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The Modus Operandi of International Trade Law Rules: A Critical Overview

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1. Introduction

The functioning of international trade law rules is not based on a concrete foundation. It mostly depends on national commercial law codification, international conventions and well-established trade usages. Again, the functioning is not constant; frequently, it receives amendments, expands boundaries and broadens its coverage to conform to remarkable changes taking place in the international trading vicinity through adoption of treaties, national laws, memorandum of understanding between trading partners, codes of conduct set by international organisations, and jurisprudence developed by national and international courts and arbitral bodies.[1] International trade law rules, however, operate through certain uniform procedures in relation to formation of trade contracts, financing of trade, carriage of trading goods, furnishing of insurance for the trading goods during the voyage, determination of liabilities of trading parties, and resolving conflict of laws with appropriate remedies either through courts or arbitral bodies.[2]

The rules of operation are not codified in a single convention or statute. Most of them are scattered, treated as soft law and hence do not have binding force. However, some of them have wide-spread usage and are followed irrespective of jurisdictions. Some of them are easily accessible while some are not, which are rather thorny giving rise to complications. In addition, international trade contracts are always concerned with a large number of risks coming from voyages or from government interferences and are subject to suits, and hence, the operating rules need to have a uniform footing.[3]

This article tends to draw out the working procedures of international trade law rules in regard to international trade contracts between parties located in two different countries. While doing so, the article analyses the existing trade law rules and practices, examines their suitability in the globalised world and finally recommends for a uniform codification of international trade law rules and practices in a single treaty, which can easily be made accessible for all trading parties concerned in achieving global prosperity through trade.

1. G C Cheshire, *Private International Law* (London: Oxford, 4th Edition 1995) 3.
2. Harold J Berman, 'Law of International Commercial Transactions (*Lex Mercatoria*)' (1987) 2 *Emory Journal of International Dispute Resolution* 235.
3. Harold Joseph Berman and Colin Kaufman 'Law of International Commercial Transactions (*Lex Mercatoria*)' (1978) 19 *Harvard International Law Journal* 221.

2. Working Procedures of International Trade Law Rules Developed Through Ages

The working procedures of international trade law rules develop through centuries and often accept the domestic and international commercial law rules and practices. In order to understand the working procedures of international trade law and to evaluate its actual functioning, historical perspective has to be taken into consideration and useful references to different international trade rules, treaties, national laws, customs, and practices have to be made.

The pre-World War I regime witnesses a few international trade in place. The principle of laissez-faire liberalism dominates the trade that takes place only between the developed countries and the government makes a little interference therein. This trend helps trading partners to go for trade contracts based on agreements that serve common interests. However, such trade practices get interrupted due to the World War I and the strict operation of the *1932 Ottawa Agreement*. The Agreement establishes imperial trade relations, based on preference and protectionism. In addition, adherence to absolute unilateralism, extreme nationalism and absolute protectionism dictate the international trade as well. All of these features contribute ultimately to the collapse of international trade based on liberalisation rules and consensus intending to protect buyersí and sellersí interests in trade.[4]

The post-war economic reconstruction starts through international economic cooperation based on specific common principles and planning. The *1941 Atlantic Charter* incorporated the concept of common principles spreading out of the international trade in a freer trading environment and on a non-discriminatory basis. The United States (US) and Great Britain (GB) endorse this common principle in their domestic legislations. The US *Uniform Commercial Code* (UCC) is the first domestic legislation covering international trade rules based on the common principle.[5] This common principle afterwards gets the multinational legal protection under Article VII of the *Mutual Aid (Lend-Lease) Agreement of 1942*.[6]

The wreckage of the World War II makes the Allied Powers get united in all spheres to salvage the world through international cooperation preferably spreading of international trade. The *1944 Brentwood's Conference* helps to create consensus among them in order to establish a number of new economic institutions like the International Monetary Fund (IMF) and the World Bank (WB). These institutions are in place to facilitate international payments for

4. M R Islam, *International Trade Law* (Sydney: LBC, 1999) 3.
5. See New York Law Revision Commission, *Study of the Uniform Commercial Code* (New York: 1955) 348.
6. Islam, (1999) 4.

international trade between States.[7] The *Brentwood's Conference* also attempts to consolidate for a freer trade regime with the view of establishing the International Trade Organization (ITO) and giving it with the burden of administration and enforcement of a free world-trading market.[8] However, its discomfort with the US results in its death and gives birth to the *General Agreement on Tariffs and Trade* (GATT) in 1948 to carry out the ITO's tasks.[9]

At the same time, in order to enable the UN to play a direct role in international trade, several efforts are taken to establish an international trading system through the creation of the United Nations Conference on Trade and Development (UNCTAD) and the United Nations Commission on International Trade Law (UNCITRAL). The (UNCTAD) is given the task of liberalisation of trade for the underprivileged[10] and the UNCITRAL facilitates international trade through 'the promotion of the progressive harmonisation and unification of the law of international trade.'[11]

A number of powerful trading nations broke up and dodged the GATT provisions for the purpose of re-establishing protectionism in inter-State trading. Nine codes and agreements were made to ease the tension arising out of such situations. As the final step of such measures, the Eighth Round of the GATT talks started although it faced hectic debates to reach a consensus framework for international trade. Its ending paved the development of the World Trade Organization (WTO) in 1995 to perform more effectively than the GATT. Thus the Uruguay Round alters the total surroundings of international trade law with new trends and standards having been set in the post-cold war era.[12]

In addition, the proliferation of regional trading alliances in the 1990s and their free trade agenda opened up a new building block in the international trading system. The European Single Market, North Atlantic Free Trade Agreement (NAFTA), Asia Pacific Economic Cooperation (APEC), Association for South East Asian Nations (ASEAN), and South Asian Preferential Trade Agreement (SAPTA), which are glaring examples of such regional arrangements, have been in operation with terrific impact on international trade law rules.[13]

Thus, the working procedures of international trade law rules get different shapes in different trade regimes. However, the trading countries do not

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7. J M Trebilcock and R Howse, *The Regulation of International Trade* (London: Routledge, 1995) 21.
8. Islam, (1999) 5.
9. Islam, (1999) 5.
10. Ibid, 6.
11. Ibid.
12. Ibid.
13. Ibid.

substantially differ on certain essential rules of working procedures as, for example formation of contracts, financing of trade contracts, carriage of trading goods, furnishing of insurance, and so on. The following rules of international trade are by far and large accepted by a great majority countries trading in international arena.

3. Essentials of International Trade

International trade is in essence the sale of goods with the addition of an international component. The buyer and the seller being in different countries execute a contract for the sale of goods and the goods travel from the seller's country to the buyer's country under a contract of the carriage. Given the risks that are incidental to such transit, the goods are insured. The goods are paid for and various methods for payment have been devised to facilitate international trade. Therefore, international trade involves a contract of sale of goods between buyers and sellers living in two different countries, a contract of carriage for transporting the goods, an insurance contract to cover the risks incidental to such carriage, financing/making payment for such sale contracts and resolving disputes, if any, arising out of such contracts.

3. 1. International Sale Contracts

The sale contract is the central part of the international trade. The main characteristic of an international sale is that it involves a transaction between a buyer in one state and a seller in another. It requires the movement of goods from the seller's state to the buyer's, in general by sea. An export sale contract usually involves five elements: (a) a primary sale-contract setting out the goods, the mode and place of delivery, the mode of payment and other supplementary; (b) a contract of carriage entered into by either the seller or the buyer as per the obligation as set out in the sale-contract; (c) a contract of insurance covering the goods whilst in transit, the party responsible for making this contract being dependent on the sale-contract; (d) fulfilment of conditions required by the export and import authorities; (e) and particularisation of mode of payment (such as by cash, or bill of exchange, or documentary credit) by the buyer.

Thus, the obligations arising out of the five elements are to be performed by the parties to an international sale of goods and these obligations often involve certain mandatory documents: bill of lading, insurance policy or certificate, bill of exchange and documentary credits.[14] These obligations are described in details in such trade terms as CIF, FOB, FAS, and others.[15]

3. 1. 1. The International Commercial Terms (Incoterms)

The International Chamber of Commerce (ICC) consisting of merchants and traders from all over the world introduces the International Commercial Terms

14. Lord Templeman and Pamela Sellman et al (eds), *Law of International Trade* (London: Old Bailey, 2nd Edition 1999) 43-44.
15. Berman, (1987) 244-8.

(Incoterms). Formulated and published by the ICC, they act as the core of the international trade now-a-days and explain the responsibilities of buyers and sellers in international trade.[16]

The Incoterms concentrate on fundamental issues of cost and risk allocation. The ICC publishes its 13 Incoterms in 1936. Since then, ICC expert lawyers and trade practitioners update the Incoterms six times to keep pace with the development of international trade.

Contracts executed after 1 January 2000 refer to the latest edition of Incoterms, called 'Incoterms 2000'.[17] Versions of Incoterms prior to the 2000 edition may still be included into future contracts on the desire of the parties, but such a need is almost obsolete the 'Incoterms 2000; being in line with the latest developments in commercial practice. Absent legal enforceability, *Incoterms 2000*, having been endorsed by the UNCITRAL, carries some weight in formulating a standard set of obligations.[18]

An international sale contract can follow any of the *Incoterms*, described below, in describing the buyers' and sellers' obligations.[19] There are 13 *Incoterms* in practice, which are described as EXW" Terms; "F" Terms; "C" Terms", and "D" Terms.[20] EXW terms refer to *ex works* (named place), and, in an EXW contract, the seller fulfills his obligation to deliver to the buyer the goods when he has made the goods available at his premises such as factory, and warehouse.[21] *"F" Terms* refer to those incoterms that begin with "F" such as FCA (meaning free carrier with named place); FAS (meaning free alongside ship with named port of shipment); and FOB (meaning free on board with named port of shipment).[22]

16. <http://www.iccwbo.org/incoterms/id3042/index.html> 10 June 2006.
17. Earlier versions of Incoterms - like Incoterms 1990 - are still binding if incorporated in contracts that are unfulfilled and date before 1 January 2000. Ibid.
18. Ibid.
19. For example, a buyer or a seller in Bangladesh generally follows the Incoterms of FAS for international trade transactions. The seller under this type of contract fulfils his obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment. The FAS term requires the buyer to clear the goods for export. It should not be used when the buyer cannot carry out either directly or indirectly all of the export formalities. This term can only be used for sea freight or inland waterway transport. See, 'Summary of Incoterms' <http://www.esta-rotterdam.nl/images/incoterms.pdf> 15 June 2006.
20. L S Sealy and R J A Hooley, *Commercial Law: Text, Cases and Materials* (London: Butterworthís, 2nd Edition 1999) 442-443; see also Berman, (1987) 244-54.
21. Ibid.
22. Sealy and Hooley, (1999) 442-443.

In contracts of *F Incoterms*, the seller is obliged to deliver the goods to the buyer's appointed carrier.

In contracts of *"C" Terms*, the seller has to contract for carriage, and he does so without assuming the risk of loss of or damage to the goods, and also without assuming additional costs arising from events occurring after shipment or dispatch. Of *"C" Terms*, notable are: CFR (cost and freight with named port of destination); CIF (cost, insurance and freight with named port of destination); CPT (carriage paid with named place of destination); and CIP (carriage and insurance paid, with named place of destination).[23]

In contracts of *"D" Terms*, such as DAF (delivered at frontier with named place) and DES (delivered ex ship with named port of destination), the seller bears the costs and risks of transporting the goods to the destination.[24]

3. 1. 2. Classification of Sale Contracts

Based on the Incoterms developed over the years, two types of sale contracts are most popular: CIF and FOB. These are analysed below.

3. 1. 2. 2. CIF Contracts and General Provisions Regarding Them

In a CIF contract the obligation of the seller is to ship the goods at the port of shipment stipulated in the contract at his own expense. He has to insure normally the goods under a policy of marine insurance for the sea voyage or to buy the insured goods already afloat on a ship which sailed with its cargo from the chosen port of shipment.[25]

The seller completes his performance by delivering to the buyer or his agent (often his bank) all the documents required under the CIF contract. The documents include a shipped bill of lading covering the contract goods, other contract-required documents, a commercial invoice stating the contract goods, a policy of insurance for the goods' duration in the sea and several other documents - certificate of inspection or certificate of quality as the buyer may require in the contract.[26]

General rules regarding CIF contracts may be summarised as:

(i) In a CIF contract, the buyer has (a) the right to immediate possession of the goods at the port of destination and b) the benefit of the contractual claim againsat the seller and the insurers.

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23. Ibid.
24. <http://www.iccwbo.org/incoterms/id3042/index.html> 10 June 2006. Other ëDí terms are: DEQ (delivered ex quay with named port of destination), DDU (delivered duty unpaid with named place of destination), and DDP (delivered duty paid with named place of destination).
25. Templeman and Sellman et al (1999) 44.
26. Ibid, 45.

(ii) If the buyer fails to accept properly tendered and conforming documents, he is in breach of his primary obligations under the contract.

(iii) In a CIF contract documents are of primary importance and goods are secondary, in which the buyer has a) the right to reject the documents and b) the right to reject the goods. A buyer may lose his right to reject the documents once he/his bank has accepted them and made payment without any objection.

(iv) in a CIF contract, the property in goods passes in accordance with the intention of the parties, and under certain circumstances passing of property may be made conditional. The general presumption is, however, that the property will only pass with delivery and acceptance of the shipping documents.[27] If the buyer rejects the goods upon examination, the property in the goods reverts to the seller.[28]

(v) In such a contract, the seller must provide a notice of commandeering to the buyer, so that the buyer gets advance notice of shipment enabling him to know exactly what the contract goods are. Again, this may enable him to sub-sell the property in goods, or to assess the time of arrival of the ship for arranging the collection of goods.

(vi) Under CIF contracts, the seller must insure the goods for their sea voyage with a policy of marine insurance covering normal marine risks. The buyer has the right to reject the policy in default.[29]

(vii) The buyer is usually entitled to a commercial invoice to clear the goods through customs. The commercial invoice is also required for assessing customs duty.

(viii) Under a CIF contract the presumption is that risk passes as and when shipment of the goods passes, meaning that risk will pass to the buyer before property in the goods passes. The separation of risk and the passing of property may cause problems, because the CIF buyer may not be able to bring an action in tort for injury done to the goods prior to his getting hold of the property or a right of possession in those goods. The risk, which passes, is the risk of unintentional damage to, or atypical (but not inevitable) wear and tear, of the goods. As a result, if the goods are shipped and lost during the ocean transit the seller is still entitled to tender the proper shipping documents to the buyer and to claim the sale price.

These trade practices for CIF contracts as endorsed by the UNCITRAL have become useful components of international trade rules specifying buyers' and sellers' duties to each other. However, these rules do not say anything as regards the risk arising out of loss of the goods while held in customs awaiting payment of duty.[30]

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27. Templeman and Sellman *et al* (1999) 46-50.
28. Ibid, 47-48.
29. Ibid, 50-51.
30. Peter B Maggs, 'International Trade and Commerce' (1993) 42 *Emory Law Journal* 449, 467.

3. 1. 2. 2. FOB Contracts and General Provisions Regarding Them

FOB means 'free on board' and this is the first and foremost of a price term although it relates to the delivery obligations of the parties. The FOB contract has been classified into three categories, namely, (1) classic FOB (2) extended FOB, and (3) strict FOB.

In a *classic FOB contract,* the seller puts the goods on board a ship nominated by the buyer. In such a case, the seller is directly a party to the contract of carriage at least until he takes out the bill of lading in the buyer's name.[31] In an *extended FOB contract,* the seller makes necessary arrangements for shipping, and usually takes the bill of lading in his own name and obtains payment against the transfer. Also, the seller is burdened with some additional obligations, e.g., to buy an insurance.[32] In a strict FOB, the shipping arrangements are made by the buyer or by his forwarding agent, who books space on a particular ship. The seller discharges his duty by putting the goods on board after getting the mateís receipt. He then hands it over to the forwarding agent for enabling him to obtain the bill of lading.[33]

It appears, therefore, that the basic concepts as to delivery, property and risk are common to them all. However, the categorization of FOB contracts depends on some other mutual incidents arising out of the relationship between the parties.

General consequences or rules regarding FOB contracts may be summed up as follows:

(i) The passing of property depends on the intention of the parties.[34]

(ii) Risk of damage or loss to the goods will normally pass upon shipment of goods and there may be a term in the contract of sale to that effect.[35]

(iii) FOB contract being flexible, the obligations of the parties follow the terms of the contract.

(iv) Like the CIF sellers and buyers, FOB buyers and sellers have similar obligations.[36]

However, such provisions have some built-in problems. For example, if the arrival is well in advance of the stipulated date of shipment, the buyer may well be placed in awkward position as the goods may not be ready for shipment. In that situation, who will pay the ship-owner for the idle time is an open question. It has to be settled again depending on the relationship between the parties.

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31. Templeman and Sellman et al, (1999) 68-69.
32. Ibid.
33. Ibid, 70-71.
34. Ibid, 69-70.
35. Ibid, 69.
36. Ibid, 70-77. The ICC has detailed a list of obligations of the FOB sellers and buyers.

3. 1. 3. Efforts to Bring Uniformity in International Sales Contracts

It is quite usual that more than one legal system is involved in a contract for an international sale of goods. In case of a dispute between the parties, which law and court will have jurisdiction is extremely difficult to assess in advance, and it causes a lot of inconveniences.[37] With a view to overcoming such problems, the UN asks the International Institute for the Unification of Private Law (UNIDROIT) and the UNCITRAL to formulate a uniform regulation for international sales contracts. This effort succeeds with the introduction of the 1988 *Convention on Contracts for International Sale of Goods* (hereafter the CISG Convention) to attain consistency and certainty in international trade law. It is a means towards the protection and promotion of international trade through uniform rules.[38]

3. 1. 3. 1. Efforts Taken by the UNIDROIT

The UNIDROIT convenes its Rome Convention in 1930 to put in order a uniform law on international sale of goods. This attempt discontinues at the beginning of the World War II. It resumes in the early 1950s and ends with the adoption of two uniform law conventions- the *Convention on the International Sale of Goods* and the *Convention on the Formation of Contracts for the International Sale of Goods* in the Hague Conference in April 1964. These conventions come into effect on 18 August 1972 with only nine ratifications. Both of these two conventions turn out to be unpopular quickly, because of their Euro-centric nature and negligence towards the developing countries.[39]

3. 1. 3. 2. Efforts Taken by the UNCITRAL

Then the UNCITRAL arrives on 17 December1966 to promote the progressive harmonisation and unification of international trade law rules. In 1968 the Working Group of the UNCITRAL redrafts the Hague Uniform Laws with a view to gaining much wider and diverse acceptance. Consequently the Vienna Conference held on 11 April 1980 adopts the CISG Convention. It comes into force on 1 January 1988. The drafters of the Convention acted under certain imperatives like narrowness (narrowing down the scope), compromise of civil and common-law systems, plain language text and allowing freedom of contract.[40]

3. 1. 3. 3. The CISG Convention

The CISG Convention is a comprehensive set of rules governing the formation, performance, and remedies for breach of contracts for the sale of goods within

37. Cheshire, (1995) 3.
38. Teija Poikela, 'Conformity of Goods in the 1980 United Nations Convention of Contracts for the International Sale of Goods' [2003] *Nordic Journal of Commercial Law* 1.
39. Ibid.
40. Ibid.

the ambit of its jurisdiction. It receives the approval of groups of lawyers all over the world for its harmonisation of the international law of sales. This harmonisation is considered attractive, in terms of compelling economic and political realities.[41]

The primary objectives of the CISG Convention have been to enhance certainty by facilitating common understanding among parties to international sale contracts, to formulate a text, which can easily be applied by parties and enforced by judges of diverse legal and cultural traditions with the possible outcome of consistent precedents, to reduce costs and time needed to complete transactions, to harmonise and unify both the substantive and procedural laws on contracts for the international sale of goods, and to accommodate the diverse commercial interests of all trading partners.[42]

Now the scope of the CISG Convention can be discussed. The Convention does not apply to sales of goods bought for personal use or sales of ships, vessels or aircrafts etc,[43] and to contracts relating to supply of labour or other services.[44] It deals with only the formation of the contract but does not deal with passing of property and contractual validity (effect of mistake, fraud etc in civil and common-law systems);[45] or with death and personal injury of the seller.[46] It lays down the rules of interpretation of the contract terms taking help from legal systems mostly popular in the world. In Part II the Convention deals with the elements of the contract like offer, acceptance, withdrawal, revocation of offer, duration of offer etc,[48] while its Part III deals with the obligations of the seller and buyer, passing of risk, remedies for breach.[49]

Importantly, the Convention has consolidated the common-law and civil law rules relating to sale of goods by compromise and inserting plain language in the text. It often, therefore, generates confusion and misunderstanding considerably subverting some of the goals of the Convention.[50]

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41. Arthur Rosett, 'Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods' (1984) 45 (2) *Ohio State Law Journal* 265, 266.
42. Charles H Martin, 'The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law' (2008)16(2) *Tulane Journal of International & Comparative Law* 467.
43. Article 2 of the *UN Convention on Contracts for the International Sale of Goods,* 1980.
44. Article 3, Ibid.
45. Article 4, Ibid.
46. Article 5, Ibid.
47. Article 8, Ibid.
48. Articles 14, 15, 16 and 18, Ibid.
49. Articles 31-44, 45-65, 66-70 & 71-78, Ibid.
50. Benjamin Mahr, *Is the Vienna Convention on International Sale of Goods Too Much Influenced by Civil Law and Should it Contain a Rule on the Passing of Property?* (2007) 14.

Despite its contribution, the Convention may be criticised on a number of counts. It does not define international sale of goods, although it has cut off such sales from the body of commercial law as a special subgroup to be governed by the Convention.[51] Also, it does not provide for any central international authority to interpret the Convention uniformly to produce a set of coherent jurisprudence on international sale of goods. In additon, there is no ongoing body to carry out periodic review and put forward amendments and improvements of the Convention; nor has the UNCITRAL given this mandate. Consequently, reforms in international sale of goods may only be achieved through the time consuming and costly negotiating process.[52]

The responsiveness of, and familiarity with the Convention remains fairly low, particularly in common-law jurisdictions where legal practitioners are expected to point out the Convention's applicability for the Court to deliberate on. Another limitation is that absent naming the Convention in the contract, its provisions will not govern the outcome of the dispute.[53] The Convention does not deal with the important issue of contractual validity.

Criticisms apart, the Convention has been playing very important role in regulating international sales disputes. Its strength has been its attainment of a compromise between civil and common-law systems and between socialist and western systems on the writing requirement as envisaged in Article 11 of the Convention.[54]

3. 2. Financing International Trade

The term 'financing international trade' is drawn on to refer to the financial payment of the contractual prices for the international sale of goods in a CIF or FOB contract. Such a payment is an essential element of an international sale. However, arrangement of payment from unknown parties is very difficult since international sales entail parties who are very often unknown to one another, residing in separate jurisdictions and operating under different trade practices. They have their conflicting commercial interests and considerations as well. These things appear severe enough to militate against international trade. In this situation of confidence crisis, banks come up as intermediaries to satisfy the

51. Edita Ubartaite, 'Application of the CISG in the United States' (2005) 7 *European Journal of Law Reform* 277.
52. Luke Nottage 'Who's Afraid of The Vienna Sales Convention (CISG)? A New Zealander's View from Australia and Japan' (2005) 36 *Victoria University of Wellington Law Review* 815.
53. John O Honnold 'The Sales Convention: From Idea to Practice' (1997) 17 *Journal of Law and Commerce* 181.
54. B A Anderson, 'Uniformity in the CISG in the First Decade of Its Application' in Fletcher et al, (ed), *Foundations and Perspective of International Trade Law* (London: Sweet & Maxwell, 2001) 289.
55. Islam, (1999) 337-338.

concerns of both parties by substituting bankís credit worthiness as security for the transaction. This participation of banks offers financial security and business-related expediencies e.g. in the form of a bill of exchange (drafts) to both parties in doing risk minimisation in the event of a breach by either party.[55]

Initially, a letter of exchange or a bill of exchange acts as a request or order by a creditor to his debtor directing the latter to pay a third party, the drawee. By the 13th century, open letters of credit are developed and used only by the English Kings. They take the form of a letter of credit addressed by the King to a credit provider in Europe (particularly in Rome) authorising the addressee to make advances to or honour drafts drawn by the bearer of the credit and obtaining reimbursements. This mechanism becomes well-liked to the English merchants after more than four centuries i.e. in the 17th century. Afterwards during the 19th century when the Anglo-American goods trade goes in rampage, a new kind of commercial credit called the documentary letter of credit emerge.[56]

3. 2. 1. Credit Methods in International Sales

In international sales contracts, there are two usual modes of credit: (1) short-termed credit methods and (2) documentary letters of credit of them, documentary letters of credit is the most common mode of credit since it is incorporated in almost all legal systems of the world for its easy-going formalities.

3. 2. 1. 1. Short-Termed Credit Methods[57]

The following are the major short-term credit methods frequently used in international sales contracts. These methods require payments within two years after the delivery of goods:[58]

1. **Payment with Order:** It requires the buyer to make payment with cash in advance at the time of ordering the goods. This prepayment deal renders the buyer to the risk of not receiving the goods for various reasons, including events beyond the seller's control.
2. **Open Account:** This method of Open Account enables the buyer to furnish an agreement for making payment to an open account of the seller after delivery or receipt of the goods. However, this post delivery payment pushes the seller to the risk of non-payment.
3. **Novation:** The Novation method allows the seller to novate the contract with the buyer using one of the seller's creditors-usually his bank. In the new agreement the buyer agrees to pay the debt due to the seller and the seller's debt to the bank.
4. **Assignment of the Debt:** Under the Assignment of the Debt, the seller could give the buyer's debt to his creditor (the bank). Here notice to the buyer is mandatory before he ceases to be liable to the seller (the assignor) and becomes liable to the bank (the assignee).

This short term method often involves with cash which may be of different currencies, individually sending money from one country to another country and high transaction costs varying from country to country.

56. Ibid, 338.
57. Berman, (1987) 235.
58. Ibid.

3. 2. 1. 2. Letter of Credit (LC)

Documentary letters of credit or simply letters of credit turn almost into the key commercial means of payments. It is called the lifeblood of modern transactions.[59] A documentary credit can be simplified by terming it as a banker's promise to pay against the presentation of specified documents.[60]

All commercial credits issued, transferred and amended by major banks in the world are more or less subject to the UCP (Uniform Customs and Practice for Documentary Credits), a document that the ICC has developed since 1933 (revised in 1952, 1962, 1974, 1983 and 1993). It provides a set of rules that standardizes primarily international banking practice and the duties and liabilities involved in the use of documentary credit in international commerce.[61] The UCP 500 has been in operation since 1 January 1994. The latest revision of UCP is approved by the Banking Commission of the ICC at its meeting in Paris on 25 October 2006. This latest version, called the UCP 600, is put into effect on and from 1 July 2007.[62]

The consequences of a letter of credit have been that the buyer, the account party, has to cause the credit to be established for the seller. The issuing bank opens the credit account and issues a letter of credit with the advice to the beneficiary through the confirming bank which has to advise the beneficiary and honour his or her draft upon the presentation of appropriate documents. A new credit relation between the two banks thus develops in the process.[63]

It should be mentioned here that there may be a variety of Letter of Credit in business practices.[64] These are as follows:

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59. J Lowell Mooney and Marks S Blodgett, 'Letters of Credit in the Global Economy: Implications for International Trade' (1995) 4(2) *Journal of International Accounting, Auditing and Transaction* 175.

60. See generally H Harfield, *Bank Credits and Acceptances* (New York: John Wiley & Sons, 5th Edition 1974).

61. Article 2 of the UCP 500 defines documentary credits in the following terms:

    For the purpose of these articles the expression "documentary credit(s)" ...mean any arrangement, however named or described whereby a bank (the issuing bank), acting at the request and on the instructions of a customer (the applicant) or on its own behalf

    (I) Is to make a payment to or to the order of a third party (the beneficiary), or is to accept and pay bills of exchange (drafts) drawn by the beneficiary; or

    (II) Authorises another bank to effect such payment, or to accept and pay bills of exchange (drafts); or

    (III) Authorises another bank to negotiate against stipulated document(s) provided that the terms and conditions of the credit are complied with.

62. <http://www.iccwbo.org/policy/banking/> 10 June 2007.

63. Islam, (1999) 345-346.

64. Ibid.

Revocable Letter of Credit

A revocable letter of credit may be amended or cancelled or revoked by the issuing bank on its own initiative or at the instructions of its customer, the buyer, without prior notice to the beneficiary (the seller).[65] A revocable credit, which has to be clearly stated in the credit, presents no protection to the beneficiary and that's why its use is very rare.[66]

Irrevocable Credit

The irrevocable letter of credit forms a definite undertaking of the issuing bank provided that the stipulated documents are presented and comply with the terms and conditions of the credit. It cannot be amended or cancelled without the agreement of all parties.[67]

Confirmed Credit

A credit becomes confirmed when the confirming bank, acting on the request of the issuing bank, undertakes and confirms its payment obligation to the beneficiary.[68]

Unconfirmed Credit

The irrevocable credit becomes unconfirmed when the confirming bank does not offer an independent undertaking to pay against the presentation of the documents.

Transferable Credit

The transferable credit entitles the beneficiary a right to transfer the credit for the benefit of a third party who is usually the supplier of the goods to the beneficiary and to request the paying bank to effect payment to that third party.[69]

Revolving Credit

When the seller and the buyer enter into a long-term commercial relationship (such as a distribution agreement) and undertake regular transactions, the buyer would prefer a revolving credit. It operates continuously for a specified period and provides a fixed ceiling for the seller to withdraw against the tender of specified goods for each transaction.

Back- to- Back Credit

Back to back LCs are used to finance a series of successive sales, which involve two credits. The first credit is sourced by the buyer in favour of the seller (the beneficiary), where the seller may apply to his or her bank and seek to create another credit in favour of a third party/parties who have sold goods on credit to the former. In the second credit called the back-to-back credit, the first creditís

65. Article 8 of UCP 500.
66. Article 6 of UCP 500.
67. Article 9.a and 9.d of UCP 500.
68. Article 9.b of UCP 500.
69. Article 48 of UCP 500.

beneficiary is the applicant or account party or buyer. The back-to-back credit is free from the original credit but payment under the latter is reliant on payment under the former. The first beneficiary (the applicant of the second credit) is entitled to be paid under the first credit only if the second credit-issuing bank sends the confirming documents to the first credit-issuing bank. Thus the two credits are placed back to back and the first credit acts as a security for the second. The common practice is that the second credit-issuing bank takes over all the rights of the beneficiary under the original letter of credit. The obligation under a back-to-back credit can move away under an overriding credit.

Red-ink-Clause Credit

A red-in-clause credit allows the confirming the bank to pay in part as an advance to the beneficiary (the seller) without document presentation.

Packing Credit

A packing credit is also an advance payment, almost the same as the red-ink-clause credit. The paying bank is instructed to pay part or the full amount of the credit prior to the shipment of the goods. It operates against a document (e.g. warehouse receipt) other than a transport document.

Standby Letters of Credit

A standby letter of credit that gives out as a bank-supported performance guarantee against any default of non-performance of obligation under the underlying contract of sale.[70] The banks involved in credit transactions are under an obligation to ensure that the documents on their face meet the terms of the credit arrangement. In examining the documents, the banks are also obliged to take reasonable care.[71]

3. 3. The Contract of Carriage of Goods by Sea

Carriage of goods by sea is correlated with the transit of goods from the delivery port to the port of destination within the composition of either an FOB or CIF contract of sale.[72] The party responsible for shipping goods is called the shipper and the party liable for transporting the goods on the voyage is called the carrier.

The seller can carry out his obligation to ship the goods in a number of ways, namely, by chartering the vessel under a contract called charter party, by simply booking shipping space without chartering the entire vessel, and by employing the services of freight forwarder or a combined transport operator, especially when the goods are to be carried in containers.

70. Graham and Geva, 'Standby Credits in Canada' (1984) 9 *Canadian Business Law Journal* 180.

71. Article 13 of UCP 500.

72. Berman, (1987) 254-61

The shipper, usually the seller, may prefer to send the goods on a general ship. His goods will be shipped on the same vessel along with consignments[73] of other shippers. The seller-shipper need not enter into a charter party with the ship owner. Once the goods have been shipped, the ship owner, who is both the legal and the actual carrier of the goods, would issue a shipped bill of lading covering his goods only to the seller-shipper. The seller-shipper must then send the bill of lading and other documents as required by the contract of sale either to the buyer or if a letter credit (LC) is being used to finance the sale, to the advising bank or issuing bank.[74]

If the bill of lading is prepared to the order of the seller-shipper, the latter will on tendering the documents indorse the bill of lading to the buyer or bank as he thinks suitable. The transferee of the bill known as the endorsee got vested in him all rights of suit under the contract of carriage, contained in or evidenced by the bill of lading as if he had been a party to that contract.[75]

It may be mentioned here that far from being uniform the charter party usually takes a number of forms - Time Charter, Voyage Charter, and Charter by Demise ñ and the attendant consequences or obligations may vary. For example, in a time charter, in which the time for redelivery of the vessel is of essence,[76] a charterer hires the ship for a specific period of time at the end of which the ship owner is entitled to redelivery of the ship in like condition as on hire. On the other hand, a voyage charter allows the hiring of the ship for a particular or a series of voyages, the ship owner being responsible for the navigation and the management of the vessel. Unlike the time charter party, the ship must travel the customary or agreed routes of her specified voyage(s), while in a charter party by demise, unlike the other two charters, the charterer gets hold of the management of the ship. In a charter by demise the crew become charterer's servants, even if they are members of the ship owner's staff.

3. 3. 2. Bill of Lading and Obligations of the Parties

The charterer is both the legal and the actual carrier of the goods. The bill of lading issued by the charterer will, in the hands of the shipper, be a receipt for the goods. It will also act as an evidence of the contract of carriage. The transfer of the bill of lading in that case makes the presumption that the contract of carriage is executed between the buyer and the charterer.[77]

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73. The goods to be shipped are called consignment. If the buyer or the bank in the letter of credit is actually named on the face of the bill of lading, they are called the consignee and the shipper of the goods will be the consignor.
74. Berman, (1987) 254-61
75. Ibid.
76. S Thomas Harley and Redwanul Bari, *Shipping Law: An Introduction to Maritime Law, Carriage of Goods by Sea & Arrest of Ships* (Dhaka: 1997) 39.
77. Clive M Schmitthoff and A G Sarre *Charlesworth's Mercantile Law* (London: Stevens & Sons, 12th Edition 1972) 392.

The freight forwarder acts as the seller's agent for the shipping of the consignment of goods meant for the buyer. Hence the bill of lading is issued by the ship owner to the seller as principal and the shipper of the goods. Afterwards the seller indorses and delivers the bill of lading to the buyer in performance of the contract of sale. The bill of lading should then turn into the contract of carriage between the buyer and the shipper.[78]

In addition, the freight forwarder acts as the seller's agent in the preparation of the goods for shipment, the finding of a vessel and the fixing of the rates of freight. The bill of lading is issued by the ship owner to the freight forwarder who is ultimately the legal shipper. This bill of lading acts as an evidence of contract of carriage between the ship owner and the freight forwarder.[79]

Afterwards, the freight forwarder conveys the bill of lading to his own agent at the port of destination. This enables the agent to take possession of the goods from the ship. Then the agent holds the goods to his principal's order. After that the freight forwarder issues a 'house bill of lading' to the seller, not similar to a proper bill of lading acting as a document of title.

The seller can then carry out his contract of sale by tendering the house bill of lading to the buyer. The seller needs to specify in the contract of sale for a 'house bill of lading' to be a good tender, otherwise the buyer may reject this house bill of lading.

On coming of the bill of lading into the hands of a third party i.e. a stranger to the charter party, the question of the propriety and effect of such incorporation raises.

The first duty is to take the incorporation clause in the bill of lading. This involves looking at both the terms of the incorporation clause itself and at the charter party clauses. However, there is wide judicial recognition that freight and other conditions shall be determined as per the charter party, all other terms/ conditions including negligence clauses and exceptions shall be governed by the charter party, and that all other terms, conditions, clauses and exceptions contained in the charter party, also apply to the bill of lading and are deemed to be incorporated herein.

If the terms are put into the bill of lading, they have to be consistent with the express terms of the bill of lading. Besides, the intentions of the parties need to be considered even in the absence of inconsistency with the express provisions of the bill of lading.[80]

In cases of time and voyage charter parties, the master of the ship usually signs the bill of lading at the time of its issuance to the charterer as the agent of the ship owner.[81]

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78. P S Atiyah, *The Sale of Goods* (London & New York: Oxford 1995) 389-395.
79. Ibid.
80. Ibid.
81. Ibid.

Amongst the four major means of international transports of goods (sea, road, rail and air), sea carrier is the most usual and frequently used means of transportation to transfer the volume of goods across international frontiers.[82]

3. 3. 2. 1. The Hague Rules

The International Convention for the Unification of Certain Rules Relating to Bills of Lading, commonly known as the Hague Rules, is adopted on 25 August 1924 (effective from 2 June 1931) in order to bring about uniformity in the international legal regime governing carriage of goods by sea. The Hague Rules present a mandatory regulatory regime in regard to the liability of a sea-carrier for loss of and/ or damage to goods transported under a bill of lading.[83] The Hague Rules apply to contracts of carriage evidenced by bill of lading or a similar document of title having the character of a bill of lading. The liability of the carrier arises between the time of physically loading the goods onto the ship and the time of their discharge.

The liability arises from the carrier's obligation to exercise due diligence a) in making the ship seaworthy; b) in properly servicing, equipping and supplying the ship; and c) in making the ship cargo worthy.[84]

Failure to exercise due diligence would give rise to the liability of a carrier for loss and damage to goods aboard. The Hague Rules incorporate a long list of circumstances as exceptions, which serve as defences by carriers against their liabilities. A carrier can run away from liability for lost or damaged cargo if he successfully pleads negligent management and faulty navigation of the ship. The unit of goods is called the package and the liability of a carrier was £100 per package or unit lost or damaged, which has gone up in subsequent amendments.[85]

3. 3. 2. 2. The Hague-Visby Rules

The Hague Rules are amended by the Visby Protocol of 1968, known as the Hague-Visby Rules, and by the Special Drawing Rights (SDR) Protocol of 1979. These amendments are intended to alter the financial limit of liability for lost/ damaged goods. The intention is not to alter the basic liability regime and the allocation of risks under the Original Hague Rules. The maximum limit of liability is raised to 666.7 units of account (referred to as SDR, the special currency unit of the IMF) per package or two units of account per kilogram of the gross weight of the goods, lost or damaged, whichever is higher.[86]

The operation of The Hague Rules as amended by the Visby Rules causes

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82. Ibid.

83. <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html> 10 June 2007.

84. Ibid.

85. Ibid.

86. Article IV.5 of the Visby Rules.

widespread dissatisfaction, especially among the developing countries for several reasons[87]:

First, the over all allocation of risks and responsibilities is considered to be imbalanced, heavily favouring ship owner interests at the expense of cargo owners interests. Secondly, A number of unsure and vague provisions resultes in higher transportation costs put up with by shippers and consignees. Thirdly, continuing development in technology-based modern shipping conditions and techniques (such as containerisation, deck cargo and electronic bill of lading) makes many Hague Rules useless.[88]

3. 3. 2. 3. Hamburg Rules

The UNCITRAL was given the task of examining, revising and amplifying the Hague Rules in 1968 with a view to addressing the problems of ambiguities and inequitable distribution of risks and responsibilities in the international carriage of goods by sea. Commencing its work in 1971, the UNCITRAL prepared a draft Convention on the carriage of goods by sea in 1976, which was adopted at a UN-funded diplomatic conference at Hamburg on 31 March 1978. Effective from 2 November 1992, this convention departed from the earlier Rules in that it accorded greater protection to shippers by increasing the liability and responsibility of the carriers, and adopted modern methods of shipping, cargo handling and shipping documents.[89]

The scope of the Hamburg Rules is very wide and includes even the carriage of animals in its purview. It applies to all contracts for the carriage of goods by sea between two States excepting charter-parties if (i) the ports of loading and discharge are located in a contracting State; (b) the bill of lading or other documentary evidence of the contract is issued in a contracting State; (c) the bill of lading or other document evidencing the contract of carriage provides that the Hamburg Rules are to apply, and (d) the bill of lading is issued under a charter party and governs the relation between the carrier and the non-charter holder of the bill of lading.

The job of the carrier for the goods covers up the entire period during which the carrier is in charge of the goods at the port of loading during the carriage and at the port of discharge.[90]

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87. David C Frederick, 'Political Participation and Legal Reform in the International Maritime Rulemaking Process: From the Hague Rules to the Hamburg Rules' (1991) 22(1) *Journal of Maritime Law and Commerce* 81.
88. George F Chandler III, 'A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules' (1984) 15(2) *Journal of Maritime Law and Commerce* 233.
89. TL Meng 'Carriage of Goods by Sea Act 1972 and the Hamburg Rules' (1980) 22 *Malaya Law Review* 199.
90. Article 4, Hamburg Rules.

The liability is determined on the principle of presumed fault or neglect on the part of the carrier. The carrier's liability arises if the incidence causing the loss, damage or delay in delivery takes place while the goods are in its hold. The liability goes off if it can be proved that the carrier, its servants or agents adopt all reasonable measures to keep the incidence and its consequences away.

The offending carrier's liability falls to an amount equal to 835 units of account per package or other shipping unit, or 2.5 units of account per kilogram of gross weight of the goods lost or damaged, whichever is higher. In addition, the liability for negligent delivery is limited to an amount equivalent to 2.5 times the freight payable for the goods delayed but not exceeding the total freight payable. The carrier is exempted from liability for loss, damage or delay in delivery that result from measures to save life or property at sea.[92]

A contracting carrier has got the option to assign the entire carriage or a part of it to another carrier (actual carrier). The contracting carrier can also bring in a clause in the bill of lading freeing itself from liability arising out of loss, damage or delay assignable to the actual carrier. It can ably restrict or exclude the liability of the actual carrier or the right of the shipper from instituting a suit in an appropriate jurisdiction.[93] The Hamburg Rules appear to poise a compromise between these rival interests by enabling the contracting carrier to exempt itself from liability for loss, damage or delay attributable to the actual carrier.[94] The contacting carrier can exempt liability only when the contract of carriage specially identifies the part of carriage assigned to the named actual carrier, and the shipper can institute judicial or arbitral proceedings against the actual carrier.[95]

The contracting carrier's liability for loss, damage or delay caused during the voyage, regardless of whether the loss, damage or delay is fully or partially assignable to the actual carrier comes up when these conditions are not met. Where both the contractual carrier and the actual carrier are liable, their liability is joint and several, the cumulative on of which must not exceed the limits of liability provided under the Hamburg Rules.[96]

A shipper's liability arises for loss or damage to the contractual carrier, the actual carrier or the ship caused by the fault or neglect of the shipper or his or her servants or agents. A shipper is under specific obligations to take very efficient

91. Article 5, Ibid.
92. Article 6, Ibid.
93. Part II: Liability of the Carrier, Ibid
94. William Tetley, 'Interpretation and Construction of The Hague, Hague/Visby And Hamburg Rules' (2004) 10 *Journal of International Maritime Law* 30.
95. <http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html> 10 June 2007.
96. Articles 10 and 11 of the Hamburg Rules.

care of dangerous goods. In handing over dangerous goods to a carrier, a shipper needs (a) to mark or label the goods in a suitable manner; (b) to inform the carrier of their dangerous character; and (c) to suggest necessary precautions to be taken.[97]

Non-compliance with these obligations entitles the carrier to be compensated for loss or damage resulted from the shipment of goods. The carrier can also dispose of dangerous goods or render them harmless depending on the circumstances. For this, he does not have to compensate the shipper if the goods turn out to be a real threat to life and property.[98]

The carrier is under obligation to issue a bill of lading to the shipper on the latterís demand at the time when the former accepts the possession of the goods. The rules contained in the Hamburg Rules relating to the bill of lading are as follows[99]:

I) It must be signed by a person duly authorised by the carrier and the signature may be in the handwriting, printed in facsimile, perforated, stamped, in symbols, or made by any other mechanical or electronic means, provided it is not inconsistent with the law of the country where it is issued.[100]

II) It must contain itemised information relating to the general nature of goods, the leading marks necessary for identification of the goods, the number of packages or pieces, their weight, quantity, apparent condition, the carrierís name and principal place of business, the name of the shipper and the consignee, the port and date of loading, the date and port of discharge, the number of original copies and the place of issuance of the bill of lading, the freight payable by the consignee (if any), and statements indicating: a) if the goods can be carried on deck, b) if there is any increase in the limit of liability and c) that the carriage is subject to the Hamburg Rules, which nullifies any derogation detrimental to the shipper or the consignee.

III) The carrier is obliged to issue to the shipper on demand a ëshippedí bill of lading after the goods have been loaded on board, indicating the goods are on board a named ship and the date of such loading.[101]

IV) The absence of one of the required particulars does not affect the legal character of the document as a bill of lading.

V) The information contained in the bill of lading is prima facie evidence of taking over or loading by the carrier of the goods.

VI) The description of the goods in the bill of lading is conclusive in favour of a third-party transferee who has acted in good faith on the description.

VII) If the carrier knows or reasonably suspects that the information about the goods in the bill of lading is not accurate and has no reasonable means of checking that

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97. Articles 12-17, Ibid.

98. Articles 12 and 13, Ibid.

99. Article 16-22, Ibid.

100. Article 14, Ibid.

101. Article 15, Ibid.

information, the carrier is entitled to insert a reservation in the bill of lading to this effect.[102]

VIII) The shipper is deemed to have guaranteed to the carrier the accuracy of particulars of the goods for inspection and must indemnify the carrier against loss emanating from inaccuracies in such particulars in the bill of lading.

IX) A shipper may request the carrier to issue a clean bill of lading without reservation even when the carrier has genuine ground to insert one. In return, the shipper agrees to indemnify the carrier against any loss resulting from the issuance of such a clean bill of lading.

X) The Hamburg Rules permit the carrier to issue any transport document other than a bill of lading as evidence of the receipt of goods to be carried.[103]

The conveying of the goods to the consignee by the carrier is *prima facie* evidence of the delivery of the goods in good condition. The consignee must give a notice in writing to the carrier as regards any loss or damage next working day; for apparent loss within 15 consecutive days; for hidden loss within 90 days and within 60 days for delay.[104]

The Hamburg Rules have significantly improved the Hague-Visby Rules in many respects. In particular, the Hamburg Rules now (i) deal much more with the rights and obligations of the parties to a contract of carriage; (ii) successfully balance the risk allocation of lost or damaged sea-borne cargo between shippers and carriers; (iii) contain a clear, precise and concise liability-test regime which is far easier to understand and interpret; (iv) appear logical and fair in making the carrier responsible for the safety of the cargo while it is in the custody of the carrier; and are (v) realistically and progressively better equipped to cope with the changing needs of the technology-driven twenty-first century in navigating, packaging, and containerising. Moreover, documentations have been factored into these new Rules which correspond with the liability imposed on carriers involved in the carriage of goods by other modes of transport, such as road and rail.[105]

The Hamburg Rules rectifies the injustice made by the Hague Rules which support the ship owning interests of the developed countries and disregard the cargo owning interests of the developing shipping countries.[106] The Rules also

102. Article 16, Ibid.

103. Article 16, Ibid.

104. Articles. 19- 22, Ibid.

105. John F Wilson, *Carriage of Goods by Sea* (London: Pitman, 3rd Edition 1998) 220-222.

106. Boris Kozolchyk, 'Evolution and Present State of the Ocean Bill of Lading from a Banking Law Perspective' (1992) 23(2) *Journal of Maritime Law and Commerce* 161.

offer the best-ever opportunity of introducing a just and uniform law governing the contract of carriage of goods by sea although the realisation depends on acceptance by the States parties worldwide.[107]

3. 4. Marine Insurance

In international sales contracts, goods are voyaged from the seller's country to the buyer's. Throughout the voyage goods are by and large insured against the perils likely to come across. If perils of the voyage cause any loss or damage to the cargo, the insured are entitled to recover his losses from the underwriter or insurer, depending on the terms of the insurance policy. An insurance contract undertakes to indemnify the insured not only against the perils of the sea or but also against the future losses/ damage to goods caused by particular circumstances, such as fire, earthquake and theft.[108]

On conclusion of a contract on CIF or FOB terms, goods are shipped by sea and are then covered by a marine insurance contract. A CIF contract requires the seller, at his expense, to get insurance cover for the voyage and tender the policy to the buyer (or the advising or confirming bank where the parties have agreed on a letter of credit arrangement), along with the bill of lading. In an FOB contract, there is no legal obligation to buy insurance cover on the part of the buyer or the seller.[109]

The insurance market uses the SG policy (Ships and Goods policy) as the standard contract until 1982. The Institute of London Underwriters and Lloyds now substitute this policy with the Institute Cargo Clauses (A), (B) and (C) and are well known and used all over the world.[110]

Marine insurance cover is normally acquired through a broker. He takes the details of the cargo, the ship on which the cargo is to be carried, the amount of cover required, and the kind of cover required, etc. A floating policy is encouraged on the non-availability of details. Usually the broker approaches underwriters, and those willing to underwrite the risk, will ëwrite a lineí on a slip. The line stops up with a contract binding the underwriter and the assured. The policy is issued later and gets signed.[111]

Unless otherwise agreed, on issuance of the policy the premium is to be paid. It is the duty of the assured or his agent to pay the premium. However, the insurer in general turns to the broker for the premium.

3. 4. 1. Forms of Insurance Policy

To cover international sales contract various forms of insurance policy is available. Some of them are as follows[112]:

107. Ibid.

108. Schmitthoff and Sarre, (1972) 357.

109. Indira Carr, *Principles of International Trade Law* (London: Cavendish, 2nd Edition 1999) 253.

110. Ibid

111. Ibid.

112. Ibid, 253- 254.

Voyage Policy

The most accepted policy in international sales arena is a voyage policy i.e. a policy for a specific voyage.

Time Policy

If the subject matter is insured for a period, the policy is called a time policy. It is very ordinary to insure pre- and post-shipment risks, e.g. all three sets of Institute Cargo Clauses provide for insurance from the time, the cargo leaves the warehouse to deliver the goods at the destination warehouse.

Valued Policy

If the value of the subject matter insured is specified, the policy is termed as a valued policy. The agreed value need not reflect the actual value of the goods. It is customary to include expected profits in such policies. If the profits are grossly exaggerated, the policy may fall foul of the failure to disclose a material fact if the assured fails to inform the underwriter of this.

Unvalued Policy

An insurance policy is unvalued if the value is unspecified. The value is left to be calculated by applying rules set out in the domestic legislation suitably applicable therein. In regard of goods or merchandise, insurable value is the principal cost of the property insured plus expenses of and incidental to shipping and charges of insurance upon the whole. The main cost is the commercial value of the goods, not the original cost.

Floating Policy

If the insurance is described in general terms, then it is called a floating policy. This policy is used where there are several consignments over a period of time and the assured does not know the details of the ship, dates of shipment, etc. Floating policies are opened for a specified amount.

The international sales contracts initially require transfer from the seller to the buyer a policy. However, the contracts require now-a-days not only a policy but also a certificate under a floating policy. It means the exporter receives from the insurer a policy covering, typically, all shipments to be made over a certain period of time and within a certain geographical area. This policy will bring together with a pad of blank certificates, each of which is already signed, to be used for the individual shipments.[113]

3. 4. 2. Principles of Marine Insurance

The marine insurance contracts follow certain principles in formation of the contracts, which serve the interests of both the insurers and the insured. These principles help determining premium, insurance claims, and determining compensation.

113. Berman, (1987) 283

3. 4. 2. 1. The Doctrine of 'Utmost Good Faith'

Marine insurance contracts are contracts of utmost good faith (*uberrimae fidei*). Parties to the contract are hereunder an obligation to disclose information that may have an effect on others' judgment. In absence of complete disclosure of information, a contract of marine insurance can be passed up on the ground of failure to observe utmost good faith.[114]

The doctrine of 'utmost good faith' requires the assured to disclose all material information known to him before finalising the contract. Materiality is defined as that which 'would influence the judgment of a prudent insurer in fixing the premium, or determining whether he will take the risk'. However, the extent of influence is a matter of debate. As a matter of the controversy, it is raised in *Container Transport International Inc and Reliance Group Inc v. Oceanus Mutual Underwriting Association (Bermuda) Ltd.*[115] It was inter alia held that a fact is material if it would have had an impact on the formation of a prudent insurer's opinion. The issue came up for consideration in *Pan Atlantic v. Pine Top*[116] in which the *Container Transport International* decision was upheld by the court that added that 'to avoid the contract for non-disclosure, the undisclosed material circumstance must have induced the particular insurer into making the contract.'

However, it is not easy to foresee which circumstance is material and which is not. It is really a question of fact, but case laws may help in determining the materiality of a circumstance.

The burden of proof that lack of utmost good faith exists is on the party alleging it. The obligation of utmost good faith applies to material representations as well.[117]

3. 4. 2. 2. Insurable Interest

Since a marine insurance contract is a contract of indemnity, the recognized principle is that the person for whose benefit the insurance policy is bought has an insurable interest or expects to obtain an insurable interest therein. Parties with insurable interest would normally include consignees, ship owners, charterers and bailees.[118]

A person having insurable interest is a person who is interested in a marine adventure. He is also a person interested in a marine adventure where he stands

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114. Thomas J Schoenbaum, 'The Duty of Utmost Good Faith in Marine Insurance Law: A Comparative Analysis of American and English Law' (1998) 29(1) *Journal of Maritime Law and Commerce* 1.

115. (1984) 1 Lloyd's Rep 476.

116. (1994) 3 WLR 677.

117. Carr, (1999) 254- 255.

118. Ibid, 232

in any legal or equitable relation to the adventure to any insurable property at risk therein. For his interest in the property, he may get prejudiced by its loss, or damage thereto, or by the detention thereof, or he may sustain liability in respect thereof.[119]

Where there are doubts regarding the interest of an assured, the insurer may issue a *ppi* policy (policy proof of interest). These policies are held void since they are widely regarded as wagering or gaming contracts.[120] The *ppi* policies are unenforceable, but hold a very common place in the insurance industry.

3. 4. 2. 3. The Doctrine of Subrogation

Subrogation means substitution whereby the insurer takes the place of the insured in respect of the rights and remedies of the assured upon payment. This principle has developed over the years in marine insurance law. Through the operation of the principle the insurer is entitled to recover only what he has paid out. It is said that 'subrogation will only give the insurer rights up to 20 shillings in the £ on what he had paid.'[121]

3. 4. 2. 4. Double Insurance

If the property is insured with two insurers it is called double insurance. The assured are not entitled to recover the loss twice. The insurer paying the damage will look to the other insurer for a proportionate contribution.[122]

3. 4. 2. 5. Reinsurance

If an insurer himself insures the whole or part of the risk he takes on with another insurer. Unless otherwise provided in the policy, the assured does not have any right or interest in the reinsurance.[123]

3. 4. 2. 6. Assignability of Policies

Marine insurance policies are assignable although it is possible to be expressly forbidden on the policy. This option is not often used. This is an important characteristic since, in CIF contracts, the seller hands over insurance policies to the buyer. Endorsement is the usual means for assignment. However, other traditional methods are recognised. Two conditions are necessarily to be met, i.e., the delivery of the policy and establishment of the intention to transfer the rights. The policy may be assigned before or after loss.[124]

3. 4. 2. 7. Warranties in Marine insurance

Marine insurance brings about a number of warranties, express or implied, on the part of the insured. Warranties in the context mean conditions that must be exactly met. Implied warranties include (i) that the ship is sea-worthy for the

119. Ibid.

120. Schmitthoff and Sarre, (1972) 357.

121. Carr, (1999) 255.

122. Harley and Bari, (1997) 139.

123. Schmitthoff and Sarre, (1972) 361.

124. Carr, (1999), 255- 256.

particular voyage and is fit to carry cargo (in the case of a voyage policy on goods), and (ii) that the ship is reasonably fit to encounter ordinary perils of sea and (iii) of the port (if the policy covers the ship while in port).[124]

For any breach of implied or express warranties, the insurer is discharged from liability as from the date of the breach.[126]

3. 4. 2. 8. Deviation Clause

The ship is under obligation to go on its voyage on the customary route or the course designated in the policy. For any deviation taking place on the voyage, the insured loses cover from the deviation in the Institute Cargo Clauses (A), (B) and (C). However, it is excepted if deviation occurs because of one of the purposes listed in the policy.[127]

3. 4. 3. Liability for Loss in Marine Insurance

The insurer bears the liability for any loss proximately caused by risk insured against, unless he agrees otherwise to the marine insurance policy. The cause nearest in time is not necessarily the proximate cause. The proximate cause is deemed to mean the cause that is proximate in efficiency. If the Institute Cargo Clauses (A), (B), and (C) are used in the marine insurance policy, it is enough to show that the loss/damage is reasonably assignable to the risks listed in the policy. The common principles of loss folowed in marine insurance are as follows :[128]

1. The burden is on the insured to make out a *prima facie* case that the loss is proximately caused by a risk insured against.
2. The loss/damage is caused by a number of proximate causes. If one of the proximate causes is anticipated, then the insurer is not liable.
3. The circumstances listed in the policy where the insurer is not liable are delay, wear and tear, inherent vice, etc. It is to be mentioned that Institute Cargo Clauses (A), (B), and (C) exclusions have reproduced some of the exclusions.
4. The Insurer may be liable for the total or partial loss. The level of liability is to be determined on the basis of the insurance policy. The Institute Cargo Clauses (A), (B), and (C) cover the total and partial loss with one exception i.e. cl. 1.3 of the Institute Cargo Clauses (B).[129]

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125. Harley and Bari (1997), 40.
126. Carr, (1999), 256.
127. Ibid.
128. Ibid, 256- 257.
129. Total loss comprises both actual total loss and constructive total loss. Actual total loss accrues where the entire subject matter is in existence or where the subject matter is extinguished to an extent that it ceases to be a thing of the kind insured (for example, dates become unfit for human consumption), or the insurer is permanently deprived of the subject matter. Limits of constructive total loss are laid down as it occurs where it is reasonable to abandon the subject matter, since actual total loss is unavoidable or where preservation costs exceed subject matter's value.

     In the case of constructive total loss, the loss may be treated as partial loss off actual total loss. If the latter, the insured is to abandon the subject matter and clear natice (oral or in writing) of abandonment to the insurer, the insurer has to accept notice; mere silence is insufficient.

To use standard insurance contracts is a common practice. Institute Cargo Clauses (A), (B), and (C), which replaced SG policy in 1982, are commonly accepted. The Clause (A) covers all risks and provides the widest coverage, whereas Institute Cargo Clauses (B) and (C) provide coverage for certain named risks only.[130]

3. 5. Conflict of Laws in International Trade

'Conflict of laws' refers to the variation between internal laws of two countries on the same matter.[131] In deciding a case where conflict of laws exists, the court is concerned with either actions in *personam* or actions in rem. The basic rule for jurisdiction of a domestic court[132] over actions in *personam*[133] is the defendant's presence in the country, and in actions in *rem*[134] *requires the ship's presence in the country.*[137]

This basic rule regarding the international sale contracts in a situation of conflict of laws gets altered drastically in a country, which incorporates the *1980 Rome Convention,*[136] concerning the 'proper law of the contract'.[137]

The 'proper law of the contract' denotes the system of law under which the contract is dealt with.[138] In general, the proper law of the contract regulates the formation of the contract and the reality of the agreement, the effect of any misrepresentation, mistake or duress alleged to affect it, its interpretation, its validity (meaning whether the contract or its terms are valid and effective), the discharge of the obligations of the parties under the contract, and in some respect the legality of the contract.[139] The matter where the contract is executed is determined for the purposes of jurisdiction of the court or finding the governing law to that effect.[140]

The competence to contract is contemplated to be governed by the proper law of the contract although there is no authoritative statement for or against it. Such proper law is to be decided by looking for the system of law with which the

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130. Carr, (1999), 257.
131. For details see Cheshire, (1995), 17.
132. That a court has jurisdiction means that it is competent to hear a case.
133. Actions in which one person attempts to cause another to refrain from doing something or to pay damages. For details see Cheshire, (1995) 599-609.
134. Actions brought against ships. For details, Ibid, pp 610-615.
135. Ian F G Baxter, 'International Conflict of Laws and International Business' (1985) 34(3) *International and Comparative Law Quarterly* 538.
136. *Convention on the Law Applicable to Contractual Obligations* 1980.
137. Ibid.
138. For details see Cheshire,, (1995) 199.
139. Ibid, 208.
140. Ibid.

transaction has its closest and most real link. It ignores any express choice of law if chosen for the purpose of giving a party competence when otherwise this does not exist. Such a proper law is often called the putative proper law, and is usually used when endeavouring to find out the existence of a contract.[141]

If a contract or its performance is illegal at its formation by its putative proper law, it does not cease to be enforceable. Even if a contract is not illegal by its proper law, it does not become unenforceable by reason of its breaching some other system of law. If a contract, whatever the proper law is, conflicts with a domestic law when the domestic law is the forum, its enforcement becomes *ipso facto* inoperative to the extent of the conflict.[142]

In addition, a contract is not enforced if it is illegal by the law of the place of its performance. The illegality may arise for a number of reasons: if it is a system different from the proper law or it is illegal by the domestic law for its alleged conflict therewith or if it is against domestic public policy and hence ineffective.[143]

Again, a contract becomes ineffective for supervening illegality. The consequence of supervening illegality in the form of a change in the proper law of the contract or domestic law works as a frustrating event. If such supervening illegality takes place, it turns the enforcement of the contract contrary to domestic public policy.[144]

In *Amin Rashid v. Kuwait Insurance Co.*,[145] Lord Diplock enumerates the common approach of the English courts in determining the proper law of a contract in the words as follows:

> English conflict rules accord to the parties to a contract a wide liberty to choose the law by which their contract is to be governed. So the first step is to examine the policy in order to see whether the parties have, by its express terms, or by necessary implication from the language used, evinced a common intention as to the system of law by reference to which their natural rights and obligations under it are to be ascertained.

Hence, the parties can use their choice option to select the law for governing their contract, and if they do so by means of an express choice of law clause, the courts will uphold the choice of the parties provided that it is made *bona fide* and is not illegal.[146]

The most influential case in which an express choice of law clause is upheld is an advice of the Privy Council in the case of *Vita Food Products v. Unus*

141. Ibid, 205.

142. Templeman and Sellman et al, (1999) 325-329.

143. Ibid.

144. *Ralli Bros. v. Compania Naviera Sorty Azner* (1920) 2 KB 287.

145. (1984) 1 AC 50.

146. Templeman and Sellman et al, (1999), pp. 325-329.

Shipping where it was held:[147]

> The parties' choice is in general conclusive and there is no necessity for a relation between the transaction and the system of law chosen but the choice had to be *bona fide*, legal and not contrary to public policy.

The extent of the leverage, upon these grounds, for upsetting the choice of law clause has been hotly debated but with little outcomes. For example, where the Hague-Visby Rules are given statutory force, they will likely violate the express choice. In relation to this, Lord Denning MR said in *the Hollandia*:[148]

> ...public policy demanded that in international trade all goods carried by sea should be subject to uniform Rules- they should not vary according to the country ... in which the dispute is tried out- therefore the Rules would apply whatever the proper law of the contract.

Therefore, the parties' freedom of choice gets restricted in a number of cases. Firstly, the courts are entitled to enforce the mandatory laws of the forum irrespective of the law which would otherwise be applicable. Second, parties to the contract will not be able to avoid a mandatory rule of a national State by the choice of a foreign law in circumstances where all other relevant elements of the contract at the time of that choice are connected exclusively with that particular national State. Such mandatory rules have been defined as those 'which cannot be derogated from by contract.' Third, a choice of law is not permissible if it either prejudices the application of international conventions to which a contracting State is a party, or is manifestly incompatible, with the public policy of the forum.[149]

In addition, if the parties do not rely on choice of law, 'the contract shall be governed by the law of the country with which it is most closely connected'.[150]

3. 6. Remedies for Breaches of International Sales Contracts

The available remedies in international sales contracts reflect a deliberate balancing among the remedial approaches of the civil law, the common law, and other various legal systems of the world.[151]

3. 6. 1. Interim Remedies

Fulfilment of the jurisdictional requirements and obtainment of the judgment from a competent court do not solve the problem of the claimants for obtaining

147. (1939) AC 277.

148. (1983) 1 AC 565.

149. Ibid.

150. Ibid.

151. Avery W Katz, 'Remedies for Breach of Contract under the CISG' (2005) 25(3) *International Review of Law and Economics* 378.

satisfaction since 'an unsatisfied judgment against an assetless defendant is a pyrrhic victory'. Between judgment and execution periods, the defendant may have become insolvent or he may have made use of the chance to remove his assets out of the jurisdiction. Before getting on litigation or arbitration or conciliation (mediation), a claimant would be well advised to seek some form of interim relief in order to ensure that any possible judgment in his favour will be met.

In English law there are two methods of obtaining such relief: action in *rem*, and freezing injunction (formerly known as *Mareva* injunction).

3. 6. 1. 1. Action in *Rem*

An action in *rem* authorizes the claimant to secure the seizure of the ship in connection with which the claim arises. This is so called since it not only involves the ship in connection with which the claim arises but also other ships beneficially owned by the defendant. Such action extends to 'any claim for loss of or damage to goods carried in a ship' and to 'any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.'[152]

3. 6. 1. 2. Freezing Injunction

The freezing injunction, previously known as *Mareva* injunction,[153] is comparatively a recent type of security invented by Lord Denning in *Mareva Compania Naviera SA v. International Bulk Carriers*[154] and *Nippon Yusen Kaisha v. Karageorgis.*[155] It is a form of an interlocutory injunction restraining a party to legal proceedings from taking away moveable assets from jurisdiction or from otherwise disposing of them to the prejudice of the plaintiff pending judgment. The injunction causes retention of the defendant's assets for generating a possible fund out of which any subsequent judgment can be satisfied.[156]

The English law, which incorporates the provision of freezing injunction, provides that there must be an existing action between the parties to which the freezing injunctions concerning 'any assets' can attach. Moreover, in a petition for such a relief, the courts can 'deal' 'with any assets'. The phrase 'dealing with any assets' has been given a wide meaning and is not interpreted *ejusdem generis* with 'removing from the jurisdiction.' The freezing injunction, therefore, extends to cases where there is a risk that the assets will be degenerated within the courtís jurisdiction as well as removed out of the jurisdiction.[157]

152. Wilson, (1998), 310-312

153. Harley and Bari, (1997) 93.

154. (1975) 2 Lloyd's Rep 509.

155. (1975) 2 Lloyd's Rep 137.

156. Harley and Bari, (1997) 99.

157. Rule 25.1 (1) (f) of the Civil Procedure Rules 1998 provides that-

'(1) The court may grant the following interim remedies-

...(f) an order (referred to as a 'freezing injunction') restraining a party from removing from the jurisdiction assets located there; or restraining a party from dealing with any assets whether located there; or restraining a party from dealing with any assets whther located within the jurisdiction or not...'

Far from an automatic relief, freezing injunction having worldwide enforcement depends on the plaintiff's ability to show that he has a good arguable case; that the assets are inadequate to meet any likely judgment and that there are assets abroad; and that there is a real risk that those assets will be dissolute or concealed so as to render any judgment which the plaintiff might obtain nugatory.[158] Moreover, the courts while dealing with an application for a freezing injunction remain stick to the following guidelines:

The claimant must make full and frank disclosure of all matters in his knowledge, which are material for the judge to know.

1. The claimant should give the court particulars of his claim against the defendant.
2. The claimant should give some grounds for believing that the defendant has assets within the jurisdiction.
3. The claimant should give some grounds for believing that the defendant is about to deal with the assets in such a way as would defeat the ends of justice.
4. The claimant should give an undertaking in damages in case he fails in his substantive claim or the injunction turns out to be unjustified.[159]

The injunction takes effect straight away on its pronouncement and affects all assets it stipulates to cover.

The interim relief of freezing injunction gets circumscribed with the certain limitations. For example, freezing injunctions are not awarded to make improvement to the position of the claimants as against other creditors of the defendant by giving them priority over the assets subject to the order, not to prevent him from paying debts as they fall due. Further, freezing injunctions should allow for drawings to meet up the defendant's reasonable living expenses not exceeding a certain sum, which should take account of his particular circumstances, and an innocent party may have the injunction varied as against the claimant when he will be bound to pay the third party's costs of the application. Finally, rather than being permanent, a freezing injunction is intended to maintain the *status quo* until a judgment is put into effect.[160]

3. 6. 2. Arbitration as a Means to Settle Trade Disputes

Subsequent to the World War II, arbitration becomes an extremely popular means for resolving disputes. Arbitration seems to be the first step towards privatisation of justice since it acts as an alternative to resolution through national courts.[161] In arbitration, the parties can negotiate strongly as regards the appointment of arbitrators, language of the arbitration, place of arbitration and

158. Templeman and sellman et al, (1999) 324.

159. Ibid, 325-326.

160. Ibid, 326-327.

161. Ibid, 328.

the principles to be applied to issues under consideration. The arbitration decides issues relying on equitable principles (*ex aequo et bono*) or law (*lex mercatoria*). Compared to litigation, arbitration is the result of consent between the parties, who can reach to an agreement for arbitration either before or after the dispute has arisen.

The Protocol on Arbitration Clauses 1923, the *Geneva Convention on the Execution of Foreign Arbitral Awards 1927* and the *United Nations Convention on the Enforcement of Foreign Awards 1958* are the governing international laws for enforcing arbitral awards. Besides, the UNCITRAL'S Model Law on International Commercial Arbitration has got direct influence on national legislations for its user-friendly accessibility.

Depending on the nature or stipulation mentioned in the trade the parties may opt for either institutional arbitration offered by national or international institutions; or ad hoc arbitration.[62]

3. 6. 2. 1. 1. Institutional Arbitration: Accessibility and Advantages

The American Arbitration Association (AAA), the Australian Centre for International Commercial Arbitration (ACICA), Australian Commercial Disputes Centre (ACDC), the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), and the Nederland Arbitrage Instituut (NAI) are possibly the most renowned national institutions offering services in the area of trade related arbitration. Organisations such as GAFTA (Grain and Feed Association), FOSFA (Federation of Oils, Seeds and Fats Associations) and the London Maritime Arbitration Associations also provide arbitration facilities for commodities' trade and maritime disputes.[163]

Apart from the UN Commission on International Trade, the International Chamber of Commerce (ICC) offers institutional arbitration and has developed rules as regards the *modus operandi* of arbitration. It recommends the following clause, should parties desire to submit to the ICC arbitration:

> All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.[164]

Arbitration shares with ordinary litigations a number of characteristics. Nonetheless, institutional arbitration has become extremely popular amongst the trading entities for the following innovative characteristics that are absent in lawsuits:

162. Ibid, 329.

163. It is to be noted that recently, the Federation of Bangladesh Chambers of Commerce and Industry (FBCCI) has launched offfering arbitration services.

164. <www.iccwbo.org/court/dispute_boards/id4354/index.html> 14 June 2007.

a. Choice of arbitrators, meaning people with specialised knowledge of a particular trade and commercial practice settle the dispute;
b. Choice of institutional arbitration, meaning the application of procedures intended with the business community in mind;
c. Control over where and when arbitration takes place, which lessens costs;
d. Parties can put the nature of their dispute private, since arbitrations are not conducted in public;[165]
e. The determination of arbitration awards means that time and money are not misused on appeals through various courts as in litigation;
f. Cost and speediness are often cited as an advantage of arbitration;
g. The transnational nature of arbitration, where parties agree to apply *lex mercatoria* or equitable principles *ex aequo et bono,* this belief is partly true.

Moreover, following are the advantages which an institutional arbitration offers:

a. set procedural rules- for example, the AAA, LCIA and ICC have specific rules to deal with procedural issues such as the appointment of arbitrators, language of arbitration in the absence of indication by the parties, etc;[166]

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165. For instance, in an Australian decision (*Esso Australia Resources Limited V. Plowman,* 1995), the High Court was off the opinion that a third party (not party to the arbitration) could discover information provided in arbitration. Though the private nature of a hearing was an integral part of arbitration, confidentiality was not, on the grounds that:
    1. Witnesses were not subject to the confidentiality obligation;
    2. Court proceedings relating to arbitration procedure would bring the information deemed confidential into the public sphere;
    3. Disclosure of awards to third parties such as shareholders and insurers was commonplace.

    The courts however, have no problems in maintaining the confidentiality of arbitral proceedings. In *Hassneh Insurance Co. of Israel Ltd v. Mew* the court had no hesitation in saying that disclosure of documents prepared for an arbitration hearing could not be disclosed to third party on the grounds that such disclosure would be equivalent to opening the doors of the arbitration room to a third party.
166. The ICC, on 8 April 1997, adopted a revised version of Rules of Arbitration, which came into effect on 1 January 1998. The new rules introduce a number of changes: for example, according to Article 1, disputes of both national and international character may now be held under the auspices of the ICC; parties may, under Article 32, modify the time limits set by the Rules while preserving the ICC courtís power to extend deadlines on its own initiative where appropriate. The arbitral tribunal, under Article 22, must declare the proceedings closed once parties have had a reasonable opportunity to present their cases, on such a declaration, further information can be submitted only on the request of the tribunal, or with the authority of the tribunal. The new rules obviously have been devised to reflect flexibility and reduce delay.

b. handling administrative matters- for example, assistance with establishing date , time , venue;

c. wide ranging experience- for example, the ICC has offered international commercial arbitration services for 75 years; in 1995 the ICC received in excess of 400 new requests for arbitration to be held in more than 30 countries);[167]

d. scrutiny of arbitral awards- for example, where the ICC Arbitration Rules apply, the tribunal is required to submit to the International Court of Arbitration of the ICC the award in draft form for its approval.[168] The court may lay down modifications as to the form of the award, and may also draw its attention to points of substance without affecting the tribunal's liberty of decision;[169]

e. several institutions (for example the ICC) determine arbitrator's remuneration and administrative costs within a scale providing the parties with a common prior idea about the likely cost of the arbitration.[170]

3. 6. 2. 1. 2. Ad hoc Arbitration

An ad hoc arbitration is also referred to as non-institutional arbitration. It requires no administration costs payable. Where there are no institution-drafted rules, parties need to draft their own procedural rules or fall back on the arbitration rules found in national law of the seat of arbitration (if available). In the case of Bangladesh this is the Arbitration Act 2001 or in the case of England, this is the Arbitration Act 1996. The parties have the option to incorporate rules framed by institutions such as those of the ICC but these may not always meet up the requirements of the parties. A better alternative is to adopt the arbitration rules devised by the UNCITRAL. For instance, in the partiesí failure to make consensus on the appointment of an arbitrator, Article 6(2) of the UNCITRAL Rules provides that:

> ...if within 30 days after receipt by a party of a proposal made in accordance with para. 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon refuses to act or fails to appoint the arbitrator within 60 days of the receipt of a party's request therefor, either party may request the Secretary General of the Permanent Court of Arbitration at the Hague to designate an appointing authority.

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167. ICC, 7(1) *International Court of Arbitration Bulletin* 3.

168. Article 27 of the ICC Arbitration Rules 1997.

169. Article 28 of the ICC Arbitration Rules 1997.

170. For instance, according to Article 2 of Appendix 111 to the ICC Arbitration Rules 1997, where the sum in dispute is not in excess of $ 50,000 administrative costs are fixed at $2500 and the arbitratorís fee between the minimum of $2,500 and a maximum of 17 per cent (that is, $8,500). The actual amount payable to the arbitrator will be arrived at by taking into account the complexity of the dispute, the time spent, the rapidity of the proceedings and the diligence of the arbitrator.

4. Conclusion

The operation of international trade law rules is dependent on the mixture of domestic law and public or private international law applicable to trade in goods, services and trade related intellectual property rights (TRIPs) that cross national boundaries. The growth in international trade rules has inevitably led to an interest in international trade law, which as a subject casts its net worldwide covering topics that range from formation of contracts, liability, from protection of IPRs to contract of sale, contract of carriage, and contract of insurance. Multilateral treaties notably the UN Convention for the International Sales of Goods, Uruguay Round Agreements and several other practices like UCP 500 dealing with trade terms, dispute resolution and the enforcement of resulting adjudications play important roles in this field. However, while attempting to execute a sales contract it is not often possible for a trader to make enquiries of these scattered trade rules lying in different sources. Avoidance of incorporating such diverse rules in contracts gives rise to complications between parties if they breach their respective obligations later. Therefore, it is said that if the rules of international trade law are compiled in a single document, international trade regime will help promote peace; disputes will be handled constructively; it will make life easier for all; freer trade will cut the costs of living by providing more choices in products and their qualities, will raise incomes and will stimulate economic growth; the basic principles will make life more efficient, governments will be shielded from lobbying, and the system will encourage good governance in the international trade regime.