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# Risk of Loss of Goods in Transit: A Comparison of the 1990 INCOTERMS with Terms from Other Voices

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# RISK OF LOSS OF GOODS IN TRANSIT: A COMPARISON OF THE 1990 INCOTERMS WITH TERMS FROM OTHER VOICES

DANIEL E. MURRAY\*

I. INTRODUCTION .....	94
II. DEPARTURE TERMS .....	95
A. <i>Ex Works, Ex Factory, Ex Warehouse—EXW</i> .....	95
III. MAIN CARRIAGE UNPAID TERMS .....	98
A. <i>Free Carrier—FCA</i> .....	98
B. <i>Free Alongside Ship—FAS</i> .....	101
C. <i>Free on Board—FOB</i> .....	103
IV. MAIN CARRIAGE PAID TERMS .....	108
A. <i>Cost and Freight—CFR</i> .....	108
B. <i>Cost, Insurance, and Freight—CIF</i> .....	110
C. <i>Carriage Paid To—CPT</i> .....	120
D. <i>Carriage and Insurance Paid To—CIP</i> .....	121
V. ARRIVAL TERMS .....	121
A. <i>Delivered at Frontier—DAF</i> .....	121
B. <i>Delivered Ex Ship—DES</i> .....	122
C. <i>Delivered Ex Quay—DEQ</i> .....	123
D. <i>Delivered Duty Unpaid—DDU</i> .....	124
E. <i>Delivered Duty Paid—DDP</i> .....	124
VI. "BUYING GOODS AFLOAT," "GOODS SOLD IN TRANSIT," "STRING OF SALES" ..	125
VII. CONCLUSION .....	130

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## I. INTRODUCTION

INCOTERMS,<sup>1</sup> prepared by the International Chamber of Commerce, are elaborate definitions of the common shipping terms, such as FOB and CIF, and some uncommon terms, such as CPT and CIP, which are used in international commerce. The introduction states:

The purpose of INCOTERMS is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree.<sup>2</sup>

In addition to the above goal, the contractual adoption of INCOTERMS can fill a void where one of the contracting parties in a sales transaction is a resident of a country which has no legislative or judicial coverage of the meaning of shipping terms. If the parties have adopted the INCOTERMS in their contract then the terms should become the law of the contract.<sup>3</sup>

It is the purpose of this article to explore the meaning of the various INCOTERMS, and then to compare the passage of risk in transit under the terms with other voices including the Uniform Commercial Code of the United States,<sup>4</sup> the law in England, The United Nations Convention on Contracts for the International Sale of Goods<sup>5</sup> and the Civil Code in Italy,<sup>6</sup> and the commercial codes in Guatemala,<sup>7</sup> Costa Rica,<sup>8</sup> El Salvador,<sup>9</sup> and Paraguay.<sup>10</sup> It will soon become apparent that a term-by-term comparison cannot be made with the laws of the above countries because the terms are

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1. INTERNATIONAL CHAMBER OF COMMERCE, RULES FOR THE INTERPRETATION OF TRADE TERMS, para. 1, at 6 (6th ed. 1990) [hereinafter INCOTERMS, followed by the three letter abbreviation used for page tabs in the manual, and if applicable, the letter and number designating the specific obligation of the buyer or seller]. Incoterms were first published in 1936, and amended editions were published in 1953, 1967, 1976, 1980, and 1990; *see id.* para. 2, at 6.

2. *Id.* para. 1, at 6.

3. INTERNATIONAL CONTRACTS § 1.03[3][A][i], at 17 (Hans Smit et al. eds., 1981).

4. UNIFORM COMMERCIAL CODE (West 1991) [hereinafter UCC].

5. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 19 I.L.M. 671 [hereinafter U.N. Sales Convention].

6. CODICE CIVILE [C. Civ.] (Italy).

7. CÓDIGO DE COMERCIO [Cód. Com.] (Guat.).

8. CÓDIGO DE COMERCIO [Cód. Com.] (Costa Rica).

9. CÓDIGO DE COMERCIO [Cód. Com.] (El Sal.).

10. CÓDIGO DE COMERCIO [Cód. Com.] (2d ed. Oscar Paciello 1980) (Para.).

much more extensive and varied than is reflected in the laws of the various countries.

A final section will deal with a puzzling problem: the passing of risk in buying goods when they are afloat or in land transit. The INCOTERMS and the UCC have chosen to step over this problem; however, the U.N. Sales Convention recognizes and addresses this area. A comparative analysis will be made of this problem.

When the parties fail to specify the nature of the sales contract by using the terms FOB or CIF, the UCC presumes that the parties intended a shipment contract whereby the seller is required to send the goods by carrier to the buyer, but the seller is not bound to deliver the goods at a particular destination. Nor does the seller retain the risk in transit until the goods are received at the destination place.<sup>11</sup> The author was unable to discover a clear articulation of this presumption in other legal systems or in the INCOTERMS.

## II. DEPARTURE TERMS

### A. *Ex Works, Ex Factory, Ex Warehouse—EXW*

The terms Ex Works, Ex Factory, Ex Warehouse are not found in either the UCC or the U.N. Sales Convention. These terms mean, of course, "from" the designated source. The seller under this term has carried out his performance if he makes the goods available to the buyer at the designated source.<sup>12</sup> The seller is not responsible for loading the goods on any vehicle supplied by the buyer, and, as a corollary, the buyer assumes the expense and risks involved in removing the goods from the seller's premises and transporting them to the destination.<sup>13</sup> The seller has the duty to supply conforming goods and a conforming commercial invoice (or other agreed upon documents), and to place the goods at the dis-

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11. *Ladex Corp. v. Transportes Aereos Nacionales, S.A.*, 476 So.2d 763, 42 U.C.C. Rep. Serv. (Callaghan) 133 (Fla. Dist. Ct. App. 1985); *Morauer v. Deak & Co.*, 26 U.C.C. Rep. Serv. 1142 (D.C. Super. Ct. 1979); *Pestana v. Karinol Corp.*, 1367 So.2d 1096, 1099, 25 U.C.C. Rep. Serv. 1306, 1309-1310 (Fla. Dist. Ct. App. 1979); *Droukas v. Divers Training Academy, Inc.*, 376 N.E.2d 548, 553, 24 U.C.C. Rep. Serv. 118, 122 (Mass. 1978); *Eberhard Mfg. Co. v. Brown*, 232 N.W.2d 378, 380, 17 U.C.C. Rep. Serv. 978, 980 (Mich. Ct. App. 1975); *Electric Regulator Corp. v. Sterling Extruder Corp.*, 280 F. Supp. 550, 552, 4 U.C.C. Rep. Serv. 1025, 1031-1032 (D. Conn. 1968).

12. INCOTERMS, *supra* note 1, EXW at 18.

13. *Id.* at 18-19.

posal of the buyer on the date agreed upon or within a stipulated tender period.<sup>14</sup> It would appear that the buyer has the risk of loss or damage from the time that the goods have been placed at his disposal. This approach would seem directly contrary to the approach of the UCC which would place the risk of loss on a merchant seller during this tender period, with the risk of loss not passing to the buyer until he received the goods.<sup>15</sup> The UCC approach is based upon the theory that the seller would have insurance to cover this risk during the tender period.<sup>16</sup> Of course, if the buyer should fail to receive the goods during this tender period, the aggrieved seller under the UCC could "to the extent of any deficiency in his effective insurance coverage treat the risk of loss as resting on the buyer for a commercially reasonable time."<sup>17</sup> The INCOTERMS approach would seem to be a dryly logical allocation of the risk of loss during the tender period, but it seems to ignore the commercial reality of insurance.<sup>18</sup> INCOTERMS also ignores the fact that the person in possession has the greatest opportunity to guard the goods against damage or loss.

Although neither the UCC nor the U.N. Sales Convention expressly use the terms Ex Works, Ex Warehouse, or Ex Factory, both provide for transactions which meet the described terms. For example, if a merchant seller is not going to ship the goods, and delivery is to take place at the seller's premises, then "risk of loss passes to the buyer on his receipt of the goods."<sup>19</sup> Of course, this rule is "subject to contrary agreement of the parties."<sup>20</sup>

If delivery is to be made without the goods being moved and the goods are held by a bailee, then risk of loss passes to the buyer on his receipt of a negotiable document of title, by the bailee's attornment to the buyer, or after the receipt of a non-negotiable document of title.<sup>21</sup> Risk passes only after "the buyer has had a reasonable time to present the document . . . and a refusal by the bailee to honor the document . . . defeats the tender" and defeats

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14. *Id.* A1 and A4, at 18.

15. U.C.C. § 2-509(3).

16. *Id.* § 2-509 cmt. 3.

17. *Id.* § 2-510(3).

18. *Hayward v. Postma*, 31 Mich. App. 720, 722-724, 9 U.C.C. Rep. Serv. 379, 382 (1971).

19. U.C.C. § 2-509(3).

20. *Id.* § 2-509(4).

21. *Id.* § 2-509(2)(a),(b), and (c).

the passage of risk.<sup>22</sup>

In cases not involving the shipment of goods, Article 69 of the U.N. Sales Convention provides that:

- (1) 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.<sup>23</sup>

Subsection (1) of Article 69 seems to encompass the "ex store" or "ex factory" transactions where the risk passes upon delivery from the store or when the buyer fails to take delivery after tender. Subsection (2) seems to be wide enough to cover the delivery of warehoused goods by use of negotiable and non-negotiable documents of title, but without the specificity of section 2-509(2) of the UCC.

A simple hypothetical problem can illustrate the difference between the INCOTERMS and Article 69 of the U.N. Sales Convention as to the passing of risk. Assume that an ex works sales contract provides that the buyer will come to the works during the month of June, and the goods are destroyed by fire on June 16th. Under the U.N. Sales Convention, risk is retained by the seller because the goods were not taken over by the buyer and the tender period had not ended. Under the INCOTERMS, the goods had been placed at the buyer's disposal and risk would have passed even though the buyer had no real control over the safekeeping of the goods. If UCC section 2-509 is applied to the hypothetical case, risk would not pass to the buyer until possession was taken. It is submitted that the INCOTERMS in this respect are overly generous to the seller.

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22. *Id.* § 2-503(4)(b); see *Commonwealth Propane Co. v. Petrosol Int'l Inc.*, 818 F.2d 522, 527, 3 U.C.C. Rep. Serv. 2d 1778, 1784-1785 (6th Cir. 1987).

23. UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, pt. 1, at 186, U.N. Doc. A/CONF. 97/19, U.N. Sales No. E.81.IV.3 (1981)[hereinafter U.N. Sales Convention].

In England, when goods are located in a warehouse and the sales contract seems to imply a sale ex warehouse, then the property and the risk of loss passes to the buyer when the warehouse acknowledges that it is holding the goods for the buyer. If damage to the goods occurs in transit, the loss falls on the buyer.<sup>24</sup>

The sale in England of an undivided interest in a larger amount of goods, such as selling 120,000 gallons of spirit from a larger quantity of spirits by the issuance of a delivery order which is accepted by the warehouseman, will transfer the risk of loss in deterioration while in storage, but it will not transfer the property in the spirits because the sold fungible spirits have not been separated (appropriated) from the mass.<sup>25</sup>

The UCC avoids the pitfalls of the English system by denigrating the importance of title<sup>26</sup> and allowing for the appropriation of undivided shares in fungible goods upon the mere making of the contract.<sup>27</sup> This matter will be discussed further in the context of CIF shipments.<sup>28</sup>

### III. MAIN CARRIAGE UNPAID TERMS

#### A. *Free Carrier—FCA*

If one looks solely at the 1990 INCOTERMS version of the term "Free Carrier" it is not entirely clear as to its purpose; however, the 1980 version tells us that "this term has been designed to meet the requirement of modern transport, particularly such 'multimodal' transport as container or 'roll-on—roll-off' traffic by trailers and ferries."<sup>29</sup> The passing of risk is less clearly defined when using this approach because the term, although designed for container transport, also attempts to cover goods which are not containerized. For example, according to the INCOTERMS definition, "'Free Carrier' means that the seller fulfills his obligation to

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24. *Wardar's (Import & Export) Co. v. W. Norwood & Sons Ltd.* [1968] 2 Q.B. 663 C.A.

25. *Sterns, Ltd. v. Vickers, Ltd.* [1923] 1 K.B. 78 C.A.

26. U.C.C. § 2-401.

27. *Id.* § 2-501 cmt. 5; see *Henry Heide, Inc. v. Atlantic Mut. Ins. Co.*, 363 N.Y.S.2d 515, 518-519, 16 U.C.C. Rep. Serv. 701, 703-704 (N.Y. Sup. Ct. 1975) (held that the purchaser of unsegregated bags of sugar had an identified and insurable interest in 200,000 pounds of sugar which vanished from a professional warehouse).

28. See text accompanying *infra* notes 93-143.

29. COMMISSION ON INTERNATIONAL COMMERCIAL PRACTICES, INTERNATIONAL CHAMBER OF COMMERCE, PUB. NO. 354, GUIDE TO INCOTERMS 27 (1980).

deliver when he has handed over the goods, cleared for export, into the charge of the carrier. . . .”<sup>30</sup> This language would seem to suggest that mere delivery to the freight agent of the carrier would constitute “delivery.” However, the text goes on to say that:

Delivery to the carrier is completed:

I) In the case of *rail transport* when the goods constitute a wagon load (or a container load carried by rail) the seller has to load the wagon or container in the appropriate manner. Delivery is completed when the loaded wagon or container is taken over by the railway or by another person acting on its behalf.

When the goods do not constitute a wagon or container load, delivery is completed when the seller has handed over the goods at the railway receiving point or loaded them into a vehicle provided by the railway.

II) In the case of *road transport* when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the vehicle provided by the buyer, but when the goods are delivered to the carrier's premises, delivery is completed when they have been handed over to the road carrier or to another person acting on [its] behalf.

III) In the case of transport by *inland waterway* when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the carrying vessel provided by the buyer.

When the goods are delivered to the carrier's premises, delivery is completed when they have been handed over to the inland waterway carrier or to another person acting on [its] behalf.<sup>31</sup>

If one can visualize a fact pattern somewhere in between the above rules—*e.g.*, after rail transport, goods are trucked a mile from the seller's property and then handed over to the inland waterway carrier (*e.g.*, barge line)—when is delivery made?

Other modes of transport included in INCOTERMS are:

IV) In the case of *sea transport* when the goods constitute a full container load (FCL), delivery is completed when the loaded container is taken over by the sea carrier. When the container has been carried to an operator of a transport terminal acting on behalf of the carrier, the goods shall be deemed to have been taken over when the container has entered into the premises of

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30. INCOTERMS, *supra* note 1, FCA at 24.

31. *Id.* A4, at 26.



that terminal.

When the goods are less than a container load (LCL), or are not to be containerised, the seller has to carry them to the transport terminal. Delivery is completed when the goods have been handed over to the sea carrier or to another person acting on [its] behalf.

V) In the case of *air transport*, delivery is completed when the goods have been handed over to the carrier or to another person acting on [its] behalf.

VII) In the case of *multimodal transport*, delivery is completed when the goods have been handed over as specified in I) - VI), as the case may be.<sup>32</sup>

These "Free Carrier" terms state that the seller has no obligation to make a contract of carriage with the carrier; however, "[w]hen, according to commercial practice the seller's assistance is required in making the contract with the carrier (such as in rail or air transport) the seller may act at the buyer's risk and expense."<sup>33</sup>

In addition, if requested by the buyer, or if it is commercial practice, and the buyer does not give a contrary instruction, "the seller may contract for carriage on [the] usual terms at the buyer's risk and expense[; however,] the seller may decline to make the contract . . . [upon] prompt[] notif[ication] to the buyer. . . ."<sup>34</sup>

The "Free Carrier" term includes:

"any person who, in a contract of carriage, undertakes to perform or to procure the performance of carriage by rail, road, sea, air, inland waterway or by a combination of such modes. If the buyer instructs the seller to deliver the [goods] to a person . . . who is not a 'carrier,' . . . e.g., a freight forwarder . . . the seller is deemed to have fulfilled his obligation to deliver the goods when they are in the custody of that person."<sup>35</sup>

The word "[c]ontainer" includes any equipment used to unitise cargo, e.g., all types of containers and/or flats, whether ISO accepted or not, trailers, swap bodies, ro-ro equipment, igloos, and applies to all modes of transport."<sup>36</sup> It is to be wondered why

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32. *Id.* at 26, 28.

33. *Id.* at 24.

34. *Id.* A3.

35. *Id.* FCA at 24-25.

36. *Id.* at 25.

the drafters did not spend more time defining the above objects. For example, are the "flats" in INCOTERMS equivalent to the "pallets" in the Hamburg Rules?<sup>37</sup> Are removable ships' tanks for the carriage of liquid cargo to be considered as "containers"?<sup>38</sup>

In the "Free Carrier" sale, the risk of loss passes to the buyer upon delivery in accordance with the above delivery standards.<sup>39</sup>

### *B. Free Alongside Ship—FAS*

The Free Alongside Ship term is succinctly defined in INCOTERMS as meaning:

that the seller fulfil[s] his obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment.<sup>40</sup>

The UCC states that the seller must "at his own expense and risk deliver the goods alongside the vessel in the manner usual in that port or on a dock designated and provided by the buyer. . . ."<sup>41</sup>

Similarly, INCOTERMS provides that the seller must "[d]eliver the goods alongside the named vessel at the loading place named by the buyer at the named port of shipment on the date or within the period stipulated and in the manner customary at the port."<sup>42</sup> Both the UCC and INCOTERMS reflect the usual rule that the buyer is often the charterer of the ship, and he has the duty to name the ship, the port, and the dock.<sup>43</sup>

The buyer bears all risks of loss or damage to the goods "from the agreed date or the expiry date of the period stipulated for delivery. . . ." under the following circumstances: (1) If the buyer should fail to obtain, at his own risk and expense, any export or import licenses, other required authorizations, or formalities; (2) if the buyer fails to give the seller adequate notice of the name of the

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37. United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, 17 I.L.M. 608.

38. *Shinko Boeki Co. v. S.S. "Pioneer Moon"*, 507 F.2d 342 (2d Cir. 1974).

39. INCOTERMS, *supra* note 1, FCA, A5, at 28.

40. *Id.* FAS at 32.

41. UCC § 2-319(2)(a) (emphasis added).

42. INCOTERMS, *supra* note 1, FAS, A4, at 32.

43. For a discussion of the scarcity of case law dealing with an F.O.B. sale where no port is named, see *David T. Boyd & Co. v. Louis Louca* [1973] 1 Lloyd's Rep. 209, 211 Q.B.

vessel, the loading place and the required delivery time; or (3) if the named vessel fails to arrive on time, or is unable to load the goods.<sup>44</sup> Of course, this allocation of risk to the buyer is conditioned upon "the goods hav[ing] been duly appropriated to the contract" by the seller.<sup>45</sup>

When testimony in a U.S. courtroom shows that a seller and a buyer have used a term such as "F.A.S. Norfolk, Virginia"<sup>46</sup> with different meanings in their minds, then parol testimony about course of dealing and trade usage can be introduced to determine whether the seller or the buyer will have to pay the cost of unloading the seller's trucks, the storage charges prior to loading, and the cost of delivering the goods from the port warehouse to the side of the vessel.

This notion of supplementing the meaning of a UCC provision with course of dealing and trade usage is paralleled by a similar approach in the introductory remarks to the INCOTERMS:

#### CUSTOMS OF THE PORT OR OF A PARTICULAR TRADE

Since the trade terms must necessarily be possible to use in different trades and regions it is impossible to set forth the obligations of the parties with precision. To some extent it is therefore necessary to refer to the custom of the particular trade place or to the practices which the parties themselves may have established in their previous dealings (cf. Article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods). It is of course desirable that sellers and buyers keep themselves duly informed of such customs of the trade when they negotiate their contract and that, whenever uncertainty arises, [they] clarify their legal position by appropriate clauses in their contract of sale. Such special provisions in the individual contract would supersede or vary anything which is set forth as a rule of interpretation in the various Incoterms.<sup>47</sup>

If there is a possibility of a delay between the carrier's receipt of the goods and the loading on board, or if there is a possibility that the goods will have to be warehoused and then transported from the warehouse to the ship for loading, it would seem wise for the parties to provide for cost allocations in their sales contract.

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44. INCOTERMS, *supra* note 1, FOB, B5, at 39, 41.

45. *Id.* at 41.

46. Brunswick Box Co. v. Coutinho, Caro & Co., 617 F.2d 355, 356, 28 U.C.C. Rep. Serv. 616, 618 (4th Cir. 1980).

47. INCOTERMS, *supra* note 1, Intro., para. 6, at 8.

Reference to custom or practice can add to arbitration or litigation costs; contractual allocations can save both time and money.

Under an English FAS sales contract the buyer has the duty to arrange for shipping space, to inform the sellers of that shipping space, and to designate the time within which the goods are to be brought. Until the buyer performs these duties, the seller has no obligation to move the goods.<sup>48</sup>

The Guatemalan FAS (*costado del buque*) seller has the same duties as an FOB seller, except that he merely has to bring the goods alongside the ship or vehicle to transfer the risk to the buyer.<sup>49</sup>

### C. Free on Board—FOB

INCOTERMS defines “Free On Board” as meaning:

that the seller fulfills his obligation to deliver when the goods have passed over the ship's rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point.<sup>50</sup>

It is to be noted that the risk passes to the buyer as the goods pass over the ship's rail, which means that the loading process has commenced. The UCC, on the other hand, states that the seller must “ship the goods in the manner provided”<sup>51</sup> in section 2-504 of the UCC. Section 2-504 provides that the seller must “put the goods in the possession of such a carrier” and enter a contract of carriage. In short, the FOB term under the UCC does not require the commencement of the loading process unless the term is also FOB vessel, and then the seller bears the expense and risk of loading the goods on board.<sup>52</sup>

The U.N. Sales Convention does not provide for shipping terms, but it is content to say in Article 67:

(1) If the contract of sale involves carriage of the goods and the

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48. *Anglo-African Shipping Co. of N.Y. v. J. Mortner, Ltd.*, (1962) 1 Lloyds List L. Rep. 81, 92 Q.B.; see also CLIVE M. SCHMITTHOFF, *SCHMITTHOFF'S EXPORT TRADE: THE LAW AND PRACTICE OF INTERNATIONAL TRADE* 15-16 (9th ed. 1990); BENJAMIN'S SALE OF GOODS 1238-1239 (A.G. Guest et al. eds., 3d ed. 1987); DAVID M. SASSOON & H. ORREN MERREN, *C.I.F. AND F.O.B. CONTRACTS* 426-428 (3d ed. 1984).

49. Cód. Com. art. 698 (Guat.).

50. INCOTERMS, *supra* note 1, FOB, at 38.

51. UCC § 2-319(1)(a).

52. UCC § 2-319(1)(c).

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.<sup>53</sup>

It would appear that subsection (1) above bears more than an accidental resemblance to section 2-509(1)(a) of the UCC, and creates the same result that risk passes to the buyer when the seller delivers to the carrier. Subsection (2) above is related to section 2-501 of the UCC, and the retention of documents language in subsection (1) is the UCC shipment "under reservation" term in section 2-505.

The second sentence of subsection (1) of Article 67 can best be explained by the use of a hypothetical case. Assume that a buyer in Hamburg, Germany contracts to buy a machine tool from a manufacturer in Pittsburgh, Pennsylvania. The contract provides for shipment from New York City. The seller then delivers the tool to a truck line in Pittsburgh, and it is stolen at a point three miles from the New York port. Since the seller was "bound to hand the goods over to a carrier at a particular place" per subsection (1), the risk does not pass to the buyer until the goods are handed over in New York. The seller thus bears the loss from the theft.

Sellers who might be unhappy with the above result have the ability under Article 6 of the U.N. Sales Convention to alter this result by using appropriate contractual terms.

The UCC provides for an FOB *destination* contract under which the seller must, at his own expense and risk, transport the goods to the destination and there tender delivery of them as provided in Section 2-503.<sup>54</sup> The INCOTERMS do not replicate this UCC approach under the FOB term, but add the term of "delivered duty unpaid (. . . named place of destination)" as a similar

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53. UNITED NATIONS CONFERENCE ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS, pt. 1, at 184, U.N. Doc. A/CONF. 97/19, U.N. Sales No. E.81.IV.3 (1981).

54. UCC § 2-509.

substitute.<sup>55</sup> This “substitute” term is discussed later.<sup>56</sup>

The seller under the INCOTERMS must supply conforming goods and a conforming commercial invoice “or its equivalent electronic message.”<sup>57</sup> The seller must also supply “at his own risk and expense any export licence . . . and carry out all [required] customs formalities.”<sup>58</sup> The seller has no obligation to enter into a contract of carriage or to obtain an insurance policy.<sup>59</sup>

The seller must also “pay all costs relating to the goods until . . . they [pass] the ship’s rail, . . . and pay [all] costs of customs formalities necessary for export[] as well as all duties, taxes and other official charges.”<sup>60</sup> Of course, the seller must notify the buyer “that the goods have been delivered on board.”<sup>61</sup> If the buyer requests that the seller help the buyer, the seller is then obliged to render assistance in obtaining shipment documents (e.g., negotiable bill of lading, non-negotiable sea waybill) at the risk and expense of the buyer.<sup>62</sup>

The United States FOB cases are a litany of “variant” FOB sales. For example, under a “FOBST” or Free on Board, Stowed, and Trimmed term which “means that the seller must prepare the cargo and the vessel’s holds to ensure efficient, safe loading,” any damage caused to the ship by the negligence of the stevedores would be at the risk of the seller during the loading, stowing, and trimming of the cargo.<sup>63</sup>

“The term ‘FOB PLANT’ is well understood to require delivery to the carrier and does not imply any other meaning.”<sup>64</sup> As a consequence, if the goods were loaded in a container supplied by the buyer and the container was stolen before it was delivered to the carrier, the risk of loss would remain on the seller.

The term “FOB Refinery” means that the seller has the risk

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55. INCOTERMS, *supra* note 1, DDU, at 86.

56. See text accompanying *infra* notes 167-70.

57. *Id.* FOB, A1, at 38.

58. *Id.* A2.

59. *Id.* A3.

60. *Id.* A6, at 40.

61. *Id.* A8.

62. *Id.* A7.

63. *Camden Iron & Metal, Inc. v. Bomar Resources, Inc.*, 719 F. Supp. 297, 306-307, 12 U.C.C. Rep. Serv.2d 398, 412 (D. N.J. 1989).

64. *A.M. Knitwear Corp. v. All Am. Export-Import Corp.*, 359 N.E.2d 342, 347, 20 U.C.C. Rep. Serv. 581, 588 (N.Y. 1976).

and expense of loading the oil into the buyer's trucks.<sup>65</sup>

The term "FOB Del'd" means that the goods are to be delivered to the destination at the risk and expense of the seller.<sup>66</sup>

In the case of *Minex v. International Trading Co.*,<sup>67</sup> a sales contract provided that bags of cement would be shipped "FOB stowed Polish port."<sup>68</sup> The cement became contaminated during the voyage as a result of soy beans falling on the cement bags.<sup>69</sup> The buyer maintained that the contract term required the seller to sweep, clean, and dry the holds of the vessel. The court held, however, that the term did not impose these duties upon the seller. The seller was obligated to place the cement in the holds "in an orderly, compact manner' and 'in such a manner as to protect the goods from friction, bruising, or damage from leakage.'"<sup>70</sup>

Over one hundred years ago, the English courts agreed that a buyer, who had a floating policy of insurance on goods which he was importing into England, would have the risk of loss under an FOB Hamburg, Germany sales contract.<sup>71</sup> The buyer would also have an insurable interest in the shipped goods even though they had not been physically appropriated in the ship. In prior sales, the seller would ship like goods to England and then appropriate specific goods upon discharge from the vessel. In this case the ship was a total loss in transit, and the appropriation, of course, was never made.

In the absence of a special agreement, the risk of loss and the property interest do not pass from the seller to the buyer under an FOB sales contract until the goods are actually placed on board the ship.<sup>72</sup>

When an English sales contract has been construed to be an FOB C.O.D. contract (partly written and partly oral), and the goods have been placed on board a ship and have arrived in the destination country, but have been temporarily misplaced by the

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65. See *L & L Trading Co. v. Tenneco Oil Co.*, 693 F. Supp. 470, 475, 7 U.C.C. Rep. Serv.2d 716, 723 (E.D. La. 1988).

66. *Milwaukee Valve Co. v. Mishawaka Brass Mfg.*, 319 N.W.2d 885, 890, 34 U.C.C. Rep. Serv. 15, 22 (Wis. Ct. App. 1982).

67. 303 F. Supp. 205 (E.D. Va. 1969).

68. *Id.* at 208.

69. *Id.* at 207.

70. *Id.* at 208 (citing definition of "stowage" in BLACK'S LAW DICTIONARY 1589 (4th ed. 1968)).

71. *Inglis v. Stock* [1884-85] App. Cas. 263 (1885).

72. *Colley v. Overseas Exporters* [1921] 3 K.B. 302.

railroad, any delay damage resulting from the delayed delivery of the goods must be borne by the buyer.<sup>73</sup>

In the *Galatia*,<sup>74</sup> 2,008 bags of sugar were loaded on board the ship *Galatia* on or before March 24, 1975. On March 24, fire broke out and the fire was put out with water. The combined fire and water damage rendered the sugar worthless, and it was removed from the ship and destroyed. On the day of loading, clean mate's receipts were issued. A bill of lading was issued on April 6, 1975. The bill of lading stated that the sugar had been shipped in apparent good order and condition, but then a typewritten statement was superimposed on the bill of lading: "Cargo covered by this bill of lading has been discharged Kandla view damaged by fire and/or water used to extinguish fire for which general average declared."<sup>75</sup> In a suit by the seller against the buyer, the Court of Queens Bench and the Court of Appeal agreed that the bill of lading was a "clean" bill of lading, and that the buyer was obliged to pay upon the tender of this clean bill of lading. Risk had passed to the buyer upon shipment which the court stated took place upon the loading of the sugar.<sup>76</sup>

Article 474 of the Commercial Code of Costa Rica states in part that the delivery of the merchandise to the carrier is equivalent to delivery to the buyer.<sup>77</sup>

The Costa Rican Commercial Code uses the English FOB term even though the Spanish equivalent should be L.A.B. (*libre a bordo*):

In purchase-sale contracts in which is stated the phrase "Free on Board" (*libre a bordo*), known by the abbreviation "FOB," the seller shall fix a price which includes all of the costs up to placing the goods sold on board the ship or vehicle which must transport them to their destination, from which moment ac-

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73. *Frebold and Sturznickel (Trading as Panda O.H.G.) v. Circle Prods., Ltd.* [1970] 1 Lloyd's Rep. 499 (C.A.).

74. *M. Golodetz & Co. v. Czarnikow-Rionda Co.* [1980] 1 W.L.R. 495, 498 (C.A.).

75. *Id.* at 498.

76. *Id.* at 508-510, 518-519. See generally 2 RAOUL COLINVAUX, *CARVER'S CARRIAGE BY SEA* §§ 1618-1620, at 1130-1133 (13th ed. 1982); SASSOON, *supra* note 48, §§ 551-552, at 406-407; P.S. ATIYA, *THE SALE OF GOODS* 221 (5th ed. 1975); J.O. Honnold, *Risk of Loss*, in *INTERNATIONAL SALES*, ch. 8 (N.M. Galston & H. Smit eds., 1984); Bernd Von Hoffmann, *Passing of Risk in International Sales of Goods*, in *INTERNATIONAL SALE OF GOODS*, DUBROVNIK LECTURES 265 (Petar Sarcevic & Paul Volken eds., 1986).

77. COD. COM. art. 474 (Costa Rica).



count and risk shall run to the buyer.<sup>78</sup>

The Free on Board Concept seems to be well articulated in Guatemala:

Free on board, FOB. In the sale: free on board, FOB, the goods of the contract shall be delivered on board the ship or vehicle which must transport them, in the place and time agreed; at that moment the risk shall transfer to the buyer.

The price of the sale shall include the value of the goods, plus all the expenses, duties and fees which are incurred up to the moment of delivery on board the carrier.<sup>79</sup>

The El Salvadorean Commercial Code provision makes allowance for both the English and Spanish phrases:

In the purchase-sale contract "free on board" (LAB or FOB), the seller shall fix a price which includes all of the costs up to placing the goods on board the ship or vehicle which will transport them; from that moment, the risk shall be transferred to the buyer.<sup>80</sup>

#### IV. MAIN CARRIAGE PAID TERMS

##### A. *Cost and Freight—CFR*

The 1980 INCOTERMS used the phrase "Cost and Freight" with the symbol C & F.<sup>81</sup> This encouraged some persons in the United States to use the symbol CAF with the letter "A" standing for the word "and." Unfortunately, some Europeans perceived the letter "A" to stand for the word "assurance," which places the duty on the seller to procure an insurance policy.<sup>82</sup> Wisely, the 1990 INCOTERMS have avoided this possible trap.

The CFR term "means that the seller must pay the costs [of the goods] and [the] freight necessary to [transport] the goods to the named port of destination[; however,] the risk of loss of or damage to the goods . . . is transferred . . . to the buyer when the

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78. *Id.* art. 475.

79. Cód. Com. art. 697 (Guat.).

80. Cód. Com. art. 1035 (El Sal.).

81. INCOTERMS, *supra* note 1, C & F at 40 (1980).

82. GEORGE G. BOGERT ET AL., CASES AND MATERIALS ON THE LAW OF SALES AND SECURITY 526 (4th ed. 1962).

goods pass the ship's rail in the port of shipment."<sup>83</sup>

In order for the risk to pass to the buyer, the seller must supply conforming goods, "obtain at his own risk and expense any export licence, . . . and carry out all customs formalities [required] for the exportation of the goods."<sup>84</sup> In addition, the seller must make the usual contract of carriage with the ship and deliver the goods on board the ship within the delivery period stated in the sales contract.<sup>85</sup> The seller has no duty to obtain any kind of insurance for the goods, but the seller's freight obligation includes the cost of loading and unloading "which may be levied by regular shipping lines when contracting for carriage."<sup>86</sup> The seller also has the duty to notify the buyer "that the goods have been delivered on board the vessel."<sup>87</sup> In addition, "unless otherwise agreed," the seller must give the buyer the "usual transport documents . . . [which] enable the buyer to sell the goods in transit by the transfer of the document."<sup>88</sup> If a bill of lading in a set of parts has been issued, the seller must deliver the full set of originals to the buyer.<sup>89</sup>

As stated above, the risk of loss will pass to the buyer when the goods pass the ship's rail in the port of shipment. This clearly indicates that any loss or damage incurred in the discharge from the ship's tackle, or in the loading, stowing, or trimming would fall on the buyer. Any loss or damage in transit, or in the unloading process, would, of course, fall upon the buyer.

Under a C & F sales contract in the United States the seller has no liability for improper stowage of the cargo on the ship.<sup>90</sup> In accordance with the words "unless otherwise agreed," stated in UCC section 2-320, the parties are free to tailor-make CIF or C & F terms to fit their wishes.<sup>91</sup>

The cost and freight contract in Guatemala and El Salvador imposes the same risks and duties as the CIF contract with the

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83. INCOTERMS, *supra* note 1, CFR at 44 (1990).

84. *Id.* A2.

85. *Id.* A3(a) & A4.

86. *Id.* A3(b) & A6, at 46.

87. *Id.* A7.

88. *Id.* A8.

89. *Id.* A8, at 48.

90. *E.g.*, *Indiana Farm Bureau Coop. Assoc. v. S.S. Sovereign Faylenne*, 24 U.C.C. Rep. Serv. 74, 80-81 (S.D.N.Y. 1977).

91. *Steuber Co. v. Hercules, Inc.*, 646 F.2d 1093, 31 U.C.C. Rep. Serv. 508 (5th Cir. 1981).

exception that there is no insurance.<sup>92</sup>

### *B. Cost, Insurance, and Freight—CIF*

The cost, insurance, and freight sales contract is the most widely used sales contract in international trade.<sup>93</sup> The phrase CIF means that the buyer is obtaining a "package deal;" he knows the total cost of the delivered goods with the exception of any customs duties, incidental warehouse or dockage charges, that may be incurred.

The INCOTERMS provide that the term CIF "means that the seller has the same obligations as under CFR but with the addition that he has to procure marine insurance against the buyer's risk of loss of or damage to the goods during the carriage."<sup>94</sup> The CIF term "can only be used for sea and inland waterway transport."<sup>95</sup> In addition, "[w]hen the ship's rail serves no practical purposes such as in the case of roll-on/roll-off or container traffic, the CIP term is more appropriate to use."<sup>96</sup> The CIP term will be discussed later in this article.<sup>97</sup>

The INCOTERMS provide that "[t]he insurance shall be contracted with underwriters or an insurance company of good repute and, [unless otherwise agreed, the insurance must] be in accordance with minimum cover of the Institute Cargo Clauses (Institute of London Underwriters) or any similar set of clauses."<sup>98</sup> Insurance coverage must extend to the point when the goods have passed the rail of the ship at the port of destination.<sup>99</sup> Under this provision, it would seem that a prudent buyer should insist in his sales contract that the insurance policy cover the goods beyond the ship's tackle and up to the warehouse or other quarters of the buyer.

The seller "[w]hen required by the buyer . . . shall provide at the buyer's expense war, strikes, riots and civil commotion risk insurance . . . if procurable."<sup>100</sup> The UCC, on the other hand, pro-

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92. Cód. Com. art. 1034 (El Sal.) and Cód. Com. art. 704 (Guat.).

93. Schmitthoff, *supra* note 48, at 33.

94. INCOTERMS, *supra* note 1, CIF at 50.

95. *Id.* at 51.

96. *Id.*

97. See text accompanying *infra* notes 149-52.

98. INCOTERMS, *supra* note 1, CIF, A3(b), at 50.

99. *Id.* A4, A5, B4, B5, at 52-53.

100. *Id.* A3(b), at 52.

vides that war risk and marine insurance then current at the port of shipment must be procured by the seller, with the cost of war risk insurance to be passed on to the buyer.<sup>101</sup> The UCC does not seem to require that the buyer request the war risk coverage. Under both systems, the buyer has to bear the increased premium for the coverage.

Section 2-320 of the UCC does not explicitly state that the insurance coverage must equal the sales price of the goods; however, a comment notes that the insurance should cover "the value of the goods at the time and place of shipment [excluding] any increase in market value during transit or any anticipated profit to the buyer on a sale by him."<sup>102</sup> The INCOTERMS take a different position. The minimum insurance coverage must cover the contractual sales price plus 10% and it "shall be provided in the currency of the contract."<sup>103</sup> This currency requirement is a reflection of the current English and European Economic Community practice of giving judgments in the currency of foreign countries in accordance with contractual provisions calling for foreign currency. Indeed, in England (whether in contract or tort cases) the courts grant judgments in foreign currencies which have the most real connection with the conduct of the parties.<sup>104</sup>

The UCC in its treatment of the CIF term fails explicitly to cover the risk of loss from the time goods are delivered for transport to a carrier, the time goods are loaded on board, and the time goods are discharged from the ship until actual delivery to the buyer at the port of destination. It is during these "windows of opportunity" that loss by theft, fire, flooding, or other event can often occur; and it is surprising that not more attention was paid to these problems by the drafters of the UCC. This lack of attention becomes even more pronounced by the confusion displayed in comment 1 to section 2-320 of the UCC:

The CIF contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon *shipment* if the seller has properly performed all his obligations with respect to the goods. *Delivery to the carrier*

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101. UCC § 2-320(2)(c).

102. *Id.* cmt. 8.

103. INCOTERMS, *supra* note 1, CIF, A3, at 52.

104. *Miliangos v. George Frank (Textiles) Ltd.*, [1976] 1 Lloyd's Rep. 201; [1976] A.C. 443; *see also* "The Despina R." *Services Europe Atlantique Sud (Seas) v. Stockholms Rederiaktiebolag, Svea (The "Folias")*, [1979] 1 Lloyd's Rep. 1.

is delivery to the buyer for purposes of *risk* and "title." . . . [U]pon tender of the required documents[,] . . . the buyer must pay the agreed price without awaiting the arrival of the goods and if they have been lost or damaged after proper *shipment* he must seek his remedy against the carrier or insurer.<sup>105</sup>

The inconsistent treatment of "shipment" and "delivery" in the above comment seems to be mirrored in some of the versions of the INCOTERMS. For example, the 1953 INCOTERMS stated that the seller must bear all risks of the goods "until they shall have been delivered into the custody of the first carrier, at the time as provided in the contract."<sup>106</sup> The 1980 and 1990 versions use the passing of the ship's rail as the turning point.<sup>107</sup> In light of this initial "window" at the port of shipment, it would seem that a prudent seller ought to procure insurance coverage for this period of open risk.

A Florida appellate court cited comment 1 to UCC section 2-320 and held that the risk of loss by theft passed to the buyer when the goods were delivered to a cargo handler in the shipment port.<sup>108</sup> In that case, the goods were stolen from the cargo handler's premises. The court made no attempt to reconcile the comment with the text of the code section.

The same Florida appellate court followed the same reasoning (but without citing its prior decision) in a case where the goods reached the destination city but were hijacked before actual delivery was made to the buyer.<sup>109</sup>

The point at which risk passes from the seller to the buyer in a CIF sale becomes most acute when goods are damaged in transit and the seller sues the insurance carrier. In *York-Shipley, Inc. v. Atlantic Mutual Insurance Co.*,<sup>110</sup> the seller delivered a boiler to the carrier in Miami under a CIF Guatemala sale. The boiler was damaged in transit, and the seller sued the insurance carrier. The court held that the seller had no insurable interest in the goods:

Accordingly, once York-Shipley [the seller] put the boilers in

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105. UCC § 2-320, ct. 1.

106. INCOTERMS, *supra* note 1, CIF, A3 (1953).

107. INCOTERMS, *supra* note 1, CIF, A6, at 50 (1980) and CIF, A5, at 52 (1990).

108. *Kumar Corp. v. Nopal Lines, Ltd.*, 462 So.2d 1178, 41 U.C.C. Rep. Serv. 69, 71 (Fla. Dist. Ct. App. 1985).

109. *Ladex Corp. v. Transportes Aereos Nacionales, S.A.*, 476 So.2d 763, 765, 42 U.C.C. Rep. Serv. 133, 135-136 (Fla. Dist. Ct. App. 1985).

110. 474 F.2d 8, 12 U.C.C. Rep. Serv. 124 (5th Cir. 1973).

the possession of the carrier in Miami, it no longer had any interest in them. Indeed, it was prohibited from tendering the goods instead of the appropriate documents. York-Shipley therefore has no insurable interest in the cargo and, consequently, has no standing to sue.<sup>111</sup>

Prior to the above quotation, the court noted that the seller had a duty to load the goods under section 2-320; however, the court made no attempt to link this duty to load with the notion that the seller has no interest in the goods once they are delivered to the carrier.<sup>112</sup>

Seven years after the decision in the *York-Shipley* case, the same court cited *York-Shipley* with approval, and it again reiterated that risk passes upon delivery to the carrier in a CIF sales contract.<sup>113</sup> In this case, a freight forwarder in Miami received a shipment of watches from Hong Kong and dispatched them to a purchaser in Asuncion, Paraguay. One crate of watches did not arrive in Paraguay, and the freight forwarder sued his insurance carrier as the named insured. The freight forwarder refused to disclose the name of his principal and asserted that his undisclosed principal was the owner of the watches, and the freight forwarder was suing as his agent. The trial record did not disclose the nature of the sales contract between Miami and Asuncion, Paraguay. The court noted that:

The principal retained the risk of loss until he delivered the goods to the carrier if the contract were a shipment contract, as the ordinary contract is without specific contrary terms, but he carried the risk of loss until the carrier tendered the goods to the buyer in Asuncion if the contract were a destination contract. . . . The underlying contract in the present case fell in the shipment contract category if it were an ordinary CIF contract.<sup>114</sup>

Four years after the above decision, the federal district court for the Southern District of Florida cited it as authority for the proposition that "title and risk of loss under a CIF shipment contract passes to the buyer upon shipment if the seller has properly

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111. 474 F.2d 9, 12 UCC Rep. Serv. 126.

112. This decision was vacated on other grounds. *York-Shipley, Inc. v. Atlantic Mut. Ins. Co.*, 476 F.2d 1283, 12 U.C.C. Rep. Serv. 1136 (5th Cir. 1973).

113. *Sig M. Glukstad, Inc. v. Lineas Aereas Paraguayas*, 619 F.2d 457, 29 U.C.C. Rep. Serv. 504 (5th Cir. 1980).

114. 619 F.2d at 459, 29 U.C.C. Rep. Serv. at 506.

performed all his obligations with respect to the goods."<sup>115</sup> The district court then totally confused the risk of loss issue. In that case, tomatoes were shipped from Miami to Bridgetown, Barbados under a CIF Bridgeport contract with payment to be made upon delivery in Barbados. The tomatoes arrived in Bridgeport, and the buyer rejected them as being spoiled. The buyer shipped the tomatoes back to Miami without payment. The seller then sued the carrier as being at fault for the spoiled tomatoes. In the meantime, the insurance company paid the seller. The court held that usually the risk of loss in transit would fall on the buyer, but that would not control in this case because of the spoiling of the tomatoes and the fact that the buyer was to wait for the tomatoes before making payment.<sup>116</sup> With all due respect, it is submitted that the court should have cited UCC section 2-321 as this sales contract appeared to be a CIF variant contract under which the seller retains "the risk of ordinary deterioration . . . and the like in transportation but has no effect . . . on the passing of the risk of loss."<sup>117</sup> The court was right for the wrong legal reason.

A pre-code case (although the court cited section 2-320 of the UCC) stated that the risk of loss passed to the buyer upon delivery of the goods to the carrier.<sup>118</sup> Sections 2-509 and 2-320 of the UCC provide that the risk of loss in a CIF transaction normally passes to the buyer when the goods have been shipped. However, if non-conforming goods are shipped then the risk of loss remains with the seller.<sup>119</sup>

When a tanker bill of lading has been issued in the buyer's name under a CIF sales contract, the title and risk of loss passes to the buyer upon shipment of the oil.<sup>120</sup> On the other hand, another federal district court has stated that risk of loss passes to the buyer when the seller makes a proper shipping contract with the carrier.<sup>121</sup>

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115. *William D. Branson, Ltd. v. Tropical Shipping & Constr. Co.*, 598 F. Supp. 680, 681, 40 U.C.C. Rep. Serv. 883, 884 (S.D. Fla. 1984).

116. 598 F. Supp. at 682-683, 40 U.C.C. Rep. Serv. at 885-886.

117. UCC § 2-321(2).

118. *Amco Transworld, Inc. v. M/V Bambi*, 257 F. Supp. 215, 3 U.C.C. Rep. Serv. 860 (S.D. Tex. 1966).

119. *Larsen v. A.C. Carpenter, Inc.*, 620 F. Supp. 1084 (E.D.N.Y. 1985).

120. *Petroleo Brasileiro, S.A. v. Ameropan Oil Corp.*, 372 F. Supp. 503, 506, 14 U.C.C. Rep. Serv. 661, 664 (E.D.N.Y. 1974) (citing UCC § 2-320 cmt. 1).

121. *Harlow & Jones, Inc. v. Advance Steel Co.*, 424 F. Supp. 770, 21 U.C.C. Rep. Serv. 410 (E.D. Mich. 1976).

The risk of delay in shipment is a very real economic risk which is seldom mentioned as one of the risks faced by a seller. For example, assume that a CIF sales contract for steel calls for shipment "September-October." It is trade usage in the steel industry that "September-October" shipment means delivery in October or November.

In *Harlow & Jones, Inc. v. Advance Steel Co.*,<sup>122</sup> steel was shipped on November 14th, but it was delivered to the buyer on November 29th, and as a result, the buyer rejected the shipment due to its untimeliness. The seller showed that strikes, bad weather, and obstruction in a canal were the causes of the late shipment. The court held that under sections 2-320 and 2-504 of the UCC, and traditional contract doctrine, the CIF buyer can reject for delay only when "material delay or loss ensues."<sup>123</sup> In this case, although the shipment dates were delayed, no material delay occurred because the steel was delivered in November. As a result, the buyer was liable for breach of contract. As the court put it:

A material delay in shipment has traditionally been required before a buyer under a C.I.F. agreement is allowed to cancel his order, and a merely technical delay or a delay which is later cured by timely delivery has never by itself justified cancellation, since this would, in effect, work a penalty or a forfeiture upon the seller.<sup>124</sup>

If war risk surcharges are added by the carrier to the freight costs after a CIF or C & F sales contract has been entered into, then this risk must be borne by the seller under case law in the United States<sup>125</sup> and in England.<sup>126</sup> The English Sale of Goods Act of 1979, unlike the UCC, does not address war risk insurance, and the case law has not been charitable to buyers.

When a sales contract provided for "war risk for buyer's account" the seller was not obligated to procure war risk insurance for the benefit of the buyer, but rather, if the buyer desired to have war risk insurance he would have to procure it at his own expense.<sup>127</sup> In addition, the fact that the goods had not been appro-

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122. 424 F. Supp. 770, 21 U.C.C. Rep. Serv. 410 (E.D. Mich. 1976).

123. 424 F. Supp. at 777, 21 U.C.C. Rep. Serv. at 420.

124. *Id.*

125. *Continental Ore Corp. v. United States*, 423 F.2d 1248, 7 U.C.C. Rep. Serv. 440 (Ct. Cl. 1970).

126. *Tsakiroglou & Co. v. Noble Thorl G.m.b.H.*, [1961] 2 All E.R. 179 (H.L.).

127. *C. Groom, Ltd. v. Barber*, [1915] 1 K.B. 316 (1914); accord *In re An Arbitration*



priated at the time the ship was sunk by enemy fire would not affect the passage of risk of loss to the buyer.<sup>128</sup>

When war broke out after the conclusion of a CIF sales contract and the ship carrying the goods was seized by the enemy, the seller had the right to present the shipping documents and to demand payment from the buyer. Impossibility of delivery was no defense to the buyer who could not recover from the insurance company where the policy provided for "free of capture and seizure."<sup>129</sup>

Section 32, subsection 3 of the Sale of Goods Act of 1893 provides that:

Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.<sup>130</sup>

It has been held that this section has no application to CIF contracts because insurance is a part of the contract, and the seller has no duty to procure war risk insurance if war becomes imminent after the date of the contract.<sup>131</sup>

In normal C & F and CIF sales contracts governed by English law the risk of loss will pass from the seller to the buyer on shipment of the goods, but the property (title) will not pass to the buyer until he pays for and takes up the bill of lading indorsed to him. This dichotomy between risk and property becomes terribly important in those cases wherein the risk of loss has passed to the buyer, damage has occurred in transit, and the buyer never receives the indorsed bill of lading or receives it after the damage in transit has occurred. In this case, the buyer has no right to sue the carrier in tort for the damage because the property has not passed to him.<sup>132</sup> The court pointed out that all of this can be avoided if

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between *Weis & Co. and Credit Colonial Et Commercial (Antwerp)*, [1915] 1 K.B. 346.

128. *C. Groom, Ltd.*, [1915] 1 K.B. at 316.

129. *In re An Arbitration between Weis & Co. and Credit Colonial Et Commercial (Antwerp)*, [1915] 1 K.B. 346.

130. *Sale of Goods Act, 1893*, 56 & 57 Vict., ch. 71, § 32(3) (Eng.). Section 32, subsection 3 of the 1979 English *Sale of Goods Act* contains similar wording.

131. *Law & Bonar, Ltd. v. British American Tobacco Co.*, [1916] 2 K.B. 605.

132. *Leigh and Sullivan, Ltd. v. Aliakmon Shipping Co.*, [1986] 2 W.L.R. 902 (H.L.); see also *Margarine Union G.m.b.H. v. Cambay Prince Steamship Co.*, [1969] 1 Q.B. 219 (1967).

the sellers should sue for the benefit of the buyers, or the sellers could simply assign their rights to the buyers.<sup>133</sup>

There are a number of situations under English Law in which the buyer has the risk of loss in transit, but he does not have the property (title) right and is without a cause of action against the carrier for damage in transit.<sup>134</sup> These "risk without remedy" cases have led to a demand by merchants to replace the 1855 Bills of Lading Act. In response, the Law Commission and the Scottish Law Commission have recommended, among other things, that:

The lawful holder of a bill of lading should be entitled to assert contractual rights against the carrier, irrespective of the passing of property and regardless of whether he has suffered loss himself, if necessary being able to recover substantial damages for the benefit of the person who has suffered the loss.<sup>135</sup>

133. Leigh and Sullivan, Ltd. v. Aliakmon Shipping Co., [1986] 2 W.L.R. at 917.

134. Sewell v. Burdick, [1884-85] 10 App. Cas. 74 (rights of a pledgee); The Aramis, [1989] 1 Lloyd's Rep. 213 (C.A.) (non-delivery of the bill of lading); The Delfini, [1990] 1 Lloyd's Rep. 252 (indorsement after delivery of the goods).

135. THE LAW COMMISSION AND THE SCOTTISH LAW COMMISSION, LAW COM. NO. 196 & SCOT. LAW COM. NO. 130, RIGHTS OF SUIT IN RESPECT OF CARRIAGE OF GOODS BY SEA 40 (1991). The author is indebted to Mr. Jack Beatson, Law Commissioner, for a copy of the report. Sect. 2 of the proposed act is the most relevant:

2.—(1) Subject to the following provisions of this section, a person who becomes—

- (a) the lawful holder of a bill of lading;
- (b) the person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which a sea waybill relates is to be made by the carrier in accordance with that contract; or
- (c) the person to whom delivery of the goods to which a ship's delivery order relates is to be made in accordance with the undertaking contained in the order,

shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is to be made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession of the bill no longer gives a right (as against the carrier) to possession of the goods to which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) above unless he becomes the holder of the bill—

- (a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or
- (b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements.

(3) The rights vested in any person by virtue of the operation of subsection

The proposed Act would give the holder of a bill of lading, the possessor of a sea waybill, or the person to whom delivery of the goods is proper under a ship's delivery order the same rights as against the carrier. The adoption of this proposed Act would bring the law of England in line with the law of the United States.<sup>136</sup>

The Costa Rican Commercial Code in effect in 1977 nicely provides for the CIF sales contract:

Purchases made under the clause "Cost, insurance and freight" (*costo, seguro y flete*) known in commerce by the abbreviation "CIF," includes the cost of the goods, the agreed insurance and the freight as far as the place which is indicated in the contract. The seller remains obligated to contract for the transportation and to obtain insurance for the benefit of the buyer, conforming to the contract. The merchandise shall be shipped from the place of embarkation to the destination for the account and risk of the buyer. The prior provisions shall also be applicable, in the following, when the purchase has included only cost and freight,

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(1) above in relation to a ship's delivery order—

(a) shall be so vested subject to the terms of the order; and

(b) where the goods to which the order relates form a part only of the goods to which the contract of carriage relates, shall be confined to rights in respect of the goods to which the order relates.

(4) Where, in the case of any document to which this Act applies—

(a) a person with any interest or right in or in relation to goods to which the document relates sustains loss or damage in consequence of a breach of the contract of carriage; but

(b) subsection (1) above operates in relation to that document so that rights of suit in respect of that breach are vested in another person, the other person shall be entitled to exercise those rights for the benefit of the person who sustained the loss or damage to the same extent as they could have been exercised if they had been vested in the person for whose benefit they are exercised.

(5) Where rights are transferred by virtue of the operation of subsection (1) above in relation to any document, the transfer for which that subsection provides shall extinguish any entitlement to those rights which derives—

(a) where that document is a bill of lading, from a person's having been an original party to the contract of carriage; or

(b) in the case of any document to which this Act applies, from the previous operation of that subsection in relation to that document;

but the operation of that subsection shall be without prejudice to any rights which derive from a person's having been an original party to the contract contained in, or evidenced by, a sea waybill and, in relation to a ship's delivery order, shall be without prejudice to any rights deriving otherwise than from the previous operation of that subsection in relation to that order.

136. G.H. Treitel, *Passing of Property Under C.I.F. Contracts and the Bills of Lading Act 1855*, LLOYD'S MAR. & COM. L.Q., Feb. 1990, pt. 1, at 1. For a very well written article addressing this passing of property problem, see J. Beatson and J.J. Cooper, *Rights of Suit in Respect of Carriage of Goods by Sea*, LLOYD'S MAR. & COM. L.Q., May 1991, pt. 2, at 196.

known in commerce by the abbreviation C and F (C y F).<sup>137</sup>

In the CIF sales contract, the law of El Salvador provides:

In the purchase-sale contract "cost, insurance and freight" (CIF or CAF) the price shall include the cost of the goods plus the insurance premium and the freight charges, as far as the place agreed to be received by the buyer.<sup>138</sup>

The CIF seller is obliged:

To contract for the transportation in the agreed terms, to pay the freight and to obtain from the carrier, the bill of lading or waybill respectively.

To acquire insurance for the total value of the goods sold, in favor of the buyer or the person indicated by him, which covers the agreed risks or the usual risks, and to obtain for the buyer the corresponding policy or certificate.

To deliver to the buyer or the person whom he designates, the above documents.<sup>139</sup>

If the seller in a CIF sale does not contract for the insurance in the terms previously stated, he shall respond to the buyer in case of disaster, as would an insurer. The buyer may contract for the insurance and deduct the premium from the amount owed to the seller.<sup>140</sup>

Unless specified or contrary to custom, the bill of lading or waybill will be at the expense of both parties, but the risks shall be charged to the buyer when the goods have been received by the carrier.<sup>141</sup>

The Guatemalan CIF (*costo seguro y flete*) sales contract requires the seller to contract with and to pay the carrier and to obtain a bill of lading or waybill.<sup>142</sup>

The risk of loss point is succinctly stated in a Guatemalan CIF sale:

Risk in the CIF purchase-sale contract. The risks, in the CIF purchase-sale contract, shall be transmitted to the buyer, from the moment in which the contracted goods have been delivered to the carrier. The insurance coverage must begin from that

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137. Cód. Com. art. 473 (Costa Rica).

138. Cód. Com. art. 1030 (El Sal.).

139. *Id.* art. 1031.

140. *Id.* art. 1032.

141. *Id.* art. 1033.

142. Cód. Com. art. 701 (Guat.).

moment.<sup>143</sup>

If the CIF seller should fail to obtain insurance coverage, then:

Incomplete insurance. If the CIF seller, does not contract for insurance on the agreed terms or on the usual terms, he shall respond to the buyer in case of risk, as if he were the insurer. The buyer, in this case, may contract for the insurance and, in any case, deduct the amount of the premium from the price owed the seller.<sup>144</sup>

### C. *Carriage Paid To—CPT*

The term "Carriage paid to . . ." means that the seller must pay the freight for the transport of the goods to the destination, "but the risk of loss or damage passes to the buyer when the goods have been delivered into the custody of the carrier."<sup>145</sup> This term may be used when the carriage is by rail, road, sea, air, inland waterway, or by a combination of the foregoing in a multimodal transport.<sup>146</sup> When more than one carrier will be used, the risk passes to the buyer upon delivery to the first carrier.<sup>147</sup>

The seller must supply conforming goods, obtain any required export license, satisfy customs formalities, and deliver the goods to the carrier. The seller must also pay all costs of freight, loading and unloading charges (if they are not included in the freight bill) and all export and customs duties, taxes or other official charges. He must notify the buyer of the delivery of the goods to the carrier, provide the usual transport documents, pay the costs of necessary checking operations, and provide for any necessary packaging.<sup>148</sup>

It is to be noted that the seller has no obligation to arrange for insurance coverage for the goods.<sup>149</sup> As distinguished from the CIF term, the CPT term, by placing the risk of loss on the buyer as soon as the seller delivers the goods to the first (or only) carrier, does away with the "window" period previously discussed.<sup>150</sup>

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143. *Id.* art. 702.

144. *Id.* art. 703.

145. INCOTERMS, *supra* note 1, CPT at 56.

146. *Id.* at 57.

147. *Id.*

148. *Id.* A6 & A9, at 58, 60.

149. *Id.* A3, at 56.

150. See text following *supra* note 104.

*D. Carriage and Insurance Paid To—CIP*

The term "Carriage and insurance paid to . . ." means that the seller has the same obligations as under the CPT term but with the added obligation to purchase insurance coverage for the benefit of the buyer.<sup>151</sup>

The risk of loss passes to the buyer upon delivery to the first (or only) carrier. The seller must arrange for insurance for the benefit of the buyer, and the insurance policy must conform to the same requirements as if this were a CIF contract, *e.g.*, the coverage must be 110% of the sale price, insurance underwriters of good repute, and so forth.<sup>152</sup>

It may be recalled from the discussion of the CIF sales contract that the risk passed to the buyer when the goods passed the ship's rail and not upon mere delivery to the carrier.<sup>153</sup> This means, of course, that the seller bears the risk between the time the goods are delivered to the carrier and the time when they pass the ship's rail. The drafters of the INCOTERMS do not attempt to explain why this "window" should exist in the CIF contract and not in the CIP contract.

From the perspective of sellers, it would seem wise to stipulate in the CIF sales contract that the risk of loss will pass to the buyer upon delivery of the goods to the carrier.

## V. ARRIVAL TERMS

*A. Delivered at Frontier—DAF*

The phrase "Delivered at Frontier" means that the seller must make the goods

available, [and] cleared for export, at the named point and place at the frontier, but before the customs border of the adjoining country. The term frontier may be used for any frontier including that of the country of export. . . . The term is primarily intended to be used when goods are to be [transported] by rail or road, but it may be used for any mode of transport.<sup>154</sup>

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151. INCOTERMS, *supra* note 1, CIP, at 62.

152. *Id.* A3, at 62, 64.

153. See text following *supra* note 104.

154. *Id.* DAF at 68, 69.

As in other sales contracts, the seller has the duty to supply conforming goods and a commercial invoice, obtain at his own risk and expense any export license or documentation required for export, and place the goods at the disposal of the buyer at the named point of delivery at the frontier on the date or within the contracted tender period.<sup>155</sup>

The risk of loss passes to the buyer from the time that the goods have been placed at the buyer's disposal. Inasmuch as this shipping term does not require the seller to arrange for insurance,<sup>156</sup> the buyer must either procure insurance or be self insured during the window between the goods being placed at the buyer's disposal and actual physical receipt by the buyer.

Consistent with most of the prior shipping terms, the seller must give notice to the buyer of the delivery, supply proof of delivery, and provide a "transport document" covering transport of the goods to the destination.<sup>157</sup>

#### *B. Delivered Ex Ship—DES*

"Delivered Ex Ship" obligates the seller to tender delivery of the goods on board the ship which has reached the destination port. The seller has the usual obligations to supply conforming goods, a commercial invoice, export licenses, contract of carriage, freight payment, and to tender delivery.<sup>158</sup> The buyer is left with the task of clearing the goods for import at the destination.<sup>159</sup> In doing so, the buyer has the obligation to secure the import licenses, take care of import formalities, and so forth.<sup>160</sup>

The risk of loss passes to the buyer upon proper tender of delivery while the goods are on board the ship.<sup>161</sup> Accordingly, the buyer bears the expense and risk of loss or damage during the unloading process.

In the Privy Council case of *Yangtze Insurance Assoc. v. Lukmanjee*,<sup>162</sup> an insurance policy covered the seller and "all . . .

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155. *Id.* A1 & A2, at 68.

156. *Id.* A3 & A4, at 68.

157. *Id.* A7 & A8, at 70.

158. *Id.* DES, A1-A7, at 74.

159. *See id.* at 74 (seller delivers goods "uncleared for export").

160. *Id.* B2, at 75.

161. *Id.* B5, at 75.

162. 1918 App. Cas. 585 (P.C.) (appeal taken from Ceylon).

persons to whom the [goods] shall appertain in part or in all . . . .”<sup>163</sup> The goods consisted of 382 teak logs, 144 of which were sold ex ship to one buyer. After the 144 logs were discharged from the ship and placed in a log raft, they were swept out to sea and lost as a result of a sudden gale. The buyer sued the insurance company. The Privy Council held that since the logs were at the seller’s risk during the voyage, there was nothing from which to infer that the seller had an obligation and an intention to procure insurance on the buyer’s behalf. The term “cash against documents” which was used in the sales contract did not imply that insurance for the buyer was to be considered as coming within the word “documents.”<sup>164</sup>

### C. *Delivered Ex Quay—DEQ*

“Delivered Ex Quay (duty paid)” means that the seller fulfills his obligation to deliver when he has made the goods available to the buyer on the quay (wharf) at the named port of destination, cleared for importation. The seller has to bear all risks and costs including duties, taxes and other charges of delivering the goods thereto.

This term should not be used if the seller is unable directly or indirectly to obtain the import licence.

If the parties wish the buyer to clear the goods for importation and pay the duty the words “duty unpaid” should be used instead of “duty paid.”

If the parties wish to exclude from the seller’s obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: “Delivered ex quay, VAT unpaid (. . . named port of destination).”

This term can only be used for sea or inland waterway transport.<sup>165</sup>

Under the above term, the seller must defray all of the export and import costs, “and carry out all customs formalities for the exportation and importation of the goods. . . .”<sup>166</sup> Moreover, the seller must supply conforming goods and a commercial invoice.<sup>167</sup>

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163. *Id.* at 587.

164. *Id.* at 588-589.

165. INCOTERMS, *supra* note 1, DEQ at 80-81.

166. *Id.* A2, at 80.

167. *Id.* A1.



Risk of loss or damage passes to the buyer when the goods have been placed on the quay or wharf at the destination port, tendered on the day or within the agreed time period.<sup>168</sup>

*D. Delivered Duty Unpaid—DDU*

"Delivered duty unpaid" requires the seller to deliver the goods to the named place in the importing country. The seller has the expense and risk involved in bringing the goods to the stipulated place, but is not responsible for duties, taxes, other importation charges, or costs and risks of performing customs formalities.<sup>169</sup> The buyer must "pay any additional costs" and incur "any risks caused by his failure" to timely clear customs.<sup>170</sup> The risk of loss shifts from seller to buyer when the goods have been placed at the buyer's disposal.<sup>171</sup>

*E. Delivered Duty Paid—DDP*

The last of the INCOTERMS, "Delivered duty paid" imposes the maximum obligation upon the seller while the first of the INCOTERMS, "Ex works," imposes the minimum obligation upon the seller.<sup>172</sup>

The DDP term means that the seller must deliver the goods to the named place in the importing country, pay all costs of clearing the goods for importation including duties, taxes, and other delivery charges.<sup>173</sup> INCOTERMS warns that the designation D.D.P. should not be used by contracting parties if the seller is unable to obtain the required import license.<sup>174</sup>

If the parties desire that the buyer clear the goods through customs and "pay the duty, [then] the term DDU should be used."<sup>175</sup> Likewise, "[i]f the parties wish to exclude from the seller's [duties] some of the costs [for] importation of the goods (such as the value added tax (VAT)), then the contract should state "Delivered duty paid, VAT unpaid (. . . named place of

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168. *Id.* A5, at 82.

169. *Id.* DDU at 86.

170. *Id.*

171. *Id.* A5, B5, at 88-89.

172. *Id.* DDP at 92.

173. *Id.*

174. *Id.*

175. *Id.* at 93.

destination).’ ”<sup>176</sup>

The DDP term can be employed regardless of the manner of transport elected.<sup>177</sup> Inasmuch as the risk is on the seller during transit, the seller bears no obligation to obtain insurance.<sup>178</sup>

In accordance with the delivery terms, the risk of loss passes to the buyer upon tender of delivery at the time the goods have been placed at the buyer’s disposal in accordance with the delivery requirements.<sup>179</sup> “Delivery” means that “the seller must place the goods at the disposal of the buyer . . . on the date or within the period stipulated.”<sup>180</sup>

#### VI. “BUYING GOODS AFLOAT,” “GOODS SOLD IN TRANSIT,” “STRING OF SALES”

The foregoing shipping terms seem to have the same basic premise—that the sales contract has one seller and one buyer with the risk of loss passing from one to the other depending upon the exact shipping term used.

Today, the simple one-seller-one-buyer transaction is often eclipsed by the following scenario: An oil seller in the middle east sells a shipload of oil to A who in turn sells it to B who sells it to C who sells it to D who finally takes delivery in the United States. Upon delivery, the buyer discovers that the oil has suffered salt water damage or other damage. Who bears the risk of loss? Readers of the INCOTERMS will find only hints which must be used by analogy and extension.

The drafters of the INCOTERMS recognized the problem in their introductory remarks:

14. It happens in commodity trades that goods are bought while they are carried at sea and that, in such cases, the word “afloat” is added after the trade term. Since the risk for loss of or damage to the goods would then, under the CFR- and CIF-terms, have passed from the seller to the buyer, difficulties of interpretation might arise. One possibility would be to maintain the ordinary meaning of the CFR- and CIF-terms with respect to the division of risk between seller and buyer which would mean that

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176. *Id.*

177. *Id.*

178. *Id.* A3, at 92.

179. *Id.* B5, at 95.

180. *Id.* A4, at 92.

the buyer might have to assume risks which have already occurred at the time when the contract of sale has entered into force. The other possibility would be to let the passing of the risk coincide with the time when the contract of sale is concluded. The former possibility might well be practical, since it is usually impossible to ascertain the condition of the goods while they are being carried. For this reason the 1980 U.N. Convention on Contracts for the International Sale of Goods Article 68 stipulates that "if the 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." There is, however, an exception to this rule when "the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer". Thus, the interpretation of a CFR- or CIF-term with the addition of the word "afloat" will depend upon the law applicable to the contract of sale. The parties are advised to ascertain the applicable law and any solution which might follow therefrom. In case of doubt, the parties are advised to clarify the matter in their contract.<sup>181</sup>

The complete text of Article 68 of the U.N. Sales Convention states:

The risk in respect of goods sold in transit passes to the buyer from the time of the conclusion of the contract. However, if the 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.<sup>182</sup>

Under Article 68, the buyer at the end of the string will suffer the loss in the vast majority of cases. Whatever one may think about this result, it has at least the virtue of certainty. On an anecdotal level, the author has been informed that many European lawyers have been assiduously using Article 68 of the U.N. Sales Convention to "exclude the application of this Convention" from their clients' sales contracts.<sup>183</sup> Prudent lawyers who represent sellers would be wise to adopt Article 68 as part of the sales contract if

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181. *Id.* para. 14, at 12.

182. U.N. SALES CONVENTION, *supra* note 23, at 185.

183. *Id.* at 178.

the U.N. Sales Convention is to be excluded.

The UCC does not contain any express recognition of the concept of buying goods afloat, goods sold in transit, or goods in a string of sales, but comment 2 to section 2-509 does state:

The underlying reason of this subsection does not require that the shipment be made after contracting, but where, for example, the seller buys the goods afloat and later diverts the shipment to the buyer, he must identify the goods to the contract before the risk of loss can pass. To transfer the risk it is enough that a proper shipment and a proper identification come to apply to the same goods although, aside from special agreement, the risk will not pass retroactively to the time of shipment in such a case.

This comment seems totally unsupported by the text of section 2-509 of the UCC, and it seems to be totally inconsistent with the U.N. Sales Convention.

A question of risk allocation is presented when a buying afloat transaction, designated CIF and not governed by the U.N. Sales Convention, involves a sales contract entered into after the goods have been lost at sea. In *Couturier v. Hastie*,<sup>184</sup> a cargo of corn was sold by a del credere agent of the seller. However, days prior to this sale, the cargo was unloaded and sold by the ship because the corn was deteriorating in transit. After learning of the prior sale, the English buyer repudiated the contract. The seller then sued his del credere agent for the purchase price. The court held that the sales contract was invalid because the goods were no longer owned by the seller, and accordingly found the agent not liable. It appears that this case is the source of section 6 of the English Sale of Goods Act:

Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.<sup>185</sup>

Section 7 of the English act carries the concept further:

Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement

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184. 1853-1856 Rev. Rep. 329 (H.L. 1856).

185. Sale of Goods Act, 1893, 56 & 57 Vict., ch. 71, § 6 (Eng.). The Sale of Goods Act, 1979, 27-28 Eliz. II, ch. 54, retains § 6.

is thereby avoided.<sup>186</sup>

Notably, both sections deal with goods that have perished; no provision is made for deterioration. In a time of short supply, a buyer might be happy to complete the sale despite deterioration of the goods; the English act does not have a flexible approach.

In England, questions about risk of total loss and risk of deterioration have not been entirely settled by the courts. A terse dictum by Lord Porter in *The Julia*<sup>187</sup> has inspired speculations in various hypothetical fact patterns.<sup>188</sup>

Section 2-613 of the UCC attempts to combine sections 6 and 7 of the English Sales Act:

Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, . . . then

- (a) if the loss is total the contract is avoided; and
- (b) if the loss is partial or the goods have so deteriorated as no longer to conform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the

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186. *Id.* at § 7. The Sale of Goods Act, 1979, 27-28 Eliz. II, ch. 54, retains § 7.

187. *Comptoir D'Achat et de Vente Du Boerenbond Belge S/A v. Luis de Ridder Limitada (The Julia)*, 1949 App. Cas. 293.

188. BENJAMIN'S SALE OF GOODS sets forth the risk of deterioration rules as follows: Risk of deterioration. Under the rules stated by Lord Porter in *The Julia*, the risk of deterioration will be on the buyer where the sequence of events is as follows:

- (1) Goods are sold, shipped and then deteriorate: here the risk will have passed on shipment.
- (2) Goods are shipped, deteriorate and are then sold: here the risk is on the buyer *as from* shipment. It passes *with retrospective effect* in the sense that the buyer bears the risk of deterioration which had already occurred when the contract of sale was made.
- (3) Goods are shipped, a contract is made for the sale of goods of that description and the shipped goods are then appropriated to the contract: here the risk is on the buyer (a) without retrospective effect if the goods deteriorated *after* appropriation and (b) with some retrospective effect if they deteriorated *after* contract but *before* appropriation. In case (a) the risk can be said to have passed on contract or on appropriation; in case (b) it can be said to have passed as from shipment, though it might be more accurate to say that it passed as from contract, it being unnecessary in such a case to relate the retrospective effect back to the time of shipment.

BENJAMIN'S SALE OF GOODS, *supra* note 48, at 1086 (emphasis in original).

deficiency in quantity but without further right against the seller.

The comments to section 2-613 of the UCC talk solely about the goods being destroyed while section 2-613 itself talks about both casualty and deterioration.<sup>189</sup> For example, comment 2 to section 2-613 notes that this section “applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they are destroyed subsequently but before the risk of loss passes to the buyer.”

It appears then, that if the buyer in a string of sales could prove that either a casualty or deterioration occurred prior to the purchase of the goods, then the risk of loss would not pass to the buyer, who would then have no insurable interest in the goods.

The 1942 Italian Civil Code provides in merciful brevity that:

Risks. If the sale concerns goods in transit, and the insurance policy covering the transportation risks is among the documents delivered to the buyer, the risks to which such goods are exposed shall be borne by the buyer from the time of delivery of the goods to the carrier.

This provision does not apply if the seller knew at the time of the sale that the goods had been lost or damaged, and in bad faith did not disclose such facts to the buyer.<sup>190</sup>

This provision seems to be the source of similar commercial code provisions in Central America. Similar provisions were not found in South America.

The sophisticated notion of buying afloat and its risks are covered in the Costa Rican Commercial Code:

If the goods are encountered (in the sense of purchased) in the course of the route and among the documents delivered is a form of insurance policy for the risks of transport, these shall remain the burden of the buyer from the moment of the delivery of the goods to the carrier, unless the seller had known, at the time of the execution of the contract, the existence of the loss or damage of the goods and had concealed it from the buyer.<sup>191</sup>

Guatemala also provides for the passage of risk when goods in

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189. UCC § 2-613, cmts. 1-3.

190. THE ITALIAN CIVIL CODE § 4, art. 1529, at 389 (Mario Beltramo, et al. trans., 1969).

191. Cód. Com. art. 476 (Costa Rica).

transit are sold:

Goods in transit. If the goods are encountered in transit and among the documents delivered, is a policy of insurance of transport, the risks shall be understood as a burden on the buyer from the moment the merchandise was delivered to the carrier, unless the seller knew, at the time of the execution of the contract, of the loss or damage of the goods and concealed it from the buyer.<sup>192</sup>

El Salvador also recognizes the buying afloat concept by replicating the language found in Article 476 of the Costa Rican Commercial Code.<sup>193</sup>

At least one edition of the Code of Commerce of Paraguay includes the 1953 INCOTERMS in its appendix, although there does not seem to be any clear indication that they were formally adopted by the legislature.<sup>194</sup>

Argentina does not seem to have any provisions in its Commercial Code to cover the various kinds of sales previously discussed in this article; however, the U.N. Sales Convention has been ratified.<sup>195</sup>

## VII. CONCLUSION

It is suggested that the INCOTERMS ought to be adopted in most international sales contracts for the following reasons:

1. The terms are the most detailed articulations found in any source.
2. The terms are written in the form of a checklist which delineate the respective obligations of the buyer and seller.
3. The terms are written in simple English and French; a non-law trained arbitrator would have no difficulty in using the "checklist" to determine the parties' rights and duties.
4. In a similar vein, the seller and buyer would have a ready reference for their rights and duties.
5. In the negotiation stage, each party would be able to recognize the objective for which they were bargaining.

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192. Cód. Com. art. 696 (Guat.).

193. Cód. Com. art. 1028 (El Sal.).

194. Cód. Com. art. 459 (Para.).

195. Cód. Com. art. 1083 (Arg.).

6. Adoption of the terms in a sales contract would not only provide a choice of "law," but also a choice of language by using either the English or French version of the terms.

7. The terms permit flexibility in the negotiation stage by allowing the parties to deviate expressly from one or more of the terms.

8. Finally, the incorporation by reference of the terms greatly shortens the required length of any written contract.