- **Property**
  Traditionally, property in specific goods sold on FOB terms passes on shipment. However, FOB contracts often expressly provide, or it is inferred, that property is to pass only on payment. With unascertained goods the goods must be clearly appropriated to the contract before property can pass.

- **Risk**
  Risk passes to the buyer when the goods cross the ship's rail. This is why it is important for the buyer to arrange insurance.

- **Remedies**
  - *Seller* - If the buyer does not accept the goods or refuses to pay or to give proper shipping instructions the seller can recover damage for the value of the goods less any resale value. Storage charges prior to resale are also recoverable.

  - *Buyer* - If the documents or goods are defective the buyer can reject and claim damages. However, as with CIF contracts the right to reject is lost by acceptance or by waiver. Damages for failure to deliver are the difference between the contract and market prices plus any loss of profit. Where goods are defective damages are the difference in value or the cost of repair.

The law is as stated at January 2003.
The law relating to the international sale of goods is complex. This pamphlet is written simply as a guide and a brief introduction to the issues involved. This pamphlet is not meant to be exhaustive and does not constitute legal advice. If you require legal advice on any of the topics raised in this pamphlet you should consult a solicitor.

FRED KAN & CO.

Fred Kan & Co. are committed to a standard of excellence and provide legal services to our clients with absolute integrity.

We maintain the following practice groups:

- Corporate & Commercial
- Real Estate
- Litigation
- International Trade, Shipping & Insurance
- Intellectual Property
- Urban Planning & Environmental Law
- Canadian Law
- China

For further information please contact our
Hong Kong office:-

3104-7, 31/F., Central Plaza
18 Harbour Road, Wanchai
Hong Kong

Telephone : (852) 2598 1318
Facsimile : (852) 2588 1318
E-mail address: kanlaw@fredkan.com

FRED KAN & CO.

Solicitors & Notaries
Hong Kong

LAW GUIDE SERIES No. 1

International Sale of Goods

Hong Kong Office
3104-7, 31/F., Central Plaza
18 Harbour Road
Wanchai, Hong Kong
Telephone : (852) 2598 1318
Facsimile : (852) 2588 1318
E-mail address: kanlaw@fredkan.com

Tianjin Office
A-1-1010 ICTC
59 Machang Road, Hexi District
Tianjin, China
Telephone : (86) (22) 2313 9761 / 2
Facsimile : (86) (22) 2313 9763

INTRODUCTION

The Hong Kong Sale of Goods Ordinance ("SOGO") regulates both local and international sales. Hong Kong has no specific legislation regulating the international sale of goods. Although the UK has enacted such legislation it does not extend to Hong Kong and unlike China Hong Kong has not acceded to the Vienna Convention (1980).

This pamphlet considers the duties of a buyer and seller under the two most common international sale contracts, namely CIF and FOB contracts. These duties are implied from international practice (mainly derived from English law unless the contract specifically provides that "Incoterms 1990" (as published by the International Chamber of Commerce) will apply) and from SOGO.

The parties can vary the usual duties and the following points are subject to any express term to the contrary in the sale contract.

CIF CONTRACTS - 'COST, INSURANCE AND FREIGHT'

A CIF contract is where the price includes the cost, insurance and freight.

- **Duties of the Seller**
  - *Shipment* - The seller must ship goods matching the contractual description, quantity and quality. Usually a shipment period is provided in the contract.
  - *Tender of Shipping Documents* - The seller is required to tender various documents, which invariably match the documents to be negotiated under any letter of credit opened by the buyer, such as:

    (a) A clean 'shipped on board' Bill of Lading covering the entire voyage. This document has a threefold function as evidence of the contract of carriage, receipt for the goods and as a negotiable document by which title to the goods can pass.

    (b) A commercial invoice.

    (c) A Marine Insurance Policy covering at least 100% (and usually 110%) of the CIF price. The policy must be assignable as it is taken out by the seller. If the sale is on C & F terms (i.e. without insurance) the obligation to effect transit insurance is on the buyer.

    (d) Other documents such as the Packing List, Certificate of Origin, Pre-Shipment Inspection, etc.

- **Duties of the Buyer**
  The buyer's main duty is to pay the price when the seller delivers the shipping documents. Where payment is being made by a letter of credit then the documents must strictly comply with the terms of the letter of credit. The buyer is not entitled to examine the goods prior to payment. If the goods are lost or damaged during transit and prior to tender the buyer must still pay.

- **Property**
  If a contract is silent under SOGO property passes for specific goods (i.e. goods clearly identifiable at the time of the contract) when the parties intend it to pass and SOGO sets out rules to determine the parties intention. However, in CIF contracts usually the parties are deemed to intend that property will not pass until payment. If the goods are unascertained (part of an undivided bulk) property can not pass until the goods are ascertained, normally on delivery.

- **Risk**
  Under SOGO the risk of loss or damage to the goods shifts to the buyer when property passes. However, in CIF contracts this is displaced as risk passes on shipment except if the goods are a total loss after shipment but prior to sale.

- **Remedies**
  - *Seller* - Under SOGO a seller can sue for damages should the buyer refuse to accept the documents or to pay. Damages are the difference between the contract price and the market price at time of delivery. However, the seller has a duty to mitigate the loss by reselling the goods, if possible.
  - *Buyer* - If the seller fails to ship the goods or to tender valid documents the buyer can sue for non-delivery. Damages are the difference between the contract price and the market price at time of delivery of the documents. The court can order specific performance, i.e. delivery of the actual goods, but this is rare.

The buyer can reject defective goods. However the right to reject is lost if the goods are accepted. Under SOGO the buyer is deemed to have accepted if he has had a reasonable opportunity to examine and has done some act inconsistent with the seller's ownership of the goods. Moreover, if the buyer delays too long he runs the risk of waiving his right to reject.

FOB CONTRACTS - 'FREE ON BOARD'

A FOB contract is for the cost of the goods only. The seller places the goods on board the vessel and all subsequent charges including freight and insurance are borne by the buyer.

There are two main variants :

- where seller delivers the goods to a vessel nominated by the buyer, the buyer having arranged the shipping and insurance.
- where seller makes the shipping and insurance arrangements at the account and risk of the buyer and invoice him separately for the cost and any expenses incurred.

- **Duties of the Seller**
  - *Delivery of Goods* - The sellers duty is to deliver the goods (suitably packed) over the ship's rail.
  - *Documents* - As a minimum the seller is usually required to provide a clean bill of lading.
  - *Shipment Date* - The seller must deliver the goods before the end of the contractual shipment period.
  - *The Goods* - The goods delivered must meet the contractual requirements as to quantity, quality etc.

- **Duties of the Buyer**
  - *Shipping Instructions* - The buyer must nominate a suitable vessel capable of loading the goods at the load port within the contractual period.
  - *Payment* - SOGO requires a buyer to be ready to pay in exchange for possession. However, FOB contracts usually allow payment against tender of documents or provide that a letter of credit must be opened within a specified period.