# INTERNATIONAL TRADE TRANSACTION

Passing of risk from the seller to the buyer under sea carriage

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## Dedication

I would like to dedicate this work to my husband, Kwadwo, my sons, Pannin and Kakra, my daughter, Ama, my sister in law, Akoto and to my mother, Afua Obenewaa.

## Acknowledgement

I would like to thank Svante O. Johansson for his supervision and contribution to this work. His help has been very much appreciated.

## Abstract

The concept of risk under sea carriage is an important subject under sales law. This due to the fact that when goods are handed over from the seller to a carrier, neither the seller nor the buyer has physical control over the goods while in transit

Risk under sales law deals with who bears the risk of goods damaged or loss without fault on the part of the parties to the sales contract. Risk under the sea carriage therefore has to do with who bears the ultimate responsibility in circumstances of loss or damage to the goods while in transit. Usually the parties under the sales contract contemplate on insurance to cover such losses. However, it is important to establish whether it is the seller or the buyer who has a claim against the carrier or insurer.

I chose the concept of risk under sea carriage because coming from a developing country where raw materials are exported and finished products imported, trade is vital to the economic growth of the country. As bulk cargoes are mainly transported by sea, risk under sea carriage cannot be overlooked. Therefore, it is important to understand how trade partners allocate risk among themselves especially after each has fulfilled his contractual obligation and a carrier who is not a party to the transaction has to convey the goods to the buyer.

To get a clear understanding of the concept of risk under sea carriage, I chose to look at the transaction based on a contract where the seller has to get the goods, arrange for the transport and insurance (CIF) and found out that the contract of sale, finance, contract of carriage and contract of insurance are inter-dependant in an international trade transaction.

## List of Abbreviations

| | |
|---|---|
| Carriage and Insurance Paid To | CIP |
| Carriage Paid to | CPT |
| Cost and Freight | CF |
| Cost Insurance Freight | CIF |
| Delivered At Frontier | DAF |
| Delivered Duty Paid | DDP |
| Delivered Duty Unpaid | DDU |
| Delivered Ex Quay | DEQ |
| Delivered Ex ship | DES |
| Ex Works | EXW |
| Free Alongside Ship | FOB |
| Free Carrier | FCA |
| International Chamber of Commerce | ICC |
| United Nations Convention on Contracts for the International Sale of goods | CISG |

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# 1 Introduction

International sale of goods is a risky venture as usually the seller and the buyer are located in different countries. In drafting their sales contract, a lot of issues are contemplated on. Notable among them are the mode of payment to employ and mode of transportation to be used.

Carriage of goods by sea remains the most usual way of transporting goods to a foreign country. The importance of the contract of carriage lies in the fact that, during the transit the goods are in charge of the carrier and neither the seller nor the buyer has any physical control over them. These goods are usually subject to the perils of the sea and are likely to suffer some loss or damage.

Therefore, risk under sea carriage is to determine who bears the ultimate responsibility if there is loss or damage to the goods while in the care of the carrier. It is important to know the liabilities of the carrier and for the seller or buyer to know what contractual rights they have against the career.[1] Normally, a policy of insurance is acquired to cover such losses. The passage of risk therefore is to determine which of the parties has a claim against the carrier or insurer.[2]

The parties to an international sales transaction enjoy enormous freedom in formulating their contract. Where the transaction involves the transportation of goods by sea, the transport document plays a vital role to make the transaction work.[3] To help clear issues of who bears the risk of loss or damage in the sale or carriage, efforts have been made to bring

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[1] The Law of International Trade; Day & Griffin 3rd edition page 7
[2] Commercial Law Roy Goode 3rd edition page 243
[3] Bills of lading; A Guide to Good Practice; Stephen Mills 2nd edition page 37

about uniformity of terms. These attempts have given rise to agreed codes and conventions and recognized practices. The International Chamber of Commerce (ICC) is one such organization and among their uniforms codes are ICC Incoterms 2000 and Uniform Customs and Practice for Documentary Credit, 2007, (UCP600) rules. On the other hand the convention that deals with the sale of goods is The United Nation Convention on Contracts for the International Sale of Goods (CISG). Furthermore, the conventions applicable to bills of lading are The Hague/ Hague Visby rules and the Hamburg rules.

To be able to discuss risk under sea carriage, the underlying contract which leads to the carriage of the goods by sea must be analyzed.
As Roy puts it quoting Charles Debattista, "part of the complexities of the subject lies in the fact that in relation to export and import transactions, the contract of carriage cannot be viewed in isolation from the related contracts, in particular, the contract of sale and the provision of finance against documents.'[4]

## 1.1 Reasons for choosing the subject

I chose the concept of risk under sea carriage because coming from a developing country where raw materials are exported and finished products imported, trade is vital to the economic growth of the country. I have also been in exports and also worked in a shipping company dealing with cargo release. Therefore, my interest lies with reviewing the whole chain of events from purchase to delivery to understand the intricacies of maritime trade. It is necessary to understand the concept of how trade partners allocate risk among themselves especially after each has fulfilled his contractual obligation and a carrier who is not a party to the initial transaction has to convey the goods to the buyer.

In order to get a clear understanding of the issue of the concept of risk under sea carriage, I chose to look at the transaction based on a contract where the seller has to get the goods, arrange for the transport as well as the insurance (CIF).

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[4] Commercial Law; Roy Goode. 3rd edition, page 1030. He was quoting Prof Charles Debattista

The study reviewed the sales transaction, mode of payment, contract of carriage and cargo insurance using the trade usages and conventions mentioned above. The idea is to look at the risk allocations between the parties involved in the main sales contract as well as the third parties needed to execute the transaction, and how each party fulfils his contractual obligations.

### 1.1.1 Presentation of the subject

An international sales contract will in many cases, involve negotiations between seller and buyer. Often seller's interest in minimizing his risks will conflict with buyer's interest in minimizing his own risks. Both the seller and the buyer have a legal obligation to protect their interest and will therefore look for ways of minimizing such risk.

In this context, answers are looked for with regards to the question of whether the buyer is obliged to pay the price for the goods even if they have been "accidentally" lost or damaged or whether the seller is entitled to claim the price after delivering contractual goods[5]. This can be painstaking and to minimize the risk involved, the parties to the sales contract try to specifically refer to how to allocate risk in their contract in an attempt to avoid confusion and possible litigation. This problem can be disturbing and difficult to deal with.

Passage of risk under the sea carriage deals with when the risk of loss or damaged is transferred from the seller to the buyer. It determines who bears the ultimate responsibility from purchase of the goods through to contracting the transport, acquiring insurance, who pays for what among others. Moreover, loss of or damage to cargo is generally revealed only at the end of the line thus after the goods get to the buyer at destination. As such, it is not out of place to say that the buyer is more often than not in a superior position than the seller to determine the damage, and undertake the steps needed to claim for the loss.

[5] http://www.scholargoogle.com Zoi Valioti. Passing of Risk in International Sale Contracts…Nordic Journal of Commercial Law Issues 2004 # 2 page 2

Likewise, from the seller's point of view, certain issues can influence the performance of his contractual obligations. The issue of finance is an important consideration that affects both the seller and the buyer when goods travel great distances.

After the delivery of contractual goods to a carrier, there comes the issue of the perils of the sea which are beyond the control of the seller and the buyer but have a direct bearing on the outcome of the sales contract, as delivery to the buyer ends the chain of events under the sales contract.

## 1.2 Research objective

The research is based on the study of risk with regards to sea carriage. The study was conducted using the descriptive and comparative approach in analyzing the underlying sale, mode of payment and the transportation risk under the sea carriage.

The primary focus of this research was to look at how the seller and buyer apportion the transport risk between them. This was achieved by the use of trade terms. Furthermore, the financial security for the seller and the buyer was analysed by employing the use of documentary letters of credits. In addition, the link between the contract of sale and contract of carriage was looked at through the use of the bill of lading. Finally, the beneficiary of cargo insurance under the sales contract was determined.

### 1.2.1 Organization of the study

The research is structured into seven chapters. Chapter one as we have already seen, deals with the introduction and general overview of the whole research. It is followed by chapter two which gives an exposé into the legislative roots of international trade terms with particular focus on CIF contracts. Furthermore, the third chapter deals with documentary letters of credit to give the reader a fair idea of how the issue of financial security is covered and why it is relevant to the allocation of risk under the sea carriage. This is followed by analyses of the documents presented under documentary letters of credit. The

fourth chapter deals with the role of the carrier, and its associated risk after the parties involved in the sales contract have fulfilled their contractual obligations. The fifth chapter analyzes the concept of risk in detail with focus on risk inherent in the main transport document – the bill of lading. This is followed by a brief overview of cargo insurance and its role in managing risk under the sales contract. Finally, the concluding chapter gives a summary of the whole thesis with focus on the relevant issues discussed.

### 1.2.2 Terminology definitions

For the sake of simplicity and clarity, the following terminologies were used interchangeable.

Seller, exporter, shipper means the same person

Buyer, importer, consignee means same person

## 1.3 Legal sources

The legal sources used for this thesis ranks from mandatory rules to non mandatory rules. The rules applied under the contract of sale are the International Chamber of Commerce official rules for the interpretation of trade terms - incoterms 2000. These set of rules are uniform sales agreement and define the responsibilities and obligations of the seller and the buyer in foreign trade transactions. They are not binding unless the parties expressly refer to them.

The second set of rules is the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980. Unlike incoterms, they are binding provided the respective country has rectified it. However, a contract subject CISG allows the parties to depart from it, subject to article 6.

The next legal source used is with regards to the mode of payment and that is the International Chamber of Commerce Uniform Rules and Practice for Documentary Credits, 1993 revision (UCP 500), and International Chamber of Commerce Uniform Customs and Practice for Documentary Credits 2007 Revision (UCP 600). These rules apply to documentary letters of credit if the credit expressly indicates that it is subject to these rules.

Furthermore, the legal source applied to the contract of carriage was The International convention for the Unification of certain rules of law relating to Bills of Lading (Hague Visby rules). This applies to contract of carriage which relates to the bill of lading. Applicable subject to article X.

There are no international conventions with regards to cargo insurance as such the last sets of rules are national statues. They apply to the contract of marine insurance. These are The Institute Cargo Clauses and the Norwegian Cargo Clauses.

## 2 Introduction to the contract of sale

According to Roy Goode, "commercial law is that branch of law which is concerned with rights and duties arising from the supply of goods and services in the way of trade"[6]. Such trade presents commercial and legal problems due to the fact that trade partners are usually located at different parts of the world geographical. The seller is most of the time not willing to release cargo without payment; neither is the buyer willing to pay for goods without being sure of getting it delivered in good order and condition. A lot is contemplated on before finally agreeing on the sales contract.

Usually, the parties involved in such transactions have the right to decide and agree on their own contract provided their issues are legal. In order to fulfil their contractual obligations, certain third parties are employed. This makes the whole transaction a risky undertaking.
Due to the freedom the seller and the buyer enjoy under such transactions, attempts have been made to harmonize some of the rules applicable to international trade. This helps to avoid misunderstanding as to who bears the risk of sale or carriage of the goods.[7] Some of such harmonized terms are the International Chamber of Commerce Rules for the Interpretation of Trade Terms (incoterms) and the Uniform Customs and Practice for Documentary Credits (UCP 600). Chapters two and three looks into these trade usages also known as the Lex Mercatoria Incoterms 2000 and UCP 600 rules and their impact on the allocation of risk under the sea carriage and where necessary use the United Nations Convention on Contracts for the International Sale of Goods (CISG) as a supporting law.

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[6] Commercial Law; Roy Goode 3rd ed. page 8
[7] Bills of Lading; A Guide to Good Practice; Stephen Mills page 37

## 2.1 International trade terms - Incoterms

As discussed in the introductory chapter, risk allocation is a major problem for both seller and buyer and both parties always look for the most convenient way of allocating risk. One way of allocating risk is through the selection of trade terms and this is directly related to the transportation risk.[8]

"Incoterms are standard trade definitions most commonly used in international trade."[9] They are internationally accepted because they have been used over the years all over the world and their flexibility tested. Devised and developed in 1936 by the International Chamber of Commerce (ICC) in Paris, they have undergone many revisions with the latest version being Incoterms 2000. There are thirteen trade terms under Incoterms 2000 and these terms help define the general responsibilities and obligations of the parties in international commercial transactions.

Furthermore, incoterms gives information about who has to organize the transportation and who has the right to the goods and at which point. Therefore, it defines the decisive point at which the transfer of risk is passed from the seller from the buyer.[10] Additionally, incoterms deals with various modes of transport. Therefore, it is onerous upon the parties to select the appropriate term not only to determine the division of responsibility and cost between them but also that which deals with the appropriate transport mode they intend to use.[11] However, what are of relevance to this study are the ones related to sea transport.

Moreover, incoterms help define the transfer of risk from the seller to the buyer but do not deal with issues with regards to breach of contract. These terms are to be incorporated into the sales contract to make them legally binding. As such, the governing law of the contract is important for cases regarding breach of contract.

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[8] Managing Risk In Shipping; A Practical Guide Page 22

[9] http://www.iccwbo.org/incoterms/id3402/index.html

[10] This has to do with loss or damage with regards to forwarding the goods to the goods to the buyer

[11] The sale of Goods Carried by Sea; Charles Debattista 2nd edition page 20

They are divided into two sections with the letter “A” demarcating the seller’s obligation while the letter “B” states that of the buyer’s.[12] A1 to A10 deals with the seller’s responsibility with regards to the allocation of cost, transfer of risk and the documentation needed to pass on the risk. The same rules apply at the buyer’s side which is from B1 to B10. Below I will briefly elaborate on the different trade terms.

Appendix 1 is a diagrammatic presentation of the seller’s obligation under incoterms 2000.

## 2.2 The different trade terms

### 2.2.1 Ex Works

The first of these terms is the E-term which consists solely of Ex works – EXW is a trade term I prefer to call the seller’s term. Under this term, the seller makes the goods available at his premises and the buyer has the responsibility of arranging for the transportation and insurance. The seller’s risk ends after making the goods available at his premises. As such, the buyer bears all risk from the seller’s warehouse to his warehouse.

It is obvious that a seller who selects this term wants less risk as much as possible and therefore leaves the buyer to bear most of the risk. EXW therefore represents the minimum obligation for the seller and the buyer has to bear all cost and risk in taking the goods from the seller’s premises.

Section A5 deals with the transfer of risk on the seller’s side and it is in collaboration with A4 which deals with delivery. The seller must place the goods at the buyer’s disposal not loaded to any vehicle. No carriage is required. According to B5, the buyer must bear all risk of loss or damage to the goods from delivery which is at the named place in the contract. Arrangement for carriage under EXW is therefore irrelevant to the sale contract as the seller is not directly involved in arranging the carriage.

[12] For instance A5 deals with transfer of risk on seller’s side while B5 deals with the same on the buyer’s side.

### 2.2.2 The F-Terms

Another group of incoterms are F-terms (FCA, FAS, and FOB). The seller hands over the goods to a nominated carrier by the buyer. Typically under an F-term like FOB, the seller clears the goods for export and delivers the goods to a carrier. He himself does not contract the carriage. It is done by the buyer. Risk passes when the goods pass the ship's rail. According to A5, the seller bears the risk of loss or damage to the goods until when the goods have passed the ships rail. On the other hand, the buyer bears the risk from the time the goods have passed the ship's rail.[13] Moreover, the buyer pays for the freight as he arranges the carriage. As such, carriage is unpaid by the seller.

### 2.2.3 The C-Terms

In addition to these are the C-terms (CFR, CIF, CPT, and CIP). Typically under a CIF contract, the seller in addition to the cost of the goods, arranges for insurance and contracts and pays for the carriage. In this transaction, the main carriage is paid by the seller thus he bears certain risk more than under the F-terms by paying for certain cost. These extra cost i.e. freight and insurance cost are added to the price of the goods. The cost of the goods will be higher under this trade term than under an FOB term. Furthermore, the seller bears all the cost and risk of loss and damage until such a time that the good's pass the ship's rail at the port of shipment.

The difference between the FOB term and CIF is that, the seller in the former does not contract and pay for the carriage but just delivers whiles in the latter, the seller pays for and contracts the carriage as well as arranging for insurance.
However, the seller does not have to assume the risk of loss of or damage to the goods or the supplemental cost associated due to events after dispatch of shipments.[14] The C-terms

[13] Incoterms 2000 FOB term B5
[14] For details see Incoterms 2000

have two critical points, one for the transfer of risk and another indicating when added obligation to arrange and pay for carriage comes to an end.[15]
CIF contracts will be critically looked at 2.4 as it forms the basis for this research.

### 2.2.4 The D-Terms

The last group of incoterms are the D-terms (DES, DEQ, DDU, and DDP). A buyer who wants to refrain from too many responsibilities will choose the D-terms. Also known as the arrival terms, or by my term it will be known as the buyer's term. The seller takes responsibility of the goods and bears all the cost and risk until they get to the buyers premises. For a typical term like DDP, the seller bears all the cost and risks involved in bringing the goods to the buyer's country of destination. Unlike EXW, DDP represents the maximum obligation of the seller.

To sum up, incoterms deals with defining the obligations of the seller and the buyer with regards to the point of delivery, procurement of transport and the procurement of insurance. This is limited by the fact that, there are no rules regulating non performance. As such, incoterms constitute an incomplete set of rules and must be applied together with the governing law. With regards to this study, it is more appropriate to consider the rules with regards to risk allocation under incoterms together with CISG.

## 2.3 Seller obligation under incoterms 2000

Applying Incoterms 2000 clauses A3 and A8 determines the seller's obligation as to the contract of carriage and insurance and his obligation to tender documents. This depends on the type of incoterms chosen. In most of the incoterms with the exception of Ex works, the seller must show documentation to prove that the goods have been delivered to a carrier. These obligations are related to delivery and the price risk but do not deal with breach of contract or non performance.

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[15] www.scholargoogle.com J. Ramberg Incoterms 2000: The necessary link between contract of sale and contract of carriage Page 43

As such the seller's obligation can be looked at under CISG. Articles 31-36 of CISG contain rules on the seller's obligation. According to these articles, risk passes from the seller to the buyer at the time when the seller has fulfilled his obligation by delivering contractual goods or has done what is necessary to fulfil his obligations to deliver.
Article 36 states that the seller is liable for any lack of conformity of the goods existing at the moment the risk passes to the buyer. Again, the seller is liable when the lack of conformity is a result breach of his contractual obligations.
This is contrary to incoterms which deals with risk passing when delivery takes places without specifying what happens if the delivered goods do not conform to that specified in the contract.

## 2.4 CIF contracts

The terms that determine the critical point in time where the risk passes from the seller to the buyer under sea carriage are under the F and C terms. The focus of the study is on CIF contracts as such more it is examined in details below.
According to Ewan Mckendrick, "the CIF contract is probably the most commonly encountered of the export terms in practice."[16] This point is again repeated by Day & Griffin who puts it as "CIF contracts are undoubtedly the most important of the contracts based on the carriage of goods by sea, if not of all sale transaction."[17] This fact cannot be doubted as it is the most convenient form of trade term for importers who do not want to think about how to arrange for transport and insurance for the goods.

As the name suggests CIF means Cost, Insurance and Freight. The seller has the obligation to include the cost of freight and insurance to the cost of the goods. As such, the seller is the one who contracts a carrier for the carriage of the goods and also procures cargo insurance against the risk of loss or damage to the goods. Furthermore, the seller pays the insurance premium as well as the freight. As such, the cost of the goods is inclusive of the

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[16] Sale of Goods; Ewan Mckendrick page 647
[17] The Law of International Trade; Day & Griffin 3rd edition page 65

cost of freight and insurance. This means that the cost of the goods will be higher than in an FOB sale for instance. Therefore, the seller makes a marginal profit if cost of freight and insurance premiums rises while he makes more profit when these prices drops.

A unique feature about CIF sale in relation to sea carriage is that, in addition to delivering the physical goods, the seller also has to tender documents which includes but not limited to a shipped bill of lading, the policy of insurance and the sales invoice to the buyer against payment of the purchase price.

## 2.5 The seller's obligation under CIF contracts

According to incoterms 2000 A1, it is the seller's duty to provide the goods as specified in the contract. Therefore, the seller needs to delivery contractual goods. In addition to the goods, there should be an invoice issued to cover the goods. The invoice usually shows the description of the goods, quantity and price paid for the goods. Furthermore, according to A3, the seller contracts the carriage and obtains insurance for the goods. Again, subject to A8, the seller must at his own expense provide the buyer with documents covering the contract of carriage and insurance. Specifically a negotiable bill of lading is mention which proves how important such a document is. The bill of lading is analyzed in chapter three. The three major obligations of the seller will be outline below as they are looked at in detail at subsequent chapters of the thesis.

### 2.5.1 Contract of carriage

Under a CIF contract, the seller is responsible for contracting a carrier to send the goods to a named destination mentioned in the contract of sale. The seller has to do this at his own expense. This means that the goods must be delivered on board a vessel at the named port of shipment on the agreed date and within the period specified. There is an element of specificity under this contract of sale as it is time bound.
In return for the goods, the carrier issues a shipped bill of lading which further evidences the contract of carriage as it serves a receipt for the goods and document of title. At the point of delivery, risk subject to A5 passes to the buyer.

The seller's obligations under a CIF sale can be looked at in conjunction with CISG article 32(2) which states that "if the seller is bound to arrange for the carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transport appropriate in the circumstance and according to the usual terms for such transportation. This is a more specific provision than incoterms which just states that the goods should be delivered to a carrier. Under a CIF sale, risk passes when the goods pass the ship's rail. Therefore, seller's transport risk ends when he has done everything necessary to contract the carriage and obtain the transport document evidencing the carriage.

### 2.5.2 Policy of Insurance

In addition to arranging the delivery to a carrier, the seller is also obliged to arrange for insurance to cover the goods. Under the conditions stipulated under A3 (b), this insurance should not be arranged with just any insurer but with an insurer of good repute. This means that the minimum cover to be procured must be a secure one to ensure that the buyer's insurable interest is covered. "The insurance amounts according to CIF incoterms correspond to the invoice amount plus ten percent"[18] The minimum insurance cover therefore means insurance under Institute cargo clause C or any similar set of clauses.
The seller is bound to insure the goods in order to fulfil the sales contract as the cost of the insurance and freight is part of the purchase price.

### 2.5.3 Seller's obligation to tender documents

The seller's obligation under a CIF sale under sea carriage includes tendering documents covering the contract of sale –invoice, contract of carriage – bill of lading and a policy of insurance.
The seller's obligation to procure the documents mentioned above is as important as delivering contractual goods conforming to the sales contract. Thus his obligation includes a documentary and physical delivery in relation to the goods. The seller may be in breach of documentary delivery without breaching delivery of contractual goods.

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[18] International Commercial Transactions; Jan Ramberg 3rd edition page 113

Article 34 CISG goes to put emphasis on the seller's obligation to hand over documents relating to the goods. He must hand them over at the time and place in the form required by the contract.

The question then becomes whether the seller has a second chance to present documents if the first set is rejected. Article 34 CISG gives the seller another opportunity provided the second tender is within the time specified in the contract and if it will not cause any inconvenience to the buyer. If the second tender will cause the buyer any loss, he can claim damages. On the other hand, the seller is protected if contractual goods are delivered and the right tender is made under article 58 CISG. The seller has a right of withholding the goods or documents until the buyer pays for the goods.

## 2.6 The buyer's obligation under a CIF contract

According to incoterms 2000, B1, the obligation of the buyer is to pay the price as stipulated in the contract of sale. This is about the only requirement for the buyer before the goods get to the named destination. This is also in accordance with article 53 CISG.

The buyer's interest is at stake here as he cannot be present to inspect the goods. Being separated by time and space, this he cannot do himself. So usually the payments method used is by documentary letters of credit. As such, the buyer works through a bank to get his interest sustained. Chapter three deals with the obligation of the buyer by examining documentary letters of credit.

To sum up, A CIF contract in short is a sale based on the seller paying all the cost and bearing all the risk in the sale until delivery of the goods to the ship's rail. The seller procures the contract of carriage and insurance. After shipping contractual goods, he tenders documents covering the goods against payment. The documents are symbolic of the goods and at the point of payment risk passes to the buyer.

Therefore, under a CIF contract the seller's minimum obligation includes not just providing the buyer with the contractual goods, but also provides three requisite documents in the form of a commercial invoice issued by the seller himself, a bill of lading issued by a carrier and a policy of insurance issued by an insurer.

It is therefore not out of place to agree with writers who say that a CIF contract is a sale of documents and not a sale of goods. This is due to the fact that the seller's delivery obligation is more encompassed with documentary evidence than the goods themselves. The seller gets payment of the purchase price on presentation of the right documents to the buyer who has not yet seen the goods but relies on the documents presented. Even though the buyer has not yet seen the goods, the documents tendered to the bank represent the goods and as such the buyer deals with the goods while afloat. It is the transfer of the documents that gives the buyer the rights to the goods. The bill of lading and insurance policy gives him the right against the carrier and the insurer respectively in case of loss or damage.

It can be deduced that the seller bears all the expenses related to the goods from purchase until the goods are delivered to a carrier. As to whether the goods will arrive safely and in the same quality and quantity is not the duty of the seller. As such, the seller does not guarantee the safe arrival of the goods in the condition shipped.

# 3 Mode of payment

## 3.1 Introduction to letters of credit

International sales pose problems about payment because of the time between dispatch and delivery. Some of the financial risk encountered in international trade includes non payment of invoices, delayed payment and the insolvency of the buyer. The seller would like to be paid for goods delivered on time and the buyer would want to make sure that goods delivered conform to what has been specified in the sales contract. Usually, for both the seller and the buyer to be secured, documentary letters of credit are employed as the mode of payment.

A documentary credit may be defined as an irrevocable undertaking by a bank to make payment to an exporter on the presentation of conforming documents. They are considered to be the most equitable method of payment in international trade. This is due to the fact that, they satisfy the seller's desire to be paid when he exports and the buyer's desire to receive exactly what he has ordered within the agreed time frame.
The rules governing letters of credit was first developed and published by the ICC in 1933. It has been revised over the years with the latest version being 2007 known as the Uniform Customs and Practice for Documentary Letters of Credit -UCP600.
Just like incoterms, the UCP rules are not binding in themselves unless the parties refer to it in their contract. This is stressed on in article 1 of UCP 600 which states that the test of the credit must expressly state that it is subject to the rules. Once the contract refers to the UCP rules, they are binding on the parties. They are trade usages and have gained international recognition and acceptance among banks.

### 3.2 Functions of documentary letters of credit

Letters of credit has several basic functions. It is important to note, however, that the parties can modify or change these basic functions to tailor the credit to their own needs. It is the most common and convenient method of payment for goods in international trade. This is due to the fact that, both the seller and the buyer have their interest sustained as the seller is sure of receiving payment against tendering of specified documents and the buyer also get the assurance that once the right documents have been tendered, there is the likelihood of getting contractual goods.

First of all, the beneficiary is paid promptly after shipping the goods and making a valid tender. Furthermore, without the credit, the seller would have to require pre-payment for the goods or would have to wait until after the consignee receives the goods. The seller may be reluctant to sell on open account if he does not know enough about the credit worthiness of the buyer. As such, the credit helps to overcome the seller's reluctance to do business with the buyer

The bank undertakes its own obligation to pay the seller, that obligation being independent of the buyer's obligation to pay under the sales contract.[19] Moreover, the seller receives payment in his own country thus he can receive the same currency as used in his country subject to exchange of the currency of the buyer. As such, the credit is established under the terms of the contract of sale.[20]

Furthermore, the intervention by the bank resolves many of the worries necessarily experienced by the seller dispatching expensive goods to another country before being paid while at the same time, financing the transaction and resolving buyer's cash flow difficulties. The letter of credit acts as a guarantee against payment for the goods

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[19] Bills of Lading and Bankers' Documentary Credits; Paul Todd 4th edition page10
[20] The Law of International Trade; Day & Griffin 3rd edition page 173

purchased. On the other hand, the buyer has security that the payment will only be made upon presentation of the appropriate documents which is stipulated by the credit.

Every sales contract carries a risk of a dispute concerning whether the goods conform to the contract. If the method of payment is an open account, the seller most likely will bear the cost of litigating that dispute without the purchase price. A commercial credit re-allocates this cost to the buyer, because the seller receives the purchase price promptly when he presents conforming documents to the Issuing Bank. The holder of the purchase money has little incentive to initiate litigation. Since the commercial credit places the purchase money in the hands of the seller, the buyer will likely need to pursue the purchase money by entering the forum of the seller.

### 3.3 Procedures involved in issuing a letter of credit

According to article of 2 of UCP600, "credit means any arrangement, however named and described, that is irrevocable and thereby constitutes a definite undertaking of the issuing bank to honour a complying presentation." There is no definition of irrevocable credit in UCP600. However in UCP500, article 9[21] defines an irrevocable letter of credit as a "definite undertaking by the issuing bank (to make payment to the beneficiary) provided the stipulated documents are presented to the issuing bank and the terms and conditions of the credit are complied with." The issuing bank gives an irrevocable undertaking to the beneficiary.[22]It is an arrangement between the seller and the buyer that the transaction must be paid using letter of credit. Once opened it is valid and cannot be revoked.

Certain procedures must be followed before a letter of credit is issued. The first procedure is between the seller and the buyer, under the underlying sales transaction. This is the contract of sale between seller and buyer, under which the buyer contracts to make

[21] The edition that preceded UCP600
[22] Bills of Lading and Banker's Documentary credit; Paul Todd 4th edition page 15

payment by documentary credit. Thus an agreement is reached between the seller and the buyer that the mode of payment must be documentary letters of credit.

The second stage is where the buyer now known as the applicant, contracts his bank known as the issuing bank, to open a letter of credit. This arrangement is between the buyer and his bank. The issuing bank informs the seller about the credit usually through his bank known as the beneficiary bank. The seller is therefore the beneficiary of the letter of credit. This lead us to the final stage where a relationship is created between the issuing bank and the beneficially bank. The issuing bank is instructed to make payment for goods shipped as specified in the sales contract upon presentation of specified documents by the seller to the beneficiary bank. These documents under sea carriage are usually the sales invoice, a clean shipped bill of lading and the insurance certificate as agreed between the parties in the sales contract. These documents as specified conform to the arrangement under the CIF contract.

As such, the banks act based on the specifications from the buyer as they are not a party the underlying sales contract. The seller presents the documents to the bank. Furthermore, the bank inspects the documents to make sure it conforms to that stated in the credit. If the documents conform to the face of the credit, the beneficiary bank pays the seller and intends forward the documents to the issuing bank. If the issuing bank is also satisfied with the documentation, it will reimburse the beneficiary bank. The buyer becomes indebted to the issuing bank. As such, the issuing bank holds the documents as security against payment from the buyer. It is upon payment that the buyer gets the document for which he can use to claim the goods from the carrier.
Therefore, the buyer's risk is inherent in the documents presented to the bank by the seller. Note article 5 which states that "banks deal with documents and not goods, services or performance to which the documents may relate."

### 3.4 The impact of Inspection under documentary letters of credit

The buyer is responsible for specifying the documents required to be drawn on the face of the credit. On the other hand, the banks are responsible for inspection of the documents

which must be in strict compliance with the credit. If the documents appear to be in order, the banks are required to pay. On the other hand, if the documents do not conform, the bank is entitled to with hold payment as failure will lead to the bank being liable to the buyer for non compliance. However, it should be noted that the bank is not a party to the sales contract and is not expected to know the inside out of the underlying sale. As such, the bank follows the instructions of the buyer. Note article 3(a) which states that "a credit is a separate transaction from the sale or other contracts on which it may be based."

Moreover, the doctrine of strict compliance does not demand that every document in the set should indicate every detail required. It is enough that all necessary details are stated.
A fraudulent seller can as such connive with a carrier to issue a shipped bill of lading for goods that have actually not been shipped. The seller will present the documents to the bank against payment. The buyer will be expecting the goods to arrive only to realize that there are no such goods on board the supposed ship.

Furthermore, the bank is to examine the document with "reasonable care"[23] to ascertain that the documents conform to the face of the credit. Article 14 UCP 600 outlines the standards for the examination of the documents. The bank is not under an obligation to investigate to determine the genuineness or validity of signatures or the like on the documents. It should be noted that such a system could lead to fraudulent sellers duping the banks as documents presented may appear to be the same under the credit but will in reality be far from so. There is no where in the UCP rules which mandates the banks to have a duty of care towards the applicant. This is further exacerbated by the fact that, the applicants are not considered a party to the letter of credit itself. However, it should not be overlooked that the banks have an interest in the documents presented as it holds it as security against payment from the buyer. As such, the banks have an interest in the type of document presented. Moreover, the banks unless stipulated in the credit, accept original documents which are more authentic than photocopies and the like.

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[23] See article 13 UCP500

If the documents do not conform to the face of the credit, the banks have a right to reject it. The issue that arises is whether the seller will be given the second chance to correct the defect and make a right presentation. The UCP rules are silent on this point as such we can fall back on CISG article 34. If the documents are non conforming, the seller has a right to cure the lack of conformity but only if it will not cause unreasonable inconvenience for the buyer. What is to be considered an inconvenience is to be determined by the details in the contract of sale.

The documents presented in relation to the letter of credit are analysed below.

## 3.5 Documents presented under letters of credit

The seller's duty under a CIF contract A8 includes providing certain documents before payment. The UCP600 rules articles 18, 20 and 28 mentions documents that may have to be presented under sea carriage, viz the commercial invoice, bill of lading and an insurance policy. The documents are transferred from the shipper to the bank against payment and the bank then forwards it to the buyer for a refund of the payment.

The study does not deal with the complexities of the different types of carriage documents like the delivery order, sea way bill and other non-negotiable documents. The emphasis will be on the traditional negotiable bill of lading, commercial invoice and insurance policy.

### 3.5.1 Commercial Invoice

According to article 18 of UCP600, a commercial invoice must be issued by the seller made out in the name of the buyer. The seller issues an invoice covering the goods. "The content of the invoice may be regulated by the contract of sale itself."[24] However, normally, it will contain information on the quantity, description, weight and price of the goods. This must conform to the specifications written in the letter of credit. The currency

[24] Sale of Goods; Ewan Mckendrick page 669

used also has to be in line with the currency of the letter of credit. It is not a requirement that it must be signed[25].

The commercial invoice is the document that the seller presents to the carrier in addition to the packing list to enable the carrier to issue the bill of lading.

### 3.5.2 Insurance policy

Article 28G of the UCP600 rules states that "a credit should state the type of insurance required" This presupposes that the parties to a CIF contract of sale have to determine the type of insurance the seller effects. If there are no specifications in the contract, the seller is obliged to insure the goods on minimum cover. This means having cover at least under the Institute Cargo Clauses C. It must be noted however that the insurance cover is from port to port unless otherwise agreed by the parties.[26] The buyer will then have to arrange for additional cover if he wants full coverage for his loss from port to destination.

As stated under CIF incoterms A3, the seller is to arrange the insurance in such a way that the buyer can claim directly from the insurer in case of loss or damage during the insurance period. The policy must therefore be assigned to the buyer at some point, when title in the goods passes to the buyer.

Furthermore, the insurance policy must be issued by an insurance company and duly signed or on behalf of the company. The date of the insurance policy should not be later than the date of shipment. That is to say that, the policy must conform to the date of shipment. A CIF seller is under an obligation to insure the goods against marine risk, and the buyer is entitled to the benefit from the insurance policy covering the goods for the intended voyage.[27]

### 3.5.3 The bill of lading

Under a CIF sale, the seller has an obligation to deliver the goods to a carrier. The carrier issues a bill of lading in exchange for the goods.

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[25] Article 18 UCP600
[26] International Commercial Transactions Jan Ramberg 3rd Edition page 113
[27] Bills of Lading and Bankers' Documentary Credits; Paul Todd 4th edition page 106

A bill of lading can be described as the most important document in international sale of goods involving carriage by sea. It is a sophisticated and multi functionary document. Firstly, it is a receipt for the cargo. The carrier confirms what he receives, when and where and to whom to deliver it to. For the shipper the bill of lading evidences that he has made a shipment of such quantity and quality and as such has fulfilled his contractual obligation. Notable among its functions is the fact that it is a document of title such that the holder is the owner of the goods. When the seller transfers the bill of lading to the buyer, he also transfers the property rights in the goods.

According to article 20 of UCP600, a bill of lading must indicate the name of the carrier, port of shipment and date of shipment. Unlike the commercial invoice, it must be signed by the carrier, master or his agent. It must be a shipped bill of lading to conform to the credit requirement. That means the goods must actually be on board the vessel.

Article 27 further adds that it must be a clean bill of lading. A clean bill of lading is further explained to mean "one bearing no clause or notation" Thus goods shipped on board must conform with the specifications in the sales contract to conform to that of the credit. The individual functions will be commented on briefly as it is discussed in detail under chapter five of the thesis

## 3.6 Functions of the bill of lading

### 3.6.1 The bill of lading as receipt of cargo

"The bill of lading is evidence that a certain quantity of cargo, in the condition stated, has been received for carriage at a specified time, usually at the time of loading." [28] The carrier as such relies on the information given by the shipper usually based on the shipping invoice. The carrier's examination of the goods is therefore based on a visual external examination during loading which in itself is a limitation. This proves why most bills of lading has the phrase "weight and quantity unknown or said to contain so and so"[29]

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[28] Scandinavian maritime law ;Thor Falkanger 2nd edition page 259
[29] See 5.8

### 3.6.2 The bill of lading as evidence of the contract

The bill of lading is not the contract in itself as there is always an established contract either through the issuing of a booking note or other forms of establishing the contract. Therefore the bill of lading goes to confirm the existing contract.

### 3.6.3 The bill of lading as document of title

This function of the bill of lading makes the holder of the original the owner of the goods. The bill of lading can thus be considered as representing the goods.[30] In other words, the seller is able to transfer his ownership in the goods to the buyer by transferring the document to him. The buyer can also transfer such rights to a third party.

The bill of lading has an additional function as being negotiable. Its negotiability is as a result of the fact that, it can be transferred from one party to another by endorsement. For instance under current study, the buyer under documentary credit procedure secure credit to finance the transaction from the bank and transfer the bill of lading to the bank as a form of security. If the consignee is named, or the bill of lading is made to order, the bill of lading becomes negotiable by endorsement.

To sum up, the bill of lading is central to the discussion of passage of risk and property under sea carriage as it is the one document that proves that the seller has actually delivered goods of a certain quantity and specification to the buyer. It becomes the weapon for which the parties to the sales contract can rely on under the sea carriage as it evidences that the goods are "in movement and not static"[31]

## 3.7 The issuing of more than one original bill of lading

Usually, a carrier issues more than one original bill of lading. Normally three originals are issued. The idea is for the shipper to keep one, one to accompany the goods and the last one to be transferred to the consignee. This is an insecure practice for the consignee as different

[30] Scandinavian maritime Law; Thor Falkanger 2nd edition page 259
[31] Commercial Law; Roy Goode 3rd edition page 885

persons may be holding the bill of lading at the same time. As such, the ownership of the goods may be vested in different persons and the consignee will not have full disposition of the goods.

The banking sector have realised this risk and in accordance with the UCP600 article 20 (IV), if more than one original bill of lading is issued, the shipper has to present all the originals to the bank. The issuing of several originals seems out of place as one original can be used for the same purpose more than one original performs. As such, the reasons for issuing more than one original have been defected by the banks demanding that all three originals be presented against payment. This is to ensure security in the ownership rights of the goods as unscrupulous people can chance on one original and present it against delivery from the carrier.

### 3.8 The underlying sale and the bill of lading

In fulfilment of the sales contract, a contract of carriage must be entered into so the sales agreement can be performed. As such the document issued should conform to the underlying sale requirements. This relationship is centred around the bill of lading and by so doing, a carrier is "drawn into" the relationship between the buyer and the seller.[32]

If a shipped on board bill of lading is issued, the buyer gets the satisfaction that the goods have actually been shipped and will arrive at the named destination. Again, the buyer can rely on the description of the goods and condition stated and will be expecting to receive the goods as described.

This leads us to ask two further questions as to whether the buyer can pay for the price of the goods and if he is sure of receiving the goods. The answer to the former question will depend on if the seller has actually delivered the goods to the carrier. To answer the latter question depends on the carrier's performance of the voyage.

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[32] Scandinavian Maritime Law; Thor Falkanger 2nd edition page 254

Nevertheless, at the port of destination, the consignee is expected to present the bill of lading against delivery of the goods. The holder is the authorised receiver as such the bill of lading serves as security for the seller, bank, carrier and buyer.

Furthermore, the transfer of the bill of lading determines who has propriety rights in the goods. Also, for the security in the bill of lading to be maintained, the consignee must be able to rely on the information made in it about the apparent order and condition of the goods. If the goods get lost or damage, the consignee should be able to hold the carrier liable based on the contract. The consignee, however is not a party to the original contract of carriage but gains such rights by the transfer of the bill of lading from the shipper. Under the Hague Visby rules, when the bill of lading is with a third party who acquired it in good faith, it is prima facie evidence that the contents exist.[33]

To sum up, the commercial invoice, insurance policy and the bill of lading are to be tendered in by the seller to the bank in order to get payment for the goods. Hence the documents play a vital role in the transaction. This has led to most writers referring to a CIF contract as a sale of documents and not goods. The transaction can by no mean be described as dynamic in nature due to its interrelationship between the contract of sale, contract of carriage and contract of marine insurance[34].
As the transaction involves transportation under sea carriage, the bill of lading forms the most important document that help in executing the sales contract to end.

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[33] Hague Visby rule 3(3 and 4)
[34] Sale of Goods; Ewan Mckendrick page 650

# 4 Contract of carriage

## 4.1 Introduction

Having examined the sales contract including the mode of payment, it is important to look at the link between the contract of sale and the contract of carriage. Under a CIF contract as discussed so far, the seller is obliged to ship the goods on board and obtain a shipped bill of lading. This evidences that, goods of a certain quality and quantity have been shipped. The seller is thus responsible for contracting a carrier to perform the carriage. Therefore, in order to fulfil the sales agreement a contract of carriage must be entered into. This is where the carrier has a vital role to play in the transaction. It is the carrier who transports the goods from the seller to the buyer. For the buyer to pay the purchase price, and the seller to get the payment under a documentary letter of credit, the buyer must be sure that the goods have actually been shipped.

As has been discussed in the previous chapter, neither the bank nor the buyer can inspect the goods. Therefore it becomes the carrier's responsibility to inspect the goods and issue the bill of lading to certify the goods. However, this examination only regards the physical nature of the goods. Such inspections are as such based on the information provided by the seller. Neither the seller nor the buyer has physical control over the goods after it has been delivered to the carrier and their only tool is the bill of lading which has been issued by the carrier. This is what can be used to hold the carrier responsible for lost or damage to the goods. As such, the seller and the buyer security in the goods are now entrusted to the carrier and the way he executes his part of the contract becomes essential for the fulfilment of the sales contract.

The carrier’s acts or omissions therefore have to be controlled to protect both his interest and the cargo interest. To bring uniformity and harmonization with regards to rules governing sea carriage, contracts of carriage under a bill of lading known are regulated by The Hague, Hague Visby and Hamburg rules.
I will now deal with the rules governing contract of carriage with particular attention to The Hague Visby rules.

### 4.2 The Hague/Hague Visby rules

According to Roy Goode, “the law relating to contracts of carriage by sea under bills of lading has evolved as a response to the imbalance of bargaining power between ship-owners on one hand and cargo owners on the other”[35]Cargo owners found themselves at the receiving end and had to accept any terms imposed on them by shipowners. This led to a protest against such state of affairs and in an attempt to harmonize and control the carrier’s activity, the Brussels convention of 1924, adopted a set of uniform rules relating to bills of lading. The terms of the rules were drafted in The Hague in 1921 and adopted by a number of countries in Brussels in 1924. This is known as The Hague rules. It was amended by the Brussels protocol of 1968 which added rules known as the Visby rules. They are now known collectively as the Hague Visby rules. These rules regulate the rights, duties and immunities of the carrier under a contract of carriage by sea evidenced by a bill of lading.

#### 4.2.1 Identifying the carrier

Before accessing the role of the carrier, it is important to establish first who a carrier is.
A consignee of cargo or a bill of lading holder may be beset with problems of identifying who the carrier of the goods is. This is because, ships are often chartered out by their owners on time or voyage charter, for the use of third parties, who often will also charter it out. This makes it difficult to ascertain who actually the contractual carrier is. Again usually goods are handed over from the shipper to a freight forwarder who then contracts a

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[35] Commercial Law; Roy Goode 3rd edition page 1031

carrier to ship the goods or may do it himself. In such instances, it becomes difficult to know the identity of the carrier when there is loss or damage.

According to The Hague Visby rules article 1, "carrier includes the owner or the charterer who enters into a contract of carriage with a shipper." This is to say that the one who issues the transport document evidencing the contract to the shipper becomes the carrier. The carrier's identity therefore depends on the particular contract of affreightment which is entered into.[36]This is the path this study took and as such the problems of who a performing carrier and contracting carrier are has not been discussed in detail.

## 4.3 The role of the carrier

Article 3(1) of the Hague Visby rules states that, the carrier must before and at the beginning of the voyage exercise due diligence and provide a seaworthy ship. This seaworthiness requirement covers not just the ship itself but also the equipments and personnel manning the ship. This means the ship must be properly maintained and equipped both with human resource and machinery needed to execute the voyage. Furthermore, the carrier is charged with how the cargo should be handled. He shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried.

Therefore, the carrier is charged with the responsibility to take care of the cargo and deliver them undamaged. A minimum duty of care is necessary as physical damage to the goods carried by sea is not unpredictable. Failure to exercise due diligence to make the ship seaworthy, which results in loss or damage makes the carrier liable under the rules.

Furthermore, the carrier is also required to commence the voyage with reasonable dispatch and completes the voyage within reasonable time without unlawful deviations. Lawful deviation is permissible for instance to save life. For cargo interest any impermissible deviation makes the carrier liable under the rules. A sense of urgency is thus added to the

[36] Carriage of Goods by Sea; Stephen Girvin, page 13

carrier's duties. After the voyage, the carrier is responsible to deliver the cargo to the rightful owner of the goods.

It must be stated that rules regarding the carrier's liability vary from country to country.

Article IV (2) enumerates the immunities enjoyed by the carrier which does not constitute liability arising out of loss or damage due to any of the listed rules. The carrier will only be liable when he has failed in the exercise of due diligence and the loss or damage is caused by intent. Notable among the carrier's immunity are the errors committed in the management of the ship and navigation. The carrier is also able to limit his liability if found culpable.

### 4.4 Shipper's obligations under the Hague Visby rules

It is the duty of the shipper to deliver contractual goods at the correct time and place. The shipper is also responsible for the packing, numbering, marking and weighing of the cargo. This conforms to the seller's obligations under CIF contract incoterms 2000 A9 which mandates the seller to pay for the cost of packing, checking, weighing among others. This he has to do properly to avoid being liable for loss or damage.

Furthermore, it is the duty of the shipper to supply information about the goods with regards to their inherent nature and characteristics. This includes their dangerous nature. The shipper guarantees that his information regarding the cargo is correct. If not, the shipper becomes liable to the carrier if there is loss or damage as a result of incorrect information. Article 3 rule 5(2) of the Hague Visby rules states that …"the shipper shall indemnify the carrier against all loss, damage, and expense arising or resulting from inaccuracies in such particulars…" The shipper's obligation is further highlighted on in article 4 rule 2(I,N,O,P) where the carrier is not liable for insufficiency of packing, inadequate marks, acts or fault by the shipper and latent defect that is not easily seen by the carrier.

Therefore, lots of emphases are placed on the pre shipment arrangement by the shipper under a CIF sale and The Hague Visby rules. In order for the shipper to avoid being liable, the seller has to execute the pre shipment obligations well avoid loss or damage to the goods.

On the other hand, the Hague Visby rules states in article 4.6 that the shipper is not responsible for loss or damage sustained by the carrier resulting from fault or neglect of the shipper. However this does not apply if dangerous goods have been shipped without the carrier consent. The shipper's liability with regards to dangerous goods is strict and the carrier may discharge the goods without compensation to the shipper in this respect.

## 4.5 Consignee's obligation under the Hague Visby rules

At the port of destination, it is the duty of the consignee to receive the cargo. This is similar to incoterms 2000 B4 where the buyer must accept delivery of the goods when they have been delivered in accordance with A4 and receive them from the carrier at the named port of destination. The consignee however, can only take delivery of the goods by becoming a party to the contract of carriage through possession of the bill of lading. As noted under 2.5.1, it is the seller who contracts the carriage and obtains the documents under the carriage. It is only by transferring the bill of lading to the buyer that he can gain lawful rights to the goods.

## 4.6 Carrier's period of responsibility

Another issue worth looking at is when the carrier becomes responsible for the goods. Under the Hague rules, the carrier's period of responsibility for the goods applies from "tackle to tackle" This means that the carrier's responsibility begins once the goods are picked from the quay at the loading port and ends once the goods are dropped at the quay at the discharging port. The periods before loading and after discharge are not under his duty of care.

This is further highlighted in most bills of lading putting a disclaimer for the period of responsibility. For instance the old Conline bill clause 4 states "the carrier or his agent shall not be liable for loss or damage to the goods during the period before loading and after discharge from the vessel, howsoever such loss or damage arises."[37]

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[37] Scandinavian Maritime Law; Thor Falkanger, 2nd edition page 303

Therefore if the goods get loss, damaged or stolen before loading and after discharge, the carrier is free from liability. Who bears the risk for these losses? If the seller has delivered contractual goods to the carrier and it get damaged before the goods pass the ship's rail that would mean the seller bears the risk of loss. Furthermore, if the goods are at the seller's risk, and loss or damage occur before loading, although it has been delivered to the carrier, the seller cannot then claim the price for the goods as risk has not yet passed to the buyer.
On the other hand, if risk has passed to the buyer when the goods are damaged or lost he has to pay the price and pursue the responsible party for damages. This could be the seller or the carrier.[38]This presupposes that, the seller has to bear the loss before loading when the goods have already been delivered to the carrier. Likewise, the buyer bears the risk after discharge when he actually has not taken possession of the goods or examined them to see their physical condition.

Moreover, the period of responsibility from tackle to tackle under containerisation is worth considering. Goods are usually stowed in containers and placed at vantage points for pick up by the carrier. In such instances, when does the carrier's period of responsibility begin? Again when such containers are handed over to freight forwarders before being handed over to the actual carrier what can we describe as the period of responsibility of the carrier? As such, the period of responsibility should be at the moment the carrier takes charge of the container. It is therefore not out of place to suggest that the period of responsibility should be from the period before loading to the period after discharge. In this instance the Hamburg rules have the best solution to this problem. It can therefore be said that the period of responsibility of the carrier under the Hague Visby rules is needs to be reconsidered.

[38] The International Sale of Goods; Law and Practice 2nd edition page 391

# 5 Concept of risk under sea carriage

## 5.1 The meaning of risk under sales law

According to Ewan Mckendrick, "to say that a party to a contract for the sale of goods bears the risk, means that he bears the loss if the goods are damaged or destroyed without fault on the part of either party to the contract"[39] Hence risk is concerned only with events causing damage or loss of the goods which are due to neither of the parties fault. The damage or loss can be accidental or caused by a third party. [40]

The concept of risk therefore deals with which of the contractual parties under the sales contract has to bear the loss. This is an important problem to be solved by sales law. Usually a policy of insurance is acquired to cover such losses. However the passage of risk determines which of the parties is to press a claim against the carrier or issuer and where insurance is absent, the risk becomes even more pronounced.[41]

Goods may suffer loss or damage while at the seller's premises, during packaging, on the way to the port for shipment, during the sea carriage and the like. The most important question then becomes who is responsible for these losses or damage to the goods. The rules on passing of risk under sea carriage is to determine whether the seller is entitled to receive the purchase price after delivery of the goods to a carrier and whether the buyer is entitled to pay for the goods delivered.

## 5.2 Time of transfer under CIF contract

The transfer of risk is regulated in sections A5 and B5 in all the different variants of incoterms. The risk passes at the time of delivery. The time of delivery is defined in

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[39] Sale of Goods; Ewan Mckendrick page 107
[40] Commercial Law Fidelma White page 385
[41] Commercial Law; Roy Goode 3rd edition page 243

sections A4 and B4 and it regulates the time of handing over the goods by the seller and it being taking over by the buyer. Under CIF contracts, A5, the "seller must, subject to the provisions of B5, bear all risk of loss or damage to the goods until such time as they have passed the ship's rail at the port of shipment."

According to A4 and B5, the seller fulfils his obligation to deliver when the goods pass the ship's rail at the named port of shipment on the agreed date or time. The transfer of risk is thus tied to delivery at a definite point in time. This is when the goods pass the ship's rail.

This means that the seller is free from all liability when the goods pass the ship's rail provided he has delivered contractual goods which will be eminent in the shipped bill of lading.

What constitutes the ships rail is a subject of debate and there are many views on this point.

### 5.3 Ships rail concept

Under CIF contracts, the point of delivery and hence passing of risk is the moment when the goods pass the ship's rail. The problem is what constitutes the ship's rail. This is an issue worth considering as it is difficult to determine the exact point in time when the risk passes. Who bears the loss if the goods suffer loss or damage in the process of loading? There have been various suggestions as to who bears the responsibility at this point. Some theories suggest that the seller bears the risk if the goods fall on the wharf or into the sea while others think the buyer bears the risk if the goods fall on the deck since the goods would have already passed the ship's rail.

Both opinions are not clear and that it makes it difficult to determine when exactly the risk passed to the buyer. In an attempt to clarify the issue, two answers have been given. The first theory suggests that the goods pass the ship's rail when they actually cross the rail of the vessel. Therefore, if the goods get damaged in the loading process or fall on the wharf, the risk is on the seller. Likewise, if it falls on deck, it will be on the buyer. The second

theory suggests that the risk only passes when the loading process is completed.[42] This may be in line with the carrier's period of responsibility under the Hague Visby rules.

This problem has been further exacerbated by the evolution of containerization. Where goods are packed in containers and placed at vantage points for pick up by the carrier. In this sense what constitutes the ship's rail? Is it when the carrier picks up the container or when the container has already been put on board the vessel? Therefore it is not out of place to say that the concept of the ship's rail needs to be reconsidered under CIF contracts to be abreast with modern trends. This point is also reiterated by Day and Griffin who state that "the ship's rail has clearly lost all significance as a transitional point in the performance of the contract."[43] Instead if the goods are handed over to a carrier for onward shipment to the buyer, risk should pass to the buyer. This can be looked at in the light of article 67(1) of CISG.

## 5.4 Combined transport and tender

The seller may deliver the goods to a combined transport operator who will issue a received for shipment bill of lading as the goods have not yet been shipped on board. "Such a document may not be a good tender under a CIF contract since it cannot, by mere transfer, pass the property in the goods."[44]

Article 19 of UCP 600 rules deals with transport documents covering at least two modes of transport. Article 19(a) (ii) states that the document issued should indicate that the goods have been taken in charge of or shipped on board. This presumes that if the transport document indicates that the goods have been taken, it should be acceptable for tender. But how can the property pass to the buyer under a received for shipment bill of lading which just indicates the goods have been taken to be shipped? When the goods are loaded on

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[42]For more on the ship's rail concept see www.scholargoogle.com Zoi Valioti Passing of Risk in International Sale Contracts… the Nordic journal of commercial law issue 2004 # 2 page 30
[43] The law of International Trade Day& Griffin 3rd edition page 126
[44] The Law of international Trade Day & Griffin 3rd edition page121

board a shipped bill of lading will be issued in exchange for the received for shipped on board bill of lading.

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## 5.5 Passing of risk and or property

Another issue worth discussing with regards to risk is when property passes to the buyer under sea carriage. Risk usually passes on shipment. Under a normal sale, for instance, when one purchases goods, by paying for the goods, the person assumes ownership. However under a CIF sale, this is a different case. There are various opinions to as to when property in the goods pass to the buyer. Some suggest property passes on shipment while others support the view that property passes when the buyer has received the tendered documents and paid the price.

### 5.5.1 Passing of property

According to A4 and A5, the seller fulfils his obligation to deliver when the goods pass the ship's rail at the named port of shipment on the agreed date and time. After delivery, the risk passes to the buyer. This is compatible with CISG article 67(1), where the risk passes when the goods are handed over to the carrier. Under the documentary letters of credit, where shipment takes place before tender of the documents, if the bank rejects the documents for being non conforming, the risk in the goods would have passed to the buyer without ownership passing to him. As such, the buyer assumes risk in the goods on and after shipment. However, property in the goods may not pass with risk. Property may pass on tender and payment. Both incoterms and CISG are not clear about when ownership rights in the goods should pass.

As such, the intention of the parties is taken into consideration together with the governing law. In such instances, ownership is transferred at the time the parties intended it to. However, a problem arises if the parties did not have any intention as to when property should pass. Under a CIF sale as we have discussed so far, risk passes on shipment as the contract of carriage is a pre-requisite for the sales contract to be fulfilled. As such, it cannot

be said that property has passed before shipment. If the property has passed from shipment, then the seller does not have right of claim on the goods, although he has not received payment because he has not yet tendered the document. By making a valid tender however, the seller is sure of payment under the current UCP600 rules where the credit is irrevocable. Nevertheless, the seller can also retain the bill of lading as security for non payment of the purchase price. In such instance, property rights in the goods remain with the seller although risk has passed to the buyer on shipment. It should be noted that the seller will not be interested in retaining property in goods he has shipped to a foreign country where he will be required to claim the goods when the ship arrives.[45]

On the other hand, when the buyer assumes risk on shipment without property, then he is acquiring liability in something he cannot claim ownership to. This presupposes that the passing of risk is inherent in the documents such as the bill of lading. This can be explained by the functions of the bill of lading. Property passes to the buyer when he makes payment against the documents. Risk passes as from the time of shipment.[46] Griffin also points out that "the most practical point for the passing of property under a CIF contract will be on the tender of the documents to the buyer…"[47] However, the problem still exist as the buyer has a right to reject non conforming documents back to the seller in which case property revest back unto the seller although risk would have passed on shipment to the buyer.

The theory of passing of risk with ownership therefore seems unrealistic since the seller can maintain ownership in the goods while the buyer bears the risk. Passing of risk with delivery though realistic, is not so simple under documentary letters of credit. This is due to the fact that, the document that gives the buyer title is still with the seller after shipment. This is only transferred after tender and it is only when the documents are accepted that ownership is transferred to the buyer.

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[45] Bills of Lading and Bankers' Documentary Credits; Paul Todd 3rd edition page 9
[46] Commercial Law; Roy Goode 3rd edition page 940
[47] The Law of International Trade; Day & Griffin 3rd edition page 93

## 5.6 Passing of risk under multimodal transport

Another area to be looked at is passing of risk under multimodal transport. With current containerisation of goods, it is not uncommon for more than one mode of transport to be used for conveying goods from one place to the other. A seller under a CIF contract using such mode of transport will give the goods to one carrier for onward shipment by sea.

When the shipper deliveries goods to a multimodal transport operator, a received for shipment bill of lading is issued. This is not equivalent to a shipped bill of lading as the goods have not been shipped on board for a shipped bill of lading to be issued. When will the risk pass to the buyer under the circumstance? Is it when the goods have been delivered to the first carrier or when they actually cross the ship's rail? This is uncertain although under the current revision of UCP rules, a received for shipment bill of lading makes a valid tender. This can be looked at under article 19 of UCP600 rules where when transport document indicate that the goods have been taken in charge of by a carrier, the document merits a valid tender. This goes on to prove that the ship's rail concept is obsolete or rather needs to be reconsidered!

For further consideration, it can be stated that the transfer of risk affects the parties' situations of loss or damage under the contract of carriage and policy of insurance. It determines the point in time when the seller is entitled to get payment for the goods and when the buyer after acquiring title can enforce property rights action against others in court. It is needless to say then that risk of loss or damage passes to the buyer upon shipment and title passes upon payment as you cannot fully claim title to something you have not paid for.

## 5.7 Consequence of the passing of risk

The consequence of passing of risk can be looked at with regards to article 66 of CISG. The buyer is obliged to pay for the goods provided the goods conform to the contract of sale and the right documentation provided. As such, if a loss or damage occurs accidentally, the buyer cannot hold the seller responsible for non performance.

On the other hand, if the goods are nonconforming, the seller shall continue to bear the risk of loss in the goods until the defect is rectified. In such instances title is reverted to the seller. However, if the loss or damage is as a result of an act or omission on the part of the seller, then the seller will be the party to bear the risk of loss. In such instances, the buyer can claim for remedies subject to articles 74 to 77.

With regards to documentation, the issuing bank can reject non conforming documents according to article 16 UCP 600 rules. However, the remedies after such refusal are not clear cut. The seller has a right to make another presentation within the stipulated time stated in the credit provided this does not cause an unreasonable inconvenience to the buyer.[48]

## 5.8 Risk inherent in the bill of lading

### 5.8.1 As receipt of cargo

The bill of lading is prima facie evidence that goods have been shipped with the stated quantity, quality and condition. The burden of prove is on the carrier to show that such quantity was actually shipped. Due to such circumstances, bills of lading are issued with the words" weight and quantity unknown" or "said to contain…" The burden of prove is reversed in such instances as it rest on the shipper to prove that such quantity was actually shipped. However under The Hague Visby rules, note article 3 rule 4, the quantities recorded becomes conclusive evidence that such quantity has been shipped and the buyer can rely on the bill of lading to claim for shortages against the carrier.

Furthermore, the condition of the cargo is also stated in the bill of lading. Generally words such as "shipped in apparent order and condition" appear on the face of the bill of lading. This is due to the fact that, the carrier does not conduct thorough examination of the cargo despite the use of the word "apparent" which indicates some precision. Moreover, the

[48] Note article 43 UCP 500

carrier becomes at risk as goods stowed in containers, crates and cases cannot be seen through. This confirms the fact that only the shipper can actually prove the actual condition and quality of the goods.

Another issue worth considering as an element of risk is the date on the bill of lading. This is significant for payment of the price and fulfilling the sales contract.[49] Under documentary letters of credit, the date of shipment is important as it must conform to that on the face of the document. Most shippers can connive with carriers to issue shipped bills of lading when goods have actually not been loaded on board. This is a risk for the buyer as the expected time of arrival of the goods will be deviated from, preventing the buyer from fulfilling his contractual obligations to his clients. It is therefore important that a shipped bill of lading shows the date on which loading was completed with regards to the parcel of cargo identified in it.

### 5.8.2 As document of title

The function of the bill of lading as a document of title is of major concern for the seller, buyer, bank and carrier. The risk here is that the holder of the original bill of lading becomes the owner of the goods. There are times that we have more than one person demanding the delivery of the cargo. This may be due to the fact that, the bill of lading has fallen into the wrong hand and such a person uses it to claim for the cargo leaving the original buyer without the goods. Furthermore, there could be situations where goods arrive at the discharging port without the bill of lading being available. Again, if the original shipper has not parted with the bill of lading due to non payment by the buyer such a situation could arise.[50]

These problems are further exacerbated with the issuing of more than one original. Currently under UCP600 rules, the banks demand that all three sets if issued must be presented against payment. This is a check against having other originals in circulation

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[49] Bills of Lading; A Guide to Good Practice. Stephen Mills. 2nd edition, page 80

[50] Ibid

against presentation for the release of the cargo. It should be noted that, in the hands of an innocent buyer, an unauthorised bill of lading may not be worthless.

### 5.8.3 Delivery of the cargo

Delivery of cargo to the right consignee is of major concern to the parties under the sales contract. Sometimes, there is the possibility of the carrier delivering cargo without the presentation of the bill of lading. For the underlying sale to be complete, the goods must be delivered to the right owner. Delivery of cargo without the bill of lading is a breach of contract and the cargo owner can bring an action against the carrier.

The carrier's liability for misdelivery is unlimited. This is so if the carrier fails to delivery the goods to the consignee without the presentation of at least one original bill of lading. It must be noted that the issuing of more than one original bill of lading can be a cause of misdelivery reiterating the risky nature of such practice.

### 5.8.4 Letters of indemnity

Shippers sometimes deliver cargo that is not in conformity with the required standard. This may be with regards to defective cargo or the date of shipment which may not be in line with the letters of credit. In such instances, the carrier will not be willing to issue a clean bill of lading as required under letters of credit. The shipper then influences the carrier to issue a clean bill of lading in exchange for a letter of indemnity. "This is a document under which the shipper promises to indemnify the carrier for any liability which arises out of the issuance of a clean bill of lading."[51] Although the consignee can hold the carrier liable, such back letters are not admissible in a court of law. As such carrier sometimes require a bank guarantee in place of letters of credit.

Not all letters of indemnity are issued based on fraudulent bases. Some have been used overtime due to the nature of the trade. A further consequence of the issuing of a clean bill of lading against back letters is that it is not recoverable under any insurance.

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[51] Scandinavian Maritime Law; Thor Falkanger 2nd edition page 321

To sum up, generally when goods are sold under a CIF contract, the seller will not have an interest in suing the carrier for loss or damage at sea when he has obtained payment for the goods. Although the buyer does not make the contract of carriage, he has the utmost interest in the goods after shipment as he has paid the price for the goods, so is the bank which pre financed the sale. It is therefore important that, the buyer gains rights under the contract of carriage through the bill of lading in order to gain title to the goods and be able to sue the carrier against damages. The parties to the contract must therefore explicitly state where property should pass to the buyer in addition to the trade term selected. Not all of the risk factors under the sea carriage have remedies. As such quoting Ramberg, "…the parties to a contract of sale cannot expect to get satisfactory protection for the risk of loss of or damage to the goods in transit by the liability resting upon the carrier and other persons engaged in the carriage of the goods from point to point. Instead, it is for the seller and buyers in the first instance to distribute such risk between themselves with the trade terms of their contract and arrange insurance protection accordingly."[52]

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[52] International Commercial Transactions; Jan Ramberg 3rd edition page

# 6 Overview of cargo Insurance

## 6.1 Introduction

Carriage of goods by sea is subject to risk of loss or damage. To insure the goods plays a fundamental role under the sales contract.[53] Cargo insurance is normally linked to the transport of goods under a sales agreement[54]. As such it is important that the insurance cover the interest of third parties**.** As has been discussed in previous chapters, one of the seller's obligations under a CIF contract is to insure the goods on minimum cover. The concept of risk under the sea carriage is linked to insurance as usually it is the insurer who will reimburse the cargo owner against loss or damage to the goods and have a recourse claim against the carrier in case of loss or damage due to the carrier's fault which is recoverable under the insurance policy. Therefore, the contract of insurance plays a vital part in a CIF transaction.

Since there are no international conventions or common rules with regards to insurance, the Norwegian cargo clauses 2004 and its related commentary was used in the anaylzes.

## 6.2 Beneficiary under cargo insurance

The seller is obliged to insure the cargo on behalf of the buyer and as such, under the Norwegian cargo clauses, the seller is the person effecting the insurance. Section 9 deals with interest covered by the insurance. The insurance is for the benefit of the person effecting the insurance. 'If the insurance has been contracted by the seller, the buyer's interest in the goods will not be co-assured until "title to the goods has been transferred" to

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[53] The Law of International Trade; Day & Griffin 3rd edition page 133
[54] Scandinavian Maritime Law; Thor Falkanger 2nd edition page 538

him.'[55]The buyer's insurable interest is linked to when risk passes from the seller to the buyer. "The point at which the CIF seller's risk and buyer's risk intersect will normally be when the risk in respect of the goods passes to the buyer. This could be on shipment or on tender of the documents. In a CIF contract the transport document is first handed over to the bank that also has an interest in the object insured. This is also clarified under the clause. The formulation of Section 9 applies to several beneficiaries over time.[56]

A person having security in the goods may invoke the insurance "provided that such security has been established through assignment of the transport document for the goods." The interest of the bank is covered under this clause and they stand to benefit in case of loss or damage when the insurable interest lies with the bank. This will be the case when the buyer has refused to reimburse the bank for the payment given to the seller and the bank is holding the transport document as security against payment. Section 1 no. 3 clarifies what constitute a transport document.

Usually under a CIF sale, since the insurance is effected on behalf of the buyer, this entitles him to claim for loss or damage under the insurance provided risk has passed to him from the seller. At the time of loss or damage, the owner of the goods must be able to demonstrate an insurable interest in the goods to either benefit financially for its safe arrival or lose out in the event of loss, delay or damage to the goods.

## 6.3 Assignment of interest and policy

The rights of the buyer under the policy will be based on the assignment of the policy by the seller to the buyer. This will normally be by delivering the policy under a CIF sale. The assignment of the policy is implied by the contract. The transfer of the insurance policy from the seller to the buyer secures him the legal rights in the policy. This right is gained when risk and property passes to the buyer.

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[55] Carriage of Goods Insurance Commentary to Norwegian cargo Clauses – 1995/2004; Extract from Marlus nr. 331 page 269

[56] Scandinavian Maritime law; Thor Falkanger 2nd edition page 539

## 6.4 Identification and duty of disclosure

The seller being the person effecting the insurance owe it a duty to disclose material facts to the insurer. As the assured in this case the buyer will fully be identified with the seller on failure of the duty of disclosure. The acts and omissions of the seller will affect the buyer's claim under the insurance policy. This has a great deal to do with the description of the goods and their inherent characteristics. Section 10(1) b opens for identification between the assured (buyer) and the previous owner of the insured goods. In such instances, in cases of breach of safety regulations, the assured stands to be identified with the person effecting the insurance only subject to the limitations in 11 no. 3. A buyer who has however acquired the policy through assignment in good faith is protected and the insurer cannot invoke the acts of the seller to avoid compensation against the loss.

As such, the person effecting the insurance should act to minimise loss by ensuring that goods are safely packed and all other information relevant to the issuing of the policy given.

## 6.5 Losses covered in relation to The Hague Visby rules

Unless otherwise agreed by the buyer, the insurance is to be effected on minimum cover. As stated in 3.5.2 this means under the cargo clauses C also known as transport accident clauses. Section 5 deals with the losses covered which includes fire, collision, explosion, earthquakes among others. These are subject to exclusions in Section 17 deals with deck cargo, 18 and 19 deals mainly with the condition of the cargo and delay. The insurance also covers total loss, shortage and damage.

The main risk under sea carriage is with damage, shortage, loss and delay among others.

The insurance does not cover wrong description of the goods, insufficiency of packing, weight loss, inherent vice and delay and the like. There is emphasis on the duty of the shipper under the Hague Visby rules and the insurance cover with regards to pre shipment preparations. Under the Hague Visby rules, article IV (2) n-p, deals with the exclusions from insufficiency of packing, marks and latent defects in the goods not discoverable by

due diligence. The shipper therefore has a lot of rule to play for the buyer to be able to claim under the policy.

Other exclusion worth commenting on is that of delay. Section 18(5) deals with delay which is generally excluded from cover whether or not the assured is to be blamed. This puts the assured at a disadvantage when the goods are with a carrier. It is also important to note how the Hague Visby rules are silent on delay but deals with deviation which leads to delay. Delay is looked at being foreseeable under any transport arrangement hence its exclusion from cover under the cargo insurance.

Insurers of cargo have to reconsider the exclusion of delay which is not caused by fault or privy of the assured.

## 6.6 Period of cover

The period of cover of the insurance is dealt with in section 14. This depends on whether it is a seller or buyer's insurance. In a CIF sale where the insurance is effected by the seller, the insurer's liability attaches form the time the goods are moved for direct loading into the means of transport which shall convey them from the warehouse or the place at which the insured transit shall commence. This ensures that no gaps are left from cover. If the insurance is effected by the buyer or it cover's the buyer's interest, the insurer's liability attaches when risk passes to the buyer in accordance with the sales contract.

In this regards, under a CIF sale where the seller effects the insurance on behalf of the buyer, the liability of the insurer attaches only when risk has passed to the buyer. This leaves a gap for the period form the seller's warehouse to delivery to the ship's rail. The seller will have to bear the loss or damage in such instances as risk has not passed to the buyer.

Furthermore, the third paragraph contains a special provision for situations where the buyer has taken up a bill of lading in good faith, which contains no information of shortage or damage. As such losses encountered after goods leave the seller's warehouse will be covered.

# 7 Conclusions

This chapter contains a summary of the relevant issues of the thesis with possible limitations and future prospects of the thesis.

International trade transactions and for that matter carriage of goods by sea as discussed are risk oriented. The main risk that arises under sea carriage is risk of loss, damage and delay. These risks are shared between the seller and the buyer through the contract of sale.

## 7.1 Contract of sale

Under a CIF contract of sale, the seller is responsible to provide the goods, arrange for carriage and insurance to cover the goods. In addition the seller has to tender valid documents against payment of the purchase price. The buyer secures his interest by the use of documentary letters of credit.

The harmonization of these transactions by the use of trade usages and conventions has help to eliminate risk to a point. For instances, incoterms help to define the responsibilities of the parties by allocating the sharing of cost and risk. However, there is lack of clarity as to the exact point in time property passes to the buyer. The responsibility then lies with the parties to decide on whether property passes on shipment or on tender of the documents. On the other hand, the concept of the ship's rail under a CIF contract appears to be obsolete and needs to be replaced with something more practical such as risk attaching when goods are handed over to the first carrier. Moreover, incoterms do not deal with breach of contract as such the governing law of the contract still plays a major part in the transactions despite the use of the trade terms.

### 7.1.1 Mode of payment

Furthermore, the use of the letters of credit has help minimize risk in terms of the seller not getting payment, likewise the buyer not being willing to pay for unseen goods. Under the current UCP600 rules, the seller is secured once he makes a valid tender as the credit is irrevocable and the buyer's security lies with the validity of the documents presented. This is to the seller's advantage as there is no insurance cover for insolvency on the part of the buyer. However, since the banks are interested in documents and not goods, it is difficult to ascertain the physical characteristics of the goods until arrival at destination. As such the true condition of the goods can only be determined on arrival.

### 7.1.2 Contract of carriage

In addition to these, the role of the carrier forms the core of the transaction as both parties to the contract do not have control of the goods once they have been handed over to the carrier. The use of the bill of lading as a receipt, evidence of carriage and document of title has helped promote cargo interest to a point. However, the immunities enjoyed by the carrier, in addition to the limitation of the period of responsibility of the carrier before loading and after discharge are risk to be borne by who bears the risk of loss in the goods.

The link between the contract of sale and contract of carriage is by the use of the bill of lading. By obtaining a shipped bill of lading, the seller fulfils his obligation under the contract of sale to contract the carriage, ship goods as described under the sales contract and tender documents as proof of shipment. On the other hand, the carrier establishes a relationship with the consignee to deliver the goods only to the holder of the original bill of lading. As such ownership and risk is inherent in the bill of lading.

Furthermore, the buyer is at the receiving end and stands a better chance of discovering the loss or damage to the goods. As such, to pursue the claim against the carrier or his insurers, it is important that he gains property in the goods on time to acquire contractual rights to pursue the claim in case of loss or damage.

### 7.1.3 Contract of Marine Insurance

Risk of physical loss or damage to the goods under sea carriage is a risk that seller or buyer contemplates on. As such a policy of insurance is usually effected to cover these losses.

That brings about the importance of cargo insurance which in itself does not cover all types of loss. Although the seller effects the insurance, his interest is not covered as the buyer becomes the beneficiary under the insurance. There is therefore an uncovered gap for the seller from his warehouse to the point of delivery. It is important that the seller effects insurance to cover his risk before the risk passes to the buyer.

The parties to the sales contract distribute the risk between them as adequately as possible as satisfaction cannot be obtained from the carrier for loss or damage to the goods. Neither is there an insurance that covers “all risk” In such instances, the inter relationship between the contract of sale, mode of payment, contract of carriage and the contract of cargo insurance inter reacts in international trade.

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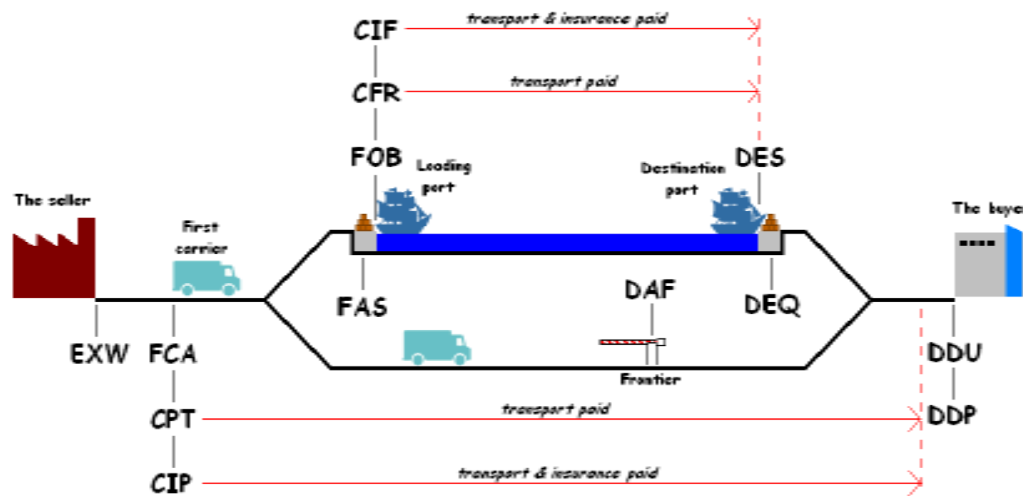
## Appendix 1 – Seller's payment responsibility under incoterms 2000

| | Load to truck | Export duty payment | Transport to exporter's port | Unload to truck at the destination's port | Landing charges at the destination's port | Transport to importer's port | Landing charges at importer's port | Unload unto truck from importer's port | Transport to destination | Insurance | Entry – custom clearance | Entry – taxation |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| EXW | No | No | No | No | No | N o | No | No | No | No | No | No |
| FCA | Yes | Yes | Yes | No | No | No | No | No | No | No | No | No |
| FAS | Yes | Yes | Yes | Yes | No | No | No | No | No | No | No | No |
| FOB | Yes | Yes | Yes | Yes | Yes | No | No | No | No | No | No | No |
| CFR | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | No | No | No |
| CIF | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | Yes | No | No |
| CPT | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | No | No | No |
| CIP | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | Yes | No | No |
| DAF | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | No | No | No |
| DES | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | Yes | No | No |
| DEQ | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No | No | Yes | No | No |
| DDU | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No | No |
| DDP | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

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