

COGSA - DECK CARRIAGE AS A DEVIATION

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The doctrine of deviation is utilized by shippers in an attempt to avoid COGSA's \$500.00 per package limitation. 46 U.S.C. §1304(5). Deck carriage is a non-geographic type of deviation. Although the doctrine of deviation predates COGSA, COGSA statutorily recognizes a somewhat limited version of the doctrine of deviation. 46 U.S.C. §1304(4) provides:

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 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 or passengers, it shall, prima facie, be regarded as unreasonable.

On deck carriage appears to be the only non-geographic deviation which courts have held may deprive the carrier of its right to limit. *Constructores Tecnicos v. Sea-Land Service, Inc.*, 945 F.2d 841 (5th Cir.1991); *English Electric Valve Co. v. M/V Hoegh Mallard*, 814 F.2d 84 (2d Cir.1987). However, with the ever increasing utilization of containers and container ships to transport cargo, on deck carriage has become much more the norm, and the courts have begun to recognize that fact.

Initially, the general rule is that "a clean bill of lading imports under deck stowage." *St. Johns N.F. Shipping Corp. v. S.A. Companhia Geral Commercial do Rio Janeiro*, 263 U.S. 119, 124, 44 S.Ct. 30, 68 L.Ed. 201 (1923); see also *Clamaquip Engineering West Hemisphere Corp. v. West Coast Carriers Ltd.*, 650 F.2d 633 (5th Cir. Unit B 1981); *Encyclopedia Britannica Inc. v. SS HONG KONG PRODUCER*, 422 F.2d 7 (2d Cir. 1969) cert. denied, 397 U.S. 964, 90 S.

Ct. 998, 25 L.Ed.2d 255 (1970). Further, the carrier has the burden of showing that the shipper agreed to something other than below deck stowage. *Ingersoll Milling Machine Co. v. M/V BODENA*, 829 F.2d 293 (2d Cir. 1987). Thus, on deck carriage is generally a deviation, which, if unreasonable, deprives the carrier of the right to take advantage of the package limitation. If the deviation exposes the cargo to a greater likelihood of harm or was the proximate cause of the damage, then it is unreasonable. *Constructores Tecnicos v. Sea-Land Service, Inc.*, 945 F.2d 841 (5th Cir. 1991).

However, with respect to containerized cargo, a different rule has evolved. One line of reasoning is that on deck carriage is not a deviation if the carrier proves an established custom of on deck carriage of containers. *Konica Business Machines, Inc. v. SEA-LAND CONSUMER*, 153 F.3d 1076 (9th Cir. 1998). A second line of reasoning for allowing on deck carriage of containers is that even if on deck carriage of a container is a deviation, it does not violate COGSA because it is not unreasonable, given that the container itself protects cargo stowed on deck, and accordingly, there is no increased risk of damage. *Id. at 1078; Du Pont. de Nemours Int'l S.A. v. S.S. Mormacvega*, 493 F.2d 97, 101-103 (2d Cir. 1974).

For further information, see:

- Michael F. Sturley, *An Overview of the Considerations Involved in Handling the Cargo Case*, 21 Tul. Mar. L.J. 263 (1997)
- James F. Whitehead, *Deviation: Should the Doctrine Apply to On-Deck Carriage?*, 6 Mar. Law. 37 (1981)
- Katherine Woodward, Note, *The Liberty to Deviate: Yang Machine Tool Co. v. Sea-Land Service, Inc.*, 20 Tul. Mar. L.J. 201 (1995)

