THE CONCEPTS OF LOADING & DISCHARGE IN THE CARRIAGE OF GOODS BY SEA ACT, 1925

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INTRODUCTION

Modern transport has advanced by leaps and bounds over the centuries. Maritime transport has also been a beneficiary of these technological advancements. However, to fully grasp these developments in transport technology, it becomes imperative for shippers and carriers to have knowledge about traditional methods of international transport. Maritime transport has been a go to mode of transport for exports since time immemorial.

In the event the Master of a vessel is responsible for the loading and discharge of cargo, it becomes imperative that he and his employees have adequate know-how about the multifarious types of cargo they may carry and more importantly the methods of loading and discharge. Skilled and proficient stevedores actually handle the loading and discharge of cargo. Yet the master of the vessel may still have to supervise the work of these stevedores. However, with the coming up of Indian Carriage of Goods of Sea Act, 1925 based on The Hague Rules, 1924 the dynamics of these responsibilities stood altered.

Keeping these facts in mind, this paper is an attempt to research into the legal aspects of maritime transport, with special focus on the concepts of loading and discharge. Relevant case laws and commentaries have been utilised to achieve the purpose of this paper. However, the list of cases is not exhaustive.

THE CONCEPT OF LOADING AND DISCHARGE

Loading as a combined process was laid down in the cases of *Harris* v. *Best, Ryley, Ryley & Co*[1] and *Argonaut Navigation Co Ltd* v. *Ministry of Food*[2]; the charterer had the duty of lifting the cargo to the rail of the ship, the first stage of loading; and the duty of the ship-owner to

[1] Harris v. Best, Ryley, Ryley & Co, (1892) 68 L.T. 76.
[2] Argonaut Navigation Co Ltd v. Ministry of Food, (1949) 1 K.B. 572.

transfer it on board and stow it, the second stage. *Pyrene Co Ltd* v. *Scinidia Navigation Co Ltd*[3], is a landmark case with reference to the concepts of loading and discharge. It was decided under The Hague-Visby Rules; and threw light on the interpretation of Article I(e)[4] and Article III, r.2[5] of The Hague Rules. It was held that the rights and liabilities under the rules are attached to the contract or part of the contract, rather than to a period of time. The rationale behind "part of a contract" was that a single contract may encompass transport on both sea and land; hence, the part which falls within the rules is that which "*relates to the carriage of goods by sea*", as given under Article 1(b)[6]. To illustrate, the carrier is under an obligation to exercise due diligence in manning, equipping and making the vessel seaworthy; which is independent of time.[7] Similarly, the terms of the contract of carriage by sea determines the operation of the rules and is not dictated by time.

Further, there is no special significance needed to be accorded to the phrase "loaded on" in Article 1(e). The object is not to stipulate an accurate instant of time; and the operation of rules does not begin and end with a precise period of time. The object of the phrase "*when goods are loaded on*" in Article 1(e) is to identify loading as the first operation in the series of operations ("handling, stowage, carriage, custody and care") which constitute the carriage of goods by sea; and similarly the phrase "when they are discharged" indicates the last operation.

The carrier is practically obligated to take some part in the loading operation, but the scope and area of the part that he is to play is determined by the contract of carriage and may further depend upon the custom and trade practice of the port and the nature of the cargo. The phrase "shall properly and carefully load" in Art. III r.2 is not designed to define the scope and area of the carrier's part in the loading operation but defines the terms on which that service should be performed.[8] Therefore, where goods sold under an FOB contract and loaded from the quay

[3] Pyrene Co Ltd v. Scindia Navigation Co Ltd, [1954] 2 Q.B.
[4] 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.*"
[5] Reads "*2. Subject to the provisions of Article 4, the carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.*"
[6] Reads, "*Contract of carriage applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.*"
[7] Leo D' Arcy et al., SCHMITTOFF'S EXPORT TRADE: LAW AND PRACTICE OF INTERNATIONAL TRADE, 333, (11th ed., 2006).
[8] GH Renton & Co Ltd v. Palmyra Trading Corporation of Panama; The Caspiana, [1957] A.C. 149; The Jordan II [2004] UKHL 49, upheld the *ratio* of Renton case, that a term shifting the duty of loading to the shipper did

in the ship's tackle were damaged by the negligence of the carrier's servants before they crossed the ship's rail (dropped on the quay), the carriers were liable because as per the contract they were responsible for the whole of loading, and not only for the part following the crossing of the rail.[9]

The carrier's duty to properly and carefully discharge goods carried, as stipulated in Art. III r.2, is generally ended when the goods are delivered from the ship to a person entitled to receive them[10] in ostensibly the same condition and order as on shipment.[11] Nonetheless, in the event that they are discharged into a lighter, the ship-owner continues to be liable if they are damaged by other cargoes in the lighter which have negligently been stowed on top of them.[12] As the phraseology of Art. III, r.2 defines the terms on which the contract of carriage is to be performed without any geographical connotation, it does nullify a clause according to which the carrier is entitled, if the port of discharge is strikebound to discharge the goods at any other safe and convenient port[13], the cost of the same will have to be borne by the shipper. By virtue of Art. III, r.8[14], any term in the contract of carriage seeking to relieve or lessen the carrier's liability in respect of the goods is null and void.[15]

The Indian position is similar to the above legal propositions; and was reflected in the case of *Thakur Shipping Co. Ltd., Bombay* v. *Food Corporation of India*[16], one of the issues before the court was whether the carrier was liable for damages, when under the Charter party terms, the loading and discharge was to be done by the shippers. It was contended by the respondent/defendant that there was a statutory obligation under Article 3, r.2. This was dismissed by the court relying on Article 6, which gives liberty to the parties to fix any terms, which may be at variance to the statute but not against public policy. The Court followed the

not violate Art. III (8) of The Hague Rules as an attempt to contract out of r.III (2); *See* Carver's CARRIAGE OF GOODS BY SEA, (1952).

[9] Pyrene Co Ltd v. Scindia Navigation Co Ltd, [1954] 2 Q.B.

[10] Sze Hai Tong Bank Ltd v. Rambler Cycle Co Ltd, [1959] 2 Lloyd's Rep. 114, 120.

[11] Gosse Millard v. Canadian Government Merchant Marine, American Can Co v. Same, [1927] 2 K.B. 432 at 434.

[12] Goodwin, Ferreiera & Co Ltd v. Laport and Holt Ltd, (1920) 34 I.I.L.R 192, 194.

[13] GH Renton & Co Ltd v. Palmyra Trading Corporation of Panama; The Caspiana, [1957] A.C. 149.

[14] Reads, "*8. Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to, or in connexion with, goods arising from negligence, fault, or failure in the duties and obligations provided in this Article or lessening such liability otherwise than as provided in this Convention, shall be null and void and of no effect. A benefit of insurance in favour of the carrier or similar clause shall be deemed to be a clause relieving the carrier from liability.*"

[15] The Saudi Prince (No.2), [1988] 1 Lloyd's Rep. 1.

[16] Thakur Shipping Co. Ltd., Bombay v. Food Corporation of India, AIR 1983 Mad. 105.

ratio laid down in *Food Corporation of India* v. *Prosperity Steamship Co.*[17], which had upheld the terms of the contract as well.

COMMENCEMENT OF LOADING

As the ship's tackle was used in *Pyrene* v. *Scindia* and the carrier undertakes loading, it would appear that loading begins when the tackle is attached to the cargo at the quay. Ship's tackle has been outdated and replaced by engagement of stevedores by carriers as part of their duties and the use of shore equipment; the loading would appear to start when they commence work on the cargo for the purpose of loading it.[18] In other circumstances (like, loading from a grain elevator or by pump) there may nonetheless be recourse to the ship's rail, or a flange connection.[19]

COMPLETION OF DISCHARGE

Similarly, where the carrier undertakes unloading and ship's tackle is utilised, discharge stops where the goods are unhooked from the tackle on the quay.[20] The overall outcome is frequently stated as the "tackle to tackle" or "hook to hook" principle, though these phrases would be more appropriate to an interpretation which *requires* the carrier to perform the loading and unloading operations.[21] There is supplementary authority in connection with lighterage. In the event goods are discharged into a lighter it has been held that the Rule will still apply until this has occurred (though they not extend to the lighter).[22] Analogous reasoning would imply that, where stevedores are utilised, deposition of goods on the quay stops discharge; though precise identification of that moment may not be possible if the goods are shifted direct to storage, and

[17] Food Corporation of India v. Prosperity Steamship Co., (1977) 1 Mad LJ 278.
[18] Raymond Buke (Motors) Ltd v. Mersey Docks and Harbour Board [1986], 1 Lloyd's Rep 155.
[19] Thomas Gilbert Carver *etal*, CARVER ON BILLS OF LADING, 659, (3rd edn., 2011).
[20] Tetley, MARINE CARGO CLAIM, 25, (4th ed., 2008).
[21] A draft of 1921 actually used the words "*from the time when the goods are received on the ship's tackle [palan du navire] to the time when they are unloaded from the ship's tackle*." The words were removed in the same year. *See* Berlingieri, 798, 804, 810. The Australian Carriage of Goods by Sea Rule 1990 seek to solve the problem by defining in considerable detail "carriage of goods by sea" so as to cover the period when the goods are "in charge of" the carrier. *See* Hetherington, [1999] L.M.C.L.Q 12; *see also* Hamburg Rules, Art. 4.
[22] Goodwin, Ferreira & Co v. Lamport & Holt Lines Ltd, (1929) 34 L.I.L Rep. 192 (no discharge till all intended goods in lighter, including other goods); The Arawa [1977] 2 Lloyd's Rep. 416 at 425-426 (reversed on other grounds [1980] 2 Llyod's Rep. 135). But KMA Abdul Rahim v. Owner of Lexa Maersk [1973] 2 M.L.J. 121.

there may again be a tendency to fall back on the ship's rail rule[23], or some other appropriate time (passing the flange connection) for liquid cargoes.[24]

The following section discusses the nitty-gritties of loading and discharge through case laws.

LOADING BROKER

In *Heskell* v. *Continental Express Ltd* [25], Devlin J. made a reference to trade practices and described a loading broker as an agent, hired: to arrange for the goods to be brought alongside the vessel; to make custom entries for the cargo; to pay any dues on the cargo; and to collect the completed bill of lading and give it to the shipper, after shipment.[26] Most shipping lines entrust the arranging for cargo to a loading broker. The broker advertises the date of sailing in papers, journals etc. A sailing card may also be circulated to the customers physically or electronically; it would contain the name of the vessel, port of loading, date of commencement and closing for loading. A shipmaster will be entitled to refuse loading if a shipper delivers the cargo after the closing date.[27] The role of the broker and other principles were reiterated in the Indian case of *N. Ponnappan* v *Assistant Commissioner Customs*.[28]

BRINGING THE CARGO ALONGSIDE

In the case of *Grant & Co.* v. *Coverdale, Todd & Co.*[29], a ship headed to load iron. The time for loading was to begin as soon as the vessel was ready to load, except in cases of strikes, frosts, or other unavoidable accidents capable of precluding loading. However, owing to frost, there was a delay in bringing the cargo to the docks. It was held that the charterer was liable

[23] Nikolay Malakhov Shipping Co Ltf v. SEAS Sapfor Ltd (1998) 44 N.S.W.L.R. 371 at 389, *per* Shellar J.A; *see also* Cole J.A. at 417.
[24] Seafood Import Pty Ltd v. ANL Singapore Pte Ltd [2010] FCA 702; (2010) 272 A.L.R. 149, it was held that the duty of care of cargo as regards discharge extended to discharge of a container supplied by the ship the refrigeration machinery of which was ineffective to operate in the port terminal and before the contrainer might be expected to be opened, by reason of a propensity (stemming from incompatible software) to become stuck in defrost mode.
[25] Heskell v. Continental Express Ltd, [1950] 1 All E.R. 1033.
[26] Paul Todd, CASES AND MATERIAL ON INTERNATIONAL TRADE LAW, 687, (1st ed., 2003).
[27] It is generally a few days before the actual sailing, so as to prepare the vessel for the voyage.
[28] N. Ponnappan v Assistant Commissioner Customs, W.P. (MD) No.9351 of 2016 & WMP (MD) Nos. 7404 & 7719 of 2016.
[29] Grant & Co. v. Coverdale, Todd & Co., (1884), 9 A. C. 470.

for the delay as the frost was not of the nature that could prevent delay, by the House of Lords. In common law, exception clauses regarding loading generally protect the charterer only if actual loading was prevented and will not be applicable when he is not able to get the goods to the port.[30]

LOADING A FULL AND COMPLETE CARGO

In *Hunter* v. *Fry*[31], the charter-party had stated that the charterer was to load a "*full and complete cargo*". 336 tons had been loaded by the charterer although the vessel could carry 400 tons of that type of cargo. In common law, the charterer must load a full and complete cargo and not only equal to the ship's burden as stated in the charter-party.[32] It was held by the King's Bench that the ship-owner was entitled to damages for dead freight, for incomplete cargo.

The obligation to load a full and complete cargo is subject to the *de minimis* rule.[33] In *Margaronis Navigation Agency Ltd.* v. *Henry W. Peaboy & Co. of London, Ltd*.[34], as per the terms of a charterer-party the charterer had an obligation to load full and complete cargo of maize. It should've amounted to 12,600 tons, but only 12,588 tons 4 cwt was loaded. It was held by the Court of Appeals that this amount was not in a commercial sense a full and complete cargo and that quantity was outside the limits of the *de minimis* rule.

Under common law, if a charterer leaves spaces between the items of cargo which he had loaded and does not fill up those spaces, the charterer will be liable for damages for "*broken stowage*".[35] In the case of *Cole* v. *Meek*[36] the charterer was to provide "*a full and complete cargo of sugar or other lawful produce*". Mahogany logs was loaded, but with spaces left between the logs. The Court of Common pleas held that he was bound to provide sugar or other produce of the port of loading to fill the spaces. Since that was not done, damages had to be paid for broken stowage.

[30] E.R.H. Ivamy, CASEBOOK ON CARRIAGE BY SEA, 75, (4th ed., 1997).
[31] Hunter v. Fry, (1819), 2 B. & Ald. 421.
[32] E.R.H. Ivamy, *supra* note 30, at 76.
[33] E.R.H. Ivamy, *supra* note 30, at 77.
[34] Margaronis Navigation Agency Ltd. v. Henry W. Peaboy & Co. of London, Ltd. [1964] 2 Lloyd's Rep. 153.
[35] E.R.H. Ivamy, *supra* note 30, at 78.
[36] Cole v. Meek, (1864), 33 L.J.C.P. 183.

WHAT CONSTITUTES A SAFE PORT

The port selected by the charterer for discharge must be a safe port.[37] However, what constitutes a safe port is circumstantial. In the case of *Leeds Shipping Co., Ltd.* v. *Societe Francaise Bunge*[38], the charter-party stated that the vessel was to proceed to "*one or two safe ports in Morocco*". The charterer directed the vessel to Mogador. In that port, there was a lack of shelter and a liability of onset of unpredictable high wind which cause an anchor to drag. The port was near some rocks and shallows and the anchorage was restricted. The Court of Appeal held the port was unsafe.

OR SO NEAR THERETO AS SHE MAY SAFELY GET

Facts and circumstances of case determine whether a ship has reached a place sufficiently near to the point named in the contract.[39] In *The "Athamas" (owners)* v. *Dig Vijay Cement Co., Ltd*[40], according to the charter-party, a vessel was to discharge her cargo at Pnom-Penh or *"so near thereto as she may safely get*". The vessel could not reach there and had to discharge at Saigon, which was 250 miles away. The Court of Appeal held that the in the circumstances of the case, discharge at Saigon was sufficient compliance.

DAMAGE CAUSED BY ENTERING UNSAFE PORT

In the case of *Reardon Smith Line Ltd.* v. *Australian Wheat Board*[41], the charterer had directed the vessel to a port in Western Australia. After the vessel's arrival and while the loading was being carried out, the wind freshened and became a gale force and damaged the vessel. The Judicial Committee of the Privy Council held that the port was unsafe and that the master of

[37] E.R.H. Ivamy, *supra* note 30, at 80.
[38] Leeds Shipping Co., Ltd. v. Societe Francaise Bunge, [1958] 2 Lloyd's Rep. 127.
[39] E.R.H. Ivamy, *supra* note 30, at 82.
[40] The "Athamas" (owners) v. Dig Vijay Cement Co., Ltd, [1963] 1 Lloyd's Rep. 287.
[41] Reardon Smith Line Ltd. v. Australian Wheat Board, [1956] 1 All E.R. 456.

the ship had acted reasonably in going there. The damage to the vessel flowed from the breach of the charter-party and consequently the liability was attached to the charterer. A charterer who nominates an unsafe port will be liable for any damage so caused as long as it is not remote.[42]

COST OF DISCHARGING

The terms of the charter-party determine whether the ship-owner or the charterer bears the cost of discharging or loading.[43] In the case of *S.G. Embiricos Ltd. v. Tradax Internacional S.A.; the "Azuero"*[44] clause 48 of the charter-party stated "*Charterers' stevedores to be employed by vessel at discharge port and discharge to be free of expense to the vessel*". During discharge, the hatches were opened and closed by the stevedores at the port of discharge. It was alleged by the charterers that the ship-owner had to bear the expense of discharge, as part of fulfilling the duty to take proper charge of the cargo during discharge. However, the Queen's Bench Division held that the opening and closing of hatches were part of discharge and the expenses had to be borne by the charterers.

CONCLUSION

The concepts of loading and discharge appear simple at first glance, but on a deeper inspection it was found out that there are certain complexities and certain legal niceties as well. In a practical sense the carrier may have to perform some part in the process of loading and discharge. The analysis of the rules and the case laws has led to possible inferences detailed below. The responsibility of loading and discharge is determined by the contract of carriage and may further depend upon the customs and trade practices of the port and the nature of the cargo. The carrier's duty to properly and carefully discharge goods carried ends when the goods are delivered to the person entitled to receive them in the ostensibly the same condition. The courts appear to favour the freedom of contract principle; but any term in the contract of carriage seeking to relieve or lessen the carrier's liability in respect of the cargo maybe struck down as null and void.

[42] E.R.H. Ivamy, *supra* note 30, at 83.
[43] E.R.H. Ivamy, *supra* note 30, at 84.
[44] S.G. Embiricos Ltd. v. Tradax Internacional S.A.: The "Azuero", [1967] 1 Lloyds's Rep. 464.

With respect to the nitty-gritties of these concepts, the findings are briefed below – Most shipping lines entrust the arranging for cargo to a loading broker, to arrange for the goods to be brought to the vessel; to make custom entries, to pay any dues on the cargo and may collect the completed bill of lading. Further loading clauses protect the charterer only if actual loading was prevented and will not if he was unable to bring the goods himself. If the charterer has undertaken to load a full and complete cargo under the charter-party, he must fulfil that obligation; if not he may be liable. The obligation to load a full and complete cargo is also subject to the *de minimis* rule. A safe port must be selected by the charterer for discharge. The question whether a ship has reached a place sufficiently near to the point named in the contract depends on the facts and circumstances. A charterer will be liable for damages if he has nominated an unsafe port. The cost of discharging or loading depends on the terms of the charter-party.