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The insurance clause in INCOTERMS 2020: The latest stage in its evolution and a progressive development 1980-2020

(PART II)

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7. INCOTERMS X-2010: LARGEST CONTEMPORARY LANDMARK CHANGE

7.1. INCOTERMS X-2010 at a glance

INCOTERMS X-2010, continuing the major structural changes of INCOTERMS IX-2000, reduced the number of rules further from 13 to 11. Four rules (DAF, DES, DEQ, DDU) were removed and two new ones (DAT and DAP) introduced, bringing the number of INCOTERMS to 11. However, those removals did not affect the overall diversity and quality of the rules. The replaced rules (DAF, DES, DEQ and DDU) were not used much in day to day trading any way. By far the principal changes by INCOTERMS X-2010 were: consolidation of the D-family of rules.** Other modifications included an

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** In Part I (1/2020 April) and this Part II of this article, references such as INCOTERMS I-XI were provided by the author for purposes of this article, and are not the official designations of the Rules by the ICC. This Part II continues coverage of Insurance Clauses in INCOTERMS X-2010,

increased obligation for buyers and sellers to cooperate on providing notice and information sharing regarding insurance and changes to accommodate sales on transit or afloat ("string" sales). The INCOTERMS came into effect on January 1, 2011. These modifications, continued in INCOTERMS XI-2020, are detailed below in paragraph 9(3) of this article.

7.2. Emphasis on Security Related Clearances

Like its immediate predecessor, (INCOTERMS IX-2000), INCOTERMS X-2010 also had more prominently featured insurance and security-related obligations of the seller and buyer in the various terms. These security obligations, for example, the obligation to obtain security related clearances or chain-of-custody information, were contained in Clause A2 and Clause B2 of each rule. While the contracts of carriage and insurance were limited to Clause A3(a) / B3(a) and Clause AB3(b) / B3(b), respectively.

7.3. Progressive Development of the Insurance Clause

However, in comparison, by far the major changes to the insurance clauses had been made by INCOTERMS X-2000. Consequently, apart from drafting changes, the creators of the Institute Cargo Clauses (Cargo Clauses) were acknowledged for the first time as the London Market Association (LMA) and the International

INCOTERMS XI-2020. It includes aspects not covered by INCOTERMS, but relevant to insurance, such as: parties' additional insurance requirements; sellers and buyers interest insurance; and other insurance considerations not covered by INCOTERMS and its insurance clauses that parties need to be aware of.

Removing Delivered at Frontier (DAF), Delivered Ex Ship (DES), Delivered Ex Quay (DEQ) and Delivered Duty Unpaid (DDU); and adding (Delivered at Terminal (DAT) and Delivered at Place (DAP).

Underwriters Association (IUA). Nevertheless, the seller was still required to obtain cargo insurance complying at least with the minimum cover provided by Cargo Clauses (C). Furthermore, parties were made aware that this minimum level of insurance covers only major casualties, such as total loss of cargo. The buyer also had the option of the seller providing, at his (the buyer's) expense and where procurable, any additional cover, for example, cover provided by Cargo Clauses (A) or Cargo Clauses (B) or any similar clauses and/or cover complying with the War Clauses and/or Strikes Clauses or any similar set of clauses.¹ This acted as a sort insurance a bolt-on business deal or activity is one that you make or do in addition to your usual deals or activities "bolt-on", but the buyer was required to pay more for this. If the buyer wished for the seller to arrange for this "bolt-on" insurance, it was recommended that this is included in the sale contract.² Other changes to the insurance clauses are indicated below.

7.4. Sellers' Insurance Obligations

The CIF³ Seller's obligations, contained in Article A3(b) for both CIF and CIP, contracts provided that:

"The seller *must*⁴ obtain, at his own expense⁵ cargo insurance complying at least with the minimum cover as provided by Clauses (C) of the Institute Cargo Clauses⁶ (LMA/IUA)⁷ or *similar clauses*.⁸ The insurance shall be contracted with underwriters or an *insurance company of good repute*⁹ and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer.

¹ Similar clauses include those of the US, Japan and other major EU and OECD maritime trading nations.

² For the type of additional cover and other considerations for the CIF parties, see Ademuni-Odeke, 2016b, 27–44; Ademuni-Odeke, 2016a, 20–34; see also paragraph 10 of this article below.

³ INCOTERMS 2010, ICC Doc.No.715E, 105–117, 110.

⁴ It is not clear whether this mandatory obligation (must) related to provision of only the minimum or also agreed additional covers.

⁵ Expense introduced in INCOTERMS X-2010 was continued from the corresponding Clause in INCOTERMS IX-2000.

⁶ First time specifically mentioned rather than simply "minimum cover."

⁷ Authors of the UK Cargo Clauses used with the Lloyds Marine Policy.

⁸ Clauses such as those of the US and other major trading nations providing comparable cover would be acceptable.

⁹ For definition of "insurance company of good repute", see Ademuni-Odeke, 2016b, 37–38; Clause 13.1 of the GAFTA Contract No.72 instead uses "First Class Insurance", which probably has the same meaning.

When required by the buyer, the seller shall, subject to the buyer providing *any necessary information*¹⁰ requested by the seller, provide at the buyer's cost¹¹ (expense) any additional cover, *if procurable*¹², such as cover as provided by Clauses (A) or (B)¹³ of the Institute Cargo Clauses) (LMA/IUA)¹⁴ or any similar clauses, and/or cover¹⁵ complying with the Institute War Clauses and/or Institute Strikes Clauses (LMA/IUA) or any similar clauses).

The insurance shall cover, at a minimum, the price provided in the contract plus **10% (i.e., 110%)**¹⁶ and shall be in the currency of the contract.

The insurance shall cover the goods from the point of delivery set out in A4 and A5 to at least the named place of destination.¹⁷

The seller must provide the buyer with the insurance policy **or other evidence of insurance cover**.¹⁸

Moreover, the seller must provide the buyer, at the buyer's request, risk and expense (if any), with

¹⁰ This reference to information is different from those provided above in the CIF/CIP Clause A5 which uses "insurance company of good repute"; see also in paragraph 9 of this article; Ademuni-Odeke, 2007, 445–447.

¹¹ "Cost" replaces "expenses".

¹² It would that the seller can comply only if the requested additional cover is procurable; if not he should notify the buyer so that he takes out own cover, hence the need for notice and information for such purposes under this clause and Clauses A7/B7 and A10/B10 respectively; see also Note 19 below.

¹³ Ibid.

¹⁴ First time the *Lloyd's Market Association* (LMA) is mentioned replacing the *Institute of London Underwriters*. The LMA represents the interests of the Lloyd's community, providing professional and technical support to our members. The purpose of the LMA is to identify and resolve issues which are of particular interest to the Lloyd's market. It is also the first time that the *International Underwriting Association* (IUA) is mentioned. The IUA is the focal representative and market organisation for non-Lloyd's international and wholesale insurance and reinsurance companies operating in the London Market. Not mentioned is the *International Union of Marine Underwriters* (IUMI).

¹⁵ Wider choice is provided for either similar clauses or similar cover which might not necessarily be contained in clauses.

¹⁶ Words 'ten percent' omitted instead 10% (i.e., 110%) is preferred.

¹⁷ Also the first time it is specifically mentioned rather than simply referring to the clauses as in INCOTERMS IX-1990.

¹⁸ To conform with tender of the policy under letters of credit in Article 28 of UCP 600, which includes alternatives to the policy.

information that the buyer needs to procure any additional insurance”¹⁹ (emphasis provided).

Other than the above observations, there were no significant changes from the corresponding clause in INCOTERMS IX-2000 save that the rules now allowed for variance of the insurance obligations by parties’ agreements and/or by customs of a particular trade. On the minor side, there was more preference for use of buyers’ expenses rather than costs in the drafting.²⁰

7.5. Buyer’s Insurance Obligation

The CIF buyers’²¹ obligation contained in Clause B3(b) provided that:

“The buyer has no obligation to the seller to make a contract of insure. However, the buyer must provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer as envisaged in A3(b).”

The CIP buyer’s obligation was identical. It is also noteworthy that the requirement for notice and information was regarded so significant in insurance that some aspects thereof were repeated in Clauses A7 / B7 (Notice to the buyer and seller respectively) in addition the Insurance Clause (A3(b) / B3(b)) and the remaining recurring in the general information Clause A10/B10 (Assistance with information and related costs). Furthermore, the caution to parties on ‘No Obligation’ (Clause B3 (a) on additional cover, applied. However, the insurance clause was retained in only 2 rules (CIF and CIP) of the INCOTERMS; not in the remaining 9 rules.

7.6. Insurance Obligations in Other INCOTERMS X-2010 Rules

Accordingly, none of the other 9 rules in the INCOTERMS X-2010 required parties to provide insurance to the other: hence the origin and basis of the NO OBLIGATION rule applicable to buyers in CIF and CIP and all parties in the 9 rules. However, the texts went beyond simply “NO OBLIGATION.” Regarding sellers, Clause A3(b) in all the remaining 9 INCOTERMS provided that:

¹⁹ Specific need for insurance-related information is included here in addition the generally notice regarding delivery and reception of the goods in Articles A7/B7 respectively. Needless to emphasize failure to perform the latter could have liability and therefore insurance.

²⁰ Further detailed analysis of the Clause appears in INCOTERMS IX-2000 and INCOTERMS X-2010.

²¹ INCOTERMS 2010 ICC Doc. No. 715E, 111.

“The seller has no obligation to the buyer to make a contract of insure. However, the seller must provide the buyer, at the buyer’s request, risk and expense (if any), with information that the buyer needs for obtaining insurance” (emphasis provided).

Emphasizing further the basis of the information for insurance. While for buyer’s, Clause B3(b) in 4 (EXW²², FCA, FAS, FOB) of the remaining 9 rules simply provided that: “The buyer has no obligation to the seller to make a contract of insurance”, without no requirement for notice or information either way. However, the equivalent provision in 5 rules (CPT, DAT, DAP, DDP and CFR) included notice and information proviso, thus:

“The buyer has no obligation to the seller to make a contract of insurance. However, the buyer must provide the seller with, upon request, with the necessary information for obtaining insurance.”

Once more, these were additional to the requirements of notices in Clauses A7/B7, (Notice to the buyer and Notice to the seller respectively) and Clauses A10/B10 (Assistance with information relating to costs) availing the information requirements in at least 3 Clauses.

It was against that background of those developments that the latest, INCOTERMS XI-2020, appropriately titled “Looking Ahead”, entered the scene.

8. INCOTERMS XI-2020: LOOKING AHEAD

8.1. INCOTERMS 2020 at a glance

The latest INCOTERMS, (INCOTERMS XI-2020), published in the second half 2019 and entering into force on 1 January 2020, has kept face with the ever-evolving global trade landscape. Among the differences between the 2010 and the 2020 version was the dropping of DAF in favour of DUP. Furthermore, there is re-emphasis of parties’ provision of notices and information to the other for purposes of the mandatory and additional insurance (A5/B5). The insurance costs (A9(f)/B9(d)) and in relation delivery (A10/B10) are also included. Before INCOTERMS XI-2020 carriage and insurance were contained in Clauses A3(a)/B3(a) and A3(a)/B3(b) respectively. These reverted to the format of INCOTERMS V-1953 numberings with the separation of Clause A4/B4 (Carriage) from Clause A5/B5 (Insurance) respectively. Although rather repetitive in drafting, Clause A5 is extensive and more elaborate than in INCOTERMS X-2010. Apart from those cosmetic

²² However, Carropines that “it will be in the buyer’s interest to take out insurance on passage of risk” (Carr, 2014, 53).

changes, basis of insurance obligations remains largely unchanged from those of INCOTERMS X-2010.

8.2. Insurance Clauses in INCOTERMS 2020

Accordingly, INCOTERMS XI-2020 has not altered the basic terms in which sellers' insurance obligation were compulsory in INCOTERMS VIII-2000 and INCOTERMS IX-2010. The position remains that, with the exception of CIF and CIP rules, INCOTERMS place no obligation on the seller or buyer to provide insurance cover to each other in all its remaining 9 rules. However, depending upon the actual term used for each shipment, the seller or buyer bears responsibility for loss or damage to the goods at some point during transit. Prudence would, therefore, dictate that this exposure to financial loss be insured against. So, INCOTERMS position is that in two rules (CIF and CIP) the seller must provide insurance and in the remaining 9 rules the seller does not have to. However, it does not mean parties on those 9 rules should make some insurance arrangements or for those in CIF and CIP to provide more cover. That notwithstanding, they cannot provide lesser cover unless otherwise agreed. The Explanatory Note for users draws attention to the possibility of restrictive practices at destination.²³ That notwithstanding, there are still similarities and differences between INCOTERMS XI-2020 and its immediate predecessor.

8.3. Comparison of INCOTERMS 2010 and 2020

8.3.1. Main Similarities

A decade on from the last revision, INCOTERMS XI-2020 text has a very different layout and a more user-friendly style of presentation. INCOTERMS XI-2020 features many changes to the sequencing and presentation of the rules, simplified presentation and providing a welcome expansion of the explanatory notes within the INCOTERMS rather than in a separate publication as before. As indicated above, the insurance clause reverses to its original A5/B5 numbering in INCOTERMS V-1953 from Clauses A3(b)/B3(b) used between INCOTERMS II-1976 and INCOTERMS X-2010. Nevertheless, these are only cosmetic changes. There have been very few substantive changes from INCOTERMS X-2010. There are still eleven rules. They are still divided into 4 "water" rules and 7 inter-modal rules that can be used with any transport mode. No rules have been removed or added, and only one rule has been renamed from DAT to DPU. The separation

²³ INCOTERMS 2020, ICC Doc. No. 723E, Note 4 at p. 52 (CIP) and Note 8 at p. 124 (CIF).

of the English from the French texts, started in INCOTERMS X-2010, is continued.

8.3.2. Main Differences

The main differences between INCOTERMS XI-2020 and INCOTERMS X-2010 are:²⁴

The DAT rule has been renamed DPU Delivered at Place Unloaded. This name change underlines the fact that delivery can happen anywhere, and not just at a transport "terminal." As with DAT, this is the only rule that requires the seller to unload the goods at their destination. Both commentaries and guide to users are now contained in a single publication, providing a one stop shop, rather than in different publications previously. Hence the user-friendly attribute.

For the CIP, the level of freight insurance cover required (unless otherwise specified in the agreement) is Cargo Clauses (A), a higher level of cover than those specified in INCOTERMS X-2010, where the level of cover was of Cargo Clauses (C). For the CIF, there has been no change – the default level of cover remains that of Cargo Clauses (C). The reasoning at this juncture being that CIF is popular with commodities transactions, where this lower level of cover is widely accepted.

INCOTERMS XI-2020 tries to assist the seller when the FCA rule is used in conjunction with a letter of credit. Parties can agree that the buyer should instruct the carrier to issue the seller with a document such as an on-board bill of lading – something that banks often require under a letter of credit. This is clearly a "stopgap" solution to banks' insistence on asking for on-board bills of lading for containers. It also does little to mitigate the underlying risk when allowing a buyer to arrange transport. Thus, the INCOTERMS XI-2020 rules now cover the situation where either the buyer or the seller transports the goods using their own vehicles, without engaging the services of a third party.

Finally, there are more details on allocation of insurance costs generally (Clauses A9(f)/B9(d)) and those arising from security-related obligations in the CIP rule.²⁵

8.3.3. Draw-back Implications for commercial practice

Authors of the INCOTERMS XI-2020 have clearly intended to make it an effective, practice and teaching document as well as a reference work. However, the very limited changes from INCOTERMS X-2010 do not provide much incentive for its adoption, especially

²⁴ Ibid, paras 58-77, pp.12-17.

²⁵ For more detailed analysis of the differences see "Introduction to INCOTERMS Chapter IX", *INCOTERMS 2020*, ICC Doc. No. No. 723E, paras. 58-78 at para. 70, 12-17, at p.14 and pp. 60-61.

where the INCOTERMS X-2010 has been incorporated into complex trading agreements. Nevertheless, as always, trading partners remain free to adopt the INCOTERMS Revision of their choice by specifying it in their commercial contracts. That means contracts under INCOTERMS X-2010 and others before it, as far back as is contractually possible are still applicable where parties expressly so provided. On the positive side, since the changes are minimal, organisations who have already established a good INCOTERMS X-2010 practice will not need to undertake a major retraining exercise for INCOTERMS XI-2020.²⁶

8.4. Sellers' Insurance Obligations

8.4.1. CIF Seller

Clauses A5/B5 of INCOTERMS XI-2020 now represent the latest stage of the evolution and progressive developments of the insurance clause in INCOTERMS. The CIF and CIP Seller's obligations, now contained in Clause A5²⁷ for both contracts, provides that:

"Unless otherwise agreed or customary in the particular trade²⁸, the seller must obtain, at his own cost²⁹ cargo insurance complying at least with the minimum cover as provided by Clauses (C) of the Institute Cargo Clauses (LMA/IUA) or similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer.

When required by the buyer, the seller shall, subject to the buyer providing any necessary information requested by the seller, provide at the buyer's cost³⁰ any additional cover, if procurable, such as cover³¹ complying³² with the Institute War Clauses and/or Institute Strikes

²⁶ For other changes, see: Kreitman (n/a).

²⁷ INCOTERMS 2020, ICC Doc. No 723E, pp. 123–133, at p. 128 and 51–61 at 57 respectively.

²⁸ Phrase not contained in the equivalent INCOTERMS 2010 provision Article A3(b). This is significant as it implies that the insurance clause could be displaced express agreement between the parties to the contrary or customs of a particular trade such those pertaining to GAFTA, FOSFA, Energy (Oil and Gas Trade, Coal), etc.

²⁹ Note the change from "expenses" to "costs" from INCOTERMS X-2010. Whether this is significant at all, it marks a return nearly 70 years back to INCOTERMS III-1953 when that word was first appeared in the INCOTERMS Insurance Clause.

³⁰ Ibid.

³¹ Word "provided" between the word "cover" and the word "complying" from INCOTERMS X-2010 are omitted.

³² Ibid.

Clauses³³ (LMA/IUA) or any similar clauses,³⁴ (unless such cover is already included with the cargo insurance described in the preceding paragraph).³⁵

The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e., 110%) and shall be in the currency of the contract.

The insurance shall cover the goods from the point of delivery set out in A2³⁶ to at least the named place of destination

The seller must provide the buyer with the insurance policy *or certificate or any other evidence of insurance cover.*³⁷

Moreover, the seller must provide the buyer, at the buyer's request, risk and cost³⁸, with information that the buyer needs to procure any additional insurance" (emphasis provided).

Other than the highlighted texts and commentaries therein, the Insurance Clause A5 of the CIF and CIP rules of INCOTERMS XI-2020 is almost identical to

³³ The text "(A) or (B) of the Institute Cargo Clauses", are omitted.

³⁴ "And/or cover" between "similar clauses" and "complying" in INCOTERMS X-2010 are omitted.

³⁵ The text, "(complying with the Institute War Clauses and/or Institute Strikes Clauses (LMA/IUA) or any similar clauses)", from INCOTERMS 2010 has been rearranged.

³⁶ Compared to the previous "A4 and A5" in INCOTERMS X-2010.

³⁷ First time "certificate" is mentioned. This is to synchronise INCOTERMS with Article 28(a) of the UCP 600 which allows for the tender of the certificate in lieu of the policy. Furthermore, "any other" is also mentioned for the first time. This is also in line with Article 28(a) of the UCP 600 which permits tender of a certificate or "a declaration under an open cover." Furthermore, the use of the phrase 'such as' implies that the list of acceptable insurance documents is not exhaustive. However, "An insurance policy is acceptable in lieu of an insurance certificate or a declaration under an open cover" – Article 28(d).

³⁸ The word "cost" replaces "expense"; and "if any" between "cost" and "with" in INCOTERMS X 2010 is omitted. The replacement of expense with cost might not be significant as the two invoke the same meaning depending on the context. In economics, production, research, retail, and accounting, a *cost* is the value of money that has been used up to produce something or deliver a service, and hence is not available for use anymore. In business terms, the *cost* may be one of acquisition, in which case the amount of money expended to acquire it is counted as cost. To an ordinary individual, an *expense* is an expenditure is an outflow of money to another person or group to pay for an item or service, or for a category of costs. Buying food, clothing, furniture or an automobile is often referred to as an *expense*. For a tenant, rent is an expense. For students or parents, tuition is an *expense*. However, it does not make any difference to the seller who recoups the costs or expenses from the buyer as an invoice item. The significance of notice and information is dealt with below.

those of the corresponding Clauses A3(b) of the CIF and CIP rules in INCOTERMS X-2010.

8.4.2. CIP Seller

Under the CIP, the seller must now obtain an increased level of cargo insurance. It will be recalled that under INCOTERMS X-2010, a CIP seller had to purchase cargo insurance on Cargo Clauses (C) terms, which provides cover for a limited number of risks. Under INCOTERMS XI-2020, a CIP seller must purchase insurance on Cargo Clauses (A), which is the nearest to an “all risks” policy but for the exceptions.³⁹ The status of CIP seller’s insurance obligations is almost back to that of INCOTERMS V-1953 when the level of CIP terms was higher than that of the CIF. There are at least two further issues at this point. First, the seller must contract for insurance cover against the buyer’s risk of loss of or damage to the goods from the point of delivery to at least the point of destination. This may cause problems where the destination country requires insurance cover to be purchased locally (see restrictive practices, para 12. below). To avoid this dilemma, the parties may be advised to instead contract and ship CPT. Secondly, parties should also not note the unusual situation under this INCOTERMS where the seller is required to provide the more extensive cover complying with Cargo Clauses (A) rather than with more limited cover under Cargo Clauses (C). Despite that, the contract keeps the parties option to provide a less favourable insurance coverage resulting from agreement to the contrary or where trade custom provides so. This contradicts and might cause problems with tender of insurance documents under Article 28 of the UCP 600 requiring tender of exact and conforming documents.⁴⁰ Although there are no significant changes, the Rules now allow for variance of the insurance obligations by parties’ agreements and by customs of a particular trade.

8.4.3. Summary of the differences between CIF and CIP Insurance

From the foregone, despite its later development, insurance coverage in CIP is much higher than those of the older CIF. Thus, as indicated above, in INCOTERMS CIP the seller is under the obligation to take out under

³⁹ The nearest because parties have to compensate for the contractual or cargo clauses exceptions to bring it up to an all risk policy. An all-risk policy covers all physical loss or damage from any external circumstance, excluding loss or damage caused by war, riots, strikes, or civil disobedience. It generally costs about 1–2% of the declared value of the shipment.

⁴⁰ See again Note 4 (CIP) and 8 (CIF) *INCOTERMS 2020*, ICC Document, No. 723E at p. 52 and pp. 124–5 respectively.

contract transport insurance in favour of the buyer with extensive coverage, which corresponds to Clause A of the Cargo Clauses (IUA/LMA). Nevertheless, parties may agree to take out insurance which offers reduced coverage (Clause C of the Cargo Clauses) although that is unlikely.

In the CIF, on the other hand, the seller is only under the obligation to take out under contract insurance with minimum coverage, which corresponds to Clause C of the Cargo Clauses (IUA/LMA). This difference with CIP is justified on the basis that as the CIF is commonly used for bulk maritime transport (raw materials, minerals etc.) whose price per kilo is very low and the requirement of insurance with maximum coverage which would drive up considerably the policy premium, making it much more expensive, and which is detrimental to margin for negotiation of the sellers. In either event, comparable CIP to and CIF, parties may agree to take out insurance which offers broader coverage (e.g., Clause A of the Cargo Clauses) which will be compulsory, if the sales’ payment is made by means of a letter of credit.

8.4.4. Other Cosmetic [Drafting] Changes

On the minorside, as indicated above, there is more preference for use of buyers’ *costs*⁴¹ rather than *expenses*⁴² in the drafting. That notwithstanding, this view provides the rationale for the differences in cover which also tallies with comparative practitioners’ position who have opined that:

“Under INCOTERMS 2010, the seller was required to obtain the minimum coverage under Institute Cargo Clause C in both CIF and CIP contracts. In INCOTERMS 2020, the ICC has responded to feedback that in practice, these two terms often call for different levels of cover. CIF is a maritime-only term and is therefore more typically used for trading bulk cargoes for which Institute Cargo Clause C level coverage is sufficient. However, CIP is a multimodal term, often used for manufactured goods which may require a higher level of cover. It remains open to the parties to decide on the appropriate level of insurance cover for their trade; this can be provided for expressly in the contract. Parties should be aware, however, that under INCOTERMS 2020, the default position under CIP is

⁴¹ The difference is only academic; in practise costs are expenses and are both chargeable.

⁴² Ibid; either way the seller includes them in the invoice and is reimbursed for the costs or expenses when he tenders the documents for payment.

that the seller must procure the level of cover provided for in Institute Cargo Clause A.”⁴³

Exhaustive comparative analysis of the two INCOTERMS is beyond the scope of article. However, this opinion is also in line with comprehensive examination of the differences between expenses and costs in INCOTERMS X-2010⁴⁴ and INCOTERMS IX-1990⁴⁵ provisions in earlier publications.

8.5. Buyers Insurance Obligations

8.5.1. CIF Buyer

The CIF Buyers’ obligations contained in CIF Clause B5⁴⁶ provides that:

“The buyer has no obligation to the seller to make a contract of insure. However, the buyer *must* provide the seller, upon request, with any information necessary for the seller to procure any additional insurance requested by the buyer under A5.”⁴⁷

The mandatory seller’s obligation arising from the use of “must” in the provision is only upon his agreement with the buyer’s request and omits the customary accompanying text “at his risks and cost.”⁴⁸

8.5.2. CIP Buyer

The CIP buyer’s obligations under CIP Clause B5⁴⁹ are identical to those of the CIF Clause A5. Accordingly, the guideline to the parties therein are relevant. Needless to emphasize, at the risk of repetitions, that the above narratives apply only to the two rules CIF and CIP, not the remaining 9: themselves further divided into 3 unimodal (sea and inland waterways) and 6 multimodal (any modes) transports.

8.6. Parties Obligations in the remaining 9 INCOTERMS Rules

8.6.1. In Rules for any Mode or Modes of Transportation

Sellers’ insurance obligations in all the 6 rules (CPT, DAP, DDP, DPU, EXW and FCA) in this category have identical provisions under Clause A5, namely that:

⁴³ Holman Fenwick Willan LLP, (2019).

⁴⁴ Ademuni-Odeke, 2016b, 1–44; Ademuni-Odeke, 2016a, 1–34.

⁴⁵ Ademuni-Odeke, 1995, 17–25, for INCOTERMS 1990; This is a reverse of the provision in EXW, see below.

⁴⁶ INCOTERMS 2020, ICC Doc. No. 723E, 123–133, 129.

⁴⁷ Ibid; for “No Obligation” and the requirement for Notice and Information, see paragraph 9 below.

⁴⁸ See again Note 11 and the text therein.

⁴⁹ INCOTERMS 2020, ICC Doc. No. 723E, 123–133, 51.

“The *seller has no obligation* to buyer to make a contract of insure. However, the seller *must* provide the buyer at the buyer’s request, risk and cost with information in the possession of the seller that the buyer needs to obtain insurance.”⁵⁰

Consequently, the only seller’s insurance-related obligation in the category is provision of notice and/or information to enable the buyer obtain insurance. However, the seller should bear in mind the implications of ‘NO OBLIGATIONS’ caution and to take care of own sellers’ insurance interests. Buyer’s insurance obligations, (Clause B5), have to do the same. The buyer is responsible to insure from delivery (Clause A2/B2), to destination (Clause A3/B3) points, respectively. Accordingly, both parties should pay attention to issues arising from delivery and passage of risks.⁵¹

8.6.2. In Rules for Sea and Inland Waterway Transport

All the remaining 4 (FOB⁵², CFR⁵³, EXW and FAS) of the 9 rules have identical insurance obligations to those of the 6 above.

The remainder of this article examines the wider practical-related issues and external policy factors affecting the developments in INCOTERMS generally and the insurance clause in particular. This part also elaborates on “NO OBLIGATION”; what “INCOTERMS Does and Does not Do”; requirements for Notice, information for both mandatory and additional insurance; INCOTERMS’ limitations; restrictive state practices in maritime transport and marine insurance market; effects of sanctions, embargoes and force majeure on export trade; and alternative sources of cargo insurance market. These are not directly mentioned in INCOTERMS but are nevertheless significant factors that should concern anyone involved with export-import insurance. They are contained in most export trade, INCOTERMS and cargo insurance commentaries and guidelines.

⁵⁰ Ibid; Note that the mandatory nature of the obligation is based on the seller agreeing to the buyer’s request, at his (buyers) risk and costs and only to information in the seller’s possession and the level of buyer’s needs. The nature and extent of the provision has not been tested in court.

⁵¹ This is almost the reverse of the provisions of the corresponding Clause A5 in EXW and other 5 rules above.

⁵² However, at Common Law it could be different in Extended FOB or FOB with Additional Duties where the extensions include Cost and Insurance which would make it almost same as CIF-see author’s commentary on this at: Ademuni-Odeke, 2007, 425–462.

⁵³ CFR replaced the old C&F and is almost same as CIF save for Insurance.

9. CAUTIONS TO PARTIES ON INCOTERMS INSURANCE

9.1. Effects on Insurance of What INCOTERMS Does Not Cover

INCOTERMS are not as exhaustive as we are meant to believe. It is instead a codification of guidelines to exporters and importers.

First, for instance, INCOTERMS do not cover passage of property, as those are governed by national laws or the *Convention on International Sale of Goods* (CISG) or contractual customs of particular trades.

Secondly, they also do not cover sources of additional or state sponsored insurances such as: export credit insurances, war risks insurance, Cargo Clauses exceptions and the minimum insurance under Cargo Clauses. There are explanations, backgrounds and developments to this state of affairs.⁵⁴ INCOTERMS is not a creation of international Convention-i.e., not a product of intergovernmental organisation. It is instead an invention of a non-governmental organisation (the ICC) and as such does not have automatic application. Consequently, it only applies where and when parties expressly provide that it will provide the basic terms and conditions of their contract. This is despite the fact that some jurisdictions such Jordan, Iraq and others in the Arab Gulf have incorporated INCOTERMS into their commercial laws. Where they have been incorporated into domestic commercial law, their application becomes mandatory in those countries. Other than that, they remain instruments of a private commercial organisation of business- albeit being the most observed and widely applicable international commercial rule.

Thirdly, in addition to not covering passage of property, INCOTERMS do not also cover ownership and passage of risks of the goods. These terms are agreed upon separately between the two transacting parties. These items are defined by the express terms in the sales contract and by the governing law. For the UK, this is partly contained in ss.12–16 of the *Sale of Goods Act 1979* (SGA 1979)⁵⁵, as amended. They do not cover parties' liabilities for damages and for failure to perform insurance and other contractual obligations, remedies for contractual breach and conflict of laws issues. Instead they only provide guidelines as to shipment, delivery, passage of property, passage of risks and insurance.

⁵⁴ INCOTERMS 2020, ICC Document Publication No. 723E, 2020, Paris, 2–3.

⁵⁵ Provisions on Implied Terms in Sales Contracts.

Fourth, it only deals with which party should provide the goods and perform the shipment, customs clearances, licenses, insurance, etc. It does delve into the mechanics doing so or damages and other consequences for failure to perform those tasks. For insurance purposes, it is concerned only with which party bears the risks and the CIF and CIP sellers' providing insurance for the buyers' benefits, in accordance with the underlying contract, but not necessarily those conforming to INCOTERMS. Neither does it delve into the practicalities, principles of and/or sources of the cargo policy. The INCOTERMS generally and the Insurance Clause in particular are, therefore, only a of guidelines. It is only part of the wed of export trade practices that should be seen in the interface with other instruments such as the Cargo Clauses and the Commodity Trade Clauses, the banking and transport practices. For instance, in practice, the insurance documents should be tenderable under Article 28 of the UCP 600 for purposes where the CIF and CIP contract are financed by a letter of credit. Even the latest stage of the insurance clause in INCOTERMS XI-2020 has not altered those fundamentals.

Finally, the duty costs of the goods may be calculated against a specific Incoterm: for example, in India, duty is calculated against the CIF value of the goods, and in South Africa the duty is calculated against the FOB value of the goods. Because of this it is common for contracts for exports to these countries to use these INCOTERMS, even when they are not suitable for the chosen mode of transport. If this is the case, then great care must be exercised to ensure that the points at which costs and risks pass are clarified with the customer. This has a direct bearing consequence on insurance of INCOTERMS sales. For those reasons, parties are advised to consider wider implications, other than the CIF and CIP insurance clauses which might have cost bearings on their contractual as well as additional insurance requirements.

9.2. Caution on “NO OBLIGATION” to insure provisions

As demonstrated above, with the exception of the CIF and CIP, 9 of the 11 rules do not deal with sellers' insurance obligations. In those 9 rules, all INCOTERMS up to INCOTERMS XI-2020 simply provide “NO OBLIGATION” under the buyers' insurance duties. This can be misleading. Both parties should, therefore, be very careful about this provision in INCOTERMS especially in relation to insurance. Otherwise they might be left exposed or left under insured in both their mandatory, additional, and own insurance requirements. For insurance purposes, the

expression may imply, but does not mean, that the party in question should not bother about other/and or with indirect insurance requirements. All it means is that the concerned party does not owe the other a duty to contract for insurance on both their counterparts' and their own benefit. They (sellers) could even agree to provide the cover on buyers' request, risk and expenses. In that case those sellers should, however, ensure that they have adequate contingency cover to their own exposure arising from breach of contractual duties relating to delivery, property passage, passage of risks both before and during delivery to the buyer. That means even when they feel they have performed their obligations adequately; they should still also take out contingency insurance to cover any contingencies such pre- and post-shipment eventualities such premature passage of risk.

The rationale behind the drafting of INCOTERMS insurance provisions in their current form may be understood by seasoned traders acquainted with INCOTERMS and insurance, but not to novices. For those reasons, perhaps there needs to a warning to all parties, in red and capitals as is in rules governing exclusion of liabilities in contract law, to all parties along the lines that, "YOU MAY WISH TO AND / OR ARE STRONGLY ADVISED TO INSURANCE YOUR OWN RISKS AND ANY POSSIBLE BREACHES ON YOUR PART." In its place, for INCOTERMS insurance, this is explained in earlier accompanying documents to INCOTERMS:⁵⁶

"As appears from the expressions 'the seller must', and 'the buyer must' INCOTERMS are only concerned with the obligations which the parties owe to each other. The words 'no obligation' have therefore been inserted whenever one party does not owe an obligation to the other party. Thus, if for instance according to A3 of the respective term the seller has to arrange to pay for the contract of carriage we find the words 'no obligation' under the heading contract of carriage in B3 setting forth the buyer's position. Again, where neither party owes the other an obligation, the words no obligation will appear with respect to both parties, for example, with respect to insurance.

In either case, it is important to point out that even though even party may be under no obligation towards the other to perform a certain task, this does not mean that it is not in his interest to perform that task. Thus, for example, just because a CFR buyer owes his seller no duty to make a contract of insurance under B4, it is clearly in his interest to make such a contract, the seller

⁵⁶ For instance, paragraph 10 (The Expression "No Obligation") of Ramberg J, *Introduction to INCOTERMS 2000*, ICC Doc. No. 560, 5–22, at 19.

being under no such obligation to procure insurance under A4."⁵⁷

Thus, although INCOTERMS is widely used globally, it does not follow that it is equally widely and commonly understood. Introduction should, therefore, be made at this stage to a publication – INCOTERMS for Americans⁵⁸, a type of INCOTERMS explained in a region whose understanding and application of INCOTERMS differs slightly from those of the Common Law, European and other traditions. The publication explains INCOTERMS in simple terms. The other caution relates to the requirements for insurance notice and information (Clauses AB5/B5) and insurance costs (Clauses A10/B10).

The other caution relates to the requirement for notice and information in insurance (Clause A5/B5 and Clause A10/B10).

9.3. The requirement of notice and information

9.3.1. Notice and Information Relating to Insurance

One of the developments in INCOTERMS practices, generally and insurance in particular, are the twin requirements for both parties. First, except under CIF and CIP rules, to give notice to each other to enable the shipment and to provide information to enable the other to take out insurance as well as additional insurance, where applicable. This is significant as such notice was required only in FOB⁵⁹ and related contracts at common law but not in CIF and later CIP under s. 32(3) of the UK SGA 1979.⁶⁰ Secondly, this points to the fact that in practice the difference between the Free family (FOB and related contracts) and the CIF-CIP is quickly disappearing in this and other respects.

⁵⁷ Reproduced at Ramberg J, *ICC Guide to INCOTERMS 2000*, ICC Doc. No. 620, 194.

⁵⁸ Reynolds simplifies and answers questions about INCOTERMS Rules from American perspectives (Reynolds, 2020).

⁵⁹ Ademuni-Odeke, 2007, 447–449; *Wimble Sons & Co. v. Rosenberg & Sons*, [1913] 3 K.B. 743, 747–48; *Northern Steel & Hardware Co. v. John Batt & Co. (London)* [1917] 33 T.L.R. 516, 516.

⁶⁰ Section 32(3) of the UK SGA 1979, as amended, provides that: "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit; and if the seller fails to do so, the goods are at his risk during such sea transit." Case law (e.g., *Wimble v Rosenberg* and *Northern Steel v John Batt* above) has suggested that the provision applies only to FOB but not apply to CIF (and by deductions to CIP) contracts: see, also, Ademuni-Odeke, 2016b, 28–29; Ademuni-Odeke, 2007, 443–445.

As detailed immediately below, 4 particular aspects of notice require parties' attention: nature of the risks involved, sufficiency of the notice, consequences of failure to give notice and extent of the requirements.⁶¹

9.3.2. Risks, sufficiency, form of and failure to give Notice

First, is the nature of the risks involved. Information relating to insurance depends on the nature of the risks, need for additional insurance and market restrictions in the buyers' country, where applicable.

Secondly, is the sufficiency of the notice. There are no guidelines on this. The rules only state that the notice must be "sufficient. However, they should be adequate such as to enable the other party to act accordingly."

Third, as to the form, there are again no special requirements in INCOTERMS that notice be given in a particular form e.g., such as by letter, telex or telefax. Resort to the principal means of communication used in the sales contract might be a good guide as to the nature and means of the notice too. Failing that, any of the social or mass media could apply.

Fourth, the rules do not provide for consequences of giving insufficient notice or failure to provide notice at all. It can only be conjectured that such failure can lead to breach of contract giving either party the right to cancel and terminate the contract or for loss and damage arising from such failure such as in the premature passage of risks (Clause B5) below or the liability to pay additional costs.

Lastly, it is a noticeable development that the emphasis on requirement for notice is: very recent (only since INCOTERMS IX-2000); are important; and not restricted to the insurance clause. Hence their inclusion not only in the CIF-CIP Insurance Clauses (Clauses A5 / B5) but are also to be in Clauses A3/B3 (Transfer of Risks for EXW, CPT, DAP, DPU, DDP, FAS, FOB and CFR); and in Clause A10/B10 (Taking Delivery at Shipment and at Destination) in all the rules.

9.3.2. Importance of Standardization of Notice

The standardization is now contained, with the 4 conditions for the notice and information, in Clause B10 of FCA especially with reference to Clause A2 (Delivery) thereof.⁶² Although, they have no obligation to provide insurance, sellers in EXW, FCA, CPT, FAS, FOB and CFR must however provide the buyer, at buyer's request, risks and costs, with information in

⁶¹ ICC Guide to INCOTERMS 1990, ICC Doc. No. 461/90, 37.

⁶² Ibid.

their (sellers) possession that the buyer requires to take out insurance (Clause A5). Consequently, only those sellers in DAP, DDP, and DPU do not have to provide the information or give notice under Article A5. Equally, buyers in DAP, DPU, and DDP have to provide the information or give notice under Clause B5. This would now equate their position to those of CIF and CIP buyers regarding the requirement for notice and information with the exception that the latter have to also insure and provide the information both contractual and in relation to additional insurance. While buyers in EXW, FCA, CPT, FAS, FOB and CFR do not have to either insure or provide the information or give notice under Clause B5.

Buyers should also be aware of the exceptional circumstances affecting liability such as pre-mature transfer of, pre-shipment and post-shipment, risks.

9.4. Premature Transfer of Risks' Insurance

Since coverage of risks of loss or damage to goods is the primary function of insurance, parties need to pay particular attention to their passage.⁶³ Risks can pass after contracting, but before shipment, and/or delivery—so called premature transfer of risks. In that case an extension of or additional policy may be necessary. This policy extension covers scenarios where risks pass anytime, through sellers' or buyers' fault, before delivery at shipment or destination. It covers incidences where risk such as late delivery or failure to nominate vessel, passes to the buyer due to his failure to perform a contractual obligation such as contracting with the carrier and insurer or to load.⁶⁴ One remedy for this is the use of "door to door" or "warehouse to warehouse" or "held covered" policy, prevalent in CIF and CIP contracts. The other rule where such a policy may be necessary is EXW.

Risks could also pass pre-shipment: there are elements of premature transfer of risks in pre-shipment insurance.

9.5. Pre-Shipment Risks Insurance

Pre-shipment risk insurance covers the exporter's prime costs of an export transaction if production has to be stopped because an insured risk has

⁶³ Ramberg J, ICC Guide to INCOTERMS 2010, ICC Doc. No. 720E, 77.

⁶⁴ For premature transfer of risks in INCOTERMS, see Ramberg, JICC Guide to INCOTERMS 2000, ICC Doc. No. 620, 61; for a treatment of the same subject in the earlier INCOTERMS (IX-1990), see Ramberg J, ICC Guide to INCOTERMS 1990, ICC Doc. No. 461/90, 35.

occurred.⁶⁵ Similar to post-shipment, it is part of export contingency insurance (below). It covers political and foreign customer's *del credere risks*.⁶⁶ This may involve failure of pre-shipment inspection process.⁶⁷ The insured amount can also include any cash paid in response to an unjustified call of the advance payment guarantee. This eradicates the need to take out additional contract bond insurance to cover aspects where of loss or damage occurs before or between the seller's premises and shipment and/or delivery. At the other end of pre-shipment is post-shipment risks.

9.6. Post-Shipment Insurance

Post-shipment cover protects the seller against the risk of an overseas buyer failing to pay for goods received on credit. Like pre-shipment insurance, it is also part of export contingency insurance (below). The main source of post-shipment insurance are the private and public export credit agencies. It is intended to protect transactions with repayment terms not exceeding 12 months and mainly includes the supply of consumer goods, raw materials, semi-finished goods and spare parts. It can cover all post-shipment losses or damage despite passage of property to the buyer at the time. The policy covered by specific export contingency insurance or general contingency insurance. The cost of these risks may be transferable to the buyer or built into the sellers' organization. Borderline costs which might be passed to the buyer are considered below. Either way, existence of both would be undisclosed from the buyer, being part of sellers personal, non-contractual and additional insurance requirements below.

In addition to pre-mature passage of risks, pre- and post-shipment insurances, both parties need to cover their own additional insurance requirements.

10. OVERAL CONCLUDING REMARKS

This article has demonstrated that INCOTERMS too have come a long way since 1895 when the ICC

⁶⁵ Ramberg J, *ICC Guide to INCOTERMS 2000*, ICC Doc. No. 620, 61; Ramberg J, *ICC Guide to INCOTERMS 1990*, ICC Doc. No. 461/90, 35.

⁶⁶ A risk covering the probability that a buyer who purchases through a buyer or a guarantor will be unable to fulfil his payment obligations. This is occurring because the agent functions as a surety in the event that the vendee fails to make the required payments.

⁶⁷ Ramberg, J, *ICC Guide to INCOTERMS 1990*, ICC Doc. No. 461/90, 26–27; Ramberg J, *ICC Guide to INCOTERMS 2000*, ICC Doc. No. 620, 52–53.

was conceived, 1919 when it materialised, 1936 when INCOTERMS was first published and 1953 when the insurance clause first appeared. The Insurance Clause has come a long way since 1953. The article has also established that both INCOTERMS and the Insurance Clauses have been influenced and shaped by developments in the broader remits of International Trade [financial, technological, transport, etc]. Thus, for INCOTERMS, the period 1954-1979 was expended by restructuring the rules and incorporating changes from developments in transportation, communication, customs, finance, insurance and technology. However, the article was never about the details INCOTERMS themselves or details of their insurance clause (dealt with elsewhere⁶⁸), but about the overview of the progressive development of the insurance clause, now contained in Clauses A5/B5 of CIF and CIP rules, from their inception.

Thus, both INCOTERMS and the Insurance Clause have had to adapt to commercial and other global environments such as the introduction of the new Cargo Clauses and developments of containerisation and the emergence of rail, air, road and multimodal transport. Insurance clauses were either non-existent or did not feature much in the earliest INCOTERMS. Despite preliminary developments, the only 2 INCOTERMS contracts containing the seller's insurance obligations are the old CIF and the newly introduced CIP rules.

In their current form, INCOTERMS XI-2020 is intended to last until INCOTERMS XII-2030. Even the Commodity Trade [e.g. GAFTA-FOB/GAFTA-CIF] Contracts simply provide that the INCOTERMS or Commodity Trade Insurance Clause, themselves based on Cargo Clauses, shall apply. Thus, insurance clauses in CIF and CIP rules together with the cargo clauses have become the standard bearers of insurance clauses in international trade law and practice. With Cargo Clauses now also form the basis of the commodity trade terms and insurance provisions.

However, of the 11 rules, only the CIF and CIP rules expressly include sellers' insurance obligations in Clause A5 therein. The other 9 rules contain only insurance guidelines in their corresponding Clauses A5 and B5. The earliest INCOTERMS to feature insurance clauses (INCOTERMS V-1953), had no CIP. Consequently, before the introduction of the CIP rules, in INCOTERMS VIII-1980, the only INCOTERMS rule with an insurance clause was the CIF. By INCOTERMS VIII-1980, however, the old Cargo Clauses' (1946) FPA terms were replaced by the new Cargo Clauses C and its exceptions (Clauses 4-7 therein). The Cargo Clauses

⁶⁸ Ademuni-Odeke, 2007, 445–447; Ademuni-Odeke, 2016b, 26–27, and the cases discussed therein.

A, B and Care now the principal governing terms of conditions for INCOTERMS, Commodity Trade, such as GAFTA, and all other contracts.

Accordingly, the fact that only the sellers in CIF and CIP have contractual insurance obligations to the buyers does not mean the sellers in the remaining 9 rules do not have insurance responsibilities to the buyers except to themselves. Neither does it mean that, despite the NO OBLIGATION under their insurance obligations to the sellers, buyers in all the 11 rules are free of all indirect insurance obligations to both sellers and themselves. In short, all parties in all the 11 rules owe some insurance duty to themselves: for additional covers and to provide notice and information to their contractual counterparts detailed above. For those reasons INCOTERMS Insurance Clause should, therefore, be treated only as guidelines and/or starting point.

Additionally, the latest three INCOTERMS (1990, 2000 and 2020), have introduced a requirement for notices and information liaisons between the parties to deal with shipment and insurance issues. This is important because at common law only the FOB contract required the seller to provide the buyer with notice to enable him take out the policy except where he (buyer) already had or should have had the information. The rationale for this being that, except in extended or FOB with additional duties (where the extended duty includes shipment and insurance), it is the buyers' duties to take out the policy. This is in marked contrasts to both CIF and CIP rules. Hence, the requirements for notice and information did not apply in the CIF and consequently CIP. So, by gradually introducing the concept of such requirements, INCOTERMS is now trying to standardise international trade practices thereby chipping away on the historical major differences between the FOB and related contracts and the CIF/CIP and related contracts. Finally, the numbers have also remained reduced to 11 from their peak of 14 in INCOTERMS IX-1980, although without bearing on insurance clause.

Since their inception, INCOTERMS have always provided for only the minimum insurance based on the old FPA terms and now the new Cargo Clauses A-C. In the UK jurisdiction, this also coincided with the introduction of the new *Lloyds Marine Form* and the *Insurance Companies' Policy Form* replacing the old *Ships and Goods (SG) Policy* that had existed for nearly 400 years. The ICC has had to co-operate with Lloyds and the ILU during the progressive development of its insurance clause. Furthermore, particular average, war risks, and risks peculiar to the cargo or party's individual requirements have always been and remain excepted. Any higher cover has always been additional. However, neither the INCOTERMS nor the insurance clauses therein

consider the wider and practical requirements such as additional insurance, state restrictions and governmental interventions in shipping and cargo insurance for which the parties have to be very careful. Contractual parties, their insurers and lenders should normally maintain intelligence for the benefit of their clients.

As indicated in WHAT INCOTERMS DO AND DO NOT DO above, INCOTERMS similarly do not deal with wider terms of the contract such as the passage of property including the Reservations of Title Clauses and, therefore, the law applicable to the contract and related public aspects of international commercial law. They likewise avoid conflict resolutions to the contract. Yet, these factors have direct bearings on the parties' insurance obligations as liability can arise from any of the 10 non-insurance Clauses. They may be specialist contracts but parties to INCOTERMS contracts are not immune from the interface between insurance and wider aspects of international trade. However, this is because, as a private international concern wish to avoid the conflict of law and other public international issues. Apart from short-comings, there have been some positive and progressive developments of the insurance clause especially during INCOTERMS IX-2000 and INCOTERMS X-2010.

These have included the close co-operation with the market and to include contributions of the LMA and IUA, IUMI and widening of the scope of insurance documents for tender under UCP 600 for letters of credit. Thus, besides keeping abreast other international trade practices, INCOTERMS has also kept up-to-date with financial requirements. In particular it has involved synchronising with the UCP 600 to widen tenderable instruments from the "insurance policy" to "insurance documents." In so doing it has allowed the tender of alternative documents such as the certificate of insurance, declarations under open cover, and letters of insurance (but not a covernote) under Article 28 of the UCP 600. This has enabled keeping in touch with international trade practices.

And finally, are the different levels of insurance between the CIF and CIP which has been retained in INCOTERMS 2020. Noting that point, the ICC has opined that: "Under the CIF INCOTERMS rule, which is reserved for use in maritime trade and is often used in commodity trading, the Institute Cargo Clauses (C) remains the default level of coverage, giving parties the option to agree to a higher level of insurance cover. Taking into account feedback from global users, the CIP INCOTERMS rule now requires a higher level of cover, compliant with Cargo Clauses (A) or similar clauses."⁶⁹

⁶⁹ ICC, "What's new about INCOTERMS 2020?", Wednesday 29 April 2020.

That view and its rationale is also backed by practitioners thus: “As well as the reallocation of all insurance obligations from former articles A3/B3 to new articles A5/B5, the default minimum level of insurance cover required under the CIP INCOTERM has increased, from Institute Cargo Clauses (C), to Institute Cargo Clauses (A). Under INCOTERMS 2010, both CIF and CIP INCOTERMS required the seller to procure insurance cover which conformed with Institute Cargo Clauses (C) as a minimum, which covers certain limited listed risks, subject to listed exclusions. Institute Cargo Clauses (A) is by comparison an ‘all risks’ cover but subject again to listed exclusions. The amendment reflects a better understanding of the types of goods commonly transported under the two INCOTERMS: while CIF is a Maritime Rule, used predominantly for maritime commodity trades, CIP is a Multi-Modal Rule, more commonly used in the sale of high-value, manufactured goods. Sellers will therefore need to factor in the increased cost of the additional insurance premium that is required under CIP.”⁷⁰

Other developments have included additions of the requirement for notices and/or information between the parties. Starting with notices related to shipment and/or delivery of the goods, it was extended to information for insurance purposes. In relation to the CIF on the one hand and the Free INCOTERMS (FOB, FCA, FAS, etc.) the notice, information and other requirements have moved CIF nearer Common Law FOB. This should lead to further exchange of information on external factors and restrictive practices. This is one of the indicatives of progressive development of not only the insurance clause, now contained in Articles A5 and B5 of CIF, CIP and all other INCOTERMS, but also of the whole INCOTERMS family since their inception in INCOTERMS I-1936. Those developments have been more pronounced in the last 40 years since INCOTERMS VIII-1980, the period covered by this article.

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⁷⁰ Ibid; Lewis, Bryant, 2019, para 2(ii).