CHAPTER THREE

THE PASSING OF RISK IN CIF AND FOB CONTRACTS

Insurance and risk in international trade contracts.

It is unrealistic to discuss the passing of risk in international trade without linking it to that of insurance, the essence of which is risk. It is normally the underwriter who bears the loss where the cargo has been insured.

Responsibility for insuring goods in transit differs depending on the type of contract involved. It is normal practice for all parties involved in international trade agreements to be insured. Financial institutions, if involved, insist that the cargo is insured to protect their investment.

Since it is usual practice for the underwriter to reinsure his risks, the loss is usually spread even more thinly. Whilst denting the profits of a large number of underwriters, even the most dramatic of maritime losses may not in fact mortally wound the financial well being of any single individual or corporate grouping. This genius for spreading risk has ensured that Lloyd's of London has become the longest enduring and strongest insurance market in the world.

Whilst probably the most ready of business organisations to accept a client's money, the insurance underwriter is one of the hardest to extract money from. Often claims are fiercely contested by underwriters in attempts to shift potential losses away from their doorstep.

There are several standard form insurance policies involved in international trade. The archetypal policy was the Lloyd's S.G. (Ship and Goods) Policy. This has now been superseded by a number of specific policies ; The Institute Hulls ; Institute Time ; Institute Voyage ; Institute Cargo Claims Policies A, B & C ; War Risks Policies and P & I Club Membership.

The Ship Owner / demise charterer : The 'Hull Policy' covers the ship itself.

The Carrier Institute Time Policy or Institute Voyage Policy depending on the type of charterparty involved. A war clauses policy is normally addended when a vessel ventures into known trouble spots eg the Gulf Wars or Yugoslavia etc.

The Cargo Owner Either the buyer or the seller depending on the sales contract (c.i.f or f.o.b) takes out the policy most commonly today under Institute Cargo Clauses A, B or C depending on the degree of risk that the cargo owner wishes to cover. I.C.C. A is the dearest being 'All risks'.

For over 350 years the Lloyds Policy was the standard insurance policy used in international trade with a variety of clauses which would be added to tailor the policy to the insurable interest. Since the 1980'ies a series of Institute Policies have been developed and adopted for each of the main types of insurable interest.

Frequently the real parties to litigation are underwriters who sue in subrogation, that is to say, in place of the policy holders. When one reads in a case that a particular buyer, seller, shipowner or carrier is held liable for the loss one should not necessarily feel the decision is unfair on that person since in reality his underwriter bears the loss.

The legal principle at stake is nonetheless important since, if for any reason the insurance policy is held to be invalid, the assured is the person who would bear the loss. The legal principles also highlight who should be insuring themselves and against what risks. It will be seen that an insurance policy is only valid if a person has an insurable interest. Persons who have to bear losses obviously have an insurable interest and it is therefore in such a person's interest to insure against such risks. Wherever documentary credits are involved it is a condition of the credit that insurance is provided.

In c.i.f. contracts insurance is negotiated and provided for by the seller, though of course the cost of insurance will be covered by the price, and so is in reality paid for by the buyer. In f.o.b. contracts the buyer usually negotiates his own insurance.

When does risk pass ?

The general principle is the same for f.o.b. & c.i.f. contracts. Risk in goods passes from the seller to the buyer on shipment of the goods. See in particular Inglis v Stock [1] regarding f.o.b.and The Julia [2] regarding c.i.f. sales contracts.

The result is that the buyer has no action against the seller if the goods are lost or damaged at sea. The buyer must accept the shipping documents and pay the agreed price, even though the goods might be damaged or may even have ceased to exist. Professor R.M.Goode argues that this should not be the case and that a seller could be prevented from appropriating damaged or lost goods to a contract. However, **Groom(C) Ltd v Barber** [3] and **Manbre Saccharine Co. Ltd v Corn Products Co Ltd**.[4] have both held that documents c.i.f. and f.o.b. can be tendered to a buyer by a seller even if the goods have been lost at sea. Neither case addressed the issue of what would happen if the goods had not been appropriated before the loss.

The rule on the passing of risk only applies to the Seller and Buyer relationship. It is not applicable to other relationships. **Inglis v Stock** involved an F.o.b. part purchase of 200 tons of a larger undivided cargo of bulk sugar bound for Hamburg. The seller sold 200 tons to the buyer and the rest of the bulk cargo to a third party. The buyer subsequently bought the third party's share as well. The vessel sank in the Elbe. After the sinking the seller, knowing of the loss appropriated 200 tons to the buyer. The buyer accepted the documents and paid up. If he had refused to do so the seller could have sued for breach of contract. Could the buyer succeed in an insurance claim under a floating policy[5] on any kind of goods and merchandise between Hamburg & Bristol ? Blackburn L held in the House of Lords that he could. The goods were at his risk once he accepted.

Groom (C) Ltd v Barber involved a shipment c.i.f. of 100 bails hessian cloth on the 15th July 1914 on board the City of Winchester during peace time. On the 4th of August war was declared and on the 6th August The City of Winchester was sunk by a German cruiser. Sometime later the seller tendered the bill of lading to the buyer. The cloth was by that time at the bottom of the sea. The seller also tendered the insurance policy which did not contain war risk cover. The buyer refused to pay. Atkin J. held that the seller could sue for the price. A seller c.i.f. may validly tender a bill of lading for goods lost at sea at the time of the tender.

Manbre Saccharine v Corn Products involved a c.i.f. contract for a number of bags of starch of 280 pounds weight. Bags of different sizes but amounting to the same total weight were shipped. The carrying vessel, The Algonquin, was sunk by a German submarine and the seller knew this. He tendered the shipping documents to the buyer including the bill of lading and a letter stating that the goods were insured but without tendering the actual policy of insurance. The court stated obiter that the seller could tender the documents knowing of the loss but (Ratio) that the buyer could refuse to take them up because

i) The goods were not in accordance with the contract description i.e. wrong size bags.[6]
ii) No policy of insurance had been tendered. A mere letter declaring insurance is insufficient c.i.f. The actual policy must be tendered.

The suit involved an action by the buyer for breach of contract, namely,. a failure to tender the appropriate documents to fulfil the c.i.f. contract. He was claiming damages as the most appropriate remedy in the situation because the price of the starch had risen considerably and so he had suffered a considerable loss of bargain.

Who bears the loss for goods damaged in transit ?

Normally, the buyer can claim on his insurance. The buyer may also have a legal action against the carrier for loss of, or damage to the goods. How much loss the carrier bears depends on the terms of the contract of

1 **Inglis v Stock** [1885] 10 App Cas 263
2 **The Julia** [1949] A.C 293
3 **Groom(C) Ltd v Barber** [1915] 1 KB 316
4 **Manbre Saccharine Co. Ltd v Corn Products Co Ltd** [1919] 1 KB 198
5 A floating insurance policy is one where an assured buys a cheap rate bulk insurance and allocates consignments of cargo to the policy until cover is exhausted.
6 Semble **Re Moore & Landauer** [1921] 1 K.B. 73. Consider however whether or not the result would be the same today under the new s14 implied term as to satisfactory quality.

carriage, the availability of limitation of liability under International Conventions governing contracts of carriage and similar provisions in domestic law, and the cause of the loss. The buyer would normally make a claim against his underwriter who would in turn takes out an action against the carrier, under the doctrine of subrogation, which places the underwriter in the shoes of the buyer for the purpose of the legal claim. The buyer would recover in full under his insurance policy, whereas the underwriter would only be able to recover the percentage available under the limitation convention from the carrier. The carrier in turn would claim on his own insurance for the amount he has to pay the underwriter though his policy will probably not cover loss due to his actual fault and privity. Therefore the buyer seldom suffers. Either the underwriters or the carrier pays. Ultimately the entire loss may be covered by insurance.

Occasionally the buyer does not have an action against the carrier and there may be a problem with the insurance cover for example because that particular risk is not covered by the policy or because the goods have increased in value leaving the goods underinsured. The buyer then has to bear the loss since he cannot sue the seller and he cannot refuse to pay the seller the price.

c.i.f. contracts The risk passes retrospectively, if the goods are already at sea, from the seller to the buyer, on endorsement of the bill of lading and runs from the time that the goods passed over the ship's rail. Thus if the goods are damaged after loading, the risk remains with seller until the bill of lading is endorsed. On endorsement the risk is, by a legal fiction, back-dated to loading so that the risk of something that has already occurred transfers to the buyer.[7]

f.o.b. contracts : As the contract states, the goods are delivered free on board. Once over the ship's rail the risk in the goods passes to the buyer. **Inglis v Stock** confirms that a buyer f.o.b. has an insurable interest in goods which are lost at sea and can successfully claim against his underwriter for that loss. Even though he may not yet be the owner of the goods he is nonetheless the person who has to bear the loss. The contract of insurance is not a gambling contract but a genuine contract of indemnity. It is important, since it shows even if one anticipates owning, but does not yet own part of a bulk cargo, one nonetheless has an insurable interest since the risk passes on presentation of the bill of lading f.o.b.[8]

Knowledge of loss and tender of bill of lading ?

It was held in **Groom (C) Ltd v Barber** that a seller c.i.f. may validly tender a bill of lading in respect of goods lost at sea at the time of the tender. It is also authority for the statement that there is no general obligation under a c.i.f. contract to provide war risk insurance. The insurance policy that is required under a c.i.f. contract is a policy that is usual in the trade. The contract was dated 8th July when a war policy was not usual in the trade. The policy had a section 'war risk for buyer's account' which was not taken up. The seller did not know the goods were lost at the time of tender.[9] In **Manbre Saccharine v Corn Products_** the court assumed that it makes no difference whether the seller did or did not know of the loss at the time of the tender. In the event the buyer won on a different ground, so unfortunately, any statement to that effect is obiter.

Can a buyer reject a bill of lading where goods are lost or damaged after loading ?

In **The Galatia**[10] **f**ollowing a bank rejection of a bill of lading, which indicated that goods subject to a documentary credit sale had been loaded in good order and condition but had subsequently been damaged, the buyer refused to accept tender of the bill of lading directly to him from the seller. The court held that the buyer was in breach of contract for refusing to accept the documents and pay up on the tender. The goods were loaded in good condition. A fire occurred before the vessel sailed. The goods were offloaded before the bill of lading was issued. Subsequently the bill of lading was claused to indicate that the cargo was smoke damaged. The buyer refused to accept the bill of lading. A third attempt was made at tender by the seller, first to Bank 1, secondly to Bank 2 and finally directly to the buyer. The Court of Appeal held that there was a valid tender. The buyer had to accept the bill of lading since the damage occurred after loading. A clause in

7 See **The Julia** [1949] A.C 293, **Manbre Saccharine v Corn Products** [1919] 1 K.B 198 and **Groom v Barber** [1915] 1 K.B 316 for legal authorities and discussion on passing of risk c.i.f.

8 See also the leading article by Feltham [1975] 3.B.L 273 on passing of risk in c.i.f.

9 Feltham argues that such knowledge would prevent tender though this is doubtful in the light of **Manbre Saccharine v Corn Products**. [1919] 1 K.B. 198

10 **The Galatia** [1980] 1 WLR 495 : 1 All ER 501

a bill of lading is only effective if it states the goods when loaded were damaged. Since it stated that the goods were in good order on loading it was a clean bill of lading. The court did not discuss in any detail whether or not the banks' rejections were valid, assuming that the rejection was covered by the Uniform Customs and Practices of Documentary Credits' standard form terms and conditions. Nonetheless, the buyer had failed to provide a reliable paymaster and in that event the seller can circumvent the normal requirement that where a sales contract is by way of documentary credit presentation must be to the bank and not direct to the buyer.

Exceptions to the general rule that risk passes at the ship's rail.

s14(2). S.O.G. 1979 Implied condition of satisfactory quality.

2). Where the seller sells goods in the course of a business there is an implied condition that the goods supplied under the contract are of satisfactory quality.

2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.

2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods -

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied.
(b) appearance and finish,
(c) freedom from minor defects,
(d) safety and
(e) durability.

2C) The term implied by ss2 above does not extend to any matter making the quality of goods unsatisfactory -

(a) which is specifically drawn to the buyer's attention before the contract is made.
(b) where the buyer examines the goods before the contract is made, which that examination ought to reveal or
(c) in the case of a contract for sale by sample, which would have been apparent on a reasonable examination of the sample.

3). Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known

a) to the seller, or
b) (where the purchase price or part of it is payable by instalments and the goods were previously sold by a credit broker to the seller) to that broker, any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied except where the circumstances show that the buyer does not rely, or that it is unreasonable for him to rely, on the skill or judgment of the seller or credit broker.

4). An implied term about quality or fitness for a particular purpose may be annexed to a contract of sale by usage.

5). The preceding provisions of this section apply to a sale by a person who in the course of a business is acting as agent for another as they apply to a sale by a principal in the course of a business, except where that other is not selling in the course of a business and either the buyer knows that fact or reasonable steps are taken to bring it to the notice of the buyer before the contract is made.

6). As regards England and Wales and Northern Ireland, the terms implied by subsections (2) and (3) above are conditions.

s14(2) Sale of Goods Act 1979 as amended by the Sale of Goods and Supply of Services Act 1994 covers the situation where goods are of unsatisfactory quality at the time of shipping. Even now, it is still not clear from the Act at what time goods are supplied. If it is at the time of shipping, then provided the goods are of satisfactory quality at that time then the implied condition of s14(2) is fulfilled.

If the goods are of 'satisfactory quality' at the time of shipping but deteriorate during the voyage there would be no breach of s14(2) unless 'satisfactory quality' requires the goods to be able to survive the voyage. If this is not so then the risk of deterioration must be borne by the buyer. All the old cases talk of merchantable quality so they cannot be regarded as necessarily applicable now to the new version of s14. It is nonetheless possible, though in no ways certain, that the courts will refer back to the old cases and confirm that the new s14 satisfactory quality requirement encompasses the same issues and would result in the same outcome.

Marsh & Murrell v Joseph I. Emmanuel [11] per Diplock J, Merchantable quality required that the goods had to be capable of surviving a normal sea voyage. A cargo of potatoes was shipped from Cyprus to Liverpool. The c.i.f. cargo deteriorated and was no longer fit for human consumption. The buyer claimed the cargo was not of merchantable quality and so there was no need to pay and in his own turn claimed damages for breach of contract by the seller for failing to provide goods of merchantable quality. Diplock at 1st instance agreed with the buyer. The decision was reversed by the C.A because it was not a normal sea voyage. The ventilators had been closed. This caused the deterioration. However, Diplock's general principle was not affected by the reversal.

There were a number of subsequent cases which doubted the validity of Diplock's dicta, most notably **Cordova Land Corporation v Victor Bros Ltd**.[12]. However Diplock L took the opportunity in **Lambert v Lewis** {1982} A.C. 225 in the House of Lords to reafirm that the implied condition of merchantable quality continued for some time after the sale.

Cordova Land Corpn v Victor Bros [19661 1 WLR 793 : Winn J criticised Diplock's principle. He stated that it only applies, if at all, to perishable goods. It is not applicable to leather skins and merely vulnerable goods which can deteriorate but whose deterioration is not inevitable due to a limited storage life.

Perishable goods refers to highly vulnerable food stuffs such as bananas and tomatoes whose deterioration is inevitable since they have a limited storage life. The implication is that the old s14(2) S.O.G.A. 1893 & 1979 meant that one could not ship, on an extended voyage, food stuffs which were ripe and ready for immediate consumption and so of 'merchantable quality' for a very limited period of time since the goods might not be of merchantable quality on arrival at the port of destination. Merchantable quality implied adequate storage life to reach to port of discharge. Compare however **George Wills & Co Ltd v Davids Pty Ltd.**[13] where beetroot canned in vinegar with a shelf life of one year as opposed to beetroot canned in brine with a shelf life of three years was nonetheless of merchantable quality. Provided the contract called for beetroot in vinegar there was no breach of the Sale of Goods Act implied terms.

See also the Law Commission Working Paper No 85 [14] which endorsed Diplock's view and stated that it should be adopted as law if it had not already acquired that status. However, the Law Commission Working report was directed at domestic and not international sales. If Diplock's view continues to prevail some commentators such as Paul Todd,[15] assert that the negotiability of bills of lading is seriously restricted, with serious implications for the universal acceptance and use of bills of lading by buyers, sellers, banks and underwriters. Such commentators assert that common sense dictates that domestic and international sales of goods should operate from a different point of view and therefore be governed by different criteria. In International Sales rights should be settled solely by reference to the shipping documents. Otherwise each sale would require inspection which would make business nonsense. Thus, if in a **Marsh and Murrell v Joseph Emmanuel** type scenario a contract of resale takes place the buyer is likely to presume that the goods are in good condition. A second buyer with knowledge might refuse to accept the goods especially if the seller has meanwhile gone bankrupt leaving buyer No 1 with a problems since he would be unable to make buyer No2 accept the goods and would be unable to recover from the seller either. Such a system would force inspection of goods at the time of each contract. So, on this basis it is asserted, that there are good policy reasons not to apply Diplock's dicta, since it is impossible to inspect goods at sea every time there is a resale.

Materials later restrict Diplock's view which was merely obiter though this hardly maters since in the light of **Lambert v Lewis**. It was NOT ratio, BUT, Winn J.'s restrictions on Diplock's views were ratio. It was necessary for Winn J. to decide whether or not there was a breach of the sales contract in England, since the buyer wished to serve an order on a U.S. Company. In order to do so the buyer had to show a breach of contract in England.

11 **Marsh & Murrell v Joseph I. Emmanuel** [1961] 1 WLR 862 : [1962] WLR 16 per Diplock J :
12 **Cordova Land Corporation v Victor Bros Ltd** [1996] 1 WLR 793. See Atiyah S.O.G. p129 7th Ed.
13 **George Wills & Co Ltd v Davids Pty Ltd** (1956-57) 98 C.L.R. 77
14 Law Commission Working Paper No 85 (1983) ppl9 - 20
15 Paul Todd, Modern bills of Lading p33

In **Cordova v Victor** the contract of carriage involved a voyage from the U.S. to Hull. The buyer said that the seller had warranted that the skins would arrive in Hull in merchantable condition. He claimed that there was a breach of contract in Hull because they did not so arrive. This claim was based on Diplock's reasoning, which was rejected by Winn J, who thought that there was no breach of contract provided the skins were loaded in good condition and certainly no breach of contract in Hull Therefore the court refused the writ. It does imply however that Diplock's view must be distinguished.

It is however very likely that the new s14(2) does not embrace the notion of survivability of the normal sea voyage in that s14(2B)(e) requires the goods to be durable exactly mirroring **the Marsh and Murrell v Joseph** criterion. Whether or not the distinction drawn in **Cordova v Victor** is upheld in future is uncertain. What is at issue really is whether or not the seller/ shipper or the carrier should bear the risk of loss to cargo which is inherently capable of self destructing. Many other cargoes besides perishable food stuffs potentially have some capacity for self destruction though it may be less certain and less evident to a carrier. If the conditions necessary to carry a cargo safely are well known, as with leather that needs to be kept in a dry environment then the carrier who provides a damp ship should be held responsible for consequent loss.

If however a cargo requires special care whilst being transported which a carrier is unlikely to know about the onus is on the shipper to make a contract of carriage which ensures that special care is provided. Without it the party to the contract of carriage with the carrier whether the buyer f.o.b. or the seller / shipper c.i.f. will have failed to provide an effective vessel.

In the case of a f.o.b. sales contract the buyer cannot complain since he is the author of his own loss since it is the buyer's duty to nominate the vessel.

In the case of a c.i.f. sales contract an essential ingredient of the sale's contract is breached. The buyer will not discover this breach until he receives the damaged or defective cargo. If the buyer sues for breach of the term that an effective vessel should have been provided that was fit to carry the goods the buyer is left with the problem of dealing with the damaged goods and mitigating the loss. He has to do this with sufficient care and diligence to avoid the seller / shipper complaining that no genuine attempt at mitigation has been made by the buyer and all the attendant uncertainty that such a claim imports.

It is perfectly reasonable that the buyer be able to remonstrate that the goods, due to the seller's neglect, have not arrived in a satisfactory state and at the least claim for that loss or even reject the goods, thereby placing the burden of disposing of the defective goods on the seller where it rightly belongs. Under s15(A) Sale of Goods Act as amended, the remedy available in relation to a sales contract between commercial dealers depends on whether or not the damage is so slight that it would be unreasonable to reject the goods. The type of damage suffered in **Marsh and Murrell v Joseph Emmanuel** would clearly be covered by the right to reject though the courts may in future be involved in some hard decisions of fact. No guideline is provided beyond common sense as to what would or would not amount to 'so slight' and the test is presumably yet again, the objective one of, the reasonable man.

Presuming that the buyer has already paid on endorsement of the shipping documents whether directly to the seller or through the banking chain involved in a documentary credit, he should be able to reclaim the price. If he has not yet paid then he should be able to set off payment against a claim for payment and in addition claim damages for the seller's breach of contract. However, once the documentary credit process has started a buyer cannot refuse to reimburse the bank which deals in documents and has no right to reject documents, in the absence of fraud, even when there is actual knowledge that the goods are defective.

On closer examination, none of the above seriously threatens the negotiability of bills of lading any more than any other of the implied conditions as to quality or fitness within the Sale of Goods Act. C.i.f. sales are a sale of documents. There is a duty to accept the documents and to pay on endorsement if the documents are in order. Acceptance of the documents is not acceptance of the goods. The standard procedure under **Marsh and Murrell v Joseph** situations would be for the buyer to accept tender of documents and pay, then reject the goods and then demand return of the price due to a failure of consideration. Paul Todd's objections are really a recognition of the problem incurred by all end of chain buyer's regarding defective goods where

the claim for compensation has to be chased back through the chain since there is no privity of contract between the ultimate buyer and the first seller. Whilst the result is a complicated litigation chain, each previous buyer joins the preceding seller as co-defendant back through the chain to the seller. Perhaps at some stage it might be desirable for a statutory scheme to enable a direct action between first and last tradesman in a chain akin to that now available in consumer protection legislation.

Sellers are still able under the new regime to exclude liability in inter-business relationships under s55 Sale of Goods Act for implied statutory rights or can expressly classify the term as a warranty entitling the buyer only to damages. Such a stipulation must be express unless a trade usage develops to that effect by virtue of s14(4) Sale of Goods Act 1979 as amended by the Sale of Goods and Supply of Services Act 1994. Therefore, the contractual rights afforded to the buyer and the respective duties of the seller are a matter of commercial choice for the parties to the sale's contract.

The problem in **Marsh and Murrell v Joseph Emanuel** was that the buyer had not paid on endorsement. Technically this was a breach of contract for which the seller could sue and would be entitled as of right to damages. However, the buyer had the right to reject the goods for breach of the s14(2) Sale of Goods Act implied term. At this stage a set off between the buyer's right to reclaim the price and the seller's right to be paid on endorsement would result in the two claims cancelling each other out. However, this scenario would not be possible under a documentary credit sale where the bank would have paid for the documents on presentation and endorsement. Then the buyer would be forced to reclaim the price later.

When a bill of lading states that goods are in apparent goods order and condition in respect of perishable goods which are in good order at the time of loading the master is making an accurate statement, and the carrier is not liable for subsequent natural deterioration. However, it could be argued that the statement is incomplete if it is obvious and apparent to the master that the goods will not survive the voyage. Perhaps one solution would be to impose a duty on the master to clause the bill of lading to that effect so that the s14(2)(?B)(d) requirement would become part of the statement as to good order and condition in the bill of lading. Since such bills of lading would not be good tender the loss would not then have to be claimed through the chain. After all, why should the law set up a system to ensure the negotiability of bills of lading for defective goods thus hoodwinking buyers into buying and paying for a law suit ? This would satisfy Mr Todd's objections in a very neat manner by requiring one inspection at the time of shipment and obviating any need for subsequent inspections during passage. A third possible solution to the problem would be to incorporate a term into the sales contract of perishable goods that a certificate of durability for the voyage should be issued by an independent inspector immediately prior to shipment which must be tendered along with the other documents on endorsement. Again, nobody would then be forced into buying a law suit.

If the voyage is not a normal sea voyage who is liable for damage to perishable cargo during the passage ? This then depends on causation as seen by **The Europa.**[16] If the damage is caused by the defectiveness of the vessel then the carrier is liable under s2 C.O.G.S.A. 1992. If the damage would have occurred in any case because of the inherent vice of the goods the carrier is protected both by the exceptions to liability accorded to the common carrier in **Coggs v Bernard**[17] and by the exception for inherent vice in the Hague and Hague Visby Rules.

The passing of risk before shipment.

According to Avery J in **J.J.Cunningham v Munro** [18] circumstances may occur where the buyer accepts the risk of goods before shipping if he is unable to nominate an effective vessel by the nominated time when the seller delivers the goods at the docks. It is the buyer's duty f.o.b. to nominate a vessel and notify a delivery time to the seller. If the vessel does not arrive or is unsuitable for carrying the cargo then the buyer is in breach of contract. The seller can sue the buyer if the seller delivers the goods to the quay on time and the seller is unable to load the goods because of the buyer's default. The case involved an f.o.b. contract for the October shipment of cereals, a perishable bulk cargo. The buyer was allowed under the contract to chose a shipment date any time in October. The seller was short of warehouse space and wished to ship earlier in the

[16] **The Europa** [1908] P.84.

[17] **Coggs v Bernard** (1703) 2 Lord Raym. 909

[18] **J.J.Cunningham v Munro** (1922) 12 Ll.R 62 & 216: Avery J :

month. The seller took the cargo to the docks on the 14th of October and advised the buyer that the cargo had been placed in lighters (a large flat barge used to carry goods from the quay to vessels moored someway from the quay) and in effect said to the buyer that he should collect the cereals and arrange shipment as soon as possible. The buyer protested that the seller could not make him take delivery immediately. Nonetheless he agreed to ship as soon as possible.

The vessel nominated by the buyer arrived on the 28th October. However, the goods had already deteriorated. The seller claimed that the buyer was responsible for the deterioration because of his conduct and the lateness in arranging shipment. This claim was rejected on the facts. The buyer did and said nothing to indicate that he would make arrangements on the 14th October. This was forced upon him unilaterally. The buyer had rejected the new conditions under protest and had not accepted the risk of the goods and had merely agreed to arrange shipment as soon as possible. Risk in the goods remained with the seller till actual shipment.

Avery J said obiter that if the buyer had said to the seller that he had arranged a vessel to arrive on the 14th October and relying on it the seller had sent the goods to the docks on the 14th then if the vessel had arrived on the 28th and the goods had deteriorated then the buyer might well be liable, even though the damage occurred before shipment and at a time when such damage was normally still at the seller's risk.

There were two reasons for this :-

i). The buyer by his conduct (a fortiori if the buyer had requested that the goods be made available for shipping at that time) would have varied the contract to a contract of shipment on the 14th.

ii). Representation and reliance. The party making representation ie the buyer would then be estopped from going back at a latter time. The buyer would be estopped even though the goods were at the seller's risk.

If a buyer breaches the term of a f.o.b. contract to nominate an effective vessel (ie one that arrives on the contractual date) as in **Bowes v Shand** [19] then the seller can elect to repudiate the sales contract. Election must be promptly done once the seller knows of the breach. A failure to do so may result in implied waiver and loss of the right to repudiate the contract or to claim damages.

In the event of a protest or of notification of an intention to repudiate the parties could then enter fresh negotiations. In consideration of the seller not repudiating the contract and suing for breach of contract a valid contract could come into being on terms that the buyer accepts the risk of the goods immediately, to cover the interim period until goods are shipped. This can never be an automatic process. Protest and renegotiation with requisite consideration are essential ingredients of the process.

If there is an implied waiver by the seller of the breach but the cargo deteriorates on the dock-side then risk remains with the seller. If he protests and reserves the right to damages but does not get the buyer to accept the risk of the goods can the seller claim the loss as a consequence of the failure to the vessel to arrive on time ? The answer is probably not. The deterioration would not be caused by the breach but rather by the nature of the goods. Additional storage costs would be a direct result of the breach and could be recovered as damages but not the loss suffered from deterioration.

In order to minimise loss the seller may be better advised to sell the cargo elsewhere in order to mitigate loss and minimise storage and provide a fresh cargo when the vessel does arrive. The requirement to mitigate loss clearly applies to the storage costs but since the seller would bear the loss due to deterioration he would do this not to mitigate loss but rather to limit or prevent the loss that he would otherwise suffer. This all become legally very complicated and so the best solution really is to repudiate the contract or persuade the buyer to accept the risk.

Note that the Inco Terms FOB standard terms and conditions specifically state that risk will pass from the seller to buyer if the vessel arrives late, thereby ensuring the application of **Cunningham v Munro** in large numbers of international sale's contracts.

[19] **Bowes v Shand** (1877) 2 App Cas 455

s32(3) Sale of Goods Act 1979.

Unless otherwise agreed, where goods are sent by the seller to the buyer, by a route involving sea transit, under circumstances where it is usual to insure, the seller must give such notice to the buyer, as may enable him to insure them during the sea transit and if the seller fails to do so, the goods will be deemed to be at his risk during the sea transit.

The buyer's need to insure arises only under f.o.b. and c & f contracts. There is almost certainly an obligation on the buyer to do so in respect of documentary credit purchases and it is only in respect of these contracts that the s32(3) requirement comes into play and where the seller may remain at risk if there is insufficient information for the buyer to be able to insure the cargo.

Under c.i.f. contracts the seller takes out a transferable insurance policy which he hands over to the buyer along with the bill of lading so the s32(3) requirement is not applicable. There are no authorities on c & f in respect of the section. **Law & Bonar Ltd v B.A.T**.[20] concerned the same sinking as in Groom v Barber supra. A claim that the seller had given the buyer insufficient information to take out a policy in breach of the s32(3) requirement failed. The court held that s32(3) does not apply to c.i.f. contracts. The buyer had claimed he had been given insufficient information to decide whether or not to take out a war risks supplement on the insurance. The ship had been sunk by a German cruiser at the outset of the 1st world war. The buyer had turned down the opportunity to avail himself of a war risks supplement when the goods were loaded during peace time.

The valuable piece of information, that is to say,. that war was due to break out, was one that perhaps all world leaders would also have wished for and was certainly not the sort of information that advance notice of shipping would have provided the buyer with. Thus in **Wimble v Rosenburg**,[21] the Court of Appeal produced a 2 : 1 decision in favour of a seller. Each judge adopted a different reasoning. It is therefore very difficult to say what the case did in fact decide: There was an f.o.b. sales contract. The cargo was loaded on a Sunday. The seller did not notify the buyer of the loading and the name of the vessel because of a postal delay. The buyer had no open cover and was uninsured. He claimed that he did not know the name of the vessel or that the goods had been shipped. The vessel sank soon after sailing and the goods were destroyed. The buyer sought to rely on s32(3) but his claim failed.

Hamilton l.J.. held that s32(3) was not applicable to f.o.b. contracts because goods are not sent by the seller to the buyer by a route involving sea transit. The delivery of goods f.o.b. is at the ship's rail before the ship sails. No sea transit is involved.

Vaughan Williams L.J. and Buckley L.J both held that s32(3) does apply to f.o.b. contracts. They differed however on how to apply it and on how much information is required.

Buckley L.J. held that the seller gave sufficient information. He told the buyer the freight and the ports of loading and discharge enabling the buyer to take out open cover thus fulfilling the requirements of s32(3) so the buyer's action failed.

Vaughan Williams L.J held that there was insufficient information and found for the buyer, but his was a minority decision.

Conclusions are difficult if not impossible to draw. The ratio, if any, must include the finding for the seller. Therefore the quantum of information to be supplied by the seller is very small. The buyer will always know the freight and ports of loading and discharge. The f.o.b. buyer nominates the vessel so he should not be able to claim ignorance of its name. Even if s32(3) Sale of Goods Act applies the duties are not onerous and therefore the section is not useful at all. Alternatively, following Hamilton J it may be that s32(3) only applies to specified destination contracts since delivery is at the place of destination and involves sea transit, warehouse to warehouse etc. s32(3) Sale of Goods Act 1979 could apply to any variation of f.o.b. contract where the seller undertakes to arrange the vessel and has a choice of ports of loading.

[20] **Law & Bonar Ltd v B.A.T**. [1916] 2 KB 605

[21] **Wimble v Rosenburg** [1913] 3 K.B. 743. C.A.

Conclusions on the exceptions to the rule that risk passes at the ship's rail.

To the extent that any exceptions to the general rule apply, any contractual doctrines altering the rules on risk reduce the negotiability of the shipping document and as such are undesirable and should in principle be limited as much as possible. Risk depends on the contract remaining in existence and in force. A breach of contract by the seller which is sufficient to allow the buyer to reject the documents or to reject the goods on arrival if he has already accepted the shipping documents, results, in situations where the buyer does so reject, in placing the risk on the seller, whilst the buyer exculpates himself. Thus, in **Manbre Saccharine v Corn Products** [22] the bags of starch would normally have been at buyer's risk. However because of the buyer's rejection, based on the fact that no insurance policy was tendered and because the wrong size bags were offered, the buyer did not pay on presentation. The seller had to bear the cost of the sinking. This sort of solution could pose problems for intermediate buyers in circumstances where the negotiability of the bill of lading is not called into question soon enough. Alternatively this points out the need to inspect the documents thoroughly.

[22] **Manbre Saccharine v Corn Products** [1919] 1 K.B. 198

CHAPTER THREE

THE PASSING OF PROPERTY

Relevance of the passing of property to export sales.
The concept of passing of property need not feature in export sales contracts at all if the parties to the contract so desire. The Universal Contract of Sales,[23] developed by the Uniform Law of International Sales avoids the passing of property concept in that contractual consequences follow on from certain actions without the involvement of legal concepts. However, since the Universal Contract of Sales' format is rarely adopted by contracting parties in the UK, it is still necessary to consider the implications of the concept of the passing of property on international sales. The Carriage of Goods by Sea Act 1992 and The Sale Of Goods Amendment Act 1995 have reduced the importance of the phenomena. This is so, in particular, because a number of factors depend on the passing of property though it is not necessarily the sole or conclusive issue at stake in deciding these matters. The various factors governed by the passing of property issue are unrelated and so it is not possible to generalise about these relationships on the basis of the passing of property.

The Legal Presumption under s20 Sale of Goods Act 1979. Unless otherwise agreed, risk passes from the seller to the buyer at the same time as the property. However, s20's relevance is mainly to domestic sales. It is rarely applicable to International Sales. Property usually passes after risk in International Sales since the parties normally OTHERWISE agree that the risk passes on shipment, making s20 inapplicable.

Seller's rights to actions affected by the passing of property.

Bankruptcy.
Whether property has passed or not is relevant to bankruptcy settlements since, if the buyer goes bankrupt, goods which remain the property of the seller are not available to buyer's trustee in bankruptcy. The seller's interests are thus protected to the detriment of the buyer's creditors. Conversely, if property has passed to the buyer and the seller goes bankrupt the seller's trustees in bankruptcy cannot get the goods, thus protecting the buyer. The same rules apply to domestic sales.

s49 Sale of Goods Act 1979 : Seller's Action for the price.
The seller's right to an action for the price under s49 is only available if property in the goods has passed to the buyer. Otherwise the seller only has a right to an action for breach of contract for either a) refusal to accept goods or b) some other terms of the contract.

The right to a s49 action may be deferred if payment is due on a date certain, fore example, when a set period of extended credit for example, 10 days, is given to the buyer. The advantage to the seller of an action for the price is that it is for a fixed price. There is no need to prove loss. Nor does he have to mitigate his damage. By contrast a plaintiff claiming contractual damages is obliged to mitigate the loss by reselling goods at the best market price. There is a danger of haggling over whether or not he did obtain the current best rates and what in fact represents the best current rate. Thus contractual damages represent a more difficult route to recovery of losses.

Resales by the buyer.
Under s21 Sale of Goods Act 1979 and s1 Factor's Acts 1899 there are circumstances where an innocent purchaser receives good title from a buyer / mercantile agent, in possession of goods even though property has not at that time passed to such buyer / mercantile agent. In such a situation the fact that property has not passed to the buyer does not afford the seller any protection.

The unpaid seller's right to stop goods in transit is lost by virtue of s43(1)(a) Sale of Goods Act on delivery of goods to a carrier for transmission to a buyer unless the seller reserves a right to dispose of the goods. The fact that payment has not occurred or that property has not yet passed to the buyer is not material to this. However, where a buyer of goods becomes insolvent s44 Sale of Goods Act provides that he has a right to resume possession of goods in transit and can retain it as until payment or tender of the price. Even here the issue of passing of property is only relevant in that property will usually pass to the buyer on payment. Nonetheless the result is that where property has not passed to insolvent buyer because the seller has not yet been paid the seller can regain possession of the goods.

[23] see Chapter 14 Schmitthoff for more detail.

Actions involving third parties.
If goods are damaged at sea the question as to whether property has or has not passed to the buyer affects what actions avail against the carrier. Usually it is the buyer who will wish to bring an action. Whether the buyer can sue the carrier in tort depends on whether he had property in the goods at the time of the damage. Whether the buyer could sue the carrier in contract under s1 Bill of Lading Act 1855 depended on whether he had property in the goods at the time of damage, though this is no longer the essential factor under s2 Carriage of Goods By Sea Act 1992. Conversely, whether the carrier could sue the buyer also depended under s1 Bill of Lading Act 1855 on the passing of property to the buyer, though again this is no longer the case under s2 Carriage of Goods by Sea Act 1992.

Retention of property by the seller.
From a practical point of view arrangements for payment by Banker's Documentary Credit (often the case in commercial transactions) requires that the seller retains property long enough to transfer some kind of security to the bank. Once property passes to the buyer, the seller has no security to pass to the bank. Reservation of title clauses can also delay the passing of property until a certain event, namely payment, occurs.

When does property pass ?
Property does not usually pass in unascertained goods by virtue of s16 Sale of Goods Act 1979. There are now exceptions to this since s16 now refers to the new provisions under s20(A). Ascertainment relates to the ability to identify goods and appropriation relates to the setting aside or allocation of goods to a contract.

In a contract for unascertained goods, no property is transferred to the buyer unless and until the goods are ascertained. Ascertainment often occurs on discharge at the port of destination but can equally occur during the voyage. The timing is IMPORTANT regarding tortious actions against the carrier. Unascertained goods become ascertained by appropriation to the contract. Only once appropriation has occurred can property pass. However, there are occasions when property does not pass for quite some time after appropriation, but apart from the s20(A) exceptions, property does not pass before appropriation. It is clear that ascertainment, appropriation and the passing of property are not synonymous concepts.

Appropriation is often the last act performed by the seller as owner of the goods, after which the seller consigns goods to the buyer. The relevant moment is when the seller can no longer change his mind. It must be an irrevocable act. Regarding manufactured goods, appropriation normally occurs on shipment since the seller often cannot do any more after shipment. However there are times when appropriation may take place after shipment, for example if 10 identical goods are shipped for 10 buyers then appropriation of each of the goods takes place when the shipping documents are tendered to each buyer in turn. A dispatch number or code can identify to the buyer which of the articles is his.

Bulk Consignments of generic goods such as grain and oil, which are to be split between a number of buyers have presented problems legal problems in the past for buyers. These problems are now largely solved. If goods are damaged or sunk, the buyer of an undivided part of a bulk consignment has been able, since 16.9.92 to pursue an action in contract against the carrier by virtue of s2 Carriage of Goods By Sea Act 1992 and since 19.9.95 the buyer can also pursue an action against the carrier in tort by virtue of the Sale of Goods Amendment Act 1995.

A contract action based on s1 Bill of Lading Act 1855 depended on property having passed in the goods upon or by reason of consignment or endorsement. **The Aliakmon** [24] held, regarding locus standii, that only a person with an interest can sue in tort, so property has to pass before a tort action is possible, with the result that in **The Aliakmon** no action was possible because of a s19 Sale Of Goods Act Reservation of title clause. A similar action in tort today would still fail though a contract action under s2 Carriage of Goods by Sea Act 1992 would succeed. As a general application of the rule, confirmed in **The Aliakmon,** that property must pass before a tort action is possible, since property could not at that time pass in an undivided bulk by virtue of the original provisions of the s16 Sale of Goods Act, a buyer of such goods would also have been prevented from pursuing an action in tort against a carrier.

[24] **The Aliakmon : Leigh & Sillivan v Aliakmon Shipping Co Ltd** [1986] AC 785

Conversely, a carrier would also be prevented from pursuing a contract action based on the bill of lading against a buyer or agent who refused to take delivery of goods. If the buyer did not present the carrier with the bill of lading a **Brandt v Liverpool** contract would not have implied a contract between the carrier and a buyer or agent even for post shipment expenses such as demurrage and storage charges. Whilst in most situations a buyer would normally wish to take delivery of goods, there may be circumstances where the value of the goods has dropped so much that he chooses not to take delivery of them, especially if the carrier's charges greatly exceed the value of the goods. This situation has not changed under the Carriage of Goods By Sea Act 1992, though for different reasons.

Where the buyer is the shipper he is a party to the contract of carriage so there is privity of contract and he can sue. The problem then shifts to the seller who may equally have difficulty in establishing a right of suit. The shipper / seller in the **Pyrene v Scindia** situation may still have problems recovering from a carrier today in contract since the Carriage of Goods By Sea Act 1992 provisions do not apply to shippers, though a tort or bailment action should not be a problem today.

Concurrent actions by the buyer in tort contract.

Where there are concurrent rights and duties under both contract and tort the buyer can choose whichever of the actions affords him the best procedural advantages. In the recent past tort actions have been resorted to to evade perceived difficulties in suing in contract. Thus in **The Elafi : Karlshamns Olje Fabrikar v Eastport Navigation Co.**[25] a buyer bought Copra which was part of an undivided consignment. During the voyage some of the copra was off loaded. Under fresh transactions the buyer bought the whole of the remaining cargo from other persons who had originally bought directly or indirectly from the seller. Ultimately, the buyer owned the entire remaining 6,500 tons approximate of copra. Some of the cargo was damaged by water due to the negligence by the carrier. The buyer sued the carrier in tort for negligence in the commercial court following an appeal from arbitration. Mustell J held that the buyer's action succeeded since he held property in the goods at the time of the damage. The carrier had claimed that the buyer could have no property in the copra till discharge. He claimed that the buyer had no property at loading and at no time had the seller done a positive act to appropriate goods to the buyer's contract. He claimed that appropriation needs a positive act. However, Mustell J held that there was '**appropriation by exhaustion'**. The case provides a good discussion on the passing of property and appropriation. It presents a good analysis and is well worth reading. There was no need to decide on the statutory contract action under s1 Bill of Lading Act 1855, so any comments were necessarily obiter. Mustill J thought that the buyer could have succeeded in contract as well virtue of a wide - non literal interpretation of the 1855 Act. There would be no problem now to recovery under s2 Carriage of Goods By Sea Act 1992 where a buyer is a lawful holder of bills of lading or ship's delivery orders covering the whole or part of the property.

Can property pass in equity on different principles ?

In the light of the problems outlined above under the old legal provisions, several attempts were used to try and use the law of equity to enable a buyer to recover. This approach was tried but failed on two occasions. **Re Wait** [26] involved a c.i.f. purchase of a bulk cargo of wheat. The buyer paid up but the seller went bankrupt. The seller's trustee in bankruptcy took the money and claimed the goods since the property had not passed. The buyer claimed that he had an equitable property in the goods. The claim was rejected. The Court of Appeal made it clear that the rules on passing of property contained in the Sale of Goods Act were conclusive and that there was no room for the concept of equitable property. Thus unless the property passes under the Sale of Goods Act it has not passed at all.

Re Wait was approved by Brandon L in **The Aliakmon** where an action in tort failed because the buyer had no property in the goods. It is best to read **The Aliakmon** on this issue since **Re Wait** is fully discussed in the latter case. Whilst the reason property had not passed in **The Aliakmon,** was unusual, the ratio of the case is still applicable in respect of tort actions today and unaffected by recent legislation.

[25] **The Elafi : Karlshamns Olje Fabrikar v Eastport Navigation Co** [1982] 1 All E.R. 208.

[26] **Re Wait** [1927] 1 Ch 606.

The passing of property in specific and ascertained goods.
There are often practical difficulties identifying exactly when property passes. Ascertainment is governed by s17-20 Sale of Goods Act 1979, in particular s17, s19 & s20 in respect of International Sales Contracts.

s17(1) Sale of Goods Act 1979 : Where there is a contract for sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. Proving what the parties intend can be problematic.

s17(2) Sale of Goods Act 1979 *: For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.*

s18 Sale of Goods Act 1979 provides guidelines regarding the intention of the parties as to when property is to pass but its provisions are more relevant to domestic sales contracts than to international sales contracts.

s19(1) Sale of Goods Act 1979 *Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in such a case, not withstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.*

s19(2) Sale of Goods Act 1979 *: Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie to be taken to reserve the right of disposal.*

s19 (3) Sale of Goods Act 1979 *Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him.*

s19 Romalpa Reservation of Title Clauses The effect of s19 is that the seller can reserve the right of disposal in property until some specific event occurs. This is not automatic. The seller must expressly reserve title. The event that is usually prescribed is payment of the goods. It was because of the s19(1) reservation of title clause that the tort action failed in **Leigh & Sillavan v Aliakmon S.S.**[27] The discussion was limited to a Tort action only in the House of Lords. It was assumed that the buyer had no property. The question of property was only considered in the Court of Appeal.

s19(2) Sale of Goods Act 1979 Where goods are shipped and under the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie taken to reserve the right of disposal, usually till payment on endorsement of the bill of lading, the presumption being that he reserves title as security. The presumption can be rebutted in which case property passes on endorsement of the bill of lading.

s20(1) Sale of Goods Act 1979 : Unless otherwise agreed, the goods remain at the seller's risk until property is transferred to the buyer, but when property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.

This links the passing of property to the passing of risk, since risk passes on shipment. The question that arises therefore is "Does property pass when risk passes ?" The answer is "Yes", but only unless otherwise agreed. It is usually the case in International Trade Contracts that the parties 'otherwise agree' and is implicit in c.i.f. sales contracts. The conclusion is that, unless otherwise agreed, since risk passes on shipment, then likewise, property passes on shipment. On this see in particular **The Parchim**.[28]

Regarding manufactured goods, payment is frequently by Banker's Documentary Credit. It is vital in such cases that the seller retains property till the document is tendered to the bank. If property passes on shipment the seller has no property to pledge. The general rule of policy should be that property passes with the documents. However, Banker's Documentary Credits are a modern concept. Consequently, there are earlier arguments to the effect that property should pass on shipment because the seller is protected in any case because he has a seller's lien on the goods.

[27] **The Aliakmon : Leigh & Sillavan v Aliakmon S.S** [1985] Q.B. 350 (1986] 2 W.L.R. 902.
[28] **The Parchim** [1918] AC 157.

It was held in **The Parchim**, an old Privy Council case, in a situation where a bill of lading which had not been reserved to the seller's order and where there had been no reservation clause, that property passed on shipment. It is possible that **The Parchim** applies only to f.o.b. though the justification for this is not clear. Why should c.i.f. and f.o.b. be treated differently ? They serve the same purpose. The goods were seized at sea after the buyer had paid for them. The court held that the seizure was unlawful. The goods were the property of Dutch Company. They were not German owned when seized. It is possible that this was a policy decision. The reasons that it was claimed that the property ceases to be the seller's on shipment are thus

1). Shipment is the time when risk passes. Property must inevitably pass at some time, and since s20 S.O.G.A. states that property passes with risk the reverse logic is that since risk passes on shipment then shipment is also the time when property passes..

2). Appropriation occurs on shipment. However,, there is no reason to assume that property passes on appropriation. There is no basis for linking the two concepts beyond the assertion of the fact that under s16 property cannot pass until ascertainment which is itself linked to a appropriation.

The Parchim has since been limited to its own facts. However, the Privy Council decision has never been over ruled. It is correct on its facts, which facts could therefore presumably occur again in the future. What then is so special about **The Parchim** ?

a). The goods had been paid for. The bill of lading was not therefore retained as security against non-payment.

b). Banker's Documentary Credits were not involved. Therefore there was no implication of the bill of lading being held as security for the bank.

If there is retention of the bill of lading, or if there is a Banker's Documentary Credit it is therefore possible that **The Parchim** would be not be applicable and could be distinguished on the facts & circumstances of the case. **The Parchim** discussed the passing of property in relation to the rules of the Prize Court.[29] During World War I some cargo was seized by the British Government, as Prize. If German owned, the British Government could seize the property whilst at sea. If not, the property could not be seized. The case involved a sale between a German Company as seller and a Dutch Company as buyer. It was said to involve a c.i.f. sales contract. The court held that the contract had more of the characteristics of an f.o.b contract than of a c.i.f. and so it was treated as such by the court. The issue therefore was whether or not property had passed to the Dutch buyer. If property had passed the British Government could not claim it as Prize.

The Parchim was considered and limited by **The Kronprincessan Margarita.**[30]. Sumner L stated that **The Parchim** was an exceptional case and was not therefore of general application. Property passes on payment in cases involving Banker's Documentary Credits since the parties 'otherwise agree' where as in **The Parchim** there was no 'other agreement' so s20 applied. Sumner L's opinion of the passing of property in situations involving Banker's Documentary Credits is very similar to that of Wright L in **Smyth v Bailey** [31] who talks in terms of the retention of, and the passing of 'general property'. **The Kronprincessan Margareta** [32] also concerned the rules of Prize and the Doctrine of Infection which states that if some of the property on board the vessel was German owned then all the property shipped on the vessel was infected by the taint of enemy property. There was an attempt to show that property had passed before shipment since otherwise it would be German. The claim failed. There was no intention to pass property before it had been paid for. The bill of lading was to the buyer's order not to the seller's. Therefore s20 S.O.G.A. was not applicable since the parties had 'otherwise agreed'.

The passing of property under c.i.f. contracts.

As affirmed by Roskill L.J in **The Albazero,**[33] property passes on endorsement of the bill of lading. "I unreservedly accept that in the absence of any contrary intentions appearing from the contract, the conduct

[29] Prize Courts are courts of special jurisdiction which come into existence during war time in order to decide whether or not property seized by the armed forces of H.M. Government, do or do not belong to the enemy. Only enemy property and property tainted by association with enemy property can be seized as Prize by the Court.

[30] **The Kronprincessan Margarita** [1921] 1 AC 486. Sumner L

[31] **Smyth v Bailey** [1940] 3 All.E.R. 60.

[32] **The Kronprincessan Margareta** [1921] 1 A.C. 486

[33] **The Albazero** [1977] AC 774,

of the parties and the circumstances of the case, where goods are sold on c.i.f. terms, the property will not pass from the seller to the buyer except against tender of documents by the seller to the buyer and payment by the buyer to the seller against these documents".

The Court of Appeal decision discussed the passing of property issue and whilst the House of Lords made its decision on different grounds to the Court of Appeal, nonetheless the House of Lords in reaching it's decision did so on the basis that property passed when the Court of Appeal said it did. A bill of lading was reserved to the seller's order. However, there was a presumption that property had passed previous to endorsement because, despite the reservation to the seller's order, the seller had extended unsecured credit to the buyer for 180 days from first sight of the goods. The c.i.f. sellers of the goods were also time charterers of the carrying vessel, The Albacruz, a sister ship to the Albazero, which was subsequently arrested as a security for the court action.

The bill of lading was to the seller's order as shippers. The seller posted the bill of lading to the buyer. Before the bill of lading reached the buyer, The Albacruz sank and the goods were lost. Usually goods are at the buyer's risk and so it is the buyer who wishes to bring action. However, in the circumstances, the Hague Rules applied to the bill of lading and imposed a one-year time bar. The buyer held and paid for the bill of lading and goods just before sinking and would have had a valid action but for the time bar. The seller was an associated company of the buyer and decided to sue on behalf of the buyer and so tried to sue, not as shippers because of time bar, but on the Charter Party to which they (the seller was also the shipper) were a party. Since the Hague Rules are not applicable to the Charterparty Contract, if successful, the action would have been a way of avoiding the time bar. The Albazero, the Albercruz's sister ship, happened to be in U.K waters and jurisdiction and was arrested as security for the action.

The court had to decide whether or not the property had passed. If the property had passed to the buyer then the seller could recover nominal damages only. If the property was still the seller's when The Albacruz sank then the seller could sue and the buyer could not, since the s1Bill of Lading contract would not apply. The seller claimed property only passed on delivery of the bill of lading and endorsement. Since the goods were lost before delivery and endorsement property had not passed and the mere fact that the seller had posted the bill of lading to the buyer was not sufficient for property to pass. Diplock held that property had passed on posting of the bill of lading, following Roskill's argument in the Court of Appeal and so property had passed to the buyer by the time the goods sank. Consequently the seller could not sue on the Time Charter Party for substantial damages.

What would happen if a similar situation to **The Albazero** arose today ? Under the Carriage of Goods by Sea Act 1992 the passing of property is not a relevant factor in transferring rights under the contract of carriage from the seller to the buyer. The essential factor is presentation of the bill of lading to the carrier. Providing the buyer did not present then the seller would retain his right to sue on any contract of carriage. Furthermore, a charterparty shipper's right to sue is not lost even by transfer of the bill of lading. The seller could therefore sue. He could recover damages and hold them in trust for the buyer.

The ability to recover substantial damages on behalf of the other party to a contract is affirmed by **Linden Gardens Trust v Lintesta Sludge Disposals.**[34] Unlike a tort action where exclusion clauses in a contract can serve to limit the scope of duty of care owed in the tort action, the seller/shipper/charterer could use the device to evade the Hague Visby Rules and the right to exclusion and limitation of damages. This highlights the value of putting exclusion clauses in charterparties even though they cannot apply to contracts of carriage incorporated into bills of lading at least as far as the lawful holder of a bill of lading who is not the shipper are concerned.

The essential factor under a c.i.f. contract it appears, is not payment but tender of the documents, though usually tender and payment are synonymous. The deciding factor regarding the passing of property may be whether the bill of lading is to banker's order and not to the seller's order. It does not necessarily follow that property passes on shipment. It will only do so in exceptional cases like **The Parchim** where there is no Banker's Documentary Credit and no s19 Sale of Goods Act Romalpa reservation of title clause.

[34] **Linden Gardens Trust v Lintesta Sludge Disposals** [1993] 3 All.E.R. 417.

In **The Kronprincessan** the buyer needed to show that property had passed BEFORE shipment. There is a strong presumption that it does not in c.i.f. and f.o.b. However, it is possible that appropriation may take place before shipping. In particular see the discussion of this in **Pyrene v Scindia**. In **Pyrene v Scindia** a sales contract concerned a fire engine. Before it had passed the ship's rail it was dropped. There had in reality been an appropriation of the fire engine to the sales contract. The seller had carried out his final act prior to shipment and was unlikely to change his mind. Devlin J. stated that the fire engine remained the seller's property till it passed ship's rail. It may be concluded regarding c.i.f. and f.o.b. that property can pass on shipment but can never pass before shipment, despite the fact that appropriation has taken place.

In **The San Nicholas**,[35] a clause in an f.o.b. contract of sale of molasses stated that risk and property were to pass to the buyer at the permanent hose connection of the vessel at the loading port. However, the contract was also subject to a Banker's Documentary Credit. Roskill J. gave some vague indications that it might be possible that property can in some circumstances pass before shipment despite the presumption that it does not, implying that the presumption is rebuttable. However, the issue was not important to the case since property passed on indorsement of the bill of lading in any case. Likewise, the action in **The Kronprincessan Margarita** would have failed even if **The Parchim** was of general application since the parties had otherwise agreed, thus excluding s20 Sale of Goods Act 1979.

Where a bill of lading is reserved to the seller's order there is a presumption by virtue of s19(2) Sale of Goods Act which suggests that a reservation to the seller's order implies a right of order retained by the seller until endorsement of the bill of lading and the simultaneous payment for the goods. However the presumption is rebuttable. Why was the s19(2) Sale of Goods Act presumption rebutted in **The Albazero** ? If the bill of lading is reserved to the seller there is a usually a presumption of a reservation of title till payment of the goods. Possible reasons include that

i) Payment was not due till 180 days after sight of the bill of lading. Therefore the seller was extending unsecured credit to the buyer and so there was no need to reserve property till endorsement. Under the s19(2) Sale of Goods Act "prima facie type of reservation", the presumption is rebutted if credit is extended. This may not however have been a conclusive factor in **The Albazero**.

ii) The conclusive factor could have been that the bill of lading reservation to the seller's order was included only because group business arrangements require flexibility of distribution requiring the seller / shipper to initially hold the bill of lading. Therefore the only reason to hold the bill of lading and reservation to the seller's order was administrative and not as a security for the goods and the credit.

Summary of General Rules and Exceptions

- It is a general rule for c.i.f. contract's and possibly f.o.b. that property passes on endorsement.
- It is a general rule that when a bill of lading is reserved to the seller's order property passes on endorsement.
- It is a general rule that when there is retention of the bill of lading as a security property passes on endorsement.
- It is a general rule that when payment is by Banker's documentary Credit property passes on endorsement.

If some of these factors are absent, property may pass at an earlier time. Factors leading towards earlier passing on shipment as in **The Parchim**, or after shipment and pre endorsement as in **The Albazero** are :-

a) Credit is extended to the buyer.
b) The payment is not by Banker's Documentary Credit.
c) The bill of lading is not retained as security against payment.
d) The reason for retention of a bill of lading is administrative only.
e) A possible reason, regarding f.o.b. but not c.i.f. sales contracts, is that property may pass on shipment as in **The Parchim**.

[35] **The San Nicholas** [1976] 1 Lloyd's Rep 8.

The Action for the Price.
This action depends either on whether property has passed s49(1) Sale of Goods or by s49(2) Sale of Goods Act 1979.

s49(1) Sale of Goods Act.
Where, under a contract of sale, the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

s49(2) Sale of Goods Act.
Where, under a contract of sale, the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed and the goods have not been appropriated to the contract.

s49(2) Sale of Goods Act applies to a contract of sale when the price is payable on a day certain, irrespective of delivery. In reality, s49(2) will rarely apply to International Sales and especially not where there are delivery specifications. It is a possibility that it might apply to **The Albazero** type situation where payment was due 180 days after sight of the goods, though of course the buyer had already taken delivery of the goods in any case.

Under s49(1) the seller can maintain an action for the price if the property has passed. If property has not passed and there is a refusal by the buyer to accept delivery the seller can sue for breach of the contract of sale, but he cannot maintain an action for the price.

The Advantage of an Action for the Price. The seller receives damages based on his loss. Damages are calculated as against the position if the contract had been properly performed, which includes payment of the price.

Suppose that the reason for the refusal to accept is that the market price has fallen. Similar goods can be obtained cheaper elsewhere. Surmise that the contract price was £10,000 but that the goods are now worth £5,000. The seller is left with the property to sell. If he sues for the price the seller gets £10,000 awarded outright. If he claims damages for breach of contract, having mitigated his loss by selling the goods for £5,000, he would then claim damages for the outstanding loss suffered. If the contract had been properly performed he would have got £10.000. Since he has received only £5,000 on resale his damages would be £5,000 plus any expenses incurred on the resale.

The main difference is that in the latter scenario he has to prove both the loss and the expenses incurred in the resale to the court and the seller is required to mitigate his loss. It is insufficient for the seller to show that he got £5,000 for the goods since the buyer could claim that the best possible market price at the time was substantially more for example £6,500. The seller therefore has to show that not only did he get £5,000 but also that £5,000 represented the best market price possible at the time. Obviously, even though the court's scrutiny of the question of best market price is not particularly rigorous, an action for the price is still a better, safer and easier option.

Colley v. Overseas Exporters [36] involved an f.o.b. contract for unascertained goods. The seller sent the goods to the dock but the buyer failed to nominate an effective ship so the goods were left stranded on the quay. The seller sued for the price and failed. McCardie J reaffirmed that the only circumstances where one can maintain an action for the price is by virtue of s49. Since property had not passed that was the end of the action. The reason the property had not passed was the buyer's fault since the seller had done everything necessary to fulfil his part of the bargain. None the less an action under s49 could not succeed though the seller could recover damages for breach of contract.

Whilst a reservation clause can prevent property passing such a clause can defeat an action for the price under s49. **F.E. Napier v Dexter,**[37] is authority for the proposition that the seller can waive the right of disposal in order to sue for the price under s49. The reason for this is that the right of disposal is a privilege of the seller for his own benefit, which he is therefore entitled to waive. In **F.E. Napier v Dexter** a seller sought an action for the price but property had not passed. The buyer claimed that the seller had reserved a

[36] **Colley v. Overseas Exporters** [1921] 3 K.B. 302.
[37] **F.E. Napier v Dexter** [1926] 26 Lloyd's Rep 184

right of disposal against payment. The basis on which the case was argued (whether a reservation actually existed is not certain) was that since there was a reservation of title, property had not passed to the buyer. Title to the goods did not pass to the buyer because the buyer did not pay, thus the failure of the property to pass was the buyer's fault. The buyer can therefore produce a stalemate situation. Title had not passed because of the reservation of title whose sole existence, in the first place, was to guard against situations where the buyer did not pay.

Reservation of title and the bankrupt buyer. Where a buyer has taken delivery of property subject to a reservation of title clause, but has not paid for it and the buyer then goes bankrupt, what would be the effect of a waiver by the seller ? Despite the fact that it is the waiver which enables the property to pass, that passing then places the goods in the hand of the trustees in bankruptcy of the buyer who can sell it and use the proceeds to swell their funds to pay themselves for their work as trustees and then for distribution firstly to preferential creditors and finally to share the remainder out to non-preferential creditor, one of whom would be the seller who would be likely to receive, at best, a mere percentage of the contract price.

Could a waiver of reservation be used to gain preference over creditors on the basis that the seller retains an equitable interest in the property ? If the view expressed in **Re Wait,**[38] namely that the Sale of Goods Act rules are exclusive and conclusive, and there is no room for the concept of equitable property, this would be unlikely. If so, the seller is better off reclaiming the goods and suing for breach of contract. Damages would still depend on the priorities of other creditors. However, he would retain property in the goods.

It may be however that the claim of an equitable interest could work here since the situation is not on an equal footing with **Re Wait**. The waiver occurs after the trustee in bankruptcy has entered the scene not before. If the trustee in bankruptcy's right to garner in property is restricted to rights which have accrued to the buyer prior to the trustee's appointment, once he is appointed any new dealings could then be said to operate on an equitable basis as between the trustee and the seller. The public legal notice of appointment of trustees in bankruptcy would mean that the s21 exception to the nemo dat rules would not operate. The seller could assert then that any subsequent unlawful dealing in the goods by the buyer would not pass property to innocent third parties since they would be deemed to have notice of the seller's interest.

[38] **Re Wait** [1927] 1 Ch 606