LLM International Trade Law

International Sale Contracts
Assignment Paper
Presentation by 10th of March 2006

Question 1

Introduction

The statement that: "*The termination rules of English law recognise the need for legal certainty and predictability*" will be discussed with regard to its relevance and applicability to international sales contracts for the sale of commodities.

Issues

The following issues will be addressed:

- Contract Terms
- Contract Formation
- Breach of Contract & Remedies

Termination rules apply to the circumstances in which the parties to a contract may terminate it. The phrase "*legal certainty*" as construed by Lord Wright[1] favours a broad definition and Colman J. applies it also to jurisdiction.[2] The need for certainty in deciding similar / identical cases is a basic principle of English law and achieved by applying precedent. The impact on legal certainty of Hong Kong Fir[3] which introduced innominate terms will also be considered. Although "*predictability*" has been quite narrowly defined[4] Common Law reliance on precedent to achieve predictability of legal outcome is not always consistent. An international sales contract has been defined[5] as one that "… *will involve a transaction between a buyer in one state and a seller in another*, *requiring the movement of goods from the seller's state to the buyer's, typically by sea*." Authority for this definition is provided by the UCTA[6] which distinguishing between domestic and international sale contracts.

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[1] Hillas & Co Ltd v Arcos Ltd (1932) 147 L.T. 503, 514 "*It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects;"*

[2] Konkola Copper Mines plc v Coromin, QBD (COMMERCIAL COURT), [2005] EWHC 898 (Comm), [2005] 2 All ER (Comm) 637 "*The court has thus held that the principle of legal certainty requires, in particular, ….. the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of art 2, and consequently to undermine the principle of legal certainty, which is the basis of the convention*."

[3] Hongkong Fir Shipping v Kawasaki Kisen Kaisha Ltd (1962) 2 QB 26

[4] Owusu v Jackson and others, (Case C-281/02), Court of Justice of the European Communities, [2005] QB 801 "*41 Application of the forum non conveniens doctrine, which allows the court seised a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid down by the Brussels Convention, in particular that of article 2, and consequently to undermine the principle of legal certainty, which is the basis of the Convention*."

[5] Evans J, *Law of International Trade*, 3rd edition, (London, Old Bailey Press, 2001) page 43

[6] s 26 of the Unfair Contract Terms Act 1977

Contract Terms

When the proper law of a sales contract is English law then the Sale of Goods Act 1979[7] (SGA) applies. The SGA recognises two principal types of contract terms i.e. conditions[8] and warranties[9] to which intermediate / innominate[10] terms has been added. Contract terms can be either express or implied.

Conditions

i. A condition, as a "fundamental term", is defined by Lord Upjohn[11] affirmed by Lord Reid,[12] as a term that goes to the root of the contract, breach of which entitles the injured party to terminate the contract and claim damages. However, the word condition can also be used in the sense of a stipulation or provision,[13] breach of which serves to suspend the rights and obligations of the parties but gives no right of action.[14] A contract clause can be made a condition expressly[15] by the contracting parties; by implication of law;[16] or by the courts,[17] binding the parties accordingly. Upon breach there is reasonable legal certainty regarding the injured party's rights and remedies, a given decision can be anticipated with relative accuracy.

Time clauses[18] however, such as in charter parties regarding e.g. vessel arrival or departure dates, or time frames for nominating or confirming a vessel, are invariably treated strictly[19] to ensure legal certainty. In string contracts[20] the same party can become both buyer and seller and wants parity of action and remedy to minimise disputes and ensure maximum certainty.

ii. Promissory and Contingent conditions are not synonymous. A promissory condition is a promise made or undertaking given which, if breached, grants the injured party the right of action.[21] A contingent condition (see below item iii) is dependent upon the occurrence or not of some uncertain future event that shall, or not, as the case may be, impose an obligation upon one or both of the contract parties.[22] Both are applicable to international sales contracts where prior performance by one[23] or both parties of a certain act is a contractual pre-requisite, often secured by a bond.

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[7] The Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994 and the Sale of Goods (Amendment) Act 1995

[8] *Loc. Cit.* footnote 7 at s.11(3)

[9] *ibid* at s.61

[10] Bentsen v Taylor, Sons & Co (1893) Q.B. 274, 281; Hongkong Fir Shipping Co Ltd v Kawasaki Kiesen Kaisha (1962) 2 Q.B. 26, 60; State Trading Corp. of India Ltd v M. Golodetz Ltd (1989) 2 Lloyd's Rep. 277

[11] Suisse Atlantique Societe d'Armement Maritime SA v N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C. 361,422

[12] *ibid* "*General use of the term "fundamental breach" is of recent origin and I can find nothing to indicate that it means more or less than the well-known type of breach which entitles the innocent party to treat it as repudiatory and to rescind the contract*."

[13] L.G. Schuler A.G. v Wickman Machine Tool Sales Ltd (1974) A.C. 235

[14] *Chitty on Contracts*, 29th edition, (London, Sweet & Maxwell, 2004) page 718, 12-025

[15] Dawsons Ltd v Bonnin (1922) 2 A.C. 413; Lombard North Central plc v Butterworth (1987) Q.B. 527

[16] Sale of Goods Act 1979, ss. 11(3), 12(5A), 13(1A), 14(6), 15(3)

[17] State Trading Corp. of India Ltd v M. Golodetz Ltd (1989) Lloyd's Rep 277, 283 per dictum Kerr LJ "*making a value judgment about the commercial significance of the term in question*."

[18] Bunge Corporation, New York v Tradax Export SA, Panama, House of Lords (1981) 1 W.L.R. 711

[19] Goff in Commercial contracts and the Commercial Court (1984) L.M.C.L.Q. 382, 392 e.g. "*People who charter ships are not children in arms*."

[20] Common in oil and grain transactions where "strings" can create "circle" contracts

[21] Stoljar (1953) 69 L.Q.R. 485

[22] London Transport Passenger Board v Moscrop 1942) A.C. 332, 341;Panoutsos v Raymond Hadley Corp. of New York (1917) 2 K.B. 473

[23] Trans Trust S.P.R.L. v Danubian Trading Co Ltd (1952) 2 Q.B. 297, 304 in which Denning L.J. considered the obligation to issue a credit and distinguished between promissory and contingent conditions upon non-provision

iii. Conditions precedent and subsequent. The former effectively holds a contract in abeyance until a pre-determined event or obligation has, or has not yet, occurred invoking various consequences: to suspend the rights and obligations of both parties[24] and makes a contract conditional upon its fulfilment or; one party may, subject to a condition, incur a unilateral and irrevocable obligation[25] or; the parties bind themselves contractually but some or all of the parties' obligations are in suspense until fulfilment of a given condition.[26] If a condition precedent is not fulfilled[27] then it appears the contract will not come into existence[28] and no liability is incurred by either party. If an event stipulated in a condition subsequent occurs then a previously binding contract is made void. Such conditions are a common feature of both international sales contracts and facility letters issued by financing banks.

Warranties

A warranty is defined as[29] *"... collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.*" It is critical to distinguish between a condition and a warranty[30] to achieve legal certainty regarding rights of action in the event of breach.

Intermediate or Innominate terms

The decision by Lord Diplock in *Hongkong Fir*[31] has probably introduced an element of uncertainty in distinguishing between terms and the consequences of breach. In this case, concerning vessel seaworthiness, breach of a clause was held to be insufficiently grave to permit termination. There were many ways of breaching the clause, not all representing a fundamental breach "going to the root of" the contract. In the *Cehave*[32] the total quantity of goods were rejected by buyers although damage occurred to only a part. Lord Denning MR said[33] "*The contractual term 'shipment to be made in good condition' was not a condition within the meaning of the Sale of Goods Act but was an innominate term*[34] so buyers could not validly reject.

Simply calling a term a condition or a warranty does not make it one, so precise drafting of an international sale of goods contract is critical to create clarity for the contract parties.

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[24] Pym v Campbell (1856) 6 E. & B. 370 in which the approval of a 3rd party was not given to the agreement
[25] Smith v Butler (1900) 1 Q.B. 694
[26] Worsley v Wood (1796) 6 Term Rep. 710; Clarke v Watson (1865) 18 C.B.(N.S.) 278; Re Sandwell Park Colliery Co (1929) 1 Ch. 277; Parway Esates Ltd v I.R.C (1958) 45 T.C. 135
[27] *supra* footnote 24
[28] *supra* footnote 24. at 374 whereby the written agreement was held "*not to be an agreement at all*."
[29] The Sale of Goods Act 1979 as amended by the Sale and Supply of Goods Act 1994 and the Sale of Goods (Amendment) Act 1995 s.61
[30] Loc. Cit. s.11(3) *"... whether a stipulation ... is a condition ... or a warranty ... depends in each case on the construction of the contract*; *and a stipulation may be a condition, though called a warranty in the contract*."
[31] Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha (1962) 2 QB 26
[32] Cehave NV v Bremer Handelsgesellschaft mbH; The Hansa Nord (1976) 1 Q.B. 44
[33] "*If a small proportion of the goods sold was a little below that standard, it would be met by commercial men by an allowance off the price. The buyer would have no right to reject the whole lot unless the divergence was serious and substantial*."
[34] *Schmitthoff's Export Trade, The Law and Practice of International Trade,* 10th edition (London, Sweet & Maxwell Ltd, 2000) page 88

Contract Formation

A critical area relevant to legal certainty is deciding when and/or whether a contract has actually been concluded. According to Blackburn J[35] an objective test of reasonable conduct suffices to bind the parties. A subjective analysis of intent proposed by Lord Diplock[36] has found less favour as it leaves room for doubt as to whether a contract has been formed. In this analysis, as interpreted by Goff LJ,[37] the "*actual intentions of both parties should in fact coincide.*" Support for the objective test is provided by Slade LJ[38] stating that withdrawal of an unambiguous offer is contrary to well-established principles of contract law. It appears that certain types of mistake[39] in this case as to the nature of the goods bid for, can grant the innocent party a right of rescission. If the mistake is not fundamental[40] it appears the contract stands. Contracting parties must also consider the issue of offer and acceptance. Creating legal certainty at this stage ensures greater predictability in subsequent actions.

Breach / contract termination / affirmation - remedy(ies)

- Anticipatory breach occurs when one party declares, prior to the time foreseen for the contractual performance, his intent not to perform[41] or, by means of conduct[42] infers the same intent enabling a reasonable person to conclude that the defaulting counterpart unilaterally abandons his contractual performance obligations. The innocent party can choose between accepting the breach, suing for damages immediately,[43] or waiting until the time foreseen for the defaulting party's performance[44] and then suing. However, if the innocent party, during the time up to the point foreseen for fulfilment, demands performance[45] he is precluded from later accepting the anticipatory breach if subsequent events discharge the contract by frustration.[46] It is thus important for contracting parties to understand the consequences and remedies for such a breach, especially where performance and time are of the essence.[47]

- Wrongful repudiation exposes the repudiating party to a claim for damages[48] as supported in another case[49] where contract conform CIF documents were rejected due to short delivery and Lord Diplock stated the obligation to take up documents is "… *so well established in English law as to be beyond the realm of controversy* …" which facilitates the obligations in chains of buyers/sellers common in international commodities transactions.

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[35] Smith v Hughes (1871) LR 6 QB 597
[36] The Hannah Blumenthal (1983) 1 AC 834
[37] The Leonidas D (1985) 1 WLR 925
[38] Centrovincial Estates plc v Merchant Investors Assurance Company Ltd (1983) Com LR 158
[39] Scriven Bros v Hindley (1913) 3 KB 564 the auction catalogue misled bidders re. the goods "tow & hemp" see also Harrison and Jones v Burton and Lancaster (1953) 1 QB 646 concerning goods of inferior quality
[40] Leaf v International Galleries (1950) 2 KB 86 wherein both parties wrongly held a picture to be a Constable
[41] Forslind v Becheley-Crundall, 1922 S.C.(HL) 173; Proctor & Gamble Ltd v Carrier Holdings Ltd (2003) EWHC 83 (TCC); (2003) B.L.R. 255 at (35); Stocznia Gdanska SA v Latvian Shipping Co (2001) 1 Lloyd's Report 537, 563
[42] Universal Cargo Carriers Corp v Citati (1957) 2 Q.B. 401; e.g. failure to load cargo within given laytime
[43] Hochster v De la Tour (1853) 2 E. & B. 678; Xenos v Danube etc., Ry (1863) 13 C.B. (N.S.) 825
[44] Avery v Bowden (1855) 5 E. & B. 714; (1856) 6 E. & B. 953
[45] thus affirming and sustaining the contract bilaterally
[46] Avery v Bowden (1855) 5 E. & B. 714; (1856) 6 E. & B. 953 where war was declared prior to expiry of the vessel loading date
[47] e.g. chartering and nominating vessels, loading within lay days, effecting payment for hire et al
[48] Bunge Corporation, New York v Tradax Export SA, Panama, House of Lords (1981) 1 W.L.R. 711; where failure to give required notice of vessel's probable readiness was held to be breach of a condition.
[49] Gill & Duffus SA v Berger & Co Inc, House of Lords, (1984) A.C. 382

➢ Discharge by Frustration can be said to occur when fulfilment of a contractual obligation becomes impossible of performance because external event(s) change the very essence and nature of the contract. The same event[50] can however lead to different decisions. In the first example[51] the contract to rent rooms for 2 days specifically to view the procession was held frustrated by the external event whereas in the second case[52] cancellation of the naval review did not of itself frustrate the contract as the hire included a cruise around the fleet. In a commercial context the method of performance can be critical[53] particularly if no alternative method of performance is agreed.[54] The outbreak of war makes dealing with the enemy illegal[55] however here the pre-payment had to be returned due to a total lack of consideration. Self-induced frustration will not discharge a contract[56] where an alternative method of performance is possible, albeit the onus of proof is on the party assserting self-induction.[57] Frustration is denied simply because the contract becomes commercially unviable for one of the parties.[58] Frustration is allowed per Lord Roskill[59] "…*where the effect of that event is to cause delay …will make any ultimate performance of the relevant contractual obligations 'radically different' from that undertaken by the contract*." Denning L.J supported this[60] if a given act incurred a cost that "*was .. 100 times as much as the contract price, that would be a "fundamentally different situation" … and they would not be bound to pay it*."

➢ Economic or commercial grounds represent a risk of contract termination as also bad faith[61] where one party takes advantage of a falling or rising market, rather than any harm or loss suffered by virtue of a breach. Thus the intent is to avoid the contract entirely and profit from the altered market conditions rather than claim damages. This must always be borne in mind when dealing with untested contract parties, especially in international transactions.

➢ A Notice Clause or express power or option to terminate the contract under agreed circumstances may be agreed[62] which may or may not foresee damages e.g. a Charter Party term for late vessel redelivery,[63] failure to nominate[64] or load[65] a vessel within a prescribed period. All or any such can be linked to a liquidated damages clause stipulating the sum due for a given breach in addition to a mutual waiver of further contract performance. However, in *Laing*[66] the contract was sustained in mutual benefit despite an express power to terminate clause being invoked, hence caution is advisable.

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[50] in this case the King's illness
[51] Krell v Henry (1903) 2 K.B. 740
[52] Herne Bay Steamboat Co v Hutton (1900-1903) All E.R. Rep. 627
[53] Nickoll & Knight v Ashton Edridge & Co (1901) 2 K.B. 126; where a named ship was nominated to load in a specified port during a particular month
[54] The Evia (No. 2) (1982) 3 All E.R. 350 whereby hostilities causing delay when the ship ran aground prior to performance thus frustrating the contract
[55] Fibrosa Spolka Akcyjnia v Fairbairn Lawson Combe Barbour Ltd (1942) 2 All E.R. 122
[56] J. Lauritzen A.S. v Wijsmuller BV – "The Super Servant Two" (1990) 1 Lloyd's L.R. 1
[57] Joseph Constantine Steamship Line Ltd v Imperial Smelting Corp Ltd (1941) 2 All E.R. 165
[58] British Movietonews Ltd v London & District Cinemas Ltd (1952) A.C. 166; in this case the claim that there was no longer demand for war related newsreels did not warrant termination
[59] Pioneer Shipping Ltd v BTP Tioxide Ltd; The Nema (1982) A.C. 724 at 752
[60] Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd (1952) 2 All E.R. 497 at 501; he held that a rise in the price of piassava of 20 – 30% over the contract price did not absolve the seller from obtaining an export licence but that if the price of the licence became significantly higher they were absolved
[61] Arcos Ltd v E A Ronaasen & Son(1933) A.C. 470 in which timber was allegedly rejected for minimal oversize whereas the "real" reason was commercial i.e. to profit by rejection of goods in a falling market
[62] Aktieselskabet Dampskibsselskabet Svendborg v Mobil North Sea Ltd (2001) 2 Lloyd's Rep. 127, 130
[63] Torvald Klaveness A/S v Arni Maritime Corporation, *The Gregos* (1994) 4 All ER 998
[64] Olearia Tirrena SpA v N.V. Algermeene Oliehandel; *The Osterbeck* (1972) 2 Lloyd's Rep. 341
[65] Kwei Tek Chao v British Traders and Shippers Ltd (1954) 2 Q.B. 459
[66] Laing Management Ltd v Aegon Insurance Co (UK) Ltd (1998) 86 Build L.R. 70, 108

- Damages

The traditional view on damages is summarised by Lord Wilberforce stating[67] that "*The general principle for the assessment of damages is compensatory, i.e. that the innocent party is to be placed …… in the same position as if the contract had been performed*." This view implies a "net loss" approach, sums saved or gained by the claimant being set off against the losses incurred. Reasonable steps must be taken to mitigate losses.[68] If e.g. performance of a delivery period is delayed or renounced this may result in a claim for compensatory damages due to repudiatory breach.[69] Or a contract may foresee payment or deposit of a pre-agreed sum or earnest which is forfeited upon non-performance[70] e.g. the buyer declines to proceed with the purchase. The courts have wide discretion under the Law Reform (Frustrated Contracts) Act 1943, s.1 (2) to determine whether to grant compensation for expenses incurred prior to the frustrating event.[71] In certain exceptional circumstances similar powers exist to impose further damages[72] beyond simple compensatory reinstatement.[73] Nominal damages can be claimed even if the claimant has suffered no loss.[74] Even when assessing damages is difficult a claim is still permitted.[75] The courts do their best to assess such damages based on the evidence available.[76] A contingent loss[77] also requires mitigation, any presumed benefits being set off against the damages assessed, also for loss of profits.[78]

The right to terminate can be forfeit if the wronged party affirms the contract[79] or acts implying affirmation[80] but, to quote McKendrick:[81] "A breach of a condition enables the party who is not in breach of contract ("the innocent party") *either* to terminate performance of the contract and obtain damages for any loss suffered as a result of the breach *or* to affirm the contract and recover damages for the breach." Authority is provided by the SGA[82] s.13(1) and s.15A, subject to certain exclusions,[83] was incorporated to preclude uncertainty(ies) so minor divergences do not entitle the buyer to reject goods and/or terminate the contract if this would be unreasonable. English law is indeed relevant and applicable to international sales contracts and provides a reasonable degree of predictability to contracting parties imparting the outcome of an action with reasonable predictability concerning a claim.

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[67] Johnson v Agnew (1980) A.C. 367 at 400-401
[68] Westwood v Sectretary of State for Employment (1985) A.C. 20, 44
[69] Carbopego-Abastecimento de Combustiveis SA v Amci Export Corp. (2006) EWHC 72 All ER (D) 227
[70] Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd (1993) A.C. 573
[71] Gamerco S.A. v ICM/Fair Warning (Agency) Ltd (1995) 1 W.L.R. 1226
[72] making the defendant account for and surrender any profits gained by virtue of the breach
[73] Attorney-General v Blake (2001) 1 A.C. 268 "*In a suitable case damages for breach of contract may be measured by the benefit gained by the wrong-doer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained*."
[74] Marzetti v Williams (1830) 1 B. & Ad. 415; The Mediana (1900) A.C. 113, 116
[75] Chaplin v Hicks (1911) 2 K.B. 786
[76] Tai Hing Cotton Mill Ltd v Kamsing Knitting Factory (1979) A.C. 91, 106
[77] Davies v Taylor (1974) A.C. 207, 213
[78] H. Parsons (Livestock) Ltd v Uttley, Ingham & Co Ltd (1978) Q.B. 791, 802-803
[79] Suisse Atlantique Societe d'Armement SA v N.V. Rotterdamsche Kolen Centrale (1967) 1 A.C. 361, 398
[80] Pust v Dowie (1863) 5 B. & S. 33
[81] McKendrick E. *Contract Law,* 5th edition, (Basingstoke, Palgrave Macmillan, 2003) 10.1 at page 215
[82] Sale of Goods Act 1979
[83] s.15A does not apply to commodities contracts in relation to shipment date, the port or seller's obligations regarding provision of conforming documents nor indeed to express contractual terms

Question 2 a) – Agamenmon plc

Mr. Mace of Agamenmon plc (A), seeks advice on three issues:
i. the likely grounds of Brutus' (B) claim
ii. the remedies available to B
iii. B's chances of success

Setting out the facts it appears that:
- there is a FOB (Free On Board) contract covering of 500mt of bran FOB Buenos Aires
- B was required to nominate a vessel within the period foreseen for loading the goods
- A was required to load the goods during 01 – 31.10.
- B advised problems in finding shipping space on 30.10.
- A implied a short delay was acceptable but reserved all rights to enforce the contract in accordance with its terms
- at 15:00 on 31.10. B nominated *The Enterprise*
- A refused the nomination alleging insufficient time to load the goods within due time
- it appears that B contemplates legal action
- the price of bran (the goods) has risen from £40/mt to £50/mt since contract completion.

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1. The obligations under a "strict"[84] or "classic"[85] fob (free on board) contract require *inter alia* a seller to ship contract conform goods on a vessel nominated by the buyer.[86] Devlin J.[87] defined two further types of fob contract however a classic fob contract is assumed here.

2. B nominated a vessel on 31.10. at 15:00 – it is assumed 31.10. was a working day and 15:00 was within the port's normal working hours. It appears the vessel was nominated within the stipulated period.[88]

3. A had to load goods during 01. – 31.10.[89] provided he had enough time to (fully) *"... load the goods before the end of the shipment period (or any extension of it.)*.[90] It is assumed no notice period[91] was agreed or imposed in a standard form contract[92] failure to comply with which may have rendered B liable for breach.

4. Although B notified A of problems in finding shipping space, it seems no extension to the shipment period was sought by B or expressly agreed by A. Hence B had to nominate a suitable[93] and effective[94] vessel within due time.

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[84] nomenclature as per Sassoon, *CIF. and FOBb. Contracts* 4th ed. (London, Sweet & Maxwell, 1995) para. 443
[85] per Devlin J. in Pyrene Co Ltd v Scindia Navigation Co Ltd. (1954) 2 Q.B. 402; (1954) Lloyd's Rep. 321
[86] H.O. Brandt & Co v H.N. Morris & Co Ltd (1917) 2 K.B. 784
[87] Pyrene Co Ltd v Scindia Navigation Co Ltd. (1954) 2 Q.B. 402; (1954) Lloyd's Rep. 321
[88] J. & J. Cunningham v Munro (1922) 13 Lloyd's Rep. 62 and 216
[89] Bunge & Co Ltd v Tradax England Ltd (1975) Q.B. (Comm. Div.) 2 Lloyd's Rep. 235
[90] quoting Kerr L.J. in Tradax Export SA v Italgrani di Francesco Ambrosio (1986) 1 Lloyd's Rep. 112
[91] obligation to advise seller's of e.g. probable date of readiness or arrival of the vessel at the port of loading
[92] Bunge Corp, New York v Tradax Export SA, Panama (1981) 1 W.L.R. 711, (1981) Lloyd's Rep. 1 dealing with a GAFTA form 119 obligation in Clause 7 thereof
[93] Compagnie de Renflouement de Recuperation et de Travaux Sous-Marins VS Baroukh et Cie v W. Seymour Plant Sales and Hire Ltd (1981) 2 Lloyd's Rep. 466, HL at 482
[94] Napier (F.E.) v Dexters Ltd (1926) 26 L.I.L.R. 184 i.e. "… *must be able to load the goods within the shipping period.*"

5. Contract terms could, by mutual agreement, be amended by variation[95] but a unilateral notification[96] without agreement would not constitute a valid variation.[97] It seems no consideration was sought or given for Mr. Mace's remark validating a variation.[98] It is unlikely any remark was a forbearance, effective as a waiver, due to A's subsequent conduct i.e. repudiating the vessel nomination. It seems A insisted upon fulfilment of the original terms.

6. B nominated a specific vessel[99] within the shipment period apparently fulfilling this contractual obligation.[100] Hence A, assuming the vessel was suitable, was obliged to load.[101] This conduct might imply A granted no extension to the shipment period. Presumably the ship was suitable. If not, and nomination was made merely to effect a timely[102] nomination, then apparently A could repudiate both nomination and contract.[103]

7. It seems A exercised an anticipatory breach, alleging insufficient time to load the goods within the shipment period. Because "*An anticipatory breach must be proved in fact and not supposition"*[104] the onus is on A to prove his allegation. The seller need not have goods load ready at all times and the buyer must give reasonable notice of the vessel's estimated time of arrival "…*that the vendor may be in a position to fulfil his part of the contract*."[105] Whether partial performance[106] was expected, demanded or contemplated, is not known but this could affect any claim for damages and/or the mitigation obligations.

8. Probably B's claim will sound in an action for non-delivery of the goods, lost profits and damages.[107] B may claim A's failure to ship good on the vessel nominated is a repudiatory breach[108] and that A's rejection of B's nomination represents a wrongful repudiation. A must prove it was impossible to load (any) goods within the time available. However, if A can demonstrate he had insufficient notice to load the goods within the time given[109] the court may consider his repudiation to be reasonable. B might claim that the time given was indeed reasonable and sufficient to enable A to load goods within the stipulated period and that he relied upon A's statement that " *a short delay should not be a problem ..*" construing this as an implicit extension of the shipment period.

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[95] Berry v Berry (1929) 2 K.B. 316
[96] e.g. Mr. Mace saying "… *a short delay should not be a problem ..*"
[97] Cowey v Liberian Operations Ltd (1966) 2 Lloyd's Rep. 45
[98] Re William Porter & Co Ltd (1937) 2 All E.R. 361
[99] Bunge & Co v Tradax England (1975) 2 Lloyd's Rep. 235
[100] J. & J. Cunningham Ltd v Robert A. Munro & Co Ltd (1922) 28 Com. Cas. 42 at 45
[101] Harlow & Jones Ltd v Parex (International) Ltd (1967) 2 Lloyd's Rep. 509
[102] Ian Stach Ltd v Baker Bosley Ltd (1958) 2 Q.B. 130, 139 & 142; see also Halsbury's *Laws of England*, 4th ed., vol. 9 (1974), paras. 481-482 "*(1) that the court will require precise compliance with stipulations as to time wherever the circumstances of the case indicate that this would fulfil the intention of the parties, and (2) that broadly speaking time will be considered of the essence in "mercantile" contracts*"
[103] Texaco Ltd v The Eurogulf Shipping Co Ltd (1987) 2 Lloyd's Rep. 54 at 545
[104] Universal Cargo Carrier Corp v Citati ((1957) 2 Q.B. 401, 449-450
[105] J. & J. Cunningham Ltd v Robert A. Munro & Co Ltd (1922) 13 Lloyd's Rep. 62 and 216
[106] i.e. loading such part of the goods as possible within the time permitted
[107] Sale of Goods Act 1979, s.51 (1), (2) and (3)
[108] Kwei Tek Chao v British Traders & Shippers Ltd 1954) 2 Q.B. 459
[109] based on *inter alia* the location of the goods and his commercial knowledge of port customs and procedures

Remedies available to B are the right to terminate the contract, commence an action for breach and to claim damages and lost profit. In principle damages should reinstate the claimant to the position he would have enjoyed but for the breach. Presumably B will claim for damages plus £10/mt anticipated "profit" especially if B is in a chain and had to cover in the spot market at prevailing prices. Although unlikely, B might seek specific performance, even of unascertained goods.[110]

To succeed, B must prove the time given to A to fully load the contract goods before close of business on 31.10. was in fact sufficient[111] or that a short delay was acceptable. B might also claim A was in breach for not loading the maximum tonnage possible until close of business 31.10. in partial performance. Presumably A will claim B's delay in nominating a vessel frustrated the contract making A's performance impossible[112] justifying repudiation..[113] A might claim the vessel was not effective[114] and/or "*The buyers had broken a condition of the contract by failing to nominate an effective vessel, capable of loading the cargo within the period*."[115] B could cite another case[116] of a vessel nominated at 16:30 on the last day of the shipment period where seller's refusal of the nomination was held a wrongful repudiation making them liable for non-performance.[117] There is an implied mutual duty to facilitate contractual performance[118] which B might use claiming A's lack of cooperation.

In conclusion, B's chances of success turn on his ability to prove the points noted above, especially that A's nomination rejection was unfounded. A must prove that loading (any) goods within the time given was impossible thus justifying his repudiation.

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[110] Sky Petroleum v VIP Petroleum (1974) 1 All E.R. 954
[111] Sale of Goods Act 1979, s.29 (5) "*Demand of tender of delivery may be treated as ineffectual unless made at a reasonable hour; and what is a reasonable hour is a question of fact*."
[112] British & Beningtons v North Western Cachar Tea Co (1923) A.C. 48 at 70
[113] Universal Cargo carriers Corporation v Citati (1957) 2 Q.B. 401
[114] J. & J. Cunningham Ltd v Robert A. Munro & Co Ltd (1922) 13 Lloyd's Rep. 62 and 216
[115] Bunge & Co Ltd v Tradax England Ltd (1975) 2 Lloyd's Rep. 235
[116] Agricultores Federatos Argentinos v Ampro SA (1965) Lloyd's Rep. 157
[117] ibid on the facts loading could have been completed before the end of the shipment period had overtime working been imposed
[118] All Russian Co-operative Society Ltd v Benjamin Smith & Sons (1923) Ll. L. Rep. 351

Question 2 b) – Agamenmon plc

Mr. Mace of Agamenmon plc (A), seeks advice on three issues:
i. Whether he can enforce payment against Claudio plc (C)
ii. Whether he can enforce payment against Diavolo plc (D)
iii. In both cases, if payment is (un)enforceable, the reason(s) therefore

Setting out the facts it appears that:
- there are Cost, Insurance & Freight (CIF) contracts for 500mt of wheat CIF Hamburg
- C has bought 200mt and D 300mt – both for October shipment
- payment is on CAD (Cash Against Documents) basis for both lots
- 500mt was shipped on board *The Adventurer* on 05.10.
- documents for both lots were presented to C & D on 06.10.
- C refused payment, demanding prior examination of the goods
- D failed to pay alleging "cash flow problems"
- 100mt of the goods proved to be unsuitable due to weevil infestation
- A admits to quality problems and that goods were likely to be infected upon shipment

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1. The real nature of the contract is determined by examining all its terms[119] but a true cif contract as defined by Lord Wright is assumed.[120] It is assumed bills of lading tendered are full sets of original "clean shipped on board"[121] bills providing continuous cover[122] to Hamburg, that documents required were complete (at least an invoice, bill of lading, insurance policy[123]) and contract conform[124] giving buyer no grounds for rejecting documents.

2. As the contracts stipulate October as sole month of shipment, time is of the essence,[125] seller must ensure timely loading. Risk to and property in goods need not pass to the buyer simultaneously. In a standard cif contract, risk[126] passes upon shipment[127] whereas property passes when "… *the parties to the contract intend it to be transferred*"[128] typically when documents are tendered and paid for.[129] If passing of property is conditional[130] the seller could retain property in the goods until he has been paid.[131]

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[119] Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (The Julia) (1949) A.C. 293; (1949) 1 All E.R. 269 where a purported cif contract was in fact deemed to be an arrival or ex ship contract
[120] Smyth & Co Ltd v Bailey Son & Co Ltd (1940) 3 All E.R. 60 paraphrasing Lord Wright: "*The seller has to ship or acquire after that shipment the contract goods … obtain proper bills of lading and proper policies of insurance. He fulfils his contract by transferring the bills of lading and the policies to the buyer*."
[121] bear no "*clause or notation which expressly declares a defective condition of the goods and/or the packaging*" as defined by the International Chamber of Commerce Publication No. 283, page 5
[122] Hansson v Hamel & Horley Ltd (1922) 2 A.C. 36 held that any break in cover can result in repudiation
[123] Biddell Brothers v E. Clemens Horst Co (1911) 1 K.B. 211, 221
[124] Gill & Duffus SA v Berger & Co Inc (1984) A.C. 382
[125] Ian Stach Ltd v Baker Bosley Ltd (1958) 2 Q.B. 130, 139 & 142
[126] of loss and/or damage to goods
[127] Johnston v Taylor Bros (1920) A.C. 144; Colley v Overseas Exporters (1921) 3 K.B. 302, 307; see also J.D. Feltham (1975) J.B.L. 273
[128] Sale of Goods Act 1979 s17(1)
[129] Delaurier (A) & Co v Wyllie (1889) 17 R 167; Eastwood & Holt v Studer (1926) 31 Com Cas 251
[130] Sale of Goods Act 1979 s19(2) & (3), i.e. subject to the fulfilment of conditions imposed upon and agreed to by the buyer.
[131] Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd (1976) 2 All E.R. 552

3. It seems no documentary credits or Bills of Exchange are involved providing an independent means of securing payment hence, according to McCardie J.[132] "… *the obligation of the vendor is deliver documents rather than goods* …" The buyer must pay against tender of contractually conform documents[133] not delivery of the goods, which sentiment is supported by Scrutton J.[134]

4. Shipment of goods appears to have been timely. It is unknown whether goods are unascertained bulk goods[135] or if they were appropriated to the contract[136] e.g. stowed separately from all other goods, clearly identifiable and linked to specific bills of lading tendered.[137] It is assumed notice of appropriation was given or effected upon documents being tendered. Buyers can only acquire property rights as an owner in common in unascertained goods if payment had been made for some or all of them[138] hence it seems property in the goods remains with the seller here.

5. It is unusual that documents were tendered just one day after shipment, normally this require several days. If deliberate misdating of bills could be proven[139] this could enable repudiation and a claim for damages[140] unless the *The Ocean Frost*[141] decision was followed.

6. C must pay upon tender of contract conform documents.[142] As noted in *The Julia*[143] the cif buyer has two separate rights of rejection; of goods upon their arrival and of documents.[144] A partial rejection of damaged goods is also possible.[145] C must reject the goods within a reasonable time or forfeit this right.[146] Hence C must pay immediately (CAD) and await arrival of the goods to inspect same, which, if not contract conform, he can reject.

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[132] Manbre Saccharine Co Ltd v Corn Products Co Ltd (1919) 1 K.B. 198
[133] Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (*The Julia*) (1949) A.C. 293; (1949) 1 All E.R. 269 per Lord Porter "*Against tender of these documents the purchaser must pay the price*." See also Sharpe v Nosawa (1917) 2 KB 814 per Atkin J " … *Seller … to deliver the documents … and the buyer paying the price*."
[134] Arnold Karberg & Co v Blythe, Green, Jourdain & Co (1915) 2 K.B. 388; Clemens & Horst v Biddell Bros (1912) AC 18
[135] Sale of Goods Act 1979 s16 – whereby property cannot pass; Re Goldcorp Exchange Ltd (1995) 1 A.C. 74
[136] Sale of Goods Act 1979 s20A
[137] *Blackburn on Sale* (1st edn 1845), p. 123
[138] Sale of Goods Act 1979 s20A (1) (b)
[139] e.g. to evidence an October shipment
[140] *The Saudi Crown* Q.B. (Admiralty Court) (1986) 1 Lloyd's Rep. 261 restricting Grant v Norway and making the owners liable in damages for misdating bills of lading; Kwei Tek Chao v British Traders & Shippers (1954) Q.B. 459; (1954) Lloyd's Rep. 16
[141] Armagas Ltd v Mundogas SA, *The Ocean Frost*, ((1986) 2 W.L.R. 1063; (1986) 2 Lloyd's Rep. 109 where the misdating of bills of lading, as a less significant misrepresentation, did not make the owner liable
[142] Arnhold Karberg v Blythe, Green, Jourdain & Co (1916)1KB 495, 510 CIF contract as defined by Bankes LJ "… *a contract for the sale of goods to be performed by the delivery of documents*."
[143] Comptoir d'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (*The Julia*) (1949) A.C. 293; (1949) 1 All E.R. 269
[144] Kwei Tek Chao v British Traders & Shippers (1954) Q.B. 459; (1954) Lloyd's Rep. 16
[145] Sale of Goods Act 1979 s35A
[146] Berstein v Pamson Motors Ltd (1987) 2 All E.R. 220, a reasonable time as defined by Rougier J.

7. As for C, D's payment obligation is clear he too must pay against tender of contract conforming documents. However, if D can reasonably be expected to become unable to fulfil his payment obligation, A will have the remedies available to him as an unpaid Seller. These give him a lien over the goods, stoppage of goods in transit and/or grant a right of resale[147] and to claim any shortfall suffered. Constructive property in the goods passed upon tendering documents appropriating goods to the contract,[148] so he can commence an action for the price and claim damages for buyer's non-acceptance of goods.[149]

8. Due to weevil infection the goods' implied "*fitness for purpose* …." is breached[150] for 100mt. If no pre-shipment inspection was done evidencing weevil infestation and the bill of lading is "clean"[151] damage might have occurred during transit[152] making the carrier liable for damages unless A knowingly shipped infested goods.[153]

Conclusion
Mr. Mace has a clear case against C who, as shown above, has to pay immediately upon tendering of contract conform documents. If such documents were tendered, C must pay.

Regarding D, Mr. Mace can in principle also insist upon immediate payment against tendering contract conform documents. However, if D is unable to pay A must consider mitigating his potential loss by selling to another buyer and then claiming damages in restitution from D.

It is not clear to which buyer the infested goods have been appropriated. This part of the bulk might be rejected as being of unsatisfactory quality. A could propose fumigation at his own cost, rendering goods satisfactory, and insist upon payment. Otherwise, this part must be split out and dealt with in situ at seller's account, with A claiming the contract price less 100mt.

Word Count: 3'992

[147] Sale of Goods Act 1979 s39
[148] Sale of Goods Act 1979 s18 Rule 5 (1)
[149] Sale of Goods Act 1979 s49 & s50
[150] Sale of Goods Act 1979 s14(2) & (3)
[151] omits any clause expressly declaring a defective condition of the goods ISBP, ICC publ. No. 645
[152] Cerealmangimi S.p.A. v. Toepfer (*The "Eurometal*"), Q. B. Div. (Comm.) [1981] 3 All ER 533, [1981] 1 Lloyd's Rep 337
[153] Misrepresentation Act 1967, s2

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