Delivery, Transfer of Risk & Transfer of Title

The International Chamber of Commerce (ICC) created a generally accepted, readily understandable set of terms called Incoterms 2010. These terms defines the responsibilities of both the buyer and seller in the various transportation options. Incoterms 2010 is not a body of law. It is an internationally agreed upon protocol for understanding who pays for what, when risk transfers, and where the goods are to be delivered. **Incoterms do not identify where the transfer of title occur.** Incoterms cover the fundamentals terms of the movement of the cargo: <u>Documentation</u>; who is to arrange for the documentation, <u>Cost</u>; who is responsible for the various costs involved, <u>Control</u>; who possesses control of the goods at any point in the journey and <u>Liability</u>; who is exposed to the economic loss if the cargo is damaged.

DELIVERY UNDER INCOTERMS

In global trade, "delivery" refers to the seller fulfilling the obligation of the terms of sale or to completing a contractual obligation. "Delivery" can occur at any point in the physical movement of the cargo. Incoterms describe the seller's responsibility to "deliver the cargo to a specified or 'named' place". When the cargo is delivered to that 'named' place, responsibility for the cargo is on the buyer.

PASSING OF RISKS UNDER INCOTERMS

Incoterms provides that the risk of loss or damage to the goods, as well as the obligation to bear the costs relating to the goods, passes from the seller to the buyer when the seller has fulfilled his obligation to deliver the goods.

TRANSFER OF TITLE

Transfer of title occurs when the parties wish it to occur. A statement as to transfer of title should be included in the body of the contract and commercial invoice. Transfer of title affects the parties' rights in the event of total or partial loss and damage or destruction of the goods. Once transfer of title has occurred, the buyer may be precluded from rejecting the goods despite valid complaints of quality, quantity or description. When buyer acquires titles, the seller can sue the buyer for non-payment. Problems may arise in commercial agreements if the contract does not specify when the transfer of title occurs. A good example of this is what happens if "delivery" occurs but the buyer breaches the contract by not paying the contract price. In such an example, problems may arise with regard to who is the legal owner of the goods. **Romalpa clause.** A Romalpa clause is a title retention clause, which serves to separate the passing of title, and risk of loss and which provides that until payment is received, title remains with the seller. An example of a Romalpa clause; '*Risk of loss and damage shall pass to the Buyer upon delivery. Title shall pass to the buyer upon payment in full*'.

INCOTERMS AND DOMESTIC FREIGHT TERMS

Incoterms should not be confused with domestic trade terms. The domestic terms are under the Uniform Commercial Code adopted by each state. The following chart offers guidance as to the differences.

DOMESTIC	INTERNATIONAL
Transfer of title to the goods presumed by use of term but can be negotiated by seller and buyer.	Transfer of title not specified by use of the Incoterms; should be stated separately.
Risk and title transfer are presumed to transfer simultaneously but can be negotiated by seller and buyer	<u>Risk transfer based on Incoterms selected</u>; title transfers based on agreement between seller and buyer.
Five different terms; F.O.B. is the most commonly used term with specified locations stated, and modifications.	Thirteen different terms are possible with specified locations stated, i.e. ex-works seller's warehouse.
Based on Uniform Commercial Code adopted by each state, becoming a state law	An agreement adopted by the International Chamber of Commerce then incorporated into seller and buyer AGREEMENTS

INCOTERMS

	CARRIAGE	RISK TRANSFER	COSTS
EXW	Carriage to be arranged by the buyer	Risk transfer from the seller to the buyer when the goods are at the disposal of the buyer	Costs transfer from the seller to the buyer when the goods are at the disposal of the buyer
FCA	Carriage to be arranged by the buyer or the seller on the buyer's behalf	Risk transfer from the seller to the buyer when the goods have been delivered to the carrier at the named place	Costs transfer from the seller to the buyer when the goods have been delivered to the carrier at the named place
FAS	Carriage to be arranged by the buyer	Risk transfer from the seller to the buyer when the goods have been placed alongside the ship	Costs transfer from the seller to the buyer when the goods have been placed alongside the ship
FOB	Carriage to be arranged by the buyer	Risk transfer from the seller to the buyer when the goods pass the ship's rail	Costs transfer from the seller to the buyer when the goods pass the ship's rail
CFR	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods pass the ship's rail	Costs transfer at port of destination, buyer paying such costs as are not for the seller's account under the contract of carriage
CIF	Carriage and insurance to be arranged by the seller	Risk transfer from the seller to the buyer when the goods pass the ship's rail	Costs transfer at port of destination, buyer paying such costs as are not for the seller's account under the contract of carriage
CPT	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods have been delivered to the carrier	Costs transfer at port of destination, buyer paying such costs as are not for the seller's account under the contract of carriage
CIP	carriage and insurance to be arranged by the seller	Risk transfer from the seller to the buyer when the goods have been delivered to the carrier	Costs transfer at port of destination, buyer paying such costs as are not for the seller's account under the contract of carriage
DAF	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods have been delivered at the frontier	Costs transfer from the seller to the buyer when the goods have been delivered at the frontier
DES	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods are placed at the disposal of the buyer on board the ship	Costs transfer from the seller to the buyer when the goods are placed at the disposal of the buyer on board the ship
DEQ	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods are placed at the disposal of the buyer on the quay	Costs transfer from the seller to the buyer when the goods are placed at the disposal of the buyer on the quay
DDU	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods are placed at the disposal of the buyer	Costs transfer from the seller to the buyer when the goods are placed at the disposal of the buyer
DDP	Carriage to be arranged by the seller	Risk transfer from the seller to the buyer when the goods are placed at the disposal of the buyer	Costs transfer from the seller to the buyer when the goods are placed at the disposal of the buyer

Risk is often managed through using a Marine insurance policy. A Marine insurance policy usually includes a 'Warehouse to Warehouse clause'. The plain meaning is insurance coverage on cargo continues in force during the ordinary and customary course of transit to the final destination. Transit does not begin until the goods are properly packed for export. Insurance remains in force for 15 days after discharge (30 days if the destination is outside the limits of the port of discharge while awaiting normal clearance for transit to the final destination). Anyone who has an insurable interest in a cargo shipment (i.e., anyone who would suffer a loss if the cargo were damaged or destroyed or who would benefit from the safe arrival of the cargo) may insure cargo. Marine Insurance covers in the event of loss or damage to goods due to a covered peril insured against while at risk under the policy. Marine insurance indemnifies the holder regardless of the carrier limits of liability (ocean carrier $500 per package, International air carriers, $9.07 per pound, Domestic Air carriers $0.50 per pound). Incoterms, insurable interest and transfer of title all may not coincide with the intended condition of the sales transaction. In addition, risk of non-payment of the invoice value is an important consideration. Consider the following recommendations: Measurement and recognition of risk are vital steps in a supply chain. Incoterms must be clearly stated within or on the sales invoice/contract. Keep in mind that some Incoterms are incompatible with the selected mode of transportation. Insure your cargo. Our Cargo Insurance policy automatically covers approved goods under the so-called 'warehouse to warehouse clause' to protect your investment all the way to destination. If you insure under your own policy, discuss the coverage limitations with your insurance agent. We also recommend that the choice of Incoterms recognize this. The cargo is inspected at time of delivery at destination to check for any obvious in-transit damage. That title transfer is specifically spelled out in the contract. That consideration is given to credit insurance to protect lack of payment due to an unreasonable or unfair dispute with your customer. ** Letters of Credit can be quite useful in controlling your risk of payment. Discuss the incorporation of Letters of Credit into your Sales order with your Banker. **This review of title, risk and delivery is not legal advice. M.E. Dey & Co., Inc understands the above to be accurate. However, it represents only a summary of our understanding of three very complex issues. Contact your attorney for proper legal guidance in this important issue.