INCOTERMS 2000 - THE NECESSARY LINK BETWEEN CONTRACTS OF SALE AND CONTRACTS OF CARRIAGE

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The first version of INCOTERMS was published in 1936. As commercial practice changes from time to time, some revisions of INCOTERMS are necessary. The latest revision took place in 2000. INCOTERMS have so far been satisfactorily used worldwide in the intersection between contracts of sale, carriage and insurance as well with documentary credits. The combination of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and INCOTERMS 2000 now constitutes a solid basis for the correct understanding and implementation of international contracts of sale.

Key words: INCOTERMS, international contracts for sale, 1980 UN Convention on Contracts for the International Sale of Goods, carriage of goods

INTRODUCTION

Since times past, merchants have used trade terms, such as FOB and CIF, to convey the basics of their transactions. However, these acronyms are far from sufficient as a tool for the understanding and implementation of their contracts. Thus, there is room for variations and misunderstandings. The International Chamber of Commerce, as one of its first initiatives to facilitate international trade, explored the understanding of trade terms in the 1920s and launched the first interpretive version of the most commonly used terms in INCOTERMS 1936.

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As commercial practice changes from time to time, revisions are needed to reflect contemporary methods of carrying goods, of implementing contracts of sale, of clearing goods for export and import and of using documents as evidence and tools in order to secure the rights of the entitled persons to receive the goods from carriers at agreed destinations.

As interpretation of trade terms from time to time would need an adjustments difficult to perform by legislation, the task is more appropriately dealt with by the International Chamber of Commerce, which through its national committees can obtain the information needed to reflect current commercial practice worldwide.

Thus, the combination of the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) and Incoterms 2000 constitutes a solid basis for the correct understanding and implementation of international contracts of sale.

HISTORY OF INCOTERMS

By the 1920's the International Chamber of Commerce had engaged in a study of the most commonly used trade terms publishing the results of the study in 1923. This first study was limited to six common trade terms as used in 13 different countries and was to be followed by a second published study in 1928 expanding the scope to the interpretation of trade terms used in more than 30 countries. The studies demonstrated disparities in the interpretation of the trade terms which required further measures resulting in the first version of Incoterms in 1936.[1] At that time, trade terms involving carriage of goods focused on carriage by sea and reflected the worldwide use of the terms FAS, FOB, C&F (later to be renamed CFR), CIF, Ex Ship, Ex Quay (now DES, DEQ). Further revision of Incoterms was suspended during the Second World War and the work was not resumed until the 1950s resulting in the 1953 version. A trade term for non-maritime transport was added, namely FOR-FOT ('Free On Rail-Free On Truck') as well as DCP ('Delivered Costs Paid') - now CPT - as an equivalent to CFR when land transport was intended. The words 'Free On Truck' are misleading as, semantically, they could refer to any truck

[1] See Eisemann, F, Die 'Incoterms'. Zur Klauselpraxis des internationalen Warenhandels, Vienna 1976, pp. 17-21.

regardless of whether it was used in connection with rail or road transport. In fact, the addition FOT in the 1953 version only concerned railway transport. No version of Incoterms ever referred to a trade term specifically to be used only in connection with road transport. In 1967, further trade terms were added addressing delivery at frontier (DAF) and delivery in the country of destination (DDP).

In 1976, a particular term for air transport, which received the somewhat peculiar name 'FOB Airport', was added. In a sense, the term reflects the confusion relating to the interpretation of 'FOB'. Where goods are to be carried by a ship, it is appropriate to interpret the acronym FOB as signifying that the goods should be delivered 'Free On Board' the ship and defining the exact point for the transfer of the risk of loss of or damage to the goods as the point where the goods pass the ship's rail. However, entry into an aircraft is hardly a practical risk division point for goods to be carried by air. Instead, handing over the goods to the air carrier would constitute the transfer of the risk of the goods. In this sense, the acronym FOB would follow American practice where it simply means delivery at a certain point unless the word 'vessel' is added, in which case FOB becomes equivalent to the term FOB as Incoterms used it in connection with maritime transport. FOB Airport remained in the 1980 version of Incoterms.[2]

The most important addition in Incoterms 1980 undoubtedly concerned the 'Free Carrier' term.[3] The reason for this addition had to do with the growth of the carriage of goods in containers signifying that the goods were not actually received by the maritime carrier at the ship's side but rather at some reception point ashore, usually at so-called container yards or container freight stations. The goods could either move in a container loaded by the seller at his premises for further carriage over land to the seaport to be subsequently lifted on board the container vessel or, alternatively, be delivered for stowage by the carrier itself into containers, usually at a terminal or other cargo handling facility in the seaport. Needless to say, defining the point for the transfer of the risk of loss or damage to the goods as the arrival onto the ship itself became wholly inappropriate. Instead, the relevant point, as with FOB Airport, would be the point of handing over the goods to the carrier. In order to further support that

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2 See Ramberg, J, Guide to Incoterms, 1980 ed, ICC Publ No 354, Paris 1980, pp. 36-39.

3 Ramberg, J, id pp. 26-31.

understanding, the name of the term, when first introduced in the 1980 version of Incoterms, became 'Free Carrier […] (named point)' with the acronym 'FRC'.[4]

Carrying goods in containers also triggered new documentary practice. While, traditionally, Bills of Lading were the only documents actually used when the goods were to be carried by sea, other variants now appeared similar to transport documents used for non-maritime carriage. Particularly when no sale of the goods in transit was contemplated, the Bill of Lading as a negotiable document with the particular function of permitting transfer of the rights under the Bill of Lading to another party in transit became unnecessary. This explains the developments towards so-called sea waybills without such a transferability function.[5] Thus, the seller could fulfil his obligation to tender the documents not only by using of the Bill of Lading but also by using other customarily used transport documents, such as a sea waybill. Consequently, the Free Carrier clause had to reflect this change of practice by referring to 'the usual document or other evidence of the delivery of the goods'.[6]

THE FREE CARRIER TERM

I think it is fair to say that the Free Carrier clause in the 1980 version of Incoterms was received with some scepticism and, indeed, even today would in some areas of the world be difficult to accept as a replacement for FOB, which in international trade enjoys a particular status solidified through the centuries. Generally, merchants are more concerned with costs than with risks which in most cases is a matter for cargo insurance. Thus, a buyer may become disinclined to accept Free Carrier, where he might have to pay costs occurring between the point at which the goods are handed over to the carrier and the point where the container is placed on board the container ship (transport handling charges, THC). Even though an addition to the Free Carrier term, such as 'THC to be paid by the seller, would solve the problem, the parties

4 See further Ramberg, J, in Eisemann, F, Die Incoterms heute und morgen. Zur Klauselpraxis des internationalen Warenhandels, Vienna 1980, pp. 291-315.

5 See Herber, R, Die einheitlichen Regeln des CMI über Seefrachtbriefe, Schriften des Deutschen Vereins für Internationales Seerecht Vol 80, Hamburg 1991.

6 Ramberg, J, Guide to Incoterms, 1980 ed, 31.

would in many cases prefer to retain the old practice of using FOB. Time and again, the ICC stresses the importance of avoiding attaching the risk of loss of or damage to the goods to a point subsequent to handing over the goods to the carrier appointed by the buyer. The seller loses the possibility to control what happens with the goods after delivery to the carrier and, since there is no contractual relation between the seller and the carrier when not appointed by the seller, it seems wholly inappropriate that the seller should retain the risk when the goods have been delivered to somebody else's contracting party, the carrier. The assumption that the use of FOB does not create any problems when cargo insurance has been taken out under the so-called transit clause, where also on-carriage to the ship would be covered, may entail considerable risks for the seller when not protected by his own insurance, since he cannot rely on the buyer's insurance when the buyer himself is at no risk before the goods pass the ship's rail. And even if the cargo insurer would pay, the seller would simply not have performed his obligations until he has been able to find goods in substitution for those that have been lost or damaged while in custody of the carrier appointed by the buyer. The aforementioned risks should be pretty obvious to anyone bothering to analyse the situation following from the use of FOB when there is no delivery at the ship's side but at an earlier point. However, many merchants do not seem to bother until they are hit by some of the mentioned misfortunes.

THE REVISIONS OF INCOTERMS 1990

The 1990 revision of Incoterms[7] further strengthened the position of the Free Carrier term, now with the acronym FCA instead of FRC. Since FCA could be used regardless of the type of transport contemplated including carriage of goods by road, which so far had not been blessed with any specific trade term, the particular trade terms for carriage of goods by air and rail were removed from the 1990 version of Incoterms. Another important addition was made in the 1990 revision in the A8-clauses dealing with the seller's duty to provide proof of delivery and the transport document. Here, in the last sentence, the

[7] Ramberg, J, Novel features of the ICC Incoterms 1990, *Congress of the United Nations Commission on International Trade Law. Uniform commercial law in the twenty-first century,* New York, pp. 18-22, May 1992. New York 1995, pp. 77-83.

following words were added: 'Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraphs may be replaced by an equivalent electronic data interchange (EDI) message'.[8]

THE AMENDED CUSTOMS CLEARANCE OBLIGATIONS IN INCOTERMS 2000

When Incoterms came up for revision again in the late 1990s, it was hard to point at any particular change of commercial practice which required amendments or additions to Incoterms 1990. The revision work came to focus around the possibility of updating the FOB term and adapting the old term EXW representing the seller's minimum obligations in order to properly reflect what actually happens in practice. While, certainly, FOB ought not to reflect anything but delivery *to the ship*, as distinguished from FCA where delivery occurs upon handing over the goods *to the carrier*, it was investigated whether a more practical notion could be found than the old passing of the ship's rail as a risk transfer point. There were considerable drafting efforts but they all fell, either because they were simply wrong or did not reflect all the possible variants actually used for delivery of the goods to the ship. Wording comprising all such possible variants - e.g. 'delivery to the ship as appropriate depending upon the nature of the cargo and the loading facilities' - might be correct but certainly unable to provide any specific guidance. As a result, the efforts were abandoned and FOB stands in the same manner as it always had in Incoterms.

However, there was another consequence of the notion of 'passing the ship's rail' which was observed. The importance of the trade term FOB has, indeed, been so strong that it signifies a border between the seller's and buyer's responsibility, so that, traditionally, the point has also served as the point for the division of the obligations to clear the goods for export and import. In this sense, the trade term Free Alongside Ship (FAS) under Incoterms has meant that the seller escapes the obligation to clear the goods for export. In essence, it then becomes a domestic sale equivalent to the sale to a trading house which in turn would sell the goods to a second buyer for export. This understanding of FAS was removed in Incoterms 2000 where in the preamble to the term there

[8] Ramberg, J, Guide to Incoterms, 1990 ed, 81, pp. 144-145.

is a capitalized reminder that the change is a reversal from previous versions of Incoterms. A corresponding change was made in the clause Delivered Ex Quay (DEQ) where, due to the fact that the goods had to enter into the country of destination when landed on the quay, the seller according to the previous versions of Incoterms had to arrange for import clearance. This obligation is now on the buyer.[9] Consequently, with respect to clearing the goods for export and import Incoterms 2000 reflect a considerable simplification, namely that the seller clears the goods for export and the buyer for import with only two exceptions. As EXW represents the seller's minimum obligation, the principle that he simply has to make the goods available for the buyer at his own premises or some other indicated place without any further obligations is retained. Therefore, it is up to the buyer to clear the goods for export. And when the term Delivered Duty Paid (DDP) has been used, the term explicitly says that the shipper has to deliver the goods with duty paid and, as a consequence, he would also have to undertake the import clearance obligation.

In connection with celebrating 70 years of Incoterms, voices were again raised that Incoterms should be further revised. However, the answers to the questionnaire sent to the national committees of the ICC worldwide did not indicate any problem sufficiently important to require a further revision at this time. So, there is certainly no principle that Incoterms ought to be revised every ten years but rather that there is some merit in consolidating commercial practice using Incoterms as is done in the present version Incoterms 2000.

INCOTERMS AND CISG

Although trade terms play a very important role in international sales transactions, it was deemed inappropriate to deal with them in CISG itself. As has been demonstrated in explaining the history of Incoterms from 1936 up to its 2000 version, international commercial practice would require changes from time to time. Under such circumstances, it would be impractical to include definitions in an international convention which certainly would not be flexible enough to account for necessary adaptation to changed commercial

[9] See with respect to these changes Ramberg, J, Guide to Incoterms, 2000 ed, ICC Publ 620, Paris 2000, pp. 156, 159.

practice. Instead, it was left to the ICC working with UNCITRAL to endorse the revisions of Incoterms from time to time.

In essence, Incoterms provide specificity to the general provisions of CISG in Arts 31, 67-69. Also, Incoterms are different compared with CISG as their main purpose is to tell the parties what to do but, except in some cases of premature passing of the risk of the loss of or damage to the goods, not to tell them what happens if they do not do it. In other words, the consequences of breach of contract are generally outside the scope of Incoterms. However, in some cases, Incoterms differ from CISG and would in such cases supersede by virtue of CISG Article 6 permitting deviations from the convention under the principle of freedom of contract. Perhaps the most important difference concerns the seller's obligations under EXW. Under Incoterms the seller simply has to make the goods available for the buyer and, as soon as this has been done as agreed the risk of loss of or damage to the goods transfers to the buyer, even though he may not have become aware that the goods were in fact available for him. Nevertheless, for the risk to transfer the seller would have to prove that the goods have been duly appropriated to the contract, that is to say, 'clearly set aside or otherwise identified as the contract goods' (EXW B5). Normally he would do that by a notice to the buyer which is required under EXW A7. A failure to give such notice would constitute a breach of contract which would compensate the buyer for any loss as a consequence of the breach according to CISG Art. 74.[10]

INCOTERMS AND ADDED CONTRACTUAL RELATIONS

As we have seen, Incoterms focus, in particular, on the seller's obligations in contracts where he has to hand over the goods for carriage (FCA, FAS, FOB, CFR, CIF, CPT and CIP). Under all these trade terms, the seller either fulfils his shipment obligation simply by handing over the goods for carriage (the F--terms) or by contracting and paying for the carriage as well (C-terms). However, the critical point for the transfer of the risk of loss of or damage to the goods coincides in the F- and the C-terms, which may appear surprising, as the point

[10] See further on the difference between Incoterms 2000 and CISG, Ramberg, J, To what extent do Incoterms 2000 vary articles 67.2, 68 and 69, The Journal of Law and Commerce, University of Pittsburgh Vol. 25, pp. 219-222.

mentioned after the respective C-term is the point up to which the seller has to arrange and pay for the carriage. In practice, the important point where the seller actually fulfils his obligation - namely in the country of shipment - would usually not be indicated in contracts under C-terms. Therefore, it is frequently overlooked that the C-terms actually have two critical points, one for the transfer of the risk of loss of or damage to the goods (e.g. the passing of the ship's rail under FOB, CFR and CIF-contracts) and another one indicating where the added obligation to arrange and pay for carriage comes to an end. This being so, merchants frequently believe that the shipper has not fulfilled the contract until the goods actually arrive at destination or, in other words, that the C--terms indicate an obligation to deliver the goods at destination. However, such an extended obligation only occurs under the D-terms, 'D' signifying Delivery (DAF, DES, DEQ, DDU and DDP). This mistake is further exacerbated by the fact that under the C-terms the seller will become the contracting party to the carrier, so that measures have to be taken in order to ensure that the buyer could exercise rights in contract against the carrier. If that is achieved under a contract of carriage conforming with the requirements of Incoterms, then the seller would have duly performed his obligation.

The important A8-clauses in CFR, CIF, CPT and CIP specify exactly what type of document the seller must provide in order to make it possible for the buyer to ensure that the seller has fulfilled his obligation to contract for carriage as set forth in clause A3. In the maritime terms CFR and CIF, reference is in A3 made to 'the carriage of the goods to the named port of destination by the usual route in a sea-going vessel', while in CPT and CIP reference is made to 'the carriage of the goods to the agreed point at a named place of destination by a usual route and in a customary manner'. While in CPT and CIP reference is made to 'the usual transport document', it is added in CFR and CIF that the document 'must cover the contract goods, be dated within the period agreed for shipment, enable the buyer to claim the goods from the carrier at the port of destination and, unless otherwise agreed, enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer'. Thus, the seller's obligations under CFR and CIF would achieve two things. First, ensure that the buyer gets the right to claim the goods from the carrier at the port of destination, although the contract of carriage was made by the seller. Second, unless otherwise agreed, the document must be such that the buyer could use the document for the sale of goods in transit. No other document than the Ocean Bill of Lading could fulfil the latter transferability function. If, however,

an electronic transfer of rights is agreed upon, a 'notification to the carrier' may suffice whether it is made electronically or otherwise.[11]

It also appears from the wording of the A8-clauses of CFR and CIF that efforts have been made to achieve compatibility with documentary credit transactions. Here, unless the document covers the contract goods and is dated within the period agreed for shipment, the document would not comply with the requirements under usual documentary credit instructions. Also, when bills of lading have been issued in several originals a full set of such originals must be presented. Otherwise, the buyer would not control the disposition of the goods in the sense of CISG Art 58(2).[12]

The letter 'I' in CIF and CIP signifies Insurance. In fact, this is the only difference compared with CFR and CPT which in every other respect would be identical to CIF and CIP. It follows from clause A3 b of CIF and CIP that the seller must obtain at his own expense cargo insurance and, further, that the insurance should 'be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses'. One may well ask why reference has been made to the 'minimum cover' which, indeed, would be quite insufficient for most goods carried by sea, except some commodities which are more or less insensitive to hazards to which the goods might be exposed, such as bad stowage, rough cargo handling or penetration of sea water. In fact, the minimum cover would only apply when something happens to both ship and cargo, in which case the insurance would also cover the obligation to contribute in general average to cover such expenditure which might have been incurred in order to salvage the ship and/or the cargo. There might be different explanations for the choice of the minimum cover. It might be practical to depart from the minimum and then add to the minimum whenever this is requested by the buyer. In fact, since insurance of the goods in most cases would be covered by general arrangements by both sellers and buyers under annual contracts with the insurers, ad hoc insurance arrangements are usually only required for sale of commodities. As we have seen, such sales would frequently be repeated while the goods are in transit. As the insurance

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[11] See Ramberg, J, International Commercial Transactions, 3 ed, Stockholm 2004, ICC Publ No 691, 112 and also Ramberg, J, Sea waybills and electronic transmission [in The Hamburg Rules: a choice for the E.E.C.?, Antwerp 1994].

[12] Cf. ICC Uniform Customs and Practice for Documentary Credits (UCP 600) Arts 14 e, 19 a. ii-iii, 20 a. ii-iv, 21 a. ii-iv, 22 a. ii-iv, 23 a. ii and a. iv, 24 a. ii-iii and 24 c.

arrangements made by subsequent prospective buyers may be unknown at the time of shipment, it is practical to depart from the minimum in order to avoid double insurance.

STATUS AND FUTURE OF INCOTERMS

Needless to say, it is preferable to explicitly refer to Incoterms in their present version in the contract of sale. If such reference is made, it is not necessary to use Art 9 CISG as a default rule incorporating Incoterms in the contract of sale as an international custom of the trade. It may well be true that in some areas of the world the contracting parties 'ought to have known' of Incoterms and that Incoterms are proven to be 'widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned'. However, while this may be true in some areas of the world it may be looked upon differently in other areas. Not surprisingly then, opinions differ as to whether Incoterms amount to an international custom of the trade.[13] Be that as it may, Incoterms have so far been satisfactorily used worldwide in the intersection between contracts of sale, carriage and insurance as well as with documentary credits and there is no reason to expect that this will not continue for the future.

[13] See Ramberg, J, and Herre, J, Internationella köplagen (CISG), 2nd ed, Stockholm 2004, 130-131, Erauw, J, The Journal of Law and Commerce, University of Pittsburgh Vol 25, 203 at 212 and Schwenzer, I, and Fountoulakis, C, International Sales Law, New York 2006, pp. 100-101.

Sažetak

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INCOTERMS 2000 - POTREBNA VEZA IZMEĐU UGOVORA O KUPOPRODAJI I UGOVORA O PRIJEVOZU

Prva verzija Međunarodnih trgovačkih termina INCOTERMS objavljena je 1936. Kako se trgovačka praksa mijenja s vremena na vrijeme, potrebno je bilo izvršiti i povremene revizije INCOTERMS. Posljednja takva revizija bila je 2000. godine. INCOTERMS se na zadovoljavajući način koristi širom svijeta kao veza između ugovora o kupoprodaji, ugovora o prijevozu i ugovora o osiguranju te dokumentarnih akreditiva. Kombinacija Konvencije UN o ugovorima o međunarodnoj kupoprodaji iz 1980. i INCOTERMS 2000 čini čvrstu osnovu za valjano razumijevanje i primjenu međunarodnih ugovora o kupoprodaji.

Ključne riječi: INCOTERMS, ugovori o međunarodnoj kupoprodaji, Konvencija UN o ugovorima o međunarodnoj kupoprodaji iz 1980, ugovori o prijevozu robe

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