The Defining Role of Delivery Conditions in International Trade of Goods by Sea for the Detection of Irregularities and Non-Conformities

Professor **Florin TUDOR**[1]
Lecturer **Ștefania MIRICĂ**[2]

Abstract

It is well known that Incoterms rules have emerged in a context where the need for trade uniformity justifies the decision to introduce a common set of regulations on international trade. Relevant is that these delivery conditions are not mandatory, they only have the role of supporting the actors involved in international trade of goods, but if the parties agree to use them, they become mandatory. Unfortunately, practice shows that, in many cases, they are misinterpreted and used in clear contradiction with the other provisions of the commercial sale contract, in complete disagreement with the recommendations of the International Chamber of Commerce. The inconsistencies in the interpretation of some delivery conditions often encountered in relation to the provisions of the commercial contract for the international transport of goods by sea are surprising. Through this paper, we aim to identify the most important mistakes resulting from practice and somehow try to correct them, so that all these possible irregularities and frauds do not further affect the EU's financial interests[3]*.*

Keywords*: Incoterms, delivery conditions, customs, shipping, irregularities, fraud.*

JEL Classification*:* K19, K29, K39

1. Introduction

The difficulty of interpreting the rules and trade practices in ports required the emergence of a set of rules that would clarify a number of disputes among business partners regarding the execution of sales contracts in international freight traffic[4]. The dynamics of internationalization of trade and the need to simplify contractual clauses facilitated the decision of the representatives of the International Chamber of Commerce in Paris to establish in 1920 a first attempt to codify the most commonly used terms of trade in order to accurately identify the time of risk transfer.

Even if they did not understand from the beginning the benefits of the approach initiated, one by one, the traders took over in their contracts these clauses also recognized by the state authorities when processing administrative acts for establishing import rights or by courts/arbitral tribunals, as they are invested with the settlement of commercial disputes having as object the interpretation of the contractual clauses.

---

[1] Florin Tudor - Faculty of Law and Administrative Sciences, "Dunărea de Jos" University of Galați, Romania, florin.tudor@ugal.ro.
[2] Ștefania Mirică - Faculty of Law and Administrative Sciences, "Dunărea de Jos" University of Galați, stefania_mirica@yahoo.com.
[3] This paper is financed out of the funds of the project unfolded by the "Dunărea de Jos" University from Galati with the title: "Society based on democracy and common values", Financing Contract no. RF 3638/30.09.2021.
[4] I. Iorga, M. Costache, *Contracting Parties in the International Successive Transport*, „Acta Universitatis Danubius. Juridica", vol. 6, no 3/2010, pp. 127-142.

Also motivated by the fact that the share of trade has increased, and the conflict of laws and competences largely justified the improvement of the legislative framework with an element of foreignness, being widely used, the revision of Incoterms rules (acronym for International Commercial Terms) has become a priority[5]. Thus, the first real codification took place in 1936, and its revision in 1953, completed in 1967, revised in 1976 with additions in 1980, 1990, 2000, 2010. The most recent variant dates from 2020[6].

2. Delivery conditions specific to maritime and inland transport

In practice, there is often confusion about the use of rules for the means of transport used in the traffic of goods. There are a number of delivery conditions that are specific to shipping and inland waterways, such as: FAS[7] (Free Alongside Ship - means that the seller fulfills its delivery obligation when the goods are stored on the docks near the ship), FOB (Free On Board - means that the seller has the obligation to deliver the goods to the ship indicated by the buyer in the port of departure), CFR[8] (Cost & Freight - the seller delivers the goods to the ship and pays the transport to the destination) and CIF[9] (Cost, Insurance & Freight - the seller delivers the goods to the ship, takes out an insurance policy and pays for transport to the destination) and which may not be applicable to land transport (road and rail)[10].

However, some of the rules used in land transport may be applicable to maritime and inland waterway transport. The most used are:

- EXW[11] - Ex Works - „*means that the seller delivers when he makes the goods available to the buyer at the seller's premises or in another designated place*";

- DAP[12] - Delivery at Place – „*means that the seller delivers when the goods are made available to the buyer on the means of transport arriving for unloading at the established place of destination. The seller bears all the risks involved in bringing the goods to the said place*";

- DDP[13] - Delivery Duty Paid – „*means that the seller delivers the goods when the goods are made available to the buyer, customs cleared for import on the means of*

---

[5] For details see: B. Audit, *Review of the Convention on Contracts for the International Sale of Goods*, „Revue Critique du droit international prive", Paris, 1997, p. 5; see also P. Kahn, *La vente commerciale internationale, Incoterms*, Colection „Exporter", Editions Jupiter, Paris, 1960, p. 30; D-A. Sitaru, *Răspunderea în contractul de vânzare-cumpărare internațională*, Biblioteca de Economie Mondială, Institutul de Economie Mondială, Bucharest, 1982, p.311.

[6] D. Stojanovic, J. Ivetic, *Possibilities of using Incoterms clauses in a country logistics performance assessment and benchmarking*, „Transport Policy Journal" 98 (2020), https://doi.org/10.1016/j.tranpol.2020. 03.012, 217-220, p. 218; For more details, see https://iccwbo.org/resources-for-business/incoterms-rules/ (accessed 11.11.2021).

[7] The risk of loss or damage to the goods is transferred from the seller to the buyer when the goods are near/ along the ship.

[8] The risk of loss or damage to the goods is transferred from the seller to the buyer when the goods cross the ship's hull.

[9] The risks are transferred from the seller to the buyer in the port of destination.

[10] For details see: D. Mazilu, *Dreptul comerțului internațional*, Special part, 5th ed., Ed. Lumina Lex, Bucharest, 2006, p. 192 et seq.

[11] For more details, see https://iccwbo.org/resources-for-business/incoterms-rules/ (accessed 11.11.2021).

[12] Until the goods are delivered to the port of destination, all risks are borne by the seller.

[13] For more details, see https://iccwbo.org/resources-for-business/incoterms-rules/ (accessed 11.11.2021).

transport arriving at the established place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and is obliged to clear the goods not only for export but also for import, to pay any duty for both export and import and to complete all formalities. customs clearance".

According to the Incoterms 2020[14] rules, for example, in the case of the FOB delivery condition, the seller has the obligation to deliver the goods on board the ship designated by the buyer to the port of shipment agreed by the international contract for the carriage of goods. In other words, the seller has the obligation to prepare the goods on the quays or in the warehouses, to load the goods on board the ship contracted by the buyer and to carry out the administrative export operations.

In accordance with the provisions of the Methodological Rule for the Implementation of the Convention on the Facilitation of International Maritime Traffic (FAL), adopted in London on 9 April 1965 by the International Conference on Facilitation of Travel and Maritime Transport, the obligation to contact and finalize all arrival details for to enter the ship in port, at the operating berth, belongs exclusively to the buyer.

In practice, however, as the buyer is not present at the place of departure, he often delegates to the seller the right to carry out the administrative formalities necessary for the entry of the ship into port. On the one hand, there is the issue of the ship entering an operational berth, an approval granted by the port administration, and on the other hand, there is the issue of the ship being able to enter the port for loading. With regard to the final approval, the master of the vessel, directly or through the vessel's agent[15], shall send the masters the notice of arrival of the vessel. As there is no legal relationship between the seller and the master of the vessel/ship's agent, the approved date and time of entry into port often do not coincide with the transmission of the arrival notice. The ships lose their turn when entering the berth, being forced to resume the approvals for entering the port with the consequence of paying the contrasts[16]. Divergences thus arise between the seller, who is accused of non-performance of the contract due to the non-timely delivery of the goods on board the ship, although the obligation to place the ship in port under the FOB delivery condition rests with the buyer.

The delivery condition EXW (Ex Works) is extremely used, being one of the golden rules in the trade for the buyer. It is assumed that you can identify optimal

---

[14] Available at https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-rules-2020/, (accessed 11.11.2021).

[15] According to the FAL Convention: *Art. 11. - "Before the arrival of a ship, regardless of the flag, in a Romanian port, the ship's master has the obligation to send messages through the naval radiocommunication station to the public authorities, indicating in advance: the estimated time of arrival, important data concerning the ship and its cargo, as well as information on any time changes, if this information may affect the conduct of the check. The master of the vessel must also notify the name and address of the vessel's agent who represents its interests in that port. The ship's agent will obtain, prior to the ship's arrival, the approval of the port administration for the arrival in port and the allocation of the berth/berths. Art. 12. - Upon arrival of the ship, the ship's agent has the obligation to communicate, in writing, to the port administration information regarding the ship and the operations it will perform during the call at the port. Art. 13. - After obtaining the authorization of free sanitary practice, the ship's agent shall take over from the ship's master the declarations provided in these norms and submit them to the port public authorities for verification and approval, in order to obtain the berthing permit confirming the free practice at arrival.*

[16] If the agreed time for loading/unloading the ship is exceeded, then additional costs will be paid to the shipowner depending on the number of days of delay.

transportation solutions so that you can buy the goods at the right price without including additional expenses, such as transportation. The delivery condition is that which allows the seller not to assume risks, transferring them to the buyer after the goods are made available to him on ramps, in a warehouse or at the designated place. The buyer is thus obliged to load his goods on a means of transport to the port, to secure the goods, to obtain the export authorizations, if necessary, to carry out the customs export formalities, to load the goods on the ship.

As in this case, it will be difficult for the buyer to conclude service contracts in another territory, it will require the direct support of the seller to obtain export licenses, identify a carrier, a service provider for handling and mooring goods. , hiring a customs commissioner for the preparation of export formalities, of some port providers. All this makes it difficult for the seller who, being directly interested in selling his goods, accepts such a compromise that does nothing but complicate matters. Not infrequently, the export formalities do not allow the seller to perform them precisely because he does not have the right to do so being a transaction with an EXW delivery condition, mentioned as such in the export customs declaration.

3. Irregularities and non-conformities

In both situations described above, the seller will act exclusively on the risk and expense of the buyer. Otherwise, if the expenses are borne by the seller, the import duties in the country of destination will be affected with serious consequences regarding the collection of customs duties, value added tax, excise duties, etc.

According to Article 1 of the Agreement on the Application of Article VII of the General Agreement on Tariffs and Trade of 12.04.1979 (GATT Agreement)[17] "*The first basis for determining the customs value under this Agreement is" transaction value*". the price actually paid or payable.

If the commercial invoice, which is the basis for establishing the customs value, is agreed and declared the delivery condition EXW, but the expenses, at the place of departure, are made by the seller, the import duties in the country of destination may be affected. According to the customs valuation rules, expenses incurred externally to the border of entry into the country of destination are added to the transaction value. Therefore, if the commercial invoice is not accompanied by other expenses (handling, insurance, etc.)[18], the customs value can be reduced, which is a tax fraud.

---

[17] For more details see the available Agreement at: *https://lege5.ro/Gratuit/he3dknzy/acordul-privind-aplicarea-articolului-vii-al-acordului-general-pentru-tarife-si-comert-din-12041979* (accessed on 11.11. 2021).

[18] See in this sense related to the provisions of art. 57 para. (1) and (2), art. 58 para. (1) The Customs Code of Romania, Decision no. 1444/2014 - Establishment of customs duties by determining the value of imported goods based on the provisions of art. 3 of the Agreement on the application of art. VII to the GATT. Conditions - High Court of Cassation and Justice - Administrative and Fiscal Litigation Section, available at *https://lege5.ro/Gratuit/gm3dmnbqhe2a/decizia-nr-1444-2014-stabilirea-taxelor-vamale-prin-determinarea-valorii-marfurilor-importate-in-baza-prevederilor-art-3-din-acordul-privind-aplicarea-art-vii-al-gatt-conditii?pid=313293924&expression=#p-313293924 (accessed at 11.11.2021)*, by which it was ruled that the establishment of the new customs values based on art. 3 of the Agreement on the application of art. VII of the GATT is erroneous in the conditions in which the importing company submitted supporting documents regarding the real value of the imported goods, documents confirmed by experts and which were

In the latter case, the provisions of Article 1 should be corroborated with those of Art. 8 of the said Agreement which provides, inter alia, for *'adjustments to the actual price paid, or payable, where certain specific elements which are considered to be part of the customs value are borne by the buyer but are not included in the actual price paid; or payable for imported goods.*

Thus, through art. 2-7 inclusive of the agreement are stated "*the methods to be used for determining the customs value, if this determination cannot be made by applying the provisions of art. 1*". At the same time, art. Article 8 of the Agreement also provides for "*the inclusion in the transaction value of certain services provided by the buyer in favor of the seller in the form of certain goods or services, rather than in the form of money*".

It is essential that according to art. 8 of the agreement, the determination of the customs value at the transaction price will be added, if they were paid by the buyer, not including in the price, labor costs, packaging, materials, royalties, assignments, commissions, etc. Also, according to art.8 letter b): „*the value calculated, accordingly, of the following products and services when they are provided directly or indirectly by the buyer without expenses or at reduced costs and used when the production and sale for export of imported goods, in so far as this value has not been included in the actual price payable or payable: i) materials, components, parts and similar elements incorporated in the imported goods; ii) equipment, molds, shapes, and similar elements used in the production of goods imported; iii) materials consumed on the occasion of the production of imported goods; iv) engineering, development, works of art and design, plans and sketches, executed in another country than in the country of import and necessary to produce the imported goods*".

4. Conclusions

It is imperative that when verifying the customs value, as declared by the importer, all the contracts which formed the basis of the transaction, the commercial invoice, the other transport invoices (internal and/or external), insurance, handling (loading/unloading, transshipment/transfer), quality and producer quality certificates, package specifications, export licenses and import authorizations, if applicable, etc.

International sales contracts must be analyzed in the light of commercial transport contracts. Once the Incoterms delivery condition has been identified in the sales contract, the delivery conditions according to the charter-party transport contract must also be identified. There are often inconsistencies between these, for example, the Incoterms clause decided by the parties being FOB, the transfer of risks taking place when the goods have been loaded on board the ship, and the Liner In or Liner Out delivery condition indicates that both loading and unloading are included in the tariff for renting storage space for transport (freight). Therefore, if in addition to the cost of the goods the commercial invoice also indicates the cost corresponding to the loading/ unloading operations in and from the ship, then there is an irregularity that may affect the customs value and therefore the customs payment rights.

In addition, additional documents may be required on board the ship, such as the

presented both during the control and during the consultations required by the Agreement on the application of art. VII to the GATT.

cargo manifest (the document certifying the quantity and quality of the goods on the ship), as well as the title to the cargo (sometimes identified by the bill of lading)[19], an extreme document important because it can provide information on the owner-payer of the goods, often different from the importer, as the holder of the import customs declaration, a situation which avoids imports into territories where there are restrictions, such as quotas, embargoes and so on.

Bibliography

1. B. Audit, *Review of the Convention on Contracts for the International Sale of Goods,* „Revue Critique du droit international prive", Paris, 1997.
2. Convention on the Facilitation of International Maritime Traffic (FAL), adopted in London on 9 April 1965.
3. D-A. Sitaru*, Răspunderea în contractul de vânzare-cumpărare internațională*, Biblioteca de Economie Mondială, Institutul de Economie Mondială, Bucharest, 1982.
4. D. Mazilu, *Dreptul comerțului internațional,* Special part, 5th ed., Ed. Lumina Lex, Bucharest, 2006.
5. D. Stojanovic, J. Ivetic, *Possibilities of using Incoterms clauses in a country logistics performance assessment and benchmarking*, „Transport Policy Journal" 98 (2020).
6. Iorga, M. Costache, *Contracting Parties in the International Successive Transport*, „Acta Universitatis Danubius. Juridica", vol. 6, no 3/2010, pp. 127-142.
7. P. Kahn, *La vente commerciale internationale, Incoterms*, Colection „Exporter", Editions Jupiter, Paris, 1960.

[19] According to the Brussels International Convention of 1924, in which the "Hague Rules" were adopted, the contract of carriage means that contract identified by a bill of lading or another similar document.