

NAVIGATING THE SEAS OF INTERNATIONAL TRADE: CONTRACT AND COMPLIANCE ISSUES FOR THE NON-TRADE LAWYER



Presented by

Leonard Fleisig, *Partner*

WILLCOX SAVAGE

October 22, 2013

Introduction

- Background
 - Commercial
 - Legal
- Purpose
 - Issue spotting for non-trade lawyers
- Presentation
 - Commercial
 - Legal



Scope of World Trade

- From shirt to shoes
- From soup to nuts
- About 90% of world trade is carried on ships
 - Hampton Roads
 - Region is filled with transport providers, logistics providers and buyers and sellers

Beneath the Surface

- The purchase
 - What are you buying?
 - How much?
 - When
 - Cost
 - Landed cost – the real cost
 - Payment
 - Cash, collection, LC
 - Risk
 - Title
- The sale
 - What are you selling?
 - How much
 - When
 - Cost
 - What should your price include?
 - Payment
 - Cash, collection, LC
 - Risk
 - Title

What Are You Buying/Selling

- You don't just buy or sell shirts or theodolites or widgets
 - Cotton, cloth or chintz?
 - Technical specs etc.
- Not unique to international sales but the devil is in the lack of details particularly in international transactions

How Much?

- Will it be shipped all at once or over time
- Will it fit in a 20' container? A 40?
- Axiomatic but know what your product is and what it will take to ship it. The answers will have a real impact on:
 - Calculating cost
 - Assessing and minimizing risk
 - Delay
 - Expense

When

- Christmas tree lights
- Just in time inventory
- Delivery time is an essential component
 - Goods don't just sit in warehouses anymore
 - Inventory/warehouse time costs money

Payment

- And you do want to get paid
 - Fixing payment terms is essential
 - Cash in advance, international collection, letter of credit
 - Credit terms
 - At sight? 30 days, 60 days?

Payment

- Letters of Credit
 - Most secure
 - Cumbersome and requires documentary precision
- International Bank Collections
 - L/C lite: bank as trusted intermediary
 - Cash against documents
 - Documents against acceptance at ____ days

Choice of Law & Venue

- U.S. of foreign law
 - UCC
 - CISG (UN Convention International Sale of Goods)
- Litigation or Arbitration

Contracts and Terms of Sale

- These questions should be addressed in your purchase or sale contract

International Sales Contracts

U.N. Convention
for the
International Sale
of Goods

Effective January
1, 1988.

52 Fed Reg 6262-6280 (March
2, 1987)



Purpose

- Establish substantive provisions of law to govern the formation of international sales contracts and the rights and obligations of the buyer and seller.
 - *Usinor Industeel v. Leeco Steel Products, Inc.*
209 F. Supp.2d 880, 884 (N.D. Ill. 2002)

Federal Right of Action

- Actions under CISG arise under a treaty of the United States.
- Creates a private right of action.
 - *Delchi Carriers v. Rotorex Corp.* 71 F.3d 1024, 1027-28 (2nd Cir. 1995)
 - *BP Oil Int'l Ltd. V. Empresa Estatal Prtreleos de Ecuador*, 332 F.2d 333, 336 (5th Cir. 2003)
 - Trumps challenge to diversity if one of the parties has a presence in the state of suit

Federal Preemption

- Application of the CISG may preempt state law
 - *Asante technologies, Inc. v. PMC-Sierra, Inc.*
164 F. Supp. 2d 1142, 1151-52 (ND Cal. 2001)

Application

- Article 1
 - Sales of goods between parties whose places of business are in different contracting states
 - U.K., Hong Kong, India, South Africa, Taiwan most prominent non-signatories
- Article 2
 - Does not apply to sales:
 - » Family or household use;
 - » Auction sale or sales under color of law
 - » Stocks, shares, financial instruments;
 - » Ships and aircraft
 - » Electricity

Article 3

- Contracts for labor or other services
 - Does not apply where significant portion of the obligations consists in the supply of labor or other services

Article 5

- Does not apply to liability of seller for death or personal injury caused by the goods

Article 6

- Convention automatically applies to international sales contracts unless parties agree to exclude its application.
 - *Zhejiang Shaoxing Yongli Printing & Dyeing Co. Ltd. V. Microflock Textile Group Corp.*, 2008 WL 2098062 at *2 (S.D. Fl. May 19, 2008)
- Opt out must be explicit.
 - *BP Oil Intl. Ltd.*, supra at 227
 - *Asante Techs, Inc.* supra at 1150

Articles 8 and 11

- Article 11
 - A contract of sale need not be concluded or evidenced by writing and is not subject to any other requirements as to form. It may be provided by any means, including witnesses.
- Parol Evidence
 - *Mitchell Aircraft Spares v. European Aircraft Serv.*, 23 F. Supp. 2d 915 (N.D. Ill. 1998)
 - » This court agrees with the Eleventh Circuit that article 8 of the CISG requires the court to consider parol evidence inasmuch as that evidence is probative of the subjective intent of the parties.

Articles 8 and 11 (cont'd)

- Signatory Nations may opt out of Article 11
 - If one of two nations represented in a dispute have taken a reservation the court must look to non-CISG law of the choice of law state
 - Compare with UCC § 2-201

Article 9(b)(2)

- The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 9(b)(2) (cont'd)

- Incorporates Incoterms®
 - “It is worth noting at the outset that the entire body of Incoterms . . . Is incorporated into the CISG through Article 9(2) thereof.”
 - *St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, GmbH*, 2002 WL 465312, *3-4 (S.D.N.Y. Nar. 26, 2002)

Article 10

- **Principal Place of Business**
 - If a party has more than one office (in multiple states), the place of business which has the closest relationship to the contract shall be the principal place of business

Articles 14 - 24

- Offer and acceptance provisions

Articles 25 - 28

- Obligations of buyer and seller

Article 67: Passage of Risk

- If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

Article 67 (cont'd)

- Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.
- Risk passage provisions of Incoterms® (B5) will generally apply

Article 74: Damages

- Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract
- Does not address attorney's fees
 - *Zapata Hermanos Sucesores v. Hearthside Baking Co.*, 313 F.3d 385, 388 (7th Cir. 2002)

Statute of Limitations

- Not covered by CISG
- But: Consider Article 8 of the U.N. Convention on Limitation Periods in the International Sale of Goods – which is 4 years
- Ratified by U.S. but not as many signatory nations as with CISG
- Put it in the contract

Incoterms 2010®

Contract Terms of Sale

Terms of Sale

- Risk is a part of life
 - Ships sink
 - Cargo is lost or damaged
 - Who bears the risk of loss?
 - Answer – it is in the terms of sale (or should be)
- Terms of sale also critical to fixing costs

Terms of Sale

- **INCOTERMS®**
 - What are INCOTERMS?
 - Examples
 - Ex warehouse
 - FOB Port (Free on board)
 - CIF (Cost insurance freight)
 - DDP – delivered duty paid
- **TITLE**
 - Incoterms do not address title

Title

- CISG V. UCC
- Why this matters:
 - Italverde
 - Italverde Trading, Inc. v. Four Bills of Lading, 485 F.Supp.2d 187 (E.D.N.Y. 2007)
 - » Savino asserts that it is entitled to summary judgment because (1) only **Italverde** brings a claim for conversion and (2) Delverde — as opposed to **Italverde** — held title in the containers of pasta at the time Savino seized them.

Ex Warehouse

(Named Place of Delivery)

- Risk
 - Passes as soon as the goods are picked up at the warehouse
- Cost
 - The sales price covers the actual cost of the goods at the seller's location. Everything else is on the buyer. Everything!

Free on Board FOB (Named Port of Loading)

- Risk
 - Transfers at foreign port of loading
- Cost
 - Purchase price includes the actual price of the goods plus inland transportation to the port of loading

Carriage Paid To CPT (named place of destination)

- Risk
 - transfers to buyer upon handling goods over to the first carrier at place of shipment in the country of export.
- Cost
 - Seller pays for carriage
 - Note this is an instance where cost covers carriage beyond transfer of risk

Cost Insurance Freight CIF Port of Delivery

- Risk
 - Risk still transfers upon loading on vessel
- Cost
 - Sales price includes ocean transportation and marine insurance

Delivered Duty Paid DDP Richmond


- Risk
 - Risk passes when goods are cleared through Customs at port or place of destination and delivery is made to buyer
- Cost
 - Sales price includes all freight charges to destination, marine insurance, and Customs duties

Cost

- Being able to determine or calculate, even if approximate, your landed cost is essential
 - Terms of sale let you know who is responsible for various portions of the transit to make such calculation

Cost Components

- Base price
- Inland transportation x 2
- Ocean freight
- Marine insurance
- Customs duties and compliance
- Export compliance (licenses etc.)



| DESCRIPTION | SELLER | BUYER |
|--|--------|-------|
| EXW Ex Works | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| FCA Free Carrier | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| CPT Carriage Paid to | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| CIP Carriage and Insurance Paid to | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| DAT Delivered at Terminal | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| DAP Delivered at Place | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| DDP Delivered Duty Paid | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| FAS Free Alongside Ship | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| FOB Free on Board | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| CFR Cost and Freight | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |
| CIF Cost, Insurance and Freight | SELLER | BUYER |
| | SELLER | BUYER |
| | SELLER | BUYER |

All modes of transport
Sea and inland waterways
COGS
INS
INSURANCE

Maritime Law and Bills of Lading

Brief Overview

Federal Subject Matter Jurisdiction

- Article III, § 2., cl 1
 - The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;
 - No diversity
 - No \$ minimum

Carriage of Goods by Sea Act

- COGSA

- The Carriage of Goods by Sea Act (COGSA), formerly published at 46 U.S.C. Appx. § 1301 *et seq.*, was not recodified when the Appendix to 46 United States Code was recodified in 2006. The Appendix to Title 46 no longer exists. COGSA was not amended or repealed: it just is not included under its own provisions in the United States Code. COGSA now is published in the United States Code as part of the historical and revision notes to the recodification of the Harter Act, at 46 U.S.C. § 30701.

What is a Bill of Lading

- A bill of lading serves three distinct functions: "First a receipt for the goods; second, a contract for their carriage; and, third, documentary **evidence** of **title** to the goods
 - *Norfolk Southern R. Co. v. James N. Kirby, Pty Ltd.*, 543 US 14, 19 (2004)
 - *CAR Transp. Brokerage v. Darden Restaurants*, 213 F. 3d 474, 478 fn. 1 (9th Cir. 2000)

Carriage of Goods By Sea Act COGSA

- “Stuff” Happens



Cargo Claims Under COGSA

- Liability regime
 - Strict liability
 - Limitation of Liability
 - \$500 per package or customary freight unit
 - 1 year for suit



Cargo Claims cont.

- Extends to inland portion of multi-modal moves as matter of contract
 - *Norfolk Southern Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14 (2004)
- Extends to agents of carrier under Himalaya Clause
 - *Adler v Dickson (The Himalaya)* [1954] 2 Lloyd's Rep 267, [1955] 1 QB 158
- Extends to pre/post loading phases as a matter of contract
 - *Uncle Ben's Intl. Div. of Uncle Ben's Inc. v. Hapag-Lloyd*, 855 F.2d 215 (5th Cir. 1988)

Anatomy of a Shipment

From Old

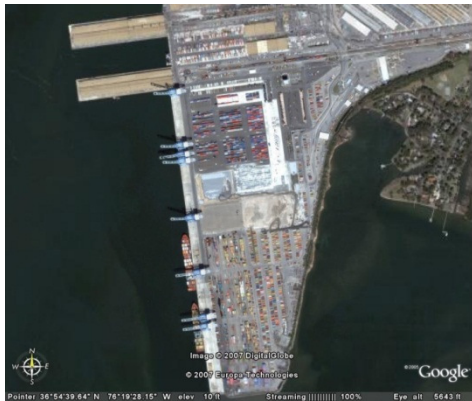


To New



New Order

Norfolk



Singapore



Now What?

- How do you get it there?
- How do you get paid?


What Size Container

Know Your Stow

20'


20'

20' GP




| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 20'0" | 8'0" | 8'6" |
| Internal | 19'4" | 7'8" | 7'9" |
| Door Opening | 19'4" | 7'8" | 7'6" |
| Max Capacity | 1158-1186 (cu ft) 39380-47860 (lbs) | | |
| Tare Weights | 5030-5490 (lbs) | | |

20' HQ




| | L | W | H |
|--------------|-------------------------------------|------|-------|
| External | 20'0" | 8'0" | 9'6" |
| Internal | 19'4" | 7'8" | 8'10" |
| Door Opening | 19'4" | 7'8" | 8'6" |
| Max Capacity | 1350-1390 (cu ft) 39380-47860 (lbs) | | |
| Tare Weights | 5350-5550 (lbs) | | |

20' DD




| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 20'0" | 8'0" | 8'6" |
| Internal | 19'4" | 7'8" | 7'9" |
| Door Opening | 19'4" | 7'8" | 7'6" |
| Max Capacity | 1158-1186 (cu ft) 39380-47860 (lbs) | | |
| Tare Weights | 5030-5490 (lbs) | | |

20' Side Open




| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 20'0" | 8'0" | 8'6" |
| Internal | 19'4" | 7'8" | 7'9" |
| Door Opening | 19'4" | 7'8" | 7'6" |
| Max Capacity | 1158-1186 (cu ft) 39380-47860 (lbs) | | |
| Tare Weights | 5030-5490 (lbs) | | |

20' OT




| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 20'0" | 8'0" | 8'6" |
| Internal | 19'4" | 7'8" | 7'9" |
| Door Opening | 19'4" | 7'8" | 7'6" |
| Max Capacity | 1158-1186 (cu ft) 46280-62240 (lbs) | | |
| Tare Weights | 4630-4960 (lbs) | | |

20' FR



| | L | W | H |
|--------------|--------------------------------|------|-----------|
| External | 20'0" | 8'0" | 8'6" |
| Internal | 18'1"-19'6" | 8'0" | 7'1"-7'7" |
| Door Opening | 5'51"-5'94m, 2.44m, 2.16-2.33m | | |
| Max Capacity | 46910-39900 (lbs) | | |
| Tare Weights | 21280-30005 (kgs) | | |

20' RF



| | L | W | H |
|--------------|------------------------------------|------|------|
| External | 20'0" | 8'0" | 8'6" |
| Internal | 17'6" | 7'2" | 7'4" |
| Door Opening | 17'6" | 7'3" | 7'3" |
| Max Capacity | 932-1003 (cu ft) 45460-60450 (lbs) | | |
| Tare Weights | 6750-7450 (lbs) | | |


20' Container

New - DNV, GL or ABS Certified
Used - Under IICL, Cargo Worthy, Wind Water Tight
Customized - Upon request

40'


40'

40' GP




| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 40'0" | 8'0" | 8'6" |
| Internal | 39'6" | 7'8" | 7'9" |
| Door Opening | 39'6" | 7'8" | 7'6" |
| Max Capacity | 2390-2397 (cu ft) 58820-60740 (lbs) | | |
| Tare Weights | 6460-8380 (lbs) | | |

40' HQ



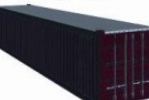
| | L | W | H |
|-------------------|-------------------------------------|------|-------|
| External | 40'0" | 8'0" | 9'6" |
| Internal | 39'6" | 7'8" | 8'10" |
| Min. Door Opening | 39'6" | 7'8" | 8'6" |
| Max Capacity | 2700-2715 (cu ft) 58970-60400 (lbs) | | |
| Tare Weights | 6800-8230 (lbs) | | |

40' DD




| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 40'0" | 8'0" | 8'6" |
| Internal | 39'6" | 7'8" | 7'9" |
| Door Opening | 39'6" | 7'8" | 7'6" |
| Max Capacity | 2390-2397 (cu ft) 58820-60740 (lbs) | | |
| Tare Weights | 6460-8380 (lbs) | | |

40' OT




| | L | W | H |
|--------------|--------------------------|------|------|
| External | 40'0" | 8'0" | 8'6" |
| Internal | 39'5" | 7'8" | 7'9" |
| Door Opening | 39'5" | 7'8" | 7'6" |
| Max Capacity | 2295 (cu ft) 58490 (lbs) | | |
| Tare Weights | 8050 (lbs) | | |

40' RF



| | L | W | H |
|--------------|-------------------------------------|------|------|
| External | 40'0" | 8'0" | 8'6" |
| Internal | 37'8" | 7'4" | 7'1" |
| Door Opening | 37'8" | 7'4" | 7'0" |
| Max Capacity | 1963-2055 (cu ft) 56990-58180 (lbs) | | |
| Tare Weights | 6560-5929 (lbs) | | |

40' FR



| | L | W | H |
|-------------------|-------------|-------|-------|
| External | 40'0" | 8'0" | 8'6" |
| Internal | 12'19m | 2.44m | 2.59m |
| Min. Door Opening | 12'01m | 2.31m | 1.98m |
| Max Capacity | 56188 (lbs) | | |
| Tare Weights | 26485 (kgs) | | |

40' Container

New - DNV, GL or ABS Certified
Used - Under IICL, Cargo Worthy, Wind Water Tight
Customized - Upon request

Step 2. Book the Container

- Ocean Freight Rates
 - VOCC
 - NVOCC
 - Freight Forwarder
- Type of rates
 - Tariff
 - Service Contract
 - Pros and cons of VOCC v. NVOCC
- Inland Freight Rate
 - Truck
 - Rail
 - Barge

Other Documents

- Certificate of origin
- Commercial Invoice
- Packing List
- Other documents
 - *e.g.* phytosanitary
- Marine insurance
- The bill of lading, commercial invoice, and packing list etc. all needed by seller to get paid and by buyer to clear goods upon arrival

Traps for the Unwary Importer

- U.S. Customs & Border Protection
 - Customs territory of the United States
- You need to properly
 - Classify
 - Value
 - Mark your goods

Classification

- Multiple possible classifications for any given product
 - Check
 - The HTSUS
 - Customs rulings
- Multiple duty rates for any given product
 - Check
 - Country of origin

Valuation

- Fair market value
 - Are you and your supplier related?
 - Are these arms length transactions
 - Does commercial invoice represent total price paid for the product?

Country of Origin

- Where are your goods from?
- Are they marked?
- How are they marked?
- Are you the end user?
- Any logos that may confuse the buyer?
 - “Made U.S. tough”
 - “U.S. Toys, Inc.”

Reasonable Care

- Importer must use reasonable care
- CBP must provide enough information for importer to use reasonable care

Administrative Actions

- Rulings
 - Ruling requests
 - Rulings database
- Protests
 - Accelerated decision
 - 19 C.F.R. § 174.22
 - Deemed denial in 30 days. Ripe for litigation at Court of International Trade as “final administrative action”.

Administrative Actions 2

- Enforcement actions
 - Notice of action
 - Pre-penalty notice
 - Penalty Notice
 - Negligence = 2x lost duty
 - Gross negligence = 4x lost duty
 - Fraud = 8x lost duty or value of goods
- Voluntary Disclosure

Traps for the Unwary Exporter

- What is it?
- Where is it going?
- Who will receive it?
- What will they do with it?

Why?

- Sanctions/Embargo - Treasury
- Dual Use - Commerce
- Military goods - State

So

- You must know your buyer
- You must know your destination
- You must know the intended use

The Land Mines

What is the cost of
non-compliance?

Export

- Violations of export administration rules may subject the exporter to both criminal and administrative penalties. Criminal penalties can reach up to 10 years imprisonment and \$1 million per violation. Administrative penalties can reach \$11,000 per violation, and \$120,000 per violation in certain administrative cases involving national security issues

Import

- Significant delays and disruption of your supply chain
- Significant fines and penalties

Questions

Leonard Fleisig
Willcox & Savage, P.C.
440 Monticello Avenue, Suite 2200
Norfolk, VA 23510-2243
(757) 628-5605
www.willcoxsave.com

WILLCOX SAVAGE