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INCOTERMS AND OTHER TRADE TERMS

Note by the Secretary-General

1. The United Nations Commission on International Trade Law at its first session decided to include in its work programme, as a priority item, the subject "general conditions of sale, standard contracts, Incoterms and other trade terms".[1/]

2. As regards Incoterms and other trade terms, the Commission decided to request the Secretary-General to invite the International Chamber of Commerce to submit to the Secretary-General, before the second session of the Commission, a report including its views and suggestions concerning possible action that might be taken for the purpose of promoting the wider use of Incoterms 1953 and other trade terms by those engaged in international commerce.[2/]

3. Pursuant to the request of the Commission, the Secretary-General, by a letter dated 20 May 1968, invited the International Chamber of Commerce to submit, for transmission to the Commission, a report on the above topic. He also informed the International Chamber of Commerce of the desire expressed by the Commission that the report should state the considerations and factors which are impeding a wider use and acceptance of Incoterms and other trade terms.[3/]

1/ See report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16, p. 18, para. 12 (iv).

2/ Ibid., p. 20, para. 20.

3/ Ibid., p. 20, para. 21.

4. In response to the Secretary-General's invitation, the International Chamber of Commerce submitted a report entitled "Promoting the wider use of acceptance of Incoterms". The report is reproduced in the annex to this note.

Annex

PROMOTING THE WIDER USE AND ACCEPTANCE OF INCOTERMS: REPORT SUBMITTED TO THE UNITED NATIONS BY THE INTERNATIONAL CHAMBER OF COMMERCE

I. STANDARDIZATION OF SALES CONTRACTS AND DEFINITIONS OF TRADE TERMS

1. For a very long time, it has been the aim of people engaged in trade and commerce to standardize contract conditions for their particular trades. Some of the advantages of this kind of standardization are obvious. By using conditions already known to them, the parties to a contract save time. It is easier to calculate costs and to foresee risks and, in so far as a uniform interpretation is adopted, the number of disputes may be reduced.

2. Especially in the field of international sales an admirable network of standardized contracts has been created. However, these forms of contracts also strengthen the bargaining power of the party issuing them. This power is the more apparent if the party in question has formed an association with his competitors and the standard contracts have been issued by this trade association.

3. However, the balance between the weaker and the stronger contracting parties has been restored in many fields (for instance in the sawn softwood trade) by means of standard contracts composed jointly by the trade associations of both parties. This policy has also been successfully adopted by the Economic Commission for Europe of the United Nations (ECE). It is well known that the different sets of General Conditions of Sale of the ECE are drafted with great care and skill by representatives of all European legal systems, including the socialist countries.

4. There are a great many standardized contracts containing or referring to legal rules, which are almost as detailed as national laws.

5. Quite a different kind of standardization arises in the case of "trade terms" such as F.O.B. and C.I.F. which are used to identify specific categories of sales by reference to the conditions of delivery of the goods. Standardization in that case consists in defining precisely the duties and liabilities implied by the use of the term chosen. Standardization of trade terms affects all industries and trades irrespective of the nature of the commodity traded: it might be

described as "horizontal standardization". "Vertical standardization" would be that affecting only a particular industry or trade; the various ECE conditions are typical examples.

6. "Trade terms" are abbreviated indications of the conditions applicable to the delivery of the goods in relation to the agreed price. They do not, therefore, comprise the many other conditions of a sale, such as description, quantity and quality of the goods, the price itself, the delivery date, etc. The use of standardized definitions of trade terms leads to more rapid agreement between the contracting parties and avoids difficulties of language; the parties need only refer to the appropriate term to incorporate into the contract all the clauses generally used to define liabilities in a sales contract of that category.

II. TRADE TERMS MOST CURRENTLY USED

7. The term F.O.B. came into use at the beginning of the nineteenth century and C.I.F. (and also C. and F.) some forty years later. Six other terms also defined by "INCOTERMS 1953", viz. Ex Works, F.O.R. (F.O.T.), F.A.S., Freight or Carriage paid to, Ex Ship and Ex Quay, have come into use progressively. More recently, the ICC defined the two trade terms "delivered at frontier... (named place of delivery at frontier)" and "delivered... (named place of destination in the country of importation) duty paid" (Brochure "dp").

These basic terms are sometimes modified by the insertion of one or more words of varying significance, such as "landed" in connexion with C.I.F., or "duty paid", or "payment on arrival".

III. DIVERGENCIES OF INTERPRETATION

8. Besides these eleven trade terms there exist a great number of other clauses which have been developed within specific industries and trades. They are, however, almost used in international trade exclusively by firms within the trades which originated them. The most frequently used among these are the terms "free frontier", "free point of destination", etc. In general, the interpretation of these terms is still most uncertain, and their use often gives rise to difficulties and sometimes to litigation.

9. An extensive practice and a substantial jurisprudence have developed in different countries on the interpretation or juridical construction of trade terms. To avoid divergencies in the interpretation and application of such clauses, a number of efforts have been made to define them more narrowly.

Some countries, as in Scandinavia, have tried to define such clauses to some extent by giving a statutory interpretation to their more important aspects in their laws on the Sale of Goods.1/

In other countries, definitions have been reached by private initiative, as in the instance of the "American Foreign Trade Definitions" which were published in 1919, and revised in 1941. Another set of definitions is to be found in the so-called Warsaw-Oxford Rules (1928-1932) established by the International Law Association for the definition of the C.I.F. contract.

10. When the International Chamber of Commerce came into existence, it was agreed at the London Congress in 1921 to invite each National Committee to set up a special committee, consisting of exporters, importers, agents, shippers, shipowners, insurers and bankers in order to examine the meaning of the term "F.O.B.". By 1923, an initial selection of definitions had been compiled explaining the interpretation given to the following six terms in thirteen countries: F.O.R.-F.O.T., free delivered, F.O.B., F.A.S., C.I.F., and C and F. The second part of this document gave comparative tables of definitions for four of these terms. The tables showed certain differences of usage between the countries concerned, but they also indicated the similarities, and established common ground as a basis for the Chamber's work towards standardization.

11. The Chamber was able to present the first code for the uniform interpretation of eleven trade terms at the Paris Congress in 1935 which adopted it under the title INCOTERMS (ICC Brochure 92), a word compounding international, commercial terms. However, revision was felt to be necessary because the rules did not correspond to British and American practice. The revised text (Brochure 166) was approved unanimously at the Vienna Congress in 1953. This codification, entitled "INCOTERMS 1953", could by no means be said to be artificially created: it accurately reflects business practice.

1/ Cf. Gunnar LAGERGREN, Delivery of the Goods and Transfer of Property and Risk in the Law of Sale, Stockholm, 1959, p. 43 et seq.

12. The unique character and position of INCOTERMS in the field of standardization should be stressed.

They cannot be said to operate in favour of any specific group of persons or countries, whether sellers and exporting countries or buyers and importing countries, and the type of economy practiced in the buyer's or the seller's country is of no relevance.

INCOTERMS are not imposed upon the parties as would be a law; they are solely intended to facilitate the choice of a specific type of sale. As such, INCOTERMS have been worked out in such a way as to reflect as closely as possible the general practice in international trade.

13. It should also be remembered that at the time of the publication of INCOTERMS 1953, the ICC depicted the still existing divergencies in the interpretation of such trade terms in different countries in the final edition of the handbook "Trade Terms". In this publication, the obligations of seller and buyer are set out in synoptic tables showing the interpretation given for ten trade terms or types of sale in eighteen countries. Although the main intention was to draw attention to differences, the reader was able to measure the large progress already made by standardization since the start of ICC's work, Today, fifteen years later, it can be observed that these differences have further decreased so that, generally, practice is in even closer conformity with INCOTERMS rules than before.

IV. MATTERS STANDARDIZED

14. Trade terms relate only to a part of the law governing the sale of goods; hence, the ICC definitions standardize matters which are of varying concern to contracting parties according to the nature of their business activities.

15. Place and mode of delivery of merchandise are dealt with as a matter of major concern. A point of similar importance is the transfer of risk at a given time and place: thereafter the buyer's obligation to pay for goods ceases to be affected by any deterioration or loss; in line with general practice, the rules stipulate the transfer of risk without affecting or altering the law applicable in each country to the transfer of property.

Thirdly, the rules determine the allocation between seller and buyer of variable costs incurred between the place of despatch and the ultimate destination, their allocation being closely related to the delivery of the goods and the transfer of risks, and of practical importance since it directly affects cost structure and calculation of selling price. These costs involve air, sea and land freight charges, insurance, and handling charges, together with charges incurred by forwarding or other agents. Finally, the ICC regulations facilitate the allocation of liability for customs and other taxes, and in addition, for the provision of sometimes complex documentation.

V. FACTORS IMPEDING A WIDER USE AND ACCEPTANCE OF INCOTERMS

16. These factors could be ranged in three different categories. They could be of (a) a political,
(b) an economic, and/or
(c) a juridical nature.

17. As a political factor may be cited the reluctance which some countries may feel in favouring rules emanating from a body such as the ICC, composed mainly of representatives from free enterprise. Possibly this hesitation could be removed if, through the activities of UNCITRAL, it could be made clear and more commonly known that, as stressed especially in paragraph 12 above, INCOTERMS aim to reflect business practice and to a considerable extent have succeeded in this.

18. Turning to factors of an economic nature impeding the wider use of standard contracts and general conditions, it not unfrequently happens that standard contracts and general conditions are elaborated unilaterally by seller or buyer, or by their representative organizations, and are therefore thought, rightly or wrongly, to favour one or other party to the contract. This makes the other party naturally reluctant to accept such conditions without modification.

19. As already explained, however, INCOTERMS - representing a horizontal standardization - cannot be criticized on such grounds. Moreover, it should be noted that INCOTERMS do not endeavour to restrict the choice of the parties to trade terms contained in INCOTERMS 1953, or to remove the parties' freedom to contract in any way they may choose; the object is only to secure a uniform and unambiguous interpretation of the trade terms that are used.

20. The most serious obstacles to a wider application of INCOTERMS, however, are of a juridical nature. As INCOTERMS do not emanate from the legislative authority of any State, they have not the force of "law" and will thus, according to any classical legal theory of obligations not be applied by a court, unless the parties, expressly or by implication, have incorporated them in their contract. Moreover, according to such theory, local usages are often preferred to the international usage and practice as reflected by INCOTERMS.

21. A new and different approach to trade terms such as INCOTERMS is therefore needed.1/ Codifications of a kind which justly could be said to express the common expectations of the parties, and which the parties reasonably could be imputed to have in their minds when making the contract, should, as far as possible, prevail not only over local usages but also over definitions contained in national legislation or established in national jurisprudence or court practice. It is obvious that the more widely INCOTERMS are known, the more such a solution is justified.

22. Such thoughts may have inspired the draftsmen of Sec. 117 of the new Czechoslovakian International Trade Code.2/

Legal scholars have also in recent years advanced theories in the same effect.3/

1/ Indeed, as stated in the Report of the Secretary-General of the United Nations to the General Assembly (doc. A/6396, p. 53), "a tendency has evidenced itself to consider that the Incoterms also are relevant to a commercial transaction, even in the absence of explicit reference, unless the parties have expressed a contrary intention".

2/ This section reads: "If the parties make use in their contract of some clauses regulated in the rules of interpretation applied on international scale, they shall be presumed to intend to attain such legal effects as are provided in the said rules of interpretation to which they expressly refer or which they most probably bear in mind".

3/ Vide: Eisemann, Die INCOTERMS im internationalen Warenkaufrecht. Wesen und Geltungsgrund, Stuttgart, 1967, pp. 53 et seq. with numerous further references.

VI. CONCLUSIONS

23. To await legislation of the kind adopted in Czechoslovakia, or the development of a unanimous doctrine and court practice in this field would be a very lengthy procedure.

24. Uniformization of trade terms through the wider use of INCOTERMS can, however, be promoted more rapidly and effectively in other ways.

25. One simple step would be to make INCOTERMS better known in business circles all over the world. Although the ICC since 1953 has distributed hundreds of thousands of copies of its Brochure 166, not to mention publications issued by National Committees of the ICC and others in their own languages, there still remains a great deal to be done in this respect.

26. A distribution through UNCITRAL to countries in which the ICC has not yet established National Committees or gained sufficient ground would certainly be useful. Moreover, UNCITRAL could invite Member States of the United Nations to take all appropriate steps to make INCOTERMS, reflecting, as they do, generally followed international business practice, better known, and to favour their more widespread use, or to state their objections thereto, if any.

27. On the other hand, one could also envisage UNCITRAL inviting Member States to examine the desirability of an international convention. Such a convention would provide for the application, in the absence of contrary provisions in the contract, of generally accepted international commercial practices in the field of international trade as codified by "INCOTERMS 1953" or any similar codification which may be published in the future.

28. It is fully recognized that such a project is likely to encounter considerable difficulties. If INCOTERMS are to continue to reflect business practice in the field of international trade, the proposed convention would presuppose continuing work by the ICC to keep INCOTERMS up to date and in line with international practice. One may think here not only of the newly-published definition of "Delivered at frontier..." and "delivered... (named place of destination in the country of importation) duty paid", which formally do not yet form part of the INCOTERMS, but also of the needs newly created by container traffic (to which the usual F.O.B.,

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C. and F., and C.I.F. contracts are not ideally suited). Similarly, air freight is now much more important in international trade than in 1953 and gives rise to a need for corresponding types of sale different from these up to now defined by the ICC.

29. Another aspect of the same problem would be that some Governments may be reluctant to leave the codification of international business practice in the hands of a private body such as the ICC. The past work of the ICC in the field of codification and unification of trade terms may however provide a guarantee for any foreseeable future. Indeed, private initiatives and the participation of the business community seems essential if the law of international trade is to develop along satisfactory lines.
