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Transfer of risk
In sale of goods on shipment terms

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Summary

A seller f.o.b. performs his obligation by putting the goods which conform with the contract onboard the ship at his expense. The general rule in f.o.b. contracts is that risk passes *on* shipment and according to the traditional view, this is made when the goods cross the ship's rail. The seller in c.i.f. contract performs his obligation by tender the proper documents i.e. a bill of lading, a policy of insurance and an invoice to the buyer. The buyer is bound to pay the price even if the goods fail to reach him. Therefore, it can be stated that a c.i.f. contract is a sale of documents (related to goods) rather than sale of goods itself.

The general rule in c.i.f. contracts is that the risk generally passes *on* or *as from* shipment. However, it will only pass if the seller has performed his physical duty to ship goods or to procure goods shipped which conform to the specifications set out in the contract of sale and which comply with the seller's duties implied by the SOGA- 79 regarding satisfactory quality and conformity with description and sample. In other words, the buyer takes the risk of loss or damage to the goods even in the case where the damage occurred prior the conclusion of the contract between the seller and the buyer. It must be recalled that the retrospective passage of risk to the buyer does not mean that he is left without any remedy. It means simply that the seller has performed his duty of physical delivery and that the buyer must look elsewhere for a remedy if the goods do not arrive at the agreed destination or if they arrive in a damaged state.

However, there may be exceptional cases where the risk will remain by the seller. This is where he fails to make a reasonable contract of carriage or fails to give the buyer notice as may enable him to insure the goods during transit.

If the goods are lost or damaged before the contract is concluded, the preferred view to be taken is that the buyer is obliged to pay for the goods on the ground that risk passes to the buyer *as from* shipment. A more difficult situation is where the parties have entered into the contract and the goods are lost before or possible after they have been appropriated. A c.i.f. buyer is clearly bound to pay where the goods are sold, appropriated and then lost. The position is however less clear when the goods are lost before the seller has appropriated the goods to the contract. In this situation, the rules in shipment terms appear to put the risk of transit loss to the buyer. The justification for this view stated is that there is no good reason to distinguish between goods damaged and goods lost. It will also strike at the principle of retrospective risk allocation.

However, it can be argued that if the seller knows about the transit loss and makes the contract with the intention of appropriating the lost cargo thereto, in this case, it can be seen as a fraudulent misrepresentation on the fact that the seller will benefit of the loss at the expense of the buyer.

Acknowledgements

The concept of risk is indeed a fascinating and dynamic topic which has been a great subject of interest to me. The topic of this thesis has and will most likely continue to be debated and play an important role in maritime trade in the future, and I will follow these discussions with great interest.

The author would like to take the opportunity to thank a few people who have been helpful during writing of this thesis. First, I wish to thank my tutor Professor Lars-Göran Malmberg for his valuable comments on this thesis.

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Abbreviations

A.C.	Appeal Cases
App. Cas.	Appeal Cases
C&F	Cost & freight
C&I	Cost & insurance
C.A.	Court of Appeal
C.I.F.	Cost, insurance and freight
C.A.D.	Cash against documents
C.F.R	Cost and freight
CISG	United Nations Convention on Contracts for the International Sale of Goods, 1980
Com. Cas.	Commercial Cases
F.O.B.	Free on board
H.L.	House of Lords
H.L.C.	House of Lord Cases
I.C.C.	International Chamber of Commerce
J.B.L.	Journal of Business Law
K.B.	Kings Bench
L. Rep.	Lloyd's Report
L.J.K.B.	Lord Justice Kings Bench
L/C	Letter of Credit
Lloyd's Rep.	Lloyd's Report
Q.B.	Queens Bench
Q.B.D.	Queens Bench Division
SOGA-79	Sale of Goods Act 1979

1 Introduction

1.1 Background

In international trade, the sales contract is the heart of an export-import transaction. It is, however, always supported by several other related contracts, reflecting the complexity of the transaction and number of parties involved. Basic among these additional contracts are the contract of carriage by sea, under which the goods are transported from one country to the other and the contract of marine insurance, by which the parties protect themselves from the risks of loss or damage to the goods in transit.¹

The seller and the buyer through their contract of sale, under familiar principles of contract law, can allocate many of the burdens and risks inherent in an international transaction. The seller can, indeed, if the buyer is willing, shift virtually all the burdens and risks to the buyer once the goods have left the seller's facilities. From the seller's point of view, it would be very desirable to be able to forget about the goods once they leave the factory and to be paid immediately in exchange for the carrier's receipt tendered to the buyer. On the other hand, the buyer would prefer to have no responsibility for the goods whatsoever until they arrive at their destination in his country and to be able to postpone payment until he has inspected the goods and accepted them.² The goods may be lost or damaged during transit, either before or after the contract is made. The principal tool used to allocate the predicament that might arise where the goods are damaged or lost before or after the contract is made is the doctrine of risk. The doctrine of risk is a special doctrine developed for the law of sale, unlike the doctrine of frustration, which is the general doctrine of the law of contract.

It is important to emphasise that the doctrine of risk does not operate to bring the contract of sale to an end. It may however, release one party from his obligations under the contract of sale. So if, for instance, the goods are at the seller's risk and they are damaged or lost, this would, in effect, release the buyer from his obligation to accept the goods, but it would not release the seller from the obligation to deliver them. Conversely, if the goods are at the buyer's risk and are damaged or lost, he may still be liable to pay the price even though the seller is no longer liable for failing to deliver the goods. In some cases where the goods are damaged, this would be the fault of a third party and that third party may be liable to be sued. This is particularly likely to be the case where the goods are being carried, because experience shows that goods in transit are particularly vulnerable to accidents.³ However, a very important practical consideration to take into account here is that a

¹ Berman, Harold J and Kaufman, Colin. *The Law of International Commercial Transactions (Lex Mercatoria)*. Harvard International Law Journal/ Vol. 19, p. 230.

² Ibid. p. 231.

³ Furmston, Michael. *Sale & Supply of Goods*. 3rd ed., 2000, p. 89.

party will not necessarily have a tort action for damage to the goods simply because the risk as between buyer and seller has been placed on it.⁴ This is because tort actions for damage to goods by third parties are usually only available to those who either own the goods or are in possession of them at the time that the damaged caused.

1.2 Presentation to the subject

It is common to speak of risk passing from seller to buyer in the same way that property passes from one to the other.⁵ This may give the impression that risk, like property, is in a real sense a right which is sold by the seller to the buyer. Other rights and powers too, like the right to claim delivery of the goods, the power to transfer that right and contractual title to sue the carrier, are frequently said to be transferred from seller to buyer. This manner of speaking may appear to cause difficulty when it is pointed out that in c.i.f and f.o.b. contracts, the seller will typically pass the risk to the buyer at the point of shipment before he passes any of those other rights and powers to the buyer. Risk, however, is unlike any of these other concepts in the sense that it is not a right over the goods, which can be transferred from the seller to the buyer.

To say that risk has passed from seller to buyer is another way of saying that the seller has performed his physical duty under the contract of sale to deliver the goods to the buyer. That the buyer's remedies, if any, for loss of or damage to the goods while in transit lie not against the seller, but against the third parties brought into contractual privity with the buyer through the documents tendered by the seller, namely, the carrier or the insurer.⁶ If, on the other hand, risk has not passed from the seller to the buyer, then this is a way of saying that the seller has not yet performed his contractual obligations and need to deliver the goods to the buyer. He is consequently still under a duty to deliver goods as described in the contract, and that he is therefore still liable to the buyer under the contract of sale for loss for or damage to the goods. The object of ascertaining where the risk of goods in transit lies is therefore to establish whether the seller is an appropriate defendant to a contractual claim brought by the buyer in respect of non-delivery, short-delivery or damage to cargo. If the risk rests with the seller, then he is a proper defendant, if the risk has passed, then he is not.⁷

⁴ In certain circumstances, a buyer who receives the bill of lading will have a contract action against the carrier, but this will be outside the scope of this work.

⁵ SOGA-79 s. 20.

⁶ Debattista, Charles. *The Sale of Goods Carried by Sea*. Second ed., 1998, p. 72.

⁷ Ibid.

1.3 Purpose

The concept of risk is not in every aspect legislated in the English law. In fact, there are uncertainties in some situations when the risk is to pass from seller to buyer, which has not yet been clarified. The purpose of this essay is to describe and examine the concept of risk in shipment terms where the parties have performed their duties according to the contract of sale, but where the goods has been lost or deteriorated during transit. The question to be answered is who to bear the risk. I wish to introduce the reader to the concept of risk and the specific problems faced within this setting from an English perspective. The most dominating authors on this area are divided and my aim is to clearout this and to make it easier to understand. Since there is a very limited legislation on this area, it will be of major importance to scrutinize and analyse relevant case law and practitioner books.

It is the aim of this thesis to contribute to the discussion concerning the possibility how to solve the different situations, which might arise. I will do so by examining and pinpoint the main problem areas encountered in the work. I will further examine various circumstances within this concept and look how the UK Courts respectively have solved this and with anticipation, this will produce a clearer picture. In addition, this study can potentially be seen as a study report indicating what line to approach on the different situations. Finally, the intention of this work is not to produce a legislation proposal, but instead to present a recommendation on what direction to follow.

1.4 Method and materials

This thesis is an analytical study of the doctrine of risk. In order to fulfil the aim of this work a great of variety of materials has been used. The majority of this work consists of case law from United Kingdom together with traditional sources as practitioners' books which are exclusively British legal literature as well as articles has been used. However, some descriptive parts and analytical statements are used through out, this is to present a more interest reading of the topic chosen.

One valuable and interesting contribution to the work and analysis is an article written in 1975 by Feltham *The Appropriation to a C.I.F. Contracts of Goods Lost or Damaged at Sea*.

1.5 Delimitations

I will focus on the passing of risk in shipment terms, when goods are lost or deteriorated at sea. This will itself lead to major limitations. The goods, which will be dealt within this work is specific, ascertained or unascertained goods, which have or have not been appropriated, before or after the contract was made. I will not deal with the contract of carriage or the

insurance contract, except as they relate to the contract of sale. This is since the contract of carriage is today highly regulated both by national laws and by international conventions. Therefore, I will focus my work in a much more narrow way into the problem of risk. From that aspect, I assume the reader is familiar with the basic knowledge in Maritime Law and Commercial Sale.

1.6 Outline

Following this introductory chapter is the second chapter, which aims to introduce the reader to the shipment terms. This chapter will clarify the difference between c.i.f. and f.o.b. contracts and the purpose of these terms. Furthermore, it will be clarified whether a c.i.f. contract is a sale of document or a sale of goods.

The third chapter is devoted to risk as general. As a first part, the work conducted on the general principle of risk is presented. Following this, is a part on the work in transfer of risk in shipment terms where it is explained at what stage risk in c.i.f. and f.o.b. terms are to be transferred and the proposition for this. The last part of the chapter is devoted to some exceptions to the rule together with an analysis regarding risk in loss or deterioration.

The fourth chapter is the last before the closing comments. Here will the most difficult problem be pinpointed, which has not yet been resolved. It will further be demonstrating the difficulty if the goods has been lost or damaged before or after appropriation to the contract and the motivation for such conclusion. The central issue will be whether it is possible to appropriate cargo, which has already been lost or damaged.

Appropriately, the fifth and final chapter of this work contains closing comments, in which the main problem will be highlighted.

1.7 Target group

This thesis is not primarily written for readers without at least some basic knowledge in maritime law. Since the extent of this thesis is limited, basic conditions are not explained or only explained when necessary. A certain amount of previous knowledge is therefore recommended. I would appreciate any interest that this paper would draw and such contribution it can make to others.

2 Shipment terms

The following section will deal with shipment terms i.e. c.i.f. and f.o.b. contracts, which will be thoroughly examined and analysed. As next chapter will elucidate, c.i.f. and f.o.b. contracts are vital contracts when discussing transfer of risk in maritime trade.

2.1 C.I.F.

2.1.1 Introduction

A contract of sale c.i.f.⁸ is a contract where the buyer has to pay for the price, insurance and freight of the goods.⁹ It is a contract, which contemplates the carriage of goods by sea, and has constituted the most important instrument of the overseas trade. The seller is therefore more intimately bound up with the carriage arrangements for the goods than in the case with a seller under f.o.b. contract.¹⁰ The buyer must pay the price as provided in the contract of sale¹¹ but does not generally assume any obligations in relation to the contract of carriage or the contract for the insurance of the goods during sea transit.¹²

Under the c.i.f. contract, the seller performs his obligations by shipping, at the time specified in the contract or, in the absence of an express provision in the contract, within a reasonable time, goods of the contractual description in a ship bound for the destination named in the contract. However, the seller is not himself obliged to ship the goods unless the contract so requires. He may instead purchase goods afloat and appropriate them to the contract or appropriate to the contract goods already purchased by him afloat before he entered into the contract. In short, under a c.i.f. contract (in contrast to an f.o.b. contract) there is no obligation on the seller to deliver the goods themselves to any delivery point.¹³

⁸ Cost, insurance and freight.

⁹ A variation, without the insurance, is the c & f contract. See p. 13. Other variants have appeared over the years including: c & i (no freight) and c.i.f. landed, where the seller pays for the cost of landing the goods.

¹⁰ Although, where the f.o.b. contract takes the form of the “extended f.o.b. contract” the seller is involved in the shipping arrangements, and, indeed, it can often be difficult to distinguish between an extended f.o.b. contract and a c.i.f. contract.

¹¹ Incoterms 2000, B1. Incoterms is produced by the ICC and should be distinguished from the parties undertakings under English law. However, the incoterms are often incorporated in the contract of sale.

¹² Incoterms 2000, B3.

¹³ Goode, Roy. *Commercial Law*. Third ed., 2004, p. 938. In this respect, the normal construction of c.i.f. by English Courts differs from that of Incoterms, which require the seller himself to deliver the goods onboard the vessel at the port of shipment unless otherwise indicated, e.g. by the addition of “afloat”.

The general rule¹⁴ is that, unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. This rule is applicable to c.i.f. contracts but, at the same time, it requires some modification in its application in that the prima facie obligation of the buyer is one to pay upon delivery of the documents, not delivery of the goods.¹⁵

In a contract of sale c.i.f. there are two subordinate contracts made by the seller. There is first the contract of carriage by sea, which is known as the contract of affreightment, under which the shipowner¹⁶ signs a bill of lading on receipt of the goods. Secondly, there is the contract of insurance in accordance with the underwriters deliver a policy of insurance. Aside from the essential ancillary relationship, the c.i.f. contract creates additional relationships, which are supplementary thereto.¹⁷ The documentary nature of the transaction lends itself readily to the introduction of bankers and other financing agents who may act for either seller or buyer as intermediates.¹⁸

2.1.2 The essence of C.I.F. Contract

The essential nature of a c.i.f. contract has already been described.¹⁹ The seller does not undertake that the goods shall arrive, but agrees at his own expense:

- (a) to procure and tender to the buyer the requisite shipping documents, which, unless otherwise agreed, comprise:
 - a) a bill of lading showing shipment at the contractual port of shipment (if any) of goods conforming to the contract;
 - b) a policy of insurance covering the goods for their sea transit;
 - c) a commercial invoice relating to the goods;
- (b) to transfer the property in the goods to the buyer at the due time for such transfer, provided that the goods are then in existence.

If the goods, having been shipped sound²⁰ are lost or damaged in transit, the buyer's remedy (if any) is not against the seller but against the carrier and/or insurer, pursuant to the contracts of carriage and insurance taken out by the seller and transferred or to be transferred to the buyer.²¹ For this reason, the c.i.f. contract has sometimes been described as being a sale of documents relating to goods rather than sale of goods.²²

¹⁴ SOGA-79 s. 28.

¹⁵ The more straightforward view would appear to be that the parties to a c.i.f. contract do in fact contract out of s. 28 and replace it with a rule whereby payment must be made upon delivery of the prescribed shipping documents.

¹⁶ Usually the carrier.

¹⁷ Sassoon, David M. *C.I.F. and F.O.B. Contracts*. Fourth ed. 1995, p. 3.

¹⁸ Payment against C.A.D or L/C.

¹⁹ See introduction 2.1.1.

²⁰ That is, in a such condition that with a normal voyage they will arrive in a sound condition. See *Mash & Murrell Ltd v Joseph I Emanuel Ltd*. [1961] 1 W.L.R. 16.

²¹ Goode, Roy. *Commercial Law*. Third ed., 2004, p. 937.

²² See chapter 2.1.3.

The advantage of the c.i.f. contract, which has made it an essential instrument of sea-borne commerce, is to enable to deal with cargoes afloat, by transferring the documents representing the goods. The seller, while taking the risk of the rise or fall in the price of the goods, the cost of carriage²³ and the rate of insurance before shipment, has the advantage of being able to obtain payment of the price of the goods before their arrival, and even in the event of loss or damage in transit. By stipulating for payment by an irrevocable letter of credit, the seller may obtain cash for the goods sold immediately after shipment; or, if the terms of payment are “cash against documents” or “net cash” (which is the same thing), he may still obtain payment from the buyer a considerable time before the goods arrive at their destination.²⁴

Whether a particular contract is or is not a c.i.f. contract is a question of substance. It cannot be resolved solely by reference to the label, which the parties have chosen to attach to their contract. Lord Porter in *Comptoir D'Achat et de Ventes u Boerenbond Belge SA v. Luis de Ridder Limitada (The Julia)*²⁵ stated that:

“Not every contract which is expressed to be a c.i.f. contract is such.”²⁶

For example, were the parties describes their contract as a c.i.f. contract but the terms gives the seller the option to supply the buyer with the goods but not the documents, then the contract would not, in law, amount to a c.i.f. contract. This is because its own terms would conflict with the documentary obligations, which lies in the heart of a c.i.f. contract. However, it does not follow from this that the label chosen by the parties is irrelevant. It can be adduced as evidence of the true nature of the contract, but it is not conclusive.²⁷

It must be noted that it is of importance to distinguish the parties obligations under the English law and under Incoterms 2000. This is since the seller’s and the buyer’s obligations under c.i.f. and f.o.b. terms has not been subject of legislative definition in the United Kingdom. It is instead a product and result of commercial custom and usage, whereas Incoterms is developed by ICC. However, the responsibilities of the parties according to the definition of Incoterms 2000²⁸, which is not binding for the English courts,²⁹ may nevertheless furnish prima facie evidence of usage even where, under

²³ For instance of c.i.f. contract where the buyer took the risk of the rise of freight after the date of the contract, see *Acetylene Corporation v Canada Carbide Co.* [1921] 6 L1.L.Rep. 410 at p. 468; 8 L1.L. Rep. 465 (C.A.).

²⁴ Sassoon, David M. *C.I.F. and F.O.B. Contracts*. Fourth ed., 1995, p. 6f.

²⁵ [1949] A.C. 293.

²⁶ *Ibid.*, at p. 309. The line can be a difficult one to draw. The problem is compounded by the fact that in some cases the court appears to take the view that the contract is not truly a c.i.f. contract, while in others it seems to conclude that the contract is a c.i.f. contract with variations.

²⁷ McKendrick, Ewan. *Sale of Goods*. 2000, p. 649f.

²⁸ See ICC Publication No 560.

²⁹ Unless expressly incorporated by the parties into their contract.

national law, where the scope of any particular duty is in doubt because of lack of authority or absence of agreement, express or implied.

2.1.3 A sale of documents or a sale of goods

There is one important issue, which has given rise to disagreement in relation to the nature of a c.i.f. contract. That disagreement relates to whether or not a c.i.f. contract is truly a sale of goods or whether it is, in fact, a sale of documents. The documents are in many ways the heart of the c.i.f. contract and the importance of documentation is reflected in some judicial dicta, which lend support to the proposition that a c.i.f. contract should be classified as a sale of documents rather than a sale of goods.³⁰ The suggestion that a contract for the sale of goods c.i.f. shall be regarded as a sale of documents is derived from the judgment of Scrutton J. in *Arnhold Karberg & Co. v Blythe, Green, Jourdain & Co.*³¹ when he declared:

“I am strongly of the opinion that the key to many of the difficulties arising in c.i.f. contracts is to keep firmly in mind the cardinal distinction that a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods...he buys the documents, not the goods, and it may be that under the terms of the contracts of insurance and affreightment he buys no indemnity for the damage that has happened to the goods.”³²

For this reason, the seller must tender documents and cannot claim performance of a c.i.f. contract by tendering, in lieu thereof, the goods themselves at the port of destination unless of course the buyer waives compliance with the terms of the agreement.³³

Another well-known statements is made by Judge McCardie J. in *Manbre Saccharin Co Ltd v. Corn Products Co. Ltd*³⁴

“I conceive that the essential feature of an ordinary c.i.f. contract as compared with an ordinary contract for the sale of goods rests in the fact that the performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer’s right and extent of the vendor’s duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent.”³⁵

This description focuses upon the delivery obligation of the seller. It has validity because the seller’s delivery obligation is defined as one which pertains to the documents rather than the goods themselves. Indeed, a contract, which gives the seller an option either to deliver the goods or the documents, is not a true c.i.f. contract. The seller must tender the relevant

³⁰ McKendrick, Ewan. *Sale of Goods*. 2000, p. 648.

³¹ [1915] 2 K.B. 379.

³² *Ibid.*, at p. 388.

³³ Sassoon, David M. *C.I.F. and F.O.B. Contracts*. Fourth ed., 1995, pp. 29f.

³⁴ [1919] 1 K.B. 198.

³⁵ *Ibid.*, at p. 202.

documents and it is not possible for him to perform his contractual obligation by instead tendering the goods alone.³⁶

On presentation of the shipping documents, if they are complete and regular, the buyer is bound to pay the price, irrespective of the arrival of the goods.³⁷ The seller is not under any duty to ensure the actual physical delivery of the goods at the destination i.e. that the goods actually reach the buyer. A seller performs his delivery obligation by tendering the appropriate documents to the buyer and the fact that the goods subsequently fail to reach the buyer does not of itself involve the seller in a breach of contract. So, if the goods are lost in transit or arrive in a damaged condition the buyer will ordinarily have his remedy under the policy of insurance or against the carrier under the contract contained in the bill of lading. Whether in any particular case either of these remedies is available to him depends upon the terms of the policy of insurance and the bill of lading.³⁸

Although all the c.i.f. advantages, there are certain problems or disadvantages that must be noted. Since the buyer must pay upon presentation of proper documents, he will generally be unable to reject the documents on the grounds that non-conforming goods were shipped. On the other hand, he will be in a position to reject non-conforming documents even when the seller has shipped conforming goods.

While it is true to say that the seller does not assume an obligation physically to deliver the goods to the buyer, it is not true to say that the seller does not owe the buyer any duties in relation to the conformity of the goods with the terms of the contract. It is accepted that the buyer has two rights of rejection, namely the right to reject the documents and the right to reject the goods.³⁹

2.2 C.& F. Contract

A c.& f. contract is an agreement to sell goods at an inclusive price covering their *cost* and *freight* to the agreed destination. The duties of the parties are the same as under c.i.f. contract with the obvious exception that the seller is not bound to insure. However, it may require the seller to insure the goods at the buyer's request and for his account. Property and risk under a c.& f. contract generally pass at the same time and in the same way as under a c.i.f. contract, but there may be exceptions to this principle. Thus the duty of a seller to give notice to enable the buyer to insure under section 32(3) of SOGA- 79, does not generally apply to a c.i.f. contract because the terms of such contract, obliging the seller to insure, are evidence of contrary

³⁶ McKendrick, Ewan. *Sale of Goods*. 2000, p. 648.

³⁷ The same would be true where the seller agrees to provide a certificate of quality at the port of discharge. Payment in such case is due even without presentation of such certificate. See *Gill & Duffus S.A v. Burger & Co. Inc.* [1984] 1 Lloyd's Rep. 227 (H.L.).

³⁸ Sassoon, David M. *C.I.F. and F.O.B. Contracts*. Fourth ed., 1995, pp. 4f.

³⁹ The implied terms in sections 13-15 of SOGA-79 are applicable to c.i.f. contracts.

intention. This obviously does not apply to a c.& f. contract, which either contains no provision as to insurance, or requires the buyer to insure. So, that a c.& f. seller may well be under a duty to give the notice required by section 32(3), with consequent effects on risk.

2.3 F.O.B.

2.3.1 Introduction

The distinction between a c.i.f. and an f.o.b. contract is in many ways important. It lies in the determining of the method of calculating the price, the passing of property and finally, the risk and the methods in which the parties can perform their obligations under the contract. It would seem to follow from the nature of an f.o.b. contract that the seller⁴⁰ must actually ship the goods in accordance with the contract.⁴¹ This does not mean that the seller must personally ship the goods; he can perfectly well procure the shipment to be made by a supplier on his behalf. What he cannot do is to tender documents in respect of goods already afloat, or a shipment made by a third party after and without reference to the contract, and subsequently appropriated by the seller since this are in practice synonymous with c.i.f. and c.&f. contracts.

Under c.i.f. & c.&f. contracts, goods may be appropriated to the contract after shipment, but in the case of an f.o.b. contract such appropriation must be made by (or before) shipment. This is the natural meaning of the obligation to deliver free on board. If the seller could appropriate to an f.o.b. contract goods shipped by another person, considerable difficulty might arise in adequately covering the buyer's interest by insurance.⁴²

An f.o.b. contract must further be distinguished from a contract to deliver goods simply at the port of shipment. Under a contract of the latter kind, the seller is not bound to put the goods on board, nor is the buyer bound to nominate an effective ship. If the contract is on f.o.b. terms, a buyer who fails to nominate an effective ship is not bound to claim damages for non-delivery.⁴³ A further distinction between an f.o.b. contract and one simply to deliver at the port of shipment may also be relevant in determining where the buyer should have examined the goods so that he may be deemed to have accepted them.⁴⁴

⁴⁰ Even if, lie a c.i.f. seller, he has undertaken to arrange for carriage and insurance.

⁴¹ Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 20-009.

⁴² Ibid.

⁴³ See for example, *Maine Spinning Co. v Sutcliffe & Co.* [1918] 87 L.J.K.B. 382.

⁴⁴ Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 20-010.

2.3.2 The essence of F.O.B. Contract

It is not easy to state in general terms the duties of an f.o.b. seller, for the obvious reason that they vary according to the type of f.o.b. contract in question. A further difficulty in discussing the duties of the seller results from the fact that shipment under an f.o.b. contract is in many respects a collaborative enterprise, involving co-operation between buyer and seller. It can, however, be said that the principal duties normally undertaken by an f.o.b. seller are to put goods which conform with the contract on board the ship in accordance with the shipping instructions (if any) received from the buyer, and the buyer are to bear the expense of doing so. Additional duties may, of course, be undertaken in the contract.⁴⁵

When looking at the various judicial pronouncements that have attempted to define the f.o.b. term, one statement may be struck by the general term in which they are implicit. One of the earliest is probably *Stock v Inglis*⁴⁶ a case dealt with specific goods, where it was stated:

“If the goods dealt with by the contract were specific goods, it is not denied but that the words *free on board*, according to the general understanding of merchants, would mean more than merely that the shipper was to put them on board at his expense; they would mean that he was to put them on board at his expense on account of the person for whom they were shipped; and in that case the goods so put on board under a contract would be at the risk of the buyer whether they were lost or not on the voyage.

Now that is the meaning of those words free on board in a contract with regard to specific goods, and in that case the goods are at the purchaser's risk, even though the payment is not to be made on the delivery of the goods on board, but at some other time, and although the bill of lading is sent forward by the seller with documents attached, in order that the goods shall not be finally delivered to the purchaser until he has accepted the bills or paid cash.”⁴⁷

Almost a century later Lord C.J. similarly stated in *J. Raymond Wilson & Co. Ltd. v. N. Scratchard Ltd.*⁴⁸ that the f.o.b. term has:

“For a long time, certainly more than one hundred years, had a well-known meaning, and if a party sells goods *free on board*, the meaning is that he has to put the goods on board and to pay the expense of doing so, and delivery is made and the goods are at the risk of the buyer when they are on board, the expense having been paid by the seller.”⁴⁹

Looking in both these judgments, there are two characteristics of the f.o.b. terms, which can be summarized as follows:

- the seller must pay the cost and bear the responsibility of putting goods “free on board” , in other words, bear the full liability for the cost and safety of the goods until the point of their passing the ship's rail, and

⁴⁵ Ibid., § 20-011.

⁴⁶ [1884] 12 Q.B.D. 564, affirmed by H.L. in [1885] 10 App. Cas. 263.

⁴⁷ Ibid., at p. 573.

⁴⁸ 77 L1. L. Rep. 373.

⁴⁹ Ibid., at p. 374.

- that upon this being accomplished delivery is complete and the risk of loss in the goods is there and then transferred to the buyer.⁵⁰

However, the above cited definitions are only directed to the essential features of the f.o.b. term. They do not include an extensive or detailed examination of a variety of marginal responsibilities of which many have been the subject of dispute and even litigation between parties to f.o.b. sales. For example, they do not indicate whether an obligation, monetary or other, which relates to the shipment of the goods, that must be complied with before the goods can in fact be loaded, is for the buyer's or for the seller's account.⁵¹ In the absence of express contractual stipulations, judicial interpretations have had to rely on usage or custom⁵² and by implication attempt to ascertain what the intention of the parties with respect to performance must have been.

There are various types of f.o.b. contracts, and for the sake of convenience, they have been grouped under three major headings. It is in the first place directed exclusively to the elaboration of the first of the two basic features of the f.o.b. contract mentioned earlier, namely, to the division of costs and responsibilities which putting goods *free on board* may actually entail in various instances. For this reason they have been termed respectively the *strict* the *additional services* and the *shipment to destination*.⁵³

2.3.2.1 F.O.B contract with additional services

An f.o.b. contract may impose on a seller duties in addition to those undertaken by him under a *strict* f.o.b. contract. In such case, one or more of the rules applicable to a *strict* f.o.b. contract will be displaced. A common variant to add words such as *stowed* (f.o.b.s.) *trimmed* (f.o.b.t.) or *stowed and trimmed* (f.o.b.s.t).⁵⁴ These extend the seller's obligation and impose on him liability for expenses beyond those of putting the goods on board as well as the duty of finding shipping space or doing his best to that end, or of effecting insurance. In such cases, the seller's duties in relation to shipment and insurance are analogous to those of a c.i.f. seller, but the contract is distinguishable from a c.i.f. contract in that the cost of freight and insurance are for the buyer's account.⁵⁵

Less clear is whether they also extend the contractual delivery point or the point at which property and risk pass to the buyer. Much of this depends on the terms of the contract and in particular on how much control the seller has.

⁵⁰ Sassoon, David M. *C.I.F. and F.O.B. Contracts*. Fourth ed., 1995, p. 353.

⁵¹ *Ibid.*

⁵² Whether of general or particular application.

⁵³ Sassoon, David M. *C.I.F. and F.O.B. Contracts*. Fourth ed., 1995, p. 355.

⁵⁴ Goode, Roy. *Commercial Law*. Third ed., 2004, p. 936.

⁵⁵ Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 20-007.

For different views on the undertakings of the parties under a c.i.f. and f.o.b. contract, see definitions for example by of the ICC, American Uniform Commercial Code, Institute of Export, British Association of Chambers of Commerce.

3 Risk

3.1 Meaning of risk

The statutory provisions as to risk are to be found in ss 20, 32 and 33 of SOGA-79, which must be read with the rules of frustration embodied in ss 6 and 7.⁵⁶ Nevertheless, before we examine these provisions and when risk transfers between the seller and the buyer, we must get a clearer perception of what is meant by risk.

Goods are at a party's risk if he has to bear the loss resulting from their damage or destruction without fault on the part of either party to the contract. As Professor Sealy remarked:

“The truth is that risk is a derivative, and essentially negative, concept – an elliptical way of saying that either or both of the primary obligations of one party shall be enforceable, and that those of the other party shall be deemed to have been discharged, though the normally prerequisite conditions have not been satisfied”.⁵⁷

If the goods are at the seller's risk, this means that if they suffer an accident and the seller, being unable to tender delivery in accordance with the contract, cannot recover the price from the buyer and must repay any part of the price paid in advance.⁵⁸ Where the risk is on the buyer, this means that he must pay the price⁵⁹ despite the fact that the goods have been lost or damaged before the buyer has taken possession, or after he has taken possession but before the property has passed to him. In other words, since the risk is on the buyer, it releases the seller from his duty to deliver the goods and if the goods are merely damaged, the seller is entitled to tender, and the buyer is obliged to accept and pay full price as if the goods were in conformity with the contract. In simple words, the concept of risk deals with the question of who as between the buyer and the seller has to bear the loss.

Such events will typically include loss or damage caused by an act of God or by the misbehaviour of third parties, such as carriers. It may include losses caused by governmental intervention, such as requisition, though this may depend upon particular contracts of sale. SOGA- 79 does not list the events that fall within the ambit of risk nor does it define risk, it merely states a presumptive rule for its transfer.⁶⁰

⁵⁶ Frustration will not be dealt in this work.

⁵⁷ L. S. Sealy. *Risk in the Law of Sale*. [1972] 31 CLJ 225, at p. 226.

⁵⁸ Goode, Roy. *Commercial Law*. Third ed., 2004, p. 243.

⁵⁹ If he does not, he can be sued for damages for non-acceptance.

⁶⁰ Bridge, Michael. *The International Sale of Goods Law and Practice*. 1999, p. 391.

3.2 The general principle of risk; *res perit domino*

The passing of risk with regard to loss or damage occurring after the contract is made, is governed by the English rule in s. 20 of SOGA-1979:

- (1) Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.
- (2) But where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.
- (3) Nothing in this section affects the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party.

It will be seen that English law has adopted the basic rule that risk is to pass at the same time as property. Nevertheless, the parties can, and frequently do, separate the passing of risk and property. The link between risk and property under the Act only applies unless the parties agree otherwise. However, this section⁶¹ of the Act does not apply to sale contracts on shipment terms,⁶² where a seller who still owns the goods does not run the risk of their loss or damage in transit. Risk passes to the buyer *on or as from* shipment⁶³ irrespectively of the transfer of property⁶⁴ from seller to buyer. The authority for such proposition that risk in such contracts passes *on or as from* shipment is both clear and unimpeachable.⁶⁵

The practical effect of the transfer of risk is equally clear, once risk passes, the buyer's remedies, if any, for loss or damage to the goods in transit lie no longer against the seller but against the carrier or the cargo insurer.⁶⁶ It may also be noted that in a c.i.f. contract, risk may, and quite often does, pass before the contract has been made because of the presumption that risk passes *as from* shipment. This means that, if the goods are sold while they are on the high seas, the risk of damage or loss between shipment and the date of contract will pass to the buyer.

⁶¹ SOGA-79 s. 20(1).

⁶² See for example, *Stock v Inglis* [1884] 12 Q.B.D. 564.

⁶³ In c.i.f. contracts, risk passes on shipment or, when the goods are bought afloat, as from shipment, see *The Julia* [1949] A.C. 293, at p. 309.

⁶⁴ Property usually passes on transfer of the documents (bill of lading, invoice and policy of insurance) or, if later, on payment: this is a matter of the intention of the parties.

⁶⁵ See *The Julia* [1949] A.C. 293.

⁶⁶ Debattista, Charles. *The Sale of Goods Carried by Sea*. Second ed., 1998, p. 73.

3.3 The transfer of risk

3.3.1 Reason for risk passing “on or as from shipment”

The justifications for the reversal in shipment sales of the general rule set out in section 20(1) of the SOGA- 79 are both commercial and legal. From the seller’s point of view, selling on shipment terms involves two types of danger, a physical danger and a financial one. First, the physical danger is the risk that the goods might be lost or damaged at sea before he has paid the price, and second, the financial is the risk that the buyer might fail to pay the price altogether.⁶⁷ This will become less worrying to the seller if he stops being liable for the safekeeping of the goods when the goods are shipped on board the vessel and if the title is reserved to the seller until payment. As we have seen, the seller performs his contractual obligations by shipping goods of the contract description on the contract vessel and by tendering the contractual documents to the buyer, but he owes the buyer no duty to guarantee that the goods will actually reach the contractual destination. For these commercial and legal reasons, the general rule as to the passage of risk is that the risk in shipment sales passes from the seller to the buyer *on or as from* shipment of the goods.⁶⁸

The risk is thus commonly separated from property; the seller’s obligation to cover the buyer by insurance from shipment is regarded as evidence of agreement to exclude the ordinary rule⁶⁹ that risk passes with property. Lord Porter’s statement in *The Julia*⁷⁰ contains two rules. Where the goods are sold and then shipped, the risk passes *on* shipment;⁷¹ but where they are already afloat at the time of sale, it is more apposite to refer to the risk as having passed *as from* shipment.⁷²

3.3.1.1 The retroactivity rule

The rule that risk in transit loss in shipment sales passes *on or as from* shipment appears to allow the seller to pass risk in goods which have lost or damaged before the contract is concluded or before property passes.⁷³ In c.i.f. and c.&f. contracts, the seller can perform his contractual duty physically to deliver goods by procuring goods which are already at sea and

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ SOGA- 79 s. 20(1).

⁷⁰ Supra.

⁷¹ *Leigh & Silavan Ltd v Aliakmon Shipping Co. Ltd* [1986] A.C. 785, 808. Compare CISG art. 67(1), first sentence: which risk passes, not on shipment, but on the handing over the goods to the carrier.

⁷² Compare CISG art. 68, second sentence; from the time the goods were handed over to the carrier.

⁷³ Debattista, Charles. *The Sale of Goods Carried by Sea*. Second ed., 1998, p. 74.

bound for the agreed destination.⁷⁴ If risk passes *as from* shipment, then the buyer would bear the risk of loss or damage which precedes the contract under which he bought the goods. Again, where the goods are sold on shipment terms and are lost or damaged after shipment⁷⁵ but before property in an identifiable parcel thereof passes through ascertainment and appropriation to a particular buyer,⁷⁶ the rule in shipment sales would appear to put the risk of transit loss or damage on the buyer, who would need to look elsewhere for his remedy, if any, for such loss or damage.⁷⁷

3.3.2 Risk in f.o.b. term

3.3.2.1 Risk passes on shipment

The general rule is that risk passes to the buyer under an f.o.b. contract *on* shipment of the goods.⁷⁸ Therefore, until shipment, the risk is on the seller and passes on to the buyer *on* shipment.⁷⁹ There is no scope in the case of *strict* f.o.b. contracts for the rule applicable to c.i.f. contracts that risk can pass *as from* shipment. This rule presupposes that goods are first shipped and then sold, and this is a sequence which cannot occur under a *strict* f.o.b. contract, since goods sold on f.o.b. terms must be appropriated to the contract by shipment at the latest.⁸⁰ However, it is not clear whether this applies to *extended* f.o.b. or f.o.b. with *additional* services. This since the seller undertakes responsibility for procuring the contract of carriage itself at the buyer's expense i.e. the seller acts as shipper.⁸¹ The additional terms are price terms in that the seller has to perform the additional duties at his own expense. Therefore, It can be argued that it also extend the contractual delivery point or the point at which property and risk pass to the buyer and in cases where the seller makes the contract of carriage in his own name, and the buyer buys from the seller charterer who has already shipped the goods, the risk passes *as from* shipment.⁸²

⁷⁴ In f.o.b. contracts, there is generally no need for the "or as from shipment" part of the rule, as the seller does not traditionally sell the goods already at sea on f.o.b. terms.

⁷⁵ But if the goods are lost or damaged before shipment risk should lie with the seller, who would be under a duty to ship substitute goods.

⁷⁶ See ss. 16 and 18 rule 5 of SOGA- 79.

⁷⁷ See *Inglis v Stock* [1885] 10 App. Cas. 263.

⁷⁸ *Colley v Overseas Exporters* [1921] 3 K.B. 302.

⁷⁹ *Stock v Inglis* [1984] 12 Q.B.D. 564 at pp. 573, 575, 577; *Inglis v Stock* [1985] 10 App. Cas. 263 at p. 273; *The Parchim* [1918] A.C. 157 at p. 168. Under CISG the general rule is that risk passes when the buyer "takes over the goods" Art. 69(1): exactly when this point is reached under an f.o.b. contract would depend on the type of f.o.b. contract in question. For f.o.b. with additional services, see p. 22.

⁸⁰ It follows that the rule laid down by Art. 68 of CISG that risk in respect of goods sold in transit passes to the buyer from the time of the contract cannot apply to f.o.b. contracts.

⁸¹ Goode, Roy. *Commercial Law*. Third ed., 2004, p. 937.

⁸² For a different opinion see Benjamin § 20-086, where he says that risk in f.o.b. contracts cannot pass as from shipment since the rule presupposes that goods are first shipped and then sold.

Risk may pass *on* shipment even though property does not pass at this time. This is either because the seller reserves the right of disposal⁸³ or because the goods at the time of shipment form an undifferentiated part of a larger bulk, and have not been paid for, or for both these reasons.

In *The Parchim*⁸⁴ the contract provided: “should the ship be lost before the loading is completed, this contract is cancelled for that part of the cargo which is not yet laden.” The Privy Council relied on this clause as an indication that the risk had passed *on* shipment. Indeed, the clause went further and absolved both parties from liability in respect of that part of the goods which was not yet loaded, and in respect of which the risk had therefore not yet passed.

3.3.2.2 The Pyrene case

The difficulty, which English law has never actually resolved, is the precise moment in time when risk passes from seller to buyer. This is because most of the statements as to the passing of risk under f.o.b. contracts refer to the goods as being either on board or not on board, or as loaded or not yet loaded. They do not deal with the difficulty of loss of or damage to the goods during the actual process of loading.⁸⁵ There is no reported case on the passing of risk between seller and buyer in this problem but the problem arose between an f.o.b. seller and the carrier in *Pyrene Co. Ltd v Scindia Navigation Co. Ltd*.⁸⁶ Here a fire tender which had been sold f.o.b. London was damaged through the fault of the carrier while being lifted onboard. The damage occurred before the tender had crossed the ship’s rail and the question was whether the shipowner was entitled to limit his liability under the Hague rules⁸⁷. This depended in part, on whether at the relevant time the goods were being

“Loaded on...the ship.” Council for the seller argued that this was not the case.

“He (the seller) treated the word *on* (in the Carriage by Goods Sea Act 1924) as having the same meaning as “free on board”; (namely) goods are loaded *on* the ship as soon as they are put across the ship’s rail, which the tender never was”.⁸⁸

He submitted that the loading was “a joint operation, the shipper’s duty being to lift the cargo to the rail of the ship... and the shipowner’s to take it on board and stow it...”.⁸⁹ Devlin J on the other hand held that the shipowner was protected by the Hague rules.

⁸³ A clause reserving property in the goods until payment are commonly called “Romalpa”. The object is to protect the seller against the consequences of non-paying by retaining property in the goods. In the absence of express terms in the contract expressly defining the moment at which property passes, it will be left to the courts to ascertain the intention of the parties in this regard. See s. 19 of SOGA- 79.

⁸⁴ [1918] A.C. 157.

⁸⁵ Benjamin’s. *Sale of Goods*. Sixth ed., 2002, § 20-087.

⁸⁶ [1954] 2 Q.B. 402.

⁸⁷ Now superseded in England by the Hague- Visby rules.

⁸⁸ *Supra* at p. 414.

⁸⁹ *Ibid*.

If risk does not pass to the buyer on the commencement of the loading process, when does it pass? Is it when the goods cross the ship's rail or is it only when the goods have been actually loaded on board the vessel? The former approach can claim some support from history in that lawyers have traditionally attached significance to the ship's rail as the dividing line between the obligations of the seller and the obligations of the buyer.⁹⁰ As Devlin J pointed out in *Pyrene*;

“The division of loading into two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its nineteenth-century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.”⁹¹

He further held: “the operation of the (Hague) rules is determined by the limits of the contract of sea and not by any limits of time”⁹²; that the parties were free to define their respective obligations as to “loading”; and that in the case before him the carrier's obligations in this respect had begun before the tender had crossed the ship's rail.

Devlin J. did not (in the *Pyrene* case) make any specific statements as to the passing of risk between buyer and seller. However, it is arguable that his reasoning is equally applicable to this problem. In other words, the question whether the goods have been “shipped” at any particular point [as to pass the risk] depends on the division of duties with regard to shipment, which the contract of sale makes between buyer and seller.⁹³

According to the traditional view, risk passes when the goods cross the ship's rail.⁹⁴ This is the point at which performance of the seller's duty to ship is completed. However, that duty may be enlarged or curtailed by the provisions of the contract of sale. It is arguable that, where this is the case, the risk should pass, not when the goods cross the ship's rail, but whenever the seller's duty with respect to loading is performed.⁹⁵ However, this view seems less sound than the traditional view and may be less convenient since it may lead to situations in which the risk can pass to the buyer before shipment, and hence before he is likely to be covered by insurance.⁹⁶ Given this uncertainty, the best way to avoid this is to specify by an express provision in the contract when risk is to pass between buyer and seller.

There is one alternative solution to this. This is the moment when the carrier becomes responsible for the goods, protected by the insurance cover, and

⁹⁰ McKendrick, Ewan. *Sale of Goods*. 2000, pp. 637f.

⁹¹ *Supra* at p. 419.

⁹² *Ibid*.

⁹³ Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 20-088.

⁹⁴ In favour of this view, see the statement made by Scmitthoff. *Legal Aspects of Export Sales*. 1953, p. 43.

⁹⁵ If the sale were on “f.o.b. stowed” terms, the risk would not pass until the goods were stowed.

⁹⁶ Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 20-088.

able to benefit from limitations of liability under the Hague or the Hague-Visby rules. The advantage of this is that only one of the parties to the contract of sale would need to insure the goods against loss or damage resulting from acts or omissions of the carrier for which the latter was not contractually liable. This suggestion is, however, inconsistent with the assumptions underlying the *Pyrene* case, which are that the carrier is protected by the contract of carriage as soon as performance of his duty to load has begun, but that the risk passes from seller to buyer only when performance of the seller's duty to load is completed.⁹⁷

3.3.2.3 Exceptional cases

As we have seen, the main rule in c.i.f. contracts is that risk passes from seller to buyer *on or as from* shipment, and in f.o.b. contracts *on* shipment with the exception as in the case of extended f.o.b. contracts, where it passes *on or as from* shipment. However, the risk may remain, wholly or in part, with the seller in certain exceptional circumstances. Risk will remain with the seller where he fails to make a reasonable contract of carriage with the carrier⁹⁸ or he fails to give the buyer notice as may enable the buyer to insure the goods during their sea transit.⁹⁹ The risk of deterioration will also be on the f.o.b. seller where he is in breach of his implied undertaking that the goods can endure normal transit¹⁰⁰ or of some other undertaking, e.g. as to packing or loading with due care and skill.¹⁰¹ The whole risk will also be on the seller where he ships the goods but at the same time demands a higher price than agreed in the contract of sale.¹⁰²

Risk may on the other hand be on the buyer before shipment where delivery has been delayed through the fault of the buyer. For example where he fails to give proper shipping instructions to the seller within the contract period, and the goods deteriorated as a consequence of that failure.¹⁰³ The goods may also be at the buyer's risk before shipment even though he is not guilty of any actual breach of contract. This was the case in *J. & J. Cunningham v Munro Ltd. R.A. & Co.*¹⁰⁴ where Lord Hewart C.J. found in favour of the sellers', right to recovery on the ground that he had relied on the buyers' statement and acted upon it to his detriment. The buyer had induced the

⁹⁷ Ibid.

⁹⁸ SOGA- 79, s. 32(2).

⁹⁹ SOGA- 79, s. 32(3).

¹⁰⁰ See *Mash & Murrell Ltd v Joseph I. Emanuel Ltd* [1961] 1 W.L.R. 16.

¹⁰¹ Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 20-089.

¹⁰² See *Williams v Cohen* [1971] 25 L.T. 300.

¹⁰³ SOGA- 79, s. 20(2). The subsection does not put the whole risk on the buyer in such a case, but only "the risk...as regards any loss which might not have occurred but for such fault." Under CISG the normal rules as to risk may similarly be displaced where delay on the part of the seller is due to an act or omission of, or to a fundamental breach by the seller: Arts 66 and 70. Neither of these provisions affords any remedy to the seller where delay in delivery is due to a breach of contract on the part of the buyer in taking delivery, but the buyer's wrongful failure to take delivery can lead to the passing of risk to the buyer under Art. 69(1) and (2).

¹⁰⁴ [1922] 28 Com. Cas. 42.

seller to have the goods ready at the docks by telling him that the ship on which they were to be loaded would be there on a particular day, but she did in fact not arrive until a day later, and during this time the goods had deteriorated. In that case it was said:

“There may also be circumstances where, although the purchaser may be entitled to reject when the goods are being placed over the ship’s rail, yet the vendor may be entitled to recover damages in respect of the deterioration of the goods.”¹⁰⁵

This is not the same as saying that the risk had passed (for in that case the purchaser would not be entitled to reject), but in practise it leads to much the same result.

3.3.3 Loss or deterioration

As earlier discussed, risk in overseas sales is often separated from property, so that it would not be surprising if risk in part of a bulk shipment could pass to the buyer before property has passed, e.g. because the goods were not ascertained and the conditions laid down in SOGA- 79 section 20(A) had not been satisfied or that the seller has a right of disposal. Conversely, it is submitted that risk in such goods would not necessarily pass merely because the buyer had become owner in common of the bulk by virtue of that section. Risk may pass even under a domestic sale of an unascertained part of a bulk in a store or warehouse. In certain situations, the separation of risk and property may be as much a matter of imposition of legal rules, as it is a matter of ascertaining precisely what was intended by the parties.

In *Sterns Ltd. v Vickers Ltd.*,¹⁰⁶ there was a sale of 120.000 gallons of white oil out of a larger bulk of 200.000 gallons lying in tanks belonging to a wharf company. The seller obtained and delivered to the buyer a delivery warrant issued by the wharf company “for 120.000 gals. ex white oil in bulk deliverable to Messrs. Stern Ltd (the buyer) or assignees only against this warrant duly indorsed. This warrant is the only document issued as a legal symbol of the goods.” At that time, property in the goods could not pass until they were separated from the bulk.¹⁰⁷ The oil deteriorated in quality and the buyers claimed damages for breach of warranty that the oil should be of the contract quality when delivered. It was held that the risk had passed to the buyer even though the 120.000 gallons were not at the relevant time ascertained, so that, as the law then stood, property could not pass to the buyer.

¹⁰⁵ Ibid., at p. 46.

¹⁰⁶ [1923] 1 K.B. 78.

¹⁰⁷ Now see SOGA- 79 s. 20(A).

The Court of Appeal gave two reasons for their decision:

- (1) that the seller had, by obtaining and handing over the delivery warrant, done all that he had undertaken to do by enabling the buyers to take delivery, and
- (2) that after the buyer had accepted the delivery warrant the seller had no further control over the goods and could do nothing to prevent their deterioration.

Although the decision in *Sterns Ltd v Vickers Ltd* appears to have been approved by the House of Lords¹⁰⁸ where Lord Porter said:

“It is difficult to see how a parcel is at the buyer’s risk when he has neither property nor possession except in such cases as in *Inglis v Stock*¹⁰⁹ and *Sterns Ltd v Vickers Ltd*¹¹⁰ where the purchaser had an interest in an undivided part of a bulk parcel on board a ship, or elsewhere, obtained by attornment of the bailee to him.”¹¹¹

And Lord Normand observed:

“In those cases in which it has been held that the risk without the property has passed to the buyer it has been because the buyer rather than the seller was seen to have an immediate and practical interest in the goods,¹¹² as for instance when he has an immediate right under the storekeeper’s delivery warrant to the delivery of a portion of an undivided bulk in store, or an immediate right under several contracts with different persons to the whole of a bulk not yet appropriated to the several contracts.”¹¹³

The decision in *Sterns v Vickers*¹¹⁴ must therefore be accepted as correct on its particular facts, but the case raises many problems, which are closely related to the difficulties arising with regard to the passing of property. It can be seen, therefore, that the acceptance of the delivery warrant in *Sterns Ltd v Vickers*¹¹⁵ was regarded as the crucial factor in this case, since it was this, which gave the buyer an immediate right to possession, and therefore, an insurance interest.¹¹⁶

¹⁰⁸ In *The Julia* [1949] A.C. 293.

¹⁰⁹ [1885] 10 App. Cas. 263, an f.o.b. case in which risk was held to have passed on shipment before the goods were specifically appropriated to the contract.

¹¹⁰ [1923] 1 K.B. 78.

¹¹¹ *Supra* at p. 312.

¹¹² But this is not really so as regards c.i.f. contracts, for the seller retains the general property, and the buyer has not even an immediate right to possession.

¹¹³ *Supra* at p. 319.

¹¹⁴ *Supra*.

¹¹⁵ *Supra*.

¹¹⁶ Where the goods are still in possession of the seller himself, though not yet ascertained, it seems that the risk may pass to the buyer on the making of the contract, or at least when the delivery falls due.

4 Retrospective Appropriation to Lost or damaged Cargoes

4.1 Introduction

The retrospective transfer of risk in c.i.f. terms has already been illustrated. The question to approach now is how far that retrospectivity principle is to be applied. Can it extend to loss or damage suffered by the goods before the contract was concluded? In c.i.f. contracts, the consequences of the risk being on the buyer *as from* shipment are even today not thoroughly resolved. As we shall see, the courts have not always distinguished clearly between appropriation in its contractual sense and appropriation in its proprietary sense. It can be difficult to stabilise the cases, so it is necessary to distinguish the various facts situations in which the courts have experienced difficulty.

4.2 Goods lost before contract is concluded

In the case where the goods are lost before the obligations implied by the contract between the parties are concluded, and the seller later tenders the documents related to these goods, the question is whether the buyer is obliged to pay against these documents. There is an uncertainty in the authority whether the buyer is obliged to pay or not. Nevertheless, in *Couturier v Hastie*¹¹⁷ the parties entered into a contract for the sale of a cargo of corn on what in fact had more characteristic of a c.i.f. contract.¹¹⁸ At the time the contract was concluded the corn was believed to be in transit from Salonica to the United Kingdom. But, before the contract was made, unknown to both parties, the corn had deteriorated in a commercial sense to such an extent that the master of the ship sold it. The seller argued that the buyer was obliged to pay the price of the corn because he had bought an interest in the adventure or such rights as the seller had under the shipping documents.

The House of Lords rejected the seller's argument and held that he was not allowed to recover the price on a tender of shipping documents relating to the goods that had deteriorated before the conclusion of the contract.¹¹⁹ The subject matter of the contract was not the seller's right under the shipping

¹¹⁷ [1856] 5 H.L.C. 673. See also s. 6 of the SOGA- 79.

¹¹⁸ The contract was actually stated to be an f.o.b. contract but, given that the seller was required by the terms of the contract to include the cost of insurance and freight within the price, it would appear to have been in substance a c.i.f. contract.

¹¹⁹ This result would be reversed under Art. 68 of the CISG, provided the seller neither knew nor ought to have known of loss or damage to the goods at the contract date.

documents, instead there was a total failure of consideration since no corn did exist.

The decision is quite inconsistent with the view that the risk of loss under the c.i.f. contract had passed *as from* shipment.¹²⁰ The *Couturier* case did concern a sale of specific goods¹²¹ but the reasoning can be arguable to apply equally to a sale of a specified quantity of unascertained goods forming an undifferentiated part of an identified bulk shipment, the whole of which had been destroyed before the contract was made.¹²² However, no clear answer can be given to this question in the present state of the authorities, since neither *Couturier* nor s. 6 of the SOGA- 79 purport to deal with this problem, so it may be that, in such a case, the buyer must take the consequences and to pay the price on the ground that the risk passes to the buyer *as from* shipment, provided that the loss has occurred after shipment.

4.3 Goods damaged before the contract is made

In the situation where the buyer tenders documents which relate to goods which were damaged prior to the conclusion of the contract of sale, there appears to be no case which precisely brings the problem in point. However, it is suggested that the buyer is obliged to pay for the goods provided that conforming documents are tendered by the seller and that the buyer will have a valuable insurance policy as well as the prospect, as assignee of the seller's rights, of an action against the carrier.¹²³ Even if the decision in *Couturier* supports the view that in c.i.f. contract the retrospective transfer of the risk of loss to the buyer will stop at the contract date, the decision does not preclude a similar backdating of the risk of damage and it does not prevent the parties from making, whatever contractual provision for the allocation of risk they wish as long they sufficiently demonstrate their intentions.¹²⁴

¹²⁰ Compare CISG art. 68, first sentence, under which risk in respect of goods sold in transit generally passes "from the time of the conclusion of the contract": this leads to the same result as that reached in *Couturier v Hastie*. Under art. 68, second and third sentences, risk may in exceptionally pass from the time the goods were "handed over to the carrier who issued the documents embodying the carriage", but only if at the time of contracting the seller neither knew or ought have to known of the precious loss; that the seller had such knowledge or means of knowledge in *Couturier v Hastie*, so this part of art. 68 would also lead to the same result as that reached by the House of Lords.

¹²¹ So that now the contract would be void under s. 6 of the SOGA- 79. This would now be the case where the sale was of a fraction or percentage of an identified bulk cargo: see SOGA- 70 s. 61(1), definition of "specific goods".

¹²² Benjamin's. *Sale of Goods*. Sixth ed., 2002, § 19-109.

¹²³ I.e. that the seller has not breached one of the implied terms contained in ss. 13-15 of the SOGA- 79.

¹²⁴ Bridge, Michael. *The Sale of Goods*. 2000, p. 121.

4.4 Appropriation to lost cargo

In cases where the goods are lost after the contract is made between the parties but before, or possibly after the seller has appropriated the goods in question to the contract with the buyer and the seller tenders the documents, which relates to these goods, must the buyer in this situation pay? It is necessary to consider the position both where the goods are lost before they have been appropriated to the contract, and where they are lost after they have been appropriated to the contract. There is a sign of confusion in the case law between contractual appropriation and proprietary appropriation. It is appropriation in its contractual sense which is central in this context, not its proprietary sense.¹²⁵

A c.i.f. buyer is clearly bound to pay the price where the goods are sold, appropriated to the contract, and then lost before the seller has tendered the documents.¹²⁶ On the other hand, he is not bound to pay where the goods had already been lost at the time of contracting, at any rate where they are specific.¹²⁷ The position is less clear, which gives rise to a complicated problem which has never been faced in cases. This arises when the loss occurs before the goods have been appropriated to the contract. The question is whether the seller is entitled to appropriate the goods which has already been lost, or if the appropriation must be made before the loss? A seller who has not yet appropriated any goods to the contract and where the goods are sold, the rule in shipment sales appear to put the risk of transit loss on the buyer.¹²⁸ There are two cases which can be seen in the light of this dilemma and both requires careful evaluation.

¹²⁵ McKendrick, Ewan. *Sale of Goods*. 2000, p. 676.

¹²⁶ The position would be the same under CISG both where the contract is for the sale of goods to be shipped (art. 67) and where it is for the sale of goods afloat (art. 68).

¹²⁷ *Couturier v Hastie* [1856] 5 H.L.C. 673. The position is generally the same under CISG art. 68, first sentence "risk...passes from the time of the conclusion of the contract" but, second sentence: risk may pass from the time when the goods were handed over to the first carrier "if the circumstances so indicate." Risk might therefore pass before appropriation. But see art. 67(2) provides that risk cannot pass before the goods are identified, i.e. in English terminology, contractually appropriated to the contract. The meaning of this phrase is obscure; it refers most obviously to special agreement excluding the normal rule stated in art. 68 first sentence, but it could also refer to the rule that under a c.i.f. contract risk can pass as from shipment, and extend that rule so that risk can pass from delivery to the carrier. Even if such circumstances are present, the third sentence of art. 68 would probably, on its facts such as those in *Couturier v Hastie*, lead to the same result as that reached in that case: it puts the risk on the seller if at the time of contracting he "knew or ought to have known that the goods had been lost and did not disclose this to the buyer." The English cases do not seem to regard the seller's knowledge, or means of knowledge, as relevant in the present context.

¹²⁸ In favour of the view stated in the text, see Debattista. *The Sale of Goods Carriage by Sea*. pp. 73-74, Sassoon. *C.I.F. and F.O.B. Contracts*. §§ 252-253 and Feltham. *The Appropriation to a C.I.F. Contract of Goods Lost or Damaged at Sea*. Against this view, see Benjamin's. *Sale of Goods*. §§ 19-079, 19-080 and 19-109 and Goode. *Commercial Law*. pp. 953-957.

4.4.1 C. Groom Ltd v Barber

In *C. Groom Ltd v Barber*¹²⁹ A, a London merchant, on June 8, 1914, sold to B on c.i.f. terms 100 bales of Hessian cloth for shipment from Calcutta and had the same day made a purchase on similar terms save as to price from C, a merchant with a branch in Calcutta. The Calcutta merchant shipped 25 bales of cloth of the contract description on the vessel *City of Winchester*, which was sunk by enemy action on August 6. On August 20 A, being unaware of the loss of the *City of Winchester* was informed for the first time by an invoice from C that the ship was carrying goods appropriated to C's contract. The same day A sent a similar invoice to B naming the *City of Winchester*. The next day the loss of the *City of Winchester* was posted at Lloyd's and B who had failed to take out insurance against war risk, refused to pay against the documents. Atkin J. held that the seller's may validly and effectively tender the documents relating to the goods lost at sea at the time of tender and that the buyer's was not entitled to reject the documents and therefore bound to pay the price of the goods to the seller's.

Atkin J. assumed here that there had been no appropriation and he said:

“The seller must be in a position to pass property by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender.”¹³⁰

This statement was made in reply to an argument that at the time of the loss the goods must have been appropriated to the contract to pass the property to the buyer.¹³¹ It is uncertain whether Atkin J. had in mind appropriation in its proprietary sense or in its contractual sense. The question raised in the case was whether the seller had appropriated the goods in its contractual sense of binding himself upon contractually to deliver particular goods in question or goods forming an undifferentiated part of particular bulk cargo, or to deliver documents relating to such goods. An appropriation of this kind depends primarily on the intention of the seller (who must not merely intend to deliver the goods or documents relating to them, but also to bind himself contractually to do so). In *C. Groom v Barber*¹³² there was evidence in the correspondence¹³³ relating to insurance, that the seller had appropriated some shipment¹³⁴ to the contract. In this sense, therefore, he could be said to have appropriated the goods on the *City of Winchester* before they were lost.¹³⁵

¹²⁹ [1915] 1 K.B. 316. See also *Plaimar Ltd v Waters Trading Co. Ltd* [1945] 72 C.L.R. 304 (where the fate of the goods was unknown at the time of tender of documents).

¹³⁰ At p. 324.

¹³¹ Feltham J.D. *The Appropriation to a C.I.F. Contract of Goods Lost or Damaged at Sea*. [1975] J.B.L. 273, p. 275.

¹³² *Supra*.

¹³³ I.e. the seller's letter of August 3.

¹³⁴ And it seems likely that he intended to appropriate the shipment which was lost.

¹³⁵ Benjamin's. *Sale of goods*. Sixth ed., 2002, § 19-079.

4.4.2 *Manbre´ Saccharine Corporation v Corn Products Ltd*

In the second case, *Manbre´ Saccharine Corporation v Corn Products Ltd*¹³⁶ the parties entered into a c.i.f. contracts for the sale of syrup and starch c.i.f. London. On March 12, 1917 the *Algonquin*, carrying a portion of the goods, was sunk either by a submarine or a mine. The sellers, with knowledge of the loss, tendered the documents to the buyers on March 14. The buyers refuse to accept the documents tendered on the ground, inter alia, that the sellers had tendered documents relating to goods, which to their knowledge had already been lost.

McCardie J. held that the buyers were entitled to reject the documents tendered and that they were entitled to recover damages from the seller for breach of contract on the ground in tendering non-conforming documents. The conclusion for this was that the sellers tendered a certificate of insurance rather than a policy of insurance. If the seller had tendered a policy of insurance , then the position would have been different because then the buyers would not have been entitled to reject the tendered documents on the ground that the *Algonquin* had to their knowledge of the sellers, sunk prior to the tender of the documents.

4.4.3 Evaluation

There is a statement by McCardie J. in *Manbre Saccharine Co. Ltd v Corn Products Co. Ltd*¹³⁷ that a c.i.f. seller can validly tender documents in respect of goods shipped on a vessel which at the time of the tender the seller knows to have been totally lost. Where he said:

“If the vendor fulfils his contract by shipping appropriate goods in the appropriate manner under a proper contract of carriage, and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights or duties of either party are affected by the loss of ship or goods, or by knowledge of such loss by the vendor, prior to the actual tender of the documents. If the ship be lost prior to tender but without the knowledge of the seller, it was, I assume, always clear that he could make an effective proffer of the documents to the buyer. In my opinion it is also clear that he can make an effective tender even though he possess at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the documents he bargained for; and if the policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract.”¹³⁸

¹³⁶ [1919] 1 K.B. 198.

¹³⁷ *Supra*.

¹³⁸ At p. 203.

The buyer, is therefore, where the proper documents are tendered to him:

“Obliged to pay for goods although they may be at the bottom of the sea, or through some unforeseen circumstances they may never arrive, or although they may have been lost owing to some cause not covered by the agreed form of policy”¹³⁹

Whether the seller was or was not aware of the loss at the time of tender is immaterial. It is clear from these cases that the buyer is bound to pay the price of the goods where they are lost after the conclusion of the contract and after they have been appropriated to the contract. The difficult question is whether these statements are correct in a case where the seller has not, prior to the time of the loss appropriated the goods in question to the contract. It can be argued that the buyer in such a case is obliged to pay the price because *C. Groom v Barber* can be seen as an authority for the statement made by Atkin J. when he said:

“The committee have not dealt with the question of fact as to whether there had been any appropriation of goods to this contract by or on behalf of the seller...Upon the evidence as disclosed in this case there does not appear to have been any appropriation, and I shall assume there was none”.¹⁴⁰

He justifies his decision in the case by the argument that otherwise the shipper of goods in bulk or of goods intended for several contracts or the intermediate seller who may be last in a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. It seems probable that a seller in the middle of a chain will be unable to appropriate particular goods to his contract until he receives an appropriation from the seller to him.¹⁴¹

It is difficult to ascertain whether there had been a contractual appropriation of the goods prior to their loss. Just the fact that the seller had shipped goods of the contractual description onboard the *City of Westminster* does not necessarily infer that there had been a contractual appropriation. However, there may have been a contractual appropriation by virtue of the correspondence between the parties, particularly the sellers letter of 3 August which drew the buyers attention to need to take out insurance against war risk. But it is not all clear whether or not there had been a contractual appropriation since McCardie J. found it unnecessary to refer to the issue of appropriation of the goods to the contract.¹⁴²

In *Re Olympia Oil & Cake Co. Ltd and Produce Brokers Co. Ltd*¹⁴³ a contract for the sale of 6.000 tons of soyabeans provided that particulars of shipment were “to be declared by original sellers,” and that “in case of resales, copy of original appropriation to be accepted by buyers...”. The

¹³⁹ Bankes L.J. in *Arnhold Karberg & Co. v Blythe, Green, Jourdain & Co.* [1916] 1 K.B. 495, At p. 510.

¹⁴⁰ [1915] 1 K.B. 316 at p. 323.

¹⁴¹ Feltham J.D. *The Appropriation to a C.I.F. Contract of Goods Lost or Damaged at Sea.* [1975] J.B.L. 273, p. 276.

¹⁴² McKendrick, Ewan. *Sale of Goods.* 2000, p. 678.

¹⁴³ [1915] 1 K.B. 233.

sellers bought an equivalent amount from their suppliers who declared a shipment on the vessel *Canterbury*, and the sellers appropriated this shipment to their contract with the buyers after the *Canterbury* had, to their knowledge, been lost. The Divisional Court rejected the notion that under the terms of the contract in question¹⁴⁴ a seller might validly appropriate to the contract a shipment known to be lost. This decision was later doubted by Scrutton L.J. in *Produce Brokers Co. Ltd v Olympia Oil Co. Ltd*¹⁴⁵ who said:

“My own strong impression is that on the true meaning of this contract...where a seller under the contract received an appropriation from an original buyer, this clause binds the buyer under that contract to accept the declaration whether the cargo is lost or not.”¹⁴⁶

Furthermore, the Court of Appeal upheld an arbitral finding that there was a custom in the oil seed trade by which a buyer had to accept an appropriation originating with the head seller even if the intermediate seller knew of the loss before appropriating the cargo to the contract with the buyer. This criticism is based on the particular terms of the contract and not on any general principle as to the effectiveness of appropriation after loss. In the view of this, and on the fact that the contract was not a c.i.f. contract, neither the decision of the Divisional Court nor the criticism by Scrutton L.J. can be seen as a safe guide to the solution of the general problem of the effectiveness of appropriation after loss under c.i.f. contracts.¹⁴⁷

However, in the case *Clark v Cox, McEuen & Co.*¹⁴⁸ the Court of Appeal held that the terms of the particular contract permitted the appropriation of goods known to be lost.

4.5 Appropriation to damaged cargo

If we consider the question of damage to the goods rather than loss thereof, it is easier to state that a c.i.f. seller may validly appropriate to his contract goods, which have been damaged at sea prior to the time of appropriation than if the goods has been lost. This is on the rule that the risk of damage passes *on or as from* shipment¹⁴⁹ under a c.i.f. contract. According to Benjamin, the justification for this difference in the rules relating to lost and deteriorated goods, is that it can often be impossible to establish the point in

¹⁴⁴ Not a c.i.f. contract.

¹⁴⁵ [1917] 1 K.B. 320.

¹⁴⁶ At pp. 329f.

¹⁴⁷ Benjamin's. *Sale of goods*. Sixth ed., 2002 § 19-080.

¹⁴⁸ [1921] 1 K.B. 233. Apparently not a c.i.f. contract.

¹⁴⁹ See *The Julia*. Arts. 67 and 68 of CISG apply to cases of deterioration no less than to cases of loss; but in practice the third sentence of art. 68 (which leaves the risk of goods sold in transit on the seller where at the time of contracting he knew or ought to have known that the goods had been lost or damaged) is unlikely to apply to cases of mere deterioration since the seller will usually have no knowledge (actual or imputed) of deterioration before the end of the transit.

time when the goods were damaged or deteriorated. This since the damage is commonly not discovered until after the goods have arrived at their destination.

A rule, which requires the court to ascertain whether the damage or deterioration occurred before or after the appropriation of the goods to the contract, might be extremely difficult to operate in practice.¹⁵⁰

In *Margarine Union G.m.b.H. v Cambay Prince Steamship Ltd*¹⁵¹ it was argued for the buyer under a c.i.f. contract who was plaintiff in an action against a shipowner that, when the documents were taken up, the risk of damage to the goods passed under the contract of sale to the buyer retrospectively *as from* the date of shipment. Roskill J. accepted that the risk passed when the plaintiff took up the documents and he does not appear to reject the argument that it passed retrospectively. However, there is no suggestion that the seller knew about the damage at the time of tender of documents, but it seems that it would make no difference even if the seller knows about the damage at the time he appropriates the goods to the contract.¹⁵²

Given this need for a clear rule, the buyer should not be entitled to reject the documents even in the case where damage or deterioration occurred before the goods were appropriated to the contract.

¹⁵⁰ Benjamin's. *Sale of goods*. Sixth ed., 2002, § 19-081.

¹⁵¹ [1969] 1 Q.B. 219. *Mash & Murrell Ltd v Joseph I. Emanuel Ltd* [1962] 1 W.L.R. 16.

¹⁵² Feltham J.D. *The Appropriation to a C.I.F. Contract of Goods Lost or Damaged at Sea*. [1975] J.B.L. 273, p. 277.

5 Closing Comments

The issue which still awaits definitive judicial resolution is whether or not a seller can validly tender documents which relate to goods which were lost after the contract between the parties had been concluded but before they had been contractually appropriated to the contract. Arguments can be advanced to support the proposition that the seller can validly tender such documents. On the other hand, there are arguments which supports the other way around, that the seller cannot validly tender such documents. I will here demonstrate the different arguments of these views and final make a summary with my own opinion in this matter in order to make a (safe) guide to follow.

The first supported argument is when Atkin J. in *C. Groom v Barber* held that the buyer was bound to pay even though, in his view, there had been no appropriation on the facts. For the contrary view, this statement can be misplaced because of the fact that it is uncertain whether he used appropriation in its proprietary sense or in its contractual sense, and there are suggestions that he talked about appropriation in its proprietary sense.

The second is that McCardie J. in *Manbre Saccharine* did not attach any significance to the question whether or not the goods had been appropriated to the contract prior to their loss. However, the silence of McCardie J. is a weak foundation for the argument that the issue is irrelevant.

Another argument favour for the proposition that it is possible to appropriate cargo, which has been already lost, is that it can be difficult to work out whether or not there has been an appropriation on any given facts. Support for this fact is that we cannot be sure whether there had been a contractual appropriation in either *C. Groom v Barber* or *Manbre Saccharine*.

For the opposite view, it can easily be argued that it is not particular difficult to work out whether or not there has been a contractual appropriation given the use of notice of the appropriation which is made in commercial practise. The reason why it we have difficulty in working out whether there or not there had been contractual appropriation on the facts in *C. Groom v Barber* and *Manbre Saccharine* is not because the issue is inherently difficult but because the issue was not discussed by the judge in either case.

A rule which states that the seller can validly tender documents whether or not the goods have been appropriated to the contract is clear and simply to apply. The need for a clear rule was a factor, which influenced McCardie J. in *Manbre Saccharine*¹⁵³ where he said that the view, which he adopted:

¹⁵³ Supra.

“Will simplify the performance of c.i.f. contracts and prevent delay either through doubts as to the loss of the ship or goods or through difficult questions with regard to the knowledge or suspicion of a vendor as to the actual occurrence of a loss”¹⁵⁴

On the assumption that a c.i.f. seller may validly appropriate to a contract goods already lost, a further question arises. Does the seller only have the right in relation to goods lost at sea after the date the contract was concluded or may he make a c.i.f. contract and then appropriate goods already lost at sea? Where there is a chain of sales c.i.f. (usually are), it may well be that the later contracts are made after goods appropriated to his contract by the first seller and passed down the chain were lost or damaged at sea.

The disadvantage of a rule which permits a seller to tender documents relating to goods which has been lost prior to being appropriated to the contract, might enable the seller to benefit unfairly at the expense of the buyer, at least in the case where the seller has knowledge of the loss of the goods at the time he appropriates them to the contract. The benefit for the seller would be that, if the market rose he would appropriate and tender the lost shipment, but he would not be bound to do this. Therefore, if the market fell and the policy did not cover the loss, he could buy another shipment below the contract price, tender that, and claim the insurance¹⁵⁵ on the original (lost) shipment. This was pointed out by Rowlatt J. in *The Olympia Oil*¹⁵⁶ where he said to allow appropriation after loss might lead to some strange results.

“Pushed to its legal conclusion, this would involve that the persons in whose hands the ship was lost could afterwards enter into a contract to sell cargo, and, if the price fell, buy a cargo and tender it and pocket the difference; and, if the price rose, tender the lost ship and escape from the speculation without loss.”¹⁵⁷

Although the dictum refers to the case of goods lost before the conclusion of the contract, the same result would follow if a c.i.f. seller would be able to appropriate goods after loss.

Since this specific problem has not yet in its narrow sense been actually solved, it is difficult to see how the courts will approach this. I believe it much depends how the courts will strike the balance between certainty and fairness. A court who wishes to lay down a clear and certain rule will conclude that the seller is entitled to tender documents relating to goods the contract. On the other hand, a court who wishes to avoid giving what seems to be an unfair opportunity to the seller to speculate in the market at the expense of the buyer may approach the view that the seller is not entitled to appropriate goods which has already been lost. Whether the seller had or had not knowledge of the loss is not always easy to determine.

¹⁵⁴ At p. 204.

¹⁵⁵ Which would normally be based on the contract price.

¹⁵⁶ [1915] 1 K.B. 233.

¹⁵⁷ At p. 239. Rowlatt J. contemplates the sale of “a cargo” – not of “the cargo”, which would be specific goods.

To say that a seller may not appropriate a lost cargo strikes at the principle of retrospective risk allocation, and in the light of the principles as to damaged goods canvassed in the previous chapter and the suggested right of a seller c.i.f. to appropriate to his contract goods lost at sea between the time of the contract and that of the appropriation, my opinion is that if a c.i.f. seller may validly appropriate to his contract goods, whether or not he knows of the loss at the time of appropriation so he can pass the risk of such loss or damage to the buyer *as from* shipment.

Another reason in favour of the view stated is that, if we consider how this would work where the loss or damage occurred in a cargo traded down a string. Each buyer would have a cause of action against his seller for breach of the seller's duty to deliver goods of contract description. Each seller would wish to rebut liability by proving that the goods were in a perfect condition when he sold it down the string. For the seller to prove this might be difficult to meet in practice. Therefore, if the seller is not in breach, as here suggested, the litigation ensuing from loss or damage is altogether neater and more appropriately directed against the party who most likely has caused the loss or damage i.e. the carrier, instead of the parties who least likely to have caused it i.e. the traders.¹⁵⁸ At any rate, if the buyer has title to sue the carrier, either by bringing himself within the COGSA -92 or by claiming such title to sue through an implied contract, tort or bailment.

On the above arguments represented, I found it hard to see why the rule should not be applicable to goods, which are lost prior to the time of appropriation. There are no good reason for a different principle between a case of [serious] damage and a case of loss. The buyer is therefore, where the proper documents are tendered to him obliged to pay for the goods, although they may be at the bottom of the sea or through some unforeseen circumstances they never arrive. However, I will end by saying that it is arguable that if the seller *knows* about the loss and makes the contract with the intention of appropriating the lost cargo thereto that there has been a fraudulent misrepresentation as to present intention as described above.

¹⁵⁸ Contra *Benjamin*, where he takes the view that a seller cannot appropriate goods which are lost, he places the risk of deterioration, as appose to loss, prior to appropriation upon the buyer, on the basis that risk passes on or as from shipment, because it will often be impossible to show whether the deterioration occurred before or after appropriation.

Supplement A

Benjamin

Deterioration:

Sold – shipped – deteriorated: Risk on the buyer, passed *on* shipment.

Shipped – deteriorated – sold: Risk on the buyer, passed *as from* shipment with retrospective effect.

Shipped – contract – appropriated – deteriorated: Risk on the buyer.

Shipped – contract – deteriorated – appropriated: Risk on the buyer.

Lost:

Sold – shipped – lost: Risk on the buyer.

Shipped – lost – sold: Risk on the seller.

Shipped – contract – appropriated- lost: Risk on the buyer.

Shipped – contract – lost – appropriated: Risk on the seller.

Goode

Lost/ deterioration

Documents – lost: Risk on the buyer.

Tender documents – lost – acceptance: Risk on the buyer.

Unless the goods still form an unidentified part of a larger bulk.

Contract – shipment – lost – tender documents: Risk on the buyer.

This is even if the seller was aware of the loss

Shipment – lost – contract:

(a) unknown to the parties: The contract is void or frustrated according to art 6 of Sale of Goods Act 1979.

(b) damage/ deteriorated: buyer right to reject (from start).

Bridge

Lost/ deterioration

Appropriation – lost – tender documents: Risk on the buyer.

Lost – appropriation – tender documents: Risk on the buyer.

(a) seller did not know: no different

(b) seller knew: more difficult but no different

No different between damage and loss.

No reason (documentary) to deny the sellers right to appropriate lost cargo.

Debattista

Shipped – lost – property ascertained/ appropriated: Risk on the buyer.

Possible to appropriate the goods after loss.

Feltham

Damage – contract – appropriation: Risk on the buyer.

Contract – damage – appropriation: Arguable that the risk is on the buyer.

Even though the seller knows about the damage at the time of appropriation.

Contract – lost – appropriation: Arguable that the risk is on the buyer.

But it may be otherwise if the seller knows of the loss and makes the contract with the intention of appropriating the lost cargo thereto.

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