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ADMIRALTY LAW: CARRIAGE OF GOODS BY THE SEA ACTQUASI-DEVIATION-SEDCO, INC. V. MV STRATHEWE

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COMMENT

ADMIRALTY-LAW: CARRIAGE OF GOODS BY THE SEA ACT — QUASI-DEVIATION — *SEDCO, INC. v. M/V STRATHEWE*

The concept of "deviation," as that term is used in the area of admiralty law, refers to a voluntary and unjustifiable departure by a carrier from its contracted voyage.[1] The law is well-settled, in both the United States and England, that such action by a shipowner renders him liable for any damages or losses to his cargo resulting from that deviation. Although at one time application of this doctrine was limited to an actual geographical departure by a carrier from an agreed upon route, in recent years its use has been expanded to include various actions by a carrier which tend to expose his cargo to a greater risk of damage or loss.[2] The confusion associated with this expansive application of the deviation doctrine and its relationship to the liability limitation provisions of the Carriage of Goods by Sea Act of 1936[3] (COGSA) are reflected in the recent decision of the United States Court of Appeals for the Second Circuit in *Sedco, Inc. v. M/V Strathewe*.[4]

In June of 1982, Sedco, Inc. (Sedco) contracted with the British shipping line Peninsular and Oriental Steam Navigation Ltd. ("P & O") to ship eighteen packages of oil drilling equipment from Dubai, Saudi Arabia to Houston, Texas.[5] The equipment was loaded on board the P & O vessel *M/V Strathewe*, which departed from Dubai in the early part of June.[6] Soon after her departure, the *Strathewe* was requisitioned by the British Government for service in the Falkland Islands

1. The United States Supreme Court has defined deviation as a "voluntary departure without necessity from the regular and usual course of a voyage . . . ." Hostetter v. Park, 137 U.S. 30, 40 (1890); *see also* G. GILMORE & C. BLACK, LAW OF ADMIRALTY § 3-40, at 177 (2d ed. 1975).
2. *See* G. GILMORE & C. BLACK, *supra* note 1, § 3-41, at 182.
3. 46 U.S.C. §§ 1300-1315 (1982).
4. 800 F.2d 27 (2d Cir. 1986).
5. *Id.* at 29.
6. *Id.*

War, in accordance with that country's war powers.[7] In response to orders to discharge her present cargo at a convenient port, the ship proceeded to Malta,[8] which in addition to being on her course to Britain, was also on the course of another P & O vessel, the *M/V Strathesk*, en route to Houston, Texas.[9] Sedco's cargo was offloaded by P & O at Malta on June 12th.[10] In mid-July, Sedco's custom's broker in Houston twice inquired of P & O as to the estimated date of arrival of the cargo, and in both instances he was told the cargo would arrive aboard the *M/V Strathewe* on August 24th.[11] On August 4th, after a third inquiry as to the estimated arrival date, P & O informed Sedco's agent that the cargo had been discharged at Malta and reloaded on the *M/V Strathesk* which had departed on August 3rd.[12] The *Strathesk* arrived in Houston on August 30th with only sixteen of Sedco's eighteen packages.[13] Although the *Strathesk's* shipping manifest stated that eighteen packages had been reloaded, only sixteen actually were. The other two packages were left on a pier in Malta and were not located until 1984, at which time they could only be sold by Sedco as salvage.[14]

Sedco brought suit against P & O in the United States District Court for the Southern District of New York[15] for the value of the lost cargo.[16] The claim asserted that the *Strathewe*'s departure from its intended voyage and P & O's subsequent misrepresentations and post-discharge negligence in the handling of Sedco's cargo constituted an unreasonable deviation, thereby voiding COGSA's $500 per package liability limitation.[17] The district court held that P & O's failure to notify Sedco that its cargo had been offloaded at Malta, coupled with their erroneous representations that the cargo was still aboard the *Strathewe* when in fact it was still in Malta, and their inability to properly reload all eighteen packages amounted to an unreasonable

7. *Id.*

8. *Id.* The following message was received: "Your vessel Strathewe is required for service in connexion [sic] with the Falkland Islands Emergency. Request you instruct your master to proceed to Southampton at best speed discharging present cargo at a port convenient to you subject to minimum delay." *Id.*

9. Sedco, Inc. v. M/V Strathewe, 630 F. Supp. 120, 121 (S.D.N.Y. 1986).

10. 800 F.2d at 29.

11. 630 F. Supp. at 121.

12. Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 29 (2d Cir. 1986).

13. *Id.*

14. *Id.*

15. Sedco, Inc. v. M/V Strathewe, 630 F. Supp. 120 (S.D.N.Y. 1986).

16. *Id.* at 122. Sedco had contracted to sell the lost drilling equipment for $350,000. The salvage value was $167,362.52; thus Sedco sought to recover $182,637.48. *Id.*

17. *See* 46 U.S.C. § 1304(5) (1982).

deviation, precluding P & O's reliance on the liability limitation.[18] On appeal, the Second Circuit, in an opinion which reflects the ambiguous application of the deviation doctrine, held that P & O's actions did not amount to an unreasonable deviation within the meaning of COGSA and thus P & O's liability was governed by the $500 per package limit imposed by COGSA.[19]

Traditionally, carriers were held liable for all damages or losses to their cargo which were not the result of an act of God, the public enemy, the fault of the shipper, or the inherent characteristics of the cargo.[20] This held true even absent negligence or fault on the part of the carrier.[21] The rationale behind this somewhat harsh rule was that the carrier was in sole possession and control of the cargo, thereby lending credence to fears that they might very well steal the goods which they were carrying.[22] Moreover, such exclusive possession made it virtually impossible for a cargo owner to effectively prove the true cause of his loss.[23] Thus, it was not necessary for shippers to assert a carrier's geographic deviation as a distinct basis of liability, since even non-deviating carriers were liable for cargo losses not attributable to one of the above-mentioned exceptions.[24] It was in response to this rule of "carriers as insurers" that shipowners began to insert various clauses and provisions into their bills of lading, which had the effect of contracting away their liability.[25] These clauses generally were held valid as "[p]rinciples of freedom of contract prevented courts from refusing to enforce these stipulations."[26]

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18. 630 F. Supp. at 122. P & O also contended that pursuant to COGSA's "restraint of princes" defense, it was immune from liability. Under this defense, where a sovereign's assertion of control over a vessel is the proximate cause of the loss, the carrier will be relieved from liability. *See* Baker Castor Oil Co. v. Insurance Co. of America, 157 F.2d 3, 4-5 (2d Cir.), *cert. denied*, 329 U.S. 800 (1946). Both courts here rejected this defense since P & O's activities, and not the British government's restraint, were the proximate cause of Sedco's loss. 630 F. Supp. at 121; Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 32-33 (2d Cir. 1986).

19. 800 F.2d at 33.

20. *See* G. GILMORE & C. BLACK, *supra* note 1, § 3-22, at 139-40; *see also* Propeller Niagara v. Cordes, 62 U.S. (21 How.) 7, 23 (1859); Clark v. Barnwell, 53 U.S. (12 How.) 272, 282 (1851). Even where a loss was attributable to one of these common law exceptions, a showing of fault or negligence on the carrier's part would result in imposition of liability upon the carrier. *Id.*

21. Sorkin, *Changing Concepts of Liability*, 17 FORUM 710 (1981).

22. *See* Forward v. Pittard, 99 Eng. Rep. 953 (K.B. 1785).

23. *Id.*

24. Friedell, *The Deviating Ship*, 32 HASTINGS L.J. 1535, 1537 (1981); *see supra* note 20 and accompanying text.

25. Friedell, *supra* note 24, at 1549.

26. *Id.* at 1537.

One of the more common provisions inserted into bills of lading by carriers to limit their liability was the valuation clause, which stipulated the value of the cargo. Often fixed at $100 per package, these clauses were usually enforced under the theory that cargo owners had the opportunity to pay a higher price and declare a higher valuation.[27] It was the widespread use of the valuation clauses and other liability limitation provisions during the nineteenth century from which the notion of deviation as a distinct basis of liability arose.[28]

With the introduction of steam powered vessels during the Industrial Revolution and England's traditional maritime history, it seemed inevitable that British ships would dominate the trans-atlantic shipping market.[29] Thus, it was no surprise that British bills of lading generally contained the most extreme liability limitation provisions.[30] In the United States, where the use of these provisions was prevalent only among rail carriers, their validity was generally determined by state contract law.[31] While such liability provisions were valid where not prohibited by state law, clauses excusing liability for negligence were deemed against public policy and generally unenforceable.[32] British courts, on the other hand, were more receptive to negligence clauses, and while narrowly construed, they were nevertheless enforced.[33] This sharp conflict demonstrated the need for uniformity in the area of carrier liability, for as one court noted, "the state of the law put American shipowners at a great disadvantage . . . ."[34]

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27. Hart v. Pennsylvania R.R., 112 U.S. 331, 340-41 (1884). Of course, where shippers were not given "fair opportunity" to opt for a higher valuation, such clauses were unenforceable. *See, e.g.*, New York, New Haven & Hartford R.R., v. Nothnagle, 346 U.S. 128, 135 (1953) ("[o]nly by granting its customers a fair opportunity to choose between higher or lower liability by paying a correspondingly greater or lesser charge can a carrier lawfully limit recovery to an amount less than actual loss sustained"); Boston & Me. R.R. v. Piper, 246 U.S. 439, 444-45 (1918).

28. Friedell, *supra* note 24, at 1537.

29. G. GILMORE & C. BLACK, *supra* note 1, § 3-23, at 142.

30. *Id.*

31. Sorkin, *supra* note 21, at 711.

32. Compania la Flecha v. Brauer, 168 U.S. 104 (1897); Liverpool Steam Co., v. Phoenix Ins. Co., 129 U.S. 397 (1888); Railroad Co. v. Lockwood, 84 U.S. (17 Wall.) 357 (1873). While the federal courts uniformly held this view, prior to the establishment of federal supremacy in admiralty matters, state courts occasionally upheld these clauses. *See, e.g.*, Blair v. Erie R.R., 66 N.Y. 313 (1876).

33. *See, e.g.*, Bodenham v. Bennet, 146 Eng. Rep. 384 (Ex. 1817); *In re* Missouri S.S. Co., 42 Ch. D. 321 (1889). Legislation in this area was also lacking, for as one court noted, "the English shipowners were powerful in Parliament and they used their influence to block legislation." Wirth Ltd. v. S.S. Acadia Forest, 537 F.2d 1272, 1277 (5th Cir. 1976) (quoting A. KNAUTH, OCEAN BILLS OF LADING at 120 (4th ed. 1953)).

34. Wirth Ltd. v. S.S. Acadia Forest, 537 F.2d 1272, 1277 (5th Cir. 1976); *see also* Nichman Co. v. M.V. Farland, 462 F.2d 319, 327 (2d Cir. 1972) ("Ultimately, this process

The first legislative response to the competing interests of shippers and carriers came from the United States Congress in 1893, with passage of the Harter Act.[35] This Act attempted to achieve a compromise between those interests concerned with the carrier's liability and those concerned with protection of the shipper's cargo. The first section prohibited bills of lading covering shipments "from or between ports of the United States and foreign ports"[36] from containing any provisions tending to limit carrier liability for "loss or damage [to cargo] arising from negligence, fault or failure in proper loading, stowage, custody, care or proper delivery."[37] The carrier was also prevented from attempting to contract out of his liability for failure to provide a seaworthy vessel.[38] Section 3 of the Act, which reflected a response to the carrier's interests, provided that no carrier "shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel . . . ."[39] One treatise summed up the results of this compromise as follows:

> [T]he shipowner could not contract out of the duty to use care to put his vessel in good shape for the voyage, or the duty to care properly for the goods while they were in his hands aboard. On the other hand, if he did use due care to send a seaworthy vessel on the voyage, he could not be held for the defaults of those he put in charge, in regard to running her.[40]

The Harter Act proved to be an effective compromise; it was so well received in the international sphere that the uniformity of liability indicative of coastal voyages in the United States ultimately was established worldwide through enactment of the Hague Rules,[41] promulgated at the Brussels Convention of 1924. In 1936, the United States ratified the Convention and enacted COGSA, a virtual word-for-word adoption of the Hague Rules.[42] Today, COGSA governs all foreign transport to and from the United States while the Harter Act regulates

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threatened to turn the general maritime law on its head, with English courts and some state courts—though not courts of the United States—honoring even bills of lading provisions excepting public carriers from liability for loss due to their own negligence and that of their employees.").

35. 27 Stat. 445 (1893) (current version at 46 U.S.C. §§ 190-196 (1982)).

36. 46 U.S.C. § 190 (1982).

37. *Id.* § 190.

38. *Id.* § 191.

39. *Id.* § 192.

40. G. GILMORE & C. BLACK, *supra* note 1, at 182.

41. International Convention for the Unification of Certain Rules Relating to Bills of Lading (Hague Rules), Aug. 25, 1924, 120 L.N.T.S. 157 [hereinafter Hague Rules].

42. 49 Stat. 1207 (1936) (current version at 46 U.S.C. §§ 1300-1315 (1982)).

coastal transport within the United States.

COGSA's attempt to achieve uniformity of liability while at the same time mitigating the harsh common law rule holding carriers to be insurers of their cargo is reflected in Section 1304(5), which provides:

> Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package . . . unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading.[43]

This clause, and the effect that a carrier's deviation has on the package limitation, has been the subject of immense litigation.

While COGSA does not provide a specific definition of deviation, pre-COGSA cases have defined it to be a "voluntary departure without necessity or reasonable cause from the regular and usual course of the voyage."[44] The general rule before the promulgation of COGSA was that a carrier's geographical departure from his route amounted to a repudiation of the contracted voyage, thus ousting the carriage contract along with any liability limitations, and effectively rendering the carrier an insurer of his cargo.[45] This rule was based upon the law of marine insurance, which held that an insurer was only liable for those risks which were contemplated by the contracted voyage.[46] Once a carrier unreasonably deviated from that route, the insurer was relieved of his obligations as an insurer since the carrier's actions in effect voided the insurance contract. The rationale in both cases was that the parties to the agreement have contracted only for that voyage which is reflected in the bill of lading and any deviation amounts to a substitution of a new voyage, to which the bill of lading does not apply.[47] Thus, in the celebrated pre-COGSA case, *The Willdomino*,[48] where a ship knowingly left port with an insufficient supply of coal to complete the voyage and was forced to deviate from its contracted route, the United States Supreme Court held that the carrier was liable for the damage

43. 46 U.S.C. § 1304(5) (1982).

44. Hostetter v. Park, 137 U.S. 30, 40 (1890).

45. S.S. Willdomino v. Citro Chem. Co., 272 U.S. 718, 725 (1927).

46. *See* Friedell, *supra* note 24, at 1543.

47. See, e.g., Lavabre v. Wilson, 99 Eng. Rep. 185 (K.B. 1779), where Lord Mansfield wrote: "The true objection to a deviation is not the increase of the risk . . . . [i]t is, that the party contracting has voluntarily substituted another voyage for that which has been insured." *Id.* at 189.

48. 272 U.S. 718 (1927).

to its cargo which occurred when the ship subsequently struck a reef.[49] In holding that the carrier could not avail itself of the liability limitations of the then applicable Harter Act, the Court noted "[n]othing in the present bills of lading suggests that the vessel might wander about the sea heading first for one port, and then without adequate reason for another."[50] This rationale found support in England as well.[51]

Though the doctrine of deviation was originally limited to cases involving a carrier's geographical departure from its contracted voyage, it was later applied to situations where there was no departure from the agreed upon route. Here the deviation results from misconduct by a carrier which is so repugnant to the carriage contract as to amount to a material breach of that contract.[52] This concept of "quasi-deviation" was recognized by the United States Supreme Court in 1923 in the case of *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial,* [53] where the Court held that a carrier's stowage of cargo on deck when the contract of carriage stipulated carriage below deck, rendered the carrier liable for the subsequent damage to that cargo.[54] Recognition and acceptance of this theory as a basis for ousting liability limitations incorporated into bills of lading quickly opened the courts to a whole new class of deviation cases. Other quasi-deviation theories include: dry docking with cargo on board;[55] carriage by rail;[56] misrepresentation in bills of lading;[57] carriage on a different vessel;[58] and unreasonable delay.[59]

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49. *Id.* at 724-25.

50. *Id.* at 727.

51. *See, e.g.*, Joseph Thorley, Ltd. v. Orchis S.S. Co. [1907] 1 K.B. 660, 669 (C.A.); Balian & Sons v. Joly, Victoria & Co., 6 T.L.R. 345 (C.A. 1890); Leduc & Co. v. Ward, [1888] 20 Q.B.D. 475 (C.A.).

52. G. GILMORE & C. BLACK, *supra* note 1, § 3-41, at 182.

53. 263 U.S. 119 (1923).

54. *Id.* at 123. "[T]he clean bill of lading amounted to a positive representation . . . that the goods would go under deck. By stowing the goods on deck the vessel . . . exposed them to greater risk than had been agreed and thereby directly caused the loss." *Id.* at 124; *see also* The Southlands, 37 F.2d 474 (5th Cir. 1930); The Gualala, 178 F. 402 (9th Cir. 1910).

55. The Indrapura, 171 F. 929 (D.Or. 1909).

56. The Jean Jadot, 14 F. Supp. 161 (E.D.N.Y. 1935); The Princess Anne, 1925 A.M.C. 1638 (S.D.N.Y. 1925).

57. Berisford Metals Corp. v. S/S Salvador, 779 F.2d 841 (2d Cir. 1985); American Industries Corp. v. M.V. Margarita, 556 F. Supp. 216 (S.D.N.Y. 1983).

58. Sidney Blumenthal & Co., Inc. v. United States, 21 F.2d 798 (S.D.N.Y. 1927), *rev'd on other grounds*, 30 F.2d 247 (2d Cir. 1929).

59. The Morristown, 19 F.2d 441 (2d Cir. 1927); The Ontario, 1925 A.M.C. 1353 (S.D.N.Y. 1925); The San Guiseppe, 1923 A.M.C. 608 (S.D.N.Y. 1922); The Citta Di Messina, 169 F. 472 (S.D.N.Y. 1909); Hellenic Army Command v. M.V. Livorno, 1981 A.M.C. 1288 (S.D.N.Y. 1981) (not officially reported); Little Lisa Ltd. v. NYK Line, 77

It is important to note that under COGSA, liability for deviation attaches only where it is unreasonable. As Section 1303(4) of the Act states:

> Any deviation in saving or attempting to save . . . property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this [Act] or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: *Provided, however*, that if the deviation is for the purpose of loading or unloading cargo . . . it shall, prima facie, be regarded as unreasonable.[60]

While it is clear that COGSA has abolished the harsh common law rule that any deviation rendered the carrier liable, the Act does not indicate what the effect of an unreasonable deviation is. The Seventh Circuit, in *Atlantic Mutual Ins. Co. v. Poseidon Shiffahrt*,[61] held that even a carrier's unreasonable deviation from the contract of voyage will not void COGSA's $500 per package liability limitation.[62] This view is based upon the language of Section 1304(5) of the Act which states, "[n]either the carrier nor the ship shall *in any event* be liable . . . in an amount exceeding $500 per package."[63] Accordingly, the court concluded that the absolute terms of Section 1304(5) completely abolished the common law doctrine of deviation.[64] This interpretation has found little support,[65] and the majority view seems to be reflected in decisions by the Second, Fifth and Ninth Circuits, which hold that an unreasonable deviation amounts to a repudiation of the voyage contract, thus rendering the carrier liable for any resulting losses.[66] The reasoning of these circuits is based upon the view that had Congress intended to completely abolish the common law doctrine, it would have done so

Civ. 5368 (S.D.N.Y. 1980) (not officially reported).

60. 46 U.S.C. § 1304(4) (1982) (emphasis in original).

61. 313 F.2d 872 (7th Cir. 1963).

62. *Id.* at 875.

63. 46 U.S.C. § 1304(5) (1982) (emphasis added).

64. 313 F.2d at 874-75.

65. *See* Nassau Glass Co. v. M.V. Noel Roberts, 249 F. Supp. 116 (S.D.Fla. 1965); Varian Assocs. v. Compagne Generale Transatlantique, 85 Cal. App. 3d 369, 149 Cal. Rptr. 534 (Cal. Ct. App. 1978).

66. *See* Nemeth v. General S.S. Corp., 694 F.2d 609 (9th Cir. 1982); Calmaquip Eng'g West Hemisphere Corp. v. West Coast Carriers, Ltd., 650 F.2d 633 (5th Cir. 1981); Spartus Corp. v. S.S. Yafo, 590 F.2d 1310 (5th Cir. 1979); Iligan Integrated Steel Mills, Inc. v. S.S. John Weyerhaeuser, 507 F.2d 68 (2d Cir. 1974); Du Pont de Nemours Int'l S.A. v. S.S. Mormacvega, 493 F.2d 97 (2d Cir. 1974); Encyclopaedia Britannica, Inc. v. S.S. Hong Kong Producer, 422 F.2d 7 (2d Cir. 1969); Searoad Shipping Co. v. E.I. duPont de Nemours & Co., 361 F.2d 833 (5th Cir. 1966).

in unambiguous language. For as one court noted, "such a drastic change in the existing law, with its far-reaching consequences in the commercial and financial world would have been expressed in clear and unmistakable terms."[67]

In *Sedco*, the Second Circuit was again faced with an appeal of a district court decision expanding the doctrine of quasi-deviation. The district court here held that the post-discharge conduct of P & O, namely its failure to inform Sedco that the cargo had been offloaded at Malta, its misrepresentations that the cargo was still on board the *Strathewe*, and its failure to properly reload all eighteen packages, constituted a quasi-deviation and thus voided COGSA's $500 per package liability limitation.[68] In an opinion by Judge Miner, the Second Circuit reversed the lower court and held that the deviation to Malta by the *Strathewe* was reasonable, and more importantly, that the negligence and misrepresentations of P & O did not constitute any deviation within COGSA's meaning.[69]

With respect to a geographical deviation, Section 1304(4) states in part that where a carrier deviates "[f]or the purpose of loading or unloading cargo or passengers, it shall prima facie be regarded as unreasonable."[70] In the present case, the *Strathewe*'s detour to Malta to unload Sedco's cargo, although in response to orders from the British Government, clearly constituted an unreasonable deviation under the above language. This presumption of unreasonableness, however, is not irrebuttable. Citing to a leading treatise on admiralty law, the court noted the rationale behind the proviso creating the presumption: "the carrier ought not to be allowed to deviate with no other motive than the increase of his own revenues; thus the proof required to overcome the prima facie unreasonableness of such a deviation would have to show something more than mere reasonableness from the point of view of the carrier. . . ."[71] In viewing the circumstances surrounding the *Strathewe*'s departure, it was clear that pecuniary gain was not a motivating factor behind the deviation to Malta. Furthermore, as the facts show, Malta's proximity with respect to cargo en route to the United States certainly made the island an appropriate port in which to discharge the Sedco cargo.[72] As a result, the Second Circuit had little difficulty in affirming the district court's finding that the "geographical"

67. Jones v. The Flying Clipper, 116 F. Supp. 386, 389 (S.D.N.Y. 1953).
68. Sedco, Inc. v. M/V Strathewe, 630 F. Supp. 120, 122 (S.D.N.Y. 1986).
69. Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 33 (2d Cir. 1986).
70. 46 U.S.C. § 1304(4) (1982).
71. 800 F.2d at 31 (quoting G. GILMORE & C. BLACK, *supra* note 1, § 3-40, at 179).
72. *See* 630 F. Supp. at 121.

deviation by the *Strathewe* was "reasonable and sensible."[73]

The Second Circuit's reversal of the district court's finding with regard to the quasi-deviation issue is somewhat more troubling. This argument focused on the post-discharge negligence and misrepresentations of P & O and its agents following the *Strathewe*'s arrival in Malta: "(1) in failing to reload all eighteen pieces of cargo at Malta, (2) in erroneously responding to Sedco and its agent in mid-July that the cargo was still aboard the *Strathewe*, and (3) in failing to immediately locate the misplaced cargo . . . ."[74]

As the opinion noted, the doctrine of quasi-deviation has had limited application in the Second Circuit.[75] This view is a reflection of the trend to restrict the quasi-deviation doctrine as expressed by Judge Friendly in *Iligan Integrated Steel Mills, Inc. v. SS John Weyerhaeuser*,[76] where he noted that the concept of quasi-deviation seems to run counter to the absolute language of Section 1304(5) of COGSA and thus "the principle of 'quasi-deviation' is not one to be extended."[77] Traditionally, the doctrine served to protect shippers whose cargo would no longer be insured once the carrier departed from his contracted voyage.[78] Today, however, this is not generally the case since most cargo insurers cover shippers' losses whether or not there was a geographical deviation.[79] Thus, the justifications for the doctrine are no longer valid, and account for the trend towards limiting its expansive application.

Presently, there appears to be some conflict within the Second Circuit as to just how far the doctrine of quasi-deviation extends. The *Sedco* opinion correctly stated that it has had limited application within the circuit.[80] The court, however, incorrectly stated that the doctrine has been limited to situations involving on-deck stowage.[81]

In *Berisford Metals Corp. v. S.S. Salvador* [82], a decision handed down only eight months before *Sedco* yet not cited by the court, a different panel of the Second Circuit [83] held that a carrier's misrepresentations in the bill of lading with respect to the condition of the cargo

73. 800 F.2d at 31.
74. *Id.*
75. *Id.* at 31-32.
76. 507 F.2d 68 (2d Cir. 1974).
77. *Id.* at 72.
78. *See* Friedell, *supra* note 24, at 1543.
79. *Id.* at 1544; *see also* G. GILMORE & C. BLACK, *supra* note 1, § 3-40, at 176-77.
80. Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 31-32 (2d Cir. 1986).
81. *Id.* at 31.
82. 779 F.2d 841 (2d Cir. 1985).
83. The panel in *Sedco* was composed of Judges Newman, Pierce and Miner, while the panel in *Berisford* was composed of Judges Friendly, Mansfield and Winter.

"amounted to a fundamental breach going to the very essence of its contract" and precluded reliance upon COGSA's liability limitation provision.[84] The opinion, authored by Judge Mansfield, reaffirmed the court's reluctance to extend the quasi-deviation doctrine and justified this result as adherence to the well-settled holding of *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha*, ("*Olivier II*").[85] Although a pre-COGSA case, the holding of *Olivier II* today stands for the proposition that "the $500 per package limitation of liability may not be invoked by a carrier that has issued an on board bill of lading erroneously representing that goods were loaded aboard its ship, regardless whether or not the carrier acted fraudulently."[86] In *Berisford*, the carrier received one hundred bundles of tin ingots and issued a bill of lading, with respect to its own conduct, that those one hundred bundles had been loaded on board its ship.[87] As it turned out, only thirty were loaded, while the other seventy mysteriously disappeared.[88] In precluding the carrier from asserting COGSA's liability limitation provisions, the court stated, "[w]e hold simply that when a carrier misrepresents its own conduct in loading goods aboard ship it is responsible for the misrepresentation and may not invoke contract provisions incorporating COGSA's limitations on liability."[89]

The *Berisford* decision is extremely relevant, given the facts in *Sedco*, and yet the court here chose not even to cite it. As in *Berisford*, P & O misrepresented its own conduct to Sedco regarding the status of Sedco's cargo. Although P & O told Sedco's agent that the cargo would arrive in Texas on August 24th aboard the *Strathewe*,[90] the cargo had in fact been sitting on a dock in Malta since June 12th.[91] These misrepresentations were repeated upon a second inquiry and it was not until a third inquiry on August 4th that Sedco was informed that the eighteen packages had been discharged and reloaded on the *Strathesk*, which had departed one day earlier.[92] In addition, that the shipping manifest of the *Strathesk* stated all eighteen packages had been

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84. 779 F.2d at 848.

85. 47 F.2d 878 (2d Cir. 1928), *cert. denied*, 283 U.S. 856 (1931). The Olivier case was subject to two appeals in the Second Circuit. The first, 27 F.2d 129 ("*Olivier I*"), was affirmed on remand to the district court, at 47 F.2d 878 ("*Olivier II*").

86. 779 F.2d at 846. In *Olivier II*, the court held that a carrier's misrepresentations regarding its own conduct precluded its reliance on the favorable liability limitations stipulated in the bill of lading.

87. *Id.* at 843.

88. *Id.*

89. *Id.* at 849.

90. Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 29 (2d Cir. 1986).

91. *Id.*

92. *Id.*

reloaded when in fact only sixteen were seems to suggest that further misrepresentations were perpetrated.[93]

Unlike the *Berisford* case, the facts in *Sedco* seem to suggest a fraudulent misrepresentation, since it appears that information concerning the status of the Sedco cargo was either known to P & O's agent or at least readily ascertainable, given Sedco's repeated inquiries. Furthermore, that the *Strathesk*'s shipping manifest stated that eighteen packages had been loaded also suggests fraudulent misrepresentation by P & O for as the district court decision noted, "a number of people from stevedores to ship personnel did not count from 16 to 18."[94]

Under the *Berisford* decision, which reaffirms *Olivier II*, there is no need to even prove that the carrier acted fraudulently. It is sufficient that the misrepresentation pertains to the carrier's own conduct, and that it amounts to a "fundamental breach going to the very essence of its contract . . . ."[95] While it is true that the misrepresentations in *Berisford* were contained in the bill of lading whereas in *Sedco*, they were contained in the shipping manifest, the offloading at Malta and the degree of misrepresentations by P & O would still seem to bring this case under the holding of *Berisford*, precluding assertion of COGSA's liability limitations.[96]

In distinguishing the cases cited by Sedco in their brief, the court wrote, "[t]he cases cited, however, either involve one of the two types of deviation recognized in this circuit [geographical and on-deck stowage], or were decided before the enactment of COGSA, or were decided in circuits where deviation does not void the COGSA limitation of liability."[97] These last two qualifications made by the court are somewhat questionable. With respect to pre-COGSA decisions, the court seems to suggest that these decisions have been completely superceded by COGSA and thus have no precedential value. In reality, however, these cases are superceded only to the extent that they hold that *any* deviation by carrier precludes reliance on any liability limitations contained in the bill of lading. Indeed, given COGSA's lack of any definition of "deviation," courts today have been forced to look to pre-COGSA decisions for guidance.[98] Furthermore, the decision in *Berisford* expresses

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93. *Id.*

94. Sedco, Inc. v. M/V Strathewe, 630 F. Supp. 120, 121 n.1 (S.D.N.Y. 1986).

95. Berisford Metals Corp. v. S.S. Salvador, 779 F.2d 841, 848 (2d Cir. 1985).

96. The court in *Berisford* noted the "necessity for maintaining the integrity of and confidence in bills of lading," given the indispensable role they play in international trade and commerce. 779 F.2d at 845.

97. Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 32 (2d Cir. 1986).

98. 2A BENEDICT ON ADMIRALTY § 122, at 12-13 (1986).

its adherence to the holding in *Olivier II*, a pre-COGSA case.[99]

The second category of cases distinguished by the *Sedco* court are those which hold that even an unreasonable deviation does not preclude reliance on COGSA's limitation of liability.[100] This is a minority view followed only by the Seventh Circuit, as enunciated in the case of *Atlantic Mutual Ins. Co. v. Poseidon Shiffahrt*.[101] There the court recognized that a delay of one and a half years in delivery constituted an unreasonable deviation.[102] While the holding in that case, that even an unreasonable deviation cannot preclude reliance on COGSA's liability limitations, is indeed the minority view, its finding that unreasonable delay constitutes an unreasonable deviation finds support in decisions both prior to and after the enactment of COGSA,[103] contrary to the *Sedco* court's implication that only the unreported decision of *Hellenic Army Command v. M.V. Livorno*,[104] supports this view.[105]

The case law of the Second Circuit which speaks on the doctrine of quasi-deviation clearly demonstrates that notwithstanding the language in *Sedco*, its application is not limited to cases involving on-deck stowage.[106] The exact limits of this doctrine, however, are far from clear, given the *Sedco* court's misstatements, omissions and distinctions. This decision is a prime example of the confusion and conflict that exists with respect to this area of admiralty law, and serves only to further thwart the long sought after goal of uniformity in cases involving carrier deviation, which lies at the very heart of COGSA.

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99. 779 F.2d at 846.

100. Sedco, Inc., v. M/V Strathewe, 800 F.2d 27, 32.

101. 313 F.2d 872 (7th Cir. 1985).

102. *Id.* at 874-75.

103. *See, e.g.*, The Hermosa, 57 F.2d 20 (9th Cir. 1932); The Ontario, 1925 A.M.C. 1353 (S.D.N.Y. 1925); The San Giuseppe, 1923 A.M.C. 608 (S.D.N.Y. 1922); Little Lisa Ltd. v. NYK Line, 77 Civ. 6368 (S.D.N.Y. 1980) (not officially reported).

104. 1981 A.M.C. 1288 (S.D.N.Y. 1981) (not officially reported).

105. Sedco, Inc. v. M/V Strathewe, 800 F.2d 27, 32 n.2.

106. *See, e.g.*, Agfa-Gevaert, Inc. v. S/S "TFL Adams", No. 82 Civ. 4038 (S.D.N.Y. Oct. 26, 1984) (LEXIS, Genfed library, Dist file), where Judge Kram wrote: "Decisions in this court, and in this Circuit, have held the deviation doctrine applicable (and the limitations provisions of COGSA inapplicable) *in situations other than on-deck stowage.*" *Id.* (emphasis added). In *Agfa*, a carrier's reckless conduct was challenged as an unreasonable deviation. Although the presence of recklessness was deemed an issue to be resolved at trial, a reading of the decision seems to suggest that the court here espoused recklessness as an additional form of quasi-deviation. *See also infra* note 107.

Perhaps the state of the law governing carrier deviation following the decision in *Sedco Inc. v. M.V. Strathewe* was best summed up over sixty years ago by the eminent jurist Learned Hand when he wrote "[t]he law regarding deviation does not seem to me very clear."[107]

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107. The Poznan, 276 F. 418, 430 (S.D.N.Y. 1921). On Sept. 2, 1987, following a trial on the issue of recklessness, the *Agfa* court declined to vitiate COGSA's liability limitation provisions. In support of her decision, Judge Kram wrote: "Since TFL was not reckless, its acts did not constitute a quasi-deviation." *Agfa*, No. 82 Civ. 4038. Thus, it is clear that even after the *Sedco* decision, at least one court in the Second Circuit continues to recognize the application of the doctrine of quasi-deviation to situations other than one of on-deck storage.