

## Answer Guidance for Chapter 20 Practice Questions

### Practice questions

1. (a) When does risk and property pass in:

- an Fob contract under English law?
- a Cif contract under English law?
- a Cif Contract under New York Law.

(b) When does the seller make delivery in:

- an Fob contract;
- a Cif contract under English Law ;
- an INCOTERM Cif contract.?

(c) What are Incoterms?

- (a) and (b) Risk passes in all three types of contract when the seller delivers the goods to the buyer. In both Fob and Cif contracts delivery occurs when the goods are loaded. At Common Law this is, literally 'when the goods pass the ship's rail' though in such contracts under Incoterms 2010 delivery is 'on loading' which means that the goods have as a minimum come to rest in the vessel English law applies the Common Law definition of FoB but typically New York Courts conclude that when the CISG (which is part of New York law) applies to a contract the INCOTERM definition applies.
- (c) Incoterms are a set of standard trade terms issued by the International Chamber of Commerce. They are always designated by three letters and will stipulate matters such as where delivery of and risk in the goods takes place and the documentary duties of the seller. In English law, unless there are other factors, simply using an Incoterms three letter designation will introduce the common law definition of the term and not the Incoterms one, and there are differences between them. For example, CIF Incoterms 2010 requires the tender of all bills of lading in a set, although this is not the case with Cif at common law.

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2. Is it true to say that Cif is a contract for the sale of documents?

### Introduction

- As with all essays, you should begin with an introduction that sets out what the question is about, why the topic is an important one, and how your essay will go about answering the question set. By providing an outline structure of the discussion to follow, your essay will be clearer and more structured.
- This is a fairly simple essay to structure and, indeed, in order to answer this question you will need to explain in broad terms the obligations of buyer and seller, including when risk and property in the sale of goods passes in order to provide a foundation for your answer.

### The parties' obligations in a cif contract and their effect

- It is important to note that, typically, the seller's duties relate to goods (the duty to ship goods which conform to the contract), the procurement of a contract of carriage, and one of marine cargo insurance as well as providing documents relating to these contracts. You might well explain how the effect is to insulate the buyer from many of the risks of loss during transit and enable him to sell or otherwise deal with the goods while they are afloat.
- It is also important to explain when the buyer's payment obligation arises, especially where the contract is 'payment against documents'. In a completely 'documentary sale' involving a bill of exchange or under a letter of credit the buyer's payment obligation will also be performed by the tender of documents.
- This could be followed by an explanation of how rights in the goods and under the contracts pass from seller to buyer.

### Is it a sale of goods or of documents?

This issue is probably best dealt with by comparing the arguments for and against the proposition.

- There are judicial comments which support the statement in the essay, for example Scrutton J in *Arnhold Karberg & Co. v Blythe Green Jourdain & Co*, and although Bankes LJ effected a correction on appeal, stating that Cif is more like a contract 'for the sale of goods to be performed by the delivery of documents', even this suggests that the seller's delivery obligation concerns documents not goods.
- This is not surprising in the light of cases like *Manbre Saccharine* which establish that the seller owes no duty to ensure the goods actually arrive at their destination and meets his duties by tendering conforming documentation, even in the knowledge that the goods no longer exist. Similarly, the bill of lading symbolises the goods in many ways. It is a document of title to them and possession of it amounts to constructive (or symbolic) possession of them. Delivery of possession of the document is in law delivery of possession of the goods and typically property in the goods passes with the document too.

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- The decision in *Gill & Duffus SA v Berger & Co Inc* suggests that a buyer commits a breach of contract for rejecting conforming documents even if it later transpires that the goods are non-conforming (though in fact in this case the goods did conform,) or perhaps even more startlingly if the goods had never been loaded. This compartmentalisation of duties into those relating to goods and those relating to documents, also seen in *Kwei Tek Choa*, may be so great that it is as if there are two separate contracts; one for documents, the other for goods.

Although not strictly an argument to show that Cif is a contract for the sale of goods, it is true to say that the right to reject the goods is circumscribed by the content of the documents, as demonstrated by *Panchaud Freres*. Similarly, since the buyer will have already paid on receipt of the documents, he is commercially unlikely to reject the goods since to do so will leave him with nothing to show for his money than a cause of action – the issue which probably induced the buyer in *Kwei Tek* not to reject goods he was confident were non-conforming. It is as if issues relating to the goods are of secondary importance to the documents.

- This is underlined when we recognise that the measure of damages for breach of a Cif contract is not by reference to their value at the point of physical delivery at the port of discharge, but at the point of delivery of the documents by application of S51 Sale of Goods Act.
- However, notwithstanding these arguments, there are persuasive arguments for recognising Cif contracts as contracts for the sale of goods.

Firstly, they are structured as sales of goods; the issues concerning the documents are there in order to provide protection for a buyer who will be paying for goods before he can examine them and upon whom the risk of loss or damage in transit falls. That said, although as between the original parties the contract is certainly structured as a contract for the sale of goods where the benefit of the contracts are then sold, perhaps many times, the buyers or sellers in this string are in reality not focussed on the use value of the underlying goods but simply regard them as a repository of value – the transactions are financial in their purpose and in their ‘feel’ to the participants.

Secondly, it is not even correct to say that performance of the delivery obligation is by delivery of documents. As *Hindley & Co Ltd v East India Produce Co Ltd* demonstrates that there are two delivery duties, the duty to load conforming goods, which in a Cif contract is the act of physical delivery of the goods, and the duty to deliver conforming documents. This understanding conforms to the fact that, unless agreed otherwise, payment is due against delivery of documents by virtue of s28 Sale of Goods Act 1979, since it is at that point that the delivery obligations under the contract have been completed.

Finally, in listing the duties of a seller Cif, the courts consistently include the duty to ship (ie deliver) conforming goods. Whilst this may simply reflect the fact that this must be done in order to obtain a bill of lading, and so not represent a standalone duty but simply a

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preparatory task in order to comply with the duty to deliver the requisite documents, this is not the way in which the courts have expressed themselves and clearly would not explain the decision in *Hindley*. In the same way the courts apply the Sale of Goods Act to Cif contracts and, indeed, some of the SoGA principles derive from Cif cases pre-dating the Act. Whilst it is possible to explain this either on the basis that documents are themselves goods or that the application is by an unacknowledged analogy with sales of goods, this is not the most plausible explanation of the phenomenon.

### Conclusion

You will need a sensible conclusion evaluating the pros and cons you have included.

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3. S and B entered into 3 contracts. The first was for 100 tons of Spudulite, an explosive substance. A price was agreed, but the only other term was 'Fob'.

Yesterday B nominated a ship and a port and date for loading, but B has discovered that the ship cannot load on that date. He has called S and said that this did not matter, and that S should transport the goods to the port and leave them at B's warehouse. S has discovered that an export licence has not been obtained and, in any event, would like to avoid the contract because he only has a limited supply of Spudulite, which he can sell for a higher price to someone else.

The second contract is one for a chemical called Xalite: 'Cif loading Shoreham 27<sup>th</sup> - 31<sup>st</sup> January delivered Bremen between 1<sup>st</sup> and 4<sup>th</sup> February. Cash 5 days after delivery'. The goods were loaded on 31<sup>st</sup> January but arrived in Bremen on 5<sup>th</sup> February because the ship was unavoidably detained. B accepted the documents on 3<sup>rd</sup> February but refused to pay for the goods.

The third contract was identical to the first but was for a chemical called Yalite. The goods were loaded in a different ship on 31<sup>st</sup> January and unloaded in Bremen on 4<sup>th</sup> February. B accepted the bill of lading which stated the date of loading as 30<sup>th</sup> January and paid S on 9<sup>th</sup> February.

S commenced proceedings in the High Court against B claiming the price of the Xalite. B has applied to have the action struck out, as English courts do not have jurisdiction. Both parties agree that the English courts only have jurisdiction if the goods were delivered in England. B has also indicated that, if his strike out application fails, he will counterclaim for the price he paid for the Yalite, as he has discovered the error on the bill of lading.

Advise S whether he can 'get out' of the contract for Spudalite and on his prospects in relation to the other two contracts.

### Introduction

- Many students think that only essay questions require an introduction, but this is not so. Answers to problem questions should also begin with a lucid and well-structured introduction that clearly highlights the area (or areas) of law to which the question relates. By doing this, you demonstrate immediately that you have understood the question and have clearly identified the relevant legal topics.
- There are a number of issues in this question including whether, in relation to the Spudulite contract, the contract is void for uncertainty, whether a Fob seller must obtain an export licence, and whether an Fob seller has a right to demand 'delivery short'. In relation to the Xalite contract, it must be determined whether it is Cif or DAP, and, in relation to the Yalite contract, whether B has a claim and if so for what. Each of these issues needs to be considered in turn.

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### Spudulite contract - 'Fob' did not name the port. Is this void?

- The court can construe this contract in one of three ways:
  1. The contract is void for uncertainty, although the courts will try to avoid this construction. However, see *Cumming & Co Ltd v Hasell* where the High Court of Australia held void a contract 'Fob' where no port of loading was indicated.
  2. The seller decides the port of loading. You should explain whether the court is likely to reach this conclusion, bearing in mind that it would appear it is the buyer who has to arrange carriage.
  3. The buyer has the right to nominate the port of loading (see *David T. Boyd & Co Ltd v Louis Louca*).

### Spudulite contract - in Fob does the seller have to get export licence?

- The issue is whether S has broken his duty to B. Clearly, if B chooses not to obtain an export licence, S cannot complain.
- At common law the answer seems to depend on the circumstances. You should compare *Brandt* with *Hardy* and reach a sensible conclusion whether the duty to obtain an export licence is on S or B. However, the position with INCOTERMS is different, as the seller does have to arrange export clearance.

### Spudulite contract – does the buyer have the right to ask for delivery short?

- It is the duty of the buyer in a strict Fob contract such as this to nominate an efficient vessel, that is to say a ship which can load the goods during any loading period, and this is a condition of the contract. In principle therefore, if the nominated ship is not efficient, then S can terminate the contract for breach of a condition (see *Petrograde Inc v Stinnes GmbH*). However, it has been held in the High Court of Australia in *Cohen & Co v Ockerby & Co Ltd*<sup>1</sup> that the buyer may require 'delivery short' unless the seller suffers detriment. It is unclear whether the detriment of not being able to treat the failure to nominate an effective vessel as a repudiatory breach and so terminate the contract, bearing in mind that he can sell the goods at a higher price, amounts to a detriment.

### Xalite contract – Cif or DAP?

It might be helpful for you to have some background to the issues here, though this information is not needed in order to answer the question. The problems of private international law are beyond the scope of *Commercial Law*, however many international sales cases involve the question of whether the courts of England & Wales have jurisdiction to hear the case, and this is the issue here.

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<sup>1</sup> (1917) 24 CLR 288.

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What is called 'Brussels I' governs jurisdiction where the defendant is EU domiciled and the relevant provisions are:

Art 5 (1) (a) ...a person domiciled in a member state may, in another member state, be sued in matters relating to a contract in the courts for the place of performance of the obligation in question...

Art 5 (1) (b) 'for the purpose of this provision and unless otherwise agreed the place of performance of the obligation in question shall be: in the case of the sale of goods the place in a member state where under the contract the goods were delivered or should have been delivered.

The issue of where delivery takes place is to be determined by English law, which is why we need to know whether this is a Cif contract or a DAP contract.

- S 61(1) of the Sale of Goods Act 1979 provides that unless the context or subject matter otherwise requires, 'delivery' means 'voluntary transfer of possession from one person to another'. This would suggest delivery takes place where the *bill of lading* is delivered since it constitutes constructive possession of the goods. However 32(1) provides:

Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer.

It is accepted that in Cif, goods are delivered on loading and this makes sense since in the special case where s32(1) applies delivery to the carrier is *deemed* to be delivery to the buyer notwithstanding the fact that s61(1) (stating the general case) is to the contrary.

- In a DAP contract delivery is at the named place – that is Bremen.
- The issue is therefore whether this is Cif or DAP – this is a real issue because prima facie the contract imposes a duty on the seller to ensure the goods are delivered in Bremen. It would appear either the Court must ignore the words Cif or the words 'delivered Bremen'. You should refer to page 541 of *Commercial Law*, which contains a discussion of what are called 'Cif delivered' terms like this. One possibility might be that the contract is Cif, but S has a duty to load on a ship which would be anticipated to deliver between these two dates.

### Yalite Contract – remedies for incorrectly dated bill of lading.

- Typically, the date or period of loading, if mentioned in an international sales contract, will be treated as part of the description of the goods and so failure to meet this requirement will be a breach of the S13 condition – *Bowes v Shand* permitting the buyer to reject the

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goods. Similarly, an incorrectly dated bill of lading can be rejected as a breach of the duty of the seller to tender accurate documents – (see *Finlay v Kwik Hoo Tong*). However, here B has accepted the documents and so has lost the right to reject them.

- However, unless there was something in the documentation which indicated that loading actually took place on a date other than on 30<sup>th</sup> January (see *Panchaud Freres*), B may reject the goods, assuming the Court construes the dates as being part of the description of them. However, if he has accepted the goods or if he has lost his right to reject them through the content of the documentation, then he is left with his remedy in damages.
- In *Kwei Tek Choa* substantial damages were recovered on the basis that, in tendering incorrect documents, the seller prevented the buyer from discovering that the documents were non-conforming (the actual date of shipment was outside the contractual shipping period), and so caused him to lose his right to reject them and induced him to pay the contract price.

Here however, if the bill of lading had been accurately dated, B could not have rejected it, since the goods were loaded inside the shipping period. Consequently, B lost nothing by being offered incorrectly dated documents and so will recover nominal damages only – see *Proctor & Gamble Philippine Manufacturing Corp v Kurt A Becher GmbH*.