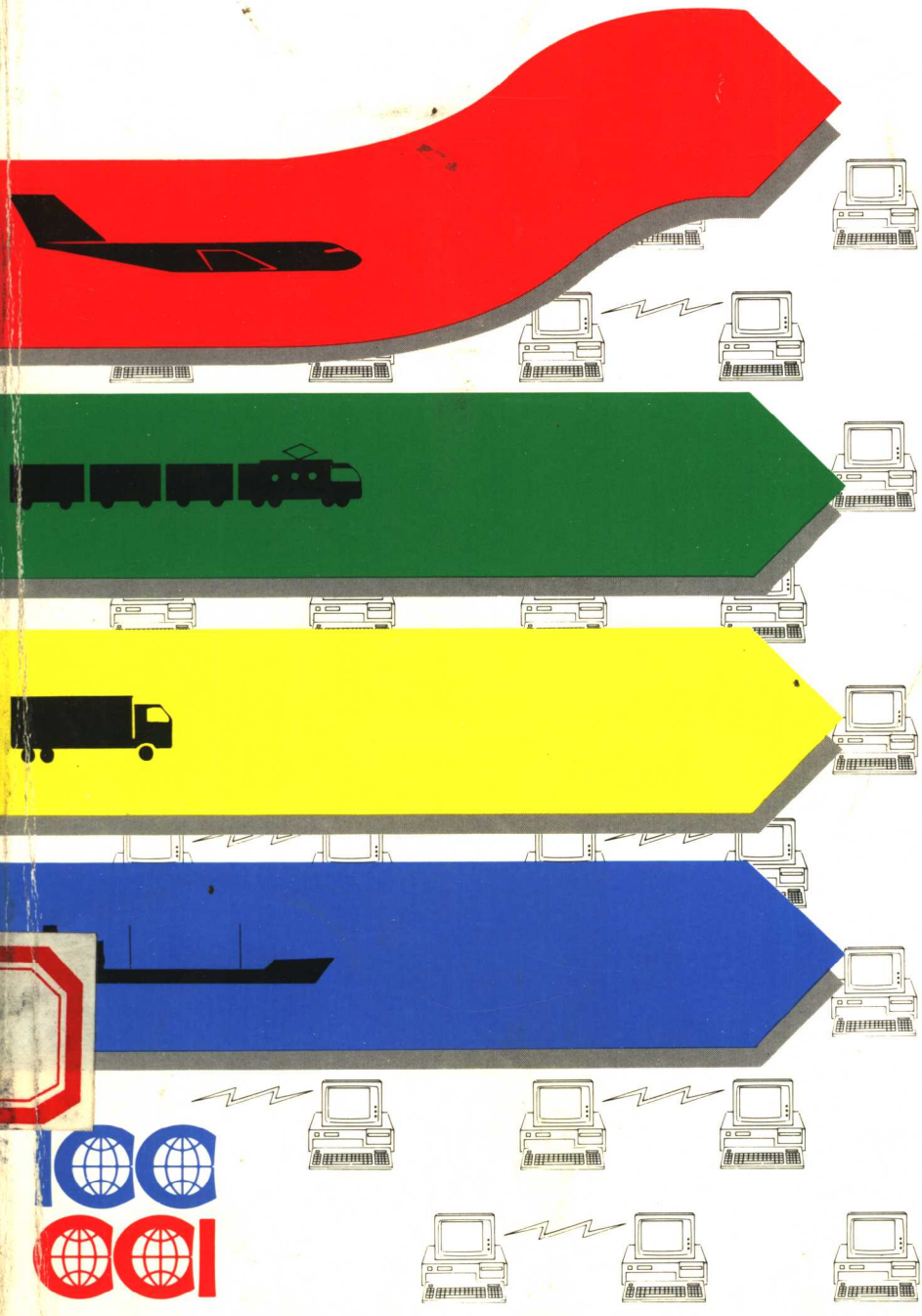
incoterms

INternational COmmercial TERMS 1990



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Please note that the abbreviations in three letters given for each Incoterm are a standard reference agreed upon by the ICC and the Economic Commission for Europe of the United Nations.

TABLE DES MATIÈRES

Les abréviations de trois lettres données en tête de chaque Incoterm constituent un code standardisé adopté conjointement par la CCI et la Commission Economique pour l'Europe des Nations Unies.

FOREWORD

Sending goods from one country to another, as part of a commercial transaction, can be a risky business. If they are lost or damaged, or if delivery does not take place for some other reason, the climate of confidence between parties may degenerate to the point where a lawsuit is brought. However, above all, sellers and buyers in international contracts want their deals to be successfully completed.

If, when drawing up their contract, buyer and seller specifically refer to one of the ICC Incoterms, they can be sure of defining their respective responsibilities, simply and safely. In so doing they eliminate any possibility of misunderstanding and subsequent dispute.

Incoterms have been revised to take account of changes in transportation techniques - certain terms have been consolidated and rearranged - and to render them fully compatible with new developments in electronic data interchange (EDI). They are presented in a new format which allows seller and buyer to follow a step-by-step process to determine their respective obligations. A new lay-out makes Incoterms 1990 easier to use.

The publication is the result of extensive consideration by the ICC's Commercial Practices Commission and particularly its Trade Terms Working Party under the Chairmanship of Dr. Hans de Vries (Netherlands). Detailed drafting was entrusted to Professor Jan Ramberg (Sweden), Mr. Ray Battersby (United Kingdom), Mr. Jens Bredow and Mr. Bodo Seiffert (Germany), Mr. Mauro Ferrante (Italy), Mr. Asko Räty and Mr. Kainu Mikkola (Finland) and to Mrs. Carol Xueref (IHQ) to whom the ICC is particularly indebted.

The other Working Party participants were as follows:
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INTRODUCTION

PURPOSE OF INCOTERMS

1. The purpose of «Incoterms» is to provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus, the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree.

2. Frequently parties to a contract are unaware of the different trading practices in their respective countries. This can give rise to misunderstandings, disputes and litigation with all the waste of time and money that this entails. In order to remedy these problems the International Chamber of Commerce first published in 1936 a set of international rules for the interpretation of trade terms. These rules were known as «Incoterms 1936». Amendments and additions were later made in 1953, 1967, 1976, 1980 and presently 1990 in order to bring the rules in line with current international trade practices.

WHY NEW INCOTERMS?

3. The main reason for the 1990 revision of Incoterms was the desire to adapt terms to the increasing use of electronic data interchange (EDI). In the present 1990 version of Incoterms this is possible when the parties have to provide various documents (such as commercial invoices, documents needed for customs clearance or documents in proof of delivery of the goods as well as transport documents). Particular problems arise when the seller has to present a negotiable transport document and notably the bill of lading which is frequently used for the purposes of selling the goods while they are being carried. In these cases it is of vital importance, when using EDI messages, to ensure that the buyer has the same legal position as he would have obtained if he had received a bill of lading from the seller.

NEW TRANSPORTATION TECHNIQUES

4. A further reason for the revision stems from changed transportation techniques, particularly the unitisation of cargo in containers, multimodal transport and roll on-roll off traffic with road vehicles and railway wagons in «short-sea» maritime transport. In Incoterms 1990 the term «Free carrier ... named place» (FCA) has now been adapted to suit all types of transport irrespective of the mode and combination of different modes. As a consequence, the terms which appear in the previous version of Incoterms dealing with some particular modes of transport (FOR/FOT and FOB Airport) have been removed.

NEW METHOD OF PRESENTING INCOTERMS

5. In connection with the revision work within the ICC Working Party, suggestions were made to present the trade terms in another manner for the purpose of easier reading and understand-

ing. The terms have been grouped in four basically different categories; namely starting with the only term whereby the seller makes the goods available to the buyer at the seller's own premises (the **«E»-term** Ex works); followed by the second group whereby the seller is called upon to deliver the goods to a carrier appointed by the buyer (the **«F»-terms** FCA, FAS and FOB); continuing with the **«C»-terms** where the seller has to contract for carriage, but without assuming the risk of loss of or damage to the goods or additional costs due to events occurring after shipment and dispatch (CFR, CIF, CPT and CIP); and, finally, the **«D»-terms** whereby the seller has to bear all costs and risks needed to bring the goods to the country of destination (DAF, DES, DEQ, DDU and DDP). A chart setting out this new classification is given hereafter.

INCOTERMS 1990		
Group E Departure	**EXW**	Ex Works
Group F Main carriage unpaid	**FCA**	Free Carrier
	FAS	Free Alongside Ship
	FOB	Free On Board
Group C Main carriage paid	**CFR**	Cost and Freight
	CIF	Cost, Insurance and Freight
	CPT	Carriage Paid To
	CIP	Carriage and Insurance Paid To
Group D Arrival	**DAF**	Delivered At Frontier
	DES	Delivered Ex Ship
	DEQ	Delivered Ex Quay
	DDU	Delivered Duty Unpaid
	DDP	Delivered Duty Paid

Further, under all terms, the respective obligations of the parties have been grouped under 10 headings where each heading on the seller's side «mirrors» the position of the buyer with respect to the same subject matter. Thus, if for instance according to A.3. the seller has to arrange and pay for the contract of carriage we find the words «No obligation» under the heading «Contract of carriage» in B.3. setting forth the buyer's position. Needless to say, this does not mean that the buyer would not in his own interest make such contracts as may be needed to bring the goods to the desired destination, but he has no «obligation» to the seller to do so. However, with respect to the division between the parties of duties, taxes and other official charges, as well as the costs of carrying out customs formalities, the terms explain for the sake of clarity how such costs are divided between the parties although, of course, the seller might not have any interest at all in the buyer's further disposal of the goods after they have been delivered to him. Conversely, under some terms such as the «D»-terms, the buyer is not interested in costs which the seller might incur in order to bring the goods all the way to the agreed destination point.

CUSTOMS OF THE PORT OR OF A PARTICULAR TRADE

6. Since the trade terms must necessarily be possible to use in different trades and regions it is impossible to set forth the obligations of the parties with precision. To some extent it is therefore necessary to refer to the custom of the particular trade place or to the practices which the parties themselves may have established in their previous dealings (cf. Article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods). It is of course desirable that sellers and buyers keep themselves duly informed of such customs of the trade when they negotiate their contract and that, whenever uncertainty arises, clarify their legal position by appropriate clauses in their contract of sale. Such special provisions in the individual contract would supersede or vary anything which is set forth as a rule of interpretation in the various Incoterms.

THE BUYER'S OPTIONS

7. In some situations, it may not be possible at the time when the contract of sale is entered into to decide precisely on the exact point or even the place where the goods should be delivered by the seller for carriage or at the final destination. For instance reference might have been made at this stage merely to a «range» or to a rather large place, e.g. seaport, and it is then usually stipulated that the buyer can have the right or duty to name later on the more precise point within the range or the place. If the buyer has a duty to name the precise point as aforesaid his failure to do so might result in liability to bear the risks and additional costs resulting from such failure. In addition, the buyer's failure to use his right to indicate the point may give the seller the right to select the point which best suits his purpose.

CUSTOMS CLEARANCE

8. It is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf. Thus, the exporter should normally clear the goods for export, while the importer should clear the goods for import. However, under some trade terms, the buyer might undertake to clear the goods for export in the seller's country (EXW, FAS) and, in other terms, the seller might undertake to clear the goods for import into the buyer's country (DEQ and DDP). Needless to say in these cases the buyer and the seller respectively must assume any risk of export and import prohibition. Also they must ascertain that a customs clearance performed by, or on behalf of, a party not domiciled in the respective country is accepted by the authorities. Particular problems arise when the seller undertakes to deliver the goods into the buyer's country in places which cannot be reached until the goods have been cleared for import but where his ability to reach that place is adversely affected by the buyer's failure to fulfil his obligation to clear the goods for import (see further the comment to DDU below).

It may well be that a buyer would wish to collect the goods at the seller's premises under the term EXW or to receive the goods alongside a ship under the trade term FAS, but would like the seller to clear the goods for export. If so, the words «cleared for export» could be added after the respective trade term. Conversely, it may be that the seller is prepared to deliver the goods under the trade term DEQ or DDP, but without assuming wholly or partly the obligation to pay the duty or other taxes or official charges levied upon importation of the goods. If so, the words «duty unpaid» might be added after DEQ; or the particular taxes or charges which the seller does not wish to pay may be specifically excluded, e.g. DEQ or DDP «VAT unpaid».

It has also been observed that in many countries it is difficult for a foreign company to obtain not only the import licence, but also duty reliefs (VAT deduction, etc.). «Delivered, Duty Unpaid», can solve these problems by removing from the seller the obligation to clear the goods for import.

In some cases, however, the seller whose obligation of carriage extends to the buyer's premises in the country of import, wants to carry out customs formalities without paying the duties. If so, the DDU term should be added with words to that effect such as «DDU, cleared». Corresponding additions may be used with other «D» terms, e.g. «DDP, VAT unpaid», «DEQ, duty unpaid».

PACKAGING

9. In most cases, the parties would know beforehand which packaging is required for the safe carriage of the goods to the destination. However, since the seller's obligation to pack the goods may well vary according to the type and duration of the transport envisaged, it has been felt necessary to stipulate that

the seller is obliged to pack the goods in such a manner as is required for the transport, but only to the extent that the circumstances relating to the transport are made known to him before the contract of sale is concluded (cf. Articles 35.1. and 35.2.b. of the 1980 United Nations Convention on Contracts for the International Sale of Goods where the goods, including packaging, must be «fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement»)

INSPECTION OF GOODS

10. In many cases, the buyer may be well advised to arrange for inspection of the goods before or at the time they are handed over by the seller for carriage (so-called pre-shipment inspection or PSI). Unless the contract stipulates otherwise, the buyer would himself have to pay the cost for such inspection which is arranged in his own interest. However, if the inspection has been made in order to enable the seller to comply with any mandatory rules applicable to the export of the goods in his own country he would have to pay for that inspection.

FREE CARRIER... NAMED PLACE (FCA)

11. As has been said, the FCA-term could be used whenever the seller should fulfil his obligation by handing over the goods to a carrier named by the buyer. It is expected that this term will also be used for maritime transport in all cases where the cargo is not handed to the ship in the traditional method over the ship's rail. Needless to say, the traditional FOB-term is inappropriate where the seller is called upon to hand over the goods to a cargo terminal before the ship arrives, since he would then have to bear the risks and costs after the time when he has no possibility to control the goods or to give instructions with respect to their custody.

It should be stressed that under the «F»-terms, the seller should hand over the goods for carriage as instructed by the buyer, since the buyer would make the contract of carriage and name the carrier. Thus, it is not necessary to spell out in the trade term precisely how the goods should be handed over by the seller to the carrier. Nevertheless, in order to make it possible for traders to use FCA as an «overriding» «F»-term, explanations are given with respect to the customary modalities of delivery for the different modes of transport.

In the same manner, it may well be superfluous to introduce a definition of «carrier», since it is for the buyer to instruct the seller to whom the goods should be delivered for carriage. However, since the carrier and the document of transport are of great importance to traders, the preamble to the FCA-term contains a definition of «carrier». In this context, it should be noted that the term «carrier» not only refers to an enterprise actually performing

the carriage but it also includes an enterprise merely having undertaken to perform or to procure the performance of the carriage as long as such enterprise assumes liability as a carrier for the carriage. In other words, the term «carrier» comprises performing as well as contracting carriers. Since the position in this respect of the freight forwarder varies from country to country and according to practices in the freight forwarding industry, the preamble contains a reminder that the seller must, of course, follow the buyer's instructions to deliver the goods to a freight forwarder even if the freight forwarder would have refused to accept carrier liability and thus fall outside the definition of «carrier».

THE «C»-TERMS (CFR, CIF, CPT AND CIP)

12. Under the «C»-terms, the seller must contract for carriage on usual terms at his own expense. Therefore, a point up to which he would have to pay transportation costs must necessarily be indicated after the respective «C»-term. Under the CIF and CIP terms the seller also has to take out insurance and bear the insurance cost.

Since the point for the division of costs refers to the country of destination, the «C»-terms are frequently mistakenly believed to be arrival contracts, whereby the seller is not relieved from any risks or costs until the goods have actually arrived at the agreed point. However, it must be stressed over and over again that the «C»-terms are of the same nature as the «F»-terms in that the seller fulfils the contract in the country of shipment or dispatch. Thus, the contracts of sale under the «C»-terms, like the contracts under the «F»-terms, fall under the category of shipment contracts.

While the seller would have to pay the normal transportation cost for the carriage of the goods by a usual route and in a customary manner to the agreed place of destination, the risk for loss of or damage to the goods, as well as additional costs resulting from events occurring after the goods having been handed over for carriage, fall upon the buyer. Hence, the «C»-terms as distinguished from all other terms contain two «critical» points, one for the division of costs and another one for the division of risks. For this reason, the greatest caution must be observed when adding obligations of the seller to the «C»-terms referring to a time after the aforementioned «critical» point for the division of risk. It is the very essence of the «C»-terms to relieve the seller from any further risk and cost after he has duly fulfilled his contract by contracting for carriage and handing over the goods to the carrier and by providing for insurance under the CIF- and CIP-terms.

It should also be possible for the seller to agree with the buyer to collect payment under a documentary credit by presenting the agreed shipping documents to the bank. It would be quite contrary to this common method of payment in international trade if the seller were to have to bear further risks and costs after the moment when payment had been made under documentary credits or otherwise upon shipment and dispatch of the goods. Needless to say, however, the seller would have to pay every cost

which is due to the carrier irrespective of whether freight should be pre-paid upon shipment or is payable at destination (freight collect), except such additional costs which may result from events occurring subsequent to shipment and dispatch.

If it is customary to procure several contracts of carriage involving transhipment of the goods at intermediate places in order to reach the agreed destination, the seller would have to pay all these costs, including any costs when the goods are transhipped from one means of conveyance to the other. If, however, the carrier exercised his rights under a transhipment - or similar clause - in order to avoid unexpected hindrances (such as ice, congestion, labour disturbances, government orders, war or warlike operations) then any additional cost resulting therefrom would be for the account of the buyer.

13. It happens quite often that the parties wish to clarify to which extent the seller should procure a contract of carriage including the costs of discharge. Since such costs are normally covered by the freight when the goods are carried by regular shipping lines, the contract of sale would frequently stipulate that the goods would have to be so carried or at least that they should be carried under «liner terms». In other cases, the word «landed» is added after CFR or CIF. Nevertheless, it is advisable not to use abbreviations added to the «C»-terms unless, in the relevant trade, the meaning of the abbreviations is clearly understood and accepted by the contracting parties or under any applicable law or custom of the trade. In any event, the seller should not - and indeed could not - without changing the very nature of the «C»-terms undertake any obligation with respect to the arrival of the goods at destination, since the risk for any delay during the carriage is borne by the buyer. Thus, any obligation with respect to time must necessarily refer to the place of shipment or dispatch, e.g.«shipment (dispatch) not later than ...». An agreement e.g.«CFR Hamburg not later than...» is really a misnomer and thus open to different possible interpretations. The parties could be taken to have meant either that the goods must actually arrive at Hamburg at the specified date, in which case the contract is not a shipment contract but an arrival contract or, alternatively, that the seller must ship the goods at such a time that they would normally arrive at Hamburg before the specified date unless the carriage would have been delayed because of unforeseen events.

14. It happens in commodity trades that goods are bought while they are carried at sea and that, in such cases, the word «afloat» is added after the trade term. Since the risk for loss of or damage to the goods would then, under the CFR- and CIF-terms, have passed from the seller to the buyer, difficulties of interpretation might arise. One possibility would be to maintain the ordinary meaning of the CFR- and CIF-terms with respect to the division of risk between seller and buyer which would mean that the buyer might have to assume risks which have already occurred at the time when the contract of sale has entered into force. The other possibility would be to let the passing of the risk coincide with the

time when the contract of sale is concluded. The former possibility might well be practical, since it is usually impossible to ascertain the condition of the goods while they are being carried. For this reason the 1980 UN Convention on Contracts for the International Sale of Goods Article 68 stipulates that «if the circumstances so indicate, the risk is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents embodying the contract of carriage». There is, however, an exception to this rule when «the seller knew or ought to have known that the goods had been lost or damaged and did not disclose this to the buyer». Thus, the interpretation of a CFR- or CIF-term with the addition of the word «afloat» will depend upon the law applicable to the contract of sale. The parties are advised to ascertain the applicable law and any solution which might follow therefrom. In case of doubt, the parties are advised to clarify the matter in their contract.

«INCOTERMS» AND THE CONTRACT OF CARRIAGE

15. It should be stressed that Incoterms only relate to trade terms used in the contract of sale and thus do not deal with terms - sometimes of the same or similar wording - which may be used in contracts of carriage, particularly as terms of various charterparties. Charterparty terms are usually more specific with respect to costs of loading and discharge and the time available for these operations (so-called «demurrage»-provisions). Parties to contracts of sale are advised to consider this problem by specific stipulations in their contracts of sale so that it is made clear as exactly as possible how much time would be available for the seller to load the goods on a ship or other means of conveyance provided by the buyer and for the buyer to receive the goods from the carrier at destination and, further, to specify to which extent the seller would have to bear the risk and cost of loading operations under the «F»-terms and discharging operations under the «C»-terms. The mere fact that the seller might have procured a contract of carriage, e.g. under the charterparty term «free out» whereby the carrier in the contract of carriage would be relieved from the discharging operations, does not necessarily mean that the risk and cost for such operations would fall upon the buyer under the contract of sale, since it might follow from the stipulations of the latter contract, or the custom of the port, that the contract of carriage procured by the seller should have included the discharging operations.

THE «ON BOARD REQUIREMENT» UNDER FOB, CFR AND CIF

16. The contract of carriage would determine the obligations of the shipper or the sender with respect to handing over the goods for carriage to the carrier. It should be noted that FOB, CFR and CIF all retain the traditional practice to deliver the goods on board the vessel. While, traditionally, the point for delivery of the goods according to the contract of sale coincided with the

point for handing over the goods for carriage, contemporary transportation techniques create a considerable problem of «synchronisation» between the contract of carriage and the contract of sale. Nowadays goods are usually delivered by the seller to the carrier before the goods are taken on board or sometimes even before the ship has arrived in the seaport. In such cases, merchants are advised to use such «F»- or «C»-terms which do not attach the handing over of the goods for carriage to shipment on board, namely FCA, CPT or CIP instead of FOB, CFR and CIF.

THE «D»-TERMS (DAF, DES, DEQ, DDU AND DDP)

17. As has been said, the «D»-terms are different in nature from the «C»-terms, since the seller according to the «D»-terms is responsible for the arrival of the goods at the agreed place or point of destination. The seller must bear all risks and costs in bringing the goods thereto. Hence, the «D»-terms signify arrival contracts, while the «C»-terms evidence shipment contracts.

The «D»-terms fall into two separate categories. Under DAF, DES and DDU the seller does not have to deliver the goods cleared for import, while under DEQ and DDP he would have to do so. Since DAF is frequently used in railway traffic, where it is practical to obtain a through document from the railway covering the entire transport to the final destination and to arrange insurance for the same period, DAF contains a stipulation in this respect in A.8.. It should be stressed, however, that the seller's duty to assist the buyer in obtainng such a through document of transport is done at the buyer's risk and expense. Similarly, any costs of insurance relating to the time subsequent to the seller's delivery of the goods at the frontier would be for the account of the buyer.

The term DDU has been added in the present 1990 version of Incoterms. The term fulfils an important function whenever the seller is prepared to deliver the goods in the country of destination without clearing the goods for import and paying the duty. Whenever clearance for import does not present any problem - such as within the European Common Market - the term may be quite desirable and appropriate. However, in countries where import clearance may be difficult and time consuming, it may be risky for the seller to undertake an obligation to deliver the goods beyond the customs clearance point. Although, according to DDU B.5. and B.6., the buyer would have to bear the additional risks and costs which might follow from his failure to fulfil his obligations to clear the goods for import, the seller is advised not to use the term DDU in countries where difficulties might be expected in clearing the goods for import.

THE BILL OF LADING AND EDI PROCEDURES

18. Traditionally, the on board bill of lading has been the only acceptable document to be presented by the seller under the terms CFR and CIF. The bill of lading fulfils three important functions, namely

- proof of delivery of the goods on board the vessel
- evidence of the contract of carriage
- a means of transferring rights to the goods in transit by the transfer of the paper document to another party.

Transport documents other than the bill of lading would fulfil the two first-mentioned functions, but would not control the delivery of the goods at destination or enable a buyer to sell the goods in transit by surrendering the paper document to his buyer. Instead, other transport documents would name the party entitled to receive the goods at destination. The fact that the possession of the bill of lading is required in order to obtain the goods from the carrier at destination makes it particularly difficult to replace by EDI-procedures.

Further, it is customary to issue bills of lading in several originals but it is, of course, of vital importance for a buyer or a bank acting upon his instructions in paying the seller to ensure that all originals are surrendered by the seller (so-called «full set»). This is also a requirement under the ICC Rules for Documentary Credits (the so-called Uniform Customs and Practice,«UCP»; ICC Publication 400).

The transport document must evidence not only delivery of the goods to the carrier but also that the goods, as far as could be ascertained by the carrier, were received in good order and condition. Any notation on the transport document which would indicate that the goods had not been in such condition would make the document «unclean» and thus make it unacceptable under UCP (Art. 18; see also ICC Publication 473). In spite of the particular legal nature of the bill of lading it is expected that it will be replaced by EDI procedures in the near future. The 1990 version of Incoterms has taken this expected development into proper account.

NON-NEGOTIABLE TRANSPORT DOCUMENTS INSTEAD OF *BILLS OF LADING*

19. In recent years, a considerable simplification of documentary practices has been achieved. Bills of lading are frequently replaced by non-negotiable documents similar to those which are used for other modes of transport than carriage by sea. These documents are called «sea waybills», «liner waybills», «freight receipts», or variants of such expressions. These non-negotiable documents are quite satisfactory to use except where the buyer wishes to sell the goods in transit by surrendering a paper document to the new buyer. In order to make this possible, the obligation of the seller to provide a bill of lading under CFR and CIF must necessarily be retained. However, when the contracting parties know that the buyer does not contemplate selling the goods in transit, they may specifically agree to relieve the seller from the obligation to provide a bill of lading, or, alternatively, they may use CPT and CIP where there is no requirement to provide a bill of lading.