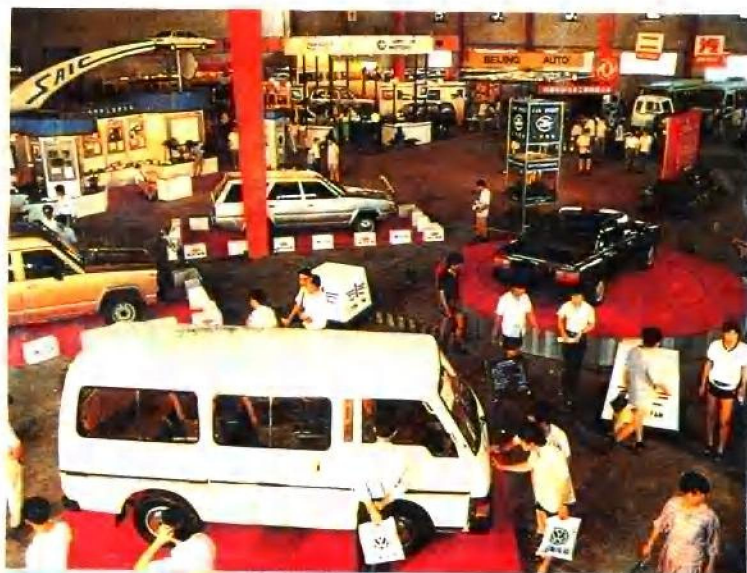


国际贸易实务英语

林小龙 主编



北京理工大学出版社

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内 容 简 介

为了满足我国日益增多的外贸工作者学习专业英语的需要,我们编写了一套《国际商务实用英语》丛书。本丛书是在参阅大量最新的国际商业原著的基础上编写而成的。它具有内容新颖、知识性强,实用性强、语言简练,文笔流畅等特点,是学习国际商务知识、提高商务专业英语水平的好读物。

本书是此丛书之一,其中包括《国际贸易销售合同》、《销售的本质和形式》、《货物品质担保及产品责任》、《信用证的特征》、《电子数据交换系统中的责任问题》、《最惠国待遇政策》、《多边贸易谈判》等 23 篇文章。

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前 言

随着我国市场经济的确立,对外开放的进一步扩大,尤其是我国关贸总协定缔约国的地位即将恢复,我国的国际经贸交往日益增多,国际市场竞争也日趋激烈,因此,培养大批既懂国际商务专业知识,又精通国际商务英语的复合型人才具有特别重要的意义。鉴于此,我们编写了《国际商务实用英语》丛书。本丛书是在参阅大量的最新国际商务专业原著的基础上编写而成的。它的特点是内容新颖,知识性强,实用性大,语言简炼而流畅,是学习国际商务知识、提高商务专业英语水平的好读物。《国际贸易实务英语》是本丛书之一。

本书由中国环球律师事务所律师、法学硕士林小龙同志任主编。参加编著的还有中国人民大学研究生黄涛、周健、吴爽、张文忠、中国民航总局国际业务司的凌洁、四通公司的陈建军等同志。本书在编写过程中,得到了中国人民大学法学院国际经济法专家林毓辉教授、王益英教授和王宗贤教授的指导,在此我们表示衷心的感谢!

由于我们水平有限,错误疏漏之处在所难免,恳请读者批评指正!

作 者

1994,8,17

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1. International Sale Contracts (I)

Introduction

A contract for the import or export sale of goods is still a contract for the sale of goods; if governed by English law, the general law of contract and the law contained in the Sale of Goods Act apply to the contract. Thus the parties are free to agree the terms of their bargain, subject to the general law, and, indeed, are subject to less restriction than the parties to a domestic contract since the Unfair Contract Terms Act 1977 does not apply to international supply contracts where the contracting parties have their places of business in different states and either

(a) the goods are to be carried from the territory of one state to another; or

(b) the acts constituting offer and acceptance were done in different states; or

(c) the contract requires the goods to be delivered to a state other than that where offer and acceptance took place.

Thus the parties are free to allocate responsibility for arranging carriage or insurance or obtaining customs clear-

ances etc to fix the method of payment to stipulate for the buyer to accept a document other than a bill of lading or to agree any other terms. However, mercantile practice has developed a number of standard contract formulae for international sales.^① The duties of the parties under these contracts are well known; they are set out in detail in INCOTERMS^② published by the International Chamber of Commerce. Moreover, the courts have recognised mercantile practice and the legal incidents of these standard contracts are now well established. The result is that where the parties use one of the standard formulae, their respective obligations are both commercially and legally defined. Commercially, the formula used may define the obligations of the parties, eg to arrange carriage of insurance, and indicate what is included in the price. Legally, it may define the time and place of delivery and, most importantly, the passing of property and risk.

Amongst the most common formulae in use are the following.

Free on Board (f. o. b.)

In this case the seller must not only supply the goods, but also bears responsibility for seeing that they are shipped at the port named in the contract. The buyer normally arranges carriage but the seller must see that the goods are loaded on the ship and pay the costs of loading.

An f. o. b. or f. a. s. contract may not be "international", for instance, if Y contracts to sell goods to Z in New

York, he may contract to purchase goods from X in England to fulfil his contract. It may be convenient for him to arrange for X to sell the goods "f. o. b. Southampton" to place them on board ship to fulfil his contract with Z.

Cost-insurance-freight(c. i. f.)

Under a c. i. f. contract the seller must not only supply the goods, but must also arrange contracts for their carriage and insurance during transit to the port named in the contract, the cost of which is included in the contract price. The seller then sends the relevant contract, carriage and insurance documents to the buyer, who pays on receipt of the documents and uses them to collect the goods on arrival. As an alternative, the contract may be "c. & f. " (cost and freight) in which case the seller arranges carriage but the buyer arranges his own insurance. This may be preferable where the buyer is a regular importer and has a block insurance policy available.

The formulae set out above are used where the contract contemplates carriage by sea. The parties may agree on other formulations; where goods are to be carried by road, rail or air, there are different. sometimes similar formulae (such as "free on rail") and the increasing use of containerised multi-modal transport is leading to the development of newer formulae such as "free carrier" and "freight, carriage and insurance paid". Even where the parties do use sea transport and one of the standard contract formulae, they remain free

to modify their obligations under the contract; the formula then simply defines what is included in the price. For instance, the seller under an f. o. b. contract could agree to arrange insurance, or under an EX works contract, to arrange delivery to the buyer's premises. In those cases the buyer must pay extra above the contract price for the extra services provided by the seller.

Seller's Obligations in Relation to Bills of Lading

Under c. i. f. and certain types of f. o. b. contract the seller must arrange carriage of the goods and forward the shipping documents to the buyer to enable him to collect them. More commonly, where payment is by documentary credit, the documents are forwarded to the buyer's bank, which holds them as security for advancing the price to the buyer. Unless the contract of sale allows the seller to tender some other document, such as a delivery order or waybill, he must tender a bill of lading in respect of the goods. If the contract is silent, the law requires that a bill of lading tendered under the contract should have the following characteristics.

(a) It must be a shipped bill, ie. showing that the goods have been loaded, rather than a "received for shipment" bill: the buyer, or his bank, needs a guarantee that the goods have been loaded in accordance with the contract, and an indication of their condition at the time of loading (which may be crucial in the event of a claim against the carrier); a received

for shipment bill gives neither.

(b) It must be “clean” as opposed to “claused”: ie it must state, without qualification, that the goods have been loaded in apparent good condition. INCOTERMS defines a clean bill as having “no superimposed clauses expressly declaring the defective condition of the goods or their packaging”^③ As will be seen, the condition of the goods at the time of loading is crucial: at that moment, risk of loss or damage will normally pass to the buyer, and the carrier will become liable for loss or damage during transit. A “claused” bill may indicate that the goods were not in accordance with the contract of sale at the time of loading. Buyers, and their bankers, may have to make speedy decisions whether to accept a bill of lading. Any qualification as to the condition of the goods at the time of loading will therefore make the bill unacceptable.

The strict legal test of a clean bill is that it should contain no indication of damage to the goods at the time of loading. However, a broader test of “commercial acceptability” is also recognised.

(c) It must show that the goods were shipped in accordance with the contract: ie at the correct place and time.

(d) It must cover the goods for the whole period of transport. Since the bill of lading gives the buyer rights against the carrier in respect of loss, etc, of the goods during transport, it is crucial that it governs the whole period: if not, the buyer would have no claim in respect of damage,

etc, occurring during the period not covered by the bill.

(e) It must identify the goods to which it relates so that transfer of the bill can transfer the relevant goods.

(f) It must cover only the goods intended for the particular buyer. Suppose that S ships a bulk cargo of grain for three different buyers. He may take three (or more) bills of lading, so that each buyer can receive a bill relating to his own share of the cargo. (In practice the seller might well take more than three bills, allowing each buyer to break up his share of the cargo and resell it in smaller parcels.) If he takes only a single bill of lading, he cannot tender it to any of the buyers. He must then issue each buyer with a delivery order, provided the relevant sale contracts allow that.

F. o. b. Contracts

The f. o. b. contract has a long history; examples can be found as early as the beginning of the nineteenth century. The contract developed in an era when it was customary for a merchant to charter a ship and travel with it to trade at various ports; the merchant would require the persons from whom he bought goods to place them "free on board" his vessel. Since then the nature of international trade has changed drastically. The improvement in communications means that merchants no longer travel with their ships and contracts are negotiated and concluded at a distance. The growth of alternative carriage arrangements, notably the c.

i. f. contract, has meant a decline in the use of f. o. b. arrangements. However, the form does remain widely used. Its popularity fluctuates from time to time, according to a number of economic and political factors. Under an f. o. b. contract the buyer may exercise control over the choice of carrier, but must also bear the risk of changes in the cost of carriage and is responsible for making carriage arrangements. Thus sellers will prefer f. o. b. contracts at times when carriage costs are high or likely to fluctuate, or when shipping space is scarce, as was the case during World Wars I and II, when f. o. b. contracts gained in popularity. ⁴ Governments may also put pressure on buyers to choose the f. o. b. form: a buyer under an f. o. b. contract may nominate a carrier from his own country, thus favouring the domestic economy; if a foreign carrier is used, as is likely to be the case under a c. i. f. contract, the cost of carriage will represent an outflow of funds from the domestic economy. Where governments act as buyers, they are therefore likely to favour the f. o. b. form. Moreover, as noted above, an f. o. b. contract may be made between a buyer and seller in the same state, where the buyer purchases goods for resale to a customer overseas (and where he may intend to resell on either f. o. b. or c. i. f. terms).

It is difficult to define an f. o. b. contract because many different variants exist; as Devlin J put it, the f. o. b. contract has become a "flexible instrument" and this flexibility probably explains the longevity of the f. o. b. form. The es-

essential obligations of the parties to an f. o. b contract were described in *Wimble Sons & Co v Rosenberg*. The seller must put on board ship goods which conform to the contract and must pay all charges in connection with loading. The seller is not obliged to book shipping space in advance; the buyer must nominate the ship to carry the goods and notify the seller of the nomination in time to allow the seller to deliver the goods on board. The costs of carriage are for the buyer's account.

However, the parties may, and frequently do, modify their obligations under an f. o. b. contract. In particular the relationship between seller, buyer and carrier may vary according to the nature of the arrangements made.

Duties of the Parties Under an f. o. b. Contract

In view of what has been said, it is clear that the duties of buyer and seller under an f. o. b. contract are largely defined by their contract. The contract must always be consulted to determine such matters as the place and time of loading, the price and the means of payment. In addition, the contract may define the basic duties of the parties. However, in the absence of express terms in the contract, the basic duties of the parties depend on commercial practice as recognised by the law.

Under a "classic" f. o. b. contract the buyer must;

- (a) nominate a ship to carry the goods;
- (b) notify the seller of the nomination in time for him

to fulfil his obligations ;

(c) pay the price in accordance with the contract.

If the contract is of the more modern type, as in *Pyrene v Scindia*, the buyer will first have to secure shipping space and make a contract of carriage with the carrier. Where payment is to be by documentary credit, it may be necessary for the buyer to notify the seller of the opening of the credit before the time for loading.

The seller must :

(a) deliver to the port of loading goods which comply with the contract of sale and arrange for them to be loaded on the ship nominated by the buyer ;

(b) pay all charges in connection with the loading up to the time the goods cross the ship's rail ;

(c) provide the buyer with information necessary to enable him to insure the goods in transit,

(d) deliver the shipping documents to the buyer to enable him to collect the goods from the ship.

Nomination of an Effective Vessel

Under a "classic" f. o. b. contract this will be the first duty to be performed; nomination will normally be for the buyer. The port of loading may be specified by the contract; if not, the buyer may nominate both port and vessel. Alternatively the contract may allow the seller to nominate the port; in that case he must notify the buyer of his nomination in time for the buyer to perform his obligation and nominate

a ship.

The duty is to nominate an "effective vessel"; ie, one ready and able to carry the goods in accordance with the contract of sale. Thus the vessel must be available to load the contract goods at the time and place fixed by the sale contract. Although there is no obligation on the buyer to book space in advance, the need to ensure an effective vessel is available to carry the goods means that he will generally do so.

Where the contract allows a choice of ports of a period during which loading may take place, the buyer may nominate a ship at any of the specified ports loading at any time within the contract period. Thus a contract for sale f. o. b. Hull or Grimsby, October shipment would be satisfied by a nomination of a ship loading at Grimsby on 28 October. However, the buyer must give the seller sufficient notice of his nomination to allow the seller to perform his obligations. This may be particularly important where the contract allows the buyer a choice of port. Thus, for instance, in the above example the nomination would probably not be effective if given on 27 October. The contract will often stipulate the amount of notice of nomination to be given. Such provisions will generally be construed as conditions, so that a failure to give sufficient notice will allow the other party to terminate the contract.

A nomination is not irrevocable. If the buyer nominates a ship which proves unable to load the goods, the buyer may

substitute a fresh nomination, provided there is time to do so in accordance with the contract. ^⑤ However, if the buyer fails to nominate an effective ship, the seller may terminate the contract. He is then released from his obligations under the contract and may sue for damages for non-acceptance. However, since failure to load will generally prevent property in the goods passing to the buyer, the seller will not be able to claim the price unless the contract makes the price payable on "a day certain".

Delivery of the Goods

Once the buyer has nominated an effective vessel, the seller must arrange to load the goods on that vessel in accordance with the contract of sale. The goods themselves must comply with the express and implied terms of the contract, including the implied terms as to merchantability, fitness for purpose and compliance with description. The description of goods has been given a wide interpretation in international sale contracts, particularly those concerned with bulk commodities, where such things as date of shipment may be crucial in allowing the goods to be identified. The country of origin will probably be part of the description of the goods, as will the date of loading. Thus in *Bowes v Shand* the contract called for a cargo of "600 tons of Madras rice to be shipped at Madras during March and April". The seller tendered a cargo most of which had been loaded during February. The buyer was held entitled to reject; Lord Cairns CJ observed