International Commercial Law
New Lex Mercatoria

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”New Lex Mercatoria”

A-national law, Non-national law, Transnational law, Soft law, ...

- A set of uniform rules regulating international transactions
- Does not necessarily emanate from national sources of law or international treaties

Sources of ”New Lex Mercatoria”

- ”Principles rooted in the good sense and common practice of the generality of civilised nations” **(Binding Public international law)**
- Usages and practices **(Binding lex mercatoria)**
- International Conventions **(Binding sources of law private law and non binding soft law?)**
  - E.g. CISG
- Model Laws **(Non binding soft law)**
  - E.g. UNCITRAL Model Arbitration Law
- Private Codifications **(Non binding soft law)**
  - E.g. INCOTERMS, UCP 600
- Restatements **(Non binding soft law)**
  - E.g. UNIDROIT Principles, European Principles

”Principles rooted in the good sense and common practice of the generality of civilised nations”

- Mentioned as source of private law obligations between commercial parties
- Is actually a source of public international law obligations among states (art 38 ICJ Statutes)

Public international law as source of private law obligations between commercial parties?

- http://www.trans-lex.org (principles and rules of transnational commercial law):
  - Principle I.1.1: The parties must act in accordance with the standard of good faith and fair dealing in international trade
  - Sources: doctrine, awards, court decisions, etc.:
    - ICC
    - ICSID
    - ICJ
    - …

Public international law as source of private law obligations between commercial parties? Cont.

- ICJ Australia v France, Rec. 1974, at 267 et seq. :

  One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

- English law of contracts: Unilateral promise is not binding
- Does the English law of contracts violate public international law?
- Or do public international law and contract law have different spheres of application?

International Conventions - Sources of Soft Law?

- If they are applicable, they are not soft law but applicable law
- If they are not applicable: Can soft law achieve application of convention in lieu of ratification?

Private Codifications

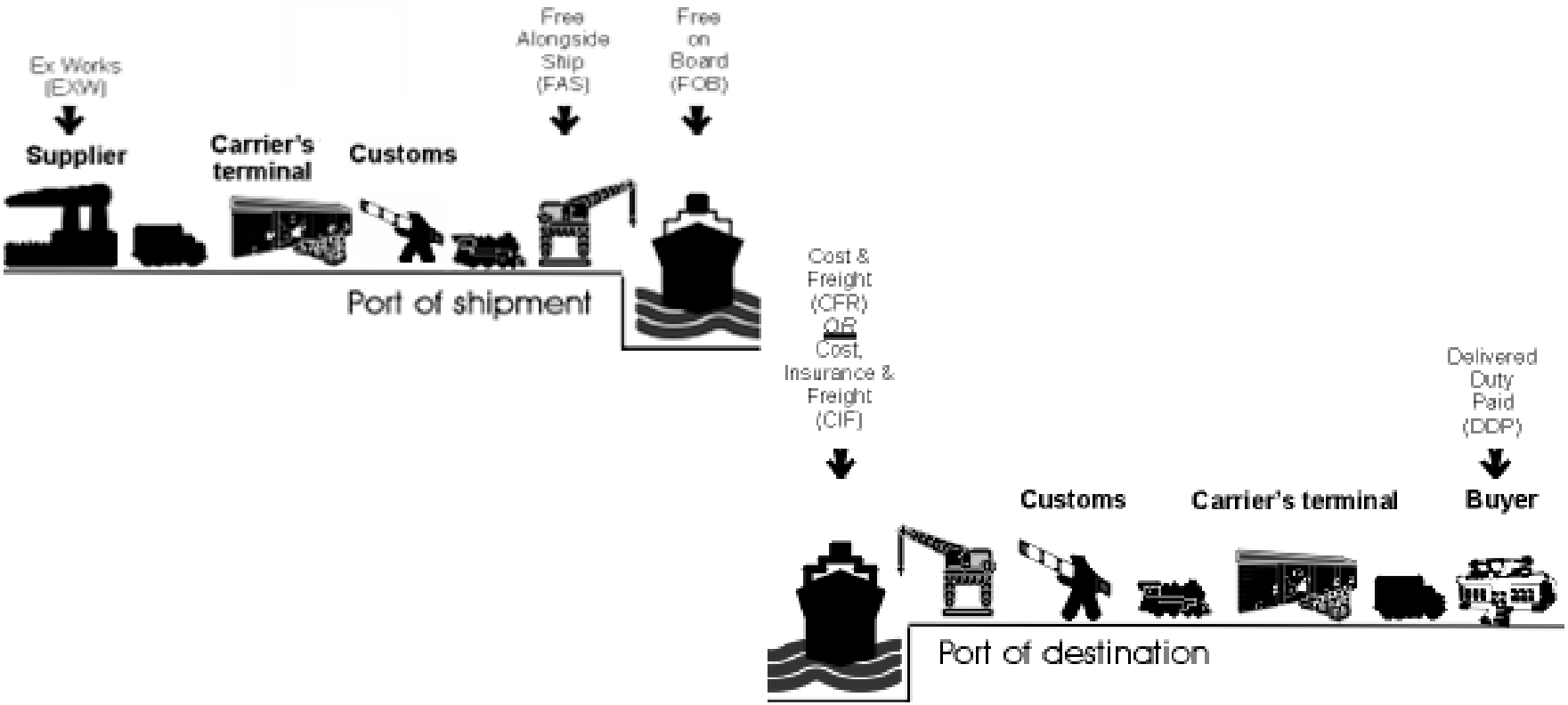
- International Chamber of Commerce, ISDA, branch associations
- INCOTERMS, UCP 600, Model Agreements, Codes, Definitions

- May be considered as expression of trade practices
- Alt.: Are applicable if incorporated by the parties
- May not prevail over conflicting madatory rules of the applicable law
- Have a clearly determined scope of application

INCOTERMS

- ICC Terms of sale regulating:
  - Passage of risk
  - Division of costs
  - Obligations in connection with delivery (customs formalities, transportation, etc.)

Source: http://www.cbsc.org/alberta/tbl.cfm?fn=incoterm



The 4 groups of terms (Incoterms 2000)

Term	Delivery
• E-terms	Departure (not cleared or loaded)
• F-terms	Main carriage unpaid (cleared)
• C-terms	Main carriage paid (risk passes)
• D-terms	Arrival (cleared for import only in DDP)

The 2 groups of terms (Incoterms 2010)

Term

- Delivery by any mode of transport
- Delivery by sea/inland waterway

The 13 INCOTERMS (Incoterms 2000)

- EXW EX WORKS (…named place)*

  FCA FREE CARRIER (…named place)

  FAS FREE ALONGSIDE SHIP (…named port of shipment)*

  FOB FREE ON BOARD (…named port of shipment)

  CFR COST AND FREIGHT (…named port of destination)

  CIF COST, INSURANCE AND FREIGHT (…named port of destination)*

  CPT CARRIAGE PAID TO (…named place of destination)

  CIP CARRIAGE AND INSURANCE PAID TO (…named place of destination)*

  DAF DELIVERED AT FRONTIER (…named place)*

  DES DELIVERED EX SHIP (…named port of destination)

  DEQ DELIVERED EX QUAY (…named port of destination)*

  DDU DELIVERED DUTY UNPAID (…named place of destination)*

  DDP DELIVERED DUTY PAID (…named place of destination)*

The 11 INCOTERMS (Incoterms 2010)

- EXW EX WORKS (…named place)*

  FCA FREE CARRIER (…named place)

  FAS FREE ALONGSIDE SHIP (…named port of shipment)*

  FOB FREE ON BOARD (…named port of shipment)

  CFR COST AND FREIGHT (…named port of destination)

  CIF COST, INSURANCE AND FREIGHT (…named port of destination)*

  CPT CARRIAGE PAID TO (…named place of destination)

  CIP CARRIAGE AND INSURANCE PAID TO (…named place of destination)*

  DAP DELIVERY AT PLACE (…named place of destination)*

- DAT DELIVERY AT TERMINAL (…named place of destination)*

  DDP DELIVERED DUTY PAID (…named place of destination)*

INCOTERMS and Governing Law-I

- Delivery FOB, goods destroyed after passage of risk
- INCOTERMS: Buyer has to pay the price
- Governing law: Buyer not bound to pay the price if loss due to seller’s negligence (art. 66 CISG)
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INCOTERMS and Governing Law

- Integration of applicable law
- Subject to applicable law
- Do not replace applicable law (e.g. Validity, Limitation, Interests, Remedies, etc.)
- May accommodate requirements of applicable law (e.g. allocate risk of customs duties)

New Lex Mercatoria - Grounds in Favour

- National law is primarily aimed at regulating domestic relationships
- National laws differ from one another
- National laws are confusing and an hindrance for international trade
- International commercial usages and practices are more adequate to regulate transactions across national borders

New Lex Mercatoria – Grounds against

- Not a system but a fragmentary collection of rules
- Rules are too vague
- Rules are difficult to determine
- Rules are not issued by competent authorities

New Lex Mercatoria – Scope of Application

- Mostly compatible with national laws
- Desirable integration of national law
- If conflict, the applicable national law prevails