



RESEARCH PAPER

Sale of Goods and Freight by Sea: An Analytical Study

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PAPER INFO	ABSTRACT
Received: September 21, 2019	Carriage of Goods by Sea is generally coupled with sale agreements. For just and peaceful commercial environments, importance of governing law and its apt interpretation cannot be denied. In situations resulting from non-performance, frustration of contracts or similar causes, the relevant laws require interpretation. Commerce and trade necessarily require trust and confidence as well as unification and simplicity. International Chamber of Commerce (ICC) have made certain rules and introduced INCOTERMS which greatly help in this regard. In this paper an endeavor has been made to study the significance of contacts of sale coupled with delivery of goods and their consequences. An attempt has been made to differentiate between the old fashioned simple sale/purchase transactions under the provisions of Caveat Emptor and modern sale by description, sample and or trademarks standards.
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Introduction

Contracts of sale of goods often include elements associated with delivery (to carrier), carriage, and freight (rates and manner of payment), insurance and finally delivery of goods to their buyer/merchant, his agent or assign. The sale of goods may be by description, sample or combination of the two. In some cases, choice of buying is left to the buyer to whom goods are made available and buying is purely on choose and pick basis. In such cases "Caveat Emptor" applies and the buyer is at liberty to choose which leaves very little grounds for buyer's claims against quality and condition (except some implied warranties) (Black's Law dictionary).

Under a contract of sale, goods are agreed to be delivered to the buyer, his agent or assign for a fixed price or may be left to be ascertained or determined by

an agreed manner during course of dealings among parties. For example, price left to be fixed by another person, for example, a broker, or to be dealt with at the market price on a specific day or time (The Sale of Goods Act 1930 hereinafter SGA 1930, Section 9 (1)). The terms of a contract may include the place and manner of delivering the goods and passing of the risk from seller/shipper to the buyer. Delivery of goods may take place at seller's premises say factory or warehouse in which case the property in goods as well as the risk passes to the buyer at once when the delivery is affected. The goods may be transported by the seller/shipper himself through a contract of affreightment at his (seller's) own risk and cost. Alternatively, transportation of goods to their destination may be made by the seller if so desired and agreed, on behalf of and at the buyer's risk. After passing of the property in goods to the buyer, if they still remain in possession of the seller, in absence of any contract to the contrary, a bailment contract may come into existence expressly or impliedly. A bailment contract is defined in the Contract Act 1872. Property in goods and risks pass to the buyer under the contract of sale while the goods may remain in possession of the seller as agreed by the buyer and the seller. A contract of bailment thus follows the contract of sale with a constructive delivery of goods (The Contract Act 1872 hereinafter TCA 1872, Section 148). The care and custody of goods deemed bailed is regulated by the laws of bailment. The seller thus becomes a bailee and the buyer, a bailor in the agreement. The buyer thereafter may arrange transportation of goods to their destination at his own cost and risk or dispose (sell) them accordingly.

Alternatively, the contract of sale may require delivery of the goods at buyer's premises at destination which may be a warehouse at the destination including buyer's door-step. In such cases, in absence of a contract to the contrary, the goods may be freighted by the seller at his cost and risk for their delivery to the buyer agreed between the seller and the buyer in the contract of sale. The price of goods in both the cases would naturally differ.

In cases of disputes resulting from damage to or short delivery of goods, loss of goods etc. the fact which plays major role in deciding the liability and *locus standi* is the event of passing of property in the commodity from seller/shipper to the buyer/receiver. In other words, in cases, provided not agreed otherwise, the owner of the goods would bear the risk and damage.

Literature Review

Caveat Emptor

The term *Caveat emptor* (buyer beware) has been derived from a longer term. It is similar to some extent with "sold as is," or sold as is and where it is "basis. It serves the purpose that the buyer undertakes the risks of a product not meeting the usual standards and expectations knowingly. Or he opts for the purchase with knowledge that the product may have defects which may be apparent or not apparent at the time of sale. Prima facie, the principle works as an alert to the buyers that they may be at the jeopardy of having no remedy against

the seller in the event of the product not meeting the usual standards and expectations. It is assumed that buyers will inspect or ensure otherwise to their satisfaction the integrity of the product before executing the deal. However the buyers do not lose their usual protection against fraud or fraudulent acts and misrepresentation. In practice, under the principle of *caveat emptor*, if a defect appears after buying, which could have been detected before by a better inspection, would leave no room for any recourse to the seller for any compensation or return of the product. However, if the defect was concealed for the purpose of selling the product amounting to fraud or misrepresentation, recourse to the seller for return or compensation would be available. The buyers are made responsible to thoroughly research and inspect the commodity including experts' opinion if needed before accepting the proposal and finalizing the sale. If a defect appears after finalizing the sale, no guarantee would be available for return or compensation.

Caveat Venditor- New Form of Caveat Emptor

With the new trends of competition in commerce and credibility of the products, *caveat emptor* though, still applies but in a lenient and modified form. Sellers of goods voluntarily assume more responsibilities for integrity of their goods in the competitive markets. In order to compete the market, *caveat emptor* has been modified or substituted with new principle called *caveat venditor* meaning "let the seller beware". Under this principle, despite buyers' responsibilities to ensure the integrity of the goods, unlike *caveat emptor*, the sale is protected by a warranty (implied) of merchantability. In such sale, the buyer may have recourse for return of the goods back to the seller or seek compensation against defects under the purview of implied warranty. However, such warranty may be waived between the parties under a mutual agreement. This new principle has largely been substituted for *caveat emptor* in the commerce today.

Contract of Sale and Agreement to Sell

Sale of goods is governed by "The Sale of Goods Act 1930". The consequence of sale of goods is the transfer of property in the commodity from seller to the buyer (SGA 1930, Section 4(1)) which ultimately *prima facie* transfers the risks collaterally with the property in the similar manner (SGA 1930, Section 26). Sale of goods is affected by a contract (of sale) or an agreement to sell. The incidence of transfer of property in the goods marks and distinguishes between a contract of sale and agreement to sell (SGA 1930, Section 4(3)). The later converts to a contract of sale on the time or event (s) passing which is agreed upon by the parties for the purpose or any conditions agreed upon by the parties are duly fulfilled e.g. payment or tender of payment etc. Agreements to sell are generally made for future goods (SGA 1930, Section 2(6)). Delivery of goods takes place as intended and agreed upon in the contract. Such intentions are drawn from the terms of the contract executed by the parties. The parties are at liberty to agree

upon any terms and conditions they desire including time, place, manner and costs of delivering the subject goods.

Delivery

Delivery is defined as transfer of possession voluntarily from one person to another (SGA 1930, Section 2(2)). Delivery of goods is affected under the terms and conditions of the contract of sale or agreement to sell. Commission of any act under a contract between parties to the contract with respect to transferring possession of goods (from seller to the buyer) amounts to delivery. Delivery may be actual or constructive. Placing the goods in the control (possession) of the buyer or buyer's agent also amounts to delivery of the goods. For example A sells 500 bales of cotton in a container and gives its keys to the buyer who is free to deal with the commodity without any further action by the seller, amounts to actual delivery. However, if the goods are on a vehicle in transit and the title document is endorsed in the name of buyer under an agreement with intention to deliver the goods, the goods are deemed to be delivered to the buyer who becomes the bailor of goods in place of the seller. Such negotiations need to be authorized by the agreement and concurrence of the bailee. An endorsement on a negotiable BOL (bill of lading) (like order B/L) would serve the purpose (SGA 1930, Section 33).

Sale and Carriage by Sea- Contracts

In order to facilitate the international trade and commerce, variety of contracts are commonly in use. A contract of sale may contain the terms pertaining to delivery regarding costs and expenses in carriage of goods. For ease and convenience, provisions for carriage of goods maybe appended with contracts of sale of goods particularly in international trade. In order to elaborate the point and highlighting the effects of such arrangements, some of the popular contracts of the kind are discussed below.

Freight on Board or Free on Board (FOB)

It is a term embodied in a contract of sale of goods also termed "Freight on Board". It is a common terminology of INCOTERMS (International Commercial Terms) published by ICC (International Chamber of Commerce) and used in international commerce and trade. In a contract of sale when used, it determines the responsibility and liability of buyer and seller with regard to sea freight and transportation costs to the ship or to the buyer's warehouse. When used in sale, it means the goods will be shipped on board or freighted by and at the cost and risk of the seller and free to the buyer to the point mentioned. In other words, the cost as well as the risks of transportation to and by the ship to a particular point mentioned shall be borne by the seller. To this point and time, the buyer will not be responsible for the cost of transportation, loading including the risks associated therewith, on board the ship nominated by the receiver (buyer). The dividing line of the cost and risk remained at ship's rail until 2010, popularly used since the term "freight on board" or "FOB" originated since the time of small and sailing ships

where goods were loaded by hands or “passed over the rail” of the ships. Under the new INCOTERM 2010 rules ‘passing ship’s rail’ terminology has been substituted with “goods on board” in the rules of INCOTERM and exists no more. The change in the rules is attributed to container revolution and multimodal carriage or transportation of goods. Goods are said to be on board when entire consignment is on board. If during loading of the consignment, an accident occurs, the risk, unless otherwise agreed between the parties shall not transfer to the buyer.

The seller arranges the goods and their clearance for export formalities paying the duties etc. Generally, depending upon the terms of the sale, once the goods are shipped on board, position changes and consignee substitutes for the shipper/seller in way of costs if any incurred thereafter, say any repair, General Average contributions, salvage costs etc. and risks associated therewith. Prior to this point and time, the buyer will not be responsible for cost of transportation, loading of goods and risks associated therewith, on board ship arranged/nominated by or on behalf of receiver/buyer.

The term (FOB) used with different notations determines the divisions of responsibilities and liabilities between a buyer and a seller with regards to cost and risks. For example “FOB delivered” specifies that the agreed price for goods includes conveyance of goods till the point of delivery at the Seller's expense and nothing beyond it. It is only a question of cost and risks to the point agreed between the parties to the contract and not dependent upon whether delivery to the buyer or his agent effected or not. "FOB origin" indicates that the buyer takes possession of the goods at their origin i.e. warehouse or factory and the seller bears the shipping costs until the goods are on board. The buyer assumes the risks associated therewith after the goods leaving their origin (factory or seller's premises). "FOB destination" designates that the seller remains liable for cost and risk until the goods reach their destination. This term is similar to “FOB delivered” but more clear and unambiguous than it.

It should be noted that such contracts determine point in time and division of responsibilities including costs and passing of risks between the parties. In case of an accident while goods are in transit, it is one of the most important questions for courts to decide that who was assuming the risk at the time when accident occurred.

FOB Sale and Shipping Documents

Shipping documents like freight invoice, BOL (bill of lading), or similar documents used in consequence of a sale for carriage of goods may include additional terms with the notion FOB. For example:

'FOB Origin, Freight Prepaid', included in price and seller/shipper pays the shipping cost with buyer assuming responsibility and risk at origin (factory or seller's warehouse).

'FOB Origin, Freight Collect', the buyer pays freight and associated costs of shipping while assuming responsibility and risks for the goods at origin (factory or seller's warehouse).

'FOB Origin, Freight Prepaid, & Charged Back', the shipping cost is added to freight bill/invoice to be paid by the buyer. The buyer assumes the responsibility and risks for the goods at the origin (factory or seller's warehouse).

'FOB Destination, Freight Prepaid', the entire shipping costs are included in the price of the goods and paid by the seller/shipper until the goods arrive at the destination agreed between the parties to the contract (port of destination or buyer's warehouse).

'FOB Destination, Freight Collect', corresponds to freighting buyer's account along with associated charges in shipping are paid at the time of delivery of goods. It exonerates the buyer, in absence of any contract to the contrary from any responsibility for the goods until goods reaching the port of destination agreed upon by parties to the contract (port of destination or buyer's warehouse).

'FOB Destination, Freight Prepaid, & Charged Back', the sale price includes the costs and freight and shipping charges agreed between the parties. Seller accepts responsibility for freighting up to the point of delivery of the goods at agreed point or destination and difference if any is settled between the seller and the buyer.

'FOB Destination, Freight Collect, and Allowed', seller includes the freight to the invoice, and the buyer deducts the freight charges from the invoice. Thus the invoice sent from seller/shipper to the buyer includes the freight charges which the shipper formerly paid. The seller assumes the responsibility for the goods until the point of delivery.

Difference between CIF and FOB

Both, CIF (Cost, Insurance, and Freight) and FOB (Freight on Board or Free on Board) are international terminologies used in contracts of sale of goods and affreightment. In CIF agreements, the costs of transporting goods, insurance, freight and other costs associated therewith are paid by the seller till the time, buyer takes possession of goods.

Contract of Carriage Prevails on Contract of Sale

Contracts of carriage made in performance of a contract of sale are made with carrier not being a party to the contract of sale. A sale contract may provide for delivery of goods and their conveyance to the buyer but such terms are not binding on the carrier entering into a contract of carriage with the shipper for carriage of goods. At times buyers erroneously may assume strict compliance with the contract of sale with lesser regard to the contract of carriage. In circumstances where terms of carriage laid down in a relevant B/L (bill of lading) or other document forming a carriage contract differ from the terms of a contract of sale for the same goods, the former shall supersede. In case of a sale on FOB basis, it was held that on loading of the goods, risk transfers to the buyer from seller but not the property in goods (*Starlight Exports Ltd /Starlight Electronics Company Ltd v CTO (HK) Ltd, 2004*).

Facts of the case decided by the High Court of Hong Kong, Special Administration Region are that three freight collect bills of lading were issued by the carrier inserted with "To Order of Shipper" who was the sellers of goods on FOB basis. On request of the buyer to meet finances, new post-dated bills akin to old ones were issued with dates of goods 'Shipped on Board. The buyer defaulted payment of price for goods. The shipper/Seller during transit instructed the carrier to return the goods back to Hong Kong. The Carrier's agent at the port of destination released the goods without production of old or new bills of lading. The Carrier/Defendant contended that the sale being FOB basis, property in goods transferred to the buyer on their shipment from Hong Kong i.e. goods delivered to the carrier or his agent for carriage to the buyer and the defendant was obliged to deliver the goods even without production of the B/L.

Reyes J. in his judgment held that 'FOB' terms in sale contracts, in the circumstances, transferred only the risk but not the property in goods or title to the buyer. Under a bill of lading inserted 'To Order of the Shipper' under D/P (Document against Payment) at sight', the Seller/Plaintiff reserved the right to the delivery/disposal of the goods.

Analysis

Under the above mentioned sale and carriage arrangements, the original contract existed between a seller and a buyer of the goods. The goods purchased were loaded on board free of cost for loading and other associated expenses to the buyer under a contract of carriage embodied in the relevant bills of lading issued on demand of the shipper/seller of goods. The later contract embodied in the said bills of lading, a contract of affreightment was between a seller/shipper and the carrier without privity of the buyer. Even nomination of the ship by the buyer would not affect the title to goods until the relevant bill of lading is properly endorsed and presented in exchange for the goods described in it. The bills of lading on face read "To Order of the Shipper' under D/P at sight". The bills of

lading though executed but the 'Original' was not released to the buyer/consignee due to non-payment of price for the goods. Bills of lading neither endorsed nor the 'original' released to the buyer/consignee, property in goods did not pass to the buyer/consignee. In case the bills of lading were endorsed to the buyer/consignee unqualified, the property in the goods should have passed to the endorsee immediately. Furthermore, the seller/shipper continued with his rights in goods for dealing with them including delivery and disposal at his discretion until the property in goods transfers to the buyer. Exercising the right, the seller/shipper rightly instructed the carrier/bailee to return the goods to Hong Kong. The carrier misinterpreting the FOB terms without having regard to the insertions in the bills of lading, delivered the goods to the buyer who defaulted in payment of price to the seller. The delivery was made without presentation of the original B/L.

The said bills of lading are deemed to be 'order bills of lading' in contrast to a 'straight bill of lading' where goods are deliverable to the named person and a 'bearer bill' under which delivery of goods is entitled to the one holding it rightfully. In case of an order bill of lading, the goods described in it are required to be delivered to a named person or his order to' (the named person) on production of the original bill of lading.

Brown L.J in *Sanders Brothers v Maclean & Co.* (1883) describes a bill of lading as "a key in the hands of a rightful owner". According to his judgment:

Goods at sea in the custody and control of a carrier as a bailee may require to be negotiated. In consequence of commercial negotiation they may require to be delivered to their new buyer while in transit. Such goods while on board in custody/control of a carrier to be delivered to the buyer or his endorsee are incapable of physical delivery while they are in transit. In order to facilitate trade and commerce and avoiding undue costs and expenses of physical delivery, a bill of lading equates the property and risks associated therewith for the goods described in it. This position is universally recognized. Thus a B/L (bill of lading) is legally regarded as representing the goods described in it as a symbol of the goods and negotiating a bill of lading rightfully for consideration amounts to negotiating the goods. A bill of lading may be negotiated by endorsement which consequently transfers property in goods to the endorsee and delivery of the B/L operates as constructive delivery of the rights to the endorsee as bailor. However, property in goods from seller to the buyer generally passes at a point and time as intended by the parties in their agreement. Property in goods passes in similar manner as it passes by an actual delivery of the goods. The bill of lading rightfully endorsed remains symbolic title for endorsee to full possession of the goods there of. Symbolic title to goods in the form of a bill of lading continues and remains in force until delivery of the cargo has been made completely to the rightful claimant under the B/L or similar document. With the complete ownership of the goods, it also includes all the rights created by the contract of affreightment enforceable under the contract between a shipper and the carrier/ship-owner. Thus according to the learned judge "it is a key which in the hands of a rightful owner is intended

to unlock the door of the warehouse, floating or fixed, in which the goods may chance to be”.

Passing of Property in Goods does not Guarantee Delivery

Despite prima facie, the property in goods passing from seller to the buyer under the terms of a contract of carriage, the terms of the sale prevail making the goods not deliverable to the consignee/receiver. Situations may arise in consequences of default in payment of price (after passing the period of credit if any) or the buyer becoming insolvent. An unpaid seller may exercise his rights of lien (possessory lien) or *stoppage in transitu* or similar remedies available under law. In such cases, it has been held that under a contract of carriage on FOB basis, with “To Order of the Shipper” bills of lading (not endorsed to the consignee), under “D/P at sight” terms, the shipper reserved the right to the disposal of the property in the goods. It was held further that the “FOB, (Free on Board)” terms in the circumstances only transferred the risk (from seller to the buyer) but not the title of the goods to the buyer.

Conclusion

Commercial activities necessarily require simplicity in unambiguous contracts with knowledge and awareness of international terminology. Contracts of sale containing provisions for delivery and carriage of goods to destination must be dealt with care and caution. Shipping documents forming contracts of affreightment by sea made with carriers prevail on terms of the contracts of sale and interpreted in accordance with terms and conditions embodied therein. Prima facie passing of property from seller to buyer does not connote delivery in legal sense or passing of property in the goods. Due regard shall be had to the laws of bailment while goods are in transit and in possession of carrier/bailee. Risk passes with property but property may not pass necessarily with the risk. Property in goods passes as per agreement between the parties despite risk passing earlier. The rights of unpaid seller prevail in accordance with the prevalent laws prior to delivery or while in transit.

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