

# TABLE OF CONTENTS

<i>Table of Cases</i>	xiii
<i>Table of Legislation</i>	xxiii
<i>List of Abbreviations</i>	xxxiii

<b>Introduction</b>	1
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## I BACKGROUND

<b>1. Documents Used in International Trade</b>	
A. Documents Relating to the Sale Contract	1.02
B. Transport Documents (aka Carriage or Shipping Documents)	1.04
C. Insurance Documents	1.05
D. Certifying Documents	1.06
E. Payment Instruments	1.10
<b>2. Legal Aspects of Electronic Communication</b>	
A. Contract Formation by Electronic Communications	2.05
B. Contract Formalities	2.24
C. Documents of Title and Negotiable Instruments	2.39
D. Provision of Electronic Communication Services	2.43

## II ELECTRONIC DOCUMENTS: LEGAL FRAMEWORK

<b>3. International Sale Contracts and their Performance</b>	
A. Standard Contract Terms and their Performance	3.02
B. Performance of the Payment Obligation	3.09
<b>4. Legal Framework to Govern Electronic Payment and Electronic Presentation of Documents</b>	
A. Electronic Presentation of Documents and Trade Data	4.04
B. Electronic Alternatives to Negotiable Financial Instruments	4.24

<b>5. Carriage Documents and the Functions that They Perform</b>	
A. Bills of Lading	5.02
B. Sea Waybills	5.54
C. Delivery Orders	5.70
<b>6. Legal Framework to Govern Electronic Transport Documents</b>	
A. English Law	6.02
B. US Law	6.54
C. International Standards	6.62
<b>7. Cargo Insurance Documents and the Functions that They Perform</b>	
A. The Cargo Insurance Market	7.03
B. Cargo Cover Documentation	7.06
C. Construing Insurance Documents	7.25
D. Making a Claim	7.28
<b>8. Legal Framework to Govern Electronic Cargo Insurance Documents</b>	
A. Contract Formation	8.02
B. Evidence of Cover	8.21
C. Construing the Contract	8.30
D. Assignment of Documents Issued in Electronic Form	8.36
E. Making a Claim	8.45
<b>III ELECTRONIC DOCUMENTS: EMERGING PRACTICES</b>	
<b>9. Removing Obstacles on the Road to Transition</b>	
A. Taking Initiative: The Role of Exporters and Importers	9.03
B. Eliminating Barriers: Import and Export Formalities	9.15
<b>10. Electronic Systems for Payment Processing</b>	
A. Electronic Financial Messaging and Trade Finance	10.06
B. Integrating Trade Data into the Financial Supply Chain	10.14
<b>11. Electronic Systems for the Issue and Transfer of Rights over Goods in Transit</b>	
A. Practical Barriers to the Adoption of Electronic Transport Documents	11.06

*Table of Contents*

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B. Systems Provided by Third-Party Service Providers	11.11
C. Carrier-Provided Systems	11.36
<b>12. Electronic Systems for Cargo Insurance</b>	
A. Practical Barriers to Electronic Placing	12.03
B. Issue of Evidence of Cover	12.14
C. Claims Processes	12.32
D. Terms of Use	12.36
Appendix 1: ESS-Databridge Bill of Lading Sample	339
Appendix 2: Lloyd's Electronic Certificate Samples	341
<i>Index</i>	347

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# 1

## DOCUMENTS USED IN INTERNATIONAL TRADE

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<b>A. Documents Relating to the Sale Contract</b>		<b>C. Insurance Documents</b>	1.05
The purchase order (aka pro forma invoice)	1.02	<b>D. Certifying Documents</b>	1.06
The invoice	1.03	Certificates of origin	1.07
		Certificates of quality	1.08
<b>B. Transport Documents (aka Carriage or Shipping Documents)</b>	1.04	Certificates of quantity	1.09
		<b>E. Payment Instruments</b>	1.10

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The modern paper-making process has its roots in China in the 2nd century AD. From China, it spread, over a millennium, to the rest of Asia, to the Middle East, and then to Europe, where the first paper mills were set up in the 13th century. The advent of paper revolutionized commerce: for the transnational community of traders, it represented a cheap and efficient way in which to make records and manage one's business. Eventually, paper began to be used as an instrument not only to record obligations, but also to embody them, increasing its significance in the realm of private law and commercial relationships. Paper continues to be used to this day, with certain documents being omnipresent in international sale transactions. In this chapter, we will be looking briefly at the most commonly used among these documents and outlining their legal significance. The rest of this book will examine the more legally complex among these documents in further detail, and will discuss how the emergence of cheaper methods of making records and sharing information is progressively leading to the decline of paper and to the development of alternatives to these paper documents that perform their functions more efficiently. The purpose of this book is to discuss the legal context in which these developments are taking place and their implications for the future evolution of the law. **1.01**

## A. Documents Relating to the Sale Contract

### The purchase order (aka pro forma invoice)

- 1.02** A purchase order (PO)—also known as the ‘pro forma invoice’—is a document issued by the buyer of goods to a supplier. The PO usually constitutes at law an offer to the seller, which becomes a binding contract upon the seller’s acceptance.<sup>1</sup> It sets out the terms and conditions that the buyer intends to be applicable to the ensuing contract of sale, including a description of the goods to be supplied by the seller and specification of quantities, price, etc. The business understanding of the PO is that it authorizes the seller to deliver goods in accordance with it (which would constitute an acceptance of the terms in the order)<sup>2</sup> and that it entitles the seller to payment as per its terms if he does so. Because conduct in response to a PO can constitute tacit acceptance, the PO is an important instrument as far as the automation of documentary compliance is concerned. As will be seen in Chapter 10, once the seller’s internal computer system has received the PO data, the system can use that data to generate a compliant invoice and to trigger the dispatch of specified goods,<sup>3</sup> thus enabling straight-through processing (STP). The achievement of STP has, for a long time, been the holy grail of the business community. While the progress made in automating internal record keeping, in setting up automated inventory systems, in automating the exchange of data between purchaser and supplier computer systems, in containerization, in the provision of logistics services and cargo tracking, and so on has, for the most part, allowed the achievement of this goal in the physical supply chain (that is, the physical performance of the contract of sale through the delivery of goods by the seller), progress still needs to be made in the financial supply chain (that is, the performance of the payment obligation by the buyer upon receipt of evidence of performance by the seller).

### The invoice

- 1.03** The invoice is a document issued by the seller of the goods as evidence of performance of the contract. The role of the invoice is to identify the goods that are being dispatched to the buyer and to indicate the price. In contracts in which the buyer

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<sup>1</sup> See Burton J’s analysis in *GHSP Inc v AB Electronic Ltd* [2010] EWHC 1828 (Comm), [10]–[13]. Note, however, that, depending upon the circumstances, a binding contract may be formed prior to the issue of a formal PO, in which case the subsequent issue of a PO will not affect the terms and conditions applicable between the parties: see *Claxton Engineering Services Ltd v TXM Olaj-És Gázkutató Kft* [2010] EWHC 2567 (Comm), [49]–[60]. A ‘battle of the forms’ may ensue if the seller, upon receipt of the buyer’s PO, responds with a communication that purports to modify its terms and conditions: see *OTM Ltd v Hydronautics* [1981] 2 Lloyd’s Rep 211 and *Tekdata Interconnections Ltd v Amphenol Ltd* [2009] EWCA Civ 1209.

<sup>2</sup> See *Continental Tyre & Rubber Co Ltd v Trunk Trailer Ltd* 1987 SLT 58, 62.

<sup>3</sup> This would require it to be linked up with an inventory database.

pays a price that includes the cost of shipping and insuring the goods,<sup>4</sup> the invoice will also indicate the cost of the different elements of the price to be paid by the buyer. The content and form of the invoice may be subject to particular requirements, either under the specific contract<sup>5</sup> or as a result of a custom of the particular trade.<sup>6</sup> The invoice is especially important when a bank is involved in the transaction as financier, because the information within it is essential to demonstrating compliance with the conditions upon the fulfilment of which the bank's undertaking to pay becomes enforceable.<sup>7</sup> The invoice has an important relationship with certain certificates relating to the goods.<sup>8</sup> In some sectors, particularly oil and petroleum, it is not uncommon for the price in the invoice to be calculated on the basis of the statements in a certificate issued by an independent inspection agency; if the latter document turns out to be inaccurate, the price may need to be adjusted.<sup>9</sup> As with the PO, the dematerialization of the invoice, such that the content of the invoice is issued in the form of electronic data rather than a paper document, carries with it the potential for greatly increasing the progress towards STP in the financial supply chain. Because the invoice constitutes evidence of performance by the seller of its contractual obligations (provided that its content matches that of the PO), a match between PO data and invoice data can bring about the triggering of the payment obligation of the buyer. In recent years, there has been a drive in some sectors to effect the transition to electronic invoicing, and this will be discussed in Chapters 4 and 10.

## B. Transport Documents (aka Carriage or Shipping Documents)

Performance of an international sale-of-goods contract requires the goods to be carried from their origin to their destination and part of the seller's obligations under a contract of sale will usually involve the delivery of the goods to their designated 1.04

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<sup>4</sup> See discussion of cost, insurance, and freight (CIF) contracts at paras 3.05–3.07. Since Blackburn LJ's pronouncement in *Ireland v Livingstone* (1872) LR 5 HL 395, 406, it has been regularly held that the invoice is one of three documents that must be tendered for the purposes of a CIF contract. See also: *Johnson v Taylor Bros & Co Ltd* [1920] AC 114; *Smyth (Ross T) & Co v Bailey Sons & Co* (1940) 67 Ll L Rep 147, 156; *Plamair v Waters Trading Co Ltd* (1945) 72 CLR 304; *Gatoil International v Tradax Petroleum* [1985] 1 Lloyd's Rep 351; and *Petrofina SA v AOT Ltd (The Maersk Nimrod)* [1992] QB 571.

<sup>5</sup> See *John Martin of London v AE Taylor & Co Ltd* [1953] 2 Lloyd's Rep 589, 594, per Lord Goddard CJ, in which the invoice was required by contract to give certain information regarding the certificate of origin. It was held that the requirement was to be construed 'in a business sense'.

<sup>6</sup> See *Ross T Smyth & Co v Bailey Sons & Co* (1940) 67 Ll L Rep 147.

<sup>7</sup> See International Chamber of Commerce (ICC), Uniform Customs and Practice for Documentary Credits (UCP 600) (2007), Art 18(c): 'The description of the goods, services or performance in a commercial invoice must correspond with that appearing in the credit.' See also *Kydon Cia Naviera SA v National Westminster Bank Ltd (The Lena)* [1981] 1 Lloyd's Rep 68, 77.

<sup>8</sup> Discussed further at paras 1.06–1.09.

<sup>9</sup> See *Apioil Ltd v Kuwait Petroleum Italia SpA* [1995] 1 Lloyd's Rep 124, 132–3.

carrier.<sup>10</sup> Thus the gamut of documents relating to the sale will usually include a document evidencing that the goods have reached the carrier and indicating the terms under which the transport of the goods is to take place. It is estimated that 90 per cent of goods traded across borders are carried by sea,<sup>11</sup> so in many cases the transport document will be issued by or on behalf of a maritime carrier. The three main types of document that are in common use are:

- (i) the bill of lading, a document of title to goods that entitles the holder to delivery of the goods and which can be used by its holder to transfer the goods by way of sale or pledge;
- (ii) the sea waybill, which is a document evidencing the terms of the contract of carriage, which names a specific consignee, and which, unlike the bill of lading, need not be presented for the delivery of the cargo; and
- (iii) delivery orders, which are a type of document usually used to split the entitlement to different parts of a bulk cargo, covered by a single bill of lading, which have been sold to different buyers by the cargo's owner.

All three types of document are discussed in detail in Chapter 5, and the legal and practical implications of the efforts made to replace them with electronic alternatives are discussed in Chapters 6 and 11.

### **C. Insurance Documents**

**1.05** A contract for the cross-border sale of goods will usually specify that the goods should be insured during their transport. Depending upon the contract terms, insurance coverage will be taken out either by the buyer or the seller. In either case, the insurance contract will usually be evidenced by a document recording the terms of the insurance and indicating who may claim under it. Traditionally, the insurance document would be issued in the form of a policy of marine insurance, which could be used by the holder to assign to another the rights under the insurance contract, a useful feature if it was the seller and not the buyer who entered into the insurance contract. Nowadays, however, cargo coverage tends to be evidenced not by a policy, but by a certificate of insurance, which—like the policy—is, by custom and usage, assignable, so that the rights evidenced by it may be transferred from the seller to the buyer of goods. The contract of insurance, and in particular the policy and the certificate, will be discussed in detail in Chapter 7, while the legal challenges inherent in their dematerialization and some examples of electronic systems that illustrate the progress that has been made towards this goal will be discussed in Chapters 8 and 12 of this book.

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<sup>10</sup> See Chapter 3.

<sup>11</sup> This is according to figures published by the International Maritime Organization (IMO), an agency of the United Nations, online at <<http://www.imo.org/>> [accessed 6 January 2013].

## D. Certifying Documents

Many international sale contracts require certain facts to be certified, for example the origin, quality, and/or quantity of the goods. The certification may be required as a form of assurance for the buyer, who does not have the opportunity to examine the goods before they are shipped. However, some certificates are required in order to satisfy import and export requirements at a country of import, export, or transit. In either case, the buyer will usually require the certification to come from an independent and reputable evaluator and certifier. The kind of entity providing the certification service and issuing the certificate will vary according to the type of certificate required. Certificates are usually signed and stamped by the issuer, and contain certain wording describing the goods<sup>12</sup> and a statement certifying a fact in relation to them. We will now look briefly at the most commonly occurring types of certificate. 1.06

### Certificates of origin

Certificates of origin are in widespread use in international trade and, indeed, are a legal requirement in certain jurisdictions. In many countries, origin certification services are provided by local chambers of commerce. In the United Kingdom, for example, the London Chamber of Commerce and Industry provides a service whereby businesses can apply for and receive European Community (EC) certificates of origin. The service is provided subject to certain rules contained in an agreement, which must be signed by the applicant.<sup>13</sup> The description of the goods in the certificate of origin will usually mirror that in the invoice.<sup>14</sup> In recent years, it has become possible to apply for a certificate of origin electronically, and for the application to be processed and the certificate to be issued over a secure electronic platform, usually operated by a third-party service provider.<sup>15</sup> When a certificate is issued in electronic form, its validity and acceptability will depend upon not only the ability of data recorded electronically to constitute a ‘document’ or ‘certificate’ and the recognition of electronic signatures as constituting ‘signatures’,<sup>16</sup> but also, where the certificate is required in satisfaction of a country’s export or import control requirements, its recognition under that country’s law as constituting a 1.07

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<sup>12</sup> The certificates must accurately describe the goods to which they refer. See *Re Reinhold and Co and Hansloh's Arbitration* (1896) 12 TLR 422, in which it was held that the certificates of description were irregular, because they did not mention the shipping marks on the cargo.

<sup>13</sup> See London Chamber of Commerce and Industry, ‘Certificate of Origin Rules: Formal Undertaking’, available online at <<http://www.londonchamber.co.uk/DocImages/7488.pdf>> [accessed 5 January 2013].

<sup>14</sup> See the London Chamber (n 13), rule 1.

<sup>15</sup> See, eg, TradeCert, online at <<http://www.tradecert.com/>> [accessed 5 January 2013].

<sup>16</sup> These matters are discussed in Chapter 2.



certificate for the purposes of those requirements. An illustrative example of an exporter that regularly uses certificates of origin issued electronically is given in Chapter 9.

### **Certificates of quality**

- 1.08** Certificates of quality are also commonly used in international trade transactions. The issuer of the quality certificate will usually be chosen on the basis of the type of goods to be evaluated and what aspect of the quality of the goods the buyer requires to be certified. The service may sometimes be provided by a cargo inspection agency (CIA).<sup>17</sup> Quality certification service providers (QCSPs) will sometimes specialize in certain types of goods, for example organic agricultural produce, or a specific type or class of commodity. Their reputability is an important consideration and usually the requirement will be to use an accredited QCSP. A valuable accreditation for a QCSP is accreditation by the International Organization for Standardization (ISO). The ISO has developed universal standards in many fields, using a number of specialist technical committees, which may be implemented on a global level, the general purpose of which is to 'ensure that products and services are safe, reliable and of good quality'.<sup>18</sup> The ISO 9000 family of standards lays down a list of best practices for quality assurance and an accredited QCSP may assess goods' compliance against a relevant ISO standard. The ISO does not accredit QCSPs itself, but independent accreditation bodies have been set up in many jurisdictions to 'guard the guardians'. In the UK, this is the United Kingdom Accreditation Service (UKAS).<sup>19</sup>

### **Certificates of quantity**

- 1.09** A certificate of quantity—another commonly required document in international trade transactions—is usually issued after an inspection of the goods by a CIA, which may offer both quantity and quality inspection for the same cargo. The proliferation of such inspection agencies has led to the establishment of the International Federation of Inspection Agencies (IFIA), which operates a number of committees, each specializing in a certain sector.<sup>20</sup> Among other objectives, the IFIA seeks to 'improve the methods, standards, safety procedures and rules used by its members'.<sup>21</sup> Certain ISO standards provide guidance as to

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<sup>17</sup> See para 1.09.

<sup>18</sup> See ISO, 'About ISO', available online at <<http://www.iso.org/iso/home/about.htm>> [accessed 5 January 2013].

<sup>19</sup> Online at <<http://www.ukas.com/>> [accessed 5 January 2013].

<sup>20</sup> See IFIA, 'Welcome to IFIA', available online at <<http://www.ifia-federation.org/content/>> [accessed 5 January 2013].

<sup>21</sup> See IFIA Leaflet, available online at <<http://www.ifia-federation.org/>> [accessed 5 January 2013].

how certain cargoes should be assessed as to quantity—in particular, petroleum products.<sup>22</sup>

## E. Payment Instruments

It was formerly common in international trade transactions to embody in a piece of paper an obligation to pay on a certain date (known as its ‘maturity date’). These types of document, which include promissory notes and bills of exchange (also known as ‘commercial drafts’), are essentially a method for the seller to advance credit to the buyer, whose payment obligation will be deferred until the maturity date. Bills of exchange are normally issued as negotiable instruments, so that the seller needing liquidity can negotiate or discount the document before its maturity. While bills of exchange have fallen out of use in some jurisdictions as other credit and payment methods have emerged, they are still widely used in certain regions of the world. Recently, there has been a push in some jurisdictions to dematerialize them and to replace them with electronic records of payment obligations. These efforts will be discussed briefly in Chapter 4, but a detailed discussion of these instruments in trade finance is beyond the scope of this book, the main focus of which is the international trade transaction and the way in which documentation is used in the performance of the contract by buyer and seller. Thus these instruments will be discussed only in so far as they are relevant to the payment arrangements that may be set up to facilitate performance by the buyer of the payment obligation. **1.10**

Technological advances in recent years have been such that anything that can be done on paper can also be done electronically. However, while the use of paper records and paper communications is underpinned by long-established and well-understood legal principles developed over centuries, the legal effects of more recently developed methods of record-making and communication are still in the process of gaining widespread recognition. In Chapter 2, we will go on to discuss some of the salient issues in this regard. **1.11**

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<sup>22</sup> See, eg, ISO, *ISO 8697:1999: Crude Petroleum and Petroleum Products—Transfer Accountability: Assessment of on Board Quantity (OBQ) and Quantity Remaining on Board (ROB)*, available online at <<http://www.iso.org/>> [accessed 5 January 2013].