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Maritime Sales and Contractual Confluence*
Ventas marítimas y confluencia contractual

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Abstract: It is estimated that ships transport about 80 % of world trade; in other words, these are goods transfers carried out by maritime mode. The maritime sale is a kind of sale and is understood as a form of distance commercial exchange. Originally, its dynamism has been closely related to the fluctuations inherent to international trade because of market opening policies or the adoption of protectionist measures.

It is a known fact that in maritime sales the confluence of at least four types of contracts occurs: The sales contract, the transport contract, the documentary credit contract and the cargo insurance contract. This investigation analyzes the dynamics of maritime sales with emphasis on the main contract, which is the international sales contract, and approaches the state of the art in Peru.

Key words: Maritime sales, international sales, maritime transport of goods, cargo insurance, documentary credit

Resumen: Se estima que cerca del 80 % del comercio mundial, se transporta por medio de buques; es decir, se trata de traslados de mercancías que se realizan por el modo marítimo. La venta marítima es una especie de compraventa y se entiende como una forma de intercambio comercial a distancia. Desde sus orígenes, su dinamismo guarda estrecha relación con las fluctuaciones propias del comercio internacional como consecuencia de políticas de apertura de los mercados o la adopción de medidas proteccionistas.

Es conocido que en las ventas marítimas se presenta la confluencia de al menos cuatro contratos, a saber: el contrato de compraventa, el contrato de transporte, el contrato de crédito documentario y el contrato de seguro de la carga. Esta investigación analiza la dinámica de las ventas marítimas con énfasis en el contrato principal, que es el de compraventa internacional, y se aproxima al estado de la cuestión en el Perú.

Palabras clave: Venta marítima, compraventa internacional, transporte marítimo de mercancías, seguro de carga, crédito documentario

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CONTENT: I. INTRODUCTION.- II. ANALYSIS OF MARITIME SALES, THEIR LINK TO INTERNATIONAL TRADE AND THE LACK OF INTERNATIONAL REGULATION.- II. 1. ANALYSIS OF MARITIME SALES: HISTORY, EVOLUTION, AND DEFINITION.- II.1.1. BACKGROUND AND EVOLUTION OF MARITIME TRADE.- II.1.2. APPROACH TO THE DEFINITION AND CLASSIFICATION OF MARITIME SALES.- II.1.3. LINKING MARITIME SALES TO INTERNATIONAL TRADE.- II.1.4. LACK OF SPECIFIC INTERNATIONAL AND NATIONAL REGULATION FOR MARITIME SALES.- III. THE CONFLUENCE AND FUNCTIONAL LINKAGE OF INTERNATIONAL CONTRACTS OF SALE, CARRIAGE OF GOODS BY SEA, CARGO INSURANCE, AND LETTER OF CREDIT.- III. 1. THE CONFLUENCE AND FUNCTIONAL LINKAGE OF INTERNATIONAL CONTRACT.- III.2. PRESENTATION OF INTERNATIONAL CONVENTIONS AND GLOBAL PRACTICES REFLECTED IN CONTRACTUAL TOOLS, LINKED TO THE CONVERGING CONTRACTS.- III. 2.1. INTERNATIONAL CONVENTIONS RELATED TO CONFLUENT CONTRACTS (HARD LAW).- III. 2.2. SOFT LAW AND SELF-REGULATION TOOLS.- IV. THE INTERNATIONAL SALES CONTRACT: HISTORICAL BACKGROUND, DEFINITION, TRANSNATIONALITY AND UNIFORMITY, AND CHARACTERISTICS.- IV.1. HISTORICAL BACKGROUND OF INTERNATIONAL SALES CONTRACTS.- IV.2. DEFINITION OF THE INTERNATIONAL SALES CONTRACT.- IV.3. UNIFICATION OF INTERNATIONAL TRADE LAW AND OF THE RULES ON INTERNATIONAL SALES AND PURCHASE, AND TRANSNATIONALITY OF THE INTERNATIONAL SALES CONTRACT.- IV.3.1. UNIFICATION OF INTERNATIONAL TRADE LAW AND RULES ON INTERNATIONAL SALES.- IV.3.2. THE TRANSNATIONALITY OF INTERNATIONAL SALES.- IV.4. CHARACTERISTICS OF INTERNATIONAL SALES CONTRACTS FROM THE PERSPECTIVE OF THE 1980 VIENNA CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG).- IV.4.1. AN APPROACH TO THE CISG.- IV.5. COMPLEMENTARY INSTRUMENTS APPLICABLE TO INTERNATIONAL SALES AND PURCHASES.- IV.5.1. THE CONVENTION ON THE LIMITATION PERIOD IN THE INTERNATIONAL SALE OF GOODS (NEW YORK, 1974).- IV.5.2. THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS.- IV.5.3. THE UNITED NATIONS CONVENTION ON THE USE OF ELECTRONIC COMMUNICATIONS IN INTERNATIONAL CONTRACTS (NEW YORK, 2005).- V. INCOTERMS 2020 RELATED TO MARITIME SALES: FAS, FOB, CFR AND CIF.- V.1. GENERAL INFORMATION ON INCOTERMS.- V.1.1. DELIVERY OF GOODS, TRANSFER OF RISK, AND DOCUMENTARY OBLIGATIONS.- V.1.2. INCOTERMS AND THE TRANSFER OF OWNERSHIP.- V.1.3. INCOTERMS AND MARITIME SALES.- V.2. AN APPROACH TO EXCLUSIVELY MARITIME INCOTERMS.- VI. THE CONTRACT OF INTERNATIONAL CARRIAGE OF GOODS AND THE CHARTER CONTRACT: DIFFERENCES BETWEEN THEM AND THE EXISTENCE OF TWO HEMISPHERES IN THE MARITIME CARRIAGE OF GOODS SERVICES.- VI.1. DIFFERENCES BETWEEN THE CONTRACT OF MARITIME CARRIAGE OF GOODS AND THE CHARTER CONTRACT.- VI.2. THE TWO HEMISPHERES IN THE MARITIME CARRIAGE OF GOODS SERVICES.- VII. APPLICATION OF PERUVIAN LAW AND INTERNATIONAL CONVENTIONS AND PRACTICES IN

RELATION TO MARITIME SALES AND CONTRACTS OF CONFLUENCE.- VIII. CASE LAW RELATED TO MARITIME SALES.- IX. CONCLUDING THOUGHTS.

I. INTRODUCTION

For decades now, it has been stated that in international trade, specifically in the sale and purchase of goods between parties whose establishments are located in different countries, there is a confluence of at least four contracts, namely: the sales contract, the contract of carriage of goods by sea, the letter of credit contract and the cargo insurance contract. However, as is well known, centuries ago, sales and maritime transport converged, at the very least. In maritime sales—which, as we shall see below, are some sort of sale and purchase agreement of the contractual legal relationships that concur and are functionally linked in trade—it turns out that the main contract is the sales contract, noting that not all sales contracts constitute a maritime sale, since it may happen that the commercial transaction is complemented by a route not linked to maritime traffic in which the goods subject to the exchange are hauled by other modes of transport, such as air or land.

The other contracts mentioned are accessory, since without the closing of the sale as the main act of commerce there would be no need to contract the means of transportation, nor the insurance covering possible damages to the cargo transferred, nor the letter of credit strictly necessary to guarantee payment in the case of international sales and purchases. It should be emphasized that the confluence of the four contracts mentioned above occurs mainly in foreign trade operations, and it is rare that maritime sales are entered into without cargo insurance and letters of credit.

While it is true that each contract is autonomous and involves different companies (sellers (exporters), buyers (importers), shipping lines, insurance companies and banks, among others), these legal relationships involved have their own legal frameworks and their own "channels of interpretation"; however, there is also an interdependence that could lead to the application of different bodies of law, from international conventions and national laws to the *lex mercatoria*, which contains globally disseminated practices as soft law.

Maritime sales are not regulated in any binding international instrument. The United Nations Convention on Contracts for the International Sale of Goods (CISG) (Vienna, 1980), of which Peru is a member country, does not contain any section on the subject; however, this international instrument does contain some rules on sales that include carriage. Maritime sales are not regulated in any law or regulation of the Peruvian legal system.

Despite the lack of special regulation at the international and national regulatory level, maritime sales have been included in the International Commercial Terms (Incoterms) from the International Chamber of Commerce (ICC), since its first version in 1936 to the latest revision, in force since January 1, 2020. As is well known, Incoterms are rules widely used in sales where goods are not produced in the same place where the seller is, they are inserted in international sales contracts, and their purpose is to regulate the obligations and rights of the parties, as well as to specify the distribution of risks and expenses between them. Incoterms are also part of globally widespread practices and are part of the new *lex mercatoria*.

Together with the confluence of contracts mentioned above, there is also a confluence of uniform international trade law and uniform maritime law instruments, and normative instruments with binding force, hard law, with contractual tools of the new *lex mercatoria*, such as the Incoterms, the Uniform Customs and Practice for Documentary Credits (UCP 600) of the ICC applicable to letters of credit, or the policies or forms used to document contracts for the use of vessels drawn up by non-governmental international organizations, to name a few soft law instruments that are part of transnational law.

The purpose of this article is to analyze maritime sales and the aforementioned contractual confluence, as well as international regulations and global practices related to maritime sales, with emphasis on the international sales contract; and to examine how these international regulations and practices are reflected, especially considering the fact that studies and knowledge on maritime sales are very limited in the country.

II. ANALYSIS OF MARITIME SALES, THEIR LINK TO INTERNATIONAL TRADE AND THE LACK OF INTERNATIONAL REGULATION

II. 1. Analysis of Maritime Sales: History, Evolution, and Definition

According to several published studies, it is estimated that approximately 80% of the world trade is transported by means of ships, i.e., by maritime route. This fact about the hauling of goods in international traffic, is fundamentally due to the efficiency of ships, since these are the vessels with the greatest capacity to haul large volumes and tons of cargo over long distances and at lower costs.

International trade agreements, which include agreements to open markets and eliminate or reduce tariffs, have had the direct effect of

increasing the intensity of commercial transactions (international sales) and, consequently, a significant increase in maritime and port traffic.

II.1.1. Background and Evolution of Maritime Trade

The evolution of maritime trade is historically related to the evolution of commercial and maritime law. The mercantile and maritime doctrine has dealt a lot with this point; moreover, in most of the treaties and manuals on these disciplines we find chapters that present the historical data.

Since ancient times, international trade (i.e., mercantile transactions carried out by merchants domiciled in two distant States) was linked to the use of ships (galleys operated by the exercitor navis in Rome and, later, the medieval senyor de la nau who operated vessels or ships, among others) for the hauling of goods between ports, from where they were then transported to warehouses, fairs, or stores for local sales. Along these lines, Ray (1996) recalls that:

> maritime operations were carried out through a close link between the owner of the ship and the owner of the transported goods [...] In the Middle Ages, if the owner of the ship was not the owner of the goods, a partnership between the owners of the ship and of the cargo was formalized, and the profits obtained from the sales of the transported products were distributed at the port of destination (pp. 413-414).

From these links between ship owners, and shippers or cargo owners, a series of legal relationships arose in Europe, which in some cases are the precedents of the business collaboration contracts and trading companies of our times. In this sense, Ray (1996) argues that in the Middle Ages

> Thus, institutions were born in the Mediterranean and in Northern Europe, especially in the Baltic, such as the comanda, the colonna, and the societas maris in the South and similar figures in the North, especially Scandinavian [...] Some time later there was a dissociation between the maritime business operations and those of overseas trade, with the consequent clash of interests (p. 414).

This historical approach to maritime trade is further developed by Professor Ray (1994) in his work Derecho de la navegación [Navigation Law], specifically in volume II.

In modern times, the dissociation between the commercial activities of the shipping businessman and those of the businessman engaged in foreign trade—the importer and exporter of goods—is evident, since they are different and perfectly distinguishable businesses. It is manifested by the contrast of interests, basically centered on the freight price, which is the consideration paid by the cargo owner to the shipowner or carrier for the transportation of goods; as well as on the distribution of costs and

risks associated with transportation—the maritime expedition—and logistics.

The antagonism between shipowners and users of maritime transport services is also reflected in the core issue of the carrier's civil liability for damage to the cargo during transport, an issue that is reflected in maritime traffic and in the negotiations that have led to the adoption of international instruments regulating the international maritime transport of goods, as discussed below, and also in the adoption of national regulations on the matter.

Maritime sales, as a form of distance sale, was consolidated in the second half of the 19th century, parallel to the irruption of technological innovations in maritime navigation, such as the change in the propulsion system of ships in the before last century, which went from the combination of wind and sails to engines; and the invention and massive use of containers in the second half of the 20th century. These powerful and truly disruptive innovations in the maritime industry, together with other non-technological but also relevant innovations—such as new forms of business organization in the maritime industry and the presence of new operators, immersed in commercial operations contained in sophisticated legal relationships—and, subsequently, the signing of trade agreements between countries or blocs of countries, as mentioned above, had an impact on the increase in world trade and, consequently, on maritime and port traffic.

II.1.2. Approach to the Definition and Classification of Maritime Sales

An approach to the definition of maritime sale, which constitutes a sort of purchase and sale, as mentioned above, makes it possible to place this type of legal relations with precision in the context of international commercial transactions. In this order of ideas, "Maritime sales belong to the categories of sales where goods are not produced in the same place where the seller is and are characterized by the incidence of maritime transport, accessory or substantially, in the regime of rights and obligations of the parties" (Górriz, 1999, p. 337).

Ripert (1954), for his part, emphasizes that "The commercial sale of goods that are sent from the seller to the purchaser by sea is called a maritime sale. They are, therefore, sales in which the maritime transport of the goods sold is taken into consideration" (p. 247).

The concept of maritime sale, as stated in the authoritative doctrine cited in this article, indissolubly associates the sale of goods with maritime transportation. The concurrence of both contracts, at least, in a sort of intertwining between the buyer or seller and the shipowner, is a substantial element to understand the scope of the maritime sale.

Here we must emphasize the hauling of goods that are the purpose of the sales contract as an effect of the maritime transport of the goods, especially in relation to the obligation of delivery and distribution of risks between the parties involved.

Maritime sales are linked to maritime law because their specialty lies in the technical fact of navigation by water. Although it is true that the transportation of goods is increasingly more "door-to-door" than "port-to-port"—mainly due to the massive use of containers and the growth of multi-modalism or the "partly by sea" transportation, the latter expression being in line with the Rotterdam Rules—it is true that maritime sales retain their specialty and their gravitation over those commercial exchanges that use other modes of transport. Following this logic, as Arroyo (2001) points out, "maritime sales continue to maintain their specialty, as evidenced by the fact that formulas typical of maritime sales are being applied to transactions carried out with other modes of transport" (p. 656). It is noteworthy that international trade terms (Incoterms), which will be discussed later, are being used in international commercial transactions for sales involving other modes of transport, such as air or land.

Maritime sales, besides having as a distinctive feature the sale of goods not produced in the same place where the seller is—at a distance—and as a core the transfer of goods by means of ships—maritime transportation—and their delivery to the consignee, also have as a distinguishing element the intertwining or confluence of at least four contracts: sales, carriage of goods by sea, letter of credit, and cargo insurance. The lack of regulation is another characteristic of maritime sales, as they are not regulated by any international instrument despite their importance for global trade. It also lacks normative discipline in national legislation as it is not regulated, in our case, by the Civil Code of 1984 or by the old Commercial Code of 1902. A last characteristic, no less relevant, is the close relationship between maritime sales and Incoterms. Along these lines, Górriz (1999) maintains, without being able to affirm that there have been changes to this affirmation in the last twenty years, that "The most important maritime sales today are four: Free Alongside Ship (FAS), Free on Board (FOB), Cost and Freight (CAF) and Cost, Insurance and Freight (CIF)" (p. 339).

In relation to how maritime sales are classified, Arroyo (2001) mentions that "Depending on the person to whom the goods are entrusted, sales are classified as direct or indirect sales" (p. 663). In direct sales the seller —exporter— makes the goods available to the buyer —importer— at the port of destination, either on the ship or on the quay; and in indirect sales the seller entrusts the goods or merchandise to the carrier —the shipping company— or places them on the ship, so that when

he fulfills this activity as stipulated in the contract and the applicable legislation, it is understood that he has fulfilled his obligation to deliver (Arroyo, 2001, p. 663). These aspects will be discussed in more detail later on. Maritime sales are a reality in trade activity, both national and international; however, it is in transnational trade that maritime sales are most evident, mainly due to the distances that must be covered to move the goods that are the purpose of the sales contracts. Beyond the increase in multimodal transport operations and intermodal transport, it is crystal clear that the dominant mode of transport will always be maritime, to the detriment of land and air transport, mainly because of the enormous transport capacity of ships compared to other vehicles. For this reason, which is not just a matter of nomenclature, it is valid to call the aforementioned contractual confluence as "maritime sale".

In the following pages we will specify the characteristics of maritime transport services from the perspective of contracts for the use of ships —maritime transport and chartering arrangements— and the existence of scheduled and non-scheduled maritime transport services.

II.1.3. Linking Maritime Sales to International Trade

The close link between maritime sales and international trade is evident from the fact that approximately 80% of world trade is moved by means of ships. This fact is decisive to maintain that the close relationship between international sales and maritime transport is indisputable, and that it is precisely the international sales contract that establishes the main legal relationship in commercial exchanges between parties domiciled in places located in different countries.

As Fernández, Arenas, and De Miguel (2013) argue:

> One of the essential features of trade is the circulation of patrimonial values, since the commercial activity involves a mediating action in the movement of things, rights or services from one holder to another. In this context, the sales contract is the most frequent of all those generated in commercial relations and can be considered as the prototype of contracts (pp. 359-360).

For the purposes of this work, the circulation or movement of goods or merchandise that are the purpose of sales contracts, as has been pointed out, is the one that concerns those transported in vessels contracted by businessmen that exercise their business activity in two different and distant States, and that are linked by a foreign trade operation in which at least four autonomous contracts converge, among them the sales contract and the contract of carriage of goods by sea.

One of the distinctive characteristics of the international sales contract, as noted above, is the fact that it is a legal act entered into between distant persons. In this line, Alba (2012) considers that:

> The seller and the buyer will be separated by a certain physical distance, and this separation has a number of implications for their relations. What interests us here is the latter, since it can be stated generally that in these contracts it will be necessary to move the goods from one place to another (p. 377).

The movement of goods between distant ports and warehouses is manifested in two types of sales contracts, distinguishable in turn precisely by the movement of goods, which are reflected in the CISG: contracts that do not involve the transportation of goods and contracts that do involve the transportation of goods, i.e., maritime sales, which are developed and analyzed in this research.

II.1.4. Lack of Specific International and National Regulation for Maritime Sales

It should be noted that maritime sales do not have a specific international regulation nor are they regulated in national laws, such as the commercial codes that contain parts dedicated to navigation and maritime trade, or the maritime navigation laws as special bodies of law on maritime transport, chartering and other concepts of maritime law.

At the international level, the CISG —where Peru is a member country— does not contain any section on the subject; however, this international instrument does contain some rules on sales with transportation, as mentioned above.

In Peru and in several legal systems of the continental system —civil law—, in addition to the lack of specific regulation of maritime sales in commercial and maritime legal bodies such as those mentioned above, there is no special regulation of this type of sales contract in the Civil Code of 1984, which regulates sales in Title I of the Second Section of Book VII, entitled "Source of Obligations."

In view of the lack of special regulation at the international and national regulatory level, maritime sales are considered in the ICC Incoterms, from their first version in 1936 to the latest revision, in 2020. As is known, Incoterms are rules that are widely used in sale of goods not produced in the same place where the seller is, they are inserted in international sales contracts and their purpose is to regulate the obligations and rights of the parties, as well as to specify the distribution of risks and expenses between them. Incoterms are an expression of the new *lex mercatoria* and are not included in laws or international conventions, but their use is widespread in international trade.

The Incoterms 2020, effective January 1, 2020, contain 11 proposed terms and their classification distinguishes them between terms usable for any mode of transportation —including multimodal and intermodal transport— and classic terms related to maritime transport and therefore used in maritime sales. The four exclusively maritime terms are: Free Alongside Ship (FAS), Free on Board (FOB), Cost and Freight (CFR), and Cost, Insurance, and Freight (CIF); and the other seven terms: Ex-Works (EXW), Free Carrier (FCA), Carriage Paid To (CPT), Carriage and Insurance Paid To (CIP), Delivered at Place (DAP), Delivered at Place Unloaded (DPU), and Delivered Duty Paid (DDP), are multipurpose, in the sense as indicated above, that they can be used for sales contracts of goods that have to be hauled by any means of transportation.

III. THE CONFLUENCE AND FUNCTIONAL LINKAGE OF INTERNATIONAL CONTRACTS OF SALE, CARRIAGE OF GOODS BY SEA, CARGO INSURANCE, AND LETTER OF CREDIT

As indicated above, maritime sales involve at least four autonomous and distinguishable contracts: the sales contract, the contract of carriage by sea, the cargo insurance contract, and the letter of credit contract.

These cross-border transactions imply the linking of the above-mentioned legal relationships, as well as the application of international rules and practices—customs and usages. In this line, it is unavoidable to refer to the presence of a commercial law and a maritime law connected with globalization, also called globalization. Hence the aspiration to have uniform rules that apply to the legal relations of operators domiciled in different countries, which have different bodies of law, often even related to different legal systems such as common law and Roman-Germanic or continental law. As Illescas (2005) points out:

> First of all, the applicable legal rules must be uniform: the same international contract must have the same discipline whatever the country in which it is executed and performed, the same contractual dispute must have the same solution whatever the State in which it arises and is resolved. This characteristic is called uniformity and constitutes the basic requirement of the commercial law of globalization (p. 82).

The uniformity of rules, so often proclaimed by the doctrine that deals with the law of international trade and maritime law, is a matter that is not peculiar to our times; medieval merchants were spontaneously self-regulated through statutes that collected what was customary and usual at the time, the same ones that formed the often mentioned

lex mercatoria. Thus, out of necessity, merchants created their own *ius mercatorum*, distinct from common law and canon law.

III.1. The Confluence and Functional Linkage of International Contracts

The maritime sales that we analyze in this research should be located, as mentioned above, as a specialty of international sales due to the fact of cross-border transactions between parties with establishments in different States, which place us before an international legal relationship.

Regarding the concurrent and functionally linked contractual legal relationships in international commercial transactions, the doctrine that has dealt with the subject is pacific in maintaining that the main contract is the sales contract, which acquires an "international" connotation when it is an operation in which the parties —buyer and seller— are domiciled in different States, specifically with respect to the rules applicable to the contract, which—as has been pointed out—do not find in the national civil codes the adequate framework because they are transnational legal relationships.

The other contracts —i.e., the contract of carriage by sea, the cargo insurance contract and the letter of credit contract— are accessory to the main nature of the international sales contract. Therefore, without the completion of the sales contract as the main legal relationship of cross-border trade, the other autonomous contracts mentioned above would not be linked.

The existence of the core legal business of the international sale and purchase triggers the need to enter into accessory contracts: the carriage by sea contract to transfer the goods from the port of origin to the port of destination and, eventually, to connect with another means of transportation; the cargo insurance contract to cover possible damages to the goods during their transportation and until their delivery at destination; and the letter of credit contract, necessary for the payment by the buyer (importer) of the purchased products. However, it is convenient to specify that entering into cargo insurance and letter of credit contracts are optional, it is not an obligation of the contracting parties to insure the cargo nor of the buyer to guarantee payment with a letter of credit, since there are other forms of payment. Nevertheless, it is true that a diligent operation of international sale and purchase normally entails that the cargo is moved with a good insurance coverage.

The confluence of contracts of sale, carriage of goods by sea, cargo insurance and letter of credit is evident, as has been shown, in international trade, in which normally the contracts of sale and purchase

entered into that have a maritime route —i.e., maritime sales— due to issues related to the legal certainty that any transaction requires, are accompanied by cargo insurance and letter of credit contracts, which form the group of accessory contracts in the contractual confluence. Although it is appropriate to point out that local maritime sales may occur when the confluent contracts are entered into between companies domiciled in the same country, which means that the contract of carriage of goods by sea is executed between ports located in the same country, which is technically known as contract of carriage of goods by sea in domestic traffic or coastal trade.

Other authors identify and give relevance—at least in FOB sales—to two contracts: the sales contract and the contract of carriage of goods by sea. Along these lines, Ostoja (1973) points out that "it is said that at least two contracts converge, since it is very often the case that the purchase and sale operation is financed by a letter of credit, which will imply new contractual relations" (p. 106).

In the same context, and highlighting the relationships for the cross-border exchange of goods that constitute the oldest international mercantile operations—sale and carriage by sea—that can be traced back without hyperbole to the Middle Ages, Alba (2012) considers that:

> these transactions define one of the contractual clusters mentioned above: the oldest of them, consisting of the triad of the sales contract as the main contract, the contract of carriage and the letter of credit contract (or other contracts for the financing or intermediation of payment), to which we could probably also add the (goods) insurance contract (p. 374).

In the confluent legal relationships, each autonomous contract naturally gives rise to rights and obligations of the related parties in their different positions: seller (exporter), buyer (importer), carrier, shipper, insurer, insured, or financial guarantor.

This research is limited to the international contracts mentioned in the introduction to this section and does not address port services contracts, such as stevedoring or warehousing, legal relationships that are sometimes linked to contracts of carriage of goods by sea and that are ultimately entered into and performed in a port that is part of a national port system.

III.2. Presentation of International Conventions and Global Practices Reflected in Contractual Tools, Linked to the Converging Contracts

The confluent contracts of sale, carriage of goods by sea, cargo insurance and letter of credit are contemplated in binding international instruments to which Peru is a party or has been a party until very recently, as is the case with international sales and carriage by sea. It should be noted that some issues are also included in global practices—of international scope—reflected in contractual instruments of widespread international use, which constitute soft law and paradigms of what is known as new *lex mercatoria*, as is the case of the Incoterms and the ICC UCP 600, for example.

It is valid to affirm that the demands of international trade, particularly of the subjects involved in cross-border trade, have led to the formulation of international instruments in the form of treaties binding on the member States and also of expressions—as noted above—of a fairly widespread international soft law.

It should also be noted that the increasingly globalized markets of the last thirty years have led to the emergence of a uniform conventional law that has become a standard in the regulation of international trade and maritime transport, and related activities and situations.

In the same line, and only referring to the main contract of the confluence of legal relationships, the purchase and sale, the need for international regulation—either through hard law or soft law—is essential because a legal framework is required to support international contracts, since the not infrequent complications arise when the laws of the seller and the buyer are different. This is evident in the process of drafting the contract, which requires careful negotiation of payment terms and delivery terms, the distribution of risks and costs associated with the relationship, and the rights, obligations and responsibilities of the parties involved (Fernández *et al.*, 2013, p. 361).

The list of legal instruments can be extensive, as these are coupled or excluded according to the criteria used, and it is not intended in this research to make even an open list, but to present those instruments linked to the confluent contracts that serve as support and normative reference to the legal relationships subject to this study. These instruments integrate international trade law and maritime law.

III. 2.1. International Conventions Related to Confluent Contracts (Hard Law)

The binding international conventions mentioned in this part are those that regulate international sales contracts and international carriage of

goods by sea, since, of the converging contracts analyzed in this research, they are the ones that have a hard law regulation.

Even before the opening of markets, which accelerated international trade since the 1990s, there had already been an international drive to seek uniformity through substantive instruments. This opening implied the free circulation of goods and services, and materialized in trade agreements and in more sophisticated integration processes, of which trade liberalization is one of the components. The increase in trade activity, in turn, generated an increase in legal relations and, naturally, in disputes, which is why the aspiration to standardize the rules concerning international trade and maritime transport took on new momentum as a more effective method for resolving conflicts of laws than that offered by private international law.

In this regard, it should be recalled that codified commercial law—whose origins date back to the 19th century—and private international law did not provide a sufficient legal framework for the development of international legal relations related to cross-border trade. Hence the marked trend towards the unification of international trade law, which produces what Rafael Illescas calls in different works the "uniform law of international trade," as we shall see below, to which we should add the transnational diffusion of uniform maritime law, both in the commercial and in the labor and technical fields.

The international conventions mentioned in this study are treaties under the Vienna Convention on the Law of Treaties (1969), in the sense that they are international agreements concluded in writing between States and governed by international law. We refer to three international instruments in particular: the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); the International Convention for the Unification of Certain Rules Relating to Bills of Lading, known as the Hague Rules (Brussels, 1924); and the United Nations Convention on the Carriage of Goods by Sea, known as the Hamburg Rules (Hamburg, 1978).

On May 12, 2020, Supreme Decree No. 012-2020-RE was published, by which the Peruvian State denounced the Convention for the Unification of Certain Rules Relating to Bills of Lading, an act which, in accordance with the provisions of Article 15 of this instrument, will take effect one year after the notification has reached the Belgian Government. As it is impossible for Peru, after the denunciation of the Hague Rules, to be left with a legal vacuum in the regulation of the international carriage of goods by sea, everything indicates that in the next few months the instrument of accession to the United Nations Convention on the Carriage of Goods by Sea, 1978, should be deposited.

The core of the international conventions governing the international carriage of goods by sea, such as the Hague Rules and the Hamburg Rules, is the carrier's liability. The Hamburg Rules, unlike the Hague Rules, contain a more balanced liability regime regarding the distribution of risks and costs between the carrier and the shipper. In this sense, the maritime doctrine is peaceful in affirming that the Hamburg Rules, besides being technically superior to the Hague Rules, are more convenient for shipper countries such as Peru.

III. 2.2. Soft Law and Self-regulation Tools

The contractual instruments of the new *lex mercatoria* which, as an expression of soft law, are commonly used in the confluent contracts, for the purposes of the scope of this research, are mainly: ICC Incoterms 2020; the UNIDROIT Principles on International Commercial Contracts; the forms containing bills of lading used to document contracts of carriage by sea and charter parties, developed by international non-governmental organizations such as the Baltic and International Maritime Council (BIMCO); the 2009 Institute Cargo Clauses of the International Underwriters Association (IUA), also approved by the Lloyd's Market Association and used in cargo insurance contracts; and the ICC Uniform Customs and Practice for Documentary Credits (UCP 600), applicable to letters of credit.

The adoption and use of contractual tools responds to a self-regulation of businessmen as operators interacting in international trade. This "spontaneous order" in Hayekian terms, as noted above, comes from the Middle Ages, when commercial law emerged in the Mediterranean, created by the merchant class, who adopted flexible rules based as it was customary and usual, and an equally flexible system far removed from scholastic formalisms to resolve their disputes. As Fernandez (2001) rightly points out:

> Flexibilization as a general trend in law finds its first manifestation in the area of procedures for the production of rules. These procedures are softened to allow a more open development of the law of international trade and, thanks to the harmonization achieved through them, it is possible to aspire to the reduction of the existing contradictions between the different legal systems and to the encouragement of States to make efforts in the perspective of internationalization (p. 145).

The self-regulation of the market by persons linked by transnational trade is supported by international non-governmental organizations such as the ICC and others mentioned in this research, entities that formulate this modern *lex mercatoria* based on commercial customs and practice.

In this line, a characteristic of the self-regulation promoted by businessmen is the withdrawal of the State as a proponent of mandatory rules and the emergence of business associations with a global presence or, at least, with the capacity to project their contractual tools internationally. In this context, Fernández *et al.* (2013) argue:

> the merchants' society, through its associations, shows a tendency to guide the market in certain specific directions by encouraging new types of commercial practices, especially in cross-border transactions. Thus, a sort of soft law emerges outside state regulations [...] These associations have a deep-rooted sense of the interests they must defend, and this is reflected in the elaboration of a series of instruments regulating important international trade operations, with the purpose of ensuring a minimum of security (pp. 54-55).

It is convenient to point out that these tools of the new *lex mercatoria*, as can be seen, constitute mercantile practices with tradition; that is to say, customs and practice that for many years coexist with the legal relations that are studied in this research. It should not be overlooked that our Code of Commerce stipulates:

> Acts of commerce, whether or not they are performed by merchants, and whether or not they are specified in this Code, shall be governed by the provisions contained therein; in the absence thereof, by the uses of commerce generally observed in each place; and in the absence of both rules, by those of the common law (art. 2).

IV. THE INTERNATIONAL SALES CONTRACT: HISTORICAL BACKGROUND, DEFINITION, TRANSNATIONALITY AND UNIFORMITY, AND CHARACTERISTICS

The international sales contract, among the contracts involved in maritime sales, turns out to be the main legal business—as explained above—and has its own autonomy, structure, and characteristics.

This part deals with the study of the international sales contract, for which it defines and develops its background, distinctive characteristics, the rights and obligations of the seller and the buyer, and, by the intrinsic nexus, the CISG is analyzed. The description of the contract is intended to frame the institution in such a way that the location of maritime sales in international trade can be more clearly understood.

IV.1. Historical Background of International Sales Contracts

International transactions in the form of buying and selling are activities in which man has been engaged for centuries. Without prejudice to

forcing the word "international," it is possible to affirm that medieval trade in the Mediterranean between Italian kingdoms or city states, or trade in the Baltic at the same time between the Hanseatic cities, or trade with the East through the Silk Road, are expressions of these long-standing cross-border exchanges, which date back even before the origins of *ius mercatorum*. In this sense, the merchants of the Middle Ages made use of the *lex mercatoria*, which evidently predates the emergence of modern states.

Transnational trade and the rules that regulate it have always existed and constitute the background of the uniform international commercial law, or uniform law on international trade (DUCI), expressed in international conventions and the *lex mercatoria*. These are instruments that regulate industrial and intellectual property, transportation of goods, dispute resolution, letter of credit, electronic commerce, and, of course, international sales, among other matters.

International sale and purchase and maritime sales have evolved over time, both in terms of the activity and the contract itself. This evolution has led to more complex operations, resulting in contracts with more sophisticated clauses and a corresponding international regulation, which has allowed buyers and sellers located in different countries to close deals with high levels of legal certainty.

IV.2. Definition of the International Sales Contract

Definitions in law may have a certain degree of discretion on the part of those who formulate them; however, they are useful to delimit and give context to the study of institutions. In this sense, Bigio (1997) recalls a phrase of Luis Echecopar García, who expressed: "It is preferable to define with limited imperfections than not to define at all, leaving everything to doubt or whim" (p. 186). As is well known, some codes and laws include definitions in their articles and sometimes glossaries of terms that may facilitate the application of the rules.

The sales contract is where the seller undertakes to transfer the ownership of a good to the buyer, and the latter to pay its price in money. This definition of the sales contract, contained in the Peruvian Civil Code, allows a first approach to the definition of international sales contract, whose element of "internationality" distinguishes it from the sales contracts made within a national jurisdiction. In this definition, it is established that it is not a contract transferring ownership, but rather it establishes the obligation of the seller to transfer ownership to the buyer and the obligation of the buyer to pay a sum of money to the seller. In the same line, Illescas and Perales (2013) mention that:

> The definition of the sales contract is practically universal and revolves around the main obligations of the parties under the contract: delivery of the object, transfer of ownership and payment of the price. Consequently, the seller's obligation is an obligation to give (dare) the thing as opposed to other types of contract in which the obligation consists of an obligation to do (facere), as is the case with contracts for work or services (pp. 98-99).

The international sales contract is a legal exchange relationship in which the seller—the exporter—undertakes to transfer the ownership of a good to the buyer—the importer—in exchange for the payment of its price in money. It is relevant that the parties are domiciled or have their places of business in different countries, and that the contract may be governed by a national law freely chosen by the parties or be subject to an international instrument such as the CISG. Disputes arising from this legal relationship may also be submitted by agreement of the parties to the solution provided by an international arbitrator or arbitral tribunal.

IV.3. Unification of International Trade Law and of the Rules on International Sales and Purchase, and Transnationality of the International Sales Contract

The unification of international trade law, as we shall see in this part, is expressed—among other manifestations—in the adoption of treaties that seek to uniformly regulate transnational legal relations, including sales, which, as has been repeatedly pointed out, constitute the core of international maritime sales.

IV.3.1. Unification of International Trade Law and Rules on International Sales

The DUCI, of which the CISG is one of the most important binding instruments, was conceived to meet the needs of international trade in order to provide certainty, security and speed to international trade. The CISG makes it possible to establish in advance the rules applicable to international sales and purchases; in other words, it offers a standard of legal certainty based on predictability, as opposed to the rudimentary conflict system, basically of resolution, which governed cross-border legal transactions before the emergence of international uniform commercial law (Illescas, 2005, p. 84).

These uniform norms, which reside fundamentally in the customs of international trade, also find their origin in the need for traders to have rules to prevent conflicts arising from legal transactions, a need that was an incentive to promote the adoption of uniform international instruments that would allow greater fluidity in transnational exchanges. This mercantile compliance exhibits its achievements in line with the

increase in international trade, which at the time of writing is going through a period of contraction due to the COVID-19 pandemic, which will surely be overcome as of 2021.

As is well known, private international law offers remedies for conflicts of laws; however, these solutions are not effective in commercial matters, since cross-border trade require prevention and agility in the composition of disputes arising between the parties. On this issue, Fernandez (2001) states:

> Therefore, despite the undeniable achievements of the codification of private international law, it cannot be ignored that the most radical and effective method for resolving conflicts of laws consists in their elimination through the unification of national laws. It is not in vain that this facet of unification constitutes the optimal guarantee of the continuity of legal relations through supranational spaces, providing them with greater legal certainty and facilitating the predictability of the law for the legal operator (p. 37).

Leaving behind ex post applicable conflict rules in international trade and establishing uniform rules that are predictable and applicable *ex ante* has been a step forward in the development and expansion of trade activity. In short, it represents uniformity and consistency in the design of rules compatible with the different legal families as opposed to the disparity prevailing in the different national legal systems potentially applicable to contracts. Along these lines, Fernández *et al.* (2013) consider that "The need for improvement and harmonization is based on the finding that national laws are often inadequate for international cases and that there is a notable disparity between them" (p. 58).

The CISG, as well as the ICC Incoterms or the UNIDROIT Principles on international commercial contracts, are expressions of the various methods that can be used to further the unification of international trade law, the former being a binding international instrument and the latter manifestations of the new *lex mercatoria*. Beyond the complex situations of trade wars or pandemics affecting international trade, the tendency to standardize or harmonize the rules of international trade is an inexorable process, hence it can be stated that the DUCI will continue to deepen.

IV.3.2. The Transnationality of International Sales

The international sales contract is a transnational, cross-border or international contract. These adjectives, among other considerations, imply the presence of contracting parties whose domiciles or establishments are located in different States, and the execution of contracts in which the tradition of the goods and the rendering

of services involve acts of transfer between two or more national territories.

The international sales contract can be understood as an expression of global law in which legal pluralism comes into play, manifested by the application of national, international or transnational rules—such as the repeatedly mentioned Incoterms—according to the choice made by the parties in accordance with the exercise of their freedom of contract.

The international sales contract is a kind of international contract, which, from a modern point of view, is a genre made up of various legal transactions linked to junctures in which there is a greater intensity in transnational trade activity.

The universality—which we could also call globalization—of international trade has been claimed historically for centuries, long before relations between peoples and between States acquired the intensity that is evident today.

As it has been indicated, one of the distinctive characteristics of the international sales contract is that it is a legal act entered into between distant persons, necessarily domiciled or with establishments located in two different countries, which entails a certain level of difficulty as to the body of law that regulates the legal relationship, not exempt from a certain degree of legal uncertainty, an issue that precisely the application of the CISG and the *lex mercatoria*—seen as powerful homogeneous instruments—allows to remedy.

IV.4. Characteristics of International Sales Contracts from the Perspective of the 1980 Vienna Convention on Contracts for the International Sale of Goods (CISG)

The characteristics of international sales described below are explained in the context of maritime sales and from the perspective of the CISG, taken as a binding international instrument to which Peru is a member.

The fact that the sale is in writing, in a well-structured document, is not a requirement or formality that must be fulfilled for the contract to be valid and effective between the parties, nor for it to be considered as a characteristic of this type of legal business. However, the fact that the sale contract should preferably be documented with the intervention of a lawyer is a matter that the parties should consider every time a contract of this nature is entered into.

It is recommended that international sales contracts be executed in writing. This implies that the design of the contract should have at least a minimum content that includes: the general information of the contracting parties, the characteristics of the goods or goods subject of

the sale or purchase, the inspection of the goods prior to shipment, the price and terms of payment, the conditions and date of delivery of the goods, the dispute resolution mechanism (it is always advisable to include a clause of submission to arbitration jurisdiction), the insertion of the Incoterm that suits the seller and the buyer, and a necessary reference to the application of the CISG as the legal framework of the contract, as well as a clause indicating that both the CISG and the UNIDROIT Principles of International Commercial Contracts will be applied on a supplementary basis to cover those aspects that the parties have not contemplated.

In the case of sales of manufactured goods or tangible goods, it is advisable to use the ICC international sales contract model.

IV.4.1. An Approach to the CISG

The CISG was signed in Vienna on April 11, 1980, with the purpose of having an international instrument to standardize international sales contracts. The adoption of the CISG can be understood as the culmination of an effort initiated by the International Institute for the Unification of Private Law—UNIDROIT, by its French acronym—based in Rome, in 1930, which sought to harmonize the rules governing the sale of goods in the world.

It is known that the background to the gestation process of CISG dates back to the first half of the 20th century, negotiations interrupted by the Second World War, which then gained momentum when, in 1964, drafts were presented at a diplomatic conference held in The Hague, where two instruments were approved: one on the international sale of goods and the other on the formation of contracts for the international sale of goods.

The CISG contains rules governing the international sales contract. Part I develops aspects relating to the scope of application and general provisions for the application of the instrument. Part II regulates the formation of the international sales contract. Part III regulates the rights and obligations of sellers and buyers, as well as the rights and actions that may be brought in cases of breach by the buyer, and regulates issues concerning the passing of risk.

The 1980 Convention does not contain any rules concerning conflict of laws situations that would make it possible to define which legal system is applicable when there are cases of concurrence of national rules in a given legal relationship. On this issue, as mentioned above, the DUCI is precisely a set of international rules whose application in legal transactions seeks to avoid situations of conflict of laws.

It should also be mentioned that the principle of party autonomy or freedom of the parties in the international sale of goods is recognized in the CISG, and more precisely in the part that stipulates that it may be excluded by agreement of the parties or that the effects of any of its provisions may be modified. This exclusion in the application of the Convention occurs, for example, when the parties agree to the application of a national law of a State that is not a party to the CISG.

UNCITRAL (2011) argues that the CISG Convention "can best serve its purpose if it is interpreted consistently in all legal systems" (p. 38). UNCITRAL calls upon parties, legal practitioners, including national courts and arbitral tribunals, to take into account the international character of the Convention and to promote uniformity in its application and the observance of good faith in international commercial transactions. Likewise, when questions relating to matters governed by the CISG Convention are not expressly settled by it, they shall be settled in accordance with the general principles on which said international instrument is based; and only in the absence of such principles, they shall be settled in accordance with the law applicable by virtue of the rules of private international law contained in the Civil Code (p. 38). The CISG does not subject the international sales contract to any express formality, therefore, in that sense, it provides that no written agreement is necessary to formalize the conclusion of the contract.

Regarding the scope of application of CISG, UNCITRAL (2011) explains the following:

> The articles on scope of application indicate both what is included and what is excluded from the scope of the Convention. The Convention applies to contracts for the sale of goods between parties having their places of business in different States where those States are contracting States, or where the rules of private international law provide for the application of the law of a contracting State (pp. 36-37).

Article 3 of CISG distinguishes contracts of sale from contracts for services. In this regard, paragraph 1 states that "Contracts for goods to be manufactured or produced are deemed to be sales unless the party ordering them undertakes to supply a substantial part of the materials necessary for such manufacture or production." Subsequently, paragraph 2 of that article states that "This Convention does not apply to contracts in which the principal part of the obligations of the party supplying the goods consists in supplying labor or other services."

The CISG clearly delimits in several articles its own subject matter to the formation of the contract, as well as to the rights and obligations of the buyer and the seller generated by such legal transaction. The regime of this international instrument does not concern the validity of the

contract, the effects that the contract may have on the ownership of the goods sold, nor the seller's liability for death or bodily injury caused to a person by the goods.

Finally, also in reference to the scope of application of CISG, UNCITRAL (2011) states:

> The final provisions provide for two further restrictions on the territorial scope of application that will be relevant for some States. One of them will apply only when a State is a party to another international agreement containing provisions relating to the matters governed by this Convention; the other allows States, whose domestic sales law is identical or similar, to declare that the Convention will not apply as between themselves (p. 37).

IV.5. Complementary Instruments Applicable to International Sales and Purchases

It is appropriate to mention, albeit superficially, three instruments of global scope also applicable to international sales. I refer to the Convention on the Limitation Period in the International Sale of Goods (New York, 1974), the UNIDROIT Principles of International Commercial Contracts, and the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005).

IV.5.1. The Convention on the Limitation Period in the International Sale of Goods (New York, 1974)

The Convention on the Limitation Period in the International Sale of Goods—hereinafter referred to as the 1974 Convention—was signed in New York in 1974 and is an instrument formulated by UNCITRAL with a protocol of amendment adopted in 1980. Peru has not acceded to the 1974 Convention, which currently has thirty States parties, in which said instrument is fully in force.

The basic purpose of the 1974 Convention is to establish rules regulating the statute of limitations to prevent late judicial proceedings for breaches of international sales contracts, claims of nullity or rescission.

IV.5.2. The UNIDROIT Principles of International Commercial Contracts

The 1995 UNIDROIT Principles on International Commercial Contracts—hereinafter referred to as the UNIDROIT Principles—whose first version is from 1994 and then has had successive editions in 2004, 2010 and 2016, are another expression of the *lex mercatoria*. They are not principles of mandatory inclusion by the parties in international

sales contracts, as they are incorporated in contracts on a voluntary basis; however, their application in international commercial contracts is relevant.

The scope of application and objectives of the UNIDROIT Principles are broader than those of the CISG, since their general application to international commercial contracts is intended to complement certain aspects not regulated by the CISG, such as issues relating to the validity of the contract or aspects generally regulated in national law, specifically in the civil codes. It is feasible that the UNIDROIT Principles and the CISG may concur in the same legal relationship, beyond the fact that this can only happen when the parties agree to include such instruments in the contract, since it is possible that ordinary national courts or arbitral tribunals may consider their application when the parties have included in the contract a clause stipulating that it is subject to the *lex mercatoria*, to general principles of law or similar expressions (Perales, 2001, item 122).

IV.5.3. The United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)

The United Nations Convention on the Use of Electronic Communications in International Contracts complements CISG with respect to the use of electronic communications. This instrument is intended to facilitate the use of electronic communications in international trade by providing that any contract concluded and all communications made by electronic means shall have the same validity as an equivalent document printed on paper.

V. INCOTERMS 2020 RELATED TO MARITIME SALES: FAS, FOB, CFR AND CIF

V.1. General Information on Incoterms

Maritime sales, as noted above, are considered in the ICC Incoterms, from their first version in 1936 to the latest revision in 2020. Incoterms, as has been stated in many places, are not the international sales contract, but rules widely used in cross-border trade that are inserted in international sales contracts, and their purpose is to regulate the obligations and rights of the seller and the buyer, as well as to specify the distribution of risks and expenses between the parties.

One aspect to take into account in relation to ICC Incoterms is that although it is true that the 2020 version came into force on January 1, 2020, the parties may agree in their international sales contracts on terms contained in previous years' versions. However, for the purposes of this research we refer to the latest version.

Incoterms, as expressed by Debattista (ICC, 2019), do not deal with issues such as the existence of a sales contract; specificities regarding the goods sold; the time, place and currency to be used to pay the price of the product purchased; the legal mechanisms available to the parties in case of non-performance of any performance under the contract; most of the consequences generated by delay and other breaches in the performance of the obligations arising from the contract; the imposition of tariffs or para-tariff measures; prohibitions to import or export goods; force majeure or hardship petition of the provision; intellectual property rights; the place where the dispute must be resolved in cases of non-performance; or the applicable law; among others (pp. 2-3).

V.1.1. Delivery of Goods, Transfer of Risk, and Documentary Obligations

It is advisable to be as specific as possible with the designation of the port, place or point where the goods are to be delivered, according to the Incoterm to be used in the contract, as this reduces uncertainty.

In Incoterms and, consequently, in international sales contracts, delivery and passing of risk are relevant issues that have legal consequences for the parties. Delivery, beyond the activity to be carried out by the seller —associated to how, where or when—implies the buyer's obligation to receive and pay the price, and delivery also marks the place and time at which the risk is transferred from the seller to the buyer, which entails bearing the costs of loss or deterioration of the goods subject to the contract. Incoterms, in turn, catalyze the prevention of disputes between the parties and allow the elucidation of important issues such as the delivery of the goods and the transfer of risks, precisely.

Incoterms are also applied to establish documentary obligations between seller and buyer. In international sales involving the transport of goods, such as maritime sales, documentary obligations take on special importance, to the extent that some contracts are sometimes referred to as "documentary sales" (Alba, 2012, p. 383).

V.1.2. Incoterms and the Transfer of Ownership

An important aspect to bear in mind with respect to Incoterms is that these rules have no regulatory scope in relation to the transfer of ownership from the seller to the buyer, a situation similar to that which arises with the application of CISG, which contains no rules on the subject. The transfer of ownership is governed by the applicable national law, either by agreement between the parties or by application of the rules of private international law. Along these lines, Górriz (1999) argues that:

> The seller's first obligation is to transfer ownership of the goods to the buyer. It is an obligation inherent in every sale. However, Incoterms do not regulate it because, on the one hand, the real right of ownership is not very effective in international trade and, on the other hand, national systems on the transfer of ownership are very diverse. They therefore refer simply to the 'supply' of the goods and reserve the expression 'delivery' for the act in which the seller consigns the cargo to the carrier. The parties should provide in the international sales contract for clauses relating to the law applicable to the transfer of ownership in order to avoid any problems that may arise (p. 345).

It is convenient to refer to the importance of the documents representing the goods being sold—referred to by the CISG in articles 58 and 67—such as the bill of lading, or in relation to the transfer of risk and the transfer of ownership of the goods transported. This issue is crucial in maritime sales and the CISG is very precise in this regard, as it identifies the dynamics of trade of goods for price with that based on the exchange of documents representing the goods by price (Alba, 2012, pp. 388-389).

When Peruvian law is applicable, the transfer of ownership of a merchandise—a specific movable thing—is performed with the tradition to the buyer, unless otherwise provided by law (article 947 of the Civil Code). In this sense, the tradition is linked to the nature of the document representing the ownership of the goods that are the purpose of the sales contract and also of the contract of carriage of goods by sea, which, as mentioned above, has the bill of lading.

V.1.3. Incoterms and Maritime Sales

Incoterms 2020, in force since January 1, 2020, contains eleven terms or rules and their classification distinguishes them between terms usable for any mode of transport—including multimodal and intermodal transport—and classic terms related to maritime transport and, therefore, used in maritime sales. The four exclusively maritime rules are: Free Alongside Ship (FAS), Free on Board (FOB), Cost and Freight (CFR), and Cost, Insurance and Freight (CIF). The other seven terms, as previously indicated, can be used for sales of goods that have to be moved by any means of transportation.

Thus, we have that the Incoterms inserted in an international sales contract, when the transfer of the goods is carried out by means of ships—maritime mode—as occurs mostly in international trade, qualifies that contract as a maritime sale, as seen above; that is, a sales contract with transportation, whose elements include the movement of goods.

In this article we concentrate on the four exclusively maritime terms, which can also be used in inland waterways, which in the case of Peru

could be the Amazon River or Lake Titicaca, to cite a few examples, or the Paraguay-Parana waterway in South America.

Incoterms can be used for any type of traffic in maritime sales, being applicable to the international sale and purchase of any kind of goods, for example, solid or liquid bulk cargo, such as minerals, edible grains or hydrocarbons; and can also be used in the traffic of containerized cargo and roll-on/roll-off cargo. In this order of ideas, it must be taken into account that Peru is an important exporter—seller—of commodities, among them minerals such as copper, iron or zinc; and also imports final goods of various kinds, many times unitized in containers, as well as heavy machinery and vehicles for land transportation, to mention some examples.

V.2. An Approach to Exclusively Maritime Incoterms

Incoterms related to cross-border sales—where goods are not produced in the same place where the seller is—are grouped into four groups: E, F, C and D. This paper concentrates on the four exclusively maritime terms, collected in groups F and C.

It should be noted that in groups F and C, placing the goods on board the ship, or in the possession or at the disposal of the carrier, marks the point where the goods are handed over from the seller to the buyer, and this also implies the transfer of risk. As an effect of these two consequences, it is crucial to identify the carrier and when there is more than one because the cargo is transshipped from one vessel to another—or to a different mode, if it is a multimodal or intermodal transport operation, where non-exclusively maritime terms may apply—as may occur, for example, with exclusively maritime transport when the goods are first placed in the hands of a river carrier, in an operation, for example, that might involve a shipment from the port of Iquitos enroute to the Atlantic Ocean and destined for a seaport; or of a carrier who, in cabotage traffic between ports on the Peruvian coast, then transships the goods to a vessel for international transport.

In relation to the above, Incoterms 2020 offers clear solutions to questions that may arise in relation to the dynamics involved in determining when the seller delivers the goods covered by the international sales contract to the buyer and thereby passes on the risks, since it may happen that one or more carriers are involved in the transport chain. These solutions naturally occur in groups F and C mentioned above (ICC, 2019, pp. 7-8).

Exclusively maritime Incoterms, which—as indicated—are the terms FAS, FOB, CFR and CIF, and those applicable to any mode or modes of transport, have no legal effect in relation to other contracts, such as carriage of goods by sea, cargo insurance or letter of credit. However, in

documentary credit operations, banks or financial institutions usually require for the issuance to determine the Incoterm applicable to the legal relationship linked to such operation. In the same sense, the Incoterm stipulated in the international sales contract may have effects on the cargo insurance contract, both in the determination of the insurable value and in the amount of the corresponding premium.

VI. THE CONTRACT OF INTERNATIONAL CARRIAGE OF GOODS AND THE CHARTER CONTRACT: DIFFERENCES BETWEEN THEM AND THE EXISTENCE OF TWO HEMISPHERES IN THE MARITIME CARRIAGE OF GOODS SERVICES

It is appropriate to point out that both the contracts of maritime carriage of goods and the charter contracts are related to maritime sales, since—as indicated—without maritime transportation, maritime sales are not conceivable. However, as has also been pointed out, the carriage of goods by sea is more closely linked to the international sales of mass consumer goods, given the greater frequency of such exchanges in international trade, since they are basically mass consumer goods transported in containers, as can be seen in the sustained increase in containerized cargo traffic over the last twenty years, as shown in all the technical studies carried out, such as those published by UNCTAD in its annual publication Review of Maritime Transport.

VI.1. Differences Between the Contract of Maritime Carriage of Goods and the Charter Contract

The contract of maritime carriage of goods under a bill of lading and the different types of charter contracts: bareboat charter, time charter, and voyage charter, together with other types, are modalities of contracts for the use or exploitation of ships. Along the same lines, maritime law has developed a theory that explains the nature and characteristics of the different modalities of use of vessels.

One sector of the doctrine points out that chartering is a modality of transportation; another sector, in turn, holds that chartering is a mixed contract that participates in the lease of things—meaning the ship (*locatio rei*)—and transportation, understood as the obligation to move goods (*locatio operis*).

We follow the doctrinal trend that identifies chartering as an autonomous and independent contract, characteristic and special of maritime law. In this order of ideas, we agree with Arroyo (2001, pp. 420-422) when he suggests that the three essential notes of the charterparty are the following: a) the main performance of the shipowner is to make available to the charterer a seaworthy vessel. It follows that the

ship and its availability is the purpose of the charterparty, and not the goods or persons, as is the case in the contract of carriage by sea. b) Chartering is a generic category that has different species, depending on the management of the vessel being distributed between charteree and charterer, ranging from a simple bareboat charter to the obligation to transport the goods, as occurs in voyage and time charters. c) Thirdly, chartering and carriage are usually linked to two different modes of operation, documentation and legal regime.

VI.2. The Two Hemispheres in the Maritime Carriage of Goods Services

Regarding maritime carriage of goods services, it can be stated—in a figurative sense—that they are provided or rendered in two well-defined "hemispheres": that of regular services, liners, and that of non-regular services, tramps. This difference between regular and non-regular services is regulated in the different legal systems as part of law of the sea and is important in the granting of licenses to operate shipping companies and commercially operate merchant ships. For the purposes of this research, and in order to better understand the operational part related to carriage of goods by sea as a legal business of private maritime law, it is convenient to approach the main distinctive elements in the provision of maritime transport of goods services.

It should be noted that both regular and non-regular services are related to maritime sales; however, regular services related to the carriage of goods by sea are more closely linked to the international sale of goods, as mentioned above.

Some notable differences between regular and non-regular services are as follows:

1. Regular maritime transport services or liners are mainly characterized by the involvement of shipping lines, which make vessels available to users with pre-established itineraries and frequencies for the transfer of goods.

   Generally, although this is not an absolute statement, these services are associated with the transportation of heterogeneous containerized cargo by means of vessels with the necessary seaworthiness conditions to transport this type of containers. These vessels, incidentally, are of the classes known as container vessels, since they can only carry containers; or multipurpose vessels, because they can carry various types of cargo.

   Regular services are generally related to the execution of contracts of carriage of goods by sea documented with bills of lading or sea waybills, which are authentic contracts of adhesion, since

there is no possibility of negotiation between the parties. They are also related to the payment of pre-established freight rates —the price of the service or consideration of the users—which are of public knowledge. It should be noted that liner terms are usually inserted in the contracts, which allow the costs and risks of certain operations related to transportation to be distributed between the parties to the contract of carriage of goods by sea: the carrier and the shipper.

The carrier's liability regime in liner shipping services, as regards international traffic, is of a mandatory nature, with limitation of the indemnity debt; and it is regulated in the international conventions on maritime transport, such as the Hague Rules of 1924, and their amending protocols of 1968 and 1979, the Hamburg Rules of 1978, and the Rotterdam Rules of 2008. It is also worth noting the national laws of countries that are not party to any international instrument and that apply their rules in this type of legal relations.

This is the hemisphere of common carriers, which have specially designed port facilities—although they can also operate in multipurpose or multipurpose port terminals—and specialized port equipment for handling containers, such as, among others, quay gantry cranes (portainers or ship to shore crane), yard gantry cranes (transtainers), or reach stackers.

2. On the other hand, related to the maritime transport of goods, there are non-regular or irregular services. These are also known as tramps because the shipping companies that provide such services make vessels available to users without pre-established frequencies or itineraries; in other words, tramp vessels which are chartered according to the user's needs, either for a specific time, voyage or a certain number of voyage.

   In general, and although this is not an absolute statement, non-scheduled or tramps services are associated with the transfer of homogeneous cargo, either solid bulk—clean or food, and dirty or industrial—or liquids, through the use of bulk carriers, tankers or multipurpose vessels.

   Non-scheduled service is usually also related to the conclusion of charter parties: time charter or voyage charter, which are documented with policies or forms of international use. The best known are the Baltime policy for time charters and the Gencon policy for voyage charters, both drawn up and updated by the Baltic and International Maritime Council (BIMCO). Charterparties are parity contracts in which the contractual terms and conditions, including the charter price, are subject

to negotiation between the parties and in which gross terms are inserted, allowing certain costs and risks of operations ancillary to the charter to be shared between the charteree and the charterer.

The liability regime of the shipowner or ship operator in tramp vessel services, regulated in codes of commerce or navigation laws, is of a dispositive nature and is not contained in any international maritime law convention.

This is the hemisphere of private carriers, which have specialized port facilities—or multipurpose port terminals—and specialized port equipment for handling bulk cargo, such as conveyor belts, ship loaders or subsea pipelines.

VII. APPLICATION OF PERUVIAN LAW AND INTERNATIONAL CONVENTIONS AND PRACTICES IN RELATION TO MARITIME SALES AND CONTRACTS OF CONFLUENCE

Although it is true that in several parts of this article we have addressed certain legal aspects of the Peruvian legal system related to the contracts involved in maritime sales, it is appropriate to make an approach to the national regulatory bodies that complement what is regulated by the international conventions and practices repeatedly mentioned in this work, and to raise a criticism—based on personal observation—on the application of these instruments in Peruvian foreign trade that aims, in any case, to generate interest in developing research that addresses these issues in greater detail.

As regards Peruvian legislation related to maritime sales, it should be recalled that, with respect to international sales, the CISG has been in force in Peru since April 1, 2000, as a result of the approval of Supreme Decree No. 011-99-RE. In other words, this international instrument, which regulates the main contract involved in maritime sales—that of sales contract—is part of our legal system. The rules of the Civil Code, including those regulating the purchase and sale, are also applicable in a supplementary manner.

Concerning contracts of carriage of goods by sea, at the time this article was being drafted, there was still uncertainty as to the direction that the regulation of international carriage of goods by sea will take, since, as already mentioned, the Peruvian Government denounced the Hague Rules and there is a climate of uncertainty, since it is not known exactly when it will become a member of the Hamburg Rules, an instrument technically superior to the Hague Rules, which proposes a more balanced and convenient liability regime for Peruvian foreign trade. In this sense, it would not be acceptable that, as a consequence of the

denunciation against the Hague Rules, there is a regulatory vacuum in a services market as important as that of international maritime transport of goods.

The chartering, which also constitutes a modality of the contracts for the use of vessels and which in some cases also forms part of the contracts that are part of the maritime sales, has a regulation applicable in addition to the aforementioned chartering policies that document the contracts, which is contained in the aforementioned Book III of the Code of Commerce of 1902, a regulatory body that does not correspond to the reality of the Peruvian maritime industry and which should have been replaced years ago by a modern maritime navigation law.

Regarding the letter of credit contract, Article 221, paragraph 7 of the General Law of the Financial System and the Insurance System and Organic Law of the Superintendence of Banking and Insurance, Law No. 26702, provides that companies may "Issue, advise, confirm and negotiate letters of credit, at sight or long-term, in accordance with international customs and in general channel foreign trade operations." Among the international usages referred to in the aforementioned regulation are the aforementioned ICC Uniform Customs and Practice for Documentary Credits (UCP 600).

The cargo or merchandise insurance contract is included within the property damage insurance, regulated by the Insurance Contract Law —Law No. 29946—and it is a practice in the international market of which Peru is part that the aforementioned Institute Cargo Clauses of 2009 of the International Underwriters Association (IUA), also approved by the Lloyd's Market Association, are inserted in the policies.

It is beyond the scope of this paper to carry out a detailed analysis of the problems in Peru with regard to the application of national regulations, internalized international instruments and global practices related to maritime sales and related contracts; however, an empirical approach leads us to say that each legal relationship has its own particularities, since, beyond the strictly legal level, the size of the contracting company can be fundamental in the context of maritime sales. Access to information on existing rules and practices, as well as to knowledgeable counsel, is not the same for a large company as it is for a small or medium-sized one, which opens up a question that could be the subject of more in-depth research, focused on approaching the study of maritime sales from this perspective.

From a legal point of view, however, I do consider that the block of rules and practices available to foreign trade operators in Peru, regardless of the size of the company, is quite acceptable, although in the specific case of contracts of carriage of goods by sea and, to a lesser extent, ship

chartering contracts, it is necessary to adhere to modern international instruments such as the Hamburg Rules or, when they enter into force, the Rotterdam Rules. Along the same lines, it is advisable to adopt a maritime navigation law at the domestic level to replace the old Book III of the 1902 Commercial Code.

VIII. CASE LAW RELATED TO MARITIME SALES

There is abundant case law relating to maritime sales, particularly at the international level. Generally, maritime sales are identifiable in judgments and awards issued in proceedings in which disputes arising from contracts for the international sale of goods have been resolved, in which the CISG is applied and in which maritime Incoterms have been incorporated exclusively, such as the repeatedly cited FAS, FOB, CFR, and CIF.

The case studies related to maritime sales is caused by the non-performance of some provision by one of the parties, such as the lack of payment by the buyer or the non-delivery of the goods by the seller within the term agreed in the contract, just to mention some situations that occur with certain frequency. It should be pointed out that, evidently, controversies may arise in the other confluent contracts, which—as has been pointed out—constitute autonomous legal relationships, so that it can be stated that there is also abundant case law that has its origin in a maritime sale, but that has been substantiated in specific channels. Regarding the latter, some examples could be proceedings initiated for causes derived from the contract of carriage of goods by sea or the cargo insurance contract, in which the bills of lading or the corresponding policies are exhibited and not necessarily the underlying sales contract.

UNCITRAL has a section on its web page entitled "Case Law on UNCITRAL Text (CLOUT)," which includes rulings and awards in which an international instrument formulated by this international organization has been invoked. There are 996 cases from different courts of United Nations member states in which CISG has been invoked, including several cases related to maritime sales, although none from Peru is recorded.

On its website, Universidad Carlos III de Madrid also has a section containing case law from several Latin American countries in which the CISG has been invoked, where you can also find judgments issued in maritime sales proceedings. This repository also contains judgments issued in Peru.

The fact that the aforementioned repositories do not record Peruvian rulings on maritime sales is probably due to the difficult access to the case

law of the Judicial Branch, since the web page of this institution does not contain an orderly record of case law nor does it have a search engine that facilitates the location of judgments by subject matter. Neither do these repositories contain awards on maritime sales issued in Peru, which would be due to the confidentiality that must be kept on the awards, provided by Article 51 of Legislative Decree No. 1071, which regulates arbitration, a rule that also stipulates that in all arbitrations governed by said legislative decree in which the Peruvian State intervenes as a party, the award will be public once the proceedings have been completed.

As is well known, it is becoming more and more common for contracts to include arbitration clauses—that is, agreements to submit to arbitration courts—to resolve disputes arising from breaches of the parties' obligations under the contracts. In this line, it is evident that in international and domestic trade, arbitration is being used more frequently and to a lesser extent the ordinary courts, since it is understood that the former is more effective in resolving disputes in special matters such as those relating to international sales, carriage of goods by sea or cargo insurance, which require solid knowledge of uniform international trade law, commercial law or maritime law on the part of those called upon to resolve the dispute.

An example is the arbitration case No. 2920-CCL-2014 (Petróleos del Perú—Petroperú S.A. Rímac Seguros y Reaseguros v. Pluspetrol Corporation S.A. y Naviera Transoceánica S.A.A.), a process derived from a local sales contract of liquefied petroleum gas (LPG) which included a CIF term for which the company selling the LPG contracted maritime transportation services. The confluent legal relations involved in the process were identified by the arbitral tribunal as a maritime sale, reason for which the award pronounced as follows:

> 90. Maritime sales, as Ignacio Arroyo states "... are complex operations that normally link the sale and purchase of goods with contracts of carriage and insurance [...] Despite the existing linkage, each contract retains its autonomy, so that its effectiveness is limited to the contractual relationship itself."
>
> 91. The core of the maritime sales lies in the delivery of the goods, in this case the 14,000 MT of LPG that Pluspetrol sold to Petroperú. In maritime sales under CIF, FOB, and CFR terms, the delivery of the goods and the transfer of risks occurs when the goods pass the ship's rail at the port of shipment. In these cases, the doctrine identifies these relationships as indirect maritime sales. […]
>
> 95. In this vein, a characteristic of maritime sales is the possibility of determining the transfer of risks between the parties. In a CIF sale and purchase, as mentioned above, the risk is transferred when the goods

pass the ship's rail, in this case of LPG transportation, the "critical point" occurs at the entry flange of the gas carrier at the port of shipment.

IX. CONCLUDING THOUGHTS

In maritime sales, the contractual confluence is manifested with through international sales contract, the contracts of carriage of goods by sea, the cargo insurance contract, and the letter of credit contract.

The absence of binding rules, international or national, governing the maritime sale as a kind of international sales contract does not affect international trade because the parties to a transnational maritime sale can use Incoterms and the UNIDROIT Principles to model with predictability the main international sales contract.

Peru is a State party to the CISG, so this international instrument is applicable to international sales contracts entered into in the country. It should also be recalled that in May 2020 the Peruvian State denounced the Hague Rules, which regulate important aspects of international maritime transport such as the carrier's liability regime. At the closing date of this article, it was not certain whether accession to the Hamburg Rules of 1978 would be approved.

The only work on maritime sales in Peru was done by Ostoja (1973) and published in the journal Derecho PUCP. No further academic research has been carried out to analyze this important institution of the uniform law of international trade and maritime law, nor has it been published in specialized books or journals.

There is no evidence that maritime sales are the subject of study in Peruvian law schools. This is evident in the curricula of the law schools of the Pontificia Universidad Católica del Perú, the Universidad del Pacífico and the Universidad de Lima, members of the Consortium of Universities. Since maritime sales are not studied in the law schools, it is likely that, in practice, a lack of consistent knowledge of the dynamics of maritime sales and of the confluent contracts may have an impact on the costs and efficiency of Peruvian foreign trade, and it is possible to empirically affirm that they are better managed by larger companies. However, this has not yet been sufficiently studied.

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