



INCOTERMS ® 2020; AN OVERVIEW

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Abstract

The trade mark of international chamber of commerce, “the Incoterms®” acts as universal standard in international trade defining the rights and responsibilities associated with the buyer and the seller. These specific terms or acronyms provide both carriers and buyers with clear rules, helping to avoid confusion about each party responsibilities and cost management. Incoterms® are not static and were subjected to amendments throughout the years of 1953, 1967, 1976, 1980, 1990, 2000, 2010, and 2020 respectively. The latest version is the 2020 and the same is discussed in this article. This version when compared to 2010 comprises of some differences including the replacement of Delivered at terminal (DAT) to Delivered at Place Unloaded (DPU); Changes in FCA; provision for different insurance coverage levels for the Cost Insurance and Freight (CIF) etc. Furthermore, the legal implications of incoterms with respect to CISG is also discussed in the article. The superseding power of incoterms and exclusion of application of CISG explains the legal position of incoterms. But rather than excluding CISG provisions completely, it must be read in tune with these standard terms.

The 2020 incoterms though are amended versions, are not completely perfect. This article investigates the different problems faced by incoterms in general and by the 2020 incoterms. The article also tries to suggest what changes can be brought in the 2030 incoterms to facilitate the trade.

Keyword

Incoterms®, International Chamber of Commerce (ICC), United Nations Convention on Contracts for the International Sale of Goods (CISG).

THEORETICAL FRAMEWORK

International contracts contain various commercial terms which confer rights and responsibilities upon the buyer and seller of a contract of sale. These terms are known as Incoterms® or International commercial terms. "Incoterms®" is a trademark and creation of the International Chamber of Commerce which holds a universal connotation. Almost 90% of the sales contracts use these terms establishing it as a universal standard¹. The ICC published Incoterms® in 1936 for the first time and which was only valid in 13 countries. Then it was updated in 1953, 1967, 1976, 1980, 1990, 2000, 2010, and lastly in 2020 by International Chamber of Commerce. This latest 9th version was in force from January 1st 2020 and is used by more than 140 countries, translated into 31 different languages. The parties can also use the previous versions, provided they are indicated in the contract. If not indicated the courts will apply the latest versions for interpretation².

LITERATURE REVIEW

1. Jonathan Davis & John Vogt, Incoterms® 2020 and the missed opportunities for the next version, International Journal of Logistics Research and Applications, 2020.

The author explains that if the Incoterms® rules are incomplete, imprecise, unclear, or lacking in parsimony, then there will be consequences. There will be complications in the trade due to the advantage gained by one party over the other. The author then deals with different Incoterms® and identifies issues that are common to all types of incoterms. The author identifies issue of delivery, flaw as to marking, issue of timeline for documentation, ambiguity in notice obligations etc were brought into notice.

2. Vogt, J., and J. Davis, "The State of Incoterm® Research." Transportation Journal 59 (3): 304–324, 2020.

The author starts by pointing the existing international legal framework of the International Sale Of Goods (CISG) and the International Commercial Terms (INCOTERMS®) for the purpose of passing of risk related to accidental destruction as well as destruction of goods. The author criticises the time gap and according to the him due to the technological and scientific changes there is a requirement of revision of these terms more frequently. But he also clarifies that to frequently amend these terms, the main benefits like stability, simplicity and specificity must not be challenged.

¹ ICC/ Paris findings; Incoterms® 2020 video, /www.Incoterms® 2020.de/, 20.03.2020.

² Anufrieva, L.P., International private law, volume 2, Moscow: Publishing house BEK, 2002.

3. Căruntu, C., and M. L. Lăpăduși., Complex Issues Regarding the Role and Importance of Internationally Codified Rules and Incoterms®, Petroleum-Gas University of Ploiesti Bulletin, Economic Sciences Series 62 (1): 98–110 , 2010.

According to this paper, Incoterms® rules benefits the parties by replacing the contract language by simplifying the negotiations and clearly defining the obligations, liability, costs, and risks associated with the buyer and seller. The author specifically notes that INCOTERMS® are limited to rights and obligation of parties in the sale purchase contract till the moment of a handling of goods to the buyer. The author in the concluding statement lists the various advantages enjoyed by the contractual parties and marks them important in terms of international trade.

4. Isai, V., and R.I. Radu, Importance of delivery conditions in the external price calculation, Vol. XI ,The Annals of "Dunarea de Jos" University of Galati, Fascicle I, Economics and Applied Informatics, 53-58 , 2005.

The authors profess the requirement of having a clear and unambiguous delivery conditions in the Incoterms®. According to them, the price of goods purchased is having a direct link with the logistics cost associated with the product and the level of risk under the Incoterm. Argument is made by the authors that the price paid by buyer will include some or none or all of cost related to packing, preparing, insurance cost and movement. They also conclude that the delivered price of the goods is something which is subjected to negotiations with the two entities without a full understanding of the risks and responsibilities imposed by the Incoterm choice.

5. Constantinovits, M., and Z. Vladár , A Terminológia Rendszerező Elvének Változása az INCOTERMS® Tükrében, Magyar Terminológia 6 (1): 84–96, 2013

The author examines the developments associated with Incoterms® with respect to structuring and ordering of terminologies associated with it. He referred the situation prior to 1990 and examined it as chronological ordering of rules and the new ones were added to the bottom list as soon as they are introduced. The logical arrangement of the order came into place in 1990 and it was there until the inception of 2010 version. The 2010 version was made in functional categories and bifurcated rules related to the ocean and all other modes.

6. Stapleton, Optimizing Shipper Contracting: the Correct Usage of Incoterms® for Containerized/ Intermodal Freight, Annual Conference Proceedings of the Production Operations Management Society, Wisconsin, May 2014

This article published in the years 2014 stresses the 2010 Incoterms® and explains the need of using the right Incoterms® in the right circumstances. The author points that due to lack of understanding there is higher chance of misuse and proposes formal training in it to reduce such misuses. He finds the FOB contract as the often misused one author sees FCA a better term than FOB because it encompasses both ocean shipping and multi modal transportation. By quoting the works of other authors, this author reiterates the fact that using the wrong Incoterms® increases risk, and cost while decreasing control.

Scope of Application

Incoterms® apply only to a contract of sale. It is not applicable in the case of other international contracts on transfer and delivery of goods³. Also, it is applicable only in the case of the sale of tangible goods and not intangible goods. The Incoterms® are only definitions but not a contract. It does not provide for the transfer of property, nor does it equip parties to deal with unforeseen events. But these terms clarify the distribution, costs and risks associated with transfer of goods from seller to buyer. With passage of time, now it has become customary to use certain abbreviations to refer various trade terms like FOB, CIF⁴ etc.

Categories– INCOTERMS 2020 ®

The Incoterms® gets frequently updated to cope up with the scientific and technological needs. The present “Incoterms® 2020 comprises of a total of 11 terms, 7. These individual Incoterms always contain three letters. In 2010 ICC to classified the terms into two straightforward categories based on the mode of transportation. The 9th version of Incoterms also follows the same containing 11 terms classified into two groups.

Group 1- Applicable to all modes of transport

- i. Ex-work, Ex-factory - The buyer has to take delivery of the goods from the seller's premises and the buyer bears all costs and risks of the goods from there except the cost of packaging.
- ii. FCA- Free Carrier - The seller is responsible for delivering the goods to the first carrier or the agreed place. From there, the buyer bears the cost and risk for the goods. This term underwent a lot of change from 2010 Incoterms® when compared to 2020 rules. In this new regime, the buyer should instruct carrier to issue the bill of lading with onboard notation of seller which was different in 2010
- iii. CPT- Carriage Paid To - CPT is applicable to transport through lands such as road, rail, and inland waterways. The seller is responsible for paying the carriage charges until the destination's place. However, the buyer bears the risk for the goods.
- iv. CIP- Carriage and Insurance Paid To (CIP) - CIP has a broader similarity to CPT. The difference is that here the seller is should pay insurance of goods in transit and transportation cost.
- v. DAP- Delivered at Place - The seller is responsible for delivering the goods to an agreed destination. Once the goods are delivered, the seller must notify the buyer, and the seller's responsibility terminates.
- vi. DPU- Delivered at place unloaded – This incoterm replaces the previously existed term of “DAT – delivered at terminal.” Here the seller is having the liability to bring the goods and to unload them at the “named place of destination”.
- vii. DDP- Delivered Duty Paid- The seller has to deliver the goods to the buyer's premises or any agreed place. The seller bears all charges until then. The seller is responsible for delivering all documents pertaining to the goods, such as warehouse warrants to the buyer so that he can take delivery of the goods.

³ Ramberg, *Guide to Incoterms® 1990*, Volumes 461-490 of ICC Publications: International Trade, Cámara de Comercio International ICC publication, (1991).

⁴ *Ibid*

Group 2- Applies to transport by sea and inland waters

- i. FAS- Free Alongside Ship - Under FAS, the seller is responsible for delivering the goods alongside the vessel at the export port. Once the goods are delivered at the port, the responsibility for the goods shifts to the buyer.
- ii. FOB- Free Onboard - The seller is responsible for loading the goods onto the vessel. He has to bear the cost of Ex- works, packaging, and transportation up to the port, custom duties, wharfage, and inspection of the quantity and quality of the goods
- iii. CFR- Cost and Freight - Under CFR, the seller bears the cost of transportation or freight up to the destination port along with FOB charges. However, once the goods are boarded on ship/vessel, the risk for loss/damage to goods vests with the buyer.
- iv. CIF- Cost, Insurance, Freight - Along with CFR, the seller also pays a marine insurance premium against the risk of loss or damage to the goods. CFR indicates maximum responsibility for the seller. The seller is entirely responsible for the goods until they reach the port of destination and the buyer takes delivery of them.

CISG and Incoterms®

The use of Incoterms® facilitates in understanding the rights and liabilities of the seller. Moreover, the default rule of CISG is replaced using Incoterms®. Though Incoterms® supersede CISG, those terms are used for supplementing the provisions of CISG very often. Thus, there is an interplay between CISG and standardized trade usages⁵.

The Incoterms® are generally incorporated in the trading contract by the agreement⁶. In case where such contracts are governed by CISG, Incoterms® will be having superseding effects to those concerned matters. But here we must analyse whether there is complete exclusion of CISG. To understand that, the interplay between Incoterms® and CISG have be seen. Once parties are mutually agreed to accept Incoterms® article 6 of CISG is attracted which give power to deviate from provisions of CISG⁷. When there is no express incorporation, based on article 9(2) Incoterms® will be applied as an international trade usage⁸. But the second conclusion will be arbitrary and it should be concluded that Incoterms® do not completely replace CISG as far as they are mutually exclusive⁹.

Pertaining to the superseding effect in case of terms of delivery, there is a view that incorporation of terms is merely a modification¹⁰ and thus CISG cannot be excluded completely whereas on the other hand scholars

⁵ Harry J. Berman & Michael Ladd, *Risk of Loss or Damage in Documentary Transactions Under the Convention on the International Sale of Goods*, 21 CORNELL INT'L L.J. 423, 431 (1988).

⁶ United Nations Convention on Contracts for the International Sale of Goods, art. 6, Apr. 11, 1980, 1489 U.N.T.S. 3

⁷ Schlechtriem & Schwenzer *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 101-118 (4th ed., Ingeborg Schwenzer, ed., Oxford University Press, Oxford, (2016).

⁸ St. Paul Guardian Ins. Co. v. Neuromed Med.Sys. & Support, GmbH, No. 00 Civ. 9344 (SHS), 2002 WL 465312 (S.D.N.Y. Mar. 26, 2002), aff'd, 53 Fed. Appx. 173 (2d. Cir.); B.P. Oil Int'l Ltd. v. Empresa Estatal Petroleos De Ecuador, 332 F.3d 333(5th Cir. 2003)

⁹ Juana Coetzee, *The Interplay between Incoterms® and the CISG*, 32 J.L. & COM. 1 (2013)

¹⁰ Ingeborg Schwenzer & Pascal Hachem, *Article 6, in schlechtriem & schlechtriem, commentary on the UN convention on the international sale of goods (CISG)*, 3rd edition,(2010).

argue that incorporation of Incoterms® displaces the delivery and risk rules of the convention¹¹. Though there are such differences it is to be noted that Incoterms® become handy in the convention where there is a lacune involved. For instance, the convention does not regulate on the circumstances where the buyer fails to provide carriage instructions in due time or fails to render assistance in making delivery. It is treated as breach of contract except under article 69(1) that talks about passing of risk in event of the buyer's failure to take delivery. But when we refer Article B5 of Incoterms®, we can see that it provides for premature passing of risk. This is highly effective and deterrent when compared to the remedy for breach¹².

Another instance where Incoterms® can be used to clarify CISG is with respect to article 34. The article says that the seller should hand over the required documents which are relating to the goods at the time, place and in the form agreed upon between them. But the convention does not define what are documents relating to goods. Here Article A8 of Incoterms® must be referred which states that delivery documents must provide some sort of proof showing that the goods with the seller have been delivered, or should be at least in a position to take delivery. Yet another example is article 60 of the CISG which states that the buyer is supposed to do all those acts which are reasonably be expected from him for enabling the seller to make the delivery. Here the Incoterms® are used to further detail the obligations to be performed by seller.

The relationship of CISG and Incoterms® can also be seen through article 36. For understanding the article Incoterms regulates about the passage of risk and A4 helps in establishing the moment when non-conformity must exist. Also, to determine the time frame that is stipulated article 38(2) the timeframe for examining the goods Incoterms® is used. Thus, both CISG and Incoterms® act as complementary and supplementary framework for international commercial contract law¹³.

CONUNDRUMS ASSOCIATED WITH INCOTERMS®

The INCOTERMS® are subjected to frequent amendments in order to resolve the lacunas that arise from time to time. Generally, though the parties are supposed to use the latest incoterm, there is also a provision to use the 2010 term with an explicit mention. But many traders refrain from doing that. The lack of mentioning of the year associated with the incoterm awakes a presumption before the court that the latest version is being used. The misuse of Incoterms® will furthermore result in usage of inappropriate rules for the selected mode of transport, improper allocation of costs and risks between the buyer and seller, unclarity of the sales contract, ambiguity as to place of delivery or destination etc.

The recent 2020 Incoterms® try to resolve challenges allied with the 2010 terms. The intension behind the 2020 version was to facilitate trade by reducing the misuse of Incoterms® and tuning them in accordance with the dynamic trade environment. But these rules remain ambiguous in many aspects and requires to be

¹¹Joseph M Lookofsky, *Understanding the CISG: A compact guide to the 1980 united Nations Convention on contracts for the international sale of goods* 100-01,3d ed. (2008)

¹²Fritz Enderlein & Dietrich Maskow, *International sales law; United nations Convention on contracts for the international sale of goods* 257(1992).

¹³ John O. Honnold *Uniform law for international sales under the 1980 United Nations convention*, sec74, Harry M. Flechtner ed., 4th ed. (2009)

simplified¹⁴. Though they convey many information about the logistics and performance of trade by seller and buyer, it is inconsistent about how and where such information is expressed. An example in this regard is the CIP and CIF. Both requires insurance, but one requires A class insurance and the other class C insurance. Another problem is regarding the insufficient mention of security and digitization concepts in the clauses¹⁵. The long-lived controversy to amend or repeal the EX-works are also not evident in the new incoterm of 2020. Furthermore, under the 2020 Incoterms® there is the issue of delivery as under FCA contract there is no requirement of specification of date or period within which delivery be made. Due to the lack of mention of condition, there is a chance of misuse. There is also a challenge associated with marking. The mark requires certain information which are identified nationally but not internationally. The Incoterms® should specify the minimum and extended marks for more clarity. It is also to be noted that for documentation no timeline for is provided and this will attribute delay in shipment. The issue pertaining to notice is another concern the definition of what amounts to sufficient notice is not given further creating ambiguities¹⁶.

ANALYSIS OF 2020 INCOTERMS®

One of the evident changes in the new 2020 rules is related to renaming of Delivered at terminal (DAT) which was there in 2010 Incoterms® to Delivered at Place Unloaded (DPU). It was to emphasize that the place of destination need not be a "terminal" but can be any place. To underscore the sole difference from Delivered at Place (DAP) – under DAP, the seller does not unload the goods; under DPU, the seller unloads the goods. Another change is with respect to the incoterm of FCA (Free Carrier). According to the 2020 Incoterms® FCA allows for bill of lading to be issued even after loading. This revision allows the parties to agree that the buyer will instruct the carrier to issue an onboard bill of lading to the seller once the goods are loaded on board and tender the document to the buyer unlike the 2010 Incoterms®¹⁷. Furthermore, the Incoterms® 2020 rules provide different insurance coverage levels for the Cost Insurance and Freight (CIF) and Carriage and Insurance Paid To (CIP) rules. Under the CIF Incoterms® rule, which is applicable for maritime trade and is often used in commodity trading, the Institute Cargo Clauses (C) remain the default level of coverage, leaving the discretion to the parties to agree to a higher level of insurance cover.

¹⁴ DURDAČ, C.; DELİPINAR, G. E.: *The past, today and future of incoterms in international delivery: A review on the innovations in logistics*. Journal of Economics Library, Vol. 7, Issue 4, pp. 201–207,(2020)

¹⁵ TOMAN, P.: *Nové Incoterms 2020 jsou srozumitelnější*. Logistika. 2019, Available form WWW: <https://logistika.ekonom.cz/c1-66693550-nove-incoterms-2020-jsousrozumitelnejsi>,(2019)

¹⁶ Jonathan Davis & John Vogt ,*Incoterms® 2020 and the missed opportunities for the next version, International Journal of Logistics Research and Applications*, 25:9, 1263-1286, DOI: 10.1080/13675567.2021.1897974,(2022)

¹⁷ Kwak, S. Y, *A Study on the Characteristics of Major Revised Contents and the Cautions for its Practical Use of Incoterms® 2020*. Korean Trade Insurance Society, 21(1), 201- 214,(2020).

FINDINGS, CONCLUSION AND SUGGESTIONS

In international trade, when laws of different jurisdictions will govern the parties, there always arises the issue of liability and rights and the enforcement of the contract. In order to overcome this problem, parties usually adopt Incoterms® as they are standardized rules with international acceptance. The concept of Incoterms® marked its inception in 1936 and from then they were gradually evolving with updates in 1953, 1967, 1976, 1980, 1990, 2000, 2010 and finally in 2020. After examining the various aspects related to incoterm the following conclusions were derived;

- Incoterms are standardised terms that gets amended from time to time defining the liabilities and obligations to be followed by buyers and sellers.
- The legal framework of incoterms is enumerated by ICC from time to time and the provisions of incoterms helps in supplementing provisions of CISG.
- The 2020 incoterms have changes such as substitution of Delivered at terminal (DAT) to Delivered at Place Unloaded (DPU), CIP was moved to “all risk cover” insurance, onboard bill of lading in case of FCA etc.
- The ignorance in mentioning of year associated with incoterm creates confusion as to whether 2010 incoterm or 2020 incoterm is followed.
- Insufficient mention of security and digitization concepts, inconsistency of information as to logistics, sustaining the Ex- works, lack of mention of minimum and extended marks etc are the identified problems associated with 2020 incoterms.

These changes were significantly made to foster the international trade environment. In such trade, if there is explicit mention of terms, it excludes the application of CISG provisions. Moreover, the Incoterms® are having a superseding effect when compared to CISG. But though CISG can be replaced, the provisions must be read in consonance with standard terms without ignoring it in Toto. It is because of the fact of sometimes an Interplay between CISG and Incoterms® might help in supplementing the interpretation of a clause.

Incoterms® are not free from glitches. The 2020 though is the latest one also has problems of its own. Furthermore, scholars claim that the avenues like innovations in technology, means of payment, artificial intelligence, and robotics needs a reflection in incoterms¹⁸. The reflection of technology in transport requires attention as they are vitally sufficient for future revisions of these terms

¹⁸ *ibid*

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