CHAPTER FIVE

RIGHTS AND DUTIES OF INTERNATIONAL BUYERS, SELLERS AND SEA CARRIERS

Introduction.

The aim of this chapter is to identify the various forms of export contract that are available to the business community, highlighting the respective rights and duties of the parties involved, be it seller, buyer or carrier. The range of options available, enable the parties to allocate risks and responsibilities for different aspects of the import / export process, in a manner most appropriate to their commercial needs and capabilities. No one contract is better than any other. There is a valuable commercial role to be played by each of the main types of import / export contract. However, without a clear understanding of the allocation of rights and responsibilities inherent in each type of contract, the prospective importer / exporter is unable to make a valid choice as to which contract is most appropriate for any given circumstance. It is often the case that the parties select a contractual form, which is not appropriate. This subsequently leads to problems and litigation, which could have been avoided if a more informed choice had been made.

There are a large variety of forms of sale of goods contracts, both domestically and in International Sales. In International Sales the nature of the sale of goods contract depends on where the central duty under the contract, namely the delivery of the goods, is to be carried out. There are four basic categories of international sales contract namely :-

1) Delivery at seller's premises, with concerns regarding arrangements for transport and export and import documentation vesting with the buyer, epitomised by the ex-warehouse contract.
2) Delivery at port of shipment, with concerns regarding arrangements for transport and import documentation vesting with the buyers and concerns regarding arrangements for transport to the port of shipment and export documentation vesting with the seller, epitomised by the free on board, f.o.b. contract.
3) Delivery at port of shipment, with concerns regarding import documentation vesting with the buyers and concerns regarding arrangements for transport to the port of discharge and export documentation vesting with the seller, epitomised by the cost, insured freight, c.i.f. contract.
4) Delivery at buyer's premises or port of discharge, with concerns regarding arrangements for transport of the goods to buyer's premises or port of discharge and export and import documentation vesting with the seller, epitomised by the ex-ship contract.

A further distinction can then be drawn between :-

a) contracts not involving maritime transport, such as cross-border air transport or land transport by truck or by rail, and
b) contracts which involve maritime transport. These can be further divided up into contracts involving:-
    i) maritime transport only and
    ii) multi-modal transport such as land and sea, air and sea, or air, land and sea.

The parties to an international sales contract are free to draw up their own terms and conditions of sale and to make whatever arrangements they feel are appropriate. The courts have provided definitions of and set out the primary rights and duties under ex-warehouse, f.o.b., c.i.f. and ex-ship contracts. Additional terms and conditions can be added by the parties.

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A relatively safe way of contracting for the uninitiated, is to adopt standard form contracts devised by bodies such as the International Chamber of Commerce which publishes INCOTERM import / export contracts for general use by the international community. The value of using such standard form contracts is that they have been tried and tested over a long period of time and the ICC continually updates the contracts to ensure they meet the needs of the evolving international trading community and to take into account changes in international law.

The Purpose and scope of Incoterms [1]**: "**The purpose of Incoterms is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree.

Frequently parties to a contract are unaware of the different trading practices in their respective countries. This can give rise to misunderstandings, disputes and litigation, with all the waste of time and money that this entails. In order to remedy these problems, the International Chamber of Commerce first published in 1936 a set of international rules for the interpretation of trade terms. These rules were known as "Incoterms 1936". Amendments and additions were later made in 1953,1967,1976,1980, 1990 and presently in 2000 in order to bring the rules in line with current international trade practices.

It should be stressed that the scope of Incoterms is limited to matters relating to the rights and obligations of the parties to the contract of sale with respect to the delivery of goods sold (in the sense of "tangibles", not including "intangibles" such as computer software). It appears that two particular misconceptions about Incoterms are very common.

First, Incoterms are frequently misunderstood as applying to the contract of carriage rather than to the contract of sale. Second, they are sometimes wrongly assumed to provide for all the duties which parties may wish to include in a contract of sale. As has always been underlined by ICC, Incoterms deal only with the relation between sellers and buyers under the contract of sale, and, moreover, only do so in some very distinct respects. While it is essential for exporters and importers to consider the very practical relationship between the various contracts needed to perform an international sales transaction - where not only the contract of sale is required, but also contracts of carriage, insurance and financing - Incoterms relate to only one of these contracts, namely the contract of sale. Nevertheless, the parties' agreement to use a particular Incoterm would -necessarily have implications for the other contracts. To mention a few examples, a seller having agreed to a CFR- or CIF-contract cannot perform such a contract by any other mode of transport than carriage by sea, since under these terms he must present a bill of lading or other maritime document to the buyer which is simply not possible if other modes of transport are used. Furthermore, the document required under a documentary credit would necessarily depend upon the means of transport intended to be used.

Second, Incoterms deal with a number of identified obligations imposed on the parties - such as the seller's obligation to place the goods at the disposal of the buyer or hand them over for carriage or deliver them at destination - and with the distribution of risk between the parties in these cases.

Further, they deal with the obligations to clear the goods for export and import, the packing of the goods, the buyer's obligation to take delivery as well as the obligation to provide proof that the respective obligations have been duly fulfilled. Although Incoterms are extremely important for the implementation of the contract of sale, a great number of problems which may occur in such a contract are not dealt with at all, like transfer of ownership and other property rights, breaches of contract and the consequences following from such breaches as well as exemptions from liability in certain situations. It should be stressed that Incoterms are not intended to replace such contract terms that are needed for a complete contract of sale either by the incorporation of standard terms or by individually negotiated terms.

Generally, Incoterms do not deal with the consequences of breach of contract and any exemptions from liability owing to various impediments. These questions must be resolved by other stipulations in the contract of sale and the applicable law.

[1] ICC official rules for the interpretation of trade terms. Incoterms 2000. ISBN 92 842 1199 9

Incoterms have always been primarily intended for use where goods are sold for delivery across national boundaries: hence, international commercial terms. However, Incoterms are in practice at times also incorporated into contracts for the sale of goods within purely domestic markets. Where Incoterms are so used, the A2 and B2 clauses and any other stipulation of other articles dealing with export and import do, of course, become redundant."

"The structure of Incoterms : In 1990, for ease of understanding, the terms were grouped in four basically different categories; namely starting with the term whereby the seller only makes the goods available to the buyer at the seller's own premises (the "E" term Ex works); followed by the second group whereby the seller is called upon to deliver the goods to a carrier appointed by the buyer (the "F" terms FCA, FAS and FOB); continuing with the "C"-terms where the seller has to contract for carriage, but without assuming the risk of loss of or damage to the goods or additional costs due to events occurring after shipment and dispatch (CFR, CIF, CPT and CIP); and, finally, the "D" terms whereby the seller has to bear all costs and risks needed to bring the goods to the place of destination (DAF, DES, DEO, DDU and DDP). The following chart sets out this classification of the trade terms :-

Group E **Departure**	**EXW** Ex Works (... named place)
Group F **Main Carriage** **Unpaid**	**FCA** Free Carrier (... named place) **FAS** Free Alongside Ship (...named port of shipment) **FOB** Free On Board (... named port of shipment)
Group C : **Main Carriage** **Paid**	**CFR** Cost and Freight (... named port of destination) **CIF** Cost, Insurance and Freight (... named port of destination) **CPT** Carriage Paid To (... named place of destination) **CIP** Carriage and Insurance Paid To (... named place of destination)
Group D **Arrival :**	**DAF** Delivered At Frontier (... named place) **DES** Delivered Ex Ship (... named port of destination) **DEQ** Delivered Ex Quay (... named port of destination) **DDU** Delivered Duty Unpaid (... named place of destination) **DDP** Delivered Duty Paid (... named place of destination)

"Mode of transport and the appropriate Incoterm 2000

Any mode of transport

Group E	**EXW** Ex Works (... named place)
Group F	**FCA** Free Carrier (... named place)
Group C	**CPT** Carriage Paid To (... named place of destination) **CIP** Carriage and Insurance Paid To (... named place of destination)
Group D	**DAF** Delivered At Frontier (... named place) **DDU** Delivered Duty Unpaid (... named place of destination) **DDP** Delivered Duty Paid (... named place of destination)

Maritime and inland waterway transport only

Group F	**FAS** Free Alongside Ship (... named port of shipment) **FOB** Free On Board (... named port of shipment)
Group C	**CFR** Cost and Freight (... named port of destination) **CIF** Cost, Insurance and Freight (... named port of destination)
Group D	**DES Delivered Ex Ship (... named port of destination)** **DEQ** Delivered Ex Ouay (... named port of destination)

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The Evolution of International Sales Contract. The earliest types of international sales contract developed into what is now known as free on board (f.o.b.) and the free aside ship (f.a.s). These contracts were developed in the 18th century. They pre-date regular shipping lines and modern communications. The only way a buyer could initially import goods was to send a ship or an agent to various ports and buy goods. The buyer would accordingly buy or hire a ship and buy goods alongside the ship, or the seller would pay for loading and the buyer would buy, or at least take delivery of goods, over the ship's rail.

In traditional f.o.b. contracts the buyer is usually the shipper. Even today where the seller ships the goods he does so actually, or theoretically as agent of the buyer, under a separate agency contract, which is quite independent of the sales contract. Under the law of agency the seller becomes the alter ego of the buyer for the purposes of the contract of affreightment. Thus the buyer is the principal party with the carrier to the contract of carriage, even where the seller actually negotiates the contract on the buyer's behalf. **Handel v English Exporters** [2] shows that even where there is an obligation on the seller to secure shipping space this does not prevent it from being an f.o.b. contract.

The name f.o.b. is still valuable however, since it indicates that risk usually passes at the ship's rail. In some circumstances even property may pass at the ship's rail, though where documentary credits are involved, this is unlikely to be the case. Pre-ship's rail costs fall on the shipper. Post ship's rail costs fall on the buyer who also has to pay the freight when the goods arrive in the home port if he doesn't own the vessel or if the seller hasn't already paid the freight charges in advance as agent of the buyer. Authority for the statement that risk passes to the buyer at the ship's rail can be found in the case of **Stock v Inglis.** [3]

Regarding the seller's liability for pre-shipment costs incurred by the carrier, the statement that the seller is solely responsible is questionable now in the light of COGSA 1992, which transfers all rights and liabilities under the contract of carriage from the shipper to the receiver including unperformed pre-shipment liabilities such as payment of freight and handling costs. However, the shipper remains jointly liable for all liabilities under the contract of carriage so the carrier may sue either the shipper or the receiver. Since any claim made by the carrier against the shipper under a traditional f.o.b. sales contract is against the buyer's account this should not make any difference, though as will be seen later the seller's liability for shipping dangerous goods could also be transferred, which would be an extension of liability, as also would be any liability of the buyer for non-payment of freight by the shipper, where the buyer has already paid him in advance. If the shipper is bankrupt the buyer is exposed to liability for a double payment.

Following the technological changes such as the introduction of telegraph communications, it became possible for the buyer to remain in his own country and nominate the vessel without travelling abroad himself. Where the buyer remains in his home country it is easier for the seller to negotiate the contract of carriage. Immediate payment by the seller at the ship's rail is a common modern form of f.o.b. with the buyer reimbursing the seller for the cost of shipment. The result is that there are several types of f.o.b. contract today. The various types of fob contract are analysed in **Pyrene v Scindia**.[4]

Reasons for using FOB Contracts.

1). F.o.b. sales contracts became quite rare during 19th century but are now more popular again. After both World Wars there was a shortage of shipping. Sellers often preferred to let the buyer obtain a vessel or nominate one since that relieved the seller of the problem.

2) The nature of certain goods is such that it is best for the buyer to hire a specific type of vessel such as an oil tanker or a refrigerated ship. The buyer may even own his own ship. This is common for companies such as Shell and B.P.

3). Foreign currency restrictions. F.o.b. involves less foreign currency than c.i.f. for the importer, since the contract of sale does not include shipping costs National Shipping Lines can then be paid in the domestic currency avoiding problems of buying dollars or sterling.

[2] **Handel v English Exporters** [1957] 1 Lloyd's Rep 517

[3] **Stock v Inglis** [1884] 12 Q.B.D .564 and see also **Raymond Wilson v Scratchard** [1944] 77 Lloyd's Rep 373.

[4] **Pyrene v Scindia** [1954] 2 Q.B. 402.

Variations on FOB and CIF Contracts. There are a number of varieties of f.o.b. and c.i.f. contracts and within each of these varieties there may also be extra standard clauses or 'one off terms' that the parties may chose to incorporate into the contract. Classic f.o.b. and f.o.b. with extended duties provide the main variation points in f.o.b. contracts, away from the original strict form of f.o.b. As a practitioner one should never assume one knows the contents of the contract simply by reading its so called nomination as 'c.i.f.' or 'f.o.b.' ; always read the contract itself.

The Value of Defining FOB and CIF Contracts. The common law only allows limited changes within the f.o.b. and c.i.f. formats.

1). The Single sale : Where there is only one seller and buyer there are no particular difficulties involved in defining and varying contract terms. If a number of re-sales occur during a voyage, it is important to have a standardised terms..

2). Certain consequences flow from the definitions. If c.i.f. or f.o.b., the risk in the goods usually passes on shipment from the seller to the buyer, always in f.o.b. and usually in c.i.f. whereas in ex-ship contracts, risk does not pass until discharge from the vessel. This factor in turn affects whether the seller or the buyer bears the cost if goods are lost during the voyage and whether it is the insurance underwriter of the seller or the buyer who has to bear the loss.

What is in a name ? If a sales contract is called c.i.f. but the terms represent ex-ship then ex-ship terms are applied by the courts. It is the attributes of the contract that are of the essence, not the label that is attached to it by the parties. In **The Julia**[5]. The House of Lords held that whilst the parties had stated that it was a c.i.f. contract it had many terms that were inappropriate for a genuine c.i.f. contract. The usual c.i.f. rules on risk were not applicable. The court held that one must look at all the terms. Similarly in **The Parchim** [6] the Crown confiscated cargo during World War I as prize The sales contract was described as c.i.f. but the court treated it as if f.o.b. because of its actual terms. More variations are allowed in f.o.b. contracts than in c.i.f. contracts. It is less usual to have a resale f.o.b. after the voyage has commenced. There is less need therefore, for the bill of lading to act as a negotiable instrument. For definitions of f.o.b. see **Wimble v Rosenburg** [7] and **Pyrene v Scindia.**[8] In **Carlos Federspiel v Charles Twigg** [9] it was held that the mere fact that the seller agrees to pay freight and insurance, will not alone, be sufficient to prevent a contract being on f.o.b. terms.
It was stated by Devlin J in **Pyrene v Scindia** and reaffirmed in **The El Amira** [10] that regarding:–

1) **The classic f.o.b sales contract :** The seller puts goods on board a vessel nominated by the buyer. Whilst the seller makes the contract of carriage as agent of the buyer in terms of ultimate financial liability, seller is treated by the courts as a party to the contract of carriage. The buyer only becomes a party to the contract of carriage through the implied contract based on the bill of lading by virtue of Brandt v Liverpool or C.O.G.S.A. 1992.

2**).** **Strict f.o.b**..The seller's duties : to get conforming goods to the carrying vessel notified to him by the buyer : to procure a mate's receipt and hand it over to a forwarding agent to send to the buyer. Thus the buyer is the original party to the contract of carriage, since he is the original holder of the bill of lading as the principal of the seller, who is his agent. The buyer's duties : booking shipping space in advance : nominating the vessel usually through a forwarding agent : insuring cargo : selecting the port of shipment and if there is a range of ports to choose from, giving written notice of that selection : to give notice to seller of the vessel's estimated and actual time of arrival.

3). **Extended (classic) f.o.b.**[11]. : The seller makes the Contract of Carriage, nominates the vessel and insures the vessel / cargo to the buyer's account. This occurs where the seller has better local knowledge than the buyer. The seller may even hire the vessel on times. This is the least common form and is a variation on the classic f.o.b.

5 **The Julia** [1949] A.C. 239
6 **The Parchim [**1918] P.C.
7 **Wimble v Rosenburg** [1913] 3 K.B. 743
8 **Pyrene v Scindia** [1954] 2 Q.B. 402.
9 **Carlos Federspiel v Charles Twigg** [1957] 1 Lloyd's Rep 240.
10 **The El Amira** 1982 2 Lloyd's Rep 28.
11 note that all forms of f.o.b. may have additional duties. "Extended" refers specifically to insurance duties.

Freight pre-paid and freight collect. The definitions of fob provided in **Pyrene v Scindia**.[12] reflected what was common practice in the industry at that time. One feature of the early part of the 20th century was the practice of fob contracts where freight was payable by the buyer on discharge of cargo at the port of destination. This firmly placed the duty of paying the carrier on the buyer in much the same way that that buyer pays for freight directly to the carrier in a strict fob contract. However, the carrier takes a risk and suffers cash flow problems collecting freight on discharge. The carrier can exercise a lien over cargo, which helps to ensure payment where the buyer wants the cargo. However, if the buyer legitimately rejects the bill of lading or otherwise fails to collect cargo, the carrier has problems collecting the freight. Carriers therefore prefer to be paid freight in advance. Hence, the need for the classic f.o.b. seller to pay, up front, for freight and reclaim it from buyers.

The seller is responsible for getting goods to the ship and pre-ship's rail loading costs. The buyer is responsible for freight, stowage, discharge and insurance costs. By nominating a vessel under an f.o.b. contract the buyer can safeguard himself against foreign currency restrictions and minimise the amount of foreign currency needed in a venture where the foreign exchange rate in his country is unfavourable. A general ship will load any goods on the dock waiting for it. Normally there will be abundant shipping space, provided advance notification of requirements of space, are posted by the buyer to the carrier. If there is a shortage of space, it is the buyer's problem and he has to deal with it and make alternative arrangements. Where a vessel belonging to a buyer's national shipping line is employed it may be more convenient for the buyer as opposed to the seller to negotiate the contract of carriage. The same applies where the buyer owns or charters the vessel. If freight is payable in advance the buyer is financially more secure if he pays the carrier himself since funds cannot then go astray. If the seller pays in advance and then reclaims the money it affects his cash flow, so again it avoids problems if the buyer deals with it himself. The essential factor in any f.o.b. contract under UK law is the actual contract and its terms. In the US there are codified definitions of f.o.b. but in the UK the courts rely on the terms of the contract. It is important to read each contract you have to deal with carefully. Never approach a contract with preconceived notions of what is involved in the contract, without taking the trouble to verify the actual contents. The label classic gives the impression that this form of f.o.b. is the most common. However, this may not be so, since the standard Incoterm f.o.b. contract is in fact a strict f.o.b. contract.

f.o.b. with additional duties. : The seller undertakes to pay freight and insurance to buyer's account. Under a c.i.f. contract the seller also accepts the responsibility for paying insurance and freight. So, what is the difference of between a c.i.f. contract and a f.o.b. contract with the additional duty of insuring the goods ? The answer lies in liability for variations in freight rate. Thus :-

FOB WITH ADDITIONAL DUTIES	**CIF**
If the rate of freight rises the seller charges the extra to the buyer.	The price is fixed in the contract for insurance and freight. The price cannot vary with the freight rate. The seller losses out financially since he cannot pass the increase on the buyer.
If the rate of freight falls the seller charges less to the buyer.	If freight rate falls the seller gains, since the buyer cannot claim the benefit.

The Naxos [13] is an example of an f.o.b. contract with additional duties. Clause 14(1) of the contract stated that 'In cases of (f.o.b.) stowed contracts the seller shall have the sugar ready to be delivered to the buyer at any time within the contract period'. This meant that the buyer could insist on the seller loading the nominated vessel immediately, at any time specified by the buyer within the time slot set aside for arrival of the ship, and that in default, the seller would be liable for damages for delay and the buyer could avoid the contract if the seller was not ready and prepared to start loading immediately.

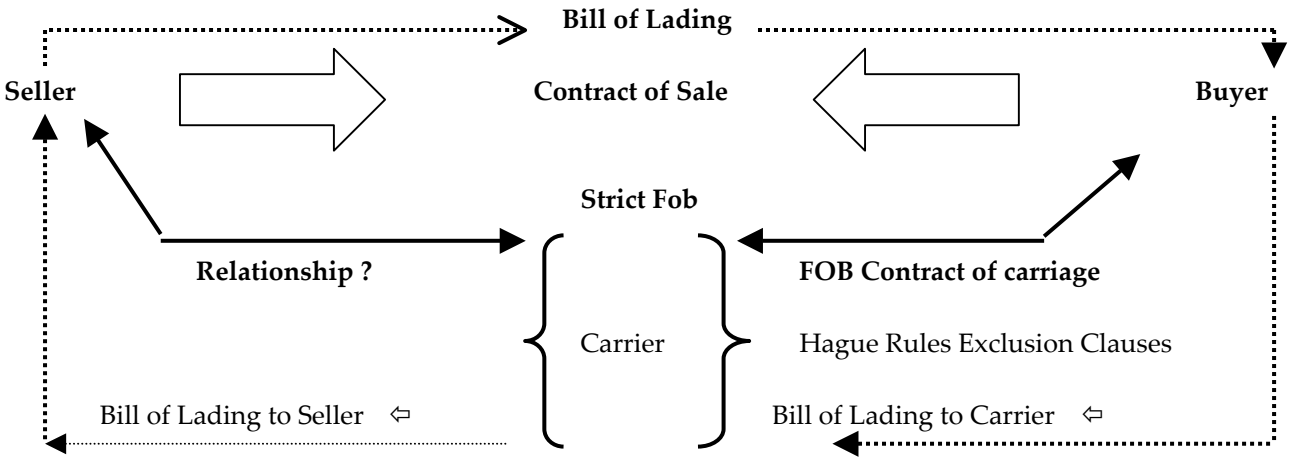
12 **Pyrene v Scindia** [1954] 2 Q.B. 402.

13 **The Naxos** 1991 1 Lloyds Rep 29

Pyrene v Scindia Navigation Co. [14] The case is important because of Devlin J's judgement :-

1). The nature of f.o.b. contracts is defined (strict, classic & additional duty variations).
2) The case provides important material on the application of The Hague Rules.
3). The Hague Visby Rules follow The Hague Rules in every respect on the issues decided in the case.

Devlin J. in the High Court, discussed the three commonly recognised variations of the f.o.b. export sales contract. **Pyrene v Scindia** is an example of a strict f.o.b. contract, since the buyer made the contract of carriage. The buyer having entered into the Contract of Carriage informed the seller of name of the contract vessel. The unusual feature was that the seller wished to sue the carrier but was not privy to the contract of carriage made between the buyer and carrier, whereas the familiar usual problem centres on a buyer seeking to sue the carrier, where the contract of carriage is made by the seller. Thus there was a reversal of the privity of contract problem common in international sales disputes.



Tort or contract claim by seller against carrier ?

A fire tender was dropped on the quayside and damaged, during the loading process. When the goods were dropped they had not passed the ship's rail. They remained the property of the seller and not buyer and remained at the risk of the seller. The bill of lading was claused to indicate damage to the cargo, thus averting the buyer to the problem and enabling the buyer to arrange for the seller had to pay the buyer compensation. The buyer had the right to reject the bill of lading because the goods to be delivered to the buyer, as acknowledged by the bill of lading, did not as required by s14 Sale of Goods Act 1893, comply with the sales description. The seller / shipper agreed to reduce the sales price to take into account the cost of having the fire tender repaired and then sought to recover the cost of repairs from the carrier.

The carrier sought to avail himself of the benefit of limitation of liability provisions in The Hague Rules. The seller as cargo owner was seeking to avoid the provisions of The Hague Rules, which, if they applied, would considerably reduce the amount of damages recoverable from the carrier.

The seller brought the action against the carrier in tort, for negligence, claiming the full £966 worth of damages. The seller alleged that he could sue in tort because there was no privity of contract between the strict f.o.b. seller/shipper and the carrier. Since he was not a party to the contract of carriage, the seller claimed that the terms inserted into the contract of carriage by the Hague Rules did not apply to him. Failing that, the seller further claimed that The Hague Rules did not apply to loading only to carriage.

Thus, the court had decide to firstly whether the seller was party to a contract of carriage governed by the Hague Rules or not. If he was not such a party then, as the seller asserted, he could sue in tort, free of the limitation of liability provisions, for the full £966 worth of damage he had suffered, due to the negligence of the shipowner / carrier's employees.

If however, the seller / shipper was a party to a contract of carriage governed by the Hague Rules, then the court had to further decide whether The Hague Rules come into operation during the loading stage or only

[14] **Pyrene v Scindia Navigation Co.** [1954] 2 Q.B. 402. per Devlin J.

after the goods have been loaded. If they did not apply to the loading stage then the shipper could claim the full amount of damages. If the Rules applied to loading, the amount he could claim would be limited by the limitation provisions of the Hague Rules in respect of negligent damage caused by the vessel's crew.

The court held that :-

1) The seller was a party to a contract of carriage governed by The Hague Rules.
2) The Hague Rules applied to the loading, stowage and discharge periods.
3) The carrier was entitled to limit his liability to the level set out in the Hague Rules.

1 Privity : Regarding the seller / shipper's claim that there was no contract between himself and the ship owner, Devlin J held that although the buyer is an express party to the contract of carriage, it can nonetheless be implied that the seller was also a party to the same venture. Devlin J's reasoning, posed in the form of question and conclusion , was as follows :-

a) Suppose the vessel had sailed without loading. Would it have been reasonable to say that the seller would have no action against the ship owner ? Devlin J. concluded it would not have been reasonable and so there must be an implied action.
b) When the carrier loads, is he guilty of conversion ? Devlin J. concluded that this was a nonsense. Accordingly, he held that there must be an implied contract.

2 Scope of Hague Rules : The seller argued that The Hague Rules do not apply to loading because Article I(e) Hague Rules states that "Carriage of goods" covers the period of time from the time when the goods are loaded on board to the time they are discharged from the ship. Therefore, since the goods had not been loaded when they were damaged The Hague Rules were not applicable. This posed a question of interpretation of The Hague Rules for the court. Devlin J. held that notwithstanding Article I(e) the rules apply to the loading process, since otherwise the carrier would be able to evade the responsibilities placed on him by Article III(2).[15] The arguments on this point remain good law. The same interpretation applies equally to the H.V.R. today.

3 Damages : The court held that since there was a contract and the limitation clauses under The Hague Rules applied, the seller lost his claim for full compensation. He was able to claim the amount of damages permitted under the Rules but no more.

Analysis : Regarding Devlin J's logic, if a vessel sails without goods, why should the seller have an action? If the carrier fails to load the nominated vessel, it is not an effective vessel. The buyer is under a duty to nominate an effective vessel. Therefore there would be a breach of the contract of sale for which the seller can sue the buyer. The buyer has a right of action against the carrier under the contract of carriage and could thus sue the carrier for any damages paid to the seller. Secondly, is there any conversion ? The answer is emphatically "No there is not". The seller consents to the carrier handling the goods. This affords the carrier the defence of "*Volenti Non Fit Iniuria*", and so there can be no injury where there is consent.

The authority of **Pyrene v Scindia** on privity is questionable and wrong. Today the seller could possibly win and might possibly get full damages. Devlin J's logic was not so obvious or impeccable as it appears to be at first sight. This aspect of **Pyrene v Scindia** was subsequently disapproved but not over ruled in **Midland Silicones v Scruttons Ltd**,[16] by the House of Lords. Nonetheless, even though not overrulled, **Pyrene v Scindia** could not be relied on in future because the court, in **Midland Silicones v Scrutton,** limited **Pyrene v Scindia** to its facts. In effect therefore, **Pyrene v Scindia** is over-ruled on the issue of privity of contract, though it is still good law regarding the scope of Articles I(e) and III.2.

In some respects it would be unfortunate if **Pyrene v Scindia** does not work to create a contract between shipper and carrier. It means that there is a possibility that The Hague Rules could be avoided with impunity by the seller who could sue for the full damages. The Hague Rules sit uncomfortably in a contract based regime, like that in the U.K. The court attempted in **Pyrene v Scindia** to reinforce the universal application of the Hague Rules. The Carriage of Goods by Sea Act 1992 has now gone some way towards dealing with

[15] Article III.2. The Hague and now The Hague Visby Rules, state that the carrier is required to carefully load, stow and discharge goods.
[16] **Midland Silicones v Scruttons Ltd** [1961] 2 Lloyds Rep 365 : [1962] A.C. 446

the issue in respect of rights of action by endorsee's of bills of lading against ship owners where the contract is made by the seller and addresses any gaps left by s1 Bills of Lading Act 1855. However, it does not work in reverse to benefit sellers where the contract of carriage is made by the buyer.

It is very likely that **Pyrene v Scindia** would produce the same result today, thus enforcing the Hague Visby Regime, but for entirely different reasons. Devlin J attempted to find a contractual relationship springing out of the contract of carriage evidenced by the bill of lading. His aim, to reinforce the Hague Rules, was laudable. The chosen method was not. The seller received the bill of lading but under the contract of sale was merely required to pass the bill of lading on to the buyer. The question therefore arises as to what relationship if any is there between the shipper, under a strict fob contract, and any contract of carriage contained in the bill of lading ? Does the shipper receive the bill of lading as agent of the buyer ? It is submitted that a preoccupation with the contract of carriage in the bill of lading blinded Devlin J to the obvious, namely that the shipper does not need to be a party to the bill of lading contract of carriage since he holds the bill of lading in a totally different way. The bill of lading has several functions. One of these is as a receipt. As a receipt for the delivery of goods into the care of the carrier it is a document evidencing the terms and conditions of bailment. Where the bailor is also the party to the contract of carriage there is a Coggs v Barnard bailment for carriage on terms of the contract of carriage. Where there is no carriage it is a storage bailment on terms. The bill of lading as a receipt can therefore limit the liability of the carrier for pre-shipment damage to cargo. Indeed it can go further, where appropriate terms are inserted, and exclude liability for any damage prior to attachment of loading hooks, whilst cargo is held in the warehouse pending loading.

The significance of bailment has been reinforced and brought back to the attention of the industry by **The Pioneer Container**,[17] and by **The Mahkutai.**[18] Since the strict liability regime of bailees could be applied to pre-shipment cargo handling it is in the interests of carriers to ensure that the bailment is on terms and the terms of the Hague and Hague Visby Rules would be ideal. There would be no question of The Hague or Hague Visby Rules limitations on liability being struck down for unreasonableness either under the UCTA 1977 or under **Photo-Productions v Securicor**.[19]

Concurrent liability in contract and tort : The jurisprudence on tort and contract has evolved considerably since Pyrene v Scindia. Devlin J could not be expected to have anticipated the ruling in **Henderson v Merrett** and subsequently in **White v Jones**. It is now clear that a contractual relationship is not needed in order to limit the scope of the duty of care in tort. Whilst **Donoghue v Stevenson** established the ground rules for the existence of a duty of care in the tort of negligence, in terms of foreseeability, the imposition of a duty and its scope depends upon the reasonableness of imposing a duty in all the circumstances of the case. Where a person notifies another that the scope of the duty that he is prepared to offer is limited in some way and that the other party should understand that they have to shoulder some, or all of the risk, then the duty may be so limited. Such limitation must be reasonable and lawful, but it is unlikely that the courts would question the reasonableness of any provisions that reflect the standards established by The Hague Visby Rules. Providing the cargo owner is notified clearly, of this limitation, in any receipt or bill of lading given him by the carrier, The Hague Visby Rules could be made to apply to the non-contracting shipper. The court might even imply such knowledge if common practice in the trade, and the Contract (Third Party Rights) Act 1999 could assist here since no contract of carriage is involved. However, some difficulties might occur in that the Act excludes contracts for the carriage of goods and a universal clause covering c.i.f. and the three variations of f.o.b. could give rise to some complicated questions. Nonetheless, with care such a clause could be devised for use specifically in strict f.o.b. contracts.

[17] **The Pioneer Container : KH Enterprise (Cargo Owners) v Pioneer (Owners)** [1994] 2 A.C. 324

[18] **The Mahkutai** [1996] A.C. 650

[19] **Photo-Production Ltd v Securicor Transport Ltd**. [1980] A.C. 827

CHAPTER FIVE

DUTIES COMMON TO FOB AND CIF BUYERS AND SELLERS.

Who will be required to fulfil the following duties will depend upon the type of contract chosen. Sometimes it will be the seller and sometimes the buyer. An important factor to be taken into account in considering these general duties is who is to benefit from the duty. If it is the buyer or the seller alone then that person may chose to waive that duty and indeed if a party asks the other to do something, which does not accord with that duty it does not behove that requesting party to then seek to blame the other for not fulfilling the duty. Thus, an f.o.b. buyer cannot complain that goods are shipped outside the contract time frame, if the vessel nominated by the buyer arrives too late.

Some duties are for the benefit of both parties. Thus, the contractual date of shipment enables both the buyer to regulate his affairs, particularly the period of time for which finance of the purchase is required, on sales and or use of the cargo, knowing that the goods are likely to arrive at a particular time but also enables the seller to make arrangements for the procurement of cargo, its shipment to the dock and finance of the sale.

Shipment Date : Time is of the essence in commercial contracts. Both the buyer and the seller must ensure that they do everything required of them to ensure that goods be shipped within that specified time frame. Where there is a potential difficulty in predicting the exact date of shipment, it may be wide to include a variation clause in the contract to provide for unexpected events. In **Gonzalez v Waring,**[20] the court held that extension clauses are contracts to vary loading time in return for additional payment by the f.o.b. buyer. They are not penalty clauses and are not therefore subject to judicial supervision on the basis of reasonableness in relation to the assessment of damages.

Stowage. It was held in **Messers v Morrison.**[21]. that stowage must be in accordance with the trade or custom of the port or with stipulations of the sales contract. The duty to arrange for stowage may fall on buyer or seller, depending on whether the contract is strict f.o.b. or classic f.o.b. or c.i.f.

Direct Shipment. The more direct the route taken from port of loading to port of discharge, with minimal inter-port visits, the lesser the potential risk of damage to cargo is, particularly where fresh produce is concerned and where the cargo is early market produce which sells at a premium. Furthermore, rapid transit ensures the goods arrive within a commercially viable time, enabling the buyer to fulfil onward sales obligations. Unlawful deviation from the contract route is treated by the courts as a breach of condition, entitling the innocent party to repudiate the contract. The court held in **Colins & Shields v Wedell**,[22] that any route specified in the sales contract must be adhered to. Otherwise the vessel must follow the normal route in the trade.

Bergerco v Vegoil,[23]. states that unless a deviation clause is permitted in the sales contract, then the contract of carriage should be for direct shipping to port of unloading. It may be unwise to incorporate a direct shipment requirement into a contract of sale, since most bills of lading will be on Charterparty terms, which tend to include a deviation clause. It may prove to be difficult to persuade a carrier to alter a standard form bill of lading to accommodate the need for direct shipment.

The strict f.o.b. buyer will be responsible for making the contract of carriage, and hence determining the route whereas that duty will fall on the seller c.i.f. The seller will have just as much interest in the route as the buyer if he is taking out his own insurance to protect himself against rejection of documents or non payment by a buyer in an f.o.b. contract.

20 **Gonzalez v Waring** [1980] 2 Lloyd's Rep 160
21 **Messers v Morrison** [1939] All.E.R 92.
22 **Colins & Shields v Wedell** [1952] 2 Lloyd's Rep 1021.
23 **Bergerco v Vegoil** [1984] 1 Lloyd's Rep 440.

CENTRAL DUTIES UNDER INCOTERMS "F" CONTRACTS.[24]

"The "F"-terms require the seller to deliver the goods for carriage as instructed by the buyer. The point at which the parties intend delivery to occur in the FCA term has caused difficulty because of the wide variety of circumstances which may surround contracts covered by this term. Thus, the goods may be loaded on a collecting vehicle sent by the buyer to pick them up at the seller's premises; alternatively, the goods may need to be unloaded from a vehicle sent by the seller to deliver the goods at a terminal named by the buyer. Incoterms 2000 take account of these alternatives by stipulating that, when the place named in the contract as the place of delivery is the seller's premises, delivery is complete when the goods are loaded on the buyer's collecting vehicle and, in other cases, delivery is complete when the goods are placed at the disposal of the buyer not unloaded from the seller's vehicle. The variations mentioned for different modes of transport in FCA A4 of Incoterms 1990 are not repeated in Incoterms 2000.

The **delivery point** under FOB, which is the same under CFR and CIP has been left unchanged in Incoterms 2000 in spite of a considerable debate. Although the notion under FOB to deliver the goods "across the ship's rail" nowadays may seem inappropriate in many cases, it is nevertheless understood by merchants and applied in a manner which takes account of the goods and the available loading facilities. It was felt that a change of the FOB-point would create unnecessary confusion, particularly with respect to sale of commodities carried by sea typically under charter parties.

Unfortunately the word "FOB" is used by some merchants merely to indicate any point of delivery - such as "FOB factory", "FOB plant", "FOB Ex seller's works" or other inland points -thereby neglecting what the abbreviation means: **F**ree **O**n **B**oard. It remains the case that such use of "FOB" tends to create confusion and should be avoided.

There is an important change of FAS relating to the obligation to clear the goods for export, since it appears to be the most common practice to put this duty on the seller rather than on the buyer. In order to ensure that this change is duly noted it has been marked with capital letters in the preamble of FAS.

FCA FREE CARRIER (... named place) : "Free Carrier" means that the seller delivers the goods, cleared for export, to the carrier nominated by the buyer at the named place. It should be noted that the chosen place of delivery has an impact on the obligations of loading and unloading the goods at that place. If delivery occurs at the seller's premises, the seller is responsible for loading. If delivery occurs at any other place, the seller is not responsible for unloading. This term may be used irrespective of the mode of transport, including multimodal transport. "Carrier" means any person who, in a contract of carriage, undertakes to perform or to procure the performance of transport by rail, road, air, sea, inland waterway or by a combination of such modes. If the buyer nominates a person other than a carrier to receive the goods, the seller is deemed to have fulfilled his obligation to deliver the goods when they are delivered to that person.

FAS FREE ALONGSIDE SHIP (... named port of shipment) : "Free Alongside Ship" means that the seller delivers when the goods are placed alongside the vessel at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment. The FAS term requires the seller to clear the goods for export. THIS IS A REVERSAL FROM PREVIOUS INCOTERMS VERSIONS WHICH REQUIRED THE BUYER TO ARRANGE FOR EXPORT CLEARANCE. However, if the parties wish the buyer to clear the goods for export, this should be made clear by adding explicit wording to this effect in the contract of sale. This term can be used only for sea or inland waterway transport.

FOB FREE ON BOARD (... named port of shipment) : "Free on Board" means that the seller delivers when the goods pass the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export. This term can be used only for sea or inland waterway transport. If the parties do not intend to deliver the goods across the ship's rail, the FOA term should be used."

[24] Incoterms 200 Section 9

CHAPTER FIVE

THE BUYER'S DUTIES UNDER CLASSIC FOB CONTRACTS

Nomination of an effective vessel. By virtue of **Bunge v Tradax,**[25] it is a condition that the buyer must nominate an effective vessel and communicate nomination to the seller in time for the seller to get the goods to the dock ready for loading. If there is no required notice period reasonable notice must be given according to **Thomas Borthwick v Buge.**[26] The seller can avoid the contract for failure to nominate in time according to **Compagnie de Renflouement v Seymour Plant Sales**.[27] The nominated vessel must be a suitable /effective vessel able to carry the contract cargo. The leading case of **Bowes v Shand**.[28] held that the vessel nominated by the buyer must sail within the time specified in the sales contract. If it does not arrive in time or is not a suitable vessel then the buyer is in breach of his duty to nominate an effective vessel. The seller can refuse to ship the goods and can sue the buyer for breach of contract.

Miserocchi v A.F.A [29] states that the f.o.b. seller is entitled to an additional payment for loading costs incurred outside the specified time band, since the obligation to deliver and the obligation to accept delivery are mutual and both are contained in the shipment period. The buyer nominated loading within a specified 15 day time band. The seller was unable to nominate a loading birth because the port was congested and there was none available till the end of the 15 day period resulting in extended loading time being required which the buyer was held liable for. It was not in this instance, the duty of the seller to provide a berth, so his inability to nominate one was not his responsibility. Nomination of an effective vessel implies that the vessel so nominated will be able to berth to allow the shipper to load the cargo. In **Federal Commerce v Tradax**,[30] the contract specifically provided that delay due to congestion was to be at the seller's expense, but such a provision is unusual. By contrast, **The Osterberk**,[31] reflects the normal term that extensions in time are to be at the buyer's expense.

The New Prosper,[32] involved an f.o.b contract for the sale of barley under a G.A.F.T.A standard form, subject to A.U.S.B.A.R terms, which stated that the vessel must comply with Australian Barley Board draft requirements. The vessel nominated could enter some but not all optional loading ports and so was rejected by the shipper. The court held that rejection was permitted. It was not a suitable vessel. The buyer was in breach of contract not the seller. The normal rule is that an effective vessel is one, which can carry the contract cargo. Depending on how the cargo is specified this rule may be some what amended by **Toepfer v Itex.**[33] The buyer bought a full cargo f.o.b. Buenos Aries. He sold the cargo on to a the sub-buyer who nominated a vessel, which the buyer in turn nominated to the seller. Unfortunately the sub-buyer also nominated the same vessel to carry another cargo. The two cargoes together exceeded the vessel's capacity. The vessel could not load a full cargo. The seller claimed the buyer had repudiated the contract since he was unable to perform the full contract. The court held that this did not amount to a repudiatory breach. The seller was only entitled to damages.

How much notice is required ? According to **Gill & Duffus v Societe des Sucres,**[34] where no time is specified in the contract, sufficient notice of arrival is required to enable the seller to arrange for the goods to reach the port in time for shipment. **Napier v Dexters,**[35] states that a failure to give sufficient notice entitles the seller to repudiate the sales contract. If the seller waives the breach the seller's duty is only to load as much as is possible within the remaining time available. Note however, that where there is sufficient time left to re-nominate a substitute vessel then short notice will not necessarily constitute a breach of condition.

25 **Bunge v Tradax** [1981] 2 All.E.R. 540 : 1 Lloyd's Rep 294
26 **Thomas Borthwick v Buge** [1969] 1 Lloyd's Rep. 17.
27 **Compagnie de Renflouement v Seymour Plant Sales** [1981] 2 Lloyd's Rep 466.
28 **Bowes v Shand** 1877 2 App Cas 455.
29 **Miserocchi v A.F.A** [1982] 1 Lloyd's Rep 202 :
30 **Federal Commerce v Tradax** [1978] AC 1
31 **The Osterberk** [1973] 2 Lloyd's Rep 86
32 **The New Prosper** [1991] 2 Lloyd's Rep 93 :
33 **Toepfer v Itex** [1993] 1 Lloyd's Rep 360
34 **Gill & Duffus v Societe des Sucres** [1986] 1 Lloyd's Rep 322.
35 **Napier v Dexters** [1926] 26 Lloyd's Rep 184

Example : Under a contract for March shipment the buyer nominates a vessel on the 2nd March for shipment on the 3rd March. The seller can refuse to accept the nomination for unreasonably short notice. This will not entitle the seller to escape the entire contract, since the buyer has plenty of time to make a fresh notification, providing the seller with adequate time to respond to the second notice. Thus a second substitute nomination on the 6th for a vessel arriving on the 10th March would be permitted.

In **Nordisk V Eriksen**,[36] the court confirmed that notice of readiness should be provided in sufficient time to allow the seller a reasonable time within which to load. The buyer requested loading at once on 1st September. On the 15th of September the seller asked for a loading date. The court held that 14 days was reasonable. The seller was in breach for having failed to load already, within that time.

Is notice of the vessel final ? The seller is likely to rely on the nomination by the seller to conclude a contract of carriage with the nominated carrier. If the seller were then to seek to nominate another vessel the seller would have a problem since the original carrier could insist on being paid the contract price. The leading case of **Agricultores F.A. V Ampro**,[37] however, states that nomination of the vessel is not normally final. If the vessel is ineffective and there is still time available to the buyer he can nominate a substitute vessel. Rejection of nomination by the seller prior to the expiry date of the band would therefore amount to a repudiatory breach by the seller. The requirement that the original vessel be ineffective is essential to the right to nominate a substitute. The buyer could not do so merely because he had found out that another carrier was prepared to carry the goods for a more advantageous price. If the vessel is ineffective, for instance because it will not arrive in time, the carrier could not sue the seller for the price of carriage because that carriage could not take place. The contract is either frustrated or breached by the carrier, leaving the seller free to make a fresh contract with another carrier nominated by the buyer.

It is common in f.o.b. contracts to lay down a specific amount of advance notice of date of shipment and nomination of the vessel. The seller will then arrange to have goods delivered to the port at the appropriate time. The seller will incur storage charges pending shipment and so the late arrival of a ship would cause him additional expense. Furthermore, where perishable goods are involved, the goods are likely to loose shelf life or even deteriorate if the waiting time in storage is excessive. **Cargill v Continental**,[38] states that if a notice period is given for nomination, a substitute vessel must be named that will arrive within that period.[39]

Specifying time of shipment from a broad time band : Once the buyer selects the exact time of shipment the seller will rely on the notification to make arrangements for cargo to be taken to the port. Any attempt by the buyer to unilaterally change that specified date will have implications for the seller, in that storage time for cargo at the port pending shipment may be extended or if the date is brought forward, the seller may not be able to procure a cargo or get it to port in time.

Renomination and implications for specified date of shipment. Where a secondary nomination is made for a vessel that will arrive later than the original nomination the seller may incur additional storage costs. There is also the added risk of damage or deterioration to cargo. In the absence of any contractual requirement to the contrary, the seller / shipper will remain responsible for the cargo until it passes the ship's rail.[40] Since the time band for shipment may be far broader than the specified time band for nomination of the vessel, it is advisable for the seller to stipulate in the contract of sale that once a date for shipment has been nominated, that date overrides the original time band.

Consider the following :-

Example 1 : A contract requires March shipment. The buyer is required to give notice of a date of shipment. The buyer chooses the 15th March. The nominated vessel becomes ineffective. The buyer nominates a substitute vessel to arrive on the 25th of March, well within the time band for shipment. Unless the contract states otherwise the buyer will not have breached the time requirements of the contract.

36 **Nordisk v Eriksen** [1920] 2 Lloyd's Rep 71.

37 **Agricultores F.A. v Ampro** [1965] 2 Lloyd's Rep 157

38 **Cargill v Continental** [1989] 2 Lloyds Rep 290.

39 See also **Bunge v Tradax** supra

40 **Cunningham J & J v Munroe R.A. Ltd** [1922] 13 Lloyd's Rep 62. INCO fob TERMS 2000 expressly provide that risk passes to the buyer if the vessel fails to arrive on time, even though the goods have not passed the ship's rail.

Example 2 : A contract requires March shipment. The buyer is required to give 5 clear days notice of a date of shipment. On the 9th March the buyer chooses the 15th March. The nominated vessel becomes ineffective. On the 19th March the buyer nominates a substitute vessel to arrive on the 25th of March, well within the time band for shipment. Unless the contract states otherwise the buyer will not have breached the time requirements of the contract.

Example 3 : A contract requires March shipment. The buyer is required to give 5 clear days notice of a date of shipment. On the 9th March the buyer chooses the 15th March. The nominated vessel becomes ineffective. On the 27th March the buyer nominates a substitute vessel to arrive on the 2nd April, outside the time band for shipment. The seller can repudiate the contract. If however, the seller chooses to accept the re-nomination the buyer could not then complain that the goods were shipped outside the contract period.

Example 4 : A contract requires March shipment. The buyer is required to give 5 clear days notice of a date of shipment. Nomination is stated to be final and it is further stated that once a date is set for shipment that date also becomes final. On the 9th March the buyer chooses the 16th March. The nominated vessel becomes ineffective. On the 10th March the buyer nominates a substitute vessel to arrive on the 16th of March, at the same time as the original vessel. In the absence of any provision preventing any renomination of any kind whatsoever,[41] the seller must accept the renomination and ship the goods.

Example 5 : A contract requires March shipment. The buyer is required to give 5 clear days notice of a date of shipment. Nomination is stated to be final and it is further stated that once a date is set for shipment that date also becomes final. On the 9th March the buyer chooses the 15th March. It becomes clear to the buyer that the vessel nominated is ineffective so on the 19th March the buyer nominates a substitute vessel to arrive on the 25th of March, well within the time band for shipment. The seller is entitled to reject the renomination and repudiate the contract on the 9th March. However, if the seller fails to exercise his right to repudiate then the buyer could assert that in reliance on the failure to elect to repudiate the seller has impliedly waived his right to reject.

Example 6 : A contract requires March shipment. The buyer is required to give five clear days notice of a date of shipment. On the 9th March the buyer chooses the 15th March. The nominated vessel becomes ineffective. On the 12th March the buyer nominates a substitute vessel to arrive on the 14th of March, well within the time band for shipment but failing to comply with the requirement for five clear days notice. The seller will be entitled to refuse to accept the renomination. However, unless the contract states otherwise the buyer will not have breached the global time requirements of the contract and could make a fresh nomination of a vessel to arrive and load within the March time frame, providing the five day requirement is met.

Example 7 : A contract requires March shipment. The buyer is required to give notice of a date of shipment. On the 9th March the buyer chooses the 25th March. The nominated vessel becomes ineffective. The buyer nominates a substitute vessel to arrive on the 15th of March, well within the time band for shipment, but considerably earlier than the first nomination. Unless the contract states otherwise, specifying that renomination of vessel and or specifying that the nominated date of shipment is final and binding, the buyer will not have breached the time requirements of the contract. The seller will have to ship the goods in accordance with the new nomination and specification of time of shipment.

In **Bremer V Rayner,**[42] the contract provided the seller with the option of accepting or rejecting a substitute renomination provided the initial nomination was valid. However, the court held that an invalid nomination could be substituted with a valid nomination without the seller being able to exercise the option to reject it.

Nomination of port of shipment. The buyer nominates the vessel and books space in the vessel. In the absence of requirements to the contrary in the contract, the buyer nominates the port of shipment. Variations in the contract mean that either the buyer or the seller can be required to nominate the port. Where a number

41 specific clauses regarding renomination rights may be included in a contract to avoid the general rules as in **The Filipinas 1** [1973] 1 Lloyd's Rep 379 which expressly forbade substitution.

42 **Bremer v Rayner** [1978] 2 Lloyd's Rep 73

of options regarding the appropriate port of loading are available as in **Boyd v Louis Louce**,[43] where the buyer had a choice of 'any good Danish Port' a failure to nominate the port amounts to breach of contract. A failure to allocate the duty of nomination to either the buyer or the seller was held to render the contract void for uncertainty in **Cumming v Hassell**,[44] but **Boyd v Louis Louce** now imposes the duty on buyer in the absence of an express clause.

Notification of date of shipment.[45] **The Osterbeck**,[46] states that if there is a time band for nomination of the vessel, a breach allows the innocent party to avoid the contract. In **Colley v Overseas Exporters**,[47] payment was due on loading. The buyer frustrated this event by refusing to nominate a vessel. The court held that nomination should have occurred, in the absence of expressly agreed time limits, within a reasonable time the buyer was in breach of the sale's contract. The buyer was liable for damages for breach of contract for a failure to nominate an effective vessel. Nonetheless, the failure to make a nomination frustrated the right of the seller to an action for the price, which from the seller's perspective was far better than a mere right to damages, since it meant that the seller had to mitigate his losses by arranging to sell the cargo to a substitute buyer.

Buyer's liability for post-shipment demurrage under classic f.o.b. contracts. The usual situation, which is confirmed in the bill of lading is that the carrier will exercise a lien over cargo for any demurrage incurred during discharge, thus ensuring that the carrier gets repayment. However, if for any reason the buyer refuses to collect the cargo the carrier may recover the money from the seller / shipper. This is facilitated by s3 Carriage of Goods by Sea Act 1992. To protect themselves, shippers can sometimes have a clause placed in the bill of lading stating that only the buyer is liable for post-shipment expenses.

Sellers right of stoppage in transit f.o.b. for non payment and bankruptcy of buyer. The Golden Rio,[48] discusses the final date for valuation of goods in a bankruptcy petition. The current value of goods shipped f.o.b. is the price at the port of discharge not the port of loading once the goods are loaded and at sea.

THE SELLER'S DUTIES UNDER CLASSIC F.O.B CONTRACTS

The primary duty to tender goods in compliance with the contract of sale. The duty to supply goods that conform to the requirements of the contract of sale is common to all sale's contracts, be they cif, fob ex-warehouse of ex-ship. **Petro Trade V Stinnes Handel,**[49] concerned the purchase of oil f.o.b. Antwerp. The plaintiff tendered a different grade oil to that stipulated in the sales contract, at a different place and at a date outside the contractual date of shipment. The buyer had extended the shipment date to give the seller the chance to fulfil his contractual obligations but eventually notified the seller that he was treating his conduct as a repudiatory breach of contract. The seller claimed the oil offered was just as good and the port offered was closer to the buyer and therefore inconvenienced him less. The court held that goods must comply with the contract description. Delivering up goods, that are as good as those contracted for, is not compliance. The buyer was entitled to repudiate the contract.

Export Documentation : Pagnan v Tradax,[50] states that the duty to procure and supply export licences lies with the seller as part of the sales contract.

The contract vessel : The contract of carriage must be made by the seller with the vessel nominated by the buyer according to **Bowes v Shand**.[51]

43 **Boyd v Louis Louce** [1973] 1 Lloyd's Rep 209

44 **Cumming v Hassell** [1920] 28 CLR 508

45 Halsbury's Laws of England : 4th ed Vol 9 : states that time conditions indicating the intentions of the parties require precise compliance. Time is of the essence in mercantile contracts. The date of shipment is normally somewhere within a specified time band, for example 1 – 31 January .

46 **The Osterbeck : Olearia Tirrena v Algermeene Oliehandel** [1972] 2 Lloyd's Rep 86

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

48 **The Golden Rio** [1990] 2 Lloyds Rep 273.

49 **Petro Trade v Stinnes Handel** [1993] 1 Lloyds Rep 142.

50 **Pagnan v Tradax** [1987] 2 Lloyd's Rep 342.

51 **Bowes v Shand** 1877 2 App Cas 455.

Specified port of shipment. The court also held in **Petro Trade V Stinnes Handel** that the port of loading f.o.b. is a condition which must be complied with. There is no point in trying to show the port offered was more convenient. The nominated port must be complied with.[52]

Time of shipment : Yello v Machado,[53] is authority for the statement that the shipper must complete loading within the specified time band or the buyer can repudiate the contract,[54] unless it is the buyer's fault in the first place. **Tradax Export v Italgrani F.A**.[55] confirms that if the seller fails to promptly deliver such that it is a frustrating delay as opposed to a mere delay in loading the buyer can withdraw the vessel or its nomination and claim demurrage if appropriate. In **Wertheim v Chicoutimi Pulp,**[56] the court stated that if it is evident that the seller is not going to deliver there is an anticipatory breach by the seller and the buyer is relieved of his duty to nominate an effective vessel.[57]

The Aragon,[58] discusses the seller's duty to ship within the contract time frame. The buyer purchased a cargo of oil f.o.b Sullom Voe, February shipment, with a 3 day window to be set 15 days from nomination of estimated time of arrival of vessel, demurrage payable for delay by endorsee and reclaimable from the seller. The vessel arrived 2 days before the 3 day loading window but had still not loaded 2 days after expiry of window. The buyer gave notice of revocation. The seller sued for damages for breach of contract. The court held what whilst under **Bunge v Tradax**,[59] February shipment is a condition, the 3 day window is not. The demurrage rate meant that the 3 day window was a warranty, with a liquidated damages clause attached. The buyer had no right to repudiate the contract. The plaintiff seller was entitled to loss of profit, at contract price, for oil which had subsequently halved in value.

Seller's option to nominate loading date : If a seller is given an option as to when he wants to load the goods then the buyer does not have to nominate the vessel until the seller tells him when he wants to load according to **Harlow v Panex.**[60] **The Honam Jade** ,[61] shows that contracts are becoming more and more complicated today. An oil terminal with limited handling capacity set out conditions for booking in vessels f.o.b. into its terminal. The oil terminal's condition required the buyer to specify a five day loading period. The seller had to notify the terminal the details of the five day slot. The terminal would in turn accept two of those days, after which the seller had to communicate his acceptance of the buyer's notification to the buyer within five days. The seller failed to do this and was held to be in breach of a serious innominate term i.e. a condition and the buyer was entitled to terminate the contract.

In **Nissho V Cargill**,[62] : the seller had right to nominate laydays and date of loading by 5 p.m., 15 days before loading, under a f.o.b contract for the sale of Brent Crude Oil. The buyer refused to pick up the phone and accept the nomination till the 5 o'clock deadline had passed. The buyer wished to keep the price down by preventing the seller from making a nomination. Dated consignments and undated consignments had different market prices Once dated the buyer would have to pay a higher price. The problem for the buyer was that unless he could resell at a higher price he would lose money if the seller made a nomination, which forced the buyer to pay the higher price. The court held that the buyer had a duty to answer the phone, so the seller was entitled to damages for the buyer's action in frustrating the seller's nomination.

Seller's duty to tender documents to buyer. Concordia V Richco,[63] confirms that a seller is under a duty to send shipping documents c.i.f. and f.o.b. to the buyer with reasonable dispatch. What amounts to reasonable dispatch however is a question of fact to be settled by an arbiter or the court as the case may be. The duty of a seller f.o.b is the same as the duty in a c.i.f contract regarding endorsement of documents namely to send

52 note that a buyer could waive the port nomination if it suited him, but is not obliged to do so.
53 **Yello v Machado** [1952] Lloyd's Rep 183.
54 as confirmed in **Petro Trade v Stinnes Handel** where the buyer was permitted to repudiate.
55 **Tradax Export v Italgrani F.A**. [1983] 2 Lloyd's .Rep. 109.
56 **Wertheim v Chicoutimi Pulp** [1911] AC 301.
57 Semble **Tumbull v Mundas** [1954] 2 Lloyd's.Rep 198.
58 **The Aragon** [1991] 1 Lloyd's Rep 61
59 **Bunge v Tradax** [1981] 2 All.E.R. 540 : 1 Lloyd's Rep 294.
60 **Harlow v Panex** [1967] 2 Lloyd's Rep. 509.
61 **The Honam Jade** [1991] 1 Lloyds Rep 39.
62 **Nissho v Cargill** [1993] 1 Lloyd's Rep 80.
63 **Concordia v Richco** [1991] 1 Lloyds Rep 475.

them within a reasonable time after shipment. The last possible date of delivery of documents is the day of delivery of goods, since documents can no longer be purchased after that date so damages assessed at market price on last day of delivery according to the arbitrators, though a reasonable time could at the arbitrator's discretion, have been at an earlier time.[64]

Pre-shipment costs to seller's account. In **The Bonde,**[65] an f.o.b. contract contained a liquidated damages clause stating that the seller would be liable to pay demurrage at a fixed rate for any excess loading time resulting from a failure to load at a fixed rate. The buyer took advantage of an extension clause in his charterparty to extend the voyage by 21 days. The seller failed to load quickly enough and the buyer tried to get the seller to pay for the 21 day extension. The court held that the seller only had to pay the fixed demurrage rate and not the additional 21 days. **The World Navigator**,[66] discusses loading obligations f.o.b. The seller failed to provide the port with the necessary documents to enable loading to start. The seller was liable for all the costs of the resulting delay. The seller must co-operate to enable a ship to dock and load in cases where his co-operation is essential to the loading process.

Seller's liability for pre-shipment demurrage under classic f.o.b. contracts. The general rule is that the seller is liable for all pre-shipment demurrage, but where the demurrage is caused by the buyer, for example because the shipper refuses to present goods to the carrier in the absence of confirmation that the buyer has arranged a documentary credit to his account, the shipper can recover the cost of the demurrage from the buyer. **Socap V Rich,**[67] discusses liability for demurrage under f.o.b. contracts.

Richco v Toepfer,[68] involved an F.o.b. sales contract, with a demurrage clause for excess loading time at an agreed rate to be paid by the seller. Because of excess loading time the carrying charges also increased. The buyer claimed these additional charges, as damages for breach of contract. The court held that if there is an agreed demurrage rate, that is all the buyer can claim, so the buyer's claim was dismissed.

The Rio Apa,[69] concerned the sale of soya f.o.b San Martin, July shipment, subject to G.A.F.T.A terms, which provided inter alia that a) should the buyer not load within delivery period the buyer to pay carrying charges b) if goods not loaded within 60 days of last day of delivery the buyer automatically in default and shall pay default damages and carrying charges c) should the buyer not tender notice of readiness within delivery period the buyer in default unless extension claimed. On the 18 July the buyer tendered notice of readiness when the vessel arrived at the Common Zone. Notice was accepted by the seller and laytime commenced to run. The vessel berthed 31st July and loaded 2-4 August. No notice of extension claimed. The seller claimed that there had been a failure to load within the delivery period and demanded carrying charges. The court held that there was no duty on the buyer to load within the shipping period, merely a duty to give notice of readiness to load.

Compare the **Rio Apa** with the normal situation where the seller is under a duty to load within the shipment period. A failure to comply is a breach of contract, but since the provision in the **Rio Apa** was for the buyer's benefit the buyer could waive the condition. In this instance the buyer had a duty to load for himself, so there was no breach. Also whilst it was an f.o.b contract, the seller paid freight so it was in fact an f.o.b. contract with additional duties.

Liability of Seller for shipment of Dangerous Cargo. The seller has duties under the Hague Visby Rules to notify the carrier of the dangerous nature of cargo, if not obvious and well known in the trade. If the cargo causes damage to the vessel or other cargo because, in the absence of a warning and advice on how to care for the cargo, the carrier has not taken appropriate precautions, then the shipper will be held liable for that damage. **The George Lemos**,[70] discusses a bill of lading contract between f.o.b. sellers as shippers and c.i.f.

64 This was correct at that time since the contract was governed by s1 B.L.A. 1855 but the same logic could not be applied today under C.O.G.S.A 1992, since s2 allows post delivery rights of suit to the lawful holder of a bill of lading.

65 **The Bonde** [1991] 1 Lloyds Rep 136.

66 **The World Navigator** [1991] 1 Lloyd's Rep 277

67 **Socap v Rich** [1990] 2 Lloyd's Rep 175.

68 **Richco v Toepfer** [1990] Times 4th Junes.

69 **The Rio Apa** [1992] 2 Lloyd's Rep 586 :

70 **The George Lemos** [1990] 1 Lloyd's Rep 277

buyers as consignees and shows how complicated contractual relations can become especially regarding the respective duties f.o.b. and c.i.f. in such situations.

The effect of a force majeure clause on the liability of the seller. Hoecheong Products v Cargill Hong Kong,[71]. provides a simple example of a force majeure clause in operation. Sellers were contracted to supply a cargo of Henan Province cotton seed expellers, f.o.b. Chinese port. A force majeure clause provided that if due to a force majeure, duly certified by the Chinese Authorities, the seller could not deliver the cargo or any part of it, the seller would be excused liability. A severe drought meant that the seller could only procure 1,000 tons of the contracted 10,000. The court held that the seller not in breach of contract.

Responsibility for the terms of a classic f.o.b. contract of carriage. In a classic f.o.b. contract, the buyer nominates the vessel but the seller brokers the contract with the carrier. The seller has to make the contract with the nominated carrier and thus has little room for negotiation. If the seller contracts on the carrier's standard terms and conditions, which the buyer should have been aware of before nominating the vessel, the buyer will have little scope for complaint. Where a problem might occur is where the contract of sale requires direct shipment but when the seller makes the contract of carriage, the standard for contract includes a deviation clause. What happens if the carrier refuses to remove the clause and guarantee direct shipment ? Presumably, if the carrier had already promised this to the buyer and then changed his mind when dealing with the seller, a **Shanklin Pier Ltd v Detel Products Ltd.**[72] type collateral contract might arise between the buyer and carrier, but should the seller be held to account ?

THE BUYER'S GENERAL DUTIES UNDER STRICT F.O.B. CONTRACTS

Contract of Carriage : The buyer must make a contract of carriage and pay for the freight.[73]

Notification to seller : The buyer must notify the seller / shipper of the vessel's name, loading schedule and place of loading and discharge where the seller does not already know this information because he has acted as the buyer's agent. The seller needs this information in order to fulfil his part of the agreement, in respect of getting goods to the port of loading on time.

Documentation : The buyer must comply with any other specific requirements placed upon him by the contract of sale such as export or import documentation, dock permits, chitty jalan, free practique, cargo inspection surveys etc where applicable.

Documentary Credit Variations : Where a sale's contract is subject to documentary credit the buyer is under a duty to provide a reliable pay master according to **Warde v Feedex**.[74]

Post Shipment Expenses : The buyer must pay all post shipping expenses and in particular post shipment demurrage. The buyer, as party to the contract of carriage, will be directly accountable to the carrier for pre-shipment demurrage but there may be a provision in the contract of sale enabling the buyer to recover such monies from the seller where the seller has caused additional expenses during the loading period.

Loading and Discharge Costs : The buyer may pay for loading and discharge as part of the contract of carriage. A free in and out contract of carriage would leave the buyer to arrange and pay for loading and discharge separately from the contract of carriage. The sales contract could provide for the seller to arrange and pay for loading.

71 **Hoecheong Products v Cargill Hong Kong** [1995] 1 Lloyds Rep 584. Privy Council

72 **Shanklin Pier Ltd v Detel Products Ltd** [1951] 2 K.B. 854.

73 The seller may be engaged by the buyer to do this for the buyer but unlike the classic f.o.b. he would then be acting as a full and complete agent of the buyer who would therefore be the principal and the only party to the contract. Freight would be payable directly to the buyer's account. The seller would not be a party to the contract of carriage at all.

74 **Warde v Feedex** [1985] 2 Lloyd's Rep 289.

THE SELLER'S GENERAL DUTIES UNDER A STRICT FOB CONTRACT

To ship goods conforming to contract at time and place specified by the buyer : The seller must deliver conforming goods to the vessel, on time for loading. Late delivery to the port, causing delay in shipment would be a breach of contract by the seller and the buyer may be able to recover damages from the seller for this. If the vessel sailed without loading because of late delivery the buyer would be able to reclaim damages from the seller and could repudiate the contract of sale. There would be no obligation on the buyer to nominate a substitute vessel.

Seller to cover all pre-shipment costs : The seller should cover all expenses prior to shipment such as pre-shipment storage. The sale's contract should specify who will pay for loading. If nothing is stated then the buyer would arrange loading through the carrier. All the seller needs to do is to hand the cargo over to be loaded. The seller is advised to insure the goods right up to the moment when risk passes from the seller to the buyer at the ship's rail even though he hands the goods over to the carrier before loading commences.

Receive Bill of Lading and forward to Buyer : Since the buyer arranges the contract of carriage, or at the very least is the principal to the contract of carriage, with the seller arranging the contract as agent of the buyer, all the seller has to do is to supply the buyer with is a mate's receipt. The buyer as principal can then exchange it for a shipped bill of lading. In reality the shipper will probably exchange the received for shipment bill of lading into a shipped bill of lading and then tender it to the bank for payment if the sales contract is supported by a documentary credit. The seller must comply with any other specific requirements placed upon him by the contract of sale such as export or import documentation, dock permits, chitty jalan, free practique, cargo inspection surveys etc where applicable.

CHAPTER FIVE

INCOTERMS 2000 : FREE ON BOARD (... named port of shipment)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorisations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the exportation of the goods.

A3 Contract of carriage and insurance

(a) Contract of carriage: no obligation.

(b) Contract of insurance: no obligation

A4 Delivery

The seller must deliver the goods on board the vessel named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have passed the ship's rail at the named port of shipment.

A6 Division of costs

Subject to the provisions of B6: pay

- all costs relating to the goods until such time as they have passed the ship's rail at the named port of shipment; and

  where applicable, pay the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorisations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorisation and carry out all customs formalities for the import of the goods and, where necessary, for their transit through any country.

B3 Contracts of carriage and insurance

a) Contract of Carriage. The buyer must contract at his own expense for the carriage of the goods from the named port of shipment.

Contract of insurance. No obligation.

B4 Taking delivery

The buyer must take delivery of the goods in accordance with A4.

B5 Transfer of risk

The buyer must bear all risk of loss of or damage to the goods

- from the time they have passed the ship's rail at the named port of shipment; and

from the agreed date or expiry date of the agreed period of delivery which arise because he fails to give notice in accordance with B7, or because the vessel nominated by him fails to arrive on time, or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as contract goods.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have passed the ship's rail at the named port of shipment; and
- any additional costs incurred, either because the vessel named by him fails to arrive on time, or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, or because the buyer has failed to give appropriate notice in accordance with B7 provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods, and
- where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country.

A7 Notice to the buyer

The seller must give the buyer sufficient notice that the goods have been delivered on board.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense with the usual document in proof of delivery in accordance with A4.

Unless the document referred to in the preceding paragraph is the transport document, the seller must render the buyer, at the latter's request, risk and expense, every assistance in obtaining a transport document for the contract of carriage (for example, a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document or a multimodal transport document).

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4

The seller must provide at his own expense packaging (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g. modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

A10 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of shipment and/or of origin which the buyer may require for the importation of the goods and where necessary, for their transit through another country.

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

B7 Notice to the seller

The buyer must give the seller sufficient notice of the vessel name, loading point and required delivery time.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the proof of delivery in accordance with A8.

B9 Inspection of goods

The buyer must pay the costs of pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

B10 Other obligations

The buyer must pay all costs and changes incurred in obtaining the documents or equivalent electronic messages mentioned in A10, and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

CHAPTER FIVE

FAS : FREE ALONGSIDE SHIP

In this contract, the seller only has to deliver the goods "alongside the vessel" so that the buyer could load them. The seller's task is naturally dependent on where the ship is berthed. Where it is berthed by the quay, or wharf, then all the seller has to do is to deliver the goods up to the ship's anchorage or so near thereto so that the goods could be effectively loaded. On the other hand where the ship could not berth by the quay but is stationed at some point outside the quay side, the seller's duty is to ensure that the goods are placed on lighters and carried by these lighters to the ship's side at sea.

While it is clear that the seller is not directly responsible for the export itself and hence, for the acquisition of any export licences, there is a convention that he should render the buyer at the latter's request every assistance in obtaining the licence or any other governmental authorisation. There is obiter dictum in **Anglo-Russian Merchant Traders Ltd v. Batt,**[75] that this might even amount to an implied term of co-operation. This is to say that there might exist a term to the effect that the seller, though not directly responsible to obtain the export licence, should offer reasonable assistance so as to enable the buyer to take delivery of the goods and thus, encourage survival of the contract.

As evidence of performance of the contract, the seller should provide at his own expense the customary clean document in proof of delivery of the goods alongside the named vessel. Although this is not an implied term of the contract, as a matter of prudence the seller does well to ensure that he receives some form of documentation that the goods had been delivered alongside the named vessel.

The buyer on the other hand must give the seller good and sufficient notice of the vessel's name and berth. He should ensure that the delivery date is made known to the seller to enable the seller to expedite delivery per contract. Where the name of the ship had been agreed to at the outset, it is up to the buyer to make an effective nomination. Once the goods have been delivered alongside the vessel, the responsibility to load passes to the buyer and so does the risk of the goods.

The seller must supply conforming documents, deliver goods in accordance with the sales contract alongside the vessel either at the dockside or if the vessel afloat then in barges/lighters to the side of the vessel, within the specified or appropriate time and obtain export documentation or facilitate the buyer in obtaining such documentation. The seller is responsible for all pre-shipment costs and risks and must provide a certificate of origin and any other documents specified.

The buyer must nominate the vessel and notify the place and time of arrival. The buyer is responsible for all costs and risks once goods arrive alongside the vessel and must pay for any failure of vessel to arrive or load the goods and is liable for costs caused by a failure to provide sufficient of the information specified in the sales contract.

[75] **Anglo-Russian Merchant Traders Ltd v. Batt** [1917] 2 K.B. 679

INCOTERMS 2000 FAS : FREE ALONGSIDE SHIP (named port of shipment)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorization and carry out, where applicable, all customs formalities necessary for the export of the goods.

A3 Contracts of carriage and insurance

a) Contract of carriage. No obligation.

b) Contract of insurance. No obligation.

A4 Delivery

The seller must place the goods alongside the vessel nominated by the buyer at the loading place named by the buyer at the named port of shipment on the date or within the agreed period and in the manner customary at the port.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

A6 Division of costs

The seller must, subject to the provisions of B6, pay

- all costs relating to the goods until such time as they have been delivered in accordance with A4; and
- where applicable, the costs of customs formalities as well as all duties, taxes, and other charges payable upon export.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorization and carry out, where applicable, all customs formalities for the import of the goods and for their transit through any country.

B3 Contracts of carriage and insurance

a) Contract of carriage. The buyer must contract at his own expense for the carriage of the goods from the named port of shipment.

b) Contract of insurance. No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods

- from the time they have been delivered in accordance with A4; and
- from the agreed date or the expiry date of the agreed period for delivery which arise because he fails to give notice in accordance with B7, or because the vessel nominated by him fails to arrive on time, or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4; and
- any additional costs incurred, either because the vessel nominated by him has failed to arrive on time, or is unable to take the goods, or closes for cargo earlier than the time notified in accordance with B7, or because the buyer has failed to give appropriate notice in accordance with B7 provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and

  where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country.

A7 Notice to the buyer

The seller must give the buyer sufficient notice that the goods have been delivered alongside the nominated vessel.

B7 Notice to the seller

The buyer must give the seller sufficient notice of the vessel name, loading point and required delivery time.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense with the usual proof of delivery of the goods in accordance with A4.

Unless the document referred to in the preceding paragraph is the transport document, the seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining a transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document).

When the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the proof of delivery in accordance with AB.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4.

The seller must provide at his own expense packaging, (unless it is usual for the particular trade to ship the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (for example modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection, except when such inspection is mandated by the authorities of the country of export.

Al0 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of shipment and / or of origin which the buyer may require for the import of the goods and, where necessary, for their transit through any country

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

BI0 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

INCOTERMS 2000 FCA : FREE CARRIER (named place)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity, which may be required by the contract.

A2 Licences, authorizations and fornalities

The seller must obtain at his own risk and expense any export licence or other official authorization and carry out, where applicable', all customs formalities necessary for the export of the goods.

A3 Contracts of carriage and insurance

a) Contract of carriage. No obligation. However, if requested by the buyer or if it is commercial practice and the buyer does not give an instruction to the contrary in due time, the seller may contract for carriage on usual terms at the buyer's risk and expense. In either case, the seller may decline to make the contract and, if he does, shall promptly notify the buyer accordingly.

b) Contract of insurance No obligation

A4 Delivery

The seller must deliver the goods to the carrier or another person nominated by the buyer, or chosen by the seller in accordance with A3 a), at the named place on the date or within the period agreed for delivery. Delivery is completed;

a) If the named place is the seller's premises, when the goods have been loaded on the means of transport provided by the carrier nominated by the buyer or another person acting on his behalf.

b) If the named place is anywhere other than a), when the goods are placed at the disposal of the carrier or another person nominated by the buyer, or chosen by the seller in accordance with A3 a) on the seller's means of transport not unloaded.

If no specific point has been agreed within the named place, and if there are several points available, the seller may select the point at the place of delivery which best suits his purpose.

Failing precise instructions from the buyer, the seller may deliver the goods for carriage in such a manner as the transport mode and/or the quantity and/or nature of the goods may require.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorization and carry Out, where applicable, all customs formalities for the import of the goods and for their transit through any country

B3 Contracts of carriage and insurance

a) Contract of carriage The buyer must contract at his own expense for the carriage of the goods from the named place, except when the contract of carriage is made by the seller as provided for in A3 a).

b) Contract of insurance No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods

- from the time they have been delivered in accordance with A4; and
- from the agreed date or the expiry date of any agreed period for delivery which arise either because he fails to nominate the

carrier or another person in accordance with A4, or because the carrier or the party nominated by the buyer fails to take the goods into his charge at the agreed time, or because the buyer fails to give appropriate notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

A6 Division of costs

The seller must, subject to the provisions of B6, pay

- all costs relating to the goods until such time as they have been delivered in accordance with A4; and
- where applicable, the costs of customs formalities as well as all duties, taxes, and other charges payable upon export.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4; and
- any additional costs incurred, either because he fails to nominate the carrier or another person in accordance with A4 or because the party nominated by the buyer fails to take the goods into his charge at the agreed time, or because he has failed to give appropriate notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods; and
- where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon import of the goods and for their transit through any country

A7 Notice to the buyer

The seller must give the buyer sufficient notice that the goods have been delivered in accordance with A4. Should the carrier fail to take delivery in accordance with A4 at the time agreed, the seller must notify the buyer accordingly.

B7 Notice to the seller

The buyer must give the seller sufficient notice of the name of the party designated in A4 and, where necessary specify the mode of transport, as well as the date or period for delivering the goods to him and, as the case may be, the point within the place where the goods should be delivered to that party.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense with the usual proof of delivery of the goods in accordance with A4.

Unless the document referred to in the preceding paragraph is the transport document, the seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining a transport document for the contract of carriage (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document).

When the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the proof of delivery in accordance with A8.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4.

The seller must provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (for example modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately

B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

A10 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of delivery and/or of origin which the buyer may require for the import of the goods and, where necessary, for their transit through any country

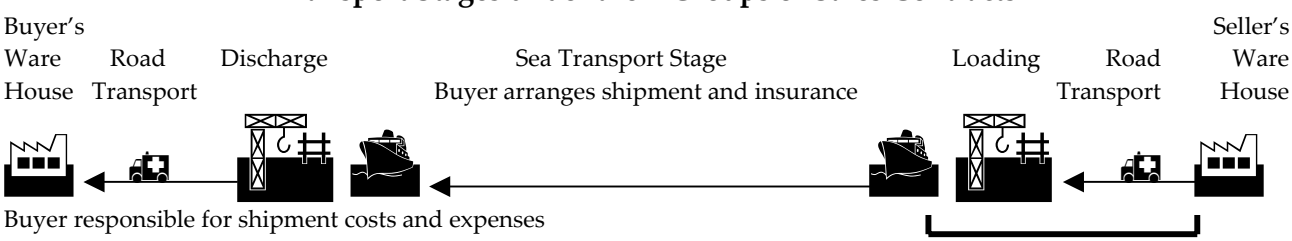
The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

B10 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith and in contracting for carriage in accordance with A3 a).

The buyer must give the seller appropriate instructions whenever the seller's assistance in contracting for carriage is required in accordance with A3 a).

Transport Stages under the F Groups of Sales Contracts



Buyer responsible for shipment costs and expenses
Buyer claims on insurance for post shipment damage to cargo
Buyer responsible to notify seller of contract vessel.
Ownership passes on payment and endorsement of documents
Risk of loss or damage to goods passes at the ship's rail.

Seller's Responsibilities
To deliver contract goods to the ship

Variations : Classic fob (seller arranges shipment on vessel nominated by buyer) and classic fob with additional duties (seller arranges shipment and insurance). Buyer responsible to nominate vessel.