

# Journal of Law & Commerce

Vol. 32, No. 1 (2013) • ISSN: 2164-7984 (online)  
DOI 10.5195/jlc.2013.39 • <http://jlc.law.pitt.edu>

## ARTICLES

THE INTERPLAY BETWEEN INCOTERMS<sup>®</sup> AND THE CISG

*Juana Coetzee*



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.



This site is published by the University Library System of the University of Pittsburgh as part of its D-Scribe Digital Publishing Program, and is cosponsored by the University of Pittsburgh Press.

# ARTICLES

## THE INTERPLAY BETWEEN INCOTERMS<sup>®</sup> AND THE CISG

*Juana Coetzee\**

**Keywords:** INCOTERMS<sup>®</sup>—CISG—interaction—supplementation—collaboration  
**Category:** Unification of Law  
**Abstract:** INCOTERMS<sup>®</sup> do not replace the CISG’s provisions on delivery and the passing of risk *in toto*, but merely supersede them in so far as they are mutually exclusive. For the rest, they function *in tandem*. Aspects which are not governed by the INCOTERMS<sup>®</sup> rules, or inadequately regulated, can be supplemented by the Convention, and *vice versa*. Collaboration between the two instruments strengthens the unified legal framework for international sales transactions with the view to facilitating international trade.

### I. INTRODUCTION

The 1980 United Nations Convention on Contracts for the International Sale of Goods (“the CISG” or “the Convention”) unifies the substantive law governing international contracts for the sale of goods with a view to legal certainty and predictability. One of its main advantages is

---

\* B.A., LL.B., LL.M., LL.D. (Stell.), Associate Professor in Mercantile Law, Faculty of Law, University of Stellenbosch, South Africa. This article is based on research undertaken for the author’s doctoral dissertation *Incoterms as a form of standardization in international sales law: an analysis of the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk*, Stellenbosch (2010).

that it reduces transaction costs by limiting the need to resort to conflict of law rules.

The CISG has been widely accepted by countries from different legal backgrounds and economies. As of September 26, 2013, 80 countries are State Parties to the Convention.<sup>1</sup> The wide acceptance of the Convention is attributed to its flexibility. Instead of demanding the rigid application of its rules, the Convention subscribes to the principle of party autonomy and the general observance of good faith in international trade. Gaps that exist in the Convention are to be filled with the general principles on which the CISG is based. The Convention places a high premium on the role of trade usages and established commercial practice in international trade. Moreover, the use of neutral terminology leaves room for autonomous and independent interpretation in line with evolving international practices and ensures that the Convention keeps pace with developments in international trade.<sup>2</sup>

This article will illustrate that a trade usage not only functions as an interpretation tool to fill gaps, or that it supersedes and replaces a default rule of the Convention where applicable, but that it can also supplement the provisions of the CISG in a mutual co-existence. To demonstrate, the article will analyze the interplay between standardized trade usages and the provisions of the CISG.

Scholars are of the view that the majority of international sales contracts are concluded on the basis of a trade term.<sup>3</sup> Trade terms (also

---

<sup>1</sup> Albert H. Kritzer, *CISG: Table of Contracting States*, CISG DATABASE, <http://www.cisg.law.pace.edu/cisg/countries/cntries.html> (last visited Nov. 6, 2013).

<sup>2</sup> U.N. Comm'n on Int'l Trade Law [UNCITRAL], *Introduction to DIGEST OF CASE LAW ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS*, at ix (2012). The Convention has, however, been criticized for its open-endedness and the vagueness of its language. See generally Arthur Rosett, *Critical Reflections on the United Nations Convention on Contracts for the International Sale of Goods*, 45 OHIO ST. L.J. 265 (1984); Christopher Sheaffer, *The Failure of the United Nations Convention on Contracts for the International Sale of Goods and a Proposal for a New Global Code in International Sales Law*, 15 CARDOZO J. INT'L & COMP. L. 461 (2007).

<sup>3</sup> FRITZ ENDERLEIN & DIETRICH MASKOW, *INTERNATIONAL SALES LAW: UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 257 (1992); JOSEPH M. LOOKOFKY, *UNDERSTANDING THE CISG: A COMPACT GUIDE TO THE 1980 UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS* 100–01 (3d ed. 2008); Günter Hager & Martin Schmidt-Kessel, *Article 67*, in SCHLECHTRIEM & SCHWENZER, *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG)* 927, 928 (Ingeborg Schwenzer ed., 3d ed. 2010); Pilar Perales Viscassillas, *Comments on the Draft Digest Relating to Articles 14–24 and*

known as delivery or price terms) are three letter abbreviations which reflect mercantile custom regarding the parties' respective obligations in connection with the delivery of goods, the passing of risk and other incidental matters. Merchants' preference for using trade terms is explained by the fact that mercantile customs consist of usages and practices which have evolved over centuries and, hence, have proven themselves to be economically efficient by having stood the test of time.<sup>4</sup> Often trade usages address the needs of merchants more effectively and efficiently than the default law of the contract.

The downside, however, is that commercial customs and practices are understood differently depending on the place and context in which they are applied.<sup>5</sup> Moreover, by nature, trade terms are dynamic and susceptible to developments in commercial practice. Hence, trade terms' meanings are not immutable. That was one of the reasons why the drafters of the CISG refrained from defining trade terms in the Convention.<sup>6</sup> Another reason was the availability of standardized trade term definitions formulated by the International Chamber of Commerce (ICC) in the form of INCOTERMS®.<sup>7</sup> INCOTERMS® are constantly updated to keep up with and reflect developments in international commercial practice;<sup>8</sup> something which would not have been possible if they had been defined in the Convention.

---

66–70, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE UN SALES CONVENTION* 259, 285 (Franco Ferrari et al. eds., 2004); Douglas E. Goodfriend, *After the Damage is Done: Risk of Loss Under the United Nations Convention on Contracts for the International Sale of Goods*, 22 COLUM. J. TRANSNAT'L L. 575, 578 (1984); Johan Erauw, *CISG Articles 66–70: The Risk of Loss and Passing It*, 25 J.L. & COM. 203, 212 (2005) [hereinafter Erauw, *CISG*]; Johan Erauw, *Observations on Passing of Risk*, in *THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE UN SALES CONVENTION* 292, 301 (Franco Ferrari et al. eds., 2004) [hereinafter Erauw, *Observations*].

<sup>4</sup> J.H. Dalhuisen, *Custom and Its Revival in Transnational Private Law*, 18 DUKE J. COMP. & INT'L L. 339, 370 (2008).

<sup>5</sup> JAMES M. KLOTZ & JOHN A. BARRETT, *INTERNATIONAL SALES AGREEMENTS* 72–73 (Int'l ed. 1998); CLIVE M. SCHMITTHOFF, *INTERNATIONAL TRADE USAGES* § 37 (Int'l Chamber of Commerce Publ'n 1987); William V. Roth, Jr. & William V. Roth, Essay, *INCOTERMS: Facilitating Trade in the Asian Pacific*, 18 U. PA. J. INT'L ECON. L. 731, 732–33 (1997).

<sup>6</sup> Harry J. Berman & Michael Ladd, *Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods*, 21 CORNELL INT'L L.J. 423, 431 (1988).

<sup>7</sup> An acronym for "international commercial terms."

<sup>8</sup> The most recent revision, INCOTERMS® 2010, came into effect on 1 January 2011. *The New INCOTERMS® 2010 Rules*, INT'L CHAMBER OF COMMERCE, <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/> (last visited Nov. 6, 2013).

Although INCOTERMS<sup>®</sup> have ramifications for most aspects connected to the commercial sales transaction,<sup>9</sup> the rules are exclusively formulated for use in the contract of sale. INCOTERMS<sup>®</sup>, however, have a limited scope of regulation and cannot operate as the governing substantive law of the contract. They provide clarification on certain duties of a seller and buyer pertaining to delivery of the goods, transfer of risk, the allocation of costs, procurement of the necessary transportation and insurance documents, as well as other obligations incidental to the export and import of goods, such as consular and customs formalities or packaging and marking of the goods. INCOTERMS<sup>®</sup> only regulate defined aspects of the contract of sale and not those aspects common to all contracts, such as mistake and other matters affecting their validity, transfer of property, impossibility of performance, misrepresentation, duties of the seller regarding the qualities of the goods, the buyer's duty to pay, impediments against performance caused by unforeseen and unavoidable events, breach and remedies for breach of contract. These aspects will still be regulated by means of contractual stipulations or the governing law of the contract.<sup>10</sup> Where the CISG is the applicable law, the Convention will regulate such aspects.

INCOTERMS<sup>®</sup> are incorporated into a contract through an agreement<sup>11</sup> or trade usages.<sup>12</sup> Where the contract is governed by the CISG, INCOTERMS<sup>®</sup> will supersede the Convention's provisions on delivery and the passing of risk. The question is whether INCOTERMS<sup>®</sup> replace the CISG's default rules on delivery and risk *in toto* or whether they only derogate from the rules. Is it possible to still resort to the CISG's provisions when an INCOTERMS<sup>®</sup> rule is uncertain or inadequate? In other words, is there any case for parallel application and co-existence between the

---

<sup>9</sup> Such as carriage, insurance, payment and customs.

<sup>10</sup> Int'l Chamber of Commerce [ICC], *INCOTERMS*<sup>®</sup> 2010, at 6, ICC Pub. No. 715E (2010); Frederic Eisemann, *Incoterms and the British Export Trade*, 1965 J. BUS. L. 114, 117 (U.K.); Roberto Bergami, *Incoterms 2000 as a Risk Management Tool for Importers*, 10 VINDOBONA J. INT'L COM. L. & ARB. 273, 274–75 (2006) (Austria). See also John O. Honnold, *Uniform Law and Uniform Trade Terms—Two Approaches to a Common Goal*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 161, 171 (Norbert Horn & Clive Schmitthoff eds., 1982); *Texful Textile Ltd. v. Cotton Express Textile, Inc.*, 891 F. Supp. 1381, 1388 (C.D. Cal. 1985).

<sup>11</sup> United Nations Convention on Contracts for the International Sale of Goods, art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG].

<sup>12</sup> *Id.* at art. 9.

INCOTERMS<sup>®</sup> and the CISG rules? To answer these questions the interplay between INCOTERMS<sup>®</sup> and the CISG needs to be analyzed in more detail.

The analysis will show that it does not always have to be a case of total exclusion, but that the CISG rules can function in conjunction with INCOTERMS<sup>®</sup> to the extent that they mutually supplement and support each other. Where the regulation provided by INCOTERMS<sup>®</sup> is inadequate, the Convention's rules can supplement the INCOTERMS<sup>®</sup> rule and *vice versa*. That way the shortcomings of a particular rule can be addressed by the counterpart rule of the other instrument.

Section II analyzes scholarly opinion on the question whether INCOTERMS<sup>®</sup> exclude the CISG's provisions on delivery and risk altogether or whether they merely derogate from or modify them. Section III will illustrate the potential for co-existence and interaction between the two instruments with reference to practical examples. Section IV concludes the discussion.

## II. TOTAL EXCLUSION OR PARTIAL DEROGATION?

The provisions of the CISG are drafted as default rules. This means that the Convention places a high premium on the principle of party autonomy.<sup>13</sup> Article 6 of the CISG grants parties the freedom to “derogate from or vary the effect of any of its provisions” or even to exclude the application of the CISG altogether by means of contractual agreement. It is therefore permissible to depart from the provisions of the CISG to varying degrees. Parties can either deviate from the effect of a particular rule or they can totally exclude a provision and replace it by their own regulation.<sup>14</sup> Hence, it is a matter of interpretation to establish whether the CISG's

---

<sup>13</sup> All the provisions of the Convention are non-mandatory and can be replaced by party agreement. *Accord id.* at arts. 6, 12.

<sup>14</sup> Ingeborg Schwenzer & Pascal Hachem, *Article 6*, in SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 3, at 102, 103; Michael Joachim Bonell, *Article 6*, in COMMENTARY ON THE INTERNATIONAL SALES LAW § 2.1 (Cesare Massimo Bianca & Michael Joachim Bonell eds., 1987); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION § 74 (Harry M. Flechtner ed., 4th ed. 2009).

provisions apply in a particular case. Guidelines for determining the intention of the parties are provided in article 8 of the Convention.

Once parties have agreed on an INCOTERMS<sup>®</sup> rule, the entire definition of the rule is incorporated into the contract on the basis of article 6 CISG.<sup>15</sup> Alternatively, the rule may apply as a contractual trade usage on which the parties agree by virtue of article 9(1) of the CISG.<sup>16</sup> In the absence of express incorporation, INCOTERMS<sup>®</sup> may apply on the basis of article 9(2) of the CISG as widely-observed international trade usages of which the parties knew or ought to have known.<sup>17</sup>

Where there is express agreement on the incorporation of INCOTERMS<sup>®</sup>, they will prevail over the Convention's default law on delivery<sup>18</sup> and the passing of risk.<sup>19</sup> However, courts and arbitral tribunals sometimes differ on whether INCOTERMS<sup>®</sup> replace the CISG's rules on delivery. Some judicial decisions have held that contracts concluded on F- or C-terms are still regulated by article 31(a) of the CISG in so far as the delivery obligations are concerned,<sup>20</sup> that the incorporation of a trade term

---

<sup>15</sup> UNCITRAL, *supra* note 2, at 315; LOOKOFSKY, *supra* note 3, at 100–01.

<sup>16</sup> Martin Schmidt-Kessel, *Article 9*, in SCHLECHTRIEM & SCHWENZER, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), *supra* note 3, at 182, 185; HONNOLD, *supra* note 14, § 114.

<sup>17</sup> See Perales Viscassillas, *supra* note 3, at 290; St. Paul Guardian Ins. Co. v. Neuromed Med. Sys. & Support, GmbH, No. 00 Civ. 9344 (SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002), *aff'd*, 53 Fed. Appx. 173 (2d. Cir.); B.P. Oil Int'l Ltd. v. Empresa Estatal Petroleos De Ecuador, 332 F.3d 333 (5th Cir. 2003). *But see* Jan Ramberg, *CISG and INCOTERMS 2000 in Connection with International Commercial Transactions*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: FESTSCHRIFT FOR ALBERT H. KRITZER ON THE OCCASION OF HIS EIGHTIETH BIRTHDAY 394, 403 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Schmidt-Kessel, *supra* note 16, at 187, 196; HONNOLD, *supra* note 14, § 118.

<sup>18</sup> Burghard Piltz, *INCOTERMS and the UN Convention on the International Sale of Goods*, CISG ONLINE 20 YEARS CONFERENCE, [http://www.20jahre.cisg-library.org/piltz\\_intro.html](http://www.20jahre.cisg-library.org/piltz_intro.html) (last visited Nov. 6, 2013); UNCITRAL, *supra* note 2, at 130. *See also generally* Henry Deeb Gabriel, *General Provisions, Obligations of the Seller, and Remedies for Breach of Contract by the Seller*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE UN SALES CONVENTION, *supra* note 3, at 336, 346–48; Alejandro M. Garro, *Cases, Analyses and Unresolved Issues in Articles 25–34, 45–52*, in THE DRAFT UNCITRAL DIGEST AND BEYOND: CASES, ANALYSIS AND UNRESOLVED ISSUES IN THE UN SALES CONVENTION, *supra* note 3, at 362, 372.

<sup>19</sup> Schwenzler & Hachem, *supra* note 14, at 109; Berman & Ladd, *supra* note 6, at 423–24, 430; HONNOLD, *supra* note 14, § 363; Goodfriend, *supra* note 3, at 578; LOOKOFSKY, *supra* note 3, at 101; Jan Ramberg, *To What Extent Do INCOTERMS 2000 Vary Articles 67(2), 68 and 69?*, 25 J.L. & COM. 219 (2005); Ramberg, *supra* note 17, at 400. *See also* UNCITRAL, *supra* note 2, at 315.

<sup>20</sup> *See* UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 1999, at 2, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/24 [S.A.P. Cordoba, Oct. 31, 1997 (R.G.D., No. 648) (Spain)].

does not modify the place of performance as indicated in article 31 of the CISG;<sup>21</sup> or that it only regulates the allocation of costs and does not regulate the place of delivery,<sup>22</sup> whilst others have stated the direct opposite.<sup>23</sup> Often the matter will be decided by the circumstances of the particular case.<sup>24</sup> According to the ICC, the point where delivery takes place should not be separated from that where the risk transfers.<sup>25</sup> In the interest of legal certainty this viewpoint is to be supported.

Differences in opinion also exist on whether the incorporation of an INCOTERMS® rule constitutes a total displacement of the CISG rules on delivery and risk or merely a partial deviation or modification.

One commentator states that trade terms “partly derogate from the CISG” and that they “opt out of some aspects of the rules on the passing of risk”<sup>26</sup> and another states that “the use of trade terms does not entirely displace the CISG rules on the passing of risk.”<sup>27</sup> Furthermore, it is said that

---

<sup>21</sup> *E.g.*, UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 1999, at 3–4, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/23 (discussing Cour d’appel [CA] [regional court of appeal] Paris, Mar. 4, 1998, D. 1998 Somm. 279, obs. B. Audit (Fr.)); *id.* at 4–5 (discussing Cour d’appel [CA] [regional court of appeal] Paris, Mar. 18, 1998, D. 1998 Somm. 279, obs. B. Audit (Fr.)); UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 2000, at 6, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/28 (discussing Oberlandesgericht Köln [OLG Köln] [Civil Court of Appeal] Aug. 1, 1997, RECHTSPRECHUNG DER OBERLANDESGERICHE IN ZIVILSACHEN [OLGZ] 27 U 58/96 (Ger.)) [hereinafter UNCITRAL, CLOUT Case No. 311]; UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 2000, at 10–11, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/31 (discussing Oberlandesgericht Oldenburg [OLG Oldenburg] [higher regional court] Sept. 22, 1998, OBERLANDESGERICHTS-RECHTSPRECHUNGSREPORT OLDENBURG 26, 2000 (Ger.)).

<sup>22</sup> UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 1999, at 2, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/23 (discussing Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 12, 1996, 134 ENTSCHIEDUNGEN DES BUNDESGERICHTSHOFES IN ZIVILSACHEN [BGHZ] 201, 1997 (Ger.)).

<sup>23</sup> *E.g.*, UNCITRAL, CLOUT Case No. 311, *supra* note 21; UNCITRAL, Case Law on UNICTRAL Texts (CLOUT), 2000, at 3, U.N. Doc. A/CN.9/SER.C/ABSTRACTS/30 (discussing Oberlandesgericht Karlsruhe [OLG Karlsruhe] [Civil Court of Appeal] Nov. 20, 1992, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1316, 1993 (Ger.)). *See also* INT’L CHAMBER OF COMMERCE (ICC), Note on Delivery, available at <http://www.scribd.com/doc/88068794/Incoterms-Note-on-Delivery> (last visited Nov. 6, 2013); ICC, *supra* note 10, at 9.

<sup>24</sup> UNCITRAL, *supra* note 2, at 133.

<sup>25</sup> *See* ICC, Note on Delivery, *supra* note 23; ICC, *supra* note 10, at 10.

<sup>26</sup> Erauw, CISG, *supra* note 3, at 212; Erauw, Observations, *supra* note 3, at 301 (trade terms “put the application of article 67 in doubt,” which “makes the application of article 67 not straightforward at all”).

<sup>27</sup> Perales Viscasillas, *supra* note 3, at 287–89 (also stating that the CISG may operate as “an aid to the interpretation of the agreed term or to fill gaps in the INCOTERMS®, particularly where there is no express reference in the parties’ agreement to the application of the ICC text”). *See also* Michael Bridge, *A Law for International Sales*, 37 H.K.L.J. 17, 38 (2007) (contractual reference to a trade term

the “broader angle of vision” of the CISG rules on risk encourages a supplementary and complementary function for INCOTERMS<sup>®</sup>,<sup>28</sup> where “each performs a function that cannot be well served by the other.”<sup>29</sup> According to this view, incorporation of an INCOTERMS<sup>®</sup> rule is “merely a modification or supplementation of the relevant provisions of the Convention”<sup>30</sup> and, hence, does not amount to an exclusion *per se*. In fact, the CISG provisions complement and work *in tandem* with the INCOTERMS<sup>®</sup>.<sup>31</sup>

On the other hand, there are scholars who are of the view that by incorporating INCOTERMS<sup>®</sup> into a contract the Convention’s rules on delivery and risk are displaced *in toto*.<sup>32</sup> The reasoning behind this is that INCOTERMS<sup>®</sup> are so complete on the point of delivery and the passing of risk that there is no need to supplement them with provisions from the CISG.<sup>33</sup> Furthermore, it is said that the CISG’s risk rules are so significantly different from the universal understanding of trade terms and documentary sales, that the use of a trade term may be construed as an implied exclusion of articles 66 to 70 of the Convention, and possibly even the entire Convention.<sup>34</sup> According to this opinion, trade terms as applied in the context of documentary sales contradict rather than supplement the Convention. It is argued that article 66 does not apply to documentary sales or cases where the seller hands the goods to a carrier for transmission to the buyer, but only applies to sales where the buyer takes over the goods directly from the seller or where the seller hands the goods directly to the buyer. In the case of documentary sales, international mercantile custom will not discharge the buyer from payment of the purchase price against

---

does not present clear enough indication of any intention to exclude the CISG rules; such exclusion would make the “extensive treatment of risk in the CISG in five articles a rather pointless business if the rules in question are to be applied only in a small minority of cases”). *But see* Lachmi Singh & Benjamin Leisinger, Article, *A Law for International Sale of Goods: A Reply to Michael Bridge*, 20 PACE INT’L L. REV. 161, 188 (2008).

<sup>28</sup> ENDERLEIN & MASKOW, *supra* note 3, at 256.

<sup>29</sup> HONNOLD, *supra* note 14, § 76.

<sup>30</sup> Schwenzer & Hachem, *supra* note 14, at 115.

<sup>31</sup> Erauw, *Observations*, *supra* note 3, at 293.

<sup>32</sup> LOOKOFSKY, *supra* note 3, at 99.

<sup>33</sup> Jan Hellner, *The Vienna Convention and Standard Form Contracts*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 335, 343 (Petar Sarcevic & Paul Volken eds., 1986). *But see* Erauw, *Observations*, *supra* note 3, at 305 (such a view is exaggerated).

<sup>34</sup> Berman & Ladd, *supra* note 6, at 437.

receipt of the documents if the goods are lost or damaged due to the seller's act or omission, as would be the case under article 66 CISG, but will only allow a claim for damages.<sup>35</sup> Furthermore, it is said that the effect of the third sentence of article 67(1), which provides for the risk to pass even if the seller retains the documents controlling the disposition of goods, is essentially opposed to the position under trade terms commonly used in documentary sales where the risk only passes when the documents are handed over.<sup>36</sup> This argument is based on the drafting history of the provision, which indicates that the third sentence was added on account of a proposal made by the United States delegation to make it clear that the risk will not pass if the seller retains control of the goods by keeping the documents as security against payment, and, furthermore, that none of the articles on the passage of risk should apply to sales in which a trade term is used.<sup>37</sup> This intended purpose is, however, not achieved by the provision as it stands today.

These arguments are not convincing. First, such an interpretation of article 66 is too restrictive. The article is intended to operate as a general provision on the passage of risk under the CISG and is by no means limited to particular types of sales or delivery methods. Hence, documentary sales are not excluded. Moreover, as this article will show, there is a possibility for interaction between trade terms and the CISG to the extent that they can supplement each other, and through such collaboration improve their general efficiency as instruments of harmonization and unification.

Second, trade terms do not displace the Convention *in toto*.<sup>38</sup> INCOTERMS® have a limited scope of regulation.<sup>39</sup> Even if incorporated into a contract of sale, an INCOTERMS® rule will not be able to regulate the full legal relationship between the parties. The Convention provides a body of law within the framework of which trade terms can be interpreted

---

<sup>35</sup> *Id.* at 427.

<sup>36</sup> *Id.* at 428–31.

<sup>37</sup> Report, Commission on International Trade Law, Commission on International Trade Law on the work of its 10th Session, U.N. Doc. A/32/17 at 52 (23 May–17 June 1977).

<sup>38</sup> Schwenger/Hachem, *supra* note 14, § 26; Rechtbank van Koophandel [District Court] Kortrijk Apr. 19, 2001, A.R. 01706/00 (Belgium), available at <http://cisgw3.law.pace.edu/cases/010419b1.html>; Oberster Gerichtshof [OGH] [Supreme Court] Oct. 22, 2002, 1 Ob. 77/01g (Austria), available at <http://cisgw3.law.pace.edu/cases/011022a3.html>.

<sup>39</sup> HONNOLD, *supra* note 14, at 104. See also Berman & Ladd, *supra* note 6, at 434.

and applied.<sup>40</sup> Moreover, aspects which are regulated by INCOTERMS<sup>®</sup>, such as the passage of risk, are not always complete or adequate and should be applied in the context of the applicable law. If the Convention were to be ousted as a whole in consequence of the incorporation of an INCOTERMS<sup>®</sup> rule, the parties would be forced to rely on the domestic applicable law to address the aspects that are not regulated by INCOTERMS<sup>®</sup>. This turn of events will adversely affect the economic efficiency of the contract. The Convention was formulated to reduce transaction costs connected to the application of conflict of law rules, reduce forum shopping, and reduce the use of domestic laws in the context of international sales transactions. Where the parties have agreed on an INCOTERMS<sup>®</sup> rule, the intention is not to exclude the governing law of the contract but to supplement the default law on delivery and risk by means of trade usage, and at the most to replace only these rules.

Third, the delivery of transport documents is not a prerequisite for the passing of risk. Article 67(1) CISG third sentence follows the rule under article A8 of INCOTERMS<sup>®</sup>, which treats a transport document as a form of control over the goods. The possibility of retaining the documents that control the disposition of the goods is aimed at securing payment of the purchase price and is not concerned with the passing of risk. Most commentators agree that the third sentence of article 67 confirms that the Convention does not link the passing of property to the passing of risk.<sup>41</sup> Hence, the risk will pass irrespective of whether the transport documents are handed over.

The more realistic view is that INCOTERMS<sup>®</sup> do not displace the CISG rules on delivery and risk *in toto*, but merely derogate from them in so far as the rules are incompatible. Where INCOTERMS<sup>®</sup> are imported into a contract on the basis of article 6 CISG, their application should be dealt with against the background of this provision. Article 6 does not only provide for total displacement or exclusion, but also for the opportunity to “derogate from or vary the effect” of any of the Convention’s provisions. This means that agreement on the application of a trade usage, such as an INCOTERMS<sup>®</sup> rule, does not have to exclude the CISG delivery and risk

---

<sup>40</sup> See Perales Viscasillas, *supra* note 3, at 288–89.

<sup>41</sup> Barry Nicholas, *Article 67*, in COMMENTARY ON THE INTERNATIONAL SALES LAW 487, 492–93 (Cesare M. Bianca & Michael J. Bonell eds., 1987); Hager & Schmidt-Kessel, *supra* note 3, § 12.

rules in their entirety, but that it can merely modify or supplement a particular rule in so far as the usage embodied in the INCOTERMS<sup>®</sup> rule may be inconsistent with the CISG's provision.<sup>42</sup> For the rest, they complement and support each other. Where the Convention provides for aspects that are not covered by INCOTERMS<sup>®</sup>, the CISG supplements the INCOTERMS<sup>®</sup> rules as well.<sup>43</sup>

### III. INTERACTION BETWEEN THE CISG AND INCOTERMS<sup>®</sup>

The main areas for interaction between the CISG and INCOTERMS<sup>®</sup> are delivery and the passing of risk. However, as the discussion will show, there is the potential for interaction in a far wider context.

The risk rules of the Convention and INCOTERMS<sup>®</sup> contain several similarities<sup>44</sup> that facilitate the interaction between the two instruments. Under both, risk means any accidental loss or damage to the goods caused by neither an act nor an omission of any of the parties. Both refer to price risk leaving out of the ambit of regulation the risk of non-performance. Both envisage different arrangements for different transport situations and are modeled on the same underlying patterns of contracting, namely the division between shipment and delivery contracts. Moreover, both instruments link the passing of risk to the transfer of physical control, or at least being placed in the position of having control over the goods and insuring them against any harm. Strong similarities exist between articles 67 and 69 CISG and the so-called "modern" INCOTERMS<sup>®</sup>. It seems that the drafters of the Convention borrowed the basic notion that risk transfers on handing over the goods to a carrier from the modernized INCOTERMS<sup>®</sup> rules, FCA, CPT, and CIP.<sup>45</sup> Both instruments require previous identification of the goods to the contract in order for the risk to pass to the

---

<sup>42</sup> Michael Bridge, *The Transfer of Risk under the UN Sales Convention 1980 (CISG)*, in SHARING INTERNATIONAL COMMERCIAL LAW ACROSS NATIONAL BOUNDARIES: Festschrift for Albert H. Kritzer on the occasion of his eightieth birthday 77, 90 (Camilla B. Andersen & Ulrich G. Schroeter eds., 2008); Schwenger & Hachem, *supra* note 14, § 26; HONNOLD, *supra* note 14, at 104.

<sup>43</sup> Piltz, *supra* note 18, §§ I, IV & V.

<sup>44</sup> See Henry D. Gabriel, *International Chamber of Commerce INCOTERMS 2000: A Guide to Their Terms and Usages*, 5 V.J. 41, 44 (2001); FRANK REYNOLDS, INCOTERMS FOR AMERICANS: FULLY REVISED FOR INCOTERMS 2000, at 13 (1999); Erauw, *Observations*, *supra* note 3, at 304–05.

<sup>45</sup> HONNOLD, *supra* note 14, at 519.

buyer.<sup>46</sup> Furthermore, INCOTERMS<sup>®</sup> 2010 state that “[f]or purposes of the INCOTERMS<sup>®</sup> rules, the carrier is the party with whom carriage is contracted.”<sup>47</sup> This definition is consistent with the understanding of “carrier” under the CISG.<sup>48</sup>

However, despite apparent similarities, the CISG rules are not always capable of accommodating trade usage clearly. In certain cases they are less detailed or nuanced than the INCOTERMS<sup>®</sup>.<sup>49</sup> To that extent, the INCOTERMS<sup>®</sup> rule deviates from or modifies the CISG’s rules on delivery and the passing of risk. For example, the FOB risk rule is generally equated to article 67(1) second sentence.<sup>50</sup> In essence, the FOB term derogates from article 67(1) CISG in the narrow sense in so far that delivery takes place and risk passes when the goods are placed on board the ship in the port of shipment and not merely when they are handed over to the first carrier at that place. The notion of “handing over to a carrier” is a broader concept than “loading onto the vessel.” The former does not necessarily require that the goods should be delivered on board the vessel; it suffices that the goods are delivered to a container yard, which acts as an agent for the carrier. Handling or stowage that is done within the confines of a carrier’s facilities will therefore also be at the risk of the buyer, unless these operations are contracted out to a harbor authority. This would be contrary to the mercantile customs on which the FOB term is based. The FAS term provides that delivery takes place and risk passes when the goods have been placed alongside the vessel in the manner that is customary in that particular port. Article 67 CISG causes the risk to pass when the goods are handed to the carrier at the particular place and not when they are merely placed at his disposal. The Convention presumes that delivery is only valid if the goods are taken over by the other party, which presupposes that delivery is always a bilateral act. Whether the FAS term can be equated to

---

<sup>46</sup> ICC, *supra* note 10, at 27, 47 & 49; CISG, *supra* note 11, at art. 67(1), 69(3).

<sup>47</sup> ICC, *supra* note 10, at 10.

<sup>48</sup> Honnold, *supra* note 10, at 167; Hager & Schmidt-Kessel, *supra* note 3, at 929; ICC, *Q&A September 2011*, Answer to Question 7, <http://www.iccwbo.org/Products-and-Services/Trade-facilitation/Incoterms-2010/Q-A-September-2011>.

<sup>49</sup> See ENDERLEIN & MASKOW, *supra* note 3, at 257.

<sup>50</sup> Bernd von Hoffmann, *Passing of Risk in International Sales of Goods*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 289 (Petar Sarcevic & Paul Volken eds., 1986); J.D. Feltham, *CIF and FOB Contracts and the Vienna Convention on Contracts for the International Sale of Goods*, J. BUS. L. 413, 424 (1991).

article 67(1) second sentence will ultimately depend on the customs of the port, and is not a straightforward matter.

Under a CIF contract, the seller is obliged to contract for the carriage of the goods and to deliver the goods on board the vessel selected by him. The port of destination referred to as part of the CIF term does not denote a place of delivery for purposes of the passing of risk, but is an indication that the costs for insurance and freight is to be carried by the seller up to that point. International trade usage requires delivery on board the vessel in the port of shipment, whilst paragraph (a) of article 31 CISG merely requires the handing over of the goods to the first carrier.<sup>51</sup> As for the passing of risk, the second sentence of article 67(1) CISG is rendered applicable where the contract indicates the place of shipment. The problem, however, comes in when the contract does not refer to a place of shipment, which means that the seller is not required to hand the goods over at a “particular place.” Thus, making the Convention’s article 67(1) first sentence the most compatible provision for the passing of risk. This interpretation does not accord with commercial practice, which determines that risk passes when the goods are placed on board the vessel at the port of shipment.

The EXW INCOTERMS<sup>®</sup> rule differs slightly from article 69(1) CISG if the goods are to be delivered at the seller’s place of business. Under EXW, risk passes when the goods are placed at the disposal of the buyer at the agreed place of delivery. The Convention, however, provides that risk passes from a later point. That is when the buyer actually takes over the goods, and only when he commits a breach by not taking delivery in due time will risk pass from the moment when they are placed at his disposal.

Although INCOTERMS<sup>®</sup> are sometimes more detailed than the CISG as to where delivery takes place and risk passes, there are aspects which are not regulated by the standardized INCOTERMS<sup>®</sup> rules at all but are covered by the CISG.

INCOTERMS<sup>®</sup> provide no detailed rules on the time of delivery apart from prescribing that delivery should take place as per the agreement of the parties, that is at an “agreed date” or within an “agreed period,”<sup>52</sup> or that the buyer should take delivery when the goods have been delivered “as

---

<sup>51</sup> See Jan Hellner, *The Vienna Convention and Standard Form Contracts*, in INTERNATIONAL SALE OF GOODS: DUBROVNIK LECTURES 335, 343–44 (Petar Sarcevic & Paul Volken eds., 1968).

<sup>52</sup> ICC, *supra* note 10, at 24.

envisaged in A4.”<sup>53</sup> The FAS (INCOTERMS<sup>®</sup> 2010) rule is the only rule which provides that, if the parties have agreed for delivery to take place within an agreed period, the buyer would have the option to choose the date within that period. In the case of the other ten INCOTERMS<sup>®</sup> 2010 rules, it is assumed that delivery can be made at any time within that period; naturally with notice to the other party. Where no time or period for delivery is agreed, article 33(c) CISG can supplement the INCOTERMS<sup>®</sup> rules as it provides that delivery is to take place “within a reasonable time after the conclusion of the contract.”

Article A7 of every INCOTERMS<sup>®</sup> rule requires notification that the goods have been delivered so as to allow the buyer to take the measures needed to take delivery. The FAS rule, for instance, requires that the seller should deliver the goods alongside the vessel and notify the carrier accordingly. Although “sufficient notice” is required, nothing is said about the form or type of notice, its promptness or when it is to become effective. Here the CISG may supplement the INCOTERMS<sup>®</sup> rules by virtue of article 27. Article 27 does not call for any requirements as to form and method of communication unless the parties have agreed otherwise. The only requirement is that it should be done “by means appropriate in the circumstances.” Furthermore, the notice will be effective as from the moment of dispatch; hence, there is no need to prove that the notice was received by the other party as “a delay or error in the transmission or its failure to arrive does not deprive that party of the right to rely on the communication.”<sup>54</sup> Article B7 of INCOTERMS<sup>®</sup>, in turn, requires that the buyer should notify the seller of aspects that he has to be aware of to make delivery, such as the time for delivery, the vessel’s name, the port of shipment or loading point and the port of destination. Here, again, article 27 CISG can supplement the INCOTERMS<sup>®</sup> rules as regards the form and nature of the notice.

---

<sup>53</sup> *Id.* at 25.

<sup>54</sup> *But see* Piltz, *supra* note 18, § III. He is of the opinion that Article 27 cannot be applied as regards the D-terms. By agreeing on a D-term, the seller undertakes to deliver at the point of destination, whilst in the case of the F- and C-terms, delivery takes place where the main carriage starts. Thus, in the case of a D-term, the seller has to ensure that the notice of delivery is received by the buyer correctly and punctually.

INCOTERMS® provide no specifics as to when the buyer has to pay for the goods.<sup>55</sup> This aspect is normally dealt with contractually or through the governing law of the contract. If the contract provides for payment to be made within a certain period of time after delivery, article A4 of INCOTERMS® will regulate the time of delivery, and hence, when payment is to be made.<sup>56</sup> In supplementation of INCOTERMS®, articles 53–59 CISG provide default rules on payment, which will apply in the absence of any party agreement to the contrary.

It is clear that in the case of a D-term, payment must be made when the buyer receives the goods. However, the position under the F- and C-terms is less clear. Although the seller's obligation to deliver is performed when the goods are handed to the buyer, it does not mean that the buyer's obligation to take delivery coincides with that. Where the buyer concludes the contract of carriage, as in the case of the F-terms, the goods are placed at the disposal of the buyer when they are handed to the carrier who takes delivery on his behalf. Payment should therefore be made at this point. In the case of a C-term, however, the carrier does not act on behalf of the buyer and it could be argued that payment is to be made when the buyer actually takes delivery of the goods.<sup>57</sup> Such uncertainty can be addressed effectively by means of the supplementing role of article 58 CISG which states that the buyer has to pay when the goods are placed at the buyer's disposal, either physically or constructively. By virtue of article 58(1), payment is due once the buyer is in receipt of a negotiable transport document which places him in a position to dispose of the goods, even if he has not physically taken delivery of the goods. Article 58(2) CISG states that the seller may dispatch the goods on condition that delivery of the goods or documents will be reserved until payment is received.

---

<sup>55</sup> Article B1 merely provides that the buyer should “pay the price as provided in the contract of sale.”

<sup>56</sup> See Foreign Trade Court of Arbitration at the Serbian Chamber of Commerce Serb., 28 Jan. 2009, available at <http://cisgw3.law.pace.edu/cases/090128sb.html> (where the contract provided for a CIP Tirana clause, the contractual time limit for payment of 45 days following delivery was computed from when the goods were delivered on board the vessel); LG Krefeld [District Court] Ger., 20 Sept. 2006, *Internationales Handelsrecht* 2007, 161, also available at <http://cisgw3.law.pace.edu/cases/060920g1.html> (in the case of a contract on CIF terms where the price was payable 85 days after delivery, the payment date was calculated as from the date of delivery of the goods on board the contracted vessel).

<sup>57</sup> See Piltz, *supra* note 18, § IV.

Furthermore, Article 58(3) states that generally the buyer is not bound to pay the price until he has had the opportunity to examine the goods.

Whilst article 59 of the Convention dispenses with any formality on the side of the seller before the price is to be paid, article 1 of the INCOTERMS<sup>®</sup> rules determines that the seller has to provide the buyer with an invoice. In these cases the formality is derived from contract or usage.

The Convention, furthermore, regulates instances where the price has not been fixed at the time of the conclusion of the contract. Article 55 states that, in these cases, the price is to be determined with consideration of all “comparable circumstances.” Since trade terms also function as price terms, the applicable INCOTERMS<sup>®</sup> rule would be one of the circumstances that should be taken into consideration when determining price.

INCOTERMS<sup>®</sup> do not regulate the situation where the loss or damage that occurred after the risk had passed was caused by the act or omission on the part of the seller. Where, during the voyage at sea, the goods deteriorate due to the seller’s failure to instruct the carrier to keep the goods at a specific temperature, INCOTERMS<sup>®</sup> will not cover the situation as they only deal with the risk of incidental loss or damage. Consequently, the buyer will still be obliged to pay the purchase price. Article 66 of the Convention, on the other hand, states that the buyer will be discharged from his obligation to pay the price when the damage is due to the act or omission of the seller. This is an example where article 66 of the CISG can supplement an inadequate INCOTERMS<sup>®</sup> rule.<sup>58</sup> As was concluded in the previous section, an INCOTERMS<sup>®</sup> rule does not cause the exclusion of all the Convention’s provisions on risk, but merely derogates from or varies the effect of a particular provision, for example article 67 or 69. Article 66 remains fully operative, unless the parties have contracted out of it explicitly.

The decision of a Chinese arbitration panel<sup>59</sup> illustrates the interplay between INCOTERMS<sup>®</sup> and the CISG risk rule in this context. The seller

---

<sup>58</sup> See Erauw, *Observations*, *supra* note 3, at 293; Perales Viscasillas, *supra* note 3, at 286–87.

<sup>59</sup> China International Economic and Trade Arbitration Commission [CIETAC] China 23 Feb. 1995 (jasmine aldehyde case), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/950223c1.html>. See also China International Economic and Trade Arbitration Commission [CIETAC] China,

agreed to sell to the buyer 10,000 kilograms of jasmine aldehyde, which was also agreed to be no less than 99% purity at the price of US \$21 per kilogram “CIF New York.” On arrival, the cargo was found to be melted and leaking. The damage caused to the goods during transport was due to the omission of the seller who did not give the carrier appropriate instructions regarding the temperature, even though the buyer warned the seller that the goods could deteriorate at high temperatures. The tribunal found that under a CIF sale the risk transfers when the goods pass the ship’s rail at the port of loading. However, since the damage to the goods was caused by an act or omission of the seller to give proper instructions to the carrier on temperature control, the tribunal applied article 66 CISG. This meant that the buyer did not have to carry the price risk.

Interaction between the two instruments is not limited to the contexts of delivery and the passing of risk. INCOTERMS® have a limited scope and are unable to regulate all aspects of a sales contract.<sup>60</sup> Therefore, in order to be effective, INCOTERMS® should be supplemented, either by party agreement or by the governing law of the contract.<sup>61</sup> Aspects that are not covered by INCOTERMS®, such as formation of contract, breach and impediments against performance will be regulated by the CISG.

Although INCOTERMS® do not provide for breach of contract *per se*, there is an automatic interrelation between the chosen trade term and the rules relating to breach. If delivery does not take place at the time and place envisaged by INCOTERMS®, it will constitute breach of contract which, to the extent that the parties have not provided for such an event, is to be remedied by the governing law of the contract.<sup>62</sup> The same applies for the delivery of non-conforming goods. Even though article A1 of each INCOTERMS® rule requires that the seller should deliver goods that are “in conformity with the contract of sale and any other evidence of conformity that may be required by the contract,” no mention is made of relief for the

---

Arbitration Award 1999 (piperonyl aldehyde case), available at <http://www.cisg.law.pace.edu/cases/990000c1.html> for a similar conclusion.

<sup>60</sup> See *HvB Antwerp* [Appellate Court] Belg. 22 Jan. 2007, available at <http://cisgw3.law.pace.edu/cases/070122b2.html>.

<sup>61</sup> Gabriel, *supra* note 44 n.3; *Texful Textile Ltd. v. Cotton Express Textile, Inc.*, 891 F. Supp. 1381 (C.D. Cal. 1985); Piltz, *supra* note 18, § I.

<sup>62</sup> Honnold, *supra* note 10, at 171.

buyer if he does not perform his obligations. Here the CISG can provide relief for breach by means of articles 45–52 and 74–77 CISG.<sup>63</sup>

Similarly, INCOTERMS<sup>®</sup> do not regulate the consequences of a failure to give sufficient notice of delivery as required by articles A7 and B7 INCOTERMS<sup>®</sup>. This situation is illustrated by the facts of the so-called *Horsebean* case.<sup>64</sup> Here, a French buyer bought horsebeans from a Chinese seller “FOB Tianjin.” The buyer informed the seller that it had contracted to resell the horsebeans to the military of Egypt. Because the Egyptian inspectors were precluded from inspecting the cargo whilst they were stored in a Chinese warehouse, the buyer refused to take delivery on grounds of breach of contract. The arbitration tribunal, however, found that the buyer failed to notify the seller of the ship’s name, loading location and time as required by INCOTERMS<sup>®</sup> 1990; that this failure amounts to a fundamental breach of contract as envisaged by article 25 CISG; and, that the buyer’s claim for damages should therefore be dismissed.

Article 70 CISG provides that, where the seller has committed a fundamental breach of contract, the buyer’s remedies are not impaired merely because the risk of loss has passed to him. Because INCOTERMS<sup>®</sup> do not contain any provisions similar to that of article 70 CISG, the Convention can regulate these cases. However, the Convention does not indicate whether seller’s breach of a trade term will constitute a fundamental breach *per se*.<sup>65</sup> That ultimately depends on the application of article 25 CISG. For example, in a dispute between a British seller and a German buyer over the non-delivery of iron molybdenum (CIF Rotterdam), a German appellate court held that in the case of CIF contracts, timely delivery by a fixed date is per definition an essential term of the contract which can give rise to a claim for fundamental breach if delivery does not take place in a timely manner.<sup>66</sup> The same appellate court, however,

---

<sup>63</sup> These remedies include avoidance, specific performance, reduction in price and damages.

<sup>64</sup> China International Economic and Trade Arbitration Commission [CIETAC] China Arbitration proceedings 8 Mar. 1996 (*horsebean* case), available at <http://www.cisg.law.pace.edu/cisg/wais/db/cases2/960308c2.html>.

<sup>65</sup> Berman & Ladd, *supra* note 6, at 430–31.

<sup>66</sup> OLG Hamburg [Provincial Court of Appeal] Ger. 28 Feb. 1997 (*iron molybdenum* case), available at <http://cisgw3.law.pace.edu/cases/970228g1.html>. See also ICC Arbitration Case No. 7645 of March 1995 (*crude metal* case), available at <http://cisgw3.law.pace.edu/cases/957645i1.html>, for a similar conclusion in a case where the parties agreed on a CFR INCOTERM.

questioned the existence of a trade usage that automatically renders untimely delivery in C&F sales a fundamental breach.<sup>67</sup>

INCOTERMS®, in turn, can supplement the CISG's provisions where the latter falls short. The Convention does not regulate instances where the buyer fails to provide carriage instructions in due time or fails to render assistance in making delivery. Apart from article 69(1) CISG, which provides for the passing of risk in the event of the buyer's failure to take delivery, the Convention treats failures of the buyer's obligations merely as a breach of contract.<sup>68</sup> Article B5 of INCOTERMS®, on the other hand, provides for the premature passing of risk when the buyer fails to assist the seller in delivering the goods in accordance with articles B7 or B2. The premature passing of risk is a more effective deterrent than remedies for breach and acts as an additional incentive so that the buyer will assist the seller in delivering the goods properly and timely. At the same time it is also much easier to apply.<sup>69</sup>

INCOTERMS® can clarify concepts that are not defined by the CISG. Article 34 CISG states that the seller should hand over the documents relating to the goods at the time, place and in the form as agreed upon. Furthermore, it provides that if the seller has handed over the documents prematurely, he may, up to the time that they should be handed over, still cure any lack of conformity in the documents, unless it will cause unreasonable inconvenience or expense for the buyer. The Convention does not define the concept "documents relating to the goods" or state any requirements as to their nature. Article A8 of INCOTERMS®, on the other hand, states that delivery documents should provide proof that the goods have been delivered or should, at least, place the buyer in a position to take delivery. If agreed or customary, the document should also enable the buyer to sell the goods in transit.

Article 60 CISG simply states that the buyer has to do "all the acts which could reasonably be expected of him in order to enable the seller to

---

<sup>67</sup> Germany 12 November 2001, Appellate Court Hamburg (*memory module case*), available at <http://cisgw3.law.pace.edu/cases/011112g1.html>.

<sup>68</sup> Article 60 CISG. The seller will be entitled to exercise the rights provided in art's 46–52 and 74–77. Article 66 CISG does not provide any relief because it merely covers the seller's act or omission and not that of the buyer.

<sup>69</sup> See ENDERLEIN & MASKOW, *supra* note 3, at 276–77.

make delivery; and in taking over the goods.” INCOTERMS<sup>®</sup> can assist here by providing some detail on the content of the obligation. According to articles A2 and B2 of every INCOTERMS<sup>®</sup> 2010 rule, where applicable, both the seller and the buyer have duties towards the other as regards export and import licenses, official authorizations, security clearances and customs formalities required for the export and import of goods. Article B3(b) of the CPT, CIP and CIF INCOTERMS<sup>®</sup> 2010 rules also require that the buyer must provide the seller, upon request, with the necessary information to obtain an insurance policy or to procure additional insurance requested by the buyer. Where there is no obligation on the seller to obtain insurance on the goods, article 32(3) CISG, in turn, states that, at the buyer’s request, the seller is obliged to provide the buyer with all available information necessary for the buyer to obtain such insurance. In conjunction with that, articles A10 and B10 of every INCOTERMS<sup>®</sup> rule provide that the seller and buyer, respectively, should render the other party assistance in obtaining documents and information necessary for exporting and importing the goods.

Article 36 CISG, furthermore, operates on the basis of an interrelationship between the CISG and INCOTERMS<sup>®</sup> inasmuch that non-conformity of the goods is to be determined at the moment that risk passes from the seller to the buyer.<sup>70</sup> Where INCOTERMS<sup>®</sup> regulate the passage of risk, article A4 will establish the moment that the non-conformity should exist. Moreover, according to article 38(2) the timeframe for examining the goods for non-conformity starts to run at the moment of delivery of the goods, which will also be determined by the INCOTERMS<sup>®</sup> rule on which the parties have agreed.

The examples discussed here are by no means meant to provide an exhaustive list of instances where interaction can take place between INCOTERMS<sup>®</sup> and the provisions of the CISG. They are simply used to illustrate that there is multiple opportunities for interaction between the two instruments in various contexts.

---

<sup>70</sup> See CLOUT Case No. 253 [La seconda Camera civile del Tribunale d’appello Lugano (Appellate Court), Switz., 15 Jan. 1998], available at <http://cisgw3.law.pace.edu/cases/980115s1.html>.

## V. CONCLUSION

INCOTERMS<sup>®</sup> incorporate trade usage into a contract, either through agreement or by means of article 9 CISG. Because they deal with issues such as delivery and the passing of risk, which are also regulated by the CISG, this article addressed the question whether INCOTERMS<sup>®</sup> totally replace the CISG's provisions on these matters, or whether they merely derogate from or vary their effect, leaving room for interaction between the two instruments.

The analysis concluded that INCOTERMS<sup>®</sup> do not replace the CISG rules *in toto* but only supersede them in so far as they are mutually exclusive. For the rest they will function *in tandem* as complementary and supplementary instruments of sales law harmonization and unification.<sup>71</sup> Seeing that both the Convention and the INCOTERMS<sup>®</sup> rules have their own limitations, there is ample opportunity for collaboration and supplementation. Aspects that are not governed, or inadequately regulated, by the INCOTERMS<sup>®</sup> rules can be effectively addressed by the Convention, and *vice versa*.

In conclusion, the relationship between INCOTERMS<sup>®</sup> and the CISG is one of co-existence and complementation. Both instruments provide a uniform legal framework aimed at the facilitation of international sales. Cooperation and interaction between them strengthens the law regulating international sales, which in the end can only benefit international trade.

---

<sup>71</sup> HONNOLD, *supra* note 14, § 76; Honnold, *supra* note 10, at 171.