Incoterms® Rules Q&A

ICC general guidance on selected questions on the Incoterms® 2010 rules

(www.iccwbo.org)

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INTRODUCTION

As the publisher of the new Incoterms ® 2010 rules for the use of domestic and international trade terms, the International Chamber of Commerce (ICC) is committed to serving its members and the broader international trading community by offering general guidance on some questions that have arisen in connection with the release of the new Incoterms® 2010 rules.

The views expressed below are intended as general interpretive guidance only, and not as authoritative opinion.

Each case differs depending on place, parties, industry, applicable laws and relevant customs and usages, so general guidance cannot be expected to determine an outcome in a dispute.

Readers are encouraged to supplement their learning on the rules by consulting the ICC publications, Incoterms® 2010 and the ICC Guide to Incoterms® 2010.

QUESTIONS

1. Letters of credit citing Incoterms® 2010 with the circled R trademark indicator may cause unintended discrepancies for beneficiaries unable to do likewise in their documents (as with typewriters).

The absence of the ® trademark symbol in a citation to any version of the Incoterms rules, including Incoterms ® 2010, should not render a document discrepant with a letter of credit that includes the ® trademark symbol in its citation to the Incoterms® rules.

2. Who pays for THC (terminal handling charges) under the new Incoterms® 2010 rules?

Allocation of costs as between buyer and seller under the rules are set out in articles A6/B6, which in the new rules have been made clearer and in some cases clarify the relation between the contract of sale and the contract of carriage.

'Terminal handling charges' is a broad category and each charge being considered needs to be analyzed to see whether it occurred before or after delivery under article A4 of the relevant Incoterms® rule, and whether it relates to an obligation treated particularly in the rules, as, for example, an import or export clearance charge, obligations with respect to which are set out in articles A2/B2.

3. There are questions regarding who bears costs for 'security-charges' (A2/B2 and A10/B10) under the Incoterms® 2010 rules. Since 1 January 2011, for example, all incoming deliveries into the [European] Common Market are subject to an ENS-filing to be done 24 hours before loading the ship. We observe that carriers are dealing with this issue differently in terms of payment. Since there are a great number of legal reporting regulations (e.g. in the field of hazardous materials, veterinarian, port authorities), these costs are in some cases being added to the usual sea freight and the fees are being invoiced in accordance with sea freight (either prepaid or collect). Other carriers (mainly Asian) are treating the ENS fees as purely prepaid costs to be covered by the shipper.

Independent of this example, different points of view to this question are being represented in practice, such as how to account the current security fees and whether they should or should not be treated as import or export formalities.

While the Incoterms rules are clauses to be used in sales contracts, within shipping company and freight contracts, they are treated as 'francatur-clauses' with the result that the carrier making reference to Incoterms clauses in contracts for carriage charge the costs either to the seller (shipper) or the buyer (consignee). Therefore, in our opinion it is very important that clear statements should be made.

We think it necessary that a common use in practice should be determined and would be grateful if you could answer some of our questions:

Who should according to the Incoterms® 2010 rules bear the costs for safety precautions for transport of goods? Should this always be the buyer?

Have you heard of similar issues within other economic sectors?

At the time of preparing Incoterms® 2010 the drafting group reviewed the various cargo security arrangements around the world. It became evident that although cargo security is a much more important issue than it was in 2000 there was no consistent global practice. With no consistent global practice the drafting group was reluctant to impose change. Therefore articles A2/B2 and A10/B10 were changed but only to a limited extent.

The allocation of costs for security will vary between seller and buyer depending on the Incoterms rule chosen – for example DAT will be different to FCA.

Note the Incoterms rules relate to the sale of goods contract between buyer and seller, and NOT to the relationship with the carrier.

Under FCA then (assuming delivery point is not the seller's premises):

The seller is responsible for clearing export but not import formalities. Therefore a seller in Japan is not responsible for an ENS filing as that is required for import.

However, under A10/B10 the seller must provide the buyer with documents or information required by the buyer to complete the ENS filing at the buyer's risk and expense.

Where there are safety precautions required for transport after the delivery point then they are for the buyer to deal with UNLESS it is a mandatory requirement to allow the goods to be exported (but note seller must in any event appropriately package the goods under article A9). The seller is responsible under A10 to provide information and data.

For example DAP (buyer's premises Paris) where seller is based outside the European Community (EC) and the first point of import into the EC is in France then:

The ENS filing is an import requirement for the EC. Under DAP the seller is not responsible for clearing import requirements. Therefore if the seller is based outside of the EC the seller is not responsible for ensuring the ENS filing is completed.

However the ENS filing is completed by the ocean carrier. In this example the seller will have contracted with the ocean carrier as the seller is responsible for transportation to the Paris destination. Therefore the carriage contract will require the seller to provide the information needed for the ENS filing and the carrier may charge the seller for fulfilling it.

The buyer is obliged to provide the information needed for the seller to provide to the ocean carrier for the ENS filing. This is because the buyer is obliged to clear import requirements under B2.

As ENS filing is an import obligation then the buyer is obliged to reimburse the seller for ENS filing cost.

4. A seller under one of the Incoterms® 2010 rules in the F-family (FCA, FAS or FOB) delivers goods in seller's own country, but the goods are destined post-delivery for another country. The buyer arranges and pays for carriage and risk for the goods has already passed to buyer at delivery in seller's country.

It is not clear from the language of the Incoterms® 2010 rules that in such a situation export clearance is 'applicable' for the seller under aricle A2. If it is 'applicable', why? If not, then isn't the requirement on the seller even lower than under article A2 in EXW, *where seller is required at least to provide assistance to the buyer for export of the goods?*

If the goods are destined for another country then export clearance is applicable and the seller needs to do it. The words "where applicable" are used to denote that Incoterms ® 2010 can be used in an entirely domestic setting as well. In EXW, the seller only needs to provide assistance for export clearance but is not responsible for it.

5. What is included in 'seller's premises' under FCA article A4(a)?

'Seller's premises' may be any place under the seller's control.

In many cases, sellers consider a terminal contracted by the seller to be seller´s premises, in which case, seller would be obliged to load the goods on the buyer's transport (e.g. ship) and therefore the seller would be responsible for the terminal handling and loading costs.

Therefore if it is not obvious whether or not the place of delivery is the "seller's premises", then it should be made clear in the contract of sale to avoid a dispute.

6. What is included in 'seller's means of transport' under FCA article A4(b)?

It may be a carrier contracted for by the seller.

It need not literally be the seller's own vehicle.

7. The Guidance Notes to CPT and CIP say that 'the default position is that risk passes when the goods have been delivered to the first carrier'. Who is the 'first carrier'?

The 'first carrier' is the very first carrier independent of the seller (i.e., not the seller's own vehicle/vessel) with whom the seller has contracted for carriage.

8. Under Incoterms® 2010 rules CPT, CIP, CFR and CIF, the seller must contract on usual terms at its own expense for the carriage of the goods to the named place or port of destination. After delivery at the place or port of departure, the buyer bears all risks for the goods (article B5) and must pay all costs and charges relating to the goods while in transit until their arrival at the place or port of destination, unless such costs and charges were for the seller's account under the contract of carriage (article B6(b)).

What costs would realistically arise during transit not related to the freight being paid by seller? It seems these would arise only in extraordinary cases. Would buyer have to pay for things like increase of rates, charges connected with extra deviation, or change of rotation?

Under article A6(b) of the C-terms, seller must pay for freight and other costs relating to obtaining a contract of carriage. In any case, if the freight-included pricing of the goods offered by the seller is accepted by the buyer and the sale contract is enacted between the parties on such terms, then the seller should bear any subsequent increases in the freight tariffs.

In the sense of article B6 under C-terms, the transfer of risk also determines the division of costs. If something occurs as result of contingencies after shipment, such as stranding, collision, strikes, governmental commands, or bad weather conditions, any other unanticipated costs charged by the carrier as a result of these contingencies, the mentioned unanticipated costs will be for the account of the buyer (unless specified as for the seller's account in the contract of carriage).

9. Under article A3 of DAT, DAP and DDP, the seller must contract for carriage. May the seller use its own means of transportation rather than an outside carrier?

Yes. The rule assigns the responsibility to the seller to arrange for carriage, which may be carried out using the seller's own means even though the text says "must contract".

10. What is a 'terminal' in the new Incoterms® 2010 rule 'Delivered at Terminal' (DAT)?

'Terminal' is intended to have a broad meaning, as the Guidance Note to DAT indicates, including any place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. But a 'terminal' cannot be simply an open field; there must be some organization of the space for receiving goods.

11. Under the Incoterms® 2010 rule 'Delivered at Terminal' (DAT), where does seller unload the goods, at the terminal or in the terminal? For example, can seller just leave commodities on a pallet on the street outside the terminal, or must the goods be brought inside?

DAT in article A4 requires that the goods be delivered 'at the named terminal'. Whether the goods must be brought inside the terminal will depend on the particular physical circumstances of the terminal, on the customs of the trade and, perhaps most importantly, upon where the seller will be able to obtain a delivery document that will allow the buyer to take delivery of the goods, as required under article A8.

Nevertheless, as advised by the Guidance Note of the DAT term in the Incoterms ® 2010 rules, it would be convenient for the parties to agree as clearly as possible upon a specific delivery point within the terminal.

12. If a buyer doesn't arrive to collect the goods once they have been delivered under the Incoterms® 2010 rule 'Delivered at Place' (DAP) by being placed at buyer's disposal, what should seller do? And who pays for whatever is done?

As stated in the query, delivery takes place by placing the goods at the disposal of the buyer on the arriving means of transport ready for unloading. The seller must give a notice to the buyer to enable the buyer to take any measures necessary for taking delivery. Assuming this has been done, delivery has taken place and any costs relating to the goods thereafter are for the buyer according to article B6(a). Moreover, the buyer must pay any additional costs if the buyer has failed to inform the seller of the relevant details of delivery mentioned in article B7.

The Incoterms ® 2010 rules do not deal with the consequences of a breach of contract, so the question as to what the seller should do with the goods where the buyer fails to take delivery as required in article B4, and what other consequences the breach would have, would be governed by the applicable law such as the CISG unless addressed in the contract of sale.

Despite the above, it can be generally stated that both the carrier and the seller have a duty of care vis-à-vis the buyer regarding the goods even when the buyer fails to take delivery in time. Normally, the consignee (being the buyer or buyer's agent) is then contacted. The seller having contracted with the carrier is in practice primarily responsible for compensating the carrier for any expenses, e.g., for the storage of the goods on the consignee´s account, but as between the seller and the buyer, these costs are for the buyer in accordance with the division of costs under DAP Incoterms ®2010.

13. While article A8 in the Incoterms® 2010 rules DAP and DDP are identical, article B8 is different: in DAP, buyer must accept the 'delivery document' provided by seller, while in DDP, buyer must accept the 'proof of delivery' provided by seller. Why the difference?

The real obligation is on the seller and B8 only mirrors it. The buyer shall accept a document that meets the requirements of A8 in each case (not in EXW). For each rule, the drafting group made a choice of a suitable wording in the circumstances. However, the buyer is not deemed to have accepted any delivery having taken place because of accepting a mere proof of delivery.

14. Under FAS, if the seller has delivered on the quay, indicated by the buyer, but the boat arrives at another quay, must the seller agree to buyer's request that seller move the goods to this new quay? Article A4 provides delivery must be 'alongside the ship', but also allows seller to 'select the point within the named port of shipment that best suits its purpose'. Can the seller select a point other than physically 'alongside the ship'?

Under article A4 FAS Incoterms ® 2010, the seller delivers the goods by placing them alongside the ship nominated by the buyer at the loading point, if any, indicated by the buyer at the named port of shipment. Under article B7, the buyer must give the seller sufficient notice of the vessel name, loading point and, where necessary, selected delivery time within the agreed period. By providing this information, the buyer makes it possible for the seller to deliver alongside an arrived ship.

Failing receipt of precise notice on the loading point and the selected delivery time, the seller may use its discretion to select a point that best suits its purpose, and the delivery time within the agreed period. Moreover, in the absence of precise information of place and time, the seller can deliver the goods even when the ship has not arrived.

Where the buyer has given an indication as to the loading point but later wants to change these instructions, the seller is not obliged to cover the expenses of transferring the goods to a new loading point, provided the seller has acted in line with the buyer´s first instructions and the buyer´s new notice has arrived too late for seller to comply with it without extra cost.

15. It seems we can no longer use FOB/CFR/CIF for containerized shipments. Is this true?

Please see the Guidance Notes to FOB, CFR and CIF in Incoterms® 2010, which caution parties to consider carefully whether the delivery point under these rules makes using them for containerized shipments appropriate.

For example, even where goods in a container are sold under FOB, a container is typically handed over by the seller at a container yard or warehouse, which is in practice the appropriate delivery point. Given that under FOB, CFR and CIF the seller would bear risk of loss of or damage to the goods until they are delivered under article A4 by being placed on board the vessel, users are recommended to instead choose FCA, CPT or CIP in such circumstances because under these rules, risk is typically transferred to the buyer when the seller hands the goods over to the carrier, usually earlier than their being placed on board.

16. The Guidance Notes on Incoterms® 2010 FOB, CFR and CIF rules say that they may not be appropriate for use where goods are handed over to the carrier before they are on board the vessel, such as goods in containers, which are typically delivered at a terminal.

But sometimes an exporter of goods in containers wants an ocean bill of lading (because the bank requires it in a Letter of Credit, for example). Can the parties agree to use FOB, CFR or CIF but stipulate in the contract of sale that risk passes to buyer when the goods are handed over at the terminal?

The parties can agree as suggested. FOB, CFR and CIF require the goods to be delivered on board the vessel and an ocean (shipped) bill of lading is evidence thereof, but risk would then pass already at terminal.The better solution is to use FCA or CIP but agree in the sale contract that seller will tender an on board bill of lading and then ask from the carrier either the issue of a shipped bill or (more likely) an annotation on a received for shipment bill of the date of shipment.

This question is a good example of how important it is that the chosen Incoterms rule and payment terms are in accordance with each other. The parties could try to refrain from asking for an on board bill of lading in the described situation. If this is not possible, then solutions offered by pricing and/or insurance could be examined.

17. Regarding the delivery point under A4 of FOB, CFR and CIF, what is meant by 'placing' the goods 'on board' the vessel? Are securing, dunnage, and/or trimming of the cargo required? Who has the risk if the goods are dropped on board during loading and damage results?

Article A4 provides that delivery must be completed 'in the manner customary at the port', and port customs may vary widely. For example, in some ports, goods are considered 'on board' for delivery purposes when they are under ship's tackle. Further, the nature of the cargo and the type of vessel frequently dictate how loading is accomplished.

In the absence of custom of the port, or other relevant consideration such as practice between the parties, the default position is that goods may be considered to be delivered on board the vessel when first at rest on deck.

If goods are dropped during loading and land on deck causing damage, this would be considered to be still at the risk of the seller, since placing goods on board does not contemplate a process that results in damage. If, however, the goods were considered to be already 'on board' when under ship´s tackle, the risk would be with the buyer.

Please also see Question 18 on securing and trimming.

18. When does risk transfer under FOB/CFR/CIF in a 'free in stowed and secured (and even maybe trimmed)' shipment?

If parties agree on a variant in their contract of sale by adding "stowed, secured, trimmed", then the costs for the buyer would most likely be understood to begin only when the goods were safely stowed/secured/trimmed as set out in the contract and passage of risk would likewise be delayed.

In order to be sure about allocation of costs and risks, though, under any variant of an Incoterms® rule, parties are strongly encouraged to make this clear in their contract of sale.

19. Under FOB, what happens if goods are destroyed during loading when only part of the goods has been put on board? Has there been delivery under article A4, so that risk for the goods already on board has passed to the buyer?

A4 provides that the seller must deliver the goods by placing them on board – 'them' referring to all the goods.

As all the goods have not yet been delivered, the risk (article A5) has not yet passed and the risk is for the seller.

The answer will be different if partial delivery is agreed or allowed under the contract of sale.