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الوثيقة العائمة في التأمين البحري على البضائع

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ك

أعضاء لجنة المناقشة:

رئيساً.	جامعة وهران	أ. د بوخاتمي فاطمة
مقرراً.	جامعة وهران	أ. د زعنون فتيحة
مناقشاً.	جامعة وهران	أ. د العربي الشحط عبد القادر
مناقشاً.	جامعة وهران	أ. د حمدان ليلى

السنة الجامعية 2012/2011

بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

.

كلمة شكر

بسم الله الرحمن الرحيم

إن الحياة ألم يخفيه أمل والأمل يحققه عمل والعمل ينهيه أجل وبعد ذلك يجزى المرء ما فعل.

إني أحمد الله تعالى الذي ألهمني الصبر والعزيمة على إتمام هذا العمل المتواضع وأتقدم بالشكر الجزيل والامتنان إلى كلا من الأساتذة " بوخاتمي فاطمة و زعنون فتيحة "

اللذان لم تبخلا عليّ بتوجيهاتهما .

كما أتوجه بالشكر إلى السادة أعضاء لجنة المناقشة الذين تجشموا عناء قراءة هذه المذكرة والمشاركة في مناقشتها.

و إلى كل من ساهم من قريب أو من بعيد بالقليل أو بالكثير في إنجاز هذا البحث .

ب.زواوية

إهداء

إلى والديّ الكريمين
إلى أفراد عائلتي
إلى كل من علمني

ب.زواوية

CIF : Cost Insurance Freight (Incoterm maritime).

FOB: Free on Board (Incoterm maritime).

W.A: Warranted free from particular average.

« CNAN »

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² -Berres Claudes, Droit des assurances entreprises et organismes d'assurance, tome 1, LGD, Paris, 2éme Edition, p 1, "introduction".

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- Berres Claudes, ibid, p1, Intrdouction.

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		1906	
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204 4،1994

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² -Arnould's, Law of marine insurance and average, volume 1,London, 15th edition, 1961, p 25.

“Avenant”

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« L’Lody’s »

« Institute of ilondorum dewriters »

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« All risks »

(F.P.A)

W.A

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¹ - القانون التجاري، الأمر 59/75 المؤرخ في 20 رمضان 1395 الموافق لـ 1975/09/26، الجريدة الرسمية رقم

101

2009 - 2008

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- Robert de Smet, Assurance maritime, Tome1, L.G.D.J, Paris, p45.

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622

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" "Ripert"

" "

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.254

2006

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-Yvomme- Cambert, Faire droit privé (droit des assurances), Dalloz, Paris, 11^{ème} édition, 2001, p 183 paragraphe 214.

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² -Section 21: “ When contract in deemed to be concluded a contract of marine insurance is deemed to be concluded when the proposal of the assured is accepted by the insurer, whether the policy be them issued or not, and for the purpose of showing when the proposal was accepted reference may be made to the ship or covering note or other customary memorandum of the contract, although it be unstamped”.

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¹ -Yvonne-Lambert, Ibid, p 186 paragraphe 220.

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.67 -66 2005

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² - Section 17: Insurance is whervrimac fidei a contract of marine insurance is a contract based up on the utmost good faith, and if the utmost good faith be not observed by either party, the contract may de avoided by the other party.

³ - Section 18: Disclosure by assured

- Subject to the provisions of the section the assured must disclose to the insurer, before the contract is concluded, every material circumstances which known to the assured and the assured is deemed to know every circumstances with, in the ordinary course of business, ought to be known by him. If the assured fails to make such disclosure, the insurer may avoid the contract.

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“Lord Levining”

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“Levening”
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⁻¹

² -Nicolas Jacob, Les assurances, premier chapitre, la formation de contrat, paragraphe 36, Dalloz, Paris.

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¹ - Jean Bigot, Traité de droit des assurances, Tome 1, L.G.D.J, Paris, 2ème édition, p.41, paragraphe A.

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الفصل الأول..... عقد التأمين البحري على البضائع

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“The provisions of this act relating to the premium; do not apply to natural insurance, but a guarantee, or such other arrangement as may be agreed upon may be substituted for the premium”

Friendly Association

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.102

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²- Abdelmalek Benlarbi, « Contrat d'assurance, les obligations mutuelles des parties », le phare, n°132, Avril 2010, p30-31.

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² - Abdelazziz Boudraa, « Le courtier d'assurance », le phare n°129, Janvier 2010, p28.

1995 30 340/95 09 -³
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¹ -Directeur général de l'assurance " courtier d'assurance" le phare, N° 129, Janvier 2010, 29.

65 1995 30 340/95 20 -² " 1995/10/31

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1995 30 339-95 -

.1995 31 65

² - جيروم هوييه، ترجمة منصور القاضي، العقود الرئيسية الخاصة، المجلد الثاني، المؤسسة الجامعية للدراسات والنشر والتوزيع، لبنان، ص1068.

³ - 609.

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² -Section 26.

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“The subject- matter insured must be designed in q marine policy with reasonable certainty”.

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“tous risques”

¹. “Tarif maritime”

(FAP- SAUF)

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¹ - “tarif maritime”

Facultés maritimes 1999/12/28 . “SAA”

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« Tout dommage qui arrive sur mer à la chose assurée ».

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« l'objet »

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¹ -« Est régi par le présent titre tout contrat d'assurance qui a pour objet de garantir les risques relatifs à une opération maritime »

.2644 619-618

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“lightening”

« fire »

“pirates”

“enemies”

“taking of sea”

“detisons”

Barratry of the master and

marines

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:Perils of sea -

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² -Magnns V. Buttermer 1852 page 76.
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¹ - Section 3:

Maritime perils mean the perils consequent on, or incidental to the navigation of the sea, that is to say, perils of the sea, fire..

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« Des dommages et pertes matériels résultant des amendes confiscation mises sous séquestre, réquisitions , mesures sanitaires ou des désinfection ou consécutifs à des violations de blocus, actes de contrebande, de commerce prohibé ou clandestin. »

² -Victor Doever, Hand book to marine assurance.

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¹ -Section 48: Delay in voyage

In the case of a voyage policy, the adventure insured must be prosecuted throughout its course with reasonable dispatch and, if without lawful excuse it is not so prosecuted, the insurer is discharged from liability as from the time when the delay became unreasonable.

² -Section 55 :

Unless the policy otherwise provides, the insurer on is not liable for any loss proximately caused by delay although the delay be caused by a peril insured against.

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« les risques exclus a moins de stipulation

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contraire »

² -Section 55 included and excluded losses

c- Unless the policy otherwise provides, the insurer is not liable for, inherent vice or nature of the subject-matter insured.

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² - Article 1760/18 paragraphe (D) code d'assurance Française

« Des préjudices qui ne constituent pas des dommages et pertes matériels atteignent directement l'objet assuré, tels que chômage, retard, différence de cours, obstacle apporté au commerce de l'assuré »



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² -Section 3:

Maritime perils mean the perils consequent on, or incidental to, the navigation of the sea, that is to say perils of the sea, fire, war, perils.

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² -Section 6: " The assured must be interested in the subject-matter insured at the time of the loss thought the needs not to be interested when the insurance is effected".

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² - Section 7 :

A- Defeasible interest is insurable.

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⁴ -Section 16:

- In insurance in goods or merchandise, the insurable value in the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole.

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“payable comptant”

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“espèce”

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Article 13 prime :

La prime est requise à l'assurance dès que les risques ont commencé à courir, elle est payable comptant entre les mains de l'assureur, au bien de la souscription de l'assurance, au moment de la remise à l'assuré ou à ses représentants ou ayant droit de l'acte dans lequel est ressortie.

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³ -Section 22: Contract must be embodied in policy.

Subject to the provisions of any statute, a contract of marine insurance is not admissible in evidence unless embodied in a marine policy in accordance with this act. The policy may be executed and issued either at the time when the contract is concluded, or afterwards.

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³ -Section 50: Assigned of policy

- A marine policy is assignable unless it contains terms expressly prohibit.

- A marine policy may be assigned by endorsement thereon or in other customary manner.

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2. "

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¹ - أنظر: محمود سمير الشرفاوي ، المرجع السابق، ص222.

² -Section 50:

-Where marine policy has been assigned so as to pass beneficial interest in such policy, the assignee of policy is entitled to sue thereon in his own name, and the defendant is entitled to make any defense arising out of the contract which he would have been entitled to make if the action had been brought in the name of the person by or on behalf the policy was effected.

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¹ -Section 25: Where the contract is to insure the subject-matter at and from one place to another or others, the policy is called a 'voyage policy'.

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² -Section 48:

In the case of a voyage policy the adventure insured must be prosecuted throughout its course with reasonable dispatch, and if without awful excuse it is not so prosecuted the insurer is discharged from liability as from the time when the delay became unreasonable.

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‘Policy of voyage’

« tout risques »

¹. « F.A.P Sauf »

« FAP Sauf » -¹

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« F.A.P Sauf » « tous risques »

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« Quai à quai » "

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² -René Rodière, Assurances maritimes, Dalloz, Paris, 1983, chapitre 2, p 271.

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¹ -Section 29: A floating policy is policy which describes the assurance in general terms, leaves the name of the ship or ships and other particulars to be defined by subsequent declaration".

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¹ -Lonides V. Pacific fine ins.co (1871). Black Bum.J

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² -Section 29:

1- A floating policy is a policy which describes the insurance in general terms, and leaves the name of the ship or ships and other particular to be defined by subsequent declaration''

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Wills and co ←Union Insurance

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¹ -René Rodière, Ibid, p 217.

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² - Article 17-173

« Les marchandises sont assurées soit par une police n'ayant d'effet que pour un voyage soit par une police dite flottante ».

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¹ -Article 31 : Accumulation des objets assurés/ Article 03 Accumulation des facultés assurés.

« Le plein maximum souscrit par expédition et par navire constitue la limite des engagements de l'assureur en cas d'accumulation des objets assurés, pour quelque cause que ce soit, même par face mafeur..... l'alme a procèdent.

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Police Française d'assurances maritimes sur facultés du 1^{er} Juillet 2009, article 2 : Risques non commencés dans les deux mois « La police ne peut produire aucun effet si, après deux mois de la date de la souscription, aucune déclaration d'aliment, n'a été faite à l'assureur, à moins qu'un autre délai n'ait été convenu expressément ».

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¹ -Section 29:

- Unless the policy otherwise provides, the declaration must be made in order of dispatch or shipment they must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission erroneous declaration may be rectified even after loss or arrival provided the omission or declaration was made in good faith.

² -Article premier – fonctionnement de la police

- L'assuré s'oblige a déclarer en aliment à l'assureur, et l'assureur s'oblige à accepter pendant la durée de la police ».

« Dunlop »

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² -René Rodière, Ibid, p 421.

³ -In relitigation involving alleged loss of cargo from Tug Atlantic sea horse, sea Barge 101 between Puerto rico and Florida, August 20, 1991 American maritime cases

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¹ -René Rodière, Droit maritime, assurance maritime, Dalloz, Paris, 1983, p 121.

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² - René Rodière, Ibid, Dalloz 1983, p 272.

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Boilers

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.(York Shipley 1973) .

Free on Board .

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⁴ -René Rodière,Ibid , p 272.

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¹ « Avis d'aliment »

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¹ - أنظر الملحق الخاص « Avis d'aliment »
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¹ -G. Hoursiangou et P. Lattions, Les polices Françaises d'assurance maritime, p 67.

.78

² -Section 29:

- Unless the policy otherwise provides, where a declaration of value is not made until after notice of loss or arrival, the policy must be treated as an involved policy as regards the subject-matter of that declaration.

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¹ -Article 27 : Police assurance Algérienne sur facultés 1998/03/16 N° 15 par ministère financière.

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² - Article 9 : Durée des risques

3- 1 mois à compter du moment où les facultés auront été déchargées du navire transportateur ou autre engin de transport, lorsque le lieu de destination final est un port.

³ - Article 9 :

- 15 jours lorsque le lieu de destination final est un point de l'intérieur.

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³ - Article 9 : Police assurance Algérienne sur facultés 1998/03/16 N° 15 :

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« Conditionnées pour expédition, quittent les magasins ou point extrême de départ du voyage assuré et finissent au moment où elles entrent dans les magasins du destination du dit voyage ».

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¹ -Section 45: Change of voyage

- Unless the policy otherwise provides, where there is a change of voyage, the insurer is discharged from liability as from the time of change, that is to say, as from the time when the determination to charge it is manifested ; and it is immaterial that the ship may not in fact have left the course of voyage contemplated by the policy when the loss occurs.

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¹ -Section 79: Rights of insurer on payment right of subrogation

- subject to the foregoing provisions, where the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is there upon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the causality causing the loss, in so far as the assured has been indemnified according to this act, by such payment for the loss.

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² - Law Assurance marine 1906

Section 17: Disclosure and representation

A contract of marine insurance is a contract based upon the utmost good faith, and if the utmost good faith be not observed by either party the contract may be avoided by the other party.

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¹ -René Rodière, assurance maritime, Dalloz, Paris, 1983, p 276.

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¹ -Section 32: Double assurance

d- Where the assured receives any sum in excess of the indemnity allowed by this act, he is deemed to hold such sum in trust for the insurers, according to the right of contribution among themselves.

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⁴ - Article 172-8

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« Les assurances cumulatives pour une somme totale supérieure à la valeur de la chose assurée sont nulles si elles ont été contractées dans une intention de fraude ».

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« Faute pour l'assuré de se conformer aux obligations qui lui incombent aux termes du présent article et en considération des quelles la police flottante est souscrite l'assureur pourra :

-Rejeter le sinistre » ».

15 1998/03/16

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« L'assureur pourra toujours exiger la production des livrets de la correspondance de l'assuré pour vérifier s'il s'est conformé à ses obligations ».

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¹ -Section 29: Floating policy by ship

- Unless the policy otherwise provides, the declaration must be made in order of dispatch or shipment, they must, in the case of goods, comprise all consignments within the terms of the policy, and the value of the goods or other property must be honestly stated, but an omission, erroneous declaration may be rectified even after loss or arrival, provided the omission or declaration was made in good faith.

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« Si l'assuré établit que les facultés ont été vendues par lui, c'est à la valeur déterminée par les obligations résultant de son contrat de vente que sera fixée la valeur d'assurance ».

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¹ -Section 79:

- “ Where the insurer pays for a total loss either of the whole or in the case of goods of any apportionable part, of the subject-matter insured, he themes pan becomes entited to take over the interest of the assured in whatever may.

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¹ -Section 68: total loss subject to the provisions of this act and to any express provisions in the policy, where there is a total loss of the subject-matter insured.

- If the policy be a value policy, the measure of indemnity is the sum fixed by the policy;
- If the policy be unvalued policy, the measure of indemnity in the insurable value of the subject-matter insured.

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² -Article 21 :

- Au cas où les objets contenus dans un ou plusieurs colis...

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Section 27: Valued policy

- A valued policy is a policy which specifies the agreed value of the subject-matter insured.

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³ - Article 22 : Franchise

La franchise est toujours indépendante de coulage ordinaire, déchet ou freinte de route, tel qu'ils sont fixés par le contrat de vente ou à défaut, par l'usage qui sont jamais à la charge de l'assureur.

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² - Article 31 : Accumulation des objets assurés le plein maximum...

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¹ - Article 3 : Accumulation des facultés assurés sans préjudice....

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« 1- paiement de l'indemnité d'assurance

Les indemnités dues par l'assureur sont payables trente(30) jours au plus tard après la remise complète des pièces justificatives ».

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« L'assuré est tenu de justifier de la date du départ du navire et de son arrivée ».

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¹ -Section 57: In the case of an actual total loss no notice of abandonment need to be given.

² -Section 62:

- Notice of abandonment may be given in writing or by word of mouth, or partly in writing and partly by word of mouth, and may be given in any terms which indicates the intention of the assured interest in the subject-matter insured unconditionally to the insurer.

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² -Section 62

- Where notice of abandonment is properly given the rights of the assured are not prejudiced by the fact that the insurer refuses to accept the abandonment''.

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² -Section 63: Effect of abandonment

- where there is a valid abandonment the insurer is entitled to take over the interest of the assured in whatever may remain of the subject-matter insured, and all proprietary rights incidental there .

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ملخص مذكرة ماجستير التامين البحري على البضائع بالوثيقة العائمة

جسد استقرار الملاحة البحرية في القانون الدولي منذ القرن السابع عشر دعماً كبيراً للتجارة الدولية، حيث أنه من غير المعقول تصور عقد النقل البحري دون علاقته بالتجارة البحرية فكلاهما يكمل الآخر. إن عقد النقل البحري يحتل حيزاً هاماً بحكم تجاوزه النطاق الإقليمي، ويلعب دوراً أساسياً في دعم الاقتصاد كل منها سواء كان ذلك بالنسبة لصادراتها أو وارداتها، في إطار احتياجات الدول الفقيرة النامية للمواد المصنعة و المواد الاستهلاكية فيكثر الطلب على الاستيراد هذه المواد، و كذا بالنسبة للدول الصناعية و حاجياتها إلى المواد الخام مما غير أن معظم هذه العمليات و طريقة أعمالها أصبحت تتم عن طريق التبادل البحري جاعلة من عقد النقل البحري الأداة الضرورية والفعالة في مجال المبادلات التجارية لتنمية الاقتصاد العالمي حيث أصبح البحر رئة لتنفس الدول المصدرة و كذا المستوردة. وأمام تعدد وتنوع المخاطر البحرية باعتبار البحر مكاناً غير آمن، كان لابد من البحث عن الضمانات الحقيقية لتوفير الحماية الضرورية بالنسبة للأموال والبضائع المنقولة بحراً عبر السفن، وتبعث على الاطمئنان لملاك هذه الأموال المنقولة بحراً. و على هذا أساس تمت معالجة موضوع التامين البحري على البضائع بالوثيقة العائمة الذي يمثل ضمان حقيقي للأموال المنقولة بحراً في مبحث تمهيدي المتعلق بالتطور التاريخي لعقد التامين البحري و في المطلب الأول بنشأة التامين البحري في ظل القوانين المقارنة وفي القانون الجزائري ثم في المطلب الثاني لخصائص عقد التامين البحري. أما بالنسبة للفصلين فالفصل الأول المتعلق بعقد التامين البحري على البضائع فالمبحث الأول يخص تكوين عقد التامين البحري من تراضي محل و سبب و في المبحث الثاني اثبات عقد التامين البحري سواء لرحلة واحدة و التي تسمى السفرية و آدا كان لعدة رحلات تسمى بالعائمة وبالنسبة للفصل الثاني يخص الوثيقة العائمة وذلك بتفصيله في المبحث الأول التزامات عقد التامين البحري العائم من التزامات المؤمن المتجسدة في الالتزام بالالتزام بالضمان و التعويض في حالة تحقق الخطر المؤمن منه والتزامات المؤمن له في التخصيص الإجباري للبضائع و كذا الالتزام بالإخطار وفي المبحث الثاني يتعلق بجزاء الإخلال بالالتزامات عقد التامين العائم .

الكلمات المفتاحية:

وثيقة الاشتراك؛ وثيقة العائمة؛ وثيقة المفتوحة؛ الإخطار؛ عدم التعيين للبضائع؛ التخصيص الإجباري للبضائع؛ التعويض؛ التامين؛ دعوى الترك؛ دعوى الخسارة.