

# Overseas medical supplies ltd v orient transport services ltd essay sample

[Transportation](#)



The Appellant, Orient Transport Services Limited appealed as it was held liable for the loss of medical equipment while being transported from Tehran to the UK and there was failure on its part as required by the contract . It was held that the contractual term exempting it from liability and responsibility was considered as irrational one under the Act, since the obligations imposed on respective parties were imbalanced. It was held that the Insurance demanded was not virtually available other than through defendants . The appellants requested the insurance to be covered and the defendants did not clearly ruled out that the limitation of liability applied also if they failed to insure. Considering the value of the lost material, the limitation to £ 600 was ridiculous. It was held by the Court of appeals that the limitation clause was irrational.

This appeal was filed by the appellants Orient Transport Services Limited (“the appellants”) against the judgment of His Honour Judge Kenny awarded in the Kingston County Court in which the judge held the defendants, who runs the business of freight forwarding, liable to the plaintiffs, for the non-delivery and loss of medical instruments on its return journey to England from Teheran. These Medical equipments were dispatched by the plaintiffs to be exhibited at the Iran Med 95 Exhibition. The Judge was also of the opinion that the defendants had breached their contractual obligation to insure the goods of the plaintiffs. Due to failure on the part of the defendants, the loss has occurred and hence the defendants have to indemnify the loss incurred by the plaintiffs.

**BASIS OF THE CLAIM:**

Judge Kenny awarded the damages for the full value of goods which amounted £ 8, 589 . 66 along with interest thereon £ 785. 07. Judge Kenny was of the opinion that defendants were in breach of their contractual duty and thus could not take shelter from the provisions of Clause 13 (B) of the British International Freight Association Standard Trading Conditions (1989), (“ the Conditions”).

This clause authorizes the transporter to limit the liabilities in respect of any claim germinating from breach of duty on their part. Judge Kenny was of the view that as regards to the duty on the part of defendants to effect insurance , the defendants had been unsuccessful to prove that Clause 13(B) and 29(A) (ii) of the Conditions satisfied the test of reasonableness inflicted by the Unfair Contract Terms Act 1977 .

#### FACTS OF THE CASE:

The plaintiffs namely “ Overseas Medical Supplies Ltd “ is carrying on business as suppliers of medical equipments. The appellants namely “ Orient Transport Services Ltd “ is in the business of carriage of goods and ancillary services. The major portion of the business of the appellants consists of specialist service of importing and exporting equipment meant for exhibition for customers and it on continuously involves a “ round trip” for the exhibition of such equipments.

The plaintiffs had engaged the services of the defendant for such services on going basis. The case mainly related to the transporting of Medical equipments of the plaintiffs for the display at the exhibition at Iran Med 95.

Plaintiffs filled in and signed the defendant's " Freight & Handling order form " which exhibited or evidenced the relationship and arrangement between the parties to the dispute.

The Freight and Handling order form consists the following conditions:

- We hereby place our order with you for the provision of freight and handling services in connection with this event.
- We accept the adoption of BIFA ' 89 Trading conditions as shown overleaf for this movement and will ensure full insurance cover is held on our cargo either through Orient namely defendants cum appellant or through another broker.....
- Insurance cover on our consignment to a total value of £ sterling — To be advised.

The main dispute referred to the judge was about the arrangements for the transport, in particular as to whether it was meant for the round trip and as to the insurance arrangements were accepted. The judge was of the opinion that there was no ambiguity as the goods were properly described and their value was advised one Ms Chotalia , an employee of the plaintiffs to the appellants later by a separate fax communication.

Further Ms Chotalia also orally communicated the same to the appellant's shipping clerk who was in charge of the particular order and instructed him orally through telephone to insure the consignment for the invoice value of £ 11, 400 at a charge of 1. 97% of value for the round trip. Unfortunately, no insurance cover was raised for which the defendants could not advance any reasonable explanation.

**LIMITATION CLAUSE:**

As regards to the insuring the plaintiff's goods and appellant's limitation of liability were concerned, the following conditions were provided:

- ' 13(A) – No insurance will be effected except upon express instructions given in writing by the Customer and all insurance effected by the Company are subject to the usual conditions and exceptions of policies of the Insurance Company or Underwriters taking the risk
- 13 (B)- In so far as the Company agrees to arrange insurance , the Company ( Orient Transport Ltd ) acts as Agent for the customer using its best efforts to arrange such insurance and does so subject to the limits of liability contained in Clause 29 hereof.....

Now let us analyse what the Clause 29 deals with:

The Clause 26 specifically states that the Company shall perform its duties with a reasonable degree of skill, care, diligence and judgment.

The important portion of clause 29 (A) is reproduced here for the better understanding.

Clause 29 (A) stipulates that Company's liability how so ever arising and notwithstanding that the cause of loss or damage to unexplained shall not exceed

- In the case of claims for loss or damage to goods
  - The value of any goods damaged or lost or

- A sum at the rate of two Special Drawing Rights (SDR) as defined by the International Monetary Fund, per kilo of gross weight of any goods damaged or lost which shall be the least.
- In the case of all other claims
- The value of the goods subject to the relevant transaction between the Company and its Customers or
- A sum at the rate of two SDR's per kilo of the gross weight of the goods the subject of the said transaction , or
- 75, 000 SDR's in respect of any one transaction whichever shall be the least.

Now let us see what the 1977 Act says about or deals with.

Section 3 of the 1977 Act specifies under the caption “ Liability arising in Contract’ inter alia that:

- This section is relevant as between contracting parties where one of them acts on the other's written customary terms of business.
- As against that party , the other cannot by reference to any contract of terms –
  - When service provider himself is in breach of contract, he can exclude or restrict any liability in respect of such breach except in so far as the contract terms satisfies the requirement of reasonableness.

Section 11 expresses inter alia that:

- In relation to a contract term, the requirement of reasonableness for the purposes of this part of this Act. It is to be analyzed whether the term shall have been a fair and reasonable one to be included having regard to the circumstance which were, or ought reasonably to have been, known to or in the contemplation of the parties when the contract was made.
- where by reference to a contract term ... a person seeks to restrict liability to a specified sum of money , and the question of arises ( Under this Act or any other Act ) whether the term ... satisfies the requirement of reasonableness , regard shall be had in particular ... to .
- the money is available to the service provider to enable him to meet the liability when or where it arises and
- Is it available to him to cover himself by insurance
- Further person who claims that a contract term fulfills the requirement of reasonableness to illustrate that it does.

#### REASONABLENESS OF THE LIMITATION CLAUSE:

The Court of Appeal also considered the decision by the Lord Bridge in the case “ George Mitchell Chesterhall Limited v Finney Lock Seeds Limited “ about what is “ fair and reasonable “ by taking into consideration of provisions of the modified section 55(5) of the Act of 1979 or section 11 of the Act of 1977. Further Lord Bridge also opined that the appellate court should treat the original decision with the utmost esteem and desist from interference with it unless it is satisfied that it decided upon some erroneous principle or was decided plainly and obviously wrong.

In deciding the reasonableness, the Court of Appeal considered the decisions made in the *Stewart Gill Limited v Horatio Myer and Co Ltd* (1992) QB 600 at 608 as per detailed below :

- Parties bargaining position by taking into account the substitute means by which the customer's requirement would have been met.
- Whether the customer has been at the mercy of the supplier thereby induced to agree the terms and had he the opportunities to sign similar contracts with the alternative service providers with out relevant conditions.
- Whether the customer already aware of the existence of such term or custom.

In *Singer v Trees* at 169 and *St Albans' City and District Council v International Computers Limited* (1995) XXI FSR 686 at 708, as regards to the equality of bargaining position, the court considered whether the alternative option was available to the plaintiffs other than the defendant.

Considering the above said views and provisions, the Judge held that defendants were found to be breached their obligation under Clause 13(B) as they had not made their best efforts to arrange for insurance to cover the plaintiffs medical equipments . As regards to the application of the limits on defendant's liability cited in Clauses 13 (B) and 29, the Judge was of the view that had the defendant's insured the goods as per instruction from the plaintiffs , the loss would not have occurred at all.

The defendant's plea was that their liability was restricted to two SDR's per kilo which amounted to £ 600 rather the actual loss amount was around £

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8600 as per the provisions of the Clause 13 (B). But the Judge was of the view that their defendant's view was not maintainable as it had not satisfied the test of reasonableness imposed by the Unfair Contract Terms Act 1977. (" the Act").

The Judge was also of the view that general limitation enshrined in Clause 29 (A) (1) of the BIFA Conditions perhaps satisfied the test of reasonableness and it would limit the plaintiffs claim to £ 600 had the loss was due to non-delivery or loss of the goods by the appellants. But the defendants had not proved that why there was failure on their part to carry out the plaintiffs instructions to insure the goods.

The Judge also was of the opinion that reasonableness and fairness of limiting liability in each case can not be equated. He also observed that in transport business, losses are frequent and not uncommon. In case of any loss in marine insurance, assessing the carrier's liability would be uncertain, complex and expensive process. Hence the limitation or even exclusions of liability for the carrier are appropriate to be regarded reasonable. However this can not be extended when there is a negligence of duty and failure on the part of defendants for arranging insurance despite the fact the plaintiffs had insisted on it.

The Judge also opined that it can not be expected that plaintiff should be prepared to cover insurance policy for any loss that may arise due to failure of duty by the defendants to arrange for insurance. In a contract of carriage, it always expected that if any thing goes wrong, insurance cover will take care of the indemnification of loss if any thing goes wrong. The Judge

strongly felt that law of limitation will definitely available to the defendant's had they insured the goods. Having failed to insure the goods, the defendants have not acted in utmost good faith and there was of failure of duty on the part of defendants.

The Judge also was of the view that Clause 13 (B) was one sided as it markedly in the defendant's favour. Thus the contract imposes an ill-equipped responsibility on the part of the plaintiffs to cover full insurance of their goods through the defendants or another broker. But the Clause 13 (B) is silent about what would happen if there is a failure on the defendant's part but imposes limited liability on the part of defendants in the case of any loss. Thus the Judge felt that overall impact of Clause 13(B) is that the plaintiffs are at loss both their goods and their insurance cover with limited compensation.

#### SUBMISSION BY DEFENDANTS:

The main argument of the appellants' was that the Court should consider the limitation inflicted by applying Clause 13(B) along with Clause 29 (A) (ii) must be taken into consideration in the background of the fact that the plaintiffs had the right on payment of an extra charge, to have taken a waiver of the appellant's limit of £ 600 if they fail to obtain insurance. The Appellant submitted further that;

- The limitation condition is in general use and consistently employed by the forwarding industry in general.

- The plaintiff is free to seek alternative service provider and parties to the contract enjoy equality of bargaining and but the plaintiffs have not gone shop around for the reasons best known to them.
- Had Ms Chotalia had gone to other service provider perhaps she might have ended up with the same limitation clause as this clause is a general condition clause imposed by the all the freight forwarders .
- Having admitted that she was aware of the condition, the Judge Kenny was wrong to deprive those admissions of their force as an admission that the bargain was made in full awareness between equals.
- The appellants have every right to restrict their liability and it is open for the plaintiffs to defer an extra charge to delete such limitation.
- Ms Chotalia herself had accepted the limitation clause with open eyes.
- Insurance cover was plainly available to the appellants but the premium was fixed in ‘ block terms’ in view of the limitation of liability clause to which the plaintiff could have negotiated by payment of additional insurance charge so as to remove the limitation clause.

The defendant cum appellant mainly based their argument around the judge’s ignorance of two aspects of Ms Chotalia’s evidence. They are of the view that judge was erred by having treated her as other than a person contracting with the plaintiffs on equal terms and conditions and with full knowledge of risks involved. The Judge had ignored the statement made by Mr. McLean that additional insurance arrangements were available to the plaintiffs if they had made special request in this regard.

SIGNIFICANCE OF THE LIMITATION CLAUSE:

The Court of Appeal had relied on the evidence given by Ms Chotalia to come to final decision in this case. The Court of Appeal had taken into account the following from the evidence given by Ms Chotalia.

- The reason for going with the defendant was that to have competitive insurance premium had it done by the defendant rather than insuring by the plaintiffs itself.
- The appellants offered a “ package service’ with benefit of a British Embassy bank guarantee for clearing goods into the country where exhibition was held.
- She informed the Court that though she aware the same package was offered by some other service providers also but the plaintiffs was not interested to shop around as they had developed a familiarity with the defendants.
- She further informed that the reason for going with the defendants was mainly due to general appeal of the entire package and because of her knowledge of the professionalism of the defendants.

Judge was of the view that Ms Chotalia was a honest witness completely lacking in guile. Thus Ms Chotalia might not have thought of fact that if the defendants failed to insure, the plaintiff might not get full claim as it was restricted to a lesser amount specified by Clause 13 (b). Thus the Judge was of the opinion that she was fully comprehended its meaning or that any ordinary customer would have been likely to do so with out help of any lawyer.

The Court of Appeal observed that since the defendant was offering a 'one stop shop' service, a customer who wishes to book such materials may not be aware of the intricacy and snares, import / export licensing and other issues like to find alternative agencies to insure the goods. Thus the evidence advanced by Ms Chotalia revealed that it was difficult to obtain such insurance except through defendants which carried it on a group basis and also much cheaper than obtaining the same in the open market.

The Court of Appeal viewed that the circumstances of the cases left an impression that if the plaintiffs longed to exhibit their medical equipments at the Tehran exhibition, there was no alternative available to plaintiffs as they had to abide the terms and conditions of the defendants and thus there was no real equality of bargaining position.

The Court of Appeal declined to accept the views expressed by Mr. Mclean, a director of defendant company that if the appellant had been asked to waive the £ 600 limit, they would have brought the matter to the attention of insurance company and passed on to the plaintiffs an increased charge to reflect any additional premium required.

#### CONCLUSION:

In view of the above, Court of Appeals based its decision on the following three broad boxes. Under defendant's standard conditions, if they fail to carry out the insurance, the plaintiffs will lose not only his goods in case of any loss but also the chance of indemnity of full value of the goods lost and his claim is restricted to £ 600 due to the effect clause of 13 (B). Secondly,

the Court observed that there existed no real equality in the parties' bargaining position as the plaintiffs could not approach elsewhere practically. Further the Court was of the view that conditions of the clause 13(B) was ambiguous in nature as the limitation of £ 600 would apply not only if the equipment was lost or damaged but so as to safeguard the defendants in case if they fail to effect any insurance arrangements despite the fact having accepted the plaintiffs instruction to do so, in return for extra charge demanded and paid as this clause lacks " reality of consent ".

Finally the Judge considered it as ' derisory' by limiting the liability to £ 600 though the plaintiffs were entitled to recover original loss value and declared it as unjust and inappropriate.

Hence the Court of Appeals dismissed the appeal by the defendants with the cost and confirmed the decision by Judge Kenny to pay the plaintiffs the full value £ 8589. 66 with interest of £ 785. 07 and plaintiffs cost of the action to insurance.

#### MY COMMENTS ON THE CASE:

I feel that as per the opinion of the Court of Appeal that the circumstances of the cases left an impression that the plaintiffs longed to exhibit their medical equipments at the Tehran exhibition, there was no alternative available to plaintiffs as they had to abide the terms and conditions of the defendants and thus there was no real equality of bargaining position.

Further I strongly have the opinion that if a freight forwarding company has accepted to provide or arrange for insurance, then limits to restrict the

liability under clause 13 (B) of 1989 Act does not arise. Thus the clause 13 (B) is found to be unreasonable by the Court of Appeal in Overseas Medical Supplies Limited v. Orient Transport Services Ltd .(1999). The Court observed that by conceding to arrange insurance for the client, the Company was executing an entirely different service from the transporting of goods. Hence different conclusion would apply when estimating the rationality of an exclusion or limitation term.

I also wish to draw the view held in the case Granville Oils & Chemicals Ltd v. Davies Turner & Co Ltd, where the judge followed the approach of Judge Kenny in the Kingston County Court who had held unreasonable a clause in the BIFA conditions purporting to limit the forwarder's liability for omission or failure to insure.

I go with the Judge's view that general limitation enshrined in Clause 29 (A) (1) of the BIFA Conditions perhaps satisfied the test of reasonableness and it would limit the plaintiffs claim to £ 600 had the loss was due to non-delivery or loss of the goods by the appellants. But the defendants had not proved that why there was failure on their part to carry out the plaintiffs instructions to insure the goods.

I wish to draw the attention of opinion given by the Court of Appeal that the circumstances of the cases left an impression that if the plaintiffs longed to exhibit their medical equipments at the Tehran exhibition, there was no alternative available to plaintiffs as they had to abide the terms and conditions of the defendants and thus there was no real equality of bargaining position.

I feel that the defendant's plea was that their liability was restricted to two SDR's per kilo which amounted to £ 600 rather the actual loss amount was around £ 8600 as per the provisions of the Clause 13 (B). But the Judge was of the view that their defendant's view was not maintainable as it had not satisfied the test of reasonableness imposed by the Unfair Contract Terms Act 1977. (" the Act").

Further the Court was of the view that conditions of the clause 13(B) was ambiguous in nature as the limitation of £ 600 would apply not only if the equipment was lost or damaged but so as to safeguard the defendants in case if they fail to effect any insurance arrangements despite the fact having accepted the plaintiffs instruction to do so, in return for extra charge demanded and paid as this clause lacks " reality of consent ".

I concur with the Judge's view it as ' derisory' by limiting the liability to £ 600 though the plaintiffs were entitled to recover original loss value and declared it as unjust and inappropriate to limit the loss .

#### BIBLIOGRAPHY:

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