Contracting on standard forms for international sales of goods

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International Sales of Goods

Contracting on Standard Forms

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In the international sales of goods adopting standard form contract and Incoterms can result in an advantageous manner of contracting. We will try to critically consider the extent to which it can facilitate parties to such agreements.

First of all, because standard form contract is a result of experience and legal expertise in the field, which include events that can happen, leading to reasonable solutions, the use facilitate trading ensuring predictability, consistency, and increased efficiency in business relations; saving time and money in negotiating efforts and drafting individual contracts. It is the application of the principle of freedom of contract in international trade.

A standard form contract provides almost all the relevant contingencies and details, making a difference with individual contracts in which not all the details would be determined. This happens also in relation to the definition of its terms, which may not have similar meaning in other countries. In English Law, even when in any written contract, the Court will apply the “parole evidence rule”, standing in what the parties have agreed to in the contract, but also the Court will have the resource of “background knowledge” in case of ambiguity or contradictions that are less likely to appear in a standard form.

Therefore, as an important point is that a standard contract of sale will include all the general provisions regarding definitions, consideration, liabilities, warranties, conditions, choice of law and jurisdiction-arbitration, force majeure, extension for delivery, quality of the goods, price and methods of payment, and breach of contract.

Failure to include clear provisions may lead to a misunderstanding, different opinion and substantial loss to one or more of the parties, such as in our case, a) when the (FOB seller) Otis is of the opinion that placing the goods on the quayside is a valid transfer of the risk to the buyer, and damage takes place before the goods pass the ship’s rail/ on board[^1^]; b) When the (FOB buyer) Joni fails in his obligation of having the vessel on time ready to load, and has not previously agreed in a time extension clause, which generates (the possibility of having) the contract repudiated by the seller.

[^1^]: in the FOB Incotems 2010 the pass of the risk is now on board.
All the advantages illustrated above have a value when - they are used by parties with similar bargaining power - as given by Lord Diplock in Schroeder v Macauley\(^2\): These are the standard contracts of the first type in which is presumed to have fair and reasonable terms. This is the judiciary application of the principle of “freedom of contract” adopted by English Law in international sales contracts. The Parliament has also respected this principle when enacting the Unfair Contract Terms Act 1977 which excluded “international supply contracts” (international sales contracts and shipping contracts) from the requirements of reasonableness generally imposed by the Act. This principle may be the reason why the Vienna Convention 1980 has not been adopted by the English law\(^3\)”, keeping the international supply contracts under the rule of common law, and the autonomy of the parties.

Many standard form contracts have been subject of detailed legal analysis and consequently many of the risks of entering into international sales contract can be avoided by selecting an appropriate standard form contract that has been carefully drafted. They are normally drafted including the shipping terms or the Incoterms of the International Chamber of Commerce.

Incoterms are not laws, they can be considered as “soft-law” and part of what is call as “transnational commercial law”\(^4\) and they do not override domestic laws. Nor are they mandatory. Instead, the seller and buyer may elect to adopt an Incoterm or may choose to specify in detail all rights and obligations of buyer and seller in a detailed contract rather than adopt any particular Incoterm. However, Incoterms are limited to certain rights and obligations, chiefly in the areas of allocating responsibility for freight costs, transfer of delivery/risk of loss, export/customs clearance and, in some cases, the requirement to obtain insurance.

In fact, the purpose of Incoterms is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree. Frequently parties to a contract are unaware of the different trading practices in their respective countries. This can give rise to misunderstanding, dispute and litigation, with all the waste of money that this entails. .

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\(^2\) Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 1308, 1316
\(^3\) Course Maritime Law- Module 1 PGD by Silas Beckwith
\(^4\) Sealy and Hooley Commercial Law 2nd Ed Butterworths, 1999
Incoterms, however, are sometimes wrongly assumed to provide all the duties which parties may wish to include in a contract of sale. This could be an issue when the parties are not fully aware of the legal consequences of including Incoterms in agreements without specify the others terms, (as ie in our case Joni and Otis). Although Incoterms are extremely important for the implementation of the contract of sale, a great number of problem which may occur in such a contract are not dealt with at all, like transfer of ownership, breach of contract and the consequences following from such breaches as well as exemption of liability in certain situation. So Incoterm are not intended to replace such contract term that are needed for a complete contract of sale either by the incorporation of standard terms using form contract or by individually negotiated terms.

Generally, Incoterms do not deal with the consequences of breach of contract and any exemptions from liability owing to various impediments. These questions must be resolved by other stipulations in the contract of sale and the applicable law.

In fact, commercial liabilities are governed by private domestic law. and if not specified agreed into the contract the question of which nation's domestic law governs an international trade contract is decided by national court, under the rules of conflict of law. However, an international aspect of commercial las is the fact that the parties to international transactions may have agreed to incorporate certain international trade customs into their contracts, such as contracting on a standard form drafted by one of the international trade association.

It would be an interesting discussion to develop on the above point in order to consider the extent to which interpretation of such a soft-law, not mandatory and not binding as Incoterms can influences Courts of different nations and became rules universally applicable. We know that Incoterms are not only terms internationally recognized by traders and Associations, but also already discussed and interpreted in ambiguous aspects by the Courts, generally English Courts and uniformly adopted. However, national courts in different countries may adopt very different approaches when interpreting the provisions of the customs or terms of international trade. With the amendments of Incoterms 2010 the ship’s rail as the point at which risk passes in FOB, CFR (c&f) and CIF sales has been replaced by the simple rule that risk passes when the goods are placed on board the ship. An interpretation is expected about this definition and it will be interesting to see if the legal concept that will be held from a national Court will be borrowed from foreign law by judges in different jurisdictions as judicial parallelism. In this case we can really talk about the existence of a
transnational commercial law as an emerging international “Lex Mercatoria”.

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