





The new Incoterms® 2020

As of January 1, 2020, the new Incoterms © 2020 come into force. Its extraordinary practical significance is evident by the use in more than 90% of purchase contracts of goods, both in international and national trade. The nine-member expert group of practitioners and lawyers set up by the International Chamber of Commerce in Paris (ICC) has fundamentally revised the Incoterms® during three years, taking into account more than 3,000 inputs from practitioners. The objective of the innovations is the easier handling, clarification and higher legal certainty of the users.

The following summary table shows the new Incoterms© 2020 in the name and order in which the buyer's obligations from above (EXW) decrease and those of the seller increase proportionally (DDP).

Tabelle zu "Incoterms® 2020"

	Verp. Kennzeichnung	Verkäufer-Sitz ----- Käufer-Sitz						Lieferhandlung	Besonderheiten
		Export-Freimachen	Haupt-Transport			Import-Freimachen			
		Kosten	Veranlassung / Art	Gefahr	Transit				
EXW	V	K	K	K	K	K	K	↓	Verkäufer-Minimalverpflichtung
FCA	V	V	K	K	K	K	K	↻ ↓	2 Varianten je nach Lieferort
FAS	V	V	K	K / Schiff	K	K	K	↓	
FOB	V	V	K	K / Schiff	K	K	K	↻	
CPT	V	V	V	V	K	K	K	↻	
CIP	V	V	V	V	K	K	K	↻	Verkäufer hat Transport zu versichern
CFR	V	V	V	V / Schiff	K	K	K	↻	
CIF	V	V	V	V / Schiff	K	K	K	↻	Verkäufer hat Transport zu versichern
DAP	V	V	V	V	V	V	K	↓	
DPU	V	V	V	V	V	V	K	↓	Verkäufer hat zu entladen
DDP	V	V	V	V	V	V	V	↓	Verkäufer-Maximalverpflichtung

 Lieferort
  Übernahmeort
  Zur-Verfügung-Stellen
  Übergabe
 © Prof. Dr. Burghard Piltz Hamburg

The "Incoterms Rules" regulate the following aspects of a purchase contract:

- A1 / B1: General duties
- A2 / B2: Delivery, receipt of the goods (place of delivery / takeover, place of delivery, loading and unloading.) Not: delivery time
- A3 / B3: Transfer of risk

- A4 / B4: Transport
- A5 / B5: Insurance
- A6 / B6: Delivery / Transport Documents
- A7 / B7: Export, transit and import clearance
- A8 / B8: Examination, packaging and marking
- A9 / B9: Cost distribution
- A10 / B10: Notifications

The previous structure has been retained, as well as the known group divisions in eleven terms. All terms contain the ten duties of the seller (A1-A10) and the buyer (B1-B10). The terms and order of the terms have been changed in part, which is mainly for the sake of clarity and brings less substantive changes. The main content changes are:¹

1. Determination of the delivery date for delivery periods by the buyer (F-terms)

If one of the F-terms apply and the parties have agreed a delivery period, the *buyer* can now determine the delivery time. For all other terms the delivery time depends on the specific agreement. If nothing has been agreed, the applicable laws for contracts for purchase of goods are to be followed, e.g. Art. 33 of the UN Sales Convention (CISG).

2. The seller is responsible for transport according to A4 of the F-terms

With the exception of terms FAS and FOB for transport by ship, the Incoterms® 2020 now clarify that the buyer is not always required to hire a transport company, but may also carry out the transportation itself.

3. Assignment of Security Clearance

Following the attack on the World Trade Center in New York 9/11, the Incoterms® 2010 provided in A2/B2 that the security clearances had to be fulfilled by the party that is responsible for the customs clearance. However, that is not possible in cases where the safety clearance concerns the carrier in general, but not the export or import clearance, for example according to the EU regulations for safety in civil aviation. The person responsible for the transport uses certain qualified persons who are authorised to carry out these safety regulations. These are, for example, the "known consignor" or the "professional consignor". This also includes the regulations of the International Ship and Port Facility Code (ISPS Code).

The new Incoterms® 2020 now differentiate in A4/B4 between the transport-relevant safety requirements above and the safety checks according to customs laws. In the case the term EXW or an F-term is agreed, the seller is also responsible for providing the buyer with the relevant safety clearance or information required for clearance upon request (A7/B7). Examples of such safety approvals are the mandatory EU entry declaration (ESumA, ENS Filing), Art. 127 UCC, or the US Importer Security Filing (ISF). For deliveries to countries of political tension, the rapidly changing export or import conditions should be observed in the purchase contract.

¹ Eine ausführliche Beschreibung enthält die von der ICC herausgegebene Broschüre zu den Incoterms® 2020 ICC Publikation 723 DE (ISBN 978-3-929621-73-0), herausgegeben von ICC Germany e.V., 10117 Berlin, Wilhelmstrasse 43G mit der Einführung und Erläuterungen von Debattista; vgl. auch den Artikel von RA Prof. Dr. Burgard Piltz, IHR 5/2019, S. 177 ff.

4. Insurance

The terms A5/B5 are generally unchanged in content, however, the risk coverage has been modified. Minimum insurance values applies only to the CIF term. So-called "broken" insurance policies, by which the seller only insures for his transport route, while the buyer insures the onward transport after the goods have been taken over, are to be avoided in principle, because in the event of an insurance claim it is difficult to prove on which route the damage occurred and then neither party can claim compensation for damages.

5. FOB / FCA and Container, B / L at FCA

The title of terms A6/B6 has been clarified. According to A6, the seller has to obtain the usual proof of delivery if an F-term applies. If the term FOB applies, the seller has no possibility to influence the risk between the delivery at the terminal and the actual loading on the ship. If the goods are damaged in the terminal, the seller receives no payment and must deliver again. *The term FOB is therefore not suitable for container transport.* Instead, the term FCA is better suited, which has been enhanced in comparison to the previous Incoterms® 2010. To solve the problem described by the seller, the parties may agree on term FCA A4, so that the seller arranges for carriage of goods at the expense and risk of the seller and/or requests a letter of acceptance (Received for Shipment Bill of Lading) instead of the usual B/L in order to claim payment on a letter of credit. However, in addition to the buyer, the bank must also accept this document in order to make payment on a letter of credit.

6. Packaging and Labelling

Terms A8/B8 refer exclusively to obligations of the seller. The buyer's obligation to inspect the goods that is regulated by A8 is to be strictly differentiated from the buyer's obligations to examine the goods according to purchase laws (Art. 38 CISG and Sec. 377 German Trade Law).

7. Cost Allocation

The costs have now been comprehensively regulated in A9/B9 which have been moved to the end, so that the decision on costs loses its undeserved importance in deciding on an applicable term. The costs are only the result of the decisions to be taken under the terms A2/B2.

Incoterms © 2020 are already applicable to new and previous contracts

Old contracts should be checked in the light of global, economic policy changes, such as BREXIT, TRADE BARRIERS of the USA, but also of changes in the law, such as the new German sales law

The new Incoterms® 2020 can immediately be applied to all contracts, including those that have been closed before 1 January 2020.

That effective date of the new Incoterms® does not constitute an obligation to use the new Incoterms® 2020. Instead, the contracting parties are free to use the new Incoterms® 2020 immediately, also retrospectively to older contracts, or to still use the earlier Incoterms® also in new contracts. However, the new terms, in particular clarifications in the Incoterms® 2020 are a good reason to use them, and to take the opportunity to review older purchase contracts. The purchase contract, however, must state clearly which version of the Incoterms® it refers to. If the contract only

mentions "Incoterms®" are applied, then in case of doubt the most current terms will apply to contracts that are concluded after 1.1.2020, i.e., the Incoterms® 2020.

Incoterms® 2020 require an effective sales contract. So they do not regulate the purchase contract itself, but merely *modify* the rights and obligations of the seller and the buyer. The following are *not regulated*, for example: the inclusion of General Terms and Conditions, transfer of ownership, payment terms and payment collateral or the consequences of breach of contract.

Similar to the previous Incoterms®, the terms regulate - in a slightly different order and description - the primary General Obligations (A1/B1), Delivery Obligations (A2/B2), the time of the Transfer of Risk to the goods (A3/B3), Transport (A4/B4), Insurance (A5/B5), Delivery and Transport Documents (A6/B6), Export-, Transit- and Import Clearance (A7/B7), Inspection, Packaging and Labelling (A8/B8), the secondary duties of Cost Allocation (A9/B9) and Notifications (A10/B10).²

The contracting parties should therefore ensure the validity of the contracts and the modalities of the contract according to the applicable sales law and agree on necessary adjustments. Current occasions for reviewing existing contracts are not only the *Brexit* and legal changes in the provisions of the trade in goods, such as new goods import or export provisions under the *US trade embargo* or the current safety or customs regulations. For example, in preparation for *Brexit*, it is advisable to review the contracts under the substantive right to the increased costs and actual feasibility, but also to determine whether the contracting parties themselves still exist even after *Brexit*, if such a contracting party has been incorporated under English law but is domiciled in the EU. Because the English Ltd. or LLP for example will no longer be an accepted legal form for a company domiciled in the EU after *Brexit* and can be transformed into partnerships by law with the full liability of partners as a consequence.

In addition, however, the actual contract performance in real life, i.e. the processes of the contracting parties when executing the contracts, must be validated and compared to the agreed terms. Often, these processes have developed a life of their own and are so far removed from the contract terms that problems can arise in the event of a dispute. In particular, it should be checked whether the terms still fit for the type of transport actually used. The FAS, FOB, CFR and CIF terms are intended exclusively for ship transport, while all other terms can be used for all types of transport.

Important to note is that the changes to the Incoterms® 2020 itself, as well as the changes to the new German sales law give urgent reason to examine the contracts and adjust them if necessary. Very often in sales contracts the wrong Incoterms® are used, such as *EXW* or *DDP* in agreements for international sale of goods. These terms are regularly difficult or even impossible to adhere to by either the non-EU buyer or seller, because European Customs Laws always require the participation of an EU-based importer or exporter. Within the EU, such incorrect choice of the *EXW* and *DDP* terms also creates VAT problems.

Furthermore, the exclusion of the UN Convention for International Sale of goods (CISG) that can be observed almost as a „standard“, very often is a potentially expensive mistake. Just like the Incoterms®, also the CISG, which is now applicable in 92 countries around the world, sets international standards. These internationally valid rules of the CISG and the Incoterms® also frequently refer to each other and follow the same goal of establishing uniform rules in the

² Näheres dazu Piltz, IHR 5/2019 S. 184 m.w.N.; Debattista in ICC-Publikation 723 DE, 2019, Einführung in die Incoterms® 2020, Rz 6ff

international sale of goods and thus contributing to legal clarity and legal certainty. Notably, just like the Incoterms®, the rules of the United Nations Convention on Contracts for the International Sale of Goods can largely be adapted according to the discretion of the contracting parties. That discretion is often more limited in national legal systems. Therefore, the application of CISG is often preferable. In any event, it is important to use the English language as the preferred language for international sales contracts, because the Incoterms® provide for the English language as valid terms in case of doubt.



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