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# Law Trends & News

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## New INCOTERMS 2010

By Lynne R. Ostfeld

An important part of a contract for the sale of goods, particularly but not only when the sale is between nationals of two or more countries, is who pays for the transport and where transfer of title takes place. INCOTERMS were designed to help resolve these issues. However, they do not deal with the formation of the contract, liability, jurisdiction, breach, etc.

INCOTERMS stand for International Commercial Terms and are commercial terms drafted and published by the International Chamber of Commerce (ICC) in Paris. First published in 1936, the terms were just updated in 2010 and are often referred to as INCOTERMS 2010. These became effective January 1, 2011, and are recommended for use for contracts executed subsequent to that date. The new INCOTERMS will not invalidate contracts using the prior version. Drafters should specify which version is being used.

These terms are intended to define the tasks, costs, and risks associated with the transportation and delivery of goods. They are intended to clarify who takes responsibility for which aspect of the transport of goods and to avoid confusion and misinterpretation. There is no INCOTERM obligating the seller to hand the goods over to the buyer. It does not exist under the UN Convention on the International Sale of Goods (CISG). It is considered impractical with international sales.

Domestic transactions are now included. The UCC now refers to INCOTERMS, because they make more sense.

Some abbreviations have been accepted as INCOTERMS, some have not. COD and FOB are not INCOTERMS.

Also, the transactions can now be done electronically. String sales are also addressed in the INCOTERMS 2010.

The parties to a contract can modify the terms but do so at their own risk.

The obligations of the buyer and seller which are regulated by the INCOTERMS rules address:

- responsibility for export, import, and transit clearance including security clearance
- contracts of carriage and insurance
- place/point of delivery and of taking delivery
- act of delivery, loading, and unloading
- transfer of risks
- allocation of costs
- notices and assistance with information
- packaging and marking

The application of a clause of the INCOTERMS results in the appliance of the ICC rules for the use of domestic and international trade terms. INCOTERMS are not law, except for being a part of the contract. Different jurisdictions rule differently about whether the site of delivery is also the site of legal jurisdiction.

There are now 10 identical headings and 11 terms. They were reduced from the previous 13, which were used in INCOTERMS 2000.

Two new rules have been introduced:

DAT—Delivered at Terminal  
DAP—Delivered at Place

These replace four rules of the prior version:

DAF—Delivered at Frontier. This was used only with truck and train transport because the goods were delivered at the border. It was hard to handle with air transport of goods.  
DES—delivered ex ship  
DEQ—delivered ex quay  
DDU—delivered duty unpaid

The eleven clauses are arranged in different groupings. There is a group of seven rules which applies regardless of the method of transport: EXW—Ex Works (named place); FCA—Free Carrier (named placed); CPT—Carriage Paid To (named place of destination); CIP—Carriage and Insurance Paid to (named place of destination); DAT—Delivered at Terminal; DAP—Delivered at Place (named place of destination); DDP—Delivered Duty Paid (destination place).

A smaller group of four rules is applicable only to sales that solely involve transportation over water, whether ocean and inland water transport: FAS—free alongside ship (named loading port); FOB—Free on board (named loading port); CFR—cost and freight (named destination port); CIF—cost, insurance, and freight (named destination port).

Four groups cover systematic characteristics:

## **C Group**

CFR—cost and freight

This is only for sea or inland waterway transport. It involves placing the goods on board the vessel or procuring goods already so delivered.

CIF—cost insurance and freight

This is only for sea or inland waterway transport. It involves placing the goods on board the vessel or procuring goods already so delivered. The seller provides insurance cover during transport of the goods.

CPT—carriage paid to

This involves any mode of transport, and the handing of the goods over to the carrier.

CIP—carriage and insurance paid to

Any mode of transport is covered. The seller hands the goods over to the carrier. Insurance cover is paid by the seller during the transport of the goods.

With CPT and CIP, the place of delivery may be designated as being at the seller's place of business or at any place between the seller's place of business and the site of transport.

Export clearance is up to the seller to obtain. The import and transit clearance are up to the buyer to obtain.

## **D Group**

DAP, DAT, DDP—all three deal with any mode of transport.

DAP—delivered at place (new)

This term involves any mode of transport, and the placing of the goods at the buyer's disposal, ready for unloading.

DAT—delivered at terminal (new)

This term involves any mode of transport, with the goods unloaded and placed at the buyer's disposal.

Between DAP and DAT, the only difference is the loading.

DDP—delivered duty paid

This allows for any mode of transport, and placing the goods at the buyer's disposal ready for unloading. The clearance for export, transit and import are up to the seller.

In the D Group, the place of delivery may be at the buyer's place of business or any place between the buyer's port of entry and his place of business. Import clearance is up to the buyer to obtain, except for DDP, where the seller must obtain it. Export and transit clearance are up to the seller to obtain.

## **E Group**

EXW—ex works

This covers any mode of transport. The seller places the goods at the disposal of the buyer, without loading the goods onto the carrier. The export and import clearance is up to the buyer to obtain.

## **F Group**

FCA—free to the carrier at a named place

Any mode of transport is covered. This is especially designed for transport in containers, as well as the handing over of the goods or placing them at the buyer's disposal.

The place of delivery may be fixed at the place of business of the seller or at any place between the seller and the port.

Import and transit clearance are up to the buyer to obtain while export clearance is up to the seller to obtain.

This is designed for the seller to place the goods on board or procuring their placement on board the carrier. It allows the seller of a commodity to resell it to someone while the good is in transit. It is already on board and the impossibility of putting it on board as part of the sale is eliminated.

FAS—free alongside ship

This is only for sea or inland waterway transport, and placing the goods at the buyer's disposal.

FOB—free on board

This is also only for sea or inland waterway transport. This involves the seller placing the goods on board the vessel or the buyer procuring goods already so delivered. It is not designed for goods in containers.

Further information, as well as the purchase of the ICC's publications, can be obtained at <http://www.iccwbo.org/incoterms>.

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