



February 8, 2011

TO: Clients and Friends of the Firm

FR: Tatyana Dzyadok

Frishberg & Partners

RE: Incoterms 2010: what's new?

Incoterms Rules were developed more than 70 years ago by the International Chamber of Commerce in Paris and have long been accepted by numerous governments, legal authorities and traders worldwide as the definitive interpretation of the most commonly used terms in international trade. The main sections of Incoterms Rules govern foreign trade contracts with provisions concerning loading, transportation, insurance and delivery of goods. Incoterms also describe the tasks, costs and risks involved in the delivery of goods.

Due to global changes within the industry over a period of time, these rules are normally updated every 10 years. The last revision of Incoterms took place way back in 2000. Of course, a number of significant changes took place in both global and domestic trade. Therefore, as expected, the International Chamber of Commerce has recently adopted a new edition of Incoterms Rules – Incoterms 2010. The new Incoterms Rules 2010 have been effective as of January 2011 and have replaced Incoterms 2000 edition.

Immediately below we discuss the principal features of Incoterms 2010, as well as the main distinctions of Incoterms 2000 and Incoterms 2010. In addition, we briefly address the issue of enforceability of Incoterms 2010 in Ukraine.

In contrast to the previous Incoterms 2000 edition, which provided for four groups of terms, Incoterms 2010 are neatly arranged into 2 main groups: (i) those applicable to all modes of transport, and (ii) those, which are only applicable to sea and inland waterway transport. We briefly review each group immediately below:

- (i) EXW - Ex Works
- FCA - Free Carrier
- CPT - Carriage Paid To
- CIP - Carriage and Insurance Paid
- DAT - Delivered At Terminal



DAP - Delivered At Place  
DDP - Delivered Duty Paid

The first class includes the seven terms of Incoterms 2010 edition that can be used irrespective of the mode of transport selected and regardless of whether one or more mode transport is employed. As noted above, EXW, FCA, CPT, CIP, DAT, DAP and DDP belong to this class. They can be used when there is no maritime transport at all, or in cases where a ship is used for a *part* of the carriage.

- (ii) FAS - Free Alongside Ship
- FOB - Free On Board
- CFR - Cost and Freight
- CIF - Cost, Insurance and Freight

In this second class of Incoterms 2010, the delivery point and the place where the goods are carried to the buyer are *both* ports and, thus, the label “sea and inland waterway” is applicable. As mentioned, FAS, FOB, CFR and CIF belong to this class. Under the latter three terms, the ship’s rail as the point of delivery has been omitted in preference for goods being delivered when they are “on board” the vessel. This more closely reflects the modern commercial reality and avoids the rather out-dated image of the risk of goods swinging like a pendulum across an imaginary perpendicular line.

In other words, whereas Incoterms 2000 edition had **four** categories, Incoterms 2010 edition has only **two** categories. In addition, the newly-adopted Incoterms 2010 includes 11 terms/rules instead of the 13 as previously encompassed by Incoterms 2000. This was achieved by employing two new rules that may be used irrespective of the agreed upon mode of transportation – DAT, Delivered at Terminal, and DAP, Delivered at Place – in place of the Incoterms 2000 rules DAF, DES, DEQ and DDU. Specifically, four sales terms have been removed:

DAF - Delivered at Frontier  
DES - Delivered ex ship  
DEQ - Delivered ex quay, and  
DDU - Delivered duty unpaid.

Under the two new rules, delivery occurs at a named destination: in DAT, at the buyer's disposal already unloaded from the arriving vehicle (as under the former DEQ rule); and in DAP, also at the buyer's disposal, but only ready for unloading (as under the former DAF, DES and DDU rules).

Accordingly, these new rules render the Incoterms 2000 rules DES and DEQ obsolete. The appointed terminal in DAT may well be in a port, and DAT can therefore safely be used in cases where the Incoterms 2000 rule DEQ once was. Likewise, the arriving "vehicle" under DAP may also be a ship and the named place of destination may be a port. Thus, DAP can seamlessly be used in cases where the Incoterms 2000 rule DES was once applied. These new rules, like their predecessors, are "delivered", with the *seller bearing all the costs* (other than those related to import clearance, where applicable) and *risks* involved in bringing the goods to the named place of destination.

In summary, the following Incoterms 2000 have been deleted from the list: DAF, DES, DEQ and DDU. In their place, two new terms have been added to the list: DAT and DAP, whereas DAT replaces Incoterms 2000 rule DEQ, and DAP replaces Incoterms 2000 rules DAF, DES and DDU.

The Incoterms 2010 edition sets forth clear distinctions between so called "blue terms" for shipping by ship and terms for multimodal shipping. The explanations for the sales terms indicate which sales terms to use for which mode of transportation (multimodal terms: EXW, FCA, CPT, CIP, DAP, DAT, DDP; blue terms: FAS, FOB, CFR, CIF).

Moreover, the sales terms FOB, CFR and CIF have been adjusted or additionally explained. For example, regarding FOB, the transfer of risk formerly occurred when the goods had passed the vertical of the ship's rail, similar to CFR and CIF. Now it has been made clear that the henceforth transfer of risk only occurs when the goods have been set down on the ship. Thus, a part of the risk has been transferred to the supplier.

Additionally, the new sales terms suggest that in modern container traffic the sales terms CFR and CIF are impracticable because circumstances in modern container ports no longer justify determining the transfer of risk by the means of loading a ship. The definition now uses "set down of goods on the ship". Thus, the recommendation is to use in container traffic the sales terms CPT or CIP (in these cases the transfer of risk takes place upon surrender of the goods to the carrier). The new set of sales terms also take into account "supply chain security" and electronic documents.

In general consideration of the two new rules, the Incoterms 2010 edition reflects advances in international trade over the last decade, making it an essential tool for contemporary trade. When used in both international and domestic contracts for the sale of goods, the rules simplify the drafting of contracts and help avoid misunderstandings by clearly setting out the specific obligations of buyers and sellers.

In addition to the 11 rules, Incoterms 2010 includes the following novel issues:

- extensive guidance notes and illustrative graphics to help users efficiently choose the proper rule for each transaction;
- new classifications to help choose the most suitable rule in light of the mode of transportation to be applied;
- advice for using electronic procedures;
- information on security-related clearances for shipments;
- advice for the use of Incoterms 2010 rules in domestic trade. (The Incoterms 2010 rules formally recognize that they are available for application to both international and domestic sales contracts).

Importantly, all contracts executed under Incoterms 2000 remain valid even after 2011. While the new Incoterms endorse the use of Incoterms 2010 after 2011, the parties to a contract for the sale of goods may still agree to choose any edition of the Incoterms rules even after 2011. In any case, however, it is vital to clearly specify the chosen edition of Incoterms in a contract.

The use of Incoterms 2000 rules in Ukraine is governed by the Decree of the President of Ukraine No. 567/94 “On Use of International Rules of Interpretation of Commercial Terms”, dated October 4, 1994, as well as Article 265 of Commercial Code of Ukraine. In order to prepare the use of Incoterms 2010 in Ukraine, a workgroup under the relevant Commission on the issues of foreign economic activity of International Chamber of Commerce was organized, consisting of the representatives of the Ministry of Economic Development and Trade, the Ministry of Foreign Affairs and the state customs service of Ukraine.

The workgroup is currently engaged in the process of coordinating the Ukrainian version of Incoterms rules 2010, as well as the procedure of their implementation within the Ukrainian authorities dealing with Incoterms rules. In the opinion of the Ukrainian national committee of the International Chamber of Commerce, the issuance of the Ukrainian version of Incoterms 2010 may be delayed due to the fact that since 1994 (i.e., upon adoption of the Decree governing the use of Incoterms rules) numerous legislative pieces have been adopted, which contain alternative and mutually exclusive requirements.



At the same time, in compliance with the above-mentioned Decree, when concluding foreign economic agreements/contracts, commercial entities may apply new Incoterms rules only after their official publication. Usually, the amendments related to newly-adopted rules can be applied within 10 days after their publication. Therefore, we believe that over the next few years most Ukrainian companies involved in foreign economic activity will continue to regulate their relationships with counterparties in accordance with Incoterms 2000.