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The Carrier's Obligation to Exercise Reasonable Diligence in the Performance of a Contractual Voyage - A Comparative Analysis

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ABSTRACT

This research seeks to examine the contractual obligation of the carrier under a contract of carriage to prosecute the voyage with reasonable dispatch without deviating from the contractual voyage. A breach of the obligation to proceed on the voyage with reasonable dispatch may amount to a deviation which could open the ship-owner to liability. Nevertheless, where the breach of the obligation not to deviate occurs, the courts have held different views as to the implication of a breach for parties to the carriage contract.

While the origins of this obligation may seem uncertain, the case of *Davis v. Garrett* firmly established an implied duty of the carrier to proceed with the voyage without unnecessary deviation.⁴ In founding a breach of the obligation, the court held that since loss actually occurred while the wrongful act was in operation, the ship-owner cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had never been done. An inference could be drawn from this judgement that a ship-owner is liable for loss or damage to cargo if the deviation resulted in the loss or damage to cargo.

Years after the decision in *Davis v. Garrett*, *Balian and Sons v. Joly, Victoria and Co. Ltd* was decided, albeit differently. The court held that a breach of the obligation not to deviate deprived the ship-owner or carrier, the benefit of stipulations contained in the bill of lading limiting his liability.⁷ It would appear that the court in the *Balian* case departed from the decision in *Davis v. Garrett* such that any deviation was considered a serious one. The presumption was that once a carrier deviates from the contractual voyage, it creates a different one from beginning to end which is at variance with the voyage applicable to the bill of lading and this renders the whole bill of lading as gone.⁸ It no longer mattered whether the breach of the obligation not to deviate resulted in the loss to cargo. As soon as a carrier deviates he was deemed to be in breach of contract and is precluded from taking shelter under exclusion clauses.

Prior to *The Balian* case was *Freeman v. Taylor* where Tindal CJ in determining the obligation of a carrier not to deviate from the contractual voyage held that while a breach of the obligation not to deviate entitles a claimant to a claim in damages, it did not entitle him to treat the contract as repudiated, except the deviation was so 'long and unreasonable' that it can be said to put an end to the object of the contract, then repudiation is a natural consequence. This decision considered a breach of the obligation as a breach of an innominate term whose effect on the contract depended on the gravity of the breach.

In contrast, *Tate & Lyle Ltd v Hain Steamship Co Ltd* restricted an understanding of the breach of this obligation mean that a party affected by a breach can elect to treat the contract as ended or as subsisting and where he chooses the latter option, he must in accordance with the general law of contract be held bound.

From the above, there is an apparent gap in the literature as to the character of the obligation of the carrier not to deviate from the contractual voyage. The courts have not resolved this apparent gap which means that the obligation is met with uncertainty especially as regards the effect of a breach.¹⁴ In view of this, it is imperative that these thesis explores the scope of the obligation of the carrier not to deviate from the carriage contract. As a result, this thesis seeks to investigate further the following:

- What is the scope of the carrier's obligation not to deviate especially as regards the effect of a breach?
- Does a breach of deviation preclude a ship-owner from relying on contractual exemption clauses? There appears to be contradicting positions on this issue.
- If the answer to the above is in the positive, to what extent can a ship-owner rely on exclusion clauses when in breach of the obligation not to deviate?

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