

# COVID-19. The sale of goods on shipment terms and Covid-19



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Training course on Implications of the COVID-19 Pandemic for Commercial Contracts



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# 1. The sale of goods on shipment terms

## **RULES FOR ANY MODE OR MODES OF TRANSPORT**

- EXW – Ex Works
- FCA – Free Carrier
- CPT – Carriage Paid To
- CIP – Carriage and Insurance Paid To
- DAP – Delivered at Place
- DPU – Delivered at Place Unloaded
- DDP – Delivered Duty Paid

## **RULES FOR SEA AND INLAND WATERWAY TRANSPORT**

- FAS – Free Alongside Ship
- **FOB – Free On Board**
- CFR – Cost and Freight
- **CIF – Cost Insurance and Freight**

## 2. Basic principles on the passage of risk

- Risk of **market fluctuations**
- Risk of **transit loss**
  - At Common Law

On or as from shipment across the ship's rail at the port of loading

- Under the Incoterms® 2020 Rules

On placement of the goods on board at the loading port; or  
by procuring the goods so delivered

NB: Same rule for CIF/CFR and FOB sales.

## 2. Basic principles on the passage of risk

The rule that risk passes on or as from shipment has a number of **statutory and Common law exceptions**: losses caused by

- By delayed delivery [SoGA 1979 – s.20(2)];  
*Gatoil v. Tradax* [1985] 1 Lloyd's Rep. 350
- By breach of the duty to take reasonable care of warehoused goods [SoGA 1979 – s.20(3)];
- Risk does not pass where the seller has failed to make a reasonable contract of carriage [32(2)].
- Where the seller has failed to pass on insurance information [s.32(3)];
- By a breach of the seller's duty to ship goods likely to withstand normal sea transit  
*Mash & Murrell v. Emanuel* [1961] 2 Lloyd's Rep. 326  
*The Mercini Lady* [2010] EWCA Civ 1145.

## 2. Basic principles on the passage of risk

More importantly under English law it is always possible to allow for **contractual exceptions**:

- Out turn quality;
- Landed quantity at contract price;
- ...

NB: prompt verification/sampling/surveying is required, and timing is often crucial.

### 3. Physical and documentary duties: the English model

Performance in shipment sales is **dual**:

#### A. Physical performance (ship goods as described in the contract)

Section 13 of the Sale of Goods Act 1979 states:

13(1) Where there is a contract for the sale of goods by description, there is an implied term that the goods will correspond with the description.

13(1A) As regards England and Wales and Northern Ireland, the term implied by subsection (1) above is a condition.

- What is a contract for the sale of goods by description?
- What does *correspond* mean?
- Which part of the contract *describes* the goods?
- What is a *condition*?

Of particular relevance to Covid-19: time and place of shipment are **part of the description!**

*Bowes v. Shand* (1877) 2 App. Cas. 455.

### 3. Physical and documentary duties: the English model

*B. Documentary performance (deliver documents promised in the sale contract or the LC)*

Documents provide *evidence of contractual physical performance*, and

- In CAD
  - They are an essential component of the delivery.
  - Crucially **all documentary breaches are breaches of condition** entitling the buyer to terminate the contract and claim damages (if any).
- In LC
  - They are the trigger for payment under the LC;
  - They must correspond with their description in the LC (strict compliance).

So: what if loading is delayed due to Covid-19?

what if the port of loading/discharge is changed due to Covid-19?



## 4. Covid-19 and its impact on shipment sales

On the *physical* front?

- Delayed shipment;
- Change of loadport/disport – rotation;
- Delay in cargo surveys;

On the *documentary* side?

- Delay in the issue of:
  - Bills of lading;
  - Certificates; and
- Delay in the transmission of:
  - The documents (CAD)/presentation (LC)

# Thank you!



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