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INCOTERMS® 2020

The importance of the Incoterms® for trade practice is enormous. According to ICC/Paris findings, the Incoterms® clauses are used in 90% of all international sales contracts and have established themselves as a widespread international standard.¹ The new Incoterms® 2020 are valid as of 1 January 2020. This paper seeks to give an overview on the structure of the Incoterms® 2020, examines the rules set up by the ICC/Paris for each of the eleven clauses of the Incoterms® 2020 and gives some guidance on its correct application.

Key words: Incoterms, sales contract, delivery, trade practices, import, export, documented credit

OVERVIEW

After several years of preparatory work, international conferences in Beijing and London and the evaluation of more than 3,000 comments from trade practice,² in autumn 2019 the International Chamber of Commerce (ICC), Paris, presented an updated version of the rules for the interpretation of internation-

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¹ Incoterms® 2020 video, [/www.incoterms2020.de/](http://www.incoterms2020.de/), 20.03.2020.

² For more details see Christoph Radtke, "Incoterms® 2020", *ICC Germany-Magazin*, No. 8, 2019, 38 ff.

ally used trade terms under the name Incoterms® 2020.³ The Incoterms® 2020 do not represent a revolution, but rather an evolution. In effect the Incoterms® 2020 adapt the previous version of the Incoterms to current developments and the needs of business practice by restructuring, supplementing and streamlining the previous rules and by formulating many of them more clearly than before. One major aim of the revision was to make working with the Incoterms easier and more accessible to practitioners. The comprehensive “*Introduction to Incoterms® 2020*” by Charles Debattista also serves this purpose by providing information on working with the Incoterms clauses which spans all clauses, as well as “*Explanatory notes for users*” for each clause with graphic illustrations. In addition, the ICC offers free of charge an app that contains diagrams of the clauses and further information.⁴

The Incoterms® 2020 continue the structure created in 2010 using the previous classification features. They begin with the presentation of those seven clauses, which can be used independently of the means of transport by which the goods sold are transported and also in a combined multimodal way (EXW, FCA, CPT, CIP, DAP, DPU and DDP). Then follow the clauses exclusively intended for transport by sea or inland waterway (FAS, FOB, CFR and CIF). This separation is to prevent the clauses specifically designed for transport by waterway from being used with other modes of transport.⁵ The waterway clauses presuppose that both the place of delivery and the transport destination are a port and should not be used if the seller delivers the goods in a container.⁶

The previous terms and abbreviations have also been essentially continued, except for the clause DAT (Delivered at Terminal). DAT replaced DEQ (Delivered ex Quay) Incoterms 2000, was only introduced in 2010 and has now become DPU (Delivered at Place Unloaded). Apart from the removal of the term “*terminal*” no further changes have been made to its substance. As was previously the case with the DAT clause, the only difference to the clause DAP (Delivered at Place) is that the seller must make the goods available to the buyer at the place of destination

³ *Incoterms® 2020 by the International Chamber of Commerce (ICC)*, ICC-Publication.

⁴ Available in the App-shop under “*Incoterms 2020*”.

⁵ E.g. “*FOB airport ...*”, cf. Corinne Widmer Lüchinger, “Art. 31 Inhalt der Lieferpflicht und Ort der Lieferung”, *Kommentar zum UN-Kaufrecht (CISG)*, (Eds. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 19; for more details see Werner Gröske, *INCOTERMS® 2010 – Praxishandbuch*, Torgau, 2011, 42.

⁶ For more details see further down under *Guidance on the correct application of the Incoterms*, second bullet-point.

unloaded,⁷ whereas the DAP clause does not oblige the seller to unload.⁸ This difference has been repeatedly misunderstood in practice, which clings to the term “terminal” and wrongly⁹ derives from it that when the DAT clause is used the destination of the delivery must be a terminal in the sense of a technical facility (“terminal building”).¹⁰ As before, the Incoterms® 2020 contain rules of interpretation for the obligations of the seller (A1 - A10) and the buyer (B1 - B10) associated with the respective clause using ten headings which are identical for all clauses. However, in addition to linguistic adjustments, there have been changes in the order of the headings and in the assignment of the rules to the headings.¹¹

GROUPS OF INCOTERMS® 2020 CLAUSES

Following methodical-dogmatic criteria, four main groups can be identified, each marked by a different first letter of the English language version (E-F-C-D). Within each group, the responsibility for the transport of the goods and the associated risks and costs are based on the same principle. The duties of the seller increase progressively from the E, F, C to the D group, while the responsibility of the buyer is reduced accordingly.

– E group: The only clause in this group (EXW - Ex Works) requires the seller to make the goods available for collection by the buyer, packed and marked, but not loaded. The transport of the goods as well as customs clearances including export clearance are the responsibility of the buyer.

– F group: According to the F group clauses (FCA - Free Carrier, FAS - Free Alongside Ship, FOB - Free On Board) the buyer remains responsible for the main transport of the goods. Unlike in the case of the EXW clause, however, the seller is obliged to transport the goods to the named place of delivery and, depending on the circumstances, also to load them and to clear them for export at his own expense. The buyer must take over the goods at the place of delivery, organise and pay for the further transport and is responsible for transit through

⁷ Charles Debattista, “Introduction to the Incoterms® 2020”, *Incoterms® 2020*, (Ed. ICC), Paris, 2019, para. 74–75.

⁸ See also Burghard Piltz, Jens Bredow, *Incoterms*, München, 2016, D-101.

⁹ Emily O'Connor (Ed.), *Incoterms 2010 Q&A*, Paris, 2013, 84 f.

¹⁰ Especially clearly Niclas Pirrong, “Die aktuelle Reformdiskussion zu den Incoterms 2020”, *Zeitschrift für Vertriebsrecht*, München, 2019, 219, 222; Roberto Bergami, “INCOTERMS 2010: Comments on the new Revisions of Delivery Terms”, *The Vindabona Journal*, Melbourne, 2011, 157, 166.

¹¹ For more details see further down under “The rules on the clauses”.

third countries and import clearance into the country of destination. Unlike the clauses FAS and FOB, the clause FCA is designed for all types of transport and in particular for deliveries of goods in containers.

– C group: The clauses CFR (Cost and Freight) and CIF (Cost Insurance and Freight) are intended for maritime and inland waterway transport. The clauses CPT (Carriage Paid To) and CIP (Carriage and Insurance Paid To) can be used for any type of transport and are suitable for deliveries of goods in containers. As a common feature of all C-clauses, the seller must clear the goods for export and, unlike in the F group, arrange the transport to the named place of destination at his own expense. Contrary to the F clauses, the buyer does not have to take over the goods at the place of delivery, but only at the named place of destination. However, as with the F group, risks pass to the buyer as soon as the goods are handed over to the carrier at the place of delivery. In contrast to the other groups of clauses, the C clauses are characterised by different interfaces for the place of delivery and transfer of risks on the one hand and the place of taking over the goods and transfer of costs on the other hand¹² (so-called two-point clauses).

– D group: As a typical characteristic of all clauses of the D group (DAP - Delivered at Place, DPU – Delivered at Place Unloaded and DDP – Delivered Duty Paid), the Seller shall bear all costs and, in contrast to the C clauses, also all risks until the goods arrive at the named place of destination. The named place of destination is the place of delivery and the place where the buyer is to take delivery of the goods. However, the buyer remains responsible for clearing the goods for import. The D clauses therefore largely form the reverse rule to the F group. Only in the case of the DDP clause does the exporter also have to arrange for import clearance. The DDP clause can therefore be used as a counterpart to EXW if it is structured accordingly.

THE RULES ON THE CLAUSES

A1/B1 General obligations

A1/B1(1) confirm, as before, essential basic elements of each sales contract. The statements expressly refer to the contract of sale and have only declaratory significance.¹³ The basis for the buyer's claim for delivery and the seller's claim

¹² Oberlandesgericht Hamm (Germany), 26.03.2012, beck-online. RECHTSPRECHUNG, 2012, 11809.

¹³ Jan Ramberg, *ICC Guide to Incoterms 2010*, Paris, 2011, 64.

for payment is therefore the sales contract and not an Incoterms clause.¹⁴ In contrast to the Incoterms 2000 which only addressed transport documents and the Incoterms® 2010 which addressed the documents mentioned in A1-A10 and B1-B10,¹⁵ according to A1/B1(2) Incoterms® 2020 all documents to be provided on the basis of the sales contract can now be considered for electronic procedures.

A2/B2 Delivery / Taking delivery

A2/B2 contain basic statements for understanding the different Incoterms clauses. A2 and the place to be added by the parties¹⁶ determine the place where the seller has to carry out the delivery action incumbent upon him (place of delivery). The C clauses, on the other hand, do not indicate the place of delivery, but the place of destination¹⁷ to which the seller has to ship the goods by means of the transport contract which is to be concluded in accordance with A4. If the parties do not additionally agree on a place of delivery when using a C clause, the seller is largely free to decide where to hand over the goods to the carrier for transport to the place of destination.¹⁸ The buyer takes over the goods only at the place of destination, i.e. the place of delivery and the place of taking delivery do not coincide,¹⁹ whereas according to B2 of the E, F and D clauses the buyer has to take delivery of the goods at the place of delivery, i.e. the place of delivery and the place of taking delivery do coincide²⁰ thereby constituting at the same time

¹⁴ Regarding the right of the buyer to receive an invoice see Burghard Piltz, “Rechnung, Umsatzsteuer und Kaufpreisfälligkeit nach UN-Kaufrecht”, *Internationales Handelsrecht*, München, 2012, 192, 193; Christoph Oertel, “INCOTERMS® 2010”, *Commercial Law*, (Ed. Peter Mankowski), München, 2019, 50. To the extent the invoice is necessary for customs clearance see the obligation of the seller to assist set out under A7 b).

¹⁵ See Incoterms® 2010 under A8.

¹⁶ The E, F and D clauses expect the parties to specify the place of delivery, for example “FCA Frankfurt Incoterms® 2020” or “DPU Atlanta Incoterms® 2020”.

¹⁷ For example “CIP Buenos Aires Incoterms® 2020”.

¹⁸ Christoph Graf von Bernstorff, *Incoterms® 2020*, Köln, 2020, par. 658. Mistaken by Corinne Widmer Lüchinger, “Art. 32 – Verpflichtungen hinsichtlich der Beförderung der Ware”, *Kommentar zum UN-Kaufrecht (CISG)*, (Ed. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 5.

¹⁹ Oberlandesgericht Düsseldorf (Germany), 25.01.2018, *Internationales Handelsrecht*, München, 2018, 209 ff.; Oberlandesgericht Hamm (Germany), 26.03.2012, BeckRS 2012, 11809; ICC Arbitration Case No. 17020, *Yearbook Commercial Arbitration XL*, 2015, 294, 314.

²⁰ Landgericht Saarbrücken (Germany), 27.06.2018, *Recht der Transportwirtschaft*, München, 2019, 270 ff.; Bundesgerichtshof (Germany), 07.11.2012, *Internationales Handelsrecht*, München, 2013,

a place of jurisdiction in terms of Art. 7 No. 1 b) Brussels Ib-Regulation.²¹ Under the E and F clauses, however, the place of delivery is located before and in the case of the D clauses after the main transport. The four waterway clauses assume that both the place of delivery and the destination are ports.²² In addition to the name of the place of delivery or destination, the specific point of delivery or point of destination should also be named, for example in the form of a postal address. In the absence of an agreement between the parties or commercial practice specifying the point of delivery / destination, it may be determined by the seller.²³ Under the F clauses, however, the buyer has an initial opportunity to determine the relevant point of delivery.

Just like Art. 31 CISG, A2 distinguishes between the delivery-alternatives of “*handing over*” and “*placing at the disposal*”. The placing on board provided for in the ship clauses FOB, CFR and CIF is to be understood as the handover to the shipper.²⁴ According to FCA 3.a), FOB and the C clauses the seller has to hand over the goods to the carrier or the person designated by the buyer. The obligation to hand over generally includes the seller’s obligation to load the goods onto the collecting means of transport. The transported goods are loaded as soon as their physical position on the means of transport is independent of the loading device; a more extensive securing of the goods is not necessary under sales law²⁵ – although this may be different under transport or traffic law. Loose fillings and bulk goods are loaded on completion of the filling process. In the case of EXW, FCA 3.b) and FAS, however, the seller’s delivery action is reduced to mere-

15, 17; Bundesgerichtshof (Germany), 22.04.2009, *Neue Juristische Wochenschrift*, München, 2009, 2606 ff.

²¹ See among others Oberlandesgericht Naumburg (Germany), 24.04.2019, *Zeitschrift für Internationales Wirtschaftsrecht*, München, 2019, 276 f.; Oberlandesgericht Stuttgart (Germany), 07.08.2017, *Zeitschrift für Vertriebsrecht*, München, 2018, 131 f.; Oberlandesgericht Celle (Germany), 29.01.2015, *Internationales Handelsrecht*, München, 2015, 247, 249; Oberlandesgericht Köln (Germany), 29.02.2012, beck-online. RECHTSPRECHUNG, 2012, 18430; European Court of Justice, 09.06.2011, *Neue Juristische Wochenschrift*, München, 2011, 3018 f.; Bundesgerichtshof (Germany), 22.04.2009, *Neue Juristische Wochenschrift*, München, 2009, 2606 ff.; C. Oertel, op. cit., No. 67; differing view C. Widmer Lüchinger, op. cit., par. 90 and partly differing Christop Graf von Bernstorff, “Fehlende Gerichtsstandsvereinbarung – Incoterms als Auslegungshilfe für den Vertrag”, *Außenwirtschaftliche Praxis*, Köln, 2019, 320 ff.

²² See above text on footnote 6.

²³ Regarding the C and D clauses regulated under A4.

²⁴ Cf. R. Bergami, op. cit., 169

²⁵ Oberlandesgericht Nürnberg (Germany), 22.02.2017, *Transportrecht*, Köln, 2017, 382 ff.; R. Bergami, op. cit. 169; cf. Carole Murray, David Holloway, Daren Timson-Hunt, *The Law and Practice of International Trade*, London, 2012, 27.

ly placing the goods at disposal ready for being taken over, without the seller being responsible for loading them onto the collecting means of transport. The D-clauses also stipulate that the seller must only place the goods at the disposal of the buyer,²⁶ but DPU obliges the seller to first unload the goods from the incoming means of transport. In contrast to many national laws,²⁷ no clause of the Incoterms® 2020 stipulates an obligation of the seller to hand over the goods to the buyer. Instead of delivery, the procurement of already delivered goods may also be sufficient to fulfil the delivery obligation thereby taking into account handling in supply chains in particular.

Regarding the time of delivery A2 refers to the agreement of the parties, which also decides on the significance of an agreed delivery time.²⁸ An agreed delivery time always refers only to the seller's delivery activity and therefore does not regulate the date of the arrival of the goods at the place of destination when a C clause applies.²⁹ If a delivery period has been agreed and the delivery date is now to be determined within this period, the F clauses grant the buyer this right of determination. In the case of the other clauses, the right to specify the delivery date in more detail is not derived from the Incoterms but stems from the relevant sales law,³⁰ such as Art. 33 CISG.

The subject of the delivery action of the seller is the sold goods including packaging. Irrespective of the assessment under other set of rules, if the seller loads a container just for one buyer and the carrier takes it over for carriage to the buyer,³¹ the container and its contents are the object to be delivered and the container is not merely a means of transport.³² The extent to which the Incoterms ap-

²⁶ Cf. Oberlandesgericht Brandenburg (Germany), 01.06.2011, *Transportrecht*, Köln, 2013, 29 ff. and ICC Arbitration Case No. 12365, CISG-online no. 2143.

²⁷ Cf. § 1061 ABGB (Austria); § 433 BGB (Germany); Art. 7:9(2) Burgerlijk Wetboek (Netherlands); Art. 1604 Code Civil (France); Art. 1476(1) Codice Civile (Italy); Art. 1462(1) Código Civil (Spain).

²⁸ Cf. Patrick Ostendorf, "Noch einmal: Führt die Vereinbarung einer CIF-Klausel zum Fixgeschäft?" *Internationales Handelsrecht*, München, 2009, 100 ff.

²⁹ Misunderstood by W. Gröske, op. cit., 21.

³⁰ Differing view C. Graf von Bernstorff, op. cit., par. 720, 749, 787, 816, 849.

³¹ FCL or FCL/FCL (Full Container Load).

³² Klaus Ramming, *FCL- und LCL-Verschiffungen, Recht der Transportwirtschaft*, München, 2019, 401 ff.; B. Piltz, J. Bredow, op. cit., F-146; C. Graf von Bernstorff, op. cit., par. 602. Differing view Koen Vanheusden, *Leveringsvoorwaarden in internationale overeenkomsten, Incoterms anders bekeken*, Antwerpen, 2013, 178, 234.

ply to liquids or physically intangible goods such as computer software³³ is sometimes discussed but in fact does not need to be discussed, as it is ultimately the parties who decide in which contracts Incoterm clauses apply.³⁴

A3/B3 Transfer of risks

A3/B3 link the transfer of risks, unlike the legal systems which link transfer of risks to the time of the conclusion of the contract³⁵ or the transfer of ownership,³⁶ to the completion of the delivery action and thus essentially correspond to Art. 67 ff. CISG and sections 446, 447 of the German Civil Code (BGB) without, however, as provided for under section 446 BGB, the transfer of risks being dependent on the buyer taking over the goods. Risks include circumstances which are neither attributable to the seller nor to the buyer and which lead to the physical loss or damage of the goods,³⁷ but do not include sovereign acts such as export or import restrictions.³⁸ If the CPT or CIP clauses are used for transport which does not solely requires, but includes carriage by ship, this can lead to an advance shift of the place of delivery and thus of the transfer of risks compared with the CFR or CIF clauses, because the handing over to the carrier is not bound to a port.³⁹ All clauses provide, that risks pass to the buyer upon expiry of the delivery time, irrespective of the completion of the seller's delivery action, provided the goods are sufficiently specified and the seller cannot carry out the delivery action incumbent upon him due to circumstances listed in B3 which are ultimately attributable to the buyer's area of responsibility - for example, because the buyer does not determine the ship in the case of FOB. In the case of the D clauses the transfer of risks can also be affected independently of delivery if the buyer despite the seller's request does not support him in the required manner in the export and transit clearance. However, it remains unclear if at all and, if so, how the risks are transferred independently of delivery if the parties have not made any arrangements at all regarding the delivery time.⁴⁰

³³ See Christoph Oertel, *INCOTERMS® 2020, Recht der Internationalen Wirtschaft*, Heidelberg, 2019, 701, 702 and ICC, Incoterms 2000, Introduction to Incoterms 2000, no. 1.

³⁴ For more details see further down under *Guidance on the correct application of the Incoterms*, first paragraph.

³⁵ For example, Art. 185 OR (Switzerland).

³⁶ For example, section 20 Sale of Goods Act (Great Britain).

³⁷ J. Ramberg, op. cit., 76.

³⁸ K. Vanheusden, op. cit., 183 f.; differing view C. Graf von Bernstorff, op. cit., par. 249, 251.

³⁹ See above text on footnote 22.

⁴⁰ For more details see B. Piltz, J. Bredow, op. cit., F-168.

A4/B4 Carriage

A4/B4 regulate the obligation to organise the carriage of the goods. While the CISG⁴¹ as well as national sales laws do not necessarily require the goods to be moved in order to execute the sales contract, the Incoterms only make sense if goods are to be transported. Under all clauses the seller must deliver the goods at the place of delivery.⁴² From there on the buyer is responsible for their transport. Only in the case of the C-clauses, does the seller have to organise the transport of the goods to the named place of destination at his own expense in addition to fulfilling the delivery obligation at the place of delivery. With the exception of EXW, it is either expressly stated as an obligation of the buyer in the case of the F-clauses or as an obligation of the seller in the case of the C and D-clauses, to organise the transport in accordance with the requirements set out in more detail in A4/B4. However, it is not always necessary to conclude a contract with a third-party carrier. Rather, FCA allows the buyer and the D clauses allow the seller to arrange for the transport of the goods by other means as for example by employing its own means of transport. Under the C clauses the seller may procure a contract of carriage instead of concluding one.

An obligation to organise the carriage of the goods is also expressly provided for in the clauses FCA 3.b) and FAS, although the sales contract is fulfilled by the seller when he has completed the act of delivery incumbent upon him. The further handling of the goods by the buyer is legally irrelevant for the seller.⁴³ However, this provision is comprehensible in relation to the clause FCA 3.a) where the place of delivery is at the seller's premises and in relation to the FOB clause, since without the means of transport to be provided by the buyer the seller cannot carry out the loading of the goods onto the means of transport for which he is responsible.⁴⁴ For the sake of a legal completeness it would also not be necessary to provide for an obligation of the seller in the D clauses to organise the carriage of the goods, as carriage to the place of destination is simply part of the seller's obligation to deliver under the D clauses.⁴⁵ This type of presentation, however, facilitates a practitioner's understanding of the measures to be taken.

⁴¹ Franco Ferrari, "Art. 1 – Anwendungsbereich", *Kommentar zum UN-Kaufrecht (CISG)*, (Eds. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 8.

⁴² See above under A2.

⁴³ With regard to FAS see J. Ramberg, *op. cit.*, 166.

⁴⁴ See above text on footnotes 24 and 25.

⁴⁵ Cf. Landgericht Siegen (Germany), 07.03.2007, beck-online. RECHTSPRECHUNG, 2008, 11375 with respect to clause DDU.

If one of the F clauses applies, the parties may - as is frequent in practice - agree that the seller concludes the transport contract at the buyer's expense and risk.⁴⁶ However, this does not turn the contract of sale into a sale involving carriage of the goods in terms of Art. 31(a) CISG,⁴⁷ since the place of taking delivery of the goods by the buyer is still identical with the place of delivery⁴⁸ and unlike Art. 31(a) CISG the seller has to agree to conclude the transport contract.

The "security clearance" introduced under the Incoterms® 2010 under A2/B2, was a reaction to 11 September 2001 and was intended to cover the controls to which commercial goods are subject in order to protect against non-operational hazards due to unlawful interference and to prevent terrorist attacks.⁴⁹ It soon became apparent that these controls are in some cases par excellence prerequisites for the transport of goods, address the carrier and therefore are transport-related.⁵⁰ As a typical example, the civil aviation security regulations in force in the EU⁵¹ address the "regulated agent", the "known consignor"⁵² and the "account consignor" as qualified participants to create a secure supply chain.⁵³ A further example are the provisions of the International Ship and Port Facility Security Code (ISPS Code),⁵⁴ which provide for measures to enhance the security of ships and port facilities. The transport-related security requirements now regulated in A4 cover these precautions which serve to secure the supply chain and prevent unlawful interference. Regulations aiming at other purposes, for example preventing cargo theft are not considered as such to be transport-related security

⁴⁶ So called "additional services". Cf. Oberlandesgericht Hamburg (Germany), 16.07.2009, *Transportrecht*, Köln, 2010, 337 (340). Mistaken by C. Graf von Bernstorff, op. cit., par. 609 f., 873, 919.

⁴⁷ Cf. Lauri Railas, "Incoterms® 2010 and Contracts of Transport and Insurance", *Vestnik International Commercial Arbitration Review*, Helsinki, 2011, 63 ff., 69; differing opinion C. Widmer Lüchinger, op. cit., par. 68.

⁴⁸ See FCA B2.

⁴⁹ Cf. *Incoterms® 2010 by the International Chamber of Commerce (ICC)*, ICC-Publication 715 ED, 11, 135 and E. O'Connor, op. cit., 47 ff.

⁵⁰ More in detail C. Debattista, op. cit., no. 76; B. Piltz, J. Bredow, op. cit., F-122 f.; Burghard Piltz, "Bekannter Versender – Sicherheitskontrollen bei Luftfracht", *Internationales Handelsrecht*, München, 2013, 61 ff. Cf. K. Vanheusden, op. cit., 97 f.

⁵¹ Regulation (EC) No 300/2008 of 11 March 2008.

⁵² More details Elmar Giemulla, "Die sichere Lieferkette und die Rechtsstellung des bekannten Versenders", *Transportrecht*, Köln, 2014, 217 ff.

⁵³ More details Wolf Müller-Rostin, "Die sichere Lieferkette im Luftverkehr", *Transportrecht*, Köln, 2014, 209 ff.; Erwin Abele, Jochen Boettge, "Die Haftung des Reglementierten Beauftragten und Deckung in der Verkehrshaftungsversicherung", *Transportrecht*, Köln, 317 ff.

⁵⁴ More details <https://www.deutsche-flagge.de/de/sicherheit/isps>, 20.03.2020.

requirements in terms of A4.⁵⁵ In principle, the seller is responsible for any transport-related security requirements of the goods until delivery and, in the case of the C and D clauses, up to the place of destination. In addition, if EXW or one of the F clauses applies, he is obliged to provide the buyer, at the latter's request, with any information in his possession, including transport-related security requirements, which the buyer needs to organize the transport of the goods.

A5/B5 Insurance

A5/B5 regulate transport insurance. In principle, each party is responsible for securing its own risks. The Incoterms do not make any statement in this respect. However, it is strongly recommended in practice to avoid fractional insurance contracts as far as possible.⁵⁶ Due to the fact that the place of delivery and transfer of risks on the one hand and the place of taking over and the transfer of costs on the other do not coincide, there is a special situation with the C clauses,⁵⁷ which the parties can take into account by agreeing on transport insurance. If the clauses CIF or CIP are agreed, the seller is then obliged to take out cargo insurance covering the transport route and amounting to 110% of the invoice value of the goods ensuring that the buyer acquires a claim directly against the insurance company. Consequently, the seller is obliged to provide the buyer with the insurance policy or other proof of insurance cover. However, whereas formerly only a minimum cover in accordance with clause (C) of the Institute Cargo Clauses was required,⁵⁸ this minimum cover under Incoterms® 2020 now only applies in the case of CIF.⁵⁹ As this cover does not usually meet the needs of companies trading in industrial products,⁶⁰ the Incoterms® 2020 now provide for cover under the CIP clause in accordance with the more far-reaching clause (A) of the Institute Cargo Clauses or other similar clauses. Other agreements between the parties or practices naturally take precedence and should be taken into consideration in particular if “*non-admitted*” countries are involved which make the insurance of risks located in their territory subject to special conditions.

⁵⁵ Differing view C. Graf von Bernstorff, op. cit., par. 612.

⁵⁶ For more details see Burghard Piltz, “Export Contract”, *Münchener Vertragshandbuch, Band 4. Wirtschaftsrecht III*, (Eds. Rolf Schütze, Lutz Weipert, Markus Rieder), München, 2018, note 66; C. Graf von Bernstorff, op. cit., par. 617, 878, 924.

⁵⁷ See above under “Groups of Incoterms® 2020 Clauses”.

⁵⁸ For more details see C. Oertel, op. cit., 297 ff.

⁵⁹ See C. Debattista, op. cit., 72.

⁶⁰ J. Ramberg, op. cit., 55, 124, 200.

A6/B6 Delivery/transport document

A6/B6 deal with delivery and transport documents. As before, the modalities of handing over documents remain unregulated⁶¹ and the buyer is not obliged to provide the seller with a document for VAT purposes.⁶² The buyer is only required to provide proof if EXW applies. Rather, the seller must provide the buyer with the usual proof of delivery under the F clauses,⁶³ the usual transport documents under the C clauses and the documents entitling the buyer to take over the goods⁶⁴ under the D clauses. In the case of CPT and CIP, the document is only required to be sent if this is customary or requested by the buyer. In addition, the C-clauses provide for more detailed requirements regarding the content of the documents, in particular to enable the resale of goods still in transit. At the request, cost and risk of the buyer, the seller shall also assist in obtaining the transport document if an F clause is agreed upon.

There are new additional rules to FCA. These were created because the FCA clause is, from the seller's point of view, much more suitable for container shipments than FOB.⁶⁵ On the other hand, the payment of a letter of credit is frequently made dependent on the presentation of a document confirming loading on board the ship⁶⁶ and, as a rule, it is the buyer who contracts the carriage of the goods and receives the transport document. FCA B6 now provides that, on the basis of an agreement between the parties, the buyer instructs the carrier contracted by him to issue the transport document with the on-board notation to the seller. According to FCA A6 the seller is then required to send this document to the buyer – for example by submitting it to the issuing bank. Alternatively, the seller and the buyer may agree that the seller concludes the contract of carriage at the buyer's risk and expense.⁶⁷ However, even in these constellations the FCA seller does not receive the document with the on-board notation contemporaneously with the delivery of the container at the terminal, rather only after it has been loaded onto the ship. As a result, the seller continues to bear certain risks

⁶¹ Cf. C. Oertel, op. cit., 245.

⁶² As a rule, the prerequisite for exemption from turnover tax is proof that the goods have left the country where the seller has his place of business.

⁶³ Cf. C. Graf von Bernstorff, op. cit., par. 622, 880, 881, 926.

⁶⁴ See Oberlandesgericht Brandenburg (Germany), 01.06.2011, *Transportrecht*, Köln, 2013, 29 ff.

⁶⁵ For more details see further down under *Guidance on the correct application of the Incoterms*, second bullet-point.

⁶⁶ See for example Art. 20, 21 and 22 UCP 600. More details C. Debattista, op. cit., no. 63 ff.

⁶⁷ See above text on footnote 46.

typically associated with a container shipped under FOB terms.⁶⁸ Alternatively, the seller and the buyer may agree that the carrier is instructed to issue a Received for Shipment Bill of Lading⁶⁹ against delivery of the container to the terminal and the bank is directed to honour the letter of credit on presentation of such a document instead of an on-board notation.

A7/B7 Export/import clearance

A7/B7 summarise the rules on export, transit and import clearance.⁷⁰ Government ordered pre-shipment inspections⁷¹ are now also addressed in A7/B7, thus covering all permits, licences, formalities, etc. required by the competent authorities for export, transit through a third country and import independent of delivery and passage of risks. The wording “*Where applicable*” makes it clear that Incoterms® 2020 are also applicable to national transactions⁷² and to transactions in single markets such as the European Union, where clearances are largely unnecessary. Otherwise, if the F and C clauses apply, the seller is responsible for export and the buyer for transit and import clearance. The DAP and DPU clauses mean that the seller now also has to arrange for transit clearance and the buyer is only responsible for import clearance. In case of EXW the entire clearance is the responsibility of the buyer and in case of DDP⁷³ of the seller.⁷⁴ As far as “*security clearances*”⁷⁵ are associated with the customs clearance, they are now explicitly mentioned in the rules. Typical examples are the entry summary declaration (ESumA, ENS Filing),⁷⁶ Art. 127 UCC (Union Customs Code), the US Importer Security Filing (ISF) and the requirements of the Container Security Initiative (CSI). If a party is not subject to a clearance obligation, it is obliged to assist the

⁶⁸ For more details see further down under *Guidance on the correct application of the Incoterms*, second bullet-point.

⁶⁹ Cf. section 514(1) German Commercial Code (HGB).

⁷⁰ The significance for practice is highlighted by J. Ramberg, op. cit., 32 f.

⁷¹ J. Ramberg, op. cit., 65.

⁷² See the subtitle of ICC-Publication 723 E, 2019: *The rules for the use of domestic and international trade terms*.

⁷³ Cf. ICC Arbitration Case No. 7903 of 09/1995, *ICC International Commercial Arbitration Bulletin*, 21/2, 74 (76).

⁷⁴ For more details see further down under *Guidance on the correct application of the Incoterms*, third bullet-point.

⁷⁵ See text above on footnote 49.

⁷⁶ E. O'Connor, op. cit., 49; differing opinion Christoph Graf von Bernstorff, “Incoterms® 2010: Praxisfragen”, *Außenwirtschaftliche Praxis*, Köln, 2015, 408, 409.

other party at the latter's request, risk and cost in obtaining the documents and information required for the clearance to be made by it. This support also embraces security clearances and goes beyond the support prescribed under A4.

A8/B8 Checking/packaging/markings

A8/B8 assign without exception to the seller the checks required for delivery,⁷⁷ such as measuring, weighing and counting the goods. These checks are to be distinguished from the buyer's obligations to examine the goods after delivery, such as those stipulated in Art. 38 CISG. The latter are not addressed in the Incoterms. Unless the goods are usually transported unpackaged, the seller is also responsible for their packaging and labelling. Special packaging or labelling requirements are subject to an agreement between the parties. Otherwise, the standard for packaging and labelling is their suitability for transport.⁷⁸ If the seller knows or should have known that the goods are to be transported by air, the packaging must accordingly meet the special packaging requirements for air freight.⁷⁹

A9/B9 Allocation of costs

A9/B9 regulate the allocation of costs between the parties to the sales contract. Customs duties, taxes and other duties and costs of assistance with regard to clearances are allocated according to the responsibilities for export, transit and import clearances or the request for assistance.⁸⁰ For the allocation of other costs, the execution of the delivery action incumbent on the seller at the relevant place of delivery is decisive.⁸¹ In the case of FCA, the cost of providing the container is therefore borne by the seller, while the Terminal Handling Charges (THC) are for the buyer's account. The situation with regard to THC is different, however, when containers are shipped under FOB. According to the C clauses, the seller is additionally responsible for the costs of transporting the goods to the agreed destination, which result from the contract of carriage to be concluded by him, including the costs for transport-related security requirements and, in the case of CIF or CIP, the insurance costs. Insofar as the transport contract also imposes costs on the seller which would otherwise have been borne by the buyer (e.g. costs of un-

⁷⁷ Critical to that B. Piltz, J. Bredow, op. cit., F-200.

⁷⁸ So already K. Vanheusden, op. cit., 234.

⁷⁹ Cf. B. Piltz, op. cit., 61, 63.

⁸⁰ See above under A7/B7.

⁸¹ J. Ramberg, op. cit., 114.

loading in the case of the C-clauses, DAP or DDP or costs arising during transport in the case of the C-clauses⁸²), the cost burden remains with the seller. In addition, the cost of the delivery/transport documents to be procured in accordance with A6 and for support requested by the seller in accordance with B5 and B7 are for his account. All costs incurred after completion of the delivery action incumbent on the seller shall be borne by the buyer,⁸³ unless they have been allocated to the seller in accordance with A9.

Moreover, under B9 all clauses stipulate an obligation of the buyer to pay “*additional costs*” if he fails to perform the obligations listed there in detail and, as a result, the seller cannot perform the required delivery action as agreed provided the goods concerned are clearly identified. In the substance, this is a claim for damages by the seller, which, like the compensation for damages under the CISG,⁸⁴ but in contrast to German⁸⁵ and some further laws, is not based on fault⁸⁶ and to which, in case of doubt, Art. 74, 77 and 79 CISG should also be applied.

A10/B10 Notices

A10/B10 regulate notice obligations. According to the E, C and D clauses, the seller must provide the buyer with the information necessary for the take over of the goods. If an F or C clause is used, the seller must notify the buyer that the delivery has been effected or, in the case of FAS, FOB and FCA, also that the timely taking over of the goods has failed. The buyer is subject to special notification obligations in the case of F-clauses.⁸⁷ In accordance with the other clauses, he shall only provide the seller with details of the delivery time and the point of delivery / destination⁸⁸ if he is entitled to do so on the basis of the underlying sales

⁸² C. Oertel, op. cit., 234 (additional costs due to unforeseen events, e.g. stranding, collision, governmental events or inclement weather conditions); C. Graf von Bernstorff, op. cit., par. 201 (handling charges at the port of destination).

⁸³ ICC Arbitration Case No. 6468 of 07/1990, *ICC International Commercial Arbitration Bulletin*, 21/2, 55 (56) (FOB, operation costs occurring after the animals are loaded); ICC Arbitration Case No. 13492 of 07/2006, CISG-online no. 2141 (CFR, demurrage costs); C. Graf von Bernstorff, op. cit., par. 649 (unloading the FCL-container from the arriving means of transport).

⁸⁴ Cf. Ingeborg Schwenzer, “Art. 74 – Umfang des Schadensersatzes”, *Kommentar zum UN-Kaufrecht (CISG)*, (Eds. P. Schlechtriem, I. Schwenzer, U. Schroeter), München, 2019, para. 3 ff.

⁸⁵ Cf. Bundesgerichtshof (Germany) 05.10.2005, *Neue Juristische Wochenschrift*, München, 2006, 47 (50) and Bundesgerichtshof (Germany), 18.10.2017, *Zeitschrift für Vertriebsrecht*, München, 2018, 22 ff.

⁸⁶ As well C. Oertel, op. cit., No. 79.

⁸⁷ For the details see B10.

⁸⁸ See above text on footnote 23.

contract.⁸⁹ It is not regulated whether the dispatch or the receipt principle applies to the notifications.⁹⁰ However, there is no doubt that these obligations are true contractual obligations, the non-fulfilment of which can be sanctioned in accordance with the applicable sales law.⁹¹

GUIDANCE ON THE CORRECT APPLICATION

In principle, the parties are free to agree which clause of the Incoterms they consider most suitable for their purposes. Legal restrictions or conditions are rather rare.⁹² When an Incoterms clause is agreed, the rules set up by the ICC/Paris under A1 to B10 shall apply, unless a reference to these rules is not intended.⁹³ The following notes provide general suggestions for selecting and working with the clauses of the Incoterms® 2020:

- The clauses FAS, FOB, CFR or CIF are only useful if the goods are transported exclusively by ship, i.e. both the place of delivery and the place of destination include open, navigable water. The other clauses can be used for any type of transport, including transport by ship.

- The FAS, FOB, CFR or CIF clauses are not appropriate when using FCL containers⁹⁴ as the seller loses control over the container, both in fact and in law as soon as it is taken over by the terminal. However, if these clauses are agreed, the seller assumes responsibility to the buyer until the container is placed alongside or on the vessel.⁹⁵ Furthermore, the seller has no influence on when the loading takes place, even if he is entitled to an onboard B/L.⁹⁶ Therefore, when FCL

⁸⁹ Mistaken by C. Graf von Bernstorff, op. cit., par. 522, 720, 749, 787, 816, 849.

⁹⁰ For more details see Burghard Piltz, "INCOTERMS 2000-ein Praxisüberblick", *Recht der Internationalen Wirtschaft*, Heidelberg, 2000, 485, 487.

⁹¹ K. Vanheusden, op. cit., 209 f.; J. Ramberg, op. cit., 90, 102, 115, 121, 130, 135, 141, 146, 153, 157.

⁹² For example, Brazil does not allow the use of the DDP clause in imports, CAMEX Resolution No. 21 of 07.04.2011.

⁹³ Cf. Bundesgerichtshof (Germany), 07.11.2012, *Internationales Handelsrecht*, München, 2013, 15 (18); C. Oertel, op. cit., 37 f.; comprehensively B. Piltz, J. Bredow, op. cit., A-302 ff.

⁹⁴ C. Graf von Bernstorff, op. cit., par. 172 ff., 851 ff.; J. Ramberg, op. cit., 22; Guillermo Jimenez, *ICC Guide to Export/Import*, Paris, 2012, 56 ff.

⁹⁵ See above under A2.

⁹⁶ It is not unusual for containers being "rolled" meaning loaded on a later vessel than the one booked for.

containers are shipped, only the clauses EXW, FCA, CPT, CIP, DAP, DPU or DDP should be applied.⁹⁷

– In the light of the associated customs and sales tax obligations in foreign transactions the clauses EXW or DDP should only be used after careful examination. This applies in particular to European exporters and importers,⁹⁸ since European customs law requires customs-declarations to be submitted by parties domiciled in the EU for both export and import clearance, Art. 170(2) UCC (Union Customs Code). Consequently, the fulfilment of the clearance obligations provided for by EXW for the non-European buyer or by DDP for the non-European seller may be legally difficult or even impossible.⁹⁹ VAT requirements for trade within the European Union also provide reason against the use of these clauses. Beyond EXW and DDP, the responsibility for export or import clearance as well as for the associated security clearances¹⁰⁰ is not a deciding criterion when narrowing down the choice because the alternatives are few. When using DAP or DPU, the parties should also be aware that the buyer may first have to clear the goods for customs before the seller can deliver them to the agreed destination.

– Cost allocation (A9/B9) should not be a decisive criterion for selection. The cost consequences ultimately associated with the clause used can be easily agreed upon differently if the parties wish to allocate cost differently to that provided for by the selected Incoterms clause in A9/B9.¹⁰¹

– Primarily the rules in A2/B2 should determine the choice of a particular clause. This applies all the more because the rules on risks in A3/B3 and on carriage in A4/B4 are based directly on the variants provided for in A2/B2 and the further rules are ultimately a consequence of the decisions made in A2/B2. As a whole, when selecting a clause, one should not strive for the clause with the least obligations. Rather, the determining factor should be which party can perform

⁹⁷ C. Debattista, op. cit., 66; E. O'Connor, op. cit., 82; C. Murray, D. Holloway, D. Timson-Hunt, op. cit., 55.

⁹⁸ On the Australian perspective see Roberto Bergami, "Removing EXW and DDP from future Incoterms editions: An Australian perspective", *The Vindobona Journal*, Melbourne, Vol. 2, 2016, 1 ff.

⁹⁹ Cf. "Explanatory Notes for Users" no. 6 regarding clause EXW and no. 7 regarding clause DDP; C. Debattista, op. cit., 22; C. Oertel, op. cit., 417; E. O'Connor, op. cit., 36.

¹⁰⁰ See above under A7/B7.

¹⁰¹ For example, by adding "... THC for seller's account ...", if the seller is nevertheless to pay the terminal handling charges when the FCA clause is agreed.

the further obligations associated with the delivery in the most cost-effective and expedient manner, particularly the transport of the goods and their insurance.¹⁰²

– The E, F and D clauses expect the parties to specify the place of delivery (e.g. “FCA airport Munich Incoterms® 2020”). The C clauses require the place of takeover (destination) to be specified (e.g. “CIP New York Incoterms® 2020”). In addition to the place, it is recommended to specify the point at which the goods are to be delivered or taken over as precisely as possible¹⁰³ and always add the reference “Incoterms® 2020”.

– In addition, a delivery date or delivery period should be agreed. If a delivery period but no delivery date is determined, the buyer decides when the F clauses apply, and often the seller decides when the other clauses apply.¹⁰⁴ If a longer period of time between conclusion of the contract on the one hand and delivery of the goods on the other hand is conceivable, the parties should arrange for appropriate precautions in case after conclusion of the contract but before delivery of the goods the export or import is subject to restrictions or completely suspended in response to changed circumstances in the country of destination or origin.¹⁰⁵

– The provisions of the individual clauses are in no way mandatory. Modifications should, however, be formulated clearly and unambiguously¹⁰⁶ and respect the structural principles of the respective group of clauses.¹⁰⁷

– The Incoterms® 2020 formulate binding obligations only for the contract between seller and buyer, but are not a sales contract, instead they presuppose one. With regard to the contract of sale, Incoterms® 2020 only regulate some of the primary obligations as well as some special secondary consequences under B3 and B9, but they do not contain, for example, any rules on the conclusion of the contract, transfer of ownership, handling of payments and, in particular, on improper performance. Therefore, the Incoterms® 2020 only supplement and mod-

¹⁰² Ulrich Magnus, Burghard Piltz, “Chapter 10: Trade Terms and INCOTERMS”, *International Sales Law*, (Eds. Larry A. DiMatteo, André Janssen, Ulrich Magnus, Reiner Schulze), Baden-Baden, 2016, 267, 283; E. O'Connor, op. cit., 37.

¹⁰³ See above text on footnote 23.

¹⁰⁴ See above text on footnote 30.

¹⁰⁵ See J. Ramberg, op. cit., 53 and B. Piltz, J. Bredow, op. cit., F-125.

¹⁰⁶ In the case of “CIF landed”, for example, it is not clear whether the intention is merely to allocate the costs differently or to have more far-reaching consequences.

¹⁰⁷ For example, EXW is not appropriate if, according to the ideas of both parties, the seller should organize the shipment via his forwarding agent.

ify the relevant sales law, but never replace it. To a large extent, the UN Sales Law (CISG) applies in addition.¹⁰⁸

SUMMARY

Incoterms® 2020 are eleven clauses for delivery of goods. The ICC/Paris has established a set of rules for each of the eleven clauses which explain in detail the obligations incumbent on the seller and the buyer when they agree on one of the eleven clauses in their contract of sale. The rules set out in A2/B2 for each clause should be given the greatest importance, as they describe the basic characteristics of the clause in question, whereas the other rules are more or less a consequence of those characteristics. Selecting and working with the clauses of the Incoterms® 2020 also requires consideration of aspects such as transport-related security requirements, reconciliation with documented credit requirements, cargo insurance and export/import clearance.

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INCOTERMS® 2020

Rezime

Incoterms® ima veliki značaj za trgovačku praksu. Prema podacima Međunarodne trgovinske komore u Parizu, Incoterms® klauzule primenjuju se u 90% ugovora o međunarodnoj prodaji i ustanovljene su kao široko prihvaćen međunarodni standard. Novi Incoterms® 2020 na snazi je od 1. januara 2020. godine. U ovom radu čini se pregled strukture Incoterms® 2020, ispituju se pravila utvrđena od strane Međunarodne trgovinske komore u Parizu za svaku od 11 klauzula Incoterms® 2020 i daju se smernice za njihovu pravilnu primenu.

Ključne reči: Incoterms, ugovor o prodaji, isporuka, trgovačka praksa, uvoz, izvoz, dokumentarni akreditiv

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¹⁰⁸ For the interaction of the Incoterms with CISG see B. Piltz, op. cit., 485, 487 f.

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