



MEANAGREENMAURA

INTERNATIONAL COMMERCIAL TERMS

The ICC published the first set of Incoterms in 1936, and has since been updating these rules and guidelines in line with industry developments.

The Incoterms aim to provide a standard set of terms for global trade, clearly specifying the obligations of the seller and buyer under each rule. The terms have universal meaning for buyers and sellers, ensuring clarity and predictability in their contractual relationships.

By incorporating Incoterms into an agreement, the parties can gain a better understanding of their positions and obligations, facilitating in turn the avoidance of disputes. Choosing the most appropriate rule for each contract is critical, as the effect of the contrary could have damaging consequences on the parties.

INCOTERMS 2020: WHAT TO EXPECT

In September 2019, the International Chamber of Commerce (ICC) released Incoterms 2020 which will enter into force on the 1st of January 2020. It is the 9th version of Incoterms rules that has been released, its predecessor being Incoterms 2010. The 2020 edition will apply to contracts incorporating Incoterms, entered into after the 1st of January, unless otherwise specified in the contract by express reference to an earlier version.

While not being legally binding per se, once a specific Incoterms rule has been incorporated into a contract by agreement of the parties, it will govern the same, setting out the buyer's and seller's respective obligations. Whereas some commercial considerations are left to be agreed by the parties, the chosen Incoterms rule definitively determines the obligation to arrange carriage and insurance cover, the distribution of costs, the point at which delivery takes place and the point at which risk is transferred.

The release of Incoterms 2020 was contemplated by industry for months, with much speculation as to the changes it would introduce. On face value the changes appear relatively moderate, but their true impact will not be seen until we have had the chance to observe their application to commercial transactions in practice. The article will discuss the main changes brought on by the new rules, to the extent of their foreseeable effects.

1. On-Board Bills of Lading under FCA

One of the most significant changes concerns the FCA term (Free Carrier), under which the seller is responsible for loading the goods to the buyer's carrier. The problem with this term is that in circumstances where the seller would load the goods on a truck hired by the buyer, but not on the international carrier, a bill of lading with a notation to the seller would not normally be provided. This is needed for the purposes of payment through letter of credit, in which case the issuing bank would require such annotated on-board bill of lading from the seller as a condition of payment.

Under Incoterms 2020, Articles A6/B6 "Delivery/Transport document" of FCA have been amended to provide for the possibility of the seller requiring the buyer to procure an on-board bill of lading from the international carrier, at the buyer's cost and risk. The modification aims to resolve this problematic issue for sellers and facilitate dispute-free commercial operations.

2. DAT (Delivered At Terminal) becomes DPU (Delivered at Place Unloaded)

The reasoning behind this change is twofold, and as expected, centered around resolving issues encountered by users. Firstly, the term was renamed to reflect the fact that in some occasions, delivery will not take place within a terminal, either due to the parties' preferences or because the destination point lacks a "terminal" in the ordinary sense of the word. Essentially, the change aims to increase flexibility in determining the place at which delivery is deemed to take place under DPU, no longer limiting such place to a terminal.

Secondly, the change aims to eliminate the confusion that exists around the differences between DAP (Delivered At Place) and DAT. Their main difference is that under DAP delivery takes place when the goods are placed at the buyer's disposal on the means of transport, before unloading. In contrast, DAT provides that delivery takes place once the goods have been unloaded and made available to the buyer at a specified place within the terminal – being the only term that allocates the unloading of goods to the seller. The renaming of DAT intends to clarify the situation and clearly distinguish the two terms. Under DPU, delivery takes place when the goods are unloaded and placed at the buyer's disposal at the agreed point, which is no longer required to be a terminal.

3. Insurance Coverage

Under the majority of Incoterms rules, the party who must arrange and pay for insurance is not identified, and the determination of said party remains negotiable. Only rules CIF (Cost Insurance and Freight) and CIP (Carriage and Insurance Paid To) identify the party to obtain insurance, and in both cases this is the seller.

Under Incoterms 2010, both CIF and CIP sellers must procure insurance, with the default minimum level of coverage being that afforded by the Institute Cargo Clauses (C), which includes certain listed risks and excludes others. Incoterms 2020 have increased the minimum level of insurance cover required of the CIP seller, raising the default minimum level to that afforded by Institute Cargo Clauses (A), which is an "all risks" cover, subject to certain exclusions. The minimum coverage under CIF has not changed.

This was done as a response to industry feedback and in an attempt to reflect the reality that the types of goods transported under the two rules differ. CIF, being a maritime rule, predominantly used for trading bulk cargoes, requires a lower level of insurance coverage than CIP, which is a multi-modal rule often used in cases of high-value manufactured goods.

Consequently, CIP sellers will have to consider the extra cost they will incur in incorporating Incoterms 2020, by reason of the increased minimum insurance coverage. Parties should know, however, that they can expressly alter the minimum insurance cover, in their contract, to match the appropriate level for their specific trade. The default position, now being Institute Cargo Clauses A under CIP and Institute Cargo Clauses C under CIF, can be departed from by mutual agreement of the parties.

4. Own means of transport

One issue under Incoterms 2010 is that it does not contemplate that some users have access to their own means of transport. As a result, the rules FCA, DAP, DAT (now DPU) and DDP, under the 2010 version, only refer to arranging carriage via a contract with a third-party carrier. Incoterms 2020 aim to reflect the commercial reality that some sellers and buyers can arrange the delivery of goods using their own logistics. The aforementioned rules are now amended to read that the party bearing the obligation can "contract or arrange at its own cost for the carriage of the goods". The language reflects that the responsible party now has the option of making arrangements for the carriage, in addition to simply contracting for it.

5. Security Requirements

Having regard to the increasing security concerns over the past years, Incoterms 2020 expressly requires the party so obliged, to comply with and pay for security-related requirements for the arranged transport. The expansion of security requirements under the new Incoterms can be seen in articles A4 ("Carriage"), A7 ("Export/Import Clearance"), and A9/B9 ("Allocation of Costs"). The latter article specifies which party is responsible for the security requirements under each trade rule, whereas the former two expressly provide for compliance with and payment for these requirements.



The word “security” is used in its wider meaning, leaving it up to the parties to specify its focus under their contract, if they so wish.

6. Presentation

The presentation and design of Incoterms 2020 has the evident aim of increasing clarity and transparency of the rules, making them more user-friendly, and enabling a better understanding of the buyers' and sellers' respective obligations, which is intended, in turn, to reduce the possibility of disputes. In order to achieve the above goals, Incoterms went through some presentational and structural changes to facilitate the selection of the most appropriate trade rule for each contract and set of parties.

One of the changes involves the re-ordering of the articles under each rule, prioritizing the ones of greater significance and of critical nature. To illustrate, “Delivery” and “Transfer of Risks” can now be found under articles A2/B2 and A3/B3, respectively. In addition, in response to industry concerns about uncertainty over cost allocation between the parties, article A9/B9 now sets out all the costs each party is responsible for. Undoubtedly, this is expected to make the allocation of costs under each rule more apprehensible by the parties and more straightforward.

We have also seen the introduction of a new section, which operates as a valuable aid in comprehending the differences between each trade rule and choosing the most appropriate one. This section presents the articles of each Incoterm horizontally, enabling users to cross-reference and compare the respective obligations of the parties under each rule.

Lastly, updated explanatory notes accompany each trade rule, as in the 2010 version, but the new Incoterms use more enhanced graphics and illustrations. These additions essentially demonstrate key features, providing a reference point for a quick summary of each Incoterm, in hopes of facilitating a better understanding of the substance of each.

A user-friendly revision?

It has been quite apparent, throughout the discussion, that the changes brought by Incoterms 2020 are focused on the facilitation of a greater understanding by the users. Transparency, clarity and pragmatism appear to be at the core of the changes. At least in theory, Incoterms 2020 are expected to achieve their intended aims, since the revisions have addressed two distinct categories of previously encountered pitfalls.

In response to the high frequency of disputes arising from the lack of a common understanding between the parties, of their respective obligations under a specific trade rule, Incoterms 2020 seek to be more comprehensible. Effort was manifestly made to clarify certain features, allocate obligations and costs in a more clear-cut and explicit fashion, and ensure, as a goal, that parties are sufficiently informed to choose the most appropriate and commercially suitable Incoterm for their specific dealings.

Furthermore, in response to industry feedback and concerns, Incoterms 2020 have implemented changes that are specifically targeted at addressing those issues. This is evident by exploring the reasons behind all new introductions or changes, except from the presentational ones. The majority of alterations, therefore, deal with practical considerations, aiming to reflect the commercial realities of the industry for the benefit of its users.

The changes appear promising at face value and in theory, and at the very least, they are expected to smooth out the interaction between Incoterm users. Whether the Drafting Group, however, was in fact successful in tailoring Incoterms to the next century of global trade remains to be seen in practice. ■



COST ALLOCATION UNDER EACH RULE

