



WEST.

Underwriting Guides

Geographical Deviation

When entering into a contract of carriage whether under a bill of lading, seaway bill or contract of affreightment a carrier undertakes to transport cargo on a particular voyage from the place of delivery or port of loading to the final port of discharge or place of delivery and that the vessel will proceed on the voyage with utmost dispatch on the usual routing without any unreasonable geographical deviation from that route or without unreasonable delay.

An intentional and unreasonable change in the geographical route of the voyage may, in the absence of suitable liberty clauses in the contract of carriage, be sufficient to constitute a deviation and represent a breach of that contract.

Whether any such breach is actionable by the cargo interests depends on whether the deviation is considered to be reasonable in the circumstances. The Hague-Visby Rules say at Article IV Rule 4 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 the Rules or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom”.

Whether something is a reasonable deviation is a matter to be decided on the facts of each individual case by the court concerned and the law as to what is a “reasonable” deviation is constantly evolving, particularly in the English and American Courts, but as a general guiding principle a deviation may be deemed to be unreasonable if there is a departure from the agreed voyage (other than in an emergency) resulting in an unjustified alteration in the risks of such voyage. Where there is a greater commercial advantage for the carrier as compared to the commercial disadvantage of the cargo

interests in any deviation then it is less likely to be held as being reasonable. A leading case in English law framed the test as follows:

“The true test [of reasonable deviation] is 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 interests of all parties concerned, but without obligation to consider the interests of any one as conclusive.” [Stag Line Ltd v Foscolo, Mango & Co Ltd [1932]AC 328]

In making their determination of whether a deviation was reasonable or not an English court might be expected to include the following factors in their assessment:

Extent in time and distance – the customary or direct route is not a precisely delineated track, so a reasonable margin is likely to be implied. However, if it is a deviation then even if the distance and time travelled is minor this will not make it less of a deviation.

Nature of Deviation – a bunkering call may not be regarded as a deviation provided it was a usual feature of the voyage (e.g. it was common for vessels of that particular trade to make such a call).

Reason for Deviation – if necessary for the safety of the vessel or cargo then it is a justified deviation, although the deviation must not exceed what is reasonable for the purpose of achieving its justifiable aim. An example would include repairs in order for the vessel to reach her destination safely.

Nature of trade – the courts will consider the nature of the trade, such as whether the vessel involved in a liner service, or is a general cargo vessel involved in tramping along a series of ports, or whether the ship is contracted to carry a full cargo from one specified port to another. The nature of the service will be relevant to determining the customary route, construing the scope of the liberty clause and what would be reasonable under the Hague-Visby Rules. However, it should be noted that express terms in a charter party or bill of lading will prevail over the nature of the trade, e.g. if the contract of carriage states that the vessel will trade “directly” from port A to port B.



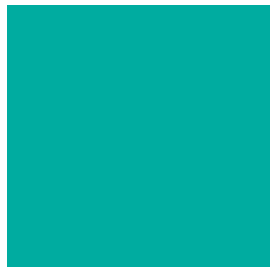
Liberty Clauses

Charterparties and contracts of carriage often contain a clause giving the carrier liberty to deviate from the contractual voyage for various stated reasons. The Club's recommended Voyage Clause and BIMCO's Liberty & Deviation Clause for Contracts of Carriage are shown in Appendix 1.

Members should be aware of the limitations of such clauses, however. If the clause is contained in the charterparty then it may not be binding on the cargo interests and the mere inclusion of such a clause in the charterparty does not grant liberty

to deviate under the bill of lading or contract of carriage. Suitable language should be used to ensure that the terms and conditions – including special reference to the liberty clause – are incorporated into the bills of lading. (Members may wish to refer in this regard to the Club's Claims Guide on the Incorporation of Charter Party Terms into Bills of Lading, which can be found at www.westpandi.com/About-Us/Claims/Claims-Guides/).

It is also the case that in many jurisdictions the terms of any liberty clause will be construed narrowly against the carrier and it should therefore not be presumed that the existence of such a clause allows the carrier freedom to deviate at will.



Club Cover

If a deviation is deemed to have been unreasonable the impact on the carrier may be significant and in particular they may not be able to rely on any defences or limitations available under the contracts of carriage in respect of claims brought by the cargo interests.

There would also be no Club cover for liabilities arising out of an unreasonable deviation to the extent that these defences or limitations are no longer available to the Member. The Club's Rule in this regard, Rule 2 Section 16 proviso (d), reads as follows:

“Unless the Committee shall otherwise determine, there is no cover in respect of liabilities, costs, and expenses arising from a deviation, in the sense of a departure from the contractually agreed voyage or adventure, or from events occurring during or after a deviation, if as a result of such deviation the Member is not entitled to rely on any defences or rights of limitation which would otherwise have been available to him to eliminate or reduce his liability, provided always that if the Member has notified the Managers in writing of the deviation before it occurs or immediately upon receiving information that it has occurred, the Managers may agree special cover in respect of the deviation on such terms as they may determine”.

The risk that a deviation by the vessel is held to be unreasonable by a court can be covered under the Club's SOL deviation cover. This will cover the Member's liability for lost and or damaged cargo in the event the Member loses their rights of defences and limits of liability under the Hague-Visby Rules were a court to find the deviation was unreasonable. It is not intended however to be a form of blanket extension for all deviations and, unless otherwise agreed in writing by the Managers, Members should advise the Club of any deviation before it takes place in order to ensure that additional cover can be arranged as necessary.



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This note is intended for general guidance only and should not be relied upon as legal advice. Should you require specific advice on a situation please contact us.



Appendix 1

The Club's Recommended Voyage Clause

With liberty to sail without pilots, to proceed via any route, to proceed to, return to and stay at any port or ports whatsoever (including the loading port) in any order in or out of the route or in a contrary direction to or beyond the port of destination once or more often for bunkering or loading or discharging cargo or embarking or disembarking passengers whether in connection with the present a prior or subsequent voyage or any other purposes whatsoever, and before giving delivery of the within mentioned cargo at the port of discharge herein provided and with the like liberties as aforesaid to leave and then return to and discharge the said cargo at such port, to tow or be towed, to make trial trips with or without notice, to adjust compasses, or to repair or dry-dock with or without cargo on board. The exercise of any liberty in this clause shall form part of the agreed voyage.

BIMCO's Liberty & Deviation Clause for Contracts of Carriage

- (a) The Vessel shall have liberty to sail with or without pilots, to tow or go to the assistance of vessels in distress, to deviate for the purposes of saving life or property, and for any other reasonable purpose, which term shall include but not be limited to calling at any port or place for bunkers; taking on board spares, stores or supplies; repairs to the vessel necessary for the safe continuation of the voyage; crew changes; landing of stowaways; medical emergencies and ballast water exchange.
- (b) If the Charterer requests any deviation for the Charterer's purposes and the Owners consent, such consent to be at the absolute discretion of the Owners, the Charterer shall indemnify the Owners against any and all claims whatsoever brought by the owners of the cargo and/or the holders of Bills of Lading against the Owners by reason of such deviation.
- (c) Prior to giving any such consent the Owners may, at their option, require to be satisfied amongst other things that the Charterer has sufficient and appropriate P&I Club cover and/or if necessary, other additional insurance cover, in respect of such a requested deviation,
- (d) This Clause shall be incorporated into any sub-charter and any bill of lading issued pursuant hereto.

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