The International Chamber of Commerce
INCOTERMS 1990 - A Guide to their Usage

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1. Introduction

International contracts for sale often contain standard shipping and delivery terms. However, even the most common terms, such as FOB or CIF, do not necessarily have the same meaning in different ports or centers of trade. In an attempt to end this confusion, the International Chamber of Commerce has, over the years, published lists of International Commercial Terms, known as ‘Incoterms’. Incoterms were first published in 1936 with subsequent revisions and additions made in 1953, 1967, 1980 and most recently in 1990. The Incoterms 1990 edition is set out in ICC Brochure No 460, and contains important differences from earlier versions.

The purpose of the Incoterms is to:

"...provide a set of international rules for the interpretation of the most commonly used trade terms in foreign trade. Thus the uncertainties of different interpretations of such terms in different countries can be avoided or at least reduced to a considerable degree...Frequently parties to a contract are unaware of the different trading practices in their respective [page 61]."

Although initially the Incoterms were concerned with carriage by sea, both the 1980 and the 1990 versions take other modes of transport into consideration. Another important feature of the 1990 Incoterms is that they provide for future developments in Electronic Data Interchange (EDI) for transport documents.

The main advantage of using Incoterms is to provide a short form of a contractual term which has a known meaning. They also bring consistency and certainty to international transactions. It is important to note, however, that as influential as the Incoterms are, there is still quite a diversity of different national and customary usages of shipping terms, and the Incoterms are not considered part of international customary law. For this reason, one cannot rely blindly on the Incoterm defined usages with impunity. It is therefore best, as a drafting matter, to put in the contract that the shipping terms are to

1International Chamber of Commerce, Incoterms 1990, ICC Publication no. 460.
2Ibid. at 6.
3Ibid. at 15. This is consistent with developments in other areas of international commerce, such as the UNCITRAL Model Law on Electronic Commerce which expressly provides for the existence and use of electronic negotiable documents. UNCITRAL Model Law on Electronic Commerce, Art. 17. (1996).
4In most countries, Incoterms are not part of the domestic law, but there are some exceptions such as Spain and Iraq. In some other countries, such as France and Germany, they are recognized as a custom of trade.
6Henry D. Gabriel, DeVan Daggett Professor of Law, Loyola University, New Orleans.
be given meaning as defined by the 1990 Incoterms. Incoterms are easily incorporated into trade agreements by including a clause to the effect that the contract is governed by the provisions of Incoterms. Specific reference to *Incoterms 1990* is recommended to avoid confusion with earlier versions.

The most commonly used Incoterms are CIF and FOB, but there are other terms that buyers and sellers should be aware of, as well as the advantages and disadvantages of the various terms. For example, a seller quoting FOB will ask for a lower price than when quoting CIF, because in the former case, the buyer will pay the insurance costs.

Sometimes other considerations will come into play in choosing the appropriate shipping terms. For example, the customs and excise practice in some countries bases the export value on FOB price and the import value on CIF price irrespective of the terms of the contract between the parties. In these circumstances, the parties will want to adjust prices accordingly, and this will likely be reflected in the shipping terms used. The question of the underlying substantive law may also influence the choice of shipping terms.

Incoterms can be grouped in four categories:

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<thead>
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<th>GROUP ELEMENT TERM DESCRIPTION</th>
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<td>&quot;E&quot; 9 Departure EXW Ex Works</td>
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<td>&quot;F&quot; 10 Main carriage unpaid FCA Free Carrier</td>
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6In this regard, it is also important to note that only the English text of the Incoterms is considered authentic. Ibid. at 150.

7For example, although the UN Convention on Contracts for the International Sale of Goods does not set out shipping terms, and therefore the parties are free to designate their own terms, the domestic law of the United States defines shipping terms. In the case where the United States law would apply, the parties would have to carefully draft the agreements to avoid conflicts between the substantive law and the Incoterms.

8Incoterms at 7.

9The seller makes the goods available at the seller’s premises.

10The seller delivers the goods to a carrier appointed by the buyer.

11The seller has the obligation to contract for carriage, but the seller does not assume the risk of loss during transit.
2. Ex Works (... named place)

Incoterms provides the following explanation:

“’Ex works’ means that the seller fulfils his obligations to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc.) to the buyer. In particular, he is not responsible for loading the goods on the vehicle provided by the buyer or for clearing the goods for export, unless otherwise agreed. The buyer bears all costs and risks involved in taking the goods from the seller’s premises to the desired destination. This term thus represents the minimum obligation for the seller. This term should not be used when the buyer cannot carry out directly or indirectly the export formalities. In such circumstances the FCA term should be used.”

Generally, the purchase price is due on delivery of the goods. Normally the seller is under an obligation to pack the goods and is required to use the customary method of packing. Failure to do so may result in a subsequent claim against a carrier being subject to a denial of liability for loss or damage on the grounds of “insufficiency of packing”.

An Ex Works clause may contain the address where the goods are to be collected, but in some cases may only refer to the town where the seller’s works, factory, warehouse or store is situated. However, the seller is required to inform the buyer of the actual local address in sufficient time for them to be collected, and failure to give the notice may bar a subsequent claim for damages for non-acceptance.

3. Main carriage unpaid

3.1 FCA (... named place)

“FCA” stands for Free Carrier, and its usage includes all modes of transport, including combined transport. Incoterms provides the following explanation:

“’Free Carrier’ means that the seller fulfils his obligation to deliver when he has handed over the goods, cleared for export, into the charge of the carrier named by the buyer at the named place or point. If no precise point is indicated by the buyer, the seller may..."
choose within the place or range stipulated where the carrier shall take the goods into his charge. [page 64] When according to commercial practice, the seller’s assistance is required in making the contract with the carrier (such as in rail or air transport) the seller may act at the buyer’s risk and expense.”

This term is similar to FOB except that the seller’s obligation is to deliver the goods into the custody of the carrier at the named place or port.

3.2 FAS (... named port of shipment)

This term means “Free Alongside Ship” and it is used for sea or inland waterway transport only. Incoterms provides the following explanation:

“ ‘Free Alongside Ship’ means that the seller fulfils his obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment. The FAS term requires the buyer to clear the goods for export. It should not be used when the buyer cannot carry out directly or indirectly the export formalities.”

The actual loading of the goods over the ship’s rail is the buyer’s obligation and at the buyer’s cost. Generally, the buyer also has the obligation of nominating a suitable ship under an FAS contract.

3.3 FOB (... named port of shipment)

The term “FOB” means Free On Board, and it is used for sea and inland waterway transport only.

Incoterms provides the following explanation:

“ ‘Free on Board’ means that the seller fulfils his obligation to deliver when the goods have passed over the ship’s rail at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that point. The FOB term requires the seller to clear the goods for export.”

This term means that all charges incurred up to and including the delivery of the goods on board ship are the seller’s. The buyer has to pay all subsequent charges. Under some domestic sales law, the seller has an additional obligation [page 65] to notify the buyer to allow the buyer to insure the goods. This is also the trade usage in some industries.

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14Ibid. at 18.
15Ibid. at 32.
16Ibid. at 38.
17See e.g. the American Uniform Commercial Code §2-504(b) and the Sale of Goods Act (New South Wales, Australia), §35.
18This is the case in the oil industry. See e.g., Scandinavian Trading Co A/S v. Zodiac Petroleum SA and William Hudson Ltd. The Al Hofuf [1981] 1 Lloyds Rep 81, 84.
The American practice is to use FOB as a general delivery term, and under American usage it does not necessarily impose on the seller the risk of loading the goods on the vessel.\(^{19}\) Moreover, under American usage, if the term is FOB (place of destination), the seller has the risk of delivery to that place.\(^{20}\) As the usage of this term in the United States is by statute, parties run the risk of an application contrary to the Incoterms in American courts.

The term FOB is also commonly used in air transport as “FOB (name of airport)”. This is also sometimes expressed as “FOA”.

4. Main carriage paid group

4.1 CFR (... named port of destination)

The term “CFR” designates “Cost and Freight” and this term is used in sea and inland waterway transport only. The Incoterms provides the following explanation:

“‘Cost and Freight’ means that the seller must pay the costs and freight necessary to bring the goods to the named port of destination but the risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered on board the vessel, is transferred from the seller to the buyer when the goods pass the ship’s rail in the port of shipment. The CFR term requires the seller to clear the goods for export.”\(^{21}\)

This term should be used rather than the commonly but erroneously used CandF which does not exist in the Incoterms.\(^ {22} \) [page 66]

4.2 CIF (... named port of destination)

The term “CIF” designates “Cost, Insurance and Freight”. It is used for sea and inland waterway transport only. The Incoterms provides the following explanation:

“‘Cost, Insurance and Freight’ means that the seller has the same obligations as under CFR but with the addition that he has to procure marine insurance against the buyer’s risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium. The buyer should note that under the CIF term the seller is only required to obtain insurance on minimum coverage. The CIF term requires the seller to clear the goods for export.”\(^ {23}\)

\(^{19}\) The American usage of FOB port of shipment is not to place the risk of loading on the seller unless the specific vessel is mentioned in the FOB term. Uniform Commercial Code §2-319(1)(a) and (c). This is the equivalent of an ‘FCA’ contract under the Incoterms.

\(^{20}\) Uniform Commercial Code §2-319(1)(b).

\(^{21}\) Incoterms 1990, p. 44.

\(^{22}\) CandF is commonly used in the United States, and its usage is provided for by statute. See, Uniform Commercial Code §2-320(1).

\(^{23}\) Incoterms 1990, p. 50.
4.3 CPT (... named place of destination)

This term signifies “Carriage Paid To”, and its usage includes all modes of transport, including combined transport. The Incoterms provides the following explanation:

“Carriage paid to” means that the seller pays the freight for the carriage of the goods to the named destination. The risk of loss of or damage to the goods, as well as any additional costs due to events occurring after the time the goods have been delivered to the carrier, is transferred from the seller to the buyer when the goods have been delivered into the custody of the carrier."

4.4 CIP (... named place of destination)

This term signifies “Carriage and Insurance Paid To” and its usage includes all modes of transport, including combined transport. The Incoterms provides the following explanation:

“Carriage and insurance paid to” means that the seller has the same obligations as under CPT but with the addition that the seller has to procure cargo insurance against the buyer’s risk of loss of or damage to the goods during the carriage. The seller contracts for insurance and pays the insurance premium. The buyer should note that under the CIP term the seller is only required to obtain insurance on minimum coverage. The CIP term requires the seller to clear the goods for export.

This term means that the seller has the same obligations as under a CPT contract but with the additional obligation on the seller to buy marine cargo insurance against the buyer’s risk of loss or damage to the goods during carriage.

5. Arrival or Delivery Ex-Ship (Name Port of Arrival)

5.1 DAF (... named place)

The term “DAF” signifies “Delivered at Frontier” and is used for all modes of transport, but principally for inland carriage by rail or road. The Incoterms provides the following explanation:

Ibid. at 56.

In other words, CPT is a “shipment” not a “destination” contract for purposes of risk of loss. See e.g., CISG art. 67; Uniform Commercial Code §2-509(1).

Incoterms 1990, p. 62. As with a CPT contract, the risk of loss passes to the buyer upon delivery of the goods to the carrier.
“Delivered at Frontier” means that the seller fulfils his obligation to deliver when the goods have been made available, cleared for export, at the named point and place at the frontier, but before the customs border of the adjoining country.”

This term is frequently used for inland carriage by rail or road where there are inland frontiers such as in Europe.

5.2 DES (... named port of destination)

The term ‘DES (... named port of destination)’ means ‘Delivered Ex Ship.’ It is used for sea and inland waterway transport only. The Incoterms provide the following explanation:

“Ex Ship’ means that the seller fulfils his obligation to deliver when the goods have been made available to the buyer on board the ship uncleared for import at the named port of destination. The seller has to bear all the costs and risks involved in bringing the goods to the named port of destination.”

5.3 DEQ (... named port of destination)

The term “DEQ (... named port of destination)” signifies “Delivered Ex Quay (Duty Paid).” It is used for sea and inland waterway transport only; the Incoterms give the following explanation:

“Delivered Ex Quay (duty paid)” means that the seller fulfils his obligation to deliver when he has made the goods available to the buyer on the quay (wharf) at the named port of destination, cleared for importation. The seller has to bear all risks and costs including duties, taxes and other charges of delivering the goods thereto. This term should not be used if the seller is unable directly or indirectly to obtain the import licence.

If the parties wish the buyer to clear the goods for importation and pay the duty the words “duty unpaid” should be used instead of “duty paid”. If the parties wish to exclude from the seller’s obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: “Delivered ex quay, VAT unpaid (... named port of destination)”.

5.4 DDU (... named place of destination)

The shipping term “DDU (... named place of destination)” means “Delivered Duty Unpaid.” It is used for all modes of transport. The Incoterms provides the following explanation:

27Ibid. at 68.
28Ibid. at 74.
29Ibid. at 86.
“Delivered duty unpaid” means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the costs and risks involved in bringing the goods thereto (excluding duties, taxes and other official charges payable upon importation) as well as the costs and risks of carrying out customs formalities. The buyer has to pay any additional costs and to bear any risks caused by his failure to clear the goods for import in time. If the parties wish the seller to carry out customs formalities and bear the costs and risks resulting therefrom, this has to be made clear by adding the words to this effect. If the parties wish to include in the seller’s obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: ‘Delivered duty unpaid, VAT paid, (... named place of destination)’.\(^{30}\) [page 69]

5.5 DDP (... named place of destination)

The term “DDP (... named place of destination)” signifies “Delivered Duty Paid”, and it is used for all modes of transport. The Incoterms provides the following explanation:

“Delivered duty paid” means that the seller fulfils his obligation to deliver when the goods have been made available at the named place in the country of importation. The seller has to bear the risks and costs, including duties, taxes and other charges of delivering the goods thereto, cleared form importation. Whilst the EXW term represents the minimum obligation for the seller, DDP represents the maximum obligation. This term should not be used if the seller is unable directly or indirectly to obtain the import licence. If the parties wish the buyer to clear the goods for importation and to pay the duty, the term DDU should be used. If the parties wish to exclude from the seller’s obligations some of the costs payable upon importation of the goods (such as value added tax (VAT)), this should be made clear by adding words to this effect: ‘Delivered duty paid, VAT unpaid (... named place of destination)’.\(^{31}\)

This term is sometimes expressed as “Free Domicile” or “Free Delivery” and represents the most favorable terms for a buyer can obtain but the most onerous terms for a seller.

6. Conclusion

Because of the long standing practice of standardized shipping terms to denote the extent of the parties’ contractual obligations under the agreement as well as denoting the allocation of risk of loss between the parties, lawyers engaged in international commercial transactions need to have a ready familiarity with standardized shipping terms. The common international practice of utilizing the Incoterms, either expressly or by implication, in the international sale of goods makes a knowledge of these terms essential for

\(^{30}\)Ibid. at 86.
\(^{31}\)Ibid. at 92.
the international commercial practitioner. This article is intended to help practitioners achieve this goal. [page 70]