

XXX ADEMUNI-ODEKE, PhD*

Insurance of CIF and related contracts under INCOTERMS, Anglo-American and other common law jurisdictions (PART II)

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5.5 CIF policy should cover only the goods sold

Further requirements are that the CIF policy should cover only goods sold, the beneficiary should be named clearly and tender must include the insurance policy or other acceptable alternative insurance document. An omission in tendering the required documents constitutes breach. An authority for the above principles is *Hickox and Another v Adams*, where the plaintiffs New York sellers contracted to sell and deliver 1,000 quarters of wheat to defendants Bristol buyers on CIF terms. However, by mistake the plaintiffs shipped a cargo of 2,000 quarters of wheat to a buyer's agent at Bristol. They also forwarded to the agent by steamer a bill of lading and policy of insurance for the whole cargo shipped. The policy was "free from particular average". The agent at the request of the plaintiffs (sellers) accepted a bill of exchange without the bill of lading and policy drawn by the seller upon him in their favour for the price of 2,000 quarters. The defendants (buyers) afterwards refused to accept the 1,000 quarters from the agent.

* LLM (Dar); LLM, PhD (Southampton); formally Visiting Scholar, Institute of Maritime Law, Southampton University Law School and Visiting Professor, Admiralty Law Institute, Tulane University Law School. The author is indebted to the US-UK Fulbright Commission and Lloyd's of London Insurance for the generous funding of a Fellowship that supported the wider research on the *Extent of Insurance of International Trade and Foreign Investment*; Professors Martin Davies (Director) and Robert Force (Emeritus Director), Admiralty Law Institute, Tulane University Law School, for hosting during research; Professor James Duggan, Director, Library Services, Tulane Law School Library, and his staff for their help; Megan Gold and Debo Awofeso, his Research Assistants at Tulane and Southampton respectively; and the Director and Staff, Institute of Maritime Law, Southampton University Law School for hosting during preparation. However, the author bears all responsibilities for any shortcomings in and views expressed in the article, e-mail: ademuni_odeke1@yahoo.co.uk.

In an action against defendants for breach of a contract in rejecting the whole 2,000 quarters the court held that the plaintiffs were not "ready and willing" to deliver the 1,000 quarters to defendants within the terms of their contract. The Lord Chancellor, Lord Justice Mellish¹, thought that overall the English firm was not bound to accept the bill of lading for the goods without the policy of insurance. On the other hand, the buyers could have elected to accept the whole cargo and paid pro rata if they so wished but were not obliged to and instead chose to enforce the technical breach. It is noteworthy that the issue of estoppel against the buyers' agents for accepting the bill of exchange was not raised against the buyers as principals. It is doubtful whether such estoppel would have been enforced against the buyers. That notwithstanding the Lord Chancellor's decision was correct; the sellers did not tender the contract goods. There is a whole difference between 2,000 delivered and 1,000 quarters ordered. It is due to mistakes like this wrong shipment and for the avoidance of possible frauds that this strict CIF rule of tendering the exact and complying contractual documents exists.² *Hickox and Adams* were followed, on this

¹ General Contract No. 1 for shipment of feeding stuffs in bags tale quale – CIF/CIFFO/C&F/C&FFO Terms, effective 1st March 2016, The Grain and Feed Trade Association, London, at 407.

² Ohio State 2006 version that: "Insurance, 'for the account of whom it may concern,' is usual and sufficient. However, for a valid tender the policy of insurance must be one, which can be disposed of together with the bill of lading and so must be 'sufficiently shown to cover the same goods covered by the bill of lading.'" It must cover separately the quantity of goods called for by the buyer's contract and not merely insure his goods as part of a larger quantity in which others are interested, a case provided for in American mercantile practice by the use of negotiable certificates of insurance which are expressly authorized by this section", is preferable. http://law.justia.com/codes/ohio/2006/orc/jd_130233-53fb.html, paragraph 9.

point, by Justice McCardie³ in *Manbre Saccharine Co Cord Products Co.*⁴

That, notwithstanding, from what point should the CIF insurable value be covered? The question is answered below.

5.6. CIF policy should cover value at shipment

The CIF insurance policy should cover not only the goods sold but should also cover the contract value at shipment; although the destination value might vary depending on a number of factors including market forces. *Tamvaco v Lucas*⁵ is the authority for that proposition. In this case, also involving agents, the defendants had become responsible, as *Del Credere* agents⁶, for the purchase of a cargo of wheat of from 1,800 to 2,000 quarters, to be shipped at the price of 50s per quarter FOB at Taganrog, and including freight and insurance to any safe port in the UK. Payment cash in London in exchange for shipping documents. The plaintiffs tendered a charter party, a bill of lading and provisional invoice, in both of which the cargo was stated to be 1,850 quarters, at 50s per quarter, totalling £4,626, less freight, at 10s 9d per quarter, totalling £1,001 10s and a policy of insurance effected on the cargo valued at £3,600. Evidence was given for the plaintiffs, which was not contradicted, that the policy tendered was sufficient to protect the interest of the shipper of the cargo at the time of shipment.

In an action against defendants for not paying or procuring from their principal payment of the price of the cargo, the defendants counter-pleaded that the plaintiffs were not “ready and willing” (statement echoing *Hickox and Adams* above) to tender, nor did they tender, ‘the usual shipping documents’ according to the contract. It was held that whether the plaintiffs had so tendered was a question for the jury; it was not a question of law but of fact for the jury, whether, in all the circumstances, the policy was a sufficient shipping document within the meaning of the contract. However, these were *obiter dictum* observations as the court had already decided that the insurance, whether CIF or FOB, should cover value at shipment although that value may subsequently change. That notwithstanding, this requirement is not unique to CIF and applies to all international business transactions and shipment contracts. Nevertheless, the case remains common law authority for value at shipment, although not for

³ *Ibid*, at 202-204.

⁴ [1919] 1KB 198.

⁵ (1862) 31 LJQB 296.

⁶ *Del Credere* Agents are agents who undertake or warrant additional risks and are important players in international trade law; see Chuah, 2012, para. 2-013 at p.32.

value at delivery, as the latter might have appreciated or depreciated according to market fluctuations.

Both current versions of Incoterms 2010 and UCP 600 are silent on CIF value at delivery. However, unlike earlier versions, both Incoterms 2010⁷ and the UCP 600⁸ are now explicit, and in line with common law, on value at shipment. The 110% coverage of the value of the goods in Article A3 (b) of both CIF and CIP Incoterms 2010 is now the minimum allowable. However, Article 20(c)⁹ of GAFTA contains more detailed and helpful guideline for value at shipment than Incoterms and the UCP 600.

That, notwithstanding, is the CIF buyer entitled to notice from the buyer to enable him to take out insurance, albeit additional, same way as the FOB buyer?

5.7. Whether CIF buyer is entitled to notice to enable insurance additional and “unusual risks”

It is established that, unless otherwise provided, CIF seller is responsible for insurance. On the other hand, an FOB buyer is not only responsible for insurance¹⁰ but is also entitled to notice from the seller to enable him/her effect the insurance.¹¹ However, the CIF buyer appears not entitled to such communication, except for ‘unusual risks’. At both case and statutory common law levels, the issue whether a CIF buyer is also entitled to notice in order to obtain insurance came up in the famous case of *Law and Bonar v British American Tobacco*¹², detailed facts of which are omitted. At statutory level, it was, held by Justice Rowlett¹³ first; that s 32(3) of SOGA 1893¹⁴, which required notice to the buyer, does not apply to a contract on CIF terms entered into “in time

⁷ Incoterms, Article A3 (b), the additional 10% represents reasonable profit for the seller. Some trades such as GAFTA can go up to 120%.

⁸ UCP 600, Article 28(f) (ii).

⁹ “20 (c) Insurable Value – Insured amount to be for not less than 2% over the invoice amount, including freight when freight is payable on shipment or due in any event, ship and/or cargo lost or not lost, and including the amount of any War Risk premium payable by Buyers”.

¹⁰ See, *Wimble v Rosenberg* [1913] 1KB 279 affirmed [1913] 3 KB 743 CA and *Northern Steel v John Blatt* 33 TLR 516 CA (1917).

¹¹ *Ibid*; see also generally: Ademuni-Odeke, 2007; Article A3(b) of CIF and CIP Incoterms 2010; Ramberg, 2011; De Battisat, 1995, chapter 5 p. 86.

¹² [1916] 2 KB 605, approved in *The Julia* Case.

¹³ *Ibid*, at 608 and 609.

¹⁴ (Cap 71), now replaced by the SOGA 1979 (cap 54) although the relevant section has not changed. See case of *Wimble Sons & Co v Rosenberg & Sons* [1913] 3KB 743, at 747-48 and *Northern Steel & Hardware Co v John Batt & Co (London)*

of peace”, inasmuch as the contract itself provides for all the insurance that is contemplated or usual at the time when it is made¹⁵; and, secondly, that s. 32(3) of SOGA 1893¹⁶, requiring the seller to notify the buyer, did not impose any new obligation on the seller to give notice to the buyer so as to enable the buyer to insure against war risks if, after the date of the contract, “war became imminent”.¹⁷ It follows that, outside statutory common law, only “unusual risks” entitles the CIF buyer to notice while under statutory common law the buyer is not entitled to notice for policies taken out in “peace time”. It follows that outside the ‘unusual risks’ and ‘imminent war’ caveats, the CIF buyer is not entitled to such notice. However, and in combining the two, it appears that when “war becomes imminent” displaces “unusual risks”. So if imminent war does not constitute an unusual insurance risk then what does?

SOGA 1893 was replaced by the SOGA 1979, itself amended several times by subsequent legislation¹⁸, although the requirement for notice is not affected. However, the common law position may be different from either practice or Incoterms¹⁹, where under certain circumstances it may be helpful for the seller to provide notice especially with regard to “unusual risks”, in the former. This reinforces the qualification in Article A3 (b) of the CIF Incoterms 2010 that “Moreover; the seller must provide the buyer, at the buyer’s request, risk and expense (if any), with information that the buyer needs to procure any additional insurance”. Read together with Article A7 (notice to the buyer) and Article B7 (notice to the seller), this brings this requirement nearer that of both case common law and statutory common law above. One can also see the probable convergence of CIF Incoterms 2010 to the FOB sellers’ duty to give notice pursuant the leading authorities of *Wimble v Rosenberg* and *Northern Steel v John Blatt*. Thus, the CIF buyer is entitled to notice at common law for unusual risks but not in time of peace. He is also entitled to the notice under Incoterms 2010 with the exception that, unlike for the FOB common law buyer, it is at his request, risk and expense.

[1917]33TLR 516 at 516 discussed in: Ademuni-Odeke, 2007, 448-449; see also Part I of this paper pp (to be inserted).

¹⁵ See also paragraphs 3.1 and 3.2 of Part I of this paper.

¹⁶ Now retained as same section in the SOGA 1979 that repealed and replaced the SOGA, 1893.

¹⁷ However as to notice of shipment for additional insurance of CIF contracts see: (Lorenzo, 2012, 190-191).

¹⁸ Such as the *Supply of Goods and Services Act 1982*(cap 29), *Carriage of Goods by Sea Act 1992* (cap 50), *Sale and Supply of Goods Act 1994*(cap 35) and the *Sale of Goods Amendment Act 1995* (cap 28).

¹⁹ See Articles A3 (b) and B3 (b) of CIF Incoterms 2010, compared to the common law position as discussed herein.

That aside, when does the CIF policy starts and terminate?

5.8. Duration of the CIF policy

The answer to the above question is that, unless otherwise provided, the CIF policy should cover whole transit. This was the subject of *Lindon Tricotage fabrik v White & Meacham*²⁰ decision. In this case, the plaintiffs delivered a consignment of pullovers to the defendants’ London office under a CIF contract. The invoice and correspondence specified “CIF customer’s warehouse London”. However, the goods were stolen before they could be transferred to the defendants’ warehouse in Ealing, West London. The plaintiffs claimed the contract price. Lord Denning²¹, approving Justice Peck’s ruling at the Appeal Court, disagreed with the plaintiffs, holding that the plaintiffs could not succeed. The court’s reasoning was that, unless otherwise provided, under a CIF contract the seller was bound to tender an insurance policy covering the goods from the seller’s warehouse or business premises to the through to the buyer’s warehouse (i.e. “warehouse to warehouse”). Therefore, since the plaintiffs had not pleaded a CIF contract but had relied on it as an alternative in the county court, the onus was on them to prove such tender, and this they had failed to do. Here, transit had not started. Once again, this requirement is not unique to CIF but applies to all international business transactions and shipment contracts.²² For those reasons all modern international sales’ policies, and in accordance with the Institute Cargo Clauses, now include transit clauses issued *warehouse to warehouse* or *door to door* to cure this problem. This is now in line with CIF Incoterms 2010 Article A3 (b) (from delivery point), Article A4 (to destination port) and Article A5 (transfer of risks). Under UCC too, insurance secured in compliance with a C.I.F. term must cover the entire transportation of the goods to the named destination. However, delivery from delivery point and delivery to port of destination is not delivery *warehouse to warehouse*. In that case, the seller may arrange for warehouse to warehouse and/or “held covered” extension or other extension clauses to the policy under sellers’ interest insurance.²³ Under ‘held covered’ clauses, the underwriter agrees to the

²⁰ [1975] 1 Lloyds Rep 384 CA sub norm *Lindon tricotage fabrik v White & Meacham* (1974) 118 Sol Jo 752; applied *Manbre Sachran Co v Corn Products* [1919] 1KB 798.

²¹ At p. 386 col.1; Lord Justices Orr and Brown concurring.

²² Where such policies must cover the whole transit on “warehouse to warehouse” or contain a “transit clause” – see for instance: (Lorenzo, 2012,192-194).

²³ See also paragraph 8.4 below.

insured goods continue to be insured on payment of an additional premium in circumstances where the seller or buyer is for instance guilty of a breach of warranty or the carrier has changed the voyage or the delivery point of delivery of the goods. Incoterms is only guidelines and therefore not conclusive.

That leads to the issue of the validity of the policy, including that of tender of foreign policies, at both ends of the CIF contract

5.9. Validity of domestic and foreign CIF policy

The CIF policy should be valid at place of shipment although there are no implications it should be at destination. Thus, the policy should not only cover goods for the whole transit (above) but should also be valid at place of shipment. This was the subject of the seminal CIF authority of *Malmberg v HJ Evans & Co*²⁴ in which Scrutton LJ, confirmed the issues that the policy must not only specify clearly the protection available to the buyer²⁵, but also further that the policy should be valid at place of shipment.²⁶ It having been admitted that in the absence of some evidence of course of business or waiver of estoppels, the only remaining issue in *Malmberg*²⁷ was whether the policy of insurance tendered by the seller was not a good tender under a CIF contract. The court found that there was no evidence of course of business between the parties, or waiver or *estoppel* on the part of defendants, which would otherwise entitle them to set up the defence that the document in question was not a compliance with the terms of the written contract. This is important in view of differences in international practice.

What *Malmberg*, or any other decision before and after it, does not answer, however, is whether it is a sufficient compliance with an English CIF contract if the seller tenders a policy, which is valid in the country in which the seller is carrying on business and on which the seller ships the goods. There is nothing to suggest that foreign policy may not be valid tender in the England and the UK. *Malmberg and Promos SA v European Grain & Shipping Ltd*²⁸, where Justice Parker considered the tender of the cover note,²⁹ support the proposition that a foreign policy may be valid tender

²⁴ (1924) 41 TLR 38.

²⁵ Affirming Bailhache J (1924) 29 Com Cas 235.

²⁶ *Ibid*, at 112.

²⁷ *Ibid*.

²⁸ [1979] 1 Lloyd's Rep 375.

²⁹ *Ibid*, at p.383; Although English law only applies to England and Wales, however, the MIA 1906, SOGA 1979 and related, "federal legislations", apply with minor modifications to Scotland and Northern Ireland.

in England and the UK. Both English common law and international practice now being standard, the reverse is probably also true. Incoterms too leaves the possibility open. Article A3(b) refers to the Institute Cargo Clauses (C) as the minimum or "any similar clauses" which would suggest leaving the possibility of tendering in England foreign policies with equivalent cover. As for American law, there is no provision for tendering of foreign policies under UCC. Otherwise, *Malmberg* was considered on that point by Lord Caldecote in *Finaska Cellulosa foreningen v Westfield Paper Co*.³⁰

That in turn raises the preliminary issue of the status of the policy of what constitutes a valid and / or invalid CIF policy within MIA1906. For instance, is valid tender under English law synonymous with tender under MIA1906?

5.10. Status of "Invalid policy" CIF under MIA 1906³¹

5.10.1. What amounts to an "Invalid" CIF policy?

In *Diamond Alkali*³², Justice McCardie determined impliedly that a CIF policy is invalid if not within MIA 1906. Impliedly, because the case actually concerned whether a "Received for shipment", bill of lading was acceptable in CIF contract. Under a contract for goods to be shipped from the US Eastern seaboard, CIF Gothenburg, the sellers tendered, together with an invoice for the goods: (a) a document purporting to be a bill of lading, containing an indorsement – "Received in apparent good order and condition from DA to be transported by the steamship *Allglia* now lying in the Port of Philadelphia or failing shipment by said steamer in and upon a following steamer, 280 bags Dense Soda," and, (b) a certificate of insurance issued by a US insurance corporation, which, as the certificate declared, "represents and takes the place of the policy and conveys all the rights of the signed policy holder, as surely as if the property was covered by a special policy direct to the holder of this certificate". It will be remembered that § 2-320 of the UCC permits the issue and tender of certificates in lieu of the policy.

Scrutton LJ agreed with the buyers that they were entitled to reject on the ground that the sellers in conformity with the contract had not tendered

³⁰ *Finaska Cellulosa foreningen v Westfield Paper Co* [1940] 4 All ER 473 per Lord Caldecote at p.81

³¹ For a discussion limited to section 44 of the Act and the *Institute Cargo Clauses*' "Warehouse to warehouse", see Lorenzo, 2012, at 194.

³² *Diamond Alkali Export Corporation v Bourgeois* [1921] KB 433 at 454, 455. As a general rule, the buyer is entitled to a policy of insurance and nothing else will suffice.

proper documents. Two reasons were given for the decision. First, because the document tendered did not acknowledge shipment, and was therefore not a bill of lading within the CIF contract; it should have been “shipped” rather than “received for shipment” bill of lading. The former is acknowledgement that goods had been shipped while the latter is simply acknowledgement of receipt to be shipped later without guarantee they will. “Shipped” bill of lading is necessary to maintain CIF’s ability to buy and sell a float. Secondly, because the insurance certificate was not good tender in England under an ordinary CIF contract unless it is an actual policy, and unless it falls within s.22 of MIA 1906. The section provides that unless otherwise provided, the contract of marine insurance is inadmissible in evidence unless embodied in a policy. This is now a standard also a standard requirement in other common law jurisdictions (except in the US where issuing of the certificate is permissible under the UCC), where a form of the Act was exported and applies. Its spirit and form applies even in the US, which does not have a federal equivalent Act.

The above position supports the general grain of this paper: the English common law based universality of international practice. That notwithstanding, *Diamond Alkali* is still generally good English law and was followed on this point in *Donald H Scott Co Ltd v Barclays Bank Ltd*.³³ However, it was distinguished, on a different issue, by Banks LJ and Scrutton LJ in *Koskas v Standard Marine Insurance*.³⁴ Thus, it would appear the common law, as codified by MIA1906, is very strict on conformity for tender of especially the insurance policy. Furthermore, the common law document must only be in a policy to be valid but also now conform to Incoterms Article A3 (b) that the CIF document must be procured from “underwriters or an insurance company of good repute”. As usual, although it largely codified common law, Incoterms does not provide any details of the phrase, “underwriters or insurance company of good repute”, a task once more left to the common law to plug.

5.10.2. What constitutes an “approved” CIF policy?

The current position is that both the English common law and Incoterms 2010³⁵, but not the UCP 600³⁶, provide for a *reputable* insurance company and / or *approved* policy but without defining or providing

³³ [1932] 2 KB 1.

³⁴ (1927) 137 LT 165.

³⁵ Incoterms 2010 CIF Article A3 (b).

³⁶ Both the UCP 500, Article 34 and UCP 600, Article 28 are silent on the issue.

what constitutes *reputable* or *approved*. It is, therefore, left to case law to provide guidance. In addition, the answer is emphatic: CIF and CIP cover should be with an “approved insurance company”. *Scott (Donald H) & Co v Barclays Bank Ltd*³⁷, where bankers issued a letter of credit to English sellers of 200 tons of steel plates to Dutch buyers, supports the principle that CIF insurance should be within an *approved* policy. However, what is an *approved* insurance policy? It was considered in the case that an *approved* “insurance policy is one to which no reasonable objection can be made”. Under the terms of the letter of credit, in this case, the bankers agreed to honour the sellers’ draft for the amount of the purchase-money, which included freight and insurance to Rotterdam, provided the draft were accompanied by “an approved insurance policy” covering the shipment of the goods.

The sellers presented their draft accompanied by a certificate of insurance, which neither contained nor offered any means of ascertaining the full terms of the insurance. In an action by the sellers against the bankers for not honouring the draft, Banks LJ, held that the certificate of insurance tendered was not an “approved insurance policy” within the meaning of the letter of credit, and that the bankers were justified in refusing to honour the draft. Despite its relative age, *Scott (Donald H)* remains good law and was applied the following year in *Malmberg*.³⁸ So the test of an approved policy, following from “one to which no reasonable objection can be made”, above is probably that of the “reasonable man”, i.e. a reasonable seller, buyer and insurer. However, unlike the CIF, the common law uses both “approved policy” and “reputable company” sometimes interchangeably, which can at times be confusing. For instance is both requirements necessary and, if so, what connects them?

5.10.3. Link between “approved policy” and “a reputable insurance company”?

However, Lord Justice’s the judgment in *Malmberg* was not explicit on what an approved insurance policy. For instance, should an “approved policy” be necessarily procured from a “reputable company”? That notwithstanding, under English law and practice a *Lloyd’s Marine Policy*³⁹ or the *Insurance Company’s*

³⁷ [1923] 2 KB 1.

³⁸ *Malmberg v HJ Evans & Co* (1924) 30 Com Cas 107 at 113, CA (propriety of tendering a policy incorporating conditions or rules in some other document).

³⁹ Developed in 1982 and used by Lloyds Insurance to replace the old Ships and Goods (SG) Policy that had lasted nearly 400 years; For reasons for change see generally, *Legal and Documentary Aspects of Marine Insurance Contract* TD/B/C.4/ISL/27/Rev 1. Report by UNCTAD Secretariat, NY 1982.

*Marine Policy*⁴⁰, the leading instruments, would fulfil both the *approved* and *reputable* requirements. The aim of these “approved” and “reputable” requirement are to protect the buyer of especially goods bought and sold afloat by ensuring that the seller does not provide a policy from either non-existent or some dubious backstreet insurer who might not be capable of meeting their obligations. Common sense dictates that everything being equal, it should be left to the court to pronounce on the meanings and consequences of the stipulations. Perhaps guidance from the GAFTA Contract provides further guidance. It provides that: “The insurance to be effected with **first class** underwriters and / or companies who are domiciled or carrying on business in the UK or who, for the purpose of any legal proceedings, accept a British domicile and provide an address for service of process in London, but for whose solvency Sellers shall not be responsible”⁴¹ (*emphasis added*).

From the foregone, an English or UK law *approved insurers* must not only be *first class*, but should also be UK domiciled or UK based business, provide a UK address and be solvent, although sellers are not responsible for the solvency. The caveats to solvency guarantee is reasonable. It would be onerous to require the seller to warrant the underwriter’s solvency. This English law requirement would be applicable in other common law jurisdictions and in the US in which each other cases are judicially cited and used by eminent jurists and authors. It is also probably persuasive in civil and other non-common law jurisdictions. For instance, the phrase “first class underwriters” requirement was also used in a Chinese CIF sales contract. Accordingly, it would reasonable to assume that civil and other non-common law jurisdictions have same requirements or that the requirement is universal.

6. TENDER OF CIF INSURANCE DOCUMENTS UNDER COMMON LAW, INCOTERMS AND UCP 600

6.1. Tender under English Common Law

From the foregone, we can assume, with the exception of the US, that unless there is provision in the contract or, probably⁴², a custom of the

⁴⁰ Ibid, but used only by the non-Lloyds Insurance Companies but covering same risks.

⁴¹ Paragraph (b) of the Gafta Contract, Series No.100 (Effective 1st September 2010).

⁴² See *Diamond Alkali Export Corpn v Bourgeois* [1921] 3 KB 443 at 458; *Malmberg v HJ Evans & Co* (1924) 30 Com Cas 107 at 116.

particular trade to the contrary⁴³, nothing short of an actual insurance policy is a good tender under a CIF contract.⁴⁴ For example, neither the broker’s cover note, nor a certificate of insurance, or other document, which does not include all the terms of the policy, is good tender under the ordinary CIF contract.⁴⁵ If, as is often the case, the seller makes use of a *floating policy* (Dunt, 2012, 213–215)⁴⁶ or an *open cover* (Dunt, 2012, 213–214).⁴⁷ instead of a single policy to insure the particular goods, it is doubtful whether, in the absence of provision in the contract or, probably, custom in the particular trade, the tender under such a policy or *open cover*⁴⁸ of a certificate not containing all the terms of the usual contract of insurance would be an effective mode of implementing the contract of sale. Such a certificate might be regarded as equivalent to a marine policy⁴⁹, but it would seem to be essential that the certificate should be one which contains all essential terms of the contract and on which liability can be legally established against the insurer in case of a loss within the insurance. Under English law, a contract of marine insurance is inadmissible in evidence unless embodied in a marine policy.⁵⁰

That notwithstanding, being a marine policy, if not taken in the buyer’s name, a CIF policy must in

⁴³ See *Burstall & Co v Grimsdale* (1906) 11 Com Cas 280 (where a certificate of insurance was held to be sufficient). See also *The Julia* [1949] AC 293 at 309, [1949] 3 All ER 269 at 274–275, HL, per Lord Porter; *John Martin of London Ltd v AE Taylor & Co Ltd* [1953] 2 Lloyd’s Rep 589. If a certificate of insurance is accepted by the buyer, there is an implied warranty by the seller that the policy will be issued: *Harper & Co Ltd v Mackechnie & Co* [1925] 2 KB 423.

⁴⁴ *Manbre Saccharine Co Ltd v Corn Products Co Ltd* [1919] 1 KB 198; *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1; *Diamond Alkali Export Corpn v Bourgeois* [1921] 3 KB 443; *Donald H Scott & Co v Barclays Bank Ltd* [1923] 2 KB 1, CA. See also *Malmberg v HJ Evans & Co* (1924) 30 Com Cas 107 at 113, CA (propriety of tendering a policy incorporating conditions or rules in some other document).

⁴⁵ *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 (broker’s note); *Diamond Alkali Export Corpn v Bourgeois* [1921] 3 KB 443 (certificate of insurance); *Promos SA v European Grain and Shipping Ltd* [1979] 1 Lloyd’s Rep 375 (brokers’ cover note).

⁴⁶ As to floating policies, see Halsbury, Vol.60, paras. 245, 282–283.

⁴⁷ As to open cover policies, including floating policy by ship or ships see s. 29 of MIA 1906, pp.121–123 and 143.

⁴⁸ Ibid.

⁴⁹ See the references to “American certificates” in *Wilson, Holgate & Co Ltd v Belgian Grain and Produce Co Ltd* [1920] 2 KB 1 at 7 per Bailhache J; and *Donald H Scott & Co Ltd v Barclays Bank Ltd* [1923] 2 KB 1 at 11, CA, per Bankes LJ.

⁵⁰ See MIA 1906 s 22; and Halsbury, Vol. 60, para. 243.

addition be assignable by endorsement or in other customary manner.⁵¹ In fact, the essential aspect of the CIF policy, enunciated in the leading case of *The Julia* is for the seller to put the buyer in a position where the buyer should claim directly and in his own name from the insurers in the event of loss or damage.⁵² This is the essence of the CIF contract. A valid policy helps to sustain that characteristic.

6.2. Tender of certificate of insurance under common law, UCP and commodity trades

Under Anglo-American and other common law jurisdictions, a certificate of insurance is a document stating that in accordance with an authorisation granted to the person signing the certificate, the insurer is liable to the insured subject to the terms and conditions stated therein. An insured, whether seller or not will need the certificate in addition to or in lieu of the policy. Justice Ballhace's ruling in *Wilson, Holgate & Co Ltd v Belgium Grain & Produce Co Ltd*⁵³ is authority for two general positions on this. First, that under a CIF contract for the sale of goods, the sellers, in the absence of any custom or special stipulation to the contrary, do not perform their obligation of tendering to the buyer either a broker's cover note⁵⁴ or a certificate of insurance instead of a proper policy along with the other shipping documents. Secondly, that where the parties to a CIF contract for the sale of goods, which have been duly shipped, enter into a stipulation that the seller, instead of tendering a policy of insurance with the other shipping documents, may tender a certificate of insurance with a broker's undertaking to hold the policy for the buyer's account, the sellers do not perform their obligation under the stipulation by tendering a certificate of insurance without the broker's undertaking. *Wilson & Holgate* is still good common law authority and was considered, as to the second point, in *Diamond Alkali and Scott (Donald H)*⁵⁵ and *Scott v Barclays Bank*.⁵⁶ Citing *Wilson & Holgate* and *Diamond Alkali*, Schmitthoff makes a distinction between the theoretical strict legal

requirements and the liberal practice on the tender of insurance documents (Schmitthoff, 2012, 413–414).⁵⁷

Otherwise, a certificate of insurance is acceptable tender in Incoterms, UCC⁵⁸ and UCP500⁵⁹ but not in UCP 600.⁶⁰ Is there a contradiction or conflict between theory and practice on the one hand and the common law and Incoterms/UCP 500/UCP 600 on the other? Could these be some of the distinctions that Schmitthoff refers to above? Probably not, as between the UCP 500 and UCP 600, since the latter supersedes the former. Neither is there one between common law and Incoterms 2010 as such tender in the latter is only subject to a proviso that the CIF contract is silent on same. The apparent difference between the common law and the UCP 600 is that the former refers to the policy, certificate, covernote, letters of insurance, individually, whereas the UCP uses the generic term; insurance documents. However, Article 20(e) of GAFTA is preferable as it details requirements for the certificates. It provides that:

“20 (e) Certificates/Policies – Sellers shall give all policies and/or certificates and/or letters of insurance provided for in this contract, (duly stamped if applicable) for original and increased value (if any) for the value stipulated in (c) above. In the event of a certificate of insurance being supplied, it is agreed that Sellers shall exchange such certificate for a policy if required and such certificate shall state on its face that it is so exchangeable. If required by Buyers, letter(s) of insurance shall be guaranteed by a recognised bank or by any other guarantor who is acceptable to Buyers” (*emphasis added*).

⁵⁷ For an extensive treatment of the subject see: Lorenzo, 2012, 168-172.

⁵⁸ The rationale for and the difference with English common law is clearly explained in paragraph 9 of Ohio State 2006 thus: “By usage these certificates are treated as the equivalent of separate policies and are good tender under C.I.F. contracts. The term ‘certificate of insurance’, however, does not of itself include certificates or cover notes issued by the insurance broker and stating that the goods are covered by a policy. Their sufficiency as substitutes for policies will depend upon proof of an established usage or course of dealing. *The present section rejects the English rule that not only brokers’ certificates and cover notes’ but also certain forms of American insurance certificates are not the equivalent of policies and are not good tender under a C.I.F. contract*” (*emphasis added*), see Note 4 above.

⁵⁹ UCP 500, Art 34(a); CIF Incoterms Article A3(b) now accepts “other evidence of insurance cover” in lieu of the policy.

⁶⁰ UCP 600 Article 28(a); also see comparison of the texts in UCP 500 and UCP 600 in Byrne's “The Comparison of the UCP 600 & UCP 500”, *Institute of International Banking Law and Practice*, pp.212-218, 2007.

⁵¹ See MIA 1906 s 50(3); Halsbury Vol. 91, para. 377.

⁵² Principle set in *The Julia* [1949] AC 293 at 309, [1949] 3 All ER 269 at 274–275, HL, per Lord Porter; a principle now embodied in the opening paragraph of Article A3(b) of CIF Incoterms 2010.

⁵³ [1920] 2 KB 1.

⁵⁴ But see UCP 600, Article 28(c).

⁵⁵ *Ibid*.

⁵⁶ [1921] 2KB 1

Furthermore, as is apparent ahead, a *broker's covernote* is explicitly not acceptable tender.⁶¹ That notwithstanding, the requirement for a warranty in certificates of insurance is an admission that, at common law, the certificate might fall short of the CIF tender requirement. However, tender of a certificate is or requires a warrant of liability on the part of the beneficiary/seller and/or their agents to validate it these shortcomings are remedied by the extraction of a collateral undertaking from the sellers. Thus, to bridge the gap, under the common law the seller is required to warrant the validity of the certificate in CIF contracts. Does this import a collateral undertaking into the contract, a contract within a contract? Alternatively, is it one of those areas where theory differs from custom and practice?

6.3. Collateral Liability for "Warranty of validity" of Certificate in CIF policy

Due to the problems intimated above, under common law there is necessity for warranty of validity of insurance certificate in CIF policy. However, what liabilities do these warranties impose on the seller and third party guarantors? In *Harper (AC) & Co v Mackechine & Co*⁶² in which facts are omitted, Justice Roche's ruling⁶³ determined the seller's liability under a CIF contract, when a certificate of insurance is tendered by the seller and accepted by the buyer in fulfilment of the contract and in lieu of a policy of insurance. The case determined that there is an implied warranty by the seller that the assertions in the certificate are true, and that the seller will produce or procure the production of the policy referred to in the certificate. The seller in such a case is liable for a breach of this warranty as a collateral contract, even if insurance brokers do in fact sign the certificate and the brokers fail to effect an insurance, which will continue valid throughout the transit of the goods. Therefore, the tender of the certificate is only provisional, and seller should be ready to obtain and provide the policy if required. Otherwise, previously certificates of insurance were not valid tender.⁶⁴ The warranty does extend to the solvency of the insurer. What is not clear, however, is whether the tender of a lesser regarded insurance document, the letter of insurance, is effective. It also remains doubtful whether this cures and / or addresses the issue

of divergence on this issue between the common law and UCP 600 raised earlier. Neither is it of any help when using letters of insurance, a document regarded as inferior to both certificates and covernotes. This is discussed below.

6.4. Whether tender of Letter of Insurance is acceptable in lieu CIF policy

Despite the above analysis, in export policies, letters of insurance are sometimes used instead of covernotes, certificates or policies. Is this yet another contradiction between legal theory and practice? Letters of insurance are used where neither certificate nor policy is issued such as in *open covers*, *blanket policies* and *floating policies* where the buyer may require a simple certification or some other form of assurance from the insurer that the seller is insured. Since *Manbre Saccharine Co v Corn Products Co Ltd*⁶⁵, Justice McCardie's ruling⁶⁶ has been and remains the authority for the proposition. Among other many authorities, the case once more, stands for authority for three other principles discuss above: first, that under a CIF contract the seller is bound to the buyer for a proper policy of insurance together with the other shipping documents; second, that that obligation is not performed by the seller simply guaranteeing through a letter of insurance, to hold the purchaser covered by insurance in accordance with the terms of the policy of insurance in the vendor's possession; and third, the buyer under a CIF contract is entitled to demand a policy of insurance, which covers, and covers only, the goods mentioned in the bills of lading and invoices.⁶⁷ The rationale for the principles is understandable. This is to stop the seller from substituting older or other non-related policies for the contract policy.

This still does not clarify the difference between practice and theory. As mentioned above, in practice, letters of insurance issued under *blanket policies*⁶⁸

⁶⁵ [1919] 1KB 198 at 216; [1918-19] All ER Rep 980.

⁶⁶ *Ibid*, at p.216.

⁶⁷ Although not directly relevant to the issue in point, the case also authority for the fact that a vendor under a CIF contract for the sale of goods, who has shipped the appropriate goods under a proper contract of carriage and obtained the proper documents, can effectively tender those documents to the purchaser notwithstanding that he knows at the time of such tender of the loss of goods- the presumption being that they will be covered by a valid policy.

⁶⁸ Blanket policies, Open Covers and Floating Policies are policies which in a single sum insured, covers a number of separate items of property without subdivision of the amount. The approach is not unique to CIF or exports and indeed started in fire insurance and motor insurance for large risks and also

⁶¹ UCP 600, Article 28(c); Dunt, 2012, 214-215.

⁶² *Harper (AC) & Co v Mackechine & Co* [1925] 2KB 423.

⁶³ *Ibid*, at p.427 and p. 428.

⁶⁴ See again *Diamond Alkali Export Corp v Fl. Bourgeois* [1921] 3KB 443 and *Phoenix Insurance Co of Hartford v De Monchy* (1929) 45 TLR 543.

such as *open covers*⁶⁹ are acceptable as valid tenders. The reasoning being that these are cheaper and more efficient ways of conducting business as they cut back paper work and bureaucracy. In theory, it may be otherwise. What also remains unclear is the tender of other insurance documents such as a broker's cover note⁷⁰ in lieu of the policy or certificate or letter of insurance.⁷¹ The reader should also be aware that despite their common origin and approach, tender of insurance documents might not be a requirement under certain circumstances in all other common law jurisdictions.⁷² That notwithstanding, would the phrase, "or other evidence of insurance cover" in Article A3(b) of CIF Incoterms 2010 include letters of insurance? Conversely, despite their apparent liberality of the phrase, a letter of insurance is not valid tender under either Incoterms 2010 or UCP600, unless it falls under the above phrase or a "declaration under an open cover".⁷³ The issue has not been tested in litigation.

Nevertheless, what exactly is this document and how does it differ in relation to declarations from other alternatives to the policy discussed above?

6.5. Whether presentation of a "Declaration of Insurance is valid CIF tender?"

Like letters of insurance, where *open covers*, *blanket policies* and *floating policies*⁷⁴ are issued, the insured simply makes a declaration of export or import against the shipments. It is, however, doubtful whether a letter of insurance ranks above a *declaration under an*

in fidelity guarantee insurance to cover the whole staff without mention of the name or position, the premium being computed on the number of employees in specific categories insurance.

⁶⁹ *Ibid*; Open covers have almost same meaning and function as blanket policies above and floating policies below. It is borrowed from unvalued policy in s 27(1) of MIA 1906. It is the business language equivalent of a floating policy. When there are regular shipments of goods it is usual to arrange an open cover to avoid the necessity of separate policies for each sending. The two most common methods are the *floating policy* and the *open cover*.

⁷⁰ See Notes 84-91 (post) and the texts therein.

⁷¹ See Schmitthoff, 2012 at para.19-011 at pp.413-414 at 414; and the sub-paragraph (f) below and authorities cited therein.

⁷² For Australian practice, see *Piesse v Tasmanian Orchardists & Producers Co-op Assn Ltd* (1919) 15 Tas LR 67 where omission of the policy did not affect tender in the CIF contract; and *Lascelles & Co Ltd* (1921) 21 SRNSW 773; 38 NSW 238 where tender of a certificate instead of a policy was acceptable even where there was deviation.

⁷³ It is not mentioned in UCP 600, Article 28(a).

⁷⁴ Floating policies have same meaning as open covers and/or blanket policies, See MIA 1906 s.29(1); Halsbury, Vol.91, paras. 282-283 and texts there under; *Johnson & Co Ltd v Bryant* (1896) 12 TLR 368; (Schmitthoff, 2012, 407-410).

open cover and / or *blanket policies* in the hierarchy of insurance documents. Nevertheless, since *open covers* (Schmitthoff, 2012, 410-412)⁷⁵ and *blanket policies* are both known to common law and export insurance practice, it would follow that such tenders are valid. It will be remembered also that an *open cover* policy is a form of long-term cargo insurance contract effected on the original contract without any limit taken together and requires that policies be issued off the cover on each shipment and declaration. Under the *open cover* the underwriter agrees to cover all shipments commencing transit within a specified period or if "always open", from a specified attaching date.⁷⁶ A *blanket policy* (Schmitthoff, 2012, 412), on the other hand is a policy, which, in a single sum insured, covers a number of separate shipments without subdivision of the amount. In the interests of cost reduction and efficiency, the approach is used in large risks to cover the whole shipments without mention of specific categories and for large declaration of shipments.

Both policies resemble *floating policies* (Schmitthoff, 2012, 407-410),⁷⁷ which defines the insurance in general terms with the actual shipment to be defined by subsequent declarations and which runs until the insured sum is exhausted by the declarations and the declarations made in a chronological order unless the policy provides otherwise. Although not frequently in modern use, of the three (blanket, open covers and floating) the *floating policy* is the only one provided for in MIA 1906.⁷⁸ Floating policies also are available at both Lloyds⁷⁹ and non-Lloyds markets. The policy to cover contingencies is a good mechanism to cover "held covered" clauses in export policies.⁸⁰ Down the pecking order of insurance documents is the covernote-issued by either the broker or the insurance companies.

⁷⁵ See also: *Macleod Ross & Co Ltd v Compagnie d'Assurances Generales Helvetia of St. Gall* [1952] W.N.56.

⁷⁶ *Ibid*; see also *Phoenix Insurance Co of Hartford v Monchy* (1929) 45 TLR.

⁷⁷ See also: *Arnould's Law of Marine Insurance* (2008, with 2010 supplement), para.9-04 for legal of declarations.

⁷⁸ MIA 1906, s. 29; see also, generally *Union Society of Canton Ltd v Wills & Co* [1916] 1 ACX 28 at 21, a floating policy on goods, where it was held that the declaration of interests must be made to insurer's agents "as soon as possible". For treatment of the floating policy under s.29(1) as to consequences of declaration see *Union Insurance Society of Canton Ltd v George Willis & Co* [1916] AC 281 and *Glencore International AG v Alpina Insurance Co* (No.2) [2004] 1 Lloyds Rep 567.

⁷⁹ For the operation of the floating policy at Lloyds see (Dover, 1975,133).

⁸⁰ And with it the need for the insured to give notice to the insurer in event of possible loss: *Thames and Mersey Insurance Co Ltd v HLT & Co* [1917] 2KB 48.

However, what is the status and role of the broker's covernote under CIF policy?

6.6. Status and role of "Brokers' Cover-Note" in CIF policy under common law, Incoterms and UCP

The role of covernotes in export policies had always been contentious. Covernotes are issued either by the insurers or brokers. In *Promos SA v European Grain & Shipping Ltd*,⁸¹ Justice Parker determined the role of broker's cover notes⁸² as a basic document in CIF contracts. However, the case distinguishes between neither an ordinary (insurer's) cover note and the broker's cover note nor its relationship with the certificate.⁸³ The former is legal document issued by the insurer whereas the broker either on his own behalf or on behalf of the insurer issues the latter. In *Promos*, a contract for the sale of grain provided for payment to be made in exchange for certain shipping documents, including an insurance certificate, the sellers were required to insure the goods against certain specified risks whilst they were in transit between warehouses. In February 1974, the contract was varied by an agreement, which provided for the goods to be delivered from a warehouse during April 1974, the sellers were also required to provide free insurance for a period after presentation of the appropriate documents.

On 26 April 1974, the sellers tendered an insurance certificate, which did not apply to goods stored in a warehouse or cover the risks specified in the original insurance clause. The buyers rejected the insurance certificate. The sellers then obtained insurance covering the goods in store against all specified risks but the cover note delivered to the buyers on 1 May 1974 was also rejected. The buyers contended that the documents (certificate and covernote) tendered were not in accordance with the contract. The GAFTA Board of Appeal found in favour of the sellers, but stated their award in the form of a special case. Justice Parker had no problem finding; first, that although the insurance clause in the original contract did not apply to goods in store, the provisions requiring insurance against specified risks remained in force notwithstanding the variation of the contract. Therefore, the sellers'

⁸¹ [1979] 1 Lloyd's Rep 375.

⁸² A broker's cover note is a document issued an insurance broker confirming that the insurance has been effected in certain terms. *Broit v Cohen & Sons (NSW) Ltd* (1926) 27 decided that it does not bind the insurer. The issue of a note does not make the broker an insurer.

⁸³ The Insurance Company's covernote is probably more easily acceptable than a broker's one.

insurance certificate tendered on 29 April was inadequate, as those risks were not covered.

Secondly, the court also found that the insurance certificate was also inadequate because it covered the goods from warehouse to warehouse only whereas the contract as varied applied to goods stored in a warehouse. Accordingly, the sellers were not entitled to rely on the cover note delivered on 1 May since it did not constitute an insurance certificate. The substituted covernote did not cure that shortcoming. Thus, the buyers were entitled to reject the entire documents tender: certificate and covernote. It should be noted that neither the insurance certificate nor the cover note complied with the contract since no provision was made for the insurance for a period after presentation of the shipping documents. Although the decision in the case rested on its peculiar circumstances, Lorenzo seems to agree with this position (Lorenzo, 2012, 173–174). However, a broker's cover note properly executed may still be valid tender in Incoterms 2010⁸⁴, UCC⁸⁵ and UCP 500⁸⁶ but not in UCP 600.⁸⁷ Schmitthoff, on the other hand, does not seem to make a distinction between the insurer's covernote and the brokers' covernote (Schmitthoff, 2012, 413–414). Details of that distinction is beyond the scope of this paper.

7. CIF COMMODITY TRADES' VARIATIONS OF INCOTERMS AND COMMON LAW OBLIGATIONS

Promos was a commodities trade contract arbitration dispute that ended in court. However, the above state of affairs may vary from those in commodities trades and other specialised CIF contracts. With regard to commodities insurance policy for instance, Article 20⁸⁸ of *Gafta Standard Contract Terms for Shipment of*

84 Incoterms 2010 CIF Article A3 (b), at pp.110 is silent on the type of document to be tendered but alludes to a phrase, "or other evidence of insurance cover", which leaves room for possible tender of alternative insurance documents.

85 For UCC see also Note 74 ante.

86 UCP 500, Article 34(c), is also silent on the documents to be tendered.

87 UCP 600, Article 28(c), but was acceptable under UCP 500 Article 34 (c) if specifically authorised by the Credit.

88 Gafta Contract, Series No.100 (Effective 1st September 2010) which provides that:

"INSURANCE – Sellers shall provide insurance on terms not less favourable than those set out hereunder, and as set out in detail in The Grain and Feed Trade Association Form. 72 viz: - then it continues to list: risks covered; war clauses (cargo);

Feeding Stuffs in Bulk (Tale Quale-CIF) provides all the essential insurance requirements. On reflection, these are however based on the common law and are similar to Incoterms 2010, UCP 500, UCP 600 and *Institute Cargo Clauses*. Article 20 is in turn detailed in *Gafta's Standard General Standard Terms Insurance Clauses No.72*.⁸⁹ Nevertheless, even within the common law jurisdictions and commodities' trades, the insurance terms may also vary for instance for CIF shipments of feeding stuffs in bulk under *Tale Quale-CIF/CIFFO/C&FFO Terms*⁹⁰ and CIF shipments of vegetable and marine in bulk-CIF Delivered Weights of the *Federation of Oils Seeds and Fats Associations Limited (FOSFA) International*.⁹¹

Thus, the CIF seller's insurance obligations even within the common law jurisdictions as well as commodity trades may not be standard. In addition to their contractual undertakings, the exact nature of the obligations will in addition depend on parties' respective jurisdictions, commodity trade membership affiliations and port customs and usages. Detailed discussions of these factors are beyond the scope of this paper.

8. PARTIES' INTERESTS AND GENERAL CONTINGENCY INSURANCE CONCERNS

8.1 General need to cover parties' additional risks and unusual risks

Both parties to the CIF transaction should be aware of the need for additional cover, including sources and methods of specialist policy cover. The issue of unusual risks should also be addressed. The full extent can lead to an uncharted territory. Accordingly, where uncertain the parties should seek professional advice from their insurers, financiers, freight-forwarder and even carriers who happen to be the main sources of insurance. In addition to contractual requirements, parties to CIF and any international business transactions are advised to take out cover for any risks they might have overlooked or were not reasonable foreseeable. These policies are only for the benefits of the party concerned and not intended to help the other pursuant to Article 15.2 strikes, riots and civil commotion clauses (cargo); insurers; insurable value; freight contingency; certificates / policies; total loss; currency of claims; war and strikes risks/premiums; sellers / buyers settlements.

⁸⁹ *Ibid.*

⁹⁰ Done under Articles 181 and 18.2; for a sample copy of the contract see Appendix XIII in: Lorenzo, 2012, 722-729.

⁹¹ Article 5; for a text thereof see: Lorenzo, 2012, 730-733.

(Benefit of insurance) of the *Institutes Cargo Clauses A, B and C*. In fact, they should not be disclosed to the other party but may cover interested parties listed in Article 15.1 of the *Institutes Cargoes Clauses A, B and C*.

For those reasons, they are referred to as either "seller's interest insurance" or "buyer's interest insurance", respectively. They intended to cover contingent or additional cargo risks hence their alternative term "contingency policies", or "extended cargo policies", i.e., to cater for unforeseeable and unavoidable risks. These policies could cover not only the particular contract in question but also the whole of the party's business conditional upon the business being limited to international business transactions. Coverage in this paper is limited to buyers' and sellers' interest insurance and excludes insurance by other possible stakeholders such as carriers, freight forwarders, financiers, agents and bailees, which might benefit the seller and buyer in tort liabilities' claims.

8.2. Sellers "general additional risks"

Seller's interest insurance has many facets. First in the list are CIF sellers' general additional requirements.⁹² As pointed out above, the policy taken by the seller to cover the shipment is for the benefit, and on account, of the buyer. Unless otherwise provided it covers risks from port or place of shipment to port or place of delivery. Whether taken in the seller's or buyer's name, once the documents are tendered and the policy transferred or assigned, the seller loses all rights contained in the policy cover in return for payment. Any sellers' risks exposures beyond tender are not covered. The avenues available to the seller include, but are necessarily limited to, consequential insurance policies for eventualities such as buyer's rejections of documents or goods for whatever reasons.⁹³ Other aspects include issues arising from: annual policies were used instead of several individuals policies (Ademuni-Odeke, 2007, 459-460); benefits of single voyage policies (Ademuni-Odeke, 2007, 459-460); blanket policies (Ademuni-Odeke, 2007, 459-460); (discussed above) were preferred; open covers policies (discussed above) (Ademuni-Odeke, 2007, 459-460); were deployed; seller availing himself of freight forwarders' open policies or carrier (Ademuni-Odeke, 2007, 459-460); and seller resorted to floating policies (discussed above). These are some of the aspects that would plug the loopholes in the seller's risks otherwise not covered by the sales or insurance contract. They

⁹² For this and seller's insurable interest see: (Lorenzo, 2012, 195-196).

⁹³ See generally: Ademuni-Odeke, 2007.

represent the difference between the contractual duties to insure vs the commercial need to insure. Fulfilment of the contractual duties does not necessarily mean the seller has had all possible risks covered. Hence the need for sellers' general additional risks' coverage.

8.2.1. Sellers' particular insurance interests

Second in the list are sellers' particular insurance concerns. Once more, they overlap and form part of sellers' general insurance interest (Ademuni-Odeke, 2007, 459–460); not covered by the contract and which sellers might wish to keep away from the buyer's attention. They include: pre-shipment risks insurance (Ademuni-Odeke, 2007, 459–460; Ramberg, 2010, 64–65)⁹⁴ to cover pre-shipment and pre-mature transfer of risks before and during loading (Ramberg, 2010, 77) not covered by normal policies; post-shipment risks (or arrival) including transit risks (Ademuni-Odeke, 2007, 459–460)⁹⁵ between sellers' premises and shipment; contingency insurance alternatives (Ademuni-Odeke, 2007, 453–454) for all unforeseen and unusual risks; any special commodity trade requirements (above) reflecting possible membership of CIF sellers and buyers; and miscellaneous risks insurances (Ademuni-Odeke, 2007, 460) to cater for unforeseen risks – a catch all situation. Depending on the nature of his business, geographical trading limits and exposure, the seller may also wish to acquaint himself with availability of export credit guarantee insurance (ECGD) (Ademuni-Odeke, 2007, 457–459; Jones, 1957, 271)⁹⁶ and other public sector insurance options to cover larger, political and other unusual insurance risks not normally covered by the (private) commercial market (Jimenez, 1997, 187–190). The level of the need for additional cover required will depend on the nature and size of the seller's business.

8.3. Buyers' interests and other insurance considerations⁹⁷

Although his contractual insurance obligations may not be as onerous as those of sellers may, buyers too might be exposed to the same risks as for sellers.

⁹⁴ These would include pre-shipment inspection risks covered in CIF Incoterms 2010, Article B9.

⁹⁵ See also Articles A5 and B5 of CIF Incoterms 2010, at pp.112 and 113 risk transfers.

⁹⁶ For a complete list of UK government export and import insurance and finance programmes see <https://www.gov.uk/government/organisations/uk-export-finance>.

⁹⁷ For this, including the buyer's insurable interests in CIF contracts see: Lorenzo, 2012, 195.

Among these are additional special commodity trade requirements (Lorenzo, 2012, 195) (above as well), buyer's interest same as seller's interest above (Lorenzo, 2012, 454–455); pre-shipment (Lorenzo, 2012, 454–455), post-shipment (Lorenzo, 2012, 454–455), contingency insurance (Lorenzo, 2012, 451–453); consequential loss insurance (Lorenzo, 2012, 457–460), and availability of public export credit (Lorenzo, 2012, 457–460; Jones, 1957, 375) insurance provided by the ECGD. However, unlike the seller, the buyer may be exposed to more risks as he is wholly dependent on the seller performing his insurance and shipping obligations and on notice from the seller to enable him take out additional insurance. It is for those reasons, *inter alia*, that Article A3(b) of the CIF and CIP Incoterms 2010 for instance requires notice from the seller to the buyer to enable the latter to take out additional insurance where necessary. Experienced sellers and buyers would be aware of the need for their respective additional risks. The inexperienced novices should, however, seek professional advice from their brokers, insurers, bankers, forwarding agents, carriers, chambers of commerce, ECGD and trade missions who are also normally the source of export/import policies.

Like for all aspects of business life it is almost impossible to foresee and cover all possible risks. Each of these circumstances discussed above may pose challenges requiring solutions beyond those addressed so far in this paper. Extension of the policy clauses, such as "held covered" below would, therefore, go along towards addressing such problems. They provide a *catch all* or *ejusdem generis* situations.

8.4. "Held covered" and Miscellaneous insurance considerations for both parties

The above discussions on the subject are not conclusive as there will always be aspects and unique risks, other than those covered herein, to which both parties need to pay attention. Matters are easier where the seller and his insurer have had previous dealings and therefore known each other enough to develop trust. In the absence of that, however, there is always "fall back" or solution of last resort. One such a solution or arrangement is conclusion of an understanding between the insurer and the insured to include a clause in the policy that the insured will be "held covered" in any unforeseen or subsequent shipment event. Including a variety of events, under the clause, the insurers agree to the subject matter continuing to be insured on payment of an additional premium in circumstances where party might be guilty of for instance a breach of warranty ("breach of warranty clause"), or has changed

the voyage of the cargo carrying vessel, (“change of voyage clause”) or the period of insurance has expired for whatever reasons, e.g., in time policies while the vessel and goods are still at sea, (“continuation clause”). This would cover eventualities where the seller has to rectify and re-tender rejected documents; and or unload, store and return or dispose of goods rejected by the buyer following the latter’s examination thereof. Other scenarios are where the vessel has deviated from its contractual or customary route or run aground away from or short of its destination. They would, however, exclude salvage and other charges covered by the *Institute Cargo Clauses* and Rule VI of the amended *York Antwerp Rules 2004*.⁹⁸

9. INSURANCE OF CIF-RELATED CONTRACTS UNDER COMMON LAW AND INCOTERMS

9.1. Insurance Risks and Obligations in CFR Contracts under Incoterms

Now we turn our attention to CIF related contracts starting with the CFR. In this contract, the seller must pay the costs and freight necessary to bring the goods to the named port of destination, but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time of delivery, are transferred from the seller to the buyer. The term requires the seller to clear goods for export and can be used only for sea and inland waterway transport. For insurance purposes, this contract has the same characteristics as the CIF save for insurance, which are not the seller’s obligations. The buyer therefore provides the insurance. Although there is no obligation on the seller to provide insurance, Incoterms 2010 makes it mandatory for him to “provide the buyer at the buyer’s request, risk and expense (if any), with information the buyer needs for obtaining insurance”;⁹⁹ which equates CFR to FOB contracts regarding notice. As neither party have insurance obligations, identical duties are placed on the buyer under corresponding Article B3 (b). Equally, the seller must heed the provisions of Article A3 (b) for the seller and Article B3 (b) for the buyer, regarding passage of risks. Parties’ pre-mature transfer of risks apply.

However, like FOB and all the other contracts where the buyer does not provide insurance, the buyer is entitled to notice from the seller to enable him take

out cover.¹⁰⁰ From the foregone, the only problem is that s. 32 (3) of SOGA 1979 regarding notice does not apply to CIF contracts. It would follow that it does not apply to the CFR either. It is evident that, in keeping with the aim of Incoterms 2010, it is clear to the parties, their respective obligations have been laid out in some particularity. It is also apparent that, on the matter of insurance cover, as against the seller’s responsibility to contract for insurance, the buyer has no corresponding obligation other than to provide information to facilitate the seller’s performance of his duty. However, as will be apparent soon, this does not mean that having provided the pertinent information the buyer needs not consider the question of insurance further. This is a new Incoterms, which has not yet generated case law. Would case law from its predecessor, the Cost and Freight (C&F), (below) apply? First, it is necessary to examine the seller’s duty in a little more detail.

Although in the CFR contract, passage of risk and insurance obligations are the same as those of FOB contract (Vishwanath, 2010, 107)¹⁰¹ in FOB risks transfer to the buyer from the moment the cargo crosses the ship’s rail at the named port of shipment. Although in theory there is no contractual obligation to the buyer for him to take out the policy, in practice it is advisable that he does so from his warehouse until goods cross the ships’ rail. He would also be advised to effect a seller’s interest extension insurance. The buyer, on the other hand, is responsible for insurance from the moment the goods cross the ship’s rail until his warehouse or resale of the goods. Conversely, buyer’s interest insurance extension (above) is highly recommended. Both parties should provide notice pursuant to Article A3 (b) for the seller and B3 (b) for the buyer. Equally, Articles A5 and A5 (consequences of failure give notice on transfer of risks) and A7 (notice to buyer) and B7 (notice to the seller) apply. Being a relatively new Incoterms, no case law has developed. However, those of its predecessor, the C&F below, would be persuasive.

9.2. Insurance risks under C&F contracts under English common law

The C&F is an English common law and American UCC term. The CFR was supposed to replace the old C&F contract, in some respects, however both English common law and American UCC have retained it. Some authors (below) also still discuss and other

⁹⁸ Rule VI on Salvage, <https://www.ctplc.com/media/268541/commentary-on-the-york-antwerp-rules-2004-2nd-edition.pdf>.

⁹⁹ Incoterms 2010, CFR Article A3(b), at p.98.

¹⁰⁰ Incoterms 2010, FOB Article A3(b), at p.88, the same provision which applies to all other Incoterms, except for CIF and CIP.

¹⁰¹ For case law see discussions under C&F below.

common law jurisdictions still use the term.¹⁰² The essence of the contract is similar to FOB: the seller delivers, and risks passes when the goods pass the ship's rail at the port of shipment. Possibly, for those reasons not many established authors give this contract much consideration apart from brief mention in Schmitthoff,¹⁰³ Lorenzo¹⁰⁴ and Benjamin.¹⁰⁵ Carr is probably the only one who questions why C&F was replaced by the CFR and the relationship between the two under Incoterms (Carr, 2015, 34–35). However, the common law nature of C&F was considered by Brandon J in *The Pantanassa*¹⁰⁶; Justice Donaldson in *Karberg (Arnhold) & Co v Blythe*¹⁰⁷; and Justice Scrutton in *The Galatia*.¹⁰⁸

Nevertheless, it is unclear whether those authorities are still applicable to its purported successor the CFR, although there are no reasons why they should not. That, notwithstanding, where a C&F contract provides that the buyer effect insurance, it imposes an obligation on the buyer to do so as if it were a CIF contract.¹⁰⁹ The seller may also be required to give notice to the buyer under s.32 (2) of SOGA 1979, which in turn equates it to the FOB seller's insurance obligations. Other than the above insurance variations, all other parties' obligations remain the same as in CFR and CIF including tender of documents being unaffected even if parties are aware of loss.¹¹⁰ Consequently, the seller and buyer's interest

¹⁰² See generally: Halsbury, Vol.91, para. 350 in which *Kerberg v Blythe* is also discussed.

¹⁰³ Schimithoff, 2012, two paragraphs at pp.50-51 and the authorities cited therein.

¹⁰⁴ Lorenzo, 2012, in one paragraph at p.174 and the authority cited therein.

¹⁰⁵ Benjamin on Sales, 2010, in two paragraphs at pp.1821-1822 and the authorities cited therein.

¹⁰⁶ *Norsk Bjergningskompagn A/S SS Pantanassa (Owners), her cargo & freight, The Pantanassa*, [1970] 1 Lloyds Rep 153 at 163; [1970] 1 All ER 848.

¹⁰⁷ *Karberg (Arnold) & Blythe, Green, Jourdain & Co* [1915] 2 KB 379 at 388; *Theodor Schneider & Co v Burgett & Newsman* [1916] 1 KB 495 comparisons with CIF insurance. The case followed *Weiss v Credit Colonial et Commercial* (1915) 114 LT 168 (on the effect of war on CIF/C&F policy and related documents) and was applied in *Hindley & Co Ltd East India Produce Co Ltd* [1973] 2 Lloyds Rep 515 (on the nature of CIF and related contracts).

¹⁰⁸ *M Golodetz & Co Inc. v Czanrnikow-Rionda C Inc., The Galatia* [1979] 2 Lloyds Rep 450; upheld by the Court of Appeal [1980] 1 Lloyds Rep 453 at 453 [1980] 1 All ER 501 (the buyers insurance obligations to pay for the documents relating to damaged or lost goods).

¹⁰⁹ See *Co v Joshua Hoyle and Sons Ltd* [1961] 1 Lloyds Rep 346 at 354, 357 and 359; See also Halsbury Vol. 91 para.361.

¹¹⁰ See *State Trading Corporation of India Ltd v M Golodetz* [1988] 2 Lloyds 182 at 182.

(above) would be applicable. Otherwise, it is no longer an Incoterms although the above authorities would be of interest and its appreciation would be useful guide to the understanding of its successor the CFR.

9.3. C&F under American UCC, and other common law jurisdictions

Under the UCC¹¹¹, “The term C&F or C.F. means that the price so includes cost and freight to the named destination” and¹¹² further that: “Unless otherwise agreed the term C&F or its equivalent has the same effect and imposes upon the seller the same obligations and risks as a C.I.F. term except the obligation as to insurance.” Furthermore, “Under the term C.I.F. or C&F unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents.”¹¹³

Those documents include insurance documents. The insurance obligations are the same as under English common law. The position in all other common law jurisdictions mirrors those of the Anglo American law¹¹⁴ and practice, save with the following differences between theory (law) and practice. The Ohio Commentary explains how the seller, although not his obligation, may yet obtain the policy as the buyer's agent.

“Under the C. & F. term, as under the C.I.F. term, title and risk of loss are intended to pass to the buyer on shipment. A stipulation in a C. & F. contract that the seller shall effect insurance on the goods and charge the buyer with the premium (in effect that he shall act as the buyer's agent for that purpose) is entirely in keeping with the pattern. On the other hand, it often happens that the buyer is in a more advantageous position than the seller to effect insurance on the goods or that he has in force an 'open' or 'floating' policy covering all shipments made by him or to him, in either of which events the C. & F. term is adequate without mention of insurance.”¹¹⁵

The commentary also discloses the factors that determine the choice of not only the CIF and FOB but

¹¹¹ UCC§ 2-320 (1).

¹¹² Under UCC 2-320(3).

¹¹³ Under US UCC§ 2-320(4), once more emphasizing it as a sale of documents, not goods; cf *Hawkland, William D.* (1958). Some Developments in American CIF Contracts, *Journal of Business Law*, 214.

¹¹⁴ For further details of American Incoterms, law and practice see, again, Reynolds, INCOTERMS for Americans 2011.

¹¹⁵ Paragraph 16 of the Commentary to the Ohio State legislation, for source see Notes 4 and 58 (ante).

also other types of international business transactions with or without the common law and Incoterms.

9.4. CIP insurance under common law and Incoterms

Like the CFR, the CIP is a relatively new term that first appeared in Incoterms 2010 contract for which the common law has not yet developed either principles or case law. Article A3(b) of Incoterms 2010 is same for CIF and CIP. It would also follow that, CIP's identical provision to CIF regarding insurance means CIF case law (discussed above) would apply. Otherwise, in this contract risks pass from the delivery of the goods to a carrier. However, if subsequent carriers are used, then the risk passes when delivery is given to the first carrier. From the foregone, as in the CIF above, the CIP seller also has to procure insurance against the buyer's risk of loss of or damage to the goods during transit. Therefore, the same position as in CIF would apply here. The American UCC has no CIP provisions.

9.5. CPT insurance under common law and Incoterms

Carriage Paid to (CPT) is the only other Incoterms 2010 trade term whose title resembles that of CIF, CFR and CIP. It falls in the "C" class Incoterms where the main carriage is paid by the buyer. However, like the CIP it is also relatively new. The CPT seller's responsibility for loss or damage, and therefore insurance, is the same as for FCA terms. The seller has no insurance obligations except to notice to the buyer at the buyer's request, risk and expenses. Neither has common law principles and case law developed around the term yet. In CPT, the risk passes upon delivery of the goods to a carrier responsible for delivery of the goods at an agreed place of destination. This delivery can be at the point of origin as in EX WORKS, the port of loading or anywhere in between. However, if subsequent carriers are used the risk passes when delivery is given to the first carrier as in CIP. From the foregone, although the seller is not obliged to insure for the buyer's benefit, he is nevertheless advised to take out his own insurance for the transit up to the place of handing over goods to the first carrier. Secondly, he would also be advised to effect take out his seller's interest policy to cover other eventualities. The buyer, on the other hand, is responsible for the main carriage insurance from the carrier's premises onwards. In addition, he should also take out a buyer's interest policy where necessary. The same Incoterms Articles relating to notice to each party for insurance purposes in CIF and CIP above apply.

Incoterms for Americans CPT (Reynolds, 2010, 71–79) is same as for Incoterms 2010 but UCC has no CPT provisions.

10. CIF INSURANCE IN CIVIL AND OTHER NON-COMMON LAW JURISDICTIONS COMPARED

This section is only a comparative rather than an exhaustive treatment of CIF insurance in civil and other non-common law jurisdictions. Exhaustive treatment of the subject is beyond the scope of this paper. That notwithstanding, the export insurance generally and CIF insurance in particular in civil and other jurisdictions are effected almost on the same principles as those of the Anglo-American and other common law jurisdictions. Backed by the equally universally respected MIA 1906, the common law practice is now almost the same as the international practice. Although the Norwegians¹¹⁶ and Scandinavians civil jurisdictions, for instance, use the *Nordic Marine Insurance Plan* (The *Norwegian Plan*), however, the *Norwegian Plan*¹¹⁷ is conducted on the basis almost identical to those of the English MIA1906. Other leading European continental trading countries such as France¹¹⁸, Germany¹¹⁹, Italy (Dunt, 2012, Chapter 9) and Switzerland apply the same common law principles despite having own national commercial and insurance codes. Similar Plans exist in China¹²⁰ and Japan (Dunt, 2012, 145–171). The Chinese policy too has all the requirements of the common law ones, which include same "all-risks", war risk, reputable insurance (first class insurance company), the 110% insurance value, currency of the contract, and deductibles' provisions. It provides that:

"The Seller shall effect insurance against all risks, war risk and on deck risk if applicable, with a first class insurance company covering 110% of the invoice value of the Contract Equipment with the Buyer as

¹¹⁶ The latest being the Nordic Marine Insurance Plan 2013 based on the Norwegian Marine Insurance Plan 1996 (2010 Version) and the 1964 Plan and Relevant *Nordic Insurance Contracts Acts* (Nordic ICAs); see also: Trine-Lise Wilhemsen and Hans Jacob Bull, Chapter 12 in: Dunt, 2012, 405-439. It is not clear whether it applies to Denmark, Finland and Sweden.

¹¹⁷ *Ibid.*

¹¹⁸ Gildas, Rostain, Marine Buzulier and Maxine de La Marionerie, Chapter 12 in: Dunt, 2012, 371-404.

¹¹⁹ Joachim Bartels, Chapter 10 in: Dunt, 2012, 311-372.

¹²⁰ For mainland China, see Liu Guiming, Liang Jian and Cai Dongdong, Chapter 13 in: Dunt, 2012, 441-464; for Hong Kong Special Economic Zone see Colin Wright and Caroline Thomas, Chapter 4 in: Dunt, 2012, 111-128.

the beneficiary. The insurance has to be covered in the Contract Currency showing claims payable in China and with no deductible clause.

In case the Contract Equipment are lost and/or damaged in the ocean transportation, the Seller shall assist the Buyer to apply to the insurance company for compensation or lodge claims against the insurance company on behalf of the Buyer and effect, upon the Buyer's request, supplementary supply of the same at the original Contract Price¹²¹.

These are also now contained in Article A3(b) of Incoterms 2010. The only significant difference between this Chinese CIF contract and the common law as well as Incoterms 2010 is the addition of assistance required of the seller to "lodge claims on behalf of the Buyer". If it is more than just a simple practical assistance required, this would counter to the CIF insurance principles of *The Julia* and Incoterms 2010 where the seller should put the buyer in a position where the latter can sue in his own name and in a direct claim from the insurer. The Latin American countries also use the civil law systems introduced by the Portuguese in Brazil, the Dutch, the French and the Spanish in their respective former colonies. However, there is evidence that these countries also use the common law principles and in some instances the spirit if not the letter of the English MIA 1906. This is due to the linkage between shipping, trade, insurance and finance and the dominance of Lloyds of London Insurance and London and the UK as a leading legal, shipping, finance, insurance and trade centre. Furthermore, Incoterms, which has largely codified common law on the subject, is also codified into some Middle Eastern and Latin American countries' laws.

11. CONCLUDING REMARKS

Parties are free to draw up own contracts, use a standard form such as Lloyds Form or Incoterms or sales contract guidelines. As in FOB, the CIF seller's insurance obligations at first seems obvious. Whatever the source or form utilised, the CIF seller must insure the goods. That is also the positions under the English, American and other common law jurisdictions. Although it is the only common law jurisdiction that has also codified its laws, the American UCC has largely preserved its CIF common law tradition as inherited from English common law. Neither has it deviated from Incoterms. Australian, Canadian, New Zealand and other common law jurisdictions follow English

law such that authorities between them are applicable precedent. The civil and other non-common law jurisdictions seem to follow common law arrangement.

However, this paper set out to, and has demonstrated, that in practice the parties' detailed insurance obligations are not as easy as provided. Sales contractual terms, common law guidance and Incoterms provisions on CIF insurance obligations provide only the basic outline of the extent of CIF parties' insurance duties. For those reasons, parties need to pay particular attention to details in their specific additional needs including differences between theory and practice, the port and trade usages and of unique jurisdictional customs. The sum total of all these factors is, therefore, that the parties' CIF insurance obligations may not be as clear-cut and as easy as provided for in the sales contract, Incoterms, statutes and literature.

Although information on the history and link between common law and Incoterms is scanty, the CIF is largely a creature of English commercial common law customs and mercantile usages. Its insurance and other characteristics also arose from common law environment. Following the need harmonise international trade law norms the said common law norms were later codified by Incoterms. This is because English common law did not only predate Incoterms by about 100 years, but also that English and other common law jurists and delegates to Incoterms drafting conferences probably heavily influenced its developments, drafting, direction and philosophy. Furthermore, English common law, both judicial and statutory, has provided the only authoritative judicial interpretation of insurance implications of CIF Incoterms and hereby filled the gaps left therein. Hence one of the theses of this paper that the lacunae in the CIF contractual provisions and Incoterms has been filled by common law judicial decisions.

The UK and London's leading global position in insurance, trade, finance, law, arbitration and shipping has farther aided English common law dominance of the law and practice of the subject. The apparent near-global adherence to MIA 1906, adaptation of *Lloyds Marine Insurance Policy*, *London Institute Cargo Clauses* and sometimes-even English law have all had global influence on CIF in particular and international business transactions generally. Hence, the reasonable assumption that Incoterms has, in turn, all but codified common law on the subject, especially in relation to CIF and CIP insurance. Thus, based on Incoterms' wide global application and common law dominance thereof, civil law and other non-common law jurisdictions seem to follow English common law and practice. English common law CIF practice has in turn been influenced

¹²¹ Art.5.15 of a CIF Model Contract for Importation of Complete Plant from overseas into China.

and complemented by commodity trade standard terms, *Institute Cargo Clauses*, the UCP and Incoterms.

For the above reasons and addition to the sales contract, common law guidelines and Incoterms provisions, practice in this area of the law is so complex that prudent parties are advised to protect themselves by, for instance, taking out contingency or other type of additional insurances to cover unforeseen and unusual risks. The CIF policy is normally in the buyer's name and for the buyer's benefit. Hence, the need for separate CIF 'sellers interest' policy following transfer of the policy to the buyer, agents and subsequent buyers. From the buyer's viewpoint, the contractual policy covers only the minimum risks. Hence the need for separate additional CIF 'buyers interest' insurances. In both cases, and depending on the nature and level of risks involved, this might include buyers availing themselves of state insurance facilities, where necessary and applicable. One such avenue is from state insurance such as the UK Export Credit Guarantee Department (ECGD) policies. Other major trading nations and jurisdictions have equivalent export credit guarantee agencies. Using this facility might result in the CIF parties being over-insured or double-insured. However, when it comes to CIF and the general export trade insurance, wisdom dictates that it is better to be over-insured or double insured than under-insured.

Apart from the near resemblance between 'Extended FOB' and CIF/CIP insurance, there seems to be a narrowing of the differences in insurance matters between the common law and Incoterms on the one hand and CIF and FOB on the other regarding sellers' notice to the buyer. Both parties now have to provide notice to the other: the seller as a matter of contractual obligations; the buyer as a matter of practical necessity; and both to cover possible individual breaches of a contractual obligation. Further narrowing is also evident in the use of letters of credit as the preferred payments' system and selling and buying afloat. As a recommendation, it would be preferable to standardise law and practice in insurance of international business transactions between the common law, Incoterms, UCP, the Geneva Convention on International Sale of Goods and the relevant transport conventions.

SUMMARY

This paper analyses and details the nature and characteristic of CIF insurance under Anglo-American and other common law jurisdictions contrasted with INCOTERMS and civil law jurisdictions.

Its thesis is that at its face value CIF insurance is the seller's duty whose onus seems straightforward. This is in contrast to FOB contract in which insurance is the buyer's duty. The paper argues that, the above assumption arises only from reading of the terms and conditions of either the CIF sales' or insurance contract or INCOTERMS (where it is adopted) or the common law as a fall-back situation. However, that assumption can be misleading as these four options provide only the variable guidelines and are therefore not exhaustive. The actual practicalities, as contained in the paper, paint a different picture.

In so doing the paper has demonstrated that further analysis and details reveals a much more complicated picture. It provides the background to the true picture and explains that that

assumption arose from CIF's unique nature and characteristics shaped by its common law origins in the 17th and 18th centuries as influenced by the customs and usages of merchants, commodity trade contracts and the London Institute Cargo Clause. CIF insurance's common law and practice was exported by the English into what emerged into other common law jurisdictions.

The above historical narratives also determined CIF's introduction into INCOTERMS in the 1920s where common law jurists and delegates were instrumental in its drafting. The common law and the London and UK insurance, shipping and finance market's dominance of international practise has influenced the civil and other legal systems. Nowhere is that more so than in the global role played by the insurance principles of the UK MIA 1906. Common law precedents are also the only available interpretations of the CIF insurance provisions. However, recent practices in international business transactions, UCP and INCOTERMS have narrowed the differences between CIF and FOB insurance where letters of credit are applied and where the requirement for parties' notice to the other for insurance purposes now seems to apply both ways. The sum total of this is that a reasonable party should seek guidance from either their brokers or other providers.

Keywords: Sale of Goods, Marine Cargo Policy, CIF and FOB Contracts, Anglo-American Law, Common Law, Incoterms 2010, Institute Cargo Clauses and UCP 600

REFERENCES

Ademuni-Odeke, XXX. (2007). Insurance of FOB Contracts in Anglo-American and Common Law Jurisdictions, *Tulane Maritime Law Journal*, 3 (1), 425-462.

- Ademuni-Odeke, XXX. (1995). Insurance Element in CIF and CIP Incoterms, *Tort Trial & Insurance Practice Law Journal*, 4 (4), 86–92.
- Ademuni-Odeke, XXX. (1993). The Nature of CIF Contracts Is it a Sale of Documents or Goods?, *Journal of Contract Law*, (1993). 6 (2), 158–176.
- Birds, J., Jonathan Wright, J., Devine, P., Cox, R., Lerego, M., Lucas, B., Whalan, M., Johnson, M. (General Editors). (2016). *Encyclopedia of Insurance Law*. London: Sweet and Maxwell.
- Bridge, M. (2014). *Benjamin's Sales of Goods*. London: Sweet & Maxwell.
- Carr, I. (2015). *International Trade Law*. London: Routledge.
- Chuah, J. (2013). *Law of International Trade: Cross Border Commercial Transactions*. London: Sweet and Maxwell.
- Clarke, M. (1981). *Marine insurance system in common law countries and problems*, available at: http://www.bmla.org.uk/annual_report/rep_marine_clark.htm (accessed on 10 July 2016).
- Condon, D. (1986). The making of the marine insurance contract: a comparison of English and US law, *Lloyds Maritime and Commercial Law Quarterly*, Part 4, 484–507.
- Crawford, H. P. (1955). Analysis and Operation of a CIF Contract, *Tulane Maritime Law Review*, 29 (3), 396–430.
- Crockford, N. (2013). (General Editor): *Insuring Foreign Risks*. London: Sweet and Maxwell/Reuters.
- Debattista, C. (2007). The new UCP 600 changes to the tender of the Seller's shipping documents under letters of credit, *Journal of Business Law*, 329–354.
- Dunt, J. (2012). *International Cargo Insurance*. London: Informa.
- Evans, P. (1993). FOB and CIF Contracts, *Australian Law Journal*, 67 (11), 844–858.
- Feltham, J. (1975). The Appropriation to a CIF Contract of goods lost or damaged at sea, *Journal of Business Law*, 273–280.
- Gower, L. (1956). FOB Contracts, *Modern Law Review*, 19 (4), 414–419.
- Halsbury's Laws of England. (2011). Vols.11, 29, 60, 61, and 91.
- Institute of London Underwriters. (2009). *Institute Cargo Clauses A, B and C*.
- ICC. (2010). *Incoterms 2010: Rules for the use of domestic and international terms*, ICC Publication No.715E, (Incoterms 2010). Paris.
- Koh, P. (1988). Insurable risks and the new Institute Cargo Clause, *Journal of Maritime Law and Commerce*, 19 (2), 287–300.
- Lorenzo, F. (2012). *CIF and FOB Contracts*. London: Sweet and Maxwell / Thomson Reuters.
- O'May, D. (1985). The new marine policy and the Institute Clauses, Part 1, February, *Lloyds Maritime and Commercial Law Quarterly*, 191–200.
- Ramberg, J. (2010). *The ICC Guide to 2000 Incoterms*, ICC Publications, No. 620.
- Reynolds, F. (2010). *Incoterms for Americans*. Toledo, Ohio: International Projects, Inc.
- Reynolds, F., Smith, D. (2006). *Letters of credit for Americans (Your Guide to UCP 600)*. Toledo, Ohio: International Projects, Inc. Toledo, Ohio.
- Sassoon, D. (1967). The Origin of FOB and CIF: Terms and Factors influencing choice, *Journal of Business Law*, 32–37.
- Sassoon, D. (1981). Application of FOB and CIF Sales in Common Law Countries, *Proceedings of International Congress on Maritime and Multimodal Sale of Goods and Documentary Credits*, Nice 21–22 May 1981, *European Transport Law*, 16, 50–59.
- Sassoon, D. (1995). *FOB and CIF Contracts*. London: Sweet and Maxwell.
- Schimithoff, C. (2012). *The Law and Practice of International Trade*. London: Sweet and Maxwell.
- Schoenbaum, T. J. (1999). *Key Divergences Between English and American Law of Marine Insurance*. Atglen, Pennsylvania: Shiffer Publishing.
- Sturley, M. F. (1999). The Proposed Statement of US Marine Insurance Law, in: *Marine Insurance at the Turn of the Millennium*, (Huybrechts, M. A. (ed.)), 167–180. Antwerpen: Intersentia.
- Treitel, G. H. (1988). Damages for breach of CIF Contracts, Part 4, November, *Lloyds Maritime and Commercial Law Quarterly*, 457–465.
- Treitel, G.H. (1984). Rights of rejection under CIF sales, Part 4, November, *Lloyds Maritime and Commercial Law Quarterly*, 565–578.
- UNCTAD Secretariat Report. (1982). *Legal and Documentary Aspects of Marine Insurance Contract*. Geneva and New York: United Nations.
- Wooldridge, F. (1973). The Kinds of FOB Contracts, in: *Law and International Trade* (Festschrift fur Clive M. Schimithoff), Frankfurt.