

Article

Corporate & Commercial

Terms and Conditions for Sale of Goods/ Incoterms® 2020 and Vienna Convention

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INCOTERMS® 2020 came into effect on 1 January 2020, so have now been operative for over a year. These do not replace INCOTERMS® 2010, which remain available for use, but did make a number of substantial changes to INCOTERMS®.

A lot of commercial documents still reference Incoterms 2010, and it may be time to review terms and conditions for the sale of goods, both for international and domestic sale.

What are Incoterms®?

A look at Incoterms® is a reminder of the number, and potential complexity, of terms and conditions that apply to a sale of goods, not just internationally but also domestically in Australia.

Incoterms® (International Commercial Terms) are published by the International Chamber of Commerce (**ICC**). As may be expected, the ICC is concerned primarily with international trade. It celebrated its centenary in 2019, having been founded in 1919, and explains the reason for its development of Incoterms® on its website:

Different practices and legal interpretations between traders around the world necessitated a common set of rules and guidelines. As a response, ICC published the first Incoterms® rules in 1936. We have been maintaining and developing them ever since.

Incoterms® are standardised terms and conditions, or rules, for a range of trade situations, usually referred to

by their abbreviated name or acronym, many of which will be familiar such as **CIF** (Cost Insurance Freight), **FOB** (Free on Board) and **EXW** (Ex Works), to name a few.

Are Incoterms® binding?

Incoterms®, described by ICC as “rules”, do not themselves have any binding force. If adopted by parties to a transaction, they have effect as terms of a contract between the parties. The rules can be incorporated in the contract by specific reference, usually by the short form name of the rules.

As well as the name of the applicable Incoterms® rules, the reference in contractual documentation should:

- Specify the version of Incoterms® - currently Incoterms® 2020, although earlier versions such as Incoterms® 2010 may still be used. If no version is specified, it is likely that the current 2020 version would apply, but this could cause doubt.
- Specify the port or place or point of delivery, as may be appropriate for the chosen Incoterms® rules. This is particularly important as ambiguity may render the contract unenforceable, or result in an unintended interpretation for a party.

Examples of the inclusion of Incoterms® by reference are:

- CIF Sydney, Incoterms® 2020;

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- DAP [Street number] [Street] [Town] [Country], Incoterms® 2020;
- FOB Shanghai, PRC, Incoterms® 2020.

Benefits of Incoterms®

Incoterms® are not a complete contract or set of terms and conditions for sale and purchase of goods. They are terms for inclusion in a contract. The benefit of using Incoterms® is that they:

- reduce the size of the contract document(s) and the amount of time and effort in drawing the contract terms and conditions;
- are generally well understood and accepted, and interpreted, which may save time and effort in negotiating a contract, and in the event of a dispute in relation to the meaning of contract terms; and
- are useful for all forms and sizes or quantities of goods and for all forms of transport.

What Incoterms® cover

The principal matters covered by the Incoterms® rules are:

Carriage and Insurance – obligations of parties to organise carriage, insurance, shipping documents, export or import licences;

Delivery and Risk – where goods are to be delivered or collected, and where risk passes from the vendor to the purchaser; and

Costs – which party bears costs such as transport, packaging, loading, unloading, checking and security.

What Incoterms® do not cover

There are many elements of a contract of sale and purchase of goods that Incoterms® do not cover.

Description of goods – obviously, Incoterms® do not describe or specify the particular goods that are bought and sold. It is important that there should be clarity in this description.

Price and finance terms – also obviously, they do not specify the price for the goods (although general condition B1 provides that the buyer must pay the

price specified) nor any deposit, time(s) for payment, method of payment, security for payment, guarantees, retentions, letters of credit, commercial paper or any interest in default or delay of payment.

Other commercial terms that Incoterms® do not cover are:

Title - when title (or property) to the goods (not risk) passes to the buyer, or if there is to be retention of title pending payment (**ROT**);

Law and disputes – the law of the contract, jurisdiction for disputes and any dispute resolution or arbitration requirements;

Breaches and termination - Incoterms® do not have any rules or breach of contract, sanctions, penalties or termination for breach.

What are the Incoterms® rules?

Incoterms® 2020 are divided into two groups:

Rules for any mode or modes of transport

EXW (EX Works)

FCA (Free Carrier)

CPT (Carriage Paid To)

CIP (Carriage and Insurance Paid To)

DAP (Delivered at Place)

DPU (Delivered at Place Unloaded)

DDP (Delivered Duty Paid)

Rules for Sea and Inland Waterway Transport

FAS (Free Alongside Ship)

FOB (Free On Board)

CFR (Cost and Freight)

CIF (Cost Insurance and Freight).

Each Incoterms® rule is divided into an **A** section for seller's obligations and **B** section for buyer's obligations and an Explanatory Section.

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How to choose the right Incoterms® rules

It is important to ensure that the appropriate Incoterms® rules are chosen for any transaction. Any seller or buyer drafting a contract, or being presented with a contract, should be familiar with the rules. The starting point is to get a copy of Incoterms® from ICC¹.

The 2020 edition is available in 29 languages in print and digital format.

As well as the specific Incoterms® Rules, the Introduction to the 2020 version has guidance on the rules and selection of the appropriate rules. It also has a section with Article-by-Article Text of the rules which explains the obligations of each clause of the rules.

If you are a seller, and wish to ensure that the buyer of goods has the sole responsibility to collect and transport these, then EXW may be the appropriate rule. A buyer who wishes to ensure that goods are delivered to them may want to use DAP (Delivered at Place) or DPU (Delivered at Place Unloaded) although a seller may not wish to have the responsibility for unloading goods. The maximum responsibility to be placed on a seller is DDP (Delivered Duty Paid) and a seller should carefully consider whether it will accept the responsibilities imposed by this rule.

Incoterms® 2010

Existing contract documents may refer to Incoterms® 2010 (or parties may still elect to use the 2010 version). The 2010 rules can still be obtained from ICC.

Care should be taken, however, as there are some substantial differences in the 2020 Incoterms® rules from the 2010 rules. These are explained in Part IX of Introduction to the 2020 rules.

Covering the gaps: Terms and Conditions not in Incoterms®

As noted above, although Incoterms® cover a substantial number of commercial terms for a contract for sale and purchase of goods, there are still many matters that are not covered by Incoterms®.

Contract specific issues such as a description of the goods, price and terms of payment should be

¹ <https://2go.iccwbo.org/catalogsearch/result/index/?p=1&q=incoterms>

clearly specified in up-front documentation, often an order. If Incoterms®, or other terms and conditions, are to be included in the contract, then these must be referenced or contained in an order or quotation before acceptance so that they become terms of the contract. Any special conditions or variations to normal terms also need to be specified and agreed up-front.

There are also, however, many other commercial terms which may need to be covered. These matters may require the drafting and use of detailed terms and conditions. This can be a substantial exercise. However, an international convention, the *United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention)* does provide terms and conditions for many of the matters which may arise, and it may be possible to utilise this Convention rather than preparing detailed terms and conditions in relation to matters covered by the Convention.

What is the Vienna Convention?

The Vienna Convention (sometimes referred to as the **CISG**) was adopted by the United Nations at Vienna, Austria on 10 April 1980. The preamble to the Convention states that countries that are parties to the Convention have agreed to the Convention:

BEING OF THE OPINION that the adoption of uniform rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade.

When does the Vienna Convention apply?

The Vienna Convention may apply to contracts for the sale of goods between parties with places of business in different countries in some circumstances, whether or not it has been adopted by the parties as a part of a contract. The Convention will have the force of law in countries that are parties to the Convention (**Contracting States**). For example, in South Australia, the Convention is given effect by the *Sale of Goods (Vienna Convention) Act 1986* and is attached as a Schedule to that Act.

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Under Article 1(1) of the Convention, it will apply to contracts for the sale of goods between parties with places of business in different States where:

- the countries are Contracting States; or
- the law of a Contracting State is the law of the contract.

Parties may also specifically adopt the terms of the Vienna Convention, in whole or in part, as terms and conditions of a contract.

The Vienna Convention will apply, as noted above, where the law of a Contracting State is the law of the contract. This may be because either the law of that country has been chosen specifically as the law of the contract by the parties or, if no specific choice has been made, the rules of private international law lead to the application of the law of a Contracting State. That can mean that the parties may not be aware that the Vienna Convention applies to their contract.

There are currently over 90 countries that have adopted the Vienna Convention and are Contracting States. These include Australia and many of its major trading partners, including the USA and China. Somewhat surprisingly, perhaps, the United Kingdom is not a Contracting State.

Can the Vienna Convention be excluded?

The application of the Vienna Convention may be excluded, if it would otherwise apply, or the parties may derogate from or vary the effect of its provisions, under Article 6, with some limited exceptions relating to requirements for a contract to be in writing.

Terms and conditions for contracts for the sale and purchase of goods often exclude the Vienna Convention. Careful consideration should, however, be given to excluding or varying the terms of the Convention. As noted below, there may be potential advantages in adopting the terms of the Convention, although some variations may be required.

One reason that traders may seek to exclude the application of the Vienna Convention from terms and conditions for contracts for sale and purchase of goods may be that the terms of the Convention may seem complex and that the concept of applying an

international convention to a private contract may seem somewhat arcane. However, the provisions of the Convention are, in most cases, no more complex than other forms of terms and conditions.

Other legislation

Even if the Vienna Convention is excluded and does not apply to a contract, other laws of the country that is selected as, or determined to be, the proper law of the contract may impose conditions that may not be excluded. In the Australian states and the UK legislation, usually entitled *Sale of Goods Act*, will regulate matters relating to a contract for sale and purchase of goods. In South Australia, the Act is the *Sale of Goods Act 1985 (South Australia)*.

In Australia, also, provisions of the *Australian Consumer Law* contained in a schedule to the *Competition & Consumer Act 2010 (Cth)* may apply and it may not be possible to exclude guarantees implied by the Law.

Under the Sale of Goods Acts implied warranties, but not other terms, may be excluded (Section 54 of the South Australian Act).

If the Vienna Convention does apply in relation to a contract, the provisions of the Convention will prevail over any other law in force in South Australia (including the Sale of Goods Act) to the extent of any inconsistency (*Section 5 Sale of Goods (Vienna Convention) Act 1986 (South Australia)*). Similar provisions exist in other Sale of Goods Acts.

Also, section 68 of the *Australian Consumer Law (ACL)* in Schedule 2 to the *Competition and Consumer Act 2010 (Cth)* states that the provisions of the Vienna Convention prevail over the provisions of Division 1 of Part 3.2 for *Consumer Guarantees* to the extent of any inconsistency. The *consumer guarantee* provisions apply in business to business transactions where a party is a “consumer” because the price of goods or services is less than \$40,000, soon to be increased to \$100,000 from 1 July 2021.

Advantages and disadvantages of the Vienna Convention

As for Incoterms®, applying the Vienna convention, in whole or in part, may reduce the size of contract documents and terms and conditions and the amount

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of time and effort, and cost, in drawing these and the Convention terms are generally well understood and have been legally interpreted, and may be more readily accepted by other parties.

The Convention is, however, quite lengthy (there are 101 Articles, although some are formal matters and not all relate to rules or conditions for contracts for sale and purchase of goods) and it may initially take some time and effort to review the provisions of the Convention to ascertain whether these are appropriate, and whether the Convention should be adopted, or adopted with amendments.

What is covered by the Vienna Convention?

The Vienna Convention does not apply to goods for personal, family or household use, goods sold by auction or by an execution process at law, stocks, shares, investments etc, ships, hovercraft or aircraft or electricity (Article 2).

Nor does the Convention apply where the buyer supplies a substantial part of materials for the manufacture of the goods, or where the preponderant part of the obligations of the seller is the supply of labour or other services (Article 3).

It is impossible in this short article to set out or explain all of the matters covered by the Convention, but, in brief and somewhat incomplete summary, the main areas of subject matter of the Articles of the Convention are:

Part I. Sphere of Application and General Provisions

Chapter I. Sphere of Application (Articles 1 – 6)

– These provisions deal with the application of the Convention, as described above.

Chapter II. General Provisions (Articles 7 – 13)

– These provide for matters relevant to the formation of a contract such as determination of intention, trade usage, place of business, evidence of the contract and need for writing.

Article 4(b) states specifically that the Vienna convention does not have any effect on the passing of property (title) in goods sold.

Part II. Formation of the Contract (Articles 14 – 24) – These Articles deal with the making of offers and acceptance, and revocation of offers.

Part III. Sale of Goods

Chapter I. General Provisions (Articles 25 – 29)

– These Articles deal with a variety of issues: fundamental breach, notice of avoidance, delaying communication, specific performance, modification and termination.

Chapter II. Obligations of the Seller

Article 30 – Delivery of goods and documents by the seller.

Section I. Delivery of the goods and handing over documents (Articles 31 – 34) – Rules for delivery of goods and documents for carriage and insurance.

Section II. Conformity of the goods and third-party claims (Articles 35 – 44) – Conditions for conformity and quality of goods, remedy of non-conformity, examination of goods, freedom from rights, or intellectual property rights, of third parties.

Section III. Remedies for breach of contract by the seller (Articles 45 – 52) – Rights of the buyer on breach of contract by the seller for specific performance, substitute goods, repair of goods, time for performance, remedy of non-performance by the seller, avoidance of the contract by the buyer, reductions of price, refusal to take delivery.

Chapter III. Obligations of the Buyer (Article 53) – Obligations of the buyer to pay the price for goods and take delivery.

Section I. Payment of the price (Articles 54 – 59) – Buyer's obligation to pay the price in accordance with the contract and laws or regulations, determination of price, place and time of payment, examination of goods.

Section II. Taking delivery (Article 60) – Buyer's obligation to take delivery.

Section III. Remedies for breach of contract by the buyer (Articles 61 – 65) – Seller's rights on breach of contract by the buyer, specific performance, time for payment, damages, avoidance of contract.

Chapter IV. Passing of Risk (Articles 66 – 70) – Rules for passing of risk.

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Chapter V. Provisions Common to the Obligations of the Seller and the Buyer

Section I. Anticipatory breach and instalment contracts (Articles 71 – 73) – Suspension of performance in the event of an anticipatory breach, or avoidance for fundamental breach.

Section II. Damages (Articles 74- 77) – Damages for breach (including consequential loss), obligations to mitigate loss.

Section III. Interest (Article 78) – Liability for interest on the payment of price or other sums (no interest rate is specified, and the parties should specify or provide for an interest rate).

Section IV. Exemptions (Articles 79 – 80) – Article 79 is, essentially, *force majeure* exemptions.

Section V. Effects of avoidance (Articles 81 – 84) – Effects of avoidance of the Contract and release of obligations.

Section VI. Preservation of the goods (Articles 85 – 88) – Provisions for preservation and protection of goods in the event of delays and acceptance, or on rejection.

Part IV. Formal Provisions (Articles 89 – 101) – These provisions relate to the formal matters for the Convention and adoption of the Convention by Contracting States, and do not affect the terms of contracts.

Adopting Incoterms® and/or the Vienna Convention

If Incoterms® and/or the Vienna Convention are adopted as terms of a contract for sale and purchase of goods then there will need to be other specific contract terms for essential matters, and for any variations or exclusions to Incoterms® terms and/or the Vienna Convention. These specific terms can be contained in an order, from a buyer, or in an offer document from a seller, or other forms of documentation.

The terms of the contract must be sufficiently clear and certain so as to ensure that there is an enforceable contract.

The basic matters which should be covered are:

- a description of the goods to be sold and purchased. How the goods are described and specified will depend on the nature of the goods, and may be very specific if the goods are, for example, an item or items of particular machinery, or may be specified by description for goods that are sold or purchased in bulk such as commodities;
- the price for the goods, or the method of calculation of the price;
- the currency for payment;
- the method of payment, and any account for payment if by electronic funds transfer, or requirements for any letter of credit or commercial paper;
- the law of the contract (the law of the appropriate country);
- the place for resolution of disputes, and Courts having jurisdiction; and
- the rate of interest on default of payment.
- If Incoterms are to apply, a statement of the appropriate Incoterms® Rule and other information required for the Incoterms® Rule.
- If the Vienna Convention is to apply, a statement to that effect (this may not be necessary if the law of the contract includes the Vienna Convention, but is desirable).
- If the Vienna Convention is to be excluded or varied, a statement to that effect.
- If the contract is an on-going contract for sale and supply of goods, the notice required for termination.

Other provisions which both buyer and seller may wish to include in the contract terms are:

- an exclusion of any implied terms or conditions, to the extent possible in accordance with the law of the contract;
- dispute resolution requirements, particularly mediation as a pre-condition to any Court action; and
- exclusion of damages for consequential loss for breach of contract or other limitations of liability.

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A seller may also wish to include:

- retention of title (ROT) provisions providing that property in goods will remain with the seller until these are paid in full;
- other forms of security for payment; and
- limitation of liability for damages to the replacement or repair of goods, or the costs of replacement or repair, for breaches of implied or express warranties, including for breach of any implied consumer guarantees under the **Australian & Consumer Law** (if these apply) to the extent that these may not be excluded by contract, or by reason of inconsistency with the Vienna Convention.

Priority of contract conditions

If Incoterms® and/or the Vienna Convention are adopted as terms of a contract for sale and purchase of goods, the initial contract documentation should provide specifically for the order of priority of applicable terms and conditions. This order of priority would normally be:

1. The specific offer and acceptance documents and any special conditions agreed by parties;
2. Incoterms® (making sure that the appropriate Incoterms® rules are specified);
3. The Vienna Convention;
4. Any trade terms or usage, unless inconsistent or excluded.

The contract documentation should make it clear that terms having priority will have priority and prevail over terms of lesser priority to the extent of any conflict or inconsistency. This is particularly important where there is any overlap of terms, e.g. in relation to passing of risk which is dealt with in both Incoterms® and the Vienna Convention.

Note, all the terms and conditions and whether Incoterms® or the Vienna Convention are adopted, in whole or part, should be in the initial contract documentation before acceptance of the terms. They can not be imposed later by inclusion on an invoice or some other means (unless specifically accepted by the other party).

Deciding on terms and conditions

As will be apparent from the comments above, there is no simple one-size-fits-all solution to the selection of terms and conditions for contracts for the sale and purchase of goods. Incoterms® and the Vienna Convention may provide some means to simplify the contract documentation, but careful consideration must be given initially to their application and specific terms and conditions and exclusions may be appropriate.

It may well be worthwhile initially for buyers and sellers to take the trouble to develop terms and conditions that are appropriate, and which may, hopefully, be acceptable without the need for, or with minimal, negotiation. DW Fox Tucker can, of course, assist in this process.



MORE INFO

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