

## **Insurance requirements in Incoterms® 2020**

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### **Abstract**

Under Incoterms® 2010 Rules, as in prior editions of these Rules, CIF and CIP clauses set forth a duty to insure requiring the seller to insure the goods under Institute Cargo Clauses (C) of the Institute of London Underwriters. Under Incoterms® 2020 Rules, the International Chamber of Commerce upgraded the default level of insurance coverage required on the goods under CIP, while maintaining the previous default level of insurance coverage required on goods sold under CIF. The former, but not the latter, now points towards the use of Institute Cargo Clauses (A). This chapter aims to identify and assess the legal and commercial implications of this change, under the framework of the United Nations Convention on Contracts for the International Sale of Goods.

**Keywords: cargo insurance/ Incoterms/ passing of risk/ trade usage/ CIF/ CIP**

### **0. Introduction**

Under Incoterms® 2010 Rules, as in prior editions of these Rules, CIF and CIP clauses set forth the seller’s duty to insure the goods under Institute Cargo Clauses (C) of the Institute of London Underwriters. Under Incoterms® 2020 Rules, the International Chamber of Commerce increased the default level of insurance coverage required on the goods under CIP, while maintaining the previous default level of insurance coverage required on the goods under CIF. The former, but not the latter, now points towards the use of Institute Cargo Clauses (A). This chapter aims to identify and assess the legal and commercial implications of this change. Section 1 will explain the concept of the passing of risk in a sale of goods. Section 2 will set out the legal framework of the insurance requirements in these trade standards, with a special focus on the default rules on the passing of risk set forth in the United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention. Section 3 will overview the history and legal nature of the Incoterms® Rules of the International Chamber of Commerce. Section 4 will move on to compare the insurance requirements in Incoterms® 2010 Rules with those in Incoterms® 2020 Rules. This is where the change in insurance requirements is set out in detail. Section 5

will discuss the legal and commercial implications of this change. The final section will express this paper’s conclusions.

## **1. The legal concept of the passing of risk**

In an international sales contract, as, more widely, in other contracts that involve the transfer of a right *in rem* over things, it is important to determine the exact moment of occurrence of a phenomenon called the ‘passing of risk’ from one party to the other party (hereinafter referred to, simply, as seller and buyer). Identifying the exact moment that the risk passes from the seller to the buyer lies at the heart of contracts of sale like many other contracts where rights *in rem* over things are transferred.

‘Risk’, which is a polysemic term, in this context assumes a broad yet rigorous meaning. Its core-elements include the notions of *(i)* possibility; and *(ii)* negativity.<sup>1</sup> In other words, its use conveys the ideas *(i)* that the mere possibility of an occurrence is at stake – this occurrence not being perceived either as an impossibility or as a certainty, but comprising all degrees of probability between 0 and 1; and *(ii)* that this occurrence is negatively valued. The risk at stake, in this context, is that of loss of or damage to the goods.

In a contract of sale, typically the seller is bound by an obligation to deliver the goods to the buyer. If the goods suffer a misfortune, the corresponding loss or damage must be borne by someone. At a crucial moment in time, the risk of occurrence of such loss or damage to the goods shifts from the seller to the buyer. That is the moment of the passing of risk. It is also the moment at which the seller is deemed to have legally completed its contractual obligation to deliver the goods to the buyer.<sup>2</sup> It is a matter of interpretation of the sale contract which determines if the risk has passed from the seller to the buyer, namely, if the seller has performed his obligation to deliver under the contract.

The risk of loss of or damage to the goods is relevant in any sales contract, but it is particularly important in the vast number of contracts involving the transfer of rights over goods that

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<sup>1</sup> See ML Rego, *Contrato de Seguro e Terceiros. Estudo de Direito Civil* (Coimbra 2010) 67-79.

<sup>2</sup> See M Davies and DV Snyder, *International Transactions in Goods: Global Sales in Comparative Context*, (OUP 2014) 245.

have to be carried from point A to point B. Should something go wrong before the passing of risk, this is the seller’s problem. Should something go wrong after the passing of risk, the risk is borne by the buyer. From that moment onwards, any loss of or damage to the goods, except for wrongdoing on the part of the seller or their agents or subcontractors, shall entail the seller’s exoneration.

The seller is thus exonerated from its contractual obligations, particularly of the obligation to deliver the goods. This is called performance risk: if the risk has passed, such obligations are treated, to all intents and purposes, as having been performed. In other words, the seller has no duty to deliver new goods, to replace those that have disappeared or deteriorated, or otherwise to remedy the consequences of their loss or damage, while retaining in full its right to consideration: namely, the sale price. The latter is called the price risk: if the risk has passed, the seller preserves its right to be paid the sale price.

The passing of risk should be distinguished from the transfer of ownership or other rights *in rem* over the goods. The rules governing them are distinct, so the two moments do not have to coincide in time, although historically they did, in accordance with the maxim *res perit domino suo* (the destruction of a thing is the loss of its owner).<sup>3</sup>

## **2. The passing of risk according to the Vienna Convention**

The passing of risk in contracts for the international sale of goods, that is to say, in contracts of sale where the parties have their places of business in different countries – is regulated in Chapter 4 of Part III, Articles 66 to 70 of the United Nations Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention (commonly abbreviated ‘CISG’). These rules have as their main antecedent Articles 96 and following of the Uniform Law on the International Sale of Goods, approved by the Hague Convention of 1964, also under the guise of the United Nations.

The Vienna Convention is the closest humanity has got to enacting a truly global trade law. It is often pinpointed as “one of the success stories in the field of the international unification

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<sup>3</sup> Ibid 246-248.

of private law”<sup>4</sup>. According to the United Nations, a total of 95 States have adopted the Convention.<sup>5</sup> Its rules are applicable to international sales of goods, when the parties have their places of business in adopting states or when the rules of private international law lead to the application of the law of an adopting state.<sup>6-7</sup>

According to Article 66:

*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.*

This provision only deals explicitly with the passing of the price risk,<sup>8</sup> or the risk of counter-performance (in German, *Gegenleistungsgefahr*), as opposed to the performance risk (*Leistungsgefahr*).<sup>9</sup> The former is the seller’s risk of losing the purchase price, or the buyer’s risk of having to pay it without receiving the goods. Not explicitly regulated in this provision is the latter, which concerns a party’s obligation “to perform in spite of unexpected impediments” (including the occurrence of loss of or damage to the goods).<sup>10</sup>

Although this wording is not too clear on the exact nature and types of occurrences that are included in the concepts of loss or damage to goods, the terms ‘loss’ and ‘damage’ were preferred over alternative terms, such as ‘deterioration’, so as not to convey the idea that the rules on the passing of risk dealt only with phenomena of natural, not human, origin.<sup>11</sup>

Case law, legal commentaries and other scholarly writings have since made it clear that the types of events covered by this language correspond to all kinds of accidental physical damage to the goods. This includes disappearance, fortuitous destruction, spoilage, evaporation, improper stowage or careless handling, theft, vandalism, discharge of cargo, the goods being sent off to the wrong destination, the goods being mixed up or blended in with

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<sup>4</sup> P Huber, ‘Comparative Sales Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edn, OUP 2019) 933-960, 935.

<sup>5</sup> See <https://iicl.law.pace.edu/cisg/page/cisg-table-contracting-states> (accessed 31 March 2023).

<sup>6</sup> See Article 1 of CISG. See P Huber, ‘Comparative Sales Law’ in M Reimann and R Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2<sup>nd</sup> edn, OUP 2019) 933-960, 936.

<sup>7</sup> “In analyzing the Convention, one must bear in mind that its provisions play a supporting role, supplying only those terms to a contract that the parties have failed to include”. SS Grewal, ‘Risk of Loss in Goods Sold During Transit: A Comparative Study of the U.N. Convention on Contracts for the International Sale of Goods, the U.C.C., and the British Sale of Goods Act’ (1991) 14 *Loy LA Int’l & Comp LJ* 93, 94.

<sup>8</sup> See PM Roth, ‘The passing of risk’ (1979) 27 *Am J Comp L* 291, 291-292.

<sup>9</sup> See N Jansen and R Zimmermann, ‘Sale of Goods’ in *Commentaries on European Contract Law* (OUP 2018, online edn, <https://doi.org/10.1093/oso/9780198790693.003.0019>, accessed 31 March 2023), 2022-2024.

<sup>10</sup> *Ibid* 2023.

<sup>11</sup> See B Nicholas’s commentary to Article 66 in Bianc and/ Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Giuffrè 1987) 484.

other goods, as well as any kind of degeneration of the physical properties of the goods, without any relevant fault of the parties. The common feature in all these cases is the accidental nature of the occurrence causing the loss or damage.<sup>12</sup> It does not include devaluation of the goods, that is, loss of market value not connected with a degeneration of the physical properties of the goods.<sup>13</sup>

The issue the transfer of ownership or other rights *in rem* over things is not regulated in the Vienna Convention.<sup>14</sup> Its treatment of the passing of risk is based on the assumption that the two matters are independent from one another, it being possible and even desirable to deal with each of these issues separately, independently from the rules applicable to the other. In any event the rules governing the transfer of ownership and other rights *in rem* over things vary greatly from jurisdiction to jurisdiction, so it would be very unwise to have the passing of risk depend on such a geographically volatile legal institution.

A more stable solution was needed, the drafters being acutely aware of the fact that many of the people who would be called upon to apply these rules in practice on a daily basis would not be legally trained. “There are thus two basic issues which confront the draftsmen of uniform rules on the passing of risk. The first is one of substance: What practical policies should the provisions concerning risk seek to achieve; which party, in a given case, should bear the risk? Secondly, there is a question of form. How can the articles be drafted so as to ensure that these policies are realized effectively, coping with the immense range of factual situations which may arise, without resorting to undue technicality?”<sup>15</sup>

As a starting point, the physical acts (or “overt commercial events”<sup>16</sup>) of handing over the goods, or of placing the goods at the disposal of the buyer took the stage. The abstract, legal concept of delivery was relegated to a supporting or subordinate role, being defined by

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<sup>12</sup> Z Valiotti, ‘Passing of risk in international sale contracts. A comparative examination of the rules on risk under the United Nations Convention on Contracts for the international Sale of Goods (Vienna 1980) and Incoterms 2000’ (2004) Nord J Com L 1, 7-8.

<sup>13</sup> See F Mohs, ‘Passing of Risk, Introduction to Articles 66–70’ in I Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4<sup>th</sup> edn, OUP 2016) 950-957, para 3. See also A Romein, *The Passing of Risk. A comparison between the passing of risk under the CISG and German law* (Pace Law School Institute of International Commercial Law, July 1999); J Erauw, ‘CISG Articles 66-70: the risk of loss and passing it’ (2005-2006) 25 J L & Com 203, 204-208.

<sup>14</sup> See Article 4(b) of CISG.

<sup>15</sup> PM Roth, ‘The passing of risk’ (1979) 27 Am J Comp L 291, 291-293.

<sup>16</sup> *Ibid* 296.

reference to the former.<sup>17</sup> The abstract, legal concept of transfer of property was not given any significant role to play.

A conscious choice was made to select a practical issue as the decisive criterion for determining the default rules on the passing of risk, in lieu of an abstraction – a particularly geographically volatile legal abstraction.<sup>18</sup> That issue was that of physical control over the goods: at any given time, the party who is in control of the goods bears the risk of loss of or damage to the goods. This rule is at its simplest in sales that do not involve a carriage of goods from point A to point B. In this case, risk passes when the buyer takes over the goods or, should the buyer fail to do so by breaching their duty to take delivery, when the buyer should have taken over the goods.<sup>19</sup>

In the great majority of sales involving carriage of goods, there is a period of time when often only a third party – the carrier – has physical control over the goods. In these cases, the passing of risk will depend on whether the seller has undertaken to hand over the goods to a carrier at a particular place – handing over being referred to the physical act, rather than the legal concept of delivery. If so, the risk passes when the goods are handed over to a carrier at that particular place. If not, risk passes when the goods are handed over to the first carrier.<sup>20</sup> The rules on the passing of risk concern the risk allocation as between both contracting parties in the sale of goods. They do not touch upon the buyer’s nor the seller’s contractual risk allocation vis-à-vis the third party carrier.

Consequently, the general default rule, when neither party has physical control over the goods, is that the buyer bears the transit risk. Again, this rule is based on pragmatic considerations: it is usually the buyer who checks the goods upon receiving them from the carrier, being in a better position to assess the loss or damage and to make a claim against

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<sup>17</sup> See Articles 31 ff. of CISG. See B Nicholas’s commentary to Article 67 in Bianca and Bonell (eds), *Commentary on the International Sales Law. The 1980 Vienna Sales Convention* (Giuffrè 1987) 487-489. See also the discussion in PM Roth, ‘The passing of risk’ (1979) 27 *Am J Comp L* 291.

<sup>18</sup> See J Erauw, ‘CISG Articles 66-70: the risk of loss and passing it’ (2005-2006) 25 *J L & Com* 203, 214.

<sup>19</sup> Article 69(1) and (2) of CISG. CISG attaches importance to the individualization of the goods, determining that, when the contract concerns goods that have not yet been individualized, that is, when the seller’s obligations are generic, the passing of risk cannot take place without their clear identification for the purposes of the contract (art. 69(3) of CISG).

<sup>20</sup> Article 67(1) of CISG. Once again, the transfer presupposes the individualization of the goods by means of their clear identification for the purposes of the contract (art. 67(2) of CISG).

the carrier and/or the insurer.<sup>21</sup> Lastly, the passing of risk occurs at the time of conclusion of the contract when the goods are sold in transit.<sup>22</sup>

A similar solution to that set forth in the Vienna Convention can also be found, more recently, in Article 20 of the Consumer Rights Directive, according to which “[i]n contracts where the trader dispatches the goods to the consumer, the risk of loss of or damage to the goods shall pass to the consumer when he or a third party indicated by the consumer and other than the carrier has acquired the physical possession of the goods”.<sup>23</sup>

The Vienna Convention’s default rules on the passing of risk seldom apply in practice, the same happening in most of the world’s national default rules on the passing of risk, mostly due to the popularity of the International Chamber of Commerce’s Incoterms® Rules.<sup>24</sup> This is so because default rules are meant to apply only if and to the extent that contracting parties abstain from setting them aside by stipulating their own rules. As the following section will highlight, Incoterms® Rules are precisely aimed at making it easy for contracting parties to stipulate on a number of matters of relevance to their contracts, including the passing of risk. Hence, the greater their popularity, the scarcer the instances where default rules are actually called upon to determine the outcome of a case.

### **3. Incoterms® Rules of the International Chamber of Commerce**

Incoterms®, an acronym which is short for ‘international commercial terms’, are sets of standard commercial terms, or pre-defined contractual clauses, that have been codified, developed and published by experts and practitioners under the guise of the International Chamber of Commerce since 1936.<sup>25</sup>

Incoterms® Rules do not technically have the force of law anywhere in the world, nor can they be chosen by contracting parties as the law governing their contract. They are purely

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<sup>21</sup> See S S Grewal, ‘Risk of Loss in Goods Sold During Transit: A Comparative Study of the U.N. Convention on Contracts for the International Sale of Goods, the U.C.C., and the British Sale of Goods Act’ (1991) 14 *Loy LA Int’l & Comp LJ* 93, 97.

<sup>22</sup> Article 68 of CISG.

<sup>23</sup> Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

<sup>24</sup> See F Mohs, ‘Passing of Risk, Introduction to Articles 66–70’ in I Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4<sup>th</sup> edn, OUP 2016) 950-957, para 23.

<sup>25</sup> See <https://iccwbo.org/resources-for-business/incoterms-rules/> (accessed 31 March 2023). See also *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), foreword by JWH Denton.

contractual, gaining their binding force from their incorporation by the parties into their contract.<sup>26</sup> Incoterms® Rules are not contract templates to be used either in contracts of sale of more broadly for transfer of goods. They do not restrict the party autonomy on the negotiation of the contract terms either.<sup>27</sup> They are terms that can be incorporated by reference amidst the other terms included in the contract. They will displace the default rules of the law governing the contract, but their incorporation will be subject to the principles of freedom of contract and the mandatory provisions of the law governing the contract.<sup>28</sup>

Incoterms® Rules are aimed at simplifying their individual negotiation by allowing certain core matters to be regulated *per relationem*, i.e. by reference to these pre-defined, ready-to-use contract terms. For ease of reference, each Incoterms® rule is known by a series of three letters, so the parties need only insert those letters in their contract in order for the entire set of clauses it refers to, to be deemed as an integral part of that contract.

The International Chamber of Commerce’s successive editions of the Incoterms® Rules include each rule’s wording, or what the authors put forward as the wording of the rule, strictly speaking. The rules are preceded by an authored introduction, the only part of the text that is presented as having been written by an individual author, and are supplemented by what may be described as instructions, guidelines or explanatory notes for users.<sup>29</sup> Although these supplements are aimed at facilitating the handling of the rules by users that may not be legally trained, the whole volume is of relevance to legal professionals as a tool for the interpretation of those sets of three letters, whenever they are inserted in a contract that is to be interpreted and applied, for instance, by a court of any given jurisdiction.

The core matters that are regulated in the Incoterms® Rules are those arising from contracting parties’ need to make arrangements for the carriage of goods from point A to

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<sup>26</sup> See O Toth, *The Lex Mercatoria in Theory and Practice* (OUP 2017) 34.

<sup>27</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 6 of the Introduction.

<sup>28</sup> Ibid 34-35; and F. Mohs, ‘Passing of Risk, Introduction to Articles 66–70’ in I Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4<sup>th</sup> edn, OUP 2016) 950-957, para 24.

<sup>29</sup> These notes were entitled ‘Guidance Notes’ in *Incoterms® 2020* and are now called ‘Explanatory Notes For Users’ in *Incoterms® 2020*. See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 77 of the Introduction.

point B. The Incoterms® Rules deal with the very common circumstance, in international trade, of there being a geographical distance between buyer and seller.

Such core matters are the tasks, risks, and costs associated with the transportation and physical handing over of the goods. Incoterms® Rules describe who undertakes to do what (the tasks), where and when the seller is deemed to have legally delivered the goods to the buyer (the risks), that is to say, where and when risk of loss of or damage to the goods passes from the seller to the buyer, and finally who pays for what (the costs).<sup>30</sup> These matters are regulated in two symmetrical series of ten articles, respectively identified as A1 to A10 and B1 to B10. The seller’s undertakings are regulated in A1 to A10, the buyer’s undertakings being set forth under B1 to B10.<sup>31</sup> Because they were written with the purpose of identifying each party’s undertakings, what each of them commits to do or to endure, little attention is directly paid to each party’s contractual rights, which must hence be inferred from the former.<sup>32</sup> Incoterms® do not regulate the contract for the carriage of goods, nor do they lay down the third party carrier’s undertakings vis-à-vis the seller and/or the buyer.

Absent from the Incoterms® Rules are other at least equally important matters, such as, what goods are being sold for which contract price. Other aspects which are entirely left out are the determination of the law governing the contract and the regulation of the transfer of title to the goods.<sup>33</sup>

Although the first known edition of the International Chamber of Commerce Incoterms® is dated 1936, Incoterms® are originally not a product of the International Chamber of Commerce, some of them having been in use since much earlier times.<sup>34</sup> Competing, albeit less influential definitions of some such terms can be found, for instance, in the American Revised Foreign Trade Definitions (1941), which could be said to have been largely pushed

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<sup>30</sup> Ibid para 5 of the Introduction, by C. Debattista.

<sup>31</sup> Ibid para 5 of the Introduction, by C. Debattista.

<sup>32</sup> C. F. Almeida, ‘Incoterms: estrutura e qualificações’ (2018) Special Ed. 6 Themis 57, 58.

<sup>33</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 7 of the Introduction, by C. Debattista.

<sup>34</sup> See, for instance, EA Craighill, Jr, ‘Sales of Goods on C. I. F. Terms’ (1920) 6 Va L Rev 229. The author compares contracts of sale CIF and FOB, referring to the former as long and “long and widely used in international commerce” (229). See also G Saumier, ‘Trade Usages in the Convention on Contracts for the International Sale of Goods’ in F Gélinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (OUP 2016) 125-144, 140.

into obsolescence by the success of Incoterms® Rules,<sup>35</sup> or in the U.S. Uniform Commercial Code.<sup>36</sup> However, the acronym ‘Incoterms’ appears to have been coined by ICC, the latter being the owner of the registered trademark Incoterms®.<sup>37</sup>

Since their publication in 1936, the Incoterms® Rules were amended in 1953, 1967, 1976, 1980 and, since then, once every decade, in 1990, 2000, 2010 and 2020.<sup>38</sup>

Some authors have warned that Incoterms® Rules as such should rigorously not be characterised as codified trade usage within the meaning of Article 9(2) CISG.<sup>39</sup> Incoterms® Rules, and the experts who contributed to each edition thereof, aim to keep up with the developments of international trade usage when carrying out their revisions, which purport to be a reflection of “business-to-business practice”.<sup>40</sup> Be it as it may, the practical significance of Incoterms® Rules is such that, for instance, U.S. courts have repeatedly held that trade terms used in international sales contracts can be interpreted in accordance with Incoterms® Rules because the latter are incorporated into the Vienna Convention through its Article 9(2).<sup>41</sup> This may also be the case even when contracts do not explicitly refer to Incoterms® Rules, by application of Article 9(1) CISG.<sup>42</sup> In sum, courts in different countries appear to treat the Incoterms® Rules in fact like uniform private law.<sup>43</sup>

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<sup>35</sup> See, for instance, [www.globalnegotiator.com/international-trade/dictionary/american-foreign-trade-definitions/](http://www.globalnegotiator.com/international-trade/dictionary/american-foreign-trade-definitions/) (accessed 31 March 2023).

<sup>36</sup> FOB and FAS are defined in § 2-319 of the Uniform Commercial Code. CIF and C&F are defined in § 2-320 of the same Code. See JA Spanogle, ‘Incoterms and UCC Article 2 - Conflicts and Confusions’ (1997) 31 Int’l Law 111.

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<sup>38</sup> See <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-history/> (accessed 31 March 2023).

<sup>39</sup> Incoterms® Rules “are not in and of themselves a trade usage within the meaning of Article 9(2), as otherwise one would have to clarify, which clause is a usage for which type of contract”. F Mohs, ‘Passing of Risk, Introduction to Articles 66–70’ in I Schwenzer (ed), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods* (4<sup>th</sup> edn, OUP 2016) 950-957, para 23.

<sup>40</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 4 of the Introduction, by C. Debattista.

<sup>41</sup> See, for instance, US District Court, Southern District of Texas, United States, 7 February 2006, available at [www.cisg.law.pace.edu](http://www.cisg.law.pace.edu) (accessed 31 March 2023): “Because Incoterms is the dominant source of definitions for the commercial delivery terms used by parties to international sales contracts, it is incorporated into the CISG through article 9(2)”.

<sup>42</sup> See G Saumier, ‘Trade Usages in the Convention on Contracts for the International Sale of Goods’ in F Gélinas (ed), *Trade Usages and Implied Terms in the Age of Arbitration* (OUP 2016) 125-144, 141.

<sup>43</sup> See G-P Calliess and IS Jarass, ‘Private Uniform Law and Global Legal Pluralism’ in PS Berman (ed), *The Oxford Handbook of Global Legal Pluralism* (OUP 2020) 746–767, 764-767. The second author carried out an in-depth analysis of English and German case law involving Incoterms® Rules from 1990 to 2015. “[H]er analysis

Currently, eleven rules are in use, according to Incoterms® 2020. Four of these rules are intended for use only in non-containerized sea or inland waterway transport, the other seven being intended for use in any mode of transport, including multimodal transport.<sup>44</sup> In some cases, this includes using one of the parties’ mode of transport, in which case no third party carrier will be involved in the transaction.<sup>45</sup>

Whenever one of the maritime rules is used, delivery occurs, i.e. risk of loss of or damage to the goods passes when the goods are placed on board or alongside a vessel.<sup>46</sup> This is why they are not suitable for the transfer of containerised goods, as those goods are handed over to a carrier at a container terminal, rather than being placed on board or alongside a vessel. In any case, risk allocation varies greatly, from EXW, which conveys the least amount of tasks, risks and costs on the seller and the most on the buyer, to DDP, which places the most tasks, risks and costs on the seller and the least on the buyer.

Below is a list of the eleven Incoterms® 2020, from the most onerous to the least onerous rules from the perspective of the buyer:

EXW	Ex Works (named place of delivery)	any mode of transport
FCA	Free Carrier (named place of delivery)	any mode of transport
FAS	Free Alongside Ship (named port of shipment)	sea/ inland waterway
FOB	Free On Board (named port of shipment)	sea/ inland waterway
CFR	Cost and Freight (named port of destination)	sea/ inland waterway
CIF	Cost, Insurance & Freight (named port of destination)	sea/ inland waterway
CPT	Carriage Paid To (named place of destination)	any mode of transport
CIP	Carriage and Insurance Paid (named place of destination)	any mode of transport
DPU	Delivered at Place Unloaded (named place of destination)	any mode of transport
DAP	Delivered At Place (named place of destination)	any mode of transport

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revealed a high degree of effectiveness of the Incoterms despite their legal status as contract language. First, the Incoterms were not declared invalid, and second, the Incoterms were even applied by the courts without a contractual reference to the Incoterms by the parties and moreover, without providing any legal theoretical justification for their application, for example, by referring to trade usages or customary law” (764).

<sup>44</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 42 of the Introduction, by C. Debattista. This distinction was introduced in Incoterms® 2010.

<sup>45</sup> *Ibid* para 30 and 71-73 of the Introduction, by C. Debattista. This clarification was absent in prior editions of the Incoterms® Rules.

<sup>46</sup> *Ibid*, para 43 of the Introduction, by C. Debattista.

DDP	Delivered Duty Paid (named place of destination)	any mode of transport
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The rule to be used when one wishes to bind the seller to a mere obligation to make the goods available for collection by or on behalf of the buyer at the seller’s premises (in German, *Holschuld*) is Ex Works, or EXW (followed by the location of the seller’s factory). Because this rule allocates all the tasks, risks and costs involved in the carriage of the goods to the buyer, the International Chamber of Commerce does not recommend its use except in purely domestic sales. Exactly the same can be said of DDP, which, at the other extreme, allocates all the tasks, risks and costs involved in the carriage of the goods to the seller. When import/export of good is at stake, some degree of cooperation between the parties is recommended for the transaction to be successful.<sup>47</sup>

F rules are those where the tasks, risks and costs associated with the carriage of goods are to be borne by the buyer (F meaning free). The most basic of these rules is FCA (Free CARRIER), which has a broad spectrum and is relatively balanced and suitable for any mode of transport, including multimodal transport, which makes it the International Chamber of Commerce’s go-to rule, when in doubt.<sup>48</sup> In this rule, if the place designated for delivery is the commercial establishment of the seller, the loading of the goods onto the means of transport provided is still carried out at the seller’s risk, the risk passing to the buyer only when this operation is concluded.

In FOB (Free On Board), which is one of the rules intended for use only in non-containerised sea or inland waterway transport of goods, risk passes when the goods are loaded on the ship. If there is a problem in stowage and the goods fall into the water or crash ashore, or even into the ship’s hold, before being safely deposited on the ship, such risk will fall on the seller. If the goods are lost or damaged after the loading operation has been completed, the buyer will bear the loss. Should the ship sink after only part of the loading has been completed, the risk remains with the seller. If the goods are transported in containers, this rule is not the most appropriate, which is one of the reasons why FOB, once a very popular rule, has been dethroned by the more flexible FCA.

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<sup>47</sup> Ibid para 22 of the Introduction, by C. Debattista.

<sup>48</sup> The ICC Model International Sale Contract (Manufactured Goods), in its 2020 edition, as in the prior 2013 edition, include a list of recommended Incoterms® Rules for the parties to choose from. In the absence of choice, the default rule shall apply, that being FCA (seller’s premises). See para 5 of the Introduction.

In this context, the most relevant evolution was observed in the transition from Incoterms® 2000 to Incoterms® 2010. Until then, the risk would have passed with the transposition of the cargo, of an imaginary vertical line drawn from the ship’s rail. As a result, if, during the stowage, the cargo fell into the water, the risk would remain on the seller. However, if it fell into the hold of the ship, the risk would be borne by the buyer. This rule was amended in 2010.

D rules are those where the seller commits to bringing the goods to the buyer’s premises (in German, *Bringschuld*) (D for delivery). In this case, the most suitable rule may be, for instance, DAP or DPU. The latter was formerly DAT, in editions prior to 2020. The letter ‘T’ literally referred to delivery at a given terminal, but, although the word was broadly defined and broadly interpreted by experts, its literal reliance on the word ‘terminal’ was thought to be potentially misleading to the rules’ users; hence the new wording, DPU, by replacing T with P, now makes it clear to everyone that delivery may occur at any given place.<sup>49</sup> As regards the passing of risk, the difference is that in the former the risk passes to the buyer when the goods are placed at its disposal in the mode of transport of arrival, ready to be unloaded, whereas in the latter the risk only passes to the buyer on completion of the unloading operation.

Risk does not always pass at the same time as the costs associated with transport are transferred from the seller to the buyer. C rules disconnect the passing of the risk from the bearing of the costs (C for costs). As a result, they are arguably somewhat counterintuitive and therefore more difficult for non-expert users to handle and may give rise to unexpected practical consequences at times.

These rules determine that the seller undertakes to arrange and also pay for the transport of the goods sold. In some cases the seller is also expected to insure the goods sold although they do not assume the corresponding risk of loss of or damage to the goods during transport. C rules are hence the only clauses that name only the place of destination, rather than the place where delivery is to take place. This is because such rules bind the seller to an

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<sup>49</sup> Ibid para 74-75 of the Introduction, by C. Debattista.

obligation to send (in German, *Schickschuld*), i.e. to organise, contract and pay for the carriage of goods, in what are often called ‘shipment sales’, rather than to an obligation to bring the goods to the buyer.<sup>50</sup>

This is the case, for example, of CIF (cost, insurance and freight). CIF is one of the Incoterms® Rules intended for use only in non-containerised sea or inland waterway transport of goods. In this wording, the risk of loss of or damage to the goods passes to the buyer as soon as the goods are loaded on board the vessel, this being legally the moment of delivery, i.e. of the seller fulfilling their obligation. The seller, however, still bears the costs of the carriage of goods to the port of destination, including transport insurance and customs clearance costs.

If something happens to the goods after the passing of the risk from the seller to the buyer, the latter’s obligation to pay the contract price is not affected. The buyer will still have to pay the contract price, but, by virtue of the insurance contract, it is expected that the buyer will acquire a right to claim compensation as against the insurer.

This disconnection between the passing of the risk and the bearing of the costs will be further explored in the following sections, as it has an impact on the insurance requirements under Incoterms® Rules.

#### **4. Insurance requirements: from Incoterms® 2010 to Incoterms® 2020**

While insurance is always available both to the seller and the buyer, regardless of their chosen Incoterms® Rules, only two out of the eleven Incoterms® Rules set forth a contractual duty to procure insurance coverage: CIP (carriage and insurance paid to destination) and CIF (cost, insurance & freight).

This is due simply to the fact that in the other nine Incoterms® Rules, the party who decides whether to seek insurance coverage is the same party that has been contractually burdened with the risk of loss of or damage to the goods.

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<sup>50</sup> Ibid para 12, 24 and 26 of the Introduction, by C. Debattista.

Thus, in EXW it is for the buyer to decide whether to insure its own risk of loss of or damage to the goods, because the risk passes at the seller’s premises, before any transport takes place. In F rules, the buyer also has to decide whether to insure its own risk of loss of or damage to the goods, for the same reason. In D rules, conversely, it is for the seller to decide whether to insure their own risk of loss of or damage to the goods, as the seller bears the risk of any problem arising before delivery at the place of destination of the goods.

As mentioned above, C rules are the most complex to understand and handle, because they bring forth a disconnection between the passing of the risk and the bearing of the costs. In these so-called shipment rules, the seller undertakes to send the goods to the buyer, which entails organising, contracting and paying for the carriage of goods. Under CPT and CFR, the risk of loss of or damage to the goods is transferred from the seller to the buyer when the goods are handed over to the carrier (CPT) or when they are on board the vessel (CFR). This means that, whilst delivery takes place early on in the transaction, the seller will have had to organise, contract and pay for the carriage of the goods to its destination. The seller is, however, not bound to procure insurance coverage. In this case, it is therefore for the buyer to decide whether to insure its own risk of loss of or damage to the goods.

Finally, under CIP and CIF, the risk of loss of or damage to the goods is transferred from the seller to the buyer when the goods are handed over to the carrier (CIP) or when they are on board the vessel (CIF). Importantly, however, under these rules, in addition to the seller having to organise, contract and pay for the carriage of the goods to its destination, the seller is also bound to obtain insurance cover against the buyer’s risk of loss of or damage to the goods. As per CIP’s article A5:

“Unless otherwise agreed or customary in the particular trade, the seller must obtain at its own cost cargo insurance complying with the cover provided by Clauses (A) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses as appropriate to the means of transport used. (...) The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e. 110%) and shall be in the currency of the contract. The insurance shall cover the goods from the point of delivery set out in A2 to at least the name place of destination” (...).

CIF’s article A5 is identical, except it refers to “Clauses (C) of the Institute Cargo Clauses (LMA/IUA)”.

These are the only two rules where the party who undertakes to obtain insurance differs from the party that bears the insured risks. This aspect is crucial to the understanding of why these are also the only two rules that impose a duty to insure, as it would be contrary to principle for a clause to impose on a contracting party a duty to protect itself from any given risk. A duty to insure is only justified, on principle as well as in practice, when the person or entity that is to be protected is different from the person or entity which is to be in charge of protecting the former. A legal duty imposed on a contracting party to obtain insurance cover so as to protect itself against its own risk of loss of or damage to its property would have been regarded by most as too paternalistic and therefore would be deemed to amount to an unjustified restriction of one’s private autonomy. A contractual duty to insure against one’s own risks would be senseless, as the other party would have no interest in enforcing such a duty as against the other. A contractual duty to insure is therefore only relevant when enforceable by the party who bears the insured risks as against the party who does not but is nonetheless contractually bound to protect the former against such risk.

Under Incoterms® 2010, as in prior editions of these Rules, the duty to insure required the seller to insure the goods for 110% of the contract value under Institute Cargo Clauses (C) of the Institute of London Underwriters.<sup>51</sup> Under Incoterms® 2020, CIP, but not CIF, was changed to require the seller to insure the goods under Institute Cargo Clauses (A) of the Institute of London Underwriters.<sup>52</sup> Therefore, since Incoterms® 2020, we now have two quite different sets of insurance clauses to choose from.

The following paragraphs will set out the differences between Institute Cargo Clauses (A), (B) and (C). For the most part, the wordings of all three sets of clauses are identical. The

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<sup>51</sup> The current version of such clauses, dated 1 January 2009, is protected by copyright of the Lloyd’s Market Association (LMA) and the International Underwriting Association of London (IUA), who have established a Joint Cargo Committee in charge of periodically updating the Institute Cargo Clauses. See [www.lmalloyds.com/LMA/Underwriting/Marine/JCC/JCC\\_Clauses\\_Project/Cargo\\_Clauses.aspx](http://www.lmalloyds.com/LMA/Underwriting/Marine/JCC/JCC_Clauses_Project/Cargo_Clauses.aspx) (accessed 31 March 2023). The first set of Institute of London Underwriters clauses dates back to 1888. See H Bennett, ‘Reading marine insurance contracts: determining the scope of cover’ (2019) 27 Asia Pac L Rev 239, 240. A direct predecessor can, however, be found on the “SG Form”, which stands for Ship and Goods Form, formally adopted by Lloyd’s as early as 1779. See J Dunt, ‘History and Harmonization’ in J Dunt (ed), *International Cargo Insurance* (Routledge 2012) 1-12, 4 (para 1.5-1.6). For a more recent by-product of the Institute Cargo Clauses, see Institute Cargo Clauses (Air), also by the Institute of London Underwriters. See MA Clarke and G Leloudas, *Air Cargo Insurance* (Routledge 2016) 25.

<sup>52</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 70 of the Introduction, by C. Debattista.

main difference between them is to be found in clause 1, which defines the risks covered under each set. (A) is the only one which qualifies as all-risks insurance,<sup>53</sup> hence providing the broadest scope of cover of the three types of Institute Cargo Clauses:

“This insurance covers all risks of loss of or damage to the subject-matter insured except as excluded by the provisions of Clauses 4, 5, 6 and 7 below”.

(B) and (C), on the other hand, both qualify as named perils insurance:

“This insurance covers, except as excluded by the provisions of Clauses 4, 5, 6 and 7 below, 1.1 loss of or damage to the subject-matter insured reasonably attributable to 1.1.1 fire or explosion 1.1.2 vessel or craft being stranded grounded sunk or capsized 1.1.3 overturning or derailment of land conveyance 1.1.4 collision or contact of vessel craft or conveyance with any external object other than water 1.1.5 discharge of cargo at a port of distress 1.1.6 *earthquake volcanic eruption or lightning*, 1.2 loss of or damage to the subject-matter insured caused by 1.2.1 general average sacrifice 1.2.2 jettison *or washing overboard* 1.2.3 *entry of sea lake or river water into vessel craft hold conveyance container or place of storage*, 1.3 *total loss of any package lost overboard or dropped whilst loading on to, or unloading from, vessel or craft*”.<sup>54</sup>

The scope of Institute Cargo Clauses (A) is broader than the others because loss or damage resulting from all perils deemed to constitute a ‘risk’, or any combination thereof, are covered unless explicitly excluded. (B) and (C) policies include only loss or damage resulting from any one of those named perils are covered, (C) providing the narrowest scope of cover because its list of perils is shorter than that contained in (B).

The burden of proof favours the insured in (A), when compared to that in (B) or (C), because under (A), as Bennett explained, “[a]ll the insured has to prove in order to recover on a claim is that, on a balance of probabilities, the cause of the loss or damage was such a ‘risk’ or a combination of such risks, but there is no need to prove precisely which risk or risks impacted on the insured goods. As a matter of contractual construction, the precise cause of the loss or damage is irrelevant since the insurer accepts liability for loss or damage caused by any and all risks. (...) Under a named perils policy, in contrast, there is no such general acceptance of liability. The insurer’s acceptance of liability is confined to loss or damage

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<sup>53</sup> See J Dunt, ‘English law and practice’ in J Dunt (ed), *International Cargo Insurance* (Routledge 2012) 49-109, 67-77 (para 3.34-3.55); O Gürses, *Marine Insurance Law* (2<sup>nd</sup> edn, Routledge 2017) 189-190.

<sup>54</sup> Italics added to mark the perils which are present in type B wording, but which are absent from type C.

caused by one or more perils listed in the insuring clause. It follows that the insured must prove, on a balance of probabilities, that the loss or damage sustained was caused by one or a combination of the listed perils, and to do that the insured must necessarily identify the relevant peril or perils”.<sup>55</sup>

The second and last difference between Institute Cargo Clauses (A), (B) and (C) can be found in exclusion clauses 4 and 6. (B) and (C) remove from the scope of cover “deliberate damage to or deliberate destruction of the subject-matter insured or any part thereof by the wrongful act of any person or persons” (4.7). (B) or (C) also exclude a number of perils characterised as different forms of deprivation of possession: “capture seizure arrest restraint or detainment, and the consequences thereof or any attempt thereat” (6.2). The same exclusion can be found in (A), but, in line with its cover of deliberate damage or destruction, the latter places loss or damage resulting from acts of piracy within the scope of cover of (A).<sup>56</sup>

## 5. Discussion

We have seen that, under Incoterms® 2010, as in prior editions of these Rules, the duty to insure required the seller to insure the goods under Institute Cargo Clauses (C) of the Institute of London Underwriters.<sup>57</sup> Explicitly, the Rules gave (C) clauses their seal of approval. The Rules required the seller to “obtain at its own expense cargo insurance complying *at least* with the *minimum cover* as provided by Clauses (C) of the Institute Cargo Clauses”,<sup>58</sup> but implicitly, this requirement also conveyed the message that (C) clauses were the benchmark against which any other insurance clauses should be measured, hinting that those who procured this level of insurance protection would conform with best trade practices.

The change from Incoterms® 2010 to Incoterms® 2020 increased the level of insurance coverage required on the goods under CIP while maintaining the same level of insurance coverage required on the goods under CIF. The former, but not the latter, now points

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<sup>55</sup> H Bennett, ‘Reading marine insurance contracts: determining the scope of cover’ (2019) 27 *Asia Pac L Rev* 239, 241. References to the balance of probabilities should be understood to refer to how the matter would be decided in the courts of England and Wales. See also J Dunt, ‘English law and practice’ in J Dunt (ed), *International Cargo Insurance* (Routledge 2012) 49-109, 68 (para 3.36).

<sup>56</sup> On piracy, or forcible robbery at sea, see O Gürses, *Marine Insurance Law* (2<sup>nd</sup> edn, Routledge 2017) 186-187.

<sup>57</sup> See above n. 51.

<sup>58</sup> Clause A3 of both CIF and CIP according to Incoterms® 2010 Rules. Stress added by the author.

towards the use of Institute Cargo Clauses (A). In sales which involve carriage by sea or inland waterway, this change gives the parties a choice, where before there was none, on the default levels of insurance coverage to be contractually demanded. Contracting parties now have two different default levels of insurance coverage to choose from, one considerably more robust than the other. Although both sets can still be said to have been granted the Rules’ seal of approval, there is now a clear subliminal message that those who seek the highest standard of protection should go for (A). Both before and after the change, contracting parties were and still are, of course, entirely free to deviate from the Rules.

One could argue that an additional unwritten implication of this change is that, in the sale of luxury or high-value goods, Institute Cargo Clauses (A) are to be preferred, so CIP should be preferred to CIF, whereas in shipments of commodities or other lower-value goods the preference might still lie with (C) clauses and CIF.<sup>59</sup> This is in keeping with market practice.<sup>60</sup> The indirect impact of this change goes well beyond the parties’ choice whether to use CIP or CIF in sales which involve carriage by sea or inland waterway. Even when contemplating to use one of the Incoterms® 2020 Rules that set forth no duty to insure, and regardless of the mode of transport that is to be used, there is a new implicit message being conveyed in Incoterms® 2020. This new implicit message is that the insurance protection which was previously seen as the norm is now often too narrow and therefore insufficient to meet the parties’ insurance needs. In other words, before 2020, only one type of insurance protection was mentioned and therefore this was implicitly the benchmark to look for when seeking insurance coverage. As from 2020, two different insurance standards are used, one broader than the others. This prompts an invitation to think which of the two is more appropriate to each set of circumstances.

Insofar as the change came as a result of market pressures to increase the required minimum level of insurance protection, as hinted in the commentaries,<sup>61</sup> the change may also have the effect of reducing the number of cases of double insurance. Double insurance occurs where

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<sup>59</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 70 of the Introduction, by C. Debattista. According to this paragraph, during the consultations leading to the change, there were advocates for and against the change. Among the latter were those involved in the maritime trade of commodities.

<sup>60</sup> According to J Dunt, ‘English law and practice’ in J Dunt (ed), *International Cargo Insurance* (Routledge 2012) 49-109, 67 (para 3.34), “[t]he usual practice is to insure cargo on all risks terms under the Institute Cargo Clauses (A)”. (B) and (C) clauses “are only used for special commodities and trades and for cargo reinsurance” (n. 172).

<sup>61</sup> See *Incoterms® 2020. ICC rules for the use of domestic and international trade terms*, © 2019 International Chamber of Commerce (ICC), para 70 of the Introduction, by C. Debattista.

two or more insurance contracts cover, wholly or partly, the same risks and the aggregate sums insured exceed the value of the cargo.<sup>62</sup> If indeed it was recently often the case that a seller would obtain insurance for the buyer as per Institute Cargo Clauses (C), to meet the contractual standard, but then the buyer would find it lacking and would purchase additional insurance as per the wider coverage of Institute Cargo Clauses (A), there would be waste in these instances of double insurance. In other words, financial resources were being spent inefficiently in the purchase of superfluous insurance coverage. It is now hoped that, as a result of this change in Incoterms® 2020, at least in some of those situations the parties would choose to contract under CIP, thereby demanding that the seller obtains the highest level of insurance protection as per Institute Cargo Clauses (A). If this happens, the buyer might no longer feel the need to supplement the seller’s contractually required insurance coverage with a second, more robust insurance contract of its own.

## **6. Conclusions**

Under Incoterms® 2020 Rules, the International Chamber of Commerce upgraded the default level of insurance coverage required on the goods under CIP, while maintaining the previous default level of insurance coverage required on goods sold under CIF. The change from Incoterms® 2010 to Incoterms® 2020 increased the amount of insurance coverage required on the goods under CIP. This development gives the parties a choice, where before there was none, on the default level of insurance coverage to be contractually required.

Now both Institute Cargo Clauses (A) and (C) get the International Chamber of Commerce’s seal of approval. Nonetheless, because the former, an all-risks type of insurance, provides for substantially more robust insurance coverage than the latter, which corresponds to a named perils insurance, there is now a clear subliminal message that those who seek the highest standard of protection should go for Institute Cargo Clauses (A). Consequently, it seems that in the sale of luxury or high-value goods, Institute Cargo Clauses (A) are to be preferred, so CIP should be preferred to CIF, whereas in shipments of commodities or other lower-value goods the preference might still lie with CIF.

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<sup>62</sup>See ‘Marine assureds overinsured by double insurance’ [2004] Shipping and Trade Law, Westlaw UK, June 1-4; see also J Dunt, ‘English law and practice’ in J Dunt (ed), *International Cargo Insurance* (Routledge 2012) 49-109, 108 (para 3.123). The author states, however, that, “in practice, double insurance is comparatively rare in marine cargo insurance”.

Regardless of the actual rule that comes to be chosen by the parties, Incoterms® 2020 now encapsulates an additional unwritten caveat: that the level of insurance protection which was previously seen as the norm might nowadays often prove too narrow and therefore insufficient to meet the insurance needs of present-day parties in an international sale of goods. It is also submitted that the recent developments are likely to reduce the number of cases of double insurance.