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**LLM IN INTERNATIONAL TRADE LAW – LM003**

**CML5674W: MASTERS IN INTERNATIONAL TRADE LAW DISSERTATION**

**TITLE:**

*Can the parties to an international sale contract on CIF Incoterms varied in the oil and gas industry achieve the objective of linking the passing of ownership in the petroleum products that are sold from England to South Africa to the passing of risk in those petroleum products by indicating such intention in their contract of sale?*

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## TABLE OF CONTENTS

Can the parties to an international sale contract on CIF Incoterms varied in the oil and gas industry achieve the objective of linking the passing of ownership in the petroleum products that are sold from England to South Africa to the passing of risk in those petroleum products by indicating such intention in their contract of sale? .....	1
<b>INTRODUCTION.....</b>	<b>6</b>
I AIM OF THE DISSERTATION.....	6
II BACKGROUND.....	6
III STRUCTURE OF THE DISSERTATION.....	7
<b>CHAPTER 2 INTERNATIONAL SALE CONTRACTS ON CIF INCOTERMS® 2010</b>	<b>8</b>
I INTRODUCTION.....	8
II CIF INCOTERMS® 2010 .....	9
III LOCATED WITHIN THE BROADER INTERNATIONAL CONTRACT OF SALE ....	15
IV DISCHARGE OF SELLER’S OBLIGATION TO DELIVER .....	15
V PASSING OF RISK.....	16
VI PASSING OF OWNERSHIP .....	17
(a) Role of the bill of lading as a document of title .....	17
(b) South African law.....	24
(c) English law .....	26
(d) Conflict of laws or the same result? .....	27
<b>CHAPTER 3 CONTRACTUAL VARIATION OF CIF INCOTERMS® 2000/2010 .....</b>	<b>28</b>
I INTRODUCTION.....	28
II OUTLINE OF CONTRACTUAL PROVISIONS .....	29
III DIFFERENCE IN RELATION TO STANDARD CIF INCOTERMS® 2010.....	31
IV TRANSFER OF RISK.....	31
V APPLICATION OF THE LAW TO THE TRANSFER OF OWNERSHIP .....	33
(a) Application of South African Property Law requirements.....	34
(b) Application of English Property Law requirements.....	35

<b>CHAPTER 4 EVALUATION OF THE EFFECTIVENESS OF THE CONTRACTUAL PROVISIONS.....</b>	<b>36</b>
I INTRODUCTION .....	36
II VARIOUS DOUBTS .....	37
III ANALYSIS OF THE RELEVANT LAW .....	38
(a) South African law .....	39
(b) English law .....	40
(c) Conflict of laws .....	41
IV POSSIBLE SOLUTIONS TO THE DOUBTS EXPRESSED .....	41
<b>CHAPTER 5 CONCLUSION .....</b>	<b>44</b>
<b>BIBLIOGRAPHY .....</b>	<b>45</b>

## INTRODUCTION

### I AIM OF THE DISSERTATION

This dissertation aims to focus on whether the parties to an international sale contract on CIF Incoterms varied in the oil and gas industry, specifically the petroleum sector, achieve the objective of linking the passing of ownership in the petroleum products<sup>1</sup> sold from England to South Africa, to the passing of risk in those petroleum products by indicating such intention in their contract of sale?

### II BACKGROUND

This question arises in relation to doubts expressed about whether two clauses used in the petroleum sector are effective in achieving this objective ie by ensuring that the transfer of risk and ownership must pass at the same time.

The two contractual clauses, in use in relation to CIF Incoterms® 2000 and 2010 respectively, read as follows:

*If Incoterms® 2000 apply:* ‘The title and risk in the petroleum products purchased and sold under the terms of this CIF international contract of sale shall pass from the seller to the buyer at the loading port as the petroleum products “pass the flange connection between the delivery hose and the permanent hose connection of the vessel.”’<sup>2</sup>

*If Incoterms® 2010 apply:* ‘The risk in and title to the petroleum products purchased and sold under the terms of this CIF international contract of sale shall transfer from the seller to the buyer once the petroleum products are loaded, stowed and secured on the vessel at the loading port.’<sup>3</sup>

Although the wording in each clause is different, what they are intended to achieve is the same. Both contractual provisions vary the standard CIF Incoterms by including the transfer of ownership from the seller to the buyer and linking same to the transfer of risk.

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<sup>1</sup> Petroleum products are defined in the Petroleum Products Act No. 120 of 1977 as ‘any liquid petroleum fuel and any lubricant, whether used or unused, and includes any other substance which will be used for a purpose for which petroleum fuel or any lubricant may be used.’

<sup>2</sup> An example drawn from the petroleum sector in respect of a typical risk and title clause contained in a standard CIF international contract of sale in the oil and gas industry where the contracting parties agree for Incoterms®2000 to apply. In addition, reference can be made to the TOTAL ‘General Terms and Conditions for CFR/CIF/Delivered Ex Ship Sales of Petroleum Products/Feedstocks and Liquefied Petroleum Gas’ 2007 edition available from <http://www.totsa.com/pub/about/GTCs%20TOTAL-PROD-CFR-CIF-DES%202007.pdf> accessed on 17 February 2014.

<sup>3</sup> An example drawn from the petroleum sector in respect of a typical risk and title clause contained in a standard CIF international contract of sale in the oil and gas industry where the contracting parties agree for Incoterms®2010 to apply. In addition, International Chamber of Commerce *Incoterms® 2010* by the International Chamber of Commerce (ICC) – ICC rules for the use of domestic and international trade terms (2010) 105-106, hereinafter referred to as ‘Incoterms 2010’, states that ‘the buyer bears all risks and loss of or damage to the goods from the time they have been delivered [by the seller]. The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered.’

This is achieved where both the transfer of ownership and the transfer of risk must occur at the same point in time namely at the port of loading. The standard CIF Incoterms are silent on the transfer of ownership and only deals with the transfer of risk in the goods sold from the seller to the buyer.

There are certain doubts expressed in relation the abovementioned contractual provisions. These doubts relate to the fact that the transfer of ownership cannot be contractually determined and should be left to the relevant and applicable principles of property law. In this regard, the relevant and applicable principles of property law in both South Africa and England will be discussed. This will be dealt with in more detail in the dissertation and will show that the outcome in respect of South African property law and English property law indeed differs.

It will be argued whether or not these contractual clauses are effective in achieving their intended objective.

### **III STRUCTURE OF THE DISSERTATION**

Chapter 2 will outline the standard CIF Incoterms, which are silent on the issue of passing of ownership but contain provisions relating to the passing of risk. In addition, the seller's obligation amongst others to deliver the goods and the relevant documents relating to those goods will be discussed.

Chapter 3 will discuss the aforementioned varied CIF contractual provisions as they appear in an international contract of sale in the oil and gas industry for the sale of petroleum products.

Chapter 4 will be an evaluation of the doubts and a brief outline of the arguments about whether the contractual arrangements for the passing of risk and ownership in international sales of petroleum products on CIF Incoterms varied are effective in achieving the parties' objectives. Either these doubts are well-grounded or they have no basis? The doubts expressed relate to whether one can link the time when ownership passes to the time when the risk passes in the petroleum products from the seller to the buyer. The determination of when the transfer of risk can take place is contractual. Essentially the question is whether it is possible for the parties to determine contractually that ownership will pass at the same time when the risk in the petroleum product passes. This is indeed what the aforementioned contractual provisions attempt to do. The question arises because the time at which ownership passes, at least in South African law, is determined with reference to property law principles

and not by contractual principles. Presumably this is the basis of the doubts about the efficacy of these contractual clauses in achieving their objective.

This dissertation will conclude that since contractual parties strive to achieve uniformity and to standardise certain risk and ownership provisions, the above contractual provisions do succeed in linking the passing of ownership of corporeal movable property to the passing of risk in that property under the international contract of sale.

## **CHAPTER 2 INTERNATIONAL SALE CONTRACTS ON CIF INCOTERMS® 2010**

### **I INTRODUCTION**

The main point of departure in international trade is the contract of sale between the seller in one country, for example in England and the buyer in another country, for example in the Republic of South Africa. As a result, the focus will be on the law of South Africa and the law of England. In addition, English law is also the preferred contracting law in the oil and gas industry when dealing with international oil companies and international trading companies. Furthermore, parties enter the international contract of sale on CIF Incoterms freely and they determine the nature and content of such international contract of sale.<sup>4</sup> In addition, the international contract of sale on CIF Incoterms governs the exportation and importation of the goods.<sup>5</sup> The reason for selecting and focussing on the CIF international contract of sale is that it is ‘undoubtedly the most important of the contracts based on the carriage of the goods by sea, if not all sale transactions’<sup>6</sup> and it is often used in the oil and gas industry. When the CIF international contract of sale is used in the oil and gas industry, specifically in the petroleum sector, it is not necessarily on the standard CIF Incoterms but a variation thereof as will be discussed in the next chapter.

The standard CIF Incoterm® 2000/2010 will be discussed in detail as well as the seller’s obligations to deliver accordingly. The CIF Incoterm is a delivery term, which regulates the passing of risk in the movable goods, in particular when the risk passes. The risk passes from the seller to the buyer at the loading port. These CIF Incoterms are silent on the passing of ownership in the movable goods. However, these terms envisage the issue of a bill of lading to the seller and the delivery of that bill of lading to the buyer. One of the functions

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<sup>4</sup> Article 1.1 (Freedom of contract) of the ‘UNIDROIT Principles of International Commercial Contracts 2004 & 2010’ available from <http://www.unidroit.org/english/principles/contracts/main.htm> accessed on 9 September 2013.

<sup>5</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 56.

<sup>6</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 58.

of the bill of lading is that of a document of title. This means that the movable goods are symbolically represented by the bill of lading. Furthermore, the bill of lading is a means to effect constructive delivery of the movable goods, which suffices to meet one of the requirements under South African law for the transfer of ownership of movable property. Accordingly, this chapter will discuss the role of the bill of lading as a document of title as well as the relevant property law for the transfer of ownership.

## II CIF INCOTERMS® 2010

As the ‘CIF (insert named port of destination) Incoterms® 2010’ term suggests, the main elements are Cost, Insurance and Freight.<sup>7</sup> CIF Incoterms® 2010 is a delivery term, which is a standard trade term in widespread international use<sup>8</sup> developed by the International Chamber of Commerce (hereinafter referred to as the ‘ICC’). Traders in the oil and gas industry will generally select the CIF Incoterm because most of the obligations are imposed on the seller and the structure of the CIF price seems to be of more value than a sale for petroleum products based on the FOB Incoterm. As reflected in *Loders and Nucoline v Bank of New Zealand*<sup>9</sup> case, with regard to the CIF price, the court held that,

‘It is perfectly true that in the contract price there are included both cost, freight and insurance, that is to say, that the seller in consideration of that contract price has not only to provide the goods but he has to ship<sup>10</sup> them at the appropriate port on a vessel under [an appropriate contract of carriage] on which he is liable and also to provide the insurance; but though these are the obligations of the seller the price in fact is an indivisible price.... The seller must take the risk of what he will have to pay for freight. Whatever he has to pay that falls on him and it is for him to determine the total price, estimating it as well as he can.’<sup>11</sup>

The three main documents in a CIF international contract of sale are (i) original commercial invoice,<sup>12</sup> (ii) the policy of insurance<sup>13</sup> or original insurance certificate<sup>14</sup> or

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<sup>7</sup> Incoterms 2010 at 105.

<sup>8</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 73.

<sup>9</sup> *Loders and Nucoline v Bank of New Zealand* (1929) 33 L1 L Rep 70.

<sup>10</sup> *Aruna Mill Ltd v Dhanrajmal Gobindram* [1968] 1 All ER 113: ‘Stipulations in a cif contract of sale as to the time and place of shipment are ordinarily conditions of the contract, a breach of which entitles the buyer to refuse to accept the documents [i.e. the bill of lading] when presented. The importance of such a stipulation and the strictness with which it is construed are not altered by the fact that a buyer is obliged to or chooses to accept the documents [i.e. the bill of lading] relating to goods shipped out of time.’

<sup>11</sup> *Loders and Nucoline v Bank of New Zealand* (1929) 33 L1 L Rep 70 at 73.

<sup>12</sup> Incoterms 2010 at 108.

<sup>13</sup> Incoterms 2010 at 110-111.

<sup>14</sup> Incoterms 2010 at 110-111.

‘insurance company's cover note’<sup>15</sup> and (iii) full set(s) of three (3/3) original Bills of Lading issued or properly endorsed to the order of the Buyer,<sup>16</sup> representing respectively the three elements of CIF namely Cost, Insurance and Freight.<sup>17</sup> Additional documents may be tendered by the seller to the buyer under a CIF international contract of sale namely ‘original certificate(s) of quantity, quality and origin (or equivalent documents issued at the Loading Terminal)’.<sup>18</sup> It is worth outlining the essential documents namely the original commercial invoice, policy of insurance or insurance certificate and bill of lading, which relate to the CIF Incoterm in more detail because the seller needs to provide all these basic documents at once to the buyer in order to discharge its contractual obligations in a CIF international contract of sale.<sup>19</sup>

The original commercial invoice will contain specific details, including but not limited to, the nature of the product, the agreed price of the goods, which is considered to be the FOB price,<sup>20</sup> the cost of carriage or freight and insurance.<sup>21</sup> For example in the oil and gas industry based on the contractual parties’ payment terms (for example, if parties agree to a specific pricing mechanism over a period of time such as a whole month average of 1-31 August 2013 where both dates are inclusive but when provisional payment has to be effected on the 20<sup>th</sup> of August 2013, the available known pricing quotations<sup>22</sup> for the month will be used and once all the pricing dates for the month is known, a revised final invoice is issued and the

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<sup>15</sup> BP Oil International Limited ‘General terms and conditions for sales and purchases of petroleum products’ 2007 edition at 43 paragraph 30.1.2 with regard to payment documents in the case of delivery CIF.

<sup>16</sup> BP Oil International Limited ‘General terms and conditions for sales and purchases of petroleum products’ 2007 edition at 43 paragraph 30.1.2 with regard to payment documents in the case of delivery CIF.

<sup>17</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 70.

<sup>18</sup> BP Oil International Limited ‘General terms and conditions for sales and purchases of petroleum products’ 2007 edition at 43 paragraph 30.1.2(c) with regard to payment documents in the case of delivery CIF.

<sup>19</sup> In *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* [1959] 1 All SA 308 (W) at 314, the following was stated: ‘To guard against the risk of non-delivery by the shipowner the c.i.f. contract requires the seller to take out a policy of marine insurance upon which the buyer may sue: and thus a person who holds both the bill of lading and the policy of marine insurance upon the goods is generally speaking for business purposes in as good a position as if the goods were actually in his possession. For this reason the delivery to the buyer of a bill of lading and a policy of insurance on the goods together with the invoice which identifies them is treated both commercially and legally as satisfying the contractual obligations of the seller under the c.i.f. contract.’

<sup>20</sup> *Salomon v Commissioners of Customs and Excise* [1966] 3 All ER 871 at 874, ‘[i]f the actual invoice price is for delivery on [CIF Incoterms], it may need very little adjustment; but if the actual invoice price is on [FOB Incoterms], it will need considerable adjustment so as to make it equivalent to [CIF Incoterms]. Once the necessary adjustments have been made, then if the Commissioners [i.e. tax authorities] are satisfied that it is bona fide, they can accept the actual invoice price as the proper value for duty.’ In terms of the South African legislation, namely Section 66 of the Customs and Excise Act No. 91 of 1964, there are six different methods of valuation in terms of how imported merchandise is appraised, which must be applied in the following order: 1. ‘Transaction Value; 2. Transaction Value of Identical Merchandise; 3. Transaction Value of Similar Merchandise; 4. Deductive Value; 5. Computed Value; and 6. Values if Other Values Cannot be Determined, the “fall-back” method.’

<sup>21</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 70.

<sup>22</sup> BP Oil International Limited ‘General terms and conditions for sales and purchases of petroleum products’ 2007 edition at 44 paragraph 30.3.2.1.

necessary adjustments are made accordingly i.e. whether the seller needs to reimburse the buyer or the buyer to pay an additional amount), a provisional invoice<sup>23</sup> is issued by the seller to the buyer in order to effect payment (for example payment could be due thirty days from the bill of lading date or five days from the completion of discharge of the product at the port of destination, whichever is the later). The nature of the provisional invoice was described in *Ross T Smyth & Co Ltd v Bailey, Son & Co*<sup>24</sup> as:

‘No doubt the provisional invoice is not a tender and cannot be taken to be more than an intimation of the way in which the sellers intend to perform their contract, but it is not necessarily even that. It may be no more than an intimation of the way in which the sellers were willing, as a concession to the buyers, to perform the contract.’<sup>25</sup>

Hence the seller must provide the original commercial invoice to the buyer in order to discharge one of its obligations in terms of the CIF Incoterm. Once the seller provides the original commercial invoice together with the other documents, namely the insurance certificate and bill of lading, then only the seller will receive payment in return from the buyer.

In addition, the seller must provide a policy of insurance or insurance certificate in order to be compliant with the CIF Incoterm. In terms of the international contract of sale based on the CIF Incoterm, the seller must tender a ‘valid and effective’<sup>26</sup> policy of marine insurance or certificate of marine insurance<sup>27</sup> in respect of the goods to the buyer.<sup>28</sup> The seller is only required to obtain minimum insurance cover.<sup>29</sup> Should the buyer require or wish to

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<sup>23</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 70.

<sup>24</sup> *Ross T Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60.

<sup>25</sup> *Ross T Smyth & Co Ltd v Bailey, Son & Co* [1940] 3 All ER 60 at 7.

<sup>26</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 76.

<sup>27</sup> From a practical point of view in the oil and gas industry, it is common practice in international oil contracts that a certificate of insurance and not a policy of insurance are provided by the seller to the buyer. The insurance certificate is generally accepted as being adequate as it will confirm the insurance coverage that the seller arranged for the duration of the contract and/or until the product is unloaded at the discharge port. The entire insurance policy will not be provided by the seller to the buyer in a CIF international contract of sale because it will contain certain confidential and commercially sensitive information that the seller would not want to disclose to the buyer and/or any other party. In addition, the seller wants to ensure that it is compliant with the relevant competition laws thereby not disclosing its commercially sensitive information, which is contained in the relevant insurance policy.

<sup>28</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 75.

<sup>29</sup> Incoterms 2010 at 105 and 110 reiterates the seller’s obligation to arrange for minimum insurance cover and should the buyer require additional insurance coverage, then the buyer should arrange this at its own expense. In terms of the CIF Incoterms, it is stated under the seller’s obligations in respect of the contract of insurance that ‘[t]he seller must obtain, at its own expense, cargo insurance complying at least with the minimum cover provided by Clauses (C) of the Institute Cargo Clauses (LMA/IUA) or any similar clauses. The insurance shall be contracted with underwriters or an insurance company of good repute and entitle the buyer, or any other person having an insurable interest in the goods, to claim directly from the insurer. When required by the buyer, the seller shall, subject to the buyer providing any necessary information requested by the seller, provide at the buyer’s expense any additional cover, if procurable, such as cover provided by Clauses (A) or (B) of the

have additional marine insurance cover, the buyer will have to take out additional insurance cover at its own expense and costs either through the seller or through its own insurance underwriters.<sup>30</sup> The minimum insurance policy, or certificate of insurance,<sup>31</sup> is generally assignable from the seller to the buyer as the risk being covered is essentially the same i.e. the risk of loss of or damage to the goods before and during shipment<sup>32</sup> until the goods are discharged at the port of destination.<sup>33</sup> For example, if the goods are lost after shipment, the seller can still request that payment be made by the buyer because the buyer will be able to execute on the insurance certificate and/or policy that covers the goods, provided of course that the buyer is adequately covered under the relevant insurance certificate and/or policy.<sup>34</sup>

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Institute Cargo Clauses (LMA/IUA) or any similar clauses and/or cover complying with the Institute War Clauses and/or Institute Strikes Clauses (LMA/IUA) or any similar clauses. The insurance shall cover, at a minimum, the price provided in the contract plus 10% (i.e. 110%) and shall be in the currency of the contract. The insurance shall cover the goods from the point of delivery...to at least the named port of destination. The seller must provide the buyer with the insurance policy or other evidence of insurance cover. Moreover, the seller must provide the buyer, at the buyer's request, risk, and expense (if any), with information that the buyer needs to procure any additional insurance'. Furthermore, English case law reasserts the position that in order for the seller to discharge its obligation in respect of acquiring cargo insurance, only minimum cargo insurance is required as illustrated in *Groom Ltd v Barber* [1915] 1 KB 316, where 'goods were sold [CIF] London on terms which provided for insurance not including war risks. The sale contract also expressly provided that war risks were for the buyer's account. War broke out after shipment and the goods were lost. The buyer declined to accept the policy. It was held that the policy was normal and valid and that the contract term on war risks did not mean that the seller was to insure against war risks and charge the buyer. The buyer was accordingly bound to accept the policy even though it in fact gave him no indemnity for the loss.

<sup>30</sup> Incoterms 2010 at 105.

<sup>31</sup> A certificate of insurance will only be assignable if allowed in terms of the actual marine insurance policy as stated in *Diamond Alkali Export Corp v Bourgeois* [1921] 3 KB 443 at 456 per McCardie J: '...before the buyer could sue at all he would have to show that he was the assignee of the certificate...In what way can he become the assignee?...The relevant statutory provision...says, "A marine policy may be assigned by endorsement thereon or in other customary manner." This subsection only applies, so far as I can see, to that which is an actual marine policy.'

<sup>32</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 77 states that '[t]he insurance policy must give the buyer the same continuous documentary cover as is required in respect of the bill of lading. In practice, it will usually do so, since the almost invariable custom is to employ a policy containing what is called a "Warehouse to Warehouse" or "Transit" clause, which gives protection during the whole of the transit. Even if there appears to be an interruption in the period of cover, it may be that the cover is in fact maintained. In *Belgian Grain and Produce Co v Cox & Co (France) Ltd* [1919] WN 308 'peas sold [CIF] Marseilles from Japan were carried on different stages by three different ships. Tender of the policy was refused on the grounds that it covered the goods only in the first two ships. The policy contained, however, a clause extending cover to all situations caused by the carrier's taking advantage of any liberty afforded him by the contract of carriage. As the contract of carriage permitted transshipment of the goods, the policy was in operation throughout the transit.'

<sup>33</sup> 'The seller need not take out the policy expressly for the benefit of the buyer. It is sufficient that it may be assigned to the buyer on tender. The seller will normally wish to cover himself against the risk of loss of or damage to the goods while they are at his risk, which will usually be during the period before shipment. The policy must therefore be capable of being transferred to any other party at whose risk the goods are, or will be, by a simple note of the transfer on the policy itself. If the policy were not assignable in this way the buyer would not easily be able to transfer it should he resell the goods to which it relates. This difficulty does not usually arise with policies themselves, since they are almost invariably assignable, but it may well do so if some document other than a policy is tendered.' This was stated in DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 76.

<sup>34</sup> Jason Chuah *Law of International Trade* 1998 at 137.

This can be illustrated by *Comptoir D'achat Et De Vente Du Boerenbond Belge SA v Luis De Ridder, Limitada*,<sup>35</sup> where the House of Lords held that,

'... the property may pass either on shipment or on tender, the risk generally passes on shipment or as from shipment, but possession does not pass until the documents [invoice, insurance policy and bill of lading] which represent the goods are handed over in exchange for the price. In the result, the buyer, after receipt of the documents [invoice, insurance policy and bill of lading], can claim against the ship for breach of the contract of carriage and against the underwriters for any loss covered by the policy'.<sup>36</sup>

Lastly, the seller must provide the buyer with the bill of lading<sup>37</sup> document. The bill of lading has three functions, namely receipt of the goods being shipped, as evidence of the

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<sup>35</sup> *Comptoir D'achat Et De Vente Du Boerenbond Belge SA v Luis De Ridder, Limitada* [1949] 1 All ER 269.

<sup>36</sup> *Comptoir D'achat Et De Vente Du Boerenbond Belge SA v Luis De Ridder, Limitada* [1949] 1 All ER 269 at 275.

<sup>37</sup> *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] 3 All ER 369 at 399; [2003] EWCA Civ 556 case, the following was stated: 'We have also opted against a definition of "bill of lading", just as there is no definition under the 1855 Act of the Factors Act. Under the present law, a bill of lading is usually identified by reference to its three functions, i.e. that it is a receipt for the goods, that it usually evidences the contract of carriage and that it may be a document of title (at least until complete delivery of the goods has been made to the person entitled thereto). However, to attempt a definition, which would necessarily be elaborate would, we feel, be counterproductive, particularly as there are many documents which are called bills of lading but which are not bills of lading properly so-called: for instance, a standard ocean "shipped" bill of lading is radically different from a so-called "house" bill of lading, which is really no more than a merchant's delivery order...' Furthermore, in the same case i.e. *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] 3 All ER 369 at 370; [2003] EWCA Civ 556, the following distinction between a straight bill of lading and classic bill of lading was made: 'A straight bill of lading, although non-negotiable, was to be viewed as a bill of lading within the meaning of the [International Convention for the Unification of certain Rules of Law relating to Bills of Lading, 1924 Brussels – the Hague Rules]. The [Hague Rules] were concerned with the content of a contract of carriage in circumstances where such a contract as found in a bill of lading might come to affect a third party into whose hands such a bill was transferred. A named consignee under a straight bill, unless he was the same person as the shipper, was as much a third party as a named consignee under a classic bill. A straight bill, in practice, was just like a classic bill, as a document against which payment was required and the transfer of which thus marked the intended transfer of property. The shipper and his bankers and insurers needed the same protection as the shipper under a classic bill; and the consignee himself and his insurers in turn needed to have rights against the carrier under the contract of carriage. The practice was also that a straight bill was written on the form of an otherwise classic bill, and required production of the bill on delivery. Furthermore, a straight bill was in principle, function and form much closer to a classic negotiable bill than to a non-negotiable receipt.' In the same case, the term negotiable bill of lading was explained as follows: 'Note 1 "Negotiable" as a term of art describes an instrument which can give to a transferee a better title than that possessed by the transferor. A bill of lading is not "negotiable" in this sense: the indorsee does not get better title than his assignor. Indeed a bill of lading is "negotiable" only in a popular, and not in a technical, sense. For it is "negotiable" to the same extent as a cheque marked "not negotiable", i.e. it is "transferable"' as stated in *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] 3 All ER 369 at 372; [2003] EWCA Civ 556. It is further stated in *JJ MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] 3 All ER 369 at 372; [2003] EWCA Civ 556: 'It is well settled that "Negotiable", when used in relation to a bill of lading, means simply transferable. A negotiable bill of lading is not negotiable in the strict sense; it cannot, as can be done by the negotiation of a bill of exchange, give to the transferee a better title than the transferor has got, but it can by endorsement and delivery give as good a title. But it has never been settled whether delivery of a non-negotiable bill of lading transfers title or possession at all. The bill of lading obtains its symbolic quality from the custom found in *Lickbarrow v Mason* (1787) 2 Term Rep 63, 100 ER 35) and that is a custom which makes bills of lading "negotiable and transferable" by endorsement and delivery or transmission. To the same effect the Bills of Lading Act, 1855, recites that a bill of lading is by custom of merchants "transferable by

contract of carriage between the carrier and the consignor and a document of title to the goods covered by it.<sup>38</sup> The bill of lading is used as one of the payment documents to either issue a letter of credit<sup>39</sup> or to effect payment.<sup>40</sup> The bill of lading once ‘tendered must give the buyer “continuous documentary cover” and if it does not provide continuous cover, then it is said not to be a ‘valid tender.’<sup>41</sup> In addition, such tender of the bill of lading by the seller to the buyer must be done ‘as soon as possible.’<sup>42</sup> For example, if the contract of sale refers to an exact date or time period in which the bill of lading should be tendered, the buyer has the right to reject the document if tendered late or not within the required and agreed time period.<sup>43</sup> Although all three functions are important, for the purposes of this dissertation, the focus will be on the function of the bill of lading as a document of title to the goods covered by it. This will be discussed in more detail under the heading of the role of the documents, particularly the bill of lading as a document of title to effect the transfer of ownership.

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endorsement”. There appears to be no authority on the effect of a non-negotiable bill of lading. This is not surprising. When consignor and consignee are also the seller and buyer, as they most frequently are, the shipment ordinarily serves as delivery (Sale of Goods Act, 1893, sect. 32(1)) and also as an unconditional appropriation of the goods (sect. 18, rule 5(2)) which passes the property. So as between seller and buyer it does not usually matter whether the bill of lading is a document of title or not.’ This extensive quotation is necessary because although there is not a specific definition for the bill of lading, reference should be made to the three functions of the bill of lading. However, this dissertation will only focus on one of the functions of the bill of lading, namely that of a document of title as this is important in respect of determining when the transfer of ownership from the seller to the buyer can take place and to meet at least one of the property law requirements in terms of South African law.

<sup>38</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 147.

<sup>39</sup> ‘The general course of international commerce involves the practice of raising money on the documents so as to bridge the period between the shipment and the time of obtaining payment against documents’ as stated by Lord Wright in *TD Bailey, Son & Co v Ross T Smyth & Co Ltd* (1940) 56 TLR 825 at 828.

<sup>40</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 153.

<sup>41</sup> *Hansson v Hamel & Horley Ltd* [1922] 2 AC 36 at 46 [that] ‘goods sold cif Yokohama by a Norwegian seller could not be carried directly to Japan from the Norwegian ports of shipment and were therefore taken by one ship to Hamburg where they were transhipped into another vessel for the rest of the voyage. A bill of lading was issued in Hamburg which purported to cover the entire transit. Thirteen days had elapsed between the shipment of the goods at the Norwegian ports and the issue of this bill of lading. The House of Lords, upholding the Court of Appeal, held that the tender of this bill of lading was not valid under a cif contract [and stated] “I am quite sure that, under the circumstances of this case, this ocean bill of lading does not satisfy these conditions. It bears notice of its insufficiency and ambiguity on its face; for though called a through bill of lading, it is not really so. It is the contract of the subsequent carrier only...and the buyer was plainly left with a considerable lacuna in the documentary cover to which the contract entitled him.”’

<sup>42</sup> *Landauer & Co v Craven and Speeding Bros* [1912] 2 KB 94 at 105.

<sup>43</sup> *Alfred C Toepfer v Verheijdens Veervoeder Commissiehandel* (1978) 122 Sol Jo 417 case that involved a CIF contract and a specific clause therein stated: “‘Payment: net cash against documents...on arrival of the vessel at port of discharge but not later than 20 days after bill of lading.’ Bills of lading were issued on 11 December 1974. The documents were tendered in February 1975 but were rejected by the buyers as being out of time. It was held that they were entitled to do so in view of the express clause.”

### **III LOCATED WITHIN THE BROADER INTERNATIONAL CONTRACT OF SALE**

The international contract of sale on CIF Incoterms® 2010 is located within the broader international contract of sale. Briefly stated, for the contract of sale to be effected, the following *essentialia*<sup>44</sup> must be met: (i) agreement to sell and purchase i.e. the existence of the parties' intention and consensus reached; (ii) the *merx* i.e. product that is clearly identified or ascertainable; (iii) clearly ascertainable price to be payable; and (iv) delivery of the product.<sup>45</sup> The seller undertakes<sup>46</sup> and has the obligation to deliver the product to the buyer in terms of the contract of sale and more specifically, in terms of the relevant standard delivery terms<sup>47</sup> as agreed to between the parties. Incoterms® 2010 are used in the application to both international and domestic sale contracts.<sup>48</sup> This brief outline is important because further in the dissertation, these basic principles of a contract become of significance when discussing the transfer of risk and ownership of movable goods from the seller to the buyer.

### **IV DISCHARGE OF SELLER'S OBLIGATION TO DELIVER**

The seller's obligations are significant because it can assist the contractual parties to an international contract of sale to ensure that the seller is acting in conformance with the CIF Incoterm. In addition, the seller's obligations are directly linked with the various documents that the seller must provide to the buyer in order to receive payment. The seller for example, will not provide the bill of lading document to the buyer alone without the other important documents namely the commercial invoice, certificate of insurance and evidence of the carriage of goods. The buyer in turn will not effect payment if these documents are not provided by the seller. Hence, these documents cannot exist independently from the bill of lading, in other words, these documents are directly intertwined with each other. The seller's principal obligations under an international contract of sale on CIF Incoterms were described by the court in the *Johnson v Taylor Bros*<sup>49</sup> case as follows:

‘The [seller] in the absence of any special provision to the contrary is bound by his contract to do six things. First, to make out an invoice of the goods sold. Second, to ship at the port of shipment goods of the description contained in the contract. Third, to procure a contract of affreightment under which the goods will be delivered at the

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<sup>44</sup> ‘Essentialia’ are defined as the characteristic features of a contract of sale as stated in JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 67.

<sup>45</sup> Incoterms 2010 at 6 and 10.

<sup>46</sup> Incoterms 2010 at 6.

<sup>47</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 73.

<sup>48</sup> Incoterms 2010 at 8.

<sup>49</sup> *Johnson v Taylor Bros* [1920] AC 144 at 145.

destination contemplated by the contract. Fourth, to arrange for insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable despatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of [insurance], delivery of which to the buyer is symbolical of delivery of the goods purchased,<sup>50</sup> placing the same at the buyer's risk and entitling the seller to payment of their price.<sup>51</sup>

In essence, the seller's obligation to deliver is discharged by placing the goods on board the vessel or 'by procuring the goods so delivered'.<sup>52</sup> In addition, the seller must deliver the goods on an agreed date or within a specific time period as agreed between the seller and the buyer and in the manner customary at the relevant loading port.<sup>53</sup> In this regard the seller must arrange for the contract of carriage. The international contract of sale on CIF Incoterms is 'inextricably entwined with other aspects of international trade'<sup>54</sup> namely carriage of goods by sea. This relates to the fact that the seller must contract or procure a contract for the carriage of the goods by sea from the place of delivery to the named port of destination.<sup>55</sup> Such a contract of carriage must be made on usual terms and/or standard terms and conditions common to both parties at the seller's expense.<sup>56</sup> In addition, the contract of carriage must provide for carriage of the goods by the 'usual route in a vessel of the type normally used for the transport of the type of goods sold.'<sup>57</sup> The buyer does not have the obligation to secure a contract of carriage as this obligation rests solely with the seller.<sup>58</sup> The terms and conditions of the contract of carriage may appear on the reverse side of the bill of lading.

## V PASSING OF RISK

Under general or standard CIF Incoterms® 2010 the point at which risk in the goods sold passes is at the point of loading from the seller to the buyer,<sup>59</sup> and that, since the point at

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<sup>50</sup> In *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd William Lillico & Son Ltd and another, Third Parties; Henry Kendall & Sons and another, Fourth Parties* [1966] 1 All ER 309 at 327 it was stated that, '[a]s delivery takes place under a [CIF international contract of sale] when and where the documents are taken up...on a [CIF international contract of sale] but where the documents are not taken up the property is deemed to have passed at the foreign port of shipment.'

<sup>51</sup> *Johnson v Taylor Bros* [1920] AC 144 at 145.

<sup>52</sup> Incoterms 2010 at 110.

<sup>53</sup> Incoterms 2010 at 110.

<sup>54</sup> J Hare *Shipping Law & Admiralty Jurisdiction in South Africa* 2 ed (2009) 570.

<sup>55</sup> Incoterms 2010 at 110.

<sup>56</sup> Incoterms 2010 at 110.

<sup>57</sup> Incoterms 2010 at 110.

<sup>58</sup> Incoterms 2010 at 110.

<sup>59</sup> Incoterms 2010 at 105 and 112. 'The seller bears all the risk of loss or damage to the goods until [the goods] have been delivered [at the loading port].'

which this risk passes is contractually determined, it is possible to vary that term to provide for the passing of risk at some other time.

## **VI PASSING OF OWNERSHIP**

With regard to the passing of ownership in the goods sold, the standard CIF Incoterms® 2000/2010 are silent on the issue though they do have provisions relating to the seller's obligation to deliver the goods and the relevant documents (ie original commercial invoice, insurance certificate and bill of lading) under the international contract of sale. In turn, the buyer has the obligation to take delivery of the movable goods and the documents.

The usual intention in CIF contracts is that ownership should pass with constructive delivery, in the form of transfer of possession of the bill of lading in respect of the goods. The passing of ownership is determined by the applicable principles of property law. The general position with regard to passing of ownership is based on the property law principles of the national legal system of a country. The abovementioned will be discussed in more detail under separate sub-headings.

### *(a) Role of the bill of lading as a document of title*

The following proposition will be discussed in that the contractual arrangements with regard to delivery of the movable goods and documents are generally taken to indicate the parties' intention that ownership should pass on delivery of the bill of lading that effects the transfer of constructive possession of goods which, with requisite intention, effects transfer of ownership of goods covered by bill of lading. The intention behind an international CIF contract of sale is interlinked with the important role relating to the exchange of documents, namely, the original commercial invoice, bill of lading and certificate of insurance and/or insurance policy<sup>60</sup> specifically the transfer of the bill of lading and payment in return. In *Golden Meats & Seafood Supplies CC v Best Seafood Import CC*,<sup>61</sup> it is stated that 'the role of the bill of lading depends upon the terms of the underlying contract of sale.'<sup>62</sup> As stated in the preceding paragraphs, the transfer of ownership in the movable goods is determined with reference to property law principles.

As stated in the preceding paragraphs, although the bill of lading has three functions, this dissertation is concerned about the function of the bill of lading as a document of title to the goods covered by it. Accordingly, this section will outline and describe the role of the bill

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<sup>60</sup> Jason Chuah *Law of International Trade* 1998 at 137.

<sup>61</sup> *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD).

<sup>62</sup> *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) at 14.

of lading as the main document in a CIF international contract of sale specifically with its function as a transferable document of title to the goods covered by and described in it.<sup>63</sup> In light of its function as a document of title, the bill of lading is ‘central to the smooth functioning of modern international trade.’<sup>64</sup> The importance of the bill of lading as a function of a document of title, was outlined in the *Ross T Smyth & Co. Ltd v. Bailey Son & Co. Ltd*<sup>65</sup> case, where the following was stated ‘the general property remains in the seller until [the seller] transfers the bill of lading...By mercantile law; the bills of lading are the symbols of the goods. The general property in the goods must be [with] the seller...’<sup>66</sup> The significance of the role of the bill of lading relates to the transfer of ownership ie the transfer of the documents is a transfer of ownership, in particular the bill of lading that is considered to be a document of title. It is also on this basis that payment by the buyer is made to the seller once the bill of lading has been transferred to the buyer and the buyer is in possession of the bill of lading.

In *Motis Exports Ltd v Dampskibsselskabet AF1912 Aktieselskab*,<sup>67</sup> Rix J stated:

‘it is of the essence of [a bill of lading] contract that a shipowner is both entitled and bound to deliver the goods against production of an original bill of lading, provided that he has no notice of any other claim or better title.’<sup>68</sup>

Accordingly, the bill of lading, which is a transferable document of title relating to the goods in question, entitles the holder of the bill of lading or anyone to whom it is subsequently transferred, to obtain possession of the goods from the carrier.<sup>69</sup> The transferability of the bill of lading relates to the transfer of the rights embodied in the document to which the goods relate to the exclusion of all others and as holder acquires the

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<sup>63</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 151.

<sup>64</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 152.

<sup>65</sup> *Ross T Smyth & Co. Ltd v. Bailey Son & Co. Ltd* [1940] 3 ALL E.R.

<sup>66</sup> *Ross T Smyth & Co. Ltd v. Bailey Son & Co. Ltd* [1940] 3 ALL E.R. at 60.

<sup>67</sup> *Motis Export Ltd v Dampskibsselskabet AF 1912 Aktieselskab* [1999] 1 Lloyd’s Rep 837 at 840 and *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) at 11 paragraph 17.

<sup>68</sup> *Motis Export Ltd v Dampskibsselskabet AF 1912 Aktieselskab* [1999] 1 Lloyd’s Rep 837 at 840 and *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) at 11 paragraph 17.

<sup>69</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 151.

right to claim possession of the goods.<sup>70</sup> A further qualification to become the holder of the bill of lading is that it must have been received in good faith.<sup>71</sup>

In *Golden Meats & Seafood Supplies CC v Best Seafood Import CC*,<sup>72</sup> Wallis J, as he then was, refers to the general rule as

‘...in the normal case, the carrier undertakes to deliver the goods, and to deliver them only, to the person in possession of the bill, whether as original shipper or as indorsee of the bill or as consignee. The carrier is not bound to deliver the goods except on production of the bill, and is liable to the holder of the bill if he wrongfully delivers the goods to anyone else.’<sup>73</sup>

In this regard, the carrier is only entitled to release the goods against presentation of the bill of lading by the holder of such document ie the bill of lading.

In respect of the above general rule, Wallis J further states

‘[i]t is for this reason that the ordinary and common practice of carriers is to require that the person claiming delivery of the goods should surrender the original bills of lading.’<sup>74</sup>

Furthermore, it is submitted in the *BP Exploration Co (Libya) Ltd v Hunt (No 2)*<sup>75</sup> that [i]n a cif contract of sale, [the buyer] has two opportunities of rejection: a right to reject the documents [i.e. the bill of lading], and a right to reject the goods, if they are not in accordance with the [cif contract of sale]. All that the *Panchaud*<sup>76</sup> case decided was that if, in a cif contract [of sale], the documents show that the goods were shipped late, and the buyer nevertheless accepts the documents, then, even if [the buyer] has

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<sup>70</sup> *Lendlease Finance (Pty) Ltd v Coporacion de Mercadeo Agricola* 1976 (4) SA 464 (A) state that ‘[t]he holder of the bill ie the person in whose favour it was originally made out or the endorsee thereof, is entitled to the exclusion of all others, to receive the goods at the place of destination. He is thus in the same commercial position as if he were in physical possession of the goods.’

<sup>71</sup> Section 8 of the Sea Transport Documents Act No. 65 of 2000 states: ‘Persons acting in bad faith. (1) Nothing in section 3, 4, 5, 6 or 7 entitles any person in possession of a sea transport document or any person making delivery of any goods to which a sea transport document relates to any right or to any defence to or discharge from any obligation if, at the time when that person acquired possession of the document or made that delivery-(a) in the case of a person acquiring possession, that person knew or had reasonable grounds for believing that- (i) the goods to which the document related had not been shipped or received for shipment; or (ii) the person from whom possession was acquired had no right to transfer the document or any right thereunder; or (b) in the case of a person making delivery, that person knew or had reasonable grounds for believing that the person to whom delivery was made had no right to receive delivery. (2) The onus of proving that subsection (1) (a) or (b) applies is on the person alleging its application.’

<sup>72</sup> *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD).

<sup>73</sup> *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) at 12 paragraph 17.

<sup>74</sup> *Golden Meats & Seafood Supplies CC v Best Seafood Import CC* 2011 (2) SA 491 (KZD) at 12 paragraph 17.

<sup>75</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1982] 1 All ER 925 at 946-947, [1979] 1 WLR 783 at 810-811 and *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co The Manila* [1988] 3 All ER 843.

<sup>76</sup> *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co The Manila* [1988] 3 All ER 843.

failed to notice the late shipment date when [the buyer] took up the documents, [the buyer] will be precluded from thereafter rejecting the goods for that reason. The decision stems from the need for finality in commercial transactions, as does the doctrine of acceptance in contracts for the sale of goods...<sup>77</sup>

The above extract illustrates the significance of the bill of lading and where such a document becomes *prima facie* evidence i.e. once the bill of lading is in the hands of the consignee or holder;<sup>78</sup> the bill of lading is *prima facie*<sup>79</sup> evidence and becomes ‘conclusive evidence in favour of a subsequent holder of the shipment of the goods or of [the goods] receipt for shipment.’<sup>80</sup>

As stated at the outset, the bill of lading has the function of the document of title to claim possession of the goods in question.<sup>81</sup> Accordingly, the bill of lading is seen as a symbol to which the goods relate. Furthermore, possession of the bill of lading by the holder entitles the holder to delivery and possession to the goods.<sup>82</sup> Possession of the goods gives the holder of the bill of lading exclusive control over the goods.<sup>83</sup> The transfer of the bill of lading by negotiation constitutes constructive delivery and not actual delivery of the goods thereby constituting symbolic delivery of the goods.<sup>84</sup> In this regard, at least one of the requirements in terms of South African law with regard to the transfer of ownership of movable property is met. In addition to the transfer of the bill of lading, which constitutes constructive delivery, the transfer of the bill of lading document must be accompanied by the requisite intention to transfer and to receive ownership.<sup>85</sup> This results in the transfer of real rights of the transferor in the goods to the transferee with regard to ownership.<sup>86</sup>

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<sup>77</sup> *Procter & Gamble Philippine Manufacturing Corp v Peter Cremer GmbH & Co The Manila* [1988] 3 All ER 843.

<sup>78</sup> In terms of Section 3(2) of the Sea Transport Documents Act No. 65 of 2000, the holder of a sea transport document i.e. bill of lading is defined as ‘[a] person is the holder of a sea transport document if that person is in possession of the original sea transport document, or possession of that document is held on that person’s behalf, and that person is—(a) the person to whom the document was issued; (b) the consignee named in the document; or (c) a person to whom the document has been transferred in accordance with subsection (1).’ Subsection (1) states: ‘A sea transport document may be transferred by the holder, either—(a) by delivery of the document, endorsed as may be necessary.’

<sup>79</sup> Section 6(1)(b)(i) of the Sea Transport Documents Act No. 65 of 2000.

<sup>80</sup> Section 6(1)(b)(ii) of the Sea Transport Documents Act No. 65 of 2000.

<sup>81</sup> In *Standard Bank v McKensie* (1902) 19 SC 302 the court stated that ‘possession of the bill of lading is equivalent to possession of the goods, and *prima facie* entitles the holder [of the bill of lading] to claim delivery [of the goods] from the [carrier].’

<sup>82</sup> *Duyn v Shangming International (Pty) Ltd* [2003] 1 All SA 173 (C) at 179.

<sup>83</sup> *Lickbarrow v Mason* (1794) 5 TR 683 at 685-686.

<sup>84</sup> *Lendlease Finance (Pty) Ltd v Coporacion de Mercadeo Agricola* 1976 (4) SA 464 (A).

<sup>85</sup> *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* [1959] 1 All SA 308 (W) at 314.

<sup>86</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 152.

As outlined above, the role of the bill of lading as a document of title effects the transfer of ownership from the seller to the buyer upon the transfer of the relevant documents, specifically the bill of lading in an international CIF contract of sale.<sup>87</sup> As stated by authors Day and Griffin,

‘[t]he purpose of the transfer of the bill of lading to the buyer is to give him not only the property rights in the goods but also all rights under the contract of carriage during the whole time that the goods are at his risk during sea transit.’<sup>88</sup>

One of the functions of the bill of lading is that it represents a document of title thereby giving exclusive control to the party in possession thereof ie the holder of the document and as such a symbol of the goods. Hence, the transfer of the bill of lading can effect constructive transfer (ie delivery) of the goods to which it relates because it can full and generally does in the context of CIF Incoterms, the function of a document of title.<sup>89</sup>

In the *Mitsui & Co Ltd v Flota Mercante Grancolumbiana SA (The Ciudad de Pasto)*<sup>90</sup> case,

‘the court held that where the international sale contract (whether FOB or CIF) is characterised by the transfer of documents [i.e. the bill of lading], [ownership] is to pass on tender of documents and payment of the price.’<sup>91</sup>

This means that the seller will pass ownership in respect of the movable goods to the buyer provided that the seller receives payment of the price for the movable goods. This position is further asserted in *Gardano & Giampari v Greek Petroleum George Mamidakis & Co*<sup>92</sup> where the following was stated:

‘It is quite true that in an ordinary contract of sale in the traditional c.i.f or c. & f. form the seller discharges his obligations as regards delivery by tendering a bill of lading covering the goods. It is not necessary for me here to state all the qualifications involved, but the transaction is essentially one which has been correctly described as a sale of goods performed by delivery of documents, and in the normal way the property passes when the documents are taken up.’<sup>93</sup>

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<sup>87</sup> In *Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60 at 68, the House of Lords held that that, ‘In [the] course of business [CIF international sales contract], the general property in the goods remains in the seller until [the seller] transfers the bills of lading. These rules, which are simple enough to state, in general terms, are of the utmost importance in commercial transactions.’

<sup>88</sup> DM Day and B Griffin *The Law of International Trade* 2 ed (1993) 74.

<sup>89</sup> Jason Chuah *Law of International Trade* 1998 at 137.

<sup>90</sup> *Mitsui & Co Ltd v Flota Mercante Grancolumbiana SA (The Ciudad de Pasto)* [1989] 1 All ER 951.

<sup>91</sup> *Mitsui & Co. Ltd v Flota Mercante Grancolumbiana SA (The Ciudad de Pasto)* [1989] 1 All ER 951.

<sup>92</sup> *Ji MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] 3 All ER 369, [2003] EWCA Civ 556.

<sup>93</sup> *Ji MacWilliam Co Inc v Mediterranean Shipping Co SA, The Rafaela S* [2003] 3 All ER 369 at 395, [2003] EWCA Civ 556.

Where the goods are in transit, the role of the bill of lading is important in effecting transfer of ownership from one party to another as evident in *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd and Others Holland Colombo Trading Society v Grimsdale & Sons Ltd [Consolidated Appeals] Grimsdale & Sons v Suffolk Agricultural and Poultry Producers Association Ltd*<sup>94</sup> case. In this case, the court explained the respective obligations of the seller and the buyer in a CIF international contract of sale while the goods are in transit:

‘When the goods are shipped cif, there is a contract of affreightment under which the master of the vessel is bound to deliver the goods to whoever produces the documents at the end of the voyage. While the goods are in transit the first holder of the documents can sell the goods to a buyer by delivering the documents in exchange for payment of the price, and there may be a chain of such sales. None of the sellers knows for certain whether his buyer will take delivery or will re-sell the goods by delivering the documents to another buyer. None of these sales is intimated to the master of the vessel. [The seller] has no concern with them, and once a seller has delivered the documents and received the price he has no concern with further sales or with the ultimate delivery of the goods. [The seller] does not deliver the goods either actually or fictionally to his buyer on their arrival. The only delivery of the goods is by the master to the ultimate buyer who presents the documents [especially the bill of lading] to him.’<sup>95</sup>

In light of the above, it is precisely for this reason why the view exists that the transfer of the bill of lading results in the transfer of ownership.

Although the general practice in an international CIF contract of sale relating to the intention<sup>96</sup> of the parties is for the ownership in the goods to pass when the bill of lading is

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<sup>94</sup> *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd and Others Holland Colombo Trading Society v Grimsdale & Sons Ltd [Consolidated Appeals] Grimsdale & Sons v Suffolk Agricultural and Poultry Producers Association, Ltd* [1968] 2 All ER 444.

<sup>95</sup> *Henry Kendall & Sons (a firm) v William Lillico & Sons Ltd and Others Holland Colombo Trading Society v Grimsdale & Sons Ltd [Consolidated Appeals] Grimsdale & Sons v Suffolk Agricultural and Poultry Producers Association, Ltd* [1968] 2 All ER 444 at 459.

<sup>96</sup> In *The Prinz Adalbert* [1917] A.C. 586 (P.C.), the following was stated: ‘...the delivery of an indorsed bill of lading, made out to the shipper’s order while the goods are afloat, is equivalent to delivery of the goods themselves, and is effectual to transfer ownership if made with that intention. The bill of lading is the symbol of the goods. Apart from specific formalities or similar prescriptions of municipal law, which are not now material, such intention is a question of fact. The usual course of dealing in the export of merchandise and the interest of the parties concerned in it suffice for the necessary inference in the absence of evidence to the contrary. When a shipper takes his draft, not as yet accepted, but accompanied by a bill of lading, indorsed in this way, and discounts it with a banker, he makes himself liable on the instrument as drawer, and he further makes the goods, which the bill of lading represents, security for its payment. If, in turn, the discounting banker surrenders the bill of lading to the acceptor against his acceptance, the inference is that he is satisfied to part with his security in consideration of getting this further party’s liability on the bill, and that in so doing he acts with the permission and by the mandate of the shipper and drawer. Possession of the indorsed bill of lading enables the acceptor to get possession of the goods on the ship’s arrival. If the shipper, being then owner of the goods, authorises and

exchanged by the seller to the buyer in order to receive payment of the price of the goods,<sup>97</sup> sometimes there may be a deviation from this general approach as evident in *The Albazero*<sup>98</sup> case where the intention that ownership should pass at some other time existed. In this case, the court held that although payment had not been received when the documents were tendered, the intention to transfer ownership nevertheless existed upon the transfer of the bill of lading as the contract of sale was between two companies of the same corporate group and there was no explicit condition that transfer of ownership depended on the payment of the goods.<sup>99</sup>

The position that the transfer of documents does not necessarily mean there is a transfer of ownership is further asserted in the *Ross T Smyth & Co Ltd v T D Bailey, Son & Co*<sup>100</sup> case where Lord Wright stated the following:

‘...I have thought it important, however, to state the general rules in as simple terms as possible... Kennedy, L. J., in [the] *Biddell Brothers v. Clemens E. Horst Co.*,<sup>101</sup> in pointing out that, if the goods are lost during the ocean transit, the buyer must still implement his contract when the documents are tendered to him said... “The vendor [i.e. the seller] tenders the bill of lading with the insurance policy and other shipping documents (if any) to the purchaser, to whom, from the moment of shipment the property has passed...” Such expressions must be read subject to all the qualifications which were fully present to the mind of that great commercial judge. He was not in that case concerned with the *jus disponendi*.<sup>102</sup> In the very example which he gives, if the *jus*

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directs the banker, to whom he is himself liable and whose interest it is to continue to hold the bill of lading till the draft is accepted, to surrender the bill of lading against acceptance of the draft, it is natural to infer that he intends to transfer the ownership when this is done, but intends also to remain the owner until this has been done. Particular arrangements made between shipper and consignee may modify or rebut these inferences, but in the absence of evidence to the contrary, and apart from rules which arise only out of a state of war existing or imminent at the beginning of the transaction, the general law infers under these circumstances that the ownership in the goods is transferred when the draft drawn against them is accepted.’

<sup>97</sup> Jason Chuah *Law of International Trade* 1998 at 138.

<sup>98</sup> *The Albazero Owners of cargo lately laden on board the ship or vessel Albacruz v Owners of the ship or vessel Albazero* [1974] 2 All ER 906 and [1977] AC 774.

<sup>99</sup> *The Albazero* [1977] AC 774. In this case it was stated that ‘...the obligations imposed on a seller under a [CIF contract of sale] are well known, and in the ordinary case include the tender of a bill of lading covering the goods contracted to be sold and no others, coupled with an insurance policy in the normal form and accompanied by an invoice which shows the price...Against tender of these documents [i.e. bill of lading, insurance policy and invoice] the purchaser must pay the price. In such a case the property may pass either on shipment or on tender, the risk generally passes on shipment [i.e. at the port of loading]...but possession does not pass until the documents which represent the goods are handed over in exchange for the price.’

<sup>100</sup> *Ross T Smyth & Co. Ltd v Bailey Son & Co Ltd* [1940] 3 ALL ER 60.

<sup>101</sup> *Biddell Brothers v. Clemens E Horst Co* [1911] 1 K B 934, at 959.

<sup>102</sup> *Jus disponendi* is a Latin word defined in The Law Dictionary featuring Black’s Law Dictionary Free Online Legal Dictionary 2<sup>nd</sup> edition available from <http://thelawdictionary.org/jus-disponendi/> accessed on 22 November 2013 as the follows: ‘The right of disposing. An expression used either generally to signify the right of alienation...or specially in the law relating to sales of goods, where it is often a question whether the vendor

disponendi had been reserved, the property in the goods in the strict sense could never pass at all. It could pass, if at all, only when the documents were taken up against payment, and before that could happen, the goods had been lost. This illustrates one peculiarity of the cif contract, which is that the sale can be completed after the loss of the goods by the transfer of the shipping goods. That does not mean that a cif contract is a sale of documents, and not of goods. It contemplates the transfer of actual goods in the normal course, but if the goods are lost, the insurance policy and the bill of lading contract – that is, the rights under them – are taken to be, in a business sense, the equivalent of the goods.<sup>103</sup>

The position whether the transfer of documents specifically the bill of lading amount to a transfer of ownership is therefore not conclusive as competing views still exist. However, even if there is not physical delivery and possession of the goods, the parties' intention that ownership should pass on delivery of the bill of lading, effects transfer of constructive possession of the goods, which with the requisite intention, effects transfer of ownership of the goods covered by the bill of lading. In essence, under standard CIF Incoterms, absent any intention to the contrary, the parties are taken to have intended that ownership will pass on the transfer of possession of the bill of lading.

*(b) South African law*

In South African law, the determination of whether and, if so, when ownership in movable corporeal property – the products – passes is with reference to principles of property law, and not with reference to contractual law principles.<sup>104</sup> The relevant property law principles are: (i) that the transferor of the property must be the property owner, or be authorised by the property owner to transfer ownership;<sup>105</sup> (ii) the property must be delivered to the transferee (delivered here entails giving possession of the property whether that be actual or constructive possession),<sup>106</sup> (iii) and the requisite intention<sup>107</sup> must exist ie the transferor and transferee must have intended to give and take, respectively ownership of the goods. If ownership is to be transferred pursuant to a sale, it seems that parties to the sale contract have

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[i.e. seller] of goods has the intention of serving to himself the jus disponendi; i. e., of preventing the ownership from passing to the purchaser, notwithstanding that he (the vendor) has parted with the possession of the goods.'

<sup>103</sup> *Ross T Smyth & Co Ltd v Bailey Son & Co Ltd* [1940] 3 ALL ER 60.

<sup>104</sup> Silberberg and Schoeman's *The Law of Property* 5 ed (2006) 2.

<sup>105</sup> *Mankowitz v Loewenthal* 1982 (3) SA 758 (A) at 766C; *Universal Group Ltd t/a Island View Shipping Co v The Fund Created by the Sale of the MV Maharani, Ex MV Claire A Tsavlis* 1990 (2) SA 480 (N) at 490G–491H.

<sup>106</sup> *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 665.

<sup>107</sup> *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 665.

the ability to determine the point of transfer of possession (either actual or constructive) of the goods sold in the contractual provisions relating to delivery as discharge of the seller's obligation to deliver, and the buyer's obligation to take properly tendered delivery, respectively, under the contract of sale.<sup>108</sup> In other words, delivery to discharge these obligations under the sale contract, may, involving a transfer of possession (either actual or constructive) as they do, also meet the requirement of transfer of possession for the transfer of ownership according to principles of property law.<sup>109</sup> By determining the point of transfer of possession of goods sold, the parties to the contract of sale may also control the point of transfer of possession for the purpose of transferring ownership. In relation to the requirement of the intention to give and take ownership rights in the property sold for ownership to pass, it seems that the parties to a contract of sale may at least give an indication in the contract of sale of their intentions as to when ownership in the property sold is to pass with delivery or at some other time.<sup>110</sup> In order to illustrate this link, in South African law, a distinction is made in terms of whether it is a cash sale or credit sale to ascertain the parties' intention when ownership in the good should pass in the absence of an explicit agreement to the contrary.<sup>111</sup> If it is a cash sale and the purchase price has not been paid, then the seller did not intend ownership to pass to the buyer on delivery.<sup>112</sup> On the other hand, if the transaction is a credit sale, the intention of the parties to transfer ownership when the goods have been delivered unless there is a specific provision to the contrary.<sup>113</sup> Equally, the use of a bill of lading in a CIF contract of sale to transfer constructive possession of the goods covered by the bill of lading, particularly where presentation of the bill is in return for payment of the purchase price, is usually taken as an indication that the parties ownership of the goods covered to pass with the transfer of the bill of lading.<sup>114</sup> In *Lendlease Finance Corporation*

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<sup>108</sup> *Info Plus v Scheelke* 1998 (3) SA 184 (SCA) at 189E.

<sup>109</sup> *Dolf Bierman Graanbemarking BK v Agri Bedryfs Bpk* [2006] JOL 17184 (T) at 9.

<sup>110</sup> *Dolf Bierman Graanbemarking BK v Agri Bedryfs Bpk* [2006] JOL 17184 at 8-9.

<sup>111</sup> *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) at 694.

<sup>112</sup> *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) at 694 where Holmes JA held that the general rule that: '(a) in a sale for cash, ownership does not pass until the price is paid, even if delivery has meantime been given.'

<sup>113</sup> *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 3 SA 685 (A) at 694 where Holmes JA held that the general rule that: '(b) in a sale for credit, ownership passes on delivery.'

<sup>114</sup> *Lendlease Finance (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A) at 491-492 it is stated that: 'The bill of lading . . . figures prominently in the transaction known as a CIF contract . . . According to Halsbury the commercial reason for the evolution of, amongst others, the CIF contract lies in the length of time taken in the carriage of goods by sea. It is to the advantage of neither party to the contract that the goods should remain *en de hors* commerce while they are in the course of shipment. The object and result of the CIF contract is to enable sellers and buyers to deal with the goods while afloat and to transfer them freely by giving constructive possession thereof . . . The most significant of the shipping documents is the bill of lading. This constitutes an acknowledgement by the master of the ship, on behalf of the shipowner, that goods have been

*(Pty) Ltd v Corporacion de Mercadeo Agricola*,<sup>115</sup> the parties' intention was derived from the facts of the case that illustrated the parties intended ownership in the goods to pass when the bill of lading was delivered and not when the goods were delivered.<sup>116</sup> This is generally the position in CIF sales and, in the absence of any indication of a contrary intention; the parties to such sale are taken to have intended this. As was held in the *Lendalease* case, by endorsing and handing over the bill of lading from the consignor or the seller of the goods, constitutes constructive delivery of the goods to the consignee or the buyer.<sup>117</sup> There might be contrary indications reflecting that the parties intend ownership to pass at some other time. The contract of sale can only address the first requirement for the transfer of ownership of the goods, namely that the transferor be the owner, or be authorised by the owner to transfer property rights in the goods, in rather indirect ways, e.g. a contractual warranty that the seller is the owner of the goods, that are of no benefit with regard to securing a transfer of ownership.<sup>118</sup>

*(c) English law*

The position in English law seems to be that provided at the time the goods have been ascertained,<sup>119</sup> the point at which ownership passes is when the parties intend that it should pass.<sup>120</sup> So the earliest point that the parties could have ownership transfer would be at the time the goods are ascertained. It seems that the parties could intend ownership to pass at some point in time after the goods had been ascertained. The Sale of Goods Act<sup>121</sup> in English law specifically deals with the transfer of ownership of movable goods. Section 17 of Part III

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delivered on board and evidences an undertaking to carry the goods to the stated place of destination. The person in whose name or to whose order the bill of lading is made out may by endorsement and delivery transfer his rights under the bill to another. The holder of the bill, ie, the person in whose favour it was originally made out or the endorsee thereof, is entitled, to the exclusion of all others, to receive the goods from the ship at the place of destination. He is, thus, in the same commercial position as if he were in physical possession of the goods. The bill of lading is, accordingly, recognised as a symbol of the goods and the transfer of the bill is regarded as a form of symbolic delivery. It is usual under a CIF contract for the seller to take the bill of lading in his own name, or to his order, and for the bill, duly endorsed, to be tendered, together with the other shipping documents, against payment of the invoice price, either in cash or by the acceptance of a draft. Ownership in the goods normally passes to the purchaser upon transfer of the bill of lading and concurrent payment'.

<sup>115</sup> *Lendalease Finance Corporation (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A).

<sup>116</sup> *Lendalease Finance Corporation (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A) at 493.

<sup>117</sup> *Lendalease Finance Corporation (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A) at 492.

<sup>118</sup> *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 667.

<sup>119</sup> Section 16 of the Sale of Goods Act 1979 states: 'Goods must be ascertained [in order for transfer of ownership to take place].'

<sup>120</sup> Section 17 of the Sale of Goods Act 1979.

<sup>121</sup> Sale of Goods Act 1979 available from <http://www.legislation.gov.uk/ukpga/1979/54>, accessed on 8 September 2013.

of the Sale of Goods Act 1979 Chapter 54 is applicable in respect of determining the transfer of ownership, which states:

‘17. Property passes when intended to pass.<sup>122</sup> (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.<sup>123</sup> (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.’<sup>124</sup>

Where the goods are not specific or unascertained, then the seller cannot transfer ownership to the buyer unless and until the goods are ascertained<sup>125</sup> or when the goods have been appropriated to the contract.<sup>126</sup>

Under standard CIF Incoterms, absent any intention to the contrary, the parties are taken to have intended that ownership will pass on transfer of possession of the bill of lading. This will always be after the goods have been ascertained.

*(d) Conflict of laws or the same result?*

If the sale is an international one involving the movement of the property that is the subject matter of the sale across national boundaries, and a dispute arises as to whether and, if so, when ownership in that property passed, that dispute may be complicated by a conflict of laws problem, ie where the application of different laws that could apply to the dispute leads

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<sup>122</sup> Section 17 of the Sale of Goods Act 1979.

<sup>123</sup> Section 17(1) of the Sale of Goods Act 1979.

<sup>124</sup> Section 17(2) of the Sale of Goods Act 1979.

<sup>125</sup> Section 16 of the Sale of Goods Act 1979 states: ‘[Subject to Section 20A below] Where there is a contract of sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.’ Section 20A of the Sale of Goods Act 1979 states as follows: ‘20A Undivided shares in goods forming part of a bulk. (1) This section applies to a contract for the sale of a specified quantity of unascertained goods if the following conditions are met— (a) the goods or some of them form part of a bulk which is identified either in the contract or by subsequent agreement between the parties; and (b) the buyer has paid the price for some or all of the goods which are the subject of the contract and which form part of the bulk. (2) Where this section applies, then (unless the parties agree otherwise), as soon as the conditions specified in paragraphs (a) and (b) of subsection (1) above are met or at such later time as the parties may agree—(a) property in an undivided share in the bulk is transferred to the buyer, and (b) the buyer becomes an owner in common of the bulk. (3) Subject to subsection (4) below, for the purposes of this section, the undivided share of a buyer in a bulk at any time shall be such share as the quantity of goods paid for and due to the buyer out of the bulk bears to the quantity of goods in the bulk at that time. (4) Where the aggregate of the undivided shares of buyers in a bulk determined under subsection (3) above would at any time exceed the whole of the bulk at that time, the undivided share in the bulk of each buyer shall be reduced proportionately so that the aggregate of the undivided shares is equal to the whole bulk. (5) Where a buyer has paid the price for only some of the goods due to him out of a bulk, any delivery to the buyer out of the bulk shall, for the purposes of this section, be ascribed in the first place to the goods in respect of which payment has been made. (6) For the purposes of this section payment of part of the price for any goods shall be treated as payment for a corresponding part of the goods.’

<sup>126</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 89.

to different results.<sup>127</sup> In such a case, reference must be made to the rules of private international law to determine which of the conflicting systems of law must apply. The rules of private international law are those of the forum called on to adjudicate the dispute.<sup>128</sup> In South African law, as in English law, the rules of private law determine that the applicable law for the determination of the passing of ownership of movable corporeal property is the law of the country in which the property is located namely the *lex situs*.<sup>129</sup> Since the systems of law that have been chosen, South African and English law, have the same requirements for the passing of ownership in movable goods, it seems unlikely in the extreme that a conflict of laws problem would arise. If there is no real conflict of laws problem, it seems that the only real issue is whether the parties to an international sale contract on CIF Incoterms can indicate an intention that ownership in property should pass at some time other than that at which constructive possession of the goods sold is transferred by way of transfer of a bill of lading.

## **CHAPTER 3 CONTRACTUAL VARIATION OF CIF INCOTERMS® 2000/2010**

### **I INTRODUCTION**

This chapter will deal with the contractual variation of the CIF Incoterms in an international contract of sale for petroleum products. It will outline the relevant contractual provisions as it is captured in the form of a deal confirmation, which deal confirmation is concluded between the traders of the seller and buyer respectively. The deal confirmation will basically highlight the essence and form the basis of the international contract of sale in the oil and gas industry. Furthermore, this chapter will indicate the differences between the standard CIF Incoterms® 2000/2010 and the contractual provisions of the varied CIF Incoterms. It will show that from a transfer of risk point of view, no differences exist. There will be an application of the relevant property law requirements in both South African law and English law to the contractual provisions of the varied CIF Incoterms.

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<sup>127</sup> *Laurens No v Von Höhne* 1993(3) ALL SA 322 (W) at 324, 335-336 and 338.

<sup>128</sup> In *Laconian Maritime Enterprises Ltd v Agromar Lineas Ltd* 1986 (3) SA 509 (D) at 521A–B, Booysen J said: ‘It seems to me in conclusion in respect of this enquiry that the general rule of South African private international law is that classification is done in terms of the *lex fori*.’

<sup>129</sup> *Marcard Stein & Co v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663 (A) at 667. In *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd William Lillico & Son Ltd and another, Third Parties; Henry Kendall & Sons and another, Fourth Parties* [1966] 1 All ER 309 at 338 it was stated that: ‘The proper law governing the transfer of corporeal movable property is the *lex situs*.’

## II OUTLINE OF CONTRACTUAL PROVISIONS

Traders in the oil and gas industry conclude the relevant deal for the purchase of petroleum products from an international trading company, ie the international contract of sale in the form of a deal confirmation, which deal confirmation is outlined below for ease of reference and understanding.<sup>130</sup>

Seller	International trading company incorporated in terms of the laws of England
Buyer	Petroleum company registered in terms of South African law
Petroleum product	500ppm Gasoil, No co-mingling of products & segregated
Quantity	30000mt
Quality	South African oil industry import specifications
Quality & Quantity determination	As determined by the mutually agreed independent inspector at loadport.
Inspection costs	Shared equally between the seller and the buyer
Delivery terms	CIF Durban
Applicable Incoterms	CIF Incoterms® 2010
Delivery date range	5-10 January 2013
Destination	One safe berth/port Durban, South Africa
Risk and title	The risk and title to the products will pass from the seller to the buyer at the loading port
Price	The average of the mean of the quotations for Gasoil as published in Platts European Marketscan under the heading FOB Arab Gulf plus/minus a relevant premium, if any
Pricing period	Whole month average of January 2013 (1-31 January 2013, both dates inclusive) and only published quotes to apply
Demurrage rate	As per the Charterparty agreement

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<sup>130</sup> A practical example of a draft deal confirmation in the oil and gas industry, specifically the petroleum sector.

Security	Irrevocable letter of credit in the seller's format
Law and arbitration	English law and the rules of the London Court of International Arbitration ("LCIA") to apply for arbitration
Terms and conditions	Shell International Trading & Shipping Co Ltd ie STASCO 2010 General Terms and Conditions

The above deal confirmation between the seller and the buyer will form the basis of the international contract of sale on CIF Incoterms varied and will include the following contractual provisions in respect of the passing of risk and ownership at the port of loading. Parties to an international sale contract of petroleum products on CIF Incoterms varied developed their own risk and ownership contractual provisions, which provisions as outlined in Chapter 1 and repeated below for ease of reference. These contractual provisions that are in use in relation to the varied CIF Incoterms® 2000 and 2010 respectively, read as follows

*CIF if Incoterms® 2000 apply:* 'The title and risk in the petroleum products purchased and sold under the terms of this CIF international contract of sale shall pass from the seller to the buyer at the loading port as the petroleum products "pass the flange connection between the delivery hose and the permanent hose connection of the vessel.'"<sup>131</sup>

*CIF if Incoterms® 2010 apply:* 'The risk in and title to the petroleum products purchased and sold under the terms of this CIF international contract of sale shall transfer from the seller to the buyer once the petroleum products are loaded, stowed and secured on the vessel at the loading port.'<sup>132</sup>

Generally only the commercial terms will vary and if the sale is based on the varied CIF Incoterms® 2010, the transfer of risk and title in the petroleum product will occur at the loading port. This is the current trend in the trading environment in the oil and gas industry

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<sup>131</sup> An example of a typical risk and title clause contained in a standard CIF international contract of sale in the oil and gas industry where the contracting parties agree for Incoterms®2000 to apply. In addition, reference can be made to the TOTAL 'General Terms and Conditions for CFR/CIF/Delivered Ex Ship Sales of Petroleum Products/Feedstocks and Liquefied Petroleum Gas' 2007 edition available from <http://www.totsa.com/pub/about/GTCs%20TOTAL-PROD-CFR-CIF-DES%202007.pdf> accessed on 17 February 2014.

<sup>132</sup> An example of a typical risk and title clause contained in a CIF international contract of sale in the oil and gas industry where the contracting parties agree for Incoterms®2010 to apply. In addition, Incoterms 2010 at 105-106 states that 'the buyer bears all risks and loss of or damage to the goods from the time they have been delivered [by the seller]. The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered.'

specifically the petroleum sector. One can infer that the traders use the varied CIF contractual provisions as outlined in the preceding paragraphs to achieve ‘global harmonisation, uniformity, equalisation and legal equilibrium’.<sup>133</sup> Furthermore, in the oil and gas industry, specifically the petroleum sector, there is ‘the need to promote similar or equal rules and regulations which will enable a certain [level of] predictability in contracts.’<sup>134</sup> In this way, when dealing with for example the same seller and buyer, both parties will know what to expect in terms of the relevant contractual terms of the international contract of sale. Accordingly, both parties from a practical point of view will agree and accept the contractual provisions of linking the passing of ownership to the passing of risk and ensuring that both occur at the same time. The mere fact that the seller and buyer selects English law to apply to the international contract of sale, will to a certain extent avoid a conflict of laws issue. In addition, the contractual provision that varies the standard CIF Incoterms will at least satisfy the property law requirements in terms of English law as will be discussed in more detail below.

### **III DIFFERENCE IN RELATION TO STANDARD CIF INCOTERMS® 2010**

Although the wording in each provision is different, the point at which risk transfers is at the same time as the transfer of ownership and both occur at the loading port.

These contractual provisions are not necessarily in compliance with the standard CIF Incoterms since they incorporate the transfer of ownership, which passes at the same time as risk in the petroleum products at the loading port. The standard CIF Incoterms only deals with the transfer of risk at the loading port and is silent on the transfer of ownership from the seller to the buyer as discussed in the preceding chapter. The abovementioned clauses indicate the parties’ freedom of contractual choice, which are explicitly reflected in the international contract of sale for petroleum products.

The express CIF Incoterms adopted in the petroleum sector referred to above, do not appear to change the standard CIF Incoterms® 2000 or 2010 position in respect of the point at which risk transfers from the seller to the buyer.

### **IV TRANSFER OF RISK**

The transfer of risk in respect of the movable goods in terms of South African law and English law will be discussed below. The express varied contractual CIF provisions outlined

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<sup>133</sup> I Fletcher, L Mistelis and M Cremona *Foundations and Perspectives of International Trade Law* (2001) 291.

<sup>134</sup> I Fletcher, L Mistelis and M Cremona *Foundations and Perspectives of International Trade Law* (2001) 291.

above and adopted in the petroleum sector with regard to the passing of risk is in compliance with both South African law and English law.

In terms of South African law, ‘in the absence of a statutory provision or an agreement to the contrary, the risk of loss of or damage [to the movable goods] passes from the seller to the buyer as soon as the [international] contract of sale becomes perfect.’<sup>135</sup> As outlined in Chapter 2 and for ease of reference, a contract of sale is perfected when the sale is ‘unconditional (ie if the sale contained any conditions, even suspensive conditions, all those conditions must be fulfilled), the goods are ascertained and the price is determined.’<sup>136</sup> Since the international contract of sale for petroleum products contains the abovementioned express contractual provision relating to the passing of risk, it complies with South African law. Accordingly, one does not need to check if the sale is perfected or not as the parties have an explicit agreement as to when the passing of risk should take place from the seller to the buyer, which is at the port of loading.

In terms of English law, the passing of risk is governed by Section 20 of the Sale of Goods Act 1979 Chapter 54, which states:

‘20 Passing of risk.

(1)Unless otherwise agreed, the goods remain at the seller’s risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer’s risk whether delivery has been made or not.

(2)But where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party at fault as regards any loss which might not have occurred but for such fault.’

Hence, absence an express agreement with regard to when the risk in the goods should pass from the seller to the buyer, section 20 will be applicable where the risk passes when the property passes from the seller to the buyer. This means that if parties to an international contract of sale do not explicitly state when risk in the goods should pass from the seller to the buyer, section 20 will apply.

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<sup>135</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 81.

<sup>136</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 81.

To summarise the above, in terms of South African law, risk passes from the seller to the buyer when the international contract of sale is perfected. In English law, risk passes when the property in the goods passes from the seller to the buyer. However, in terms of both South African law and English law, the position with regard to the passing of risk from the seller to the buyer may be varied by way of an agreement. In this regard, this is achieved where the parties to an international contract of sale adopted the CIF Incoterms although varied as per the contractual provisions outlined in the preceding paragraphs. This means that if the passing of risk in the goods sold in terms of South African law and/or English law is a matter for contractual determination and parties expressly provide, in clear terms, when that should happen, then no conflict of law issue arises and resolution of the issue of when risk passed is simply a matter of interpretation of the relevant contractual terms, which is at the loading port.

#### **V APPLICATION OF THE LAW TO THE TRANSFER OF OWNERSHIP**

This section of the dissertation will discuss the application of the relevant law, specifically South African law and English law. The area of law that requires application in respect of the passing of ownership in the petroleum products from the seller to the buyer as outlined in the abovementioned contractual provisions is the property law in South Africa and England. The fact that the passing of ownership is determined in accordance with the relevant property law principles and not by contractual principles, this could present a problem. This can result in the potential conflict of laws issue ie the relevant law applicable to the international contract of sale. There is a difference between the law applicable to the international contract of sale and the law applicable to property issues. In this regard, the issue of private international law might arise and this will then be considered in relation to specific countries, for example, South Africa and England. Where, as in South African law, the issue of whether and if so when ownership in corporeal movable property passes is determined with reference to property law principles, the question that requires an answer is whether the contractual provisions in question achieve the objective of ensuring that the property law requirements for the passing of ownership of the subject matter of the sale are met at the time when the risk in the property passes in terms of the international sale contract. When does the risk in respect of the petroleum products pass from the seller to the buyer? Can the requirements for the passing of property be met at this point? In this regard, reference will be made to the property law requirements in terms of South African law and English law.

*(a) Application of South African Property Law requirements*

In terms of South African law, the abovementioned contractual provisions cannot determine that property in the petroleum products will pass from the seller to the buyer other than in the circumstances in which property law principles determine that ownership may pass. The specific property law requirements are, if South African Law is applicable, that the seller be the owner of the goods ie the seller must be capable of transferring ownership; there must be delivery of the petroleum products from the seller to the buyer and the intention to pass ownership from the seller to the buyer must exist.

In terms of the international contract of sale, the parties can have a contractual warranty provision that confirms and/or warrants that the seller is the owner of the petroleum products and is capable of transferring ownership to the buyer. The warranty clause can state that the seller warrants title to the petroleum product or that the seller had the right to sell the petroleum product and that it had unencumbered title to the said product.

The following questions bear investigation accordingly. Is there delivery at the point at which the risk passes? To what extent can the international contract of sale determine the point of delivery? The international contract of sale can have an express delivery provision where the petroleum products are delivered at the loading port or discharge port. The next question is whether there is delivery either in the form of actual or constructive delivery of the petroleum products from the seller to the buyer, or its agent the carrier. Actual delivery of the petroleum products from the seller to the buyer would not have taken place at the loading port. However, did constructive delivery of the petroleum products from the seller to the buyer occur? In this regard, one needs to consider whether and at what point the buyer could be possession of the petroleum products. Can there be reference to transfer of possession of the goods? What are the possibilities that exist ie can possession take place at the port of loading or are possession effected via the transfer of the bill of lading or can possession only occur when the petroleum products are unloaded at the discharge port or place of destination? If the bill of lading is transferred from the seller to the buyer or its agent the carrier at the loading port, thereby ensuring that the buyer is in possession of the bill of lading, then one can infer that constructive delivery has taken place.

A further enquiry relates to whether there is an intention to pass ownership at the point of delivery. The parties' intention is factually determined and such intention is generally inferred from the role of the international contract of sale. In terms of the international contract of sale based on the varied CIF Incoterm for the sale of petroleum products, when the seller provides the buyer with the original commercial invoice, insurance certificate and

bill of lading in order to receive payment from the buyer, the buyer will effect payment once the buyer is in possession of these important documents. In addition, the significance of the bill of lading and its function as a document of title as discussed in the previous chapter, clearly illustrates that once the buyer is in possession of the bill of lading to which the petroleum products relate the buyer has in essence received constructive delivery of the petroleum products. The role and exchange of the relevant documents especially the bill of lading, indicates the parties' requisite intention to transfer and receive ownership from the seller to the buyer in respect of the petroleum products.

In light of the above analysis, the requirement for constructive delivery in the form of the buyer being in possession of the bill of lading accompanied with the parties' requisite intention to transfer ownership have been met. It is concluded that the varied contractual CIF risk and ownership provision will meet the property law requirements in terms of South African law.

*(b) Application of English Property Law requirements*

The next question bearing investigation is how, if at all, does the position in English law differ? If it does, and there is therefore the potential for conflict of laws, what law is to apply in the event of such conflict? Does the location of the property at the time of passing of the risk and/or ownership therefore matter for the purpose of determining whether the contractual provisions in question are effective in achieving their intended objective? Accordingly, the property law principles in terms of English law will be discussed.

Under the varied contractual CIF Incoterms as they appear in the international contract of sale in the petroleum sector, specifically in respect of the clauses outlined in the preceding paragraphs, it seems that an expressed intention that ownership should pass at the time of loading would suffice to ensure that ownership in the petroleum products passed at this time provided of course that by this point the goods were ascertained, which it seems they generally would have been. The intention of the parties can be established from the terms of the international contract of sale for petroleum products, the conduct of the seller and the buyer and the circumstances of the case.<sup>137</sup> Since the abovementioned varied CIF Incoterms

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<sup>137</sup> In addition, reference can be made to Section 18 of the Sale of Goods Act 1979 Chapter 54 to provide further assistance to determine the parties' intention. Section 18 contains various rules to ascertain the parties' intention and states as follows: '18 Rules for ascertaining intention. Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer. Rule 1.—Where there is an unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of

contractual provisions relating to the transfer of risk and ownership are contained in the international contract of sale for petroleum products, these contractual provisions meet the property law requirements in terms of the Sale of Goods Act in English law. Hence, the aforementioned provisions used in the petroleum sector would be in compliance with English law, specifically the property law of England.

## **CHAPTER 4 EVALUATION OF THE EFFECTIVENESS OF THE CONTRACTUAL PROVISIONS**

### **I INTRODUCTION**

This chapter will evaluate the doubts and briefly outline the arguments about whether the contractual provisions for the passing of risk and ownership in the international contract of sale for petroleum products are effective in achieving the parties' objective. Either these doubts are well-grounded or they have no basis? The objective of the parties ie the seller and the buyer, is to link the passing of ownership to the passing of risk as evident by the inclusion of the varied CIF Incoterm contractual provisions in their international contract of sale for petroleum products. This objective is achieved in at least two ways, namely (i) the parties to determine the point at which risk passes and attempt to meet the requirements for the passing

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payment or the time of delivery, or both, be postponed. Rule 2.—Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until the thing is done and the buyer has notice that it has been done. Rule 3.—Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until the act or thing is done and the buyer has notice that it has been done. Rule 4.—When goods are delivered to the buyer on approval or on sale or return or other similar terms the property in the goods passes to the buyer:—(a)when he signifies his approval or acceptance to the seller or does any other act adopting the transaction; (b)if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of that time, and, if no time has been fixed, on the expiration of a reasonable time. Rule 5.(1)Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made. (2)Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodian (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is to be taken to have unconditionally appropriated the goods to the contract. [F23(3)Where there is a contract for the sale of a specified quantity of unascertained goods in a deliverable state forming part of a bulk which is identified either in the contract or by subsequent agreement between the parties and the bulk is reduced to (or to less than) that quantity, then, if the buyer under that contract is the only buyer to whom goods are then due out of the bulk—(a)the remaining goods are to be taken as appropriated to that contract at the time when the bulk is so reduced; and (b)the property in those goods then passes to that buyer. (4)Paragraph (3) above applies also (with the necessary modifications) where a bulk is reduced to (or to less than) the aggregate of the quantities due to a single buyer under separate contracts relating to that bulk and he is the only buyer to whom goods are then due out of that bulk.]'

of ownership at the same point; and (ii) the parties to determine the point at which ownership passes and provide contractually for risk to pass at the same time. In this regard, reference will be made to South African law as well as English law as the basis of this dissertation relates to petroleum products that are exported from England and/or from a company incorporated in terms of English law and imported into South Africa by a company registered in terms of the laws of South Africa. This chapter will discuss the doubts in respect of whether the parties' objective by linking the passing of ownership to the passing of risk where both occur at the same time ie at the point of loading, can be achieved in terms of South African law and/or English law. This chapter will conclude by providing possible solutions and/or alternatives to the doubts expressed. These entail a relook at the CIF Incoterms and an alternative of whether it is more appropriate for parties to rather link the passing of risk to the passing of ownership in respect of the movable goods.

## **II VARIOUS DOUBTS**

The doubts expressed relate to the fact that the aforementioned contractual provisions varies the CIF Incoterms® 2000 / 2010 by linking the passing of ownership to the passing of risk from the seller to the buyer in respect of the petroleum products. This doubt relates specifically to the fact whereby property law principles are combined with contractual provisions yet each is determined differently. This means that the passing of ownership in respect of the movable goods, ie petroleum products are determined according to property law whereas the passing of risk is determined in terms of contract law. Can the transfer of ownership and the transfer of risk in respect of the movable goods ie the petroleum products be linked if two separate methods or areas of laws are applicable? The straightforward answer would be no without undertaking any detailed analysis of the two areas of laws ie property law and contract law. In terms of South African property law, various requirements must be satisfied in order to effect the transfer of ownership in respect of the movable goods from the seller to the buyer. In this regard and in summary, the requisite intention and delivery of the movable goods must take place in order for ownership to pass from the seller to the buyer.

The petroleum sector's variation of the standard position linking the passing of ownership to loading rather than to the transfer of the bill of lading may be problematic. It is not problematic with regard to the requisite intention as to when ownership should pass, provided of course the clause in the international contract of sale is clear. Where it may be problematic is with regard to whether the delivery requirement under South African law for the passing of

ownership is satisfied. The question and doubt this raises is whether the delivery requirement in terms of the varied CIF Incoterm and contractual provision will be satisfied at the time of loading ie whether there is delivery of the petroleum product at the loading port. At the loading port, the seller delivers the petroleum products to the carrier and not the buyer. Hence, delivery of the petroleum products for loading discharges the seller's delivery obligation in relation to the movable goods under the contract of sale. However, could this also satisfy the delivery requirement for the passing of ownership from the seller to the buyer in respect of the movable goods ie the petroleum products? The buyer only receives the actual petroleum products at the discharge port when the petroleum products are unloaded. This raises a further question that if there is not actual delivery of the petroleum products at the loading port, can there be a form of constructive delivery. Since at the loading port there is not delivery of the petroleum products to the buyer's possession, at what point does the buyer receive the bill of lading. When is the buyer in possession of the bill of lading, at the time of loading or unloading? Can there be a form of constructive possession of the bill of lading? In this respect, the role of the bill of lading will be discussed below.

Could a revision of the Incoterms address the various doubts that exist particularly to take into consideration the transfer of ownership in respect of the movable goods instead of being silent on this issue? Or as an alternative, perhaps the contracting parties should change the point at which the risk in the petroleum products passes from the seller to the buyer to link it with the passing of property in the petroleum products and draft the relevant contractual provision accordingly. These possible solutions will be discussed in more detail below.

### **III ANALYSIS OF THE RELEVANT LAW**

One of the doubts about the effectiveness of the abovementioned contractual provisions is that it is not as simple as it appears on the face of it because it requires a detailed analysis of property law principles as the passing of ownership cannot be contractually determined. What can the above contractual provisions achieve by way of satisfying property law requirements? In addition, what cannot these contractual provisions achieve? It is clear that these contractual provisions cannot achieve the requirement of actual delivery of the petroleum products at the port of loading and this only occurs at the point of unloading in the discharge country namely South Africa. Accordingly, the effectiveness of the abovementioned contractual provisions will be tested against the relevant property law of South Africa and England.

*(a) South African law*

As outlined in the previous chapter, in terms of South African law the passing of ownership from the seller to the buyer occurs when there is delivery of the movable goods accompanied by the requisite intention to transfer ownership.

The position in terms of South African law differs from English Law in that the transfer of ownership in respect of the goods from the seller to the buyer requires delivery, either actual or constructive delivery, of the goods. The question is therefore whether there has been actual or constructive delivery at the point of loading. With regard to actual delivery of the movable goods, the question is whether physical possession of the goods has been given to the buyer at the point of loading. Since the buyer is unlikely to be there in person, this can only be answered by considering whether the buyer is represented by an agent authorised to take possession of the goods in question. This seems to be one of the questions bearing investigation. In the petroleum sector, the buyer generally appoints an agent to receive the goods in question; however this takes place at the discharge port and not at the loading port. When the seller delivers the goods ie petroleum products to the carrier at the loading port, this discharges the seller's contractual obligation to deliver. In terms of the CIF Incoterm although varied, the carrier is the representative of the seller and not of the buyer.<sup>138</sup> The seller's delivery of the petroleum products to the carrier is therefore not delivery of the goods to the buyer.<sup>139</sup> Hence, there is no actual delivery of the movable goods from the seller to the buyer at the loading port. As a result, this does not meet the actual delivery requirement for the passing of ownership in corporeal movable property from the seller to the buyer. Hence the same act of deliver cannot serve both contractual delivery and the delivery requirement for passing of ownership in corporeal movable property. Accordingly, the following bears investigation in terms of when the delivery requirement for the transfer of ownership will be satisfied. In this regard, if there is not actual delivery of the petroleum product at the loading port, can there be constructive delivery in order to satisfy the delivery requirement for the transfer of ownership to be effected. In terms of the varied CIF Incoterms, the movable goods are symbolically represented by shipping documents, specifically the bill of lading.<sup>140</sup> The role of the bill of lading as a document of title was discussed in great detail in chapter 2 above. To avoid repetition, a brief outline will be

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<sup>138</sup> Incoterms 2010 at 110-111.

<sup>139</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 88.

<sup>140</sup> P Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 88.

provided in respect of the significance of the bill of lading with regard to the transfer of ownership from the seller to the buyer. The transfer of the bill of lading from the seller to the buyer, for the reasons given in the *Lendlease* case,<sup>141</sup> satisfies the requirement of constructive delivery. This means that once the CIF seller delivers the bill of lading to the buyer, the buyer will be in possession of the bill of lading, thereby constituting symbolic possession.<sup>142</sup>

In addition to the delivery requirement, the requisite intention to pass ownership in the movable goods must be present. The parties' intention is determined by inference. Is the transfer of ownership intended to pass with the transfer of the bill of lading as constructive transfer of the goods? The seller will have the requisite intention to pass the bill of lading to the buyer in order to receive payment for the movable goods.<sup>143</sup> Although the bill of lading representing the movable goods in question is transferred from the seller to the buyer before actual delivery of the movable goods, there will be symbolic possession and the existence of the requisite intention of the parties, which will result in the transfer of ownership from the seller to the buyer.<sup>144</sup> Under South African law, the standard CIF Incoterms, in so far as they are taken to evidence an intention that the parties intended ownership to pass on transfer of the bill of lading, bring about a transfer of ownership in accordance with South African property law principles. Ascertaining the parties' intention is essentially the same as in English law, ie absent any contrary indication; the parties are taken to have intended that ownership should pass at this point.

*(b) English law*

The transfer of ownership analysis in terms of English law is more straightforward than in South African law. The reason is that the transfer of ownership in English law is governed by the applicable statute namely the Sale of Goods Act of 1979.

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<sup>141</sup> As stated in *Lendlease Finance Corporation (Pty) Ltd v Corporacion de Mercadeo Agricola* 1976 (4) SA 464 (A) at 492-493, 'the parties' intention was derived from the facts of the case that illustrated the parties intended ownership in the goods to pass when the bill of lading was delivered and not when the goods were delivered. Furthermore, by endorsing and handing over the bill of lading, constitutes constructive delivery of the goods to the consignee or the buyer.'

<sup>142</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 88.

<sup>143</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 81.

<sup>144</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 81.

As discussed in the preceding chapter, in terms of English law, the transfer of ownership in the movable goods, which goods must be ascertained, from the seller to the buyer will take place when the parties intend it to pass.<sup>145</sup> Where the movable goods are not ascertained, the transfer of ownership from the seller to the buyer will only occur when the goods have been appropriated to the contract.<sup>146</sup> As stated previously, the petroleum products are ascertained at the time of loading and the parties' intention is contained in the varied CIF contractual provision in their international contract of sale whereby the transfer of ownership should take place at the loading port. Accordingly, the varied CIF contractual provisions meet the property law requirements in terms of English law.

*(c) Conflict of laws*

Briefly, it is in relation to this issue ie the transfer of ownership of the movable goods that the application of English law may lead to a different outcome than would the application of South African Law. This would be a true conflict of laws problem. In this case the rules of private international law come into play. It seems however not to matter whether one applies English conflict rules or South African conflict rules. They lead to the same result ie the proper law to be applied is the *lex situs*. Where the property is situated therefore determines what law applies to this issue. The question that one may have to consider is the point in time at which the property situation matters, ie at the time the dispute arises or the time at which it is alleged ownership passed.

#### **IV POSSIBLE SOLUTIONS TO THE DOUBTS EXPRESSED**

Since this dissertation focused on the CIF Incoterms® 2000 / 2010 and the variation thereof in an international contract of sale for petroleum products, can one refer to the Incoterms to provide a future solution to the doubts expressed? As outlined in Chapter 2 of this dissertation, CIF Incoterms® 2000 / 2010 explicitly states when risk in the movable product passes from the seller to the buyer but is silent on the transfer of ownership. Will future revisions of the Incoterms possibly take into account ownership provisions and/or by providing an explicit provision when ownership in the movable product should pass from the seller to the buyer? However, if one refers to previous revisions of the Incoterms since 1936, it seems highly unlikely that any future revisions of Incoterms will outline when ownership in the movable products should pass from the seller to the buyer. The reason is that Incoterms,

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<sup>145</sup> Section 17 of the Sale of Goods Act 1979.

<sup>146</sup> Section 16 of the Sale of Goods Act 1979.

as with the Vienna Convention and many international instruments in other areas of law, do not address property law issues, so as not to infringe on national property laws. This is the reason why it is unlikely that contractual instruments will address property law issues in the future. There is indeed a clear division between property law and contract law. Accordingly, the need for uniform contractual ownership provisions will not exist. Hence, a possible future revision of Incoterms to take account of ownership provisions and/or to include when the transfer of ownership should pass is unlikely to occur.

Contractual provisions in an international sale contract on a variation of CIF Incoterms reflecting the parties' intentions with regard to when ownership in the goods sold is to pass from the seller to the buyer may not achieve the parties' objective in this regard. The reason is that the determination of when ownership passes in such circumstances is with reference to principles of the applicable property law and the application of these principles may determine that ownership passed at some other time. Provided however, parties to an international contract of sale for petroleum products on varied CIF Incoterms bear in mind the relevant property law requirements for the passing of ownership in movable property, they can exercise a considerable degree of contractual control over this issue. The contractual provisions can go some way to achieving this control by specifying the point of delivery, either actual or constructive, and reflecting an intention that the passing of ownership of such property be linked to this delivery. In the case of the varied CIF contractual provisions in the international contract of sale, this linkage is satisfactorily achieved by linking the intention that ownership should pass to the transfer of possession of the bill of lading, which effects a transfer of constructive possession of the goods it covers. The issue that is of primary concern is whether the intention that ownership should pass could be linked to some other point in time, in this case the point at which risk in the goods passes. This could be achieved if the passing of risk could be linked to transfer of possession of the goods, either actual or constructive possession. If the bill of lading is transferred from the seller to the buyer at the point of loading of the movable goods, then this can bring about constructive possession of the goods. This approach would be distinct from the usual intention in international contracts of sale on CIF Incoterms, that ownership should pass with constructive delivery, in the form of transfer of possession of the bill of lading that cover the goods.

As a further alternative, could parties contract on the basis of the FOB (Free On Board)<sup>147</sup> Incoterm instead? In this respect, the position under the varied CIF Incoterm will be contrasted with the FOB Incoterm. The contractual provisions developed in the oil and gas industry, specifically the petroleum sector as outlined in Chapter 3 seem to attempt to link the passing of ownership of the goods to a point in the process of loading the goods at the port of loading. If that point of loading could be considered the point at which the buyer received actual delivery of the movable goods, it would be possible to achieve the objective of having ownership pass at that point. This would be the case in FOB sales where the services of the carrying vessel are engaged by the buyer and the vessel can therefore be considered the buyer's agent authorised to take actual delivery of the goods at the port of loading.<sup>148</sup> Hence, in the absence of an agreement to the contrary, delivery of the movable goods by the seller to the carrier (in this case the carrier is the representative of the buyer), constitutes actual delivery of the good in terms of the contract and in terms of the law of property.<sup>149</sup> In addition, if the parties' required intention is present, then together with actual delivery of the movable goods from the seller to the buyer, ownership then passes from the seller to the buyer.<sup>150</sup> However, even though transfer of ownership can take place at the loading port in terms of the FOB Incoterm, it is unlikely that the parties to an international contract of sale for petroleum products will select the FOB Incoterm due the shipping risks involved. The problem with CIF contracts as discussed above is that the services of the carrying vessel are engaged by the seller, and the carrying vessel is therefore not considered the agent of the buyer as the carrier is the seller's agent. Under CIF Incoterms, actual delivery of possession of the movable goods to the buyer would generally therefore be at the port of discharge and not at the port of loading. Hence, constructive delivery of possession in the form of the bill of lading to which the goods relate, at the port of loading can bring about the transfer of ownership from the seller to the buyer as discussed in the preceding paragraph.

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<sup>147</sup> Incoterms 2010 at 87.

<sup>148</sup> Incoterms 2010 at 87.

<sup>149</sup> JP Van Niekerk and WG Schulze *The South African Law of International Trade: Selected Topics* 3 ed (2011) 86.

<sup>150</sup> *Anderson & Coltman Ltd v Universal Trading Co* 1948 (1) SA 1277 (W).

## **CHAPTER 5 CONCLUSION**

The contractual provisions outlined in Chapter 3 indicate the current trade practice in the petroleum sector but is it how the transfer of risk and ownership provisions should be? Parties are caught in their own conflicting interest and it is indeed difficult to strike a balance between what is and what ought to be especially for a South African contracting party to be in strict conformity with the property law of South Africa. As discussed in this dissertation, the contractual provisions on the varied CIF Incoterms will not satisfy the actual delivery requirement in terms of South African property law in order to effect transfer of ownership at the port of loading. It will however satisfy the requirement of constructive delivery via the transfer of possession of the bill of lading from the seller to the buyer. Accordingly one cannot argue for the property law of South Africa to reflect the current trade practice in the petroleum sector because the property law is highly unlikely to change. The conflict will continue to exist based on the parties' respective contractual interests. Since contractual parties strive to achieve uniformity and to standardise certain risk and ownership provisions, the above varied CIF contractual provisions do succeed in linking the passing of ownership of corporeal movable property to the passing of risk in that property under the international contract of sale. Furthermore, parties to an international contract of sale should bear in mind that contractual provisions are determined in terms of contract law whereas the transfer of ownership of the movable goods are determined accordingly to property law. As a result, the transfer of risk and ownership provisions will not necessarily be in conformity with the property law of the country where the movable goods are situated.

As an alternative, contractual parties in a CIF international contract of sale for petroleum products should consider a reformulation that the risk from the seller to the buyer should pass when ownership passes. In this way, the transfer of ownership provision could then meet the relevant property law requirements. However, another difficulty arises in determining at which point this will occur. It is further submitted that it is unlikely that such amendments will take place in the current trade practice in the petroleum sector when dealing with international sellers as parties strive towards contractual uniformity and familiarity in the petroleum sector.

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