

## Transfer of Contractual Risk and INCOTERMS Brief Analysis of its Application in Brazil

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**Abstract.** The moment at which risks on merchandise are transferred is a fundamental question in sale contracts. In international system, business uses standardized clauses whereby contracting parties define the time of that transfer. They are called *Incoterms* and are typical of international business dealings. Nevertheless, these clauses are admitted into Brazilian law, not only in relations of a transnational character, but likewise in internal contracts. Such a transposition, however, is not always explained, although the jurisprudential application of the *Incoterms* is similar to the international tradition. The objective of this limitation is to show how *Incoterms* has been taken on by current jurisprudence. Understanding it, would help explain its role in Brazilian Law.

### I. Introduction

Although it is not a novelty in Brazilian law, the concern on *Incoterms* seems restricted to scholars of international trade. Such option is explained by the traditional way in which Comparative Law is dealt in Brazil. There seems to be a lack of curiosity on the innovative role of foreign institutions and on the viability of its solutions.

The way in which *Incoterms* have been dealt with well exemplifies the criticism of this old way of thinking. By means of its application, it is possible to perceive the appropriation of international figures and its adaptation to the typical needs of internal trade<sup>1</sup>.

Within this line of thinking, the intention of the present study is to identify the way in which *Incoterms* are being appropriated by Brazilian Courts, including when the clause is applied to internal business contract for which it was not originally considered.

For this purpose, a research was conducted in four of the most important Brazilian courts (Paraná's Court of Justice, Rio Grande do Sul's Court of Justice and Rio de Janeiro's Court of Justice and Brazilian Superior Court of Justice) during the period between 2006 and 2008, even though a few other cases outside of the limits mentioned are examined. The objective of this study was to show, in different scenarios, the way that *Incoterms* are applied by current jurisprudence. In this case, the States of Parana, Rio de Janeiro and Rio Grande do Sul were mentioned as important exporting centers and, therefore, with a great shipping from their ports.

It is to be emphasized, finally, that hypothesis subject to specific regulation of consumption will not be considered, since they would not fit within the application proposed for *Incoterms*. The observations will later be taken up again as concluding notes.

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<sup>1</sup> Judith Martins Costa, *Os princípios informadores do contrato de compra e venda internacional na convenção de Viena de 1980*, In *CONTRATOS INTERNACIONAIS E DIREITO ECONÔMICO NO MERCOSUL: APÓS O TÉRMINO DO PERÍODO DE TRANSIÇÃO* 163, 164 (Paulo Borba Casella, coord., 1996).

## **2. Transfer of risk and Brazilian contractual law: a brief approach.**

One of the fundamental questions in contracts involving the delivery of merchandise is exactly at what time the risks are transferred. In the Brazilian system, transfer of risks coincides with the transfer of ownership and exoneration of the debtor. A great complexity comes into play when transport of the object becomes necessary to make the delivery effective. Taking into consideration that the Brazilian legal system is unified, i.e. the same regulation serves for internal and international dealings and for business and non-business contracts, it is extremely important to understand not only the national legal system, but also, the most common provisions of international business transit.

According to Brazilian law, in the absence of contractual provisions, the risks should be borne by the seller until the surrender of the object (*tradition*). On the other hand, the buyer assumes the risk if he demands for transportation (art. 494 of the Civil Code). In this last case, GOMES explains that the delivery of the good to the carrier is the equivalent to the transfer of the property<sup>2</sup>. This is also the interpretation of the Preliminary Draft European Code of Contracts (Art. 46).

The parties may thus negotiate when and where the *tradition* should occur as one way of determining when the transmission of the risks over the objects would happen. There is, herein, the normative justification for the contractual definition of the transfer of business risks when involving goods transportation<sup>3</sup>.

A different question would be the costs involved in that goods transfer. In Brazilian law, in the absence of contractual provision, the expenses for *tradition* should be borne by the seller (art. 490 of the Civil Code). That disposition is similar to Article 6.1.11 of the UNIDROIT Principles. It sounds natural, since those costs would be the expenses necessary for the performance of the obligation. However, Tepedino et al (2006) opines that such expenses (“accessories of the price”) may not be confused with possible elements included in the price (such as those present in CIF and FOB clauses)<sup>4</sup>. In contrast, Wald et al (2006) do not differentiate those costs and prefer to list the same CIF and FOB clauses as examples of the possibility of negotiation of the costs of delivery<sup>5</sup>.

A different issue arises when those contracts demand international regulation. There is no single solution to the risk transfer question since the different legislations work with distinct criteria<sup>6</sup>. Important harmonization efforts were done, nevertheless.

In global terms, the most important international treaty on the matter is the Vienna Convention of 1980 (CISG). Its standardizing relevance for Brazil appears, at first sight, to be indirect. This is because Brazil is not a signatory (maybe because there is a belief that Brazil should use Brazilian own legislation as a paradigm)<sup>7</sup>, although various countries with which it habitually negotiates are. Thus, its provisions may come to be applied in the national territory by way of Conflict of law (art. 9 of the LICC and Art. 1, I, b of the CISG). As a source of international law and as a reference for comparative law, however, its importance is much more evident.

The Convention establishes that the main obligation of the seller is the delivery of the goods (art. 31) specifying widely when the risk transfer occurs. In the event that this regulation is not enough, it would be

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<sup>2</sup> ORLANDO GOMES, *CONTRATOS* 270 (6<sup>th</sup> Ed. 1977).

<sup>3</sup> RICARDO LUIS LORENZETTI, *TRATADO DE LOS CONTRATOS* t. I 314-315 (2<sup>nd</sup> Ed. 2004).

<sup>4</sup> GUSTAVO TEPEDINO, HELOISA HELENA BARBOZA E MARIA CELINA BODIN DE MORAES, *CÓDIGO CIVIL INTERPRETADO: CONFORME A CONSTITUIÇÃO DA REPÚBLICA* Vol. II 151 (2006).

<sup>5</sup> ARNOLDO WALD, *CURSO DE DIREITO CIVIL BRASILEIRO: OBRIGAÇÕES E CONTRATOS* 335 (17<sup>th</sup> Ed. 2006). CARLOS EDUARDO NICOLETTI CAMILLO, GLAUBER MORENO TALAVERA, JORGE SHIGUEMITSU FUJITA E LUIZ ANTONIO SCAVONE JR., *COMENTÁRIOS AO CÓDIGO CIVIL*. 497 (2006).

<sup>6</sup> CELSO RIBEIRO BASTOS E EDUARDO AMARAL GURGEL KISS, *CONTRATOS INTERNACIONAIS* 21 (1990).

<sup>7</sup> Eduardo Grebler, *A Convenção das Nações Unidas sobre contratos de venda internacional de mercadorias e o comércio internacional brasileiro*, 144 *Revista de Direito Mercantil, Industrial, Econômico e Financeiro* 59, 60-61 (2006).

possible to affirm the creation of certain additional duties attached to the contracting parties based on the principle of objective good faith,; duty of diligence on the part of the seller in allowing for transport (art. 32,2), duty of information regarding the conditions of contracting insurance (art. 32(3)), duty of adequate packing of the goods (art. 35, 1 and 2, “d”); duty of guarantee (arts. 35.3 and 36.1 and 2) and ; duty of providing information regarding the risk of loss, deterioration or perishing of the goods (art. 68)<sup>8</sup>. Even though the CISG foresees the possibility of the contracting parties to exclude or modify the application of its text, the commercial practice seems to prefer to adopt clearer rules of risks transfer, such as those proposed by ICC, for instance.

Together with the Vienna Convention, the *Incoterms* appear as viable and useful instruments for regulation of the transfer of risk in international purchase and sales contracts<sup>9</sup> in a more detailed<sup>10</sup> and complementary way<sup>11</sup>.

### 3. Incoterms

“Incoterms” is otherwise known as International Commercial Terms. They are standard contractual conditions<sup>12</sup> for international trade. They refer to international purchase and sale contracts<sup>13</sup> in which, in the absence of specific regulation, identification of the time of risk transfer (and therefore costs) in regard to the goods, is indispensable. The level of details provided by Incoterms, in definition of the time at which risk transfer occurs, ends up being extremely practical and would result in avoiding faults in understanding<sup>14</sup>. That task was carried out by the International Chamber of Commerce of Paris (ICC) which published the first version in 1936 (with later alterations in 1953, 1967, 1976, 1980, 1990, 2000 and 2010). Such initiative conforms to a certain international trend for uniformity of contractual rules<sup>15</sup> and would have the purpose of facilitating interpretation of business conditions.

Incoterms binding power arise from the exercise of individual autonomy<sup>16</sup>, even though its “authority” is highly recognized within international trade. Pinheiro, for instance, argues that since *Incoterms* are the assumed usage of the international commerce, it should have mandatory application (by the provisions in art. 9 of the CISG)<sup>17</sup>. On the other hand, it should also be remembered that the ICC guide states that one should voluntarily submit to the *Incoterms*.

*Incoterms* could also be understood as price clauses<sup>18</sup>, but others consider that since *Incoterms* regulate not only the cost of the goods, but also responsibilities (transport, insurance, licenses and customs clearance, for instance), its main function was risk transfer<sup>19</sup>.

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<sup>8</sup> MARTINS COSTA, *supra* note 1, at 175-176.

<sup>9</sup> FERNANDO NETTO BOITEUX, *CONTRATOS MERCANTIS* 73 (2001).

<sup>10</sup> Patrícia Bezerra de M. Galindo da Fonseca, *Anotações pertinentes à regulamentação sobre transmissão de risco: Convenção da ONU de 1980, Incoterms e Código Civil brasileiro*, 139 *Revista de Informação Legislativa* 39, 48 (1998).

<sup>11</sup> ENRIQUE GUARDIOLA SACARRERA, *LA COMPRAVENTA INTERNACIONAL: IMPORTACIONES Y EXPORTACIONES* 127. See also: Neil Gary Oberman, *Transfer of risk from seller to buyer in international commercial contracts: a comparative analysis of risk allocation under the CISG, UCC and Incoterms* (<http://www.cisg.law.pace.edu/cisg/thesis/Oberman.html>). YVES DERAIS, JACQUES GHESTIN, *LA CONVENTION DE VIENNE SUR LA VENTE INTERNATIONALE ET LES INCOTERMS: ACTES DU COLLOQUE DES 1ER ET 2 DECEMBRE 1989*, 164-169 (1990).

<sup>12</sup> DERAIS, GHESTIN, *supra* note 11, at 39. ANTOINE KASSIS, *THEORIE GENERALE DES USAGES DU COMMERCE: DROIT COMPARE, CONTRATS ET ARBITRAGE INTERNATIONAUX*, *LEX MERCATORIA* 274 (1984).

<sup>13</sup> FONSECA, *supra* note 10, at 47.

<sup>14</sup> OBERMAN, *supra* note 11.

<sup>15</sup> MARTINS COSTA, *supra* note 1, at 167.

<sup>16</sup> WALD, *supra* note 5, at 370; BASTOS, KISS, *supra* note 6, at 21; Celso Barbi Filho, *Contrato de compra e venda internacional: abordagem simplificada de seus principais aspectos jurídicos*, 25 *Revista do Curso de Direito da Universidade Federal de Uberlândia* 15, 30 (1996); ANTONIO CARLOS RODRIGUES DO AMARAL, *DIREITO DO COMÉRCIO INTERNACIONAL: ASPECTOS FUNDAMENTAIS* 241 (2004); LUÍS DE LIMA PINHEIRO, *ESTUDOS DE DIREITO CIVIL, DIREITO COMERCIAL E DIREITO COMERCIAL INTERNACIONAL* 317 (2006); DERAIS, GHESTIN, *supra* note 11, at 38-39; Maria Luiza Machado Granziera, *Incoterms*. In *CONTRATOS INTERNACIONAIS* 147, 153 (João Grandino Rodas Coord. 2<sup>nd</sup> Ed. 1995).

<sup>17</sup> PINHEIRO, *supra* note 16, at 319.

<sup>18</sup> GRANZIERA, *supra* note 16, at 156).

Moreover, it may also be perceived as a quite simple way of dealing with the responsibility for risks. In Brazilian law, the legal provisions concerning the risks applicable to the deliverable objects are not of public order and, therefore, may be the object of negotiation between the contracting parties<sup>20</sup>. In addition, *Incoterms* would serve as a common (uniform) definition<sup>21</sup> of the most usual business conditions in the international trade, avoiding doubts<sup>22</sup> and repetitions<sup>23</sup>. Some authors identify the genesis of *Incoterms* with *lex mercatoria*, which include consuetudinary international law<sup>24</sup>. Grebler (1992), for example, expressly declares them as examples of the application of the *lex mercatoria*.<sup>25</sup>

The idea itself of *Incoterms*, however, may appear paradoxical: if it promotes the typical dynamic nature of trade, on the other hand, its repeated use could end up halting negotiating activity. That is the reason for which the contracting of adaptations is ever more common (for example, EXW loaded or CIF unloaded)<sup>26</sup>. This kind of situation is even more unusual since *Incoterms* do not foresee the possibility of such adaptations. One could highlight the complete inadequacy, at least for those that see *Incoterms* in a pure form, when they are used in relation to national contracts or even apart from sales.

The adaptations, however, have become more and more common and, in principle, would have been put aside by ICC itself when it established that the objective of *Incoterms* would be “to provide a set of international rules for interpretation of the commercial terms most commonly used in foreign trade”<sup>27</sup>. Part of the doctrine precisely highlights its international nature<sup>28</sup>. It is interesting to note, however, that ICC itself recognizes the phenomenon of internal use of *Incoterms*<sup>29</sup>, a fact actually expressly defended by some authors<sup>30</sup>.

The fact is, however, that such adaptations have occurred<sup>31</sup> and that they will need a definition on the part of doctrine and jurisprudence. In this sense, one must highlight the initiative of adaptation (linguistic-operational) of *Incoterms* to electronic commerce<sup>32</sup>.

Before advancing to the conclusions of the jurisprudential research, it is noteworthy that despite the time and topographical limits presented, the great majority of the Brazilian cases analyzed involved FOB and CIF clauses. It is not excessive, however, to remember that these two types of negotiating conditions are not the only *Incoterms* used in Brazilian practice, although they are the most common.

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<sup>19</sup> DERAIS, GHESTIN, *supra* note 11, at 39. PINHEIRO, *supra* note 16, at 320. FONSECA, *supra* note 10, at 47.

<sup>20</sup> GOMES, *supra* note 2, at 271; CARLOS ROBERTO GONÇALVES, DIREITO CIVIL BRASILEIRO: CONTRATOS E ATOS UNILATERAIS 206 (2004); WALD, *supra* note 5, at 334; FÁBIO ULHOA COELHO, MANUAL DE DIREITO COMERCIAL 412 (9<sup>th</sup> Ed. 1997); PAULO LUIZ NETTO LÓBO, COMENTÁRIOS AO CÓDIGO CIVIL: PARTE ESPECIAL, DAS VÁRIAS ESPÉCIES DE CONTRATOS Vol. 6, 74 (2003).

<sup>21</sup> Fran Martins, *O contrato de compra e venda internacional*, 33 Revista de Direito Mercantil, Industrial, Econômico e Financeiro 25, 33 (1979); IRINEU STRENGER, CONTRATOS INTERNACIONAIS DO COMÉRCIO 282 (4<sup>th</sup> Ed. 2003).

<sup>22</sup> Bernardo Prado da Camara, *O contrato de compra e venda internacional de bens*. 27 Revista de Direito Privado 07, 19 (2006); BARBI, *supra* note 16, at 30; ANTÔNIO MÁRCIO DA CUNHA GUIMARÃES, GERALDO JOSÉ GUIMARÃES DA SILVA, MANUAL DE DIREITO DO COMÉRCIO INTERNACIONAL: CONTRATO DE CÂMBIO 251 (1996); AMARAL, *supra* note 16, at 267; STRENGER, *supra* note 21, at 284-285.

<sup>23</sup> SÍLVIO DE SALVO VENOSA, DIREITO CIVIL: CONTRATOS EM ESPÉCIE Vol. III, 74-75 (5<sup>th</sup> 2005).

<sup>24</sup> BOITEUX, *supra* note 9, at 34; GONÇALVES, *supra* note 20, at 193; VENOSA, *supra* note 23, at 74-75; FILALI OSMAN, LES PRINCIPES GENERAUX DE LA LEX MERCATORIA: CONTRIBUTION A L'ETUDE D'UN ORDRE JURIDIQUE ANATIONAL 280-281 (1992).

<sup>25</sup> Eduardo Grebler, *O contrato internacional no Direito de empresa*, 85 Revista de Direito Mercantil 22, 27 (1992).

<sup>26</sup> Angelo Luiz Lunardi, *Incoterms 2000 e outras condições de venda* ([www.aduaneiras.com.br/noticias/semfronteiras/default.asp?m=2&artigoId=366](http://www.aduaneiras.com.br/noticias/semfronteiras/default.asp?m=2&artigoId=366)).

<sup>27</sup> CCI, *INCOTERMS* – 2000 11 (2004).

<sup>28</sup> Paulo Caliendo, *Incoterms, cláusulas padronizadas de comércio internacional* 1 Revista da Faculdade de Direito Ritter dos Reis 119, 122 (1998); Monica. Eghrari Goulart, *A Convenção de Viena e os Incoterms* 856 Revista dos Tribunais 67, 73 (2007).

<sup>29</sup> CCI, *supra* note 27, at 12.

<sup>30</sup> PINHEIRO, *supra* note 16, at 317.

<sup>31</sup> EMMANUEL JOLIVET, LES *INCOTERMS*: ETUDE D'UNE NORME DU COMMERCE INTERNATIONAL 375 (2003).

<sup>32</sup> Arjan Foekens, Andreas Mitrakas, Yao-Hua Tan, *Facilitating International Electronic Commerce by formalizing the Incoterms*. (<http://www2.computer.org/portal/web/csdl/abs/proceedings/hicss/1997/7734/04/7734040459abs.htm>).

The FOB condition means “free on board” or, in other words, that the seller delivers the goods when they pass over the gunwale of the ship at the port of shipment (in other words, cleared). As of this point, all the costs and risks pass to the buyer. This clause, in accordance with the ruling of *Incoterms*, would be for exclusive use of sea or waterway transport. For highway transport, the recommended clause would be FCA. The term **FOB Stowed** (which appears in one of the cases heard by the Superior Court of Justice) is not an ICC standard, but a variable that may present questions regarding to the extension of the obligation of the seller: if they involve only the risk or the cost, depending on the fine detailing of the contracting parties<sup>33</sup>; for this reason it is not recommended.

The CIF clause (cost, insurance and freight), for its part, means that the seller delivers the goods when they pass over the gunwale of the ship at the port of shipment (in other words, cleared). It differs from the FOB clause to the extent that the costs of transport and insurance (minimum coverage) are also of the seller up to the port of destination. This clause, in accordance with ruling of *Incoterms*, would be for exclusive use of sea or waterway transport. For highway transport, the recommended clause would be CIP. Some operational difficulties exist, for instance, by Brazilian law there is the obligation of contracting an insurer for international transport of imported goods.

#### **4. Incoterms in the view of the Courts: international cases**

Moving beyond the conceptual delimitation of the theme, it is necessary to understand how Brazilian Courts have approached the subject of this article. The first analysis of the researched cases, however, allows the presentation of an initial distinction: the Brazilian jurisprudence has debated the application/interpretation of *Incoterms* in cases involving international and internal contracts.

Such a distinction is pertinent since *Incoterms*, as the denomination itself translates, would not initially serve for internal contracts. It may be observed, however, that this initial limitation has been overcome by contractual liberty.

As can be observed from the brief report that follows regarding each case, Brazilian Courts have made use of *Incoterms* in a relatively extensive way. In other words, those conditions would serve not only for composition of price (therefore as price clauses) but likewise for definition of responsibility for loss of goods. Certain liberties, nevertheless, are taken; references to *Incoterms* are very rare, i.e., CIF and FOB clauses are used through their own concepts, without reference to the system suggested by ICC. Cases that seek to lay a foundation for the binding nature of those conditions are also rare. This latter observation, for example, allows us to affirm that Brazilian jurisprudence fails to question the possibility of such clauses being incorporated in internal contracts, nor that their obligatory nature are certain. The adaptations made by the party also do not appear to attract the attention of the judge, who looks the same way at an aeronautical or highway FOB clause as he would do at any other contract involving sea transport.

##### *4.1 Brazilian Superior Court of Justice.*

A first case debated by the Superior Court of Justice that is worth examining is *Appeal (Recurso Especial) no. 194.117-SP*. It dealt with a case involving commercial litigation between representatives of the importer (SAB Trading) and the exporter (Usina Santa Bárbara) on the supposed non-payment of exportation expenses (14,000 metric tons of granulated refined sugar under the condition of FOB Stowed). Summarizing very briefly, the exporter requested the representative to advance payment of the shipping costs of the product, promising to reimburse it when the payment for the export was made. Exportation, however, was frustrated by fiscal demands, which gave motive to the exporter to deny reimbursement of the expenses. The Court understood that

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<sup>33</sup> CCI, *supra* note 27, at 25-26.

there is no intent to deny reimbursement of the representative since it would not be obliged in the terms of the contract (in accordance with the FOB clause, the seller would be responsible for those expenses), nor would it be confused with the buyer. Another interesting case was that discussed in the *Appeal (Agravo regimental) no. 136.065 between Contrec Comércio de Importação e Exportação Ltda and Lloyd Aéreo Boliviano*. The Court understood that the existence of the FOB clause would impede the possible pretension of indemnification of the buyer (Contrec) since the expenses after loading of the goods would be under its responsibility (including transport). The exceptional aspect to this case is the use of the FOB clause in an air transport contract.

#### *4.2 Paraná Court of Justice.*

The Parana's Court of Justice, for its part, discussed a case involving *Alcan Alumínio do Brasil Ltda. and Transportadora Alexandra do Brasil Ltda.* in which the latter laid claim to the payment of diverse freight undertaken to Paraguay which should have been paid at the destination, but ended up not being paid. The defense of Alcan alleged that the goods had been imported under the CIF condition (in other words, with freight included), while the carrier argued that the transport condition was FOB (as well as the exporter assuming the condition of co-obligor through contractual clause). The Court understood that there was a certain documental contradiction for although normally the contracting had been under FOB condition, some had been undertaken under the CIF condition. Thus, seeking refuge in international uses,<sup>34</sup> it maintained the sentence that convicted Alcan, basing itself on the solidarity clause (foreseen in the general conditions of the transport contract) and on the "common rule" ("the most logical" in international trade) which foresees the payment of freight by the importer or receiver of the goods (FOB). It is interesting to consider that the position of the court allows one to affirm that if there were not in the contracting of the solidarity clause, only the importer would be responsible for payment of the freight (Appeal [Apelação Cível] no. 167.032-0). In this case there is no recourse to the regulation of *Incoterms*, in addition to being a case involving highway transport.

Another case examined involved responsibility for damages caused by mistaken delivery of goods (*Appeal [Apelação Cível] no. 476.608-9*) in which Laminort Indústria e Comércio de Lâminas Ltda intended to be compensated by the Companhia Libra de Navegação due to damages stemming from lack of observance of the documentary collection procedure. The Court held that as Laminort (exporter) did not had any contractual bond to the carrier (due to the FOB clause), it could not intend to impute to it possible delay in payment for the exported products. A point worth highlighting in this decision is that the Court sought refuge in the regulation of *INCOTERMS* (2000), especially in the meaning of the FOB clause; in other precedents of the Court (2005) and in precedents of comparative law (even though not regarding the FOB clause) to pronounce the decision.

#### *4.3 Rio Grande do Sul Court of Justice.*

A situation very similar to the previous case was decided in the Appeal (*Apelação cível*) no. 70011128089 of the Rio Grande do Sul's Court of Justice which involved Ermisa S/A and Santa Clara Indústria e Comércio, Beneficiamento e Exportação de Cereais Ltda. Ermisa claimed the collection from Santa Clara of the values in reference to freight under the argument that Santa Clara assumed, solidarity (a clause that would appear in the general conditions), responsibility for the payment of freight. The Court understood, on the other hand, that the expenses on the transport contract would be of the sender (art. 196 of the old Commercial Code) and that, in the absence of FOB clause, collection from the importer could not be claimed.

The clause of passive solidarity was rejected since the importer did not give his consent. This is a highway transport contract, whose solution does not indicate reference to the regulation of *Incoterms*.

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<sup>34</sup>("The best manner (...) of interpreting commercial law, especially in dealing with international relations"),

#### *4.4 Rio de Janeiro Court of Justice.*

The Rio de Janeiro's Court of Justice discussed the meaning of CIF clause in an international purchase and sales contract for garlic in which impugnation of the amount charged was claimed since it included the price of freight. The Court understood that when CIF clause is present, the selling company would assume the cost of transport and, consequently the price of the product would increase, the reason for which it judged valid the request for collection of transport expenses (*Appeal [Apelação cível] no. 54456/2007*). This judgment is relatively confusing, but if understanding serves, the court authorized reimbursement of the freight paid by whoever was responsible for its disbursement.

Another case judged by the Rio de Janeiro Court involved the discussion regarding the quality of goods (candles) imported on a regular basis. The discussion was as to whether the quality of a certain lot was inferior to the previous lots or not and, consequently, regarding compensation for damages caused. The supply report maintained between the parties was established under FOB conditions. The Court held that the exporter was responsible for the damages caused and that the quality of the product would not have varied in accordance with the storage of the product, therefore removing application of FOB clause to this concrete case due to the characteristics of the product sent (*Appeal [Apelação Cível] no. 49777*).

In another case, responsibility for the costs arising from demurrage was discussed. The Court held that in contracts with FOB clause, responsibility for such costs and for customs clearance would be assumed by the importer because it granted the demand for compensation brought about by the carrier. It is interesting to note that the decision makes reference to the "international secular uses and customs" to justify the binding nature of said clause (*Appeal [Apelação Cível] nº 16249*).

#### *4.5 Other courts.*

Another interesting case is the discussion presented in an Appeal [*Apelação Cível] no. 40.112* from the Santa Catarina's Court of Justice. It dealt with a case involving the *Empresa de Navegação Mambisa and Comércio e Indústrias Brasileiras Coimbra S/A* regarding possible compensation for damages caused by an accident that occurred at the time of loading of the product (soybeans) destined to Cuba. The stowage had been undertaken by agency of Coimbra S/A and it was responsible for spilling part of the cargo which, in face of the weather conditions, has compromise the quality of the product (which later was not observed). The captain of the ship undertook the defeasance on the bill of lading, which was immediately refused by Coimbra S/A which claimed compensation for delay in release of the "clean" bill of lading. As the contract, foresaw the F.I.O clause (like the FAS clause, the cargo is made available along the broadside of the ship), responsibility for its loading would be that of the ship owner. The Santa Catarina's Court of Justice held that the shipping company would be responsible for compensation, especially after observing the existence of said clause and confession that the accident occurred within the ship. In addition, it ruled that there would be legal responsibility for the carrier. In this case the reference to the regulation of *Incoterms* (1953!) is only indirect.

Another case involved the discussion carried out in the Appeal [*Apelação Cível] no. 45.753* of the Court of Justice of Santa Catarina. It dealt with a suit in which Dalcelis Indústria e Comércio de Malhas Ltda. claimed declaration of the non-existence of a supposed debt arising from purchase and sale of dyes. According to its argumentation, it had quoted the value of the product and was surprised by the entry of protest of the document months later. The alleged creditor presented rebuttal and cross complaint. He claimed collection of the value of the sale, upholding the existence of an import permit and the forwarding of the respective bills of lading. The contract had been made under FOB condition, the reason for which the responsibility of the creditor would cease at the time at which the product was placed on board the ship. The Court understood that the existence of the import permit, whose original had been signed by Dalcelis representative, would be sufficient proof of the existence of the purchase and sales contract. In this case, there is no reference to the regulation of *Incoterms*, but only to the meaning of FOB clause given by a dictionary.

Another interesting case involved the discussion regarding the definition of price in an international bid for the acquisition of a medical device. Two bidders filed a suit seeking the annulment of their declassification in the competition because the proposal had not been sufficiently clear (they mentioned the price under CIF condition). The Minas Gerais Court of Justice, as appeal (*Appellate Review [apelação Cível] no. 1.0024.01.586875-5*), considered the administrative decision valid on the basis that the price did not made reference to the responsibility of the seller to assume the expenses on freight, insurance, loading and unloading, etc. up to the establishment of the buyer. It worked under the hypothesis that DDP's<sup>35</sup> condition would be demanded by the public notice.

The FOB clause is also mentioned by the Minas Gerais Court of Justice in the case involving the collection for freight expenses involving litigation between Fundação Minas Gerais and Grimaldi Compagnia di Navigazione (*Appeal [apelação Cível] no. 2.0000.00.512885-4*). The appellant (Fundação Minas) intended to be exonerated from the duty of paying the freight and demurrage of containers in customs warehouse due to refusal in receiving equipment different from that acquired. The Court held that such refusal would not exonerate the buyer from bearing the costs it had assumed due to contracting of FOB clause, but it could be compensated for the losses caused by the seller.

The judgment of the Portugal Superior Court of Justice is also worth highlighting in which Bobinagem de Fios claimed compensation from Companhia Portuguesa de Seguros due to theft of goods exported to England. Exports had been made under CIF condition. In other words, the risk of the seller would be limited to delivery with freight and the insurance paid in benefit of the buyer (the identical content of art. 797 of the Portuguese Civil Code). The insurance, however, was made in the name of the seller itself. The Court held that in this case, CIF clause must be understood as CIP (since the carrier was a highway carrier) and that the fact of the seller having insured the goods in its own name revealed that he assumed the risk of perishing of the goods up to their delivery at the warehouse of the buyer, the reason for which it would be procedurally and materially legitimated in claiming compensation from the insurer. It is to be highlighted that the decision contains express mention of the regulation of *Incoterms* (2000).

## **5. Incoterms in the view of the Courts: national cases**

Brazilian courts also judged cases involving the application of *Incoterms* to internal domestic contracts, especially those that involved highway goods transport. This situation represents an interesting adaptation of their use.

### *5.1 Brazilian Superior Court of Justice.*

In regard to Incoterms, the Superior Court of Justice discussed the questions involving the base of calculation for state taxes - the need for exclusion of the value arising from the transport of salt sold in bulk under CIF condition from the base of calculation of the circulation taxes (Appeal n. 22.283) or of it was possible to crediting the quantity paid as freight (Appeal n. 743.839). Referring to the FOB clause, the Superior Court of Justice ended up with the understanding that it would not have effectiveness before Tax Authorities for exonerating tax responsibility of the seller (Appeals no. 886.695 and 896.045). Note that in all the cases, the clauses were employed for internal domestic highway transport contracts.

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<sup>35</sup> It is a condition rarely used since it bores operational difficulties to exporters: the customs clearance requires the landing of the goods, the brazilian custom's code state's the importer as the taxpayer (Art. 103), and the SISCOMEX system demands a Brazilian fiscal code (CNPJ) to carry out the steps required to import.



### 5.2 *Paraná Court of Justice.*

The Parana's Court of Justice has judged, principally, cases involving FOB clause, normally involving highway transport. In a general way, the application of the meaning FOB given by the regulation of Incoterms has been respected, although reference has not been made to it. It is interesting to note, however, as one may gather from the brief report of the cases, that the discussion has been in regard to the cost of transport (responsibility for payment of freight, stays, etc.) and not, strictly speaking on transfer of risk on the goods.

The case examined in the Appeal n. 339.494-3 may be worthwhile mentioning. It dealt with the controversy involving Expresso Araçatuba Ltda and Indústria e Comércio Hidromar Ltda regarding responsibility for the costs arising from payment of the daily charges for goods remaining in Customs Facilities of Uruguaiiana, in Rio Grande do Sul, due to fiscal irregularities. The Court understood that due to the existence of FOB clause, responsibility for freight and insurance would fall completely upon the buyer and not on the seller, since delivery of the goods to the carrier would be equivalent to tradition. Precedents from the same court (1998) and from the Superior Court of Justice (1997 and 2005) were cited.

Another case was debated in the Appeal n. 142.438-6 of the same Court. In this case, Singer do Brasil Indústria e Comércio Ltda promoted the collection of credit arising from sales made to Topmaq Comércio de Máquinas de Costura e Representações Comerciais Ltda. The latter wanted to reduce the conviction alleging the costs of delivery of the goods were not their responsibility. The trial court judge considered that under FOB condition (shown by the invoices and testimony), the removal of the goods and the costs of transport would be the responsibility of the debtor. This would be the typical effect of EXW clause, and not, strictly speaking, of the FOB clause. The Court, for its part, interpreted the FOB clause and held that once the goods had been delivered to the carrier (a fact proven in the records), the responsibility for the costs and insurance would come to be that of the buyer, the reason for which it maintained the value of the conviction. In this case, there is no reference to the regulation of Incoterms, as well as dealing with a case involving highway transport.

Another case involving responsibility for the payment of freight was judged in the Appeal n. 435.249-4 in which Terra Agro Sul Comércio de Insumos Ltda claimed compensation from Nova Guaíra Transportes Ltda due to undue charges. According to Terra Agro Sul, she had acquired from third parties certain supplies that would be delivered to her main facilities. This acquisition had been made under CIF condition, with the cost of freight borne by the seller (third party). Through error, there was the issuance of an undue charge slip in the name of Terra Agro, which was forwarded to collection. Without evaluating the merit of the clause, the Court understood that there was no way to demand that the carrier would know about the condition agreed upon by the contracting parties and that the illicit act would not be imputable to it.

A separate case was that judged in the Appeal n. 249.820-4, involving Mercantil Ferragens Riflor Ltda and ESAB S/A and dealt with the delivery or lack thereof of goods. Riflor had acquired goods from ESAB that had not been delivered. In its defence, ESAB alleged that the sales occurred, but that the transport of the goods had remained under the responsibility of Riflor (who was to have contracted the carrier) due to FOB condition of the contract. Once the goods were delivered to the carrier, its responsibility ended. The Court understood that the sale, the delivery of the goods to the carrier and FOB condition (mentioned in the invoice) were proven and as such, there was no responsibility of the seller for delivery of the products.

Finally it may be mentioned that in another case, an FOB clause is simply mentioned as a price criteria of machinery without its nature having been relevant in the solution of the suit (Appeal n. 298.405-8). A case should also be mentioned in which the CIF clause was discussed as a criteria for definition of the value of storage at the Container Terminal of the Port of Paranaguá through the lack of payment of taxes (Appeal n. 402.216-4).

*5.3 Rio Grande do Sul Court of Justice.*

The Court also analyzed the question involving the CIF clause as the parameter for definition of the price of storage of imported goods (Appeal no. 70017159781).

Regarding the FOB clause, the Court of Justice debated cases involving the definition of its internal competence for judgment (*Appels ns. 70026242636, 70024156473 and 70024736910*). In the tax area, it discussed a case in which the exclusion of the circulations tax on FOB sales was claimed, understanding that there was no reason for granting the preventive injunction (Appeal n. 70015320955) and a case in which the exclusion of the tax penalty was claimed since theft of cargo had occurred. The FOB clause was invoked to define the time at which the goods became available to the buyer and therefore assumed tax responsibility (Appeal n. 70011520111).

Cases were likewise discussed involving responsibility for spilling of hydrochloric acid in the vicinity of a residence and the possible responsibility of the seller of the product for the damages caused. In this case the FOB clause was invoked by the seller alleging that once a company purchased and sold to a third party, it would not be responsible for transport of the product. The Court accepted this argumentation and denied the indemnification request. It is interesting to mention that the decision makes reference to judgments of the Court itself and of the Superior Court of Justice (*Appeals ns. 70024207748, 70024104218, 70024051278*).

Another case examined by the Rio Grande do Sul Court was the request for cancellation of the title and compensation for damages caused by undue protest due to mistaken freight charges. In accordance with the records, the seller established a contract under FOB condition with its buyer. The carrier, however, erred in regard to the delivery location and intended to charge the freight difference from the seller. The Court understood that with the existence of FOB clause, responsibility for payment of freight expenses would be of the purchaser which, in case of divergence, must seek reimbursement from the seller and therefore the carrier could not issue notes and protest them in the name of the seller (Appeal n. 70024013930). Another very similar discussion, also involving FOB clause, was judged similarly. In other words, the carrier cannot charge freight from the selling company under the present FOB condition (Appeal no. 70021535356).

A variation of this position was the case in which the Court understood that the drafter of the trade note could not charge the product receiver for the freight since the latter had not participated in the contracting of the transport, even though the purchase and sale had been established under FOB condition (Appeal n. 70017012774).

Another case examined was the discussion regarding the legitimacy for values charging arising from mercantile sale under FOB condition. The buyer failed to fulfil its obligation under the argument that he did not receive the goods. The Court considered that under FOB condition, the risk of the seller goes up to the moment of delivery to the carrier, and from that point on, it is under the responsibility of the buyer, the reason for which charging of the price would be legitimate (Appeal n. 70022251482 and 70017502899). Others cases can be highlighted in the sense that the responsibility for the cost of transport and risk of loss is borne by buyer under FOB condition (*Appeals ns. 70022628440 and 70014875108*). The position may also be stressed that FOB clause is not merely a cost clause, but also involves risk transfer, and that therefore it cannot be presumed in the affirmation that “freight is under the responsibility of the receiver” (Appeal ns. 70012463543 and 70012463576).

Diverging from this position, there is the manifestation of the same Court in the sense that an FOB clause must be interpreted in a reasonable manner so as to protect trust; in other words, the seller should bear the costs of freight since it would be reasonable to suppose that the carrier would only have accepted undertaking transport to another State once it was requested by the seller. Furthermore, it would not be very probable that the buyer from another State had undertaken contracting of the carrier (Appeal n. 71001147008).

Another debate carried out in the Rio Grande do Sul Court of Justice was FOB clause as a criteria for establishment of price of supplies and consequent responsibility of the buyer for culpable delay in removing the acquired product (*Appeal n. 70014281000 and Appeals requesting clarification ns. Emb. 70015668528 and 70015695976*).

#### *5. 4 Rio de Janeiro Court of Justice.*

The Court, on its part, evaluated a case which claimed to demonstrate the existence of FOB clause by means of the affirmation contained in the invoice that the freight expenses would be under the responsibility of the buyer. The question was important because the goods were not delivered and the freight had not been paid. The Court understood that the existence of the condition had not been proven (*Appeal 2007.001.64460*). In a similar sense, the Court understood that the unilateral opposition of FOB clause in an invoice, without previous consensus, does not create the duty of payment of freight for the buyer (*Appeal no. 18.717*).

Another case analyzed the discussion regarding the validity of protested trade notes when the goods had not been delivered. The Court understood that in the face of the existence of FOB clause, the responsibility of the seller would be exhausted upon delivery to the carrier, the reason for which the buyer must pay the price (*Appeal n. 2007.001.57679*). The position of the Court is the same when it analyzed the disappearance of cargo sold under FOB condition (*Appeal no. 2006.001.16499*).

## **6. Conclusion**

Incoterms are still unknown to a large part of Brazilian doctrine and jurisprudence. Even though their foundations, characteristics, purposes and limits are debated by foreign doctrine, reflections of the discussion still appear to be very distant from Brazilian national reality. There is, in fact, a problematic state of affairs which only emphasizes the preoccupying situation of observing the existence of so many conflicts being judged by Brazilian Courts without adequate concern for the theoretical base of the decisions.

In a general way, the Brazilian Courts, when entreated to solve situations involving such conditions, end up giving the customary interpretation to each one of them even if in an intuitive manner. Thus, simpler cases that involve mere discussion regarding composition of the price (duty of indemnification, for example), (un)due protest through responsibility for payment of freight and discussion regarding the time as of which the risk of loss of the goods end up being adequately treated.

Greater complexity, however, is involved when interpreting business dealings that are outside the customary cases: the binding nature of the condition to third parties, intervention of third parties, and the moment of concrete fulfilment of transfer of risk in dealing with non-maritime contracts, for example.

Such situations demand more than mere affirmation that under condition X the responsibility for the loss of goods or for payment of freight is bore by Y. In these cases, discussion regarding the nature of this type of clause or of the manner that the creative alterations made by the parties must be interpreted is indispensable. Clearly, not all the negotiated solutions may be indicated by Incoterms, as emphasized by Oberman<sup>36</sup>, for even though they may be a guide that has been broadly tested in practice, their range is limited. It is at this point that creativity in negotiation needs theoretical support. In this aspect, comparative law may help to set a solution; after all, as the research showed (even if only through a quick glance), there are others confronted with the same phenomenon.

Incoterms are only pertinent to professionals in foreign trade. They play a vital role in daily life, whether through freight paid for a “move” as illustrated in the discussion carried out in the Rio Grande do Sul Court

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<sup>36</sup> OBERMAN, *supra* note 11.

# JICLT

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regarding civil responsibility of the carrier for environmental damages or through discussion regarding establishment of the price of certain goods (up to the limits of public invitation to bid, for example).

It is, therefore, within this perspective that a new role for comparative contractual law is proposed: from mere curiosity to promoter of creativity in negotiating supported by deepened theoretical research. The truth, whether we like it or not, is that we need to find comparative solutions to problems that transcend<sup>37</sup> the traditional concerns of Brazilian law. This is the role that the contemporary operator must take on.

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<sup>37</sup> "Le recours généralisé aux *Incoterms* dans les ventes commerciales internationales et la réception de ces termes dans les droits nationaux sont alors déterminants d'une positivité juridique dont le respect emporte la création d'un usage d'origine internationale transcendant les divergences communément observées entre les systèmes dits de « droit civil » et de « common law ». " (JOLIVET, *supra* note 31, at 428).