

Incoterms and UCC Article 2— Conflicts and Confusions

By this time, attorneys are accustomed to the concept that different rules are applicable to domestic and international sales of goods—respectively the Uniform Commercial Code (UCC) and the Convention on Contracts for the International Sale of Goods (CISG).¹ The purpose of this article is to point out that there is another potential conflict between domestic and international normative rules, a conflict relating to the commercial terms that provide rules for the delivery term in a contract for the sale of goods.

The UCC has its own definitions of such terms as “F.O.B.” and “C.I.F.”² The CISG does not have such definitions, and the CISG rules on delivery terms are very sparse.³ Instead of incorporating detailed rules on the meaning of individual commercial delivery terms for the international sale, the drafters of the CISG could rely upon a written formulation of industry understanding of the meaning of such terms.⁴ That written formulation is contained in Incoterms, published

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1. *United Nations Convention on Contracts for the International Sale of Goods*, U.N. GAOR, U.N. DOC. A/CONF.97/18 (1980), reprinted in 19 I.L.M. 671 (1980) [hereinafter CISG].

2. U.C.C. §§ 2-319 to -324.

3. CISG, *supra* note 1, art. 31.

4. See JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* ¶¶ 208, 211 (2d ed. 1991).

by the International Chamber of Commerce.⁵ At least one author has concluded that Incoterms would qualify as an international "usage" under the CISG, and therefore would be available to fill in gaps in CISG provisions.⁶

Incoterms is an acronym for "International Commercial Terms" and was first published in 1936. It has been updated periodically since that time. Incoterms underwent major revisions in 1953 and 1990, and it was republished with new terms in 1967, 1976, and 1980.⁷ These revisions of Incoterms have made the Incoterms definitions of commercial terms substantially different from the UCC definitions of similar terms.

UCC Article 2 is itself currently being revised. The committee revising UCC Article 2 must now confront many of the same problems faced by the CISG drafters, and possibly those of the Incoterms revisers. Should the commercial terms be defined in the statute? If so, should the original UCC 1952 definitions be retained, or should they be modernized to reflect changes in industry practice during the past forty-five years? If any definitions are retained, how can they be formulated so as to reflect further changes in industry practice? If commercial terms are not defined in the statute, what are the proper sources of such definition? Are there any principal concepts or principles that should be retained in the statutory language, even though detailed definitions are not provided?

The purpose of this article is to open the debate on these issues. This article describes the provisions of the Incoterms definitions of commercial terms and then compares those provisions with the comparable UCC provisions. The comparison will show significant differences that can cause considerable confusion, especially when the same acronyms have different meanings. Thus, a continuation of the present statutory definitions, without revision, will exacerbate these differences. However, in the 1990 revision of Incoterms, some important provisions of earlier drafts were omitted, and some important aspects of the transaction are not covered by the new 1990 Incoterms. Thus, there may be concepts that should be retained in the statutory language, even if detailed definitions are not provided.

I. The Setting

When goods are to be carried from one location to another as part of a sales transaction, the parties will often adopt a commercial term to state the delivery obligation of the seller. Such terms include F.O.B. (Free on Board), F.A.S.

5. INTERNATIONAL CHAMBER OF COMMERCE INCOTERMS 1990 (I.C.C. Publ. No. 460, 1990 ed.) [hereinafter INCOTERMS 1990]; see also JAN RAMBERG, GUIDE TO INCOTERMS 1990 (I.C.C. Publ. No. 461/90, 1991 & No. 505, 1996) [hereinafter GUIDE TO INCOTERMS 1990] for further explanation and elaboration on the use and meaning of the 1990 revision of Incoterms.

6. Jan Ramberg, *Incoterms 1980*, in THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 137, 151 (Norbert Horn & Clive M. Schmitthoff eds., 1982); see also *Textful Textile, Ltd. v. Cotton Express Textile, Inc.*, 891 F. Supp. 1381 (C.D. Cal. 1995).

7. See Peter Winship, *Introduction to 2 BASIC INSTRUMENTS IN INTERNATIONAL ECONOMIC LAW 707* (Stephen Zamora & Ronald Brand eds., 1990).

(Free Alongside), and C.I.F. (Cost, Insurance, and Freight). These terms are defined in the UCC,⁸ but the UCC definitions are seldom used intentionally in international trade. In fact, the UCC definitions are becoming obsolescent in domestic trade also, because the abbreviations used are now associated primarily with waterborne traffic, and the statutory terms do not include the new terminology associated with air freight, containerization, or multimodal transportation practices.

In international commerce the dominant source of definitions for commercial delivery terms is Incoterms, published by the International Chamber of Commerce (ICC) and last revised in 1990. Incoterms provides rules for determining the obligations of both seller and buyer when a commercial term (such as F.O.B. or C.I.F.) is used. The Incoterms rules state what acts the seller must do to deliver, what acts the buyer must do to accommodate delivery, what costs each party must bear, and at what point in the delivery process the risk of loss passes from the seller to the buyer. Each of these obligations may be different for different commercial terms. Thus, the obligations, costs, and risks of seller and buyer are different under F.O.B. than they are under C.I.F.

Such definitions may be found in other sources, in addition to the UCC and Incoterms, such as the American Revised Foreign Trade Definitions (1941).⁹ The American Revised Foreign Trade Definitions has been widely used in Pacific Ocean trade, but may be replaced by the more recently revised Incoterms.

Since the ICC is a nongovernmental entity, Incoterms is neither a national legislation nor an international treaty. Thus, Incoterms cannot be "the governing law" of any contract. Instead, it is a written form of custom and usage in the trade, which can be, and often is, expressly incorporated by a party or the parties to an international contract for the sale of goods. Alternatively, if it is not expressly incorporated in the contract, Incoterms could be made an implicit term of the contract as part of international custom. Courts in France and Germany have done so, and both treaties and the UNCITRAL Secretariat describe Incoterms as a widely observed usage for commercial terms.¹⁰ This description should allow Incoterms to qualify under the CISG as a "usage . . . which in international trade is widely known to, and regularly observed by, parties to" international sales contracts, even if the usage is not global.¹¹

Although the UCC has definitions for some commercial terms (e.g., F.O.B., F.A.S., C.I.F.), these definitions are expressly subject to "agreement otherwise."¹² Thus, an express reference to Incoterms will supersede the UCC provi-

8. See, e.g., U.C.C. §§ 2-319, 2-320.

9. Revised American Foreign Trade Definitions, excerpted in ANDREAS F. LOWENFELD, INTERNATIONAL PRIVATE TRADE DS-151-158 (1977).

10. See Winship, *supra* note 7, at 707-10.

11. CISG, *supra* note 1, art. 9(2), at 674.

12. U.C.C. §§ 2-319(1)(2), 2-320(2).

sions, and United States' courts have held so.¹³ Such incorporation by express reference is often made in American international sales contracts, especially in Atlantic Ocean trade. If there is no express term, and the UCC is the governing law rather than the CISG, Incoterms can still be applicable as a "usage of trade" under the UCC.¹⁴ The UCC criteria for such a usage is "any practice . . . having such regularity of observance . . . as to justify an expectation that it will be observed with respect to the transaction in question."¹⁵ A usage need not be "universal" or "ancient," just "currently observed by the great majority of decent dealers."¹⁶

Incoterms gives the parties a menu of thirteen different commercial terms to describe the delivery obligations of the seller and the reciprocal obligations of the buyer to accommodate delivery. They include:

- (1) EXW (Ex Works)
- (2) FCA (Free Carrier)
- (3) FAS (Free Alongside Ship)
- (4) FOB (Free On Board)
- (5) CFR (Cost and Freight)
- (6) CIF (Cost, Insurance, and Freight)
- (7) CPT (Carriage Paid To)
- (8) CIP (Carriage and Insurance Paid To)
- (9) DAF (Delivered At Frontier)
- (10) DES (Delivered Ex Ship)
- (11) DEQ (Delivered Ex Quay)
- (12) DDU (Delivered Duty Unpaid)
- (13) DDP (Delivered Duty Paid)

Several types of divisions may be made of these thirteen different terms. One is a division between the one term that does not assume that a carrier will be involved (EXW) and all the twelve other terms. A second division is between those six terms that require the involvement of waterborne transportation (FAS, FOB, CFR, CIF, DES, and DEQ) and those six other terms that are applicable to any mode of transportation, including multimodal transportation (FCA, CPT, CIP, DAF, DDU, and DDP). The UCC has none of the latter six terms, although the types of transactions they are designed for arise routinely and can be handled under the UCC designations "F.O.B. place of shipment,"¹⁷ "C. & F.," "C.I.F.,"¹⁸ and "F.O.B. place of destination."¹⁹

The twelve terms requiring transportation can also be divided into "shipment contract" terms (FCA, FAS, FOB, CFR, CIF, CPT, and CIP) and

13. Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd., 782 F.2d 314 (2d Cir. 1985).

14. U.C.C. § 1-205(2).

15. U.C.C. § 1-205, cmt. 5; see Ramberg, *supra* note 6.

16. U.C.C. § 1-205, cmt. 5.

17. U.C.C. § 2-319(1)(a).

18. U.C.C. § 2-320(1)(2).

19. U.C.C. § 2-319(1)(b).

“destination contract” terms (DAF, DES, DEQ, DDU, and DDP). The UCC and CISG both use this terminology.²⁰ The underlying concept is that in shipment contracts the seller puts the goods in the hands of a carrier and arranges for their transportation, but transportation is at the buyer’s risk and expense.²¹ On the other hand, in destination contracts the seller is responsible to put the goods in the hands of the carrier, arrange their transportation, and bear the cost and risk of transportation.²² Unfortunately, many aspects of transportation usages have changed since 1952, and the UCC concepts do not always fit the practices now described in Incoterms.

The ICC suggests that these thirteen commercial terms be divided into four principal categories, one for each of the different first letters of the constituent terms, E, F, C, and D. The “E” term (EXW) is where the goods are made available to the buyer, but use of a carrier is not expressly required. All other terms require the use of a carrier. The “F” terms (FCA, FAS, and FOB) require the seller only to assume the risks and costs to deliver the goods to a carrier, and to a carrier nominated by the buyer. The “C” terms require the seller to assume the risks and costs to deliver the goods to a carrier and arrange and pay for the “main transportation” (and sometimes insurance), but without assuming additional risks due to post-shipment events. Thus, under “C” terms, the seller bears risks until one point in the transportation (delivery to a carrier), but pays costs to a different point in the transportation (the agreed destination). The “D” terms (DAF, DES, DEQ, DDU, and DDP) require the seller to deliver the goods to a carrier, arrange for their transportation, and assume the risks and costs until the arrival of the goods at an agreed country of destination.

Incoterms are periodically revised, and the last revision was in 1990. In the latest revision, the ICC included references to electronic messages and to new types of transport documents, such as air waybills, railway and road consignment notes, and “multimodal transport documents.” The ICC explained that these changes were needed because of “the increasing use of electronic data interchange (EDI)” and “changed transportation techniques,” including “containers, multimodal transport and roll on–roll off traffic.”²³

The 1990 Incoterms obligations are arranged in a mirror-image format that sets forth the obligations of sellers and buyers in adjacent columns. Each column has numbered paragraphs, and each numbered paragraph refers to the comparable obligation of each party. The obligations covered include licenses and other formalities, contracts of carriage and insurance, physical delivery, risk of loss, division of costs, notices, transportation documents or equivalent electronic messages, and inspections.

20. CISG, *supra* note 1, art. 31, at 678; U.C.C. §§ 2-504, 2-509.

21. U.C.C. § 2-504.

22. *See, e.g.*, U.C.C. § 2-319(1)(b) (“F.O.B. place of destination” contracts).

23. INCOTERMS 1990, *supra* note 5, at 6.

II. The Terms of Incoterms

Under the Incoterms Ex Works (EXW) commercial term²⁴ (including Ex Factory and Ex Warehouse), the seller needs only to “tender” the goods to the buyer by placing them at the buyer’s disposal at a named place of delivery. Thus, the seller has no obligation to deliver the goods to a carrier or to load the goods on any vehicle. The seller must also notify the buyer when and where the goods will be tendered, but has no obligation to arrange for transportation or insurance. The risk of loss transfers to the buyer at the time the goods are placed at its disposal. The seller will normally provide a commercial invoice or its equivalent electronic message, but has no obligation to obtain a document of title or an export license. The Incoterms definition has no effect upon either payment or inspection obligations under the contract, except to require the buyer to pay for pre-shipment inspection. The Incoterms risk of loss provision is contrary to the default rules of both the UCC²⁵ and the CISG,²⁶ which delay passing the risk until the buyer’s receipt of the goods, both because the seller is more likely to have insurance and because the seller has a greater ability to protect the goods.

Under the Incoterms Free Carrier (FCA) commercial term,²⁷ the seller is obligated to deliver the goods into the custody of a carrier, usually the first carrier in a multimodal transportation scheme. The Incoterms definition of “carrier” includes freight forwarders. The seller has no obligation to pay for transportation costs or insurance. Usually the carrier will be named by, and arranged by, the buyer. However, the seller “may” arrange transportation at the buyer’s expense if requested by the buyer, or if it is “commercial practice” for the seller to do so. But, even under such circumstances, the seller may refuse to make such arrangements as long as it so notifies the buyer. Even if the seller does arrange transportation, it has no obligation to arrange for insurance coverage during transportation and need only notify the buyer “that the goods *have been delivered* into the custody of the carrier.”²⁸ The risk of loss transfers to the buyer upon delivery to the carrier, but the buyer may not receive notice until after that time. The seller must provide a commercial invoice or its equivalent electronic message, any necessary export license, and usually a transport document that will allow the buyer to take delivery—or an equivalent electronic data interchange message. The Incoterms definition has no provisions on either payment or post-shipment inspection terms under the contract.

This FCA term is the Incoterms commercial term that is most comparable to the UCC’s “F.O.B. place of shipment” term.²⁹ However, there are two levels

24. *Id.* at 18–23.

25. U.C.C. § 2-509.

26. CISG, *supra* note 1, art. 69, at 687.

27. INCOTERMS 1990, *supra* note 5, at 24–31.

28. *Id.* at 28 (emphasis added).

29. U.C.C. § 2-319(1)(a).

of confusion. One is that Incoterms has an "F.O.B." term that is different,³⁰ and the UCC "F.O.B." term is more likely to be compared with the Incoterms "FOB" term. The other is that the obligations under FCA and the UCC "F.O.B. place of shipment" term are, in fact, different. The norm under the UCC's "F.O.B." is for the seller to arrange transportation, while the seller need do so under FCA only in special circumstances.³¹ Further, if the seller does ship, the seller usually must also arrange insurance coverage, unless instructed otherwise by the buyer.³² Under Incoterms FCA, the seller does not seem ever to have any obligation to arrange for insurance coverage. Traditionally, under both the 1980 version of Incoterms FAS³³ and the UCC "F.O.B. place of shipment" term, there is no implied special payment or inspection terms, no implied requirement of payment against documents or payment before inspection. This would also seem to be a preferable interpretation of the current Incoterms FCA term.

Under the Incoterms Free Alongside Ship (FAS) commercial term,³⁴ the seller is obligated to deliver the goods alongside a ship arranged for and named by the buyer at a named port of shipment. Thus, it is appropriate only for waterborne transportation, and the seller must bear the costs and risks of inland transportation to the named port of shipment. The seller has no obligation to arrange transportation or insurance for the "main" (or waterborne) part of the carriage, but does have a duty to notify the buyer "that the goods *have been delivered* alongside the named vessel."³⁵ The risk of loss will transfer to the buyer also at the time the goods are delivered alongside the ship. The seller must provide a commercial invoice and usually a transport document that will allow the buyer to take delivery, or the electronic equivalent of either. But the seller has no obligation to provide an export license, only an obligation to render assistance to the buyer to obtain one.

The Incoterms definition has no provisions on either payment or post-shipment inspection terms under the contract. Under the UCC, the term "F.A.S. vessel"³⁶ requires the buyer to pay against a tender of documents, such as a negotiable bill of lading, before the goods arrive at their destination and before the buyer has any post-shipment opportunity to inspect the goods.³⁷ Otherwise, the UCC "F.A.S." term is similar to the Incoterms "FAS" term, including obligating the seller only to deliver the goods alongside a named vessel and not obligating the seller to arrange transportation to a final destination.

30. See *infra* notes 40-47.

31. U.C.C. §§ 2-319, 2-504.

32. U.C.C. § 2-504.

33. INTERNATIONAL CHAMBER OF COMMERCE, INCOTERMS: INTERNATIONAL RULES FOR THE INTERPRETATION OF TRADE TERMS (I.C.C. Publ. No. 350, "FAS," 1980 ed.) [hereinafter INCOTERMS 1980].

34. INCOTERMS 1990, *supra* note 5, at 32-37.

35. *Id.* at 34 (emphasis added).

36. U.C.C. § 2-319(2).

37. U.C.C. § 2-319(4).

However, in the prior 1980 version of Incoterms, the definition of FAS³⁸ did not provide that payment against documents was required under an FAS contract, and the 1980 Incoterms did contain such payment provisions in its definitions of other commercial terms.³⁹ Thus, it is more likely that the current version of Incoterms FAS is not intended to require payment against documents, to restrict inspection before payment, or to require use of negotiable bills of lading.

Under the Incoterms Free on Board (FOB) commercial term,⁴⁰ the seller is obligated to deliver the goods on board a ship arranged for and named by the buyer at a named port of shipment. Thus, this term is also appropriate only for waterborne transportation, and the seller must bear the costs and risks of both inland transportation to the named port of shipment and loading the goods on the ship (until "they have passed the ship's rail").⁴¹ The seller has no obligation to arrange transportation or insurance, but does have a duty to notify the buyer "that the goods *have been delivered on board*"⁴² the ship. The risk of loss will transfer to the buyer also at the time the goods have "passed the ship's rail."⁴³ The seller must provide a commercial invoice, or its equivalent electronic message, any necessary export license, and usually a transport document that will allow the buyer to take delivery—or an equivalent electronic data interchange message.⁴⁴

The Incoterms definition has no provisions on either payment or post-shipment inspection terms under the contract. The UCC does define "F.O.B.,"⁴⁵ but it is not a term requiring waterborne transportation. Thus, as has been discussed above, the UCC "F.O.B." is more closely linked to the Incoterms FCA term. But the UCC also has a term "F.O.B. vessel,"⁴⁶ which does relate only to waterborne transportation and therefore is most closely linked to the Incoterms FOB term. Under the UCC, the term "F.O.B. vessel" requires the buyer to pay against a tender of documents, such as a negotiable bill of lading, before the goods arrive at their destination and before the buyer has any post-shipment opportunity to inspect the goods.⁴⁷ Otherwise, the UCC "F.O.B. vessel" term is similar to the Incoterms "FOB" term, including obligating the seller only to deliver the goods to a named ship's rail and not obligating the seller to arrange transportation to a final destination.

However, in the 1980 version of Incoterms, the definition of FOB provided

38. INCOTERMS 1980, *supra* note 33.

39. *Id.* "CIF" ¶ A1, "C&F" ¶ A1.

40. INCOTERMS 1990, *supra* note 5, at 38–43.

41. *Id.* at 38.

42. *Id.* at 40 (emphasis added).

43. *Id.*

44. For a more detailed analysis of the F.O.B. and FOB terms, see A. Frecon, *Practical Considerations in Drafting F.O.B. Terms in International Sales*, 3 INT'L TAX & BUS. LAW. 346 (1986).

45. U.C.C. § 2-319(1).

46. U.C.C. § 2-319(1)(c).

47. U.C.C. § 2-319(4).

that payment against documents was not required for an FOB contract, while the 1980 Incoterms did not contain such payment provisions in its definitions of other commercial terms. Thus, it is more likely that the current version of Incoterms FOB is not intended to require payment against documents or to restrict inspection before payment, unless such a term is expressly added or there is a known custom in a particular trade. In addition, it is more likely that negotiable bills of lading are not intended to be used with Incoterms FOB shipments, unless the parties specify "payment against documents" or use of a letter of credit in the sale contract.

Under the Incoterms Cost, Insurance, and Freight (CIF) commercial term,⁴⁸ the seller is obligated to arrange for both transportation and insurance to a named destination port and then to deliver the goods on board the ship arranged for by the seller. Thus, the term is appropriate only for waterborne transportation. The seller must arrange the transportation and pay the freight costs to the *destination port*,⁴⁹ but has completed its delivery obligations when the goods have "passed the ship's rail" at the *port of shipment*.⁵⁰ The seller must arrange and pay for insurance during transportation to the *port of destination*, but the risk of loss transfers to the buyer at the time the goods pass the ship's rail at the *port of shipment*.⁵¹ The seller must notify the buyer "that the goods have been delivered on board" the ship to enable the buyer to receive the goods.⁵² The seller must

48. INCOTERMS 1990, *supra* note 5, at 50-55.

49. The seller must pay the freight and unloading costs of the carrier at the destination port under the 1953 Incoterms C&F term, but the buyer must pay all other costs, including unloading costs not collected by the carrier. *In re Commonwealth Oil Refining Co.*, 734 F.2d 1079 (5th Cir. 1984). However, demurrage charges for the cost of docking the ship longer than agreed are to be borne by the party causing the delay. *Id.*

50. Thus, significant litigation has arisen when the CIF contract specifies the arrival date at the port of destination. Since the 1980 Incoterms C&F is a shipment contract, the U.S. courts have held that the seller's obligations are fulfilled when the carrier takes delivery of the goods. Thus, the buyer could not specify an arrival or delivery date after the sale contract has been formed. *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314 (2d Cir. 1985). If a CIF contract specifies a delivery date rather than a shipment date, the British decisions are split. One case held that the buyer under an Incoterms CIF contract specifying a delivery date can calculate an "appropriate latest delivery date," and that the seller is then entitled to calculate a "last date for loading" the goods on board the carrier. Thus the seller was not liable for late delivery to the port of destination, since its duties were completed upon a timely loading of the goods and notification to the buyer. *P & O Oil Trading Ltd. v. Scanoil AB*, [1985] 1 Lloyd's Rep. 389 (Q.B. 1984). However, another court has held that a delivery date term is not inconsistent with Incoterms CIF. The court rejected an interpretation of CIF that requires the seller only to deliver to the carrier and thereafter the risk of delay is on the buyer. *CEP Interagra SA v. Select Energy Trading, GmbH* (Q.B. 1990), LEXIS, UK Library, Engcas File.

51. The buyer bears the risk of damages that occur to the goods during transit, even though the seller has a duty to procure insurance against such risks. *Etalissements El Hadj Ousmanou Chetima v. Chuanchow Maritime*, No. 83 Civ. 6479 (S.D.N.Y. Apr. 4, 1984). For an exhaustive study of risk of loss issues under Incoterms, see Daniel E. Murray, *Risk of Loss of Goods in Transit: A Comparison of the 1990 Incoterms with Terms from Other Voices*, 23 U. MIAMI INTER-AM. L. REV. 93 (1991).

52. INCOTERMS 1990, *supra* note 5, at 54.

provide a commercial invoice, or its equivalent electronic message, any necessary export license, and "the usual transport document" for the destination port.⁵³

The Incoterms definition has no provisions on either payment or post-shipment inspection terms under the contract. However, Incoterms does require that the transportation document "must . . . enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer . . . or by notification to the carrier," unless otherwise agreed.⁵⁴ The traditional method of enabling the buyer to do this, in either the "payment against documents" transaction or the letter of credit transaction, is for the seller to obtain a negotiable bill of lading from the carrier and to tender that negotiable document to the buyer through a series of banks. The banks allow the buyer to obtain possession of the document (and control of the goods) only after the buyer pays for the goods. Thus, the buyer "pays against documents," while the goods are at sea, and pays for them before any post-shipment inspection of the goods is possible. This transaction should still be regarded as the norm under Incoterms CIF, and the definition of the term in the 1990 version does refer to the use of a negotiable bill of lading.

The 1980 version of Incoterms was more precise on these payment obligations, requiring the buyer to "accept the documents when tendered by the seller . . . and pay the price as provided in the contract."⁵⁵ The implication of this provision was that the buyer had no right to inspect the goods before this payment against documents. The UCC also has a definition of "C.I.F." that requires the buyer to "make payment against tender of the required documents."⁵⁶ The UCC "C.I.F." term is otherwise similar to Incoterms CIF in that it requires the seller to deliver to the carrier at a port of shipment and bear the risk of loss only to that port, but to pay freight costs and insurance to the port of destination.⁵⁷

Some ambiguity is introduced in the CIF definition, because it also refers to the use of nonnegotiable documents as well.⁵⁸ However, the ICC's Introduction to the 1990 Incoterms recognizes that the use of nonnegotiable documents is inappropriate in a "payment against documents" situation and thus would not "enable the buyer to sell the goods in transit by surrendering the paper document" to the sub-buyer.⁵⁹ The introduction then explains that sometimes the parties

53. *Id.* Under the 1980 Incoterms, the transportation document was required to be a "clean negotiable bill of lading" and "a full set of 'on board' or 'shipped' bills of lading." INCOTERMS 1980, *supra* note 33, "CIF" ¶ A7. Under the 1953 Incoterms, a "clean negotiable bill of lading for the port of destination" was required. *In re Commonwealth Oil Refining Co.*, 734 F.2d 1079 (5th Cir. 1984); *cf.* *Concord Petroleum Corp. v. Gosford Marine Panama S.A.* ("The Albazero"), [1974] 2 Lloyd's Rep. 38 (Q.B.) (title to goods covered by a bill of lading issued to seller's order passes when the bill of lading is endorsed and mailed to the buyer).

54. *Id.* at 54.

55. INCOTERMS 1980, *supra* note 33, "CIF" ¶ B1. So held in *Phillips Puerto Rico Core, Inc. v. Tradax Petroleum Ltd.*, 782 F.2d 314 (2d Cir. 1985) (C&F contract).

56. U.C.C. § 2-320(4).

57. U.C.C. § 2-320(2).

58. INCOTERMS 1990, *supra* note 5, at 54, 15.

59. *Id.* at 15.

“may specifically agree to relieve the seller from” providing a negotiable document when they “know that the buyer does not contemplate selling the goods in transit.”⁶⁰ The 1990 Incoterms does not have any provisions on when title to the goods passes from the seller to the buyer.⁶¹ Thus, when title issues arise the courts must turn to the UCC for applicable provisions.⁶²

The Incoterms Cost and Freight (CFR) commercial term⁶³ is similar to the CIF term, except that the seller has no obligations with respect to either arranging or paying for insurance coverage of the goods during transportation. Under the CFR term, the seller is obligated to arrange for transportation to a named destination point and then to deliver the goods on board the ship arranged for by the seller. Thus, the term is appropriate only for waterborne transportation. The seller must arrange the transportation and pay the freight costs to the *destination port*, but has completed its delivery obligations when the goods have “passed the ship’s rail” at the *port of shipment*.⁶⁴ The seller has no express obligation to arrange or pay for insurance on the goods during transportation, and the risk of loss transfers to the buyer at the time the goods pass the ship’s rail at the *port of shipment*. The seller must notify the buyer “that the goods *have been delivered* on board” the ship to enable the buyer to receive the goods.⁶⁵ The seller must provide a commercial invoice, or its equivalent electronic message, any necessary export license, and “the usual transport document” for the destination port.⁶⁶ As with CIF, the Incoterms CFR definition has no provisions on either payment or post-shipment inspection terms under the contract. However, Incoterms does require that the transport document “must . . . enable the buyer to sell the goods in transit by the transfer of the document to a subsequent buyer,”⁶⁷ which has traditionally meant use of a negotiable bill of lading and payment against documents. Both the UCC and prior versions of Incoterms regarded this term as requiring payment against documents while the goods were still at sea, thus restricting post-shipment inspection of the goods before payment.⁶⁸ These provisions should still be regarded as the norm under Incoterms CFR.

The Incoterms Carriage and Insurance Paid To (CIP)⁶⁹ and Carriage Paid To (CPT)⁷⁰ commercial terms are similar to its CIF and CFR terms, except that they

60. *Id.*

61. *Texful Textile Ltd. v. Cotton Express Textile, Inc.*, 891 F. Supp. 1381 (C.D. Cal. 1995).

62. *Id.* The court used U.C.C. §§ 2-511 and 2-401 to resolve the issues. See also L. Galler, *An Historical and Policy Analysis of the Title Passage Rule in International Sales of Personal Property*, 52 U. PITT. L. REV. 521 (1991).

63. INCOTERMS 1990, *supra* note 5, at 44-49.

64. *Id.* at 46.

65. *Id.* (emphasis added).

66. *Id.*

67. *Id.* at 46-48.

68. U.C.C. § 2-320(3), (4); INCOTERMS 1980, *supra* note 33, “C&F” ¶ B1.

69. INCOTERMS 1990, *supra* note 5, at 62-67.

70. *Id.* at 56-61.

may be used for any type of transportation, including multimodal transportation, and not just for waterborne transportation. Under the CIP term, the seller is obligated to arrange and pay for both transportation and insurance to a named *destination* place. However, the seller completes its delivery obligations, and the risk of loss passes to the buyer, upon delivery to the first carrier at the place of *shipment*. Thus, the term is appropriate for multimodal transportation. The CPT commercial term is similar, except that the seller has no duty to arrange or pay for insurance coverage of the goods during transportation.

Under both CIP and CPT, the seller must notify the buyer “that the goods have been delivered” to the first carrier and also give any other notice required to enable the buyer “to take the goods.”⁷¹ Under both, the seller must also provide a commercial invoice, or its equivalent electronic message, any necessary export license, and “the usual transport document.”⁷² A list of acceptable transport documents is given, and there is no requirement that the document enable the buyer to sell the goods in transit.⁷³ There are no payment or post-shipment inspection provisions in the Incoterms definitions, and the UCC does not define these terms. Further, the Introduction to Incoterms contrasts CIP and CPT with CIF and CFR, indicating that there is no requirement to provide a negotiable bill of lading with CIP or CPT terms.⁷⁴ Thus, unless the parties expressly agree to a “payment against documents” term, it is more likely that the CIP or CPT commercial terms are not intended to require payment against documents or to restrict inspection before payment.

Incoterms provides five different commercial terms for “destination” or “arrival” contracts. Two of them, Delivered Ex Ship (DES)⁷⁵ and Delivered Ex Quay (DEQ),⁷⁶ should only be used for waterborne transportation. The other three, Delivered At Frontier (DAF),⁷⁷ Delivered Duty Unpaid (DDU),⁷⁸ and Delivered Duty Paid (DDP),⁷⁹ can all be used with any type of transportation, including multimodal transport. In all of them, the seller is required to arrange transportation, pay the freight costs, and bear the risk of loss to a named destination point. Although these definitions have no provisions on insurance during transportation, since the seller bears the risk of loss during that event, the seller must either arrange and pay for insurance or act as a self-insurer during transportation. Incoterms contains no provisions on payment or post-shipment inspection, but there is no requirement for use of a negotiable bill of lading, and delivery occurs

71. *Id.* at 66.

72. *Id.*

73. *Id.* at 66, 58.

74. *Id.* at 15.

75. *Id.* at 74–79.

76. *Id.* at 80–85.

77. *Id.* at 68–73.

78. *Id.* at 86–91.

79. *Id.* at 92–97.

only after arrival of the goods. Thus, there is no reason to imply a "payment against documents" requirement if none is expressly stated. On the other hand, the parties are free to agree expressly on both a destination commercial term and a payment against documents term.

Under the Incoterms DES commercial term, delivery occurs and the risk of loss passes when the goods are placed at the buyer's disposal on board ship at the named destination port.⁸⁰ To be "at buyer's disposal," the goods must be placed (at the seller's risk and expense) so that they can be removed by "appropriate" unloading equipment. However, the goods need not be cleared for importation by customs officials; that is the buyer's obligation. Under the UCC, the term "ex ship" requires the seller also to unload the goods.⁸¹ Under the DEQ commercial term, the goods must be placed at the buyer's disposal on the quay or wharf at the named destination port.⁸² However, the parties who use a DEQ term should further specify either "Duty Paid" or "Duty Unpaid," because both DEQ (Duty Paid) and DEQ (Duty Unpaid) terms are in use. If "Duty Paid" is specified, or there is no specification, the seller must "pay the costs of customs formalities . . . duties, taxes . . . payable upon . . . importation of the goods, unless otherwise agreed."⁸³

In both DES and DEQ shipments, the seller must notify the buyer of the estimated time of arrival of a named vessel at a named destination port. Also, in both DES and DEQ shipments, the seller must provide the buyer with a commercial invoice or the equivalent electronic message, a "delivery order and/or the usual transport document," and an export license.⁸⁴ For DEQ shipments, but not for DES shipments, the seller must also provide an import license, unless otherwise agreed.

Under the Incoterms DAF commercial term, which is most appropriately used with rail or road transportation, delivery occurs and the risk of loss passes when the goods are placed at the buyer's disposal at a named place at the frontier, but before the customs frontier of the importing country.⁸⁵ Under the DDU commercial term, delivery occurs and the risk of loss passes when the goods are placed at the buyer's disposal at "the agreed point at the named place of destination" in the country of importation.⁸⁶ However, the seller has no obligation to pay import duties or charges. Under the Incoterms DDP commercial term, delivery occurs and the risk of loss passes when the goods are placed at the buyer's disposal at the named place in the country of destination and are cleared for importation

80. *Id.* at 74.

81. U.C.C. § 2-322.

82. INCOTERMS 1990, *supra* note 5, at 80.

83. *Id.* at 82.

84. *Id.*

85. *Id.* at 68.

86. *Id.* at 86.

into that country.⁸⁷ The seller must pay all import duties and charges and complete customs formalities at its own risk and expense. The only UCC destination term is "F.O.B. the place of destination,"⁸⁸ which seems similar to "DDU," but without much of the detail and precision.

In each of these terms DAF, DDU, and DDP, the seller must notify the buyer of the dispatch of the goods and give any other notice necessary for the buyer "to take the goods." In each type of shipment, the seller must provide a commercial invoice or its equivalent electronic message. In a DAF shipment, the seller must provide "the usual document or other evidence of the delivery" and an export license.⁸⁹ In a DDU shipment, the seller must also provide a "delivery order and/or the usual transport document" and an export license.⁹⁰ In a DDP shipment, the seller must provide the delivery order or transport document and both an export license and an import license.⁹¹

III. Analyzing the Changes

Some of the changes between the 1980 Incoterms and the revisions in the 1990 Incoterms are not fully explained. Many UCC commercial delivery terms have incorporated payment and inspection obligations as part of their definitional scheme, particularly the concept of "payment against documents" that precluded post-shipment inspection of the goods before payment.⁹² The 1980 Incoterms also had incorporated payment obligations as part of their definitional scheme. Under prior versions of Incoterms, these obligations and disabilities had been expressly stated in the definition of such terms as CIF and C&F.⁹³ In the 1990 revision of Incoterms, all references to payment against documents terms have been deleted, leaving only a standard provision that the buyer must pay for any pre-shipment inspection.⁹⁴ The reasons for these deletions are not satisfactorily explained.

The reason offered is that the newest Incoterms revision was to provide for the potential use of "electronic messages" as a replacement for "transport documents."⁹⁵ An additional reason was the adoption by the Comité Maritime Internationale of the Rules for Electronic Bills of Lading (1990) (CMI Rules), which were believed to have the same characteristics as the traditional bill of lading.⁹⁶ The underlying assumption seemed to be that the CMI electronic bill of lading

87. *Id.* at 92.

88. U.C.C. § 2-319(1)(b).

89. INCOTERMS 1990, *supra* note 5, at 70, 68.

90. *Id.* at 88, 86.

91. *Id.* at 94, 92.

92. U.C.C. §§ 2-319(4), 2-320(4), 2-513(3).

93. INCOTERMS 1980, *supra* note 33, "C.I.F." ¶ B1, "C&F" ¶ B1.

94. INCOTERMS 1990, *supra* note 5, at 49, 55.

95. GUIDE TO INCOTERMS 1990, *supra* note 5, at 8-9.

96. *Id.*

would replace the traditional negotiable bill of lading, so that Incoterms provisions no longer needed to be based on the traditional bill of lading. That reasoning may have overshoot the proper balance point.

The traditional negotiable bill of lading has three characteristics: a contract with the carrier, a receipt for the goods, *and* a document of title.⁹⁷ Several programs created electronic bills of lading before the CMI Rules. Some created only receipts,⁹⁸ some created a receipt with a "no disposal" term,⁹⁹ while others attempted to simulate the negotiable document of title by creating a registry.¹⁰⁰ The difficulty has been that, although it was feasible to create an electronic receipt that was acceptable to merchants in the shipment of goods transaction, these programs were not able to create a commercially feasible electronic replacement for the document of title that banks would accept in a financial transaction. It was the latter that lay at the heart of the use of CIF and CFR terms.

Under the CMI Rules, any carrier can issue an electronic bill of lading as long as it will act as a clearinghouse for subsequent transfers. Upon receiving goods, the carrier sends an electronic message to the shipper describing the goods, the contract terms, and a "private key" that can be used to transfer the shipper's rights to a third party. Under the CMI Rules, the shipper would then have the "right of control and transfer" over the goods and would be called a "holder."

97. W. TETLEY, *MARINE CARGO CLAIMS* (3d ed. 1988); D.G. Powles & S.J. Hazelwood, *Maritime Fraud—I*, 1984 J. BUS. LAW 31, 33.

98. Atlantic Container Lines used dedicated lines between terminals at its offices in different ports to send messages between those offices. It generated a Data Freight Receipt that was given to the consignee or notified party. Such a receipt was not negotiable and gave buyers and banks little protection from further sale or rerouting of the goods by the shipper in transit.

The Interstate Commerce Commission now authorizes the use of uniform electronic bills of lading for both motor carrier and rail carrier use. These electronic bills of lading have been authorized since 1982 and 1988 respectively. Although both negotiable and nonnegotiable bills are technically authorized, there is an assumption that such electronic bills of lading merely communicate information about the goods, the shipper, and the consignee. There are no provisions to define the rights and obligations of the parties to the electronic bill. Thus, the bills do not allow for further sale or rerouting of the goods in transit or for using the bills of lading to finance the transaction.

99. The Cargo Key Receipt was similar to, but also an advance over, the approach of Atlantic Container Lines discussed *supra* in note 98, because it included a "no disposal" term in the shipper-carrier contract. Thus, this electronic message protected the buyer from further sale or rerouting by the seller in transit. The electronic message could not be used to finance the transfer, however, because the electronic receipt, even if it named a bank as consignee, was not formally a negotiable document of title. The receipt was believed to give the bank only the right to prevent delivery to the buyer, not a positive right to take control of the goods for itself.

100. The Chase Manhattan Bank created the SeaDocs Registry, which was intended to create a negotiable electronic bill of lading for oil shipments. The Registry acted as custodian for an actual paper negotiable bill of lading issued by a carrier and maintained a registry of transfers of that bill from the original shipper to the ultimate "holder." The transfers were made by a series of electronic messages, each of which could be authenticated by "test keys," or identification numbers, generated by SeaDocs. SeaDocs would then, as agent, endorse the paper bill of lading in its custody. At the end, SeaDocs would electronically deliver a paper copy of the negotiable bill of lading to the last endorsee to enable it to obtain the goods from the carrier. While SeaDocs was a legal success, showing that such a program was technically feasible, it was not a commercial success, lasting less than a year.

Under Rules 4 and 7, an electronic message from the shipper that includes the private key can be used to transfer the shipper's rights to a third party, who then becomes a new holder. The carrier then cancels the shipper's "private key" and issues a different private key to the new holder. Upon arrival, the carrier will deliver the goods to the then-current holder or a consignee designated by the holder.

The original parties to the transaction agree that the CMI Rules will govern the "communications" aspects of the transaction. All parties also agree that electronic messages satisfy any national law requirements that a bill of lading be in writing. This agreement is an attempt to create by contract and estoppel an "electronic" writing that is a negotiable document of title. Some commentators have observed that this is an attempt by private parties to create a negotiable document, a power usually reserved to legislatures.¹⁰¹ American bankers have been skeptical of the device created by the CMI Rules. The registries maintained by each carrier do not have the same level of security associated with Society for Worldwide Interstate Financial Telecommunications procedures.¹⁰² In addition to fraudulent transactions, there is a risk of misdirected messages. Thus, a bank could find itself relying on "nonexistent rights based upon fraudulent information in a receipt message transmitted to it by someone pretending to be the carrier."¹⁰³ The banks are concerned as to whether carriers will accept liability in their new role as electronic registrars for losses due to such fraudulent practices.¹⁰⁴ The banks are also concerned that the full terms and conditions of the contract of carriage are not available to subsequent "holders." Thus, use of the CMI Rules does not yet seem to be widely adopted, and bills of lading are still primarily paper-based in both the "payment against documents" and letter of credit transactions.

Thus, the deletions of the payment terms from the 1980 Incoterms leave a gap that must be filled from some other source of information. There are at least three sources of such information. One such source of payment and inspection terms is the prior versions of Incoterms, such as the 1980 Revision,¹⁰⁵ that contained definitions which did include terms on payment and inspection. The definitions in the 1990 Revision of Incoterms refer to "the usual transport document,"¹⁰⁶ and it can be argued that this reference incorporates the standards established in definitions from prior versions. Further, the deletions are not explained, except

101. See Boris Kozolchyk, *The Paperless Letter of Credit and Related Documents of Title*, 55 *LAW & CONTEMP. PROBS.* 39 (1992) (including authorities cited therein).

102. *Id.*

103. *Id.*

104. See Peter Winship, *Current Developments Concerning the Form of Bills of Lading in the United States*, in *OCEAN BILLS OF LADING: TRADITIONAL FORMS, SUBSTITUTES, AND EDI SYSTEMS* 263 (A.N. Yiannopolis ed., 1995).

105. INCOTERMS 1980, *supra* note 33.

106. INCOTERMS 1990, *supra* note 5, ¶ A8, at 46, 5.

to indicate a desire not to impede the introduction of the use of EDI messages to handle transportation arrangements. On the other hand, the 1990 revision of Incoterms establishes several new terms, for which this approach will be ambiguous; and this approach, over time, could be used to impede the use of EDI technology. However, some carryover use of such payment and inspection terms should be expected.

A second source of payment and inspection terms is national law, such as the UCC. The UCC provides "default rules" for a number of commercial terms.¹⁰⁷ Under prior versions of Incoterms, these default rules were not applicable if the parties selected Incoterms, because the parties had "agreed otherwise." Now, however, that analysis may no longer stand. The parties have agreed that Incoterms will preempt UCC terms, where applicable; but Incoterms no longer has payment and inspection provisions, so the payment and inspection provisions of the UCC definitions may no longer be preempted. This analytical approach has some difficulties. One is that many of the Incoterms commercial terms no longer correspond to their UCC namesakes.¹⁰⁸ A second is that the parties, by nominating Incoterms, may have intended to bypass all aspects of the statutory definitions and substitute customary definitions. Nevertheless, some use of the UCC and other definitions from national law should be expected as a source of information to resolve all legal issues created by the deletion of the payment and inspection provisions in the Incoterms definitions.

If neither prior versions of Incoterms nor specific definitions in national law are deemed to be acceptable sources of information, then the general provisions of national law give virtually no provisions for interpretation of the commercial terms, except to allow a court to consult general customs and usage of trade. Custom and usage, therefore, can be a third source of such terms.¹⁰⁹ However, custom and usage must be proven as matters of fact, usually by expert testimony; and the proof must surmount several legal hurdles to be accepted by a court. The use of experts and surmounting of legal hurdles was exactly what the parties thought they were avoiding by incorporating Incoterms into their contract. It is possible that those expectations may now be violated, at least as to payment and inspection terms. Thus, use of Incoterms definitions may subject the users to problems of proof of custom and usage that may not arise from the UCC definitions.

IV. Potential Courses of Action

The committee that is revising UCC Article 2 is aware of the conflicts and confusions discussed above. Several courses of action are open to it. One possible

107. U.C.C. §§ 2-319 to -323.

108. See, e.g., prior analysis of Incoterms FOB and U.C.C. "F.O.B."

109. See, e.g., U.C.C. §§ 1-205, 2-208; CISG, *supra* note 1, art. 9, at 674.

course of action is to retain the current detailed definitions in the original UCC Article 2, because they are easily understood and are familiar to the practicing bar. However, that course of action is not satisfactory to the industry, because the current definitions have become less relevant to modern transportation practices. If the revised statute incorporates any detailed definitions, they should at least reflect current practices.

A second course of action is to rewrite the current UCC Article 2 detailed definitions of commercial terms to reflect modern transportation practices. This approach would cure shortcomings of the present detailed definitions. The rewritten detailed definitions would be similar to, but not necessarily identical to, the current Incoterms, because of differences between international and American domestic commercial practices. The problem presented by this approach is that transportation practices, both domestic and international, change over time. Thus, any revised detailed definitions would also become less relevant over time as practices change, just as has happened with the original detailed Article 2 commercial terms definitions. It is also possible that transportation industry practices are changing more rapidly now than they have in the past, so that any revised detailed definitions would become less relevant more quickly. Thus, if there are revisions to provide new Article 2 commercial terms, then the definitions should not be detailed, as they were in the original UCC Article 2, but should be very general.

A third approach would be to incorporate Incoterms into the revised UCC Article 2. That approach would eliminate the present conflicts and confusions between Incoterms and Article 2. An incorporation of the specific definitions in the 1990 revision of Incoterms would start becoming obsolete after the next revision of Incoterms—presumably around the year 2000.

An incorporation of Incoterms generally, as it changes during successive revisions, would solve the obsolescence problem, but would create others. Incorporation into a state statute of terms to be written by nongovernmental persons or bodies can raise issues concerning proper delegation of legislative authority,¹¹⁰ but this issue has not precluded the use of the ICC standards by some states in nonuniform amendments.¹¹¹ Also, although a federal court has recognized that Incoterms 1990 is “the most widely recognized sets of nonstatutory definitions” for foreign trade,¹¹² it is not certain that Incoterms and American domestic practices are identical. Finally, adoption of Incoterms would be a large instantaneous change that many, especially small shippers, might not be prepared to deal with. Thus, there may be significant difficulties in adopting either the current

110. See generally C. DALLAS SANDS & MICHAEL E. LIBONATI, *LOCAL GOVERNMENT LAW* § 9.12 (looseleaf, 1981-).

111. See, e.g., nonuniform amendment to U.C.C. § 5-102(4), adopted in New York, Alabama, Arkansas, and Missouri, which deferred application of U.C.C. Article 5 if the ICC's Uniform Customs and Practice for Documentary Credits was incorporated into the credit.

112. *Texful Textile Ltd. v. Cotton Express Textile*, 891 F. Supp. 1381, 1388 & n.6. (C.D. Cal. 1995).

details of Incoterms 1990 or incorporating Incoterms, as it is revised from time to time, into the statute.

A fourth approach is to delete all of the detailed definitions in the original UCC Article 2 and not replace them with any detailed definitions from any source. Such an approach would avoid most of the difficulties discussed in the previous paragraphs concerning the first three approaches. However, the absence of detailed definitions would also leave the courts without any statutory guidance and would require proof of custom in the transportation industry in cases where it is not so required under the current statutory regime.

This lack of guidance could be alleviated by two possible further actions. One would be to refer to Incoterms as a possible source of custom until other sources could be developed. Such a reference would be different from an incorporation of Incoterms into the statute, because Incoterms would furnish only a potential source of custom concerning the meaning of a term, not a statutory definition of that term; and its effect would be determined by the trier of fact. A second possible action would be the development of a statement of customary meanings of commercial terms in the American domestic transportation industry. Such a statement might be identical to Incoterms or might differ in significant ways. To date, the presence of the statutory definitions in UCC Article 2 has inhibited the development of such a standard set of definitions for domestic transactions. Deletion of the statutory definitions could encourage the speedy production of such a set of definitions for domestic transactions.

The committee that is revising UCC Article 2 has chosen the fourth approach.¹¹³ The committee recognizes the difficulties inherent in this approach, but also recognizes other, probably greater, difficulties inherent in any other approach. However, the committee has not completely followed through on this approach and problems still remain.

One set of these problems arises out of the fact that the committee has only deleted sections 2-319 to 2-324 of the original UCC Article 2 and has not made the necessary revisions in other sections of original Article 2. One such section is section 2-504 in original Article 2, which establishes a presumption that, where transportation is authorized, the seller is obligated to arrange transportation and insurance.¹¹⁴ This presumption is out of step with commercial practice,¹¹⁵ Incoterms,¹¹⁶ and federal law on international sales.¹¹⁷

Section 2-504 should be rewritten so that the presumption is that the seller has no obligation to make transportation arrangements unless the buyer requests

113. See U.C.C. § 2-309 (Revised Art. 2 Discussion Draft, July 1996).

114. U.C.C. § 2-504(a).

115. See U.C.C. § 2-507 cmt. 1 (Revised Art. 2 Discussion Draft, July 1996).

116. See *supra* discussion in text at notes 24-28.

117. CISG, *supra* note 1, arts. 31(a), 32, at 678.

it to do so, or unless it is "commercial practice" for the seller to do so.¹¹⁸ Any such arrangements would be at the buyer's expense. Such a presumption would not conflict with the CISG¹¹⁹ and would reflect commercial practice, as represented by Incoterms FCA, for the least set of obligations on the seller under a sale of goods contract requiring transportation of the goods.¹²⁰ The presumption would protect the buyers from surprise where it is now common practice for the seller to arrange shipment at the buyer's expense (such as mail order purchases), while resolving the present conflicts between international and domestic presumptions.

The second set of problems remaining with the committee draft revision of UCC Article 2 is that it assumes that Incoterms covers all aspects of each commercial term. As Section II of this article demonstrates, the 1990 revision of Incoterms has no provisions concerning payment against documents, post-shipment inspection, or the passing of title.¹²¹ Article 2 of the UCC does include provisions that govern the passing of title,¹²² and these provisions are included in the current draft of the Revised Article 2.¹²³

Post-shipment inspection provisions are also included in both the original Article 2 and in the current draft of Revised Article 2, but in both texts they are expressly determined by whether "the contract provides . . . for payment against documents of title."¹²⁴ That reference is no longer appropriate under the 1990 revision of Incoterms because it no longer has provisions that declare whether any particular commercial term requires "payment against documents." The provisions in prior revisions of Incoterms that required payment against documents have been deliberately deleted and not replaced.

Thus, the language in the Revised Article 2 draft referring to "payment against documents" seems to lead nowhere. The language does not lead, as it did in original Article 2, to statutory definitions, because original Sections 2-319 to 2-324 have now been deleted. It does not lead, as it did under prior versions of Incoterms, to a provision in these pronouncements of custom in the industry that CIF or CFR require payment against documents.

This "dead-end" reference in the current revision can be dealt with in several ways. One method is to leave the analysis to the courts and hope that they will have sufficient knowledge of commercial custom to "do the right thing." A second method is to change the current references to "payment against documents" to a comparable phrase appearing in the 1990 Incoterms. However, no

118. That is not the presumption in the current draft of Revised U.C.C. Article 2. See authorities cited *supra* note 115.

119. CISG, *supra* note 1, arts. 31(a), 32, at 678.

120. INCOTERMS 1990, *supra* note 5, at 24-31; see *supra* text accompanying note 27.

121. See *supra* text at notes 92-104.

122. U.C.C. §§ 2-401, 2-510, 7-502.

123. See U.C.C. §§ 2-401, 2-402 (Revised Art. 2 Discussion Draft, July 1996).

124. U.C.C. § 2-513(3)(b); see U.C.C. § 2-513(c)(2) (Revised Art. 2 Discussion Draft, July 1996).

such comparable phrase appears in 1990 Incoterms CIF or CFR. In paragraph B1 of each definition, which used to require the buyer to pay against the documents,¹²⁵ the language now states only that buyer is to “[p]ay the price as provided in the contract of sale.”¹²⁶ The paragraph on transport documents is of no greater help, since it merely requires that the “document” must “enable the buyer to sell the goods in transit by the transfer of the document,”¹²⁷ and does not refer to any requirement of payment against the document. Thus, it would be difficult to amend the original UCC Article 2 to replace the current reference to “payment against documents” with a new phrase. Further, even if that substitution were made, there is no guarantee that the new phrase reference would appear in subsequent revisions of Incoterms.¹²⁸

A third method of dealing with such problems is to specify in the Revised UCC that “CIF” and “cost and freight” are terms that do require payment against documents or their electronic equivalent if electronic bills of lading become widely accepted by the banking industry. Whether such a specification can merely be stated in the Comments or needs to be stated expressly in the statute is an open question. If the latter, the revisors of UCC Article 2 could insert new statutory provisions with very general definitions of “CIF” and “cost and freight.” Alternatively, they could define the term “payment against documents” as including “CIF” and “cost of freight” unless otherwise agreed. This approach is currently used with the term “C.O.D.”¹²⁹ and seems not to have created a problem. Such a solution would not conflict with Incoterms, since the 1990 revision of Incoterms no longer includes “payment against documents” provisions.

V. Conclusion

Conflicts exist between the detailed definitions of commercial terms in UCC Article 2 and the definitions of similar terms in Incoterms and cause confusion. The UCC definitions represented current commercial practice in 1952, but those practices have changed since then, and the Incoterms definitions are now closer to current commercial practices. Therefore, in the revision of UCC Article 2, these obsolete definitions of commercial terms should be deleted. Further, the revisions should not attempt to substitute replacement of detailed definitions for the ones that are being deleted, because any such detailed definitions will also become obsolete as commercial practices evolve. Even incorporation by reference of all the details of Incoterms may not be appropriate, since current American

125. INCOTERMS 1980, *supra* note 33, “CIF” ¶ B1.

126. INCOTERMS 1990, *supra* note 5, ¶ B1, at 51.

127. *Id.* ¶ A8, at 54.

128. Apparently the Incoterms drafters were not concerned with preserving customary phrases built into current statutes during the 1990 revision of Incoterms.

129. U.C.C. § 2-513(3)(a).

domestic practice is not necessarily identical to the international practice represented by Incoterms definitions.

To replace the current statutory detailed definitions, the American transportation industry may have to develop a statement of customary meanings of commercial terms, which could be similar to, but not identical to, Incoterms. In the meantime, Incoterms and the former provisions of UCC Article 2 could both be sources of guidance for the courts. The elimination of the statutory definitions should encourage the industry to produce a set of definitions and to provide them in a more appropriate vehicle than a statute that is revised every forty years.

The revisions of UCC Article 2 should include not only the deletion of the detailed definitions of commercial terms, but also the revision of more general provisions, such as section 2-504, which are also out of step with current practices. Further, there are other UCC Article 2 provisions that depend upon whether the sales contract requires "payment against documents." Unfortunately, the 1990 revision of Incoterms deleted all references to "payment against documents," without adequate explanation, and did not furnish any useable substitute language or criteria. The revisions of UCC Article 2, therefore, need to state which commercial terms are presumed to require payment against documents, or their electronic equivalent, either as part of a general definition of those commercial terms or as part of a definition of "payment against documents."