

Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods

That the Vienna Convention on Contracts for the International Sale of Goods¹ does not attempt to define trade terms (CIF, C&F, FOB carrier at named point of shipment, FAS, FOB carrier at named point of destination, ex ship, and the like) is entirely understandable. These terms, which (among other things) allocate the risk of loss or damage during transit, are too detailed and complex in their operation to be easily susceptible to international codification. Moreover, their definition is subject to change in the light of changing commercial custom and should not be frozen by international legislation.²

Less easy to understand, however, is the Convention's failure to address problems of risk of loss or damage that arise in documentary sales transactions in which trade terms are, in fact, used by the parties. Such documentary transactions probably constitute the great majority of contracts for the international sale of goods, yet the Convention deals with documentary transactions only incidentally, and its provisions on risk of loss or damage would, if they were applicable, conflict with elementary principles underlying such transactions. According to the legislative history of the Convention, the drafters intended that parties can, if they wish, supplement the Convention by the use of trade terms, and that in such cases the trade terms "will prevail over the rules set forth in the present Convention."³ There is no indication, however, of the legal

* B.A. Dartmouth College (1938); M.A. (History) Yale University (1942); L.L.B. Yale University (1947). Robert W. Woodruff Professor of Law, Emory University School of Law; James Barr Ames Professor of Law, *emeritus*, Harvard Law School.

** J.D. Emory University School of Law (1988).

1. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, [hereinafter "Convention" or "CISG"], *reprinted in* 52 Fed. Reg. 6264-2 (1987).

2. *See infra* note 32.

3. "Frequently, of course, the risk of loss will be determined by the contract. In particular, such trade terms as FOB, CIF, and C&F may specify the moment when risk of loss passes from the seller to the buyer. Where the contract sets forth rules

principles that would be applicable to trade terms.⁴ Moreover, it is possible that trade terms commonly used in documentary sales may be found to contradict, rather than supplement, the Convention, with the consequence that either those terms may be ousted by the Convention or the Convention itself may be ousted by those terms.

One purpose of the present Article is to suggest language that may be used in international sales contracts to remove doubts concerning the effect of the Convention on the law governing trade terms used in documentary transactions.

First, we shall very briefly describe some of the main characteristics of documentary sales, including trade terms used in such sales. Second, we shall analyze the provisions of the Convention governing risk of loss or damage to goods in transit. Third, we shall discuss how trade terms used in international sales contracts may be interpreted in the light of the Convention, in the absence of express contractual language dealing with their interpretation. Finally, we shall propose express language that may save both the trade term of a contract and the Convention.

I. Trade Terms in Documentary Transactions

In most overseas sales, and also in a great many international sales by land or air, the seller hands over goods to a carrier and receives from the carrier a bill of lading (or other comparable transportation document), which, together with other documents, he tenders to the buyer, or to a bank designated to act for the buyer, in return for payment of the price. If the contract is on CIF, C&F, FOB vessel port of shipment, or FAS terms, it is said to be a "shipment" contract and the holder of the bill of lading normally bears the risk of loss or damage from the time the goods were placed on board or alongside the vessel or other carrier.⁵ If the trade term of the contract is ex ship, or free carrier point of destina-

for the determination of risk of loss by the use of trade terms or otherwise, those rules will prevail over the rules set forth in the present Convention." *Commentary by the U.N. Secretary General on the Draft Convention on the International Sale of Goods*, U.N. Doc. A/CN.9/116, Annex I, reprinted in [1978] IX Y.B. COMM'N INT'L TRADE L. 96, 139, U.N. Doc. A/CN.9/SER.A/1978.

4. The Secretary General of UNCITRAL, in a speech made after the Convention was completed, acknowledged that this could lead to uncertainty: "In some countries INCOTERMS are considered to express merchant customs. Therefore, when a trade term is used, such as FOB or CIF, the courts rely upon INCOTERMS for a specification of the obligations of the parties. In other countries, INCOTERMS are relevant to the interpretation of the contract only if the parties have so stipulated. If they have not, the courts interpret the trade term in the light of prior court decisions or, in the United States, according to statutory requirements. . . . The same result will occur under the convention." Sono, *UNCITRAL and the Vienna Sales Convention*, 18 INT'L LAW. 7, 12 (1984).

5. If a "received-for-shipment" bill of lading is provided for under a CIF or C&F contract, under the Uniform Commercial Code the risk may pass prior to loading on board. See U.C.C. § 2-323(1) and commentary. Under INCOTERMS, however, for a received bill the risk passes only after the goods are placed on board. INTERNATIONAL CHAMBER OF COMMERCE, INTERNATIONAL RULES FOR THE INTERPRETATION OF TRADE TERMS, I.C.C. Pub. No. 350 (1980) [hereinafter INCOTERMS 1980].

tion (in American usage, FOB vessel Buyer's city),⁶ it is said to be a "destination" contract, and the risk of loss or damage remains with the seller until the carrier reaches its destination. There are, of course, many possible variations of these conditions. Similar rules are applicable to shipment and destination contracts involving carriage by rail, truck, or air.

Not only passage of the risk of loss or damage to the goods, but also many other legal consequences flow from the trade term contained in documentary sales. While the trade term is, in one aspect, a price term defining the buyer's duty to pay upon transfer of the proper documents, it is also a delivery term defining the duties of the seller.⁷ For example, the U.C.C. provides that in a documentary sale the seller may not normally require the buyer to accept the goods in lieu of the documents. This makes sense if only because the bill of lading, being in most cases a negotiable document of title, may be used by the buyer to effectuate a re-sale of the goods. Also, the buyer may reject the documents if they differ even slightly from those called for in the contract as, for example, if the contract calls for "June shipment" and the bill of lading is dated "May 31" or "July 1," or if the contract calls for an "on board" bill of lading and the seller tenders a "received for shipment" bill. The rule of perfect tender makes sense in such instances, not only because the negotiable bill of lading is transferable to third parties by endorsement, free of personal defenses, but also because it may be tendered to a bank as security for a letter of credit whose rules require that the documents conform strictly to those specified in the credit.

The law of documentary sales is a product of the custom of the international community of merchants, shipowners, marine insurance underwriters, and bankers of many countries. It has developed over

6. The U.C.C. recognizes three types of FOB contracts: FOB place of shipment, FOB place of destination, and FOB vessel, car, or other vehicle. U.C.C. § 2-319(1). FOB place of shipment requires the seller to deliver the goods to the carrier at a named place, and to bear the expense and risk until he does so. U.C.C. § 2-319(1)(a). An FOB place of destination contract requires the seller to bear the expense and risk of transportation and delivery to the named place. U.C.C. § 2-319(1)(b). FOB carrier requires the seller, in addition, to load the goods on board at his own expense and risk. U.C.C. § 2-319(1)(c). The INCOTERMS FOB term refers to what the U.C.C. calls FOB carrier. The INCOTERMS definition is more exhaustive and specific than that of U.C.C. § 2-319(1)(c). The seller must deliver the goods on board, pay any export taxes or fees, provide any export license, provide a clean receipt from the ship showing goods delivered on board, provide a bill of lading and any other documents required by the buyer, pay loading costs, and bear all risks until the goods pass the ship's rail. The buyer must nominate the carrier, contract for the carriage, pay the freight, pay loading costs to the extent they are included in the freight, pay unloading costs, pay for the documents, and bear all risks from the time the goods pass the ship's rail.

7. Cf. U.C.C. § 2-319(1): "Unless otherwise agreed the term FOB at a named place, even though used only in connection with the stated price, is a delivery term. . . ." Comment 1 to that section explains that it is "intended to negate the uncommercial line of decisions" which treats an "FOB" term as "merely a price term." See *infra* note 15.

many centuries as part of the international law merchant.⁸ Since the seventeenth century it has gradually been received into the developing national commercial legal systems of most countries. In the United States it has been restated and systematized in the Uniform Commercial Code, which expressly refers to the law merchant as a supplementary source of law.⁹ Many of the rules of the law merchant relating to documentary sales are embodied in the definitions of trade terms elaborated by the International Chamber of Commerce and published as INCOTERMS 1980.¹⁰

II. Provisions of the Convention Governing Risk of Loss or Damage in Transit

Chapter IV of the Convention, entitled "Passing of Risk," contains five articles.¹¹ The first, article 66, provides that if the goods are lost or

8. Cf. Berman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 2 EMORY J. INT'L DISP. RES. 235 (1988). This is a revision of a previous edition of that article which appeared in W. SURREY & D. WALLACE, JR., *A LAWYERS GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS*, Part III, Folio 3 (2d ed. 1983) which is in turn a revision of Berman & Kaufman, 19 HARV. INT'L L.J. 221 (1978). The Table of Contents of the Article, as it appeared in the Emory Journal, was omitted by mistake. The author will be glad to supply a copy of it on request.

9. U.C.C. § 1-103 states: "Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions." The U.C.C. does not generally refer to custom as a source of law but instead refers to usage or trade practice. The similarity and difference between custom and usage is discussed in Berman, *supra* note 8.

10. INCOTERMS 1980. INCOTERMS 1980 replaced the original 1953 edition which had been updated in 1967 and 1976. See also INTERNATIONAL CHAMBER OF COMMERCE, *GUIDE TO INCOTERMS (1980)*. The chief rival to INCOTERMS 1980 is the GENERAL CONDITIONS FOR DELIVERY OF MERCHANDISE, developed in 1968 by the Council for Mutual Economic Assistance and revised Jan. 1, 1976. THE REVISED AMERICAN FOREIGN TRADE DEFINITIONS was adopted in 1941 by a Joint Committee representing several leading foreign trade organizations. In 1980 both of these organizations recommended that INCOTERMS 1980 replace the 1941 TRADE DEFINITIONS.

11. For the convenience of the reader, Chapter IV is reproduced herewith. CISG, *supra* note 1.

Article 66:

Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 67:

(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk.

(2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise.

damaged after the risk has passed to the buyer, he is not discharged from paying the price, unless such loss or damage is due to an act or omission of the seller. Read in isolation from the succeeding articles, article 66 would stand in stark contrast to the universally accepted rules concerning passage of risk in documentary sales, under which the buyer pays the price against documents and is *not* discharged from that duty, but only may subsequently bring an action against the seller for damages in the event that the goods were lost or damaged due to the seller's act or omission. Read in context, however, it is clear that article 66 is not concerned with documentary sales, nor is it concerned with sales, whether or not documentary, in which the seller hands over goods to a carrier for transmission to the buyer. Instead, article 66 appears to be concerned solely with sales in which the goods have been taken over by the buyer directly from the seller or have been handed over by the seller directly to the buyer. Such sales are quite unusual in international trade.

In contrast, article 67(1)¹² expressly governs sales contracts which require the seller to hand over goods to a carrier for transmission to the buyer. It provides, first, that if the seller "is not bound to hand over the goods at a particular place," the risk passes to the buyer when the goods are handed over to the first carrier. This seems to refer to the passage of risk in all except destination contracts, an inference supported by the legislative history, the phrase, "at a particular place," having been substituted for the original phrase, "at a particular destination."¹³ It

Article 68:

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage. Nevertheless, if at the time of the conclusion of the contract of sale the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer, the loss or damage is at the risk of the seller.

Article 69:

(1) In cases not within articles 67 and 68, the risk passes to the buyer when he takes over the goods or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) However, if the buyer is bound to take over the goods at a place other than a place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to goods not then identified, the goods are considered not to be placed at the disposal of the buyer until they are clearly identified to the contract.

Article 70:

If the seller has committed a fundamental breach of contract, articles 67, 68 and 69 do not impair the remedies to the buyer on account of the breach.

12. *Supra* note 11.

13. John Honnold, who as Secretary of UNCITRAL between 1969 and 1974 was one of the chief architects of the Convention, recounts the following history regarding the reference in article 67(1) to "the particular place" where the seller may (or may not) be obliged to hand over the goods. "This language," he states, "resulted

appears, however, that in this article the draftsmen were concerned only with the question whether, in the event of transshipment from one carrier to another, the risk should pass when the goods are handed over to the first or the second carrier. That explanation is supported by the history of the second sentence of 67(1), which provides that if the seller is bound to hand over the goods *to a carrier* at a particular place, the risk does not pass until the goods are handed over by the seller to the carrier at that place. Although this language seems to refer more specifically to shipment contracts, legislative history shows that it, too, was intended to refer only to transshipment at an intermediate point or points in the transport chain.¹⁴ The original language was "at a particular place other than the destination." The deletion of the reference to "destination" in the first two sentences of article 67 was apparently intended to make it clear that (a) as a general rule, in instances where the goods are transshipped, the risk passes to the buyer from the time the goods are handed over to the first carrier, unless the contract provides that the seller is bound to hand them over *to the buyer* at another place, and (b) this general rule is not applicable when the seller (and not the first carrier) does the handing over *to a carrier* at the intermediate point. Whether or not this interpretation of very murky language is correct, there is little doubt that the first two sentences of article 67(1), like article 66, assume that the parties have not provided for the passage of risk by use of a trade term.

The third sentence of article 67(1) states: "The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk." Professor Honnold has explained that this sentence was introduced to avoid implying that in a documentary transaction the risk passes not when the goods are handed over to the carrier but only when the documents are handed over to the

from redrafting at the Diplomatic Conference. The 1978 draft, in the first sentence, referred to contracts requiring the seller 'to hand [the goods] over at a particular destination' and, in the second sentence, referred to a seller's obligation 'to hand the goods over to a carrier at a particular place other than the destination.' The sponsor of this amendment explained that it was designed to make clear that this exception from the basic rule referred to 'intermediate' points in the transport chain; the references in the 1978 draft to the 'destination' had contradicted this idea and therefore were deleted." J. HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 376 (1982).

14. Honnold breaks article 67(1) into two rules. The first sentence, he says, is intended as a default provision to the effect that risk passes when the seller hands the goods over to the first carrier. The second sentence provides an exception, namely, that if the seller is to "hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place." Honnold adds: "Throughout the Convention the phrase 'hand over' is used to describe the physical act of transferring possession. This language, plus the statement that the exception applies when the seller does the handing over, prevents this language from being applied to a transfer by an initial carrier to a second carrier. This point is emphasized by the statement in the first sentence that risk passes when the goods are handed over to the 'first carrier.' The Convention thus rejects the view that in sales requiring both inland and ocean transport, risk does not pass until the goods are delivered to the ocean carrier." J. HONNOLD, *supra* note 13, at 376-77.

buyer.¹⁵ "In arranging for a documentary transfer," Professor Honnold states, "the parties are concerned with only one issue—payment of the price."¹⁶ Therefore, he concludes, in a documentary transaction, as in any other, the risk ought to pass upon delivery of the goods to the first carrier unless the seller is bound to hand them over somewhere else. However, in a documentary transaction the parties almost invariably use a trade term, and it is the trade term, and not article 67, that would control the passage of risk. Thus if the trade term is FOB vessel New York, the risk does not pass at all until the seller tenders to the buyer a bill of lading; then the risk passes, by relation back, at the time the goods are loaded on board the vessel in New York, *not* at the time they are

15. Professor Honnold states that the final sentence of article 67(1) is important because it "avoids unintended upset of the basic rule on risk and is consistent with commercial practice." *Id.* at 377. It is not clear what he means by "the basic rule." In fact, the addition of the final sentence of article 67(1) was proposed by the United States delegation in a 1977 drafting session, with the following explanation:

The present version of article 65(1) [now article 67(1)] provides that where the contract involves carriage, risk passes to the buyer when the goods are handed over to the first carrier unless the seller is 'required to hand them over at a particular destination.' This may be adequate to deal with contracts that are clearly 'destination' contracts (e.g. FOB buyer's city), but its application to CIF contracts (e.g. CIF buyer's city) is unclear. It may be that no negative implication is intended and that article 65(1) does not apply to either of the types of contracts just mentioned. Or it may be that CIF contracts are governed by article 65(1) so that risk passes on delivery to the first carrier. (This would not explain why the same result follows under a C&F contract.) Furthermore, it would be desirable to modify article 65 to make it clear that the seller's retention of control through taking a bill of lading does not derogate from the usual rules.

Analysis of Comments by Movements and International Organizations on the Draft Convention of the International Sale of Goods as Adopted by the Working Group on the International Sale of Goods—Report of the Secretary General, reprinted in [1977] VIII Y.B. COMM'N INT'L TRADE L. 133, U.N. Doc. A/CN.9/SER.A/1977. In an effort to clarify the fact that article 67 was not intended by the Convention drafters to have any application to documentary sales transactions, the U.S. delegation proposed the addition of the final sentence in article 67. The amendment was adopted in the final working meeting of UNCITRAL's Commission on International Trade Law which dealt with the Convention text.

The 1977 Report of the Commission on International Trade Law explains that the U.S. proposal was "designed to make it clear that the seller's retention of control of the goods by retaining the documents as security against payment until after the goods are shipped does not affect the passage of risk." *Report of the United Nations Commission on International Trade Law on the Work of its 10th Session* (Vienna, 23 May-17 June 1977) at 538, U.N. Doc. A/32/17.

The amendment, in fact, does not achieve its intended purpose, since without the benefit of the legislative history the final sentence of article 67(1) is likely to be interpreted to mean that article 67(1) does apply to documentary sales, including sales which use trade terms. It would have been clearer to state that none of the articles on the passage of risk in the Convention are intended to have any application to sales in which a trade term is used by the parties.

16. J. HONNOLD, *supra* note 13, at 377. This statement conflicts with the U.C.C.'s intention that trade terms and documentary sales transactions cover a wide range of issues (such as insurance and passage of risk) in addition to payment of the price. *See supra* note 7.

handed over to the first rail or truck carrier in, say, Duluth, or to the first ocean carrier in, say, Charleston.

Article 68,¹⁷ dealing with goods sold in transit, also assumes that the contract is silent as to trade terms.¹⁸ The first sentence of article 68 states that the risk in such a sale passes to the buyer at the time of the conclusion of the contract.¹⁹ In many, if not most cases of such sales, the seller agrees to hand over to the buyer not goods but documents representing the goods. Normally the contract contains a trade term defining when the risk passes to the buyer. The rule that the risk passes at the time of the conclusion of the contract rests on assumptions connected with transfer of title and is unworkable in most cases of international sales.²⁰

The second sentence of article 68 states (also with respect to goods sold in transit) that "if circumstances so indicate," the risk passes at the time the goods are handed over to the carrier who issued the documents embodying the contract of carriage.²¹ It is not clear to what kinds of circumstances reference is made. Also, this reference to documents appears to be merely a means by which to identify a particular carrier. Again, the provision applies only where the sales contract is silent as to trade terms. Otherwise, the proviso should have referred not to "circumstances" but to "the terms of the contract."

Article 69²² governs cases not within articles 67 and 68. It supplements the provisions of article 66 concerning sales contracts which call for the buyer to take over the goods at the seller's place of business or at a warehouse or which call for the seller to take the goods to the buyer's place of business. As Professor Honnold states, article 69 "does not apply to most international sales."²³

Finally, article 70²⁴ provides that, in the event of a fundamental breach of contract by the seller, the buyer's remedies are not impaired merely because the risk of loss or damage has passed to him. However,

17. For the text of article 68, see *supra* note 11.

18. Article 67(2), which postpones the passing of risk under any circumstances until after the goods have been clearly identified to the contract, is not relevant to this discussion.

19. This assumes that the seller did not hand over the goods to the carrier for transmission to the buyer, since there was no buyer at the commencement of the carriage.

20. In general, the Convention, like the U.C.C., has avoided determining the passage of risk by the transfer of title or property, providing instead that risk passes on the occurrence of "concrete commercial events—handing over goods to the carrier and the buyer's 'taking over' physical possession from the seller." Honnold, *The New Uniform Law for International Sales and the U.C.C.: A Comparison*, 18 INT'L LAW. 21, 27 (1984). Cf. Roth, *The Passing of Risk*, 27 AM. J. COMP. L. 291, 293-98 (1979).

Professor Honnold has stated that article 68 will frequently be difficult to apply, J. HONNOLD, *supra* note 13, at 379, and he has suggested that contracts be drafted so as to avoid the application of its "awkward" provisions. Honnold, *supra*, at 27.

21. *Supra* note 11.

22. *See id.*

23. J. HONNOLD, *supra* note 13, at 381.

24. *Supra* note 11.

the Convention does not indicate whether breach of trade terms by the seller, in contrast with delivery of nonconforming goods, is a fundamental breach. We shall return to this point later.

III. Interpretation of Trade Terms in the Light of the Convention

In various articles the Convention recognizes and validates the practice of documentary sales in international trade and, by implication, the use of trade terms in connection with such sales. It does not, however, attempt to define or regulate documentary sales. For example, article 30 states that the seller "must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract and this Convention," but it does not state what the word "documents" includes, nor does it indicate the consequences of a violation of the seller's obligation to hand them over. Similarly, article 34, states that "[i]f the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract," but article 34 does not indicate how contractual terms concerning time, place, and form are to be interpreted, or how gaps in the contractual terms concerning these matters are to be supplied. Although these provisions are consistent with the law of most countries, including the U.C.C.,²⁵ nevertheless the U.C.C. also specifies the different requirements introduced by different kinds of contracts.²⁶

The decision to avoid definition or regulation of documentary sales in the Convention was connected with the decision not to define or regulate the use of trade terms and, indeed, not even to refer to them. Without now disputing the wisdom of these decisions, one must determine how to interpret trade terms used in documentary sales under the Convention when disputes arise concerning their meaning. This question is especially acute in the context of disputes concerning risk of loss or damage to goods in transit, where, as we have seen, articles 66 to 70 of the Convention reach solutions that are essentially opposed to solutions that would be reached under many, if not most, trade terms.

25. U.C.C. § 2-504 provides that the seller's responsibilities are threefold: He must hand the goods over to the carrier; he must "obtain and promptly deliver or tender in due form any document necessary to enable the buyer to obtain possession of the goods or otherwise required by the agreement or by usage of trade;" and he must notify the buyer of the shipment. U.C.C. § 2-504(b). Comment 1 points out that this section generally covers FOB point of shipment contracts, as well as CIF and C&F contracts. The Commentary further explains that "the requirement that the seller must obtain and deliver promptly to the buyer in due form any document necessary to enable him to obtain possession of the goods is intended to cumulate with the other duties of the seller. . . ." U.C.C. § 2-504 comment 4. U.C.C. § 2-503(5)(a) provides that the seller "must tender all such documents in correct form." Thus, if the seller does not hand over documents which conform to the contract, he is in breach, and the general provisions for passage of risk are inapplicable.

26. U.C.C. § 2-319(1) deals with FOB contracts; U.C.C. § 2-319(2) deals with FAS contracts; U.C.C. § 2-320 deals with CIF and C&F transactions.

In order to apply the Convention to a dispute concerning the meaning of a trade term, assuming such meaning cannot be established by the intent of the parties under article 8, one would look to the previous course of dealings between the parties (under article 9), trade usage (also under article 9),²⁷ the general principles on which the Convention is based (under article 7), or, as a last resort, the law applicable by virtue of the rules of private international law (also under article 7).²⁸

In the absence of a previous course of dealings between the parties, the interpretation of trade terms presumably should be governed by trade usage. Yet trade terms involve a quite different kind of usage from that which is involved in determining usages of particular trades or usages of particular places. Whereas the latter kind of usage might determine, for example, whether the term "10 kilos more or less of anchovies" is understood in Lisbon to mean no less than 8 and no more than 12, trade terms such as CIF and FOB, used in international sales, represent fundamental rights and obligations under the contract. These fundamental rights and obligations allocate not only the risk of loss or damage to goods in transit but also, among others, the duty to select a carrier, the duty to hand over goods to the carrier and to procure a bill of lading (which itself embodies fundamental rights and obligations), the duty to procure insurance, the time of payment, and the duty to meet obligations to respective governments of the exporting and importing countries. A contractual term such as "CIF Lisbon, Cash against documents" goes to the heart of the purchase and sales agreement. Such a CIF contract normally would state the name of the vessel and place and date of its departure, but otherwise might only contain details concerning the quantity, quality, and price of the goods to be shipped. In the event of loss or damage en route, how is a tribunal to know precisely what risks and circumstances "CIF" covers, and at what

27. U.N. Convention, article 8 states that the intent of the parties will be inferred from "all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

Article 9 provides:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

28. Article 7 of the Convention provides:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

precise point they pass to the buyer? It must look not to patterns of behavior of a particular trade or a particular locality but to a universal mercantile understanding concerning (a) the obligatory norms of behavior implied in the term CIF as a general matter, and (b) the application of such norms to the circumstances of the particular case. "Trade usage" refers to *patterns* of behavior usually practiced in commerce of the kind in question; the interpretation of trade terms such as "CIF" and "FOB" involves *customary law*, that is, the understanding of people who use such terms concerning the *norms* of behavior implied in them.²⁹

Since the Convention makes no reference to the customary law surrounding the use of trade terms, parties using them and tribunals interpreting and applying them must look elsewhere for guidance. Fortunately, the international mercantile community, acting through the International Chamber of Commerce, has elaborated a set of definitions of the most important trade terms now in use.³⁰ The latest edition of these terms, INCOTERMS 1980, is admirably detailed and precise.³¹ There is a widespread practice among traders of all countries to incorporate INCOTERMS 1980 into their international sales contracts. The authors of the Convention had in mind the availability of INCOTERMS when they decided to omit any reference to trade terms in the Convention.³²

29. On the distinction between behavioral custom (usage) and normative custom, see Berman, *supra* note 8. Cf. J. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 59 (H. Walbrock ed. 1963):

"Custom [is] . . . more than mere habit or usage; it is a usage felt by those who follow it to be an obligatory one. There must be present a feeling that, if the usage is departed from, some form of sanction will probably, or at any rate, ought to, fall on the transgressor."

30. The International Chamber of Commerce is a global federation of national committees of approximately 65 countries. The U.S. national committee is the United States Council for International Business. Where no national committee has been established, direct membership is available to enterprises as well as business and trade organizations, including chambers of commerce. Direct membership exists in approximately 110 countries, including many in the developing world. Over 50,000 enterprises are represented, either through national committees or by means of direct membership.

Enterprises in planned economies of the Soviet Union and Eastern Europe are not represented in the ICC. However, the ICC is formally engaged in a number of cooperative activities with representatives of these countries.

31. INCOTERMS 1980, *supra* note 5, contains 14 trade terms, including FAS, FOB, C&F, and CIF. It also introduces two important new terms: Free Carrier named point (under which the seller delivers the goods to a carrier named by the buyer, at a point named by the buyer—typically a warehouse or cargo terminal), and Freight Carriage and Insurance paid to (under which the seller pays the transport to a destination named by the buyer, delivers goods to the first carrier, furnishes documents to the buyer, and the buyer accepts delivery when the goods are handed over to the carrier, bearing risk as of that time). The terms attempt an exhaustive coverage of the rights and duties of parties to a sales transaction.

32. In 1970, at its second session, the U.N. Commission on International Trade Law decided that "it would be desirable to give the widest possible dissemination to INCOTERMS 1953 in order to encourage their world-wide use in international trade." *Report of the Secretary General (addendum): Pending Question with Respect to the Revised Text of a Uniform Law on International Sale of Goods*, reprinted in [1975] Y.B. COMM'N INT'L

Nevertheless, INCOTERMS 1980 does not solve, and does not purport to solve, all problems of risk of loss or damage in international sales. It is not a code of law. It does not state the principles that underlie its rules. It is rather a set of standard contract terms, and, as in the case of all contract terms, their meaning depends on interpretation in the light of some body of law.

It is useful, in this connection, to compare INCOTERMS 1980 with the definitions of trade terms provided in the Uniform Commercial Code. The U.C.C. definitions are less detailed. They are, however, somewhat more comprehensive, and, in addition, they are accompanied by extensive commentary articulating some of their main principles and purposes. Even more important, these definitions presuppose the applicability of the other parts of article 2 (Sales) of the U.C.C. as well as the entire common law of contracts.³³ INCOTERMS 1980, in contrast, necessarily assumes that the interpretation and application of its rules will be undertaken in the context of whatever law may be applicable to the sales contract in which it is incorporated.

To give a simple illustration: INCOTERMS 1980 states that under the CIF term the seller is required "to procure, at his own cost and in a

TRADE L. 110, 117, U.N. Doc. A/CN.9/100, Annex IV (citing an earlier decision of the U.N. Commission on International Trade Law, [1970] Y.B. COMM'N INT'L TRADE L., U.N. Doc. A/CN.9/SER.A/1970). Later, the Secretary General, in a report to the Commission at the drafting stage, suggested that the Commission might "wish to consider adopting a clause in the general conditions by which INCOTERMS 1953 are incorporated by reference as the definition of those trade terms." *Report of the U.N. Commission on International Trade Law, reprinted in* [1975] Y.B. COMM'N INT'L TRADE L. 95, U.N. Doc. A/7618. At the same time, it was noted that the general provisions of the Convention were thought to "incorporate the INCOTERMS 1953 definitions by reference." *Id.* The Report went on: "Since this will lead to overlap, every effort has been made to eliminate potential conflicts. However, conflicts cannot be totally excluded and this Commission may wish to consider this problem." *Id.* at para. 60(3). Nevertheless, the drafters wisely decided not to include definitions of trade terms, in whole or by reference, in the Convention text. "Leaving out definitions of trade terms . . . was not an oversight. In view of the almost infinite variety of settings in which those words may be used, general statutory definitions of merchant's words can be misleading and unsuited to the practices and transaction at hand. Moreover, the definitions of trade terms need to change to take account of changes in commercial practice, such as the container revolution." Honnold, *supra* note 20, at 25.

This view is widely shared. See J. Hellner, *Unification of Sales Law at the Regional and International Level: A Scandinavian View*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW 90 (J. Ziegel & W. Foster ed. 1969). Professor von Caemerer is in accord. "The continuously changing meaning of these clauses seems to render legal regulation inadvisable." von Caemerer, *Unification of Sales Law at the Regional and International Level: A European Comment*, in ASPECTS OF COMPARATIVE COMMERCIAL LAW (J. Ziegel & W. Foster ed. 1969). See also Goodfriend, *After the Damage is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods*, 22 COLUM. J. TRANSNAT'L L. 575, 605 (1984).

33. U.C.C. § 1-103 provides that the code is supplemented by "the principles of law and equity, including the law merchant. . . ." This theme runs throughout article 2 of the U.C.C. For example, the commentary regarding CIF sales says "the dominant outlines of the CIF term are so well understood commercially that any variation should, whenever reasonably possible, be read as falling within those dominant outlines." U.C.C. § 2-320 comment 14.

transferable form, a policy of marine insurance against the risks of carriage involved in the contract.”³⁴ It further provides that the seller must furnish the buyer, together with the bill of lading and the invoice, “the insurance policy or, should the insurance policy not be available at the time the documents are tendered, a certificate of insurance issued under the authority of the underwriters and conveying the same rights as if he were in possession of the policy and reproducing the essential provisions thereof.”³⁵ It adds that the buyer, having accepted the documents, must “bear all risks of the goods from the time when they shall have effectively passed the ship’s rail at the port of shipment.”³⁶ All this is admirably clear as a set of general propositions. Left open, however, are a myriad of questions. For example, what is meant by a marine insurance policy “in transferable form”? Suppose the buyer (or his bank) accepts tender of a certificate of insurance and later discovers that the policy was “available”? Consider the following example: (a) the bank accepts the documents and pays under a letter of credit, (b) the buyer defaults, (c) the bank, left with the documents, transfers them to a new buyer, (d) the goods are lost at sea, and (e) the insurer states that it will not honor the policy (or certificate) in the hands of the transferee. Who then bears the risk of loss? To answer that question one must look beyond INCOTERMS 1980. One must also look beyond trade usage, in the sense in which that phrase is used in the Convention.³⁷ One must look to a body of law dealing not only with the definition of trade terms but also with documentary sales generally, marine insurance, the law of agency, and other parts of commercial law as well.

Such examples could be multiplied.³⁸ Contract terms can never exhaust the obligations of the parties. The meanings of such terms always depend on the existence of a body of law that stands under and over and around the particular transaction. That law may be customary law (the law merchant). It may be the law of a nation state. It may be the Convention on the International Sale of Goods.

34. INCOTERMS 1980, *supra* note 5, at CIF A(5).

35. INCOTERMS 1980, *supra* note 5, at CIF A(5).

36. *Id.* at CIF A(6).

37. The Convention uses trade usage to determine both the intent of the parties and the terms of the contract. U.N. Convention at articles 8, 9, *supra* note 27. See Goldstajn, *Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention*, in *INTERNATIONAL SALE OF GOODS* 55 (Sarcevic ed. 1986), and Note, *Trade Usages in International Sale of Goods: An Analysis of the 1964 and 1980 Sales Conventions*, 24 VA. J. INT’L L. 619 (1984).

38. The reference to a particular INCOTERM is not sufficient to determine the full legal relationship between the parties to a contract of sale. “Matters such as breaches of contract and their consequences, as well as the difficult problem of ownership of the goods, are left outside of the scope of the trade terms.” *GUIDE TO INCOTERMS*, *supra* note 5, at 10. For instance, INCOTERMS FAS requires that the seller deliver the goods alongside the vessel, and notify the carrier. INCOTERMS 1980, *supra* note 5, at FAS A(2). However, the type of notice and the promptness required, as well as the point at which the notice is effective, are not defined.

If the Convention governs, and neither a prior course of dealings between the parties nor a trade usage is applicable, then one must turn, under article 7, to the general principles of the Convention in order to fill gaps and resolve ambiguities in INCOTERMS. However, such general principles are very hard to find.³⁹ With respect to risk of loss or damage, if there is any general principle at all it is *caveat emptor*: Absent contractual stipulation otherwise, the Convention favors transferring the risk to the buyer from the moment the seller hands over the goods to the first carrier, and if the goods are sold in transit then from the time the contract of sale is concluded.⁴⁰ The Convention recognizes, however, that in documentary sales, trade terms prevail over the Convention's rules concerning passage of risk. With respect to trade terms, the Convention seems to contain no general principles whatever.

We are thus led ineluctably to "the law applicable by virtue of the rules of private international law." If that law is the law of a state of the United States, the parties are fortunate enough to have in the U.C.C. a comprehensive codification of the law relating to the passage of risk in documentary sales transactions. In comparison with INCOTERMS 1980, the U.C.C. rules tend to favor the seller.⁴¹ But of course the U.C.C. rules, like INCOTERMS 1980, are applicable "unless otherwise agreed." Hence the parties may draft their contract around the U.C.C. rules, modifying them in the light of their respective needs and bargaining power.

If, however, the parties stipulate that the U.C.C., as adopted by a given state of the United States, shall apply to disputes arising out of the interpretation and application of the trade term of their contract, or, more generally, to disputes concerning passage of risk, a question arises as to whether they have not thereby ousted the Convention entirely. This is so for two reasons. First, the U.C.C. rules on passage of risk under trade terms are based on, and interwoven with, the entire U.C.C. law of sales and, therefore, with the common law of contracts as it exists in the state which has enacted the U.C.C. It is very difficult to choose as

39. For a legislative history of article 7, see J. HONNOLD, *supra* note 13, at 126-27. In his book on the Convention, Honnold argues that the general principles of the Convention may be implied from its specific provisions. He acknowledges, however, the difficulty of this task. He presents an example of a problem in which the search for a general principle might be undertaken, but he is unable to solve the problem with any definiteness, saying merely that it is intended to "illustrate the problems and possibilities presented by Article 7(2)." *Id.* at 129-30.

40. Honnold notes that the increased shipment of goods in containers provides another compelling argument for avoiding splitting of risks at some point during transit. "The Convention . . . rejects the view that in sales requiring both inland and ocean transport risk does not pass until the goods are delivered to the ocean carrier. Such splitting of transit risks is inconsistent with modern practices for multi-modal transport and presents practical problems of determining where the damage occurred." J. HONNOLD, *supra* note 13, at 376-77. He notes, however, that parties may agree to split risks by the use of trade terms, and that in such circumstances trade terms will govern. *Id.*

41. For one example, see *supra* note 5.

the governing law one part of the U.C.C. without choosing the rest of it and, therefore, without choosing the whole law of the state which has enacted it. The second reason why choice of the U.C.C. rules on passage of risk in documentary sales, whether by the parties or by a tribunal, may be understood to oust the Convention is the Convention itself. The Convention rules on passage of risk, limited as they are to sales contracts in which the parties have not used a trade term, vary so greatly from the universal understanding of the rules applicable to trade terms that merely using a trade term may be construed as implying an intent to exclude articles 66 to 70 of the Convention and possibly, therefore, the entire Convention.

IV. How to Save Both the Trade Term and the Convention

It would seem that the parties to a documentary sale of goods can, if they wish, preserve both the rules that are associated universally with the use of trade terms in documentary sales *and* the rules and principles of the Convention, by using contractual clauses stipulating that (a) INCOTERMS 1980 is applicable to the trade term of the contract, and (b) the rules laid down in INCOTERMS 1980 shall supersede articles 66 to 70 of the Convention. It should be added (c) that the buyer has the right to reject the documents required by INCOTERMS to be tendered under the trade term of the contract if such documents do not conform to those specified in the contract, and (d) that any breach of the seller's obligation with respect to the tender of documents shall be considered a fundamental breach under the Convention.

There remains the question whether, in the absence of a contractual clause to the contrary, gaps or ambiguities in INCOTERMS 1980 are to be supplied or resolved by the application of a national law or, possibly the international law merchant. If the parties wish to resolve doubts on this score, they may designate the law to be applied to the interpretation of INCOTERMS 1980. If they do so, and they wish to preserve the application of the Convention to all other matters, they should say so expressly.