2nd November 2022 Aman Jordan

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Seller duties Under Common Law with regard to "Classic" FOB Contract and an "Extended "FOB Contract

Interesting Differences – Who has the risk at loading?

INTRODUCTION

Shiparrested Members are interested in obtaining security for a Client's Claim by arresting a vessel {or fighting to lift that arrest if instructed by Shipowners].

I will not go into any great detail on arrests covered by the Arrest Convention – I take it as read that you are all experts in your own jurisdiction on arrest of vessels but, as an *aide memoir*, we need to keep in in mind the Arrest Conventions, conveniently set out on the ShipArrested website as below:

- 1952 Brussels Arrest Convention
- 1999 Geneva Arrest Convention
- 1926 Liens & Mortgages Convention
- 1993 Liens & mortgages Convention
- 1967 Int'l Convention for the Unification of Certain Rules relating to

The law on Ship Arrest does of course vary from country to country.[1] That is why we gather here today to exchange ideas and knowledge on the subject.

For further information on ship arrest in specific countries, see the Guides on Ship Arrest in specific countries on the website of Seafarers' Rights International ('SRI') at www.seafarersrights.org.

Resumé on Arrests

1. In 77 countries national laws giving effect to the 1952 Brussels Convention on the Arrest of Sea-going Ships ('the 1952 Convention')

[1] See: Guides on Ship arrests in specific countries on the Seafarers' Rights International ["SRI"] website at www.seafarersrights.org

2. In 10 other countries national laws for such Arrests are based on the 1999 International Convention on Arrest of Ships 1999 ('the 1999 Convention').
3. With an Arrest the Court effectively takes possession of the Ship on behalf of the Claimant and this prevents the ship from leaving port.
4. Another way of stopping the Ship would be, in the case of unpaid wages, to rely on Port State Control Authorities and the Maritime Labour Convention 2006[2] ["MLC"]. That would not be a judicial arrest – the Ship would not be subject to a Court supervised process.
5. Under the 1952 Convention, arrest follows only if there is a 'maritime claim' against the ship. In other words, for it to be a maritime claim it must arise in connection with a ship. The UK enacted the convention by way of the Administration of Justice Act 1956.
6. The Convention's lists of claims were incorporated into the English Admiralty jurisdiction *in rem.* The 1956 act crafted new grounds onto existing rights to proceed *in rem,* so we now have ancient maritime liens together with a number of statutory extensions. The 1956 rights *in rem* did not create maritime liens - per Prof. Robert Grime:

> "The new, 1956, rights *in rem* did not create maritime liens. 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 gives rise to the claim, but by proceedings which involve the arrest (*The Monica S* [1968])[3]. So, the selling of the ship after the event but before proceedings frees her: later dispositions do not"[4]

7. So maritime liens can provide pre-judgement security for a maritime claim by entitling the claimant to arrest the ship even if it has been sold to a new owner or passed into the possession or control of a new charterer, manager, operator or any other third party.
8. Relying on ss 20 -24 of the present Supreme Court Act 1981 - s. 20(2) sets out a virtually comprehensive list of "maritime claims" and, with reference to following two sections

(g) any claim for loss or damage to goods carried in a ship, and

[2] For details see ILO website www.ilo.org/gflosal/standards/maritime=labour-convention/lang- - en/htm
[3] [1968] P.741; [1968] 2 W.L.R.431
[4] Shipping Law 2nd Ed. Prof. Robert Grime page 16.

(h) Any claim uprising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

We shall examine in closer detail who has the risk in the cargo being carried.

9. Ships are for carrying cargoes that are bought and sold on a daily basis, with the risks in such commodity trades giving rise to many claims and disputes.
10. Consider how you would seek security for a client [who believes that he has a valid claim] arising from an incident that takes place on your doorstep but may well involve contracts that have an agreed jurisdiction clause that means you might have to "work" under a different jurisdiction?
11. Commodities are traded on standard terms, basically FOB, CIF or CIF [INCOTERMS has a larger list of standard terms, but I will concentrate on FOB type sales].
12. We will look at a Seller's duties under the Common Law and the "Classic" FOB Contract and an "Extended FOB" Contract. There are interesting differences – Who has the risk at loading[5]?
13. What about a client who believes that he has a valid claim arising from an incident that takes place on your doorstep?
14. Examples that come to mind mainly concern the shipment of cargoes – in fact, problems that frequently crop up in *The International Sale of Goods Carried by Sea?*
15. The load port and the discharge port are places where commodity disputes commonly [frequently] arise. Parties to these disputes are generally parties who are resident in different jurisdictions.
16. Your client may well seek security by way of arresting a ship for loss of or damage to cargo – who should shoulder that risk?
17. The intention of this paper is to shine a light on just where risk can pass from Seller to Buyer at the load port - so that you can take this into account when approached by clients in such a situation.
18. It is important to reflect on what happens in the logistical problems around buying and selling and transporting goods. We live in difficult times which have made international trade difficult, the impact of Covid-19 can still cause problems and what is generally accepted as the illegal invasion of

[5] "Sellers duties [A] Under Common Law FOB Classic" by Aadesh Patil

Ukraine by Russia has made this a very difficult year for Ukrainian exporters. It has also made life difficult for all Black Sea Traders – to say nothing of its world-wide impact on shipping and the world's food supply lines.

19. **So, to begin at the beginning** FOB contracts do of course come into existence before any other part of the logistics chain. A Buyer in one country contracts with a Seller in another country to buy, at some time in the future, an agreed quantity of specified goods to be loaded on a ship that he will then charter with the express purpose of loading the said contractual goods within an agreed period of time.
20. Exporting does of course require that the cargoes ["goods"] being exported will leave the country of origin, and with the International Sale of Goods Carried by Sea in mind, this generally means that the Buyer and Seller are trading at arm's length.

    They will not be in the same country and may well have different domestic laws.
21. To permit such arm's-length trading various contracts were devised which you will know well, but I list them here for convenience.

    21.1 FOB: Free on Board

    Often described by lawyers as a "classic" or "straight" FOB contract.

    A FOB Seller simply brings the goods to the ship. He will be liable for bringing them to the Ship's Rail. In a now famous English law case[6]the judge described fob contracts by saying that *'the fob contract has become a flexible instrument".*

    How right he was.

    21.2 FOB "extended" terms.

    Here we start to look beyond the classic FOB contract to a FOB Contract with "extended" terms. These extended terms can be taken to include loading and stevedore costs.[7]

    21.3 CIF: Carriage, Insurance, Freight or

    21.4 C&F: Carriage & Freight [where the Buyer arranges Cargo Insurance.

[6] *Pyrene Co Ltd v. Scindia Navigation Co Ltd [*1954] 2 QB 402, at 424

[7] The *"Pyrene"* case established that "Freedom of Contract" allows the parties to agree on who does what and who pays for what.

This is straight forward. A FOB Buyer, whether he buys on classic or extended FOB terms will look to sell on the goods on either CIF or C&F terms.

21.5 As said above, firstly there must be an agreement between a Seller and Buyer [and for the purposes of this paper we shall assume that the Seller and the Buyer have mutually agreed terms] for the transfer of the contractual goods from the Seller to the Buyer. Such a sale can be said to be a:

"contract for the sale of and a contract for the purchase of goods on equal terms".

22. Much has been, and will be said, today about English law and Jurisdiction but any Contract of Sale concerning the export of goods is a sale on 'Shipment Terms'

23. Assuming that Sellers and Buyers have agreed terms we will now concentrate on the first steps in any logistics chain for the Sale of Goods to be Carried by Sea. That is the loading of the cargo.

The parties involved will be:

23.1 The Shipper [probably also the Seller]
23.2 The Buyer
23.3 The Charterer (whether voyage or time charter)
23.4 The Carrier [that is the Shipowner]
23.5 The Buyer's Bank (where sales are against a L/C).

24. In this look at the International Sale of Goods Carried by Sea we will try and look at the question of "risk" in such sales. This is surprisingly a subjectwhich many struggle with.

25. It is safe to say that most commodity sales were once made on a FOB basis and, at common law,[8] the task of defining FOB contracts has been a very slow and tough process, because of its flexible nature. To repeat [in brief] a FOB contract is said to be a contract where the

[8] Common law. In England & Wales "common law" is the Basis of the legal system. It is a system of laws based on customs and court decisions [arrived at over a period of time]. A court states an opinion (usually with reasons for the opinion]. Taken together with past decisions they act as "precedent" and are binding on future judges/arbitrators.

Seller's duty is to deliver the goods on board a vessel nominated by a Buyer at his expense [and risk].[9]

26. Times change and most export sales are now made on *FOBS&T* terms.

27. I want to draw your attention to the fact that the addition of the "S&T" [Stowed and Trimmed] element has had an impact on the moment when risk passes.

28. This is of importance to Shippers /Exporters, and Buyers because it raises the question of who has the title/property in the goods at the important time: this being the time when the incident arose that gives a right to a Maritime Lien. It should be of interest to any Member instructed by a possible Claimant.

29. Shippers/Exporters are [or should be] aware of just when risk [that is the risk[10] in the loss of, or damage to, the cargo sold] passes from Seller to Buyer in International Sales.
It is also important that Lawyers representing Shippers/Sellers also understand just where risk sits in the loading operation[11] in order to properly manage this risk.

Jurisdiction

30. While the Convention on Contracts for the International Sale of Goods 1980 (CISG)[12] is widely accepted by many countries as containing the law in international trade, it requires that the two contracting parties be from countries that are signatories to CISG. Be aware that the United Kingdom is not a signatory to CISG.

[9] See *Stock v Inglis* [1884] 12 Q.B.D. 564 at p.573. the judge Brett M.R. put it as being generally understood by Traders that FOB is taken to mean that the Shipper was to put the goods onboard at his expense and at his risk.
[10] Reference to "risk" here is to use it as a shorthand way of "who pays."
[11] The loading operation involves three parties. It starts with the Shipper who presents [ships] goods and has duties to perform and expenses in delivering the goods to the Ship. These expenses have to be paid {accounted for], either by the Seller or the Buyer. [This is what we will explore].
[12] P Viscasillas, 'Applicable Law, the CISG, and the Future Convention on International Commercial Contracts' [2013] 58 Villanova Law Review 733, 734.

31. Commodity Trading relies heavily on Trade Associations. Two major trading associations are GAFTA[13] and FOSFA[14] both of which are based in London.
They provide the standard form contracts most commonly used in agricultural trades.

32. These "Trade" Contracts account for around 80% of world trade in cereals and oil seed. By using ["Trading"] on these contracts Buyers and Sellers accept domicile in England. Trading on these contracts means that they have accepted to be bound by English law and jurisdiction.

33. I can only suggest that English law and jurisdiction has reached this position because it offers the parties certainty in its application. Disputes do arise, no matter how careful parties are, and the Trade Associations have arbitration procedures in place for the resolution ofsuch disputes.

34. English law regarding sales made on such Trade Contracts is set down in the Sale of Goods Act 1979[15] (hereinafter "SOGA 79") and to the slightly later Sale and Supply of Goods Act 1994[16]. Today we will rely mainly on SOGA.

Entering a contract [any contract] means taking on a risk[17].

35. To establish just when "Risk" Passes in commodity sales will require a look at the mechanics of what is involved. International trade begins when a Buyer goes to market and contracts with a Seller in another country and, these

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[13] GAFTA The Grain and Feed Trade Association founded in 1871 is an international, London headquartered trade association consisting of traders, brokers, superintendents, analysts, fumigators, arbitrators and other professionals in the international grain trade. See www.gafta.com

[14] FOSFA The Federation of Oils, Seeds and Fats Associations (**FOSFA** International) is the main trade association for the oil seeds and fats industry. See www.fosfa.org

[15] An Act which regulates English contract law and UK commercial law in respect of goods that are bought & sold. It consolidated the original Sale of Goods Act 1893 and was part of an attempt to codify English legislation. https://www.legislation.gov.uk/ukpga/1979/54/contents

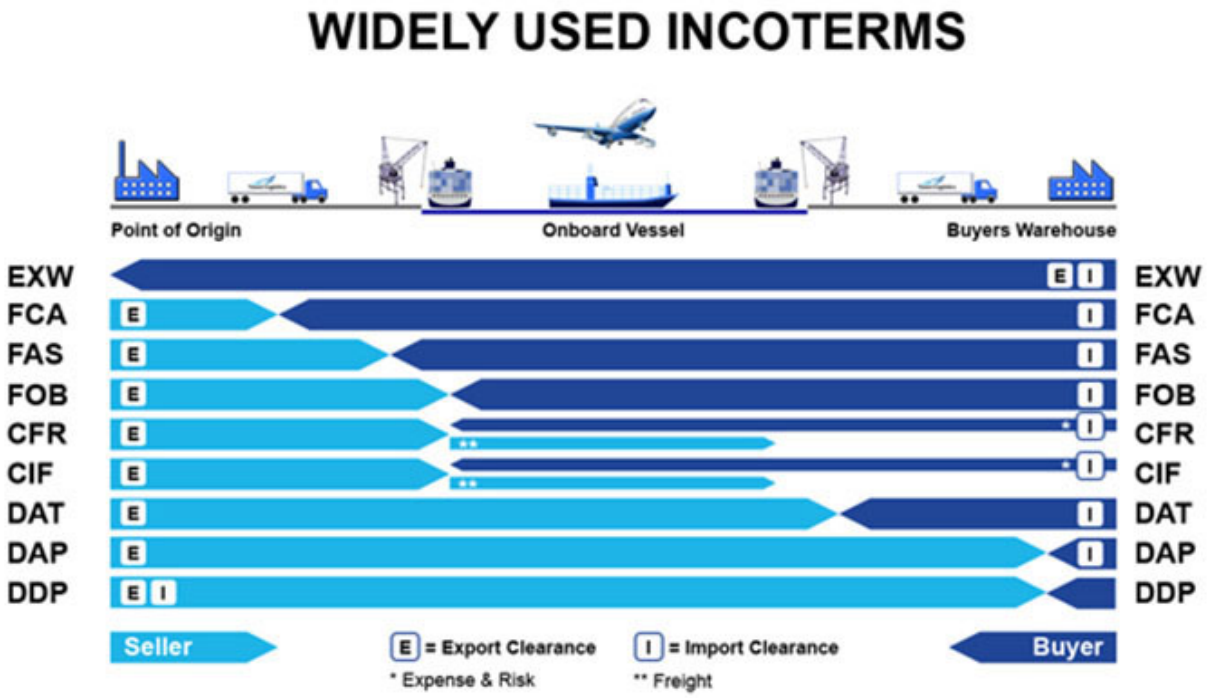
[16] An Act to amend the law relating to the sale of goods; to make provision as to the terms to be implied in certain agreements for the transfer of property in or the hire of goods, in hire-purchase agreements and on the exchange of goods for trading stamps and as to the remedies for breach of the terms of such agreements; and for connected purposes. https://www.legislation.gov.uk/ukpga/1994/35

[17] See f/n 5 above. Once again reference to "risk" here is to use it as a shorthand for "Who Pays."

day, Exporters of basic commodities prefer to sell on FOB[18] terms. This of course requires the Buyer to present "a suitable Vessel" to load the contract cargo at a named port within a named shipment period.

36. While there are a number of different types of contracts that can be used in international trading, and INCOTERMS do provide a guide, please do remember that these terms are not the law. Under English law Arbitrators and Judges will only apply INCOTERMS if they are incorporated into the contract.

I have put a diagram below showing the various options



37. The FOB Seller obviously waits for the vessel nominated by the Buyer to get to the berth nominated by the Seller. Here the FOB Buyer will be wearing two hats:

37.1 Under the Sale Contract he is the Buyer.

37.2 He will be the Charterer towards the Carrier.

[18] Free on Board. This expression has been around for centuries. The easiest way to discover the terms used in such sales is to refer to the ICC "INCOTERMS." See https://2goiccwbo.org Incoterms 2020 by the International Chamber of Commerce (ICC): ICC Rules for the Use of Domestic and International Trade Terms

38. Historically the standard form contracts provided by Trade Associations have been based on a basic, or classic, FOB standard. The more general practice today has changed with most sales now being on a "FOBS&T" basis.

39. It is this fact that needs to be examined. The impact that this has on both the Sales Contract and the Contract of Carriage [The Bill of Lading ["B/L"][19] and the Contract of Affreightment ["COA"][20], also known as a Charterparty, is often overlooked.

40. Why is the contract of carriage, the B/L, so important?

    40.1 Bear in mind that in International Sales the B/L must be transferable and serves three main functions.

    - It acts as a "Conclusive Receipt" by the Carrier for the goods.[21] i.e., it is an acknowledgement that the goods have been loaded, and: -
    - it contains, or evidences the terms of the contract of carriage, and:-
    - it serves as a "Document of Title" to the goods, subject to the *nemo dat* rule[22].

41. As the " Contract of Carriage" a B/L contains the terms and conditions between the Carrier and the Shipper. The contractual Carrier under the B/L may be the physical carrier (Shipowner or Demise Charterer) or another party (such as the charterer, or sub charterer).

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[19] A B/L can be evidence of the contract of carriage, but it is not the contract of carriage itself. That contract is between the carrier & the shipper is **created** when the goods are loaded on board the ship and will therefore already exist before the bill of lading is issued.

[20] COA "Contract of Affreightment." In general, the contract between a Shipowner [or Disponent Owner] & Charterer under which a ship is hired to carry its goods.

[21] Usually with the words "Received on Board in apparent good order & condition."

[22] *Nemo dat quod not habet* Latim maxim meaning "no one gives what they do not have." Sometimes referred to as the *"nemo dat*" rule or principle. It refers to the question whether someone purporting to give or sell property has legal title or right to do so. If not, the gift or transfer will not take effect and cannot be enforced. The transferor's title may be questionable because the property has been stolen or looted or acquired by fraud, or simply because of some error in the process of a prior sale or transfer. [ICLR website definition].

Remember that a Shipowner's primary duty is not to the sale contract but rather to his liability under the Contract of Carriage [the B/L] as the physical and/or contractual Carrier. Where does this concern come from?

42. English law incorporates the Hague-Visby Rules ("HVR")[23] by way of section 1 of the Carriage of Goods by Sea Act 1971[24]. Art. III Rule IV of the HVR

provides that the figures on the B/L will be conclusive evidence between the Carrier and a third-party receiver (to whom the B/L has been transferred in good faith).

43. **BUT** the first step in this operation is the loading operation itself. At this stage, the end Receiver plays no part. The Shipper is the FOB Seller, and it is the Shipper who brings the cargo to be loaded on his Buyer's nominated ship. His main interest in doing this is because, as a FOB Seller, he needs to obtain a "valid and proper B/L" to present to his Buyer in order to obtain payment under the Sale Contract.

44. The FOB Buyer may not be the Receiver and, more often than not, becomes a CIF[25] Seller. Such a Seller also needs to present a "valid and proper B/L" as part of the shipping documents - needed to obtain payment under his CIF Sale.

45. The Carrier, following Charterer's orders, sends his ship to the nominated berth to load the cargo described in the C/P. Under standard terms in a C/P, and the HVR, the ship goes to the berth under a duty to load the cargo delivered to the ship's side by the Shipper.

46. In this scenario the Carrier will be held to the duties laid down in Art III r2 which reads:

> *"Subject to the provisions of Article VI, under every contract of carriage of goods by sea the carrier, in relation to the* ***loading, handling, stowage, carriage,*** *custody, care and discharge of such*

[23] Basically, these are the Hague Rules as amended by the Brussels Protocol 1968. For a useful guide to the HVR see https://www.standardclub.com/fileadmin/uploads/standardclub/Documents/Import/publications/goto-handouts/2767683-contracts-of-carriage-and-bills-of-lading-the-hague-visby-rules.pdf

[24] Traders should leave this discussion to the lawyers. This because English law also has the Carriage of Goods by Sea Act 1992 [which replaced the Bills of Lading Act 1855]. Section 5 (5) of the 1992 Act reads: "The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971.

[25] CIF "Carriage, Insurance & Freight." See again INCOTERMs.

goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and indemnities hereinafter set forth"

47. For the sake of clarity Art. I(e) defines when the Carrier becomes responsible (in other words "liable") for the goods, it reads:

> *"(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."*
>
> Effectively this means that the Carrier would have the responsibility and liability for taking over the loading operation from the moment in time that the Shipper brings the cargo to the ships rail.

48. While it is true to say that the risk in a standard FOB contract would pass from the Shipper to the Carrier at the ships rail; **this would not be the case** where the parties involved have invoked freedom of contract[26] to agree to other terms and conditions to be applied to the loading operation.

49. The more widespread practice today is for the Shipper to agree to include [in the sale contract with his Buyer] for the cargo to be loaded not on standard FOB terms but on FOBS&T terms. In such a case the FOBS&T Buyer will include in the C/P a requirement that the B/L [to be issued by the Carrier to the Shipper] will acknowledge that the cargo was loaded on "FOBS&T" sterms.

50. How does a sale on FOBS&T terms alter the passing of risk?

50.1 In a standard FOB contract, the general rule **is** that "risk" passes from Seller to Buyer on shipment – taken to be the ship's rail but that is **not** the case under a FOBS&T Contract.

50.2 Under a FOBS&T Contract the Shipper has undertaken not just to present the cargo at the ship's side but to arrange and pay for the full cost of the loading operation - which will only be completed when the cargo is fully loaded onboard. The loading

[26] Freedom of contract is something that English Courts strongly support. Unlike civil law countries [1] English law does not recognize the principle of "good faith" [except in certain matters such as insurance] and [2] English law generally does not require a contract to be made "in writing" [again there are certain exceptions such as contracts for the sale of land] in other words, *"what you see is what you get."* More on this at 56 below.

operation is only completed when the full contractual quantity has been stowed and trimmed in the holds [and probably fumigated].

50.3 Risk cannot pass before then.

51. Perhaps surprisingly the view of many traders and freight brokers is still that the risk passes from the Shipper/FOB Seller to the Buyer when the goods pass "at the Ship's Rail."

52. To better understand this please read the following judgements.
    a. *Pyrene v Scindia* [1957] AC 149[27]
    b. *GH Renton & Navigation Co. Ltd.* [1954] cargo owners challenged this Rule and failed. The rule became *ratio decidendi.*
    c. In *Jindal Iron & Steel Co. Ltd and others v. Islamic Solidarity Company Jordan Inc.* [2004] UKHL 49 the House of Lords were again asked to reverse the rule that the parties to the loading operation are free to reallocate risk. [See link to the case].

53. The argument from cargo interests was that the Carrier was bound by Art III r.2 of the HVR – namely that "*2. Subject to the provisions of Article IV, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried."*

    53.1. *Pyrene* v *Scindia* is the leading authority for the view that the parties to the loading operation are free to decide for themselves who does what and who will pay for the services provided.

[27] Six fire tenders sold FOB London to Indian Buyers. Owners negligently dropped 1 fire tender while it was being lifted from the quay on to the vessel causing damage. B/L issued by Owners with damaged tender deleted from the list. FOB Seller sued Owners in tort as risk in the machine had not passed at the time of the accident. Owners contended that they were protected by the package limitation in the Hague Rules. *Held*: Devlin J found Sellers were party to the contract of carriage between the Buyers & Owners. He concentrated on Art III in determining the application of the Hague Rules & thought it was artificial to distinguish between the act of loading prior to the goods' passing the ship's rail and loading subsequent. Although the duty of loading was imposed on owners by Art II, it did not preclude owners from employing a 3rd party to carry out this function.

53.2. Under the common law the duty to load, stow and discharge the cargo *prima facie* rested on shipowners but this duty can be transferred by agreement to cargo interests.

53.3. In *Pyrene* Devlin J pointed out that this rule did not override the freedom of contract to reallocate the functions described in the above Rule when he said:

"The phrase 'shall properly and carefully load' may mean that the carrier shall load and that he shall do it properly carefully: or that he shall do whatever loading he does properly and carefully. The former interpretation has language more closely, but the latter making more consistent with the object of the Rules. Their object, put, I think, correctly in *Carver's Carriage of Goods by Sea,* 9th ed (1952), p 186, is to define not the scope of the contract service, but the terms on which that service to be performed. The extent to which the carrier has to undertake loading of the vessel may depend not only upon different systems of law but upon the custom and practice of the court and the nature of the cargo. It is difficult to believe that the Rules were intended to impose a universal rigidity this respect, or to deny freedom of contract to the carrier. The carrier is practically bound to play some part in the loading and discharging, so that both operations are naturally included in those contracts of carriage. But I see no reason why the rules should not leave the parties free to determine by the contract the part which each has to play. On this view the whole contract of carriage is subject to the rules, but the extent to which loading discharging are brought within the carrier's obligations is left to the parties themselves to decide. I reject the interpretation of loading in article 2 as covering only the second stage of operation. Such authority as there is against it. ……." [*Pyrene* p417/418]

53.4 While *Pyrene* may be considered as *obiter dictum* in *GH Renton & Navigation Co. Ltd.* [1954] cargo owners challenged this Rule and failed. The rule became *ratio decidendi.*

53.5 In *Jindal Iron & Steel Co. Ltd and others v. Islamic Solidarity Company Jordan Inc.* [2004] UKHL 49 the House of Lords were again asked to reverse the rule that the parties to the loading

operation are free to reallocate risk. [See link www.parliment.uk]

53.6 The *Jindal* is case is interesting in that it offers a resume of previous case law by the House of Lords **and** confirms beyond doubt that the reasoning by Devlin J has been confirmed as the position in English law. [See *Jindal* paras 12-14 paras 28 -29].

53.7 Please note that para 21 is of particular interest. It points out that since the decision of the House [*of Lords*] in *Renton* in 1956 no English textbook writers have challenged its correctness.

54. The passing of risk from FOBS&T Seller to FOBS&T Buyer has to be examined in the whole. The parties can exercise their freedom of contract [concerning the loading operation] and the FOBS&T Seller can take on the risks involved in loading.

55. The FOBS&T Seller will have a contract governed by the Sale of Goods Act 1979 ["*SOGA*"] – and would be responsible for the arrangement of the loading

operation and could only discharge this duty by putting all of the contracted quantity of the goods on board[28] . [See also *Colley v Overseas Exporters (1919) Ltd.* [1921] All E.TR. Rep. 596].

56. **The position of the Carrier with regard to "risk" under FOBS&T terms.**

56.1 It is clear from the above that a Carrier is free to contract out of the duties imposed by Art III r.2 of the HVR. Although he must still play his part in the loading operation.

[28] See Colley *v Overseas Exporters (1919) Ltd.* [1921] All E.TR. Rep. 596]. A quantity of unascertained leather goods were sold FOB Liverpool. Buyer failed to nominate a ship with goods left at the docks. Sellers sued for the price. Property did not pass, and McCardie J held at page 598 , *inter alia, "……Nor can it be said that sub-s.(1) of s.49 applies, for the property in the goods has not in fact and in law passed to the buyer. …… rules for passing of property are indicated in ss. 16,17 18 of the Act, and also in s.32. ….. I need only to deal with f.o.b. contracts. It seems clear to me that, in the absence of special agreement, the property and risk in goods does not, in the case of an f.o.b. contract, pass from the seller to the buyer till the goods are actually put on board…In my opinion… no action will lie for the price until the property has passed save only in the special cases provided for in by s.49(2). That seems plain both on the Act and on the Common Law principle. I have searched in vain for authority to the contrary.*

56.2 This must be to the advantage of a Carrier in instances where there has been an incident at the load port, for example where after proceeding to the berth and loading commences but is then stopped by reason of the berth being unsafe.

56.3 Where less than the permitted minimum quantity (under either the Sale Contract or the C/P) has been loaded there could be a dispute over issuing any B/L[29].

57.4 Remember also that there is no obligation on a carrier to issue a B/L[30] the HVR make it clear that the issue of a B/L is only obligatory on the "*demand of the Shipper.*"

Art III Rule 3 reads:

"*After receiving the goods into his charge, the carrier or the master or agent of the carrier, shall* ***on demand of the shipper,*** *issue to the shipper a bill of lading showing among other things:*

(a)

(b)

(c)

58. The FOBS&T Seller has undertaken to be responsible for the loading operation and cannot get to a stage where he can pass risk to his Buyer (who is probably also the Charterer of the ship) until completion of the stowing and trimming of the cargo.

59. An intended or unintended consequence of selling on FOBS&T terms?

59.1 It is widespread practice for sales of commodities to include a contractual requirement that the B/L be to be issued "To Order."

[29] A careful Charterer would do well to include a clause in the C/P to the effect that "Bills of Lading to be issued on competition of loading" as protection for demands from the Shipper for partial Bs/L.
[30] See Art III Rule 3

59.2 This opens the door to s.19 (2) of SOGA the *"Reservation of right of disposal"* which reads:
"s. (2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal".

59.3 A FOBS&T Seller, probably following what was agreed in the Sale Contract with his Buyer, who has requested a "To Order" B/L from the Carrier; has effectively accepted that he has retained the title to the property even where a contractual cargo has been loaded and the Carrier has indeed issued Bs/L.

59.4 While s.20 of SOGA concerns the 'Passing of Risk' the first words of s.20 (1) state: - *"Unless otherwise agreed" ……*

59.5 By agreeing to a FOBS&T Contract the parties (including the Carrier) have "otherwise agreed" who has the risk in the loading operation. It is the FOBS&T Seller.

59.6 It must be that the FOBS&T Seller who presents shipping documents for payment that includes a "To Order" B/L intends that property and title will pass to the Buyer only on payment.

59.7 The other side of this coin is that the FOBS&T Seller will remain "on risk" until he receives payment.

58. Protection

58.1 The position of the Carrier under FOBS&T terms is clear. The Shippers/Sellers have agreed between themselves who will be responsible for arranging and paying for costs of taking delivery from the Shipper at the loadport and for the stowing and trimming of that cargo in the ships holds.

58.2 It follows that the Carrier stands back and is not part of the contractual obligations/liability regime involved in the loading operation which will then fall on the Shipper or the Buyer [if he is shown as the Shipper on the B/L] depending on the terms of the Sale Contract.

58.3 The course and the liabilities of the loading operation under FOBS&T terms are generally born in the first instance by the Shipper/Seller who will seek to recover these costs under the terms of the Sale Contract.

58.4 A Shipper could protect himself from possible liability by simply including the term *"risk to pass at the ship's rail"* in his sale contract. I believe that such a term is often included in FOB sales of non-agricultural cargoes.

58.5 A Carrier will remain bound by the terms of the C/P and the duties under the HVR.

59. Conclusion

59.1 I hope that I have shone a light on current practice used in the commodity trades and given readers some background to assist in understanding the position that a Shipper/Seller may find himself in when problems arise from the cargo being sold or intended to be loaded.

59.2 Disputes will still arise but a better understanding of the consequences of freedom of contract when selling on FOBS&T terms mentioned today may assist in finding a resolution of such disputes or, indeed in seeking security from the right party.

59.3 Claims by cargo interests against Carriers, where some cargo has been loaded but the contract quantity has not been reached and the cargo onboard has deteriorated, may be brought where the Carrier will then look to recover damages [if he is found liable] from the Charterer.

59.4 As a footnote to this discussion, the recent Court of Appeal decision in the *Eternal Bliss* [31] case had been thought to have settled the question of what damages are recoverable for exceeding the laytime [when it decided that it was demurrage and no more]. Leave to appeal to the Supreme Court has now been granted so watch this space.

CONCLUSION

[31] K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (*The "Eternal Bliss*") – Court of Appeal (Sir Geoffrey Vos, MR, Newey, and Males LJJ) [2021] EWCA Civ 1712 – 18 November 2021

There are times when parties to a commodity dispute will seek security for their claim, be that against the Shipper, Carrier, Charterer, or a Receiver [who is not happy with goods delivered to him].

There are many different contracts involved and I hope that this examination of the risk involved may assist.

To have a Maritime Lien is one thing but the aim of that lien is to attach it to property owned by the right person. Who has the title to the property in question should be the right target.

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