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Review

Role Analysis of Contract Aim in INCOTERMS 2020 as Main Cause of Transfer of Risks of Petroleum and Refinery Equipment

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ABSTRACT

The international chamber of commerce (ICC) created a generally accepted set of terms named INCOTERMS 2020 which provides that the risk of the loss of or damage to the goods passes from the seller to the buyer when the seller has fulfilled his obligation to deliver the goods. However, this rule is based on a false base, which causes numerous exceptions where the goods are delivered, but the risk remains on behalf of the seller. In this paper, we will prove that there is only one unexceptional factor which indicates whether the risk has passed through the other side or still remains with it; that factor is reaching the aim. The aim has a composite nature, and preparing the last part of that nature allows reaching the goal; this is the main reason for transferring the risk of the thing. Thus, when the buyer's aim from the contract is fulfilled, the risk of the goods will be transferred to him or her, and when the seller's aim from the contract is met, the risk of the price will be transferred to him or her. Generally, the aim or the cause of the obligations should be defined as the acquirement of the property and the possession of the thing which is peaceful and useful for enjoying with security. Hence, each term will be separately analyzed by the theory of the cause of the obligations in the civil law of France, and we will name this totally new theory which defines the goal as a composite nature the theory of the spirit level of the risk.

1. Introduction

The main reason for this research is responding to the question of what really causes transferring the risk of the thing in petroleum contracts when we are exporting products to achieve the price and in refinery equipment contracts when we are importing products by paying the price. By answering these questions, we will modify the INCOTERMS charts by replacing the delivering of the goods through achieving the aim of the contract. Thus, there will be no exception at all.

2. Materials and Methods

First of all, in petroleum contracts, because of their nature which provides transferring the gasoline and its productions from the sea and waterways, the chosen

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INCOTERMS should be within the specific INCOTERMS for this reason, but in refinery equipment contracts, all kinds of INCOTERMS may be chosen.

Then, we will first analyze the INCOTERMS which may be chosen for the contracts of refinery equipment and then the INCOTERMS which may be chosen for petroleum contracts.

3. INCOTERMS for all Modes of Transport

3.1. Ex Works (EXW)

"Ex works" indicates that the seller delivers the goods when it places them at the disposal of the buyer at the seller's premises or at another named place. The seller does not need to load the goods on any collecting vehicle, nor does the seller need to clear the goods for export where such clearance is applicable[1]. It is obvious that this represents the minimum liability for the seller[2], and the buyer must carry out all the tasks of export and import clearance. Carriage and insurance are to be arranged by the buyer[3], and the buyer is at risk when the goods have been placed at his/her disposal at the agreed time and place[4]; nevertheless, we should dispose of this illusion that the deliverance supposes transferring the risk of the thing. Therefore, in this term, because of the major difference between the power of the two parties and the obvious weakness of the buyer, the virtual spirit level of the risk will change its position in favor of the seller, and probably his aim of the contract is achieved only by the deliverance of the goods; however, what happens if the goods are not in the same position that the buyer desired? The answer is the risks will remain on behalf of the seller. But why?

By accepting the deliverance as the main factor of transferring the risks, this example should be count as an exception; nonetheless, by choosing the real factor which indeed is preparing the aim of the buyer from the contract, this example is no longer an exception; in fact, by not preparing the aim of the contract, the goods will remain at the seller's risk.

3.2. Free Carrier (FCA)

In this term, the seller must deliver the goods to the carrier at the agreed point, at the named place, on the agreed date or within the agreed period. The obligations of the seller are limited similar wot EXW, but just a little more. In EXW, the seller is the one who should pay for export packing service and for marking and labeling the goods, but in FCA, the obligation of export clearance such as the license, electronic export information (EEI), and automated export system (AES) is added to the seller's obligations. In fact, buyer's composite aim is prepared when these obligations are fulfilled regardless of whether the goods are delivered or not. Hence, if the buyer has not reached his aim, the goods will remain at the risk of the seller although the goods are handed over to the first freight carrier or an agreed location. Perhaps the definition of the possession in civil law of France is useful. In article 2261, it is obvious that the possession should be continuous, uninterrupted, peaceful, public, and unequivocal.[5] This definition of the real possession in addition to security is what we name the cause of the obligation or the aim of the contract. On the base of the spirit level of the risk theory, preparing it causes the things to be at the risk of the creditor.

3.3. Carriage Paid To (CPT)

In this term, we face an enormous increase in the seller's obligations. In fact, the buyer's power in pre-contract negotiations is much higher than EXW and FCA terms, and the seller who has more obligations to perform has to fulfill all the previous obligations too. The seller is the freight forwarder and should pay the documentation fees and inland freight to the main carrier. He is responsible for the origin terminal and vessel loading charges. Ocean or air freight is in his charge too, and he should nominate the export forwarder. However, what about the marine insurance? Similar to EXW and FCA terms, the INCOTERMS 2020 does not obligate neither the buyer nor the seller to insure the goods. Therefore, this issue will be addressed elsewhere in the sale contract. It is clear that the risk will be transferred to the buyer when the goods are delivered to the first carrier. Nevertheless, it is obvious that if the seller denies to perform the previous obligations such as nominating the export forwarder or paying the vessel loading charges, the goods will remain at his/her risk. How is it possible? Because of choosing the wrong factor for transferring the risk, which is the deliverance of the goods, you will face these exceptions. Nonetheless, when we look at the aim of the buyer in the contract, delivering the goods is only one of his/her desires and often his/her last one; thus, we will find out that achieving the buyers' aim by completing this composite nature which is his/her aim from the contract is the main

[1] Iccwbo.org
[2] Searates.com
[3] Searates.com
[4] If-insurance.com
[5] Code civil, Dalloz, 2018, 117 edition

reason for transferring the risk; hence, it does not matter what is the name of the last part of his/her aim; it can be deliverance, paying the shipping charges, or something else. However, it is important that the completed aim as a composite nature will cause the risk to be transferred to the other party. Therefore, when the sale contract is about the refinery equipment, which is delivered but the seller denies to perform his obligations due to the CPT term and because of the impossibility to achieve the aim of the buyer from the contract, the goods will remain at the risk of the seller. In the CPT term, determining the party which is responsible for the charges of unloading from the main carrier and for the destination charges depends on the contract of carriage. In this contract determining the aim of each party by moving the virtual spirit level of the risk will indicate the final position of the aim bubble, and the degree shown by the aim bubble indicates that what are the obligations of each party. In the CPT term, when the goods are in their destination (for example Bandar Abbas harbor), nominating on-carrier and paying the charges are about the seller through bill of lading or door-to-door rate to buyer's destination. Performing these obligations is completing the aim of the buyer, and by refusing to fulfill them when an unintended the loss of or damage to the goods happens, the goods are still at the risk of the seller despite of their delivery.

3.4. Carriage and Insurance Paid to (CIP)

This term is very similar to the previous term, i.e. CPT, with only one difference. The obligation of marine insurance in about the seller. The deliverance of the goods to the first carrier is supposed to be the point of the transfer of the risks to the buyer, but with accepting this unreal fact, we will face the examples which despite of delivering the goods, by occurring unintentional the loss of or damage to the goods, the seller is still responsible. However, by accepting the cause of the obligations, which is the aim of the buyer in the contract as the factor the preparation of which results in transferring the risk, if the seller denies to perform his/her whole obligations to make true the will of the buyer, he/she should take the risk. Thus, the deliverance of the goods should be separated from the risk transferring. In other words, if the deliverance completes the composite aim of the buyer in the contract, this will cause the transferring of the risk, and if not, we should wait for another element which will complete this composite nature such as paying the destination terminal charges.

3.5. Delivered at Place (DAP)

Delivered at place means that the seller delivers the goods when they are placed at the arriving means of transport ready for unloading at the named destination. The seller takes all risks involved in bringing the goods to the named place, and the point within the agreed place of destination is where the risks are transferred to the buyer. In this rule, because of the weakness of the seller during the pre-contract negotiations, the aim bubble shows that there is a large domain of obligations for the seller to prepare the aim of the buyer in the contract. All the previous obligations are added to nominating the carrier after unloading the goods at the destination terminal. However, what about the risks? In INCOTERMS 2020, the seller takes all the risks of the loss of or damage to the goods until they have been delivered at the disposal of the buyer by the arriving means of transport ready for unloading at the agreed point (if any), at the named destination, and on the agreed date or within the agreed period. Nonetheless, choosing the wrong factor for transferring the risk is the main cause of foreseeing the exceptions which indicate that if the buyer fails to fulfill its obligations, then he/she bears all the resulting risks of the loss of or damage to the goods, but it is not an exception. This phrase according to the theory of the spirit level of the risk indicates that if the buyer intentionally fails to fulfill its obligations, it means that he/she has reached his/her aim. Then, the goods will be at risk even if he/she refuses to deliver the goods. Hence, when the buyer's aim is prepared, the goods will be at his/her risk, and when the seller's aim is prepared, the risk of the price will be transferred to him/her.

3.6. Delivered at Place Unloaded (DPU)

This rule is the new term created by INCOTERMS 2020. The previous term in INCOTERMS 2010 was DAT which was replaced by the DPU term in INCOTRMS 2020. In the delivered at terminal (DAT) term, the seller was obligated to perform all the obligations in the previous terms in addition to the charges of unloading the main carrier. However, there was a big different between the DAT and the CIP. In the CIP term, marine insurance is one of the seller's obligations, while in the DAT term, this issue is addressed in the sales contract. In fact, by choosing the CIP term, the buyer mandates the seller to insure the marine because by the theory of the spirit level of risk of the aim bubble crosses over the point which shows this obligation for the seller; hence, if this does not happen, the buyer's aim will disappear and the goods remains at

the risk of the seller despite of being delivered to the buyer.

By the current international conditions for Iran with the most powerful sanctions ever existed in its international relationships, insurance plays a major role in refinery equipment contracts of sale. Therefore, choosing this term is preferred to the DAT term. In fact, by choosing this term, the aim of the buyer is achieved by marine insurance as the last part of the aim composite nature complementary. Thus, if it does not happen, the refinery equipment remains at the risk of the seller despite of their delivery to the first carrier; hence, paying the unloading charges in the destination terminals such as Bushehr Harbor if the goods have marine insurance is preferred to the DAT term which addresses this obligation elsewhere in the sales contracts.

This term was named DAT in INCOTERMS 2010 which is replaced by the DPU rule. The new INCOTERMS rule is created by replacing the DAT term. This acronym changing is a simple renaming given that the obligations and functions of both terms are exactly the same. The DAT rule was the only term in which the goods are delivered unloaded at the place of destination. The change of name is sustained as the goods can be unloaded not only at transport terminals and infrastructures such as ports, airports, docks, etc. as foreseen in the DAT term but also at any other points in the destination country which have facilities for the unloading of the goods from the means of transport such as a factory or warehouse. Therefore, the term DPU includes often the DAP term since the goods are delivered ready for unloading, that is, a step prior to the unloaded goods as in the DPU. As a result, in the INCOTERMS 2020 in the DPU term, the seller delivers the goods once unloaded from the arriving means of transport into a place, whereas in the DAP term, the seller delivers the goods when they are placed at the disposal of the buyer on the arriving means of transport for unloading. Thus, International Chamber of Commerce (ICC) decided to make two changes to the DAT and DAP terms.

- Because in the DAP term, delivering happens before unloading, it should be placed before the DAT term.
- The term DAT has been changed to DPU emphasizing the reality that the place of destination will be any place and not just a terminal because terminal often causes confusion.

Therefore, the DPU term broadly covers any place whether covered or not.

In the DPU term, by emphasizing the aim of the buyer in the contact and the theory of the spirit level of the risk, unloading goods in the destination is one of the parts of the compound nature of the aim of the buyer and covers a more dreaded domain of possibilities to be achieved in comparison with the DAT term wherein the goods should be unloaded at the destination terminal and not any place that the buyer determines. This weakness is not covered by the DAP term because in this rule delivery occurs before unloading. As a result, when the aim of the buyer contained the seller's obligation to deliver the goods in a place other than the destination terminal by unloading the goods, it has to choose the DAT rule and tries to define the word terminal broadly; now in INCOTERMS 2020, this aim can be chosen apparently by the buyer. Nevertheless, when is the risk transferred? If we choose the wrong element for transferring the risks of the thing, which is named the delivery of the goods, by unloading the goods in the determined place chosen by the buyer, it is supposed that the risks are transferred to the buyer; however, if the previous obligations of the seller are not met, we will face the exceptions. Nonetheless, the real fact is that realization the whole obligations of the seller completes the compound aim of the buyer in the contract, and this prepared aim causes transferring the risks; thus, the goods will be at the risk of the buyer.

3.7. Delivered Duty Paid (DDP)

In this rule, we see a great increase in the seller's obligations. In fact, the buyer obviously imposes his/her willing to the other party. Choosing this term shows that according to the theory of the spirit level of the risk, the aim bubble is in its maximum distance from the buyer, and it indicates that its aim is very difficult to achieve; on the other hand, the buyer's obligations are at its minimum level.

DDP means that the seller delivers the goods when they are placed at the disposal of the buyer, cleared for import on arriving the means of transport, ready for unloading at the named place of the destination. The seller has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import, and to carry out all the formalities of customs. However, what do we see in INCOTERMS 2020 about transferring the risks in the DDP?

The seller bears all the risks of the loss of or damage to the goods until they have been delivered by placing them at the disposal of the buyer on the agreed date or within the agreed period, but the following items are the exceptions:

- If the buyer fails to the fulfill its obligations, the buyer must provide assistance to the seller at the seller's request, risk, and expense in obtaining any import license or other official authorization for the import of goods.
- If the buyer fails to give notice about the time within an agreed period and/or the point of taking delivery within the named place of the destination, then the buyer bears all the risks of the delivery from the agreed date or the expiry date after the agreed period provided that the goods are clearly identified as the contract goods.

Nonetheless, these are not exceptions and according to the theory of the spirit level of the risk; by failing to fulfill the obligations, the buyer is supposed to achieve his/her aim. Then, the goods will be at his/her risk even if they have not been delivered yet provided that the goods in the contact are the same as those bought by the buyer. This term is the most desirable term for importing the goods such as refinery equipment, but it will be possible only in a suitable situation. In fact, the buyer causes the virtual spirit level of the risk bubble of the aim to be at its limit with the maximum distance from the buyer, which indicates that the buyer's aim needs to fulfill plenty of obligations by the seller, and even if one of these obligations is not accomplished, the goods remain at the risk of the seller. Hence, by failing to pay the charges of unloading the goods from the main carrier or failing to pay the charges of the destination terminal within an agreed period of time, any loss of or damage to the goods will be at the risk of the seller regardless of whether the goods are delivered or not.

4. Rules for Sea and Inland Waterway Transport

These rules are suitable for the countries which are the oil exporters such as Iran.

4.1. Free Alongside Ship (FAS)

This rule means that the seller delivers the goods when they are placed alongside the vessel nominated by the buyer of the named port of shipment; also, the risk of the loss of or damage to the goods passes when the goods are alongside the ship and the buyer bears all the costs from that moment onward. This rule is similar to the FCA rule with the difference that in the FAS, the inland freight to the main carrier is paid by the seller, while in the FCA, the buyer pays the inland freight, and the seller arranges and loads pre-carriage carrier and pays the inland freight to the "F" delivery place so that the delivery happens; however, after the buyer finds out that the seller has refused to perform his/her total engagements, which party is responsible for the risk of the goods?

We see in the text of INCOTERMS 2020 that the seller must obtain at his/her risk and expense any export license or other official authorization and carry out all the formalities of customs necessary for the export of the goods.

By accepting the deliverance as the factor for risk transferring, the previous statement should be an exception, but it is not. Due to the theory of spirit level of the risk, it is not the deliverance which brings risk transferring, but the preparation of the aim of the buyer; also, it is true that we often have deliverance as the last part of its composite nature, but we should dispose of this illusion that the causality relationship is between the deliverance and transferring the risk; indeed, it is between preparing the composite aim of the buyer in the contract and the transferring the risk. Thus, if the seller denies to perform any of his/her obligations, despite performing the last one such as delivering the goods, the goods will remain at the risk of the seller.

4.2. Free on Board (FOB)

This rule means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already delivered. The risk of the loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all the costs from that moment onward. The seller must deliver the goods either by placing them on board the vessel on the agreed date or within the agreed period and in the customary manner at the port; also the seller must pay all the costs relating to the goods until they have been delivered and the costs of the formalities of the customs necessary for export; further, all the duties, taxes, and other duties and charges payable upon export are a part of the seller's obligations. Therefore, if the delivery happens by placing the goods on board the vessel nominated by the buyer, but one of the numerous obligations of the seller before delivering the goods has not been accomplished as well as it should be, the goods will be at the risk of the seller because of the damage to the buyer's aim, which is his/her cause of the obligations. As a result, we have a principle without any exception, and that is when the buyer's aim is prepared by performing all the seller's obligations; this completed composite nature each single part of which has entered into the contractual domain expressly or implicitly as a part of the aim will cause the risks of the goods to be transferred to the buyer.

Between the rules for the sea and inland waterway transport, for the reason that Iran is or was one of the greatest oil exporters, choosing a term with the minimum obligations for the seller is the best way to protect the national fate. Thus, the FAS term is the best rule for Iran because the buyer's aim is achieved more easily compared to the other terms. By preparing the oil customer's aim, the risk of the product will be transferred to the buyer. In fact, among the rules for any mode or modes of transport in refinery equipment, Iran is often in an importer position and should focus on the rules in which the seller's aim is achieved more easily compared to the other terms, including the DAP, DPU, or DDP terms. For the oil, which is the most important export of Iran, choosing a rule among the rules of waterway transport such as FAS and FOB in which the buyer's aim is provided more easily is preferable.

4.3. Cost and Freight (CFR)

This rule means that the seller delivers the goods on board the vessel or procures the goods already delivered. The risk of the loss of or damage to the goods passes when the goods are on board the vessel.

In INCOTERMS 2020, this rule has two critical points because the risk and the costs are transferred at different places. While the contract always specifies a destination port, it might not specify the port of shipment, and we see that the seller must pay all the costs related to the goods until they have been delivered. He/she must pay freight and all the other costs, including the costs of loading the goods onboard and any charges for unloading at the agreed port of discharge. These obligations should be satisfied by the seller under the contract of carriage, and he/she should pay the costs of the formalities of customs, taxes, other charges payable upon export, and the costs for their transport through any country. These obligations should be fulfilled by the seller under the contract of carriage. Therefore, what will happen if the buyer refuses to obtain the obligations before delivering the goods by placing them on board the vessel and the continuous obligations until the goods are delivered to the destination? It is obvious that the goods will remain at the risk of the seller and INCOTERMS 2020 repairs the weakness of choosing the deliverance as the cause of the risk transfer by relating the obligations of the seller after delivering the goods to the buyer to the carriage contract. Hence, although the risk has been passed through the buyer in the rule (CFR) after delivering by placing the goods on board the vessel in origin terminal, by the carriage contract until delivering the goods to the buyer in the destination terminal, the goods are still at the risk of the seller. However, the real regulation and final solution is as follows: delivering will not cause the transfer of the risk neither in the origin terminal nor in the destination terminal. There is only one real and unexceptional cause for the transfer of the risk: completing the compound aim of the buyer by performing all of the duties of the seller. Therefore, when all of the obligations of the seller are performed, the risk of the goods will be passed through the buyer; if not, the goods will remain at the risk of the seller. For this reason, we see that when the INCOTERMS 2020 mentions the parties' obligations, it uses the word "must".

4.4. Cost Insurance and Freight (CIF)

This rule means that the seller delivers the goods on board the vessel or procure the goods already delivered. The risk of the loss of or damage to the goods passes when the goods are on board the vessel. The seller also contracts for insurance cover against the buyer's risk of the loss of or damage to the goods during the carriage. The seller is required to obtain insurance for only a minimum cover like the previous rule. This rule has two critical points too because the risk and the costs are transferred at different places. For covering the lack of conformity to reality that choosing the deliverance as the cause for transferring the risk of the goods has, it is foreseen that, with another contract, this lack will be covered. Nonetheless, what is happening in reality? The buyer suspends preparing his/her aim to perform the obligations for marine insurance by the seller; thus, if all of the seller's obligations are performed, the aim and the vision of the buyer have become true, and at this moment, the risk of the goods will be transferred to him/her. For oil exporting, the last two rules, namely CRF and CIF, are not proposed because preparing the buyer's aim needs to perform more obligations in comparison with rules FAS and FOB.

5. Results and Discussion

In the present study, we conclude that in INCOTERMS 2020, because of adopting a wrong factor for transferring the risk, we face plenty of exceptions in which although the risk has been passed through the buyer, the seller is still responsible for the loss of or damage to the goods. However, there is an old theory in civil law of France named "the cause of the obligations" which means the aim of the contract. This element which is one of the essential elements for the validity of contracts, is the golden key to the problem of transferring the risks and the exceptions which are created by

choosing the delivery factor, that is, a fake factor in risk transferring will be disappeared instantly.

According to the theory of the cause of the obligations or the aim of contract, a new theory is being born which is named the spirit level of the risk by imagining a virtual spirit level and a bubble known as the aim bubble between the parties during the pre-contractual negotiations. Each party tries to move the spirit level down on its behalf; then, where the aim bubble stops, it shows the aim of each party and the path to reach this goal. Performing the whole obligations makes the aim of the creditor party come true. There is also an axe for the spirit level which determines the domain of the movement of the spirit level and its limit of length; this is because the public order effects prevent the imposing of unfair conditions by one party on the other one.

INCOTERMS 2020 if interpreted by this theory, it shows that by moving from E to B, to C, and finally to D rules, preparing the aim of the buyer is becoming harder and harder because of the increase in the domain of the obligations of the seller.

The aim has not a simple nature but a composite one, and preparing this compound nature makes the aim prepared and this preparation the real cause of risk transferring.

Accepting the theory of the spirit level of the risk moves away any exceptions to risk transferring which accepting the deliverance of the goods has brought to INCOTERMS 2020.

Iran as a buyer of refinery equipment should impose D rules, namely DAP, DPU, or DDP, to the seller which contains a spread domain of seller's obligations, and until these obligations are not satisfied, the refinery equipment remains at the risk of the seller.

Iran as an important exporter of oil should impose the rule to the other party with a spread domain of obligations for the buyer often between the rules for waterway transferring such as FAS and FOB, and, if the transfer of the goods is possible through the land, between the rules such as Ex Works and FCA. In these rules, the aim of the buyer is achieved by the limited obligations of the seller, and by performing these obligations, the goods such as oil and gas will be at the risk of the buyer.

6. Conclusions

There are different factors in national and international laws for causing the risks of the thing to be transferred. None of these factors are based on the true reasons and causes such as the moment of transferring the property or delivering the goods. Therefore, by choosing these fake factors the most well-known of which is the goods deliverance, we will face so many exceptions. In fact, each party by imagining a motif and making it an aim by entering it in the contractual domain, expressly or implicitly, determines the path of the obligations that performing them will make its aim of contract come true. Preparing the aim is the golden answer for risk transferring. The aim with a composite nature consists of different parts which are the performance of the obligations of the other party. In INCOTERMS 2020, the real element that causes the risk to be transferred is not the delivery of the goods but performing the whole obligations of the seller. Thus, when Iran is in the buyer's position, its profit is in the rules which have a domain of minimum obligations for the buyer and a domain of maximum obligations for the seller; when Iran is in the seller's position, its profit is in the rules with a domain of minimum obligations for the seller and a domain of maximum obligations for the buyer. By this goal, the cause of the obligations, which is the aim of the contract, will reduce all the exceptions and make the contract and its conditions transparent by imagining a virtual spirit level of the risk. By this theory, one of the most misunderstanding factors, the deliverance of the goods as the main reason for risk transferring, which may cause major prejudices and judicial defeats in international courts, will be prevented.

Nomenclature

The rules for all the models of transport	
CIP	Carriage and insurance paid to
CPT	Carriage paid to
DAP	Delivered at place
DDP	Delivered duty paid |
DPU	Delivered at place unloaded
EXW	Ex works
FCA	Free carrier
The rules for sea and inland water ways	
CIF	Cost insurance and freight
CFR	Cost and freight
FAS	Free along ship
FOB	Free on board

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