9 Transit risks in CIF contracts – meaning and categories

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THE RISKS INVOLVED IN INTERNATIONAL SALES

International sales involve various risks, such as the foreign exchange risk, the risk of failing to obtain export or import licences, the legal risks involved in bringing and enforcing claims abroad and the risk of the contracting partner's default (the credit risk). This chapter will focus on the transit risks, i.e. the risks arising in the course of the carriage of goods, and will examine them in the context of CIF (cost, insurance and freight) contracts.[1]

The CIF and C&F (cost and freight, also referred to as CFR) contracts, along with FOB (free on board) contracts, are the most frequently used form of contract for international sale of goods. They are shipment contracts in the sense that the transit risks pass at the port of shipment. They can be contrasted with the arrival contracts, such as DES (delivered ex ship) and DEQ (delivered ex quay), under which the transit risks pass at the port of discharge. The transit risks contemplated are the risk of loss of goods and the risk of damage to goods. What traders and lawyers are less aware of are that there are other categories of transit risks and the usefulness of distinguishing them. The purpose of this chapter is to give a systematic treatment to different categories of transit risks, articulate their meaning and illustrate the usefulness of distinguishing them.

Although the transit risks usually contemplated are the risk of loss of goods and the risk of damage to goods, there are in fact other transit risks. This chapter will illustrate the usefulness of distinguishing different categories of transit risks such as the risk of increased cost of carriage, the risk of deterioration, the risk of damage, the risk of loss inflicted by external causes, the risk of loss caused by the inherent nature of goods and the risk of delay. Too often the words 'loss', 'damage' and 'deterioration' are used without defining them. In a majority of cases, no problem arises, but in some cases it is useful to define and distinguish them. This volume, on the theme of 'risk and the law', provides a fitting opportunity to give a systematic treatment to the different categories of transit risks and to articulate their meaning.

Risk of increase in the cost of carriage

The transit risks pass as from shipment also in FOB contracts. CIF contracts are distinguished from FOB contracts by the fact that the freight for the main sea carriage is paid by the seller, whereas in FOB contracts it is paid by the buyer. In other words, in CIF the cost of carriage from the seller's premises to the buyer's premises is divided at the port of discharge. CIF contracts therefore contain two critical points: the port of shipment where the transit risks pass and the port of discharge where the cost of carriage is divided.

Which matters concern the risk and which matters concern the cost of carriage are usually obvious. Thus where an additional freight is charged under the contract of carriage due to a market increase during transit, it is the seller rather than the buyer who is to bear the additional freight since it is a matter concerning the cost of carriage. But what if a casualty affecting the ship – such as strandings, collisions, strikes, government directions – should take place and has caused additional cost to be charged under the contract of carriage? Who – as between the seller and the buyer – is to bear the additional cost? The question can be translated into the language of risk and be phrased: where does the risk of unexpected increase in the cost of carriage pass from the seller to the buyer? Does it pass as from shipment, together with the risk of loss or damage? Or is the increased cost, being part of the cost of carriage, to be divided at the place of discharge?

A detailed definition of the CIF contract is to be found in the Incoterms (International Commercial Terms, revised from time to time by the International Chamber of Commerce). The Incoterms are applicable where they are incorporated into the contract. The Incoterms 2000 provides in the pertinent part:

> B6 Division of costs
>
> The buyer must . . . pay . . .
>
> – all costs and charges relating to the goods whilst in transit until their arrival at the port of destination, unless such costs and charges were for the seller's account under the contract of carriage; . . .

The ICC Guide to Incoterms 2000 elaborates the point:[2]

> While the seller has to pay all costs required to bring the goods to the port of shipment and to deliver the goods onboard the vessel (as well as unloading charges at the port of discharge, provided they have been included in the freight), the buyer has to pay any further costs which may arise after the seller has delivered the goods onboard the vessel. In this sense, *the transfer of the risk also determines the division of costs*. If something occurs as a result of contingencies after shipment – such as strandings, collisions, strikes, government directions, hindrances

> because of ice or other weather conditions – any additional costs charged by the carrier as a result of these contingencies, or otherwise occurring, will be for the account of the buyer. [Emphasis added]

It follows that where the Incoterms 2000 version of CIF is applicable, the risk of increase in the cost of carriage passes as from shipment. That risk should be recognised as a category of transit risk since it is, by definition, not covered by the risk of loss of or damage to goods and also because it would underscore the point that an unexpectedly increased cost of carriage is to be divided in CIF at the port of shipment, in contrast to the cost of carriage included in the freight, which is to be divided at the port of discharge.

Risk of deterioration

Deterioration is distinguishable from damage. Though they both affect the quality of goods, damage is inflicted by external causes such as contamination, whereas deterioration is caused by the inherent nature of the goods, such as discoloration of bananas.[3] The risk of deterioration so understood remains with the seller until the port of discharge in English law. The leading authority is *Mash & Murrell v Joseph I. Emanuel*.[4] In this case a quantity of Cyprus potatoes was sold on C&F terms. When they arrived at Liverpool, they were found to be rotten. The buyer claimed that the seller was in breach of implied warranty. Diplock J allowed the buyer's claim, holding that when goods were sold under a C&F, CIF or FOB contract, the goods must be shipped in such a state that they could endure the normal journey and be in a merchantable condition on arrival. The emphasis is on the condition at the time of shipment, in compliance with the nature of CIF as a shipment contract. This requirement now finds an express statutory basis. Section 14(2) of the Sale of Goods Act 1979 requires the goods sold in the course of a business to be of satisfactory quality and subsection (2B), which was inserted after the *Mash & Murrell* case, though not because of it, specifically mentions 'durability' as one of the aspects of quality to which regard is to be had.

The requirement that the goods must be durable at the time of shipment is consistent with the nature of the CIF contract as a shipment contract, since regard is had to the condition of the goods at the time of shipment rather than at the time of discharge. Translated into the language of risk, this requirement means that the risk of deterioration happening during a normal course of voyage remains with the seller until discharge. This is in contrast to the risk of damage, which passes as from shipment. The risk of deterioration should, therefore, be recognised as an anomalous type of transit risk.[5]

Then, what if the voyage is not normal? In *Mash & Murrell*, an appeal was made to the Court of Appeal.[6] The court did not overrule Diplock J's *ratio* but ascertained the facts differently and reached a different conclusion. The court found that the voyage to Liverpool was not a normal voyage since the potatoes were not properly ventilated during the voyage and accordingly held that there was no sufficient ground for inferring that potatoes were not fit to travel at the time of shipment. Translated into the language of risk, this decision simply confirms the rule that in CIF contracts the risk of damage inflicted by external causes passes as from shipment, because the incidents such as the lack of ventilation which make the voyage unusual should be regarded as external causes which inflict damage to goods.

OUT-TURN CLAUSE

We have now examined the usefulness of recognising the risk of increase in the cost of carriage and the risk of deterioration as categories of transit risks, and of distinguishing them from the risk of loss or damage. We will now consider the usefulness of distinguishing the risk of loss from damage and of splitting the risk of loss by examining the interpretation of out-turn clauses in CIF contracts.

In the typical CIF contract the price is calculated on the basis of the quantity agreed in the contract. The seller must ship the goods in the contractual quantity, which is supposed to be recorded in the bill of lading. But the seller does not promise that the goods will arrive at the port of discharge since the CIF contract is a shipment contract. Some CIF contracts, however, contain a clause, sometimes called an 'out-turn' clause or a 'net landed weight' clause, which calls for the price to be calculated on the basis of the quantity actually discharged. There are several possible interpretations where an out-turn clause is contained in a CIF contract, which will be examined in turn.

Denying effect to the out-turn clause

First, an out-turn clause in a CIF contract may not be given effect on the ground that it is repugnant to the nature of the CIF contract as a shipment contract. Thus in *Law & Bonar Ltd v British American Tobacco Company Ltd*,[7] a CIF contract contained a printed clause stating that the goods were at the seller's risk until discharge. That clause was held inapplicable in the particular transaction entered into in that case on the ground that it was repugnant to the nature of the CIF contract.

It is submitted that great caution should be exercised in adopting this interpretation since the CIF buyers may have legitimate interests in inserting an out-turn clause. If the seller ships goods in less than the contractually agreed quantity, bills of lading are supposed to provide the buyer with evidence of the quantity actually shipped. But in practice, printed forms of bills of lading commonly contain the so-called 'weight and quantity unknown' clause which destroys their evidential value.[8] The CIF buyers therefore often have good reason to wish to pay for only so much of the goods as have actually arrived.

The decision in *Law & Bonar* was in fact narrowly interpreted in later cases.[9] Similarly, an out-turn clause should be denied effect only where it is part of a printed form added to other negotiated terms and where no alternative interpretations, examined below, can reasonably be adopted.

Denying effect to the CIF/C&F label

Where a contract expressed to be a CIF or C&F contract contains an out-turn clause and other strong elements proper to the arrival contracts, the CIF/C&F label may be ignored. Then, the contract may be interpreted as being in fact an arrival contract and no difficulty in giving effect to the out-turn clause will arise. As the traders are not always legally well informed, they may not choose the most appropriate trade term. Thus in the House of Lords case, *The Julia*,[10] a quantity of rye was sold on CIF terms but contained an out-turn clause, which stipulated as follows:

> The grain to be weighed . . . Seller and buyer to have the right of supervision both as to weighing and delivery. Any deficiency on bill of lading weight to be paid for by seller and any excess over bill of lading weight to be paid for by buyer at contract price.

The ship never reached the port of discharge. The court allowed the buyers to recover the price they had paid, holding that the contract was in fact not a CIF contract but a contract to deliver at the port of discharge. The contract exhibited a strong character of an arrival contract.[11] In particular, there was a clause indicating that the risk of damage remained with the seller until the port of discharge, which read as follows:

> Condition guaranteed on arrival . . . Samples to be taken and sealed at port of discharge jointly by the agents of the shippers and of the holders of the bill of lading or shippers' delivery order.

Giving effect to both the out-turn clause and the CIF/C&F label

We have now seen cases in which effect is denied either to the out-turn clause or the CIF/C&F label. But there is a third way. The contract may be regarded as possessing a mixed character and effect may be given to both the out-turn clause and the CIF/C&F label. The trade terms such as CIF, C&F, FOB, DES and DEQ are merely convenient shorthand in order to save the trouble of negotiation on detailed terms. In the absence of contrary agreement, the meaning of those trade terms is supplied by the governing national law or, where applicable, Incoterms. But their meaning may be modified by special terms agreed to in order to cater for particular parties' needs. An attempt should therefore be made to give effect to both the special terms and the usual meaning of the parties' chosen trade term. To this end, we will examine below a few ways of giving effect to both an out-turn clause and the CIF/C&F label.

Distinguishing the risk of loss from the risk of damage

The contract may contain a clause which expressly treats the risk of damage differently from the risk of loss, although it may not necessarily say that it passes as from shipment. So in *Produce Brokers New Company (1924) Ltd v Wray, Sanderson & Co Ltd*,[12] the contract was for sale of oil at a price CIF Hull and contained the following out-turn clause:

> DELIVERY: . . . Buyers to ascertain the weight within seven days after discharge under sellers' superintendence.
> PAYMENT: Buyers to pay 98 per cent of provisional invoice amount in exchange for shipping documents . . . Balance to be paid or refunded . . . after delivered weight is ascertained.

Part of the oil was spilled during discharge at Hull. It was held that the contract was of a mixed character and that the oil remained at the sellers' risk. The seller was therefore held to have no right to receive or retain payment in respect of the spilled oil. As regards the risk of damage, there was a clause which purported to allocate it by agreement or arbitration. It read as follows:

> Should the quality and/or condition of the oil on arrival not prove equal to the above guarantees, or should the oil contain seawater or other admixture, this contract is not to be void, but the oil is to be taken with an allowance to be agreed upon or fixed by arbitration, provided always that the oil shipped shall be of the description contracted for.

The contract may be silent on the risk of damage. If a CIF contract is found to be of mixed character due to an out-turn clause, the risk of damage will presumably pass as from shipment while the risk of loss will remain with the seller in accordance with the out-turn clause. Thus in *The Gabbiano*,[13] the contract was expressed to be a CIF contract but contained an out-turn clause which provided:

> If, after loading, any steamer stemmed under this contract is lost, or is, for any reason unable to deliver the cargo or any part thereof, the quantity of ore so undelivered by such steamer shall be written off the contract quantity . . .

The court upheld the validity of this clause while recognizing it as being inappropriate to a CIF contract proper. But it held that the contract remained, as expressed to be, a CIF contract with variations. The report mentions nc provision on the risk of damage but the court held that if the circumstance: concerning the risk of loss never arose, the contract would be performec according to its tenor as an ordinary CIF contract. This would mean that i the contract contained no clause on the risk of damage, that risk passed a: from shipment.

Splitting the risk of loss

Where a CIF or C&F contract contains an out-turn clause but the rest of the clauses exhibit a strong character proper to the CIF and C&F contracts, the clause may be given a restrictive interpretation by limiting its effect to only a certain type of risk of loss. That would enable a certain risk of loss to remain with the seller until discharge in accordance with the out-turn clause while the rest of the risk of loss to pass as from shipment in accordance with the strong CIF and C&F character.

Limiting the effect of the out-turn clause to partial loss

In *Soon Hua Seng Co Ltd v Glencore Grain Ltd*,[14] the entire cargo of rice sold was lost when the ship ran aground. The contract was headed 'C&F full outturn weight' and contained a clause saying 'Price: cost and freight liner-terms Rotterdam in bulk . . . full outturn weight at port of destination'. But the court found that the contract had the hallmarks of a true C&F contract in contrast to the contract in *Produce Brokers*, examined above. The court observed that the contract in the latter case was full of reference to delivery at the port of discharge, containing obligations regarding discharging, pumping, strikes and quality and condition. By contrast, the contract in the instant case provided inter alia:

> 4. The Rice to be at Buyers' risk from warehouse to warehouse . . .
> 5. Sellers to deliver the Rice overside and Buyers to take the Rice. . . .
> 6. . . . Remarks: Quality, condition fumigation final at time of shipment as per certificate independent surveyors . . .

In view of the strong elements proper to the CIF contracts, the court, excluding the operation of the out-turn clause in the case of the total loss, held that if the goods were lost and did not arrive at all, the risk of loss was on the buyers and no question of any adjustment to the payment could arise.

An exclusion of an out-turn clause in the case of total loss may be expressly provided in CIF and C&F contracts. Thus clause 117 of the CIFFO (CIF Free Out) contract of the Sugar Association of London reads:

> In case of total loss of a consignment where the contract provides for settlement on landed weight . . ., the Buyer shall be invoiced at the contract price for the shipped weight of that consignment plus five per cent plus the premium for bags when applicable.

Giving effect to an out-turn clause in the case of the total loss would result in the total release of the buyer from his obligation to pay. This result might be thought too blatantly contradictory to the nature of the CIF and C&F contracts, especially where the contract contains strong elements proper to the shipment contracts. In such cases, the exclusion of the operation of an out-turn clause in the case of the total loss may be defensible. Then, partial loss cases are left to be covered by the out-turn clause. But should all of them be covered? If the application of an out-turn clause were to depend upon the simple distinction between the total and partial loss, wholly arbitrary results would be produced. Thus if 99 per cent of the goods were lost, the buyer would have to pay only for 1 per cent in accordance with the out-turn clause, whereas if 100 per cent of the goods were lost, the buyer would have to pay for 100 per cent. It is submitted that a better distinction on which to rest the application of an out-turn clause is the one between the loss inflicted by external causes and the loss caused by the inherent nature of goods.

Limiting the effect of the out-turn clause to the loss caused by the inherent nature of the goods

The loss of goods is sometimes inflicted by external causes such as leakage and spillage. In other cases, loss is caused by the inherent nature of the goods such as evaporation and shrinkage.[15] If the effect of an out-turn clause is limited to the loss caused by the inherent nature of the goods, the total loss is almost automatically excluded since the inherent nature of goods is unlikely to result in the total loss.

A closer reading of the decision of *Seng v Glencore Grain* suggests that the court's intention was in fact to limit the out-turn clause to the loss caused by the inherent nature of the goods. The court held that the contract distinguished between the risk of accidents, to be covered by insurance, and out-turn weight differences arising in other ordinary circumstances. The court also agreed with the view expressed in *Schmitthoff's Export Trade*,[16] which in turn refers to section 2–321 of the United States Uniform Commercial Code. That section reads:

> Under a contract containing a term C.I.F. or C. & F.
>
> (1) Where the price is based on or is to be adjusted according to 'net landed weights', 'delivered weights', 'out turn' quantity or quality or the like, unless otherwise agreed the seller must reasonably estimate the price. The payment due on tender of the documents called for by the contract is the amount so estimated, but after final

adjustment of the price a settlement must be made with commercial promptness.

(2) An agreement described in subsection (1) or any warranty of quality or condition of the goods on arrival places upon the seller *the risk of ordinary deterioration, shrinkage and the like* in transportation but has no effect on the place or time of identification to the contract for sale or delivery or on the passing of *the risk of loss*. (Emphasis added)

The official comment for this section says that those provisions provide for a shift to the seller of the risk of quality and weight deterioration during shipment without changing the legal consequences of the CIF or C&F term as to the passing of marine risks to the buyer at the point of shipment.

Although the terminology used is different from the one adopted in this chapter, those provisions seem to limit the effect of out-turn clauses to deterioration and the loss caused by the inherent nature of the goods. In English law, deterioration does not need to be covered by the out-turn clause since the risk of deterioration remains with the seller at any event in accordance with *Mash & Murrell*, examined above.

The buyers in *Seng Co. v Glencore Grain* pointed out the difficulty of proving the cause of loss. But the court did not see this as a problem, holding as follows:

> simple loss of weight appears unlikely to result from an accident at sea affecting a rice cargo, unless one postulates examples of obvious accidents affecting the integrity of the vessel or requiring the jettisoning of cargo. Increase in weight, due to additional moisture, is a more likely result of an accident; but in that event the extra moisture would probably be readily discernible.

The proper allocation of the burden of proof seems to be for the buyer to prove the quantity actually discharged and then for the seller to prove that any loss resulted from external causes.

ARRIVAL-TIME CLAUSE

In the typical CIF and C&F contracts, the passage of risk of loss at the port of shipment means that the sellers do not promise that the goods will arrive at the port of discharge, let alone by a certain date. However, CIF and C&F contracts sometimes contain a clause referring to the arrival time.

Interpreting the clause as relating to shipment

One way to make sense of such a clause is to interpret it as requiring the seller to make or procure such shipment as would normally arrive at the port of discharge by the specified time. If the clause is interpreted as relating to shipment, it complies with the nature of the shipment contract. Thus in *The Wise*,[17] a C&F sale of motor spirit provided inter alia:

> 9. Delivery: Vessel TBN [i.e. to be nominated]. Arrival March 15–30 1986.
> 12. Title and risk: Passes at vessel's manifold flange at loadport.
> 14. Vessel: vessel nominated to be subject to buyers' acceptance.

The sellers nominated the *Wise* and the buyers accepted it. But the vessel was then hit by a missile and the cargo never arrived. The court held that the contract did not wear the air of a contract designed to procure the guarantee of delivery within the period stipulated. On that basis, it was held that the sellers' obligation was to nominate such vessel as would in the ordinary course of events arrive at the port of discharge within the stipulated period. The *Wise* was found to fulfil that requirement because, but for the missile attack, she would have arrived at the port of discharge by 30 March 1986.

Distinguishing the risk of delay from the risk of loss or damage

A clause referring to the arrival time cannot be interpreted as relating to shipment if, unlike the contract in *The Wise*, the contract itself relates to the goods already on board a particular vessel which has already sailed. Thus in *The Jambur*,[18] a contract for the sale of gas oil contained a clause which read:

> DELIVERY: Latest by 30th April 1990, CIF basis one safe berth/port Kaohsiung, Taiwan, as full cargo per mt 'JAMBUR', which sailed from Constanza 10:00 am 28th March 1990.

A collision and arrest made it impossible for the *Jambur* to reach Kaohsiung by 30 April. The buyers pointed out that the delivery clause in the present case could not, unlike the clause in *The Wise*, sensibly relate to the choice of the vessel since the contract itself had chosen the *Jambur*, which had loaded the cargo and had sailed. It was common ground that, apart from the delivery clause, the contract had all the features of a classic CIF contract. It provided inter alia:

> PRICE: US Dollars 184.50 per metric ton CIF basis . . . on B/L weights.
> INSPECTION: If possible, mutually agreeable independent inspectors to be appointed by seller at loadport for quantity/quality ascertainment.

Notwithstanding the strong CIF character, the court did not accept the sellers' submission that the delivery clause should be disregarded. By interpreting the delivery clause as expressing the seller's promise to deliver at the port of discharge by 30 April, the court held that the buyers were entitled to treat the contract as repudiated on 10 April for the sellers' anticipatory breach.

It has been pointed out by some commentators[19] that in the sale of oil, the time of the arrival can be crucial to the buyer, who has to make advance arrangements for the provision of terminal facilities needed for the reception of oil. It was also held in *The Orient Prince*[20] that the dates of delivery of oil products in Rotterdam were matters of great importance, because oil traders base their profit on the margin between buying and selling prices, and Rotterdam had historically been the basis for reckoning prices since large quantities of oil were delivered there for consumption or storage. In that case a CIF sale of naphtha contained a clause saying 'Delivery Feb 15/March 15 Basis Rotterdam'. The court interpreted this as meaning that the seller must deliver the cargo in Rotterdam by midnight on 15 March if Rotterdam was nominated as the discharging port, or alternatively within a reasonable time after 15 March if another port was nominated.

In the sale of other goods, too, the arrival time may be important. Thus in *Cargill International SA v Bangladesh Sugar & Food Industries*,[21] a C&F sale of sugar contained a clause unequivocally promising arrival by a specified date. It read:

> Special clause (i) The arrival period/time is the essence of the contract. Therefore the seller shall strictly adhere to the arrival period/time stipulated in this contract. If the seller fails to do so, the buyer shall be entitled . . . to terminate the contract and . . . forfeit the performance bond.

As the vessel arrived late, the buyers rejected the shipment and made a call on the bond. It was held that the buyers were entitled to make the call for the sellers' breach of the arrival-time clause, though, on a point irrelevant to the theme of the present chapter, they were held entitled to retain only an amount equal to the loss actually suffered.

These cases show a great tendency of the courts to give effect to arrival-time clauses in CIF and C&F contracts by interpreting them as meaning that the risk of delay remains with the seller until the port of discharge. In the archetypal CIF and C&F contracts, the sellers do not promise that the goods will arrive at the port of discharge by a certain date and, therefore, the risk of delay passes as from shipment together with the risk of loss or damage. But in the cases where a CIF or C&F contract contains an arrival-time clause, it may be useful to distinguish the risk of delay from the risk of loss or damage as this enables the risk of delay to remain with the seller until discharge in accordance with the arrival-time clause and the risk of loss or damage to pass as from shipment in accordance with the CIF/C&F label.

Thus the contract in *The Jambur*, seen above, indicated that the risk of loss and damage passed as from shipment by the clauses which provided that the payment of the price was to be on the bill of lading weights and that an inspection of the goods was to be carried out at the port of shipment for quantity and quality ascertainment. The court seems to have endorsed (although not unequivocally) the effect of those clauses by holding that '[t]he Buyers carried the risk of contamination of the cargo, the risk of leakage between the point of discharge and the shoretank and, possibly, the risk of a degree of loss in transit'.

If the risk of delay remains with the seller until discharge and the risk of loss passes as from shipment, the consequences are that, if the goods are lost in transit, the seller can still claim the price, but if the goods are only delayed the seller cannot claim the price. The seller may then be motivated, when the vessel is likely to arrive late, to cause the goods to be lost. But if he does so, he would be in breach of his obligation not to prevent the goods from arriving. Although the CIF and C&F sellers do not have an obligation to deliver the goods at the port of discharge, he is still under a negative obligation not to interfere with the carriage so as to prevent the buyer from receiving the goods.[22]

SUMMARY

This chapter has examined different categories of transit risks and sought to illustrate the usefulness of recognising and distinguishing between them. The main points made were as follows:

1. The risk of increased cost of carriage caused by a casualty affecting the ship – such as strandings, collisions, strikes, government directions – is a distinct category of transit risk since it is by definition not covered by the risk of loss of or damage to goods and also because this would underscore the point that an unexpectedly increased cost of carriage is to be divided at the port of shipment. This is in contrast to the cost of carriage included in the freight, which is to be divided at the port of discharge.
2. Deterioration is distinguishable from damage. Though they both affect the quality of goods, damage is inflicted by external causes such as contamination, whereas deterioration is caused by the inherent nature of the goods, such as discoloration of bananas. The risk of deterioration so understood remains with the seller until the port of discharge under CIF and C&F contracts. This is in contrast with the risk of damage, which passes as from shipment. The risk of deterioration should, therefore, be recognised as an anomalous type of transit risk.
3. Loss is distinguishable from damage as it affects the quantity (weight or volume), as opposed to quality, of goods. In the typical CIF and C&F contracts there is little merit in distinguishing the risk of loss from the

risk of damage since they both pass at the port of shipment. But where a contract expressed to be CIF or C&F contains an out-turn clause (a clause calling for the price to be calculated on the basis of the quantity actually discharged), the distinction may be useful as it enables the risk of loss to remain with the seller until discharge in accordance with the out-turn clause while the risk of damage passes as from shipment in accordance with the CIF/C&F label.

4 Where a contract expressed to be CIF or C&F contains an out-turn clause but the rest of the clauses exhibit a strong CIF or C&F character, it may be useful to split the risk of loss. The out-turn clause may then be given a restrictive interpretation by limiting its effect to a certain type of risk of loss. That would enable the certain risk of loss to remain with the seller until discharge in accordance with the out-turn clause and the rest of the risk of loss to pass as from shipment in accordance with the strong CIF or C&F character. For this purpose the distinction between the total loss and partial loss is arbitrary. A better distinction is the one between the loss inflicted by external causes such as leakage and spillage and the loss caused by the inherent nature of goods such as evaporation and shrinkage.

5 In the typical CIF and C&F contracts, the passage of risk of loss at the port of shipment means that the seller does not promise that the goods will arrive at the port of discharge, let alone by a certain date. The risk of delay, therefore, passes as from shipment together with the risk of loss or damage. But where a contract expressed to be CIF or C&F contains a clause calling for arrival of goods by a certain date (an arrival-time clause), it may be useful to distinguish the risk of delay from the risk of loss or damage as this enables the risk of delay to remain with the seller until discharge in accordance with the arrival-time clause while the risk of loss or damage passes as from shipment in accordance with the CIF or C&F label.

Notes

1 C&F contracts will be treated as identical to CIF contracts for the purpose of this chapter since the only difference between them, i.e. the existence or absence of an obligation on the seller to conclude an insurance contract, is not material for the purpose of the discussion here.
2 The comment to B6 of CFR, to which reference is made from the comment for CIF.
3 Other commentators may prefer other expressions. For example, Guenther Treitel, in A.G. Guest (gen. ed.), *Benjamin's Sale of Goods*, 6th edn, London: Sweet & Maxwell, 2002, para 18–222, uses the words 'risk of necessary deterioration' to refer to the deterioration which any goods of the contract description necessarily suffer in the course of contemplated transit and the words 'risk of extraordinary deterioration' to refer to deterioration due to some accident or casualty.
4 [1961] 1 Lloyd's Rep 46.

5 Recognition is given to the risk of deterioration by the Sale of Goods Act 1979 in the case where, unlike in CIF contracts, the seller agrees to deliver specific goods at his own risk. In that situation, the buyer nevertheless takes 'any risk of deterioration in the goods necessarily incident to the course of transit' (sn 33) unless otherwise agreed.
6 [1961] 2 Lloyd's Rep 326 (CA).
7 [1916] 2 KB 605.
8 See *The Atlas* [1996] 1 Lloyd's Rep 642; *The Mata K* [1998] 2 Lloyd's Rep 614.
9 *The Julia* [1949] AC 293; *The Jambur*, 14 November 1990, unreported (transcript available on Lexis).
10 [1949] AC 293.
11 It contained, for example, a clause allowing a delivery order to be substituted for a bill of lading and a certificate of insurance for a policy and a clause stating '[a]ll average to be for seller's account'.
12 (1931) 39 Ll L Rep 257.
13 [1940] P 166.
14 [1996] 1 Lloyd's Rep 398.
15 In J.J. Lightburn and G.M. Nienaber, 'Out-turn clauses in c.i.f. contracts in the oil trade' *Lloyd's Maritime and Commerce Law Quarterly*, 1987, 177, the authors state that the distinction between the transportation loss (due to unavoidable causes) and the marine loss (which is fortuitous and extraordinary) is clearly recognised in the oil trade. It is interesting to note that they include spillage as an example of transportation loss, while acknowledging that there may be no spillage if perfectly new equipment is used.
16 C.L. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 9th edn, London: Sweet & Maxwell, 1990, p. 54.
17 [1989] 1 Lloyd's Rep 96 (reversed by the Court of Appeal on other grounds [1989] 2 Lloyd's Rep 451).
18 14 November 1990, unreported (transcript available on Lexis).
19 E.g. G. Treitel, Chapter 19 in A.G. Guest (gen. ed.), *Benjamin's Sale of Goods*, 6th edn, London: Sweet & Maxwell, 2002, para 19–071.
20 [1985] 1 Lloyd's Rep 389.
21 [1998] 1 WLR 461.
22 See e.g. *Peter Cremer v Brinkers Grondstoffen NV* [1980] 2 Lloyd's Rep 605; *The Playa Larga* [1983] 2 Lloyd's Rep 171; *The Rio Sun* [1985] 1 Lloyd's Rep 351.