep. p 88 at p 89, where it stated that :

"On the issue of damages, the sound arrived value should be assessed on the basis that a higher rate of duties would be payable on them."; Freedman & Slater v. M.V.Tofero, [1963] A.M.C. p 1525.

141-Tetley, Marine Claim, pp 130-131.

market price may be calculated, in the absence of special circumstances, on sub-contracts[142] which is considered as evidence to show that was the value of the goods at the date which should have been delivered.

If there has been a contract to resell the goods carried, that contract price may be taken as evidence of value[143], but we cannot regard it as a substitute method for the market price ruling on the presumed date of arrival.[144]

Lord Wright, in, Monarch. S.S. Co, ltd v. Karlshamns Oljefabriker[145], referred to the authority of the Scotch case of Connal Cotton and Co. v. Fisher Renwick & Co, where he states that:

> " Where the cost of the transhipment was allowed as the proper measure of damages for failure to deliver under a contract of sea carriage at the agreed destination."

Whereas, professor Walker[146], has added many elements in calculating the value of the goods on the basis of "purchase price together with":

a) Cost of transport.

142-The Arpad, [1934] p. 189; 49 LI.L.Rep. p 313 at p 320; Compare, Walker, Law of Damages, p 143, where he states that "...sub-contracts cannot be regarded either to enhance or diminish damages unless they were within the contemplation of both parties."

143-Patrick v. Pusso British Co.[1927] 2 K.B. p 535.

144-Williams v. Agius[1914] A.C. p 510;Slater v. Hoyle[1920] 2 K B. p 11; Walker, Law of Damages, p 140; Scrutton,(19th,ed 1984).p 404.

145-[1949] A.C. p 196 at p 225.

146-Walker, Law of Damages , pp 139-140.

b) An element of normal profits or ; the price at the nearest available market or at the ultimate destination with allowances for the cost of carriage"[147].

The courts will, however, not be bound by any phraseology used by both parties, but will look to the intent rather than to the form of the contract in construing the terms of the contract concerning the meaning of the market value or any disputed issue.[148]

Accordingly, the courts have to take into account the special character of the contract, the expression of the general principles which apply to them, and extraordinary surrounding circumstances which have been contemplated by the contracting parties. Viz., the courts may apply equitable principles in assessing damages in order to reach just result.[149]

These considerations may justify higher damages than the market value as compensation for the damaged cargo.[150]

We can, thus, say that the measure of damages or the criterion which is used to ascertain the market value or price is a question of fact.

147-Levatino Co. v. American President Lines, [1965] A.M.C. p 2386 at p 2393. where it is stated that :
"under the long established law the applicable values are those which prevail on the date of the ship's arrival . . . As there were no sales published in the New York Daily Report for that date the nearest sales dates govern"

148-Anson's Law of Contract, p 573; Cellulose Acetate Silk Co.,Ltd. v. Widness Foundry (1925), Ltd, [1933] A.C. p 20.

149-Hato La vargarena,C.A. v. S.S.Susaa[1973] A M.C.p 195 at p 201.

150-The Pegase[1981] 1 LIoyd's Rep. p 175; The Ardennes [1951] 1 K.B. p 55.

ii) THE UNIT OF ACCOUNT IN THE INTERNATIONAL CONVENTIONS

The monetary limits of the international convention have various effects depending on a particular basis in a particular convention. For instance, the Hague Rules adopted a Gold Clause, The Visby Rules chose the Franc Gold basis and the Hamburg Rules approved the S.D.R. basis.

I will, therefore, discuss the following heads :-

1) The Gold Clause

2) The Gold Franc Basis.

3) The S.D.R. Basis.

1) THE GOLD CLAUSE BASIS

Article 4 [5] of the Hague Rules provides that the monetary limits do not exceed the amount of £100 for the lost or damaged cargo. The standard of the unit account which is equivalent to that sum, viz, £ 100 shall be taken to be gold value, as Article [9] of the Hague Rules states:

> "The monetary units mentioned in this convention are to be taken to be gold value."

The gold clause aimed to ensure the international uniformity of the recovery value for loss or damage to or in connection with goods which imposed on the carriers in different countries. Many difficulties have nevertheless arisen in application of this article.

Firstly, the inconvertibility of the pound sterling into gold and the devaluation of the pound in relation to the sovereign. The pound did not have the same value as the pound sterling in 1924 and became an inconvertible into gold because it did not represent one pound sterling in gold.

The limitation level had been decreased and the carriers gained an extra-profit from the £100 limit or its equivalent in other currencies.[151] Consequently, the balance of interests between the carriers and cargo-owners, which was ascertained by the Hague Rules is interrupted in favour of the carrier's interest, who harvested the merit and the ultimate object of the Hague Rules.[152]

However, the British Maritime association has concluded the "Gold Clause Agreement" on 1st August, 1950 which raised the limitation of liability to £200 Lawful money of the United kingdom. This agreement was amended on July 1st 1977 by increasing the amount of limitation to £ 400 Sterling lawful money of the United Kingdom.[153]

Secondly, the date of conversion for those contracting states in which the pound is not a monetary unit.

151-Samir Mankabady,"The Brussels Bills of Lading Convention: Deficiencies and Suggested Reforms". A thesis Approved for Ph.D degree. London University, 1970. pp 230-231. hereinafter cited as "Mankabady,The Brussels Bills of lading convention."

152-N.W. Palmier Egger, "The Unworkable Per-Package Limitation of the Carrier's Liability Under the Hague (or Hamburg) Rules",[1978] 24 M.C.Gill.L.J. p 459, hereinafter cited as "Egger, The Unworkable Per-Package Limitation."; Falih. pp 289-290.

153-Tetley, Marine Claim, p 601.

The courts of different contracting states have not arrived at a uniform conclusion in determining the rate of conversion as follows

(1) The date of the commencement of the proceeding

(2) The date of the breach of the contract.

(3) The date of the arrival of the ship at the port of discharge.

(4) The date of the judgement.

(5) The date of the payment.[154]

The jurisprudence of the United States and the United Kingdom have, however, their own particular opinions in this issue.

The jurisprudence of England had been adopted the date of the breach of the contract or when the loss was incurred in the case of tort as a suitable rate of conversion.[155]

The main change has been made by the House of Lords in Miliangos v. Frank(Textiles) Ltd[156], where it held that

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154-Falih, p 298, Al-Jazairy, p 240, Mankabady, The Brussels Bills of Lading Convention, p 231-235.

155-Bankes, L.J, in, Di Ferdinando v. Simon Smiths & Co.Ltd.[1920] 3 K.B. p 409. Viscount Simonds, in, United Railways of Havana and Regla Warehouses, Ltd. In re [1961] A.C. (H.L), p 1007 at 1034, where he states that :-

"...A claim for damages for breach of contract or for tort in terms of a foreign currency prevailing at the date of breach or tortious act"; Halsbury's Damages, para, 1201, p 485; Walker, Civil Remedies, p 393.

156-[1976] A.C. p 443 at p 444 (H.L.); [1976]1 Lloyd's Rep. p 201 at p 206; Lord Denning, in, George Veflings Rederi A/s v. President of India (The Bellamil), [1978] 1 Lloyd's. Rep. p 467, Affirmed by the Court of Appeal [1979] 1 Lloyd's.Rep, p. 123, where Lord

the date of conversion should be at the date payment in terms of sterling.[157]

The Scottish jurisprudence has differed from the English jurisprudence in this issue.

The prevailing Scottish view has been in conflict as to what constitutes the relevant moment of conversion of a foreign currency into sterling. The court of session held for a sum in U.S. dollars. The House of Lords held that the payment can only be in British money.[158]

Therefore the U.S. dollars should be converted into sterling on the date of raising the action.[159] Whereas Macfie's judicial factor v. Macfie,[160] held that the amount to be calculated in sterling was in accordance with the rate of exchange prevailing at the date when the debt became payable and not at that prevailing at the date of decree.[161]

However the Scottish court in Commerzbank Aktiengesellschaft v. Large[162], held that:

Denning says that:-
"It seems to me clear that the rate of exchange should be the rate prevailing at the date of payment."

157-Al-Jazairy, p. 241.

158-David M. Walker, The Law of Civil Remedies in Scotland, 1974, p 393, hereinafter cited as, "Walker, Civil Remedies"; Barry v. Van Den Heek, [1920] 2 K.B. p 709.

159-Hyslops v. Gordon (1824) 2 Sh. App. p 451.

160-1932. S.L.T. p 460 at p 461.

161-A. E. Anton, Private International Law, A Treatise from the Standpoint of Scots Law, 1967, p 231, hereinafter cited as "Anton, Private International Law."

162-1977.S.L.T. (Reports)p 219 at p 224.

"For the purpose of this case the pursuers have deliberately chosen to fix the conversion date as the date of payment or at the date when the decree is extracted whichever is the earlier."

Nevertheless, the Reciprocal Enforcement Act 1933, S. 2 (3) provides that where foreign judgments for payment are expressed in foreign currency, then the sum is to be converted into sterling at the exchange rate prevailing at the date of the original judgement.[163]

These provisions have, however, abrogated by S.4 of the Administration of Justice Act 1977, for the whole of the United Kingdom as from 29 August, 1977.[164]

The House of Lords in 1976 expressly departed from that rule, which is stated that the foreign currency should be converted into sterling, then the plaintiffs are entitled to recover their loss of or damage to the cargo in foreign currency and the English courts can give judgement in foreign currency,[165] and finally to enforce it by converting that amount of money into sterling at the rate current at the date of payment.[166]

163- Walker, Civil Remedies, p 34.; Commerzbank Aktiengesellschaft v. Large, op.cit, p 222.

164-Beare, The Effect of Conflict of Law. Beare 10.

165-Miliangos v. Frank (Textiles), Ltd. op.cit., p 201; Lord Denning,in, The Bellami, [1979] 1 Lloyd's.Rep. p 123 at pp 124-125, where he states that:
"Since so far as demurrage was concerned the money of account as well as the money of payment was U.S. dollars ; and since there was no provision for it to be paid in sterling, a reasonable inference was that the money was payable in U.S dollars"; Folias [1977] 1 Lloyd's.Rep.p 535; Despina R. [1977] 2 Lloyd's Rep. p 319.

166-Scrutton, (19th-ed.1984), p 395.

Although, there are different rules in the United States as to the proper date of conversion. The Supreme Court has adopted the date of commencement of the proceeding as the date of conversion.[167] The District courts of the United States uphold the date of the breach as the proper date of conversion.[168]

Whereas Beare states that :-

> "I understand that in the United States it is customary for the value of the loss to be converted into U.S. dollars at the rate ruling at the date the goods were discharged or should have been discharged from the vessel and for the judgment to be given in U.S. dollars."[169]

There is however no general principle or common understanding among the contracting parties for the proper date of conversion.

Therefore one can conclude that the proper date for conversion is the date agreed by the parties[170] or is the date which is governed by national laws of the contracting parties and by its jurisprudence in explaining this issue, in spite of their contradicting decisions which have been in conflict as to what constitutes the relevant moment of conversion.

These principles have been confirmed by Article 9 [3] of the Hague Rules where it provides that:-

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167-Die Deutsche Bank v. Humphrey, 272 U.S. p 517 (1926).

168-Philip Holzman A.G. v. S.S. Hellenic Sunbean, [1977] A.M.C.p 1731; Falih, p 298, A-Jazairy, p 243.

169-Falih, p 313 ; Marshall, Foreign Currency, p 77.

170-Diamond, The Hamburg Rules, p 18.

"The national laws may reserve to the debtor the right of discharging his debt in national currency according to the rate of exchange prevailing on the day of the arrival of the ship at the port of discharge of the goods concerned."

Many difficulties may arise in interpreting the words "at port of discharge" ?

It could be intended to mean the place at which the goods are discharged from the ship regardless of whether this place is the port of destination or not.[171] This interpretation is aimed at avoiding the uncertainty which may happen where the goods are discharged in a port short of destination.

2) THE GOLD FRANC BASIS

Article 2 para [d] of the Visby Rules provides that :-

> "A Franc means a unit consisting of 65.5 milligrammes of gold of millesimal fineness 900."

The gold poincaré Franc has replaced the gold clause as a unit of account in order to achieve uniformity and avoid fluctuations and devaluation in currencies[172] which might result from having the limits expressed in any national currencies.

At any rate it provides the uniformity and stability which might be provided by the gold franc as long as the

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171-Falih, p 297.

172-Mankabady, The Brussels Bills of Lading Convention, p 240.

dollar was linked with gold, especially before the 1939 war.[173]

However, when the floating policy was adopted by most currencies including the dollar after 1971, then the value in terms of gold reflected changes in market rates of national currencies and it was difficult to convert an amount of gold into local currencies.[174]

Then one can conclude that the gold poincaré Franc has proven its inadequacy as a unit of account in the international monetary affairs.

The fluctuations and the devaluations of the poincaré franc's price have made the official price less than the free market price. This situation has caused many difficulties in applying the gold franc as a unit of account of limitation of carrier's liability. For instance the shipowners endeavoured to limit their liability to an amount based on the official price and the cargo-owners attempted to apply the free market price.

The Supreme Court of the Netherlands in Hornlinie A.G v. Societe National Petrole Aquitainé[175] has solved this problem, where it states that:

173-L.Bristow,"Gold Franc- Replacement of Unit of Account", [1978] 1 LMCLQ, p. 31 at p 33, hereinafter cited as "Bristow, Gold Franc"; Allan I. Mendelsohn,"The Value of the Poincaré Gold Franc in Limitation of Liability Convention",[1973] 5 J.Mar.L.& Com., p 125, hereinafter cited as, "Mendelsohn, The Value of the Poincaré Gold Franc".

174-Samir Mankabady, p 113.

175-1972.E.T.L. p 933.

"The conversion rate of the gold franc, under the Brussels convention on shipowners' limitation of liability , shall be calculated on the basis of the official value of the currency in relation to the poincaré gold unit and not on that of the free market."

The COGSA of the United kingdom 1971 adopted the poincaré gold franc as a unit account of limitation by converting the gold franc into SDR and then into sterling at a rate of exchange prevailing on the date in question.[176] However, Article 2[d] of the Visby Rules states that: -

> "The date of conversion of the sum awarded into national currencies shall be governed by the law of the court seized of the case."

Therefore, one can say that the Visby Rules are more flexible than the Hague Rules because they leave the date of conversion to be decided by the national law of a particular contracting state's court.[177]

3) THE SDR BASIS

There was no problem with the exchange rate of gold until 1971, but after that the gold market price became as high as five times the official price. The convertibility of U.S. dollar balances into gold was suspended.

This situation has created a duality in prices and a problem as to which one should be taken as a basis for

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176-Diamond, The Hague/Visby Rules, p 11., Article 4(5) of Schedule to the 1971 COGSA of the United Kingdom.

177-Compare, Falih, p 322, Al-Jazairy, p. 245.

the conversion of the gold franc into national currencies.[178]

The [IMF][179] was also faced with the same problems relating to the value of the SDR which was used as a form of reserve currency as well as a unit of account which it fixed by terms of gold. Then in 1974 the [IMF] decided to define the value of the SDR in terms of "basket" of (16)[180] IMF members' currencies which reflected the largest exports of goods and services for the period 1975-1979.[181]

However, the international liability conventions aimed to use the SDR as a unit of account in order to avoid the fluctuations and the devaluations of the poincaré franc gold by converting a gold franc into SDRs and then into national currencies at a rate which reflected current market conditions.[182] Consequently the "UNCITRAL" has adopted the SDRs as a unit of account which it defines

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178-Samir Mankabady, pp 113-114 ; Chandler, p. 270.

179-International Monetary Fund.

180-The SDR was valued in terms of basket of (5) IMF members' currencies as follows: The U.S. Dollar 42%, the Deutschmark 19% and 13% each for the French Franc, the Japanese Yen and the Pound Sterling.

181-Diamond, The Hague Visby Rules; p 10; Diamond, The Hamburg Rules, p 19; Les Ward,"The SDR in Transport liability Conventions: Some Clarification", [1968] 13 J. Mar. L & com; p 1 at p 3, hereinafter cited as "Ward, The SDR in Transport Liability Conventions; Compare, Bristow, The Gold Franc, p 32 where he states that:-

"In 1974 the [IMF] decided to define the value of the SDR in terms of a basket of (16) members' currencies."

182-Bristow, Gold Franc, p. 32., Article II(1) and (2) of the Brussels Protocol of 1979 to the Hague/Visby Rules.

by the international monetary fund [IMF] in order to provide a more stable and justifiable instrument of international trade and exchange.[183]

Thus the Hamburg Rules have adopted two methods of units of account: "The SDR and the poincaré Franc".

The SDRs are created by Article [26] para [1] and this Article is mentioned that the SDRs are defined by the [IMF], whereas the [IMF] do not define the SDRs, but the fund allocates the SDRs and determines their value.[184]

We can produce a technical analysis to the Article [26] of the Hamburg Rules as follows:

> "The unit of account in the contracting states, which are a member of IMF, is the SDR and the method of valuation of this unit should be applied to the same method of the IMF at the date of question for the operations and transactions".

1-The unit of the account in the contracting states, which are a member of IMF, is the SDR and the method of valuation of this unit should be applied to the same method of the IMF at the date of question for the operations and transactions.

2-The unit of account in the contracting states which are not members of the IMF, but whose laws permit them to

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183-Aleksander Tobolewski, "The Special Drawing Right in Liability Conventions: An Acceptable Solution?"[1979] 2 LMCLQ. p 169 at p 172, hereinafter cited as "Tobolewski, SDR"; Stephen A. Silard, "Carriage of the Goods by Sea:The Unit Account of the Hamburg Rules",[1978] 10 J. Mar. L.& com., p 13 at p 27, hereinafter cited as "Silard, The Unit of Account."

184-Silard, The Unit of Account, p 29.

use the SDRs, is still the SDRs and it is to be calculated according to their manner which is determined by those states.

3-An exceptional option is granted by this Article for those states which are not members of the IMF and whose law does not permit the application of the SDRs as follows:

"a" Accept the SDRs as a unit of account according to the method of valuation which is described by this art.

"b" Allow to convert the value of their currencies into terms of gold which in this case should be the poincaré franc as an alternative unit of account.[185]

The relevant date of conversion as mentioned in Article [26] of the Hamburg Rules is the date of judgement or the date agreed upon by the parties.[186]

It should be noted that the date of judgement is not an alternative solution, because it raises the question of the exchange risks between that date and the date of payment. Consequently, this situation would give the strong party a right to choose the date of conversion which would be most favourable to him.

Therefore, it will be more sensible to consider the date of payment as a date of conversion in order to inquire the aims of conversion by avoiding the

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185-Silard, The Unit of Account, p 34; Falih, p 331; Diamond, The Hamburg Rules, p.19.

186-Falih, p 337; Silard, The Unit of Account, p 29.

fluctuations in the exchange rates and providing the uniformity in international liability conventions which are governing the carriage of goods by sea.

CONCLUSION

Any doctrine which endeavours to confine or limit the compensatory damages cannot be inconsistent with the general principle which is set forth in the Hague/Visby Rules, COGSA, and the Hamburg Rules. These principles have explained the duty of the carrier in dealing with the cargo in loading, handling, stowage, carriage, custody, care and discharge.

Thus, the contractual obligation requires the carrier to take extensive care of the goods while these goods were in his charge. Otherwise, he will be liable for all loss of or damage to and in connection with the goods, though he exercised due diligence in making the ship seaworthy and properly manned, equipped, and supplied the vessel to make it fit and safe for the goods reception, carriage and preservation.

According to the compensatory nature of the damages, the court is bound to recover the actual loss of or damage to the cargo caused by the act or default of the carrier.

Therefore, any aggravated or exemplary damages are not recoverable, but the court may be awarded such damages when it takes into account the intent of the contracting parties, depending on the contractual obligation and the

claimant's motives.[187]

That means that the compensation of the claimant, in case of loss or damage to the cargo, is based upon the compensatory nature of of the damage by recovering to the plaintiff the actual damage and not punishing the carrier for his wrongdoing.[188]

However, in respect of damage caused by an unjustifiable deviation that will deprive the carrier of the benefit of the statutory limitation of liability which is stated in the Rule and COGSA.[189] Nevertheless, mere non-delivery does not constitute a deviation,[190] but may create a presumption of compensation of all the loss of or damage to the cargo caused thereof.

Finally, one can conclude that the failure of the carrier to discharge the goods carried to their destination and hand them to the consignee at the contemplated time and place could cause very grave consequences which could affect the financial situation of the consignee or any claimant.

187-Halsbury's Damages, p 416, para, 1112; C.F.British Transport commission v. Gourlay [1956] A.C. p 185 at p 206.

188-Harvey Mc Gregor,"Compensation Versus Punishment in Damages Awards, (1965) 28 M.L.R. p 629, hereinafter cited as "McGregor, Damages Awards"; Compare, P.S. Atiyah, Accidents, Compensation and the Law. (2d, ed,1975) p 478, hereinafter cited as "Atiyah, Compensation and the Law", where he states that :-
"We are not taking the money from the defendant in order to give to the plaintiff, we are giving some money to the plaintiff because we want to punish the defendant."

189-Jones v. The flying Clipper, [1954] A.M.C. p 259.

190- Shackman v. Cunard White Stare, Ltd, [1940] A.M.C. p 971.

This may encourage claims for delay in delivery which caused economic loss and there is authority either in the rules, or COGSA and the decisions of the United Kingdom and United States, which authorized to recover all the loss of or damage to or in connection with the goods.

That does not mean any non-physical damage is recoverable, but may indicate that the meaning of "damage" in a statute is a matter of construction,[191] which is based upon the intent of the contracting parties, and the surrounding circumstances of a particular case, in characterization the non-physical damage whether it is recoverable or not.

However, mere intention or wilful misconduct is not enough to constitute an unreasonable deviation, but the causal relationship should be shown between the loss of or damage to the cargo in order to deprive the shipowner or the carrier from all the protection of the Rule or COGSA and deprive him from the benefit of the statutory limitation of liability.

Thus in case of an unreasonable deviation or when such an act, default or a omission is enough to amount an unreasonable deviation, then the consignee or any person who is interested in the cargo can recover such loss or damage on the basis of the market value or price without applying the limitation clauses or any provisions which limit the responsibility of the carrier or shipowner according to the unit of account in the Rules or COGSA.

191-Hulsbury's Damages, p 141, para, 1102.

In respect of unreasonable deviation any limitation clauses are invalid under COGSA because the Bill of lading and the Rules are displaced by deviation.[192]

Then the consignee or claimant has a right under the general maritime law or common law, to recover full losses or damages caused to the cargo during the course of the maritime voyage.[193]

Although, when the nature and value of the goods have been declared by the shipper before shipment and inserted in the Bill of lading, then such damages in addition to the value of the goods may be calculated on the basis of the market value or price at which the goods were discharged from the ship or should have been so discharged.[194]

Namely, when the shipper makes a statement concerning the value and the nature of the goods, then he, or any person authorized by him, is entitled to compensation for full damages caused to the cargo[195] which may exceed the

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192-Tetley, Marine Claim, pp 412-413.

193-Joseph C.Sweeney, "Review of the Hamburg Conference", Published in the Speakers' Papers for the Bill of Lading Conventions Conference, New York, Organised by Lloyd's of London Press, 1978. Sweeney 1 at Sweeney 15, hereinafter cited as "Sweeney, Review of the Hamburg Conference", Diamond, The Hague/Visby Rules, p 16 ; Scrutton, p. 464.

194-Dor, pp 128-129.

195-Shackman v. Cunard White Star, Ltd.[1940] A.M.C. p 971; where it is stated that:
"A price at port of destination "clause must be read with the statutory recovery is $ 500, if such price exceeds $ 500 for a package, the maximum recovery is $ 500 unless a large value was declared."

statutory limitation. Otherwise, for instance, in absence of such a statement or a false statement may render the carrier liable for only a sum which is set out in the Rules or COGSA.[196]

196-Scrutton, (19th, ed, 1984), p 454; Article [IV] para (5) (a) of the Carriage of the Goods by Sea Act 1971, Mark S.W. Hoyle, The Law of International Trade, (1st, ed, 1984), pp 203-204, hereinafter cited as "Hoyle"; Varian Assoc v. C.G.T.[1980] A.M.C. p 450, where it is stated that:-

". . . shipper's failure to insert in bill of lading the value of (4) ton crate containing electromagnet worth $ 35,000 precludes recovery of more than $ 500 from ocean carrier."

CHAPTER FIVE

PROCEDURES OF ACTION FOR LOST OR DAMAGED CARGO

Once the cargo claimant has made his claim to the court, in order to enquire the precedent conditions of the action, he must:

First:

Prove that the notice of loss or damage has been given to the carrier or his agent, before or at the time of the removal of the goods, or not latter than the day when the goods were handed over to the consignee, or within specified days in case the loss or damage is not apparent[1].

Second:

Prove that the suit has been brought and instituted within a specific period after delivery of the goods, or the date when the goods should have been delivered[2].

Third:

Satisfy himself that the court which heard a particular case is the right court and the action must be brought within its jurisdiction[3]; and

Finally:

Prove the cause of the loss or how the loss took place

1-Article 3 [6] of the Hague Rules and Article 19 [1,2,4,5] of the Hamburg Rules.

2-Article 3 [6] of the Hague Rules and Article 20 [1,2] of the Hamburg Rules.

3-Article [21] of the Hamburg Rules.

and who bears the burden of proof in the litigation of a claim for loss or damage[4].

These four points are divided into formal and substantive conditions which are very important for the court in bringing justice to the parties. The first three conditions are formal condition. Viz, the court must enquire and must be satisfied, as a matter of form, that these conditions have been instituted before hearing the case.

The last condition which is called the burden of proof is a substantive condition. Namely, the court must constitute who bears the burden of proof at a particular point in the litigation of a claim for loss of or damage to the cargo.

I will therefore explain the following points in more detail:

Section One: Notice of Loss, Damage and Delay in Delivery.

Section Two: Time Limitation for Suit.

Section Three:Jurisdiction Clauses.

Section Four: Burden of Proof.

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[4]-Article [4] of the Hague Rules and Article [5] of the Hamburg Rules.

SECTION ONE

NOTICE OF LOSS, DAMAGE AND DELAY IN DELIVERY

When the carrying vessel has arrived at the port of destination. The cargo-owner expects the carrier to deliver his goods in good condition. The cargo-owner, or his representative, may find that his goods were short-landed or were damaged while they were in the carrier's charge.

The procedures in these cases are that the warehouse[5], usually issues a short-landing certificate, in case of shore-landing, which certifies the loss of the goods at the port of destination, and consequently the consignee, or any person authorized by him, is entitled to claim for the loss of his goods against the carrier.

On the other hand, in respect of damaged cargo, the warehouse usually issues an out-turn report certifying the condition of the goods as received from the vessel. Also, the cargo-owner, consignee or his agent will exercise his right to call for the surveyor to examine and inspect the goods in order to itemize and value the damaged goods. A surveyor usually issues a report concerning the condition of the goods and identifies the cause of the damage if possible.[6]

However, if upon delivery from a carrier, the

5-We use this term to indicate the port authority or any public or private depository.

6-TD/B/C.4/ISL/4/Rev.1/p 7.

consignee, or his agent, finds the goods have suffered loss of, damage to, or delay in delivery, then he will be obliged to issue a notice of such loss of, damage to, or delay in delivery. This notice has particular rules governing the procedures of the action depending upon the rules of a particular International Convention or COGSA which control the legal procedures of a given case.

I will therefore discuss the legal consequences of such a notice of loss, damage, or delay in delivery under the following heads:

i-Under the Hague Rules and COGSA of the United Kingdom and the United States.

ii-Under the Hamburg Rules.

i-UNDER THE HAGUE RULES AND COGSA OF THE UNITED KINGDOM AND THE UNITED STATES

Where the carrier has unloaded the goods at the port of destination in apparently sound condition without any objection from the consignee or any person who is authorised to receive the goods. That means that is prima facie evidence of discharging the cargo in the same apparent condition as stated in the bill of lading[7].

Whereas, discharge the goods under reserve or a written notice of loss or damage issued at the time of the delivery or within three days of delivery, in case of such loss or damage is not apparent, is considered prima facie as evidence to the contrary[8].

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[7]-Astle, pp 110-111; Hoyle, p 199.

[8]-D.E.Murray,"The Hamburg Rules, A Comparative Analysis",[1980]

Article 3 [6] of the Hague Rules has however explained these rules in detail in order to emphasise the basic duty of the carrier to deliver the goods which were in his charge in apparently as sound a condition as he received them at the port of loading.[9]

Consequently, the purpose or the nature of the notice requirements under the Hague Rules and COGSA is that:

1- Once the notice is given to the carrier by the consignee, or any person authorised by him, that means that the goods have suffered loss or damage.

2- To give the carrier plenty of time to investigate the claim while he has access to the facts concerning the goods and all the evidence is still available to him in order to defend himself against groundless claims or retort exaggerated claims.[10]

The notice of loss or damage to the cargo must be given to the carrier in writing and must disclose the general nature of such loss or damage[11] before or at the time of the removal of the goods into the custody of the person entitled to delivery.[12]

The United States COGSA added an additional paragraph

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12 Lawyer of the Americas (U.S.A.), p 59 at p 79, hereinafter cited as "Murray, The Hamburg Rules".

9-Astle, pp 109-110.

10-George F.Wood; "Damages in Cargo Cases", [1971] 45 Tul.L.Rep. p 932 at p 952, hereinafter cited as "Wood, Damages in Cargo Cases"; Delaware Steel Co. v. Calmar S.S. Corp. 378 F.2d, p 386;[1968] A.M.C.p 1527 (3d.cir,1967); Deer Island Granite Prods.Corp. v. Luckenbach, S.S. Co[1959] A.M.C. p 1839.

11-Tetley,Marine Claim, p 426; Wood,Damages in Cargo Cases, p 952.

12-Article 3 [6] of the Hague Rules; Tetley, Marine Claim, p 427.

to the Rules in order to clarify these Rules as follows:

> "Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof".

We can therefore conclude that there are some forms or manners other than written notice which are considered as an equivalent to such notice as follows:

1- To issue a qualified receipt at the time of discharge[13], i.e; bad order receipt, or out-turn report and short-landing certificate for the goods.

2- Joint survey or inspection by the contracting parties or their agents[14].

We turn however now to the effect or sanction of the failure to give notice and ask does the failure to give notice operate as a forfeiture of the claim or is it merely a prima facie obstacle?

We can reveal from Article 3 [6] of the Hague Rules that the failure to give notice does not affect the right of the parties to bring suit within one year[15].

The authors have their own viewpoints in referring to such sanction or effect.

Scrutton[16] believes that the notice of loss or damage seems to have no legal effect as following:

13-Astle, p 111.

14-Article 3 [6] of the Hague Rules.

15-Wood, Damages in Cargo Cases, p 953.

16-Scrutton, 19th,ed, 1984, p 440.

"Whether notice is given or not, the onus of proving loss or damage will lie upon the person asserting it".

Carver[17] supports Scrutton's viewpoint by saying:

"The first paragraph of this rule appears to have little, if any meaning, as the burden of proving loss or damage is on the consignee in any event".

Whereas, Tetley[18], says that the notice of loss or damage is set out in the Hague Rules as prima facie evidence of the condition of the goods at discharge which can be valuable to the consignee.

However, Article 3 [6] of the United States COGSA has made that quite clear by adding the following paragraph:

"Provided, that if a notice of loss or damage either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered".

Then, what is the legal effect of a notice of claim clause which purports to bar the suit in case a notice was not given in a specific time?

These clauses are not valid under the Hague Rules because the failure to give notice does not affect the

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17-1 Carver, para, 524.

18-Tetley, Marine Claim, p 428, where he states:
"Clauses in a bill of lading calling for a written notice of claim (otherwise suit is barred) are valid under the Harter Act, if reasonable, but not under the Hague Rules".

right of the consignee, or his agent, to bring suit within one year[19]. Although, Article 3 [8] of the Hague Rules provided that any clause intends to relieve the carrier or the ship from liability arising from negligence, fault or failure in the duties and obligations provided in the Rules or lessen such liability other than as provided in this convention, shall be null and void and of no effect[20].

ii-UNDER THE HAMBURG RULES

The " UNCITRAL " plenary discussion in respect of a "notice of loss" created contradictory versions of what is the sanction for a failure to give the required written notice.

The United States' viewpoint is that the failure to give such notice is not considered as a time bar.

Germany favoured retention of the "notice of loss" provision of the Hague Rules as a precondition to stating a claim. Whereas, the United Kingdom supported the viewpoint of Germany concerning the retention of the "notice of loss" provision of the Hague Rules, but as

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19-Dor, p 72; Tetley, Marine Claim, p 429; The Hawaiian Craftsman[1954] A.M.C. p 72; Coventry Sheppard. v. Larrinage S.S.Co.[1942] 73 Ll.L.R.p 256; Elser,Inc. v. International harvester[1955] A.M.C. p 1929.

20-Nashiwa v. Matson Navigation Co.[1954] A.M.C.p 610, where it is stated:

"The failure to give notice of loss within three days after delivery, as set out in the bill of lading, does not bar the suit, despite the provisions of the bill of lading. Such provisions are null and void of S. 1303 [8] of COGSA".

"disciplinary measure".[21]

The notice of loss must be given to the carrier in writing, but the periods for giving notice have been slightly enlarged by the Hamburg Rules.[22]

In the case of apparent loss or damage, the required time for the written notice, concerning the general nature of such loss or damage, is to be given not later than the day after the day when the goods were handed over to the consignee.[23]

Where the loss or damage is not apparent, the requirement in the Hamburg Rules concerning the time of giving notice according to Article 19 [2] is a period of fifteen consecutive days, regardless of holidays, after the day when the goods were handed over to the consignee.[24]

However, in respect of loss or damage to the cargo caused by delay, the notice must be given in writing to the carrier within sixty days after the day when the goods were handed to the consignee.

These notices of loss, damage or delay in delivery must be given by the consignee to the carrier, actual carrier, shipper or any person who acting on the carrier's or the actual carrier's behalf, including the master or the officer in charge of the ship, or to a person acting on

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21-Sweeney, Part V, p 173.

22-Murray, The Hamburg Rules, p 79.

23-Article 19 [1] of the Hamburg Rules.

24-Sweeney,Part V, p 174; Samir Mankabady, p 94.

the shipper's behalf is deemed to have been given to the carrier, to the actual carrier or to the shipper, respectively[25].

On the other hand, in the event that the goods caused damage to the ship, then such notice must be given by the carrier or actual carrier not later than ninety consecutive days after the occurrence of such loss or damage or after the delivery of the goods, whichever is later.

However, failure to give notice, concerning the loss or damage to the cargo, does not affect the right of the consignee to bring suit against the carrier and it goes only to the question of the quality of the evidence[26]. Namely, such failure to give notice is deemed prima facie evidence that the carrier has delivered the goods as described in the bill of lading or, has delivered them in sound condition, if no such bill of lading has been issued[27].

Respecting the failure of the carrier to give notice concerning the loss or damage to the ship caused by the goods is considered prima facie evidence that the carrier, or the actual carrier, has sustained no loss or damage due to the fault or neglect of the shipper, his servants or agents[28].

On the other hand, the failure to give notice of loss

25-Article 19 [5,8] of the Hamburg Rules.

26-Sweeney, Part V, p 173.

27-Article 19 [1] of the Hamburg Rules; Samir Mankabady, p 93.

28-Article 19 [7] of the Hamburg Rules; Murray, The Hamburg Rules, p 79.

or damage caused by delay is considered as a precondition to recovery, because no compensation shall be payable for delay in delivery and it will bar the claim[29].

Where the state of the goods has been the subject of a joint survey or inspection by the parties, then written notice need not to be given because such a survey or inspection is deemed an equivalent to such notice.

The Hamburg Rules bound however the carrier and the consignee by Article 19 [4] to give all reasonable facilities to each other for inspecting and tallying the goods.

29- Article 19 [5] of the Hamburg Rules; Sweeney, Part V, p 74; Murray, The Hamburg Rules, p 80.

SECTION TWO

TIME LIMITATION FOR SUIT

The general principles of the time limitation within which an action may be brought is characterized, such a period of time, as procedural and not substantive rules. Then when the claimant institutes his action after the expiry of a time limitation, it will bar the contractual remedy, but not extinguish the right[30].

That means that a claim may be revived by an acknowledgement or payment made after the expiry of the time limitation of a particular action[31]. Then the contracting parties may agree to extend the time limitation provided by the Rules because it is not considered as a part of the public policy.

I will therefore discuss the problem of the time limitation for suit for loss or damage to the cargo as follows:

i- Under the Hague/Visby Rules.

ii- Under the Hamburg Rules.

iii- The Effect of the Deviation on the Time Limitation for Suit.

30-Anson's Law of Contract, p 588; P. A. Stone, "Time Limitation in the English Conflict of Laws", [1985] 4 LMCLQ, p 497, hereinafter cited as "Stone, Time Limitation"; Thomas, The Hamburg Rules, p 8.

31-Stone, Time Limitation, p 500.

i-UNDER THE HAGUE/VISBY RULES

According to the Hague/Visby Rules[32], the time limitation for suit for loss of or damage to the cargo, is one year[33]. The claimant must institute his action within the one year provided by the Rules[34]. Article 3 [6] of the Hague/Visby Rules provides that the period of limitation is commenced within one year from delivery of the goods, or the date when the goods should have been delivered.

What do the Rules mean by providing term {delivery} as an important point for operating the time limitation for suit; and what is the difference between delivery and discharge?

Since the Rules used the term "delivery", there is no doubt that delivery was what the Rules required to commence the running of the time period[35]. Disputes may arise in determining the scope and the meaning of the term "delivery"[36]

Tetley[37] has defined "Delivery" as follows:

32-The period of the time limitation under the Hague Rules is unchanged by the Visby Rules.

33-Article 3 [6] of the Hague Rules.

34-Franco Steel. Corp. v. N.V.Nederlandsch Amerikaansche. Stoomvart Maatschappij, [1967] A.M.C. p 2440.

35-Hemphill,D.J. in,The American Hoesch Inc. v. "Aubade",[1971] 2 Lloyd's. Rep. p 423 [U.S.Dis.Ct,Dis of South Carolina {Charleston Division}].

36-Walker, The Companion to Law, pp 349, 362, where he defines the word "delivery" and "discharge".

37-Tetley, Marine Claim, p 331.

> ".. the moment when the consignee named in the bill of lading receives the goods. This would normally mean upon delivery by the stevedore or terminal agent to the consignee or to the consignee's agent"[38].

Hemphill, D. J. in, American Hoesch. Inc. v. Aubad[39], has explained the differences between the term "delivery" and "discharge" as follows:

> "The word "delivery" was not synonymous with "discharge", for "delivery" denoted a two-party transaction in which the consignee would have an opportunity to observe defects, whereas "discharge" need only involve the carrier, and there might or might not be an opportunity. for the consignee to discover the damage at that point, only at delivery must there be such an opportunity".

However, Devlin, J, in, Pyrene Co.Ltd. v. Scindia Steam Navigation Co.Ltd[40], has explained the scope of

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[38]-Centerchem Products v. A/S Rederiet Adjell et Al[1972] A.M.C. p 373 at pp 374-75,where it is defined the proper delivery by saying: "It has been established that proper delivery occurs when a carrier (1)separates goods from the general bulk of the cargo; (2) designates them; and (3) gives due notice to the consignee of the time and place of their deposit, and a reasonable time for their removal".

[39]-[1971] 2 Lloyd's. Rep. p 423 (U.S. Dis. Ct. Dis of Carolina, Charleston Division); Compare, Lord Wright, in,Gosse Millard v. Canadian Government Merchant Marine [1927] 28 Ll.L.Rep. p 88 at p 103, where he said:
"The word "discharge" is used , I think in place of the word "deliver" because the period of responsibility to which the Act and Rules apply (Art 1 (e), ends when they are discharged from the ship. The words "properly discharge" I think, mean, deliver from the ship's tackle in the same apparent order and condition".

[40]-[1954] 1 Lloyd's.Rep. p 321 at p 329.

application of the Rules quite clearly by saying that the carrier's liability commences when the cargo crosses the ship's rail and ceases the moment the goods are released from the discharging ship's tackle.

The Hague Rules have adopted the terms "discharge" and "delivery" in order to apply the Rules to goods which cannot be handled by tackle, e.g; grain, oil...etc. Also, to avoid any difficulties arising from applying the term "tackle to tackle": precisely, but it was not intended to alter the "tackle to tackle" criterion.[41]

That indicates that the term delivery must have a different meaning from discharge, which is used in Article 1 (e) of the Hague Rules in explaining the period of the carrier's liability. On the other hand, the Rules refer to the term "delivery" in Article 3 [6] concerning "time for suit" without referring to the word "discharge".

We can conclude that the failure to mention "discharge" in Article 3 [6] of the Rules was purposeful[42] and must be considered as an essential factor in interpreting the term "delivery".

The period of limitation does not begin from the date of discharge of the goods, but it commences from the moment of the delivery, or the date when the goods should have been delivered.[43]

41-Mankabady,The Brussels Convention,p 98; Al-Jazairy, p 117, Footnote, 1.

42-Tetley, Marine Claim, p 284.

43-Compared, Wood,Damages in Cargoes Cases, p 55, where he states:

The substituted delivery has raised many difficulties concerning the commencement of the moment of delivery such as when the goods are discharged into, barges, lighters, etc. Then what constitutes delivery in such a case?

As far as the substituted delivery is concerned we can say that there is delivery for limitation purpose when the goods are released from the vessel's tackle and are loaded into a craft, lighter or onto the quay.[44] Respecting, the discharge of goods into a lighter or craft, the limitation period does not commence until the last item of the shipment is delivered, or should have been delivered.[45] Then the completion of the discharge into a particular lighter is an essential element in deciding whether the delivery of the goods is accomplished or not.[46]

However, the actual passing of possession of the goods to the consignee, or any person authorized by him, is a determined element in differentiating between discharge and delivery. Otherwise, if the possession or control of the goods is still under the carrier, then it is mere discharge of the cargo and is not delivery.[47]

"Since the duties, rights and responsibilities of the carrier under COGSA terminated upon discharge of the goods, logic would dictate that the limitation period of section 3[6] commences at that time".

44-See chapter II for more details.

45-Loeb v. S.S. Washington Mail, 150 F.Supp. p 207; [1957] A.M.C. p 267; Ungar v. S.S. Urold [1946] A.M.C. p 1663.

46-The Hoegh Lines v. Green Truck Sales, Inc, 298 F.2d. p 240; [1962] A.M.C. p 431 (9th.Cir.Court, denied, p 371, U.S. p 817 (1962); Wood, Damages in Cargo Cases, p 955.

47-American Hosech Inc. v. S.S. Aubade [1971] A.M.C. p 1217 at p

Thus, when the goods are discharged into the consignee's lighter, or he owns or controls such a lighter, then the carrier's liability will cease at tackle because the goods are still under the consignee's control. Whereas, when such lighters or barges are under the carrier's control, or he owns such a lighter or barge, then he will still be responsible until the goods have been discharged on land and are ready for delivery[48].

In respect of non-delivery, the Hague Rules are quite clear, saying that the time limitation begins to run from the date when the goods should have been delivered[49].

The American court in Western Gear Corp. v. States Marine Lines Inc[50], held that:

> "Suit instituted within a year from actual delivery,but (16) months after it should have been delivered, was barred by the one-year limitation under COGSA".

Misdelivery is to be treated the same as non-delivery, then the proceedings of the action must commence within one year from the date when the goods should have been delivered. Otherwise, when the proceedings were not commenced until the expiry of the time limitation, the

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1221; [1971] 2 Lloyd's.Rep. p 423 at p 425.

48-Tetley & Cleven, p 826; Compare, C.Tennant, Sons& Co. v. Norddeutscher Lloyds [1964] A.M.C. p 754, where it is stated: "The claim was time barred, because the time limitation was commenced from the date of discharge of the goods into the barges".

49-Tetley, Marine Claim, p 334.

50-[1966] A.M.C. p 1969.

claim was time-barred[51].

However, the phrase "unless suit is brought" meant "unless the suit before the court was brought within one year and not whether other proceedings had been instituted within that period of limitation"[52]. That means that the action must be brought in the jurisdiction which the dispute is ultimately decided[53]. Then such action will be time-barred, when the proceedings are not instituted before the proper jurisdiction and were brought before other jurisdiction within the period of limitation.

Roskill J. in, The Comanion Colombiana De Seguros v. Pacific Steam Navigation Co[54], has made that quite clear when he said:

> "I think the true proposition in English Law is that where in an action in the English courts the plaintiff seeks relief and the defendant pleads limitation, the issue which an English

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51-Astle, pp 113-114; Commodity Service Corp. v. Furness Withy & Co.[1964] A.M.C.p760;Anglo-Saxon Petroleum & Co.Ltd. v. Adamastos S.S. Co. Ltd [1957] 1 Lloyd's.Rep. p 79, where it is stated:
"Article 3 [6](4) of the Hague Rules covers the liability for wrong delivery even though the goods had suffered no physical loss or damage and consequently the one year time was applied"; Hellyer v. N.Y.K.[1955] A.M.C. p 1258, where it is stated:
"Non-delivery of cargo after the vessel arrives at the port of destination is not such a "deviation" (if deviation it be) as will avoid the COGSA one-year limit upon the time to sue".

52-Ivamy, p 142; Al-Jazairy, p 282; Companion Colobiana De Seguros v. Pacific Steam Navigation Co, [1965] 1 Q.B. p 101 at p 103.

53-Scrutton, p 44; Halsbury's Shipping and Navigation, p 535, para, 773, Footnote, 1; The Merak [1965] 1 ALL E.R. p 230.

54-[1963] 2 Lloyd's.Rep. p 479 at p 496.

> court had to determine is whether the action before the court, and not some other action, has been instituted within the relevant limitation period".

Respecting an arbitration clause contained in a bill of lading does not affect the time limit and, in such a case, the principles of that period of limitation should be applied, because it does not amount to a waiver of the time limit[55].

Therefore, if an arbitration clause intends to limit the period of limitation in less than one year, such a clause would be null and void, because of its conflict with purpose of Article 3 [6] of the Hague Rules by lessening the time limitation for suit.

This was made quite clear in The Ion[56], where it is held:

> "The part of the arbitration clause concerning the time limit was void, because it was in conflict with Article 3 [6] of the Hague Rules".

Then, when part of an arbitration clause calling for lessening the period of limitation which provided in Article 3 [6] of the Hague Rules, such a clause would be

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55-Mankabady, The Hamburg Rules, p 95; Murray, The Hamburg Rules, p 80, where he states:
"Case law in America and England has differed as to whether arbitration proceedings are within the COGSA one-year limit, with the American courts taking the view that it does not apply to arbitration proceedings, while the English courts follow the opposite view"; N E A Agrex S.A. v. Baltic Shipping Co. Ltd [1976] 2 Lloyd's.Rep. p 47; Chandler, p 257.

56-[1971] 1 Lloyd's.Rep. p 541.

void to that extent but no further[57].

The term "suit" includes then the proceedings of arbitration[58] and the commencement of arbitration should be brought within the period of limitation which providing by Article 3 [6] of the Hague Rules. Therefore, when the claimant failed to claim within one year of delivery, or the time when the goods ought to have been delivered, then the Arbitration Act of 1959 will not apply upon an admiralty cases concerning the time limit as a matter of construction, i.e; allowing the court to extend an agreed limitation period.

Kerr, J, in, The Angeliki[59], has pointed out these principles by saying:

> "The court should not exercise its discretion so as to interfere with the time limit of the Hague Rules".

Thus, the extension of the time limit shall not be left to the discretion of the court, but should be governed by the provisions of the Hague Rules and not by non-admiralty law. The one year delay for suit may however be waived or extended by written consent between the contracting parties[60].

57-Ibid, at p 542; Denny Motte & Dickinston Ltd. v. Lynn Shipping Co, [1963] 1 Lloyd's.Rep. p 339.

58-Cadwallader, Bills of Lading, p 8; Compare, Son Shipping Co. v. De Foss & Tanghe [1952] A.M.C. p 1903, where it is stated:
"Where an arbitration clause was incorporated in a bill of lading, there was no time bar because arbitration is not within the term "suit" as used in Article 3 [6] of the American Act".

59-[1963] 2 Lloyd's.Rep. p 226 at p 230.

60-Firman's Ins. v. Gulf Puerto Rico[1973] A.M.C. p 995 at p 1004.

The jurisprudence in most countries enforce the terms of any express extension of the time limitation[61]. If the extension is given for a certain time then the suit must be brought before the court by the end of the extension or another extension must be agreed by the contracting parties[62]. Therefore a mere request for extension without agreement by another party does not establish a waiver[63].

Article 1 [2] of the Visby Rules has authorized expressly any agreement between the parties to extend the time limitation as follows:

> "Subject to paragraph (6) bis the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the

61-The British Maritime Law Association Agreement [The Gold Clause Agreement], extends the time limitation to two years as follows:
"The shipowners will, upon the request of any party representing the cargo whether made before or after the delivery of the goods or the date when the goods should have been delivered as laid down by the {Hague Rules} extend the time for bringing suit for a further twelve months unless (a) notice of the claim with the best particular available has not been given within the period of twelve months or (b) there has been undue delay on the part of consignees, receivers or underwriters in obtaining the relevant information and formulating the claim"; Buxton v. Rederi [1939] A.M.C. p 815; United Fruit v. Folger [1959] A.M.C. p 224; Clifford March [1982] 2 Lloyd's.Rep. p 251, where it is stated:
"Where there was any extension "up to and including April, 21st, 1981 which was a Sunday then suit on the following Monday was timely".

62-Wood, Damages in Cargo Cases, p 957.

63-Schwadach Coffee Co. v. S.S. Suriname [1967] A.M.C. p 604 at p 605, where it is stated:
"Knowledge of the pending claim and failure to answer a written request for an extension of time to file suit... did not constitute a waiver by the carrier of the one-year limitation provision of COGSA"; Tetley, Marine Claim, p 341.

goods, unless suit is brought within one year of their delivery or of the date when they should have been delivered. This period may, however, be extended if the parties so agree after the cause of action has arisen".

We can conclude from the foregoing discussion that the contracting parties might effectively extend the period of limitation, whether prior to, or after the cause of action has arisen, by inserting a clause in the bill of lading, or depending upon the provision of the Visby Rules in the case of the extension being made after the cause of action has arisen[64].

The one year time limit for suit is however not subject for an indemnity claim against a third party. Then what is the time-bar for an indemnity claim against a third party?

Article 3 [6] bis of the Visby Rules provides:

"An action for indemnity against a third person may be brought even after expiration of the year provided for in the preceding paragraph, if brought within the time allowed by the law of the court seized of the case. However, the time allowed shall be not less than three months, commencing from the day when the person bringing such action for indemnity has settled the claim or has been served with process in the action against himself".

We can find out from the foregoing provision that such

64-Companion Colombiana De Seguros v. Pacific Steam Navigation Co.[1965] 1 Q.B.p 101;F.J.J.Cadwallader,"COGSA 1971"[1972] 35 M.L.R.p 68, hereinafter cited as "Cadwallader,COGSA 1971"; Astle,p 195; Powles, p 143.

an indemnity action may be commenced even after the expiration of the time limitation, if it is brought before the proper court within the time allowed by the law of the court seized of such action[65]. The time allowed under the Visby Rules, shall not be less than three months.

This extension for time limit concerning the recourse action has raised some controversies about the term "has settled the claim". It has however been suggested that settlement means that an agreement has been reached or a binding arrangement to pay been intered into, but no payment made[66].

Also, the phrase "time allowed by the law of the court seized of the case" has made the time-bar in his case be governed by the general period of limitation by the local law of a particular country[67].

Thus, English Law still applies a six years delay for suit concerning a recourse action, when the party is claiming the indemnity against a third person, then he must bring the action within six years or much longer if the time limitation expires before he has settled the

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65-Cadwallader, COGSA 1971, p 68; Powles, p 143; Astle, p 195.

66-Tetley, Marine Claim, p 346; Al-Jazairy, p 295; Compare, John Maskell, Messrs, Norton, Rose, Botterell and Roche, "The Influence of the New Rules on Contracts of Carriage",Published in The Hague/Visby Rules and The Carriage of Goods by Sea Act, 1971, London, p Maskell, 1 at p Maskell 5, hereinafter cited as "Maskell, Contract of Carriage ", where he states:
"I myself feel that actual payment will have to be made before the time limit commences".

67-Maskell, Contract of Carriage, p 5.

claim[68].

Finally, the Visby Rules by virtue of Article 4 bis [2] have extended the defence system which provides for the carrier to cover his servants or agents as follows:

> "If such an action is brought against a servant or agent of the carrier {such servant or agent not being an indepependent contractor}, such servant or agent be entitled to avail himself of the defences and limits of liability which the carrier is entitled to invoke under this convention".

The servants or agents will then protect themselves by the Visby Rules defences when such Rules are incorporated specifically within a contract. Otherwise, where the Rules are not incorporated in a contract, the voyage will not be subject to the Visby Rules and consequently the servants or agents will not avail themselves of the carrier's defences[69].

The same result is reached if the servants or agents act fraudently or recklessly, then they will lose the benefit of this Article by virtue of Article 4 bis[4] which refers to the defences under the convention including the time limitation for suit[70].

There is no public policy opposed to the inclusion of the one-year time limit of Article 3 [6] of the Hague

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68-Cadwallader,COGSA 1971, p 68; Bosma v. Larsen[1966] 1 Lloyd's.Rep.p 22.

69-Maskell, Contract of Carriage, p 5.

70-Tetley, Marine Claim, p 347; Halsbury's Shipping and Navigation, p 549, para, 787.

Rules in a bill of lading[71], but there is public policy preventing the carrier from having or inserting in a bill of lading a clause shortening the time limit because it would be contrary to the Article 3 [8] of the Hague Rules, which does not allow the carrier to make any agreement or insert any clause which relieves or lessens his duties, and obligations otherwise than as provided by the Rules[72].

The jurisprudence in the United Kingdom and the United States are however identical in their solution concerning the shortening of the period of limitation for suit by forbidding such an agreement or clause insertion by the carrier[73].

ii-UNDER THE HAMBURG RULES

The problems and difficulties concerning the time limit which are accompanied with the application of the Hague/Visby Rules, have been discussed extensively at the "UNICTRAL" conference and eliminated by drafting the Hamburg Rules.

71-South Star [1953] A.M.C. p 1304; Church Bay [1957] A.M.C. p 16.

72-Dor, p 71.

73-The Zarembo [1942] A.M.C. p 544; The Blidjendick[1950] A.M.C. p 1235; Coventry Sheppard v. Larrinage S.S. Co.[1942] 73 Ll.L. Rep. p 256; Compare, Piazza v. West Coast Line[1951] A.M.C. p 1668, where it is stated:
"A clause providing that a suit for freight shall be subject to a six month time limit, can be considered perfectly valid", Lossia Bank [1938] A.M.C. p 1033; Dear Is.G P.Corp. v. Luckenbach S.S.Co.[1959] A.M.C. p 1839, where it is stated:
"The six months bill of lading limitation period and notice of claims are valid".

The limitation period for suit which provides by the Hague/Visby Rules has enlarged to two years[74] by virtue of Article 20 [1] of the Hamburg Rules as Follows:

> "Any action relating to carriage of goods under this convention is time-barred if judicial or arbitral proceedings have not been instituted within a period of two years".

Thus, the ambiguities, which arose under the Hague/Visby Rules, concerning the arbitration clause have been clarified by stating that the limitation period covers both judicial and arbitral proceedings.

Also, Article 20 [2] of the Hamburg Rules has pointed out the commencement of the limitation period and removed all the disputes which arose under the Hague/Visby Rules by explaining the day or the date of the goods delivery or when they should have been delivered[75].

The Hamburg Rules have explained in more detail which day is included in the limitation period and which one is not, by virtue of Article 20 [3][76], where it is stated

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74-Sweeney, part II, p 349, where he states:
"At the conclusion of the Plenary Discussion nine states: favoured the "one year time bar (U.S, U.S.S.R, Japan, France, Poland, Belgium, Brazil, Argentina, and U.K.) while six states favoured the "two years" provision (Australia, Nigeria, Singapore, Norway, India and Hungary). Accordingly the entire topic was referred to the Drafting Party".

75-Article 20 [2] of the Hamburg Rules provides:
"The limitation period commences on the day on which the carrier has delivered the goods or part thereof or, in case where no goods have been delivered, on the last day on which the goods should have been delivered".

76-Article 20 [3] of the Hamburg Rules provides:

that the first day of the commencement of the time-bar is not included, whereas the last day of the period is counted.

The extension of the limitation period has however been allowed expressly by the Hamburg Rules in Article 20 [4][77], where it is stated that the limitation period may be extended during the commencement of the time-bar by a declaration in writing to the claimant[78].

The Hamburg Rules have followed the Visby Rules by providing a special provision for recourse actions and by allowing the claimant to institute his action even after the expiration of the time limit which is restricted to two years. If the consignee, or claimant, has a right to sue the ship beyond the limitation period, then the ship may sue the shipper when the action is:

> "instituted within the time allowed by the law of the state where proceedings are instituted, However, the time allowed shall not be less than (90) days commencing from the day when the person instituting such action for indemnity has settled the claim or has been served with process in the action against himself"[79].

"The day on which the limitation period commences is not included in the period".

77-Article 20 [4] of the Hamburg Rules provides:

"The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration in writing to the claimant. This period may be further extended by another declaration or declarations".

78-Murray,The Hamburg Rules,p 80;Mankabady,The Hamburg Rules,p 97.

79-Article 20[5] of the Hamburg Rules; Murray, The Hamburg Rules, p 81.

The Hamburg Rules have however removed the doubt created by the Hague/Visby Rules concerning the time-bar where it is stated in Article 20 [1] that:

"Any action relating to carriage of goods"

This phrase covers actions by the carrier and by the cargo interests whether they are based on contract, tort, or otherwise[80]. The carriers actions then against the shipper concerning dangerous goods or freight would be covered by the provisions of the Hamburg Rules[81].

Moreover, the Hamburg Rules provide a special rule for the servants and agents who can avail themselves of the defences and limits of liability which the carrier is entitled to invoke under this convention by virtue of Article 7 [2].

Thus, the time limitation for suit applies to servants and agents of the carrier if they prove that they acted within the scope of their employment, even though they acted deliberately or recklessly and with knowledge that such loss, damage, or delay in delivery would probably result.

80-Article 7 [1] of the Hamburg Rules.

81-Article 8 [2] of the Hamburg Rules.

iii- THE EFFECT OF DEVIATION ON THE TIME LIMITATION

There has been long argument over the effect of deviation or fundamental breach on the time limit. This argument depends upon the characterization of the deviation and its effect[82]. There are two trends concerning the effect of deviation on the one year prescription.

The first opinion purports to deprive the carrier, or the shipowner, of the benefit of the one year limitations provision[83]. This trend concentrates on the argument that an unreasonable deviation[84] displaces the whole of the Rules which are considered as a part of the contract[85] and it abrogates the contractual stipulations including the time limitation for suit.

That means that the pre-existing effect of deviation under the common law is still applicable[86] under the

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82-See chapter III, for more detail about the effect of deviation.

83-Cerro Sales.Corp. v Atlantic Marine Enters, 403 F.Supp, p 562 (S.D.N.Y.1975); [1976] A.M.C. p 375; Astle, p 310.

84-Hellyer v. N.Y.K. [1955] A.M.C. p 1258, where it is stated:
"A claim for non-delivery of merchandise is not to be equated with an unjustifiable deviation which results in abrogating the contract of carriage"; Franco Steel Corp v. N.V. Nederlandsch[1967] A.M.C. p 2440, where it is stated:
"The fact that ocean carrier breached its bill of lading contract by carrying cargo on deck which should have been stowed under deck has no effect on COGSA's one-year time for suit clause".

85-1 Carver, para, 550.

86-Eastern Tempest [1928] A.M.C. p 70, where it is stated:
"There was no deviation and a suit for damage to the apples brought after the period specified in the bill of lading will be dismissed".

Hague/Visby Rules[87].

The same result has been reached by the American courts in respect of fundamental breach, i.e; fraud case.

The court in the Commodity Service Corp. v. Furness Withy & Co[88] held that:

> "If the misdelivery of the goods was intentional, then there was a fraud, and it is submitted that the whole contract would have been breached under such circumstances the carrier could not have the benefit of the one-year period for suit".

The second attitude aims however to apply the provision of Article 3 [6] of the Hague/Visby Rules in cases of deviation as well[89]. Viz, when the Rules apply *ex proprio vigore*, then the deviating carrier is entitled to

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87-Flying Clipper[1954] A M.C. p 259 at pp 262-63, where it is stated:
"There is nothing in the history of the Act to indicate that congress by fixing the limitation of $500 intended to displace the doctrine of unjustifiable deviation which was firmly entrenched in maritime law".

88-[1964] A.M.C. p 760; The new York Star [1977] 1 Lloyd's.Rep. p 445; Insurance Company of North America v. The Exminster, 127 F. Supp, p 541, {S.D.N.Y.1954}, where it is stated:
"Where the action was brought after the COGSA period of limitation had expired, on facts involving cargo shown on the bill of lading but in fact never loaded. It was held that this was a fraudulent misrepresentation, amounting to an unreasonable deviation which precluded reliance on the COGSA protections"; Tetley, Marine Claim, p 335; Morgan, p 489; Compare, Zajicke v. United Fruit Co.[1972] A.M.C. p 1746.

89-Hoyle, p 200, where he states:
"This time limit applies to actions even if the contract is fundamentally broken by a deviation, but this is arguable, and would depend on the circumstances"

avail himself of the time limitation statutory. This trend attempts therefore to clarify the ambiguity of the Rules concerning delay for suit depending upon the meaning of the term "in any event"[90].

The American courts have made that quite clear in The Franco Steel Corp. v. N.V.Nederlandsch[91], where it is held:

> "..at least two bases upon which the limitation should be held effective:
> First, that the language "in any event" clearly suggest that the bar is to apply notwithstanding a deviation or other breach; and Second, that a statute cannot be displaced by a deviation".

This argument intends thus to reject the pre-COGSA position concerning the drastic effect of unreasonable deviation which displaced the contract of carriage and deprived the carrier of relying upon limitation or exception statutory.

The Seventh Circuit in The Herman Schulte[92], held that:

> "The Congress clearly intended to modify the pre-COGSA law by enacting the phrase in any event".

There is however a tendency to apply Article 3 [6] sub-para (4) of the Hague/Visby Rules in the case of unreasonable deviation, fundamental breach, or fraud

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90-Whitehead, pp 45-46; Astle, p 310.

91-[1967] A.M.C. p 2440 at pp 2455-56; Potter v. North German Lloyd, 50 F.Supp, p 173 (N.D.Cal.1943).

92-Atlantic Mutual v. Poseidon [1963] A.M.C. p 665 at p 669.

cases depending upon the words "whatsoever"[93] which is added by virtue of the Visby Rules as follows:

> "...the carrier and the ship shall in any event be discharged from all liability whatsoever in respect of the goods".

We can however conclude that the criterion of "privity or Knowledge" is the best category in applying the time limitation in case of deviation or fundamental breach[94].

Where the damage resulted from an act or omission of the carrier or his servant or agent with intent to cause damage, or recklessness, and with knowledge that damage would probably result[95]. The carrier or his servant, or agent, is then not entitled to protect himself by provision of Article 3 [6] of the Hague/Visby Rules[96].

93-Tetley, Marine Claim, p 346; Compare, Sassoon & Cunningham, at p 175, where they say:
"The addition of the word "whatsoever" was presumably designed to prevent the limitation from being abrogated through carrier misconduct such as unjustifiable deviation, and would have been redundant if the limitation applied "in any event" and regardless of the carrier's fault".

94-U.S.A. v. Wessel,Duval &Co.Inc[1953] A.M.C. p 2056, where it is stated:
"... a negligent stranding was not a deviation, and the time for suit clause was not displaced".

95-Article 3 [4] of the Visby Rules.

96-Morgan,p 490;E.I.Dupont De Nemours v. The Mormacvega, 493F.2d, p 100(2d.Cir.1974,Footnote,98),where Judge Timeberlake States that: "In spite of the absolute terms of section 4(5) of COGSA... it is the law of this circuit that any intentional unjustifiable or unreasonable deviation from the contract of carriage will deprive the carrier of the statutory limitations of liability"; Cerro Sales Corp. v. Atlantic Marine Enterprises[1976] A.M.C. p 375, where it is stated:

Otherwise they are entitled to protect themselves by provision of time limitation for suit[97].

We turn now to discuss the effect of the deviation on the time under the Hamburg Rules. These Rules have dealt with deviation by general principle of liability of the carrier in these Rules[98] in order to avoid the complexities which arose under the Hague/Visby Rules.

The Hamburg Rules appear to adopt a somewhat similar approach to the Visby Rules without specific reference to unreasonable deviation. The Rules only provide in Article 8 [1,2] that the carrier, servant, or agent is not entitled to the benefit of the limitation of liability provided in Article [6], when such carrier, servant or agent committed an act or omission with intent to cause loss, damage, or delay in delivery or acted recklessly and with knowledge that such loss, damage or delay would probably result[99].

One can find out that such deprivation of limitation of

"Cargo damage action commenced on July 23, 1969 was timely under COGSA Sec. 3 (6). If the fire occurred without the carrier's privity. the deviation to Honolulu was a reasonable one and the carrier were privy to the fire's cause, the carrier would be guilty of an unreasonable deviation which would deprive it of the protection of the one-year COGSA limitation".

97-Morgan, p 493, where he suggests the following solution:
[A possible solution would be an amendment to the Rules, holding the carrier deprived of the protections of the Rules in regard to damage to cargo resulting from "intentional unjustifiable or unreasonable "breaches of the contract of carriage, including unreasonable deviations"].

98-Article 5 [6] of the Hamburg Rules.

99-Pollock, The Hamburg Rules, p 9.

liability by virtue of Article 8 [1,2] of the Hamburg Rules is not concluded the time limit which provided in Article [20] of the Rules.

Then the time limit is still applicable even if such loss, damage, or delay in delivery resulted from an act or omission of such carrier, servant, or agent, done intentionally or recklessly and with knowledge that such loss, damage, or delay in delivery would probably result[100].

This was made quite clear by virtue of Article 8 [2] of the Hamburg Rules where it is stated:

> "Notwithstanding the provisions of paragraph (2) of Article[7]"

The latter article expressed the defences and limits of liability which the carrier is entitled to invoke this convention and consequently his servant or agent is entitled to avail himself if he proves that he acted within the scope of his employment.

100-Morgan, p 493; Al-Jazairy, p 299.

SECTION THREE

JURISDICTION CLAUSES

A jurisdiction clause is a clause which intends to choose the place or the country and the court where proceedings may be commenced by the claimant[101]. This clause does thus not regulate the laws which apply to a particular dispute.

The following points concerning the jurisdiction clause should therefore be discussed:

i- Under the Hague/Visby Rules.

ii- Under the Hamburg Rules.

i- UNDER THE HAGUE/VISBY RULES

The Hague/Visby Rules do not contain any provision regulating the jurisdiction for the handling of claims[102]. The bill of lading contains a jurisdiction clause which is intended to take advantage of local laws, or to seek appropriate facilities for handling and defence of claims by a carrier[103].

Many courts, in respect of a jurisdiction clause, call for staying an action rather than dismissing it. This

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101-Thomas, The Hamburg Rules, p 9; Al-Jazairy, p 300; Mankabady, The Hamburg Rules, p 98; Tetley, Marine Claim, p 399.

102-Thomas, The Hamburg Rules, p 9; Al-Jazairy, p 300; Mankabady, The Hamburg Rules, p 98; Tetley, Marine Claim, p 399.

103-R. E. Beare, "Forum Shopping: The Effect of Conflict of Law on the Exercise of Cargo-Underwriter's Subrogation Rights", Published in the Speakers Papers for the Bill of Lading Conventions Conference, 1978, Organized by Lloyd's of London Press Ltd, Beare, 1, hereinafter cited as "Beare, Forum Shopping".

depends on the ground that the time limit for suit may be expired under the court to which jurisdiction is transferred or the court refusing to hear such a case[104]. Thus, prima facie, the original court would stay proceedings instituted in its jurisdiction by hearing such a case[105].

What is the criterion for the court to determine the jurisdiction clause and consider it valid?

There are a number of criteria which are applied by the courts in considering the validity of the jurisdiction clause. Most courts endeavour to base the exercise of their discretion on the criterion of "reasonableness" in order to accept or refuse the jurisdiction clause[106].

Then what constitutes reasonableness?

There are many factors constituting a reasonable jurisdiction clause. These factors concluded from the agreement of the contracting parties, or if there is no allegation that the court, to which jurisdiction is transferred, would not provide a fair trail[107], or the defendants were in that country and discussion had broken place there[108]. Whereas, mere inconvenience or additional

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104-Tetley, Marine Claim, p 392.

105-The Fehmarn [1957] 1 Lloyd's.Rep. p 551; Astle, p 315, where he quoted (the Gottingen No. 2) case which the court held that:
"They should not decline jurisdiction, as to do so would be unreasonable in the light of public policy expressed in the Carriage of Goods by Sea Act".

106-Tetley, Marine Claim, p 396; Astle, p 314; The Aldof Warski, [1976] 2 Lloyd's.Rep. p 241.

107-Nieto v. Tinnum [1958] A.M.C. p 2555; The Archsum [1962] A.M.C. p 999.

108-The Vestris [1932] 43 Ll.L.Rep. p 86.

expense is not the test of reasonableness[109]. The court will thus enforce the jurisdiction clause unless the plaintiff could clearly show that enforcement would be unreasonable and unjust[110].

Brandon, J, in, The Eleftheria[111], has made that quite clear when he said:

> "The principles established by the authorities can, I think, be summarised as follows:
> 1-Where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within the jurisdiction; is not bound to grant a stay but has a discretion whether to do so or not.
> 2-The discretion should be exercised by granting a stay unless strong cause for not doing so is shown.
> 3-The burden of proving such strong cause is on the plaintiffs.
> 4-In exercising its discretion the court should take into account all the circumstances of the particular case.
> 5-In a particular, but without prejudice to (4), the following matters, where they arise may be properly regarded:
> "a"In what country the evidence to the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trail as between the English and foreign courts;
> "b"Whether the Law of the foreign court applies and, if so, whether it differs from English Law

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109-Muller v. Swedish American Lines Ltd [1955] A.M.C. p 1687.

110-Zapata off Shore Co. v. The Breman & Unterweser Reederei G.M.B.H. [1972] 2 Lloyd's. Rep. p 315 (U.S. Sup. Ct).

111-[1969] 1 Lloyd's.Rep. p 237 at p 242.

in any material respects;
"c"With what country either party is connected, and how closely;
"d"Whether the defendants genuinely desire trail in the foreign country, or are only seeking procedural advantages;
"e"Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would (I) be deprived of security for that claim, (II) be unable to enforce any judgment obtained, (III) be faced with a time-bar not applicable in England, or (IV) for political, radical, religious or other reasons be unlikely to get a fair trail".

We can however say that the criterion of reasonableness gives prima facie validity to foreign jurisdiction clause and puts the burden of proving the reasonableness of that jurisdiction clause on the plaintiff[112]. That indicates that the question of reasonableness is a question of fact which depends upon the surrounding circumstances of a particular case[113].

It should be noted that the jurisdiction clause must be clear and precise in order to apply such a clause in a particular country. That makes the jurisprudence of some countries submitting that the jurisdiction clause is null and void because the ambiguity of such a clause does not permit the parties to ascertain which court is the proper one[114].

112-Mankabady, The Hamburg Rules, p 102; Muller v. Swedish American Lines Ltd [1955] A.M.C. p 1687.

113-Eleftheria [1969] 1 Lloyd's.Rep. p 237.

114-Tetley, Marine Claim, p 392; Al-Jazairy, p 302; Dundee Ltd v. Gilman & Co.(Australia) Pty Ltd[1968] 2 Lloyd's.Rep. p 394

Any change in the jurisdiction of a particular case should however not cause any inconvenience to the parties by losing rights which they have already acquired in the original court; i.e; there is prejudice to suit in England, while the delay for suit in Poland had expired.[115]

Such an inconvenience may emerge from contravening Article 3 [8] of the Hague Rules by relieving the carrier from duties or obligations or lessening such liability which provided in this convention.

For instance, when the jurisdiction clause is to be allowed to transfer the case or dispute to a country which has neither adopted nor incorporated the Hague Rules, then such a clause will be null and void. If the jurisdiction clause is not in conflict with Article 3 [8] of the Hague Rules, then it will be valid.

Scrutton L.J. in, Maharani Woollen Mills.Co. v. Anchor Line[116] has made that quite clear when he said:

{Australia Supreme Court of New South Wales,Court of Appeal}, where it is stated:
"The law of a particular country was the proper law of the contract did not mean that there had been a submission to the jurisdiction of the courts of that country"; The Media [1931] 41 Ll.L.Rep. p 80 at p 82.

115-Brandon, J, in, The Adolf Warski [1979] 1 Lloyd's.Rep. p 107 at p 114, where he states:
"It should often be reasonable unless real prejudice to the defendant is clearly proved to make such enforcement subject to a condition that the defendant should waive reliance on the time bar if he can lawfully do so; or alternatively, if such waiver is not permissible, to refuse a stay".

116-[1927] 29 Ll.L.Rep. p 169.

"Now the liability of the carrier appears to me to remain exactly the same under the clause. The only difference is a question of procedure- where shall the law be enforced? and I do not read any clause as to procedure as lessening liability".

The jurisprudence of the United Kingdom and the United States concerning the validity of the jurisdiction clauses arrived at the same conclusions, but on different grounds[117].

So far as the United Kingdom jurisprudence is concerned, when the jurisdiction clause provides that the disputes should be settled in the United Kingdom, then such a clause is considered valid[118].

Otherwise, when the jurisdiction transfers the disputes to the foreign courts, then such clauses would be settled according to the principles of the "convenience" and the "reasonableness" according to the surrounding circumstances of a particular case[119].

117-Beare, Forum Shopping, p 5, where he states:
"Similar attitudes and tests are adopted in the English and Canadian courts, although the impression seems to be that the courts in the United States are less likely to stay an action".

118-Mankabady, The Hamburg Rules, p 99.

119-Eleftheria [1969] 1 Lloyd's.Rep. p 237 (Admiralty Division); Makefiell [1976] 2 Lloyd's.Rep. p 29; Aldof Warski[1976] 2 Lloyd's. Rep. p 241, where it is stated:
"Although the court might be more willing to grant a stay where a clause was reasonable than where it was not"; Sergio M. Carbone & Fausto Pocar, " Conflict of Jurisdictions, Carriage by Sea and Uniform Law", Published in Studies on the Revision of the Brussels Convention on the Bills of Lading, Universita of Di Genova, Facolta 'Di Economica E, Commercio, p 315 at p 325, hereinafter cited as

Whereas, the jurisprudence of the United States has fluctuated in considering the validity of the jurisdiction clause. The United States jurisprudence rejected any jurisdiction clause which displaced the jurisdiction of the United States' courts[120].

This attitude has been changed, by the American Courts, by granting exclusive jurisdiction to foreign courts on the basis of "reasonableness"[121] and "convenience"[122].

Finally, the admiralty court has jurisdiction to stay the whole action, whether such action be founded in contract or in tort[123]. Whereas, the admiralty court has no jurisdiction of a tort committed by a cargo checker on a pier[124].

"Carbone & Pocar"; Al-Jazairy, p 303.

120-Wood & Salick Inc v. Companie General Transatlantique, 43F.2d, pp 941-42 (2d.Cir.1930);Carbon Black Export Inc v. The SS. Monrosa, 254 F.2nd, p 297 (5th.Cir.1958);Indussa Corp. v. SS.Ranborg, 377 F.2nd, p 200 (2nd.Cir.1967); Mankabady, The Hamburg Rules,p 101.

121-Kranger v. Pennsylvania Rail Co.,174 F.2d.p 2556 (2 Cir.1949); Muller v. Swedish American Lines Ltd[1955] A.M.C. p 1687; Zapata Off-Shore Company v. The Breman & Unterweser Reederei G.M. B.H.(The Chaparrall,[1971] 2 Lloyd's.Rep. p 348 at p 351 (U.S.Sup.Ct).

122-Indussa Corp. v. Ranborg [1967] 2 Lloyd's.Rep. p 101, (U.S.Ct. of App); Northern Assurance Co.Ltd. v. M.V.Caspian Career [1977] A.M.C. p 421, where it is held:

"A clause requiring disputes to be settled in the Tokyo District Court was involved under Section 3 [8] of the United States Carriage of Goods by sea Act,1936, since the clause "lessens the carrier's liability";Beare,Forum Shopping,p 5; Carbone&Pocar,p 331.

123-Makefjell [1976] 2 Lloyd's.Rep. p 29; Selim & Kazas v. Naviera Aznar S. A. ET. Al [1976] A.M.C. p 673 at p 674.

124-Strohmeyer & Arpe Company v. American Line S.S.Corp[1938] A.M.C. p 875.

ii-UNDER THE HAMBURG RULES

The working group of UNCITRAL has discussed various viewpoints concerning the subject of jurisdiction in cargo damage disputes.

The first view was against the suggestion of adding a jurisdiction clause to the Rules. The second approach supported the idea that all the foreign jurisdiction clauses should be null and void. The third view was in favour of the insertion of a provision in the Rules which governed the jurisdiction clause by the general criteria which emerged from the extensive practice over the question of the jurisdiction clause under the Hague/Visby Rules due to the absence of a specific provision which regulates such a clause or supplies any guidance which gives validity to the clause. The fourth view supported the trend which supplies a specific provision by giving several alternative places by which a claim may be brought[125].

These different views have been extensively discussed and debated by the Working Group, and the next in Article [21] of the Draft Convention was adopted by the Hamburg Rules which provides that the plaintiff[126] or the claimant

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125-Mankabady, The Hamburg Rules, p 104; Sweeney, Part I, p 95.

126-Sweeney, Part, I, p 101, where he states:

"The United States also opposed the use of the word "Plaintiff" as inappropriate in the context of the purpose for which these rules were being drafted. "plaintiff" would mean either the cargo interest or the carrier interest, whereas the true purpose of the provision was to replace choice of law and choice of forum clauses in bills of lading limiting the effective remedies for the cargo

has the option to bring an action in any court of the following places:

"a"The principal place of business or, in the absence thereof, the habitual residence of the defendant;or

"b"The place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made, or

"c"The port of loading or the port of discharge; or

"d"The agreed or designated place in the contract of carriage by sea.[127]

"e"The place where the vessel has been arrested.[128]

The plaintiff has broadly the same choice of forum in case of arbitral proceedings.[129] Respecting judicial or arbitral proceedings, the claim may be brought to a place other than mentioned above when the contracting parties so agree after the dispute has arisen.[130] The action might be removed to another jurisdiction within the meaning of Article [21] of the Hamburg Rules according to the

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interest".

127-Article 21 [1] of the Hamburg Rules.

128-Article 21 [2] of the Hamburg Rules; Sweeney, Part, I, p 75, Footnote, 45, pp 97-98, where he states:

"Some delegates opposed the provision of the In Rem jurisdiction. For instance, France, believed the In Rem problem to be solved by the 1952 C.M.I. convention on the Arrest of Vessels "International Convention Relating to the Arrest of Seagoing Ships, May 10,1952", Also, Norway objected to any In Rem attachment at places other than the states listed in subparagraph 1(a),(c),and(d)of the proposal A.

129-Article 22 [3] of the Hamburg Rules.

130-Article 21 [5] of the Hamburg Rules; Thomas, The Hamburg Rules, p 9; Murray, The Hamburg Rules, p 81; William Tetley, "The Hamburg Rules-A commentary", [1979] 1 LMCLQ, p 1 at p 8, hereinafter cited as "Tetley, The Hamburg Rules".

request of the shipowner and the claimant must remove the action, when the defendant is obliged to furnish security sufficient to ensure payment of any judgement that may subsequently be awarded to the claimant in the action[131].

It is to be noted that there is no new action between the same parties on the same grounds where a suit has been instituted in a court competent under Article 21 [1,2] of the Hamburg Rules, or where a judgement has been delivered by such a court, unless the judgement is not enforceable in the country in which the new proceedings are instituted[132].

Although the enforcement of a judgement or, the removal of a an action to a different court within the same country, or to a court in another country is not to be considered as starting a new action.

Many commentators have however criticized the jurisdiction provision which provides by the Hamburg Rules on the grounds that there are many places mentioned as a competent court, within the meaning of Article [21] of the Hamburg Rules which would replace them by another courts for being identical with those where legal proceedings may be brought according to the basic principles of law upheld by the courts of all

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131-Article 21 [2] (a) of the Hamburg Rules.

132-Article 21 [4] (a) of the Hamburg Rules; Murray, The Hamburg Rules, p 81, where he states:
"The doctrines of collateral estoppel and *res judicata* are implicitly recognized by the provision of the Article 21 [4] (a) of the Hamburg Rules".

countries.[133] For instance, the place where the contract was made and "the port of loading" are usually, indicated to the same place because the bill of lading is normally issued at the port of loading.[134]

We should although note that the Rules require that a court which exercises the jurisdiction under Article [21] must be "competent" according to its national law. That does not mean that the Hamburg Rules refer to the rule of "forum non convenience". Accordingly, the court competent within the meaning of the Article [21] can exercise its discretion to refuse to hear such a case on that ground.[135]

Therefore, the contracting parties' right to choose one or more forums, as an additional option to the choice of forums indicated in the Rules, is not absolute, but it

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133-D.C.Jackson, "The Hamburg Rules and Conflict, of Laws", Published in The Hamburg Rules on the Carriage of Goods by Sea, Edited by Samir Mankabady, 1978, p 221 at p 230, hereinafter cited as "Jackson, The Hamburg Rules".

134-Mankabady, The Hamburg Rules, p 105; Al-Jazairy, p 313; Sergio M. Carbone & Riccardo Luzzatto, "Arbitration Clauses, Carriage by Sea and Uniform Law", Published in The Studies on the Revision of the Brussels Convention on Bills of Lading, 1974, p 353 at p 385, hereinafter cited as "Carbone & Luzzatto, where they criticise the jurisdiction option to institute the action in the place where the contract was made, but on another ground by saying that:

"The principles adopted in various national legal system with a view to determining the moment and place of making contracts vary considerably under many aspects in accordance with more general concepts of the theory of juridical negotiation and it is equally well known how divergent may be the solutions accepted by various national legal system as to determination of fundamental norms where by the place of concluding a contract is to be ascertained".

135-Jackson, The Hamburg Rules, p 234.

must be selected as a competent or proper forum according to the principle of the reasonableness and subordinated to a condition of equality of the parties.[136]

SECTION FOUR

BURDEN OF PROOF

Where the cargoes have arrived in a damaged condition without showing specifically the cause of the damage, then a situation of real controversy about who bears the responsibility of such damage will emerge.[137]

This makes the contracting parties defend themselves by any available excuse. For example, the consignee endeavours to show that the damage was caused by the misconduct or negligence of the carrier or his servants, i.e; where the vessel has deviated from the contracted or customary voyage, intentionally without any reasonable reason or permission from the shipper; or where the goods were badly stowed or improperly ventilated.

On the other hand, the carrier rebuts such argument by saying that damage was caused by inherent vice of the goods.[138]

136-Carbone & Pocar, p 339.

137-Black,H.C.Law Dictionary (St.Paul, Minnesata: West Publication Company, 1957), p 246, hereinafter cited as "Black's Dictionary", where he stated the meaning of the burden of proof as:
"The necessity or duty of proving affirmatively a fact or facts in dispute on an issue raised between the parties in a cause"; Walker, The companion to Law, p 904, where he defines the word onus of proof or burden of proof.

138-Diamond, The Hamburg Rules, p 10.

Then, the burden of proof is a very important element in deciding the proximate cause[139], which is considered as a source of uncertainty and as a matter of diversity between the contracting parties especially in case of deviation.[140]

I will therefore discuss the principles of burden of proof under these headings:

i- Burden of Proof Under the Hague Rules.

ii- Burden of Proof Under the Hamburg Rules.

i-BURDEN OF PROOF UNDER THE HAGUE RULES

There is no general theory of proof set out in the Hague Rules[141]. That does not mean that there is not a particular provision dealing with the burden of proof. The burden of proof in an action for damages against a carrier is on the claimant. He must establish that the loss of or damage occurred while the cargoes were in the carrier's charge; the physical extent of such loss or damage and the actual monetary value of the loss or damage.[142]

Once the claimant has made his claim clear, then the carrier must prove the course of the loss and whether he has a right to invoke one of the valid immunities

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139-Green Wood, p 800.

140-TD/B/C.4/ISL/6/ Rev.1/ p 44.

141-Tetley, Marine Claim, pp 47,54.

142-Halsbury's Shipping & Navigation, para, 450, 1199; Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 T.L.R. p 177; Ashcroft v. Curtin[1971] 3 ALL E.R. p 1208.

stipulated in the COGSA or in the bill of lading.[143] There are a number of cases which indicate that the carrier's failure to deliver the cargoes in spite of the arrival of the vessel, or the short delivery and delivery in a damaged condition[144], may be considered as evidence of breach of contract by the carrier and consequently the loss of or damage to the cargo had occurred while the goods were in his charge[145]. That does not establish prima facie wilful misconduct against the carrier[146], but probably of negligence.[147]

The carrier can however protect and free himself from the responsibility by showing that the goods were not shipped on his vessel[148] in case of non-delivery or that the loss of or damage to the cargo occurred while the goods were not in his charge.[149]

If the carrier wants then to seek the protection of the immunities conferred upon the carrier by the COGSA or the Rules. The burden of proof is on the carrier to show that the loss of or damage to the cargo occurred without

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143-Fabre S.A. v. Mondial United.Corp[1963] A.M.C.p 946;Scow Steelweld (Capsizing)[1968] A.M.C.p 2064; TD/B/C.4/ISL/6/Rev.1/p 9.

144-Kimball, p 228; Cleton, p 5.

145-Scrutton, 19th, ed, 1984, p 220.

146-Smith v. G.W.RY.[1922] A.C. p 178.

147-The Roberta [1938] 60 Ll.L.R. p 84.

148-Scrutton, 19th,ed, 1984, p 220; Chung Hwa Steel Products & Trading Co, Ltd. v. Glen Line, Ltd. [1935] 51 Ll.L.R. p 248.

149-Ciano [1947] A.M.C. p 1477, where it is stated:
"The carrier having failed to prove either that the damage did not occur aboard the vessel or that, however it occurred, it was not due to or contributed to by the fault of the carrier, the libellant is entitled to recover".

the carrier's actual fault or privity nor the fault or neglect of the carrier's agents or servants.[150]

Whereas, if there are two contributing causes of the loss of or damage to the cargo, one of these causes constituting unseaworthiness by a failure of the carrier to exercise due diligence, and one for which the carrier is entitled to exempt himself from liability by the exceptions of Article 4 [2] of the Hague Rules. The onus of proof is upon the carrier to prove what part of damage was caused by the excepted peril.[151]

For instance, if he proves that he exercised due diligence to make the vessel seaworthy but in spite of that some loss or damage was caused to the cargo, then he will be entirely exempted by virtue of Article 4 [2] of the Hague Rules.[152] Otherwise, if he fails to prove his diligence, then he will be responsible for the whole of the damages sustained[153], unless he can show the proportion of damage attributable to the excepted peril.[154] We can say that the burden of proof rests upon

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150-Article 4 [2] (9) of the Hague Rules; Owners of Cargo of City of Barada v. Hall Line Ltd, [1926] 42 T.L.R. p 717; Astle, p 81.

151-Ceylon Government v. Chandris[1965] 3 ALL E.R.p 48; [1965] 2 Lloyd's.Rep.p 204;Halsbury's Shipping & Navigation, para, 448, Footnote, 2.

152-J. Gerber & Co. v. S.S.Sabine Howaldt & Co,[1971] A.M.C. p 539.

153-Smith, Hogg &Co,Ltd. v. Black Sea & Baltic General Ins[1940] A.C.p 997.

154-Astle, p 81; Clarke, pp 189-190; Tetley, Marine Claim, p 126; Al-Jazairy, pp 97-98; Lord Summer, in, the Gosse Millerd v. Canadian Government Merchant Marine [1929] A.C. p 223 at p 241; Compare, The Vallescura, 293 U.S. p 296; [1934] A.M.C. p 1573, where it is stated:

the carrier to show that neither his actual fault or privity[155] nor neglect of his agents or servants[156] contributed to the loss or damage[157], or to bring himself within any exception exonerating him from liability which the law otherwise imposes on him.[158]

If the carrier cannot protect himself by one of the catalogue of the exceptions contained in the COGSA or the Rules, then he is liable for the unexplained damage despite the facts that the vessel was seaworthy, the goods were stowed perfectly and the hold was in good condition.[159]

When the shipowner or the carrier has proved that the loss or damage to the cargo resulted from one of the excepted perils[160], the shipper or the consignee must refute all the carrier's evidence in order to recover such loss of or damage to the cargo by showing that the real cause of the loss was not covered by the exception

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"... the carrier must bear all the damages even though it has been established that those damages were in part caused by occurrences for which it is excepted from liability".

155-Celestial [1962] A.M.C. p 1965, where it is stated:
"The carrier remains liable if its negligence concurred in causing the loss".

156-Owners of Cargo of City of Baroda v. Hill Line,Ltd[1926] 42 T.L.R. p 717.

157-Article 4 [2] (q) of the Hague/Visby Rules; Astle, pp 162,325.

158-Vallsecura [1934] A.M.C. p 1573; Westinghouse v. Lestie Lykes [1982] A.M.C. 1477; Shickshinny[1942] A.M.C. p 910; Virgin Islands Corp v. Merwin Ltge Co,[1958] A.M.C. p 294; Sweeney, Part, I, III.

159-George E. Pickett [1948] A.M.C. p 453; Levationo Co, v. S.S. President Hayes [1964] A.M.C. p 1247

160-Maui, [1940] A.M.C. p 1299.

of Article 4 [2] of the Hague Rules, i.e; where the unseaworthiness or unjustifiable deviation caused such loss or damage to the cargo.[161]

Thus, if the shipper cannot make a prima facie case to that effect then the shipowner will be protected by one of the excepted perils. That does not mean that the carrier cannot rely on the exception clauses, unless he proves absence of negligence on his part. The carrier or the shipowner has then a right to exempt himself from liability by an excepted peril or excepted cause and he may, in such a case, have to give evidence excluding causation by his negligence.[162]

Another source of uncertainty has however arisen in cases of deviation. There is a heavy burden of proof upon the carrier because he has access to the facts concerning the goods and the whole contracted venture. The burden rests upon the carrier to prove what was the contractual route or the customary course of the voyage; the criterion of reasonableness of the deviation; that the loss of or damage to the cargo took place while the vessel was on the contractual route[163]; and that the loss

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161-Scrutton, 19th, ed, 1984, p 220; Hunt & Winter Botham v. B.R.S.[1962] 1 Q.B. p 617; The Citta Di Messina, 169 Fed. Rep, p 472 {1909 S.D.N.Y.}, where it is stated:
"Where damage to cargo was prima facie within the exceptions in the bills of lading, the burden is on the shipper to establish that the goods are removed from the operation of such exception because of the carrier's negligence".

162-Lord Pearson, in, Albacora S.R.L. v. West Cott & Laurance Line,Ltd [1966] 2 Lloyd's.Rep. p 53 at p 64.

163-TD/B/C.4/ISL/6/Rev.1/ p 44.

or damage to the cargo was caused by justifiable deviation or that such loss or damage could occur even if the vessel had not deviated.[164]

Whereas, the consignee or claimant must prove the deviation or the unreasonable change in course of maritime voyage and that loss or damage was caused by and a result of deviation.[165]

The method or procedure of the proof is established by having surveyors examine the goods on board the vessel and inspect the cargo there. The surveyors are obliged to issue a certificate about the survey concerning the condition of the goods and what happened during that survey.

Then, what is the legal situation if the carrier refuses permission to the surveyors or the consignee to attend on board?

The Rules do not expressly oblige the carrier to give permission to the consignee to attend on board[166]. We can conclude such permission from Article 3 [6] of the Hague Rules as following:

> "In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods".

164-George W. Burns, "An Analysis of Common Carrier Liability for Special Damages", [1968] 7 Transportation Journal,p 11 at p 20, hereinafter cited as "Burns, Common Carrier Liability for Special Damages".

165-Tetley, Marine Claim, p 356; Scrutton, 19th, ed, 1984, p 220.

166-Tetley, Marine Claim, p 263.

Mere certificates and surveys, however, are not enough to discharge a carrier's obligation for proper stowage. The United States Court has made that quite clear in the "Anthony II"[167], where it is stated:

> "That certificates issued by port warden and Canadian Government surveyors were not sufficient to discharge carrier's obligation for proper stowage because carrier could not delegate that duty; and that those certificate did not preclude findings of negligence".[168]

We can say that the survey report constitutes only one item of evidence against the carrier[169] that the damage was caused to the cargo while they were in his charge, especially where such survey took place on board the carrying vessel.

Thus, the question of the carrier's legal liability for the loss of or damage to the cargo is beyond both the port authority and the power of the surveyor.[170]

ii- BURDEN OF PROOF UNDER THE HAMBURG RULES

The Hamburg Rules have removed the confusion of applying the general pattern of proof in COGSA cases under the Hague Rules by adopting the principle of presumed fault or neglect, in all cases of loss or damage

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167-[1966] 2 Lloyd's.Rep. p 437 at op 438.

168-West Kyska [1946] A.M.C. p 997.

169-TD/B/C.4/ISL/6/Rev.1, p 7; Interstate Steel Corp. v. S.S. Crystal Gem [1970] A.M.C. p 617, where it is stated:
"Even where cargo has not actually been repaired, damages may be based on marine surveyor's estimates of depreciation predicated on examination of only part of the cargo".

170-Edouard Materne v. S.S. Leerdam [1956] A.M.C. p 1977 at p 1978.

to the cargo, on the part of the carrier[171]. That indicates that where the occurrence which caused the loss, damage, or delay in delivery took place while the goods were in the carriers charge, the carrier can escape from liability in the case of proving that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.[172]

The common understanding of the Hamburg Rules has made this issue quite clear by imposing the burden of proof on the carrier. The Rules of burden of proof in respect to certain cases are modified by the provisions of the conventions depending upon the surrounding circumstances of a particular case.[173]

These exceptions on the Rules of burden of proof, which is generally imposed against the carrier, is, in fact, in the case of carriage of live animals. According to these exception the carrier will not be liable for loss, damage ore delay in delivery resulting from any special risks inherent in that kind of carriage or if he can prove compliance with any special instructions given by the shipper.[174]

However, the problems which have arisen under the Hague Rules, where two contributing causes, such as fault of

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171-Wilson, p 141; Al-Jazairy, p 99.

172-Article 5 [1] of the Hamburg Rules.

173-Annex [2] of the Hamburg Rules.

174-Article 5[5] of the Hamburg Rules;Pollock,p 8;Wilson,pp 142-43.

the carrier combined with an exception to cause loss, damage, or delay in delivery, may be clarified under the Hamburg Rules by providing that the carrier shall be liable "only to the extent that the loss, damage, or delay in delivery is attributable to his fault".

The carrier can then escape from the liability of loss, damage or delay in delivery when he establishes the proportion of the loss attributable to other factors. Otherwise, if he fails to discharge this burden of proof, he will be liable for the entire loss of or damage to the cargo resulting from such causes[175].

The method of proof is outlined in the Hamburg Rules by authorising the surveyors to examine and inspect the goods on board the vessel in certain cases, such as in case of fire on board the ship affecting the goods.

The surveyors have a right to investigate the cause and circumstances of the fire according to the shipping practices in a particular case.

At the same time, they are obliged to issue a report after the damages have been itemized and valued in general and the surrounding circumstances which combined during that survey in particular[176]. The surveyor's report shall be made available on demand to the carrier and the

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175-Article 5 [7] of the Hamburg Rules; Wilson, pp 144-45; Al-Jazairy, pp 103-104; Guido Alpa & Francesco Berlingieri, "The Liability of the Carrier by Sea: Present Regulation and Prospects of Reform", Publish in the Studies on the Revision of the Brussels Convention on Bills of Lading, 1974, p 69, Universita Di Genova, Facolta' Di Economia Ecommercio, hereinafter cited as "Alpa & Berlingier, The Liability of the Carrier by Sea".

176-TD/B/C.4/ISL/6/Rev.1, p 7.

claimant[177].

We can however conclude that the Hamburg Rules have put the carrier under a heavy burden of proof to show and prove that neither he nor his agents or servants caused the loss, damage or delay in delivery by their fault or neglect[178].

We can not deny then that the carrier is in a disadvantaged position by imposing a burden on him to show that the relevant occurrence did not occur while the cargoes were in his charge, or he took all the reasonable measures that could reasonably be required to avoid the occurrence and its consequences[179].

177-Article 5 [4] of the Hamburg Rules.

178-Report Cleton, "The Hamburg Rules Diplomatic Conference", Publish in The Hamburg Rules A One-Day Seminar, Organized by Lloyd's of London Press Ltd, 1978, London, Cleton, p 1 at p 5, hereinafter cited as" Cleton, The Hamburg Rules"; Pixa, p 456.

179-These principles have defined in the Hague Rules by a long catalogue of exceptions under Article 4 [2]; Diamond, The Hamburg Rules, p 12; Sweeney, Part.1, p 111-117.

CONCLUSION

The Hamburg Rules have significant impact on the procedure of the action for lost or damaged cargo in many aspects.

First:

The period for giving notice has been slightly enlarged from three days, as provided in the Hague/Visby Rules, to fifteen days in case of latent damage. This written notice must be given within sixty consecutive days, in case of delay, after the day when the goods were transferred to the consignee.

Second:

The sanction for not giving notice is still the same, which does not affect the right of the contracting parties to bring suit against the carrier within the time limit for suit in the Rules.

Then, the effect of not giving such written notice is considered prima facie evidence of discharging the carried goods in sound condition as stated in the bill of lading.

Viz, we can consider such written notice as "disciplinary measure" to investigate the claim and all evidence which is available to the carrier at the port of discharge.

Third:

The time limit for suit has extended to two years, it is one year in the Hague Rules. This time limit, which

covers both judicial and arbitral proceedings during the two years period under the Hamburg Rules, was a controversial issue under the United States and the United Kingdom COGSA and case law.

American courts adopted the viewpoint that the COGSA one year limit does not apply to arbitration proceeding.[180]

The expansion to two years under the Hamburg Rules represents a great advantage to shippers and cargo interest because it gives the claimant additional time to collect all evidence which proves his case, or to decide whether or not to sue the carrier.[181] Consequently, the extension of the limitation period will increase the frequency of claims and that will increase the cost of shipowners.[182]

The New Rules are however seemingly less favourable to the shipper because the carrier never loses the limitation period even in the case of loss, damage, or

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180-Murray, The Hamburg Rules, p 80.

181-Honour, p 248; A. Diamond, "The Division of Liability as Between Ship and Cargo (in so far as it affects Cargo Insurance) Under the New Rules Proposed by UNCITRAL" [1977] 1 LMCLQ, p 39 at p 51, hereinafter cited as "Diamond, UNCITRAL"; Tetley, The Hamburg Rules, p 14.

182-W. R. A. Brich Reynardson, M. A. Messrs. Thos. R. Miller & Son, "The Implications on Liability Insurance of the Hamburg Rules", Published in the Hamburg Rules, A One-Day Seminar, Organised by Lloyd's of London Press, Ltd, 1978, Reynardson, p 1 at p 4, hereinafter cited as "Reynardson"; Sassoon & Cunningham, p 185, where they said:

"The Hamburg provision is formulated as a time-bar rather than as a discharge from liability. This change may prove beneficial to cargo interests in areas not related to the carriage of goods, for example. bankruptcy".

delay in delivery resulted from an act or omission done with intent to cause such loss, damage, or delay, i.e; unreasonable deviation, fraud.etc.; or recklessness and with knowledge that such loss, damage, or delay in delivery would probably result.[183]

Fourth:

Due to the absence of a particular provision on jurisdiction provided by the Hague/Visby Rules, the court of most countries in exercising their discretion may accept or refuse jurisdiction according to Article 3 [8] of the Hague Rules.[184]

That makes the situation more complicated because the choice of forum or <u>fora</u> may be more important than many of the express terms of the contract and may indeed be determinative of the outcome.[185]

The legal situation of the jurisdiction under the Hamburg Rules is thus much better than under the Hague Rules by providing several alternative places by which action may be brought and supplying the same choice of fora concerning the arbitral proceedings.[186]

These provisions aim to achieve a balance between the carrier and the cargo interests by allowing the shipper or the cargo-owner, and any person who is authorized by him, to bring his action in any court provided by the

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183-Morgan, p 493.

184-TD/B/C.4/ISL/6/REV.1/ p 1 at p 50.

185-Learned Judge, in, <u>The Tricolar</u> [1933] A.M.c. p 919; Compare, Al-Jazairy, p 316.

186-Shah, p 25.

Hamburg Rules as the proper forum in such action[187].

Finally:

The Hamburg Rules have clarified the general pattern of proof by applying the principle of presumed fault or neglect on the part of the carrier in the case of lost or damaged disputes. This is then another disadvantage imposed on a carrier to show that the loss, damage, or delay in delivery occurs while the goods were not in his charge or he took all the reasonable measures to avoid the relevant occurrence and its consequences.

187-Carbone & Pocar, p 339; Compare, Jackson, The Hamburg Rules, p 234, where he states:
"The carrier will not always be the defendant and more important, it leaves it open to a court to deny a plaintiff in one of the other places the exercise of the jurisdiction in that place".

CHAPTER SIX

THE IRAQI LEGAL SYSTEM CONCERNING THE LIABILITY OF THE CARRIER, COMPARED WITH EGYPTIAN JURISPRUDENCE IN CERTAIN POINTS

The legal system of the liability of the carrier, in respect of the carriage of goods by sea, is a most controversial issue which raises many difficulties in solving the problems, whether in the International Conventions or in National Laws, of the contracting parties or non-contracting parties. The Iraqi Draftsman endeavoured to unify all the rules governing the transportation in uniform text by issuing the Iraqi Transport Law[1]

We have to point out, therefore, that the general principles of the Iraqi Transport Law in fact apply to all types of carriage having regard to particular circumstances of a particular sort of transport, by providing a separate provision for transport by Air, Road, and Sea.

Article [3] of the Iraqi Transport Law[2] makes this quite clear by providing:

> "The principles of this law apply to all types of transport whatever the character of the carrier in practicing his business, taking into account the principles of the International Convention of which Iraq is a part."

1-Law 80/83 issuing the "Transport Law" is published in the offical Gazette 2953/83 [effective 8 February 1984].

2-Quotations from the Iraqi and Egyptian Codes in this chapter are my own translation from the original Arabic.

I will thus shed some light on the principles of the liability of the carrier in general, and the maritime carrier in particular, under the Iraqi Transport Law compared with Egyptian jurisprudence in the relevant points.

The following points should then be discussed:

Section one: Basis of the Liability of the Carrier According to the Iraqi Transport Law.

Section two: Limitation of the Liability of the Carrier.

Section three: Procedures of Action for Lost or Damaged Cargo.

SECTION ONE

BASIS OF THE LIABILITY OF THE CARRIER ACCORDING TO THE IRAQI TRANSPORT LAw

The general principles of the Iraqi Transport Law purport to introduce the best services in transporting passengers and carrying goods by providing a just balance between the obligations of the contracting parties which emerge from the carriage contract.[3]

Also the Iraqi law aims to regulate transportation in order to participate in the inquiry of the national development plans.[4] In order to enforce such principles then the Iraqi Transport Law is founded on the following bases:

1. To unify all the rules which govern carriage;
2. to dominant the object of the legal relationship on the contractual relationship;
3. to ensure that the socialist sector is leading and directing the carriage activity.[5]

I will discuss therefore the following points:

i-Basic Elements of the Liability of the Carrier under the Iraqi Transport Law.

ii-Recovery of losses, Damages and Delay in Delivery.

iii-Immunities of the Carrier.

3-Article [1] para [1,2] of the Iraqi Transport Law.

4-Article [1] para [3] of the Iraqi Transport Law.

5-Article [2] of the Iraqi Transport law.

i- BASIC ELEMENTS OF THE LIABILITY OF THE CARRIER UNDER The IRAQI TRANSPORT LAW

The Iraqi Transport Law provides general principles for the liability of the carrier.[6] These principles consider the carrier's liability as an "obligation of result" and not as an "obligation to exercise due diligence".[7]

Article 46[1] of the Iraqi Transport Law makes this quite clear when it provides :

> "The carrier ensures the safety of the goods during the performance of the carriage contract and is liable for all damages caused to the cargo. The carrier would not be exempted from the liability which occurs from the loss[8] of, or damage to the goods, or delay in delivery, unless he proves that such loss, damage, or delay in delivery, has occurred by force majeure, inherent vice in the goods or the fault of the consignor or the consignee."

6-I have explained the general principles of the liability of the carrier under the International Convention such as, The Hague/Visby Rules and The Hamburg Rules. Therefore, I will not become involved in an extra explanation of these principles which are set forth in Chapter II, and IV.

7-Talib Hussan Musa, The Commercial Contract under the Iraqi Commercial Law, (vol 1, 1st.ed, 1973), Baghdad, p 53, hereinafter cited as "Musa, The Commercial Contract; Majid H. AL-Anbaki, Iraqi Transport Law, the Rules and the Principles, Baghdad, 1984, p 226, hereinafter cited as "AL-Anbaki, Iraqi Transport Law".

8-The literal translation for the word "loss" which is mentioned in the Arabic text, is "destruction of the thing". Whereas, the meaning of that word in French means "loss" which is actually used in the Hamburg Rules. I rather use therefore word "loss" than "destruction of the thing" which is not understandable in United Kingdom jurisprudence.

That means that the Iraqi Law constitutes the carrier's liability on the principles of "trust" by taking over the goods carried. The carrier's liability is, however, a contractual liability which emerges from the carriage contract.

The carrier is liable when he has violated his contractual obligation in relation to the loading, handling, stowage, custody, care and discharge of the goods in the sound condition stated in the bill of lading, whether such violation has been committed by the carrier, or his agents, or servants, within the scope of their employment, unless he proves that such loss was caused by force majeure, inherent vice in the goods, or the fault of the shipper, consignor, or consignee.[9] We can characterise, therefore, the carriers liability, which emerges from the carriage contract, as "an obligation to exercise due diligence".[10]

The current trend, however, in the Iraqi Transport Law, concerning the period of the carrier's liability, supports the idea which believes that the carrier's liability commences from the moment the goods are in the carrier's charge and ceases at the moment the goods are delivered to the consignee.[11]

9-M. S. AL-Sharkawi, The Maritime Law, 1978, p 270, hereinafter cited as " AL-Sharkawi, The maritime law"

10-Compare, Ahmed Hussni, Maritime Cassation, 1980, p 35, hereinafter cited "Hussni, Maritime Cassation."

11-Article 27 [1] of the Iraqi Transport Law extends the liability of the carrier to commence from the time the carrier has taken over the goods, until the time he has delivered the goods.

Article [27] para [1] of the Iraqi Transport Law has adopted such attitude by providing:

> "The carrier's liability commences the moment the carrier has taken over the goods and ceases when he has delivered them to the consignee, according to the rules of the law."[12]

On the other hand, Article 131 [1] of the Iraqi Transport Law provides the same principles in more detail as follows:

> "The carrier's liability commences when the goods are in his charge and ceases when he has delivered them to the consignee at the destination, or, has put them under the control of the consignee, according to the contract or the law, or when he has delivered them to the authorized body."

Consequently, we can reveal that the principles of the Iraqi Law concerning the carrier's liability, differ from the basic elements founded under the Hague/Visby Rules which extend only to the "maritime stage or course".

Viz, the carriers liability commences from the beginning of the voyage, and ceases at the end of the voyage, by discharging the goods from the vessel. That is what is called the "tackle to tackle" period[13] when the carrier's liability extends only for that period unless the carrier has agreed to extend such a period of liability during his control of the goods [at the port of loading or discharge].

12-Article 27 [1] of the Iraqi Transport Law.

13-Tetley, Marine Claim, p 256; see chapter II.

The attitude of the Egyptian courts concerning the period of the carrier's liability is however the same as that of the Hague Rules[14] which restrict the liability of the carrier to the maritime course or stage by establishing a construction which provides that the loss of or damage to the goods is assumed to have taken place during the maritime stage[15] unless the carrier proves otherwise.[16]

Accordingly, the Egyptian court of cassation held on 11th, February, 1960[17] that:

> "It is quite clear from the preparatory measures of the International Convention For The Unification of certain Rules of Law Relating To Bills of Lading and Protocol of Signature, BRUSSELS, 25/8/1924 that if the goods carried are lost or suffer some loss or damage and it is difficult to fix the date of such loss, whether it happens before the loading or after the discharge, or during the maritime course, then the damage presumably

14-Egypt adopted the Hague Rules by the law No. 18 of 1940 and have been enforced since 29th, 1944; See Hussni, Maritime Cassation, p 91; Sameha Al-Kalubi, The Maritime Law, 1982, p 287, hereinafter cited as "Al-Kalubi, Maritime Law".

15-M.K.Taha, Principles of Maritime Law, 1974, p 287, hereinafter cited as "Taha, Maritime Law, where he states:

"Limiting the Rules to the maritime stage is against the doctrine of the unity of the contract of transport which starts with taking over the goods by the carrier and ends with delivery of the goods to the consignee".

16-Ahmed Hussni, The International Maritime Carriage for the Goods and the Perils of the Sea According to the Hague/Visby Rules and the Hamburg Rules 1978, 1980, p 35, hereinafter cited as "Hussni, Maritime Carriage"

17-DDECC, Year, 11th, Case, 124/25 of 11 February 1960; Egyptian Court of Cassation, Case 452/42 of 20 June 1977, Year 28th, p 1452.

has taken place during the maritime stage. Namely, the period which expires only between the loading and discharge of the goods, unless the carrier proves that the loss has taken place during the operations prior to the loading or subsequent to the discharge".

Whereas, those principles under the Iraqi law are similar to the principles of the Hamburg Rules because the New Rules extend the scope of the carrier's liability to cover the entire period during which the carrier is in charge of the goods, at the port of loading, during the carriage and at the port of discharge.

The Iraqi Draftsman aims however to extend the scope of the period of the carrier's liability to cover all the different operations of loading, discharge, and custody of the goods in the carrier's warehouse, which are deemed to be necessary for the carriage of goods by sea.[18]

Then the carrier's supervision or control of the goods is to be considered as a factorial element in deciding whether the goods are in the carrier's charge or not. The only restriction, however, has been imposed by the Hamburg Rules, that the place of taking over is limited to the port of loading.[19]

On the other hand, the Iraqi Law purports to widen the scope of the carrier's liability by applying the Rules at the moment of taking over the goods by the carrier and placing them under his supervision or his control.[20]

18-Article [4] para [1] of the Hamburg Rules.

19-Article [4] para[1] of the Hamburg Rules.

20-Article [131] para [1] of the Iraqi Transport Law provides:

We turn now to discuss the basic duties of the carrier, under the Iraqi Transport law, which are divided into three categories.

1-Prior to the Voyage.

2-During the Voyage.

3-Subsequent to the Voyage.

1-PRIOR TO THE VOYAGE

According to the Iraqi Transport Law, the carrier should take into account the following procedures before the vessel has sailed for a given voyage.

A-Acceptance of the Requests of the Loading and Preparation of the Goods for Shipping.

B-Seaworthiness of the Vessel.

A-ACCEPTANCE OF THE REQUESTS OF THE LOADING AND PREPARATION OF THE GOODS FOR SHIPPING.

The carrier is bound to accept all the requests of loading which are within the capacity of his transportation. The carrier can nevertheless refuse such requests where the existing space in the vessel is not sufficient for carriage and stowage of such goods in safety, or were these goods are out of his transportation field, i.e; where the carrier is used to carrying grain, wheat, flour, etc. and he receives a request of loading is for transportation of oil, which needs a special

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"For the purpose of para [1] of this Article, the meaning of taking over the goods by the carrier is to put the goods under the supervision and control of the carrier".

vessel provided particularly for such purpose, he may refuse the request.

If the carrier discovers, however, that these requests of shipment are within his ability, then he has to accept them and consider the following conditions:

1-The date of the request, i.e, if there are many orders for shipment he will be obliged to give the priority to the first order;

2-The priority is for goods which are necessities, e.g., wheat, flour, grain...etc.[21]

B-SEAWORTHINESS OF THE VESSEL

The carrier is obliged to supply a seaworthy ship in design, structure, equipment and with a sufficient and competent crew, in order to render the vessel fit for carrying the goods to the destination undertaken by the contract of carriage. The obligation to make the vessel seaworthy becomes an obligation to exercise due diligence by furnishing the vessel to make it seaworthy.

The criterion for seaworthiness is then "due diligence" which is clearer than the phrase "reasonable diligence" or "all reasonable means".[22]

The Iraqi Transport Law has, however, established general rules for seaworthiness by providing an Article [29] para [1] which states:

> "The carrier is bound to carry the goods by reliable method of transport".

21-Article [26] para 1 and 2 of the Iraqi Transport Law.

22-Cadwallader, Seaworthiness, p 3.

This paragraph has raised numerous difficulties for many reasons:

1-The meaning of seaworthiness is subsumed under the general rule of the carrier's liability without restricting or mentioning the specific meaning of seaworthiness in the maritime voyage.

2-It does not mention the nature of the obligation of the "reliable method of transport" whether, the intention is to "exercise due diligence" or "all reasonable means" or whether it means to "exercise an absolute obligation".

3-Also it does not provide the precise moment of the seaworthiness, whether it is required before and at the beginning of the voyage, as stated in the Hague Rules, or through the course of maritime voyage, as provided in the Hamburg Rules, by stating the term "reasonable measures".[23]

Whereas, the Egyptian Court of Cassation on 30th January 1964[24] held that:

> "The carrier cannot avoid the responsibility resulting from loss of, or damage to the goods, unless he proves that he exercised due diligence in making the ship seaworthy before the commencement of the voyage".

We can deduce, however, from the foregoing discussion, that seaworthiness is an objective rule and not a subjective one, that it could be exercised by the

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23-Article [5] para [1] of the Hamburg Rules.

24-Egyptian Court of Cassation case 119/29 of 30 January 1964, Year 15th, p 154; Hussni, Maritime Carriage, p 46.

shipowner or by those whom he employs for that purpose. It is not, therefore, an absolute obligation, but it is a relevant term[25] which depends upon the nature of the contemplated contracted voyage, the goods carried and their stowage.[26]

2-DURING THE VOYAGE

There are many duties imposed on the carrier, either prior to the maritime course of voyage or when the goods are in his charge, i.e; loading, handling, stowage, carrying, and caring for the goods properly and carefully.

These basic duties endeavour to make the ship fit for the purposes of a particular voyage by following the carriage contract and the instructions of the shipper or consignor, which have been fixed in the bill of lading.

The following points should therefore be discussed:

1-Proper Care of the Goods.

2-Contemplated Voyage.

1-PROPER CARE OF THE GOODS

The carrier's obligation, which emerges from the carriage contract is to load the cargo properly and carefully. It can be said that the performance of the contract of carriage is to commence from the moment of loading.

25-Longley, p 43; Poor, p 166; Compare, Astle, p 53; Clarke p 125.

26-Astle, pp 59-60; Villareal, p 773; Hyun, pp 17-19.

The Iraqi Transport Law has, nevertheless, adopted a different viewpoint by providing that the scope of the period of the carrier's liability commences from the moment that the goods are in the carrier's charge, and ceases at the moment the goods have been delivered to the consignee.[27]

The carrier is obliged to load the cargo under deck, unless there is an agreement or law which authorized the consignor to load the cargo on deck. Consequently, the consignor will be responsible for all loss of, or damage to, the cargo, or delay in delivery, resulting from carrying out these duties.

Article [30] of the Iraqi Transport Law makes this quite clear by providing:

> "1-The carrier is bound to load, and handle the goods and pay all the required expenses, unless the consignor or other person has carried out these duties, according to the agreement, the law, or the instructions, in which case the latter is responsible for all the damages resulting therefore".
> 2-If the carrier accepts to perform the transportation without reservation, then the loading and handling are presumed to be done under his supervision till it is proved otherwise".

There are many methods for the operations of loading, handling, and stowing the goods carried, depending upon the nature of the goods, the contracted voyage, the

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27-Article [27] para [1] and Article [131] para [1] of the Iraqi Transport Law.

capacity of the vessel and the custom and usage of the stowage of particular goods which applies in a particular port.

The carrier should however deal with the goods properly and carefully from the moment the goods are in his charge, whether at the beginning of loading or throughout the voyage, until discharge and delivery of the goods to the consignee[28], or during the carrier's custody of the goods where he has agreed to keep them in his warehouse.

Consequently the carrier will be liable, under the Iraqi Transport Law, for the loss or damage to the goods in connection with their custody, care, and handling prior to the loading and subsequent to the discharge from the ship.

The Iraqi Law does not provide a specific provision as a criterion for dealing with goods carried, but it is subsumed under the general rules of the carrier's liability.

The words, "properly and carefully" which are used by the Hague/Visby Rules, are a quite clear criterion for

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28-Hussni, Maritime Carriage, pp 78-79, where he states the decision of the Egyptian Court of Cassation held in case 235/42 of 25 December 1978 [unpublished]as follows:
"The carrier is bound to deliver the goods carried in the same condition as stated in the bill of lading"; Iraqi Court of Cassation held in case 764/82 of 17 June 1982 that:
"The carrier's receipt of the goods without reservation means that he has received the goods in goods condition. Therefore he is obliged to deliver them in the same state, otherwise he is responsible to compensate the shortage and damage which has occurred to the goods".

showing the degree of the undertaking of care required for the cargo by the carrier throughout the voyage. This criterion is considered as a reasonable measure to exercise due diligence to avoid any loss or damage to the cargo.

Iraqi Law adopted however a material criterion for taking over the goods and consequently exercising due diligence by taking reasonable measures throughout his undertaking which begins before loading and ceases at the moment the goods have been delivered to the authorized person.[29]

These measures commence from the moment of taking over the goods by the carrier, which is clarified by article [131] para [2] of the Iraqi Transport Law, where it is provided that the meaning of taking over the goods by the carrier is to put the goods under his supervision and control.[30]

This attitude is in the shipper's interest rather than the carrier's interest. Developing countries have struggled for a long time to get rid of the Hague Rules, which were imposed upon them before they gained their independence, and created new international trade transactions.

I will discuss thus the following points:

29-Article [132] of the Iraqi Transport Law.

30-Egyptian Court of Cassation held in case 452/42 of 20 June 1977, Year 28th, p 1452 that:
"The obligation of the carrier is expired by actual delivery"; Hussni, Maritime Carriage, p 77.

A-Stowage of the Goods on Deck.

B-Dangerous Goods.

C-Live Animals.

A-STOWAGE OF THE GOODS ON DECK

The carrier is bound to stow the goods properly and carefully in accordance with the contract of carriage and the nature of the goods, especially when certain goods need specific considerations in stowage, e.g., timber cargo, railway engines...etc.

Therefore the carrier must stow the goods under deck in order to avoid damage to the goods unless there is an agreement or the nature of the goods authorized the carrier to carry and stow them on deck.[31]

Article [135] of the Iraqi Transport Law explains in detail the rules of stowage on deck as follows:

1-The goods must be shipped in the provided places in the vessel, but the goods are allowed to be shipped on deck in the following cases:

a-where there is an express agreement which is fixed by writing in the bill of lading or any documents which are considered as evidence for the contract of carriage.

b-If by the nature of the goods determines they can be shipped on deck.

c-If the transportation has been fulfiled according to

31-Article [1] para [c] of the Hague Rules provides the meaning of "deck cargoes" as follows:
Cargo which by the contract of carriage is stated as being carried on deck and is so carried".

statutory provision.

2-If the goods are shipped on deck according to the para [1] of this Article, then the carrier is not liable for the loss of, or damage to, the goods, or delay in delivery resulting from transporting the goods by such a method.

Therefore, the Iraqi Law has clarified the meaning of stowage by providing a common standard for carrying the goods by the vessel and providing instances where the goods are allowed to be carried on deck. It has provided the sanction for carriage on deck unless otherwise agreed.

The carrier will therefore be liable for loss of, or damage to, the goods, or delay in delivery resulting from improper stowage, or stowage of the goods otherwise to the agreed method of stowage for the goods carried.[32]

If improper stowage however combines with the excepted peril of sea to produce loss, damage, or delay in delivery, then he has to show that such loss, damage, or

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32-Article [44] of the Egyptian Maritime Commercial Law provides that:
"The carrier will be liable for the damages occurred to goods which are stowed on deck without a written consent from the cargo-owner".
On the other hand, Egyptian Court of Cassation adopted a different viewpoint according to the Hague Rules which was adopted by Egypt since 29th, May 1944 as follows:
"The Rules do not apply to goods carried on deck according to the Article [1] para [c] of the Hague Rules which provides that the Rules do not apply to the cargo which, by the contract of carriage, is stated as being carried on deck and is so carried"; see, Hussni, Maritime Cassation, p 91 where he states the decision of the Court of Cassation held on 17 May, 1966.

delay in delivery has occurred from the peril of the sea in order to avail himself of the exception.

If the carrier cannot thus separate loss or damages to the goods or he cannot show the proportion of the loss or damage caused by his fault or neglect or that of his servants or agents, then the carrier will be liable for all the loss of, or damage to, or delay in delivery occurring to the goods.

These principles have been adopted by the Iraqi Transport Law in Article [139] which is the same principle as Article [5] para [7] of the Hamburg Rules concerning the contributing causes.

B-DANGEROUS GOODS

The consignor expressly undertakes, under the Iraqi Transport Law, to mark or label dangerous goods, according to the custom or usage and the regulations of the maritime international organization.[33]

The consignor must therefore declare to the shipowner, or the carrier, the dangerous character of the goods in order to take proper precautions if necessary.

If the consignor has not declared to the carrier the facts about, or the character of, the dangerous goods, then he will be liable for any loss, damage, or delay in delivery resulting from shipping such goods,[34] unless the carrier has not taken the required measures to avoid the

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33-Article [62] para [1] of the Iraqi Transport Law.
34-Ibid.

consequences, especially when he knew or should have known the nature of the dangerous goods.[35]

If the carrier has however discovered the nature of the dangerous goods shipped on his vessel without his consent or knowledge then he has a right to avoid the possible and imminent danger by unloading such goods or destroying them without binding him to pay any compensation for such damage.[36]

It is assumed that the dangerous goods should be known to the carrier when the character of such goods are fixed in the bill of lading or any documents which indicate the nature of such goods.[37]

When the carrier has agreed to ship dangerous goods, or the nature of such goods was known to him and he has taken all the required measures to avoid such danger, then he has a right to unload, or destroy such goods without paying any compensation especially when the dangerous goods become an actual danger and form a threat to life and property.[38]

C-LIVE ANIMALS

The Iraqi Transport Law[39] has adopted the attitude of the Hamburg Rules[40] concerning live animals excluded from the Hague Rules by Article [1] para [c].

35-Ibid.

36-Article [62] para [2] of the Iraqi Transport Law.

37-Article [102] of the Iraqi Transport Law.

38-Article [138] of the Iraqi Transport Law.

39-Article [134] of the Iraqi Transport Law.

40-Article [5] para [5] of the Hamburg Rules.

The carrier under the Iraqi Law is liable for loss, damage, or delay in delivery respecting the carriage of live animals, unless he proves that he has complied with special instructions given to him by the consignor.[41]

If the loss, damage, or delay in delivery has taken place even when the carrier complied with the instructions of the consignor, then such loss, damage, or delay in delivery resulting from special risks[42] is inherent with that kind of carriage.[43]

The carrier is, however, not liable for loss, damage, or delay in delivery unless the consignor proves that such consequences resulted from fault or neglect on the part of the carrier or his servants.[44]

2-CONTEMPLATED VOYAGE

Article [64] para [1] of the Iraqi Transport Law provides general principles concerning any special instructions given to the carrier by the consignor. The aim of this Article is to regulate the legality and timing of the consignor's instructions.

When the carrier then has taken over the goods, the consignor in fact has a right to issue instructions to the carrier respecting the goods, for example not to commence with the transportation of the goods or, to stop

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41-Article [134] para [1] of the Iraqi Transport Law.

42-Special risks associated with live animals are those of death and injury.

43-Article [134] para [2] of the Iraqi Transport Law.

44-Article [134] para [2] of the Iraqi Transport Law.

the transportation and to deliver them to the consignor or to send them to another person or place which is not fixed by the carriage contract.[45]

On the other hand, the consignor has no right to give any instructions concerning the delivery of the goods where the goods have arrived at the destination and the consignee has demanded their delivery, or the notice has been given to the consignee for delivering the goods.[46]

The carrier is not, however, bound to fulfil the instructions of the consignor unless the latter still holds the bill of lading.

When the bill of lading has been transferred to another holder then consequently all the rights of the goods would be transferred to the new holder.

In this case the carrier must not follow the instructions of the consignor, but he must apply the instructions of the consignee or the holder of the bill of lading who becomes the owner of the goods.[47] The consignor is, notwithstanding, obliged to compensate the carrier for all expenses and damages which occur by reason of performing those instructions.[48]

If the carrier then has changed the voyage or deviated from the contemplated voyage, without notification from the shipper or consignor, that might expose the carrier to the responsibility for the loss of, or damage to, the

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45-Article [64] para [1] of the Iraqi Transport Law.

46-Article [64] para [3] of the Iraqi Transport Law.

47-Al-Anbaki, Iraqi Transport Law, p 89.

48-Article [64] para [1] of the Iraqi Transport Law.

goods and delay in delivery which occurred from changing the voyage or deviation.

I will discuss therefore the following points:

A-Deviation.

B-Change of Voyage.

A-DEVIATION

The Iraqi Draftsman does not adopt the Hamburg Rules, but adopts the attitude of the Hague/Visby Rules as far as the deviations' principles are concerned. The Iraqi Transport Law provides a specific provision which regulates the general principles of deviation and constitutes a reasonable deviation in the course of maritime voyage.

Deviation is a deliberate departure from the contemplated course of voyage which constitutes a different venture from that voyage, and causes loss of, or damage to, the goods without reasonable reason.

The concept of deviation however implies that an additional risk of loss, or damage to, the goods results from deviation. Otherwise, if there is no loss or damage occurring from deviation, then the doctrine of deviation is not applicable.

Any change or modification in the agreed course of voyage then is to be considered as an unreasonable deviation when it causes loss of, or damage to, the cargo. Whereas, mere premeditated intention to deviate amounts to nothing, unless it is actually carried into

effect.

The relevant provisions concerning reasonable deviation in the Iraqi Transport Law are Article [17] and [140].

Article[17] of the Iraqi Transport Law states that:

"1-The carrier is not liable for damage resulting from delay in transport, or deviation from the particular route, caused by assisting any person who was ill, injured, or in a disaster, unless it is proved that he or his auxiliaries committed wilful misconduct or gross negligence".[49]

"2-[a]Wilful misconduct means every act or omission committed by the carrier or his auxiliaries with intent to cause damage;

[b]Gross negligence means every act or omission committed recklessly by the carrier or his auxiliaries with knowledge that damage would probably result."

This Article indicates that the causal relationship must be shown between deviation and loss of, or damage to, the cargo in order to apply the doctrine of deviation. Also, it explains that the relationship must be shown between the emergency circumstances and the disaster which forced the vessel to depart from the contractual voyage to assist people in jeopardy.

It seems to me that the criterion used by the Iraqi Law to define wilful misconduct concerning the liability of the carrier or his servants or agents is a subjective intention by providing a term "with intent to cause damage". In this case then it must prove that the carrier has done something wrong.

49-I prefer to use "gross negligence" than "gross fault".

Whereas, the term "recklessly", which is used in explaining gross negligence, is a subjective realisation implying a deliberate disregard on the part of the carrier of the consequences of his conduct.

These criteria under Iraqi Law nevertheless have the same effect in considering whether the carrier is liable or not,[50] especially when the Iraqi Draftsman provides in Article [17],[140] of the Iraqi Transport Law that the carrier is liable for loss of, or damage to, the cargo resulting from deviation or delay in transport in the case of the carrier, or his servants or agents committing wilful misconduct or gross negligence.[51]

If there is a reasonable reason to excuse a deviation from the contemplated voyage it should not arise out of circumstances deliberately planned nor from gross negligence. Deviation then from the agreed course of the voyage should be commensurate with circumstances of necessity or emergency which will justify a ship deviating from the proper course.

50-The majority of Egyptian textwriters have adopted the same viewpoint which indicates that gross negligence must have the same effect as wilful misconduct; See A.J.D. Awad,"The Limitation of the Maritime Carrier's Liability According to the Brussels Convention"; A J, Year 35th, No. 7, pp 1416-1419, hereinafter cited as "Awad, The Limitation of the Carrier's Liability"; A. R. Salim, "The Exception Clauses of Liability According to the Bills of Lading Convention", A Thesis Approved for Ph.D Degree, Cairo University, 1956, hereinafter cited as "Salim, The Exception Clauses".

51-Article [169] para [3], Article [229], and Article [170] para [3] of the Iraqi Civil Code; The Iraqi Court of Cassation, [1968] JICCD, p 484 "19 June,1967"; The Iraqi Court of Cassation, JICCD, p 513, "17 December 1967."

Article [140] of the Iraqi Transport Law makes this quite clear where it states that:

> "The carrier is not liable for damage resulting from measures to save life or from reasonable measures to save property, unless it is proved that he or his auxiliaries committed wilful misconduct or gross negligence".

It is clear from this Article that a deviation would not be reasonable merely because it was convenient to the carrier or the shipowner.

The carrier must act with prudence, skill, and care by taking measures to save life or reasonable measures to save property whether in avoiding dangers or in mitigating the consequences of such disaster. The shipowner or the carrier is however bound to consider what would be contemplated reasonably by the contracting parties and in the interest of all concerned, i.e; cargo-owner, shipowner, shipper, consignee. etc.

Article [31] of the Iraqi Transport Law provides general principles respecting the carrier's liability by regulating geographical deviation as follows:

> "In accordance with the principles of Article [17] of this law, the carrier ought to follow the agreed route, otherwise he must take the shorter route and he has a right to deviate from a particular route or follow a longer one if there is any necessity".

That means that Iraqi law has confined the concept of deviation as the Egyptian's jurisprudence does.[52]

52-Article [38] of the Egyptian Maritime Law; The Mixed Commercial

B-CHANGE OF VOYAGE

Iraqi Transport Law does not contain any provision which regulates the change of voyage, or indicates the differences between the change of voyage and deviation. It seems to me that Iraqi Transport Law, for this purpose, is identical with the Hague/Visby Rules and the Hamburg Rules.

There is a specific meaning for change of voyage which is different from deviation.

Change of voyage is however where the vessel entirely relinguishes the intention to proceed on the agreed voyage after embarkment. On the other hand, deviation is a change in the customary or contemplated course of voyage but has not been lost sight of.[53]

3-SUBSEQUENT TO THE VOYAGE

Where the vessel arrives at the port of destination, then the carrier is obliged to take part in discharging the cargoes from the vessel and delivering them to the consignee or any person authorized by him.

The following points then should be discussed:

A-Discharging the Goods.

B-Delivering the Goods.

Court of Alexandria, 28 April, 1930 p 272; Hussni, Maritime Carriage, p 81; Falih, p 448.

53-See, chapter [1] section [3] for more detail.

A-DISCHARGING THE GOODS

The term "discharge" is used by the Iraqi Draftsman in a different context to the term "delivery". Iraqi Transport Law intends by providing "discharge of the goods at the destination" that the discharge is a material operation which ends when the carrier has discharged the goods from the vessel.

Article [34] of the Iraqi Transport Law provides that:

> "The carrier is bound to discharge the goods at the destination and pay all the required expenses unless the consignee or other person has carried out this duty according to the agreement, or law, or regulations, then ,in this case the latter is responsible for the damages resulting from the discharge".

The carrier is obliged to discharge the cargo properly at its destination, otherwise he will be liable for loss of, or damage to, the goods resulting from improper discharge.

The contracting parties, according to Article [134], are at liberty to conclude any agreement for the manner of discharge, or for who is going to take responsibility. Viz, the consignee may be obliged to discharge the goods from the vessel and consequently he will be liable for loss of or damage to the goods resulting from the discharge.

An agreement between the contracting parties however to exempt the carrier from the discharge expenses does not mean that the carrier has escaped from his duty to

discharge the goods at their destination. Consequently the carrier will be liable for any loss or damage which occurs to the cargo.[54]

B-DELIVERING THE GOODS

Delivery is a legal operation whereby the carrier has delivers the goods in his charge to the consignee or any authorized person and then the carriage contract ends.

The Iraqi Transport Law does not define delivery or what constitutes proper delivery. The carrier is however specifically obliged to deliver the goods under the Iraqi Law which endeavours to classify delivery into two categories,i.e; actual and constructive delivery.

Article [35] of the Iraqi Transport Law provides that:

> "The carrier is actually bound to deliver the goods to the consignee or constructively at the agreed place".

Delivery must be made in accordance with the usage, or the law of the port of destination, or the agreement between the contracting parties, if any.[55] A proper delivery is where the carrier has delivered the cargoes to a safe place, i.e; a covered warehouse.

Iraqi Law, therefore, defines constructive delivery by

54-Iraqi Court of Cassation, case 341/81 of 20 February 1983.

55-Al-Kalubi, The Maritime Law, p 259, where she states that: "The carriage contract elapses with delivery of the goods to the consignee, unless there was an agreement against that which is affirmed by the bill of lading"; Egyptian Court of Cassation, case 423 of November 1974, Year 25th, p 1210.

Article [35] as follows:

> "The delivery to authorized bodies, or to the custodian, who is appointed by the court, is considered a constructive delivery".

The authorized body is defined by Article [89] of the Iraqi Transport Law as a "custom authority".

Egyptian jurisprudence has its own viewpoints regarding the meaning of "delivery" which differs from the Iraqi's attitude by saying that delivery means the actual delivery which ends the contract of carriage and the obligation of the carrier by delivering the goods in good state to the consignee, or any person authorized by him. Whereas, delivery to the "custom authority" is considered as an "illegal delivery", because it is not deemed an authorized body appointed by the consignee. The contract is therefore still valid until the carrier delivers the goods in sound condition to the consignee.[56]

The carrier's failure however to deliver the cargo after discharge violates its obligation under both Iraqi and Egyptian jurisprudence by not having a proper delivery. The carrier is therefore liable.

56-Egyptian Court of Cassation, case 654/40 of 12 April 1976, Year 27th, p 922; Al-Kalubi, The Maritime Law; Hussni, Maritime Cassation, pp 38-39, Where he states number of unpublished decisions of Egyptian Court of Cassation which confirmed that the "delivery" should be actual delivery to the consignee or any body or person authorized by him".

ii-RECOVERY OF LOSSES, DAMAGES, AND DELAY IN DELIVERY

The liability of the carrier under the Iraqi Transport Law, which emerges from the carriage contract might arise in cases of loss, or damage to the goods as well as from delay in delivery, is the same principles as Article [5] para[1] of the Hamburg Rules. Whereas, liability under the Hague/Visby Rules is only in respect of loss of, or damage to the goods.

The carrier is liable for loss of, or damage to the cargo, or delay in delivery, whether prior, during or subsequent to the course of the voyage, while the goods are in his charge. That does not mean that the carrier is liable for any loss of or damage to the cargo resulting from the carriage adventure, wilful misconduct, fraud or gross negligence on the part of the consignor or consignee or his servants or agents while the goods were under their supervision and custody during the course of carriage.[57]

I will discuss then the following points:

1-Losses.

2-Damages.

3-Delay in Delivery.

4-Measures of Damage.

57-Article [47] of the Iraqi Transport Law.

1-LOSSES

The carrier is obliged to deliver the goods, which are in his charge, in sound condition and in the same number of packages or quantity or weight. If the statement of condition and quality or quantity is not precisely accurate, then the carrier is liable for such loss of the cargo.

When the carrier issued however a clean bill of lading without reservations which states that the goods were "received in apparent good order and condition", then he must offer some evidence to show that the goods were not in good order and condition when shipped. Otherwise he will be liable for any partial or total loss caused to the cargo.

Article [36] para [2] of the Iraqi Transport Law explains the general principles concerning the constructive loss which is similar to Article [133] except that the period which considered the loss is constructive.[58]

Article [133] of the Iraqi Transport Law defines constructive loss as follows:

> "....the goods may be treated as lost if they have not been delivered to the consignee or he has not been given a notice for their delivery within[60] consecutive days following the expiry time of delivery".

This period concerning the constructive loss commences

58-Within [45] consecutive days.

on the expiry time of delivery, or where no goods have been delivered, on the expiry time on which the goods should have arrived at their destination by a prudent carrier in the same circumstances where no day of delivery has been fixed previously.[59]

Is the carrier liable when the quality of the goods are replaced by better quality goods?

The Iraqi court of cassation expressed this on August 2, 1971[60] by saying:

> "If the carrier has delivered the goods carried to the consignee by replacing the quality of the material with better quality material, i.e; wool instead of tarpaulin, then the carrier accordingly is not liable for paying any compensation to the consignee because such goods are more valuable than the actual goods which indicate that the replacement might benefit the suppliers".

The Iraqi Transport Law contains however a specific provision which regulates the"Trade losses in Transit"or what is called in French "Freinte de route" by saying in Article [44] para [1] that:

> "The carrier is not liable for shortage,whether in weight or size, sustained from the nature of the goods during the course of carriage."

The recovery of the "Trade Losses In Transit" and the measure of such recovery should be based upon the rules of liability which is constituted under Iraqi Law on the

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59-Article [88] para [1] of the Iraqi Transport Law.

60-[1973] JI C CD, pp 81, 82.

principles of "trust".

These principles have put the burden of proof on the carrier to show that such losses resulting from the nature of the goods, namely from reasons beyond the carrier's hand or supervision and control, i.e; condensation, staining...etc.

This indicates that "Trade Losses In Transit" is not an obligatory consequence of maritime course of voyage, but is simply an allowance given to the carrier in order to escape from such consequences.

Egyptian Law does not define a particular method for measuring the recovery of losses caused to the cargo resulting from a normal minor loss "Trade Losses in Transit". It refers therefore to the custom of the port which has developed over the years as a result of the nature of the given goods, e.g. grain, oil...etc.

Accordingly the Egyptian Court of Cassation[61] on June, 3, 1974, held:

> "When the court adopted the 5% of the exception from customs duty as a percentage for measuring the trade losses in transit, then there was no contradiction and it does not imply any violation of the law".

This means that the Egyptian Court of Cassation has adopted a criterion which constitutes the 5% of the shortage resulting from the trade losses in transit as a maximum for compensation of such losses.[62] If the

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61-Egyptian Court of Cassation, case 292/37 of 3 June 1974, Year 25th, p 967; Al-Kalubi, Maritime Law, p 264; Hussni, Maritime Cassation, p 138.

62-Egyptian Court of Cassation held in case, 71/37 of 30 march

percentage of the losses exceeds 5% of the trade losses in transit fixed by the law of customs duty, then the carrier will avail himself by 5% of such losses, but he is still liable to recover the other losses which exceeds the mentioned percentage.[63]

2-DAMAGES

The carrier is liable for damage caused to the cargo while the goods are in his charge whether during the course of the voyage or in the warehouse. Viz, the carrier is obliged to pay full compensation to the consignee or cargo-owner while the goods are under his supervision and control, unless he proves that he or his servants or agents took all measures that could reasonably be required in dealing with the goods or avoiding the accumulation of the consequent damages.[64]

Physical damage may however be caused to the cargo partially or totally, depends upon the purpose for which the goods are prepared.

If the goods, therefore, are not worthy or are worthless and cannot be used for the purpose for which they are prepared, then the carrier will be liable for recovering such damages whether partially or totally.

1972, Year 23 rd , p 590, that:
"According to the custom of the port concerning the oil is that the carrier will be exempted by 1% percentage of the shortage resulting from the trade losses in transit".

63-Ali. Al-barodi, The Principles of the Maritime Law, 1983, pp 175-176, hereinafter cite as "Al-barodi, Maritime Law".

64-Article [133] of the Iraqi Transport Law.

The clean bill of lading is a factorial matter in considering the burden of proof concerning damages. If the bill of lading is clean it presumes that the carrier has received the goods in the sound condition in which he is bound to deliver them to the consignee. Otherwise, if the goods are in bad condition, then the consignee can receive the goods with reservation or, issue a protest against the carrier.

In this case the burden of proof is easy because the consignee can prove that damage took place while the goods were in his charge.

On the other hand, when the bill of lading is not clean, then the task of the consignee to show the damages caused to the cargo is difficult because he has to prove that the goods carried were received by the carrier in a good condition and the causal connection between the damage and the reservations, if any, at the moment of loading or when the goods were under the supervision or control of the carrier.[65]

3-DELAY IN DELIVERY

The Iraqi Transport Law contains a specific provision for delay in Article [32], [36] para [1] which adopts the same trend as the Hamburg Rules by providing special provisions for delay in delivery.

Unlike the Hague/Visby Rules which contain no express provision for delay in delivery.Such an obligation could

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65-Al-Anbaki, Iraqi Transport Law , p 240.

be implied into Article [3] para [2] of the Hague/Visby Rules.[66]

Article [132] of the Iraqi Transport Law provides that the carrier is to be liable for loss of, or damage to, the goods resulting from delay in delivery, unless the carrier or his servants or agents took all measures that could reasonably be required, having regard to the circumstances of the case.

Article [36] para [1] of the Iraqi Transport Law defines what is to constitute delay in delivery by saying:

> "delay in delivery occurs when the goods have not been delivered at the time expressly agreed upon, or in the absence of such an agreement, on the expiry of the time on which the carriage operation would be required of a diligent carrier, with regard to the circumstances of the case."

This Article provides two possibilities for delay in delivery.

First: Agreed time for delivery by the contracting parties.

Second: Reasonable time required of a diligent carrier.[67]

66-Pollock, The Hamburg Rules, p pollock 1.

67-Article [32] of the Iraqi Transport Law has expressed this criterion by providing that:
"The carrier is bound to deliver the goods at the destination within the time expressly agreed upon or within the time which could be reasonably required with regard to the circumstances of the transport".

Damage is however a factorial element in deciding the liability of the carrier concerning delay in delivery.

As far as delay in delivery is concerned neither the Iraqi Transport Law nor The Hamburg Convention indicates to damage as an important element for applying the principles of the carrier's liability. That does not mean that mere delay in delivery is sufficient in constituting carrier's liability.

The causal connection between damage and delay in delivery should be shown in order to constitute the carrier's liability to pay compensation to the aggrieved party.[68] That indicates that delay in delivery does not in itself constitute damage.

This trend, regarding delay in delivery differs from the criterion for the loss of, or damage to, the goods which establishes a damage in itself and is based on the carrier's liability with mention to the causal connection with the fault or neglect of the carrier or his servants or agents.

Egyptian jurisprudence has applied Article [114] of the Egyptian Maritime Law, concerning the charterparty, in the case of delay in delivery.[69]

68-Muhsen Chafik, The Rules of the Carriage of Goods by Sea [The Hamburg Rules,1978], 1984, p 43, hereinafter cited as "Muhsen Chafik, The Hamburg Rules"; Compare, Al-Anbaki, Iraqi Transport Law, p 241, where he states that:
"Article [32] and [36] para [1] of the Iraqi Transport Law do not indicate to damage as an important element in deciding the carrier's liability because mere delay in delivery is a damage and it is enough in itself to constitute the carrier's liability".
69-Al-Sharkawi, The Maritime Law, p 272; Al-Kalubi, The Maritime

Drafting provisions of Egyptian Maritime Law provides in Article [285] para [1] the same principles as the Iraqi Transport Law saying that the carrier is liable for delay in delivery, unless he or his servants or agents took all reasonable measures, or that it was impossible for them to take such measures in preventing delay in delivery with regard to the surrounding circumstances of a given case.

4-MEASURE OF DAMAGE

Measure of damage aims to establish a just balance between the obligations of the contracting parties by restoring the monetary position of the aggrieved party to the same position as if the contract had been performed.

The measure of damages in respect of lost or damaged goods, under the Iraqi Transport Law, when the liability of the carrier is not limited, is different, where the value of lost or damaged goods are fixed on the face of the bill of lading, from those goods which do not have their value fixed on the face of the bill of lading.

Carriers have argued about the value of the goods when the value of such goods are not fixed previously on the bill of lading to show by all available evidence the real value of the disputed issue.[70] The real value of the goods is deemed a basic standard for assessing damages resulting from loss of, or damage to, the cargo and consequently in considering the compensation for such damage.

Law p 275; Al-Barodi, The Maritime Law, p 176.

70-Article [51] para [3] of the Iraqi Transport Law.

In the case of the value of the goods carried not being fixed on the bill of lading, the measure of damages then would be calculated with reference to the value of these goods at the place and time of arrival, unless the law provides otherwise.[71] That indicates that the measure of damages in this case is the difference between the contract price and the market value of the goods on the date when they should have been delivered.

If there is however a partial loss, such as a loss resulting from the "Trade Losses in Transit", the law then allows, in this case, to discount a percentage of compensation equal to the losses resulting from the trade losses in transit.[72]

This aims to prevent the carrier from recovering more than the value of he could gain if the goods carried undamaged or without partial loss and consequently to reach a just result for paying real recovery for the damages resulting from partial loss or physical damage.[73]

When the goods carried are damaged or delayed and have lost the purpose for which they are prepared. The aggrieved party has a right to claim for full compensation of such goods as a total damage which is constituted on the value of the goods on the date they should have been delivered.[74]

As far as the recovery of total loss of the goods is

71-Article [51] para [1] of the Iraqi Transport Law.

72-Article [51] para [2] of the Iraqi Transport Law.

73-Ibid.

74-Article [53] of the Iraqi Transport Law.

concerned the claimant does not have a right to claim for recovering the damages resulting from the total loss and delay in delivery.[75] Whereas, in a case of partial loss, the carrier may claim for compensation for the damages occurring from delay in delivery by measuring and assessing the damage which has occurred only to the arrived goods.[76] Recovery of the damage resulting from delay in delivery should, however, not exceed more than the value of the total lost or damaged cargo.[77]

Egyptian Maritime Commercial Law contains no express provision or guidance as to what is to be the measure of damages.[78] We should therefore refer to the general principles of the Civil Code. These principles provide that damage is an important element in assessing recovery, and that what constitutes damage is a matter of law which should be considered before the court of cassation.[79]

Egyptian jurisprudence adopts however a viewpoint which constitutes the carrier's liability, for recovering loss of or damage to the goods, on the market value of selling such goods at the destination.[80]

75-Article [52] para [1] of the Iraqi Transport Law; Musa, The Commercial Contract, p 52.

76-Article [52] para [2] of the Iraqi Transport Law.

77-Article [52] para [3] of the Iraqi Transport Law.

78-Egyptian Court of Cassation, case 173/41 of 17 April, 1975, Year 26th, p 890.

79-Egyptian Court of Cassation, case 569/40 of 26 May 1975, Year 26th, p 1078.

80-Egyptian Court of Cassation, case 145/38 of 17 April 1973, Year 24th, p 616; Hussni, Maritime Cassation, pp 82-84.

iii-IMMUNITIES OF THE CARRIER

The liability of the carrier is based on the principles of "trust" under the Iraqi Transport Law. This differs from the principles of the Hague/Visby Rules and the Hamburg Rules which are based on the liability regime on the presumed fault or neglect.

consequently, the carrier is liable for loss, damage and delay in delivery, unless he proves that such loss of, or damage to, the goods and delay in delivery results from reasons out of his control, or supervision.

The Iraqi transport Law regulates the carriers' exemptions from liability by Article [46] para [1] which provides:

> "The carrier ensures the safety of the goods during the performance of the carriage contract and is liable for all damage caused to the goods. The carrier would not be exempt from the liability which occurs from the loss of, or damage to, the goods, or delay in delivery, unless he proves that such loss, damage, or delay in delivery has occurred by force majeure, inherent vice in the goods, or the fault of the consignor or the consignee".

The Iraqi Draftsman only recognises the exemptions provided by the Transport Law in order to exonerate the carrier from liability. The contractual exonerations are therefore not valid because the principles of this law are considered a "public order", which prohibits all agreements between contracting parties which are contrary to basic principles such as these.

Article [46] para [2] of the Iraqi Transport Law has confirmed these principles by saying:

> "Any conditions which state that the carrier is exempt from liability resulting from total or partial loss of, or damage to, the goods and from his auxiliaries action is deemed void."

Accordingly, Article [259] of the Iraqi Civil Code,[81] which allows any agreement between the contracting parties, is not applicable in this case because there is a particular provision[82] which confines the exemptions as follows:

1-Force Majeure.[83]

81-Article [259] of the Iraqi Civil Code is the same provision of Article [217] para [2] of the Egyptian Civil Code, where it is stated that:
"The debtor may by agreement be discharged from all liability for his failure to perform the contractual obligation, with the exception of liability arising from his fraud or gross negligence. The debtor may, nevertheless, stipulate that he shall not be liable for fraud or gross negligence committed by persons whom he employs for the performance of his obligation".

82-Article [46] para [1] of the Iraqi Transport Law.

83-The Iraqi Court of Cassation held in case 419/67 of 16 July 1969 that:
"When the weather is so exceptionally severe that it is not considered as a force majeure or an extraordinary nature in winter because such severe weather should be expected at that time of the year. The carrier is therefore liable for damages to the goods resulting from such an accident because he did not take the required measures in avoiding such consequences and save the goods carried"; It is also held in case 196/78 of 19 December 1978 that:
"the tide is not a force majeure which exempts the carrier from liability because it is considered as an expected peril"; [1966] DDECC, Year 17th, p 1129, held on May, 17, 1966, where it is stated that:
"The perils of sea are not considered an exception from the

2-Inherent Vice.[84]

3-Consignor and Consignee's Fault.[85]

Egyptian Law provides that the carrier is entitled to exempt himself from liability by inserting a special clause in the bill of lading making it more favorable to him.

Article [217] of the Egyptian Civil Code[86] makes this clear by allowing the contracting parties to conclude any agreement which exempts the debtor in civil cases, or the

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liability, but if such perils of sea were so severe that the prudent carrier cannot foresee or avoid such perils, then it will consider a force majeure which exempts the carrier from the liability"; Al-Kalubi, Maritime Law, p 266.

84-Article [45] para [1] of the Iraqi Transport Law provides:
"The carrier is liable for damages resulting from Inherent Vice in wrapping, filling, packing, when he accepts to carry the goods with the knowledge that there was such a defect in the goods. The carrier is considered to have known the nature of the defect, if such a defect was apparent or that any prudent carrier should discover such a defect".

85-Article [141] of the Iraqi Transport Law states:
"The consignor is not liable for damage sustained by the carrier or the actual carrier or for damage sustained by the ship unless such damage was caused by the fault of the consignor or his auxiliaries.Nor is any auxiliary liable for such damage unless caused by a fault on his part".

86-Article [217] of the Egyptian Civil Code provides:
"The debtor may by agreement accept liability for unforeseen and for cases of farce majeure.
The debtor may by agreement be discharged from all liability for his failure to perform the contractual obligation, with the exception of liability arising from his fraud or gross negligence. The debtor may, nevertheless, stipulate that he should not be liable for fraud or gross negligence committed by persons whom he employs for the performance of his obligation.Any clause discharging a person from responsibility for unlawful acts is void"; Al-Kalubi, Maritime Law, p 270.

carrier in maritime cases, from all liability for his failure to perform the contractual obligation, unless such loss or damage resulted from his wilful misconduct or gross negligence. Also he may stipulate that he will not be liable for wilful misconduct or gross negligence on the part of his servants or those whom he employs for the performance of the contractual obligation.

Article [132] of the Iraqi Transport Law provides:

> "The carrier is liable for loss of, or damage to, the goods, and delay in delivery, unless the carrier proves that he or his servants took all measures that could reasonably be required in dealing with their business, regarding the circumstances of the case, and thereof they ought not to be less than the measures taken by a prudent man in avoiding such loss, damage, or delay in delivery and its consequences".

This attitude was adopted by the Warsaw Convention[87] and the Hamburg Rules[88] which aimed to consider that the carrier is liable for the loss of, or damage to, the goods, and delay in delivery, unless the carrier, or his servants took all reasonable measures to avoid such damages, or that it was impossible for him, or them, to take such measures.

87-United Kingdom Treaty Series, 1967, Nos: 51-111, Treaty Series No: 62 [1967] p 14, Article [10] of the Protocol to Amend the Convention for the International Carriage by Air, Signed at Warsaw on 12 october 1929, which provides that:
"Paragraph 2 of Article [20] of the Convention shall deleted".
However, Article [20] of the Warsaw Convention provides:
"The carrier is not liable if he proves that he and his agents, have taken all necessary measures to avoid damage or that it was impossible for him, or them, to take such measures".

88-Article [5] para [1,2] of the Hamburg Rules.

The carrier is not liable then for such loss, damage to the goods, or delay in delivery resulting from such measures to save life or from reasonable measures to save property at sea.[89]

That does not mean that the carrier shall be entitled to avail himself of Article [140] of the Iraqi Transport Law if it is proved that such loss of, or damage to, the goods or delay in delivery resulted from wilful misconduct or gross negligence on the part of the carrier or his servants or agents.

If the carrier's fault or neglect or that of his servants or agents coincides with one of the exceptions provided by the Iraqi Transport Law, to cause loss of or damage to the cargo and delay in delivery, the carrier then must prove the proportion of damage which occurred by a particular exception in order to protect himself from liability. Otherwise he will be responsible for such loss, damage, or delay in delivery resulting from the given case.[90]

89-Article [140] of the Iraqi Transport Law.

90-Article [139] of the Iraqi Transport Law.

SECTION TWO

LIMITATION OF THE LIABILITY OF THE CARRIER

The Iraqi Transport Law deals with this issue in Article 150(1) and (2), which provides that the carrier is entitled to limit his liability for damage resulting from loss of, or damage to, the cargo, as well as for delay in delivery, as in the Hamburg Rules.

Three conditions are specified in the Iraqi Law for application of the provisions concerning limitation of liability as follows:

1-The transportation should be between Iraq and a foreign country;

2-The value of the goods must have not been declared in the bill of lading;

3-Neither the carrier, nor his servants, or agents, must have been guilty of wilful misconduct or gross negligence.[91]

The purpose of the provisions for limitation of

91-Article [150] of the Iraqi Transport Law provides that:
"1-The limitation of the liability of the carrier for loss, damage, or delay in delivery in carriage between Iraq and Abroad is to be in accordance with the provisions of the rules as set out in the schedule of this law.
2-The carrier shall not be entitled to the benefit of the limitation of liability in the following cases:
"a"When the value of the goods has been declared in the bill of lading.
"b"When it is proved that he, or his auxiliaries, committed wilful misconduct or gross negligence".; [1961] DDECC, Year 12th, p 557, where the Egyptian Court of Cassation held that:
"The carrier is not entitled to avail himself of the limitation of liability when he personally committed fraud or gross negligence. Viz, the carrier shall avail himself of the limitation provisions even his servants or agents committed fraud or gross negligence."

liability which are set forth in the Iraqi Law purports to protect foreign carriers from unlimited liability in respect of a particular package or packages of unexpectedly high value, and to preclude the carriers from lessening their liability otherwise than stated in this law.

Therefore, in order to clarify the general principles concerning limitation of liability, the following points should be discussed:

i-Concept of "Per Package or Unit".

ii-Dual System of Limitation.

iii-Special Drawing Rights.

i-CONCEPT OF "PER PACKAGE OR UNIT"

The Iraqi Law does not define the term "package" as set out in the schedule, but it does give an explanation of the term by providing, in Article [2] Para [a] of the schedule:

"....per package or other shipping unit"

Package would completely include goods which are made up for facilitating their handling during transportation. The shape, size, or weight of the cargo has no effect on the determination of whether the goods constitute a package or not, i.e; a railway wagon; a container; and a pallet, have all been held to be packages.

If, however, the lost or damaged cargo does not constitute a "package", then the limitation of liability

is based on the "other shipping unit" which has a wider meaning than "package" and may be extended to any cargo which is not shipped in packages, e.g; a yacht, a barrel, a sack.etc, or it may refer to the "freight unit" or "commercial unit".[92]

The Iraqi Transport Law has taken into account the new technological advances in the transportation industry by providing specific rules for the "container or a similar article of transport", e.g; pallet...etc.

Article [2] para [1] of the schedule of this law has imposed some restrictions on considering a particular container or similar article of transport as a separate shipping unit as follows:

1-When packages or other shipping units are enumerated in the bill of lading.

2-Where a container or similar article of transport is owned or supplied by a carrier even if it has not been enumerated in the bill of lading.

Otherwise, the container or any similar article of transport, including its contents, will be considered one package or shipping unit.[93]

92-See chapter [2] section [2].

93-Article [2] para [a] of the schedule of the Iraqi Transport Law provides that:

1-Where a container or similar article of transport is used to consolidate goods, the package or other shipping units enumerated in the bill of lading are deemed packages or shipping units, otherwise, the container, including its contents , are deemed one package.

2-Where the carrier supplies a container or similar article of transport used to consolidate goods, the package or other shipping

The Egyptian Drafting law has adopted the same principles as the Hamburg Rules as far as the meaning of the per package or unit is concerned.[94]

ii-DUAL SYSTEM OF LIMITATION

The Iraqi Transport Law has adopted a mixed system of limitation, which is based on either the "per package or other shipping unit" or on a certain amount "per kilo of gross weight", by providing in Article [2] para [a] of schedule to the Iraqi Transport Law that:

> "The liability of the carrier for carriage of goods by sea is limited to an amount equivalent to [1/250] Dinar per kilogramme or [350/00] Dinar per package or other shipping unit whichever is the higher...".

This system was also adopted by the Egyptian Drafting Law[95] which is considered a flexible criterion for solving the dilemma of the carrier's limitation of liability, especially when the weight of the cargo is unknown, or the cargo is not packed in a container or other "article of transport", e.g; oil, grains.

The trend of the Iraqi Law, however, favours the shipper, or consignor by including the phrase:

"whichever is the higher".

Meaning that the claimant may recover the higher amount

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units even when not enumerated in the bill of lading are considered separate shipping units".

94-Hussni, Maitime Cassation, p 103.

95-Ibid, p 103.

of the limit of liability for lost or damaged goods i.e, the limit based on the weight of the goods or the limit based on the package or other shipping unit.

The method of calculating the amount of limit of liability for lost or damaged cargo is different from the method of calculating the limit of the carrier's liability for delay in delivery.

Limitation of liability concerning lost or damaged cargo is based upon a mixed system which is equivalent to [1/250] Dinar per kilogramme or [350/00] Dinar per package or other shipping unit.[96]

On the other hand, the baseline in calculating the limitation amount of the carrier's liability for delay in delivery is based on the amount of freight which is equivalent to two and a half times the freight payable for the delayed goods.[97] Compensation for the delayed goods must not exceed the total freight payable for the goods carried under the contract of carriage of goods by sea.[98]

Under the Iraqi Transport Law, however, the contracting parties have a right to conclude any agreement for limiting the carrier's liability to an amount exceeding those provided for in the schedule to this law.[99]

96-Article [2] para [a] of the schedule to the Iraqi Transport Law.

97-Article [2] para [b] of the schedule to the Iraqi Transport Law.

98-Ibid.

99-Article [3] of the schedule to the Iraqi Transport Law.

In contrast, the Egyptian Drafting Law does not allow for the carriers to limit their liability by less than the amount fixed in the law otherwise it would be against public policy.[100] Egyptian Civil Code allows however the contracting parties to fix, in advance, an amount of damages either in the contract or in a subsequent agreement.[101]

The validity of the limitation agreement will be governed by the following conditions:

1. The claimant must have suffered some loss of, or damage to, the cargo.[102]
2. The judge may reduce the amount when;

"a" The amount fixed was grossly exaggerated;

"b" The principal obligation has been partially performed.[103]

3. Where the loss of, or damage to, the cargo exceeds the amount of limitation of liability fixed by the contract, the claimant cannot recover the amount of any loss of or damage in excess of the limitation amount, unless it is proved that the carrier has committed fraud or gross negligence.[104]

However, Iraqi jurisprudence will apply a limitation clause when it is stated in the bill of lading in quite

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100-Article [281] para [c] of the Draft Proposal For Egyptian Maritime Law; Egyptian Court of Cassation , case 569/40 of 26 May 1975, Year 26th, p 1078; Al-Kalubi, Maritime Law, pp 274,309.

101-Article [223] of the Egyptian Civil Code.

102-Article [224] of the Egyptian Civil Code.

103-Ibid.

104-Article [225] of the Egyptian Civil Code; Al-Sharkawi, Maritime Law, p 276; Al-Barodi, Maritime Law p 182.

clear language in a form which is different from the rest of the bill of lading.[105] It is not to be applied when there is any ambiguity or lack of clarity in the limitation clause.[106]

iii-SPECIAL DRAWING RIGHTS

The Iraqi Transport Law has adopted the Special Drawing Rights (SDR) as the monetary unit for calculating the limits of liability, in order to achieve uniformity and avoid problems of fluctuation and devaluation in currencies which might result from having the limits expressed in terms of any national currency dependent upon the rate of exchange with gold, the franc, or the dollar.

Egyptian jurisprudence adopts the attitude of the Hague/Visby Rules in calculating the limitation of liability.

Article [4] of the schedule to the Iraqi Transport Law explains in more detail the calculation of Special Drawing Rights in terms of the Iraqi Dinar by stating:

> "The Iraqi Dinar equals [2.1/9] two and a ninth times of the Special Drawing Right which is certified by the International Monetary Fund. Reevaluating the amounts of limitation in the case of the difference between the exchange rate of these Special Drawing Rights and the Iraqi Dinar exceeding the percentage of 25%

105-Iraqi Court of Cassation, Administrative Committee, case 283/Transport /83/84 of 4 January 1984 [unpublished].

106-Iraqi Court of Cassation, Administrative Committee, case 753/ Transport/ 83/ 84 of 18 January 1984 [unpublished].

> [shall be effected] by issuing a regulation from the Central Bank of Iraq and publishing it in the Iraqi Gazette".

It can be concluded from the technical analysis of this Article that it is considered redundant, because the rates of exchange with Special Drawing Right fluctuate, up and down, depending on the valuation of the currencies which are considered the basis for calculation of the value of the Special Drawing Right.

It can therefore be said that the Iraqi Draftsman could provide, in Article [2] para [a] of the schedule to the Iraqi Transport Law that the Special Drawing Right should be basis for calculating the limitation of liability, with a reference to the Central Bank of Iraq, which is responsible for issuing regulations for calculating the value of the Special Drawing Right in terms of the Iraqi Dinar. Those regulations could be published in the gazette, with a reference to the position of the International Monetary Fund concerning Special Drawing Rights.

SECTION THREE

PROCEDURES OF ACTION FOR LOST, OR DAMAGED CARGO

Under the Iraqi Transport Law, the carrier is obliged to recover all the loss of, or damage to, the cargo as well as delay in delivery. The contractual liability of the carrier gives the aggrieved part, i.e; the consignor or consignee who suffered some loss of, damage to, the cargo or delay in delivery, a right to institute an action against the carrier for recovering such losses.

Also, when the goods carried are covered by insurance the insured party has a right to compensate such losses from the insurer according to the insurance contract. An insurer who indemnifies the insured against such losses caused to the cargo may be subrogated to the insured's right against the carrier, or a third party, whose negligence caused the loss depending upon the conventional or legal subrogation.

The defendants in these cases may however be the carrier, actual carrier or the agent (attorney) according to the power of the attorney in transportation which defines in Article [83] para [2] of the Iraqi Transport Law as follows:

> "Power of attorney is a contract whereby an attorney binds himself to perform a juridical act on behalf of a carrier".

The Iraqi Transport Law extends the consequences of the power of attorney in transportation to cover all affairs, or services, of the social sector or any authorized body in transportation which act on behalf of a carrier[107] by giving the facilities for or assistance to the carrier in performing the contract of carriage. The agent (attorney) is however not liable in this case for the consequences of the decision or any authority against the carrier or actual carrier.

The carrier or the actual carrier is responsible for paying compensation to the innocent party resulting from their breach of the contract of carriage.[108]

On the other hand, the agent (attorney) is bound under the Iraqi Transport Law to take all measures that could reasonably be required to enable the consignee, or any person authorized by him, to obtain an insurance from the carrier for recovering all losses resulting from the breach of contract.[109]

The following points should therefore be discussed in order to reveal the procedures of the action for lost, or damaged, cargo as well as delay in delivery under the Iraqi Transport Law and the Egyptian Maritime Law.

i-Competent Court.

ii-Notice of Loss or Damage.

iii-Limitation of Actions.

107-Article [83] para [2] of the Iraqi Transport Law.

108-Article [84] of the Iraqi Transport Law; Al-Anbaki, Iraqi Transport Law, pp 51-52.

109-Article [85] para [1] of the Iraqi Transport Law.

i-COMPETENT COURT

The Iraqi Transport Law does not provide any specific provision dealing with the jurisdiction of the court concerning the loss of, or damage to, the cargo occurring during the course of the transportation.

The Iraqi Procedural Law provides in Article [37] many options for the plaintiff in instituting his action as follows:

1-The habitual residence of the defendant;or

2-The principal place of the defendant's business, or the place of any branch or agency through which the defendant runs his business; or

3-The place where the contract was made or executed; or

4-Any additional place designated for that purpose by the contracting parties.[110]

The court of the first instance has however jurisdiction to hear the cases of loss, damage, and delay in delivery because it has universal jurisdiction over all commercial and civil cases[111] without any limitation to the amount of the claim.[112]

If there is nevertheless a dispute between two parties in the public sector, or between a party in the public sector with the private sector then the administrative court[113] will be competent to hear all disputes whether they are commercial or civil.

110-Al-Jazairy, p 309.

111-Article [29] of the Iraqi Civil Procedural Law.

112-Article [31] of the Iraqi Civil Procedural Law.

113-Article [2] of the Iraqi Administrative Law, No. 140 of 1977.

Any appeal against the judgement of the court of the first instance with limited jurisdiction would be made to the court of Appeal. It is however up to the appellant to elect the course of appeal concerning the judgement of the court of the first instance with unlimited jurisdiction either by appealing to the Court of Appeal and after that to the Court of Cassation or by making it directly to the Court of Cassation. On the other hand, if there is an appeal against the judgement of the Administrative Courts, then these should be made directly to the Court of Cassation, which will be heard by special bench of the Court of Cassation called "Administrative Causes Panel".[114]

Egyptian Maritime Commercial Law, however, does not contain any particular provisions concerning the jurisdiction problems.[115] Also, there are no maritime tribunals in Egypt with jurisdiction over maritime actions.

Maritime actions, therefore, must be brought to the Egyptian competent courts in accordance with Articles 29 and 30 of the Egyptian Procedural Law which confine the jurisdiction to the Egyptian Courts,[116] especially when

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114-Sayed Hassan Amin, Middle East Legal systems, 1985, pp 230-31, hereinafter cited as "Amin, Legal Systems".

115-Al-Kalubi, Maritime Law, p 274; Mahmoud Kamel, "Some New Trends of Practice and Procedure in the Egyptian Maritime Commercial Law", [1963] 1 Al-Qanoun Wal Iqtisad, Year 33 rd, p 329 at p 344, hereinafter cited as "Kamel, Egyptian Maritime Commercial Law", where he states that:

"In commercial matters in Egyptian "Mixed" law, the commercial tribunals were independent having a specific separate competence".

116-These principles are identical to the principles of the Iraqi

the defendant has a habitual residence in Egypt, or the action deals with assets existing in Egypt or concerns obligations which have been created or enforced or ought to be enforced in Egypt.

The carriers may attempt to avoid a particular jurisdiction because they believe that courts or jurisprudence may operate against their interest by inserting a jurisdiction clause in the bill of lading.

Egyptian Law and jurisprudence admit that such a jurisdiction clause, which avoids the Egyptian Court from hearing such cases, would be null and void because Egyptian jurisdiction is a part of public policy.[117]

The Egyptian ordinary tribunals have then jurisdiction over the maritime action according to the sum involved in a given case. There are two Summary Tribunals which are competent to hear commercial disputes only, including maritime cases. These tribunals have been established in Cairo and Alexandria according to the order of the Minister of Justice. The decision which is delivered by the summary tribunals may be appealed against; then such an appeal will be considered by the commercial chambers of the Tribunals of the First Instance.[118]

Law which Article [29] of the Iraqi Civil Procedural Law provides that :
"The civil courts authority govern all the natural and artificial persons included in the government and it has universal jurisdiction over all disputes unless expressly provided otherwise by a law".

117-Al-Sharkawi, The Maritime Law, p 310.

118-Kamel, Egyptian Maritime Commercial Law, p 346.

ii-NOTICE OF LOSS OR DAMAGE

The Iraqi Transport Law provides specific rules in Article [69] para [1] respecting the notice for loss of, or damage to, the cargo as follows:

> "The consignee is bound to fix his reservations concerning the condition of the goods if he revealed that the goods have suffered a partial loss, or damage, and a notice must be given in writing to the carrier within [30] consecutive days after the day the goods were actually handed over to him".

The Iraqi Draftsman purports to clarify this by providing such an article that when the notice of loss, or damage, has been given to the carrier, then the goods carried have suffered loss or damage while in his charge.

Failure to give a notice concerning the lost or damaged cargo does not affect the right of the innocent party[119] to bring suit within two years, as provided in Article [87] of the Iraqi Transport Law.

The notice must be given in writing and disclose the nature of loss of, or damage to, the cargo. Whereas, such a notice need not be given where a joint survey or inspection has taken place by the contracting parties, or their agents, which is deemed as an equivalent to such a notice.[120]

119-Last proviso of Article [69] para [1] of the Iraqi Transport Law provides:
".... failure to give such notice is prima facie evidence that the consignee has received the goods in good condition as described in the bill of lading".

120-Article [69] para [2] of the Iraqi Transport Law provides:

The consignee need however not give such a notice to the carrier, but the notice which have been given to the actual carrier or to a person acting on the carrier's or the actual carrier's behalf including the master, or the officer, in charge of the vessel is considered to have been given to the carrier and vice versa.[121]

Egyptian jurisprudence has applied the Hague Rules, which were adopted by Egypt on May 29, 1944 to the carriage by sea cases regarding formal or substantive conditions,[122] when such cases arose between a carrier and a consignor or a holder of the bill of lading or any similar document of title, in so far as such a document relates to the carriage of goods by sea and is issued in one of the contracting states of the Hague Rules.

An application of the Hague Rules whether *ex proprio vigore* or by an agreement between the contracting parties that excludes the principles of Articles 274 and 275 of the Egyptian Maritime Commercial Law[123] from applying to the action concerning the lost, or damaged, cargo because these principles of the aforesaid articles are not a part of public policy even though it is deemed as a formal procedure.[124]

"If the state of the goods at the time they were handed over to the consignee has been the subject of a joint survey or inspection by the parties, notice in writing need not be given of loss, or damage, ascertained during such a survey or inspection".

121-Article [148] of the Iraqi Transport Law.

122-Hussni, Maritime Cassation, pp 88-89.

123-Al-Barodi, Maritime Law, p 231.

124-Egyptian Court of Cassation, case 304/47 of 11 February 1980[unpublished].

The Egyptian Court of Cassation[125] has made that quite clear where it held on February 27,1975 that:

> "The principles of Articles 274 and 275 of the Egyptian Maritime Commercial Law are considered as a part of the procedural rules which are governed by the law of the judge in accordance with Article [22] of the Civil Code.[126] It is not deemed, nevertheless, as a part of the public policy, then the contracting parties have a right to lessen or increase the period of limitation provided by the aforesaid articles or apply the periods provided in foreign law".

The aim of the notice in the case of lost or damaged cargo, under Egyptian jurisprudence, purports to show that the goods have suffered loss or damage while in the carrier's charge.

Failure to give such notice before or at the time of the removal of the goods into the custody of the consignee, or any person authorized by him, is considered *prima facie* evidence that the goods carried were handed over to the consignee in the same condition as described in the bill of lading. Also, such failure does not affect the right of the innocent party to bring suit within one year.

The notice must be given in writing and indicate the

125-Egyptian Court of Cassation, case 240/40 of 27 February 1975 [unpublished]

126-Article [22] of the Egyptian Civil Code provides:
"Principles of competence of courts and all questions of procedure are governed by the law of the country in which the action is brought, or in which the proceedings are taken".

general nature of the goods and particular loss of or damage to the goods. Where loss, or damage, is not apparent, then notice must be given within three days of delivery of the goods.[127] Any notice given, however, before handing over the goods is not deemed as a notice according to Egyptian Maritime Commercial Law.[128]

iii-LIMITATION OF ACTIONS

According to the Iraqi Transport Law, the time limit for suit concerning loss of, or damage to, the cargo as well as delay in delivery is two years.

An action relating to partial loss of, or damage to, the goods shall be time-barred if proceedings have not been instituted within two years from the date of the delivery of the goods by the consignee and notification in writing concerning the condition of the goods has been given.[129]

On the other hand, an action relating to the total loss of the goods, or delay in delivery, shall be time-barred if proceedings have not been instituted within two years from the expiry of the time expressly agreed upon for delivery or, in the absence of such an agreement, on which the goods should have arrived at their destination by a diligent carrier with regard to the circumstances of

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127-Article [3] para [6] of the Hague Rules.

128-Egyptian Court of Cassation , case 305/32 of 24 January 1967, Year 18th, p 176; It is also held in case 877/47 of 21 April 1980 [unpublished]; Hussni, Maritime Cassation, pp 111-112.

129-Article [87] of the Iraqi Transport Law.

the case.[130] The limitation period is however procedural and not substantive rules.

The Iraqi Draftsman aims, nevertheless, to show that the time is not considered as a part of public policy[131] by providing:

1-The expiry of a time limit is barred by the contractual remedy, but does not extinguish the right. The judge is not entitled then to dismiss the action automatically without asking such a demand from the disputed parties.

2-An agreement between the contracting parties may extend the time limitation provided by the Iraqi Transport Law.[132]

3-The limitation period is a time of prescription, but not a prescription extinctive, the time limitation therefore does not run in the case of interruption or stoppage.[133]

The carrier is not entitled, however, to avail himself of the prescriptions' provisions provided in the Iraqi Transport Law when he, or his servants or agents committed fraud or gross negligence.[134]

130-Article [88] para [1] of the Iraqi Transport Law.

131-Compare, Al-Anbaki, Iraqi Transport Law, p 272.

132-Article [93] of the Iraqi Transport Law provides:
"The time limit provided in this chapter may be extended by an agreement in writing ".

133-Iraqi Court of Cassation held on August 8 1973, [1976] I JJ, No. 2, p 205, where it is stated that:
"The ratification of the existing shortage in the goods is interrupted the time limitation".

134-Article [91] of the Iraqi Transport Law.

The provision purports to protect the interests of the innocent party, i.e; the consignor, consignee, shipper, or any holder of the bill of lading, and prevent the carrier benefitting from his own or his servants' or agents' wilful misconduct.

On the other hand, the time limit under the Egyptian law is a controversial issue because the rules of the time limit in the maritime commercial law are in contradiction with those principles provided for in Brussels Convention for Unification of Certain Rules of Law Relating to Bill of Lading [The Hague Rules].[135]

Thus, it is desirable to amend the Egyptian Maritime Commercial Law by adopting the principles of the Hague Rules as mere rules applying in cases of dispute concerning the time limit.

This proposed amendment will unify the principles of the time limit and avoid all the ambiguities which arise from applying a dual system of the time limit under the Egyptian Law.

The principles of time limits for suit under the Egyptian Maritime Commercial Law, however, do not apply to inland navigation which are similar to those principles provided in the Hague Rules of not applying the Rules to inland navigation.[136]

The time limit under the Egyptian jurisprudence is then divided into two categories:

1-Limitation of Actions under the Egyptian Maritime

135-Al-Barodi, Maritime Law, p 183.

136-Kamel, Egyptian Maritime Commercial Law, pp 339-340.

Commercial Law.[137]

2-Limitation of Actions Under the Hague Rules.[138]

1-LIMITATION OF ACTIONS UNDER THE EGYPTIAN MARITIME COMMERCIAL LAW

Article [274] of the Egyptian Maritime Commercial Law provides[139] that the carrier is entitled to make a plea for non-admission of the action, which is brought against him concerning the loss of the goods when the goods have been handed over to the consignee and he has not given a notice from the moment of the delivery of the goods.

Also, an action shall be inadmissible when it brought against the charterers for damage done if the shipmaster delivered the goods and received his freight without any protest.

Article [275] of the Egyptian Maritime Commercial Law[140] adds that the notices and actions shall be null and

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137-Articles 271, 274, and 275 of the Egyptian Maritime Commercial Law.

138-Article [3] para [6] of the Hague Rules.

139-Kamel, Egyptian Maritime Commercial Law, p 339, where he states the text of the Article [274] of the Egyptian Maritime Commercial Law as follows:
"Shall be inadmissible any actions against the shipmaster for damage suffered by the goods shipped if delivery thereof was made without any protest, all actions brought against the charterers for damage done if the shipmaster delivered the goods and received his freight without any protest, all actions for making good the damage caused for boarding in a place where the shipmaster may bring an action if he had not lodged a claim".

140-Kamel, Egyptian Maritime Commercial Law, p 339, where he states the text of the Article [275] of the Egyptian Maritime Commercial Law as follows:

of no effect if the notices are not given within [48] hours and are not followed by bringing an action to the court within [31] days from that date.

The scope of this pleading is confined to the partial loss of or damage to the goods. The carrier is therefore not entitled to retain such a plea concerning total loss or delay in delivery.[141]

The Egyptian Court of Cassation held, in case of delay in delivery, that when the goods have not arrived at their destination in time, then the liability of the carrier is ascertained without any need to inspect the goods carried within a specific period.[142]

The characterization of the plea for non-admission of action is considered as a substantive condition in accordance with Articles 274 and 275 of the Egyptian Maritime Commercial Law, but not a formal condition which is allowed to dismiss the action according to the Procedural Law.[143]

Consequently an order for dismissal of action, according to such a plea, must be made during the interlocutory proceedings and is not allowed to be made at the conclusion of the trial or at the court of

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"These protests and claims are null and of no effect if they were not lodged and notified within forty eight hours and if, within thirty one days from their date, no legal proceedings followed".

141-Al-Kalubi, Maritime Law, pp 277-278; Al-Barodi, Maritime Law, pp 183-184.

142-Egyptian Court of Cassation held on April 30th, 1968, Year 19th, p 891.

143-Al-Kalubi, Maritime Law, p 280.

cassation for the first time.

It is also not deemed as a part of public policy. The judge is therefore not entitled to dismiss the action by himself without asking that the defendant,[144] and the contracting parties may give up such a right expressly or impliedly, i.e; where the contracting parties stipulated in the carriage contract or at the delivery of the goods or, when the carrier promised to compensate the consignee or the shipper for all the loss of, or damage to, the goods.

The Alexandria court of the first instance[145] has, however, ruled out the application of the plea for non-admission of action, which emerges from Articles 274 and 275 of Egyptian Maritime Commercial Law, in a case when the facts, which caused damage to the cargo, are known to the carrier, or were made known to him, or should have been known to him, because he has enough time to collect the evidence and defend his interests against any action which might arise.

Article [271] of the Egyptian Maritime Commercial Law, however, provides that the action respecting the delivery of the goods is time barred within a year from the arrival of the vessel.

The one year provision of the time limit for the plaintiff to bring suit under Article [271] of the

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144-Egyptian Court of Cassation held on May 4th, 1971, No.468, Year 36th, p 594.

145-Alexandria Court of the First Instance held on March 4th, 1968, February 26th, 1967, and January 29th, 1968, where they stated by Al-Baroodi, Maritime Law, p 186.

Egyptian Maritime Commercial Law applies in the case of total loss or delay in delivery and when the carrier does not exercise his right to plea for non-admission of action, or the court does not operate this plea and accepts the suit against the carrier.[146]

This limitation period commences from the day of the arrival of the vessel at its destination. If any accident takes place during the course of the voyage, then the time of prescription runs from the day when the vessel should have arrived according to the customary course of voyage.[147] It is however submitted to the general principles of the interruption in accordance with Article [273] of the Egyptian Maritime Commercial Law.

Though the action is time barred, the plaintiff has a right to ask the court to make the carrier swear that he has performed his obligations completely in transporting the goods in accordance with Article [272] of Egyptian Maritime Law.[148]

2-LIMITATION OF ACTIONS UNDER THE HAGUE RULES

As far as the time limit is concerned, under Egyptian jurisprudence, the Hague Rules would be applied in cases of carriage of goods by sea relating to bill of lading or any similar document of title.

The time limit for loss of, or damage to, the cargo is therefore one year from delivery of the goods, or the

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146-Al-Barodi, Maritime Law, p 189.

147-Al-Kalubi, Maritime Law, p 281.

148-Al-Barodi, Maritime Law, p 190; Al-Kalubi, Maritime Law,p 281.

date when the goods should have been delivered.[149]

Egyptian jurisprudence extends the Hague Rules only to the maritime course. The carrier's liability, therefore, begins from the commencement of the voyage and cease at the end of the voyage by discharging the goods from the vessel.

Whereas, Article [271] of the Egyptian Maritime Commercial Law applies to the disputes which arise before loading or after discharging the goods carried which emerge from breaching the contract of carriage by not performing the obligations of such a contract partially or totally.[150]

Consequently, the beginning of the period of the time limit under Egyptian Maritime Commercial Law is different from that provided in the Hague Rules by saying that the time limit commences from the day of the arrival of the vessel at the agreed destination.

On the other hand, the criterion of delivery[151] is an important factor in deciding the beginning of the time limit as mentioned before.[152]

If the carrier, therefore, wants to avail himself of the time limit for suit either in the Hague Rules or Egyptian Maritime Commercial Law, then he has to show

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149-Article [3] para [6] of the Hague Rules.

150-Hussni, Maritime Carriage, p 132.

151-[1958] 39 AJ, p 636, where it is stated the decision of the Alexandria Court of First Instance held on January 26th, 1958.

152-Al-Sharkawi, The Maritime Law, p 311; Hussni, Maritime Carriage, p 132.

evidence that the loss of or damage to, the goods occurred during a particular stage of transport, i.e; during the maritime course or before or after the maritime stage, in order to decide which rules are competent as far as the time limit is concerned.[153]

Otherwise, it would be considered that loss of, or damage to, the goods occurred during the course of the maritime voyage, unless the carrier proves that such loss or damage has taken place before loading or after discharging the goods from the vessel.[154]

The carrier is however not entitled to lessen the period of the time limit for suit by inserting special terms in the contract of carriage because it would be contrary to Article [3] para [8] of the Hague Rules.

By contrast, the carrier may extend the period of time limit in accordance with Article[5] of the Hague Rules.[155]

The principles of interruption or stoppage in the Civil Code would be applied on the time limit for suit.[156]

The confession of the carrier, which admits that the cargo-owner has a right to compensation and the carrier is therefore responsible for recovery of the loss of, or damage to, the cargo, would interrupt the time limit.[157]

153-Egyptian Court of Cassation held on February 11th, 1960, Year 11th, p 126.

154-Egyptian Court of Cassation held on February 11th, 1960, Year 11th, pp 126, 137.

155-Hussni, Maritime Carriage, p 131.

156-Egyptian Court of Cassation held on April 20th,1968, Year 19th, p 891.

157-Al-Barodi, Maritime Law, p 233.

CONCLUSION

We can conclude from the foregoing discussion that the principles of the Iraqi Transport Law are similar to the principles of the Hamburg Rules as far as the carrier's liability is concerned.

For instance, by extending the carrier's liability to cover the entire period whether prior to the voyage or during and subsequent to the voyage while the goods are in his charge and cease at the moment the goods have been delivered to the consignee,[158] or by adopting the Special Drawing Rights and the way of calculation of the amount of the limitation of liability for loss resulting from loss of, or damage to, the cargo as well as delay in delivery.

The Iraqi Transport Law, however, on some occasions differs from the principles of the Hague and the Hamburg Rules concerning the basis of the carrier's liability by establishing the liability system on the principles of "trust".[159]

By contrast, the principles of presumed fault or neglect has been implied by the Hague Rules and expressed by the Hamburg Rules.[160]

On the other hand, Egyptian jurisprudence has adopted the attitude of the Hague Rules by providing that the

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158-Article [27] para [1] and [131] para [2] of the Iraqi Transport Law.

159-Article [46] para [1] of the Iraqi Transport Law.

160-Article [3,4] of the Hague Rules and Article [5] of the Hamburg Rules.

scope of the carrier's liability is confined to the maritime course. Viz, the scope of the carrier's liability begins from the commencement of the voyage and ceases at the end of the voyage, that which is called the "tackle to tackle" criterion, unless the carrier has agreed to extend his liability beyond the maritime stage.

All this can be said with confidence. As a result of recent developments, neither the traditional Shari'a Law nor the Ottoman Law of Maritime Commerce 1863 apply to the laws governing the system of the foreign maritime carrier.[161]

The Ottoman Commercial Law was displaced in Egypt and Iraq respectively as far as the liability of the carrier is concerned.

Modern legislation is modelled on Egyptian Law by ratification of the Hague Rules since May 29th, 1944. Also, the Egyptian Draftsman attempts to embody the Hague/Visby Rules in the Final Draft Proposal For Egyptian Maritime Law. In the subsequent Iraqi Law has embodied the principles of the Hamburg Rules in the national law by legislation of the Transport Law in 1983.

Iraqi and Egyptian jurisprudence have broadened their horizons however by looking beyond traditional Islamic Law and adopting the principles of the International

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161-Compare, Al-Jazairy, pp 68, 73, 123, 272, 291, where he states: "Ottoman Law of Maritime Commerce is in force in Iraq which was enacted in 1863 when Iraq was colonized by Ottoman Empire". Whereas, the Ottoman Law of Maritime Commerce was displaced as far as the liability of the carrier is concerned in 1983 by enacting the Iraqi Transport Law.

Convention.

Shari'a Law is being consistently eroded by the dictates of modern principles of maritime law, which provided in the International Convention,[162] in Egypt and Iraq respecting the liability of the maritime carrier.

The principles of maritime law have however applied even in the Shari'a Law countries,[163] e.g. Qatar which gives priority to maritime law and the general principles of the Civil Law and consequently, in the absence of a specific provision that the court may apply the principles of the International Conventions even Qatar itself does not subscribe to such a convention.[164]

The Qatar Court of Appeal in 1975 declared:[165]

> "Whereas no maritime law has been promulgated in Qatar one should turn to general provisions of Qatar Civil Law, and after perusing articles from it we find it stipulates that "in the

162-W. M. Ballantyne, Legal Development in Arabia, 1980, p 66, hereinafter cited as "ballantyne, Legal Development In Arabia" where he states :

"Commercial and business law in this area will, in my view, continue to develop along the lines of the continental system, the Shari'a Law will inevitably continue to be eroded in this respect and play less and less of a role in commercial relations; and the common law system will, with the exception perhaps of some increasingly isolated instance, become extinguished"; See also, Noel J, Coulson, Commercial Law in the Gulf States, 1984, pp 91-93, 107-108, hereinafter cited as "coulson, Commercial Law in the Gulf".

163-Saudi Arabia, Bahrain, Kuwait, Oman, Qatar, and The United Arab Emirates.

164-Deborah Ann Rice, Maritime Legislation in the Arabian Gulf States, [1985] 1ALQ, p 69 at 71.

165-Qatar Court of Appeal , case 15/94 of January 1975.

absence of an applicable legal provision the judge shall adjudicate according to custom. Special Custom shall prevail over general custom.Should there be no custom the principles of the Islamic Shari'a shall apply". And whereas it is not questionable that there is no special or local custom in the state of Qatar, or the port of Doha, the opinion of the First Instance Court to apply the general principles of maritime assistance and salvage emanating from international customs codified in the Brussels Convention of 1910 is correct"

The general aim of the comparative study of Iraqi and Egyptian jurisprudence is then to reveal that both apply the Rules of International Convention either by adopting these conventions or embodying the principles of the Rules in their own national law.

The Iraqi and Egyptian courts, to some extent, intend to benefit from the precedents and experience of the United Kingdom and United States, particularly in the field of the legal system concerning the carriage of goods by sea because both countries apply the Rules of the International Convention and they have tremendous experience respecting the carriage of goods by sea.

Any attempt therefore to establish a bridge of joint understanding for the principles of carriage of goods by sea would be helped by all countries, either developed or developing, solving their problems, which arise from the International trade, through United Nations Channels and the Committees which specialise in development of trade law, i. e; UNACTAD, UNCITRAL.etc.

FINAL CONCLUSION

Classification of deviation into geographical and non-geographical deviation is very important in explaining the context of deviation's terminology within the law of carriage.

This trend of classification has however little impact on the characterization of the effect of deviation, especially when we found that geographical, or non-geographical deviation which has occurred during the course of the maritime voyage, or quasi-deviation which has taken place outside the scope of the maritime voyage, viz, the port of departure or the port of discharge, has the same impact on the contract of carriage.

Any diversion, therefore, which occurs during the carriage course is deemed deviation and it is immaterial to inquire the type of deviation as geographical, non-geographical or even quasi-deviation.

A useful classification of the deviation is however possible by adopting the criterion of reasonableness which is contended to define what is fundamental, and what is not fundamental deviation. This criterion is based on the interests of the contracting parties and whether they benefit by the deviation or not by considering the nature of the adventure, the contemplated voyage and the surrounding circumstances of the given case at the time deviation took place[1].

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[1]-Per Lord Atkin, in, The Foscolo Mango & Co. v. Stag Line Ltd.

The "reasonableness", then, cannot arise out of circumstances deliberately planned nor from gross negligence. A causal connection should be shown between unreasonable deviation and the loss of, or damage to, the cargo, otherwise the carrier will not be liable for such loss of, or damage to, the cargo[2].

Wilful or intentional misconduct is an essential element in considering what is, and what is not, unreasonable deviation. Any intentional deviation from the contract of carriage, whether by changing the course of the voyage or breaching the contract of carriage by stowing the goods on deck, whereas, the contract stipulated that the goods carried should be stowed under deck, is deemed an unreasonable deviation[3].

By contrast the carrier is liable for any loss of, or damage to, the cargo resulting from wrongful stowage on deck which is classified as lack of proper care according to Article 3 [2] of the Hague/Visby Rules and COGSA. On the other hand, an error in the navigation or management of the vessel which is committed by the master is not sufficient to be considered as a deviation, but might be deemed as a navigational error which will exempt the carrier from liability according to Article 4 [2] (a) of

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[1931] 41 Ll.L.Rep. p 165 (H.L).

2-Tetley, Marine Claim, p 356; Gilmore & Black, p 180; Mobile Sales & Supply Corp. v. M.V.Banglar Kakoli, No, 81-7704 (S.D.N.Y.13 June 1984).

3-This trend is the attitude of the United States jurisprudence which has extended the concept of deviation to cover any variation in the conduct of a vessel.

the Hague/Visby Rules and COGSA.

Any exaggeration in the drastic effect of an unreasonable deviation should however be isolated from the scope of the responsibilities which are provided in Article 3 [2] of the Hague/Visby Rules and COGSA concerning the carrier's duty to load, handle, store, carry, keep, and discharge the goods properly and carefully[4].

It is also important to keep in mind the distinction between the characterization of unreasonable deviation and its effect on the bill of lading and on insurance policy[5].

Under marine insurance, any variation or increase of the insured risks is actually an unreasonable deviation which displaces the insurance policy[6].

Whereas, mere variation of the insured risk is not deemed deviation in the law of carriage, but violation of the contract is so serious that it goes to the root of that contract then it invalidates all the exemption clauses in the bill of lading and deprives the carrier of all the benefits granted by the contract of carriage when deviation has taken place with intent to cause damage or recklessly with knowledge that damage would probably

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4-Tetley, Marine Claim, p 356; Gilmore & Black, p 182, Compare, Roger, p 182, Footnote, 135.

5-Knauth, p 251; sarpa, p 147.

6-Robert H. Brown, Marine Insurance, (5th,ed, vol,I, 1986), p 99, hereinafter cited as "Brown, Marine Insurance", where he states: "No action, such as avoidance of contract is required of the underwriter;the effect of deviation being automatic"; Knauth,p 251.

result[7].

The notion of deviation is then based on a rule of substantive law rather than a rule of construction because unreasonable deviation is an infringement or breach of the contract of carriage which emerged from the Hague/Visby Rules or COGSA.[8]

That indicates that delay occurring in the course of the maritime voyage, even though unreasonable, does not amount to as serious a breach of the contract as deviation and there is some differece between them whether in context or in effect on the contract of carriage.[9]

The carrier is liable for loss of, or damage to, the cargo resulting from delay in delivery depending on the basis of the commercial purpose of the venture which is frustrated by the carrier's negligence to begin the contemplated voyage with utmost dispatch.

The carrier's failure constitutes then a breach of the contract but it does not go to the root of the contract. Consequently the contract is still subsisting and valid but the delay in delivery will be actionable unless there is an agreement between the contracting parties to the contrary[10].

The purpose of the Hague Rules is however aimed at

7-Tetley, Selected Problems of Maritime Law, p 56; Tetley, Marine Claim, p 354; Gilomre & Black, p 180.

8-Compare, Mills, The Future of Deviation, p 596.

9-See chapter one section (IV).

10-Knauth, pp 261-265; 2 Carver, para, 1205, p 890.

making a compromise between the interests of the carrier and the shipper, namely the developed and developing countries. This purpose has been substantially directed in favour of the cargo-owners rather than the carriers under the Hamburg Rules by establishing a "balanced allocation of risk between cargo-owners and carriers".

This policy of International Conventions has reflected in rather elaborate provisions on the basis of the liability regime which is still based on the principles of presumed fault or neglect and not of strict liability.

The Hamburg Rules have rearranged the principles of the liability of the carrier in order to fit the interests of the shippers and the cargo-owners.

For instance, by creating a new system for the carrier's immunity rather than a long list of exception clauses which are provided by the Hague Rules or;

Expanding the scope of the carrier's liability to cover the entire period during which the carrier is in charge of the goods or, to cover the carriage of live animals and the stowage of the goods on deck whether such liability emerges from physical or non-physical damage such as in the case of delay in delivery of the goods carried. Whereas, the period of liability under the Hague/Visby Rules, is limited to the maritime stage only and the carrier's liability is excluded from applying on the carriage of live animals or the stowing of the goods on deck or;

Extending the time limit of the lost, or damaged, cargo

to two years and giving the claimant a right to institute his action to the contempt courts of six different places. Under the Hague/Visby Rules, the time limitation for suit of loss of, or damage to, the cargo is one year and these Rules do not provide any provision concerning the jurisdiction clause for the handling of claims[11].

The insurance policies purport to cover any loss, or damage, caused to the cargo insured even though the carrier is liable for such loss, or damage. That does not mean that the liability regime is replaced with cargo insurance. Many cases in the practical field have shown that some loss of, or non-physical damage to, the cargo is not covered by the cargo insurance and the cargo insurers have no duty to indemnify them, i.e; delay warranties even if the delay is caused by an insured risk; economic loss such as a market loss or any consequential loss resulting from delay in delivery.

The liability system is very important in considering who is responsible for loss of, or damage to, the cargo and determining whether the cargo-owner may recover compensation or bear the loss himself. It also determines the right of recourse of the insurer against the carrier especially in the case of "overlapping insurance". the liability regime is then an essential element in considering the responsibility of the carrier concerning the carriage of goods by sea.

The question now may arise about the effect of the

11-Chandler, pp 233-289.

moderate increase in the level of the liability system which is adopted by the Hamburg Rules on the marine insurance industry.

The main issue for modern writers, in regard to the liability of the carrier under the Hamburg Rules, is the deletion of the exceptions of nautical fault and fire which are deemed as privileges for shipowners, or carriers, under the Hague Rules. The Hague Rules provide however that any losses of, or damages to, the cargo caused by nautical fault or fire are recoverable from cargo insurers with whom these losses ultimately remain because there is no legal way authorising the cargo insurers to recover these losses from the carriers according to the catalogue of the Hague Rules' exceptions.

On the other hand, the cargo insurers have a right to exercise recourse against the shipowners under the legal system of the Hamburg Rules which provides a general standard for the carrier's liability depending on the principles of presumed fault or neglect without mentioning a particular exception merely saying that the carrier is obliged to take all measures that could reasonably be required to avoid the occurrence and its consequences.

This trend endeavours to prove that any change in the level of the carrier's liability will affect the marine insurance industry on the one hand and the sharing between the cargo insurers and the P & I Clubs of the

total volume of premiums on the other hand. That indicates that the net payments of cargo insurers will be less and the premium volume will be reduced accordingly under the Hamburg Rules.

By contrast, the net payments and the premium of the P & I Clubs will increase. Besides, this encourages the carriers to impose a higher freight on the shipper than the increase in the liability insurance cost. Consequently, the shippers or cargo-owners would pay more for their goods in freight than they would save from the decrease in the premium volume of the cargo insurance[12].

This viewpoint, which is based on the economical level in considering the impact of the increase in the level of the carrier's liability under the Hamburg Rules, is debatable and highly questionable.

First of all, we should avoid any misunderstanding concerning the attitude of the Hamburg Rules towards cargo insurance. These Rules neither dislodge the need for cargo insurance in the form of insured bills of lading, nor reduce the advantages for the cargo-owner or shipper of establishing an insurance policy which aims to reach quicker settlements of claims on a commercial basis.

Secondly, the fears of increasing the cost of insurance and the freight rates, resulting from the tightening up of the carrier's liability by being careful and prudent in dealing with the goods while they are in his charge,

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12-Selvig, pp 311-313.

did not materialize under the Warsaw Convention and would not be raised in the carriage of goods by sea under the Hamburg Rules because the developed countries have exaggerated in evaluating the effect of the liability regime of the new Rules and these Rules would not be effective on the insurance industry which is competitive and dependent on international transactions.

Thirdly, the high standard of care of the maritime carrier in dealing with cargo which provides by the Hamburg Rules might reduce overall insurance costs, whether in cargo insurance or P&I Clubs, by taking greater care in order to avoid loss, damage, or delay in delivery.

Finally, any shift in risk allocation from cargo insurance to carrier's liability would be particularly detrimental to the interests of developing countries[13], especially when the developing countries realize that the freight rates will never go up because they are established by the liner conferences which are dominated by the shipowners of "developed countries" and they fix the freight rates with the competitive market. Therefore the carriers would be able to accommodate the new system of liability created by the Hamburg Rules.

I am then inclined to the attitude which intends to increase the level of the carrier's liability in favour of the shippers or cargo-owners which would help developing countries in improving their international

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13-Shah, pp 11-18.

trade with developed countries on the basis of equal bargaining power, equitable reciprocity and, justice, taking into account the relevant economic effect of the carrier's liability on the insurers or P & I Clubs, which might not be effective on the marine insurance companies especially when they act according to the competitive market.

however, these general principles of maritime law concerning the liability regime have some connection with principles regulating other methods of transportation, i.e; Air, Road, and Rail. This kind of harmonization between the traditional modes of carriage has responsed to the rapid technological development and encouraged the international community, under the supervision of the United Nations, to emerge a new convention on "International Multimodal Transport of Goods". This convention has created a multimodal transport which intends to carry the goods by at least two different modes of transport on the basis of multimodal transport[14].

The Iraqi Draftsman has made a good effort by issuing the Iraqi Transport Law which unifies all the principles governing different modes of transport in uniform text and considering the surrounding circumstances of a given mode of transport by providing a separate provision for these modes of transport, i.e; Air, Sea, Road, Rail and

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14-Article 1 [1] of the United Nations Convention on International Multimodal Transport of Goods.

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