

How to prepare for new Incoterms

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Introduction

The International Chamber of Commerce (ICC) is set to launch a new version of the International Commercial Terms (Incoterms) rules – the globally used, standardised set of trade terms for the international sale and delivery of goods. The new rules, which will update the 2010 version, will be published later in 2019, but will not take effect until 1 January 2020. However, parties involved in the international sale of goods should use the impending introduction of the new rules as an opportunity to review their existing contracts and standard delivery terms and determine whether they are being used correctly.

Since 1939, the ICC has published and updated the Incoterms rules in order to:

- facilitate the smooth conduct of international trade;
- eliminate differences in the interpretation of delivery conditions; and
- provide clear, practical, uniform and predictable commercial terms which define the respective rights and obligations of buyers and sellers in national and international commercial transactions.

The rules are updated regularly to meet the demands of international commerce and reflect changing trade practices and evolving modes of transport.

The Incoterms 2010:

- allocate or transfer the risk of loss of or damage to goods;
- define buyers' and sellers' duties regarding, among other things, carriage and insurance; and
- distribute various costs and documentary obligations.

The Incoterms 2010 comprise 11 rules, which are divided into two categories:

- six rules for any mode of transport (ie, Ex Works, Free Carrier (FCA), Carriage Paid To, Carriage and Insurance Paid To, Delivered at Terminal and Delivered at Place); and
- five rules specifically covering sea and inland waterway transport (ie, Delivered Duty Paid (DDP), Free Alongside Ship (FAS), Free on Board, Cost and Freight (CFR) and Cost Insurance and Freight).

New rules

The updated rules have been developed with the assistance of relevant parties and interest groups, such as carriers, international traders, insurers, lawyers and economists. Publication is scheduled for September or October 2019, whereupon the ICC and other organisations involved in international trade will organise events and training sessions to familiarise users with the uniform interpretation of the new rules.

Although the new rules will not enter into force until 1 January 2020, they have already attracted a significant amount of industry speculation and comment. For example, it has been reported that, due to a lack of use in practice, the FAS rule has been deleted from the 2020 rules.

Meanwhile, a new Cost and Insurance (CNI) rule is expected to be introduced, whereby sellers will be responsible for taking out insurance, while buyers bear the risk and costs of carriage. This change is intended to cover the existing vacuum between the current FCA and CFR rules.

Changes are also expected to both the FCA rule (which will be divided into a rule applicable to any

mode of transport and a rule applicable to sea and inland waterway transport) and the DDP rule.

It is anticipated that the new Incoterms rules will also reflect changes to the old FOB and CIF rules accommodating goods being transported by container.

Finally, it is reported that the ICC will use the new Incoterms rules to explicitly address data privacy and cybersecurity issues, since carriers and terminals are among those exposed to such digital threats as distributed denial of service attacks and theft of financial or commercial data.

Comment

Interested parties should not act on rumours, but rather wait for the official publication of the Incoterms 2020. However, before that time, they can prepare and take the necessary action to be fully ready to use the new rules when they take effect. To that end, they can familiarise themselves with the correct selection and application of the various rules. Incoterms rules are often selected and used in international sales contracts in an incorrect manner, which leads to confusion, delays in resolving disputes and additional dispute resolution costs.

Parties should continue to assess the delivery terms in their contracts and general conditions against the changing commercial and political environment. For example, parties may unknowingly become contractually bound to bear additional costs due to recent tariff impositions, trade sanctions, increased customs formalities and the legal, documentary and operational consequences of Brexit.

Parties should also be careful when referring to 'terms latest version' in their contracts, as this version will automatically change with effect from 1 January 2020. The new rules on interpretation might suddenly change how the delivery term originally chosen in a contract is to be explained.

Once the 2020 version of the rules has been officially published, existing contracts and purchase and sales conditions should be checked to assess whether the interpretation under the new version of the rules actually used in the contract documentation is similar to the old explanation and still in line with what the parties originally intended.

The publication of the Incoterms 2020 will allow parties to:

- verify whether their standard delivery terms are used correctly in view of the actual mode of transport and the intention of both parties;
- properly apply the Incoterms rule that is best suited to their sales transactions; and
- ensure that their eventual choice is future-proof – at least for the next 10 years.

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