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THE APPLICATION OF INCOTERMS 2020 IN INTERNATIONAL CONTRACTS – CRITICAL APPRAISAL

Uma Pusapati
Research Scholar
Dr B R Ambedkar College of law
Andhra University
kuma09@yahoo.in

Abstract: *This article provides a study of Incoterms, especially its newest edition of 2020, as well as its applicability to international contracts. The article seeks to analyse the various instruments that aim to facilitate the application of Incoterms and the contractual drafting techniques that make the application of these rules in international contracts more effective. It also seeks to analyse the methods applicable so that these instruments can be better used by international law operators.*
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1. INTRODUCTION

Nowadays, we can no longer talk about a globalised world without mentioning international trade. Human needs increasingly transcend the borders imposed by countries, so international trade has proved to be an important tool for human evolution.

International contracts are the instruments through which international trade is organised and implemented. This is why these instruments need to be increasingly developed legally, precisely to meet the need for constancy and speed in the development of international trade.

Thus, on the international stage, numerous devices have been drawn up to help with the task of facilitating the harmonisation, standardization, and application of international contracts. There are various organisations and bodies working in the field of private international law to this end. These include the work of the International Chamber of Commerce, especially in drawing up the Incoterms. On the other hand, as will be analysed in detail in this article, the parties to an international contract must be careful when referring to an Incoterm in order to guarantee its effective application. As will be seen, there is a range of instruments aimed at facilitating the application of Incoterms, and likewise, the parties must also be careful when drafting the contract so that it guarantees the maximum effectiveness of the rules.[1]

So, in order to analyse how these instruments can best be used in international contracts, this article will analyse international contracts (item 1), deal with the work of the International Chamber of Commerce (item 2), and then address Lex and its application (item 3).

2. INTERNATIONAL CONTRACTS

Contracts are an important instrument of the law, as well as the way in which business is carried out and most obligations are created in the legal world. Contracts are present everywhere and in

[1] Yang, Jung-Ho. "A study on the reasonable choice and utilization of incoterms 2020 rules from the perspective of logistics and supply chain management." Journal of Korea Trade 25.1 (2021): 152-168.

every country in the world and therefore have an important mission in the human universe.

The doctrine goes so far as to say that the presence of contracts in the world is as widespread as that of business, so that it cannot be said that there is business without contracts. Contracts are the means by which human will is realized, and, especially in commercial practice, they are used to make companies' objectives effective. They are an association of the values, interests, and will of the parties that cannot be contrary to the public order.[2]

Studying the subject of international contracts is very important because international transactions tend to have less legal certainty than transactions involving only domestic law. It is therefore important to understand and study the ways in which the parties involved in an international contract can protect themselves from the risks intrinsic to such a relationship.

There are several reasons why an international transaction, and therefore its contract, has less legal certainty than domestic law contracts and relationships. These include social factors, such as the fact that the parties involved in these contracts come from different cultures, speak different languages, have different cultures, have different political, social and macroeconomic experiences, as well as being subject to different regulatory and tax regimes.

However, it's not just these factors that make international contracts and relations difficult, especially when it comes to international contracts, and certain characteristics mean that they can be subject to the rules of more than one legal system. Thus, unlike domestic law contracts, jurisdiction and applicable law are not always clear. These factors contribute to whether or not the legal certainty of an international contract is guaranteed, especially when you consider that the applicable law is also directly linked to the effectiveness and validity of the international contract.

In fact, the international nature of a contract differentiates it from contracts governed by a single legal system. Equally difficult is the task of defining an international contract, but for the purposes of this article we can adopt the definition given by Strenger: "International trade contracts are all bi- or plurilateral manifestations of the free will of the parties, aimed at relations of property or services, whose elements are binding on two or more extraterritorial legal systems, by virtue of domicile, nationality, principal place of business, place of contract, place of performance, or any circumstance that expresses an indicative indication of the applicable law."[3]

Due to this characteristic, international contracts develop a peculiarity that distinguishes them from those that produce effects only within a state or within the same legal system. This peculiarity leads to the need for certain clauses to be incorporated into the international contract—clauses that, by dealing with situations typical of transnational economic or commercial relations, have become typical of international contracts.

[2] Ağaoğlu, Cahit. "Incoterms® 2020." Public and Private International Law Bulletin 40.2 (2020): 1113-1149.

[3] Marrella, Fabrizio. "Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts." Vand. J. Transnat'l L. 36 (2003): 1137.

It is precisely because international contracts present a greater challenge to the law that various international bodies and organisations have been working on this issue to issue rules and principles aimed at harmonising and standardising the subject. These organisations are working to issue models for the aforementioned clauses typical of international contracts, as well as drafting soft laws and updating the Lex Mercatoria. The doctrine defines soft laws as: "This is a special category of material or inspirational sources within the set of normative sources of private international law. This includes recommendations, guidelines, codes of conduct, laws, models, and principles that are not, at first sight, endowed with immediate binding effects, i.e., effects that oblige certain behaviours by individuals; they are norms that influence and inspire the internal legislative process in states and the negotiation of treaties and conventions, and they also serve as a reference for the actions of national judges and the parties in concrete cases. These sources are improperly known as soft law sources and comprise topics related to various sectors of public international law, private international law, and international trade law."[4] The doctrine defines lex mercatoria as "a set of (transnational) rules that regulate the organisation and international commercial activity based on international commercial uses and customs, contractual clauses, standard contracts, and rules emanating from international organisations."[5]

As examples of bodies and organisations that do this kind of work, one cannot fail to mention the International Chamber of Commerce ("ICC"), the International Institute for the Unification of Private Law ("UNIDROIT"), and the United Nations Commission on International Trade Law ("UNCITRAL"). However, for the purposes of this article, the ICC will be analysed in greater detail.

3. THE INTERNATIONAL CHAMBER OF COMMERCE

The ICC was founded shortly after the First World War, more specifically in 1919, a time when there was little or no regulation on the international scene on issues such as international trade, investment, and international finance.

Thus, the creation of the ICC was intended to fill these gaps in the international arena, since its founders believed that the private sector was better qualified to set international standards for business than the states.

Since its foundation, the ICC's main function has been to facilitate international trade. As such, this association is one of the main bodies on the world stage for issuing rules and principles aimed at facilitating trade and the interpretation of contracts concluded between traders from different places. In 1923, the ICC also created its Court of Arbitration, so that the resolution of arbitration disputes in international trade is also one of its missions.

It should also be noted that the ICC sees trade as a tool to lift people out of poverty and states that its mission is to promote international trade in a responsible and inclusive manner. Currently, the ICC operates through the formation of national committees, which issue rules for international trade and arbitration services. Despite being based

[4] Bucur, Loredana Ioana. "Lex Mercatoria, Soft Law and a Closer Aproach of Unidroit Principles." Law Review 02 (2018): 292-312.

[5] Michaels, Ralf. "The true lex mercatoria: law beyond the state." Ind. J. Global Legal Stud. 14 (2007): 447.

in Paris, the ICC has offices in other locations around the world, including India.

4. INCOTERMS AND THEIR APPLICATION

As already mentioned, one of the ICC's functions is to issue rules applicable to international trade in order to fill in gaps and harmonise and standardise the application of international contracts. With this function in mind, the first Incoterms were published in 1936.

The term "Incoterms," which is now a registered trademark of the ICC, is an abbreviation for "International Commercial Terms," which in Portuguese translates as international commercial clauses. Although the term states that these are international clauses, there is nothing to prevent their application and use in domestic transactions and contracts. The Collins dictionary defines Incoterms as "standard expressions, used in international trade practice, that indicate the responsibilities of the buyer and seller in the process of international buying and selling (more specifically, with regard to the delivery of goods and the resulting charges). The term Incoterm is an abbreviation of the Anglo-Saxon expression international commerce. "Its existence derives from the need for legislative unification in this area in order to reduce the legal and regulatory obstacles to the desirable development of international trade."[6]

Incoterms are used to govern commercial transactions only, so they are not applicable to sales to consumers. Although the ICC does not define the commercial nature of the sale, an analysis of the rules leads to the conclusion that the criterion they select is the economic one, i.e., any sale involving a cross-border movement of goods is international.

The Incoterms published by the ICC are booklets containing code words that constitute cost and risk distribution clauses for transactions involving the sale and transport of goods. The Incoterms define themselves as a set of international rules for the interpretation of the commercial terms most commonly used in international trade. This avoids uncertainties in the interpretation of such terms in different payments. Incoterms define themselves as a set of international rules for interpreting the commercial terms most commonly used in international trade. Thus, uncertainties in the interpretation of such terms in different countries are avoided. Incoterms are standard international trade terms developed by the ICC and widely recognised by common abbreviations such as "FOB" and "CIF." In essence, Incoterms allocates the following key contracts between seller and buyer: (i) transport costs; (ii) risk of loss or damage to the goods; (iii) export and import customs clearance and payment of duties (if any); and (iv) insurance responsibilities. Incoterms are standard international trade terms developed by the ICC and widely recognised by common abbreviations such as 'FOB' and 'CIF'. In essence, Incoterms allocates the following key obligations between seller and buyer: (i) transport costs; (ii) risk of loss or damage to goods; (iii) export and import customs clearance and payment of duties (if any); and (iv) insurance liabilities.[7] Thus, if a contract mentions any of these clauses, it clearly establishes when the

[6] Collins. Incoterms. English language dictionary: complete & unabridged 2012 digital edition. London: William Collins Sons & Co. Ltd.: Harper Collins, 2012.

[7] Jimenez, Guilhermo C. ICC guide to export/ import - global standards for international trade. 4. ed. Paris: International Chamber of Commerce, 2012, p. 43.

risk and cost of a goods transport operation are transferred from one party to the other. Every time an international contract refers to an Incoterm, it is opting for the application of a certain legal regime.[8]

Incoterms are the most famous and widely used of the rules issued by the ICC. According to the ICC, Incoterms facilitate global trade worth trillions of dollars every year. In other words, these terms are used on a daily basis in countless international contracts, and their use is even recommended as a way of simplifying contracts and harmonising the law (especially international law and lex mercatoria).

Although there were tools whose system was similar to the Incoterms before they were published, it was the repeated use, clarity, and quality of the Incoterms text that led to their acceptance. In this sense, the doctrine states that Incoterms originated from various sources, such as certain categories or branches of commerce that, out of a need for organisation and discipline, set up mechanisms for contractual self-regulation, contractual formulas, and standardised models of the parties' rights and obligations. This is because their validity and effectiveness derive from the will of the parties. Thus, despite being an apparently simple idea, its relevance, importance, and effectiveness on the international stage are extreme.

It is important to mention that these clauses deal with all types of transport, i.e., road, rail, air, waterway, and sea. It is worth noting that there are specific clauses for water transport, whether by waterway or sea.

Incoterms are important in the international arena, especially when you consider that these operations involve different legal systems, which have different rules on the transfer of property (traditio). This is because, although the Incoterms do not expressly define the moment of transfer of ownership, they can allow this to be determined when the applicable law links the moment of transfer to the place of delivery. Thus, in these cases, contractual regulation of this issue becomes very important.

In this way, for example, if the parties to an international contract include the Incoterm "Free on Board" in their contract, it is established between them that the goods will be delivered by the seller to the deck of the ship in the port of origin, this being the moment when the costs and risks are transferred from the seller to the buyer.[9]

As explained above, the first version of Incoterms was published in 1936. However, the ICC has maintained and developed this instrument since then,[10] so that new versions were published in 1953, 1967, 1976, 1980, 1990, 2000, and 2010. Recently, in celebration of its centenary in 2019, the ICC published Incoterms 2020, with the aim of adapting the rules to the challenges that international trade will face in the coming years.[11]

[8] Fiser-Sobot, Sandra. "ICC Rules for the Use of Domestic and International Trade Terms-INCOTERMS 2020." Collection Papers Fac. L. Nis 91 (2021): 31.

[9] Kim, Jin-Hwan. "The Comparative Study of Incoterms 2020 and 2010 in International Physical Distribution." Journal of Distribution Science 20.4 (2022): 101-110.

[10] On Incoterms and their role see: https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020/ (last accessed on 24/12/2023)

[11] For more information on the changes introduced in Incoterms 2020: https://iccwbo.org/resources-for-business/incoterms-rules/what-are-the-key-

Although Incoterms 2020 is the most recent version of the clauses, Incoterms 2010 are still in force, especially for contracts that use them. It is therefore important that when the parties decide to refer to an Incoterm in your contract (international or not), they also specify which version of these rules is referred to. Legally, the location of this indication does not matter, but for ease of reading the contract, it is indicated that it be done after the chosen expression. In this sense, the 2020 version of Incoterms covers 11 rules, as set out below:

Rules applicable to any mode of transport:

- 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

Rules applicable only for waterborne transport (maritime or inland waterway):

- FAS - Free Alongside Ship
- FOB - Free On Board
- CFR - Cost and Freight
- CIF - Cost Insurance and Freight

Although the ICC has published Incoterms in 29 languages and more than 250 launch events and training seminars have been organised around the world by ICC national committees, there is an online course of instruction on Incoterms, and this tool has been used for a long time. The Chamber reports that many users use Incoterms inappropriately.

In light of this, the ICC has sought to further improve this tool, with the inclusion in Incoterms 2020 of more detailed explanatory notes and improved graphics to illustrate the responsibilities of importers and exporters for each rule. In addition, the introduction to Incoterms 2020 includes a more detailed explanation of how to choose the right rule for your contract and the most appropriate one for a given transaction. The CCI has also made available a mobile phone application on Incoterms.

This concern to make the rules more accessible and avoid their inappropriate use does not seem to be exclusive to the ICC through the Integrated Foreign Trade System, which has created its own summary table to elucidate the subject, already addressing the new version of the rules (Incoterms 2020).

Furthermore, in addition to the efforts being made by various organisations to ensure that these rules are used properly, there are various precautions that the parties can take when drafting the international contract to avoid problems with the application of Incoterms.[12]

A first precaution when using the Incoterms that the parties can take in drafting the international contract, as already explained above, is to do so expressly and indicate the version of these rules that is being referred to, even if the incorporation of the terms in a tacit way is admitted. Errors are thus avoided when the parties opt for concise wording and copy the chosen Incoterm in full, expressly mentioning the version of the rules

changes-in-incoterms-2020/ (last accessed on 24/12/2023)

[12] Davis, Jonathan, and John Vogt. "Incoterms® 2020 and the missed opportunities for the next version." International Journal of Logistics Research and Applications 25.9 (2022): 1263-1286.

chosen. Despite appearing simple, as already pointed out, this technique is misused in practice, creating great difficulty for enforcers of international contracts in identifying the legal regime to which the parties wished to submit their contract. Similarly, when expressly adopting Incoterms, it is not recommended to use or translate the terms. As mentioned, the ICC works with these rules in 29 languages, so it is recommended that one of these versions be used. Translating the terms can lead to ambiguity. Equally unchangeable is the meaning of abbreviations. If this happens in an international contract, it could lead to the contract being subject to a completely different regime than the one initially envisaged by the contracting parties, possibly not the regime envisaged by the Incoterm.

In this respect, it is important to point out that the use of Inconterms does not make it indispensable for the buyer and seller to enter into a purchase and sale agreement to provide for, among other things, the applicable law, the method of resolving disputes, and other peculiarities of the transaction.

Another misuse of terms is the mention of several Incoterms in the contract. The general conditions of an international contract may require the mention of more than one commercial term, but it is recommended that, whenever possible, the parties refer to only one Incoterm.

On the other hand, it may happen that the choice is not expressly expressed (which, again, is not recommended), and, in these cases, the behaviour of the parties during the negotiations or during the execution of the contract should be analysed. Analyzing these elements makes it possible to recognise or not tacitly consent to the adoption of Incoterms. In this sense, it is an example of tacit consent, the application of which can be problematic when the parties do not clearly mention the Incoterm they wish to apply but only part of the term.[13]

Another problem that can arise when incorporating Incoterms into international contracts is the failure of the parties to indicate the version of the rules to which they have referred in the contract. It is not always possible to assume that the parties have opted for the latest version of the Incoterms, especially when it is considered that the entry into force of a new version of the rules does not revoke any of the previous versions, so that the autonomy of the will of the parties allows them to opt for any version of the Incoterms.

In any case, it is important to note that the entry into force of a new version of the Incoterms encourages the parties to use this version rather than the previous ones. Not least because Incoterms are revised and updated to adapt to the demands of international trade players. Thus, the new versions published take into account the evolution of international trade. In other words, opting for an older version of the rules must be the result of a thorough analysis by the parties of the risks and results of such a choice, just as interpreting the contract to conclude that there has been a tacit choice for a version other than the most recent one must also be done cautiously. Depending on which version of the rules is applied, obligations may be added or subtracted for each party.

It may happen that the Incoterm chosen by the parties to appear in the

[13] Petrová, Michaela, Martina Krügerová, and Michal Kozieł. "INCOTERMS–history and future development." Proceedings of the 15th International Conference Liberec Economic Forum. 2021.

international contract appears in only one version of the Incoterms, so that it will be clear which version the parties have chosen to apply to the contract, even if there is no express mention of it. However, it is much more common for expressions to appear in several versions or even all versions of the Incoterms and not just one of them.

Furthermore, another point of attention that the parties should take when drafting an international contract that refers to an Incoterm is that it should not contain obligations that are inconsistent with those established by virtue of the terms. For this reason, it is of the utmost importance that the parties have a thorough knowledge of the obligations imposed by the adoption of an Incoterm so that they do not establish a conflicting obligation in the international contract out of ignorance. Once again, the ICC has a number of institutes that make it easier for the parties to fully understand the terms and the rules they impose.

On the other hand, the parties may intentionally choose to depart from the standard content of a particular Incoterm, generally because they want to adapt the legal regime applicable to the international contract. Although the ICC even allows the agreement of the parties to set aside specific obligations laid down in some Incoterms, the parties must be extremely careful in the contractual wording so as not to call into question the characteristic obligations of the chosen commercial term and mischaracterize it. It is important to note that Incoterms are the result of extensive commercial practice, so that the allocation of responsibilities and the legal regime laid down in them reflect years of study and practical experience on the best way to allocate risks, which leads to the conclusion that changes to their legal regime should only be made in exceptional cases.[14]

A similar problem that can occur is when the parties to an international contract decide to add obligations to Incoterms. In commercial practice, what can also happen is that the parties decide to associate an Incoterm with other existing commercial terms, what the doctrine calls "combiterms" or "liner terms." However, the combination of terms, especially considering that this culminates in the combination of legal regimes, must be done with extreme caution. Practice shows that it is not always easy to harmoniously combine different contractual provisions and terms, especially when it comes to transferring risks and sharing costs.[15]

Thus, only the correct use of Incoterms enables them to fulfil the function for which they were drawn up, which is to guarantee legal certainty in relationships. This is why studying contract drafting techniques and the tools provided by the ICC on Incoterms is so important.

5. CONCLUSION

Incoterms are tools that guarantee legal certainty in a contract, especially in an international contract, which faces greater difficulties than a contract under domestic law. For this reason, the terms are widely used in practice. According to ICC data, Incoterms facilitate global trade worth trillions of dollars every year. Due to the repeated use of these terms, they also make it possible

[14] Petrová, Michaela, Martina Krügerová, and Michal Kozieł. "New Challenges in Incoterms in the BackGround of Their Historical Development." ACC Journal (2021).

[15] Kim, Sang Man. "Some Critical & Controversial Issues on Incoterms 2020 for International Trade." Global Trade and Customs Journal 17.1 (2022).

to simplify and harmonise international contracts (especially in terms of international law and lex mercatoria).

In this way, the use of these terms in an international contract, when possible, is recommended because, in addition to adequately visualising the legal transaction planned by the contracting parties, the terms stem from extensive commercial practise and reflect years of study on the subject, as well as facilitating the definition of the allocation of risks and costs in the commercial transaction. What should be clear is that every time an international contract refers to an Incoterm, it is opting for the application of a certain legal regime.

On the other hand, its use must be done cautiously, and the parties to an international contract must be fully aware of the obligations they are entering into when including an Incoterm in their contract. To this end, there are various tools created by the CCI and other organisations (such as Siscomex) to facilitate understanding of Incoterms and, above all, to ensure that they are applied properly to international contracts. The ICC has increasingly sought to improve this tool to make it even more accessible to its users, so that Incoterms 2020 has been equipped with more detailed explanatory notes with improved graphics to illustrate the responsibilities of importers and exporters for each rule.

The parties should also be careful when drafting the contract to avoid problems with the application of Incoterms. For this reason, it is recommended that references to Incoterms always be made expressly and indicate the version of the rules chosen by the parties. There can be no mistakes if the well-informed parties opt for concise wording and copy the chosen Incoterm in full, expressly mentioning the version of the rules chosen.

If the Incoterm chosen by the parties does not correspond in a pertinent way to the legal situation desired by the contracting parties, the latter can exercise their contractual freedom. The ICC allows Incoterms to be adapted. Thus, it is possible to add or remove obligations from a standard term. However, this contractual freedom must be exercised with extreme caution and must be implemented by parties who are familiar with the Incoterms, at the risk of conflicting obligations being established in the contract signed.

The use of Incoterms in international contracts must be done with caution, clarity, and through study by the parties; otherwise, the terms will not bring the desired legal certainty but could generate conflicting contractual obligations and, consequently, conflicts between the parties.

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