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DEVIATION IN ENGLISH, AMERICAN AND FRENCH MARITIME LAW *

"...the truth being that the Rules completely ignore a crucial feature of the legal problem which deviations and deviation clauses raise".

TEMPERLEY

I

In the naval science great importance is attached to the deviation of the compass. This has been described as the horizontal angle through which a magnetic needle is deflected away from the magnetic meridian by the counter-attraction of the ship's iron [1]. Similarly to other terms which have been used in different sense, the word deviation has acquired several meanings and has significance not only in the naval, technical science. No less is its position in the law, in legal science. For centuries far-going legal consequences have been attached to deviation in the maritime laws of sea-faring nations.

Like other legal concepts, the concept under the term „deviation" had throughout its long history various scope and content. It has its origin and course of development, it performed important function in the law of carriage of goods by sea. Its „curriculum vitae" shaped by the economic needs of sea trade, by conflicting interests of the sellers, carriers, insurers, bankers, buyers presents undoubtedly one of the fascinating topics for historical investigation. For the research digging beneath the surface of the legal term into its economic and social background.

* This paper was submitted on April 29, 1958 at the Harvard Law School to Professor Harold J. Berman in the Seminar on Legal Problems of International Trade in Satisfaction of the Requirements of that Seminar.

[1] Cf. e. g. *Encyclopedia Britannica*, Vol. 6, p. 173; vol. 7, p. 283.

Its background deserves certainly scholarly investigation. Deviation had great importance when the sailing ship ruled the seas. And when the steam and motor overcame the clipper, deviation did not loose its weighty significance in the maritime adventure. The modern ship still deviates. Indeed, fruitful results await the research directed to discover what, how, when and why created the concept of deviation, and how in turn this concept served and influenced its "forces créatrices de droit". How doing so in its own country, it, not infrequently, drew from and gave to the sources of law of external provenience.

Naturally, the method suggested above, very difficult but most desirable for widest possible illumination of the concept under research, for thorough understanding of its present from its past, and its future from its present status — obviously such method would lead to a weighty book on deviation. Project of this kind cannot be embarked upon within the limits of the present paper. Or let us put it frankly: We are not able to achieve now this admirable goal.

Therefore, with the limited means at our disposal we propose to organize the work on deviation before us in the following way: The discussion will be conducted within the scope of the respective provisions of The Hague Rules. More specifically, we shall attempt to consider the topic in the light of the rules on deviation adopted in the Brussels Convention of 1924 — the International Convention for the Unification of Certain Rules Relating to Bills of Lading — and in its, more or less reliable, "photographs" which may be found in the legislative acts put into effect in the states indicated by the title of this essay.

The law of sea carriage, then, will be the main scene of our endeavour. But this is not the end of the story. Deviation has also its room in another large area of maritime law — in the law of insurance. This is taken into account here and, besides the law of carriage, on the second scene, so to speak, we try simultaneously to throw light on the insurance department. In this way we hope to present a look at the large scope of this paper clearly suggested by its title We hope so with consciousness that second and third look would be needed to do the work aright.

The discussion will be divided into three parts representing the respective countries and will be conducted along the path of the legislation referred to above as well as selected judicial decisions and doctrinal reasoning. It will revolve around three main aspects of the problem under examination. These are: (1) What is meant by deviation, (2) When deviation is reasonable or justifiable, (3) Consequences of unjustified deviation. At the end some comparative conclusions will be

formulated. In short, the plan we have embarked upon is composed of the following chapters: I. Introductory remarks; II. English maritime law; III. American maritime law; IV. French maritime law; V. Conclusions.

II

1. The British "photograph" of the Brussels Convention, the Carriage of Goods by Sea Act, which received the royal assent on August 1, 1924 [2] provides in Art. IV, r. 4 that: "Any deviation in saving or attempting to save life, or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom. "It has been observed [3] that in addition to Art. IV, r. 4 provisions of Art. III, r. 2 and Art. III, r. 8 can also be considered as applicable to the route of the ship agreed upon in the contract of carriage".

Art. III, r. 2 states: "Subject to the provisions of Article IV the carrier shall properly and carefully load, handle, stow, carry, keep *care for* and discharge *the goods carried*". (Emphasis added) [4]. And Art. III, r. 8 says that: "Any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with goods arising from negligence, fault or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in these Rules shall be null and void and of no effect.

"A benefit of insurance or similar clause shall be deemed to be a clause relieving the carrier from liability".

The question has been put forward what is the relation between the provisions quoted and, in particular, what are the consequences of Art. IV, r. 4. It has been stated [5] that there are three possible standpoints in this respect. First, it may be held that any clause in the bill of lading

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[2] The text of the Carriage of Goods by Sea Act, 1924 is based on the Hague Rules amended at Brussels in October, 1923. The amended draft of The Hague Rules (first approved at The Hague in September, 1921) of October, 1923 differs somewhat — but not in respect of the rules concerning deviation — from the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading signed at Brussels on August 25, 1924 (Cf. Scrutton, *Charterparties and Bills of Lading,* 453 et seq. (16th ed. 1955).

[3] Scrutton, 1. c., 488.

[4] The qualification „Subject to the provisions of Article IV", is omitted in the corresponding Section 3 (2) of the American Act

[5] Scrutton, 1 c., 488.

which authorizes wider freedom to deviate from the geographical or customary route than the freedom defined in Art. IV, r. 4 is void by virtue of Art. III, r. 8. Second, one may consider that the parties have the capacity to agree on *any* contractual route; however, any clause, outside their definition of the contractual route, providing for wider freedom to deviate from the contractual route than the freedom defined in Art. IV, r. 4 cannot be relied upon by them. Third, it is possible to assume that the freedom to deviate defined in Art. IV, r. 4 should be considered as an addition to the freedom of the carrier authorized in the bill of lading, irrespective of whether the freedom so authorized is expressed in the definition itself of the contractual route or not.

The first viewpoint is simple and finds support not only in Art. III, r. 8. It is supported sufficiently, it seems to us, by strict interpretation of Art. IV, r. 4 itself and by application of arg. a contrario. Such an approach to Art. IV, r. 4 seems to be proper because it is an exception in favour of the carrier, an exception to the provision of Art. III, r. 2 the provision which in all probability has the character of a provision iuris cogentis. And an exception to the provision of such kind should be treated as a special rule, rule which also falls under the category of ius cogens and cannot be replaced or modified by a contrary clause agreed upon by the parties.

The first approach has also the virtue consisting in that it unifies the rules applicable to the bills of lading and therefore realizes one of the objectives of the Convention and the Act. However, the courts in England have not accepted it and have treated deviation clauses or liberty to call clauses going beyond the scope of Art. IV, r. 4 as valid. [6].

The second viewpoint is, according to Scrutton, defensible from the logical point of view because, he says, "deviation" can only mean departure from the route contracted for [7]. He adds, however, that ado-

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[6] Cf. Scrutton, 1. c., 488 and cases cited therein: Stag Line v. Foscolo Mango (1932) A. C. 328 Foreman and Ellams v. Federal S. N. Co. (1928) 2 K. B. 425.

[7] Scrutton, 1, c., 488. The author points to the loose usage of the term „deviation" and the phrase „permissible deviation". The ship proceeding from A to B — this is his example — may pursue a route which differs from both — the direct route between A and B and the route between A and B which has been contracted for. Frequently the direct route is the route which has been contracted for. The author stresses with justification that deviation takes place only when the ship departs from the route contracted for. Often it is said that there is a „permissible deviation" in case where there is a departure from the direct route, although it is in accordance with the route contracted for. The author points out that in such a case there is no deviation at all, and says that the criterion of deviation or, as he puts it, „the Via" that is material is that which is agreed by the contract of the parties". Scrutton, 1. c., 302.

ption of the second viewpoint may result in rather artificial solutions. These would be based on whether or not the bill of lading contains such phrase as „shall be deemed to be part of the contractual voyage".

It seems to us that the formulation itself of the second viewpoint raises certain objections and affords ample possibility for artificial results. According to it: (a) the parties can give any definition of the contract route whatsoever but (b) they cannot rely on the clause which is not in the definition of the contract route and goes beyond the scope of the freedom to deviate defined in Art. IV, r. 4.

Now, it seems to us that if „the "via" that is material is that which is agreed by the contract of the parties", the decisive question is which "via" is agreed. Is it reasonable to assert that the "via" in the clause which is not in the definition of the contract route, the clause beyond the scope of Art. IV, r. 4 is not agreed? Positive answer to this question would mean that the said clause is not only outside the definition of the contractual route but also outside the contract itself. Such answer seems to be unacceptable. Once we say that the parties are free to define whatever route they like, we should take into account all clauses of the bill of lading concerning the route and in the light of all of them decide where the contractual route runs. This means that when wide freedom of the parties is assumed, we are against the discrimination between the definition of contractual route and the clause not contained in the definition.

We think that the clause in question should be treated as being right within the definition. And it should be so just because the parties agreed to the said clause in the same way as they agreed to the original definition and they were entirely free to so agree. We have to stress, however, that we reach this conclusion as a logical consequence of the assumption of the second viewpoint. If asked which viewpoint should be recommended for application we would vote for the first. It has the virtues referred to above and, moreover, what is not less important, it aims at protection of both parties [8]. Whereas the second

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[8] After having written these remarks we found in Temperley, *Carriage of Godds by Sea Act,* 1924, 74-76 (ed. 1927) some sound statements on the subject. In fact he advocates the first view, although — as he says — it „...may seem forced and artificial". The second view, in his opinion, leads to the conclusion that any deviation clause in the bill of lading is possible. And he has this to add: „This would be in flat opposition to the general policy of the Rules to impose a statutory minimum of responsibilities and liabilities and a maximum of rights and immunities upon the carrier".

It would seem almost better to adopt the view outlined above, on pp. 74,75 [reference to the first view] as to the effect of Art. III, Rule 2, in spite of its apperent artificiality; *the truth being that the Rules completely ignore a crucial*

viewpoint may tempt the carrier — and it does in practice — to dictate hard conditions to the shipper.

But the conclusion at which we have arrived in the preceding remarks brings us straight into the heart of the third viewpoint. In effect what we have attempted to recognize, rightly or wrongly, as the logical conclusion of the second view, of the second viewpoint's assumption, is envisaged in the third view [9]. It is because the third view treats expressly any freedom to deviate, agreed upon in the contract of carriage incorporated in the bill of lading, irrespective of whether it be contained in the definition of contractual route or not — as validly conferred on the carrier. Consequently, according to the third view, the legislative freedom allowed by Art. IV, r. 4 is additional to the freedom agreed upon in the contract of carriage. And in consequence the carrier is happy as a King. He has all rights and almost no duty.

It has been stated that in the light of existing judicial decisions it is impossible to say with accuracy which view has been accepted by the courts. And it has been submitted that the second view is the best [10]. This approach, as has been pointed out before is favorable to the carrier. When we add to it the circumstance that there is no concept of constructive deviation [11] in the English maritime law, the conclusion follows that the English carrier has better place in the law of carriage than his American brother.

2. Let us now proceed with the foregoing remarks about interpretation questions, to the consideration of some aspects of the British

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feature of the legal problem which deviations and deviation clauses raise." (Emphasis added).

Consistently with the second approach giving the parties or rather the carrier full freedom to define the contractual route, the Chamber of Shipping, have adopted the following deviation clause: „The vessel shall have liberty to sail without pilots, to call at any ports, in any order, for bunkering or other purposes, or to make trial trips after notice or adjust compasses all as part of the contract voyage". Temperley observes that the phrase „all as part of the contract voyage" „...suffices to render valid any deviation clause in any terms whatsoever." (l.c., 76).

[9] This reminds us that „the exclusive pursuit of the analytical method in dealing with legal conceptions always leads into some strait of this kind [where such elements of contract as proposal and acceptance cannot be clearly distinguished], and if the pursuit be obstinate, lands us in sheer fictions." (Pollock, *Principles of Contract* 7, 10th ed. 1936).

[10] Scrutton, l.c., 489.

[11] „The English authorities, by which the whole doctrine of deviation was developed, have never hinted at such a thing [constructive deviation]..." See Griffin, *The report of the Chairman of the Association of Average Adjusters of the United States for 1932*, p. 2229 (1932). We shall dwell upon this kind of deviation in the American part of our work.

carrier's obligation. In particular, let us attack what is called "usual and reasonable route" [12], reasonable deviation from that route and — last not least — the consequences of unreasonable deviation.

One of the implied obligations of the carrier, if there is no express contractual stipulation to the contrary — says Scrutton — is that the carrier's ship "...shall carry out the voyage contracted for without unjustifiable deviation". (cit. omit.) [13]. The anti-deviation obligation is implied in all contracts for the carriage of goods by sea [14]. The carrier is obligated to proceed "by a usual and reasonable route without unjustifiable departure from that route and without unreasonable delay" [15].

Now, what definition do the English propose for "usual and reasonable route"? First of all, if no course of voyage is prescribed in the contract, the direct geographical route is a "usual and reasonable route". However, the carrier is allowed to prove, if express provisions of the contract do not say otherwise, that different route is usual and reasonable. He may support his proof by the argument that the class of his ship and the time of voyage impose upon him the duty to elect or at least justify the election of a course differing from the direct geographical course. But the contract, frequently if not usually confers on the carrier the authority to call at ports located off the usual route [16]. Nevertheless, the terms of the contract conferring such authority have been measured by the courts with the aid of the principles of interpretatio restrictiva, and not extensiva, in other words, despite their sympathy for the carrier, the courts, by and large, were against an unlimited carrier's authority to depart.

The foregoing statement may be illustrated by the following example: The bill of lading conferred on the carrier "liberty to call at any ports in any order and to deviate for the purpose of saving life or property", and the voyage was from Fiume to Dunkirk. It goes without saying that the above clause gave the carrier practically an unlimited autho-

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[12] Scrutton, l.c., 295.

[13] Scrutton, l.c., 95.

[14] Other implied undertakings by the carrier are: that the ship is seaworthy (this undertaking is not binding under the Carriage of Goods by Sea Act, 1924. According to the Act, the carrier undertakes to exercise, before the voyage and at its beginning, what is called due diligence in order that the ship be seaworthy. This shows that the English Act enlarges, with regard to seaworthiness, carrier's privileges in the same way as the 1936 American Act does); that the ship shall commence and carry out the voyage described in the contract with the so-called reasonable diligence.

[15] Scrutton, l.c., 295.

[16] For examples of clauses in this direction introduced into charters and bills of lading, see Scrutton, l.c., 300, 301.

rity to deviate from the usual route and that it was imposed on the shipper who, in all probability, had no choice but to agree to it. Relying on this hard clause, the carrier departed to Glasgow on his own business. Owing to a storm in the Clyde the carrier's ship was lost.

The court decided that, despite the broad language of the clause, the carrier was not authorized to go up to Glasgow, but only to the ports in the usual course of the voyage. The court ruled that the carrier was liable [17]. It has been observed with justification that — interpreting such clauses as the above — the court will carefully follow the general principle that the chief purpose of the contract must not be defeated [18].

The preceding observations carry us straight to the question — unanswered expressis verbis by the British Act (and American as well) — what is a deviation from the legal point of view. Scrutton defines it in the following words [19]: „Unjustifiable departure from the contract route unless involuntary (e. g., resulting from error of judgment as to route) constitutes a deviation. (cit. omit.). Another writer [20] puts forward the following formula: "the essence of deviation is the voluntary substitution of another voyage for the contract voyage" [21]. Temperley says that "a deviation may be defined as a departure from the route by which the carrier has expressly or impliedly contracted to carry the goods" [22].

The second definition, used in Payne, would not, it seems to us, be acceptable to Arnould. Arnould draws a clear distinction between deviation and change of voyage. He says in particular these words: "The great distinction between a deviation and a change or abandonment of voyage is that in the former the original voyage, as described in the policy, is not given up or lost sight of, while in the latter it is" [23]. He supports his view with Kent's definition which we like to quote in this place despite its American whereabouts.

"A deviation is — says Kent [24] — not a change of the voyage but of the proper and usual course of performing it. The voyage insured

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[17] See Leduc v. Ward (1888), 20 Q.B.D. 475; see also Payne, *Carriage of Goods by Sea* 59 (5th ed. 1949); see Scrutton, l.c., 296

[18] Payne, ibidem.

[19] L.c., 296.

[20] Payne, l. c., 60.

[21] This, as we shall see later, is not precise since it does not distinguish between deviation sensu stricto and the change of voyage.

[22] L.c., 74.

[23] Arnould, *On the Law of Marine Insurance and Average,* Vol. I 374 (13th ed. 1950).

[24] 3 Kent Com. 317; quoted in Arnould, l.c., 374, 375.

is never lost sight of in cases of deviation, actual or intended. If, however, the original place of destination be abandoned, in order to get to another port of discharge, the voyage itself becomes changed because one of the termini of the voyage is changed. The identity of the voyage is gone, and a new and distinct voyage is substituted".

3. It will be agreed that the crucial feature of the above definitions, even if not expressly indicated in them, is the question of reasonableness of deviation. If deviation is reasonable or justified, then — this is clearly spelled out in Scrutton's wording — it loses its essential characteristic and the consequences, which will be described at a later stage, are immaterial. What is actually meant by justifiable or reasonable deviation? Art. IV, r. 4 of the Act adopted in Britain uses the concept of "reasonable deviation" (Its French counterpart, as we shall see in due course, does not) and says that such a deviation is allowed. It seems to us that two answers deserve particular attention.

Scrutton says [25] that "whether a deviation is reasonable or not is a question of fact for the court, which must be decided in the light of all the circumstances of the case. "(cit. omit.)" The true test seems to be — declares Lord Atkin in Stag Line v. Foscolo Mango [26] — what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned, but without obligation to consider the interests of any one as conclusive". The Stag Line v. Foscolo Mango case is illuminating and it will be worth presenting its facts [27].

The S. S. Ixia had received at a Welsh port a cargo of coal to be delivered at Constantinople. Two men, employees of the manufacturer of a fuel economiser supplied to the ship, boarded her in order to operate the said economiser. These men were to be left at the pilot station. However, they were not left as intended; they were landed at a port further along the coast. After landing them the ship sailed along the dangerous coast, instead of returning immediately to the normal course. Sailing in dangerous waters she stranded and was lost.

It was found that the carrier was liable for the loss, but there was no certainly as to the ground of the decision. The charterparty and bill of lading were examined by the court, with a view to finding out a clause which would justify the ship's departure. No justification was found in these documents. Thereafter the question was considered

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[25] L.c., 489.

[26] (1932) A. C 343.

[27] (1932) A. C. 328; cf. Poor, *American Law of Charter Parties and Ocean Bills of Lading* 191 (4th ed. 1954).

whether the ship's deviation could be recognized *as reasonable* in the light of the British Act. There was no agreement on this point. Some judges held the view that the carrier's calling at a port further along the coast was reasonable, that, however, sailing along the coast after the men were landed was unreasonable deviation. Other judges, their minority, were of the opinion that the carrier's call at the said port was in itself an unjustifiable deviation. We think that the minority's view is more in accord with the 1924 Act than the view accepted by the majority.

In the Teutonia case [28] a German ship was bound for Dunkirk. She called, however, at Dover because of a report that war broke out between Germany and France. Although declaration of war took place three days later, the court ruled that deviation to Dover was reasonable [29].

Another case [30]. A general ship [31] received goods at Swansea and was to proceed from Bristol to New York. She called at Queenstown after having suffered damages through bad weather. Her cargo was damaged too. The captain informed the shipowners at Bristol about the situation. They ordered him to go back to Bristol. The cargo owners were not notified by the captain. The ship and cargo were lost in the Avon owing to a peril enumerated in the bill of lading exceptions. The owners of the cargo filed a bill against the carrier for loss on a deviation. The proof was supplied that the ship's refit could be made at Queenstown, but the cargo could not be repaired there. It was proved also that both ship and cargo could be repaired at Swansea and that it was possible to sell cargo there. Lastly, there was a proof that at Bristol the ship's repair could be made with advantage and cargo could be sold.

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[28] (1872) L.R. 4 P.C. 171; see also Payne, l.c., 60.

[29] Similar case quoted in Berman, *Cases and Materials on Legal Problems of International Trade* (mimeo) 37 et seq. (1954). The case is Comptoir d'Achat et de Vente du Boerenbond Belge, S.A., v. Luis de Ridder, Limitada. (House of Lords, 1949) 82 Lloyd's List Law Reports 270 (1949). The ship carrying the cargo from Bahia Blanca to Antwerp was directed by the carrier to Lisbon because while she was at sea in May, 1940 the Germans invaded Belgium. Deviation to Lisbon was not subject to controversy. There seems to be no doubt that it was reasonable under the circumstances of the case at bar.

[30] Taken from Scrutton 305, 306; interesting cases ibidem, 302-305.

[31] „i.e. a ship which is used for the carriage of the goods of several merchants who may desire to have them conveyed by her, and which is not employed for the carriage of a charterer's goods only." See Stevens' *Elements of Mercantile Law* 450 (11th ed. 1950 by J. Montgomerie).

It was not certain, however, whether the cargo could be repaired at Bristol.

According to the opinion of the jury the deviation was reasonable. The C. A. shared this opinion and ruled that it was not necessary to inform the owners of the cargo and have their sanction [32].

In Frenkel v. Mac Andrews case [33] the plaintiff's goods were shipped on the defendants' ship. They were to be carried to Liverpool, and to Bradford. The defendants operated more ships between Liverpool and Spanish Mediterranean ports. They used to call at Malaga either on the outward voyage or on the homeward voyage. They did not do that on both voyages. In the principal case they put into Malaga on the outward journey before sailing up the east Spanish coast.

The route to be pursued by any given ship of the defendants was advertized at Malaga in the local press, and in the principal case the plaintiff's agents were found to have known the route. The plaintiff's goods were lost owing to storm on the outward voyage between Malaga and Cartagena. He filed the bill demanding the value of the goods. The defendants thought that they were protected by the bill of lading exception clauses. The plaintiff insisted that the defendants were not entitled to bill of lading exceptions because their ship deviated from the contractual voyage. The Court ruled that the bill of lading did not define the terminus a quo of the voyage and its terminus ad quem. In view of this — the court held — parol evidence was permissible to explain what was the contractual voyage in the principal case. And it appeared from the evidence that the plaintiff's agents knew what route was planned in the case in question and had knowledge of the practice of the defendants' ships. The Court held in the light of this evidence that the route pursued by the defendants' ship was a customary route and consequently it was authorized by the contract of carriage.

The Court concluded that there was no deviation. However, the Court's decision raises some doubts with regard to the contract of marine insurance. It is not certain whether it is applicable to the insurance contract in the same extent as to the contract of carriage. "It is undoubted — says Arnould [34] — that a marine insurance policy must contain a description of the voyage insured sufficient to indicate clearly the *terminus a quo* and the *terminus ad quem:* otherwise the policy is void" (cit. omit.). In the light of this approach it seems reaso-

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[32] Phelps, James &. Co. v Hill (1891) I Q. B. 605. See Scrutton, l.c., 306.

[33] (1929) A. C. 545. See Arnould 387, 388.

[34] L.c., 388.

nable to assume that the description of the voyage in the principal case would not be sufficient for a marine insurance policy.

True, if the voyage insured is sufficiently described, it is permissible to prove what is usual and customary route on such a voyage [35]. However, the question remains open whether a more difficult proof than in the principal case would be required, i. e. a proof of usage or custom *sensu stricto* in order to establish the existence of the "usual and customary course" within the meaning of sub-section 46 (2) (b) of the Marine Insurance Act, 1906 [36].

Arnould observes [37] that "it appears doubtful whether an underwriter, not actually conversant with such a practice as was shown to exist in this case [the case stated above], can be bound by anything less than strict proof of custom and usage to accept the substantial alteration of the risk, which such a practice may involve".

The preceding review leads to the conclusion that two generalizations are possible with regard to the notion of reasonable deviation. First, deviation is reasonable if it is made for the safety of the voyage, for its successful prosecution. And the decision as to whether the prosecution and safety of the voyage require deviation from the contrac-

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[35] See Arnould, l c, 388 and the case cited therein.

[36] The Act became law on January 1,1907 Its full title is „An Act to codify the Law relating to Marine Insurance". This title constitutes a part of the Act and as such it may be helpful for the interpretation of the Act. Cf. Arnould, l.c 3. Section 46 of the Act reads as follows:

46 — (1) Where a ship, without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from liability as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy —

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from: or

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

And Section 47 of the Act says that:

47 — (1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to „ports of discharge", within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them, or such of them as she goes to, in their geographical order. If she does not there is a deviation.

[37] L.c. 388.

tual route belongs to the captain of the ship. His powers in this respect are considerably wide. Second, deviation is undoubtedly reasonable if it takes place with the intention to save human life. Since the adoption of the Act of 1924 it is also considered as justified if pursued in order to save property [38].

4. The result of unreasonable deviation in England — similarly to what we shall see in the American law — is displacement of the contract. This statement must be qualified by an important addition, namely that the displacement takes effect if the shipper, having knowledge of the deviation, will not affirm the contract.

If he will not, the carrier guilty of deviation is no longer entitled

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[38] Section 49 of the Marine Insurance Act, 1906 regulates the problem of reasonable deviation in the following words:

49 — (1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused —

(a) Where authorized by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(c) Where reasonably necessary in order to comply with an express or implied warranty; or

(d) Where reasonably necessary for the safety of the ship or subject-matter insured; or

(e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage, with reasonable dispatch.

As to the reasonableness of deviation, see e.g. Temperley's comment, l.c., 76,77. Also E. F. Stevens, Ocean Carriage 50 (1956).

For interesting comments to the provisions of Section 49, see Arnould, l.c. 409,410. The author argues convincingly that the term „deviation" implies the concept of space or locality that, therefore, it should not be used in the sense of delay — the notion relating to time. And he concludes that „...there is no need for the fiction that an unjustifiable delay amounts to a deviation. In the Mar. Ins. Act, 1906, deviation is not — he stresses — defined as including delay". (Ibidem, 372) Contrary approach to these notions seems to be favoured in Scrutton, l.c., 296). The writer says that „delay in performing the contract voyage may also constitute a deviation (cit. omit.), just as delay in carrying out the insured voyage may constitute a deviation under an insurance policy. And the writer — contrary to the 1906 Act and Arnould's interpretation — cites in support of the preceding statement ss. 48 and 49 of the said Act.

Scrutton's view seems to be shared in Carver, *Carriage of Goods by Sea* 501 (10th. ed. 1957), where it has been stated that „delay amounts to a deviation when it is such as to substitute an entirely different service from that contemplated

to the bill of lading exceptions. Consequently, he becomes an insurer of the cargo and even loses the common law exceptions granted to the common carrier [39].

On the other hand, if the shipper prefers, despite the deviation, to have the contract valid, the contract will not cease to be determinative of the rights of the parties. In such case, the shipper will be entitled to damages for any loss caused by deviation. The carrier, however, will be obligated to prove that the shipper has really chosen to treat the contract of carriage as valid. If he is not able to perform this obligation, the contract loses its legal effect [40].

As a striking illustration of the consequences of unreasonable deviation the case of the ship torpedoed by German submarine may be quoted. The ship deviated without reasonable cause and during deviation was hit by the torpedoe. The Court ruled, after having decided that the deviation was unjustifiable, that the carrier could not be protected by the common law exception. That he could not be excused by the fact that the loss was brought about by the King's enemies [41].

III

1. It has been observed in the American literature [42] that the concept of deviation was primarily a device in contracts of marine insurance. Its role and effects therein have been well characterized by

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(cit., omit.); it must make the voyage one different from the contract voyage (cit. omit)" But Carver concludes (501, 502); „But the term „deviation" is sometimes loosely used to describe any delay beyond the shortest reasonable time in which a voyage can be carried out." (cit. omit.)

In our humble opinion Arnould's view is better. All the more so because the „loose usage" of the term deviation has made an astonishing „progress". A striking illustration of this may be found in the concept of „quasi-deviation" (Carver, l c, 506, 507). This has been described in Carver, l c, 506, in the statement that „any breach of contract of so serious a character as to entitle the party aggrieved to treat it as repudiated and to rescind it has the effect of a deviation — unless it is waived it abrogates the exceptions clauses in the contract and puts an end to the contract as a whole".

[39] He becomes liable for any loss unless he can prove that the loss was caused by the act of God, by the King's enemies, or by inherent vice of the goods, and unless he can prove in addition that the loss would have arisen even if there had been no deviation See Scrutton, l c, 298

[40] See also consequences of unreasonable deviation defined in subsection 46 (1) of the Marine Insurance Act, 1906.

[41] James Morrison & Co. v. Shaw Savill & Co, (1916) 2 K.B. 783; See Stevens' Elements... 448, 449.

[42] See Griffin, l.c., 2223,

Judge Hough [43]. He said that "if an insured shipowner fails to pursue that course of navigation which experience and usage have prescribed as the safest and most expeditious mode of proceeding from one voyage terminus to the other, he violates a tacit but universally implied condition of the contract between himself and his underwriter, who is therefore freed from liability for loss subsequent to deviation because the assured has enhanced or varied the risks insured against".

In the light of this statement deviation is considered as a departure from the customary route. However, as has already been indicated in the English part of our discussion, this definition requires qualification. The point is that a departure from the route prescribed by custom may be agreed upon in the contract of carriage as well as in the insurance policy. If such is the case, Judge Hough's definition should be limited in scope. It should be said that the carrier deviates when he departs from the customary and contract route [44].

Let us examine the analysis adopted by Judge Hough. Why does he assume that the insurer is free from liability in case of deviation. The first ground for his assumption, expressly stated by him, is that the deviation from the prescribed route increases or changes the risks insured against. The second, more fundamental ground on which his assumption rests is that the deviation actually results in a different voyage, a voyage which has not been contemplated in the contract of insurance. The insurer is, therefore, not liable; he cannot be liable because there is no agreement on his part to the different voyage. And no agreement by himself to insure against the increased risks [45].

The latter observation finds support in what might be recognized, within the law of marine insurance, as the third ground or reason for the limited liability of the insurer. The contract of insurance is typically one of the so-called fiduciary relationships. Their essential featu-

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[43] Citta di Messina, 169 Fed. 472; quoted in Griffin, ibidem.

[44] Cf. Knauth, *The American Law of Ocean Bills of Lading,* 154 (1937). The author says that „to constitute deviation there must be a departure both from the customary route and also from the contract route, if that differs from the customary route." Poor writes that a deviation is a departure from the contractual course of the ship. He adds, however, that the contractual course may be in part defined by express contract and in part by the usage and custom of the business, or even of the particular shipowner (l.c., 189). In a more precise definition deviation has been described as „a voluntary departure, without necessity or reasonable cause, from the regular and usual course of the ship insured". See Poor, l.c., 197; Griffin, l.c., 2225.

[45] Cf. Griffin, 2224. Phillips, *A Treatise on the Law of Insurance,* Vol. I 553 (5th ed. 1867) says that „...*deviation... is the enhancing or varying from the risks insured against* as described in the policy, *without necessity or just cause, after the risk has begun*". (cit. omit.).

re is that the utmost good faith of both contracting parties is indispensable [46]. And the insured, when he increases or changes the risk of the voyage without the knowledge of the insurer, must be charged with bad faith.

His bad faith and the variation of risks resulting from his conduct displace the contract of marine insurance and release the insurer. In short, the carrier departing without reasonable cause from the customary and contract route is said to be guilty of: (1) substituting unlawfully a new voyage for the voyage agreed upon, (2) subsequent increase and variation of the risks of the voyage, (3) abuse of the fiduciary relation which is the essentialium of the contract of insurance. The carrier acting in this way frees the insurer from liability.

The analysis described above had successful career in the American maritime law. It has been applied also to cases where the carrier did not depart geographically from the customary or contract route, where there was no deviation in the strict sense of the term [47]. Attempts have been made to apply it to any breach of contract by the carrier [48]. This resulted in dangerous widening of the scope of the deviation concept. The danger would not be grave if it would be made clear that the said concept is used by analogy in the contract breach other than the deviation sensu stricto. It seems, however, that the idea of analogy is rather lost sight of in the concept of the so-called "constructive deviation" which covers contract breaches differing from deviation [49].

The "constructive deviation" — not known in the English law [50] — is a vague notion. It can work unjust results in the law of insurance as well as in the law of carriage.

2. One legal writer [51] has stated that "the doctrine of deviation is an anomalous thing in the law of carriage". That "indeed, it does not

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[46] Cf. Griffin, l c., 2224.

[47] Knauth, l.c., 156 observes that „strictly speaking, a deviation by a ship is a geographical matter.'

[48] Cf. Griffin, l.c., 2224; Knauth, l.c., 156. Knauth indicates that the doctrine has not been applied in case of lack of due diligence on the part of the carrier to make the ship seaworthy. If the ship puts into a port of refuge because of unseaworthiness resulting from lack of due diligence before sailing, the bill of lading does not become void. In such a case then the deviation doctrine is not used, notwithstanding the fact that there is a physical departure from the customary or contract course of voyage.

[49] Cf. Griffin, l. c. 2224; Knauth, l.c., 156.

[50] But it has much in common with the „quasi-deviation" referred to in Carver, l.c., 506, 507, (See note 38, supra).

[51] Griffin, l.c., 2223.

belong in the law of carriage at all". This radical view may be looked upon from various angles. We might even vote for it.

We might do so if we had a definition of the contract of carriage whereby the carrier would not be under the obligation to observe the course of voyage prescribed by custom or contract. Whereby he would not be liable towards the shipper in case of deviation, irrespective of his liability towards the insurer. In other words, if a given contract of carriage consists only in the obligation of the carrier to carry by sea defined goods to an agreed destination and in the shipper's obligation to pay defined freight — and nothing at all in this hypothetical contract is said about the course of voyage the carrier should not depart from, about localities he has to pass through — then one might think that the contracting parties contemplated the carrier's freedom to adopt any route, that the problem of deviation does not, therefore, exist.

It is obvious, however, that the approach indicated above is unacceptable. Security of economic intercourse would be destroyed if the carrier had freedom to sail according to his wish, without consideration of the shipper's interest. The better view, supported by long experience, is to charge the carrier — even if nothing is spelled out in the contract — with the duty to observe the route prescribed by custom. Such duty would not be imposed upon him only in the case where freedom from it has been provided for in the express terms of the contract.

The above considerations militate against the opinion that deviation has no place in the law of carriage by sea, that it "...does not belong in the law of carriage at all". As the matter of fact, the author of this verdict admitted that one of the grounds for the doctrine of deviation as applied in the contract of marine insurance is also applicable to the contract of carriage. He said: "Now my thesis is that the first of these principles, — i. e., that the ship is making a voyage different from that agreed upon, — may be applied, if the facts warrant it, to cases of carriage..." [52]. He stressed at the same time "... that the second principle, — i. e., variation of risk, — is an insurance doctrine, having nothing to do with contracts of carriage" [53]. It may probably be accepted that the latter statement is a true reflection of what the author had actually in mind when he wrote in sweeping terms that the doctrine of deviaton "... does not belong in the law of carriage at all".

Let us see closer what are the limits of the doctrine's application within the American law of carriage. As has already been indicated, it is argued that its shape in the law of marine insurance is different

[52] Griffin, l.c., 2224.
[53] Griffin, ibidem.

from that which is relevant in the contract of carriage [54]. The distinction in this respect between the contract of insurance and the contract of carriage was looked for also by the author of the following statement: „As applied to the relation of carrier and shipper, shorn of all obligations entailed by reason of insurance of cargo or freight the term [i. e. deviation] is not applied in so strict a sense" [55]. It has been said that the increase or change of risk is not a deviation within the law of carriage, that it does not cause voidness of the contract of carriage and invalidation of the exceptions provided for in the bill of lading [56].

What is a deviation in the American law of carriage? What are really the underlying *legal* grounds for the doctrine of deviation in this department of law? The explanation that the doctrine is based on the ground that there exists an implied warranty not to deviate seemed to one of the authors "...like lifting oneself by the bootstraps. We imply a warranty — he said — in order to explain deviation, and then we explain deviation by saying that there is an implied warranty. *Why* should a warranty be implied?" — he asks [57]. He thinks that

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[54] See also Kish v. Taylor, 1912 A. C. 604, 621. It was said in this case that „the fact that by a policy of insurance the insurer merely indemnifies the insured against loss from certain risks, and it is therefore his right not to have these risks increased, differentiates... altogether the case of an insurer from the case of an indorsee of a bill of lading whose goods have been brouth safely and undamaged to the port of discharge". This statement on its face sounds well, but, if we pursue the question further we must ask: What about an indorsee of a bill of lading whose goods have *not* been brought safely to the port of discharge. Doesn't he deserve the same protection and title to right which the insurer is given?

[55] The Indrapura, 171 Fed. 929, 933.

[56] See Malcolm Baxter, Jr., 277 U. S. 323; the Turret Crown, 284 Fed. 439, 297 Fed. 766; Kish v. Taylor, 1912 A. C. 604. In case where the bill of lading exceptions (see Sec. 4 of the U. S. Carriage of Goods by Sea Act, 1936) are invalidated, the carrier becomes liable like common carrier or his liability is even greater. He is said to become an insurer of the cargo, he is said to be under the obligation to make good the losses to the cargo, irrespective of whether the losses have been caused by the deviation. Cf. Griffin, l.c., 2223.

[57] Griffin, l.c., 2225,6. The author rejects the implied warranty explanation. He argues that the term „warranty" has two meanings First, it is merely a promise which forms part of a contract. An implied warranty of seaworthiness is an example of such a promise. Its breach — contends the author — does not destroy bill of lading exceptions, and does not make the ship an insurer. It, therefore, has consequences differing from those flowing from the deviation. It gives to the cargo only the right to damages proximately resulting. Secondly, the term „warranty" means a condition of the contract which must be complied with in order that the contract may be valid. The author calls warranties in this sense „*express* representations as to past or existing facts" or „*express* limitations of the scope of the contract". One of his examples in this direction is life insurance policy with a warranty regarding past condition of health. In case there is a breach of

there must be some substantial reason behind it. The real explanation, according to him, of the consequences of deviation in the law of carriage is the fact that the ship which has deviated substitutes a different voyage for that agreed upon. The contract is applicable only to the contractual voyage, and not to the non-contractual one. The ship departing from the contract route takes the goods to an unauthorized place and is therefore charged with greater responsibility. In support of these observations the following judicial opinion is quoted [58]:

"... the shipowner who by deviating has voluntarily substituted another voyage for that contracted for in the bill of lading cannot claim the benefit of an exception contained in the special contract, which is only applicable to the voyage mentioned in that contract".

Deviation, then, changing the course of the voyage, changes what the author calls physical location of the cargo. He sees two analogies [59]. One is in the case frustration causing the extinction of the contract owing to the lack of its subject-matter. And the other analogy is afforded in the relation between principal and agent. The principal is liable for the agent's action so long as the agent acts within the limits of his authority. If he acts within these limits the principal is not free from liability, notwithstanding the fact that the agent's action may be negligent. The principal is free, however, when the agent acts beyond the authority granted to him. Similarly, negligent performance of the voyage by the ship does not constitute deviation so long as the ship observes the voyage agreed upon. Negligent performance may be considered as a breach of contract with its usual, not exceptional, consequences.

The author concludes [60] that there is no deviation in cases where: (1) the ship sails too fast in fog, (2) she runs ashore, (3) she sails in an unseaworthy condition, even if this condition causes deviation from

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such warranty the contract becomes void and of no effect as against anybody. This consequence, then, is different again from the consequences brought about by the deviation (no support in the bill of lading exceptions, liability exceeding the common law liability of a carrier).

The author posed almost the same question as Holmes in the following passage: „You can give any conclusion a logical form. You can always imply a condition in a contract. *But why do you imply it?* (Emphasis added). It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions". (The Path of the Law, 10 Harv. L. Rev. 465,466, 1897).

[58] Griffin, l.c., 2226; Thorley v. Orchis S.S. Co., 1907. I K.B. 660.

[59] Griffin, l.c., 2227.

[60] Griffin, ibidem.

the voyage. In short, the ship deviates only in case where she deliberately changes the course of the voyage. The author formulates his final conclusion in these words [61]:

"This suggests that the real test is one of place. When the ship deviates, she carries the goods to an unauthorized place and thereby makes herself responsible for their safety. That is the foundation of her liability".

3. We are not satisfied with the above explanation. It seems to us that it stops half-way. It explains *when* the ship deviates, *when* she becomes responsible for the goods. But it does not go deep enough to answer *why* the ship is charged with unusual responsibility. Is the change of place a decisive criterion for the foundation of the liability? We are ready to accept without hesitancy that the change of the course of voyage is a physical fact whose legal consequence is the determination of the time of rise of the increased liability on the ship's part. It does not constitute, however, in itself a sufficient *legal* ground, the *legal* rationale supporting the exceedingly high liability of the ship. This criterion, if taken alone, is unable, it is submitted, to account for the concept which we shall refer to later — the concept of the so-called reasonable deviation.

If one assumes that the change of place is to be the foundation of liability, it is difficult to understand this considerable significance which has been conceded to the "reasonable" change of place.

If the change is "reasonable", there is no foundation, or, putting it more precisely, the change ceases to be the foundation of liability. Well, one might say that here as elsewhere the reasonable deviation or reasonable change of place is nothing more than an exception to the rule. We think, however, that the change of place, taken alone, is not the principle of liability and the reasonable change of place is not an exception to it.

The contract of carriage by sea creates a peculiar legal relationship because carriage by sea is a service of peculiar nature. Its peculiarity, which is of interest to us now, consists — still in our time — in its dangers. Its dangers are the very foundation for the *limited* liability of the carrier. But the limited liability of the carrier cannot be and is not sustained without certain conditions.

The carrier has the benefit of the bill of lading exceptions, and the shipper has to bear greater risk of sea dangers so long as the carrier does not deviate from the contract route. So long the lion's part, so to speak, of the responsibility for cargo is carried by the shipper. This

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[61] Griffin, ibidem.

division of responsibility is based on the confidence that both parties will perform in utmost good faith their duties; and particularly on the confidence that the carrier will not increase the dangers contemplated by the shipper through departing from the contract route. It is apparent that, in our approach, the relationship created by the contract of carriage by sea is a fiduciary relationship. It results from its nature that the carrier, when he has deviated, violates his *trust* in carrying the goods and he is, therefore, guilty of gross negligence because he does not fulfill the terms of the confidential relationship.

An objection may be raised against this analysis. It may be said that, recognizing the fiduciary nature of the carriage relation, we come back where we started — to the insurance relationship. And yet we know that it has been attempted to draw far-going distinction between the two.

It seems to us that also in the law of carriage the *trust* idea supports more than anything else the deviation consequences. But this idea should not be pressed so far as to pave the way for the concept of "constructive deviation" in the law of carriage. Here it has less justification than in the insurance area. Here deviation should be understood as "a voluntary departure, without necessity or reasonable cause, from the regular and usual course" [62]. If it is deemed appropriate to apply consequences of deviation in the above sense to a case where there is no such deviation, it should be made perfectly clear that the doctrine is applied by analogy [63].

However, there has been growing tendency to use the concept of deviation without limitations. This is described well in the following judicial observation [64]:

"The term "deviation" in the law of shipping has at the present day a varied meaning and wide significance. It was originally employed, no doubt, for the purpose its lexicographical definition implies, namely to express the wandering or straying of a vessel from the customary course of voyage; but it seems now to comprehend in general every conduct of a ship or other vehicle used in commerce tending to vary or increase the risk incident to a shipment".

It may be asked where is the reason for this expansion of deviation in the law of shipping. Why the insurance approach conquers the law

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[62] Hostetter v. Park, 137 U.S. 30, 34 L. Ed. 568.

[63] Worth praise in this respect is the decision in Johns Corporation, 63, U.S. 119. Instead of stowing goods under deck — in accordance with the contract — the ship stowed them on deck. The Supreme Court has said that the ship is liable *„as for a deviation."* (Empasis added). Cf. Griffin, l.c., 2228.

[64] The Indrapura, 171 Fed. 929.

of carriage and exports to it its concept of deviation. This question has not been considered by bitter opponents [65] of the growing tendency.

With due respect for the difficulty of the question suggested we think that its solution may be looked for in the fact that not only the ship but also the cargo is insured. The fact is that the risk to the cargo shifted from the carrier to the shipper is in turn transferred by the shipper to the insurer. No doubt, the latter is anxious to protect best the cargo's interest in the contract of carriage. He will do all he can to catch the carrier's guilt and to shift back to the carrier his (i. e. the insurer's) liability towards the shipper. And it is easy to see that he will like to use also for this purpose just the device which has been used by him successfully against the carrier in the contract whereby the ship is insured. The device's name is, as we know, "constructive deviation".

It seems to us that the preceding observations may help to explain why such cases as wrongful drydocking, towing, extraordinary delay in sailing etc. have been recognized as deviation, although strictly speaking the doctrine of deviation has been applied to them by analogy. In his hostility against the rule of "constructive deviation" in the law of carriage, Griffin [66] claims that the above cases "are all instances of actual deviation" because they involve taking the goods to an unauthorized place. We are not happy with this view. At any rate, these cases do not fall under the standard definition of deviation quoted above.

There is one thing which cannot be over-estimated in connection with the foregoing remarks. When one tries to draw the dividing line between the standard definition of deviation and "the deviation by analogy", and between the latter and the usual breach of contract, the borderline cases may frequently present difficulty [67]. It must be ad-

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[65] In particular Griffin, throughout his critical observations referred to above, failed to put forward this question.

[66] L c., 2227, 2229.

[67] This may be exemplified by the Pinellas case, 1929 A.M.C. 1301. The ship, owing to a strike of her engineers, could not proceed under her own power and was towed from Savannah to Charleston, in order to complete at Charleston her loading started at Savannah. After her arrival at Charleston she was supplied with fuel oil and caught fire owing to some negligence. The cargo was damaged.

The District Court ruled that: The ship had not been properly constructed or competently manned; these faults had caused the fire; these faults had constituted neglect of the shipowner, therefore he had no defence under the fire statute; the shipowner was liable. The District Court said also that there was a deviation on the part of the ship because she was towed. It supported this finding with the opinion expressed in the Indrapura, 171 Fed. 929 — a case of fire in drydock.

In that opinion the following statement was made by the Court:

mitted that the problem does not lend itself for an easy and durable solution. Undoubtedly, history would explain it better than logic. Conflicting economic interests are involved in it. The shipper, the carrier and the insurer guard their own fields. They produce the main driving force which has shaped in response to the needs of time the form and content of the law of deviation, the concept of deviation and constructive deviation. It has been responsible for the development of the so-called reasonable deviation. We shall turn now to the consideration of what is meant by reasonable deviation in the American law.

4. Sec. 3 of the Harter Act[68] states i. a. that "... the vessel, her owner or owners, charterers, agent, or master..." shall not be liable for losses resulting "...from saving or attempting to save life or property at sea, or from any deviation in rendering such service". According to Sec. 4 (4) of the U. S. Carriage of Goods by Sea Act, 1936 "any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: Provided[69], however, that if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable".

It has been observed that the American Act has enlarged in Sec. 4 (4) the rights of the carrier[70]. Prior to its adoption any deviation, without regard to its reasonableness, was treated as a violation causing the displacement of the contract of carriage. This treatment was not in consonance with the general criterion of the validity of the bill of lading clauses. The criterion is that the clauses should be reasonable under all the circumstances.

According to this general test, expressly adopted by the 1936 Act, deviation, if reasonable, is excusable and does not displace the contract. The legislator did not give clear indication which would facilitate the

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„So for like reasons, towing, or being towed, was added to the list of acts to which is properly imputable an element of risk not contemplated by the contract and therefore constituting a deviation".

The Pinellas case was appealed. The Circuit Court of Appeals (1930 A.M.C. 1875) affirmed the decision of the District Court. It found that the fire was caused by the shipowner's neglect. No mention about deviation, however, has been made by the Circuit Court. Cf. Griffin. l.c., 2229, 2230.

[68] The Harter Act of 1893 is still in force. See Knauth, l.c. 120. For illuminating observations on the economic reasons underlying the adoption of the said Act, see Temperley, l.c., III.

[69] This proviso is only in the American Act, it is not in any other Hague Rules text. See Knauth. l.c., 156, 157.

[70] Knauth, l.c., 154.

recognition of what deviation is or is not reasonable. It is up to the judge to pass decision on this issue. We shall review a couple of cases to see how the American judges approached the problem of reasonableness of deviation.

In Accinanto Ltd. v. Cosmopolitan Spg. Co.[71] the ship proceeded in 1948 from New York to Antwerp, Cherbourg, Havre and Boulogne She was to call at the ports named in that order. However, the bills of lading clauses gave her authority to call at other ports if delay was anticipated at the port of discharge. They also provided that directions of any government should be adhered to. When the ship left New York a strike broke out at Antwerp and it was clear that she could not discharge the cargo according to plan at that port. In the meantime she received notice from the French government directing that most of the cargo consigned to it should be carried to and discharged at Brest. She, therefore, called at Brest. After her arrival at Brest, she caught fire and, together with the cargo, was destroyed. The Court ruled that: proceeding to Brest was authorized; the claim of the consignees of the Antwerp and Havre cargo that there was deviation was unfounded.

The second case. In The Wildwood[72] a ship proceeding from New York to a port in the vicinity of Vladivostock with a cargo of copper changed the course and went back to U. S. Pacific port anticipating the danger of British capture. World War II had begun, Russia however was not a belligerent then. The bill of lading authorized the decision taken by the ship in case she was in danger of capture. The Court ruled that her decision to terminate the voyage was proper.

The third — the Willdomino case[73]. A general ship had refit at the Azores. Then she was steered towards New York. The captain knew that he had insufficient coal supply and could reach New York only if the weather was favourable. As the voyage went on it appeared that more coal was necessary. The captain called, therefore, at a bunker port and stranded while sailing in a fog along the Nova Scotia coast. The lower courts ruled that he deviated impairing contract and custom. The Supreme Court condemned the master for hesitation and not taking a decisive action. For steering to New York, although he thought seriously about stopping for bunkers. The Supreme Court did not consider the reasonableness of his action. Under the Convention and the Acts — says Knauth — the reasonableness "...could be argued and might well alter the result"[74].

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[71] 199 F. 2d 134, C.A. 4 Cf. Poor, l.c, 193, 194.

[72] 133 F. 2d 765, C.C A. 9. See Poor, l.c., 194.

[73] (366A), 1924 A.M.C. 889, 300 Fed. 5; affirmed, 1927 A.M.C. 129, 272 U. S. 718.

[74] Knauth, l.c., 155.

As has already been indicated, Section 4 (4) of the American Act has the additional — not known in the other texts — proviso:

"If the deviation is for the purpose of loading or unloading cargo or passengers, it shall, *prima facie,* be regarded as unreasonable".

This proviso limits the freedom of the carrier. But perhaps it has less significance than its wording suggests. The presumption of unreasonableness can be overcome by proof that deviation in order to load or unload cargo or passengers was actually reasonable. Moreover, the principle expressio unius est exclusio alterius will help to argue that deviation to take, e. g., fuel or stores cannot be considered as unreasonable under the Proviso. However, the Proviso testifies that the American legislator is not in favour of unlimited freedom of the carrier. We shall not devote special paragraph to the consequences of unreasonable deviation in the American law. It does not differ in this respect from the English law.

IV

1. In contradistinction to the British Act of 1924 and the American Act of 1936, the French Act of 1936 — Loi du 2 avril 1936 [75] — contains provision with regard to deviation which differs considerably from the text of Art. IV, r. 4 of the Brussels Convention. The French provision we have in mind is Art. IV, r. 6. It says that the carrier shall be liable for all losses or damages to the goods unless he proves that they result from assistance or saving or an attempt in this direction or from deviation made for this purpose [76].

The difference between the law of April, 1936 and the Brussels Convention, the different formulas with regard to deviation incorporated in them, bring out the question of the extent to which they are applicable. According to Art. 10 of the Convention, its provisions are

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[75] Relative aux transports des marchandises par mer (Journ. Off. du 11 avril 1936).

[76] „Art. IV: Le transporteur est garant de toutes pertes, avaries ou dommages subis par la marchandise à moins qu il ne prouve que ces pertes, avaries ou dommages proviennent":

„No. 6 D'un acte d'assistance, ou de sauvetage ou de tentative faite dans ce but ou encore de deroutement du navire effectué à cet effet".

The French text of Art IV r. 4 of the 1924 Convention reads as follows:

„Aucun deroutement pour sauver ou tenter de sauver des vies ou des biens en mer, ni aucun deroutement raisonnable ne sera considéré comme une infraction à la presente convention ou au contrat de transport, et le transporteur ne sera responsable d'aucune perte ou dommage en resultant".

applicable to every bill of lading made in one of the contracting states [77]. In view of this Article the law of April, 1936 or, precisely, its rules differing from the respective rules of the Convention, could not be applied in France, Algeria and colonies — contrary to Art. 12 of the Law. The contradiction between Art. 10 of the Convention and Art. 12 of the French law has been discussed in the legal literature [78].

Ripert [79] suggests i. a. that, in order that the Convention might be applicable, it is necessary that the bill of lading, made in one of the contracting states, be possessed by a citizen of another contracting state. Marais [80] thinks that Niboyet offered better interpretation of Art. 10 of the Convention. Niboyet declared that it seems to be in consonance with general principles of the international law to decide that the French 1936 law should be applicable to the internal relations, and the Convention to the international relations.

Niboyet's approach, although it may seem plausible, is not in consonance with the express language of Art. 10 of the Convention according to which its "...dispositions... s'appliqueront *à tout* connaissement créé dans un des Etats, contractants". (Emphasis added) [81].

There is an international relation — says Niboyet further — where the carriage is effected between a French port and foreign port, or where one party to the contract is of foreign nationality. Marais adds that even in this case the law of April, 1936 will be applicable if both parties to the contract of carriage are French. He indicates, moreover, that in his opinion where the bill of lading covers the voyage between two French ports and is made by a French carrier for a French shipper — the French law will be applicable, irrespective of the nationality of the bearer of the bill of lading.

The preceding remarks point to the fact that the real adoption of an international convention is not an easy problem. Even the ratification of a given convention does not, unfortunately, indicate with certainty

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[77] „Art. 10. — Les dispositions de la présente convention s'appliqueront à tout connaissement créé dans un des Etats contractants".

[78] Cf. Marais, *Les Transports Internationaux de Marchandises par Mer* 22, 23, (1949), (hereafter called Marais Int.).

[79] Ripert, *Droit Martime,* T. II 263 (4e éd. 1952).

[80] Marais Int., ibidem.

[81] In connection with these observations the criticism of Scot Cairns deserves attention. He said that „the accuracy of the conclusion... that a bill of lading issued in a country which has adopted The Hague Rules is not, in the courts of that country, subject to these Rules unless it expressly incorporates them seems a surprising one". D. A. Scott Cairns (rev.) Carver's *Carriage of Goods by Sea* (9th ed. 1952) 69 The Law Quarterly Review 259, 260 (1953).

that its provisions will be given full effect by the ratifying powers [82]. Here as elsewhere changing and conflicting economic interests constitute one of the greatest barriers to the effectiveness of intergovernmental agreements. But this observation cannot be pursued further, as we have intimated at the outset, within the compass of this discussion. We cannot do better in this connection than to repeat Cardozo's [83] words: "A richer scholarship than mine is requisite to do the work aright".

2. It will be seen from the texts of Art. IV, r. 4 of the Convention and Art. IV, r. 6 of the French law that considerable divergence between them consists in that the French law does not mention at all about the reasonable deviation.

The draft of la Loi 1936 submitted to the Parliament accepted entirely the language of the Convention in this respect. However, the Commission of the Chambre des Députés has thrown out the reasonable deviation concept from Art. IV. The argument was that the concept had no raison d' être [84].

Let us look more closely at la Loi du 2 avril 1936 and at the French approach towards the deviation. La Loi says that the carrier is authorized to deviate in order to perform „un acte d' assistance ou de sauvetage" (Art. IV, r. 6). This phrase, the distinction between „assistance" and "sauvetage" not used expressly in Art. IV of the Convention [85], raises some doubts. In the first place, the question arises whether la Loi draws distinction between saving of life (l'assistance aux personnes) and saving of property (sauvetage des biens).

It has been said that from the legal point of view saving of life is

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[82] For interesting remarks as to the reason for differences between the Convention and the French 1936 law, see Ripert, l.c., 252 et seq.

[83] *The Nature of the Judicial Process* 13 (1955).

[84] See Marais Int. 176. The author says with regard to the Commission's argument: „Cela ne nous parait pas certain. En tous cas, la Commission a créé une différence entre le texte de la Convention et celui de la loi du 2 avril 1936. *Cette méthode de légiférer est très défectueuse eu égard aux efforts tentés depuis si longtemps pour essayer d'établir en ces matières une loi internationale uniforme.*" (Emphasis added). This frank look at the matter and understanding of its significance is very valuable. All the more so when we compare it with Ripert's observation: „La différence de rédaction [i. e. the difference between the said articles of the Convention and la Loi] n'est pas très importante étant donné que le déroutement déraisonnable constituerait une faute nautique du capitaine. Les armateurs se courrent contre cette foute par une clause expresse (cit. omit.). La faute est aujoudr'hui couverte par la loi ellemême en tant que faute nautique..." (Ripert, l.c., 421).

[85] But adopted in the Brussels Convention of September 24, 1910.

a naval action which should be distinguished from saving of property [86]. Saving of life involves an aid given by one ship to another ship which, despite its damaged condition, still has the features of a vessel and on whose board there are still persons in danger of death [87]. An action to give such aid is — argues Marais — what has been described by la Loi in Art. IV, r. 6 as "acte d'assistance ou de sauvetage, tentative faite dans ce but, déroutement du navire effectué à cet effet". Saving of property only, when life is not in danger, is not an action within the meaning of the foregoing rule and, a fortiori, of the Convention itself. Therefore, continues the same author, the carrier is charged with the losses resulting from it.

3. What is actually meant by deviation (déroutement, changement de route) in the French literature. In the definition of Emerigon which is precise and has been generally accepted [88] deviation is translated into the following words: "Le navire change de route lorsqu'au lieu de suivre la voie usitée, ou celle qui lui est permise par le contrat, il en prend une différente, sans perdre toutefois de vue l'endroit de sa destination" [89].

To illustrate Emerigon's definition we shall state briefly the case from his treatise. It occurred long ago, and yet, like the book [90] in which it has been described, this interesting case expresses today the living force of the law. In 1776 the ship le Carnate was to go from Lorient to Pondichéry, Madras, China and come back to Lorient, with liberty

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[86] Marais, *Les Transports de Marchandises par Mer* 55 et. seq. (1948) (hereinafter called Marais Tr.) Ripert, however, says that „... le sauvetage et l'assistance sont même chose." But it is submitted that Ripert himself weakens this statement by his further observation: „Mais la loi française ne prévoit le déroutement qu'en vue de l'assistance; la Convention internationale est plus large..." (l.c., 699).

[87] Marais Tr., ibidem; Ripert, l.c., vol. III 121 et seq.

[88] Arnould's opinion is indicative in this direction. Quoting Emerigon's definition he says: „The language of Emerigon is marked with all his usual terseness and perspicuity." (Arnould, l.c., 371).

[89] Emerigon, Traité des Assurances et des Contrats à la Grosse T. II. 94 (nouv. éd. par P. S. Boulay-Paty, 1827). From deviation the author distinguishes clearly the change of voyage (changement de voyage) in the following wording (l.c. 92): „Si le navire met à la voile pour toute autre destination que celle du voyage assuré; ou si, parvenu à la hauteur et *vue* du lieu du reste, il va à un endroit plus éloigné; ou si, en s'écartant de la route légitime, dans laquelle il était entré, il abandonne sa destination primitive pour aller ailleurs, dans tous ces cas *le voyage est changé*".

[90] In Arnould, l.c., 367 the following testimony deserves to be brought out here: „...meanwhile the attention of the student may be directed to the thirteenth chapter of Emerigon's great work, an admirably arranged magazine of legal learning and accurate thought. Boulay-Paty, in his *Cours de Droit Mar.*, Vol. 3, tit. X, s 9, has done litte more than copy his distinguished predecessor".

to call where necessary in order to supply and repair the ship. The carrier received an amount of money from bankers in Paris who insured it in London for the said voyage. The carrier gave afterwards secret instructions to the captain. After having reached Pondichéry he was required by these instructions to sail to Bengal and then turn back for Europe without going to China. This amounted to a route differing from the route originally planned and insured by the bankers from Paris.

Le Carnate left Lorient in December, 1776 and called at Pondichéry in June, 1777. It appeared that her hull was damaged, but repair was effected without special difficulty. After unloading and loading of goods the ship proceeded to Madras and then followed the course consistent with the secret instructions. After over three months she came back to Pondichéry and in March 1778 left for Europe. In October le Carnate sailed along the coast of Bretagne and was seized by an English corsair. Subsequently she was steered to England.

Her captain had said that he could not proceed to China because of damaged hull. He had to change the course — said he- for Bengal to arrange for repairs there. The lower court ruled that the London insurers should cover the Paris bankers' loss.

On appeal the secret instructions, found in the meantime on board le Carnate, were submitted to the Court. Lord Mansfield delivered its opinion.

Lord Mansfield, reversing judgment of the lower court, decided that the ship deviated unreasonably from her contractual route; the insurers were not, therefore, liable for the loss. Where is deviation — said the Judge after an exhaustive examination of the case — the contract is displaced.

Emerigon approves entirely of Mansfield's opinion and decision. Asked for advice, he told the Paris bankers that the carrier, and not the insurers in London, is liable for the whole loss [91]. Emerigon states expressly that where is no sea danger, where deviation is voluntary, irrespective of whether it was ordered by the insured or his captain, the insurers are not liable [92]. The question of reasonable deviation is not exhaustively discussed in his doctrine. But it seems reasonable to assu-

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[91] It is worth noting the admiration of the author for Mansfield's approach to the case. He admires the celebrated Judge who decided the case at the time of war between England and France. He expresses his feeling in these words: „On ne saurait s'empêcher d'admirer cette manière de procéder, quelque éloignée qu'elle soit de nos moeurs, car l'impression que la vertu fait sur nous est si forte, que nous l'aimons jusque dans nos ennemis mêmes," (cit, omit.) (Emerigon, l.c., 103).

[92] L.c., 95, 97,

me that the principles he has developed are in substantial agreement with the English common law of insurance, so well codified in the Marine Insurance Act, 1906.

4. However, the French law of sea carriage has its different, original features. True, the definition of deviation in France is drafted like the Anglo-American definitions. Nevertheless, the French approach to the problem and to its legal consequences presents a new picture. Ripert paints it with expressive colours. He says that the duty not to deviate is imposed solely upon the captain, that the unique sanction, consequence of the deviation is the liability of the captain. And he adds that this liability cannot be enforced unless the deviation caused damage to the shipper. Besides, he remarks, default of the captain is a nautical fault covered by the law of April, 1936 or by negligence clause [93].

It seems to us that Ripert is in favour of almost complete irresponsibility of the carrier. Somewhat different attitude is reflected in his introductory observations, in the section dealing with déroutement. He admits that déroutement results in the liability of the carrier (l'armateur) so far as the fault of the captain caused damage to the shipper because of delay or damage to the goods. But as there must be, he stresses, the causal relationship between the fault and damage, the carrier is not in his opinion liable for casus fortuitus after the deviation, unless the shipper proves that casus fortuitus would have not affected the cargo, if the ship had not deviated [94].

An attempt has been made, says the author, to maintain that the voyage after deviation goes beyond the contract (un voyage extracontractuel) and therefore the carrier is pleno iure liable for all accidents occurring during the voyage, and even cannot seek protection in the lading bill exceptions [95]. Ripert is rather against this attempt, which, as we have seen above, has full recognition in the American and English law. He finds support in the view that the said attempt testifies to the confusion between the route and the voyage. If there is a simple deviation (simple déroutement) — he argues — the carriage effected is the

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[93] Ripert, l.c., T. II. 420 He says: „Mais ces interdictions [i.e. the prohibition against deviation] ont comme unique sanction la responsabilité du capitaine. Or cette responsabilité ne peut être mise en jeu que si l'irrégularité du voyage a été pour les chargeurs une cause de préjudice. La faute du capitaine est d'ailleurs une faute nautique couverte par la loi du 2 avril 1936 ou par la négligence-clause.

[94] French judicial decisions are not quite clear as to whether the burden of proof is imposed on the shipper or on the captain. See Ripert, l.c., 420.

[95] Ripert, l.c., 420 and the decisions cited therein.

carriage contracted for; and there is simply the fault of the captain in the navigation — states Ripert.

The author mentions that English courts have treated deviation as the reason for the contract's displacement resulting in that the sea carrier becomes a common carrier charged with increased liability for the goods. He states, in accordance with the decisions, that the English and American courts consider deviation as contractual fault of the carrier and not as the fault of the captain [96]. But — this is important — he declares expressly: „Cette solution ne doit pas être admise en droit français. Le déroutement n'est pas l'abandon du voyage" [97].

With great respect for the learned author, we feel that his unqualified statement is very discouraging. Everybody who desires more and more understanding in the international intercourse must think with deep concern that such statement is an attempt to defeat the purposes of the Brussels Convention ratified by France.

The celebrated and justly revered jurist [98] does not give reason for optimism. Also in his comment on reasonable deviation [99], he does not

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[96] See also interesting discussion in Marais Int. 176, 177.

[97] L.c., 421. The second sentence is somewhat misleading since in Ripert's presentation even „l'abandon du voyage" seems to be treated more as „une faute du capitaine" than „une faute contractuelle du transporteur".

[98] It is worth mentioning that special publication has been devoted to him (*Le droit privé français au milieu du XXe siècle.* Études offertes à Georges Ripert. T. I. Paris 1950).

[99] An example where the French court's analysis may be compared with the English judicial analysis in cases of reasonable deviation may be found in *Droit Maritime Français* 434 (1949) The French court (Tribunal de commerce du Havre, 31 Mars 1944) has said: „I. — La route assignée à un navire d'une ligne régulière n'est par déterminée par rapport à la distance la plus courte mais par rapport à la ligne desservie, celle-ci s'inspirant de considérations commerciales plutôt que géographiques".

„Ne constitue donc pas un déroutement le fait par un navire avant chargé au Congo des marchandises à destination de Dunkerque d'être, passé devant ce port sans y entrer, d'avoir touché Hambourg et de n'être revenu qu'ensuite à Dunkerque lorsque, affecté à une ligne régulière il a suivi son itinéraire normal, fixé depuis de longues années, de notoriété publique".

„II. — L'application de la clause d'un connaissement autorisant le capitaine à faire escale dans tous ports, dans n'importe quel ordre, ne peut se heurter qu'au contrôle des tribunaux en cas d'usage abusif. Un tel abus n'existe pas lorsque le capitaine s'est conformé à l'itinéraire choisi par l'armateur et connu depuis de longues années par la clientèle de la ligne".

Marais Int. 173, 174, 179, 180 in his discussion of reasonable deviation cites American, English and Irish cases. Only in the section devoted to what he calls „déroutement en tant qu'acte du capitaine" (p. 177, 178), he brings out some French

follow the course delineated by the Convention. He does not attach importance to the fact that the law of April, 1936 (Art. IV) accepts deviation "au cas d'assistance ou de sauvetage de personnes ou de biens" but omits the language of the Convention in respect of the reasonable deviation. He has this to say on the matter [100]: "La différence de rédaction n'est pas très importante étant donné que *le déroutement déraisonnable constituerait une faute nautique du capitaine.* (Emphasis added). Les armateurs se couvrent contre cette faute par une clause expresse (cit. omit.). La faute est aujourd'hui couverte par la loi elle-même en tant que faute nautique".

The comments written by Ripert are all the more discouraging when one reads the dramatic address delivered by M. Ramadier in 1930. His words indicate clearly how great was the need for an international regulation of the carriage by sea and proper drafting of the carrier's liabi-

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cases. He notes i a. Le Havre, 26 Mars 1923, Dor, 2-563 noted (see above) by Ripert (l.c., 420). See also Marais Tr. 58-61 where American, English and Irish cases are supplied.

[100] L.c., 421. Similar observation in Christ. *De la Responsibilité du Transporteur Maritime d'après les Lois française et allemande des 2 avril 1936 et 10 août 1937,* p. 112 (1943). He says:

„Si le déroutement est effectué dans un autre but (i. e. other purpose than saving of life or property) ou si tout en étant, entrepris dans ce but, il n'est pas „raisonnable", il n'est pas couvert par le no 6 de l'article 4, et constitue *à priori* une faute (arg. art. 4 *in fine*). Notre loi qui a réuni sous cette disposition unique le contenu des §§ 608, no 6 et 636a allemands [i. e. of the German Commercial Code] se montre donc plus sévère à l'égard du transporteur que ces derniers (et d'ailleurs la Convention de Bruxelles)"

The reader might assume that the French law is indeed more severe towards the carrier than the Convention and American, English, German, and other laws, However, not the formula but its application is, here as elsewhere, decisive. Christ explains what happens really in the French law behind the façade of Art. IV N. 6 of la Loi 1936 in the following words:

„Mais si les déroutements mentionnés constituent, d'après notre texte français, une faute *encore s'agira-t-il de l'apprécier: Si celle-ci- revêt le caractère de faute nautique, et ce sera le cas presque toujours, l'irresponsabilité sera encore acquise.* (Emphasis added). Dans ces conditions, l'on peut se démander si c'était bien utile d'allonger le texte de notre loi en mentionnant spécialement le cas de non responsabilité figurant sous le no 6. Le transporteur, par contre, serait responsable d'un déroutement non couvert par loi causant un dommage aux objects transportés s'il l'avait ordonné lui-même par T.S.F. à son capitaine se trouvant en mer, puisque dans ce cas, il y aurait faute personnelle de sa part."

Well, this suggestion cannot satisfy the justified demand of the shipper. Clearly, the limitation of the carrier's liability to that caused by his *personal* fault is against the basic purposes of the 1924 Convention.

In this connection see again Marais Int. 176 and Marais Tr 60 where he criticizes the French 1936 law and says that the text of Art. IV no. 6 should be in consonance with the Convention.

lity — so well reflected in the pioneering document called Harter Act. M. Ramadier expressed great truth in the following text [101].

"L'exonération du transporteur aboutit à un scandaleux abus. On confie des marchandises à un navire pour les transporter à bon port, la Compagnie de navigation livre n'importe quoi, n'importe où, dans n'importe quel état. Et le destinataire doit s'incliner, trop heureux d'avoir cependant reçu quelque chose...".

"...n'ayant plus d'autre limite que leur conscience les armateurs font chaque saison de nouveaux progrès dans la négligence".

It is difficult for us to believe that Ripert as well as other writers, with their insistence on "faute nautique du capitaine", support effectively "les armateurs" making continuously new progress in negligence, and particularly in unreasonable deviation. Unfortunately, scripta manent. We see no reason why the carrier should not in today's navigation be responsible for his captain's default. True, the dangers of navigation are still great to many ships. But the carrier hiding himself behind the captain's default wants us to believe that his ship and his agent, the captain are from the good old times of Christopher Columbus. We cannot treat seriously this "challenge".

Marais, despite his praiseworthy call for complete uniformity between Loi 1936 and the Convention, is — like Ripert — in favour of the carrier's non-responsibility in case of deviation. In short, he says, contrary to the Anglo-American doctrine, that the captain deviates, not the carrier. And he thinks that one of the leading ideas of the Convention was to establish a cause of legal exculpation of the carrier, of his non-liability for the acts, negligence and default of the captain.

To this contention — which seems to be surprising in the light of M. Ramadier's indignation — Marais adds [102]: "Or, nous supposons que le déroutement injustifié est l'acte exclusif du capitaine. Nous pensons donc qu'une saine interprétation de la Convention, suivant son esprit conduit à consacrer la conception française en matière de déroutement".

As we know "la conception française" — evidently not favoured by M. Ramadier and French shippers — means that the shipper who suffered damage by carrier's default, not infrequently very serious damage, is told to go to the poor captain.

Now, this was not the purpose of the Convention. And unjustified deviation is not, as a rule, the exclusive act of the captain. If it was, the captain would be fired pretty soon by the powerful carrier corpo-

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[101] Cf. Chavaudret, *Le Responsabilité du Transporteur Maritime d'après la Loi du 2 avril 1936*, p. 1 (1939).

[102] Marais Int. 177.

ration. There is no shortage of captains today. It is, by and large, much easier to have the ship's crew today than at the time of the oar and the sail. But there is no need to fight further for the truth with our inexperienced pen. M. Marais himself knows it. Let him speak [103]:

"Mais, comme le déroutement injustifié aura presque toujours pour résultat un profit procuré au transporteur, ce cas d'exonération [i.e. the exculpation in the case of unjustifiable deviation caused exclusively by the captain] ne jouera en pratique très rarement".

In viev of this frank statement one may ask why the same author, only two pages back, defended the carrier and wanted us to believe that „le déroutement injustifié est l'acte exclusif du capitaine" This may be one of the questions leading right into the middle of the legal battle fought around the economic conflict we have referred to time and again. The conflict among the shipper, the carrier, the banker, the insurer, the consignee of the cargo — frequently representing five different nationalities [104].

We think that it may be appropriate to end the French part of this discussion with the observation that will be reiterated in the final conclusions. The observation is that the Anglo-American concept of deviation based on contractual fault of the carrier is more wholesome, so to speak, than the French approach. More wholesome because it reflects better the true — let us say so — distribution of powers among the characters of international trade. Because it indicates without sophistication that in the age of Diesel and wireless, the carrier has — in the final analysis — *much more* to say about the carriage he contracted to perform than the captain — his obedient servant.

Therefore we think that also in this area, similarly to other departments of law, the principle of vicarious liability [105] deserves recognition.

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[103] Marais Int. 179.

[104] Cf. Chavaudret, l.c., 2.

[105] Laski in most illuminating analysis sees its basis, similarly to other legal principles, „... in the economic conditions of the time". (Basis of Vicarious Liability [an essay in The Foundations of Sovereignty (1921)] 259). He says that „...the employer [in our case the carrier] is himself no more than a public servant, to whom, for special purposes, a certain additional freedom of action, and therefor a greater measure of responsibility has been vouchsafed" (cit. omit.).

If that employer is compelled to bear the burden of his servant's torts even when he is himself personally without fault, *it is because in a social distribution of profit and loss, the balance of least disturbance seems thereby best to be obtained* (cit. omit.) (Emphasis added) l c, 260, 261).

„It is only by enforcing vicarious liability that we can hope to make effective those labor laws intended to promote the welfare of the workers; (cit. omit.) for it is too frequently the corporation that evades the statute or attempts to discredit it (cit. omit). It is useless to argue that the responsibility rests upon

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The discussion we have tried to present is not complete. It suffices, however, we hope, to bring out clearly enough the issues of great importance within the field we have attempted to cover. What emerges in the first place in the study of the law of deviation is the need for "substantial improvement" [106]. Improvement — in what direction?

In order to answer this question in simple language let us, primarily, set out the list of more essential issues disclosed in our presentation.

First of all, there is the cardinal discrepancy between the Anglo--American and French approach towards the carrier's liability. As we know, in England and in the United States it is held that the carrier deviates, that deviation (unreasonable deviation) is analysed in terms of the contractual fault of the carrier. We have already said and say it again that this approach is right. And we repeat that the French treatment of deviation as "faute du capitaine" is, shortly speaking, old-fashioned and unjust.

Second, the notion of the "constructive deviation" (American law) and the notion of the "quasi-deviation" (English law), the fictions resulting therefrom are not welcome "guests" in the maritime law. Also it is not desirable to say that delay is a deviation. True, fiction may be a helpful instrument for the legislator; it may save his time and it may help in working out a clear legislative statement. But it tends unavoidably to create artificiality, to erect "iron curtain" between law and life. Someone said that the virtue if pressed too hard becomes a vice. It seems that fiction in the law becomes a vice without pressing too hard, or even without any pressing. Arnould's teaching merits attention also in this respect. Let us repeat his words [107]: "...there is no need for the fiction that an unjustifiable delay amounts to a deviation. In the Mar. Ins. Act, 1906, deviation is not defined as including delay".

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the agent; for it is unfortunately too clear that men may act very differently in their institutional relations than in their ordinary mode of life". (cit. omit) (l.c. 276, 277).

Why shouldn't we apply Laski's argument to our case and say: It is useless to argue that the responsibility rests upon [the captain]; for it is unfortunately too clear that [the captain] may act very differently in [his service] relations than in [his] ordinary mode of life.

[106] The phrase borrowed from Rosenthal's conclusion: „From the analysis that has been made it is obvious that there is need for substantial improvement in the field of international commercial arbitration." (Arbitration in the Settlement of International Trade Disputes, II Law and Contemporary Problems 831 (1945-1946).

[107] L.c., 372.

Third, it is not quite certain whether deviation in order to save property is justified. In England and in the United States such a deviation was not justifiable prior to the adoption of the Hague Rules. After their adoption great weight of authority excuses the carrier who deviates for property saving. In France "sauvetage" has not been raised to the legal status, so to speak, of "assistance"". Only the latter operation (to save life) justifies deviation. But this circumstance as well as non-recognition by the French of the "reasonable deviation" does not mean at all that the French carrier is treated badly. He says that his captain deviates. Fortunately, the French courts have attempted to demand more explanation from him (Ripert, as has been indicated, does not praise the judicial distrust) and look for his express orders to deviate, and also for his profit derived from deviation (Marais discloses this information).

Fourth, the rules contained in the British and American Carriage of Goods by Sea Acts (1924, 1936) and in the French law (1936) do not, unfortunately, follow faithfully the spirit and the letter of the Brussels Convention. As far as the deviation problem is concerned, la Loi du 2 avril, 1936 is particularly objectionable. The American Act, on the other hand, deserves praise. It has changed the letter of the Convention by adding the Proviso to Art. IV, r. — this is true. But this change reflects tendency for improvement of the Convention, and not the intention to circumvent it. The Proviso aims at increasing the liability of the deviating carrier.

Fifth, neither the spirit, nor the letter of Art. IV r. 4 of the Convention itself is clearly expressed. It lends itself for various interpretations. Like many international rules it is a compromise reached half--heartedly, a by-product of conflicting economic and national interests and, last not least, differing doctrinal views[108]. No wonder then that it ignores — as Temperley put it — "...a crucial feature of the legal problem which deviations and deviation clauses raise". And no wonder that, in spite of good intentions which animated its sponsors, it fails to restrict the practices of the carriers who — let M. Ramadier speak — "n'ayant plus d'autre limite que leur conscience... font chaque saison de nombreux progrès dans la négligence".

We come back to our postulate and question: in what direction should a "substantial improvement" be made? The answer is that the

[108] Professor Kopelmanas has given to our Seminar a valuable information in this respect (at the meeting on April 3, 1958). According to him, the fatigue of debaters contributes much to the adoption of a discussed draft. At the beginning of the conference they disagree, later when they are tired agreement is likely to be achieved.

desirable improvement should aim at a complete recognition of "...a crucial feature of the legal problem which deviations and deviation clauses raise". This cannot be done overnight. It seems that the time is not ripe yet for the postulated reform. Decisive steps to revise Art. IV r. 4 of the Convention and its national "photographs" can successfully be undertaken — when?

When it will become clear that the sea carrier benefiting more and more from the technical progress should bear more responsibility for the activity he pursues. The sea carrier himself may be compelled, sooner or later, to accept this contention, faced with the growing competition of the air carrier.

It seems, however, that there is another element which is indispensable for the achievement of the proper legal regulation of the deviation problem, its international regulation. An understanding, it is submitted, must be reached that there is no reason why the deviating carrier should be liable towards the insurer, and avoid or try to avoid liability towards the shipper. That there is no justified reason in the modern maritime law for the existence of two different concepts of deviation: 1) "insurance deviation", 2) "carriage deviation". Vigorous advocates of the carrier's freedom might say that our postulate goes to the fabulous region where the fact ends and fancy begins. They might say that we disregard this considerable difference which exists between the contract of carriage and the contract of insurance. No, we are not going so far.

What we want to disregard is not the difference between the contracts themselves, but the difference between two kinds of deviation, "insurance deviation" and "carriage deviation". We strongly advocate that consideration be given to the possibility of the creation of *one* deviation concept, of uniform deviation concept modelled after the "insurance deviation". In other words our contention is that if the ship deviates under the contract of insurance it deviates as well under the contract of carriage [109].

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[109] It may be worth noting at this junction an interesting analogy in Gray v. Gardner case (17 Mass. 188, 1821). There was a condition in the contract of sale that if whaling vessels will bring greater quantity of oil at named ports on agreed dates the buyer will be free from obligation incurred under the said contract. Analysing this condition, „the arrival of a certain quantity of oil at the specified places in a given time", the Court held that this happening should be treated in the same way in the contract of sale as it would be treated under the contract of insurance. The Court said: „Oil is to arrive at a given place before twelve o'clock at night. A vessel with oil heaves in sight, but she does not come to anchor before the hour is gone. In no sense, can the oil be said to have arrived. The vessel is coming until she drops anchor or is moored. She may sink, or take fire, and never

We have noted, however, in the American part that there is a warning in the American literature against the so-called "constructive deviation" imported to the law of carriage from the law of insurance.

Do we want to model the postulated uniform concept of deviation after the "constructive deviation" concept which is said to impose hardship upon the carrier? We hope that it has been made sufficiently clear in the American part and also at the outset of this chapter that our answer to this question is negative. Where do we find then the contemplated model?

The model is in the English law, in the Marine Insurance Act, 1906 which is an example of good legislative work [110]. Not only its sections relating to the deviation proper (46, 47, 49) deserve consideration in the direction suggested. The whole chapter entitled The Voyage, from Sec. 42 to Sec. 49 both inclusive, should be strongly recommended for adoption, *mutatis mutandis,* into the law of carriage by sea. Into the Brussels Convention and its counterparts in the national internal legislations. It merits such recommendation because, besides other virtues, it takes conscientiously into account the justified interests of all those taking part in the maritime adventure.

The suggested approach finds particular support — let us stress it again — in the fact that deviation exposes to danger both — the ship and the cargo. The cargo is also insured. And it is difficult to understand that one and the same departure from customary and contractual route should be treated as deviation in relation to the ship, and not as deviation where cargo is involved. Deviation for the insurer, not deviation for the shipper. True, here as elsewhere, historical reasons are at the root of the matter. The contract of carriage and the contract of marine insurance have their different historical developments, under which also their "own deviations" grew. But, with due respect for the history, the legal profession responsible for the modern maritime law, for its development, is faced with the situation where historical differentiation ceases to be valid.

Let us propose the solution, which we should work for, in this final conclusion: Our end is a uniform law of deviation in the maritime law

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arrive, however near she may be to her port. *It is so in contracts of insurance; and the same reason applies to a case of this sort.*" (Emphasis added) (Quoted in Dawson and Harvey, *Cases and Materials on Contracts and Contract Remedies,* Vol. III 687, 1953).

[110] It is worth mentioning that at the meeting of our Seminar, during discussion of insurance cases, Professor Berman said that this Act merits high praise.

of carriage and insurance. Our means to this end are the following provisions of the Marine Insurance Act, 1906 [111].

The Voyage

Implied condition as to commencement of risk

42 — (1) Where the subject matter is insured by a voyage policy "at and from" or "from" a particular place, it is not necessary that the ship should be at that place when the contract is concluded, but there is an implied condition that the adventure shall be commenced within a reasonable time, and that, if the adventure be not so commenced the insurer may avoid the contract.

(2) The implied condition may be negatived by showing that the delay was caused by circumstances known to the insurer before the contract was concluded, or by showing that he waived the condition.

Alteration of port of departure

43 — Where the place of departure is specified by the policy and the ship instead of sailing from that place sails from any other place, the risk does not attach.

Sailing for different destination

44 — Where the destination is specified in the policy, and the ship, instead of sailing for that destination, sails for any other destination, the risk does not attach.

Change of voyage

45 — (1) Where, after the commencement of the risk, the destination of the ship is voluntarily changed from the destination contemplated by the policy, there is said to be a change of voyage.

(2) Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to change it is manifested; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

Deviation

46 — (1) Where a ship without lawful excuse, deviates from the voyage contemplated by the policy, the insurer is discharged from lia-

[111] See Arnould, l.c., 1211, 1212.

bility as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs.

(2) There is a deviation from the voyage contemplated by the policy —

(a) Where the course of the voyage is specifically designated by the policy, and that course is departed from; or

(b) Where the course of the voyage is not specifically designated by the policy, but the usual and customary course is departed from.

(3) The intention to deviate is immaterial; there must be a deviation in fact to discharge the insurer from his liability under the contract.

Several ports of discharge

47 — (1) Where several ports of discharge are specified by the policy, the ship may proceed to all or any of them, but, in the absence of any usage or sufficient cause to the contrary, she must proceed to them, or such of them as she goes to, in the order designated by the policy. If she does not there is a deviation.

(2) Where the policy is to „ports of discharge" within a given area, which are not named, the ship must, in the absence of any usage or sufficient cause to the contrary, proceed to them or such of them as she goes to, in their geographical order. If she does not there is a deviation.

Delay in voyage

48 — In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable despatch, and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

Excuses for deviation or delay

49 — (1) Deviation or delay in prosecuting the voyage contemplated by the policy is excused —

(a) Where authorised by any special term in the policy; or

(b) Where caused by circumstances beyond the control of the master and his employer; or

(c) Where reasonably necessary in order to comply with an express or implied warranty; or

(d) Where reasonably necessary for the safety of the ship or subject — matter insured; or

(e) For the purpose of saving human life, or aiding a ship in distress where human life may be in danger; or

(f) Where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship; or

(g) Where caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.

(2) When the cause excusing the deviation or delay ceases to operate, the ship must resume her course, and prosecute her voyage with reasonable despatch.

Katedra Prawa Cywilnego