

SHIP-OWNER'S UNDERTAKING TO PROCEED WITHOUT DEVIATION: A CRITICAL ANALYSIS

Md. Khurshid Alam*

I. Introduction

Charter-parties, bills of lading and marine insurances provide certain undertakings which are implied but very important and form the basis of the contractual relationship between the concerned parties. Some of these are so vital that without them the contract of affreightment would not properly function. One of such undertakings on the part of the ship-owner is that the ship shall proceed on the contract route without deviation. Naturally, if the ship is to reach destination on time, she must not deviate. The Courts have given effect to this very reasonable proposition in a number of judicial decisions, which have established the doctrine of deviation, under which the master is held strictly liable, as a general rule, to follow the proper route.

The present article shall examine the principles relating to the ship-owner's undertaking to proceed without deviation under charter-party, bill of lading and marine insurance. The discussion includes the very nature and scope of this undertaking along with an analysis of the cases of justifiable deviations. Finally the effects of unjustifiable deviations have been scrutinized. The discussion shows that the standard of 'no deviation' has evolved and developed over time, but the basic principles behind the practical application of the law remain the same.

II. Meaning of Deviation

In general, deviation means departure from the prescribed or ordinary route, which the ship should follow in fulfilment of the contract of carriage. In the absence of express stipulations to the contrary, the ship shall proceed on her contract voyage without making any unjustifiable deviation from her usual, reasonable or proper route and without unreasonable delay.¹ Where the route of adventure is laid down in express terms in the contract of carriage, then that is the proper route. On the other hand, where the route is not prescribed and the contract simply stipulates the port of loading and the port of discharge, the proper route between these two *termini* is that which is

* Associate Professor, Department of Law, University of Dhaka

¹ Davis v. Garrett (1830) 6 Bing. 716.

nautically usual² or ordinary trade route. 'If no evidence be given, that route is presumed to be the direct geographical route, but ... evidence may always be given to show what the usual route is ... In some cases there may be more than one usual route.'³

In *Reardon Smith Lines Ltd. v. Black Sea and Baltic General Insurance Co. Ltd.*⁴ a vessel bound from Poti (in the Black Sea) to Sparrow's Point (in the USA) stopped for bunkering at Constanza, which was not on her direct geographic route. She was stranded at Constanza, and the cargo-owner sustained loss due to the delay. There was evidence that about 25% vessels proceeding from Black Sea ports to Bosphoras bunker at Constanza. It was held by the House of Lords that no deviation has occurred, since the ship was on a customary route.

Again, in *Al-Sayer Navigation Co. v. Delta Int. Traders*⁵ the respondent, a Bangladeshi firm, imported salt from North Yemen. The salt was shipped from Hodeidah port of North Yemen, and the bill of lading was issued on 31st December 1977. Normally, a voyage from the Hodeidah port to the Chalna port of Bangladesh takes 3-4 weeks, and the expected date of arrival was 27th January 1978. The ship, instead of proceeding towards Chalna port, travelled in the opposite direction to a port of Dar-es-Salam. Such travelling was inconsistent with the contract of carriage. The ship reached Chalna port on 1st April 1978. The respondent, amongst others, claimed that there was undue delay and deviation. The Appellate Division of the Supreme Court of Bangladesh held that the proceeding of the ship in the opposite direction towards Dar-es-Salam was in violation of the bill of lading and was an unauthorised deviation. The carrier must be held responsible for such deviation, as it was one of the causes of undue delay in arrival of the ship at the port of Chalna.

III. No Deviation, whether a Condition or A Warranty

a. Charter-parties and Bills of Lading

The undertaking of no deviation is a 'condition,' and not a 'warranty.' It can be broken by trivial unjustifiable deviation, as well as, by unjustifiable deviation which may inevitably result in a total loss of the

2 Evans v. Cunard S.S. Co. (1902), 18 T.L.R. 374.

3 Reardon Smith Lines Ltd. v. Black Sea and Baltic General Insurance Co. Ltd., The Indian City (1939) AC 562, 584.

4 Ibid.

5 Appellate Division (Civil) 34 DLR 1982, 110.

vessel. Breach of this undertaking relieves the charterer or shipper of further performance of his part of the contract, if he so elects.

Fletcher Moulton, L.J. laid down⁶ ‘...a deviation is such a serious matter, and changes the character of the contemplated voyage so essentially, that a ship-owner who has been guilty of a deviation cannot be considered as having performed his part of the bill of lading contract, but something fundamentally different. He therefore cannot claim the benefit of stipulations in his favour contained in the bill of lading.’

Similarly, Lord Atkin observed⁷ that ‘I venture to think the true view is that the departure from the voyage contracted to be made is 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 the contract terms.’

b. Marine Insurances

In marine insurance, deviation is treated as a ‘warranty’, and not as a ‘condition.’ Hence insurance cover does not cease on deviation. Clause 8.3 of the standard Institute Cargo Clauses A, B and C provides that ‘This insurance shall remain in force ... during delay beyond the control of the Assured, any deviation, forced discharge, reshipment or transshipment and during any variation of adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.’⁸ It is obvious that Clause 8.3 covers deviation and other situations. For example where during repairs, the cargoes are warehoused, the insurance cover continues. When the events listed in Clause 8.3 occurs, the insured is not required to give notice to the insurer or to pay any extra premium.

IV. Justifiable Deviations

Apart from any express terms of the contract, in certain cases, deviations are justified and, therefore, the ship-owner will incur no liability. Such deviation, however, must not defeat the main object of the contract of carriage.

6 Joseph Thorley, Ltd. V. Orchis S.S. Co. (1907) 1 K.B., 660.

7 Hain SS Co. Ltd. v. Tate and Lyle Ltd. (1936) 2 All ER 597 HL 601.

8 © Copyright: 11/08 - Lloyd's Market Association (LMA) and International Underwriting Association of London (IUA). CL382 01/01/2009. Please visit www.lmalloyds.com.

The justifiable deviations are as follows:

a. Deviation in Saving Human Life or Property at Sea

1. Charter-parties

Previously, deviation to save human life at sea was justified, but not to save property, unless there was an express stipulation in the charter-party to that effect. Thus in *Scaramanga v. Stamp*⁹ a ship deviated from her course to assist another in danger. But instead of saving the crew only, she attempted to earn salvage by towing the distressed ship into port. In doing so, she went ashore and was lost with her cargo. It was held that the deviation was unjustifiable and the ship-owner was liable for the loss of the cargo.

The law relating to deviation was succinctly stated in this case: ‘... deviation for the purpose of communicating with a ship in distress is allowable, in as much 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. If, therefore, the lives of the persons on board a disabled ship can be saved without saving the ship, as by taking them off, deviation for the purpose of saving them will carry with it all the consequences of an unauthorised deviation. But where the preservation of life can only be effected through the concurrent saving of property, and the *bona fide* purpose of saving life forms part of the motive which leads to the deviation, the privilege will not be lost by reason of the purpose of saving property having formed a second motive for deviating.’

Now, the BIMCO General Time Charter-party (Code name Gentime) contains express provision justifying deviation in saving life or property or both at sea. Clause 9(b) of the Gentime provides that ‘In the event of the Vessel deviating ... for reasons other than to save life or property the Vessel shall be off-hire from the commencement of such deviation ...’¹⁰

9 (1880) 5 CPD 295.

10 Gentime is published by the Baltic & International Maritime Council (BIMCO), Copenhagen and issued in September 1999. Please visit www.infomarine.gr/bulletins/chartering_forms/gentime.pdf.

2. Bills of Lading

Article IV, Rule 4 of the Schedule to the Carriage of Goods by Sea Act¹¹, which applies only to bills of lading, provides 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 ... of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom.'

Lord Atkin laid down¹² that to be reasonable, a deviation need not only be made in the joint interests of the ship and the cargo, or to avoid an imminent peril. 'A deviation may, and often will, be caused by fortuitous circumstances never contemplated by the original parties to the contract; and may be reasonable though it is made solely in the interests of the ship or solely in the interests of the cargo or indeed in the direct interest of neither: as for instance where the presence of a passenger or of a member of the ship's crew was urgently required after the voyage had begun on a matter of national importance; or where some person on board was a fugitive from justice, and there were urgent reasons for his immediate appearance. The true test seems to be what departure from the contract voyage might a prudent person controlling the voyage at the time make and maintain, having in mind all the relevant circumstances existing at the time, including the terms of the contract and the interest of all parties concerned, but without obligation to consider the interests of any one as conclusive.'

Whether a deviation is reasonable or not is a question of fact in each particular case. In *Stag Line Ltd. v. Foscola, Mango & Co. Ltd.*¹³ mangoes were shipped from Swansea to Constantinople. The ship deviated from her contractual route and went to St. Ives for the purpose of dropping two engineers, who had been testing her fuel-saving apparatus. Before the vessel regained the contract route, she struck a rock and wrecked. It was held by the House of Lords that the deviation was unreasonable, since the dropping of two engineers do not fall within purposes connected with the contractual voyage.

Again, a deviation is reasonable where it is made in order to comply with any orders given by the government of the nation under whose flag she sails.¹⁴

¹¹ 1925 : Act XXVI.

¹² *Stag Line Ltd. v. Foscola, Mango & Co. Ltd.* (1932) A.C. 328.

¹³ (1932) A.C. 328.

¹⁴ *Luigi Monta of Genoa v. Cechofracht Co. Ltd.* (1956) 2 QB 552.

b. Deviation Necessary for Safety of Adventure

Deviation is justified when it is necessary for the prosecution of the voyage, or for the safety of the adventure, because one of the main duties of the master is bring the voyage to a successful conclusion by protecting the ship and the cargoes from undue risks. Thus where the ship sustained damage and repairs became indispensable, and the ship was taken to the nearest port for effecting such repairs,¹⁵ or where the master made a deviation on receiving reliable information that by pursuing the contract route the ship or cargo will run into imminent danger by ice-burges, heavy fog, hurricanes, pirates or hostile capture,¹⁶ there it was held that the deviation was justifiable. Again, deviation is justified, though caused by the initial unseaworthiness of the ship, where it would be dangerous to keep her at sea without effecting necessary repairs. Thus in *Kish v. Taylor, Sons & Co.*¹⁷ a ship became unseaworthy due to overloading. During the voyage this unseaworthiness obliged her to deviate from her normal route and to proceed to a port for repairs. It was held that the deviation was justifiable. The fact that it was caused by initial breach of contract did not make an otherwise reasonable deviation unreasonable.

Lord Atkinson laid down¹⁸ ‘...must the master of every 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? 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.’

c. Liberty to Deviate Clause

Deviation is justified when it is covered by the liberty clause contained either in the charter party, bill of lading or marine insurance¹⁹. The liberty clauses must be construed in such a way so that they do not defeat the

15 *James Phelps & Co. v. Hill* (1891) 1 QB 605.

16 *The Teutonia* (1872) LR 4 PC. 171.

17 (1912) AC 604.

18 *Ibid.*

19 Clause 8.3 of the standard Institute Cargo Clauses A, B and C provides that ‘This insurance shall remain in force ... during any variation of adventure arising from the exercise of a liberty granted to carriers under the contract of carriage.’ For source, see footnote 8.

object of the contract of carriage. If the terms of contract give the carrier 'liberty to call at any port,' off the ordinary route, it must be construed as meaning the right to call at any port substantially in the course of the voyage. Vague general terms, however, do not justify such deviation. In *Leduc v. Ward*²⁰ the bill of lading for goods shipped from Fiume to Dunkirk gave 'liberty to call at any port in any order ...' On ship-owner's private business the ship deviated from her course some 1200 miles and went towards Glasgo. She was lost in a storm in the Clyde. It was held that the liberty clause merely gave a right to call at any port in the course of the voyage. Glasgo was not in the course of the voyage. Proceeding towards Glasgo was an unjustifiable deviation and the ship-owner was, therefore, liable.

Again, in *Stag Line Ltd. v. Foscola, Mango & Co. Ltd.*²¹ it was held by the House of Lords that where the bill of lading gave 'liberty to call at any port in any order for bunkering or other purposes ...,' the word 'other purposes' should be construed as meaning to call at any port for some purpose having relation to the contract voyage.

The deviation clause most commonly met with, viz. 'with liberty to call at any port or ports in any order,' gives comparatively little latitude, for it has been construed to mean only any ports which are normally passed in the ordinary course of the voyage. More than that, the clause has proved a broken reed to the ship-owners.²² That is why a very comprehensive deviation clause is recommended for more protection of the ship-owner. In *Connolly Shaw Ltd. Nordenfjeldske S. S. Co.*²³ the bill of lading for lemon shipped from Palermo to London gave 'liberty, either before or after proceeding towards the port of delivery of the said goods, to proceed to or return to and stay at any ports or places whatsoever (although in a contrary direction to or out of or beyond the route of the said port of delivery) once or oftener in any order backwards or forwards for loading or discharging cargo passengers coals or stores or for any purpose whatsoever ... and also such ports places and sailing shall be deemed

20 (1888) 20 QBD 475.

21 (1932) A.C. 328.

22 Chorley & Giles' Shipping Law, 7th Edition, 211.

23 (1934) 50 TLR 418.

included within the intended voyage of the said goods.’ Before proceeding to London the ship deviated to Hull. In spite of the delay, the lemons arrived in London in good condition, but in the interval the price of lemons had fallen. The endorsee of the bill of lading sued the ship-owner for the damages they had sustained due to the dropping of price which occurred during the delay. It was held that the endorsee was not entitled to damages, since the deviation to Hull was covered by the liberty clause.

V. Effects of Unjustifiable Deviation

a. As Regards Contract of Carriage

An unjustifiable deviation relieves the charterer or shipper of further performance of his part of the contract, if he so elects. Unjustifiable deviation does not of itself abrogate the contract of carriage. It is open to the party not in default either to treat the contract as repudiated or to waive the breach and treat it as subsisting.

Lord Atkin observed²⁴ that ‘I venture to think the true view is that the departure from the voyage contracted to be made is a breach by the ship-owner of his contract, 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 the contract terms ... If this view be correct, then the breach by deviation does not automatically cancel the express contract, otherwise the ship-owner by his own wrong can get rid of his own contract.’

Where the contract of carriage is for more than one voyage, and the ship deviated on her first voyage, the charterer or shipped is justified in refusing to load on the second voyage. Thus in *Compagnie Primera v. Compania Arrendataria*²⁵, where a voyage charter-party contained the clause that it should remain in force for ‘two consecutive voyages at the same rate of freight and upon the same terms and conditions’ and the vessel made deviation on the first voyage, it was held by the Court of Appeal that since the charter party was not indivisible, a deviation on the first voyage relieved the charterers of further performance of their part of

²⁴ Hain SS Co. Ltd. v. Tate and Lyle Ltd. (1936) 2 All ER 597 HL 601.

²⁵ (1940) K.B. 362.

the contract on the second voyage, if they have chosen to treat the contract as repudiated.

The charterer or shipper may, however, waive the unjustifiable deviation and treat the contract as subsisting. In that case his acts must clearly show that he intended to treat the contract as still binding.²⁶ 'A waiver to be operative so that a party's claim is estopped must be unequivocal, definite, clear, cognate and complete.'²⁷

It was held by the House of Lords²⁸ 'For this purpose the case is like any other breach of a fundamental condition, which constitutes the repudiation of a contract by one party; the other party may elect to treat the repudiation as being final, but to treat the contract as subsisting...'

Where the charter or shipper waives the deviation and treat the contract as subsisting, he will be entitled to damages for loss actually caused by the deviation.²⁹

b. As Regards Freight

Where the charterer or shipper rescinds the contract of carriage, the ship-owner is not entitled to any freight. However, where the contract is repudiated, but even then the goods reach their destination safely, the ship-owner is entitled to a reasonable sum as freight on the basis of *quantum meruit*, as he has essentially performed his obligation to carry.³⁰ On the other hand, the charter or shipper must pay full freight, where in spite of unjustifiable deviation the contract subsists, or where the unjustifiable deviation is waived.

c. As Regards General Average

The ship-owner cannot claim general average contribution from the charterer or shipper where unjustifiable deviation was the cause of the common danger. Again, where initial unseaworthiness forced the ship to deviate, the ship-owner cannot recover general average contributions in respect of expenses at the port of refuge.³¹

26 Ibid.

27 *McCormick v. National Motor Insurance* (1934) 40 Com. Cas. 76, 93.

28 *White & Carter v. McGregor* (1962) A.C. 413 (H.L.).

29 *Hain S.S. Co. v. Tate & Lyle. Ltd.* (1936) 2 All ER 597, 601 HL.

30 Ibid.

31 *Schloss v. Heriot* (1863) 14 CBNS 59.

d. As Regards Limitation of Liability

Where unjustifiable deviation has occurred, the ship-owner can neither rely on any clause in the charter-party or in the bill of lading entitling him to limit his liability,³² nor claim demurrage.³³

e. As Regards Carrier's Immunities

Where there has been an unjustifiable deviation, the ship-owner cannot rely on immunity clauses, or exception clauses or any clause exempting his liability. Unjustifiable deviation is regarded as a fundamental breach and the carrier is deprived of the protection of the exclusion clauses on the principle that some breaches of contract are so contrary to the basic requirements of a particular contract that the benefit of any clause is lost to the party in breach. Thus in *Joseph Thorley, Ltd. v. Orchis S.S. Co.*³⁴ the bill of lading exempted the ship-owner from liability for loss arising from negligence of stevedores, appointed by them. Later the ship deviated from the proper route. The ship-owner was held to be debarred from relying on the exemption clauses.

The carrier's immunities are as follows:

1. Charter-parties

The ship-owner is responsible for any loss or damage to the goods which he is carrying, unless it is covered by the exception clauses contained in the charter-party. If the charter-party is silent on this matter, then the court will presume the following exceptions:

- (a) act of God;
- (b) act of foreign enemies;
- (c) act of war;
- (d) inherent vice in the goods themselves; and
- (e) the negligence of the owner of goods;

³² *Cunard SS Co. Ltd. v. Buerger* (1927) AC 1 HL.

³³ *United States Shipping Board v. Bungey Born Ltda Sociedad* (1925) 134 LT 303.

³⁴ (1907) 1 K.B., 660.

2. Bills of Lading

The Carriage of Goods by Sea Act³⁵ sets out a list of 'excepted perils.' But the ship-owner cannot rely on them if he has committed unjustifiable deviation and such deviation is the cause the damage.

Article IV, Rule 2 of the Schedule to the Act³⁶ provides that '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:
- (b) fire, unless caused by the actual fault or privity of the carrier:
- (c) perils, dangers and accidents of the sea or other navigable waters:
- (d) act of God:
- (e) act of war:
- (f) act of public enemies:
- (g) arrest or restraint of princes, rulers or people, or seizure under legal process:
- (h) quarantine restriction:
- (i) act or omission of the shipper or owner of the goods, his agent or representative:
- (j) strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general:
- (k) riots and civil commotions:
- (l) saving or attempting to save life or property at sea:
- (m) wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods:
- (n) insufficiency of packing:
- (o) insufficiency or inadequacy of marks:
- (p) latent defects not discoverable by due diligence:
- (q) any other cause arising without the actual fault or privity of the carrier, or without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.'

35 1925 : Act XXVI.

36 1925 : Act XXVI.

3. Marine Insurances

Various losses for which the insurer is not liable to indemnify the assured are as follows:³⁷

- (a) losses not proximately caused by the perils insured against;
- (b) losses caused by the wilful misconduct of the assured;
- (c) losses caused by delay;
- (d) losses caused by ordinary wear and tear;
- (e) losses caused by inherent vice;
- (f) other losses e.g. those caused by vermin.

VI. Findings:

a. No deviation, Whether a Condition or a Warranty

In charter-party and bill of lading, the undertaking of no deviation is a 'condition,' and not a 'warranty.' While in marine insurance, no deviation is treated as a 'warranty', and not as a 'condition.'

b. Justifiable Deviation

1. Deviation in saving human life and property at sea is always justified;
2. Deviation for the prosecution of the voyage or for the safety of the adventure is permissible, on the ground that the master is bound to bring the voyage to a successful conclusion;
3. Deviation is justified when it is done in exercise of the liberty clause. Such deviation, however, must not defeat the main object of the contract of carriage.

c. Effects of Unjustifiable Deviation:

1. An unjustifiable deviation relieves the charterer or shipper of further performance of his part of the contract, if he so elects. The charterer or shipper may, however, waive the unjustifiable deviation and treat the contract as subsisting.
2. Where the charterer or shipper rescinds the contract of carriage, but even then the goods reach their destination safely, the ship-owner is entitled to a reasonable sum as freight on the basis of *quantum meruit*. On the other hand, the charter or shipper must pay full freight, where in spite of unjustifiable deviation the contract subsists, or where the unjustifiable deviation is waived.

³⁷ Ivamy, E. R. Hardy, *General Principles of Insurance Law*, 6th Edn. (1993), 285.

3. The ship-owner cannot claim general average contribution from the charterer or shipper where unjustifiable deviation was the cause of the common danger.
4. Where unjustifiable deviation has occurred, the ship-owner can neither rely on any clause in the charter party or bill of lading entitling him to limit his liability, nor claim demurrage.
5. Where there has been an unjustifiable deviation, the ship-owner cannot rely on immunity clauses, or exception clauses or any clause exempting his liability. The carrier's immunities applicable to bills of lading are laid down in express terms in the Carriage of Goods by Sea Act³⁸, while immunities applicable to charter-parties and marine insurances are regulated by contracts and judicial decisions.

VII. Conclusions

The undertaking to proceed without deviation lies in the very heart of the contractual relationship between the concerned parties. Our findings show that the principles of deviation have gradually evolved over time to include a number of cases where deviation is justified. Similarly, the effects of unjustifiable deviations have also gradually developed through a series of case laws. The basic principles however have not changed.

The statutory law in Bangladesh covers only a few of the relevant aspects of this issue, the rest is dependent on judicial interpretations. In order to further develop the law, there is no alternative but to conduct in-depth research on these issues from the perspective of Bangladeshi jurisdiction. The laws all over the world on this issue have uniformity for very understandable reasons. But its application from one jurisdiction to another varies greatly depending on the efficiency of the particular legal system. Further studies on these aspects are urgently needed with special focus on the enforcement mechanism offered by our legal system.

38 1925 : XXVI.

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