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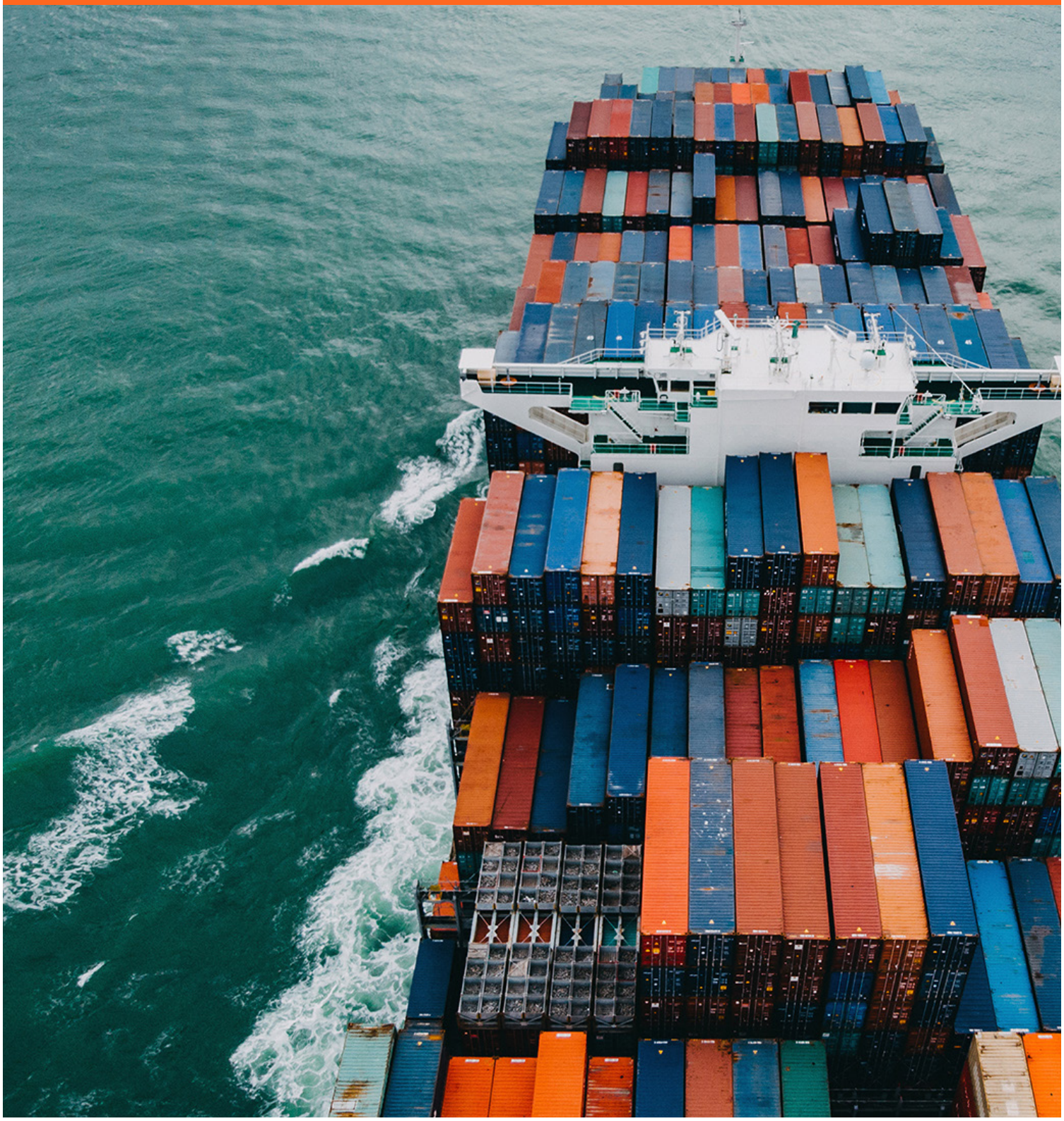
10 “To Dos” for all users of the new Incoterms® 2020



At the beginning of the year, the new edition of the world's most frequently used trade terms came into force. In their 8th edition, the Incoterms® mainly involve changes to the details, which can, however, have far-reaching consequences for supply chains.

We have compiled 10 important "To Dos" for you.

Are they all completely new?

The new edition of the Incoterms® had been eagerly awaited as they were last revised in 2010. Contrary to what was originally thought, the new Incoterms® 2020 did not involve any far-reaching changes. It was expected, for example, that the EXW, DDP and FAS clauses would be abolished, the FCA clause for maritime and land transport would be split or a new CNI (cost and insurance) clause would be introduced. However, instead of the elimination of existing clauses and the introduction of new ones, the changes in content of Incoterms® 2020 are reflected in the already existing clauses.

The most important To Dos:

1. Indicate the applicable Incoterms® version

When concluding new contracts, if using Incoterms® clauses (e.g. "FOB"), make sure you indicate the corresponding Incoterms® version (e.g. "Incoterms® 2020"). Old Incoterms® versions do not automatically lose their validity when Incoterms® 2020 come into force. Therefore, especially in the current transition phase to the new Incoterms®, it is important to specify the Incoterms® version precisely in order to avoid misunderstandings and difficulties in the execution of contracts. In the case of contracts already concluded, there will generally be no need to update the version of the Incoterms® clause used in each case (e.g. by way of a supplementary agreement). This may be assessed differently if the corresponding Incoterms® 2020 clause results in advantages for one or both parties.

2. Check your transport insurance

Under the clauses CIF (Cost, Insurance and Freight) and CIP (Carriage Insurance Paid To) the seller is obliged to take out transport insurance in favour of the buyer. While the necessary insurance cover under the CIF clause has remained unchanged and only requires a minimum level of cover, the requirements for mandatory insurance cover under the CIP clause have increased significantly. Please also note: Transport insurance typically does not cover damage caused by the current corona pandemic, e.g. storage of goods because a ship is quarantined. It could be the case, without separate insurance, that storage costs may be incurred by the seller.

3. Check your price calculation

The stricter requirements for individual clauses, such as the seller's obligation to provide comprehensive insurance cover under the CIP clause, can lead to rising costs for the seller. Since these costs cannot be billed separately to the business partner, they must be taken into account when calculating sales prices.

4. Caution when using DAT

With the Incoterms® 2020, the DAT (Delivered At Terminal) clause has been replaced by the DPU (Delivered At Place Unloaded) clause. You should therefore check your use of DAT. The ICC has made it clear that in the new DPU clause that the place of delivery is not limited to “terminals” in the literal sense, but can be any location. Please also note that unloading at DPU is the seller’s duty. The seller must therefore provide appropriate unloading facilities.

5. Caution when using FOB

Select FCA (Free Carrier) instead of FOB (Free on Board) if the goods are delivered at the terminal in case of container transport or air freight. Otherwise there is a risk of insurance gaps, since you have no control over the processes in the terminal. Therefore, only use FOB if you, as the seller, are responsible for the loading yourself and want to be liable for it. You will only be released from your responsibility once the goods have arrived safely on board the ship!

6. Make use of a new option if FCA has been agreed

Since, if the FCA clause is agreed, delivery by the seller is deemed to have been completed when the goods are handed over or made available to the carrier and thus before the goods are loaded on board a ship, it is not certain whether the seller can actually receive an on-board bill of lading from his carrier. However, he regularly requires such a bill of lading as proof that he has fulfilled his delivery obligation. To address this situation, the new FCA clause provides for the option that, if the parties so agree, the buyer must instruct his carrier to issue to the seller, at the buyer’s risk and expense, a transport document certifying that the goods have been loaded on board the vessel. This provides more security for the seller.

7. Check that you comply with all safety related requirements

In the Incoterms® 2020, the security requirements have increased, which must be observed by the seller or the buyer, depending on the choice of Incoterms® clause. Carrier-related security requirements and security requirements for customs clearance are explained separately. Transport-related safety requirements include, for example, load securing, compliance with safety, environmental and traffic regulations, training of drivers and employees, immobiliser, site monitoring, etc. The security requirements for customs releases, on the other hand, include physical checks before release for export or import. The responsible party must carry out pre-shipment inspections to ensure compliance with the import/export authorisation.

8. Bear in mind Brexit particularly when agreeing DDP

It is still unclear whether the EU and Great Britain will conclude a free trade agreement beyond the transition period at the end of 2020. If no agreement is reached, customs duties would again be levied in trade with Great Britain and customs clearance (import and export) would take place. This would lead to new obligations for sellers based in the EU, especially if DDP (Delivery Duty Paid) were to be contractually agreed. This would then - in contrast to all other Incoterms® clauses - also be responsible for clearing imports in Great Britain. In the future, sellers should therefore carefully consider whether to choose another clause instead of the DDP provision, e.g. DPU.

9. Note that the Incoterms® do not cover force majeure

The Incoterms® clauses make no statement as to what happens in the event of force majeure, e.g. who has to bear which risks and costs. In general, the choice of an Incoterms® clause, which entails little responsibility on your part, minimises your own risks in the event of force majeure. This is particularly true in the current corona pandemic, which is leading to repeated transport failures and interruptions in the supply chain.

10. Make sure your contracts are consistent

As a rule, it is not enough to simply include an Incoterms® clause somewhere in the contract (often under provisions on delivery). The parties should consider the implications of the clause in question throughout the contract. If, for example, the seller and buyer have agreed on “ex works” (EXW), the contract should not stipulate elsewhere that the seller (partially) covers transport costs.

One step forward

Critics of the update refer to the fact that certain practical problems are still unsolved. For example, the letter of credit is often agreed as the method of payment, which can still lead to problems with many clauses. In the context of FCA, the ICC has reacted by adding an optional special regulation, which, according to practice commentaries, however, misses the point. Moreover, the use of the popular and unchanged EXW clause in international trade in goods often leaves loopholes and contradictions which the ICC has not addressed. Many practitioners also wanted the VGM (Verified Gross Mass) requirements to be addressed.

Despite all the criticism, however, it must be borne in mind that the clauses are used in countless legal systems and that overly detailed regulations would jeopardise this universality. In any case, the new version of the application notes, a practical commentary and the clarifying amendment of DAT to DPU have considerably improved the practicability and access to the regulatory content of the clauses.

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