

The Sur and deviating carriers:

same-old same-old - or watch this space? Where is the law moving?

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1 Background and context

Geographical deviation has long been seen as the worst type of breach that could be committed by a carrier of goods by sea. Not only is P&I cover imperilled, but the English Courts have traditionally deprived a deviating carrier of limitations and exceptions in the contract of carriage and/or in the Hague/Hague-Visby Rules. Moreover, attempts were made to extend this drastic “deviation rule” to other forms of “*quasi-*”deviation, like unauthorised deck stowage.

- What is it about deviation that justifies this drastic treatment?
- What *is* deviation? What is a “contractual”, “direct” or “usual” route?
- Is it *still* clear English law that a deviating carrier loses all its exclusions and limitations?
- The Sur [2018] EWHC 1673 (Comm) is the latest case in which the English Courts have returned to this difficult area, unfortunately (for carriers) re-affirming what had been thought to be the rather outdated “deviation rule”.
 - Is the decision right?

- Can it be side-stepped?

2 What is it about deviation that justifies this drastic treatment?

Insurance cover origins

P&I cover current rules

Fundamental Breach in the general law of contract

3 What is deviation? What is a “contractual”, “direct” or “usual” route?

4 *Carver on Bills of Lading* says at 9-038 in relevant part: “Although direct discussion of the point is surprisingly difficult to find, it appears that a deviation is a deliberate going off the normal route for the voyage.What the contract route is can be ascertained from the expectations of the parties and the usage of the trade: it need not be geographically direct.”

5 At 10.291, *Aikens on Bills of Lading* says “Deviation is normally a geographical departure from the agreed or permitted route. ... In the absence of contrary evidence the usual route will be the most direct. Contrary evidence of a route usual in the trade may, however, be adduced to show that in the circumstances of a particular contract the vessel followed the usual route.”

6 Justifiable deviation:

- The HVR III.4 life, property and reasonable deviation
- Contractual exclusions

7 The Deviation “rule”

The doctrine of Fundamental Breach in Contract Law

The Deviation Rule

The death of the doctrine of Fundamental Breach in Contract Law

The survival of the Deviation Rule in Carriage

The death of the deviation rule in “quasi-“deviation – misdelivery, unauthorized deck stowage

Why should the deviation rule survive in geographical deviation

The current position in the literature

The *Sur* 2018 EWHC 1673 (Comm)

8 Quasi-deviation

9-059 of *Carver on Bills of Lading*: “It is submitted that the right course for the courts is to reject the English line of special authority even for geographical deviation; to regard the reasoning in Joseph Thorley Ltd v Orchis SS Ltd as superseded by that of the House of Lords in Hain SS Co Ltd v Tate & Lyle Ltd; and to redevelop the reasoning in the latter case (where the preoccupation at the time was with the significance of waiver) in accordance with the doctrine of discharge of contract by breach subsequently laid down by the House in Heyman v Darwins Ltd and Photo Production Ltd v Securicor Transport Ltd. This would emasculate the ancient doctrine, and any modern extensions it might be argued to have, but it is appropriate to do so. It would, as already stated, leave untouched established case law regarding the burden of proof in bailment and the interpretation of contract clauses...”

see Deep Sea Marine v Monjasa 2018 EWHC 1495 Comm