CHAPTER 2

RISK AND PROPERTY IN THE GOODS

Introductory The parties to every sale contract are concerned about the quality and condition of the goods they trade but—when the sale involved is an international one—there is a further cause for concern: to reach their buyers the goods sold have to be carried across international, political and geographical boundaries. It may well happen that such goods are shipped in lorries at the producers' plant, transhipped onto barges or lighters, transhipped again on a seagoing vessel, to be discharged at destination only several weeks after they left the seller. While carried, the goods are in the control of a network of carriers, independent contractors working neither as agents of the seller nor for the buyer, but what happens if the goods are damaged or lost in transit? Although both the carrier (or its liability insurer) and the cargo insurer will provide compensation for transit losses, the identity of the party who will actually be damaged by the loss depends on the answer to a rather different question: who bears the risk of loss of or damage to the goods while in transit? 2–001

Scope and structure of this chapter The purpose of this chapter is to discuss the peculiarities of the English law rules of passage of risk and property in goods sold on c.i.f. and f.o.b. terms. The discussion will start from the passing of risk and will focus on common risk clauses in commodity sales, the Incoterms® 2010 Rules and finally on the position under the Sale of Goods Act 1979. The discussion regarding passage of property will follow the path tracked by the Act and the effect of the most common contractual provisions on transfer and retention of title. 2–002

1. THE PASSING OF RISK: THE RULE

Risk of transit loss or damage to the goods Because of the timing of international commercial transactions—where sale contracts (and price) may be agreed upon long before, or indeed long after, the actual date of shipment—and the high volatility of the freight and insurance markets, selling on c.i.f. terms means retaining the risk of fluctuations of effectively three separate markets (the commodity, the freight and the insurance), whereas opting for an f.o.b. solution 2–003

leaves fluctuations in the freight and insurance markets to the buyer to bear. This risk of market movements however, is not the risk discussed in this chapter. The issue at stake here is one of risk of transit loss or damage to the goods: once the vessel has sailed with the cargo, neither the seller nor the buyer have physical control over the way it is carried and—where something goes wrong—the very first issue which arises is: for whom? If the cargo is lost at sea, *who* has lost the cargo? Who has an interest—as opposed to an entitlement[1]—to sue the carrier and recover for the damages suffered? The seller/shipper or the buyer/receiver? According to the maxim *res perit domino*, only the owner of the cargo can suffer an actual loss from its cargo being lost or damaged. And in fact, s.20 of the Sale of Goods Act 1979[2] clearly states that: "Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer . . .".

However, when goods are sold on shipment terms between commercial entities,[3] the situation is more elaborate and risk and property are very seldom transferred at the same time.[4]

2–004 **Contractual provisions on transfer of risk** Given the key importance of risk in international trade transactions, it may happen that the parties expressly clarify the allocation of transit risks in their contracts with ad hoc clauses saying, for example, that "risk . . . shall pass to Buyers at the loading port or terminal as the oil passes the loading vessel's permanent hose connection". In such cases it is clear that risk of transit loss will pass to the buyer at the very precise moment in time at which the contract says it would pass. It may also happen that the parties, in the exercise of their freedom of contract, agree to sell goods on c.i.f. terms and defer the transfer of the risk on the goods sold all the way through to discharge. This is usually done through indirect devices such as out-turn quantity or quality clauses,[5] but express stipulations as to the risk passing on delivery at destination are not uncommon. It is possible to argue that such stipulations make the contract "concluded upon something other than c.i.f. terms",[6] raising undesirable difficulties of interpretation as to whether the remaining law of c.i.f. sales is still applicable to the transaction concerned.[7] On the other hand, if the parties have not given special consideration to the issue of risk, risk will pass according to the kind of contract stipulated by the parties.

2–005 **Risk from E terms to D terms** In *ex works* contracts, the seller's duty is to place the goods at the disposal of the buyer for collection at the seller's or another

[1] See below, at para.5–074 for bills of lading, para.5–090 for seawaybills and para.5–098 for delivery orders regulated under the Carriage of Goods by Sea Act 1992.
[2] Sale of Goods Act 1979 C.54, the Act covering the Sale of Goods in the United Kingdom.
[3] For the position of consumers, see M. Bridge (ed.), *Benjamin's Sale of Goods*, 9th edn (London, 2014) (hereafter "*Benjamin*"), paras 18–306 et seq.
[4] In general, see *Benjamin*, at paras 18–286 et seq. and C. Debattista, *Bills of Lading in Export Trade*, 3rd edn (London, 2008) (hereafter "*Debattista*"), paras 4.1 et seq.
[5] See below, at para.2–019.
[6] *Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (The Julia)* [1949] A.C. 293, per Lord Porter at 310. For c.i.f. variants regarding delivery, see below at paras 3–028 et seq.
[7] For example, in *Vitol SA v Esso Australia Ltd (The Wise)* [1989] 2 Lloyd's Rep. 451.

named place (warehouse/factory, etc), not loaded on any collecting vehicle,[8] whereas the buyer has the duty to take delivery of them and to make its own transit arrangements from that point to their final destination.[9] The main consequence of this is that the risk of transit loss rests with the buyer from the point of collection at seller's premises and onwards.[10] At the opposite end of the spectrum, in contracts concluded on *D terms*, the seller undertakes to arrange the carriage of the goods to the named destination in the country of import, whereas the buyer has to take delivery only if the goods it receives at destination are as agreed in the contract. From this it follows that the risk for transit damage to or loss of the goods whilst being carried rests squarely with the seller.[11]

2–006 **Transfer of risk and the Incoterms® 2010 Rules** If the confirmation note or the contract incorporate CIF, CFR or FOB Incoterms® 2010 Rules, the allocation of the risk between seller and buyer is dealt with as follows:

> "The seller bears all risks of loss of or damage to the goods until they have been delivered in accordance with A4, with the exception of loss or damage in circumstances described in B5. . . . The buyer bears all risks of loss of or damage to the goods from the time they have been delivered as envisaged in A4."[12]

This provision makes risk pass on delivery and—as such—is identical to that found in earlier editions of the terms. The new A4, however, has done away with the familiar concept of "ship's rail"[13] and now provides that delivery may take place by (a) placing the goods on board; or by (b) procuring the goods so placed.[14] This in turn means that under the Incoterms® 2010 Rules, risk passes from seller to buyer *on placement on board* of the goods or—what is most surprising—*on procurement* of goods placed on board. The effect of the changes appears twofold: (i) a container dropped on board a vessel during the loading operation would still be at the risk of its seller, as it had not been *placed on board* at the time of the damage or loss; and—perhaps more worryingly—(ii) the seller of goods in a string may no longer be able to pass the risk on to its buyer retrospectively from shipment anymore, as risk appears to be transferred on the action of "*procuring* the goods so delivered" rather than on the physical act of delivery. The intention of the draftsmen was clearly that of expressly allowing retrospective passage of risk and, as such, it is surely laudable and in full conformity with current market practice. However, under English law, the Incoterms® are simply another set of standard forms which will be interpreted by courts and arbitrators according to the usual rules of interpretation, which may well be leading to the much less desirable solution above. Parties wishing to avoid surprises should incorporate an earlier edition of the Incoterms® or make

[8] The Incoterms® 2010 Rules EXW A4.
[9] The Incoterms® 2010 Rules EXW B4.
[10] The Incoterms® 2010 Rules EXW A5 and B5.
[11] For example, "Ex Ship deliveries: The risk and property in the crude oil delivered under the agreement shall pass to the Buyer as the crude oil passes the Vessel's permanent hose connection at the Discharge Port". See also Incoterms® 2010 DES A5 and B5.
[12] Incoterms® 2010 Rules CIF, CFR and FOB A5, B5.
[13] See below, at paras 2–008 et seq.
[14] Incoterms® 2010 CIF, CFR and FOB A4.

express reference in the confirmation note incorporating CIF or FOB Incoterms® to risk nonetheless passing on or as from shipment.

2–007 **Risk not passing under the Incoterms® 2010 Rules** The Incoterms® contain a number of exceptions to the general rule, depending on whether the FOB or the CFR/CIF term is incorporated. In FOB sales, risk does not pass to the buyer in two circumstances: (a) if the buyer fails to give the seller sufficient notice of the vessel name, loading point and, where necessary, the selected delivery time within the agreed period; and (b) if the vessel nominated by the buyer fails to arrive on time to enable the seller to place the goods on board within the agreed period, or otherwise closes for cargo earlier than the time notified to the seller. In such cases the buyer bears all risks of loss of or damage to the cargo, but only from the date in which the goods should have been placed on board.[15] In the CFR/CIF situation there are no exceptions to the rule of passage of risk, unless the contract allows the buyer to determine the time or place of shipment. In such cases, the Incoterms® impose on the buyer the duty to give sufficient notice to the seller and failure to do so attracts the risk of loss or damage from the agreed date of placement on board or the expiry date of the agreed period for shipment.[16]

2–008 **Shipment sales at common law: risk passes *on or as from shipment*** In the absence of a contractual clause to the contrary, if the sale is concluded on *shipment terms*, either the seller (in c.i.f. and c. & f.) or the buyer (in f.o.b. sales) may undertake to make transport arrangements,[17] but delivery of the goods always takes place on board the nominated vessel at the port of shipment.[18] If the obligation of the seller is one to deliver the goods on board a vessel—in other words to *ship* the goods—it must follow that the risk of transit loss of such goods passes from the seller to the buyer from that moment on, i.e. *on (or as from) shipment*, irrespective of where the property in the goods lies.

2–009 In fact, the presumption made by s.20(2) of the Sale of Goods Act 1979 that risk passes together with property is said to be defeated by the express choice of the parties by contracting on shipment terms, as demonstrated in *The Julia*,[19] where Lord Porter held:

> "... under a c.i.f. contract ... the property may pass either on shipment or on tender [of documents], the risk generally passes on shipment or as from shipment, but possession does not pass until the documents which represent the goods are handed over in exchange for the price. In the result the buyer after receipt of the documents can claim against the ship for breach of the contract of carriage and against the underwriter for any loss covered by the policy."[20]

[15] Incoterms® 2010 FOB B5.
[16] Incoterms® 2010 CIF B5.
[17] See below, at para.3–004 for c.i.f. sales and paras 11–002 et seq. for f.o.b. sales.
[18] As to delivery see below, at para.4–001 for c.i.f. sales and paras 10–002 et seq. for f.o.b. sales. See also Incoterms® 2010 Rules CIF A4; CFR A4 and FOB A4.
[19] *The Julia* [1949] A.C. 293, see also below, at para.3–032.
[20] *The Julia* [1949] A.C. 293, at 309.

In the more recent case of *Scottish & Newcastle Int Ltd v Othon Ghalanos*,[21] the Court of Appeal reiterated the concept and said:

> "After all, in the case of documentary sales what the parties are primarily concerned with is not actual physical delivery at destination—something which may never take place even though the seller has fulfilled all his obligations and the buyer is still obliged to pay the price—but a legal concept of delivery. Moreover, albeit in such a case title may not be transferred at shipment, risk is, and, subject to transferring the documents, which the seller is in any event bound to do against receipt of the price, the goods are delivered, under the contract, to the carrier for carriage to the buyer."[22]

2–010 **Shipment at the ship's rail** Defining the moment of passage of risk as "on shipment" would still leave a certain degree of uncertainty with respect to damages caused to cargo during the various phases of shipment. The rule here is that unless otherwise agreed in the contract, risk passes from seller to buyer across the ship's rail at the port of loading.[23] As stated by Devlin J in *Pyrene Co Ltd v Scindia Navigation Co Ltd*,[24] an f.o.b. sale:

> "[The seller] treats the word 'on' [in the Carriage of Goods by Sea Act 1924] as having the same meaning as in 'free on board'; [namely] goods are loaded *on* the ship as soon as they are put across the ship's rail ..."

As elegantly put by Professor Schmitthoff while discussing f.o.b. sales:

> "[T]he ship's rail is the dividing line to which lawyers and businessmen attach equal importance. The ship's rail determines not only the charges which have to be borne by the seller or buyer respectively but it is also the legal test adopted for the performance of the contract, *viz.*, the passing of property, the delivery of the goods, and the passing of risk, except where a different intention of the parties is evident. The ship's rail is, thus, the legal frontier between the seller's and buyer's lands ..."[25]

Although this rule has attracted criticism throughout the years,[26] it seems well accepted as market practice, it has been adopted for decades as the default position under the old Incoterms® and it is very commonly used in international sale contracts.[27]

[21] *Scottish & Newcastle Int Ltd v Othon Ghalanos* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341; affirmed by the House of Lords at [2008] UKHL 11; [2008] 1 Lloyd's Rep. 462.
[22] *Scottish & Newcastle Int Ltd v Othon Ghalanos* [2006] EWCA Civ 1750; [2007] 2 Lloyd's Rep. 341 at [48].
[23] See *KG Bominflot Bunkergesellschaft fur Mineraloele mbH & Co KG v Petroplus Marketing AG (The Mercini Lady)* [2009] EWHC 1088 (Comm); [2009] 2 Lloyd's Rep. 679 at [12]; reversed in part, but not on this point, by the Court of Appeal in [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep. 442. The passage in the text has been judicially approved by the High Court of Singapore in *Profindo Pte Ltd v Abani Trading Pte Ltd (The MV "Athens")* [2013] SGHC 10, [2013] 1 Lloyd's Rep 370 at [38]–[39]. On the general point of the desirability of the rule, see P. Todd, *Laytime and Demurrage Provisions in Sale Contracts* [2013] LMCLQ 150 at 156.
[24] *Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 Q.B. 402 at 414.
[25] *Legal Aspects of Export Sales* (1953), p.43.
[26] See, e.g. the same Devlin J in *Pyrene Co Ltd v Scindia Navigation Ltd* [1954] 1 Lloyd's Rep. 321 at 329.
[27] See, e.g. *Primetrade AG v Ythan Ltd (The Ythan)* [2005] EWHC 2399 (Comm); [2006] 1 Lloyd's Rep. 457; and *Trasimex Holding SA v Addax BV (The Red Sea)* [1999] 1 Lloyd's Rep. 28.

2–011 **As from shipment** The rule that risk in goods passes on or *as from shipment* also responds to the commercial reality that a seller might have shipped goods before it has reached a binding agreement with a buyer, or situations where a trader might have sold goods it is yet to buy. In these cases, if the goods are lost or damaged in transit prior to the conclusion of the contract of sale, it is still the buyer who retrospectively bears the risk for such loss, and its duty to pay the seller against conforming documents remains unaffected. But what if a buyer of goods in transit with knowledge that the goods have perished, sells on to another buyer? Does this on-buyer inherit retrospectively a risk which has already materialised?

2–012 **Retrospective transfer of risk** In the absence of clear authority on the point, the above question seems to divide commentators. *Benjamin* suggests that a seller who ships the goods on a vessel which is subsequently lost is not discharged of its duties under a c.i.f. contract by tendering the documents to an on-buyer, "unless at the time of the loss he had appropriated them to the contract".[28] *Debattista*, on the other hand, suggests the opposite view that "if risk passes 'as from shipment', then the buyer would bear the risk of loss or damage which precedes the contract under which the goods are sold".[29] *Bridge* is of the same view: "the established rule is that risk passes as from shipment even if this has to be accomplished retrospectively".[30]

2–013 McCardie J in Manbre Saccharine Co Ltd v Corn Products Co Ltd,[31] stated:

> "I conceive that the essential feature of an ordinary c.i.f. contract as compared with an ordinary contract for the sale of goods rests in the fact that performance of the bargain is to be fulfilled by delivery of documents and not by the actual physical delivery of goods by the vendor. All that the buyer can call for is delivery of the customary documents. This represents the measure of the buyer's right and the extent of the vendor's duty. The buyer cannot refuse the documents and ask for the actual goods, nor can the vendor withhold the documents and tender the goods they represent. . . . If the vendor fulfils his contract by shipping the appropriate goods in the appropriate manner under a proper contract of carriage, and if he also obtains the proper documents for tender to the purchaser, I am unable to see how the rights or duties of either party are affected by the loss of ship or goods, or by knowledge of such loss by the vendor, prior to actual tender of the documents. If the ship be lost prior to tender but without the knowledge of the seller it was, I assume, always clear that he could make an effective proffer of the documents to the buyer. In my opinion it is also clear that he can make an effective tender even though he possess at the time of tender actual knowledge of the loss of the ship or goods. For the purchaser in case of loss will get the documents he bargained for; and if the

[28] *Benjamin*, at para.19–083. In the same vein see E. McKendrick, *Goode on Commercial Law*, 4th edn (London, 2010), pp.1045–1048; where it is concluded: "It is accordingly submitted that while the location of the property in the goods at the time of loss is irrelevant, the seller cannot make a valid tender of shipping documents after loss of the goods unless before loss they had become fully identified as the contract goods", p.1047.

[29] *Debattista*, at para.4.6. This is then justified "in terms of principle and convenience" at para.4.6. In the same sense *Halsbury's Laws of England*, Vol.41, at [346] relying on *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 K.B. 198.

[30] M. Bridge, *The International Sale of Goods—Law and Practice*, 3rd edn (2013) (hereinafter "Bridge"), Ch.7, para.7.53.

[31] *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 K.B. 198.

> policy be that required by the contract, and if the loss be covered thereby, he will secure the insurance moneys. The contingency of loss is within and not outside the contemplation of the parties to a c.i.f. contract."[32]

2–014 And in *C Groom Ltd v Barber*,[33] Atkin J stated:

> "In my opinion the result is that the contract of the seller is performed by delivering to the buyer within a reasonable time from the agreed date of shipment the documents, ordinarily the bill of lading, the invoice, and the policy of insurance, which will entitle the buyer to obtain on arrival of the ship delivery of goods shipped in accordance with the contract, or in case of loss will entitle him to recover on the policy the value of the goods if lost by a peril agreed in the contract to be covered, and in any case will give him any rightful claim against the ship in respect of any misdelivery or wrongful treatment of the goods. It therefore becomes immaterial whether before the date of the tender of the documents the property in the goods was the seller's or buyer's or some third person's. The seller must be in a position to pass the property in the goods by the bill of lading if the goods are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor need he have obtained any right to deal with the bill of lading until the moment of tender. If it were otherwise the shipper of goods in bulk, or of goods intended for several contracts, or the intermediate seller who may be the last of a chain of purchasers from an original shipper, might find it impossible to enforce a contract on c.i.f. terms. The seller's obligation cannot depend upon whether the goods are lost or not, and if when there is no loss the property has to pass to the buyer before delivery of the documents, at what stage of the transaction must it pass? Unless it be at the time of shipment I can see no reason for fixing upon any other time than on delivery of the documents, and if it be the law that a tender of documents is ineffectual unless in fact at the moment of shipment the property actually passed to the ultimate buyer, it appears to me that business operations would be very seriously embarrassed."[34]

2–015 But in *Couturier v Hastie*,[35] the Lord Chancellor's view, based on the facts of the case, was thus:

> "... looking to the contract itself alone, it appears to me clearly that what the parties contemplated, those who bought and those who sold, was that there was an existing something to be sold and bought, and if sold and bought, then the benefit of insurance should go with it. . . . I think the full benefit of the insurance was meant to go as well to losses and damage that occurred previously to the 15th of May, as to losses and damage that occurred subsequently, always assuming that something passed by the contract of the 15th of May. If the contract of the 15th of May had been an operating contract, and there had been a valid sale of a cargo at that time existing, I think the purchaser would have had the benefit of insurance in respect of all damage previously occurring. The contract plainly imports that there was something which was to be sold at the time of the contract, and something to be purchased. No such thing existing, I think the Court of Exchequer Chamber has come to the only reasonable conclusion upon it, and consequently that there must be judgment given by your Lordships for the Defendants in Error [the buyers]."[36]

2–016 **A contractual solution** It is clear that if the parties have agreed that payment should be made "ship lost or not lost", no issue would arise. It is however here suggested that even in the absence of such a clause, whether the seller's duty is one to "*ship* goods of the contract description" or one to "procure the same goods *shipped* as promised", the obligation of the seller under a sale contract on

[32] *Manbre Saccharine* [1919] 1 K.B. 198 at 202–204.

[33] *C Groom Ltd v Barber* [1915] 1 K.B. 316.

[34] *C Groom* [1915] 1 K.B. 316a t 324–325.

[35] *Couturier v Hastie* (1856) 10 E.R. 1065.

[36] *Couturier* (1856) 10 E.R. 1065 at 1070 at [681]–[682].

shipment terms is one to be assessed at the time of *shipment* of the goods, never at the time of tender of the documents. Hence, in order to decide whether the risk has passed to the buyer, it would seem that the right questions to be asked are: (a) did the seller procure goods that—*at the time of shipment*—conformed to the requirements set in the sale contract?; and (b) do the documents tendered evidence that goods of the contract description were in fact shipped? Where both questions are answered in the affirmative, the seller has performed its duty and risk should rest with the buyer.[37]

2–017 The fact that the buyer does bear such a significant risk is, however, balanced out by possession of some degree of control over the goods, through the documents which the seller has delivered to it: by holding a bill of lading which gives constructive possession of the goods, the buyer can ask the carrier for the goods and sell them on; by becoming a party to the contract of carriage with the carrier, it acquires title to sue the carrier in case the goods are damaged in transit[38] and finally by being the beneficiary under the contract of insurance,[39] the buyer has recourse against the insurer for transit loss.

2. THE EXCEPTIONS TO THE RULE

2–018 **Introductory** The rule that risk passes on or as from shipment is not without exceptions which—if triggered—would relieve the buyer from bearing all or part of the risk of transit loss or damages. Such exceptions may be divided into two main categories: (i) the *contractual exceptions* arising out of express agreement between the parties; and (ii) the *legal exceptions*, which find their source in statutory provisions or in the Common law. They will be dealt with in turn.

2–019 **Contractual exceptions** In the exercise of their freedom of contract, the parties may well decide to allocate the risks associated with the carriage of the goods sold as they see fit. In practice, this is usually done with specifically drafted *out turn* clauses commonly related to the quantity,[40] quality or condition[41] of the cargo at the port of discharge. Such clauses usually provide for an adjustment in price in case the commodity reaches its destination falling short—in quantity, quality or condition as the case may be—of the contract specifications with the effect of reversing the risk of such losses back onto the seller's shoulders.[42] It is important to note that the seller at this stage may not have cargo insurance, and will have probably lost its title to sue the carrier under

[37] *C Groom* [1915] 1 KB 316. Contra, for cases of total loss of specific goods see *Couturier* (1856) 10 E.R. 1065.
[38] See COGSA 1992 and below, at para.5–074.
[39] See below, at paras 6–006 et seq.
[40] For example, providing for the out turn quantity "to be settled at the appropriate Price Settlement Committee appointed by and published by the Federation, or, if no price is fixed by the Federation, or, if no price is fixed by the Federation then at the market price to be mutually agreed or fixed by arbitration for the day of arrival of the last ship to arrive at the berth/place where the contracted goods are to be discharged at the port of destination", FOSFA 54 cl.16, l.170.
[41] Typically providing for a discount proportional to the deterioration in the quality or condition of one or more items of the description; e.g. GAFTA 119 cl.5.
[42] See FOSFA 54 cl.16.

s.2(5) of the Carriage of Goods by Sea Act 1992. It may also have great difficulty in proving title to sue the carrier in tort.[43] It is therefore crucial to all sellers willing to accept to trade on *out turn* basis that they complement the clause with an express clause requiring the buyer to assign its action against the carrier back to the seller.

Out turn clauses are interpreted strictly *contra proferentem* by the courts, and hence do not cover the total loss of the consignment. In *Soon Hua Seng Co Ltd v Glencore Grain Ltd*, Mance J (as he then was) said: **2–020**

> "... the contracts must be viewed as essentially c. & f. in their nature, with the simple proviso that, if and when the goods do arrive and outturn, they will be weighed and the price will in that event be adjusted by reference to the outturn weight. If the goods covered by the shipping documents and invoice are lost in transit and do not arrive at all, the risk of loss remains on the buyers and no question of any adjustment to the payment due against the commercial invoice can arise."[44]

Legal exceptions Whether or not the contract contains specific clauses on the reallocation of risks, both the Sale of Goods Act 1979 and the common law provide for a limited number of exceptions to the rule that risk passes on or as from shipment. There are five legal exceptions, four of which are to be found in the Act and one in the rule stated in *Mash & Murrell*,[45] as now clarified by *The Mercini Lady*.[46] **2–021**

(i) Late shipment Under s.20(2) of the Sale of Goods Act 1979, where delivery has been delayed through the fault of the seller (or buyer), any loss which might not have occurred but for such fault is for that party's account. As stated by Bingham J in *The Rio Sun*[47]: **2–022**

> "Despite the peculiar features of a c.i.f. contract, what the buyer wants at the end of the day is actual delivery of the goods, and he wants them in good condition. The seller need do nothing after tendering the shipping documents against payment. But if the seller does wrongfully delay actual delivery of the goods, whatever other breach of contract may be involved, I see no reason why the sub-section should not have the effect of putting upon him the risk of any loss which might not have occurred but for the delay which he caused."[48]

(ii) Late discharge Section 20(3) of the Act provides that where the seller (or buyer) acts as bailee or custodian of the goods, losses caused by breach of the duty to take reasonable care of such goods is for that party's account. This preserves the Common law rule on bailment, but hardly ever applies to shipment sales where delivery takes place by shipping the goods sold and hence placing them in the custody of the carrier.[49] **2–023**

[43] See *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2003] UKHL 12; [2003] 1 Lloyd's Rep. 571, see below at para.2–035.
[44] *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep. 398 at 405.
[45] *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 W.L.R. 862; [1961] 1 Lloyd's Rep. 46; [1962] 1 W.L.R. 16; [1961] 2 Lloyd's Rep. 326.
[46] *The Mercini Lady* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep. 442.
[47] *Gatoil International Inc v Tradox Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep. 350.
[48] *The Rio Sun* [1985] 1 Lloyd's Rep. 350 at 362.
[49] See *Debattista*, at paras 4.15 et seq.

2–024 **(iii) Failure to make a reasonable contract of carriage** Section 32(2) of the Act provides as follows:

> "Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages."[50]

Notwithstanding that this provision is derived *tale quale* from the Sale of Goods Act 1893, s.32(2) has apparently remained dormant for well over a century, attracting very little judicial consideration and even less scholarly research. The greatly underestimated importance of these few lines of the Act is revealed by the draconian consequence inflicted upon its breach: if the bill of lading tendered is found to be *unreasonable*, the buyer may refuse to treat delivery to the carrier as delivery to itself or hold the seller responsible for damages,[51] and the risk of transit loss will rest *ex tunc* with the seller. Two issues arise here: (a) what is the exact meaning and extent of the word "reasonable" as it appears in the section; and (b) when can the buyer be said to have "otherwise authorised" its seller so as to negate *in toto* the applicability of s.32(2). The two issues will be discussed in turn.

2–025 *(a) Section 32(2) and the concept of reasonableness* Section 32(2) has remained unaltered since its appearance in the Sale of Goods Bill introduced to the House of Lords in 1892,[52] but its roots come from further back, with judicial expressions of the duty taking subtly different forms.[53] More specifically, in *Clarke v Hutchins*[54]—a case strictly related to the insurance of the cargo—it was decided that it is the duty of the seller "to do *whatever was necessary* to secure the responsibility of the carriers for the safe delivery of the goods, and to put them into such a course of conveyance, as that in case of a loss the [buyer] might have his indemnity against the carrier [*emphasis* added]".[55] In applying the above case in *Pointin v Porrier*[56] Grove J further rephrased the extent of the seller's obligation and held that:

> "[The seller] must take reasonable precautions to insure safe delivery, and if it does not, and in the case of loss the defendant has no indemnity against the carrier, it cannot be said to have been a proper delivery."[57]

[50] Sale of Goods Act s.32(2).
[51] Sale of Goods Act s.32(2).
[52] The Sessional Papers of the House of Lords, 1892. The bill was finally approved to become the Sale of Goods Act (1893). On the history of the Act, see M.D. Chalmers, *The Sale of Goods Act, 1893 including the Factors Act 1889 & 1890*, 2nd edn (1894) (hereinafter "Chalmers"), pp.iii–vii.
[53] *Clarke v Hutchins* (1811) 14 East 475; *Buckman v Levi* (1813) 3 Camp 414. *Chalmers*, at pp.65–66.
[54] *Clarke* (1811) 14 East 475.
[55] *Clarke* (1811) 14 East 475, per Lord Ellenborough CJ at 476; applied by the same judge in *Buckman* (1813) 3 Camp 414 at 415.
[56] *Pointin v Porrier* (1885) 49 J.P. 199.
[57] *Pointin v Porrier* (1885) 49 J.P. 199.

Since the coming into force of the 1893 Act very few cases have dealt with the exact meaning of the sentence "a contract which is *reasonable* having regard to the nature of the goods and the other circumstances of the case" [emphasis added] and—more importantly—how to prove the reasonableness of the contracts concluded in the circumstances concerned. The authorities available appear to suggest that the word "reasonable" in this section has three phases: the seller must provide a contract of carriage (i) on usual terms[58]; which are (ii) appropriate[59] to grant sufficient protection to the goods while in transit[60]; and (iii) give the buyer "protective rights"[61] against the carrier.

2–026 *(i) The contract tendered must be concluded on usual terms.* There appears to be considerable support for the proposition that the contract of carriage tendered by the seller to its buyer has to be concluded on terms usual for the trade concerned[62] at the time of shipment.[63] Indeed, in the 1888 Sale of Goods Bill the duty was one to arrange carriage on *usual* terms too.[64] It is also quite clear, however, that while what is usual in the trade is to be considered "mercantilely reasonable",[65] the meaning of *reasonable* in s.32(2) is somehow broader. In the words of Lord Radcliff:

> "In my opinion there is no magic in the introduction of the formula 'customary or usual route' to describe the term implied by law. It is only appropriate because it is in ordinary circumstances the test of what it is reasonable to impose upon the vendor in order to round out the imperfect form of the contract into something which, as mercantile men, the parties may be presumed to have intended. . . . The natural way to answer this question is to find out what is the usual thing in the same line of business. Various adjectives or phrases are employed to describe the point of reference. I can quote the following from judicial decisions: recognised, current, customary, accustomed, usual, ordinary, proper, common, in accordance with custom or practice or usage, a matter of commercial notoriety: and, of course, reasonable. I put 'reasonable' last because I think that the other phrases are at bottom merely instances of what it is reasonable to imply having regard to the nature and purpose of the contract."[66]

[58] *Ceval Alimentos SA v Agrimpex Trading Co Ltd (The Northern Progress)* [1996] 2 Lloyd's Rep. 319, per Rix J at 328; *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, per Lord Radcliffe at 121–122, and Lord Guest at 132–133; *Finska Cellulosaforeningen (Finnish Cellulose Union) v Westfield Paper Co Ltd* (1940) 68 Ll. L. Rep. 75, per Lord Caldecote at 81; *TW Ranson Ltd v Manufacture d'Engrais et de Produits Industriels Antwerp* (1922) 13 Ll. L. Rep. 205, per Greer J. at 205; *Burstall & Co v Grimsdale and Sons* (1906) Com. Cas. 280, per Kennedy J at 290.
[59] *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] 1 Lloyd's Rep. 146, per Tudor Evans J at 149; *Gatoil International Inc v Tradax Petroleum Ltd (The Rio Sun)* [1985] 1 Lloyd's Rep. 350, per Bingham J at 360.
[60] *Thomas Young and Sons Ltd v Hobson and Partners* (1949) 65 T.L.R. 365, per Tucker LJ at 366. In the same sense *DM Duncan Machinery Co Ltd v Canadian National Railway Co* [1951] Ont. Rep. 578, per LeBel J at 583; *BC Fruit Market Ltd v The National Fruit Co* (1921) 59 D.L.R. 87, per Stuart J at 95.
[61] *Hansson v Hemel and Horley* [1922] 2 A.C. 36, per Lord Sumner at 45.
[62] *Benjamin* at para.18–287; D.M. Sassoon, *C.I.F. and F.O.B. Contracts*, 4th edn (1995) (hereinafter "Sassoon") at para.93; similarly E. McKendrick (ed.), *Sale of Goods* (2000) at para.6–010 speaks of "ordinary terms".
[63] *Finska Cellulosaforeningen* (1940) 68 Ll. L. Rep. 75. For the time in which the test is to be satisfied, see *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, per Lord Guest at 132.
[64] Sale of Goods Bill 1888 cl.40(2).
[65] *Sanders v MacLean* (1883) 11 Q.B.D. 327, per Brett MR at 337.
[66] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] A.C. 93, per Lord Radcliffe at 121,122.

That there is a strict connection between what is reasonable and what is usual in the trade is also demonstrated by the fact that some authorities, while deciding whether a specific aspect of the carriage contract concluded and tendered satisfied the requirement imposed by s.32(2), tend to refer to such duty as one to procure a contract which is "reasonable *and* usual" [emphasis added].[67] If *reasonable* in s.32(2) is read as to mean reasonable *and* usual, it must follow that there is more to "reasonable" than just *usual*. But, if it is true—as it is here suggested—that there is more to *reasonable* that just *usual*, what does the seller's duty further entail?

2–027 *(ii) It must be appropriate to grant sufficient protection to the goods while in transit.* A second line of authorities appears to interpret the word reasonable as to impose on the seller the duty to take such steps as were necessary to protect the cargo while in transit, having regard to the particular circumstances of the case. This is certainly what lies behind Lord Chalmers' original consolidation of the law[68] when he found that the common law implied a duty "to mak[e] the carrier responsible to the buyer for the safe custody and carriage of the goods".[69] In *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*[70] both Lord Reid and Lord Radcliffe, in deciding that a longer route than usual was a reasonable one within the meaning of s.32(2) of the Act, relied strongly on the fact that there was no evidence that the longer "voyage would be prejudicial to the condition of the goods or would involve special packing or stowing"[71] nor—more simply—"could damage the [cargo]".[72] In *The Rio Sun*[73] the c.i.f. buyers of crude oil which solidified in the tanks of the vessel due to its delayed discharge, tried to recover damages from the sellers on the ground that—by failing to procure them a contract of carriage providing for heat to be applied, or at least for a right to require heating—they were in breach of s.32(2) of the Act. The Commercial Court found—as a matter of fact—that the specific crude at stake did not require heating in the circumstances and hence the defendants "were entitled to assume that the cargo would survive the voyage contemplated without deterioration even if unheated".[74] On this ground the buyer's action failed. In reaching this conclusion however, Bingham J, as he then was, said:

[67] *Finska Cellulosaforeningen* (1940) 68 Ll. L. Rep. 75, per Lord Caldecote at 81; and *The Northern Progress* [1996] 2 Lloyd's Rep. 319, where Rix J said at 328 that: "In the context of the c.i.f. sale it seems to me to be well established that the seller is bound not to impose upon his buyer a contract of carriage which contains *unreasonable or unusual* terms [emphasis added]".

[68] The Sale of Goods Act 1979 s.62(2) preserves both the common law rules and the Law Merchant "except in so far as they are inconsistent with [its] provision". On the some point in relation to the Marine Insurance Act 1906, see *Eide UK Ltd v Lowndes Lambert Group Ltd* [1998] 1 All E.R. 946, per Phillips LJ at 950.

[69] 1888 Sale of Goods Bill cl.40(2).

[70] *Tsakiroglou & Co* [1961] 1 Lloyd's Rep. 329.

[71] *Tsakiroglou & Co* [1961] 1 Lloyd's Rep. 329, per Lord Radcliffe at 339.

[72] *Tsakiroglou & Co* [1961] 1 Lloyd's Rep. 329, per Lord Reid at 337.

[73] *The Rio Sun* [1985] 1 Lloyd's Rep. 350.

[74] *The Rio Sun* [1985] 1 Lloyd's Rep. 350, per Bingham J at 360.

> "In considering the cargo, [the sellers] were, in my view, bound to possess reasonable knowledge of the characteristics of the goods they were selling and ensure that their contract of affreightment provided, whether expressly or by virtue of the duty lying on the shipowner, for the taking of any necessary precautions to preserve the goods during the voyage in question."[75]"

In an earlier case where electric engines sent by railway carriage were severely damaged in transit, because they were not properly secured by battens, the Court of Appeal held that the buyers were entitled to decline delivery to the carrier as delivery to them, although it appears that the main ground for the decision was that the goods were sent at their owner's, rather than at carrier's, risk and this was held to be unreasonable.[76] In *BC Fruit Market Ltd v The National Fruit Co*,[77] the goods sold were cabbages shipped on a heated train car, but the bill of lading tendered failed to make it clear that the goods were to be so carried. On arrival the cabbages were found to be frozen, and the buyer refused to take delivery on the ground that "the goods were not billed by Heated Car [*sic*]".[78] In rejecting the seller's claim for the price, the Alberta Supreme Court held that the duty implied by the word *reasonable* in the Act is one to provide the buyer with a contract with the carrier:

> "... whereby the latter would be bound to protect the [goods] from frost while in transit because that would clearly be the only contract which would be 'reasonable having regard to the nature of the goods and the other circumstances of the case'."[79]"

In all the above authorities the link between reasonableness and protection appears to be very strong and somehow mirrors the duty to ship goods reasonably fit to reach the agreed destination in a merchantable condition[80]: if it is true that the goods shipped must be capable of withstanding ordinary or customary sea voyage, it must follow that the voyage arranged for must be such as to allow the goods shipped to reach their destination in a merchantable quality. In light of *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*[81] and the dicta above, it is suggested that a contract on usual terms which fails to afford the goods the protection they require would not fulfil this phase of the test of reasonableness.[82]

2–028 *(iii) And give the buyer protective rights against the carrier.* The requirement that the contract of carriage tendered is to give the buyer protective rights against the carrier is clearly established by the House of Lords in *Hansson v Hamel and Horley*,[83] and indeed appears to underpin the arguments in all the decisions discussed above. In *Hansson* goods were shipped on a feeder in Norway and

[75] *The Rio Sun* [1985] 1 Lloyd's Rep. 350.

[76] *Thomas Young and Sons Ltd v Hobson and Partners* (1949) 65 T.L.R. 365, per Tucker LJ at 366.

[77] *BC Fruit Market Ltd v The National Fruit Co* (1921) 59 D.L.R. 87.

[78] *BC Fruit Market* (1921) 59 D.L.R. 87 at 89.

[79] *BC Fruit Market* (1921) 59 D.L.R. 87, per Stuart J at 95. In the same sense in a case where machinery sold was found inadequately prepared for shipping *DM Duncan Machinery Co Ltd v Canadian National Railway Co* [1951] Ont. Rep. 578, per LeBel J at 583.

[80] *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 Lloyd's Rep. 47, per Diplock J at 55; reversed on other grounds by the Court of Appeal [1961] 2 Lloyd's Rep. 326.

[81] *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1961] 1 Lloyd's Rep. 329.

[82] In the same sense *Goode*, at p.279; *Bridge*, at p.160 uses the word "proper".

[83] *Hansson v Hamel and Horley* [1922] 2 A.C. 36.

transhipped in Hamburg for discharge in Japan. The cargo was carried under a through bill of lading issued by the agent of the ocean carrier in Hamburg and it referred to goods shipped in Norway "and bound to Hamburg for transhipment into the... Atlas Maru... to be delivered... at the port of Yokohama". In upholding the buyer's rejection of the documents the House of Lords held that:

> "A c.f. and i. seller... has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination... When documents are to be taken up the buyer is entitled to documents which substantially confer protective rights throughout."[84]

This statement is often cited in support of the proposition that the buyer is entitled to a document which gives it "continuous documentary cover"[85] against the carrier. In a more recent case, where goods were sold C&F liner terms Rotterdam, and the expression liner terms meant that responsibility for discharge laid with the carrier, failure to provide a bill of lading clearly indicating that such responsibility rested with the carrier was held to be bad tender. In his judgment Mance J said:

> "When the sale contract price clause refers to 'linerterms', the natural conclusion is in my view that it refers to a right which buyers are to be given as against the carriers. So viewed, the contract remains, from shipment, an essentially documentary transaction, under which the buyers part with payment in return for continuous documentary protection against inter alia the carrier."[86]

Hence, this third face of the test appears to be fulfilled only if the documents tendered *substantially confer continuous protective rights against the carrier*. What exactly such *continuous protective rights* amount to is a rather different matter and will have to be decided on a case-by-case basis. What appears quite clear from the statements above is that the document tendered must be such as to make the buyer a party to the contract concluded with the carrier and confer it title to sue,[87] without which contractual *rights against the carrier* would never arise. This is also apparent from the wording of s.32(2) which is only applicable where the seller arranges the carriage contract "on behalf of the buyer" and hence presupposes that the latter will become at some stage of the transaction party to such contract.[88] From this it must follow that the absolute minimum requirement for a contract of carriage tendered under s.32(2) of the Sale of Goods Act must be that—in the absence of authorisation to the contrary—it has to give the buyer title to sue in contract by virtue of s.2(1)(a) of COGSA 1992.[89] However, there

[84] *Hansson v Hamel and Horley* [1922] 2 A.C. 36, per Lord Sumner at 44–46.

[85] *Holland Colombo Trading Society Ltd v Segu Mohammed Khaja Alawadeen* [1954] 2 Lloyd's Rep. 45, where the Privy Council held that "a bill of lading issued by a shipowner who by the transhipment terms in it disclaims all liability in respect of the goods in the event and as from the time of transhipment gives no such 'continuous' cover", per Lord Asquith of Bishopstone at 53. *Benjamin*, at para.19–027; *Debattista*, at para.7–14.

[86] *Soon Hua Seng Co Ltd v Glencore Grain Ltd* [1996] 1 Lloyd's Rep. 398 at 401.

[87] In the words of Lord Ellenborough in *Buckman v Levi* (1813) 3 Camp. 414 at 415: "[The buyer] must be put into a situation to resort to the [carrier] for his indemnity".

[88] *Texas Instruments Ltd v Nason (Europe) Ltd* [1991] Lloyd's Rep. 146, per Tudor Evans J at 148–149.

[89] See *Debattista*, at para.4–24.

appears to be much more in *Hansson* than mere title to sue. Would a through bill of lading validly excluding the liability of the carrier for loss of the cargo due to its own wrongdoings offer the buyer *protective rights* at all? Would a bill validly excluding the carrier's liability for loading and stowing the goods confer any rights to recover the damages actually caused by incompetent stowage? To answer in the affirmative, it is suggested, would imply downgrading *Hansson* as to require a bare procedural duty against Lord Sumner's own words that: "[the buyer] is not buying litigation".[90] Although it is clearly impossible to read in the words *protective rights* as much as a right effectively to receive compensation, the better view appears to be that continuous protection must be provided and bills containing clauses which in fact deprive the buyer of any substantive protection whatever should be considered as not fulfilling s.32(2) of the Act. Whether this can go as far as to say that the document tendered should be subject to the Hague-Visby Rules, however desirable it may be, is not yet clear.[91]

2–029 *(b) Section 32(2) and authorising the tender of unreasonable contracts.* The first sentence of s.32(2) of the Act itself provides that—whatever a reasonable contract of carriage may be—the duty to tender a *reasonable* contract applies only "unless [the seller is] otherwise authorised by the buyer". But what type of evidence does the seller need to put forward in order to show that the buyer has *authorised* it to make and tender an *unreasonable* contract of carriage? The terms of the sale contract will usually contain details about the carriage contract to be arranged by the seller. So, for example, terms relating to the packing, destination, place and date of shipment, discharge and demurrage rate and the documents tendered in exchange for payment may all be specified therein and—if so—the seller must comply with such physical and indeed documentary requirements. It is apparent that the duty to make a reasonable contract of carriage is one which "arise[s] by implication of law"[92] and as such "may be negatived or varied by express agreement, or by the course of dealing between the parties, or by such usage as binds both parties to the contract".[93] Clearly an express clause in the sale contract which allows tender of a particular or even exceptional contract would amount to the required buyer's authorisation. However, in *Bigge v Parkinson*,[94] a pre-Act case where the contract was for a supply of troop stores "guaranteed to pass survey of the East India Company's officers", it was held that such an *express* warranty did not exclude the warranty implied by law that the stores should be reasonably fit for the purpose for which they were intended; and it appears that this common law principle has survived codification.[95] Moreover s.55(2) of the Act specifies that: "An express condition or warranty does not

[90] *Hansson* [1922] 2 A.C. 36 at 46.

[91] See *Jindal Iron & Steel Co Ltd v Islamic Solidarity Shipping Co Jordan Inc (The Jordan II)* [2004] UKHL 49; [2005] 1 Lloyd's Rep. 57, per Lord Steyn at [25].

[92] Sale of Goods Act 1979 s.55(1).

[93] Sale of Goods Act 1979 s.55(1).

[94] Sub nom. *Smith v Parkinson* (1862) 7 H. & N. 955.

[95] *Cammell Laird & Co Ltd v Manganese Bronze and Brass Co Ltd* [1934] A.C. 402. Refers to "terms... which, if not expressly excluded, the law imports [in the contract]" Lord Wright in *Luxor (Eastbourne) Ltd v Cooper* [1941] A.C. 108 at 137. *Benjamin*, puts it in this way: "It seems, however, that express conditions or warranties will normally be construed as additional to the implied terms", at para.11–068.

negative a condition or warranty implied by [the] Act unless inconsistent with it".[96] The position appears to be that whether a specific incorporated clause will be inconsistent with the duty to provide a reasonable contract of carriage will be a matter for the court to decide on the express wording of the contract concerned.

2–030 A fortiori, when the sale contract does not contain express requirements on specific issues relating to the carriage of the goods, e.g. that the carrying vessel should be in class,[97] and the goods are shipped on an patently unseaworthy vessel, it would appear that the seller's duty to make a contract *which is appropriate to grant sufficient protection to the goods while in transit* has not been satisfied.[98] Criticisms of this statement may come from anyone who sees in the reliance on s.32(2), an ex post attempt "by an aggrieved buyer [to re]write in a sale contract a term which [he] might have himself negotiated with the seller"[99] in the first place. However, this interpretation appears—with respect—to give no weight to the *Bigge v Parkinson*[100] line of authorities, the opening words of the section—"unless otherwise authorised by the buyer"—and indeed to s.55 of the Act. The duty rather appears to be one the buyer could easily give up by authorising the seller in this sense[101] by express agreement to the contrary, course of dealing or binding usage inconsistent with it,[102] but—if not surrendered—also as one which the buyer is entitled to and may in fact enforce.[103] The contrary view would appear to lead to quite extraordinary results. In a sale of frozen meat, for example, where the confirmation note provides for carriage in a reefer container without specifying a precise range of temperatures, the contract imposes a clear duty to arrange carriage by reefer, and tender of a reefer liner bill would be required. However, if such a term was to be considered sufficient authorisation to displace s.32(2) altogether, tender of a bill recording shipment at a temperature inadequate to preserve the cargo would be permissible. This conclusion—it is believed—would deprive the contract as a whole of its business efficacy; this would probably be enough to imply in the agreement a term that the temperature should be low enough to preserve the cargo,[104] irrespective—but a fortiori in the existence—of s.32(2).

2–031 *The exception under the Incoterms® 2010 Rules* If the contract incorporates the Incoterms® 2010 Rules, the relevant provisions are arts A3(a) and A8 of the CIF term, which specify in some detail the characteristics of the contract of carriage to be provided by the seller. The articles are worded as follows:

[96] Sale of Goods Act 1979 s.55(2).
[97] Like is seldom the case in commodity sales, which usually include such a requirement; e.g. GAFTA 100 lines 79–80.
[98] *Dubitante* on the point *Debattista*, at para.7–13.
[99] *Debattista*, at para.7–11.
[100] *Bigge v Parkinson* (1862) 7 H. & N. 955.
[101] Sale of Goods Act 1979 s.32(2).
[102] Sale of Goods Act 1979 ss.55(1) and 55(2).
[103] Under s.60 of the Act which provides: "Where a right, duty or liability is declared by this Act, it may (unless otherwise provided by this Act) be enforced by action".
[104] *Liverpool City Council v Irwin* [1977] A.C. 239, per Lord Cross of Chelsea at 258.

> A3(a) "... The contract of carriage must be made on *usual terms* at the seller's expense and provide for carriage by the *usual route* in a *vessel* of the *type normally used* for the transport of the type of goods sold."
>
> A8 "The seller must, at its own expense, provide the buyer without delay with the *usual transport document* for the agreed port of destination[emphases added]."

The effect of the provision seems to be that of providing guidelines on how certain terms have to be read in the context of CIF sales. The "reasonableness test" would then be displaced by one regarding what is "usual in the trade".[105]

(iv) Failure to pass on insurance information If the seller has failed to pass on information to enable the buyer to insure goods during their sea transit, again the goods will be at the seller's risk during such sea transit.[106] **2–032**

(v) Shipping goods unable to withstand normal sea transit This is a common law exception to the rule of passage of risk, according to which if the consignment gets damaged or lost in transit, because its condition at the time of shipment was such as to make it unlikely to withstand normal sea transit, they will be at seller's, rather than at buyer's, risk. The rule originates from a 1960s' case *Mash & Murrell v Emanuel*.[107] In that case Mash & Murrell bought from Joseph I. Emanuel Ltd 50 tons of Cyprus potatoes at £32 10s. per ton, c. & f. Liverpool. The plaintiffs claimed that the potatoes were rotten on arrival at Liverpool and were condemned by the health authority. The claimant made known to the defendants at the time of the contract that they required the goods for re-sale in the course of their business and for sale for use (after being carried to and arrival at Liverpool) for human consumption. The claimants argued that it was an implied term of the sale that the goods should be of merchantable quality not only at the time of the sale, but also on their arrival at Liverpool. In giving judgment for the claimant, Diplock J held: **2–033**

> "On those findings of fact, a question of law, which has been hotly debated, arises. I have so far travelled through my legal life under the impression, shared by a number of other Judges who have sat in this Court, that when goods are sold under a contract such as a c.i.f. contract, or f.o.b. contract, which involves transit before use, there is an implied warranty not merely that they shall be merchantable at the time they are put on the vessel, but that they shall be in such a state that they can endure the normal journey and be in a merchantable condition upon arrival.[108] ... It follows, therefore, applying that view of the law to the present case, that, these goods being bought c. & f. Liverpool, the warranty as to merchantability was a warranty that they should remain merchantable for a reasonable time, the time reasonable in all the circumstances, which means a time for the normal transit to the destination, Liverpool, and for disposal after. That warranty was, in my view, broken."[109]

[105] For carriage on deck under a CIP contract see: *Geofizika DD v MMB Int Ltd* [2010] EWCA Civ 459; [2010] 2 Lloyd's Rep. 1.
[106] Sale of Goods Act 1979 s.32(3). The extent of the duty is discussed below, at paras 12–002 et seq.
[107] *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 W.L.R. 862; [1961] 1 Lloyd's Rep. 46; [1962] 1 W.L.R. 16; [1961] 2 Lloyd's Rep. 326, CA.
[108] *Mash & Murrell Ltd v Joseph I Emanuel Ltd* [1961] 1 W.L.R. 862; [1961] 1 Lloyd's Rep. 46 at 50.
[109] *Mash & Murrell* [1961] 1 W.L.R. 862; [1961] 1 Lloyd's Rep. 46 at 53. The outcome in favour of the claimants was reversed by the Court of Appeal but with no effect on the rule.

2–034 In support of his judgment, Diplock J referred to a passage from the judgment of McCardie J in *Evanghelinos v Leslie & Anderson*,[110] where the conclusion of an umpire to the effect that in the contract in question (a sale of tinned salmon shipped from Japan c.i.f. Port Said and found unfit for human consumption upon arrival) was confirmed:

> "The sellers were under an obligation to ship the goods in such a condition as would enable the goods to arrive at their destination on a normal voyage, and under normal conditions, in merchantable condition."[111]

Except for *Evanghelinos v Leslie & Anderson*, Diplock J cited no further authority in support of this proposition.[112] Diplock J's judgment in the *Mash & Murrell* case was briefly considered by Winn J in *Cordova Land Co Ltd v Victor Brothers Inc*,[113] where the learned judge suggested that its application be restricted to the sale of perishable goods. There the English buyer of a quantity of skins shipped from Boston c.i.f. Hull, which arrived in a damaged condition, sought leave to serve notice of a writ out of the jurisdiction on the American seller. The buyer cited the *Mash & Murrell* decision in support of his contention that by tendering defective skins in Hull a breach of contract was committed in England. Winn J refused to grant the permission sought, and in so deciding offered the following comments[114]:

> "I do not think that passage in the judgment of Diplock J. founds 'a good arguable case' that the vendors in the present matter, the present transactions, entered into a warranty to be performed in Hull that the goods on arrival there would there and then be of the contract description and quality. It seems to me, whilst obviously this topic will call for some further consideration in some future case, that there is a real distinction between the obligations undertaken by a vendor who ships perishable goods and those undertaken by a vendor who ships goods such as skins, which though plainly vulnerable to some extent to deterioration in transit are not nearly so vulnerable as potatoes; the latter may, *inter alia*, mature and ferment."

2–035 **The Mash & Murrell exception only applies at time of shipment** The *Mash & Murrell* exception has recently been put to the test in *The Mercini Lady*.[115] In this case the f.o.b. buyer admitted that the gasoil sold to it was shipped on-specification, but alleges that it thereafter changed its quality and specification on arrival to the port of discharge. It was therefore to be inferred that the gasoil

[110] *Evanghelinos v Leslie & Anderson* (1920) 4 Ll. L. Rep. 17.
[111] *Evanghelinos* (1920) 4 Ll. L. Rep. 17 at 18.
[112] See, e.g. *Broome v Pardess Co-operative Society* [1939] 3 All E.R. 978, f.o.b. contract, reversed on the grounds of an express stipulation to the contrary in [1940] All E.R. 603, CA. See also McNair J's statement in *Gardano and Giampieri v Greek Petroleum George Mamidakis & Co* [1962] 1 W.L.R. 40 to the effect that: "Nor do I think it clear at all on this contract that the charterers' obligations as to the condition of the kerosene were in any way limited, as they normally are in a c.i.f. contract, to shipping goods of the contract description in a condition in which they would normally arrive by the ordinary course of ocean transit in the same condition" (at 53).
[113] *Cordova Land Co Ltd v Victor Brothers Inc* [1966] 1 W.L.R. 793.
[114] *Cordova Land Co Ltd v Victor Brothers Inc* [1966] 1 W.L.R. 793 at 796.
[115] *The Mercini Lady* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep. 442, see also below, at 10–027 et seq.

was not "capable of remaining" of satisfactory quality, and the seller was therefore in breach of contract. In refusing to take the exception too far, Rix LJ said:

> "In *Mash & Murrell Ltd v. Joseph I Emmanuel Ltd* [1961] 1 WLR 862 Diplock J held that in a cif or c&f contract for the international sale of perishable goods, such statutory conditions required the goods 'to be capable of standing a normal voyage to Liverpool and to be of merchantable quality at the time of arrival' (at [page] 872). So expressed, the warranty plainly attached at the time of shipment (there from Limassol): the warranty related to the goods' then capability (in the terms of the modern statute, durability). There has been some controversy as to whether Diplock J was speaking of a continuing warranty, and it is true that some formulations in his judgment are potentially ambiguous... Similarly, in *Ollett v. Jordan* [1918] 2 KB 41, cited by Diplock J at [page] 868, Atkin J had said at [page] 47: '... the condition that the goods must be merchantable means that they must be in that condition when appropriated to the contract and that they will continue so for a reasonable time'."[116]

He then concluded:

> "... the implied condition of satisfactory quality applies only at the time of delivery, and is a fixed point or prospective warranty only, and not a continuing one, and that ... is how *Mash & Murrell* is to be understood."[117]

In order to avoid such difficulties, an express stipulation relating to inevitable deterioration would not be superfluous. Indeed, the point is sometimes covered by the "latent defect" clauses that are inserted in most standard contracts and which generally provide that "the goods are not warranted free from defect, rendering same unmerchantable, which would not be apparent on reasonable examination".[118] Such a clause, however, falls short of relieving the seller from liability in appropriate circumstances, arising from the amended s.14(3) of the Sale of Goods Act,[119] because suitability and merchantability are two distinct factors.[120]

2–036 **Retention of title has no effect on passage of risk** The issue has arisen as to whether the common practice of retaining title to the goods as a form of protection against possible default by the buyer[121] can have an impact on the rules on passing of risk. This is clearly not the case, and the much-cited opinion of Brett MR in *Stock v Inglis*[122] is clear authority to that effect. In that case sugar merchants in London agreed to sell to the plaintiff, a Bristol merchant, 200 tons of sugar of a certain description. The sugar was to be shipped f.o.b. Hamburg, payment in cash to be made in London in exchange for the bill of lading. In order to satisfy the contract, and also a similar contract with another purchaser, the seller's agents in Hamburg shipped 400 tons in 3,700 bags of sugar of the

[116] *The Mercini Lady* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep. 442 at [19]–[20].
[117] *The Mercini Lady* [2010] EWCA Civ 1145; [2011] 1 Lloyd's Rep. 442 at [21].
[118] See, in *WN Lindsay & Co Ltd v European Grain & Shipping Agency Ltd* [1962] 2 Lloyd's Rep. 387 at 395.
[119] Previously s.14(1).
[120] The difference between the two is that merchantability (now defined in s.14(6) of the 1979 Act) means that the thing sold is reasonably fit for the general purpose for which it is manufactured and sold, whereas suitability is designed to meet a specific purpose made known to the seller.
[121] See below, at para.2–048.
[122] *Stock v Inglis* (1884) 12 Q.B.D. 564 at 573.

CHAPTER 11

BUYERS' OBLIGATIONS UNDER AN F.O.B. SALE

Introduction 11–001 The two basic features of an f.o.b. contract[1] are that (i) the seller pays the cost and bear the risks and responsibilities of placing the goods "free on board", and (ii) once this is accomplished, delivery is complete and risk of loss of or damage to the goods passes to the buyer.[2] This triggers the duty of the buyer to pay the price and the payment mechanisms adopted by the parties, amongst which is the letter of credit.[3] This chapter discusses the key duties of the buyer under an f.o.b. sale: i.e. the duty to effect a valid nomination, to procure an export licence and pay for the relevant export duties and—of course—pay the contract price as agreed with the seller.[4]

1. THE DUTY TO MAKE AN EFFECTIVE NOMINATION

The basic duty 11–002 It is the duty of an f.o.b. buyer to nominate the vessel in which the seller is to place the goods free on board.[5] This obligation of the buyer is a condition precedent to the seller's duty, which may be negatived by the terms of the contract. Hewart CJ once defined it in the following manner with respect to a contract "f.o.b. Rotterdam, October shipment":

> "Under such an agreement it was the duty of the purchasers to provide a vessel at the appointed place, Rotterdam, at such a time as would enable the vendors to bring the goods alongside the ship and put them over the ship's rail so as to enable the purchasers to receive them within the

[1] Discussed above, at paras 9–020 et seq.
[2] See above, at para.2–008.
[3] On which see above, at paras 8–013 et seq; and A. Malek and D. Quest, *Jack: Documentary credits*, 4th edn (London, 2009) (hereafter "*Jack*").
[4] In this chapter, payment is only dealt with for those aspects which differ from the c.i.f. term; for a more detailed analysis of the buyer's duty to pay the contract price see—mutatis mutandis—above, at paras 8–004 et seq.
[5] Under the Incoterms® Rules 2010 FOB B7 "The buyer must give the seller sufficient notice of the vessel name, loading point and, where necessary, the selected delivery time within the agreed period". See also FOSFA 53 cl.4; and above, at para.10–004.

> appointed time.... The usual practice under such a contract is for the buyer to nominate the vessel and to send notice of her arrival to the vendor, in order that the vendor may be in a position to fulfil his part of the contract."[6]

Before the buyer has provided the necessary tonnage and has given the seller proper notice of the name of the ship and its expected arrival time, the seller will be unable to perform his part of the contract. As stated by Pollock CB, as long ago as 1863[7]:

> "It had been decided, in a case where the expression 'free on board' was used, that it is the duty of the person who seeks to have the goods to point out the ship, or specify where they are to be delivered, before he can complain that the goods are not on board the ship."

For, as subsequently stated by Megaw J in another case[8]:

> "They [the sellers] are not under an obligation to take the goods away from their factory or warehouse and to start them in circulation in the hope, or expectation that they may arrive at a place which, later, the buyers would have said was the place where the buyers' ship was going to be at some particular time."[9]

11–003 **What is an "effective nomination"?** The three basic ingredients for an "effective nomination" are: it has to (i) comply with the *formal* requirements agreed in the contract; (ii) comply with its express terms; and (iii) allow the seller to perform its physical duty to ship at the place and time agreed in the contract. In other words, in the absence of an express term, the buyer must make a nomination providing a vessel which is physically and legally available for the seller to load where and when agreed. Once this duty is fulfilled, the seller must load despite the fact that there may be reservations about, for example, the cleanliness of the hold such that a shipowner would not be able to give a valid notice of readiness to a voyage charterer for the commencement of laytime.

11–004 Thus in *Soufflet Negoce v Bunge SA*,[10] the seller entered into an f.o.b. contract to sell a quantity of feed barley for delivery on board a vessel between 9 October and 22 October 2006. The contract required the vessel to be "presented at loading port in readiness to load" and she gave notice of readiness to load on the last day of the delivery period. The seller refused to load saying that the holds were unclean and argued that the vessel was not presented "in readiness to load". The Board of Appeal of the Grain and Feed Trade Association (GAFTA) concluded that the seller was required to load regardless of the concern it may have had about the cleanliness of the vessel because there was nothing in the contract expressly requiring the buyer to give notice of readiness in like terms as a shipowner would give under a charter. It followed that the word "presented" incorporated under GAFTA contract form 49 meant simply that the vessel had

[6] *J&J Cunningham Ltd v RA Munro & Co Ltd* (1922) 28 Com. Cas. 42 at 45.
[7] *Sutherland v Allhusen* (1866) 14 L.T. 666; *Armitage v Insole* (1850) 14 Q.B 728; *Stanton v Austin* (1872) L.R. 7 C.P. 651. See also, per Porter M.R. in *Hobson v Riordan* (1886) 20 L.R. Ir. (QB) 255 at 271.
[8] *Anglo African Shipping Co v J Mortner Ltd* [1962] 1 Lloyd's Rep. 81.
[9] *Anglo African Shipping Co* [1962] 1 Lloyd's Rep. 81 at 92.
[10] *Soufflet Negoce v Bunge SA* [2009] EWHC 2454 (Comm); [2010] 1 Lloyd's Rep. 718; affirmed by the Court of Appeal in [2010] EWCA Civ 1102; [2011] 1 Lloyd's Rep. 531.

arrived and was moored at a suitable berth for loading and there were no legal or physical restrictions preventing loading. On appeal to the Commercial Court the finding of the Board of Appeal was upheld.

11–005 **Nomination to be formally and contractually valid** It is not uncommon for standard form contracts to provide for very strict rules on the manner in which the nomination must be *formally* given. So, for example, if the f.o.b. contract provides for the nomination to be given "together with expected date of readiness to load, demurrage rate if applicable, flag, quantity"[11] within a given time, such stipulations are to be considered as conditions and must be complied with, unless a different remedy for breach has been expressly stipulated for in the contract itself.[12] And the same applies where the agreement expressly provides for a formal way in which any notices—including the notice of nomination—must be given. So, for example, where the contract provides that notices may be given in any written form but expressly excludes emails, a notice sent by email will not be formally valid.[13]

11–006 **Place of shipment** For the nomination to be effective, the ship has to be available at the port of loading specified in the contract and, unless the seller agrees to deliver at a different place, the buyer is in default by designating a ship in another port. Accordingly, Rowlatt J[14] once observed:

> "In this case the parties have made a contract for the sale of coal to be shipped f.o.b. Hull, Grimsby or Immingham, and, of course, there can be no question at all but that the tender of a ship by the buyers at Goole would have been a bad tender."[15]

11–007 **Port of loading as a range** The contract may provide for delivery at one of several ports which are defined regionally, e.g. "f.o.b. United Kingdom port", or "f.o.b. European continental port".[16] In such a case, the buyer's duty is generally to elect the port of shipment within the stipulated range and to inform the seller where delivery will be expected in good time.[17] In *David T Boyd & Co Ltd v Louis Louca*,[18] Kerr J held that in the absence of express agreement, trade custom or any inference which can be drawn from surrounding circumstances, the choice of loading port in an f.o.b. contract is that of the buyer if the contract does not name a port of shipment. In this case a contract for the sale of a quantity of Danish herring meal provided for delivery to be made by three instalments in successive months "f.o.b. stowed good Danish port" the buyers did not provide

[11] FOSFA 53 cl.4, ll.25, 26.
[12] FOSFA 53 cl.12.
[13] FOSFA 53 cl.20, l.138; cf. GAFTA 119 cl.18 where notice by email is acceptable but—in case receipt of such notice is contested, the burden of proving transmission is on the sender; cfr FOSFA 53 (2004 edn) at l.138 where emails are expressly excluded. In the 2016 edn no express reference to email communication is made.
[14] *Modern Transport Co Ltd v Ternstrom & Ross* (1924) 19 Ll. L. Rep. 345; see also *Benjamin*, at paras 20–017 and 20–049.
[15] *Modern Transport* (1924) 19 Ll. L. Rep. 345 at 346.
[16] Such was the case in *Fielding & Platt Ltd v Najaar* [1969] 1 W.L.R. 357.
[17] *Muller Brothers v GM Power Plant Co* [1963] C.L.Y. 3114; *David T Boyd & Co Ltd v Louis Louca* [1973] 1 Lloyd's Rep. 209.
[18] *David T Boyd* [1973] 1 Lloyd's Rep. 209.

any shipping instructions or communicate with the sellers in any way, and towards the end of each month the sellers claimed that the buyers were in default. This was accepted by the court which held, as stated above, that naming the port of shipment in an f.o.b. contract was the buyer's duty. Where the seller agrees to provide the vessel for the buyer, either as principal or as agent,[19] the duty of selecting the appropriate port may be affected. Clearly, it is possible for the two issues—namely the duty to charter the vessel for the contractual range and exercising the option to nominate the actual port of loading—to be separated and it might well be the case that the buyer may wish to reserve the choice of selecting the port of departure while delegating the responsibility of securing tonnage to the seller. However, if the seller is the charterer the carrier will have to comply with its orders and a buyer wishing to retain the right to choose the port of loading should expressly state so in the sale contract. In some cases the choice of the actual loading port may be determined by a governmental authority that enjoys an export monopoly of the product sold. In such a case the loading port will be dictated by a third party and any load port restrictions must be complied with by the buyer in respect of all permissible options.

11–008 **Uncertainty as to place of shipment** In *Cumming & Co Ltd v Hasell*,[20] an Australian case, it was held that an agreement for the sale of goods f.o.b. without any stipulation, express or implied, as to the port of shipment was too uncertain to constitute a binding agreement. In current market practice it is highly unusual to come across f.o.b. contracts which fail to identify the place of shipment, particularly in respect of commodities of which the origin of the product has a significant impact on its value. Indeed, *Cumming v Hasell* has been distinguished twice by the English courts[21] which seem more inclined to preserve the existence of the contract. In *Pagnan SpA v Feed Products Ltd*,[22] when asked to apply *Cumming v Hasell*, the Court of Appeal said:

> "It is said that any agreement made on Feb. 1 was void for uncertainty because there was no express or implied agreement on the loading port or on any range of loading ports. Agreement on this matter is necessary (it is said) before there can be a concluded agreement: *Cumming v. Hasell*, (1920) 28 C.L.R. 508. This submission also founders on the facts. I am satisfied that agreement was reached. ... GAFTA 119 incorporated the law of England and the English rule is that where, in an f.o.b. contract, there is an agreed range of ports then prima facie where nothing is expressly agreed and where there is no custom nor any surrounding circumstances from which any particular conclusion can be drawn, the choice of a loading port is that of the buyer: David T. Boyd v. Louis Louca, [1973] 1 Lloyd's Rep 209 at pp. 212–213. It may very well be that the sellers would, by agreement, have nominated the loading port, but I do not think there was any uncertainty or any doubt in the minds of the parties on this matter."

The "range" to which the learned judge refers, however, seems in fact—at least from the law report—more of a mutual assumption than a term of the contract. Whichever way it may be, it would seem arguable that, considering the factual matrix of a given case including the f.o.b. price of the cargo, a range may in

[19] See above, at para.9–032.
[20] *Cumming & Co Ltd v Hasell* (1920) 28 C.L.R. 508.
[21] *David T Boyd* [1973] 1 Lloyd's Rep 209, at 215; and *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601.
[22] *Pagnan SpA v Feed Products Ltd* [1987] 2 Lloyd's Rep 601.

practice always be determinable and that this early 20th-century Australian decision may not represent the law as it stands in the 21st century.

11–009 **Time of shipment** For the nomination to be effective, it is also necessary that the named vessel must be capable of allowing loading within the shipment period which, as already discussed,[23] is a condition of the f.o.b. contract. Where the vessel nominated by the buyer arrives at the port of shipment close to the expiration of the shipment period, the seller is under a duty to load as much as can be loaded within the delivery period specified in the contract. But its obligation ceases at the end of that period, and it is under no obligation to continue loading after that period expires. In *Bunge & Co Ltd v Tradax England Ltd*,[24] the contract was for the sale of 1,000 tons of barley for delivery f.o.b. from one good East Coast United Kingdom Port (to be declared before 15 December 1972) between 1 and 20 January 1973 (both dates inclusive) at buyers call. The sellers nominated the port of Berwick in due time. The buyers nominated a certain vessel but as she was delayed they nominated a substitute vessel, expected ready to load on Friday 19 January 1973. The sellers protested that if the vessel arrived on 19 January there would be insufficient time to load the cargo within the shipment period which expired at midnight, 20 January. In the event, only 110 tons of barley were loaded, and the balance of the contract quantity was never shipped. Donaldson J, upholding an award in favour of the sellers, on a case stated by a trade association Board of Appeal, said, inter alia:

> "Under an f.o.b. contract, the obligation to deliver and the obligation to accept delivery are mutual and both are confined to the shipment period. Even if the sellers waived their right to rely upon the buyers' failure to tender the vessel timeously as a ground for refusing to deliver, this waiver did not create a new right in the buyers to demand delivery outside the agreed shipment period."[25]

11–010 So too in the *Al Hofuf*,[26] Mocatta J noted that:

> "It was admitted between counsel that the provision in the ... contract for delivery between Feb. 20 and 28 was a condition of the contract and of its essence, and it was further admitted that timely notices of expected time of arrival of the vessel ... was also a condition and of the essence of the contract."

But where, as in that case, there was insufficient time to load the entire contract amount (due to the late nomination of the vessel which the sellers did not have to accept to begin with and her arrival on Friday 28 February) the buyer is not entitled to complain if loading is not completed within the delivery period, and, unless the delay amounts to a "frustrating period", the delay is not a breach of a condition. Delay in loading (at least where due to late nomination) is thus to be distinguished from most other delays, and particularly from failure to deliver in time, since time generally is of the essence in mercantile contracts, and delay amounts to a repudiatory breach. Provisions are, however, often found in f.o.b.

[23] Above, at para.10–006.
[24] *Bunge & Co Ltd v Tradax England Ltd* [1975] 2 Lloyd's Rep. 235.
[25] *Bunge* [1975] 2 Lloyd's Rep. 235 at 239.
[26] *Al Hofuf* [1981] 1 Lloyd's Rep. 81 at 84.

contracts under which the buyer may apply for an extension of the shipping period, and—if the seller agrees to grant the extension—bear the costs and carrying charges including interest resulting therefrom.[27]

11–011 **Delay at the loading port** In *Miserocchi and C SpA v Agricultores Federados Argentinos SCL; Same v Bunge AG*,[28] the problem in dispute was whether under an f.o.b. contract the risk of delay to the carrying vessel and consequent costs incurred by virtue of congestion at the port of loading fall on the buyer or the seller. Staughton J considered the basic obligations of an f.o.b. contract and stated:

> "It is the buyer's obligation to provide a ship at the place of shipment, on the day when shipment is to take place. The seller must then bring his goods to the ship's rail for loading. If there is not a single day fixed for shipment, but for example any of the 30 days in the month of June, then the question arises who will choose when a ship shall be provided. In these contracts the choice lay with the buyers. Similarly there may be more than one place of shipment. . . . Again the question arises who is to choose where the ship must be provided; in this instance . . . the choice lay with the sellers. Presumably the option as to the precise time of arrival is entrusted to the buyers, because it is their duty of providing a ship which will most require some flexibility; and the option as to a berth is entrusted to the sellers, because they are most affected by the choice. Those reflections must of course give way to the actual terms of the contracts."[29]

The buyers, who had chartered vessels and given the required 15 days' notice of probable readiness to load, disputed their duty to present the vessels at the loading berths, but their contention was rejected as nothing could be found in the contracts distinguishing them from the ordinary f.o.b. contract "where the obligation [of the buyer] is to present the ship at the place of loading".[30] Although the sellers had in fact failed to nominate a berth as soon as they received notice of probable readiness to load (as they were obliged to do), this was held to be immaterial since by virtue of the port congestion it would have made no difference to the vessel's progress. Accordingly, it was held that the buyers had to bear the costs including those arising from storage and carrying charges. To avoid this situation, some standard form contracts provide that the expense of delay caused by congestion shall be borne by the f.o.b. seller.[31] But as such costs are generally due to an event for which neither party is directly responsible, the risk, in the absence of an express contrary provision in the contract, falls on the party whose performance it affected, and no implied obligation that there would be an available berth as would enable a duly nominated vessel to load within the contract period will ordinarily be implied.[32]

11–012 **Mutual timing of the essence** The buyer must nominate the ship in reasonable time to enable the seller to place the goods on board in accordance with the

[27] For example, GAFTA 119 cl.9; FOSFA 53 cl.12.
[28] *Miserocchi and C SpA v Agricultores Federados Argentinos SCL; Same v Bunge AG* [1982] 1 Lloyd's Rep. 202.
[29] *Miserocchi and C SpA* [1982] 1 Lloyd's Rep. 202 at 207.
[30] *Miserocchi and C SpA* [1982] 1 Lloyd's Rep. 202 at 208.
[31] See, e.g. *Federal Commerce and Navigation Co Ltd v Tradax Export SA* [1978] A.C. 1 at 10–11; and above at para.10–021.
[32] *Miserocchi & C SpA* [1982] 1 Lloyd's Rep. 202 at 209.

relevant shipping instructions.[33] The timing of the two interdependent obligations is crucial as is the communication between seller and buyer as to the time of shipment. This is well illustrated by *JJ Cunningham Ltd v RA Munro & Co Ltd*,[34] where the contract called for delivery f.o.b. Rotterdam "October Shipment" of 200 tons of Dutch bran the buyers having secured freight for 28 October. The sellers forwarded the bran to the port on 14 October but the bran had deteriorated while awaiting shipment. As the buyers were not bound to take delivery under the contract before 28 October, their rights were held unprejudiced by the sellers' action. Obviously, where the buyer has the option to select the date of delivery within a stipulated period of time, e.g. January to March, the contract should provide for some advance notice of his readiness to load and for the declaration of the expected vessel's name in order to give the seller sufficient advance notice to enable him to perform his duty of delivery.

11–013 **Advance notice of vessel's nomination** That is why many f.o.b. contracts nowadays provide for the buyer's notice of the vessel's nomination and readiness to receive delivery of the goods to be given to the seller in advance (e.g. 15 consecutive days). If the buyer fails to do so in time, he is in breach of a condition of the contract and the seller may refuse to make delivery. This was decided by the House of Lords in *Bunge Corp v Tradax Export SA*,[35] where the buyers agreed to buy from the sellers a quantity of US soya bean meal f.o.b. one US Gulf port at sellers' option stowed and trimmed. The sellers issued a separate contract in respect of the first of three monthly shipments which provided, inter alia, that the buyers were to give 15 days' loading notice as contained in cl.7 of the incorporated GAFTA 119. No notice pursuant to cl.7 was initiated by the buyers to any sub-buyers until 14 days prior to loading. On appeal by the buyers, the House of Lords held that cl.7 was intended as a condition precedent to the seller's obligation. It was clearly essential that both the buyers and sellers should know precisely what their obligations were, particularly so where the ability of the seller to fulfil his obligation is dependent on punctual performance by the buyers since until the 15-day notice requirement was fulfilled the sellers could not nominate the "One Gulf Port" as the loading port. Thus, Lord Wilberforce stated in the course of his judgment:

> "[T]he statement of the law in *Halsbury's Laws of England* (4th ed.) Vol. 9 (Contract) paras. 481–482, including the footnotes to par. 482 . . . appears to me to be correct, in particular in asserting (1) that the Court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in 'mercantile' contracts—with footnote reference to authorities which I have mentioned. . . . This relevant clause falls squarely within these principles, and such authority as there is supports its status as a condition—see *Bremer Handels-gesellschaft m.b.H. v J.H. Rayner & Co. Ltd.*[36] and *cf. Turnbull & Co. (Pty.) Ltd. v Mundas Trading Co. (Pty.) Ltd.*[37] In this present context it is clearly essential that both buyer and seller (who may change roles in the next series of

[33] See *Bunge & Co Ltd v Tradax England Ltd* [1975] 2 Lloyd's Rep. 235.
[34] *JJ Cunningham Ltd* (1922) 28 Com. Cas. 42.
[35] *Bunge Corp v Tradax Export SA* [1981] 2 Lloyd's Rep. 1.
[36] *Bremer Handels-gesellschaft mbH v JH Rayner & Co Ltd* [1978] 2 Lloyd's Rep. 73; reversed on a different point by the Court of Appeal [1979] 2 Lloyd's Rep. 216.
[37] *Turnbull & Co (Pty) Ltd v Mundas Trading Co (Pty) Ltd* [1954] 2 Lloyd's Rep. 198.

contracts, or even in the same chain of contracts) should know precisely what their obligations are, most especially because the ability of the seller to fulfil his obligation may well be totally dependent on punctual performance by the buyer."[38]

11–014 In *Gill & Duffus SA v Societe pour L'Exportation des Sucres SA*,[39] the question arose as to whether a term requiring the f.o.b. sellers of a shipment of sugar to give the buyers notice of the loading port (within the line Rollen/Hamburg excluding Immingham) "at latest Monday 14.11.83", was a condition, breach of which entitled the buyers to rescind the contract. Shipment under the contract was to be in December 1983/ January 1984, with 14 days' notice in respect of the vessel's e.t.a. Because the market price of sugar fell the buyers refused to accept the nomination (of Dunkirk as the load port) made on November 1983, which would still have permitted shipment on the first day of the shipment period with sufficient time to give the 14-day advance notice in respect of the vessels estimated arrival time. The sellers claimed US$977,300 in damages for a repudiatory breach and prevailed in a trade arbitration based on the finding that the words "at latest" were not to be construed as a condition. The award stated that in the refined sugar trade it would be customary for a trader, in such circumstances, to give a notice of default albeit short, e.g. 24 hours, prior to cancellation, before time became of the essence of the contract. But both Leggatt J, as well as the Court of Appeal, disagreed, reversing the award: "... there are no words in the English language by which a deadline can be appointed more concisely, more precisely and with more finality than the words 'at latest'" said Leggatt J,[40] and the Court of Appeal concurred, adding that:

> "There is no suggestion that the process of shipment under an f.o.b. contract for sugar or indeed contracts for the sale of sugar generally are in any relevant respect different from contracts for the sale of some other soft commodity."[41]

11–015 **Customs of the trade of advance notice** In some trades there may be a custom in relation to the scope of the buyer's duty of notification. For example in the oil trade, considered in *Scandinavian Trading Co A/B v Zodiac Petroleum SA and William Hudson Ltd (The Al Hofuf)*,[42] Mocatta J noted that:

> "It is common ground that in this interesting and relatively new trade it is the custom that the buyer who buys f.o.b. must give, in succession, notices of expected arrival of the vessel at the refinery or lifting port in question, 72, 48 and 24 hours in advance of the anticipated date of arrival."[43]

11–016 **Terminal acceptance** Where loading facilities are very limited, the contract may provide that the f.o.b. seller give the buyer a "terminal acceptance" within a stipulated period of time subsequent to nomination of the vessel by him so as to ensure him of timely delivery. The obligation of the seller to provide such a

[38] *Bunge Corp* [1981] 2 Lloyd's Rep. 1 at 6.
[39] *Gill & Duffus SA v Societe pour L'Exportation des Sucres SA* [1986] 1 Lloyd's Rep. 322, CA.
[40] [1985] 1 Lloyd's Rep. 621.
[41] Per Donaldson MR at 325.
[42] *Scandinavian Trading Co A/B v Zodiac Petroleum SA and William Hudson Ltd (The Al Hofuf)* [1981] 1 Lloyd's Rep. 81.
[43] *The Al Hofuf* [1981] 1 Lloyd's Rep. 81 at 84.

terminal acceptance within the time stipulated was construed as an innominate term (and not as a condition justifying rescission by the buyer) by Hobhouse J in *Phibro Energy AG v Nissho Iwai Corp and Bomar Oil Inc (The Honam Jade)*[44] and the Court of Appeal was reluctant to reverse this decision.

11–017 **Delivery on shore may be refused** Because the f.o.b. term is not to be regarded solely for the benefit of any one party, a failure to nominate a suitable[45] or "effective" ship in time is a breach of contract, and the buyer cannot normally insist on substitute performance, e.g. delivery on shore. Lord Ellenborough enunciated this principle as long ago as 1812, in *Wackerbarth v Masson*,[46] where he stated:

> "The delivery for which the [seller] undertook was—on board a ship to be named by the [buyer]. He was always ready to deliver ... in this manner, and he offered to do so. But the [buyer] requires a *tertium quid*. Instead of naming a ship, he demanded to have the sugars weighted off and delivered into his own hands, or transferred to his own name in the warehouse-keeper's books. The seller might have been exposed to some risk, or might have lost some advantage by agreeing to this; and he had a right to refuse, as it was not the mode of delivery for which he had stipulated."

However, in *Cohen & Co v Ockerby & Co Ltd*[47] decided by the High Court of Australia, Isaacs J was less emphatic. Although he held that in the circumstances before him the buyer could not substitute delivery f.o.b. for delivery on shore, it was his "opinion" that:

> "In the case of a simple f.o.b. contract the purchaser may in some cases ... claim delivery short of the ship. The universal principle (subject, of course, to any requirement of public policy) is that a man may renounce a benefit, but he cannot, without consent, impose a burden or disadvantage on another. If I contract to pay a certain sum to carry my goods two miles, I may dispense with the carriage of them after a mile, provided I pay the agreed price and occasion no burden or inconvenience to the carrier. If I purchase goods for a specified price to cover the cost of putting them over the ship's rails for my benefit, I can pay the price and take them on the wharf or at the seller's warehouse, unless it can be shown that the seller thereby sustains some detriment. But is that the case having regard to the present contract? I am not prepared to go so far with the respondents as to say that there was an undertaking on the part of the appellants to export the flour. It is not necessary to go so far. It is one thing to limit the buyer's right as against the seller to delivery on board, and another to impose on the buyer the obligation of sending and keeping the goods out of the country. If the narrower interpretation is correct, it is sufficient; if it is not correct, it is useless to inquire further."[48]

Isaacs J's final words in the passage just quoted, however, do little to substantiate the foregoing hypothesis, for he concluded his judgment by saying that:

> "In my opinion ... the agreement as to delivery was 'free on board' a ship, to be provided by the buyers; that they were bound to provide such a ship, unless prevented by war, and in that event there was to be no delivery at all."[49]

[44] *Phibro Energy AG v Nissho Iwai Corp and Bomar Oil Inc (The Honam Jade)* [1991] 1 Lloyd's Rep. 38; [1991] 1 Lloyd's Rep. 50, CA.
[45] See, e.g. *Hecht, Pfeiffer (London) Ltd v Sophus Berendsen (London) Ltd* (1929) 33 Ll. L. Rep. 157.
[46] *Wackerbarth v Masson* (1812) 3 Camp. 270.
[47] *Cohen & Co v Ockerby & Co Ltd* (1917) 24 C.L.R. 288.
[48] *Cohen* (1917) 24 C.L.R. 288 at 299.
[49] *Cohen* (1917) 24 C.L.R. 288 at 301.

11–018 **Delivery at pier may also be refused** Nor indeed, absent a specific agreement to this effect, will the seller be allowed to claim performance by delivery at the pier.[50] That performance became impossible due to failure of the buyer to nominate a ship or because, as a result of circumstances beyond its control, the ship nominated by it was in fact unable to receive the goods, is immaterial.

11–019 **Substitution of the effective nomination** As already stated, time will normally be of the essence of the contract, and a failure to make an effective nomination would amount to a repudiatory breach by the buyer, the seller then being entitled to terminate.[51] The buyer is not, however (unless otherwise agreed), irrevocably bound by its nomination which—it is submitted—may be substituted at any time with a fresh *effective* nomination. The seller therefore would be ill-advised to cancel the contract before it is certain that no effective nomination can be made. If its first nomination fails and the original vessel becomes unavailable for any reason, the buyer may still substitute it and nominate a new vessel, provided loading can be completed within the contract period. This was so held in *Agricultores Federados Argentinos v Ampro SA*,[52] where the allegation that the buyer could not withdraw the vessel originally nominated and nominate a substitute vessel in performance of the contract failed. The sellers had sold a quantity of Plate maize f.o.b. Rosario, shipment to be from 20–29 September 1960. The buyer nominated the *Oswestry Grange* but she was delayed by rain, and it was apparent that she could not load until 30 September, the day after the contract would expire. At 16.00 on 29 September, the sellers informed the buyers that they intended to cancel the contract because the vessel nominated by them had not arrived. However, at 16.30 the buyers managed to engage another vessel, the *Austral*, which was at Rosario and was capable of carrying the goods. The sellers, however, refused to cooperate and to undertake the arrangements which were required in order to enable the *Austral* to load within the contract time. There was a clear finding of fact that there was sufficient time for them to have done what was necessary in order to enable her to load in time. It was held, on a case stated, that the sellers' behaviour evinced an intention not to perform their contract and that the buyers were entitled to treat this failure as an anticipatory breach and a repudiation of the contract. In the course of his judgment Widgery J said:

> "There is nothing expressly in this contract to provide the circumstances in which a particular vessel shall be nominated, and the rights of the parties are to be regulated by the general law as it applies to an f.o.b. contract. As I understand it, the general law applying in such a contract merely is that the buyers shall provide a vessel which is capable of loading within the stipulated time, and if, as a matter of courtesy or convenience, the buyers inform the sellers that they propose to provide vessel *A*, I can see no reason in principle why they should not change their minds and provide vessel *B* at a later stage, always assuming that vessel *B* is provided within such a time as to make it possible for her to fulfil the buyers' obligations under the contract. I can see no principle at all to indicate in a case of this kind that when the buyers had nominated the *Oswestry Grange* they were in any way inhibited at any time from changing their minds and substituting the *Austral*, provided always, as was the fact here, that the *Austral* was capable of accepting the cargo within the time for shipment stipulated in the contract."[53]

[50] See, however, *Burch & Co Ltd v Corry & Co* [1920] N.Z.L.R. 69 (New Zealand); and *Meyer v Sullivan*, 40 Cal. App. 723, 181 Pac. 847 (1919) where the court held that the term "f.o.b." was used in connection with the price and was entirely for the benefit of the buyer, who could waive it and succeed in claiming damages for the seller's failure to deliver on shore.

[51] *Ramburs Inc v Agrifert SA* [2015] EWHC 3548 (Comm); (2016) 943 L.M.L.N. 2.

[52] *Agricultores Federados Argentinos v Ampro SA* [1965] 2 Lloyd's Rep. 157.

11–020 **Contractual and customary variations** Widgery J further held that the buyers had failed to discharge the burden of proving an alleged custom at the port of loading (Rosario) allowing for an extension of up to five days beyond any shipment date stipulated in the contract. However, as stated, the decision was in their favour nonetheless because they were entitled to nominate a substitute vessel. This being the general rule, it is not uncommon for the parties to stipulate expressly in relation to the right of substitution.[54] Thus, e.g. long-term contracts for delivery f.o.b. often specify that the buyer shall submit shipping schedules for the seller's approval some time in advance of the delivery dates, and nominate particular vessels for actual loading some time prior to expected arrival date. In these cases the right of substitution may be restricted by a specific term, i.e. to any time prior to 10 days before the expected date of arrival of the previously designated vessel at loading terminal. Or it may be denied completely by means of a provision that nomination "once given shall not be withdrawn",[55] or that "nomination of vessel is irrevocable unless the seller agrees to substitution". The latter provision was considered in *Bremer Handelgesellschaft mbH v JH Rayner & Co Ltd*,[56] where Mocatta J opined that it meant that a valid nomination was irrevocable but that "an invalid nomination [could] be replaced by a valid one".[57] An example of a more complex restrictive clause may read:

> "The replacement vessel must be on or about the same position of the substituted one. The word 'about' to mean more or less five days than the last reported ETA. If earlier than last reported ETA of original nomination, substitution must be given latest four business days prior to new vessel ETA. Above conditions to be considered without prejudice to the original preadvice of the first nomination. The substituting vessel must go to the same destination as the originally nominated vessel."

11–021 In *Cargill UK Ltd v Continental UK Ltd*,[58] the contract was for the sale of 25,000 tonnes of English feed barley between 5 and 31 August, f.o.b. Hull. The contract incorporated certain general conditions, one of which provided that:

> "[B]uyers were to give notice of eight clear days of the date of arrival of the vessels e.t.a. at loading port. . . . Such notice to show vessel name, itinerary and approximate quantity to be loaded. The provisional notice must be followed by a final (definite) notice of four clear days of the date of presentation of the vessel for loading. . . . In the event of failure to give definite notice . . . buyers will be deemed in default. . . ."

[53] *Agricultores Federados Argentinos* [1965] 2 Lloyd's Rep. 157 at 167.

[54] FOSFA 53, cl.6.

[55] As was the case in *R Pagnan & Fratelli v NGJ Schouten NV (The Filipinas 1)* [1973] 1 Lloyd's Rep. 379.

[56] *Bremer Handels-gesellschaft mbH v JH Rayner & Co Ltd* [1978] 2 Lloyd's Rep. 73. The decision was reversed on a different point in [1979] 2 Lloyd's Rep. 216, CA.

[57] *Bremer Handels-gesellschaft mbH* [1978] 2 Lloyd's Rep. 73 at 94.

[58] *Cargill UK Ltd v Continental UK Ltd* [1989] 2 Lloyd's Rep. 290, CA.

The buyers gave a provisional notice nominating Cobetas *or sub*, and a definite notice nominating Cobetas e.t.a. of August 1986. The sellers acknowledged receipt of the definite notice. But a different vessel *The Finnbeaver* arrived at 23.35 on 31 August and was then ready to receive the contract goods. The sellers, however, refused to load the vessel on the ground that she was not the contractual vessel having been nominated in accordance with the contract terms. They regarded the buyers in default and cancelled the contract. The dispute was referred to a trade arbitration which held for the buyers as the contract was not read to expressly preclude the buyers from nominating a substitute vessel, but this decision was reversed both by Evans J[59] as well as by the Court of Appeal. It was held that in view of the stipulation quoted above it was impossible to attribute to the parties the mutual intention that the buyers could nominate another vessel with a different itinerary, notwithstanding that it was too late to give either a provisional or a final notice in respect of her. No such term could be implied into the contract and the sellers were entitled to refuse to load *The Finnbeaver*. The value to the seller of a clause limiting the buyers' right of substitution in f.o.b. contracts may be due to the fact that, absent such a clause, the seller could not recoup from the buyer any additional expenditure or loss incurred as a result of the substitution. No such problem arises if the substitution constitutes a breach of contract.

11–022 **Additional costs of a valid substitution** If the buyer is not in breach of his basic nomination obligation, and the substitution is valid, is the seller able to recover for additional costs? In *J&J Cunningham v Munro Ltd RA & Co*,[60] Lord Hewart CJ justified the seller's right to recovery in the circumstances in the following terms, stating: "where one person makes a statement to another meaning that statement to be relied upon and acted upon by that other, if the other suffers damage by so relying and acting upon it he is entitled to recover such damage from the person making the statement". However, this was an obiter dictum, and the proposition is not free from difficulty on the assumption that the substitution is contractually permissible and valid both in form and substance. In practice, if the seller does have to bear costs as a consequence of a valid (and therefore contractual) substitution, it would probably be best advised to rely on a separate breach of contract such as failure to give sufficient advance notice of expected readiness to load. Others have suggested that appropriate express terms are best suited to deal with the problem.[61] This certainly seems the safer and more predictable option.

11–023 **Effects of substitution on the date of shipment** In the absence of an express term as to the effects of substitution on the date of shipment, a substitution provision may be interpreted as to extend the shipment date, as it was the case in *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd*.[62] In other cases, the words have been construed more restrictively as was done by the Court of Appeal in

[59] [1989] 1 Lloyd's Rep. 193.
[60] *J&J Cunningham* (1922) 28 Com. Cas. 42 at 46.
[61] As recommended by Bennett, "F.O.B. Contracts: Substitution of Vessels" [1990] L.M.C.L.Q. 466.
[62] *Thomas Borthwick (Glasgow) Ltd v Bunge & Co Ltd* [1969] 1 Lloyd's Rep. 17.

Finnish Government (Ministry of Food) v H Ford & Co Ltd.[63] There an f.o.b. contract for the sale to the appellants of a quantity of River Plate maize provided that shipment would be by "steamers expected ready to load February and/or March 1920". The quantity clause specified "14,750 tons, or sufficient to load the steamships *Pallada, Merkur*, and *Joulan* or substitutes". Two out of the three named ships loaded part of the contract goods though late, but the *Merkur* was sunk in May while she was on her way to load. The court held that another ship could not be substituted for her because in May it was impossible to replace her by another vessel which was expected ready to load in February and/or March. Bankes LJ, construing the shipment clause, said:

> "In order to make sense of the clause, it is necessary to read in the word 'by.' It would therefore read: 'shipment by steamers expected to load February and/or March 1920.' [it was] suggested that the words there used 'expected ready to load,' are not contractual words at all, that they are mere words of expectation. In my opinion, that is not the view of this clause at all. I am satisfied that these words were used as contractual words."[64]

Consequently, the seller was entitled to regard the contract as at an end, so far as the balance of the wheat was concerned, and could not be held liable for breach in respect thereof. Although based on a narrow point of construction, this latter view appears—with respect—more consistent with the commercial purpose of the duty to make an effective nomination. If the parties intend to allow extensions to the time of shipment they can certainly do so by expressly so providing for in the contract.

11–024 **Damages for failure to make an effective nomination** Where the buyer fails to nominate the ship the seller may sue for damages without tender of performance if he alleges to being willing and able to perform; but he cannot normally tender delivery on shore at the docks and sue for the price of the goods. In *Colley v Overseas Experters*,[65] the seller delivered for shipment f.o.b. Liverpool a consignment of leather bolting. The vessel originally nominated by the buyer was withdrawn from service by her owner, and four other vessels which were in turn substituted by the buyer were all prevented from receiving the goods by a series of misfortunes and as a result of a variety of causes. The seller contended that he was entitled to recover the contract price and not merely damages for breach. The claim failed. It was held that no action for the price of the goods could subsist even though it was due to the buyer's default that property failed to pass. McCardie J said:

> "It seems clear that in the absence of a special agreement the property and the risk in goods does not in the case of an f.o.b. contract pass from the seller to the buyer till the goods are actually put on board: see *Browne v Hare*[66]; *Inglis v Stock*[67]; *Wimble v Rosenberg*."[68]

[63] *Finnish Government (Ministry of Food) v H Ford & Co Ltd* (1921) 6 Ll. L. Rep. 188.
[64] *Finnish Government (Ministry of Food)* (1921) 6 Ll. L. Rep. 188 at 189.
[65] *Colley v Overseas Experters* [1921] 3 K.B. 302.
[66] *Browne v Hare* (1858) 3 H. & N. 484; (1859) 4 H. & N. 822.
[67] *Inglis v Stock* (1884) 12 Q.B.D. 564; (1885) 10 App. Cas. 263.
[68] *Wimble v Rosenberg* [1913] 3 K.B. 743.

But this, it is submitted, is not an entirely accurate statement. Quite apart from the statement on the passing of property, risk of loss or damage to the goods may in such cases pass to the buyer, at any rate to the extent that the goods are appropriated and such risk is due to the breach. This is certainly the case if the Incoterms® 2010 Rules are incorporated into the contract, as they expressly provide that the risk of loss of or damage to the goods in such circumstances are wholly with the buyer.[69] But the remedy for this, as for any additional charges resulting from the failure to nominate the vessel, appears to be in damages. It should be noted that many standard f.o.b. contracts contain provisions entitling the seller to claim payment at the contract price (plus various carrying charges such as storage, insurance and interest) against tender of, e.g. warehouse receipts, if the buyer failed to provide suitable tonnage within the contract time, or any pre-agreed extension thereof. Sometimes such clauses allow deduction of loading charges that may have been saved.[70]

11–025 **Anticipatory breach by the buyer** Where the f.o.b. buyer has nominated a vessel that may not be able to load the entire contract quantity (because of the buyers' obligation to accept other cargo) the seller may not assume a repudiatory breach as a matter of course. Absent a clear and unambiguous statement of unwillingness or inability to perform by the buyer, the seller must show that on the balance of probabilities the buyer would not perform. Showing that the buyer may not be in a position to perform is insufficient. This was decided in *Alfred C Toepfer International GmbH v Hagrani Export SA*,[71] where Saville J refused to alter an arbitration award in favour of the buyers. In that case a cargo of 22,000 tonnes of Argentine maize for delivery f.o.b. during August 1983 was sold. The buyers agreed to sell a like quantity of maize, on similar terms, to sub-buyers who nominated a vessel for carriage of the cargo that was passed on to the sellers. However, the sub-buyers also nominated the same vessel to load 6,100 tonnes up river under another contract, so that only 15,400 tonnes of the contract quantity could be loaded on the vessel. The sellers submitted that the buyers were in repudiatory breach. It was held that the mere fact of entering into inconsistent obligations (in the circumstances of the case) did not of itself necessarily establish inability or unwillingness to perform, and that the buyers did not wrongfully repudiate their contract with the sellers.

2. SHIPPING THE GOODS: COSTS AND LIABILITIES

11–026 **Export formalities and shipment** In f.o.b. sales the seller is responsible only for services and expenses relating to placing the goods f.o.b. As stated by Brett MR in *Stock v Inglis*[72]: "... the words 'free on board,' according to the general understanding of merchants ... mean ... that the shipper was to put them on board at his expense...." It has therefore been said that:

[69] Incoterms® 2010 Rules FOB B5.
[70] As was, e.g. the case in *Bremer v Rayner* [1979] 2 Lloyd's Rep. 216; see also GAFTA 119 cl.9, ll.72, 73.
[71] *Alfred C Toepfer International GmbH v Hagrani Export SA* [1993] 1 Lloyd's Rep. 360.
[72] *Stock v Inglis* (1884) 12 Q.B.D. 564 at 573.

> "in writing about the responsibilities of the parties to a f.o.b. contract, most authorities mention only the buyer and the seller, but it is suggested that a notional third party—the shipper—has duties to perform and expenses to bear. The shipper's duties and expenses have to be borne either by the seller or by the buyer, depending on the contract."[73]

Obligations not connected therewith which, due to administrative regulations or otherwise, may require arrangement before the goods can, in effect, be loaded are not really the concern of the seller and thus are not for its account or risk. The decisive factor therefore is not the *time* of payment of or compliance with the relevant regulations but rather a functionality test, namely, whether the requirement at stake pertains to the loading/delivery phase of the transaction or to its export phase. Consequently, in the absence of an express term allocating the relevant duties, in order to allocate which formalities must be complied with by whom, it is necessary to examine their nature to assess whether they pertain to one or the other of the two phases.

11–027 **The cost of shipping the goods "free on board": bare f.o.b.** The party named in the ship's manifest as shipper is responsible for the various entries required by the customs and excise authorities. The shipper, moreover, is also the party who must satisfy the Port of London Authority's regulations, and on whom the onus for meeting the charges levied in most other UK ports falls. As discussed elsewhere in this work,[74] the buyer on f.o.b. bare terms is sometimes itself the shipper of the goods with the costs and responsibilities defined accordingly. In this case the bills of lading will be issued to its order, and performance by the seller will have to be evidenced by some other document, usually a mate's receipt. This, however, does not in itself exclude a contractual relationship between the seller and the ship on an implied contract of the *Pyrene v Scindia*[75] type. As loading has traditionally been regarded as a joint operation of the shipper and shipowner, the division of duties at the ship's rail instead of alongside may now seem outdated and this was clearly the view of the draftsmen of the Incoterms® 2010 Rules. Moreover, there is nothing to prevent the parties from altering their respective responsibilities, as was stated by the House of Lords in *Renton (GH) Co Ltd v Palmyra Trading Corp of Panama*,[76] where Devlin J's dictum to this effect in the *Pyrene* case[77] was endorsed with approval. Either by virtue of some usage, course of dealing, or as a result of an express agreement, the buyer may consequently be charged with the cost of certain operations (loading and stevedoring for example) which are normally considered to be the seller's or the ship's responsibility. So that when the question arose as to whether a loading broker entered into any independent contractual relationship with the shipper (other than as agent of the shipowner) in the port of Liverpool, Devlin J answered it in the negative in *Heskell v Continental Express Ltd*.[78] He stated that:

[73] Davis, "The various Types of F.O.B. Contract" [1957] 3 *Business Law Review* 256 at 258.
[74] See above, at para.9–027.
[75] *Pyrene v Scindia* [1954] 2 Q.B. 402.
[76] *Renton (GH) Co Ltd v Palmyra Trading Corp of Panama* [1957] A.C. 149.
[77] *Pyrene* [1954] 2 Q.B. 402 at 417.
[78] *Heskell v Continental Express Ltd* [1950] 1 All E.R. 1033.

(d) Damages for breach of a jurisdiction agreement

15–105 **Damages for breach of a jurisdiction agreement** Where the common law rules apply, a party to an exclusive jurisdiction agreement which has been breached may be able to recover damages for breach of contract[295] or for the tort of procuring a breach of contract.[296]

15–106 **Costs** A party may recover indemnity costs where the other party has acted in breach of a jurisdiction clause, an arbitration clause or an anti-suit injunction.[297]

[295] *Union Discount Co v Zoller* [2001] EWCA Civ 1755; [2002] 1 W.L.R. 1517; *Donohue* [2001] UKHL 64; [2002] 1 Lloyd's Rep. 425 at [36], [48] and [75]; and *Compania Sud Americana De Vapores SA v Hin-Pro International Logistics Ltd* [2015] EWCA Civ 401; [2014] EWHC 3632 (Comm).

[296] See Morison J in *The Hornbay* [2006] EWHC 373 (Comm); [2006] 2 Lloyd's Rep. 44 at [26].

[297] *Travelers Casualty and Surety Co of Canada v Sun Life Assurance Co of Canada (UK) Ltd* [2006] EWHC 2885 (Comm); *A v B (No.2)* [2007] EWHC 54 (Comm); [2007] 1 Lloyd's Rep. 358 (Swiss arbitration subject to the jurisdiction of the Swiss courts) but not in *C v D* [2007] EWCA Civ 1282; [2007] 1 All E.R. (Comm) 633.

CHAPTER 16

GOVERNING LAW

1. INTRODUCTION

Which Convention or Regulation determines the law? The purpose of this chapter is to consider the law applicable to obligations in a contract of sale. If the obligation can be characterised as contractual the English court will apply the rules of European legislation to determine which law applies. If the contract was concluded before 17 December 2009, the Convention on the Law Applicable to Contractual Obligations of 1980 (the Rome Convention)[1] will apply, provided no exception applies. If, however, the contract was concluded as from 17 December 2009, Regulation (EC) No.593/2008 on the law applicable to contractual obligations (Rome I)[2] will apply, provided no exception applies. Where the obligation in question is non-contractual, for example for misrepresentation prior to the conclusion of the contract, neither the Rome Convention nor Rome I will apply but Regulation (EC) No.864/2007 on the law applicable to non-contractual **16–001**

[1] Following the harmonisation of the rules as to when a court of an EU Member State had jurisdiction by the EC Jurisdiction Convention (see Ch.15), the rules as to how such a court should determine what law governs a contract were also harmonised in the Rome Convention. Section 2 of the Contracts (Applicable Law) Act 1990 gives the force of law to the Rome Convention, as amended by subsequent accession Conventions, with the exception of arts 7(1) and 10(1)(e). It came into force on 1 April 1991.

[2] Rome I came into force on 17 December 2009 in all EU Member States, except Denmark, and applies to contracts concluded as from 17 December 2009 (art.28 as amended). The United Kingdom opted in to Rome I.

obligations (Rome II) may.[3] If Rome II does not apply yet, ss.9–15 of the Private International Law (Miscellaneous Provisions Act) 1995[4] may.

16–002 **Party choice** Although it is usual for contracts for the sale of goods to contain an express jurisdiction and governing law clause,[5] this is not always the case. Furthermore, even where there is an express clause, as we shall see, the parties' choice may be subject to restrictions. Where there is no choice we need to consider what guidelines are available to determine the governing law. The governing law chosen is usually, but not always,[6] the law of the place which the parties have chosen to have jurisdiction. This is simply for the common sense reason that a tribunal is best placed to adjudicate on its own law with which it is familiar, rather than on a foreign law. It is much quicker and cheaper for the High Court in London to apply English law than to hear evidence from foreign lawyers on the law of another country and then determine that law. Proper law and jurisdiction may therefore be inextricably linked. An express choice of jurisdiction may indicate the parties' choice of governing law.[7] However, if the parties have chosen English court jurisdiction and the English courts determine that Italian law applies, they will apply Italian law.

16–003 **Consistency between the Jurisdiction Regulation, Rome I and Rome II** Rome I follows the same pattern as the Rome Convention but has some differences. This chapter will therefore focus on the main provisions of Rome I that are relevant to contracts of sale. In this chapter it may be assumed that the provisions of the Rome Convention are similar unless a difference is highlighted in the footnotes. Recital 7 of Rome I provides that the substantive scope and the provisions of Rome I should be consistent with the Jurisdiction Regulation and Rome II.[8] Both Rome I and Rome II provide for "provisions which cannot be

[3] Article 31 provides that Rome II shall apply to events giving rise to damage which occur after its entry into force which was on 20 August 2007. Article 32 provides that it applies from 11 January 2009 except for art.29 (which requires Member States to notify the Commission of international conventions to which one or more Member States are parties at the time when the Regulation is adopted and which lay down conflict of law rules relating to non-contractual matters), which applies from 11 July 2008. In Case C-412/10 *Homawoo v GMF Assurance SA* EU:C:2011:747; [2012] I.L.Pr.2 the European Court of Justice held that Rome II applies to events giving rise to damage occurring after 11 January 2009. The date on which the proceedings seeking compensation for damage were brought or the date on which the applicable law was determined are not relevant to the issue of when Rome II applies.

[4] Which entered into force on 1 May 1996.

[5] See, e.g. GAFTA Contract No.119 effective 1 September 2010 cl.25; GAFTA Contract No.100 effective 1 March 2016 cl.26; FOSFA Contract 53 cl.27; and FOSFA Contract 54 cl.27.

[6] See, e.g. the Bermuda Form for liability insurance which provides for London arbitration and New York law which was considered in *C v D* [2007] EWCA Civ 1282; [2008] 1 All E.R. (Comm) 1001.

[7] See below, at para.16–014.

[8] There is no such provision in the Rome Convention which preceded the Jurisdiction Regulation and Rome II. Section 3(1) of the Contracts (Applicable Law) Act 1990 provides that any question as to the meaning or effect of any provision of the Conventions set out in the Schedules to the Act shall be referred to the European Court of Justice in accordance with the Brussels Protocol or determined in accordance with the principles laid down by, and any relevant decision of, the European Court. Although the Rome Convention has been in force since 1 April 1991, the First Protocol of 19 December 1988 on the interpretation of the European Communities of the Rome Convention did not come into force until 1 August 2004. Therefore although the European Court of Justice has referred to

derogated from by agreement", "overriding mandatory provisions", international conventions, Community law and public policy.

2. SCOPE OF ROME I—CONTRACTUAL OBLIGATIONS

16–004 **"Contractual obligations"** Article 1(1) of Rome I provides that it applies "in situations involving a conflict of laws, to contractual obligations in civil and commercial matters".[9] Rome I only applies to contractual obligations.[10] Whether a contractual obligation is involved raises similar issues in other contexts such as whether a claim relates to a contract in art.7(1) of the Recast Regulation[11] or the Regulations on Unfair Terms in Consumer Contracts and case law in those contexts may assist here.

16–005 **"Situations involving a conflict of laws"** Any international sale contract will involve a conflict of laws. The seller and the buyer may be companies incorporated in different countries, the port of shipment and the port of discharge may be in further different countries, payment may be made in a yet further different country and the parties may provide for the law of none of those countries to apply to their contract. Even a domestic sale contract may involve a conflict of laws for even if the parties are all incorporated in the same country and the goods are to be carried by road from the place of manufacture to the place of delivery within that country, the parties may provide for the law of a different country to apply to their contract.

16–006 **The only link with Europe is that the court of an EU Member State has to determine the applicable law** The application of Rome I is not limited to contracts which have some connection with an EU Member State. In this respect Rome I may be contrasted with the Recast Regulation, the application of which is generally triggered by the domicile of the defendant in an EU Member State. Rome I applies to a contractual obligation within its scope which comes before the court of an EU Member State provided it involves a choice of laws, i.e. of any laws. Thus, for example, if the English court has to determine whether Japanese or New York law applies to a contract of sale, it will apply Rome I.

the Rome Convention when interpreting other conventions and regulations, it did not consider the Rome Convention itself until its judgment in Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuisen BV, MIC Operations BV.* In addition, the report on the Rome Convention by Professor Mario Giuliano and Professor Paul Lagarde which is reproduced in the *Official Journal of the Communities* of 31 October 1980 may be considered in ascertaining the meaning or effect of any provision of the Convention. Article 18 of the Convention further provides that in the interpretation of the rules of the Convention regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application. In interpreting the Rome Convention the European Court of Justice has had regard to the provisions of Rome I in support of its interpretation—Case C-29/10 *Heiko Koelsch v Etat du Grand-Duche de Luxembourg* at [46].

[9] Article 1 of the Rome Convention is slightly differently worded and refers to "any situation involving a choice between the laws of different countries".

[10] *Base Metal Trading Ltd v Shamurin* [2002] C.L.C. 322.

[11] See above, at para.15–068.

16–007 **Exclusions** Article 1(2) of Rome I provides for a list of exclusions from the scope of the Regulation. Those which may be relevant to sale contracts include "obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character".[12] The main reason for this exclusion is that many EU Member States, although not the United Kingdom, are parties to the Geneva Conventions which deal with these matters. It was not clear under the Rome Convention whether this exclusion included bills of lading[13] but Recital 9 of Rome I clarifies that the exclusion covers obligations under "bills of lading to the extent that the obligations under the bill of lading arise out of its negotiable character". It is clear that Rome I applies to the obligations between the original parties to the contract, the carrier and the shipper as the obligations under the bill of lading between the original parties to the bill of lading do not "arise out of its negotiable character". For example, where the shipper, who is not the charterer, sues the carrier on a bill of lading contract dated 1 October 2010, Rome I applies. Where the shipper is the charterer, the contract of carriage is usually the charterparty,[14] unless the bill of lading supersedes the charterparty which is rare, and Rome I would apply to the charterparty. What still remains unclear is whether the exclusion should be given a wide interpretation[15] and the bill of lading is not covered by Rome I in all cases where the bill comes into the hands of a third party or there should be a narrower interpretation so that only proprietary obligations are excluded.[16] In the case of the wider interpretation, where the bill of lading is negotiable as it is an order bill[17] or a bearer bill, Rome I will not apply as the obligations under it "arise out of their negotiable character". Where, however, the bill of lading is a straight bill of lading as it is made out to a named consignee, the bill of lading is not negotiable although it may well be transferred by the shipper (who may be the seller) to the consignee (who may be the buyer)[18] in exchange for payment where the sale contract or the letter of credit so requires. Moreover, the terms of the straight bill

[12] Rome I art.1(2)(d) and Rome Convention art.1(2)(c).

[13] R. Asariotis, Y. Baatz and N.Gaskell, *Bills of Lading: Law and Contracts* (LLP, 2000), paras 19.7 and 19.8 where it is argued that, as a bill of lading is not a negotiable instrument, bills of lading are covered by the Rome Convention.

[14] See above, at para.5–002.

[15] See the view of H. Boonk, [2011] L.M.C.L.Q. 227 at 231–232.

[16] See the view of Professor Erik Rosaeg that bills of lading are only excluded where the issue is a proprietary one as opposed to a contractual one—see his paper at the Colloquium on Maritime Conflict of Laws held at Southampton, 2010. In the Giuliano Lagarde Report No.C 282/11 it is stated that "certain Member States of the Community regard these obligations [arising from bills of exchange, cheques, promissory notes] as non-contractual".

[17] In *Parsons Corp v CV Scheepvaartonderneming "Happy Ranger" (The Happy Ranger)* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep. 357 the Court of Appeal held that the bill of lading issued was a document of title within art.1(b) of the Hague-Visby Rules as, although only a named consignee appeared in the consignee box, the printed words on the front of the bill referred to delivery of the goods to the "consignee or to his or their assigns". Read together this made the bill of lading transferable and not a straight bill of lading.

[18] In *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* discussed below, at para.16–020 Steel J and the Court of Appeal applied the Rome Convention to the contract between the carrier and the consignee. See also *Caresse Navigation Ltd v Office National de L'Electricite (The Channel Ranger)* [2014] EWCA Civ 1366; [2015] 1 Lloyd's Rep 256; [2013] EWHC 3081; [2014] 1 Lloyd's Rep. 337.

of lading may well require it to be presented to the carrier in order to obtain delivery of the cargo.[19] Do the obligations of the carrier to the named consignee under the bill of lading arise out of its negotiable character? It might seem odd if Rome I does not apply to some third parties but does to others.

16–008 **Arbitration and jurisdiction agreements** By art.1(2)(e) of Rome I[20] it does not apply to "arbitration agreements and agreements on the choice of court". The reason for this exclusion is that such agreements are subject to other international conventions such as the New York Convention and art.25 of the Recast Regulation.[21] It is necessary to distinguish the governing law of the underlying contract and the arbitration agreement which is a separable and separate agreement.[22] Although the law of the underlying contract, the arbitration agreement and the law of the place where the arbitration is to be conducted will often be the same, they may not be. A contract may be governed by one law but the arbitration governed by a different law. It would be rare for the law of the arbitration agreement and of the seat of the arbitration to be different. In *C v D*[23] an insurance policy provided for London arbitration and was governed by New York law. The parties had further agreed that the seat of the arbitration was London and the law of the arbitration was English law. The US insurer applied to the arbitration tribunal to correct its award alleging that the award was manifestly in disregard of New York law and it threatened to commence proceedings in a US Federal Court. The Court of Appeal upheld the anti-suit injunction granted by Cooke J. By choosing London as the seat of the arbitration, the parties must be taken to have agreed that proceedings on the award should be only those permitted by English law. Proceedings in a US Federal Court would negate the whole framework in which the arbitration took place and was vexatious and oppressive, unconscionable and an abuse of process.[24] As the arbitration provision expressly referred to English law and the Arbitration Act 1996, the

[19] In *JI MacWilliam Co Inc v Mediterranean Shipping Co SA (The Rafaela S)* [2005] UKHL 11; [2005] 1 Lloyd's Rep. 347 the House of Lords held that a straight bill of lading is a "similar document of title" and therefore the Hague-Visby Rules apply to it. The bill of lading in that case provided: "IN WITNESS whereof the number of Original Bills of Lading stated above [viz. three] all of this tenor and date, has been signed, one of which being accomplished, the others to stand void. One of the Bills of Lading must be surrendered duly endorsed in exchange for the goods or delivery order". However, Rix LJ in the Court of Appeal, at [145] and Lords Bingham and Steyn in the House of Lords, at [20] and [45] stated obiter that a straight bill of lading would be a document of title even if it contained no express provision requiring surrender. See also *Peer Voss v APL Co Pte Ltd* [2002] 2 Lloyd's Rep. 707 Singapore Court of Appeal and the discussion above, at paras 5–043 to 5–045.

[20] Rome Convention art.1(2)(d). See *Sul America Cia Nacional De Seguros SA v Enesa Engenharia SA* [2012] EWCA Civ 638; [2012] 1 Lloyd's Rep 671; *Arsanovia Ltd v Cruz City 1 Mauritius Holdings* [2012] EWHC 3702; [2013] 2 All E.R. 1; *Habas Sinai Ve Tibbi Gazlar Istihsal Endustrisi AS v VSC Steel Company Ltd* [2013] EWHC 4071 (Comm); [2014] 1 Lloyd's Rep. 479; *Beijing Jianlong Heavy Industry Group v Golden Ocean Group Ltd* [2013] EWHC 1063 (Comm); [2013] 2 Lloyd's Rep. 61; and *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] EWHC 1328 (Comm); [2013] 2 Lloyd's Rep. 121.

[21] Formerly art.23 of the Jurisdiction Regulation discussed at paras 15–031 to 15–050.

[22] *Premium Nafta Products Ltd v Fili Shipping Co Ltd* [2007] UKHL 40; *Fiona Trust & Holding Corp v Privalov* [2007] UKHL 40; [2008] 1 Lloyd's Rep. 254.

[23] *C v D* [2007] EWCA Civ 1282; [2008] 1 All E.R. (Comm) 1001; [2008] 1 Lloyd's Rep. 239.

[24] Applying *Noble Assurance Co v Gerling-Konzern General Insurance Co* [2007] EWHC 253 (Comm); [2007] 1 C.L.C. 85.

parties had not only agreed to arbitration itself, but also that any challenge to an award would only be made to the courts of the place agreed as the seat of the arbitration.[25] The choice of New York law as the governing law of the insurance policy did not mean that the parties had replaced the framework of the Arbitration Act 1996.[26]

16–009 **"Companies and other bodies, corporate and unincorporated"** Article 1(2)(f) of Rome I[27] excludes matters governed by the law relating to such bodies including the creation, legal capacity, internal organisation or winding up of such bodies and the personal liability of officers and members for the obligations of such bodies.

16–010 **Agency** Article 1(2)(g) of Rome I[28] excludes "the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate, or unincorporated, in relation to a third party". Such an issue may arise in relation to a contract of sale, e.g. whether an agent had actual or ostensible authority to conclude a contract on behalf of the seller.

16–011 **Pre-contractual obligations** Article 1(2)(i) of Rome I[29] provides that "obligations arising out of dealings prior to the conclusion of a contract" are outside the scope of Rome I. The reason for this is that such obligations are within the scope of art.12 of Rome II.[30]

16–012 **Certain insurance contracts** Article 1(2)(j) of Rome I[31] specifies certain life assurance contracts to which the Regulation does not apply. As far as other insurance contracts are concerned the insured is given some protection as they are

[25] Applying *A v B* [2006] EWHC 2006 (Comm); [2007] 1 Lloyd's Rep. 237; and *A v B (No.2)* [2007] EWHC 54 (Comm); [2007] 1 Lloyd's Rep. 358.

[26] Applying *XL Insurance Ltd v Owens Corning* [2000] 2 Lloyd's Rep. 500.

[27] Rome Convention art.1(2)(e).

[28] Rome Convention art.1(2)(f). The law applicable to determine whether an agent had actual or ostensible authority to bind Daehan Shipbuilding Company to two guarantees of two charterparties was considered in *Rimpacific Navigation Inc v Daehan Shipbuilding Co* [2009] EWHC 2618 (Comm); [2010] 2 Lloyd's Rep. 236 (Steel J); [2011] EWHC 2618 (Comm) (Teare J).

[29] There is no equivalent provision in the Rome Convention and it is a controversial question whether the Rome Convention covered pre-contractual obligations. It seems likely that the European Court of Justice would conclude that it does not in light of the case law of that court in relation to art.5(1) of the Jurisdiction Regulation—see above, at para.15–069. Furthermore, Rome II treats such obligations as non-contractual—see Recital 30 and art.12 of Rome II discussed further below, at para.16–042.

[30] Discussed further below, at para.16–042.

[31] The Rome Convention does not apply to "contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community" (art.1(3)). The English court must apply its own law in order to determine whether a risk is situated in these territories. The reason for this exclusion is that such risks are covered by the EC Second Directive on Non-Life Insurance which has its own special rules on governing law which are similar to those in the Rome Convention. Contracts of reinsurance are not covered by art.1(3) (art.1(4)). So, for example, if a risk is situated in Denmark, the contract of insurance covering such risk is not governed by the Rome Convention, whereas the reinsurance of such risk or the insurance of a risk situated in India, would be governed by the Convention. Rome I consolidates the current rules on insurance and reinsurance contracts which are to be found in the Rome Convention and the Insurance Directives in art.7. It can only be helpful to have all the rules in one instrument. The substance of the law remains the same.

treated as if they were a consumer, unless the insurance contract covers a "large risk" as defined in art.5(d) of the First Council Directive 73/239/EEC of 24 July 1973. In the case of insurance of a "large risk", art.7(2) of Rome I applies and permits the parties to choose the applicable law in accordance with art.3 of Rome I and provides that where no choice has been made the insurance contract shall be governed by the law of the country where the insurer has his habitual residence, unless it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, when the law of that country shall apply. Insurance of goods carried by sea or other forms of transport are a large risk.

3. FREEDOM OF CHOICE

16–013 **Express choice** Party autonomy remains a fundamental principle of Rome I. Article 3(1) of Rome I[32] provides that the parties must make their choice "expressly" or it must be "clearly demonstrated by the terms of the contract or the circumstances of the case". Thus if a contract of sale expressly provides that English law is to govern the contract, that choice clearly falls within art.3(1) and will be the applicable law, unless one of the restrictions dealt with below applies. The parties can choose the law applicable to the whole or a part only of the contract.[33]

16–014 **Choice "clearly demonstrated"** If the contract contains no express choice of law provision the parties may still have clearly demonstrated their choice. Recital 12 of Rome I[34] states that, "An agreement of the parties to confer exclusive jurisdiction on one or more courts or tribunals of a Member State to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law was clearly demonstrated". This confirms the interpretation of party choice in the existing English case law on the Rome Convention. In *Egon Oldendorff v Libera Corp*[35] Clarke J had to consider whether the London arbitration clause in the charterparty on the NYPE form demonstrated with reasonable certainty that the parties had chosen English law within art.3 of the Rome Convention. He also had to consider a Memorandum of Agreement in the Norwegian Sale Form to be attached to the charterparty which provided for arbitration in a city to be specified by the parties and the contract to be subject to the law of the country agreed as the place of arbitration. A footnote in the standard wording provided that if the line was not filled in, it was understood that arbitration would take place in London in accordance with

[32] Rome Convention art.3(1). The wording of this provision differs very slightly as it provides that "The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case".

[33] *Centrax Ltd v Citibank NA* [1999] 1 All E.R. (Comm) 557, CA.

[34] There is no equivalent Recital in the Rome Convention but it is in the Giuliano and Lagarde Report at C-282/12 and 282/17.

[35] *Egon Oldendorff v Libera Corp* [1996] 1 Lloyd's Rep. 380. See also *Marubeni Hong Kong and South China Ltd v Mongolian Government* [2002] 2 All E.R. (Comm) 873; and *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA, Ace Seguros SA (The Hornbay)* [2006] EWHC 373 (Comm); [2006] 2 Lloyd's Rep. 44.

English law. The clause further provided for three arbitrators. Another footnote provided that if the parties did not complete who was to appoint the third arbitrator, the third would be appointed by the London Maritime Arbitrators' Association (LMAA) in London. It was held that there was no reason to disregard the footnotes and that therefore the parties had agreed London arbitration and that the Memorandum of Agreement was to be subject to English law as the country agreed as the place of arbitration.

16–015 **Choice of forum** Clarke J concluded that the parties had demonstrated their choice in the charterparty with reasonable certainty. On all the facts of the case, when set in the context of the terms of the contract as a whole and of the circumstances of the case, the arbitration clause was a strong indication of the parties' intention to choose English law as the applicable law as well as the curial law. Having agreed English arbitration for the determination in London of disputes arising out of a well-known English language form of charterparty which contains standard clauses with well-known meanings in English law, it was to be inferred that the parties intended that law to apply. Having agreed a neutral forum the reasonable inference is that the parties intended the forum to apply a "neutral" law, namely English law and not either German or Japanese law. The parties made a tacit choice of English law as the applicable law of both the charterparty and the Memorandum of Agreement which was not surprising as they undoubtedly chose English law in the case of the Memorandum of Agreement and it was an express term of their Agreement that the Memorandum of Agreement would be attached to the charterparty. Clarke J accepted that the plaintiff's case would have been even stronger if the charterparty had contained wording similar to the Memorandum of Agreement providing for arbitration in London by LMAA arbitrators or London brokers or by a local association or exchange. The charterparty clause here simply provided that all arbitrators were to be conversant with shipping matters. The decision would be equally applicable in the context of a sale contract on c.i.f. or f.o.b. terms. In *Martrade Shipping & Transport GmbH v United Enterprises Corporation (The Wisdom)*[36] Popplewell held that the Late Payment of Commercial Debts (Interest) Act 1998 does not apply to a trip time charterparty of a Panamanian registered vessel made between the owners, a Marshall Islands Company, and German charterers through Greek shipbrokers. The vessel was not going to trade to England and the hire was payable to a bank account in Greece. The Act imposes a penal rate for two purposes: to protect commercial suppliers whose financial position makes them particularly vulnerable if their debts are paid late and general deterrence of late payment of commercial debts. Section 12 of the Act provides that where parties to a contract with an international dimension have chosen English law to govern the contract, the choice of English law is not of itself sufficient to attract the application of the Act. There must be a significant connection between the contract and England (s.12(1)(a)); or the contract must be one which would be governed by English law apart from the choice of law (s. 12(1)(b)). The fact that the contract contained a London arbitration clause which in turn would have

[36] *Martrade Shipping & Transport GmbH v United Enterprises Corporation (The Wisdom)* [2014] EWHC 1884 (Comm); [2014] 2 Lloyd's Rep. 198 [27]–[30].

meant that the contract was governed by English law[37] was not a relevant connecting factor. Nor was the fact that the contract was in English; adjustment of general average was in London in accordance with English law; the entry of the vessel in a P & I Club with London managers; the NYPE Interclub agreement provides that its governing law is to be that of the charterparty; or the fact that the standard for classification was set by Lloyd's Register and that basic war coverage was to be as defined by Lloyd's of London.

16–016 **Standard terms commonly used in the London market** In *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd*[38] the Court of Appeal upheld the decision of Cresswell J that there was an implied choice of English law demonstrated with reasonable certainty by the terms of the contract which contained the clauses commonly used in the London market within art.3 of the Rome Convention. Although the reinsurance slip stated "as original" it did not incorporate all the terms of the Taiwanese insurance policy including the Taiwanese choice of law clause, but only the provisions which defined the extent of the risk insured.

16–017 **Connection between two contracts** Where there is a connection between two contracts the fact that there is an express choice of law in one may demonstrate that there is an implied choice of that law in the other connected contract. Thus in *Star Reefers Pool Inc v JFC Group Co Ltd*[39] there were two charterparties between Star Reefers and Kalistad Ltd. JFC Group Co Ltd signed two guarantees of the performance of the charterparties. Teare J held that the circumstances of the case demonstrated that English law had been chosen as the law applicable to the guarantees. The circumstances were the very close connection between the charterers and the guarantor and the express choice of law in the charterparty. The judge rejected the argument that there was no implied law and that the applicable law was Russian which was the law with which the guarantee was most closely connected in that the party who was to effect the performance which is characteristic of the contract of guarantee was the guarantor whose central administration was in Russia under art.4(2). The case went to the Court of Appeal but this aspect was no longer in issue before that court.[40] A similar decision was reached by the Court of Appeal in *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd*[41] where again a charterparty was governed by English law

[37] See above, at para.16–014.

[38] *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] C.L.C. 1270. See also *Gard Marine & Energy Ltd v Tunicliffe* [2009] EWHC 2388 (Comm); [2010] Lloyd's Rep. I.R. 62.

[39] *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm) at [13]–[15]. The case subsequently went to the Court of Appeal but not on this point—[2012] EWCA Civ 14. See above, at para.15–104. See also *FR Lurssen Werft GmbH & Co v Halle* [2009] EWHC 2607 (Comm); [2010] C.P. Rep. 11; *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411 at [170]; and *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie Investindo* [2011] EWHC 256 (Comm).

[40] *Star Reefers Pool Inc* [2012] EWCA Civ 14 [14] and [17].

[41] *Golden Ocean Group Ltd v Salgaocar Mining Industries PVT Ltd* [2012] EWCA 265 at [42]–[45] affirming [2011] EWHC 56 (Comm); [2011] 1 W.L.R. 2575 applied in *Alliance Bank JSC v Aquanta Corp* [2012] EWCA Civ 1588; [2013] 1 All E.R. (Comm) 819; and *Mitsui OSK Lines Ltd v Salgaocar Mining Industries Private Ltd (The Unta)* [2015] EWHC 565 (Comm); [2015] 2 Lloyd's Rep. 518 at [37].

and by including a guarantee within the charterparty, the parties had demonstrated with reasonable certainty a choice of English law to govern the guarantee under art.3 of the Rome Convention. The proper law of the claim against the broker for breach of warranty of authority was also English law; the circumstances of the implied contract demonstrated with reasonable certainty a choice that it should be governed by the same law as the proposed principal contract to which it was ancillary. The same result could be achieved by application of arts 4(1) and/or 4(5).[42]

16–018 **Specific words of incorporation** Some bills of lading specifically incorporate the choice of law clause in the charterparty pursuant to which the bill of lading is issued.[43] In *Caresse Navigation Ltd v Office National de L'Electricite (The Channel Ranger)*[44] Males J accepted the submission that general words of incorporation in a bill of lading are sufficient to incorporate a proper law clause.[45] This has also been held to be the case under Singapore law in *The Dolphina*,[46] a decision of the Singapore High Court. Belinda Ang Saw Ean J held that where the bill of lading contained no choice of law but had general words of incorporation of the charterparty terms, they would be sufficient to incorporate an express choice of law clause in the charterparty.

16–019 **Validity of the contract disputed** If there is a dispute as to the validity of a contract or as to the validity of the choice of law clause, e.g. on the grounds that the incorporation is ineffective, art.3(5) of Rome I[47] provides that the existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of arts 10, 11 and 13.[48] Article 10(1)[49] provides that the existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under Rome I if the contract or term were valid. Nevertheless, under art.10(2)[50] a party may rely upon the law of the country in which it has its habitual residence to establish that it did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of its conduct in accordance with the law specified in art.10(1). Mance J considered both the equivalent provisions in art.8 of the Rome Convention in *Egon Oldendorff v Libera Corp.*[51] There German charterers alleged that they had concluded a charterparty with Japanese owners. The latter argued that the agreement was subject to two conditions which had not been satisfied. One of those conditions was subject to details of a previously concluded fixture which provided for London arbitration. Mance J

[42] *Golden Ocean Group Ltd* [2012] EWCA 265 at [49].
[43] For example, Congenbill 1994, Heavyconbill, HIBL and Orevoybill. See *Daval Aciers D'Usinor et de Sacilor v Armare Srl (The Nerano)* [1996] 1 Lloyd's Rep. 1.
[44] *Caresse Navigation Ltd v Office National de L'Electricite (The Channel Ranger)* [2014] EWCA Civ 1366; [2015] 1 Lloyd's Rep. 256; [2013] EWHC 3081; [2014] 1 Lloyd's Rep. 337.
[45] Applying *The Njegos* [1936] P 90 and *The San Nicholas* [1976] 1 Lloyd's Rep. 8.
[46] *The Dolphina* [2011] SGHC 273; [2012] 1 Lloyd's Rep. 304.
[47] Rome Convention art.3(4).
[48] Rome Convention arts 8, 9 and 11.
[49] Rome Convention art.8(1).
[50] Rome Convention art.8(2).
[51] *Egon Oldendorff v Libera Corp* [1995] 2 Lloyd's Rep. 64.

held that if the arbitration clause was validly incorporated, any contract which was validly made was subject to English law and not Japanese law. Therefore, English law applied to determine whether the subject details had been lifted. Even on the assumption in the Japanese owners' favour that Japanese law would have reached a different conclusion, Mance J held that they could not rely on art.8(2). He thought that the onus must be on the party who sought to invoke art.8(2) to negative consent, to bring himself within the provisions of that article. Whether or not that was right, there were very strong grounds for regarding it as unreasonable to determine the effect of the owners' conduct on either the formation of a valid contract or the agreement on a valid arbitration clause in accordance with Japanese law. The natural implication of the London arbitration clause in the charterparty on which the negotiations were based was that English law governed. It would be contrary to ordinary commercial expectations to ignore that clause when everything suggested that the owners must have considered and accepted the clause and, even if they had not done so, should have done. Furthermore, the arbitration clause was precisely the sort of clause which they might have expected in such an international charterparty (indeed the charterparty form which the owners had originally proposed was amended to provide for London arbitration).

16–020 Similarly, in *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)*[52] the Court of Appeal upheld the decision of Steel J that, assuming that English law was applicable under art.8(1) of the Rome Convention and applying that law, the arbitration clause referred to in an executed charterparty was incorporated into the bill of lading. In *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No.2)*[53] the claimant sought to rely on Ukrainian or Swiss law to establish it did not consent to incorporation by virtue of art.8(2) of the Rome Convention. Steel J held that the burden was on Welex to displace the effect of art.8(1). The shippers presented the Congenbill to the master for signature; it was not suggested that there was anything unreasonable in holding Welex to the contract of carriage as a whole; an arbitration clause was commonplace in contracts of this kind; in due course Welex succeeded to the shippers' rights and obligations; and there was nothing "eccentric" let alone unjust in the English law to hold that both shipper and consignee were bound by the terms of the dispute resolution clause. The transaction was an entirely conventional one, nothing in the circumstances rendered it unreasonable to determine the effect of Welex's conduct by reference to English law. More recently in *Toyota Tsusho Sugar Trading Ltd v Prolat SRL*[54] Cooke J held that where the subject matter of the application to the English court was the existence or otherwise of an agreement to arbitrate as Prolat argued that it

[52] *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* [2003] EWCA Civ 938; [2003] 2 Lloyd's Rep. 509; [2002] EWHC 762 (Comm). See also *Raffeisen Zentralbank Osterreich Aktiengesellschaft v National Bank of Greece SA* [1999] 1 Lloyd's Rep. 408 at 412 and 413; and *Horn Linie GmbH & Co v Panamericana Formas E Impresos SA, Ace Seguros SA (The Hornbay)* [2006] EWHC 373 (Comm); [2006] 2 Lloyd's Rep. 44. On a letter of credit *Marconi v PT Pan Indonesia Bank Ltd TBK* [2004] EWHC 129 (Comm); [2004] 1 Lloyd's Rep. 594.
[53] *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa) (No.2)* [2002] EWHC 2033 (Comm); [2002] 2 Lloyd's Rep. 701. This decision will only apply if Rome I applies to a transferable bill of lading and is not excluded by art.1(2)(d) of Rome I as discussed above, at para.16–007.
[54] *Toyota Tsusho Sugar Trading Ltd v Prolat SRL* [2014] EWHC 3649 (Comm).

was not a party to such an agreement, English law as the putative proper law of the sale contract for sugar was the applicable law. Article 10(2) of Rome I did not apply.[55] Cooke J found that Mr Dibranco had both actual and ostensible authority to act on behalf of Prolat and to bind them to the sale contract containing the arbitration agreement.[56]

16–021 **Certainty as to what is incorporated** As a result of art.13 of Rome I the parties may incorporate by reference into their contract a non-state body of law or an international convention. There must be certainty as to what is incorporated and in *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd*[57] a reference to Sharia law did not identify specific aspects of Sharia intended to be incorporated into the agreement. The reference to Sharia law was therefore repugnant to the choice of English law and could not be given effect to.

16–022 **Incorporation of foreign legislation** Where a charterparty incorporates foreign legislation, for example the US Carriage of Goods by Sea Act 1936, which gives effect to the Hague Rules, the question of construction of the legislation must be determined by the proper law of the contract. Thus in *The Stolt Sydness*[58] it made a difference whether the time bar in the US Carriage of Goods by Sea Act 1936, which was incorporated into the voyage charterparty, was interpreted under English law or US law. Under the latter "suit" in art.III r.6, which is reproduced in s.3(6) of the US Act, was confined to litigation and did not extend to arbitration. By contrast, under English law suit includes arbitration and thus arbitration must be commenced within the one-year time limit.[59] As the charterparty expressly provided for London arbitration and English law, Rix J held that the English law interpretation applied and the claim was time barred as arbitration had not been commenced within the one-year time limit.

16–023 **Parties free to vary their choice of law** As part of the principle of autonomy art.3(2) of Rome I[60] provides that the parties may at any time agree to vary the law which previously governed the contract. Thus, for example, where the parties had already agreed that Italian law should govern the contract, they could at any time thereafter agree that the contract should be governed by English law. Similarly, if the contract did not contain any choice of law either express or clearly demonstrated, the contract would have an applicable law which would fall to be determined in accordance with art.4 of Rome I, but the parties would be free to agree a new applicable law. There may be a floating proper law which is objectively ascertainable.[61]

[55] *Toyota Tsusho Sugar Trading Ltd* [2014] EWHC 3649 (Comm) [18].
[56] *Toyota Tsusho Sugar Trading Ltd* [2014] EWHC 3649 (Comm) [43] and [44].
[57] *Shamil Bank of Bahrain EC v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19; [2004] 2 Lloyd's Rep. 1. Cf. *Halpern v Halpern* [2007] EWCA Civ 291; [2008] Q.B. 195 at [33].
[58] *Mauritius Oil Refineries Ltd v Stolt Nielsen Nederland BV (The Stolt Sydness)* [1997] 1 Lloyd's Rep. 273.
[59] *Owners of Cargo on Board the Merak v The Merak (Owners) (The Merak)* [1964] 2 Lloyd's Rep. 527.
[60] Rome Convention art.3(2) considered in *ISS Machinery Services Ltd v Aeolian Shipping SA (The Aeolian)* [2001] EWCA Civ 1162; [2001] 2 Lloyd's Rep. 641.
[61] *Bhatia Shipping v Alcobex* [2004] EWHC 2323 (Comm); [2005] 2 Lloyd's Rep. 336.

4. LIMITS ON THE EFFECTIVENESS OF PARTY CHOICE

16–024 **Limits on the effectiveness of party choice** There are a number of ways in which the law chosen by the parties may be disregarded. Articles 6, 7 and 8 of Rome I[62] have provisions on consumer, some insurance and individual employment contracts respectively but it is assumed for present purposes that these are not relevant. Article 3(3) provides for provisions which cannot be derogated from by agreement[63]; art.3(4) for provisions of Community law which cannot be derogated from by agreement[64]; art.9 for overriding mandatory provisions[65]; art.21 for public policy of the forum[66]; art.23 for conflict of law rules in provisions of Community law[67]; and art.25 for conflict of law rules in international conventions.[68]

16–025 **Provisions which cannot be derogated from by agreement** There are a number of limitations on the parties' freedom to choose the proper law. Article 3(3) of Rome I deals with the situation where a contract is domestic as all the elements relevant to the situation are connected with country A,[69] save that the parties have provided for the law of country B. In that event provisions of the law of country A "which cannot be derogated from by agreement" cannot be

[62] Articles 5 (certain consumer contracts), 6 (individual employment contracts) and art.1(3) (contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community were excluded from the scope of the Rome Convention as such insurance contracts were governed by the Insurance Directives which gave protection to some insureds) of the Rome Convention.
[63] Rome Convention art.3(3) differs in its wording but not its substance—see below, at para.16–025.
[64] There is no equivalent provision in the Rome Convention.
[65] Rome Convention art.7 differs as discussed below, at para.16–028.
[66] Rome Convention art.16.
[67] Rome Convention art.20.
[68] Rome Convention art.21 differs as discussed below, at para.16–031.
[69] For the case law on this requirement in art.3(3) of the Rome Convention see the dicta of Longmore J in *Bankers Trust International Plc v RCS Editori SpA* [1996] C.L.C. 899 at 904–905; and, in particular, obiter at 905H where the judge doubted whether all the elements relevant to the situation were connected with Italy; *Ingmar GB Ltd v Eaton Leonard Technologies Inc* [1999] E.C.C. 49, CA; and *Emeraldian Ltd Partnership v Wellmix Shipping Ltd (The Vine)* [2010] EWHC 1411; [2011] 1 Lloyd's Rep. 301 where the elements were not all connected with China as the guarantee covered the obligations under a charterparty which provided for English law and English jurisdiction and the beneficiary of the guarantee was a Liberian company. Teare J stated: "It does not appear to me that that article applies because this is not a case where all the other elements are connected with China. One such element is that the obligations of the Charterers under the charterparty, which are the subject of the guarantee, are governed by English law. Another is that the Owners, the beneficiary of the guarantee, are a Liberian company. Mr. Persey submitted that these elements did not count as other relevant elements but I do not see why they do not so count". *Caterpillar Financial Services Corp v SNC Passion* [2004] EWHC 569 (Comm); [2004] 2 Lloyd's Rep. 99; *Dexia Crediop SpA v Comune di Prato* [2015] EWHC 1746 unclear appeal not followed in *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA* [2016] EWHC 465 (Comm); [2016] 4 W.L.R. 49; where it was held that all the elements were not connected with Portugal in interest swap agreements between a Portuguese bank and Portuguese state-owned transport companies. The bank was able to assign its obligations to its Spanish parent company, standard international documentation was used, there was a practical necessity for a relationship with a bank outside Portugal, the swaps market in which the swaps contracts were concluded was international in nature, and back-to-back contracts were concluded with a bank outside Portugal in circumstances in which such hedging arrangements were routine.

prejudiced by the parties' choice of law. Recital 15 of Rome I states that the rule should apply whether or not the choice of law is accompanied by a choice of jurisdiction. Article 3(3) will not apply to a contract for the international sale of goods as the fact that it is international, rather than a domestic sale, means that all the elements relevant to the sale will not be connected with one country. The wording of art.3(3) of Rome I is slightly different from art.3(3) of the Rome Convention which refers to "rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'".[70] Recital 15 of Rome I further provides that no substantial change was intended and the change of wording in the two provisions was to align this provision and art.14 of Rome II.[71] However, Recital 37 of Rome I provides that the "concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively".

16–026 **Community law where all the elements are located in one or more Member State** Article 3(4) of Rome I[72] provides that where all other elements relevant to the situation at the time of the choice are located in one or more of the Member States,[73] the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

16–027 **Overriding mandatory provisions** A further exception to the law determined by Rome I based on "considerations of public interest" which only applies in exceptional circumstances[74] is where there are overriding mandatory provisions. "Overriding mandatory provisions" are defined in art.9(1) as

> "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation."

[70] Mandatory rules are rules of law which cannot be derogated from by contract, e.g. for bills of lading the Hague-Visby Rules. Article 3(3) of the Rome Convention will not apply to a contract for the international carriage of goods but could apply to purely coastal trade, e.g. from an English port to another English port on an English registered ship. Were the parties to provide for a foreign law which would apply the Hague Rules, the English court would be entitled to apply the Hague-Visby Rules as s.1(3) of the Carriage of Goods by Sea Act 1971 extends the application of the Hague-Visby Rules and gives them the force of law in relation to coastal trade where the port of shipment is a port in the United Kingdom, whether or not the carriage is between ports in two different states. See further fn.75 below.

[71] See below, at para.16–041.

[72] There is no equivalent provision in the Rome Convention.

[73] See fn.69.

[74] Rome I Recital 37.

Article 9(2) provides that nothing in Rome I restricts the application of the overriding mandatory provisions of the law of the forum.[75] This provision is very similar to art.7(2) of the Rome Convention.

16–028 **Overriding mandatory provisions of the law of the country where the obligations performed** The United Kingdom and several other EU Member States did not give the force of law to art.7(1) of the Rome Convention[76] which dealt with mandatory rules of "another country with which the situation has a close connection". There is no possibility of reservation to a Regulation and therefore art.9(3) of Rome I, which is a narrower version of art.7(1) of the Rome Convention, applies to all the Member States. The forum has a discretion pursuant to art.9(3) to apply the overriding mandatory provisions of the law of the country where the contract is to be performed or has been performed to the extent that those provisions render the performance of the contract unlawful. It is relevant to consider the nature and purpose of those provisions and the consequences of their application or non-application.[77] Article 9(3) has been described as a "welcome development",[78] as it reflects existing case law under English common law.[79]

16–029 **Public policy** Article 21 of Rome I[80] provides that the application of the law of any country specified by Rome I may be refused only if such application is manifestly incompatible with the public policy of the forum. "Public policy" will be very restrictively interpreted as it is only to apply in exceptional circumstances.[81]

[75] An example in relation to bills of lading is where applying the law of the forum, the Hague-Visby Rules apply mandatorily even if they would not apply under the law chosen by the parties. Before the Rome Convention came into force the House of Lords held that a choice of law clause in a bill of lading was null and void where it would have resulted in the application of the Hague Rules with a lower limit of liability than that imposed by the Hague-Visby Rules which applied mandatorily under English law—*The Morviken* [1983] 1 A.C. 565. The effect of art.9(2) of Rome I would be the same as that of the decision in *The Morviken*. The law otherwise applicable to the contract as determined under arts 3, 4, or 5 could not restrict the application of the Hague-Visby Rules where they apply mandatorily. It is important to stress that art.9(2) of Rome I would not apply where the Hague-Visby Rules only apply contractually to a contract, as opposed to mandatorily. It should be noted that the fact that English law governs the contract, does not necessarily trigger the application of the Hague-Visby Rules—see *Trafigura Beheer BV v Mediterranean Shipping Co SA (The MSC Amsterdam)* [2007] EWCA Civ 794; [2007] EWHC 944 (Comm); *Hellenic Steel Co v Svolamar Shipping Co Ltd (The Komninos S)* [1991] 1 Lloyd's Rep. 370; and the obiter dicta of Tuckey LJ with whom Aldous LJ agreed, Rix LJ dissenting, in *Parsons Corp v CV Scheepvaartonderneming "Happy Ranger" (The Happy Ranger)* [2002] EWCA Civ 694; [2002] 2 Lloyd's Rep. 357 at [19].

[76] See, e.g. *AP Moller Maersk A/S v La Societe Viol Freres* no.95-20.570, Bull.1997, IV, no.349 (cassation) considering an embargo under Ghanaian law.

[77] Cf. *The Vine* [2010] EWHC 1411.

[78] See A. Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts" [2006] J.P.I.L. 27 at 70.

[79] See *Foster v Driscoll* [1929] 1 K.B. 470 (smuggle alcohol into US during prohibition); and *Reggazzoni v KC Sethia* [1958] A.C. 301 (Sale of Jute from India to South Africa in breach of Indian law).

[80] Rome Convention art.16. See, e.g. *The Vine* [2010] EWHC 1411; [2011] 1 Lloyd's Rep. 301.

[81] See Recital 32 of Rome II discussed below, at para.16–041.

16–030 **Community law** Article 23 provides that Rome I shall not prejudice the application of provisions of Community law[82] which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations, with the exception of insurance matters.[83]

16–031 **International conventions** Article 25 deals with the relationship between Rome I and "international conventions to which one or more Member States are parties at the time when Rome I is adopted and which lay down conflict-of-law rules relating to contractual obligations". Rome I will not prejudice the application of such a convention, as the Member States are obliged to honour their international commitments.[84] The wording of art.25 of Rome I is more restricted than the equivalent provision, art.21 of the Rome Convention, in two ways. First the Rome Convention refers to "international conventions to which a Contracting State is, or becomes, a party". Rome I only permits international conventions to which one or more Member States are parties at the time when Rome I is adopted, and not thereafter.[85] Clearly, a Member State cannot unilaterally enter into new conventions which conflict with Rome I and override it. A procedure for a Member State to enter into agreements with third countries will be proposed by the European Commission to the European Parliament.[86] Secondly, art.25 of Rome I specifically requires the international convention "to lay down conflict-of-law rules relating to contractual obligations". There is no such requirement in art.21 of the Rome Convention. Article 26 of Rome I required Member States to notify the Commission of the international conventions referred to in art.25(1) by 17 June 2009 and the Commission to publish the list of those conventions "to make the rules more accessible".[87] Finland, France and Sweden have notified the Hague Convention of 15 June 1955 on the law applicable to the international sale of goods. The United Kingdom has notified that there are no conventions referred to in art.25 of Rome I to be notified.[88]

[82] Rome I Recital 40.
[83] Special rules on insurance are set out in art.7 of Rome I.
[84] Rome I Recital 41.
[85] This change is also seen in the amendments made to art.57 of the EC Jurisdiction Convention which has now become art.71 of the EC Jurisdiction Regulation.
[86] Recital 42 provides that "The Commission will make a proposal to the European Parliament and to the Council concerning the procedures and conditions according to which Member States would be entitled to negotiate and conclude, on their own behalf, agreements with third countries in individual and exceptional cases, concerning sectoral matters and containing provisions on the law applicable to contractual obligations". Formerly a Member State would need to submit a request to the European Commission in accordance with art.67 of the European Community Treaty as amended by the Treaty of Amsterdam, but this has now been repealed. The Commission could in turn submit a proposal to the Council.
[87] Rome I Recital 41.
[88] See the list at 2010/C 343/06.

5. NO CHOICE

16–032 **No choice** Where the parties have not chosen the law applicable to the contract in accordance with art.3, art.4(1) of Rome I provides for a number of rules that apply to specific types of contracts. Thus, for example, a contract for the sale of goods[89] shall be governed by the law of the country where the seller has his habitual residence[90]; a contract for the provision of services by the law of the country where the service provider has his habitual residence[91]; and a contract for the sale of goods by auction by the law of the country where the auction takes place, if such a place can be determined. If a contract is not one of those mentioned in art.4(1) of Rome I, or where the contract is for more than one of the types specified, for example it is a contract for the sale of goods and the provision of services, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.[92] Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in art.4(1) and (2), the law of that other country shall apply.[93] Where the law applicable cannot be determined pursuant to art.4(1) or (2), the contract shall be governed by the law of the country with which it is most closely connected.[94]

16–033 **Contracts of carriage** Article 5 provides for special rules for contracts of carriage of goods[95] and carriage of passengers.[96] For contracts of carriage the law shall be that of the country of the habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law is that of the country where the place of delivery as agreed by the parties is situated. Those rules are subject to an escape if it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, is manifestly more closely connected with a country other than that indicated, in which case the law of that country shall apply.

16–034 **Comparison with the Rome Convention** The result would be the same under the Rome Convention for a contract for the sale of goods but Rome I is more specific. Article 4(1) of the Rome Convention provides that where there is no choice the contract shall be governed by the law of the country with which it is most closely connected. That article further provides that a severable part of the contract which has a closer connection with another country may be governed by the law of that other country.

[89] Compare art.7(1)(b) of the Recast Regulation—see above, at para.15–072. As in that provision there is no definition of "sale of goods" but the case law on art.5(1)(b) of the Jurisdiction Regulation will be applicable here as the Jurisdiction Regulation and Rome I should be interpreted consistently—Recital 7 of Rome I.
[90] Rome I art.4(1)(a).
[91] Rome I art.4(1)(b).
[92] Rome I art.4(2).
[93] Rome I art.4(3).
[94] Rome I art.4(4).
[95] Rome I art.5(1). cf. art.4(4) of the Rome Convention discussed below, at para.16–035.
[96] Rome I art.5(2).

16–035 **Presumptions in the Rome Convention** In order to determine which country the contract is most closely connected with, there are a number of presumptions in art.4(2), (3)[97] and (4)[98] of the Rome Convention, all of which may be disregarded in accordance with art.4(5) if it appears from the circumstances as a whole that the contract is more closely connected with another country. If the contract is, for example, an international sale contract, time[99] or demise charterparty, insurance contract to which the Rome Convention applies, reinsurance contract or letter of credit, the presumption in art.4(2) applies. That presumption is that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, its principal place of business or where the contract provides that performance is to be effected through another place of business, the country in which that other place of business is situated. This involves first working out what the characteristic performance of the contract is. This will be the performance in return for which payment is promised.[100] The performance characteristic of a contract of sale is delivery of the goods,[101] not payment of the purchase price, and in a contract of insurance it is the provision of insurance cover,[102] not payment of the premium. Thus the governing law of a contract of sale would usually be the principal place of business of the seller. Under the Recast Regulation, if the parties have not chosen the jurisdiction under art.25, the claimant may sue where the defendant is domiciled or where, under the contract, the goods were delivered or should have been delivered. There may be no connection between the place of delivery and the principal place of business of the seller, with the unfortunate result that the court with jurisdiction has to apply the law of a different country. For example, a seller whose principal place of business is in France, sells a cargo of oil on f.o.b

[97] Rome Convention art.4(3) relates to immovable property and is not therefore relevant for present purposes.

[98] Rome Convention art.4(4) provides for a special presumption for contracts for the carriage of goods considered in Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuisen BV, MIC Operations BV* [2009] E.C.R. I-09687. This provision is slightly different from that in art.5(1) of Rome I. Unlike Rome I there is no special presumption for contracts for the carriage of passengers. See also the next footnote.

[99] In *Martrade Shipping & Transport GmbH v United Enterprises Corporation* [2014] EWHC 1884 (Comm) at [27]–[30] Popplewell J held that a trip time charterparty, like a term time charter, is not an undertaking by the owner to carry goods, but is to make the vessel and her crew available to the charterer as a means for the charterer to transport goods. Therefore the presumption in art.4(2) applies to a trip time charter, and not art.4(4).

[100] See, e.g. *Print Concept GmbH v GEW (EC) Ltd* [2001] EWCA Civ 352; [2002] C.L.C. 352; [2001] E.C.C. 36 (distributorship agreement); *Iran Continental Shelf Oil Co v IRI International Corp* [2002] EWCA Civ 1024; [2004] 2 C.L.C. 696. On letters of credit see *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep. 87 (letter of credit between the confirming and the issuing bank); *PT Pan Indonesia Bank Ltd TBK v Marconi Communications International Ltd* [2005] EWCA Civ 422; [2004] 1 Lloyd's Rep. 594 (letter of credit between the beneficiary and the confirming bank); *Tavoulareas v Tsaviliris* [2005] EWHC 2140; [2006] 1 All E.R. (Comm) 109 at [49]–[52].

[101] Cf. Recast Regulation art.7(1) discussed above, at paras 15–067—15–078.

[102] *Credit Lyonnais v New Hampshire Insurance Co* [1997] 2 Lloyd's Rep. 1; applied in *American Motorists Insurance Co v Cellstar Corporation Welex* [2003] EWCA Civ 206; [2003] Lloyd's Rep. I.R. 295, CA; [2003] EWHC 421 (Comm); [2002] 2 Lloyd's Rep. 216; *Dornoch Ltd v The Mauritius Union Assurance Co Ltd* [2006] EWCA Civ 389; [2006] 2 Lloyd's Rep. 475 at [41]–[43], the characteristic performance of a reinsurance contract was payment in the event of a claim.

terms so that the buyer must provide a ship to take delivery of the goods in Rotterdam for carriage to an English port. Therefore, it is very important that the parties choose both jurisdiction and governing law.

16–036 **The presumptions may be disregarded** The presumptions will apply unless it appears from the circumstances as a whole that the contract is more closely connected with another country.[103] Circumstances such as where the performance of all the contractual obligations is to be given and the governing law of an independent but interconnected contract may be relevant.[104] In *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH*[105] the characteristic performance of the contract was for Oasis to perform in two concerts in Germany and thus the presumption under art.4(2) was that as the party to effect the characteristic performance was located in England, English law would be the governing law of the contract. However, the defendant established factors which showed the contract had a closer connection with Germany than with England as the contract required performance of contractual obligations by both parties in Germany. Therefore the presumption did not apply and German law applied.

16–037 **Common law** Where neither the Rome Convention nor Rome I apply, for example, because the bill of lading was concluded after 17 December 2009 and the issue is one excluded under art.1(2)(d) of Rome I, the common law rules in relation to conflict of laws apply. The proper law of the contract means the system of law which the parties intended to apply to the contract. The parties may express their intention or where there is no express written choice their intention may be inferred from the terms and nature of the contract. So, for example, where

[103] Rome Convention art.4(5). See Case C-133/08 *Intercontainer Interfrigo SC (ICF) v Balkenende Oosthuisen BV, MIC Operations BV* [2009] E.C.R. I-09687; applied in *British Arab Commercial Bank Plc v Bank of Communications* [2011] EWHC 281 (Comm); [2011] 1 Lloyd's Rep. 664; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [1999] C.L.C. 1270, per Beldam LJ at 1279; and, per Cresswell J [1998] C.L.C. 1072 at 1082. See also *Raffeisen Zentralbank Osterreich Aktiengesellschaft v National Bank of Greece SA* [1999] 1 Lloyd's Rep. 408 at 412 and 413; and *Ferguson Shipbuilders v Voith Hydro GmbH and Co KG*, 2000 S.L.T. 229, a decision of the Scottish Outer House; *ISS Machinery Services Ltd v Aeolian Shipping SA (The Aeolian)* [2001] EWCA Civ 1162; [2001] 2 Lloyd's Rep. 641; *Star Reefers Pool Inc v JFC Group Co Ltd* [2010] EWHC 3003 (Comm) at paras [13]–[15] the case subsequently went to the Court of Appeal but not on this point—[2012] EWCA Civ 14; and *The Vine* [2010] EWHC 1411; [2011] 1 Lloyd's Rep. 301 at [170].

[104] *Bank of Baroda v Vysya Bank Ltd* [1994] 2 Lloyd's Rep. 87 (letter of credit between the confirming and the issuing bank). See also *HIB Ltd v Guardian Insurance Co Inc* [1997] 1 Lloyd's Rep. 412. The decision of the Court of Appeal in *Crédit Lyonnais v New Hampshire Insurance Co* [1997] C.L.C. 909 is relevant to art.4. Although the court was there considering the Second EC Directive on Non Life Insurance, it recognised that there are many similarities between the Rome Convention and the second directive (at 913).

[105] *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* [2001] 2 All E.R. (Comm) 1. See also *Iran Continental Shelf Oil Co v IRI International Corp* [2002] EWCA Civ 1024; [2004] 2 C.L.C. 696; *Samcrete Egypt Engineers and Contractors SAE v Land Rover Exports Ltd* [2001] EWCA Civ 2019; [2002] C.L.C. 533; *Ennstone Building Products Ltd v Stanger Ltd* [2002] EWCA Civ 916; [2002] 2 All E.R. (Comm) 479; applied by *Waldwiese Stiftung v Lewis* [2004] EWHC 2589 (Ch); 2004 WL 2652645 (Ch D); *Kenburn Waste Management Ltd v Bergmann* [2002] EWCA Civ 98; [2002] C.L.C. 644; *Caledonia Subsea Ltd v Micoperi SRL*, 2003 S.C. 70 (Inner House Court of Session); and *Ophthalmic Innovations International (UK) Ltd v Ophthalmic Innovations International Inc* [2004] EWHC 2948 Ch; [2005] I.L.Pr. 10.

the contract contains a choice of forum clause, but no express choice of law clause, the court will infer that the parties intended the contract to be governed by the law of the forum where disputes are to be tried unless there are strong indications that they did not intend or may not have intended this result.[106] The English court would hold an express choice of law void where the choice would lessen the carrier's liability if the Hague-Visby Rules are mandatorily applicable as in *The Morviken*.[107] Where the intention of the parties as to the governing law is not expressed and cannot be inferred from the circumstances, the contract is governed by the system of law with which the transaction has its closest and most real connection.[108] As in common with many other jurisdictions, England will not apply a foreign law which is contrary to public policy.

6. ROME II—NON-CONTRACTUAL OBLIGATIONS

16–038 **Relevance of non-contractual obligations in the c.i.f. and f.o.b. context** Although the majority of claims under c.i.f. and f.o.b. contracts will be for breach of contractual obligations, such as failure to deliver on time, or at all, or in accordance with the contractual specification, a claimant may have a claim for breach of a non-contractual obligation which is not governed by Rome I, but is now governed by Rome II,[109] which contains specific provisions on product liability,[110] unjust enrichment,[111] *negotiorum gestio*[112] and *culpa in contrahendo*.[113] A claim for misrepresentation is of relevance to sale contracts. Although English law would formerly have regarded a claim by the buyer for misrepresentation by the seller which induced the buyer to enter into a contract with the seller as a contractual matter, this is not the case under Rome II and therefore the rules under that Regulation will be considered briefly.

16–039 **Scope of Rome II** Recital 7 of Rome II provides that the substantive scope and the provisions of Rome II should be consistent with the Jurisdiction Regulation

[106] *Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572; *The Al Wahab* [1983] 2 Lloyd's Rep. 365; *Hellenic Steel Co v Svolamar Shipping Co Ltd (The Komninos S)* [1991] 1 Lloyd's Rep. 370.

[107] See above, para.16–027, and, in particular, fn.75.

[108] *Compagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation SA* [1971] A.C. 572; *Trade Indemnity Plc v Forsakringsaktiebolaget Njord* [1995] 1 All E.R. 796. Compare *Baring Brothers & Co Ltd v Cunninghame District Council* [1997] C.L.C. 108, a decision of the Scottish Court of Session concerning a void contract.

[109] As to when Rome II applies see fn.3 of this chapter. Part III of the Private International Law (Miscellaneous Provisions) Act 1995 entered into force on 1 May 1996 and determines the law applicable to torts committed before Rome II is applicable. A major change from the rules under the Private International Law (Miscellaneous Provisions) Act 1995 is that the scope of Rome II is wider as the 1995 Act only deals with tort and delict and does not cover other non-contractual obligations such as restitution including unjust enrichment or equitable obligations. The law determined as applicable under Rome II will also govern the assessment of damages (art.15(c)), whereas the 1995 Act does not.

[110] Rome II art.5.

[111] Rome II art.10.

[112] Rome II art.11.

[113] Rome II art.12.

and the Rome Convention and Rome I.[114] Non-contractual obligation is an autonomous concept and also covers non-contractual obligations arising out of strict liability.[115] If the dispute between the parties involves, for example, a tort committed after Rome II applies, the governing law will be determined by the rules set out in Rome II, subject to a number of exclusions.[116] Like the Rome Convention and Rome I, Rome II applies to any choice of law situation which comes before the courts of an EU Member State, whether the damage occurs within or outside the European Union, and may result in the court applying the law of a non-EU Member State.

16–040 **Freedom of choice** As in Rome I, party autonomy is recognised, although conditions are imposed on the choice to protect weaker parties.[117] Thus the parties may choose to submit non-contractual obligations to the law of their choice in two situations: first where an agreement is concluded after the event giving rise to the damage[118]; or secondly where all the parties are pursuing a commercial activity, by an agreement freely negotiated before the event giving rise to the damage occurred.[119] In either case the choice must be express or demonstrated with reasonable certainty.[120] It is important to note that the choice shall not prejudice the rights of third parties.

16–041 **Restrictions on the applicable law** As in Rome I the law applicable to non-contractual obligations may be subject to provisions which cannot be derogated from by agreement[121]; the provisions of Community law which cannot be derogated from by agreement[122]; overriding mandatory provisions[123]; public policy[124]; Community law[125] which in relation to particular matters lay down conflict-of-law rules relating to non-contractual obligations[126]; and "international

[114] "The instruments dealing with the law applicable to contractual obligations." See also Recital 7 of Rome I which is in similar terms.

[115] Rome II Recital 11.

[116] Rome II art.1(2)(c) probably excludes non-contractual obligations arising under bills of lading to the extent that the obligations arise out of their negotiable character. See the discussion in relation to this exclusion under Rome I at para.16–007. Although there is no recital equivalent to Recital 9 of Rome I, the Regulations must be interpreted consistently—see Recital 7 of Rome II.

[117] Rome II Recital 31 and art.14.

[118] Rome II art.14(1)(a).

[119] Rome II art.14.

[120] See Rome I art.3(1) discussed above, at para.16–013.

[121] Rome II art.14(2).

[122] Rome II art.14(3).

[123] Rome II art.16.

[124] Rome II art.26. "Public policy" will be very restrictively interpreted as it is only to apply in exceptional circumstances. Recital 32 of Rome II states that a law which grants "non-compensatory exemplary or punitive damages of an excessive nature" may be regarded as being contrary to the public policy of the forum. Equivalent situations in a non-contractual context could include economic duress.

[125] Rome II Recital 35.

[126] Rome II art.27.