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TITLE PAGE

PART I: Charterparty

Project Title: *The Achilleas* Case

Summary: The decision of the House of Lords in "*The Achilleas*" has been both welcomed and criticised in equal measures by different sectors of the shipping and chartering industry. In my project I explained the rationale for the decision and the reasons for the conflicting reactions to it on the part of these different sectors. Finally, I explained why in my opinion the decision can or cannot be supported on legal or commercial grounds.

Advisor: Dr. T. Nikaki

PART II: Carriage of Goods by Sea, Land and Air

Project Title: Liabilities incurred by shipowners as a result of a deviation

Summary: The Wales and West P&I Club is currently revising its rules, one of which excludes cover for liabilities incurred by shipowners as a result of a deviation. I reviewed this exclusion and advised (i) as to the law underlying this exclusion and (ii) as to whether its continued retention is justified. The advice takes account of: (a) the common law; (b) the Hague-Visby Rules; (c) the Hamburg Rules; and (d) the Rotterdam Rules. Finally I advised the Wales and West P&I Club accordingly.

Advisor: Prof. S. Baughen

SUBMITTED TO SWANSEA UNIVERSITY IN PARTIAL FULFILLMENT OF THE REQUIREMENTS FOR THE AWARD OF THE LL.M IN INTERNATIONAL COMMERCIAL AND MARITIME LAW DEGREE
SEPTEMBER 2014

DECLARATION

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PART I

The Achilleas Case and the Pertinent Issues

The detailed examination of *The Achilleas* case and its impact on the remoteness of damage in contract

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1. Introduction

How to measure the liability of the party in breach in case one of the parties breaches their contractual agreement? The answer was clear for 150 years; the party in breach should contemplate the loss which is not too remote. However *Transfield Shipping Inc v Mercator Shipping Inc* ("*The Achilleas*")[1] has introduced a debate in the rules and principles to be applied for the remoteness of damage in the contract.

There are two approaches which can be applied to similar cases. Under the remoteness test, in order to understand whether the party in breach is liable of the loss arising from the breach, the main question is whether the loss was 'foreseeable' when the parties have made the contract; it is a question of facts[2]. The remoteness test is knowledge based which hinges the reasonable contemplation or foresight of a loss when the parties entered into contract. Under this rule, a party of the contract who commits a breach would be liable of the losses of a kind or type which the parties would have reasonably contemplated as 'not unlikely' result of a breach of contract. This was the decision of Alderson B in the famous remoteness case; *Hadley v Baxendale*[3].

Whereas under *The Achilleas* approach, the main question is whether the party in breach could be assumed to have reasonably assumed the loss when the contract was made. In other words the party would be liable of the loss if he has reasonably assumed the responsibility of the loss when the parties have entered in the contract. This approach is called the assumption of responsibility approach which is based on intention and it is question of law.[4]

The main question is whether the courts will apply the remoteness test or the assumption of responsibility test to measure the liability. In my paper I will discuss the cases precedent to *The Achilleas* which shaped the rule of remoteness then discuss *The Achilleas* case in details and will try to explain the reasons why this case was not and should not be followed by the following cases.

[1] *Transfield Shipping Inc v Mercator Shipping Inc ('The Achilleas')* [2008] UKHL 48, [2009] 1 AC 61.
[2] H. G Beale, *Chitty On Contracts* (31st edn, Sweet & Maxwell, 2012) at para 26.107.
[3] *Hadley v Baxendale* (1854) 9 Ex 341.
[4] Op. cit. n. 2.

2. *The Achilleas* [5]

2.1.Test of Liability

The subject of the case is the remoteness of damage[6] and the assumption of responsibility. By entering into contract parties undertake some risks, Chitty explains that the legal test of *The Achilleas* seems to depend on 'the express or implied intention of the parties'.[7]

2.2.The facts of the case

In this case, the owners have made a charter contract with the charterers, under which the latest date for redelivery was May, 2 2004 for a daily rate of US$16,750. However the charterer before the delivery decided to take a last legitimate voyage. Therefore the charterers could not deliver the vessel on time and gave notice on April 20 that they will deliver the vessel between April 30 and May 2. The next day the owners entered in a follow-fixture (Cargill charter) with new charterers for a period of four to six months at a daily rate of US$39,500. The new fixture's cancellation date was May 8. However the vessel was delivered on May 11.

The owners succeeded to extend the cancellation date but in this time the shipping market rate dropped drastically to US$31,500 per day. The owners claimed "for the loss of the difference between the original rate and the reduced rate over the period of (the follow-on) fixture" which was US$8,000 per day and which would last for 191 days therefore amounting US$1,364,584.37.

Whereas charterers argued that they have not assumed this responsibility and they should be liable only for the market rate and contract rate difference for nine days of delay ('the overrun period') which was US$158,000.

[5] Op. cit. n. 1.
[6] Op. cit. n. 2, para. 26.104; The term of 'remoteness of damage' refers to the legal test used to decide which types of loss caused by the breach of contract may be compensated by an award of damages.
[7] Ibid.

3. *The History of The Achilleas*

3.1. *Hadley v Baxendale*

In this case the manufacturer's mill was broken and the defendant delivered the broken crank shaft with five days of delay from the contractual time. The plaintiff argued that because of the delay of the shaft the mill stopped working and he lost profit and claimed the profit loss due to the delay of the defendant in the return to the work of the mill. The court rejected the claim of the plaintiff by arguing that the defendant was unable to know that the delay would cause such a loss of profit. And on the way of deciding the measure of the damage Barons Parke, Martin and Alderson held that;

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either (i) arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or (ii) such as may be reasonably be supposed to be in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*[8]

Forseeability can be divided to two parts. The key phrases are 'arising naturally' and 'probable result'. The parties need to contemplate the loss at the time when they have entered into contract.[9] The first part of the rule explains what a reasonable person should contemplate as it is the natural and usual liability that would occur. This is called objective knowledge.[10]

3.1.1. The Second Limb (Orthodox Rule)

Under this part, it is explained that when one party of the contract is in breach of his contractual performance he will be liable of the loss that would occur 'in the ordinary course of things' which means that the promisor is treated as he accepted the responsibility of the loss which is not unusual unless the contrary is mentioned in the contract. Moreover the party in breach will be treated as if he is not liable of the loss that would not occur in the ordinary course of things. In order to be liable of the unusual

[8] Op. cit. n. 3, at p.354.
[9] *Jackson v Royal Bank of Scotland* [2005] UKHL 3.
[10] D. Whayman, "The limits of foreseeability and The Achilleas", J.I.M.L. 2011, 360, at p.366.

loss he should be informed about it while entering into the contract.[11] This part is about the knowledge of the specific circumstances by the party in breach. This is called subjective knowledge.[12]

In this case the millers did not have any spare crankshaft therefore they had profit loss but it was thought that they have one therefore the loss was not 'natural' result of the breach. And the case failed to go with the second rule because the carrier was not informed about any special knowledge of the millers' circumstances, that they do not possess a spare shaft.

3.1.2. Development of the Rule

Under the traditional view the test of remoteness had two types; the one which needs a particular knowledge and the one which needs a general knowledge. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*[13] and *C Czarnikow Ltd v Koufos (The Heron II)*[14] cases have been interpreted and restated the principles of *Hadley v Baxendale*.

3.1.2.1. *Victoria Laundry*[15]

In this case the claimant (Victoria Laundry) wanted to improve their business and ordered a larger boiler however the delivery was delayed for 5 months. Therefore they firstly claimed for the loss of extra laundry business that they have missed and secondly for the loss of particular dyeing contract that they were going to sign with the Ministry. Court of Appeal held that the second loss was a different type of loss and allowed to recover the first loss but not the second one because it needed a special knowledge to be recovered.

The court argued that the supplier knew the claimant before getting into contract and that they would have foreseen that the business would have lost business during 5 months of delay however without any special knowledge; the supplier could not have known that Victoria Laundry was going to enter into special contract of dyeing with the Ministry.

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[11] Op. cit. n. 3.
[12] Op. cit. n. 10.
[13] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.
[14] *C Czarnikow Ltd v Koufos* (hereafter *"The Heron II"*) [1969] 1 A.C. 350.
[15] *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528.

As a result it was held that the innocent party was entitled to recover his loss 'as was at the time of the contract reasonably foreseeable as liable to result from the breach', secondly that the reasonably foreseeable loss has depended on the knowledge of the parties or of the party who commits the breach and lastly, knowledge can be possessed as imputed or actual and reasonable man is assumed to know the ordinary course of things and what loss he would cause by the breach in the ordinary course of things. However Heron II criticized this restatement in reason of the degree of probability to foresee the loss is not sufficiently indicated.

3.1.2.2. *Heron II*[16]

The 'likelihood' that a loss needs to have in order to be recovered by the claimant is examined. In this case, the owners arrived 9 days late. The cargo (sugar) was going to be sold in the market but the market rate has dropped on the arrival. The charterers sued the owners for the difference in prices of 9 days. Judge found that it was impossible for the defendant to reasonably foresee that such a loss would occur because of the delay in delivery. However Court of Appeal reversed the decision and held that the charterers shall be recovered because the loss was not too remote and the owners would have contemplated it from the contract date. Lord Reid explained that "of a kind which the defendant, when he made the contract, ought to have realised was not unlikely to result from the breach I use the words "not unlikely" as denoting a degree of probability considerably less than an even chance but nevertheless not very unusual and easily foreseeable."[17]

3.1.2.3. *Parsons (Live stock Ltd v Uttley Ingham & Co Ltd)*[18]

In this case, the pig farmer had contracted with the defendant to buy a metal hopper to feed the pigs. The seller forgot to open the ventilator in the hopper and caused the food to turn mouldy. The buyer did not think that the pigs would get affected and fed the pigs. They noticed the lack of ventilation. Overtime pigs got sick and then they died. The question was whether the seller was liable of the death of the pigs. Type or extent of loss is argued. And it was held that the fact that the pigs died was not a different type of loss than their sickness, it was just an extent of the loss therefore Court of Appeal held that the defendants were liable of both the sickness and death of the pigs.

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[16] *C Czarnikow Ltd v Koufos* (hereafter *"The Heron II"*) [1969] 1 A.C. 350.
[17] Ibid, at 388.
[18] *Parsons (Live stock Ltd v Uttley Ingham & Co Ltd)* [1978] QB 791.

3.1.2.4. *South Australia Asset Management Corporation v. York Montague Ltd.*[19]

In this case, the rule of remoteness was modified where the valuer gave a negligent valuation of the property to the lender who has offered it as a security for loan. And the loss increased by the huge fall of the market value. The defendant was held liable of the loss that the valuer caused, whose responsibility was assumed, even if the loss due to market fall was natural and foreseeable, it was held not to be recoverable.

[19] *South Australia Asset Management Corporation v. York Montague Ltd.* [1997] 1 A.C. 191 HL.

4. Decision of *The Achilleas*

In *The Achilleas* case, the second limb rule of *Hadley v Baxendale*[20] was changed. The Achilleas indicated that it was not a major change. The Arbitrators and the court of appeal found the owners entitled to recover the total loss whereas the House of Lords allowed the appeal of the charterers and held that only a part of the loss shall be compensated by the charterers. In the next part I will discuss their reasons in detail.

4.1. The Arbitrators & First Instance & Court of Appeal

The majority of the arbitrators found for the owners. They argued that the case was falling in the first rule of the *Hadley v Baxendale* because the loss was coming naturally from the breach.[21] As an answer to charterers' argument that they have not assumed this responsibility the arbitrators told that the length of the follow-on fixture was irrelevant, unless it was an extravagant or unusual bargain.[22] They claimed that the charterers would have realised that the loss was 'not unlikely' to result because they were in the shipping market and they would have realized that the vessel would be chartered again after the redelivery and that redelivery would cause to lose it.[23] Arbitrators mentioned about *Heron II* and told that the charterers should have known that this loss would occur when the contract was made not the breach was made.

The reasoning of the arbitrators was that the charterers should have known about the loss at the time of the contract therefore the claim falls within the first limb of *Hadley v Baxendale*. While the arbitrators accepted that the market was volatile and the amount of the loss was unusual but claimed that the type of loss was already identifiable"[24], they said that the charterers should be very careful that the redelivery time of the vessel does not affect its business.[25] However as they have not been informed or known about the Cargill fixture the claim does not fall within the second rule of *Hadley v Baxendale*.[26]

[20] Op. cit. n. 3.
[21] Transfield Shipping Inc v Mercator Shipping Inc (The ''Achilleas'') arbitrators award at para 6.
[22] İbid at para 18.
[23] İbid at para 9.
[24] İbid at para 11
[25] İbid at para 12.
[26] İbid at para 20.

Justice Clarke started his decision by a modern explanation of the *Hadley v Baxendale*. He explained that the owners' claim was not too remote.[27] The charterers have argued that the case does not fall within the first rule of Hadley v Baxendale case. Justice Clarke argued that the owners' loss was falling within the first limb of Hadley Baxendale as the arbitrators have argued because in considering the first limb, what the court has to look is "general . . . facts . . . known to both parties" and "such knowledge and information as (the contract breaker), as reasonable men (sic), experienced in its trade, should have had and should have brought to bear in its contemplation". And if the charterers would only pay the difference between the market rate and the contract rate the loss would only compensate a part of the loss but not the whole. Therefore the Justice Clarke has dismissed the appeal by saying that the arbitrators had not erred in law. The charterers appealed the decision and Court of Appeal dismissed it.

In Court of Appeal Justice Ward, Tuckey and Rix LJ argued that the arbitrators and court of first instance were right on the basis of the case. They explained that the loss was foreseeable at the time of contract because the imputed or actual knowledge had allowed the contract breaker that he should recovered the loss. Court of Appeal held that there was no rule of law that damages for late redelivery were limited to the overrun period measure unless the owners could show that, at the time of contract, they had given their charterers special information of their follow-on fixture.[28]

4.2. House of Lords

The traditional test of remoteness was found insufficient to find which loss shall be recovered. *The Achilleas* brought a 'new approach' to measure damages in breach of contract. This is assumption of responsibility which is more easy to explicate but more difficult to apply.[29] The mere basis for the loss is how much risk does the contracting party was undertaking.

House of Lords appealed the decision because they believed that the loss was too remote; firstly because the charterers were not able to assume the responsibility of such an extensive damage and secondly under the market expectations, the charterers were

[27] Transfield Shipping Inc v Mercator Shipping Inc (The ''Achilleas'') [2006] EWHC 3030 (Comm) at para 55.
[28] Transfield Shipping Inc v Mercator Shipping Inc (The ''Achilleas'') [2007] EWCA Civ 901.
[29] Elizabeth Macdonald, Ruth Atkins, and Laurence Koffman. *Koffman & Macdonald's Law of Contract*, (8th edn, Oxford University Press, 2014) p.516.

subjected to compensate the difference between the charter rate and the market rate for the overrun period.[30] All the Lords allowed the appeal but their reasons were different.

Lord Hoffmann and Lord Hope took a similar approach. Both for Lord Hoffmann[31] and Lord Hope[32] it is important whether the defendant has assumed responsibility for the loss in question. Lord Hoffmann started his argument by asking the question whether the damages shall be recovered by considering foreseeable damages which is an external rule of law or by the intention of the parties which is a prima facie assumption.[33] He clearly stated his reasoning which has derived from his speech in the *South Australia*[34] case. The reason why he rejected the owners' claim for loss of the following fixture was that the charterers could not be regarded as assuming responsibility for such a loss.[35] Therefore he explained that the only way that the charterers compensate the loss of profit arising from the loss of profit due to dismiss of the following fixture is that the charterers have accepted such a loss when the contract was made. He argued that a party's liability for damages is based on the interpretation of the contract as a whole construed in its commercial setting, not on the interpretation of the language of the contract.[36]

He also argued that the most logical way to found liability for damages is upon the intention of the parties because the parties take the risks voluntarily and that undertaken risks shape the terms and especially the payment of the contract. Any party taking a large risk will get an extra premium in exchange. The contract breaker needs to accept the responsibility of the loss in order to recover it. Lord Hoffmann explained that from the findings of the arbitrators and the commercial background it is very clear that the charterers would not assumed that the owners would lose such a high profit from the following fixture. He argued that the owners were only entitled to recover the loss due to the difference of rate during extended period. He therefore claimed that he would allow the appeal.[37]

[30] Ewan McKendrick, *Contract Law: Text, Cases, and Materials*, (6th edn, Oxford University Press, 2014) p. 83.
[31] [2009] 1 A.C. 61.
[32] Ibid at para. 32.
[33] Ibid at para. 9.
[34] Op. cit. n. 17.
[35] [2009] 1 A.C. 61, para. 9 and 15.
[36] Ibid para. 11.
[37] Ibid para. 26.

Lord Hope's emphasis seems to be different from Lord Hoffman's since he described the basis of assumption of responsibility as the basis of remoteness of damage of the contract. He added that whether the loss was foreseeable was not the test and in fact the question was whether the loss for which the party can reasonably be assumed to have assumed the responsibility. He argued that the fact that the owners would enter into a new fixture was something unpredictable and that the charterers did not have control at the time of entering into contract. According to Lord Hope the charterers shall compensate the loss between the charter rate and the market rate for the delay period because the loss recoverable for breach of contract is limited to the usual circumstances. Therefore he said that he would appeal the case.[38]

Lord Rodger and Baroness Hale took the traditional approach. They did not support Lord Hoffman's argument. Lord Rodger claimed that by applying Hadley v Baxendale rule, the loss between the rates of the new charter was not a loss that the parties would have contemplated that they would be liable about in case of breach because the reason was the 'extremely volatile market'. He argued that the extent of the relevant rise and fall in the market in a short time was actually unusual.[39] He referred to the South case where he said that he has "not found it necessary to explore the issues concerning" that case and "assumption of responsibility".[40] Baroness Hale based her argument on the fact that the loss was too remote and explained that the loss has to be within the contemplation of the parties in the time of the contract was made, not 'in the usual course of things'.[41] And lastly Lord Walker claimed that he agreed with the analysis of Lord Hoffmann, Lord Hope and Lord Rodger.[42] As a result House of Lords held that the owners were not entitled to recover the additional loss because charterers would not be able to assume such a responsibility firstly because of the general understanding of the shipping market and secondly that the charterers were not able to know about or control the new contract.

[38] [2009] 1 A.C. 61 para. 34.
[39] Ibid para. 53.
[40] Ibid para.63.
[41] Ibid para.91.
[42] Ibid para.87.

5. Reaction of Shipping Industry

The owners have claimed that the loss that they suffered due to the charterers' failure to redeliver the vessel on time. They have lost US$1,364,584.37 from the profit, plus US$158,000 from the overrun period and could only recover the second very low loss. However the House of Lords held that the owners should bear the responsibility because they did not let the charterers know about the following fixture. The owners were disappointed with the decision of the House of Lords because it was from the nature of the charter that they were going to sign a new fixture. They argued that have been mistreated by law because they had to carry the contractual liability of the charterers who failed to redeliver the vessel on time.

While **the charterers** have argued that they would not be able to assume such a huge loss and therefore they should not pay it. And they became were quite content with the decision of House of Lords. However what the charterers would not assume is the extent of loss not the type of loss as to the owners would fail the following fixture.

6. Commentary of *The Achilleas* under the Academic Literature

This case brings a new approach to the recovery of damages. After the decision, it is no longer sufficient to decide the damages according to the reasonably foreseeable result of the breach. Under the Achilleas rule, the party in breach will not be held necessarily liable of the loss, 'whether they were usual or unusual, merely because the defendant he knew or should have known that they were not unlikely to occur'.[43] The party who breaches the contract will not be liable of a loss if he cannot be assumed as he has assumed the responsibility of the loss. Thus the criteria of likelihood and the knowledge will not be used anymore to measure the liability of the party in breach. [44]

6.1. Problems With The Case

Chitty argues that contractual liability is based on express or implied agreement. And it is argued that the assumption of responsibility approach is too vague and there should be a simpler rule such as the defendant will be liable for losses which are likely to occur in the usual case or whose have been made known about the likelihood to occur when the contract was made, unless there is a contrary agreement which excludes or limits the liability.[45]

6.1.1. Lack of Concrete Guidance on The Test

The first problem faced in this case is that there is not a ratio decidendi[46]. There are two dominant views; one of them is the assumption of the responsibility argued by Lord Hoffmann and Lord Hope. The second view is that what the parties knew at the time of the contract which is argued by Lord Rodger and Baroness Hale. Whereas Lord Walker's reasoning is not very clear. He seems to be agreeing with them all. [47] Therefore the approach to be followed by the future cases is not clear either.

The fact that the House of Lords had two different views prevents to form a rule and causes lack of guidance. Peel shows his disappointment by saying that; 'it must be a source of some regret that the decision in *The Achilleas* does not provide the lower

[43] Op. cit. n. 2, para 26.104.
[44] Op. cit. n. 2, para 26.104.
[45] Ibid para. 26.130.
[46] http://legal-dictionary.thefreedictionary.com/ratio+decidendi;
The legal principle upon which the decision in a specific case is founded
[47] Paul C.K. Wee, "Contractual interpretation and remoteness" [2010] L.M.C.L.Q. 150-176, p. 156-157

courts with a clear indication of which approach should be applied'.[48] He reasons this fact to Lord Walker's appeal which showed signs of both approaches[49] and for the further reasons given by Lord Hoffmann, Lord Hope and Lord Rodger.

Peel argues that that might be because Lord Walker did not differentiate big differences between two approaches but according to him; 'the House will be invited to revisit further the rule of remoteness'.[50]

6.1.2. Uncertainty & Confusion

6.1.2.1.In Practicality

Lord Hoffmann's approach to measure the damages is named as assumption of the responsibility[51] or intention based approach[52]of the type of loss which is the question.

Under this approach, in order that the party in breach compensate the loss in question, he has to assume the responsibility of the loss when the contract was made. It means that the intention of the parties shall be understood in order to accuse them. However this issue has seen problematic between the law academics. It is argued that the application of assumption of responsibility approach is causing uncertainty because it involves assuming that the parties have assumed the responsibility of the loss in question. However it is not possible to prove that the parties have assumed the responsibility of the loss. Chitty disagrees with Hoffmann's approach, he argues that by this approach it is 'simply hard to quantify the liability' therefore its application will cause 'inappropriate results'.[53] From the quotation of Lord Reid explained in Heron II case that;

> "*The remoteness rule in tort and in contract is different because in contract cases the parties have the opportunity to direct the other party's attention to unusual risks*".

Chitty reasons that parties may specify the terms of the contract; they can either limit the liability such as the party in default may not pay the reasonably foreseeable damage

[48] Edwin Peel, "Remoteness Revisited" (2009) 125 L.Q.R. 6-12, p. 11.
[49] [2009] 1 A.C. 61 at 69, 86.
[50] Op. cit. n. 46, at p. 12.
[51] Hol at 30.
[52] Hol at 12.
[53] Op. cit. n. 2, para 26.130.

or they may decrease the liability where the party in breach was held liable of assuming liability even it would not occur in the ordinary circumstances. Therefore for most cases, there is no need for a further protection by the courts to decide that the party was not assuming responsibility. [54] Robertson argued that to define the extent of liability for losses caused by the defendant's breach there will seldom be any 'factual foundation for making a determination as to whether the defendant is implicitly assumed responsibility for the risk in question'.[55] Robertson indicated that 'there is no factual basis for judging the intention of the parties'.[56]

McAulley argues that the reasons that the House of Lords provide in order to prove that the charterers have not assumed the responsibility of the losses are firstly that the loss of the nature was unquantifiable and that the owners were able to enter into a new fixture before the vessel arrives.

McAulley explains that those reasons are arbitral facts and does not provide any information about the assumption of the responsibility of the parties and that they may only be used 'to achieve what the courts consider just outcome' not to analyse the assumption of the responsibility.[57] And similarly, Wee criticizes that the reasoning of the courts is based on the fact that the loss is unquantifiable and unpredictable. He adds that on the contrary it has never been an issue to prevent the recovery of any loss.[58]

Wee argues that this new approach creates uncertainty about the allocation of the risk. He argues that in a contract-centred agreement in the case of a delay, the party who takes the risk of the lost profit shall be allocated but in this case it is not possible to understand the intention of the parties it from the facts and therefore to indicate 'reliable and consistent route' to do it.

In Hadley case it is inferred that in the agreement-centred approach to remoteness, it is not possible to answer to the question of what the parties intended about who carries the risk 'without resorting the fiction'.[59] McGregor argues that

[54] Ibid.
[55] Andrew Robertson "The basis of the remoteness rule in contract" (2008) 28 Legal Studies 172, p. 196.
[56] Ibid, at p. 185.
[57] Steve McAulley, "Transfield v Mercator" (2010) 38 ABLR 65, p. 66.
[58] Op. cit. n. 47, at p. 165.
[59] Ibid, at p.170.

> "*What Lord Hoffmann and Lord Hope propose is full of difficulty, uncertainty and impracticality. How are we to tell what subjectively the contracting parties were thinking about assumption of responsibility? When contracting, assumption of responsibility was probably not in their minds at all, for it is well known that parties entering a contract are thinking of its performance rather than of its breach. Apart from this uncertainty there is the impracticality of allowing defendants to raise the issue, as they will surely do, in case after case as an extra argument, thereby taking up the time of the courts unnecessarily and making the arriving at settlements more difficult*".[60]

6.1.2.2.Implied Terms & Interpretation of The Contract

Lord Hoffmann explains that;

> "*…the implication of a term as a matter of construction of the contract as a whole in its commercial context and the implication of the limits of damages liability seem to me to involve the application of essentially the same techniques of interpretation. In both cases, the court is engaged in construing the agreement to reflect the liabilities which the parties may reasonably be expected to have assumed and paid for*".[61]

Lord Hoffmann's suggestion that an implied term would be the basis is not found satisfactory. This issue has been criticized that to use implied terms in order to explain the remoteness of damages is not inappropriate but this should be a 'last resort'. The case shall aim to guide the future cases instead of 'gap-filling'. The House of Lords bases the assumption of responsibility of the loss on the implied terms and the interpretation of the contract.

However since this case brings a new perspective to the principles of law in remoteness of damages, the House of Lords should be more specific and more concrete about the rules to apply to solve this issue. The fact they use the 'umbrella concept of interpretation' it is very likely that 'lack of guidance and uncertainty' occur because they do not provide specific and concrete rule and principles but prefer to use 'over-generalisation and over-abstraction'.[62]

Stiggelbout argues that the argument of House of Lords that the court is able to construe the parties' intention is completely false.[63] To answer the risk allocation through contractual interpretation is argued to be a fallacy.[64]

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[60] Harvey McGregor, *McGregor on Damages*, (19th Edn, Sweet & Maxwell, 2014) para 6-171.
[61] [2009] 1 A.C. 61 at para. 26.
[62] *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2011] 1SLR 150 at 97-98
[63] M. Stiggelbout, "Contractual Remoteness, 'Scope of Duty' and Intention" [2012] L.M.C.L.Q. 97 at

6.1.3. External presumption and the objectivity of the contract

Hoffmann starts his speech by asking the fundamental question in order to build his answer how to measure damages;

> "*is the rule that a party may recover losses which are foreseeable ("not unlikely") an external rule of law, imposed upon the parties to every contract in default of express provision to the contrary, or is it a prima facie assumption about what the parties may be taken to have intended ... capable of rebuttal in cases in which the context, surrounding circumstances or general understanding in the relevant market shows that a party would not reasonably have been regarded as assuming responsibility for such losses*?"[65]

Hoffmann rejects the external rule and he bases his solution upon the intention of the parties (objectively ascertained). This issue is highly criticized by the academics. It is argued that the fact that Hoffmann uses the interpretation in order to understand the intention of the parties is not a good way of understanding the intention because under English law the ascertainment of the intentions is an objective issue. External presumption does not comply with the objectivity of the contract

Sabapathy argues that it is difficult to apply the presumption of responsibility to market risks. He reminds that "*legal presumptions are inferences derived from our common experiences of how reasonable parties in the world actually behave*." He therefore suggests that in order to apply this rule, it is required to look 'how parties who enter into agreements generally allocate risks between themselves'. He continues that it is not easy for a party to accept such a risk of the market that is beyond control.[66]

6.1.4. The distinction of type and extent of loss

I want also to mention about the distinction of type and extent of the loss. Cooke explains in the Classic case that the case fell under 'the classic distinction recognised in numerous prior authorities between type of loss and extent of loss.[67]

118.
[64] S. Sabapathy, "*The Achilleas*; Struggling to Stay Afloat" (2013) Singapore Journal of Legal Studies 387, p.398.
[65] [2009] 1 A.C. 61 at para 9.
[66] S. Sabapathy, "Falling market and remoteness", (2013) LMCLQ 285 p.288
[67] Ibid at 72.

Lord Rodger argued that the when considering the damage for breach of contracts the one should not look at the distinction of extent and type. He also argued that the market rate was extremely volatile and therefore parties were not able to contemplate the additional loss. Whereas Hoffmann questioned whether the loss for which the defendant is asked to recover is of a 'kind' or 'type' for which he has assumed the responsibility. He stated that the principle to measure damages can be either inclusive or exclusive. Inclusive principle is when the foreseeable damages are to be recovered and is a question of fact. Under exclusive principle in order to recover the loss, its responsibility shall be assumed by the parties, the fact that the loss is foreseeable is not sufficient to be recovered.

It is argued that the law does not require that the parties to foresee the dimension of the loss but the nature of the kind of loss reasonably foreseeable. In the relevant case, the kind of loss of the following fixture was reasonably foreseeable therefore it could be recovered by the owners.[68]

[68] Lord Hoffmann, "The Achilleas: Custom and Practice and Foreseeability?"(2010) Edinburgh Law Review, Volume 14, Issue 1, p.52-53.

7. Post-Achilleas Cases

The approach of *The Achilleas* and especially the test of assumption of responsibility of Lord Hoffmann has been a speculative issue in recent cases whether *The Achilleas* brought a new rule different from the rule in *Hadley v. Baxendale* about remoteness of the damage in contract. Post-Achilleas decisions doubted to apply the approach of *The Achilleas* not also because it was not easy to change the law applied for 150 years but also the approach to apply was not clear. Therefore they held that the new approach shall be applied in some extreme situations and the general test of remoteness shall keeps to be the rule of remoteness of damage in contract.

In *Asm Shipping Ltd. of India v TTMI Ltd. of England ("The Amer Energy")*[69], the issue as to whether the charterer's claim arising from the owner's late arrival was too remote. Arbitrators found for the charterers and the owners went for appeal. The importance of the case id that Flaux J held that *The Achilleas* did not bring a new test to remoteness and therefore it did not change the law[70] and he stated that if Lord Hoffmann held that 'the rule in Hadley will no longer apply', this view will not be shared by the majority and it would be 'heterodox'.[71]

Classic Maritime v Lion Diversified Holdings[72] is about the claims of Classic claimed for damages caused by non performance of the contract of affreightment (COA) against Limbungan, a subsidiary of Lion. Classic asked for a summary of judgment from the court. Lion argued that under the new approach of the Achilleas, they were not liable for the full loss because they have not assumed the responsibility of the loss and also the market was extremely volatile. The judge held that Classic was not entitled to a summary judgment. He also stated that it would be 'highly surprising' if *The Achilleas* case had altered the remoteness rule for contract to 'assumption of responsibility'.[73] Cooke argued that whatever test he would apply, the loss was recoverable. Gay indicates that Cooke has mentioned that the appropriate test was in terms of knowledge and likelihood; 'it cannot be said that the type of loss is between the contemplation of the parties at the time of entering the contract, if one of them should break it'.[74]

[69] *Asm Shipping Ltd. of India v TTMI Ltd. of England ("The Amer Energy")* [2009] 1 Lloyd's Rep. 293.
[70] Ibid at 19.
[71] Ibid at 18.
[72] *Classic Maritime v Lion Diversified Holdings* [2010] 1 Lloyd's Rep 59.
[73] İbid at 71.
[74] Ibid.

Donoghue v Greater Glasgow Health Board[75] is a judgment of Scottish equivalent of the High Court.[76] In this case, the defendant, an employee of Health Board walking down the steps of the building, because of the path was on gravel and pieces of the gravel have passed to the steps, the employee fell and injured her back. Health Board accused the constructing firm by reason that they have promised to make the path in asphalt the near area in grass. Whereas the constructing firm have not comply with the constructing specification and made the path in gravel. Lord Uist, by referring to the speech of Lord Hoffmann in *The Achilleas*, held that the third party was not liable of the employee's damage because this loss was too remote and that it is not possible to assume that they have assumed the responsibility; they should only be taken to have assumed responsibility for the cost of reconstructing the path complying with the instructions.[77] Lord Uist decision looks like in the same way of Lord Hoffmann however it is argued that this decision is not a remoteness case but it is a causation case because in regard to 'but for test' sub-contractor was liable of the injury. Therefore it is submitted that this judgement shall be treated as a line of thought of Lord Hoffmann.[78]

Supershield Ltd v. Siemens Building Technologies FE Ltd[79] is a construction case where the decision followed *The Achilleas*. In this case the new building was affected by the flood which was caused by the defective installation of a valve. The question was whether the damage was too remote to be recovered. The court held that it was not. Toulson LJ sought to indicate the difference between Hadley and *The Achilleas* rules. He held that Hadley rule is still the 'standard rule' where the contract breaker is liable of the loss that when the contract was made he had in mind as not unlikely to result from a breach but this approach reflects the imputed intention of the parties in the ordinary case. He explained that in *The Achilleas* 'the court by examining the commercial background and the contract decides that the expectation or intention reasonably to be imputed to the parties'. It was also held that the new rule may have exclusionary effect by holding a contract breaker not liable of loss which was kind of loss not unlikely to

[75] *Donoghue v Greater Glasgow Health Board* [2009] CSOH 115.
[76] Robert Gay, "The Achilleas in the House of Lords" (2008) 14 J.M.L., Gay argues that this judgment may have a persuasive effect in the English Court p.429.
[77] Ibid at 16.
[78] Op. cit. n. 72, at p.430.
[79] *Supershield Ltd v. Siemens Building Technologies FE Ltd* [2010] EWCA Civ 7, [2010] 1 Lloyd's Rep. Plus 20

occur or inclusionary effect; if a loss is within the scope of the duty, it will be not be treated as too remote, even if it would not have occurred in the ordinary circumstances.[80]

The more clearly explanation of why *The Achilleas* case should not be followed in normal cases is made in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd*[81] where, because the owners were late to get the vessel repaired the charterers missed sub-charter contract. They could only find a new sub-charter for lower price therefore sued the owners for the loss of profit from the difference between the lost and new charter. Queen's Bench held that the loss in question was foreseeable and was falling within the limb rule of Hadley v. Baxendale therefore the charterers were entitled to recover the loss in issue. Justice Hamblen held that the damages associated with the loss were too remote and rejected the owners' argument that they have not contemplated the loss.

> "*The orthodox approach remains the general test of remoteness applicable in the great majority of cases. However, there may be 'unusual' cases, such as The Achilleas itself, in which the context, surrounding circumstances or general understanding in the relevant market make it necessary specifically to consider whether there has been an assumption of responsibility. This is most likely to be in those relatively rare cases where the application of the general test leads or may lead to an unquantifiable, unpredictable, uncontrollable or disproportionate liability or where there is clear evidence that such a liability would be contrary to market understanding and expectations*."[82]

He continued that 'in the great majority of cases it will not be necessary specifically to address the issue of assumption of responsibility'[83] which is consistent what Lord Hoffmann has said in his speech; the orthodox approach is the "prima facie" rule which will apply in the "great majority of cases" [84] and that 'cases of departure from the ordinary foreseeability rule based on individual circumstances will be unusual'[85]

Another case where a similar decision with *The Sylvia* about the effect of the Achilleas on the measure of the damages in contract was taken is *Ispat Industries Ltd v Western Bulk PTE. Ltd*[86] which is an early redelivery case. Justice Teare held that the orthodox test remains as the test which shall be applied to the remoteness of damages in contract

[80] Ibid at 43.
[81] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] EWHC 542 (Comm).
[82] Ibid at 40.
[83] Ibid at 41.
[84] [2009] 1 A.C. 61 at para. 9.
[85] Ibid at para. 11.
[86] *Ispat Industries Ltd v Western Bulk PTE. Ltd* [2011] EWHC 93 (Comm)

cases.[87] She held that 'damages measured by the hire that would have been paid for the expected minimum duration of the time charter trip' and indicated that 'measure of damages is consistent with the orthodox test of remoteness'. She explained that she could find any basis 'which it could be said that such measure of damages was contrary to the market understanding or expectations'.[88]

In *John Grimes Partnership v Gubbins*[89], consulting engineering firm had caused a delay for 15 months and it was questioned whether he was liable of dropping the value of a property development about £400,000. The court held that the engineer firm is liable of the loss due to market fall and the defendant appealed the case in reason that they have not assumed the responsibility of the loss. The appeal was dismissed. Sir David Keene held that *The Achilleas* case did not affect a major change and the traditional rule shall be applied. Only in cases where 'the commercial background' shows that 'the standard approach would not reflect the expectation or intention reasonably to be imputed to the parties' then the approach would be displaced. [90] So the two-staged approach is applied to hold that the claimant is liable of the loss. Firstly it is emphasized that if there is not a term dealing with what type of losses shall be covered then the law in effect will be applied. In the absence of an express term about the liability of the loss, the law in effect implies a term that usually accept liability of a loss which can be foreseen at the time of the contract and not unlikely to occur when the party is in breach. Next, it is judged whether nature of the contract, commercial background or particular circumstances could take the case outside the scope of the traditional rule.

In MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd[91] case, the Achilleas were discussed in a very detailed way and were found not to be the law in Singapore. In this case, Dickson had been in breach with the employment contract toward its ex employer (Fish & Co) by bringing confidential information to its new employer (MFM Restaurants). Therefore they all signed a settlement deed. Fish claimed damages for breaches occurred before and after the settlement deed. The defendants claimed that the breaches happening after the settlement were too remote to be recovered but The

[87] Ibid at 52.
[88] Ibid at 53.
[89] *John Grimes Partnership v Gubbins* ("*Gubbins*") [2013] EWCA Civ 37,
[90] Ibid at 22.
[91] *MFM Restaurants Pte Ltd v Fish & Co Restaurants Pte Ltd* [2010] SGCA 36, [2011] 1SLR 150.

Singaporean Court of Appeal held that the breaches after the settlement were natural and therefore held to compensate all the losses. They did not apply the approach of Lord Hoffmann because it was producing uncertainty, and the Hadley rule was already embodying the concept of assumption of responsibility and there were problems in the concept of *The Achilleas*.[92]

[92] Ibid.

8. My opinion about the decision on commercial and legal grounds

The charterers caused such a huge loss to the owners and they argued that they have not assumed the loss of profit of the owners. The majority of House of Lords agreed that the charterers are not liable of the additional loss because it cannot be assumed to have assumed the responsibility of the loss or because they would not be able to contemplate reasonably the loss or because of the market was extremely volatile.

Firstly thinking about commercial situation of the case; trade concerns risk which is the most frightening part of the commerce for the people who want to earn money from trade. And the ones who are engaged into trade are required to assume the risk. Therefore parties by getting into a contract, accept the risk. In this case the owners and the charterers were parties of a contract of charterparty. The charterers are required to assume that anything can happen which would cause them to deliver the vessel later then the delivery date. So according to the nature of trade the charterers shall be assumed to accept the risk of a late delivery and its high consequences since in maritime industry the market rates are known to be very high by worldwide.

Therefore it is not acceptable when the charterers as a result of their late redelivery of the vessel argue that they should not be liable because they have not assumed such a loss. Their argument is against the nature of the maritime trade.

And I also want to mention the speech of Rix LJ where he replied to the charterers who have argued that they did not have any special knowledge about the follow-on fixture. He argued that the fact that the owners would let them know about the following fixture was *uncommercial* and *undesirable*. Firstly the maritime industry requires being continuous as the high cost of a vessel is also known universally. The owners buy the vessels in order to charter them because each day passing without chartering would cost the owners a lot and they would suffer loss. Therefore the fact that the owners bought the vessel to charter is a fact known by the charterers. The owners do not have the duty to inform them that the vessel will be hired in the redelivery time is unnecessary. And also the requirement to inform the charterers would put the owners 'too much at the mercy of the charterers'.[93]

[93] [2007] EWCA Civ 901, [2007] 2 Lloyd's Rep 555, at para. 119.

As Sheppard indicates the charterers have more control to redeliver the vessel on time, at least they can foresee whether the last legitimate voyage will let them to redeliver the vessel on the contractual time and they can arrange their time according to the redelivery date. Whereas the owners do not have any control on the legitimate voyage and if the charterers will not redeliver the vessel because the last legitimate vessel was delayed according to House of Lords' decision the owners will have to bear the heavy liability.[94] I think that the fact that the consequences of the last legitimate voyage which makes the charterers earn more money but the owners to suffer loss is not fair because the charterers have the duty to redeliver the vessel on time.

House of Lords examined the commercial background, circumstances and the contract; they used their power of discretion. The argument of Lord Rodger's was that the market was extremely volatile and therefore the charterers shall not compensate the total loss. What if the market rate at the time of contractual redelivery was not so much different than the actual redelivery time? Let us assume that the loss of profit was not $1million but $150.000; I do not think that Lord Rodger's argument would be the case and the charterers would pay it and the owners would be entitled to $150.000. Therefore if the market rate would be lower the owners could recover more loss. I do not find this decision fair. I would say that in order to have a fairer decision they would condemn the charterers to compensate not the total additional loss of profit but a sum of loss of profit by taking the average of the market.

Lord Hoffmann argued in order to compensate the loss the charterers shall assume the responsibility of the loss at the time when they made the contract and he added that the charterers would not be able to assume such a huge loss.

I think that Lord Hoffmann's approach is very difficult to apply and to prove. It is never known what the parties were thinking to assume the responsibility of the loss. And the fact that what parties consider to undertake the risk at the time when they make the contract is something personal, in other words it would be an issue differentiating from one person to another and it does not seem possible to be sure about it. In assumption of responsibility approach adapted by House of Lords, party in breach who had the necessary knowledge at the time when they entered into contract may escape the responsibility by arguing that he did not assume that he was undertaking the risk.

[94] M. Sheppard, "Damages for Late Redelivery Re-visited: *The Achilleas*" (2008) 14 JIML 49 p.58.

Whereas under remoteness rule the knowledge is important, in case party in breach may reasonably contemplate the loss at the time he entered into contract, he is liable of the loss. the assumption of responsibility approach lets the party in breach to deny because it is based on an assumption. The assumption is not something concrete to know and therefore to prove because it depends on each person's mind. Whereas the remoteness of damage approach is based on knowledge and it is possible to prove it.

In my thesis I tried to examine the facts and reasons of *The Achilleas* case decision, the reactions of both the academics and the courts. As a last word I would say that I agree with the academics and the courts; *The Achilleas* case was not a fair-minded decision and it should not be followed by the courts because firstly the nature of the trade concern risk and the parties are assumed to accept risks, secondly the maritime industry is a very high cost area and the parties are assumed to know the risks and its high costs. Thirdly the nature of buying a vessel requires to be chartered continuously and this is fact to be known by the charterers; the owners were not supposed to inform them about the new fixture. And in the legal basis I think that the test of remoteness is fairer than assumption of responsibility approach. As a conclusion *The Achilleas* case shall stay as an '*unusual*' case.

9. Conclusion

The rule of remoteness of damage in contract has been followed since 150 years which is known as the rules of *Hadley v Baxendale*; however House of Lords in *The Achilleas* sought to change the test of liability. The 'new approach' namely the approach of the responsibility aimed to expand the scope of the liability of the party in breach. It has been the argument of my project that in regard of remoteness rules *The Achilleas* produced uncertainty and confusion both theoretically and practically. The remoteness test has been formed in *Hadley v Baxendale* case and later developed in *Victoria Laundry* and *Heron II* cases. The test was formed by two parts; first limb required that the party in breach was liable of the loss at issue if he has reasonably foreseen the loss at the time when they entered into contract and the second limb required that the party in breach shall know the special circumstances of the case in order to be liable of the particular loss. Therefore the foreseeability rule was knowledge based. Whereas the approach of responsibility required that a person is liable only if it is reasonably assumed that the party assumed the responsibility of the loss in question when he entered into contract. This approach was intention based and in order to find out the intention of the parties the court suggested to examine the commercial background of the parties, and to make contractual interpretation. These issues have been highly criticized in both national and international law academics.

Post- *Achilleas* judgments failed to recognize and apply the assumption of responsibility test. Those decisions clarified that traditional rule to remoteness shall remain as the main rule whereas the application of *The Achilleas* is restricted to cases with exceptional circumstances. I want to finish the project with the quotation of the Lord Hoffmann in his extra-judicial article;

'If the effect of the Achilleas is, as I hope, to free the common law from the need to explain its decisions on contractual remoteness of damage by the single criterion of probability and to enable it to recognise that liability for damages may be influenced by commonsense distinctions between different commercial relationships, it will be the result of a combination between judicial decision-making and academic writing'[95]

[95] Op. cit. n. 68.

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INTRODUCTION

Deviation is a crucial issue because of its serious consequences on shipowners especially when the shipowners insert exclusion clauses in order to mitigate their liability of common law. The fact that the shipowners are protected by P&I Clubs makes these Clubs concerned from the deviation. Over 300 years deviation has been an issue in English carriage of goods by sea law dealing with the situation where a carrier "deviates" from the agreed route between the parties.[100] The shipowner is under an implied duty of carrying goods on the agreed voyage and to do so directly without deviation but the duty must be obeyed regarding the circumstances during the voyage. It has been ruled for hundreds years that the deviating carrier would not be able to rely on the exclusion clauses even if there is not casual relation with the deviation. The issue of deviation has born as a matter of insurance. Lately it is brought as a matter of law of carriage of goods. The complication in the deviation rule stems from the difference between the insurance and carriage contracts; insurance contract can be reformed by returning the premium but in carriage of goods contract the cargo owner cannot give back the benefit that he has taken from the delivery of the cargo.[101]

In this project I will discuss whether P&I Club shall exclude the liability over deviation occurred by the shipowners. The fact that the there are different types of Rules applied in the UK, I will discuss chronologically; common law Rules, Hague-Visby Rules, Hamburg Rules and lastly Rotterdam Rules. In common law there are three main cases[102] which form three periods in the common law rules. Those rules are more strict then the other Rules not as important as they were anymore.

[100] Robert Chorley, Samuel Theodore Chorley, et al. *Chorley and Giles' Shipping Law*. (8th edn, 1987, Pitman), p.177.
[101] S. Baughen, "Does deviation still matter?" (1991) L.M.C.L.Q. p.70, p.72.
[102] *Davis v Garett* (1830) 6 Bing. 716; 130 E.R. 1456.

I. DOCTRINE OF DEVIATION

1. Definition of Deviation

The shipowner has an implied duty not to deviate the vessel while he performs the obligations under the contract of carriage.[103] Deviation is a voluntary departure from the proper route without necessity or reasonable cause.[104]

2. Types of Deviation

The concept requires geographical deviations from the contractual route therefore firstly it is important to identify the contractual route. In *Reardon Smith Line v Black Sea and Baltic General Ltd*[105] Lord Porter pointed out the importance of the geographical route by explaining that the ship has the duty to follow the usual route between two ports and if there is not any information about the route, it is presumed that the vessel has to take the direct geographical route but navigational or other reasons may cause to change it. It was also held that the practice is more important to identify the usual route instead of the geographical route. However geographical deviation is not always the case, the deviation may include unauthorized carriage of deck cargo[106] or misdelivery of cargo[107] or the carrier's failure to prosecute the voyage with reasonable dispatch.

3. Justification of Deviation

3.1.Common Law Justifications

In the most of the cases the main issue is justification of deviation rather than the existence of deviation.[108]
The deviation is justified if it is not voluntary such as a result of necessity.[109] The reasons of common law justifications are explained as that in some particular events

[103] J. F. Wilson, Carriage of Goods by Sea (7th edn, 2010, Pearson Longman), p. 16.
[104] J. LEE, *Deviation under the General Maritime Law* (1972) Tulane Law Review Vol. 47, p. 155.
[105] *Reardon Smith Line v Black Sea and Baltic General Ltd* [1939] AC 562; the vessel took a different route in order to take cheaper oil but as the 25% of the ships was doing the same it is assumed that this is the usual route. But the cargo owner tried to show that it was a deviation in order to resist a general average claim and to do this tried to prevent the carrier to rely on the exclusion clauses.
[106] *Royal Exchange Shipping Co. v Dixon* (1887) 12 App. Cas 11,18.
[107] London N. W. Railway v. Neilson [1922] A.C. 262 (H.L.).
[108] Op. cit n.1, p.182.
[109] *Lavabre v Wilson* (1779) 1 Doug. 4th edn. 284.

deviation is not intentional but forced therefore the deviation made in case of those circumstances needs to be justified. [110] In common law the deviation is justified when

i. To save human life or to communicate with a vessel in distress in case the lives can be in danger

In Scaramanga[111] case the vessel gave a tow to another vessel and in order to do it she reduced the speed and his vessel became a total loss.[112] The shipowner wanted to rely on the "Perils of the sea" clause in the charterparty but it was held that charterparty was in breach therefore the owner was unable to rely on the exception clauses. Deviation in order to save lives is justifiable but deviation in order to save property is not justified.[113]

ii. To avoid danger to the ship or cargo[114]

At common law, deviation was allowed when the contractual route would require the vessel to enter on danger.[115] If the ship saves itself but not only the cargo, this deviation is also justified.[116] However the shipowner will not be entitled to claim General Average.[117] And similarly, the master is entitled to follow orders within the limits of obviously grave danger.[118]

iii. Where the deviation is made necessary by some default on the part of the charterer[119]

Navigational error and defective compass were accepted as justifying the deviation and the deviating carrier was able to rely on the exclusion clauses.[120]

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[110] *Rio Tinto v Seed Shipping* (1926) 24 LIL Rep 316; the master had changed the route to south-south-east from south-south-west because he did not feel well but it was held that the carrier did not deviate because Roche J held that there was not any change of route which constitutes a deviation.
[111] *Scramanga v Stamp* (1880) 5 CPD 295, CA.
[112] Deliberate reduction of speed is treated as a deviation.
[113] Op. cit. n. 12.
[114] *Kish v Taylor* [1912] A.C. 604; Deviation caused by unseaworthiness was another type of justification while the shipowner has been only liable of the unseaworthiness. *Monarch Steamship v Karlshamns Oliefabriker* [1949] AC 196, p212; , it was held that a deviation made in order to remedy unseaworthisness is not a reasonable deviation but it would be so if the owners knew the state of the vessel. *Phelps James & Co. v Hill* [1891] 1 QB 605,CA; because of bad weather the master changed the route without communicating the owners. It was held that what the Master did was reasonable because the port he deviated was relevant for both the repair of the vessel and sale of the cargo therefore the deviation was justified.
[115] *The Teutonia* (1872) L.R. 4 P.C. 171.
[116] Ibid.
[117] 3rd art. p.150
[118] *Portsmouth Steamship Co Ltd v Liverpool & Glasgow Salvage Association* (1929) 34 Ll. L. Rep. 459
[119] Op. cit. n.1 p. 17-19.

3.2. Liberty clauses:

Another way to justify the deviation is to include liberty clauses into the contract. Parties to a contract of carriage by sea may exclude or vary liability of deviation through liberty clauses. The shipowners are willing to widen the liberty clauses in the bills of lading but the courts, on the contrary are looking to make the liberty clauses narrower.[121]

In the case *Leduc v. Ward*[122] in the bill of lading there was a liberty clause stating that the shipowner can call at any port. The ship had deviated from the ordinary route proceeding to another port for the shipowner's private business where the ship was lost.

Evans v Cunard Shipping Co. (1902) the bill of lading included a deviation clause saying that the ship had liberty 'to stay at any ports … whether in or out of the customary route'. The fact that the ship has deviated to another port was held to be permissible. In *Reardon Smith Line v Black Sea and Baltic General Ltd*[123] the deviation clause in the charterparty gave the vessel liberty "to call at any port or ports in order to bunker or deviate for the purpose of saving life or property". The vessel was called to another port to bunker and while going to bunkering port was the vessel was stranded. It was held that the vessel had not deviated so the shipowner was able to claim general average from the cargo interests.

There may be some situations that the carrier may not rely on the liberty clauses such as the nature of the contract and the liberty clause are inconsistent[124] or the contrary oral promise was prevailing the clause[125] or because the mentioned port in the clause as an intermediate port was not an intermediate port[126].

3.3.The Effect of Deviation on Positive Rights

The deviating carrier may sometimes be able to perform his contractual duty to deliver the cargo to the cargo owner but because of the deviation the contract may be repudiate.

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[120] *Paterson Steampship v Robin Hood Mills* (1937) 58 Ll.L Rep. 33.
[121] Op. cit. n.2, p.70.
[122] (1888) 20 Q.
[123] [1939] AC 562.
[124] *Renton (GH) & Co Ltd v Palmyra Trading Corp of Panama* [1957] AC 149, HL.
[125] *The Ardennes* [1951] 1 KB 55.
[126] *James Morrison v. Shaw, Savill* [1916] 2 K.B. 783.

This fact does not prevent the carrier to get the freight on a quantum basis.[127] Or in some situations the deviating carrier may have to wait for the cargo owner to get the cargo. The owner gets entitled to demurrage even if the contract was repudiated by the deviation.

[127] Hain v Tate & Lyle.

II. Deviation and Marine Insurance

4. The Origin of Deviation Doctrine

The origins of the deviation doctrine have appeared firstly in marine insurance policies rather than being used in the law of carriage of goods.[128] The insurance notion of deviation was used in *Cole v Shallett*[129]case in 1693. There are some cases which show that this concept has been mentioned in 1702[130] where the fundamental duties of the bailees are decided. The common law carrier's duties are relevant to the contemporaneous duties of the carrier which is said to be what is left to the carrier.[131] Therefore the term which is mentioned in the policy for the first time seems to be shaping the concept of deviation which is not protecting the carrier who did not accomplish the contractual voyage.[132] The result of the doctrine is that the underwriter is not liable of any damages subsequent to deviation. The carrier by making an unauthorized deviation was losing the insurance cover.[133] This rule was enacted in the Marine Insurance Act 1906 s.46.

5. Deviation and P&I Cover

Almost all P&I Clubs exclude cover for consequences of an unjustified deviation[134], the Clubs offer covers only in cases where there is prior notification of the deviation, or where no notification was given because the shipowner considered there had been no deviation. This approach shows that the Clubs are concerned about deviation issue and shipowners and masters would understand how serious is the financial consequences of the deviation. Not only deviation but also; delivery of the cargo without the bill of lading, proper clausing the bill of lading while the cargo is damaged or negotiability of the bill of lading affecting the bank credit are issues to cause the shipowner to lose his indemnity.[135]

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[128] S. Girvin, *Carriage of Goods By Sea*, (2nd edn, Oxford University Press, 2011) , p.310.
[129] (1693) 3 Lev.; 83 E.R. 567.
[130] Green v Young (1702) 2 Salk. 444; 91 E.R. 385 (2 Ld. Raym. 840; 92 E.R. 61). Bond v. Gonsales (1704) 2 Salk. 445; 91 E.R. 386.
[131] James Morrison v Shaw Savill and Albion
[132] Op. cit. n.1, p. 180.
[133] Op. cit. n.4, p. 21.
[134] Heinz E. Gohlish, *Charterers Liability Insurance: Essential Best Practice*, (Witherbys, 2009) p.85, http://www.ukpandi.com/fileadmin/uploads/uk-pi/Documents/generalP%26Icover%20.pdf art.13.
[135] Ibid, p.86.

Baughen exemplifies the situation that if the shipowner is assumed to take a voyage from the point A to the point B, but instead takes the route to C, so there is new voyage which is not insured by the cargo owner. Therefore the insurance cover of the contract seems to cover another voyage.

6. Held Covered Cargo

However in the practice P&I Clubs offer another type of cover clauses by which the insurer is "held covered" clause for deviations have been offered for a long time.[136] Those covers include the liability of the deviation in condition that the shipowners provide an additional premium which is called 'held covered' cargo when deviation is notified earlier to the cargo owner.

[136] The Institute Voyage Clauses, Hulls, cl.2 (1/10/1983); Institute Cargo Clauses (A), sub-cl.8.3 (1/10/1982); Institute Cargo Clauses (B), sub-cl.8.3 (1/1/1982); Institute Cargo Clauses (C), sub-cl.8.3 (1/11/1982).

III. Deviation as a Basis of Liability and Carriage of Goods by Sea

The legal consequences of the deviation have been discussed since centuries and are still a problematic issue. Legal consequences of deviation depend on the law governing the contract of carriage. I will examine deviation under common law then Hague-Visby Rules, Hamburg Rules and lastly Rotterdam Rules.

1. Deviation under Common Law

In common law, the common carrier has the duty to deliver the goods in the same condition, at the discharge port. His liability is so heavy that he is in this sense of the insurer of the goods.[137] Under the traditional view, it is argued that the deviation can have three situations; the first one is where the deviation has occurred but did not cause any damage or loss, the second is that deviation has occurred and caused some damage or loss but it is not the sole reason of the damage or loss. And lastly, where the deviation has occurred and it is the only reason of the damage or the loss.[138] And traditionally, deviation may have two effects; the first impact is that the shipowner will not be able to rely on the contractual, common law or statutory exceptions, and secondly the shipowner will not be able to claim freight from the cargo owner.[139]

The effect of deviation of common law has been transformed through time. I will follow Dockray's division of deviation principle development; firstly in *Davis v Garett*[140] (1833) it was held that deviation goes to the root of the contract and that the owner cannot rely on the exclusion clauses, secondly *Balian v Joly* (1890 -1936) showed some developments and the lastly *Hain* (1936) revised the doctrine.[141]

1.4.Deviation as an Implied Duty *(Davis v Garett)*

The defendant was supposed to carry the lime in his barge, from Medway River in Kent to London. The vessel deviated and due to a storm both the barge and the cargo were

[137] C. Debattista, "Fundamental breach and deviation in the carriage of goods by sea" (1989) Journal of Business Law pp. 22, p.23.
[138] Op. cit. n.2, p.70.
[139] Ibid, p.71.
[140] *Davis v Garett* (1830) 6 Bing. 716; 130 E.R. 1456.
[141] M. Dockray, "Deviation: a doctrine all at sea?" (2000) L.M.C.L.Q. pp. 77.

lost. The defendant argued that they were not liable of loss because the storm caused the damage, not the deviation.[142]

Davis v Garett[143] (1833) has been a vital case in the doctrine of deviation where the court decided for the first time that the carrier has an implied duty no to deviate and that he should take the usual and customary course unless the parties had agreed in the contrary. Therefore the case terminated the uncertainty of this duty. Deviation was defined as "*a deliberate and unjustifiable departure from whatever is the usual and customary course which the vessel must follow in getting from its loading port to the discharge port*".[144]

It was held firstly that the carrier has to follow only the usual customary route unless there is any other agreement and secondly that the cargo owner could be paid without proving that the loss or damage was caused because of the deviation. It was held that shipowner was not able to rely on exceptions after a deviation occurred. Tindal C.J. explained that only in the direct and usual course the defendant can rely to the contractual exceptions.[145] So the contractual exception clause did not fit with the loss occurred by the owner. The reason of such a decision was that the carrier was performing another voyage rather than the insured one because the insurance policy was void when there is an unjustifiable deviation. Dockray indicates that the case has been an evolution but not a revolution because it had a limited significance for the development of the doctrine however brought "important practical implications".[146]

1.5.Doctrine of Discharge by Breach

At common law unjustifiable deviation has been a breach of fundamental term of the contract of carriage, and it has been held to deprive the carrier of any exclusion clauses from, or limitations of, liability to which he would otherwise have been entitled under the express terms of the contract[147] or under terms incorporated in the contract by statute[148].

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[142] M. Dockray, *Cases and Materials on the Carriage of Goods by Sea* (3rd edn., 2004, Cavendish Publishing) p. 63.
[143] *Davis v Garett* (1830) 6 Bing. 716; 130 E.R. 1456.
[144] İbid at p.725.
[145] Ibid at p.719.
[146] Op. cit. n.42, p.8.
[147] *Joseph Thorley Ltd. v Orchis S.S. Co. Ltd.* [1907] 1 K.B. 660.
[148] *Stagline v Foscolo Mango* [1932] A.C. 328.

1.5.1. *Balian v Joly Victoria and Co* Case[149]

In the previous cases rule of construction was followed by the courts however in this case rule of approach was applied which extended the doctrine. [150] In this case, the vessel deviated and as a result there has been damage. The owner could not rely on the limitation clause of '£5 per package'. The reasoning of Lord Esher was that deviation invalidates the exception clauses because the deviation creates a new voyage, differently from the contractual voyage and that the whole bill of lading was gone. It was held that the doctrine of deviation is a matter of the whole contract. Therefore the doctrine of deviation moved to principle of repudiation in contract law from a general principle of carriage of law.

1.5.2. *Joseph Thorley Ltd. v Orchis S.S. Co. Ltd*[151]

In this another very important case of doctrine of deviation, the vessel had deviated and independently of the deviation, the stevedores caused a damage of goods. The bill of lading has included an exclusion clause exempting the owner from liability for loss caused by the negligence of stevedores.

It was held that the shipowner cannot claim the benefit of the clause because he did not perform his part of the bill of lading. Cozens Hardy explained that the duty of not to deviate is a condition or a warranty in the sense of seaworthiness and therefore if the shipowner breaches this duty, it goes to the root of the contract and shipowner cannot rely on the exclusion clause. In other words, the reason why the deviating carrier cannot rely on the exception clause is that the insured contract is substituted by a new one and it does not exist anymore. Therefore from the moment that the owner breaches the contract he becomes a common carrier and cannot rely on the exclusion clauses arising from the contract. Cozens Hardy mentioned about *Lavabre v Wilson* where Lord Mansfield explained that "*The true objection is not the increase of risk. If that were so it would only be necessary to give an additional premium. It is that the party contracting has voluntarily submitted another voyage for that which has been insured*". [152]

[149] *Balian & Sons v Joly, Victoria & Co Ltd* (1890) 6 TLR 345.
[150] Op. cit. n. ,1 p.181.
[151] *Joseph Thorley Ltd. v Orchis S.S. Co. Ltd* [1907] 1 K.B. 660.
[152] (1779) 1 Doug. 4th edn. 284.

1.5.3. Following Cases

Another important part of the decision is that the carrier becoming the common carrier may rely on the exceptions of the common law which are acts of the King's enemies, act of God and inherent vice.[153] In *International Guano v Robert v. MacAndrew & Co.*[154] Pickford, J. held that once there is deviation the carrier is reduced to common carrier status and that the contract was gone because the shipowner had deviated but he was liable of only damages arising from deviation not from the delay. Pickford J held that. It can be argued that the decision is contrary to the *Thorley* but in this case the shipowner proved that damage arose from inherent vice of goods and that loss would still have occurred even if deviation had not occurred. So the loss of the shipowner became proportionate. It can be said that the carrier was enforced to have the benefit of common law but actually the proof was not easy as in *James Morrison v. Shaw, Savill* where the loss was caused by the Queen's enemies (German submarines), the carrier was held liable of the devious route, because he could not prove that the same result would have happened if he has taken the contractual route.

In the case *Cap Palos*[155] a different approach was applied to the deviation cases. The parties have contracted that the vessel should take the route from Immingham to Gothenburg and that the first stage shall be taken within 15 hours, a clause excluding the owner from liability of problem related to tug. The vessel while going to Gothenburg had to go back because of a tug problem. It was held that the owner cannot be protected of the clause when they wrongfully abandoned the contract. In this case whether the clause shall be applied to a contract when there is fundamental breach is about construction of the clause in question and it is not whether the contract was waived or not.[156]

In another case the vessel was chartered for "two consecutive voyages at the same rate of freight and on the same terms and conditions as herein provided". Because the

[153] Op. cit. n. 2, p.71.
[154] [1909] 2 K.B. 360; the vessel was supposed to take the route from Holland to Algericas and Alicante. Between intermediate ports the vessel was delayed without negligence of the owner and this caused damage to the cargo. Later on, the shipowner has been called to Seville after Algericas, before leaving for Alicante and this was a deviation which caused more damage to the cargo. Pickford, J. held that the contract was gone because the shipowner had deviated but he was liable of only damages arising from deviation not from the delay.
[155] [1921] P. 458, 472.
[156] Op. cit. n. 2, P.79

shipowner deviated during the first voyage, the charterer refused to load the cargo for the second voyage. The charterer acted as whole contract was repudiated. [157]

1.6.Modified Doctrine

Before getting into details of the *Hain S.S. Co. Ltd. v Tate & Lyle*[158] I want to explain the needs of the maritime law in regard to deviation at those times. The deviating carrier was seen as he has performed another voyage different from the insured contract[159] because the risk was altered[160]. This situation caused the carried goods to lose the insurance and therefore the carrier became the insurer of the goods. This was economically very difficult for a carrier because he was not able to rely on the exclusion or limitation clauses of the contract in order to limit or exclude his liability of the loss or damage. The courts wanted to release this very severe situation of the innocent carriers and to equalise their situation with the cargo owners. 'The doctrine of deviation pre-dated and gave rise to the concept of fundamental breach'.[161]

1.6.1. *Hain v Tate*[162]

This case shaped the rule of deviation. The vessel was supposed to load the cargo from three ports. After loading from the first two ports and while proceeding to the third port the vessel deviated. The charterer loaded the cargo even they were aware of the deviation. After the third loading, the vessel stranded but part of the cargo was transhipped and carried to the UK which entailed General Average Expenditure. The House of Lord decided;

(i) The loss or damage caused after deviation is regarded as the result of the deviation and unless the carrier may prove the contrary he is liable of the loss or damage.

(ii) Deviation does not destroy automatically the contract of carriage. The charterer may choose to terminate the contract or to survive it. This decision arises from the desire of the House of Lords to reduce the severity of the deviation consequences.

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[157] *Companie Primera de Navagaziona v Compania de Monopolia de Petroleos (The Yolanda)*, 1930
[158] *Hain S.S. Co. Ltd. v Tate & Lyle (Hain v Tate)*, 1936 41 Com. Cas. 350; 55 Ll.L.Rep. 159.
[159] Op. cit. n. 5, p.158
[160] S. Hodges, *Cases and Materials on Marine Insurance Law* (1st edn, 1999, Canvendish Publishing), p.155.
[161] C.P. Mills, "The future of deviation in the carriage of goods by sea" (1983) L.M.C.L.Q. pp. 587 at p.596
[162] *Hain S.S. Co. Ltd. v Tate & Lyle*, 1936 41 Com. Cas. 350; 55 Ll.L.Rep. 159.

(iii) The charterer or cargo interest may waive the deviation, which enables the special contract of affreightment to subsist. This enables the charterer of affreightment to sue for damages arising out of the deviation, and at the same time entitles the carrier to rely upon the exceptions contained in the charterparty. The case however did not mention about the *quantum meruit* of the carrier. There are two points of view; either the shipowner becomes disentitled to the payment because he had broken the contract or he deserves a reward because he delivered some of the cargo.

(iv) The charterer or cargo interest may treat the breach as repudiation, thus putting an end to the special contract, together with its exceptions. This puts the whole onus upon the carrier and makes him absolutely liable for the goods. The only possible exception to this is if the carrier can show that the damage must have occurred even if there had been no deviation

(v)Fundamental breach of the contract is the basis of the deviation rule.

In summary, it is submitted that the contract does not end automatically but depends on the choice of the innocent party. One of the benefits of this new law is to benefit the owner from the exclusion clauses for the losses occurred before the deviation. The case is argued to have moved to general contract law from the specific deviation rule. The rule of law was applied instead of construction. This case is accepted to be a new explanation which is not similar to the reasoning of the previous cases but similar as a result. Dockray states that the reason of the change should be to make the rule easier and to explain that the deviation does not cause an automatic discharge of the contract.[163] However this decision has been found unsuccessful in several ways. The fact that the party chooses to end the contract was making the contract void and the parties are freed from their contractual duties but the fact that the carrier might deliver the cargo to the discharge port would be illogical and unfair. After the cargo owner gets aware of the deviation, he may cancel the contract while the other party is still performing the contract and it would be a question which rules will govern the relation between the parties for the rest of the voyage.[164] Bill of lading was governing till the deviation occurs and the new implied contract was governing the rest.

[163]Op. cit. n. 42, p.14.
[164] Op. cit. n. 2, p. 85; B. Coote, *Deviation and the Ordinary Law. Lex Mercatoria: Essays in Honour of Francis Reynolds* (2000) LLP, Chapter 2, p.18.

1.6.2. Deviation and Fundamental Breach of Contract

A breach can be either a condition or warranty. In order to understand whether the deviation makes the contract of carriage by sea void and consequently deprive the carrier from the exceptions clauses which protect from liability, it is vital to understand the characterization of the deviation. Every breach shall be considered under the nature of the term. Deviation is seen as a fundamental breach but this does not mean that it deprives the carrier from relying on the exclusion clauses.[165] In Hong Kong Fir[166] the obligation of seaworthiness which is a very severe duty comparing to the duty not to deviate had not cause the contract of carriage to end. It is argued that deviation shall not end the contract automatically. Lord Maugham indicated that;"*The breach of a condition contained in a contract of carriage by sea, even so fundamental a condition as that the ship in the absence of express provision shall proceed by the ordinary and customary route, does not itself that is without an acceptance of the repudiation by the charterer or the other party, abrogate the contract*."[167]

1.6.3. Fundamental Breach and Exclusion Clause

The notion of fundamental breach prevents one party to rely on exception clauses. Under common law deviating carrier is reacted such as he made a fundamental breach of the contract of carriage. The party who relies on the exemption clause was protected if he was performing his contractual obligations under the principle of the contract namely, within four corners of the contract[168] or shall be convenient to 'the main object and intent of the contract'[169]. Scrutton analyzes whether deviation affects the contract as a breach of condition or it waives the contract as repudiation. He argues that if the former is the case then the contract will be still subsisting and therefore the shipowner will reserve his right to damages he will be able to rely on exceptions, if the latter is the situation then the contract will be repudiated and the contract will terminate so the owner will not be able to rely on exception clauses.[170] According to Gaskell whether the

[165] H.G. Beale,*Chitty On Contracts* (31st edn., Sweet & Maxwell, 2012) at para.14.021.

[166] [1962] 2 Q.B. 26.

[167] *Hain S.S. Co. Ltd. v Tate & Lyle (Hain v Tate)*, 1936 41 Com. Cas. 350; 55 Ll.L.Rep. 159. at p.182.

[168] Gibaud v Great Eastern Railway [1921] 2 KB 426

[169] Glynn v Margetson [1893] AC 351.

[170] Thomas Edward Scrutton, and Bernard Eder. *Scrutton On Charterparties and Bills of Lading: By Sir Bernard Eder ... [et Al.]*. (22nd edn, 2011, Sweet & Maxwell) at para. 12.013.

breach will strike down the clauses is an issue of the construction of the contract therefore a clearly expressed exclusion clause can apply to a breach.

1.6.4. *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale ("Suisse Atlantique")* [171]

In *Suisse Atlantique*[172] case the charterers caused delay during the loading and discharge. Shipowners sued them for demurrage which was at the rate $1000 a day and charterers argued that the bill of lading includes an exclusion clause about demurrage. Shipowners claimed that they cannot rely on the clause because they committed a fundamental breach of contract. House of Lords rejected the claim of the owners. The importance of this case is not related with its facts or final decision but with the reasoning. In the reasoning the concept of fundamental breach and its consequences on the exclusion clauses is very important. Lord Upjohn made a distinction between two notions of "fundamental breach" and "breach of a fundamental term". He held those are two different terms and that the fundamental breach goes to the root of the contract and whether a breach constitutes a fundamental breach depends on the construction of the contract and all the fact of circumstances of the case.[173] It was held the owners did not repudiate the charter and they were still bound by its provisions. The view that fundamental breach is the rule of law was rejected and it was accepted as a rule of construction.

Later on *Harbutt's Plasticine Ltd.* v. *Wayne Tank and Pump Co. Ltd.*[174] fundamental breach is accepted the as a rule of law. The Court of Appeal held that the defendant cannot rely on the exclusion clause because the breach of contract was so fundamental that the whole contract went, including the exclusion clause. The case was criticised firstly for having the duality of letting both the innocent party to cancel the case and the party in default to rely on the exclusion clause of the contract. Secondly it is argued

[171] *Suisse Atlantique Societe d'Armament SA v NV Rotterdamsche Kolen Centrale* [1967] 1 AC 361
[172] Ibid.
[173] Ibid at 363.
[174] [1970] 1 All E.R. 225; This case was about the installation of some equipment in factory manufacturing plasticine. The contract contained an exclusion clause limiting the recovery of damages to the value of the work. The defendant's negligence caused the plasticine factory to burn to the ground as a result of a fault in the equipment. The plaintiff sued the defendant for the loss and the question was whether the defendant could rely on the exclusion clause.

that, the decision has mixed the two quite separate concepts of "rescission *ab initio*" and "termination".[175]

But as the legal view was pro-rule of construction because of UCTA was clearly drafted explaining that innocent party could rely on the clause if reasonable in the contract even if he chooses to end the contract.[176] The legislation of UCTA and UTCC[177] has signified that exemption clauses shall not be invalidated by the common law. The advent of the UCTA and UTCC has meant that there is no need for a general common law doctrine to strike down exemption clauses.

1.6.5. Deviation and General Law of Contract Law

In *Photo v Securicor*[178] it was held

"Any deviation has always been regarded as a breach going to the roof of the contract and it was held in those earlier cases that if the consignor's goods were lost after there had been a deviation, the shipowner could not rely on clauses limiting or excluding his liability… The reasons for this varied […] but it was made clear in the speeches in this House in Hain v Steamship[179] case it was made clear that the there is no special rule applicable to deviation cases: the ordinary principles of law of contract must be applied."[180]

House of Lords suggested that the general contract law must be applied to doctrine of deviation. It has been emphasized that deviation should constitute a body of sui generis. Lord Reid continued that he cannot find any rule of law depriving the exemption clauses and therefore he cannot find any reason to keep fundamental breach as a rule of law but as a rule of construction. And he suggested that whether the clause will survive the breach will depend on the construction of the whole contract.

In *UGS Finance v National Mortgage Bank of Greece and National Bank of Greece SA*[181] Pearson LJ held that

"As to the question of "*fundamental breach", I think there is a rule of construction that normally an exception or exclusion clause or similar provision in a contract should be construed as not applying to a situation created by a fundamental breach of the contract. This is not an independent rule of law imposed by the Court on the parties*

[175] Op. cit. n. 38, p.25.
[176] Unfair Contract Terms Act 1977 section 22.A
[177] Unfair Terms in Consumer Contracts Regulation 1999
[178] *Photo v Securicor* [1980] AC 827.
[179] (1936) 41 Com. Cas. 350
[180] Ibid at 399.
[181] [1964] 1 Lloyd's Rep. 446

willy-nilly in disregard of their contractual intention. On the contrary it is a rule of construction based on the presumed intention of the contracting parties."[182]

As a summary, the House of Lords suggested constructional fundamental breach instead of substantial one. And it was held that the survival of exclusion clauses will depend on the interpretation of the whole contract and especially the intention of the parties.

1.6.6. The Abolition of Fundamental Breach

And the final point that any fundamental breach may cause destroying an exemption clause was decided in *Photo* case.[183] In the *Photo* case the doctrine of "fundamental breach" was abolished and the courts had to look to the specific meaning of the clauses. The Court held that the parties to contract may choose whether the exception clause would survive the deviation or not. Lord Wilberforce has held that whether a clause will be applied after the deviation shall be a matter of the parties' intention. Lord Diplock held that;

> "*since the presumption is that the parties by entering into the contract intended to accept the implied obligations exclusion clauses are to be construed strictly and the degree of strictness appropriate to be applied to their construction may properly depend upon the extent to which they involve departure from the implied obligations*."

In *Photo* case House of Lords held that substantial fundamental breach cannot prevail the contractual terms unless it is clearly stated and whether those terms apply depend on the interpretation of the terms.

However it is still a question whether the specific deviation doctrine shall be applied or it can be subsumed into the general post-photo production law of contract. According to Scrutton[184], Carver[185] and Mill[186] were against the Securicor case and they thought that the doctrine of deviation shall be applied instead of the general rule of contract law

[182] Ibid 453.
[183] *Photo v Securicor* [1980] AC 827.
[184] Op. cit.n. 72 at pp.261, 262.
[185] *Carver's Carriage by Sea* (13th ed., 1982), at para. 1194.
[186] Op. cit.n. 62.

whereas Debattista[187], Clarke and Coote[188] argue that the doctrine shall be assimilated into the general principles of the contract.

[187] Op. cit.n. 38 p.6; he asks why the law of general contract law shall not be applied even in Hain v case it was applied.
[188] Coote, *Deviation and the Ordinary Law. Lex Mercatoria: Essays in Honour of Francis Reynolds* (2000) LLP, Chapter 2, p.15

IV. Deviation in Hague and Hague-Visby Rules

In this part I will discuss the effect of the most commonly applied Conventions the Hague and Hague-Visby Rules on deviation and the consequences of a deviation in regard of these Conventions. Hague Rules are implemented to the UK law by Carriage of Goods by Sea Act 1924. Those Rules apply to the contract as constructional rules not on the wording of the Rules themselves. Whereas Hague-Visby Rules are implemented to the UK law by Carriage of Goods by Sea Act 1971. They may be incorporated into the contract by a clause paramount or by may apply by the statute. [189] Carriage of Goods by Sea Act (COGSA) 1971 s.1 (2) provides that the Rules will apply by "the force of law". Therefore the effect upon the Rules of an unjustified deviation will be the same as on any other contractual exemption or limitation clauses.[190]

Differently from deviation in common law, even if cargo owner chooses to repudiate the contract, and the contract between the parties collapses, the Statute needs to be applied by the parties.

4. Reasonable Deviation

Despite the deviation rule has been problematic since centuries, there is not an exact definition of deviation in the Rules. Hague-Visby Rules article IV (4) has widened types of justifications existing in common law. The Hague Rules defences include to save life and to save property and also any reasonable deviations are allowed,

> "*Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting there from*".

The key word here is reasonable deviation and its meaning can be understood from several cases. Reasonable deviation has been discussed in *Stag Line*[191], *Al-Taha* and *The*

[189] Carriage of Goods Act 1971 section 1(3) or 1(6) or Article X of the Schedule.
[190] Cooke, J. H. S. *Voyage Charters*. (3rd ed. 2007, Informa), p. 196.
[191] (1932) A.C. 328. In this case, the vessel was supposed to go from Swansea to Istanbul and two engineers were taken to the vessel in Swansea in order to repair the vessel but they could not finish their job on time and they missed the pilot. Therefore the vessel had to deviate in order to not to take two engineers abroad. The master increased a small risk and leaving the port but the vessel took the coastal route that highly increased the risk.

Product Star and *Thiess v Australian Steamships*[192] cases. In *Stag Line* case Lord Atkin held that deviation in order to land servants of the shipowner or others who could not be transferred to any incoming vessel is not reasonable. He added that a deviation which was made for the interests of the ship or for cargo or for the ship's passenger or the crew would be a reasonable deviation. [193]

Lord Atkin explained in the same case that

> "*The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain having in mind all the circumstances existing in the time, including the terms of the contract and the interests of all parties concerned but without obligation to consider the interests of anyone as conclusive*."[194]

Under Al-Taha[195] case, the deviation was made in order to get bunker and to repair booms damaged by heavy weather. The court expressed that in deciding about deviation, the intention of the shipowner is important. In cases where deviation was caused because of a storm or through the master's negligence, it was held that there would not be a deviation.[196] Gaskell argued that the intention of the shipowner would not change whether the new voyage has caused more risks.[197] And it was held that the deviation can be reasonable if it is planned before the voyage starts or bill of lading is signed and therefore there was a reasonable deviation in this case. In *The Product Star*[198] case it was held that in order to understand if the deviation is reasonable, facts such as the severity of risk taken by the owner, the length of the new voyage, the effect of the delay on the goods need to be examined in a detailed way. *Thiess v Australian Steamships* case the vessel carrying coal, with a specific liberty clause to bunker deviated in order to take on bunker. It was held that to take the bunker was not necessary for the voyage therefore the deviation was not reasonable within the meaning of Art IV rule 4 of the Hague-Visby Rules.

5. Quasi-deviations

[192] [1955] 1 Lloyd's Rep. 459.
[193] [1932] A.C. 328.
[194] [1932] A.C. 328 at p. 343.
[195] [1990] 2 Lloyd's Rep. 117
[196] *Stagline v Foscolo Mango* [1932] A.C. 328.
[197] Op. cit. n. 1, p.182
[198] *Abu Dhabi National Tanker Co v Product Star Shipping (The Product Star)* (No. 2) [1993] 1 Lloyd's Rep 397 at 405.

Unauthorized deck carriage is a classic form of quasi-deviation and it is a very old issue. Scrutton has argued that wrongful deck stowage was a type of deviation where a rule of construction is preferred. Reynolds define the quasi-deviation as 'another example of bad breach'.[199]

The issue of quasi-deviation has been discussed in cases *Scaramanga v Stamp*[200] and *Royal Exchange Shipping Co. v Dixon*[201]. In the latter case, the vessel brought the cargo on deck as opposed to the bill of lading which was ruled under Hague Rules. And when the vessel went aground the master jettisoned the cargo to get the vessel off. It was held that the master cannot rely on the jettison clause because there was a quasi-deviation. So the court has accepted the quasi-deviation as a deviation under Hague Rules.

In *The Berkshire*[202], where there was an exclusion clause in the bill of lading stating that the carrier would not be liable while the goods were not in the actual custody of the carrier. And the carrier, who had a deviation, caused the goods to get damaged and held liable of the damage since the clause did not mention the specific situation. The court used the constructional approach similar to *J. Evans v Andrea Merzario*[203] case where the goods were carried on deck. There was an oral assurance to importers from forwarders that the goods would be carried under deck. The court held that the oral promise does not prevail the printed clause therefore the importers cannot rely on the clauses. The fact that the courts deal with the severe issue of quasi-deviation under the general contract law is interpreted as the courts would decide the deviation cases under the general law of contract too.[204]

Under the Eugenia case it was held that because the route that the master is supposed to take becomes obstructed at the moment, the owner may be obliged to take the route which is usual and reasonable at the time of the journey.[205]

[199] F. M. B. Reynolds 'The implementation of Private Law Conventions in English Law' in *Butterworth Lectures* 1990-1991 (London, 1992) at 50.
[200] (1880) 5 C.P.D. 295.
[201] *Royal Exchange Shipping Co. v Dixon* (1887) 12 App. Cas 11,18.
[202] [1974] 1. Lloyds Rep. 1985.
[203] [1976] 1 W.L.R. 1078.
[204] Op. cit. n. 2, p.93.
[205] The Eugenia [1964] 2 Q.B. 226; The Captain George K [1970] 2 Lloyd's Rep. 21

6. Deviation and Hague-Visby Rules' Exceptions and Limitations

I will discuss about the exclusions of the Rules; the list of exclusions in article IV (2); the one-year time-bar in article III (6); and the package and unit limitation in article IV (5). It is argued that in order to decide whether or not a deviating carrier can rely on the exceptions of the Hague-Visby Rules, the language of the Rules themselves shall be taken as reference and common law doctrine of deviation shall be disregarded. Since The Rules have force of law and The Rules have not mentioned anything that the carrier would lose its right to benefit from the exceptions, the carrier will be able to benefit from the time bar and package limitation provisions even there is deviation falling outside of the Hague-Visby Rules Art IV (4). The reason behind it is the language of the exception provisions; in Art III (6) the wording "whatsoever" is added and in the Art IV (5) the right to limit where there has been the wilful misconduct on the part of the carrier or ship is removed. But the Rules will not apply if consequences of the deviation arise from the termination of the contract not from the construction of the provisions of the contract.[206] The exceptions and limitations of Hague-Visby Rules will be applied as a statutory provision and will not be affected by the deviation.

The Antares[207] is a case of unauthorized carriage of the cargo on deck, namely quasi-deviation. It was analogous to deviation cases in the meaning of limitation and exclusion clauses. There is not any definition of quasi-deviation in this case. The cargo was carried from Antwerp to London and the bill of lading was governed by Belgian law and there was a clause stating that the Hague-Visby Rules shall apply. The cargo was carried unauthorizedly on deck and arrived damaged and the cargo owner claimed damages to the Mediterrenean Shipping Company because they thought that they were the owner. After 1 year and 2 days of the discharge of last cargo MSC explained that they are not the owner. And the plaintiff claimed to the owner who in response told that the time bar has expired. Cargo owner replied that they are in a fundamental breach by stowing the cargo on deck therefore they cannot rely on the time bar clause. In common law the decision would be like this. But because COGSA 1971 s.1 (2) have the force of law, Court of Appeal held that the owner was entitled to rely on time bar exclusion clause of Hague-Visby Rules Art. III.6. This means that exemptions or limitations applicable to the carrier do not arise from the contract but from the force of statute so

[206] Baughen, Simon. *Shipping Law*, (5th edn., 2012, Routledge), p. 90.
[207] *Kenya Railways v Antares, The Antares* [1986] 2 Lloyd's Rep 633 [1987] 1 Lloyd's Rep 424.

they can survive deviation. So whether the clause survives deviation depends on the construction of the Statute where Lord L.J. held that;

> "*Whatever may be the position with regard to deviation cases strictly called, (I would myself favour the view that they should now be assimilated into the ordinary law of contract) I can see no reason for regarding the unauthorized loading of deck cargo as a special case. The sole question therefore whether on its true construction Art. III (6) applies*."[208]

There is not any case lastly applied to deviations but it is assumed that if this case is applied to quasi-deviation, this would also be applied to deviations.

The Chanda[209] the carrier who stowed the cargo on deck with authorization could not rely on the package limitation of Hague-Visby Rules (Art IV rule 5) because the clause was construed by reference to the "four corners" rule. Unauthorized deck stowage was not a type of deviation but Hirst J held that as a matter of construction the carrier could not rely on the clause. The case was overruled *The Kapitan Petko Voivoda*[210] where the carrier has committed a serious breach of contract by carrying the cargo on deck without authorization. Lloyd and Longmore LJJ explained that 'the deviation cases should now be assimilated to the ordinary law of contract'.[211] Also Court of Appeal members of *Kapitan Petko Voivoda* generally agreed with Longmore.[212]In *The Antares*, the court emphasized that Art. III.6 discharged the carrier from all liability "whatsoever" after expiry of the time-bar while in Art. IV 5 of Hague-Visby Rules which about economical limitations of the carrier there is a wording "in any event" which meant "in every case" so the charterers were entitled to limit their liability.[213] In *Kapitan Petko* the decision in *The Antares* was overruled.

Under article IV r.2 (a) in Hague and Hague-Visby Rules, a master who decides to sail on a longer route than one preferred by cargo interests may well be protected by the

[208] [1987] 1 Lloyd's Rep. 424, 430.
[209] *Wibau Maschinenfabrik Hartman SA v Mackinon Mackenzie & Co (The Chanda)* [1989] 2 Lloyd's Rep. 494.
[210] *Daewoo Heavy Industries Ltd.v Klipriver Shipping Ltd (the Kapitan Petko Voivoda)* [2003] EWCA Civ; [2003] 1 All E.R. (Comm) 801
[211] *The Antares* 424, 430.
[212] *Daewoo Heavy Industries Ltd.v Klipriver Shipping Ltd (the Kapitan Petko Voivoda)* [2003] EWCA Civ; [2003] 1 All E.R. (Comm) 801, at 13 -14.
[213] Op. cit. n.43, p.192

error in navigation defence. *Whistler International Ltd v. Kawasaki Kisen Kaisha Ltd (The Hill Harmony)*[214]

Hague-Visby Rules Art III r 8 makes null and void any clause excluding or limiting the obligations imposed by the Rules. Where the Rules do not apply, under common law, such clauses are valid. The Court may use the construction rule to the clauses.

Rasmussen argues that under Hague and Hague-Visby Rules, it is not implicit whether the national doctrine of deviation and particularly the doctrine of unreasonable deviation which deprives the liability of the carrier will continue to apply.

He mentions that Gaskell is not certain about the it and he adds that Hague-Visby Rules provides the carrier to retain its rights of one year time prescription under art III (6) and limitation of liability under art IV(5) by the wording 'in any event'.[215]

Hague-Visby Rules may apply by virtue of incorporation or by the rule of law. If it applies by the virtue of incorporation, the destiny of the exception clauses will depend whether the old cases or post-Securicor analysis will apply. If the old cases' analysis would apply then the contract will be terminated by repudiation and therefore the exclusion in article IV (2) will go with the contract and time and package limitations would also go with the contract even if they apply 'in any event'. On the other hand if the post-*Securicor* analysis would apply then exceptions would survive the deviation. Art IV (2) would exclude the liability if the construction of the clause allows and the other time and package limitations will exclude the liability. Whereas if the Rules apply by force of law the situation will be similar to post-*Securicor* analysis; all of the exclusions would survive.[216]

[214] [1992] 2 Lloyd's Rep. 209
[215] Ibid, p.134.
[216] Op. cit n.38, p.8

V. Deviation under Hamburg Rules

Hamburg Rules do not have specific rule dealing with the deviation but include a specific article for unauthorized deck cargo.[217] Therefore the issue of deviation is not clear in Hamburg Rules either. The Rules contain a provision about non-liability for loss, damage, or delay in delivery resulting from life-saving measures or from reasonable measures to save property at sea. Therefore because there are not any specific rules about deviation, this rule must be applied to the liability of the carrier. So the only reference is made in Article 5(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"

In Hague and Hague-Visby Rules, the deviation rule is regulated expressly whereas in Hamburg Rules it is not express but implied from the wording of the article. Under this article of the Hamburg Rules the carrier shall not be liable of loss, damage or delay in cases where he tries to save life at sea. On the other hand when the loss, damage or delay results from measures that the carrier seeks to save property, the Rules exclude liability only in reasonable situations. As a summary, the carrier will not be liable at any measure in cases where he causes loss, damage or delay in order to save life at sea and he will not be liable at reasonable measures to save property at sea.

Therefore if the charterparty is ruled under Hamburg Rules, whether P&I Club excludes the liability of deviation is an important issue because there are situations where the shipowner will be held liable of deviation. Therefore if P&I Club do not want to compensate damage or loss caused by deviation, it is better to exclude the liability of deviation from the P&I Cover.

[217] Hamburg Rules Article 9, under which carriage on deck contrary to agreement would fall outside the protection of the Rules.

VI. Deviation under the Rotterdam Rules

Deviation rule becomes finally clear with the Rotterdam Rules. The works for Convention on Contracts for International Carriage of Goods Wholly or Partly by Sea ("the Rotterdam Rules") is a piece of work almost for 20 years. During the period of the preparation of the Rotterdam Rules; in the first draft a provision similar to the Hague-Visby Rules Art IV (4) was added which became later Art 24[218] is a specific rule to deviation;

> 'When pursuant to applicable law a deviation constitutes a breach of the carrier's obligations, such deviation of itself shall not deprive the carrier or a maritime performing party of any defence or limitation of the Convention, except to the extent provided in article 61[219]'.

In the second draft there has been no substantial change[220]. Therefore Rasmussen explains that the meaning and application of the provision must limit the scope of the national rules, in other words in a case of deviation causing a breach, the effect of the deviation can only be consistent with the provision Rotterdam Rules.[221] Berlingieri agrees with this statement and explains that in case of deviation any rule provided by the applicable national law conflicting with the Rotterdam Rules will be inoperative and also that from the purpose of the provision it is understood that it is aimed to avoid that the liability regime of deviation is displaced by national rules.[222] Rasmussen indicates

[218] Article 6.5(a), Deviation in annex entitled Draft Instrument Transport Law to UN Doc. A/CN.9/WP.21 (cited: 'WP.21). It provided: 'The carrier is not able for loss, damage or delay in delivery caused by a deviation to save or attempt to save life or property at sea, or by any other reasonable deviation.'

[219] Art. 61; Loss of the benefit of limitation of liability: '(1) Neither the carrier nor any of the persons referred to in article 18 is entitled to the benefit of the limitation of liability as provided in article 59, or as provided in the contract of carriage, if the claimant proves that the loss resulting from the breach of the carrier's obligation under this Convention was attributable to any personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result. (2) Neither the carrier nor any of the persons mentioned to in article 18 is entitled to the benefit of the limitation of liability as provided in article 60, if the claimant proves that the delay in delivery resulted from a personal act or omission of the person claiming a right to limit done with the intent to cause such loss or recklessly and with knowledge that such loss would probably result.

[220] The first paragraph was deleted and the second paragraph was amended. This suggestion of change appeared as a footnote in A/CN.9/WG.III/WP.32; footnote 112 at page 33 reads as follows:
Alternative language for this paragraph could read as follows: "Where under national law a deviation of itself constitutes a breach of the carrier's obligations, such breach would not deprive the carrier or a performing party of any defence or limitation of this instrument." If such language is adopted, the Working Group may wish to consider whether paragraph 1 is necessary.

[221] U.L. Rasmussen The Rotterdam Rules 2008 Chapter 6 p.135

[222] F. Berlingieri, An analysis of two recent commentaries on The Rotterdam Rules (Il Dritto Marittimo, I-2012) p.23.

that the article only says that 'a deviation shall not deprive the carrier of any of the defence or limitation of the Rotterdam Rules' and he adds; except to the extent that art. 61does not cause to lose the right of liability.[223] Rasmussen explains that the meaning of 'any defence' in the provisions means defences under art 17 which is 'the carrier's possibility to be relieved of liability in the case of measures to save or attempt to save life at sea or in the case of reasonable measures to save or attempt to save property at sea'.[224] Lastly it is submitted that in order to be liable of deviation there has to be causation between the deviation, loss, damage or delay under Art. 17.[225]

So according to this provision, the carrier is protected by the defences and limitations of the Rotterdam Rules even if the deviation did not cause any loss. Thus in case that the charterparty is governed by the Rotterdam Rules, P&I Clubs shall not worry about the liability of the deviation because in case of a breach caused by deviation the shipowners will be able to rely on the exclusion or limitation clauses of the Rules.

[223] Op. cit. n.122, p. 133-150.
[224] Op. cit. n.122 p.135 fn 11: article 17 (3)(1) and (m).
[225] Ibid p.136.

VII. Conclusion

In my project I tried to discuss whether P&I Clubs who carry the liability of the shipowners shall exclude the liability of deviation or not. The liability of deviation is important in the meaning of its severe consequential loss.

During the period between *David v Garett* and *Balian v Joly Victoria and Co*[226] whether the loss has occurred before or after deviation, or whether the loss is caused by the deviation, the rule prevented the owner to rely on the exception clauses. Therefore the deviating carrier had to suffer the high cost of the deviation. Between the period of 1890-1936 the deviating carrier's situation became better with the effects of *Thorley* and *Balian v Joly Victoria and Co*[227] while the judges continued to decide that the deviating carrier cannot rely on the exclusion clauses.[228] After *Balian* case, deviation advanced to a more radical approach. The carrier who deviates has become the common carrier and could rely on common law defences only if the loss has occurred before the deviation in condition to prove that the loss would have occurred even if the deviation did not occur.

An owner who makes an unjustified deviation makes a fundamental breach of contract. The answer whether this fundamental breach is a condition or a warranty will lead us to the answer whether the owner may rely to exclusion clauses. This issue has been modified through the cases.

Later on the with *Hain v Tate case* the doctrine of deviation shifted to a different level. It opened the door to the deviating carrier to rely on the exclusion or limitation clauses even if damage or loss has occurred. With this case the fundamental breach has born. It was held that deviation was a fundamental breach. The cargo owner may choose to waive or to repudiate the contract. If the cargo owner chooses to waive it, the contract substitutes and the deviating carrier may rely on the exclusion clause of the contract and his liability will not be so high and relatively P&I Clubs will not suffer of the indemnity of the owners.

[226] *Balian & Sons v Joly, Victoria & Co Ltd* (1890) 6 TLR 345.
[227] Ibid.
[228] Op. cit.n. 42, p.12

Later in *Photo v Securicor* case it was held that doctrine of fundamental breach and its application as a rule of law shall be abolished and the general principles of contract law and the rule of construction shall be applied. And *The Antares* the rule of construction was applied to quasi-deviation cases, as was held in *Kapitan Petko* which were not about the geographical deviation but the quasi-deviation which is a type of the deviation

As a nutshell there are two analysis of the deviation doctrine; application as rule of law or rule of construction. This is still an unknown issue but I think that even the last quasi-deviation cases will lead the future cases related to geographical deviation shall fall within the general law of contract. The Courts will decide in the light of the last cases and the owners will be able to rely on the exclusion clauses.

I think that the deviation doctrine shall be included in the general law of contract instead of having its special rule because it causes unfairness. The innocent party may not rely on the exclusion clauses. Therefore, if deviation would fall within the general contract law rule, the innocent party would be able to rely on the exclusion clauses. And P&I Clubs would not worry about the indemnity of the shipowners under deviation.

Whereas in the Hague-Visby Rules the survival of the exclusion clauses depend on the application of the Hague-Visby Rules. If the Rules apply by rule of law; the innocent party will be able to rely on the exclusion clauses but if the Rules apply by the incorporation the situation depend whether the traditional approach or post-Securicor will be applied. In cases that the traditional approach applies, depending whether the party chooses to waive or to repudiation the situation will change. If they repudiate then the deviating carrier may not be able to rely on the exclusions clauses but he will be able to rely on them in the post-Securicor approach.

In Hamburg Rules the situation is not clear because there is not a specific rule governing the deviation. Whereas In Rotterdam Rules the party will be able to rely on the exclusion clauses under article 24.

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