Einführung von "Incoterms 2020"

In Kürze

Im September 2019 veröffentlichte die Internationale Handelskammer (ICC) die achte Überarbeitung ihrer Internationalen Handelsbedingungen, die Incoterms 2020. Die neuen Incoterms treten am 1. Januar 2020 in Kraft und werden eine Reihe von Änderungen gegenüber den Incoterms von 2010 mit sich bringen.

Gegenwärtiger Stand

Bereits in unserem Newsletter August 2019 (2) haben wir auf die baldige Veröffentlichung der Incoterms 2020 hingewiesen und u.a. die Bedeutung der Incoterms in Bezug auf ihre zollrechtlichen Auswirkungen dargestellt.

Die derzeit aktuellsten Incoterms sind die sogenannten Incoterms 2010. Etwa alle 10 Jahre veröffentlicht die Internationale Handelskammer (ICC) aktualisierte Incoterms. Diese Handelsklauseln sollen im internationalen Warenhandel durch Standardisierung eine einheitliche Auslegung bestimmter Pflichten von Käufern und Verkäufern gewährleisten.

Die verschiedenen Bestimmungen regeln insbesondere den Zeitpunkt des Gefahrenübergangs, die Verantwortung für Transport und Lieferung sowie die Verantwortung für die Versicherung und die Kosten dieser verschiedenen Elemente.

Seit ihrer Einführung am 1. Januar 2011 werden die Incoterms 2010 im internationalen Handel weltweit eingesetzt. Der internationale Handel und der grenzüberschreitende Warenverkehr haben jedoch zwischenzeitlich erhebliche Veränderungen und Modernisierungen erfahren. Insoweit sollen die nunmehr veröffentlichten Incoterms 2020 den sich in der Praxis gezeigten Anpassungserfordernissen, z.B. in Bezug auf erhöhte Sicherheitsanforderungen, gerecht werden.

Nachstehend haben wir die aus unserer Sicht wichtigsten Änderungen skizziert.

Wichtige Änderungen, welche im Jahr 2020 eingeführt werden

DAT wird zu DPU

Die bisherige Klausel DAT (Delivered at Terminal) wurde durch Austausch mit der Klausel DPU (Delivered at Place Unloaded) erweitert. Diese Änderung soll klarstellen, dass der Lieferort nicht immer ein Terminal sein muss und ermöglicht es dem Verkäufer zu überprüfen, ob er in der Lage ist, die Ware an einem Lieferort, Terminal oder an einem anderen Ort zu entladen.

Warenbegleitpapier nach FCA

Die ICC hat die Klausel FCA (Free Carrier) erweitert, indem sie eine Option eingeführt hat, bei der Verkäufer und Käufer vereinbaren können, dass der Käufer seinen Frachtführer anweisen muss, dem Verkäufer ein Konnossement mit „shipped on board"-Vermerk zur Verfügung zu stellen. Der Verkäufer kann der Bank diese „Bill of Lading – shipped on board" vorlegen und so die Zahlung aus dem Dokumentenakkreditiv erhalten.

Versicherungsschutz in CIF und CIP

Die Incoterms 2010 sahen in Bezug auf die CIF- (Cost, Insurance, Freight) und CIP-Klausel (Carriage and Insurance Paid to) jeweils die gleiche Mindestversi-

cherungsdeckung vor. Die neuen Incoterms sehen hingegen lediglich in Bezug auf die CIF-Klausel eine Mindestversicherungsdeckung, in Bezug auf die CIP-Klausel aber eine allumfängliche Gefahrenabdeckung vor.

Die Versicherung deckt immer mindestens 110% des Rechnungsbetrages. Nach beiden Klauseln steht es den Parteien frei, eine niedrigere oder höhere Mindestdeckungssumme für die Güterversicherung zu vereinbaren.

Transport durch Verkäufer oder Käufer

Die Incoterms 2020 sehen vor, dass Verkäufer oder Käufer eigene Transportmittel verwenden können. Es besteht keine Verpflichtung, die Waren mit Hilfe eines Drittanbieters zu transportieren.

Sicherheitsrelevante Anforderungen

Die ICC haben jede Klausel erweitert, indem sie dem Verkäufer und Käufer sicherheitsrelevante Verpflichtungen in Bezug auf die Transportanforderungen zuweisen.

Sicherheitsanforderungen werden immer häufiger gestellt, da sie in der Praxis von großer Relevanz sind. Die Incoterms 2020 spiegeln diese nun wider.

Einfachere Bedienung

Um Missverständnisse, die zu Streitigkeiten führen können, zu vermeiden, hat die ICC die Vorschriften überarbeitet, um sie verständlicher zu gestalten und ihre Anwendung zu vereinfachen. Dies findet sich insbesondere in den „Erläuternden Hinweisen für Benutzer“ für jede Handelsklausel wieder.

Ausblick

Dieser Newsletter enthält nur die aus unserer Sicht wichtigsten Änderungen der Incoterms 2020.

Soweit der Wortlaut der aktuellen Incoterms 2020 zur Orientierung im internationalen Handelsverkehr dient, sollte sich jeder Wirtschaftsbeteiligte mit den neuen Regelungen intensiver auseinandersetzen. Zu betonen ist hierbei jedoch, dass die Vereinbarung der ab Januar 2020 geltenden Incoterms 2020 freiwillig ist. Die Vertragsparteien können nach wie vor auch weiterhin andere Vereinbarungen (wie z.B. die Incoterms 2010) in die Vertragsgrundlage einbeziehen.

Weitere Informationen

Für detailliertere Informationen zu den eingehenden Incoterms beachten Sie bitte den weiter ausführenden Newsletter von PwC Niederlande (in Englisch), der auch eine Anleitung enthält, wie Unternehmen mit den neuen Änderungen der Incoterms umgehen können.

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DIS or DAT - Which Incoterm 2020 works for you?

Overview

Incoterms were first introduced by the International Chamber of Commerce (ICC) to the global trading system back in 1936. They were borne out of a series of research studies that aimed to develop a set of international rules that could aid in the interpretation of the most commonly used trade terms. Since then, this set of rules has been an integral part of trade.

On 10 September 2019, the ICC released the latest update to the Incoterm rules. This version, Incoterms 2020, enters into force on 1 January 2020 and is the ninth revision since the original rules.

Prior to the official release of Incoterms 2020, there was much speculation and anticipation around possible changes, including the removal of the EXW and DDP incoterms, introduction of a new Cost and Insurance (CNI) incoterm, and breaking down of DDP and FAS into two incoterms respectively.

In this article, we lay out how incoterms are used in international sales transactions, examine the officially updated terms, and explain what this all means to companies.

What are incoterms?

Incoterms are a set of internationally recognised standardised trade terms that reflect business-to-business practice in contracts for the sale of goods. They are used in domestic and international sales, and govern three key areas:

1. delineation of **responsibilities** and tasks between buyers and sellers with respect to export and import clearance and transport;
2. transfer of **risk** associated with the goods, which is at the point of 'delivery' under the terms; and
3. distribution of certain **costs**, for instance transport, loading/unloading, and packaging.

The harmonisation into a common set of trade terms that is used around the world helps users avoid potentially costly misunderstandings. Periodic revisions help ensure the rules remain relevant to businesses today and reflect current trade practices.

While incoterms are widely incorporated into contracts for the sale of goods and other commercial documentation, they do not constitute a complete contract and cannot replace one. This is a deliberate action as incoterms are to be read in conjunction with a sale contract. For instance, incoterms do not guide title transfer, pricing of goods, payment obligations and terms, warranties, termination, and dispute settlement mechanisms amongst other things. In addition, it is important to note that although standard incoterms are very commonly used, they are not obligatory. Buyers and Sellers of goods can decide on any terms that are mutually acceptable to them, whether or not they are pre-defined incoterms.

What are the key changes from Incoterms 2010?

Incoterms 2020 was the culmination of a 2.5 year effort of the ICC Drafting Group. As Incoterms 2010 brought about radical changes especially in relation to the D-terms, many were expecting major changes that extended to the deletion of existing terms. In actual fact, improvements were mainly made to the structure and style of the Incoterms 2020 rule book to make them more user-friendly. Content-related changes that eventuated were considerably more modest. No rules were deleted nor were any introduced, so a total of eleven rules remain. They are categorised into two buckets:

a. Incoterms for multimodal transport: EXW, FCA, CPT, CIP, DAP, DPU and DDP; and
b. Incoterms for sea and inland waterway transport only: FAS, FOB, CFR and CIF.

We have examined the main changes from Incoterms 2010 to 2020 below.

1. DAT renamed to DPU

Under the 2010 Delivered at Terminal (DAT) term, goods are considered delivered and the risk transferred to the buyer once they are unloaded at the designated terminal. Many users were confused as they were (mis)interpreting this to mean that the unloading had to occur at a terminal. This was a misapplication of the rules as the Guidance Notes in the 2010 version of incoterms did state that terminal was to be given a broad definition.

To eliminate such misunderstandings, the name has been changed to Delivered at Place Unloaded (DPU). This is intended to broaden the original 'terminal' reference, to make clear that delivery can take place at other locations such as a warehouse or factory etc., in a manner that is difficult to miss. Since there is no change to the substance of the trade term, companies using the DAT term can switch to DPU next year with minimal disruption.

2. Increased insurance requirements under CIP

Under both the Carriage and Insurance Paid to (CIP) and Cost, Insurance and Freight (CIF) terms, the seller is required to insure the goods against risk of loss up to the agreed destination.

In the new version, the minimum insurance cover for CIP has been bumped up from Institute Cargo Clause C (basic level of insurance) to Clause A (widest insurance cover; an 'all risks' cover). In contrast, the level of cover required for CIF deliveries remains unchanged at Clause C. As CIF terms are otherwise identical to CIP terms except for their limited use in relation to sea freight, a member of the Drafting Committee explained that discussions were had on the various permutations. That is, increasing the insurance cover for both, leaving both the same, or increasing one but not the other.

At the end of the day, the determination was made based on the type of goods that tend to be shipped under each term. More expensive manufactured goods

tend to be shipped under a CIP term, whereas CIF tends to be used for the shipment of less expensive commodities.

Sellers selling under the CIP term should therefore expect to pay a premium which is beneficial for buyers. At the end of the day however, it is key to remember that parties can negotiate and agree on the level of insurance cover they desire.

3. Option to issue on-board Bills of Lading under FCA

As a matter of practice, letters of credit that secured the seller's payment sometimes called for an on-board Bill of Lading. This does not typically present an issue, except when the goods are sold under the Free Carrier (FCA) term and are transported by sea.

According to the 2010 version of this term, the seller is responsible for export formalities and risk passes at the point of delivery. Under FCA, that is:

– at the seller's premises – when the goods are loaded on the carriage arranged by the buyer; or
– at an alternative place – when the goods have been loaded onto the seller's transport, have arrived at the named place, and are ready for unloading such that they are at the disposal of the buyer.

The issue that arises in both scenarios is that deliveries are completed prior to the loading of goods onto a vessel. This means the seller may not always be able to obtain a Bill of Lading with an on-board notation from the carrier.

In practice, parties are therefore forced to consider using the Free on Board (FOB) term as an alternative. However, under FOB, while the seller should be able to obtain an on-board Bill of Lading, it also exposes the seller to risks between the shipment's arrival at the port and its loading onto a ship. An example would be unanticipated costs where the container is damaged within a container stack.

A member of the Incoterms 2020 Drafting Group revealed that they had consultations with the banking sector over this issue. After all, one solution would be for trade finance providers to drop their requirement for an on-board Bill of Lading. However, as this is not on the near horizon, the Drafting Group created a simple workaround to the above issue.

A new insertion was made in the form of articles A6 and B6 (seller's and buyer's obligations respectively) to the FCA term under Incoterms 2020. It essentially permits Bills of Lading to be issued after loading under a FCA term. Specifically, parties may agree that the buyer will instruct the carrier to issue an on-board Bill of Lading to the seller after the loading of goods onto the vessel. The seller must then tender that on-board Bill of Lading to the buyer.

With this added flexibility, sellers currently selling on FOB terms may wish to consider amending their trade terms to FCA and leveraging the option to issue on-board Bills of Lading. This would require a discussion with their buyers as well as a revision to their sale contracts.

4. Permission to arrange own carriage in FCA, DAP, DPU and DDP deliveries

Previous versions of the incoterm rules were drafted based on the assumption that parties to a transaction would engage third-party carriers for the carriage of goods. A literal interpretation was therefore that Incoterms 2010 required the party

responsible to “contract for” carriage, and disallowed the party from using its own truck for deliveries.

Incoterms 2020 provides additional flexibility for the seller under the D-terms and the buyer under FCA to use or arrange their own transport, as opposed to only engaging a third-party carrier. Specifically, it added explicit wording to the FCA, DAP, DPU, and DDP terms, allowing the party to “arrange for” carriage.

5. Greater transport security requirements in carriage obligations

A member of the Drafting Group shared that heightened transport security requirements was a response to the September 11 attacks in 2001. At the time of the 2010 drafting, security practices were still in a state of flux which made it imprudent to include any changes in that version.

Now that security practices are more established, the ICC determined it was appropriate to make security-related obligations more prominent than before. References in Incoterms 2020 now provide for a clear allocation of security-related obligations under articles A4 (Carriage for sellers) and A7/B7 (Export/Import Clearance for sellers and buyers respectively) under each trade term.

6. Detailing of cost allocation under a single article

In the earlier version of the rules, there was already a dedicated article on seller’s and buyer’s costs under each trade term. However, it listed certain costs but left out others, which were instead listed in separate articles. From a user perspective, it led to unnecessary confusion and even costly disputes.

In a bid to avoid misunderstandings, Incoterms 2020 therefore sought to consolidate all costs related to different aspects of the sale under articles A9 and B9 for sellers and buyers respectively, for each trade term.

7. Structural changes for easier use

Incoterms 2020 have generally been updated to be more user-friendly. The intention has been to aid interpretation in the event of disputes, and to help businesses select the most appropriate incoterm for any transaction.

The Introduction section stresses the importance of getting it right, and explains how incoterms within sales contracts relate to other ancillary contracts, such as insurance contracts or a letter of credit. The ideal situation is for all three to align. Where they differ, the parties are bound to act in accordance with the contract that they are a party to.

Guidance Notes that preceded individual incoterms have been replaced with Explanatory Notes for Users. It is an upgrade that features easy-to-understand graphics, guidance on when the term should be used, when risk transfers, and how costs are allocated.

What should companies do?

Changes to incoterms do not come about often and the latest revision presents a good opportunity for parties to examine their current practices. This should be done to determine if and when they would like to incorporate the latest revision, and to simultaneously assess if any improvements can be made to their current practices.

Step 1: Have we chosen the right rule?

Buyers and sellers should be aware of the terms of trade (be they incoterms or other terms) they are using and assess if they are and/or remain suitable for a particular transaction. This may sound easy and many companies are quick to brush this off, but it is where we see many of our clients trip up. The choice of an incorrect incoterm, being one which does not reflect the reality of how business is done, may be due to the legacy of old contracts, particular local requirements, complex relationships between buyers and sellers, but - more often than not - a lack of consideration by the Sales or Legal teams in the contract negotiation process.

One common misapplication is the use of maritime-only trade terms (FAS, FOB, CFR and CIF) for other modes of transport, which gives rise to ambiguity. A simple example is where road transport is used but FOB is stated on the contract for the sale of goods. According to the FOB rule, risk transfers to the buyer only when the seller places the goods on board a vessel. The buyer could therefore argue that the risk never passed since goods were never placed on a vessel. Likewise, a CIF named sea port contract where the buyer expects the goods to be delivered to a point further inland. In this instance, disputes may arise over whether the seller is obliged to procure carriage and insurance to the inland point or to the seaport named in the contract.

Another common mistake we encounter is selection of an non-ideal incoterms. Buyers or sellers should appreciate that certain rules have inherent ‘weaknesses’ in them.

– For one, the EXW term is mostly appropriate for domestic sales or contracts within trading blocs, and is not ideal for international sales. This is because risk passes to the buyer at the point of delivery, which under article A2 is when the seller puts the goods at the buyer’s disposal at a named place. Under the rules, there is no requirement for the seller to load the goods onto a vehicle. However, in practice, sellers often do so as a favour to their buyers. As you can imagine,

disputes over who bears the risk of loss or damage that occurs during loading often eventuates. In such a situation, it is prudent to specify in the sales contract the party that bears the risk during loading. Further, under EXW, the seller has no obligation to organise export clearance. Where the buyer is an overseas party, it often encounters unanticipated difficulties in the local export clearance process. Both of these potentially costly issues can actually be overcome by simply selecting the FCA term.

– Another example is where buyers agree to C-terms but do not put in place safeguards in their sales contract to govern where and when delivery occurs. This is because the named destination where the carriage of goods is arranged to is not the place of delivery where risk passes. As a result, buyers often lack control and are kept in the dark as to when risk has passed to them. Buyers should first try to avoid buying on a C-term, where this is not possible they should indicate in the contract where and when delivery happens.

With the above in mind, a feature we find particularly useful in Incoterms 2020 is the Article-by-Article Text of Rules in the Annex. It facilitates the comparison of trade terms according to each article. It lays out the rules in a 'lateral' manner for the first time. Users looking to compare for instance, items of cost or place of delivery across different terms can simply refer to this section. This is expected to facilitate comparison across terms and help users select the most appropriate incoterm for their needs.

Step 2: Which version should we use?

A second consideration is which version of incoterms to use. In making this determination, buyers and sellers are encouraged to determine if the changes brought about under Incoterms 2020, and assess its impact on them. The plus side of having limited content-related changes mean that those looking to update incoterms references can do so quickly and with minimal retraining.

Based on ICC's estimate, most incoterm users will make the switch to Incoterms 2020 in about 12 to 18 months. We expect a slower uptake as the lack of substantive changes may mean a lack of impetus to make a change.

Although Incoterms 2020 comes into play on 1 January 2020, parties are not obliged to switch over to the latest version as older rules do not simply become defunct. As a general rule, the version of trade terms that applies to a contract is the version that is specifically referenced in the contract. This means if the older Incoterms 2010 are referenced in an existing contract, the parties can opt to continue as-is or make a switch to Incoterms 2020 now, on, or after, 1 January 2020. Likewise, post-1 January 2020, parties can still choose to incorporate the older (or even the oldest, so long as both parties agree!) set of trade terms in their contracts.

Step 3: Have we incorporated the relevant rule and version correctly?

As incoterms do not have the force of law, they need to be expressly incorporated into contracts. If your sales contracts do not currently make reference to incoterms, you may wish to consider doing so for greater protection in the form of clarity in the allocation of risks, responsibilities and costs.

For existing incoterms users looking to shift to using Incoterms 2020, both parties to the contract should be informed. A starting point would be to make a simple revision to update the sales contract. Afterwards, relevant changes will need to be made to ensure other ancillary documentation (mainly the letter of credit, contract for carriage, and insurance contract) is updated in line with this change.

Operational changes, for instance to an ERP system, will need to be made. Precise changes will depend on individual system requirements.
The specific version of the rules that governs a contract should be stated to avoid ambiguity. What should parties do if their contracts do not make reference to a particular version of incoterms? We have laid out three scenarios below for consideration:

Scenarios	Incoterms 2010 or 2020?
Existing contracts – i.e., those effective on 10 September 2019	References to incoterms will be interpreted as a reference to whichever Incoterms were used in the original contract (most likely Incoterms 2010). This is irrespective of whether performance under the contract stretches past 1 January 2020. If the original contract does not specify an incoterm version, the new contract should be updated to be specific, so as to limit the scope for dispute.
Contracts entered into between 10 September 2019 and 1 January 2020	Incoterms 2020 can be used prior to the entry into force date. Parties are advised to identify the version that applies.
Contracts to be entered into on or after 1 January 2020	References to incoterms will be assumed to be to Incoterms 2020.

Hence as a general guideline, to avoid any confusion or dispute around the above, parties are advised to include the relevant incoterm version specifically in their sales contracts.

In addition to stating the version, a best practice is to be as precise as possible. This is relevant when stating the place or port. For instance, it is better to state "DAP No. 123 Incoterms Street, Malaysia, Incoterms 2020" than "DAP Malaysia".

Conclusion

The biggest change we see with Incoterms 2020 is in relation to restructuring the way the rules are presented such that they are more intuitive to users. Changes to the content of the rules are similarly focused on avoiding the misapplication and misinterpretation of the rules. There remains a number of existing issues that Incoterms 2020 does not solve, two of which we explored in Step 1 above.

It would be easy to dismiss the most recent changes as lacking in 'substance'. Nevertheless, we believe the revision serves as a good reminder to companies to assess whether they are using incoterms correctly, and if not, now is a good time to make the necessary changes.

Finally, we would not want to miss this opportunity to remind our readers once more that incoterms do not cover the change in title to a product. The assumption that they do is is a frequent cause for problems where it concerns the application of other tax related matters, such as VAT recoverability and Permanent Establishment implications.