INSURANCE OF CIF AND RELATED CONTRACTS UNDER ANGLO-AMERICAN AND OTHER COMMON LAW JURISDICTIONS REVISITED (PART I)-2.docx

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ABSTRACT

Insurance is one of the most innovative risk management mechanisms ever devised by commerce. Despite no compulsion to insure, in practice only a suicidal transacts business without it. No lender or carrier would entertain a proposal without it. The two leading export contracts, Free On Board (FOB) and Cost, Insurance and Freight CIF), differ from each other in prescribing rights and obligations on the parties. Each contract has a purpose and imposes duties and obligations on exporters and importers. One such obligation is to insure goods in transit against marine and export risks. The nature and extent of those duties depend on the nature, history and development each of the two main contracts. The duties are governed by common law, customs and usages, International Chamber of Commerce (ICC) Official Rules for the Interpretation of International Commercial Terms (INCOTERMS), various Commodity Trade Rules and Institute CargoClauses. Although on the surface a CIF seller’s insurance obligations appear straightforward, in practice and considered in details, it is much more complicated than that. Thus, such orthodox assumptions can be perilous. Following similar coverage of FOB Insurance⁴, this article revisits and re-examines parties’ CIF insurance obligations under Anglo-American and other Common Law Jurisdictions contrasting with FOB Insurance and selected Civil Law Jurisdictions. The article challenges traditional views, prescribes practical solutions and concludes that there are far more for parties’ required practical considerations than is available in basic literature.

I. INTRODUCTION

Cost Insurance, and Freight (CIF) is one of the two principal contracts in international sales’ transactions; the other being Free on Board (FOB). The two have different histories, variations and characteristics. Among the minor differences are the distinct characteristics and manner of performance and among the similarities are points of passage
of property and risks and converging contemporary practices in tender of documents for payments. The FOB is thought to be the older of the two although now the less popular, accounting for about 40% compared to 60% for CIF, in proportion of international sales’ transactions carried by them. The principle difference between them is the parties’ insurance obligations and the emphasis therein in each. Except for FOB, ‘with additional duties’ or Extended FOB, the usual (Classic or Strict) FOB is devoid of freight and insurance obligations², whereas those functions are essential portion of the CIF sellers’ duties.

This article revisits and analyses insurance of CIF-related contracts³ under Anglo-American and other Common Law jurisdictions, compares it with FOB insurance provisions and the practice in selected civil law jurisdictions. The need for the article arose from the author’s awareness of lack of adequate treatment of the subject. In the author’s experience, even the most eminent English law scholars and jurists such as Sassoon⁴, Benjamin⁵, Schmitthoff⁶, Chuah⁷ and the Encyclopaedias⁸ treat the subject in existing literature only as a passing matter or as part of the general marine insurance issue. Even the closest treatment, Crawford⁹, relates only to regulatory rather than substantive aspects of the subject. During a literature review, the author was struck by the non-availability of any comprehensive materials and/or

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⁴ LLM(Dar); LLM, PhD(Southampton); MIEx; MIBIM,COMPANION(NI); Founding and Managing Consultant, Bahari Maritime Consultants; Visiting Scholar, Institute of Maritime Law, Law School, Southampton University. The author is indebted to the US-UK Fulbright Commission and Lloyd’s of London Insurance for the generous funding of a Fellowship that supported the wider research on the Extent of Insurance of International Trade and Foreign Investment; Professors Martin Davies (Director) and Robert Force (Emeritus Director), Admiralty Law Institute, Maritime Law Centre, Tulane University Law School, New Orleans, for hosting him; Professor James Duggan, Director, Library Services, Tulane Law School Library, and his staff for their help; Megan Gold, his Research Assistant at Tulane; and the Director and Staff, Institute of Maritime Law Southampton University Law School for subsequent hosting. However, the author bears all responsibilities for any shortcomings in and views expressed in the article.


⁷ Related contracts include Cost and Insurance Paid (CIP), the former Cost and Freight (C&F) and the newer Cost and Freight (CFR) of the ICC’s INCOTERMS.

⁸ Related contracts include Cost and Insurance Paid (CIP), the former Cost and Freight (C&F) and the newer Cost and Freight (CFR) of the ICC’s INCOTERMS.


⁰ Crockford, Neil (General Editor): Insuring Foreign Risks (Loose-leaf), Sweet and Maxwell (Reuters), London 2013; although not addressing the subject specifically, John Dunt, International Cargo Insurance, Informa, 2012 (John Dunt, “International Cargo Insurance”) has wider coverage of international insurance the major commonwealth and other jurisdictions
survey of the subject (both qualitatively and quantitatively) and in any meaningful manner. The original remit of the article had been a modest examination of the subject only under English Common Law. However, on consulting and comparing notes with colleagues in the Australia, Hong Kong, Singapore, South Africa, US, and other leading Common Law jurisdictions, it became apparent that the situation in those countries is not very different from that pertaining under English Common Law, hence the expanded title, aims and objective of the article. It also transpired that common law and practice on the subject is now fairly international.

This article updates earlier versions done under INCOTERMS 1990, and follows up similar treatment of FOB insurance. However, unlike the earlier one, this enhanced version includes CIF-related contracts and scenarios where insurance might be a factor in the contract and includes changes introduced by the latest INCOTERMS 2010. For instance, common law obligations may not necessarily tally with those under INCOTERMS 2010 or indeed under the new Uniform Customs and Practice for Documentary Credit (UCP 600). Although, unlike in FOB, in theory, the CIF insurance provision may be straightforward, this is not borne out by the practical reality. The article is, therefore, a bold attempt to expose these assumptions and put under one roof comprehensive insurance aspects of the CIF and CIF-related contracts and in a manner and extent never attempted before in either a major or minor publication.

Consequently, the article details CIF insurance requirements in new approach and supported by case law. The article’s overall objectives of the article are, therefore, to: continue questioning the perceived wisdom that insurance in CIF contracts is very straightforward and easy to understand, an approach started in the second exposition in the series;
restate the common law aspects of insurance of CIF insurance with additional discussions on the CIP, CFR and C&F; augment knowledge on the subject; provide the reader (academic or practitioner) with valuable materials that had never before existed under one roof; and fill the lacunae on available literature. For those reasons, it is hoped that all those involved in export trade and insurance, legal practice and academia will find the article useful.

The article opens with an examination of the extent of parties’ insurance responsibilities in CIF contracts under Anglo-American and other Common Law jurisdictions. Coverage includes treatment under the UCP 600 and in other jurisdictions but not Incoterms 2000 now superseded by INCOTERMS 2010. Furthermore, treatment of the subject matter is limited to parties’ insurance obligations and excludes discussions on the routine mechanisms of effecting insurance itself. Also omitted are discussions on the general insurance principles and doctrines which also apply to CIF and related export insurances.

Before embarking on detailed treatment of insurance aspects, the article provides a table of contents, an abstract and a prerequisite background on the nature, passage and transfer of property and risks in CIF contracts. It opens with the Introduction (Part I); Summarises the role of insurance in international trade (Part II); Exhaustively details the nature and parties’ general duties on the contract at common law (Part III); Compares the position under American Federal and State legislation (Part IV); Details with general duties under common law (Part V); Covers tender of the CIF policy and related documents at common law (Part VI); Includes other practical insurance considerations that a reasonable party might bear in mind (Part VII); Compares CIF-related contracts under common law and Incoterms (Part VIII); Recasts the treatment of the subject in selected Civil Law jurisdictions (Part IX); and Closes with the customary Concluding Remarks (Part X).

II. ROLE OF INSURANCE IN CIF AND INTERNATIONAL TRADE

(a) Insurance---Luxury or international trade necessity?

There is no compulsion under Anglo-American and/or other Common Law jurisdictions for a seller (exporter) or buyer (importer) to insure goods in transit. However, commercial considerations often compel arrangement of insurance. Only

23 A quite separate, but related, aim of the article is to make available to other scholars, researchers and teachers of international trade law materials that they can use and probably expand on.

24 For a link to the jurisdiction see http://en.wikipedia.org/wiki/Common_law (accessed on 19 May 2015); for a full list see http://www.electoralcommission.org.uk/__data/assets/electoral_commission_pdf_file/0009/79515/List-of-eligible-countries.pdf (accessed on 20 May 2016); for a comprehensive list see, Ademuni-Odeke, “Insurance of FOB Contracts”, Note 17, at p.430 (Note 20 thereof)

an uninformed party would proceed without insurance. Apart from this, it would appear common prudence for the party to insure goods whilst in transit. It is more so where credit to finance the venture is involved. Furthermore, without insurance, it would be necessary for parties to set aside large sums of money to cover possible losses, which money would be better employed in their other business. Besides, it would be pointless to hold large sums in reserve against possible losses when, for a relatively small outlay (premium), protection would be available through insurance. Therefore, a scheme where payment of a tiny fraction of the shipment value makes full compensation in the event of a loss or damage is unparalleled. Equally, carriers and freight forwarders, in order to protect their interests against liability to cargo-owners, would advise the party to insure his merchandise while in transit.

Insurance is, therefore, an essential element not only of domestic commerce but more so of international trade transactions, where the risks involved are far greater. As demonstrated above, operating on credits systems, export parties would find it almost impossible to obtain finance for their ventures without insurance. Indeed no one in their right mind would trade without insurance, for without it the alternative would be financial ruin and commercial suicide. For those reasons the insurance policy has been, and remains, an essential part of CIF or any export trade process.

(b) Comparison of CIF and FOB Insurances.

It is necessary to resort to history to appreciate the different insurance approaches in CIF and FOB contracts. As discussed above, of the two, the merchant’s insurance obligations are quite explicit and detailed in CIF, where insurance features prominently in the short designation of the contract (CIF), compared to those in FOB. However, there has been a tendency for those involved with the export process to assume that of the two, the fulfilment of the parties’ insurance obligations is easier in FOB than in CIF contracts. This assumption can lead to unfortunate consequences. Reasons for this assumption are partly historic. First, at the FOB inception, the ship-owner was also the carrier, importer, exporter, insurer and financier of the import/export transaction—“all three in one”\(^\text{26}\). For those reasons, insurance considerations were not so prominent in the contract then, as the seller had no such obligation. Secondly, and as a later development, the FOB (unlike the CIF) was used predominantly for bulk cargoes only, that is, cargoes that are packaged but is loaded onto overseas vessel in loose form (e.g. coal, grain, oil, etc.). This development no doubt had effect on the nature and origins of risk allocations in both contracts.

Under those circumstances, the seller was responsible for losses only up to the time goods were loaded onto the overseas vessel provided by the buyer. Once cargo was loaded, it became the buyer’s responsibility to arrange transportation and insurance to destination. Thirdly, also at its inception, documentary credit system was either underdeveloped or did not operate in FOB sales in the same way that it did right from the beginning for the CIF sales. This is mainly because an

\(^{26}\) See Sassoon, “Origins of FOB and CIF”, Note 2
FOB seller did not want payment for goods to depend on their safe arrival at destination; payment for them (goods) related to evidence that they had been loaded, so that title passed to the buyer at that point. That assumption has led to the general view that the seller’s most important FOB function was the physical delivery of goods on board a vessel, whereas in CIF it is the symbolical delivery, i.e., delivery of documents relating to the goods rather than the goods themselves27. Insurance was, therefore, more pronounced in the latter, where there were more risks and less in the former for the reverse reason.

(c) Insurance and Allocation of FOB and CIF Export Risks

The common view is, and has remained, that unless the contract provides otherwise it is the duty of the FOB buyer (not the seller) to provide insurance and that the seller’s only duty is to give such notice to the buyer as may enable him to insure goods during their (sea) transit. However, on closer examination, comparative duties between CIF and FOB may not be as clear-cut as they first appear, for, with modern developments in finance and especially transport technology, those differences between CIF and FOB performances have either narrowed or disappeared altogether. This is reflected in INCOTERMS 2010 which counsels caution. It therefore follows that continued assumptions regarding parties’ corresponding insurance duties can no longer be taken for granted, need challenging and, may be, restating. This article argues that the hitherto orthodox contractual interpretation should be viewed with caution and only as a general rule subject to exceptions. With technological and other developments, these differences are soon disappearing and the manner of performances of both contracts converging.

Consequently, although on its face value insurance requirement does not seem to feature prominently in FOB, compared to CIF or Cost and Insurance Paid (CIP) contracts, the nature and extent of the risks involved in both contracts are, and have always been almost the same, and are of equal importance. Equally, all factors considered, parties’ insurance responsibilities in both CIF and FOB contracts would on the surface appear to be the same. However, upon closer analysis, the exact nature of the parties’ general and insurance obligations may be even more complicated, and more demanding in FOB considering that the contract is further divided into at least three categories28. That intricacy is summarised by Sassoon29

(d) Passage of Property and Risks in CIF Contracts.

27Hence a further assumption that the CIF is a sale of documents goods rather than a sale of goods: see also, Ademuni-Odeke, “Nature of CIF Contracts”, Note 42, at pp.27-31

28 See Notes 57-62 post; Davis “The Various Types of FOB Contracts, Note 1 ante; Schimitthoff, The Law and Practice of International Trade, Note 5, Chapter 2 at pp.19-22

29 See Sassoon, CIF and FOB Contracts, Note 4 ante, pp.12-19 where he discusses passage of risks and property in both contracts.
Although *Pyrene v Scindia*[^30] determined passage of property[^31] and therefore risks in all export shipping contracts, passage of risks in CIF has specific rules[^32]. These are namely that:

(i) Risks pass to the buyer as from shipment[^33];

(ii) Buyer of goods damaged before discharge cannot sue carrier[^34];

(iii) Buyer of goods damaged before receipt of bill of lading sues in tort[^35];

(iv) Seller does not warranty existence of goods at time of tender[^36];

(v) Goods can be shipped or bought and sold afloat;

(vi) Most important function is tender of documents rather than goods;

(vii) Sometimes treated as sale of documents rather than goods; and

(viii) Tender with knowledge of lost goods is good tender[^37].

The basis for the above characteristics are is that any loss is underpinned by insurance policy to compensate any party in the chain that suffers losses and/or damages.

(e) **CIF Insurance part of Marine Cargo Insurance**

As indicated above, insurance against perils is an important aspect of international commercial transactions. In the event of loss or damage to cargo due to hazards during voyage, an insured party will be able to recover losses from the insurer. The type of insurance required depends *inter alia* on the mode of transport agreed between parties to deliver the cargo. As such, insurance required may include marine, aviation, land and property. The type of insurance contract

[^30]: Pyrene Co Ltd v Scindia Navigation Co Ltd [1954] 2 QB 402

[^31]: Discussions on passage of property and reservations of right of disposal are omitted here; see *Halsbury’s Laws*, Vol.91, and Note 8 ante, para. 356

[^32]: Ibid, para. 357

[^33]: E.Clemens Horst v Biddell Bros [1912] AC 18 HL, reversing SC sub nom Biddell Bros v E Clemns Horst [1911]1KB934 CA; *The Julia* [1949] 1 All ER 269; *The Galatia* [1980] I All ER 501;


[^36]: Groom (c) v Barber [1915] 1 KB 316; Re Weis & Co Ltd & Credit Colonial et Commercial, Antwerp [1916] 1 KB 346

may further depend on the common law, INCOTERMS, commodity trades and Institute Cargo Clauses adopted by the parties in a sale contract. A CIF sales contract requires the seller to obtain insurance cover for the voyage. An FOB contract however places no obligation on the buyer or seller to obtain insurance, although it is prudent for the buyer to protect against potential losses. Thus, it is not uncommon for the FOB buyer to request the seller to arrange insurance on an understanding that they will reimburse the insurance costs incurred. It will be apparent ahead that in both contracts the insurance obtained must cover only those goods that are being sold and stipulated in shipping documents.

The insurance must also cover the entire voyage of the sale contract. Where it covers only party of the transit, the buyer will be able to reject the documents upon tender. Marine insurance contracts, the mainstay in export/import insurance, may be divided into hull, aviation or cargo insurance all of which affect export trade insurance. Although the United Nations Conference on Trade and Development (UNCTAD) attempted to introduce one, there is no uniform law or convention for international marine insurance. However commercial customs, usage and practices in international marine insurance have played a significant role in regulating marine insurance internationally. Thus, the marine insurance contract, basis of FOB/CIF insurances, is subject to both general principles of contract law and relevant domestic marine insurance law. Other export trade transportation modes use the marine insurance principles and documentation. That is why aviation, road, rail and multimodal transport (principal CIF conveyors) insurance contracts all include marine cargo insurance. The various transport modes of apply own international transport conventions. These conventions together provide further guidance to domestic and international export insurance ranging from FOB, CIF and related contracts. The insurance may be issued to independent exporters and importers or to those transacting on commodity trade rules.

(f) Application of marine insurance principles to CIF and related policies

In the UK and most common law jurisdictions, export policy is governed by the principles of the Marine Insurance Act 1906(MIA 1906) either in its original form or as modified. The MIA1906 applies to CIF insurance. As such the CIF policy is subject to all the principles, doctrines and rules contained in the Act. For instance, both parties in the CIF should have insurable interests in the subject matter insured, capacity to contract and make marine insurance contracts. They are also bound by the utmost good faith duties of disclosure and non-disclosure, representations and misrepresentations, proximate cause, conditions and warranties, payment of premium, types and rules as to policies, types and rules as to losses, doctrine of abandonment and subrogation in claims process and related insurance principles. Detailed discussions of their application to the CIF are beyond the remits of this article. The rest of the article is devoted to CIF insurance and case law thereto.

III. PARTIES' GENERAL OBLIGATIONS IN CIF AND RELATED CONTRACTS

(a) Nature of CIF Common Law Obligations

The CIF names the port of destination and the price quoted by the seller includes cost of the goods, insurance and freight. The seller’s principal common law obligations are to ship or buy afloat goods of the contract description. If they are unascertained goods, sellers must normally give notice of appropriation. On or after shipment they must obtain a proper bill of lading and insurance policy or equivalent documents. The seller performs the contract by transferring the shipping documents - bill of lading, insurance policy and invoice- to the buyer on the 'prompt', the date fixed for payment through assignments. In Re Denbigh Cowan & Co & R Archery & Co\(^{39}\), following the landmark case of The Julia\(^{40}\), Lord Banks LJ\(^{41}\) at the English Appeal Court re-emphasizes the sellers’ common law obligation to provide and tender insurance documents under CIF contract without which buyers can refuse to take delivery of goods. The purpose of the CIF contract is to enable dealing with goods afloat. If payment transfer is being made by letters of credit the documents will in practice be tendered to a bank making the payment. The special feature of the CIF contract is the importance attached to the documents\(^{42}\). If insurance is not effected the buyer may reject the goods even though they arrive safely\(^{43}\), but if proper documents (including the policy or equivalent) are tendered the buyer must accept and pay for them even though the goods are damaged or lost after shipment\(^{44}\).

These CIF characteristics have led to the suggestion that a CIF contract is a sale of documents rather than of goods. However, it may be rather a contract of sale of goods\(^{45}\) to be performed by delivery of documents, since a contract for the sale of specific goods CIF is void if at the time of sale the goods had perished even though a policy relating to them was in existence\(^{46}\). Thus, when sellers bought what they believed were goods afloat covered by regular documents and re-sold them it was held they did not fulfil the contract by handing over an apparently regular set of shipping documents when the goods had never existed\(^{47}\). There are separate rights to reject documents and goods if they are not in conformity with the contract\(^{48}\), but if the buyers take up without objection documents, which do not conform, they will

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39 125 LT 388, [1921] All ER Rep 245 CA; 90 LKJB 836
41 Lords s Scrutton LJ and Atkin LJ concurring, at 390, reversing the judgment of Rowlett J
42 Smyth v Bailey [1940] 3 All ER 60; See also Ademuni-Odeke, “The Nature of CIF Contracts”), Note 42
43 Orient Co. v Bekke and Howlid [1913]1KB531
46 Couturier v Hastie (1856) HLC 673
47 Hindley v East India Produce Co [1973] 2 Lloyd’s Rep 515
48 Kwei Tek Chao v British Traders [1954] 2 QB 459
be precluded from rejecting them later. Once more the lynch-pin here being the insurance policy.


The above common law position may differ from statutory law. For instance since under s.28 of the UK Sale of Goods Act 1979 (SOGA 1979), payment and delivery are concurrent conditions and delivery in a CIF contract means delivery of shipping documents, the buyer (unless there is contrary agreement) cannot refuse to pay until he is able to examine the goods, s. 34 thus being excluded.

This does not exclude his right to reject the goods if they do not conform to the contract on arrival. Section 32 (1) providing that delivery to a carrier is prima facie delivery to the buyer, does not apply to FOB as it does CIF, nor does s. 32 (3) as there are always terms as to insurance, but s. 32 (2) requiring a seller to make a reasonable contract with a carrier, does apply. As in the FOB a contract, property normally passes on delivery of the shipping documents, but in special circumstances, this may be displaced. Risk normally passes 'on shipment or as from shipment' so that s. 20, linking property with risk, is displaced. The bill of lading must normally be transferable, cover the voyage continuously over an agreed or customary route, state the goods are shipped and not merely received for shipment, be genuine in stating correct dates and not containing forgery, cover only the contract goods, be valid and effective and be 'clean', that is not contain any adverse comment on the good order or condition of the goods.

The insurance policy must be assignable, legally effective (not an honour policy), cover only the contract goods continuously over the route and be usual in the trade or as specified in the contract. If it is usual or agreed sellers will not be in breach if they fail to cover other risks, e.g. war risks. The invoice must at least enable the buyer to relate it to the contract but more detail may be required by the contract; the requirements as to documents may be modified by the contract, e.g. allowing a delivery order on the ship of a 'received for shipment' bill of lading or a certificate of insurance instead of a policy. The contract may also require other documents such as certificates of origin, quality, testing and the like. Furthermore, the contract may require the seller to give notice of appropriation of goods to the contract or to

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49 Pancahaud v General Grain [1970] 1 Lloyd's Rep 53
50 Although the principles of the Marine Insurance Act 1906 and the Sale of Goods Act 1979, as amended, apply to CIF policies there is no specific UK statute applicable to CIF contracts. The only such a statute in the Common Law jurisdictions is the US UCC. The new UK Insurance Act 2015 has not made any difference to the Marine Insurance Act 1906 in this respect.
51 Clement Horst v Biddle Bros Horst [1912]AC 18
52 The Julia, [1919] AC 293
53 The Albazero [1977] AC 774
54 See, Note 48, ante.
55 See Halsbury’s Laws Vol.91 Note 7; See also Note 73
56 Ibid; See also Groom v Barber [1915] 1 KB 316; INCOTERMS 2010, Note 24, Article A3(b)
'declare' a shipment within a given time and these documents may be added to the shipping documents. Such notice transforms hitherto unascertained goods into specific goods, and the contract binding. These modifications do not, however, affect the fundamental nature of the CIF contract so long its distinctive difference with FOB is retained.

(c) Comparisons with FOB Contracts.

(i) With Classic or Strict and Simple FOB Contracts.

In terms of their nature, CIF or CIP are both different from the FOB. This is due to explanations above that historically the FOB was the first contract developed when there were no separate and independent insurance, shipping and banking institutions or facilities. Hence, at the time, the FOB buyer was the ship-owner, self-financier and self-insured. He paid for the goods in cash himself, was responsible for the freight and took upon himself the risks involved. It follows therefore that both the seller’s freight and insurance duties were redundant. Apart from a few changes in the “FOB Classic” and “Extended FOB” regarding shipping duties, those principal duties remain basically the same; that is in the normal FOB Classic, such as one contained in the INCOTERMS 2010, the seller does not have to take out either the shipping or the insurance contracts. However, the parties’ insurance obligations in the second category, simple (buyer contracting with carrier) FOB are same as in strict or classic FOB

(ii) With Special FOB Contracts

The “FOB with additional duties” or the “Extended FOB”, all but resembles the CIF contract where both insurance and freight form part of the additional duties. However, certain fundamental differences remain such as the CIF unique characteristics of almost being a contract for sale of documents rather than a sale of goods. The emphasis on delivery (tender) of documents rather than physical delivery of the goods and the availability of separate and independent remedies for rejection of goods and rejection of documents being the other distinguishing factors. There are many other ways by which especially the CIF differs from the FOB but these are beyond the remits of this article and have been ably dealt with elsewhere. Where only two additional duties (Carriage and Insurance) are involved then the FOB contract with additional duties would bear resemblance to CIF contract. It is also possible that these additional duties

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57 See generally, Davis, “Various Types of Fob Contracts”), Note 1; Ademuni-Odeke, “Insurance of FOB Contracts”, Note 17, pp.440-449; Schmitthoff, The Law and Practice of International Trade, Note 5, at pp. 19-22


59 Arnold v Blythe [1915] 2KB 379 at 388 (Scrutton J, said the CIF contract is not a sale of the goods themselves, but of the documents relating to the goods); Crawford, Note, “Analysis and operation of CIF Contract” [1995] TLR 396; Ademuni-Odeke “The Nature of CIF Contracts”, pp.158-176

60. See Note 17.
could be part of the FOB *classic*. These are also dealt with elsewhere under “Extended” or “Additional Duties” FOB where the additional duties include freight and insurance in which those FOB insurance obligations nearly resemble those of the CIF contract\textsuperscript{61}. Where the additional duties include freight and insurance, those FOB insurance obligations nearly resemble those of the CIF contract\textsuperscript{62}

The remaining part of the article will be dedicated to judicial approach to CIF insurance under Anglo-American and other Common law jurisdictions.

**IV. AMERICAN CIF INSURANCE POLICY OBLIGATIONS UNDER THE UCC**

(a) **Parties’ General Obligations at the Federal Level.**

The US law and practice are not very different from those of the UK law except for the former’s codification into the UCC and the lack of distinction between the CIF and C&F or C.F. For instance, s. 2-30(1) of the UCC provides that:

“(1) The term C.I.F. means that the price includes in a lump sum the cost of the goods and the insurance and freight to the named destination. The term C. & F. or C.F. means that the price so includes cost and freight to the named destination” ----

(2) The seller must:

(a) (omitted);

(b) (omitted);

(c) (omitted);

(d) prepare an invoice of the goods and procure any other documents required to effect shipment or to comply with the contract; and

(e) forward and tender with commercial promptness all the documents in due form and with any indorsement necessary to perfect the buyer’s rights.

(3) Omitted

(4) Under the term C.I.F. or C. & F. unless otherwise agreed the buyer must make payment against tender of the required documents and the seller may not tender nor the buyer demand delivery of the goods in substitution for the documents”.

The section captures the gist of the English common law provisions on the nature, insurance, payments, documentation and tender in CIF contracts.

\textsuperscript{61} Ibid, at pp.440-449

\textsuperscript{62} Ibid, at pp.443-445
(b) Parties’ Insurance Obligations at the Federal Level.

With specific reference to insurance s.2-30(2) of the UUC, once more closely follows English common law practice in providing that:

“(2) Unless otherwise agreed and even though used only in connection with the stated price and destination, the term C.I.F. destination or its equivalent requires the seller at his own expense and risk to:
(a) Omitted;
(b) Omitted; and.
(c) obtain a policy or certificate of insurance, including any war risk insurance, of a kind and on terms then current at the port of shipment in the usual amount, in the currency of the contract, shown to cover the same goods covered by the bill of lading and providing for payment of loss to the order of the buyer or for the account of whom it may concern; but the seller may add to the price the amount of the premium for any such war risk insurance”

Most US States have adopted the federal code. One particular example, which will be used for guidance in this chapter, is that of the Ohio State Revised Code 2006.

(c) Parties’ General and Insurance Obligations at State Level: The Ohio Revised Code 2006 - 1302.32.

The Ohio State Revised Code’s general obligations and insurance provision are the same as that at federal level. This in turn largely mirrors the position below under English common law and INCOTERMS’ law and practice with regard to the seller’s obligations, role of the policy and certificate of insurance, extent of the war risk insurance, terms current at port of shipment, currency of the policy, limitation of the policy to only contractual goods, minimum nature of the coverage and buyers’ costs for war and any other additional insurance. However, the Commentary to the Ohio State Revised Code demonstrates some important aspects in which the US may differ from the English common law especially in relation to minimum cover and ‘All Risks’ policies-a position backed up by Reynolds below. He is of the view that the ‘“All Risks” is a U.S. insurance term which should probably be called “almost all risk” as it typically does not cover war or strikes, riot or civil commotion perils. It is so called London Underwriter Institute Clauses A63

(d) CIF Concepts under “Incoterms for Americans”

63 Reynolds, Frank and Smith, Donald R. LETTERS OF CREDIT FOR AMERICANS (Your Guide to UCP 600), International Projects, Inc. Toedo, OH 2006 p.18 Note 1.
As indicated immediately above US law and practice under the UCC⁶⁴, regarding delivery obligations and risks, is not very different from English law. The US CIF insurance obligations under ‘US INCOTERMS’ is also almost the same as in both English law and European practice above⁶⁵. However, in his explanations, Reynolds explains that:

“Insurance is a seller obligation under CIF. However, only minimum cover (commonly ‘free of particular average’) is required by the Incoterm. Since this is inadequate in most situations, the buyer and seller should agree to additional coverage outside the Incoterm⁶⁶

a. If both seller and buyer have insurance in place to cover their respective pre-carriage and on-carriage risks, a form of ‘with average’ insurance covering main-carriage only may be sufficient. However, this is risky in that one or the other party may slip up.

b. “All Risk” coverage provides excellent coverage. It is usually written warehouse to warehouse (pre-carriage, main-carriage, and on-carriage). However, it should be called “almost all risks” since it usually does not cover war or strikes and civil commotion. Both of this supplemental coverage is available, usually at a very modest additional cost. The amount of should be 110% of the CIF value, unless both parties agree to a different amount”⁶⁷.

The US position should be compared to rest of the common law and ICC Incoterms discussed below.

V. COMMON LAW AND INCOTERMS’ OBLIGATIONS IN CIF AND RELATED CONTRACTS.

(a) Extent of the Common Law Insurance Obligations.

According to Sassoon, the fullest extent of CIF insurance should be considered against 5 criteria:

(i) Seller’s express contractual obligations⁶⁸;

(ii) Seller’s implied contractual obligations⁶⁹;

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⁶⁴. Ibid.
⁶⁵. Reynolds, Frank, Incoterms for Americans, International Projects Inc. Toledo, Ohio2010 (Reynolds, “Incoterms for Americans”, Commentary No 9, at p.80

⁶⁶ For what insurance documents under UCP 600 see p18; for insurance certificates and what constitutes minimum coverage see p.34 and for the marine policy see p.78 in the US, of Reynolds, Frank and Smith, Donald R in LETTERS OF CREDIT FOR AMERICANS(Your Guide to UCP 600), International Projects, Inc. Toledo OH 2006.

⁶⁷. Ibid.

⁶⁸. Sassoon, CIF and FOB Contract, Note 3, pp.161-162 including cover as per contract, requirements under INCOTERMS 2010, conflicts between Incoterm Rules 2010 and other forms, and the duty under UCP 600

⁶⁹. Ibid, at pp.163-174 including necessity of insurance policy, effect of customs and usages, consequences of failure to insure and/or tender policy, relation of certificates to policy, need for stating policy terms, indemnity in lieu of policy, role of broker’s cover note and c and f insurance.
(iii) Amount of cover\textsuperscript{70};
(iv) Terms of the policy\textsuperscript{71};
(v) War Risks Cover\textsuperscript{72}; and
(vi) All Risks Cover\textsuperscript{73}.

The rest of the article will summarise and focus only on a few of those ahead.

(b) Summary of Common Law/Incoterms Article A3 (b).

The seller’s common law obligations consist mainly of case\textsuperscript{74} law and statutes as outlined below. This has, however, been influenced by and now ‘codified’ into INCOTERMS since its introduction in 1957, latest being Article A3 (b) of CIF and CIP INCOTERMS 2010 providing that:

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

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

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

\textsuperscript{70} Ibid, at pp.175-179 covering judicial approach, minimum amount under Incoterms 2010/UCP 600, implied amount, minimum amount (110\%), sufficient amount, and freight considerations,

\textsuperscript{71} Ibid, at pp.179-182 covering trade and customs, meaning of ordinary policy, policy terms under INCOTERMS 2010, relevance of ICC definition, and policy terms under UCP 600,

\textsuperscript{72} Ibid, at pp.182-186 covering excluded war risks, institute war risks clauses, express stipulations as to, free of war risks, and responsible part.

\textsuperscript{73} Ibid, at pp. 186-202 covering express stipulations on, meaning of, certainties, customary exclusions, meaning and exclusion of inherent vice, attachment or risks, particular contractual stipulations, notice for additional insurance and shipment, confinement to contractual goods, coverage of entire transit, transit clause, effect s.44 MIA 1906, loss between warehouse & ships rail, buyers and sellers insurable interests, tender of foreign policy, effect of statements in certificate, policy for buyer’s benefit, validity of policy, other policy forms, assured’s identity, insurers insolvency, right to excess insurance, increased value policy, and effect of failure to insure.

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

The seller must provide the buyer with the insurance policy or other evidence of insurance cover. Moreover; the seller must provide the buyer, at the buyer’s request, risk and expense (if any), with information that the buyer needs to procure any additional insurance.\textsuperscript{75} (\textit{Emphasis added to indicate changes introduce by Incoterms 2010 to Incoterms 2000})

With scant information on the history and development of INCOTERMS, it is fair to assume that pre-1936 common law decisions as laid out below influenced INCOTERMS\textsuperscript{76}. That notwithstanding, case law pre and post 1936 has interpreted Incoterms as discussed below.

\textbf{(c)} \textbf{The Nature and terms of CIF policy.}

The CIF policy should be those current in the particular trade. Justice Mathew in \textit{Bothwick v Bank of New Zealand}\textsuperscript{77} supports the supposition. This is so whether the contract is for an ‘All Risks’ CIF policy or only covering war and other risks separately. Terms of the policy will also depend on a particular trade and current practice therein. However, Schmitthoff is of the view that:

\begin{quote}
“The parties should not place too much reliance on the customs of trade, which sometimes varies at the ports of shipment and destination and may be interpreted differently by merchants and courts”\textsuperscript{78}. Instead, he advises, that, “they should, in appropriate cases agree in the contract of sale on the nature of the insurance policy which the seller has to tender, for example whether the policy should be an all risks policy in the form of an\textit{ Institute of Cargo Clauses to Lloyds Marine Policy} or should cover war risks”\textsuperscript{79}.
\end{quote}

Thus, he cautions that there is marked difference between legal theory and practice. Furthermore, CIF insurance should of course be assignable\textsuperscript{80}.

\textsuperscript{75} Article A3 (b) (emphasis added); See also Ramberg, \textit{Guide to INCOTERMS} 2010, Note 24, pp. 200-201. Identical commentary appeared in Ramberg’s ICC Guide to Incoterms 2000 at pp.120-121. This text varies slightly as indicated therein from that of INCOTERMS 2000, ICC Publications No 560

\textsuperscript{76} Although the ICC itself was established in 1919, Incoterms were not introduced until 1936, first revised in 1957 and then almost at every ten years’ at the end of a decade, thereafter.

\textsuperscript{77} (1900) 17 TLR 2

\textsuperscript{78} Schmitthoff, \textit{The Law and Practice of International Trade}, Note 5, chapter 2, para.2-023, p.37

\textsuperscript{79} Ibid.

\textsuperscript{80} Halsbury’s Laws Vol.91, Note 7, para. 32
(d) The and the ‘All Risks’ Policy

(i) The extent of CIF ‘All-risks’ policy

An ‘All Risks’ policy is not the preserve of CIF contracts, a CIF All risks policy should therefore be part of the much wider “All risks insurance”\(^{81}\)- a type of insurance designed to protect the insured against loss or damage however caused. In relation to CIF contracts, \(Groom(C) v Barber\)^{82} Lord Atkin J\(^{83}\) opined on what constitutes the nature and terms of a policy constituting an “All Risks”. The next few paragraphs are devoted to various aspects of this type of policy.

(ii) An “All Risks” CIF policy should be inclusive.

As the title suggests, this type of policy should cover all risks, including war risks without any exceptions. Further judicial authority for this is \(Yuill & Co v Robson\)^{84}, in which Lord Alverston CJ\(^{85}\) gave two guidelines as to “All Risks” policy, upholding Justice Chanel’s judgment\(^{86}\). The case decided that inclusion of a “free from capture and seizure” (fc and s) clause in the “All Risks” CIF policy is a breach of such a policy. In the case, a contract was made at Buenos Aires for the sale and shipment of cattle from there to Durban at a price which included cost, freight, and insurance, the insurance to be ‘against all risks,’ The seller obtained and delivered to the purchasers an ordinary Lloyd’s ‘all risks livestock’ policy, which contained the clause ‘Warranted free of capture, seizure, and detention, and the consequences thereof.’

During the voyage, foot and mouth disease broke out amongst the cattle, and the authorities at Durban refused to allow the vessel to enter the port, with the result that the cattle were slaughtered on board and sold at a considerable loss. The insurers refused to pay upon the policy, except for losses by death during the voyage, on the ground that they were protected by the “free of capture and seizure” clause. In an action by the buyers against the seller Justice Atkins held that the seller, in procuring an insurance which did not protect the purchaser against the risk of the landing of the cattle being prohibited by the authorities, had broken his contract to procure an insurance, ‘against all risks’, and was therefore liable for the loss. Besides, evidence was not admissible to show that a policy containing the “free of capture and

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\(^{81}\) These types of policies are not restricted to export or CIF, but rather are used in general marine insurance, jewellery insurance, contractors’ insurance and cash or goods in transit policies

\(^{82}\) [1915] 1 KB 316 (effect of validity of tender for goods lost in transit; however, distinguished in Arnold Karberg & Co v Blythe,Green, Jourdain and Co, Schneider & Co v Burgett & Newsman [1915] 2KB379); see also Vincentelli Co v Rowelett & Co (1911)105 LT 411 on the extent of vendor’s obligations on All Risks Insurance.

\(^{83}\) Groom v Barber, Note 75, per Lord Atkins, at 324-325

\(^{84}\) [1908] 1KB 270

\(^{85}\) Ibid, at 274, Buckley LJ and Kennedy LJ concurring

\(^{86}\) [1907] 1KB 685
seizure” clause was a performance of the contract to procure an insurance against all risks. *Yuill* was considered on this point, and in the same year, *in Upjohn v Ford*87 by Lord Warrington LJ88 and Lord Scrutton89, affirming the decision of Roche J90. Thus, where no “All Risks” policy is provided, the CIF seller provides only the ‘minimum cover’ under common law, Incoterms and all other rules. However, what constitutes ‘minimum cover’?

(iii) Seller provides only the ‘minimum cover’

Unless otherwise notified and requested by the buyer, the CIF seller is bound to provide a policy with only the minimum coverage. The obvious omission in the phrase is war risks. Accordingly, it is up to the buyer to either provide extra coverage or request extra coverage at additional costs or provide one himself. However, this problem could be solved by a provision in the contract stipulating the nature of insurance, e.g., that the seller provides an *All Risk Policy*.91 This is also the case now with INCOTERMS.92 Furthermore, what the buyer requests will depend on various factors including but necessarily limited to his circumstances, availability of insurance services at home and sometimes government regulations requiring insurance with domestic insurance companies in what is known as policy considerations in or government regulation or interference with insurance. However, what exactly is the ‘All Risks’ policy?

(iii) The extent of the policy—“all risks” vs. “all causes” insurance

The extent of vendor's obligation in an all risks policy was also the subject of *Vincentelli & Co v John Rowlett & Co*96, an earlier case involving a contract for the sale of goods on CIF terms, which contained the following words: ‘insurance

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87. [1918] 2KB 48; *sub nom* see also *Upjohn v Hitchens* [1917-18] 24 TLR 412 alias *Upjohn v Ford*—although the policy was to do with exceptions of war risks in a *Landlord and Tenant Aircraft Risks* rather than CIF or international trade risks.

88. Ibid, at 55 & 56; Lord Pickford LJ giving a separate judgment

89. Ibid, at 60 and 61

90. [1918] 1KB 171

91. See under *War Risk Policy* (D (iv) through to (D (v) of this article below, and the authorities cited therein.

92. See e.g. Articles A3(b) and B3(b) of CIF INCOTERMS 2010, discussed above at Note 68


94. Ibid; for policy considerations, see Sassoon, “Origin of CIF and FOB Contracts”, Note 1; Battista, Note 86, Chapter 5, pp.92-94 and 96

95. Ibid, and Annex 2 at p. 96 for list of countries with compulsory national insurance (State Regulation of Export trade insurance)

96. (1911) 105 LT 411
to be effected by (sellers) all-risks’. Justice Hamilton\(^{97}\) opined that on the construction of the contract, the sellers’ obligation was to effect an insurance to cover all risks in the sense of the entire quantity of damage, and not to cover the assured against all causes of accident, e.g. damage done to the goods in consequence of the ship-owners committing a breach of the contract of carriage by improperly stowing them on deck instead of below deck. There remains a major difference between insurance against all risks and against all causes. Still the question is whether (a) under such a contract of sale it is sufficient for the seller to procure protection for the buyer against all risks partly by means of the contract of carriage and partly under the contract of insurance\(^{98}\) and (b) the relation and differences between ‘War Risks’ and ‘All Risks’ policies.

(iv) The General Nature of CIF “War Risks” Policy

The nature of the CIF War risks policy\(^{99}\) was the subject of *OuluOsakayetio of Oulu, Finland v Arnold Laver &Co Ltd*;\(^{100}\) an authority, which best demonstrates this point. The article will dwell at length on the case at length for the reason that ironically here goods were shipped in vessel of a belligerent. By CIF contracts dated October 6 and 7, 1938, Finnish sellers contracted to sell to British buyers parcels of timber to be shipped in November 1938, from Pateniemi to Hull. Clause 6 of the contracts provided that the sellers, before or as soon as tonnage was secured, were to insure the timber for the voyage to Hull against (inter alia) war risks, and any increase in premium payable for covering those risks in respect of the country of destination in excess of the rates ruling at September 26, 1935, was to be for buyers’ account. The exchange rate premium on September 26, 1935, was 3d per £100. The sellers chartered a Spanish steamship to carry the timber, there was no evidence that any other suitable vessel was available.

At the material time the prevailing rate of war risks premium for all steamships other than those flying the Spanish or Greek flags was 2s 6d per £100, the premiums for Spanish and Greek ships being left to the discretion of individual underwriters. At the beginning of November 1938, due to Spanish civil war, the war risks premiums for cargo in Spanish ships rose abnormally and the sellers, fearing the rates would rise still higher as they in fact did, insured the timber with Lloyds’ underwriters at a premium of £5 per ton. They then claimed the difference between 3d and £5 per £100 from the buyers, who repudiated liability.

However, on judgment from Justice Atkinson\(^{101}\), Lord Justice Slesser\(^{102}\) had no difficulty in finding that the con-\(^{97}\) Ibid at 415
\(^{98}\) For the minimum and maximum amounts in CIF policy see Sassoon, *CIF and FOB Contracts*, Note 3, at pp.175-179
\(^{99}\) For War Risks generally see *Halsbury’s Laws*, Vol.60, Note 7, pp.557-565 at 559-562
\(^{100}\) [1940] 2 All ER 243; [1940] 1 KB 750; 109 LJKB 669; 162 LT 415; 56 TLR 545; 84 Sol. Jo 453; 45 Corn Cas 193, CA
\(^{101}\) [1939] 4 All ER88
\(^{102}\) Ibid, at 246, Lord Justices Luxmore and Goddard concurring at p.247
tract provided for a comparison being made between like and like, i.e., between the general market rate current at September 26, 1935 and the general market rate prevailing at the material date in 1938, and holding that the buyers were only liable for the difference between 3d and 2s 6d per £100. He agreed with the sellers that they (seemle that)(the sellers) were entitled under the contract to charter a belligerent ship, but with a proviso that if they chose to do so they could not hold the buyers to account for the abnormal premiums asked in respect of such a vessel. Thus, under CIF the sellers are not only obliged to insure but should do so the war circumstances notwithstanding although they have discretion how they do it. How does this relate to the ‘War Risks’ and ‘All Risks’ policies under Institute Clauses?

(v) CIF “War Risks” Policy under UK Institute Cargo Clauses

Finally, an all risks policy, whether CIF or otherwise, is best and is now effected under the Institute Cargo Clauses A. However, even then parties should be careful as the Institute Cargo Clauses A is not really a true “All Risks” policy since it has exclusions such as war, civil commotions and strikes, which are then covered by additional clauses separately accordingly. That notwithstanding, and as indicated above, unless otherwise provided the CIF seller’s common law and INCOTERMS (Article A3 (b)) duty is to provide a minimum cover which does not include war and/or strikes cover. A reasonable party should therefore add the Institute Cargo Clauses (War Risks) and the Institute Cargo Clauses ( Strikes) and any other excluded risks, separately and additionally, to ensure fulfilling obligation to provide a ‘War Risks’ and ‘All Risk’ policy under CIF103. Otherwise a Non-All Risks policy can also be contracted for instance through the Institute Cargo Clauses B and C. Equivalent Institute Clauses exist in the US and in other major common law jurisdictions104 as well as civil law jurisdictions105. Policies under Clauses would be acceptable under English law. With regard to CIF commodities policy, Article 20(h) of Grain and Feed Trade Association (GAFTA) instance provides that the “Sellers' obligation to provide War Risk Insurance shall be limited to the terms and conditions in force and generally obtainable in London at time of shipment”. Other trades will have their own rules and guidelines for and above common law, GAFTA and Incoterms.

(CONTD. IN PART II)

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103. For a more detailed discussion of War Risks in CIF Contracts see, Sassoon, CIF and FOB Contracts, Note 3, at pp.182-186

104. Such as Australia, Canada, New Zealand, South Africa, Singapore and Nigeria

105. Such as the Norwegian Plan; France, Germany and Switzerland being the other leading Civil Law countries; see Notes 227-233, infra.