

Incoterms 2010 - Key changes to put on your radar

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Those of you involved in cross-border sale of goods will probably know that a new version of Incoterms takes effect on 1 January 2011. Incoterms (or international commerce terms) are a series of international sales terms published by International Chamber of Commerce and widely used in international commercial transactions.

There are some significant differences between Incoterms 2000 and the new Incoterms 2010. Some of the changes will need to be incorporated into new sale of goods contracts entered into before 1 January 2011; other changes simply need to be understood and considered when preparing contracts effective on or after 1 January 2011.

What needs to be done before 1 January 2010?

Timing is all important. After 1 January 2011, any reference to Incoterms in a contract signed on or after that date will be understood to be a reference to Incoterms 2010, unless the parties expressly agree otherwise.

Both international and domestic users, therefore, should consider what amendments need to be made between now and 1 January to bring new contracts in line with Incoterms 2010. This will involve a thorough audit of standard suites of contracts that refer to Incoterms to ensure that those standard contracts are consistent with Incoterms 2010.

What will change?

1. Incoterms DAF, DES, DDU and DEQ replaced

Because of increased point-to-point sales and containerisation, Incoterms 2010 replaces four existing Incoterms with two new Incoterms:

| New Incoterm | Replaces Incoterm |
|-----------------------------|---|
| Delivered at Place (DAP) | Delivered at Frontier (DAF) Delivered Ex Ship (DES) Delivered Duty Unpaid (DDU) |
| Delivered at Terminal (DAT) | Delivered Ex Quay (DEQ) |

2. Institute cargo clauses updated and insurance obligations clarified

In 2009, insurance markets adopted the revised Institute Cargo Clauses (LMA/IUA) (2009). Incoterms Cost Insurance and Freight (CIF) and Carriage and Insurance Paid (CIP) have been amended to reflect this. The amendments also clarify information obligations regarding insurance.

3. New security obligations

The seller and the buyer will be compelled to co-operate as they have not done previously. This is because Incoterms 2010 will allocate the obligations to supply the necessary information in order to obtain export and import clearance (eg, chain of custody information).

4. Obligations around terminal handling charges clarified

Incoterms 2010 seeks to reduce the potential for buyers to be charged twice for terminal handling charges. Pass through of the cost of carriage of goods to an agreed destination, which often resulted in buyers being charged twice, should disappear as a result of amendments to CIP, CPT, CFR, CIF, DAT, DAP and CCP Incoterms.

5. Requirements and obligations associated with string sales recognised

Incoterms 2010 recognises and clarifies the practice of string sales (ie, multiple sales of goods during transit).

Specifically, FCA, CPT, CIP, FAS, FOB, CFR and CIF Incoterms have been amended to provide that the seller in the middle of a string sale has an obligation to "procure goods shipped" and not to "ship" the goods.

The seller's obligation to contract for the carriage of goods has been amended to allow the seller to procure a contract of carriage.

Key amendments in Incoterms 2010

Three key areas of amendments do not require any specific action but should be understood and considered when preparing contracts to be given effect on or after 1 January 2011. These are:

1. Using Incoterms for domestic sale of goods contracts

Incoterms 2010 have been adapted for use in domestic contracts. This will make it easier to incorporate Incoterms in contracts relating to the movement of goods domestically - for example, within a trading bloc such as the EU where the export and import formalities have largely disappeared, and in the US where there has been an increasing preference to use Incoterms rather than the Uniform Commercial Code in domestic sales.

2. Revised term categories

Incoterms 2010 separates its eleven terms into two broad categories:

| Deliveries by any mode of transport (sea, road, air, rail) | Deliveries by sea and inland waterways transport |
|--|--|
| Ex Works (EXW) | Free Alongside Ship (FAS) |
| Free Carrier (FCA) | Free on Board (FOB) |
| Carriage Paid To (CPT) | Cost and Freight (CFR) |
| Carriage and Insurance Paid to (CIP) | Cost, Insurance and Freight (CIF) |
| Delivered at Terminal (DAT) | |
| Delivered at Place (DAP) | |
| Delivered Duty Paid (DDP) | |

Previously, confusion occurred when some people misused FOB to indicate any point of delivery. This new categorisation clearly states that the FOB rule is meant to be used solely for sea and inland waterway transport.

3. Maintenance of electronic records

This amendment imposes the same obligation to keep contractual documentation and records regardless of their form. Interestingly, 'electronic communication' is used broadly to encapsulate future technological developments.

What you need to remember

Trading companies that refer to Incoterms in their contracts need to be aware of the effect of the differences between Incoterms 2000 and Incoterms 2010.

Confusion (and potential disputes) may arise where trading companies have not conducted a thorough audit of their existing contracts (or proposed new contracts) that will apply after 1 January 2011 to ensure they understand the effect of the amendments and consequently the terms they have (or will in the future) agreed.

If trading companies have not familiarised themselves with the changes between Incoterms 2000 and Incoterms 2010 before 1 January 2011, users may still choose to be bound by the previous version - provided the parties' agreement to use those terms is clear.