

# **Understanding FOB and CIF contracts: and when Property and Risk pass in these transactions.**

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## **ABSTRACT**

The aim of this article is to critically, but simply determine when property and risk pass in FOB and CIF contracts. With the aid of relevant cases and statutes, this article will attempt to analyse the issues herein using the following structure; meaning of FOB and CIF contracts; differences between FOB and CIF contracts; the passing of property and passing of risk in FOB contract; the passing of property and passing of risk in CIF contracts; and finally, a brief summary.

**KEY WORDS:** INTERNATIONAL CONTRACTS, FOB, CIF, PASSING OF PROPERTY AND RISK

*Shipping Law*

## **Meaning of FOB and CIF Contracts**

### **a. FOB**

FOB (Free On Board) is a delivery term used in international contract with maritime element to signify that the seller's delivery obligation is completed when the goods are loaded free on board ship.<sup>3</sup> An FOB contract is generally described as a flexible instrument. A classic FOB contract was described in *Wimble, Sons & co v Rosenberg & sons*<sup>4</sup> for instance that it involves a buyer's duty to nominate the ship and the seller's duty to put the goods for account of the buyer and to procure a bill of lading in general terms to the trade. The FOB contract as a matter of trade practice has evolved, thus creating different variants of FOB.<sup>5</sup> Therefore, they could be practical differences in the definition of FOB depending on the variant.

In *Pyrene v. Scindia Navigation Co. Ltd.*<sup>6</sup>, Devlin J. gave a full recognition of the variations in FOB contracts. These variations are; Strict or Classic FOB; FOB contract (Buyer

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<sup>3</sup> M. G. Bridge, *The International Sale of Goods*, Third Edition (Oxford University Press, 2013), p. 71.

<sup>4</sup> [1913] 3 KB 743.

<sup>5</sup> John Williamson, FOB Contracts: An examination of their Principles and Practical Application in Internal Trade (1987) 5 Auckland U. L. Review, 476.

<sup>6</sup> [1954] 2 QB 402, 424.

Contracting with Carrier); and FOB with Additional Services. In *N.V. Handel My. J. Smits Import-Export v. English Exporters Ltd*<sup>7</sup> the Court stated that a contract does not cease to be FOB merely because the seller has agreed to secure the shipping space.<sup>8</sup> The Court in *Carlos Federspiel and Co S.A. v. Charles Twigg and Co Ltd.*,<sup>9</sup> held a contract to be FOB even though the seller agreed to pay for freight and insurance. A fundamental aspect of the FOB contract despite variations in description of the contract, is loading. Further discussions involving passing of property and passing of risk in FOB invariably considers loading responsibilities as an important aspect of determining these factors. The FOB seller is under the implied duty to, if there is no express term included in the contract, to see that the goods are properly packed. The cost of this, and with other features of loading process, falls on the seller.<sup>10</sup> This is also in accordance with the Sale of Goods Act (SOGA)<sup>11</sup> which presumptively requires the seller to bear the expense of putting the goods into a deliverable state.<sup>12</sup> The case of *Stock v Inglis*<sup>13</sup> established the basic characteristics of FOB, which is that the seller must pay the cost and bear the responsibility of putting the goods ‘free on board’ a ship; the seller must bear full liability for the cost of the goods until they pass over the ship’s rail; and delivery is then completed, while the risk in the goods then transferred to the buyer.<sup>14</sup>

While it is necessary to have knowledge of the variants in FOB contracts, the situation presents some difficulty on which of the variation can be classified as classic. It presupposes that the term classic FOB is of little importance as it is better to concentrate on the various duties of the buyer and seller under different type of FOB contracts.<sup>15</sup> Roskill LJ in *The Albazero*<sup>16</sup> stated that ‘it is a trite observation that what is sometimes called a true FOB or a true CIF contracts is a comparative commercial rarity. Contracts vary infinitely according to the wishes of the parties to them.’<sup>17</sup>

## **b. CIF**

CIF, or ‘cost, insurance and freight’, is a contract for the sale of goods where the amount to be paid covers not only the invoice figure of the goods, but also the insurance and freight.

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<sup>7</sup> [1957] 1 Lloyd’s Rep. 517, 521.

<sup>8</sup> Williamson, (n.3), p. 477.

<sup>9</sup> [1957] Lloyd’s Rep. 240.

<sup>10</sup> Bridge, (n.1), p. 75.

<sup>11</sup> See: Section 29 (6) of the UK Sale of Goods Act, 1979.

<sup>12</sup> Bridge, (n.1), 75.

<sup>13</sup> [1984] 12 QBD 564.

<sup>14</sup> Williamson, (n.3), p. 477.

<sup>15</sup> Bridge, (n.1), p. 82.

<sup>16</sup> [1977] AC 774, 809, CA.

<sup>17</sup> Bridge, (n.1), p. 83.

The essential emphasis of a CIF contract is on ‘documents’ and ‘delivery’. In *Arnold Karberg and Co. v. Blythe, Green, Jourdain and Co.*,<sup>18</sup> there were CIF contracts for the sale of beans to be shipped from Chinese ports to Naples and to Amsterdam. The beans were shipped in July, 1914, on German ships, but due to the outbreak of war, the carrying vessels berthed in a different port for refuge, where they remained. The buyer subsequently refused a tender of the documents on the grounds that they have become void and unenforceable. The Court stated *inter alia* that ‘the key to many of the difficulties in CIF contracts is to keep in mind the cardinal distinction that a CIF is not a sale of goods, but a sale of documents relating to the goods’.<sup>19</sup> This view was quashed by the Court of appeal by Banks and Warrington, L.JJ stating thus; ‘I prefer to look upon it as a contract for sale of goods to be performed by the delivery of documents’.<sup>20</sup> The view of the Court of appeal in the *Arnold* case was buttressed by the House of Lords in *Couturier v. Hastie*<sup>21</sup> that parties in a CIF contract contemplated the existence of the goods, so the argument that the buyer bought the shipping documents in the event of the loss of the goods cannot stand on its own.<sup>22</sup> While the focus of this research is not to dwell on arguments concerning documents in CIF, it is necessary to note that the essential documents of a CIF contract are the bill of lading, the sales invoice, and the insurance policy.<sup>23</sup>

An examination of the CIF Contract shows that there are three methods in which delivery might be performed. It could be by surrender of the goods to the carrier; or by subsequent tender of the documents representing the goods; and physical delivery of the goods on arrival at destination.<sup>24</sup> Shipment under a carriage contract and the taking out of insurance, coupled with the delivery of documents that record the transactions may be seen as substitute for the physical delivery of the goods.<sup>25</sup> Also, when the acts of shipment and contracting for insurance are executed, the seller’s physical delivery responsibility extinguishes.<sup>26</sup> Legal delivery occurs in CIF when the goods cross the ship’s rail in the port where the goods are to be shipped. The buyer takes delivery of the goods at the location identified in the contract as the final destination. The responsibility of the seller terminates from the moment the goods are safely over the rail and placed on the ship; the ‘risk’ in the goods during ocean transit is

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<sup>18</sup> [1915] 2 KB 379.

<sup>19</sup> Philip W. Thayer, C.I.F. Contracts in International Commerce (1940) 53 Harvard Law Review, 792 at 795.

<sup>20</sup> *Ibid.*

<sup>21</sup> [1856] 5 H.L. 673.

<sup>22</sup> Thayer, (n.17), 796

<sup>23</sup> *Ibid.*, 798.

<sup>24</sup> *Ibid.*, 807.

<sup>25</sup> Bridge, (n.1), p. 124

<sup>26</sup> *Ibid.*

covered by the insurance. The risk then remains with the buyer and his insurance underwriters from the moment of actual shipment.

### **Differences between FOB and CIF Contracts**

The differences between the two contracts can be gleaned from the duties of the parties during transaction. For instance, Under the FOB contract, the seller bears all necessary cost such as the payment of handling, and transferring the goods to the ship and loading. It is the duty of the seller too to ensure necessary arrangements for the buyer's account such as making a contract of carriage by sea and insuring the goods under an insurance contract. Also, the seller is not expected to pay the freight and cannot be compelled to provide "freight pre-paid bill of lading" from the carrier, because the contract of carriage and the freight are made between the carrier and the buyer.<sup>27</sup> In CIF contract, the seller bears all costs relating to the goods until delivery of the goods on board the vessel. Further, under the CIF, it is the seller's duty to provide a contract of carriage and the seller has to insure the goods under the insurance contract. The insurance policy is made to protect the buyer; else, the seller will be liable for breach of contract.<sup>28</sup>

Differences could also be seen in that the free characteristics parties enjoy in FOB are not present in CIF. Once parties subject themselves to CIF contract, the risks over the goods passes during shipment and title goes to the buyer when the documents are transferred to him as required under the *incoterms* and not the decision of the parties.

### **Passing of Property and Passing of Risk in FOB Contract**

#### **a. Passing of Property**

One criticism of the SOGA is that it does not provide expressly the responsibility for the transfer of properties between parties. Although section 27 of SOGA provides the primary duties of contracting parties, for instance the duty of the seller to deliver, the Act does not compel a primary duty to the seller to transfer ownership.<sup>29</sup> The Act does state an implied obligation which serves as a condition in Section 12(1) the rights to sell the goods, but that does not suffice as compelling the seller to transfer such rights to the buyer. Rather it assumes

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<sup>27</sup> See:

<[http://www.akellawfirm.com/yayinlar/THE\\_MAIN\\_DIFFERENCES\\_BETWEEN\\_CIF\\_AND\\_FOB\\_CONTRACTS\\_UNDER\\_ENGLISH\\_LAW.pdf](http://www.akellawfirm.com/yayinlar/THE_MAIN_DIFFERENCES_BETWEEN_CIF_AND_FOB_CONTRACTS_UNDER_ENGLISH_LAW.pdf)> (accessed on 17/12/2017).

<sup>28</sup> Ibid. See also the case of *Hickox v Adams* [1876] 34 L.T. 404.

<sup>29</sup> Bridge, (n.1), p. 311.

a willing seller.<sup>30</sup> However, a seller who fails to participate in the passing of property would commit a breach of contract.<sup>31</sup>

The general rule on passing of property according to the SOGA<sup>32</sup> is that ‘where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained’. Then Section 17 of SOGA is specific that where there is a contract for the sale of ascertained goods, property passes at such time the parties intended it to pass. FOB contracts are transacted based on ascertained goods. Therefore, the general rule for the passing of property in FOB is that property passes to the buyer when they are placed on board the vessel pursuant to the contract.<sup>33</sup> The cardinal principle here is the ‘intention’ of the parties as formulated in Section 18 rule 5(1) and (2) of the SOGA. If the seller delivers the goods to the carrier without reserving the right of ‘disposal’ by keeping the bill of lading, then the property will pass when the goods are put on board the ship.<sup>34</sup> In *Pacific Molasses Co. Ltd. v. Entre Rios Cia Navira SA (The San Nicholas)*,<sup>35</sup> it was stated that as a ‘*prima facie case*’ the property passes at a later date on the *indorsement* of the bill of lading. The right of disposal under Section 19(2) Of SOGA arises to cure risks incurred by the seller where the buyer does not pay. Section 19(2) does not apply where the bill of lading is made in favour of the buyer.<sup>36</sup> However, where the seller retains possession of the bill of lading or delivers it to the bank or other agent to facilitated payment, the presumption is that the seller intends to reserve the right of disposal until payment, whether there have been a part payment or not.<sup>37</sup>

On the flip side, the problem of the buyer in the transfer of property is illustrated in the *Federspiel*<sup>38</sup> where there was a contract for the supply of cycles ‘f.o.b. British port’ for carriage to Costa Rica. The sellers were responsible for shipment and the buyers sent a cheque in response to invoices containing details of shipping sent by the sellers. There was a delay in shipment because; a secured creditor of the sellers took charge of the goods which contributed to the difficulty of arranging shipment to Costa Rica, and not because the sellers desired to retain their property rights in the goods. The Court held that the property in the

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<sup>30</sup> Ibid.

<sup>31</sup> Ibid

<sup>32</sup> Section 16, UK Sale of Goods Act.

<sup>33</sup> Ewan McKendrick, *Goode on Commercial Law*, Fifth Edition (LexisNexis UK and Penguin Books, 2016), p. 995.

<sup>34</sup> Bridge, (n.1), p. 314.

<sup>35</sup> [1976] 1 Lloyd’s Report 8.

<sup>36</sup> McKendrick, (n.31), 996.

<sup>37</sup> Ibid.

<sup>38</sup> Supra.

goods had not passed to the buyers. According to the Court, the parties intended to pass the property upon shipment because shipment was the decisive act to be done by the seller in the performance of the contract.<sup>39</sup> Personally, this contradicts the principle of ‘intention’ of parties in the transfer of property. The Court based its decision on expected action rather than intention that creates the expected action.

## **b. Passing of Risk**

Section 20(1) of SOGA provides the general rule that risk passes with property except the parties have agreed otherwise. This was reflected in the judgement of Blackburn J., in *Martineau v. Kitching*<sup>40</sup> when the Court stated that ‘when you can show that the property passed, the risk of the loss *prima facie* is in the person in whom the property is.’<sup>41</sup> Thus, in order to determine when risk passes, one must understand when property passes and the intention of the parties.<sup>42</sup> But, the nature of export transactions ensures that the general rule is usually rebuttable.<sup>43</sup> However, below is a break-down of how risk passes in FOB contracts;

First, pursuant to Section 18 Rule 5(2) of SOGA, where the seller delivers the goods to the buyer or the buyer’s nominated carrier for the purpose of shipment to the buyer, and does not reserve the right of disposal, he is taken to have unconditionally appropriated the goods. In FOB the risk passes to the buyer on shipment, even if the seller retains the bill of lading or even intended to reserve a right of disposal, or made out a secure order of his own.<sup>44</sup> In *Inglis v Stock*,<sup>45</sup> there was an FOB part purchase of 200 tons of a cargo of bulk sugar shipped to Hamburg. The seller sold 200 tons to the buyer and the remaining part of the bulk cargo to a third party. The buyer eventually acquired the third party’s share as well. The ship sank en-route Hamburg near Elbe. After the ship sank, the seller having knowledge of the loss appropriated 200 tons to the buyer. The buyer accepted the documents and paid. If he had refused to do so the seller could have sued for breach of contract. The contention was whether a buyer could succeed in an insurance claim under a floating policy on any kind of

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<sup>39</sup> Bridge, (n.1), p. 316.

<sup>40</sup> [1872] L.R. 7 QB 436 at 454.

<sup>41</sup> M.G. Bridge, Benjamin on Sale of Goods (Sweet and Maxwell). Available at:

<<https://login.westlaw.co.uk/maf/wluk/app/document?&srguid=i0ad6ada600000160c60bfd4d17137806&docguid=ID8F1C2606B5F11DCB24F915140CF1D67&rank=40&spos=40&epos=40&td=476&crumb-action=append&context=2&resolvein=true>> (accessed on 27/12/2017).

<sup>42</sup> See section 17 and 18 of UK Sale of Goods Act, 1979.

<sup>43</sup> McKendrick, (n.31), p. 996.

<sup>44</sup> Ibid. See also Williams v. Cohen [1871] 25 LT 300 at 303.

<sup>45</sup> [1885] 10 App Cas 263.

goods and merchandise? The House of Lords held that he could. The goods were at his risk once he accepted.

Since risk passes to the buyer upon shipment, the crucial consideration is when does shipment take place? The traditional view is that shipment takes place when the goods are on-board the ship over the rail in simple FOB cases. This is notwithstanding the fact that parties can alter the rules depending on their actions and characteristics in the contract. Exception to the rule that risk passes when the goods is over the ship's rail is provided in Section 14(2) of SOGA, which when applied to shipping implies that goods supplied for shipping should be of merchantable or satisfactory quality. In *Marsh & Murrell v Joseph I. Emmanuel*<sup>46</sup> the Court said that merchantable quality required that the goods had to be capable of surviving a normal sea voyage. This entails that the goods has to be fit for purposes of its kind, free from minor defects.<sup>47</sup> Therefore, I will submit that if the goods does not meet satisfactory specifications, risk cannot be transferred.

## **Passing of Property and Passing of Risk in CIF**

### **a. Passing of Property**

Unlike FOB, sales, shipment does not usually produce a transfer of the property in the goods in a CIF contract, because the seller is not obliged to ship the goods, and may not have possession of them until they are afloat.<sup>48</sup> CIF contracts deals in most part with goods that are sold by description, goods that are unascertained, or yet to be procured by the seller.<sup>49</sup> However, the seller must exhibit the right to dispose the goods pursuant to Section 12 of SOGA,<sup>50</sup> and the buyer also possesses the right to reject (including claim for damages) even after taking delivery of the bill of lading.<sup>51</sup> This is because the bill of lading is not a negotiable document of title and the transferor cannot give what is not in his possession.<sup>52</sup> Which means that they must be elements of certainty in the goods, that is, the goods exist whether physically or about to be manufactured, or procured. The contention has always been the point after ascertainment that the property is said to pass.<sup>53</sup>

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<sup>46</sup> [1961] 1 WLR 862

<sup>47</sup> See generally Section 2 of SOGA.

<sup>48</sup> Ibid, p. 1000.

<sup>49</sup> Thayer, (n.17), 816.

<sup>50</sup> McKendrick, (n.31), p. 1001.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid.

<sup>53</sup> Thayer, (n.17), p. 816.

If the buyer pays for shipping documents, including the bill of lading, it creates a point that the property will pass to the buyer, consistent with the parties' intention and not a prior shipment of the goods.<sup>54</sup> Where the buyer pays for the document, the property will still pass whether or not the document is defective. In *Trafigura Beheer BV v. BCL Trading GmbH*,<sup>55</sup> the buyer had waived defects in the documents, but it was held that the position will be the same even if the buyer fails to notice the defects.<sup>56</sup> Even if the intention of the parties was that property shall pass on shipment of the goods, the presumption is that property is not intended to pass until delivery of the shipping documents to the buyer by whatever means expressly or impliedly stipulated in the contract,<sup>57</sup> as long as the goods are ascertained. This is consistent with the exception that parties cannot provide for property to pass where the goods are unascertained according to Section 16 of SOGA. In *Re Goldcorp Exchange Ltd*,<sup>58</sup> Lord Mustil stated that 'it makes no difference what the parties intended of what they intended is impossible...the law's insistence on ascertainment is a necessary statement of the practical; it is founded on the very nature of things'.<sup>59</sup>

## **b. Passing of Risk**

It is immaterial to discuss risk passing in international export trade, especially in CIF contracts, without linking it to the contract of carriage and insurance. Most of the principles of passing of risk in property enumerated under FOB and provided by SOGA<sup>60</sup> also apply to CIF contracts. The principle of ascertained goods is also very fundamental in CIF. For instance, if at the time of loss, the good remained wholly unascertained, the issue of risk does not arise as it cannot be determined that what was lost is the contract good.<sup>61</sup> The presumption, as highlighted in *The Julia*<sup>62</sup> is that risk passes from the time of shipment, although the property *prima facie* passes to the buyer when he makes payment against the documents.<sup>63</sup> The nature of the contract presupposes that parties contemplated the risk or damage in transit by carrying out the contracts of carriage and insurance which the seller is required to take out and transfer to the buyer.<sup>64</sup> In *Manbre Saccharine v Corn Products*,<sup>65</sup>

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<sup>54</sup> Bridge (n.1), p. 316.

<sup>55</sup> [2002] EWCA Civ 251.

<sup>56</sup> Bridge, (n.1), 317.

<sup>57</sup> McKendrick, (n.31), 1000. See also the *Albazero* [1977] AC 774.

<sup>58</sup> [1995] 1 AC 74, PC.

<sup>59</sup> Bridge, (n.1), 318.

<sup>60</sup> See sections 12, 16, 17, 18, 19, and 20.

<sup>61</sup> McKendrick, (n.31), p. 1002.

<sup>62</sup> [1949] AC 293.

<sup>63</sup> McKendrick, (n.31), p. 1001.

<sup>64</sup> *Ibid*.



there was an action by the buyer for breach of contract, on the failure of the seller to tender appropriate documents to satisfy the CIF contract. The goods were not in accordance as described in the contract, and no insurance policy was tendered. The Court held that a mere letter showing insurance is not enough evidence. The actual policy must be tendered.

McKendrick in Goode on Commercial law enumerated the rights and duties of the parties which can be used to determine passing of risk in CIF. For instance, if the goods are lost after buyer accepted the documents; the risk is on the buyer.<sup>66</sup> If the goods are lost after tender of documents before acceptance, and the buyer finds grounds which entitled him to reject the document, the risk reverts to the seller; otherwise, the risk is with buyer.<sup>67</sup> Where the goods are lost and are identified as the contract goods before tender of documents, the risk remains with buyer, unless otherwise discovered that at the time of loss the goods were not appropriated by the seller as part of the contract.<sup>68</sup> Where the goods after shipment but before contract, suffers damages or deterioration or loss, the buyer cannot be compelled to accept risk as the goods conforming to the contract were never available.<sup>69</sup> Finally, loss before shipment is wholly borne by the seller, except there is a contrary agreement.<sup>70</sup>

An examination of *The Julia* and *Manbre Saccharine* cases reveals that in CIF contracts, risk passes retrospectively from the time the goods passed over the rail, if the goods are already at sea from the buyer to the seller, and the bill of lading has been endorsed. Therefore if the goods are damaged after loading, the risk remains with the seller until the endorsement of the bill of lading.<sup>71</sup> On endorsement of the bill of lading, the risk by legal contemplation reverts, and is back dated to loading so that the risk of an event that has already occurred is then transferred to the buyer.<sup>72</sup>

## Conclusion

In summary, risk in the FOB contract as stated in this article, passes upon shipment. Where the seller delivers the goods over the ship's rail, he is not responsible for damages or losses

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<sup>65</sup> [1919] 1 KB 198.

<sup>66</sup> McKendrick, (n.31), 1002.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid., 1003.

<sup>70</sup> Ibid.

<sup>71</sup> Available at:

<file:///C:/Users/Microsoft/Documents/International%20Contracts/CHAPTERTHREETRADE%20-%20risk%20and%20property%20passing.pdf>, p. 28 (accessed on 29/12/2017).

<sup>72</sup> Ibid.

after that because in FOB the ship is usually nominate by the buyer. It is also presumed that property in goods passes at the same time.

In CIF, stated in *Tregelles v Sewell*<sup>73</sup> risk passes on shipment to the buyer, while property passed from shipment. This means that risk passes when the seller concludes his contractual duties on CIF terms and delivers the goods on-board the ship. Or that while the goods are afloat, the seller makes the goods subject of the contractual document which are transferred to the buyer. At this point, the risk passed before shipment.

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<sup>73</sup> [1862] 7 H. and N. 575 ER. 600.

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