INCOTERMS® 2010*

*Jan Ramberg***

A. Incoterms 1936 and Subsequent Revisions

After their initial introduction in 1936, Incoterms were revised for the first time in 1957 and thereafter in 1967, 1976, 1980, 1990 and 2000. This appears to suggest that, in recent times, Incoterms have been revised at 10-year intervals. This, however, is a false impression. It is merely a coincidence that the last three revisions are separated by two 10-year periods. Indeed, the main purpose of Incoterms is to reflect international commercial practice. Needless to say, commercial practice does not change at a set interval.

It is a common misunderstanding that Incoterms represent nothing more than standard contract terms that could be revised at any time. In fact, the value of Incoterms as an expression of international commercial practice would be endangered by frequent changes for some purpose or other, such as to make them more reader-friendly or to clarify a few points of minor importance. A revision of Incoterms therefore requires that something important has taken place in commercial practice.

The first version of Incoterms[1] was clearly focused on commodity trading and fixed the important delivery points at the ship's side or at the moment when the goods are taken on board the ship. The risk transfer point in the latter case was deemed to be the moment when the goods passed the ship's rail.[2] This point was in the important and well-known trade terms FOB ("Free On Board"), CFR ("Cost and Freight") and CIF ("Cost, Insurance and Freight"). In cases where the goods were to be delivered alongside the ship rather than across the ship's rail, the trade term FAS was available. Incoterms 1936 also contained a trade term representing the minimum obligation of the seller, namely EXW ("EX-WORKS").

After the Second World War, work on the revision of Incoterms was resumed. Carriage of goods by rail had now increased, and it was necessary to introduce appropriate terms. In railway traffic, the seller frequently undertakes to arrange for the carriage in the same manner as under FOB. In 1957, two trade terms were added for this purpose, namely FOR and FOT ("Free on Rail" and "Free on Truck"). In 1976, a specific term for air transport was added, namely FOB Airport.

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** Professor Emeritus of the Law Faculty of the University of Stockholm.

1 *See* for an account of the historical background D. Sassoon, *CIF and FOB Contracts*, London 1975, para. 319; F. Eisemann & J. Ramberg, *Die Incoterms heute und morgen*, Vienna 1980, p. 133 *et seq.*

2 The ship's rail has been regarded as a border between the seller's and the buyer's land. *See* C.M. Schmitthoff, *Legal aspects of export sales*, London 1953, p. 43.

All these trade terms, which applied to a specific mode of transport, were removed from the 1990 version of Incoterms, as it was deemed unnecessary at that time to have specific terms for different modes of non-maritime transport. It was sufficient to use the general term FCA signifying "Free Carrier named point". This term was first introduced in the 1980 version of Incoterms, as by this time the carriage of goods in containers had increased to such an extent that it was necessary to introduce a new trade term (then with the acronym FCR).[3] This was all the more necessary because the existence of various container terms could, at worst, lead to a chaotic proliferation of variants to the detriment of international trade. Nevertheless, the innovation represented by FCA was regarded as an experiment, which explains why it was introduced as an additional trade term at the very end of the relevant ICC publication. However, in the 1990 version, FCA became one of the more important Incoterms. Nevertheless, it took a considerable amount of time before merchants realized that it was no good using trade terms such as FOB when, in practice, the goods were not handed over to the carrier on board the ship but at earlier reception points in the country of shipment: so-called container yards or container freight stations. It was difficult for merchants to understand that a seller should not remain at risk after the goods had been handed over to a carrier nominated by the buyer.

In the 1980 revision of Incoterms, it was necessary to add CIP ("Carriage and Insurance Paid to") for non-maritime transport as an equivalent to CIF, under which the seller undertakes to arrange and pay for the carriage and insurance. As a result, the terms CPT ("Carriage Paid To") and CIP, corresponding to CFR and CIF for maritime transport, were both added to Incoterms. The transport document used for maritime transport – the bill of lading – is not used for non-maritime transport, the reason being that, except when carried by ship, goods are normally not sold in transit. Therefore, there is no need for a specific document like a bill of lading, which enables the holder to sell the goods by transferring the document to a new buyer.[4] Consequently, CPT and CIP only make reference to the "usual transport document".

In 1967, it was necessary to add terms for cases in which the seller undertakes to deliver the goods at destination. In such cases, the seller concludes a contract of carriage in order to fulfil his obligation to deliver the goods to the buyer at destination. Although he also pays for the freight under CFR and CIF, he actually fulfils his obligation upon the shipment of the goods. Under these trade terms, his obligation is reduced to arranging and paying for the transport and tendering a document that enables the buyer to receive the goods from the carrier at destination. However, the seller assumes no risk for loss of or damage to the goods after they have been placed on board the ship in the country of shipment.

3 *See* Eisemann & Ramberg, *supra* note 1, p. 293 *et seq.*

4 *See* J. Ramberg, 'The vanishing bill of lading & the "Hamburg Rules Carrier"', 27 *Am. J. Comp. L.* 1979, pp. 391-406.

It is sometimes difficult for merchants to understand that a contract in which the point at destination is named – such as "CIF New York" – nevertheless signifies that the risk is transferred from the seller to the buyer before the indicated point, namely the point in the country of shipment where the goods are taken on board the ship. Indeed, all terms starting with the letter C signify that there are two critical points: one concerning the transfer of risk at the port of shipment and the other being the point up to which the seller has the obligation to arrange and pay for transport.

In the 1990 revision of Incoterms,[5] it was deemed unnecessary to retain the earlier trade terms relating to specific modes of transport (FOR, FOT and FOB Airport). The revision was also triggered by the shift from paper documents to electronic communication. As a result, a paragraph was added in the clauses dealing with the seller's obligation to tender documents to the buyer stating that paper documents could be replaced by electronic messages if the parties had agreed to communicate electronically.[6]

What then is the reason for the revision of Incoterms resulting in Incoterms 2010? It appears that the main problem with Incoterms 2000 was not so much what they contained but rather that it was not sufficiently clear how they should be used in practice. In addition, it is important to expand the use of Incoterms, particularly in the United States, where a possibility to do so has arisen as a result of the removal of the 1941 definitions of trade terms from the Uniform Commercial Code. Indeed, the key trade term FOB is understood differently in the United States than in Incoterms. In the United States, FOB merely represents a point that could be anywhere. In order to achieve an equivalent to FOB under Incoterms, it would be necessary to add the word "vessel" after the term FOB. A new trade term – DAP ("Delivered at Place") – has therefore been added. When using this term, it is possible to indicate any appropriate place. However, DAP is inappropriate in cases where the goods should be made available to the buyer unloaded from the means of transport. Another new term – DAT ("Delivered at Terminal") – has therefore been added for use when the unloading of the goods from the means of transport should be performed at the seller's cost and risk. This means that the maritime terms DES ("Delivered Ex Ship") and DEQ ("Delivered Ex Quay") in Incoterms 2000 have been replaced, respectively, by DAP and DAT, since the "terminal" in DAT corresponds to the "quay" in DEQ where the goods are unloaded from a ship. In the event that parties continue to use DES or DEQ under Incoterms 2000, the result will be the same as under DAP and DAT in Incoterms 2010.

5 *See* J. Ramberg, *Novel features of the ICC Incoterms 1990, Uniform law in the Twenty-first century*, New York 1995, pp. 77-83.

6 *See* with respect to the replacement of the paper bill of lading with electronic procedures J. Ramberg, 'The 1990 CMI Rules on Electronic Bills of Lading in the Context of Electronic Commerce', *European Transport Law*, Vol. XXXII, No. 6, 1997, pp. 699-701 and *id.*, Electronic Communication and Incoterms 2000, in Cranston *et al.* (Eds.), *Commercial Law Challenges in the 21st Century, J. Hellner in memoriam*, Uppsala 2007, pp. 219-228.

There are limits to what can be done to increase the understanding of Incoterms. In particular, merchants retain old habits and are not easily persuaded to depart from the traditional maritime terms, although this is clearly necessary when contemplating non-maritime transport. In order to promote a better understanding of Incoterms, the 2010 version starts by presenting trade terms that can be used for any mode or modes of transport and only then presents trade terms that can be used for sea and inland waterway transport. Hopefully, this will induce merchants to first consider the use of the "all modes terms". Nevertheless, it is important to consider the different needs of trading in commodities as compared to manufactured goods. Commodity trading will continue to focus on carriage of goods by ship, and it remains to be seen whether merchants will choose to use the new terms. Be that as it may, merchants need to understand that trading in manufactured goods – which frequently involves containerization – requires a range of trade terms that are tailored to contemporary commercial practice.

Another frequent misunderstanding concerns the very purpose of Incoterms. Although they are needed to determine key obligations of sellers and buyers with respect to the different modalities of delivery, transfer of risk and cost, the terms do not represent the whole contract. It is also necessary to determine what rules apply when the contract is not performed as expected, owing to various circumstances, and how disputes between the parties should be resolved. While Incoterms tell the parties what to do, they do not explain what happens if they do not do so! For this purpose, the parties need to lay down applicable rules in a contract or by using a standard form contract as a supplement. In practice, disputes might nevertheless arise owing to unexpected events that the parties have failed to consider in their contract in a clear and conclusive manner. In such cases, the applicable law may provide a solution. Fortunately, the 1980 UN Convention on Contracts for the International Sale of Goods (CISG) has now become recognized worldwide, thus contributing significantly to transparency and effective dispute resolution in international trade. However, the provisions of CISG need to be supplemented with terms which offer the parties more precise variants suitable for their transactions. Thus, Incoterms appropriately supplement CISG and have accordingly been endorsed by UNCITRAL.[7]

B. The Revision Methodology

Incoterms have a well recognized standing in international trade because they reflect contemporary trade practices. The methodology used in creating these rules firmly rests upon a thorough research through the medium of the National Committees of ICC in order to find out what is actually going on in practice and then to seek a common denominator. Traditionally, the ICC has not endeavoured to find the *ideal* solutions and then to recommend the use of such solutions but rather used the method of assessing the value of the usages actually appearing in

7 *See* for the difference between CISG and Incoterms J. Ramberg, 'To what extent do Incoterms 2000 vary Arts. 67(2), 68 and 69?', 25 *J.L. & Com.* 2006, pp. 210-222.

the market place. True, it would be compatible with the traditional methodology to *inform* merchants about the shortcomings of the traditional trade terms, whenever these are difficult or impossible to use because of changed methods in cargo handling and transportation techniques and emerging innovations with respect to documentation and exchange of information between traders. But the difficulty starts when it is up to the ICC to decide whether a further step should be taken *to design trade terms* which are adapted to such new practices but do not yet exist in the market place. Should the ICC change its methodology and speed up the slow adaptation process in world commerce? This, in a sense, was the key issue in the revision leading to Incoterms 2010.

C. The Presentation and Structure of Incoterms 2010

In order to induce traders to use Incoterms correctly the ICC publication No. 715E on the front cover indicates: "ICC rules for the use of domestic and international trade terms". It is important to note the word "domestic", since Incoterms is a short expression for international commercial terms which seems to indicate that their use is restricted to international contracts of sale only. However, by referring to Incoterms in any contract of sale they become incorporated as part of the contract in the same manner as other terms. The inclusion of the word "domestic" is intended to promote the use of Incoterms generally and particularly in countries such as United States where the transport of the goods from seller to buyer may cover much longer distance than between parties in neighbouring countries.

Old habits die hard and it appeared that traders continued to use the traditional maritime terms also in situations where they were wholly inappropriate. In essence, the maritime terms should be used for the sale of commodities carried by sea from port to port. In particular, maritime terms are inappropriate for the sale of manufactured goods which nowadays are usually containerised or delivered to a carrier inland. Needless to say, in such cases the carrier's reception point cannot be the same as under the maritime terms where the goods are delivered to the carrier alongside or onboard the ship. Already with the presentation in 1999 of the ICC Model International Sale Contract (ICC publication no. 556) the recommended terms did not include the maritime terms. This is now followed up with the presentation of the terms in two groups starting with Group I with rules for any mode or modes of transport followed by Group II with rules for sea and inland waterway transport. Group I contains the terms EXW, FCA, CPT, CIP, DAT, DAP and DDP, while the maritime terms FAS, FOB, CFR and CIF appear in Group II.

D. The Introduction of DAT and DAP

The revised Uniform Commercial Code in the United States no longer includes the 1941 American Foreign Trade Terms Definitions. This may well induce trad-

ers in the United States to use Incoterms more frequently than before. In order to further induce them to do so the term DAP ("Delivered At Place") was introduced so that the use of FOB for delivery at a particular place could be discontinued. The use of FOB for other than maritime transport creates considerable confusion in international trade as traders are not aware of the need to add "vessel" after FOB when maritime transport is intended. When the parties simply agree that the goods should be delivered at a particular place it is often unclear exactly what should be done upon the arrival of the means of transport. In order to clarify this the term DAT ("Delivered At Terminal") was introduced. Under this term, the seller must unload the goods from the arriving means of transport and must then deliver them by placing them at the disposal of the buyer at the named terminal (DAT clause A 4). This is different from the seller's obligation under DAP where it is enough that the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading (DAP clause A 4). The same applies under the term DDP ("Delivered Duty Paid").

Perhaps surprisingly, the maritime terms DES ("Delivered Ex Ship") and DEQ ("Delivered On Quay") no longer appear in Incoterms 2010. Logically they become superfluous as DAP and DAT – ready for unloading and unloaded respectively – could be used instead. In the Guidance note to DAT of the ICC publication No. 715 E it is explained that "Terminal" includes any place, whether covered or not, such as quay, warehouse, container yard or road, rail or air cargo terminal. Nevertheless, it may appear shocking to shipowners that ships nowadays as arriving means of transport are regarded in the same manner as lorries. It may be expected that traders will continue to use DES and DEQ. If so, it is reasonable to assume that they intended that these terms should be interpreted as set forth in Incoterms 2000. If, by mistake, they referred to Incoterms 2010 but nevertheless use DES or DEQ one would have to choose between two alternatives. Either they must have meant Incoterms 2000 or acted in the belief that the terms had been retained in Incoterms 2010. In any case, the result would be the same under the old DES and DEQ compared with the new DAP and DAT as there has been no change of substance.

E. Abolishing the Ship's Rail as Risk Transfer Point

Undoubtedly, the most radical change in Incoterms 2010 appears to be the shift of the risk transfer point under FOB, CFR and CIF. However, the change has been deemed appropriate, since the shortcomings of the ship's rail to serve as an adequate point for the division of risk are well known. Indeed, any reference to the ship's rail in this respect is sometimes covered by ridicule as is evidenced by the famous dictum in *Pyrene v. Scindia Navigation*: "Only the most enthusiastic lawyer could watch with satisfaction the spectacles of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail."[8] Nevertheless, the ship's rail has in practice functioned quite

8 *Pyrene v. Scindia Navigation* [1954] 2 Q.B. 402 at p. 419.

well as a point for the division of responsibilities, the seller been responsible for those engaged to bring the goods over the ship's rail and the buyer for those engaged to receive the goods onboard the ship. At first sight, it may appear clear enough that the goods should actually be placed on board and that this is the obligation of the seller. But it is now that the difference between placing the goods on the truck as compared with placing them on board the ship becomes apparent. How should the expression "place on board" be interpreted? Does it include the stowing and trimming of the cargo onboard? Or could the goods be placed on board in any fashion? An obligation to do something includes to do it appropriately. Presumably, therefore, it must be determined case-by-case exactly what should be done at the seller's and buyer's risk respectively. Thus, the effect of using "placing on board" rather than "passing of the ship's rail" may not represent a radical step at all, since the traditional seller's and buyer's responsibilities for those acting in connection with the loading of the ship may well be retained also in the future.

F. Legal Status of Incoterms

The introduction of Incoterms 1936 was preceded by studies of trade terms as they were used in international trade in order to ensure that Incoterms were firmly based on international custom of the trade. As we have seen, the ICC has increasingly in the subsequent revisions endeavoured to assist traders in choosing the appropriate trade term. Also, when there was a need for additional trade terms, although not clearly based on commercial practice, the ICC did not hesitate to act, such as with the inclusion of FCA in Incoterms 1980 (then referred to as FRC). Further, the new terms DAT and DAP could not as such be based on any existing custom of the trade. However, they reflect the most common practice with respect to the obligation to unload the goods from the arriving means of transport. It must therefore be concluded that Incoterms still reflect custom of the trade but, in some respects, amount to no more than a standard form contract. In any event, Incoterms 2010 should always by reference be expressly incorporated into the individual contract. If this is properly done, they simply join the other terms of the contract and there is no need to determine their legal status.

Nevertheless, the policy of ICC – particularly expressed in connection with the launching of Incoterms® 2010 – has regrettably resulted in a decline of Incoterms as an expression of international custom of the trade. In order to protect its intellectual property rights ICC has proceeded to register Incoterms® as a trademark. Thus, the proper reference is no longer Incoterms 2010 but Incoterms® 2010. As expressed in the ICC publication No. 71 SE containing Incoterms® 2010:[9]

> "ICC holds all copyright and other intellectual property rights in this collective work. No part of this work may be reproduced, copied, distributed, transmitted, translated or adapted in any form or by any means (whether graphic,

9 International Chamber of Commerce, Publication No. 715E, p. 125.

electronic, or mechanical, and including, without limitation, photocopying, scanning, recording, taping, or by use of computer, the Internet or information retrieval systems) without the written permission of ICC through ICC services, Publications Department.

'Incoterms' is a registered trademark of the International Chamber of Commerce.

Although ICC encourages and promotes the use of the Incoterms registered trademark rules by third parties in sales contracts in compliance with ICC's copyright policy, 'Incoterms' is not a generic term that may be used to designate any trade terms, but is a trademark used to designate only the terms devised by ICC and products and services from ICC."

Thus, it is evident that ICC – using the original *lex mercatoria* as a basis for the interpretation of the trade terms FOB, CFR and CIF – now seeks to monopolize the required refinements of these and other trade terms through its efforts to preserve intellectual property rights to what is referred to as its "collective work". But, clearly, nothing would prevent other organizations – such as UNCITRAL or UNIDROIT – to engage in efforts to interpret trade terms used in international commerce. The *trademark* "Incoterms®" may be registered but the *product* as a refinement of *lex mercatoria* should not be appropriated to any organization however important. The interpreted trade terms should rather be regarded as default rules of the same kind as the rules of the CISG. In view of ICC's important and successful work to establish an authoritative interpretation of the trade terms on a worldwide basis, UNCITRAL decided to do no more than to suggest some basic principles relating to delivery and transfer of risk in CISG[10] and instead to express its satisfaction by endorsing Incoterms. Under such circumstances, it is hardly acceptable that the default rules as such should be protected by a trademark of a non-governmental international organisation such as ICC.

There is a further risk that confusion may arise when an Incoterms rule is used as the basis but modified by the parties. To what extent does such an amended rule still represent the "collective work" of ICC? But, more importantly, a decline of the Incoterms rules as an expression of *lex mercatoria* of the same kind as the default rules of CISG, and as a part of international contracts of sale by the application of its Article 9, is not in the best interests of international trade. Obviously, you cannot eat the cake and still have it. Either one would have to accept that the Incoterms rules have declined and are now of the same kind as standard contract terms, which normally require express and not only implied incorporation into the individual contracts, or induce the ICC to change its policy in order to achieve compatibility between the default rules of CISG and the Incoterms rules.

10 *See* Ramberg, *supra* note 7.