AN EXAMINATION OF THE RELATIONSHIP BETWEEN THE FOB SELLER AND THE CARRYING SHIP IN FOB CONTRACTS FOR CARRIAGE OF GOODS

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Abstract

Beyond the expenses incurred on putting goods on board in an FOB Contract lies the duties and obligations of the parties – FOB Seller, FOB Buyer and Carrier or Carrying Ship in the bargain of purchase and sale to the point of delivery. The duty/ obligation depends, amongst others, on the type of the agreement or contract between the parties.This paper discusses the parties liable before and after the goods have crossed the rail in the event of any damage. To this extent, the paper examines the point at which a relationship or obligation arises between an FOB seller and the carrier as well as the implication of such relationship.Also, the paper reviews the introduction of Rotterdam Rules making clearer the responsibility of the parties.

Keywords: FOB Seller, FOB Buyer, Contract, Carriage of goods

Introduction

Free on Board (FOB) contracts are known to extend beyond the bounds of ordinary contracts of sale. It is not unusual to have, as part of FOB contracts, a contract of carriage of goods with the consequence that there will be varying degrees of rights and liabilities among the parties involved. Nonetheless, there is no confusion as to the position of the FOB buyer in its relationship with every party involved in the FOB contract. It is not the case with the FOB seller, especially with its relationship with the carrier. A significant duty of the FOB seller is to get the goods on board the vessel nominated by the FOB buyer.[1] However, pending the time goods cross the rail, the risk remains with the FOB seller who most likely is not a party to the contract of carriage.[2] The validity of the above statement is dependent on the type of FOB contract. There are three types of FOB contracts.

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[1] *All Russian Co-operative Society Ltd. v. Belgium & Sons* (1954) 13 Lloyd's Rep. p. 351.

[2] N Kouladis, *Principles of law Relating to International Trade* 2006 Springer Pg 202.

This paper seeks to identify and review the nature of the relationship that exists between the FOB seller and the carrier and the effect the relationship would have on a third party. Under these circumstances, it is imperative to consider the privity of contract, limited contract, and contract for the benefit of the third party. Finally, the responsibility and liabilities of sellers and buyers that were introduced by the Rotterdam rules shall be considered.

FOB Contracts

A universally accepted definition of a FOB contract is not possible because "it is a flexible instrument."[3] This has made it impossible to give a satisfactory definition of this kind of contract. Nonetheless, the main purpose of a FOB contract is that the seller is bound at his expense to place the goods 'free on board' a ship for transmission to the buyer. Arguably, the concept of FOB contracts goes beyond the expenses incurred in putting the goods on board as it also deals with the obligations of the parties added to the bare bargain of purchase and sale.[4] It defines the obligations which arise in connection with the transmission of the goods from the FOB seller to the FOB buyer. Ordinarily, the FOB seller, except in the face of a contractual agreement, is not bound to find shipping space for the goods [5] or to insure them. The cost of carriage and insurance incurred by the FOB seller is normally on the FOB buyer's account.

Types of FOB Contracts

There are different classes of FOB contracts. These are dependent on the nature of duties undertaken by the parties involved. These duties vary depending on the terms of individual contracts. As laid down in *Pyrene Co Ltd v Scindia Navigation Co, Ltd*,[6] there are three types of FOB contracts. Delvin J gave a helpful explanation of the types of FOB contracts.

The Classic FOB

[3] Per Delvin J *Pyrene Co. Ltd v Scindia Navigation Co. Ltd* (1954) 2 QB 402 at 424.
[4] *Wimble Sons & Co v Rosenberg* (1913) 3 K.B 743 at 756.
[5] *Ian Stach Ltd v Baker Bosley Ltd* [1958] 1 Lloyd's Rep. 127.
[6] (1954) 2 QB 402.

The classic FOB contract is one in which the FOB seller puts the goods on board the ship on the account of the buyer so that the carrier will look to the FOB buyer for freight payment. The ship would have been nominated by the FOB buyer.[7] However, the FOB seller procures a bill of lading[8] on terms usual in the trade.[9] This will usually be in the buyer's name. In recent times however, it is becoming more common that the bill of lading is in the FOB seller's name although in a transferable form so that it can be negotiated with the FOB buyer at a later date. The reason the FOB seller wants to procure the bill of lading in his name is his desire for security after delivery and pending payment. In situations like that, it is more appropriate to think of the FOB seller as the principal in the contract of carriage and not as the FOB buyer's agent.

The Extended FOB

The second type of FOB contract referred to in Pyrene[10] is where the FOB seller makes all the arrangements with the carrier without any reference to any nomination of a ship by the FOB buyer. The contract may then provide for his taking the bill of lading[11] in his name and obtaining payment against transfer. In this second type of FOB, it is the FOB seller that is the original party to the contract of carriage. The FOB buyer will acquire rights under the contract only upon transfer of the bill to him.

The Third Type of FOB

Here, the shipping arrangements are made by the FOB buyer, or by the buyer's forwarding agent. It is the agent that has the responsibility of booking a space on the carrying ship and the FOB seller only discharges his duty by putting the goods on board, getting the mate's receipt, and handing it over to the forwarding agent to enable him to obtain the bill of lading.[12]

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[7] *Wimble Sons v. Rosenberg & Sons* [1913] 3 K.B. 743.
[8] A bill of lading is is an undertaking by the carrier to the world at large that the carrier will duly deliver the goods to the holder of the bill of lading. It describes the goods, state the quantity and its apparent order and condition, when shipped or received by the carrier.
[9] *Benjamin's Sale of Goods* (6th edn, Sweet & Maxwell, London, 2002).
[10] Ibid.
[11] Or his chartering the ship on which the goods are to be carried as in *Satef Huttenes Albertus SpA v Paloma Tercera Shipping Co. SA (The Pegase)* [1981] 1 Lloyd's Rep 175.
[12] *President of India v Matacalfe Shipping Line* [1970] 1 Q.B. 289.

The essence of the classification is that it draws attention to the fact that the different forms of FOB contracts have given rise to different kinds of relationships among the parties involved. As it is not clear if there exists any relationship between some parties in some types of FOB contracts, it is important that the issue is addressed. It is imperative that in distinguishing between the different forms of FOB contracts, attention is paid to the consequences of (a) The relationship between the buyer and the seller (b) The relationship between, on the one hand, the buyer and the carrying ship and, on the other hand, the seller and the carrying ship and (c) The effect these relationships would have on a third party.

The Relationship between the FOB Seller and the Carrier

Unless by contractual agreement, it is not the responsibility of the FOB seller to arrange a carrying ship and space in the carrying ship for the onward transmission of the goods to the buyer.[13] As such, drawing from the types or classifications of FOB, it is in order to conclude that the duty to arrange for the ship that will eventually convey the goods to the buyer could be the responsibility of either the seller or buyer. Consequently, if the duty to arrange for the carrying ship falls on the buyer, he is automatically a party to the contract of carriage. This implies that there is a relationship between the two and as such the contract of carriage of goods by sea Act is binding on the buyer.

The relationship that exists between the FOB seller and the carrying vessel should always be easily definable where, for instance, the FOB seller did not participate in the contract of carriage but obtained the bill of lading in his name. It is a contentious position, notwithstanding, and it may be argued that by obtaining the bill of lading in his name (as is sometimes the case on FOB contracts), the FOB seller automatically becomes a party to the contract of carriage of goods by sea. Where the features of the FOB contract fall within the purview of the extended FOB contract, a logical argument that the FOB seller was a party to the contract could be put forward and the relationship between the FOB seller and the carrying ship becomes clearer.

[13] *Ian Stach Ltd v Baker Bosley Ltd (1958) 2 Q.B 130 at 139*.
Securing a space in the carrying ship is usually a subject of contractual agreement. However, in a situation where the contract is silent, it is the duty of the buyer.

In a FOB contract, risk does not pass from the seller to the buyer until the goods have crossed the rail.[14] As such, once the goods cross the rail, and anything happens to the goods, the position of the law is clear. The problem, however, lies with what happens if the goods gets damaged before crossing the rail, while the carrier was transferring the goods into the ship. These questions arise: Does the FOB seller have any redress against the carrying ship? Does any contract exist between them on which the FOB seller could hinge his claim? Is there the possibility of extending the contract between the FOB buyer and the carrying ship to between the FOB seller and the carrying ship? Is it possible to say that as the law is the agent of the FOB buyer, the contract between the FOB seller and carrying ship is applicable and binding on the FOB seller as well? The answers to the above questions are dependent on whether or not there is a relationship between the FOB seller and carrier. If yes, what kind of relationship is it?[15] A close look at the extended FOB contract reveals that there is a relationship between both parties in situations where the features of the FOB contract is an image of the second type of FOB contract. Determining if there is a relationship between the FOB seller and the carrier may not be that simplistic due to the characteristics of the contract and the roles played by both parties involved in the contract of carriage.

Pre-Bill of Lading Relationship

Under the classic FOB, the FOB Buyer is the one saddled with the responsibility of nominating a vessel and in some situations, the responsibility extends to reserving a space on board the vessel that will eventually carry the goods for onward transmission to the FOB buyer.[16] As such, the responsibility of the FOB seller is to deliver the goods to the side of the vessel for the carrier to load on board the vessel and he thereafter obtains the bill of lading in

[14] *Frebold and Sturznickel (trading as Panda OHG) v Circle Products Ltd* [1970] 1 Lloyd's Rep 299; (1970) 114 S.J. 262 CA (Civ Div); *NSW Leather Company Pty Ltd v Vanguard Insurance Co Ltd* [1991] 25 NSW LR 699.
[15] *Mediterranean Shipping Co. S.A. & Anor v. Enemaku & Anor (2003) LPELR 9253 (CA)*.
[16] *El Amria, The and Elmria The* [1982] 2 Lloyd's Rep. 28.

the FOB buyer's name. In such situations, it is very difficult to conclude that there really exists a relationship between the FOB seller and the carrier.

However, where the FOB seller was mandated to reserve spaces for the goods on board the vessel, it could be argued that there really was a pre-bill of lading contract between the carrier and the FOB seller and as such, a relationship. This could at best be summed as a pre-bill of lading contract. However, Delvin J[17] has said that the FOB seller in a classic FOB is a party (until the bill of lading is taken in the buyer's name) to the contract having made preliminary arrangements. The seller should be deemed to have acted as a principal and not as an agent.

Privity of Contract

The doctrine of privity of contract is that a party who was not a party to the contract cannot share in the rights and liabilities arising from the contract.[18] Under common law, only a promisee may enforce the promise. This means that if a third party is not a promisee, he is not privy to the contract.[19] The absence of privity of contract makes it impossible to subject the FOB seller to the terms of the contract between the carrier and the FOB buyer.

Based on the above principle of law, and considering the role of the FOB seller in the third type of FOB contract, ascertaining the existence of a privity of contract between the FOB seller and the carrying vessel may be problematic. The role of the FOB seller in the third class of FOB contract, is to deliver the goods to the carrier for onward transmission to the FOB buyer. In essence, he was not privy to the contract and as such, there is no reason he should be a victim of an agreement he was not a party to. It is however possible, as per the analysis of Delvin J,[20] for the FOB seller to be deemed an agent of the FOB buyer under the third type of FOB contract. According to him,

> Where the shipper takes out a bill of lading or an insurance policy, he has at the time of the contract himself got the property in the goods; the question whether he contracts for the benefit

[17] *Pyrene Co. Ltd v Scindia Navigation Co. Ltd* (1954) 2 QB 402.
[18] G.H Treitel, The Law of Contract, 9th ed, 1995; *Adeoye & Ors v. Olopo & Ors* (2020) LPELR- 51017 (CA); *J.E Oshevire Ltd v. Tripoli Motors* (1997) LPELR – 1584 (SC); *Makwe v Nwukor & Anor* (2001) LPELR 1830 (SC).
[19] *Dunlop Tyre Co v Selfridge* [1915] AC 847.
[20] *Pyrene Co. Ltd v Scindia Navigation Co. Ltd* (1954) 2 QB 402.

> of subsequent owners depends on proof of his intention at the time of contracting. But where, as in this case, he has not got the property at the time of the contract, and does not intend to acquire it before the contract begins to operate, he must act as agent. He cannot intend otherwise; the intention is inherent in the act; he must either profess agency or confess himself a wrongdoer. For if the ship owner lifts the seller's goods from the dock without the seller's authority he is guilty of conversion to which the shipper, by requiring him to do it, makes himself a party.

However, the FOB seller's argument that he lacks privity of contract since he only acted as the agent of the FOB buyer, if considered along the strict common law principle, would appear to be right but for some exceptions to the principle of privity of contract which includes the agency rule. The agency rule exception, which is applicable to the FOB seller is to the extent that an agent may enter a contract on behalf of his principal with a third party and form a binding contract between the principal and third party.[21] It is now trite that in entering a contract, the promisee did not only do so on his own behalf but also as the agent of the intended beneficiary of the promise, so that the latter is not in truth a stranger to the contract but a second premise. The court gave a good illustration of the agency approach in the decision of the Privy Council in The *Eurymedon.*[22]

In the situation of the FOB seller, it could be argued that the buyer acted as the agent of the seller for the purpose of fulfilling the contract of sale between them and as such, the buyer should be seen as the agent of the seller rather than the seller as the agent of the buyer. If this were the case, the agreement entered into by the buyer with the carrier should be binding on the seller. By the terms of FOB contracts, it is only possible for the seller to put the goods across the ship when the buyer has completed shipping arrangements and the terms of the contract should apply to the FOB seller because he is deemed to be an undisclosed principal. Hence, the FOB buyer in booking a space was not only acting for himself but also for the FOB seller.

[21] *Scruttons Ltd v Midland Silicones Ltd* [1962] AC 446.
[22] *New Zealand Shipping Co Ltd v A.M Satterthwaite & Co Ltd* (1975) AC 154.

Implied Contract

An implied contract is an agreement that is legally enforceable as a result of the relationship that exists among the parties to the contract or due to the application of the legal principle of equity.[23] For instance, a contract is implied when a party accepts a benefit from another party in situations where the benefit could not be termed a gift. In a case like this, the party that receives and benefits from the gift is under a legal obligation to give fair value for the benefit received. The carrying ship would only carry the goods under a bill of lading incorporating the carriage of goods by Sea Act. The Act, would therefore, have been incorporated into the contract of carriage made on behalf of the FOB buyer by the FOB seller with the carrying ship. One is compelled to say that the subject of contention which is whether or not there is any implied contractual relationship between the seller and the carrying ship should be in the affirmative.[24]

The above submission is based on the premise that once an FOB seller brings the goods for shipment and they are taken into the custody of the ship for loading, an implied contract is created on the terms as to the care of the goods contained in the contract of carriage.[25] It is paramount that the FOB seller puts the goods on board for him to fulfil the contract of sale and as such, he should be aware that a bill of lading incorporating the Act would be issued. Once this is done, a contract is implied to exist between the FOB seller and the carrying ship.[26] Failure to imply a contract would amount to a voluntary act on the part of the carrier which is much doubted because the carrier would not want to put something on nothing as there must be a basis for accepting the goods. It must be noted that if the ship was protected under the contract of carriage and not protected while taking the goods the carrier has no obligation to accept the goods. One is aware of the fact that an argument could be brought forward that the bill of lading has not been issued and as such, the terms are not applicable.

[23] Halsbury's Laws of England, volume 9 paragraph 212.
[24] *Pacers Multi-Dynamics Ltd v. M.V. Dancing Sisters & Anor* (2012) LPELR-7848 (SC).
[25] Article II of the Schedule on the Carriage of Goods by Sea Act:
"Subject to the provisions of Article VI, under any contract of carriage of goods by sea the carrier, in relation to the loading, handing, stowage, carriage, custody, care and discharge of such goods, shall be subject to the responsibilities and liabilities, and entitled to the rights and immunities hereinafter set forth.
[26] *Adesanya v. Leigh Hoegh & Co* (1968) SC.

The position of the law is clear on that and it is to the effect that once parties enter into a contract of carriage, the terms of the bill of lading becomes binding on them from that moment notwithstanding the fact that it has not been issued but because they are aware that it shall be issued.[27]The fact that an implied contract exists between the seller and the carrier could also be considered from the point that when the goods were brought to the side of the vessel by the seller and he grants the carrier the permission to lift the goods into the vessel, the seller impliedly becomes a party to the contract of carriage.[28] This point can be buttressed from the fact that if the carrier were sued for conversion, he could earnestly seek redress against the seller.

Furthermore, it could be argued that once the seller delivers the goods by the side of the vessel, the seller impliedly invites the carrier to the goods and by lifting the goods, the carrier has accepted the offer. In accepting the offer, which ultimately creates an implied contract, the contract would have incorporated terms usual in the trade. This is because the carrier could not contract on terms different from those he offered on the voyage as a whole.[29] It would now be improper for the FOB seller to disregard the terms of contract under which the carrying vessel agreed to accept the tender on board.

Limited Contracts

After considering implied contracts, it is still possible to argue that even if there was an implied contract, on the true construction of the rules, it does not apply to their situation. This is due to the fact that the contract is a limited one in the sense that terms of contract plus the rights and liabilities of each party to the contract is limited to a particular period. This is premised on the fact that by the true construction, the rules would not apply until the goods that have crossed the ship's rail are 'loaded on'[30] and, therefore, since the implied contract, should only be in relation to loading, it should not be regarded as a contract of carriage within the purview of the rules, for the goods were yet to cross the ship's rail. By article 1(b)[31] a

[27] Per Delvin J *Pyrene Co. Ltd v Scindia Navigation Co. Ltd* (1954) 2 QB 402.
[28] *Pacers Multi-Dynamics Ltd v. M.V. Dancing Sisters & Anor* (2012) LPELR-7848 (SC); *Mediterranean Shipping Co. S.A & Anor v. Enemaku & Anor* (2003) LPELR -9253 (CA).
[29] *Elder Dempster & Co Ltd v Paterson Zochonis & Co (1924) A.C 522*.
[30] *NSW Leather Company Pty Ltd v Vanguard Insurance Co Ltd* [1991] 25 NSW LR 699.
[31] Carriage of Goods by Sea Act.

contract of carriage is only a contract of carriage for the purpose of the rules in so far as the documents covering the contract relates to carriage by sea, and article 1(e) limits the period covered by the contract of carriage to the time when they are "loaded on to the time when they are discharged from the ship." Article 2 limits the scope of the rights and immunities given by article 4 rule 5.[32]

It is possible to argue that the words 'in relation to the loading' apply to the time between 'loading on;' that is, when the goods are over the ship's rail and discharged. This is because the period which article 1 (e) refers to as 'carriage of goods' does not refer to everything that happened under the contract outside the period. The period in question here starts when the goods reach the ship's rail, because, before then, the goods cannot be said to be on the ship.[33] The rules must be construed according to English principles[34] and the words 'loaded on' in article 1(e) given their natural meaning of 'across the ship's rail.' The carrier's obligation is to take the goods at the ship's rail and his responsibilities start there.[35]

The above argument is difficult to sustain as there are loopholes in it. Firstly, it is agreed that though the bill of lading, which incorporates the terms of the contract of carriage may not have been before the goods cross the rail, parties are aware that a bill of lading would be issued later and as such, it becomes binding on them from when they entered into the contract of carriage. Also, it is wrong to attach the rights and liabilities in the rules[36] to a particular period of time. Instead, the rules should be attached to a part of the contract. This is in the sense that a single contract could cover both inland and sea transport. Should this be the case, the only relevant rule is that which relates to carriage of goods by sea.[37] Article II borders on 'the right and liabilities' of the carrying ship and goes to the extent of mentioning its right to limit his liability. However, it can only do this "in relation to loading" and under every contract of carriage." The bone of contention here is when this loading begins. It must be noted that the contract can be divided into periods- a period of inland transport, a period of

[32] Carriage of Goods by Sea Act.
[33] *Goodwin, Ferreira & Co v Lamport & Holt Ltd (1929) 141 L.T 494*.
[34] *Scrutton on charterparties and Bills of lading 15th Ed, (1948), pg. 445*.
[35] *Harris v Best, Ryley & Co (1892) 68 L.T 76*.
[36] Hague/Visby rules.
[37] *Pyrene Co. Ltd v Scindia Navigation Co. Ltd (1954) 2 Q.B 402*.

sea transport, and a period of inland transport. It is possible to want to limit the wording 'when the goods are loaded on' to the second period which by implication is to start upon the completion of loading to the completion of discharge. However, this strict literal interpretation could create some absurdities.[38] This is because, if considered alongside the fact that "till completion of discharge" is included, how then can it be explained that loading is excluded? As such, it is submitted that loading should cover from the time when the carrier lifts the goods from the side of the vessel into the vessel to when it is delivered to the buyer. It is not out of place to point out that the operation of the rule is determined by the limits of the contract of carriage and not by the limits of time. Also, the fact that article 7 gives freedom of contract prior to loading on and subsequent to the discharge from the carrier, one cannot but say that loading on must be included.

Also, if considered from the point of article 3 rule 2,[39]

> The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

The import of this is that the carrier shall load and do whatever loading he does properly and with care. If that interpretation holds water, then it is not out of place to conclude that it is intended that the period of loading should be extended to before the goods cross the rail and not until the goods are already seated in the vessel. It is even implied in the article that the carrier is naturally under an obligation to play some role in loading and discharging and leaves no option than to conclude that loading and discharge are naturally included in the contract of carriage. It is submitted here that loading includes transferring of the goods from the side of the vessel into the vessel with care.

From the foregoing, the resultant effect of the provision of the rules on the relationship of the FOB seller and the carrier is that the seller cannot hide behind the fact there is a limited contract which makes it impossible for him to be deemed a part of the contract. Based on the meanings given to terms [40] 'loaded on' and 'contract of carriage,' one cannot but submit that

[38] *Ibid.*
[39] Hague Rule.
[40] *Pyrene Co. Ltd v Scindia Navigation Co. Ltd* (1954) 2 Q.B 402 *per Delvin J.*

the kind of contract of carriage in which the FOB seller finds himself cannot be regarded as a limited contract.

Contract for the benefit of the party

It has been argued in the Pyrene case that the FOB buyer in nominating a ship and reserving a space on board the vessel did not only act on his own benefit but also for the benefit of the FOB seller. The reason put forward being that if the FOB buyer had failed to nominate the ship, it would have been impossible for the FOB seller to carry out his part of the contract of sale and as such that the FOB buyer should be deemed as the agent of the FOB seller for that purpose and at the same time that the FOB seller should be deemed to be a party to the contract of carriage.

The school of thought that the FOB buyer should be deemed as the agent of the FOB seller for that purposes is acceptable. However, that the FOB buyer should be deemed as carrying out a task for the benefit of the FOB seller is not totally acceptable. The reason is that although the FOB seller would be able to perform his own part of the contract of sale only if the FOB buyer nominates an effective ship, the failure to nominate a vessel means that the FOB seller could bring an action for damages against the FOB buyer based on breach of contractual agreements. It must be noted that the FOB buyer's failure to nominate a vessel is as good as nominating an ineffective ship. It is better to sum it up that the buyer was doing his part of the contract rather than doing the seller a favour.

The implication of the Relationship between the FOB Seller and the Carrying Ship

Having taken a close look at the probable position of the both parties with regard to if there existed a relationship between them, it is important to state the likely legal implication(s) of each position.

Firstly, if the argument that was put forward in favour of the FOB seller is that that no relationship exists between him and the carrying ship, then, it would amount to the fact that the FOB seller would be in a better position than the FOB buyer who happens to be the FOB seller's principal in this situation. Since there is no relationship which the carrying ship could

lay claim to, it is certain that if anything should happen to the goods at the point of being transferred into the ship, the FOB seller would be able to bring an action outside of the law governing the contract of carriage. The implication of the FOB seller instituting an action outside of the law governing the contract of carriage is that the carrying ship would not be able to exercise his right to limit his liabilities and as such would expose him to damage that may not be good for the carrying ship and commerce in general.

As a result of this, the carrying ship may have no option than to enter a separate and distinct contract with the FOB seller before accepting to transfer the goods from the side of the vessel into the vessel. This serves as a protection to the seller. If that be the case, the agreement may even be more stringent than what would have obtained if there were to be a consensus that there existed an implied contract between them based on the terms of contract of carriage of goods by sea. It is not impossible to foresee a case of inability to reach an agreement by the parties. If this were to be the case, the FOB seller, if possible, would only be left with the option of finding a means of getting the goods on board the vessel. Failure to do this would mean that he has breached the contract he entered into on FOB terms with the buyer. This would ultimately expose him to damages.

Nevertheless, considering the fact that there really exists a pre-bill of lading contract between the seller and the carrier under the first type of FOB contract, the terms and law governing the pre-bill of lading contract would be different. This is based on the fact that the bill of lading was issued after the contract between the seller and the carrier plus the fact that the contract was between two different people. Delvin J stated that the terms of the bill of lading should be deemed to have become enforceable from the moment the contract of carriage was entered into, based on the premise that the parties are all aware that the bill is intended to be used to regulate their contract, the pre-bill of lading relationship, on the whole, may not have any effect. However, if the position put forward in favour of the carrying ship pulls through, it implies that the contract of carriage by sea would be applicable to the FOB seller and the carrying ship would be able to exercise his right even with regards to limiting his liabilities. As such there would not be a need to enter a separate and distinct agreement with the seller.

The Rotterdam Rules and Its Effect on the FOB Seller

The Rotterdam Rules is an international convention consisting of 96 articles. The main aim of this convention is to create uniform rules on carriage of goods by sea that provides for the technological and commercial developments that have taken place since the adoption of Hague, Hague – Visby and Hamburg rules.[41] The Rotterdam Rules seek to bring about changes in the duties and period of responsibility of the carrier under the contract of carriage. Although the Rotterdam Rules have features which are synonymous to those of Hague and Hague-Visby rules, which impose positive duties on the carrier, it has however, gone beyond the basics of The Hague and Hague-Visby rules to place on the carrier's shoulders additional responsibilities. The inclusion of a new concept of documentary shipper makes it different from what obtains in previous rules.

The inclusion of the concept of documentary shipper is classic and novel when compared with the Hague/Visby rule. It is classic in the sense that it seeks to bring a person who was not a party to the contract of carriage but who only agrees that his name be used as a shipper to the same position as the original party to the contract. As such, such a person will also become liable to the carrier as provided under Act 33[42] in case anything goes wrong alongside the original party to the contract of carriage. However, when the position of the FOB seller is considered in relation to that of a documentary shipper, one might initially feel that the provision will be unfair to the FOB seller because he might initially not be party to the contract of carriage. That position is negated by the ability of the FOB seller to take out the bill of lading in his name and as a result, he becomes the documentary shipper under the Rotterdam Rules. The FOB seller would not be favourably disposed to the idea of being regarded as a documentary shipper with its attendant liabilities, especially because he has no benefit to derive from the contract of carriage. However, if all the arguments that have been put forward in this paper regarding the position and relationship of an FOB contract with the carrier are considered closely, it will be clear that the documentary shipper is simply an extension of the FOB seller. The only change is that the FOB seller becomes liable alongside

[41] See the preamble to the Rotterdam Rules and also official records of the General assembly, fifty-first session Supplement No 17 (A/51/17) para 210.
[42] Rotterdam Rules.

the buyer under a documentary shipper arrangement. It might not be proper for the FOB seller to complain because, he stands to derive some benefit(s) from the contract of carriage in the sense that by accepting the goods (i.e. the carrier) he has helped the FOB seller in fulfilling a part of the contract of sale. If the carrier refuses to load the goods, the seller would have recourse against the buyer for nominating a ship that is regarded as a non-efficient vessel.

Another new thing under the Rotterdam Rules is that the carrier's period of responsibility begins when he receives the goods for carriage.[43]This is quite distinct from what obtains in the Hague-Hague Visby rules which only stipulates that carriage of goods covers the period from the time when the goods are 'loaded on'[44] which is capable of causing confusion. This is because there will always be a need to define 'loaded on'. The Rotterdam Rules under article 12(1) is capable of causing confusion unless read along side articles 12(2)a and 12(3). Hence, if considered alongside the position of the FOB seller and the carrying ship, there is no question as to when the obligations of the carrier began because it has been stated that if the laws of the place of receipt requires that the goods be handed over to an authority, the period of responsibility starts when the carrier collects the goods from the authority or third party.[45] In the absence of that, it is possible for the parties in question to agree on the time and location of the receipt of goods which would inadvertently serve as when the period of responsibility began.[46] However, what is difficult to ascertain is whether or not the FOB rule that property in the goods does not pass until the goods have crossed the rail would survive this Rotterdam Rule. The reason is that since it is possible for the parties to agree as to time and place where the receipt would take place (this could be anywhere) the FOB seller still be responsible for the goods till they have crossed the rail, even after handing over the goods to the FOB buyer's contracted carrier who ought to properly and carefully receive, load, handle, stow, carry, keep, care for, unload, and deliver the goods.[47] It is strongly suggested that for the purposes of the Rotterdam Rules, property should be deemed passed once the carrier has taken over responsibility of the goods.

[43] Rotterdam Rules, art 12.
[44] Hague-Visby Rules, art 1(e).
[45] Rotterdam Rules, art 12(2)(a).
[46] Rotterdam Rules, art 12(3).
[47] Rotterdam Rules, art 13(1).

Conclusion

The position of the FOB seller with regards to his legal relationship with the carrying ship is not a very clear one. However, after considering the arguments that could be advanced by both the FOB seller and the carrying ship in a contract of carriage, this writer feels compelled to state that there is an implied contract between the two parties as a result of which there is a deemed relationship between them. It would be absurd to say that no relationship existed between the two parties because on what basis would it be said that the carrier agreed to lift the goods from the side of the ship on board the ship? At the same time when considered from the point of view that probably what existed between the carrier and the buyer is a limited contract, it should not be stretched to include the FOB shipper. But a close look at terms in the Hague/Visby rule and the meaning accorded to them by the court in the decided case of *Pyrene Co Ltd v Scindia Navigation Co. Ltd*[48] one cannot but say that there was no limited contract and as such it would amount to absurdities to attempt to give terms like 'loading' a close meaning. The reason is that such restricted or closed meaning has the tendency of leading to a deviation from the intention of the law makers and as such lead to miscarriage of justice.

However, the fact that some of the contracts have been termed as the contract for the benefit of the FOB seller in the sense that in nominating a ship and reserving a space on board the vessel, the FOB buyer did not only act on his own behalf but also for the benefit of the FOB seller if the buyer fails to nominate the vessel. That the buyer might not be able to carry out his own part of the contract of sale is questionable because it should be seen more as the buyer doing what he ought to do under the contract of sale.

The relationship of the FOB seller and the carrier has its legal implication which in some situations may not be palatable for commerce. It appears that in situations where there exists a pre-bill of lading contract, the relationship between the FOB seller and the carrier would not be regulated by the terms incorporated in the bill of lading. However, going by the

[48] (1954) 2 Q.B 402.

position laid down in the Pyrene, the bill of lading dates back to when the contract of carriage was entered into and as such, should be enforceable in a pre-bill of lading contract.

The Rotterdam Rules has nonetheless introduced a new rule called the Documentary Shipper. This provision brings along with it an unprecedented level of liability for a person who though not a party to the contract of carriage agrees that his name should be used as the shipper. Consequent upon the agreement, such a person shall be deemed liable alongside the original party to the contract of carriage. The FOB seller seems to be referred to as the documentary shipper under the Rotterdam Rules going by the definition given to the documentary shipper. The general implication of this position under the Rotterdam Rules is that it appears the FOB seller is being put in position of liability for a contract which he derives no benefit from. In the case of a classic FOB contract however, the FOB seller is a party and stands to benefit from it. This is aside the fact that there is an implied contract.

Furthermore, the period of responsibility of the carrier under the Rotterdam Rules is made clear and it extends to the moment when the goods are handed over to the carrier. Consequently, the matter of the time the goods are loaded on is no longer an issue.