In addition to the express clauses agreed by the parties, every contract of affreightment is negotiated against a background of custom and commercial usage from which a series of obligations are implied which are automatically incorporated into the contract in the absence of agreement to the contrary. Since such obligations are derived from a common source in the law merchant, a similar result follows at common law irrespective of whether the terms of the contract are enshrined in a charterparty or evidenced by a bill of lading. There is, however, one important proviso. In contracts of carriage which are governed by the Hague or Hague/Visby Rules the scope and application of some of these implied obligations have been modified while the ability of the parties to exclude their operation by mutual agreement has been considerably restricted. In the following pages each of these implied obligations will be considered separately and a final section will be devoted to the effect of frustration on a contract of affreightment.

2.1 The undertaking as to seaworthiness

In every contract of affreightment there is an implied obligation to provide a seaworthy vessel ‘fit to meet and undergo the perils of the sea and other incidental risks to which of necessity she must be exposed in the course of a voyage’. In the majority of charterparties this implied undertaking is reinforced by an express term to the same effect, such as the requirement in the preamble to the NYPE form that the vessel be ‘tight, staunch, strong and in every way fitted for the service’. The obligation covers not only the physical state of the vessel but also the competence and adequacy of the crew, the sufficiency of fuel and other supplies, and the facilities necessary and appropriate for the carriage of the cargo.

2.1.1 Nature of the obligation

At common law the obligation of the owner to provide a seaworthy ship is absolute and, in the event of breach, he will be liable irrespective of fault. It amounts to an undertaking ‘not merely that they should do their best to make the ship fit, but that the ship should really be fit’. On the other hand, the owner is not under a duty to provide a perfect ship but merely

1 Field J in Kopitoff v Wilson (1876) 1 QBD 377 at p 380.
2 Lord Blackburn in Steel v State Line Steamship Co (1877) 3 App Cas 72 at p 86.
one which is reasonably fit for the purpose intended. The standard required ‘is not an accident-free ship, nor an obligation to provide ship or gear which might withstand all conceivable hazards. In the last analysis the obligation, although absolute, means nothing more or less than the duty to furnish a ship and equipment reasonably suitable for the intended use or service.’ The test would appear to be objective in that ‘the vessel must have that degree of fitness which an ordinary careful and prudent owner would require his vessel to have at the commencement of her voyage having regard to all the possible circumstances of it.’ The standard required will therefore be variable depending on the nature of the voyage, the type of cargo to be carried and the likely dangers to be encountered en route. This common law obligation can, however, be excluded by an appropriate clause in the contract of affreightment, although the courts are inclined to treat such clauses in the same way as all exceptions and apply a restrictive interpretation to them. Thus in *Nelson Line v Nelson* a clause exempting the shipowner from liability for any damage to goods ‘which is capable of being covered by insurance’ was held not to be effective in excluding liability for damage to cargo resulting from unseaworthiness. To be effective any such clause must be expressed in clear and unambiguous language. A rare example of a clause satisfying this test is to be found in *The Irkentskiy Proliv* where a bill of lading contained a provision excluding liability for loss or damage of any kind ‘arising or resulting from: unseaworthiness (whether or not due diligence shall have been exercised by the carrier, his servants or agents or others to make the vessel seaworthy).’ The trial judge, in holding the clause sufficiently widely drafted to exclude all liability for unseaworthiness, rejected the claimant’s argument that it was repugnant to the main object of the contract by reducing the contract to a mere declaration of intent.

Where the contract of affreightment is governed by the Hague or Hague/Visby Rules, the absolute obligation at common law is replaced by a duty to exercise due diligence to make the ship seaworthy. Accordingly, while the carrier will no longer be strictly liable in the absence of any fault, he will be liable not only for his own negligence but also for the negligence of any party, even including an independent contractor, to whom he has delegated responsibility for making the vessel seaworthy. This reduction in liability is, however, accompanied by a provision invalidating any attempt by the carrier further to reduce or exclude his responsibility under the rules to provide a seaworthy ship.

Many modern standard charter forms have now adopted the Hague Rules formula with regard to the requirement of seaworthiness. Thus the NYPE charter, by the use of a ‘clause paramount’, expressly incorporates into the charterparty the provisions of the US Carriage of Goods by Sea Act 1936, while the Baltime form excludes the liability of the shipowner for loss or damage to cargo unless such ‘loss has been caused by want of due diligence on the part of the Owners or their Manager in making the vessel seaworthy and fitted for the voyage.’

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3 District Judge Kilkenny in *President of India v West Coast Steamship Co* [1963] 2 Lloyd’s Rep 278 at p 281.
4 Channell J in *McFadden v Blue Star Line* [1905] 1 KB 697 at p 706 quoting with approval a passage from an early edition of *Carver on Carriage by Sea*.
5 [1908] AC 16.
6 See also *Ingram v Services Maritime* [1914] 1 KB 541; *The Rossetti* [1972] 2 Lloyd’s Rep 116.
8 The bill of lading in this case was not subject to either the Hague or Hague/Visby Rules.
9 See Art III rule 1.
10 *The Muncaster Castle* [1961] AC 807. For further treatment, see infra at pp 188–90.
11 See Art III rule 8.
2.1 THE UNDERTAKING AS TO SEAWORTHINESS

In both of these cases it would appear that the common law absolute obligation to provide a seaworthy ship has been replaced by a duty to exercise due diligence.

2.1.2 Incidence of obligation

The requirement for the shipowner to provide a seaworthy vessel comprises a twofold obligation. On the one hand, the vessel must be suitably manned and equipped to meet the ordinary perils likely to be encountered while performing the services required of it, while at the same time it must be cargoworthy in the sense that it is in a fit state to receive the specified cargo.

So far as the first aspect of the seaworthiness concept is concerned, the implied undertaking at common law covers not only the physical condition of the vessel and its equipment, but also extends to the competence of the crew and the adequacy of stores and documentation. Thus a vessel will clearly be unseaworthy where it has defective engines or a defective compass, or where deck cargo is stowed in such a way as to render the vessel unstable. But the shipowner will be equally in breach where he employs an incompetent engineer or other officer, where inadequate bunkers are taken on board for the voyage, or even where the documentation for the voyage is inadequate. Once these legal requirements are satisfied, however, the implied undertaking does not extend to cover such matters as recommended manning levels and conditions of employment formulated by extra-legal organisations such as trade unions.

In the case of a voyage charter the obligation to provide a seaworthy vessel in the above sense attaches at the time of sailing on the charter voyage. It is immaterial that defects exist rendering the vessel unseaworthy during the preliminary voyage to the loading port, or even during the loading operation, provided that they can be rectified by the time of sailing. Similarly the obligation is discharged if the vessel is seaworthy at the time of sailing, irrespective of what happens afterwards either during the voyage or at an intermediate port. The warranty . . . is a warranty only as to the condition of a vessel at a particular time, namely, the time of sailing; it is not a continuing warranty in the sense of a warranty that she shall continue fit during the voyage. If anything happens whereby the goods are damaged during the voyage.

13 The position is identical under the Hague and Hague/Visby Rules, see Art III rule 1. The US view is expressed in the following terms in *The Framlington Court* [1934] AMC 272 at p 277: "Seaworthiness is a relative term depending for its application upon the type of vessel and the character of the voyage. The general rule is that the ship must be staunch and strong and well equipped for the intended voyage. And she must also be provided with a crew, adequate in number and competent for the voyage with reference to its length and other particulars, and have a competent and skilled master of sound judgment and discretion."

14 *Hong Kong Fir Shipping Co v Kawasaki* [1962] 2 QB 26; *The Amstelslot* [1963] 2 Lloyd’s Rep 223.

15 *Paterson Steamships Ltd v Robin Hood Mills* (1937) 58 ILR 33.


17 *McIvor v Tate Steamers* [1903] 1 KB 362; *Northumbrian Shipping Co v Timm* [1939] AC 397.


19 See *The Derby* [1985] 2 Lloyd’s Rep 325, where a vessel was delayed in port for 21 days by a strike of stevedores resulting from failure of the vessel to comply with manning levels, rates of pay and conditions of employment of the crew as recommended by the International Transport Workers Federation. See also *The Silver Constellation* [2008] 2 Lloyd’s Rep 440.

20 Cf. *Stanton v Richardson* (1875) LR 9 CP 390.
voyage, the shipowner is liable because he is an insurer, except in the event of the damage happening from some cause in respect of which he is protected by the exceptions . . . 22 It follows that, in the case of a consecutive voyage charter, the obligation arises at the beginning of each voyage undertaken in performance of the charter. 23 Again, in the case where a voyage charter is divided into stages by agreement between the parties, there will be a duty to make the vessel seaworthy at the commencement of each stage of the voyage. 24 The position is, however, different in respect of the time charter where the obligation attaches only at the time of delivery of the vessel under the charterparty. In this case the initial seaworthiness undertaking is normally supplemented by some form of maintenance clause under which the shipowner is required to ‘keep the vessel in a thoroughly efficient state in hull, machinery and equipment for and during the service’. 25 But this express undertaking to maintain the vessel throughout the charter is entirely distinct from any obligation as to seaworthiness.

The second aspect of the common law undertaking as to seaworthiness relates to the cargoworthiness of the vessel. The shipowner is under an obligation to ensure that his ship is in a fit state to receive the contractual cargo. This requirement would not be satisfied where the vessel’s holds needed fumigating or cleaning before being in a fit state to receive cargo, 26 where frozen meat was to be shipped and there was a defect in the vessel’s refrigeration plant, 27 or where the pumps were inadequate to drain surplus water from the cargo. 28 In each case the implied undertaking as to cargoworthiness is operative as from the commencement of loading. ‘The warranty is that, at the time the goods are put on board, she is fit to receive them and encounter the ordinary perils that are likely to arise during the loading stage; but . . . there is no continuing warranty after the goods are once on board that the ship shall continue fit to hold the goods during that stage and until she is ready to go to sea, notwithstanding any accident that may happen to her in the meantime’. 29 So in McFadden v Blue Star Line, 30 after cargo had been safely loaded, the ship’s engineer opened a sluice door on a watertight bulkhead and on closing it, failed to secure it properly with the result that water percolated through and damaged the claimant’s cargo. It was held that, since the defective closure of the sluice door occurred after the cargo had been loaded, it did not constitute a breach of the cargoworthiness undertaking.

It has already been noted that many modern charter forms expressly include the provisions of either the Hague or Hague/Visby Rules and this practice may affect the operation of the implied seaworthiness obligation. Thus in the case of Adamastos Shipping Co v Anglo-Saxon Petroleum 31 the voyage charter involved included a clause paramount incorporating the

22 Channell J in McFadden v Blue Star Line [1905] 1 KB 697 at p 703.
24 The Vortigern [1899] P 140.
25 NYPE 93 form, clause 6.
27 Cargo per Maori King v Hughes [1895] 2 QB 550.
28 Stanton v Richardson (1874) 9 CP 390.
29 Channell J in McFadden v Blue Star Line [1905] 1 KB at p 704. Cf. the position under the Hague and Hague/Visby Rules where the Privy Council has held that the obligation to exercise due diligence to provide a seaworthy ship under Art III rule 1 covers ‘the period from at least the beginning of the loading until the vessel starts on her voyage’. Maxine Footwear Co Ltd v Canadian Government Merchant Marine [1959] AC 589 at p 603. See infra at p 187.
30 [1905] 1 KB 697.
provisions of the US Carriage of Goods by Sea Act 1936 which were treated by the court as if written verbatim into the charter. In these circumstances a majority of the House of Lords was prepared to give full effect to the provisions of the Hague Rules in respect of all voyages under the charter irrespective of whether they were to or from ports in the United States, or whether they were in ballast or with cargo. Some writers have been prepared to go further by suggesting that, as the seaworthiness provisions of the Hague Rules are applicable ‘before and at the beginning of the voyage’, the obligation to exercise due diligence to provide a seaworthy ship would arise in respect of each voyage under the time charter. A note of caution has, however, been sounded by Mustill J in *The Hermosa* where he pointed out that ‘there are in most time charters express terms as regards initial seaworthiness and subsequent maintenance which are not easily reconciled with the scheme of the Hague Rules, which create an obligation as to due diligence attaching voyage by voyage. It cannot be taken for granted that the interpretation adopted in [the *Adamastos* case] in relation to voyage charters applies in all respects to time charters incorporating the Hague Rules.’

### 2.1.3 Burden of proof

The burden of proof of unseaworthiness will rest on the party alleging it, although in many cases he may be assisted by inferences drawn by the court. Thus the presence of seawater in the hold will normally be treated by the courts as prima facie evidence of unseaworthiness. Having established breach of this undertaking, however, it will then be incumbent on the claimant to establish that the unseaworthiness caused the loss of which he complains. In the case of *International Packers v Ocean Steamship Co* a cargo of tinned meat shipped from Brisbane for Glasgow was damaged by seawater during the voyage as the result of tarpaulins being stripped from the hatch covers during a storm. On hearing that the vessel was equipped with locking bars designed to secure the hatches, the trial judge held that the loss was caused not by the unseaworthiness of the vessel but by the negligence of the crew in failing to make use of the equipment provided. Similarly, the cargo owner will fail to discharge the burden of proof if it is clear that the damage resulted from bad stowage rather than from any unfitness of the vessel to receive the contract cargo.

### 2.1.4 Effect of breach

Having established a breach, the next question is to decide what remedies are available to the charterer. Are the courts prepared to apply the traditional classification of terms into conditions or warranties and treat the obligation to provide a seaworthy ship as either a condition, any breach of which would entitle the charterer to repudiate his obligations under the contract, or as a warranty, sounding only in damages? In the event the courts have taken the view that neither of these alternatives is appropriate. The shipowner’s obligation to provide a

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31 See Art III rule 1.
34 See *The Europa* [1908] P 84.
seaworthy vessel was classified as an innominate or intermediate term by the Court of Appeal in *Hong Kong Fir Shipping Co v Kawasaki*.\(^{38}\) In refusing to categorise the term once and for all as either a condition or a warranty, Diplock LJ pointed out that such an undertaking ‘can be broken by the presence of trivial defects easily and rapidly remediable as well as by defects which must inevitably result in a total loss of the vessel’.\(^{39}\) As the results of a breach could be so variable it would be as unreasonable to permit a party to repudiate a charter because a few rivets were missing as it would be to prevent him from doing so in the event of the defects in the vessel being irremediable.\(^{40}\) Thus, while objectively a compass defect was a serious matter, it would be illogical to permit the rejection of a 24-month charterparty if the defect could be repaired by a compass adjuster within a matter of hours. While damages would always be available for breach of the undertaking, a charterer should only be allowed to repudiate his obligations under the charterparty where the breach deprived him of substantially the whole benefit which it was intended that he should obtain from the contract.\(^{41}\) Everything would depend on the effects of the breach in each individual case and, in the view of Diplock LJ, the test as to whether a party had been deprived of substantially the whole benefit of the contract should be the same whether it resulted from breach of contract by the charterer or from the operation of the doctrine of frustration.\(^{42}\)

What remedies are then available to the charterer in the event of a breach of this intermediate obligation by the shipowner? A distinction has to be drawn between the situation where the breach is discovered before performance of the charterparty has commenced and the position where the breach only comes to light after the vessel has sailed. In the former case the charterer will be able to treat his obligations under the contract as discharged if the breach deprives him of substantially the whole benefit of the contract and it is a breach which cannot be rectified within such time as would prevent the object of the contract from being frustrated. Thus in the case of *Stanton v Richardson*,\(^{43}\) where the pumping equipment on the chartered vessel was inadequate to deal with the surplus water from a cargo of wet sugar, the charterer was held entitled to repudiate the contract when it was established that new pumps could not be installed within a reasonable time. On the other hand, if the effects of the breach are less severe, the charterer will be restricted to his remedy in damages. In this respect it must be remembered that the permissible time allowance in which to remedy the defect will vary as between a voyage and a time charter. While a relatively brief delay may be sufficient to frustrate the object of the former, the Court of Appeal held in the *Hong Kong Fir* case that the absence of a vessel for five months undergoing repairs was insufficient to frustrate the objects of a 24-month time charterparty.

The provisions of the time charter itself may, however, provide the charterer with an opportunity for escape if the shipowner cannot make good the defect before the cancelling date, even though the breach would not otherwise have entitled the charterer to repudiate. Thus under clause 22 of the Baltime form the charterer is entitled to cancel the charterparty unless the vessel is delivered to him by a specified date, ‘she being in every way fitted for ordinary


\(^{39}\) [1962] 2 QB at p 71.

\(^{40}\) See *Bunge Corp v Tradax Export* [1981] 1 WLR 711.

\(^{41}\) [1962] 2 QB at p 69.

\(^{42}\) For an example of a court applying an identical test to a situation which involved both a breach of the seaworthiness undertaking and an alleged frustrating event, see *The Hermosa* [1982] 1 Lloyd’s Rep 570.

\(^{43}\) (1875) LR 9 CP 390. See also *Snia v Susuki* (1924) 18 ILR 333.
2.2 OBLIGATION OF REASONABLE DISPATCH

cargo service’. The charterer in *The Madeleine* was able to take advantage of this clause when the shipowner was unable to produce the required deratisation certificate by the cancelling date. In the words of Roskill J, ‘there was here an express warranty of seaworthiness and unless the ship was timeously delivered in a seaworthy condition, including the necessary certificate from the port health authority, the charterers had the right to cancel’. Such right to cancel is not, however, dependent on any breach of obligation by the shipowners.

Where the unseaworthy state of the vessel is not discovered until after it has set sail, mere acceptance of the vessel does not amount to a waiver of the charterer’s right to damages. Nor does it necessarily amount to a waiver of the right to repudiate the charter provided that the breach, when discovered, is sufficiently fundamental. This is particularly true of the time charter though, in the case of the voyage charter, if the breach is not apparent before the vessel sails, for all practical purposes the charterer may have little opportunity to discover it before the vessel arrives at its destination and performance of the contract is complete.

### 2.2 Obligation of reasonable dispatch

A second undertaking inherent in every contract of carriage requires the shipowner or carrier to perform his contractual obligations with reasonable dispatch. Whenever no time is specified for a particular obligation there is an implied obligation to complete the performance within a reasonable time. Thus in a voyage charter there is an implied undertaking that the vessel will proceed on the voyage, load and discharge at the time agreed or within a reasonable time. Likewise in a time charter, the master is expected to prosecute each voyage with the ‘utmost dispatch’.

Performance of this obligation is judged, not on a strictly objective basis, but in relation to what can reasonably be expected from the shipowner under the actual circumstances existing at the time of performance. When the language of the contract does not expressly, or by necessary implication, fix any time for the performance of a contractual obligation, the law implied that it shall be performed within a reasonable time. The rule is of general application, and is not confined to contracts for the carriage of goods by sea. In the case of other contracts the condition of reasonable time has been frequently interpreted; and has invariably been held to mean that the party upon whom it is incumbent duly fulfils his obligations notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably.

#### 2.2.1 Effect of breach

As with the seaworthiness undertaking the obligation to exercise reasonable dispatch appears to fall into the category of innominate or intermediate terms. Accordingly, the remedy available in any particular case will be dependent on the effects of the relevant breach. While the

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45 Ibid at p 241. For a more detailed account of the effects of a cancellation clause, see infra at pp 66–7.
46 *The Democritos* [1975] 1 Lloyd’s Rep 386 at p 397.
48 See Baltime, clause 9; NYPE 46, clause 8.
49 Lord Watson in *Hick v Raymond* [1893] AC 22 at p 32. For a modern example in the context of a contract of affreightment, see *The Kriti Rex* [1996] 2 Lloyd’s Rep 171.
injured party will always be able to recover compensation in the form of damages for any unreasonable delay, he will only be able to repudiate the contract if the delay is so prolonged as to frustrate its object. In *Freeman v Taylor* the vessel had been chartered to take her cargo to Cape Town and, after discharging it, to proceed with all convenient speed to Bombay in order to load the charterer’s cargo of cotton. After discharging at the Cape, however, the master for his own account took on board a cargo of mules and cattle for carriage to Mauritius en route to Bombay. As the result of this diversion, the vessel was some six or seven weeks late in arriving in Bombay and the court held the delay sufficiently long to frustrate the object of the charter. In cases where the delay is not so prolonged, however, the injured party will be restricted to a claim for damages. Even such a claim may be barred if the particular delay is covered by an excepted peril.

### 2.3 Obligation not to deviate from the agreed route

The owner of a vessel, whether operating a liner service or under charter, impliedly undertakes that his vessel, while performing its obligations under the contract of carriage, will not deviate from the contract voyage. Deviation has been defined as ‘an intentional and unreasonable change in the geographic route of the voyage as contracted’. In order to determine whether such a deviation has occurred it is first necessary to ascertain the precise route envisaged by the contract of affreightment. A few standard charter forms make express provision for the route to be followed but, in the absence of such provision, the presumption is that the proper route is the direct geographical route between the ports of loading and discharge. This presumption can, however, be rebutted by the shipowner adducing evidence as to the customary route in the trade, or even as to the route previously followed by the particular shipping line involved. So in *Reardon Smith Line v Black Sea and Baltic General Insurance* a vessel chartered to proceed from a Black Sea port ‘to Sparrow Point’ in the United States, departed from the direct geographical route to bunker in Constanza, where cheap supplies of oil fuel were available. On proof that vessels engaged in that trade invariably put into Constanza and that 25 per cent of ocean-going oil-burning vessels passing through the Bosphorus followed a similar practice, the House of Lords held that there had been no deviation from the normal route. The relevant law was neatly summarised by Lord Porter:

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

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50 (1831) 8 Bing 124.
51 *MacAndrew v Chapple* (1866) LR 1 CP 643.
52 *Barker v MacAndrew* (1865) 18 CB (NS) 759.
53 Tetley p 1812. While English courts have restricted the concept of deviation to geographic deviations, US courts have extended it to other departures from the terms of the contract which materially increase the risks to cargo such as unauthorised deck carriage (*Jones v Flying Clipper* (1954) 116 Fed Supp 386) or over-carriage (*The Silver Cypress* [1944] AMC 895).
54 For example, Austral, clause 2; Austwheat, clause 2.
55 *Frenkel v MacAndrews* [1929] AC 545.
56 [1939] AC 562.
2.3 OBLIGATION NOT TO DEVIATE FROM THE AGREED ROUTE

other reasons, and evidence may always be given to show what the usual route is, unless a specific route be prescribed by the charterparty or bill of lading.57

To constitute an unjustifiable deviation the departure from the contractual voyage must be the result of a deliberate act on the part of the owner or the ship’s officers. Consequently, there will be no breach of this implied undertaking if the vessel is blown off course during a storm, or is set on a wrong course as the result of the illness of its navigation officer or reliance on a defective compass.58

2.3.1 Justifiable deviations

(I) At common law

A departure from the proper route is permissible at common law in the following circumstances:

1. To save human life or to communicate with a vessel in distress in case lives may be in danger.

‘Deviation for the purpose of saving life is protected and involves neither forfeiture of insurance nor liability to the goods’ owner in respect of loss which would otherwise be within the exceptions of “perils of the seas”. And, as a necessary consequence of the foregoing, deviation for the purposes of communicating with a ship in distress is allowable, inasmuch as the state of the vessel in distress may involve danger to life. On the other hand, deviation for the sole purpose of saving property is not thus privileged, but entails all the usual consequences of deviation.’59

In the case from which this quotation is drawn, the vessel, having deviated to answer a distress call, could easily have taken off the crew from the stricken ship, but decided to take the latter in tow in order to earn salvage. While the vessel was engaged in this operation it was driven ashore in a gale with the loss of her cargo. The deviation in order to save the ship was held not to be justified and the shipowners were held liable for loss of cargo despite the fact that such loss was covered by the exception of perils of the sea in the charterparty. The position would have been otherwise had the weather been such that it had been necessary to take the disabled ship in tow in order to save the lives of the crew.

2. To avoid danger to the ship or cargo. The master is under an obligation to exercise reasonable care and skill in ensuring the success of the joint enterprise and accordingly is entitled to deviate from the proper course in order to ensure the safety of the vessel and its cargo. Indeed, in the majority of cases, he will be under a duty to take such action.60

The risks may arise from natural causes such as storms, ice or fog, or they may involve political factors such as the outbreak of war or the fear of capture by hostile forces.61 In either case, however, the danger must be of a reasonably permanent nature, since a master

57 Ibid at p 584.
58 Rio Tinto Co v Seed Shipping Co (1926) 24 LLR 316.
59 Cockburn CJ in Scaramanga v Stamp (1880) 5 CPD 295 at p 304.
60 See Notara v Henderson (1870) LR 5 QB 346.
61 The Teutonia (1872) LR 4 PC 171.
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would not be justified in substituting a substantially different voyage in order to avoid a risk arising from a merely temporary obstruction such as a shortage of tugs or a neap tide.62

One of the most frequently encountered examples of this type of justifiable deviation is the vessel which, for safety reasons, has to put into port for repairs to damage sustained on the voyage.63 Nor is it apparently material that the damage has resulted from the initial unseaworthiness of the vessel. Thus in Kish v Taylor64 a vessel had been chartered to load a full and complete cargo of timber at two ports in the Gulf of Mexico for carriage to western Europe. On the charterer failing to provide a full cargo, the master procured further timber from other shippers, some of which he loaded on deck in such a way as to render the vessel unseaworthy. Heavy squalls were encountered during the voyage which caused the deck cargo to shift and endanger the safety of the vessel. Accordingly the master put into Halifax for the necessary repairs before proceeding to Liverpool where he discharged the cargo. When the shipowner sought to exercise the contractual lien for dead freight and demurrage, the cargo owner contended that the right to rely on the lien had been forfeited as the result of what was alleged to be an unjustifiable deviation to Halifax. The House of Lords rejected this argument and held the deviation to be justified even though it resulted from initial unseaworthiness. In their view justification was to be sought in the existence of a danger and not in its cause. Lord Atkinson indicated the policy considerations involved:

"It is the presence of the peril and not its cause which determines the character of the deviation, or must the master of the ship be left in this dilemma that, whenever, by his own culpable act or a breach of contract by his owner, he finds his ship in a perilous position, he must continue on his voyage at all hazards, or only seek safety under the penalty of forfeiting the contract of affreightment?"

In such a dilemma the master must clearly be given the benefit of the doubt, since:

"Nothing could, it would appear to me, tend more to increase the dangers to which life and property are exposed at sea than to hold that the law of England obliged the master of a merchant ship to choose between such alternatives."65

It would appear that a deviation may be justified although the risk to be avoided affects only the ship and not the cargo.66 On the other hand, in the reverse situation, the position is far from clear. There is authority for suggesting that where continuation of the voyage would result in substantial damage to the cargo, the master might be under a duty to deviate to protect the interests of the cargo owners,67 but it is doubtful whether such an obligation arises where the apprehended damage is slight or only affects part of the cargo. While the master is expected to take into account the interests of both ship and cargo, 'I am not prepared to hold that the instant it becomes clear that by going on some mischief

62 Hand v Baynes (1839) 4 Wharton 204.
63 Phelps, James & Co v Hill (1891) 1 QB 605.
64 [1912] AC 604. US courts have held deviation not to be justified where the shipowner was aware of the unseaworthy condition of the vessel before it sailed. The Louise [1945] AMC 363.
65 [1912] AC at pp 618–19. Compensation in the form of damages would of course be available for any loss (including delay) resulting from the initial unseaworthiness.
66 The Teutonia (1872) LR 4 PC 171.
67 The Rona (No 2) (1884) 51 LT 28.
will be done to some portion of the cargo that it becomes the duty of the captain to go back, and perhaps put all concerned to a very enormous expense... Presumably the decision as to whether a deviation is justified in such circumstances will depend upon a comparison between the gravity of the danger and the inconvenience and expense of taking avoiding action.

3. Where the deviation is made necessary by some default on the part of the charterer. Thus it may be justifiable to put into port to discharge dangerous cargo which has been loaded by the charterer without the knowledge of the shipowner. Again, a master may be permitted to deviate to obtain more cargo in a situation where the charterer has breached his contractual obligation to load a full cargo.69

(II) Under the Hague and Hague/Visby Rules

In addition to the types of justification recognised at common law, Art IV rule 4 of the Hague/Visby Rules70 provides two further heads: ‘deviation in saving or attempting to save . . . property at sea’, and ‘any reasonable deviation’. The interpretation of these provisions is discussed elsewhere,71 but it is relevant to note at this point that courts in the United Kingdom have given an extremely restricted interpretation to the term ‘reasonable deviation’ with the result that there are few reported cases in which the concept has been successfully invoked.

2.3.2 Liberty clauses

Most standard charter forms include a clause giving the master a liberty to deviate for specified reasons. A good example is provided by clause 3 of the Gencon form:

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

Clauses in other charters specify a variety of reasons for which deviation is permissible, including for bunkering purposes,72 for adjusting compasses or radio equipment,73 or for landing and embarking crew members.74 If such clauses were applied literally, they would have far-reaching effects, but, as they are inserted predominantly for the shipowner’s benefit, the courts apply the principle of contra proferentem and where possible give them an extremely restricted interpretation. Thus in the case of Glynn v Margetson75 a cargo of oranges was loaded in Malaga on a vessel bound for Liverpool on a bill of lading which gave the owner ‘liberty to proceed to and stay at any port or ports in any rotation’. Despite the breadth of this clause,
it was held not to protect the shipowner when the vessel called at ports not on the geographical route to Liverpool with the result that the oranges arrived at their destination in a damaged state. In a case involving a similar clause, Lord Esher expressed the view that such a term ‘has always been interpreted to mean that the ship may call at such ports as would naturally and usually be ports of call on the voyage named. If the stipulation were only that she might call at any ports, the invariable construction has been that she would only be entitled to call at such ports in the geographical order; and therefore the words “in any order” are frequently added; but in any case it appears to me that the ports must be ports substantially on the course of the voyage.’

Such principles of interpretation are ultimately at the mercy of a skilled draftsman and can be defeated by the use of appropriate words. Thus clause 13 of the Nubalwood form gives the shipowner a liberty to call ‘at any port or ports whatsoever in any order in or out of the route or in a contrary direction to or beyond the port of destination . . . ’. Clauses of this type have been given full effect by the courts which have described them as conferring on the ship a liberty to go where she pleased, subject only to the restriction that the essential purpose of the voyage must not be frustrated.

A further problem arises in the not infrequent case where the standard charterparty form expressly incorporates the Hague or Hague/Visby Rules. As these regimes prescribe the minimum protection for the cargo owner which is incapable of being reduced by agreement between the parties, to what extent are such liberty clauses affected by the requirement in Art IV rule 4 that a deviation, other than to save life or property, has to be reasonable? The US courts have taken a strict view in such circumstances, holding that liberty clauses in the charter only take effect to the extent that the deviation is reasonable. English courts, on the other hand, regard the express liberty clause as defining the scope of the contractual voyage rather than as a provision seeking to excuse the shipowner should he depart from it. On this view there is no conflict between such a clause and Art IV rule 4 of the Hague/Visby Rules. In the words of Hodson LJ, ‘the object of the Rules is to define not the scope of the contract of service, but the terms on which that service is to be performed.’ Presumably the same result would follow where a bill of lading, issued under a charterparty, included a provision expressly incorporating a liberty clause in the charter.

### 2.3.3 The effect of breach

At common law any unjustifiable deviation from the proper route has been traditionally regarded as a fundamental breach of the contract of affreightment.

‘The true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, a breach of such a serious character that, however slight the deviation,

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76 *Leduc v Ward* (1888) QBD 475 at p 482.
77 Branson *v Connolly Shaw & Nordenfjeldske SS Co* (1934) 50 TLR 418. See also *Hadji Ali Akbar v Anglo-Arabian SS Co* (1906) 11 Com Cas 219; *Frenkel v MacAndrews* [1929] AC 545.
78 For example, Polcoalvoy, clause 28; Nuvoy 84, clause 43.
79 Article III rule 8.
81 *Renton v Palmyra Trading Corp* [1956] 1 QB 462 at p 510. (Hodson LJ was referring to an identical provision in the Hague Rules.) See also *Foreman & Ellams v Federal SN Co* [1928] 2 KB 424; *Stag Line v Foscolo Mango* [1932] AC 328.
the other party to the contract is entitled to treat it as going to the root of the contract, and to declare himself as no longer bound by any of the contract terms. 82

A fundamental breach was traditionally distinguished from a condition by the fact that, on a breach of the former, the innocent party was entitled to repudiate his obligations under the contract and sue for damages at large irrespective of any exceptions or limitation of liability provisions in the contract of carriage.

The importance attached to the breach stems from the fact that, in earlier marine insurance practice in Great Britain and the United States, cover under a cargo insurance policy was lost in the event of deviation. The strict liability imposed on the shipowner was therefore designed to afford protection to the cargo owner. Under present insurance practice, however, such a policy will normally include a 'held covered' clause under which cover can be extended in the event of deviation in return for the payment of an additional premium. This change in procedure, together with the practice of incorporating widely drafted liberty clauses into the contract of carriage, has greatly reduced the practical importance of the deviation concept.

There is now some doubt as to whether the strict view of the concept of deviation, operating as a rule of law, can survive the combined effect of the strictures of members of the House of Lords in the two cases of Suisse Atlantique 83 and Photo Production v Securicor. 84 In their opinion, the doctrine of fundamental breach, conceived as a substantive rule of law, had been a judicial aberration initially designed to protect the consumer against the effects of exclusion clauses. Such protection is no longer required after the Unfair Contract Terms Act 1977. So far as the commercial world is concerned, a reversion to a strict application of the construction approach would leave them free to negotiate their own contracts and allocate risks as they see fit.

What effect will these judgments have on the traditional approach to the concept of deviation? 85 On the one hand, Lord Wilberforce in Photo Production v Securicor extended a possible lifeline to retaining the concept of deviation as a rule of law when he remarked that 'it may be preferable that [the deviation cases] should be considered as a body of authority sui generis with special rules derived from historical and commercial reasons'. 86 The alternative view would be that deviation, as one facet of the wider doctrine of fundamental breach, survives not as a rule of law, but as a sub-species of construction. This was the approach adopted by the Court of Appeal in The Antares, 87 where Lloyd LJ was of the opinion that deviation cases 'should now be assimilated into the ordinary law of contract'. Such an approach would require the courts to take into consideration the entire terms of the contract, including both exceptions and liberty clauses, with a view to discovering whether, on their true

82 Lord Atkin in Hain SS Co v Tate & Lyle (1936) 41 Com Cas 350 at p 354. See also Carver 9.043 ff; Gaskell 6.51 ff.
83 [1967] 1 AC 361.
85 In this respect it is important to note that contracts of carriage by sea will not normally be subject to the provisions of the Unfair Contract Terms Act (see Schedule 1) and so their terms will rarely be required to conform to the standard of reasonableness imposed by that statute.
construction, it was clear that the parties intended them to apply to the new situation, i.e. the substituted voyage.\textsuperscript{88} With such formidable weapons at the disposal of the court it is doubtful whether there is any need to retain the rule of law approach to the problem raised by deviation. In the words of a modern writer, ‘All the common law methods of control are retained and these are strengthened by the requirement of reasonableness. The rules of construction still weigh very heavily against the proferens. A competent judge should find little difficulty in ousting an unwelcome exemption clause.’\textsuperscript{89}

What then is the effect of deviation on the contract of carriage? The traditional view is that, in the event of an unjustified deviation, however slight, the charterer or cargo owner is permitted an election. He is entitled either to treat the breach as a repudiation of the contract of carriage or to waive the breach with the result that he will be restricted to an action for damages. A similar approach would presumably be adopted by a court which found that, as a matter of construction, the terms of the contract of carriage were not intended to be applicable to the substituted voyage. The following account of the traditional view must, however, be treated with some reserve until the full implications of the decision in \textit{Photo Production v Securicor} become evident.

\textbf{(I) Effect of treating the contract as repudiated}\n
If the injured party elects to treat the contract as at an end, the shipowner can no longer rely for protection on the terms of the charterparty or bill of lading. Henceforth his liability will be equivalent to that of a common carrier in that he will be subject to the strict liability imposed by the common law. In the event of being sued for loss or damage sustained during or subsequent to the deviation, he cannot invoke the contractual exceptions or the provisions for limitation of liability. Only three exceptions are recognised at common law, namely, those relating to act of God, act of the Queen’s enemies and inherent vice. Even these are not available as a defence to the shipowner unless he can prove that the relevant loss would have been sustained irrespective of the deviation. In the majority of cases this is no easy task. In \textit{Morrison v Shaw, Savill}\textsuperscript{90} the exception of King’s enemies was held not to be applicable to a case where a vessel had been sunk by an enemy submarine after having deviated from her course without justification. The owner was unable to establish that the loss would have been sustained even if the vessel had not deviated. In practice the common law exceptions will rarely offer any protection to the deviating carrier except possibly in the case where damage to cargo results from inherent vice.\textsuperscript{91}

Deviation was followed by equally drastic consequences even where the contract of carriage was covered by a bill of lading governed by the Hague Rules. The carrier could not in such an event rely on the Art IV exceptions as a defence to a cargo claim. The provisions of the Act import into the agreement compulsorily certain exceptions, but there is nothing in the Act to show that these exceptions can be relied upon while the vessel is not pursuing the contract voyage, but is pursuing a voyage, or part of it, which is not covered by the contract at all.\textsuperscript{92} This result was the inevitable consequence of the common law approach which apparently


\textsuperscript{89} Mills [1983] LMCQ at p 595. See also Gaskell 6.73 ff.

\textsuperscript{90} [1916] 2 KB 783.

\textsuperscript{91} See \textit{Internationale Guano v MacAndrew} [1909] 2 KB 360.

\textsuperscript{92} Greer LJ in \textit{Foscolo Mango v Stag Line} [1931] 2 KB 48 at p 69.
2.3 OBLIGATION NOT TO DEVIATE FROM THE AGREED ROUTE

regarded the provisions of the Hague Rules, when applicable, as little more than compulsory terms of the contract of carriage. Doubts have, however, been expressed as to whether deviation would deprive the carrier of his right to limit liability under Art IV rule 5, or invoke the time bar under Art III rule 6, of the Hague Rules, since both provisions are expressly made applicable ‘in any event’. In recent decisions involving unauthorised deck carriage the Court of Appeal has taken the view that the decisive factor in such cases is not the seriousness or otherwise of the breach, but a straightforward construction of the relevant provisions.93 Adopting this approach, they held that the words ‘in any event’ meant what they said. ‘They are unlimited in scope and I can see no reason for giving them any other than their natural meaning.’94 The carriers were accordingly entitled to rely on the respective Hague Rules defences irrespective of the seriousness of the breaches involved.95 The introduction in the United Kingdom of the Hague/Visby Rules has reinforced this approach since their provisions are expressly given ‘the force of law’.96 If they are to be effective as rules of law then presumably they will survive any repudiation of contractual obligations by the parties concerned.97

In the event of the charterer treating the deviation as a repudiation of the contract of carriage, to what extent can the shipowner rely on exceptions in the charterparty or bill of lading in respect of losses occurring before the deviation? Alternatively, can he sue for demurrage or dead freight incurred at the port of loading? The traditional view relating to breaches of condition in general was expressed by Lord Sumner: ‘Though a party may exercise his right to treat the contract as at an end, as regards obligations de futuro, it remains alive for the purpose of vindicating rights already acquired under it on either side.’98 Opinions are divided as to whether a similar rule applies in the case of fundamental breach,99 but there seems no reason in principle why deviation should affect accrued rights, and this is the standpoint adopted by US courts.100

One final point relates to the effect of deviation on the shipowner’s right to recover freight. There still appears to be some doubt on this point. While it is clear that there will be no right to recover the charter freight once the deviation has been accepted as a repudiation of the contract of carriage,101 there seems no reason why, in appropriate circumstances where the cargo safely reaches its destination, the shipowner should not be entitled to reasonable freight on a quantum meruit basis.102

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97 This was the view taken by the Court of Appeal in The Antares [1987] 1 Lloyd’s Rep 424 in respect of the Hague/Visby time limit.
98 Hirji Mulji v Cheong Yue SS Co [1926] AC 497 at p 511. See also Lord Maugham in Hain SS Co v Tate & Lyle (1936) 41 Com Cas 350 at p 371.
100 See The Poznan (1922) 276 Fed Rep 418. See also Cooke 12.34 ff; Gaskell 6.58 ff.
102 See Lord Wright in Hain SS Co v Tate & Lyle [1936] 41 Com Cas 350 at pp 368–9.
(II) Effect of waiving the breach

Despite deviation constituting a fundamental breach of contract, the cargo owner may elect to ignore it and treat the contract as still subsisting since ‘however fundamental is the condition it may still be waived by the goods owner’. The adoption of such a course of action is hardly surprising in the substantial number of cases where deviation results in little or no loss to the cargo owner. In the event of such affirmation, all the terms of the contract continue to apply including the exceptions and the provisions relating to the limitation of liability. Similarly, the shipowner is entitled to claim freight and general average contributions, the cargo owner being restricted to a remedy of damages for any loss attributable to the deviation and not covered by an exception.

A good example of the options open to the cargo owner is provided by the facts of the case of *Hain SS Co v Tate & Lyle*. A vessel had been chartered to proceed to the West Indies and load a cargo of sugar at two ports in Cuba and one port in San Domingo to be nominated by the charterer. The charterer made the required nominations but, owing to a failure of communication by the owner’s agents, the master was not informed of the nominated port in San Domingo. Consequently, when the relevant cargoes had been loaded at the two Cuban ports, the master proceeded to Queenstown for orders. Shipowners and charterers quickly discovered the mistake, whereupon the master was ordered back to San Domingo to load the remaining cargo. On subsequently leaving the latter port, however, the vessel ran aground and part of the cargo was lost, the remainder being transhipped on another vessel for completion of the voyage to the United Kingdom. Shortly before the vessel arrived at its destination the bills of lading covering the cargo of sugar were endorsed to Tate & Lyle who took delivery of the cargo in ignorance of the deviation.

The court had little doubt that the deviation constituted a fundamental breach of contract entitling the cargo owners to treat the contract as repudiated. So far as the charterers were concerned, however, with full knowledge of the facts they had elected to waive the breach by ordering the vessel back to San Domingo. As the aggrieved party, ‘the cargo owner can elect to treat the contract as subsisting; and if he does this with full knowledge of his rights he must in accordance with the general law of contract be held bound’. In these circumstances the shipowners, in the event of any claim being made by the charterers, would be entitled to rely for protection on the charter exception of perils of the sea. The position with regard to the bill of lading holders was, however, entirely different. There could be no waiver without knowledge of the breach and, on the principle enunciated in *Leduc v Ward*, the bill of lading holders were not bound by any waiver on the part of the charterers. Consequently, the shipowners were unable to rely on the bill of lading exceptions as a defence to any cargo claim brought by the consignees.

The burden of proving waiver will always rest with the deviating shipowner, and as it will rarely be in the interest of the consignee to waive the breach once the cargo has

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103 Lord Wright in *Hain SS Co v Tate & Lyle* [1936] 2 All ER 597 at p 608.
104 [1936] 2 All ER 597.
106 (1888) 20 QBD 475; see *infra* pp 130–2.
reached its destination, ‘A waiver to be operative so that a party’s claim is estopped, must be unequivocal, definite, clear, cogent and complete.’ In this respect there appears to be some doubt as to whether mere reference of a dispute to arbitration in accordance with a clause in the charterparty would constitute such a waiver. The better view is that it would not.

2.4 The obligation to nominate a safe port

Whenever a charterer has the right to nominate a port, whether under a time or voyage charter, the question arises as to whether he is under a corresponding obligation to nominate a safe port. The right to nominate may take one of two distinct forms. On the one hand the charterer may be given the right to nominate from a range of ports listed in the charter, e.g. Sydney/Melbourne/Brisbane. In this case no implied warranty of safety will arise on nomination since the owner, having agreed to the port being identified in the charter, may reasonably be assumed to have accepted any risk as to its safety. Alternatively the charterer may be given the right to nominate from a number of unnamed ports within a specific range, e.g. Ghana/Nigeria. Here a distinction has to be drawn between a time charter and a voyage charter. In the case of a time charter, where the owner has placed the commercial use of his vessel at the disposal of the charterer, a warranty as to the safety of any nominated port will invariably be implied. In the opinion of Donaldson J in *The Evaggelos Th*, ‘I should make this implication because common sense and business efficacy require it in cases in which the shipowner surrenders to the charterer the right to choose where his ship shall go and because I think that this is in accordance with the weight of authority.’

The position with regard to the voyage charter is, however, less straightforward. In the absence of clear authority, recent cases have suggested that, where a voyage charterer has the right to nominate from a range of unnamed ports, the implication of such a warranty is not automatic but depends on the specific terms of the particular charter and on whether the implication is necessary to give business efficacy to the contract.

In the majority of charters the need for such an implied obligation is obviated by the presence of an express term to the same effect. An example of such a term is provided by clause 2 of the Baltic 1939 form which provides:

‘The vessel shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the vessel can safely lie always afloat.’

What then constitutes a safe port for the purpose of such warranties? The case law would suggest that the basic concept of a safe port remains the same irrespective of whether it relates

107 Slesser LJ in *McCormick v National Motor Insurance* (1934) 40 Com Cas 76 at p 93.
108 See *US Shipping Board v Bunge & Born* (1924) 41 TLR 73 at pp 74–5.
109 See Cooke 5.35 ff.
110 See Cooke 5.37 ff.
111 [1971] 2 Lloyd’s Rep 200 at p 204.
to an express or implied warranty or to a time or voyage charter. The classic definition was provided by Sellers LJ in *The Eastern City*:

‘a port will not be safe unless, in the relevant period of time, the particular ship can reach it, use it and return from it without, in the absence of some abnormal occurrence, being exposed to danger which cannot be avoided by good navigation and seamanship.’

### 2.4.1 The period covered by the warranty

The ‘relevant period of time’ mentioned in the definition clearly covers the entire period during which the vessel is using the port from the moment of entry to the time of departure. In certain circumstances the coverage may be extended to incorporate risks encountered in the approaches to a port, as, for example, ice in the Elbe preventing safe access to the port of Hamburg, while in exceptional cases it may even cover dangers encountered on the open sea, such as the risk of submarine activity around British ports during wartime. Conversely, when the loading or discharging operation has been completed, the vessel must be able to leave the port in safety. So Manchester was held an ‘unsafe’ port for the ship involved in a case where, after discharge of the cargo, the masts of a vessel were too high to pass under bridges on the ship canal linking the port with the sea. It is essential, however, that the danger must be linked with the use of the nominated port since, in the words of Devlin J in *Grace v General SN Co*, it is obvious in point of fact that the more remote it is from the port, the less likely it is to interfere with the safety of the voyage. The charterer does not guarantee that the most direct route or any particular route to the port is safe, but the voyage which he orders must be one which an ordinarily prudent and skilful master can find a way of making in safety.

Nevertheless, the majority of cases are concerned with the safety of the vessel while in the port itself where a similar variety is evident in the range of risks encompassed by the warranty. The most frequently encountered danger in an unsafe port is the risk of physical damage to the vessel. This may arise from an insufficient depth of water or from the presence of ice or periodic silting which hinders access to the port. Alternatively an exposed or rocky anchorage may render a port unsafe, particularly one which is liable to the onset of unpredictable gales or other bad weather. On the other hand, the risks may have a political origin, as for example in the event of the imposition of a blockade or the outbreak of hostilities. Finally, there are the organisational risks arising from faulty administration by the port authorities.

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113 [1958] 2 Lloyd’s Rep 127 at p 131. For an alternative US definition, see Bond Smith J in 49 Tulane LR 861: ‘A safe port is a place where a chartered vessel may enter, load or discharge, and leave without legal restraint and at which the vessel will encounter no perils greater than those of the sea. Whether a port is safe is a fact to be determined in each case having regard to the vessel concerned.’


115 *Palace Shipping Co v Gans SS Line* [1916] 1 KB 138. See also *The Saga Cob* [1992] 2 Lloyd’s Rep 545 (vessel attacked by Eritrean guerrillas while anchored four miles off port).

116 *Limerick v Stott* [1921] 2 KB 613.

117 [1950] 2 KB at p 391.


119 *The Hermine* [1979] 1 Lloyd’s Rep 212.

120 *The Eastern City* [1958] 2 Lloyd’s Rep 127.


122 See *The Marinicki* [2003] 2 Lloyd’s Rep 655 (no proper system in place to investigate reports of underwater obstructions and to find and remove them). See also *Independent Petroleum Group v Seacarriers* [2008] 1 Lloyd’s Rep 72.
These may range from the lack of adequate safety equipment such as marker buoys, warning lights and radar, to the absence of suitable weather reports or the provision of unsafe berths.\textsuperscript{124}

### 2.4.2 The nature of the risks covered

Whether or not a port is ‘safe’ is a question of fact depending on the circumstances of each individual case.\textsuperscript{125} Regard must be paid to the type of vessel involved, the work to be done and the conditions pertaining in the port at the relevant time. Thus a port may be safe for one type of vessel but not for another as, for example, where the draught of a 250,000 ton tanker is too deep to allow it access to many ports which are otherwise perfectly safe for normal vessels. It must also be remembered that some risk is attached to the use of any port and a port will not be rendered unsafe by the presence of risks which can be avoided by good navigation and competent seamanship. Accordingly, a port is not necessarily unsafe because it is liable to the occasional storm even though vessels may be required to leave it in the event of bad weather.\textsuperscript{126} On such occasions, however, adequate weather forecasts must be available and the organisation of the port must be such as to enable a competent master to take the necessary avoiding action. Thus, in the case of \textit{The Khian Sea},\textsuperscript{127} the Court of Appeal held a port unsafe when, although the master obtained adequate warning of an approaching storm, he was prevented from leaving his berth by the presence of two other vessels anchored close by. Lord Denning MR took the opportunity of enumerating the requirements which had to be satisfied in such circumstances under the safe port warranty. ‘First there must be an adequate weather forecasting system. Second, there must be an adequate availability of pilots and tugs.\textsuperscript{128} Thirdly, there must be adequate sea room to manoeuvre. And fourthly, there must be an adequate system for ensuring that sea room and room for manoeuvre is always available.’\textsuperscript{129}

It is not every hazard, however, which will render a port unsafe. Where the obstruction is only of a temporary nature as, for example, when caused by high winds, neap tides or silting, the master is expected to wait a reasonable time until the danger has disappeared or been removed. Only where the resultant delay is ‘inordinate’, i.e. such as to frustrate the object of the charterparty, will it constitute a breach of the safe port warranty. Thus a port on the Mississippi was not unsafe because the departure of a vessel had been delayed for some 21 days as the result of fog and the periodic silting of the river downstream. In the words of Roskill LJ,\textsuperscript{130} ‘a shipowner cannot throw up a charterparty merely because there has been . . . “commercially unacceptable delay”, that is to say, delay exceeding a reasonable time. The delay in such a case must, before he can rescind and treat the charterer’s conduct as a repudiation of the charterer’s obligation to load, be such as will frustrate the adventure.’ He added that ‘if you substitute any other test than frustration, you use a yardstick which is

\textsuperscript{123} \textit{The Dagmar} [1968] 2 Lloyd’s Rep 563.

\textsuperscript{124} \textit{Reardon Smith Line v Australian Wheat Board} [1956] AC 266.

\textsuperscript{125} See Morris LJ in \textit{Compania Naviera Maropan v Bowaters} [1955] 2 QB at p 105.

\textsuperscript{126} See \textit{The Heinrich Horn} [1971] AMC 362.

\textsuperscript{127} [1979] 1 Lloyd’s Rep 545.

\textsuperscript{128} See \textit{The Universal Monarch} [1988] 2 Lloyd’s Rep 483.

\textsuperscript{129} \textit{The Khian Sea} at p 547.

\textsuperscript{130} \textit{The Hermine} [1979] 1 Lloyd’s Rep 212 at p 218.
extremely difficult to apply in any given case. How do you judge whether a particular delay is commercially acceptable?'

The position may, however, be different where the characteristics of the port, giving rise to the temporary hazard, existed at the time of its nomination and the shipowner is not seeking to rescind the contract but merely to claim damages for detention. Thus in the recent case of *Independent Petroleum Group v Seacarriers*\(^\text{131}\) the *Count* had been detained for 4 days in leaving the port of Beira by a vessel which had run aground on a sandbank and was obstructing the main channel. Arbitrators had found that marker buoys were out of position as a result of shifting sands and that there was no adequate system of monitoring the channel. Although the *Count* had suffered no physical damage and no question of frustration was raised by the delay, Toulson J nevertheless held Beira to be an unsafe port and awarded damages for detention. In his opinion the reasoning in *The Hermine* was no bar to a finding by arbitrators that the characteristics of a port, existing at the time of nomination, were such as to create a continuing risk of danger to vessels, thus rendering it prospectively unsafe. He sought support for this approach from the words of Lord Roskill, when commenting on his leading judgment in *The Hermine*, in the later case of *The Evia (No 2).*\(^\text{132}\) In his view the main concern of the Court of Appeal in *The Hermine* was as to ‘whether there was a breach of the promise which had arisen on nomination because much later there was temporary delay of a non-frustrating kind.’

On their respective facts, it is difficult to reconcile the two decisions. In both cases the claimants were seeking damages for detention and in both cases their claims relied substantially on characteristics which were endemic to the respective ports, namely, periodic silting and shifting sandbanks. Yet in one case the port was found safe while in the other, which involved a shorter period of delay, it was held unsafe. Perhaps the crucial point which distinguishes the two cases is the fact that in the *Independent Petroleum Group v Seacarriers* the port authorities in Beira were found at fault in failing adequately to monitor the safety of the main navigational channel. It was a continuing breach of duty from the time of nomination of the port.

2.4.3 The nature of the undertaking – remedies available for breach

There is little authority as to whether the safe port undertaking constitutes a condition or a warranty. In view of the fact that breach of a term which is technically classified as a condition entitles the innocent party to repudiate all further obligations under the contract, it is unlikely that the parties to a time charter envisage the term as constituting more than a warranty sounding in damages. The position may well be different in the case of a voyage charter, but everything would turn on the wording of the particular contract.

What does, however, appear clear is that a shipowner can refuse a nomination if he is aware that the port is inherently unsafe.\(^\text{133}\) Indeed, if he ignores the obvious danger and proceeds to enter the nominated port, his conduct may well amount to a *novus actus interveniens*.

\(^{131}\)[2008] 1 Lloyd’s Rep 72.


\(^{133}\)But if a shipowner with full knowledge of the danger unequivocally accepts a nomination, he cannot subsequently repudiate his election although he may retain his right to claim damages for breach of contract: *The Kanchenjunga* [1990] 1 Lloyd’s Rep 391.
which prevents him from recovering compensation for any damage subsequently suffered by his vessel. The existence of the safe port warranty ‘does not mean that a master can enter ports that are obviously unsafe and then charge the charterers with damage done’. On the other hand, the courts recognise that, in such a situation, the master is in a dilemma and will often give him the benefit of the doubt where the choice lies between a loss of freight or a scratch to the paintwork.

In the majority of cases the master, on receiving the nomination, will be unaware of the potential danger and, in any event, is entitled to presume that the charterer is fulfilling his obligation by nominating a safe port. Consequently, by sailing to the nominated port the master is not regarded as having waived any breach by the charterer. ‘It does not lie in the mouth of the promisor to say that a promisee has no right to assume that a promise has been faithfully carried out and should make his own enquiries to see whether it has or not. If everything done under contract has to be scrutinised and tested by the other party before he can safely act upon it, many transactions may be seriously held up – in doubtful cases, perhaps indefinitely.’ Consequently, when, on arrival at the port, the master discovers the potential hazard, he is still entitled to refuse to enter. Whether or not the charterer is then entitled to make an alternative nomination is uncertain, although he will certainly be liable to compensate for any loss of time involved. The cases suggest that such alternative nomination is possible in the case of a time charter where the vessel has been chartered for a specified period of time during which the owner has undertaken to carry out the charterer’s instructions. The position is different with regard to a voyage charter, since here the agreement is to charter the ship for a voyage between specified ports. Even where a charterer is given the right to nominate the ports, the cases suggest that, once nominated, the ports are to be treated as if they had been specified in the original charter. No substitutions may therefore be permitted, in which case the safe port undertaking may be regarded as a condition precedent entitling the shipowner to repudiate further performance of the charterparty in the event of its breach. In practice, however, there may be specific provision for such an eventuality in the contract, or it may be covered by the proviso ‘or as near as she can safely get.’

Any claims for breach of the safe port undertaking will be limited by the rules of causation and remoteness of damage. They may take one, or more, of three possible forms:

1. Normally it will consist of a claim for physical damage to the vessel.
2. Alternatively, where no physical damage has been suffered, the shipowner may seek to recover the cost of avoiding the danger by, for example, engaging tugs or lightening the vessel where the draught is too great.
3. In cases where the vessel is trapped in a port by a temporary obstruction such as, for example, silting or the outbreak of hostilities, there may be a claim for damages for detention provided the cause of delay is such as to render the port unsafe. Otherwise no remedy will be available unless the delay is so prolonged as to frustrate the object of the contract. In such circumstances the charterer will not be allowed to avoid liability by pleading frustration, since his breach renders the frustration self-induced.

135 See American President Lines v USA [1968] AMC 830.
137 See infra p 62.
138 See infra pp 63–4.
2.4.4 The scope of the undertaking

A final question, which has provoked some debate in recent years, relates to the precise scope of the undertaking given by the charterer. One point is, however, clear. The undertaking refers to the safety of the port at the time it is to be used, rather than to its safety at the time of nomination. Thus a port may be unsafe at the time of its nomination in January, because of the presence of ice which will have disappeared by the time of its intended use in the following June. Conversely, a port may be safe at the time of its nomination in June, but will be blocked by ice when used in the following January.

Beyond this point of agreement, however, there was, prior to the decision in *The Evia (No 2)*, a divergence of opinion as to the nature of this undertaking. On one view it imposed on the charterer a strict contractual liability for all loss suffered by the shipowner resulting from unsafe conditions in the port, irrespective of whether such conditions were foreseeable at the time of nomination. In essence, this would amount to a continuing guarantee of the safety of the port during the period it was to be used, subject of course to the normal rules of causation and remoteness of damage outlined above. Such an approach was justified on the grounds that it was in line with the express wording of the time charter clauses requiring the vessel to be employed only between good and safe ports, and also because it resulted in an equitable allocation of risk – the shipowner undertaking for a specified period to comply with the charterer’s orders in return for a guarantee from the charterer to use the vessel only between safe ports. The contrary view favoured an obligation which was ‘limited to a warranty that the nominated port of discharge is safe at the time of nomination and may be expected to remain safe from the moment of a vessel’s arrival until her departure’. This approach would link the undertaking to the inherent characteristics of the port at the time of nomination and would involve an objective test to be applied irrespective of the knowledge of the charterer. In brief, such an obligation would relate to the prospective safety of the port at the time of nomination and would not extend to ‘abnormal occurrences’ which were not within the reasonable expectations of the parties at that time.

This difference of opinion was finally resolved by the House of Lords in *The Evia (No 2)*. In this case *The Evia* had been chartered on a Baltime form which included an express undertaking that she be employed ‘only between good and safe ports’. In March 1980 she was ordered by the charterers to load a cargo in Cuba for carriage to Basrah at a time when there was no reason to believe that Basrah was unsafe, or was likely to become so in the foreseeable future. *The Evia* arrived in the Shatt al Arab on 1 July but, owing to congestion, had to wait until 20 August before a berth was available in Basrah. Discharge was not completed until 22 September, the very day on which navigation on the Shatt al Arab ceased due to the outbreak of the Iran–Iraq war. *The Evia* being indefinitely trapped, the umpire in the subsequent arbitration held that the charterparty was frustrated as from 4 October. Being thus deprived of any further payments of hire, the shipowner appealed on the ground that any frustration was self-induced since it had resulted from a breach of the express undertaking to

140 For a summary of the case law to this effect, see the judgment of Mustill J in *The Mary Lou* [1981] 2 Lloyd’s Rep 272.
nominate a safe port. In rejecting the appeal, the Lords were unanimously of the view that the warranty did not amount to a continuing guarantee of the port’s safety but referred only to the prospective safety of the port at the time of nomination. In the words of Lord Diplock, ‘It is with the prospective safety of the port at the time when the vessel will be there for the loading or unloading operation that the contractual promise is concerned, and the contractual promise itself is given at the time when the charterer gives the order to the master or other agent of the shipowner to proceed to the loading or unloading port.’

In rejecting the ‘continuing guarantee’ approach, the Lords affirmed that the charterer would be liable for the prevailing characteristics of the port irrespective of whether they were known to him. On the other hand, he would not have to accept responsibility for such ‘unexpected and abnormal’ events as the outbreak of the Iran–Iraq war. ‘I cannot think that if . . . some unexpected or abnormal event thereafter occurs which creates conditions of unsafety where conditions of safety had previously existed . . . that contractual promise extends to making the charterer liable for any resulting loss or damage, physical or financial. So to hold would make the charterer the insurer of such unexpected and abnormal risks which in my view, should properly fall upon the ship’s insurers.’

If the correct test to be applied in the future is to be based on the prospective safety of the port at the time of nomination, this cannot be the end of the story. What happens if the port becomes actually or prospectively unsafe to the knowledge of the charterer while the vessel is sailing towards it, or even after it has berthed within the port? In the view of their Lordships, the solution to this problem is to place on the time charterer a secondary obligation, in such circumstances, to cancel the original nomination and order the ship out of the danger. Where the vessel is already inside the port, as in *The Evia* case itself, such an obligation will only arise where it is still possible for the vessel to leave.

The decision in *The Evia* clearly caught the market by surprise – in particular the rejection of the continuing guarantee formula as a ‘heresy’ by Lord Diplock, in favour of a more complicated test based on a combination of primary and secondary obligations. As regards the new ‘secondary obligation’ concept two points require further clarification. First, how diligent is the charterer required to be in discovering any subsequent unexpected threat to the safety of the nominated port? Is the obligation to take avoiding action absolute, or based on due diligence, or on the actual knowledge of the charterer? Secondly, there is some uncertainty as to whether a secondary obligation can arise in the case of a voyage charter. Once the voyage charterer has exercised his right to nominate a port, the normal understanding is that no subsequent variation is permissible. Their Lordships in *The Evia* refused to commit themselves on this point.

The two subsequent illustrations of the operation of Lord Roskill’s secondary obligation have provided no elucidation on either problem. The facts in *The Lucille* were practically identical with those in *The Evia* except for the fact that the vessel in the former case was prevented from entering Basrah until 20 September, i.e. two days before the outbreak of the Iran–Iraq war. By that time the court found that Basrah was no longer

143 Ibid at p 310. See Lord Roskill at p 315 to the same effect.
144 Lord Roskill at p 315.
145 Ibid at p 320 per Lord Roskill.
146 Ibid at p 310.
147 See infra at p 62.
prospectively safe and that consequently the charterer should have ordered the ship to escape while there was still an opportunity to do so. In failing to take such action, as a result of which the vessel was indefinitely trapped in Basrah, the charterer was in breach of his safe port undertaking.

2.4.5 The safe port/safe berth relationship

Whether a port is named in the charter, or to be nominated by the charterer, it is presumed that such charterer will also have the right to nominate a berth or berths within that port. In many cases the charter will expressly require the charterer to nominate only safe berths, e.g. 1/2 safe berths Southampton. In the absence of such express provision, whether or not the right to nominate is accompanied by an obligation to nominate a safe berth will depend on a number of factors. Where the right to nominate arises at a port expressly warranted safe by the charterer, such warranty extends to cover the berth with the result that the charterer is under an implied obligation to nominate a safe berth.149

Where, however, the right to nominate occurs at a port not warranted safe by the charterer, the Court of Appeal has recently held that in such a case there is no implied obligation to nominate a safe berth. In Mediterranean Salvage & Towage Ltd v Seamar Trading150 a vessel had been chartered for a voyage from Chekka in Lebanon to Algiers with a cargo of cement in bulk. The charter contained no express warranties as to the safety of either the port or the berth. The charterers nominated a berth for loading at Chekka at which the vessel was severely damaged as the result of its hull being penetrated by a hidden underwater projection. In response to a claim for damages for breach of an implied warranty as to the safety of the berth, the Court of Appeal held that the existence of such a warranty depended on the construction of the terms of the charter as a whole. The burden of proof rested on the owners and they had failed to cite a single case in which a warranty had been implied in similar circumstances. ‘The question is simply whether the charterers agreed to take the risk of unsafety at the berth from hidden dangers and the answer is no.’151

Finally is the reverse case, where the charterer is required to nominate a safe berth at a named port which is not itself expressly warranted as being safe. Here the nomination of the berth raises no implication as to the safety of the port. The practical effects of this distinction are illustrated by the facts of The APJ Priti152 where a charterer had the right to nominate 1/2 safe berths at Bandar Khomeini, a port named in the charter but not itself warranted as safe. The vessel was severely damaged by a missile while in transit to the port. The Court of Appeal held that damages were not recoverable since the approach voyage did not fall within the safe berth warranty and there was no warranty, express or implied, relating to the safety of the port. In the words of Bingham LJ, ‘I do not accept that the vessel’s passage to and from a nominated berth should be treated as including any part of the voyage to and from the port. It would only include movement within the port to and from a nominated berth.’153

149 Cooke 5.42.
151 Ibid at para 45 per Sir Anthony Clarke MR.
153 Ibid at p 42.
2.5 The obligation not to ship dangerous goods

At common law the shipper impliedly undertakes not to ship dangerous goods without first notifying the carrier of their particular characteristics. A similar obligation arises irrespective of whether the goods are shipped under a contract of affreightment governed by a bill of lading or a charterparty although, in the latter case, the implied undertaking will often be reinforced by an express clause in the charterparty itself. No requirement of notification will, however, arise where the carriers, or members of their crew, knew or ought reasonably to have been aware of the dangerous nature of the cargo.

2.5.1 Meaning of dangerous goods

No definition of dangerous goods is provided by the common law and two alternative approaches to the concept are possible. On the one hand, a traditional view might be to regard dangerous goods as a category the extent of which is to be developed by precedent or statutory regulation. Certainly a number of substances such as explosives and radioactive materials are inherently unsafe, and it would not be difficult to compile a substantial list on this basis. Such an attempt is to be found in s 446 of the Merchant Shipping Act 1894 which refers to 'aquafortis, vitriol, naphtha, benzine, gunpowder, lucifer-matches, nitro-glycerine, petroleum, any explosive within the meaning of the Explosives Act 1875, and any other goods of a dangerous nature'. The most recent example of such a 'list' is provided by regulation 1(2) of the Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997 which defines 'dangerous goods' by reference as any 'goods classified in the Blue Book, the IMDG Code or any other IMO publication specified below as dangerous for carriage by sea . . . '

Such an approach, however, constitutes only half the story since the courts have defined the concept in far wider terms to embrace cases in which the danger is to be found in the surrounding circumstances rather than in the inherent nature of the goods themselves. Thus, while it may be thought inaccurate to categorise grain as an inherently dangerous cargo, a hazardous situation might well arise if grain shipped in bulk is allowed to overheat in transit. Similarly, liquids which are otherwise safe may nevertheless create problems if permitted to leak from their containers and damage other cargo. In these circumstances the danger lies rather in the overall situation than in the particular category of goods involved. In approaching such cases it is important, in the opinion of Mustill J, ‘to find a general test which will permit the identification of those cargoes whose shipment is a breach of contract in the absence of a specific warning as to their characteristics. In my view, it is essential when looking for such a test to remember that we are here concerned, not with the labelling in the abstract of goods as “dangerous” or “safe” but with the distribution of risk for the consequences of a dangerous situation arising during the voyage. The character of the goods does, of course, play an important part in creating such a situation. But it is not the only factor. Equally important are the knowledge of the shipowner as to the characteristics of the goods,

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154 See Baltimore form clause 2.
155 The final phrase is presumably to be construed eadem generis with what has gone before.
156 See Sellers J in Ministry of Food v Lamport & Holt [1952] 2 Lloyd’s Rep 371 at p 382. The goods may be dangerous even though they constitute no risk to the vessel itself. See The Giannis NK [1998] 1 Lloyd’s Rep 337.
and the care with which he carries them in the light of that knowledge. In the case at issue, the vessel had been damaged by an explosion caused by the ignition of a mixture of air and methane gas emitted by a cargo of coal after loading. While it was impossible to categorise coal as either an inherently dangerous or safe cargo, it was common knowledge that it had a propensity to emit methane gas which might result in an explosion in the appropriate circumstances. The trial judge took the view that, ‘In such a case, I consider that it is not correct to start with an implied warranty as to the shipment of dangerous goods and try to force the facts within it; but rather to read the contract and the facts together and ask whether, on the true construction of the contract, the risks involved in this particular shipment were risks which the [shipowners] contracted to bear.’

The concept has also been extended to cases in which the goods themselves were in no way physically dangerous. So in *Mitchell, Cotts v Steel*, the shippers were aware that the cargo could not be discharged at Piraeus without the permission of the British Government and were held liable for the resulting delay when such consent was not forthcoming. In the view of Atkin J the loading of unlawful cargo which may involve the vessel in the risk of seizure or delay ‘is precisely analogous to the shipment of a dangerous cargo which might cause the destruction of the ship’.

### 2.5.2 Nature of liability

Where goods are shipped without notice of their dangerous qualities the shipper will be liable for any damage resulting either to the vessel or to any other cargo on board. The orthodox view is that such liability is strict and in no way dependent on the knowledge available to the shipper as to the nature of the goods. This view stems from the majority decision in *Brass v Maitland* where a consignment of ‘bleaching powder’ containing chloride of lime had been shipped in casks. During the voyage the chloride of lime corroded the casks and damaged other cargo in the hold. The majority of the court took the view that the shipper would be liable even though he was unaware of the dangerous nature of the goods, having shipped the casks immediately after receiving delivery from a third party, without any intermediate inspection. In the absence of knowledge on either side, the majority dealt with the issue purely as a question of allocation of risk. ‘It seems much more just and expedient that, although they were ignorant of the dangerous qualities of the goods, or the insufficiency of the packing, the loss occasioned by the dangerous quality of the goods and the insufficient packing should be cast upon the shippers than upon the shipowners.’

On the other hand, there was a strong dissenting judgment from Crompton J who felt that there was no authority to support an absolute obligation on the part of the shipper. ‘It seems very difficult that the shipper can be liable for not communicating what he does not know . . . I entertain great doubt whether either the duty or the warranty extends beyond the cases

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159 [1916] 2 KB 610. See also, the shipment of contraband cargo: *The Donald* [1920] P 56.

160 [1916] 2 KB at p 614.

161 *Great Northern Rly Co v LEP Transport* [1922] 2 KB 742; *Micada v Texim* [1968] 2 Lloyd’s Rep 742.

162 [1856] 26 LJQB 49.

163 *Ibid* at p 54, per Lord Campbell.
where the shipper has knowledge, or means of knowledge, of the dangerous nature of the
goods when shipped or where he has been guilty of some negligence as shipper, as by ship-
ping without communicating danger, which he had the means of knowing and ought to have
communicated. There has been little further authority on this point in the intervening
years. Opinions still differ, but in obiter dicta in *The Athanasia Comninos*, Mustill J supported
the strict liability approach. This approach was confirmed in the later case of *The Giannis
NK* where the House of Lords expressed the view obiter that both limbs of the common law
undertaking were absolute.

The distinction may not be of great practical importance since the issue will only arise on
the rare occasion when neither shipper nor shipowner knows, or ought reasonably to be
aware, of the dangerous nature of the goods. If the shipowner is aware of the nature of the
cargo or reasonable means of knowledge are available to him, then the shipper will be under
no obligation to give notice. Thus in *Brass v Maitland* where the cargo had been described as
‘bleaching powder’ the shipper was eventually held not liable since the shipowner ought to
have known that the powder contained chloride of lime. Similarly, it might be argued that
owners of vessels designed for the carriage in bulk of grain or coal ought to be aware of the
propensities of the goods in such conditions even though the goods themselves may not be
inherently dangerous.

In essence, the object of the obligation imposed on the shipper to give notice is to provide
the carrier with the opportunity either to refuse to carry the goods or to take the necessary
precautions to protect his vessel and any other cargo on board. Once notice has been given,
then, at common law, the shipper’s obligation has been discharged and if the carrier subse-
quently consents to carry the cargo, the shipper will not be liable for any resulting damage.
The only exception to this rule is where the shipper, in shipping dangerous goods, is in breach
of a term of the charterparty. In such a case, even though the carrier accepts the cargo with full
knowledge, the shipper will normally be liable for any damage caused by it. Nor will the
shipper be liable, even in the absence of notice, if the carrier knew, or ought reasonably to
have been aware of, the hazardous nature of the cargo. Presumably in the latter case, the
carrier is treated as if his decision to carry the goods had been made in full knowledge of the
risks involved. In the rare situation where the means of knowledge are available to neither
party, there may be much to be said for Lord Campbell’s view of treating the issue purely as
a question of allocation of risk.

### 2.5.3 Liability under the Hague/Visby Rules

Express provision for the carriage of dangerous goods is to be found in Art IV rule 6 of the
Hague/Visby Rules:

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164 *Ibid* at p 57. A similar view was taken by a US court in *Sucrest Corp v M/V Jennifer* [1978] AMC 2520.
169 See Cooke 6.50 ff (i.e. 6.51).
170 *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240.
171 *Brass v Maitland* (1856) 26 LJQB 49.
172 The provision is identical in Art IV rule 6 of the Hague Rules.
‘Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.

If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any."

It will be noted that this section makes provision for two separate and distinct contingencies. In the first situation the carrier’s consent to the shipment of the cargo has been obtained in ignorance of its inflammable, explosive or dangerous nature. In such an event the carrier is not only entitled to land, destroy or render the goods innocuous without paying compensation but he is also able to hold the shipper liable for all damages and expenses arising from such shipment. The second provision covers the alternative situation where cargo initially shipped with the knowledge and consent of the carrier, subsequently becomes a danger to ship or cargo. In such an event the carrier is entitled to take similar action to avoid the danger as in the first case, without liability to the shipper except possibly by way of general average. On this occasion, however, the shipper will not be liable for the damage and expenses involved.173

After some doubt as to the exact nature and scope of this provision, the situation has been greatly clarified by the decision of the House of Lords in *The Giannis NK*.174 A cargo of groundnut extraction meal pellets had been shipped in Dakar for carriage to the Dominican Republic under a bill of lading incorporating the Hague Rules. On arrival at the port of discharge the cargo was found to be infested with Khapra beetle, although the infection had not spread to a cargo of wheat in an adjacent hold. The reaction of the health authorities in the Dominican Republic and in neighbouring US ports was such that the shipowner had little alternative but to jettison both cargoes at sea. He then commenced proceedings against the shippers of the groundnut cargo under Art IV rule 6 of the Hague Rules for damages for delay and other costs, together with an indemnity to cover any claims by the owners of the cargo of wheat.

The House of Lords, having accepted the finding of the trial judge that the infestation of Khapra beetle had originated with the shipment of the groundnut cargo, established two important markers with regard to the interpretation of Art IV rule 6:

1. The expression ‘goods of a dangerous nature’ should be given a broad interpretation and not be restricted *eiusdem generis* to goods of an ‘inflammable’ or ‘explosive’ nature. Nor should its application be confined to goods which are liable to cause direct physical damage to the vessel or other cargo. What made the cargo dangerous [in this case] was the fact that the shipment and voyage was to countries where the imposition of a quarantine and an order for the dumping of the entire cargo was to be expected. In that sense the Khapra-infested cargo posed a physical danger to the other cargo.175

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173 Provided that he is not in breach of a term of the contract not to ship dangerous goods: *Chandris v Isbrandtsen-Moller* [1951] 1 KB 240.
175 Lord Steyn at p 346.
2. Liability under Art IV rule 6 was strict. In reaching this decision the Court declined to adopt the view taken by US courts that there should be no liability without fault. The US interpretation was based on the alleged overriding effect of Art IV rule 3 of the Hague Rules which provides that:

'The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault or neglect of the shipper, his agents or his servants.'

In the view of the US courts, the word ‘act’ in this context must be read as connoting a positive intentional act on the shipper’s part if it is to be reconciled with the alternative requirement of ‘fault or neglect’. The majority of members of the House of Lords, however, reached a different conclusion and, while declining to comment on the US interpretation of the word ‘act’, held that Art IV rule 6 was an independent provision in no way subject to Art IV rule 3. In the words of Lord Lloyd, ‘Art IV rule 6 is a free-standing provision dealing with a specific subject-matter. It is neither expressly, nor by implication, subject to Art IV rule 3. It imposes strict liability on shippers in relation to the shipment of dangerous goods irrespective of fault or neglect on their part.’

The broad interpretation recommended by their Lordships to be given to the expression ‘goods of a dangerous nature’ would still appear to require, as a minimum, the presence of some indirect physical danger to the vessel or other cargo on board. This at least was the view taken by Tomlinson J in Bunge v ADM Do Brasil Ltda in holding that consequential loss arising from the loading of a quantity of rats along with a cargo of soyabean meal pellets was not recoverable under Article IV rule 6 because the presence of the rats did not pose any threat of direct or indirect physical damage to the vessel or its cargo. After reviewing the judgments in The Giannis NK, he took the view that it was ‘most unlikely that the word “dangerous” can be intended, when used in Article IV rule 6 of the Hague Rules, to bear a meaning going beyond physical danger’ (para 25). He was also of the opinion that the same meaning attached to the word ‘dangerous’ in the corresponding term implied by the common law.

2.5.4 Statutory regulation

The position at common law has been reinforced by a series of statutes designed to control the shipment of certain categories of goods. In the main they seek to establish codes of procedure for the marking, packing and stowage of goods, the provisions of which are enforced by fines and other penalties. One of the earliest examples of such legislation is provided by s 446 of the Merchant Shipping Act 1894 which requires shippers of a specified list of goods

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177 Only Lord Cooke supported the more pragmatic approach of the Court of Appeal that the word ‘act’ in Art IV rule 3 would be triggered by the mere act of shipment itself, irrespective of any specific intent.
178 Lord Cooke objected to the term ‘free-standing provision’, and preferred to justify his decision that Art IV rule 6 was not subject to Art IV rule 3 on the basis of the maxim generalia specialibus non derogant.
180 See supra at pp 33–4.
to provide the master or shipowner with notice of their characteristics before shipment and also to indicate clearly on the outside of any package or container the nature of such goods. On failure to take such action the shipper is liable to a penalty of £100 for each offence. Should unmarked goods be loaded without the required notice being given to the carrier, s 448 further provides that, on discovery, the master or owner may have such goods thrown overboard without incurring any civil or criminal liability.

More recent legislation has taken the form of regulations issued by the Secretary of State for Trade and Industry under the authority of s 85 of the Merchant Shipping Act 1995 which are designed to implement the provisions of succeeding international conventions for the safety of life at sea. The current set of Merchant Shipping (Dangerous Goods and Marine Pollutants) Regulations 1997 give effect to the provisions of the 1974 SOLAS Convention and its 1978 Protocol as amended. After defining ‘dangerous goods’ as those classified in the IMDG Code and other specified IMO publications, the regulations proceed to formulate a detailed code for their documentation, marking, packaging and stowing. More specialised codes also exist for the carriage of bulk cargoes such as grain, meat and oil.

### 2.6 The effect of frustration

In concluding the present chapter devoted to implied terms, it may not be inappropriate to make reference to the effect of frustration on a contract of affreightment. In the words of Lord Radcliffe, ‘frustration occurs whenever the law recognises that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni*. It was not this that I promised to do.’

In its origins in the mid-nineteenth century the doctrine of frustration was justified on the basis of a term to be implied in order to give effect to the presumed intention of the parties, although in more recent years it has come to be treated more as a question of construction of the terms of the contract. It has pertinently been remarked that the implied term theory has never been acted on by the court as a ground of decision, but is merely cited as a theoretical explanation. The more generally accepted view is that of Lord Wright that ‘the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are on the one hand the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties.’

In its operation the doctrine is potentially applicable to all forms of contracts of carriage by sea, although in practice the decided cases refer almost exclusively to charterparty disputes.
2.6 THE EFFECT OF FRUSTRATION

2.6.1 Types of frustration

In the context of shipping contracts, frustration can take a variety of forms ranging from impossibility of performance or supervening illegality to inordinate delay. The decision on frustration in each case appears to be a mixed question of fact and law. While in the ultimate analysis the decision as to whether or not a contract is frustrated is a question of law, this decision has to be taken after an assessment of the relevant facts. Thus 'while the application of the doctrine of frustration is a matter of law, the assessment of a period of delay sufficient to constitute frustration is a question of fact'. The distinction is particularly important in cases where a court is considering an appeal from an arbitration award, since courts will generally not disturb an arbitrator’s decision on a point of fact. In the most recent ruling on this issue, Lord Roskill expressed the view that ‘For the future I think that in those cases which are otherwise suitable for appeal, the courts should only interfere with the conclusion on issues such as those which arise in cases of frustration expressed by arbitrators in reasoned awards either if they are shown to have gone wrong in law and not to have applied the right legal test or if, while purporting to apply the right legal test, they have reached a conclusion which no reasonable person could, on the facts which they have found, have reached.’

(I) Impossibility of performance

The most obvious example of this type of frustration occurs when a chartered ship is either actually lost or becomes a constructive total loss. Indeed, in some time charters there is an express clause providing that in such an event hire paid in advance, but not earned, is returnable. In the converse situation, however, destruction of the cargo intended to be shipped by a charterer will rarely result in frustration of the contract of affreightment. The reason is that a charterer is normally regarded as being under an absolute obligation to procure a cargo and the only occasion on which he may be excused is where the contract is construed as constituting an agreement to load a specific cargo and the cargo, without any fault on the part of the charterer, has been destroyed before loading has commenced. A similar result may follow where a vessel is chartered to ship a specific commodity, the export of which is subsequently prohibited by government decree.

(II) Supervening illegality

A contract will also be frustrated when a subsequent change in the law renders further performance illegal. The implication is that parties contract on the assumption that they will be able legally to perform their obligations, with the result that when this assumption proves to be false, they will be discharged from further performance. It would appear to be immaterial whether such illegality results from a change in English law or from a change in the law

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188 For requirements for appeal from arbitration award, see infra at pp 339–43.
191 For example, NYPE 93 clause 20.
192 See infra pp 69–72.
193 See Aaby’s Rederi v LEP Transport (1948) 81 ILR 465.
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of a foreign country in which performance is to take place.\textsuperscript{195} Frustration will also occur where the outbreak of war renders further performance of the contract illegal. Such a situation may arise when a vessel is owned or chartered by a person who subsequently becomes an enemy alien, or where performance of the contract involves dealings with parties resident in enemy occupied territory.\textsuperscript{196} In such circumstances the supervening illegality has the effect of automatically discharging the contract irrespective of its terms or the presumed intentions of the parties.

(III) Delay

Where performance of the contract is delayed due to the occurrence of some event or change of circumstances, the contract may be frustrated if the resulting delay is likely to be so prolonged as to defeat the object of the parties in entering the contract of affreightment. Whether or not this test is satisfied will depend upon the facts of the particular case, but in general it is likely that a shorter delay will be sufficient to frustrate a voyage charterparty than would be required to discharge a time charter. In \textit{Jackson v Union Marine Ins}\textsuperscript{197} the shipowner contracted to pick up a cargo at Newport with all possible dispatch, ‘dangers and accidents of navigation excepted’. When the ship ran aground in Caernarvon Bay en route for Newport, and suffered damage which would take six months to repair, all further liability under the contract was discharged despite the exception clause. In the opinion of the court the parties had not intended this clause to cover such a fundamental alteration in the nature of the contract.\textsuperscript{198} It would appear to be immaterial whether the relevant event occurs before performance has commenced or after the contract has been partly executed, providing that its effect is to frustrate the intention of the parties in entering the contract.\textsuperscript{199} The frustrating event may take a variety of forms as, for example, the length of time required to complete repairs after a collision,\textsuperscript{200} detention by a foreign government,\textsuperscript{201} or persistent strikes.\textsuperscript{202}

From a survey of the decided cases the most frequent cause of delay results from the requisitioning of ships during an emergency or the trapping of vessels on the outbreak of hostilities. In the former case the decision as to whether to claim frustration may well hinge on the compensation being offered by the Government during the period of requisition. Should the amount of compensation exceed the hire rate under a time charter, then it is likely that the owner will allege frustration, whereas the position will be reversed should a lower rate be offered.\textsuperscript{203} In \textit{Tamplin SS Co v Anglo-Mexican Petroleum Products Co}\textsuperscript{204} a tanker had been chartered for a period of five years to carry oil as the charterers should direct. When the

\textsuperscript{195} \textit{Ralli v Compania Naviera Sota y Aznar} [1920] 2 KB 287; \textit{Société Co-opérative Suisse v La Plata} (1947) 80 LLR 530.
\textsuperscript{196} See \textit{Fibrosa v Fairbairn Lawson} [1943] AC 32.
\textsuperscript{197} (1874) LR 10 CP 125.
\textsuperscript{198} See Bramwell B at p 141.
\textsuperscript{199} \textit{Embiricos v Reid} [1914] 3 KB 45.
\textsuperscript{200} \textit{The Hermosa} [1980] 1 Lloyd’s Rep 638.
\textsuperscript{201} \textit{Scottish Navigation v Souter} [1917] 1 KB 222; \textit{Tatem v Gamboa} [1939] 1 KB 132.
\textsuperscript{202} \textit{The Nema} [1961] 2 Lloyd’s Rep 239; \textit{The Penelope} [1928] P 180. These cases appear somewhat exceptional in that, as strikes are potentially capable of being settled overnight, courts are reluctant to hold contracts frustrated in such circumstances.
\textsuperscript{203} As to whether the charterer is, in any event, entitled to such compensation, see Scrutton p 23.
\textsuperscript{204} [1916] 2 AC 397.
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The charterparty had still three years to run the tanker was requisitioned by the Admiralty, whereupon the owners claimed that the contract was discharged. The charterers, however, were still willing to pay freight and they argued that the basis of the contract had not disappeared since no definite commercial adventure had been contemplated. This view was upheld on appeal by a majority of the Lords, who were possibly influenced by the fact that the owners were no doubt attempting to avoid the contract in order to obtain a higher degree of compensation from the Admiralty. As was later pointed out by Lord Finlay, the principles of law enunciated by the majority and the dissentients were identical, the only divergence appearing in their respective application of those principles to the facts of the particular case. A contrast is to be found in the case of Bank Line v Capel where the claimants had chartered a vessel for 12 months from the time when she should have been delivered to them, but, before that time arrived, the steamer was requisitioned by the Government. On these facts, the Lords held that the charter had been frustrated, even though the steamer had been released after only three months, for otherwise ‘the whole character of the adventure would be changed’. Lord Sumner pointed out that the early release of the ship was immaterial since, at the time when the requisitioning took place, it was envisaged that its duration would be indefinite.

Other examples of delay resulting in frustration are to be found in the numerous cases where, through no fault on the part of owner or charterer, vessels have been trapped on an unexpected outbreak of hostilities. A spate of such litigation resulted from the closure of the Shatt al Arab in 1980 on the outbreak of war between Iran and Iraq.

Whether an intervening event involves such delay as to frustrate the commercial object of the venture must obviously be decided on the facts of each individual case. As regards time charters, the decision will invariably be reached on the basis of a comparison between the period of interruption or delay and the overall length of the charterparty. The test is an objective one and must be applied without the benefit of hindsight. In the words of Bailhache J, ‘the parties must have the right to claim that the charterparty is determined by frustration as soon as the event upon which the claim is based happens. The question will then be what estimate would a reasonable man of business take of the probable length of withdrawal of the vessel from such service with such materials as are before him, including, of course, the cause of the withdrawal and it will be immaterial whether his anticipation is justified or falsified by the event. Thus in Bank Line v Capel it was immaterial that by the time the issue came for trial, it was clear that the requisition had lasted for a mere three months. The decision as to frustration had to be taken on the basis of information available at the time the requisition commenced. ‘Rights ought not to be left in suspense or to hang on the chances of subsequent events. The contract binds or it does not bind, and the law ought to be that the parties can gather their fate then and there. What happens afterwards may assist in showing

205 In Bank Line v Capel [1919] AC 435 at p 443.
206 For a similar decision see Port Line v Ben Line [1958] 1 Lloyd’s Rep 290, where a vessel under a 30-month charter was requisitioned with 10 months of the charter still to run. The court refused to hold the charter frustrated in view of the fact that it was estimated that the requisition might last for not more than three to four months.
208 Lord Finlay at ibid p 442.
209 See Court Line v Dunt [1939] 44 Com Cas 345.
211 Anglo-Northern Trading Co v Emlyn Jones [1917] 2 KB 78 at p 84.
what the probabilities really were if they had been reasonably forecasted, but when the causes of frustration have operated so long or under such circumstances, as to raise a presumption of inordinate delay, the time has arrived at which the fate of the contract falls to be decided.

2.6.2 Factors to be taken into consideration

The burden of proving frustration will fall on the party alleging it. He must satisfy the court that the intervening event has rendered performance of the contract either impossible or radically different from that envisaged at the time of its formation. In reaching a conclusion on the basis of the evidence submitted, there are a number of factors which the court is required to take into consideration.

(I) Frustration of the commercial object

In order to establish frustration it is necessary to prove that performance has been rendered either impossible or so radically different that it would be unjust to hold the parties bound to the terms of the contract. "It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for." Thus in *Tsakiroglou v Noble Thor*216 sellers had agreed to sell a quantity of Sudanese groundnuts c.i.f. Hamburg. Shortly after the conclusion of the contract, the outbreak of hostilities in Egypt resulted in the closure of the Suez Canal to navigation. The only option open to the seller was to ship the groundnuts via the Cape of Good Hope at substantially enhanced freight rates and he accordingly pleaded frustration. The Lords rejected this contention on the ground that shipment via the Cape, while being more expensive ‘was not commercially or fundamentally different’ from shipment by the intended route. Similar decisions were reached in cases where vessels had been voyage chartered,217 and time chartered for a trip.218 In such circumstances it would appear that frustration is only likely to arise either where a specific route has been indicated which has subsequently been rendered impossible,219 or where the vessel is carrying perishable cargo which is unlikely to survive the alternative route.

(II) Express provision in the contract

In its origins the doctrine of frustration envisaged the occurrence of some unexpected event which radically transformed the contractual obligations. By implication if the particular event was foreseeable and no provision for it had been included in the contract, then it was presumed that the parties had intended to create an absolute obligation. Later cases have suggested that such an assumption is fallacious and that the doctrine will only be excluded

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213 Lord Sumner at ibid p 454.
218 The Eugenia [1963] 2 Lloyd’s Rep 381.
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where provision is made to cover the event in the express terms of the contract. So in Tatem v Gamboa, where a vessel which had been chartered to evacuate refugees from Spain during the Civil War was seized by the Nationalists, the contract was held frustrated even though such an outcome must have been foreseeable from the outset.

Even where express provision is made in the contract to cover a particular event, such a term is normally subjected to strict interpretation by the courts. The attitude adopted is not dissimilar to the contra proferentem approach applied when construing clauses seeking to exclude liability for fundamental breach. Thus in Jackson v Union Marine Ins the contract was held frustrated when the vessel ran aground even though the charter included a provision excepting ‘dangers and accidents of navigation’. In the opinion of the court the parties had not intended this clause to cover such a fundamental alteration in the nature of the contract.

Again, in Bank Line v Capel the House of Lords was prepared to hold that an express provision in the charter granting the charterer, but not the owner, the option of cancelling should the ship ‘be commandeered by Government during this charter’ did not prevent the shipowner from successfully pleading frustration when the vessel was subsequently requisitioned in wartime. In the view of Lord Haldane, ‘what is clear is that, where people enter into a contract which is dependent for the possibility of its performance on the continued availability of the subject matter, and that availability comes to an unforeseen end by reason of circumstances over which its owner had no control, the owner is not bound unless it is quite plain that he has contracted to be so’. In his Lordship’s opinion no such contractual intention existed in this case.

(III) Self-induced frustration

Where the event which is alleged to have interfered with performance arises from the act or election of one party, such a person cannot rely on his own default to excuse him from liability under the contract. So in Maritime National Fish v Ocean Trawlers, the defendants had chartered a fishing trawler with knowledge that it could only be operated with an otter trawl, and that the use of such trawls was prohibited without a licence from the Newfoundland government. The defendants, who operated four other vessels equipped with otter trawls, eventually applied for five licences. When only three licences were granted, the defendants allocated them to their other vessels and claimed that this particular charter was frustrated since it was illegal to operate a trawler without a licence. The Privy Council rejected this argument on the ground that any frustration was self-induced having resulted from a deliberate election on the part of the defendant.

The burden of proving that frustration is self-induced lies on the party who makes the allegation, and there appears to be some uncertainty as to the precise extent of the concept. On the one hand, it seems clear that a party cannot invoke frustration where the situation

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221 [1938] 61 LlLR 149.
222 See also The Eugenia [1963] 2 Lloyd’s Rep 381.
224 (1874) LR 10 CP 125.
226 Ibid at p 445. See also Viscount Simon in Fibrosa v Fairbairn Lawson [1943] AC 32 at p 40.
228 Constantine v Imperial Smelting Corp [1942] AC 154.
has been created by a breach of contract on his part. Thus where further performance of a charterparty has been rendered impossible as the result of breach of the safe port warranty,\(^\text{229}\) or the seaworthiness obligation,\(^\text{230}\) the defence is not available to the defaulter. The same may be true where the supervening event results from negligent conduct, as, for example, where the vessel is seriously damaged as the result of a negligent act on the part of the owner or a member of the crew.\(^\text{231}\) It has been pointed out, however, that self-induced frustration involves deliberate choice and that in the majority of cases mere negligence may not suffice. Lord Russell noted that such cases ‘can range from the criminality of the scuttler who opens the sea-cocks and sinks his ship, to the thoughtlessness of a prima donna who sits in a draught and loses her voice. I wish to guard against the supposition that every destruction of corpus for which a contractor can be said, to some extent or in some sense, to be responsible, necessarily involves that the resultant frustration is self-induced within the meaning of the phrase.’\(^\text{232}\)

### 2.6.3 Effect of frustration

The effect of frustration at common law is automatically to discharge the parties from all further liability under the contract. ‘Frustration brings the contract to an end forthwith, without more and automatically.’\(^\text{233}\) The parties are given no option to treat the contract as at an end for it is discharged by operation of law, irrespective of their volition. A contract has, however, come into existence which is perfectly valid until the occurrence of the frustrating event. All rights and obligations which have accrued before that time are unaffected. On the other hand, the contract ceases to bind from the moment frustration intervenes, and rights which accrue after that time are unenforceable.\(^\text{234}\) So freight paid in advance under a contract for the carriage of goods by sea or a voyage charterparty is irrecoverable even though the entire object of the contract is subsequently frustrated and the goods are not delivered at their destination. Conversely, freight payable on the completion of the voyage is not recoverable unless the contract is performed by the delivery of the cargo to the consignee at the agreed discharge point.

It is believed that a similar rule operated in relation to the payment of hire under a time charter, prior to the Frustrated Contracts Act 1943.\(^\text{235}\) Some amelioration of the strict common law rule resulted from the decision of the House of Lords in *Fibrosa v Fairbairn Lawson*\(^\text{236}\) where it was held that an advance payment was recoverable in circumstances where the entire consideration provided in return for it had failed. The general view is that this decision in no way

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230 *Monarch SS Co v Karlshamns* [1949] AC 196; see also *The Eugenia* [1963] 2 Lloyd’s Rep 381.
231 See *Constantine v Imperial Smelting Corp* [1942] AC 154. But presumably not where the alleged breach of contract or negligent act is covered by an exception, e.g. negligence in the navigation or management of the ship under Art IV rule 2(a) of the Hague/Visby Rules.
232 *Constantine v Imperial Smelting Corp* [1942] AC at p 179. ‘Mere negligence seems never to have been suggested as sufficient to constitute “fault” in this connection’, per Lord Wright at p 195. Cf. Bingham LJ in *The Super Servant Two* [1990] 1 Lloyd’s Rep 1 at p 10.
233 Lord Sumner in *Hirji Mulji v Cheong Yue SS Co* [1926] AC 497 at p 505.
235 See *French Marine v Compagnie Napolitaine* [1921] 2 AC 494; *Civil Service Co-operative Soc v General SN Co* [1903] 2 KB 756.
236 [1943] AC 32.
affected the well-established mercantile usage that freight payable in advance is irrecoverable, although in such circumstances it would rarely be the case that there had been a total failure of consideration.

The legislature finally intervened in an attempt to remove the remaining anomalies. The Frustrated Contracts Act of 1943 provides no definition of a frustrating event but merely seeks to secure a reasonable apportionment of the loss resulting from frustration. Its provisions are applicable only to contracts governed by English law and, in the maritime sphere, only to time charters and charterparties by demise. Contracts for the carriage of goods by sea and voyage charterparties are still governed by the old common law rules although the risks involved are invariably covered by insurance. The distinction between time and voyage charters accordingly becomes increasingly important.

Two fundamental changes were introduced by the Act. Section 1(2) provides that all sums paid or payable before the frustrating event shall, if paid, be recoverable and, if not paid, shall cease to be payable. This provision confirms the *Fibrosa* decision, but extends its operation by allowing a party to recover sums paid even though there has been only a partial failure of consideration. The section is, however, subject to a proviso giving the court a discretionary power to grant compensation, out of the money so paid or payable, for expenses incurred before the frustrating event. Thus, where a time charter has been frustrated after the payment in advance of a monthly installment of hire, such sum is recoverable by the charterer subject to the court’s discretionary power to deduct an appropriate amount to cover the owner’s running costs prior to frustration. In no circumstances may the amount recoverable by the owner exceed the actual expenses incurred, nor may it exceed the amount paid or payable under the contract before the frustrating event.

Section 1(3) further provides that where, prior to frustration, a valuable benefit has been conferred on one party by partial performance of the contract, the party conferring the benefit may recover as compensation such sum as the court considers just in the circumstances. The amount recoverable must not exceed the value of the benefit conferred, taking into account any expenses which the benefited party may himself have incurred in performing his side of the contract and any circumstances connected with the frustration which may have affected the value of the benefit. In the case of frustration of a time charter this provision may enable the court, in an appropriate case, to order the payment of a sum equivalent to the full amount of the hire for the actual days on which the charterer had use of the vessel prior to the frustrating event. Such remedy would, of course, be an alternative to the recovery by the owner of running costs under s 1(2).

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238 For an illustration of the operation of this section, see *BP Exploration Co v Hunt* [1982] 1 All ER 925.