Incoterms 2010 and the mode of transport: how to choose the right term

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Abstract. Incoterms 2010 provide harmonized interpretation rules for eleven common trade terms. From these eleven common terms, a trader has to choose the Incoterm that is most appropriate for the specific transaction he wishes to engage in. The International Chamber of Commerce (ICC) encourages the use of 'multimodal' terms (FCA, CPT, CIP, etc.) instead of the 'maritime' Incoterms (FAS, FOB, CFR and CIF). According to the ICC, maritime terms are not appropriate, and thus should not be used in container trade, as the seller does not 'deliver' the container on board the vessel, but most often hands over the goods to the carrier at an inland point or terminal. This paper intends to examine the underlying rationale behind this advice. Furthermore, this paper intends to provide support for traders, proposing criteria that might be applied to choose the right Incoterm. It will thereby take into consideration how the transport mode influences and sometimes even imposes the choice for a particular term.

Keywords: Incoterms 2010, delivery conditions, transport mode, container trade, multimodal transport

1 Introduction

One of the central clauses in an international contract of sale is the trade term. It is truly exceptional for an international sales contract not to include a trade term[1], and rightly so, because every contract of sale should include one[2].

A trade term is a short term - e.g. FOB - that encompasses a catalogue of delivery obligations to be performed by either the seller or the buyer. Thus, traders do not have to include extensive agreements on these obligations in their contracts. At first sight, both parties know who is in charge of, and who bears the risks during and the costs of transport, insurance, documents and formalities. This facilitates a trader's life.

The tradition of incorporating trade terms started in Great Britain in the nineteenth century[3]. Although this practice encouraged the harmonization and standardization of international trade practices, differences in the interpretation of trade terms in various countries and branches of industry put a spoke in the wheels. There was no legal certainty regarding the true content of what was agreed upon in the contract of sale by reference to a trade term.

That explains why the *International Chamber of Commerce* (ICC)[4], which has been publishing codifications of international trade practices since foundation[5], proposed a set of uniform interpretation rules of trade terms in the publication of the *International Commercial Terms* or *Incoterms* in 1936. As of then, traders could refer to the interpretation provided by the Incoterms when inserting a trade term in their contract of sale. By now, the Incoterms are used all over the world and have become the international standard for the interpretation of trade terms.

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[1] J. RAMBERG, *International Commercial Transactions*, Paris, ICC Publication no 588 - Kluwer Law International - Norstedts Juridik, 1997, 93.

[2] G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 45; J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 34.

[3] D. M. SASSOON, "Application of FOB and CIF Sales in common law countries", *ETL* 1981, 51-52; D. M. SASSOON, "The origin of FOB and CIF terms and the factors influencing their choice", *J.Bus.L.* 1967, 32-37.

[4] http://www.iccwbo.org. The ICC is an internationally organized interest group which represents thousands of companies in more than 130 countries.

[5] The ICC is amongst others responsible for the *Uniform Customs and Practice for Documentary Credits (UCP 600),* the *Uniform Rules for Collections (URC 522)*, the *Uniform Rules on Demand Guarantees (URDG 758)*, the *ICC Rules of Arbitration* and the *UNCTAD/ICC Rules for Multimodal Transport Documents*.

Because the Incoterms needed to be adapted to the evolving commercial and logistical practices, they were revised in 1953, 1967, 1976, 1980, 1990 and 2000. On the first of January 2011, the Incoterms 2010 (formally called Incoterms ® 2010 rules) entered into force. Throughout the past revisions, new terms have been introduced and other terms have disappeared. The Incoterms 2010 introduced two new terms (DAT and DAP), and eliminated four previous terms (DEQ, DES, DDU and DAF), to end up with standard interpretation rules for eleven trade terms.

It is of the utmost importance that traders apply a trade term that is appropriate for their transaction[6]. Incoterms standardize contract practices, but problems remain because the parties inadvertently choose the wrong term[7]. The choice of the 'right' Incoterm prevents disputes[8], but an Incoterms is only 'right' if it is in harmony with the other contracts (contract of carriage, of insurance, L/C, etc.) parties engage into to execute their obligations under the contract of sale[9]. An ICC Belgium enquiry[10] indicates that Belgian traders more often than not apply the 'wrong' Incoterm. Certainly for smaller companies (SME's) the problem is significant: they misuse, do not apply or apply certain terms too much[11]. This of course harms exportation[12] and international trade as a whole.

Choosing the 'right' Incoterm requires the parties to a contract of sale to consider, amongst others, the following elements:
- the nature of the goods: containerized, manufactured goods, bulk goods or commodities, etc.;
- the means of transport: maritime, non-maritime or multimodal;
- the conditions of payment and the documentary requirements imposed by these conditions;
- and the capabilities of and the efficiency with which the seller or the buyer can perform the obligation to deliver the contracted goods: someone will have to do it, but who does it most cheaply?

This contribution takes into consideration how these factors influence and sometimes even impose the choice for a particular term.

2 Overview of the eleven Incoterms 2010

In the ICC publication on the Incoterms 2010, the Incoterms are divided in rules for any mode or modes of transport, and rules only suitable for sea and inland waterway transport[13]. This way, the ICC wishes to change the recurring habit of using maritime terms when the multimodal[14] terms would be more appropriate.

In this overview, the terms are arranged according to the balance of obligations between seller and buyer. EXW represents the minimum obligation, and DDP the maximum obligation for the seller. This is the way the Incoterms were presented in 1990 and 2000. I prefer this classification as it remains relevant from an educational point of view, and because the classification according to means of transport is treated more thoroughly in chapter six of this contribution.

Four categories can be distinguished:
- **E-terms** (only EXW): the goods are placed at the disposal of the buyer at the seller's premises – 'come to collect the goods';
- **F-terms**: the buyer is responsible for the cost and risk of the main international carriage – goods are 'sent from';
- **C-terms**: the seller pays for the main international carriage, but does not bear the risks thereof – goods are 'sent to, freight prepaid';

[6] X., *Incoterms® 2010*, Paris, ICC Publication no 715E, 2010, 5.
[7] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 13.
[8] J. W. RICHARDSON, *The Merchants Guide 1998 Edition*, Rotterdam, P&O Nedlloyd, 1997, 11.
[9] C. DEBATTISTA, "Incoterms and the contract of carriage", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 10.
[10] ICC Belgium enquiry about the application and revision of the Incoterms 2000, conducted in spring 2008, http://www.iccwbo.be/index.html?file=142.
[11] D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 84-89.
[12] P. VAN DOOREN, "Onvoldoende kennis Incoterms schaadt Belgische export", *De Lloyd* 4th of July 2008, http://www.iccwbo.be/index.html?file=218.
[13] See chapter 6.
[14] When referring to 'multimodal' terms, in this contribution this signifies the Incoterms suitable for any mode(s) of transport, including multimodal transport.

- **D-terms**: the seller bears all costs and risks up to the delivery point in the country of destination – goods are 'delivered at'.

The Incoterms 2000 were thus divided in departure contracts (E-terms), main carriage unpaid (F-terms), main carriage paid (C-terms) and arrival contracts (D-terms)[15]. In a broad sense, E-, F- and C-terms are all departure contracts, because delivery occurs at the agreed place of departure, and only the D-terms are arrival contracts.

If the Incoterms 2010 were classified according to the classification system in the prior editions, they would be broken down in categories as follows:

Departure			Arrival
Category E	*Category F*	*Category C*	*Category D*
EXW	FCA FAS FOB	CPT CIP CFR CIF	DAT DAP DDP

Tab.1. Classification of the Incoterms 2010 in E, F, C and D-terms

In Incoterms, the term 'delivery' refers to the point when risk passes from the seller to the buyer[16]. Generally, this will also be the point upon which costs pass, even in the C-terms although with an exception for the costs of freight. The latter terms have two 'critical points': delivery, and thus passing of risk, occurs in place of departure, whereas carriage to the agreed place of destination is for the account of the seller, but at buyer's risk.

2.1 EXW (Ex Works)

EXW represents the minimum obligation for the seller (as opposed to DDP)[17]. The seller fulfills his obligation to deliver when he places the goods at the disposal of the buyer at the seller's premises or at another named place (works, factory, warehouse, etc.), not loaded, not cleared for export. The contractual shipper on the waybill should be the buyer.

As the seller is often better placed and equipped to load the goods (and clear them for export when applicable), parties are advised to use 'FCA *seller's premises*' instead of EXW[18].

2.2 FCA (Free Carrier)

Under FCA *seller's premises*, the seller delivers by loading the goods on the collecting vehicle, provided by the buyer. Now the shipper on the waybill will be the seller. Under FCA *other place*, the seller delivers the goods at the agreed place, on the seller's means of transport, ready for unloading. The shipper on the waybill should be the buyer. In both cases, it the seller is responsible to clear the goods for export (when applicable).

The buyer organizes the main international transport, although if it is commercial practice, or at the buyer's request, the seller may organize transport at the risk and expense of the buyer (this is a FCA *additional service* or FCA +). Preferably – i.e. if the carrier agrees – the seller will then book carriage on a 'freight collect' basis. If the carrier does however not agree to a 'freight collect' and claims a 'freight prepaid', an additional line will appear on the invoice 'freight at buyer's request'.

2.3 FAS (Free Alongside Ship)

FAS means that the seller in principle delivers when the goods are placed alongside the vessel (e.g. on a quay or a barge) nominated by the buyer at the named port of shipment. The seller has to clear the goods for export.

The buyer organizes the main international transport, although if it is commercial practice, or at the buyer's request, the seller may again organize transport at the risk and expense of the buyer (this is a FAS *additional service* or FAS +).

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[15] X., *Incoterms 2000*, Paris, ICC Publication no 560, 1999, 5.

[16] X., *Incoterms® 2010*, Paris, ICC Publication no 715E, 2010, 10.

[17] D. Chevalier calls EXW '*l'Incoterm de la paresse'*, the Incoterm for lazy traders, see D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 88.

[18] See 6.4.

2.4 FOB (Free On Board)

The seller delivers the goods in the manner customary at the port of shipment, and if there are no port customs, by placing them on board the vessel[19]. Whereas FCA refers to 'loading', the FOB-term uses the term 'placing'. The seller also clears the goods for export. The buyer organizes the main international transport, although if it is commercial practice, or at the buyer's request, the seller may organize carriage at the risk and expense of the buyer (this is a FOB *additional service* or FOB +).

2.5 CPT (Carriage Paid To)

CPT has two 'critical points'. Delivery, and thus passing of risk, occurs at the place of departure, when the seller hands over the goods to the carrier that has been contracted for transport to the agreed place of destination. Nevertheless, the seller pays – and thus includes in his selling price, the costs of transportation (the freight) that is for the seller's account under the contract of carriage until arrival at the agreed place of destination. In other words, the carriage is for the account of the seller, but occurs at buyer's risk. Often it is presumed that *all* the costs until destination are for the account of the seller (and thus included in the contract price). This is not the case. CPT indeed signifies '*Carriage* Paid To' and not '*Costs* Paid To'.

2.6 CIP (Carriage and Insurance Paid to)

This term is very close to CPT, but puts an additional obligation on the seller to procure cargo insurance covering the goods at least to the agreed point of destination and complying at least with the minimum cover as provided by clauses (C) of the *Institute Cargo Clauses*. This cover may be sufficient for bulk goods, but is often insufficient for manufactured goods that often have a value exceeding by far the carrier's liability under the waybill. In such cases, the most extended cover available should be applied for, e.g. clauses (A)[20] including 'War Risk' and SRCC (Strikes Riots and Civil Commotion). In the latter case, the buyer is advised to stipulate the obligation of the seller to undertake an extended cover in the contract of sale.

The seller obtains insurance not for his own risk, but for the benefit of the buyer (the one that has an insurable interest as the risk already passed).

Buyers or sellers might be compelled to take out insurance in their own country, to minimize expenditure in foreign currencies and/or to support the domestic insurance industry. In such situations, a buyer can be obliged to import on CPT (or FOB) terms, whereas a seller might be legally obliged to sell on CIP terms[21]. In such situations, 'umbrella covers' and 'seller's contingency' insurance policies might be appropriate.

2.7 CFR (Cost and Freight)

CFR equally has two 'critical points'. Delivery, and thus passing of risk, occurs in the port of departure, when the seller places the goods on board the vessel (as in FOB). On the other hand, the seller pays the freight until the port of destination. In other words, sea carriage is for the account of the seller, but occurs at buyer's risk.

2.8 CIF (Cost, Insurance and Freight)

This term is very similar to CFR, but puts an additional obligation on the seller to procure cargo insurance in the buyer's interest. See the remarks about the insurance obligation under 2.6.

2.9 DAT (Delivered At Terminal)

The seller delivers the goods when he places the goods at the disposal of the buyer, unloaded from the arriving means of transport, in a terminal at the agreed port or place of destination. The buyer has to clear the goods for import.

DAT is a new Incoterm that also encompasses DEQ (Delivered Ex Quay) Incoterms 2000. Therefore 'terminal' is to be interpreted in a broad sense and *"includes any place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal."*[22]

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[19] The criterion of the ship's rail has indeed been replaced by the notion 'on board the vessel' in the Incoterms 2010, see 6.1.

[20] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 20.

[21] Ibid., 62.

[22] X., *Incoterms® 2010*, Paris, ICC Publication no 715E, 2010, 53.

Changing commercial practices induced the ICC to propose a term 'unloaded in terminal'. Sellers indeed want to increase their control on the supply chain for all sorts of reasons (reputation and quality maintenance, cost, etc.), choosing not only the freight forwarder at departure and the carrier, but also the terminal where they want their clients to collect their part of the (consolidated) shipments. The former DDU did not cover this variant of delivery conditions. C. M. Radtke, member of the drafting group, also referred to a tendency of the 'liner terms' to disappear and be replaced by freight conditions that are freely negotiated between the maritime transport companies and their clients. The latter conditions often include the terminal handling charges (THC) in the port of destination. In container trade conditions like 'terminal in-terminal out', that include unloading costs at destination, have become normal practice[23]. DAT gives parties an option that did not exist in the former Incoterms to select a term that exactly matches their intentions, without having to fall back on variants of 'official' Incoterms[24].

2.10 DAP (Delivered At Place)

DAP means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport, ready for unloading, at the agreed place of destination. Import duties and formalities have to be conducted by the buyer.

'Delivered At Place' is a new abbreviation that unites DAF, DDU and DES Incoterms 2000 into one term that is very similar to the former DDU.

- DAF (Delivered At Frontier) was used primarily for rail transport. In the preparation of Incoterms 2000 it was already debated whether DAF should be retained, because sellers and buyers contracting on the term DAF did often not consider more than the division of costs, instead of both risks and costs. If parties only wished to divide costs, CPT or CIP were more appropriate. Eventually DAF was retained because it was still used in some areas[25]. In the Incoterms 2010 DAF has been replaced by DAP, because under DAF the buyer was not able to examine the goods before taking delivery at the frontier[26]. If the goods were damaged during transport, it was unclear if the damage occurred before or after passing the border. Furthermore, DAF was misused in common markets, because within the common market goods are not stopped at the borders anymore. Consequently, placing the point of the passing of risk and cost in the middle of a rail or road transport directly to the destination, unnecessarily complicated things[27].
- DDU (Delivered *Duty* Unpaid) was considered confusing when contracting within customs-free zones such as the United States and the European Union. When buying goods 'duty unpaid' within a customs union, the question indeed arose whether the goods were bought not yet cleared for import at the point of departure, or not including VAT, excises duties, environmental taxes, etc. in the country or state of destination. Several national committees favored a term that did not give cause for speculation as to the customs nature of the goods. Something similar to 'Door-to-Door', Free House, Delivered at Destination … or 'Delivered at Place'.
- DES (Delivered Ex Ship) could easily be replaced by DAP, and consequently was equally removed in the Incoterms 2010.

2.11 DDP (Delivered Duty Paid)

DDP is essentially the same as DAP, but with the added obligation for the seller to obtain all official authorizations, carry out all customs formalities and pay all duties, taxes and other charges payable upon import, including VAT. The term represents the maximum obligation for the seller (as opposed to EXW).

Most countries require a registration in the country of importation to be able to import goods (and deduct the VAT payable upon import). The 'Guidance Notes' to DDP therefore explicitly state '*The parties are well advised not to use DDP if the seller is unable directly or indirectly to obtain import clearance. If the parties wish*

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[23] C. M. RADTKE, "The new Incoterms® 2010 rules of the International Chamber of Commerce", *ICC Masterclasses 17-18 February 2011* , 3.

[24] This gave rise to disputes about the unloading costs at destination when the parties agreed on a 'DDU Terminal' sale, e.g. in ICC Arbitral Award 12365, February 2004, *ICC International Court of Arbitration Bulletin* 2010, 21/1, 80.

[25] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 48. This also means that parties contracting under DAF Incoterms 2000 should not blindly replace their term by DAP Incoterms 2010. If they intend to put the passing of risk at the place of departure, CPT/CIP should be used instead.

[26] C. M. RADTKE, "The new Incoterms® 2010 rules of the International Chamber of Commerce", *ICC Masterclasses 17-18 February 2011* , 3.

[27] D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 87.

the buyer to bear all risks and costs of import clearance, the DAP rule should be used'. If the sale is nevertheless concluded on DDP-terms, the DDP-seller will have interest in a relief clause in the contract of sale, that postpones the delivery date or gives him the right to dissolve the contract, should he not be able to obtain (even with the assistance of the buyer[28]) an import license or to conduct the import clearance. Otherwise, the seller will be in breach of contract, because the import clearance is a responsibility of the seller under DDP.

As it is not always possible for the seller to obtain a refund for the VAT, DAP or the variant DDP *VAT unpaid* can provide a better deal for both parties. The latter solution being available in only a limited number of countries, as most countries do not authorize a separate clearance for customs and VAT-purposes.

3 Overview of the transport modes

The UN/CEFACT[29] distinguishes eight transport modes for international trade can be:

- maritime,
- inland water,
- rail,
- road,
- air,
- fixed installation (e.g. pipelines),
- mail[30],
- and multimodal transport.

Multimodal transport occurs when goods are carried by at least two different modes, from a place at which the goods are taken in charge by a transport operator, to a place designated for delivery, on the basis of one transport contract.

4 How to select the appropriate mode of transport

Several factors have to be considered in order to conduct the trade-off between cost and service requirements, namely

- operational factors, e.g. law (including liability of the carrier, security requirements, etc.), payment conditions (including the need for a 'title document'), taxation and the basic logistic infrastructure;
- consignment factors, e.g. volume, weight, speed of delivery and distance;
- and transport mode characteristics, e.g. reliability and availability.

Most of these considerations are relatively obvious ones, but the problem lies with the large number of different aspects that need to be taken into account. In most cases, the trader will shift the choice of the mode of transport to a freight forwarder[31]. It goes beyond the scope of this article to discuss these issues in detail, and therefore I refer to the excellent elaboration in *The handbook of logistics & distribution management*[32].

5 Who should organize the international transport?

5.1 Obligation entirely on either seller or buyer

As a general principle, the entire transport should be organized by either seller or buyer. Logically this should result in an optimal transport economy, because the overall volume of transport services purchased will be larger,

[28] As the buyer is obliged to assist the seller therewith under B10.

[29] UN/CEFACT Recommendation no. 19 (second edition), *Codes for Modes of Transport*, http://www.unece.org/cefact/recommendations/rec19/rec19_01cf19e.pdf.

[30] *'This code is provided for practical reasons, despite the fact that mail is not a genuine mode of transport. In many countries, the value of merchandise exported and imported by mail is considerable, but the exporter or importer concerned would be unable to state by which mode postal items had been conveyed.'*

[31] G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 225.

[32] A. RUSHTON, P. CROUCHER en P. BAKER, *The handbook of logistics & distribution management*, London, Kogan Page, 2010, 331 et seq.

as it is not divided between two parties[33]. It would even be more practical if either buyer or seller is responsible – and thus carries the risk – for the whole transport supply chain.

This implies that the Incoterms at the "extreme" of the range theoretically are the most economical Incoterms, all other factors excluded. FCA *seller's premises*[34] (buyer is responsible for transport) and D-terms *buyer's premises* (seller is responsible for transport) would therefore be economically justified terms. Conversely, the majority of international sales are concluded under terms that divide the obligations of carriage between the parties[35]. This stems from the tradition to use FAS, FOB, CFR and CIF in commodity trade, which often involves the chartering of ships, instead of a door-to-door transport contract with a freight forwarder[36]. It is moreover understandable that sellers wish to avoid the risks in the buyers' country, and that buyers do not wish to take upon them the risks in the seller's country[37].

On the other hand, if a buyer can deduct the VAT levied on the freight invoice for domestic carriage in the country of destination, it could be economical for the buyer to pay for this leg of the transport (this of course implies multimodal transport)[38]. A seller might indeed face problems in some countries if he wants to obtain a VAT refund.

5.2 Advantages of the seller organizing transport

Whether it has to be the buyer or the seller who organizes transportation, has to be evaluated according to their relative positions on the market. A seller with large and regular sales volumes is able to arrange transport better and cheaper than the occasional buyer of smaller quantities[39].

Small and beginning exporters often prefer (EXW or) F-terms, thereby placing the organization and cost of the international transport on the buyer. Frequently, they are unable to estimate the cost of carriage prior to the execution of the contract they are negotiating. However, the exporter may neglect an important opportunity: he could manage the transport operation himself and charge a commission to the buyer for the service rendered[40].

In a 'perfect market', it will be the seller who is best placed to contract for the international carriage[41]. As a rule, he will be in a better position to do so, because[42]:

- he can consolidate shipments and thus reduce transport costs, serving multiple clients in the country or region of destination;
- he can contract with a transporter of his choice, whom he knows and trusts to transport a certain type of goods[43];
- under a transport contract governed by his own national law (whether or not in conjunction with international transport conventions), and with clauses preventing claims should the consignee be in default when receiving the goods;
- to include the cost of carriage in his selling price in order to ascertain its payment to which he might be jointly and severally liable under the contract of carriage;

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[33] G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 226. See also the remark about the deletion of DAF in Incoterms 2010, supra 2.9.

[34] FCA is preferred over EXW, see 6.4.

[35] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 54.

[36] J. RAMBERG, *International Commercial Transactions*, Paris, ICC Publication no 588 - Kluwer Law International - Norstedts Juridik, 1997, 117.

[37] J. RAMBERG, "Incoterms 1980", in N. HORN en C. M. SCHMITTHOFF (ed.), *The transnational law of international commercial transactions*, Deventer, Kluwer, 1982, 139.

[38] K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 261.

[39] J. RAMBERG, "Incoterms 1980", in N. HORN en C. M. SCHMITTHOFF (ed.), *The transnational law of international commercial transactions*, Deventer, Kluwer, 1982, 140.

[40] G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 226.

[41] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 40.

[42] C. MURRAY, D. HOLLOWAY en D. TIMSON-HUNT, *Schmitthoff's Export Trade*, Londen, Sweet & Maxwell, 2007, p. 24, no 2-008; K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 262-263.

[43] As one car manufacturer reportedly said: '*Although I may be relieved of the risk of damage to my cars sold under an FOB contract, I am not pleased to see how they are being damaged when hopeless efforts are made to squeeze them into a cargo hold of a wholly inappropriate ship.*' Cited in J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 46.

- he can align the pickup date with his production planning, whereby storage costs awaiting transport at his premises are avoided;
- he knows how to package the goods for transport without the need of the buyer's instructions;
- he can instruct the carrier to tender him the specific documents required for payment under the L/C, for proof of intracommunity delivery or exportation (for the VAT exemption[44]);

It will also be for the benefit of the buyer, because it will often lead to lower freight costs. And if the seller includes transport charges in his quoted selling price, it is easier for the buyer to compare offers internationally.

Combined with the general trend in international trade of 'house-to-house' or 'door-to-door' service[45], this leads to a growing prevalence of the D-terms[46]. This occurs especially in the trade of high value manufactured goods, where sellers are concerned with the preservation of the quality of their products (and their reputation) until they have reached the country of destination[47]. A manufacturer who sells goods in a competitive foreign market cannot remain idle if something has happened to the goods after shipment. He may even go further than this, in view of the guarantees offered by the seller to the end consumer[48]. In some markets, buyers are in a dominant position and they might insist on being quoted D-terms prices[49].

5.3 (Minor) disadvantages of the seller organizing transport

- If a seller quotes a price, transport included, he must take into account that the transport price offered by the carrier at the time of the offer may be higher at the moment that the contract will be executed[50]. Freight (and insurance) rates may be higher because the fuel price goes up (e.g. a change of the *Bunker Adjustment Factor*), because of war or currency risks and because of shipping scarcity[51]. Including freight in the selling price means that this difference will reduce the profit margin.

- Problems might arise when the seller has the duty to pay for the transport, but in fact does not pay the carrier. The latter will then have a right of retention on the goods, and the buyer – although he might already have paid the price of the goods including freight to the seller – will have to pay the freight to the carrier if he wants to take delivery[52].

- Sometimes, the buyer has better opportunities to organize (and consolidate at departure) transport if he works on a larger scale than the seller, e.g. for just-in-time deliveries from a small exporter to a sizeable wholesaler or department store[53].

- In some countries, the choice of a shipping line is restricted to national shipping lines[54]. If that is the case, the seller can still organize transport, but the buyer should then include a contractual clause limiting the seller's choice of carrier.

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44 See 6.4 'VAT exemption upon exportation'.

45 G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 91.

46 J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 46; J. GUEDON en B. VAN DE VEIRE, "Incoterms and documents", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 36. This trend was already predicted in 1969, see D. M. SASSOON, "Trade Terms & the Container Revolution", *Journal of Maritime Law and Commerce* 1969, Vol. I, No. 1, 82.

47 K. VERCAUTEREN, *De Incoterms 1990 in het kader van de internationale handelskoop - een juridisch onderzoek naar de rechten en verplichtingen van koper en verkoper*, Licentiaatsverhandeling tot het bekomen van de graad van Licentiaat in de Haven- en Maritieme Wetenschappen (onuitg.), Universiteit Gent, 1992, 71-73.

48 J. RAMBERG, "Incoterms 1980", in N. HORN en C. M. SCHMITTHOFF (ed.), *The transnational law of international commercial transactions*, Deventer, Kluwer, 1982, 140.

49 G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 114; D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 90.

50 J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 34.

51 D. M. SASSOON, "Trade Terms & the Container Revolution", *Journal of Maritime Law and Commerce* 1969, Vol. I, No. 1, 77.

52 K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 260.

53 J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 19.

54 Ibid., 19.

- A seller, accepting the risk until arrival at destination, will often not be present upon arrival at the consignees address and thus will not inspect the goods upon arrival and make the required reservations on the transport document in order to claim under the liability of the carrier and the contract of insurance. As the inspection and notification delays under CISG are more flexible than the claim delays under the different contracts of carriage, a 'liability gap' might occur.

6 Mode of transport and the corresponding Incoterm

In the ICC publication on the Incoterms 2010, the Incoterms are divided in rules for any mode or modes of transport and rules only suitable for sea and inland waterway transport. This way, the ICC wishes to change the recurring habit of using maritime terms when multimodal terms would be more appropriate. Consequently, the Incoterms for any mode or modes (i.e. multimodal) of transport are handled in the first part of the publication, followed by the maritime Incoterms.

The following Incoterms can be used for any mode(s) of transport, including sea and waterway transport, whether or not combined: EXW, FCA, CPT, CIP, DAT, DAP and DDP. Conversely, the following Incoterms are considered only suitable for sea and inland waterway transport: FAS, FOB, CFR and CIF.

Any mode or modes of transport	Sea and inland waterway transport
EXW, FCA, CPT, CIP, DAT, DAP, DDP	FAS, FOB, CFR, CIF

Tab.2. Classification of the Incoterms 2010 according to mode of transport.

For air transport, a specific Incoterm 'FOB Airport' was introduced by the ICC in 1976[55]. The expression 'Free On Board' was not appropriate though, because goods are handed over (and the Air Way Bill is often already delivered) in terminal, instead of on board the airplane. In the Incoterms 1990 the term was replaced by FCA, mainly because the ICC did not wish to refer explicitly to a particular mode of transport, as the multimodal transport became more and more prevalent[56].

6.1 Passing of the ship's rail and roll-on roll off transport

Until the Incoterms 2010, the point of delivery under FOB, CFR and CIF was the passing of the ship's rail. The ship's rail traditionally represented the 'frontier' where goods left the country of the exporter (port of departure) and entered the country of the importer (port of destination)[57]. In the Incoterms 2010 this has been replaced by 'placing the goods on board the vessel'. The Introduction to Incoterms 2010 explains that the omission of the ship's rail as the point of delivery in preference for the goods being delivered when they are "on board" the vessel reflects more closely modern commercial reality and avoids the rather dated image of the risk swinging to and fro across an imaginary perpendicular line. The old criterion clearly did not suffice anymore, as goods can be placed on board by 'roll-on roll-off' (RORO) operations, which do not involve lifting the goods over the ship's rail. Instead, goods are driven on the ship *under* the ship's rail.

In the first version of the Incoterms, published in 1936, RORO ships of course were not as common as they are now. Nevertheless, even when RORO ships became part of trade practice, the criterion of the ship's rail was retained because changing it would *'jeopardise the international standing of the Incoterms and create confusion'*[58]. Although changing this criterion was already considered in the preparation of Incoterms 1980, it was only in 2010 that there were no objections anymore against an amendment.

In practice nevertheless, the ship's rail criterion did only occasionally pose a problem as the Incoterms criterion is only a default rule, should there be no port customs[59]. Indeed, if specific port customs exist as to the place of delivery under FOB (and thus also CFR and CIF) they have priority over the Incoterms[60].

[55] X., *Incoterms*, Paris, ICC Publication no 274, 1976, 92-99.
[56] X., *Incoterms 1990*, Paris, ICC Publication no 460, 1990, 6.
[57] J. RAMBERG, "Incoterms 1990 in relation to contracts of sale, carriage, insurance and financing", in J. PUTZEYS (ed.), *Les ventes internationales et les transports - les nouveaux Incoterms*, Louvain-la-Neuve, Bruylant, 1992, 3.
[58] J. RAMBERG, "Incoterms 1980", in N. HORN en C. M. SCHMITTHOFF (ed.), *The transnational law of international commercial transactions*, Deventer, Kluwer, 1982, 148.
[59] K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 166.

6.2 The container revolution and the problems with maritime terms

It was mainly because of the container revolution (1960-70) that logistical practices dramatically changed. It became clear that the maritime terms were not suitable for container trade.

Multimodal transport

Containerization opened the door for multimodal transport, because containers can easily be put from one means of transport to another, greatly reducing the risks of damage and theft[61]. It enabled a single transport operator to take charge of a cargo throughout the entire voyage, thereby replacing the 'port-to-port' with a 'door-to-door' thinking[62].

It is clear that the terminology in the maritime terms only works when the goods are delivered directly to the sea or inland waterway carrier without passing through a terminal. The maritime terms refer to '*alongside the ship', 'on board the vessel', 'port of shipment/destination', 'in the manner customary at the port'*, etc. As a result, they are in most situations not suitable for other modes of transport or multimodal transport.

Under the Incoterms (A8) the seller contracting under CFR and CIF has to tender a negotiable on board bill of lading to the buyer. Unless otherwise agreed, it has to be a document of title, i.e. one entitling the buyer to ask the carrier for the goods and enabling him to sell the goods in transit. This will often not be the case in door-to-door transport, where the seller will be tendered a multimodal (combined) bill of lading[63] or other transport or receipt documents that do not meet the documentary obligations established under CFR or CIF.

Different point of delivery

In container trade, the goods are received either at a container freight station (CFS) or at a container yard (CY), for subsequent loading of the containers on board the ship[64]. In other cases, the containers are loaded by the seller and then collected at the seller's premises (often FCL deliveries)[65]. The seller thus hands over the goods to the carrier at an inland point, instead of placing them on board the ship.

In the Incoterms 1980 the possibility was introduced to change the point of risk transfer from the 'passing of the ship's rail' to the delivery to the carrier before shipment on board takes place[66]. The maritime terms therefore should not be used anymore in container trade: *'If, under such circumstances, sellers continue to sell FOB, C & F or CIF, they have to assume the risk of loss of or damage to the goods during a period of time when they have absolutely no control. This means that if something goes wrong during that period, and before the goods have actually been placed on board the ship, the sellers have not fulfilled their obligation. Consequently, they could be called upon by the buyer to provide substitute goods or to pay liquidated damages or other compensation on account of delay or non-performance. Furthermore, it is frequently impossible to determine* where *loss or damage, discovered at the destination, actually occurred. This is particularly difficult in container traffic.'*[67]

This could lead to a liability and/or insurance gap, should something happen to the goods in terminal, before they are placed on board the ship[68]. It does indeed happen that port terminals suffer from fire damage[69]. Even if

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60 Incoterms 2010, FOB A4 'Delivery': *'In either case, the seller must deliver the goods [...] in the manner customary at the port'*; See also X., *Incoterms 2000*, Paris, ICC Publication no 560, 1999, 20: *'To some extent it is therefore necessary to refer to the custom of the port [...]'*.

61 G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 242.

62 D. M. SASSOON, "Trade Terms & the Container Revolution", *Journal of Maritime Law and Commerce* 1969, Vol. I, No. 1, 77-78.

63 I. CARR, *International Trade Law*, Oxon - New York, Routledge - Cavendish, 2010, 412; J. GUEDON en B. VAN DE VEIRE, "Incoterms and documents", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 33: '*the better view seems to be that it cannot transfer control of the goods while in transit through the simple endorsement of the document'*.

64 J. RAMBERG, "To what extent do Incoterms 2000 vary articles 67 (2), 68 and 69", *Journal of Law and Commerce* 2005-06, vol. 25, http://www.uncitral.org/pdf/english/CISG25/Ramberg.pdf, 220.

65 J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 15.

66 X., *Incoterms 1980*, Paris, ICC Publication no 350, 1980, 10. However, CPT did already exist in the Incoterms 1953

67 J. RAMBERG, "Incoterms 1980", in N. HORN en C. M. SCHMITTHOFF (ed.), *The transnational law of international commercial transactions*, Deventer, Kluwer, 1982, 147.

68 B. ZELLER, "Is the ship's rail really significant?", *Nordic Journal of Commercial Law* 2005, #2, http://www.njcl.utu.fi/2_2005/article3.pdf, 8.

the buyer's insurance policy contains a so-called transit clause, to the effect that the insurance protection lasts from warehouse to warehouse, the seller cannot benefit from this insurance. There are two reasons for this: first, the seller is not a contracting party to the buyer's insurance contract, and second, when contracting under maritime terms, the buyer does not have an insurable interest before the goods have been placed on board. Then, the seller can only appeal to his insurer if he is fully insured under an 'open' cover[70].

The costs under maritime terms pass to the buyer when the goods are placed on board, although freight forwarders will often include terminal handling charges (THC) incurred between the inland point and the placing of the goods on board the ship in the freight invoice. If the FOB-buyer arranges transport, he will pay for these costs, although technically he is not required to pay them. The only alternative is a cumbersome division between buyer and seller of the freight forwarder's invoiced price.

Under maritime Incoterms, the seller has to tender a delivery document proving that the goods have been placed *on board* the ship. In container trade, a bill of lading stating that the goods were simply 'received for shipment' is usually tendered to the seller[71]. This is not a sufficient delivery document under maritime Incoterms[72]. And even *if* the seller provides a port-to-port onboard bill of lading, the buyer may find himself unable to recover against the carrier if the goods were damaged between the inland point and the discharge port[73].

6.3 FCA, CPT and CIP: the terms for any mode of transport, including multimodal and container transport

Luckily, Incoterms are not 'fixed' in a treaty[74] or in legislation[75], and can easily be adapted to changes in trade practices. As a result, the Incoterms 1980 introduced the terms FCA (Free Carrier) and CIP (Carriage and Insurance Paid to), and revised CPT (Carriage Paid To).

These new Incoterms replaced the point of the passing of risks and costs from 'on board the ship' to the 'delivery of the goods into the custody of the carrier', before shipment on board takes place[76]. The documentary obligations were equally adapted, so that the seller was not required to tender an on board bill of lading as a proof of delivery.

Buyers have to be aware that when they change from FOB, CFR or CIF to FCA, CPT or CIP, not only the point of risk transfer, but also the point of cost division might change. Therefore, the terminal handling charges (THC) at departure (to be paid in the currency of the seller) will be for the account of the buyer instead of the seller when switching from FOB to FCA. If the buyer does not agree with the shift of costs, parties can apply the variant FCA '*THC for seller's account'*, or even a split of these costs can be agreed, e.g. FCA *'50% of THC to be paid by the seller'*[77].

In practice, the 'misuse' of the maritime terms still frequently occurs[78]. In some situations this is caused by 'extra-delivery-circumstances' (e.g. financing or payment conditions requiring a title document for transport purposes) and of course it does not help if handbooks on international trade put the stress on FOB and CIF, and

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69 G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 104.

70 J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 26.

71 C. DEBATTISTA, "Incoterms® 2010 rules and documents in international trade - Incoterms® 2010 rules and other ICC instruments", *ICC Masterclasses 17-18 February 2011* , p. 4, no. 20.

72 J. GUEDON en B. VAN DE VEIRE, "Incoterms and documents", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 29.

73 C. DEBATTISTA, "Incoterms and the contract of carriage", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 15.

74 The ICC has always opposed against the incorporation of Incoterms in a treaty, see E. JOLIVET, *Les Incoterms - Etude d'une norme du commerce international*, Paris, Litec - FNDE, 2003, 340-341.

75 The incorporation of Incoterms in national law has occurred in the past, namely in Spain, Iraq and Ukraine, see J. MALFLIET, "De rechtsaard van de Incoterms en de voorwaarden voor hun toepassing", in DEPARTEMENT VORMING EN OPLEIDING VAN DE ORDE VAN ADVOCATEN VAN DE BALIE VAN KORTRIJK (ed.), *Recente ontwikkelingen en topics van het handelsrecht*, Brussel, Larcier, 2010, 226-228.

76 X., *Incoterms 1980*, Paris, ICC Publication no 350, 1980, 10.

77 J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 33.

78 G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 103; J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 15.

only cursory discuss the multimodal terms[79]. As has been mentioned in the introduction, the maritime Incoterms are the oldest trade terms, and traders are very familiar with them. Since 1990, the ICC has tried to convince them not to use the maritime terms for multimodal or container transport[80]. In the Incoterms 2010, the whole layout was conceived in order to avoid traders applying the old maritime terms where they should actually apply multimodal terms[81].

6.4 EXW is not in line with international trade practices

Besides FCA, CPT and CIP, there's also the departure term EXW, which can be used for any mode of transport. Though it is a very popular trade term – it even is the default term in the ICC Model Sales Contract and the Orgalime models - it is not in line with international trade practice.

The contract of carriage and the obligation of the buyer to load the goods

Under EXW, the seller does not have to load the goods on the collecting vehicle sent by the buyer. However, in practice, it is often the seller who performs this obligation[82].

As the buyer is obliged to collect the goods at the seller's premises, the (pre-)transport shall mostly be done by road. In many countries, the international (and even national) contract of carriage by road is governed by the *Convention on the Contract for the International Carriage of Goods by Road* (CMR)[83]. Pursuant to article 17, 4 (c) of this convention, the carrier is not liable for damage due to the loading of the goods by the shipper. This signifies that, unless agreed otherwise, the carrier does not load the goods and if he does so, he will load the goods as an 'agent' of the shipper (who should, in an EXW-contract, be the buyer). However, in some cases, the carrier will receive instructions from the buyer to load the goods at his expense and risk, e.g. for exceptional transports of large, indivisible goods such as reactors, heaters, industrial machines, etc.[84]

Furthermore, the seller's corporate liability insurance might not cover damages caused by 'third' persons acting in the sellers premises on behalf of the buyer. Therefore, normally the seller is in the best position to load the goods on the collecting vehicle.

Although in this regard, the Incoterm EXW does not reflect the most common trade practice, '*it was thought desirable to retain the traditional principle of the seller's minimum obligation under EXW, so that it could be used for cases where the seller does not wish to assume any obligation whatsoever with respect to the loading of the goods.*'[85]

If the seller however *does* load the goods, he will do this in principle at buyer's risks and costs, thus allowing him, under the contract of sale, to add a line on the invoice for 'loading at the buyer's request'. In practice indeed, it is the seller who will pay (or at least advance) the loading costs[86], unless the goods are stored in a warehouse not under supervision of the seller. In the latter case, the seller receives a separate invoice for the loading costs, which he can then forward or reinvoice to the buyer[87].

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[79] E.g. I. CARR, *International Trade Law*, Oxon - New York, Routledge - Cavendish, 2010, 5.

[80] X., *Incoterms 1990*, Paris, ICC Publication no 460, 1990, 14; X., *Incoterms 2000*, Paris, ICC Publication no 560, 1999, 24.

[81] See chapter 2.

[82] X., *Incoterms® 2010*, Paris, ICC Publication no 715E, 2010, 15; K. VANHEUSDEN, "Incoterms 2000 - Knelpunten bij toepassing in de praktijk", in C. DEHOUCK (ed.), *Incoterms en betalingstechnieken in de internationale handel*, Brugge, Die Keure, 2007, 220; D. CHEVALIER, *Le MOCI mémo-guide Incoterms 2000 - Tous les mécanismes*, Paris, Sedec, 2006, 34; K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 148; X., *Incoterms 2000*, Paris, ICC Publication no 560, 1999, 12; D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 89; J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 32; J. RAMBERG, *International Commercial Transactions*, Paris, ICC Publication no 588 - Kluwer Law International - Norstedts Juridik, 1997, 101; K. MIKKOLA, "Variants on Incoterms (Part 1)", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 147.

[83] Geneva, 19 May 1956.

[84] D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 89-90.

[85] X., *Incoterms 2000*, Paris, ICC Publication no 560, 1999, 12.

[86] D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 89.

[87] K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 148.

Uninsured 'risk gap'

Another problem with EXW is that there is a 'risk gap' that is not covered by the usual transport insurance policy[88]. The transport insurance of the buyer only covers damage from the moment the goods are handed over to the carrier, whereas the passing of risk under EXW occurs when the goods are placed at the disposal of the buyer. That means that the buyer's risk is not insured under the transport insurance policy as long as the carrier has not picked up the goods at the seller's premises.

Possibility for the buyer to perform export formalities

Some countries require a registration (and even a residence) in the country of exportation to be authorized to export goods. This is certainly the case if an export license is required. The seller is not obliged to carry out the export clearance, or to obtain the export license. His obligations are limited (A10) to assistance at the request, expense and risk of the buyer. The EXW-buyer therefore has interest in a relief clause in the contract of sale, postponing the delivery/reception date or giving him the right to dissolve the contract, should he not be able to obtain an export license or to conduct the export clearance.

A customs broker or a freight forwarder could perform these obligations as a 'commission agent' on behalf of the buyer, but they will of course charge a commission to the buyer. It will economically be more advantageous if it were the seller who performs the export formalities. The seller usually can indeed carry out export formalities at a lower cost and with less effort than a foreign buyer[89].

VAT exemption upon exportation

Most countries give a seller the possibility to exempt his invoice from VAT if the goods sold are exported. In an EXW sale the seller however neither clears the goods for export, neither organizes carriage to a place outside the country or customs territory. Therefore, the seller has to rely on the buyer to provide him with the proof that the goods have actually been exported.

The buyer however is not obliged to export the goods under the Incoterms, and even if he does export the goods, he does not have to tender a proof of export to the buyer. Hence, the seller can face administrative problems to prove the VAT exemption accorded. Rightfully, the Guidance Notes to EXW state: '*EXW represents the minimum obligation for the seller. The rule should be used with care as: [...] c) The buyer has limited obligations to provide to the seller any information regarding the export of the goods. However, the seller may need this information for, e.g., taxation or reporting purposes*.'

If the buyer wants to be invoiced without VAT, the seller should impose a contractual obligation on the buyer to export the goods and to tender the proof thereof.

Advise to use FCA seller's premises or EXW loaded at seller's risk

For the aforementioned reasons, parties are advised to use FCA *seller's premises* instead of EXW. Usually, FCA is more appropriate for international trade, while EXW only works for domestic trade[90]. Under FCA, the goods are loaded on the collecting vehicle at the expense and the risk of the seller. The seller equally conducts the export clearance.

If parties only wish to impose the loading obligation on the seller, but not the export clearance, they could use the variant EXW *loaded*. This also provides a solution if the seller is unwilling to change his price quotation from EXW to FCA[91]. The parties are advised to clarify if that means that the passing of risk will also be delayed until the goods have been loaded, or if they only intend to shift the loading costs from the buyer to the seller. They can do so by adding *'at seller's risk'* or *'at buyer's risk'*[92]. Preferably, also the passing of risk should be delayed, because this would eliminate the above-mentioned 'risk gap'.

[88] K. MIKKOLA, "Variants on Incoterms (Part 1)", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 146.
[89] D. CHEVALIER, "Incoterms - bien les connaître pour mieux les utiliser", *Le MOCI* 2003, 89.
[90] X., *Incoterms® 2010*, Paris, ICC Publication no 715E, 2010, 15.
[91] K. MIKKOLA, "Variants on Incoterms (Part 1)", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 147.
[92] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 32.

6.5 When to use the maritime terms?

One could argue that if the abovementioned Incoterms are suitable for *any* mode of transport, then why do the Incoterms 2010 still provide for maritime terms?

Firstly, the Incoterms were conceived as a codification of international trade usages: *'These rules have been based upon the greatest common measure of practice now current in international trade, in order to obtain the widest possible adoption of them.'*[93] In 1953, some urged that the Incoterms should impose desirable improvements on current practice. Conversely, the Chamber's Committee stated two objections, but indicated that in the future, there would be room for improvements: *'(i) what practical merchants have evolved over the years as convenient is always likely to be better than theoretical improvements and (ii) the prime consideration is to get one set of international rules agreed and widely adopted. If that could be achieved it would be a great step forward, and on the basis of it thereafter improvements may gradually be accepted.'*[94]

As of 1967, until then non-existing terms were introduced, such as DAF, DDP, FOB Airport, FCA, CIP, etc. As a result, the Incoterms were no longer only codifying but also introducing new standards. It is nevertheless clear that the Incoterms are only applied worldwide because they align with international trade practices. As traders still frequently apply the maritime terms – they represent the largest volume of world trade[95] – they cannot be ignored in the Incoterms.

Secondly, a buyer is often not prepared to accept costs and risks – and execute payment - from the moment they are ready to be shipped from an inland terminal in the seller's country[96]. If a buyer only wishes to assume the risk of the goods (and pay) from the moment they are loaded on board the ship and embodied in a title document that is negotiable (the bill of lading), and not from the moment they are delivered to the carrier at an inland point, the maritime terms still offer a valid alternative.

Indeed, only CFR and CIF require the seller to provide the buyer with an on board bill of lading. If the buyer (or his bank that is financing the operation) only wants to accept an onboard bill of lading as the delivery/payment document tendered by the seller, he should contract under these terms. This type of delivery document is required if the buyer wants to resell the goods afloat, which is done by endorsing the bill of lading[97]. This will mostly occur in the trade of bulk goods or commodities, such as oil, iron, ore and grain.

In a strict sense, FAS and FOB do not require a bill of lading, but only a 'usual proof' that the goods have been placed alongside or on board the ship according to the port customs. A mate's receipt or a received for shipment bill of lading might thus suffice, if this document qualifies as the usual proof that the goods have been delivered. These documents are however not a document of title to the goods, which means that the goods cannot be sold en route through transfer of the document[98]. In such situations, the seller's liability is limited to the provision of assistance to the buyer, at the buyer's request, risk and expense, in obtaining the bill of lading[99]. To create clarity on this issue, it is advisable to incorporate a clearly drafted 'Documents' clause in the contract of sale listing and describing the type of documents the seller is to tender[100].

Lastly, administrative authorities (such as customs) may require the parties to refer to an 'established' Incoterm like FOB or CIF. In such situations, parties can still apply the appropriate term in their contract of sale, whereas 'for administrative/customs purposes only' they can state the term preferred by the administration on the invoice[101].

[93] X., *Incoterms 1953*, Paris, ICC Publication no 166, 1953, 6.
[94] Ibid., 6.
[95] J. RAMBERG, *ICC Guide to Incoterms 2000*, Paris, ICC Publication no 588, 1999, 18.
[96] Ibid., 18.
[97] G. JIMÉNEZ, *Guide to Export-Import Basics - Vital Knowledge for Trading Internationally*, Paris, ICC Publication no 685, 2008, 113.
[98] J. GUEDON en B. VAN DE VEIRE, "Incoterms and documents", in C. DEBATTISTA (ed.), *Incoterms in Practice*, Paris, ICC Publication no 505, 1995, 30.
[99] A8 Incoterms 2010.
[100] C. DEBATTISTA, *Bills of lading in export trade*, Haywards Heath, West Sussex, Tottel, 2009, p. 12, no. 1.25.
[101] K. VANHEUSDEN, *Leveringsvoorwaarden in internationale overeenkomsten. Van Trade Terms en Incoterms*, Antwerpen-Apeldoorn, Maklu, 2005, 260.

7 Conclusions

Merchants often do not sufficiently analyze the possible effects of choosing one or another trade term but rather, without much reflection, continue to sell as they and their predecessors have done previously[102]. Often, the chosen Incoterm will not vary from transaction to transaction and is part of the business strategy[103]. Nevertheless, a trader should evaluate thoroughly which Incoterm to choose as it has a huge impact on cost, risks, liabilities and formalities… and thus of the profitability of the transaction. In order to make a carefully thought-out choice, one of the considerations to be taken into account is the mode of transport.

It is not without reason that the Incoterms 2010 put so much stress on the division between 'any mode' and 'multimodal' on the one hand and maritime Incoterms on the other hand. The former can be used for any mode of transport e.g. goods shipped in containers, and the latter may only be used when the goods are shipped by sea or inland waterway. The reasons for this division are threefold: firstly, the maritime terminology does not apply to other modes of transport, secondly, the delivery in multimodal or container transport occurs at an inland point, instead of alongside or on board the ship, and thirdly, the documentary requirements differ.

Whereas the difference in terminology is obvious, the difference is not that obvious with respect to the point of delivery. The legal consequences are however important: if sellers wrongfully continue to contract under maritime terms, they have to assume the risk of loss of or damage to the goods during a period of time when they have lost control over the goods as the goods are already handed over for shipment. The risk during this period might not be covered by the transport insurance policy. Moreover, it is often difficult to determine if loss or damage occurred before placing the goods on board the ship (in the terminal) or after, if this loss or damage has only been discovered at destination, upon opening the container. It is not only the passing of risk that poses problems, but also the point of cost division can lead to a cumbersome split-up of the freight forwarder's invoice, which often includes the costs of bringing the goods on board the ship.

Under CFR and CIF, the seller has to tender a negotiable on board bill of lading. Under FOB and FAS, this document would certainly suffice, but a mate's receipt, a received for shipment B/L or a sea waybill might equally be acceptable if they are regarded as the usual proof of delivery. In door-to-door transport, the buyer will often not be tendered such a delivery document, but he will instead receive a CMR, multimodal or 'through' bill of lading. In container transport, the seller usually hands over the goods to the carrier against a FCR or 'received for shipment' bill of lading. These documents do not meet the documentary obligations under the maritime terms. This is an important consideration, because when prices go up in a volatile market, buyers may be inclined to avoid the contract under the pretext of a contractual breach, if the seller does not procure the required delivery document.

EXW, suitable for any mode of transport, seems to offer an easy and carefree solution for sellers. In reality, 'avoiding costs and risks at all cost' comes at a high price … certainly if the seller depends on certain documents and formalities the buyer has to perform for tax and accounting purposes. EXW moreover is not in line with international trade practice. Parties are advised to contract FCA *seller's premises* instead.

FCA, CPT and CIP place the point of delivery at the moment they are handed over to the carrier, and impose less strict documentary obligations. In most cases, traders are advised to use these terms instead of the maritime terms. The latter have been retained in the Incoterms, because sometimes buyers are reluctant to assume any risk before the goods are on board the ship. They are equally the proper terms for the trade of bulk goods or commodities, which are often resold in transit, whereby a negotiable transport document is required.

As for the question to which party should be in charge of carriage, the basic economical rule is that the transport obligation should be put in one basket and thus borne entirely by either seller or buyer. Often, it will be more efficient and thus cheaper to have the seller organizing carriage, but sometimes buyers can consolidate at departure and are more accustomed to organize international transport and therefore in a better market position to do so.

This leads to a general trend in international trade towards the D-terms. As all the D-terms can be used for any mode of transport, including multimodal, this also avoids that traders use the wrong term and international traders are well advised to take a specific look at the newly introduced terms DAP and DAT.

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[102] N. HORN en C. M. SCHMITTHOFF, *The transnational law of international commercial transactions*, Deventer, Kluwer, 1982, 139.

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