



Qualis A3 ISSN: 2178-2008

ARTIGO

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Revista Processus de Estudos de Gestão, Jurídicos e Financeiros



Contractual Freedom and Its Limits in Incoterms Rules: An Analytical Study

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Publication information

ISSN: 2178-2008

Received: 28-01-2026

Accepted: 12-04-2026

Published in: 26-05-2026

Keywords:

Freedom of contract,

Party autonomy,

International sales contracts,

Maritime sales,

Risk allocation,

Transaction costs.

Abstract

This paper undertakes a doctrinal examination of one of the fundamental issues arising in connection with international trade terms, with particular focus on the rules promulgated by the International Chamber of Commerce (ICC), commonly known as Incoterms. These rules are optional in nature and do not inherently possess the characteristic of being binding; their legal force derives exclusively from the expressed intention of the contracting parties where such intention is directed toward their incorporation, whether in their original form or as modified through the augmentation or reduction of the obligations they establish. Notwithstanding this optional character, the recognition of party autonomy in this context necessarily invites scrutiny as to whether the principle of contractual freedom operates without qualification in this domain, or whether it is subject to limiting constraints—most notably within the framework of international sales contracts—at the intersection of municipal law frameworks, international conventions, and the normative architecture of Incoterms. Against this background, the present study seeks to determine the scope of party autonomy in the incorporation of Incoterms and to identify the boundaries by which it is circumscribed.

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Introduction

International trade terms, as a general principle, reflect the prevailing commercial customs and practices commonly employed in international sale contracts. These terms were promulgated by the International Chamber of Commerce (ICC) in Paris, with the first edition issued in 1936. This edition was subsequently revised and updated in 1958, 1967, 1980, 1990, 2000, and 2010, culminating in the most recent edition of 2020. The rationale underlying each successive revision has been to ensure that these rules remain consonant with the evolving requirements and developments of international trade, while elucidating the deficiencies and obstacles encountered in the application of prior editions. The 2020 edition encompasses eleven (11) formulas, expressed in the form of three-letter abbreviations, which precisely delineate the obligations of the seller and the buyer, the allocation of costs, and the assumption of risks during transit, thereby conferring greater precision and clarity upon international sale contracts. These formulas are applicable irrespective of the mode of transport employed for the carriage of goods—whether by sea, air, road, or rail—with the exception of four terms that are exclusively reserved for maritime sales, namely: Free Alongside Ship (FAS), Free On Board (FOB), Cost and Freight (CFR), and Cost, Insurance and Freight (CIF).

Incoterms constitute a set of advisory rules; they are optional *ab initio* and are not inherently binding. It is only upon the agreement of the parties to a sale on one of these formulas that the attribute of bindingness attaches thereto. This signifies that Incoterms derive their binding force from the will of the parties, in accordance with the principle of *pacta sunt servanda* (the sanctity of contracts). In this regard, four hypotheses may be posited:

First Hypothesis: The parties may agree to apply the formula precisely as set forth in the adopted edition, without augmentation or diminution, given that each edition may modify certain consequences attendant upon its application.

Second Hypothesis: The parties may agree to augment the obligations—constituting a consensual modification whereby additional obligations and responsibilities are imposed upon one or both parties beyond those prescribed in the agreed-upon sale formula.

Third Hypothesis: The parties may agree to reduce or diminish the obligations pertaining to a particular sale formula.

Fourth Hypothesis: The agreement may be directed toward the complete exclusion of the application of Incoterms rules.

The agreement of the parties to adopt a rule literally, to modify it, or to exclude its application gives rise to a profoundly significant problematic concerning the limits of individual freedom to derogate from the obligations prescribed for each trade formula. The central question is whether this autonomy is absolute or circumscribed, and if circumscribed, what are the boundaries of such limitation.

To address this problematic, the descriptive method has been employed to delineate certain theoretical aspects and concepts pertinent to the subject matter. Additionally, the analytical method has been adopted through the examination of selected legal and customary provisions, as well as certain judicial applications—notwithstanding their scarcity—which have adjudicated disputes arising from international sales transactions.

This paper has been divided into two chapters: the first chapter addresses contractual freedom within Incoterms rules, and the second chapter examines the constraints imposed upon freedom of contract within the Incoterms framework.

1. Contractual Freedom in Incoterms Rules

The will of the parties in international sale contracts occupies a position of cardinal importance, serving as the governing law of the contract. Its manifestations are generally reflected in the adoption, modification, or exclusion of Incoterms rules. Since the first edition of 1936, the ICC has endeavored to unify the interpretation of Incoterms and to endow them with the requisite flexibility. The legal nature of Incoterms (Section 1.1) constitutes the foundation upon which the manifestations of contractual freedom (Section 1.2) become apparent.

1.1. The Legal Nature of Incoterms Rules

The determination of the legal nature of Incoterms is subject to two competing doctrinal positions. The first maintains that these rules constitute international commercial customs (*usages*), while the second holds that they are standard contractual terms formulated by the ICC. The adoption of either position entails legal consequences of considerable significance.

1.1.1. Incoterms as International Commercial Customs

Incoterms do not possess the character of binding legal rules for two considerations: first, the ICC has not designated them as legal rules in any edition; and second, various national legislations have not accorded them the status of legal rules, nor have international conventions done so (Yawar & Amani, 2025, p. 116).

These rules are applicable only when incorporated as a clause in an international sale contract by mutual consent of the parties. They are also described as codified international commercial customs. International commercial customs are understood as those unwritten rules collectively shaped by international legal persons through their positions and conduct (Ağaoğlu, 2020, p. 1120). If one accepts that Incoterms constitute international commercial customs, a significant legal consequence follows: international commercial customs apply automatically in the absence of any agreement governing the contract. As a general principle, however, this does not apply to Incoterms, since they derive their existence from the will of the parties.

Courts and arbitral tribunals in numerous jurisdictions have applied Incoterms on the basis that they constitute international commercial practices and customs, in accordance with Article 9(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG), where the parties expressly refer to them in the contract. Furthermore, pursuant to the conditions set forth in Article 9(2) of the CISG, where a usage is widely known and regularly observed, an implied intention of the parties to be bound by such usage may be presumed (Coetzee, 2012, pp. 572–573).

Incoterms are customarily incorporated into sale contracts expressly by agreement of the parties. However, where there exists a prior course of dealing between the parties over a prolonged period, and where the parties have habitually employed Incoterms in their successive contracts, the Incoterms may apply on the basis of implied agreement, even in the absence of their express inclusion in the new contract (Ağaoğlu, 2020, p. 5). The implied agreement of the contracting parties to apply Incoterms has been, and continues to be, a matter of doctrinal debate and contention among legal scholars, with both opponents and proponents.

In this regard, Professor John Spanogle of George Washington University affirmed that Incoterms cannot constitute the governing law of the contract; rather, they are written commercial customs and terms that are most commonly incorporated by parties

to the international sale of goods. Where they are not expressly included in the contract, they may be applied impliedly, as recognized by the jurisprudence of both France and Germany (Spanogle, 1997, pp. 111–132).

In truth, the characterization of Incoterms as international commercial customs permits the application of Article 9 of the CISG, which signifies that custom has settled in favor of the adoption of these terms in international sale contracts, whether the parties have expressly agreed thereto or on the basis of implied agreement. The operation of Article 9 is contingent upon the acceptance that Incoterms constitute international commercial customs; accordingly, there is no scope for the application of Article 9 where the character of international commercial custom is denied to Incoterms (Ağaoğlu, 2020, pp. 578–579).

1.1.2. Incoterms as Standard Contractual Terms

Incoterms are also described as standard (model) contractual terms. According to the preamble to the 2010 edition, the successive revision of Incoterms in each instance raises the controversy as to the extent to which they may be regarded as commercial customs entrenched over centuries. By way of illustration, the 2010 edition abolished the concept of the "ship's rail" as the decisive point for the allocation of costs and risks under the FOB, CFR, and CIF formulas, in view of the legal and practical difficulties to which it had given rise. Although this amendment was introduced to align with modern commercial practices, the new rules and the obligations they encompassed had not been sanctioned by custom and had not yet attained the status of international commercial usage. Accordingly, the intervention of the ICC in modifying the obligations and the architecture of Incoterms formulas on each occasion negates the characterization of these rules as customs or international usages. Moreover, certain editions introduce entirely new formulas; for example, the DAP and DAT formulas were introduced in the 2010 edition, with the DAT formula subsequently being replaced by DPU in the 2020 edition, for reasons principally relating to the restrictive nature of the DAT formula regarding the places at which goods may be delivered, in contrast to the DPU formula, which broadens the scope of delivery locations (Coetzee, 2012, p. 581).

These modifications cannot be regarded as commercial custom; rather, they are standard (model) contractual terms formulated by the ICC. Consequently, the revision of any rule should not deviate from the most prevalent commercial practice at a given stage, and notwithstanding the widespread use of these rules, they have not yet crystallized into international commercial custom.

Ramberg went further in his criticism of the ICC's decision to protect its intellectual property rights, arguing that the collective endeavor that has consolidated these rules over decades is, in reality, nothing more than the product of the ICC's purely intellectual efforts. In so doing, the ICC does not acknowledge that these rules constitute custom or international practice; at best, they are merely an improvement upon international trade law—that is to say, standard contractual terms (Coetzee, 2012, p. 581).

Irrespective of the doctrinal controversy surrounding the legal nature of Incoterms, the ICC seeks, through its successive amendments, to consolidate the most widely and commonly used Incoterms rules and to keep abreast of various developments and evolutions. The more extensively these rules are employed, the more they evolve toward constituting commercial custom, in which case they may be applied independently of the will of the parties.

The characterization of Incoterms as international commercial customs raises the question of the binding nature of these rules, for the answer to this question carries legal

consequences of paramount importance. Proceeding from this point and in light of the position of the second doctrinal approach, if the rules formulated by the ICC and updated in each edition are not inherently binding—particularly where they are merely standard contractual terms deriving their binding force from the agreement of the parties—then the matter stands differently when considered from the perspective of the first approach. Under this latter view, Incoterms constitute international commercial customs encompassing the dual elements of repetition (*consuetudo*) and bindingness (*opinio juris*). From this standpoint, the ICC's contributions to the formulation of these customary rules may be regarded as possessing a binding character, albeit implicitly or indirectly, for the binding character of a customary rule is not derived from the promulgating body itself but from the attribution to it of the status of a customary rule, as imposed by the reality of international commercial transactions.

The binding character becomes manifestly apparent where Incoterms are characterized as international commercial customs and no express agreement of the parties exists to adopt an alternative rule incorporated into the international sale contract. In such a case, and in application of Articles 6 and 9 of the CISG, priority is accorded to the custom that the parties have agreed to apply, whether expressly or impliedly.

Furthermore, the elements of repetition and bindingness may not be clearly discernible in all ICC editions. With respect to the repetition or habituation of the customary rule, certain ICC editions address matters of a technical nature that may be unknown to the operators themselves, or at the very least are not commonly employed between them. A prominent example of this is the intervention of artificial intelligence in the field of international sales, such as electronic bills of lading, electronic platforms, smart contracts, and related innovations.

1.2. The Functional Basis of Contractual Freedom

The scope of contractual freedom, when parties to an international sale employ Incoterms, extends between literal application and the right to modify them, on the one hand, and the exclusion of their application (Subsection 1.2.2), on the other. Before examining the manifestations of contractual freedom, it is necessary to delineate the fundamental functions of Incoterms (Subsection 1.2.1).

1.2.1. The Fundamental Functions of Incoterms Rules

The fundamental functions of Incoterms determine the substantive scope for the use of the various Incoterms formulas. In essence, international trade terms perform three critical functions that confer clarity and predictability upon international transactions. These functions constitute the pillars supporting the logistical and financial architecture of international commercial transactions (International Trade Council, n.d., p. 7):

First — Precise Delineation of Obligations: Each of the eleven Incoterms rules clearly defines the tasks incumbent upon the seller and the buyer. This encompasses everything from arranging transport and procuring shipping documents to handling customs clearance procedures upon export and import. For instance, under the EXW (*Ex Works*) rule, the seller's obligations are at their minimum, being confined to making the goods available at the seller's premises. Conversely, under the DDP (*Delivered Duty Paid*) rule, the seller's obligations are at their maximum, as the seller is responsible for delivering the goods to the buyer's designated destination, cleared for import, with all duties paid.

Second — Allocation of Costs: Misunderstanding as to which party bears the costs of transit constitutes a recurrent source of disputes. Incoterms provide a precise breakdown of cost allocation, identifying the party responsible for transport costs, insurance, loading, unloading, and customs duties. Incoterms 2020 rendered this matter more transparent by consolidating all cost-related provisions for each rule, thereby enabling users to ascertain a complete list of anticipated costs at a glance (Pusapati, 2024, pp. 130–131).

Third — Determination of the Transfer of Risk: Risk denotes the liability for loss of or damage to goods. Each Incoterms rule identifies the precise moment in the shipping journey at which such risk transfers from the seller to the buyer. This constitutes a critical juncture: if goods are damaged before the point of transfer, the loss falls upon the seller; if damaged thereafter, the loss falls upon the buyer. This clarity is indispensable for insurance purposes.

1.2.2. Manifestations of Contractual Freedom

First — Literal Application of Incoterms Rules and the Right of the Parties to Modify Them

The parties to an international sale contract are entitled to incorporate Incoterms literally as set forth in the relevant edition. Although it might appear at first glance that the will of the parties is absent in such a case, freedom of will is clearly manifest in the entitlement to adopt any prior edition. The parties may also modify the rules by augmenting or diminishing obligations (Petrova et al., 2021, p. 92).

1. Freedom of Will in the Literal Application of Incoterms Formulas: This entails the adoption of an Incoterms formula as it stands without modification. However, certain requirements must be observed: for the intention of the parties to be valid in the literal adoption of a formula, an essential formal condition must be included in the sale contract, namely the specification of the edition year and the port of shipment—for example: "*FOB Shanghai Incoterms® 2020*."

Among the manifestations of the literal adoption of Incoterms is the citation of more than one formula in a single international sale contract. In this regard, experts frequently advise the use of a single term and the avoidance of what are known as "compound" or "parallel" terms. The integration of more than one term—even where each is applied literally in isolation—entails inherent risks arising from the combination of these terms without due regard to the contradictions existing between the formulas, particularly with respect to the determination of the fundamental functions performed by international trade terms, such as the precise identification of the point of risk transfer and the allocation of costs (International Chamber of Commerce [ICC], 2019, pp. 9, 16).

2. Freedom of Will in the Modification of Incoterms Formulas: Incoterms are characterized by clarity and ease of comprehension and incorporation into international sale contracts, thereby precluding disputes regarding the interpretation of contractual clauses. However, it is impossible for these rules to respond to every development, commercial practice, and circumstance of the parties. Consequently, the parties may need to modify a sale formula, but it is imperative that such modification be articulated with precision to avoid any misconstruction or misunderstanding (Imamova, 2024, p. 149).

Second — Freedom of Will in Excluding the Application of Incoterms Rules

The default position in international sales is that the contract is governed by the principle of party autonomy (*autonomie de la volonté*), meaning that the contracting

parties agree upon the contractual terms in a manner that serves their respective interests. The parties may either apply Incoterms to the contract or exclude their application, substituting in their place bespoke contractual rules of their own making. The exclusion of Incoterms may be either total—whereby the established formulas are entirely set aside and the parties adopt none of them—or partial. A notable illustration of partial exclusion is what are known as "hybrid Incoterms contracts." These are formulas resembling the official formulas issued by the ICC but employing modified abbreviations. There exist abbreviations derived from the FOB contract with the addition of a letter appended to the formula, namely: FOBT (*Free On Board Trimmed*)—delivery on board with trimming; FOBS (*Free On Board Stowage*)—delivery on board with stowage; and a formula combining the two preceding formulas: FOBST (*Free On Board Stowage and Trimmed*)—delivery on board with stowage and trimming (Coetzee, 2013a, pp. 586, 588).

Stowage refers to the placement of the cargo in a manner that ensures its safety, such as positioning the goods away from heat-generating parts of the vessel and ensuring the stability and equilibrium of the vessel—a process technically referred to as stowage and dunnage. Trimming, by contrast, refers to the even distribution of the cargo after stowage across each hold and throughout the vessel, and is applicable in the case of bulk goods.

2. Constraints on Freedom of Contract in Incoterms Rules

The constraints on freedom of contract are classified into legal constraints relating to municipal laws and international conventions, and substantive constraints relating to the essence and architecture of Incoterms rules.

2.1. Legal Constraints on Freedom of Contract in Incoterms Rules

It is not feasible to encompass all constraints prescribed in municipal laws and international conventions. The laws selected herein serve merely to confirm the existence of legal constraints, which the parties must take into consideration when agreeing upon the terms of the sale contract.

2.1.1. Constraints Arising from Municipal Laws Relating to International Trade

It should be noted at the outset that the vast majority of domestic legislations worldwide have not regulated Incoterms through detailed statutory provisions but have confined themselves to cross-referencing the ICC editions. When parties to a sale employ Incoterms, they must bear in mind that certain laws and regulations in particular countries may constitute constraints on the use of specific rules. In many instances, the parties are entirely unaware of these constraints, with one party being confronted by them only at the stage of contract performance. In this regard, the ICC issued a report in January 2025 concerning the national regulatory barriers facing the application of the Incoterms 2020 rules. Among the barriers identified is that insurance on foreign carriage under CIF and CIP documents is permissible up to the point of entry but is not permitted for subsequent inland transport. This constraint was recorded in relation to several states, including Singapore, India, China, Tunisia, and Algeria (International Chamber of Commerce, 2025, pp. 8, 10, 14, 28).

What is to be understood from this is that under the CIF and CIP sale formulas, it is the seller who is obligated to procure insurance on the goods for the benefit of the buyer. Undoubtedly, such insurance will be effected with a foreign insurance company, and in this case, numerous national insurance laws refuse this arrangement on the basis of the principle of territorial sovereignty, encouraging their operators to insure with insurance companies subject to domestic law. Foreign insurance remains valid up to the

point of entry into the territory of the state; beyond this point and into the interior of the state territory, coverage falls within the exclusive competence of national insurance companies.

In a memorandum from the Association of Banks and Financial Institutions addressed to the directors of Algerian banks and financial institutions, concerning the conditions for the application of procedures relating to imports under the FOB formula, the Association recommended the selection of the Algerian maritime fleet—that is, vessels subject to Algerian law—prior to any import operation, and the prioritization of contracting under the FOB formula. Where an invoice is presented for domiciliation on the basis of the CIF formula, it must be disaggregated into three components: the value of the goods, the freight charge, and the insurance premium (ICC, 2019, p. 5).

These procedures were adopted to fulfill requirements derived from insurance, banking, and foreign exchange legislation, within the framework of protecting against the depletion of hard currency reserves through insurance with companies subject to Algerian law, and prioritizing the Algerian fleet in order to limit recourse to foreign insurance and foreign-flag vessels. Accordingly, priority is accorded to the FOB sale formula, as it is the buyer who selects the vessel and concludes the insurance contract. Furthermore, the conclusion of international sale contracts is monitored through banking channels, with the disaggregation of the constituent elements of the CIF sale formula being required to facilitate banking supervision and to curb the illicit transfer of hard currency.

In order to avoid such conflict between Incoterms and municipal laws, the ICC recommended that sellers adopt the DAP and DPU formulas instead of DDP, because under the latter formula the seller assumes obligations that cannot be fulfilled practically or legally in the buyer's country, such as obtaining import licenses. The ICC also recommended a meticulous review of national laws before agreeing to Incoterms, or the use of alternative rules in lieu of Incoterms (International Chamber of Commerce, 2025, pp. 8, 10, 14, 28).

Among the municipal laws characterized by considerable flexibility compared to the formula adopted by the ICC is English law. For instance, English law adopts the FOB formula but with additional transport services to be performed by the seller, who pays the costs of transporting and insuring the goods on behalf of the buyer. The question arises as to whether the seller in this case is bound in the capacity of an agent of the buyer, subject to a duty of care, with the contract producing the effects of an agency relationship, or whether the seller's obligation remains a primary obligation within the framework of the sale contract, binding the seller to achieve a specific result (*obligation de résultat*). In principle, the court ascertains the intention of the parties with precision. Under English law, the seller acts as an agent unless the contract provides otherwise (Fedi, 2018, p. 417). Accordingly, the parties to an international sale contract governed by English law must be aware that the default position is that the seller transacts in the capacity of an agent of the buyer, unless an agreement to the contrary is contained in the sale contract. Addressing this point in the contract may spare the parties disputes during performance and in the determination of the legal characterization of the contract.

2.1.2. Constraints Arising from International Conventions

Among the most significant international conventions that intersect with Incoterms are the United Nations Convention on Contracts for the International Sale of Goods (CISG) and the conventions relating to maritime carriage.

First: Constraints Arising from International Conventions on Maritime Carriage

Four international conventions regulate the question of maritime carriage by defining the carrier's liability and its limits: the International Convention for the Unification of Certain Rules of Law relating to Bills of Lading and Protocol of Signature, known as the Hague Rules (1924); the Protocol Amending the said International Convention, known as the Hague-Visby Rules (1968); the United Nations Convention on the Carriage of Goods by Sea, known as the Hamburg Rules (1978); and the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, known as the Rotterdam Rules (2008).

To date, the Hague Convention of 1924 remains the most successful convention and has enjoyed broad international acceptance, whereas the Hague-Visby Rules have not attracted widespread interest from the international commercial community. The Hamburg Rules received the support of developing countries, unlike the major maritime powers. As for the Rotterdam Rules, although their purpose was to meet the requirements of modern maritime transport, they have been the subject of reservations by numerous states (Coetzee, 2013b, pp. 2–4).

Maritime sales are executed through contracts of maritime carriage; a maritime sale is inconceivable without maritime carriage. Accordingly, the mandatory (*jus cogens*) provisions of international conventions take precedence over Incoterms, and the will of the parties cannot derogate therefrom. For example, the seller and buyer in an FOB or CIF sale contract may agree to exempt the maritime carrier from liability for damage to the goods. Such a contractual clause is void under Article 23 of the Hamburg Rules, which renders null any clause exempting the carrier from liability, and the carrier may not rely upon it to escape liability. Furthermore, the commencement and termination of the carrier's liability are not determined in accordance with Incoterms but in accordance with the mandatory provisions of the applicable convention.

Second: Constraints Arising from the United Nations Convention on Contracts for the International Sale of Goods (CISG)

The CISG is characterized by flexibility. Rather than mandating the strict application of its provisions, the Convention has embraced the principle of party autonomy and good faith in international commercial transactions. The instability of international trade terms and the divergence in their interpretation led the drafters of the Convention to refrain from defining these terms. Moreover, the international trade terms formulated by the ICC obviate the need for such definitions, and the parties may have recourse thereto (Yawar & Amani, 2025, p. 116).

In the event of a breach of Incoterms, courts and arbitrators may render a judicial or arbitral decision to resolve the dispute on the basis of national laws or international treaties, such as the CISG. The fundamental distinction between Incoterms and the CISG is that Incoterms prescribe what the parties are required to do, whereas the Convention determines the liability arising from the breach of obligations—it ensures that each party will perform its obligations (Yawar & Amani, 2025, p. 119).

The scope of Incoterms is limited, and they cannot be regarded as constituting a sale contract. They delineate certain obligations, such as the delivery of goods, the transfer of risk, the assumption of costs, the procurement of transport documents and insurance, as well as the determination of customs procedures and port dues, and the packaging, marking, and labeling of goods. They regulate only certain aspects of the sale contract and do not address other matters pertaining to defects of consent (*vices du consentement*), transfer of title (*transfert de propriété*), *force majeure*, and termination of contract. All

these aspects are governed by the contractual terms or the law governing the contract (*lex contractus*). Where the CISG is the applicable law, the Convention regulates these matters (Yawar & Amani, 2025, p. 118).

The provisions of the Convention are supplementary to Incoterms. The parties may expressly agree to derogate therefrom. In the event of a conflict between Incoterms and the provisions of the Convention, the Incoterms conditions prevail over the contract and not the provisions of the Convention. By virtue of the supplementary and interpretive nature of the provisions governing international sale contracts, and in the absence of agreement between the parties, the dispute is resolved by reference to the provisions of the Convention, whether the dispute relates to matters falling outside the scope of Incoterms or to the interpretation of certain matters regulated by Incoterms but requiring the interpretation and supplementation of their provisions. Certain obligations falling within the scope of Incoterms are addressed in a detailed and explanatory manner by the provisions of the Convention, for example (Debattista, 2020, p. 3):

- The obligation of delivery pursuant to Article 31 of the Convention.
- The assumption of costs pursuant to Article 76 of the Convention.
- The buyer's refusal to take delivery of the goods pursuant to Article 86 of the Convention.
- States requiring that the sale contract be in writing, contrary to Article 11 of the Convention, as provided for under Article 96 of the Convention.

In a case submitted to the China International Economic and Trade Arbitration Commission (CIETAC) on 7 April 1999, known as the *PVC Suspension Resin* case, the facts may be summarized as follows: an American seller exported PVC (*polyvinyl chloride*) to China under the CIF sale formula. The goods were transported by container, and upon arrival at the port of discharge, it was discovered that the goods had sustained damage. The buyer claimed compensation for the damaged goods. The seller argued that the goods were in sound condition at the time of shipment, as evidenced by the inspection company's certificate, and that the containers were sealed. The seller further contended that, under the CIF condition, risk transferred to the buyer upon shipment of the goods on board the vessel, and that the damage resulted from improper packing and packaging within the containers. The tribunal held that the seller was liable for compensation, being the party obligated to undertake the packing and packaging operations pursuant to the CISG, specifically under Articles 35, 36, 67, and Article 9(2). Accordingly, recourse to the provisions of the Convention was necessitated by the failure of the Incoterms to regulate matters relating to packing and packaging, confining themselves to the point of transfer of risk to the buyer, namely the shipment of goods on board the vessel (Coetzee, 2013b, pp. 3–4).

2.2. Substantive Constraints on Freedom of Contract in Incoterms Rules

In order to preserve the stability of international commercial transactions and to avoid any ambiguity in the interpretation of Incoterms conditions, the essence and architecture of Incoterms rules cannot be impaired. The parties must observe certain constraints relating to the substantive scope of Incoterms, whether applied literally, modified, or excluded from the contractual sphere.

2.2.1. Substantive Constraints on the Literal Application of Incoterms Rules

The freedom of the parties to adopt Incoterms literally is not unqualified; rather, it is subject to an essential formal condition that must be included in the sale contract, namely the specification of the edition year and the port of shipment—for example: "*FOB Shanghai Incoterms® 2020*," or other formulas adopted in previous years. A new edition

does not abrogate prior editions; they remain in force and the parties may have recourse thereto. Each edition may be said to be independent of the others and self-sufficient in its own right. The failure to specify the edition year in the contract may give rise to difficulties that are hard to remedy, and opens the possibility for the court, the arbitrator, or the parties to apply any of the prior editions, or to adopt a presumption that the parties' intention was directed toward the adoption of the most recent edition. The specification of the port of shipment further serves to identify the point of delivery—that is, the place at which risk transfers from the seller to the buyer (ICC, 2019, pp. 9, 16).

2.2.2. Substantive Constraints on the Modification of Incoterms Rules

The modification of Incoterms may encounter an obstacle relating to the various contracts involved in the import and export operation. The question arises as to whether these ancillary contracts are affected by Incoterms. Among the most significant contracts involved in the performance of any international sale are contracts of carriage. A contract of carriage requires the presentation of a bill of lading issued by the carrier to the shipper (i.e., the seller). The contract also requires a method of payment, and recourse is typically had to documentary credit (*lettre de crédit documentaire*). Where the terms of the three contracts—sale, carriage, and documentary credit—are aligned, the transaction proceeds smoothly. In the event of misalignment, however, difficulties arise in the performance of the obligations pertaining to each contract. It is therefore in the interest of all parties involved that these contracts be compatible with the Incoterms rules. This compatibility does not fall upon the carrier or the issuing bank, as they are not parties to the sale contract; accordingly, it is the seller and the buyer who must assess this compatibility when formulating the terms of the sale contract.

Among the most notable innovations of the 2020 edition is the recognition that carriage is ordinarily performed by a third party, namely a carrier, with whom the seller or buyer contracts according to the applicable Incoterms formula. It subsequently became apparent from commercial practice that the seller or buyer may transport the goods by their own means without the need for a third-party carrier.

When selecting an Incoterms formula, the parties must take into account the possibility that the agreed-upon formula may conflict with other similar formulas. By way of illustration, under the CIF formula, risk transfers to the buyer at the port of shipment. Where the parties agree that the seller shall bear the risk for a quantity of goods upon their arrival at the destination port, a conflict arises between this clause and the adopted CIF formula. The question then becomes whether the loss of or damage to the goods during transit is borne by the buyer after shipment, as under CIF, or by the seller pursuant to the new clause.

American courts held that the agreement was concluded under the CIF formula and that any agreement derogating from the adopted Incoterms formulas must not deviate from the essence of the formula. Furthermore, the parties may include clauses relating to the carriage of goods and contractual performance that are extraneous to the essence and scope of Incoterms; such clauses must accordingly be excluded and cannot be grafted onto the substantive core of the Incoterms framework (Coetzee, 2013a, pp. 586, 588).

2.2.3. Substantive Constraints on the Exclusion of Incoterms Rules

The parties may agree to the total or partial exclusion of Incoterms by agreeing to apply hybrid rules or formulas that resemble Incoterms but fundamentally alter their scope. One doctrinal view holds that among the foundational principles underlying

international trade terms is that the party in possession of the goods bears the risk, and any deviation from this fundamental principle corrupts the obligations. Accordingly, these hybrid formulas constitute nothing more than an additional financial obligation upon the seller and do not affect the obligation of delivery or the transfer of risk, which occurs at the point of shipment of the goods on board the vessel under the FOB formula. An alternative view holds that the seller's obligation of delivery is not discharged until the obligations of stowage, dunnage, and trimming have been completed in accordance with the adopted hybrid formula (Coetzee, 2013a, pp. 586, 588).

This latter view is supported by the American case of *Minex Shipping v. International Trading Company of Virginia and SS Eirin*, in which the sale contract provided for the shipment of bags of cement. During the voyage, the cement was contaminated as a result of soybeans falling onto the cement bags. The buyer argued that a contractual clause obligated the seller to sweep, clean, and dry the ship's holds. The court, however, held that the FOBS term did not impose such obligations upon the seller; the seller was obligated only to place the cement in the ship's holds in an organized and secure manner, in a way that protected it from friction, bruising, or damage resulting from leakage. The court ruled that once the cargo had been properly stowed, the risk of damage transferred to the buyer (Coetzee, 2013a, pp. 586, 588).

Among the modifications introduced into the CIF formula is what is known as the "outturn quantity" or "outturn weight" clause—a provision commonly employed in contracts for the maritime carriage of petroleum. Recourse to this modification is had because the volume of petroleum decreases during transit as a result of evaporation, sediment accumulation, or spillage. These losses are termed "transit losses" and are distinct from maritime losses (*avaries*) arising from fortuitous events, such as adverse weather conditions, war, or destruction of the vessel. Transit losses that cannot be avoided are borne by the seller, whereas other categories of risk—on the preponderant view—transfer upon shipment, as is the case under the official CIF formula, and are borne by the buyer (Coetzee, 2013a, pp. 586, 588).

Conclusion

This study has reached the following findings:

First — The general principle is that party autonomy constitutes the foundational pillar upon which the adoption of Incoterms rules in international sale contracts rests. Consequently, the parties are entitled to adopt Incoterms without modification, to modify them by augmenting or diminishing obligations, or to exclude their application.

Second — Incoterms derive their binding force from the agreement of the parties to adopt them, in application of the principle of *pacta sunt servanda*.

Third — The study revealed two conflicting doctrinal approaches regarding the legal nature of Incoterms: the first characterizes these rules as international commercial customs, while the second considers them standard contractual terms. This divergence entails legal consequences of paramount importance, particularly with respect to the interpretation of the express and implied will of the parties.

Fourth — Incoterms perform three fundamental functions: the precise delineation of obligations, the allocation of costs, and the determination of the transfer of risk. Accordingly, they do not regulate all matters pertaining to the sale, leaving such matters to the terms of the international sale contract. Incoterms are therefore properly regarded as terms regulating certain clauses of the international sale contract.

Fifth — Municipal laws relating to international trade—such as banking, insurance, and customs legislation—contain provisions that may conflict with the application of

Incoterms, thereby constituting an obstacle to the performance of international sales transactions.

Sixth — The CISG is characterized by flexibility, and its provisions are supplementary to Incoterms. Where the parties have not agreed upon a matter falling within the scope of Incoterms, the provisions of the Convention apply.

Seventh — Incoterms are subject to a series of substantive constraints relating to the essence and architecture of the rules. Under no circumstances should the principle of contractual freedom lead to the evisceration of the substance and structure of the rules as determined by the ICC editions.

On the basis of these findings, the study makes the following recommendations:

First — The express incorporation of Incoterms into municipal legislation, with the inclusion of provisions elucidating the constraints derived from laws relating to international trade—such as banking, insurance, customs, and others—with cross-reference to the ICC editions.

Second — The establishment of a specialized digital platform for import and export procedures, functioning as an information repository and a guidance tool for economic operators, enabling them to ascertain the various legislative and administrative constraints pertaining to international sales.

Third — The issuance by the ICC of interpretive guidance of greater clarity regarding the limits of the contractual freedom of the parties.

Fourth — The exercise of precision by the contracting parties when agreeing to adopt Incoterms, and the consultation of experts and specialists in the field of international sales.

Fifth — The study inclines toward the characterization of Incoterms as standard contractual terms, on the ground that this characterization is consistent with the nature of international commercial transactions—characterized by rapidity—and keeps pace with developments in the field of artificial intelligence. Conversely, the study rejects the characterization of Incoterms as international commercial customs, in view of the legal difficulties raised by the implied interpretation of the parties' will under the CISG, in addition to the difficulty of establishing the elements of international commercial custom with respect to each new development and edition issued by the ICC.

In fine, contractual freedom in the adoption of Incoterms by the parties is not an absolute freedom; rather, it is an authority circumscribed by municipal laws, international conventions, and the functional architecture and essence of Incoterms rules, together with the necessity of preserving their substance. In light of the accelerating evolution of international trade rules and the digital transformations occurring within the framework of artificial intelligence, the subject remains a fertile ground for further study and scholarly inquiry.

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