

THE ROLE OF THE SHIPPING DOCUMENTS IN C.I.F AND F.O.B CONTRACTS

Lecture Paper
By
KATABARO, Jackson*

1. Introduction

Export and import transactions in the sphere of international trade normally involve the use of International Trade Terms incorporated under International Commercial terms (Incoterms),¹ published by the International Chamber of Commerce (ICC).² Among the fundamental trade terms set under the Incoterms, include but not limited to C.I.F. and F.O.B.³

This Lecture paper will explore in succinct the obligations of seller and buyer under C.I.F and F.O.B contracts and further the focus will be on the legal perspective and the roles of the shipping documents in C.I.F. and F.O.B contracts.

1.1 Definition of terms

There is no first and hard rule in defining C.I.F. and F.O.B. contracts, most of the literatures and courts of law have adopted obligations of seller and buyer as the technique to differentiate and assign the meaning to the two trade terms, the same approach is adopted herein.

* LL.M-Taxation (UDSM), LL.B (SAUT)
Assistant Lecturer, SAUT-School of Law
Available at jkatabaro@gmail.com

¹ International Rules for the Interpretation of Trade Terms

² First published in 1936 and the current version is of 2012

³ Other terms include but not limited to F.A.S., F.C.A, C.P.T, C.I.P, C.F.R and Exworks.

1.1.1 C.I.F. Contract

The term C.I.F. is the acronym which means Cost, Insurance and Freight. It is a type of a contract which is more widely and more frequently in use than any other contract used for the purpose of seaborne commerce.⁴

According to Lord Porter in the case of *Comptoir d Achat vs. Luis de Ridder*⁵ It is the type of contract where the seller is under obligations to ship at the port of shipment, goods of the description enclosed in the contract, to secure contract of carriage by sea, to make out invoice which will charge the buyer with the agreed price of the actual cost, commission charges, freight and insurance premium and to tender bill of lading to the buyer covering the goods contracted to be sold.

Moreover, his excellence pointed out that, against tender of the aforesaid documents the purchaser must pay the price, receive the goods at the port of destination, procure import or permit license and in such a case a property may pass either on shipment or on tender of documents. The risk generally passes on shipment and title over the goods does not pass until documents which represent the goods are handed over to the buyer in exchange of price. In C.I.F. contract, the focus is not the sale of the goods themselves, but the sale of documents relating to the goods. This is to the effect that, possession of document is as good as possession of goods in transit.

⁴ Schmitthof's Export Trade: The law & Practice of International Trade at p 33

⁵ [1949] A.C 293, 309

1.1.2 F.O.B. Contract

F.O.B. contract is another trade term which stands for Free On Board. This type of contract was well elaborated in the case of *Wimble Sons & Co. Ltd vs. Rosenberg & Sons*.⁶ In this landmark case, it was declared that, F.O.B. is the contract under which the buyer nominates the seaworthy ship, the seller is obliged to put the goods free on board at his own expense under the account of the buyer.⁷

Furthermore, the seller is under obligation to pay cost and bare responsibility of putting the goods free on board until the goods passes the ship rail.⁸ It is at the ships rail where division of liability in F.O.B. contract occurs, this is in the sense that, the risks over the goods passes from the seller to the buyer when the goods passes over the ships rail.⁹

However, the passing of property in goods has different legal procedure in terms of unascertained and ascertained goods. In F.O.B contract, unascertained goods those shipped in bulk to be distributed to different buyers at the port of destination, the property in such arrangement does not pass to the assigned buyers until the bulk of goods are apportioned to them at the port of destination.¹⁰

⁶ [1913] 3 KB at 743

⁷ Ibidem

⁸ Schmitthof's Export Trade: The law & Practice of International Trade at p 24

⁸ Ibidem

⁹ Ibidem

¹⁰ Ibidem

The property will be said to have been passed, when every concerned buyer has acquired his or her portion of the imported goods at the port of destination.¹¹ In case of ascertained goods, property passes when they are shipped unless the passing of title is postponed by express or implied contract terms.¹²

2. Types of F.O.B. Contract

F.O.B contract has become a flexible contract and parties are left free to agree over and above the terms fixed under the International commercial terms (Incoterms). This position was well expressed in the case of *Pyrene vs. Scindia Navigation Co. Ltd*¹³ where Devlin J pointed out three varieties of F.O.B. contract including;

- a) Strict or Classic F.O.B,
- b) F.O.B Contract (Buyer Contracting with Carrier) and
- c) F.O.B with Additional Services.¹⁴

2.1 Strict or Classic F.O.B. Contract

In this type of F.O.B. the buyer nominate the seaworthy ship, when ship arrived at the port of shipment the seller places the goods on board and later procure contract of carriage by sea with the carrier (this contract is made on account of the buyer) and lastly the seller receive the bill of lading in his name and endorse the same to the buyer to secure payment.

¹¹ Obestan Inc V. National Mineral Development Corporation Ltd [1987]

¹² Ibidem

¹³ [1954] 2 Q.B.198

¹⁴ Also see, The El Amria and El Minia[1982]

In this arrangement the seller is directly a party to the contract of carriage until he takes out the bill of lading in the buyer's name.¹⁵ Nonetheless, there two circumstances prevailing;

- i. Sometimes, the seller is requested to make necessary arrangements for the transportation of goods and secure the contract of carriage on account of the buyer, the bill of lading stipulate his name and the anticipation is, he will secure payment when the bill is endorsed or transferred to the buyer, this is akin to C.I.F. contract.
- ii. Where there is a requirement of advance freight, the buyer engages his own forwarding agent at the port of loading to book space for the goods,¹⁶ in such expedient arrangement the seller discharge his duty by putting the goods on board, getting the mates receipt and handle it to the forwarding agent who later exchange the same for the bill of lading.¹⁷

In this second (ii) arrangement the buyer is the party to the contract of carriage *ab initio*. In the sense that, the bill of lading will be direct in the name of the buyer through a forwarding agent of the buyer at the port of shipment. This is also underlined as another common and second type of F.O.B. contract, **F.O.B Contract (Buyer Contracting with Carrier)**.¹⁸

¹⁵ See, *Wimble, sons & Co. Ltd v. Rosenberg & Sons* [1913]

¹⁶ Usually the buyer will recruit the services of the Clearing and Forwarding agency available at the port of shipment

¹⁷ Also see, *EL Amria and El Minia* [1982] 2 Lyod's Rep 28.32

¹⁸ See, *Schmitthof's Export Trade: The law & Practice of International Trade*, (9th Edn) London, at pp 20

2.2 F.O.B. Contract with Additional Services

Under this contract, the buyer requests additional services from the seller to the effect that shipping and insurance arrangements are made by the seller on account of the buyer.

For that reason, the buyer is no longer under commitment to designate the seaworthy ship. The seller nominates the seaworthy ship, procure contract of carriage by sea, places the goods on board ship and later transfers the bill of lading to the buyer. This is the alteration of classic F.O.B. contract in which the seller is mandated to settle insurance arrangement and any other securable services requested by the buyer. F.O.B Contract with additional services shares similar shipping documents like those in C.I.F. contract where the bill of lading, insurance policy and invoice are involved.

3. The Legal Importance of Shipping Documents

The importance of shipping documents in C.I.F and F.O.B contract enables the sellers and buyers to deal with goods afloat and to transfer them freely from hand to hand by giving constructive possession of the goods in question.

Apart from that, shipping documents are very imperative documents which among other things they confer title over goods, cover the goods from the port of shipment to the port of destination and guarantee payment arrangement between the seller and buyer.

The shipping documents in C.I.F. and F.O.B. contracts are basically three unless otherwise agreed by parties other documents can be attached together with the following, Clean Bill of Lading, Marine Insurance Policy and Invoice.

3.1 A Clean Bill Of Lading

This valued document in international trade is used in both C.I.F. and F.O.B. contracts. The authoritative definition of bill of lading was uttered in the case of *Lickbarrow vs. Mason [1974]*. In this case, it was stated that, a bill of lading is the formal receipt by ship owner that good have been received for shipment in the stated condition and quality, is the memorandum which evidence and repeats in detail the contract of carriage by sea and lastly it is a document of title to the goods which enable the consignee to dispose the goods by endorsement or delivery.

3.2 Marine Insurance Policy

This document provide constant cover from the port of shipment to the port of discharge in the manner that whatever peril happen in the goods during transit the buyer will have a cause of action on the bill lading against the carrier or against the underwriters on the insurance policy.¹⁹ Marine insurance is used mutually under C.I.F. and F.O.B. contracts particularly in F.O.B. contract with additional services.²⁰

¹⁹ See, Roskill J in *Margarine Union G.m.b.H v. Cambay Price Steamship Co Ltd [1969]* 1 QB 219, 245

²⁰ Marine insurance covers maritime (sea) perils incidental to the ship like jettisons and barratry.

A contract of marine insurance is an agreement of the parties or custom of trade extended so as to protect the assured against losses on inland waters or land which are incidental to the sea voyage.²¹

The terms of the international contract of sale provides as to who bares the costs for the marine insurance in international export and imports of goods. For example, where parties engages C.I.F contract, it is the duty of the seller to undertake marine insurance policy and settle all the demanding costs.²² On the other hand, in F.O.B contract as the name suggests, the question of insurance is not that contemplated.

Thus, where parties engages F.O.B terms it is the principle duty of the buyer to undertake marine insurance unless it is F.O.B with additional services where the seller may undertake such insurance policy upon the request of the buyer and in account of the buyer.²³

3.3 The Invoice

This is another vital document preferred in both F.O.B. and C.I.F. contracts. Invoice normally debits the buyer with the agreed price or the actual cost, commission charges, freight and insurance premium. The invoice must be fulfilled in strict agreement with terms of contract to avoid difficulties in payments particularly when documentary credits are involved.

²¹ See, Section 2(1) of the United Kingdom Marine Insurance Act, 1906

²² See, Biddlell Brother V. E Clements Harts Co [1911]
Contepoir d Achat v. Luis de Ridder [1949] A.C293, 309

²³ See, Schmitthof's Export Trade: The law & Practice of International Trade 9th edition at p 23

4. The Role of Shipping Documents in Passing of Title and Risks

Where the seller enters into the contract of carriage with the carrier and procure bill of lading, as explored in the case of classic or strict F.O.B contract and in F.O.B contract with additional services, it is left at the liberty of the parties (seller and buyer) to decide whether the title to the goods passes on shipment when the goods across the ship rail or upon tender of the bill of lading endorsed in the name of the buyer, at large this depends on the intention of the parties.²⁴

Generally the intention will be, risk passes when the goods across the ships rail and the passing of title will be postponed until the seller delivers the bill of lading to the buyer or his agent.²⁵

The freedom of the parties in strict or classic F.O.B. and F.O.B. contract with additional services is not freely accommodated in C.I.F. contract. In essence, once the parties subject themselves to C.I.F. contract the risks over the goods passes during shipment and title goes to the buyer when the document are tendered to him, this is the requirement under the Incoterms and not option of the parties. Conversely, the parties can further agree on other sweet terms to extend the passing of risk and liabilities and it is at this juncture where other varieties of C.I.F. contract like C.I.F. delivered contracts are invited.

²⁴ See, Schmitthof's Export Trade: The law & Practice of International Trade,(9th Edn) London: Stevens & Sons, 1990 at 25

²⁵ Ibidem
See, Heckfeld vs. Castle [1921] , 186 Cal, 53, 198 p 1041

5. Conclusion

Freedom to contract is one of the fundamental elements in any arrangement which involve formation of contract between two parties. However, even though parties are at liberty in F.O.B. contract to agree on the sweet terms over and above the terms fixed under the Incoterms, the court in the *Pyrene vs. Scindia Navigation Co.Ltd*²⁶ held that, the contract will always be construed in consistence with the F.O.B. contract as set in the Incoterms and not as agreed by parties.

In other words, where parties to the F.O.B contract as for example opt for F.O.B with additional services in export and import of goods, in any dispute pertaining such agreement, the court will stick on the proper requirements as set under the Incoterms. The jurisprudence behind this reasoning is to avoid contradiction with the C.I.F. contract when construing F.O.B. contracts with additional services.²⁷

²⁶ [1954] 2 QB, 198

²⁷ Basing on the expedient development trend in international trade, this reasoning has for the time being taken into consideration with other circumstances surrounding a given international trade transaction, currently this principle has been translated as not absolute to save the purposes of the parties in international trade.

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