

CHAPTER 4

CIF CONTRACTS

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4.1 DEFINITION

- CIF contracts are undoubtedly the most important of the contracts based on the carriage of goods by sea.
- The classical judicial definition of a CIF contract was given by Lord Atkinson in *Johnson v Taylor Bros.* [1920] AC 144 at 145.

Johnson v Taylor Bros.

[1920] AC 144 at 145 [Lord Atkinson]

- The *vendor* ...is bound by his contract to do six things. **First**, to make out an invoice of the goods sold. **Secondly**, to ship at the port of shipment goods of the contract description. **Third**, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. **Fourth**, to arrange for an insurance upon the terms current in the trade which will be available for the benefit of the buyer.

Fifthly, with all reasonable despatch to send forward and tender to the buyer three 'shipping documents', namely, the *invoice*, *bill of lading* and *policy of insurance*, delivery of which to the buyer is symbolical of delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price.

Smyth & Co. Ltd v Bailey, Son & Co. [1940] 3 All ER 60

[Per Lord Wright]

“The initials [CIF] indicates that the *price* is to include cost, insurance and freight. It is a type of contract which is more widely and more frequently in use than any other contracts used for the purposes of sea-borne commerce.”

The Julia [1949] AC 293 [Lord Porter]

The obligations imposed on a seller under a CIF contract include the tender of a BL covering the goods contracted to be sold, coupled with an insurance policy in the normal form and accompanied by an invoice which shows the price. Against tender of these documents the purchaser must pay the price. ... The buyer, after receipt of the documents, can claim against the ship for breach of the contract of carriage and against the underwriter for any loss covered by the policy.

Although the parties to the contract may state that it is on CIF terms, it is not conclusive. In ***The Julia***, Lord Porter said: “The true effect of all its terms must be taken into account, though, of course, the description CIF must not be ignored entirely”.

4.2 CENTRAL ROLE OF DOCUMENTS

A CIF sale: a sale of documents?

In ***Arnold Karberg & Co. v Blythe Green Jourdain & Co.*** [1915] 2 KB 379 at 38, Scrutton J stated: “ A CIF sale is not a sale of goods, but a sale of documents relating to goods.”

- There are, however, factors that militate against this rule.

- One important objection is the fact that even if the CIF seller has tendered valid documents, the buyer will still have the right to reject the actual goods if they do not conform to the requirements of the contract.
- Moreover, the dictum of Scrutton J was expressly dissented from by the Court of Appeal in the same case.

Arnold Karberg v Blythe

[1916] 1 KB 495 at 510(CA) [**Bankes L J**]

I am not able to agree with that view of the contract, that it is a sale of documents relating to goods. I prefer to look upon it as “a contract for the sale of goods to be performed by the delivery of documents”.

Arnold Karberg v Blythe

[1916] 1 KB 495 at 514 [**Warrington L J**]

The contracts are contracts for the sale and purchase of goods, but they are contracts which may be performed in a particular manner... that the delivery of the goods may be effected first by placing them on board ship, and secondly by transferring to the purchaser the shipping documents.

Documents play a central role

In any case, we have to admit that documents play a central role in the CIF contract (that is why some writers call it as a ‘documentary sale’) and goods are in one sense secondary. The seller does not undertake that the goods will arrive, but merely that the buyer will have possession of documents, conferring on him:

- (a) The right to immediate possession of the goods from the carrier on arrival at the port of destination and the benefit of a contractual claim against the carrier; and
- (b) The benefit of a contractual claim against the insurers.

4.3 Documents in CIF contracts

The term CIF indicates the three documents central to such a sale and these are:

- (i) A commercial invoice, representing the cost element (sales contract);
- (ii) An insurance policy, representing the insurance element (insurance contract); and
- (iii) A bill of lading, representing the freight element (contract of carriage).

(1) Commercial invoice

- This is an invoice prepared on shipment of the goods and therefore more than a normal type of invoice which is merely a price quotation and request.
- The invoice must be completed in strict agreement with the terms of the contract. Even the slightest variation may cause difficulties, in particular with the bank which may in that case be reluctant to make available finance under the letter of credit.

- The invoice, on occasion, has to satisfy official requirements of the country of importation.
- It is on the price quoted in the commercial invoice that customs duty is assessed.

- The invoice should set out the full details of the parties, the goods, the price and the payment terms, shipping marks and numbers, and the shipment itself including the port of loading, route and port of discharge.

(2) Insurance policy

- The marine insurance policy which the seller has to tender to the buyer should provide cover against the risks which is customary in the particular trade to cover with respect to the *cargo* and voyage in question.
- It is usual to agree in the contract of sale on the *nature of the insurance policy*, e.g. whether the policy should be an all risks policy in the form of Institute Cargo Clauses A to Lloyd's Marine Policy.

Delivery of Policy may not be possible in the case of an 'open cover'

- In practice, the delivery of the policy itself is sometimes not practicable because the seller may have arranged an 'open cover', which covers an unspecified quantity of goods that are to be shipped within a certain period, and under which no specific policy for each consignment is issued.

Should stipulate in the contract if 'cover note' or certificate' only can be tendered

- In this case he will not receive an insurance policy which he can tender to the buyer, but merely a broker's cover note or certificate. In such a situation, the seller ought to stipulate for the delivery of a cover note or insurance certificate. If there is no such provision, the buyer can reject such documents because they do not give the holder a direct right of action against the insurer.

(3) Bill of Lading

- A bill of lading is a document issued by or on behalf of the actual sea-carrier of goods to the person (usually called the shipper) with whom he has contracted to transport the goods.
- A bill of lading has three functions:
 - (i) A receipt for the goods shipped;
 - (ii) Evidence of the contract of carriage; and
 - (iii) A document of title.

- Bills of lading can be classified into:
 - (i) Negotiable bill of lading: or an “order bill”.
 - (ii) Non-negotiable bill of lading: a straight consigned bill, which is deliverable to the named consignee only, who has no right to transfer.

- Another way of classifying bills of lading is:
 - (i) A “**shipped bill of lading**” is one which states that the goods have been shipped, i.e. put on board the carrying ship. Normally it will state the date on which the goods were shipped.

- (ii) A “**received (for shipment) bill of lading**” is one which merely states that the goods have been received by the carrier for shipment and provides no evidence of actual shipment. Such a bill of lading will be rejected if tendered under a CIF contract in the absence of an express agreement to the contrary.

- The form and type of the bill of lading to be used in a CIF contract will be determined by the terms of the contract, including any terms to be implied into it as a result of trade usage or the previous dealings of the parties.
- Certain *general principles* apply, however, when the contract is silent on that point.

(A) The bill must be a shipped bill of lading

- In the absence of agreement to the contrary, the bill of lading to be tendered under a CIF contract must be a 'shipped bill of lading'.

(B) The bill must be clean on its face

- The bill of lading must be clean and not clauded or fouled. A clean bill of lading is one which bears no superimposed clauses declaring a defective condition of the goods or packaging.

(c) The bill must cover the entire voyage

- The CIF buyer is entitled to continuous documentary cover throughout the voyage. The BL must cover the entirety of the transit of goods; any break in cover might mean that the buyer may be left without a right of suit against an errant carrier.

Landauer & Co. v Craven

[1912] 2 KB 94.

- A *CIF London* sale of hemp involved shipment at Manila. It was the trade practice to *transship at Hong Kong*. The bill of lading tendered, however, did not cover the Manila to Hong Kong leg of the journey and was therefore held to be defective. The *Landauer* case was followed in *Hansson* case where it was held that in such a case the buyer may repudiate the contract.

Hansson v Hamel & Horley Ltd

[1922] 2 AC 36

- The cargo of cod guano was to be shipped CIF Kobe or Yokohama from Norway. There were however no ships sailing directly from Norway to Japan. Transshipment had to be made and the goods were placed on a local ship to be carried to Hamburg before transshipped to Japan. The bill of lading issued at the port of Hamburg made no reference to the leg between Norway and Hamburg.

Held: The bill of lading in this case afforded the buyer no protection in regard to the first voyage. Although labeled a 'through bill of lading', it was not really so. The buyer was left with a considerable lacuna in the documentary cover to which the contract entitled him. Therefore, he was entitled to repudiate the contract.

(D) The bill must be freely Transferable (negotiable)

- Subject to the terms of the contract, the bill must be made "to order" (negotiable), so as to entitle the consignor to transfer the rights to a sub-buyer or any other person.
- However, it is possible for the sale agreement to envisage the production of "straight consigned bill" (non-negotiable). This happens where the consignee of the goods has no intention to transfer his rights to any third party.

(E) The bill must be valid and effective

- The bill would not be effective if it is not transferable on its face as, when e.g. it is marked “Not transferable”.
- A bill is also not effective if the contract it represents is for any reason void.

Arnold Karberg v Blyth

[1916] 1 KB 495

Goods were sold CIF Naples and shipped on a German ship. Though both seller and buyer were British the contract of carriage became void for *illegality* on the outbreak of war in 1914. The tender of the bill of lading was therefore not valid and effective.

(F) Other substitutes

- The parties to CIF contract may agree that some other documents, such as sea waybill or delivery order shall replace the bill of lading.
- **(1) A Sea waybill** – is a document which contains an undertaking by ‘the carrier’ to the shipper to deliver to the person who is for the time being identified as being entitled to delivery. A sea waybill is a receipt for the goods but is non-transferable and is not a document of title.

- **(2) A ship’s delivery order** – Sometimes it is not possible for the seller to procure bill of lading, especially when he has shipped a large consignment of goods. Normally, there will be just one bill of lading for the bulk cargo. It cannot be divided up. The seller must use delivery order as an alternative.

- A delivery order is an order in writing given by an owner of goods (seller) to a person in possession of them, e.g. as carrier or warehouseman directing the latter to deliver the goods to the person named in the order.
- **(3) Electronic bills of lading:** See UNCITRAL Model Law or E Commerce 1996. CMI Rules on E Bills of Lading 1990; Bolero Bills of Lading.

- See Assoc. Prof. Dr. Abdul Ghafur Hamid, "The Legal Implications of Electronic Bills of Lading: How Imminent Is the Demise of Paper Documents?", *INSAF* (2004) Vol. XXXIII, No. 3, p. 1-18.

4.3 Tender of the documents

- The shipping documents are extremely important to the seller who relies on them to be paid; and for the buyer they allow him to claim the goods and to have property in the goods.
- Where the buyer relies on his bank to settle the invoice, the documents are equally important for the bank to serve as security for money advanced.

- It is therefore imperative that the seller ensures that the documents as tendered conform to the contractual requirements in order to be paid.

Must be tendered within time limit or as soon as possible

- If the contract expresses or implies any *time limit for tender*, the buyer is entitled to reject the documents if they are not tendered within this limit.
- If there is *no time limit* in the contract, the seller must tender the shipping documents to the buyer 'as soon as possible'

4.4 TWO RIGHTS OF REJECTION

- Since documents are central to a CIF sale, the buyer has two rights of rejection for non-conformity:
 - (1) the right to reject the documents;
 - and
 - (2) the right to reject the goods.

Kwei Tek Chao v British Traders & Shippers Ltd. [1954] 2 QB 459 Lord Devlin

“There is a right to reject the documents and a right to reject the goods and the two things are quite distinct. ... So far as the goods are concerned a CIF seller must put on board at the port of shipment goods in conformity with the contract description.

He must also forward documents and those documents must comply with the contract...

A right to reject is merely a particular form of the right to rescind.”

Facts of the case

London exporters sold goods to merchants in Hong Kong, CIF Hong Kong, shipment from continental port not later than October 31. Unknown to the sellers the goods were shipped after that date but the *BL was forged* and showed October 31 as the date of shipment.

The buyers, who were unaware of this, accepted the documents and disposed of the goods after their arrival by placing them into godown and by pledging the godown warrant with a bank by way of security.

(Two rights of rejection are distinct. Disposal of the goods does not deprive the buyer of his right to reject documents)

Later the buyers discovered the forgery and sued the sellers for damages.

- Held: The two rights of rejection being distinct in a CIF contract, the disposal of the goods by the buyer did not result in the loss of their right to reject the documents as not being in accordance with the contract and they were entitled to claim damages for being prevented from rejecting the documents.

(1) Rejection of documents

The seller must tender to the buyer documents stipulated by the contract. If the documents do not conform to the contract then the buyer is entitled to reject those documents and the seller will be in repudiatory breach of contract, subject to the seller's ability to re-tender conforming documents within the time allowed by the contract. See *Borrowman, Phillips & Co. v Free & Hollis* (1878) 4 QBD 500.

- The relevant documents must be tendered by the seller within the time stipulated by the contract or, if no time is stipulated, within a reasonable time. See *Toepfer v Lenersan-Poortman* [1980] 1 Lloyd's L.R. 143.
- A CIF contract stipulated, "Documents to be tendered not later than 20 days after issuance of the BL". BLs were issued on 11 December 1974. The documents were tendered in February 1975 but were rejected by the buyers as being out of time.

Held: they were entitled to do so in view of the express clause.

The buyer must be aware that the right to reject the documents is lost when he or the bank takes up the documents, even if inaccurate, and pays against them without objection.

(2) Rejection of goods

- If the goods are not in conformity with the contract the buyer may reject the goods.
- It does not mean that the buyer must always reject the non-conforming goods. He has the option. He may accept them and sue for damages as in the case of breach of warranty.
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- The normal measure of damages will apply, namely, the difference between the contractual value of the goods and their actual value as at the date of delivery.

4.5 PASSING OF PROPERTY

In a CIF contract, passing of property depends on three important factors.

- (1) **The goods must be ascertained:** The first point to be taken into account is that under s. 16 of the SGA, property in unascertained goods shall not pass until they have been ascertained. The term “ascertained” here means “identified in accordance with the contract”. See *Re Wait* [1927]1 Ch. 606.

- (2) **Intention of the parties: Property in the goods passes on tender of documents and payment of the price:**

Where the goods have been ascertained, property in them passes according to the intention of the parties.

According to trade practice, the presumed intention of parties in a CIF contract is that “property in the goods passes upon the transfer of the documents in exchange for payment of the price”.

Mitsui & Co.Ltd. v Flota Mercante

[1989] 1 All ER 951

Held: "In a CIF contract the property is to pass on tender of documents and payment of the price".

The general practice is that there is no intention to pass property in the goods in the transfer of the documents if there is no reciprocal payment of the price from the buyer.

(3) **Subject to the buyer's right to reject the goods:**

Even if (a) the goods are ascertained and (b) the buyer has received the documents and paid the price, the buyer may retain the right to reject the goods if they do not conform to the specifications of the contract.

If the buyer exercises this right, the property will revert in the seller (i.e. returns to the seller).

Kwei Tek Chao v British Traders & Shippers Ltd.

[1954] 2 QB 459

The buyer paid the price against the tender of documents and then discovered that the goods did not conform to the contract. The question arose as to their right to reject.

Devlin J: "what the buyer obtains is the property in the goods, subject to the condition that they revert if upon examination he finds them to be not in accordance with the contract. That means he gets only conditional property in the goods."

- Therefore, any transfer of property under a CIF contract must be regarded as conditional until such time as the buyer, expressly or by implication, clearly and unambiguously accepts the actual goods.

4.6 PASSING OF RISK

- (1) Under a CIF contract the presumption is that risk passes as from shipment of the goods. This means that risk will generally pass to the CIF buyer before property in the goods.
- (2) The separation of risk and the passing of property may cause problems in that the CIF buyer may not be able to bring an action in tort for damage done to the goods prior to his obtaining property or right of possession in those goods. See *Leigh & Sullivan Ltd. v Aliakmon Shipping, The Aliakmon* [1986] AC 75.

- (3) However, In *Biddel Bros v E Clemens Horst Co.* [1911] 1 KB 934, it was held that “The goods are at the risk of the buyer [at the time of shipment], against which he has protected himself by the stipulation in his CIF contract that the seller shall, at his own cost, provide him with a proper policy of marine insurance intended to protect the buyer’s interest, and available for his use if the goods should be lost in transit.”

4.7 DUTIES OF THE CIF SELLER

- (1) To make a contract of carriage for the goods to the named port of destination.
- (2) To insure the goods for the contractual voyage.
- (3) To provide the buyer with a commercial invoice, a clean bill of lading and an insurance policy.

(4) To ship the goods conforming to the contract

- The seller is not himself obliged to ship the goods unless the contract requires. He may instead purchase the goods afloat and appropriate them to the contract.
- Subject to the terms of the contract, a CIF seller has the following duties in respect of shipment:

(i) The seller must ship or appropriate goods on a ship which departed from the port of shipment on the date or within the period of shipping specified in the contract. Failure to do so is a repudiatory breach. See *Ashmore v Cox* [1899] 1 QB 436.

(ii) The ship must be bound for the agreed port of destination and following the contractual or if none the usual or reasonable route.

(iii) Unless there is provision for 'deviation', the seller is in breach if the ship in fact deviates. The buyer could reject the goods on this basis, and the seller's recourse would be against the carrier provided that the contract of carriage had provided deviation.

4.8 DUTIES OF THE BUYER

(1) To pay on tender of documents

(a) The buyer must pay the price if the documents conform and cannot delay until he has examined the goods. If the buyer knows that the goods are not in accordance with the contract, the general rule is that he must nevertheless pay against documents if they are conforming.

The rule does not apply where the non-conformity of the goods is due to the seller's fraud. See *Gill & Duffus v Berger* [1984] AC 382.

(b) The buyer must pay the price in the manner specified by the contract. This is usually a strict obligation and his use of another unauthorised mode of payment will enable the seller to reject the buyer's performance.

(c) The vast majority of CIF contracts made today will establish a documentary credit as the method of payment and will ensure that the seller receives payment of the price on tender of valid shipping documents to a specified bank.
The credit is established under the terms of the sale contract.

The buyer instructs his bank (the *issuing bank*) to open a credit in the seller's name, normally through a bank in the seller's country (the *correspondent bank*); this bank notifies the seller of the opening of the credit, on which the seller may draw only on presentation of the correct shipping documents to the bank.

(2) To take delivery of the goods

The buyer has the right to inspect the goods and reject them if he can show that the goods did not conform when the seller shipped them.

Loss and deterioration caused after the time of shipment is at the buyer's expense and he must look either to the carrier under the contract of carriage, or to his insurance.

4.8 REMEDIES IN INTERNATIONAL SALES

4.8.1 Buyer's remedies

- (1) Rejection of the goods on arrival if
 - (a) they had been sold by a seller who had no title in the goods; or
 - (b) do not conform with contract.
- (2) Specific performance (s. 51 SGA)
- (3) Damages for non-delivery of the goods. Damages could also be claimed for late delivery.

4.8.2 Seller's remedies

(1) Action for the price

The seller is entitled to claim for the price only when property in the goods has passed to the buyer.

(2) Damages for non-acceptance

(3) Damages for breach of warranty