

CARRIAGE OF GOODS COURSE WORK

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This assignment will consider the significant legal issues that arise when the goods are carried by sea. This assignment will therefore consider a number of issues. However, the main focus will be on deviation and the issues that arise in particular in respect of charterparty contracts and bill of lading as these are the most important legal issues that arise as a result of carriage of goods by sea. These legal issues can make it difficult to operate in relation to freight and claim for the return of the deposit. Although, it should also be recognised that the law has developed considerably with the onset of globalisation, meaning that international codes and laws are being created in an attempt to solve some of the issues that arise when the parties agreed to make contracts for carrying goods between the ports by ships. It is better to start identifying the general principles of carriage of goods by sea and then a brief explanation of the case will be examined.

Where the goods are carried by sea by the shipowner, either directly or with an agent, or a ship is provided, the agreement between the parties is called the contract of affreightment^[1]. It could be said that there are some variety of contractual forms. In traditional differentiation, the contracts are divided in two which are classified as the charterparties and bill of lading^[2]. The form of charterparty is an agreement that the shipowner provides an entire or a part of his vessel either for a specific destination or a period of time. In addition to this, the charterer agrees to pay a balance of money to the shipowner. There are some different kinds of charterparties like voyage charters, time charters, time trip charters and demise charters^[3]. On the other hand, when the shipowner offers his vessel for carrying goods to ship cargo, the contract for the carriage could be named as a bill of lading. In some cases, a bill of lading can be used apart of a contract as a shipping document.

In the case, *Hain Steamship Company Ltd v Tate & Lyle Ltd*^[4], Tate & Lyle, the respondents, bought sugar to be delivered from two ports in Cuba and one port in San Domingo to West Indies so a vessel which is named Tregenna was chartered for carrying the sugar. After loading in the ports of Cuba, the master of the vessel was not informed clearly to go to San Domingo because of a failure in communication. When the vessel was on the way to home with the cargoes of sugar, the shipowners and chartereres noticed the mistake and informed the master quickly to go to San Domingo for loading the rest of sugar. On leaving the port of San Domingo, Tregenna was stranded and damaged. Some of the cargo was lost and the rest of the cargo was carried by another

[1] Baughen S., *Shiiping Law*, Cavendish Publishing, 4th edition, 2009, p.8-10

[2] Wilson J. F., *Carriage of Goods By Sea*, Pearson Publishing, 7th edition, 2010, p.3

[3] Boyd S., Eder B., Burrows A., Foxton D., Berry S., Smith C., *Scrutton on Charterparties and Bills of Lading*, Sweet & Maxwell Publishing, 21st edition, 2008, p.2

[4] [1936] 2 All ER 597

another vessel to the United Kingdom. Before the arrival of the ship to the United Kingdom, the bill of lading was endorsed to Tate & Lyle but the occurrence of deviation was ignored by the respondent. Tate & Lyle which was the indorsees of the bill of lading noticed that the deviation had occurred because of Hain SS Company. The liability had occurred because of deviation and the freight would be payable to the respondents. Then, an action was brought by Tate & Lyle against the appellants that the liability of the loss of sugar could not be attributed to them. Finally, a decision was made by the High Courts in United Kingdom and the case was brought to the House of Lords after the Court of Appeal by the application of Hain SS Co^[5]. The problem about the case is about the deviation and whether it is unjustified or not. Also, the other problem is about the party, which noticed the deviation, could declare itself not to be bound by the contract or the contract will be in breach automatically when the deviation comes out.

First of all, in the case which is mentioned above, Lord Atkin had made some comments about deviation so explaining what is meant by the deviation could be a good starting point. Deviation is the mistake or error of the geographical route by the vessel, which is carrying the cargoes between the loading and discharging ports. There is still not a common understanding about whether deviation could be recognized as a fundamental breach of the contract or not. However some attempts have been made to differentiate justified deviation from unjustified deviation. An example could be seen in Hague and Visby Rules. It is stated that:

“Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of these Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.”^[6]

It could be understood that, deviations except for these conditions, that are listed in the article, would be considered as an unjustified deviation. From the perspective of maritime law in Hague and Visby Rules, the deviation, which has occurred because of Hain SS Co., would be considered as an unjustified deviation because there is not any link to the article in relation to the deviation in the case. On the other hand, it could be said that the deviation has been causing fundamental breach of the contract for 200 years but in the case, the respondents did not use their right to breach of the contract in the time of unjustified deviation and it was noticed after the indorsement of bill of lading so Lord Atkin insisted at this point of problem.

The first doctrine and the way of thinking about the deviation goes to 1830s.

[5] Hughes A.D., Casebook on Carriage of Goods By Sea, Blackstone Publishing, 2nd edition, 1999, p.92-97

[6] Art. 5(4), 1968

In the past times, the geographical routes were chosen by express choice of the parties^[7]. However, if there is not an express choice to term written by the parties, then the solution would be looking to the implied terms of the carriage of goods contract. In the case, *Davis v Garrett*^[8], the court accepted in the favour of respondent that, there could be some exemption clauses that a vessel might change the direction of the route. Although, the problem about the judgement in the case is that in today's world there is not only one destination between the ports and sometimes more than one cargo could be loaded from more than one port to be carried to the discharging port. Another way of deviation which was considered deviation seriously was in the case *Balian and Sons v Joly, Victoria and Co. Ltd*^[9]. It was decided that the innocent party of the contract could not rely on the terms of the contract if the deviation was unjustified. The parties are free to agree on the conditions of the contract and if the vessel deviates from the agreed route, then the shipowner would be liable. The next step for the problem about deviation was seen in the case *Joseph Thorley Ltd v Orchis Steamship Company Ltd*^[10]. It was accepted by the Court of Appeal that if there is no sensible connection between the deviation and the damages, then there should not be a breach of contract. After the judgement, the importance of insurance had started playing an important role on the carriage of goods by sea. The idea of Lord Atkin in *Hain SS Co.* which was the importance of looking at the roots of contract had the same affect on the case *Joseph Throley*. The exemption clauses^[11] could not be regarded as part of the contract. The bill of lading should be regarded as a whole^[12] contract.

Between the years 1906-1936 there had been uncertainty for the rules which could be applied to the deviation cases. While some of the judgements had been influenced from the *Davis* case, the other ones had been inspired of *Balian* case. At the end of this period, it could be seen from the judgements that there was not a clear language used by the courts to be applied for reaching a solution for the parties of carriage of goods. However, the decision in *Hain SS Co.* is regarded as the beginning of new century according to deviation. It was stated that deviation will always be a serious matter in the carriage of goods by sea. The principle had changed because at the time when the deviation had occurred, if this was known by the charterers and the contract was not repudiated by

[7] Dockray M., Deviation – a doctrine all at sea, *Lloyd's Maritime and Commercial Law Quarterly*, 2000 p.81-82

[8] (1830) 6 Bing

[9] (1890) 6 T.L.R. 345

[10] [1907] 1 K.B. 660

[11] Beale H., *Chitty on Contracts*, Sweet & Maxwell Publishing, 30th edition, 2010, p. 14-025

[12] Lord Atkin noted that “the parties of contract entitled to treat deviation as going to the root of the contract” in *Hain SS Co.*

them, then after the carriage was finished, the shipowner could not be sued in relation to breach of the contract because of the deviation. The doctrine was brought to an end by the case, *Suisse Atlantique Societe d'Armement SA v NV Rotterdamsche Kolen Centrale*^[13]. A vessel was chartered by the respondents to carry coal from United States to Europe. The respondents commenced an arbitration against the appellants because of deviation. It is said that, exceptions clause could not be revoked because there is not such a rule that enables fundamental breach. The matter is all about the construction of the contract. If there is no rule that allows fundamental breach of the contract because of deviation, then the application could be only for the demurrage payments. It is treated by the lords that, deviation is governed by the law of contract.

The intention of the parties and the construction of the contract should be examined all together in order to reach a solution about whether the deviation could be recognized as fundamental breach or not. In other words, the demise of fundamental breach started because the deviation could easily be prevented by liberty clauses by the parties^[14]. This case is important because the influence of liability and exemption clauses were to be regarded as a doctrine in other cases in relation to matter of construction. In the case, *Photo Production Ltd v Securicor Transport Ltd*^[15], it could be seen that the principal of fundamental breach was repealed. The importance would be given to the clear meaning of the contracts because if there is not a clear clause, the cases would be solved by the courts using construction of terms^[16], which used in the contract so, the connection between *Hain SS Co* could be seen slightly. In my opinion, Lord Atkin meant the same thing by saying that it is entitled to go to the roots of the contract for finding a solution.

The present status of deviation is still linked with the judgement in the case *Hain SS Co. v Tate & Lyle*. Deviation survives as an independent legal theme today in relation to carriage of goods by sea but today's doctrine could differ from the old doctrine related to the matters of construction of the contract and the intention of the parties^[17]. After the development of Carriage of Goods by Sea Act^[18], there had been some changes about the liability of the parties. On the other hand, there are not enough rules to cover the deviation about in which cases it could be considered as a fundamental breach or not so, therefore the best answer is insurance. The common law doctrine of deviation could be

[13] [1967] 1 A.C. 361

[14] Todd P., Excluding and limiting liability for misdelivery, *Journal of Business Law*, 2010, p.4-7

[15] [1980] AC 827

[16] *Kenya Railways v Antares Co. Ltd* known as *The Antares* [1987] 1 Lloyd's Rep 424

[17] Mills C. P., *The future of deviation in the law of the carriage of goods*, *Lloyd's Maritime and Commercial Law Quarterly*, 1983

[18] S.3, 1992

ignored in connection with whether a shipowner can rely on the exceptions by the rules of Hague – Visby. The best answer to the question could be referencing to the language of the rules. Another solution could be defining the deviation as an unjustified deviation or a quasi deviation which means the unauthorised storage of cargo on deck. Nowadays, the loss or damage of the cargo could be protected by insurance if the loss or damage of the cargo is caused from the deviation. However, the value of cargo is a problem for insurance because it is not easy to determine the value of cargo and if the deviation occurs how much would be paid to the innocent party. It could be risk between the insurer and the parties despite the damages could be regarded as recoverable by the insurer. Before summing up all the ideas, it could be said that the principles is still an enigma today. The problem in the past years has been slightly solved by insurance. Although, it is still valid that the construction of carriage of contract and the intention of parties exists to determine the problem.

This essay has touched on some of the legal issues that may arise when the goods are carried by sea. It is clear therefore that there are a number of significant legal issues that can arise when carrying the goods by sea, not least in relation specifically to bills of lading and charterparties. Provided that those operating in carriage of goods by sea, take precautions such as ensuring to insure the cargo and expressly intending what is meant by the contract at the outset, the risk of having to bring or defend proceedings under deviation is unlikely to occur. It might be difficult to say that deviation still exists today because the rule in *Hain SS Co. & Tate & Lyle* has not been overruled yet. The parties are insuring the cargo in order to prevent problems which might occur because of deviation.

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