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## The insurance clause in INCOTERMS 2020: The latest stage in its evolution and a progressive development 1980-2020 (PART I)

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### Abstract

International Commercial Terms (Incoterms) are a set of international trade rules published by the Paris-based International Chamber of Commerce (ICC), a business-to-business non-governmental organisation. Although established over 100 years ago, Incoterms (one of its most important creations) were not introduced until 1923. However, its leading constituents Free on Board (FOB) and Cost and Insurance (CIF) had existed in British commerce since 1812 and 1895 respectively. Incoterms deal with guidelines on most aspects of international trade and has been regularly updated ever since and every 10 years from Incoterms 1980. Among the rules is a clause on the parties' obligations to insure goods against risks while in transit, which first appeared in Incoterms IV-1953. Successive Incoterms (V–VIII) modified and refined the insurance clause in accordance with developments in international trade

practices such as: migration from Free of Particular Average (FPA) term and from the older 1946 to the newer from Institute Cargo Clauses version from 1979; containerisation; and other technological advances in transport. These developments necessitated additions of more Incoterms from 6 in 1953 to 14 at the peak in 1990; stabilising to 11 from 2000. The latest is Incoterms IX–2020, which came into force on 1 January 2020. This article traces the chronological evolution and development of the insurance clause in Incoterms over a period of 4 decades: the cut-off starting period of 1980 being the time of significant changes in the clause. Although the insurance clause directly governs only two Incoterms: CIF and Cost and Insurance Paid (CIP) contracts, the article also covers: insurance implications in the other 9 Incoterms; what Incoterms does and does not do; the additional sellers and buyers' insurance interests; and global policy considerations affecting parties' export-import insurance that are not covered by Incoterms.

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### 1. INTRODUCTION

Every 10 years from 1980 the ICC updates its Incoterms. The latest is Incoterms 2020<sup>1</sup>, published on 15 September 2019, and came into force on 1 January 2020. The Rules cover most aspects of the export-import trade. Divided into obligations, for each

<sup>1</sup> ICC Publication:723E, ISBN:978-92-842-0510-3; ICC Knowledge 2Go:2go.iccwbo.org.

party, the 10 areas are: general obligations<sup>2</sup>; delivery<sup>3</sup>; transfer of risks<sup>4</sup>; carriage<sup>5</sup>; insurance<sup>6</sup>; delivery/transport documents<sup>7</sup>; export/import clearance<sup>8</sup>; checking/packaging/markings<sup>9</sup>; allocation of costs<sup>10</sup>; and notices.<sup>11</sup> Although other clauses such as those addressing transfer of risks indirectly impact on insurance, of the 11 Rules in Incoterms 2020<sup>12</sup>, only the CIF and the CIP contain obligations on the seller to provide insurance for the buyer's benefit. Even then, only minimum cover is provided, any additions being subject to buyer's requests, risks, costs and/or expenses.

Like all its 9 forerunners (Incoterms I-IX 1923-2010)<sup>13</sup>, Incoterms X-2020 provides a set of international rules, for the interpretation of the most commonly used trade terms. It divides transaction costs and responsibilities between buyer and seller, reflects state of the art transportation practices and closely corresponds to the English Common Law and the *U. N. Convention on Contracts for the International Sale of Goods (CISG)*. Again like its immediate predecessor (Incoterms IX-2010), Incoterms X-2020 deals with questions related to the delivery of the products from the seller to the buyer. This includes the carriage, export and import clearance responsibilities, who pays for what, and bears the risks for the condition of the products at different locations within the transport process. It should be noted that all contracts made under Incoterms 2010 before 2020 remain valid. Moreover, although the use of Incoterms 2020 is recommended, parties to the goods sales of contracts are free to choose any version of the Incoterms rules after before and after the 2020 versions. However, it is important to clearly specify the chosen version. Unlike a Convention, it does not have mandatory application and only binds parties following voluntary choice to use.

The identical insurance clause for both CIF and CIP Rules are contained in Article A5/B5 respectively. This insurance clause has evolved and experienced

progressive developments since Incoterms V-1953, the earliest set of the comprehensive rules. This article traces and discusses those evolutions and progressive developments in insurance clause, in the last 4 decades, and examines factors which influenced its evolution and developments. Although Incoterms have been published since 1923, the period in question chosen for analysis have had the most striking challenges in the development of international trade, principal being the development of containerisation from the 1970s which greatly affected the packaging and delivery of export/import goods thereby reducing, not just the costs but the risks of loss and damage to cargo, insurance wordings and premiums.

The said developments also coincided with the introduction of the new Institute Cargo Clauses (ICC) in 1979 as the governing export/import insurance terms and conditions. The cut-off starting period of 1980 is chosen as the situation before then was rather muddled. Although focused on the 4 decades of Incoterms insurance of Incoterms (Incoterms VII-X: 1980-2020), for complete coverage, the article also summarises developments pre (1919-1922) and post Incoterms I-VII, 1923-1976. Part I covers the period up to the end of Incoterms I-IX (1923-2010), while Part II deals with Incoterms X-2010 and Incoterms-2020. The rest of the article is divided as indicated below.

## 2. INSURANCE CLAUSES IN INCOTERMS I-VI, 1923-1976

### 2.1. Incoterms-Introduction-Pre Incoterms 1812-1922

Incoterms are a set of rules which define the responsibilities of sellers and buyers for the delivery of goods under sales contracts. They are widely used in commercial transactions. Incoterms inform sales contracts by defining respective obligations, costs, and risks involved in the delivery of goods from the seller to the buyer, but they do not themselves conclude a contract, determine the price payable, currency or credit terms, the governing contract law or define where title to goods transfers. Two Incoterms (FOB and CIF) predate ICC Incoterms. The FOB was first used in the British Courts in 1812. This was later known as the forefather of the famous transport clauses – Incoterms. In 1895, 83 years later, due to the expansion of world trade and technological developments (in banking, transport, insurance and communication) a second Incoterm CIF was born. In 1919, the European Trading Scheme (ETS) created its own terms but which had a still-birth. Without any relation to the ETS, the same

<sup>2</sup> Clause A1/B1.

<sup>3</sup> Clause A2/B2.

<sup>4</sup> Clause A3/B3.

<sup>5</sup> Clause A4/B4.

<sup>6</sup> Clause A5/B5.

<sup>7</sup> Clause A6/B6.

<sup>8</sup> Clause A7/B7.

<sup>9</sup> Clause A8/B7.

<sup>10</sup> Clause A9/B9.

<sup>11</sup> Clause A10/B10.

<sup>12</sup> ICC Document No.723E.

<sup>13</sup> These numberings of Incoterms I-XX are only for the purposes of this Article and have bearings on the official numbering which simply use, e.g. INCOTERMS 1980.

year 1919 the ICC was created and following the 1923 Draft and the 1928 researches and consultations, the first official usable Incoterms 1936 version was published. Following WWII disruptions, the next Incoterms version was 17 years later in 1953, modified in 1967 and 1976.

## 2.2. Incoterms I-III (1923-1936): first ever sounding of global commercial trade terms

The first Incoterms (Incoterms I-1923), published 4 years following the ICC's creation in 1919, had just six commonly used terms<sup>14</sup> and in just 13 countries.<sup>15</sup> It was the first commercial sounding of trade terms. It had rather rudimentary provisions and none on insurance. The second Incoterms (Incoterms II-1928) improved the clarity of the terms. It also expanded interpretation of the terms to more than 30 countries.<sup>16</sup> However, it also contained rudimentary insurance provisions. Following further studies, the first version that had near universal application and provided a more global guideline for traders was published in 1936 (Incoterms III-1936) but still with only the six Incoterms and rules.<sup>17</sup> Hence the birth of Incoterms as we know today. Hence, for the first time in commercial history, there was a global effort to standardize international trade practices. Although Incoterms III expanded insurance provisions, it, however, had no CIP Rules. There were no Incoterms revised or published for another 17 years during WWII until Incoterms IV-1953.

## 2.3. INCOTERMS IV-1953: Influence of developments in road and rail transportation

### 2.3.1 Beginnings of Concerted Insurance Clauses

Developments in rail road and transportation technology and the interruptions of WWII, suspended use of Incoterms until the 1950' (i.e.1953 to be exact). Meanwhile rail and road transportation were on the rise and so three new Incoterms were introduced for non-maritime transport: Free on Rail (FOR), Free on Truck (FOT), Delivered Costs Paid (DCP which became CIP) and Ex-Works (EXW). The new rules between them introduced land (truck and rail) risks and therefore land transport insurance. Incoterms IV-1953 also continued the first concerted start of the progressive developments of insurance provisions. The

<sup>14</sup> FAS, FOB, C&F, CIF, Ex Ship and Ex Quay.

<sup>15</sup> Not known, but most of the original OECD Member States.

<sup>16</sup> Not known, but most of the expanded OECD Member States.

<sup>17</sup> See note 15, op. ct.

CIF insurance clauses (Clause 5) was as developed<sup>18</sup> then as was one 27 years later in Incoterms VII-1980 (below) and included the provision of the policy in a transferable form.

### 2.3.2 Sellers Insurance Obligations

The CIF Seller's insurance obligations in Incoterms IV-1953<sup>19</sup> were contained in Clause 5, providing for the seller to:

“Procure, at his own cost and in a transferable form, a policy of marine insurance against the risk of carriage involved in the contract. The insurance shall be contracted with underwriters or insurance companies of good repute on FPA<sup>20</sup> terms as listed in the Appendix<sup>21</sup> and shall cover the CIF price plus ten percent. The insurance shall be provided in the currency of the contract, if procurable.<sup>22</sup>”

*Unless otherwise agreed*, the risk of carriage shall not include special risks that are covered in specific trades or against which the buyer may wish *individual protection*. Among the specific risks that should be considered and agreed upon between buyer and seller are theft, pilferage, leakage, breakage, chipping, sweat, contact with other cargoes and others *peculiar to any particular trade*. When required by the buyer, the seller shall provide, at the buyer's expense, war risk insurance

<sup>18</sup> Available at: [https://www.uncitral.org/pdf/english/texts\\_endorsed/INCOTERMS1953\\_e.pdf](https://www.uncitral.org/pdf/english/texts_endorsed/INCOTERMS1953_e.pdf), 20. 11. 2019.

<sup>19</sup> Available at: [https://www.uncitral.org/pdf/english/texts\\_endorsed/INCOTERMS1953\\_e.pdf\\_27.1.2020](https://www.uncitral.org/pdf/english/texts_endorsed/INCOTERMS1953_e.pdf_27.1.2020).

<sup>20</sup> See Note 23 below.

<sup>21</sup> The only Incoterms including an Index in its presentation. A note at p.110 provides that: “The insurance conditions listed in Part I of the Appendix have been drawn up in consultation with the International Union of Marine Insurance as giving the essential guarantees which are, in business practice, equivalent to each other. Part II of the Appendix contains, as an example the full wording of one of the insurance conditions as in Part I, namely ‘Institute Cargo Clauses (FPA)’ dated 11.2.46.” See also pp.40–45 of the ICC Brochure on Incoterms 1953.

<sup>22</sup> A note at p.110 provides that: “CIF provides for the minimum terms (FPA) and period of insurance (warehouse to warehouse), as listed in Part I of the Appendix. Attention is invited to paragraphs 4–7 of the Introduction. The basis of the ‘Incoterms 1953’, is that, in matters on which there are major differences of practice, it provides that the contract-price will include minimum liabilities to the seller whenever the buyer wishes more than the minimum liabilities to be included in then he should take care to specify that the basis is to be ‘Incoterms 1953’ with whatever addition he requires. For instance, if he requires WA insurance instead of FPA insurance, the contract may specify ‘Incoterms 1953 CF’ with WA insurance.” This is one of the many times that Incoterms has a provider that the provisions of additional insurance and/or in the currency of the contract is subject to whether it is possible to do so.

in the currency of the contract, if procurable"<sup>23</sup> (*emphasis provided*).

However, those insurance provision were rather rudimentary. Furthermore, it simply:

(a) provided for the seller's provision and tender of a *policy of marine insurance*, without any alternatives or alternative names such as cargo policy, export credit policy, etc.;

(b) requested the policy in a transferable form, which is in accordance with trade practice;

(c) covered only those risks involved in the carriage contract rather than the wider export/import and related risks;

(d) required that the policy be taken out with "underwriters of good repute" (without further clarifications), a practice borrowed from the common law;

(e) contained the old FPA<sup>24</sup> of the old Institute Clause, 1946 as the main terms and conditions;

This meant that only the General Average (GA)<sup>25</sup> but not Particular Average (PA) losses or risks peculiar to any particular trade were insurable. This meant that unless otherwise agreed the buyer had to get additional cover for the excepted risks listed therein namely: "thefts, pilferage, leakage, breakage, chipping, sweat, contact with other cargoes, and others peculiar to any particular trade";

(f) neither were individual protection insurance and/or insurance of a specific trade permissible. It follows that the list of risks not covered mirrors those in the current general exceptions of Articles 4-7 in modern Cargo Clauses A, B and C<sup>26</sup>;

<sup>23</sup> *Ibid.*

<sup>24</sup> The FPA, or "free of particular average", is a shipping and/or insurance clause which excludes from a particular average loss (partial losses) coverage to the cargo or to the hull except those resulting from stranding, sinking, burning, or collision. Under its provisions, losses below a given percentage of value, say 10 percent, are excluded.

<sup>25</sup> Articles 4-7 General Exclusions (4), Unseaworthiness Exclusion Clause (5), War Exclusion Clause (6) and Strikes Exclusion Clause (7).

<sup>26</sup> General Average is an ancient principle of equity in which all parties in a sea adventure (ship, cargo, and freight) proportionately share losses resulting from a voluntary and successful sacrifice of part of the ship or cargo to save the whole adventure from an impending peril, or extraordinary expenses necessarily. In maritime law it is a principle; of apportioning the financial liability for the loss arising from the jettisoning of cargo by dividing the costs among all those whose property (ship or cargo) was preserved by the action. Hence general average claims arising from general average sacrifice. Now covered I Article 2. General Average Clause 2 of the Institute Cargo Clauses A, B and C thus: "This insurance covers general average and salvage charges, adjusted or determined according to the contract of

(g) contained the already known common law CIF insurable value of "plus 10%";

(h) included the current requirement that the policy be in the currency of the contract;

(i) included the provision "if procurable" but without what would be the case otherwise;

(j) contained the provision of the "minimum cover", leaving other possibilities to parties' agreements; and

(k) contained the possibilities of "war risks at buyer's request and expense", novel then, but is now standard.

It is notable that the Incoterms IV-1953 insurance clause was revived with only cosmetic changes in the Incoterms VII-1980 Clause (below).

### 2.3.3. Buyer's Insurance Obligations

There were no corresponding insurance obligations for the CIF buyer save for a short mention in Clause 5 that: "If war insurance is provided, it shall be in the expense of the buyer". Also, the now common phrase "No Obligation", evident in latter Incoterms, had not yet been coined then. Thus, the buyer had to bargain for cover for the exceptions. As is apparent below, the Incoterms V-VI period of corrections and revisions left the insurance unaltered, so there was to be no review of insurance clause for another 27 years until Incoterms VIII-1980.

### 2.3.4. Incoterms V-VI 1967-1976: Corrections and Revisions

#### (a) Misinterpretations corrected

The fifth Incoterms (Incoterms V-1967) revised Incoterms IV-1953, by dealing first with misinterpretations arising from it version and adding two new trade terms: Delivered At Frontier (DAF) and Delivery Duty Paid at destination (DDP).

#### (b) Incoterms VI-1976: Revision of Incoterms V-1967

The sixth Incoterms (Incoterms VI-1976) responded to and accommodated advances in air travel by revising Incoterms V-1967. The increased use of air transportation gave cause for another version of the popular trade terms in 1974 adding the new term Free on Board Airport (FOB Airport) to allay confusion with FOB by signifying the exact "vessel" used. This type of transportation had not yet been stipulated in previous

affreightment and/or the governing law and practice, incurred to avoid or in connection with the avoidance of loss from any cause except those excluded in Clauses 4, 5, 6, and 7 or elsewhere in this insurance".

texts. FOB (Airport) was eventually amalgamated with FOT and FOR to form the Free Carrier (FCA), which introduced risk transfer between the exporter and the importer. This risk transfer occurs as soon as the carrier takes charge of the goods, as opposed to upon transport. This new concept is essential for the understanding of the new Incoterms. Thus, to avoid creating additional Incoterms to address air transportation, the three new Incoterms were adopted applicable to all modes of transportation. This was also the last Incoterms which did not follow the 10-year publication cycle beginning and ending with the decade. At the same time, the emergence of containerization within transport necessitated modification of old Incoterms. As will be apparent below, these changes were reflected in Incoterms VII-1980. Incoterms are ever-evolving. Incoterms 1980 increased the rules to 14 (maximum number ever reached), most of which lacked simplicity and were not as commonly used as they are today.

(c) Progressive Developments in Insurance Clauses in Incoterms V-VI 1967-1976

Thus, both Incoterms V-1967 and Incoterms VI-1976 added meaningful value to the progressive developments of both rules. However, the addition of FCA (from FOR and FOT) during this period did not alter the parties' insurance obligations. Accordingly, despite the above developments, Incoterms I-VI did not advance the progressive developments of the insurance clause. This was notwithstanding the fact that introduction of air cargo naturally added the risks in, and therefore, insurance of air-cargo. Notwithstanding that, it did not provide for its FOB (Airport) insurance, leaving it to the parties to sort out their own insurance problems. It will be recalled that the FOB (Airport) was introduced for air freight to avoid confusion with the FOB Incoterm. However, the basic insurance obligations remained unchanged. This is mainly because the very nature of the FOB family of contracts is that they excluded insurance obligations from the sellers' duties.

### 3. INSURANCE CLAUSES IN INCOTERMS VII-1980: THE AGE OF CONTAINERIZATION

#### 3.1. The Influence of Containerization

In 1980, due to the proliferation of freight traffic in containers<sup>27</sup>, two new Incoterms were added: FRC and FCI, which are known today as FCA and CIP respectively. Containerization had a lot of influence

<sup>27</sup> Regarded as the boom period of containerization.

on the secure packaging and the reduction of loss of damages and theft and consequently the reduction of risks and the rephrasing of insurance clauses. The insurance clause had developed to nearly what it is now. However, in the 1980s CIF and CIP insurance clauses, although almost identical, were nevertheless still treated differently as evidenced below. However, as indicated in Incoterms III-1953 and below, there was no progressive developments in the insurance provisions in the 27 years between 1953 and 1980 except for: the omission of the Appendix of FPA list; the addition of the CIP contract and, therefore; the CIP seller's insurance obligations. With the maximum number (14) terms, Incoterms VII- 1980, marked a landmark in the development of Incoterms generally and the progressive development of insurance clauses in particular as follows:

(a) by the expansion of carriage of goods in containers and new documentation processes, which led to the introduction of the trade term FCA, which in turn provided for goods not actually received by the ship's side but at a reception point on shore, such as a container yard;

(b) consequently, the Incoterms removed FOB (Airport), FOR and FOT replacing them with the general term FCA instead;

(a) due to the proliferation of freight traffic in containers, another Incoterms FCI, known today as CIP, was added;

(d) other provisions accounted for increased use of electronic messages and carriage and dedicated insurance clause numbering changes to A3(a) and A3(b) for the seller and B3(a) and B3(b) for buyer carriage and insurance respectively; and

(e) also from Incoterms 1980 onwards the revisions and publications became every 10 years.

#### 3.2. CIF and CIP Sellers' Insurance Obligations

In Clause 5, the CIF<sup>28</sup> seller had to:

“Procure, at his own cost and in a transferable form, a policy of marine insurance against the risk of carriage involved in the contract. The insurance shall be contracted with underwriters or insurance companies of good repute on FPA terms, and shall cover the CIF

<sup>28</sup> Incoterms 1980, ICC Doc 350 pp48-57 at pp.50 and 52.

price plus ten percent.<sup>29</sup> The insurance shall be provided in the currency of the contract, if procurable.<sup>30</sup>

Unless otherwise agreed, the risk of carriage shall *not include special risks* that are covered in *special trades* or against which the buyer may wish *individual protection*.

Among the special risks that should be considered and agreed between seller and buyer are theft, pilferage, leakage, breakage, chipping, sweat, contact with other cargoes and others peculiar to any particular trade.

When required by the buyer, the seller shall provide, at the buyer's expense, war risk insurance in the currency of the contract, if procurable<sup>31</sup> (*emphasis added by the author*).

This was probably not a progressive development as the need for the policy in a transferable form was first used in Incoterms IV-1953. In fact, Incoterms VII-1980 insurance clause is almost identical to Incoterms IV-1953. It also retained the reference to the old FPA and the exclusion of special carriage risks now contained in Articles 4-7 of most Institute Cargo Clauses A, B and C as are special trade risks and individual insurance protection requirements which are excluded from the minimum policy to be provided by the seller under Clauses A3(b) and B3(b) of all CIF insurance. The list of the special risks was in line with the excepted PA compared to those covered by GA. Thus, there was no progressive development of the insurance clause regarding the seller.

However, the Incoterm introduced CIP insurance obligations for the first time. The CIP<sup>32</sup> sellers' insurance duties, contained in Clause 11<sup>33</sup> instead of Clause 5 for the CIF, was more elaborated and couched slightly differently from those of the CIF seller, namely:

"Procure, at his own cost, (*and in a transferable form*), *transport insurance (a policy of marine insurance against the risk of carriage involved in the contract)*<sup>34</sup>, as agreed in the contract and upon such terms that the buyer, or any other person having insurable interest in the goods,

<sup>29</sup> This is now expressed in both words and figures thus: plus 10% or 110%.

<sup>30</sup> A note at p.50 of Incoterms 1980 (ICC Doc.No.350), (see Bibliography) provides that "CIF Article A.5 provides for the minimum FPA and period of insurance (warehouse to warehouse). Whenever the buyer wishes more than the minimum liability to be included in the contract, then he should take care to specify that the basis of the contract is to be 'Incoterms', with whatever addition he requires".

<sup>31</sup> ICC Incoterms 1980 ICC Document No.350 First published in Marych 1980 and reprinted in 1983 pp 48-57 at p.50 (Article 5).

<sup>32</sup> Incoterms 1980, ICC Doc 350, pp114-121 at 116 and 118.

<sup>33</sup> At that time they did not correspond to that of the CIF.

<sup>34</sup> Omitted in CIF above.

shall be entitled to claim directly from the insurer, and provide the buyer with the insurance policy, or other evidence of insurance cover. The insurance shall be contracted with parties (*underwriters or insurance companies*) of good repute, and failing express agreement, on such terms that are in the sellers view appropriate having regard to the custom of the trade, the nature of the goods and other circumstances affecting the risk. (*that on FPA terms, and shall cover the CIF price plus ten percent*). The insurance shall be provided in the currency of the contract, if procurable.<sup>35</sup>

Unless otherwise agreed, the risk of carriage shall not include special risks that are covered in special goods are borne by him in accordance with B2. (*emphasis added by the author*).

The insurance shall cover the price provided in the contract plus ten percent<sup>36</sup> and shall be provided in the currency of the contract, if procurable. *When required by the buyer, the seller shall provide, at the buyer's expense, war risk insurance in the currency of the contract, if procurable*<sup>37</sup> (*emphasis added by the author*).

This provision was quite exhaustive, if not revolutionary for its age. It was preferable to that of the CIF, a contract which was considered more superior to the CIP. Being CIP's first appearance as an Incoterm, this represented a progressive development of the insurance clause.<sup>38</sup>

### 3.3. CIF and CIP Buyers' Insurance Obligations

Neither the CIF nor the CIP buyer had obligation to provide insurance. This was in keeping with what became a long tradition of "No Obligation" for these two rules as well as those of the 9 rules (see "No Obligation" in Part II of this article). There were no requirements for Notice between the parties this time. However, both parties had to pay attention to their own additional insurance requirements.

### 3.4. Insurance Obligations for rules in Incoterms VII-1980.

None of the remaining (12) terms in Incoterms VII-1980 had any other parties' insurance obligations and/or clauses. Nevertheless, the both parties had to

<sup>35</sup> *Ibid.*

<sup>36</sup> Only in words, from 1990 onwards it was also expressed in figures (i.e. ren percent (110%).

<sup>37</sup> But a separate sentence in the CIP.

<sup>38</sup> See paragraph 3.5 below for further analysis.

pay particular attention to the “No Obligation” and the requirement of notices’ consequences.

### 3.5. Summary of Progressive Development in Insurance Clauses

The insurance clause had become a permanent feature of the rules by 1980 albeit still being restricted to CIF and CIP. This is important because the buyer in case of loss or damage to the goods, normally turns to the insurer. The extent of the cover for risks of loss of or damage to the goods varies under different terms of insurance. CIF and CIP insurances was based on the principle of minimum liability for the seller, who only had to procure insurance in the so-called FPA terms. This meant that the insurer is “free” and did not have to pay in case of partial (particular) loss or damage. Owing to this limitation in the insurance cover, the FPA insurer, in principle, only had to pay when the incident ‘generally’ affects ship and cargo (the “marine adventure”) such as stranding’s, collisions and fire. Sometimes the shipper was called upon to pay contributions to the sea carrier for such costs or sacrifices which may have been incurred on account of extraordinary measures to save the ship and cargo from a common danger (e.g., costs for salvage or expenses in ports of rescue), so-called general average expenditure. In this case the FPA insurer would cover his liability and deliver “general average bonds”, that may be necessary to tender to the sea carrier in order to have the cargo released.

Another drawback for the insurance clause up to and in Incoterms VII-1980 was that the FPA insurance would cover only total (other than partial) loss or damage of the insured goods. The FPA insurance was really only sufficient for rough cargoes such as iron ore or coal. Fragile or valuable goods that were particularly liable to damage or theft required more expensive insurance cover. This is usually achieved through the so called “All Risks” policy, a concept which was not popular then. The extent of the cover may vary but the policy covers in principle all risks of fortuitous loss or damage to insured cargo from the time the goods leave the sellers’ warehouse until they reach the warehouse at the agreed destination. In view of the limited protection offered by the FPA terms, it was important that the CIF and CIP buyers, when the contract was made, requested the seller to get more expensive cover whenever necessary. This is customarily also done with respect to some special risks which are excluded in the ordinary insurance policy but which could be re-introduced by

special clauses, such as war and strikes, riots and civil commotion clauses.

Finally, the insurance clause in the rules did, and still, excluded coverage for other than transport risks of the goods. Thus, although the war and other exceptions could now be covered by agreement between the parties, the wider commercial and political risks of the import-export trade nonetheless remain outside the scope of Incoterms.

## 4. INCOTERMS VIII-1990. A COMPLETE REVISION

### 4.1. The Influence of a Complete Revision

In 1990 there was a complete revamp of Incoterms to adapt to inter-modal transportation. Changes were made to accommodate the increasing use of Electronic Data Interchange (EDI). Incoterms VIII-1990 also further simplified the FCA term by deleting rules for specific modes of transport (e.g. FOR; FOT; FOB (Airport) and multimodal). It reduced the number of terms from 14 to 11 where it has remained ever-since. Also from Incoterms VIII-1990 all obligations related to a given rule were grouped under 10 headings, with the obligations for the seller and buyer under each heading stated and mirrored with respect to the same subject matter. Shipping and insurance obligations were contained in A3(a) and A3(b) for the seller and B3(a) and B3(b) Clauses for the buyer respectively. Finally, the 10-year revision cycle revision and publication was continued.

### 4.2. Progressive Developments in Insurance Clauses

Incoterm VIII-1990 first, retained the restriction of insurance to only the CIF and CIP Rules. Secondly, the key development in insurance clause were two two-fold: the consolidation of the minimum cover principle and the realisation of the inadequacy of the “minimum cover” for manufactured goods as outlined below.

#### 4.2.1 *The Minimum Cover Principle in CIF and CIP*

The obligation of the seller to obtain and pay for the cargo insurance under CIF and CIP A3(b) was based on the principle of the “minimum cover” as set out in the Institute Cargo Clauses drafted by the Institute of London Underwriters. But such minimum cover could also follow any other similar set of clauses. In practice, however, so called “All-Risks” insurance (Institute

Clause A)<sup>39</sup> is preferred to less extended cover (Institute Clauses B and C) since the minimum cover is only appropriate when the risk of loss of or damage to goods in transit is more or less confined to casualties affecting both the means of conveyance and the cargo, such as those resulting from collisions, strandings and fire. In such cases, the minimum would not protect the buyer against the risk of having to pay compensation to a shipowner for his expenses in salvaging the ship and cargo, according to the rules relating to general average (the York Antwerp Rules 1974).<sup>40</sup> Furthermore, the minimum cover is not suitable for all consignments.

#### 4.2.2 Unsuitability of the minimum cover for manufactured goods

However, the minimum cover is not suitable for manufactured goods (particularly not for goods of high value) because of the risk of theft, pilferage or improper handling or custody of the goods. Therefore, extended insurance cover is usually taken out as a protection against such risks (Institute Clause A is then advisable). A buyer of manufactured goods should stipulate in the contract of sale that the insurance according to the CIF or CIP should be extended as indicated. If he does not, the seller can fulfil his insurance obligations by providing only minimum cover (Institute Clause C). The buyer may also wish to provide additional cover (see below) not included in Institute Clause A, e.g., insurance against war, riots, civil commotion, strikes or other labour disturbances. This would normally be done by specific instructions to the seller.

The question whether it is correct to follow the principle on minimum insurance cover has been much debated. One proposal during the drafting of Incoterms VII-1980 and its revision by Incoterms VIII-1990 was to take the extended cover (Institute Clauses A) as a “point of departure”. The contracting parties, it was said, could then deduct from this extent of the cover when the contract of sale concerned rough cargoes only exposed to major casualties. After such discussion, this was discarded. Moreover, the option of allowing the seller's insurance obligation to differ according to the

nature of the goods and intended transport was not chosen because of the uncertainty which would arise about the seller's insurance obligation. But the fact remains that the principle of the minimum insurance cover can be a serious trap for the unwary buyer.

#### 4.3. CIF and CIP Seller's Insurance Obligations

For the CIF<sup>41</sup> seller, Article A3(b) provided that:

“Obtain at his own expense *cargo insurance* as agreed in the contract, that the buyer, or any other person having an insurable interest in the goods shall be entitled to claim directly from the insurer and provide the buyer with the *insurance policy or other evidence of cover*.”

The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with the minimum cover of the Institute Cargo Clauses (Institute of London Underwriters)<sup>42</sup> or any similar set of clauses.<sup>43</sup> The duration of the insurance cover shall be in accordance with B.5 and B.4. When required by the buyer, the seller shall provide, at the buyer's expense war, strikes, and civil commotion risk insurances if procurable. The minimum insurance shall cover the price provided in the contract plus ten percent (i.e. 110%)<sup>44</sup> and shall be in the currency of the contract” (*emphasis added by the author*).

The only difference between the CFR and CIF term is that the former required the seller to also obtain and pay for cargo insurance—a changed language from a marine insurance policy. Own expense is no problem as the seller claims that through his invoice. The only significance is that he could not ask for money upfront. Thus, the language changes here from marine insurance to a cargo insurance policy; although one is a subset of the other, the latter represents modern practice. This is particularly important for the buyer, since under CIF the risk for loss of or damage to the goods will pass from the seller to the buyer when the goods pass the ship's rail at the port of shipment.<sup>45</sup> In addition, it is vital for the buyer to be given the right to claim against

<sup>39</sup> An all risk policy covers all risks including. Consequently Institute Cargo Clauses A is actually not an all risks policy—albeit being the best of the lot—it has exclusions in Articles 3–7 have to be added for an additional premium to make it one.

<sup>40</sup> The York Antwerp Rules are a set of maritime rules that were established in 1890, Amended several times since, the latest revision being the 2016 Rules, their inception, this set of maritime rules outlines the rights and obligations of both ship and cargo owners in the case that cargo must be jettisoned in order to save a ship. Detailed discussions of the rules are beyond the scope of this article.

<sup>41</sup> Incoterms 1990 ICC Doc.460 at pp.50–57 at p.50 and 52.

<sup>42</sup> This is the first time both the New Institute Cargo Clauses and their source (the Institute of London Underwriters) are mentioned.

<sup>43</sup> Equivalent and comparable clauses from other jurisdictions such as the US, Scandinavia, Japan, China, etc. will be acceptable for tender.

<sup>44</sup> This is the first time that the sum is expressed in both words and figures.

<sup>45</sup> CF Clause A5 under Cost and Freight(CFR), a rule similar to CIF and CIP save for insurance.



the insurer independently of the seller (a Common Law principle). For this purpose, it may be necessary to provide the buyer with the insurance policy under which the insurer makes his undertaking directly to the buyer.

It is important to note that the seller needed to provide only the so called “minimum cover”. As discussed above, such limited cover is only suitable for bulk cargoes, which normally do not suffer loss or damage in transit unless something happens to the ship as well as the cargo (standings, collisions, fire, etc.) The buyer and seller are, therefore, advised to agree that the seller should provide a more suitable insurance cover. The buyer should then specify the extended cover he prefers. The insurance cover according to the so-called Institute Cargo Clauses was then available in categories A, B and C. The C category provides the less minimum cover, and the cover is extended progressively in categories B and A. The addition of “*other evidence of the cover*” to the insurance policy<sup>46</sup> also reflects modern practice by accommodating tendering other documents under Article 28 of the UCP 600 appropriately titles *Insurance Documents and Coverage*, which permits tender of a certificate of insurance or declaration under an open policy (but not the cover-note) in credit-financed contracts.

However, even the most extended cover in A does not provide for what is misleadingly called “all risk insurance”. Furthermore, there are other important exceptions which even category A does not cover, e.g., cases where the loss have been caused by insolvency or fraud, or when financial loss has been incurred by delay in delivery. Besides some particular risks require additional insurance cover, and if the buyer requests it, the seller must arrange this additional cover at the buyer’s expense- e.g., insurance against the risk of war, strikes, riots and civil commotion-if this cover can possibly be arranged (if procurable). Just as “own expense”, the inclusion of “at the buyers’ expense” superfluous save that in this case the buyer needs to make the request and may be request to pay upfront. That esoteric distinction, notwithstanding, in practice the final difference was the same that the seller paid upfront and got reimbursed through tender of the invoice together with the policy, bill of lading and all accompanying customary shipping and contractual documents.

That the amount of cover should correspond to the price provided in the contract plus ten percent was already traditional. The additional 10 percent was intended to cover the average profit which buyers of goods expect to make from the sales. It was also projected to compensate for the fact that the CIF (but

not the CIP) is a fixed rigged contract, where the seller is compensated for his contractual inability to pass on subsequent additional costs to the buyer. Furthermore, that the insurance should be provided in the same currency as stipulated in the contract for the price of the goods, was also already an existing practice. This is presumably to avoid conflict of laws. Consequently, if the price of the goods is to be paid in convertible currency, the seller may not provide insurance in other than convertible currency.

The duration of the insurance cover must coincide with the carriage and must protect the buyer from the moment he has to bear the risk of loss or damage to the goods (i.e., from the moment the goods pass the ship’s rail at the port of shipment. This is the same for the FOB and most other export shipment contracts. It must extend to until the goods arrive at the agreed port of destination or where applicable “door to door”.

Otherwise the CIP<sup>46</sup> seller’s insurance obligations were identical to those of the CIF seller.

#### 4.4. CIF and CIP Buyer’s Insurance Obligations

Under Clause B3(b) both the CIF and CIP buyer had no insurance obligations to the seller. However, it is vital for the buyer to understand that the seller only has to take out the minimum insurance cover. This cover, in most cases, is insufficient when manufactured goods are involved. In the contract of sale, therefore, the buyer should require the seller to take out additional cover usually according to the Institute Clause A or a corresponding cover. If, however, the contract does not deal with the matter at all, the seller’s obligation is limited as stipulated in A3(b), and the buyer has to arrange and pay for any additional insurance cover required. In most cases, however, the seller will know how to arrange insurance from the contract of sale (from the invoice value of the goods, their destination, etc.). But if this is not the case, the buyer has to provide the seller, upon the latter’s request, with any additional necessary information. And, of-course, the buyer has to take care of any other buyer’s interest insurance and other considerations as indicated below.

#### 4.5. Parties’ Insurance Obligations in Other Incoterms VIII-1990 Rules

Since the goods are made available to the buyer either at the seller’s premises or other points, the sellers had no obligation to procure carriage and insurance in the rest of the 11 (other than the CIF and CIP) of the 14 terms in Incoterms VIII-1990. Thus, the prudent buyer

<sup>46</sup> Incoterms 1990, ICC Doc. 460 at pp.652-67 at p.62 and 64.

was on notice regarding “No Obligation” provision, “Notices” requirement, and need for additional insurance not stipulated in the rules; which applies to the seller as well.

## 5. INCOTERMS IX-2000: AMENDED CUSTOMS CLEARANCE OBLIGATIONS

### 5.1. The Influence of Amended Customs Clearances

In 2000, Incoterm formats were further simplified for clarity and to better distribute responsibilities for customs clearance. Certain customs and clearance and in exporter and importer of records requirements in parts of FAS and DEQ led to the amendments of the two terms.

### 5.2. Progressive Development in Insurance Clauses

These were the same as for Incoterms VIII-1990 above. Thus, there were no meaningful further progressive development in insurance clauses in the decade between 1990 and 2000. Other details are below.

#### 5.2.1. CIF and CIP Sellers' Insurance Obligations

The CIF Seller's obligations<sup>47</sup> as contained in Article A3(b) for both contracts provides that:

“The seller must obtain, at his own expense cargo insurance as agreed in the contract, such that the byer, or any other person having an insurable interest in the goods, shall be entitled to claim directly from the insurer and provide the buyer with the insurance policy or other evidence of insurance cover.<sup>48</sup>

The insurance shall be contracted with underwriters or an insurance company of good repute and, failing express agreement to the contrary, be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses. The duration of the insurance cover shall be in accordance with B5 and B4. When required by the buyer, the seller shall provide at the buyer's expense war, strikes, riots and civil commotion insurance if procurable. The minimum insurance shall cover the price provided in the contract plus ten percent

<sup>47</sup> Incoterms 2000 ICC Doc. No 560 pp.65–71 at p.66.

<sup>48</sup> This was to comply with Article 34 of the UCP 500 which allowed for tender of the certificate of insurance, in lieu of the policy, as a matter of practice.

(i.e.110%) and shall be provided in the currency of the contract”.

These duties too were identical to those of Incoterms VIII-1990; thus, there were no progressive developments in the CIF insurance clauses during the decade 1990-2000.

The CIP Seller's obligations also were identical to those of the CIF. However, although there were no significant changes, the rules allowed for variance of the insurance obligations by parties' agreements and by customs of a particular trade. On the minor side, there was more preference for use of buyers' costs rather than expenses in the drafting.

#### 5.2.2. CIF and CIP Buyers' Insurance Obligations

The CIF buyers' obligation, contained in Clause B3(b)<sup>49</sup>, provided that he had “No obligation”. The CIP buyer's obligation was identical. Hence, sellers and buyers then and now should be aware of the “No Obligation” expression below including the need to give notices to each in Clauses A7/B7 and to take care of own insurance requirements.

#### 5.2.3. Insurance Obligations in Other Incoterms

None of the remaining 11 Rules in Incoterms IX-2000 provided for insurance. However, parties then and now should pay attention to the “No Obligation” provision as indicated below. Secondly, they should also pay attention to the provision of Clauses A7/B7 respectively regarding the requirement of notice to each other, failure of which might incur liability.

## 6. SUB-CONCLUDING REMARKS

As of 2000 (period covered by Part I of this article), both the Incoterms rules generally and the insurance clause therein in particular had sufficiently developed. The period between Incoterms IV-1953 and Incoterms IX-2000 had witnessed tremendous changes in transport technology (emergence of air transport and, therefore changes to air-cargo and air-cargo insurance), further developments in rail and road transport, the introduction of containerisation and great leap-forward in facilitation of international trade. So from emergence of Incoterms in 1923, the 1928 refinement and the 1936 publication of the first usable version with only 6 Incoterms in 13, the rules had no insurance clauses. After WWII Incoterms IV-1953 witnessed

<sup>49</sup> Incoterms 2000 ICC Doc No 560 pp.65–71 at p.67.

the first insurance clauses. No significant changes occurred in Incoterms V-VI 1967-1976, save for further refinement and consolidations of the non-insurance clauses. Surprisingly containerisation of cargo (1960-1980) had little effect on CIF insurance clauses save for the more elaborate CIP clauses and accommodation of the new Institute Cargo Clauses from 1979 which remove the FPA term. Incoterms 1990 saw complete revision of the rules and the consolidation of the minimum cover requirements of the insurance clauses, and the first appearance as a player in the scene of the *Institute of London Underwriters*. Incoterms IX-2000 did not progress the general rules themselves that much. However, with regard to insurance clauses, it introduced and formalised the requirement of notice between the parties to facilitate the obtaining of, including additional, insurance; and the concept of “No [insurance] Obligations”, among other things.

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