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Declaration

I declare that *Liability of the Seller under CIF Contract in the Event of Loss or Damages to Goods Carried by Sea* is my own work; that it has not been submitted before for any award of degree or examination in any university or higher learning institution by myself or any other person, and that where other persons' work or ideas have been used or quoted adequate reference has been made.

Genereuse MUKESHIMANA

Signature:.....

...../...../2015

DEDICATION

This work is dedicated to:

My beloved Parents late MUKAMUSONI Floride and SOMIKI Jean Damascène;

My sisters and brothers.

ACKNOWLEDGEMENTS

I would like to take this opportunity to express my heartfelt gratitude to my Supervisor Prof. Alphonse M. NGAGI for taking time and effort to read, contribute with valuable opinions and for providing useful insights in the dissertation.

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ABBREVIATIONS AND ACRONYMS

B/L	: Bill of Lading
CFR	: Cost and Freight
CIF	: Cost Insurance and Freight
CIM	: Convention Concerning the Carriage of Goods by Rail (<i>Règles uniformes concernant le Contrat de transport international ferroviaire des marchandises</i>)
CIP	: Carriage and Insurance Paid
CISG	: Convention on Contracts for the International Sale of Goods
CMNI	: Convention on the Contract for Carriage of Goods in Inland Waterways (<i>Convention relative au Contrat de transport de Marchandises en Navigation Intérieure</i>)
CMR	: Convention on the Contract for the International Carriage of Goods by Road (<i>Convention Relative au Contrat de Transport International de Marchandises par Route</i>)
COTIF	: <i>Convention de l'Organisation Intergouvernementale pour les Transports Internationaux Ferroviaires</i>
CPT	: Carriage Paid To
DAP	: Delivered at Place
DAT	: Delivered at Terminal
EXW	: Ex Works
FCA	: Free Carrier

FOB	: Free on Board
GAFTA	: The Grain and Feed Trade Association
ICC	: International Chamber of Commerce
INCOTERMS	: Rules or International Commercial terms
L/C	: Letter of Credit
MIA	: Marine Insurance Act
SG	: Ships and Goods
SOGA	: Sale of Goods Act
UCC	: Uniform Commercial Code
UCP	: Uniform Customs and Practice that govern the operation of letter of credit
ULIS	: Uniform Law for International Sale of Goods
UPICC	: UNIDROIT Principal of International Commercial Code
UNCITRAL	: United Nations Commission for International Trade Law
UNCTAD	: United Nations Conference on Trade and Development

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Abstract

In a CIF contract of sale when the seller has shipped the goods, procured shipping documents and tendered them to the buyer he/she is entitled to the full payment of the price. This is done immaterial of whether or not goods safely reach the buyer who bears the risk of loss or damage generally from the shipping time. This has triggered this research carried out with the objective of examining what happens when goods are damaged or lost in transit, whether the buyer can reject them if damaged in transit or whether the seller can claim full price where goods do not reach their destination and the means of compensation of the buyer in case of goods' loss or damage. It was realised that the seller is not liable for the loss or damage of goods which occurs while they are in transit and he/she is entitled to the payment of full price. The buyer cannot reject goods that have been damaged in transit due to event beyond the seller's control and he/she has to pay full price even if goods are damaged or totally lost. The buyer is however protected by the insurance cover subscribed for by the seller. In case the loss or damage is due to the carrier's fault the buyer has an action against the former. There are, nonetheless, instances where the buyer is not protected; i.e when the loss or damage is due to a peril that is not covered by the insurance policy or when he/she is not named in the bill of lading and cannot therefore sue the carrier in case of the latter's liability. It is suggested that the subscription of the additional insurance cover for uncovered risks and the recognition of the standalone action of the buyer in tort against the carrier in case of the latter's fault would offer more protection to the buyer in a CIF contract.

GENERAL INTRODUCTION

1. Presentation of the subject

The rules on the liability of the seller and passing of risk in Cost, Insurance and Freight (CIF or C.I.F.) Contracts under Incoterms¹ 2010 and the Convention on the Contracts for the International Sales of Goods (hereinafter 'CISG') are challenging concepts. Despite the fact that the consequences of the passing off of risk under Incoterms 2010 are the same as those under the CISG, the issue of time at which risk passes marks the difference.

Furthermore, the unsuitability of the statutory provisions of domestic and international statutory instruments (like for instance the United Kingdom Sale of Goods Act and the United Nations Convention the Contracts of International Sale of Goods) for the passing of risk in CIF contracts is elaborated and demonstrated that the settled practices in trade are more suitable than the provisions². It is suggested that the parties should rely upon the trade terms themselves and incorporate their own intentions in the form of an express clause or trade term in the contract to exclude or derogate from the rules of these provisions³. In international trade, the sale contract is the heart of an export-import transaction.⁴ It is, however, always supported by several other related contracts, reflecting the complexity of the transaction and number of parties involved.

¹ International Commercial Terms.

² C. Murray, *Export Trade: The Law and Practice of International Trade*, 10th ed., London, Sweet & Maxwell, 2000, p. 17

³ D.M.Sassoon, *C.I.F. and F.O.B. Contracts*, 4th Edition, London, Sweet & Maxwell, 1995, p. 350.

⁴ United Nation Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), Article 2, Vienna, 2009.

Basic among these additional contracts are the contract of carriage by sea, under which the goods are transported from one country to the other and the contract of marine insurance⁵, by which the parties protect themselves from the risks of loss or damage to the goods in transit.

The seller and the buyer through their contract of sale, under familiar principles of contract law, can allocate many of the burdens and risks inherent in an international transaction⁶.

A CIF contract therefore involves the seller entering into not only a sale contract but also, at a later date, insurance and carriage contract. The seller, therefore, fixes a price to cover all these costs and it is he/she who carries the risk of fluctuations in insurance and freight costs. The goods will normally be insured against loss or damage during carriage and it is usual for the banking system⁷ to finance such a transaction⁸. As A. Alsterberg pointed out, on one hand, the seller can, indeed, if the buyer is willing, shift virtually all the burdens and risks to the buyer once the goods have left the seller's facilities and; from the seller's point of view, it would be very desirable to be able to forget about the goods once they leave the factory and be paid immediately in exchange for the carrier's receipt tendered to the buyer⁹. On the other hand, he further argued the buyer would prefer to have no responsibility for the goods whatsoever until

⁵See the comment on Article 5.2.3 of UNIDROIT PRINCIPALS of International Commercial Contract 2010 (exclusion and limitation clauses) "Contractual provisions limiting or excluding liability of those who are not parties to the contract are very common, particularly in contracts of carriage, where they often form part of a settled pattern of insurance..... . In general the autonomy of the parties should be respected in this area too." International Institute for the Unification of Private Law, *Unidroit Principles of International Commercial Contracts* available at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>, accessed on 27th January, 2014. See also Section 1 of MIA 1906; A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure. See also S. Hodges, *Law of Marine Insurance*, 4th Edition, London, Cavendish Publishing Limited, 1996, p.968.

⁶ Report by the UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT (UNCTAD) Secretariat, *Legal and documentary aspect of the marine insurance contract*, New York, Geneva, 1982, Chap. III, §1, 2.

⁷F. M. VENTRIS, *Bankers Documentary Credit*, 2nd Edition, London, Sweet & Maxwell, 1990, p.325.

⁸Under Article 17 of the UCP 600 'banks will accept a transport document which indicates as the consignor of the goods a party other than the Beneficiary of the Credit.'

⁹ A. ALSTERBERG, *Transfer of Risk in Sale of Goods Shipment Terms*, Master Thesis, Faculty of Law, University of Lund, 2006/2007, p. 4 available at <http://lup.lub.lu.se/luur/download?func=downloadFile&recordId=1555616&fileId=1563716>, accessed on 27 July 2013.

they arrive at their destination in his country and to be able to postpone payment until he has inspected the goods and accepted them¹⁰.

The goods may be lost or damaged during transit¹¹, either before or after the contract is made¹². The principal tool used to allocate the predicament that might arise where the goods are damaged or lost before or after the contract is made is the doctrine of risk. The doctrine of risk is a special doctrine developed for the law of sale, unlike the doctrine of frustration, which is the general doctrine of the law of contract.

It is important to emphasize that the doctrine of risk does not operate to bring the contract of sale to an end. It may, however, release one party from his obligations under the contract of sale¹³. Therefore, if, for instance, the goods are at the seller's risk and they are damaged or lost, this would, in effect, release the buyer from his obligation to accept the goods, but it would not release the seller from the obligation to deliver them¹⁴.

¹⁰*Ibid*; See also P. S. ATIYAH, J. N. ADAMS, H. MCQUEEN, *Atiyah's Sale of Goods*, 12th ed., London, Pearson, 2011, pp. 332-340.

¹¹See A. ROMEIN, "The Passing of Risk: A Comparison between the passing of risk under the CISG and German Law", available at <http://www.cisgw3.law.pace.edu/cisg/biblio/romein.html> accessed on 20th January, 2014. See also art.68 (i) of CISG which provides that the risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. This provision can cause serious practical problems, since it will normally be impossible to determine the moment in which the damage or loss occurred; this is especially the case when the goods are forwarded in containers. In fact, this risk lies with the seller who, in case of a difference of opinion, will have to prove that the risk had already passed to the buyer, if he wants to release himself from his liability.

¹²H. D. Gabriel, *Contracts for the Sale of Goods: A Comparison of U.S. and International Law*, 2nd Edition, Oxford, Oxford University Press, 2009, pp 2009-2010.

¹³The CIF contract relies on two basic concepts for the protection of buyer: 1)the transfer of ownership by means of endorsement of the bill of lading, and 2) the transfer of protection for the goods by the contemporaneous assignment of the insurance policy'. See Essa Alazemi, *Passing of Risk in International Contracts of Sale of Goods; A Comparative Study between the United Nations Convention on Contracts for Sale of Goods 1980 and the English Sale of Goods Act 1979*, available at <http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html> , accessed on 21st January, 2014.

¹⁴Michael Bridge, *The international Sale of Goods: Law and Practice*, 2nd ed, Oxford, Oxford University Press, 2007, p. 88-93.

Conversely, if the goods are at the buyer's risk and are damaged or lost, he may still be liable to pay the price even though the seller is no longer liable for failing to deliver the goods¹⁵.

In some cases where the goods are damaged, this would be the fault of a third party and that third party may be liable to be sued. This is particularly likely to be the case where the goods are being carried. This position is backed by M.L. FURMSTON: goods in transit are particularly vulnerable to accidents¹⁶. However, a very important practical consideration to take into account here is that a party will not necessarily have a tort action for damage to the goods simply because the risk as between buyer and seller has been placed on it. This is because tort actions for damage to goods by third parties are usually only available to those who either own the goods or are in possession of them at the time that the damage is caused¹⁷.

2. Problem statement

The contracts of sale are the heart of international sale of goods. The most important aims of a sale of goods contract are to pass the goods sold under the contract into the hands of the buyer from the hands of seller and pay the price to the vendor by the purchaser¹⁸. For these purposes, a contract of sale in international level is supported by a number of additional contracts which add to the complication of contracts in international transactions.

The main crucial contracts among them are the contract of carriage by sea to transport goods from the port of shipment to the port of destination and the contract of insurance¹⁹ which covers the risk of damage or loss that may be arisen in transit.²⁰

¹⁵ For example, article 87 of the 1906 Act reads: ".....speaking generally, the main object of the Act is to declare the law, that is to say, to indicate to the parties the legal position if they do not make any express bargain, leaving them free to make any bargain they like to suit their own needs". M.D. Chalmers, *Chalmer's Marine Insurance Act.1906*, 7th ed., E.R.H. Ivamy, ed.(London, Butterworth, 1971), p. 137.

¹⁶M.L. FURMSTON, *Sale & Supply of Goods*, 3rd ed., London, Cavendish, 2000, p. 89.

¹⁷Ch. DEBATTISTA, *The Sale of Goods Carried by Sea*, 2nd ed., London, Southampton, 1998, p. 72.

¹⁸ Under Article 17 of the UCP 600 'banks will accept a transport document which indicates as the consignor of the goods a party other than the Beneficiary of the Credit.'

¹⁹ I. CARR, *International trade law*, 4th edition, London and New York, Routledge-Cavendish, 2010, p.431

²⁰See Section 67 of English Marine Insurance Act 1906- An Act to codify the Law relating to Marine Insurance [21st December 190]. See also S. HODGES, *Cases and Materials on Marine Insurance Law*, London, Cavendish Publishing Limited, 1999, p, 413.

Since the goods sold²¹ are to be sent long distances, it is possible that they may be damaged during the sea voyage, stolen on the sea or even destroyed in transit when the ship carrying them sinks, either after or before the conclusion of the contract²². Therefore, the importance of "risk" and the time, at which it passes from the seller to the buyer, and its consequences, are the most significant issues in every contract of sale. In this regard, the following are major research questions of my work:

What will happen if the goods are damaged in transit or destroyed following sinking of the ship?

Does the buyer have right to reject the damaged goods in transit?

Does the seller have right to claim the agreed price in full, even if the goods do not reach the agreed port of destination? Or provided that the buyer has already paid the price, can he/she reclaim it or not?

What about the buyer's compensation in case of loss of or damage to goods?

Normally goods will be at the seller's risk and at some point it will pass to the buyer and he will bear the risk. Consequently, when the risk is on the buyer, the seller is released from his obligations and the buyer must pay the agreed price in full, even if the goods are damaged or destroyed in transit.²³ On the other hand, when the risk is on the seller, and the goods are damaged or lost during the sea voyage, he is not released from his obligation in delivery of the

²¹See A. ROMEIN, "The Passing of Risk A Comparison between the passing of risk under the CISG and German Law", available at <http://cisgw3.law.pace.edu/cisg/biblio/romein.html>, accessed on 8th August, 2011. See also art.68 (i) of CISG which provides that the risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. This provision can cause serious practical problems, since it will normally be impossible to determine the moment in which the damage or loss occurred; this is especially the case when the goods are forwarded in containers. In fact, this risk lies with the seller who, in case of a difference of opinion, will have to prove that the risk had already passed to the buyer, if he wants to release himself from his liability. See also risks of losses contained under UCC §§2-509, 2-510(2006).

²²Proceedings of the United Nations Conference on Trade and Development, vol.I, Final Act and Report (United Nations publication, Sales N^o. E. 68.II), third part, annexes available at http://unctad.org/en/Docs/td97vol1_en.pdf

²³United Nations Commission on International Trade Law (UNCITRAL), 'Setting Rules for International Trade and Settling Disputes', available at http://www.unis.unvienna.org/documents/unis/25vic/25years_vic_uncitral.pdf, Accessed on 27th September 2011

goods of contractual description.²⁴ However, these consequences depend on the question to know whether the risk will be borne by the seller or the buyer and the moment at which the risk passes. However, the answers would not be the same in all types of contracts naturally.

For instance, in a contract for which the applicable law is the United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980,²⁵ the time at which risk passes and its consequences depends on the applicable Law.²⁶ Furthermore, the parties may incorporate their own intentions into the contract and exclude or derogate from the applicable statutory provisions where it is permitted. As an example, they may provide an express term in the contract to determine the time of the passing of risk, such as CIF²⁷. Therefore, different rules will be applied according to the stipulated agreement or trade term provided in the contract.

This paper dissertation focuses on the passing of risk in CIF contracts under Incoterms 2010 in comparison with the CISG. There are some relevant statutory provisions, decided cases and valuable comments presented by the commentators. It tries to consider the provisions and annotations to show the similar and different approaches of Incoterms 2010 and the CISG on the passing of risk in CIF contracts.

3. Objectives and rationale of the study

The purpose of this work is to describe and examine the concept of risk in shipment terms where the parties have performed their duties according to the contract of sale, but where the goods has been lost or deteriorated during transit the question to be answered is who to bear the risk. I wish to introduce the reader to the concept of risk and the specific problems faced

²⁴ Sales Of Goods Act 1979 s. 20.

²⁵ In 2008 the UNCITRAL approved The Convention on Contract for the International Carriage of Goods wholly or partly by sea which was adopted by UN General Assembly on December 2008. The Convention was opened for ratification following a signing ceremony in Rotterdam in September 2009 and has been known as the "Rotterdam Rules". The application of the new Convention made international trade easier and more efficient.

²⁶ International transport of goods overland is carried out by the following main international conventions: the convention on the Contract for the International Carriage of Goods by Road (CMR) of 1956; and the Convention Concerning the Carriage of Goods by Rail (CIM) of 1961, which became the Appendix of the Convention Concerning the International Carriage by Rail (COTIF from *Convention de l'Organisation Intergouvernementale pour les Transports Internationaux Ferroviaires*) in 1980 and is generally referred to as the CIM-COTIF Convention. The inland waterway transport is regulated by the Budapest Convention on the Contract for Carriage of Goods in Inland Waterways (CMNI) of 2000.

²⁷ See Article 9 of CISG

within this setting from an Incoterms 2010 perspective. The most dominating authors on this area are divided and our aim is to clear out this and to make it easier to understand. Since there is a very limited legislation in this area, it was of major importance to scrutinize and analyze relevant case law and practitioner books.

However, it is also used in application and observance of good faith²⁸ in international trade²⁹.

It is the aim of this work to contribute to the discussion concerning the possibility to solve different situations which might arise. I have done so by examining and pinpoint the main problem areas encountered in the work. I have further examined various circumstances within this concept and look how the Courts respectively have solved this and with anticipation, this has produced a clearer picture. In addition, this study can potentially be seen as a study report indicating what line to approach on the different situations. Finally, the intention of this work is not to produce a legislation proposal, but instead to present a recommendation on what direction to follow.

4. Research methodology

The process for developing this research is a challenging and complicated task. It is in this vein that desktop methods were used to develop it. Literature was studied; legal instruments and case-law were deeply analyzed. Legal provisions of both international conventions and national laws related to transfer of risks³⁰ in a CIF contract were confronted to come up with an in-depth analysis. Furthermore, case-law was studied to get what in practice is done.

Internet sources were also consulted to improve other methods used including the comparative approach which constitutes a cross-cutting method of my research. It is through comparative approach that different legal instruments, scholars' writings and case-laws were analyzed to reach the general conclusion.

²⁸ United Nation Convention on contracts for the international sale of goods, Article 7(1), Vienna, 1980

²⁹ United Nation Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), Article 2, Vienna, 2009.

³⁰ See BRIDGE, *International Sale of Goods*, 2nd Edition, Oxford, Clarendon Press, 1999, pp. 390-398.

5. Scope and limitation of the study

This work is conducted on the '*Liability of the Seller under CIF Contract in the Event of Loss or Damages to Goods Carried by Sea*'. The work is divided into two chapters: In the first chapter key concepts related to the subject; namely the concept of liability, CIF contract, risk and carriage of goods by sea are explored. Then, in the second and last chapter, the passing of risk in CIF contracts under Incoterms 2010³¹ is elaborated. Given that, the time and consequences of the passing of risk in CIF contracts are considered, and the suitability or unsuitability of the statutory provisions for CIF contracts³² are examined and the possible solutions are suggested in the conclusion.

CHAPTER ONE: CLARIFICATION OF KEY CONCEPTS

A number of important technical concepts are referred to in this work at several occasions and are thus core for a better grasp of the substance of the work. It is therefore relevant to first shed more light on them. In this respect this first chapter of the work is dedicated to the synoptic review of the concepts of (1) Liability, (2) Incoterms & CIF Contract, (3) Risk and (4) Goods Carried by Sea.

I.1 Notion of liability

There exist various types of liability like criminal liability, disciplinary liability, civil liability, etc. For the purpose of this work, however, only civil liability is explored as the work falls within its ambit.

Expounding on civil liability, P. A. FORIERS states that "one is legally liable when he/she is bound to make good the loss caused to another either by himself/herself or by another person, by the thing or by the animal for which he/she is answerable".³³ The same author argues that "civil liability is either contractual or tortious where it results from breach of a contract or

³¹C. DEBATTISTA, *The Sale of Goods Carried by Sea*, 2nd ed, Witherbys, 1998, p. 72.

³² United Nations Commission on Int'l Trade Law, *Report of the United Nations Commission on International Trade Law, 41st Session*, para 298, Annex I, U.N. GAOR, 63rd Sess., Supp. No. 17, U.N. Doc. A/63/17, accessed on 6th April, 2013.

³³ See P. A. FORIERS, *Les Obligations*, Syllabus, Tome Second, 2008-2009, p. 2 (Author's translation).

breach of an extra-contractual duty (often the general duty of diligence expected from anyone) respectively".³⁴ This section explores thus the two types of liability; viz contractual liability and tort liability.

I.1.1 Contractual liability

Contractual liability entails the "responsibility of the individual who, under contract, without justification does not fulfill its obligations and so causes a prejudice to the other party to repair the damage".³⁵ Contractual liability can result from non performance or delay in performance of a contract.³⁶ Undoubtedly, this liability results from a preexisting legal relationship and FORIERS terms it as an obligation of second level.³⁷

Under Rwandan law, and actually under any other law on contracts, non-performance of a contractual obligation which is due means breach of contract³⁸ which can be either total or partial.³⁹ Material breach of a contract by non-performance of its provisions gives right to a claim for damages for obligations not performed if such damages extinguish remaining obligations of the aggrieved party.⁴⁰ Right to claim damages can also arise in case of repudiation of contractual obligations by the debtor.⁴¹

For instance, under Rwandan law, the seller can be liable to pay damages if s/he has failed to deliver the thing sold at the agreed time or place.⁴² In this case, the seller's liability is a result of contract breach.

³⁴ *Ibid.*

³⁵ D. D. NICOLETA, "Civil Liability Issues in view of the National Legislation in 2011", p. 19.

³⁶ E. GINOT, *La responsabilité contractuelle*, Master Pratiques Juridiques et Judiciaires Promotion 2006-2007, Nîmes, 2006, p.1.

³⁷ P.A. FORIERS, *op. cit.*, p. 2.

³⁸ Art. 80, para 2 of Law No 45/2011 of 25/11/2011 governing Contracts, in *O.G.*, no 04 bis of 23/01/2012 (hereinafter "Contracts Law")

³⁹ Art. 80, Contracts Law.

⁴⁰ Art. 86, Contracts Law. See also arts. 137 et seq., Contracts Law.

⁴¹ Art. 88, Contracts Law.

⁴² See arts 287-288 of CCB III.

Contractual liability is subject to some requirements. Firstly, it requires the existence of a valid contract,⁴³ there can be, therefore, no contractual liability where the underlying contract is null.⁴⁴ Secondly, the victim must be a party to the contract.⁴⁵ Note, however, that it has been suggested to extend the contractual regime to any person entitled to claim damages from the defaulting debtor.⁴⁶ Thirdly, contractual liability requires the foreseen or foreseeable loss.⁴⁷ Fourthly, the loss must result from the breach of contract;⁴⁸ in other words, there must be a causal link between the fault (breach of contract) and the loss suffered. In the context of CIF contract for instance, in *Hindley v East Indian Produce*, the seller to a CIF contract failed to ship the goods [as agreed in the contract] and this amounted to the breach of the contract that resulted in the seller being obliged to pay damages including the refund of the price.⁴⁹ Though it is not detailed in the case, it is understandable from this case that there was a valid contract which was not performed by the seller by failure to ship the goods which resulted in the buyer's loss as he had paid the price but could not get the goods. So the seller had not only to refund the price but also pay other damages. Also in the *The Marine Star* case, the contract required the seller to nominate the vessel who nominated *The Marine Star* to cancel the nomination later that day without renominating a substitute vessel. The seller invoked a force majeure clause that was in the CIF contract which exempted from liability the party in breach of contract due to an event beyond its control arguing he could not find a substitute vessel or cargo. The seller lost the case and the appeal was refused and he was bound to pay damages for loss of profit, compensation paid to the next buyer (the plaintiff had already sold the cargo to Coastal Aruba that arranged for the substitute cargo and claimed compensation from the plaintiff) and costs due to the breach of contract by the seller.⁵⁰

⁴³ P. LE TOURNEAU, *La responsabilité civile*, 3^e éd., Paris, Dalloz, 1982, p.68.

⁴⁴ *Id.*, pp. 78-79.

⁴⁵ *Ibid.*

⁴⁶ *Ibid.*

⁴⁷ See art. 141, Contracts Law, A. M. NGAGI, *Cours de droit civil des obligations*, Manuel pour Etudiants, Butare, Les Editions de l'Université Nationales du Rwanda, 2004, p. 102 and P. LE TOURNEAU, *op. cit.*, pp.87-91.

⁴⁸ A. M. NGAGI, *op. cit.* p. 102.

⁴⁹ See *Hindley v East Indian Produce* [1973] 2 Lloyd's Rep 515 quoted by C. H. SPURIN, *op. cit.*, p. 29.

⁵⁰ See *The Marine Star* [1993] 1 Lloyds Rep 329 and *The Marine Star* [1994] 2 Lloyds Rep 629 quoted by C. H. SPURIN, *op. cit.*, p. 35.

I.1.2 Tort liability

The law of torts sometimes described as the law of civil wrongs delineates certain conduct as wrongful and attaches civil sanctions (most often damages) to that conduct.⁵¹ In the same line, the law of torts is based on a number of duties it imposes on persons to certain other persons and comes into play whenever there is a breach of those duties.⁵² Tort liability may be personal when it results from one's own conduct, vicarious when one is liable for the conduct of others or for things under his/her control.⁵³ However, for the purpose of this dissertation only personal liability is detailed as it is the only one having bonds with the topic under scrutiny; i.e. liability of seller in a CIF contract in case of loss of or damage to goods.

Liability is personal liability when there is liability for damage caused to others by the breach of one's duty⁵⁴ "not to harm another by an act or behavior that an ordinarily diligent person placed in similar circumstances would not have committed."⁵⁵ This breach of the duty is commonly known as "the fault" and this is the reason why personal liability is also known as liability for personal fault. The fault may be a wrongful act as it may also be a wrongful omission,⁵⁶ it may be intentional (art. 258 CCB III) or unintentional in case of negligence or carelessness (art. 259 CCB III).

Specifically, in a CIF contract when the buyers are not the holders of the bill of lading they can claim from the carrier on the basis of tort liability.⁵⁷ In the *Nea Tyhi* also referred to as *Schiffahrt and Kohlen G.m.b.H.v v Chelsea Maritime Ltd: The Irene's Success*, it was held that CIF buyers who had no action to claim on contract as they were not holders of the bill of lading,

⁵¹ Queensland Law Reform Commission, *Vicarious Liability*, Discussion Paper WP 48, 1995, p. 3.

⁵² *Ibid.*

⁵³ See W. A. SCHABAS and M. IMBLEAU, *Introduction to Rwandan law*, Quebec, Les Editions Yvon Blais, 1997, p. 88.

⁵⁴ *Id.*, p. 7.

⁵⁵ W. A. SCHABAS and M. IMBLEAU, *op. cit.*, p. 87.

⁵⁶ *Ibid.*

⁵⁷ See For instance *Brandt & Co. and F.W. Vogel & Co. v. River Plate Steam Navigation Company, Ltd* (1923-24) 17 Ll. L. Rep. 142 at 145 and *The Nea Tyhi* [1982] 1 Lloyd's Rep. 606 cited by W. FAN, *The Measurement of Damages in Carriage of Goods by Sea-A Comparative Study of English and Chinese Law with a View to Possible Revisions of the Chinese Maritime Code and other Legislation*, PhD Thesis, University of Exeter, 2008, p. 110. Available at <https://ore.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW.pdf?sequence=2>, accessed on 10/12/2014.

had an action in negligence since the cargo was physically damaged by sea water during the voyage due to the sea carrier's breach of the duty of care.⁵⁸

I.2 Concept of Incoterms and CIF Contract

It is important to first understand thoroughly the concepts of Incoterms and CIF contract of sale to be able to examine the passing of risk and risk bearer in case of loss of or damage to goods. It is in this respect that this section devoted to the analysis of the concepts of Incoterms and CIF contract respectively.

I.2.1 Incoterms

It is important to understand the meaning of Incoterms and their development before one can provide their scope of application as well as the details of every type of Incoterms. This subsection is devoted therefore to a brief explanation of the Incoterms and their application.

I.2.1.1. Meaning & Brief Development of Incoterms

As expounded by J. MALFLIET Incoterms are: 'Trade terms published by the International Chamber of Commerce (ICC) that are commonly used in both international and domestic trade contracts. Incoterms, short of "International Commercial Terms", are used to make international trade easier by helping traders in different countries understand one another'.⁵⁹ According to Mike IGBOKWE, many of 'trade terms have over the years evolved by trade usages, customs and practices of merchants and they are shorthand way of incorporation of some aspects of contractual obligations and performance in sales contracts'. Indeed, the International Chamber of Commerce has noticed concern that what FOB (Free On Board) for instance, meant in a given country was not the same in another country and it began the research on different trade terms in use at the time in 1920s to come up with a finding that despite the differences, there was a great deal of agreement.⁶⁰ In 1933 ICC came out with the

⁵⁸ *Schiffahrt and Kohlen G.m.b.H.v v Chelsea Maritime Ltd: The Irene's Success* [1982] Q.B. 481 cited by S. TODD, "Remedies of the Buyer for Damage to Goods Carried by Sea" [1986], *Canterbury Law Review*, Vol.3, p. 91.

⁵⁹ See J. MALFLIET, 'Incoterms 2010 and the mode of transport: how to choose the right term', Ghent University, Date not provided, p. 168.

⁶⁰ UNCTAD Secretariat, *Legal Aspects of International Trade*, Geneva & New York, UN Publications, 1999, p. 9.

uniform definitions of trade terms officially called “International Rules of Interpretation of Trade Terms” popularly known as INCOTERMS [International Commercial Terms] to ensure their unified use and understanding with the aim of reducing to the minimal level uncertainties of different interpretations of those terms in different countries.⁶¹ Incoterms were updated in 1953, 1967, 1976, 1980, 1990, 2000⁶² and 2010⁶³.

This periodical revision of Incoterms is meant to make them reflect current international trade practice in matters they concern. As stated by COETZEE, the 1953 full revision introduced five obligations of the buyer and seller to an international contract and defined them in detail. This revision was triggered by the necessity to make Incoterms reflect the practices of international trade of the time to motivate most parties to international commercial contract to adopt them. For instance where practices in use were conspicuously differing from Incoterms, only minimum obligations were stated in Incoterms leaving to contracting parties the freedom to stipulate obligations beyond the minimum ones.⁶⁴

⁶¹ M .I. IGBOKWE, ‘Contracts of Sale/Purchase and Carriage of Goods’ available at <http://www.mikeigbokwe.com/publications.php>, accessed on the 10/11/2014.

⁶² Anita SZABO, *Incoterms 2000 in light of its practice*, Budapest, BALAZS & HOLLO LAW FIRM, 2008, p. 4.

⁶³ See <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/>

⁶⁴ J. COETZEE, *op. cit.*, p. 180.

It is relevant to note that most often used terms (EXW⁶⁵, FAS⁶⁶, FOB⁶⁷, C&F⁶⁸ and CIF) were introduced by the 1953 revision.⁶⁹ The 1967 added “delivered terms” to the list while the 1977 version added ‘FOB Airport to the list account taken of development of air transportation.⁷⁰ In 1980, amendments were made including addition of new terms to suit new trends in trade such as the cargo unitization.⁷¹ In addition, the revision was influence by changes in transportation techniques and documentary practices triggered by what came to be known as “container revolution”. Under this revised version new terms (Free carrier...named point (FRC) and Freight, carriage and insurance paid to (CIP) were introduced and the ship’s rail was replaced as the critical point by a “named point” where the carrier takes the goods into his custody.⁷²

The 1990 revision of Incoterms was mainly triggered by the need to accommodate the use of electronic data interchange (EDI) instead of paper documentation.⁷³ This revision also introduced a clause on that replace the “ship’s rail” by the “entry into carrier’s custody” as the

⁶⁵ Ex Works: means that the seller delivers when it places the goods at the disposal of the buyer at the seller’s premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable (visit <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>, accessed on 14/11/2015)

⁶⁶ Free Alongside Ship” means that the seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The risk of loss of or damage to the goods passes when the goods are alongside the ship, and the buyer bears all costs from that moment onwards(visit <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>, accessed on 14/11/2015)

⁶⁷ Free On Board” means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards. (visit <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>, accessed on 14/11/2015)

⁶⁸ Cost and Freight” means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. the seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination. (visit <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>, accessed on 14/11/2015).

⁶⁹ See DE LY, *International Business Law and Lex Mercatoria* (1992) 173 and DE VRIES “ The Passing of Risk in Internatinal Sales under the Vienna Sales Convention 1980 and compared with Traditional Trade Terms” 1982 (17) *Eur Trans L* 495 515 cited by J. COETZEE, *op. cit.*, p. 180.

⁷⁰ See N. G. OBERMAN, “Transfer of risk from the seller to the buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and Incoterms” Juin 1997 available at <http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html>, accessed on 5/2/2013 and J. COETZEE, *op. cit.*, p. 181.

⁷¹ UNCTAD Secretariat, *op. cit.*, p. 9.

⁷² J. COETZEE, *op. cit.*, p. 182.

⁷³ M. Igbokwe, *op. cit.*, p. 4 and RAMBERG *Guide to INCOTERMS 1990* (1991) 8 cited by J. COETZEE, *op. cit.*, p. 183.

critical point of delivery and transfer of risks in CIP (Carriage and Insurance Paid To), CPT (Carriage Paid To) and FCA (Free Carrier).⁷⁴ The 2000 revision of Incoterms that was dictated principally by the quest to reflect the most common trade practices even in countries that did not always participate in their elaboration process or were they were not often resorted to came up with a few changes. The important changes include the shifting of the obligation of export clearance from the buyer to the seller under FAS (Free Alongside Ship) as well as the duty of import clearance from the seller to the buyer under DEQ (Delivered Ex Quay). The other change are about the loading and unloading obligations under FCA (Free Carrier)⁷⁵

The Incoterms 2010 have consolidated some of the former rules to come up with a classification divided into eleven (11) Incoterms rules with extensive guidance notes and illustrative graphics to help users efficiently choose the right rules for each transaction, new classification to help choosing the most suitable rule in relation to the mode of transport, etc.⁷⁶ Substantively, the 2010 version of Incoterms introduced two new terms (DAT (Delivered At Terminal) and DAP(Delivered At Place)) by eliminating four then existing terms (DEQ (Delivered Ex-quay), DES (Delivered Ex Ship), DAF (Delivered At Frontier) and DDU (Delivered Duty Unpaid)) that are considered to be encompassed by the two new ones.⁷⁷

1.2.1.2 Scope and description of Incoterms

It should be noted that the scope of Incoterms is only limited to matters relating to the rights and obligations of the parties to the sale contract with respect to the delivery of goods sold as well as related issues such as risk, insurance, documentation and matters incidental to the export and import of goods. They have the shortcomings of not applying to other rights and obligations of parties to the contract like the transfer of property rights in goods nor deal with the consequences of a breach of sales contract, etc which parties are advised to take care of ensuring that elements related to aspects not covered by Incoterms are well defined in their

⁷⁴ D. FLAMBOURAS, 'Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods', p. 34 available at www.cisgw3.law.pace.edu/, accessed on 29 Sept. 2014.

⁷⁵ J. COETZEE, *op. cit.*, p. 184.

⁷⁶ Incoterms available at <http://www.iccbooks.com/Product/ProductInfo.aspx?id=653>, accessed on 02/12/2014.

⁷⁷ J. MALFLIET, 'Incoterms 2010 and the mode of transport: how to choose the right term', Ghent University, Date not provided, pp. 164 and 166-167.

sales contract or the applicable substantial law. Incoterms may however be used to fill the gaps in the contract.⁷⁸

Incoterms have been traditionally and broadly classified into four groups: i.e. E-Terms, F-Terms, C-Terms and D-terms. In fact, the first letter of each term indicates to which group the latter belongs.

1) *E-Terms*: this group that contains only one term, EXW (Ex- Works), the seller is only required to make the goods available to the buyer at the seller's premises.⁷⁹ This term has the minimum duties for the seller.

2) *F-Terms*: this category contains three terms (FCA, FOB and FAS) that basically entail the obligations for the seller to deliver the goods to a carrier nominated by the buyer.⁸⁰ The buyer is the one responsible for the cost and risk of the main carriage⁸¹ and the seller has to arrange for the pre-carriage to reach the agreed point for delivery of the goods to the carrier.⁸²

3) *C-Terms*: this category comprises four terms (CFR (Cost and Freight), CIF, CPT(Carriage Paid To) and CIP(Carriage and Insurance Paid To)) whereby the common feature is that the seller is duty bound to contract the carriage, but without being liable for the risk of loss of or damage to goods sold or any additional cost resulting from events occurring after shipment and dispatch.⁸³

⁷⁸ Anita SZABO, *op. cit.*, p. 4 and J. COETZEE, *INCOTERMS as a form of standardization in international sale law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to passing of risk*, PhD Thesis, University of StellenBosch, 2010, p. 22.

⁷⁹ Lorenz & Partners, 'Trade Terms in International Sale of Goods and International Commercial Terms (Incoterms)', *Newsletter* No 55 (EN), June 2010, p. 4; J. COETZEE, *op. Cit.*, p. 186 and J. MALFLIET, *op. cit.*, p. 165.

⁸⁰ Lorenz & Partners, *op. cit.*, p. 4 and J. COETZEE, *op. Cit.*, pp. 186-187.

⁸¹ J. MALFLIET, *op. cit.*, p. 164.

⁸² ICC Guide to Incoterms 2000, p. 40.

⁸³ Lorenz & Partners, *op. cit.*, p. 4; J. COETZEE, *op. Cit.*, p. 187 and J. MALFLIET, *op. cit.*, p. 164.

4) *D-Terms*: this category comprises three terms (DAT, DAP and DDP (Delivered Duty Paid)) under Incoterms® 2010 (into force today) whereby the seller must bear all the costs and risks up to the delivery point at the place of destination.⁸⁴ In this category it is clear that the seller assumes the maximum obligations.

For the purpose of this research, however, only one term, CIF, shall be dealt with in details with a focus on the analysis of the seller's liability in case of loss of or damage to goods. It is in this respect that CIF contract deserves a more detailed explanation.

I.2.2 CIF Contract

In this sub-section the meaning of Cost Insurance Freight (CIF) contract of sale shall be explored. The CIF contract of sale being a sale in which doing play a crucial role, documents used in CIF shall also be briefly presented. Finally, the nature of CIF contract of sale shall be analyzed.

I.2.2.1 Meaning of Cost Insurance and Freight (CIF) contract

The Cost Insurance Freight specifies an agreement to sell at an inclusive price covering the cost of the goods, insurance and freight⁸⁵. The seller ships the goods of contract description and sends them to the agreed port of destination within the fixed time in the contract or, in the absence of express time, within a reasonable time.⁸⁶

⁸⁴ Lorenz & Partners, *op. cit.*, p.5; J. MALFLIET, *op. cit.*, p. 165 and J. COETZEE, *op. Cit.*, p. 187

⁸⁵For example, article 87 of the 1906 Act reads: ".....speaking generally, the main object of the Act is to declare the law, that is to say, to indicate to the parties the legal position if they do not make any express bargain, leaving them free to make any bargain they like to suit their own needs". M.D. Chalmers, *Chalmer's Marine Insurance Act.1906*, 7thed., London, Butterworths, 1971, p. 137.

See also article 2 of French Law N°.67-522 of 3 July 1967 on marine insurance designating those articles which are not capable of being overridden by contract, thereby permitting the parties to alter the effect of the other provisions by their mutual agreement. Furthermore, the provisions of the Commercial Code of 1885 apply only in the absence of provision in the insurance contract.

⁸⁶ United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (Rotterdam Rules), Article 1 § 11 A. ALSTERBERG, *op. cit.*, p. 8.

In this regard, he/she fulfills his/her obligations by presentation of proper shipping documents to the buyer⁸⁷.

The seller is released from his/her entire obligations and receives the price, even though the goods have been lost before he/she tenders such documents.⁸⁸ However, the buyer is able to sue the carrier or underwriter, for the loss.⁸⁹

⁸⁷Those documents fulfill different functions; a Bill of Lading is a document of title. See Article 1(b) of The Hague-Visby Rule, available at <http://www.admiraltylaw.com/statutes/hague.html> ; accessed on 05th February, 2014. The policy of insurance protects the buyer against the perils of the sea; the Incoterms 2010, CIF, para. A3 (b) requires the seller to obtain cargo insurance such that the buyer or any other person having an insurable interest in the goods may claim directly from the insurer. The seller must also provide a commercial invoice to enable the buyer to clear the goods through customs and to identify the goods as being covered by an import license; the commercial invoice shows the price (see the INCOTERMS 2010 buy ICC, A₁). The risk generally passes on shipments or as from shipments, but possession does not pass until the documents which represent the goods are handed over in exchange for the price. See Bridge, *International Sale of Goods*, Clarendon Press, Oxford, 1999, pp. 230 and 232-234 and the invoice to recover for their loss if they are lost on the voyage.

⁸⁸ The seller usually receives the price before the goods arrive at the named destination because by tendering documents he is entitled to the price and this happens before the arrival of the goods. See Sassoon D.M., 'The origin of f.o.b. and C.I.F. terms and the factors influencing their choice', (1967) JBL 32, available at http://www.njcl.fi/2_2004/article3.pdf, accessed on 20th June, 2012. See also Carole Murray and others, *Schmitthoff's export trade: the law and practice of international trade*, 11th ed., London, Sweet & Maxwell 2007, p. 55.

⁸⁹P. Schlechtriem, and I. Schwenzer. *Commentary on the UN Convention on the International Sale of Goods*. Oxford, Oxford University Press, 2005, Article 79, paragraph 6. F. Enderlein, D. Maskow. *International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods*. New York 1992, Article 79, comment 2; F. Ferrari, H. Flechtner, R. A. Brand. *The Draft UNCITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention*, London, 2004, Art. 79, comment IV A 4; C. Liu. *Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law*, comment 3, available at http://www.juridicainternational.eu/public/pdf/ji_2009_1_85.pdf, accessed on 29th January, 2012.

In some cases, CIF contracts have been judicially defined.⁹⁰ The best definition of CIF contract was elaborated by Lord Atkinson in the following terms: in a CIF contract ... the vender is bound...to make out an invoice of the goods sold, ... ship at the port of shipment goods of the description contained in the contract,...procure a contract of affreightment,...arrange for an insurance,...tender to the buyer shipping documents, namely, the invoice, Bill of Lading and policy of assurance⁹¹...entitling the seller for payment of price...⁹²

In my view, this definition of Lord Atkinson embraces all the concepts surrounding the Concept of CIF contract. It covers all the details including the making of invoices, shipping, procuring the contract of affreightment and arranging for the insurance and delivering documents thereof to the buyer. As underscored, in a CIF contract documents play a vital role to the extent some judges as well as authors consider this contract as a sale of documents rather than goods.⁹³ It is thus relevant to curtly review these documents.

⁹⁰See the commentary on Article 67 by Barry Nicholas. Under Article 67(2) of the Vienna Convention on Contracts For the International Sale of goods "Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise." This might prevent the passing of risk in an unascertained part of a specific bulk in circumstances in which risk might pass at common law. CIF contracts are an exception to the general rule in s20 of the Sale of Goods Act which links the passing of risk to the passing of property. Whereas property under a CIF contract passes at the time the buyer pays and takes up the documents, the goods are deemed to be at the buyer's risk from the time of shipment. Where the seller ships goods for the buyer, risk passes at the time of shipment; where the contract is made after shipment, risk passes at the time of the contract but retrospectively, so that the goods are deemed to have been at the buyer's risk since the time of shipment. This might seem hard on the buyer, but in fact imposes little hardship. The buyer takes the benefit of the contract of carriage and policy of insurance and is therefore able to claim, either under the contract or the policy, in respect of most damage or loss from the time of shipment. Moreover, the rule "is or damaged while at sea." available at, <http://www.cisg.law.pace.edu/cisg/biblio/nicholas-bb67.html>, accessed on 29th January, 2012.

⁹¹See Report by the UNCTAD secretariat TD/B/C.4/ISL/27/Rev.1, 69-94 (United Nation Conference on Trade and Development, Legal and documentary aspects of the marine insurance contract), New York, 1982, available at

⁹² See *Me. Neil Gary Oberman, Transfer of risk from seller to buyer in international commercial contracts: A comparative analysis of risk allocation under the CISG, UCC and Incortems (Juin 1997)*, "Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller", available at, <http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html>, accessed on 29th January, 2012. See also Article 96 of Convention relating to a Uniform Law on the International Sale of Goods (The Hague, July 1, 1964).

⁹³ See for instance *Arnold Karberg & Co v. Blythe, Greene, Jourdain & Co* and *L. D'Arcy, C. Murray, B. Cleave, op. cit.*, p. 30.

I.2.2.2 Shipping documents

The documents are at the centre of CIF contract as it depends on the handing the documents which permit the buyer to have power over the goods, on one side, and permit the seller to be paid on the other side. Except in cases of special provisions in the contract or from trade usages, these documents are the bill of lading, the insurance policy and the invoice.⁹⁴

1) Bill of lading

The bill of lading is ‘a document which evidences a contract of carriage by sea and the taking over or loading of the goods by the carrier, and by which the carrier undertakes to deliver the goods against surrender of the document’.⁹⁵ The bill of lading was also defined as “a memorandum acknowledging the receipt of goods on board a ship and containing the terms and conditions of the carriage thereof” and serves therefore as the best evidence to prove the contract of carriage has been executed as it is delivered by the master when the goods are shipped.⁹⁶

When he receives goods in his/her charge the carrier or the master or agent of the carrier must issue to the shipper a bill of lading on demand of the latter. The bill of lading must indicate the leading marks necessary for the identification of goods, the amount (number of packages or pieces, quantity or weight) of goods as furnished by the shipper in writing and the apparent order and condition of the goods⁹⁷ as well as any other particulars as provided by the shipper such as name of the shipper, name of the consignee, port of loading, port of discharge...⁹⁸

The bill of lading possession represents possession of and title to goods and delivery of the bill to any party entails transfer of ownership in the goods to the latter.⁹⁹ The bill of lading always required except if the contract provides otherwise allows the buyer to obtain actual delivery of

⁹⁴ M. GALDES, *The Obligations of the Seller in C.I.F. Contracts*, PhD Thesis, University of Malta, 2001, p. 58.

⁹⁵ See Article 1(7) of The United Nations Convention on the Carriage of Goods by sea(1978) Hamburg Rules

⁹⁶ M. GALDES, *op. cit.*, p. 63.

⁹⁷ See Article III paragraph 3(a), (b) and (c) of The Hague-Visby Rules- The Hague Rules as Amended by the Brussels Protocol 1968.

⁹⁸ Art. 15 (1) United Nations Convention on the carriage of goods by sea, Hamburg Rules, 1978.

⁹⁹ M. GALDES, *op. cit.*, pp. 58-59.

the goods when they reach the port of destination. It can also operate as a pledge of the goods themselves and enable the credit from the bank. The bill of lading should be distinguished from the “mate’s receipt” which is “a document given by the carrier’s agent to the shipper as a receipt for the goods brought by the shipper on to the quay for shipment when it is not possible to issue the bill of lading immediately”; and when the goods are shipped on the vessel the master must deliver a bill of lading signed.¹⁰⁰ The bill of lading should also be distinguished from the delivery order which is given when the buyer receives only part of the parcel of goods shipped under a single bill of lading. It differs from the bill of lading in that it is not a transferable document of title.¹⁰¹

2) Insurance policy

In a CIF contract, the seller must also contract for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage.¹⁰² This insurance is subscribed at the seller’s expense and the policy delivered to the buyer or the bank in case of payment by letter of credit.¹⁰³ The Seller can provide another evidence of insurance cover in place of an insurance policy.¹⁰⁴ The insurance cover must respond to contract provisions and in case of failure to obtain the insurance cover or adequate insurance cover by the seller, the goods are deemed to be at the seller’s risk.¹⁰⁵ It is also argued that the insurance must have the minimum cover which is of 110 per cent (110%) of the price of the goods.¹⁰⁶ In case the buyer wants greater cover, he/she has to arrange for it him/herself or makes an express agreement thereof with the seller.¹⁰⁷

3) Invoice

¹⁰⁰ *Ibid.*

¹⁰¹ *Id.*, pp. 61-62.

¹⁰² ICC, Incoterms®Rules available at <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>, accessed on 30/09/2014.

¹⁰³ M. GALDES, *op. cit.*, p. 83.

¹⁰⁴ Anita SZABO, *Incoterms 2000 in light of its practice*, Budapest, BALAZS & HOLLO LAW FIRM, 2008, p. 21.

¹⁰⁵ *Id.*, p. 84.

¹⁰⁶ Anita SZABO, *op. cit.*, p. 21.

¹⁰⁷ Y. YINAN, *Entitlement to Insurable Interest in Stoppage of Transit under English and Chinese Law: A Comparative Study*, Master Thesis, Lund University, p. 12.

Finally, the seller must give the buyer an invoice of the price including the cost of goods, insurance premiums and the cost of freight. The three may be itemised separately on the invoice but the CIF price is regarded as an indivisible price.¹⁰⁸

I.2.2.3 Nature of CIF contract

C.I.F contract is among shipment contracts.¹⁰⁹ In shipment contract the buyer bears the risk of loss for the goods prior to actually receiving them as the seller's only duty is to get the goods to a common carrier and make proper delivery arrangements for the goods to get to the buyer.¹¹⁰ After shipment of goods, the seller has no responsibility in regards to goods. Moreover, he/she bears no costs or liability for loss of goods during their voyage as the risks passes at shipment.¹¹¹

The essential feature of the contract is that the seller, on the one side, fulfils his/her obligations by handing to the buyer regular and complete documents and not by the actual material delivery of goods and the buyer, on the other side, must pay the agreed price upon receipt of such documents immaterial of whether the goods arrive or not.¹¹²

The place occupied by documents in CIF sale contract has led to the discussion among scholars and judges on whether the CIF sale is a sale goods or a sale of documents. On the one side, it was argued that a CIF sale is a sale of documents by judges like in *Arnold Karberg & Co. v. Blythe, Greene, Jourdain & Co* where Scrutton J. suggested that "...a c.i.f. sale is not a sale of goods, but a sale of documents relating to goods."¹¹³ This argument is grounded on the fact that in a CIF sale, the seller performs his duties by handing over the documents and goods are paid bading on the stenght of documents and the buyer simply purchases rights of action against the

¹⁰⁸ *Id.*, pp. 90- 91.

¹⁰⁹ ICC Guide to Incoterms 2000, p. 38.

¹¹⁰ Legal Information Institute, 'Shipment Contract' available at http://www.law.cornell.edu/wex/shipment_contract, accessed on 30 Sep. 2014.

¹¹¹ J. COETZEE, *INCOTERMS as a form of standardization in international sale law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to passing of risk*, PhD Thesis, University of StellenBosch, 2010, p. 10.

¹¹² M. Galdes, *op. cit.*, p. 28.

¹¹³ See *Arnold Karberg & Co. v. Blythe, Greene, Jourdain & Co* (1915) 2 K.B. 379 at p. 388 quoted by M. GALDES, *op. cit.*, p. 34.

carrier and the insurer contained in the shipping documents.¹¹⁴ The other argument voiced and considered the strongest by M. GALDES is that “...when goods are lost at sea the documents remain valid and can be tendered just the same in exchange for the full purchase price.”¹¹⁵

On the other side, it is argued that “...the emphasis on the documents was simply the terms of the contract and the manner of its performance rather than its essence”.¹¹⁶ It was argued by comparison, in *Manbre Saccharine Co. Ltd. v. Corn Products Co Ltd*, that the documents are compared to the keys to a house and that the buyer of a house cannot be considered to buy keys rather than the house itself when he/she pays on handing over of the keys.¹¹⁷ In *Sanders Brothers v Maclean* it was emphasized that the documents are symbols for the goods and not the very essence of the contract.¹¹⁸ To conclude this debate, I espouse the view of those who argue that though documents play a very crucial role in a CIF contract, the latter cannot be reduced to a simple sale of goods by borrowing the words of M. GALDES who argued, among other arguments, that “If the c.i.f. contract were to be considered a sale of documents, it would not be possible to explain how the buyer can reject goods in the case where the documents are in order.”¹¹⁹ In the same vein, M. G. BRIDGE argues that the firm answer is that it is a sale of goods performed through the medium of documents.¹²⁰ This view was stressed in *Biddell Brothers v E Clemens Horst Co* where the court decided that the CIF contract of sale is a sale of goods to be performed by the delivery of documents.¹²¹

It is important to finally explore and expound reasons behind the choice of CIF contract. The choice of latter is dictated by advantages it presents for contracting parties, i.e. both the seller and the buyer. On the one side, the seller has the advantage of receiving the transaction money well before the goods actually reach the buyer.¹²² Moreover, the seller being the shipper of

¹¹⁴ M. GALDES, *op. cit.*, pp. 34-35.

¹¹⁵ *Id.*, p. 36.

¹¹⁶ *Id.*, pp. 36-37.

¹¹⁷ *Manbre Saccharine Co. Ltd. v. Corn Products Co Ltd* (1919) 1 K.B. 198 cited by M. GALDES, *op. cit.*, p. 37.

¹¹⁸ *Sanders Brothers v Maclean* (1883) 11 Q.B.D. 327 cited by M. GALDES, *op. cit.*, p. 37.

¹¹⁹ See M. GALDES, *op. cit.*, p. 39.

¹²⁰ M. G. BRIDGE, *Documents and cif Contracts*, p. 4.

¹²¹ *Biddell Brothers v E Clemens Horst Co* quoted by I. CARR, *op. cit.*, p. 11.

¹²² X. “Scope of CIF Contracts” available at <http://strippedlaw.blogspot.com/2010/03/scope-of-cif-contracts.html>, accessed on 02/12/2014

goods can tender them while they are afloat. He has possession of goods as the bill of lading is issued to him/her and is certain that the insurance has been procured and he/she can recover the value of the goods in case they are lost or damaged before payment (contrary to the seller in FOB for instance).¹²³ Indira Carr adds another advantage on the side of the seller who can charge a higher price account taken of extra services rendered; namely obtaining shipping place and insurance.¹²⁴ On the other side, the advantage of the buyer is that he/she has a substantial right once he/she gets the documents of sale (he/she can dispose of the goods for example before their actual delivery) with the right to reject the goods on their actual delivery once they turn out not to be in conformity with the standards of contract description.¹²⁵

In addition, the buyer in a CIF contract knows from the date of the contract the exact price to pay for the goods since the contract price includes freight and insurance and he/she can resell them even before their arrival. Also, the buyer is protected against the losses by the bill of lading giving him/her a contractual right against the carrier and the insurance policy covering most accidental losses.¹²⁶ According to Tarelli E., the CIF contract is more advantageous where the buyer is a small company or small retailer who is relieved of the troublesome duties of getting the shipping space, negotiating the contract of carriage and getting an insurance policy which duties require information and expertise the former may not have¹²⁷ especially when this is to take place in a foreign country where the buyer may be unfamiliar with local practices.¹²⁸ The buyer is also shielded from risk of fluctuations in the cost of freight and insurance which rather falls on the seller.¹²⁹

¹²³ Sassoon, 'The origin of f.o.b. and c.i.f. terms and the factors influencing their choice' (1967)JBL 32 cited by E. TARELLI, "C.I.F. o F.O.B.: That is the question!" Main Features of the two contracts for the international sale of goods (September 3, 2009) available at SSRN: <http://ssrn.com/abstract=1467820> , p. 7

¹²⁴ I. CARR, *op. cit.*, p. 6.

¹²⁵ X. "Scope of CIF Contracts" available at <http://strippedlaw.blogspot.com/2010/03/scope-of-cif-contracts.html>, accessed on 02/12/2014.

¹²⁶ See Edward A. CRAIGHILL, 'Sales of Goods on C.I.F. Terms' [January 1920], *Virginia Law Review*, Vol. 6, No 4, p. 230 available at <http://www.jstor.org/stable/1063103>, accessed on 16/10/2014.M. RAHAT, F. MOYEED and A. KHAN, "Define a CIF contract and what are its advantages and disadvantages in practice?" available at <http://www.slideshare.net/MohammadRahat/define-a-cif-contract-and-what-are-its>, accessed on 02/12/2014.

¹²⁷ E. TARELLI, "C.I.F. o F.O.B.: That is the question!" Main Features of the two contracts for the international sale of goods (September 3, 2009), , p. 7, available at SSRN: <http://ssrn.com/abstract=1467820>

¹²⁸ See I. CARR, *op. cit.*, p. 7.

¹²⁹ E. TARELLI, *op. cit.*, p. 8.

I.3 Concept of risk

Risk has been defined by Professor Sealy in the following terms: “The truth is that risk is a derivative, and essentially negative, concept—an elliptical way of saying that either or both of the primary obligations of one party shall be enforceable, and that those of the other party shall be deemed to have been discharged, though the normally prerequisite conditions have not been satisfied”¹³⁰

Z. VALIOTI suggests that ‘risk’ covered in INCOTERMS is just the same as in CISG as they both cover only “price risk”. The latter entails that the buyer is bound to pay and the seller is entitled to claim the price in case of accidental loss or damages to goods.¹³¹ Article 66 of the CISG that talks about risk refers to *loss of or damage to the goods*, which implies that events should take place that will lead to either the destruction of the goods, or damage or deterioration of the goods.¹³² The provisions on the passing of risk are concerned with accidental loss or damage which affects the physical condition of the goods.¹³³ They also cover loss or deterioration caused by independent third parties such as thieves and vandals as well as incidents which are not caused by human beings. The loss or damage must not be a result of one of the contracting parties or persons for whom they are responsible.¹³⁴ Also, the risk must be a result of an external factor and not an inherent characteristic of the goods.¹³⁵

Situations where the goods could not be found, when they were stolen, or transferred to another person have also been associated with the loss of the goods. Damage includes physical damage, deterioration, spoilage, confusion or mixing up the goods with other goods. “Risk” is therefore a broad notion which also includes natural processes of decline such as ripening,

¹³⁰ L. S. SEALY, *Risk in the Law of Sale*, [1972] 31 CLJ 225, at p. 226 quoted by A. ALSTERBERG, *op. cit.*, p. 17.

¹³¹ Z. VALIOTI, *op. cit.*, p. 22.

¹³² Hager “Article 66” in *Schlechtriem-Schwenzer Commentary* para 4 states that the CISG’s risk rule envisages the “actual impairment” of the goods, which implies physical damage to or loss of the goods)

¹³³ See Part III, Chapter V of the CISG.

¹³⁴ The CISG does not regulate in the chapter on risk the risk of non-performance, because these rules are connected with the area of breach of contract and the obligations of the parties. See A. ROMEIN, “The Passing of Risk A Comparison between the passing of risk under the CISG and German Law”, available at <<http://cisgw3.law.pace.edu/cisg/biblio/romein.html>>. See Romein *The Passing of Risk: A comparison between the passing of risk under the CISG and German law* LL M thesis Heidelberg <http://www.cisg.law.pace.edu/cisg/biblio/romein.html> (accessed 14-04-2013)

¹³⁵ J. Coetzee, *op. cit.*, p. 231.

ageing, softening, leakage, thawing, melting, evaporation, shrinking, loss of weight or of strength or taste, discoloring, oxidation, risk of scratching or otherwise showing wear and tear, sickness or death. These conditions can occur during transportation of the goods or during handling or storage¹³⁶. Some examples of risk from case law include adulteration of spirit by the admixture of inferior liquid¹³⁷, loss of goods by theft¹³⁸, emergency unloading.¹³⁹

The risk rule only applies in situations where the goods are lost or where their physical condition is affected¹⁴⁰ by damage or deterioration. As I have said above, risk of loss provisions only allocate loss or damage caused by external events outside the control of the seller or the buyer. In instances where the goods may be lost or become deteriorated due to their inherent characteristics, parties should allocate the responsibility in regard to such characteristics contractually; alternatively it should be allocated by the default rules of the CISG.

If the goods do not conform to the quality standard agreed upon in the contract when the risk passed to the buyer, or if they are not fit for the normal purpose for which goods of the same nature are used, a breach of contract within the scope of article 35 of CISG has occurred¹⁴¹. In situations involving evaporation, spoilage or deterioration¹⁴² in the grade or quality of goods such as cotton, liquids or perishable foodstuffs Article 36(2) of the CISG states that the seller is liable for non-conformity which exists at the moment that risk passes, even if the non-conformity only becomes apparent at a later stage¹⁴³ if variations in quality or quantity are the result of inappropriate packaging or containerization, it could amount to non-conformity, which

¹³⁶Erauw "Observations on passing of risk" in Ferrari et al (eds) *The Draft UNCITRAL Digest and Beyond: Cases, Analyses and Unresolved Issues in the U. N. Sales Convention* (2004) 292 294; Erauw "2005-06 (25) JL & Com 204.

¹³⁷ *Sterns Ltd v Vickers Ltd* [1923] 1 KB 78.

¹³⁸ Athens Court of Appeal 4041/1987 CLR 1988 246. P Zepos, GLG 1955 1301.

¹³⁹ *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 123.

¹⁴⁰Hager "Article 66" in *Schlechtriem-Schwenzer Commentary* para 4. Treitel *Frustration and Force Majeure* 2nd Ed (2004) para 3-007 also states that risk deals with "supervening events which affect the physical integrity of the subject-matter."

¹⁴¹ Even if the risk already passed to the buyer, he will still be entitled to invoke his contractual remedies in case of fundamental breach pursuant to art 70 CISG. Art 36(1) provides the possibility of keeping the seller liable even if the non-conformity only becomes apparent at a later stage.

¹⁴²Berman, Harold and Kaufman, Colin, "The Law of International Commercial Transactions [Lex Mercatoria]", (1987), *Harvard International Law Journal*/ Vol. 19, p. 230, available at http://reidenberg.home.sprynet.com/lex_informatica.pdf, accessed on 9th April, 2012.

¹⁴³ In order to preserve its remedies, the buyer must observe the examination and notice requirements of arts 38 and 39 CISG.

is covered by the provisions of article 35(2)(d) of CISG. If the seller failed to provide the carrier with special instructions, such as for example to keep the goods at a particular temperature to avoid overheating or thawing, the proviso to article 66 will determine that the risk remains on the seller.

Goods are at a party's risk if he/she has to bear the loss resulting from their damage or destruction without fault on the part of either party to the contract. If the goods are at the seller's risk, this means that if they suffer damage or loss, the seller being unable to tender delivery in accordance with the contract, cannot recover the price from the buyer and must repay any part of the price paid in advance. Where the risk is on the buyer, this means that he/she must pay the price despite the fact that the goods have been lost or damaged before the buyer has taken possession, or after he has taken possession but before the property has passed to him unless the loss or damage is due to an act or omission of the seller¹⁴⁴. In other words, since the risk is on the buyer, it releases the seller from his duty to deliver the goods and if the goods are merely damaged, the seller is entitled to tender, and the buyer is obliged to accept and pay full price as if the goods were in conformity with the contract. Such events will typically include loss or damage caused by an act of God or by the misbehavior of third parties, such as carriers. It may also include losses caused by governmental intervention, such as requisition, though this may depend upon particular contracts of sale.

Finally, it is important to note that some types of risks do not fall in the ambit of risk in the sense described above like the economic risk (e.g.: fluctuation in goods' value on the market) and contractual risk (e.g.: lack of conformity for instance).¹⁴⁵

¹⁴⁴ See Article 66 of the CISG.

¹⁴⁵ J. ERAUW, 'Passing of Risk between the Buyer and Seller', *Journal of Law and Commerce*, Vol. 25: 203, pp. 204-209.

It should be finally noted that Incoterms, CIF contract included, do only cover the ‘price risk’ which means that the buyer has to pay the price and the seller entitled to claim it if goods are accidentally lost or damaged as elaborated above.¹⁴⁶

I.4 Goods carried by sea

Before defining goods carried by sea, it is important to first explain the contract of carriage of goods by sea. This contract has been defined or contemplated differently in three major international set of rules governing carriage by sea (i.e Hague-Visby Rules, Hamburg Rules and Rotterdam Rules)

Under article 1 (b) and (e) of the Hague-Visby Rules

“the contract of carriage” applies only to contracts of carriage covered by a bill of lading or any similar document of title, in so far as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such a bill of lading or similar document of title regulates the relations between a carrier and a holder of the same’ and ‘ “carriage of goods” covers the period from the time when the goods are loaded on to the time they are discharged from the ship’.

Principles of carriage of goods developed in the above provisions are classically known and referred to as “tackle to tackle”.¹⁴⁷ This means that goods are considered to be carried by sea from the moment they are loaded to the time they are unloaded from the ship and in a CIF contract it is in this period that they are normally covered by insurance in case of loss or damages. It should be noted that ‘live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried’ are excluded from goods carried by sea under Hague –Visby Rules.¹⁴⁸

Under article 1 (6) of Hamburg Rules on carriage of goods by sea the contract of carriage of goods by sea is defined as ‘any contract whereby the carrier undertakes against payment of

¹⁴⁶ Z. VALIOTI, “Passing of risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on the International Sale of Goods (Vienna 1980) and Incoterms 2000”, *NJCL*, Issue 2004 #2, p. 22.

¹⁴⁷ M. D. ISAACS and A. S. COFMAN, “The Rotterdam Rules & “Wet” Multimodal Shipping: Important Concepts for Lawyers’, p. 4 available at <http://www.cmla.org/papers/5%20-%20The%20Rotterdam%20Rules%20-%20Important%20Concepts%20for%20Lawyers%20-%20Isaacs.Cofman.pdf>, accessed on 30 September 2014.

¹⁴⁸ See art. 1 (c) of the Hague-Visby Rules.

freight to carry by sea from *one port to another*; however, a contract which involves carriage by sea and also carriage by some other means is deemed to be a contract of carriage by sea'. According to M. D. ISAACS and A. S. COFMAN, the Hamburg Rules have extended the "tackle-to-tackle" principle embodied in the Hague-Visby Rules to full "port-to-port" inclusion in the contract of carriage. To borrow the two authors' arguments, Hamburg Rules applies, in addition to the carrier's custody of goods on board its ships, at the ports of loading and discharge.¹⁴⁹ The goods are thus considered to be carried by sea from on port to another; i.e. while in port before being loaded or after being discharged. Contrary to the Hague-Visby Rules, Hamburg Rules includes in goods live animals as well as goods carried on deck.¹⁵⁰

The scope of the contract of carriage in Hamburg Rules has thereafter been extended in the United Nations Convention of Contracts for the International Carriage of Goods Wholly or Partly by Sea famously known as Rotterdam Rules. Under article 1 (1) of these rules a contract of carriage is defined as 'a contract in which a carrier, against the payment of freight, undertakes to carry goods from one place to another'. Under the same article the contract provides for carriage by sea and can also provide for carriage by other modes of transport in addition to the sea carriage. These rules adopt the approach referred to as 'door-to-door' principles or 'maritime-plus'.¹⁵¹ In fact, these rules go beyond carriage by sea and apply to other modes if parties have so agreed. Under Rotterdam Rules therefore, the scope of the contract coincides with that during which the carrier is in custody of goods.¹⁵²

¹⁴⁹ M. D. ISAACS and A. S. COFMAN, *op. cit.*, p. 4.

¹⁵⁰ See art. 1(5) of Hamburg Rules and the Explanatory note by the UNCITRAL secretariat on the UN Conventions on the Carriage of Goods by Sea, 1978 (Hamburg), p. 24.

¹⁵¹ M. D. ISAACS and A. S. COFMAN, *op. cit.*, p. 4.

¹⁵² F. BERLINGIERI, 'A comparative analysis of the Hague-Visby Rules, the Hamburg Rules and the Rotterdam Rules', *Paper delivered at the General Assembly of the AMD, Marrakesh, 5-6 November, 2009*, pp. 5-6.

One may argue from the above that there is no uniform definition of goods carried by sea as this depends on the applicable rules as agreed on or used by parties to the contract of carriage that may be wholly or partially by sea.

Having briefly toured major concepts used in the work, it is undoubtedly relevant to move to the gist of the thesis; i.e. passing of risk and liability of the seller in case of loss or damages of goods under CIF contract.

CHAPTER 2: PASSING OF RISK AND LIABILITY OF THE SELLER IN CASE OF LOSS OR DAMAGES OF GOODS UNDER CIF CONTRACT

This second chapter enters into the details on the rules, principles and practices governing the passing of risks in case goods sold under CIF contract are lost or damaged (1). Thereafter, it talks of the liability of the seller in case of loss of or damage to goods in a CIF contract (2) and means of compensation available to the buyer (3). Finally, ways of protecting the buyer are proposed (4).

II.1 Passing of risks in case of loss or damages of goods under CIF contract

The passing of risk in a CIF contract is analysed in two different angles depending the way the contract is concluded. In this respect, this section explores the passing of risk on shipment and passing of risk in goods sold or allocated afloat.

II.1.1 Passing of risk on shipment

In normal circumstances under CIF terms as in every other Incoterms the risks passes to the buyer at the time of delivery. Under A5 clause of CIF,¹⁵³ the risk passes from the seller to the buyer at the time goods have passed the ship's rail at the port of shipment. From this time the buyer must bear any loss of or damage to goods. A. ODEKE has justified this by the fact that "...the parties contemplate the risk of loss or damage in transit and cover it by the contracts of carriage and insurance which the seller is required to take out and transfer to the buyer"¹⁵⁴. Understandably, the buyer has hardly anything to fear since the goods are covered. So, once the goods have passed the ship's rail, the seller shall be entitled to claim payment of the price and the buyer bound to pay the price even if the goods have been damaged or lost as detailed *supra*.¹⁵⁵ Practically, that the fact that goods have been lost at sea does not prevent the seller from being paid on tendering of valid documents the risk being the buyer's who would indeed secure insurance money if the risk is covered as held in *Manbre Saccharine v Corn Products* or

¹⁵³ See Incoterms 2000

¹⁵⁴ A. Odeke, *Commercial Law Textbook*, Volume II-International Trade, 3rd ed., London, HLT Publications, 1992, p. 63 quoted by Z. VALIOTI, *op. cit.*, p.23.

¹⁵⁵ See Section 1.3 of chapter 1.

simply bear the risk of loss where the loss is due to a risk not covered by insurance like war as it was held in *Groom v Barber*.¹⁵⁶

It is submitted by D FLAMBOURAS that the criterion of “ship’s rail” is an arbitrary point of transfer of risk which is not in line with modern trade needs who suggests rather to consider the passing o risk on “delivery of goods to the carrier’s custody” in a CIF contract. He argues that by considering this latter criterion, difficulties that arise in case goods are damages during the loading process could be avoided.¹⁵⁷

Where the buyer is entitled to determine the time for shipping the goods and/ or the port of destination he/she must give sufficient notice in this regard. If he/she fails to do so on the agreed date or the expiry date of the period fixed for shipment, the risk of loss of or damage to goods passes to him/her provided that the goods have been duly appropriated to the contract (i.e. clearly set aside or otherwise identified as the contract goods).¹⁵⁸ This is referred to by some authors as premature transfer of risks as, I argue, the buyer shall bear the loss of or damage to goods before they are shipped as normally is the case. Note, however, that in this last case where the sale is of goods in bulks and it is thus difficult to mark goods or name the recipients, the risk passes only at the time of effective appropriation, this is for instance when a separate bill of lading has been or delivery orders for parts of the bulk consignment have been issued.¹⁵⁹

II.1.2 Passing of risk in goods sold or allocated in transit

According to Essa ALAZEMI citing *Smyth & Co Ltd v Bailey Son & Co Ltd*, among other advantages of the CIF contract to the seller is to permit him/her to ship large amount of merchandise and thereafter allocate them or their portion to a buyer while they are

¹⁵⁶ See *Manbre Saccharine v Corn Products* [1919] 1 K.B. 198 and *Groom v Barber* [1915] 1 K.B. 316 quoted by I.CARR, *op. cit.*, pp.26-27.

¹⁵⁷ D. FLAMBOURAS, ‘Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods’, p. 34 available at www.cisgw3.law.pace.edu/, accessed on 29 Sept. 2014.

¹⁵⁸ See Clauses B5 and B7 of CIF Incoterm 2000 version.

¹⁵⁹ J. RAMBERG, *ICC Guide to INCOTERMS 2000*, Paris, ICC Publishing S.A, 1999, p. 61 cited by Z. VALIOTI, *op. cit.*, p.24.

afloat.¹⁶⁰ This raises, however, issues and concerns about the passing of risks from the seller to the buyer that need to be addressed since in a CIF contract the risk normally passes at the time of shipment.

As suggested by Z. VALIOTI, in case of sale of goods in transit in a CIF contract, the risk passes to the buyer from the time the goods pass the ship's rail at the port of shipment.¹⁶¹ The same author, whose idea I share, adds that this disadvantages the buyer as he/she has to bear the risk of loss of or damage to goods even before the sale contract is concluded.¹⁶² The risk passes thus retroactively as from the moment the goods are shipped. In addition, the seller in a CIF contract, argue authors such as Essa ALAZEMI and A. ALSTERBERG, can validly tender the documents (bill of lading, invoice and insurance policy) for sent out goods while knowing that the latter have been entirely lost and the buyer cannot reject them if the goods were assumedly in conformity with the contract when they were consigned.¹⁶³ Indeed, the buyer to whom documents are tendered has a valuable insurance policy and the prospect of an action against the carrier as the assignee of sellers' rights. On this subject, however, I rather adhere to the views of D. FLAMBOURAS, who argue that where the goods are shipped, lost and then sold, the necessary effect would seemingly be the avoidance of contract especially where the seller knows of the loss as it drives the seller to act in good faith not selling cargoes lost at sea. This is more relevant with the advances of telecommunications systems where it is almost impossible for the loss of cargo to be unknown to the seller for long. It would thus be presumed that the seller knows within a reasonable time (Flambouras suggests in terms of hours) or to attribute the knowledge of the seller's agents or employees to him. For the damage to goods, I concur with the same author that the seller should be allowed as usual to sell goods as it would be

¹⁶⁰ E. ALAZEMI, *Passing of Risk in International Contracts of Sale of Goods: A Comparative Study between the United Nations Convention on Contracts for Sale of Goods 1980 and the English Sales of Goods Act 1979*, LLM Dissertation, Brunel University, 2012, p. 25.

¹⁶¹ Z. VALIOTI, *op. cit.*, p. 28.

¹⁶² *Ibid.*

¹⁶³ E. ALAZEMI, *op. cit.*, p. 25 and A. ALSTERBERG, *op. cit.*, p. 27.

difficult to know the deterioration in most instances as goods are in most cases sealed in containers¹⁶⁴

For goods lost or damaged after being sold, but before appropriation two distinctions are made while considering the passing of risk.

Where goods are sold and lost before tendering of documents the buyer is really bound to pay (the risk is his/her) if the goods are appropriated to the contract (understandably where goods are not appropriated there is no passing of risk).¹⁶⁵ On the contrary, where the goods have been damaged, the risk passes to the buyer immaterial of whether the damage occurred before or after appropriation.¹⁶⁶ In this contract thus, the traditional principle '*res perit domino*' governing the transfer of risks does not apply.

It is very relevant to conclude that the principle is that, in the CIF contract of sale, the risk of loss of or damage to goods during transit is the buyer's whether the risk is covered by insurance or not. This implies therefore that the seller is not liable for loss of or damage to goods during the transit. There are, however, a few exceptional cases where the seller may be the one to bear the risk as detailed below.

II.2 Liability of seller in case of loss or damages of goods under CIF contract

It is logical to briefly explore one party's duties in order to visualize the other party's rights in case the former has not lived up to his/her obligations. In addition to parties' duties and rights, this section details the seller's liability in case goods are lost or damaged and available means of compensation.

II.2. 1 Duties and rights of parties

As underlined by Peter SCHLECHTRIEM, the duties of the seller under CIF contract are to ship the goods of contract description at the port of shipment, to procure a contract containing the

¹⁶⁴ D. FLAMBOURAS, 'Comparative Study in English, Greek Law and the United Nations Convention on Contracts for the International Sale of Goods', p. 34 available at www.cisgw3.law.pace.edu/, accessed on 29 Sept. 2014.

¹⁶⁵ See for instance A. ALSTERBERG, *op. cit.*, p. 28.

¹⁶⁶ J. Coetzee, *op. cit.*, p. 93.

obligation and duties of parties to contract and description of goods, to insure the goods, to prepare an invoice and finally to deliver these documents to the buyer.¹⁶⁷ The duties of the buyer, on the other hand, include nominating the port of destination, payment of the price on delivery of documents, taking delivery of goods, payment of costs for unloading goods, procure import licences and payment of required duties.

2.2.1.1 Duties of the seller

1) Shipping of goods of the contract description

The obligation of the seller to ship merchandises that correspond to the contract description is fulfilled when he/she actually loads the merchandises at the port of shipment and in the manner specified in the contract.¹⁶⁸ This obligation can also be fulfilled by purchasing goods that are already afloat¹⁶⁹ or allocating to the contract goods from the bulk already shipped. It is up to the seller to choose any of the three options and the buyer cannot compel him/her to use one of these options.¹⁷⁰ The seller must ship the goods at **the time** agreed in the contract and failure to do so amounts to the breach of the contract. In this regard, it was decided that shipping earlier than the time in the contract means breach of contract “...because it could force the buyer to pay sooner than expected and pay unwanted storage costs for goods on arrival...” and shipping at a later date than agreed is also a breach as it can defeat the purpose of the contract.¹⁷¹

It was held by courts that form part of the description of goods the agreed packaging terms, methods of performance if agreed on.¹⁷² In addition, points out M. GALDES, the goods must be of the agreed quantity and not less or more than the former. This goes in the sense of articles

¹⁶⁷See Peter Schlechtriem, *Commentary on the U.N. Convention on the International sale of Goods, Translated by Geoffrey Thomas*, 2nd ed., Oxford, Oxford University Press, 1998, pp. 42-43.

¹⁶⁸ M. Galdes, *op. cit.*, p. 43.

¹⁶⁹ See *Fairclough v Vantol* [1957] 1 WLR 136 and *Lewis v Sammut* [1959] 2 Lloyd’s Rep 629.

¹⁷⁰ M. Galdes, *op. cit.*, p. 43.

¹⁷¹ *Aron v. Comptoir* [1921] 3KB 435, *Ashmore v. Cox* [1889] QB 436 and *Bowes V. Shand* [1877] 2 App Cas 455 cited by C.H. SPURIN, “The Cost Insured Freight (CIF) Contract”, 2004, p. 29.

¹⁷² *Manbre Saccharine Co. Ltd. V. corn Products Co Ltd* (1919)1 K.B. 192, 202 and *Benabu & Co. V. Produce Brokers Co. Ltd* (1921) 37 T.L.R. 609 Cited by I. CARR and P. STONE, *International Trade Law*, 5th Ed, New York, Routledge, 2014, p. 12.

293 and sequel of Rwandan CCB III which is, however, somehow flexible as it provides for some small amount that can exceed or lack (1/20) and the contract is not affected. Where the port of shipment, a particular route and a specific class or type of vessel has been specified in the contract the seller has a duty to comply with them and understandably the port of destination indicated by the buyer.¹⁷³

2) Insuring the goods

The seller must ensure the goods during their voyage. The seller must subscribe for insurance at his/her own cost of insurance from a reputable insurer and a valid insurance policy shall be availed to the benefit of the buyer.¹⁷⁴ The seller must procure and tender the insurance document and procure the insurance cover that is consistent with the terms of the contract. If there is no specific provision to that effect in the contract, the seller must obtain a valid policy of marine insurance with reputable insurers. The policy has to be the one covering the goods journey envisaged in the contract.¹⁷⁵ In case the seller fails to get an adequate insurance cover or insurance cover at all he/she bears the risks of loss or damages to goods.¹⁷⁶ According to M GALDES, the insurance policy must cover the contract goods and no others and the cover must be continuous up to the destination. In addition, the seller is obliged to hand over the insurance policy to the buyer even where the goods safely arrive at the destination because the buyer may need to resell them while they are still afloat.¹⁷⁷ This insurance policy plays two roles; i.e to enable the buyer to know whether the terms in practice about insurance have been complied with and enables him/her to claim directly from the insurer in case goods are lost or damaged.

Tendering of a broker's cover or a letter informing the buyer of the existence of an insurance policy were held by the court to mean the same as non tendering of insurance policy.¹⁷⁸ This is also the case for the certificate of insurance. It was held in the case of *Diamond Alkali Export Corporation v Fl Bourgeois* that a certificate of insurance cannot enable the buyer to verify

¹⁷³ M. Galdes, *op. cit.*, pp. 49-54.

¹⁷⁴ A. R. KENNEDY, *Contracts of Sale. C.I.F. (Cost, Insurance, Freight)*, London, Steven and Sons Ltd, 1924, p. 76.

¹⁷⁵ M . GALDES, *op. cit.*, p. 84.

¹⁷⁶ *Tricotagefabrik v. White and Meacham* (1975) 1 Lloyd's Repo. 384.

¹⁷⁷ M. GALDES, *op. cit.*, p. 85.

¹⁷⁸ *Manbre Saccharine Co. Ltd. V. corn Products Co Ltd*

whether the terms of the contract have been respected because these are only included in the policy of insurance and that the certificate being non-transferable by endorsement do not give the buyer a right of action against the insurer.¹⁷⁹ However, the certificate of insurance being accepted in the modern trade I am of the view of authors like L. d’Arcy who argue that tender of insurance certificate amounts to fulfilling the obligations to tender insurance policy.¹⁸⁰ M. Bridge adds that being restricted to the insurance policy may not even be practical in some instances like where the seller has to allocate goods shipped in a bulk under one insurance contract among several buyers and that in modern times the policy may even comprise the certificate.¹⁸¹

In as far as the cover is concerned the insurance policy must comply with “terms current in the trade” which is appreciated account taken of factors such as nature of the goods, vessel and the route of transit. In this regard generally many policies exclude war among the risks. Contracts of sale may, however, be specific on risks to be insured against or even the quantity to be covered and here the seller must respect the contract.¹⁸² It should, however, be recalled that the required insurance cover under Incoterms is the minimum cover under the Institute Cargo Clauses and any similar sets of rules.¹⁸³ This cover is equal to 110 per cent (110%) of the price of the goods and it must be in the currency of the contract.¹⁸⁴ This insurance does not cover some risks like strikes, war, acts of God...¹⁸⁵

3) Procuring the contract of carriage (affreightment) and bill of lading

Under the CIF contract of sale the seller has the duty to contract for carriage of goods on usual terms and at his/her own expenses to the named port of destination by usual route in the vessel of the type normally used for the transport of goods of the contract description.¹⁸⁶ The

¹⁷⁹ *Diamond Alkali Export Corporation v Fl Bourgeois* (1921) 3 K.B. 443.

¹⁸⁰ L. D’Arcy, *op. cit.*, p. 35.

¹⁸¹ M. BRIDGE, *The International Sale of Goods*, Oxford University Press, 1999, p. 212.

¹⁸² A. R. KENNEDY, *op. cit.*, pp. 77-78.

¹⁸³ M. GALDES, *op. cit.*, p. 89.

¹⁸⁴ Anita SZABO, *op. cit.*, p. 21.

¹⁸⁵ Y. YINAN, *op. cit.*, p. 12 and A. R. KENNEDY, *op. cit.*, p. 77-

¹⁸⁶ X. “CIF- Cost, Insurance and Freight Responsibilities” available at <http://www.pierobon.org/export/ch11/cifr.htm>, accessed on 12-10-2014.

contract of carriage (contract of affreightment) and the bill of lading are considered separate; but in the normal case, as pointed out by M. GALDES, where the seller has the duty to make shipping arrangements and tender the bill of lading the contract of carriage and the bill of lading coincides. The bill of lading is considered the best evidence to prove the contract of carriage has been executed as it is delivered by the master when the goods are shipped.¹⁸⁷ In English authorities the bill of lading is clearly the evidence of the contract of affreightment to the extent that even where the contract of affreightment is written, the bill of lading is equally required to ascertain that goods have actually been shipped.¹⁸⁸

It should be noted that the bill of lading should be transferable to constitute a valid tender under CIF contract and can thus be an order or bearer bill of lading. The bill of lading must provide continuous documentary cover from the time of shipment to the time of arrival at destination.¹⁸⁹ The bill of lading should be for “shipped or received for shipping”. Save express contract terms and trade customs or usages, the seller is bound to procure for the buyer a “shipped bill of lading” that shows that the goods have been actually shipped on board. The B/L can also be “received for shipment” certifying goods have been received. The bill of lading must provide for the carriage by the agreed or customary route to the agreed destination as per the contract otherwise the seller breaches the contract. The bill of lading should not be fraudulent (e.g. forgery in the bill, false representation of goods...) and clean; i.e. with no reservations entered by the carrier as to the apparent condition or packaging of goods since a clean bill of lading sturdily indicates that the goods have been received in good order by the carrier.¹⁹⁰ Moreover, the bill of lading has to cover the agreed quantity and not more than that.¹⁹¹

4) Make out the invoice for goods

The invoice should debit the consignee with the agreed price and gives him/her credit for the amount of the freight he/she has to pay to the carrier on actual delivery of goods (this is

¹⁸⁷ M. GALDES, *op. cit.*, p. 63.

¹⁸⁸ *Ibid.*

¹⁸⁹ *Hansson V. Hamel & Horley LTD* (1922) 1 A.C. 36.

¹⁹⁰ I. CARR and P. STONE, *op. cit.*, p. 15.

¹⁹¹ See for instance M. GALDES, *op. cit.*, pp. 65-83.

famously known as “freight collect” which is an arrangement where the freight is not paid by the seller but rather the buyer upon delivery of the goods at the port of destination¹⁹²). It is relevant to underscore that the commercial invoice is the most important document while considering the description of goods once payment demanded. It must be complete in strict terms of the contract of sale and it is considered as a statement where the seller shows details of the goods to be shipped as well as their price. In most cases, the buyer receives a provisional invoice to get information on the goods before the complete tender of documents.¹⁹³

5) Tendering documents

After having procured the necessary documents, the seller is under the obligation to forward them to the buyer. The seller is must tender the shipping documents to the buyer even if the goods are lost or destroyed after the contract was formed.¹⁹⁴ The documents in question are all documents specified in the contract of sale. In the absence of any provision in the contract about the documents, these are the bill of lading, the insurance policy, the invoice and any documents that may be required by the customs.¹⁹⁵ In this regard he/she must make all possible efforts to send them as soon as possible after the goods have been shipped to the buyer. In *Barber v. Taylor* cited by A. R. KENNEDY, the court decided not only that the seller was supposed to send the bill of lading in a reasonable time without reference to the arrival or discharging of goods but also that there having unreasonably been delay to send the bill of lading the buyer was entitled to reject the goods.¹⁹⁶ It is therefore important to discuss the time and place of tendering the documents.

The seller has to forward the documents on or within the time agreed expressly in the contract. Where no time is agreed, the tendering must be done as soon as possible after the goods are shipped.¹⁹⁷ Where the goods are purchased afloat, the requirement to send the documents to the buyer as soon as possible is considered from the moment the seller has appropriated the

¹⁹² See for instance *Biddell v Clemens Horst* [1911] 1 K.B 214.

¹⁹³ *Id.*, pp. 90-91.

¹⁹⁴ *Manbre Saccharine Co. Ltd. V. Corn Products Co. Ltd.* [1919] 1 K.B. 198 and *C. Groom Ltd v. Barber* [1915] 1 KB 316 available at http://pntodd.users.netlink.co.uk/cases/cases_m/manbre.htm, accessed on 10th October 2014.

¹⁹⁵ M. GALDES, *op. cit.*, p. 93.

¹⁹⁶ A. R. KENNEDY, *op. cit.*, p. 107.

¹⁹⁷ *C. Sharpe & Co. Ltd v. Nosawa* (1917) 2 K.B. 814 cited by

cargo to the buyer¹⁹⁸ It has transpired in a number of court decisions that the seller is normally under an obligation to make sure that the documents reaches the buyer before the goods' arrival at the port of destination. More specifically, if there is a clause in the contract under which the documents must be tendered before the arrival of the goods any failure to do so means the breach of the contract that may lead the buyer to termination of the contract because of the seller's fault. If there is no clause on the time, then only slight delay does not constitute a contract breach.¹⁹⁹ Another question is to know where to make the tender of documents? Though many of the existing authorities say the place of tendering is the buyer's place of business, there is no consensus about the matter.²⁰⁰

Basically, the seller must tender the documents that meet the requirements spelled out in the contract of sale; i.e conforming documents. The general principle is that where the seller presents documents that are consistent with contract terms, the buyer or his bank is under the obligation to accept them.²⁰¹ On the contrary, if the tendered documents do not meet contracts terms and requirements the buyer or his/her bank in case of payment through documentary credit has an undisputable right to reject and refuse to pay them.²⁰²

It is relevant to note that the right of the buyer to reject non-conforming documents should not be confused with the right to reject the goods. In addition to the right to rejects the documents that do not meet the contract requirements, the buyer is entitled to reject the goods on arrival if he/she discovers goods do not conform to the contract. The seller being under the duties to deliver the goods for shipping and to tender proper shipping documents according to the contract terms, he/she can fail to accomplish one or both of the two obligations. In either case, the buyer has the right to reject in respect of the failure.²⁰³ The documents can therefore be

¹⁹⁸ M. GALDES, *op. cit.*, p. 95.

¹⁹⁹ *Id.*, pp. 96-97.

²⁰⁰ *Id.*, pp. 98-100.

²⁰¹ LIJIA YI, *Documentary Fraud under Letters of Credit-A Comparative Study of English and Chinese Law*, Master Thesis, Lund University, 2012, p. 24.

²⁰² M. JAFARZADEH, *The buyer's remedies for seller's non-conforming delivery-A Comparative Study under the English Law, The 1980 UN Convention for the International Sale of Goods and Shi'ah Law*, PhD Thesis, University of Sheffield, 1998, p. 60.

²⁰³ *Kwei Tek Chao v. British Traders & Shippers Ltd* [1954] 2 Q.B. 459 and *Gill & Duffus S.A. v Berger & Co. Inc* [1984] A.C. 382 cited by M. JAFARZADEH, *op. cit.*, p. 61.

rejected for defects on their face like being wrongly dated or describing the goods' order or condition. For instance, the arbitral tribunal has decided that the buyer was entitled to reject the bill of lading where the contract said they goods were to be shipped in January and the bill of lading was to be dated on the reason that the bill of lading was dated in February even if the goods were actually shipped in January.²⁰⁴ Also, the buyer can reject the bill of lading because it contains the quantity that exceeds the one agreed in the contract even if the goods actually are shipped within these limits.²⁰⁵ It should be noted, however, that the seller can have the possibility to cure the defects in the documents which become subsequently conforming.²⁰⁶

Goods can also be rejected despite the fact that documents are in good order and have been and paid for if the goods are defectives like when they are of unsatisfactory quality provided it could not be seen from the face of the documents.²⁰⁷

Finally, it is important to note that there exist some others obligations weighing on the seller such as the duty to give the notice of appropriation or declare shipment made to the buyer where the contract expressly so requires,²⁰⁸ the duty of the seller to obtain the export licence where the contract does not provide otherwise²⁰⁹ and any other duty that may be stipulated in the contract. **In an effort to find out details about the CIF seller's duties the breach of which may trigger his/her liability in a Rwandan context, I interviewed the Chief Registrar of the Commercial High Court who told me the court has not until now received a case related to CIF contract or any Incoterm related contract.**²¹⁰

²⁰⁴ *In re General Trading Co & Van Stolk's Commissiehandel* [1910] 16 Com. Cas. 95.

²⁰⁵ M. JAFARZADEH, *op. cit.*, p. 61.

²⁰⁶ I. SCHWENZER, "Avoidance of the Contract in case of non-conforming Goods (Article 49 (1)(A) CISG)" [2005-2006], *Journal of Law and Commerce*, Vol. 25:437, p. 441.

²⁰⁷ *Ibid.*

²⁰⁸ *The Post Chaser* [1981] 2 Lloyd's Rep. 695 and M. GILDES, *op. cit.*, p. 56.

²⁰⁹ M. GILDES, *op. cit.*, p. 92.

²¹⁰ **Interview with Chief Registrar, High Commercial Court, Kigali on 30/01/2015.**

This was corroborated by the information provided by one arbitrator affiliated with Kigali International Arbitration Centre (KIAC) who said they have not had such a case.²¹¹ This is linked, may be, to the fact that Rwanda is a landlocked country.

II.2.1.2 Rights (Remedies) of the buyer

In CIF contract the buyer has the right to reject non-conforming documents and non-conforming goods and terminate the contract and the right to claim damages.

1) Termination of the contract for breach

The buyer has the rights to reject non-conforming documents and non-conforming goods respectively. The first one arises where the required documents are handed over while the second arises when the goods arrive at destination and the buyer is given proper time to examine them and finds they do not respond to contract terms.

As detailed above, documents are non-conforming where they are defective or tendered late. In addition, documents can be rejected if they reveal a defect in goods that amounts to the breach of a condition. Moreover, any acceptance of the defective documents does not mean the buyer's waiver of the right to reject the goods once examined and it is found out that they do not conform to contract description.²¹²

One may also argue that the Convention on Contracts for the International Sale of Goods also envisages the same remedies in case of the breach of contract.

In fact, Article 30 of the very Convention obliges the seller "deliver the goods, hand over any documents relating to them...as required by the contract" and Article 49(1) (a) entitles the buyer to avoid the contract if the failure by the seller to perform "any of his obligations under the contract amounts to a fundamental breach of contract". It is therefore very clear from the convention that the seller may be under double obligations to tender the documents and

²¹¹ Interview with Jean Bosco RUSANGANWA, Arbitrator, KIAC, Kigali on 23/01/2015.

²¹² A. C. L. MULLIS, "Termination for Breach of Contract in C.I.F. Contracts under the Vienna Convention and English Law; Is there a Substantial Difference?" available at <http://www.cisg.law.pace.edu/cisg/biblio/mullis.html>, accessed on 17/10/2014.

deliver the goods and in case of any failure (in respect of goods and/or documents delivery) the buyer has the right to terminate the contract for breach.

2) Claim of damages or requiring specific performance

In case of seller's failure to fulfil his/her obligations the buyer is, in addition to the right to reject non-conforming documents or goods, entitled to the right to claim damages. The buyer is indeed entitled to sue the seller for any loss he/she has sustained. In this case, the buyer has a duty to demonstrate that the loss suffered is a result of the seller's breach of the contract.²¹³ The buyer is entitled to claim damages even when he/she has decided to keep non-conforming goods.²¹⁴

It should also be noted that the buyer could have, where practicable, the right to require specific performance from the seller.²¹⁵ The buyer can thus require the seller to deliver the goods or the required documents where the latter had failed to deliver them and if the goods have been already delivered but do not conform, the buyer can demand the seller in breach either to supply substitute goods or repair the non-conforming goods. Other examples include where the buyer can demand that the seller delivers the goods at the right place or date as specified in the contract. It could also be the case where part of the purchased goods is missing.²¹⁶

II.2.1.3 Duties of the Buyer

1) Acceptance of documents and payment of the price

Once all the required documents are tendered to the buyer in due form and order; i.e. they are conforming documents, the latter is under obligation to accept them and pay the

²¹³ M. JAFARZADEH, *op. cit.*, p. 349 and A. C. L. MULLIS, "Termination for Breach of Contract in C.I.F. Contracts under the Vienna Convention and English Law; Is there a Substantial Difference?" available at <http://www.cisg.law.pace.edu/cisg/biblio/mullis.html>, accessed on 17/ 10/2014.

²¹⁴ G. I. PRIEST, "Breach and Remedy for the Tender of Nonconforming Goods under the Uniform Commercial Code: An Economic Approach"[1978], *Harvard Law Review*, Vol. 91: 960, p. 963.

²¹⁵ F. WEI, *op. cit.*, p. 99.

²¹⁶ M. JAFARZADEH, *op. cit.*, p. 156.

seller²¹⁷; irrespective of the arrival of the goods²¹⁸ and even when goods have been lost.²¹⁹ This duty of the buyer to pay against the documents, being independent, must be performed even if the seller has breached the duty to ship conforming goods and even though the buyer is entitled to subsequently reject the goods.²²⁰ Therefore, the buyer must be ready to pay or accept the draft, depending on the case, according to the terms of the contract of sale within a reasonable time after the shipping documents are tendered to him/her. The reasonable time here is a matter of fact dependant on situation. In normal situations, however, it is understood that acceptance and payment come swiftly after tender.²²¹ It should be noted that where the contract provides for payment to be made via a letter of credit, the obligation of the buyer in respect of payment then becomes one of opening a letter of credit that meets the requirements of the contract.²²² Acceptance of a non-conforming letter of credit (expressly or through conduct) by the seller has been considered, however, to be equal to a new agreement capable of amending the contract of sale itself.²²³

2) Name the port of destination

Where the port of destination has not been fixed in the contract, the buyer has an obligation to nominate it before he/she can complain about the seller's obligations to ship goods.²²⁴ Besides, whenever the buyer is entitled to determine the time for shipping the goods and/or the point of receiving the goods within the named port of destination, he/she must give the seller sufficient notice thereof within the time frame provided for in the contract or reasonable time where no time is fixed in the contract .²²⁵

²¹⁷ *Gill & Dufus v. Berger* [1984] A.C 382 cited by C. H. SPURIN, *op. cit.*, p. 33.

²¹⁸ M. GALDES, *op. cit.*, p. 28.

²¹⁹ S. PEEL, *The Development of the Bill of Lading: Its Future in the Maritime Industry*, PhD Thesis, Institute of Marine Studies, 2002, p. 139.

²²⁰ *Id.*, p. 101.

²²¹ F. LORENZON et al., *C.I.F and F.O.B. Contracts*, London, Sweet & Maxwell, 2012, p. 230.

²²² *Id.*, p. 234.

²²³ *W.J. Alan & Co Ltd V El Nasr Export and Import Co* [1972] 2 Q.B. 189 CA available at <http://www.bailii.org/ew/cases/EWCA/Civ/1972/12.html> , accessed on 25/10/2014

²²⁴ F. LORENZON et al., *op. cit.*, p. 239.

²²⁵ Incoterms®2010 CIF B7.

It is important to note that the buyer has some other duties such as the duty to take delivery of goods²²⁶ to be able to reject them in case they do not conform to contract stipulations and claim back the price already paid, the duty to pay import licences and/or customs, etc.²²⁷

II.2.1.4 Rights of the seller in case of buyer's breach of duties

Where the buyer has breached his/her obligations the seller is entitled to, among other remedies, the action for payment of the contract price, an action for non-acceptance of the documents, the right to withhold delivery, stoppage in transit, right of resale as well as the right of lien over the goods and ultimately the right to terminate the contract and sue for damages. Noteworthy is that these remedies available to the seller in case of a defaulting buyer are available from instruments other than Incoterms which only provide for duties but are silent on remedies in case of their breach.²²⁸

After detailing the duties and rights of parties to a CIF contract, it is relevant to return to one of the core issues of this research which is the seller's liability in CIF contract in case of loss of or damage to goods. In this perspective, the following sub-section delves into details about conditions of seller's liability.

II.2.2 Conditions of seller's liability in case of loss of or damage to goods

As thoroughly analysed supra²²⁹ the risk in goods sold under CIF contract passes from the seller to the buyer at the time of shipment. Therefore, risks that can affect the goods after their shipment are borne, in principle, by the buyer. In other words, the seller is not liable for loss of or damage to goods after their shipment. Under some conditions, however, the risk can be the seller's in which case he/she is liable for the loss of or damage to goods. What are thus the

²²⁶ Incoterms®2010 CIF B5.

²²⁷ C. H. SPURIN, *op. cit.*, p. 33.

²²⁸ J. RAMBERG, "CISG and INCOTERMS 2000 in Connection with International Commercial Transactions", in C. B. ANDERSON and U.G. SCHROETER (eds.) , *Sharing International Commercial Law across National Boundaries: Festschrift for Albert H. Kritzer on the Occasion of his Eightieth Birthday*, Wildy, Simmons & Hill Publishing, 2008, p. 400. These are remedies provides for for instance by CISG in its arts 62 et seq., UK Sale of Goods Act in its Sect. 49 et seq. and Uniform Commercial Code of the USA in its § 2-709 et seq.

²²⁹ See sub-section II.1.1 and II.1.2 above

conditions for his/her liability? In general, one of the parties to the contract can trigger its contractual liability if there is a breach of contractual obligation (1), the reason for the breach must arise out of the sphere of the party that should perform (2), there is damage (3) and finally there is a causal connection between the breach of the contract and the damage suffered (4). In this section the aforesaid general requirements are applied to the contract of CIF Sale with a focus on the seller's liability in case of loss of or damage to goods. **As highlighted earlier in this chapter²³⁰, according to the interviews I carried out there are no cases related to the topic of CIF seller's liability handled by commercial courts or arbitration in Rwanda. The following arguments and views are only buttressed by information available from other jurisdictions' doctrinal material as well as case law.**

II.2.2.1 Breach of contractual obligation: contractual fault

Contract breach has been stated to be "...discrepancies between the agreed action plan and the actions actually performed".²³¹ Under Rwanda law governing contracts, the breach of contract is its "non-performance" and it can be either partial or total.²³² Moreover, for a contract breach to give rise to damages the law states that it must be a material breach.²³³ According to B. A. BLUM, "a breach is material if the failure or deficiency in performance is so central to the contract that it substantially impairs its value and deeply disappoints the reasonable expectations of the promise"²³⁴. In various exceptional instances where scholars and case law consider the seller to be liable for loss of or damage to goods (he/she bears the risk) it is because he/she has breached one of his contractual duties. This is even in the same philosophy as article 70 of CISG where, though the buyer bears the risk for loss of or damages to goods, the seller may be liable to the buyer for losses or damages that may result from his/her breaches of contractual obligations.

²³⁰ See II.2.1.1, page. 39.

²³¹ J. GANUZA and F. GOMEZ POMAR, *The Strategic Structure of Contract Law*, Book draft, University of Barcelona, date not available, p. 125 available at http://www.upf.edu/dretcivil/pdf/mat_fernando/strategicstructurecontractlaw.pdf, accessed on 02/12/2014.

²³² Articles 80 and 81 of the Law on Contracts respectively.

²³³ See Article 86 of the Law on Contracts. For details constitutive elements of the material breach see art. 85 of the same law.

²³⁴ B. A. BLUM, *Contracts: Examples & Explanations*, 3rd Ed., New York, Aspen Publishers, 2004, p. 546.

For instance, as seen above, where the seller does not get an insurance cover or adequate insurance cover, he/she bears the risk in case of loss or damages. It is in this regard that it was decided in *Tricotagefabrik v. White and Meacham* “ as a result of the fact that the seller did not obtain insurance cover for the entire transit, he was held not to be entitled to obtain payment for goods which were stolen while awaiting delivery to the buyer’s correct address”.²³⁵ This means, it is suggested, that, for instance, if goods are lost or damaged and the insurance cannot cover the loss or damage it shall be up to the seller to repair any prejudice suffered by the buyer, including for sure but not limited to the refund of the price. Also, in *Hansson v Hamel & Horley Ltd*, goods sold under CIF were to be shipped from Norway to Kobe or Yokoham in Japan. Goods were shipped from Braatvag in Norway to Hamburg where they were transhipped onto Atlas Maru which transported them from Hamburg to Japan but its owners had no contractual responsibility in respect of the carriage of goods from Braatvag to Hamburg. In his opinion Lord SUMMER held that

A c.f. and i. seller...has to cover the buyer by procuring and tendering documents which will be available for his protection from shipment to destination, and I think that this ocean bill of lading afforded the buyer no protection in regard to the interval of thirteen days which elapsed between the dates of the two bills of lading and presumably between the departure from Braatvag and the arrival at Hamburg.²³⁶

While commenting on this case M. GALDES submits that the fact that the seller tendered a bill of lading which did not provide continuous cover from shipment to destination meant that any loss or damage that could have possibly happened during the uncovered voyage would have been at the risk of the seller.²³⁷

Where the loss occurs when the risk is still the seller’s he/she can be liable for non-delivery except if he/she effects a timely cure or the buyer accepts.²³⁸ Also, if damage to goods during the voyage is caused by goods themselves the seller is liable to the buyer. This contractual

²³⁵ *Tricotagefabrik v. White and Meacham* (1975) 1 Lloyd’s Repo. 384 quoted by M. GALDES, *op. cit.*, p. 84 and I. CARR, *op. cit.*, p. 17.

²³⁶ *Hansson v. Hamel & Horley Ltd* (1922) 2 A.C. 36 available at < <http://naralaw.com.ne.kr/case.html>>, accessed on 30/11/2014.

²³⁷ M. GALDES, *op. cit.*, p. 75.

²³⁸ MALACHY T. MAHON, “Remedies in Sales Disputes under the Uniform Commercial Code-Notes for the Litigator” [1963], *Fordham Law Review*, Vol. 31, p. 738 available at <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1769&context=flr>, accessed on 01/10/2014.

liability is based on the seller's failure to delivery conforming goods and he/she must compensate the buyer.²³⁹

The opinions from the above two cases are in line with an *a contrario* deduction from the arguments of some authors like Essa ALAZEMI according to whom,

...the rule under the CIF contract is that the seller can validly tender documents such as an invoice, a bill of lading or an insurance policy, with respect to the dispatched commodities although the vendor knows that these commodities have been totally lost. In such a case, the buyer would not have a right to reject the documents, if it can be assumed that the commodities were in accordance with the sale contract at the time of consignment²⁴⁰

From this, one can clearly deduct that the seller would bear the loss if he/she breached the duty to deliver commodities in accordance with the contract of sale. One may also rightly conclude that the above cases only mention breach cases that were brought before them; but generally a case of breach by the seller (i.e. failure to respect agreed terms about the route, time of shipment, vessel...) that would concur with the loss of or damage to goods would lead to him/her bearing the risk of loss or damage. This implies he/she shall be liable to refund the price paid in advance by the buyer as well as any loss the latter may have suffered.

II.2.2.2 Breach linked to the breaching party's conduct

J. GANUZA and F. GOMEZ POMAR argue that "The mere fact that a discrepancy exists between the actions or outcomes as determined expressly or implicitly in the contract and realized actions and outcomes does not necessarily lead to a finding of breach of contract that opens the availability of legal remedies for breach".²⁴¹ There must also be a relevant link between the failed action or outcome and the party to be held in breach. In this sense, non-performance resulting from events qualified as "acts of God" or "force majeure" shall not be attributable to the breaching party. If reference is made to cases cited above (see II.2.2.1), the failure to

²³⁹J. ERAUW, 'CISG Articles 66-70: The Risk of Loss and Passing It'[2005-06] , *Journal of Law and Commerce*, Vol. 25: 203, p. 208.

²⁴⁰ See Essa Alazemi, *Passing of Risk in International Contracts of Sale of Goods; A Comparative Study between the United Nations Convention on Contracts for Sale of Goods 1980 and the English Sale of Goods Act 1979*, available at <http://www.cisg.law.pace.edu/cisg/biblio/alazemi.html> , accessed on 21st January, 2014.

²⁴¹ J. GANUZA and F. GOMEZ POMAR, *op. cit.*, p. 129.

provide an adequate insurance or documentary cover (or any other breach concurring with the loss) must not result from an act of God.

II.2.2.3 Damage

Jacques Bussy argues that the damage (prejudice or loss) can be material (the one that undermines the patrimonial rights), corporal (the one that harms the body of a person and leads to patrimonial rights) or moral (pretium doloris: the one that affects the extra-patrimonial rights) and adds that the defaulting party has only to repair the damage foreseeable at the time of contract formation.²⁴² This research is, however, only concerned with material damages. There must thus be a damage suffered by the buyer in the form of a loss. The latter may be a loss on price difference like where the buyer resolves to re-buy substitute goods on a higher price, loss of resale profit, etc.²⁴³ The loss may also be a consequential one, like where the buyer failed to deliver to sub-buyers and is held liable.²⁴⁴

II.2.2.4 Causal connection between the breach of the contract and the damage

Damages being meant to compensate the loss ensuing from the breach, it is logical that the plaintiff should only claim those damages caused by the breach. It is thus necessary to prove the causal link between the breach and the loss.²⁴⁵ In this respect, in *Tricotagefabrik v. White and Meacham* cited above²⁴⁶ for instance, it can be submitted that the seller's failure to secure appropriate insurance cover for the goods that were lost has resulted in the buyer's inability to claim and recover the loss from the insurer. In other words, had the seller procured the appropriate insurance cover, the buyer should have been able to claim from the insurer and there should not have been loss suffered by the buyer.

²⁴² J. BUSSY, *Droit des Affaires*, 2^e ed. revue et mise à jour, Paris, Presse des Sciences Po et Dalloz, 2004, pp. 86 and 101. See also article 141 of the Randan Law on Contracts.

²⁴³ See Y. LI, *Remedies for Breach of Contract in the International Sale of Goods-A Comparative Study between the CISG, Chinese Law and English Law with reference to Chinese Cases*, PhD Thesis, Univeristy of Southampton, 2010, pp. 119, 123

²⁴⁴ *Idem*, p. 138.

²⁴⁵ B. A. BLUM, *Contracts: Examples & Explanations*, 3rd Ed., New York, Aspen Publishers, 2004, p. 614.

²⁴⁶ *Supra*, note 231.

However, as submitted by Yan LI, under some jurisdiction like under English law the requirement of causation is ignored in most of the time and confused with the remoteness test. In this perspective, if the loss is certain the courts awards damages where the loss falls within the reasonable contemplation of the breaching party at the time of contract formation immaterial of whether or not the loss is directly or indirectly caused by the breach.²⁴⁷ It is in this regard that it was held in *Hadley v. Baxendale* that the defendant was liable for the loss that a reasonable person in his position could have contemplated.²⁴⁸

II.3 Means of compensation for the buyer in case of loss or damage

As highlighted above the seller discharges his/her obligations by shipping the goods of contract description, procuring the required documents and tendering them to the buyer. Once these duties have been fulfilled the seller is entitled to claim the contract price irrespective of whether or not the goods arrive to their destination or whether they are damaged or not. Moreover, save in exceptional circumstances where the seller may have failed to fulfil his/her contractual obligations, the loss of or damage to goods is not borne by the latter. And the core problem here is to know whether this situation is not detrimental to the buyer. **In an effort to find answers to this question from a Rwandan practice perspective I have interviewed some key informants from international transport and insurance industry.**

The Great Lakes Legal Manager of Balloré Africa Logistics in Rwanda, one of the biggest companies in international transport of goods in Rwanda, highlighted that, in general, they have had cases of loss of or damage to goods and the goods owners were insured with local insurance companies which compensated them. He, however, averred they have not had so far a case of loss of or damage to goods related to a CIF contract.²⁴⁹

The Head of Legal Services in SONARWA, the oldest insurance company in the country, revealed that, in practice, they have never had a contract involving the seller and buyer as it may be the case in CIF. He added that they only have in their records buyers who come to ensure their

²⁴⁷ Y. LI, *op. cit.*, p. 105.

²⁴⁸ *Hadley v Baxendale* (1854) 9 Ex. 341, 355 cited by Y. LI, *op. cit.*, p. 109.

²⁴⁹ **Interview with Benjamin NTAGANIRA, Great Lakes Legal Manager (Rwanda, Burundi and East DRC), BALLORE AFRICA LOGISTICS, Kigali on 20/ 01/2014.**

goods against loss whereby the insurer does not know who the seller is. In case of loss or damage the buyer is thus compensated by the insurance cover he/she subscribed for.²⁵⁰

In the absence of Rwandan practical case on the loss of or damages to goods during sea carriage under CIF contract; I have resorted to doctrinal materials on other jurisdictions' practice where solutions have been devised in favour of the buyer. In these circumstances, the buyer has as remedies that are exercised against the carrier or the insurer.²⁵¹ This sub-section curtly explores the two remedies.

II. 3.1 Claim with the insurer

The buyer who is bound to pay against the documents even when the goods are lost or damaged has a claim with the insurer to recover the loss suffered provided it is covered by the terms of insurance policy.²⁵² In case of covered loss, the buyer or any other person having the insurable interest in the goods is entitled to claim directly from the insurer.²⁵³ This insurance policy tender with other required documents enables the buyer to exercise this action.²⁵⁴ It should be noted, however, that the insurance cover has its limitations. In fact, as it has been expounded above, the seller under CIF contract is only required, in principle, to procure the minimum insurance cover for the goods.²⁵⁵ It is understandable, therefore, that where goods are lost due to an event that is not attributable to the carrier's or seller's misconduct and not covered by the insurance policy the buyer will bear the loss²⁵⁶. This situation thus leaves a lot to be desired in as far as the buyer is concerned. When the loss or damage to goods is attributable to the carrier, the buyer also has a claim against the former.

²⁵⁰ Interview with the Head of Legal Services, SONARWA Ltd, Kigali on 20/01/2015.

²⁵¹ M. GALDES, *op. cit.*, p. 101.

²⁵² Y. YINAN, *op. cit.*, pp. 23-24 and E. A. CRAIGHILL, "Sales of Goods on C.I.F. Terms"[1920], *Virginia Law Review*, Vol. 6, No 4, p. 230 available at <http://www.jstor.org/stable/1063103>, accessed on 16/10/2014

²⁵³ UNCTAD, *Legal Aspects of International Trade*, New York and Geneva, UN, 1999, p.12.

²⁵⁴ See *supra*, note 145 (M. GALDES, *op. cit.*, p. 85).

²⁵⁵ See Section 2.2.1.1.2 above.

²⁵⁶ See for instance, M. GALDES, *op. cit.*, p. 122.

II. 3.2 Claim against the carrier

The buyer may also have an action against the carrier for loss of or damage to goods depending on the cause of loss.²⁵⁷ Where the delivery of goods is not possible consequently to the misconduct of the master or mariners that is not covered by the insurance, the buyer is entitled to claim from the ship-owner.²⁵⁸ The carrier is bound to carry the goods to their destination and to deliver the goods to the party entitled to delivery. If it does not deliver the complete and undamaged cargo it is traditionally presumed to have breached its duties under the carriage contract (This obligation of the carrier is known in domestic legislations as the one of “result”²⁵⁹). This means that if there is no delivery it is presumed that cargo was lost and if the cargo arrives but in damaged condition, damage is presumed and the carrier’s liability is triggered.²⁶⁰ It should be noted that the buyer (consignee) can sue the carrier not only for loss of or damage to goods during the period of carrier’s responsibility (while goods are in his/her custody) but also for delay in delivery of goods attributable to the latter.²⁶¹

In whatever case the buyer is really entitled to sue the carrier under the carriage contract. After documents delivery, the buyer being “the lawful holder of the bill of lading [he/she] will be entitled to assert contractual rights against the carrier, irrespective of the passing of property and regardless of whether he has suffered the loss himself”.²⁶²

²⁵⁷ C.H. SPURIN, *The passing of risk in CIF and FOB Contracts*, 2004, p. 26.

²⁵⁸ E. A. CRAIGHILL, “Sales of Goods on C.I.F. Terms” [1920], *Virginia Law Review*, Vol. 6, No 4, p. 230 available at <http://www.jstor.org/stable/1063103>, accessed on 16/10/2014 and *C. Groom Ltd v. Barber* [1915] 1 KB 316 available at http://pntodd.users.netlink.co.uk/cases/cases_m/manbre.htm, accessed on 10th October 2014.

²⁵⁹ See Saul Litvinoff, *Contract, Delict, Morals, and Law*, 45 *Loy. L.Rev.*1, 35 (1999) cited by A. VON ZIEGLER, “The Liability of the Contracting Carrier” [2009], *Texas International Law Journal*, Vol.44:329, p. 333.

²⁶⁰ A. VON ZIEGLER, “The Liability of the Contracting Carrier” [2009], *Texas International Law Journal*, Vol.44:329, p. 333.

²⁶¹ *Id.*, p. 348.

²⁶² L. GORTON, “The Liability for Freight”, *Stockholm Institute for Scandinavian Law*, 1957-2009, p. 485.

Basing on arguments of M. A. RAZZAK who points out that the contract of afreightment included in the bill of lading is initially made between the shipper (seller in CIF contract of sale) and the carrier and is transferred to the consignee (buyer in CIF contract of sale)²⁶³ who steps into the shoes of the former, it is submitted that this action in an action in contractual liability that the buyer acquires by contract assignment. There are also arguments that the buyer's action on carriage contract results from the operation of a contract with provisions in favour of a third party (*stipulation pour autrui* in French) whereby the shipper enters into a contract with the carrier for the benefit of the consignee. It was, moreover, argued that the buyer's action results from the peculiar nature of the bill of lading which is a tripartite agreement to which the seller, shipper and buyer are parties.²⁶⁴ Without delving into the real nature of the afreightment contract embodied in the bill of lading, it is important to underscore that all the views agree on the buyer's action under contract of carriage. However, there are instances where the loss of or damage to goods is not covered by insurance and the buyer is not entitled to sue the carrier. This is, among others, when the bill of lading is in the name of the seller²⁶⁵ and the buyer's name appears nowhere. This may become therefore a potential source of difficulty for the buyer seeking redress from the carrier for loss of or damage to goods. In this situation, the buyer cannot sue the carrier since he/she is not a party to the contract.

In a Rwandan legal context the relevant legal text in transport matters is the Decree of 19 January 1920 on Freight Forwarders and Carriers. However, it is important to note that its provisions in as far as carriers are concerned are of no relevance to this research since they exclude sea carriage from their ambit of application.²⁶⁶ This is, in my opinion, coupled with the

²⁶³ M.A. RAZZAK, "Bill of Lading: A Pivotal Document in International Sale Transactions" [2005], *Bangladesh Legal Decision*, November Volume, pp. 13-14 available at <http://nebula.wsimg.com/01b01f6d79d0e78bfd33513387b490d?AccessKeyId=DE126302E8D8D67B5FD3&disposition=0&alloworigin=1>, access on 15/12/2014.

²⁶⁴ M. BOUASSIDA, "La qualification de la livraison en droit maritime Tunisien", available at <http://www.legavox.fr/blog/marwen-bouassida/qualification-livraison-droit-maritime-tunisien-12032.htm#.VLOArkeUdbE>, published on 29/06/2013.

²⁶⁵ *Id.*, p. 493.

²⁶⁶ Article 9 of the Decree of 19 January 1920 on Freight Forwarders and Carriers (Décret du 19 Janvier 1920 Sur des Commissionnaires et des Transporteurs, *B.O.* 1920, p. 194) which says that provisions of the very Decree on carriers do not apply to sea carriers .

fact that the only types of transportation by water existing in Rwanda are only transport by river and by lake.²⁶⁷

II.4. Proposition of means of protection of the buyer in case of loss or damages of goods

In this section some of the means that can be devised to offer more protection to the buyer in a CIF contract in case of loss of or damage to goods are suggested. In this respect, however, the author does not pretend to be exhaustive as there can probably be quite a range of possible means that the author cannot imagine. It is in this respect that the following sub-sections deal with the subscription for additional insurance (1) and recognition of the buyer's standalone right to sue the carrier where he/she cannot do so by virtue of the bill of lading or contract of carriage (2).

II.4.1 Subscription for additional insurance cover

As it has been expounded above, the seller under CIF contract is only required, in principle, to procure the minimum insurance cover for the goods which, under the Institute Cargo Clauses, covers only 110 per cent of the goods' price and does not cover some risks like war, strikes, acts of God etc. The way to trounce this difficult of problems that may arises in case goods are damaged or lost due to a perils not normally covered by the insurance policy under CIF contract of sale would be the subscription for additional insurance by the buyer. Indeed, as submitted by Y. YINAN, where the buyer wishes greater cover (the insurance against the risks that are not covered like strikes, wars, acts of God, etc) he or she has either to agree expressly with the seller to arrange for additional cover or arrange the extra insurance cover him/herself.²⁶⁸ It is also possible to agree, in the contract of sale, on the perils to be insured against (and include for instance those that are not normally covered by the minimum insurance under CIF contract for instance) or alternatively agree on the quantity of the damage to be covered. In both cases the seller shall be bound to comply with the contract and failure to comply would

²⁶⁷ P. RWANKUBITO, *Droit du Transport*, Manuels de droit rwandais, Kigali, Printerset, 1993, pp. 31-32.

²⁶⁸ Y. YINAN, *op. cit.*, p. 12.

trigger his/her liability.²⁶⁹ As an example of such special provisions in the contract, one can cite *Yuill & Co., Ltd v. Scott-Robson* case, where a sale of cattle at Buenos Ayres c.i.f to Durban included a clause to be insured against “all risks” and the court decided the buyers should be covered by insurance when the cattle was not allowed to be landed by reasons of government regulations prohibiting cattle to land pursuant to cattle foot and mouth disease outbreak.²⁷⁰

II.4.2 Recognition of the buyer’s right to sue the carrier

To be able to sue to the carrier on contractual breach, the buyers must make sure that they are clearly identified as the beneficiary in the bill of lading (contract of carriage).²⁷¹ In instances where the buyer may face problems while the only possibility of recovering damages for loss of or damage to goods by suing the carrier over the contract and the bill of lading is not in his/her name, this difficult may be overcome by statutory acts at international and/or domestic levels giving the buyer of goods as a consignee of the cargo a standalone right to sue the carrier of goods as it is the case in English law. Section one of the English Bills of Lading Act reads as follows:

Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself.²⁷²

Alternatively, sellers can assign their right of action against the carrier to the buyer who suffer a loss attributable to the carrier and are unable to sue on their own. The seller can sue and recover damages against the carrier and be accountable to the buyer for the proceeds of the judgment.²⁷³

²⁶⁹ See A. R. KENNEDY, *op. cit.*, p. 78.

²⁷⁰ *Yuill & Co., Ltd v. Scott-Robson* (1907) 1 K.B. 685; (1908) 1 K.B. 270 (C.A.) cited by A. R. KENNEDY, *op. cit.*, p. 78.

²⁷¹ Under Rwandan law this is regulated by articles 114 – 119 of Law N^o 45/2011 of 25/11/2011 governing Contracts, O.G., N^o 04 BIS OF 23/01/2012.

²⁷² See The Bill of Lading Act 1855, section 1, available at <http://www.legislation.gov.uk/ukpga/Vict/18-19/111/contents/enacted>, accessed on 1 October 2014.

²⁷³ S. TODD, *op. cit.*, p. 87.

II.4.3 Recognition of the buyer's action in tort against the carrier

The recognition to the buyer of an action in tort against the carrier by virtue of the principle of “transferred loss” would afford more protection to the CIF buyer who cannot sue the carrier on contract. According to this principle, if a person “A owes a duty of care in tort not to cause physical damage to B’s property, and commits a breach if that duty in circumstances in which the loss of or physical damage to the property will ordinarily fall on B; but such loss or damage, by reason of a contractual relationship between B and C, falls upon C, then C will be entitled...to bring an action in tort against A in respect of such loss or damage to the extent that it falls on him”.²⁷⁴

Without using the principle announced above some court decisions have recognized the CIF buyers are entitled to sue on the basis of tort liability especially where they cannot sue on contract because they are not holder of the bill of lading.²⁷⁵ This transpired also from *Schiffahrt and Kohlen G.m.b.H.v v Chelsea Maritime Ltd: The Irene’s Success* case where it was held that CIF buyers who had no action to claim on contract as they were not holders of the bill of lading, had an action in negligence since the cargo was physically damaged by sea water during the voyage due to the sea carrier’s breach of the duty of care.²⁷⁶ It is submitted that this cases can inspire the endeavor to improve the CIF buyer’s status by the recognition of the action in tort.

²⁷⁴ *Id.*, p. 96.

²⁷⁵ See *Brandt & Co. and F.W. Vogel & Co. v. River Plate Steam Navigation Company, Ltd* (1923-24) 17 Ll. L. Rep. 142 at 145 and *The Nea Tyhi* [1982] 1 Lloyd’s Rep. 606 cited by W. FAN, *The Measurement of Damages in Carriage of Goods by Sea-A Comparative Study of English and Chinese Law with a View to Possible Revisions of the Chinese Maritime Code and other Legislation*, PhD Thesis, University of Exeter, 2008, p. 110. Available at <https://ore.exeter.ac.uk/repository/bitstream/handle/10036/38653/FanW.pdf?sequence=2>, accessed on 10/12/2014.

²⁷⁶ *Schiffahrt and Kohlen G.m.b.H.v v Chelsea Maritime Ltd: The Irene’s Success* [1982] Q.B. 481 cited by S. TODD, “Remedies of the Buyer for Damage to Goods Carried by Sea” [1986], *Canterbury Law Review*, Vol.3, p. 91.

GENERAL CONCLUSION

The contracts of sale of goods at the international level are of various types depending on duties and rights of contracting parties. One of these types is the CIF sale contract which is the sale agreement where the price includes the cost of goods, their insurance and freight. In this contract, thus, the seller fulfils his/her obligations shipping the goods and by properly procuring and tendering the invoice, the insurance policy and the bill of lading collectively referred to as shipping documents. Risks of loss of or damage to goods during transit is then transferred to the buyer from the moment of shipment of in goods while upon tendering proper documents the seller is entitled to payment of the price whether goods safely reaches the destination or not. This has led to this research with the objectives of finding out what happens when goods are damaged in transit or destroyed following the sinking of ship; whether the buyer can reject the goods damaged during the transit; whether the seller is entitled to claim full price even if goods do not reach destination or whether the buyer can claim back the price where it is already paid; and finally means of compensation of the buyer when goods are lost or damaged.

The analysis of available literature and court decisions allowed noticing that in CIF contract the risk in goods passes from the seller to the buyer at the time of their delivery; i.e. when they have passed the ship's rail at the port of shipment. In case of sale of goods in transit the time of shipment precedes even the formation of the contract; but the risk of loss or damage is still the buyer's. Where the buyer is the one to fix the time of shipment, he/she will bear the risk of loss of or damage to goods even before shipment if he/she has failed to determine the time and goods are lost or damaged after being appropriated to the contract. In all the above cases, the buyer cannot reject the goods and the seller is entitled to claim payment of the full price though the buyer can only get damaged goods or no goods at all.

Exceptionally, the seller is liable, and thus bears the risk of loss of or damage to goods, where he/she has breached the contract which breach is followed by the loss of or damage to goods. Examples include instances where the seller has failed to subscribe for adequate insurance cover for goods which are later damaged or lost or where the seller has not delivered conforming goods for shipment.

The buyer in CIF contract is, on the other side, protected in case of damage to or loss of goods. He/she is entitled to claim from the insurer by virtue of the insurance cover procured by the seller in case there risk of loss or damaged occurs. There are instances, however, when goods can be damaged by perils that are not covered by the minimum insurance cover the seller is only required to subscribe for.

Where the loss of or damages to goods is due to the carrier's fault, the buyer has also the right to sue the carrier on the contract of carriage embodied in the bill of lading tendered by the seller. Scholar's arguments and views on the legal mechanism underlying the buyer's action in this instance differ with some arguing that it is an action resulting from the contract assignment while other affirm that is results from the contract with provisions in favour of a third party or the very peculiar nature of the bill of lading as a tripartite agreement. Without seeking to delve into details on which views holds than the other, it is noticed that they all converge on the fact that the buyer's action is the one in contractual liability against the carrier. It was however noticed that where the buyer is not clearly nominated in the bill of lading as the consignee he/she cannot sue on contract of carriage.

To overcome challenges found by the research it is submitted that the buyer should be well aware of the very nature of the CIF contract and subscribe for additional insurance cover in case goods may be damaged or lost pursuant to a peril that is not covered by the minimum insurance the seller is required to subscribe for. In addition, where the buyer cannot sue the carrier on breach on carriage contract because the bill of lading is not in the names of the former, it is recommended to States and international bodies dealing with international trade like the UNCITRAL to recognise to the buyer a standalone action to sue the carrier as it is the case now under British Law. Finally, where goods are damaged due to the carrier's fault (i.e. breach of duty of care), the recognition of the action in tort against the latter would increase the buyer's protection in case he/she cannot succeed in action on carriage contract.

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