CURRENT PROBLEMS IN INTERNATIONAL CRUDE OIL AND PETROLEUM PRODUCT SALES

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Until the 1970s international trading in petroleum seems to have given rise to relatively few legal controversies and even less litigation. The reasons for this are largely historical and economic. Before the 1970s most international petroleum trade was conducted by and among the major multinational oil groups.

In those days it was not unusual for oil to be produced by a company through its concession in the producing state, for it to be shipped in ships belonging to an affiliate of that company to the refinery of yet another affiliate from where the refined products would be distributed to its customers, often in the case of motor gasoline through yet another affiliate's retail filling stations. Even where the distribution chain was not so well integrated as described, much trading was carried out between the major companies whose similarity of interests was such that disputes, when they arose, rarely led to litigation. Indeed, the amounts involved would often not have justified litigation.

Two important things have happened since the 1970s to change the situation. The first was the increasing tendency of producing States to re-acquire from the concession holders the right to produce crude oil and having done so to sell it to a far wider range of Buyers than had previously been involved in crude oil trading. These Buyers would themselves sell to an even wider range of customers.

This fragmentation drew to the oil trading world many traders experienced in the international trade in other commodities. It was natural that international petroleum sales would be conducted by them within the framework used in the trade of other commodities (like grain). There has therefore been a burgeoning of crude oil and refined product sales on FOB, C&F and CIF terms which in many cases are somewhat unsuited to oil trade (and perhaps any other trade in the 1980s).

The second reason for the increase in litigation was the dramatic rise in price which meant that crude oil became a commodity worth litigating over.

Another feature of the oil trade since the 1970s has been fluctuating prices which have meant that parties are unwilling to commit themselves for long periods. Even so-called long-term contracts usually provide for price re-negotiation every three months and for termination (sometimes a phased termination) if the parties cannot agree on price when it is periodically reviewed. This has led to cargoes frequently being traded on a 'spot' basis and individual cargoes being bought and sold by long chains of Buyers and Sellers.

Whilst members of the AMPLA may be broadly familiar with the common forms of international trade *i.e.* FOB, C&F and CIF as defined in

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'Incoterms',[1] a more detailed knowledge of the rights and obligation of Buyers and Sellers under these terms is necessary to understand how problems arise and how they can be avoided.

Incoterms are interesting not only for what they contain but also for what they do not contain. It is very common for traders to specify that a contract that they have concluded in the sketchiest possible terms will be governed by Incoterms because the traders believe that Incoterms will fill all the gaps in their contract. They are very surprised indeed when they discover that Incoterms do not, for example, provide a *force majeure* clause and that in the case of a CIF sale, the insurance which the Seller has to procure is only of a fairly rudimentary kind.

A 'SIMPLE' PROBLEM IN FOB TRANSACTIONS

Central to traditional international trade is the Bill of Lading. A brief description of some of the problems associated with Bills of Lading appears later in this paper but you are asked to consider one aspect of Bills of Lading as an illustration of a trap for the unwary. The Bill of Lading has since the eighteenth Century been regarded by the courts as a document of title, negotiable by indorsement (it is not truly negotiable as an indorsee can never get better title than the indorsor — he can never be a 'holder in due course'). International sales proceed on the basis that title to goods passes on indorsement and delivery of the Bill of Lading. It is worthwhile considering this concept in relation to FOB sales.

Parties to FOB transactions often assume that title to goods passes on their shipment, either when they pass the rail of the ship or in the case of bulk liquids when they pass the permanent hose connexion of the ship. Incoterms are silent on the point. Where there is no express term in the contract title will it seems, pass by virtue of the indorsement and the delivery of the Bill of Lading. A difficulty arises in relation to a transaction, governed by a contract that expressly provides for title to pass on loading but where the Seller has the Bill of Lading made out in his own name (which he is probably entitled to do) for subsequent indorsement and delivery by him. Can title to the goods represented by the Bill be said to have passed until the Bill has been negotiated?[2] It need not be emphasized how important it may be to establish whether or not property in a cargo has passed — for example, in the case of a liquidation.

From this simple example, it may be demonstrated how even in the most straight forward of international sales, FOB, difficult points of law arise even on what ought to be a very well settled point. From the Seller's point of view it is clear that the contract should specify that title passes with the documents and that risk passes on loading. In this way the Seller retains the security of the documents until he is paid. Indorsement and delivery of the documents is normally accepted as being conditional on payment and

1 *International Rules for the Interpretation of Trade Terms* published by the International Chamber of Commerce.
2 See *e.g.* Section 24(2) of the Goods Act 1958 (Vic.), Section 24(2) Sale of Goods Act, 1923 (N.S.W.) and equivalent legislation in other states based on the provisions of the Sale of Goods Act 1893 (U.K.) — now Sale of Goods Act 1979.

if the Seller is not paid he may call for re-indorsement and re-delivery of the documents. The Seller might find that an FOB Buyer is reluctant to allow title to pass later than loading but it is really not inconsistent with international trade practice and finance.

CIF SALES

The obligations of Buyers and Sellers under CIF sales are well known and are set out in Incoterms which provide:

The Sellers obligations:

1. To ship at the port of shipment goods of the description contained in the contract.
2. To procure a contract of carriage by sea under which the goods will be delivered at the destination contemplated by the contract.
3. To arrange for an insurance upon the terms current in the trade which will be available for the benefit of the Buyer.
4. To make out an invoice which normally will debit the Buyer with the agreed price or the actual cost, commission charges, freight and insurance premium, and credit him for the amount of the freight which he will have to pay to the ship owner on delivery of the goods at the port of destination.
5. To tender these documents to the Buyer, so that he may know what freight he has to pay and obtain delivery of the goods, if they arrive, or recover for their loss, if they are lost on the voyage.

The Buyer must:

1. Accept the documents when tendered by the Seller, if they are in conformity with the contract of sale, and pay the price as provided in the contract.
2. Receive the goods at the agreed port of destination and bear, with the exception of the freight and marine insurance, all costs and charges incurred in respect of the goods in the course of their transit by sea until their arrival at the port of destination, as well as unloading costs, including lighterage and wharfage charges, unless such costs and charges shall have been included in the freight or collected by the steam-ship company at the time freight was paid.
   If war insurance is provided, it shall be at the expense of the Buyer...
   Note: If the goods are sold "CIF landed", unloading costs, including lighterage and wharfage charges, are borne by the Seller.
3. Bear all risks of the goods from the time when they shall have effectively passed the ship's rail at the port of shipment.
4. In case he may have reserved to himself a period within which to have the goods shipped and/or the right to choose the port of destination, and he fails to give instructions in time, bear the additional costs thereby incurred and all risks of the goods from the date of expiration of the period fixed for shipment, provided always that the goods shall have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.
5. Pay the costs and charges incurred in obtaining the certificate of origin and consular documents.
6. Pay all costs and charges incurred in obtaining the documents mentioned ... above.
7. Pay all customs duties as well as any other duties and taxes payable at the time of or by reason of importation.
8. Procure and provide at his own risk and expense any import licence or permit or the like which he may require for the importation of the goods at the destination.

Thus the Seller's fundamental obligations are to load the goods, contract for their carriage and insure them. He proves that he has done these things by providing the appropriate documentary evidence namely, the Bill of Lading and a certificate or policy of marine insurance: he must also supply an invoice.

As usual, Incoterms do not supply the fine print (they were never intended to do so). Because the Buyer and Seller have wider responsibilities than in an FOB sale, it is even more important for them both to put flesh on the skeleton provided by the International Chamber of Commerce. An example will illustrate this point. Incoterms provide that the Seller must procure marine insurance on what is described as 'terms current in the trade'. It is generally recognized that this falls rather short of the insurance which a prudent purchaser of a petroleum cargo should insist upon. Accordingly, the Buyer should insist on more appropriate insurance cover stating not only the terms of the cover (for example 'Lloyd's Marine Policy MAR with Institute Cargo Clauses (A)') but also that the insurance should be written by an underwriter of repute and should contain no special terms as to the processing of claims. It is not unusual for a policy to specify that claims are to be made through a particular broker — for obvious reasons which do not benefit the purchaser of the goods (or rather the assignee of the policy of insurance).

REMEDIES OF CIF BUYERS

(a) Against the Seller

It will be remembered that it is the Seller's obligation to ship goods that comply with the contract description. Subject to agreement to the contrary, the sale is also subject to the statutory conditions as to fitness and merchantability at the time of loading. To show compliance with contractual description it is usual for the contract to specify that the Seller will obtain a certificate from an independent surveyor as to the quality of the goods loaded.

This exposes a common difficulty in CIF transactions. A Buyer finds that the cargo that he has bought CIF is off specification. What are his remedies and against whom does he have a cause of action? The first person to whom the Buyer will normally look is the Seller. It has however been seen that the Seller is only obliged to place goods of the contract description on board the ship. He gives no warranty as to their condition at the time of the ship's arrival. Thus even if the cargo is one that is liable to deteriorate, the Buyer takes the risk of deterioration during the voyage. In one case, *Mash and Murrell Ltd. v. Joseph I. Emmanuel Ltd.*,[3] it was decided that the Seller gave an implied warranty that the goods were in such a condition as to withstand the normal hazards of a sea voyage. This case has been much criticized.[4]

If, therefore, the Buyer is to have a remedy against the Seller he must establish that the goods were defective when loaded. He may do this in one of several ways including independent examination and analysis of the samples which are normally taken and retained at loading and the certificates of quality. Here it is important to bear in mind that contracts often specify that the certificates of quality are conclusive evidence of the quality of the goods and where a 'conclusive' certificate erroneously shows

3 (1961) I.W.L.R. 862 (reversed on other grounds).

4 *'The Rio Sun'* High Court, England 31 July 1984 unreported at the time of writing.

the goods to be on-specification, the Buyer may be left with no remedy against the Seller or indeed anyone else.[5] There may be a possibility of being able to proceed against the cargo inspector who gave the erroneous certificate but such actions are notoriously difficult to sustain.

If the goods were not of contract description at the time they were loaded, the Buyer will have a remedy not only in damages but also, perhaps, in being able to reject the goods. The right of rejection in a CIF sale is paradoxical. It has been seen that title normally passes with the documents and therefore before the goods have arrived and before the Buyer has had a chance to inspect them. Notwithstanding the previous passing of title the courts have held that the Buyer of goods CIF which were not of contract description on loading may reject them, subject to all the usual qualifications about delay in inspection *etc.*[6]

There is an important Australian High Court decision on the question of rejection, namely *Henry Dean & Sons (Sydney) Ltd. v. O'Day Pty. Ltd.*[7] In this case the correct documents were tendered but the Buyer refused to pay until he had inspected the goods which he suspected did not comply with the contractual description. His suspicion turned out to be well founded. The Seller contended that refusing to pay when the documents were tendered amounted to repudiation and claimed damages and that the Buyer who himself claimed damages was not entitled to them. The majority of the court found for the Buyer. In a recent House of Lords decision, *Gill & Duffus S.A. v. Berger & Co. Inc. (No. 2)*,[8] the court preferred the minority view in the Australian Case. The weight of academic opinion supports the House of Lords decision *i.e.* that a CIF Buyer must pay against tender of the correct documents and claim damages or reject the goods if they turn out not to have been of contract quality on loading.

(b) Against the Ship Owner

If the goods were of contract quality on loading but have deteriorated or been contaminated during the voyage, the Buyer's remedy (if any) will be against the ship owner under the Bill of Lading. This is not the place to give an expansive account of the exceptions that a ship owner may take advantage of under the Hague/Hague Visby Rules. The Hague Visby Rules have not been adopted in any of the States of Australia or by the Commonwealth. The Hague rules are adopted by the Commonwealth[9] and by legislation in all States and apply to all international and inter-State sea carriage. Suffice to say here that the ship owner's liability is far from strict.

The other circumstance in which a Buyer may have a remedy against a ship owner is where the goods are of contract quantity on discharge but the quantity discharged is less than that contracted for.

5 *N. V. Bunge v. Norga d'Importation et d'Exportation (Bow Cedar)* [1980] 2 Lloyd's Rep. 601.
6 *E. Clemens Horst Co. v. Biddell Bros.* [1912] A.C. 18.
7 (1927) 39 C.L.R. 330.
8 [1984] A.C. 382.
9 Sea Carriage of Goods Act 1924 (Cth.)

Again, the first question to ask is whether the contract quantity was loaded. Here the quantity stated in the Bill of Lading is likely to be conclusive. It is not only conclusive so far as the Seller is concerned, but also so far as the ship owner is concerned and if he delivers less than that stated on the Bill of Lading, the onus will be very much on him to show that he is entitled to be protected by one of the exceptions in the Hague rules. There is however a trade exception that he might try to take advantage of.

There has arisen a custom (not in the technical sense) that a deficiency of less than 0.5% in the cargo discharged will not give rise to a cause of action against the ship. This notion arose during the days of cheap oil and has gained a certain amount of respectability in the trade.

Indeed, U.S. arbitrators are inclined to treat the concept as a custom in the technical sense and relieve ship owners from liability for a loss of up to 0.5% of the cargo. The English courts are by no means as ready to accept this.[10] There appear to be no Australian cases on the point but ship owners will normally resort to the custom as a 'defence' in pre-litigation negotiations at least.

IS THE SALE REALLY CIF?

It can be seen from the description given of a 'classic' CIF Sale that (subject to his right to reject the goods or claim damages if they were not of contract description or quality or quantity at the time they were loaded) the Buyer must pay on tender of the correct documents even if the goods arrive late or if they never arrive at all. Any sale which ties payment to the arrival of goods or their condition on arrival may not be a true CIF Contract. In practice this will lead to difficulties because traders (particularly in the United States) often do not appreciate what CIF really means. Some examples of provisions frequently encountered in CIF transactions which contradict their essential nature, will be helpful.

The first is a condition that the Buyer is obliged to pay for out-turn quantity or quality. It has been noted above that the Buyer in a CIF transaction accepts the risk of loss and deterioration as soon as the goods are loaded. He is the only party with an insurable interest and indeed, once the documents have been transferred to him, he will be the only party with insurance covering the goods or contractual rights against the ship owner.[11] The ship owner may be liable in negligence[12] — but this is a proposition which has not escaped criticism and has probably been overruled.[13]

Where a Buyer has contracted to buy subject to out-turn quality or quantity, and the goods arrive having deteriorated, the Seller will find that he cannot claim the price (or the full price) from the Buyer but he is left with no remedy against the ship owner or insurers because his rights against them will have been transferred to the Buyer with the documents (*i.e.* the Bill of Lading, and insurance policy). Where the parties really intend that the Buyer should only pay for what he receives, the sale is more properly

10 *Supra* n. 4.
11 *Margarine Union GmbH v. Cambay Prince Steamship Co.* [1967] 1 Q.B. 219.
12 *Schiffahrt & Kohlen GmbH v. Chelsea Maritime Ltd.* [1982] QB 481.
13 *Leigh and Sillivan Ltd. v. Allakmon Shipping Co. Ltd.* (1984) 'The Times'.

described as an 'ex-ship' sale (often described as a 'delivered' sale) in which case the Buyer receives no documents other than an invoice, although if he is prudent he will call in the contract for a copy of the Bill of Lading in an attempt to establish the Seller's title. An alternative approach is to contract on a CIF basis but provide that if the goods are not of contract quality or quantity, the Buyer will pay only for the goods he gets and will re-assign to the Seller his rights under the Bill of Lading and insurance policy. This approach sometimes has commercial attractions, but the reason for this is a mystery to a mere lawyer.

The second commonly encountered provision which negatives the effect of a CIF sale, is a credit period of so-many days after the date of delivery. As has been emphasized, in a CIF transaction the Buyer must pay for the documents whether the goods arrive or not. If the credit period is tied to the date of delivery, the Buyer will clearly not have to pay for the goods if they never arrive.

A third example of a provision inconsistent with a CIF sale which nevertheless often appears in CIF contracts is one by which the Seller undertakes that the goods will arrive at the discharge port within a particular date range. It cannot be stated too strongly that in a CIF sale, the Seller gives no warranty that the ship will arrive at all. If the parties really wish to contract on a basis entirely consistent with a CIF sale, but nevertheless wish to establish a date range for the arrival of the goods, they should contract on the basis that the goods will be loaded within a date range which will enable them to arrive within the date range required by the Buyer assuming a normal voyage time. Indeed, if the contract is a true CIF Contract in all other respects, a condition about the arrival date range may be construed by the courts as an obligation on the Seller to load within a date range which will enable the goods to arrive at the specified period given a normal voyage time.

'A TRANSACTION IN DOCUMENTS'

Since, as has been noted, the Buyer's rights under the usual forms of international trade depend almost entirely on documents, it must be recognized how important it is to ensure that before payment is made, the documents tendered by the Seller correspond in every respect with the documents contracted for. In this respect, these transactions are very much like the sale and purchase of land with common law title and it is astounding to see how casual many traders accept documents tendered with little regard to their crucial importance. The minute examination of the documents is essential.

First the Buyer must be sure that the rights assigned under the Bill of Lading and insurance policy are sufficient to enable him to make a claim against the ship owner or underwriters. In particular does the Bill of Lading represent the correct quantity and type of goods and show the correct discharge port? Does the insurance policy or certificate cover the correct goods for the correct voyage? And does the insurance cover granted by the policy correspond with that contracted for?

Secondly, if the Buyer is in turn sub-selling the cargo he may be faced with a Buyer whose documentary requirements are different from or more exacting than his own or, more likely, with a Buyer whose Bank's requirements are very exacting indeed when finance for the transaction has been raised on the security of the documents.

FINANCE

One of the advantages of trading in documents is that Banks are used to providing credit on the security of documents. They are, therefore, willing to lend a Buyer the money necessary to pay for goods if they can have transferred to them the documents representing them (*i.e.* the Bill of Lading and insurance policy) to be held by the Bank until the loan is repaid.

Traditionally, a Seller, unhappy with the credit of the Buyer, has required payment to be made under an irrevocable letter of credit confirmed by a first class Bank in the Seller's own jurisdiction.

It is not intended to give a detailed account of documentary credits. The most important thing to bear in mind is that the ICC publication governing the subject (*i.e.* the '4th Revision of the Uniform Customs and Practice for Documentary Credits' — 1983 Revision), to which these credits almost invariably refer, should be very closely examined because it really does provide a comprehensive code and the Banks do not hesitate to rely on their strict rights. They are also inclined to examine documents punctiliously to ensure that they are identifical to those specified in the credit itself.

An important lesson here is that where a Seller is selling to a Buyer on the basis of payment by documentary credit, he must ensure that before he accepts the form of credit proffered, he will be able to deliver all the documents the Bank requires in the form specified. If he is unable to do so, he should not accept the credit and must insist on a form that he can comply with. Alternatively, he can ensure that his own supplier supplies him with the documents which he will have to provide to his Buyer's Bank. Whilst the common practice of the Banks to be very exacting in their documentary requirements can be very frustrating for traders (and their lawyers) they are, in truth, doing no more than the traders themselves should do on their own behalf.

An increasingly common form of credit for international trade is the stand-by credit. A lawyer faced with such a credit should recognize that this so-called credit is little different from a guarantee and is likely to be treated by the courts in a similar way. Historically the use of the stand-by credit in international trade has evolved partly because of the inability of U.S. Banks in many States to issue guarantees and the Banks so inhibited have circumvented this restriction by adopting the stand-by credit.

In recent years the stand-by credit has come to resemble the documentary credit more and more in that whilst originally the Bank would undertake to pay the Seller on confirmation from the Seller that the Buyer himself had not paid, Banks frequently now insist that such a confirmation be accompanied by all the documents the Bank would have obtained under a documentary credit. It may be seen therefore that a

stand-by credit in its original form would (all other things being equal) offer security more easily realized than a documentary credit, but that in recent times the conditions often attached to a stand-by credit make it just as inconvenient to enforce because of the need to comply with precise documentary requirements.

The increasing use of stand-by credits has now been recognized by the ICC and the latest version (the 1983 edition) of the Uniform Customs and Practice incorporates a code for stand-by credits. It is interesting to note that the Banks' enthusiasm for stand-by credits and the fiction that they were credits and not guarantees was so avidly embraced that Banks often used to refer to earlier editions of the Uniform Customs and Practice even though those earlier editions actually made no reference to stand-by credits.

Despite the difficulties associated with the enforcement of documentary credits outlined above, their value cannot be over estimated. It is to be appreciated that a confirmed irrevocable credit places on the confirming Bank a liability to pay quite independent of the contract for the sale of goods, binding the Bank in all circumstances except fraud.

BILLS OF LADING

As has been noted, the most important document in FOB and CIF sales is the Bill of Lading. The Bill of Lading is the document issued by the master of a ship on behalf of its owner (or in some cases the desponent owner) acknowledging receipt of the cargo. The document also sets out either *in extenso*, or by reference to the charter party, the terms under which the goods are to be carried. By a combination of trade custom, common law and statute the Bill of Lading has come to fulfil three distinct roles:

- a contract of carriage;
- a receipt for the cargo; and
- a document of title.

It is crucial that the Buyer understands the nature of the Bill of Lading and its importance to him. A CIF Buyer is (subject to some comments later in this paper) not a Buyer of goods: he is buying documents. Where by virtue of the indorsement or consignment of a Bill of Lading, property in goods passes (as it will in the case of a CIF sale) the indorsee or consignee of the Bill has transferred to him the contract of carriage with the ship owner described in the Bill. Thus, by statutory magic, privity of contract is deemed to exist between the holder of the Bill of Lading and the ship owner.[14] If through the fault of the ship owner (subject to the statutory exemptions mentioned below) the goods are damaged or destroyed or never arrive, the holder of the Bill of Lading will be able to proceed against him for the recovery of damages. If the risk is covered by insurance, the insurer will, of course, be subrogated to the rights of the holder of the Bill (the Buyer).

14 S.74 Goods Act 1958 (Vic.); S.5, Usury, Bills of Lading and Written Memorandum Act, 1902 (N.S.W.); S.5 Mercantile Act 1867 (Qld.); S.14 Mercantile Law Act, 1936 (S.A.); S.1 Bills of Lading Act 1857 (Tas.); S.1 Bills of Lading Act 1855 (U.K.).

(a) Bills in Sets

A most curious feature of this document is that it continues in most cases to be issued in a set of three or more *originals*. In the early days of international trade it was convenient for the shipper if the ship issued more than one original Bill of Lading so that he could despatch each of them by different means of transport to their destination hoping that at least one would arrive before, or if all else failed, with, the ship carrying the goods, to enable the consignee to produce the Bill to the ship's master to get the ship discharged.

As early as 1881, Lord Blackburn said in *Glyn Mills & Co. v. East and West Indian Dock Company*[15] 'I have never been able to learn why merchants and ship owners continue the practice of making out a Bill of Lading in parts. I should have thought ... since the establishment of electric telegraph every purpose would be answered by making one Bill of Lading only which should be the sole document of title'.

Despite this obviously sensible comment, Bills continue to be issued in sets. Each original Bill contains a statement that it has been issued as a set of three (or however many) originals, one of which having been accomplished, the others to stand void. In other words, once the ship has discharged the cargo on presentation of one of the originals, the other originals, wherever they may be, are void. However, because of the possibility of fraud, traders (and more particularly Banks) insist that the documents to be delivered to them will include all original Bills of Lading. This being so, issuing three Bills is even more pointless now than ever especially taking into account the fact that if 'modern' communications in 1881 were efficient enough to enable Bills to be issued as single originals, how much more so is that true today?

It is interesting to note that in the United States, Section 6 of the Uniform Bills of Lading Act prohibits the issue of negotiable Bills in parts or sets for inland carriage.

Another problem with Bills of Lading issued in sets is the temptation that it offers to traders to attempt to make 'part indorsements' of each original so as to split up a cargo by indorsing each original as to part only of the cargo and deliver an original 'part indorsed' Bill to each purchaser. Such 'part indorsements' are probably wholly ineffective. Whilst it cannot be said with any certainty what effect such a purported indorsement has, it can be said with absolute confidence that it is ineffective to pass title in part of the cargo since property cannot be passed under any jurisdiction in Australia, or under English law, in unascertained goods. The legal position is different in some states of the United States (for example New York).

(b) The Missing Bill of Lading

Despite (or because of) the efficiency of modern communication, it often happens that a ship arrives before the consignee has obtained any of the original Bills of Lading. This often occurs when a transaction concerns

15 [1881] 7 App. Cas. 591, 605.

a particular cargo involving a long chain of Buyers and Sellers and their Banks each of which needs to see the original documents. A ship owner is entitled to refuse to deliver the goods until he has the Bill of Lading presented to him. In the absence of production of the original Bill, he may be prepared to discharge the goods against presentation of an indemnity from the consignee perhaps supported by a Bank guarantee in respect of that indemnity.

Similarly, whilst a contract will normally provide that payment is to be made within the credit period and on presentation of all the original documents specified, it often happens that those documents are not available at the expiry of the credit period and a Buyer may be persuaded to pay on the faith of an indemnity in lieu of those documents (backed by a Bank guarantee if necessary). If the Seller knows in advance that he is not going to be able to present the original documents at the time that payment is due, he should insert into the contract an obligation on the Buyer to pay on presentation of an indemnity in lieu of documents. The Buyer in turn may agree to do so provided that the indemnity is guaranteed by a Bank. The advantage of making specific reference to the indemnity and guarantee in the contract is obvious. In particular, it enable the parties to negotiate the precise terms of the indemnity before either party is bound to the other for the sale and purchase of the goods.

A Bank that has issued a Documentary Credit may also be prepared to accept an indemnity in lieu of documents.[16]

ADVANTAGES AND DISADVANTAGES OF THE PRESENT SYSTEM

The common forms of international sales, despite being strewn with hidden traps, do have important advantages which should not be ignored. The chief of these is that despite the ignorance referred to elsewhere in this paper, they are very widely understood by traders and Banks. The importance of the Banks cannot be underestimated. The ability to find simple finance for large transactions is very important and can only be achieved because those Banks involved in international trade have been able to assess the risks involved in financing trade on the traditional terms over many years.

In addition, most of the problems described have been considered by the courts and an enormous weight of case law has accumulated and is available to lawyers to enable them to advise their commercial clients.

However, a major disadvantage of employment of CIF and FOB terms is that despite the widespread acceptance and knowledge of them described above, there is in some areas an appalling ignorance of many of the, admittedly, esoteric pitfalls described. This ignorance can be very expensive indeed.

16 For further information on the form and content of these indemnities and for a fuller treatment of the problem of missing documents refer to Wiseman R. M. 'Transaction Chains in North Sea Oil Cargoes' (1984) 2(2) *Journal of Energy and Natural Resources Law.*

Another strange aspect of the way in which international trade is conducted in the fourth quarter of the twentieth century is the extent to which modern technology and communications are almost entirely ignored. Complete reliance has still to be placed on the physical transfer of original documents down long chains of Buyers and Sellers and Bankers. This can cause inordinate delay and the expense can be staggering.

SUGGESTED IMPROVEMENTS

Some obvious improvements come readily to mind. The first is the abolition of issuing more than one original Bill of Lading. The multiplicity of originals serves virtually no purpose whatsoever: it does however confuse, and provide additional opportunity for documents to go missing.

Another improvement that could be achieved with relatively little difficulty or expense would be better education of traders and (dare it be suggested) lawyers. As Australia becomes increasingly involved in international trade, the proper education of traders and their lawyers is of considerable importance.

Greater use of modern technology can achieve very little given the present state of the law. At present the effective creation and transfer of rights under Bills of Lading and contracts of insurance require written documents. Until that changes (and this would require domestic legislation and considerable international agreement), the scope for improved efficiency through modern technology is limited.

A scheme for 'computerized' documentation is being developed by Chase Manhattan Bank. It is called 'Seadocs'. This will be a computerized register of Bills of Lading and will involve physical delivery of the original Bills to the register. Working as it will within the existing legal framework, its benefits are bound to be limited. It will have to be a register of documents rather than a register of title, this will further detract from its usefulness.

Since, as has been explained, many traders, thinking that they are buying and selling on a CIF basis are in fact trading 'ex-ship' or 'delivered', it would be sensible for them (and their bankers) to recognize this. If traders accurately labelled the type of contracts that they were entering into, a great deal of confusion could be avoided. This might result from better education and training.

THE FUTURE

There are two things which would help to reduce the number of problems experienced at present in international oil trading.

The first is the adoption of modern technology which, as has been noted, can only come about through legislation and international agreement. An analogy is often drawn between international trade and international banking. By and large, Banks do not transfer funds from one to another as pieces of paper but, as electronically transmitted data. The time must surely come when rights in internationally traded cargoes are transferred in the same way.

Secondly, other commodities that have been internationally traded for many years are often bought and sold on standard terms and conditions setting out very precisely what the rights and obligations of the parties are (for example the standard contracts of the Grain and Feed Trade Association — GAFTA). The oil industry could usefully follow suit and thereby avoid some of the ambiguities that their dealings often give rise to. The legal profession needn't worry about this too much. There is still enough litigation on GAFTA agreements to keep the Commercial Bar in London reasonably prosperous!