

# ASSIGHMENT FOR INTERNATIONAL TRADE LAW

## **Introduction**

International trade transaction is essential for the sale of goods with the addition of an international element. In practice, the seller and buyer are in different countries where the goods must travel from the seller's country to the buyer's country by various means of transports. In international sale of goods, they usually transit the goods by sea because of the international transactions. Therefore, contracts for the carriage of those goods must be procured between the seller or buyer and common carrier depending on different types of sale of contracts. Moreover, in most of incidences, the agreed goods are usually insured at a reasonable amount in case of being loss or damaged during the transit. The goods must also be paid for by various methods of payment to facilitate international trade.

This essay aims to analyse the possible claims from our advising buyer G arising from other parties to the contracts involved in this transaction. The essay will also analyse the legal relationships of all parties created that their respective rights and duties may have in the transaction. In doing so, it will discuss sale of contracts on c.i.f. terms firstly, where it involves two other contracts respectively. Then, I will mainly analyse the duties of the shipper in the contract of carriage. Next, the most discussion will be referred to the contract of marine insurance on the relationship between the assured and insured, as well as the insurance cover. Finally, I will analyse letters of credit as a method of payment in international trade. The possible advice for G will be given in each respective contractual relationships.

## **Part I**

### 1) The sales contract on c.i.f. terms

As Lord Wright said in the case of *T D Bailey, Son & Co v Ross T Smyth & Co Ltd*<sup>1</sup>, c.i.f. contracts are the most common form of contract for sale of goods in the international trade transaction. When a sales contract is signed on c.i.f. terms, the seller's obligations ends only when he or she ships the agreed goods at the port of shipment specified in the contracts<sup>2</sup>.

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<sup>1</sup> (1940) 56 TLR 825

<sup>2</sup> Pamela Sellman "Law of International Trade"(2000) Old Bailey Press at p41

## 2) Legal relationships between the seller and the buyer under Incoterms2000<sup>3</sup>

The parties are bound to the Incoterms 2000 if expressly incorporated into their sale contracts. Therefore, their obligations differ slightly from the common law decisions. Under the incorporations of the Incoterms, the seller's primary duty is to make a carriage contract with a carrier ensuring the goods safely transferred to the buyer. A seller also must insure the goods at his own expense in the favor of the buyer in the event of the loss or damage for the goods. A seller must also supply goods under the Sale of Goods Act 1979; delivery goods on board the vessel at the port of shipment. Moreover, a seller must also tender to the buyer the shipping documents: an insurance policy to cover the goods, an invoice with particulars of the goods and a bill of lading and other documents if required.

The buyer, on the other hand, must accept delivery of the goods and pay for the contract price against payment specified in the sales contract. A buyer is also obliged to accept the documents tendered by the seller. CIF contract gives the buyer two distinct rights of rejection<sup>4</sup>: 1) the right to reject the documents; 2) the right to reject the goods. However, a buyer may lose his right to reject the goods. If a buyer accepts the documents which will entitle him to reject the goods for non-conformity if it was not apparent on the face of documents. In other words, if the defect is apparent on the face of the documents, the buyer will be taken to have waived his right to reject the goods because the defect will be estopped from asserting his right to reject the goods for that defect.<sup>5</sup>

## 3) The buyer's possessory title for the goods

A bill of lading is a document of title which entitles the holder to take possession of the goods loaded at the port of destination from the carrier. It should bear in mind that the bill of lading is a document of possessory title but not proprietary title<sup>6</sup>. Therefore, transfer of a bill of lading amounts to the delivery of the goods<sup>7</sup>

Under The Carriage of Goods by Sea Act 1924<sup>8</sup>(the CGSA 1924), the person who wants to sue the carrier in contract for the goods of loss, or damage is the lawful holder of a bill of lading<sup>9</sup> or the person

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<sup>3</sup> Incoterms are international commercial terms that are used in business mainly to make clear the delivery obligations of each contracting parties. First published in 1936 by International Chamber of Commerce(ICC), the current version is Incoterms 2000

<sup>4</sup> Kwei Tek Chao v British Traders and Shippers Ltd [1954] 2 QB 459 by Devlin J

<sup>5</sup> Judith Evans *Law of International Trade* (3<sup>rd</sup> edition) Old Bailey Press

<sup>6</sup> Janette Charlery *International Trade Law*(1993) The M& E handbook series

<sup>7</sup> Clemens & Horst v Horst v Biddell Bros [1912] AC 18

<sup>8</sup> The CGSA 1924 came into force on September 16,1924, which repealed the Bills of Lading Act 1885 by replacing its terms with new principle to update the prior law.

<sup>9</sup> CGSA 1924 S2(1)(a)

to whom delivery of the goods is to be made in the case of a sea waybill or a ship's delivery order.<sup>10</sup> As a result, the buyer is entitled to sue the carrier in the carriage of contract provided that he has become the lawful holder of a bill of lading defined as the consignee named in the bill of lading or the indorsee of the bill of lading who has possession of the bill of lading.<sup>11</sup>

## Part II

### 1) Nature of the contract of carriage goods

According to the international sale of contract description, the seller (shipper/cargo-owner) is required to enter into an appropriate carriage contract with the carriers. The carriage contract between the shipper of goods and the carrier of which the bill of lading is evidence will be governed by the International Convention that is the Hague -Visby Rules.<sup>12</sup> The Rules will prima facie have statutory application to every bill of lading relating to the carriage of goods between ports in two different states (Art X). Therefore, in the present case, the Hague-Visby Rules shall apply.

### 2) The relationships for the shipper and the carrier<sup>13</sup> under the Rules

The liabilities of a carrier under the Rules are relatively strict to protect the goods safely transferred from the seller to the buyer<sup>14</sup>. The cargo-owner also has liability under the govern of the Rules for the carriage of dangerous goods, the express provision is to be found in Art IV rule 6<sup>15</sup>. It can be noted that the carrier's consent to the shipment of the cargo has been obtained in ignorance of its inflammable, explosive or dangerous nature. In such situation the carrier is not only to 'land, destroy or render the goods innocuous without paying compensation but also he is not liable for all damages and expenses arising from such shipment<sup>16</sup>.

What is classed as 'dangerous goods'? there is no further provisions contained in the Rules 6. The common law involves a far wider definition of what constitute dangerous goods than a dangerous cargo

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<sup>10</sup> S2(1)(b)(c)

<sup>11</sup> S5(2)

<sup>12</sup> In the UK, the Hague -Visby Rules were given effect by the Carriage of goods by Sea Act 1971, which was brought into force internationally in 1977.

<sup>13</sup> The definition of 'carrier' in Article I(a) of the Convention includes both the owner of the ship and any charterer who enters into a contract of carriage with a shipper.

<sup>14</sup> Article III(1)-(3)

<sup>15</sup> 'Goods of an inflammable, explosive or dangerous nature to the shipment whereof the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. '

<sup>16</sup> John F Wilson *Carriage of Goods By Sea* (4<sup>th</sup> edition) by Longman

is not in itself inherently dangerous but which may endanger the free movement of the ship then causing unreasonable delay.<sup>17</sup> The law relating to dangerous goods was recently reviewed by the House of Lords in *Effort shipping Co.Ltd v Linden Management SA (The Giannis NK)*<sup>18</sup>, where the Lords fully confirms the description of ‘dangerous goods’ within the meaning of article IV(6), Lord Lloyd said::

“It was settle law that the word ‘dangerous’ ....must be given a broad meaning. Dangerous goods were not confined to goods of an inflammable or explosive nature or other like. Goods could be dangerous... if they were dangerous to other goods, even though they were not dangerous to the vessel itself. ‘Dangerous’ was not to be confined to goods which were liable to cause direct physical damage to other goods.”

Therefore, the *Giannis NK* established the broad meaning of ‘dangerous goods’ approach which is adopted by the HL for the concept of ‘dangerous goods’ at common law by Mustill J in *The Athanasia Comminos*<sup>19</sup> that ‘dangerousness’ is not an absolute quality only but it determines the distribution of risk for the consequences of a dangerous situation arising during the voyage.

The second provision of rule 6 further provides the carrier may take the same actions in respects of goods that become a danger to the ship or cargo even if shipment of goods with his knowledge and consent, without liability except to general average, if any. This part of provision can be understood in a case of *Chandris v Isbrandsten-Moller Co Inc*<sup>20</sup>, where the court held that the shipment of dangerous goods with the consent of mater did not preclude the shipowner’s right to claim damage against the shipper.

Article IV(6) provides a very strict liability for shippers to ship dangerous goods that the shipper alone is liable for all damages arising directly or indirectly from the shipment of dangerous goods. However, the application of Art IV (6) always remains the subject to the carrier’s overriding obligation to make the ship seaworthy under Art III r1. In the recent case of *Northern Shipping Co v Deutsche Seereederei*

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<sup>17</sup> Mitchell, *Cotts and Co v Steel Brothers and Co Ltd* [1916] 2 KB 610

<sup>18</sup> [1998] AC 605. The Court of Appeal held that shipped goods were in fact “dangerous” within the meaning of Article IV(6), Hague -Visby Rules. On appeal, the House of Lords agreed with CA decision that a cargo can be ‘dangerous’ even though its physical attributes do not imperil the ship itself.

<sup>19</sup> [1990] 1 Lloyd’s Rep 277

<sup>20</sup> (1949-50) 83 Ll. L. Rep. 385

*GmbH*,<sup>21</sup> where the court held that supplying a seaworthy ship is an overriding duty which must pre-exist before the protective provisions in the Hague Visby Rules.

### 3) Summary

Therefore, the goods are classed as ‘dangerous goods’ within the definition of Art IV(6). Carrier may rely on Art IV(6) claim damage against cargo owner who ship dangerous goods. The facts in the present case are: 1) the initial combustion of goods in hold occurred arising from vibration of the ship because of heavy weather; 2) the explosion of two bags of fertilizer become danger to other goods and the ship; 3) the carrier discharges all goods in case of further endanger. It can be noted there are two causes resulting in the loss of goods, but it is important to decide which of them is the more dominant contributing to the loss. The relevant fact also indicates that carrier had known the goods are ‘highly sensitive to vibration of any kind’ from the media report when he discharges all goods into the sea. If carrier could store the goods in the ship’s hold by an appropriate manner in the event of vibration by which the loss would not have combusted. Therefore, the dominant cause is that carrier’s failure to exercise his due diligence to make the ship seaworthy. As a result, he can not rely on rules 6 as a protective rule to claim any indemnity. Thus, I advice G, as a lawful holder of bill of lading to sue FL and claim damages.

## Part II

### 1) Nature of the marine insurance contract

One of the more important concerns to exporters and importers involved in an export transaction is that risks of damage or loss during trade transactions from seller to buyer. But the risks can be fully protected through special transportation insurance provided: marine insurance for example. Thus, when such loss or damage suffered during the transactions by sea, the trader can sue the carrier or the cargo-owner by insuring the goods from the insurer without going to the court. The trader will be entitled to be indemnified by the insurers at the value of the goods, or less but not excess. The insurance contract is a contract of indemnity<sup>22</sup>, its nature is stated in schedule 1(1) of Marine Insurance Act 1906 that “A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, losses incident to the marine adventure.” Generally, marine insurance is governed by Marine Insurance Act 1906 (MIA), schedule of Act; Lloyds Marine Policy and Institute Cargo Clauses A or B or C.

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<sup>21</sup> [2000] 2 Lloyd’s Rep 255

<sup>22</sup> *Castellain v Preston* (1883) 11 Q.B.D 380 by Brett J

2) The relationship in the insurance contract between the assured and the insurer

Under the MIA 1906, the assured has the duty to disclose all material<sup>23</sup> facts to the insurers before the contract is concluded based on the doctrine of *uberrimae fidei* (otherwise known as the duty of utmost good faith). If the assured does not give sufficient information to the insurer, the insurance contract may be avoided<sup>24</sup>. This is a case of non-disclosure. In addition to the obligation to ensure that all material circumstances are disclosed, the assured also under a duty to ensure that all material representations made by him or his agents to the insurer are true and accurate<sup>25</sup>. Otherwise, this will be a case of misrepresentation<sup>26</sup>. Therefore, the insurer is not entitled to avoid the insurance contract for any non-disclosure or misrepresentation unless he can show that the non-disclosure or misrepresentation was material before the contract is included. However, section 17 is applied before the conclusion of the contract under MIA 1906. The duty on the assured to disclose to the insurers material facts in pre-contract should be continuing during the performance of insurance contract in question.

The proposition on the duty of the assured to disclose a fact material to the risk being undertaken by the insurer does not continue in the post-contract was established in a leading case of *Cory v Patton*<sup>27</sup>, where the court said that “the assured need not communicate to the underwriters facts which afterwards come to his knowledge material to the risk insured against; and the non-disclosure of such facts will not vitiate the policy of insurance afterwards executed.” This conclusion was also approved by the House of Lords in *Niger Co. Ltd v Guardian Assurance Co. Ltd*<sup>28</sup> that no duty of disclosing post-contract facts on the assured within his knowledge, which, if disclosed, might have induced the insurer to exercise its right to terminate the contract.<sup>29</sup> The House of Lords relied on these authorities in a recent case of *The Star Sea*<sup>30</sup>, holding that the duty to disclose all material information to the insurer is the positive duty on the assured to the risk proposed in the pre-contract stage. Thus, the insurer is not allowed to rescind the contract by reason of the post-contract failure to disclose all facts which the insurer might have interest in knowing and might affect his conduct.

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<sup>23</sup> ‘Material’ means that a fact which a notional prudent insurer would take into account when deciding whether to accept the risk and on what terms.

<sup>24</sup> MIA 1906 S Section 18(1)

<sup>25</sup> MIA 1906 SS 20,21

<sup>26</sup> *The Game Boy* [2004] 1 Lloyd’s Rep

<sup>27</sup> (1872) 7 QB 304.

<sup>28</sup> (1922) 13 LILR 75

<sup>29</sup> *Ionides v Pacific Insurance Co* (1871-1872) L.R. 7QB 517

<sup>30</sup> *Manifest Shipping Co. Ltd v Uni-Polaris Insurance Co. Ltd (the Star Sea)* [2001] 2 WLR 170

### 3) Insurance Cargo Clause (hereafter referred to as ICC)<sup>31</sup>

Insurance Cargo Clause provides standard terms on which an insurance cover may be obtained for the carriage of goods. There are three sets of cargo clauses (A, B, C), which defines risks covered and the exclusion of the losses.

ICC (A) covers for all risks of loss or damage to the insured subject-matter subject to the various exclusion clauses<sup>32</sup> Although the insurance is termed to covers so-called ‘all risks’, it does not mean that every thing which may cause the losses of damages to the insured subject matter and not fall with the exclusions is a risk that the assured is entitled to cover. As an indemnity contract, only loss or damage caused by a risk or things which are not certain to happen will be covered, in other words, it is a fortuitous event, not a certainty<sup>33</sup>. The certainty or fortuity of losses is one of the limitations for ‘all risk’ covered. What is certainty or fortuitous must be tested from the assured’s standpoint<sup>34</sup> if he is aware of the loss at the outset will happen as a matter of course, which renders the loss a certainty. Thus, where the loss or damage is caused by the inherent defect or vice of the goods themselves, the law treats this as a certainty<sup>35</sup>. A second limitation is found in the ICC (A) themselves under Clause 4,5,6 and 7, which are risks or perils the insurer will not cover generally. It should bear in mind that the Clause A cover protects for loss or damage against ‘risk’ only, not against events which are certain to occur.

### 4) Summary

In conclusion, clause A gives the insured the right to claim insurance indemnity relied on the loss is caused accidentally, he does not need to prove that the exact nature of the peril, as by Lord Sumner described the burden of proof in *Rhesa Shipping Co SA v Edmunds (The Popi M)*<sup>36</sup> that : “the assured need only give evidence reasonable showing that the loss was due to a casualty, not to a certainty... I do not think that he has to go further and pick up one of the multitude of risks covered, so as to show exactly how this loss was caused.” Therefore, for an “all risk” policy to apply, it suffices for an assured to prove that there is some casualty or accident. Indeed, in the present case, the loss of goods was suffered a casualty because the discharge all fertilizer in to the sea by the carrier was an act from prevent the ship from further damage. Nor the assured was able to contemplate that the carrier would have discharged all of his cargo, as the duty of carrier is to transfer the goods to the buyer safely. As a

<sup>31</sup> The ICC was introduced on 1 January 1982, replaced the standard Lloyd’s SG policy

<sup>32</sup> Clause 1 “This insurance covers all risks of loss of or damage to the subject matter insured except as provided in Clauses 4,5,6 and 7

<sup>33</sup> *British & Foreign Marine Insurance v Gaunt* [1921] 2 AC 41

<sup>34</sup> *London and Provincial Leather Process Ltd v Hudson* [1939] 3 ALL ER 857

<sup>35</sup> [1921] 2 AC 41

<sup>36</sup> [1985] 1 WLR 948

result, the loss of fertiliser was a casualty or accident, not a certainty although the nature of goods is a certainty that may cause loss or damage, but there is not the case under an 'all risk' policy. Therefore, S can not exclude his liability for insured goods under the ICC Clause A. There is no need for the assured to show what happened to the goods<sup>37</sup>. Moreover, the assured has completed his duty to disclose all information before the conclusion of the contract, there is no duty of disclosure in pre-contract stage.

G as a cif buyer is entitled to be indemnified for the effect of the loss of goods. In order to recover under the policy the assured must have an insurable interest in the subject matter insured at the time of the loss.<sup>38</sup> Insurance interest is defined in section 5 of MIA 1906. It is clear from these terms that a party who bears the risk has an insurance interest. However, the buyer does not have insurable interest in the goods simply by entering into the contract of sale. His insurable interest usually arises where when the risk in the goods has passed to him. In a cif contract, the general rule of passing risk is that risk in the goods passes as from time shipment of the goods.<sup>39</sup> This is because the parties have regulated the prospect of loss or damage in transit and covered it by the carriage contract and insurance which the seller is required to take out and transfer to the buyer subsequently.

So far the buyer has two possible avenues of claim. The first is under his 'all risk' insurance cover. The second is against the carrier in the breach of his duty. If G chooses to recover under Clause A, then he cannot then also sue the carrier and retain the proceeds. Otherwise, he will be recovering more than once for his loss. Thus, having been paid by the insurer, who is entitled to proceed against the carrier to reduce to level of indemnity for which the assured has made him liable<sup>40</sup>. This is the right of the insurer to be subrogated to the rights and remedy of the assured. Therefore, the insurer is entitled to claim recovery in respect of the subject matter insured from any party who is liable for the loss of goods from the time of the casualty. Whether there has been a total loss or merely a partial loss,<sup>41</sup> the insurer is only able to recover that which he has paid to the assured<sup>42</sup>

To sum up, G will be entitled to claim against the insurer if he is able to prove that the loss of goods is suffered accidentally. Also, G is allowed to claim indemnity of loss of goods resulting from the

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<sup>37</sup> Application of National Benefit Assurance Co Ltd (1933) 45 Ll. L. Rep 147

<sup>38</sup> ICC Clause 11.1

<sup>39</sup> Fohnston v Taylor Bros [1920] AC 144

<sup>40</sup> Dufourcet v Bisshop (1886) 18 QBD 373

<sup>41</sup> MIA 1906 S 79

<sup>42</sup> Yorkshire Insurance v Nisbet Shipping [1962] 2 QB 330

carrier's failure to exercise of due diligence. Therefore, he then will have two rights of claims. If G claims indemnity from the insurer against the policy, in turn, where the insurer pays for a total or partial in the cases of goods, he is entitled to claim recovery from the party who had caused the loss of the goods and be liable for it.

## **Part III**

### **1) Nature of the documentary credit**

The documentary credit system in the international trade transactions as a method of payment is particularly useful where when the goods of seller who entered into a sales contract with an overseas buyer, will want to be sure that he will received the contract price for shipped goods, and the buyer on the other hand must pay the contract price until the seller has complied with his contractual obligations.

The general procedure is that the bank ( the issuing bank) undertakes the payment made to the beneficiary( the seller) only the presentation of the documents(including the invoice, the bill of lading, the insurance policy etc) by the seller are accordance with the terms of letter of credit which has already been opened by the applicant(the buyer) in time<sup>43</sup>.

Letters of Credit are generally governed by the Uniform Customs and Practice for Documentary Credits( hereafter referred to as the UCP 500), which is a body of articles regulating the implementation and operation of the documentary credit issued by the International Chamber of Commerce.<sup>44</sup>When the terms of the UCP 500 are incorporated into a documentary credit, the parties' respective rights and duties are regulated by its terms. The rules do not apply under English law unless expressly incorporated by the parties to the credit<sup>45</sup>.

### **2) Letters of credit and the standby credit under UCP 500**

A standby credit is a special type of letters of credit activated by the tender of documents in accordance with the terms of the credit.<sup>46</sup>In short to say that a standby credit is a form of guarantee for the beneficiary's protection in case of default of the other party to the underlying contract. The standby

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<sup>43</sup> *Garcia v Page & Co. Ltd* (1936) 55 Ll. L. Rep 391

<sup>44</sup> The rules were revised in 1993 and came into force on 1 January 1994. The edition currently in force is the UCP 500.

<sup>45</sup> The UCP 500 Article 1: "The Uniform Customs and Practice for Documentary Credit, 1993 Revision, ICC Publication No 500, shall apply to all Documentary Credits .....where they are incorporated into the text of the Credit. "

<sup>46</sup> Judith Evans *Law of International Trade*(3<sup>rd</sup> edition) by Old Bailey Press

credit is subject to the UCP 500<sup>47</sup> in the international trade transaction.

The credits (including a standby credit) are separate from and independent of the underlying contract of sale between the Applicants(the buyer/seller)and the Beneficiaries(the seller/buyer).Thus, the applicant is not entitled to prevent payment for the beneficiary under the letter of credits<sup>48</sup>.

Under the Article 13(a), when the seller tenders the documents to the bank, the bank must examine all documents with reasonable care to determine whether or not they conform with the credit(s).<sup>49</sup>The bank also undertakes to look for the correct documents which are consistency between all the documents and that the content of each document is correct. Therefore, in the present case where the issuing bank found that the actual amount shipped (800 tonnes) as reflected in the bill of lading tendered by NT is not inconsistent with two other documents, the buyer is entitled to refuse to accept the documents under Article 14 that documents are not in compliance with the terms and conditions of the credit<sup>50</sup>.The obligation of the beneficiary to tender documents exactly compliance with the credit is strict not only under the articles but also under common law<sup>51</sup>.

### 3) Summary

As far as I have concerned, G will be entitled to claim payment against the standby credit provided he could tender the writing statement to the bank to show that he is not dissatisfied with the performance of NT. The statement made by G must be consistence with the terms of present standby credit for NT's defective performance under article 13, UCP 500. The bank, accordingly, has obligation to make payment against conforming documents under article 9(A).There is an exception that the bank is entitled to reject a forged document on the grounds that it is a nullity.<sup>52</sup> But I can not find any evidence that G made a forged statement or fraudulently made. Therefore, the bank should pay against the statement made by G which is accord with the terms of the credit. Furthermore, the credit is separate from and independent of the underlying contract of sale, with the effect, therefore, NT as an applicant for the credit can not prevent the bank from making payment. Overall, whatever types of letter of credits are issued, the bank undertakes to make the payment to the beneficiary only where the

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<sup>47</sup> Article 1 and 2

<sup>48</sup> Article 3

<sup>49</sup> Gian Singh & Co Ltd v Banque de l'Indochine[1974] 1 WLR 1234

<sup>50</sup> JH Rayner & Co. Ltd v Hambro's Bank Ltd[1943] KB 37

<sup>51</sup> Equitable Trust Company of New York v Dawson Partners Ltd(1927) 27 Ll. L. Rep 49 by Viscount Sumner

<sup>52</sup> United City Merchants (Investments) v Royal Bank of Canada [1983] 1 AC 168

documents tendered by the beneficiary is strictly compliance with the letter of credits according to the rules in UCP 500.