

EXPORTS AND IMPORTS

The export and import of goods gives rise to special problems. In the first place, there is the question of what law governs the sales contract: the law prevailing at the seller's place of business or the buyer's business place, or perhaps some other law. A related matter is the question of which courts have jurisdiction to deal with disputes arising out of the sales contract. Problems may also arise with export and import licences. With the continual removal of barriers to trade within the European Union, international sales comprise an ever-increasing volume of commercial transactions. Governments in most countries enthusiastically encourage exports. Governments have also sought to simplify the complex legal rules surrounding international sales, to facilitate the free flow of international trade. To that end, numerous multilateral conventions have been adopted, either dealing with specific aspects of sales law or with sales generally or with the carriage of goods.

International Sales:

Where a sale of goods transaction does not have any significant foreign element i.e. is almost entirely a local arrangement, the rights and obligations of the parties are governed by the Sale of Goods Acts 1893-1980. But where there is a significant foreign element in the transaction additional considerations arise. For example, if the transaction is an 'international sale' as defined in section 24 of the Sale of Goods and Supply of Services Act 1980, the prohibitions in section 22 of the 1980 Act against exclusion clauses do not apply as between the parties. Accordingly, there is complete freedom of contract for international sale of goods transactions.

Conventions:

Several international treaties have been organised to introduce a degree of uniformity in international sales law. The most significant of these is the United Nations-sponsored **Vienna Convention on Contracts for the International Sale of Goods 1980**. This convention, which was agreed to by representatives of all the U.N. Member States, deals with the main features of international sales contracts, such as offer and acceptance, principles for interpreting contracts, determining the terms of contracts, the types of breaches of contracts, the seller's and buyer's obligations, remedies for breach of contract, the passing of risk for the accidental destruction of or damage to the goods. This Convention lays down substantive or material rules which govern the relationship of the parties to international sales contracts.

Definition of an 'International Sale' Contract: Various criteria can be used in order to determine if an agreement is indeed an international sales contract. One test is whether the transaction involves goods moving from one country to another; the buyer and the seller may both be based in one country but they agree to a sale involving the cross-border delivery of goods. Alternatively, the focus may be on where the parties are based rather than on the movement of the goods; if the buyer and the seller are based in different countries, there is an international sale regardless of what is to be done to the goods. Section 24 of the 1980 states that an international

sale is one where the parties' places of business are in different States and additionally, any one of the following three factors are present: the transaction involves the carriage of goods from one State to another or; the offer and acceptance of the terms of sale took place in different States or; where the offer and acceptance occurred in one State, the goods are to be delivered in another State.

The Contract of Sale: one the most important features of such contracts are where the goods are to be delivered. An 'ex works' or 'ex store' contract signifies that the buyer must take delivery from the seller's place of business. An 'ex ship' contract is at the other extreme and requires the seller to deliver the goods to the buyer at the port of discharge. 'Free on Board' or f.o.b. contracts are more common. With these the seller's obligations are fulfilled once the goods are placed on board the ship; thenceforth, matters such as freight and insurance are entirely the buyer's responsibility. The commonest type of contract is the 'c.i.f.' sale, which obliges the seller to pay the freight and to have the goods insured. However, a contract may describe itself as c.i.f. or f.o.b. may have features not common with that type of contract and may indeed be misdescribed and be an entirely different type of contract.

Applicable Law: often the parties will stipulate what law is to govern the contract and because of the highly developed nature of English commercial law, it is common for the parties to choose English law as applicable even though neither they nor the transaction have any substantial connection with England. Where the parties have not expressly selected a law, the various terms of the contract may indicate by implication what particular law they had in mind. If it is not possible to ascertain their intention in this manner, then the contract will be governed by its 'proper law' i.e. the law with which it has the closest connection. In the absence of evidence of a contrary intention, the law of the place of delivery always has a strong claim to being the proper law. Because of the uncertainty surrounding determining the 'proper law', the parties usually stipulate what law is to govern.

Another matter which may arise if the parties are in dispute is what court or forum is entitled to hear and determine their case. As with the applicable law, this matter is often settled by an explicit choice of forum clause in the contract. Very often they will choose arbitration. In relation to the enforcement of judgements, as far as disputes between traders within the European Union are concerned, these matters are regulated by the 1968 Brussels Convention on Jurisdiction and Enforcement of Judgements, which was made part of Irish law by the Jurisdiction of Courts and Enforcement of Judgements (European Communities) Act 1988-1993. Under this Convention, the defendant may be sued where he is domiciled. The 1968 Convention has no application to arbitrations. They are governed in Ireland by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which was made part of domestic law by the Arbitration Act 1980.

Documents in International Sales: documents play a very significant role in international sales, primarily because, as a rule, there is an appreciable time span between sending the goods and the buyer taking delivery of them.

Bill of Lading: where the goods are being sent by sea, almost invariably they will be the subject of a bill of lading. Bills of lading operate as a receipt by the carrier for the goods; accordingly, they are evidence of the fact that the goods were dispatched in the

condition as described on the face of the bill. Generally, the carrier will be estopped from denying that he received the goods as described in the bill. Bills of lading also constitute evidence of the terms of the contract to carry the goods. That contract will have been actually concluded before the carrier issued the bill but, usually, the bill will expressly or by implication state the principal terms of the contract, such as the destination, voyage and charges payable. A very significant feature of bills of lading is that persons to whom bills are passed and who acquire the property in the goods are, by statute, given whatever rights the sender possessed under the contract of carriage and are also made subject to the liabilities in that contract.

Perhaps the most significant feature of bills of lading is that they constitute a document of title to the goods which were shipped. A person properly in possession of a bill can demand delivery up of the goods, subject to whatever charges may be payable. Additionally, bills of lading are usually negotiable, in the sense that the due transfer of a bill from one person to another operates to transfer the title of the goods, where that was the parties' intention. A bill of lading must sufficiently identify the goods being shipped. If the goods have not been adequately identified, getting a bill of lading will not give the buyer the property in the goods nor the right to sue the carrier for breach of the contract of carriage.

Bills of lading are not used for road, rail or air transport. Instead, the road or rail carrier will usually issue a **consignment note**, which will briefly describe the goods and will state or refer to the principal terms of the contract of carriage. International conventions prescribe the format and essential contents of consignment notes. The equivalent document issued by air carriers is the **air waybill**, the format and contents of which are also regulated by international convention. None of these documents are documents of title to the goods or confer on the consignee the rights and obligations of the consignor under the contract of carriage.

Carriage of Goods by Sea:

Ireland, being an Island, in the past, most exports and imports were carried by sea. In continental Europe, carriage by road, rail and by canal was and indeed still is more common. At present goods which are compact and have a high value are often carried by air transport.

Rights and obligations in connection with the carriage of goods by sea are founded principally on contract, in particular, the contract made between the seller of the goods (or sometimes the buyer) and the carrier to transport the goods to the designed destination. Contracts of carriage are subject to the general principles of contract law regarding, for instance, consideration, mistake, express and implied terms, fundamental breach. Where persons involved in the carriage of goods are not parties to the contract of carriage, they may still have rights or be subject to duties by virtue of the law of tort, such as the torts of negligence and of conversion. The principal enactments in this field are the Bills of Lading Act 1855 (governing bills of lading discussed above) and the Merchant Shipping Acts 1894-1947.

The Contract of Carriage: the terms under which the goods are to be shipped will be contained in a contract of carriage. The parties to the contract are the carrier and

the sender. In respect of the carrier, it is not essential that the carrier has any interest whatsoever in the ship; for instance, he can be a freight forwarder who merely arranges with owners or charterers of ships to carry goods on his behalf. The other party to the contract is the sender or shipper. Depending on the terms under which the goods were bought (c.i.f. or f.o.b.), he may be the buyer or the seller of the goods. Section 1 of the Bills of Lading Act 1855 gives rights under the contract and imposes liabilities on certain third parties, namely the consignee of the goods and anyone to whom the bill of lading was endorsed, provided they acquired the property in the goods.

The terms of the contract will be determined by the parties, such as the time and method of loading, the voyage, freight and the destination. Most of the terms will be set out in the bill of lading. However, the contract will have been made before the bill of lading was actually issued, so that the bill's terms are no more than evidence, albeit very persuasive evidence, of the contents of the contract.

Shipper's Obligations:

1. The cargo must be tendered to the carrier in accordance with the contract's provisions, such as regarding the time, place and manner of tendering. Breach of any of these provisions will result in incurring liability in damages.
2. Because carriers can be held to representations contained in the bill of lading, the shipper is deemed to have guaranteed the accuracy, as at the time of shipment, of the number, quantity and weight furnished. Where the carrier incurs any loss, expense or damage in consequence of an inaccuracy in these matters, he is to be indemnified by the shipper.
3. The shipper has a common law duty of care to the carrier to disclose the fact that the cargo is actually or potentially dangerous. It is an implied term of the contract that the cargo is free from any potentially dangerous condition or defect. What precisely must be disclosed will depend on the nature of the cargo, the way it is packaged, the type of ship and prior dealings between the parties.
4. It is an implied term in the contract of carriage that the shipper will pay freight i.e. the charges for carrying the goods. But the parties may come to some other agreement, such as that freight is to be paid by the consignee or by an endorsee of the bill of lading. At common law, the carrier has a lien over the goods in respect of the freight, as well as any expenses incurred in protecting or preserving the goods.

Carrier's Obligations:

1. It is an implied term at common law that the ship is seaworthy. However, all that is required from the carrier is 'due diligence' i.e. where sufficient care was taken but the ship proved to be unseaworthy, resulting in the cargo's loss or damage, the carrier will not be held liable.

2. Once the goods have been delivered into the carrier's charge, the shipper is entitled to demand that he be issued with a bill of lading displaying certain information about the goods.
3. The carrier is required to properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.
4. It is an implied term of the contract of carriage that the vessel will load and be ready to commence its voyage with all reasonable dispatch. If a route is stipulated, that must be followed except in case of emergency.
5. On arrival at the port of discharge, the carrier must proceed to the agreed place for unloading the goods, get the goods out of the hold and put them on the deck or alongside. Where the goods are not collected within a reasonable time, the carrier may put them in a warehouse at their owner's expense.

There are certain restrictions on a carrier's liability for damage to goods. This list of 'exempted perils' includes acts of God, acts of war, riots and civil commotion and quarantine restrictions.

Carriage of Goods by Air:

Carriage of goods by air on an extensive commercial scale is a comparatively recent phenomenon. The law regarding air transport is concerned primarily with obligations regarding passengers and their belongings.

As is the case with carriage of goods by sea, rights and obligations in connection with the carriage of goods by air are founded principally on the contract of carriage between the consignor, either on his own behalf or on behalf of the consignee, and the air carrier. The main provisions concerning international carriage by air are contained in the **Warsaw Convention** of 1929 which sought to remove inconsistencies between the laws of different countries and to strike a reasonable balance between the interests of the fledgling air carriage industry and its customers. Once the Convention was extensively adopted, it generally became no longer necessary to ascertain which State's law governed a particular contract of carriage because the same basic rules about liability applied in most countries. The Warsaw Convention became part of Irish law by virtue of section 17(1) of the Air Navigation and Transport Act 1936. The Convention has been amended on number of occasions and these changes have been incorporated into Irish law by further Air Navigation and Transport Acts.

The Convention covers any carriage of goods where both the point of departure and the destination are in States which are parties to the Convention. It also covers a carriage between two places in one State-party where there is an agreed stopover in some other State, whether or not that State is a party to the Convention.

The Air Waybill: the principal document issued when goods are being sent by air transport is the air waybill. Various rights and obligations in connection with the waybill are set down in the Warsaw Convention. Where goods are being sent by international air carriage a waybill must be delivered. However, with the consignor's consent, a receipt may be substituted for a waybill, provided the receipt preserves a

record of the carriage to be performed. The waybill must be made out by the consignor. Frequently, it is made out by the carrier, which is permitted where the consignor has consented. There must be three original parts to the waybill, although many more parts are common. One part is marked 'for the carrier' and is signed by the consignor. Another part is marked 'for the consignee' and is signed by the carrier and the consignor. The third compulsory part, signed by the carrier, is retained by the consignor. An air waybill must contain the following: an indication of the weight of the consignment and of the places of departure and of destination. The consignor is responsible for the correctness of the particulars concerning the cargo, which he inserts in the waybill or which are put in it on his behalf. He must indemnify the carrier for all loss or damage he suffers in consequence of such information being irregular, incorrect or incomplete.

Air waybills resemble bills of lading in some respects. They are a receipt for the goods in question, being prima facie evidence of acceptance of the cargo. They are prima facie evidence of the conclusion of a contract of carriage and of its terms and, in particular, of the weight, dimensions and packaging of the cargo, of the number of packets and of the apparent condition of the cargo. But they are only prima facie evidence against the carrier of the actual quality, volume and condition of the cargo where the goods were checked by him in the consignor's presence and that fact is stated in the waybill. Unlike bills of lading, however, waybills are not negotiable instruments in Irish law i.e. they are not a title document.

Consignor's Obligations: the consignor's obligations will be laid down in the contract of carriage, which generally will be a standard form contract made out by the carrier.

1. They must make out an air waybill or receipt in three parts (as outlined above), although they can permit the carrier to do so on their behalf.
2. They must indemnify the carrier for any loss he suffers in consequence of being given wrong information.
3. If the goods are dangerous in any way, they must disclose that fact.
4. They must pay the freight in accordance with the terms as agreed.

Carrier's Obligations: the carrier's obligations will be determined by the contract of carriage but the Warsaw Convention imposes certain minimum duties which cannot be contracted out of.

1. It is an implied term that the carrier supplies an airworthy aircraft, in the sense that mechanical defects will not provide him with a defence in an action brought by the cargo-owner.
2. Carriers are liable for damage sustained because of the destruction, loss or damage to the cargo, if caused during the course of the air carriage. The liability is subject to a financial ceiling.

3. Carriers are also liable for any damage resulting from delay in carrying the goods, but they can escape liability where they can show that they took all the 'necessary measures' to avoid the danger.

Under the Convention, there is a limitation period for bringing claims against the carrier. The catalogue of 'excepted perils' in respect of which the air carrier is exonerated from any liability is much shorter than those applicable to the carrier by sea.

Carriage of Goods by Road:

The principal aspects of the carriage of goods by road are regulated by the **Convention on the Contract for the International Carriage of Goods by Road 1956**. This Convention applies whenever goods are being carried for reward between two different countries provided that one of those countries is a party to the Convention. However, the U.K. Government's protocol of signature of the Convention stipulates that it shall not apply to traffic between the U.K. and Ireland. Accordingly, the Convention's terms are not imposed on carriers of goods by road between the Republic and Northern Ireland.

Where goods are being brought by a road vehicle to a destination on the Continent, the Convention applies where the entire vehicle is carried by sea or air to the Continent and the goods are not unloaded from the vehicle in the course of the voyage. Thus, the Convention applies in the many cases where goods are being brought by container to a continental destination.

Under the Convention, the carrier is liable for any total or partial loss of the goods or for damage caused to them between the time he took possession of the goods and the time they were to be delivered; he is also liable for loss resulting from delayed delivery. Again, there is a short list of 'excepted perils' in respect of which he is exempted from liability.

As with the other Conventions, there is a limitation period for bringing claims against the carrier and a ceiling on the amount of damages which may be recovered against him.