

Q001: My buyer 'B', is in France and they trade on a Merchanting basis, that is to say they buy from me 'A' in South Africa and sell to a third-party 'C' in another country. Recently they placed an order with me 'A' to ship one container from South Africa, directly to their buyer 'C', who was, in this case, in Costa Rica.

My sales term with my French buyer 'B' is 'CFR Puerto Limon, Costa Rica, as defined in the ICC's Incoterms 2000.

On shipment I was paid against my on-board bill of lading, by buyer 'B', who thereafter issued their final commercial invoice and shipping documents to their client 'C' in Costa Rica. My buyer 'B' sold to 'C' on a 'CIF Puerto Limon' Incoterms 2000 basis. Note that my buyer 'B' is shown as the shipper on the carrier's bill of lading. Cargo to Costa Rica transits via the USA where it was randomly stopped for examination as part of the USA anti-terrorism program. When the container did finally arrive in Costa Rica, the consignee 'C' was asked by the carrier to pay an additional USD 965.00 for the USA examination, before the carrier would release the container.

My question is; who should bear the cost of the examination in this case? Would it be the original seller i.e. my company 'A', or would it be my client the French company 'B', or should it be their buyer 'C', in Costa Rica?

A001: *To answer this question we need to consider three positions. 1. What is the position of the 'seller' (both the original seller, 'A' and the on-seller 'B')? 2. What is the position of 'B' as the 'shipper'? And finally 3; what is the common 'commercial' position?*

Note that 'B' the 'seller' and 'B' the 'shipper' will have

different positions, even though we know they are one in the same entity.

- 1. Under the CFR and CIF commercial terms, the seller has no risk beyond the ship's rail at the port of loading and (generally) the seller's cost is to disburse the basic freight to the destination port, only. As the examination happened after loading (i.e. after the ship's-rail event) and as costs associated with a random examination would not normally be included in the basic freight disbursement, so – at the sales-contract level – the risk and additional cost are for buyer 'B' under the sales contract between 'A' & 'B'. However, the same principles hold true in 'B's contract with 'C' – thus the risk and additional cost is then on-passed by buyer 'B', under their sales contract where they are the 'seller', to 'buyer' 'C'. All things being equal, we can ultimately conclude that the costs (and risks) are 'C's liability.*
- 2. But, the carrier who is raising the charge has no involvement or interest in the sales contracts between the various sellers and buyers. Their contract is with the party who booked the cargo with them and/or the named 'shipper' on the bill of lading (and possibly with the consignee, should the consignee agree to enter into the contract with the carrier at some point – this agreement is often normally evidenced by the consignee applying for the release of the cargo.) For practical reasons, initially the carrier will endeavour to recover the charge from the consignee making this a condition of release. This is practical in that the carrier uses the release of the cargo as leverage to secure the charges. Should the consignee refuse the charge (at which point the carrier will most likely decline to release and continue to hold the cargo, exercising a lien over the goods which the consignee may*

abandon interest in) then the carrier would make the named shipper liable to pay the additional charge, under the terms of the contract of carriage. If the shipper then declines liability, it could only be because the carrier is prepared to accept the party who made the initial booking with them as being liable for the charge. Should the shipper 'B' accept the liability for the cost, we could then assume that (in their role as the seller) 'B' would in turn hold 'C' liable to them in terms of the sales contract conditions. Equally, should 'C' (as the consignee) settle with the carrier, they may have recourse to seller 'B', if the terms of the sales contract allow this. But note that, in a strict 'C'-prefixed sale there would not be such recourse for 'C' under normal circumstances.

- 3. The resulting commercial position is merely a practical one and can be summarised thus; 'where is the money?' As 'A' has been paid, then how involved 'A' now wishes to get in 'coming to the party' and contributing something towards the cost of the examination is entirely elective on 'A's part – how important is the buyer to them, do they want future business? (And so on.) This is to say that 'A's involvement or lack thereof, is a commercial consideration, not a contractual one. If, however, 'A' (or 'B' in their mirror-relationship with 'C') had granted a credit period to their buyer, they may have found that an involuntary 'contribution' was deducted from the payment. 'B' (in the contract with 'A' and 'C' in the contract with 'B') would be contractually wrong to deduct in this manner, but it would be a common solution to their problem and while 'A' would have every right to demand full payment (having met the conditions of the 'C'-prefixed contract), whether 'A' would actually be able to exercise this right is debatable i.e. can they 'afford' to exercise this right?*

While there is no direct connection to sales terms (commercial terms) and payment mechanisms, the question at hand illustrates well why seller's using 'C'-prefixes would always be advised to endeavour as best possible to avoid giving unsecured credit.

Related subjects can be found by reference to these questions:

CFR / Cost & Freight Q058.

CFR/CIF additional costs in transit Q058.

Merchanting general Q005, Q011, Q036, Q057, Q073.

Merchanting & bills of lading Q004.

The role of the shipper versus the seller Q020, Q023, Q030, Q044, Q058, Q068, Q073.

Refer also to these 'Trading Words & Phrases':

*Abandonment – Carrier – Cost and Freight (CFR) – Commercial Terms –
Consignee – Cost & Freight – Freight – Incoterms – Lien – Merchanting – Seller
– Shipped-On-Board – Shipper*