TRANSFER OF CONTRACTUAL RISK AND INCOTERMS: brief analysis of their application by Brazilian jurisprudence[1]

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"What is most revolting to me in mathematics is its practical applications." (Mario Quintana)

SUMMARY: I. IT IS ALWAYS SAFE TO LEARN, EVEN FROM OUR ENEMIES; II. TRANSFER OF RISK AND BRAZILILAN CONTRACTUAL LAW: A BRIEF APPROACH; III. INCOTERMS: VERY BRIEF APPROACH; IV. INCOTERMS IN THE VIEW OF THE COURTS: INTERNATIONAL CASES; V. INCOTERMS IN THE VIEW OF THE COURTS: NATIONAL CASES; VI. CONCLUDING NOTES; VII. BIBLIOGRAPHICAL REFERENCES.

ABSTRACT

A fundamental question in contracts that involve the delivery of merchandise is the moment at which the risks inherent to it are transferred. In the international system, business customs consecrated standardized clauses by means of which the contracting parties define the time of that transfer. These are denominated as Incoterms. Typical of international business dealings, they ended up being admitted into Brazilian law not only in relations of a transnational character, but likewise in internal business dealings. Such a transposition, however, is not always explained, although the jurisprudential application of the Incoterms is similar to the international tradition. Understanding it, in short, will help to explain the new role of comparison in Brazilian Law.

KEY WORDS: CONTRACT; PURCHASE AND SALE; INCOTERMS; RISKS.

[1] Published in Kierkegaard, Sylvia M. (Ed.). Private Law: rights, duties & conflicts. LSPI, 2010, p. 733-746.

I. It is always safe to learn, even from our enemies.

Although it is not a novelty in Brazilian law, the concern with the thus designated Incoterms seems restricted, as perhaps is to be expected, to scholars of international trade[2].

Such a statement, with due interdisciplinary self critique, is explained by the traditional way in which Comparative Law is dealt with in the different curricula of Law courses. The role of "filigree", let us say, is not just or true for it.

The deceiving myth has become generalized that the Brazilian legal tradition rests in a certain creative autopoiesis, with the innovative role of the study of foreign institutions and of the possible practically and juridically viable application of its solutions being limited.

The way in which that which is known as Incoterms have been dealt with well exemplifies the criticism of this old way of thinking. By means of its application, one perceives that the "*Legal Workers*", in the fitting expression of Luiz Edson Fachin[3], appropriate the typical figures of the international scene, learning their content and molding them to the typical needs of internal trade[4].

This flexibility which is so typical of private autonomy, made possible by informational integration and functionality of business ties, contributes to a contemporary understanding of the contract, which is fundamental, in the Brazilian case, for administration of the Justice system of the concrete case and social pacification.

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

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[2] For instance it's possible to cite the program's course in International Trade Law developed by Maria Helena Brito for the contest for the post of Associate Professor of Law Faculty of the Universidade Nova de Lisboa (BRITO, Maria Helena. Direito do Comércio Internacional. Coimbra: Almedina, 2004, p. 170-171).

[3] FACHIN, Luiz Edson. Quebra de Confiança. In Folha de São Paulo, São Paulo, 06 de fevereiro de 1999, Caderno 3, p. 2.

[4] MARTINS COSTA, Judith. Os princípios informadores do contrato de compra e venda internacional na convenção de Viena de 1980. *In* CASELLA, Paulo Borba (Coord.). Contratos internacionais e Direito econômico no MERCOSUL: após o término do período de transição. São Paulo: LTr, 1996, p. 164.

For this purpose, research was formulated of the most recent decisions (made from 2006 to 2008) of three important state courts (Court of Justice of Paraná, Court of Justice of Rio Grande do Sul and Court of Justice of Rio de Janeiro) and of the Superior Court of Justice, even though a few other cases outside of the limits mentioned are examined. The objective of this limitation is to show, in different scenarios, the way that the Incoterms are taken on by current jurisprudence. In this case, the States of Parana, Rio de Janeiro and Rio Grande do Sul are mentioned as important exporting centers and, therefore, with a great flow from their ports.

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

II. Transfer of risk and Brazilian contractual law: a brief approach.

One of the fundamental questions in contracts that involve the delivery of a movable is exactly the time at which the risks inherent to it are transferred. This point is especially important because in the Brazilian system, it would coincide with the transfer of ownership and, assuredly with the fulfillment of obligation and consequent exoneration of the debtor. A great complexity comes into play when, to make delivery effective, transport of the object becomes necessary.

Moreover, an interesting fact to be taken into consideration is the double contractual unification brought about by the civil codification of 2002: the same regulation serves for internal and international contracts and the same regulation for contracts undertaken without business purposes and those for a clear business purpose. While this latter “unification” has influenced the interpretation of business dealings, the former has imposed greater concern on contracting parties with the legislation applicable to the contract (when it is not Brazilian) and its submission or not to international conventions.

Taking this into consideration comes to be extremely important for understanding not only the system of transfer of risks within the Brazilian juridical order, but also, the most routine provisions of international business traffic.

We begin with a brief approach to Brazilian rulings. According to our legislation, in the absence of provisions regarding transfer of risk, they will be under

the responsibility of the seller until tradition that would occur at the location in which the object is found, unless agreed upon to the contrary (arts. 492 and 493 of the Brazilian Civil Code)[5]. Likewise, art. 494 of the Civil Code disposes that, in the event of transport, the risks come to be that of the buyer when demanded by it. In this sense Orlando Gomes states that "In the same way, when the buyer orders the shipment of the object to a diverse place, from the moment it is delivered to the carrier. The delivery is equivalent to transfer of property"[6]

The parties may thus negotiate the location of occurrence of tradition and, along with it, the transmission of the risks inherent to the object. There is, herein, the normative justification for the contracting of clauses by means of which the contracting parties define the transfer of business risks when involving the need for transport of goods[7].

A different question, furthermore, would be the costs involved in the business dealing. That is because in the absence of express provisions from the contracting parties, expenses for tradition would be under the responsibility of the seller (art. 490 of the Civil Code). Nothing more natural, since they would be the expenses

[5] Note, however, that this is not a uniform definition. It is interesting to mention that the repealed Commercial Code provided another rule: the costs and risks would fit the buyer as soon as the seller put the thing available to the purchaser (art. 206). On the other hand, the Portuguese Civil Code, for example, states that the risks are borne by the buyer from the conclusion of contract (art. 796, 1). When the contract involves transportation, the risk is transferred to time of the delivery of goods to the carrier (art. 797). Regarding the latter, Maria Angela Bento Soares and Rui Manuel Moura Ramos expressly advocate the contrary position adopted by the legislation, as it transfers the risk even when the buyer has no control over the goods (SOARES, Maria Ângela Bento; RAMOS, Rui Manuel Moura. Contratos internacionais: compra e venda, cláusulas penais, arbitragem. Coimbra: Almedina, 1986, p. 170-176).

[6] GOMES, Orlando. Contratos, 6. Ed., Rio de Janeiro: Forense, 1977, p. 270. In this sense it is prediction of the Preliminary Draft European Code of Contracts (Art. 46)

[7] Ricardo Luis Lorenzetti points short summary of the international trend on the topic. Drawing on lessons from Sergio Le Pera, he explains that there were four ways to solve the question: 1) a first system that imposes to the buyer the risks on the goods since the finalization of the contract (like the solution adopted by the Vienna Convention in the case of goods sold in transit - art. 68), 2) the second system transfers the risk with the transfer of the domain, even thought without the delivery of the good - (like those adopted by the French Civil Code art. 1138 and several Latin American laws) 3) a third model that combines risk transfer with the transfer of the domain (as adopted by Argentine law - art. 578 Civil Code) and, finally, 4) the more contemporary, which provides that the risks are transferred when the seller put the good available to the buyer, regardless of the transfer of the domain. (LORENZETTI, Ricardo Luis. Tratado de los contratos, 2. Ed., Buenos Aires: Rubinzal-Culzoni editores, 2004. Tomo I, p. 314-315). Similar classification is made by Valioti, but he only refers to three systems (not to mention the fourth type that actually identifies with the third) (VALIOTI, Zoi. Passing of risk in international sale contracts: a comparative examination of the rules on risk under the United Nations Convention on contracts for the international sale of goods (Vienna 1980) and Incoterms 2000 http://www.njcl.fi/2_2004/article3.pdf. Acesso em 1° de dezembro de 2008, p. 08-10.).

necessary for performance of the obligation[8]. The revoked Commercial Code, however, inverted such a rule: the expenses on the instrument of sales and transport would be, unless otherwise agreed upon, under the responsibility of the buyer (art. 196).

In this point arises a certain controversy. Tepedino, Barboza and Moraes understand 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)[9]. Arnaldo Wald and Carlos Eduardo Nicoletti Camillo et alli, nevertheless, do not differentiate them and list the same CIF and FOB clauses as examples of the possibility of negotiation of the costs of tradition involved[10]. As of this point arise references to that designated as Incoterms.

In terms of international purchase and sales, on the other hand, the absence of a law immediately applicable to these business dealings demands the capacity for adaptation from the contracting parties and many times the creation of specific conditions for each contract. That is because, as reported by Celso Ribeiro Bastos and Eduardo Kiss, there would not be a single solution to the question of transfer of risk since it would be common that different legislations work with distinct criteria[11].

In short, in these contracts, when the fulfillment of the obligation depends on transport, which is within the normal situation of these business dealings, the problem is in knowing exactly when delivery is considered to be performed, and the risks thus transferred.

Some international Conventions concerned themselves with the regulating of international contracts, such as the International Convention of the Hague in 1955 regarding law applicable to the purchase and sales of corporeal moveable objects;

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[8] In this sense, for instance, is the art. 6.1.11 of the Unidroit Principles. UNIDROIT - Instituto Internacional para a Unificação do Direito Privado. Princípios Relativos aos Contratos Comerciais Internacionais. Roma: Ministério da Justiça de Portugal, 1995, p. 157.

[9] TEPEDINO, Gustavo; BARBOZA, Heloisa Helena; MORAES, Maria Celina Bodin de. Código Civil interpretado: conforme a constituição da República. Rio de Janeiro: Renovar, 2006. Vol. II, p. 151.

[10] WALD, Arnoldo. Curso de Direito Civil Brasileiro: Obrigações e contratos, 17. Ed., São Paulo: Saraiva, 2006, p. 335; CAMILLO, Carlos Eduardo Nicoletti; TALAVERA, Glauber Moreno; FUJITA, Jorge Shiguemitsu; SCAVONE JR., Luiz Antonio (Coord.). Comentários ao Código Civil. São Paulo: RT, 2006, p. 497.

[11] BASTOS, Celso Ribeiro; KISS, Eduardo Amaral Gurgel. Contratos internacionais. São Paulo: Saraiva, 1990, p. 21.

the Uniform Law of Vienna of 1964 (LUVI) regarding purchase and sale of corporeal movable objects[12], but its application did not come to be relevant.

The great international reference regarding the matter is precisely the Vienna Convention regarding the purchase and sale of goods of 1980 (CIVM). Its standardizing relevance for Brazil appears, at first sight, to be indirect. That is because Brazil is not a signer[13], although various countries with which it habitually negotiates are. Thus, its provisions may come to be applied in national territory by way of competent connection (art. 9 of the LICC and art. 1, I, b of the CIVM[14]). 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 delivery of the goods (art. 31). It foresees that "if there is no determination of the place of delivery by the parties and if the hypothesis is not subsumed by paragraphs a [if the contract involves transport] or b [making available to the buyer at the location in which the goods are found] of art. 31, then the seller must make the goods available to the buyer in its establishment (at the time of conclusion of the contract)."[15]

It furthermore establishes that the transfer of risk in the contracts that involve transport occurs when the delivery of the goods to the first Carrier (art. 67). It's the dissociating of the transfer of risks from transfer of ownership[16]. It clarifies that the

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[12] The Uniform Law of Vienna has never entered into force for lack of adherence and, over time, replaced by the CISG. Under the terms of that uniform law, if the contract of sale did not provide transportation, the good should be delivered at the place where the seller had it (art. 19, 23), and the cost of delivery of the thing were to be borne by the seller (art. 90). The transfer of risk would occur with the delivery of the goods (art. 97). (MARTINS, Fran. O contrato de compra e venda internacional. In Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n° 33. São Paulo: RT, jan/mar 1979, p. 28-29).

[13] Eduardo Grebler seems to identify one of the reasons why Brazil has not acceded to the Convention: the certain belief that we should use our own legislation as a paradigm and, consequently, strict international commitment (GREBLER, Eduardo. A Convenção das Nações Unidas sobre contratos de venda internacional de mercadorias e o comércio internacional brasileiro. In Revista de Direito Mercantil, Industrial, Econômico e Financeiro, n° 144, out/dez 2006, p. 60-61).

[14] "(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States: (…) (b) when the rules of private international law lead to the application of the law of a Contracting State."

[15] GOULART, Monica Eghrari. A Convenção de Viena e os Incoterms. In Revista dos Tribunais, Vol. 856. São Paulo: RT, fevereiro de 2007, p. 85.

[16] "Art. 67 (1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk. (2) Nevertheless, the risk does not pass to the buyer until the goods are clearly identified to the contract, whether by markings on the goods, by shipping documents, by notice given to the buyer or otherwise."

loss or deterioration of the object after the transfer of risk does not exonerate the debtor from payment of the price (art. 66). If the goods are in transit, transfer of risk will occur with establishment of the contract (art. 68). For the cases in which this rule is not applicable, the Convention establishes that the transfer of risk would occur upon delivery of the goods to the buyer or when they are available to him (art. 69).

If this ruling were not enough, based on the principle of objective good faith, one of the underlying principles of the Convention, it would be possible to affirm, according to Judith Martins Costa, the creation of certain additional duties attached to the contracting parties. In this sense, one may, for example, provide for the 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); duty of providing information regarding the risk of loss, deterioration or perishing of the goods (art. 68)[17].

The Vienna Convention, however, foresees the possibility of the contracting parties excluding, annulling or modifying the application of parts of it in concrete cases (art. 6). This supplemental character would authorize the convention regarding, for example, the transfer of risks (art. 31, head of the article, for example)[18].

The Convention did not establish specific conditions such as those identified by the ICC, not having done this, according to Valioti, for various reasons: its text is compact, as the terms are mutable, the text could become out-of-date and the ICC would be the most adequate stage for its definition[19].

Thus, commercial practice preferred to adopt clearer rules of transfer of risks, adapting them to the business needs. That way, along with the Vienna Convention, arise the Incoterms, which would appear as viable and useful instruments for regulation of the transfer of risk in international purchase and sales contracts[20] in a

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[17] MARTINS COSTA, Op. cit., p. 175-176.

[18] In this respect, it would be interesting to note that the Incoterms are in harmony with the Convention of Vienna in two senses: in the aforementioned freedom of contracting away from the Convention (Article 6) and in stating that contractors are bound by usage that they undertook and the practices that they have established (art. 9). GOULART, Op. Cit., p. 76-81 e SACARRERA, Enrique Guardiola. La compraventa internacional: importaciones y exportaciones. Barcelona: Bosch, s.d., p. 126-127.

[19] VALIOTI, Zoi. Passing of risk in international sale contracts: a comparative examination of the rules on risk under the United Nations Convention on contracts for the international sale of goods (Vienna 1980) and Incoterms 2000. Disponível em: http://www.njcl.fi/2_2004/article3.pdf. Acesso em 1° de dezembro de 2008, p. 05-06.

[20] BOITEUX, Fernando Netto. Contratos mercantis. São Paulo: Dialética, 2001, p. 73.

more detailed way[21]. The system that arises, therefore, would be complementary between the Convention and the Incoterms[22].

III. Incoterms: very brief approach.

By the abbreviation "Incoterms" should be understood what is otherwise known as International commercial terms. Actually, they are standard contractual conditions for international trade. They refer to international purchase and sale contracts[23] in which, in the absence of specific regulation, identification of the time of transfer of risks (and therefore costs) in regard to the goods, is indispensable. Oberman rightly indicates that the details provided by the Incoterms, in definition of the time at which transfer of risk occurs, ends up being extremely practical and would result in avoiding faults in understanding[24].

This is a task 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 and 2000)[25]. Such initiative would obey a certain international

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[21] FONSECA, Patrícia Bezerra de M. Galindo da. Anotações pertinentes à regulamentação sobre transmissão de risco: Convenção da ONU de 1980, Incoterms e Código Civil brasileiro. In Revista de Informação Legislativa, n°139. Brasília, jul/Set 1998, p. 48.

[22] "La Convención y los INCOTERMS son complementarios, realizando cada cual función que no puede ser cumplida por La outra, lo que permite, vista La sincronización que se aprecia entre ambos, afirmar que estamos avanzando en el camino de la necesaria uniformidad, a nivel mundial, del derecho aplicable a La compra-venta internacional." (SACARRERA, Op. Cit., p. 127). See also: OBERMAN, Neil Gary. 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. On the other hand, Philippe Fouchard when summarizing the work of the Colloquium on the CISG and Incoterms even states that the Convention itself leave open space to complementation, since it considers the usage hierarchly superior (art. 9) and by adopting an inaccurate statement when referring to risk transfer (DERAINS, Yves; GHESTIN, Jacques (Direc.). La convention de Vienne sur la vente internationale et les incoterms: actes du colloque des 1er et 2 décembre 1989. Paris : LGDJ, 1990, p. 164-169).

[23] Some authors perceive the Incoterms as special contracts of sale (MARTINS, Op. Cit., p. 33) or standard contracts (DERAINS; GHESTIN, Op. Cit., p. 39; KASSIS, Antoine. Théorie générale des usages du commerce: droit compare, contrats et arbitrage internationaux, lex mercatoria. Paris : LGDJ, 1984, p. 274). Most of the doctrine, however, understand incoterms as special conditions of sale (FONSECA, Op. Cit., p. 47).

[24] OBERMAN, Neil Gary. 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).

[25] Interesting to note that these reforms were motivated by changes in international trade. Caliendo, for example, commenting on the 1990 version refers to "the increasing use of electronic data interchange (EDI - Eletronic Data Interchange) on international trade" and to the news techniques of transport (roll-on e roll-off). (CALIENDO, Paulo. Incoterms, cláusulas padronizadas de comércio internacional. In Revista da Faculdade de Direito Ritter dos Reis, vol. 1, Porto Alegre, 1998, p. 120).

trend for uniformity of contractual rules[26] and would have the purpose of facilitating interpretation of business conditions.

Its binding power would arise from the exercise of private autonomy[27], although its "authority" is highly recognized within international trade, the reason for which in spite of the innumerable occasions in which there is no specific reference to its regulations, they may serve as rules for interpretation. Luís de Lima Pinheiro, on the other hand, came to defend that due to the provisions in art. 9 of the CIVM, there may be a truly obligatory nature of application of the Incoterms, regardless of willingness, since it is seems that we would be dealing with use observed specifically in a determined sector of international trade[28]. This position is rebutted by Valioti when he states that the ICC in its guide foresaw the need for voluntary submission to the Incoterms and that they are not the only rules that govern international trade, it therefore being fitting to attribute an interpretive function to them[29].

Part of the doctrine is understood as linked to the notion of price (for they would influence its definition) and as such they would be price clauses[30]. Not all accept this position, principally through the fact that the Incoterms regulate not only the cost of the goods, but responsibility for risks[31], for contracting (transport and insurance, for example), for provision of licenses and for customs clearance. It comes to be stated that the main function of the Incoterms resides in the definition of the time at which the risks are transferred[32].

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[26] MARTINS COSTA, Op. Cit., p. 167.

[27] WALD, Op. Cit., p. 370; BASTOS; KISS, Op. cit., p. 21; BARBI FILHO, Celso. Contrato de compra e venda internacional: abordagem simplificada de seus principais aspectos jurídicos. In Revista do Curso de Direito da Universidade Federal de Uberlândia, vol. 25. Uberlândia: Universidade Federal de Uberlândia, dez. 1996, p. 30; CALIENDO, Op. Cit., p. 119; RODRIGUES, Waldemar. Condições internacionais de exportação e importação -INCOTERMS. In DIAS, Reinado; RODRIGUES, Waldemar (Org.). Comércio exterior: teoria e gestão. São Paulo: Atlas, 2004, p. 313; AMARAL, Antonio Carlos Rodrigues do (Coord.). Direito do comércio internacional: aspectos fundamentais. São Paulo: Aduaneiras/Lex, 2004, p. 241; PINHEIRO, Luís de Lima. Estudos de Direito Civil, Direito Comercial e Direito Comercial Internacional. Coimbra: Almedina, 2006, p. 317; DERAINS; GHESTIN, Op. Cit., p. 38-39; GRANZIERA, Maria Luiza Machado. Incoterms. In RODAS, João Grandino (Coord.). Contratos internacionais, 2. Ed.. São Paulo: RT, 1995, p. 153.

[28] PINHEIRO, Op. Cit., p. 319.

[29] VALIOTI, Zoi. Passing of risk in international sale contracts: a comparative examination of the rules on risk under the United Nations Convention on contracts for the international sale of goods (Vienna 1980) and Incoterms 2000 (http://www.njcl.fi/2_2004/article3.pdf).

[30] RODRIGUES, Op. Cit., p. 316. Granziera believes that they would have also the nature of price clauses since "the reference to each word to determine the compositional elements of the price of the goods, but not limited to it since it also defines some other obligations" (GRANZIERA, Op. Cit., p. 156).

[31] PINHEIRO, Op. Cit., p. 320; FONSECA, Op. Cit., p. 47.

[32] DERAINS; GHESTIN, Op. Cit., p. 39.

It may be perceived, on the other hand, that this is a quite simple way of establishing the conventional form for the brocardo res perit domino (transfer of domain, delivery of the object and responsibility for risks)[33]. That is because the provisions concerning the risks applicable to the object to be delivered are not of a public order and, therefore, may be the object of negotiation between the parties[34]. In addition, they would serve as a common (uniform) definition[35] of the of the most usual business conditions in the international trade, avoiding questions[36] and repetitions[37].

Some authors identify its genesis with what is known as the lex mercatoria, which would include consuetudinary international law[38]. Eduardo Grebler, for example, expressly declares them as examples of the application of the lex mercatoria.

> "The lex mercatoria would thus consist of the set of practices adopted in a repeated and uniform way by the economic agents of international trade, among which would be highlighted what is known as model-contracts instituted by professional associations, the general sales conditions, the international commercial terms (Incoterms) and the standards regarding documentary credit from the International Chamber of Commerce of Paris. Such instruments would function, at the same time, as manifestations of the

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[33] MARTINS, Op. Cit., p. 36.

[34] GOMES, Op. cit., p. 271; GONÇALVES, Carlos Roberto. Direito Civil brasileiro: contratos e atos unilaterais. São Paulo: Saraiva, 2004, p. 206; WALD, Op. Cit., p. 334; COELHO, Fábio Ulhoa. Manual de Direito Comercial, 9. Ed. São Paulo: Saraiva, 1997, p. 412; LÔBO, Paulo Luiz Netto. Comentários ao Código Civil: parte especial, das várias espécies de contratos. São Paulo: Saraiva, 2003, Vol. 6, p. 74;

[35] MARTINS, Op. Cit., p. 33; STRENGER, Irineu. Contratos Internacionais do Comércio, 4. Ed., São Paulo: LTr, 2003, p. 282.

[36] CAMARA, Bernardo Prado da. O contrato de compra e venda internacional de bens. In Revista de Direito Privado, n° 27. São Paulo: RT, Jul/Set 2006, p. 19; BARBI, Op. Cit., p. 30; GUIMARÃES, Antônio Márcio da Cunha; SILVA, Geraldo José Guimarães da. Manual de Direito do Comércio Internacional: contrato de câmbio. São Paulo: RT, 1996, p. 251; AMARAL, Op. Cit., p. 267; GOULART, Op. Cit., p. 73; STRENGER, Op. Cit., p. 284-285. It should, however, be noted that the Incoterms are not the only consolidated contractual conditions of international trade. Beside them are widely used the Revised American Foreign Trade Definitions. Although very similar, have substantial differences, for example, the clause FOB with six different meanings (MARTINS, Op. Cit., 34).

[37] VENOSA, Op. Cit., p. 74-75.

[38] BOITEUX, Op. cit., p. 34; GONÇALVES, Op. Cit., p.193; VENOSA, Sílvio de Salvo. Direito Civil: contratos em espécie, 5. Ed., São Paulo: Atlas, 2005, Vol. III, p. 74-75; CALIENDO, Op. Cit., p.123; BAPTISTA, Luiz Olavo. A boa-fé nos contratos internacionais. In Revista de Direito Bancário, do Mercado de Capitais e da Arbitragem, n° 20. São Paulo: RT, abril/junho 2003, p. 24-46; GOULART, Op. Cit., p. 69; ARAUJO, Nadia. A cláusula de hardship nos contratos internacionais e sua regulamentação nos Princípios para os contratos comerciais internacionais do UNIDROIT. In POSENATO, Naiara (Org.). Contratos internacionais: tendências e perspectivas. Ijuí: Editora Unijuí, 2006. p. 322. As of custom coding, and therefore formal source of the Lex mercatoria: OSMAN, Filali. Les príncipes généraux de la lex mercatoria: contribution à l"étude d"un ordre juridique anational. Paris: LGDJ, 1992, p. 280-281.

trend for uniformity of international trade law, overcoming the barriers of national laws to establish a form of supranational law"[39]

Roberto Senise Lisboa, on his part, comes to affirm the existence of a mitigation to the principle of autonomy of will before the proper Law of the contract[40]. Such a position has generated a great deal of controversy: part of the doctrine is opposed to this understanding, while others would not see any reason to fear it[41].

Moreover, it is to be highlighted that the Incoterms are recognized by Brazilian customs legislation[42], citing, for example, Administrative Ruling (Portaria) no. 35/2006 of the Foreign Trade Office (Secretaria de Comércio Exterior) which in the chapter regarding sales conditions establishes: "Art. 192. Any sales conditions practiced in international trade will be accepted in Brazilian exports. The International Commercial Terms (Incoterms) defined by the International Chamber of Commerce may be accessed on the electronic address of this Government Ministry."

The idea itself of the Incoterms, however, may appear paradoxical. That is because if, on the one hand, it promotes the typical dynamic nature of trade, on the other hand, its repeated use may 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)[43].

Such a situation is even more unusual since the Incoterms do not foresee the possibility of such adaptations. This is, once more, contractual freedom adapting the negotiating instruments to the needs of the operators. In this same sense, one may furthermore highlight the complete inadequacy, at least for those that see the Incoterms in a pure form when they are used in relation to internal contracts[44] or even apart from purchase and sales[45].

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[39] GREBLER, Eduardo. O contrato internacional no Direito de empresa. In Revista de Direito Mercantil, nº 85. São Paulo: RT, Janeiro/Março 1992, p. 27.

[40] "A proper Law of international contracts" (LISBOA, Roberto Senise. Manual de Direito Civil: contratos e declarações unilaterais - teoria geral e espécies, 3. Ed., São Paulo: RT, 2005, Vol. 3, p. 298.).

[41] "There is nothing to fear, therefore, the use of rules of the lex mercatoria, since, as the customs and usage, are a source of law of the lower hierarchy. They will not have efficacy against positive law, much less against standards of internal public order. Ignore their existence and growing influence in the field of international legal relations, on the other hand, would deny a fact of reality." (GREBLER, Op. Cit., p. 28)

[42] Circulares n°3.325/2006, 3291/2005, 3264/2004 (already repealed), 3249/2004 (already repealed), all of them stated by the Brazilian Central Bank.

[43] LUNARDI, Angelo Luiz. Incoterms 2000 e outras condições de venda. In www.aduaneiras.com.br/noticias/semfronteiras/default.asp?m=2&artigoid=366.

[44] CALIENDO, Op. Cit., p. 123.

The adaptations, however, have become more and more common and, in principle, would have been put aside by the ICC itself when it established that the objective of the Incoterms would be: "to provide a set of international rules for interpretation of the commercial terms most commonly used in foreign trade"[46]. Part of the doctrine precisely highlights its international nature[47]. It is interesting to note, however, that the ICC itself recognizes the phenomenon of internal use of the Incoterms[48], a fact actually expressly defended by some authors[49].

The fact is, however, that such adaptations have occurred[50] and that they will need definition on the part of doctrine and jurisprudence. In this sense, one must highlight the initiative of adaptation (linguistic-operational) of the Incoterms to electronic commerce[51].

Before we advance to the conclusions of jurisprudential research, it is fitting to highlight that the great majority of the Brazilian cases analyzed, considering the time-topographical limits present to the present research, involve the FOB and CIF clauses, the reason for which a brief explanation of each one of them is necessary. 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.

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 the 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 the ICC standard, but a variable that may present questions in regard to the extension of the obligation of the seller: if they

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[45] See also: www.aduaneiras.com.br/noticias/semfronteiras/default.asp?m=2&artigoid=2451. CALIENDO highlights that only when the obligation is performed by delivery it would be possible of being objects of such clauses, but still, not all international agreements could have them by clause. Their application is limited to international contracts of sale (CALIENDO, Op. Cit., p. 123-124.).

[46] CCI, Incoterms - 2000. São Paulo: Aduaneiras, 2004, p. 11.

[47] CALIENDO, Op. Cit., p. 122; GOULART, Op. Cit., p. 73.

[48] CCI, Op. Cit., p. 12.

[49] PINHEIRO, Op. Cit., p. 317.

[50] JOLIVET, Emmanuel. Les incoterms: étude d"une norme du commerce international. Paris : Litec/FNDE, 2003, p. 375.

[51] FOEKENS, Arjan; MITRAKAS, Andreas; TAN, Yao-Hua. Facilitating International Electronic Commerce by formalizing the Incoterms. http://www2.computer.org/portal/web/csdl/abs/proceedings/hicss/1997/7734/04/7734040459abs.htm.

involve only the risk or the cost, depending on the fine detailing of the contracting parties[52]; for this reason its wording 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, however, 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 the 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 example, the obligation of contracting of a national insurer for international transport of imported goods (Resolution no. 3 of 01/18/1971 of the National Council of Private Insurance (Conselho Nacional de Seguros Privados - CNSP).

IV. Incoterms in the view of the Courts: international cases.

Moving beyond the conceptual delimitation of the theme, understanding of how the Courts have approached the question is necessary. First analysis of the cases identified allows the presentation of an initial distinction: jurisprudence has debated the application/interpretation of the Incoterms in cases involving international business dealings and in cases involving internal business dealings.

Such a distinction is pertinent since the 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.

We understand the approach to jurisprudence in a divisional form (by court) to be useful so as to have greater clarity regarding the possible variations of positions.

As can be observed from the brief report that follows regarding each case, the Brazilian courts have made use of the Incoterms in a relatively extensive way. In other words, said 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 the Incoterms are very rare, that is, the CIF and FOB clauses are used through their own concepts, without reference to the system suggested by the ICC, for example. Cases that seek to lay a foundation

[52] CCI, Incoterms - 2000. São Paulo: Aduaneiras, 2004, p. 25-26.

for the binding nature of said conditions are also rare. This latter observation, for example, allows us to affirm that Brazilian jurisprudence seems not to question the possibility of such clauses being able to be incorporated in international contracts, nor that their obligatory nature is 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 at any other contract involving sea transport.

Superior Court of Justice. A first case debated by the Superior Court of Justice that is worth examining is the Special 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) and 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 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 there would be no motive 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 is that discussed in the Regulatory Appeal (Agravo regimental) no. 136.065 between Contrec Comércio de Importação e Exportação Ltda and Lloyd Aéreo Boliviano regarding the possibility of denouncing judicially the exporter of the products acquired by Contrec. 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.

Court of Justice of Paraná. The Court of Justice of Paraná, 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 ("the best manner (...) of interpreting commercial law, especially in dealing with international relations"), 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 would allow one to affirm that if there were not the contracting of the solidarity clause, only the importer would be responsible for payment of the freight (Appellate Review [Apelação Cível] no. 167.032-0). In this case there is no recourse to the regulation of the Incoterms, in addition to being a case involving highway transport.

Another case examined was that involving responsibility for damages caused by mistaken delivery of goods (Appellate Review [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, in the end, understood that as Laminort (exporter) did not have 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 the 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.

Court of Justice of Rio Grande do Sul. A situation very similar to the previous case was that judged in Appellate Review (apelação cível) no. 70011128089 of the Court of Justice of Rio Grande do Sul 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, solidarily (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 the FOB clause, collection from the importer could not be claimed.

The clause of passive solidarity, for its part, was rejected, since there had not been consent of the importer in said contracting. This is, once more, a highway transport contract, whose solution does not indicate reference to the regulation of the Incoterms.

Court of Justice of Rio de Janeiro. The Court of Justice of Rio de Janeiro discussed the meaning of the 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 the 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 (Appellate Review [Apelação cível] no. 54456/2007). This judgment is relatively confusing, but if understanding serves, the court authorized reimbursement of the freight paid by that which 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, in the end, understood 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 the FOB clause to this concrete case due to the characteristics of the product sent (Appellate Review [Apelação Cível] no. 49777).

In another case, responsibility for the costs arising from demurrage was discussed. The Court understood that there being the contracting of the FOB clause, responsibility for such costs and for customs clearance would be that of the importer, the reason for which 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 (Appellate Review [Apelação Cível] n° 16249).

Other courts. Another interesting case is the discussion presented in Appellate Review [Apelação Cível] no. 40.112 of the Court of Justice of Santa Catarina. 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 for Cuba. The stowage had been undertaken by agency of Coimbra S/A and it was responsible for spilling of part of the cargo which, in face of the weather conditions, was liable to compromise the quality of the product (which later was not observed). The captain of the ship undertook 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 which was object of the controversy 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 Court of Justice of Santa Catarina understood 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 understood that there would be legal responsibility of the carrier. In this case the reference to the regulation of the Incoterms (1953!) is only indirect.

Another case involved the discussion carried out in the Appellate Review [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, months later, was surprised by the entry of protest of the document. The supposed creditor, for its part, presented rebuttal and cross complaint and 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 contracting had been made under the 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 the 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 the Incoterms, but only to the meaning of the 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 the CIF condition). The Court of Justice of Minas Gerais, 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 make 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 certainly worked under the hypothesis that the DDP[53] condition would that which is demanded by the public notice.

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

The judgment of the Superior Court of Justice of Portugal is also worth highlighting in which Bobinagem de Fios claimed compensation from the Companhia Portuguesa de Seguros due to theft of goods exported to England. Exports had been made under the 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 understood that in this case, the 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 it assumed the risk of perishing of the goods up to their delivery at the warehouse of

[53] It is a condition rarely used since it bores operational difficulties to exporters: the custom´s clearance requires the landing of the goods (RODRIGUES, Op., P. 327), 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.

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 the Incoterms (2000).

V. 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 transport of goods. This situation, in itself, would already represent an interesting adaptation of their use.

Superior Court of Justice. In regard to the Incoterms, the Superior Court of Justice has discussed, especially, questions involving the base of calculation for state taxes. Thus, for example, it discussed the need for exclusion of the value arising from the transport of salt sold in bulk under the CIF condition from the base of calculation of the ICMS of Rio Grande do Norte (Appeal in writ of mandamus no. 22.283) or of crediting the quantity paid as freight (Special Appeal no. 743.839). In that which refers to the FOB clause, the Superior Court of Justice ended up consolidating the understanding that it would not have effectiveness before Tax Authorities for exonerating tax responsibility of the seller (Special appeals no. 886.695 and 896.045). Note that in all cases, the clauses were employed for internal domestic highway transport contracts.

Court of Justice of Paraná. The Court of Justice of Parana has judged, principally, cases involving the FOB clause, normally involving highway transport. In a general way, the application of the meaning FOB given by the regulation of the 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 Appellate Review (Apelação Cível) no. 339.494-3 may be mentioned. 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 the Customs Facilities of

Uruguaiana, in Rio Grande do Sul, due to fiscal irregularities. The Court understood that, due to the existence of the 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 that debated in the Appellate Review [Apelação Cível] no. 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 intended, as appeal, reduction of the conviction alleging the costs of delivery of the goods were not its responsibility. The trial court judge considered that under the 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, however, would be the typical effect of the EXW clause, and not, strictly speaking, of the FOB clause. The Court, for its part, understood, interpreting the FOB clause, 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 the Incoterms, as well as dealing with a case involving highway transport.

Another case involving responsibility for the payment of freight was judged in the Appellate Review (Apelação Cível) no. 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, it had acquired from third parties certain supplies that would be delivered to its main facilities. This acquisition was to have been made under the CIF condition, with the cost of freight borne by the seller (third party). Through error, there was the issuing of a charge slip in the name of Terra Agro which, in spite of being undue, was forwarded to collection. Without evaluating the merit of the clause, the Court understood that 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 Appellate Review (Apelação Cível) no. 249.820-4, involving Mercantil Ferragens Riflor Ltda and ESAB S/A whose object was the discussion of delivery or lack thereof of goods. Riflor had acquired goods

from ESAB that had not been delivered. In its defense, 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 the FOB condition of the contract. That way, 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 the FOB condition (mentioned in the invoice) were proven, the reasons for which it understood there was no responsibility of the seller for delivery of the products.

Finally it may be mentioned that in another case the FOB clause is simply mentioned as a price criteria of machinery, without its nature having been relevant in the solution of the suit (Appellate Review [Apelação Cível] no. Ap. 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 (Interlocutory Appeal [Agravo de Instrumento] no. 402.216-4).

Court of Justice of Rio Grande do Sul (TJRS). The TJRS 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 of Rio Grande do Sul debated cases involving the definition of its internal competence for judgment (Appellate Reviews [Apelações Cíveis] no. Ap. 70026242636, 70024156473 and 70024736910). In the tax area, it discussed a case in which the exclusion of the ICMS on FOB Sales was claimed, understanding that there was no reason for granting the preventive injunction (Appellate Review [Apelação Cível] no. 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 (Appellate Review [Apelação Cível] no. 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 established mercantile purchase and sale with a third party, under that condition, it would not be responsible for transport of the product. The chamber accepted this argumentation and denied the request. It is

interesting to mention that the decision makes reference to judgments of the court itself and of the Superior Court of Justice (appellate reviews [apelações cíveis] no. 70024207748, 70024104218, 70024051278).

Another case examined by the Court of Rio Grande do Sul was the request for cancellation of the title and compensation for damages caused by undue protest due to mistaken freight charges. In accordance with that which appears in the judgment, the seller established a contract under the 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 the 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 (Appellate Review [Apelação Cível] no. 70024013930). Another very similar discussion, also involving the FOB clause, was judged in the same sense, in other words, the carrier could not intend to charge freight from the selling company when there was that negotiated condition (Appeal no. 70021535356).

A variation of this position was the case in which the Court understood the draft of the trade note for the charging of freight to be illegitimate since the receiver of the product had not participated in the contracting of the transport even though the purchase and sale had been established under the FOB condition, the reason for which issuing of the trade note would lack cause, and its protest was undue (Appellate Review [Apelação Cível] no. 70017012774).

Another case examined was the discussion regarding the legitimacy or not of charging of values arising from mercantile purchase and sale under the FOB condition. The buyer failed to fulfill its obligation under the argument that it did not receive the acquired goods. The Court considered that with the contracting of the FOB clause, 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 pricer would be legitimate (Appellate Review [Apelações Cíveis] no. 70022251482 and 70017502899). In the sense that responsibility for the cost of transport and risk of loss is of the buyer when the FOB clause is contracted, other appeals may also be cited (Appellate Reviews [Apelações Cíveis] no. 70022628440 and 70014875108). The position may also be highlighted that the FOB clause is not merely a cost of transport clause, but also involves the transfer of risks, and that

therefore it cannot be presumed in the affirmation that “freight is under the responsibility of the receiver” (Appellate Reviews [Apelações Cíveis] no. 70012463543 and 70012463576).

Diverging from this position, there is the manifestation of the same court in the sense that the FOB clause must be interpreted in a reasonable manner so as to protect trust; in other words, it would belong to the seller (in a contract established under the FOB condition) to 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 and that, furthermore, it would not be very probable that the buyer from another State had undertaken contracting of the carrier (Innominate appeal [Recurso inominado] no. 71001147008).

Another debate carried out in the Court of Justice of Rio Grande do Sul was the 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 (Appellate Review [Apelação Cível] no. 70014281000 and Appeals requesting clarification [Embargos de declaração] no. Emb. 70015668528 and 70015695976).

Court of Justice of Rio de Janeiro (TJRJ). The TJRJ, on its part, evaluated a case which claimed to demonstrate the existence of the 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 because the freight had not been paid. The Court understood that the existence of the condition had not been proven (Appellate Review [Apelação Cível] 2007.001.64460). In a similar sense, the Court understood that the unilateral opposition of the FOB clause in an invoice, without previous consensus, does not create the duty of payment of freight for the buyer (Appellate Review [Apelação Cível] 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 the 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. (Appellate Review [Apelação Cível] no. Ap. 2007.001.57679). The position of the Court is in the same direction when it analyzed the disappearance of cargo sold under the FOB condition (Appellate Review [Apelação Cível] no. 2006.001.16499).

VI. Concluding notes.

As has already been affirmed, the 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 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 our courts without adequate concern for the theoretical base of the decisions.

In a general way, as may be perceived, the Brazilian courts, when entreated to resolve situations involving such negotiated conditions, even if in an intuitive manner, end up giving the customary interpretation to each one of them. 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 is passed end up being adequately treated.

Greater complexity, however, is in basing a given interpretation provided to 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 fulfillment of transfer of risk in dealing with non-maritime contracts, for example.

Such situations demand more than more affirmation that in condition X the responsibility is of the contracting party Y for the loss of goods or for payment of freight. 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 the Incoterms, as emphasized by Oberman and Valioti[54], 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 discover a solution; after all, as the research showed (even if only

[54] OBERMAN, Neil Gary. 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) and VALIOTI, Zoi. Passing of risk in international sale contracts: a comparative examination of the rules on risk under the United Nations Convention on contracts for the international sale of goods (Vienna 1980) and Incoterms 2000 (http://www.njcl.fi/2_2004/article3.pdf).

through a quick glance), we are not the only ones who confront this same phenomenon.

Go beyond the time in which simplistic solutions are sufficient for serving a wide range of situations. This affirmation must be weighed against a secondary item of data from the research undertaken: the Incoterms are not a problem only pertinent to professionals in foreign trade. More and more they are entering into openings in daily life, whether through freight paid for a “move”, in the discussion carried out in the Court of Rio Grande do Sul 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 and juridical filigree 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[55] the traditional concerns of Brazilian law. This is the role that the contemporary operator must take on.

VII. References

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[55] “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, Op. Cit., p. 428).

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ANNEX – TABLE OF CASES

Court	Appel	Year	Incoterm	Matter
Superior Court of Justice	RE 896.045	2008	FOB	Internal
Superior Court of Justice	RE 886.695	2007	FOB	Internal
Superior Court of Justice	RE 743.839	2006	CIF	Internal
Superior Court of Justice	Rec. Mandado de Segurança n ° 22.283	2006	CIF	Internal
Superior Court of Justice	Resp 194.117	2005	FOB	Internacional
Superior Court of Justice	A.Reg. 136.065	1997	FOB	Internacional
Paraná Court of Justice	Ap. 298.405-8	2008	FOB	Internal
Paraná Court of Justice	Ap.476.608-9	2008	FOB	Internacional
Paraná Court of Justice	Ap. 249.820-4	2007	FOB	Internal
Paraná Court of Justice	AI. 402.216-4	2007	CIF	Internal
Paraná Court of Justice	Ap. 435.249-4	2007	CIF	Internal
Paraná Court of Justice	Ap. 339.494-3	2006	FOB	Internal
Paraná Court of Justice	Ap. 167.032-0	2005	FOB/CIF	Internacional
Paraná Court of Justice	Ap. 142.438-6	2004	FOB	Internal
Minas Gerais Court of Justice	Ap. 2.0000.00.512885-4	2005	FOB	Internacional
Minas Gerais Court of Justice	Ap. 1.0024.01.586875-5	2004	CIF	Internacional
Rio Grande do Sul Court of Justice	Ap. 70026242636	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70024207748	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70024104218	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70024051278	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70024156473	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70024013930	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70024736910	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70022251482	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70022628440	2008	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70021535570 Ap. 70021535356	2007	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70017012774	2007	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70017159781	2007	CIF	Internal
Rio Grande do Sul Court of Justice	Rec. 71001147008	2007	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70017502899	2007	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70014281000	2006	FOB	Internal
Rio Grande do Sul Court of Justice	Emb. 70015668528 e 70015695976	2006	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70014875108	2006	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70015320955	2006	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70011520111	2006	FOB	Internal
Rio Grande do Sul Court of Justice	Ap. 70012463543 e 70012463576	2006	FOB	Internal
Rio de Janeiro Court of Justice	Ap. 2007.001.64460	2008	FOB	Internal
Rio de Janeiro Court of Justice	Ap. 54456	2007	CIF	Internacional
Rio de Janeiro Court of Justice	Ap. 49777	2007	FOB	Internacional
Rio de Janeiro Court of Justice	Ap. 2007.001.57679	2007	FOB	Internal
Rio de Janeiro Court of Justice	Ap. 18.717	2007	FOB	Internal
Rio de Janeiro Court of Justice	Ap. 16249	2007	FOB	Internacional
Rio de Janeiro Court of Justice	Ap. 2006.001.16499	2006	FOB	Internal
Supreme Tribunal of Justice - Portugal	04B4468	2005	CIF	Internacional