

INTERNATIONAL BAR ASSOCIATION

**Meeting of SBL Committee
International Sales and Related Commercial Practices**

**New Orleans, Louisiana
October 13, 1993**

WHY INCOTERMS 1990?

Louise Barrington*

* Member of the Bars of Ontario and New York;
Director, Institute of International
Business Law and Practice of the
International Chamber of Commerce

WHY INCOTERMS 1990?

MEETING OF COMMITTEE "M" OF THE INTERNATIONAL BAR ASSOCIATION
NEW ORLEANS, OCTOBER 13, 1993

LOUISE BARRINGTON

In the 1960's, as a Toronto youngster staying at home to avoid the proverbial dreaded Math test, I had occasion to turn on the television, where the usual American daytime fare included game shows with names like "Jeopardy", "Truth or Consequences" or "Queen for a Day". After undergoing various trials and embarrassments the successful contestants got to see, along with the home audience, the full panoply of wonderful prizes they had earned. Whether the prize was a 989 cubic foot freezer, a set of luggage for a family of 12, or a one-way trip to the North Pole, the Master of Ceremonies would unfailingly announce the value of the coveted prize as "X dollars, FOB". Little wonder, that to me, uninitiated to the world of commerce, and a Canadian to boot, "FOB" seemed to be some weird nomenclature for expressing US dollars. Little did I suspect, twenty-five years ago, that I would be standing here in New Orleans talking about FOB to an audience of professionals! It is safe to say that everyone involved in international business today has heard of FOB and CIF, at least. But there remains some doubt, even among professionals, as to exactly what they do, and as to how and when to use them.

It wasn't until decades later, studying international business law in Paris that I found out the truth about FOB and about INCOTERMS. In fact, FOB and indeed most of the other INCOTERMS are much older than twenty-five years. The first International Commercial Terms have been with us since the early years of this century. In the 1920's the International Chamber of Commerce began to study them, and in 1936 produced the first

set of "International Rules for the Interpretation of Trade Terms".¹

The title of this paper, short as it is, implies two quite important questions. First, Why Incoterms at all? Second, Why Incoterms 1990?

Our first question is why INCOTERMS?

In any contract for the sale of goods, someone will have to bear the **cost** of transporting the merchandise from the seller's factory to the buyer's place of business. In an international contract this may involve several modes of transportation, export permits, import licenses and duties, and a mass of documentary information. Who will take the time and trouble, and spend the money, to ensure the goods arrive at the seller's place of business? The answer to this question may have a bearing not only on the price negotiated, but on the very success of the relationship between the parties.

In any sales contract there is a certain element of **risk**. Risk of non-execution, risk of non-payment, risk of damage or disappearance of the goods. When a contract is for the sale of goods between parties established or operating in different countries, these risks increase, both qualitatively and quantitatively. The Vendor is unlikely to remain personally, physically in control of the goods until they are handed to the Purchaser. Various modes of transportation will be considered, and third parties, perhaps several, will become involved. Immediate execution in return for payment becomes the exception rather than the rule. Who will bear these risks, which increase over time and space? Who will suffer if the goods are damaged or disappear before reaching the seller?

¹ J. Ramberg, Guide to INCOTERMS 1990, (hereinafter "INCOTERMS") p. 8.

In keeping with the universally recognized basic principle of freedom to contract, the parties can agree between themselves who is to bear costs and risk. And many times they do just that. Even if they think they have negotiated every minuscule point of the contract, problems may still arise. First, despite the Herculean efforts of all common lawyers, the parties may not think of all the possible risks involved, and therefore not explicitly provide for them in their agreement. Second, they may provide for them in language which is ambiguous, or which is subject to different interpretations or indeed legal constraints, in different geographical regions. In situations like this, INCOTERMS could minimize the problems.

So then, what are INCOTERMS?

INCOTERMS are a **set of standard contractual terms** which permit the parties to refer to a **set of rules** which can be integrated into their contract, to provide the certainty of internationally uniform rules in establishing the roles of each of them.² In the marketplace, where time is usually money, buyers and sellers have developed over the years a kind of short-form, which, in theory at least, is known and understood by all the actors in a given marketplace, and which can be incorporated into contractual relations.

The key word here is the word "can". INCOTERMS do not usually automatically apply to any international contract; the parties invoke them. What is more, in choosing to use INCOTERMS, the parties **may agree to vary** them to suit their own circumstances and needs. When parties decide to use INCOTERMS, they are in a way using a model contract, recognized throughout the world of international trade and reduced to extremely short form, to set out their respective obligations. Later on we will see examples of this short form and how it operates.

² D. LeMasson, "Les Incoterms" in La Convention de Vienne sur la Vente Internationale et les Incoterms: Actes du Colloque des 1er et 2 décembre 1989, p. 38-39

INCOTERMS also have another role in the world of international commerce, as a **unifying factor**. Parties who are used to repeating similar transactions will become accustomed to using the same familiar conditions. The use of one particular INCOTERM may thus become the standard in one particular market. Standard form contracts may include a reference to INCOTERMS. National legislation or international conventions may call for their use. As universally recognized and accepted customs, INCOTERMS have acquired a certain status in their own right, and the notion of INCOTERMS as part of **Lex Mercatoria**, or the law of the marketplace, has to some degree become entrenched. It is thus possible (although by no means certain) that an INCOTERM will even be implied in the relationship between parties, even in a case where it has not explicitly been invoked, because the judge or arbitrator recognizes that it is the usual and accepted practice in a given marketplace.³ However, rather than rely on an eventual national court or arbitral tribunal to incorporate INCOTERMS, parties who want to use them are well advised to stipulate "INCOTERMS 1990" explicitly in their agreement. This is particularly true if one party is from an American state where the Uniform Commercial Code contains delivery terms which are by no means identical to INCOTERMS. More about that later.

Common lawyers studying INCOTERMS for the first time will be struck by one important contrast with the UCC; one thing that INCOTERMS never do, is determine when property passes in the goods from the seller to the buyer. The parties should cover this in negotiating their contract. Nor do INCOTERMS attempt to deal with third party rights, or the effects of breach of contract. Because of the very different and conflicting views on these topics among various national legal systems, the drafters of INCOTERMS decided to concentrate on what could be harmonized - that is, transfer of risk, responsibilities at the various stages of delivery, and the sharing of costs.

³ Ibid., p. 39-40

To respond to the second part of our inquiry, "Why INCOTERMS 1990?", will take us back to 1928, when the International Chamber of Commerce first published them. The ICC's research at that time showed that delivery terms as they existed were interpreted differently in different countries, so that the result of litigation could very well depend on which national court was applying the term.⁴ In 1936 when the "uniform rules of interpretation" came out, they were intended to be the international standard, to be used with then modern means of transportation and communications.

In those days, that meant ships, letters or telegraphs. International transport was by sea. Air transport was practically non-existent. Multi-modal carriage and containerization were still in the future. Electronic data interchange was science fiction. Over the decades, the INCOTERMS standard has been several times adapted to respond to the evolution in the practices of international commerce. A few INCOTERMS have been added; others have disappeared, as technology advanced and the needs of the market dictated.

In its "Guide to INCOTERMS 1990", the International Chamber of Commerce cites four developments which have necessitated changes to INCOTERMS. First, there is an increasing trend towards **delivered terms**, that is, where delivery to the buyer's place of business, or at least to her country, is set out as part of the responsibility under the contract. Second, **air transport** became increasingly common. These changes led to the addition of new INCOTERMS in the revisions of 1967 and 1976.⁵ A third development has been the so-called "**container revolution**", which has profoundly altered the extent of control and the opportunity for inspection of delivered goods. New INCOTERMS were added in the 1980 revision to deal with these

⁴ INCOTERMS, p. 8
See also F. Eisemann and Y. Derains, "La Pratique des Incoterms" (3d ed.) p. 5

⁵ Ibid., p. 8

new practices.⁶ Lastly, the ICC recognized the growing trend to replacing the traditional Bill of Lading by **electronic messages**. EDI made it desirable to update INCOTERMS to include the reference to "equivalent electronic messages" which often today replace the old Bill of Lading.⁷

A word about EDI: This, for the uninitiated, is "computer-to-computer" exchange of data, based on the use of agreed standards. It has been used for many years in the airline industry and is growing quickly in the U.S., Europe and the Orient. By having their computers talk to each other, trading partners can request a quotation, order material, acknowledge the order, notify that goods have been dispatched, advise that goods have arrived, cleared customs and invoice. Eventually, payment of the invoice can be included, as banking services are integrated.

EDI involves standardizing the content and form of messages. Various industries get together to standardize messages and to create their own structures. Just as fax messages revolutionized how we practice law ("I'll get that draft to you next week Mr. Brown" has become "I'll have it for you in 20 minutes Mr. Brown,"), so EDI will revolutionize the sale and delivery of goods. Just as we must be constantly up to date on the law to provide instantaneous replies to clients, the seller must be in total control of product (and so have complete confidence in his suppliers) so as to be able to respond immediately with the stock required by the buyer.

In 1990 it was predicted that by the year 2000 everyone would be using EDI. Actual progress has in fact been slower, for several reasons. Different standards in Europe (Edifact) and the U.S. (X12) are incompatible. The Pacific Rim countries are currently using both. EDI standards are usually industry-based, often on a national scale, which tends to separate the

⁶ Ibid., p. 9

⁷ Ibid., p. 9

markets. And of course, many people continue to cling to the reassuring tangibility of a paper record. However, most traders agree that savings in personnel costs and time make EDI the way of the future. In recognition of this, the ICC included the possibility of EDI as a replacement for paper in the 1990 version of INCOTERMS.

One other welcome refinement added in 1990 was the new "mirror" presentation of the respective responsibilities of the parties under the various INCOTERMS. The ten possible obligations of each party under each INCOTERM are set out in a list. This new, logical presentation demonstrates clearly that when one party assumes a responsibility, the other party is simultaneously relieved of it.

The Table shows the ten obligations corresponding to each of the parties, which are used to allocate cost and risk between them:

Seller must:

A1
Provide conforming goods
A2
Licences, authorizations
and formalities
A3
Carriage and insurance
A4
Delivery
A5
Transfer of Risk
A6
Division of Costs
A7
Notice to Buyer
A8
Proof of delivery
A9
Checking, packaging, marking
A10
Other obligations

Buyer must:

B1
Pay price
B2
Licenses, authorizations
and formalities
B3
Carriage
B4
Take delivery
B5
Transfer of Risk
B6
Division of Costs
B7
Notice to Seller
B8
Proof of Delivery
B9
Inspection of Goods
B10
Other obligations

Not every one of the ten will be applicable to each INCOTERM, but the ICC decided to maintain the complete list and simply mention "**No Obligation**", if that was the case. The best way to illustrate INCOTERMS is to look at a few, to see how they operate. ICC Publishing has kindly allowed me to use a set of slides which are extracted from the 1990 Guide, and which show graphically the sharing of risk and cost as the goods move from seller to buyer.

The thirteen INCOTERMS established by the 1990 revision are divided into **four groups** or classes, **E, F, C** and **D**. These letters represent the words **Ex, Free, Carriage or Cost** and **Delivered**.

The **E-group** is simple. It contains only one term. Ex Works (abbreviation **EXW**) which imposes the absolute minimum obligation on the seller. The slide illustrates: conforming goods and an invoice or its equivalent electronic message, along with any other evidence of conformity stipulated in the contract, must be made available to the buyer at some designated source, usually the seller's factory, at the agreed date.

The buyer chooses and brings the means of transportation, is responsible for loading the goods onto it, and takes them away. What the buyer does with the merchandise taken from the factory door, and when and how, are entirely up to her. Since the seller's obligation is minimal, the buyer's responsibility is maximized. Is an export license necessary? What kind of transportation will be chosen? What will it cost if the goods are lost or destroyed? What will insurance cost? Is the merchandise subject to import quotas or tariffs? Under **EXW** the buyer alone will decide and bear the responsibility for the answers to all of these questions. Needless to say, a buyer who is not in a position to carry out all these steps should not agree to **EXW** term in the contract.

In many cases, the buyer will need assistance from the seller in order to obtain a certificate of origin for example, or information required by insurers. Despite any such assistance, which should be set out in the contract, the cost is for the buyer.

Now for a couple of practical questions. Suppose the parties have agreed that seller will place the goods at the disposal of buyer at seller's factory for pick-up between 15 October and 20 October. One or more of the following events takes place:

The 20th of October comes and goes, and the buyer does not take delivery as agreed. Under B3, you will see that she has no obligation to arrange for a contract of carriage to take the goods away from the buyer's premises. However, it is in her own interest to do so, as she still must pay for the goods, and she may find herself liable for storage costs from 21 October on.

Now, assume that on 17 October, with the merchandise still sitting in the corner, seller's factory is flooded and the goods totally ruined.

According to the Guide, "all Incoterms are based on the same principle that the risk of loss of or damage to the goods is transferred from the seller to the buyer when the seller has fulfilled his delivery obligation according to A4".⁸ Since the seller has fulfilled his obligation by placing the goods at the disposal of the buyer, it follows that the buyer bears the risk. This general rule is subject to comment however. First, it assumes the flooding was not attributable to any fault of the Seller. Second, it assumes that the goods were properly packaged by the seller, in accordance with the contract.⁹ Third, according to the Guide, risk cannot pass until fungible goods have been duly appropriated to the contract, that is

⁸ Ibid., EXW A5, p. 44

⁹ Ibid., p. 45

clearly set aside or otherwise identified as the contract goods.¹⁰

The INCOTERM approach is quite different from that found in the **Uniform Commercial Code**, under which the seller would bear the risk during the period during which the goods are available to the buyer but have not been picked up. Under the UCC, subject to contrary agreement of the parties, the risk of loss passes to the buyer on her receipt of the goods.¹¹ This also seems to be the case under Article 69 of the Vienna Convention on the Sale of Goods:¹² Risk passes to the buyer when she takes over the goods, or from the time when she breached the contract by failing to take delivery. In an article in the Inter-American Law Review, Professor Daniel Murray criticizes the INCOTERMS approach as a "dryly logical allocation of the risk of loss (which) seems to ignore the commercial reality of insurance (and) the fact that the person in possession has the greatest opportunity to guard the goods against damage or loss."¹³ The simple market response to the criticism of course, is that the prudent purchaser will be aware of the risk, will consider appropriate insurance coverage, and will pick up the goods as soon as practicable.

The F-group imposes an increased burden on the seller, and the buyer has correspondingly less responsibility. The seller must hand over the merchandise to a carrier at a specified point, Free of expense and risk. The buyer has to arrange and pay for carriage from the point named in the contract. There are three F-terms, Free Carrier (FCA), Free Alongside Ship (FAS) and Free On Board (FOB). The slide shows the parties' obligations

¹⁰ Ibid., EXW B5 comments, p. 48

¹¹ Uniform Commercial Code (hereinafter UCC) s. 2.509(3)

¹² United Nations Convention on the International Sale of Goods, 1980 (hereinafter CISG)

¹³ D.E. Murray, "Risk of Loss of Goods in Transit: A comparison of the 1990 Incoterms with Terms from Other Voices" in Inter-American Law Review, 23:1, p. 93

graphically in the case of FAS. In the case of FAS, the seller has to provide an "alongside" receipt, along with his invoice and any other documents called for in the contract. The seller delivers the goods by placing them alongside the vessel on the quay as designated by the buyer.¹⁴ Like the UCC and the CISG, INCOTERMS provide for the transfer of the risk of loss with completion of the seller's obligation of delivery.¹⁵ It is still the buyer's obligation to get export permits, so if she wants the seller's assistance she should so specify in the contract. The buyer arranges and pays for loading and carriage, and must arrange for import formalities and customs duties.

The differences between FAS and FOB are minor: delivery by the seller to the quay beside the ship, or over its rail; implied in FOB is the seller's obligation to clear the goods for export.

An amusing aspect of the FOB term, Free On Board, is the perhaps apocryphal story about the crane in the gust of wind. Under FOB, the seller fulfils his obligation to deliver when the goods have passed over the ship's rail, and the buyer has to bear all costs and risks of loss or damage to the goods from that point on.¹⁶ The ship's rail is thus the imaginary boundary dividing costs and risks. So it is, that during the course of loading, if a sudden gust of wind tears two crates from the net, just as the crane is lifting them over the ship's rail, the crate that splashes into the water is the seller's loss, but it is the buyer who loses the crate that crashes onto the ship's deck.

There is also an interesting question of who pays the stevedores. Since at least two different physical operations are involved in loading and storing, traders will usually either stipulate in their contract, or rely on the custom of the port.

¹⁴ INCOTERMS, FAS A4, p. 62

¹⁵ Ibid., FAS A5, p. 62; CISG art. 69(1); UCC s.2.319(2)(a)

¹⁶ INCOTERMS, FOB A4, p. 70

If a European who is used to dealing with INCOTERMS negotiates a contract with an American partner, they would both do well to pay strict attention to these little initials. The INCOTERM FOB is always followed by the name of a boat. As we mentioned, it is when the goods pass over the siderail of that particular boat that risk passes. This INCOTERM is used only for sea transport; hence the reference to the name of a vessel.

The American delivery term FOB is quite different however. According to the Uniform Commercial Code, one might see the delivery term "FOB New Orleans", which is not the name of a ship but the name of a city. It may designate either the place of shipment or the place of destination, and the seller's obligations vary accordingly. The reference FOB plus the name of a ship chosen by the buyer is also possible, and in this case, as with the INCOTERM, the seller must at his own expense and risk load the goods on board that vessel.¹⁷ The ship's rail does not have the same importance in separating the responsibilities of seller and buyer. Incidentally, under the UCC FOB term, the buyer pays against tender of documents showing that the seller has indeed put the goods where they agreed. The buyer may not demand delivery of the goods in substitution for these documents.¹⁸

One other note about the UCC version of FOB, and it applies equally to other UCC terms such as FAS, CIF and others. The Uniform Commercial Code is primarily intended to govern domestic sales contracts and thus does not divide responsibilities such as arranging for export and import clearance, duties, taxes etc. If the parties want to apply INCOTERMS, they should specifically mention "INCOTERMS 1990" in the contract. As to the relationship between the UCC and INCOTERMS, and the effect of the Convention on the

¹⁷ UCC s.2.319(1)

¹⁸ UCC s.2.319(4)

International Sale of Goods on that relationship, these questions are better left for later in the panel.

In contrast to the E and F terms, the four C terms, CFR, CIF, CPT and CIP, all oblige the seller to pay the cost of Carriage of the goods. The interesting aspect of the graphic presentation is that for the first time we see that the seller's costs extend geographically beyond his risk.

Under Cost and Freight (CFR, but known as C&F until 1990) the seller pays all costs and freight necessary to bring the goods to the named port of destination. The risk of loss has been transferred to the buyer when the goods passed the ship's rail.¹⁹ Both CFR and CIF are suited for carriage by ship, while CPT and CIP are suited for multi-modal transport. The only difference between Cost and Freight and Cost Insurance Freight (CIF) is the seller's obligation to obtain and pay for insurance.²⁰

CIF is probably the most frequently used INCOTERM.²¹ Under Cost Insurance Freight, the seller must procure and pay for carriage of the merchandise to a named port of destination, obtain and pay for cargo insurance for the buyer's benefit, providing the buyer with the policy so that she can claim directly against the insurer if the need arises.²² Professor Murray calls it "a package deal". The buyer knows the total cost of the delivered goods with the exception of any customs duties, incidental warehouse or dockage charges.²³

¹⁹ INCOTERMS, CFR, p. 77

²⁰ Ibid., CIF, p. 86-87

²¹ C. M. Schmitthoff, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, p. 15-16 (9th ed., 1990)

²² INCOTERMS, CIF A3, p. 88

²³ Murray, p. 110

UCC treatment of CIF is not explicit about transfer of risk from the time goods are delivered for transport to a carrier, the time goods are loaded on board, and the time the goods are discharged from the ship until actual delivery to the buyer at the port of destination, thus, leaving "windows of opportunity" for loss by theft, fire, or flooding.²⁴ In contrast, INCOTERMS stipulate that the insurance must cover from the point when the goods pass the ship's rail until they arrive at the port of destination. While the UCC does not specify the minimum amount of insurance²⁵, CIF imposes minimum coverage, which must be contracted with an insurer of good repute in accordance with the minimum cover of the Institute of London Underwriters Cargo Clauses. The seller must insure 110% of the price provided in the contract, in the currency of the contract.²⁶ The astute buyer will realize that this minimum is almost certain to be **insufficient**, and will negotiate supplementary amounts and risk coverage in the contract. These are likely to be at her own expense however.

The last five INCOTERMS are the **D group**, for Delivered. These five are also known as the "arrival" terms. Graphically, we see that once again, the seller's costs and risk coincide under Delivered At Frontier (DAF), Delivered Ex Ship (DES), Delivered Ex Quai (DEQ), Delivered Duty Unpaid (DDU) and Delivered Duty Paid (DDP). If the parties are only stipulating that the seller must arrange and pay for transport, they will use Carriage Paid To (CPT). On the other hand, if the seller is also to bear the risk during the transport, they will use one of the D terms.

It is interesting to note that if the goods are placed at the buyer's disposal earlier than the date agreed upon, the buyer need not take delivery before the agreed time, although she may wish to do so. If the goods are delivered later than agreed,

²⁴ Ibid., p. 111

²⁵ UCC s.2.230(2)(c)

²⁶ INCOTERMS, CIF A3 (b), p. 88

the buyer will have the usual remedies for breach of contract - damages or rescission.²⁷

There are effectively **two sub-groups** within the D terms. DES, DAF and DDU do not require the seller to clear customs and pay any duties, while under DEQ and DDP the seller does have these responsibilities. The Guide also points out that under DAF and DDU, in the event the buyer is confronted with an import prohibition, she will not be relieved of the obligation to pay for the goods.²⁸ The Guide advises: "If any difficulties seem likely to arise in relation to the importation of the goods into the buyer's country, the seller should try to avoid DEQ and DDP." Parties are usually better suited to assess the possible risks in their own country, and better placed to take advantage of any credit arising from the payment of the duties.²⁹

The last INCOTERM, DDP, Delivered Duty Paid, is a newcomer, introduced in the 1990 revision. Responding to the recent trend towards "**arrival**" transactions, where the sale takes place at the destination rather than at origin,³⁰ DDP obliges the seller to put the goods at the disposal of the buyer at a named place in the country of importation, bearing the risks, costs, duties and taxes which may be necessary.³¹ It thus represents the maximum obligation of the seller. Consequently, the seller should avoid it unless he is very familiar with the importing country and its customs. Otherwise he may be in for some nasty and costly surprises, and the risk remains on his side of the scale for the longest possible time. Under DDP, in accordance with the mirror principle, the buyer's duty is

²⁷ Ibid., DAF B4, p. 107

²⁸ Ibid., DAF B2, p. 107

²⁹ Ibid., p. 24

³⁰ D. Chevalier, "Incoterms: Déjà l'an 2000" in MOCI 922, 28 May 1990, p. 26

³¹ INCOTERMS, DDP, p. 134

minimal: to take delivery at the appointed place and time, and of course to pay for the goods.

Before leaving the topic, a word about INCOTERMS and the Vienna Convention on the International Sale of Goods. Traders ask, "Can I still use INCOTERMS if the CISG is applicable to my contract? We have already mentioned that there are variations between the treatment by the CISG and INCOTERMS, particularly with respect to transfer of risk. Are they then incompatible?

We should first remember the nature of the two beasts. On one hand, the CISG, adopted under the auspices of the United Nations, creates a uniform law on international sales. Its origin is public; it is integrated into the national legal systems of ratifying countries. On the other hand, INCOTERMS in their present form were adopted by the International Chamber of Commerce, a private organization representing the world of businesspeople. INCOTERMS are a private response to certain specific problems - risk, delivery and the sharing of costs.

Yet both have a common goal - to unify law and practice on the international scene. Both set out specific rules of content in order to this. Both, incidentally originated in the same decade, the twenties, when international business came to the forefront because of new transport and communications techniques. They ^{do} offer somewhat different solutions to the same questions, but does that put them into conflict? Not necessarily, as both are subject to the will of the Parties. Article 12 of the CISG allows the Parties to an international sales contract to exclude the CISG entirely or parts of it, or to change its effects. Even if the CISG does not expressly set out a hierarchy as to which would govern in case of conflict, and the ICC cannot as a private body do so, the CISG does implicitly allow Parties to choose an arrangement - including INCOTERMS - which would derogate from a Conventional solution.

In addition, article 9 of the CISG states that the Parties are bound by a usage to which they have agreed, by practices they

have established between themselves, and unless they have otherwise agreed,

"to a usage of which they knew or ought to have known, and which in international trade is widely known and regularly observed by parties in their trade."

INCOTERMS 1990 fit this description perfectly, as a consolidation of well-established trade usages. So the Convention can be displaced by INCOTERMS, either by express choice, or possibly under article 9 even by silence, if in the given market, INCOTERMS are in general and notorious use.

One final comment. As Anglo-Saxon lawyer John Honnold observed in typical common-lawyer terms: "I don't believe you would choose to rely on a statute for detailed arrangements concerning transport and risk." He suggests that for rapid closing of a contract, regardless of whether the CISG or some national system of law is applicable, INCOTERMS remain a very useful tool.

The foregoing has been a rather cursory look at how some of the thirteen INCOTERMS operate. I have not mentioned the complications of sales of goods in transit, and have virtually ignored the responsibilities of packaging and notification and their effects on the outcome of the contract. No attempt has been made to elaborate the exceptions, the influence of local customs and the possibilities for modifying INCOTERMS in accordance with the express wishes of the parties as set out in their contract. I have only touched on the differences between INCOTERMS and the American UCC and the Foreign Trade Definitions of 1941, to offer a warning: Europeans and their American partners must be especially vigilant to ensure that they are indeed referring to the same FOB or FAS. We have only glanced at the relationship between INCOTERMS and the Convention on the International Sale of Goods. This paper has not been intended to exhaust the topic but to introduce it and

to give the practitioner some clues about choosing and using INCOTERMS.

Why INCOTERMS 1990? They are not a miraculous answer to every question which may occur between the parties to an international sales contract. But they are a modern tool, recently adapted to reflect modern technology and trends and to respond to the needs of the professionals who craft international sales contracts. Like any finely honed tool, they can be of invaluable assistance to the skilled professional, or can cause disaster in the hands of the unskilled or careless. Like any skilled artisan, the astute user of INCOTERMS will first size up all the circumstances and then, with full knowledge of the characteristics of each tool at hand, will choose the one best suited to accomplish the task.

* * *