
Business

Law

Review

34

FINANCE

Tax Efficient and Tax Secrecy Destinations: Legal, Okay or Not?

Peter Yeoh

44

INTERNATIONAL SALES

Delivery of Goods to Carriers in International Sales: An Examination of What It Purported to Be in Nigeria

Osuntogun Abiodun Jacob

54

CURRENT COMMENT

Can of Worms?

David Flint

56

IN PARLIAMENT



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Contents

Finance

Tax Efficient and Tax Secrecy Destinations:
Legal, Okay or Not?
Peter Yeoh

34

International Sales

Delivery of Goods to Carriers in International Sales:
An Examination of What It Purported to Be in Nigeria
Osuntogun Abiodun Jacob

44

Current Comment

Can of Worms?
David Flint

54

In Parliament

56

Delivery of Goods to Carriers in International Sales: An Examination of What It Purported to Be in Nigeria

Osuntogun Abiodun Jacob*

SUMMARY

This article deals with international sales. Specifically, it discusses the question of delivery of goods to the carrier and its implication that it shall be 'prima facie deemed to be a delivery of the goods to the buyer'. The legal consequences in Nigeria of a contract entered into by parties of different origin with respect to delivery of goods to the carrier are examined. It further discusses how a breach of duties and obligations on the part of the parties can lead to the application of statutory exceptions. It notes that there are two international conventions ratified and domesticated in Nigeria, but one protects the interests of one party more than the other and the other also does the same with the interests of the other party. It considers the application of these international conventions on the issue of delivery of goods to the carrier. Furthermore, it also considers the application of Incoterms in Nigeria to carriage of goods and argues that the controversy generated in the United Kingdom by Vaughan Williams LJ and Buckley LJ, on the one hand, and Hamilton LJ, on the other hand, has reverberated to Nigeria. It points out a misconception in the application of law on this issue which has been accepted as a settled principle of law in Nigeria.

I INTRODUCTION

This article deals with sale of goods transactions in international trade. Of course, such an international commercial transaction is bedevilled with peculiar problems associated with trans-border transactions because different people are not only involved at every stage of the transaction, but the parties entering into the contract together are often from different states of origin and are not likely to physically meet to negotiate the terms of the contract. In addition, the nature of the transaction calls for the application of different laws, which may give rise to a conflict of law as parties of diverse domestic law backgrounds examine the issues of choice of law and forum selection through the gamut of different principles, covering private international law and domestic law of applicable countries in order to decipher and interpret the rights and obligations of the parties to the contract.

From the onset, it is important to note that this article is not a study on the choice or conflict of law. Rather, it is strictly limited to the examination of the domestic law of Nigeria dealing with the application of section 33 (1-3) of the Sale of Goods Act of most of the state laws in Nigeria¹ which is *in pari* material with section 32 (1-3) of the 1893

Act.² Admittedly, the domestic provisions referred to will be examined in an international context, thus, it is important to examine the relevant international conventions relating to the carriage of goods. Be that as it may, the focus of the article is streamlined and limited in its scope of coverage, to the question of delivery of goods to the carrier and its implications on the remedies of the buyer to breach of contract by the seller.

It is also important to note that the study is not a general examination of the principles of law dealing with delivery of goods in sale of goods. It is divided into eight sections. The first section is an introduction while the second section sets the tone for critical analysis in the article by interrogating the general principle behind the domestic law relating to the issue of delivery to the carrier in Nigeria. Section three discusses how a breach of duties and obligations by the parties can lead to the application of statutory exceptions. Section four covers carriage of goods by sea transit in Nigeria and how the courts have applied the domestic law relating to it. Section five and six deal with the international regulatory framework of the carriage of goods as it espouses the law relating to the subject matter. Specifically, section five discusses the use of Incoterms in international sales, while section six examines International Conventions on the Sale of Goods. Section seven considers the application of international conventions and Incoterms in Nigeria. The conclusion is presented in section eight.

2 SETTING THE SCENE WITH THE GENERAL PRINCIPLE

In international trade where goods sold by the seller have to be loaded in the port of origin in one country and discharged in the port of destination in another country, the use of a carrier by the seller to deliver the goods is imperative in order to perform the terms of the contract between the parties. Consequently, there is the need for the parties in the contract to enter into a contract of carriage of goods with the carrier in order to transport the goods. However, since, the buyer is not visibly present to negotiate with the carrier at the port of shipment, the seller is often the ideal person to perform this responsibility. Of course, how he performs that responsibility and the capacity in which he performs it are very important to determine the legal relationship between the parties in both contracts (contracts of carriage and sale of goods). If he performs the responsibility as a seller, then he is liable for the consequences of his action, but if he performs the responsibility as an agent of the buyer, receiving instruction from him, then the buyer should be responsible for the consequences of that action. Furthermore, if the buyer performs the responsibility himself, through another party, even though he may not be visibly present, the position does not alter the consequence, he is also liable for his action. Those scenarios are what the Sale of Goods Act seems to be aiming at when it provides that 'where goods are delivered to a carrier for transmission to the buyer, this is prima facie deemed to be a delivery of the goods to the buyer provided the carrier is independent of the seller'.³ Although, the word agent or agency is not mentioned in that provision, it is important to

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¹ See s. 33 (1-3) of Sale of Goods, Oyo state law CAP. 149 2000 (Oyo State), which is *in pari* material with s. 32 (1-3) of the 1893, Sale of

Goods Act (SOGA) and s. 33 (1) of Sale of Goods Law, the Laws of Lagos State of Nigeria, vol. 7 (2003).

² *Ibid.*

³ *Ibid.*, see s. 33 (1) of Oyo, s. 32 (1) of 1893 and that of Lagos State.

understand the principle of agency in order to understand the meaning of that principle, because that principle informs on the making of that rule. The principle of agency is *qui facit per alium facit per se* which means he who does a thing through others does it himself and should be liable for it. Therefore, if the seller acts for himself in the appointment of a carrier, it is unlawful to attribute the action and inaction of the carrier to him, more so when he has a duty under the contract of sale of goods to deliver the goods to the buyer. Consequently, his risk regarding the goods will not cease until the goods are delivered to the buyer. It is vice versa if the seller acts as an agent of the buyer, the buyer bears the risk. But if the carrier is an ally of the seller, the seller will bear the risk, notwithstanding the fact that the buyer consented to his appointment.

The implication of this provision if the carrier is not a surrogate or ally of the seller is that the risk will pass to the buyer as soon as the seller delivers the goods to him.⁴ Therefore, the seller is entitled to receive the payment of goods or sue for the price, even if the goods are lost and do not reach the buyer. In *Nads Imperial Pharmacy v. Messers Siemens & Sons & Anor*,⁵ goods ordered by buyers in Nigeria from a seller in Hamburg arrived in Lagos, were delivered at the port and later taken to a warehouse. The buyers, who were informed of the arrival of the goods, claimed waivers of import duty on those goods. At the time of collection, the buyers found that the goods had disappeared through some unexplained cause. Although they delayed in taking delivery, they sued for recovery of the purchase price for failure of consideration due to non-delivery. A Lagos High Court applied the rule and held that unless the parties express a contrary intention, delivery by the seller to the carrier is deemed to be a delivery to the buyer. Consequently, the sellers were not liable. It must however, be noted that the word independence here means the carrier is not subject to the control of the seller. Thus, the carrier must not be his agent, employee or surrogate under any circumstances. If he is, the rule will definitely not apply. Thus, in *Galbraith and Grant Ltd v. Block*,⁶ the court held that since the carrier was an employee of the seller, delivery to him cannot translate to delivery to the buyer, for it is merely 'a delivery to the seller's alter ego'.

However, as noted earlier, this rule can be displaced by the intention of the parties. It is important to illustrate this with two examples. One, if the seller undertakes to deliver the goods at the point of destination, delivery to the carrier will not be deemed as delivery to the buyer until the goods are discharged at the port of destination and delivered to the buyer. The second deals with how the parties can use an intermediate approach in appropriating risk between them on a mutual basis. On this, Igweike notes correctly that parties can intend an 'inanimate state of thing' in the sense that once

the vendor has delivered the goods to the carrier, he has performed his own part of the obligation to the extent that he will not be liable in damages for breach of contract if the goods are lost in transit and do not reach their destination.⁷ At the same time, they may also agree that the whole or part of the price will not be payable until the goods reach their destination.⁸ Similarly, they may agree to transfer ownership of the goods to the buyer at the time of shipment of the goods, 'that they should then be both sold and delivered on condition that the price (in whole or in part) should be payable only on the contingency of the goods arriving'.⁹

3 HOW A BREACH OF DUTY CAN LEAD TO AN EXCEPTION

The general principle cannot subsist in all situations, particularly when the reason behind the loss or damage of goods can be attributed to failure or omission of the seller in performing his statutory duty. Consequently, the Act creates an exception on the ground of breach of statutory duties and obligations on the part of the seller.¹⁰ In doing so, it imposes a duty, subject to contrary intention by the buyer, that the seller must make a reasonable contract with the carrier on behalf of the buyer. It provides indices of test for reasonability by subjecting it to the nature of the goods to be carried and the circumstances of the case. It means each case will be treated on its own merit. However, it must be noted that this exceptional clause is so wide that it is obvious that it imposes a duty on the seller to consider a wide range of factors such as weather, the length of the voyage, the state, nature, condition, custom and practice of the goods vis-à-vis the means of transport etc. If he fails to consider all those indices before concluding a contract with the carrier, the delivery of the goods to the carrier will not be treated as delivery to the buyer. In *Thomas Young & Sons Ltd v. Hobson & Partners*,¹¹ electric engines sent by the sellers to the buyers by rail were damaged in transit because they were not securely fixed. It was discovered that if the sellers had made a reasonable contract with the carriers, the goods could have been sent at the carriers' risk instead of the owners' risk which was compatible with the custom and the usual practice for the goods. The court considered the evidence as well as the statutory provisions in holding that the delivery to the carrier (Railway Company) could not constitute delivery to the buyers and therefore the buyers were held entitled to reject the goods, since the sellers had not made a reasonable contract with the carrier.¹²

⁷ See K. I. Igweike, *Nigerian Commercial Law: Sale of Goods* 151 (3d ed., Nigeria: Malthouse Ltd Lagos 2015).

⁸ *Ibid.*, at 151–152.

⁹ *Ibid.*, at 152.

¹⁰ See Sale of Goods Act, *supra* n. 1. See s. 33 (2) of Oyo state law, which is *in pari* material with s. 32 (2) of (SOGA) and s. 33 (2) of the Lagos law which provides that 'Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages'.

¹¹ [1949] 65 TLR 365.

¹² *Ibid.*, at 366, Tucker LJ opined that 'In the present case the plaintiffs had agreed to put the goods in box wagons, and the question is whether

⁴ See Lord Cottenham in *Dunlop v. Lambert* [1839] Cl & Fin. 600, at 620–621 where he opined that 'the delivery by the consignor to the carrier is a delivery to the consignee and the risk is after such delivery the risk of the consignee. This is so if, without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance. The delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risks of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself, for such carrier then becomes his special agent'.

⁵ [1959] LLR 21.

⁶ [1922] 2 KB 155, 156.

As a final point in this section it is important to note that although the buyer has an option to displace the rule here, if he is disposed to take the benefits of the rule, he is only entitled to one of the two remedies. One is to treat delivery to the carrier as delivery to the seller and not to himself. If he takes that option, he can sue for non-delivery and sue for refund of his purchasing price. Alternatively, the buyer may hold the seller responsible for the loss and damage occasioned by such hasty, unreasonable and unfair terms in the contract of carriage. If he takes the second option, he cannot sue for non-delivery.

4 CARRIAGE OF GOODS BY SEA TRANSIT

One cannot deny the fact that in domestic and international sales where goods are meant to be shipped from one port to another, mostly from nation to nation, the risk of an accident or peril is too high and beyond human control, not to impose a duty to insure on any of the parties. However, the drafters of the Act handle this issue diplomatically. Instead of imposing a duty to insure on any of the parties, it imposes a duty on the seller to give notice that may enable the buyer to insure the goods, where goods are to be sent to the buyer by a route involving sea transit.¹³ The drafters of the Act envisage that no wise buyer will fail to insure the goods he has bought or intends to buy if he has access to such information from a credible source – the owner of the goods. Thus the act imposes a duty on the seller to give notice, not a mere notice but a notice that will enable the buyer to insure the goods. In contrast, if the seller fails to do this, the goods shall be at the seller's risk during that sea transit, irrespective of whether property has changed hands or not. Thus, even if the said goods are delivered to the carrier, it will not be treated as delivery to the buyer.

A Warri High Court applied the provisions of this Act in *Ogbe v. Kofi*.¹⁴ In that case, the seller dispatched 104 bags of cement to the buyer at Warri by an Akiriboat through the carriers who carelessly dumped the bags of cement at the open wharf, without any covering documents and without informing the buyer of the arrival of the goods. As a result, the goods were lost. The court held that since the goods were dumped at the open wharf without any covering documents and the

it was reasonable to send the goods of this nature unsecured at owner's risk when they could have been sent at the same cost at company's risk, subject to inspection by railway officials, who could, in a case like this, have required that the engines be properly secured by means of battens. We cannot think that such a requirement would have placed an unreasonable burden on the plaintiffs and in all the circumstances we are of the opinion that ... the defendants succeeded in showing that the plaintiffs had failed in their duty under s. 32(2) ... to make such a contract ... as was reasonable having regard to the nature of the goods and other circumstances of the case, and that the defendants were accordingly entitled to decline to treat the delivery to the railway company as delivery to them'.

¹³ S. 32 (3) provides 'Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit'.

¹⁴ (Unreported), Warri H/C Suit No. W/BA/76, see also *Wimble v. Rosenberg* [1913] 3 K.G. 743; *Northern Steel & Hardware Co. Ltd. v. John Batt & Co. Ltd.* [1917] 33 T.L.R. 516.

seller did not give advance notice of the imminent arrival of the consignment to the buyer (plaintiff) in breach of section 32 (2) and (3) of the Act, the seller (defendant) will bear the risk of loss.

It is important to recapitulate this section. Three conditions must be present before this rule can be effective. One, as noted earlier, parties must not have provided a contrary agreement to the rule. Two, the goods must have to be sent or were sent to the buyer though 'a route involving sea transit' which means the contract must be that of carriage of goods by sea. The last one is that the term of the contract must not displace or derogate with the feature in a carriage of goods transaction that the parties must insure. If all these requirements are met, then the rule will operate in favour or to the detriment of the seller depending on whether he performs or fails to perform the duty to furnish the buyer with sufficient information that will enable him to insure the goods. If he does that the risk will pass to the buyer, if he does not the risk remains with him.

5 THE USE OF INCOTERMS IN INTERNATIONAL SALES

In the first instance, it is important to note that the rules discussed in this article are positive and therefore not mandatory when it comes to the apportion of risk in domestic and international sales, since they provide for exclusionary provisions at the onset with the opening phrases 'where in pursuance of a contract of sale the seller is authorized or required',¹⁵ 'unless otherwise authorized by the buyer',¹⁶ and 'unless otherwise agreed'.¹⁷ This means the intention of the parties is supreme on this matter. Parties can exclude the provision of the Act by incorporating clauses in their agreement which differ from what the rule lays down by the Act. If this is not done, then the provisions of the Act will prevail. Alternatively, parties can agree on terms which have to be interpreted along with the statutory provisions.

In addition, it is common knowledge that parties in international sales, whether in export or import transactions, usually adopt Incoterms as part of the terms of the contract which affects who shall bear the risk among them, in spite of the application of the principle that delivery of goods to the carrier by the seller constitutes delivery to the buyer. Hence, this section seeks to explain these Incoterms as a prelude to the next section where the application and effects on the principle will be critically analysed.

Incoterms are uniform international standardized rules developed by the International Chamber of Commerce (ICC)¹⁸ from its study¹⁹ of complex and multifarious trade terms at the municipal level to regulate international commercial transactions through allocation of duties and obligations to the parties in some essential aspects of a contract, such as delivery, insurance, cost and contract of carriage, which

¹⁵ This means the terms of the contract or the intention of the parties matters most.

¹⁶ *Ibid.*, it means this rule is subject to the buyer's discretion.

¹⁷ *Ibid.*, it means this rule is subject to the intention of the parties or terms of the contract.

¹⁸ The International Chamber of Commerce (ICC) was established in 1919.

¹⁹ ICC commenced the study of commercial trade terms in the early 1920s and in 1936 published its first edition.

have significant effects on the allocation of risk. Its first edition was published in 1936 and subsequent editions followed.²⁰ However, it is sad to observe that for a period of almost seven decades and four years, to be specific between the period starting from 1936, when the ICC published its first edition to replace the traditional merchant terms, until 2010, when the current version was published, the merchants were still unable to fathom the true meaning of Incoterms. The reason for the lack of understanding demonstrated by the merchants according to Ramberg is due to the difficulty associated with a change of habit. He noted that 'merchants retain old habits and are not easily persuaded to depart from the traditional maritime terms'.²¹ There is no doubt that something must be done about this. Thus, one of the reasons for revision of the 1990 Incoterms was to address the problem of understanding the rules. However, it is not entirely correct to lay the problem of understanding the Incoterms on the doorstep of human habit. It definitely goes beyond that. The fact is that in addition to some human character trait, there is ambiguity in the terms that need to be simplified. Some of the cases where the terms have been the subject of analysis have shown that the complexity of the terms has given room to contradiction that must not be encouraged in the interest of those who might want to rely on them. For example, in *Geofizika DD v. MMB International Limited & Ors (The 'Green Island')*,²² the carrier escaped liability in spite of its negligence in entering into a contract of carriage and insurance with freight forwarders due to the gap in the CIP 2000 trade term, which fails to provide remedies in a situation where a Carriage And Insurance Paid To (CIP) seller

²⁰ Note that the 1st edition has been subjected to intermittent reviews. As a result, another edited version was published in 1953; another in 1967, 1974, 1980 and 1990. The most current one is the 2010 edition which has been in force since 1 Jan. 2011, although plans are underway to produce another edition in 2020; On the history of Incoterms with its intermittent revisions, see International Chamber of Commerce, *Incoterms® Rules History*, <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/> (accessed 17 Aug. 2017).

²¹ See J. Ramberg, *INCOTERMS 2010*, 29 Penn St. Int'l L. Rev. 415–424, 418 (2011).

²² [2010] 2 Lloyds Rep. In this case, a Croatian company entered an international sales agreement to buy Land Rover ambulances from a British company on CIP (Carriage and Insurance Paid To) trade terms under Incoterms 2000. The sellers contacted freight forwarders to ship the goods. The buyers had requested that the cargo be shipped on a ro-ro vessel. The carrier with whom the freight forwarder negotiated provided a booking confirmation, which contained the following remarks: 'ALL VEHICLES WILL BE SHIPPED WITH "ON DECK OPTION" this will be remarked on your original bills of lading'. The vehicles were shipped on a general cargo ship and the bill of lading contained a liberty clause permitting carriage on deck without notice to the merchant. The goods were shipped on board on 29 Nov. 2006. On receipt of the original bills of lading on 4 Dec. 2006 the freight forwarders declared the shipment under their open cover, late declarations being permitted. The forwarders issued a certificate of marine insurance under the open cover under the Institute Cargo Clauses (A) and also the following additional provision: 'Warranted shipped under deck'. The ambulances were in fact shipped on deck, unpacked and unprotected. Two of them were washed overboard in the course of the voyage in the Bay of Biscay. The buyers' claim against the insurers was declined on the basis of the breach of the warranty. The buyers claimed against the carriers under the bills of lading in Libya and those proceedings were settled. The buyers then brought the proceedings in the United Kingdom against the sellers seeking the difference between the recovery from the carriers and their loss.

procured a cargo insurance that fails to cover the carrier's breach. It is important to note that the trial court judge, HH Mackie QC, found that the freight forwarder was negligent for shipment of vehicles under deck when they were stowed on deck. He noted that since 'the contract of carriage would not be on usual terms if it permitted on deck shipment' the seller was in breach of its obligation under the contract.²³ However, the trial court's judgment was overturned because the Court of Appeal discovered some incongruities in the trade terms²⁴ and did not see a causal link between the reason for the breach and the loss occasioned by the breach. Although, like the trial court, the Court of Appeal also took cognizance of the negligence of the freight forwarders and the seemingly carelessness of the seller, thus it reasoned likewise, that the insurance cover provided was not valid because it was subject to the warranty of under deck shipment and that the freight forwarder was also negligent in giving the warranty and in failing to check that the goods were in fact shipped under deck. However, the Court of Appeal departed from the trial court's conclusion and opted for a strict non-sentimental view that since the seller's obligation under the terms in the contract was only to provide cover under the Institute Clauses (C) and the loss of the two vehicles would not have been covered under those Clauses, then the buyers had not suffered any loss by reason of the seller's breach in providing invalid insurance or the forwarders' negligence. Of course, the court itself struggled to shrug off sentiment in order to arrive at this decision.²⁵

Consequently, the panacea to contradiction in Incoterms, as exemplified in that case, is to subject it to review in order to eschew a 'potential gap of interpretation' which can put them in adverse situations simply because they entered into certain Incoterms or incapacitate them completely in the process of enforcing their contractual obligations couched in Incoterms clauses.²⁶

There are other reasons for the 2010 version of Incoterms. Perhaps, two more reasons can be given. One is the quest for consolidation of 'D-family of rules'.²⁷ The advantage of this is that it also simplifies the complexity of the trade terms. Another is the desire to accommodate reform of trade terms

²³ *Geofizika DD v. MMB International Ltd. & Anor.* [2010] EWCA Civ. 459.

²⁴ E.g. the Court of Appeal found that the 'words used in the booking note constituted a prior antecedent agreement to the effect that if the vehicles were to be carried on deck there would be an endorsement to that effect, thereby circumscribing the liberty contained in the bill of lading'. But under the Contract of Affreightment there was no right to carry on deck.

²⁵ One of the judges, Sir Nicholas Wall noted in his judgment that 'Equally, as a relative stranger to this category of litigation, it never ceases to surprise me that apparently acute men of business, who are sufficiently affluent to be able to afford good advice and who deal with substantial sums of money, are so careless with language as to require this court to tell them the meaning and effect of critical words in their dealings with each other'.

²⁶ P. Ndoluvu, *Incoterms 2010: A Consideration of Certain Implications of the Amendments to the Traditional Incoterms 2000*, 44 Comp. & Int'l L.J. S. Afr. 204–224 at 218 (2011).

²⁷ 'D-family of rules' is mostly an arrival term which imposes on the seller to deliver the goods at certain places in accordance to the requirements of the delivery terms. For a quick look on this terms, see D. Murray, *Risk of Loss of Goods in Transit: A Comparison of the 1990 INCOTERMS with Terms from Other Voices*, 23 U. Miami Inter-Am. L. Rev. 93–131, 121–125 (1991).

in the United States of America into the threshold of international trade.²⁸

All these motivating factors were addressed by the 2010 Incoterms. To make it easy for the merchants to understand; it demarcates the trade terms into two categories, those that can be used for any kind of transport,²⁹ and those that can only be used for carriage of goods by sea.³⁰ It removes 'D-family of rules',³¹ and replaces them with just two terms which are Delivered at Terminal (DAT) and Delivered at Place (DAP).³²

The 2010 version was used as a mechanism to make the US's trade practice fit into the international trade rule.³³ Finally, it also imposes more obligations on the parties to share information that will encourage 'string sales' in a 'buying afloat transaction' and to obtain security related documents for the safety of goods.

Much more importantly, since this study deals with carriage of goods by sea, this section will briefly clarify the second category of Incoterms dealing with carriage of goods. The four trade terms listed in the 2010 edition are Free Alongside Ship (FAS), Free On Board (FOB), Cost and Freight (CFR) and

Cost, Insurance and Freight (CIF). As for 'FAS', the seller's obligation to deliver the goods is discharged when the goods are placed alongside the vessel (e.g. on a quay or a barge) nominated by the buyer at the named port of shipment. From that moment, the risk of damage or loss of the goods passes to the buyer when the goods are alongside the ship, and the buyer is responsible for all costs from that moment onwards.³⁴

Indeed, it is crucial to note that the most radical change effected by the 2010 version on the remaining three Incoterms rules, dealing with carriage of goods which are 'FOB', 'CFR' and 'CIF', is the shift in the risk transfer points.³⁵ This change is also necessitated by the inadequacy of the existing transfer points to meet the modern contemporary challenge in maritime transactions. In fact, the ship's rail has been found not to be accurate in serving as an appropriate demarcating link for risk transfer between the parties in international sales.³⁶ Admittedly, the ship's rail is inadequate but not completely worthless.³⁷ It had been used successfully as the demarcating line in an Incoterm contract where property normally passes when the goods are delivered over the ship's rail.³⁸ No doubt, the rule has served to provide obligations equitably to both the seller and the buyer without qualms.³⁹ No one noticed any inadequacy with the rule, until it encountered a brick wall in *Pyrene Co Ltd v. Scindia Navigation Co Ltd*.⁴⁰ Where,⁴¹ Devlin LJ refused to apply it, noting that it has become obsolete and unfit for the modern shipping transaction.⁴² The 2010 Incoterms came to the rescue as they replaced the transfer points in all of them to 'placing the goods on board'.

²⁸ See Ramberg, *supra* n. 21, at 218–221.

²⁹ These are, 'EXW' (Ex Work) which means the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place, 'FCA' (Free Carrier) which means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place, 'CPT' (Carriage Paid To), it means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination, 'CIP' (Carriage And Insurance Paid To), it means, that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination, 'DAT' (Delivered At Terminal) means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. 'Terminal' is a place, whether covered or not, such as a warehouse, container yard or road, rail or air cargo terminal. The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination. 'DAP' (Delivered at Place) means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place and 'DDP' (Delivered Duty Paid), which means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

³⁰ These are 'FAS' (Free Alongside Ship), 'FOB' (Free On Board), 'CFR' (Cost and Freight) and 'CIF' (Cost, Insurance and Freight).

³¹ They are DAF (Delivered at Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay) and DDU (Delivered Duty Unpaid).

³² DAT was added to take care of a situation where the goods are to be made available to the buyer unloaded from the means of the transport, since DAP may not be suitable for that, see Ramberg, *supra* n. 21, at 418.

³³ On how this is done, see Ramberg, *supra* n. 21, at 418, he explained that DAP was added to ensure that the meaning of FOB under Incoterms is the same with the meaning of FOB in the US. In the US, FOB denotes 'a point that could be anywhere' thus, in order to arrive at the same meaning, it is essential to 'add the word "vessel"' after the FOB.

³⁴ *Ibid.*, 2010 Incoterms.

³⁵ See Ramberg, *supra* n. 21, at 422.

³⁶ *Ibid.*, he noted that 'the change has been deemed appropriate, since the shortcomings of the ship's rail to serve as an adequate point for the division of risk are well known'.

³⁷ Infact, Atiyah quoted Schmitthoff as saying that 'it is permissible and indeed convenient, to refer to the ship's rail as the frontier dividing the responsibilities of the f.o.b. seller and his buyer'. See P. S. Atiyah, *The Sale of Goods* 371–372 (9th ed., London: Pitman Publishing 1995); Schmitthoff, *Export Trade* 25–26 (9th ed.); *Colonial Insurance Co. of New Zealand v. Adelaide Marine Insurance Co* (1886) 12 App Case 128, noting that 'In ... f.o.b. contract, the almost universal rule is that risk passes on shipment – as soon as the goods are over the ship's rail, and if it should be material, the risk in each part of the cargo will pass as it crosses the ship's rail'.

³⁸ C. Dillion & J. P. Van Niekerk, *South Africa Maritime Law and Marine Insurance: Selected Topics* 60 (1983). The phrase for delimiting risk was 'exist or over the ship's rail' for all the three Incoterms.

³⁹ *Ibid.*, he noted that 'the ship's rail has in practice functioned quite well as a point for the division of responsibilities; the seller been responsible for those engaged to bring the goods over the ship's rail and the buyer for those engaged to receive the goods on board the ship'.

⁴⁰ [1954] 2 Q B 402.

⁴¹ In that case, a fire tender was sold as FOB London. As it was being loaded on to a ship nominated by the buyer, it was dropped and damaged before reaching the ship's rail due to the fault of the carrier. Devlin LJ held that the bill of lading, which was the contract or evidence of the contract of carriage between the buyer and the ship-owner, was important to determine the loss. He further held that the ship-owner was protected by The Hague Rules from liability.

⁴² [1954] 2 Q B 402. Devlin LJ noted that the 'division of loading in to two parts is suited to more antiquated methods of loading than are now generally adopted and the ship's rail has lost much of its eleventh century significance. Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across national perpendicular projecting from the ship's rail'.

However, placing the goods on board too is not a new phenomenon in trade practice and usage. In fact, as far back as 1944, Caldecote, C.J. in *Raymond Wilson Co. v. N. Scratchard Ltd*⁴³ described an FOB contract as the contract where party sells goods FOB. The problem is with the dogma or the phrase that has crept into the interpretation of FOB. Therefore the phrase must be removed in order to bring the rule in line with the modern trends.

Understandably, the purpose of division is to determine the exact time the risk shifts from one party to another. Thus, it might be difficult, on a cursory look, to determine the task of appropriating risk without examining the obligations and duties of each party in the contract. In an FOB contract, the seller has a duty to deliver the goods on board⁴⁴ of the vessel nominated by the buyer. If he fails to do this, he cannot claim the price of the goods, even if the reason for his failure is due to the fault of the buyer, perhaps in nominating a willing ship. He can only sue for damages.⁴⁵ Furthermore, he must deliver the goods at the named port of shipment. No deviation on this is allowed. More likely than not, he cannot be taken to have performed his own part of the contract. The buyer too must discharge his own obligations. He has a duty to nominate a particular ship at a port specified in the contract. The ship must be willing to carry out this duty. As noted earlier, this duty is so important that it can frustrate the contract if it is not carried out.⁴⁶ Furthermore, since it is the buyer who nominates the ship, he must give shipping instructions that will enable the seller to place the goods on board. He must also pay the price of the goods. In sum, FOB as a rule of contract provides standards on mode of delivery of goods, the quantum of expenses to be borne by the seller as well as the exact time that risk and loss should shift to the buyer.⁴⁷ The risk of loss or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards.

The third is 'CFR'. In this contract, the seller undertakes to deliver the goods at a particular destination. He enters into a contract of carriage to carry the goods to the named destination or port. To accomplish this purpose, he delivers the goods on board the vessel or procures the goods already so delivered. He also has a duty to pay for all costs, including freight, necessary to bring the goods to the named port of destination. As noted earlier, the risk of loss or damage to the goods passes when the goods are on board the vessel.

⁴³ [1944] Lloyds Rep. 573 at 600-601. He noted that 'for a long time, certainly more than one hundred years, f.o.b. had a well-known meaning, and if a party sells goods "free on board", the meaning is that he had to put the goods on board and to pay all the expenses of doing so and delivery is made and the goods are at the risk of the buyer when they are on board, the expenses having been paid by the seller'.

⁴⁴ Note that there is flexibility on the rules governing delivery in an FOB contract and parties have made different rules for themselves but in sum the seller has a duty to ship the goods of exact descriptions at the specified time or at a reasonable time.

⁴⁵ See *Colley v. Overseas Exporters* (1921) B.K.B. 302 where the sellers delivered the goods at the port for shipment FOB Liverpool. The vessel nominated by the buyer was withdrawn by her owner. The other four vessels nominated by the buyer as substitutes were prevented from taking delivery. The seller sued for the price of the goods. It was held that they were not entitled to their claims but could only claim damages.

⁴⁶ If this is not done the buyer can not complain of non-delivery and the seller will be relieved of his responsibility to deliver. See *David T. Boyd & Co. Ltd. v. Lousi Loisa* (1973), Lloyd's Rep. 209.

⁴⁷ *Mitsui & Co Ltd v. Flota Mercante Grancolumbiana SA* [1989] 1 All ER 951, 956 per Staughton LJ.

A CIF contract is the most attractive form of contract in international sales involving carriage of goods by sea because it is the most widely and regularly used form of contract. It is a contract which is performed by exchange of documents and price. The duties of the parties, particularly the seller, in this contract have been enumerated by Lord Wright in *Smyth & Co Ltd. v. Bailey Son & Co Ltd.*⁴⁸ Some of the duties, according to Devlin, J are in relation to the goods and some are in relation to the documents.⁴⁹ Apart from minor variances in different contracts introduced by the parties, the duties still remain essentially the same today. For the seller, he has duties, under the contract, to ship the goods in accordance with the contract description, to procure a contract of carriage for the purpose of delivering the goods at the contractually designated port, to tender all the necessary shipping documents which are essential for the performance of the contract and a condition precedent for property to pass and to arrange for insurance policy cover on the goods 'against the buyer's risk of loss of or damage to the goods during the carriage'. As for the buyer, the primary duty is to pay for the price of the goods and other quoted expenses in exchange of the shipping documents.⁵⁰

6 UNITED NATIONS CONVENTION ON INTERNATIONAL SALE OF GOODS

1920 and 1921 are memorable years in the maritime sector at the international level. They are years that should not be forgotten in a hurry in the maritime sector, because during that period the seeds of regulatory regime were sown globally. Of course, maritime issue became the cynosure of the whole world as research activities commenced at the international level on how to bring domestic rules regulating carriage of goods into the domain of international law. As noted earlier, it started in the early 1920s when the ICC, which was established in 1919, commenced research on the study of commercial trade terms. The fire ignited by the ICC in 1920 to seek uniform interpretation of trade usages at the domestic level did not run dry. Rather, it ignited a similar move, this time from the United Nations, as the International Law Association, together with the Comité Maritime International (CMI) also commenced a series of diplomatic conferences from 1921. Indeed, the whole world, both from the private and public sectors, was at *ad idem* as they commenced a resurgence of global activities with a singular aim of seeking how to ensure uniformity in the allocation of risks between parties in international sales. While the ICC focused on trade terms, the ILC and CMI focused on risk allocation between carriers and owners of cargo in international sales law.

Without mincing words, the 1921 diplomatic conferences in The Hague, London and Brussels led to the signing of The Hague Rules in 1924.⁵¹ The rules have gone through some

⁴⁸ [1940] 3 All ER 60, 67-68.

⁴⁹ *Mahabir Commercial Co Ltd v. CIT*, (1972) 2 SCC 704: AIR 1973 SC 430 and *CIT v. Mysore Chromite Ltd*, AIR 1955 SC 98.

⁵⁰ Note that some of the expenses he needs to pay will cover carriage of goods, insurance cover, the cost of unloading, landing charges at the port of destination, custom duties for clearance, import duties, taxes.

⁵¹ See International Convention for the Unification of Certain Rules of Law relating to Bills of Lading, signed at Brussels, 25 Aug. 1924 and entered into force on 2 June 1931. On the history of how The Hague Rules were adopted, see M.F. Sturley, *The History of COGSA and the Hague Rules*, 22 J. Mar. L. & Com. 1-57 (1991).

amendments, the major one being in 1968 by the Visby Protocol, which is widely known as The Hague-Visby Rules.⁵² On the one hand, an attempt was also made to replace the Convention⁵³ in its entirety, leading to the making of the Hamburg Rules.⁵⁴ But, on the other hand, the Rules also went through a comprehensive amendment which resulted in the Rotterdam Rules in 2009. Nigeria as a country has ratified and domesticated The Hague Rules of 1924⁵⁵ and the Hamburg Rules,⁵⁶ but has yet to carry out the act of domestication of the Rotterdam Rules.

Indeed, it is interesting to note that it took eighty-five years, between 1924 and 2009, for the Rotterdam Rules to come into existence. It could have been assumed that the long period might have whet the appetite of most of the countries to ravenously embrace reform in the new convention, but this does not seem to be the case. Almost eight years after the convention was made, most countries (including Nigeria) have yet to ratify the Rotterdam Rules. The implication of that lukewarm reception to the newest convention on carriage of goods by sea is that either The Hague-Visby Rules or the Hamburg Rules are in force in most of these countries. The Hague Rules are not an all-inclusive regulatory framework. Rather than covering the whole issue that should be addressed under the carriage of goods by sea, it merely provides for duties and responsibilities of the carrier and shipper. In doing so, it imposes the responsibility to exercise due diligence in making the ship seaworthy on the carrier. This responsibility arises 'before and at the beginning of the voyage' and it covers the duty to ensure that the ship supplied must not only be fit and proper but that any of its other parts, which will be used to carry the goods, are also fit and safe for the purpose of carriage, reception and preservation of goods.⁵⁷ Therefore, during the process of performing his duty under the contract of carriage of goods by sea, which include aspects of 'loading, handling, stowage, carriage, custody, care and discharge of goods', the carrier bears the risk and is liable for damage or loss sustained due to

his failure to exercise due diligence in carrying out his responsibility.⁵⁸ It is important to note that carrier is exempted from liability in certain situations.⁵⁹ In addition, the so-called duty of care in respect of seaworthiness of the ship, which is an essential factor to activate the liability of the carrier for lack of due diligence imposed on him, is not an absolute one.⁶⁰ Parties are permitted to enter into a separate contract to limit or eschew their obligations under the Act.⁶¹ The Act also limits the liability of the carrier or the ship for loss or damage to an amount not 'exceeding N200 per package or unit, or the equivalent of that sum in other currency'⁶² and provides for a condition precedent of one year within which the suit against the carrier or the ship can be brought.⁶³

As noted earlier, Nigeria has also ratified and adopted the Hamburg Rules,⁶⁴ which dichotomize the office of carrier into two⁶⁵ although that does not eschew the possibility of suing both jointly and severally as one.⁶⁶ In addition, it also seeks to correct inequity in the protective regime of the existing international conventions⁶⁷ by creating a liability

⁵⁸ See Art. VI, Art. IV (3) and Art. IV, which also deal with the carrier's responsibilities.

⁵⁹ *Ibid.*, see Art. IV (2) on this. Some of the situations are acts of God, acts of war, perils, dangers and accidents of the sea, acts of public enemies; quarantine restrictions, acts or omissions of the shipper or owner of the goods, his agent or representative; strikes or lock-outs or stoppage or restraint of labour from whatever cause, whether partial or general etc.

⁶⁰ *Ibid.*, see Art. 1(3) and Art. IV (3) of the Act.

⁶¹ *Ibid.*, Art. VII, which states that nothing 'shall prevent a carrier or a shipper from entering into any agreement, stipulation, and condition' limiting the application of the Rules; Art. VI on Special agreements, which states that full legal effect shall be given to any agreement by the carrier and shipper or their agents on any terms as to the responsibility and liability of the carrier for goods carried and as to his rights and immunities in respect of such goods, or his obligation as to seaworthiness, or the care and diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care and discharge of the goods carried by sea, if the agreement is not contrary to public policy; Art. V deals with Surrendering of rights and immunities and increase of responsibilities and liabilities by the carrier provided such surrender or increase is provided for in the bill of lading issued to the shipper.

⁶² *Ibid.*, see Art. IV (5).

⁶³ *Ibid.*, Art. IV (6).

⁶⁴ See *supra* n. 60.

⁶⁵ Art. 1 of the Convention splits carrier into an actual carrier or a carrier. A 'Carrier' means any person by whom or in whose name a contract of carriage of goods by sea has been concluded with a shipper and an 'Actual carrier' means any person to whom the performance of the carriage of the goods, or of part of the carriage, has been entrusted by the carrier, and includes any other person to whom such performance has been entrusted. A shipper is defined as any person by whom or in whose name or on whose behalf a contract of carriage of goods by sea has been concluded with a carrier, or any person by whom or in whose name or on whose behalf the goods are actually delivered to the carrier in relation to the contract of carriage by sea while a 'Consignee' means the person entitled to take delivery of the goods.

⁶⁶ On this, it has been argued that while these new joint and several liabilities of carriers and actual carriers, actually addresses 'the problem of suing the actual carrier when a charterer's bill of lading is issued', it is 'quite complicated and can cause difficulties'. Although, in spite of that complexity, it 'certainly potentially makes it easier to sue the actual carrier, and also for the actual carrier to rely on the excepted perils (which may not be possible, at least in common law countries, under the existing regimes)', see Reynolds, *supra* n. 54, at 30.

⁶⁷ These conventions are The Hague Rules of 1924 and The Hague-Visby Rules.

⁵² See The Hague Rules of 1924 as amended by the 'Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading' adopted at Brussels, 23 Feb. 1968 and entered into force on 23 June 1977. Thus, The Hague-Visby Rules still refers to The Hague Rules of 1924.

⁵³ The Hague-Visby Rules were intended to correct defects in The Hague Rules.

⁵⁴ See United Nations Convention on the Carriage of Goods by Sea, signed at Hamburg on 31 Mar. 1978, and in force on 1 Nov. 1992. For a study on The Hague Rules, the Hague-Visby Rules and the Hamburg Rules, see F. Reynolds, *The Hague Rules, the Hague-Visby Rules and the Hamburg Rules*, 7 *MLAANZ J.* 16-34 (1990); T. Nikaki & B. Soyer, *A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive and Efficient, or Just Another One for the Shelves*, 30 *Berkeley J. Int'l L.* 303-348 (2012).

⁵⁵ See Carriage of Goods by Sea Act 1926 No. 1. (CGOSA), an Act to make provisions with respect to the carriage of goods by sea Laws of the Federation of Nigeria which comes in to force on 18 Mar. 1926 in Nigeria.

⁵⁶ See United Nations Convention on Carriage of Goods by Sea (Ratification & Enforcement) Act, 2005, Laws of the Federation of Nigeria (hereinafter known as the Hamburg Rules), <http://www.lawnigeria.com/LawsOfTheFederation/UNITED-NATIONS%20CONVENTION%20ON%20CARRIAGE%20OF%20GOODS%20BY%20SEA.html> (accessed 19 Aug. 2017).

⁵⁷ See Art. III of (CGOSA), *supra* n. 55.

framework that make carriers liable 'for ... loss of or damage to the goods',⁶⁸ and also for delay in delivery,⁶⁹ 'if the occurrence which caused the loss, damage or delay took place while the goods were in his charge'.⁷⁰ However, the carrier's liability is not without exceptions as it can be avoided if the carrier can either prove himself, or through his agents or servants, that he has taken pre-emptive measures that 'could reasonably be required to avoid the occurrence and its consequences'.⁷¹

7 APPLICATION OF THE RULE

The application of Incoterms and International Conventions on domestic rules in Nigeria dealing with the delivery of goods in respect of the liability of carriers has been fraught with difficulties and complexities leading to misunderstanding of the law on this issue, even from the leading scholars in law. Igweike, a leading author in Sale of Goods Law in Nigeria, argues that the rule of delivery by carrier in section 32 (1), which has been discussed in this article, is not applicable to FOB contracts.⁷² In FOB contracts, the seller has a duty to place the goods FOB a ship at his own cost. Although, the ship is usually nominated by the buyer, once he has done so and paid the cost of shipping, the risk passes to the buyer, who is responsible for freight, insurance and other expenses.⁷³ The reason for Igweike's view on this issue is actuated by his consideration of the obligation imposed on the seller in FOB contracts and the effect of such obligation.⁷⁴ Admittedly, there will be some difficulty, perhaps an incongruity, in the application of the rule to an FOB contract. This is so because once the seller has loaded the goods on board, his liability according to the contract comes to an end. In such a situation, to apply the rule which provides that the seller who is *functus officio* for the purpose of liability is deemed to be the agent of the buyer, which has the effect of triggering the liability that has been extinguished seems to be incongruent with the rule in FOB. That may be one of

the factors contributing to Nield J.'s decision in *Frebold v. Circle Products Ltd.*,⁷⁵ to dismiss the plaintiffs'/sellers' claims and counterclaims on the ground that they (the plaintiffs) were in breach of the condition that the goods were to be delivered in time to catch the Christmas trade.

In that case, the plaintiffs, who were German sellers, sold toys to English buyers FOB Continental port on the terms that the goods were to be delivered in time to catch the Christmas trade. The goods were shipped from Rotterdam and reached London on 13 November; but because of an oversight, for which the sellers were not responsible, the buyers were not notified of the arrival of the goods until the following 17 January. On appeal,⁷⁶ some of the issues for determination were whether delivery of goods to the carrier was delivery to the buyer, whether buyers were entitled to cancel delivery and effect of instructions by sellers to shipping agents to secure payment before handing over the goods. The Court of Appeal set aside the trial court's judgment and held that the seller of the toys (Panda) was entitled to the payment of GBP 845 the moment it had completed its own part of the bargain by putting the toys on board and that the risk of 'mishaps' that occurred thereafter had passed to the buyer (Circle).⁷⁷ The court further held that the presumption that the contract was on FOB terms was not rebutted by the plaintiffs' instructions to the shipping agents not to hand over the goods until payment had been secured. It further opined that since the seller's duty is to deliver the goods FOB, the delivery of the goods to the carrier was therefore held to be delivery to the buyer.

As a matter of fact the issue of incongruity cannot be ruled out. As Sir Frederic Sellers noted in the case that 'a term which required delivery in London would be totally inconsistent with an FOB contract' but since the intention of the parties to enter into an FOB contract was certain, the risk and property should pass on shipment.⁷⁸

It is important to note that in spite of that analysis, the natural flow of events in an FOB contract can still be truncated or altered if the law makers enact a rule or the parties show intention to do so. Indeed, it has been observed that an FOB contract has been subject to intensive variations in modern times.⁷⁹ That is bound to happen in a contract of sale of goods which gives primary consideration to the intention of the parties.⁸⁰ As noted earlier, courts have been admonished to enforce that intention.⁸¹

⁶⁸ Art. 5(3) provides that loss occurs if 'The person entitled to make a claim for the loss of goods' treats 'the goods as lost if they have not been delivered as required by Article 4 within 60 consecutive days following the expiry of the time for delivery'.

⁶⁹ See Art. 5 (1) of the Act; on the meaning of delay, Art. 5(2) provides that delay in delivery occurs 'when the goods have not been delivered at the port of discharge provided for in the contract of carriage by sea within the time expressly agreed upon or, in the absence of such agreement, within the time which it would be reasonable to require of a diligent carrier, having regard to the circumstances of the case'.

⁷⁰ On the extent of responsibility of the carrier, see Art. 4 of the Act.

⁷¹ See Art. 5 (1) of the Act.

⁷² See Igweike, *supra* n. 7, at 152.

⁷³ Note that there are variants in FOB contracts but these are essentially the same. In *Wimble v. Rosenberg* [1913] 3 KB 743 at 757, Hamilton, LJ explains the features of this contract thus: 'the seller puts the goods safely on board, pays the charge of doing so, and for the buyer's protection gives up possession of them to the ship only upon the terms of a reasonable and ordinary bill of lading or other contract of carriage. There his contractual liability as seller ceases, and delivery to the buyer is complete so far as he is concerned'.

⁷⁴ 'Two important points must be made in connection with the application of section 32(1). Firstly, the provisions of the section do not apply to FOB contracts. Under such contracts, the obligation of the seller is to place the goods sold free on board the nominated ship. Thus delivery is effected once the goods are received on board the ship'.

⁷⁵ [1970] 1 Lloyd's Rep 499.

⁷⁶ See *Frebold & Iother (Trading as Panda O.H.D.) v. Circle Products Ltd.*, [1970] 1 Lloyd's Rep. 499.

⁷⁷ Note that it was an FOB contract, thus the court held that the sellers were not in breach as they had delivered the goods in accordance with the requirements of the contract by shipping them in such a way as would normally have resulted in their arrival in time for the Christmas trade.

⁷⁸ *Ibid.*, at 505.

⁷⁹ See P. S. Atiyah, *The Sale of Goods* 411-412 (12th ed., London: Pearson 2010).

⁸⁰ See SOGA, *supra* n. 1, s. 17 of SOGA; s. 18 of Oyo and Lagos states, *supra* n. 1.

⁸¹ See e.g. *Lord Tomlin in Hillas & Co Ltd v. Arcos Ltd* (1932) All ER 494. He noted that 'The problem for a court of construction must always be to balance matters that, without violation of essential principle, the dealings of men as far as possible be treated as effective, and the law may not incur the reproach of being the destroyer of bargains'.

Of course, the correct position of law is that, when it comes to the application of this rule,⁸² it is obvious that it applies to FOB and not CIF contracts. As it has been argued rightly, 'the rule that delivery to carrier is prima facie deemed to be delivery to the buyer has no application to the CIF contracts'.⁸³ The reason why it is not applicable is because of the peculiar nature of CIF 'where delivery of the goods to the buyer occurs when, but not before, the [shipping] documents are handed over'.⁸⁴ The implication of that unique attribute is that it affects the issue of obligations and duties of the parties. The duty of the seller to deliver the goods 'means only that he must deliver the documents, the delivery of which transfers the property in, and the possession of, the goods to the transferee'.⁸⁵ Consequently, the buyer is bound to pay for the price of the goods, even if goods are lost at sea and he never received them.⁸⁶ This is the position of law in Nigeria as most of the cases have shown. In *Koiki & Others v. B.V. Magnusson*,⁸⁷ the appellants/buyers entered into a contract of sale of goods in 1981 with the respondents/sellers by placing an order for the supply of 15,000 bales of stockfish from Iceland. The appellants/buyers alleged that the respondent, instead of delivering the total number contracted for, only delivered 11,052 bales. He further alleged that the documents used for shipping were irregular and forged. In a suit filed by the appellants/buyers, the respondents denied the averments by the appellants/buyers insisting that he shipped the total bales in two separate lots. At the court of first instance, judgment was entered for the appellants. On appeal, filed by the buyer/the respondent, the Court of Appeal dismissed the appellants' claim. Dissatisfied with the judgment, the appellants further appealed to the Supreme Court which by unanimous decision dismissed the appeal holding that the duty of a seller of goods for export ends when the goods are put on board the ship and the bill of lading passed.

Similarly, in *Okereke v. Comptoir Commercial and Industrial Afrique Nigeria Ltd.*,⁸⁸ the plaintiff purchased from the defendants a quantity of second-hand clothing materials to be shipped from overseas and to be delivered CIF at Port Harcourt. The Nigerian civil war broke out and Port Harcourt harbour was blockaded. The goods were subsequently lost in transit and were never delivered to the plaintiff. Hence, the plaintiff brought an action for breach of contract. In defence, the defendants tendered and relied on the bill of lading and the insurance certificate as evidence that the goods were shipped and contended that these documents discharged and absolved them from liability. The court held that since the parties entered into a CIF contract, the remedy of the plaintiff was against the ship-owner and the insurers under the policy of insurance.

Of course, since the remedy of the buyer in that situation falls on the ship-owner or the insurer, the terms of the contract of carriage of goods will have a great role to play in determining such liability. In fact, that in turn will depend on the type of International Conventions entered into by the

parties. As noted earlier, Nigeria has ratified and domesticated two international Conventions which are The Hague Rules of 1924⁸⁹ and the Hamburg Rules,⁹⁰ but not the Rotterdam Rules. Therefore, recourse shall be heard to the provisions of Article III of The Hague Rules of 1924 and Article 5 of the Hamburg Rules 2005 in determining this issue.⁹¹ As noted earlier, there are great loopholes that the ship-owner or carrier can explore in The Hague Rules to escape liability. Thus, the Hamburg Rules are more friendly and effective in protecting the interests of cargo owners.⁹²

However, it is not in all circumstances that the buyer would be left at the mercy of the cargo owners, or even the insurers. The seller can only be absolved or discharged of liability if he performed his own part of the responsibilities and obligations according to the terms of the contract between them. Consequently, the Act enumerates situations 'where the buyer may decline to treat delivery to the carrier as delivery to himself'.⁹³ The first one arises if the seller fails to make a reasonable contract with the carrier.⁹⁴ In such a situation, the reverse will be the case as the seller and not the buyer will bear the risk if the goods are lost or damaged in the course of transit.⁹⁵

Another situation or exception is where the seller fails to give notice that may enable the buyer to insure the goods where goods are to be sent to the buyer by a route involving sea transit.⁹⁶ In such a situation too, the goods shall be at the buyer's risk during that sea transit, irrespective of whether property has passed or not. A High Court in Nigeria applied the provisions of this Act in *Ogbe v. Kofi*.⁹⁷ In that case, the seller dispatched 104 bags of cement to the buyer at Warri by an Akiriboat through the carriers who carelessly dumped the bags of cement at the open wharf, without any covering documents and without informing the buyer of the arrival of the goods. As a result, the goods were lost. The Court held that since the goods were dumped at the open wharf without any covering documents and the seller did not give advance notice of the imminent arrival of the consignment to the buyer (plaintiff) in breach of section 33 (2) and (3) of the Act, the seller (defendant) will bear the risk of loss. Without labouring the matter, there is no doubt that the provision of

⁸⁹ See CGOSA, *supra* n. 55.

⁹⁰ See the Hamburg Rules, *supra* n. 55.

⁹¹ See the discussion under s. 6.0.

⁹² See the discussion under s. 6.0; Reynolds, *supra* n. 54; Nikaki & Soyer, *supra* n. 54.

⁹³ See e.g. s. 33(2) which provides that 'Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case'.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*, since according to the Act, 'the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages'; *Young v. Hobson* [1949] 65 TLR 365, the Court held that the buyer was entitled to reject the goods because the goods sent by rail could have been sent at carrier's risk instead of the owner's risk considering the nature of the goods.

⁹⁶ S. 33 (3) provides 'Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit'.

⁹⁷ (Unreported), Warri H/C suit No. W/BA/76; *Northern Steal & Hardware Co. Ltd. v. John Batt & Co. Ltd.* [1917] 33 T.L.R. 516.

⁸² S. 33 rule 1 which deals with delivery of goods to the carrier.

⁸³ See Atiyah, *supra* n. 79, at 417.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*; Note that this is not to say that the sale is a sale of documents and not goods, see *Trasimax Holdings SA v. Addax BV* ('The Red Sea') [1999] 1 Lloyd's Rep 28.

⁸⁷ [1999] 8NWLR 492.

⁸⁸ [1974] ECLSR 221.

section 33 (2) applies to CIF⁹⁸ as well as FOB contracts,⁹⁹ and the legal consequences are the same for breach of seller's duty to make a reasonable contract.¹⁰⁰ Similarly, section 33 (3) also applies to FOB contracts but not to CIF contracts. In fact, Vaughan Williams LJ, was of the view that the duty to give notice is an absolute one that must be discharged by the seller even if the buyer had enough information to enable him to take out a particular insurance policy. Thus he opined that nothing can prevent the operation of section 33 (3).¹⁰¹ However, with CIF contracts, 'there is always an express agreement as to the insurance of the goods' which makes the statutory requirement in section 33 (3) inapplicable.¹⁰² In fact, this still remains the same even if 'special circumstances occur as a result of which the ordinary insurance cover is not effective and it would be advisable to take out a special cover'.¹⁰³ Thus, the special requirement in Nigeria that those goods to be imported into Nigeria must be insured by an insurer registered in Nigeria¹⁰⁴ may not displace the application of the sub-section, particularly when exceptions can be granted in certain circumstances.¹⁰⁵

8 CONCLUSION

This article has examined the law dealing with delivery of Goods to Carrier in International Sales and what it purported to be. The International Conventions and domestic law dealing with the topic are adequately considered. It examined the legal consequences in Nigeria of international sales of goods contracts entered into by parties of different

origin with respect to delivery of goods to carrier. The study has shown that the controversy generated in *Wimble v. Rosenberg*¹⁰⁶ on the application of some of the Incoterms to the Sale of Goods Act provisions dealing with delivery by carrier in the United Kingdom by Vaughan Williams LJ and Buckley LJ, on the one hand and Hamilton LJ on the other hand,¹⁰⁷ has reverberated to Nigeria. The mode of transplantation is however not controversial in Nigeria, at least, for now.¹⁰⁸ In the United Kingdom, it was in the form of controversy but in Nigeria, it is just a misconception accepted as a settled principle of law, since other scholars do not controvert Igweike's view. This article has perhaps stirred the hornet's nest on this by taking the position that the view was misconceived. Perhaps, this might wake up other scholars to investigate further on this issue, perhaps not. But be that as it may, this article recommends the Hamburg Rules and not The Hague Rules for Nigerian exporters, because they offer more protection. In the alternative, the article also recommends The Hague Rules for the other parties who are mostly foreign traders or companies, because they also offer greater protection of their interests. This is ironical, but the situation calls for it. In a situation, where there are two international conventions ratified and domesticated in Nigeria but one protects the interests of one party more than those of the other party, and the other party also does the same with the interests of the other party, which rules shall be the choice of the parties, depends on the ability and capability of the parties to bargain.

⁹⁸ See *United City Merchants (Investments) Ltd v. Royal Bank of Canada* [1983] 1 AC 198 at 409–410; Atiyah, *supra* n. 79, at 417.

⁹⁹ See Atiyah, *supra* n. 79, at 409, noting that 'because it is the seller who makes the contract for the carriage of the goods with the ship owner ... he must comply with s. 32 (2) of the Act'.

¹⁰⁰ See *Young v. Hobson* case, *supra* n. 95.

¹⁰¹ On this, see *Wimble v. Rosenberg* [1987] 4NWLR 915; Vaughan Williams LJ agreed with Buckley LJ but Hamilton LJ was of the view that s. 33 (3) does not apply to FOB contracts because the buyer does not send the goods to the buyer but only puts them on ship. It is important to note however that Buckley LJ did not see the duty as an absolute one in cases of sufficient information at the disposal of the buyer.

¹⁰² Atiyah, *supra* n. 79, at 417.

¹⁰³ *Ibid.*

¹⁰⁴ See 67(1) & s72 (1) of the Insurance Act, Cap. 117, Laws of the Federation of Nigeria, 2004.

¹⁰⁵ *Ibid.*, s. 72 (4).

¹⁰⁶ See the *Wimble* case, *supra* n. 101.

¹⁰⁷ See *ibid.*

¹⁰⁸ Igweike first published his book in 2001, another edition in 2015, and until now, nobody has questioned his view.