



A COMMENTARY ON THE INCOTERMS® 2020 RULES



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Trade Finance Global and Bob Ronai acknowledges the hard work of all the members of the ICC's Incoterms® 2020 Drafting Group, who have been a really wonderful group of people to work with.

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ROBERT (BOB) RONAI

*Member of the ICC's Incoterms®
2020 Drafting Group*

FOR STARTERS

At the very outset please understand that this e-book does not include the actual Incoterms® 2020 rules themselves. This Commentary does not replace the Incoterms® 2020 book, rather it is hoped that it encourages you to buy that book which is available from the International Chamber of Commerce (ICC) or their various National Committees as publication 723. I absolutely recommend that you have that publication, whether as a hard copy or the soft copy, in front of you. This e-book is not a publication of the ICC, it is purely my commentary on the rules while explaining important matters in plain language so that you have a better understanding of the rules.

Bob Ronai



DEEPESH PATEL

*Editorial Director
Trade Finance Global*

FOREWORD

The volume of world merchandise trade continues to grow, despite macroeconomic and geopolitical uncertainty. As the complexity of global supply chains increase, so does the possibility of disputes and misunderstandings in the trade of goods across different markets. In 1936, the International Chamber of Commerce (ICC) created the first set of international commercial terms: standardised, universally accepted terms, to help facilitate the flow of global trade. The ICC's Incoterms® 2020 rules provide a clearer presentation and format than in previous versions, as well as giving more attention to insurance and security around transporting goods.

As the leading trade finance platform, connecting companies to banks, funds and alternative finance houses, Trade Finance Global (TFG) are advocates of the ICC rules for the use of domestic and international trade terms. With so much incorrect information published online, TFG aims to provide practical guides to help businesses to navigate global trade.

TFG would like to express its gratitude to Bob Ronai, a member of the drafting group from the ICC Commission on Commercial Law and Practice for his contributions to ensure TFG are correct in the provision of Incoterms® 2020 rules information. We are delighted to be partnering with Bob and supporting the Incoterms® 2020 Rules.

Deepesh Patel

IN THE BEGINNING

The ICC's Incoterms® 2020 Drafting Group was formed in 2016 and comprised of:

- David Lowe (Co-Chair) - UK
- Christoph Martin Radtke (Co-Chair) - France
- Charles Debattista (Special Adviser) - UK
- Ercument Erdem - Turkey
- Jian Baozhu/Virginie Jan - China
- Burghard Piltz - Germany
- Frank Reynolds - USA
- Bob Ronai - Australia
- Emily O'Connor (ICC Secretariat)
- Florence Binta Diao-Gueye (ICC Secretariat)

I have to say that the members of the Drafting Group have been a fantastic group to work with, and the long experience has been the most wonderful intellectual fun I have ever had. Our minds were stretched every which way in working through the contributions and creating these rules. Are they perfect? No, not yet but we went as far as we could given the time constraints of having the rules finalised, polished and published in the 100th anniversary year of the International Chamber of Commerce.

The members started their task at a three-day meeting in Paris in April 2017 by deconstructing the 2010 rules, removing any sentences or paragraphs which seemed problematic, and reconstructing each rule in plain English and in logical order, where appropriate incorporating points raised by the ICC's many National Committees (NCs) in their wish lists. Then the first draft was returned to the NCs for comment, and this process was repeated several times. What was notable to me as a DG member was that many NCs lost track of the fact that the Incoterms® rules are universal so they could not and should not address matters which concern only one part of the world. We found that having a horizontal format of the rules, where each point was shown for each of the rules, then the next point and so on, made it easier for the DG to keep consistent wording throughout.

This worked so well we decided to add this concept to the publication to allow users to compare particular points across all the rules and see differences in treatment of particular issues much more easily.

Once the wording of the rules was almost firm we started on the explanatory notes and rounding out the introduction.

AND NOW, THE RULES

RULES FOR ANY MODE OR MODES OF TRANSPORT

EXW

EX WORKS (insert named place of delivery)

FCA

FREE CARRIER (insert named place of delivery)

CPT

CARRIAGE PAID TO (insert named place of destination)

CIP

CARRIAGE AND INSURANCE PAID TO (insert named place of destination)

DAP

DELIVERED AT PLACE (insert named place of destination)

DPU

DELIVERED AT PLACE UNLOADED (insert named place of destination)

DDP

DELIVERED DUTY PAID (insert named place of destination)

RULES FOR SEA AND INLAND WATERWAY TRANSPORT

FAS

FREE ALONGSIDE SHIP (insert named port of loading)

FOB

FREE ON BOARD (insert named port of loading)

CFR

COST AND FREIGHT (insert named port of destination)

CIF

COST INSURANCE AND FREIGHT (insert named port of destination)

WHY ARE THERE TWO GROUPS OF RULES?

In the Incoterms® 1990 and 2000 publications the 13 rules were split into four groups:

GROUP E DEPARTURE

EXW Ex Works

GROUP F MAIN CARRIAGE UNPAID

FCA Free Carrier

FAS Free Alongside Ship

FOB Free on Board

GROUP C MAIN CARRIAGE PAID

CFR Cost and Freight

CIF Cost, Insurance and Freight

CPT Carriage Paid To

CIP Carriage and Insurance Paid To

GROUP D ARRIVAL

DAF Delivered at Frontier

DES Delivered Ex Ship

DEQ Delivered Ex Quay

DDU Delivered Duty Unpaid

DDP Delivered Duty Paid

Then in Incoterms® 2010 there were some changes. The unloaded rule DEQ was renamed and expanded as DAT and the not-unloaded rules DAF, DES and DDU were rolled up into DAP. When you think about it, Delivered Duty Unpaid (DDU) was not a logical name, the E, F and C rules are delivered duty unpaid.

The four groups became two groups:

RULES FOR ANY MODE OR MODES OF TRANSPORT

EXW Ex Works

FCA Free Carrier

CPT Carriage Paid To

CIP Carriage and Insurance Paid To

DAT Delivered at Terminal

DAP Delivered at Place

DDP Delivered Duty Paid

RULES FOR SEA AND INLAND WATERWAY TRANSPORT

FAS Free Alongside Ship

FOB Free on Board

CFR Cost and Freight

CIF Cost, Insurance and Freight

This separates the Rules for Sea and Inland Transport, what are often referred to as *the maritime rules* from the Rules for any Mode or Modes of Transport, often referred to as *the multimodal rules*, that cover transport not only by any mode but a combination of modes. Examples of the multimodal rules coming into play would be for such as:

- Airfreight where cargo is trucked to an airport before being carried on an aircraft then carried by truck after unloading from the aircraft;
- LCL (Less than Container Load) where cargo will be trucked from the seller's premises to the consolidator's terminal, placed in a container then trucked to the shipping line's terminal and finally trucked or railed to the quay for loading on board the vessel, vice versa at the other end.

The maritime rules very specifically refer only to a single mode by water, whether by ocean-going ship or river barge or a combination of these, and port-to-port only. They are clear that no other transport mode is involved.

The great majority of transactions will be covered by the multimodal rules, whether FCL or LCL in containers, by air, by road or by rail, or indeed a combination of more than one of these as is very usually the case.

If a freight forwarder is involved then almost invariably the transaction will be a multimodal one. Beware: on various forwarders' websites you will see charts laying out these rules. Most of them deal only with costs, who pays what from which point, which is clearly not the whole picture. Many will include the maritime rules interleaved with the multimodal rules and split into the old E, F, C and D groups without a warning that the maritime rules should not be used for containers.

There was also a lot of speculation on the internet as to what rules were to be deleted and new ones written into Incoterms® 2020. They were all dramatically wrong, copied from one man's imaginative but entirely incorrect blog which then went "viral". EXW and DDP did not disappear, FCA is not split into two separate rules, there is no such thing as CNI.

A1 / B1: GENERAL OBLIGATIONS



A1 / B1: GENERAL OBLIGATIONS

ALL RULES

A1 (General Obligations)

In each of the eleven rules the seller must provide the goods and their commercial invoice as required by the contract of sale and any other evidence of conformity such as an analysis certificate or weighbridge document etc that might be relevant and specified in the contract.

Each of the rules also provides that any document can be in paper or electronic form as agreed to in the contract, or if the contract makes no mention of this then as is customary. The rules do not define what “electronic form” is, it can be anything from a pdf file to blockchain or some format yet to be developed in the future.

B1 (General Obligations)

In each of the rules the buyer must pay the price for the goods as stated in the contract of sale.

The rules do not refer to when the payment is to be made (before shipment, immediately after shipment, thirty days after shipment, half now half later, or whatever) or how it is to be paid (prepayment, against an email of copy documents, on presentation of documents to a bank under a letter of credit, or other arrangement). These matters should be specified in the contract.

SUMMARY

There is no difference between any of the rules.

A2 / B2: DELIVERY



A7 / B7: EXPORT/IMPORT CLEARANCE

EXW - EX WORKS

A7

EXW is more suited to domestic transactions rather than international transactions.

In domestic transactions the seller has no obligations as there are not likely to be any clearances required.

In international transactions the seller has no obligation to arrange any export/transit/import clearances. However if the buyer requests, at its own risk and cost, the seller must assist in obtaining any documents and/or information which relate to formalities required by the countries of export/transit/import such as permits or licences; security clearance for export/transit/import; pre-shipment inspection required by the export/transit/import authorities; and any other official authorisations or approvals.

B7 (Export/import clearance)

In domestic transactions the buyer has no obligation to the seller as there are not likely to be any clearances required.

In international transactions it is up to the buyer to carry out at its own cost all export/transit/import formalities required by the countries concerned, such as any permits or licences; any security clearances; pre-shipment inspection; and any other authorisations or formalities. Note the expression "it is up to" the buyer because all of these occur after EXW delivery so if the buyer fails to do any of these it is at its own risk as delivery has already occurred.

FCA - FREE CARRIER

CPT - CARRIAGE PAID TO

CIP - CARRIAGE AND INSURANCE PAID TO

A7 (Export/import clearance)

This rule, like all the multimodal rules, is suitable for both domestic and international transactions.

Where applicable, the seller must at its own risk and expense carry out all export clearance formalities required by the country of export, such as licences or permits; security clearance for export; pre-shipment inspection; and any other authorisations or approvals.

The seller has no obligation to arrange any transit/import clearances. However if the buyer requests, at its own risk and cost, the seller must assist in obtaining any documents and/or information which relate to formalities required by the country of transit or import such as permits or licences; security

What are the potential advantages and disadvantages of each rule? Do they work with letters of credit?

It all depends upon, firstly, whether you are the seller or the buyer; secondly, what level of expertise you have in trading goods; and thirdly, what level of buying power you have. The Incoterms® 2020 rules, like the versions before them, relate not to the “warm and fuzzy” marketing aspects of a sale, not to the technical descriptions of the goods, not even to the payment arrangements, but to the essentials of who does what, when and at whose risk and whose expense. Without a good working knowledge of these rules the sales and marketing people can still make a sale but it is the logistics and often finance people who then have to tie all the loose ends together to make the sale into a reality. After all, a sale is not a sale until the goods move from seller to buyer and are paid for.

Let’s now look at the advantages and disadvantages to both seller and buyer for each of the eleven rules.

EXW – Ex Works

This rule's first version came into force in the original Incoterms® 1936 and included in its heading "Ex factory, ex mill, ex plantation, ex warehouse etc" in the English section of that book with German and French translations included in the book. Its origin in common usages go back long before that.

All advantage would seem to be to the seller, it does nothing more than shout (or email) "come and get 'em" or words to that effect. However if the sales contract is not well-drafted, while the seller might be expecting that the buyer is going to export the goods to an overseas market it could find that the buyer is in fact unable to complete export formalities and tries to reduce its potential losses by selling the goods into the seller's home market at a discounted price.

It would seem at first glance that the buyer is disadvantaged by having to take all risks and arrange and pay for everything. Assuming that it is in a good position to do so then it would likely find that it can arrange all transport and formalities at the same costs as might be offered the seller were it of a mind to do so, but without paying the seller any mark-up on these costs. Another possibility is that the buyer is buying goods not only from one seller but a number of sellers and chooses to accumulate them at another location then consolidate them into one larger more cost-effective shipment in one or more shipping containers.

On the other hand, the buyer must be in a position, for an overseas sale, to carry out export formalities in the seller's country. Most countries require the exporter to be a legally registered entity in that country to be able to carry out export formalities which generally means the buyer, usually an entity legally registered in its own country, will not be able to do so. If the buyer tries to circumvent this by using a buying agent, freight forwarder, friend or relative in the seller's country to carry out export formalities it calls into question whether that third party to the sale is really in a legal position to be the exporter of record. Add to this the issues of the seller's country's taxation authorities looking at an EXW sale as a local sale and therefore likely subject to VAT/GST – how will the overseas buyer be able to recover the tax if it is of course not registered for VAT/GST in the seller's country? The Incoterms® 2020 rules simply cannot deal with tax laws and regulations varying from country to country, as the rules must be universal across all countries, continents, markets and legal/tax jurisdictions.

Another aspect of EXW that makes life difficult is that the seller has no obligation to load the buyer's means of transport. It is the buyer who must arrange this, and that introduces all manner of potential problems. If the seller makes its goods available in its covered warehouse, it quite probably will be subject to various occupational health and safety regulations plus a variety of insurance implications. It therefore cannot allow the buyer or its carrier to turn up with its truck, a forklift and its own staff to go rampaging through the seller's warehouse. Even if the seller at the last minute places the goods outside the doors of its warehouse while ever the buyer attempts to load on the seller's grounds there are likely to be similar problems.

If the buyer requires extra documents such as a certificate of origin, the seller must assist the buyer, at the buyer's request, risk and cost, to obtain it. There could be complications if the issuing authority

carriage and insurance, the seller and buyer refer to CIF and not CIP. The Incoterms® 2020 rules need to reflect long-standing and current practice, the trading world is unlikely to make a sudden and rapid change to CIP for containers. The banks and freight forwarders will continue using CIF, indeed the banks will still require an on board bill of lading shipped by a given date and the seller is best placed to ensure compliance. The act of the containers being placed on board satisfies both seller and buyer as evidence of the goods actually leaving the country of export. This wording endeavours to provide within the CIF rule the solution to the problem, and yes it

too may need further polishing.

While A5 requires the seller to make a contract of insurance, in CIF unlike CIP it is only for minimum cover under Institute Cargo Clauses (C), as indeed CIP provided in Incoterms® 2010. The parties can nevertheless specify in their contract that the cover be increased to Institute Cargo Clauses (A). This cover is usually the default for most marine insurance so regardless of the contract most sellers would take out such cover even unknowingly so.

The above are my attempt to redesign the camel in as close a likeness to a horse as I can get it. Yes, it is still a dream, maybe for 2030.

IN CONCLUSION

I believe that the rules must reflect what is already happening, and has been happening, in the real world of trade and seek to give some order and guidance based on that practice. Trying to get trade to rapidly change direction is like trying to turn a container ship at speed in a one hundred metre circle, it just isn't going to happen.

It might mean that lawyers need to learn more about the real world that continues on without them. It might mean those with academic qualifications but no real-world experience need to step from the classroom and walk in the shoes of a business person for a little while. It might mean that bankers still steeped in what used to happen when their bosses' bosses' bosses used to be the front-line operations clerks in the 1970s need to step out of their banking chambers and see what their customers are actually doing right now despite them.

People in businesses, large and small, multi-national and micro, go about their manufacturing and trading businesses day after day to feed their families and the families of their employees, largely without interference from those who seek to tell them how they should go about selling and buying their products. I salute them for keeping the world going.

I hope that you have enjoyed reading this book and that it has enhanced your knowledge and understanding of the Incoterms® 2020 rules and trade in general.

Bob Ronai



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