

How to identify who has title & property in a cargo sold under an English law contract,

A look at the contracts involved in
the International Sale of Goods
Carried by Sea

- The intention behind this talk.
- Problems frequently arise when commodities are bought and sold on the world stage. It could be a cargo of rice (it could be any cargo].
- Lawyers obviously involved but may have problems establishing who has the title (& therefore the risk) at the time the problem arose.
- A look at the parties involved - their contractual obligations - when those obligations bite - who is carrying the risk.
- Aim: To providing a better understanding of what flows in such sales.

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- My full paper will be available on the ShipArrested website.
- The website also sets out the various Arrest Conventions starting with the 1952 Brussels arrest convention'
- The law on Ship Arrest varies from country to country. That is why we are here today.
- The Seafarers' Rights International ["SRI"] as a useful Guide on Ship Arrests @ www.seafarersrights.org .

- **Resumé**
- **1 77 Countries give effect to the 1952 convention**
- **2 10 other countries base their national laws on the 1999 Geneva Convention.**
- **3 An arrest allows the Court to take possession [of the ship] & prevent the ship leaving..**
- **4 An arrest on the cargo on-board a ship would have the same effect.**

- Alternative way of stopping a ship?
- For unpaid wages why not turn to the Maritime Labour Convention 2006 ["MLC"]. Effective but not a judicial arrest.
- Ship would not be subject to a court supervised process.
- Per 1952 Convention Arrest only for "Maritime Claim" against a ship. Claim must be connected to a ship. Enacted into English law by way of the Administration of Justice Act 1956,
- Convention's list of claims incorporated into the English admiralty jurisdiction "*in rem*".
- Internationally recognized circumstances for arrest were, in general, grounds for proceeding *in rem* in England.
- New grounds grafted onto existing *in rem* rights. Ancient *in rem* rights unaffected now with some statutory extensions.

- 1956 "Rights" did not create maritime liens, per Prof Robert Grime"
-They created some right, but it was not quite the same. It is sometimes called a "statutory lien" or an "arrest lien". The most important difference between it and the ancient maritime lien is that the arrest lien is not created by the event which give rise to the claim, but by proceedings which involved the arrest (*"The Monica S"* [1968]),
- Maritime liens - used to obtain pre-judgement security, by entitling claimant to arrest the ship even when sold to a new owner, or when controlled by a new charterer, managing/operator or other 3rd party.
- Ss 20-24 Supreme Court ACT 1981 -see especially s.20(2)
 - g. In claim for damage to goods carried in a ship, &*
 - h. Any claim arising out of any agreement relating to the carriage of goods in a ship or move the use or hire of a ship.*

- We are getting closer to the main aim of my talk
- Commodities are traded on a daily basis & give rise to many claims & disputes.
- How to seek security from an incident on your doorstep that may involve many contracts with inbuilt jurisdiction clauses from another state.
- Commodities usually traded on standard terms FOB, CIF or C&F.
- [INCOTERMS has a larger list of terms]
- Think about a Seller's duties under the common law & "Classic" FOB & "Extended" FOB contracts. Who has the risk at loading?
- Who are the parties involved and who has the risk of performing his obligations under these contracts?

- We now live in “interesting times - international trade now more difficult following Covid 19 & what is generally accepted as the illegal invasion of Ukraine - plus the evolving ecological problems (droughts and floods).
- FOB contracts are the start of the logistics train [but come after a Sale Contract has been made}.
- Buyer in one Country/Seller in another. Terms agreed - Buyer then charters a ship to load a contractual cargo at a named place within a named period of time.
- Exporting means goods leave the country of origin so Buyer/Seller are dealing arm's length.
- May well have different domestic laws.

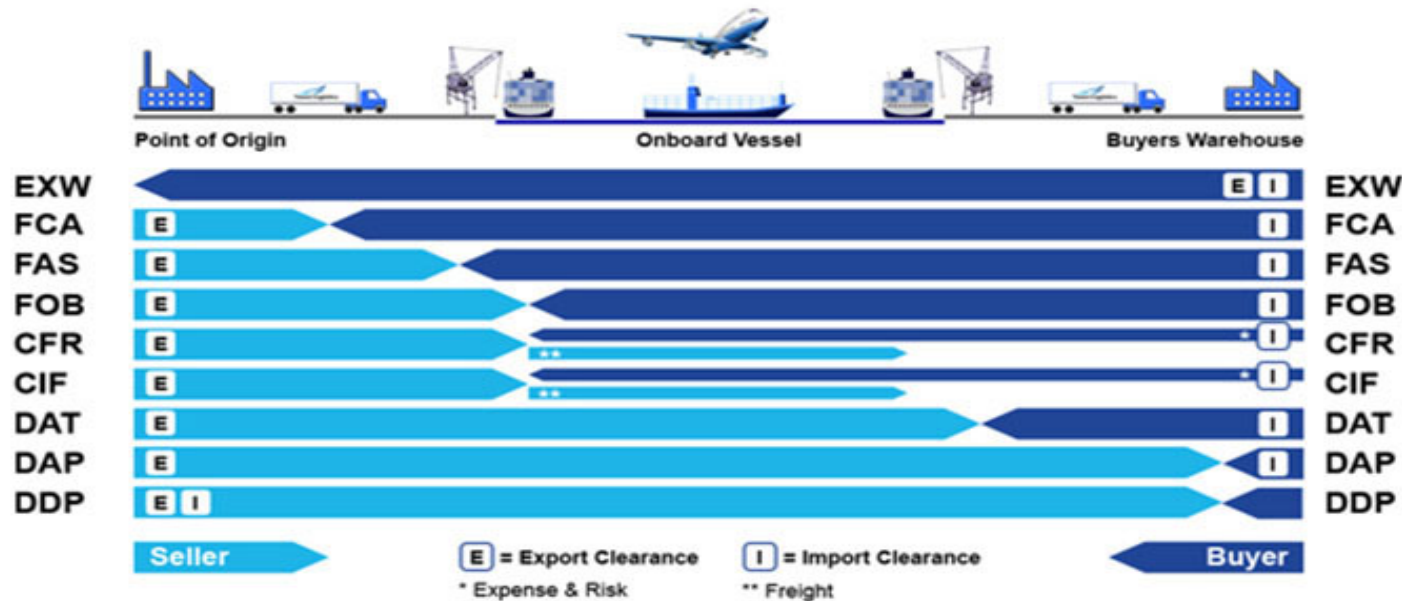
- **Difference between Classic FOB & FOB extended terms**
- FOB Seller simply brings the goods to the ship and his liability ends at the Ship's rail. Carrier responsible for loading stowing and trimming.
- FOB Seller on extended terms has to do much more' - Now described as a flexible instrument. (*Pyrene v Scindia* [1958] 2 QB 402 at 424).
- Extended terms include loading and stevedore costs.
- The *Pyrene* case established "Freedom of Contract" rules. Parties are free to decide who does what.
- CIF or C&F: Straight forward, FOB Buyer [whether on classic or extended terms] will look to sell on the goods under CIF or C&F terms.

- **These contracts are sales on "Shipment Terms".**
- Who are the parties involved?
 - Shipper [probably also the Seller].
 - Buyer
 - The Charterer (whether voyage or time charter)
 - The Carrier [that is the Shipowner].
 - The Buyer's Bank [for sales made against a L/C]
- The question is who has the "risk" such sales?
- The task of defining FOB contracts at common law - said to be difficult because of the flexible nature of such contracts.
- Trading practices have changed - best export sales now made on *F.O.B. S & T* terms [stowed and trimmed].
- Addition of "S&T" has had an impact on when risk passes.

- This is important to Shippers/Exporters/Buyers & Carriers because it answers the question of who has title/property in the goods at the important time.
- The time the important because it may gives rights to a maritime lien.
- **Jurisdiction**
- Convention on contracts for the International sale of goods 1980 [CISG} widely accepted as containing the law in international trade BUT
- It requires 2 contracting parties to be from countries that are signatories to CISG.
- Be aware the United Kingdom is not a signatory to CISG.
- Between 80 - 85% of world trade in cereals done on standard form contracts
- [e.g. GAFTA/FOSFA]. They contain Domicile Clauses by which parties are bound by English law and jurisdiction.
- English law set down in The Sale of Goods Act 1979 & slightly later The Sale and Supply of Goods Act 1984.
- When does risk pass under this statute?

- All trading means taking on risk. In commodity trading look at the mechanics involved. Take a look at the next slide.

WIDELY USED INCOTERMS



- Take a look at the FOB Line - where is the gap between light blue & dark blue?
- FOB Seller waits for Buyer's nominated vessel and brings them to the load berth.
- In a Classic FOB Sale - risk passes from Seller to Buyer at "Ship's Rail".
- Not so in a FOBS&T sale. Why? Who says so?
- Impact of such sales often overlooked.
- FOB Seller needs B/L in order to present "valid & proper" Shipping Documents before he can think of getting paid.
- B/L said to be evidence of the Contract of Carriage between Shipper & Carrier. B/L is therefore a "VID" - a Very Important Document.
- B/L acts as "Document of Title" subject to the "*nemo dat*" rule.
- Contains terms and conditions of the contract between Shipper & Carrier.
- Carrier's primary duty is not toward the sale contract.

- Carrier's primary concern is his liability under the B/L. Why ?
- English law incorporates HVR by way of s.1 of the Carriage of Goods by Sea Act 1924,
- Art. III Rule IV provides that the figures on the B/L will be conclusive evidence between Carrier & 3rd party receiver'
- BUT - 1st step in this is the loading operation itself'
- Carrier goes to berth under terms of the C/P & HVR under a duty to load cargo delivered by the shipper to the ship's side.
- See Art.III r2

"Subject to the provisions of Art. VI, under every contract of carriage of goods by Sea, the carrier, handling, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and indemnities hereinafter set forth."

- Art. 1(e) defines when and where Carrier becomes liable for the goods carried,
 - (e) "Carriage of Goods" covers the period from the time when the goods are loaded on to the time they are discharged from the ship"

So now we see the reasoning behind the mantra " risk passes at the ship's rail".

Only does not if the goods are shipped on FOBS&T terms.

Under a FOBS&T contract Shipper undertakes not just to deliver goods to the ship but to stow and trim them as well.

Loading rating only complete when full contractual quantity as being stowed and trimmed in the holds,

Risk cannot pass before then.

- See following Cases
- *Pyrene v Scindia* [1957] AC 149
- *GH Renton & Navigation Co Ltd* [1954]
- *Jindall Iron & Steel Co Ltd v Islamic Solidarity Company Jordan Inc.* [2003] UKHL 49
- Cargo interests argued Carrier aunt by Art III r.2
- *Pyrene* is the leading authority for the view parties are free to decide for themselves who does what and who will pay for services provided,.
- Common law duty to load can be transferred by agreement to cargo interests.
- *JindaL Iron* was 3rd attempt and failed.

- In the *JindaL Iron HoL* noted that since *Renton* no English textbook writers have challenged its correctness.
- *Freedom of Contract Rules!* Carriers are free to "pass the buck"!
- A FOBS&T Seller under SOGA 1979 would be responsible for arranging loading operation, and
- Can only discharge that duty by putting all of the contracted quantity on board. (*Colley v Overseas Exporters Ltd* [1919] All ER Rep 596)
- Carrier still entitled to clause B/L or refuse to issue B/L
- s.20 of SOGA concerns "passing of risk" but first words of s.20(1) are : "Unless otherwise agreed...."

- Where Buyers & Sellers have "otherwise agreed" it must be that the parties to the loading operation, including the Carrier, have agreed who has the risk and it must be the Seller.
- Must also be that a FOBS&T Seller presenting shipping documents that include a "To Order" B/L intends property and title will only pass to the buyer on payment.
- He must therefore remain on risk'
- Carrier can stand back. He has off-loaded the risk
- Conclusion:
- To arrest you must identify who owns the cargo.
- Be sure who has the title in the goods.

Thank you for listening -