THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

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CHAPTER ONE

CONTRACTUAL RELATIONSHIPS IN TRADE AND CARRIAGE

INTRODUCTION

The main focus of the first part of this book is the law concerning the import and export of goods, with specific reference, to arrangements for the transportation of goods by sea, with specific reference to the peculiarities and characteristics of English International Trade Law.

Emphasis is laid on the designation, "English." This is because, as will be demonstrated below, despite the fact that much of international commerce trades subject to English Law and jurisdiction, a significant amount of trade is carried on subject to the law and jurisdiction of civil law systems. These systems have a very different take on the respective rights and duties of the parties to trade transactions to that taken by common law legal systems which have adopted variations of the English Legal System.

International Trade involves a number of inter-related activities. The starting point for any trade transaction is the actual sale and purchase of goods by and from people and organisations in different countries. However, in order to classify the trade as international rather than domestic a further ingredient is essential. The mere purchase of goods in a country by a foreigner remains a domestic sale and is normally governed entirely by the law of the country where the transaction takes place. International Trade by contrast, involves the transport of goods from one country to another. Thus a second transaction, namely the arrangement for the transport of the goods, is an integral part of the agreement. Arrangements also have to be made for the handling of cargo from domestic land carriers to the international carrier and then on arrival at the port of destination, to domestic land carriers for delivery at final destination. It is likely that storage facilities will be required at a number of stages during this process. The goods will normally be insured against loss or damage during carriage and it is usual for the banking system to finance such transactions. Each of these related activities is discussed in due course, in this book. However, this remainder of this chapter seeks to provide an over view of the issues and terminology involved in English International Trade law.

This focus of the second part of this book is primarily concerned with the relationship between shipowners and charterers created by the contract of hire of the vessel (the charter party) and their respective liabilities to the owners of goods carried, due to contracts arising out of the contract of carriage and implied by statute and common law by virtue of The Carriage Of Goods by Sea Act 1971, otherwise knows as The Hague Visby Rules, The Carriage Of Goods by Sea Act 1992 and the so called common law Brandt v Liverpool contract. Not all contracts for the carriage of goods by sea involve a charterparty. Shipowners do operate vessels themselves and make contracts of carriage directly with shippers. However, most of the time vessels are operated by charterers who make the contract of carriage with the shipper. It is important therefore to consider the interaction between the contract of carriage and the contract in the charterparty. These two contracts also have to be considered in relation to the contract of carriage evidenced by documents such as the bill of lading.

The central feature of both trade and carriage is that relationships are defined in contracts by the parties. For this reason it is important to understand the core elements of the Law of Contract and Agency as practised in England and Wales. Many of the relationships discussed however may lack the necessary nexus to establish a contract. These relationships may be governed by either the Law of Bailment or the Law of Tort and therefore is it useful also to consider the core elements of these legal rules.

CHAPTER ONE

TERMINOLOGY USED IN INTERNATIONAL TRADE

A major problem for anyone approaching the law or practice of international trade is the number of technical and legal terms involved. A number of short definitions are provided below, to facilitate further study and understanding.

action. a cause of action is the legal grounds for making a civil claim such as breach of bailment duties, breach of contract or tortious civil wrong– an action is the pursuit of a civil claim.

action in rem. action against a vessel (the thing) which becomes security for an award of damages.

action in personam. action against the person.

actual fault *(or privity).* normally deliberate act or intended act of shipowner/charterer as compared to a negligent act of the crew. Important regarding limitation of liability under statute.

advance freight. non-recoverable freight payable before shipment, usually on signing bill of lading.

affreightment. contract of – a contract for the carriage of goods by sea.

afloat. appended to cif contracts (cif afloat) where the cargo purchased is already on board a vessel, making it clear that the shipment duties have already been discharged.

agent. the alter ego of the commissioner (principal), a person who makes contracts on behalf of a principal, in exchange for commission fees. The agent is party to the agency contract but not a party to the sales contract which is made between the principal and the third party client. The agent can only act within the confines of the authority given to him by the principal. Note that a sale or return trader, such as an estate agent, who deducts a commission on any goods sold, is not an agent as far as the law is concerned.

arbitration. private court.

arbitrator. private judge.

arrived ship. a vessel which has actually arrived in port, dock or berth, giving rise to a right to give notice of arrival, thereby triggering shipper's responsibilities to load and the commencement of laytime.

assurance. a form of insurance protection for life and personal injury. see also P&I cover.

assured. holder of an insurance policy.

back freight. charges for cargo care made by the shipowner against the shipper owner because the consignee has failed to collect the cargo, including cost of returning cargo to shipper.

bailment. the looking after of goods by one person on behalf of another. Defined in **Coggs v Barnard** under six categories, namely :- 1) loan or hire, 2) contractual storage, 3) lost and then found by stranger, 4) gratuitous favour, 5) voluntary following on from some other transaction 6) as a necessary part of carrying out some other transaction. A sub-bailment is when a bailor sub-bails the goods to a third person.

bailor. the owner of goods bailed to a bailee. The bailor may assign his bailment rights to a third party who then becomes a sub-bailor.

bailee. the person to whom goods are bailed by a bailor The bailee may sub-bail the goods to a sub-bailee.

Baltime. standard form charterparty.

barratry. deliberate wrongful acts of master and crew prejudicing the owner's interest in the safety of the vessel.

bill of exchange. a negotiable money bill, repayable either on sight or on a day certain, used by a seller to get funds in, at a discounted rate, pending repayment by the buyer of goods. A way of financing international trade transactions and solving cash flow problems.

bill of lading. 1) receipt document given to a shipper by a carrier, documenting date goods loaded / received for shipment, on board a specified vessel, from port of shipment to destination port, which can be transferred to a consignee / endorsee and subsequently exchanged for the cargo. 2) form of negotiable instrument / document of title or at least the key to taking possession of goods.3) The contract of carriage, by virtue of s2 Carriage of Goods by Sea Act 1992, as far as subsequent lawful holders of the bill of lading are concerned, but not the contract of carriage for the original shipper, s5 COGSA 1992. A bill of lading may be prefixed as

through. multi-modal shipping document covering land and sea transport.
clean. indicates goods loaded in apparent good order and condition.
claused. records pre-shipment defects in the cargo identified by the carrier before issue.
received for shipment. (mates receipt) gives no indication of loading.
s**hipped**. indicates that goods have been loaded on board the vessel.

buyer. person purchasing the goods (often the consignee of goods and endorsee / indorsee of bill of lading).

c.f.r. cost and freight to named port of destination (c&f) contract for the international sale of goods**.**

c.i.f. cost, insurance, freight – naming port of destination - contract for the international sale of goods **-** package deal covering the cost of goods, the insurance premium and carriage costs all of which are then paid for and arranged by the seller / shipper. (cif/cip – insurance policy to cover transit by land and sea to final destination)

c.i.p. carriage, insurance paid (to named destination) - contract for the international sale of goods.

c.p.t. carriage paid to (named destination) - contract for the international sale of goods.

cancelling clause. a clause which makes a term of a contract into a condition.

carrier. person who actually carries goods (including domestic and international carriers)

Centrocon. standard form voyage charterparty

cesser clause. a provision which brings a party's contractual liability to an end at a particular point in time. Liability for previous duties under the contract is unaffected. Thus "shipper's liability to cease on loading – all post shipment liability to consignee's account."

charterer. hiror of a vessel under a charterparty.

charterparty. contract for the hire of a vessel. The vessel may be hired for a voyage (Voyage Charterparty) or for a period of time (Time Charterparty). The hire may be simple, that is to say the shipowner remains in control of the vessel and retains responsibility for it or the hire may be by demise or bare boat, whereby the charterer becomes the temporary owner of the vessel and therefore responsible for it. Standard form contracts such as BALTIME, CENTROCON, GENCON, GENTIME, GENVOY, NYPE, SHELLTIME, SHELLVOY, SUPPLYTIME etc.

choice of law clause. provision in a contract regarding the law of which country will apply to a dispute arising out of a contract, e.g. "subject to English Law".

common carrier. operator of a general ship – on a regular route or from anywhere to anywhere – cargo unrestricted, who by common law, in the absence of exclusion clauses is subject to strict duties of cargo care and liability, excepting a) Act of God, b) King's Enemies and c) Inherent Vice.

condition. a term of a contract, which if broken entitles the innocent party to bring the contract to an end and claim damages for any loss suffered in consequence of the breach.

consideration. something of economic value, for example money, goods, services or the giving up of legal rights, given or promised in exchange for something of like economic value under a contract.

consignee. person receiving the goods – usually the buyer or his agent.

consignor : another word for the shipper.

contract : legally binding agreement between offeror and offeree. **Offord v Davies.**

contract of carriage : a contract of affreightment. May be contained in a bill of lading but normally proceeds the bill of lading. A charterparty is a contract of carriage.

contra preferentem. rule of construction giving the benefit of the doubt, in the case of ambiguity as to the meaning of an exemption, exclusion or limitation clause, to the claimant.

d.a.f. delivered at frontier (named place) - contract for the international sale of goods **.**

d.e.s. delivered ex ship (named port of destination) – contract for the international sale of goods.

d.e.q. delivered ex quay (named port of destination) – contract for the international sale of goods.

d.d.u. delivered duty unpaid (named place of destination) – contract for the international sale of goods.

d.d.p. delivered duty paid (named place of destination) - contract for the international sale of goods.

dangerous good. any goods, particularly those identified by statute, whose nature must be disclosed by the shipper to the carrier before shipment. Shipper will be held responsible for damages caused due to a failure to disclose.

dead freight. damages for failing to load a full and complete cargo.

delivery clause. provision for the delivery of a vessel under a charterparty. A condition.

deviation. deliberate, intentional change of voyage – gives rise to a breach of contract if not permitted by a liberty to deviate clause and not excused by law in order to save life or to protect the vessel, cargo or crew.

demurrage : liquidated damages clause in a charterparty in respect of additional time taken by charterer to load or discharge a vessel, requiring charterer to reimburse the shipowner. Also used in a general sense in respect of additional charges for cargo care and delay caused by cargo consignors and consignees, requiring reimbursement to be made to the carrier.

dispatch money. sum payable to a charterer under a voyage charterparty for loading a vessel more quickly than required.

documentary credit. credit facility provided to buyer for the international purchase of goods where the payment is made directly to the seller by the bank or its agents in exchange for shipping documents including inter alia, bill of lading, receipt and insurance policy where appropriate.

dunnage. matting etc supplied by shipowner to pack between cargo for safety purposes

e.x.w. – contract for the international sale of goods **-**

e.t.a. expected time of arrival of vessel semble "expected ready to load". vessel may be eventually be delayed and arrive late without consequence : but the expectation must have been honest and genuine and reasonably held.

employment and indemnity – E&I. provision requiring charterer to compensate the shipowner for losses incurred by the ship owner consequent on orders of employment of the vessel by the charterer and orders in respect of the issuing of bills of lading.

endorsee. the holder of the bill of lading in due course, normally the buyer or his agent. The endorsee is usually the buyer. The endorsee may be named in the bill of lading / sea way bill – or may simply be the person lawfully in possession of the bill.

endorsor. the first holder of the bill of lading, normally the seller / shipper. The endorsor sends the bill of lading to the buyer / endorsee for acceptance and payment.

exception clause. limits scope of responsibility as per Art IV Hague Visby Rules a)-s)

exclusion clause. provision excluding liability for performance of contractual duties and or damage due to a failure to perform as specified.

exemption clause. provision restricting scope of contractual undertakings and liability for specified events.

f.a.s. free alongside ship (named port of shipment) – contract for the international sale of goods.

f.c.a. free carrier (named place where carriage commences – semble fot / for – free on truck or free on rail at a specified place) – contract for the international sale of goods **-**

f.o.b. free on board (named port of shipment) - a sales contract whereby the buyer pays the seller for the cost of the goods only. The buyer procures his own insurance and is responsible for arranging the contract of carriage and payment of freight – the seller delivers the goods to the ship named by the buyer.

flotsam. goods floating on the sea, mostly after a casualty, e.g. containers.

force majeure. provision which expressly excludes liability for events occurring after the contract is formed, which are beyond the control of the parties to the contract. May bring a contract to an end. Prevents the common law rules of frustration coming into play and replaces them with a contractual version.

forwarding agent. a person who arranges contracts of carriage for others.

freight. the cost of carrying goods. Often used to describe goods being carried commercially. Freight may be a) payable on delivery b) lump sum freight c) advance freight d) back freight e) pro-rata f) dead freight.

frustration. an unexpected event, which without the fault of either party, deprives a contract of economic purpose, thereby enabling both parties to withdraw from future performance without liability in costs or damages to the other party.

GENCON –standard form voyage charterparty contract.

general average. contribution levied against cargo owners to cover additional costs incurred by a sea carrier overcoming unexpected hazards encountered during a voyage.

general average sacrifice. goods jettisoned overboard to save the vessel and cargo. The carrier and cargo owners share the cost of the lost cargo between them on an average basis.

guarantor. person who guarantees payment in the event of default by a person who undertakes a loan or contract for goods or services. The guarantor pays the third party and then seeks to recover the money under the guarantee.

guarantee. a promise to pay a third party for defaults of the person taking out the guarantee to fulfil the obligations covered by the guarantee.

Hague Rules – Hague Visby Rules : Carriage of Goods By Sea Act 1971 (UK) – set of rules establishing minimum standards of cargo care for sea carriers ; duties of shippers : provisions for the exclusion and limitation of liability by the carrier.

Hamburg Rules. A United Nations version of the Hague and Hague Visby Rules – with the same purpose but setting different standards.

hire. the monies paid to time charter a vessel.

indemnity. a promise to indemnify a person for losses. May be a contract of indemnity or insurance or a collateral contract, used to induce someone to undertake a risk, for example to ship suspect goods.

Incoterms. Standard term contracts for the international sale of goods developed by the International Chamber of Commerce (ICC) licensed to traders. Current edition is Incoterms 2000

indorsee. another way of spelling endorsee.

indorsor. another way of spelling endorsor.

inherent vice. a defect in a cargo present before loading which causes loss or damage to the cargo – embraces bad packaging. Responsibility for loss due to inherent vice vests in the shipper.

injunction. court order forbidding specific conduct. Mareva Injunction or freeing order prevents assets being moved out of the country pending the outcome of a legal action. An Anton Pillar order or seizure order forces the disclosure of information and documents to assist the prosecution of a claim.

insurance. a contract of indemnity against loss or damage to insured property due to risks covered by the insurance policy

insurance broker. middleman who acts as agent of assured and arranges the contract of insurance with an underwriter.

insurance policy. document containing the terms and conditions of a contract of insurance.

jetsam. goods cast away at sea to lighten a vessel which sink to the bottom of the sea – may become general average sacrifice.

jettison. goods cast way either because they prove to be dangerous to the vessel and crew during the voyage and no precautions have been made for safe carriage because the shipper did not declare the nature of the goods, or in order to lighten and save the vessel in the event of danger. The latter may be general average sacrifice.

jurisdiction. the right of a court or arbitrator to hear disputes. A choice of jurisdiction provision in a contract is often expressed as "subject to English (Law and) Jurisdiction" the latter giving the parties the right to refer the dispute to an English Court,

laydays & laytime. Period of time allocated for loading and discharging a vessel under a voyage charterparty.

leading marks. principal identification marks put on cargo by shipper before dispatch.

lien. possessory lien **-** a right to withhold delivery of goods pending payment for services or other losses incurred by a bailee on behalf of the owner of the goods. Maritime Lien – priority claim over a vessel for payment of maritime dues. Statutory Lien under s21 / 22 Supreme Court Act 1981 – priority claim over vessel or sistership for payment of specified maritime dues

limitation of action. time bar in a contract or under statute for the commencement of legal action.

limitation of liability. provision in a contract or under statute which places a cap on the global amount recoverable by legal action. The privilege of limitation under statute is subject to compliance with minimum standards such as absence of actual fault or privity – intent – unseaworthiness etc.

Lloyds of London. organisation which, provides facilities for underwriters to do insurance business with clients and regulates the business of its members.

loaded. appended to standard term contracts of sale to indicate that the seller is responsible for loading the goods.

load line. Plimsole Line – line on the outside hull of a vessel indicating the maximum permitted load for a vessel. It is a criminal offence for the load line to become submerged.

lump sum freight. sum of freight payable irrespective of how much cargo is loaded or delivered.

marine insurance policy. insurance policy on goods or a vessel involved in a maritime venture.

merchant's delivery order. an order given by a merchant / seller to a buyer requesting a carrier to deliver specified cargo to a named person or the holder of the delivery order.

NYPE. New York Product Exchange standard form charterparty.

nautical assessors. maritime experts used by the court to guide a judge on matters of good maritime practice.

negotiable bill of lading. a bill of lading requiring delivery of goods **"to order".**

New Jason Clause. clause common in the US ensuring general average contribution payable even though the cause of the loss was negligence of the crew.

no cure no pay. provision in salvage contracts whereby reward is dependent upon success of the salvage operation.

non-negotiable bill of lading. a bill of lading requiring delivery of goods to **"*named person*".**

notice. usually of arrival of vessel at port and readiness to load / discharge.

off hire clause. provision in a time charterparty specifying when hire will not be payable.

P&I Clubs. Associations of shipowners formed to provide insurance cover for risks not covered by ordinary insurance policies, in particular the ¾ running down clause in ship policies, marine pollution and personal injury claims.

passage money. fare charged to passengers.

penalty clause. a misnomer – in actual fact it is a liquidated damages clause specifying how much damages must be paid for breaches of particular provisions of the contract. The amount must not be a penalty and must be a reasonable estimate of potential loss, e.g. demurrage.

perils of the sea. loss due to extra-ordinary perils encountered during a voyage, beyond the control of the master and crew. Does not cover loss due to negligence. It is normal to exclude liability for perils of the sea. Loss due to perils of the sea are recoverable under a marine insurance policy. The ordinary action of wind and waves is not a peril of the sea. The vessel should be sufficiently seaworthy to withstand these.

preliminary act. a report that must be registered with Admiralty notifying facts about a maritime casualty within 2 months of the incident.

preliminary voyage. voyage from, the place where a vessel is located when the charterparty contract is made, to the port of loading. Contrast contract voyage, from port of loading, to port of discharge.

privity of contract. being party to a contract.

privy. having knowledge of something or of a state of affairs as in "actual fault or privity".

pro rata freight. freight payable proportionate to the length of a voyage – relevant where goods are delivered to a different port to that originally specified.

representation. a statement which induces a person to enter into a contract. A misrepresentation is a false representation.

safe port. a port that a vessel can safely enter into, use and depart from whilst always remaining afloat. The port must be a) politically safe – primary obligation - prospective safety subject to secondary obligation to renominate if time permits, b) physically safe and c) meteorologically safe to use. Liability is provided against the charterer for damage due to breach by the E&I Clause. See also ice bound port provisions but note novus actus interveniens means master may chose to override and waive the provision.

salvage. service of saving a vessel. salvage reward is monies payable for saving the vessel. Salvage is governed by Admiralty – contrast a salvage contract eg Lloyd's Open Form (LOF)

sea way bill. a document given to a shipper by a carrier, documenting date goods loaded / received for shipment, on board a specified vessel, from port of shipment to destination port, which can be transferred to a named individual who can subsequently exchange the bill for the cargo.

seaworthiness. the ability of a vessel to survive the normal vicissitudes of the sea for the voyage undertaken including the ability to carry the specified cargo safely. It is an in-nominate term.

seller. the person selling the goods to the buyer – usually also the owner of the goods or someone acting as an agent of the seller. The seller is often the consignor of goods and indorsor of the bill of lading.

shipper. the person who ships the goods. In both c.i.f. and f.o.b. contracts this will also be the seller or the seller's agent.

ship's delivery order. a document issued by a carrier in exchange for a bill of lading. Used where the bill of lading holder needs to sub-divide the bill of lading into smaller quantities for onward sale of portions of a bulk cargo to a number of buyers.

shipowner. the owner of a vessel, but not necessarily the carrier of goods.

stevedore. persons who load and discharge goods from vessels (dockers)

stoppage in transit. the right of an unpaid seller to retake possession of the goods.

stowed. and stowed and trimmed – appended to standard terms sales contracts to specify extent of shipper's responsibility for loading and stowage.

strike clause. a provision excluding liability for loss arising out of a strike, usually by dockers.

THC. terminal handling charges.

term. the obligations undertaken by the parties to a contract – conditions and warranties.

towage contract. a contract to tow a vessel. Contrast non-voluntary towage for salvage purposes.

trust receipt. document signed by buyer in order to take possession of a bill of lading from a bank without immediately making repayment to the bank of a documentary credit.

underwriter. insurer of risks – insurance company etc.

vicarious liability. legal responsibility and liability of an employer for the wrongful acts of its employees.

waiver. an express or implied abrogation of strict legal rights, which prevents the waiveror from subsequently avoiding the contract or asserting legal rights which have been waived.

war clause. provision in charterparty regarding right of vessel to enter a war zone. Also a marine insurance policy covering war risks.

warranty. a term of a contract which if broken gives the innocent party a right to compensation for any loss incurred due to the breach.

withdrawal clause. provision for withdrawing a vessel for non payment of hire. see also anti-technicality clause provides 48 hours to remedy non payment, otherwise withdrawal permitted.

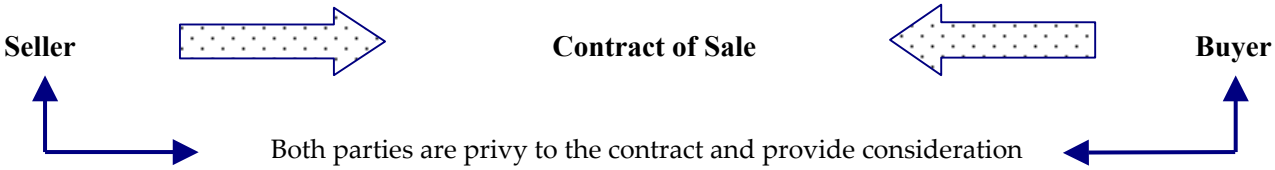
THE CONTEXT OF INTERNATIONAL TRADE

It is important to have a clear picture of the personalities that may be involved in international trade agreements. The following diagrams introduce the principal personalities involved in domestic and international contracts and some of the problems for which Trade Law has to provide solutions.

While domestic contracts can take a number of different forms, there is little that cannot be dealt with by the application of the general principles of contract and commercial law. By contrast, the logistics of a world market with buyers and sellers situated in disparate locations of the globe mean that personal contact is rarely possible or even desirable. A system that reassures each party of the bona fides of the other is essential and consequently complicates contractual arrangements. The large number and variety of persons involved can also produce problems regarding both privity of contract and the doctrine of consideration, essential elements of contracts if they are to be upheld by the courts in the UK.

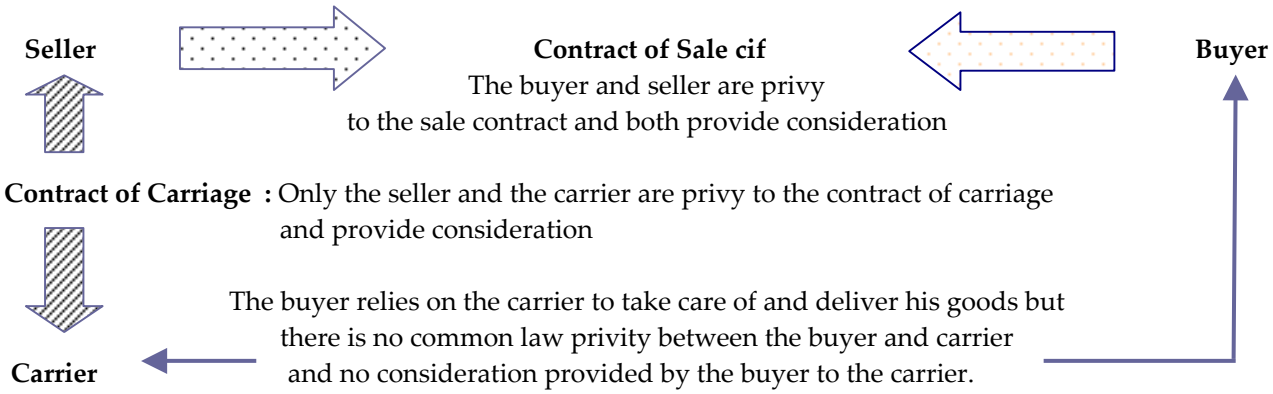
It is a peculiarity of English and related common law systems that an agreement will only be enforceable as between the parties to a contract.[1] Both parties must be privy to the contract. Agreements for the benefit of a third party are not enforceable by the third party beneficiary. The actual parties to the contract have difficulty enforcing the contract because the failure to perform the contract does not lead to loss on their behalf and so there is no loss to claim damages for, as illustrated by the House of Lords decision in **Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd.**[2] The Doctrine of Consideration is also a requirement of English law. The Doctrine requires that the parties to an enforceable contract will have committed themselves to reciprocal promises, to provide something of value to the other party, be it goods, services or financial payment, as in **Tweedle v Atkinson.**[3] A gratuitous promise is not therefore enforceable by the English courts unless some special measures are taken such as the creation of a contract under seal or a deed. Such special measures are not used in day to day commercial transactions.

Simple domestic contracts.



Since the only parties involved in this contract are, the buyer and the seller, both parties are privy to the contract and both parties provide consideration for all aspects of the agreement. The seller provides the goods. The buyer pays the price. Terms of the contract will determine whether the buyer collects the goods or the seller delivers the goods to the buyer.

International Sale where the seller provides transport as part of the sale's agreement.



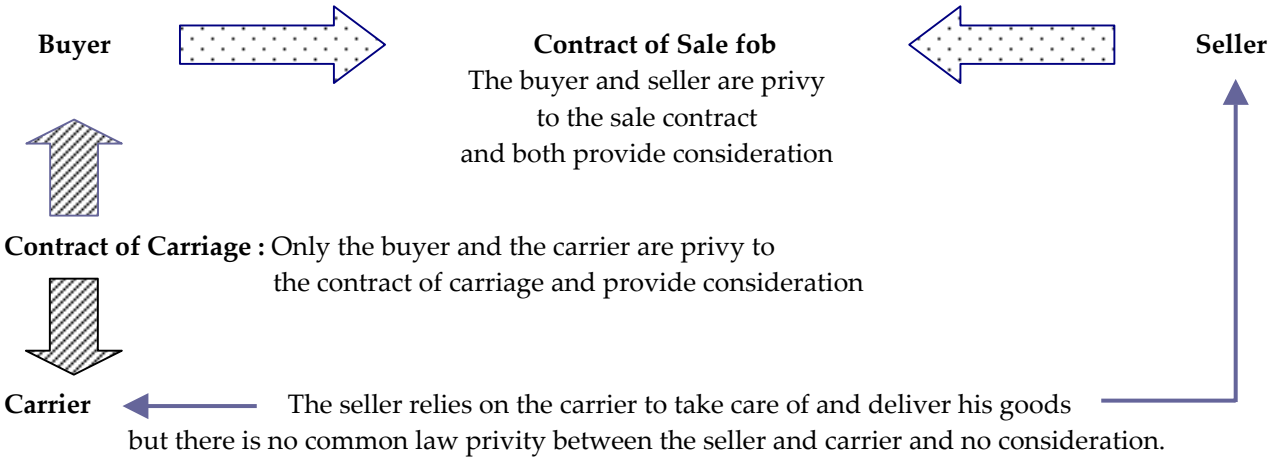
1 The Contracts (Rights of Third Parties) Act 1999 provides some measure of protection for third party beneficiaries providing the requirements of the Act are met. The Act expressly excludes contracts for the carriage of goods by sea from its scope of coverage.

2 **Dunlop Pneumatic Tyre Co Ltd v Selfridge Co Ltd** [1919] AC 847.

3 **Tweedle v Atkinson** (1861) 1 B&S 393.

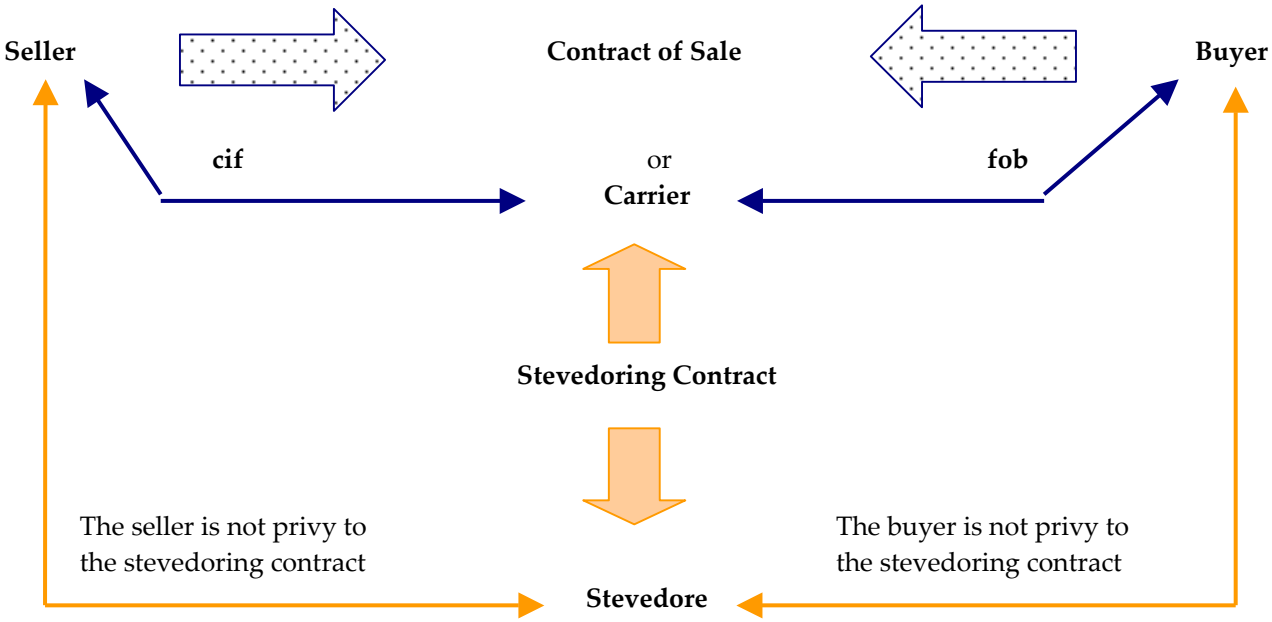
It is apparent from this diagram that there is a potential legal problem with the relationship between the buyer and the carrier. Since the buyer is not privy to the contract he has no right to sue the carrier in contract under traditional common law rules, for any loss or damage to his cargo. Since the buyer does not pay the carrier for his services the lack of consideration on his part also creates a problem if he wishes to make a claim for breach of contract. Special rules have been created both at common law and by statute to address these problems in international trade.

International Sale where the buyer arranges his own transport as part of the sale's agreement.



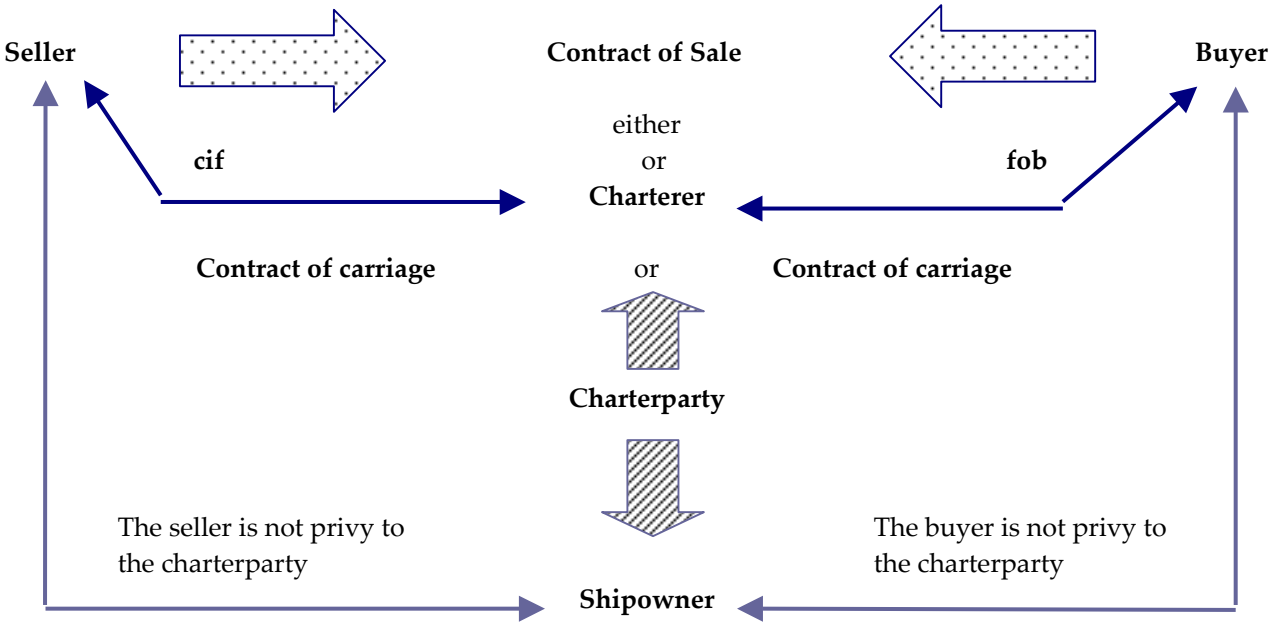
It is apparent from this diagram that there is a legal problem with the relationship between the seller and the carrier. Since the seller is not privy to the contract he has no right to sue the carrier in contract under traditional common law rules, for any loss or damage to his cargo. Since the seller does not pay the carrier for his services the lack of consideration on his part also creates a problem if he wishes to make a claim for breach of contract. Special rules have been created to address these problems in international trade.

Contracts of loading and discharge with independent contractors (Stevedoring contracts)



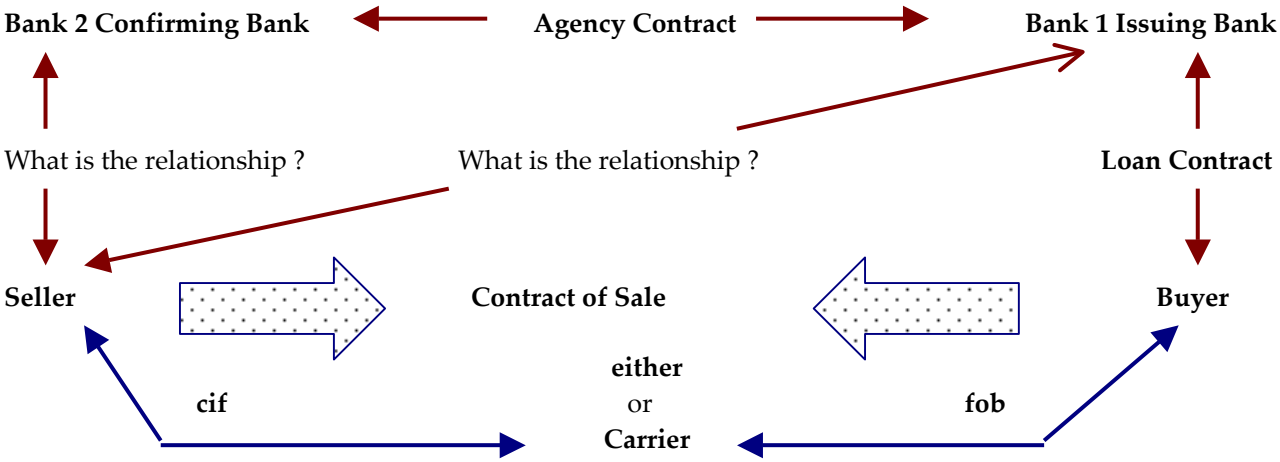
Neither the seller nor the buyer can sue stevedores for breach of contract under basic common law principles for damage caused to cargo during loading and discharge since neither is privy to the stevedoring contract and neither of them provides consideration. By contrast, stevedores are exposed to liability in tort for damage to cargo and cannot avail themselves of exclusion clauses in the absence of a collateral agency contract or by inheriting contractual rights under The Contracts (Rights of Third Parties) Act 1999

Contract of sale where the carrying vessel is chartered from a shipowner (Charterparties)



Where the contract of carriage is made with the charterer, under basic common law principles, neither the seller nor the buyer can sue the shipowner, for damage caused to cargo during carriage, since neither is privy to the charterparty contract and neither of them provides the shipowner with consideration.

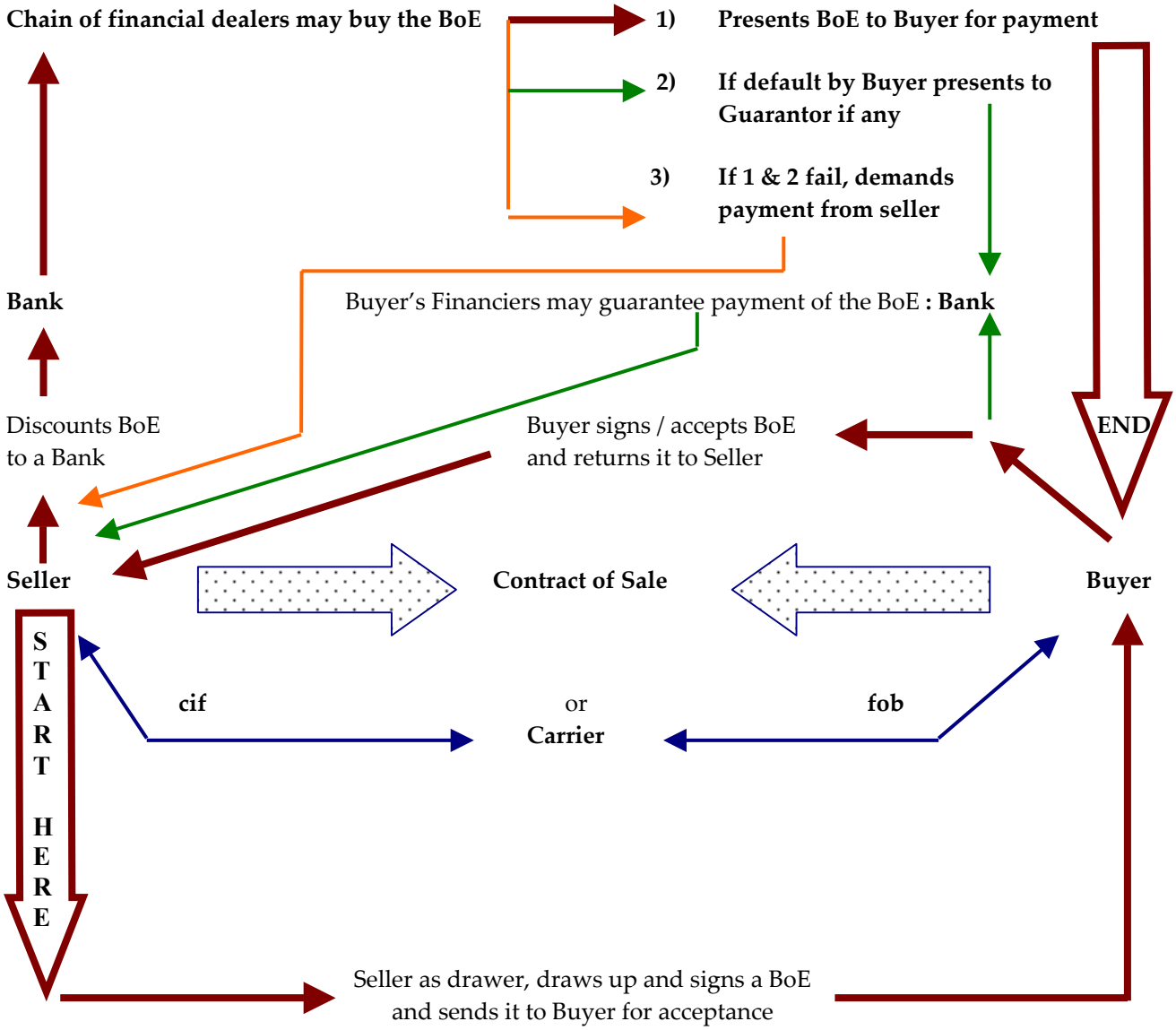
Finance of international Sales by documentary credit



This diagram introduces further problems in terms of the traditional contractual relationship that exists under English law in that only the buyer provides consideration for and is privy to the contract of loan. The Buyer pays interest on the loan and thus finances the transaction through the Issuing Bank, providing the Seller with security. The banks have no direct contractual relationship with the carrier. The goods however represent collateral for the loan and there are times when the banks can become the owners of the goods. If the goods are lost or damaged in transit common law principles do not provide a course of action for the banks against the carrier, be it charterer or shipowner or against stevedores.

Often Bank 1 will not issue a Documentary Credit unless the Buyer provides an independent guarantor. If the Buyer cannot repay the Bank the Bank will look to the Guarantor for repayment – the guarantor then claims the money back off the Buyer.

Finance of international Sales by Bills of Exchange (BoE) and Bank Guarantee



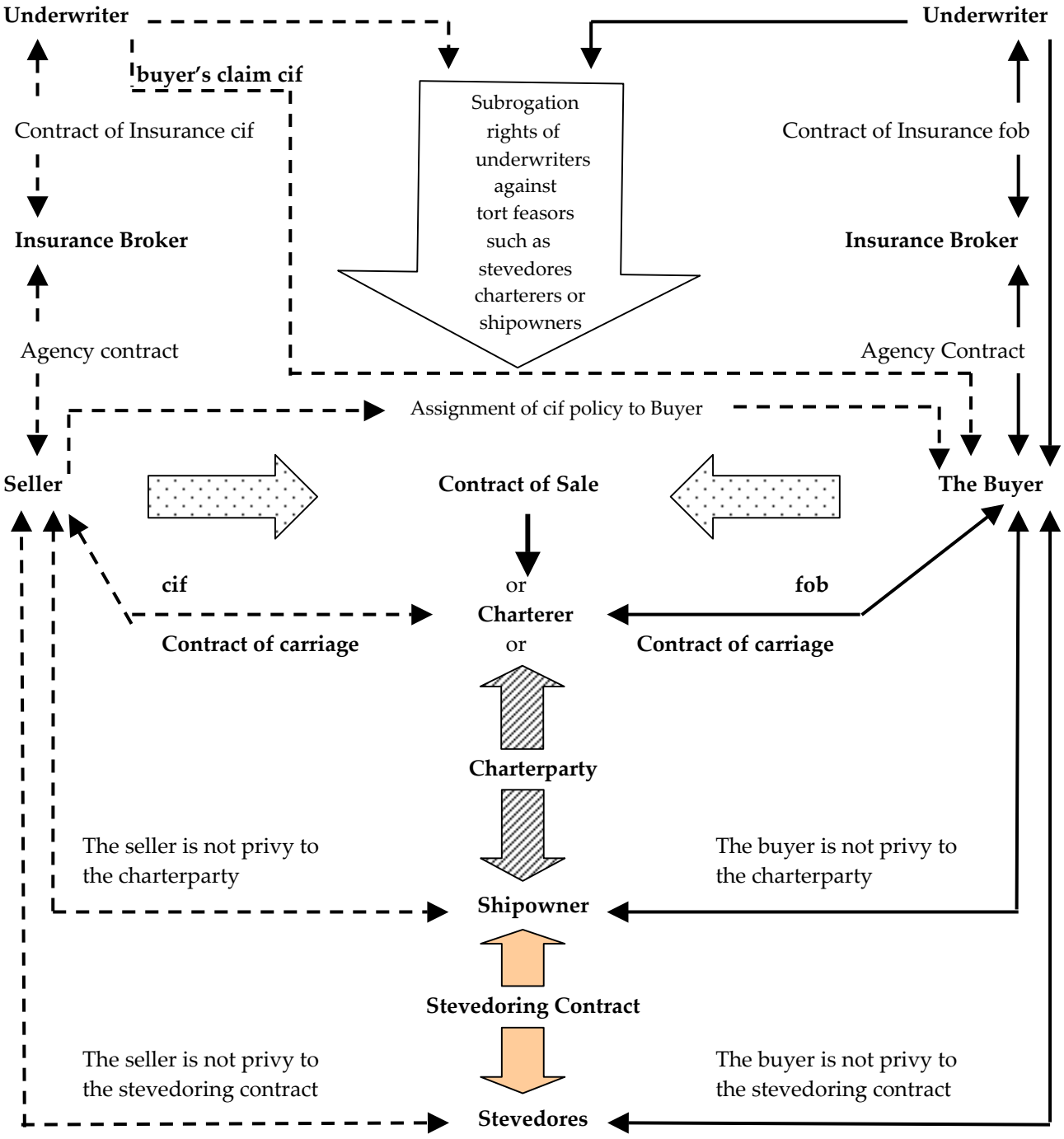
This diagram introduces further problems in terms of the traditional contractual relationship that exists under English law in that only the seller finances the transaction and in the case of default by the buyer or his guarantors, if any, must reimburse the ultimate holder of Bill of Exchange for the full face value of the Bill. The Seller is then left to sue the Buyer for breach of contract.

A Bill of Exchange may be payable on sight or on a date certain. If payable on a date certain it increases from its discount value upwards to face value as the date of payment gets nearer. The discount is the equivalent of interest. Consequently Sellers charge more for goods

The banks as holders of a Bill of Exchange have no direct contractual relationship with the carrier and no rights or interest whatsoever in the goods. The goods do not represent collateral for the loan. If the goods are lost or damaged in transit the buyer may have to claim on his insurance, or sue the seller or carrier in order to get sufficient money in order to pay the seller. Common law principles do not provide a course of action for the banks against the carrier, be it charterer or shipowner or against stevedores.

It is also possible for a system whereby the principle finance is by Documentary Credit, backed up by a Bill of Exchange. The price remains the same as for a documentary credit since the Bill of Exchange is never discounted and acts merely as a back up guarantee that if the buyer fails to honour the documentary credit the banks can recover the money from the seller.

INSURANCE OF GOODS IN TRANSIT.



This diagram introduces further problems in terms of the traditional contractual relationship that exists under English law in that only the buyer provides consideration for and is privy to the contract of insurance fob. The seller may well need to take out a separate policy of his own to protect his interests. An fob policy may not afford the banks any protection either. By contrast, the cif policy is assignable to the buyer and could equally be assigned to the bank if the bank should become the owner of the goods. However, where an underwriter pays out on a policy claim for damage to cargo during transit the bank will have the right to sue the tort feasor in subrogation of the assured and recover some, if not all, of the monies paid out to the assured, from the tort feasor. Where the assured had a claim in contract the underwriter can assert those rights as well. Will the underwriter also be subject to the assured's duties under the contract as well ? That would appear to be the case under common law but statute now provides differently.

CHAPTER ONE

Export Sale Contracts.

Import / export practice can involve simple transactions involving single buyers and sellers but equally, transactions can be very complex involving chains of buyers and sellers. The single transaction lies at the heart of the process and chains of sale and purchase simply duplicate the basic sales mechanism. Therefore, for the purpose of legal analysis, presume in the discussions below that unless otherwise stated, there will be simply one buyer and one seller and that the seller is the shipper of the goods. In reality cargoes are frequently sold many times over during a voyage. Note also that a buyer may ship his own goods and under delivery contracts the seller may deliver goods directly to the buyer's premises.

The most frequently used standard form international sales contracts are free on board (f.o.b.) and cost insured freight (c.i.f.). In both of these the seller is the shipper. Under f.o.b. the seller may be involved in the formation of the contract of carriage. In c.i.f. the seller is always a party to the contract of carriage.

Consider a typical shipment of a bulk commodity cargo such as oil, copra, wheat or sugar as an illustration of the complexity involved in common day to day international trade transactions. The seller / owner of the cargo, at the time of shipment, charters a vessel or makes a contract of carriage with a carrier. At the time of shipment the shipper receives a single Bill of Lading (a document indicating amongst other things that the cargo has been received for shipment by the carrier, which may subsequently endorsed with the caption "SHIPPED" indicating that the cargo has in fact been loaded on board the vessel) covering the whole of the cargo shipped. Thus the Bill of Lading may be made out for 120,000 tons of best US Wheat. The buyer needs the cargo to be split up into a number of smaller parcels. So in our example he might wish to sell 60,000 tons of wheat to one buyer, 40,000 to another and perhaps retain the final 20,000 tons for his own use. He therefore seeks amended bills of lading, known as "ship's delivery orders," from the carrier and then sells off parts of the cargo, each of which may in turn be followed by sub – sales, to new buyers. These sales are often conducted through a commodity exchange without intermediate buyers and sellers ever seeing the goods. The process is common regarding bulk liquid cargoes of oil / petroleum and bulk grain cargoes. Multiple sales of manufactured goods are less common.

THE INTERNATIONAL CONTRACT OF SALE

How do international sales differ from ordinary sales made within one country ? Apart from the requirement to make provision for transport, the problem of having to trust a stranger in a foreign country introduces a very different dynamic to international trades transactions.

The Seller's View Point. The buyer is likely to be unknown to the seller. The buyer resides in a foreign country. The seller and the buyer seldom trade on a regular basis. The seller does not know if the buyer is able and willing to pay for the goods. The seller therefore takes a big risk since the buyer may go bankrupt or refuse to pay. Since the buyer is abroad this causes further problems. The seller can't recover the goods easily for non-payment.

There are problems involved in negotiating a foreign resale. If the buyer defaults and he is forced to sell the goods to someone in a different country to the original buyer he will have to arrange to reship the goods incurring additional costs. Recovery of such costs will involve court action abroad, which may be expensive and uncertain. Even if all this works the seller has to fund the entire process in advance and wait until delivery to get his money, which is very bad cash management. The best solution for the seller is to insist on full pro-forma payment before shipping. This is an excellent solution regarding cash flow but his problem is that buyers rarely accept such a solution.

The Buyer's View point. The seller is an unknown quantity to the buyer. If he pays for the goods pro-forma (that is to say payment in advance) will the goods be shipped ? Even if the goods are shipped, do the goods accord with their description ? Even if this works he ties up his capital for the entire period of shipment which is bad for cash flow. The best solution for the buyer is for him to pay for the goods only after inspecting them on their arrival but the seller would be unlikely to accept such a solution.

THE BILL OF LADING

There is clearly a conflict between the seller and the buyer's interests in international trade transactions. An important function of the Bill of Lading is to provide a mechanism that seeks to reconcile this conflict. The bill of lading is issued by the carrier, who may be a charterer or a shipowner. It will be presumed for the purpose of this analysis that the seller is also the shipper of the goods, the usual case especially c.i.f., though this is not always so in relation to f.o.b.

Functions of the Bill of Lading.

The bill of lading is a multi-faceted legal / contractual document.

1 **Receipt.** When the goods are handed over to the carrier the shipper receives a received for shipment bill of lading. The bill of lading acts as a receipt from the carrier to the seller / shipper.

2 **Proof of shipment.** When the goods are loaded on the ship the carrier issues a "shipped" bill of lading to the seller. The bill of lading is dated so the buyer can double checked that the goods were shipped within the time frame specified in the contract of sale. The bill of lading will record the name of the vessel, the port of shipment and the port of delivery. It may detail the itinerary, in particular which ports, if any, will be visited en-route. An f.o.b. buyer may need this information for insurance purposes.

3 **Statement of quality and quantity of goods**. The carrier states in the bill of lading that a consignment of X goods has been loaded and (presuming it is a clean bill of lading – one that does not indicate any noticeable defects in the cargo) that when loaded the goods were in apparent good order and condition.

A claused or unclean bill of lading may be useless to the seller since it indicates that the carrier believes there is something wrong with the goods. Most banks will not accept a claused bill of lading, though it is possible for a bank to notify a buyer of the clause and the buyer may ask the bank to accept it. Sometimes the seller may offer a discount to encourage acceptance by the buyer. If a bill of lading is claused it will not accord with the description in the sales contract, thus indication that there has been a breach of the sales contract. The bank has a duty to reject such bills of lading and the buyer has a right to reject documents which do not conform with the requirements of the sale's contract.

A clean bill of lading provides the buyer with some degree of reassurance that he can safely pay for the goods without taking too great a risk. The goods have commenced their journey to the buyer. There is nothing obviously wrong with the goods.

4 **Terms of bailment and carriage**. The bill contains terms and conditions about the carriage of and care of cargo. The bill may be the contract of carriage as between shipper and carrier but frequently comes some time after that contract is made. It forms the basis of the COGSA 1992 implied contract of carriage between consignee / endorsee / buyer and the issuer of the bill of lading.

5 **A quasi-negotiable instrument.** Often (though this is not always the case today) a bill of lading can be transferred from the seller to the buyer, and even from one buyer to another, quicker than a cargo. At least until recently, the bill of lading could invariably be transferred to the buyer long before the ship and its cargo arrived in port. The delays involved in the postal system, and especially where documentary credits are involved and the fact that the documents have to pass through the hands of two banks mean that frequently the ship arrives before the bill of lading today. Once secure systems of electronic mailing are sorted out the electronic bill of lading will solve this problem which is the result of changing technology. The problems this is causing the industry in the interim period are dealt with later.

A bill of lading may name the buyer[4] but most commonly the bill of lading will require delivery to the holder of the bill. This is expressed by the words "deliver to order". Only the holder of a bill of lading can demand the goods from the carrier when they arrive at their destination. The shipowner should not hand the goods over to anyone who cannot produce a bill of lading.

[4] Now reclassified by s1 Carriage of Goods By Sea Act 1992 as a Sea Way Bill

The transferable nature of the "negotiable" bill of lading enables goods to be sold, simply by the transfer of the bill of lading. Possession of a negotiable bill of lading is as good as possession of the goods themselves from a legal standpoint. The right to take delivery of the goods is distinct from ownership of the goods. It is convenient for others, besides the owner, to be able to take delivery of the goods from the carrier on the owner's behalf. Thus the bill of lading is not a genuine negotiable instrument, since is does not transfer ownership or title, only the right to possession.

Where the seller and the buyer are strangers and neither represents a gilt edged organisation such as Shell or I.C.I, the seller is unlikely to be prepared to extend credit to the buyer. The seller therefore retains the bill of lading until the buyer has agreed to pay him on receipt of the bill of lading. A failure to pay amounts to breach of contract and leaves the buyer open to an action for the price under s49 S.O.G.A. 1979 for goods had and received.

BANKER'S DOCUMENTARY CREDITS AND BILLS OF LADING

The contract of sale between the buyer and the seller may stipulate payment by Banker's Documentary Credit. (B.D.C.) and that the Banker's Documentary Credit is revocable or irrevocable and unconfirmed or confirmed. If the sale's contract is silent on which type of Banker's Documentary Credit is required the assumption is that the buyer will request or instruct Bank 1 to issue a Banker's Irrevocable Documentary Credit in favour of the seller. If the buyer merely requests a documentary credit without specifying which the assumption under the Uniform Customs and Practices of Documentary Credits (UCP 500) is that the buyer requires an irrevocable credit. Thus a revocable credit is only acceptable if specifically requested.

Bank 1, the issuing bank, is the agent of the buyer and is usually situated in the buyer's country (one presumes this is not so for Bank 2, which is situated normally in the seller's country) Bank 1 sends the seller a message stating that a Bankers Irrevocable Documentary Credit has been issued in the seller's favour. Under the general requirements of c.i.f. subject to documentary credit, the seller has a right to refuse to ship until notified of the existence of the documentary credit. Thus reassured, the seller will now ship the goods and sends the bill of lading plus any other relevant documents such a detailed invoice and an insurance policy (if c.i.f.), to the bank or banks. Normally the seller deals with Bank 2 Bank 2 pays the seller and then reclaims the money in exchange for the documents from Bank 1. Bank 1 then claims reimbursement from the buyer in exchange for the documents. The buyer presents the bill of lading to the carrier and takes delivery of the goods.

Sometimes the buyer takes delivery of the bill of lading from Bank 1 having first signed a "Trust Receipt". The buyer then sells the bill of lading to a new buyer, Buyer No2. The original buyer, Buyer No1 then pays his bank and the trust receipt is discharged. The trust receipt device creates a form of legal security for the bank because the proceeds of the sale are held by the bank's client, in trust for the bank. The money never belongs to the client so even if the client goes bankrupt the bank is entitled to all of the money owed to it under the trust receipt. It is a form of secured loan.

The advantage of documentary credits for the seller is that he looks to a reputable bank for a guarantee. Bank 1 takes the risk of the buyer's bankruptcy. The disadvantage for the seller of a documentary credit that only involved the buyer's banks is that the seller is still dealing with a foreign bank. He may still have problems if a dispute arises and the bank refuses to pay. He is faced with the prospect of litigation under a foreign jurisdiction. The solution to the seller's problem is to have the confirmation of the credit facility to be made by Bank 2, which is situated in the seller's country. The buyer instructs Bank 1 regarding the credit. Bank 2 is instructed by Bank 1. Bank 2 deals directly with the seller. The seller tenders documents to Bank 2. The confirming bank pays the seller. Bank 1 pays Bank 2 and reclaims the money in turn from the buyer.

Advantages of Banker's Irrevocable Confirmed Documentary Credit for the Seller

A) disputes if any are with Bank 2 in his own country and
B) the seller can raise credit using the Banker's Confirmation as security.
C) the seller gets paid shortly after shipment improving cash flow.

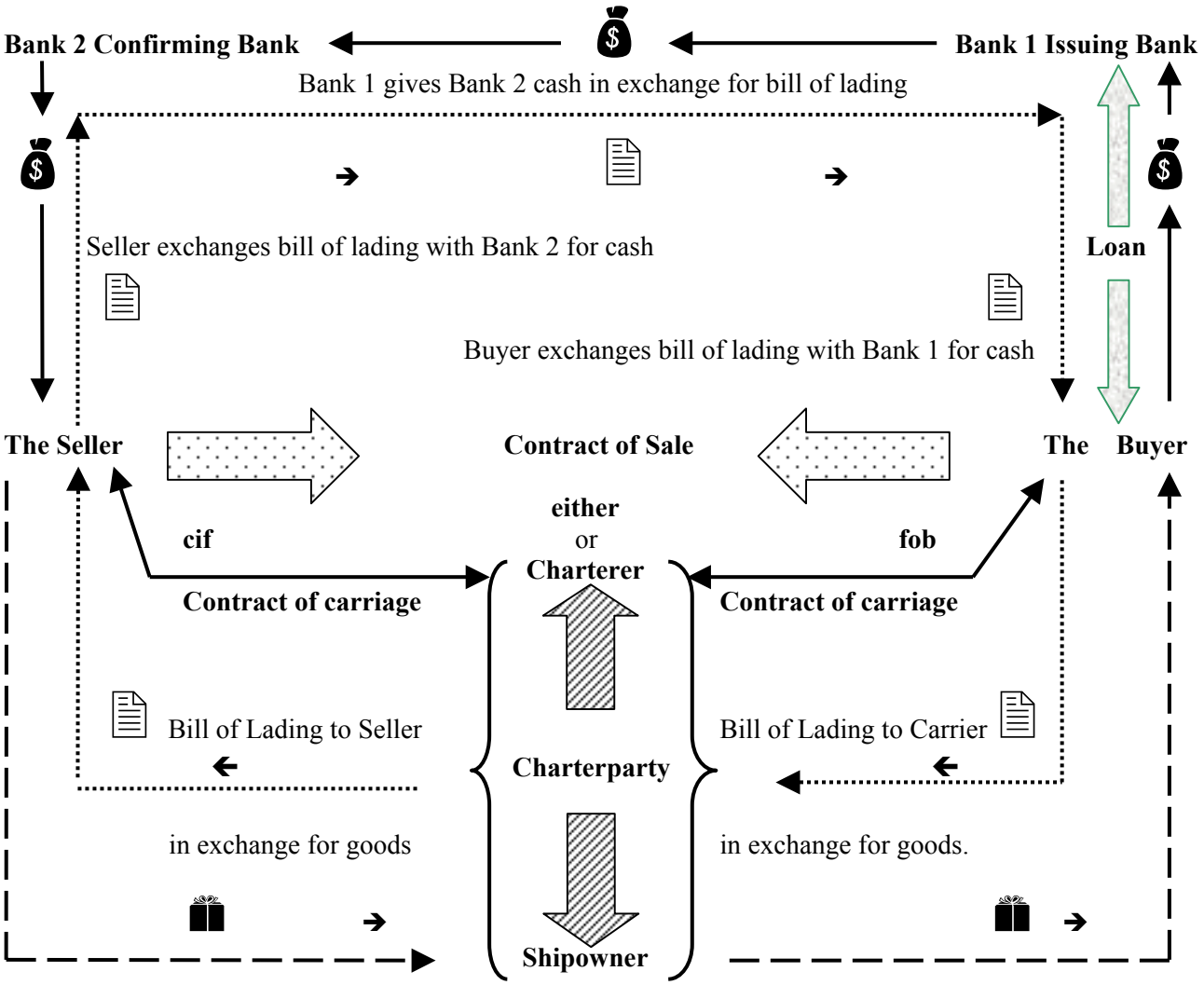
Advantages of Banker's Irrevocable Confirmed Documentary Credit for the Buyer.

The buyer gains in that once Bank 1 has paid the money to Bank 2 the buyer receives the shipping documents : the buyer can arrange a resale before paying Bank 1. Bank 1 gives the bill of lading and other related documents to the buyer in exchange for a Trust Receipt. The bill of lading etc enables the buyer to resell the goods. The bank is protected by the Trust Receipt. The buyer can resell before paying for the goods. The banks fund the entire operation, so that buyers can effectively earn money without actually spending a penny, which facilitates cash flow.

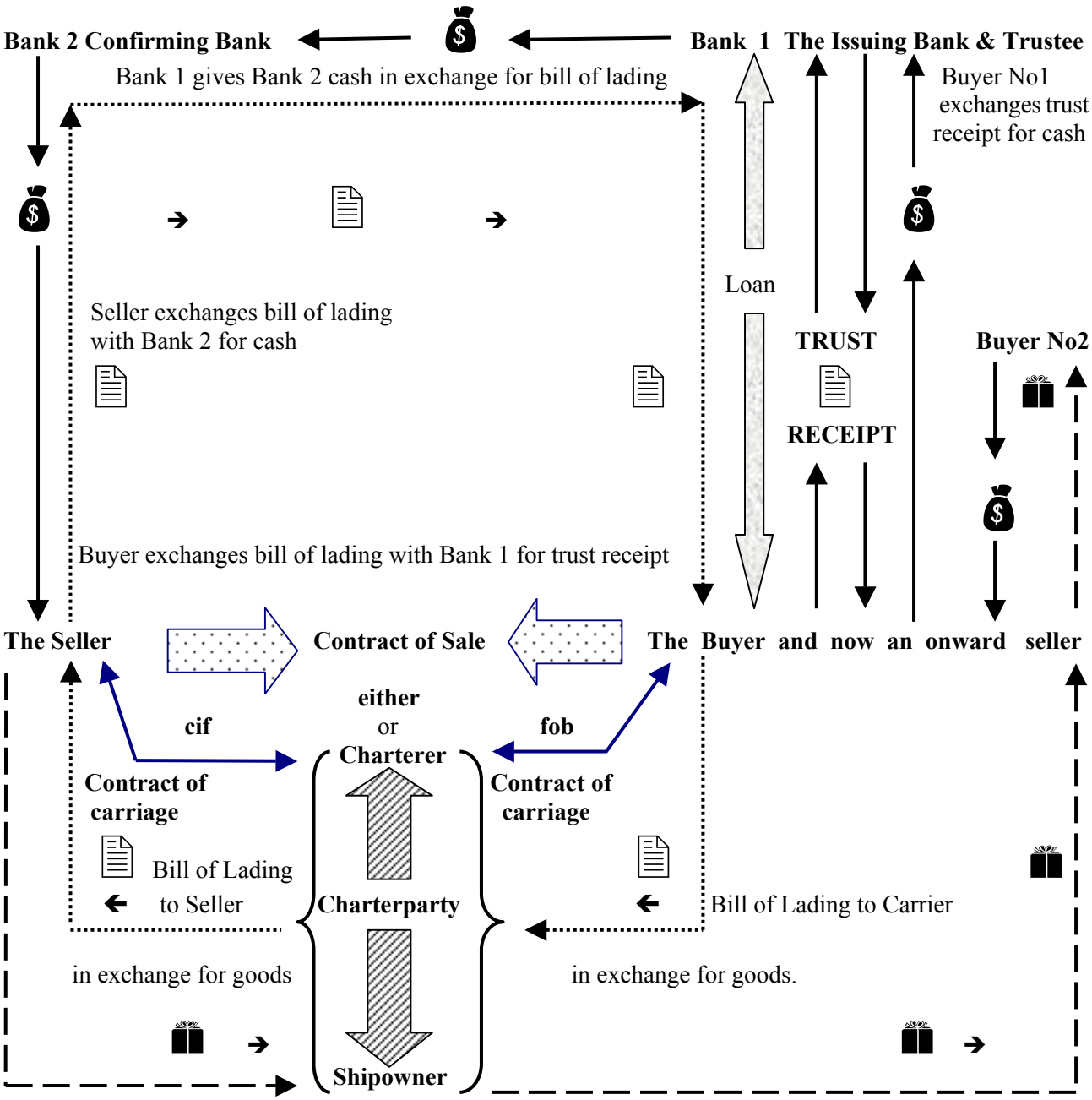
The seller cannot bypass the banking system if a Documentary Credit is specified in the sales contract.

Once payment by Documentary Credit is agreed in the sales contract the seller must tender all the documents including the bill of lading, insurance policy and receipt to Bank 1 or Bank 2, depending on which type of documentary credit is agreed. He cannot tender the document directly to the buyer and demand payment. This would deprive the buyer of the opportunity to raise credit and would disadvantage him. However, since the buyer has a duty to provide a reliable paymaster if the bank wrongly refuses to pay the seller can then go directly to the buyer for breach of contract.

The passage of the bill of lading from carrier to buyer in exchange for the goods and payment.



Trust receipts and onward sales.



The principle advantage of the trust receipt mechanism for a buyer is that it enables the buyer to sell the goods and get the monies in before paying the bank. Clearly, this reduces the buyer's profit. Additional interest costs are incurred on the loan since the period of credit is extended, but it enables the buyer to engage in transactions which could not otherwise be afforded, whilst at the same time providing the bank with a high degree of financial security.

Other Methods of Finance

Contracts may also be financed by Bills of Exchange or by Bank Guarantees. In recent years Bills of Exchange have become unpopular because the seller bears the financial risks and finances the credit. A wide variety of bank guarantees are currently evolving especially in relation to combined international sales of goods and services. Large projects frequently involve international inter-governmental and government funding and the finance systems involved are very complex and beyond the scope of this book but one should at least be aware of the existence of these new developments.

CONTRACTUAL PROBLEMS AND RELATIONSHIPS IN INTERNATIONAL TRADE

A number of contractual problems have been noted above, particularly in the flow diagrams introducing the various relationships common to international trade. These problems are listed and summarised below. The solutions to these problems are provided later in various parts of the book.

The consignor – consignee / carrier relationship

There are problems in respect of both cif and fob sales, but the problems are different in each case.

a) The cif buyer of cargo has no common law contractual relationship with the carrier. Having paid freight to the seller as part of the sale's contract normally has no need to pay any monies to the carrier for freight. Thus there is no consideration flowing from buyer to carrier. At common law the buyer has problems suing the carrier for loss or damage to cargo during transit. An action in tort may be possible but there are problems for the buyer in establishing ownership of the goods at the time of loss or damage.

b) The strict fob seller of cargo is not a party to the contract of carriage which is made between the buyer and the carrier. The law has struggled with the question as to how a strict fob shipper can hold the carrier to account for loss or damage to cargo in the absence of a carriage contract between shipper and carrier. Whilst risk normally passes to the buyer once the cargo is loaded, giving the seller a right to payment whatever subsequently happens to the goods, the seller may still have a problem is the buyer rejects the goods or defaults in payment. If the goods are lost or damaged during transit the seller will have an interest in recovering that loss from the carrier but the law of contract will be of no assistance.

Seller – Buyer / Underwriter

Insurance of cargo during transit is fraught with problems and has to be approached with care. Since the f.o.b. buyer is responsible for his own insurance, a seller has no interest in the buyer's policy and cannot rely on it to recover for any losses during transit. The seller must take out his own policy to cover his risks. The cif seller has to take care as well, because, whilst the policy is initially in his name, once the policy is transferred to the buyer the seller loses the right to claim under the policy. If things subsequently go wrong with the transaction and the buyer rejects goods or defaults on payment, the seller may find that he no longer has any legal rights under the policy and cannot recover for post policy assignment loss or damage to goods. Accordingly the seller may need to take out additional cover for post assignment risk.

The assured – underwriter / carrier

Whilst there is no apparent contract of carriage between the underwriter who provides protection for the cargo owner against loss or damage to cargo during transit, insurance law subrogates the cargo owner's legal rights of action to the underwriter. The underwriter can sue the persons responsible for the damage, in the name of the cargo owner, and so recover monies paid out under a claim from that person.

The Buyer/Seller/Bank relationship

Documentary Credit Contracts are not made directly with <u>all</u> the parties. In the U.K. the Doctrine of Privity of Contract means that those persons who are not party to a contract cannot take action on the contract nor can they be sued on the contract in English Law.

There is no obvious direct contractual relationship between either Bank 1 or Bank 2 with the seller. It would appear that Bank 2 makes an offer to the seller. When is acceptance made ? Until what point in time, if at all, can Bank 2 revoke the offer ? It would appear that the seller accepts when he tenders the shipping documents. Once an offer is accepted it cannot then be revoked. The seller can pay a confirming commission to Bank 2 on notification of the offer to prevent the offer being withdrawn. This is rare but when paid results in a concrete contract between the seller and Bank 2. What happens if Bank 2 backs out before tender of the shipping documents by the seller ? If, there is no contract between the seller and Bank 2, the seller would have to pursue his remedy against the buyer.

The Bank / Carrier Relationship

The contract of sale, the contract of loan (documentary credit) and the contract of carriage are all autonomous though financially related contracts. The bank has no privity of contract at common law with the carrier. Whilst this is not normally a problem, if the buyer defaults on the contract of loan what rights if any does the bank have against a carrier who has lost or damaged goods, purchased with the monies loaded by the bank ?

Shipper - freight forwarders & forwarding agents / carrier.

The seller is responsible for shipping the goods. The seller often engages a Forwarding Agent (Freight Forwarder) who acts for the seller to make the Contract of Carriage with the Carrier on his behalf as his agent. The agent is the alter ego of the seller, his principal so there are no problems with privity of contract between the seller and the carrier.

The Buyer or Seller / Stevedore

Whilst it is possible to contract on "free in and out" terms which make the consignor and consignee responsible for loading and discharging the vessel, necessitating the buyer and seller in making arrangements with stevedores to load and discharge, it is common for the freight costs to cover loading and discharge costs. The carrier consequently arranges with stevedores to load and discharge the cargo. On its face this should not be a problem. If the stevedores lose or damage cargo the cargo owners can hold the carrier responsible. However, it is not uncommon for the carrier to exclude liability for defaults of third party sub-contractors and in particular stevedores. The Doctrines of Privity of Contract and Consideration present the cargo owner with problems suing the stevedores in contract. Actions in tort are the only way to hold them to account in the absence of a contract.

Carrier / Loading Broker

The carrier may engage a Loading Broker or Charterer's Agent (perhaps the Ship's Master) who issues a Mate's Receipt, to show that the goods have arrived at the quay side. A mate's receipt has until recently had no legal implications for buyers beyond being a mere receipt for goods, though under COGSA 1992 a received for shipment bill of lading can now transfer rights to subsequent holders of the bill of lading. The seller (or his agent) prepares the bill of lading for signing. The bill of lading is issued and signed by the ship's master on behalf of the shipowner or carrier. However, the seller cannot have an action against the carrier for a faulty bill of lading because it is seller who prepares the draft bill of lading.

The consignor - consignee / charterer - shipowner relationship matrix.

The carrier will either be a ship owner or a charterer Some ship owners operate their own ships, in which case the ship owner and the carrier are the same person. Often however a ship owner hires his vessels out to a firm of professional 'carriers' who operate the ship. In such a case it is the charterer who makes the contract of carriage with the shipper. The bill of lading may be issued by the charterer or by the ship owner, and may furthermore be issued on behalf of and in the name of either the charterer or the shipowner.

The shipowner / charterer / sub-charterer matrix.

The shipowner charters a vessel to a charterer under the head charterparty. The charterer sub-charters the vessel to a second charterer, the sub-charterer under a sub-charterparty. Which of the three issues the bill of lading, and on whose behalf is it signed ? If the bill of lading incorporates charterparty terms, which charterparty is incorporated the head or sub-charterparty ? It is important to know who one has contracted with and on what terms and conditions.

Who is the bill of lading contract of carriage with – charterer or shipowner ?

Who employs the master and crew is important, firstly in relation to who is vicariously liable for damage caused to cargo due to wrongful acts of the master and crew and secondly, regarding who becomes contractually liable for the obligations of care of cargo and carriage of goods by virtue of the bill. As far as the holder of a bill of lading is concerned, he will look to hold the organisation, on whose behalf a bill of lading has been signed, responsible for any loss or damage to cargo.

The master and crew can be employed either by the ship owner or the charterer depending on the terms of the charterparty contract. The ship's master is employed by the ship owner in cases where the ship owner is

also the carrier and makes the contract of carriage with the shipper. The converse is true under a demise charterparty as explained below. Even if the vessel is chartered, the captain may still be employed by the ship owner. This is often the case where the vessel is chartered out under a simple voyage or simple time charter party. In such cases, the charterer hires or charters not only the vessel but also its crew. Whilst the charterer may be obliged to pay the crew and often gives the crew instructions, the ship owner remains their employer. The usual situation is that the bill of lading is signed on behalf of the shipowner but this is not always the case.

A charterparty may state that all bills of lading are to be signed on behalf of the charterer even though the master is the employee of the shipowner. It is common practice for many charterers to issue bills of lading in the name of the chartering company. A problem can arise if a ship owner's bill of lading is issued when the charterparty stipulates that a charterer's bill of lading should be issued. In such situations the ship owner may be held liable directly to endorsee's of bills of lading who have become cargo owners, for any damage to the cargo whilst in the care of the carriers. The ship owner will then have to pay the cargo owner and reclaim the money from the charterer, if he can.

If a bill of lading is falsely issued in the ship owner's name without his knowledge and without any of his servants, such as the ship's master, being involved in the issuing of the bill, the ship owner will not be liable for subsequent loss or damage to cargo. A charterer (just like anyone else) cannot give what he does not own or have the right to give. The captain is employed directly by the charterer under a charter by demise, known also as a bare boat charter. In this case all the charterer gets is an empty vessel and he has to provide his own crew. The result is that the bill of lading is signed by the ship's master, on behalf of the charterer. The ship owner cannot be sued by cargo owners in such circumstances.

Cargo owner / Ship's Master.
There is no contractual relationship between the cargo owner and the ship's master who issues a bill of lading. If the bill of lading contains inaccuracies or is issued in respect of goods, which are not shipped, the master may potentially be held liable in tort for loss or damage to cargo by the cargo owners.

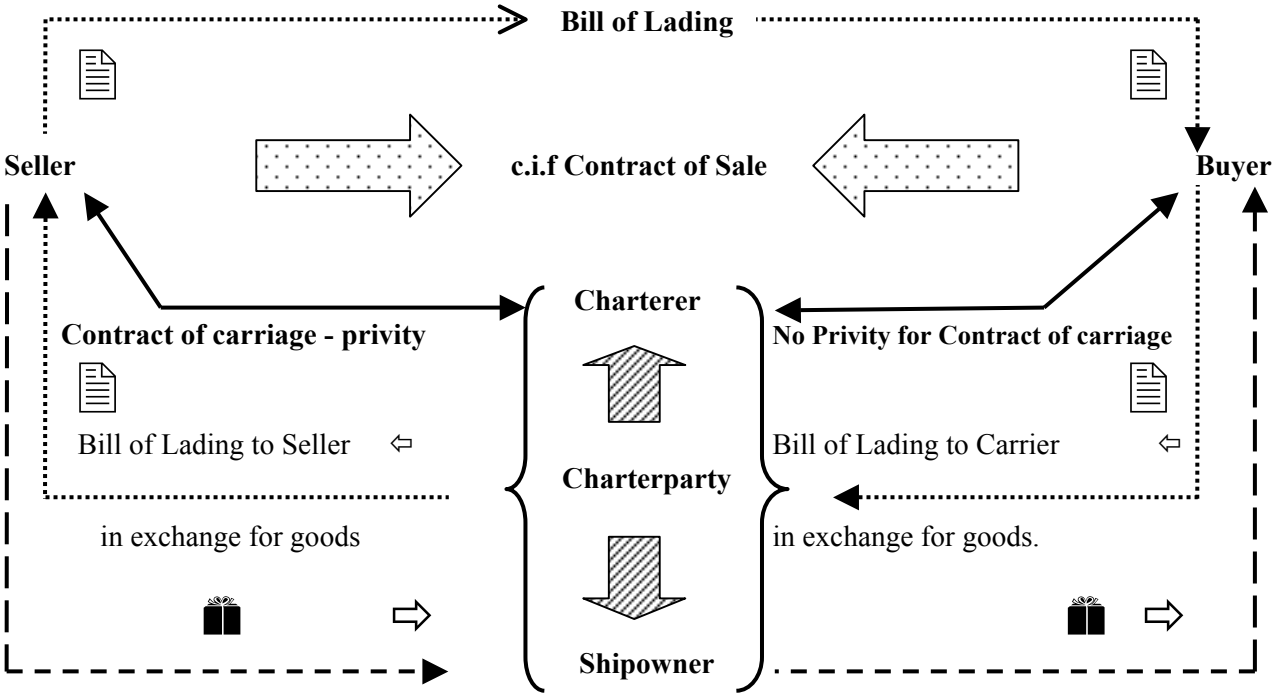
Bulk Shipper – part bulk buyers / Carrier
The bulk shipper receives a single bill of lading to cover the entire bulk cargo. In the event of onward sales of smaller parcels of the cargo the shipper will need to provide each subsequent buyer with a means of taking delivery of their portion. Since the shipper cannot give the bill of lading to each buyer he needs a number of smaller documents. For a modest administrative charge many carriers will issue a number of ship's delivery orders made out for the desired smaller quantities, thus solving the problem. However, if the carrier is not available or refuses to issue ship's delivery orders the shipper may be forced to issue merchant's delivery orders to each of the buyers instead. The problem is that merchant's delivery orders do not bind the carrier contractually and the part buyers have no contractual redress against the carrier for loss or damage to cargo.

Cargo owners / Sub-Bailees.
The shipper, having bailed goods to a carrier, the carrier may sub-bail the goods to a sub-bailee, such as a second carrier or put the goods into storage with an independent warehouseman. Is there any contractual relationship between the shipper and the sub-bailee. To complicate matters further, the shipper may sell the goods. Are any bailment rights assigned to the consignee ? Even if this is the case, what then is the relationship between the sub-bailor and the sub-bailee ?

Seller / Buyer 1 – Buyer 2 – Buyer 3 etc
Chain sales create a series of independent sales contracts concerning the same goods and the same transport arrangements. What, if any, are the rights of subsequent buyers against those lower down the chain. Clearly there is no chain of privity or consideration. Does liability end to everyone or to the person above or below in the chain, upon onward sale of goods or not ? If there are 50 sales of the same goods, does this mean 50 separate court actions to chase liability from last buyer back to the initial seller ?

THE ENGLISH RULE OF PRIVITY AND THE CONTRACT OF CARRIAGE

C.i.f. sales contracts. Consignee claims against carriers for loss or damage to cargo in transit.



The cif buyer is not privy to the contract of carriage and therefore has a problem at common law in claiming off the carrier for damage to cargo caused during transit.

There is no privity of contract between the buyer and the carrier where the seller/shipper makes the contract of carriage. Under the common law, in the absence of privity or consideration no legally enforceable obligations arise. What happens if the goods are damaged by the carrier at sea ?

The seller could sue the carrier but why should he bother ? All he wants is the money from the buyer. The buyer is obliged to pay him in any case so he has little to gain personally from suing the carrier and is unlikely to do so, especially if such a course of action would jeopardise his future relationships with a carrier that he uses on a regular basis. It is possible for a clause to be put in a contract of sale requiring a seller to sue on behalf of a buyer, but this is rare in England, though apparently quite common in Holland. It would now appear that a seller / shipper could in fact receive substantial damages on behalf of the buyer and hold the funds in trust for him so there is a value in putting a clause into a sale's contract requiring a seller to sue on behalf of a carrier. The question is, would a shipper be prepared to contract on terms which might require him to carry out such an onerous duty which offers him no apparent benefits ?

In the absence of a such a term the seller / shipper is unlikely to be willing to sue the carrier. Because the seller has suffered no damage he could only get nominal damages for himself. It is essential in order to overcome the reluctance of sellers to sue carriers on behalf of buyers that some mechanism exists for the buyer to be able to sue the carrier himself directly without having to rely on anyone else.

There are two methods by which this can be achieved, one by virtue of statute, s2 & 3 The Carriage of Goods By Sea Act 1992 (previously under the Bills of Lading Act 1855) and the other under common law, by virtue of The Brandt v Liverpool Implied Contract.[5] Under both s2 & s3 Carriage of Goods by Sea Act 1992 and Brandt v Liverpool a contract is implied or imputed between the carrier and the buyer who is an endorsee or holder in due course of a bill of lading, which enables the buyer to sue and to be sued by the carrier.

[5] Brandt v Liverpool Brazil & Riverplate S.S. Co. [1924] 1 K.B. 575

Bill of Lading Act 1855 18 & 19 Vict c 111

Whereas, by the custom of merchants, a bill of lading of goods being transferable by endorsement, the property in the goods may thereby pass to the endorsee, but nevertheless all rights in respect of the contract contained in the bill of lading continue in the original shipper or owner ; and it is expedient that such rights should pass with the property: And whereas it frequently happens that the goods in respect of which the bills of lading purport to be signed have not been laden on board, and it is proper that such bills of lading in the hands of a bona fide holder for value should not be questioned by the master or other person signing the same on the ground of the goods not having been laden as aforesaid:

1. Consignees, and endorsees of bills of lading empowered to sue- Every consignee of goods named in a bill of lading and every endorsee of a bill of lading, to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or endorsement, shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.

2**. Saving as to stoppage in transitu, and claims for freight, etc** Nothing herein contained shall prejudice or affect any right of stoppage in transitu, or any right to claim freight against the original shipper or owner, or any liability of the consignee or endorsee by reason or in consequence of his being such consignee or endorsee, or of his receipt of the goods by reason or in consequence of such consignment or endorsement.

3. Bill of lading in hands of consignee, etc.. conclusive evidence of shipment as against master etc - Every bill of lading in the hands of a consignee or endorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice at the time of receiving the same that the goods had not been in fact laden on board : Provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims.

It may seem strange to start this discussion with an Act of Parliament which was removed from the statute book in 1992 and therefore no longer represents the law. However, between 1855 and 1992 a vast number of cases relied on the Act and its central function, to overcome the problems of privity of contract to enable the endorsee / buyer of goods to claim compensation from a carrier for damage to goods, caused by the fault of the carrier during transit, is still the central function of s2 COGSA 1992. Since the old cases relied on the Act, an understanding of how it operated is important, particularly since the cases remain good authority on all issues outside the scope of the Bill of Lading Act. Some claims failed under the Bill of Lading Act which would not fail today and so it is helpful to understand what the problems with the provisions of the Act were. This will also help to explain why COGSA 1992 was drafted in the way it was and what COGSA 1992 seeks to achieve.

Defects in the Bill of Lading Act 1855

The Bill of Lading Act 1855 contained a number of defects which have now been by enlarge solved by the passing of the Carriage of Goods by Sea Act 1992. Whilst COGSA 1992 only affects contracts made after the 16th September 1992 - all contracts made before that date continued to be governed by the Bills of Lading Act 1855. Thus a number of cases after 1992 still applied the old Act. However, since the 6 year limitation period has now passed for pre-1992 claims there should be no new cases on the old Act.

It is useful to understand the issues involved in the Bill of Lading Act 1855 since a study of the workings of the Act highlight the legal relationship problems involved in international trade. Thousands of trade cases up till 1992 all centred on the Bill of Lading Act and these cases have to be read with the Act's provisions in mind. The greater percentage of these cases are still relevant today since the defects in the Bill of Lading Act 1855 only affected a certain narrow category of cases. The central role performed by the Bill of Lading Act 1855 and by the Carriage of Goods by Sea Act 1992 is the same, though admittedly they achieve that result in slightly different ways. The result of this is that there can be subtle differences between the outcome of cases under the new Act. These differences need to be appreciated. Note that the Carriage of Goods by Sea Act 1971 and the Carriage of Goods by Sea Act 1992 are totally different Acts, dealing with completely different issues and should not therefore be confused.

CHAPTER ONE

THE CARRIAGE OF GOODS BY SEA ACT 1992

1 Shipping documents etc. to which Act applies

(1) This Act applies to the following documents, that is to say -
- (a) any bill of lading;
- (b) any sea waybill; and
- (c) any ship's delivery order.

(2) References in this Act to a bill of lading -
- (a) do not include references to a document which is incapable of transfer either by endorsement or, as a bearer bill, by delivery without endorsement; but
- (b) subject to that, do include references to a received for shipment bill of lading.

(3) References in this Act to a sea waybill are references to any document which is not a bill of lading but
- (a) is such a receipt for goods as contains or evidences a contract for the carriage of goods by sea; and
- (b) identifies the person to whom delivery of the goods is to be made by the carrier in accordance with that contract.

(4) References in this Act to a ship's delivery order are references to any document which is neither a bill of lading nor a sea waybill but contains an undertaking which -
- (a) is given under or for the purposes of a contract for the carriage by sea of the goods to which the document relates, or of goods which include those goods; &
- (b) is an undertaking by the carrier to a person identified in the document to deliver the goods to which the document relates to that person.

(5) The Secretary of State may by regulations make provision for the application of this Act to cases where a telecommunication system or any other information technology is used for effecting transactions corresponding to -
- (a) the issue of a document to which this Act applies;
- (b) the endorsement, delivery or other transfer of such a document; or
- (c) the doing of anything else in relation to such a document.

(6) Regulations under subsection (5) above may -
- (a) make such modifications of the following provisions of his Act as the Secretary of State considers appropriate in connection with the application of this Act to any case mentioned in that subsection; and
- (b) contain supplemental, incidental, consequential and transitional provision;

and the power to make regulations under that subsection shall be exercisable by statutory instrument subject to annulment in pursuance of a resolution of either House of Parliament.

2 Rights under shipping documents.

(1) Subject to the following provisions of this section, a person who becomes -
- (a) the lawful holder of a bill of lading;
- (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made the carrier in accordance with that contract; or
- (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order, shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill -
- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection 91) above in relation to a ship's delivery order -
- (a) shall be so vested subject to the terms of the order; and
- (b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies -

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives -

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

3 Liabilities under shipping documents.

(1) Where subsection (1) of section 2 of this Act operates in relation to any document to which this Act applies and the person in whom rights are vested by virtue of that subsection -

(a) takes or demands delivery from the carrier of any of the goods to which the document relates;

(b) makes a claim under the contract of carriage against the carrier in respect of any of those goods; or

(c) is a person who, at a time before those rights were vested in him, took or demanded delivery from the carrier of any of those goods, that person shall (by virtue of taking or demanding delivery or making the claim or, in a case falling within paragraph (c) above, of having the rights vested in him) become subject to the same liabilities under that contract as if he had been a party to that contract.

(2) Where the goods to which a ship's delivery order relates form a part only of the goods to which the contract of carriage relates, the liabilities to which any person is subject by virtue of the operation of this section in relation to that order shall exclude liabilities in respect of any goods to which the order does not relate.

(3) This section, so far as it imposes liabilities under any contract on any person, shall be without prejudice to the liabilities under the contract of any person as an original party to the contract.

4 Representations in bills of lading. A bill of lading which -

(a) represents good to have been shipped on board a vessel or to have been received for shipment on board a vessel; and

(b) has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sigh bills of lading, shall, in favour of a person who has become the lawful holder of the bill, be conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment.

5 Interpretation. In this Act -'bill of lading, 'sea waybill' and 'ship's delivery order' shall be construed in accordance with section 1 above; 'the contract of carriage'-

(a) in relation to a bill of lading or sea waybill, means the contract contained in or evidenced by that bill or waybill; and

(b) in relation to a ship's delivery order, means the contract under or for the purposes of which the undertaking contained in the order is given; 'holder' in relation to a bill of lading, shall be construed in accordance with subsection (2) below:

'information technology' includes any computer or other technology by means of which information or other matter may be recorded or communicated without being reduced to documentary form; and

'telecommunication system' has the same meaning as in the Telecommunications Act 1984.

(2) References in this Act to the holder of a bill of lading are references to any of the following persons, that is to say -

(a) a person with possession of the bill who, by virtue of being the person identified in the bill, is the consignee of the goods to which the bill relates;

(b) a person with possession of the bill as a result of the completion by delivery of the bill, of any indorsement of the bill or, in the case of a bearer bill, of any other transfer of the bill;

(c) a person with possession of the bill as a result of any transaction by virtue of which he would have become a holder falling within paragraph (a) or (b) above had not the transaction been effected at a time when possession of the bill no longer gave a rights (as against the carrier) to possession of the goods to which the bill relates;

and a person shall be regarded for the purposes of this Act as having become the lawful holder of a bill of lading wherever he has become the holder of the bill in good faith.

(3) References in this Act to a person's being identified in a document include references to his being identified by a description which allows for the identity of the person in question to be varied, in accordance with the terms of the document, after its issue; and the reference in section 1(3)(b) of this Act to a document's identifying a person shall be construed accordingly.

(4) Without prejudice to sections 2(2) and 4 above, nothing in this Act shall preclude its operation in relation to a case where the goods to which a document relates -

(a) cease to exist after the issue of the document; or

(b) cannot be identified (whether because they are mixed with other goods or for any other reason);

and references in this Act to the goods to which a document relates shall be construed accordingly.

(5) The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (the Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods By Sea Act 1971.

6(2) The Bills of Lading Act 1855 is hereby repealed.

The international significance of the Carriage of Goods by Sea Act 1992.

Regarding international trade transactions governed by foreign civil law the peculiarities of both the Bill of Lading Act 1855 and the Carriage of Goods by Sea Act 1992 are of little or no relevance whatsoever, since the passing of property and questions of privity of contract are not significant factors in rights of suit for damage to cargo during international transit from seller to buyer. However, overseas common law systems may continue to be governed by un-modified general principles of English Law.

CARRIAGE CONTRACTS AND / OR RIGHTS OF SUIT, IMPLIED BY STATUTE

s1 Bill of Lading Act 1855. The s1 Bill of Lading Act implied contract.
The bill of lading includes terms on which the goods are carried and it is these that formed the basis of the "s1 B.L.A. 1855 contract". Whilst this Act has now been superseded by COGSA 1992, it is useful to appreciate why the Act existed and how it operated since all pre-1992 cases involved the s1 BLA contract.

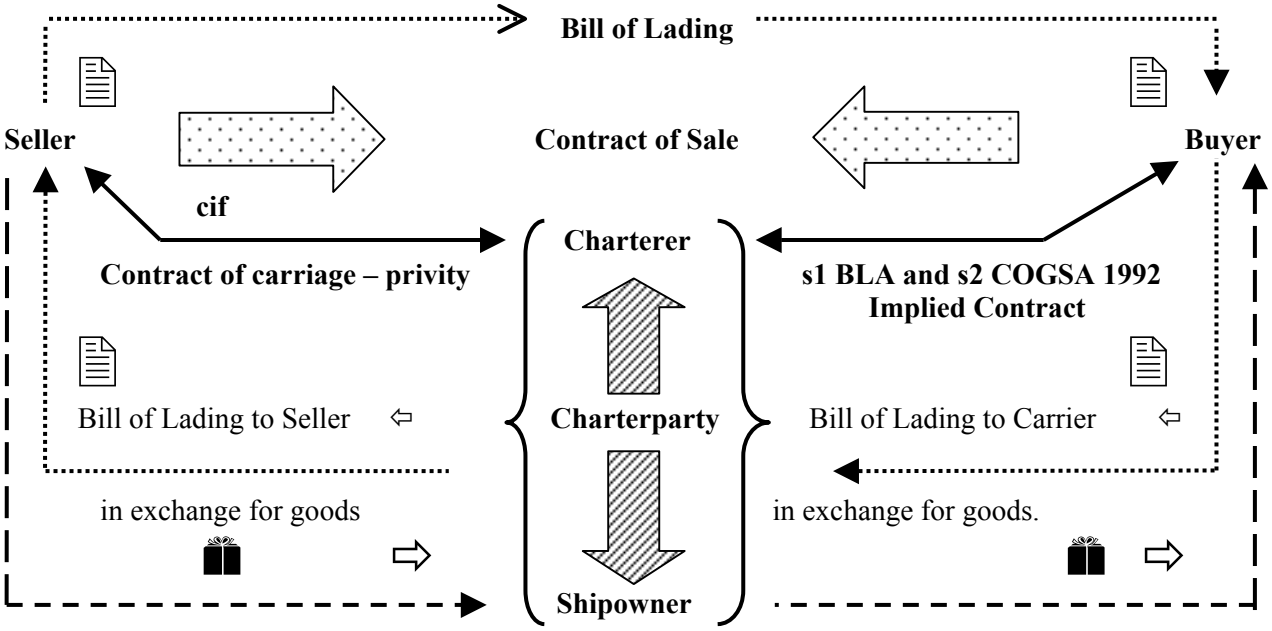
Imputation of a contract or right of suit depended on the passing of property. This caused a problem with bulk goods intended to be divided between a number of buyers on discharge since the goods could not be ascertained until discharge under the original provisions of s16 Sale of Goods Act 1893 and 1979. Consider a bulk dry cargo where the buyer buys 1,000 tons out of 100,000 tons. Until the cargo has been unloaded and separated, the buyer's share cannot become specific goods. Property could not, until the Sale of Goods Act 1994 amended the provisions of the 1979 Act, pass in a part share of undivided goods in English Law. Property could only pass in the total amount because s16 Sale of Goods Act 1893 and the restatement in s16 Sale of Goods Act 1979 prevented this from happening. Therefore imputation under sl B.L.A. 1855 was not possible in respect of an undivided shares of a bulk cargo. Put simply, part purchasers of bulk could not sue the carrier for loss or damage to cargo sustained during transit.

Equally, s1 BLA 1855 did not apply to any other situation where property did not pass by way of endorsement of the bill of lading. This commonly takes place in respect of extended credit facilities which are accompanied by a parallel reservation of title clause, preventing ownership passing pending payment,. Payment would occur some time after delivery of the cargo so the buyer would have no claim against the carrier for damage to cargo sustained during transit. The buyer who acted purely as the agent of the seller, as in **The Aliakmon** found himself in the same position having to pay for damaged goods without any right of recourse against the carrier.

s2 Carriage of Goods by Sea Act 1992 implied rights of suit.
The lawful holder of a bill of lading, a sea waybill or a ship's delivery order is entitled to all the rights of suit under the contract of carriage as if he had been a party to that contract.

However, acquisition of rights under s2 and the subjection to liabilities under s3 is subject to a complicated array of qualifications aimed at solving problems with the original s1 BLA 1855 implied contract without creating further problems such as double jeopardy. The scope of and effectiveness of much of the language is likely to be subject to judicial testing and scrutiny in the future.

Cif sales.



CHAPTER ONE

The Brandt v Liverpool (BvL) common law implied contract.

The Legal principle : On presentation of the bill of lading to the buyer there is a presumption that the goods will be delivered on bill of lading terms according to the leading case of **Brandt v Liverpool Brazil & Riverplate S.S. Co**.[6] Ownership of the goods was not needed. The facts of the case are as follows. Bags of zinc ashes were shipped from Buenos Aires to Liverpool. The ship owner issued a bill of lading stating that the bags were shipped in apparent good order and condition. Some bags were wetted by rain before loading and started to overheat in the hold after loading. The ship's master, fearing damage to the ship, discharged most of the bags at Buenos Aires and placed them in a warehouse. After a delay the goods were dried out, reconditioned and reshipped at an additional cost of £748. The goods arrived 3 months late. The value of zinc ashes had fallen in the meantime. The original buyer had financial problems and his bankers stepped in. The bill of lading was indorsed to pledgees, namely the bankers who had made an advance to the shipper. The pledging indorsees presented the bill of lading to the master and under protest paid an additional £748 in order to take delivery of the goods. The ship owner claimed a lien (a right to withhold delivery until payment) on the cargo and refused to deliver until payment had been made.

The indorsees brought an action against the ship owner 1) for damages for delay and 2) for repayment of the £748. The court held :-

1). The plaintiff was not the indorsee of the bill of lading to whom property passed within the meaning of s1 B.L.A. (banks only have an equitable, not a legal title to goods) so the plaintiff pledgee could not sue on that contract. However from the acts of presentation of the bill of lading, payment of freight and delivery and acceptance of goods specified in the bill of lading, the court held that there is inferred a contract between the parties, to deliver and to accept delivery of goods, according to the terms of the bill of lading.

2). The carrier was estopped from denying that the goods were shipped in apparent good order and condition. He had signed a bill of lading, which indicated to prospective buyers of the cargo, that the goods were in good order and condition when loaded. Buyers rely on such statements in the bill of lading. The wetting occurred pre-shipping and so the carrier was held liable in damages, for delay, which was not covered by exclusion clauses in the bill of lading.

3). The plaintiffs were entitled to recover the £748 paid under protest.

4). Exception clauses regarding delay were ineffective.

Liability under Brandt v Liverpool Contract is remarkably similar to liability in tort for negligent misstatement under the general principles developed by **Hedley Byrne v Heller**.[7] Indeed, in the absence of a Brandt v Liverpool Contract, there should be no problem today to mounting a **Hedley Byrne v Heller** / **White v Jones** [8] type action on the same grounds, since concurrent liability co-exists in tort and contract following the House of Lords decision in **Henderson v Merrett Syndicates** .[9]

In Brandt v Liverpool there had been a deviation from the terms of the contract an not as alleged by the shipowners, a mere delay in the execution of the contractual terms. The clause excluding liability for delay was not applicable under the contra preferentem rule, so damages for delay were also recoverable.[10]

Since the Brandt v Liverpool contract evolved to remedy defects in the s1 BLA implied contract the Brandt v Liverpool implied contract may no longer be that useful in the light of s2 COGSA 1992 implied rights of suit regarding carriers and holders of bills of lading. However, its potential role regarding the extension of the benefit of Himalaya Clauses to stevedores under **The Eurymedon** [11] type situation by way of an implied contract may still important, though the Contract Third Parties Act 1999 may mean that further development of the Brandt v Liverpool concept would not be needed to deal with this problem.

6 **Brandt v Liverpool Brazil & Riverplate S.S. Co**. (1924) 1 K.B. 575.

7 **Hedley Byrne & Co. v Heller & Partners Ltd.** [1964] A.C. 465

8 **White v Jones** [1995] 1 All.E.R. 691 House of Lords.

9 **Henderson v Merrett Syndicates** [1994] 3 All.E.R 506. House of Lords.

10 See also **Joseph Thorley v Orchis SS** [1907] 1 K.B. 660 and **Lilley v Doubleday** (1881) 7 QBD 510

11 **The Eurymedon : New Zealand Shipping Co. Ltd v Satterwaite (A.M.) & Co. Ltd** [1975] A.C. 154. P.C.

The actual scope of COGSA 1992 is not finalised regarding the documents it may apply in the future. There is room for the courts to extend the Brandt v Liverpool Contract in the future to other innovatory forms of shipping document, including electronic documents in the absence of amending provisions by the Secretary of State. Thus, the Brandt v Liverpool implied contract may not yet be redundant. Up to date the courts have limited its application to bills of lading, which could if continued, limit its usefulness. However, since the Brandt v Liverpool implied contract was created by the courts in the first place to reflect the aspirations and needs of the commercial world such judicial inventiveness in the future should not be ruled out.

Limitations on the value of the Brandt v Liverpool Contract.[12]

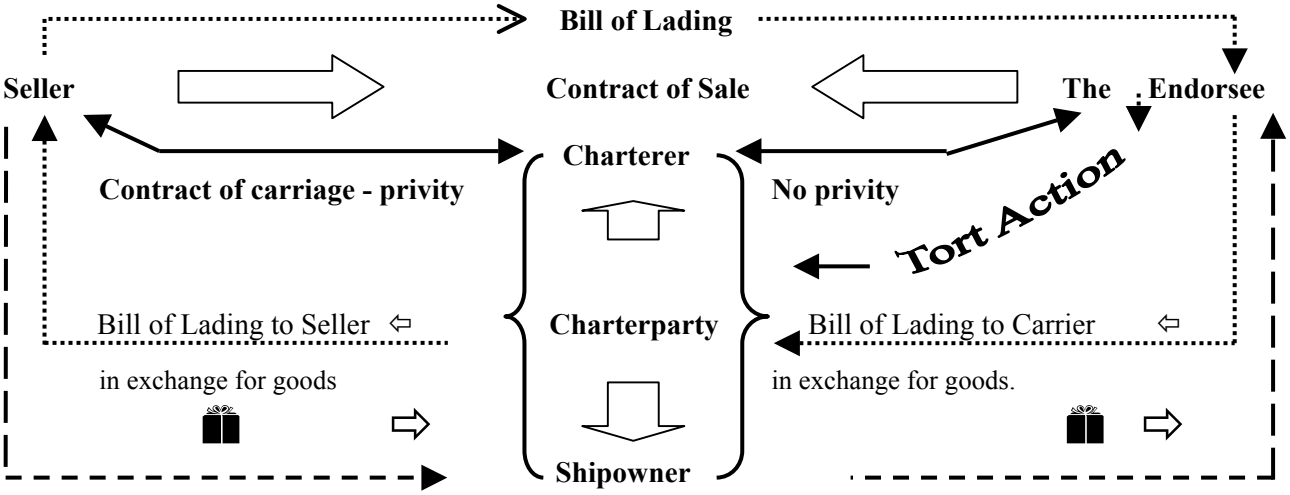
The great benefit of a Brandt v Liverpool Contract was that it involved reciprocal rights of exchange of goods for documents without any need for the claimant to establish ownership of the goods, be it through endorsement or otherwise. All that was required was to be a party to the new contract. However, the courts subsequently relied heavily on general contract principles to restrict the circumstances within which the contract could be relied upon. In particular, whilst implication short-circuited the need for privity, consideration was still essential, as was the fact of an exchange. If there was no exchange because no goods arrived at all, there could be no Brandt v Liverpool Contract. Likewise, if there was no monies due from the indorsee to the carrier, perhaps in the form of freight as in a freight collect contract, or demurrage, then the courts were not prepared to find the mere exchange of documents alone constituted consideration. The result was that few c.i.f. buyers could rely on the Brandt v Liverpool Contract since freight had already been paid in advance by the c.i.f. shipper / seller.

LIABILITY IN TORT FOR LOSS AND DAMAGE TO CARGO

Actions founded in the Tort of Negligence.

In line with the basic principles of the tort of negligence as epitomised by **Donoghue v Stevenson** [13] which made it clear that a person may owe a duty of care towards the property of others, if he could foresee that his actions might damage that property without lawful excuse, if the carrier negligently causes loss or damage to a buyer's property, the buyer may be able to sue the carrier in the tort of negligence.

Tort Action by Buyers not privy to contract of Carriage.



The major limitation is that a tort action is only possible if the property belonged to the buyer at the time that the damage was caused. As we will see later the question as to exactly when ownership passes from the seller to the buyer is highly complex and differs both from standard form contract to standard form contract and depends on the facts of every case.

Agents who bear financial responsibility for the safety of the goods but do not become owners of goods cannot claim in tort. These factors severely limit the usefulness and availability of tort actions for buyers. The problem is similar to that which prevailed in respect of the right of suit under the Bill of Lading Act

12 See the Law Commission Report leading up to the Carriage of Goods By Sea Act 1992 where the defects of the Brandt v Liverpool Contract are fully explored.

13 **Donoghue v Stevenson** [1932] A.C. 562. House of Lords.

which was also limited by an ownership requirement. On the other hand, if a claimant was the owner at the time of damage, then an action is permitted. The method by which ownership is acquired is not limited by or restricted to the endorsement of the bill of lading. The need and value of tort actions has been devalued by the introduction of s2 COGSA 1992.

In **The Aliakmon** [14] the plaintiff, a buyer, contracted to buy steel coils shipped in Korea c&f free out of Immingham, price payable by a 180 day bill of exchange to be endorsed by the buyer's bank in exchange for a bill of lading. The buyer intended to resell the cargo before the bill of lading was tendered but was unable to effect a sale and the bank declined to back the bill. The buyer did not have enough money to pay the seller on endorsement of the bill of lading. The buyer and the seller entered into re-negotiation of the contract of sale to resolve the problem. The seller sent the bill of lading to the buyer, the steel to be at disposal of the buyer and the buyer was to notify sales to the seller. The buyer sent the bill of lading to receiving agents at Immingham instructing them to clear the steel through customs and warehouse it, to the sole orders of the seller and stating that the buyer would accept liability for the customs duty acting as the seller's agents. The goods were loaded on the defendant's vessel, The Aliakmon, which was hired to charterers under a time charterparty. The time charterers were responsibility for stowage of the cargo with a power reserved to the master to intervene. Owing to bad stowage in a damp hold damage was caused to the goods. The coils rusted. The buyer brought an action claiming against the ship owner for damages for breach of contract.

Staughton J held that the ship owner was liable to the buyer under s1 B.L.A. 1855 for breach of contract and so a tort action was not necessary. The C.A. upheld an appeal. The buyer had no right in the circumstances to sue the ship owner in tort or in contract. Appeal to the House of Lords : The House of Lords dismissed the appeal and held that for the buyer to claim in tort he had to have a property right in the goods at the time of the loss. The court stated per curiam that the buyer due to the variation of the contract had lost the right to a s1 B.L.A. contract. The buyer could have sought the protection of a clause at the time of the contract, requiring the seller to sue on his behalf but had failed to do so thus leaving himself exposed to risk.

Neither the Bill of Lading Act, nor the Brandt v Liverpool Implied Contract, applied. There was no tort action available either because the proprietary interest necessary in order to found liability in tort for damage to goods was lacking. The goods remained at all times the property of the seller, because of a Romalpa [15] retention of title clause, for 180 days from receipt of bill of lading by the buyer. Even if an action in tort had been available, the rule against recovery for pure economic loss at that time would have prevented recovery.

It should be noted however, that a tort action today under **Hedley Byrne v Heller** and **White v Jones** based on reliance on the statements in the Bill of Lading regarding the condition of the goods and a failure to carry out a professional service in compliance with the contract of carriage, would most likely succeed. The action would not be subject to the pure economic loss restrictions that apply to general actions for damage under the tort of negligence.

Since s2 COGSA 1992 now accords rights of suit to the lawful holder of a bill of lading**, The Aliakmon** scenario may no longer be a bar to legal action. If the agent / buyer sued then he would still have to pay the seller the full sale price for the goods. Only one party would be able to sue and recover. The issue of who the damages are to be held for would still have to be dealt with, to prevent double jeopardy, if the seller sued under **The Albazero** [16] type principal embodied in s2(3) C.O.G.S.A. 1992 and **Linden Garden's Trust v Lenesta Sludge Disposals**.[17] The money would be kept in trust for the agent / buyer. Persuading the seller to sue for the buyer is problematic and is no longer necessary thanks to s2 COGSA 1992.

The Carrier's interest in establishing a contract with the Buyer

Far from wishing to deny the existence of a contract with the buyer, carriers are often at pains to establish that in fact there is a contract because

14 **The Aliakmon** [1986] 2 A1l.E.R. 145. House of Lords.

15 **Aluminium Industrie Vaassen BV v Romalpa Aluminium** [1976] 2 All.E.R. 552

16 **The Albazero : The Albacruz (Cargo Owners) v The Albazero (Owners)** [1977] A.C. 774.

17 **Linden Garden's Trust v Lenesta Sludge Disposals** [1993] 3 A.E.R. 417.

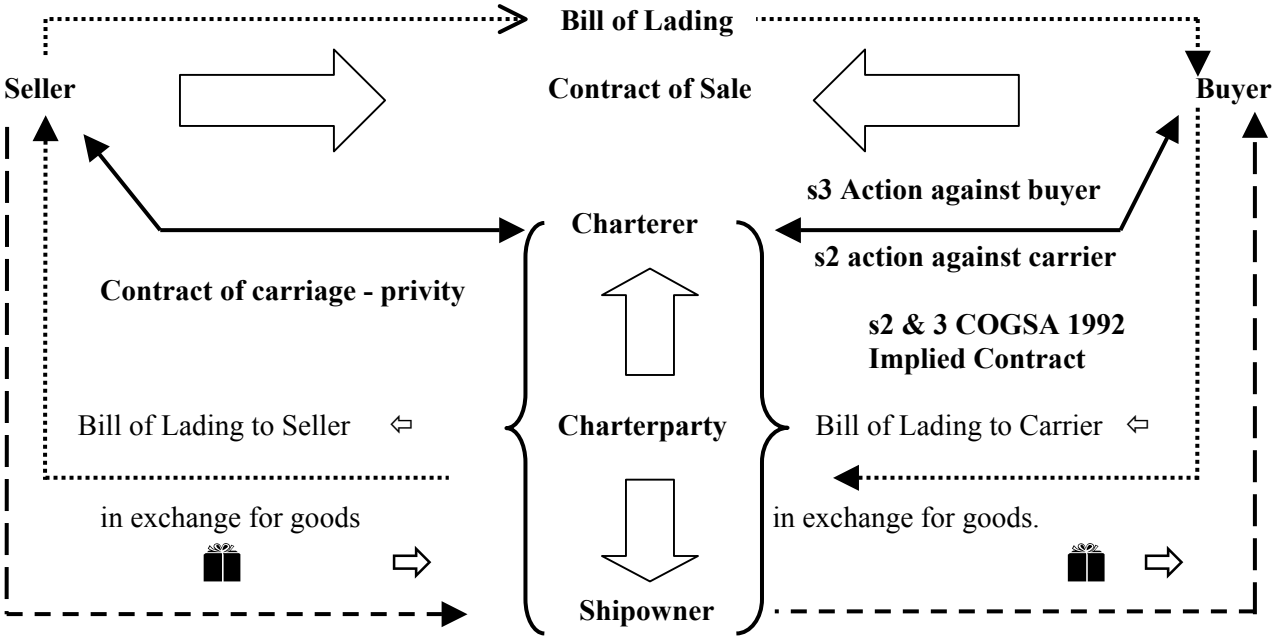
a) The carrier may want to prove there is a contract between himself and the buyer incorporating the terms and conditions of the original contract of carriage so that he can claim any outstanding freight and handling charges.

b) The Contract of Carriage may contain terms limiting the carrier's liability. Limitation, exemption and exclusion clauses in the contract of carriage are common. The exemption terms may be express between the parties or the exemption terms may be implied under The Hague Rules, The Hague Visby Rules (COGSA 1971) or The Hamburg Rules.

However, only a party to a contract can sue under the contract of carriage and likewise be bound under it. Unless the buyer is made a party to the contract of carriage he could disregard the exemption clauses and sue for the full amount in tort. Whilst the action failed in tort in **The Aliakmon** because the buyer did not own the goods such retention of title clauses are quite rare and often the buyer will have owned the goods at the time that they were damaged and could therefore successfully sue in tort. The carrier could not then rely on his exemption clauses to resist a tort action against himself.

Whilst **Henderson v Merrett Syndicates**[18] makes it clear that there is concurrent liability in tort and contract, it is clear that any exclusion clauses in the contract have the effect of limiting the scope of the duty of care in tort and providing the exclusion clause does not offend the **Unfair Contract Act 1971** (UCTA) the clause will be effective. The Carrier in such a situation will therefore also seek to show that a contract of carriage exists between himself and the buyer. This contract is now clearly established by s3 COGSA 1992. Thus, the buyer can sue the carrier on the terms of the contract of carriage contained in the Bill of Lading, but the buyer / endorsee is also subject to the liabilities imposed by the Bill of Lading contract. Hence the carrier can sue the buyer as lawful holder of the bill of lading.

s2 COGSA 1992 action.



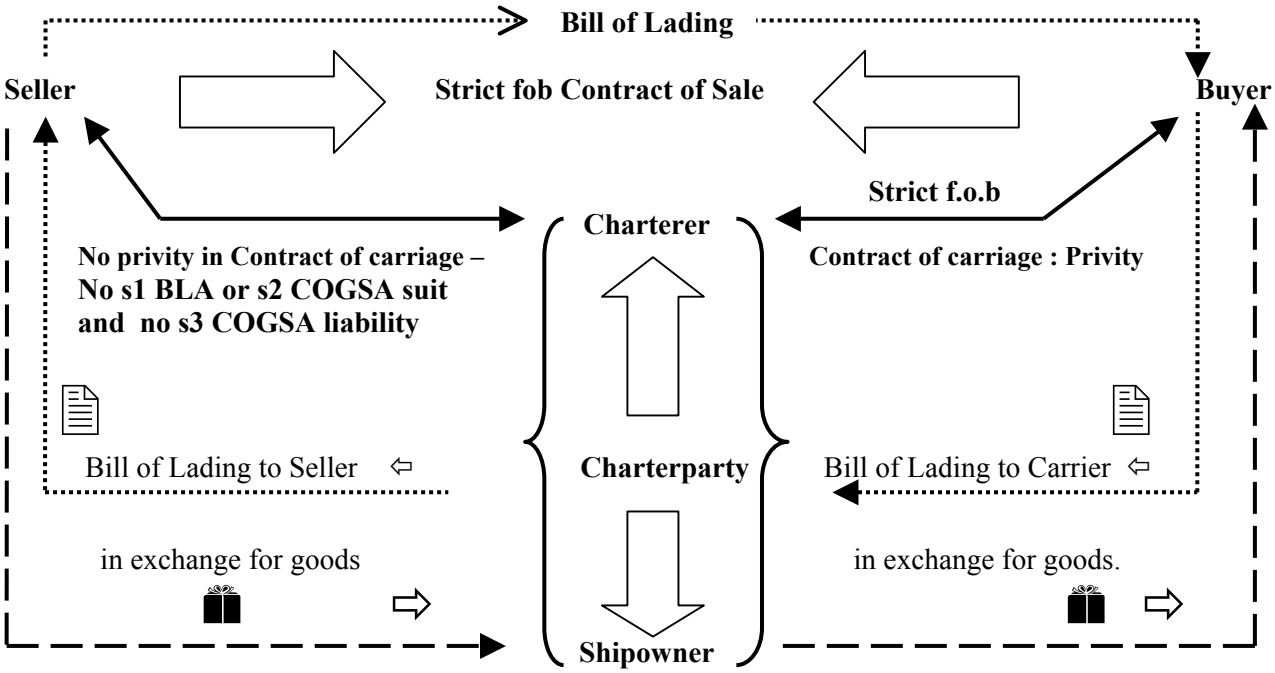
Neither party would gain any benefit from seeking to making a claim in tort since all that a claimant has to do to establish liability in contract is to establish that a contract exists and that it has been broken. A claimant in tort has to prove a duty of care, breach of the duty and causation.

[18] **Henderson v Merrett Syndicates** [1994] 3 All.E.R 506. House of Lords.

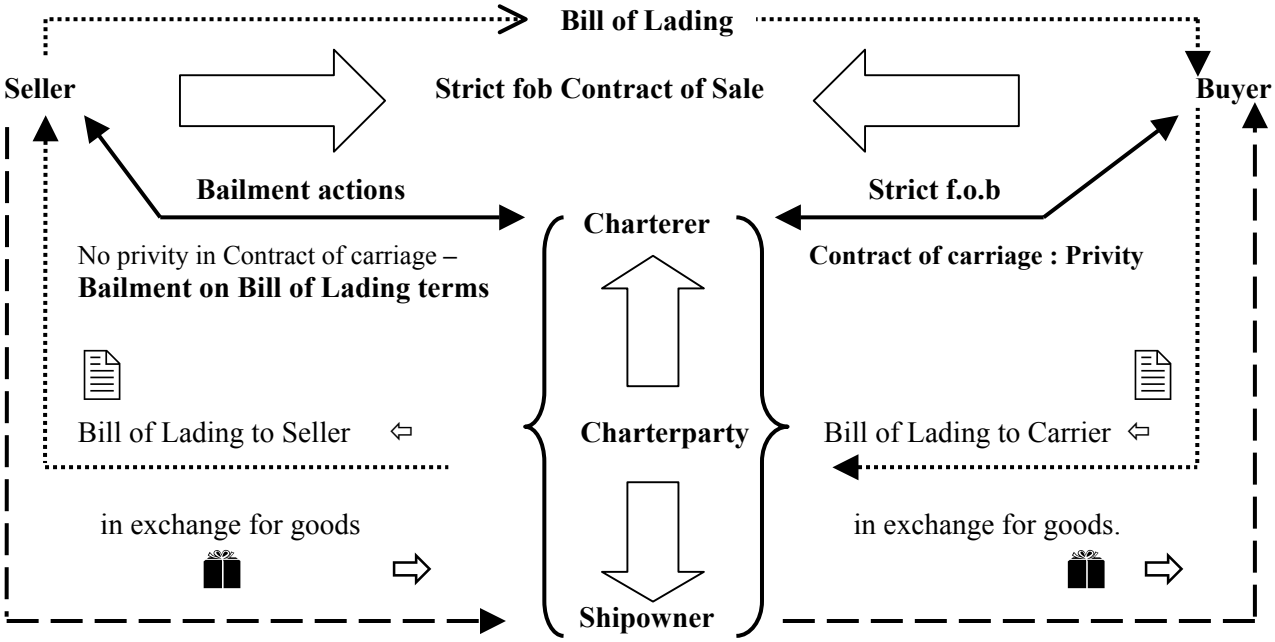
PRIVITY OF CONTRACT UNDER STRICT FOB CONTRACTS

Under a strict fob contract the buyer makes the contract of carriage with the carrier. The shipper is not a party to the contract of carriage and cannot therefore sue the carrier for loss or damage to cargo during transit or be sued by the carrier for freight or loading / discharge costs under the contract of carriage.

Strict fob sales



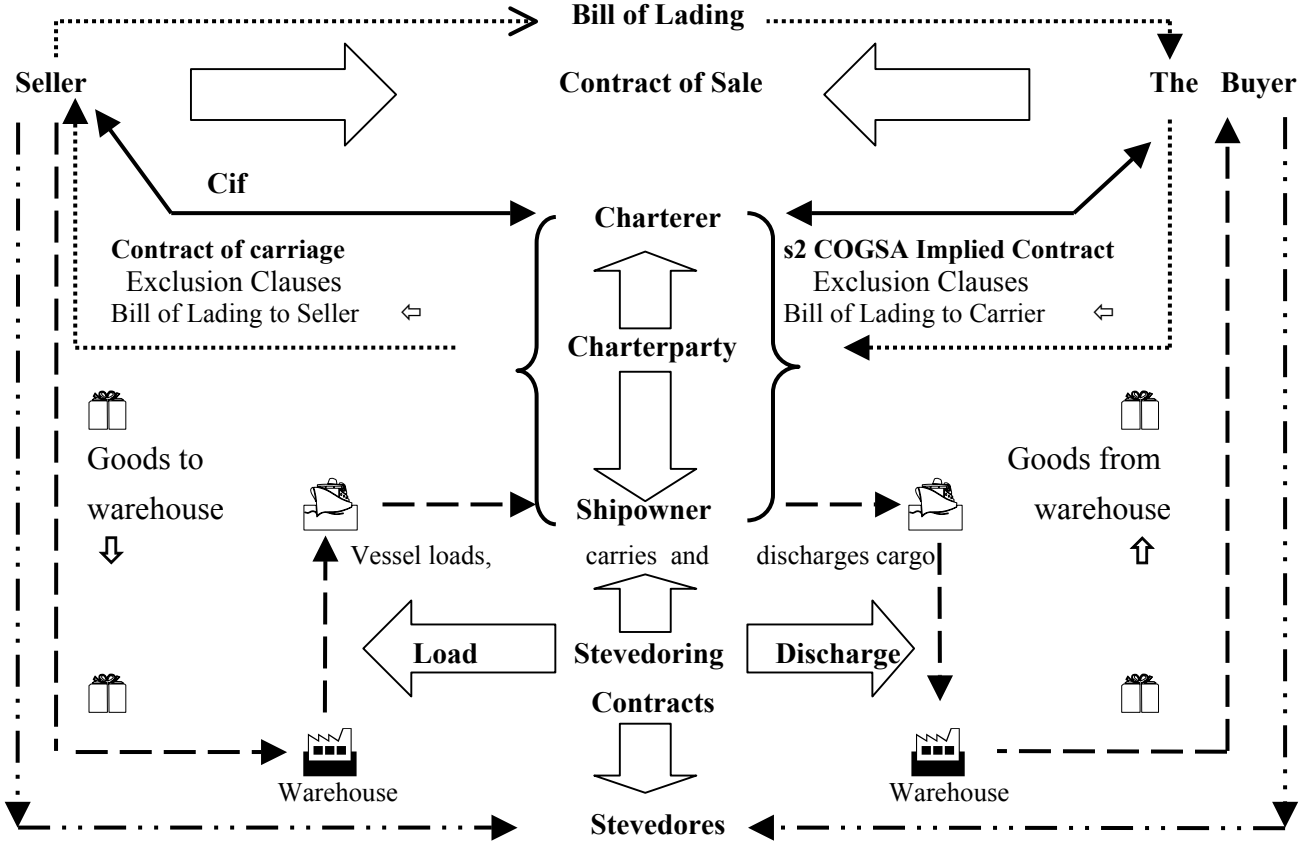
The strict fob shipper is not privy to the contract of carriage and therefore has a problem claiming compensation from a carrier for breach of contract under common law rules. s1 Bills of Lading Act 1855 did not and s2 Carriage of Goods by Sea Act 1992 does not provide the shipper with a right of suit. The solution for the shipper lies in a Bailment action using tort procedures.



THIRD PARTY INTERESTS IN THE CONTRACT OF CARRIAGE

The Contract of Carriage often contains exemption clauses, which afford protection for the carrier and stevedores. These are also quite commonly incorporated into the bill of lading by a legend such as "The Bill of lading is on, and incorporates the terms of the Contract of Carriage". Such limitations are common in Charterparties and many bills of lading are stated to be on charterparty terms.

If the stevedores damage goods, the seller / shipper or the buyer / endorsee of the bill of lading, who owns the goods, may seek to sue the stevedores directly for negligence in tort. The advantage of doing this lies in that the goods owner may be limited by The Hague / Hague-Visby Rules[19] as to the amount he can recover from the carrier. However, if the stevedores are not protected by the Convention's rights to limit liability, the goods owner may recover the full value of the damaged goods from the stevedores. Naturally therefore the stevedores will seek to show that they are privy to the contract of carriage and can therefore take advantage of such limitation rights.



Tort or contract claim against stevedore ? Tort or contract claim against stevedore ?

The text of the Hague Visby Rules is embodied in Schedule 1, Carriage of Goods by Sea Act 1971. Any goods shipped under a bill of lading from the U.K. will be subject to the provisions of Carriage of Goods by Sea Act 1971 which places a limit on the amount of compensation that can be claimed by the owner of goods accidentally damaged during loading and transit by sea. Exclusion clauses seeking to escape liability altogether are rendered null and void by Art III rules 8.

In **Scruttons v Midland Silicones,**[20] a contract of carriage incorporated the Hague Rules for an outward voyage from the U.S. in accordance with the U.S. Carriage of Goods Rules 1936.[21] The Hague Rules limited

[19] Certain limitations are placed on the ability of a carrier to limit his liability by a number of International Conventions such as 'The Hague Rules', 'The Hague-Visby Rules' (C.O.G.S.A. 1971) and 'The Hamburg Rules'. Variations of these conventions have been incorporated into the domestic law of different nations. The Hamburg Rules are part of the domestic law of certain contracting states such as Egypt and will apply at the behest of a receiver of goods subject to a contract of carriage by sea in that contracting state. Hamburg Rule provisions differ in many significant ways from The Hague and The Hague Visby rules.

[20] **Scruttons Ltd. v Midland Silicones**. [1962] A.C. 446. House of Lords,

[21] In similar terms to the U.K. C.O.G.S.A. 1934.

the liability of the carrier to $500 Maximum damages. A potential legal action existed between the shipper / seller and the carrier. The cargo, a drum of chemicals, was damaged by stevedores engaged by the carrier as independent contractors. The bill of lading was consigned to the buyer who claimed £593 damages worth circa $2,000 in 1962. If the Consignee / Endorsee sued the carrier on the bill of lading then liability would have been limited to $500 by virtue of The Hague Rules limitation clause. So, the consignee sued the stevedores directly in tort for negligence. The action succeeded. The consignee recovered the full £593 damages. The House of Lords reaffirmed the Doctrine of Privity of Contract. The Hague Rules exemption clauses were not applicable. The stevedores were not a party to a contract incorporated under The Hague Rules, or indeed any contract with the consignee at all. An agreement in the contract of services between the stevedores and the carrier had no effect on the relationship or lack of relationship, as the case may be, with the owner of the goods. The stevedores could not avail themselves of a statement in the contract of carriage that stevedores were to benefit from the limitation of liability clause within the contract of carriage because they were not privy to that contract.

In the leading case of **Adler v Dixon The S.S. Himalaya,**[22] Mrs Adler, the plaintiff, bought a ticket for a cruise aboard the S.S. Himalaya. The ticket contained an exclusion clause stating that the Peninsular and Oriental Steamship Co. (P&0) would not be liable for any injury sustained to passengers howsoever caused and that passengers travelled at their own risk. The benefit of the clause was stated to extend to servants of P&0. The vessel had been poorly secured to the quay and drifted away from the dock in the wind just as the plaintiff was crossing the gang-plank onto the vessel. She fell off the gang-plank into the dock and broke her leg. She was unable to sue P&0 because of the exclusion clause so she sued Dixon, the ship's captain, under the tort of negligence and succeeded. The Captain tried to rely on the exclusion clause in the ticket to avoid liability but failed because he was not privy to the contract. Such clauses that purport to extend the benefit of limitation and exclusion clauses to third parties have become known as Himalaya Clauses.

Today under the Unfair Contract Terms Act and now also under the Unfair Terms in Consumer Contracts Regulations 1994 and the Unfair Terms in Consumer Contracts Directive 93/13 EEC businesses are no longer able to exclude liability in service contracts for death or personal injury. **Adler v Dixon** would today impose liability on P & 0 and it would not be necessary to sue the ship's master. Furthermore, under Article IV bis, The Hague Visby Rules now extend the benefit of exclusion clauses to servants and agents of carriers. However, stevedores, who are independent contractors, still do not enjoy protection under the rules.

It was held in **Scotson v Pegg** [23] that the performance of a contractual duty owed to a third party could form the basis of consideration for a contract with another person. The plaintiff, the buyer, bought a cargo of coal from a shipper / seller including the cost of shipment, loading and unloading. The ship owner /carrier agreed with the seller to deliver coal to the buyer. The carrier was reluctant to deliver the cargo because of labour problems at the port of discharge. The buyer then agreed with the carrier / ship owner that if he delivered the coal to the buyer and discharged the coal at a certain tonnage per day he would pay him extra money. The buyer subsequently refused to pay the additional sum and the carrier sued to recover the money. The court held that performing the contract of carriage was valid consideration for a new contract to pay the extra money. Whilst the carrier might well have been in breach of contract to the shipper if he did not carry out his contract he might well prefer to pay the penalty for breach of contract to the shipper than actually perform the contract. The cost of performance may well exceed liability for breach either because of danger or because his ongoing relations with others could be seriously damaged. Therefore from his point of view an extra payment to cover these additional costs would be a necessary factor to induce him to fulfil his original contractual undertaking. Without it he would not have performed the duty. Therefore performing that duty is consideration for the new contract.

The privity rule applied in **Scrutton v Midland Silicones** was circumvented in **The Eurymedon.**[24] The facts were very similar to **Scrutton v Midland Silicone**. There was a contract of carriage incorporating the Hague Visby Rules. The clause relied on was a 1 year time bar. There was a Himalaya Clause drafted with the

22 **Adler v Dixon The S.S. Himalaya** [1955] 1 Q.B. 158.

23 **Scotson v Pegg** (1861) 2 H & N 295.

24 **The Eurymedon** : **New-Zealand S.S. v Satherwaite** [1975] A.C. 154. Privy Council appeal from New Zealand.

intention of avoiding the decision in **Scrutton v Midland Silicones**. The clause claimed to afford protection for the carrier and agents and independent contractors of the carrier and those engaged by him. The stevedores were expressly included. The stevedores were an associated company of the carrier, though retaining independent legal personality, which is why the clause was intended to protect them as well. Goods were damaged during unloading. The consignee did not sue till after the time bar in the contract of carriage had elapsed. A tort action was essential to the consignee since it was within the Limitation Act time limits. The stevedores claimed the benefit of the exclusion clauses and limitation clauses in the contract of carriage and won. The Privy Council held that by entering the bill of lading contract, the cargo owner made a general offer to the stevedores that they would extend to them the benefit of any exemption clauses in the contract of carriage. The stevedores unilaterally accepted the offer, which was therefore binding on the cargo owner. The stevedores were entitled to the benefit of limitation clauses. Thus the time bar applied.

Distinction between The Eurymedon and Scrutton v Midland Silicones ?

1) **Stevedores clearly and expressly intended to benefit form the clause**. The contract of carriage and subsequent bills of lading incorporating the terms and conditions of the contract of carriage clearly included the stevedores as beneficiaries of the exclusion clauses.

2). **Agency or collateral contract**. The ship owners made two separate contracts with the shipper (a) A contract of Carriage between the ship owner and the shipper and (b) as agents of the stevedores, a contract that all stevedoring activities would be protected by the exclusion clause in respect of damage to cargo. Since the ship owners were agents of the stevedores, the stevedores as principals were the principal parties to the stevedoring part of the contract with the shipper.

3) **Transfer of rights.** This element of the liability of stevedores could then be transferred to the consignee via the Bill of Lading on endorsement under a Brandt v Liverpool type implied contract thus solving the privity problem on endorsement to new cargo owners.

   A previous attempt at transferring protection to stevedores failed in **Wilson v Darling Island Stevedoring** [25] because whilst the clause provided for stevedores in the contract of carriage it was not included in the bill of lading. A bill of lading incorporating all terms and conditions and exclusion clauses in the contract of carriage may work. Nonetheless the stringent requirements in **Interfoto Picture Library v Stiletto Visual Programmes Ltd.**[26] may require a clear restatement of the exclusion clause in the bill of lading though this final point is far from certain.

4) **Consideration**. Under **Scotson v Pegg**, performance of a contractual duty owed to one party can be valid consideration for a contract with a third party, so whilst the carrier's contracted with and paid the stevedores for loading and unloading the cargo, performance of this contractual duty could be consideration for a new implied contract with cargo owners that it would only be performed on condition that the cargo owners accepted that it would be carried out on the terms and conditions set out in the original contract of carriage between the shipper and the carrier. Thus the consideration problem was also overcome

Why was no contract implied in Scrutton v Midland Silicones ?

1). **No express inclusion**. The stevedores were not clearly included in the contract of carriage and the Bill of Lading whereas they were in **The Eurymedon**.

2) **No agency relationship**. There was no agency relationship because the carriers did not know when they made the contract of carriage with the shipper who the stevedores would be.

3). **Ratification requires a pre-existing agency relationship and knowledge by the principal.** No prior relationship to enable an agency relationship to develop. The stevedores were unaware of the existence of the contract and its terms. The stevedores must know of the existence of an offer before they can accept it.[27] In **The Eurymedon** the stevedores and carriers were closely related.

25 **Wilson v Darling Island Stevedoring** [1956] 1 Lloyds Rep 346

26 **Interfoto Picture Library V Stiletto Visual Programmes Ltd** [1989] Q.B. 433

27 **Offord v Davies**. (1862) 142 E.R. 1336.

To what extent is the Eurymedon effective ? If there is no close relationship there may be a lack of knowledge of the offer and there will be no agency relationship either. If it is a new or novel contract of carriage then it may fail. The courts have held that providing the contract is of a usual type, common in the trade, then the courts will imply knowledge.[28] If there has been a course of previous dealings as in **McCutcheon v David McBrayne** [29] then implied knowledge is even easier to establish. Otherwise, under **Olley v Marlborough Court Ltd**.[30] terms cannot be introduced into a contract after the contract is formed unless there is fresh consideration.

Implied extension of exclusion clauses to third parties seems to be more acceptable today as seen by **Southern Water Authority v Carey**,[31] where a main contract between developer and contractor for a sewage scheme limited the liability of sub-contractors in tort for defects in or damage to portions of the system. Sub-contractors caused damage. In **Norwich City Council v Harvey,**[32] the developer of a swimming pool was stated to bear risk of loss or damage caused by fire during construction. Sub-contractors caused fire damage to the complex. In both cases however the court held that the respective exclusion clauses protected the sub-contractors from liability in tort. The reason these clauses work is because the exclusion clause does not exclude liability so much as define when a duty of care is or is not owed. The most important element required for such a defining clause to work is notice. No contract is really necessary. From this point of view an implied Brandt v Liverpool Contract would not be needed in order to exclude a duty of care on stevedores. If no contract is needed then no device has to be found to avoid the problems of either privity or consideration. Since **Henderson v Merrett** the fine distinctions drawn between tort and contract relationships are less significant.

In **The New York Star,** the courts accepted that the exclusion clause could be extended to the stevedores for the loading and unloading process, but the theft of cargo occurred after unloading during storage and it was held that the exclusion clause did not extend to that storage period and so the stevedores had to pay the full amount of damages. Since there has to be an acceptance of the unilateral contract, which occurs when the goods are unloaded and collected by the cargo owner, as under the Brandt v Liverpool Contract, what if the goods are dropped in the sea ? Is there an implied contract on commencement of unloading or only on completion of unloading and delivery ? Note that a Brandt v Liverpool contract cannot be implied, even between endorsee of bill of lading and carrier, if no goods are delivered at all as where for instance goods are lost at sea, because the basis of the contract is that delivery is on the terms and conditions of the bill of lading. Thus, if the stevedores lose or destroy the cargo completely there can be no delivery and hence no implied Brandt v Liverpool Contract.

In **Raymond Burke v Merseyside Docks,**[33] the court held, that if goods are damaged before loading or discharge commences there is no acceptance of the terms and conditions of the contract containing exclusion clauses (there were no consignee complications since the bill of lading had not been endorsed to the buyer). The acceptance occurs through performance as per **Carlill v Carbolic Smokeball Co**.[34] and so in the absence of performance there is no acceptance. The case involved a legal action by the shipper/seller against the stevedores for goods (Triumph Bonville Bikes) damaged on the docks before loading. There was a Himalaya clause for the benefit of the stevedores and The Hague Rules applied to the contract of carriage. Before starting to load the stevedores spilt sulphuric acid on the motor cycles. The court held that the exemption clauses were not applicable and the cargo owner could recover in full from the stevedores. It should be noted that **Raymond Burke v Merseyside Docks** is directly in conflict with **Elder Dempster v Patterson Zachonis** [35] which has accordingly been limited to its own facts on this point of law**.** There is no contract between a shipper and the carrier where the buyer makes the contract of carriage.

28 **The New York Star** [1981] 1 W.L.R. 138 ; **Godina v Patrick Operations Pty. Ltd**. [1984]. 1 Lloyd's Rep 333
29 **McCutcheon v David McBrayne** [1964] 1 All.E.R 430.
30 **Olley v Marlborough Court Ltd** [1949] 1 K.B. 532.
31 **Southern Water Authority v Carey** [1985] 2 All.E.R 1077.
32 **Norwich City Council v Harvey** [1989] 1 All.E.R 1180
33 **Raymond Burke Motors Ltd v The Merseyside Docks and Harbour Co. [**1986] 1 Lloyd's Rep 155.
34 **Carlill v Carbolic Smokeball Co.** [1893] 1 Q.B. 256.
35 **Elder Dempster v Patterson Zachonis** [1924] AC 522 had held third parties could be a party to a contract

Does the H.V.R. one year time bar for legal action in the contract of carriage apply to stevedores ? Under the Limitation Acts 1980 there is a standard time bar of 6 years from the time that a cause of action arises for legal action to be commenced in the courts in both contract and tort. Actions for personal injury are limited to 3 years. Once the limitation period has elapsed the action is said to be time barred and it is too late to claim. It is perfectly acceptable for the parties to a contract to stipulate a shorter limitation time period in a contract. Thus all contracts subject to The Hague Visby Rules are subject to a one year limitation period from discharge of the cargo, after which time claims for damage to cargo are time barred. Such clauses are effective to override the Limitation Act 1980 periods in respect of persons who are privy to the contract, but such a clause may be ineffective regarding tort actions, by persons who are not privy to the contract. Whether any exclusion clause or time bar clause is effective to negate a right of action for breach of contract or for a breach of duty of care in negligence will depend on reasonableness under the U.C.T.A 1977 and on notice of the existence of the clause, as to which see **Smith v Bush** and **Harris v Wyre D.C**.[36] Whilst any attempt to establish that the Hague Visby Rule time bar is unreasonable would fail, as far as carriers are concerned, there is no guarantee that it would also be reasonable for stevedores since the Rules were not intended for stevedores. This was not an issue in **The Eurymedon** since it preceded the U.C.T.A 1977. The outcome today might be different.

The Eurymedon and Brandt v Liverpool Contracts. It is possible that **The Eurymedon** may not work for endorsee's of cargo under a Brandt v Liverpool Contract since unlike a s1 Bills of Lading Act 1855 and s2 Carriage of Goods by Sea Act 1992 right of suit, the Brandt v Liverpool Contract only transfers rights and liabilities in respect of carrier, shipper and holder of bill of lading. No judicial decision has ever been made as to whether or not it embraces independent contractors.

Under **Pyrene v Scindia,**[37] The Hague and The Hague Visby Rules and duties therein, regarding the duty to safely load and discharge cargo, mean that the rules and their rights of limitation of liability apply to the loading and unloading process, from the point in time when loading hooks are attached to the cargo ready for loading, but the rules do not cover the storage period before the loading hooks are attached. By contrast the Hamburg Rules may cover the entire period of time when cargo is waiting at the docks before loading commences. Article IV bis : The Hague Visby Rules extend the benefit of the rules to servants and agents employed by the Carrier but do not include independent contractors. Even though The Hague Visby Rules are imported into the contract of carriage and the bill of lading there is still no statutory privity of contract under The Hague Visby Rules for stevedores.[38]

The Hague Visby Rules, exclusion clauses and clauses defining the scope of contractual obligations.

There are two distinct functions of clauses in contracts. The first, as seen above excludes liability for misfeasance in relation to duties undertaken in a contract. The second is to set out the scope of duties under the contract and in this respect such clauses are not really exclusion clauses at all but rather defining clauses. Thus in **Renton V Palmyra** [39] a clause regarding where cargo had to be delivered, which permitted delivery at a place other than the port of destination, in the event of strikes and other problems, defined the duties undertaken in the contract. A contract can place the liability of duties under a contract on either the carrier or the ship owner where a vessel is chartered. Neither of these clauses is in reality an exclusion clause. They do not seek to lower the standard of performance of contracts required by The Hague Visby Rules and so do not detract from the rules and are valid terms of the contract.

36 **Smith v Eric S. Bush** and **Harris v Wyre Forest D.C**. [1989] 2 All.E.R. 514. House of Lords.

37 **Pyrene Co. Ltd v Scindia Navigation Co. Ltd** [1954] 2 Q.B. 402.

38 For further discussion on when an agent is or is not an independent contractor see 'Introduction to the Law of Carriage of Goods.' By David Glass. & Chris Cashmore. Sweet & Maxwell. 1989.

39 **The Caspiana** : **Renton (G.H.) & Co. v Palmyra Trading Corp. of Panama** [1957] A.C. 957.

CHAPTER ONE

Law Commission Report No242 on Contracts - Rights of Third Parties.

In July 1996 the Law Commission finally published, after a long gestation period and much consultation, its report on Privity of Contract - Contracts for the benefit of third parties. Law Com No242: Cm 3329. HMSO. The Report contained a draft Bill. This became law in November 1999.

CONTRACT (RIGHTS OF THIRD PARTIES) ACT 1999

Preamble : An Act to make provision for the enforcement of a contract in certain circumstances by a person who is not a party to the contract; and for connected purposes.

1(1) Subject to the provisions of this Act, a person who is not a party to a contract (in this Act referred to as a third party) may in his own right enforce the contract if
- (a) the contract contains an express term to that effect; or
- (b) subject to subsection (2) below, the contract purports to confer a benefit on a third party.

1(2) Subsection (1)(b) above does not apply if on a proper construction of the contract it appears that the parties do not intend the contract to be enforceable by the third party.

1(3) The third party must be expressly identified in the contract by name, as a member of a class or as answering a particular description but need not be in existence when the contract is entered into.

1(4) For the purpose of exercising the rights conferred on him by this section there shall be available to the third party all such remedies as would have been available to him in an action for breach of the contract if he had been a party to it, and the rules relating to damages, injunction, specific performance and other relief shall apply accordingly.

1(5) Where the contract excludes or limits the third party's liability in relation to any matter references in this Act to his enforcing it shall be construed as references to his availing himself of the exclusion or limitation.

1(6) In this Act the promisor means the party to the contract against whom it is enforceable by the third party by virtue of this section and the promisee means the party to the contract by whom it is enforceable against the promisor.

2(1) Subject to the provisions of this section, where a contract is enforceable by a third party by virtue of section 1 above the parties to the contract may not without his consent vary or cancel the contract if -
- (a) the third party has communicated his assent to the contract to the promisor;
- (b) the promisor is aware that the third party has relied on the contract; or
- (c) the promisor can reasonably be expected to have foreseen that the third party would rely on the contract and the third party has in fact relied on it.

2(2) The assent referred to in subsection (1)(a) above -
- (a) may be by words or conduct; and
- (b) if sent to the promisor by post or other means, shall not be regarded as communicated to the promisor until received by him.

2(3) A contract which is enforceable by a third party by virtue of section 1 above may expressly provide -
- (a) that it shall be capable of cancellation or variation without the consent of the third party: or
- (b) that his consent is to be required in circumstances specified in the contract instead of those specified in subsection (1) above.

2(4) Where by virtue of the foregoing provisions of this section the consent of a third party is required for the cancellation or variation of a contract the court may, on the application of the parties to the contract, dispense with that consent if satisfied -
- (a) that the third party's consent cannot be obtained because his whereabouts cannot reasonably be ascertained; or
- (b) that he is mentally incapable of giving his consent.

2(5) The court may, on the application of the parties to a contract, dispense with any consent to a variation or cancellation of the contract that may be required by virtue of subsection (1)(c) above if satisfied that it cannot reasonably be ascertained whether or not the third party has in fact relied on the contract.

2(6) Where the court dispenses with a third party's consent it may impose such conditions as it thinks fit, including a condition requiring the payment of compensation to the third party.

2(7) The jurisdiction conferred by subsections (4) to (6) above shall be exercisable both by the High Court and a county court.

3(1) Subsections (2) to (5) below apply where in reliance on section 1 above proceedings for the enforcement of a contract are brought by a third party.

3(2) The promisor shall have available to him by way of defence or set-off any matter that -
(a) arises from or in connection with the contract; and
(b) would have been available to him by way of defence or set-off in proceedings for the enforcement of the contract if those proceedings had been brought by the promisee.

3(3) Subsection (2) above is subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence or set-off, and is without prejudice to any express term of the contract which makes available to the promisor by way of defence or set-off any other matter which would have been so available in proceedings for the enforcement of the contract had they been, brought by the promisee.

3(4) The promisor shall also have available to him
(a) by way of defence or set-off any matter, and
(b) by way of counterclaim any matter not arising from the contract,
that would have been available to him by way of defence or set-off or, as the case may be, by way of counterclaim against the third party if the third party had been a party to the contract.

3(5) Subsection (4) above is subject to any express term of the contract as to the matters that are not to be available to the promisor by way of defence, set-off or counterclaim.

3(6) Where in any proceedings brought against him a third party seeks in reliance on section 1 above to enforce a contract (including, in particular, a contract purporting to exclude or limit any liability of his), he may not do so to the extent that he could not have done so (whether by reason of any particular circumstances relating to him or otherwise) if he had been a party to the contract.

4 Section 1 above is without prejudice to any right of the promisee to enforce the contract.

5. Where by virtue of section 1 above a contract is enforceable by a third party and the promisee has recovered from the promisor a sum in respect of-
(a) the third party's loss in respect of the contract, or
(b) the expense to the promisee of making good to the third party the default of the promisor,
then, in any proceedings brought by virtue of that section by the third party, the court shall reduce any award to the third party to such extent as it thinks appropriate to take account of the sum recovered by the promisee.

6(1) Section 1 above is without prejudice to any right or remedy of a third party which exists or is available apart from this Act.

6(2) Section 1 above confers no rights on a third party in the case of -
(a) a contract for the carriage of goods by sea, except that a third party may by virtue of that section avail himself of an exclusion or limitation of liability in such a contract;
(b) a contract for the carriage of goods by rail or road, or for the carriage of cargo by air; which is subject to the rules of the appropriate international transport convention, except that a third party may by virtue of that section avail himself of an exclusion or limitation of liability in such a contract;
(c) a contract contained in a bill of exchange, promissory note or other negotiable instrument;
(d) an agreement to submit to arbitration present or future disputes; or
(d) an agreement as to the court, or courts, which are to have jurisdiction to settle present or future disputes or are not to have such jurisdiction.

6(3) For the purposes of subsection (2) above -
(a) "contract for the carriage of goods by sea" means a contract of carriage -
(i) which is contained in or evidenced by a bill of lading or sea waybill to which the Carriage of Goods by Sea Act 1992 applies; or
(ii) under, or for the purposes of which, there is given an undertaking which is contained in a ship's delivery order to which that Act applies;
(b) "the appropriate international transport convention" -
(i) in relation too a contract for the carriage of goods by rail, means the Convention which has force of law in the U.K. by virtue of section 1 of the International Transport Convention Act 1983.
(ii) in relation to a contract, for the carriage of goods by road, means the Convention which has force of Jaw in the U.K. by virtue of section 1 of the Carriage of Goods by Road Act 1965; and

(iii) in relation to a contract for the carriage of cargo by air, means the Convention which has force of law in the U.K. by virtue of section I of the Carriage by Air Act 1961 or the Convention which has such force by virtue of section 1 of the Carriage by Air (Supplementary Provisions) Act 1962 (or either of the amended Conventions set out in part B of Schedule 2 to the Carriage by Air Acts (Application of Provisions) Order 1967).

6(4) Section 2(2) of the Unfair Contract Terms Act 1977 (restriction on exclusion etc of liability for negligence) shall not apply where the negligence consists of the breach of an obligation arising from the terms of a contract and the person seeking to enforce them is a third party acting by virtue of section 1 above.

6(5) In sections 5 and 8 of the Limitation Act 1980 the references to an action founded on a simple contract and an action upon a speciality shall respectively include references to an action brought by virtue of section 1 above relating to a simple contract and an action brought by virtue of that section relating to a specialty.

6(6) A third party shall not by virtue of section 1(4) or 3(4) or (6) above be treated, for the purposes of any other Act (or instrument made under any Act), as a party to the contract.

7(1) Section 1 above applies also where -

(a) the express term referred to in paragraph 9a) of subsection (1) applies only to a particular provision of the contract; or

(b) it is only a particular provision of the contract that purports to confer a benefit as mentioned in paragraph (b) of that subsection.

7(2) in any such case -

(a) references in this Act to the enforcement of the contract, or to a contract being enforceable, by a third party shall be construed as references to the enforcement of the particular provision in question, or to its being enforceable, by a third party; and

(b) the reference in section 3(2)(a) above to the contract shall be construed as a reference to the contract so far as relevant to that particular provision.

8(1) Where the persons to whom a contractual promise is made include a person who does not provide consideration for the promise, that person shall not be treated as a third party for the purposes of this Act.

8(2) Subsection (1) above is without prejudice to any right or remedy of such a person in relation to the contract which exists or is available apart from this Act.

9(1) This Act may be cited as the Contract (Rights of Third parties) Act 1996.

9(2) This Act comes into force at the end of the period of six months beginning with the day on which it is passes and does not apply in relation to contracts entered into before the end of that period.

9(3) This Act extends to England and Wales only.

COMMENTS ON THE ACT

The shipping industry appears at first sight to be a prime candidate for the application of the Act since it routinely involves third parties in the provision of services. However, the Act does not apply to contracts of carriage covered by C.O.G.S.A. 1992, involving bills of lading, sea way bills and ship's delivery orders. The oddity of this is that if a carrier employs any other document the Act may apply. If any new document of title, containing a contract of carriage and making goods deliverable "to order" evolves in the future which is not a bill of lading, and which is not then made subject to Act by the Secretary of State under s1(5) and s1(6) C.O.G.S.A. 1992, as for instance an electronic bill of lading[40] then the Acts provisions would apply.

The fascinating feature of this is that such third party consignees would be better off than under s2 C.O.G.S.A. 1992. Non-COGSA 1992 consignees could sue carriers in contract but could not be sued by the carrier for pre-shipment liabilities under the contract of carriage since in the absence of s3 COGSA 1992 provisions, liabilities are not then transferred to subsequent holders of such documents. However, s3 of the Act would enable the carrier to sue for post shipment liabilities since it expressly enacts the principal parties rights of set-off and counterclaim. The third party therefore takes rights subject to some burdens. The document would have to comply with the Act and incorporate third party rights, but the third party can be a member of a class of person such as subsequent holders of the document. A prior relationship does not have to be in existence at the time the main contract is concluded.

[40] or even a through bill of lading if the Law Commission's trust in the judges proves to be misplaced.

The Act makes it clear that the stevedore's dilemma illustrated by **Scrutton v Midland Silicones** and **The Eurymedon** is to be swept away. There will be no problem under the Act in carrier's totally excluding the liability of stevedores for non Hague Visby Rules loading and discharge activities, Hague Visby Rules time limits and pre-storage and pre-loading limitations and exemptions for liability for the negligent handling of goods and for extending the benefit of the Hague and Hague-Visby Rules limitations to stevedores in respect of loading activities, where applicable.

The promise not to sue a third party, illustrated by the promise in a bill of lading by the cargo owner not to sue a sub-carrier of the carrier in **The Elbe Maru** [41] and **The Chevalier Rose** [42] was enforceable after a fashion but was somewhat uncertain. The promisee could seek a stay of action or the third party could invoke the court to exercise its discretion if the applicant could demonstrate a real possibility of prejudice to his interests if the action were not stayed. Since such bailees are not subject to a contract of carriage involving a bill of lading, ship's weigh bill or ship's delivery order, such a provision would be covered by this Act and would be enforceable. This offers a simple way of avoiding the problems in **The Mahkutai.**[43] Alternatively it is now possible to simply exclude the liability of the sub-carrier.

Some care needs to be taken regarding scope of exclusion. s2(2) U.C.T.A. 1977 would permit total exclusion of liability for infra U.K. port cargoes and the statutory reasonableness test will not apply. There is no mention however of the **Photo-Productions v Securicor**[44] **/ George Mitchell v Finney Lock Seeds** [45] common law reasonableness test which applies to international carriage contracts and these limitations on the scope of exclusion clauses will presumably therefore continue to apply. Furthermore, since any contract of carriage subject to The Hague Visby Rules benefits from the minimum standards required by the Rules such an exclusion would be null and void to the extent that it detracted from the Rules. Non contracting state cargoes would be unaffected. s2(1) UCTA 1977 still applies so exclusion of liability for death or personal injury within the U.K. cannot be bestowed on stevedores.

Extending choice of jurisdiction, law or arbitration clauses to third parties is still fraught with technical difficulties. Regarding cargo care bailment on terms, including exclusion of or limitation of liability and subject to jurisdiction, law or arbitration provisions, is possible, as demonstrated by **The Pioneer Container.**[46] The method adopted in **The Mahkutai** [47] of according arbitration rights or choice of law or jurisdiction rights on third parties would still fail under 6(2)(d) and 6(2)(e).

Under s6(2) Arbitration Act 1966 the mere incorporation of a contract containing arbitration or jurisdiction clauses may or may not be insufficient to incorporate such a clause without express incorporation of the clause. The language is not as clear as one would hope and so we will have to await judicial clarification on this issue. The Act provides :-

s6(1) In this Part an "arbitration agreement" means an agreement to submit to arbitration present or future disputes (whether contractual or not).

s6(2) `The reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement.

What then is sufficient reference to make that clause part of the agreement ? It is suggested that the best course of action is to either specifically mention the clause or even better reproduce the clause in the new agreement.

The law regarding concurrent liability in tort and contract becomes increasingly complicated. The Act makes it clear that common law remedies such as bailment, the tort of negligence and Brandt v Liverpool continue to apply and even invites judges to continue to develop the law further. It could well pay the parties to expressly provide that third parties have rights, then limit them severely in order to indicate that there is no

41 **The Elbe Maru** [1978] 1 Lloyd's Rep 206
42 **The Chevalier Rose** [1983] 2 Lloyds Rep 438.
43 **The Mahkutai** [1996] 2 Lloyd's Rep 1.
44 **Photo-Productions Ltd. v Securicor Transport Ltd.** [1980] A.C. 827.
45 **George Mitchell (Chesterhall) v Finney Lock Seeds Ltd**. [1983] 2 A.C. 803.
46 **The Pioneer Container** [1994] 2 A.C. 324.
47 **The Mahkutai** [1996] 2 Lloyd's Rep 1.

concurrent duty of care owed to the third party. The significance of **Henderson v Merrett Syndicates,**[48] is thus reinforced.

It is odd perhaps that the Law Commission decided not to repeal parts of C.O.G.S.A. 1992 especially since the logic of preventing double actions against carriers under C.O.G.S.A. 1992 has not been followed in the new Act. By contrast the Act allows two claimants to recover in full from the defendant subject to the discretion of the trial judge who can deduct sums from the third party's claim to take into account payments to the promisor. No mention is made either of the promisor having to hold awards on trust for the third party or of assessment of damages being merely nominal. The assumption is that the awards will be for actual losses - so in appropriate cases an award may in fact be nominal. Reality and common sense appear to have prevailed at last but sadly it won't apply to most contracts of carriage.

CONCLUSIONS

The overview of international trade set out above is taken, from very much an English perspective. Whilst the personalities involved in the various commercial activities outlined inevitably remain the same whatever law governs the process, the doctrines of privity of contract and consideration, which have for over two hundred years formed the central pillars of English contractual jurisprudence, have resulted in a complex matrix of rights and duties under English Law.

English Contract Law evolved around the concept of bilateral obligations between business partners and a fundamental desire to respect the right of the parties to order their own affairs, echoing the Victorian precept of laissez faire. The view was, that commerce was best regulated by the market. Parties, with equal bargaining power, would strike up commercially viable competitive deals, thereby promoting trade to the benefit of the nation. Equality of bargaining power is often absent. As early as 1924 the Carriage of Goods By Sea Act was introduced to correct the imbalance in bargaining power between cargo owners and sea carriers. The later half of the 20th century has seen further state interference in the freedom to contract, in the form of the Unfair Contract Terms Act 1977, to correct the imbalance in bargaining power between the private consumer and big business.

Lest it be thought that this is merely a modern trend forced upon the UK by alien legal jurisprudence, it should be remembered that the concept of the common carrier, which governed much of the sea trade from the 16th – 19th century imposed strict liability on carriers.

Adherence to the notion that contractual obligations are predominantly bilateral seems to have blinded our Victorian forefathers to the fact that many commercial relationships are in fact multi-lateral. As early as 1855 the Bills of Lading Act sought to address the problems created by the notion of privity of contract for cargo consignees who were not parties to the contract of carriage, providing a right of suit against the carrier where none apparently previously existed. It is perhaps the rise in the concept of ownership that exacerbated this problem and the desire of the judiciary to close down the potential floodgates of tortious liability by requiring a proprietary interest as a prerequisite of a tort action, making reliance on a contractual right of suit crucial. Equally, a judicial caution and strictures against the assignment of chose in action prevented an early acceptance of the notion of the assignment of bailment rights from bailor to sub-bailor and from bailee to sub-bailee, again forcing consignees to look to the law of contract for redress for damage to cargo caused by carriers. Sadly, by carrying over the concept of ownership into the then new s1 Bill of Lading Act provisions in 1855 and linking it to directly to endorsement of documents, the ability of English Law to meet the needs of consignees was severely restricted. This was further compounded by the provisions of s16 Sale of Goods Act 1893 which failed to provide for the needs of part purchasers of bulk goods in that property could not pass to such buyers until discharge and sub-division into distinct and separate consignments. The reforms of the 1990'ies have addressed these problems, making English Law more attractive to the international trading community.

It should not be thought that our civil law friends, free from the complexities of consideration and privity benefit from a problem free legal contractual environment. Privity and consideration have a sound conceptual basis and evolved to protect the interests of parties to a contract against undue interference from third party fortune hunters and those looking for a free ride. On the continent, such protection is provided

[48] **Henderson v Merrett Syndicates** [1995] 2 A.C. 145.

by equally complex rules preventing individuals from having obligations and duties foisted upon them by others and by rules that require the parties to have intended their gratuitous promises to be legally binding. The results are much the same but the legal mechanisms used to achieve them differ.

Finally, and in conclusion, since the doctrines of privity and consideration remain the default position under English Law, an in depth understanding of how these principles work and what is required to fit into the new statutory exceptions is vital and it is this, in the broader context of legal rights and duties, which is addressed in the following chapters on the law of contract, law governing the sale of goods and the law of tort.

SELF ASSESSMENT QUESTIONS

1 What is the Doctrine of Privity of contract ? Name the principle authority for the Doctrine and outline its significance for contracts for the carriage of goods by sea.

2 What is the Doctrine of Consideration ? Name the principle authority for the Doctrine and outline its significance for contracts for the carriage of goods by sea.

3 What are the main differences between domestic sales and international sales ?

4 What are c&f, cif, fob and ex -hip contracts ?

5 What is a charterparty ?

6 What do stevedores do ?

7 What is an agency agreement ?

8 What is a bill of lading ? Distinguish between received for shipment and shipped bills of lading and distinguish also between clean and claused bills of lading.

9 What is a sea way bill, what is a ship's delivery order and what is a merchant's delivery order ?

10 Who is responsible for the contents of a bill of lading ?

11 What are the functions of a bill of lading ?

12 What is a Documentary Credit ? Why are they used ? Which rules govern Documentary Credits ? Distinguish between revocable and irrevocable and between confirmed and unconfirmed ?

13 What is a Bill of Exchange and why are they used ? Which rules govern Bills of Exchange ?

14 What does the term bailment refer to ? Who can be a bailee ? What is a common carrier ?

15 What did the Bills of Lading Act 1855 do ? What did the Act fail to do ?

16 What does the Carriage of Goods by Sea Act 1992 do ?

17 What is a Brandt v Liverpool Contract, how does it work and what are its limitations ?

18 In what circumstances can a buyer claim compensation in tort from carriers and stevedores ? What was decided in **The Aliakmon** and **Pyrene v Scindia** ? To what extent, if at all, are these cases significant today ?

19 What does the Unfair Contracts Act 1977 provide ?

20 What is a Himalaya Clause ? Explain the significance, if any, of **Scruttons v Midland Silicones** and **The Eurymedon** to modern shipping practice.

21 What are the Hague Visby Rules ? What is their significance to English Law ?

22 What does the Contract (Rights of Third Parties) 1999 Act accomplish ?