The International Sale of Goods and Incoterms from a Maritime Lawyers Perspective

Incoterms are terms published by the International Chamber of Commerce (ICC), dealing with aspects of the sales contract such as: the seller’s and buyer’s responsibility for arranging and paying for the transportation costs; customs clearance; insurance; and arranging the necessary documentation.

They provide a framework which allows exporters to limit exposure by ensuring that a sales contract is appropriate for the particular mode and type of shipment and that it covers fully all responsibilities and liabilities of the parties. If conducted correctly, an exporter may limit carriage costs as appropriate and reduce exposure to costly claims.

Despite their international use, there are a number of significant misconceptions about Incoterms. This writer has often been informed by a client that a dispute concerns a CIF contract or an FOB contract without any full understanding by the client of what the term means or their contractual obligations by virtue of such term.

Marine transport is undoubtedly the most popular mode of transporting goods for Irish exporters. The latest statistics claim that 99% of the volume of Irish trade is shipped by sea. Good news you might say for the maritime lawyer! It certainly is good news for the Irish maritime industry. Maritime traffic has significantly increased over the last few years. Recent statistical data reveals that, despite a couple of difficult years for Irish exporters, port traffic has increased and freight and charter levels are at an all time high: statistics that support the ascendancy of the maritime market in Ireland. It is therefore useful perhaps to consider the typical disputes an Irish exporter may face shipping his goods by sea and what terms adopted in international sales and documents utilised can minimise this exposure.

1. Incoterms are not an international sale contract

Whichever of the thirteen Incoterms you adopt for your sales contract, it is essential to remember that they are “trade terms” and no more. They are not themselves the sales contract.

2. Incoterms do not deal with every issue between parties

Incoterms do not provide a solution to all disputes. Their remit is limited to setting out the parties obligation in respect of arranging the contract of carriage of goods from the Seller to the Buyer, and dictating which party is obliged to pay for costs of the shipment, which party is obliged to arrange insurance, which party is obliged to arrange and pay for customs clearance. Incoterms do not cover disputes regarding ownership of goods, unforeseeable events or an unavoidable circumstance, the actual mechanism for payment of the goods and what happens if the goods are not delivered to their ultimate destinations. Most importantly the Incoterms do not provide a mechanism for disputes. Incoterms do not cover the governing law of the sales contract.

Transfer of Risk does not amount to transfer of ownership

The Incoterms include a provision for when risk of loss or damage in the goods will pass from Seller to Buyer. This will be at different points of time depending upon the particular Incoterm adopted. This transfer of risk is however limited to the risk of loss or damage to the goods and no more. It does not confer any transfer of proprietary interest in the goods. It also does not cover loss or damage specifically caused by the Seller or Buyer.
The time that ownership in the exported goods transfers, will be governed by other express terms in the sales contract and/or the governing law. Transfer may be linked, if a maritime carriage through the transfer of a Bill of Lading. Transfer of ownership may expressly be subject to receipt of payment. This type of clause commonly referred to as a “Retention of Title” clauses is independent of Incoterms. Its applicability and enforcement will depend upon how clearly it is worded and whether such clauses are valid under the law governing the sale contract.

Some of the Incoterms are only suitable for Maritime Carriage and certain types of cargo handling.

A final note of caution is that many of the Incoterms are only suitable for maritime carriage. Depending upon which Incoterm is adopted, the term may require the Seller to provide certain documents which is specific to the maritime industry, for example a negotiable bill of lading, and as such are not suitable for other modes of carriage such as air transport (unless amended appropriately) where such documentation is not used.

The 13 Incoterms

Careful thought needs to be given not only as to the actual type of carriage i.e. sea, railway or air but also which Incoterm is appropriate for how the goods will be handled. Frequently the wrong Incoterm is adopted for the particular cargo handling and mode of carriage. For example, where goods are to be shipped in containers, an exporter should not adopt a term that will leave the goods at his risk until they pass the ship’s rail as the goods will have left his physical control at the time they are placed in a container. For the reasons set out below an FOB, CIF or CFR contract will be entirely inappropriate. It is however common to have a sales contract for goods shipped in containers incorporation the CIF or FOB term.

The four groups of Incoterms are; Group E terms, Group F terms, Group C terms and Group D terms as summarised below.

Group E - Goods placed at disposal of Buyer

“EXW”

- Term imposes the least obligations on a seller – no obligations regarding arranging contracts of carriage or insurance
- Seller simply places the goods at the disposal for the buyer
- Buyer has to carry out all the export formalities such as customs clearance
- Seller may have to render his assistance (subject to payment for such assistance)

Group F – main carriage not paid by Seller

“FCA” - Free Carrier

“FAS” – Free alongside ship

“FOB” – Free on Board
• FCA can be used for all types of carriage not just marine carriage whenever goods are handed over to carrier at some point other than alongside the ship.
• Contract of carriage and insurance arranged at buyers risk and expense (the seller may arrange carriage but not obliged to do so by F terms)
• Responsibility for costs of loading are determined by port.
• Seller arranges export clearance at his own expense
• Seller bears risk of loss or damage until delivered to named point.
• Seller pays costs under FCA up to delivery named point, up to point goods alongside ship if FAS and point pass ships rail if FOB

Group C – main carriage paid by Seller

“CFR” – Cost and Freight
“CIF” – Cost, Insurance and Freight

• CFR and CIF for marine transit only as require production of bill of lading
• CFR identical to CIF except seller obliged to also arrange and pay for insurance under latter
• Seller arranges and pays for contract of carriage
• Seller arranges at own risk and expense export formalities
• Inappropriate for goods that are to be carried from inland point in country of shipment to inland point in country of destination
• Delivery occurs when goods are placed on board vessel at port of shipment - it is frequent to see in sale contracts a named destination port or date of delivery after the Incoterm e.g. CIF Rotterdam no later than 23/02/05 - a date of delivery and destination should never be stipulated on a CFR/CIF contract as delivery obligation is fulfilled at time goods on board vessel as opposed to when arrive at destination.
• Risk passes to buyer at moment goods pass ship’s rail at port of shipment
• Seller pays costs up to point of delivery to ships rail and buyer costs thereafter

“CPT” - Carriage Paid to
“CIP” – Carriage and Insurance paid to

• Can be used for any mode of carriage and multimodal transport
• CPT identical to CIP except seller obliged to arrange and pay for insurance under latter
• Seller to arrange and pay for contract of carriage
• Risk passes to Buyer once goods are delivered to carrier – Seller bears all risk of loss or damage to that point
• Seller pays costs up to point of delivery to carrier and buyer costs thereafter

Group D – Delivered

“DEQ” - Delivered ex quay
“DES” – Delivered ex ship
“DAF” – Delivered at Named Destination
“DDP” – Delivered duty paid
“DDU” – Delivered Duty Unpaid

- Seller bears all costs and risks of bringing goods to country of destination
- The four terms set out place of delivery in country of destination
- DES and DEQ are appropriate for sea transit
- DAF primarily used road transport

In summary careful thought needs to be given as to which Incoterm is adopted by the parties. From the Irish exporter’s point of view the EXW Incoterm will limit both costs and responsibilities to the extent that all you have to do is to place the goods at the Buyer’s disposal. Realistically however, bargaining strength may restrict the possibility of concluding a sales contract with this Incoterm. If one of the F or C terms is adopted the Irish exporter will have limited financial and contractual responsibilities re the carriage but will need to look at protecting receipt of payment from the Buyer. This will involve considering methods of payment that are more secure such as documentary credits. Consideration should also be given as to the time ownership of the goods will transfer.

As far as D terms are concerned Irish exporters, manufacturers in particular, may decide for peace of mind to arrange both the insurance and contract of carriage. Adopting the D terms may be the only way to compete with other exporters.

Whichever Incoterm adopted be careful to choose the right term for the specific cargo and carriage. All too often the wrong term is adopted and as a result and costly disputes arise. Adapt your sales contract so that it is appropriate for your export, for the chosen method of carriage and above all so that, where possible the costs of shipment are limited and most importantly the potential for costly disputes are avoided.

We cannot direct the wind, but we can adjust the sails – Anon.

For more information, please contact one of our maritime team on + 353 1 614 5000. The content of this article is provided for information purposes only and does not constitute legal or other advice. Mason Hayes+Curran (www.mhc.ie) is a leading business law firm with offices in Dublin, London and New York.

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