DELVING INTO INCOTERMS® 2010:

TYPOLOGY

AND

CRITICAL POINTS REVISITED

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I hereby declare that the work submitted is mine and that where I have made use of another's work, I have attributed the source(s) according to the Regulations set in the Student's Handbook.

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Abstract

This dissertation was written as part of the "LL.M. in Transnational and European Commercial Law, Mediation, Arbitration, and Energy Law" at the International Hellenic University.

The aim of this thesis is to address practical issues arising out of the use of Incoterms® rules in modern commercial transactions. The focus is therefore initially placed on the classification of the terms according to their intrinsic features, followed by a constructive depiction of seller's and buyer's obligations, as well as of the distribution of costs and risks among them. The logic behind the construction of Incoterms rules with regard to the matters of possession, costs and risks is emphasized, whilst the differentiation between C-terms and all other terms in those respects is delineated.

Based on the outcome of such an analysis, a critical overview of the application of Incoterms rules and a fruitful assessment of the interplay with the CISG seek to define their actual legal standing. To determine their efficiency as a form of standardization in international sales law, special emphasis is placed on their added value as well as on any inconsistencies in the course of their implementation. Standing in the midpoint between Incoterms 2010 and the projected updated version of 2020, specific proposals are submitted with a view to addressing certain contextual loopholes and the challenges that users encounter in practice.

Keywords: Incoterms rules; delivery; division of costs; risk transfer; contract of sale

Ioannis Nikolaidis

February the 16th, 2018

Preface

The idea for this dissertation originally stemmed from several challenges posed in the course of my current employment, while the inspiration for delving into this issue was reinforced by certain lectures during my studies at the International Hellenic University. My engagement with this dissertation last from September 2017 to February 2018.

For promoting the study and keeping the information contained herein up to date, several communications have been conducted with the ICC Greek National Committee, the Austrian freight forwarder company Schenker & Co. AG, as well as the *Shipping and Freight Resource* blog (https://shippingandfreightresource.com, listed IMO educational resource).

With the thesis at hand now completed, I would first of all like to cordially thank my supervisor, Professor Anna Veneziano (Comparative Law, Università di Teramo, Italy), for her availability, prompt responses, and valued support throughout this period. It has been a great honour to me.

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I would then like to especially thank my current employer, Mr Hermanus van Duijne, who has been entrusting me with such interesting and inspirational tasks, and for showing great tolerance towards my flexible schedule and any demanding requirements of this LL.M. program.

Finally, a special thanks goes to my family and friends for being supportive all this time.

I hope any reader may find the information contained herein well-organized, practical, and useful.

Ioannis Nikolaidis

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List of Abbreviations

Miscellaneous

AWB	Air Waybill
CFR	Cost and Freight
CIF	Cost, Insurance, Freight
CIP	Carriage and Insurance Paid to
CISG	United Nations Convention on Contracts for the International Sale of Goods
CMI	Comité Maritime International
CPT	Carriage Paid To
DAF	Delivered At Frontier
DAP	Delivered At Place
DAT	Delivered At Terminal
DDP	Delivered Duty Paid
DDU	Delivered Duty Unpaid
DEQ	Delivered Ex Quay
DES	Delivered Ex Ship
EDI	Electronic Data Interchange
EXW	Ex Works
FAS	Free Alongside Ship
FCA	Free Carrier
FCL	Full Container Load
FOB	Free On Board
FOT	Free On Truck
ICC	International Chamber of Commerce
INCOTERMS	International Commercial Terms
LCL	Less than Container Load
LMA/IUA	Lloyd's Market Association / International Underwriting Association
PSI	Pre-Shipment Inspection
RAFTD	Revised American Foreign Trade Definitions

THC	Terminal Handling Charges
UCC	Uniform Commercial Code
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
VAT	Value Added Tax

Journals

Acta Univ. Bohem. Merid.	Acta Universitatis Bohemiae Meridionales
Am J Comp L	American Journal of Comparative Law
Comp. & Int'l L.J. S. Afr.	Comparative and International Law Journal of Southern Africa
IBLJ	International Business Law Journal
IBLQ	Irish Business Law Quarterly
Int'l L.	International Lawyer
JL & Com	Journal of Law and Commerce
J. Transp. L. Logist. & Pol'y	Journal of Transportation Law, Logistics & Policy
Penn St. Int'l L. Rev.	Penn State International Law Review
Stellenbosch L. Rev.	Stellenbosch Law Review
U. Pa. J. Int'l L.	University of Pennsylvania Journal of International Law

Contents

CHAPTER 1

INTRODUCTION

The Incoterms® rules[1], an abbreviation for "International Commercial Terms" for the trade of tangible goods, launched in 1936 by the International Chamber of Commerce (ICC), have already been revised seven times since their initial inception[2], almost once every ten (10) years, only to address potential gaps in existing terms and better depict evolving contemporary international commercial practice. They are equally suitable to apply to both international and purely domestic contracts of sale[3].

Differentiation of the type of goods sold internationally, containerization, as well as new modes of concluding contracts and communication, such as through electronic instead of paper documents, and new techniques of non-maritime transport have always been the cause of extensive revisions and the introduction of new Incoterms rules, as with FCA in 1980 when terms such as FOB, "FOB airport", or FOT failed to address the specific circumstances of carriage of goods by rail, truck or plane. Especially by providing for modern forms of transportation, they actually serve the needs of modern foreign trade and address the inefficiencies pertaining to outdated notions, such as the ship's rail in the context of risk division. At the same time though, the need to provide answers to several incidental issues relating to parties' rights and obligations has led to a more extensive standardization of the trade terms throughout the years.

The shift to Incoterms 2010 rules[4] was dictated by the need to even better illustrate various practical aspects and the usability of the rules, with a view to

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[1] The ICC has registered a trademark over the Incoterms rules. Ramberg has criticized the ICC for appropriating the rules and protecting its intellectual property rights, therefore diminishing the collective codifying work into just the outcome of ICC's own intellectual effort, to the detriment of Incoterms' global recognition as a refinement of lex mercatoria. See Ramberg, J., 2011, "Incoterms® 2010", *Penn St. Int'l L. Rev.* 29(3), p. 423. Without prejudice to the trademark, but to promote textual consistency and readability, this trademark will not appear in the course of this dissertation. Hence, INCOTERMS® rules may hereinafter also be quoted under the terms "Rules", "trade terms", or "Incoterms rules", all having the same meaning.

[2] Revisions have taken place in 1957, 1967, 1976, 1980, 1990, 2000, and 2010.

[3] In this latter case, the clauses A2 and B2 as well as any other provision dealing with export and import procedures become redundant. That is also the reason behind numerous references within Incoterms to the obligation to comply with import and export formalities only where applicable.

[4] The 2010 revision was the outcome of a large survey process involving ICC Commissions and several ICC National Committees in almost 130 countries, which last two and a half years. See Barron, J., 2011,

expanding their acceptance and implementation throughout the trading world.[5] First of all, the number of Incoterms rules reduced from thirteen to eleven, re-classified into two main categories. The terms DAF, DES, DEQ and DDU were removed, while the new terms DAT and DAP were launched instead. The rules have been classified into two categories, the "all modes" terms and those used only for sea and inland waterway transport. At the same time, the new clauses A1 and B1 introduced the replacement of paper communication by Electronic Data Interchange (EDI) for all pertinent documentation, not only for transport documents, as long as there is an express or even implied EDI agreement between the parties or where customary, also provided that a sufficiently secure and well-developed EDI system is in place.[6] The contracting parties' notification duties and other obligations with regard to insurance have better been clarified in clauses A3 and B3 to align with the revised Institute Cargo Clauses (LMA/IUA) of 2009. The costs for Terminal Handling Charges (THC), normally included by the seller in the aggregate price under freight, have also been clearly allocated by clauses A6 and B6, so that the importer is not double charged by both the seller and the terminal operator especially under those terms that put the burden of arranging for the carriage of goods to the agreed destination on the seller. The in-transit seller in the case of string sales of commodities has also been better accommodated to only procure the goods shipped by acquiring the contract of carriage already in place instead of concluding a new

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"New decade, new upgrade: Incoterms 2010 picks up where Incoterms 2000 left off", *Business Credit* 113(2), p. 20-21.

[5] For example, the original American Foreign Trade Definitions were issued in 1919, while the Revised American Foreign Trade Definitions (RAFTD) of 1941 and subsequent statutory definitions of shipment and delivery terms as codified in article 2 of the USA Uniform Commercial Code (UCC) of 1952, differentiated substantially from or even conflicted with the respective Incoterms definitions. Indeed, the term FOB was used throughout the United States for all modes of transport and without indicating a specific point, and is actually still being falsely used in that sense. Although such erroneous use of certain terms still occurs in the USA despite the removal of delivery terms definitions from the Uniform Commercial Code in 2004, it seems there is a growing willingness to use Incoterms rules in domestic transactions. See Spanogle, J., 1997, "Incoterms and UCC Article 2 – Conflicts and Confusions", *Int'l L.* 31, p. 116-124, and Ramberg, J., "Incoterms® 2010", op. cit., p. 418.

[6] A vast set of rules governing EDI has been developed by various organizations. The Comité Maritime International (CMI) adopted its Rules for Electronic Bills of Lading back in 1990. Based on these Rules, UNCITRAL developed the Model Law for Electronic Commerce in 1996. The UN Convention on the Use of Electronic Communications in International Contracts was adopted in 2005. Another attempt to enhance the legal landscape was made with the Rotterdam Rules in 2008. Further initiatives, such as the BOLERO system, have been sponsored at times to provide effective recourse to the EDI issue. See Ramberg, J., 1988, "Incoterms in the era of Electronic Data Interchange", *Forum Internationale* 13, p. 10-13.

one with the carrier and re-shipping the goods.[7] FOB, CFR and CIF have been duly adjusted to modern commercial reality, to mention that the goods are deemed to be delivered when on board the vessel, instead of when passing the ship's rail as in the past. At last, in order to address traders' security concerns, the 2010 rules have incorporated provisions with regard to security-related clearances for eliminating any possible external threats to life and property which might be caused by the consignment en route.[8]

In essence, the Incoterms rules reflect globally accepted definitions and rules of interpretation for the most common terms in cross-border trade, thereby mirroring the generally recognized principles, trade practices, and international custom of the trade. In that respect, they tend to delineate the different roles of the main parties involved in an international commercial transaction, namely the seller or shipper, and the buyer or consignee[9]. They are incorporated as default rules in the contract of sale for only to merely supplement it by providing for certain contingencies that may arise from the transaction, and therefore dictate due action of the parties thereto with regard to the carriage of the goods from the point of origin up to the point of delivery or destination, any formalities with respect to export and import clearance, as well as insurance and security of the goods in transit, whilst they also draw a line between the costs and risks which are to be paid by each party.

This thesis aims at bringing to the forefront all major strengths, weaknesses and prospects of Incoterms rules through alluding to all important aspects of international commercial transactions regulated thereby. In this context, it is clearly divided into two Chapters which gradually further its central targeting. Chapter II presents an overview of the subject matter of Incoterms rules, as described in the latest publication of the ICC. In Chapter III, a critical assessment of their effectiveness in the course of their put into practice will follow. Finally, this dissertation comes up with specific proposals with regard to the forthcoming revision process. Whatever the drawbacks in any case, it is the firm conclusion of this study that the ICC trade terms tend to reduce contractual risk by providing common ground to the parties for perceiving and interpreting their

[7] Ndlovu, P., 2011, "Incoterms 2010: A consideration of certain implications of the amendments to the traditional Incoterms 2000", *Comp. & Int'l L.J. S. Afr.* 44(2), p. 222-223.
[8] See https://iccwbo.org/publication/incoterms-rules-2010, viewed 10 November 2017.
[9] For textual convenience purposes, "the seller and the buyer" may hereinafter be referred to as "the parties", implying partnership into the underlying contract of sale.

underlying contractual and relational context, and therefore ultimately add to the efficiency of the sales contract by minimizing transaction costs.

CHAPTER 2

STRUCTURAL OVERVIEW OF INCOTERMS RULES' SUBSTANTIAL CONTENT

The Incoterms rules only deal with matters pertaining to the fundamental undertakings of the parties with respect to the mode, place, and other procedural aspects of delivery, as well as all obligations in connection therewith, and the interpretation of such delivery terms, not with any other obligations of the parties or adjacent terms of the contract of sale.

It is not the purpose of this dissertation to present all single Incoterms rules individually. These are adequately analyzed by the ICC and relevant publications. Hence, a multifaceted typological synthesis of the most prominent terms and features is laid down with regard to their operability and efficiency.

2.1 Incoterms Classification Revisited

International trade is by nature, due to the volume, multiplicity, and complexity of different kind of transactions in different parts of the world, quite inconsistent in practice. Manifold international commercial practice involves various trading patterns for different types of cargo. A first basic distinction of the trade terms addressing all such patterns can be made on the basis of their acronym's first letter. The term EXW makes a single category by itself, whereas there are three more clusters of F-terms (FCA, FAS and FOB), C-terms (CPT, CIP, CFR and CIF), and D-terms (DAT, DAP and DDP).

The Incoterms rules offer the parties the right to choose among different layers of obligations for the account of the seller, whereas the buyer's responsibilities are outlined accordingly. EXW signifies the seller's minimum obligation to only place the goods at buyer's disposal at its own premises or another named facility, while the latter is then responsible to cater for export and import clearance, and any other shipment and security arrangements. The F-terms imply that the seller undertakes to hand over the goods to a carrier nominated by the buyer at the latter's risk and expense, which holds the seller free from any such burden. The C-terms entail the seller's obligation to conclude the contract of carriage for the benefit of the buyer and bear certain costs up to the agreed point in the country of destination –including for

insurance against risks in transit under certain Rules– even after the risk of loss of or damage to the goods has passed on to the buyer. Finally, the D-terms extend the seller's obligation further down to delivering the goods at a designated destination.

All these are in the end reshuffled into Group I with terms intended for any mode of transport, and Group II with terms only for sea and inland waterway transport, as in Exhibit 1. It was the erroneous use of all past versions of the rules and the need to encourage merchants to make right use of the Rules that called for such a division in the revision of 2010.

Exhibit 1. Incoterms by mode of transport

Group	Terms for any mode of transport		Terms for sea and inland waterway transport	
E	EXW	Ex Works		
F	FCA	Free Carrier	FAS	Free Alongside Ship
			FOB	Free On Board
C	CPT	Carriage Paid To	CFR	Cost and Freight
	CIP	Carriage and Insurance Paid to	CIF	Cost, Insurance and Freight
D	DAT	Delivered At Terminal		
	DAP	Delivered At Place		
	DDP	Delivered Duty Paid		

More specifically, EXW places the maximum burden on the buyer, as the seller only has to prepare the goods for collection at its premises on an agreed upon date or within a period fixed. All other functions and costs fall upon the buyer.

Further, there are two divisions of F-terms. The term FCA can be used for any mode of transport, while the terms FAS and FOB may be used only when the goods are intended to be carried by sea. Under the F-terms, it is for the seller to hand over the goods to the carrier at an agreed upon point, whereas the buyer has to arrange and pay for the carriage from that point onwards. It is therefore wise for the buyer to provide the seller with precise instructions regarding how and where the goods should be handed over for carriage. The seller should pack or containerize the goods accordingly. Even where commercial practice dictates that the seller concludes the contract of carriage for only to assist the buyer, it is yet for the latter to pay for it and bear the risk of any adverse event.

Certain C-terms, like CPT and CIP, are intended for multimodal transport arrangements, while others, namely CFR and CIF, are for sea and inland waterway transport only. When the seller also undertakes to obtain and pay for insurance, then CIP and CIF are the appropriate terms. If insurance is not considered at all, then CPT and CFR become identical to CIP and CIF in all other respects. Under the C-terms, albeit the seller fulfils its tasks only when handing over the goods for shipment within its own country, it is still the seller's duty to arrange and pay for the main contract of carriage up to the designated destination point, as well as for the insurance under CIF and CIP. The seller also has to tender a document that will enable the buyer to take delivery from the carrier at destination. This particularity makes the C-terms more complex than the F-terms, in that the named place, up to which the seller procures and pays for carriage and insurance and where possession over the goods and subsequent costs pass to the buyer, is distinguished from the place of delivery or port of shipment, where risk is transferred. In this context, only the time of shipment of the goods is relevant and may therefore be stipulated under the C-terms, certainly not the time of delivery to end destination.

As with C-terms, the D-terms are also subject to two critical points of consideration. The first has to do with the distribution of costs and risks pertaining to discharging the goods at destination. The second relates to the division of functions for import customs clearance of the goods. In railway traffic, the place following the term DAP stands for the "tariff point", in that the costs relating to the carriage of the goods until that very point burden the seller while any costs after that point are debited to the buyer. Under the D-terms, the designated destination also serves as the point for the division of risk between the seller and the buyer. Moreover, according to clause A4 of DAP and DAT, the buyer undertakes to unload the goods from the seller's vehicle at its own premises or at any place designated by the buyer itself. Any import customs clearance fees are also to be borne by the buyer, except when DDP is agreed upon. In that sense, any duties, VAT and other similar fees would be borne by the party situated in the country concerned, so that the resident party even benefit from applicable advantages or VAT refund provisions which might not be equally accorded to non-residents. In case the goods have to pass through customs before reaching destination,

it remains the buyer's task to clear the goods for import under DAP and DAT, at its risk and expense, even if the seller still has to deliver at a later point.[10]

Beside the preceding four- and two-group categorization based on the first letter and the mode of transportation respectively, another convenient criterion for traders to distinguish between the various terms is who will bear the freight charges. "Freight prepaid" shipments are on the seller to arrange and pay for the main carriage, while "freight collect" are handled and paid by the buyer. The aggregate value of the sales invoice is then formulated accordingly, as freight charges will either be incorporated in the "freight prepaid" case, or will only show separately on an invoice issued by the carrier or forwarder in the "freight collect" case. EXW and the F-terms belong to this first division, while all C- and D- terms essentially link to the latter. [11]

2.2 Delving into Incoterms Specifics

Following the typological distinction of Incoterms' various groups, a more detailed review of the division of certain obligations, costs, and risks between the parties to a commercial transaction will follow.

2.2.1 The Contracting Parties' Obligations

The parties to a contract of sale undertake various obligations with regard to the subject matter thereof. Part of these obligations are the ones implied by the selected Incoterms rule. The ICC has further analyzed each Incoterms rule into a logical sequence of ten different headings, whereby the seller's position under each heading (A1-A10) is mirrored by the position of the buyer (B1-B10) with respect to the same topic, as in Exhibit 2.

For the purposes of this Chapter, all tasks arising therefrom have been joined together in a concise analysis split into five different albeit interrelated Sections.

[10] See Ramberg, J., 2011, *ICC guide to Incoterms® 2010*, ICC, Paris, p. 52-62.
[11] See O'Meara, A., 2017, *Making money with Incoterms® 2010: Strategic use of Incoterms® rules in purchases and sales*, 2nd edn, O'Meara & Associates, p. 2-7.

Exhibit 2. Incoterms A and B Clauses

Clause	Title	Clause	Title
A1	General obligations of the Seller	**B1**	General obligations of the Buyer
A2	Licenses, authorizations, security clearances and other formalities	**B2**	Licenses, authorizations, security clearances and other formalities
A3	Contracts of carriage and insurance	**B3**	Contracts of carriage and insurance
A4	Delivery	**B4**	Taking delivery
A5	Transfer of risks	**B5**	Transfer of risks
A6	Allocation of costs	**B6**	Allocation of costs
A7	Notices to the buyer	**B7**	Notices to the Seller
A8	Delivery document	**B8**	Proof of delivery
A9	Checking – packaging – marking	**B9**	Inspection of goods
A10	Assistance with information and related costs	**B10**	Assistance with information and related costs

2.2.1.1 Pre-Shipment Arrangements

As of the placement of a purchase order, the buyer has to duly instruct the seller for any special checking, marking and packing requirements, as well as for the intended mode and duration of the transport envisaged, so that the seller may prepare and pack the goods on time and in such a safe manner as may be accordingly required. For instance, the seller has to adequately stuff an ocean or air freight container to withstand shipment conditions. When such information is timely provided, before the contract of sale is concluded, the seller may even weigh all these factors in when issuing the initial quotation. As per clause A9 of all Incoterms rules, the seller is to bear any costs of such checking and packing operations required for only to place the goods at the buyer's disposal, unless the goods are by nature conventionally shipped unpackaged.

A pre-shipment inspection (PSI) or an import inspection may be mandated by the customs authorities in the country of export or import respectively, to ensure that the goods conform to the standards set forth by the underlying contract. Such standards should correspond to the buyer's specifications or to the terms of the purchase order or the letter of credit. The overall cost of such inspection carried out by an independent inspection agency, including the latter's reimbursement by either party, is determined by the state's legislation. Hence, under clause B9, in case reimbursement is indeed requested, and since such inspection is performed in the buyer's interest,

most usually the buyer bears the cost, except if otherwise agreed beforehand, where, for example, the goods are proven not to be conforming to the contract of sale or the inspection is mandated by the export state's authorities. In this latter case, inspection costs are normally for the account of the seller, except if EXW is used. In this respect, Incoterms are not concerned with the goods' conformance with the accompanying specifications as such, while any consequences arising therefrom should be detected in the contract of sale.

Another kind of obligation which has to be attributed to either the seller or the buyer is relevant to export and import clearance. This is regulated by clauses A2 and B2, so that the parties know who will deal with all authorizations, licenses and other pertinent customs formalities in the state concerned, as well as the exact division of risks and any charges connected therewith. Only under EXW is the buyer obliged to clear the goods for export, and only under DDP it is the seller's obligation to clear the goods for import respectively. Whichever party is held responsible for customs clearance, it may still need the assistance of the other party in obtaining the appropriate documentation, like certificates of origin or end user statements. Clauses A10 and B10 further provide that the cost for rendering such assistance has to be reimbursed by the requesting party being responsible for the clearance of the goods.[12] The main principle underlying the function of customs clearing the goods and paying for the relevant costs is that those will be fulfilled by the party that is spatially better positioned to do so. Exceptionally, under EXW and DDP the buyer and the seller have to respectively confirm that the same or their carrier or freight forwarder may apply for import license at the named place of origin or destination albeit a non-resident.

Further, the parties have to agree on the division of obligations in the course of the transportation of the consignment from the point of origin up to the place where the goods will be handed over for carriage to the carrier or freight forwarder. Normally, the buyer arranges for the pre-carriage under EXW and the seller under the F-terms, while it is the buyer that contracts for the main carriage under both E- and F-terms. If contracting for carriage is more practical for the seller though, or the commercial practice between the parties so dictates, then the seller may under FCA and FOB offer such additional service to the buyer upon the latter's instruction and at

[12] *Ibid.*, p. 64-66.

its risk and expense. In contrast, under the C-terms the seller hands the goods over to the carrier on the basis of the contract of carriage, organizes the carriage and pays the cost as well, while the buyer assumes the risk once the goods are shipped. On-carriage from the inbound gateway in the arrival country is then the buyer's responsibility. Under the D-terms, the seller assumes and handles all above obligations whilst also bearing the risk during transit.

Under clauses A1 and B1 of all Incoterms rules, the seller has to provide the buyer with a commercial invoice for the exact value of the goods sold, as well as any evidence of conformity so prescribed in the contract of sale. The buyer must accordingly pay the price, although the Rules provide no specifics as to when such payment has to be effected.

2.2.1.2 The Obligation to Deliver the Goods

The function of loading and unloading the goods to and from the available means of transport is not always comprehensively dealt with by the Incoterms rules.

Under EXW, the seller undertakes to place the goods at the disposal of the buyer at the agreed point, whether at its premises or a factory or warehouse, without having to load them on any collecting means of transport, even if it is in a better position to do so. Still, the seller usually assists by either putting the goods onto a ramp or loading them on to the collecting vehicle with a fork-lift truck.

The obligation to also load the goods onto the vehicle of the buyer's choice when delivery takes place at seller's premises is inherent in FCA though. However, if the goods are to be handed over to the carrier at another place, then the seller has to deliver on its own means of transport ready for unloading by the buyer. Hence it is important for the parties to precisely stipulate the point and mode of delivery of the goods to the carrier. The seller's or the carrier's facilities will then determine the exact mode of loading and stowing the cargo on the truck or unloading from it, albeit this is not expressly resolved by relevant Incoterms clauses A4 and B4. The quantity and nature of the goods then determine the way the goods will be stowed or

containerized.[13] Likewise, the custom of the seaports in conjunction with the facilities they provide and the type of cargo actually determine the extent of the seller's loading duty under FOB. The seller fulfils its delivery obligation when placing the goods alongside the vessel nominated by the buyer in the port of shipment under FAS.

Under the "all modes" C-terms, the seller delivers the cargo to the carrier at the place of dispatch and it is there that the seller fulfils its delivery obligation. The buyer has to first accept such delivery, and then receive the goods from the carrier at the named place or port of destination and pay for them, according to clause B4. If the buyer fails to collect the goods from the carrier, therefore violating the underlying contract, the seller may raise a claim for damages. It is due to the fact that the buyer does not have adequate control over the shipment that under CFR and CPT more incidents of fraud occur. To fight such a contingency, the buyer may seek to hinder the seller's discretion to contract for carriage under its own terms.[14] Under CFR and CIF, though, delivery is connected to the key means of conveyance, not to the carrier, as goods have to be placed on board the vessel.

Under the D-terms, the seller is obliged to place the goods at the buyer's disposal "on the agreed date or within the agreed period". The buyer is therefore free to deny acceptance of delivery before the agreed time, or hold the seller responsible for breach of the contract of sale pursuant to the applicable law for delivery after the agreed date. Further, under DAP and DDP, the seller has the obligation to place the goods at the disposal of the buyer on the arriving means of transport ready for unloading. Under DAT, it is on the seller to also unload the goods from the arriving means of transport. Again, the way the cargo will be unloaded will depend on the available infrastructure at the named place of destination.[15]

2.2.1.3 The Seller's Insurance Obligation

The seller bears the responsibility of arranging for insurance coverage along with the contract of carriage, and undertakes the cost for freight, only when opting for the

[13] A Full Container Load (FCL) may be exclusively used for the stowage of a single shipment of homogenous goods. For heterogeneous cargo of various shippers a Less than Container Load (LCL) is more suitable.

[14] The buyer may, for instance, ask for a specific shipping line or carrier. See Ramberg, J., *ICC guide to Incoterms® 2010*, op. cit., p. 55.

[15] *Ibid.*, p. 75-76.

CIF and CIP Incoterms rules[16], for the seller is much better positioned to do so, especially when carrying the goods in chartered ships, when the goods consist of large consignments of commodities or when intending to sell the goods en route where the ultimate buyer is not yet known. The vehicle or vessel deployed should be appropriate for the kind of goods sold and the usual route should be followed, for the insurance to be effective. The insurance coverage must extend until the point in time when the goods reach the agreed place or port of destination. The amount of the insurance must exceed the price provided in the contract by ten per cent, to account for the buyer's anticipated profit. The seller has to provide the insurance policy to the buyer.

Although in theory under CIF and CIP the seller is only obliged to procure minimum cover as per Clauses (C) of the Institute Cargo Clauses jointly formulated by the International Underwriting Association (IUA) and the Lloyd's Market Association (LMA), which are more suitable to bulk cargo, the buyer should in practice specifically instruct the seller to extend such insurance to any additional coverage according to its special needs and accordingly provide all necessary information.[17]

On the contrary, in the case of manufactured cargo essentially involving containerization or delivery to a carrier inland, where maritime terms are inappropriate, the parties may at all times and for all similar shipments make use of standard terms and arrangements with their insurers. Where they may have insurable interest in the consignment, prudence may call for purchase of additional insurance coverage. In this case, it is therefore deemed better to let the parties decide on the issue of insurance on their own, without submitting to any pre-existing insurance obligation, so that they may coordinate accordingly and take full advantage of the current at all times circumstances. The buyer may as well preferably arrange its own insurance for only to adjust it to its particular needs. In any case, the buyer may either

[16] The freedom to choose the most appropriate Incoterms rule with respect to insurance coverage may be restricted by certain national regulations dictating that a domestic commercial entity should take out insurance locally, for supporting the domestic insurance companies and minimizing foreign currency expenditure. An importer may therefore be compelled to opt for CFR or CPT, while an exporter may have to sell on CIF or CIP terms respectively.

[17] The seller is only obliged to procure minimum insurance as, especially under CIF where the goods are carried by sea and may therefore be resold in transit, subsequent buyers down the chain might already have concluded better insurance terms. See Graffi, L., 2011, "Remarks on trade usages and business practices in international sales law", *Journal of Law and Commerce* 49, p. 286, and Cook, Th., 2014, *Mastering the business of global trade: Negotiating competitive advantage contractual best practices, Incoterms, and leveraging supply chain options*, Taylor & Francis Inc, Florida, p. 61-63.

enjoy insurance protection through the seller's relevant arrangement or seek the same on its own initiative. The seller is yet obliged under all other terms to provide the buyer with any information that may be deemed necessary for insurance purposes.

In general, the parties to a contract of sale are urged to take out marine insurance against risks envisaged by the contract of carriage, since the liability of the maritime carriers is rather limited as they mainly bear the responsibility of exercising due diligence with regard to the vessel's seaworthiness and are entitled to significantly limiting the amount of their liability towards shippers and consignees. The carrier may thus be held liable only by the cargo insurer by means of a letter of subrogation. Any liability for loss of or damage to the cargo resulting from "nautical faults", that is, errors in the navigation or management of the ship, is left to be resolved according to the parties' insurance arrangements.[18]

2.2.1.4 Flow of Information and Notifications

Unless provided for in the underlying contract, then according to clause A7 the seller must give the buyer sufficient notice[19] regarding the time and place that the goods will be placed at the buyer's disposal under EXW, or have been dispatched to the nominated carrier or vessel under F- and C-terms, or are projected to be delivered under D-terms, in order for the buyer to take all appropriate measures to receive the consignment. Such obligation is established on the buyer's strong interest in being informed of the seller's performance and the expected time of arrival of the goods, particularly in case of lengthy carriage, in order to rationally decide upon organizational and other commercial matters. Especially under the F-terms, the seller has to further inform the buyer of the failure of the latter's nominated carrier or vessel to take delivery of the goods. However, no consequences are provided for by the Incoterms rules in case the seller fails to give proper notice, albeit such a breach of the

[18] The carrier's exemption from liability was abolished by the 1978 UN Convention on the Carriage of Goods by Sea, or else Hamburg Rules, as well as by the 2009 Rotterdam Rules, which have not yet entered into force. See Stapleton, D., Pande, V. & O'Brien, D., 2014, "EXW, FOB or FCA? Choosing the right Incoterm and why it matters to maritime shippers", *J. Transp. L. Logist. & Pol'y* 81(3), p. 235.

[19] No definition of such notification "sufficiency" is provided for by the Incoterms rules. Notice may be given in any form, even electronically if so agreed between the parties, in accordance with clauses A1 and B1.

contract of sale may trigger the seller's liability under the law governing the contract of sale.

Accordingly, under clause B7 the buyer has to give the seller sufficient and timely notice with regard to the time and place when and where the buyer should take delivery under EXW or D-terms, or the nomination of the carrier or vessel and delivery time under F-terms, or the time for dispatching the goods and the named place or port of destination under C-terms. The buyer also has only a limited obligation to inform the seller of any aspect of the export procedure, unless the latter needs this for any tax or other regulatory purposes. The breach of this rule by the buyer, when responsible for such notifications under the contract of sale, may as well cause the premature passing of risk to the buyer under clause B5, or may even instigate the buyer's liability to cover for any collateral expenses, under clause B6.

Moreover, as discussed in Section 2.2.1.3 above, under CIF and CIP the buyer may have to inform the seller of any extended or additional insurance coverage the former may desire. Conversely, the buyer may request for additional information on the goods from the seller in case it is upon the buyer itself, pursuant to the applicable Incoterms rule or to its country's national regulations, to take out insurance from a domestic provider.

2.2.1.5 Proof of Delivery and the Transport Document

When the seller concludes the contract of carriage, the buyer is duly empowered to accept delivery from the carrier at destination upon presentation of an original document procured by the seller. Such a transport document is of threefold utility, in that it constitutes evidence of the contract of carriage, proves delivery to the carrier by the date agreed, and at the same time assigns to the buyer the right to claim the consignment from the carrier at destination. Under clause A8, the seller has to submit to the buyer formal proof of its delivery obligation fulfilment. This does not stand for EXW, where the goods are anyhow collected by the buyer at a seller's facility. Under EXW though, the buyer has to provide the seller with due evidence of receipt of the goods. In general, the buyer is not obliged to accept an "unclean" proof of delivery, that is, a document verifying defective or incomplete shipment.

A problem may specifically arise under CFR or CIF, since "the usual transport document for the agreed port of destination" may be issued either upon receipt of the goods for carriage or later when the containerized cargo is lifted on board the ship. The seller should then be careful enough to tie payment based on documentary credits to the surrender of either an original "received-for-shipment" bill of lading[20] or an original "on-board" bill of lading respectively, depending on the type of transport document issued by the container lines, albeit a "received-for-shipment" bill of lading is deemed to be saving time and effort, hence more practical. The buyer may accordingly protect itself by requiring that seller's instructions to the carrier with regard to delivery of the goods to the named consignee be irrevocable, for the seller to be prevented from designating another consignee by means of updated instructions to the carrier[21]. The buyer should receive an original counterpart from the seller or the carrier itself, especially if intending to sell the goods to a third buyer afloat.

Similar non-negotiable documents are being concluded in recent years between the seller and the carrier for all other modes of transport other than sea carriage, for only to identify the consignee. Such air waybills (AWB) or waybills for rail or road carriage do not however serve as proof for the transfer of rights to the entitled buyer upon presentation.

All waybills or even the traditional bill of lading may as well take the form of EDI, when there is an explicit agreement among the parties to communicate electronically, and another agreement authorizing the shipper to provide the carrier with electronic delivery instructions in place of the bill of lading's negotiable status. Apart from such inter-party consensus, it follows that electronic communication may only be centrally facilitated by a well-developed notification system meeting certain globally accepted

[20] The bill of lading is used only in maritime transport, since goods are normally sold en route only when carried by ship. Similar but not identical to other transport documents as presented above, it has a three-fold utility, in that it serves as proof of delivery of the goods on board the vessel, evidence of the contract of carriage, and a means of transferring rights on the goods in transit to a third party upon its surrender. This last function only pertains to the bill of lading, no other transport document. The Comité Maritime International (CMI) issued the "Uniform Rules for Electronic Bills of Lading" in June 1990, to replace the traditional paper bills of lading with EDI messages to the carrier.

[21] The Comité Maritime International (CMI) has remedied this drawback of certain transport documents by means of the 1990 Uniform Rules for Sea Waybills which enable the insertion of a "no-disposal" clause whereby the seller surrenders the right to instruct the carrier to deliver other than to whom or where stipulated in the waybill.

standards, such as the BOLERO system which is so designed in order to interconnect all stakeholders involved.

Under the F-terms, the seller has to assist the buyer in obtaining a transport document, if so requested, albeit at the latter's risk and expense. Under the D-terms, a bill of lading or other similar transport document may still be necessary for the consignee to take delivery of the goods at destination provided they remain at carrier's disposal. If the goods are delivered directly to the buyer, it is advisable that the latter provides a receipt indicating any possible non-conformity finding.[22]

2.2.2 The Passing of Risk

The consignment follows a complex route through a chain of various transport modes right from the point of loading at the seller's inland warehouse or factory up to its final destination. A carrier undertakes to take delivery and carry to the port of export if necessary, whether an airport or a seaport loading dock, by truck or rail. Another forwarder then usually takes over for carrying through with the transnational carriage to the designated port. A third carrier transports the consignment to its final destination, that is, the buyer's or end user's premises. This long route entails a great amount of risk of loss of or damage to the goods, let alone establishing the exact time of and circumstances under which such loss or damage occurred, may prove a tough task.

The goods carried from one point to another are in most instances insured against risks of unexpected incidents en route. However the allocation of risk between the seller and the buyer is still critical for determining the distribution of responsibilities and any possible financial implications.

The transfer of risk from the seller to the buyer essentially relates to the physical loss of or damage to the cargo due to fortuitous events, and should not be confused with the change of ownership over the goods or the time of the conclusion of the contract. In principle, risk passes to the buyer when the seller has fulfilled its obligation to deliver according to clause A4, and as long as the goods have been appropriated to the contract.

[22] See Ramberg, J., *ICC guide to Incoterms® 2010*, op. cit., p. 71-75.

There are certain cases though where the risk may pass to the buyer prematurely, that is, before seller's discharge of its delivery obligation, mainly following the buyer's failure to either conform to delivery formalities or take delivery of the goods. The purpose behind such premature risk transfer is to prevent any unnecessary albeit intentional delay on the part of the buyer in its effort to achieve the opposite, that is, to avoid risk. Therefore, the buyer has to provide sufficient notice to the seller with regard to the time and point of taking delivery under clause B7, as also pointed out in Section 2.2.1.4 above. Moreover, under the F-terms the buyer has to notify of its nomination of a carrier, while under the D-terms it will have to clear the goods for import within the agreed time if so agreed, for the seller to duly proceed with the onward carriage of the goods to the end destination. Especially under FAS and FOB, the buyer may suffer premature risk transfer if it fails to notify the seller of the vessel name, or if the vessel fails to arrive in time or is unable to take the goods. In failing to act accordingly, the buyer is then held responsible for all collateral risks of loss of or damage to the goods as per clause B5.

The buyer though will only bear such risk if the goods have already been appropriately marked to identify with those provided for by the contract or if the consignee has already been named, as well as in case of issuance of a separate bill of lading for the goods specifically ordered by the named buyer when bulk commodities are transported. In such cases, the costs incurred due to the buyer's failure to fulfil its respective obligations are as well to be borne by the same. On the other hand, it follows that in case of incomplete fulfilment of a seller's obligation resulting in non-conformity of the goods, thus not in any way related to an accident, the seller may be held responsible even after delivery has been concluded. The risk of delay in delivery or non-fulfilment of the contract of sale are not dealt with under clauses A5 and B5 of the Incoterms rules.

With respect to the critical point where the seller is deemed to have performed its delivery obligation, as evidenced in Section 2.2.1.2 above, a clear dividing line may be drawn between the D-terms and all other Incoterms. More specifically, only under the D-terms is the seller obliged to deliver in the country of destination, whereas under all other trade terms the seller delivers within the country of export, either by making the goods available for the buyer at its own premises if on EXW or by handing

them over to the carrier at a designated point under C- and F-terms. Risk may thus pass to the buyer even before the goods leave the seller's loading dock under EXW, or it may remain with the seller until the goods reach the buyer itself under DDP, while there are numerous default points for such passing of risk along the way in between the points of origin and destination, as also evident in the Appendix. Under FOB, for instance, the seller retains the risk even after handing over and losing custody of the goods to a carrier nominated by the buyer. Hence, in case the goods are lost or suffer any accidental damage during the period from handing them over for pre-carriage until their loading on board, the insurance cover does not relieve the seller of its duty to perform. In spite of even being protected by insurance, the seller may still be held liable as well under the D-terms for breach of contract, and may therefore have to provide substitute goods or pave the way for any other appropriate restitution. The seller may thus try to eliminate its own non-performance risk by inserting relief or force majeure clauses in the underlying contract, especially when more exposed under a D-term, or else seek to rely on the applicable law, if favourable.

In any case, the seller's delivery obligation should not be confused with its undertaking to arrange and pay for the carriage of the goods. The mere fact that the seller undertakes to pay certain costs does not necessarily mean that it is also the seller's duty to assume the risks connected with the main carriage. The risk of loss of or damage to the goods passes to the buyer at the point of delivery. Even when the seller pays for the freight and maybe also for the insurance up to the indicated destination under the C-terms, the buyer assumes the risk upon such delivery point, that is, the seller no longer bears any risk after dispatch from the point of shipment within the country of export. It follows that, by extending the seller's financial obligations up to the point of destination, the C-terms axiomatically lead to considering two distinct critical points: one for the division of costs and another for the division of risk.

Under the C-terms, as long as it is the seller's responsibility to conclude the contract of carriage, it is also at its interest to prefer using CPT or CIP, where the risk passes upon delivering to the carrier, in order to avoid being at risk at the interval between handing the goods over for pre-carriage and loading them on board a ship. The same applies with container traffic, since any loss of or damage to the goods after their discharge at the carrier's terminal, that is, in the course of the carrier's period of

responsibility, actually relieves the seller from any further risk concern.[23] Under clause A3(a) of the C-terms, the seller has to procure the contract of carriage "on usual terms", following the usual route and by a vehicle of transport normally used for the specific type of goods sold. What is "usual" and normal pertaining to the "customary manner" of transportation, may be challenged. However, the seller may be held responsible by the buyer in case loss or damage occurs due to the seller's deliberate choice of an inferior means of transport.

Nevertheless, the buyer still bears the "price risk" in case the seller has duly fulfilled its delivery obligation, in that the buyer will still be bound to pay the price for the consignment even if delivery is faulty or does not take place at all due to any event in the course of transportation. That means, the buyer will have to cover any incidental costs due to unexpected or adverse circumstances occurring after the passing of risk. However, unless the seller adequately fulfils its obligations with regard to packaging, marking, and safety of the cargo as well as any other due delivery requirements, once entered into the contract of sale, the buyer is entitled to abstain from paying for the goods by pleading breach of the relevant terms of the underlying contract by the seller.

2.2.3 The Division of Costs

The Incoterms rules deal with the division of costs in clauses A6 and B6. More specifically, they give rise to four main categories of costs.

The first set of costs relates to dispatch, carriage and delivery. It may easily be inferred that such expenses are borne both in the countries of export and import and during transportation. In the country of export they may refer to loading fees at seller's premises or another named place, pre-carriage within the same country, any shipping arrangements and costs for issuance of relevant transport documents, storage and handling fees pending cargo dispatch, as well as the cost for deploying the transport equipment needed. Reversely, in the country of import the parties may bear the cost for storage and handling upon discharge of the consignment, hiring of transport equipment, on-carriage within the country, and unloading at buyer's premises or another named place.

[23] *Ibid.*, p. 24.

The second set of costs refers to export and import customs clearance. A wide variety of fees may again fall under the scope of this category, such as the duties and other charges imposed by customs authorities, as well the costs charged by the freight forwarders in their capacity as customs brokers for inspections, customs warehousing and declarations, for obtaining and legalizing all necessary licenses and authorizations, and for the provision of their own services. Freight forwarders may even provide a pre-defined cost distribution template to appease uncertainty, while it is on the parties to decide whether they will adopt this or decide otherwise with regard to the division of costs. Normally, the seller assumes the cost for export clearance under all rules except for EXW. On the other side, it is always the buyer's responsibility to clear the goods for import unless the term DDP is used.

Further, insurance-related costs are to be borne by the seller only under CIF and CIP terms. The buyer has to inform the seller of any preferred additional coverage to be taken out by the seller and be paid by the buyer itself, unless the contract of sale provides otherwise.

The fourth category of costs relates to the services or assistance rendered to the requesting party on top of the assisting party's obligations for clearing the goods under the valid Incoterms rule at the time. Such services may be rendered for export or import clearance under EXW or DDP respectively, as well as for obtaining documents from the other party's national authorities.[24]

Parties entering a contract of sale have to outright determine the division of costs arising out of their respective obligations. The main principle behind the division of costs dictates that the seller pays for the costs up until the goods have reached the agreed point of delivery, while transit costs arising thereafter, if any, are to be borne by the buyer. It does not necessarily follow though that the party responsible for a function has to bear the pertinent cost as well. As long as certain services are performed by third parties, like stevedoring companies for example[25], and to the

[24] *Ibid.*, p. 80-82.

[25] Stevedoring companies carry through with the loading function either on their own means or by using the cranes and other equipment provided by the port authorities. The division of relevant costs between the seller and the buyer is therefore troublesome, and may only be settled with due regard to the custom of the port concerned. However, such customs may considerably vary from one port to another, placing the burden on either the buyer, or the seller, or on both by splitting the costs pursuant to different methods.

extent that certain costs –like “semi-official” fees charged upon exportation or importation, or charges for goods’ temporary storage pending shipment or delivery, or expenses incurred due to unforeseen weather conditions or other events causing similar delays– cannot be clearly predicted or undertaken by either party during the contract negotiation process, it is not always easy to distribute the costs a priori, nor link cost-sharing to the respective distribution of functions under the various Incoterms rules.

In all other respects, the division of costs is determined by the particular circumstances under which risk is transferred to the buyer, as these are described in the immediately previous Section 2.2.2 in conjunction with Section 2.2.1.2 on the point of delivery. Under the F-terms, the buyer has to contract for carriage and pay the freight and other post-delivery costs. The buyer is also responsible for any costs arising out of its nominated carrier’s or vessel’s failure to take delivery. Under the C-terms, the seller pays the costs up to the point of delivery to the carrier or vessel at the place of dispatch, as well as export customs formalities, and freight and other fees related to the contract of carriage, while any charges debited by the carrier due to adverse events thereafter are for the buyer’s account. Under the D-terms, the seller has to cover all costs prior to export as well as for the contract of carriage, except if DDP is used as already mentioned, and the buyer has to accept delivery at the agreed point and time. If DAP is used, the buyer takes delivery ready for unloading from the arriving means of transport and pays for the discharging. If DAT is used, the seller further pays for unloading the goods and placing them at the named terminal, while the buyer takes all subsequent costs for their storage and onward carriage to the final destination, as well as all extra costs for failure to clear the goods for import or take delivery, unless the seller has unduly appropriated bulk goods to the buyer. In general, the seller also has to bear any additional costs and risk stemming from its choice of an unusual mode of transport, in case receipt of the goods by the buyer from the carrier is rendered unnecessarily challenging or costly due to such choice. All such information is portrayed in Exhibit 3 below, although certain correlations may be susceptible to another allocation should adjacent arrangements, like the contract of carriage or the usual transport document, so entail.

Furthermore, the division of costs may as well connect to the nature of the goods. It may be easier to define loading costs for cargo arriving at the carrier's terminal in containers or in less-than-full loads, whereas the loading duty for bulk consignments is more complex. In addition, buyers may often hesitate to take delivery at an inland point and prefer to accept the goods while still on board, in order to avoid paying additional fees for carriers, cargo handling facilities or terminals. The parties may therefore make use of certain terms for either sharing such fees or placing them on the seller.[26]

Exhibit 3. Distribution of Obligations among Seller and Buyer

Incoterm® / **Obligation**	**EXW**	**FCA**		**FAS**	**FOB**	**CPT**	**CFR**	**CIF**	**CIP**	**DAT**	**DAP**	**DDP**
Export packing, checking, marking	S	S		S	S	S	S	S	S	S	S	S
Export customs declaration	B	S		S	S	S	S	S	S	S	S	S
Loading on carrier's truck	B	S		S	S	S	S	S	S	S	S	S
Pre-carriage	B	B*	S*	S	S	S	S	S	S	S	S	S
Unloading from truck at port of export	B	B		S	S	S	S	S	S	S	S	S
Loading on means of conveyance at port of export	B	B		B	S	S	S	S	S	S	S	S
Ocean / Air freight (main carriage)	B	B		B	B	S	S	S	S	S	S	S
Insurance	**	**		**	**	**	**	S	S	**	**	**
Unloading from means of conveyance at port of import	B	B		B	B	***	***	***	***	S	S	S
Loading on truck at port of import	B	B		B	B	B	B	B	B	B	S	S
Onward carriage	B	B		B	B	B	B	B	B	B	S	S
Import customs clearance	B	B		B	B	B	B	B	B	B	B	S
Import taxes	B	B		B	B	B	B	B	B	B	B	S
Unloading delivering carrier's truck	B	B		B	B	B	B	B	B	B	B	B

B: Buyer S: Seller

* Buyer pays when "FCA Seller's premises" is quoted; otherwise, Seller pays.

** Except for CIF and CIP, no other Rule engages either party to procure insurance.

*** To be determined by the contract of carriage.

Source: Among individual work and other sources, mainly based on Incoterms® 2010 Quick Reference Chart https://www.wcl-shipping.com/wcl-17/wcl/images/pdf/incoterms_2010_chart.pdf (viewed 3 October 2017)

[26] Terms like "50% of THC to be paid by the seller" or "THC for seller's account" may work towards this direction. See Ramberg, J., *ICC guide to Incoterms® 2010*, op. cit., p. 24.

Difficulties in splitting the costs may arise at destination as well under the C-terms, when the goods have to be discharged from the means of transport deployed. Especially when the goods are carried by sea, loading and discharging fees may be included in liner shipping companies' freight charges, whereas in charter party operations the carrier itself may have provided for partly or even fully exempting itself from any similar fees through "free out" clauses. The buyer must then know all pertinent discharging details, such as the ship's time of arrival and the laytime for loading or discharging the cargo, as well as exactly define the risk of demurrage in case the laytime is exceeded. The parties may even wish to provide for dispatch money, that is, compensation by the ship owner if the laytime is in fact less than originally stipulated.

It is therefore left to the parties' discretion to negotiate all such issues while concluding the contract of sale, by paying sufficient attention to clearly distinguishing between their respective obligations under the contract of carriage on one hand and the contract of sale on the other that will have to depict the exact distribution of costs as formulated in each port of import. In any case, when any of such stipulations are not precisely included in the underlying contract, the parties involved may seek guidance in their usual commercial dealings or the custom of the trade.

The substantial content of Clauses A1-A10 and B1-B10 of the Incoterms rules, as clearly and succinctly illustrated here above, thwarts any divergent interpretations amongst traders not sharing similar background. The distribution of responsibilities between the parties pursuant to the regulation of core aspects of any formalities and other due arrangements, costs and risks altogether tend to contribute to the overall efficiency of the Rules. Uncertainty and misunderstandings are thus lifted, while clarity and predictability establish in the contractual relationship. But are there any possible inconsistencies in their application and how can these be encountered? Chapter III will exactly attempt to outline the added value of Incoterms 2010 rules and provide responses to such questions.

CHAPTER 3

QUALITATIVE VALUATION OF INCOTERMS RULES' PRACTICAL IMPACT

The choice of the most appropriate trade term is the resultant of various considerations by both parties, also with regard to the current at the time and occasion circumstances. The Incoterms rules though regulate only certain aspects of the contract of sale, irrespective of the governing law thereto. A comprehensive contractual regime may thus even supplement their material scope in particular respects. The incorporation of a specific Incoterms rule in the underlying contract has a binding effect on the parties, whereas the same effect may be entrenched by extrapolating the essence of their intent on the basis of their trading habits. The dynamic and ever-evolving normative status thereof allows for a fruitful interplay with other legal frameworks.

While the practical utility of Incoterms rules is indisputable, there are still various pragmatic distortions as to their functional mechanics. Certain misconceptions about their modus operandi are owed to the users and stakeholders themselves, who are supposed to extract own benefits out of their existence. However, other conceptual issues as well arise out of their empirical put into practice. Hence, care has to be taken towards ensuring improvement of their visibility, comprehension, and usability, especially in anticipation of their forthcoming revision.

3.1 Incoterms Rules' Empirical Use

The choice of the right Incoterms rule is determined by various factors intrinsically pertaining to the parties' business strategy, and the specifics of the delivery process as exhibited in the Appendix.

One criterion may be relevant to the territorial scope of the intended transaction. In that respect, EXW seems more suitable for domestic trade where no complex arrangements and delivery parameters have to be taken into account.

Another factor has to do with the relevant possibility of the parties for contracting for carriage or insurance. Whether an F- or a C-term will be used depends on the parties' chances of procuring the most favourable contract of carriage. The

seller may prefer to contract under CFR or CIF, especially when induced to use a national shipping line, while FAS and FOB are appropriate when the transport is arranged by the buyer. When goods are carried by sea though and are handed over to the carrier other than alongside or on board the vessel, then FCA may still be used, otherwise FAS and FOB respectively are more appropriate. Further, the decision between CFR and CIF may be affected by the parties' ability to procure insurance at the most competitive rate. On the other hand, CPT and CIP may be the most suitable choices where the buyer bears the risk but is willing to leave the contract of carriage alone or along with the insurance respectively on the seller.

It is then the type of the cargo and the freight charges' negotiating power that determine the applicability of certain terms. FCA, in contrast to maritime terms, is the most appropriate Rule for containerized goods. Additionally, the need for D-terms often arises when the seller has reasons to thoroughly control the goods until delivery to final destination or may negotiate and achieve better freight rates. In that sense, when trading manufactured goods, the exporter will most probably favour a D-term in order to control all costs during transit and thus achieve competitive prices for its products sold by the wholesaler in the country of destination. To avoid excessive charges under DDP though, the seller should try to procure any export formalities and leave the respective import clearance procedures on the buyer's side by favouring another D-term. On the other hand, when the goods are intended for a sizeable buyer who may impose its own terms, EXW or FCA may better fit the buyer's need to ensure effective management of all delivery dealings at competitive prices and timely delivery. Under EXW, the consignee enjoys better cargo traceability and control, and more transparency over any charges at all times. Furthermore, unless jointly eager to upgrade to Clause A of the Institute Cargo Clauses (LMA/IUA), CIP is rather inappropriate in the case of manufactured goods, as the minimum insurance cover required by the seller may be deemed inadequate by the buyer. Similar to these considerations is the logic behind the distinction between "freight prepaid" and freight collect" terms, as presented in Section 2.1, which may well affect the decision of the parties as such.

There are grounds for considering that all E-, F- and D-terms favour effective and continuous communication between the carrier and its principal from the point of

origin till destination, since their interests are identical. A C-term instead would complicate things by differentiating between the principal and the risk holder during the main carriage. In this respect, it may prove difficult for merchants to comprehend that a C-term under which the end destination is designated, nevertheless signifies that the risk passes to the buyer before such identified point.

In general, it can be supported that while moving across the spectrum of the various Incoterms groups, from EXW and FCA, to the D- and then to the C-terms, exporters' relative advantage and anticipated profit grow larger. On the contrary, importers are better shielded and more likely to minimize landed cost when following the opposite route around, especially when opting for FCA. The final choice of course is rather a function of laborious negotiations, where the parties have to apprehend each other's motivations and compromise their interests in the most acceptable and creative manner.[27]

3.2 The Dialectic with the CISG

Merchants may weigh in other criteria and factors as well, with a view to maximizing value and minimizing risk and transaction costs. But no matter what term will be opted for, it will have to be precisely and accurately worded to become seamlessly applicable. Incoterms by default only apply ex contractu or ex consensu, that is, when properly incorporated by means of express reference in a contract of sale. Their implementation is therefore voluntary. In case the parties wish to extend the main terms of a particular Incoterms rule by means of any additional conditions as per their mutual consent, they have to clearly articulate this in writing. Moreover, as the parties are not bound to refer only to the latest issue of Incoterms, they may as well agree to apply a past version thereof.[28]

According to the principle of freedom of contract as enshrined by article 6 CISG, whenever properly incorporated in the underlying contract, the Incoterms rules are definitely applicable and take prevalence over any matching or contradictory default

[27] See O'Meara, A., *op. cit.*, p. 6-4 to 6-16.
[28] See Seyoum, B., 2009, *Export-import theory, practices and procedures*, 2nd edn, Routledge, New York and London, p. 158.

provision on the same subject matter contained therein[29]. The contractual content may be supplemented by trade usages and practices on the basis of the intent of the parties. More specifically, article 9(1) CISG refers to the binding effect of trade usages the parties may have agreed upon. Only rules of commerce regularly observed by the practitioners in the relevant industry may enjoy the status of such usages. When the parties explicitly make use of relevant clauses in their contract of sale, any accompanying rights and obligations shall still be implemented in accordance with the interpretative context thereof, even if departing from CISG provisions or the substantial content of the contract in general. Hence, as Incoterms precede over any deviating stipulation or even choice of law clause within the contract of sale, only the explicit and complete opt out of the CISG would render the Rules prone to be overridden by the said domestic law to the extent that this latter would be contradictory to, or else mandatory rules thereof would be infringed by Incoterms rules themselves.

Article 9(1) CISG also covers trade practices the parties may have established in their transactions. Such practices may refer to the working methods adopted among the contracting parties, which give rise to a reasonable expectation that they will insist on the same kind of conduct in their future dealings as well. Similar conduct by one or both parties should be repeated with certain frequency and duration, within constellations that may be considered typical of the business relationship.[30] In that respect, it is important that the parties perceive their conduct as practice, for the general prohibition of *venire contra factum proprium* to be valid.[31]

Whether Incoterms have achieved the quality of normative custom *in toto* and may therefore as well apply independently of an explicit agreement or an explicit reference to Incoterms even where only a specific term acronym is quoted, is a

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[29] However, even in such case certain courts and arbitral tribunals have held that article 31 CISG still regulates the place of performance, or the delivery obligations in a contract concluded under an F- or a C-term. See *Tannery machines case*, Oberlandesgericht Köln No. 27 U 58/96 (8 January 1997), viewed 27 December 2017, from http://cisgw3.law.pace.edu/cases/970108g1.html, and *Steel profiles case*, Audiencia Provincial de Cordoba No. 224/1997-269/1997 (31 October 1997), viewed 28 December 2017, from http://cisgw3.law.pace.edu/cases/971031s4.html, as well as others in Coetzee, J., 2013, "The interplay between Incoterms® and the CISG", *JL & Com* 32(1), p. 7-8.

[30] See Φλάμπουρας, Δ., 2010, *Το δίκαιο της διεθνούς πώλησης κινητών*, Νομική Βιβλιοθήκη, Αθήνα, p. 99-106.

[31] See Schlechtriem, P., & Schwenzer, I. (eds), 2010, *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 3rd edn, Oxford University Press, Oxford, p. 186-187.

controversial issue. There are indeed cases where a court has held that a specific trade term or even a term resembling to the universally known ones, when quoted without explicit reference to Incoterms, has to be indeed interpreted according to Incoterms[32]. A similar point of view is also supported by article 9(2) CISG, according to which trade usages widely known to parties to like contracts and regularly observed in the particular international trade sector concerned, that the parties knew or ought to have known, are assumed to be impliedly applicable to a contract of sale even without the parties' express consent or potentially without their actual knowledge of the existence of such usage, unless the parties have otherwise agreed[33]. However, Article 9(2) does not attach normative validity to trade usages, it only seeks to supplement the underlying contract on the basis of the parties' intent.

Moreover, in the absence of an explicit agreement between the parties, Incoterms rules may still be duly considered and therefore apply in their dealings on the basis of tacit consensus when the parties' true subjective will may well be inferred from their statements, the context of the contract, or in view of their relationship and

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[32] This was the case in both the decision over *Cherubino Valsangiacomo, S.A. v. American Juice Import, Inc.*, Audiencia Provincial de Valencia No. 142/2003 (7 June 2003), viewed 2 December 2017, from http://cisgw3.law.pace.edu/cases/030607s4.html, and *St. Paul Guardian Insurance Company et al. v. Neuromed Medical Systems & Support et al.*, U.S. District Court for the Southern District of New York No. 00 Civ. 934 (SHS) (26 March 2002), viewed 4 December 2017, from http://cisgw3.law.pace.edu/cases/020326u1.html. Also see Bateson, D., & Flambouras, D., 2003/2004, "International trade law and the Greek shipping sector", *Shipping Finance Annual*, p. 40-43, and Basedow, J., 2008, "The state's private law and the economy – Commercial law as an amalgam of public and private rule-making", *Am J Comp L* 56(3), p. 709.

[33] Several courts have again held that Incoterms constitute the dominant source of delivery term definitions in international sales contracts, or even trade usages falling under the scope of article 9(2) CISG. See *St. Paul Guardian Insurance Co. v. Neuromed Medical Systems & Support, GmbH* supra; *BP Oil International v. Empresa Estatal Petroleos de Ecuador*, U.S. Court of Appeals (5th Circuit) No. 02-20166 (11 June 2003), viewed 5 December 2017, from http://cisgw3.law.pace.edu/cases/030611u1.html; and *Fiberglass composite materials case*, Higher Cantonal Court (Tribunal cantonal) Valais No. C1 08 45 (28 January 2009), viewed 5 December 2017, from http://cisgw3.law.pace.edu/cases/090128s1.html, where the court held that "even when the Incoterms were not incorporated into the contract explicitly or implicitly, they are considered as rules of interpretation". This point of view is rebutted though by the scholarly opinion that not all Incoterms rules are widely known nor widely applied across all types of trade, since only the older and well-established terms, such as FOB and CIF, enjoy broad acceptance and autonomous applicability. According to this view, article 9(2) CISG is refuted as a basis for their promotion into mercantile custom and usage due to such lack of adequately consistent practice especially with regard to the modern, less well-known trade terms. See Coetzee, J., 2012, "Incoterms® 2010: Codified mercantile custom or standard contract terms?", *Stellenbosch L. Rev.* 23, p. 575-577. However, this is again a much debated positioning, since regular observance is only required "in the particular trade concerned" and not necessarily on a global scale. See Basedow, J., *ibid.*, p. 709-710. For a detailed analysis of the enquiry a court should undergo in order to determine whether an implied term in the contract of sale falls within the scope of article 9(2) CISG, see Johnson, W., 2014, "Analysis of Incoterms as usage under article 9 of the CISG", *U. Pa. J. Int'l L.* 32(2), p. 424-426.

the history of their transactions, even though they have failed to expressly quote them.[34] The will of the parties thus derives from their established practices and conduct, as per article 8(3) CISG.[35] An implied agreement seems to be equally sufficient under article 9(1). An Incoterm rule may as well be incorporated to a contract of sale subsequent to its conclusion, by virtue of article 29 CISG, thereby amending it at the level of substantive law.

It is therefore submitted that the applicability of Incoterms is contingent upon the express agreement or the practices established between the parties pursuant to article 9(1) or, alternatively, upon the requirements set out in article 9(2) CISG when the parties are deemed to have tacitly adhered to an Incoterms rule. When such requirements are not met though, the court may still resort to Incoterms to supplement and better construe the contract of sale, unless a common understanding prevailing in both the parties' countries runs counter to the core essence of the selected term.[36]

In any case, with Incoterms rules –insofar as they accumulate and depict consistent commercial practice into an intelligible and concise language, and are therefore widely followed by commercial actors in cross-border trade– a higher degree of certainty with regard to parties' legal rights and obligations is established, while at the same time the outcome of any dispute is better predicted. They actually reflect homogeneity and harmonization in long-established trade practices, and therefore tend to increase transactional efficiency, by saving on negotiating time and costs.

3.3 Inconsistencies in Incoterms' Construction and Application

The use of each Incoterms rule is suggested under certain preconditions and only upon fulfilment of specific criteria laid down by the ICC. Nevertheless, problems often arise due to their wrongful selection and application or due to inconsistencies inherent in their architecture. It seems that although the erroneous use of the Rules may

[34] For an analysis of this point of view, as well as of the angle that Incoterms may also apply ex lege, irrespective of the will of the parties, where they qualify as trade usages or mercantile practice, see Coetzee, J., 2002, "Incoterms: Development and legal nature", *Stellenbosch L. Rev.* 13, p. 123-132.
[35] See Pamboukis, Ch., 2006, "The concept and function of usages in the United Nations Convention on the International Sale of Goods", *JL & Com* 25, p. 107-108.
[36] See Schlechtriem, P., & Schwenzer, I. (eds), *op. cit.*, p. 491.

expose the parties to unnecessary risks, it is difficult to persuade commercial actors to alter their long-established behavioural patterns.

Confusion may arise when merchants either fail to observe that there has been a change in the rules of interpretation or fail to clarify the particular version of the Incoterms rule they wish to apply to their contract or even fail to properly state the port or place of delivery after the chosen term. They often also inadvertently use a term that does not fit their exact intentions or the individual features of each single case, or even refer to a term in a wrongful or inconsistent way, probably neglecting the fact that their less-than-optimal choices render them vulnerable. Especially in the USA, the term FOB is still being used for shipments that are not intended to be delivered on board the vessel, thereby saddling the seller with risks subsequent to the handing over of the goods to the buyer's designated carrier. FOB is not appropriate though in cases where the goods are handed over to the carrier while still stowed in containers or loaded on lorries, for the latter to handle, carry to the ship and place on board.

Similarly, the parties may happen to use a certain term intended only for carriage of goods by sea, namely FAS, FOB, CFR or CIF, for deliveries which are to be forwarded via other modes of transport. An improper use thereof may yet result in unpleasant circumstances for all parties involved. The seller shall then be unable to tender the proper document to the buyer, as may be required under a faulty term, such as a bill of lading or a sea waybill.[37]

In any case, when choosing a specific trade term, the parties must quote clearly and distinctly. All essential components, that is, the term name, the named place, port or terminal, Incoterms®, and the revisions year, must be clearly quoted for a Rule to be valid. When they fail to expressly indicate whether Incoterms will govern the interpretation of the trade term they have opted for, its applicability is rather put in jeopardy, despite the judicial decisions to the contrary as discussed in Section 3.2 above.

In other respects, certain changes have been brought about by the 2010 revision, not all of which may be considered successful ones. The traditional point for the division of responsibilities and risk transfer under FOB, CFR and CIF, whereby the goods

[37] See *Incoterms 2000: ICC official rules for the interpretation of trade terms*, viewed 6 November 2017, from http://www.shipper.co.il/incoterms.html.

pass the ship's rail at the named port of shipment, has evolved into one theoretically better reflecting modern commercial practice, namely the point where the goods are placed on board the vessel. The ship's rail as the definite border for distinguishing risk and costs, whereby the seller would undertake "land costs" and the buyer "ship's costs" respectively, was rather impractical due to new methods of loading the cargo on board the vessel.[38] However, it is yet not clear enough whether the placement on board should as well include the stowing and trimming of the cargo on board or be carried through in any fashion. Hence, such a change may not reflect a radical evolution at all, since any uncertainties with regard to the parties' traditional responsibilities in connection with the loading of the vessel may well remain unsolved.[39]

Still, similar to this point, no matter the degree of harmonization or standardization of international commercial practice, certain aspects with regard to the delivery of the goods may in practice be subject to diverse customs and available infrastructure, such as the loading and unloading facilities in different ports, which affect the passing of risk from seller to buyer. In that sense, Incoterms merely reflect the resultant or dominant practice in as many regions and circumstances as possible, at a given point in time.[40] In any case though, the Rules' limited scope of regulation does not negatively affect their overall efficiency. Such functional inconsistencies may cast doubts over Incoterms' rigid regulatory power, but on the other hand attach to Incoterms the essential flexibility to adjust to current at all times circumstances and keep in touch with evolving commercial modalities.

The parties may seek to address this issue by altering or enhancing the pure context of an Incoterms rule by means of adding certain expressions, such as "EXW loaded upon departing vehicle", to extend the seller's obligation equally to loading operations. However, such additions usually result to inconsistencies in their interpretation and implementation as there can hardly be a well-established custom of the trade that would facilitate a common understanding thereof. For example, the custom of the port in the seller's country may split the loading cost under FOB

[38] See Ramberg, J., *ICC guide to Incoterms® 2010*, op. cit., p. 70.
[39] See Ramberg, J., *"*Incoterms® 2010", op. cit., p. 422.
[40] This is in line with the ICC's duty to create rules that remain "country neutral". See Coetzee, J., "Incoterms® 2010: Codified mercantile custom or standard contract terms?", op. cit., p. 565.

between the seller and the buyer. The buyer may find itself in a disadvantage if not familiar with such custom a priori though. The buyer may therefore wish to precisely quote "FOB stowed" or "FOB stowed and trimmed" should it be assured that the seller will undertake the loading and all collateral costs. However, for the avoidance of any misunderstandings the parties have to as well explicitly agree whether the seller will also bear the risk of loss of or damage to the cargo after the goods pass the ship's rail until stowage and trimming will have actually been completed. Similarly, with "EXW loaded" they have to clarify who bears the risk for any undesirable event during loading. If they choose to go beyond the Incoterms stipulation but fail to expressly describe their exact intentions, they may then have to assume unforeseen costs.[41] It is therefore necessary that the contract of sale integrates the custom of the port or of the particular trade or the practices established by the parties in their previous dealings. In general, when merely departing from standardized terms and the Incoterms interpretative context with a view to achieving further precision, the parties should be extremely cautious in their wording in order to avoid uninvited repercussions.

Moreover, as already discussed in Section 2.2.2, there are certain issues that Incoterms do not provide for, as is the case with loss of or damage to the goods due to the seller's acts or omissions albeit occurring after risk transfer and despite the buyer's due advice. Where the parties have agreed upon CIF, for example, and the goods suffer damage en route due to the seller's omission to give proper instructions to the carrier of the right storage conditions, the buyer may escape paying the purchase price on the basis of the seller's responsibility, although the shipment may have normally passed to the buyer's risk. Whilst Incoterms rules remain silent on this event as they only deal with the risk of incidental loss or damage, the buyer may rely and seek relief upon article 66 CISG, which stipulates that the buyer is discharged from its obligation to pay the price as far as the loss or damage was due to an act or omission of the seller. As this article complements Incoterms insofar as both instruments are built on the same underlying principles of international trade, the CISG may fill an Incoterms

[41] See Ramberg, J., *ICC guide to Incoterms® 2010*, op. cit., p. 70.

gap in this respect, unless the parties have explicitly contracted out of it.[42] Hence, such "price risk" does not in any way relate to the risk of breaches owed to any delay or non-fulfilment of the provisions of the contract of sale. The Incoterms rules do not provide for any other consequences arising therefrom nor any remedies available to the injured party, which should therefore be regulated by the applicable law in accordance with the underlying contract. While the Rules dictate what the parties should do, they do not lay down the repercussions in case they do not do so.

In the same line and to substantiate this argument, even though according to clause A1 of all Incoterms rules the seller carries the obligation to deliver goods "in conformity with the contract of sale and any other evidence of conformity which may be required by the contract", no relief is provided for the buyer in case of its failure to perform. Likewise, clause A7 provides that the seller must give the buyer sufficient notice that the goods have been properly delivered, without referring to any consequences in case of failure to do so. The matter is left to the underlying contract to resolve, and in the absence of any relevant provision therein, to the remedies for breach and damages provided in articles 45-52 and 74-77 CISG[43]. Mirroring clause B7 holds the buyer responsible for giving sufficient notice to the seller for all aspects of the delivery, yet there is no specific requirement about the form of notice or its validity. Moreover, Incoterms rules do not seem to resolve the issue of a party's liability due to its inappropriate and ineffective handling of its export or import clearance obligation, which amounts to a breach of the contract of sale. Incoterms may remain silent and allow for similar gaps in other respects as well.

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[42] A Chinese arbitration panel applied article 66 CISG in the *Jasmine aldehyde case*, whereby the seller omitted to instruct the carrier of the appropriate temperature conditions, although warned by the buyer that the goods could deteriorate at high temperatures. The cargo was thus found to be melted and leaking upon arrival at destination. Despite the parties' agreement on "CIF New York", the tribunal concluded that the buyer did not have to carry the price risk under article 66 CISG. See *Jasmine aldehyde case*, China International Economic and Trade Arbitration Commission (CIETAC) No. CISG/1995/01 (23 February 1995), viewed 12 December 2017, from http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950223c1.html.

[43] An arbitration tribunal dismissed the French buyer's claim for damages in a case where the buyer itself failed to notify the seller of the vessel's name, loading location and time for a cargo of horsebeans ordered from a Chinese exporter "FOB Tianjin", on the basis of article 25 CISG equating such failure to a fundamental breach of the underlying contract. See *Horsebeans case*, China International Economic and Trade Arbitration Commission (CIETAC) No. CISG/1996/13 (8 March 1996), viewed 13 December 2017, from http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960308c2.html.

Another grey area has to do with bulk consignments, especially ones of a single cargo, such as oil or grain. Such cargo is normally shipped under a CPT or CIP term, and is intended for different recipients. A fundamental axiom of Incoterms rules is that the goods must be clearly identified as the contract goods, as per clauses B5 and B6. The transfer of risk may then also be complicated if the goods are not clearly identified. The identification is normally accomplished by clearly marking the consignment and designating the consignee, and takes place along with the appropriation of pro rata parts of the bulk consignment to the buyers through separate bills of lading. The risk passes to the buyers proportionally before breaking bulk at destination. However, the overall exercise of identifying and appropriating a portion of the bulk to each particular buyer may prove a challenging one. To avoid uncertainty, it is preferable that the parties expressly agree on risk transfer.[44]

3.4 Moving Forward Towards Incoterms 2020

To keep Incoterms rules in the frame of contemporary international commercial landscape, the ICC has launched deliberations amongst all stakeholders and National ICC Committees with a view to concluding and unveiling the new updated version of the Rules by 2020. To that end, a Committee of Experts with the requisite high professional calibre due to the participation of lawyers, company representatives and traders from around the world has been established, to foster improvements and at the same time collect, assess and discuss the input contributed by Incoterms rules' users worldwide. Since deliberations are still at a very early stage and not yet publicly communicated, certain proposals may be distilled through the study for this thesis.

First of all, it is important that the new version of Incoterms rules again incorporates the Guidance Notes to each individual trade term, as was the case up until the version of 2000. In Section 3.3 above, certain faults in the practical use of the Rules were examined. Apart from the old and thus well-established ones, new Rules tend to be rather neglected or wrongfully implemented by merchants, who find it difficult to get accustomed to and employ modern working habits. The Guidance Notes served in delineating the modus operandi, certain advice towards the parties, and the

[44] Ramberg, J., 2005, "To what extent do Incoterms 2000 vary articles 67(2), 68 and 69?", *JL & Com* 25(6), p. 220.

logic behind the most prominent aspects of each term. The reinstatement thereof in a concrete and concise manner is therefore deemed useful with a view to inducing traders to shortly study and be convinced to opt in the relatively new Rules, instead of inventing inappropriate and at times impractical variants of the terms they are more familiar with.

In order to avoid such confusion though, another addition to the revised publication would prove equally helpful. As also discussed in the previous Section, the parties may become creative or seek to overcome the obstacles posed by diverse port customs and infrastructure by favouring the use of altered or enriched Incoterms rules, such as "EXW loaded upon departing vehicle", "FOB stowed and trimmed", CFR free out", "DDP VAT unpaid", and others. The ICC could possibly collect the most commonplace variants as indicated by the users themselves and trade practice, and formalize them by providing either definitions for each altered term as such, or the contextual basis for each description following Incoterms rules alone, so that they may be used in conjunction with any other term, if applicable, bearing the same meaning and ramifications in all cases. The goal would be to achieve a common understanding of all parties concerned, whether merchants or even banking institutions, with regard to all various facets thereof, especially pertaining to cost and risk division. This would deter disputes as to the parties' responsibilities and the content of the shipping documents that should comply therewith.

Furthermore, the CIF and CIP Incoterms rules entail the seller's responsibility to arrange for insurance, since it is also on the seller to conclude the contract with the carrier. However, as mentioned in Section 2.2.1.3 above, its obligation is limited to only procuring cover for minimum perils as per Clause (C) of the Institute Cargo Clauses (LMA/IUA), for, especially under CIF where the goods are carried by sea and may therefore be resold in transit, subsequent buyers down the chain might already have concluded better insurance terms.[45] But again the minimum insurance provided for under the said Clause is more suitable to bulk cargo. The parties do not only select this term for the seller to just insure the cargo due to being better positioned to do so. Especially the buyer would be expecting to be completely discharged from such an arrangement, without having to either instruct the seller or add on extra coverage at

[45] See Ramberg, J., *ICC guide to Incoterms® 2010*, op. cit., p. 35, 55.

its own expense for its own protection. The very essence of the terms should perfectly correspond to the specific circumstances of an adequately representative volume of similar cases. In that sense, the logic behind the minimum cover contradicts with that of the most appropriate cover, especially for manufactured, containerized cargo sold under CIP. The ICC should therefore lay down the seller's duty to insure certain goods, possibly listed under general prescribed categories, under Institute Cargo intermediate Clauses (B) or mainly "All Risks" (A), as may better fit for each particular consignment.

In addition, the ICC should look into lifting the rigidity over the use of certain transport documents for proof of delivery. For example an on board bill of lading could equate with a received for shipment bill of lading where appropriate[46], especially in cases where the seller is to be paid by a letter of credit requiring the first document in original, although it may not be entitled to get such a document from the carrier under the Rule used, as with FCA.

Besides, the ICC will most probably also assess the degree of acceptance and the usability of currently existing trade terms, as it has always repealed certain Rules and introduced others in its Conferences of revision. In this regard, it seems that the existing term FAS is scarcely used, especially for the delivery of certain commodities. It does not substantially differ from the term FCA, in that under this latter one the seller may as well hand the goods over to the carrier at the maritime terminal at the named port of shipment. In another respect, FAS carries the risk of considerable waiting time for the merchandise alongside the quay in case of a delay in the arrival of the vessel at the named port with any possible adverse effects, as well as the risk of much retarded shipping time in case the vessel would have to leave the named port before the goods are made available on the dock. That said, the ICC may have to examine the possibility of removing the FAS rule from the new Incoterms publication.

On the same wavelength, it is suggested that the essential content of a particular D-term is transposed into two new Rules[47]. More specifically, the terms DAT and DAP

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[46] This is anyway dictated by article 20(a)(i) of UCP 600. See *Substantive Notes on Draft 2 of Incoterms® 2020*, viewed 1 February 2018, from http://www.innovasjonnorge.no/contentassets/2602efa2c03449b781b6ad80bf24e095/updated-substantive-notes---incoterms-2020----draft-2---10-november-2017.pdf

[47] See Llamazares, O., *Incoterms 2020: Main changes*, viewed 10 January 2018, from https://www.globalnegotiator.com/blog_en/incoterms-2020-main-changes, and Alami, Z., *What do we*

already place the delivery of the goods by the seller to the buyer at a terminal, be it airport, port, or other transport centre, or at any other location away from ports of entry respectively, still within the territory of the buyer's country. The term DDP, however, while moving one step forward by providing for the customs procedures to be carried out and import taxes to be paid by the seller, remains silent as to the place of delivery, hence covering a wide range of possible nominations, from the port of entry up to the buyer's place of business. To follow and support the logic behind the introduction of DAT and DAP in 2010, DDP may as well be divided into two new terms, one calling for delivery at a terminal and another one calling for delivery at any place other than a terminal. In such a case, the parties would have to choose among four D-terms for delivery at a terminal with or without import customs clearance and taxes, or delivery at a given location other than a terminal with or without import customs clearance and taxes respectively.

The Incoterms rules primarily serve as standard contract terms. Opinions may still differ as to whether they actually amount to international trade usages, although they tend to be recognized as such, if not *in toto* at least on an individual basis, especially due to their regular refinement. The prospect of their forthcoming revision provides an ideal opportunity for filling any gaps and creating a compact set of rules with a view to assuming a significantly upgraded legal status.

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expect from Incoterms 2020?, viewed 11 January 2018, from https://www.linkedin.com/pulse/what-do-we-expect-from-incoterms-2020-zack-alami.

CHAPTER 4

CONCLUSIONS

All major features of the supply chain in international sales transactions are adequately accommodated in Incoterms rules. However, there are still literally two major misconceptions about Incoterms. On one hand, they are frequently falsely perceived as pertaining to the contract of carriage instead of the contract of sale. On the other hand, they are wrongly assumed to stretch beyond their subject matter as if regulating a vast array of aspects of the underlying contract. In that sense, Incoterms do not deal with certain issues, such as the transfer of ownership and other property rights, any exemptions from liability, or the consequences arising out of contract breaches. As Incoterms only supplement the contract of sale, the parties need to clearly specify all these factors as well as elaborate relief clauses therein, and separately lay down all applicable rules with respect to non-performance and dispute resolution.

The discussion in Chapter 2 has shown that when the seller arranges and pays for the main carriage under C- and D-terms, the goods remain by extension in its own possession, as they are practically handled by the seller's carrier or freight forwarder. Once the seller has fulfilled its undertakings, possession over the goods then passes to the buyer in the territory of the latter's country. Conversely, when the buyer arranges and pays for the main carriage, under EXW and F-terms, possession over the goods transfers to the buyer early enough in the seller's country. The transfer of costs occurs concurrently with the transfer of possession. Yet, this exact point in time does not necessarily tally with the transfer of risk. The named point of delivery signifies the point of risk transfer, while depending on the term it may also coincide with that point where costs are distributed between the parties. Only under C-terms risk transfer occurs earlier than the transfer of possession and costs, that is, in the seller's country, when the latter has handed over the goods to the carrier. It is therefore vital for the parties to get to know, even at the time a quotation is made, what is required of them under the contract of sale, since various factors may well affect their decisions and respective costs which will ultimately be reflected in the price.

It has been further suggested that the true value of Incoterms rules as a form of standardization of international sales law with respect to parties' delivery obligations and the passing of risk should be appraised on the basis of their merits, weaknesses, and practice. The primary goal of Incoterms rules is to effectuate the movement of goods in a global scale in a safe, timely, and cost-effective manner, on a sustainable and predictable basis, by mitigating inherent risks and leveraging both the seller's and the buyer's opportunities to draw commercial benefits. In that respect, they reflect certain aspects of the most consistent mercantile customs and usages developed in the course of modern international trade in a standardized form, aiming at assisting merchants in their delivery arrangements and adjacent obligations and considerations, such as cost and risk distribution. Incoterms rules may well qualify as a "lasting dependable source of international trade usages".[48] In addition, by composing a solid set of trade terms thereby removing any uncertainties owed to diverging interpretations in different jurisdictions, their extensive application ends up promoting uniformity in international trade.

Chapter 3 has addressed the issue of complementarity with the CISG in this respect. Incoterms rules supersede the CISG provisions insofar as they are mutually exclusive. In all other respects, they function *in tandem* in their capacity as supplementary instruments of sales law harmonization and unification. The interplay between the two regimes is rewarding for traders. The express selection of a particular Incoterms rule implies incorporation of its entire substantial and interpretative context into the contract of sale as per article 6 CISG. Alternatively, the Rule may apply as a contractual trade usage on the basis of article 9(1), or impliedly as a widely known and regularly observed international trade usage of which the parties knew or ought to have known by virtue of article 9(2) CISG.

Law is therefore adjusted to the needs of international commercial reality. Stability, uniformity and functionality are fostered in an effective way. By following a pragmatic model which leaves certain scope for variations and deviating customs, the overall efficiency and applicability of Incoterms is enhanced. Such flexibility, along with the elements of certainty, clarity and predictability radiated by their construction itself, allow for the considerable reduction of transaction costs for all stakeholders.

[48] See Schlechtriem, P. & Schwenzer, I. (eds), *op. cit.*, p. 196.

In practice, they enable the parties to make use of certain, clear, generally recognized key commercial terms, the common understanding of which is endorsed by the standard authoritative interpretative context thereof. In that sense, Incoterms allow parties to settle on regularized practices and at the same time negate the need for extensive negotiations and sophisticated contracts of sale. Parties are thus facilitated to make the most suitable choices according to their specific needs pertaining to the nature of the goods and the intended mode of transport, and consequently maximize value and reduce risk and expenditure. Incoterms rules therefore become an effective risk management tool in the hands of those traders who endeavor to remain well-informed and regularly observe them in contracts of sale suitable to the field of trade exercised. There is certainly room for misunderstandings in the course of their use and lacunae in their regulatory scope, but such loopholes tend to diminish due to ICC's due action.

As the added value of Incoterms rules has been unfolded here above, their further development and strengthening is deemed a condition *sine qua non* for rendering the international sales legal landscape more sound and compact. The revisions accomplished by ICC at regular intervals keep them in line with developments in transport techniques and commercial practice in general, and make them more user friendly. Key to their success is achieving superior supply chain visibility, by means of enhanced observance of unattended aspects of trade practices, and succinct division of costs and risks even in circumstances not dealt with under the current regime.

Hopefully, the new Incoterms 2020 which are projected to come into force as of January 1, 2020, will adequately account for all evolving security concerns and trade practices of the last decade and further establish Incoterms' trademark and worth in merchants' collective consciousness. The greatest challenge lies in educating and inducing all parties involved in international trade, be it shippers, freight forwarders, carriers, customs brokers, bankers, or consignees, to achieve a mind-shift and entrench correct use of Incoterms rules on a consistent basis, in line with the intended mode of transport. Only by removing ambiguity in their application and broadening their scope, they shall achieve global recognition as trade usages *in toto*.

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Appendix

INCOTERMS® 2010 Rules' Specifications

Incoterm		Recommended Use
ALL MODES TERMS	**EXW** (named place of delivery)	Suitable for domestic trade; Delivery either at seller's premises or at another named place (i.e., works, factory, warehouse, etc.), ready for loading; Buyer clears the goods for export, where applicable, and bears all costs and risks from that point onwards; Minimum obligation for seller
	FCA (named place of delivery)	Delivery either at seller's premises or another named place; Risk passes to buyer at that point; Seller clears the goods for export, where applicable; Appropriate for containerized goods
	CPT (named place of destination)	Delivery at an agreed place, where goods are handed over to carrier; Risk passes to buyer at that point; Seller contracts for carriage and pays all costs up until the designated point within the agreed place of destination; Buyer pays all import duties, charges, taxes
	CIP (named place of destination)	Delivery at an agreed place, where goods are handed over to carrier; Risk passes to buyer at that point; Seller contracts for carriage and minimum insurance cover, and pays all costs up until the designated point within the agreed place of destination; Buyer pays all import duties, charges, taxes
	DAT (named terminal at port or place of destination)	Delivery at a named terminal (quay, warehouse, container yard or road, rail or air cargo terminal) at named port or place of destination, once unloaded from the arriving means of transport; Risk passes to buyer at that point; Seller contracts for carriage and pays all costs up until the named terminal within the agreed place of destination; Buyer pays all import duties, charges, taxes
	DAP (named place of destination)	Delivery at the named place of destination, on the arriving means of transport, ready for unloading; Risk passes to buyer at that point; Seller contracts for carriage and pays all costs up until the named terminal within the agreed place of destination; Buyer pays all import duties, charges, taxes
	DDP (named place of destination)	Delivery at the named place of destination, on the arriving means of transport, ready for unloading; Risk passes to buyer at that point; Seller contracts for carriage and pays all costs up until the named terminal within the agreed place of destination, including all import duties, charges, taxes; Maximum obligation for seller

Incoterm		Recommended Use
MARITIME TERMS	**FAS** (named port of shipment)	Delivery alongside the vessel (e.g. on a quay or a barge) nominated by buyer at named port of shipment or procurement of goods already so delivered for shipment; Risk passes to buyer at that point; Seller clears the goods for export, where applicable; Not appropriate for containerized goods
	FOB (named port of shipment)	Delivery on board the vessel nominated by buyer at named port of shipment or procurement of goods already so delivered for shipment; Risk passes to buyer at that point; Buyer bears all costs from that point onwards; Seller clears the goods for export, where applicable; Not appropriate for containerized goods
	CFR (named port of destination)	Delivery on board the vessel at named port of shipment or procurement of goods already so delivered for shipment; Risk passes to buyer at that point (port of shipment); Seller contracts for carriage and pays all costs up until the named port of destination; Buyer bears all costs from that point onwards; Seller clears the goods for export, where applicable; Buyer pays all import duties, charges, taxes; Not appropriate for containerized goods
	CIF (named port of destination)	Delivery on board the vessel at named port of shipment or procurement of goods already so delivered for shipment; Risk passes to buyer at that point (port of shipment); Seller contracts for carriage and minimum insurance cover, and pays all costs up until the named port of destination; Buyer bears all costs from that point onwards; Seller clears the goods for export, where applicable; Buyer pays all import duties, charges, taxes; Not appropriate for containerized goods