

DOI: <https://doi.org/10.34069/AI/2021.46.10.22>

How to Cite:

Matvieiev, P., Klepikova, O., Kornuta, L., Abbaszade, M., & Kuznietsov, S. (2021). Public and private economic and legal interests in the field of international transport in the latest edition of Incoterms. *Amazonia Investiga*, 10(46), 217-224. <https://doi.org/10.34069/AI/2021.46.10.22>

Public and private economic and legal interests in the field of international transport in the latest edition of Incoterms

Публічні та приватні економіко-правові інтереси у сфері міжнародних перевезень в умовах останньої редакції Incoterms

Received: September 18, 2021

Accepted: November 1, 2021

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Abstract

The article examines the importance of maintaining a balance of public and private interests when using "autonomy of will" in international trade. The relevance of this study is because the field of international transport is dynamic (closely related to the economy), the sphere of public activity that requires constant monitoring and updating. Purpose: to investigate the process of implementation of economic and legal tasks in the field of international transportation, taking into account the entry into force of the new version of the Code of Trade Rules - Incoterms. Methodology: logical-semantic, historical, analytical, comparative analysis, and synthesis. Research results: such foreign economic activity as international transportation is considered, the basic conditions of Incoterms 2020 terms concerning international transportations and conditions of realization by contractors of the economic-legal interests through observance of these conditions are allocated and analyzed in detail. The work can be used in preparation for the conclusion of a foreign trade agreement.

Анотація

У статті аналізується важливість дотримання балансу публічних та приватних інтересів під час використання "автономія волі" в сфері міжнародної торгівлі. Актуальність цього дослідження обумовлена тим, що сфера міжнародних перевезень це динамічна (тісно пов'язана з економікою), сфера громадської діяльності, яка потребує постійного моніторингу та оновлення. Мета роботи: дослідити процес реалізації економіко-правових завдань у галузі міжнародних перевезень з урахуванням набрання чинності новою редакцією зведення торгових правил – Інкотермс. Методологія роботи: логіко-семантичний, історичний, аналітичний, порівняльний аналіз, та синтез. Результати дослідження: розглянуто такий зовнішньоекономічний вид діяльності, як міжнародні перевезення, виділено та детально проаналізовано базові умови термінів Інкотермс 2020, які стосуються міжнародних перевезень та умови реалізації контрагентами своїх економіко-правових інтересів за допомогою дотримання цих умов.

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Keywords: international transportation, international trade, legal regulation, Incoterms.

Робота може бути використана в процесі підготовки до укладання зовнішньоекономічної угоди.

Ключові слова: міжнародні перевезення, міжнародна торгівля, правове регулювання, Інкотермс.

Introduction

Foreign trade is a compelling, fundamental regulator of foreign economic relations, and the most significant element ensuring the existence of world trade is the international transportation of goods. International transport increases globalization, guarantees the movement of imported and exported goods across the border, affects public and private economic and legal interests.

The private interest in the field of international transport is a legally protected interest that belongs to individuals and legal entities in the process of manifesting public interest. This is a complex, multidimensional process necessary to create and maintain a legal, democratic, social, environmentally friendly world community.

The organization and implementation of international transport is a multi-layered area, in which it is necessary to regulate many emerging public relations:

- preparation and conclusion of a foreign economic operation;
- organization of import and export;
- documentation (including certificates of confirmation of the quality of goods);
- transport conditions of an international contract of sale, interaction with transport intermediaries (transport forwarding);
- customs clearance of goods;
- the process of customs control, and;
- the development of international transport corridors.

A characteristic feature of the legal regulation of international transport is that the primary issues in this area are resolved in international agreements (transport conventions), which are uniformly and standardized all regulated.

Additionally, the legal peculiarity of international transportation of goods is that contracts for international transportation are concluded and executed based on conflict of laws principles. Consequently, the shipment of goods is regulated by the laws of the country of the sender and the receipt – by the law of the country

of destination. Otherwise, the law of the carrier or the court takes precedence. A special place in the legal regulation of international transport belongs to the Incoterms set of rules, which contains the name and interpretation of the central terms used in international trade. However, proceeding from the fact that the International Chamber of Commerce has not indicated the legal nature of Incoterms, the question of the place of Incoterms in the system of national legislation is the right of each state separately. Regarding the dynamism and active development of international trade, from January 1, 2020, a new version of Incoterms came into force, which took into account the latest trends.

The level of globalization, world economy, and trade is directly dependent on international transport. High-quality regulation and organization of international transport have a colossal effect on public and private economic and legal interests. In the article, the author examines the existence of a universal definition of the concept of international transport, considering the regulatory and doctrinal approaches, highlights the characteristic features that determine the procedure for the legal regulation of foreign economic transactions. Since counterparties for international transportation, as a rule, are representatives of different states, use different national legal systems, the work analyzed the need for standardization and unification of legal relations in the field of international transportation. This will increase legal certainty and contribute to the full realization of public and private interests. The conducted research allows us to conclude that the most important document on the universalization of international trade relations is Incoterms. The principal international commercial terms (which regulate the process of international transportation) are considered and analyzed. Particular attention is paid to the document of title – the bill of lading and innovations regarding its use in Incoterms 2020. Purpose of the work: to review such foreign economic activities as international transportation, to determine how public and private interests in this area are realized, to study

the process of implementing economic and legal tasks in the field of international transportation, taking into account the entry into force of the new edition of the set of trade rules - Incoterms.

The object of research is international transportation.

The subject of the research is public relations that arise, transform and end during the implementation of public and private economic and legal interests in the field of international transportation in the context of the latest version of Incoterms, as well as international treaties and other sources of law in the field of international transportation.

Theoretical Framework or Literature Review

The scientific and theoretical basis of the topic under study is the works of scientists, theorists, and practitioners in the field of international transport.

Thus, Ermolaev and Sivakov (1999), international transportation is understood as a process when a cargo during transportation crosses the border of a state and moves through the territory of more than one state.

Meanwhile, Boguslavsky (2005) notes that international carriage of goods is the carriage of goods between two or more countries, which is considered fulfilled when the conditions established by these states in international treaties are implemented. In turn, Zinchenko (2020) rightly remarks that this definition applies only to some international transportations since, in some cases, international transportations are not subject to international agreements of the states through whose territory this transportation is made (as these agreements are simply absent). At the same time, transportation retains its international status because goods are transported through the territory of two or more countries.

Hence, we draw attention to the importance, when forming conceptual approaches to the definition of the concept, to cover all the features belonging to the international carriage of goods.

Contractual relations on international transport are always complicated by a foreign element.

Boguslavsky (1999) points out that the parties are not obliged to immediately establish which national law all procedures will be regulated, this can be done later. And in practice, this is the case.

But, if in the future the agreement is not implemented, then the question of the applicable law will be decided under the conflict of laws rules.

Analyzing current trends in the unification of international transport, Ramberg (2001) says that it is necessary to create a universal convention and secure the unlimited liability of the carrier.

Martin draws attention to the need to "take actions to strengthen and combine different instruments, in particular the symbiosis of traditional techniques such as "international convention" (as an example of hard law) and techniques with a more modern approach, such as "typical law" (as an example of soft rights) (González Martín, 2011).

The sources of soft law in the field of contractual relations should also include unified customs, typical contracts, guidelines for drafting documents, recommendations of international organizations.

The rules of Incoterms are widely applicable in the world community "such terms, having become a custom in international trade, have standardized and systematized the procedure for concluding transactions in international trade". These rules are intended to prevent misunderstandings caused by different interpretations of the terms of the contract. Rosenberg claims that this is determined by the fact that, firstly, this set of rules was drawn up by a non-governmental organization – the International Trade: secondly, the document, in the process of long-term successful application, not only underwent significant changes following technical progress, before of all - the processes of transportation and processing of goods but also received recognition from the business circles of many countries (Rosenberg, 2007).

Methodology

The methodology includes logical-semantic, historical, comparative, system-structural, analysis, and synthesis methods.

Thus, the logical-semantic technique was used to study the meaning and essence of the conceptual apparatus of the subject of knowledge, in particular, the definition of the content of the concepts of "international transportation", "public and private interest", "Incoterms", and "bill of lading".

Further, the historical method is utilized to understand the retrospective development of the sphere of international transportation, in particular, the conditions for the adoption and transformation of legal acts regulating this area.

During the consideration of the legal regulation of the implementation of international transport, the application of conflict of laws, the legal status of Incoterms in different countries, a comparative method was applied. Also, this method was used in the process of studying the distinctive features of the latest edition of Incoterms from the previous ones.

Finally, the systemic-structural method is one of the most common mechanisms of cognition and is closely related to analysis and synthesis. The system is understood as a set of material or ideal objects, the interconnection of which determines the presence of system properties that are not characteristic or are absent in the constituent elements of the system. To emphasize the difference between the emerging properties and the properties of individual elements, the scientific community calls them emergent characteristics.

Results and Discussion

Despite the tendency to harmonize the legal systems of individual states, significant differences remain between them, and therefore, for standardization, unification, and legal certainty in the field of international cargo transportation, many interstate agreements are constantly being adopted and optimized.

Most often, legal regulation is due to the type of transport through which the cargo is moved and on the territory of which states the transportation is carried out. And the definition of the concept of international transport is contained in separate transport conventions.

The Convention for the Unification of Certain Rules for International Carriage by Air defines international carriage as any carriage in which, as determined by the parties, the place of departure and destination, regardless of whether there is an interruption in carriage or transshipment, located either on the territory of two states-parties or the territory of the same state-party if the agreed stop is provided for in the territory of another state, even if this state is not a state-party. Carriage between two points on the territory of the same State Party without such a stop shall not be considered for this Convention as international (European Union, 2001).

Following the International Convention for the Unification of Certain Rules on the Carriage of Passengers by Sea, 1961, the international carriage is the carriage of passengers or goods, the place of origin of which is in one state, and the end in another, or they are in one state, but on the way, they cross its boundaries (K.H.N., 1961).

It is not connected with the fact of crossing the border of another state, the dominant element is the very fact of the beginning of transportation. Sadikov explains this by the fact that the start of transportation is sufficient, and the actual delivery across the border may not take place due to the loss of the cargo.

Based on the provisions of regulatory documents and positions that are presented in the doctrine, we conclude that international transportation of goods has such distinctive features: the presence of a foreign element, crossing the state border, such transportation of goods is most often regulated by international sources of law.

In general, private international law is characterized by the presence of four forms of sources:

1. The domestic legislation.
2. International treaties.
3. International and trade customs.
4. Litigation and Arbitration Practice.

Some scientific works contain a more detailed classification of sources of regulation of international transport, namely: international treaties on the organization and regulation of the transport process and acts of international transport organizations; the internal legislation of the states through which the transport corridors pass; international transport and trade customs (Hellmann, Balashenko, & Nagnibedi, 2015).

An exceptional source of international transport law is a set of rules for the interpretation of international trade terms – Incoterms. It is an influential legal instrument created by the International Chamber of Commerce in 1936. Since trade is a dynamic field of activity, it is influenced by scientific and technical, digital progress (the use of mobile, electronic, facsimile, and other means of communication; the use of new technology opportunities in the delivery of goods; analysis of the practice of controversial issues in the execution of the contract). Incoterms were edited and updated respectively in 1953, 1967, 1976, 1980, 1990, 2000, 2010, and finally in 2020 (International Chamber of Commerce,

2020). The latest revision came into force on January 1, 2020, and contains the developments of the previous ones. However, the counterparties retain the right to use the set of Incoterms rules in the edition of previous years, taking into account that the contracting parties indicate this in the contract, otherwise, the courts will apply the edition of the year when the contract is concluded (Anufrieva, 2002).

We take into account that the International Chamber of Commerce, compiling Incoterms, did not provide it with a single legal status for the entire world community and, therefore, states have the right to differently determine the place of this document in the system of national law. For example, in Spain, Incoterms has a high legal force and is enshrined as a legislative act. In Germany, France, Austria, Incoterms is a legal custom, but in Poland, it is a trade custom.

Incoterms 2020 contains a beneficial novelty – a separate chapter on the use of these rules. It specifies what is the subject of Incoterms, how to choose the right edition, and how to reflect in the contract the agreement regarding the application of Incoterms of the corresponding edition (Aristarkhov, 2020).

Incoterms 2020 contains 11 terms that can be classified according to different criteria.

Following the fundamental terms of delivery of products, in particular, the distribution of responsibilities between the seller and the buyer: Group E (shipment) – EXW; group F (main carriage paid by the buyer) – FCA, FAS, FOB; group C (main carriage paid by the seller) CFR, CIF, CIP, CPT; group D (delivery) DAP, DPU, DDP and DAT refer to 2010.

In the edition of Incoterms, DAT (delivery to the terminal) was excluded, but DPU (delivery with unloading) appeared. Today, under the terms of DAT, there can be any unloading location, including the transshipment terminal.

Depending on the need to conclude a contract of carriage by the seller or the buyer, all terms can be divided into the following groups:

- 1) The contract of carriage is drawn up by the buyer (EXW, FCA, FAS, FOB).

In the international community, historically, it has been the responsibility of the buyer to conclude a contract of carriage. According to international trade statistics, 40% of products worldwide are shipped on FCA (Free Carrier /

Free Carrier) terms. Under such conditions, it is considered that the seller has fulfilled his obligations under the foreign trade contract when the products are loaded onto the appropriate vehicle at a predetermined place and these products have passed through customs as part of the export procedure (export duties and taxes are also paid, if necessary). At the same time, it is the responsibility of the buyer to carry out import customs procedures.

It is a common understanding that following the use of FOB terms, the buyer is obliged to nominate the vessel. But the contract may provide that the contract of carriage is concluded by the seller on behalf of and at the expense of the buyer, and the seller can act as a representative of the buyer or a third party to the contract of carriage.

- 2) The contract of carriage is drawn up by the seller at his own expense (CPT, CIP, DAP, DPU, DDP, CFR, CIF).

Class C rules clearly stipulate that the contract of carriage is drawn up on the basis of "normal" conditions for this type of goods. Considering that an inappropriate choice of the type and method of transportation can cause death or damage to the thing, it is considered that the seller is responsible for the improper performance of the obligation. The basic conditions of the terms of group D provide for the absence of the above obligations since all risks until the delivery of the goods to the buyer are assigned to the seller. Incoterms 2020 states that the seller must comply with all safety requirements during transportation.

Terms from the first group do not oblige the seller to hand over the transport documents to the buyer. Since subject to EXW, the goods are collected at the seller's location, it is the buyer's responsibility to provide proof of acceptance of delivery. The rest of the terms require the seller to provide the buyer with a transport document. The obligation of the seller to provide the buyer with a document that will make it possible to accept the goods upon delivery - these are the basic conditions of the terms of group D. But group C contains two types of terms, CPT and CIP – transport documents are provided only on request, CIF and CFR – to provide a mandatory transport document the seller's action.

The dominant difference between CIF and CFR is that the seller has an obligation at his own expense to insure the cargo in the interests of the buyer and in the future to transfer the contract

and policy. The main advantage for the buyer is insurance against the risk of loss and damage to products during transportation (Alta soft, 2020).

The use of CIF, CFR means that the seller will be the shipper in all shipping documents. In this case, the seller is comfortable with issuing a letter of credit, cooperating with banks and fiscal authorities. In terms of CIF, CFR, a shipping document is most often a bill of lading.

Initially, the bill of lading was only a receipt confirming the receipt of the goods on board the ship, and only at the end of the 18th century, it received the status of a document of title (Lickbarrow v. Mason, 1787). Currently, a bill of lading is defined as a security in the form of a document of title, which fixes the fact of the conclusion of an agreement for the carriage of goods by sea and the acceptance of the goods by the carrier, certifying the right of its holder to dispose of the goods and receive this cargo after the completion of transportation (Du Toit, 2005). Depending on the place where the cargo is handed over to the carrier, there are two types of bill of lading: shore and side. As a general rule, the bill of lading is only proof of acceptance of the cargo, and only if the goods are loaded onto a certain vessel, the carrier issues an onboard bill of lading to the shipper, which states that the goods are on board a clearly defined vessel or vessels and the date of loading is fixed. This classification is of enormous importance in terms of the use of letters of credit during settlements. The shore bill of lading for the bank is not the basis for payment.

The new version of the Incoterms 2020 rules in the FCA delivery terms contains an innovation in the interests of the seller, in particular, now its use makes it possible to agree that the buyer has the right to oblige the carrier to issue a sea bill of lading with an onboard record to the seller. This will allow the latter to fulfill the terms of the open bank letter of credit in a shorter time.

In connection with the foregoing, the bill of lading must contain information that the goods were loaded on board the named vessel at the port of loading indicated in the letter of credit, in the form of a pre-printed text in the form or an onboard note with the fixation of the date the cargo was placed on board. It is important to note here that if the bill of lading refers to the "alleged vessel" or similar with the name of the vessel, then it is required to affix a side note on it indicating the date of shipment and the name of the vessel to which the goods were actually shipped.

Also, depending on the number of the holder's rights, a valid and "canceled" bill of lading should be distinguished, which cannot perform the function of a transport document, because the carrier no longer has cargo.

By the type of carrier, there are such bills of lading: Liner bill of lading or oceanic. The voyage is issued by the shipping company or on its behalf and covers transportation on ships plying regular routes following the accepted schedule (Makarova, 2009). Loading, stacking, and unloading of goods must be carried out by a loader. If the carriage of goods is carried out across the ocean / sea, as a rule, outside the country of origin, then this bill of lading is referred to as the Ocean bill of lading.

Concerning the duty of export / import clearance, all terms can be differentiated into:

- 1) Export and import clearance is the responsibility of the buyer, and these are the terms of the EXW term. Thus, the seller is only obliged to place the goods at the disposal of the buyer. If the buyer is deprived of the opportunity to issue export and customs clearance of products, then it is advisable to use the basic conditions – FCA.
- 2) Export and import clearance are the responsibility of the seller and these are the terms of the DDP term. Such delivery conditions are most beneficial for the buyer since all possible costs during the border crossing are borne by the seller, in particular, customs clearance and payment of taxes, transit through the territory of another state, payment of customs warehouses in case of delays in clearance. In the sphere of the buyer's duties, only the unloading of the goods upon arrival (if it is not transferred to the seller within the framework of the concluded transaction).
- 3) Export clearance is the responsibility of the seller. Import clearance is the responsibility of the buyer. This group contains all the other 9 terms (Alta soft, 2020). In this case, the conditions are quite fair, since the buyer and the seller are located in different states, in connection with which it may be quite difficult for the seller to carry out import clearance, and vice versa. Failure to comply with the seller's export clearance obligations, which is an "absolute" obligation, is considered by the courts to be a breach of contractual obligations (Great Elephant Corporation v Trafi gura Beheer B.V. and Others, 2013).

The practice of international transport, in general, contains rules on the assistance of the parties in the implementation of import and export clearance, and this is a direct manifestation of the principle of “assistance of the parties”, which is important in civil law, also manifests itself in the mutual prompt provision of the necessary information to each other for the implementation of their obligations (Tordia, & Savchenko, 2016).

We draw your attention to the fact that the party that provided assistance has the right to demand reimbursement of its costs, which are associated with the failure to provide such assistance by the other party, for example, failure to arrive at the specified time and place.

A characteristic feature of the regulation of international contractual relations is the observance of the *lex voluntatis* principle – autonomy of will. It lies in the fact that the parties are free in their right to agree on which legal system to regulate their relationship. It is obvious that even in economic and legal relations, which are complicated by a foreign element for economic development, economic entities need economic freedom, which states can only offer in a limited form.

However, we draw attention to the fact that the collisional binding “autonomy of will” does not apply if its application would contradict “social principles”, morality, “public order. The reference to the need to strike a balance between private and public interest is a reasonable constraint on the use of the autonomy of will principle.

A public policy warning (*ordre public*) is appended to each conflict of laws rule and obliges it to be read and applied in conjunction with the conflict of laws rule. Public order is fundamental economic-legal interests that are of the highest degree of public and public importance, belong to large social groups or society as a whole (for example, sanitary and epidemiological safety).

Acts (that are contrary to public order) affect the sovereignty and security of the state, constitutional rights, and freedoms of individuals. The violation of the clause on the observance of public order leads to more serious consequences than the discrepancy between the national laws of the contracting parties.

Conclusions

1. International trade relations are a centuries-old, integral part of the economy. The basis for the implementation of interstate trade is the international transportation of goods. In international law, there is no unified definition of international transport. The existing definitions are associated with the mode of transport by which the cross-border movement of goods is carried out. Based on characteristic features, the doctrine contains such an understanding that international transport is the movement of goods by a vehicle, in which, following an international treaty or foreign economic contract, the cargo crossing the territory of one or more states is envisaged. The fact of crossing the border is not mandatory due to the potential probability of loss of cargo before crossing the border, international transportation affects public and private economic and legal interests.
2. Significantly unifies, standardizes, and simplifies the process of international transportation a set of rules for the use of international trade terms called Incoterms. The last revision entered into force on January 1, 2020. Contains 11 terms, which are divided into 4 groups depending on the moment of transfer of obligations from the seller to the buyer under the basic terms of delivery. Incoterms regulate the distribution of obligations and financial costs: payment for transportation, unloading of goods, export, import clearance, customs clearance, payment of taxes and duties, insurance of damage or loss of cargo, as well as the moment of transfer of risks.
3. Such standardization greatly simplifies the process of foreign trade, increases the level of legal certainty, creates uniform regulation rules, reduces the number of disagreements (which are objectively present due to differences in the national legal systems of counterparties) and litigation. The entry into force of the new editions of Incoterms for counterparties leaves the opportunity to use the previous editions of Incoterms, however, with the obligatory fixation of this in the agreement.
4. An important innovation in Incoterms 2020 in the economic and legal interests of the seller. In particular, the FCA delivery basis has been transformed, now, under its terms, the parties can agree that the buyer can instruct the carrier to issue an on-board bill of lading. This enables the seller to fulfill the

terms of the letter of credit as soon as possible.

5. The principle of *lex voluntatis* – the autonomy of will (in international law, the application of the law of the state that the parties themselves choose) – should be applied with strict observance of public interests, which in turn affect the constitutional rights and freedoms of citizens, the interests of large social groups or society as a whole.

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