LAW 13

"THE DOCTRINES OF DEVIATION AND FUNDAMENTAL BREACH : HAVE THEY REALLY SUNK?"

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"I declare that this dissertation is my own unaided work. It is submitted for the degree of Master of Laws at the University of Cape Town, South Africa.

It has not been submitted for any degree or examination to any other university nor has it been prepared under the aegis or with the assistance of any body or person outside the University of Cape Town."

Signed by candidate

ANASTASIA KARAGIANNIS

Johannesburg, February 2000

In memory of my late father, who was taken away tragically
on the 20th September 1996.

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A. INTRODUCTION

A contract of carriage by sea evidenced *inter alia* by a bill of lading or charter-party governs and regulates the relations between the parties to whom it applies.

As in any other contract, the parties have certain duties and obligations provided for by the contract whether expressly or by implication. This paper focuses on the effects of a breach of such a contract, in particular when such a breach is a fundamental breach or is a geographical deviation made by the carrier. The effect of an exclusion or limitation clause contained in a contract, in the event of such breaches will also be considered.

There exists no jurisprudence in South African shipping law dealing with a fundamental breach or a deviation and thus in terms of s6(1) of the South African *Admiralty Jurisdiction Regulation Act* no. 105 of 1983, English law is the law applicable should a South African court be faced with a situation involving a fundamental breach or geographical deviation. The doctrines of deviation and fundamental breach will be examined from the moment of their inception to arguably their disintegration. Exclusion, exception and exemption clauses are all those clauses which exclude a party who has committed a breach from liability, and limitation clauses are those limiting liability.

How these have been affected by the doctrines of deviation and fundamental breach as well as the survival of these doctrines will now be seen.

B. THE DOCTRINE OF DEVIATION

1. The Birth of the Doctrine

The birth of the deviation doctrine can be traced back to as early as the 1800's. The slightest departure from the contracted voyage was deemed a deviation which had the effect of eliminating any exclusion or exemption clauses contained in the contract.[1] Irrespective of whether the loss suffered or damage caused to the cargo was attributable to the deviation or not, the deviating carrier lost the right to rely on any exclusion clauses contained in the contract. Thus even if no causal connection existed between the deviation and the loss, the deviating carrier was precluded from reliance on any contractual exemption clauses. The judicial reasoning was that a wrongdoer - in this case the deviating carrier - cannot be allowed to apportion or qualify his own wrong.[2] The duty not to deviate need not have been expressly contained in the contract, it was an implied duty the breach of which rendered the deviating carrier liable and unable to rely on any contractual exclusions. The carrier, upon deviation, was deemed a common carrier and as a result he was permitted to rely on the protection of the common-law exceptions. Thus if he could prove that despite the deviation, damage would have occurred to the cargo as a result of : an act of God (perils of the sea) or an act of the King's or Queen's enemies or inherent vice in the goods or defective packaging of the goods or the intentional loss of goods jettisoned in a general average sacrifice, he would not be held liable. The same treatment given to a bailee was given to a carrier. A bailee who had stepped beyond the limits of his right to possession placed upon him by the bailor, became a detainor of the goods and as such became absolutely liable for their loss or damage. Similarly a carrier was said to have become, upon deviating, an insurer of the goods.

If the loss had occurred during or due to a deviation the carrier lost both contractual and common-law exemptions. If the loss had not occurred during or due to the deviation the carrier lost only the contractual exemptions and he could only rely on the common-law exemptions if he could prove that the loss or damage would have occurred despite the deviation.[3]

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[1] *Ellis v. Turner* (1800) 101 E.R. 1529.

[2] *Davis v. Garrett* (1830) 6 Bing. 716; 130 E.R. 1456.

[3] See *Scaramanga v. Stamp* (1880) 5 C.P.D. 295 and *James Morrison v. Shaw, Savile of Albion* [1916] 2 K.B. 783.

The doctrine developed further in *Joseph Thorley Ltd v. Orchis S.S. Co. Ltd*[4] wherein a cargo-owner suffered loss due to damage done to cargo during off-loading. The bill of lading contained a clause exempting the carrier from liability for any loss caused during off-loading. The clause thus covered the loss in question. The carrier however had deviated during the voyage and for that reason the court held that the clause could not exempt the carrier as the duty not to deviate is an implied condition the breach of which displaces the contract. In spite of the fact that the damage done to the cargo was in no way caused by the deviation, the court considered the performance of the implied duty not to deviate a condition precedent to the right of the carrier to rely on the particular exclusion clause. The breach of the implied duty not to deviate was held as one going to the root of the contract thereby depriving the carrier, from the moment of the deviation, of any contractual exceptions. He was, accordingly, afforded the protection of only the common-law exemptions : acts of God; acts of King's or Queen's enemies; inherent vice et al.

Although the court reached the same conclusion it did so on opposing bases. The one view[5] was that the duty not to deviate is a condition the breach of which goes to the root of the contract rendering the breach a fundamental breach and having the effect of automatically terminating the contract. By analogy, it was found that upon a deviation, if the contract goes then so do the exclusion clauses contained therein, thereby preventing the carrier from relying on their protection.[6] The other view[7] was that an exclusion clause is intended to be available to a carrier only if he has performed the voyage contracted for without having deviated.[8]

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[4][1907] 1 K.B. 660.

[5]as per Collins, M.R. at pp 666-667.

[6]Collins considered the contract void *ab initio* irrespective of the extent of the loss suffered by the cargo-owner. All the clauses in the contract became void except for the purpose of claiming damages. The parties were accordingly deemed discharged from further obligations.

[7]as per Cozens-Hardy, L.J. at p. 669.

[8]What Cozens-Hardy, L.J. seems to have done is to have assimilated the law governing the deviations in insurance contracts with that of deviations in contracts of carriage. His reasoning was that the contracting party has voluntarily submitted another voyage for that which has been insured. This, I submit, is a superficial logic, as the two situations are very different. An insurance contract can be unscrambled after a post-deviation collapse for cover merely by having the insurer return the premium taken. In respect of a contract of carriage this is not possible, as, by the time the deviation is discovered the contract will probably have already been said to have been performed. The cargo will have probably been delivered at the port of discharge and the cargo-owner will in all likelihood not wish to return the benefit he has received by taking delivery.

In relation to the effect a deviation has on the positive obligation of a cargo-owner to pay freight to the ship-owner the court concluded, albeit *obiter*, that a cargo-owner has, despite the deviation, an implied obligation to pay freight.[9]

Joseph Thorley's reasoning was followed in *Internationale Guano v. MacAndrew*[10] where, even though the deviation had caused some and not all of the damage to the cargo, the carrier was precluded from relying on an exception clause in the charter-party exempting him from liability for damage done by inherent vice. Although the ship-owner argued that the cargo was inherently defective and would have suffered some damage even had he not deviated and that he should thus not be held liable for the damage which had occurred before the deviation, the court rejected the argument. Upon a deviation, the court held, the entire contract goes irrespective of when the damage was done thereby precluding the ship-owner from relying on the exemption clause. The carrier, however, was afforded the common-law exemption of inherent vice provided he could prove that inherent vice would have caused damage to the cargo in the absence of the deviation.

A carrier having the liberty to call at "any intermediate port" as contained in the bill of lading and being exempted from liability for any loss caused by the act of a King's enemy was found in a similar predicament in *James Morisson*,[11] when he was precluded from relying on the exemption clause due to his act of deviation. The port which he had called at was held as not being an "intermediate port" as per the contract and thus amounted to a deviation. He was afforded reliance on the common-law exemption of acts of King's enemies, but he had the onerous burden of proving that the damage caused to cargo by the act of the King's enemy would have occurred despite the deviation.

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[9]This conclusion can perhaps be said to be indicative of the courts' reluctance to allow a total collapse of the contract. A total collapse of the contract would have deprived the carrier from receiving any freight. Perhaps, the court realised that although the deviation doctrine was successful in achieving the desired result in limiting reliance on exclusion clauses, it was too wide in other respects as for instance having the effect of barring a carrier from freight.

[10][1909] 2 K.B. 360.

[11]*Supra*, fn. 3.

A somewhat different approach was taken shortly thereafter by the court in *The Cap Palos.*[12] In this case the contract to tow contained an exclusion clause wide enough to exclude liability for any damage or loss that may have arisen to any vessel or craft being towed or about to be towed or having been towed. The defendant was excluded from relying on the exclusion clause since the court found that, upon a proper construction of the contract, the defendant was not performing his contractual obligations and could thus not rely on the contractual exclusion clauses. Lord Atkin firmly supported the principle in contract law that a party who after having undertaken in a contract to do something in a certain way does not do so, cannot rely on an exclusion clause contained therein. Thus, a party can rely on an exclusion clause provided the contract has been carried out in the manner intended.[13] The court of appeal in *The Cap Palos* concluded that an appropriately worded exception clause is capable of excluding *all* breaches of contract[14] *(*my emphasis*)*. Thus the court supported the possibility of an exemption clause being devised explicity wide enough to cover any kind of breach. Lord Atkin by implication found the traditional doctrine as created in *Joseph Thorley* as having a weakness in that it holds that upon deviation the contract ends. His Lordship disagreed and held that a deviation does not automatically end the contract as is the case in insurance contracts. The traditional doctrine, he added, deems a contract automatically terminated, upon deviation, if the innocent party does not waive the breach. The court of appeal rejected the traditional view and was of the opinion that the applicability of an exception clause is not dependant on whether the innocent party has waived the breach or not.[15]

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[12][1921] p. 458.

[13]Authority for this was found in *Gibaud v. Great Eastern Railway* [1921] 2 K.B. 426, wherein an exclusion clause was held to have been designed to protect a party only while he is carrying out his obligation. Lord Atkin was of the opinion that reliance on an exclusion clause is dependant on whether the carrier was performing his contractual obligation at the time of the damage. The applicability therefore of an exclusion clause did not depend upon whether the carrier had made a repudiatory breach or whether as a result the cargo-owner had accepted the repudiation. Lord Atkins's approach was later coined the "four-corners" rule.

[14]In particular, Lord Atkin expressed that a party can make a contract wherein he can be held not liable for failure of performance, even if such failure is wilfull. Such a contract His Lordship stated would be valid if it is worded very clearly and the purpose is clearly expressed. With respect, such a statement is indeed troublesome. If a party promises to perform in a certain way in the contract, then can the same contract contain a clause exempting that party from liability fór failure to perform in that manner? Surely such a contract will not in essence be a contract at all?

[15]Lord Atkin pointed out that in the past courts had a tendency to use the analysis of discharge by breach as a tool of construction. Discharge by breach under contract law merely means that an innocent party's right to claim damages from party in breach is independent of whether he has waived or accepted the other party's repudiation of the contract. Lord Atkin expressed disapproval for an approach which automatically ends a

The "constructional" approach taken in *The Cap Palos* was once again applied by Lord Atkin sitting in *Stag Line v. Foscolo Mango & Co.*[16] This case involved a deviation which had been made by the carrier for the purpose of letting off engineers who had conducted tests on certain equipment of the vessel. Loss of cargo occurred during the deviation and although the bill of lading contained a liberty clause, granting the carrier a liberty to deviate, the House of Lords concluded that the clause had not allowed for that particular deviation. This case however is significant for another reason. The defendant - the deviating carrier - argued that the Hague Rules[17] which governed the bill of lading allowed him to rely on the defence of "perils of the sea" under Art IV despite his breach of the obligation "properly to carry" under Art III. In response to the defendant's argument the House of Lords concluded that the statutory exceptions under Art IV found in the Hague Rules which have been incorporated into certain bills of lading by virtue of The Carriage of Goods by Sea Act (COGSA) of 1924 do not apply to a voyage which is not the subject of the carriage contract. The House held that the Hague Rules are incorporated into certain bills of lading or charter-parties by contractual force (not by force of law) and they can as a result lead to a contrary intention both in terms of the contract itself and in terms of general principles of contract law. The House added that although the Rules are incorporated into bills, they cannot dislodge the body of law applied by English courts to deviations.[18] The Rules merely permit "reasonable" deviations under Art IV r 2 in addition to those deviations that may be justified by a liberty clause in the contract.[19]

In 1936, The House of Lords were once again faced with a case involving a deviation in *Hain S.S. Co. V. Tate of Lyle.*[20] The House purported to be applying general principles of contract law

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contract on the basis that a deviating carrier would as a result be able by his own wrong to get rid of the contract.

[16](1931) All E.R. 666.

[17]*International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading*, signed at Brussels, August 25, 1924.

[18]as for instance any antecedent law regarding deviations.

[19]The House nonetheless concluded that the deviation was not reasonable in terms of Art IV r 2.

[20][1936] 2 All E.R. 597; 55 U.L. Rep. 159.

governing discharge by breach, but in fact, as will be discussed, it applied a modified version of the traditional doctrine of deviation. Firstly, it expressly approved of the *Joseph Thorley* case which in essence gave birth to the traditional deviation doctrine. Secondly, it considered a deviation no matter how slight as being a serious breach going to the root of the contract, thereby giving the innocent party the right to treat a contract as having been repudiated by the carrier and declare himself no longer bound by any contractual terms. The duty not to deviate was considered an absolute obligation the breach of which is a fundamental breach which thereby automatically expunges the exclusion clauses from the contract. Upon termination of the contract the carrier loses the protection of any exclusion clause contained therein.[21] Thirdly, it held that upon a breach of a fundamental term, the innocent party has an automatic right to rescind the contract and until or unless he elects to affirm and not rescind it, the terms of the contract go and the party in breach cannot rely on its exclusion clauses.[22] Fourthly, it was of the opinion that the innocent party's election to terminate need not be a positive act and fifthly that should the cargo-owner elect to terminate, the contract is deemed terminated from the moment of the breach (the deviation). Thus, the cargo-owner is deemed to have ended the contract unless he waives the breach.

It appears that the court tried to explain the incidents of deviation as being the result of a discharge by breach. The court assumed, incorrectly so, that deviation and a discharge for breach have the same effects. The court thought that a discharge for breach automatically rescinds the contract unless it is affirmed. This is not true. In terms of general principles of contract law a contract is neither rescinded nor discharged unless the innocent party elects to rescind or be discharged from the contract.[23] The court made no mention of *The Cap Palos* which had taken a

[21]What the House, it appears, is implying is that if the cargo-owner accepts the deviation made by the carrier as being a repudiatory breach of contract, then the contractual exclusion clauses are demolished. This resembles the traditional doctrine, and in fact the court in *Hain* is said to have been responsible for bringing the traditional doctrine back.

[22]The House incorrectly articulated the deviation rule in contractual "rescission" terms.

[23]see *Heyman v. Darwin* (1942) A.C. 356. wherein a repudiatory breach committed by one party was held not to have the effect of rescinding the contract. Should the innocent party accept the repudiatory breach of the other party, that still does not have the effect of ending the contract. Even a total breach or a breach going to the root of the contract or a partial breach was considered by the court in *Heyman* as not rescinding the contract. Only if the innocent party elects to literally rescind or be discharged will this occur, and even then, the court held that certain clauses stand as for instance an arbitrations clause, and that the contract stands for the purpose of assessing damages.

"constructional" approach and it was of the view that the rule applicable to deviation is merely an application of ordinary contractual principles. Thus, though the court believed it was applying ordinary contractual principles, it in fact was not. Rather, it applied the doctrine in a slightly modified form.[24]

2. General Principles of Contract Law

Under general principles of contract law, only a breach of a condition (a term expressly classified as such in the contract) or an option to terminate in the event of a specific event occurring, no matter how trivial the breach, entitles the innocent party to treat the contract as terminated. Should the innocent party elect to end the contract, upon a repudiatory breach committed by the other party, then the contract ends from the moment of his election and not from the moment of the other party's breach. Thus a contract is not rescinded or terminated until or unless the innocent party has elected to do so. After election, both parties are discharged from performing any future obligations. Obligations which arise after the date of termination need not be performed. However, obligations which crystallized before the date of termination the performance of which arise after the date of termination, need still to be performed.[25] It must be noted that the innocent party's election to terminate must be a positive act.[26] Under general principles, if an innocent party elects to waive the other party's breach, his affirmation needs to be very clear and in waiving the breach he remains bound by any clauses in the contract.

What then of the implied duty not to deviate under general principles of contract law? This implied duty is a condition, the breach of which however, does not entitle an innocent party to treat the contract as at an end, as laid down in *Hong Kong Fir Shipping Co. V. Kawasaki Kisen Kaisho*.[27] Lord Diplock in *Hong Kong Fir* deals with this implied obligation by holding that the occurrence of

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[24]The court it appears was of two contradictory opinions. On the one hand it considered a deviation as being a fundamental breach irrespective of the true construction of the contract. On the other it proposed that deviation is merely governed by general principles of contract and it believed (incorrectly so) that it was so applying them. In hindsight it is apparent that *Hain* created special deviation rules. The court's reasoning is based on a fictitious election to terminate and not a real election - it is not possible for a cargo-owner to elect to terminate the contract when in fact the cargo is still en route.

[25]*The Sara D* (1989) 2 Lloyd's Rep. 277.

[26]*Ibid.*

[27](1962) 2 Q.B. 26.

the deviation must deprive the innocent party (who has still further obligations to perform) of substantially the whole benefit which it was the intention of the parties that he should obtain before he can be said to be entitled to treat the contract as at an end. The seriousness of the consequences of the breach is therefore the determining factor as to whether the innocent party is entitled to elect to terminate or rescind. Thus, the consequences of the deviation must first be weighed up before making the decision that the deviation is serious enough to merit giving an innocent party the right to terminate.

Prior to the *Hong Kong Fir* case the prevalent view was that every discharge for breach is a condition. Subsequent to *Hong Kong Fir*, one can easily adopt the view that ordinary principles of contract law cannot justify a termination of the contract by the innocent party on the occurrence of a deviation. It seems that only if a deviation has serious consequences or a contract specifically allows cancellation in the event of a particular type/s of act or breach occurring, may a termination of this contract be justified. Thus if a contract remains silent, then it is submitted by the court that it is not up to it to make good the parties' omission.

3. The Doctrine Prolonged

The deviation doctrine took a slightly different face when Lord Denning held in *Karsales (Harrow) Ltd v. Wallis*[28] that exemption clauses no matter how widely expressed only avail a party if he is carrying out a contract in its essential respects. Thus, he added, a party guilty of a breach which goes to the root of the contract, will not be able to rely on the exclusion clauses. His Lordship classified exception clauses as terms which operate as defences[29] and he placed emphasis on the distinction between express or implied terms in the contract. He stressed the need to examine the terms of a contract first, apart from the exemption clause/s in question in determining if the particular breach goes to the root of the contract. This case was the first case wherein the deviation doctrine was applied to a fundamental breach, in order to prevent a party who had committed a fundamental breach from relying on an exclusion clause. Lord Denning presumed

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[28](1956) 1 W.L.R. 936 (C.A.).

[29]As opposed to Lord Diplock's classification of an exclusion clause as an obligation-defining term in *Photo Production Ltd v. Securicor Transport* (1980) A.C. 827. This will be discussed in greater detail later on.

that under general principles of contract law a breach going to the root of the contract disentitles the breaching party from relying on an exemption clause.[30]

What is evident is that the courts seem to have expressed the law governing deviation in the language of discharge by breach. The deviation rule had developed so as not to require a causal nexus between the deviation and the loss in issue. The deviation rule had also been extended to cover positive obligations such as freight and demurrage.[31]

Much confusion seems to have centred around the law on deviation. In fact, Lord Denning a short while after deciding the case of *Karsales (Harrow)*, found in *Sze Hai Tong Bank Ltd v. Rambler Cycle Co.*[32] in favour of a "constructional" approach. He thus took a different approach to the one he had taken in *Karsales (Harrow)*. He, however, qualified this aproach by saying that irrespective of the width of an exclusion clause in absolving a party from almost any liability, there is an implied limitation on such a clause, cutting down its extremity. The courts, he added, are at liberty to decline the survival of an exclusion clause in absolving a party from liability, if the parties would not have expected a clause to exempt liability in a particular situation.

A similar "constructional" approach was taken soon thereafter[33] whereby the presumed intention of the parties was considered by the court as being the determining factor as to the applicability of the exclusion clauses. In terms of this approach such clauses ought to be viewed in context of the terms and language of the entire contract and in the event of a particular literal construction having absurd results then exclusion clauses will be taken as not having been intended to apply.[34]

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[30]This statement, upon a close analysis, is different to Lord Atkin's statement in *Hain* where Lord Atkin believed that a discharge for breach under general contract principles automatically rescinds the contract unless it is affirmed.

[31]As for instance in *Hain* where the deviating carrier was held not even entitled to freight. See also *U.S. Shipping Board v. Bunge y Born* (1924) 41 T.L.R. 73 wherein the deviating carrier was refused the right to demurrage.

[32](1959) A.C. 576.

[33]in *UGS Finance v. National Bank of Greece S.A.* (1964) 1 Lloyd's Rep. 446.

[34]as per Lord Pearson in *UGS Finance v. National Bank of Greece S.A, ibid.*

C. THE DOCTRINE OF FUNDAMENTAL BREACH

1. The Birth of the Doctrine of Fundamental Breach

The doctrine was created in the 1950's to defeat the effect of wide exclusion clauses. The doctrine was given birth to by the deviation doctrine and the courts considered the seriousness or degree of the fundamental breach as the determining factor when faced with the question of whether to allow exclusion clauses to have effect or not upon a party having committed a fundamental breach. A breach was considered fundamental if the manner and the consequences thereof were fundamental.[35] Thus there were categories or types of breach that were so fundamental wherefore an exclusion clause could not exclude liability.[36] It was based on the reasoning that an exceptions clause should not be applicable to protect a party for whose benefit it has been inserted, if the beneficiary has committed a breach of a fundamental term. Even a time clause requiring a party to bring a claim against the breaching party within a specific time period, could not be relied upon as a defence by the breaching party.

The doctrine of fundamental breach became perceived as a substantive rule of law and courts were reluctant to allow generally worded exclusion clauses to exclude an implied warranty of seaworthiness or negligence. Upon a breach, the contract was destroyed *ab initio* - from the moment the breach occurred - depriving the party in breach of the protection of any exclusion clauses. The contract was considered to exist only for the purpose of assisting the innocent party in claiming damages. Even Lord Denning in *Karsales (Harrow)* concluded that if a breach is a fundamental breach, the exclusion clauses become irrelevant whether or not they covered the particular breach.[37]

The doctrine became a substantive rule of law whereby no regard was given to the original intentions of the parties. Thus even a competently widely drafted exclusion clause was struck down upon a fundamental breach, leaving a party in breach unable to rely on the exclusion clause.

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[35]See Treitel, The Law of Contract (4th edition, 1980).

[36]*Chandris v. Isbrandtsen-Moller Co. Inc.* [1951] 1 K.B. 240 and *Smeaton Hanscomb & Co. Ltd. V. Sassoon I. Setty, Son & Co.* [1953] 1 W.L.R. 1468.

[37]It should be pointed out that Lord Denning incorrectly perceived the substantive rule enunciated in *Smeaton* as being a rule of construction and when he applied it in *Karsales (Harrow)* he applied it, as a rule of construction.

2. The Demise of the Doctrine of Fundamental Breach

The case of *Suisse Atlantique*[38] was very significant as it paved the way for the court in *Photo Production Ltd v. Securicor Transport*[39] to totally do away with the doctrine of fundamental breach. The House of Lords in *Suisse Atlantique* denied the existence of a substantive rule of fundamental breach although it did not overrule any previous cases which had applied it. Lord Wilberforce implied that an exclusion clause is an obligation-defining term and not a defence[40] when he held that an exception clause has the effect of limiting or qualifying the promise to which it is attached. The inference made is that even a breach serious enough to justify the innocent party's refusal to perform any further obligations may be reduced by a contractual exclusion clause to not being a breach at all. His Lordship however did state that an exemption clause should not have or be given the power to empty a contract of all its content. His Lordship added that deviation is a case wherein the parties could have hardly been expected to contemplate such a misperformance. However he expressed doubt as to whether the deviation doctrine still survives.[41] Two meanings were given to fundamental breach : fundamental breach and discharge of breach. In other words, the House believed that a fundamental breach and a discharge for breach are the same.[42]

The doctrine somewhat re-emerged in *Harbutt's Plasticines*[43] wherein the facts showed that the negligence of the defendant had disastrous consequences. The Court of Appeal found that though the exemption clause purporting to limit liability was on its true construction applicable to the consequences of the breach, and in fact was capable of limiting liability, the breaching party could not rely on it. The reason given by the court was that the effect of the breach was such as

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[38]*Suisse Atlantique Societe d'Armament Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* (1967) A.C. 361.

[39]1980 A.C. 827.

[40]This view was followed by Lord Diplock in *Securicor, ibid.*

[41]It will become apparent when the *Securicor* case is discussed further along that Lord Wilberforce sitting in that case suggested that the deviation doctrine might still survive albeit *sui generis*.

[42]The House as a result held that a separate concept for fundamental breach and one for breach of a fundamental term cannot be justified. The House retained the terminology for fundamental breach which shortly thereafter led the court in *Harbutt's Plasticine Ltd v. Wayne Tank & Pump Co. Ltd* (1970) 1 Q.B. 447 to believe that the doctrine of fundamental breach still survived.

[43]*Ibid.*

to terminate the contract thereby precluding the breaching party from relying on the exclusion clause. The court thus held that a fundamental breach can terminate a contract including its exclusion clauses without the requirement of a causal connection between the loss and the fundamental breach. Whether a breach is a fundamental breach or not is determined, according to Lord Denning, by examining the result of the breach and not so much the quality of the breach itself.[44] The court concluded that where a contract is terminated as a result of a fundamental breach then, as a rule of law, any exclusion clause designed to protect a party is not applicable.[45] The Court in applying the doctrine of fundamental breach to exclusion clauses held that upon a discharge for breach the contract is rescinded and the exclusion clauses have no effect.[46] The effect of a discharge of breach was held to be a literal rescission of contract depriving it of any future effect. The Court was of the opinion that since an exception clause is merely a defence it takes effect only at the point of adjudication which allows a clause to be denied effect by a rescission of the contract.[47]

The defendant was precluded from the protection of a limitation clause limiting his liability, on the basis that the breach was too fundamental rendering the contract and its exclusion clauses terminated.

Harbutt's Plasticines was expressly overruled in *Securicor* as shall later be seen, on the ground that Lord Denning had conflated in *Harbutt's Plasticines* two distinct concepts : rescission *ab initio* and termination.[48] *Harbutt's Plasticines* was further overruled for the reason that it allowed an

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[44]Lord Denning found that although the negligent act of the defendant's employee was not very serious, its result was. It was serious enough to terminate the contract and disentitle the defendant from relying upon the exclusion clause.

[45]The Court of Appeal misinterpreted the *Suisse Atlantique* judgement. The Court thought that what the *Suisse Atlantique* judgement was saying is that : if a fundamental breach is committed and the other party accepts it so that the contract comes to an end, the breaching party cannot rely on an exclusion clause. The *Suisse Atlantique* judgement, however, did not hold this.

[46]This view has been condemned for being consistent with the judgement in *Hain*.

[47]Were the Court to have held otherwise - that the clause has the effect of limiting the obligation - then a rescission of such a contract would have had no affected on the clause.

[48]Lord Wilberforce explained in *Securicor* at 856 that the two concepts are distinct in that a contract is rescinded *ab initio* (as having never come into existence) on the occurrence of fraud or lack of consent or mistake. A contract is said, on the other hand, to be terminated when the innocent party accepts the other party's repudiatory breach. The innocent party is then said to have rescinded the contract. Acceptance by the innocent party of the other's repudiatory breach does not result in a rescission. The contract has come into existence, but has been "terminated" or otherwise called "discharged".

innocent party to retain a cause of action against the other party despite the fact that the Court has concluded that the whole contract disappears upon the occurrence of a fundamental breach.

Before proceeding to a closer examination of the *Securicor* case, it is necessary to take a brief look at a few cases which arose between *Harbutt's Plasticines* and *Securicor*. One case, though purporting to have applied a rule of construction in fact had used the presence or absence of a fundamental breach as the determining factor as to the applicability of an exclusion clause.[49] A purely "constructional" approach requires a consideration by the courts of facts and circumstances surrounding the formation of the contract and not those surrounding the breach itself. Such an approach considers the seriousness of the breach as more significant than the category of the term - whether it is a fundamental breach or not.

One can thus see that the doctrine of fundamental breach had a strong hold over contracts containing exclusion clauses, and was applied as a substantive rule of law.

3. General Principles of Contract Law

Under general contractual principles if an exclusion clause is couched in terms narrowly defining the promisor's obligations then there may be no fundamental breach as there may be no breach at all. Should there have been a breach, then a contract is considered under contract law to be terminated once the innocent party has elected to rescind the contract and not before then.

Under common-law contractual principles there existed a rebuttable presumption whereby exclusion clauses inserted into contracts were contemplated as not being applicable to breaches of fundamental terms.[50] Fundamental terms are those terms which specify the essential purpose of a contract or which require performance in a certain way or which underlie the entire contract.

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[49]*Kenyon Son & Craven Ltd. V. Baxter Hoare & Co. Ltd.* [1971] 1 W.L.R. 519. The court tried to apply a "constructional" approach, yet they did so by applying the label "fundamental" to the breach or the term breached.

[50]see *Hong Kong Fir Shipping Co., supra,* fn. 27. This presumption was discarded in *Suisse Atlantique* wherein the distinction between a fundamental breach and a breach of a fundamental term was done away with.

A breach of such terms automatically amounts to a fundamental breach since the breach is considered as one going to the root of the contract.[51] A breach of a fundamental term gave an innocent party the right to terminate performance. However, the distinction between a fundamental breach and the breach of a fundamental term was done away with.[52] General principles also provide for parties to contract out of common-law liability for a fundamental breach.[53] A fundamental breach is seen as one which renders performance as something totally different from that contemplated by the parties. The innocent party in such a case was deemed entitled to treat such a breach as repudiatory and terminate the contract, in which case the breaching party cannot rely on an exclusion clause.[54] In the event that the innocent party chose to waive the breach then the breaching party could rely on an exclusion clause.

However in the more recent case of *Securicor* this view was considered incorrect. According to Lord Diplock, sitting in *Securicor*, a breaching party can rely on an exclusion clause. In the event of a breach being serious the breaching party's liability can nonetheless be limited.[55] In the event of a total breach - one causing serious prejudice or making performance something totally different from that bargained for - it is proposed that an exclusion clause if clearly and unambiguously expressed can also limit a party's liability.[56]

A distinction has been created, in contract law, between the breach of a condition and that of a warranty. The breach of a condition is one whereby performance rendered is different from that promised. The breach of a condition is not considered as amounting to a fundamental breach,

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[51]See the judgements of Lords Wilberforce and Upjohn sitting in Suisse *Atlantique*.

[52]see *Suisse Atlantique*.

[53]As confirmed in *Suisse Atlantique*, despite Lord Denning's view in *Karsales (Harrow)* to the contrary.

[54]See Lord Reid in *Suisse Atlantique*.

[55]See *Ailsa Craig Fishing v. Malvern Fishing* (1983) 1 All E.R. 101. See however *Suisse Atlantique* wherein liability for a serious breach could not be limited to allow a party reliance on an exclusion clause as it would amount to a disregard for the main purpose of the contract.

[56]See *Ailsa Craig Fishing, ibid,* in which the court felt strongly that to read an ambiguity into an exclusion clause by the process of "strained construction" in order to prevent the breaching party from relying on it would have the effect of re-introducing the doctrine of fundamental breach by the back door.

thereby not granting an innocent party the right to terminate the contract.[57] The breach of a warranty is also considered as not giving a party the automatic right to elect to terminate.[58] However, as will be later seen, under a "constructional" approach the distinction between a condition and a warranty becomes irrelevant.

[57]See *Afovos Shipping Co. S.A. v. Pognan (R.) and Lli (F.)*, (1983) 1 W.L.R. 195. This statement on contract law however is different to the one stated in *Hong Kong Fir Shipping Co.* which granted an automatic right to the innocent party to terminate the contract. The duty not to deviate is considered under common-law as being a condition.

[58]An innocent party however has the right to suspend performance of the contract and assess the seriousness of the breach. Assessment entails an examination of the proportion of performance promised by the breaching party which the innocent party has not received. The duty to provide a seaworthy ship is considered under common-law as being a warranty.

D. THE TWO DOCTRINES REVISITED

One can thus see that the doctrine of fundamental breach had a strong hold over contracts containing exclusion clauses. The doctrine was applied as a substantive rule of law. The deviation doctrine seemed to also hang in the balance since the last case which had dealt with a deviation had not explicitly overruled the doctrine.[59] Both doctrines came under scrutiny in the *Securicor* case. The House of Lords in *Securicor* were unanimous in realising the need to demolish the doctrine of fundamental breach and apply instead general principles of contract to determine the applicability of exclusion clauses upon a breach. The doctrine of deviation, however, arguably has not been totally demolished as shall be seen.

This realisation in fact emerged a few years earlier in the case of *Moschi v. LEP Air Services Ltd*[60] wherein Lord Diplock suggested that in order for general principles of contract law to govern a deviation situation or a fundamental breach, contractual obligations should be analyzed in terms of primary and secondary obligations. Lord Diplock as will be seen, re-iterated this analysis when sitting in *Securicor* as well. Lord Diplock categorised contractual terms as being either : primary obligations or secondary (general or anticipatory) obligations. The non-performance by one party of a primary obligation is said to be substituted by a general secondary obligation to pay compensation, by operation of law, to the other. Such a general secondary obligation is an obligation arising from the contract just as much as the primary obligation which it replaces. Thus, a party who has breached a primary obligation is considered as having committed a breach of contract, which gives rise to a general secondary obligation for him to compensate the innocent party - unless of course, the court compels performance by awarding a decree of specific performance in which case there arises no general secondary obligation to pay compensation. The source of a secondary obligation, His Lordship added, is the contract itself or general principles of contract law or even statutory law, and is prescribed in a contract in the same way as the primary obligation is prescribed.[61]

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[59]See *Sze Hai Tong Bank Ltd v. Rambler Cycle Co., supra,* fn. 32.

[60](1973) A.C. 331.

[61]The only restriction it seems would be that the contract retains the nature of a contract.

Lord Diplock firmly supported the freedom of parties, under contract law, to agree on whatever primary obligations they wish. However he also stated that with respect to carriage contracts there is an exception to total freedom to contract.[62]

In respect of implied obligations such as a carrier's duty : to take the most direct or customary route; to stow cargo below deck or a shipper's duty to prepare the cargo properly for shipment, Lord Diplock stated that these can be modified by express words. The duty imposed on the carrier by the common-law not to deviate gives, according to Lord Diplock, the cargo-owner the right to rescind the contract. Should the cargo-owner rescind the contract then the primary obligations of the deviating carrier are changed. Accordingly, limitation clauses in a contract which limit the carrier's obligations as under Art IV (1)-(4) of the Hague Rules are invalid. The reason being that in the event of the Hague Rules having been incorporated into the carriage contract, the freedom to modify secondary obligations is limited. In the event of a breach the Hague Rules impose secondary obligations on the parties which are adequate.

Upon a discharge for breach, the contract is terminated and the primary obligations are replaced by secondary obligations to pay damages.[63] A party is also entitled to rescind a contract if the other party's failure to perform a primary obligation deprives him of all/substantially all of the benefit under the contract or if the parties have expressly or impliedly agreed that any breach no matter how slight entitles the innocent party so to rescind. In such a situation, the party who has committed the breach would be required to pay compensation for obligations the non-performance of which were the breach giving rise to the innocent party's right to rescind, and to pay compensation for obligations the performance of which had not fallen due but which had been brought to an end by the rescission. This obligation was termed by Lord Diplock as being an anticipatory secondary obligation. The House conceded that though on a discharge for breach primary obligations cease and are replaced by secondary obligations to pay damages, the damages are assessed on the basis of the contract as a whole and not just selected parts of it.

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[62]Lord Diplock disapproved of the use by previous courts of the doctrine of fundamental breach as a means of restricting freedom. He did approve however of the "main purpose" rule adopted by Lords Upjohn and Wilberforce in *Suisse Atlantique* which proposed that any words or provisions which are inconsistent with the main purpose of the contract or render the contract meaningless must be disregarded. Lord Diplock termed this a rule of construction and welcomed it.

[63]The problem with the discharge by breach analysis is the same as the problem with the traditional deviation doctrine, namely that upon a deviation the contract is terminated. Surely a bill of lading holder would not want his cargo to be discharged at the next convenient port?

The House of Lords in *Securicor* felt the need to demolish the doctrine of fundamental breach once and for all. Although the House in *Suisse Atlantique* thought itself to have discarded the doctrine of fundamental breach it in fact had not. It considered the "constructional" approach as being the correct approach and that as a rule of construction the doctrine can be assimmilated into the *contra proferentem* rules. Exemption clauses would thus be viewed in context of the entire contract - the language and words used and the intention of the parties.[64] The House did not expressly overrule any of the previous cases which had applied a substantive rule of law to fundamental breach.

The Court of Appeal in *Harbutt's Plasticines* despite the judgement of *Suisse Atlantique* had continued to apply fundamental breach as a rule of law but giving it a "constructional" gloss.[65]
Even *The Unfair Terms of Contract Act*[66] which was specifically enacted to distinguish between consumers and businessmen and which made provision for the applicability of exclusion clauses, was not of much use to the law of carriage as it mainly applied to consumer rather than carriage contracts. The judgement of *Securicor* was thus most welcomed as it cleared up the confusion.

The House of Lords in *Securicor* unanimously found in favour of the defendant and allowed him the protection of the particular exclusion clause. The exclusion clause was considered on a proper

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[64]Lord Wilberforce suggested in *Suisse Atlantique* that in order to determine whether an act or omission constitutes a breach, one has to look to the contract itself. There was an indication from Lords Reid and Wilberforce that a serious breach would enable an innocent party to repudiate a contract on the grounds that it was so "seriously mutilated so as to nullify its totality", in which case an exclusion clause would have no effect.

[65]Lord Denning insisted in *Harbutt's Plasticines* that he was applying construction principles however he in fact was continuing a dogged substantive rule of law, in that he considered a court at liberty to limit or modify an exclusion clause (no matter how wide its term) to the extent necessary in order to give effect to the main object and intent of the contract. His Lordship took the same stance in the later case of *Securicor* when the case was still in the Court of Appeal and had not yet reached the House of Lords. Although he stated in *Securicor* while it was still at the appeal stage that as a matter of construction the exclusion clause was not applicable, he considered it unfair or unreasonable to allow a party who had committed a fundamental breach the right to rely on the clause. Lord Denning refused to allow the breaching party reliance on the exclusion clauses if he is guilty of a fundamental breach or a breach of a fundamental term. This statement echoes the pre-*Suisse* substantive doctrine and in fact does not resemble the reasoning of *Suisse Atlantique*, much to his insistence that he followed the *Suisse Atlantique* approach.

[66]of 1971.

construction of the contract apt to cover the breach in question. The facts involved a security company - Securicor - whose employee negligently burnt down the premises for which the Securicor company was hired to guard. Though the defendant was found to have breached the contract he was not precluded from relying upon the exclusion clause. The parties, the House, agreed are free to contract and to agree beforehand what the consequences of a breach are should a breach occur, provided the contract retains the legal characteristic of a contract. Should an exclusion clause cover the events which have occurred and it is clear that both parties had equal bargaining power and the words used are clear, then it was contended that a court should not place a strained construction on such exclusion clauses.[67]

In response to *The Unfair Terms of Contract Act*, Lord Wilberforce was of the opinion that since the Act was made applicable to consumer contracts only,[68] this was an indication by the English legislature that the intentions of parties should be upheld, thereby dismissing the doctrine of fundamental breach. The House emphasized the need to give effect to the express and implied intentions of the parties and should an exclusion clause as a matter of construction (of the whole contract and not merely of that clause) apply then an exclusion clause can apply to any and even all breaches.[69] Though these clauses will be construed *contra proferentem*, added the House, they are capable of absolving a party even from negligence provided the words used are clear.[70] Exemption clauses, however, which appear to exempt a party from strict liability or from a serious breach will not be allowed.[71]

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[67]At common law, the reasonableness of a clause is not a ground for modifying an exclusion clause once the true construction of the clause has been attained. In reaching its true construction however, one can take into consideration the "reasonableness" factor in order to arrive at its true construction.

[68]See s9(1) which applies to consumer contracts only.

[69]Lord Wilberforce made no distinction between a fundamental breach or a breach of a fundamental term. He concluded that an exemption clause can be applicable to *any* breach.

[70]In the event of a deliberate breach, Lord Wilberforce found the common-law adequate enough to deal with it. See Treitel, *The Law of Contract* (4th edition, 1980).

[71]as per Lord Wilberforce.

The House noted the defendant's implied duty to have due regard for the safety of the plaintiff's premises which was found to be an absolute implied primary obligation[72] and held that though the defendant was *prima facie* liable he was excused by the exclusion of liability clause.[73]

Lord Diplock held that obligations are divided into three categories all of which arise from the contract and which may be excluded or modified[74] :

1. the primary obligations to perform duties;
2. the general secondary obligation to pay damages for failure to perform a primary obligation; and
3. the anticipatory secondary obligation for the defendant to pay damages to the plaintiff for his non-performance of future obligations due to the fact that the plaintiff rightfully elected to terminate the contract for breach thereby discharging the defendant from future obligations.

If a primary obligation is breached, other primary obligations remain unaffected. These are required to still be performed by both parties. If they are not performed, this gives rise to general secondary obligations which arise by implication of law - either the common-law or statutory law.

However if a party has committed a fundamental breach or has breached a condition then, according to Lord Diplock, the remaining primary obligations need not be performed. A breach will be considered a fundamental breach if the primary obligation which has not been performed has had the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties he should obtain from the contract. Where the parties have made it a condition in the contract that upon a failure of one of the parties to perform a primary obligation the

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[72]see the judgement of Lord Diplock.

[73]Lord Diplock did not distinguish between those clauses which limit and those which exclude liability. This is of interest since much attention had previously been placed on such a distinction. His Lordship dismissed a distinction between the two, stating that exclusion clauses are devices for the alteration of primary obligations and therefore there can be no liability where there is no contractual breach. Since they define primary obligations, he suggested that they be strictly construed. Limitation clauses merely define the extent of the secondary obligation to pay damages once the contractual breach has occurred.

[74]Lord Diplock had created this analysis in *Moschi v. LEP Air Services supra,* fn. 60. His Lordship had followed the *Kenyon Son* case, *supra*, fn. 49, wherein "conditions" were categorised as being one of three types : those which limit or reduce what would otherwise be a defendant's duty; those which exclude the defendant's liability for breach of aspects of that duty; and those which limit the extent to which the defendant is bound to indemnify the plaintiff in respect of the consequences of the breach of that duty. Lord Diplock merely put labels to these types of "conditions" in *Moschi* and then later in *Securicor.*

other will be entitled to elect to terminate the contract, then all remaining obligations which have not yet been performed need not be performed. Thus, upon a breach of a condition or a fundamental breach the innocent party may elect to end all unperformed primary obligations. The innocent party's own primary obligations are discharged. An anticipatory secondary obligation arises for the guilty party to pay monetary compensation to the innocent party in respect of loss that will be sustained as a result of the non-performance of such primary obligations which the innocent party has elected to put an end to.

Lord Diplock held that exclusion clauses are obligation-defining terms rather than defences to accrued rights of action. They exclude or modify otherwise absolute obligations.[75] A primary obligation implied into a contract can therefore be rejected or modified. However a general secondary obligation, which has arisen due to a breach of a primary obligation, can only be modified and not rejected. The reasoning given by Lord Diplock is that if it is allowed to be rejected then the contract becomes one containing unenforceable primary obligations and thus not a contract at all.

Qualifying the promises to which they relate, exclusion clauses take effect at the formation of the contract. They are not mere defences at the point of adjudication. At common-law, primary and secondary obligations are inseparable - a primary obligation does not arise unless the party has accepted the sanctioning obligations that go with it. Exception clauses either modify the obligations at the time the contract is formed or they prevent their arising at all. Thus this concept of analyzing exclusion clauses in terms of primary and secondary obligations and not as defences leaves no need for the concept or doctrine of fundamental breach. This is based on the reasoning

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[75]See further Coote, B, *Fundamental Breach and Exclusion Clauses, Northern Ireland Legal Quarterly 1980 p. 356*, who takes the same approach to exclusion clauses being obligation-defining terms. Lord Diplock argued that if exclusion clauses were to be regarded as defences, as Lord Denning regarded them in *Karsales (Harrow) supra*, fn. 28, then these obligations would be ascertainable by an examination of the contractual terms without any reference to the particular exclusion clauses. A failure to perform any of the obligations would under Lord Denning's analysis amount to a breach of condition thereby entitling the innocent party to bring an action against the defendant against which the defendant would employ the exclusion clause to bar the claim or action.

that once the exclusion clause has taken effect at the formation of the contract, every breach thereafter will be actionable.[76]

Perhaps one minor defect in the judgement of *Securicor* is that though the *Harbutt's Plasticines* and *Wathes*[77] cases were overruled, the reasoning on which these cases was based was not disposed of. Academic opinion suggests that Lord Wilberforce could have rather based his findings on the *Moschi* approach rather than on the *Heyman* approach. The *Heyman* route is that, upon a discharge for breach the contract remains for the purpose of assessing damages, and that any clause modifying; excluding; limiting; or liquidating damages remains intact. The discharge by breach is thus not considered a rescission of the contract. It would have, with respect, made more sense for Lord Wilberforce and Lord Diplock who concurred, to follow the *Moschi* approach since it was a more recent case.[78]

Academic opinion has also questioned the route taken by Lord Diplock. His Lordship rooted his reasonings on the function of exclusion clauses - as obligation-defining terms and not defences.[79]

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[76]Consider for example three situations : (1) A party sells apples and he warrants them suitable for home-baking purposes except for the making of juice. He does not accept a primary obligation in relation to their suitability for juice-making purposes. (2) A party sells oranges and warrants them fresh. However the secondary obligation (to pay damages) which would otherwise attach to the primary obligation (to supply fresh oranges) is excluded. This shows that the party has not accepted the primary obligation to supply fresh oranges. (3) A party accepts a primary obligation to supply fresh grapes but it is agreed that should he commit a breach, his secondary obligation to pay damages does not accrue beyond a certain specified amount. Each of these examples illustrates the effect of labelling exclusion clauses as obligation-defining terms.

[77]*Wathes v. Austins* (1976) 1 Lloyd's Rep. 14 (C.A.). This case purported to follow *Harbutt's Plasticines* but in fact it appears to have taken a pre-*Suisse* rule of law approach, in that it applied the doctrine not only to a situation where the contract is discharged for breach but also to a situation where a contract is affirmed by the innocent party.

[78]Both *Heyman* and *Moschi* had the same approach. It seems that in overruling *Harbutt's Plasticines*, Lord Wilberforce did so using *Heyman's* and not *Moschi's* because had he used the *Moschi* case he would have had to accept Lord Diplock's view on exception clauses. Had he done so then it would have been assumed by legal minds that he had had a change of heart since his judgement in *Suisse Atlantique*. In *Suisse Atlantique* Lord Wilberforce had stated that it is a matter of the parties' intentions whether and to what extent exclusion clauses can be applied after a deviation. In other words, he implied that deviation cases should be governed by general principles of contract law. However, in *Securicor*, he suggested that exclusion clauses in the case of deviations be considered a body of authority *sui generis* with special rules derived from historical and commercial reasons. His Lordship however could not follow through with this suggestion, because it somehow did not fit in with *Heyman's* case which is the one he ultimately relied upon.

[79]His Lordship could not overrule *Harbutt's Plasticines* using the *Heyman* case. He overruled it using the *Moschi* case. Since he had formulated the analysis in *Moschi* he no doubt felt obliged to use the *Moschi* case to overrule *Harbutt's Plasticines*. One can presume that Lord Diplock affirmed his earlier view that limitation clauses also qualify the secondary obligations to which they relate.

The House held that the defendant was protected by the exclusion clause. It was stated that, from the moment of termination (when the innocent party has accepted the repudiatory breach of the defendant) neither party was under obligation to do what he had promised under the contract : future obligations. Special mention was made of the view that the contract including its exclusion clauses is not considered as a result to have never existed. The House assumed that a breach of a fundamental term, a breach of a condition, a repudiatory breach, and a fundamental breach were one and the same.[80] Thus it is irrelevant what kind of breach it is.[81]

It seems odd that both the Court of Appeal and the House of Lords in *Securicor* applied a "constructional" approach and yet they reached different conclusions. A true "constructional" approach under general principles of contract law would involve an ascertainment of the meaning of the exclusion clause first, in light of the contract as a whole and of surrounding circumstances at the time the contract was formed. Should a party claim that his acts (or his breach) are covered by an exemption clause and those acts are serious, then the exclusion clauses would have to be very clear in order to protect him. The degree of seriousness of those acts and not whether they are fundamental or not is the determining factor.

Before proceeding to an examination of a few cases which arose after *Securicor*, one final point requires mentioning. Though the House in *Securicor* rejected the substantive doctrine of fundamental breach it did not reject the deviation doctrine. This can be deduced from the fact that the House did not explicitly overrule any of the previous deviation cases. In fact, Lord Wilberforce suggested that the deviation rule be considered as a *sui generis* exception to general principles.[82]

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[80]This differs to the view of Lord Upjohn in *Suisse Atlantique* which is that a breach of a fundamental term (no matter how slight) is a repudiation whereas a fundamental breach can only amount to a repudiation if the effect of the breach goes to the root of the contract.

[81]See *Smeaton, Hanscomb & Co. Ltd v. Sassoon I. Setty, Son & Co.* [1953] 2 Lloyd's Rep. 580, which was authority for a totally opposite proposition : a fundamental term is a term narrower than a condition which underlies the whole contract. Non-compliance with the term has the effect of rendering performance something totally different from that contemplated by the contract. The court submitted that a well drafted exclusion clause is capable of covering or applying to the breach of a condition, whereas it is not capable of covering or applying to the breach of a fundamental term or a repudiatory breach.

[82]Lord Diplock remained silent on this matter and supported the parties' freedom to agree on whatever exclusion or modification of any obligations they wise provided this is kept within the limits that the contract

It seems, therefore, that the *Securicor* case is authority for the view that a deviating carrier will be protected by an exclusion clause if the general principles of contract law and COGSA 1971 allow for such protection. In addition, a party who has committed a breach irrespective of whether it is a fundamental breach, or a breach of condition, or a breach of a fundamental term, it will be permitted protection from an exclusion clause by ascertainment of the true construction of the contract as a whole. Thus it can be argued that fundamental breach remains under disguise, not as a rule of law, but as a sub-species of construction.

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retains the legal characteristics of a contract. Lord Wilberforce thus seems to have allowed for the survival of the deviation doctrine even after the doctrine of fundamental breach was abolished. Lord Diplock on the other hand attempted to fit deviation cases into the general contract law by creating the analysis of primary and secondary obligations in *Moschi* and developing it further in *Securicor.*

E. THE REPERCUSSIONS OF *SECURICOR*

In an Australian case shortly after *Securicor*[83] the court applied the approach taken in *Sze Hai Tong*[84] while at the same time proclaiming that the principles laid down in *Securicor* govern the effects of a fundamental breach in a carriage contract.[85] *The New York Star* is an illustration of the difficulty courts have had in dismissing the fundamental breach doctrine altogether, even after *Securicor*, had overruled it.

1. A Dichotomy between Exclusion and Limitation Clauses

Two Canadian cases[86] dealing with the applicability of exclusion and limitation clauses to breaches, created a distinction between these two types of clauses. Though neither of these cases were shipping cases, their treatment of exclusion clauses requires mentioning as they reflect general principles of contract law. In the *Ailsa Craig Fishing* case the court subjected a limitation clause to a less stringent construction than an exclusion or indemnity clause. A clause limiting liability for negligence needs to be unambiguous and construed *contra proferentem*. The clause, added the court, should never be subjected to a strained construction but rather be given a natural plain meaning.[87] Exclusion and indemnity clauses on the other hand were held to necessitate a stricter standard of approach, for the reason that it is more unlikely for an innocent party to have agreed to release the wrongdoer from the liability that would otherwise have fallen on him. Lord Wilberforce suggested that courts should take a less hostile aproach to limitation clauses because they ought to be related to other contractual terms including the wrongdoer's (*proferens*) potential risks and the opportunities for the innocent party to be remunerated and to insure.[88] Lord Wilberforce did, however, state that the argument that exclusion and limitation

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[83] *The New York Star* [1980] 3 All E.R. 257.

[84] *Supra*, fn. 32.

[85] The exception clause in this case was particularly comprehensive and clear. Yet the court found that the defendant's liability could not be limited (the exclusion clause could not protect him) upon a matter of construction and due to the fact that he had committed a fundamental breach.

[86] *Ailsa Craig Fishing Co. Ltd v. Malvern Shipping Co. Ltd.* [1983] 1 W.L.R. 964 and *George Mitchell v. Finney Lock Seeds* (1983) 1 All E.R. 108.

[87] It is arguable that there is nothing unnatural about employing a strict construction.

[88] Lord Fraser concurred with Lord Wilberforce and added that it is more probable that a plaintiff would agree to a limitation of liability than to a total exclusion thereof.

clauses play different functions in theory is a fallacy. Lord Fraser qualified this statement by adding that if an exclusion clause succeeds in its purpose then a limitation clause would prove redundant.[89] The House confirmed the view that the judicial construction of limitation clauses ought to be liberalized.[90] Their finding however that a limitation clause is applicable when there is a total failure to perform is irrelevant, as it is enough that the clause clearly limits liability for failure. There is speculation that the House may have created construction rules for limitation clauses.[91] It is difficult, though, to see how these limitation clauses can be construed otherwise when in fact they are subject to a strict construction. The real difference between a strict construction and a natural meaning is not clearly evident.[92] It is also submitted that a correct aproach to limitation clauses is not a "construction" approach but rather one taking into account the relationship of these clauses to the entire contract.

The Court of Appeal in *George Mitchell* applied the same lenient construction approach to the limitation clause in issue as had been applied in *Ailsa Craig Fishing Co.*. Lord Oliver found that on construction, the clause was not effective in limiting the liability for a negligent breach of contract. Lord Denning interpreted the *Ailsa Craig Fishing Co.* case as having relied on the reasonableness of the limitation clause. Thus Lords Denning and Oliver expressed that whether a defendant would be allowed to rely on a limitation clause is determined by whether it is fair and reasonable to allow reliance on the clause in the circumstances, and not whether there are circumstances in which the clause may be fair and reasonable. What is fair and reasonable, they added, is

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[89]In theory, a limitation clause is used as a final resort in the event that the exclusion clause in the contract is poorly drafted. Had the exclusion clause been well drafted then the finding of a breach would not have arisen in the first place and thus there would not have been a need for a limitation clause. Theoretically speaking, exclusion and limitation clauses function differently within a contract. In reality, however, limitation clauses have the same effect as exclusion clauses. They reduce contractual promises to mere declarations of intent as do exclusion clauses.

[90]In doing so, the House re-iterated *Securicor's* approach that general principles of contract law do not know a substantive doctrine of fundamental breach and thus the doctrine no longer exists.

[91]See for instance the judgement of Lord Wilberforce wherein he considered a limitation clause as being capable of being perfectly clear without the need for it to be placed it under construction.

[92]It seems that the House implicitly introduced the common-law standard of reasonableness into the construction rules.

determined at the time of the breach and not at the time the contract is formed.[93] If one is to acknowledge, they said, that the doctrine of fundamental breach is subsumed into the *contra proferentem* rule then this necessitates a finding of the extent to which seriousness of the breach will be a relevant factor in the construction of an exclusion clause.[94]

[93]Lord Oliver in deciding whether a clause applies to excuse or limit liability for the particular breach took the "constructional" approach irrespective of whether the breach is a fundamental breach or not. The House went on to conclude that the doctrine of fundamental breach was no longer a separate factor overriding the application of an exclusion clause. The doctrine, it added, was merely subsumed into the *contra proferentem* rule. The House stated that the first question to be decided on is whether there was indeed a substantive fundamental breach or the contract. Upon doing so, one can proceed to the next step which is to construe the particular exclusion or limitation clause. The House believed that this is what the *Securicor* case was saying. The House, however, had misunderstood the *Securicor* case. The *Securicor* case had discarded the first question.

[94] The minority (Lord Bridge), in the case, opposed the views of the majority(Lords Denning and Oliver) because he was of the opinion that they were attempting to re-introduce the concept of fundamental breach.

F. THE EFFECT OF THE HAGUE AND HAGUE-VISBY RULES

A crucial issue which needs attention is the manner in which certain obligations peculiar to carriage by sea are affected by what the courts have laid down in relation to the applicability of exclusion clauses. Obligations peculiar to shipping law are for instance : a carrier's duty to take reasonable care of cargo; a carrier's duty to provide a seaworthy vessel; a carrier's duty to stow cargo below deck and the duty not to deviate. Bearing in mind how the courts have dealt with the doctrines of deviation and fundamental breach, one needs to examine their effect on the Hague[95] and Hague-Visby[96] Rules and vice-versa. The Rules may apply either by force of law or by contractual force. The Rules will have force of law and apply by force of law wherever and whenever, in terms of s1(2), the English COGSA 1971 applies. The Rules will have contractual force if they are incorporated or inserted into a bill of lading or charter party, by the parties. This distinction plays a significant role as will later be seen.

1. The Duty to Provide a Seaworthy Ship

It was held in *TFL Prosperity*[97], albeit *obiter*, that an exclusion clause excluding the obligation to provide a seaworthy ship is valid and may survive should the carrier breach his obligation.[98] A "construction" approach was taken in determining whether the wide exemption clause covered the breach in question. In doing so, the court found that the exclusion clause negated the common intent of the parties and thus as a matter of construction it found that the exclusion clause did not cover the breach.

2. Stowage Below Deck

In *The Antares*[99] the Court of Appeal was faced with a situation wherein damage to cargo had been caused by unauthorised deck stowage. The carriage contract was governed by the English

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[95] *Supra*, fn. 17.

[96] *Protocol to the Brussels Convention on Bills of Lading 1924*, signed at Brussels, February 23, 1968.

[97] [1984] 1 Lloyd's Rep. 123.

[98] Lord Roskill relied on the judgement of Lord Diplock in *Securicor* which supported the parties' freedom to agree to whatever exclusion or modification of obligations provided this retains the legal characteristics of a contract.

[99] (1987) 1 Lloyd's Rep. 424.

COGSA 1971 and as a result, the Hague-Visby Rules were applicable (in terms of s1(2) of COGSA) as a force of law. The Rules thus have effect as if they had been directly enacted by statute. The Court therefore stated that the Rules ought as a result to be construed or modified in light of their own language and not in light of antecedent law. Upon construction, the court found that a limitation clause - such as Art IV r 5 - upon which the carrier wished to rely, is intended to protect a carrier only if in fact he honours his contractual obligation to stow cargo below deck. A breach of such an obligation renders the limitation clause inapplicable. The Court thus held that in terms of Art III r 8 "any clause ... relieving the carrier or the ship from liability ... or lessening such liability ... shall be null and void and of no effect."

Where the carriage contract is not governed by the Rules then the breach must be dealt with in terms of ordinary contractual principles.[100] A carriage contract will fall outside the Rules if it is not contained in the bill of lading. Thus even where a bill of lading is subject to the Rules, if the carriage contract is not contained in the bill of lading then the contract itself will fall outside the Rules. Ordinary contractual principles now seems to be those laid down in *Securicor*.

Another case in which cargo was carried on deck without authorisation was *The Chanda*.[101] The Hague Rules were held applicable because the bill of lading, and the carriage contract contained therein, was subject to German law which applied The Rules. The Rules had been incorporated into and not merely imported by German law. The court held that since The Rules had been incorporated then they become contractual terms (and have contractual force) and thus liable to modification in light of other terms.[102] The defendant carrier tried to rely on the package limitation under Art IV r 5 of the Hague Rules to limit his liability in respect of damage to cargo stowed on deck.

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[100]as in *J. Evans v. Andrea Merzario* [1976] 1 W.L.R. 1078, where the cargo was stowed on deck without authorization and the court considered this as a quasi-deviation.

[101][1989] 2 Lloyd's Rep. 494.

[102]The court noted that had the carriage contract been governed by English law then in terms of the English COGSA 1971, the Hague-Visby regime would govern the contract. It would therefore follow that since the Hague-Visby Rules have force of law (by virtue of COGSA 1971) the issue would not have been decided upon by employing a "construction" approach. This means that any ambiguities in the Hague-Visby Rules would have to be resolved by analysing the Rules themselves and they would not be liable to modifications.

The Court held that whether the defendant can rely on the package limitation is a question of construction. The Court acknowledged the distinction placed by the Hague Rules between the package limitation - Art IV r 5 and the time limitation - Art III r 6 provisions. The Court concluded that the package limitation undermined the purpose of the carrier's obligation to stow below deck and as a result was not applicable. The Court based its reasoning on the "construction" principle by holding that in order for an exclusion clause such as the package limitation provision to be capable of protecting the carrier, the carrier must as a condition have honoured his contractual obligation to stow below deck.

The Rules are also not applicable to a bill of lading if the bill clearly states that cargo is stowed on deck and cargo does in fact get stowed on deck. In such a case, the bill of lading is not governed by the Rules and will therefore be governed by contractual principles as laid down in *Securicor*.

3. **Deviation**

It is now clear after *Securicor* that a deviation is governed by general contractual principles. Thus, whether exclusion clauses are applicable and cover a deviation is determined by contract law. This was confirmed in *The Antares*[103]. The Court of Appeal held that if the wording of the Hague-Visby exceptions - the Art IV r 2 exclusions, the Art III r 6 time-bar, and the Art IV r 5 package limitation - are apt to cover a deviation and thus protect a deviating carrier then the exemptions will be valid. The Court added that the wording of the exemptions are construed without any reference to antecedant "old deviation rule" law and cases but purely on the basis of the language of The Rules.

Furthermore no distinction is made in The Rules according to the court, between a breach and a fundamental breach.[104]

However, in relation to positive obligations such as freight or demurrage which fall outside the Hague-Visby Rules the court suggested that the deviation rule may still govern these.[105]

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[103](1987) 1 Lloyd's Rep. 424 (supra).

[104]This is particularly evident in Art III r 6 of the Hague-Visby Rules.

[105]see *Joseph Thorley, supra*, fn. 4 and *Bunge y Born, supra*, fn. 31 and *Hain, supra*, fn. 20 which all dealt with freight and demurrage and the deviation rule. In terms of *Joseph Thorley* it was *obiter* that a deviating carrier would have a right to freight. In terms of *Suisse Atlantique* a demurrage clause survives a deviation

In terms of the Hague-Visby Rules a deviation to save or attempt to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of the Rules of the carriage contract.[106] In addition, the deviating carrier will not be held liable for any loss or damage resulting from the deviation.[107] A "reasonable" deviation was recently decided[108] as including one which had become necessary during the loading stage even though the conditions giving rise to the deviation were known by the carrier before the vessel began the voyage. It was also suggested by the same court that what is "reasonable" could be interpreted without reference to existing law.

If a deviation is accepted as being a deviation, and the contract is terminated on basic contractual principles, how are the exceptions in the Hague-Visby affected? The answer lies in whether the *Securicor* "constructional" approach or the old deviation rule is taken. In my opinion, the *Securicor* case has done away with the deviation rule (the deviation rule has not survived *Securicor*) perhaps it is necessary to nonetheless consider both routes : the *Securicor* approach or the old deviation route. As has been previously mentioned the Rules may have either the force of law or they may have contractual force. The Rules as a force of law will be discussed first and thereafter the Rules as a contractual force.

If the Rules apply by force of law, and the old deviation rule is deemed as having survived *Securicor* and therefore still existing, then the Rules will still apply to the contract. This is so because, under the deviation rule, upon a deviation the entire contract goes. Thus even if the contract disappears, the Rules (being applied as a force of law) serve as an "off-the-peg" structure of rules and exceptions which replace the contract. Therefore the deviating carrier would be able

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as it is not an exclusion clause. See further *The Sara D* (1989) 2 Lloyd's Rep. 277, wherein the court held that an obligation to pay freight or demurrage to the carrier at the port of discharge is not binding on a cargo-owner after a deviation as this is an obligation which has to be performed only after the termination.

[106]Art IV r 4.

[107]Art IV r 4. Note, how this is totally different from the old deviation rule.

[108]in *The Al Taha* [1990] Lloyd's Rep. 117.

to rely on all the exclusions in the Rules.[109] If the Rules apply by force of law, and the *Securicor* approach is taken the same results as those having just been mentioned above ensue.

If the Rules apply by contractual force and the old deviation rule is taken then, upon a deviation the contract goes and so do the Art IV r 2 exclusions.[110] The Art III r 6 and Art IV r 5 exemptions also go despite the Rules' insistence that they apply "in any event".[111] Thus a deviating carrier would be precluded from relying on all three exemption provisions - Art IV r 2, Art III r 6, Art IV r 5.

If the Rules apply by contractual force and the *Securicor* approach is taken then the Art IV r 2 exceptions will survive the deviation and succeed in being defences available to the carrier in excluding liability if they can pass the usual "construction" test. Art III r 6 and Art IV r 5 will survive a termination of the contract as they will be seen in terms of the *Securicor* approach, as terms which give rise to secondary obligations.[112]

In the event that a carriage contract contains a liberty to deviate clause which justifies a deviation, then the exceptions under the Rules are defences available to the carrier.[113] However, those liberty clauses which go beyond the limits allowed by Art IV r 4 thereby excluding or limiting the

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[109]Art IV r 2; Art III r 6; Art IV r 5.

[110]Authority for this lies in the *Stag Line* case, *supra*, fn. 16.

[111]This is so because if the contract goes on termination it is highly unlikely that a judge would consider even looking at the Rules let alone discover the words "in any event". Thus, whether "in any event" means that the limitations to liability in The Rules will apply even in the event of a termination of contract remains undecided. Although *The Pegase* [1981] and *The Nea Tyhi* [1982] cases both held one of the limitation provisions - Art IV 5 - to have survived after a repudiatory breach, they cannot be considered authority for the finding that "in any event" means that the limitation provisions apply even in the event of a termination of contract. The reason they cannot be considered authority is that neither of the cases were very clear. It is not certain whether the courts found the contract to have been terminated or not.

[112]It is interesting to recall the case of *Stag Line, supra*, fn. 16 discussed earlier. Although using language suggestive of the "construction" approach, the court in fact had not taken a construction approach. It held that the exceptions found in the Rules - Art IV r 2, Art III r 6, Art IV r 5 - do not apply to a voyage which is not the subject of the carriage contract. The court based its reasoning on antecedent law and not on the wording of the Rules itself. This view is clearly different to that of *Securicor*. The court had also held the Rules as being unable to dislodge the body of law applied by English courts to deviations. The effect of the Rules, according to the court, is only to permit "reasonable" deviations in addition to those that are justified by liberty clauses. The court added that even if the Rules are incorporated into the bill of lading and they as a result have contractual force one should and cannot deduce that the body of law relating to geographical deviations is dislodged. In terms of *Stag Line* and *Hain* a carrier would not be able to rely on the package limitation provision.

[113]A valid liberty to deviate clause is one which defines the scope of the contract voyage without seeking to excuse a carrier if he departs from the contract voyage : see *Stag Line*.

obligations imposed by the Rules are null and void as they fall within the mischief of Art III r 8.[114] It thus seems that a liberly clause is valid only if the deviation itself is reasonable.

A deviation to save life or property is permitted in terms of Art IV r 4 although under the common-law a deviation to save property was not permissible.[115]

One can assume that liberty clauses are no longer necessary since Art IV r 4 grants a carrier the right to deviate in order to save or attempt to save life or property or for any other reasonable purpose. The provision arguably creates the requirement of a causal connection between the loss and the deviation.

If the carrier deviates with an intent to cause damage or with recklessness and with the knowledge of the probable consequences,[116] he loses his package limitation defence under Art IV r 5. If the carrier deviates unreasonably without the intent to cause damage he loses his Art IV r 2(a)-(q) and Art III r 6 defences.

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[114]If the Rules do not apply to the particular carriage contract then the common-law relating to liberty clauses governs them whether they are valid or not. The case of *Connoly Shaw Ltd. v. A/S Net Nordefjelkste* (1934) 49 V.L. Rep. 183 held that wide liberty clauses are valid provided they do not seek to redefine the voyage to fit the deviation. The court held that those parts of a liberty clause which are inconsistent with the main purpose of the contract or which are used in a manner as to frustrate the commercial objects of the contract will be disregarded. Clauses granting a liberty to "call anywhere" are considered as describing or redefining the voyage to encompass calls which would otherwise be deviation will not be valid. A clause appearing to allow a carrier simply not to perform the voyage which the cargo-owner expects him to perform will be struck down even if the wording of the clause is very clear : *Connoly Shaw*. A liberty clause it seems will in light of *George Mitchell* be read down to fit the contract voyage by using the *contra proferentem* rule, and in terms of *Securicor* the discretion granted to a carrier to deviate must be kept within limits or within the legal characteristics of a contract.

[115]*Scaramanga v. Stamp* (1880) 5 C.P.D. 295.

[116]See Art II(e) of the Rules.

G. HAS THE DEVIATION DOCTRINE REALLY SURVIVED?

After the judgement of *Suisse Atlantique* it was safe to say that the deviation doctrine no longer survived as it had the effect of dismissing it. The judgement of *Securicor* had a different effect by upholding the doctrine but only as *sui generis*.[117] The court revived the doctrine by ridding it of its "half-sister" – the doctrine of fundamental breach. Indeed in the *George Mitchell* case, the court confirmed the *sui generis* nature of deviation and suggested its subsistence as a legal concept but which has been deprived of its old rule of law effects. Though the court was of conflicting opinions, academic opinion suggests an approach which is an amalgamation of the two different opinions.[118] Such an amalgamation approach suggests that the deviation rule still survives as an independent legal concept without being deprived of its old rule of law effects.

In two recent cases, *The Antares*[119] and *The Sara D*[120] the courts adopted a different approach by assimilating the deviation doctrine into the general principles of contract law. Thus, in terms of these two cases the deviation doctrine has not survived and the "constructional" approach governs the applicability of exclusion clauses in the event of a deviation. There exists a view in support of the general principles of contract law based on the reasoning that if a court is willing to deal with unauthorised deck stowage (and a breach thereof) under general principles of contract law[121] then surely a deviation too can be adequately dealt with under general principles of contract law.
Since the case of *Hain* no case has specifically dealt with deviation. Although in *The Antares* the court took a "constructional" approach to the applicability of exclusion clauses, it was only *obiter*. The court in *Securicor* also failed to conclusively state whether the "constructional" approach prevailed over the old deviation approach.

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[117] as per Lord Wilberforce, see *supra*, fn. 35.

[118] see C.P. Mills *The future deviation in the law of carriage of goods,* Lloyd's Maritime Commercial Law Quarterly 1983 p. 587 at 595.

[119] [1987] 1 Lloyd's Rep. 424.

[120] [1989] 2 Lloyd's Rep. 277.

[121] as was done in *The Chanda* [1989] 2 Lloyd's Rep. 494.

Can deviation cases be fitted into the general law of contract or should they be regarded as a line of *sui generis* authority and thus not subject to general principles of contract law? In order to establish whether deviation cases can be fitted into the general law of contract, it is suggested that the framework created in *Moschi v. Lep Air Services* and later developed in *Securicor* whereby contractual terms are analyzed in terms of primary and secondary obligations, ought to be utilized. Primary obligations can be modified or even negated by the parties under general principles of contract law, provided the wording used is clear and appropriate. However, it has been expressed[122] that the provision under Art IV of the Rules must remain subject to the implied stipulation that the ship is following the contracted voyage. Secondary obligations also remain free to be modified though this freedom is somewhat restricted by the Rules. In the event that an exclusion clause in a carriage contract modifies a secondary obligation, the extent of that obligation needs to be determined in light of the wording of the particular exclusion clause. One can therefore conclude that primary obligations can be governed by contractual principles and that secondary obligations can be considered *sui generis* and thus governed by carriage law.[123]

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[122] by Lord Diplock in *Securicor*.

[123] as discussed earlier, the court in *Ailsa Craig Fishing* upheld a limitation clause in a contract (similar to the Art IV r 5 limitation provision of the Rules) as valid, by basing its decision on the framework adopted in *Securicor* – that of primary and secondary obligations. However since the cases of *Securicor* and *Ailsa Craig Fishing* are not reconcilable with the cases of *Stag Line* and *Hain* (which have not been overruled), in order to make them reconcilable one must interpret "in any event" under Art IV r 5 of the Hague Rules as not applicable to a deviation. If the Hague-Visby Rules are the governing regime then this interpretation is not necessary since the Hague-Visby Rules have deleted the wording "in any event".

H. CONCLUSION

It remains to be seen what a court faced with a deviation will decide. It will have the option of following either the old authorities – *Hain* – or the "constructional" approach. Should the latter approach be adopted then deviation will cease to be a line of *sui generis* authority. It is submitted that the doctrine of deviation should at the first opportunity be done away with, and problems arising out of geographical deviations should be dealt with under general principles of contract law bearing in mind the provisions of the Rules whereto a carriage contract may be subject. Contractual principles is all about upholding the intentions of the parties. This together with a consideration of what is fair and reasonable is sufficient in dealing with deviations in carriage law, bearing in mind that a carriage contract which is subject to the Rules will also be governed by the provisions therein.

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