

Newsletter No.

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Incoterms® 2020 – What is new? With an effective date of 1 January 2020, the International Chamber of Commerce (ICC) has released the ninth version of the Incoterms® rules, the most important trade terms for the delivery of goods worldwide. This newsletter provides a short introduction to the Incoterms® rules and highlights the structural and substantive changes between the 2010 and 2020 versions. It further points out the potential need for action by sellers and/or buyers.



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The Incoterms® 2020, in force as of 1 January 2020, bring some substantial changes.

The new set of rules is designed to be user-friendlier, and the content of several rules has been changed to reflect recent developments in world trade. Probably the most important changes concern the renaming of DAT (Delivered at Terminal) to DPU (Delivered at Place Unloaded) and FCA (Free Carrier), now allowing for bills of lading with on-board notation.

What are the Incoterms® rules?

The Incoterms® rules, which were first introduced by the Chamber of Commerce (ICC) in 1936, are the most important trade terms for the delivery of goods worldwide. They contain a set of international rules identifying essential responsibilities of sellers and buyers related to the delivery of goods, such as allocation of costs, transfer of risks in the goods, responsibilities for customs declaration and payment as well as responsibilities for cargo insurance. The choice of a certain Incoterms® rule is intended to create legal certainty, facilitate the drafting of contracts and avoid misunderstandings. In principle, the Incoterms® rules can be applied both nationally and internationally.

Structurally, the Incoterms® are eleven three-letter acronyms, ranging from EXW (Ex Works) to DDP (Delivered Duty Paid), which continue to be split between (i) terms for any mode or modes of Transport, namely EXW, FCA, CPT, CIP, DAP, DPU—previously DAT—and DDP (the 'Multi-Modal Rules'); and (ii) terms for sea and inland waterway transport, namely FAS, FOB, CFR and CIF (the 'Maritime Rules'). Each individual rule contains ten commitments for sellers (=A) and another ten for buyers (=B). The commitments are preceded by explanatory comments.

Simplified, the Incoterms® rules follow the transport route from the seller to the buyer and can be divided into four

groups: (i) E-clauses (EXW) in which the buyer is responsible for all carriage; (ii) F-clauses (FCA, FAS and FOB) in which the buyer arranges the main carriage; (iii) C-clauses (CFR, CIF, CPT and CIP) in which the seller arranges the main carriage but the risks pass before the main carriage; and (iv) D-clauses (DPU—previously DAT, DAP and DDP) in which the seller arranges the main carriage and the risks pass after the main carriage.

How are the Incoterm® rules applied?

The Incoterms® rules are general terms and conditions, such as provisions with regard to the parties' specific rights and obligations for the delivery, but they do not constitute a legal regulation. Therefore, they are only applicable if the parties explicitly so agree and they do not contradict mandatory provisions. The safest way to ensure the application of the Incoterms® 2020 rules is by means of a corresponding reference in the contract. The ICC recommends the following wording for incorporation: '*[the chosen Incoterms rule] [named port, place or point] Incoterms® 2020*'; for example, *CIF Shanghai Incoterms® 2020* or *DAP Bahnhofstrasse 1, Zurich, Switzerland Incoterms® 2020*. The trademark ® can be omitted.

The parties are also free to spell out the rules and/or to amend the Incoterms® rules. However, addendums to the rules should be avoided as far as possible; they bear the risk of diluting them or rendering them ambiguous. In addition, the

parties should be careful to avoid provisions in the contract that address an issue that is already regulated by the chosen Incoterms® rule. In case of a discrepancy between the contract and the agreed Incoterms® rule, the individual agreement in the contract prevails and may cause inconsistencies or gaps.

If the Parties refer to the Incoterms® rules in their sales contract, the respective terms apply only between the parties; they are not the subject of the contract of carriage or any other contract with a third party. Consequently, it is for the seller and/or buyer alone to ensure that any contract of carriage, insurance or letter of credit corresponds with the Incoterms® rules upon which they have agreed.

What is new in the Incoterms® 2020 rules?

Since their first publication, the ICC periodically revises the Incoterms® to reflect changes in the international trade system. Besides an improved user-friendliness, the revised Incoterms® 2020 also bring substantive changes:

- **Improved user-friendliness:** The ICC's aim to make the Incoterms® 2020 more transparent and user-friendly is evidenced by several amendments. First, the 'Guidance Notes' contained in the Incoterms® 2010 are renamed 'Explanatory Notes for Users' and are featured at the beginning of each Incoterms® rule. Next, the graphics have been enhanced to illustrate the responsibilities of buyers and sellers for each rule. The A/B articles have also been reordered and now prioritise delivery (A2/B2) and transfer of risks (A3/B3). Accordingly, the order of some rules (DPU, DAP) has been changed to make the time of delivery and the transfer of risks more obvious. Lastly, the text is now structured so that users can look up the parties' respective obligations (e.g., concerning delivery) for each Incoterms® rule, thus en-

abling users to compare the parties' respective responsibilities (for example, under CFR and CIF).

- **New option in FCA for bills of lading with on-board notation:** Delivery under the FCA (Free Carrier) rule occurs either (i) at the seller's premises when the goods are loaded on the means of transport arranged by the buyer or (ii) at another named place, for example, at the carrier, forwarder or terminal, when the goods are handed over to the carrier (ready for unloading from the seller's means of transport). If the seller and buyer agree on using a letter of credit as the payment method for the transaction, banks often require the seller to present a bill of lading with an on-board notation before issuing payment. In the past, problems occurred in the case of maritime transports in which the seller handed the goods to a carrier because the seller could not obtain any bill of lading; bills of lading were only issued once the goods were loaded on the vessel (i.e., at a later time than the handover to the carrier). The amended FCA Incoterms® 2020 seek to resolve this dilemma by allowing the parties to agree that the buyer will, at its own risk and cost, instruct its carrier to procure an on-board bill of lading (hence a bill of lading before the goods are loaded on the vessel).
- **Different insurance cover in CIF and CIP:** CIF (Cost Insurance Freight) and CIP (Carriage Insurance Paid) rules require the seller to take out transport insurance at its own expense. Under the Incoterms® 2010, the seller was obliged to provide insurance for the buyer that is equivalent (or higher) to Clause C of the Institutes Cargo Clauses or similar clauses. This is a basic level of insurance, covering very limited risks, such as fire or explosion, sinking, capsizing or collision of the vessel craft. In the Incoterms® 2020, CIF keeps the same minimum insurance cover (Clause C), but CIP has increased

the required minimum insurance cover to Clause A of the Institute Cargo Clauses (so-called 'all risks' clauses). The amendment reflects the understanding of the goods usually transported under the two Incoterms® rules: CIF is a Maritime Rule, used predominantly for maritime commodity/bulk trades, whereas CIP is a Multi-Modal Rule, commonly used in the sale of high-value, manufactured goods.

- **DAT becomes DPU:** According to the Incoterms® 2010 rule DAT (Delivered at Terminal), the seller delivers the goods as soon as they are unloaded from the means of transport at a terminal. Although the Incoterms® 2010 Guidance Notes clarified that the term 'terminal' was rather wide and not only to be understood from a technical point of view, the term often caused confusion. Therefore, the DAT rule has been renamed DPU (Delivered at Place Unloaded). Any agreed place, such as the site of a factory, can therefore be the place of destination.
- **FCA, DAP, DPU and DDP apply also to transport carried out by own means of transport:** The previous versions of the Incoterms® assumed that in rules FCA (Free Carrier), DAP (Delivered at Place), DPU (Delivered Place Unloaded) and DDP (Delivered Duty Paid), sellers or buyers would contract with third party carriers for the delivery of the goods. These rules did not reflect the commercial reality that seller or buyer often transport the goods by their own means of transport (e.g., by the seller's own truck). Therefore, the Incoterms® 2020 now clearly set out that the party under the obligation to arrange carriage may also transport the goods by their own means of transport. For example, the buyer in FCA is required to 'contract or arrange at its own costs for the carriage of the goods from the named place of delivery'.
- **Security-related requirements:** As security requirements for transport of goods (e.g., mandatory screening of

containers) have become more prevalent during the last decade, the Incoterms® 2020 more prominently set out the responsibilities for security requirements and their costs (see A4 and A7 of each Incoterms® 2020 rule).

- **Transparency of costs:** The detail of the precise allocation of costs between the seller and the buyer has been improved. All cost obligations (transport costs, duties, security, insurance, etc.) are now summarised in articles A9/B9; the allocation of costs as such has not changed.

2020, (ii) which Incoterm® rule most accurately reflects the parties' commercial arrangement and/or (iii) if the changes introduced by the Incoterms® 2020 have an impact on the company's requirements.

The Walder Wyss Newsletter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this Newsletter should seek specific advice on the matters which concern them.

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Legal effect of the Incoterms® 2020 rules and application of previous versions?

The Incoterms® 2020 entered into force on 1 January 2020.

Previous versions, in particular, the Incoterms® 2010, will remain in effect for those using them; that is, where the parties' contracts make clear reference to an earlier version of the Incoterms®. However, if the year of the Incoterms® to be applied is not mentioned, the latest version—the Incoterms® 2020—will apply.

Assessment and need for action

The changes made to the Incoterms®2020 attempt to fulfil two objectives: to improve clarity so as to enable parties to choose the most commercially suitable terms; and to address a number of practical concerns that have arisen since the last version. At first glance, the changes appear to be modest. However, their actual impact will only show once they are applied in practice.

The introduction of the Incoterms® 2020 provides a good opportunity to carefully assess the Incoterms® rules being applied in a company's contractual arrangements for the sale of goods. In particular, one should identify (i) which version of the Incoterms® applies in ongoing contractual relationships as of 1 January