

AN APPRAISAL OF THE PASSING OF RISK IN THE INTERNATIONAL SALE OF GOODS UNDER INTERNATIONAL CHAMBER OF COMMERCE TERMS (INCOTERMS)

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Abstract

The set of rules governing passing of risk under the 1980 Vienna Convention on the International Sale of Goods (CISG) has been heavily criticized for its inadequacy in certain occasions, However parties of a contract of sale can choose to deviate from the provisions of the Convention by drafting their own rules. One way the parties can deviate from the Convention on International Sale of Goods is by referring to an ICC Incoterm in their contract. In light of this, this paper therefore focuses on examining the ICC incoterms rules and its interaction in international sale of goods.

Keywords: Sale of Goods, International, INCOTERMS, CISG

Meaning, Application and Scope of Incoterms

The International Chamber of Commerce Terms (Incoterms) have over the years evolved to address the needs of merchants more effectively and efficiently than the default law of the contract.¹ The preference for trade terms is explained by the fact that mercantile customs consist of usages and practices, which have evolved over centuries and, hence, have proven themselves to be economically efficient by having stood the test of time.² The question one may ask at this juncture is; what then is Incoterms? The international commercial trade terms (Incoterms) can be said to be, widely used terms formulated overtime which are designed to define the

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¹J H Dalhuisen, 'Custom and Its Revival in Transnational Private Law' (2008) 18 *DUKE J COMP & INT'L L*, 339, 370.

²*Ibid.*

obligations of the seller and the buyer as regards the point of delivery, procurement of transport documents, contract of insurance, risk allocation, and other documents necessary for the export and import of the cargo.³ Therefore once parties have agreed on an Incoterms rule, the entire definition of the rule is incorporated into the contract on the basis of Article 6 of the CISG. For the avoidance of doubt, the said article 6 of the Vienna Convention states, “The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions”.

Alternatively, the Incoterms rule may apply as a contractual trade usage on which the parties agree by virtue of article 9 (1) of the Convention, which provides that: “the parties are bound by any usage to which they have agreed and by any practices, which they have established between themselves”. In the absence of express incorporation, Incoterms may apply on the basis of article 9 (2) of the CISG as widely observed international trade usages of which the parties knew or ought to have known.

Indeed, if we accept the above mentioned approach that would mean that Incoterms would take precedence over the rules of the Convention. This view has already been reflected in case laws, where in a US case decided on 26 March 2002, the District Court of New York held that Incoterms constitute “usages” under the meaning of article 9(2) CISG.⁴

The ICC has defined these international trade terms referred to as "Incoterms", as “a set of three-letter trade terms reflecting business to business practice in contracts for the sale of goods.”⁵ The Incoterm rules describe mainly the tasks, costs and risks involved in the delivery of goods from sellers to buyers.⁶

Specifically, Incoterms defines, with respect to each commercial term, what acts the seller must do to effect delivery, what acts the buyer must do to accommodate delivery.⁷ In the event of any misfortune such as damage or loss of goods, the Incoterms help to identify who is responsible for the risk at that point. Incoterms may not prevent disputing parties from going to court but would surely make the proceedings a lot less stressful.⁸

³I Carr, *Principles of International Trade Law* (2ndedn, London: Cavendish Publishing Limited 1999) 1.

⁴*St Paul Guardian Insurance Co, et al v Neuromed Medical Systems & Support, et al* <<http://cisgw3.law.pace.edu/cases/020326u1.html>> accessed 1 March, 2022.

⁵Incoterms 2010 Rules.

⁶*NuovoPignone, Spa vsStormanAsiA M/V*, 310 F 3d 374, 380 n 5 (5th Cir 2002); *Wing Shing Products, Ltd vsSimatelex Mfr. Co, Ltd*, 479 F Supp2d, 388.

⁷ICC Incoterm Rules 2010.

⁸Gibbson Glen, “The Impact of Incoterms 2010” (2012) 4 IBLQ 15

However, it is apt to state at this juncture, that for the Incoterms to be applied in a contract, the incoterms must be incorporated into such contract either expressly or by way of implication.⁹ This is so because Incoterms are creatures of contract and not legislation, Incoterms apply to a contract if the parties to the contract have the intention to apply the Incoterms;¹⁰ therefore, it is of importance that the incoterms is incorporated into the contract.¹¹ Where so included, it should also be noted that the Incoterms only applies to one part of the sales contract not the entire contract. Traders should be aware that the Incoterms only outlines the obligations and responsibilities of the contracting parties in respect of the carriage of goods, delivery, risk bearing, packaging and charges.¹²

However, the research focuses on the risk bearing aspect of Incoterms, and so, no further discussion will be offered as regards to the other areas as they are outside the scope of this paper, other than a mere reference to them in passing.

Early History of the Trade Terms

The Incoterms rules are internationally recognized standard and are used worldwide in international and domestic contracts for the sale of goods, therefore, it is appropriate that some pages are allocated to tracing the historical roots of the trade terms. It is believed that this will help the reader gain greater appreciation of the workings of the Incoterms in subsequent sections of this work.

First published by ICC in 1936, Incoterms rules provide internationally accepted definitions and rules of interpretation for most common commercial terms used in contracts for the sale of goods.¹³ Prior to its harmonisation by ICC in 1936, these trade terms, especially the most common ones CIF and FOB, were interpreted differently in different countries, creating misunderstandings, which in turn led to conflicts and

⁹Gbenga Oduntan, “CIF Gatwick” and other such nonsense upon stilts: Incoterms and the law, jargon and practise of international business transactions (2010) 21(6) *ICCLR*, 214-223.

¹⁰Guillermo Jiménez, “The International Chamber of Commerce: Supplier of Standards and Instruments for International Trade” (1996) *Unif L Rev* (1996) 1(2), 284.

¹¹Roberto Bergami, “Removing EXW and DDP from Future Incoterms Editions: An Australian Perspective” (2016) 20 *VJ*, 1.

¹²Roberto Bergami, “Incoterms 2000 as a Risk Management Tool for Importer” (2006) 10 *VJ* 273

¹³ICC, ‘Incoterms Rules 2010’ <<https://iccwbo.org/resources-for-business/incoterms-rules/>> accessed 1 March, 2022.

problems in the performance of the contract and eventually in time and money consuming litigation.¹⁴

Since its inception, the Incoterms has been broadly embraced round the world for the purpose of international trade. However, this came about by a gradual process that went on through the period from the first edition in 1936, to the various revisions in 1953, 1967, 1974, 1980, 1990, 2000, and the current 2010 version, which is the eighth edition.¹⁵

Prior to the first edition of Incoterms there was the pre-Incoterms rules formulated through a study that was limited to six commonly used terms in just 13 countries.¹⁶ Some findings were published in 1923, highlighting disparities in interpretation.¹⁷ This made way for the 1936 Incoterms (first edition) and was limited to six commonly used terms in more than 30 countries; that was at the time when international trade was underdeveloped and still on a slow rise.¹⁸ The terms included FAS, FOB, C&F, CIF, Ex Ship and Ex Quay.¹⁹

At a time after the Second World War, the use of train transportation for the carriage of goods was on a rise, the ICC went into action in reviewing the Incoterms to suit the growing use of train carriage.²⁰ In 1957 two new trade terms were introduced, which were the FOR and FOT (Free on Rail and Free on Truck) and the FOB Airport was added in 1976, and all these trade terms were meant to be like the FOB but differs only in the mode of transport.²¹ FCA (free carrier) was introduced in the 1990 edition of the Incoterms flowing from the revision of the 1980 version of the Incoterms which listed FOR (free on rail), FOT (free on truck) and FOB airport. The FCA is to replace all other terms that were listed for transportation of goods that did not involve sea or waterway.²² This was also the same in the Incoterms 2000, and has been maintained in the Incoterms 2010, which

¹⁴ Shivbir G, 'Risk of loss in Goods Sold During Transit: A Comparative Study of the UN Convention on Contracts for the International Sale of Goods, The UCC, and the British Sale of Goods Act', (1991) 14 *Loy LA Int'l & Comp LJ*, 93.

¹⁵ Roberto Bergami, 'Incoterms 2010: Comments on the New Revision of Delivery Terms', (2011) 15 *VJ* 157.

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ ICC Incoterms 1936

²⁰ Ramberg Jan, 'Incoterm 2010 International Sales Law, (2011) 13 *Eur JL Reform* 380 (2011)

²¹ *Ibid.*

²² Carr Indira and Peter Stone, *International Trade Law* (Routledge, 2014) 35.

is the most recent. In *Pyrene and Co v Scindia Navigation Co Ltd*,²³ Devlin J classified the FOB contract into three categories, which was approved and broken down in a subsequent case of the *El Amria* and *EL Minia*.²⁴

Incoterms 2010 is the most current edition of the rules to date. The ICC has prior to the current version of the Incoterms been revising existing trade terms, creating new trade terms and also making new modes of trade transportation such as air transport as well as electronic transmission of documents. This version consolidated the D-family of rules, removing DAF (Delivered at Frontier), DES (Delivered Ex Ship), DEQ (Delivered Ex Quay) and DDU (Delivered Duty Unpaid) and adding DAT (Delivered at Terminal) and DAP (Delivered at Place). Other modifications included an increased obligation for buyer and seller to cooperate on information sharing.²⁵

To keep pace with the ever-evolving global trade landscape, the latest update to the trade terms is currently in progress and is set to be unveiled in 2020. The Incoterms 2020 Drafting Group includes lawyers, traders and company representatives from around the world.

Incoterms Revision of 2010

The latest version of the ICC Incoterms rules contains eleven trade terms divided in two groups, one group contains Incoterms that can be used for all modes of transport and one contains terms that are limited to transport by sea or waterway. The ICC's Incoterms rules reflect commercial practice that is most commonly used in international trade but parties are free to change these basic trade terms provided by the ICC and adjust them to their own needs.²⁶

It is suggested that the reason for the ICC's chosen style of arrangement of

²³*Pyrene Co Ltd v Scindia Navigation Co Ltd* [1954] 2 QB 402.

²⁴*The El Amria and El Minia* [1982] 2 Lloyd's Rep 28; 1. "classic or strict" FOB, 2. FOB "with additional services", and 3. "simple" FOB In the first, or classic type, the buyer nominates the ship and the seller puts the goods on board for account of the buyer, procuring a bill of lading. The seller is then a party to the contract of carriage and if he has taken the bill of lading to his order, the only contract of carriage to which the buyer can become a party is that contained in or evidenced by the bill of lading which is endorsed to him by the seller. The second is a variant of the first, in that the seller arranges for the ship to come on the berth, but the legal incidents are the same. The third is where the seller puts the goods on board, takes a mate's receipt and gives this to the buyer or his agent who then takes a bill of lading. In this latter type the buyer is a party to the contract of carriage ab initio.

²⁵ ICC, "History of Incoterms Rule", available at <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-history/> accessed 20th February 2018

²⁶Supra n 98

Incoterms 2010 rules (i.e., by first presenting trade terms that can be used by any mode of transport), is to promote the use of these general trade terms since merchants still too often use maritime trade terms for non-maritime transport. Unlike the older versions of the ICC Incoterms rules, where the rules were organized by delivery obligation the seller has to fulfill. The first letter of the trade terms is used as an indication of the category in which they belong.²⁷ Incoterms were classified in four categories, namely, the C-terms, the D-terms, the F-terms and one single E-term.²⁸

The Trade Terms, Usages, Risk Allocation

The first group consists of Incoterms EXW (Ex Works), FCA (Free Carrier), CPT (Carriage Paid To), CIP (Carriage and Insurance Paid To), DAT (Delivered At Terminal), DAP (Delivered At Place) and DDP (Delivered Duty Paid). The second group, (fit for transport by sea and inland waterway) consists of Incoterms FAS (Free Alongside Ship), FOB (Free On Board), CFR (Cost And Freight) and CIF (Cost, Insurance and Freight).²⁹ Under some traditional trade terms such as the CIF and FOB contract, risk of loss or damage passes to buyer when the goods are placed on board the vessel. The modern allocation of risk under the Incoterms takes place at precise moments during the physical movement of the goods. This section will examine when risk is passed from seller to buyer when an appropriate Incoterm is employed.

- a) Rules for any Mode or Modes of Transport³⁰
 - i. EXW- Ex Works

There is only one term in the E-term, namely the Incoterm Ex Works (EXW). “Ex Works” means that the seller delivers when it places the goods at the disposal of the buyer at the seller’s premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable.³¹ Since the seller only has to place the goods at the disposal of the buyer, the Incoterm EXW expresses seller’s minimum obligation.

²⁷L Railas, ‘Incoterms for the New Millennium. How problems relating to Incoterms 1990 have been solved and how the experience of the earlier version could still help us?’, (2000) *EurVervoerr*, 11.

²⁸ (n 27).

²⁹ ICC Incoterms 2010

³⁰ ICC, ‘INCOTERMS 2010’ <<https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2010/>> accessed 1 March, 2022.

³¹Incoterms 2010, Berlin, ICC Publication no. 715 ED, 20-21

The Ex terms means that the seller fulfills his obligations to deliver when he has made the goods available at his premises to the buyer. In particular, the seller is not responsible for loading the goods on the buyer's vehicle or for clearing the goods for export, unless agreed. The buyer bears all costs and risks involved in the taking of the goods from the seller's premises to the desired destination.³²

However, the seller must deliver at the agreed time or within the agreed period. The buyer must take delivery of the goods when the seller has placed them at the buyer's disposal and notified the buyer of the fact the goods are placed at his disposal. The risk is transferred from seller to buyer the moment the seller placed the goods at buyer's disposal; provided that the goods have been clearly identified to the contract.³³

Ex works as a trade term is more favourable to the seller because under the ex-works sale contract the buyer comes to collect the goods from the seller who undertakes to have the goods available for collection in his premises, which may be a factory, warehouse or mine.³⁴

ii. FCA- Free Carrier

"Free Carrier" means that the seller delivers the goods to the carrier or another person nominated by the buyer at the seller's premises or another named place.³⁵ The parties are well advised to specify as clearly as possible the point within the named place of delivery, as the risk passes to the buyer at that point.

According to the general passing or risk rule of the Incoterms, this means that the risk will pass upon handing over of the goods to the carrier, assigned by the buyer. The delivery will be completed when, if the place is the seller's premises, the goods are loaded on the means of transport provided by the buyer (in contrast to EXW, where the risk passes before loading onto the means of transport).³⁶ In cases where the named place is another place, the delivery will be completed when the goods are placed at the disposal of the carrier, ready to be unloaded from the seller's means of transport.

³² Jason CT Chuah, *Law of International Trade: Cross-Border Commercial Transaction* (4th edn: Sweet & Maxwell 2009) 31.

³³ J Ramberg, *International Commercial Transactions* (Kluwer Law International 1997)103; Incoterms 2010, Berlin, ICC Publication no. 715 ED, 20-21.

³⁴ Carr Indira and Peter Stone, *International Trade Law* (Routledge, 2014) 7.

³⁵ Incoterms 2010.

³⁶ ICC, 'Incoterms Rules 2010' <<https://iccwbo.org/resources-for-business/incoterms-rules/>> accessed 1 March, 2022.

However, it is worthy of note that the risk will only pass if the goods have been clearly identified to the contract.

iii. CPT- Carriage Paid To, and

iv. CIP- Carriage And Insurance Paid To

“Carriage Paid To” and “Carriage and Insurance Paid to” means that the seller delivers the goods to the carrier or another person nominated by the seller at an agreed place (if any such place is agreed between parties) and that the seller must contract for and pay the costs of carriage necessary to bring the goods to the named place of destination.³⁷ CIP is the same as the CPT with the inclusion that ‘the seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage.

The buyer should note that under CIP the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.³⁸

As with all C-terms, the transfer of risk will take place the moment the goods are handed over to the carrier. The Incoterm CIP is virtually identical to the Incoterm CPT with the only difference that under CIP the seller will be obliged to arrange and pay for insurance.

v. DAT- Delivered At Terminal

“Delivered at Terminal”, means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination. “Terminal” includes a place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. The seller bears all risks involved in bringing the goods to and unloading them at the terminal at the named port or place of destination.³⁹

vi. DAP- Delivered At Place

“Delivered at Place” means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all

³⁷Incoterms 2010.

³⁸ Henry Gabriel, ‘International Chamber of Commerce Incoterms 2000: A Guide to Their Terms and Usage’, (2001) 5 *VJ*, 41.

³⁹Incoterms 2010.

risks involved in bringing the goods to the named place.⁴⁰ However, once the goods arrive at the name place, risk passes to the buyer from that point.

vii. DDP- Delivered Duty Paid

“Delivered Duty Paid” means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities.

b) Rules for Sea and Inland Waterway Transport

viii. FAS- Free Alongside Ship

“Free Alongside Ship” means that the seller delivers when the goods are placed alongside the vessel (e.g., on a quay or a barge) nominated by the buyer at the named port of shipment. The seller fulfills his obligations by placing the goods alongside the ship and it is his obligation to clear the goods for export. The risk will, therefore, pass from seller to buyer when the seller placed the goods alongside the ship.⁴¹

The buyer’s failure to nominate the ship and notify the seller of the name, loading place and delivery time may result in a premature passing of risk. Thus, the failure to notify the seller will cause the risk to pass from the agreed date or expiry date of the agreed period for delivery. Also, the risk will only pass if the goods have been clearly identified to the contract.⁴²

ix. FOB- Free On Board

Being one of the oldest trade terms used in international trade, it established a dominant position. In the older versions of the ICC’s Incoterms rules, this term used the ship’s rail as decisive border for obligations and allocation of risk; however, in the 2010 version the ship’s rail as risk transfer point was replaced by placing the goods on board of the ship.⁴³

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² Roberto Bergami, “Incoterms 2000 as a Risk Management Tool for Importer” (2006) 10 *VJ*, 273.

⁴³ *Ibid.*

“Free On Board” means that 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.⁴⁴

Free on board as the name implies is for sale contracts that require sea and waterway transport, if the transportation of the goods would not be by shipping the parties should make use of the FCA.⁴⁵

The highlight of the FOB is that it is a simple division of obligations, between the buyer and the seller. In FOB the seller handles the costs and risk for the goods, until the time where the goods are on board the vessel and is also to give adequate delivery notice while the buyer, on the other hand, handles any cost and risk from the point where the goods are on board the vessel.⁴⁶

According to Jason, the FOB has a unique feature of being flexible. Meaning that it permits parties to create their own kind of terms relating to the contract, as they deem necessary. “For example the parties might agree that the seller handles the insurance for the goods even after they have passed the rail or the buyer might agree to get involved in the clearing of the goods”.⁴⁷ This feature of flexibility is a major contribution to the popularity of the FOB and was expressed by Delvin J in the case of *Pyrene Co Ltd v Scindia Navigation Co Ltd*.⁴⁸

It is clear that the FOB, is particular about the risk of loss or damage of the good that the buyer is responsible for, from the time of delivery at the FOB point. Brett M.R also noted this in his dictum in the case of *Stock v Inglis*.⁴⁹ The time of shipment is very important in an FOB contract, because the goods are expected to be on the ship by the close of shipment period. Stretching from that the buyer must have obtained a vessel in due time to the port of FOB to ensure the loading of the goods.⁵⁰

- x. CFR- Cost and Freight and
- xi. CIF- Cost, Insurance and Freight

⁴⁴Incoterms 2010.

⁴⁵ Roberto Bergami, “Incoterms 2000 as a Risk Management Tool for Importer” (2006) 10 *VJ* 273

⁴⁶ ICC, ‘Incoterms Rules 2010’ <<https://iccwbo.org/resources-for-business/incoterms-rules/>> accessed 1 March, 2022.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*

⁴⁹*Stock v Inglis* (1884) 12 QBD 573.

⁵⁰ (n 46).

“Cost and Freight” and “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 for and pay the costs and freight necessary to bring the goods to the named port of destination.⁵¹ CFR is the same as the CIF with the inclusion that ‘the seller also contracts for insurance cover against the buyer’s risk of loss of or damage to the goods during the carriage. The buyer should note that under CIF the seller is required to obtain insurance only on minimum cover. Should the buyer wish to have more insurance protection, it will need either to agree as much expressly with the seller or to make its own extra insurance arrangements.⁵²

General, the CIF is known to be a contract for the sale of goods whereby the seller handles the shipment and pays the cost of the insurance and transports the goods to the buyer in a destination already agreed by both parties. The CIF is the most used trade term when it involves sea cross-border transactions; this was pointed out by Lord Wright in the case of *Ross T Smyth v TD Bailey*.⁵³ Lord Wright observed, “A CIF contract... is not a contract that goods shall arrive, but a contract to supply goods that comply with the contract of sale, and to obtain a contract for carriage and contract of insurance”.

The Halsbury’s Laws indicates that the commonest forms of transactions that spring up legal misunderstandings in recent times are the CIF and Fob contracts on the basis of the length of time involved in the transportation of the goods by sea.⁵⁴

A CIF contract implies that the risk of loss and damage is transferred to the buyer once the seller has fulfilled his obligation of loading the goods, payment of insurance and the goods are on board a vessel.⁵⁵ A CIF contract has been adequately judicially defined by Lord Atkinson in *Johnson v Taylor Bros*,⁵⁶

when a vendor and purchaser of goods... enter into a CIF contract... the vendor in the absence of any special provision to the contrary is bound by his contract to do [the following]. First, to

⁵¹Incoterms 2010

⁵² Roberto Bergami, “Incoterms 2000 as a Risk Management Tool for Importer” (2006) 10 VJ 273

⁵³*Ross T Smyth & Co Ltd v T D Bailey Son & Co* [1940] 3 All ER 60

⁵⁴*Halsbury's Laws of England*, vol 11 (3rd edn: 1955) 158

⁵⁵ (n 52).

⁵⁶*Johnson v Taylor Bros* [1920] AC 144, 145.

make out an invoice of the goods sold. Secondly, to ship at the port of shipment goods of the description contained in the contract. Thirdly, to procure a contract of affreightment under which the goods will be delivered at the destination contemplated by the contract. Fourthly, to arrange for insurance upon the terms current in the trade which will be available for the benefit of the buyer. Fifthly, with all reasonable dispatch to send forward and tender to the buyer these shipping documents, namely, the invoice, bill of lading and policy of assurance, delivery of which to the buyer is symbolic delivery of the goods purchased, placing the same at the buyer's risk and entitling the seller to payment of their price... if no place be named in the CIF contract for the tender of the shipping documents they must prima facie be tendered at the residence or the place of business of the buyer.

According to the Incoterms, the CIF should apply only to sea transport; and for that of highway transport the clause that should be used is the CIP.⁵⁷ The CIP maybe used also if the carriage of goods requires more than one mode of transportation and under CIP the delivery of goods occurs when the seller hands the goods over to the carrier or any other nominated person by the seller at the agreed point of delivery, the seller must also cover the insurance cost and the payment of delivery.⁵⁸

As can be found in the English Sale of Goods Act, which applies to the duties of a seller in a CIF contract to make a reasonable contract for the carriage of goods. Section 32(2) states as follows:

Unless otherwise authorised by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case; and if the seller omits to do so, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself or may hold the seller responsible in damages.⁵⁹

⁵⁷Frederico Eduardo Z Glitz, 'Transfer of Contractual Risk and Incoterms', (2011) 6(2) JICLT 108–119

⁵⁸ Roberto Bergami, "Incoterms 2000 as a Risk Management Tool for Importer" (2006) 10 VJ 273

⁵⁹ English Sale of Goods Act 1979

Presently the state of things with regards to the rights of a buyer of commodities under a CIF contract to exercise that right of recourse against the carrier for loss or damages to the goods on the sea may be very complex.⁶⁰

Summary of Incoterms Revision of 2010

INCOTERMS reflect the most dominant and consistent commercial customs and practices evident in international commerce because they are regularly updated to keep them in line with changing mercantile practice.⁶¹ According to the International Chamber of Commerce, INCOTERMS are a set of international rules for the interpretation of chief terms used in foreign trade contracts, for the optional use of businessmen who prefer the certainty of uniform international rules to the uncertainties of the varied interpretations of the same terms in different countries.⁶² The ICC, being the compilers and publishers of these rules, see Incoterms as optional rules which do not apply automatically, but which can be voluntarily adopted by the parties if they so wish.⁶³ This means that the parties have to agree to the adoption of these rules into their contract. Incoterms are then applicable as part of the contractual agreement of the parties, either expressly or tacitly.

Conclusion

Employing internationally accepted trade terms with regards to risk allocation is a great commodity and allows persons from across the globe to ascribe the same definition to terms regardless of their cultural and legal backgrounds. Overall, it can be said that generally, risk allocation under the Intercoms makes room for a reasonable compromise between the seller and buyer's interests.⁶⁴

One may conclude that risk allocation under the Incoterms is practical as it provides specific moments in time when risk passes from seller to

⁶⁰FilippoLorenzon, "When is CIF seller's Carriage Contract unreasonable?- Section 32(2)of the Sale of Goods Act 1979", (2007) 13 (4) JIML 241–257

⁶¹Juana Coetzee, 'Incoterms 2010: Codified Mercantile Custom or Standard Contract Terms' (2012) 23 Stellenbosch L Rev 564

⁶²Juana Coetzee, 'Incoterms: Development and Legal Nature - A Brief Overview' (2002) 13 *Stellenbosch L Rev* 115.

⁶³*Ibid.*

⁶⁴K Pantelidou, 'Issues from the allocation of risk under the Vienna Convention for the international sale of goods' (2002) *Private Law Chronicle* 97, 102.

buyer. These terms apportion risk allocation in advance and allow the respective parties to understand their responsibilities and obligations. Detailed oriented terms such as these diminish the possibility for misinterpretation and facilitate the execution of a contract that involves delivery of goods.

Consequently, the use of Incoterms is a cost saving technique that alleviates undue and tedious descriptive work for the drafter of an international contract. Thus, the Incoterms by allowing uniform law like the CISG to flourish can be a positive force in international trade.