



Trade Law Update

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The International Chamber of Commerce issues the INCOTERMS 2020

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They are widely used in both national and international purchase agreements and describe the central rights and obligations of the parties in (almost) only three letters: the INCOTERMS ("International Commercial Terms") such as EXW, FCA FOB, CIF or DDP are a mainstay of many purchase agreements. In September 2019 the International Chamber of Commerce (ICC) issued an amended version of its rules for the construal of commercial-agreement clauses customarily used in international trade – the "INCOTERMS 2020". These better-comprehensible rules are intended to make it easier for parties to choose the right clause for their agreement. The INCOTERMS 2020 do not so much make basic changes in the content of the rules, but rather provide more detailed introductory text on the individual clauses and in some places re-order the clauses to be more logical.

The revised INCOTERMS serve to help interpret the eleven most-often used clauses. The ICC rules explain **what obligations the parties will have toward one another when using a specific clause**. Who is responsible for the shipping or insuring the goods, or for obtaining the freight documents and export or import permits? The INCOTERMS also set out rules on transfer of risk: where and when are the goods deemed to have been "delivered" by the seller, and where and when does the risk of loss or damage to the goods transfer to the buyer? Finally, the INCOTERMS governs who will bear the costs for shipping, packing, loading and unloading.

Naturally the INCOTERMS cannot replace the need for a purchase agreement. The INCOTERMS says nothing about what goods are being supplied or their guaranteed qualities, the price, payment conditions or when the buyer acquires title to the goods and what warranty rules apply. These matters

What the INCOTERMS govern ...

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must be regulated separately in the agreement between the parties. The INCOTERMS only become a part of the agreement if the parties refer to them within the agreement. The INCOTERMS also do not set out rules regarding what country's laws will govern the agreement. For international purchase agreements, there may for this reason be international laws which are applicable to the agreement.

The following aspects are of particular importance in the new INCOTERMS 2020:

- The INCOTERMS 2020 go into effect on **January 1, 2020**, but may be referenced in purchase agreements starting as of now. All of the older versions of the INCOTERMS will continue to be effective. The parties to a purchase agreement may at their discretion choose to refer to older versions of the INCOTERMS. If this is the case they should take care to specifically name the version being referenced. References to previous versions of the INCOTERMS in existing purchase agreements will remain effective and are not replaced by the INCOTERMS 2020.
- The INCOTERMS 2020 have kept eleven clauses that were not changed, four of which are specially designed to regulate shipment of goods by sea or inland waterway (**FAS, FOB, CFR and CIF**).
- Users of the INCOTERMS 2020 can now identify in those rules more clearly and in one place who will bear which costs between seller and purchaser depending on what clause is being used.
- For the clauses **CIP** ("**Carriage and Insurance Paid**") and **CIF** ("**Cost, Insurance, Freight**") the seller continues to be obligated to ensure freight insurance at its own cost in addition to the shipping to the destination. For CIP however, the insurance which the seller must provide is now subject to an increased minimum coverage.
- The **DAT** clause ("**Delivered at Terminal**") has been renamed **DPU** ("**Delivered at Place Unloaded**"). The content has not changed, even if in practice it was often – incorrectly (!) – assumed that DAT meant the delivery point was a customs processing terminal. It remains that the only difference between DPU and **DAP** ("**Delivered at**

... and what they do not govern!

Changes in the INCOTERMS 2020

Clearer Rules on Costs

Differing Insurance Coverage for CIP and CIF

DAT is now DPU

Place") is that the DPU seller is obligated to provide the goods to the buyer already unloaded; under DAP it is the buyer who is responsible for unloading the goods. DPU thus is the clause representing practically the maximum responsibility for the seller. Although under **DDP** ("**Delivered Duty Paid**") the seller is responsible for paying customs in the country of the buyer, the DDP seller is not obligated to unload the goods.

We would note the following which is of particular interest in the revised INCOTERMS:

- INCOTERMS 2020 still includes the **EXW** clause ("**Ex Works**"). This is a very popular clause for many sellers, as it puts almost all of the responsibilities for getting the goods to their destination on the buyer. The seller need only make the goods available at the seller's own factory or warehouse. EXW does not even obligate the seller to take care of export or other public permits for the goods to be shipped; rather, the seller is only obligated to assist the buyer in obtaining such documents.

In practice however, agreeing to EXW often leads to unexpected problems for exporting companies, among other things due to the EU customs code, pursuant to which the company exporting out of the EU must be a company within the customs territory of the EU. Thus, if a German supplier agrees to EXW with a Chinese buyer, the Chinese buyer cannot become the exporter within the meaning of the customs laws, meaning that they will not automatically be able to export the goods out of the EU. The consequence of this can be that the German seller has to take part in the export process in spite of having agreed on EXW. This may include assistance in obtaining documents and information. In such cases it makes more sense to set out the seller's obligations of participation and compensation from the start within the agreement. Alternatively, the parties might from the start choose an INCOTERMS clause under which the seller is obligated to obtain and bear the costs for the export processing (for instance **FCA** – "**Free Carrier**").

- The **DDP** clause ("**Delivered Duty Paid**") is the clause most often favored by the buyer. It means that the seller must deliver the goods, ready for unloading, at the desti-

EXW – Seller may be obligated to assist buyer in export process

DDP not an "all-round carefree" deal for buyer

nation, meaning that the seller bears all costs and risks in shipping. The seller also is responsible for import within the EU, bears all duties such as customs and excise tax and takes care of all customs formalities.

In practice however, DDP often turns out not to be the "all-round carefree" deal the buyer thinks it will be. There are many pitfalls that can be involved in processing import purchases, with aspects ranging from customs to tax and foreign-trade laws. The buyer should examine whether DDP delivery really makes sense on a case-by-case basis. Where there is doubt, in many cases a buyer in the EU would be better advised to assume responsibility for import processing itself, for instance by choosing to use **DAP ("Delivered At Place")** in the contract.

With the revised INCOTERMS, parties are still advised to choose the best-fitting term for their purchase agreement based on the interests of the parties. The best solution might be something other than the widely used EXW and DDP. Our firm would always be happy to help you choose the best INCOTERM for your transaction.

Summary – Make the right choice!

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