INCOTERMS®2010[1] – Introduction to changes from INCOTERMS 2000

The ICC reviews INCOTERMS from time to time to ensure that they reflect and respond to current trade practices and trends. INCOTERMS® 2010 will be the eighth revision of INCOTERMS since their inception in 1936.

IN GENERAL

What is INCOTERMS?

A series of internationally recognised standardised trade terms published by the International Chamber of Commerce (ICC) and widely used in international contracts of sale. They are also increasingly used in domestic trade.

Why INCOTERMS® 2010 are called "Rules"?

This is to recognize their contractual nature and also to be in line with general ICC policy – which calls its publications "Rules" (UCP 600, URDG 758, etc.).

What do INCOTERMS cover?

Who does what, who pays for what, when risk in the goods passes from seller to buyer, when delivery occurs, as well as issues such as insurance, export and import clearance and the allocation of other costs pertaining to the delivery of goods.

What do INCOTERMS not cover?

There is nothing on ownership/title to the goods, nothing in detail on payment obligations (when, how, what security, against what documents), nothing on detailed vessel requirements, force majeure, termination, insolvency. In short INCOTERMS do not constitute a complete contract of sale, but rather provide convenient, internationally recognised rules for the sale of goods. They work well as general outline of the contract of sale which is to be specified and adjusted with further terms and conditions of the contract.

How are they used?

They are incorporated into contracts of sale by express reference (e.g. "**FCA 38 Cours Albert 1er, Paris, France Incoterms® 2010").**

[1] „Incoterms" is registered trademark of International Chamber of Commerce – see www.iccwbo.org

Why are they changing?

To take account of the spread of customs-free zones, the increase in use of electronic communications, concerns about security following 9/11 and latest developments in global transport and trade since the 2000 version.

When are they changing?

The new rules are coming into force from **1 January 2011.**

What about contracts already entered into?

For existing contracts, INCOTERMS 2000 will continue to apply (when incorporated into the contract) even if performance of the contract will be made in 2011 or even later.

After 1 January 2011, it might be assumed any reference to "INCOTERMS" in new contracts is a reference to INCOTERMS 2010 but whether actually Incoterms 2000 or 2010 will apply will depend on all circumstances of the contract of sale. **Any uncertaintity and possible disputes are to be ruled out by the clear incorporation of INCOTERMS 2010 into the contract of sale!**

Can we still use INCOTERMS 2000 after 1 January 2011?

Certainly you can. Incoterms (whether 2010 or 2000) are contractual rules, it is up to contract parties (the seller and the buyer) to decide to use them and thus expressly incorporate them into their contract of sale. They can choose whichever revision they want!

However it is strongly recommended to start using the new Incoterms 2010 as early as possible, as they represent modern, upto date rules, which take into account last developments in global trade. Previous revisions are outdated and lack the precision of the new Incoterms 2010!

Do I really need to bother about INCOTERMS 2010?

You will need to:

- check your standard contract forms;
- consider changes in 2010 INCOTERMS;
- make any necessary consequent changes (for example changing DES or DDU INCOTERMS 2000 to DAP INCOTERMS 2010) to your standard forms for new contracts; and
- publicise the changes to your counterparties and to your traders and execution people;
- start using INCOTERMS 2010 as your standard in your new contracts of sale.

What are the main changes in INCOTERMS® 2010 that you should be aware of?

1. Removal of **four terms (DAF, DES, DEQ and DDU)** and **introduction of 2 new terms (DAP - Delivered at Place and DAT - Delivered at Terminal)**.

2. Formal creation of **two classes of INCOTERMS** - (1) rules for any mode or modes of transport and (2) rules for sea and inland waterway (INCOTERMS 2000 had four categories).

3. Formal recognition that these rules are to serve both **domestic and international trade** (as the case maybe). Term EXW is clearly stated to be suitable only for domestic trade.

4. Express reference to the use of **"equivalent electronic records",** if the parties agree or it is customary.

5. Amended **insurance** cover to reflect the alterations made to the Institute Cargo Clauses (as per recent changes to Institute Cargo Clauses LMA/IUA[2] made in 2009).

6. Allocation of parties' respective obligations to provide or render assistance in obtaining any documents and information in order to obtain **security-related clearances**.

7. Responsibility for **Terminal handling charges** expressly allocated.

8. Including an obligation to **"procure"** goods to reflect current practices in string sales (sale of goods afloat – i.e. when already on board of a vessel).

IN DETAIL

1. Removal of four terms from INCOTERMS 2000

The onward march of containerisation and point-to-point deliveries appear to have persuaded the ICC to make significant changes and introduce two new "Delivered" terms:

- **Delivered At Place (DAP)** which should be used in place of DAF, DES and DDU; and

- **Delivered At Terminal (DAT)** which replaces DEQ.

These terms may be used irrespective of the agreed mode of transport.

Part of the reasoning for fewer terms, simplification was that traders often chose the "wrong" term or muddled terms, leading to contradictory or unclear contracts.

[2] Lloyd's Market Association (LMA) and International Underwriting Association of London (IUA).

Incoterm 2000 „DAF“ was no longer satisfying the needs of the trade and actually created a problem when the buyer could not examine the goods before arrival of the goods at the place of destination, which was usually beyond the delivery point (i.e. the frontier).

For both the new terms – (DAP) and Delivery at Terminal (DAT) – delivery takes place at a named destination.

The new Incoterm 2010 rule „DAP“ (Delivery at Place) covers all situations in which the seller delivers the goods to the buyer on the arriving means of transport **not unloaded,** which is the situation covered before by DAF, DES as well as all deliveries at the buyer´s premises or other place of destination in the buyer´s country covered before by DDU.

For DAP, the „arriving means of transport“ may be also a ship, and the „named place of destination“ may be the port of discharge.

With the new Incoterm 2010 rule „DAT“ (Delivered at Terminal“) delivery occurs when the goods have been placed at the buyer’s disposal at the named terminal at the port or place of destination **unloaded** from the arriving means of transport.

Incoterm 2010 DAT replaces the former Incoterms 2000 DEQ (Delivered Ex Quay) which was suitable only for the commodity trade.

Incoterms 2000 gave no satisfying solution within the „D“ terms for the situation, where the goods are delivered unloaded from the arriving means of transport in a terminal. The new Incoterm 2010 DAT (Delivered at Terminal) solves this problem and covers all situations formerly governed by the DEQ. The „named terminal“ in DAT may be, for instance, the quay at the port of discharge or a container terminal at the port of discharge.

2. Creation of two, rather than four categories of terms

The 11 terms have been categorised under two categories:

- **deliveries by any mode or modes of transport** (sea, road, air, rail, multimodal) - EXW, FCA, CPT, CIP, DAP, DAT and DDP; and

- **deliveries by sea/inland waterway mode of transport** - FAS, FOB, CFR and CIF.

3. Adapted Rules

The new INCOTERMS are expressly stated to be for "both domestic and international trade". This is achieved by statements within the rules that the obligation to comply with export/import formalities only exists where applicable.

For trade blocs (eg. the EU) where "border" formalities have largely disappeared and in the US, where there has been an increasing willingness to use INCOTERMS rather than the former Uniform Commercial Code shipment and delivery, the new terms are now easier to apply.

4. Electronic Records

The buyer's and seller's obligations to provide contractual documentation may now be by "electronic record if agreed between the parties or customary", reflecting recognition by the ICC of the increasing importance and contractual certainty (owing to speed of transfer) provided by electronic communication. This will also "future-proof" INCOTERMS 2010 as electronic procedures/communications develop over time.

INCOTERMS 2000 required the seller and the buyer to have expressly agreed to communicate electronically for an equivalent electronic data interchange (EDI) message to be acceptable as a proof of delivery/transport document.

5. Institute Cargo Clauses

Where an INCOTERM requires the seller to obtain insurance, the insurance requirements have been amended to reflect the changes to the Institute Cargo clauses. The parties' obligations regarding insurance have also been clarified: only under CIF and CIP the seller has the obligation to contract for insurance in favour of the buyer, however under all delivery terms the parties have relevant obligations to provide the other party, upon request, with the necessary information for obtaining insurance or any additional insurance (by itself in its own favour).

The Incoterms 2010 rules have placed information duties relating to insurance in articles A3/B3, the articles dealing with contracts of carriage and insurance. These provisions have now been moved from the more generic articles found in articles A10/B10 of the Incoterms 2000 rules. The language in articles A3/B3 relating to insurance has also been altered with a view to clarifying the parties' obligations in this regard.

6. Security

The issue of security of goods/vessels, etc, is now at the front of most people's minds when considering international trade. Given that many countries now require heightened security checks, the rules now require that both parties are obliged to provide all necessary information (e.g. chain of custody information) in order to obtain import/export clearance. They also clearly allocate the associated cost.

In the A2/B2 and A10/B10 rules of each Incoterm, the obligations of the seller and the buyer regarding information to be given to the other party or assistance to be given for obtaining such information is specified.

The previous INCOTERMS did not require this degree of co-operation.

7. Terminal Handling Charges

Where the seller is required to arrange and pay for the carriage of the goods to an agreed destination (CIP, CPT, CFR, CIF, DAT, DAP and DDP) it may be the case that terminal handling charges are passed on to the buyer as part of the contractual price for the goods. However, historically, in some cases, the buyer also had to pay the terminal for this service (i.e. a double charge).

INCOTERMS® 2010 has attempted to remedy the situation by clarifying who is responsible for terminal costs. It remains to be seen, however, whether this will put an end to the double charging previously experienced.

8. String Sales

In contracts for the sale of "commodities", as opposed to manufactured goods, it is often the case that a cargo is on-sold a number of times during transit (i.e. a “string sale”, also called “sale of goods afloat”). In such situations, sellers in the middle of the string do not ship the goods, as the goods have already been shipped by the seller at the top of the string. As such, the obligation on sellers in the middle of the string is to procure goods that have been already shipped. The new INCOTERMS clarify this by including an obligation to "procure goods shipped" as an alternative to the obligation to ship goods.

This is relevant in case of FAS, FOB, CFR and CIF as it is technically only possible when a bill of lading or another type of document of title is used.

9. Guidance Note

In the Incoterms® 2010 publication, you will find a „guidance note“ before each term. This note explains the fundamentals of each term. The guidance notes are not part of the actual Incoterms 2010 rules, but are merely provided for ease of understanding of the rules.

For example, the guidance note for the CPT and CIP Incoterm 2010 highlights that under these terms the seller fulfills its obligation to deliver the goods when it hands the goods over to the carrier and not when the goods reach the place of destination.

These rules have two critical points, because the risk passes and costs are transferred at different places. The risk in the goods is transferred from the seller to the buyer when the goods are handed over to the first carrier, however the seller is also obliged to contract or procure a contract for the carriage of the goods to the named place of destination.

Likewise with Incoterms 2010 CFR and CIF the risk and cost are transferred at different places.

10. Point where risks transfer from the seller towards the buyer in cases of FOB, CFR and CIF

In Incoterms rules of FOB, CFR, and CIF **all mention of the ship's rail as the point of delivery has been omitted** in preference to the goods being delivered when they are "on board" the vessel. This more closely reflects modern commercial reality and avoids the rather dated image of risk swinging to and from across an imaginary perpendicular line (ship´s rail).

11. Usage of the term "packaging"

Packaged: This word is used for different purposes:

- The packaging of the goods to comply with any requirements under the contract of sale.
- The packaging of the goods so that they are fit for transportation.
- The stowage of the packaged goods within a container or other means of transport.

In the Incoterms 2010 rules, packaging means both **the first and second** of the above. The Incoterms 2010 rules do not deal with the parties' obligations for stowage within the containers and therefore where relevant the parties should deal with this specifically within the sales contract**.**

Incoterms 2000 were not so clear in this respect.