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THE DOCTRINE OF DEVIATION, ITS HISTORICAL AND LEGAL ROOTS

Abstract

The most common way of transporting the goods is still the sea; hence, the rules relating to the carriage of goods by the sea should be clearly examined. Transportation of goods by sea can involve different aspects of the law such as carriage contract, insurance, liability and compensation. There are different clauses and obligations in the contract which should be followed by the shipper. One of the most important clauses is deviation meaning departing from the usual or the customary route. The fault is imputed to the shipper unless he proves it justifiable or having a deviation clause in its contract. In case the deviation is not justifiable such as deviation in order to be fuelled cheaper or in order to discharge labour, and any perils of the sea occur causing loss or damage to the cargo, the shipper is responsible and the insurer will not cover damages. Also, there are examples in which deviation can be regarded as justified. This article will examine deviation, justified deviation and go through different historical and up to date cases in this regard and how it has changed in the track of time.

Annotasiya

Malların daşınmasının ən geniş yayılmış yolu hələ də dəniz olduğundan dəniz yolu üzərindən mal daşınması ilə bağlı qaydalar aydın şəkildə araşdırılmalıdır. Malların dəniz yolu ilə daşınması, daşınma müqaviləsi, sığorta, məsuliyyət və kompensasiya kimi hüququn fərqli aspektlərini əhatə edə bilər. Müqavilədə yükgöndərən tərəfindən yerinə yetirilməli olan müxtəlif müddəalar və öhdəliklər mövcuddur. Müqavilənin ən vacib müddəalarından biri olan "yayınma" həmişəki və ya ənənəvi yoldan çıxma mənasını verir. Təqsir yükgöndərənin haqlı olduğunu sübut etməməsi və ya müqavilədə yayınma maddəsi olmadığı təqdirdə onun üzərinə qoyulur. Əgər yayınma yanacağa qənaət etmək və ya işçi qüvvəsini azad etmək məqsədli yayınma deyilsə və bu zaman hər hansı bir dəniz təhlükəsi yükün itirilməsinə və ya zədələnməsinə səbəb olarsa, yükgöndərən məsuliyyət daşıyır və sığortaçı zərərin əvəzini ödəməyəcək. Həmçinin yayınmanın əsaslı hesab olunacağı nümunələr də var. Bu məqalədə yayınma, "əsaslı yayınma" anlayışları araşdırılacaq və bununla əlaqədar müxtəlif tarixi və müasir hadisələr üzərindən keçilməklə onun zaman zəminində necə dəyişdiyi aydınlaşdırılacaq.

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Introduction

After starting off the voyage, the master is obliged to proceed to the port of delivery in the direct, shortest and usual route, and within a precise time frame.[1] In most contracts of affreightment, whether by a general ship or one hired for the voyage, the shipowner impliedly tackles to proceed by the direct and usual route to the port of delivery, without unnecessary deviation, unless there is an express contract as to the course to be pursued.[2] In other words, it has been considered as an implied term in the contract of carriage of goods by the sea that the carrier will not stray from the voyage contract without lawful justification.

There are so many definitions used for the doctrine of deviation, which are common in concept. The simple definition used is that deviation is an intentional and unreasonable change in the geographical route of the voyage as contracted[3] or an unjustified departure from the route explicitly brought in the contract.

Regardless of the fact that this "doctrine is limited to be applied to actual geographical departure by a carrier from an agreed-upon route in UK courts, its use has been expanded to include various actions by a carrier which tends to expose his cargo to a greater risk of damage or loss by US courts".[4] In the law of carriage of goods by sea, the deviation is regarded as a breach that is dealt with under particular circumstances.[5] From the minute this happens, the voyage is altered and is not under the same regulations in terms of coverage or responsibilities. Rather, the contract is determined in the sense that it is no longer being operated on the agreed terms, and the insurer is absolved from later responsibilities enabling them to refrain from any further payments.[6] At first glance, there would be the tendency to renounce the aftermath of such contravening, however, it has not been strongly accepted yet, and the doctrine

[1] *See generally* Meredith Morgan, Evolving Role of The Master Mariner – Legal Aspects of Captaincy (2016).
[2] John Bourdeau, John Dvorske, Eleanor L. Grossman, Sonja Larsen, William Lindsley and Jeffrey J. Shampo, American Jurisprudence, 1 (2012).
[3] Irwin Nack, *Admiralty-Law: Carriage of Goods by the Sea Act quasi-Deviation- SEDCO, INC. v. M/V Strathewe*, 9 New York Law School Journal of International and Comparative Law 435, 435 (1988).
[4] *Supra* note 3.
[5] Lloyd's Maritime and Commercial Law Quarterly, Deviation: a doctrine all at sea? (2000), https://www.i-law.com/ilaw/doc/view.htm?id=130238 (last visited Mar. 9, 2021).
[6] Traditional Principle of Deviation in Maritime Law (2019), https://www.lawteacher.net/free-law-essays/contract-law/traditional-principle-of-deviation-in-maritime-law-contract-law-essay.php?vref=1 (last visited Mar. 9, 2021).

has been viewed from various angles either as an abandoned rule or a fresh one will forming court orders.[7] This expansive usage of the application of the doctrine of deviation and its relationship with provisions related to the limitation of liability mentioned in the Carriage of Goods by Sea Act of 1936 (hereinafter referred to as COGSA) has caused some confusions that will be dealt with in this paper in future chapters.

In this article, Common law, mainly being English law and related cases in respect of deviation are the cornerstone of the discussion. It will also revolve on the relevant rules such as the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading amended by the First Protocol and Second Protocol (hereinafter referred to as "Hague/Visby Rules"), United Nations Convention on the Carriage of Goods by Sea (hereinafter referred to as "Hamburg Rules"), and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (hereinafter referred to as "Rotterdam Rules") entitling notion of deviation in different occasions. Finally, it seems necessary to look at America's practice with respect to the doctrine of deviation and COGSA. Although deviation has a very ancient history it is still amidst various contemporary issues which needs valuable insights into its effect and surrounding circumstances.[8] Hence, this article will begin with the historical origin of the doctrine of the deviation to shed light on the concept of the deviation and its alteration in different eras up to the present, and concerning different decisions made by courts. Thereafter, the deviation will be described together with the salient issues and specifications, which are necessary for constructing the notion of the deviation, the justifiable deviation, moreover the related problems that may arise in this area. Besides, the concept of deviation will be examined in different rules and the current views about this issue will be discussed. The article will end with a conclusion regarding the examination made in the article.

I. Historical origin

Deviation as its today's notion dates back to 3 centuries ago taking its footprints in marine insurance. It has been given higher importance in its modern sense, hence in the case of unjust deviation, the results are harsher; the carrier can no longer defend to refrain from the liability rising from the deviation and any potential loss or damage either based on the statutes or contract of carriage terms and conditions and insurer has no further responsibility.[9]

[7] Sarunas Basijoka, *Is the Doctrine of Deviation only a Historical Record Today*, 1 UCL Journal of Law and Jurisprudence 114, 114 (2012).
[8] *See generally* Proshanto K. Mukherji, Jr. Maximo Q.Mejia and Jingjing Xu, Maritime Law in Motion (2020).
[9] Stanley L. Gibson, *The Evolution of Unreasonable Deviation under U.S COGSA*, 3 University of San Francisco Maritime Law Journal 197, 197 (1991).

As mentioned above, the doctrine of deviation was rooted in marine insurance law. There are implied warranties in the insurance law whose breach will render the contract null and void, hence is favourable to the marine underwriter. One of the said warranties is that the ship is on the ordinary route without deviation.[10] In this regard, as soon as deviation happened which is the departure of an agreed route,[11] and the route brought in the contract is not followed, the insurer is free from all his liabilities.[12] Besides, it is a *prima facie* fact that the carries shall not deviate from the agreed route brought in the bills of lading, and this gives automatic right to the cargo owner to terminate the contract while other factors such as unseaworthiness will not render the contract void automatically.[13] Adding to above, by reference to the fundamental wrongdoer principle of torts, the carrier is regarded as being responsible for any potential loss or defection to the cargo which are predicted not to have been in place, in case he had not changed the normal case of the voyage.[14]

The scholars in field of marine industry were long on the opinion that not deviating from the normal course of voyage should be explicitly brought in the contract otherwise it cannot be regarded as deviation and nullify the contract. But it was in odds not to take any change of the route which was not specified in the contract, as deviation in merit. The English courts based the origin of this notion in Davis v Garrett, which concerned a deviation by a common carrier.[15] The dicta say:

"The law does imply a duty in the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed with unnecessary deviation in the usual and customary course".[16] It was held by Tindal CJ that:

"From the first point of view, no wrongdoer is allowed to apportion or qualify his own wrong, and that as a loss has actually happened while his wrongful act was in operation and force, and which is attributable to his wrongful act, he cannot set up the bare possibility of a loss as an answer to the action, if his wrongful act had never been done. It might admit a different construction if he could show, not only that the same loss might have

[10] Solomon Huebner, *Policy Contracts in Marine Insurance*, 26 The Annals of the American Academy of Political and Social Science 273, 295-296 (1905).
[11] Theodora Nikaki, *The Quasi-Deviation Doctrine*, 35 Journal of Maritime Law and Commerce 45, 45 (2004).
[12] What Is Deviation Clause in Marine Insurance? (2021), https://securenow.in/insuropedia/deviation-clause-marine-insurance/ (last visited Mar. 9, 2021).
[13] Billy Tafireyi Gwini, A Comparative Study on the Development of the Carrier's Obligation of Seaworthiness from the Common Law Doctrine of Strict Liability Perspective and the Applicable International Conventions, 6 (2017).
[14] *Supra* note 12.
[15] Hamish Dempster, The Confusion of Incidents of Common Carriage with Incidents of Deviation, 275 (2016).
[16] A Critical Analysis of Justifiable and Unjustifiable Deviation of Vessel in Carriage of Goods by Sea (2019), https://www.lawteacher.net/free-law-essays/transportation-law/carriage-of-goods-by-sea-essay.php (last visited Mar. 9, 2021).

happened, but that it must have happened if the act complained of, had not been done, but there is no evidence to that extent in the present case. On the second point, we cannot think that the law does apply a duty on the owner of a vessel, whether a general ship or hired for the special purpose of the voyage, to proceed without unnecessary deviation in the usual and customary course".[17]

It is learnt from the aforementioned decision, that by altering the normal route, the insurance contract is void. Adding to above, the court proposes that if the carrier can prove that this damage or loss would have had happened even if he was on the usual route, he will not be liable anymore. In practice, it is very crucial to prove that the cause of the loss is a storm or other natural forces, but it will be less challenging in case of losses by fire or inherent vice.[18]

By looking at the US Supreme Court, we can see that, it set forth the concept of geographic deviation as early as 1958 long before COGSA was enacted. In the *Propeller Niagara v. Cordes*,[19] the court recognized a carrier's customary duty and highlighted the carrier's duty to adhere to the contract, which has expressly altered this customary duty to the specific requirements of the shipper. The court stated:

"After having set sail, the carrier 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, or that designed by the contract".[20]

In 1894, the Supreme Court in *Constable v. National Steamship* recognized that technological developments in transporting goods by water should be taken into account in determining whether or not there had been a deviation sufficient to oust the carrier's defences. It determined that a rule developed before the era of steam navigation should not be applied to find a deviation at a time when arrival dates of vessels were more reliable due to the use of steam-propelled vessels. However, the Supreme Court has not delivered a decision involving maritime deviation since COGSA became law.[21]

II. Deviation and its specifications

Deviation is of utmost importance because of the serious penalties attached to it, in a sense that the contract is invalidated and the carrier becomes a

[17] Martin Dockray, Cases and Materials on the Carriage of Goods by Sea, 64 (2013).
[18] *Ibid.*
[19] Propeller Niagara v. Cordes: 62 U.S. 7 (1858): Justia US Supreme Court Centre, https://supreme.justia.com/cases/federal/us/62/7/ (last visited Mar. 9, 2021).
[20] *Supra* note 14.
[21] Constable et al. v. National Steamship Co. | Supreme Court | US Law | LII / Legal Information Institute, https://www.law.cornell.edu/supremecourt/text/154/51 (last visited Mar. 9, 2021).

common carrier with further responsibilities,[22] hence it is important to define and categorize it well. After a historical review on the doctrine of deviation and the changes made in the track of time and before any further illumination of the notion of deviation, it should be perceived that if the parties of a contract of affreightment do not agree on specific terms in addition to the express agreed clauses, there are a series of obligations which are applied rooting in custom and commercial rules.[23]

Having said that, in common law, parties have full freedom to alter, vary, cut down or exclude any one of these implied terms, and, in practice, this is very commonly done.[24] Obligation not to deviate from the agreed route is one of the implied terms in the contract of affreightment whose definition will be discerned under different international regimes of uniform law dealing with this notion such as Hague/Visby Rules, Hamburg Rules Rotterdam Rules, and also the common law aspect. Besides, we will identify a reasonable deviation and different factors that can together constitute a reasonable or unreasonable deviation. The liability of the carriers and the scope of it will be discussed as well. At last, the effect of deviation will be observed.

A. What are the options for the definition to this notion?

One definition agreed in UK can be: "deviation is a voluntary and unjustifiable departure by a carrier from its contracted voyage or the proper route".[25] In US, deviation was applied to express the wandering or staying of a vessel from the usual route, but later on it has deviated and come to mean any variation in the conduct of a ship in the carriage of goods whereby rises the risk of any loss or damage.[26] In this case, the deviation is not only related to the geographic departure of the agreed route but rather a more expansive action.

Deviation may also consist of other departures from the agreed or customary route or method of transportation, such as towing another vessel, shipping by a vessel other than the one set out in the contract of affreightment, shipping part of the way by rail when the parties stipulated for all water carriage or carrying the goods beyond the delivery point.[27]

It seems that the latter definition is more comprehensive, as it refers to both types of deviation: the geographic deviation and the quasi-deviation. The geographic deviation, as "voluntary departure, without necessity or

[22] *Deviation in the Law of Shipping - The United States, United Kingdom and Australia, a Comparative Study*, 11 Journal of International Law & Economics 147, 147 (1976-1977).
[23] *Supra* note 7.
[24] N. J. J. Gaskell, C. Debattista, R. J. Swatton, Chorely and Giles: Shipping Law, 183 (1987).
[25] Thomas Edward Scrutton, Scrutton on Charterparties and Bills of Lading, 296 (1955).
[26] Spm Corporation, Appellant, v. M/v Ming Moon; Blue Anchor Line, Division of Transpaccontainer System, Ltd.; Yangming Marine Transportcorporation; and Maher Terminals, Inc, 965 F.2d 1297 (1992), https://law.justia.com/cases/federal/appellate-courts/F2/965/1297/19844/ (last visited Ap. 18, 2021).
[27] *Supra* note 2.

reasonable cause, from the regular and usual course of the voyage"[28] constituted for years the only type of maritime deviation, in which as a result of the deviation and change of the route, the insurer would be discharged and this is regarded as implied warranty in which certain warranties are implied from the marine law.[29]

Nowadays, the practical significance of geographic deviation is reduced for two reasons: first, because modern insurance policies normally include a "held covered" clause providing that the cargo will be insured even though the ship deviates, in return for the payment of an additional premium; and second, in order to avoid the serious effects of deviation, the carriers usually incorporate "liberty clauses" into their contracts of carriage that give them wide latitude in the scope of voyages. Carrier's misconduct of this sort is commonly called "quasi-deviation". This doctrine was set forth in the pre-COGSA era by the Supreme Court of the US in *St. Johns N.F. Shipping Corp. V. S.A. Companhia Geral Commercial do Rio do Janeiro.*[30]

B. Proper route

Some standard charter forms contain express provisions on the route to be followed. Besides the parties to a carriage contract can agree on the precise route to be followed if they wish. In the absence of such provisions and the case that the parties did not agree on a proper route, it seems that the proper route is the direct geographical route between the ports of loading and discharge. This was first mentioned in the *Reardon Smith Line v. Black Sea and Baltic General Insurance* (1969). The facts in this case are as follows:

"The appellants' vessel *Indian City* was chartered to carry a cargo of ore from Poti in the Black Sea to Sparrow's Point, Baltimore, USA. After loading, she sailed first for Constanza on the west coast of the Black Sea for fuel. The vessel grounded at Costanza and was damaged; part of the cargo had to be jettisoned. The charterers refused to contribute to general average expenses on the grounds that in going to Constanza the ship had deviated from her contractual route, which they said was from Poti to Sparrow's Point by the direct route through Istanbul."[31]

It was held by Lord Porter that:

"It is the duty of a ship, at any rate when sailing upon an ocean voyage from one port to another, to take the usual route between those two ports. If no evidence be given, that route is presumed to be the direct geographical route, but it may be modified in many cases for navigational or other reasons,

[28] John Gifford, Gifford's English and Irish lawyer, or, every man his own lawyer: containing a summary of the constitution of England and Ireland, their laws and statutes, 31 (2010).
[29] Insurance Contract Law: Misrepresentation, Non-disclosure and Breach of Warranty by the Insured, 40 (2007). Available at: http://www.lawcom.gov.uk/app/uploads/2015/03/cp182_ICL_Misrep_Non-disclosure_Breach_of_Warranty.pdf (last visited Apr. 18, 2021).
[30] *Supra* note 3, 2.
[31] *Supra* note 18, 65.

and evidence may always be given to show what the usual route is unless a specific route be prescribed by the charter party or bill of lading. In some cases, there may be more than one usual route. It would be difficult to say that a ship sailing from New Zealand to this country had deviated from her course whether she sailed by Suez Canal, the Panama Canal, round the Cape of Good Hope or through the Straits of Magellan. Each might, I think, be a usual route. It is not the geographical route but the usual route, which has to be followed, though in many cases the one may be the same as the other. But the inquiry must always be what the usual rout is. No doubt *prima facie* the route direct from Poti to Sparrow's Point through Istanbul would be the ordinary course, but I think that in this case, we have evidence sufficient to show that the route has been varied and that the practice of proceeding to Constantza to bunker after loading had become a usual one".[32]

A slight change in the original route can lead to a deviation even if it is a minor one. In majority of cases in which the doctrine of deviation in entreated such as *Cunard Steamship v. Buerger*, ship's route alteration is to take a visit to and unaccredited port in order to drop a passenger, fuelling or to fill up or discharge cargo. Heading to the port stated in the bill of lading but choosing a different order other than agreed is a deviation as well as conveying cargo to and then beyond the agreed port of discharge or landing a cargo short of its proper destination.[33]

According to the US, a departure from the regular and usual course of the voyage that is a customary incident of the voyage, and according to the known usage of trade, is not a deviation that will subject the carrier to the responsibility of an insurer. However, the custom must be general, certain and uniform, and of such long-standing as to have become generally known. A vessel's deviation from a published itinerary is not rendered customary by two prior deviations absent the shipper's knowledge that it would deviate from its itinerary.[34] In the case, which 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 the order designated by the contract, or in certain cases, by the advertisement relating to the particular voyage. Where there are two or more customary routes and the carrier is left free to choose between them, the carrier may choose without incurring increased liability if there are no special reasons that make the route chosen unsafe.[35]

C. Voluntary departure

In case the ship changes the route under free will, deviation has occurred. But there are cases in which deviation is not regarded as unreasonable, such

[32] *Ibid*.
[33] 25 LLOYD's List, Law Reports, House of Lords, 215 (1926).
[34] *Supra* note 1, part 610, 1.
[35] *Id*., part 604.

as exceptional circumstances that cannot be controlled by the captain and the ship's crew; deviations from the route due to the need to save human lives at risk due to an accident, to avoid or reduce maritime pollution due to an accident, to disembark diseased crew or passengers, or in general for reasons that obey any security need on board the ship. These were brought clearly in *Rio Tinto v. Seed Shipping*. The facts are as followed:

"The charterers shipped a cargo of coal and coke on the defendant's ship *Marjorie Seed* at Glasgow for Huelva. After leaving the Cumbrae the master, not being in perfect health, ordered the helmsman to steer south-south-east, which stranded the ship on rocks off the coast of Ayr. The ordinary course would have been to steer south-west. Ship and cargo were totally lost. The plaintiffs sued for the value of the cargo; the defendants pleaded an excepted peril to which the plaintiffs replied that there had been a deviation."[36]

It was held by Roche J:

"The essence of deviation is that the parties contracting have voluntarily substituted another voyage for that which has been insured. A mere departure or failure to follow the contract voyage or route is not necessarily a deviation, or every stranding which occurred in the course of voyage would be a deviation because the voyage contracted for, is in no case one which essentially involves the necessity of stranding. It is a change of voyage, a radical breach of the contract that is required to and essentially does, constitute a deviation. The master never intended to leave the route of the voyage from Glasgow to Huelva. He was not on another route; he was on the existing route, although he was out of the proper part of the route that he ought to have followed".[37]

There is a same view taken by US courts about the voluntary deviation. After these two main strands (proper route and voluntary departure), which should exist to call an action deviation, the unjustifiable deviation will be examined under international regimes of uniform law and common law. All of them have some common points with some small differences in the scope of application of the deviation doctrine.

D. Unjustifiable deviation

In this part, the deviation is going to be examined by Common law, Hague/Visby Rules, Hamburg Rules, and Rotterdam Rules. We will make a comparison between all these rules and notify the changes, which have been made on the doctrine of deviation.

1. Common law

Doctrine of deviation is permissible in common law in some particular circumstances:

[36] 24 LLOYD's List Law Reports, King's Bench Division, 316 (1926).
[37] *Supra* note 18, 65-66.

The first can be that the ship deviates to save human life. In order to illuminate this context, it seems worth mentioning the case *Scaramanga v. Stamp*.[38] The facts are as follows:

"The defendant chartered a ship to the plaintiff for a voyage from Cronstadt to Gibraltar. While at sea the master saw a steamer in distress, and discovered that her machinery had completely broken down. The sea was quite smooth, and he could there and then have saved the crew; but he conceived the idea of saving the cargo too, and accordingly towed the vessel into the Texel, having bargained to do so for £1000. The result was that the too adventurous captain got his own vessel on shore, and she was lost with all her cargo. The plaintiffs, as owners of the cargo and charterers of the ship, sued for its value as lost by the defendant's breach of contract in deviating from the proper track. Strangely enough, such a case has never been previously before our courts of law; and, after much argument, it has now been ruled that a ship is justified in going out of her course to save human life, but not to save cargo. This decision of the Court of Appeal will therefore form an important precedent in maritime law".[39]

The second is that the carrier deviates from the agreed route in order to avoid danger to the ship or the cargo. Therefore, the carrier can deviate even if just the ship is in danger, and about the cargo, it is far from clear and the carrier has the duty to save the cargo from any peril that may damage it, and he should deviate to protect the interest of the cargo owners. Indeed, in the majority of the cases, he will be under the duty to take such action. This may vary from natural causes such as storms, ice or fog, or they may involve political factors such as the outbreak of war or the fear of capture by hostile forces.[40] In order to elucidate deviation which is occurred due to avoidance any marine peril, the case *Phelps, James& Co v. Hill can be helpful*.[41]

The facts are as followed:

"Tin and iron plates were shipped on the *Llanduff City* at Swansea for New York. About five days out the vessel and some of her equipment and cargo were damaged in a storm and it was necessary to put back to a port of refuge. She went first to Queenstown where she was ordered by the defendant owners to return to their own yards in Bristol where suitable spare parts were available and where repairs could have been done more cheaply and quickly than elsewhere. It would also have been possible to sell or trans-ship the cargo there. In the Avon, she was run into by another vessel and was sunk. This risk was excluded by the bill of lading." The question was whether there was an

[38] *Supra* note 8, 125.
[39] A New Point in Maritime Law (1880), https://trove.nla.gov.au/newspaper/article/70944895 (last visited May 12, 2021).
[40] John F. Wilson, Carriage of Goods by Sea, 17 (2010).
[41] *Supra* note 18, 67-68.

unjustifiable deviation in going to Bristol instead of Swansea. The jury at trial found that there had not been an unjustifiable deviation.[42]

Lopes LJ held that:

"The voyage must be prosecuted without unnecessary delay or deviation. The shipowner's contract is that he will be diligent in carrying the goods on the agreed voyage, and will do so directly without any unnecessary deviation. But this undertaking is to be understood with reference to the circumstances that arise during the performance of the contract. He is not answerable for delays or deviations which are occasioned or become necessary without default on his part. Where the safety of the adventure under the master's control necessitates that he should go out of his course, he is not only justified in doing so, but it is his duty in the right performance of his contract with the owners of the cargo. Going into a port out of the usual course for necessary repairs, and staying till they are completed, is no deviation, provided it plainly appears that such repairs, under the circumstances and at such port, were reasonably necessary, and the delay not greater than necessary for the completion of such repairs, so as to enable the vessel to proceed on her voyage".[43]

After abovementioned situations; saving life and saving ship and cargo, in which deviation was regarded justified, there is the third occasion being where the deviation is made necessary by some default on the part of the charterer. Thus, it may be justifiable to put into port to discharge dangerous cargo, which has been loaded by the charterer without the knowledge of the ship-owner. Again, a master may be permitted to deviate to obtain more cargo in a situation where the charterer has breached his contractual obligation to load a full cargo.[44] The latter happened in Kish v. Taylor.[45]

In that case, "the Wearside was chartered to load a full and complete cargo of timber at Mobile or Pensacola. The charterers failed to provide a full cargo so the master attempted to mitigate by obtaining additional cargo from other sources. He was so successful that the Wearside was overloaded with deck cargo and became unseaworthy. She sailed, encountered bad weather and had to take refuge in the port of Halifax, where she was repaired and the cargo restored. On arrival at Liverpool, the ship owners claimed a lien for the charterers' failure to load a full cargo. The cargo owners disputed the existence of the lien, arguing that the deviation to Halifax was not justifiable[46]".

Lord Atkinson held that:

[42] *Ibid*.
[43] *Ibid*.
[44] *Supra* note 6, 19.
[45] Kish and Another v. Taylor, Sons, & Co. [1912] UKHL 1046 (1912).
[46] *Supra* note 18, 68.

"A master, whose ship is, from whatever cause, in a perilous position, does right in making such a deviation from his voyage as is necessary to save his ship and the lives of his crew, and that while the right to recover damages from all breaches of contract, and all wrongful acts committed either by himself or by the owners of his ship, is preserved to those who are thereby wronged or injured, the contract of affreightment is not put an end to by such a deviation, nor are the rights of the owners under it lost".[47]

It is also worth mentioning that the US version of Article IV rule 4 of the Hague/Visby rules, which are Section 1304(4) of COGSA, provides 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 there from"[48]. It should be considered that if the deviation is for the purpose of loading or unloading cargo or passengers it will be regarded as unreasonable. This enables the cargo owner to be compensated fully.[49]

Carriers have successfully rebutted COGSA's 1304(4) presumption of an unreasonable deviation when a deviation is committed for the purpose of discharging cargo under limited circumstances, including when courts find the carrier's deviation was pursuant to a proper purpose when a plaintiff fails to demonstrate a causal connection between the deviation and the loss, and when the deviation did not expose the cargo to an increased risk of encountering danger.[50]

2. Hague/Visby rules

Before going through the notion of deviation based on the Hague/Visby rules, it is incumbent on us to make an illumination on this set of rules. To put it less tersely, the Hague–Visby Rules are set of international rules for the international carriage of goods by sea. They are slightly an updated version of the original Hague Rules which were drafted in Brussels in 1924. These rules set an enormous precedent to maritime matters that were beset by various events happened by the sea.

The Hague Protocol was amended in the late 1960s and the maritime law post its amendment was acknowledged the Hague-Visby Rules worldwide. In general, The Hague-Visby Rules lay down to what extent a waybill will rule the cargo ship which is chartered in parallel with the liabilities of the both parties of the agreement. The only provision that can be found in Hague/Visby rules referring to deviation is in Article IV rule 4.

[47] *Ibid*.
[48] The Hague-Visby Rules - The Hague Rules as Amended by the Brussels Protocol (1968), https://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html (last visited Mar. 13, 2021).
[49] 46 U.S. Code Title 46—Shipping.
[50] *Supra* note 12, 53.

As stated before, this Article does not expound the concept of deviation but states the occasions in which deviation can be contemplated as justifiable or reasonable. Moreover, by adding two additional types of deviation, this Article is trying to extend the protection to the ship owner. In addition, as can be seen in this Rule, the saving of property and any reasonable deviation has been added which were not in the common law. Here, the difficulty arises by interpreting the phrase "any reasonable deviation". What can be regarded as reasonable? This is regarded as a matter of fact. The case *Stag Line v. Foscolo, Mango & Co*[51] can help us clear up to some extent, which acts can be deemed as reasonable.

There were different opinions stated here, weather the deviation was reasonable or not. House of Lords held that this was not a reasonable deviation and the ship owner cannot rely on Hague Rules in this case. In the court of appeal, Greer LJ implies that the word reasonable deviation means a deviation in favour of the ship or the cargo owner or both.[52]

Despite all these attempts to throw light on the concept of reasonable deviation, there are so few cases in which this was accepted as a defence. A similar case is *Al Taha*[53], which we may take a look at as an example of the successful invoke of the defence of reasonable deviation. The facts are as follows:

A vessel was charter partied for 2 years and the Hague Rules; Article IV, r. 4 was incorporated which allowed ship owner to deviate reasonably without liability. Cargo was shipped except a cargo derrick which was supposed to be shipped by rail to Boston. Ship owner decided to go to Boston for the bunkering and taking the boom which was needed at the port of discharge. Meanwhile, the ship grounded and the ship owner claimed for general average. The cargo owner refused to claim that this was an unreasonable deviation while the ship owner claims it was a usual port of bunkering.

Mr Justice Phillips held:

"The evidence established conclusively not merely that Boston was a usual bunkering port for such a vessel but that it was *the* usual bunkering port; more particularly it established that the usual bunkering place at Boston was the outer anchorage a 'reasonable deviation' within art. IV, r. 4 could be a deviation planned before the voyage began or the bills of lading were signed; the cargo boom was necessary if *Al Taha* was to be reasonably fit to discharge her cargo at her destination and as the boom was not necessary to render the vessel seaworthy at the commencement of the voyage it was reasonable to

[51] 41 LLOYD's List Law Reports, Reprinted (with additions from LLOYD's List and Shipping Gazette, Edited by H.P. Henley of the Middle Temple, Barrister-at-Law, 165 (1931).
[52] *Ibid*.
[53] "Reasonable deviation", - Weather negligent navigation in course of planned deviation renders deviation unreasonable, Lyric Shipping Inc. V. Intermetals Ltd. and another (The Al Taha) - Q.B.D (Com. Ct.) (Philips J.) – 22 February 1990, Lloyd's Maritime Law Newsletter, Business Intelligence Informa, 10 March 90.

plan to deviate to collect the boom en route rather than to wait for the weather conditions to permit delivery at Portsmouth; the mode of performance was within the liberty afforded by art. IV, r. 4".[54]

Therefore, a deviation planned before a voyage was regarded as a justifiable deviation.

3. Hamburg rules

The Hamburg Rules are a set of rules governing the international shipment of goods, resulting from the United Nations International Convention on the Carriage of Goods by Sea adopted in Hamburg on 31 March 1978. It tried to make a uniform legal base for the transportation of goods by sea. Developing countries played an eminent role to make this happen. It came into force on 1 November 1992.[55] In these rules, there was no eloquent objection to continue the carrier's freedom of liability toward deviation in order to save a life. But there was less protection toward deviation to save property, especially in the case that it was solely property and not saving a life.[56] The reason was regarded that this rule allows the carrier to acquire additional profit from salvage.

From the view of the drafters of the Hamburg Rules, there is no need to have a specific provision on deviation and the resulted liability should be under general rules of carries liability.[57] Thus, the carrier will be responsible for deviation unless he can prove that his agents had taken all measures that could reasonably be required to avoid the occurrence and its consequences. Ultimately, it was adopted in Article 5.6 that: "The carrier is not liable, except in general average, where loss, damage or delay in delivery resulted from measures to save life or from reasonable measures to save property at sea".[58]

Thus far, by contemplating the Hague/Visby Rules and the Hamburg Rules, it can be interpreted that the carrier's liability, is based on the principles of presumed fault or neglect. Then again, the risk approach might be adopted as the best hypothesis for an elucidation regarding a deviating carrier liable providing that the deviation is wrongful and levelling up the risk of loss beyond that permitted by the contractual terms and attempts to prevent the carrier from creating unauthorized risks.[59]

[54] Ahmad Hussam Kasem, The Legal Aspects of Seaworthiness: Current Law and Developments, 133 (2006).
[55] Utsav Mukherjee, Hamburg Rules United Nations Convention on the Carriage of Goods by Sea, 1978 - An Appraisal, 1 (2008).
[56] *Id*., 9.
[57] Hamburg Rules for International Carriage (2019)**Error! Hyperlink reference not valid.**.
[58] United Nations Convention on Carriage of Goods by Sea (1978).
[59] Al-Kabban, Riyadh A.M., 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, x (1988).

4. Rotterdam rules

The Rotterdam Rules is a treaty that puts forward new international rules to amend the legal framework for maritime affreightment and carriage of goods by sea. The Rules primarily address the legal relationship between carriers and cargo-owners. The goal of the convention is to amplify and modernize current international rules and obtain uniformity of International trade law in the field of maritime carriage. In addition, updating or replacing many provisions in the Hague Rules, Hague-Visby Rules and Hamburg Rules. "It is quite clear that draftsmen of the earlier Rules had, feasibly, not foreseen the increment of trade, and subsequent containerisation of the global commercial regime".[60] Besides, a number of legal problems arise which need harmonisation.[61]

There is a persuasion that embracing unvarying standards for the modernization and harmonization of rules pertinent to the international carriage of goods that contain a sea leg has a plausible role in enhancing legal certainty, improving the predictability and efficiency of international commercial transport operations and lowering the number of legal barriers to international commerce between all States.[62]

Having said so, it adopts a stronger attitude toward deviation. It seems that this convention accepts the Hague/Visby Rules toward reasonable deviation in attempting to save life or property or any reasonable deviation. This convention brought an expanded provision in Article 24, stating; "when pursuant to the applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or the maritime performing party of any defence or limitation of this Convention, except to the extent provided in Article 61",[63] which in comparison with previous two conventions support more protection for the carrier. It refers to the circumstances to Article 61 containing exceptions in which the carrier cannot benefit from the limitation of liability if the deviation was occurred based on omission or negligence of him and weakens the limitations. As this Article is mainly about the limitation of liability, we will cope with it in the next parts.

E. Liberty clauses

Because of the inordinate liability a deviation imposes on the carrier, carriers by sea customarily incorporate provisions expressly permitting deviations for various purposes in contracts of affreightment, whether bills of lading or charter parties. As it is known, bills of lading is an essential

[60] Nicholas V Mousionis, The Effect of International Trade Law on Maritime Law, 6 (2015).
[61] Måns Jacobsson, What Challenges Lie Ahead for Maritime Law?, 257 (2020).
[62] Lorena Sales Pallarés, *The Rotterdam Rules: Between Hope and Disappointment*, 2 Journal of Maritime Law and Commerce, 1 (2011).
[63] United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (2008).

document in maritime shipping and has a high enforceable nature in the maritime field.[64] Liberty clauses in bills of lading are construed to accredit only reasonable departures by a carrier from its normal route. A clause in a bill of lading granting liberty to deviate under certain circumstances must be given a reasonable interpretation, and the discretion conferred may not be exercised arbitrarily or unreasonably, or without substantial grounds, nor will good faith alone suffice. Although the application of this phenomenon (good faith) impacts ascertainment of liabilities and quantum of losses, however, it still does not suffice.[65] A good example of these liberty clauses is provided by clause 3 of the Gencon[66] form, which provides in Clause 3, an unrestrained right for the owners to call at any port or ports in any order, to tow and/ or to aid the ships, and to deviate from its normal route by relying on justifications such as saving life and/ or property[67]. It states:

"The vessel has the liberty to call at any port or ports in any order for any purpose, to sail without pilots, to tow and/or assist vessels in all situations, and also to deviate for the purpose of saving life and/or property".[68]

Clauses in other charter parties specify a variety of reasons for which deviation is permissible, including for bunkering purposes, for adjusting compasses or radio equipment, or for landing and embarking crew members. The liberty clauses brought in the bills of lading may give the ship owner liberty to proceed to and stay at any port or ports in any rotation. The instance can be brought in *Glynn v. Margetson* and *Leduc v. Ward*, which in the latter Lord Esher MR held that the ports that the liberty to call has been given must be the ports which are substantially ports which will be passed on the named voyage. In other words, the ship may call at such ports, as would naturally and usually be ports of call on the voyage named.[69] As in the former case, it was held that the wording chosen and written down by the parties should have a greater effect than printed standard terms and be regarded as the main object of the contract.[70] This case is a suitable instance shedding light on how the courts handle presentation. Contracts came into force to deal with upcoming events which cannot be predicted with any great measure of precision. In the place that parties to a contract try to deal with this problem

[64] *Supra* note 59.
[65] Shatarupa Choudhury, Pallab Das, Good Faith in Maritime Law, 115 (2020).
[66] Gencon is a standard voyage charter party. It is a general-purpose agreement for the services of a ship in exchange for freight and can be used in a variety of trades. It is accompanied by its own bill of lading, CONGENBILL 2016. The latest edition of this contract is Gencon 1994. Copyright in Gencon 1994 is held by BIMCO.
[67] Silvester Knight, Gencon 1994 – Tips and Pitfalls, 8 (2017).
[68] Recommended the Baltic and International Maritime Council Uniform General Charter (as revised Recommend 1922, 1976 and 1994) (To be used for trades for which no specially approved form is in force) CODE NAME: "GEN C ON".
[69] Charles Debattis, Bill of Lading as Contract of Carriage, 661 (1982).
[70] Glynn v Margetson and Co: HL 1893 (2020), https://swarb.co.uk/glynn-v-margetson-and-co-hl-1893/ (last visited Mar. 14, 2021).

by widening the clauses of the contract, the courts qualify the general words by the particular context.[71]

It may happen that the standard charter party form expressly subsumes under Hague/Visby Rules. As these rules regard the minimum protection for the cargo owner, which is incapable of being reduced between the parties, to what extent does the requirement of reasonable deviation stated in Article IV, r. 4 affect this liberty clause? There are different views held by US and UK courts.

US courts took a strict view, as can be seen in S.S. Nancy Lykes, in which was contracted with General Electric Company, International Sales Division. The bill of lading allowed the provisions of the COGSA, permitting the vessel to fuel at any port along the way. The Lykes bunkered at a port that was not an ordinary port of bunkering and had never fuelled in that port. Due to bad weather it bared damages and both district court and the Second Circuit Court of Appeals held, it was an unreasonable deviation and deprived the Lykes of COGSA's limitation of liability provision, and hence liable for the damages under these rules.[72]

English courts, on the other hand, regard the express liberty clause as defining the scope of the contractual voyage rather than as a provision seeking to excuse the ship owner from the contractual liability. Hodson LJ in the *Renton v. Palmyra* held that: the object of the liberty clause is to define not the scope of the contract of service, but the terms on which that service is to be performed.[73]

F. The effect of deviation

"It is imputed for a fault to the Master, if he directs his course by ways either dangerous through Pirates, enemies, or other evil adventures, and holds not forth his due rout, and damage happen there". This quotation dates back to 1613 from Roman time, while in modern maritime law this notion is barely seen and it has changed in other ways.[74] The salient strand of deviation is whether the ship owner is compensated or not as fully discussed.

The majority of the cases as discussed before, took it as an implied liability for the carrier not to deviate and if he would the contract was void. Due to these decisions held over a period of almost 40 decades between 1890 and 1936 English courts held that a carrier could not rely on an exclusion clause in a bill of lading to exempt from liability toward damage to cargo suffered before, during or after a deviation from the ordinary course of the voyage.[75]

[71] Bill of Lading – Deviation – Construction of Liberty Clause (2011), https://charterpartycases.com/case/60-glynn-1891-%e2%80%93-1894-al-er-rep-693 (last visited Mar. 14, 2021).
[72] *Supra* note 9, 2.
[73] *Supra* note 3, 2.
[74] *Supra* note 7.
[75] *Supra* note 18.

In this sense and by the transformation of the notion of deviation, its effect mainly depends on whether it was a reasonable deviation and hence plausible to be regarded by the insurance or unreasonable deviation to deprive him of his rights and oblige him for the damages.[76] These notions and the examples were fully covered in previous chapters and based on the doctrine of deviation courts have taken different angles based on various laws in this respect and the notion per se depends on various strands to be taken into account.

Overall, the international legal structure for maritime activities has significantly been metamorphosed. This is while some principal topics such as the 'perils of the sea', which are plausible grounds for limitation of civil responsibility of the ship owner, cargo owner or the insurer, remain as the traditional principles in maritime law. This has a close connection to the dangerous, unpredictable nature of maritime adventure.[77] A continuing theme in this regard is piracy, hijacking and terrorism, both at sea and at ports which have re-emerged and can affect the voyage in different means.[78] Regarding the perils of the sea, the United States Coast Guard Administrative Law Judge program is designed to enhance safety at sea while protecting mariner's rights,[79] as there are many issues in this sense such as seafarers' compensation claims or even passengers compensation claims[80] in need of closer and wider consideration.

Conclusion

With respect to the perils, the doctrine of deviation cannot be left to dust and still has a beating heart; therefore, we cannot refrain from accepting that this issue needs further insights and is amidst various contemporary issues which need insights on its circumstances.[81] Hence, for throwing light on the subject matter of the article, the related rules which were thoroughly mentioned above were examined. Moreover, as English law is heavily relied on throughout the maritime world,[82] it was contextualized as well as America's study on this topic.

In the normal sense of voyage, there is an implied rule that the ship shall not deviate from its normal route. There are some occasions in which deviation is regarded as being reasonable such as saving life, property or cargo. Also, it could be the safety of the master or crew, or bunkering or any

[76] *Supra* note 58.
[77] Dennis M. Powers, Taking the Sea: Perilous Waters, Sunken Ships, and the True Story of the Legendary Wrecker Captains, 100 (2009).
[78] Percy Jayasuriya, Kumar and Oberlin, Melanie, Admiralty and Maritime Law Articles Published in Non-Maritime Law Journals, (July 7, 2008). Journal of Maritime Law and Commerce, Vol. 39, No. 2, 2008, P.1, Available at SSRN: https://ssrn.com/abstract=1156570 (2007).
[79] Doctrine for the U.S. Coast Guard, An Evolving Coast Guard, 27 (2014).
[80] Aleka Mandaraka-Sheppard, Modern Maritime Law and Risk Management, 43 (2014).
[81] Mukherji, Mejia and Xu, *supra* note 8, 1.
[82] Yvonne Baatz, Maritime Law, 2 (2014).

other reason which a prudent person would take in order to alter the route and face potential damages as a result. The ship owner would not be liable in said cases.

It can be unreasonable and not any of the above which is the case in which the change of the route is on purpose and with intentions other than benefits for the ship or the cargo. An unreasonable deviation is a paramount breach of a contract of affreightment. Also, there could be a liberty clause by which the insurance is covered and even if any deviation occurs the loss is covered. It should be considered that being beholden to the peculiar nature of a maritime adventure in which ship-owner and cargo owner are both concerned, it is a crucial strand that in the nonexistence of express liberties, the ship shall proceed by the ordinary and customary route. Hence, it is important to know what the customary route is and this varies based on different court cases. Although in contemporary maritime law, the liberty clause is widely accepted and implemented in insurance contracts; the issue of deviation still remains of prominent importance and can cause huge financial liabilities for the seafarers.