



Using Incoterms® to manage the risk of damaged goods in transit

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You are importing goods or raw materials for your construction project. It's not uncommon that goods are damaged during transit; the damage often only being discovered during unloading at the site. Managing the risk associated with damage to goods in transit is a vital task for construction management professionals. In this blog, we look at the benefits (and pitfalls) of using Incoterms® for managing your transit needs.

What are Incoterms®?

"Incoterms®" stands for international trading terms and is a set of 11 abbreviated terms like "EXW" (Ex Works) or "FOB" (Free On Board), all with precise meanings. They provide common rules that can be used in the sale of goods (internationally or within Australia), to allocate responsibility between a buyer and a seller.

These rules and the term "Incoterms" are set by the [International Chamber of Commerce](#) (ICC). The current version of Incoterms® 2020 came into effect on 1 January 2020 and comprise 11 terms.

Incoterms® for any mode of carriage

1. EXW (Ex Works)
2. FCA (Free Carrier)
3. CPT (Carriage Paid To)
4. CIP (Carriage and Insurance Paid To)
5. DAP (Delivered at Place).

6. DPU (Delivered at Place Unloaded)

7. DDP (Delivered Duty Paid)

Incoterms® for sea and inland waterways only

1. FAS (Free Alongside Ship)

2. FOB (Free on Board)

3. CFR (Cost and Freight)

4. CIF (Cost, Insurance and Freight)

Why not simply say “FIS” (Free Into Store) instead?

Within Australia, it is common to use general phrases like “FIS” which is generally understood to mean that the seller will deliver the goods into the buyer’s store.

General terms like this are vague in relation to other responsibilities of the buyer and the seller because they do not specify:

- the exact delivery location where transfer of risk occurs;
- the mode of transport being used, including if there is a mix of mode of transport; or
- the party responsible for unloading, among other issues.

Using Incoterms® deals with risk during transit

By using one of the 11 abbreviated Incoterms®, it is possible to specify which party is responsible for a list of requirements which include:

- Location of delivery;
- Where transfer of risk occurs;
- Packaging and marking;
- Responsibility for loading and unloading;
- Costs for the contract of carriage;
- Responsibility for arranging insurance cover (to a very limited extent);
- Responsibility for export and import clearance; and
- Responsibility for supply chain security measures.

Notably, transfer of title is **not** provided for with Incoterms®. This is something you need to be on top of!

4 Common pitfalls when using Incoterms®

1. Force of habit – not reviewing versions of your contracts and purchase orders

If your purchase order terms and conditions or your standard contract for goods has not had a sanity check in a while, you may not be using the new/latest version of Incoterms®. By force of habit, you may also be copying and pasting an old contract for repeat purchases.

Historical Incoterms® like DDU (Delivered Duty Unpaid) and DAF (Delivered at frontier) are two examples from the 2000 version which were replaced in the 2010 revision. The risk is that you may be using outdated Incoterms® which may lead to a misunderstanding or dispute between the parties.

Disputes are easily avoided if there is a regular review of the Incoterms® contained in your contracts and purchase orders to ensure they state the correct 3 letter term and the year of the version of Incoterms®. For example, the previous version of the rules is Incoterms®2010 but the latest version (as at writing this article), is Incoterms®2020

2. Wrong or “fail” when choosing Incoterms®

Simply stating the word Incoterms® is pretty much a fail. One of the 11 terms stated above needs to be included (don't forget the year too! - Incoterms®2020).

An example of a costly consequence of this failure is not being aware of a responsibility to pay customs and duties upon arrival of the goods into Australia beforehand.

Not sticking to your side of the responsibilities after stating the Incoterm® is also a “fail”.

For example, if you agree to use the EXW term, your responsibility as the seller does not include loading the goods onto the buyer's truck. If you do the loading, then you are taking on additional risk of accidental damage that is not within your responsibility

It is also a “fail” if the terms used for sea and inland waterways only are selected for a shipment that is travelling by road or air. It is safer to use the terms that are for all transport modes, like CIP or FCA for example.

If you chose to use one of the terms specified for sea or inland waterway, it is advisable to take note of whether the goods are being containerised. The terms FOB, CIF and CFR are used where the handover is alongside a ship or onboard a ship, so using them for containerised goods is not recommended. The party exporting the goods has the responsibility of looking after the goods until they are alongside the ship or onboard the ship (depending on the term). Once goods are

containerised, it is harder to deal with who to chase for damage.

3. Inadequate insurance

When using the Incoterms® CIP or CIF, it is important to check whether the insurance cover is adequate. The seller will typically provide the minimum cover required for the goods and it is up to the buyer to ensure that the goods being transported have adequate insurance cover.

If you are the buyer and you have precious cargo at stake, this type of insurance can be easily arranged; or it may be more convenient to speak with the seller and negotiate with them to raise the level of cover for your shipment.

4. Not differentiating between transfer of risk versus transfer of title

Transfer of risk and transfer of title occur at different stages in a contract for goods.

Transfer of risk means the point in time when one party is no longer responsible for anything that happens to the goods which includes during transportation, storage and any damage at those times.

Transfer of title means the point in time when the buyer becomes the full legal owner of the goods. This means that the seller no longer has any rights to the goods

The risk of loss or damage to the goods passes from the seller to the buyer at different stages depending on the Incoterms® chosen. For example, in EXW, risk passes from the seller to the buyer when goods are ready for despatch. This does not mean, however, that title to the goods has transferred to the buyer.

Incoterms® deal with risk during transport between buyer and seller but do not deal with transfer of title.

The contract of sale is the appropriate place for the parties to agree on the issue of title.

Get help

Wambeti Legal can assist you with any aspect related to risk during transit:

- Providing advice on Incoterms® that are appropriate to use in your tender for goods or goods and services;
- Reviewing your existing terms and conditions and templates to ensure that you have the appropriate Incoterms® for your needs; and

- Minimizing risk in your tender proposals and in your contracts.

Contacting Wambeti Legal

[0423 825 235](tel:0423825235)

hello@wambetilegal.com.au

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