Goodbye Incoterms 2010, Welcome Incoterms 2020: A Brief Analysis

By Sharifah Saeedah Syed-Mohamed[1]

I. Introduction

The study of international trade law can be said to entail the legal relationships between parties who sell and buy goods from each other – the contract of sale; their relationships with persons willing to carry the goods from one place to another – the contract of carriage; the arrangements they have with insurers to protect the goods – the contract of insurance, and any financing agreements with banks of financial institutions to facilitate payment for the goods in question.

The main features of international commercial law are, among others, to ensure certainty in the parties' rights and obligations by ensuring that the law is consistent and predictable; to provide sufficient flexibility to the parties' need to do business by permitting the recognition of trade custom and usage and also to recognise the international dimension of commerce by the application of specialised rules of conflict of laws, the admittance of practice and rules of international organisations as guiding the interpretation and application of commercial law.[2]

Bilateral and multilateral treaties play an important part in international trade law. For instance, a number of bilateral friendship treaties involve states granting each other advantages in relation to imports and exports, rights of establishment and free movement of services, trade in general and rights of carriage of goods by sea. Some multilateral treaties regulate trade between the contracting states in a general way. Many multilateral treaties grant trade regulatory powers to particular international organisations such as the United Nations or the World Bank while others seek to unify the law in order to facilitate international trade and financing.[3]

The purpose of some treaties is to liberalise trade between the contracting states whilst other treaties are aimed at economic integration. Another group of treaties further aims at unification of the law where they introduce common substantive rules for legal relationships between private persons and companies.[4] The provisions of a treaty or uniform law become part of the national law of the contracting states concerned. However, treaties and uniform laws are often interpreted differently in each country. Usually, there is no common forum that can give a consistent interpretation on the provisions of those treaties. A sale contract may be governed by different national laws depending on the court seized of the matter and its conflict of laws rules, which gives little legal certainty to

---

1 Senior Lecturer, Faculty of Law, Universiti Teknologi MARA, Shah Alam, Selangor, Malaysia. Email: sharifah966 @uitm.edu.my.

2 Chuah, Jason, *Law of International Trade: Cross-Border Commercial Transactions* (6th ed London, Sweet & Maxwell 2019) at [2–3].

3 Houtte, HV, *The Law of International Trade*, (2nd ed London, Sweet & Maxwell 2002) at 2.

4 One of the most current successful regimes for international trade is the United Nations Convention on the International Sale of Goods (CISG), which is also known as the Vienna Convention. However, discussion on the application of CISG in international trade is outside the scope of this paper.

the seller and buyer in such contracts. It is upon these premises that early initiatives were taken by UNIDROIT[5] to develop uniform rules in respect of international sales.

II. The International Chamber of Commerce (ICC)

A. The ICC's Origins

The Incoterms rules devised by the International Chamber of Commerce (ICC) are rules that explain standard terms that are used in contracts for the international sale of goods. The ICC was founded in 1919 with an international secretariat based in Paris. Its overriding aim remains unchanged, namely to serve world business by promoting trade and investment, open markets for goods and services, and the free flow of capital.[6]

ICC has evolved tremendously since those early post-war days when business leaders from the Allied Nations[7] met for the first time in Atlantic City, the United States of America. The original nucleus, representing the private sectors of Belgium, Britain, France, Italy and the United States, has expanded to become a world business organization with thousands of member companies and associations in and around 130 countries. Members include many of the world's most influential companies and represent every major industrial and service sector.[8]

1. The voice of international business

Traditionally, ICC has acted on behalf of businesses in making representations to governments and intergovernmental organizations. Three prominent ICC members served on the Dawes Commission, which forged the international treaty on war reparations in 1924, seen as a breakthrough in international relations at the time. A year after the creation of the United Nations (UN) in San Francisco in 1945[9], ICC was granted the highest level consultative status with the UN and its specialized agencies. Ever since, it has ensured that the international business view receives due

---

5 The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental Organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives. Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute. Membership of UNIDROIT is restricted to States acceding to the UNIDROIT Statute. UNIDROIT's 63 member States are drawn from the five continents and represent a variety of different legal, economic and political systems as well as different cultural backgrounds. <https://www.unidroit.org/about-unidroit/overview>.

6 <http://www.iccwbo.org/id93/index.html>.

7 The Allied Nations were Allies of World War II. The major allies consisted of France, Poland, the United Kingdom, the United States of America, the Union of Soviet Socialist Republics (USSR) and China. Other allies included Australia, Belgium, Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, Mexico, the Netherlands, New Zealand, Norway, the Philippine Commonwealth, Albania, the Union of South Africa and Yugoslavia. In December 1941, U.S. President Franklin Roosevelt devised the name "United Nations (UN)" for the Allies. The Declaration by United Nations, on 1 January 1942, was the basis of the modern UN. "Allies of World War II". <http://en.wikipedia.org/wiki/Allies_of_World_War_II>.

8 n 6.

9 The United Nations was established on 24 October 1945 with 51 member countries. <http://www.un.org/en/aboutun/index.shtml>.

weight within the UN system and before intergovernmental bodies and meetings such as the G8[10] where decisions affecting the conduct of business are made.[11]

2. Defender of the multilateral trading system

ICC's reaches – and the complexity of its work – have kept pace with the globalization of business and technology. In the 1920s, ICC focused on reparations and war debts. A decade later, it struggled vainly through the years of depression to hold back the tide of protectionism and economic nationalism. When war broke out in 1939, ICC assured continuity by transferring its operations to neutral Sweden.[12]

In the post-war years, ICC remained a diligent defender of the open multilateral trading system. As membership grew to include more and more countries of the developing world, the organization stepped up demands for the opening of world markets to the products of developing countries. ICC continues to argue that trade is better than aid. In the 1980s and the early 1990s, ICC resisted the resurgence of protectionism in new guises such as reciprocal trading arrangements, voluntary export restraints and curbs introduced under the euphemism of "managed trade".[13]

3. Challenges of the 21st century

After the disintegration of communism in Eastern Europe and the former Soviet Union, ICC faced fresh challenges as the free market system won wider acceptance than ever before, and countries that had hitherto relied on state intervention switched to privatisation and economic liberalisation. As the world enters the 21st century, ICC is building a stronger presence in Asia, Africa, Latin America, the Middle East, and the emerging economies of eastern and central Europe. Today, ICC's commissions of experts from the private sector cover every specialised field of concern to international business. Subjects range from banking techniques to financial services and taxation, from competition law to intellectual property rights, telecommunications and information technology, from air and maritime transport to international investment regimes and trade policy.[14]

Self-regulation is a common thread running through the work of the commissions. The conviction that business operates most effectively with a minimum of government intervention inspired ICC's voluntary codes. Marketing codes cover sponsoring, advertising practice, sales promotion, marketing and social research, direct sales practice, and marketing on the Internet.[15]

4. Practical Services to Business

ICC communicates with members all over the world through its conferences and biennial congresses. As a member-driven organization, with national committees in 84 countries, it has adapted its structures to meet the changing needs of business. Many of them are practical services, like the ICC International Court of Arbitration, which is the longest established ICC institution. The

---

10 The Group of Eight (G8, and formerly the G6 or Group of Six and also the G7 or Group of Seven) is a forum, created by France in 1975, for governments of six countries in the world, namely, France, Germany, Italy, Japan, the United Kingdom, and the United States. In 1976, Canada joined the group (thus creating the G7). In becoming the G8, the group added Russia in 1997. In addition, the European Union is represented within the G8, but cannot host or chair. "G8". <http://wikipedia.org/wiki/G8>.

11 n 6.

12 n 6.

13 n 6.

14 n 6.

15 n 6.

Court is the world's leading body for resolving international commercial disputes by arbitration. The first Uniform Customs and Practice for Documentary Credits (UCP) was first introduced in 1933 and the current version is now the UCP 600, which came into effect in 1 July 2007. Bankers, lawyers, traders, transporters and even academics throughout the world use these rules and they serve as a useful tool in relation to the application of documentary credits. A supplement to UCP 600, called the eUCP, was added in 2002 to deal with the presentation of all electronic or part electronic documents.[16]

In 1936, the first nine Incoterms were published, providing standard definitions of universally employed terms like CIF[17] and FOB[18], and they are constantly revised and updated by the ICC. The current version is the Incoterms 2010, which came into effect on 1 January 2011 is soon to be phased out and replaced with the Incoterms 2020, which will come into force on 1 January 2020. In 1951 the International Bureau of Chambers of Commerce (IBCC) was created. It rapidly became a focal point for cooperation between chambers of commerce in developing and industrial countries, and took on added importance as chambers of commerce of transition economies responding to the stimulus of the market economy. In 2001, on the occasion of the 2nd World Chambers Congress in Korea, IBCC was renamed the World Chambers Federation (WCF), clarifying WCF as the world business organization's department for chamber of commerce affairs. WCF also administers the ATA Carnet system[19] for temporary duty-free imports, a service delivered by the chambers of commerce, which began in 1958 and is now operating in over 57 countries. Another ICC service, the Institute for World Business Law was created in 1979, to study legal issues relating to international business.[20]

III. The Incoterms in the Modern World

The global economy has given businesses broader access than ever before to markets all over the world. Goods are sold in more countries, in larger quantities and in greater variety but as the volume and complexity of international sales increase, so do possibilities for misunderstandings and costly disputes when sales contract are not adequately drafted. Incoterms, the official ICC rules for the interpretation of trade terms facilitate the conduct of international trade. Reference to the Incoterms in a sales contract defines clearly the parties' respective obligations and reduces the risk of legal complications.[21] Incoterms rules explain standard terms that are used in contracts for the

16 n 6.

17 "Cost, Insurance and Freight" means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract and pay the costs and freight necessary to bring the goods to the named port of destination. The seller also contracts for insurance cover against the buyer's risk of loss of or damage to the goods during the carriage. Definition obtained from Ramberg, J, ICC Guide to Incoterms 2010, (ICC Publications, Paris, 2011) at 199.

18 "Free on Board" means that the seller delivers when the goods on board the vessel nominated by the buyer at the named port of shipment or procure the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards. The FOB rule is to be used only for sea or inland waterway transport. Definition obtained from Ramberg, above n 16 at 171.

19 ATA Carnets are international customs documents permitting the duty-free and tax-free temporary export and import of goods for up to one year. Carnets are the easiest way to speed through Customs and to save money. <https://iccwbo.org/resources-for-business/ata-carnet/>.

20 n 6.

21 Foreword to Incoterms 2000 by Maria Livanos Cattaui, former Secretary General of the ICC (July 1996 – June 2005).

sale of goods. They are essential ICC tools that help traders avoid misunderstandings by clarifying the costs, risks, and responsibilities of both buyers and sellers.

Since the introduction of Incoterms by the ICC in 1936, this it has been regularly updated to keep pace with the development of international trade. Incoterms 2000 take into account the spread of customs-free zones, the increased use of electronic communications in business transactions and changes in transport practices.[22] Since the last revision in 2000, much has changed in global trade. Cargo security is now at the forefront of the transportation agenda for many countries. In addition, the United States' Uniform Commercial Code was revised in 2004, resulting in a deletion of US shipment and delivery terms. The Incoterms 2010 reflects these changes and also others.[23]

IV. The Evolution of the Incoterms Rules

After their initial introduction in 1936, the Incoterms rules were revised for the first time in 1957 and thereafter in 1967, 1976, 1980, 1990 and 2000.[24] It is put forward that the main purpose of the Incoterms rules is to reflect international commercial practice. Further, a revision of the Incoterms rules indicates that something important has taken place in commercial practice. For example, the first version of the Incoterms rules was clearly focused on commodity trading and fixed the important delivery points at the ship's side or at the moment when the goods are taken on board the ship.[25]

When carriage of goods by rail had increased, it was therefore necessary to introduce the appropriate terms and it is for such purpose that the Incoterms rules 1957 introduced the FOR (Free on Rail) and the FOT (Free on Truck) terms. In 1967, the ICC felt that it was necessary to add terms for cases in which the seller undertakes to deliver the goods at destination. In such cases, the seller concludes a contract of carriage in order to fulfill his obligation to deliver the goods to the buyer at destination. In 1976, a specific term for air transport was added, namely FOB Airport. In the 1980 revision of the Incoterms rules, it was necessary to add CIP (Carriage and Insurance Paid To) for non-maritime transport as an equivalent to CIF, under which the seller undertakes to arrange and pay for the carriage and insurance. As a result, the terms CPT (Carriage Paid To) and CIP, corresponding to CFR (Cost and Freight) and CIF for maritime transport, were both added to the Incoterms rules? The 1990 revision of the Incoterms rules was partly triggered by the shift from paper documents to electronic communication. As a result, a paragraph was added in the clauses dealing with the seller's obligation to tender documents to the buyer stating that paper documents could be replaced by electronic messages if the parties had agreed to communicate electronically.[26]

What then is the reason for the revision of the Incoterms rules resulting in the Incoterms 2010 rules? It appears that the main problem with the Incoterms 2000 rules was not so much what they contained but rather that it was not sufficiently clear how they should be used in practice. In addition, it was felt that it is important to expand the use of the Incoterms rules, particularly in the United States, where a possibility to do so has arisen as a result of the removal of the 1941

22 n 21.

23 <http://www.iccwbo.org/Incoterms/index.html?id=3042>.

24 The latest revision is the Incoterms 2020 which will be discussed later in this paper.

25 n 17 at 8.

26 n 17 at [8–9].

definitions of trade terms from the Uniform Commercial Code (UCC).[27] It is stated that there are limits to what can be done to increase the understanding of the Incoterms rules. In particular, merchants retain old habits and are not easily persuaded to depart from the traditional maritime terms, although this is clearly necessary when contemplating non-maritime transport. In order to promote a better understanding of the Incoterms rules, the 2010 version starts by presenting trade terms that can be used for any mode or modes of transport and only then presents trade terms that can be used for sea and inland waterway transport.[28]

Another frequent misunderstanding concerns the very purpose of the Incoterms rules. Although they are needed to determine key obligations of sellers and buyers with respect to the different modalities of delivery, transfer of risk and cost, the terms do not represent the whole contract. It is also necessary to determine what rules apply when the contract is not performed as expected, owing to various circumstances, and how disputes between the parties should be resolved. While the Incoterms enlighten the parties on what to do, they unfortunately do not explain what happens if the parties do not do so. For this purpose, the parties need to lay down applicable rules in a contract or by using a standard form contract as a supplement. In practice, disputes might nevertheless arise owing to unexpected events that the parties have failed to consider in their contract in a clear and conclusive manner. In such cases, the applicable law may provide a solution. Fortunately, the CISG has now become recognized worldwide, thus contributing significantly to transparency and effective dispute resolution in international trade.[29]

Furthermore, the 2010 version of the Incoterms rules, have been officially endorsed by the United Nations Commission on International Trade Law (UNCITRAL), confirming their position as the global standard for international business transactions. UNCITRAL, whose mandate is to remove legal obstacles for international trade, applauded ICC for its "valuable" contribution to facilitating the conduct of global trade by making the Incoterms 2010 rules simpler and clearer, reflecting recent developments in international trade.[30]

V. The Incoterms Rules, Their Functions and Referencing the Incoterms Rules in a Contract of Sale

As it is understood, the Incoterms is the abbreviation of the international commercial terms and the chosen Incoterms rule is a term of the contract of sale and not of the contract of carriage. Although the Incoterms rules are primarily intended for international sales, they can also be applied to domestic contracts by reference. Trade terms are, in fact, key elements of international contracts of sale, since they allocate the roles of the contracting parties with respect to carriage of the goods from the seller to the buyer; export, import and security-related clearance; and the division of costs and risks between the parties.[31]

Merchants tend to use short abbreviations such as FOB and CIF to clarify the distribution of functions; costs and risks relating to the transfer of goods from the seller to the buyer but misunderstandings frequently arise concerning the proper interpretation of these and similar

27 n 17 at 9.

28 n 17 at 10.

29 n 28.

30 <http://www.uscib.org/index.asp?documentID=4393>.

31 n 17 at 16.

expressions. For this reason, it was considered important to develop rules for the interpretation of the trade terms that the parties to a contract of sale could agree to apply and the Incoterms rules constitute such rules of interpretation.[32]

Although the Incoterms rules, in so far as they reflect generally recognized principles and practices, may become part of the contract of sale without express reference, the contracting parties are strongly advised to include in their contract in conjunction with the trade term the words "the Incoterms 2010 rules" and to verify whether a standard contract used in their contract of sale contains such a reference. If that is not the case, then the standardized reference "the Incoterms 2010 rules" must be superimposed to avoid the application of any previous version of the Incoterms rules.[33]

VI. What the Incoterms Rules Are Not Intended to Perform

A. Incoterms 2010

Although the Incoterms rules are incorporated into the contract of sale, it is imperative to take note that they are only rules for the interpretation of terms of delivery, and not of other terms of the contract of sale. The Incoterms rules do not, primarily, deal with the following:

1. Transfer of property in the goods

In many jurisdictions, the transfer of property rights in the goods requires that the party take possession of the goods either directly or indirectly through the transfer of documents, such as the maritime bill of lading, controlling the disposition of the goods. However, in some jurisdictions, the transfer of property rights in the goods may depend solely on the intention of the contracting parties. Frequently, the contract of sale determines whether the buyer has become the owner of the goods. In some instances, the buyer may not become the owner when the seller, under a purported retention of title clause, may have decided to retain title to them until he has been paid. In such an instance, the applicable law will decide the extent to which such clauses are effective in protecting the seller when he has surrendered possession of the goods to the buyer.[34]

2. Relief from obligations and exemptions from liability in case of unexpected or unforeseen circumstances

Although, according to the Incoterms rules, the parties undertake obligations to perform various tasks to the benefit of the other party, such as procuring carriage and clearing the goods for export and import, they may be relieved from such obligations or from the consequences of non-performance, if they can benefit from exemptions under the applicable law or terms of their contract other than those concerning the Incoterms rules. For instance, under Article 79 of the CISG, the parties may be relieved from their obligations if they are prevented from performing due to reasonably unforeseeable and unavoidable impediments beyond their control. It is noted that

32 n 31.

33 n 31.

34 n 17 at [17–18].

standard contracts typically contain explicit *force majeure*, relief or exemption clauses essentially corresponding to the main principle of Article 79 of the CISG.[35]

3. Consequences of breaches of contract

The Incoterms 2010 rules, in the A5, B5 and A6 and B6 clauses,[36] deal with the transfer of risks and the division of costs between the parties. It follows from the A5 and B5 clauses that the risk may be transferred from the seller to the buyer before the goods have been delivered, if the buyer has failed to fulfill his obligation to take delivery as agreed, or to give appropriate notice to the seller when the buyer is to nominate the carrier under the F-terms.[37] In these cases, costs arising from the buyer's failure to fulfill his obligations would also fall upon him under the B6 clauses of the Incoterms rules. However, apart from these specific cases involving the buyer's breach, the Incoterms rules do not deal with other consequences following from breaches of the obligations under the contract of sale. Such consequences follow from the applicable law or other terms of the contract.[38] For instance, Article 50 of the CISG provides a remedy to the buyer should the seller delivered goods that do not conform to the contract.

B. Incoterms 2020

Similar to the Incoterms 2010, the Incoterms 2020 rules are merely rules and therefore not a substitute for a contract of sale.[39] The rules are devised to reflect trade practice for no particular type of goods or any type of goods for that matter. They can be used as much for the trading of a bulk cargo of iron ore as for five containers of electric equipment or ten pallets of air freighted fresh flowers.[40] Specifically, the Incoterms 2020 do not deal with the following matters, namely, whether there is a contract of sale at all; the specifications of the gods sold; the time, place, method or currency of payment of the price; the remedies which can be sought for breach of the contract of sale; most consequences of delay and other breaches in the performance of contractual obligations; the effect of sanctions; the imposition of tariffs; export or import prohibitions; *force majeure* or hardship; intellectual property rights or the method, venue, or law of dispute resolution in case of such breach.[41] Perhaps most importantly it must be stressed that the Incoterms 2020, similar to the Incoterms 2010, do not deal with the transfer of property, title or ownership of the goods sold.[42]

Notwithstanding the above, this does not mean that the Incoterms rules have totally no impact on other contracts in international trade, such as the contract of sale, insurance or a letter of credit. Although the Incoterms rules do not form part of such contracts, goods are exported and imported through a network of contracts that, in an ideal world, should match one with the other. Thus, the

---

35 n 34.

36 In the Incoterms 2010, the A terms refer to the seller's obligations and the B terms refer to the buyer's obligations.

37 The F-terms in the Incoterms rules 2010 are FCA (Free Carrier), FAS (Free Alongside Ship) and FOB (Free on Board). The letter "F" signifies that the seller must hand over the goods to a nominated carrier Free of risk and expense to the buyer. n 16 at 49.

38 n 17 at 19.

39 Incorporating the CISG into the contract of sale can accommodate the sale aspect.

40 Incoterms 2020 by the International Chamber of Commerce (ICC). ICC Rules For the Use of Domestic and International Trade Terms (ICC Publication, Paris, 2019) at 2.

41 n 40.

42 n 40 at 3.

sale contract, for example, will require the tender of a transport document issued by the carrier to the seller and/or the shipper under a contract of carriage against which the seller and/or the shipper/beneficiary might wish to be paid under a letter of credit. Where the three contracts match, problems are unlikely to arise. However, when they do not, problems will rapidly arise.[43]

It can be argued that it is very much in the interest of all the parties to the different contracts in the network to ensure that the carriage or insurance terms that they have agreed upon with the carrier or insurer, or the terms of the letter of credit, comply with what the contract of sale stipulated in relation to the ancillary contracts in terms of documents that need to be obtained or tendered. Such task does not fall on the carrier, insurer or the bank providing the letter of credit, none of whom are party to the contract of sale and none of them of whom are, therefore, a party to or bound by the Incoterms 2020 rules. It is, however, in the seller's and buyers best interest to try to ensure that the different parts of the network of contracts correspond with each other.[44]

VII. What Does the Incoterms Rules Intend to Perform?

The Incoterms 2020 rules explain a set of eleven of the most commonly used three-letter trade terms namely, EXW (Ex Works); FCA (Free Carrier); CPT (Carriage Paid To); CIP (Carriage and Insurance Paid To); DAP (Delivered At Place); DPU (Delivered At Place Unloaded); DDP (Delivered Duty Paid); FAS (Free Alongside Ship); FOB (Free On Board); CFR (Cost and Freight) and CIF (Cost Insurance and Freight), reflecting business to business practice in contracts for the sale and purchase of goods.[45]

In relation to the abovementioned terms, the Incoterms 2020 rules describe:

1. The obligations of the sellers and buyers, for instance, in relation to the carriage and insurance of goods, shipping documents and export and import licences;
2. When does the risk transfers from the seller to the buyer; and
3. The costs to be borne by the parties, for example, transport costs, packaging, loading and unloading costs and also security related costs.[46]

Similar to the Incoterms 2010 rules, the 'A' articles in the Incoterms 2020 rules represents the seller's obligations and the 'B' articles represent the buyer's obligations:

> For instance, in a CIF term, 'The seller must deliver the goods either by placing them on board the vessel or by procuring the goods so delivered. In either case, the seller must deliver the goods on the agreed date or within the agreed period and in the manner customary at the port.' (A2).[47] On the buyer's part, 'The buyer must take delivery of the goods when they have been delivered under A2 and receive them from the carrier at the named port of destination.' (B2).[48]

Taking the CIF terms as an illustration, the Explanatory Notes for Users in the 2020 rules explained in greater detail where delivery of the goods takes place and risk passes from the seller to the buyer;

43 n 40 at 9.

44 n 43.

45 n 40.

46 n 40.

47 n 40 at 126.

48 n 40 at 127.

the mode of transport involved, namely for sea or inland waterway transport only; the meaning of 'or procuring the goods so delivered in A2;[49] the difference between ports of delivery and ports of destination;[50] whether the shipment port must be named; identifying the destination point at the discharge port; scenarios where multiple carriers are involved; contract of insurance; unloading costs and also export and import clearance.[51] Explanatory notes such as these were not in the Incoterms 2010 rules.

VIII. The Demise of The Ship's Rail in Incoterms 2010

One of the most significant changes made to the Incoterms rules 2010 is to the concept of the "ship's rail" as was found in the previous editions of the Incoterms rules. The concept of the imaginary ship's rail is synonymous with the FOB term and has caused considerable difficulties in the past, in particular where the division of risks between the seller and buyer is concerned. In *Pyrene & Co v Scindia Steam Navigation Co*,[52] the plaintiff was able to recover £200 from the defendant carrier, after the carrier was found to be negligent in loading the goods which caused damage prior to the goods crossing the 'ship's rail'. This case raises questions of liability if the damage occurs at any point other than after crossing the 'ship's rail'. Devlin J stated that if the goods are damaged during loading, whether that damage occurs on either side of the 'ship's rail', then the carrier's liability for negligence would have to extend to cover the damages.[53]

The Incoterms rules 2010, defined the FOB term as "the seller delivers the goods *on board the vessel* nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards"[54] as opposed to "the seller delivers when the goods *pass the ship's rail* at the named port of shipment" in the Incoterms rules 2000. It is suggested that under the Incoterms rules 2010, for sea and inland waterway transport, the biggest change has been in the FOB term, and therefore CFR (Cost and Freight) and CIF (Cost, Insurance and Freight). The notion of the "ship's rail" is dead. No longer will the parties have to concern themselves with the risk-in-transit swinging to and from the seller and the buyer across some imaginary line that extends perpendicularly from the ship's rail into the stratosphere. What is put forward now is a different notion, and that is the risk passing when the goods are onboard the vessel, which means the whole consignment, has been loaded. Should half a consignment be loaded and the ship sinks, then complete loading presumably will not have occurred and risk will

---

49 The reference to "procure" in this term caters for multiple sales down a chain (string sales) particularly common in the commodity trade. n 40 at 124.

50 In CIF, the two most important ports are the port where the goods are delivered on board the vessel and the port agreed as the destination of the goods. Risk transfers from seller to buyer when the goods are delivered to the buyer by placing them on board the vessel at the shipment port or by procuring the goods already so delivered. However, the seller must contract for the carriage of the goods from delivery to the agreed destination. Thus, for example, goods are placed on board the vessel in Shanghai (which is a port) for carriage to Southampton (also a port). Delivery here happens when the goods are on board in Shanghai, with risk transferring to the buyer at that time and the seller must make a contract of carriage from Shanghai to Southampton. n 40 at 124.

51 n 40 at [at 124–125].

52 *Pyrene & Co v Scindia Steam Navigation Co* [1954] 2 QB 402.

53 n 52 at 419.

54 n 17 at 171.

not have transferred to the buyer.[55] It is hoped that with the demise of the concept of the ship's rail, division of risks between the seller and buyer is now clearly defined and that the number of litigation in this area will be greatly reduced.

IX. Differences between Incoterms Rules 2010 and 2020

One of the most important initiatives behind the Incoterms 2020 rules has been to focus on how the presentation could be enhanced to steer users towards the right Incoterms rule for their sale contract. Thus, the Incoterms 2020 rules placed a greater emphasis on the Introduction to assist the parties in making the right choice of rules; a clearer explanation of the demarcation and connection between the sale contract and its ancillary contracts; upgraded the Guidance Notes presented in the 2020 rules as Explanatory Notes to each Incoterm rule and a re-ordering within the Incoterms rules giving delivery and risk more prominence. All these changes, though cosmetic in appearance, are in reality arguably substantial attempts on the part of ICC to assist the international trading community towards a smoother export and import transactions.[56]

Other changes made to the Incoterms 2010 in the 2020 rules are bills of lading with an onboard notation and the FCA (Free Carrier) rule; division of costs where they are listed; different levels of insurance cover in CIF (Cost Insurance and Freight) and CIP (Carriage and Insurance Paid To); arranging for carriage with the seller's or buyer's own means of transport in FCA (Free Carrier), DAP (Delivered At Place), DPU (Delivered At Place Unloaded) and DDP (Delivered Duty Paid) terms; change in the initials for DAT (Delivered At Terminal) to DPU (Delivered At Place Unloaded); inclusion of security related requirements within carriage obligations and costs and it also provides the important Explanatory Notes for Users.[57]

X. The Incoterms and the International Sale Contracts

A. *Variety of Contracts*

The Incoterms rules is but a part of a labyrinth of international sale contracts and it must be emphasised that the ways in which an overseas sale contract may be conducted are almost infinitely variable and that the applicable rules are almost always drawn from a construction of the contract.[58] Consequently, it is necessary to avoid dogmatism in dealing with overseas sales law. One cannot, for example, say that is always the FOB's buyer's responsibility to select and engage the carrier; sometimes the seller is explicitly, perhaps even implicitly, obliged under the contract to do this.[59]

As mentioned earlier, international sale contracts do not exist in a vacuum and they are frequently associated with other contracts such as contracts of carriage and insurance. Further, the

55 Bergami, R, "The Ship's Rail is Dead: Incoterms 2010". <http://www.ibt-articles.com/absnet/templates/trade_article.aspx?articleid=402&zoneid=2>.

56 n 40 at 12.

57 n 40 at 13. A detailed discussion on the aforementioned changes made in the 2020 rules is outside the scope of this paper.

58 Bridge, Michael, *The International Sale of Goods, Law and Practice* (2nd ed, Oxford University Press, New York, 2007) at 9.

59 n 58.

significance of charter party contracts[60] also needs to be considered. Where goods are sold in bulk commodities, it is commonly the head seller (in string CIF contracts) and end buyer (in string FOB contracts) who will fix a charter party to carry the goods. Therefore, charter parties have a number of clauses in common with sale contracts and the interaction of the two types of contract is an important matter that cannot be undermined.[61]

B. Interpretation of the Contract

1. A matter of law and harmonious interpretation

Until recent developments, it could have been said that the interpretation of a contract is a matter of law. Consequently, the views of experienced arbitrators as to the meaning of trade terms will be accorded respect but will not without more be adopted by the courts.[62] The treatment of interpretation as a matter of law also provides some degree of assurance to those conducting business on the basis of well-known standard forms that they can conduct their business and measure their risk according to an authoritative judicial view of the meaning of standard provisions. Backed up by judicial interpretation, such standard form contracts become something more than mere contractual documents; they become a species of private legislation binding those in the trade who have submitted to them.[63]

Particular standard terms acquire a standard meaning and in this respect, English law diminishes transaction costs and enables participants in the trade to build upon their own and others' experience. This feature of interpretation is of particular importance in international sale and related contracts, concluded by ship's brokers, agents and the like without the benefit of legal advisers. However, in recent years, as courts have insisted that contracts are to be construed within their factual matrices, the view has gained ground that interpretation is a matter of law and fact.[64] The danger of such development is that the interpretation of international commercial contracts may eventually lose its certainty.

In other instances, when faced with a complex document, the court will seek to interpret it in a harmonious way so as to avoid conflicts between its various provisions, though this does not mean that individual clauses will be interpreted in an artificial way in order to avoid conflict.[65] The contested clause is not interpreted in isolation but in its written context along with other clauses. This important rule of interpretation highlights the danger of superficial reading of documents by focusing only on the particular contentious clause in the search for meaning.[66]

---

60 A charter party is a written contract between the owner of a vessel and the person desiring to employ the vessel (charterer); sets forth the terms of arrangement, such as duration of agreement, freight rate and ports involved in the trip. <http://marad.dot.gov.documents/Glossary_final.pdf>.

61 n 58 at 10.

62 n 61. The courts referred to in this chapter are the English courts by reason of their vast judicial experience in international commercial matters.

63 n 58 at 41.

64 n 63. See *Sea Success Maritime Inc v African Maritime Carriers Ltd* [2005] 2 Lloyd's Rep 692 at 16.

65 n 58 at 41.

66 See *International Fina Services AG v Katrina Shipping Ltd (The Fina Samco)* [1995] 2 Lloyd's Rep 344, CA.

2. Avoiding absurd results

If contractual provisions are susceptible to more than one interpretation, and one of these interpretations yields an absurd or unreasonable result, then the other result is to be preferred.[67] In *The Alkeos*[68], an FOB buyer had the right to call for the original shipment period to be extended. The buyer thereby incurred a duty to pay the seller's carrying charges. The contract went on to free the buyer from that duty if the ship was delayed on its way to berth by an event for which the buyer was not responsible, but only in the event of the ship being delayed in entering River Parana, on its way to the loading port of Rosario, by the actions of the Argentinean coastguard at Recalada, which is the first port in Argentina coastal waters. The Argentinean coastguard did indeed delay the ship not at Recalada but at the subsequent port of Interseccion, which lay between Recalada and Rosario. Staughton J held that the clause, properly interpreted, was designed to place on the seller the risk of carrying charges in all cases where the Argentinean coastguard delayed the ship within Argentinean coastal waters. It would make little sense for the seller to assume the risk of delay at Recalada but for that risk subsequently to swing back to the buyer within coastal waters, when the buyer had borne the various risks of marine delay prior to Recalada.[69]

3. Upholding the validity of the contract

It is a well known principle of contractual interpretation that, faced with two possible interpretations of the contract, one upholding and the other denying the validity of the contract or one of its clauses, the court will lean in favour of the former interpretation (*magis ut res valeat quam pereat*).[70]

4. Typed and standard clauses

In the event of consistency between clauses in a standard form applied to the present contractual adventure and special clauses typed in to meet the needs of the particular contract, the latter will prevail. The rule is brought to play after the inconsistency has been established, which is where the litigation battle takes place.[71]

5. Ambiguity and extrinsic evidence

The conventional approach to interpretation is that extrinsic evidence is available to interpret a contract only if the document is ambiguous or if it contains terms that have a customary meaning or are technical expressions. According to long established principle, the ambiguity must be patent and not discoverable only when extrinsic evidence is called into play. Merely because a document is difficult to construe will not open the door to extrinsic evidence in the absence of a range of possible meanings.[72]

In resolving ambiguity, a pertinent point to note is that evidence of the parties' negotiating positions is not admissible to determine the meaning of a contractual document. Negotiating positions are adopted and abandoned during the course of pre-contractual process. Nor can one readily refer to the aim of the transaction. The process of reaching an agreement is inherently

67 n 58 at 42.

68 *Bunge AG v Sesostrad* [1984] 1 Lloyd's Rep 686. However, it is to be noted that this case was decided before the new definition of the FOB term in the Incoterms rules 2010.

69 n 68.

70 n 58 at 43.

71 n 70. See also *Naviera Amazonia Peruana SA v Cia Internacional de Seguros del Peru* [1987] 1 Lloyd's Rep 116.

72 n 58 at 44.

adversarial and the parties may have entered into the contract with different aims. Evidence of one party's aims is therefore unhelpful and potentially deceiving.[73]

6. Factual matrix

The refusal to look at negotiating positions does not mean that contractual documents are to be interpreted in a vacuum. To that extent, statements made during the course of negotiations do have a part to play in the interpretation of a written document.[74] This stance by the courts is best summed up by Lord Wilberforce in *Reardon Smith Line Ltd v Hansen-Tangen*[75] where His Lordship stated that "In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating".

7. The meaning of documents

One of the major developments in contractual interpretation in recent times can be said to stem from Lord Hoffman's introduction of the 'reasonable observer' in *Investors Compensation Scheme v West Bromwich Building Society*[76] where His Lordship, in this case, introduces 'the reasonable observer' with all necessary background knowledge concerning the contract, into the process of interpretation. Through the eyes of the observer, His Lordship went on to say that the meaning of a document is not the same thing as the meaning of particular words in a document. It can be argued that the danger of this approach to interpretation is that, despite the invocation of the reasonable observer, it introduces a measure of subjective impressionism into the process of contractual interpretation. It is also unduly forgiving of lax draftsmanship.[77]

It can be observed that Lord Hoffman's approach has more to commend it for contracts between parties who are not regular participants in the same trade, but poses a risk to commercial certainty in those trades, like the shipping and commodities trade, where participants do not need the assistance of the outside reasonable observer to instruct them in what they are doing.[78]

8. Time of interpretation

Just as evidence of negotiations does not bear directly on contractual interpretation, so a contract is to be construed at the moment of its formation. Subsequent behaviour is inadmissible as a guide to interpretation, for otherwise the meaning of a contract might change from day to day. In this respect, English law is probably in a minority amongst developed legal systems.[79] Yet, it is common for contracts to be varied and for rights to be waived. Under English law, so long as waivers and promissory estoppel exist, and with a requirement of consideration to effect a binding variation, it is plainly dangerous or imprecise to read contractual meaning into subsequent behaviour.[80]

73 n 72.

74 n 72.

75 [1976] 1 WLR 989.

76 [1998] 1 WLR 896, HL.

77 n 58 at 47.

78 n 77.

79 n 58 at 48.

80 n 79.

Only Lord Denning, sitting in the Court of Appeal, in *LG Schuler AG v Wickman Machine Tool Sales Ltd*[81] had stated that subsequent behaviour could be looked at to evince contractual meaning because the parties themselves are the best guide to the way language was used, a view which was subsequently rejected by the House of Lords in the same case.[82]

XI. Concluding Remarks

First published in 1936, the Incoterms rules are uniform rules defining costs, risks and obligations of sellers and buyers in international contracts of sale. Incoterms rules, if expressly provided for, will form part of the sales contract. Nevertheless, there are also other regimes, which apply to international sale transactions such as the CISG and domestic laws. When used correctly, Incoterms rules allow for prudent and efficient allocation of duties and risks between the contracting parties. However, incorrect use of Incoterms may bind the parties to obligations that they are not only beyond their understanding but also beyond their capabilities. The Incoterms rules have been updated at approximately ten-year intervals, the latest being the Incoterms rules 2020. It can also be observed that the Incoterms rules do not exist in isolation but they are part of the extensive international commercial transactions in the multifaceted world of international trade. Usage of the Incoterms rules in contracts of sale are often intertwined with contracts of carriage and insurance and it may not be possible at all times to avoid conflicts in such complex transactions. It is in these situations that the courts can be an indispensable institution in interpreting such contracts to resolve such disputes. In respect of the relationship between the CISG (or any other regime in relation to sale contracts in international trade) and the Incoterms, it is without a doubt that the CISG and the Incoterms rules complement each other in ensuring efficient transactions between sellers and buyers in international trade.

As the Incoterms 2020 is yet to be enforced, only time will tell if the changes introduced will bring about significant development in international trade.

---

81 [1972] 1 WLR 840, CA.

82 [1974] AC 235 HL. There are other various methods of contractual interpretation adopted by the courts but which are outside the scope of this paper.