

G. THE TRANSFER OF THE CONTRACT

(1) Bills of Lading and Analogous Shipping Documents Ordinance (Cap 440)

[cf. Carriage of Goods by Sea Act 1924 (UK), repealing Bills of Lading Act 1855]

Section 3 (shipping documents covered under Ordinance)

- s.3(1)(a) bills of lading
(b) sea waybills
(c) ship's delivery orders

Definitions:

s.3(2): **B/L** not cover documents incapable of transfer either by endorsement, or (as bearer bill) by delivery without endorsement

➔ NOT cover straight B/L

s.3(3): **sea waybill** as document not B/L but

- is receipt for goods or evidences contract for carriage of goods by sea
- identifies the person to whom delivery of goods is to be made by carrier

➔ Cover straight B/L

s.3(4): **ship's delivery order** as documents neither B/L nor sea waybill; contains an undertaking:

- (a) given under the contract for carriage by sea of the goods
- (b) by carrier to person identified in the document that he will deliver the goods to which the document relates to that person

Section 4(1)

- (a) Lawful holder of B/L [cover banks: NO liability unless s.5 applies]
- (b) Person entitled to delivery of goods under sea waybill
- (c) Person entitled to delivery of goods under ship's delivery order
- have transferred to them the right to sue under the contract of carriage as if they were party to the contract

Section 5(1)

Where s.4(1) operates, and that person

- takes or demands delivery of goods from the carrier; or
- makes a claim under the contract of carriage against the carrier in respect of any of those goods; or
- before having the rights vested in him, took or demanded delivery of goods from the carrier

Become subject to the same liabilities under the contract as if he were a party to the contract

(2) **Brandt v Liverpool Contract**

- As implied contract between carrier and buyer (incorporate carrier's obligations as set out in B/L), i.e. promise by shipowner to delivery on B/L terms
- Need consideration (for any contract): payment of any outstanding freight

NB: Reliability doubted: *The Aramis* [1989] Lloyd's Rep 213

- Always no contractual intention:
 - “mere facts (a) an endorsee, as holder of a bill of lading to demand delivery, does so, and (b) that the shipowner, bound by contract with his shipper (and perhaps his charterer) to deliver goods to any party presenting the bill of lading, duly makes such delivery” (at 224)

(3) **Tort**

Action for negligence is only possible where Plaintiff owned or possessed goods at the time when they were damaged, lost or destroyed

- *The Aliakmon* [1986] AC 785 (HL): action as one for pure economic loss

H. THE CIF AND FOB CONTRACTS

Basic Principles for CIF Contract

- Risk passes on shipment to buyer

Horst v Biddell Bros [1912] AC 18 (HL)

- CIF contract for sale of hops from Pacific Coast to England
- Plaintiff as assignee for value of the sales contract
- P demanded samples to be submitted for acceptance before giving delivery of hops; or examination of hops at delivery
- D refused
- P sued for breach of contract, and D counterclaimed

Held:

- Delivery of bill of lading (at reasonable time) treated as delivery of goods
- Buyer has to pay upon delivery of B/L, with no right to inspect goods before accepting goods

Plaimar v Waters (1945) 72 CLR 304 (HCA)

- Goods on ship bound for Singapore (then to Fremantle), but then unheard of probably due to loss under state of war then
- Appellant (buyer) presented with B/L, but payment refused and document rejected
- Respondent (seller) claimed for price and insurance payment

Held:

- Buyer had to pay upon delivery of B/L
- Should claim for loss of goods under insurance [but on facts, no claim possible as B/L (and thus insurance) contained clause exempting ship-owner from liability for loss or damage at port of transshipment]

(1) Extent to which Variation is possible for CIF contract

The Gabbiano [1940] P 166

- Sale of goods (manganiferous) from Britain (S) to Czechoslovakia (B) [at time of shipment, Czechoslovakia incorporated into German Reich; shipping to Stettin] Contract contained clause that any goods not arriving would be written off contract
- British Gov't seized goods
 - S (British firm) claimed property in goods
 - AG's Argument: although form as CIF contract, in fact not at law

Held:

- "writing-off" clause is inappropriate to CIF contract as buyer not at risk when events mentioned in the clause happened
- **BUT** contract may remain CIF contract with variation, e.g. if events mentioned in clause did not happen

(2) Duties of Seller

(ii) To ship goods which are conforming at time of shipment in respect of:

- Title
- Description (SGO s.15): cover date of shipment
NB: cases holding sellers to exact compliance with specification

Arcos v Ronassen [1933] AC 470

- Sale of Russian timber to England
- Contract allowed some variations on length and breadth, but NOT thickness (1/2 inch)
 - ONLY 5% complied with thickness; buyer rejected goods

Held:

- Buyer entitled to demand goods comply with description in contract, and thus not bound to accept the goods tendered
- Reason: if the parties did not intend the description to be strictly complied with, why did they bother to include them in the contract? [FR: though customers in England then not satisfied with Russian timber then]

NB: Time (especially month) of shipment as part of description of goods, see ***Bower v Shand*** (1877) App Cas 455

(4) Documents required: B/L and required features

1. B/L tendered should provide continuous documentary cover: cover all through shipment¹

Hansson v Hamel & Horley [1922] 2 AC 36

- Swedish merchant sold to English company guano in bags CIF Norway to Kobe or Yokohama
- Seller bought goods with B/L procured from Hamburg to Japan (originally from Norway to Hamburg)
- Buyer rejected documents (including ocean B/L) upon tendering by Seller
- Seller sued for price of goods

Held: Ocean B/L not B/L as stipulated in contract

[FR: EITHER S gives undertaking for whole transit (but no reason to bear past liability of carrier for acts done; OR to get B/L issued by 2nd vessel saying that goods received from 1st vessel, or vice versa]

2. “Clean” (i.e. contains no “clausings” as to the apparent order and condition of the goods on shipment)² → Phrase appearing on B/L

The Galatia [1980] 1 WLR 495 (CA) (Goode, pp 894-5)

- C & F contract for sale of sugar (12,000-13,200 tonnes)
- When part of sugar loaded onto vessel, fire broke out
 - 200 tonnes damaged either by fire or by water used to extinguish it
 - Discharged but not commercially practicable to recondition it
- Balance safely loaded, arrived at destination, and accepted by buyer
- **BUT** with typewritten notation: “Cargo covered by this Bill of Lading has been discharged [at loading port] view damaged by fire and/or water used to extinguish fire for which general average declared”

Held:

- B/L did not cast doubt on the condition of the goods **at the time of shipment**
- B/L still merchantable (though in unusual form) **[Though may adduce evidence to show not “fit to pass current in commerce”]**
- B/L **NOT rendered “unclean”** by inclusion of the common provision “weight, measure quantity, condition, contents and value unknown” since (even assuming that s standard term included in the bill, as opposed to notation in the margin, could constitute clausings of the bill) such a statement does not qualify the acknowledgement of receipt in apparent good order and condition.

¹ Goode: “[B/L] must cover the whole of the agreed transit, and not... be a B/L issued by an intermediate carrier..., for the buyer would have no direct claim against the first carrier for the first part of the voyage.” (p 893, point (e), citing this case)

² Goode: “bears no clause or notation which expressly declares a defective condition of the goods and/or the packaging” (p 894) [usually written in margin by ship-owner]

“Spent” B/L: when goods covered by B/L have been delivered to person entitled to delivery under it

- NOT “spent” if delivered to wrong person
 - ➔ **Unresolved:** delivery of goods without B/L
 - Potential for fraud if person taking delivery actually NOT entitled to goods: sells goods to B, and also pledges B/L to C (Carver, [6-032])
 - BUT if delivered to person entitled under B/L, who gives letter of indemnity: remain documents of title (see *obiter* in ***The Future Express*** [1992] Lloyd’s Rep 79)
 - **cf.** Carver’s submission “should not be regarded as document of title”, citing *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami* [1997] 2 Lloyd’s Rep 89, 97: “worthless as security because the [goods] were delivered without them”)
 - Also uncertainty on how long quality of B/L as D/T would last

(5) Documents other than B/L

(i) Valid tender if ship's D/O, i.e. attornment to carrier

Waren Import Krohn v Thegra [1975] 1 Lloyd's Rep 146

- Contract for sale of Thailand manioc chips "CIF Rotterdam"
- Payment on presentation of a full set on board B/L and/or delivery order
- Seller tendered (for one instalment) D/O (instead of B/L) addressed to the agents of its associated company (charterer shipping goods) to deliver goods to order of seller
- Buyer rejected D/O as not ship's delivery order under contract

Held:

- "[ship's D/O] must... be documents issued by or on behalf of ship-owners while the goods are in their possession or at least under their control and containing some form of undertaking that they will be delivered to the buyers ... on presentation of the documents" (at 155)
- i.e. should have re-issue documents with such undertaking; or if contained such undertaking, irrelevant whether issued by ship-owner or its agent
 - On facts: fall short of contractual requirement as (i) addressed to person who are not in possession of goods; and (ii) contained no undertaking by anyone for delivery of goods to buyer

(ii) NOT valid tender if merchant's D/O → **NOT CIF contract, BUT arrival contract**

The Julia [1949] AC 293 (HL)

- Contract for sale of 500 tons of rye for shipment "CIF Antwerp"
- Payment on first presentation of B/L and/or delivery order
- Seller exercised option to demand payment in exchange for D/O
- BUT Antwerp occupied by Germany before ship arrived: goods discharged at Lisbon under agreement between owner and seller (charterer); sold by seller
 - Buyer sued for reimbursement of paid amount

Held:

- Although stated as CIF contract, it was **NOT** CIF by considering the true effect of the terms: as contract to deliver at Antwerp
- Payment NOT for presentation of documents, BUT delivery of goods
 - On facts: frustration with total failure of consideration; thus buyer entitled to recover the sum paid

(iii) Freight forwarder's B/L

- NOT ocean bill and NOT D/T, see ***The Cape Comorin*** (1991) 24 NSWLR 745
 - Two B/L issued: one as freight forwarder's B/L; one as ocean bill (both contained Himalaya clause, which protects stevedore employed by carrier)
 - Goods damaged while being unloaded by stevedore

Held: Stevedore entitled to rely on Himalaya clause in ocean bill

(6) Consequences of Dual Delivery of Documents and Goods

- (iii) Documents conforming, but goods on ship known to non-conforming
- Should accept documents, and subsequently reject goods

***Gill & Duffus v Berger* [1984] 1 AC 382**

- Contract for sale of beans CIF Le Havre (500 tonnes); certificate of quality at port of discharge given by GSC as final
 - ONLY 445 tonnes discharged, and balance over-carried to Rotterdam
- Buyer rejected Seller's tender of documents (for lack of CGS cert.)
 - B not treat as repudiatory breach yet (as GSC cert. not shipping document): re-tendered with cert., but S again rejected
- S sued for breach of contract
- S tendered remaining 55 tonnes
 - B: rejected goods for breaches of description (Not covered by GSC cert.)
 - B sued for breach

Held: Wholly for S

- B's refusal to pay upon presentation of documents as fundamental breach of contract: S's obligation ceased after electing to treat as repudiation of contract
- BUT B could still sue for past breach by innocent party (e.g. B's claim for non-conforming goods)
 - On facts: GSC cert. as conclusive evidence that goods conformed to sample
 - Also NO evidence to suggest difference in quality of 445 and 55 tonnes of goods to support B's claim of breach of contract by S
- ➔ If NO GSC clause [or S did not accept B's refusal to pay as repudiation: see *Trietel*, p 573], B could only claim damages for difference in value of goods at time of shipment and as they ought to have been

Case note: *Trietel* [1984] LMCLQ 565

"...establishes that a buyer's refusal to accept and pay on tender of conforming documents is wrongful and repudiatory, even though the goods do not conform with the contract in a way that would justify their rejection" (at 572)

[1984] 1 AC 382, 395E-F

"Under the original c.i.f. contract a right of the buyer at his election to reject shipping documents and a right at his election to reject goods themselves upon delivery are separate and successive rights. The latter does not become exercisable until the seller has unconsciously appropriated the goods to the contract. Under a c.i.f. contract this does not happen until his reservation of the right of disposal of the goods by his withholding from the buyer the shipping documents which represent them is terminated by his transferring the shipping documents to the buyer"

FR: EXCEPTIONS where it is possible to reject documents (see also discussion by *Trietel*, p 576)

- Seller's fraud: itself as ground for rejecting documents

- Specific goods: not knowing what goods are for the contract; **BUT rare to have CIF contract for sale of specific goods (usu ship in bulk, esp for commodities)**
- “Peas for beans” category: goods tendered as radically different from that specified under contract (**BUT rare:** have to postulate situations where there is no fraud [ack by Lord Diplock: 390G]; or that B/L not false, and non-conformity of goods not shown on B/L)

NB: Why Lord Diplock keen for keeping two stages?

1. Keen on discouraging people rejecting documents that are perfectly alright, and then trying to something wrong in the goods, disrupting chain of documentary sale
2. Banks still have to pay to seller against good documents; NO difference for treatment of buyer

(iv) Damages for non-delivery of documents

Sharpe v Nosawa [1917] 2 KB 814

- CIF contract for sale of beans, June shipment
- S wrongfully refused to ship part of goods and purported to cancel contract
- If shipment made by end of June
 - B/L would arrive in July; goods August
 - Higher market price for beans in August than July

Held:

- Time when good ought to have been delivered as time when documents should have been tendered, NOT time when goods should have arrived
 - ➔ B should have gone out to market to buy B/L in July [time for assessing loss for B with rising market then]

James Finlay v Kwik Hoo Tong [1929] 1 KB 400

- Goods should be shipped in September, but was shipped by S on 1 October
- S tendered B/L, which falsely stated goods shipped on 30 September
- B accepted documents and goods: **BOTH did NOT conform to contract**
- Found about false documents 2 years later: could have rejected documents, and thus terminate contract without suffering from market fall after acceptance

Held: B entitled to damages in respect to market loss which he could have avoided if he had known of S's breaches in time to have exercised his right of rejection (i.e. knew from B/L that shipment date outside contract period and thus reject B/L)

Kwei Tek Chao v British Traders and Shippers [1954] 2 QB 459 (Goode, p 946-7)

- Contract for sale of 20 tons of chemical CIF Hong Kong; shipment to be made on or before 31 October
- Fraud by agent of S: goods stated on B/L as "received for shipment on 31 October and shipped subsequently"; altered to show shipment on 31 October
- Goods NOT conform to contract
- B still accepted goods
 - Knowing goods shipped later than stipulated under contract (false B/L)
 - BUT having lost sub-sale due to late delivery, could NOT sell goods due to falling market in Hong Kong
 - B sued for return of price, claiming forged B/L as nullity
 - Alternatively claimed damages for breach of contract and loss of profit

Held:

- D NOT responsible for fraud
- P affirmed contract due to lapse of time in issuing writ
 - **Two breaches on fact: Shipping non-conforming goods, and breach in tendering forged documents**
- Waiver for the former breach does not affect damages entitled for latter breach
- Correct measure of damages: put the plaintiffs in the same position as if they had known of the defect in B/L and exercised a right to reject, thus avoiding fall in market: applying *James Finlay v Kwik Hoo Tong*
 - On facts: damages assessed as the excess of contract price over market price over market price of goods in HK on date on which P (B) ought reasonably to have resold goods (i.e. date which they knew or ought to have known of right to reject)

Taylor v Bank of Athens (1922) 27 Com Cas 142 (Trietel [1988] LMCLQ, p 457)

- Goods should be shipped by end of August, but actually shipped in September
- Sharp fall in market between time of contracting and end of August
 - BUT no differences in value between August and September shipment
- B accepted goods

Held: B entitled only to nominal damages, NOT market loss damages

- Reason for loss as buyer having made a bad bargain, NOT breach
- Even though B could have avoided loss if had known of breach in time to reject goods
- ➔ **NO false B/L tendered**

Contrast: [False B/L; conforming goods]

Procter & Gamble v Becher [1988] Lloyd's Rep 21

- Contract for sale of goods in bulk CIF Rotterdam
- Cl.6 provides for period of shipment, when goods are actually on board in absence of evidence to contrary: last shipment date extended by agreement to 29 Feb 1984
- Loading commenced on 30 Jan 1984; B/L dated 31 Jan 1984
- Shipping documents presented
 - Doubts raised on true shipping date
 - S replied as within shipping period stated
- After arrival of vessel, B asserted loading date as 6 and 10 Feb
- Claimed repayment of purchase price and expressed intention to reject goods when discharged

Held:

- B lost opportunity to reject documents because they did not know about existence of breach [should be able to sue]
- Remedy confined to actual financial loss: **NO loss** on facts as goods received conformed to contract in all respects including date of shipment (within stipulated period)
- ➔ **EXCEPT that B suffered loss, e.g. that sub-B got out of sub-sale**

(7) Passing of Property

General Rule:

S intends to reserve security interest, by way of property, till payment

Smyth v Bailey [1940] 3 All ER 60

- HL rejected approach of CA that contractual appropriation passed property
- Payment as final “condition” in course of “proprietary appropriation” [for passing property] under SGO s.20 r.5(1)

Primitive recognition in s.21 SGO

- Example of property not passing against documents but earlier:

The Filiatra Legacy [1991] 2 Lloyd’s Rep 337

- P2 (S: Neste) sold oil to P1 (B: API), shipped on D’s ship (CIF contract)
- B/L as to seller’s order
- Short voyage: loading completed on 25 Nov 1983; vessel arrived on 30 Nov
- S furnished letter of indemnity authorising D to discharge cargo to API
- B notified carrier of shortage of oil, but paid S in full
 - Ps sued for missing oil in tort (conversion) or bailment

Held:

- Property passed on intention of parties, which could be derived from contract and parties’ conduct
- Act of loading as unconditional appropriation unless S exercised right to reserve right of disposal of goods [under s.19(1) SGA; HK: s.21 SGO] until certain conditions are fulfilled
 - As B/L to S’s order: right of disposal reserved under s.19(1); condition for reservation as securing of price under CIF contract with shipping documents
 - Condition fulfilled and property passed on shipment when price secured; or by the date of letter of indemnity

(8) *Passing of Risk* (Goode, p 942)

FR:

- S can tender documents even where goods have been damaged or lost at time of tender
- **BUT** S probably cannot appropriate to contract goods which at time of purported appropriation are lost (c.f. can appropriate goods deteriorated on board)

BUT these cases seem to suggest the otherwise...

Groom v Barber [1915] 1 KB 316

- Barber sold goods to Groom from Calcutta: CIF London
 - S bought goods of contractual description on same day as contract (8 June)
 - S wrote letter to B on 3 August advising B to insure against war risks (as provided for under contract)
 - **FR: Seems that contractual appropriation occurred on date of contract [Judgment assumed no contractual appropriation; NO finding of fact by arbitration committee on whether there was contractual appropriation]**
- 15 July: ship left loading port
- 14 August: S said no notice of ship
- 21 August: S got information that ship sunk by German cruiser

Held:

- S can tender documents even though goods lost at that time
- NO suggestion that S knew of loss of goods at time of tender

Manbre Saccharine v Corn Products [1919] 2 KB 198

- CIF contract for sale of starch made in October and November 1916
- 19 February 1917: B (P) asked S (D) for delivery
- 20 February 1917: S replied no notice of goods on way for B
- B alleged S tendered B/L knowing that ship sunk by submarine on 12 March 1917
 - BUT S sent to B B/L and invoice on 14 March 1917
 - ➔ **FR: S seemed to have deliberately tendered documents (showing contractual appropriation of goods) knowing that goods were lost**

Held:

- Buyer still have to pay upon tender of proper documents by Seller, even if Seller knows that goods lost
- **BUT S tendered wrong insurance document: B justified in rejecting documents and refusing payment**

Basic Principles for FOB Contract

(1) Duties of Seller

Pyrene v Scindia [1954] 2 QB 424

- “Classic” FOB contract: B’s duty to nominate ship, and S as party to contract of carriage for B (then put goods on board and procure B/L)
- Also possible that S asked to make arrangements (i.e. take B/L in his own name) as in CIF contract
- **Third type (on facts):** B engages forwarding agent at port of loading to book space and procure B/L
 - S discharges duty by putting goods on board, getting mate’s receipt (i.e. interim proof that goods shipped on board), and hand it to forwarding agent to enable him to get B/L
- **Issue:** Whether there is a contract between S and carrier? (which would incorporate clause limiting liability of carrier)
 - On facts: S had to replace goods after some originally fell and damaged when loaded by ship’s crane, but before goods crossed ship’s rail

Held:

- Contract implied between seller and carrier as intention of B, S and carrier
 - **FR: based on FOB sales contract between S and B, and B/L contract between B and carrier**
 - Devlin J: if shipper lifted goods without S’s authority, guilty of conversion; then carrier’s recourse against B who would have the right to deal with goods

(2) Passing of Property

General Rule: At shipment

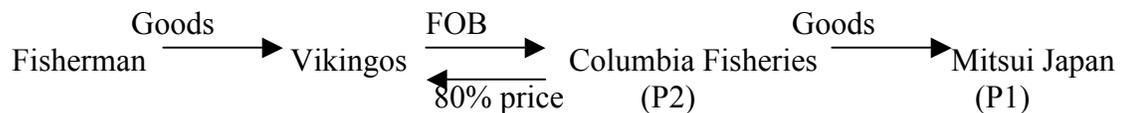
Carlos Federspiel v Twigg [1957] 1 Lloyd's Rep 240

- FOB contract for sale of bicycles from S as bicycle manufacturer
- B paid for contract price before shipment by S, or even being dispatched to port
- Then S became bankrupt

Held:

- NO property passed on facts as appropriation only finished when S put goods on shipment [context of FOB contract significant]
- Appropriation takes place when parties had intention to attach contract irrevocably to the goods so that only those goods are the subject of sale and become property of B
 - Usually as last act to be done by S

The Ciudad de Pasto [1988] 2 Lloyd's Rep 208



- Defendants: vessel owner for carriage of goods

Held:

- As B/L stated as on S's order, S intended to reserve right of disposal of goods under s.19 SGA
 - NO evidence that this presumption displaced [in ordinary way of overseas sale, S not intended to part with property until paid in full]
- NO property passed on facts as NO "unconditional appropriation" (i.e. conditional in sense of until balance of price paid)

(3) Passing of Property

Q: Can S sue for price (under s.51 SGO) by forcing goods on B?

Napier v Dexters (1926) 26 Lloyd's Rep 184

- Roche J: Stipulation that S reserved right of disposal of goods as wholly for benefit of S, and could be waived by him
- Affirmed by CA, i.e. S can sue for price by waiving right of disposal
 - ➔ **FR: NOT clear that s.19 SGA reservation as entirely for benefit of S; Also passing of property required co-operation between parties**