**Negligence, Incompetence, Deviation and Unseaworthiness**

**A. INTRODUCTION**

1. What, as maritime lawyers, do we think of (in words of more than four letters) when we see this......?



1. Or this.....?



One answer is Art IV r. 2(a) of the Hague/Hague Visby Rules, whereby

*“2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from*

*(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship.”*

1. The exception may be said to be anachronistic, if not anomalous. If it appeared in other contexts as an exclusion clause it would probably be construed out of existence or struck down by UCTA. No such exception will appear in the Rotterdam Rules. However with a strong historical tradition behind it, and the prospect of years if not decades before the Rotterdam Rules come to be of practical significance, the exception is alive and well and prospering with a rosy future ahead.
2. This is for practical as well as legal reasons. In 1994 the Donaldson report concluded that about 80% of marine accidents were caused or contributed to by human error.[[1]](#footnote-1) 20 plus years on, is there any reason to suppose this has changed? Despite (and perhaps in some instances because of) the technological advances and greater regulation, the human factor remains as prevalent as ever.
3. The exception cannot however be considered in isolation. The facts that give rise to its invocation also may involve one of more of the following factors (apart from that of breach of Art III r.2 to which it is an exception)
   1. Unseaworthiness
   2. Deviation
   3. Failure to proceed with reasonable despatch

**B. SCOPE OF THE EXCEPTION**

1. This is potentially very wide. As observed by Greer LJ in a dissenting judgment approved on appeal by the House of Lords in *Gosse Millerd v Canadian Government Merchant Marine*[[2]](#footnote-2)

I think it is incumbent on the Court not to attribute to Art IV, r 2(a), a meaning that will largely nullify the effect of Art III, r 2, unless they are compelled to do so by clear words. The words “act, neglect or default in the management or navigation of the ship”, if they are interpreted in their widest sense, would cover any act done on board the ship which relates to the care of the cargo, and in practice such an interpretation, if it did not completely nullify the provisions of Art III, r 2, would certainly take the heart out of those provisions, and in practice reduce to very small dimensions the obligation to “carefully handle, carry, keep, and care for the cargo”, which is imposed on shipowners by the last mentioned Rule.

1. This has not stopped the courts interpreting these or similar words in their widest sense, perhaps the high (or low) water mark being in *Marriott v Yeoward[[3]](#footnote-3)* where items from Mrs. Marriott’s luggage were stolen by the carrier’s employees on a voyage. The carrier was held to be entitled to rely on an exemption clause, Pickford J. observing that

“The words “any act neglect or default whatsoever” are quite unqualified. They are not “any act unless felonious,” but “any act”.”

This case has never been overruled, but we suggest that not only is it is an example of extreme literalism which would not be applied to today, it is at least highly questionable whether theft of luggage can be management of a ship. The contrary conclusion was reached in *Brown & Co v Harrison*.[[4]](#footnote-4)

**Timing**

1. In the Hague Rules context a question might arise as to the temporal application of the exception, which is after all an exception to responsibility arising under Art III r.2. Given that the Rules (see Art I(e) and Art II) cover essentially the period between loading of the goods and discharge, it might be thought that the exception was similarly limited, to acts, neglects of defaults occurring during that period.
2. This is not so. As stated in *The Hill Harmony*[[5]](#footnote-5) (of which more below)

“indeed it is not even necessary that the exception relied upon arises after the conclusion of the contract (*Reardon Smith Line Ltd v MAFF* [1960] 1 QB 439 affirmed [1962] 1 QB 42, reversed in part on other grounds [1963] AC 691)”

**Who is protected?**

1. As the wording makes clear, protection is given in respect of the acts of shore based personnel as well as mariners, but not independent contractors such as stevedores.[[6]](#footnote-6) However it will not apply to all “servants of the carrier”, and acts of those senior enough to amount to personify the carrier itself will not be protected.[[7]](#footnote-7) For identifying which side of the line a person lies, cases on “privity”[[8]](#footnote-8) will be relevant.

**Limiting the Scope**

1. The courts’ attempts to limit the scope of the exception have led to some decisions which are difficult to reconcile and accordingly to a degree of unpredictability.

***Navigation***

1. So “*Navigation must mean something having to do with the sailing of the ship; that is, of course, the sailing of the ship having regard to the fact that she is a cargo-carrying ship. Here the damage was caused by something [failure to clean a hold properly] which had nothing to do with the sailing of the ship*."[[9]](#footnote-9)
2. It has been held (or suggested in obiter dicta) to include
   1. abandoning ship – even the “grossest – not merely negligent but wilful – desertion of the ship in calm weather”;[[10]](#footnote-10)
   2. a decision when, in the prevailing conditions of wind, tide and weather, to sail from a given port is plainly a navigational matter[[11]](#footnote-11)
3. However it has been held not to include
   1. Where the master put into Corunna where he remained for 23 days, for several reasons, including his reluctance to face the Bay of Biscay in winter. It was held that damage to the cargo had not been caused by a neglect, default or error of judgment in the navigation or management of the vessel within the meaning of the exceptions in the bills of lading;[[12]](#footnote-12)
   2. Where the master had decided to remain in port for some time, despite advice to continue the voyage by a prescribed route. Bailhache J held that the master's deliberate choice, while in harbour, of one of two routes to be pursued could not be an error in the management or navigation of the ship within the meaning of an exception in the charterparty.[[13]](#footnote-13)

***The time charter cases***

1. The application to time charter cases of principles developed in the context of contracts of carriage is a familiar problem in maritime law, and this particular area is no exception. Whereas under a voyage charter it is a matter for the carrier how the ship is operated, subject to obligations to use reasonable despatch and not to deviate, a time charterer paying by the day has more control under the employment clause.
2. Some may think that the law has a taken a wrong turning in posing a false dichotomy between “employment” and “navigation”. In our view an alternative approach to the problem is to accept that some matters fall within both terms, but that certain types of navigation are within the charterers’ control and some within owners’,[[14]](#footnote-14) but wrong or right a turning has been made, starting perhaps in the 1920s. In those days it appears that a common problem, perhaps analogous to today’s slow steaming, was to have insufficient steam up to satisfy time charterers. One might think that such a problem was about as squarely within the purview of “management or navigation of the ship” as one could wish for, but two cases decided otherwise.[[15]](#footnote-15) This is subject to the caveat that in the latter case it is hard to ascertain what if anything was decided, the litigation being about as bad an advertisement for the dispute resolution process as could be imagined.
3. This development was firmly entrenched in *The Hill Harmony*, where an order as to choice of route was given by timecharterers. Clarke J. and the court of appeal were firmly of the view that these orders were as to navigation. The majority of the arbitrators and the House of Lords were equally firmly of the opposite view, with, for example, Lord Hobhouse concluding that *“any error which the master made in this connection was not an error in the navigation or management of the vessel; it did not concern any matter of seamanship.”* Given that the reason for the choice of route was a fear of adverse weather, this conclusion may be thought questionable; the fact that the fear was ill founded is nothing to the point.
4. It may be possible to distinguish *The Hill Harmony* in a bill of lading or voyage charter case and persuade a tribunal that in that context management or navigation has a broader meaning.
5. What is however important is to consider not only the act or omission in isolation but context and mental element. A mariner may have set a course of 270º for a number of reasons including (i) because he meant to set 250 º but made a slip of the finger (ii) because he wrongly thought it was the course to the next waypoint (iii) because though off the direct route he thought that it was the best course to steer to avoid the effects of heavy weather or pirate infested waters (iv) because he wanted to call in at a port en route to pick up more cargo. The legal consequences of these different circumstances may be very different

***Management***

1. If this word is interpreted broadly, most of the acts, neglects of defaults which can cause damage or delay to cargo arise from the management of a ship. In seeking to limit its scope the courts have focused on two sets of distinctions , being
   1. Between “nautical” fault and “commercial” fault;
   2. Between “fault” referable to the ship as such and that related to the cargo.
2. The first of these in particular has proved elusive. Greer LJ observed in *Gosse Millerd* (perhaps a little delphically) that “*It is worthwhile noting that Art IV, r 2(*a*), is not directed to acts, neglects or defaults in the course of management of the ship, but acts, neglects or defaults in the management of the ship*.” Lord Hailsham in the House of Lords, citing *The Glenochil,* added further guidance “*It seems to me clear that the word "management" goes somewhat beyond - perhaps not much beyond-navigation, but far enough to take in this very class of acts which do not affect the sailing.”*
3. Assistance was also given in *Suzuki v Beynon* by Lord Sumner who said “*The term "management" may better fit the present case [insufficient steam], but it is not a term of art; it has no precise legal meaning and its application depends on the facts as appreciated by persons experienced in dealing with steamers. There is a management which is of the shore, and a management which is of the sea.”* These remarks are also perhaps less than illuminating.

***Cargo***

1. For the second distinction the starting point is again Greer LJ in *Gosse Millerd*, in the following terms

“If the cause of the damage is solely, or even primarily, a neglect to take reasonable care of the cargo, the ship is liable, but if the cause of the damage is a neglect to take reasonable care of the ship, or some part of it, as distinct from the cargo, the ship is relieved from liability; for if the negligence is not negligence towards the ship, but only negligent failure to use the apparatus of the ship for the protection of the cargo, the ship is not so relieved.”

A number of cases consider, on their particular facts, whether the act in question is referable primarily to care of the cargo.[[16]](#footnote-16)

1. The master's negligence in terms of course and speed and leading to cargo damage in heavy weather, may not fall within the management or navigation but rather constitute “*a negligent failure to use the apparatus of the ship for the protection of the cargo and affected the cargo alone.*”[[17]](#footnote-17)
2. Poor stowage of cargo which endangers other cargo directly is clearly not within the exception, being a key element of care of the cargo. Different considerations apply to overloading a vessel in a way which causes delay (for example by reason of the vessel’s inability to proceed by a certain route such as via the Panama or Suez canal). This has been held to be in the management of the vessel.[[18]](#footnote-18) Different reasoning might conceivably apply if for example the overloading arose from a shoreside decision made for commercial reasons or if the draft problems arose through trim or other factors necessitated by considerations of care for some of the cargo. Another common problem is where stowage is effected to optimise stability of the ship but primarily to reduce the effect of a stiff vessel on other cargo rather than for ship safety reasons. An error in this regard would not, it is suggested, fall within the exception.

***“Outrageous” or similar conduct***

1. What if the conduct in question is worse than mere negligence? In *The Tasman Pioneer[[19]](#footnote-19)* some fairly unexceptional negligence in navigation (taking the vessel through a narrow channel and hitting a rock) was followed by conduct described in various ways by the courts including “outrageous”. The master failed to report the incident to owners or the authorities, proceeded at full steam for a significant period of time, lied about this actions (to cover up what had happened and look after his own interests) and instructed the crew to do the same. The delay in obtaining help caused by his post collision actions caused damage to the cargo, and the question of whether the carrier was protected by Art IV 2 (a) cause a division of views amongst the New Zealand judges who head the case.
2. At first instance Hugh Williams J. held that the master’s misconduct was an act in the management of navigation of the vessel but as the actions were not performed “in good faith” the carrier was not entitled to protection.
3. The majority of the court of appeal upheld this conclusion but on a different ground, i.e. that the “outrageous” conduct of the master undertaken for his own “selfish” purposes was not conduct within the navigation or management of the ship.[[20]](#footnote-20) This reasoning could be criticised as confusing the nature of an act with the motive for doing it. Whatever else may be said of the master’s conduct he was at least undertaking the contractual voyage; contrast the situation, where the majority approach might more readily apply, if the master had turned the vessel round and used it to flee to a desert island in the other direction (and see below for the extent to which the protection is lost in the event of a deviation Fogarty J. dissented, in effect on the basis that the wording was unqualified and meant what it said.
4. This decision was overturned by the Supreme Court in a decision which has been described as “cursory and thinly reasoned”.[[21]](#footnote-21) It is hard not to sympathise with this characterisation, even if there is equal sympathy for the wish of the court to achieve the result.
5. The court reached their conclusion by a finding that the exception applied to any conduct except barratry, and that the conduct did not amount to this. It did so, it appears, in part on the basis of what might be termed a “tactical concession” by the appellant’s counsel that the wording did not cover barratry, tactical perhaps because it allowed a qualification to the words in a way that could safely be advanced. This was therefore allowed to become “common ground” and then the sole qualification to the wording. As pointed out by Myburgh, barratry is conduct by mariners, against and not on behalf of owners; it thus might seem the paradigm instance where owners deserve (or at least can justify) protection against employees on “frolics” (or worse) of their own.
6. The issue is ripe for reconsideration next time some suitably “outrageous” conduct falls to be considered by an English court. The choice of solution would to be between
   1. The “good faith” approach. Whilst the notion is gaining ground generally in the law of contract,[[22]](#footnote-22) it has not generally applied to contracts of carriage;
   2. The “barratry” approach – see above;
   3. The “outside the scope” approach – see above;
   4. The “literalist” approach fashionable 100 years ago and favoured by Fogarty J.
   5. Qualifying the wording by borrowing language such as “*if it is proved that the damage resulted from an act or omission of the carrier done with intent to cause damage, or recklessly and with knowledge that damage would probably result.*” The problem is that whilst this wording does appear in Art IV (5)(e) it does not in Art IV r. 2(a). It should be noted that the Supreme Court thought that this formulation would not exclude reliance on the exception, although the Master’s post accident conduct has a serious whiff of recklessness about it, and given that the crew realised that collision with the rock had caused “significant” damage to the vessel, it is hard to see why cargo damage was not a probable result.
7. In *The Pearl C*[[23]](#footnote-23) Popplewell J. applied the *Hill Harmony* test, also in a time charter context, and reiterated that Art IV r 2(a) applied to negligence as opposed to deliberate decisions. But this sheds little light on the *Tasman Pioneer* issue. And as observed above many negligent actions are deliberate (even though not deliberate wrong doing).

**C. CARGO’S FREQUENT RESPONSE – ART III r.1 - UNSEAWORTHINESS**

1. The commonest counter by cargo interests faced with an Art IV r. 2(a) defence where is to rely on Art III r.1. The burden of proving unseaworthiness at the commencement of the voyage is on cargo, whereas the burden of showing due diligence is under Art IV r.1 on the carrier. Even if Art IV r.2(a) prima facie applies because neglect etc is a cause of the damage, it will not do so if unseaworthiness is also a cause.
2. It is possible that an Art IV r.2(a) error will arise in the context of unseaworthiness in the form of defects in the vessel’s hull and machinery. However given the “human element” inherent in the exception, the most significant instances of unseaworthiness are the two (potentially overlapping) elements of
   1. Incompetence of officers or crew; and
   2. Defective systems or procedures applied on board.

**Incompetence**

1. Incompetent people have a propensity to be negligent, but not all acts of negligence are committed by incompetent people. The difference between negligence and incompetence is as potentially elusive as it is important. For a much fuller discussion of the topic than space or time permits here, we refer to excellent analyses by Roger White,[[24]](#footnote-24) Dr. Phil Anderson,[[25]](#footnote-25) and Konstantinos Bachxevanis.[[26]](#footnote-26)
2. There is much to be said for the view of Hewson J. in *The Makedonia*[[27]](#footnote-27) that “inefficiency” is a more apt terms than incompetence, especially as certain types of “incompetence”, such as a lack of training of a specific nature or lack of familiarity with characteristics of the vessel may not in any way be the fault of the person in question.
3. The starting point in the modern cases is *The Eurasian Dream*[[28]](#footnote-28)where Cresswell J. draws together the law on the various “types” or incompetence. The relevant passage merits summary at some length:

“129. As to the competence or efficiency of the master and crew:

(1) Incompetence or inefficiency may consist of a “disabling want of skill” or a “disabling want of knowledge”........ Does not [this] apply where the master’s inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage?........ And the owner who withholds from the master the necessary information should, in all reason, be as responsible for the result of the master’s ignorance as if he deprived the latter of the general skill and efficiency he presumably possessed.

(2) Incompetence or inefficiency is a question of fact, which may be proved from one incident and need not be demonstrated by reference to a series of acts. However, one mistake or even more than one mistake does not necessarily render a crew-member incompetent: *The Star Sea* [ibid.] at p. 374:

(3) Incompetence is to be distinguished from negligence and may derive from:

(a) an inherent lack of ability;

(b) a lack of adequate training or instruction: e.g. lack of adequate fire-fighting training;

  (c) a lack of knowledge about a particular vessel and/or its systems;

  (d) a disinclination to perform the job properly:

 (e) physical or mental disability or incapacity (e.g. drunkenness, illness).

 (4) The test as to whether the incompetence or inefficiency of the master and crew has rendered the vessel unseaworthy is as follows: Would a reasonably prudent owner, knowing the relevant facts, have allowed this vessel to put to sea with this master and crew, with their state of knowledge, training and instruction.”

1. Of the five categories of incompetence, the first three are to a large extent self-explanatory. For a good quartet of cases illustrating the application of the principles to the facts in question, two resulting in victory for cargo and two for the carrier, see (i) *The Eurasian Dream* itself (ii) the Singapore case of *The Patraikos 2*[[29]](#footnote-29) (iii) *The Torepo*[[30]](#footnote-30) and (iv) *The Isla Fernandina*.[[31]](#footnote-31)
2. The remaining two categories merit some further discussion.

***Disinclination***

1. It is not uncommon for serious errors of navigation to occur in circumstances which at first sight seem surprising; a well run carrier company, a vessel with all the latest technology, and an experienced crew. The explanation may be in an attitude which falls within the fourth of the categories and can best be described as “complacency”. The navigation of a modern vessel is, for many parts of ocean voyages, as easy as it is tedious, with the comforts of autopilot, radar, GPS and various types of alarms. Whilst we express no view on whether modern mariners are in general more or less dutiful and diligent than their forebears, the ease referred to above can readily lead to shortcuts in terms of poor passage planning and chartwork, inadequate watchkeeping and look out, and over reliance on GPS. Whilst such poor practices on a voyage do not in themselves indicate incompetence in any form, a habitual tendency or propensity to so act, sometimes described in the cases as “general slackness”, may be incompetence on the part of officers concerned. By its nature this type of incompetence is often difficult to detect and address, whether by the carrier in advance of any accident or by cargo interests looking for possible incidences of unseaworthiness in its aftermath.
2. Such disinclination may apply both to junior officers and ratings charged with doing things and the master or senior officers charged with ensuring they are done or supervising them.

***Disability or incapacity***

1. An officer who is drunk at the helm mid-voyage does not render the carrier in breach of Art III r.1, however much the spectacle might alarm a prudent owner. However a habitual drunk will do, even if sober at the beginning of the voyage, by reason of “disability” or “incapacity” in the form of propensity to drunkenness even if falling short of a medical condition of alcoholism.
2. The disability need not be permanent, as long as it exists at the beginning of the voyage. A common problem is fatigue, especially as the busiest time for officers may be in port at the beginning of a voyage. Extreme fatigue may amount to disability. The prescribed periods of rest and maximum working hours are set out in the SCTW convention.[[32]](#footnote-32) Compliance with its provisions does not in itself negate the possibility of disabling fatigue, just as breach does not necessarily evidence it, but may be a relevant factor.

**Systems/Procedures**

***Documentation***

1. Lack of documentation as such does not render a vessel unseaworthy, especially where the documents are in the nature of certificates or similar.[[33]](#footnote-33) However the requirements of modern management practices and the ISM code require there to be detailed written systems and procedures in place for management and navigation of a vessel, including shipboard operations and response to emergencies. Absence of such procedures may go both to unseaworthiness and due diligence. Regardless of competence of the crew (and incompetence in terms of lack of training or familiarity may overlap with other unseaworthiness in terms of lack of documentation) a vessel without a proper “instruction manual” is unseaworthy.

***Practices***

1. Although it may be a matter of semantics, the existence of habitual or systemic poor practices may make the ship unseaworthy under the prudent owner test irrespective of proof of “disinclination” on the part of any specific officer. An example might be of a vessel where there was a clear non-smoking policy but where smoking habitually took place. On principle the vessel would be unseaworthy or arguably so without the need to consider whether there were any failings of specific officers, prior to the beginning of voyage on which the cargo caught fire, sufficient to render them incompetent.
2. The same applies to matters more directly connected with navigation, such as chart corrections or use of GPS.

**Due diligence**

1. As is well known, this duty is “non-delegable”[[34]](#footnote-34) such that if for example the unseaworthiness is a loose nut, owners are liable for the negligence of the assistant fitter of a contractor or the 5th engineer even if the shore side systems are perfect and the Chief and 2nd - 4th engineers paragons of virtue.
2. Where the unseaworthiness is incompetence of mariners (existing at the beginning of the voyage) the due diligence is usually that of shore side personnel including owners, managers, recruitment agents and the like responsible for recruitment and training of officers and crew.
3. However the monitoring and management of mariners is very much part of the job of the master and senior officers, and even if competent themselves they may be negligent (in due diligence terms) in failing to:
   1. Spot incompetence, negligent or poor practices of others
   2. Ensure compliance with correct systems and procedures.
4. Such failing will only be relevant if a habitual or systemic one which can be said to exist at the beginning of the voyage, but evidence of failing (or especially multiple failings) on the voyage in question may be evidence of a systemic problem.
5. For this reason it is usually a necessary but not sufficient requirement for an owner seeking to prove due diligence that all the written procedures and systems are adequate and that the shoreside personnel were diligent

**Casehandling implications**

1. The above has practical implications for casehandling.

***Pleadings***

1. English procedure, whereby disclosure is given on pleaded issues, and allegations can only be pleaded where there is sufficient evidential (including inferential) basis to justify them can given rise to a “Catch 22” problem for cargo interests, who may suspect unseaworthiness but have no evidence to plead it without seeing owners’ documents. The courts and London tribunals are sensitive to this difficulty and attempts to suppress unhelpful documents may be unsuccessful at best and spectacular own goals at worst.

***Disclosure***

1. Following from this, although tribunals will be astute to reject “fishing expeditions” and oppressive or unfocused disclosure requests, the categories of documents potentially relevant to liability are numerous and wide ranging, in nature and temporal scope.

***Evidence***

1. As will be apparent, an inquiry into what is at first sight a simple and obvious error of navigation may necessitate detailed consideration many aspects of ship and shore operations, covering possibly not only the voyage in question but previous voyages of the vessel in question of others in the fleet.
2. The “legal” burdens of proof on seaworthiness and due diligence may in practice be modified by matters of inference or evidential burdens of proof.
3. Factual and expert evidence is often required both on “mariner” issues and “shipment management” issues.

**Concluding observation**

1. As will be apparent, in modern times, the prima facie demonstration of error in management of navigation will constitute only the beginning the inquiry not the end of it. Two distinct if related factors contribute to the difficulty in owners relying on the exception.
2. The first is the anomalous nature of the exception, which may have seemed a perfectly normal and sensible exemption in the nineteenth century but which is out of line with modern notions of corporate responsibility for acts of employees. This leads to a natural disinclination to allow its invocation.
3. The second is the greater ability and responsibility of owners to influence what happens on board the ship, due to a mixture of mandatory regulation, modern management practice and improved communications. Thus while human error will occur in the best run carrier companies and on the best run ships, the “root cause” of an error within the exception may be in systems and procedures. Whilst the burden of proof may in legal terms be on the party alleging unseaworthiness, in evidential terms it may lie with the carrier to show that appropriate and reasonable precautions to guard against human error are in place.

**D. DEVIATION**

1. There is a well-established duty at common law not to deviate from the usual route for a voyage between the ports in question. However, the relationship between deviation and negligent navigation is not always straightforward.

**Consequences of deviation**

1. Before addressing the meaning of ‘deviation’, it is sensible to examine the consequences: the importance of establishing deviation is heavily coloured by these consequences.
2. Deviation constitutes a breach of contract; the shipper or receiver can sue for damages for loss caused by the deviation, provided the losses are not too remote.
3. Deviation can also produce more severe consequences.
   1. There is clear authority that a shipper cannot rely on clauses in the contract which would otherwise protect him from expected perils during the course of the deviation unless he can prove that the ship would have suffered the same fate even if it had not deviated. For example, in *James Morrison & Co Ltd v Shaw Savill & Albion Co Ltd* [1916] 2 KB 783, a ship deviated approximately 107 miles in a journey of over 12,000 miles during the First World War in order to deliver other cargo. The ship was sunk by an enemy submarine while off the normal route. The owner was not permitted to rely on the ‘King’s enemies’ exception which would normally have applied; he could not prove that the ship would have been targeted in any event.
   2. The displacement of clauses that would otherwise protect the shipper from expected perils is not limited to the period whilst the ship is on its deviation. See e.g. *Joseph Thorley Ltd v Orchis SS Co Ltd* [1907] 1 KB 660 where the court refused to enforce a clause exempting the carrier from liability for the negligence of the stevedores during unloading at the destination port.
   3. There is also authority which goes further and finds that the entire contract of carriage is displaced. In *US Shipping Board v Bunge y Born* (1925) 42 TLR 174 the House of Lords proceeded on the assumption that there was no right to the contractual rate of demurrage at the port of discharge. Further, the Court of Appeal in *Hain SS Co v Tate & Lyle Ltd* (1934) 39 Comm. Cas. 259 held that a deviation displaced the contractual right to freight due on delivery (although the House of Lords assumed that a reasonable freight was nonetheless due, seemingly on a restitutionary basis: (1936) 41 Comm. Cas. 350).
4. It is not easy to identify a single doctrine that emerges from these cases.
5. In *Joseph Thorley Ltd v Orchis SS Co Ltd*, the court assumed that the contract had been displaced *ab initio*.
6. However, the House of Lords in *Hain SS Co v Tate & Lyle Ltd* held that the doctrine was based on the doctrine of discharge of the contract by breach. As a consequence, the deviation could be waived or the contract affirmed. Lord Wright invoked the ‘fundamental breach’ doctrine (p.177-178). Similarly, Lord Atkin stated as follows at p.173:

“My Lords, the effect of a deviation upon a contract of carriage by sea has been stated in a variety of cases but not in uniform language. Everyone is agreed that it is a serious matter. Occasionally language has been used which suggests that the occurrence of a deviation automatically displaces the contract, as by the now accepted doctrine does an event which "frustrates" a contract. In other cases, where the effect of deviation upon the exceptions in the contract had to be considered, language is used which Sir Robert Aske argued shows that the sole effect is as it were to expunge the exceptions clause as no longer applying to a voyage which from the beginning of the deviation has ceased to be the contract voyage. I venture to think that the true view is that the departure from the voyage contracted to be made is a breach by the shipowner of his contract, but a breach of such a serious character that however slight the deviation 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 its terms.”

1. The main difficulty with the explanation in *Hain’s* case is that, following *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 287, there is no rule of law of ‘fundamental breach’; a contract is only terminated for breach when the innocent party knows of the breach and elects to do so. The charterer in *Hain*’s case did know about the deviation when it occurred so the House of Lords did not need to address the point. However, in most cases the charterer is unlikely to discover the deviation until much later. Discharge of the contract at that point would not have the effect of preventing the shipper from relying on exclusion clauses or on Art IV r. 2(a) of the Hague/Hague Visby Rules with regard to events that occurred after the commencement of the deviation but prior to the charterer’s knowledge and election.
2. Lord Wilberforce suggested in *Photo Production* that it may be preferable for the deviation cases to “*be considered as a body of authority sui generis with special rules derived from historic and commercial reasons*” (at p.845).
3. The Court of Appeal addressed the point in 1988 in *State Trading Corp of India v M Golodetz Ltd* [1989] 2 Lloyd’s Rep 277. That case did not relate to shipping, but it was argued by one of the parties that the deviation cases showed that there was a special category of case where a breach of condition terminated the contract automatically. This argument was rejected, and Lloyd LJ noted that the House of Lords in *Hain’s* case “*regarded itself as applying the ordinary law of contract, and not a rule applicable only to deviation cases*” (at p.288). Nonetheless, Kerr LJ suggested at p.287 that deviation in carriage by sea and the effects of a breach of warranty in insurance law, where automatic termination does apply, could be taken out of the general law.
4. More recently, in *The Antares* [1987] 1 Lloyd’s Rep 424 – a case concerning goods wrongfully stowed on deck – Lloyd LJ as he then was stated that he would “*favour the view that [the deviation cases] should now be assimilated into the general law of contract*” (at p.430). Longmore LJ expressed agreement with this view in *The Kapitan Petko Voivoda* [2003] 2 Lloyd’s Rep 1 at para 14.
5. *Carver on Bills of Lading* (3rd Ed.) suggests at para 9-058 that “*the whole doctrine may not survive a full reconsideration by the Supreme Court of the United Kingdom or other final tribunal elsewhere”.*
6. The upshot of this uncertainty is that a charterer would be well advised to argue that deviation is a *sui generis* doctrine which displaces the contract from the moment of deviation. A shipper, on the other hand, will want to argue that any discharge of the contract occurs only upon the election of the charterer, and applies only prospectively.

**Scope of deviation**

1. A deviation is a departure from the usual or agreed route for a voyage. A negligent departure from the usual route is generally not considered to be deviation, but rather negligent navigation within the scope of Art IV r. 2(a) of the Hague/Hague Visby Rules. For example:
2. In *Rio Tinto Co Ltd v Seed Shipping Co Ltd* (1926) Ll. L. Rep. 316 a ship set a course SSE instead of SSW out of Clyde and hit a rock. The court found that the master “*was not himself*” after a Christmas dinner of goose and plum pudding. It was held that there was no deviation: the master “*did not adopt another road…but he got himself into the ditch at the side of the road which he was intending to follow*” (p.321).
3. More recently, in *The Isla Fernandina* [2000] 2 Lloyd's Rep. 15, a vessel carrying bananas ran aground on a sandbank after the third officer had mistaken his reference point. Langley J rejected the suggestion that the incident resulted from deviation: the “*navigation was negligent and was the only effective cause of the grounding*” (p.33).
4. Conversely, in *Thiess Bros (Queensland) Pty Ltd v Australian SS Pty Ltd* [1955] 1 Lloyd’s Rep 459,a ship which departed from the normal route to load bunkers so that it would have the maximum possible aboard on termination of the charter was held to have deviated.
5. Deliberate deviation is, however, permitted at common law, where necessary to ensure the safety of the adventure (e.g. restowing cargo or offloading dangerous cargo) or to save life.
6. Mellish LJ recognised in *The Teutonia* (1872) LR 4 PC 171 at p.179 that it  *“seems obvious that, if a Master receives credible information that, if he continues in the direct course of his voyage, his Ship will be exposed to some imminent peril, as, for instance, that there are Pirates in his course, or Icebergs, or other dangers of navigation, he must be justified in pausing and deviating from the direct course, and taking any step which a prudent man would take for the purpose of avoiding the danger*”.
7. This issue arose recently in *The Triton Lark* [2012] 1 CLC 1. In that case, the disponent owners refused to proceed from Hamburg to China via the Gulf of Aden because of the risk of piracy. Instead, the owners proceeded via the Cape of Good Hope. Teare J upheld the arbitrators’ decision that this constituted neither a deviation nor a failure to prosecute the voyage with due dispatch.
8. This exception applies even where the need to deviate arises from unseaworthiness: *Kish v Taylor* [1912] AC 604; *The Devon* [2012] EWHC 3747 (Comm) at para 57.
9. Further, under Article IV.4 of the Hague and Hague-Visby Rules, deviation is also permitted to protect property (even if not related to the adventure). This provision further permits “*any reasonable deviation*”.
10. These exceptions can result in practical problems. For example, should a deviation be found to exist if the master reasonably changes course to avoid bad weather but then forgets to change back?
11. There is also some basis to suggest that deviation extends beyond geographic deviation.
12. In *Scaramanga v Stamp* (1880) 5 CPD 295 at p.299, it was stated by Cockburn CJ that taking a ship in tow “*has been held to be equivalent to a deviation, and rightly so, seeing that the effect…is necessarily to retard the progress of the towing vessel, and thereby to prolong the voyage*”. Similarly, in *Brandt v Liverpool SN Co* [1924] 1 KB 575, Scrutton LJ suggested that there was “*sufficient delay to amount to a deviation*” (p.597).
13. It has been suggested that deviation might also extend to unauthorised carriage of the goods on deck. As *Carver on Bills of Lading* (3rd Ed.) notes at para 9-056, “*In a sense these situations actually provide a stronger case than geographical deviation for applying the doctrine, since the goods are more likely to be exposed to different risks from those which might be contemplated*”.
14. Whether a modern court would accept such additions to the ‘core’ geographic deviation may well turn on its view as to the consequences. If deviation is a *sui generis* category, which displaces the contract as from the moment of deviation, the courts are unlikely to broaden the scope of that doctrine. If, however, deviation is assimilated into the general law of termination for breach, a more generous approach to deviation might follow.

**Liberty clauses**

1. Courts are often asked to reconcile ‘liberty clauses’ in a bill of lading with the duty not to deviate. Such clauses are often given a narrow interpretation.
2. Lord Sumner explained in *Frenkel v MacAndrews & Co Ltd* [1929] AC 545 at 562 that the “*two parts of a bill of lading, the described voyage and the liberty to deviate, must be read together and reconciled, and…a liberty [to deviate], however generally worded, cannot frustrate, but must be subordinate to the described voyage*”.
3. In *Glynn v Margetson & Co* [1893] AC 351 a bill of lading to ship oranges from Malaga to Liverpool gave “*liberty to proceed to and stay at any port or ports in any rotation in the Mediterranean, Levant, Black Sea, Adriatic, or on the coasts of Africa, Spain, Portugal, France, Great Britain and Ireland, for the purpose of delivering coals, cargo or passengers, or for any other purpose whatsoever*”. This was held not to protect a carrier who had commenced the voyage by setting off to a port 350 miles up the Spanish coast in the opposite direction to Liverpool.
4. It follows that these clauses do not provide much comfort for a carrier.

**Concluding thoughts**

1. The law on deviation remains surprisingly unsettled. Given the potentially drastic consequences, charterers are likely to continue to invoke the doctrine in a broad range of cases. It will be interesting to see how the courts – and arbitration tribunals – respond in the coming years both in terms of the scope of the doctrine and the consequences where deviation is established.

**E. REASONABLE DESPATCH**

1. The implied duty of the carrier to proceed upon and complete the contractual voyage with all reasonable despatch has been recognised in a number of well known cases:
   1. *Mc’Andrew v Adams* (1834) 1 Bing NC 31 at 38 (Tindall CJ):

“Upon general principles, in all contracts by charter-party, where there is no express agreement as to time, it is an implied stipulation that there shall be no unreasonable or unusual delay in commencing the voyage; and, after it has been commenced, no deviation.”

* 1. *Louis Dreyfus & Co v Lauro* (1938) 60 Ll. L. Rep. 94 at 96, where Branson J referred to *“the implied term that the ship will use all convenient speed to get to her port of loading.”*
  2. *Fyffes Group Ltd v Reefer Express Lines Pty Ltd (“the Kriti Rex”)* [1996] 2 Lloyd's Rep 171 at 190-1 (Moore-Bick J):

“In many cases [the duty] is expressed in terms such as "shall proceed with all convenient speed", but if the charter contains no express term to that effect one will ordinarily be implied...

... the implied obligation to proceed with reasonable despatch arises from the nature of the contract and is necessary in order to give it commercial efficacy. Its existence is by now so well established that it can be regarded as an ordinary incident of any contract of carriage by sea which exists unless the parties have expressly or by implication provided otherwise. This means that rather than it being necessary for [the claimant] to show that such a term is to be implied ... it is for [the defendant] to show that in this case the parties agreed that such an obligation should be excluded.”

**The Source of the Duty?**

1. The duty derives from the common law and it will be implied into all contracts of carriage in the absence of express provision to the contrary.
2. Notably, neither the Hague nor the Hague-Visby Rules contain an equivalent provision which codifies or gives effect to the obligation to proceed with reasonable despatch. This is arguably significant as regards the applicability of the exceptions in Article IV r. 2 to a claim based on unreasonable delay in the prosecution of the voyage (see below).
3. The position is different as regards the Hamburg Rules, which replace the implied obligation of reasonable despatch with an express liability for delay unless the carrier can prove that he, his servants or agents took all measures that could reasonably be required to avoid delay (Article 5(1)). Delay occurs when the goods have not been delivered at the port of discharge within the time expressly provided for, or, in the absence of such agreement, within the time which it would be reasonable to required of a diligent carrier having regard to “the circumstances of the case” (Article 5(2)). The person entitled to make a claim for delay can also elect to treat the goods as lost if they remain undelivered more than 60-days after the time for delivery (Article 5(3)).
4. To a lesser extent, the Rotterdam Rules also make some provision for carrier liability in circumstances where goods are not delivered at their destination within the time agreed in the contract of carriage (Article 21).

**The Consequences of Breach?**

1. The implied duty to proceed with reasonable despatch is an in nominate term of the contract of carriage. The cargo interest or charterer will only be entitled to terminate the contract if the delay is so prolonged that it *“goes to the root of the whole matter, deprives the charterer of the whole benefit of the contract, or entirely frustrates the object of the charterer in chartering the ship.”* If the delay is not so serious as to have this effect, the claimant will be confined to a claim for damages.
2. The question of whether delay is sufficiently serious to give rise to a right to terminate is a question of fact that will necessarily depend on the circumstances of the particular case. However, for illustration, compare the outcomes in *MacAndrew v Chapple* (1865-66) L.R. 1 C.P. 643 (delay of a few days insufficiently serious to entitle the charterer to refuse to load cargo) and *Freeman v Taylor* (1831) 8 Bing 124 (delay of 6 or 7 weeks sufficiently long to amount to a repudiation of the charter).

**The Forgotten Duty?**

1. The duty of reasonable despatch has largely been overlooked in recent times – *“the implied obligation has rarely been articulated in case-law in modern time”* (Girvin, *the Carriage of Goods by Sea*, 2nd ed at §26.01) – *“the decisions relating to this obligation are not usually significant for bills of lading contracts”* (Carver, *Bills of Lading, 3rd* at §3-034).
2. There are a number of possible explanations for this:
3. The event giving rise to delay may be actionable on another ground – for example (i) mechanical failure or crew incompetence in navigation or management may render the vessel unseaworthy under Article III r. 1 of the Hague-Visby Rules (see *the* *Kriti Rex* above); (ii) delay in performance of the voyage may also constitute a deviation (see *Brandt v Liverpool, Brazil and River Plate Steam Navigation Company Limited* [1924] 1 KB 575 (CA) at 597 (Scrutton LJ) and 601 (Atkin LJ); *Scaramange & Co v Stamp* (1880) 5 CPD 295 (CA) at 299 per Cockburn CJ)).
4. The claimant may only be able to recover damages in respect of losses caused by the delay as distinct from losses caused by the unseaworthiness of the vessel or other events (see the obiter comments of Cooke J in *CHS Inc Iberica SL v Far East Marine SA (“the Devon”)* [2012] EWHC 3747 (Comm) at [55]-[58]).
5. The implied duty is usually excluded or modified by the express terms of most standard form time or voyage charterparties e.g. the Gencon 1994 clause 1; Asbstankvoy form clause 1; NYPE 93 clause 8; Baltime clause 9.

**When to Plead the Duty?**

1. Despite the comparative lack of recent case-law on the point, it is possible to think of situations in which it may nevertheless be advantageous for the cargo interest or charterer to seek to rely on a breach of the duty to proceed with reasonable despatch:
2. The claimant will be unable to rely on a breach of the duty to provide a seaworthy ship under Article III r. 1 of the Hague-Visby Rules in respect of events that occurred once the voyage was underway. The duty is not a continuing one and it will be discharged if the vessel was seaworthy at the point of sailing. The defendant may also be able to escape liability for losses that have arisen as a result of the actions of a negligent – but not incompetent – crew or if he nevertheless due diligence in selecting his crew.
3. The exceptions to liability in Article III r. 2 of the Hague-Visby Rules are arguably inapplicable as regards a claim for breach of an express or implied contractual duty to proceed with reasonable despatch. This duty is not codified in Article III of the Rules and it is therefore arguable that it is not “subject to” the list of exceptions in Article IV in the same way as is, for example, the duty to take reasonable care of the cargo in Article III r. 2.[[35]](#footnote-35)

**Reasonable Despatch and the Practice of “Slow Steaming”**

1. The importance of the duty to proceed with reasonable despatch has recently come back into focus in the context of the practice of “slow steaming” or “super-slow steaming,” whereby vessels are deliberately operated at significantly less than their maximum speed.
2. Slow steaming emerged during the financial crisis of 2008-2009 as a result of declining freight rates, increasing bunker costs and an oversupply of shipping tonnage. Carriers responded by adopting slow and super-slow steaming on various services. This enabled them to make cost savings by reducing fuel consumption and to absorb lower demand while still maintaining regular services.
3. The potential legal consequences of this practice were recently highlighted by the decision in Bulk *Ship Union SA v Clipper Bulk Shipping Ltd* *(“the Pearl C”)*[2012] 2 Lloyd’s Rep 533, which concerned a time charter on an amended NYPE form for a period of about 9-12 months. The charterers contended that the vessel had failed to proceed with reasonable despatch and that they were entitled to withhold hire for time lost due to slow steaming under the off-hire clause.
4. The case was initially heard in arbitration and the Tribunal found a breach of the duty of reasonable despatch on the basis that vessel had failed to achieve its warranted speed of 13 knots. The owners appealed under section 69 of the Arbitration Act 1996 on the grounds that: (i) the Tribunal had erroneously converted the performance warranty from one which applied at the time the vessel was delivered into a continuing performance warranty which applied throughout the course of the charter and (ii) that the Tribunal had failed to apply Article IV(2)(a) so as to exempt the owners from any liability for loss arising from any *“act, neglect or default of the master, mariner ... or the servants of the carrier in the navigation or management of the ship.”*
5. Popplewell J dismissed the appeal on both grounds:
6. The Tribunal had been entitled use the warranted speed as a benchmark against which to assess whether the vessel had proceeded with reasonable despatch. The owners had not adduced any evidence to justify the failure to achieve the warranted speed and, in the circumstances, there was no other realistic explanation other than a deliberate decision to slow steam. [[36]](#footnote-36)
7. The Tribunal had also been correct to find that Article IV(2)(a) was inapplicable on the facts. The exception only applied in relation to a negligent error in the navigation or management of the vessel and not to a deliberate decision to proceed at a reduced speed (citing the speech of Lord Hobhouse in *The Hill Harmony* at 106, with which the other members of the House of Lords agreed).
8. The decision is timely reminder that, in the absence of any agreement to the contrary, owners will usually be liable for a deliberate decision to slow steam. Claimants will be able to establish a prima face breach of the duty simply by showing that the vessel failed to achieve its warranted speed and the burden will then be on the defendant to explain its under performance by reference to mechanical failure, adverse weather conditions or other factors.
9. A possible solution for owners would be to press for the incorporation of the standard form “slow steaming clauses” that have recently been published by the Baltic and International Maritime Council (BIMCO) for both time and voyage charterparties. These clauses provide owners with a two-fold protection – (i) an express recognition that slow-steaming in accordance with orders (whether given by charterers or owners) will not amount to a breach of the reasonable dispatch obligation; and (ii) an obligation on the charterer to ensure that the terms of the bill of lading permit slow-steaming and to indemnify owners for any liability arising from a breach of the obligation to proceed with reasonable dispatch.
10. Despite the recent dramatic fall in oil prices, a number of major lines have indicated that they intend to persevere with slow steaming.[[37]](#footnote-37) The interplay between this practice and the duty of reasonable dispatch is therefore an issue that may be expected to give rise to further litigation in the near future.

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1. As quoted at [1995] LMCLQ 221 [↑](#footnote-ref-1)
2. [1928] 1 KB 717, [1929] AC 223 [↑](#footnote-ref-2)
3. [1909] 2 KB 987 [↑](#footnote-ref-3)
4. (1927) 27 LL L Rep. 415, 418 [↑](#footnote-ref-4)
5. [2001] 1 AC 638 [↑](#footnote-ref-5)
6. *The Cheybassa* [1967] 2 QB 250, 275 [↑](#footnote-ref-6)
7. *Mercantile v Netherlands* (1883) 10 QBD 221,223 [↑](#footnote-ref-7)
8. As in, for example Art IV(2)(b) or section 39(5) of the MIA 1906 [↑](#footnote-ref-8)
9. *Canada Shipping Co v British Shipowners' Mutual Protection Association* (1889) 23 QBD 342 [↑](#footnote-ref-9)
10. *Bulgaris v Bunge* (1933) 38 Com Cas 103 [↑](#footnote-ref-10)
11. The [Larrinaga case [1945] AC 246](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=24&crumb-action=replace&docguid=ID75CEDA0E42711DA8FC2A0F0355337E9) as referred to in *The Hill Harmony, The Ocean Victory* [2014] 1 Lloyd's Rep. 59 paras. 147-149, reversed without reference to this point [2015] EWCA 16 [↑](#footnote-ref-11)
12. *The Renée Hyaffil* (1915) 32 TLR 83; (1916) 32 TLR 660 [↑](#footnote-ref-12)
13. [SS Lord (Owners) v Newsum Sons and Co Ltd [1920] 1 KB 846](http://login.westlaw.co.uk/maf/wluk/app/document?src=doc&linktype=ref&context=24&crumb-action=replace&docguid=I92BDA310E42711DA8FC2A0F0355337E9). In The Hill Harmony Lord Bingham said of this case “While the judge, in my opinion, erred in his formulation of principle, I would not question his conclusion. The decision is inconsistent with the view that the choice of route from one port to another is a navigational matter within the sole discretion of the master.” [↑](#footnote-ref-13)
14. Although there is the additional difficulty with this point, apart from it being contrary to House of Lords’ authority, that clause 26 of NYPE confirms responsibility of owners for the navigation of the vessel. [↑](#footnote-ref-14)
15. *Toyosaki Kissen Kaisha v Societe Les Affreteurs Reunis* (1922) 27 Com Cas 157 and *Suzuki v Beynon* (1924) 18 Ll. L. Rep. 415, (1924) 20 Ll. L. Rep. 179, (1926) 24 Ll. L. Rep. 49 [↑](#footnote-ref-15)
16. *Foreman and Ellams Ltd.* v. *Federal Steam Navigation Company* [1928] 1 K.B. 424, *The Bulknes* [1979] 2 Lloyd’s Rep. 39, *The* *Iron Gippsland* [1994] 1 Lloyd’s Rep. 335, *The* *Hector* [1955] 2 Lloyd’s Rep. 318 (the doubts expressed by *Cooke* (para. 85.263) as to the correctness of this case are, it is suggested, justified, as Steel J. considered in *The Eternity* [2009] 1 Lloyd's Rep. 107, para. 28). *The Aconcagua* [2010] 1 Lloyd's Rep. 1. [↑](#footnote-ref-16)
17. The Washington [1976] 2 Lloyd's Rep. 453 [↑](#footnote-ref-17)
18. *The Aquacharm* [1980] 2 Lloyd's Rep. 237, [1992] 1 Lloyd's Rep. 7 [↑](#footnote-ref-18)
19. [2009] 2 Lloyd's Rep. 308, [2010] 2 Lloyd's Rep. 13 [↑](#footnote-ref-19)
20. Paras 59-60 [↑](#footnote-ref-20)
21. [2010] LMCLQ 569, a penetrating critique by Paul Myburgh, who also analysed the NZCA decision at [2009] LMCLQ 291-294 [↑](#footnote-ref-21)
22. *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] 1 Lloyd's Rep. 316 [↑](#footnote-ref-22)
23. [2012] 2 Lloyd's Rep. 533 [↑](#footnote-ref-23)
24. *The human factor in unseaworthiness claims* [1995] LMCLQ 221. Although not inconsistent with it, this article predates the judgment in *The Eurasian Dream*. [↑](#footnote-ref-24)
25. [*ISM Code: A practical Guide to the Legal and Insurance Implications*](http://www.i-law.com/ilaw/browse_chapters.htm?name=ISM+Code%3a+A+practical+Guide+to+the+Legal+and+Insurance+Implications&querySector=Maritime+and+Commercial) (2005) Informa [↑](#footnote-ref-25)
26. *‘Crew negligence’ and ‘crew incompetence’: their distinction and its consequence* [2010] 16 JIML 102 [↑](#footnote-ref-26)
27. [1962] 1 Lloyd's Rep. 316 [↑](#footnote-ref-27)
28. [2002] 1 Lloyd's Rep. 719 [↑](#footnote-ref-28)
29. [2002] 4 SLR 232 [↑](#footnote-ref-29)
30. [2002] 2 Lloyd's Rep. 535 [↑](#footnote-ref-30)
31. [2000] 2 Lloyd's Rep. 15 [↑](#footnote-ref-31)
32. Although whether it applies to Masters in terms is a matter of debate. [↑](#footnote-ref-32)
33. *The Derby* [1985] 2 Lloyd's Rep. 325 [↑](#footnote-ref-33)
34. *The Muncaster Castle* [1961] 1 Lloyd's Rep. 57 [↑](#footnote-ref-34)
35. A similar point appears to have been argued in *CHS Inc Iberica SL v Far East Marine SA (“the Devon”)* [2012] EWHC 3747 (Comm) (see [58]), but Cooke J did not express any clear view on the matter. [↑](#footnote-ref-35)
36. See also *Ease Faith Limited v Leonis Marine Management Limited* [2006] EWHC 232 (Comm) at [131], where Andrew Smith J accepted the submission that the duty to proceed at utmost despatch was a duty *“to proceed at the maximum speed that is consistent with normal navigation and normal use of engine power.”* [↑](#footnote-ref-36)
37. Maersk Line Sticks to Slow Steaming, *Shipping Watch* (22 October 2014) [↑](#footnote-ref-37)