

Incoterms 2010: a consideration of certain implications of the Amendments to the Traditional Incoterms 2000

Portia Ndlovu^{*}

Abstract

One of the prominent features of maritime commercial activity is the use of Incoterms. Incoterms exist as a result of the International Chamber of Commerce's endeavours to create uniform standard contracts which can be entered into by parties transnationally as part of commonplace global trade. It is therefore essential to explain in the South African context, some of the implications of such terms with particular reference to the recent amendments to the traditional list in Incoterms 2000. Incoterms were created as a result of orthodox commercial exigencies of the maritime industry. These exigencies included, for example, taking into account factors such as the commercial position of an importer (buyer) or exporter (seller). It is therefore consequential that the new Incoterms 2010 will naturally raise a useful enquiry as to the implications of its effects on future international trade. With factors such as significant drops in freight rates during the recent economic recession, it is imperative that an investigation into the amendment of terms be considered in order to determine whether or not the latest amendments to Incoterms provide the required support for sustainable imports and exports.

^{*} PhD (University of KwaZulu-Natal). Faculty of Law.

INTRODUCTION

Incoterms¹ are standard term agreements or global trade standard business contracts² formulated by the International Chamber of Commerce (ICC)³ to create harmony in business and commercial language in the context of international trade.⁴ The ICC is a world business organisation founded in 1919 to serve world business by promoting global trade and investment. The ICC refers to itself as ‘the voice of world business’ which champions the global economy as a force for economic growth, job creation and prosperity.⁵

¹ The term ‘Incoterms’ is a registered trademark of the International Chamber of Commerce as illustrated in:

<http://www.iccwbo.org/Incoterms/index.html?id=38859&terms=original+incoterms> (last accessed on 16 November 2010). J Ramberg *Guide to Incoterms 1990* (1991) 30 – 31.

This term is derived from the first syllables of the phrase ‘International Commerce Terms’ which traces its roots towards the standardisation of international sales contracts which started taking place in 1921 after the founding of the ICC in 1919. See Australia Department of Commerce and Agriculture *Overseas trading* vol 22 (1970) 292. Incoterms regulate the relationship between the seller and buyer on the important point of risk of loss or damage to goods and the responsibility for transportation (that being shipping in the case of maritime activities) and other related costs which are natural to such a transaction. DL Gardner *Supply chain vector: methods for linking the execution of global business models with financial performance* (2004) 102; C Cheng *Basic documents on international trade law* (1990) 91.

² ICC *Incoterms 1990* Issue 460 of ICC Publications (1990) 1; ICC *International Commercial Terms: EXW, FCA, FAS, FOB, CFR, CIF, CPT, CIP, DAF, DES, DEQ, DDU, DDP* (1990) 2; EG Hinkelman *Dictionary of international trade: handbook of the global trade community* (6ed 2005) 1, 253.

³ <http://www.iccwbo.org/> (last accessed on 16 November 2010).

⁴ It is argued that business in the global context has always been complicated by interpretation of language and it was this trade contingency which gave rise to the creation of Incoterms. For example, the word ‘delivery’ means something very specific in commercial transactions, while it may mean something different in another context. It became necessary to create industry specific commercial terms which could be used without creating language interpretation difficulties. See: <http://www.foreign-trade.com/reference/incoterms.cfm> (last accessed on 16 November 2010). Incoterms provided the standardisation of international commercial terms as necessitated by global trade. Australia Department of Commerce and Agriculture n 1 above at 292.

⁵ With regard to the promotion of growth and prosperity in international commerce, the ICC is involved in supporting government efforts to make a success of the Doha trade round. (The Doha trade round also commonly referred to as the Doha Development Round or Doha Development Agenda is an endeavour driven by the World Trade Organisation for the development of international trade relations and implementation of international agreements which support the development of ideal global trade in all countries, particularly developing ones. See

http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm (last accessed on 16 November 2010). The ICC provides world business recommendations to the World Trade Organisation. Among other efforts the ICC is also committed to spreading business expertise and to act as an advocate for international business by acting as a voice thereof and a defender of multilateral trading systems. Further, the ICC is committed to the use of trade as a tool for development; therefore it is active in providing practical services to business and is committed to the fight against commercial crime. See

The ICC achieves its mandate through direct access to national governments throughout the world from its Paris-based international secretariat where business views in the global markets are shared.⁶

The ICC meets its goals by actively establishing voluntary rules, guidelines and standards, including a commercial arbitration process (through the ICC International Court of Arbitration founded in 1923),⁷ the creation of uniform customs and codes for documentary credit;⁸ and with particular reference to this article, the creation of Incoterms.⁹

The formulation of global trade terms and views obviously does not take place in a vacuum, and the ICC is constantly interacting with issues such as the recent global financial crisis, which affects global market forces.¹⁰

<http://www.iccwbo.org/id93/index.html> (last accessed on 16 November 2010).

⁶ The Constitution of the ICC:
http://www.iccwbo.org/uploadedFiles/ICC/ICC_Home_Page/pages/ICC_Constitution_EN_8_June_2009.pdf (last accessed on 16 November 2010).

⁷ This forum of arbitration resolves international commercial and business disputes. <http://www.iccwbo.org/court/>, and <http://www.iccwbo.org/court/arbitration/id4584/index.html> (last accessed on 16 November 2010). KK Mwenda *Principles of arbitration law* (2003) 20; P Fouchard, E Gaillard, B Goldman & J Savage *Fouchard, Gaillard, Goldman on international commercial arbitration* (1999) 539–541. The ICC International Court of Arbitration is distinguishable from the Permanent Court of Arbitration (PCA) founded in 1899, whose primary focus is matters arising out of international treaties and other agreements to arbitrate particularly on matters of human rights, maritime boundaries and other matters of the same nature. See P Hamilton *The Permanent Court of Arbitration: international arbitration and dispute resolution: summaries of awards, settlement agreements and Reports* (1999) 3; J Arnaldez, Y Derains & D Hascher *Collection of ICC arbitral awards, 1996–2000 vol IV* (2003) xvi; Y Derains & EA Schwartz *A guide to the ICC Rules of Arbitration* (2005) 1.

⁸ ICC Uniform Customs and Practice for Documentary Credits (UCP 600) which came into force on 1 July 2007; www.exporthelp.co.za/documentation/ucp600.html 20 April 2010 and www.exporthelp.co.za/.../LCs/UCP_600_Exporters_Guide_ABN.pdf (last accessed on 20 April 2010).

⁹ ‘The Incoterms® rules are an internationally recognized standard and are used worldwide in international and domestic contracts for the sale of goods. First published in 1936, Incoterms® rules provide internationally accepted definitions and rules of interpretation for most common commercial terms. The rules have been developed and maintained by experts and practitioners brought together by ICC and have become the standard in international business rules setting. They help traders avoid costly misunderstandings by clarifying the tasks, costs and risks involved in the delivery of goods from sellers to buyers. Incoterms® rules are recognised by UNCITRAL as the global standard for the interpretation of the most common terms in foreign trade.’ See <http://www.iccwbo.org/incoterms/> (last accessed on 16 November 2010).

¹⁰ An International Chamber of Commerce (ICC) Research Report Prepared by the Peterson Institute for International Economics (PIIE) *G20 Protection in the Wake of the Great*

This article will survey the history, and certain of the legal principles applicable to Incoterms within the South African context. South Africa is directly involved in ICC endeavours.¹¹ The development of the Incoterms, culminating in Incoterms 2010, is examined in the hope of expanding the knowledge base around these terms in the global trade context.¹² I will also test whether the developments instituted by Incoterms 2010¹³ support sustainable import and export agreements, or international sales agreements. This will be considered, most notably, in the context of dominant market forces such as the recent protectionist proposals¹⁴ which flowed from the recent global financial crisis and the ensuing slow global recovery.¹⁵

Recession (June 2010). See

http://www.iccwbo.org/uploadedFiles/ICC/iccrf/G20_Protection_in_the_Wake_of_the_Great_Recession.pdf (last accessed on 17 November 2010).

¹¹ ICC South Africa is a branch which interacts directly with the ICC and it is described as a national committee within the Republic of South Africa. Such a branch is formed by leading companies and business associations in the relevant countries or territories and it is open for any other businesses to join. <http://www.iccwbo.org/id15478/index.html> (last accessed on 17 November 2010).

¹² This article makes reference to the marine carriage of goods context where the transportation relates to shipping.

¹³ The Incoterms 2010 are set to take effect in January 2011. See: <http://www.iccwbo.org/incoterms/id3042/index.html> (last accessed on 17 November 2010). <http://www.djacobsonlaw.com/2010/01/incoterms-update-incoterms-2010-likely.html> (last accessed on 17 November 2010).

¹⁴ Protectionist policies aim to discourage imports in order to prevent foreign markets from taking over the domestic economies. Protectionist trade policies are typically national actions and policies which restrict and restrain international trade with the aim of protecting local business and employment. This is done through import tariffs, quotas, subsidies or tax cuts to local business and other intervention by the State. *Encyclopedia Britannica Online* <http://www.answers.com/library/Britannica+Concise+Encyclopedia-cid-65374> (last accessed on 17 November 2010). For a discussion protectionist policies in US history, see P Sutherland *Competition law of South Africa, abuse of dominance* (2009) 7.

¹⁵ International Chamber of Commerce (ICC) Research Report, prepared by the Peterson Institute for International Economics (PIIE) *G20 Protection in the Wake of the Great Recession* (June 2010), see http://www.iccwbo.org/uploadedFiles/ICC/iccrf/G20_Protection_in_the_Wake_of_the_Great_Recession.pdf (last accessed on 17 November 2010). The traditional debate which compares protectionism against free market trade is not the primary concern of this article, however it has been mentioned in this paper because it directly affects freight markets and shipping which forms the basis of transportation in international sales. Protectionism is primarily the ending of maritime transport, especially with reference to containerised cargo which will have a domino effect on other related industry that pertains to shipping and cargo carriage. The ICC itself has made an enquiry into protectionism as a tool for post-recession recovery. International Chamber of Commerce (ICC) Research Report Prepared by the Peterson Institute for International Economics (PIIE) *G20 Protection in the Wake of the Great Recession* (June 2010). See: http://www.iccwbo.org/uploadedFiles/ICC/iccrf/G20_Protection_in_the_Wake_of_the_Great_Recession.pdf (last accessed on 17 November 2010). The ICC research team

THE HISTORY OF INCOTERMS

The first Incoterms were published in 1936 as a set of international rules for the interpretation of trade terms.¹⁶ Their development can be traced back to the years 1900¹⁷ to 1921 following the establishment of the ICC.¹⁸ The initial Incoterms created rules which refer solely to the relationship between a seller and a buyer and not the relationship between the consigner and the carrier.¹⁹ Further, the 1936 Incoterms referred to carriage of goods by means other than marine transport. The Incoterms 1936 introduced the first ten Incoterms in the following terms:

1. Ex Works – Ex factory, ex mill, ex warehouse etc.
- 2.1 FOR – Free on rail, named departure point.
- 2.2 FOT – Free on truck, named departure point.
- 2.3 FOB (US reference) – named point.
3. Free – named port of shipment.
- 3.1 FOB cars (US) – named point on seaboard.
4. FAS – Free alongside ship, free alongside (vessel in US).
5. FOB – Free on board.
6. C & F – Cost and Freight, named port of destination.
7. CIF – Cost, Insurance, Freight.
8. Freight or Carriage Paid to – named port of destination.

in this paper concluded that protectionism is not the answer to post-recession recovery, as it will ultimately cause a loss of jobs for exporters in that protectionist nation. It appears therefore, that Incoterms 2010 have been adapted at a time when free trade is still encouraged and therefore will contribute to sustainable international sales. For further reading on protectionism versus free trade, see D Zhou ‘Can protectionist trade measures make a country better off? A study of versus and minimum quality standards’ *Journal of Business Research* 55/3 (2002) 227–236; JA Frieden, DA Lake *International political economy: perspectives on global power and wealth* (2000) 303; J Slemrod. *National Bureau of Economic Research* (1994) 1–8. The author draws a comparison between free trade taxation and protectionist taxation.

¹⁶ This following the Berlin Congress of the ICC in 1935. Cheng n 1 above at 91; B Martin ‘Incoterms 1936’ at: <http://www.martintittle.com/publications/Incoterms1936.pdf> (last accessed on 18 November 2010).

¹⁷ http://www.insourceaudit.com/Whitepapers/Deciphering_Incoterms.asp (last accessed on 25 November 2010). It is said that ‘international traders located in different countries devised short abbreviations for certain commonly used trading terms. However, due to differences in culture, connotations, dictions, grammar, experience, translations and linguistics, these trading terms had different meanings for different global participants. Confusion and errors became a regular staple and a consistent risk of international trading’.

¹⁸ Australia Department of Commerce and Agriculture n 1 above at 292.

¹⁹ ICC *Incoterms 1936 International Rules for the Interpretation of Trade Terms* Brochure No 92 Paris (VIII); Martin n 16 above. Further, the contract between the carrier and consigner is governed by a separate contract of carriage. P Gillies & G Moens *International trade and business: law policy and ethics* (1998) 122.

9. Free or Free Delivered – named port of destination.
10. Ex Ship – named port.²⁰

These have been updated six times over the years.²¹ We therefore find Incoterms 1953;²² Incoterms 1967;²³ Incoterms 1976;²⁴ Incoterms 1980;²⁵ Incoterms 1990;²⁶ and Incoterms 2000.²⁷ Trade relationships between seller and buyer in the import and export context have been regulated by these Incoterms. Incoterms 2000 encapsulate the thirteen most recent Incoterms.²⁸ It is these (listed below) that the Incoterms 2010 seek to amend.

Origin Terms:

1. EXW – Ex-Works, named place where shipment is available to the buyer, not loaded.
The seller will not contract for any transportation.
International Carriage not Paid by Seller:
2. FCA – Free Carrier, unloaded at the seller’s dock OR a named place where shipment is available to the international carrier or agent, not loaded.
This term can be used for any mode of transport.
3. FAS – Free Alongside Ship, named ocean port of shipment.
Ocean shipments that are NOT containerized.
4. FOB – Free On Board vessel, named ocean port of shipment. This term is used for ocean shipments only where it is important that the goods pass the ship’s rail.

²⁰ *Ibid.*

²¹ J Ramberg *ICC guide to Incoterms 2000: understanding and practical use* (1999) 30, J Ramberg *ICC Incoterms 2000: a forum of experts* (1999) 10, DC Long *International logistics: global supply chain management* (2003) 30, Society for Mining, Metallurgy, and Exploration (US) *Industrial minerals & rocks: commodities, markets, and uses* (2006) 52, SITPRO ‘Simplifying international trade’ at: <http://www.sitpro.org.uk/trade/incoterms1.html> (last accessed on 18 November 2010), <http://www.maerskline.com/link/?page=brochure&path=/glossary/i> (last accessed on 18 November 2010).

²² *INK* "<http://www.google.co.za/search?hl=en&sa=G&tbs=bks:l&q=inauthor:%22International+Chamber+of+Commerce.+Committee+on+Trade+Terms%22&ei=JUvITKGvDpCW4gav45jwDg&ved=0CDMQ9Ag>" ICC: Committee on Trade Terms *Incoterms 1953* (1959) 1; Cheng n 1 above at 37.

²³ Cheng n 1 above at 91.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ ICC *Incoterms, 1990: International Commercial TERMS: EXW, FCA, FAS, FOB, CFR, CIF, CPT, CIP, DAF, DES, DEQ, DDU, DDP* (1990) 2; S Fisher & D Fisher *Export best practice: commercial and legal aspects* (1998) 136; I Carr & P Stone *International trade law* (2005) 47.

²⁷ ICC *Incoterms 2000* (1999); V Sehgal *Supply chain management integrating best in class process* (2009) 195.

²⁸ <http://www.i-b-t.net/incoterms.html> (last accessed on 18 November 2010).

International Carriage Paid by the Seller:

5. CFR – Cost and Freight, Named ocean port of destination.
This term is used for ocean shipments that are not containerised.
6. CIF – Cost, Insurance and Freight, named ocean port of destination.
This term is used for ocean shipments that are not containerised.
7. CPT – Carriage Paid To, named place or port of destination.
This term is used for air or ocean containerized and roll-on roll-off shipments.
8. CIP – Carriage and Insurance Paid To, named place or port of destination.
This term is used for air or ocean containerized and roll-on roll-off shipments.
Arrival at Stated Destination:
9. DAF – Delivered at Frontier, named place of destination, by land, not unloaded.
This term is used for any mode of transportation but must be delivered by land.
10. DES – Delivered Ex-Ship, named port of destination, not unloaded.
This term is used for ocean shipments only.
11. DEQ – Delivered Ex-Quay, named port of destination, unloaded, not cleared.
This term is used for ocean shipments only.
12. DDU – Delivered Duty Unpaid, named place of destination, not unloaded, not cleared.
This term is used for any mode of transportation.
13. DDP – Delivered Duty Paid, named place of destination, not unloaded, cleared.
This term is used for any mode of transportation.²⁹

It must be borne in mind that the use of Incoterms in international trade is voluntary and not stipulated in international sales contracts. This means that if parties wish to be bound by the terms, they must make an express provision to that effect, preferably in writing. Further, any additional terms to which the parties may agree subject to the main terms of that particular Incoterm must be clearly articulated by the parties.³⁰ This implies that parties may agree to be bound by earlier Incoterms, as they are not restricted to the use of the latest or most updated list of Incoterms.³¹

²⁹ <http://www.i-b-t.net/incoterms.html> (last accessed on 18 November 2010).

³⁰ Brochure No 92 n 19 above at 9, under heading 'Application of the rules'. Martin n 16 above.

³¹ B Seyoum *Export-import theory, practices, and procedures* (2008) 158. Parties must state clearly whether or not they are applying a current Incoterm to avoid confusion. See www.2dix.com/pdf-2010/incoterms-pdf.ph http://www.mitchellorg.com/html/Commodity_Trade/Understanding_Incoterms.pdf (both last accessed on 25 November 2010).

Of course, agreement on standard terms will work to the benefit of parties in that their contractual terms are clearly spelled out from start to end of the contract. Where this happens, the rules governing the discharge of obligations under the contract will be clear. This, in turn, will limit the problems that generally arise in international contracts, for example uncertainty surrounding the applicable law and the effect of the international contract on international banking.³² Although the use of Incoterms does not always guarantee the clearest interpretation of the contract,³³ their inclusion is useful in guiding the court as to the intention of the parties to the international contract.

PRACTICAL APPLICATION OF INCOTERMS

To understand how Incoterms regulate relationships between importers and exporters in international trade, it is essential to consider the obligations created by adherence to a particular Incoterm. This is best done by reference to practical examples. As a general ICC list, various types of Incoterms are used and accepted.³⁴ However, some are used more regularly than others.³⁵ Closer scrutiny of the obligations created by such Incoterms is apposite³⁶ – particularly as they represent the position of the seller and buyer in an even and balanced manner. In practice, there are times when the seller or buyer is responsible for the risk in the goods for a longer period during the transaction depending on which Incoterm has been used.

Under American law, Incoterms are embodied in the Uniform Commercial Code (UCC)³⁷ which was created by the US to clarify the modern principles

³² JL Neels ‘The music performance contract in European and Southern African private international (part 1)’ (2008) 71 *Tydskrif vir die Hedendaagse Romeins-Hollandse Reg* (2008) 351 *Journal of Contemporary Roman-Dutch Law* 530, 531.

³³ *Ibid.* *Maschinen Frommer GmbH & co kg v Trisave Engineering & Machinery Supplies (Pty) Limited* (415/02) [2002] ZAWCHC 55; [2003] 1 All SA 453 (C), [2003] JOL 10636 (C) 13 where the court considered a CIF contract and the law to be applied in the circumstances.

³⁴ JF Morrissey & JM Graves *International sales and arbitration: problems, cases and commentary* (2008) 148; JM Klotz *International sales agreements: an annotated drafting and negotiating guide* (2008) 53.

³⁵ It has been argued by Frank Reynolds in his commentary on US law and Incoterms that the most commonly used Incoterms which favour the most informed sellers are the CIP, CPT, CIF, CFR, DDU. F Reynolds *Managing exports: navigating the complex rules, controls, barriers and laws* (2003) 177. On the other hand, it is also argued that the EX WORKS, FOB are also commonly used. JM Klotz *Power tools for negotiating international business deals* (2008) 46.

³⁶ *Ibid.*

³⁷ As revised in 2004, see <http://www.law.cornell.edu/ucc/1/> (last accessed on 25 November 2010). The UCC Act captures international trade principles of law which are

of commercial law. It has been argued that the US UCC complements the Incoterms in many areas. However, as national law varies from country to country, it is further argued that parties applying the UCC Incoterms should state this clearly to avoid confusion.³⁸

In what follows, I shall examine 'EX WORKS', 'FOB', 'CIP', 'CIF' and 'DDU' to clarify the practical application of Incoterms in terms of the ICC Incoterms 2000. Each of these examples represents a particular category of terms that may be used by parties engaging in international trade transactions.

Ex works

The ex works Incoterm is often referred to as a term of origin, as the seller does not contract for the transportation of the goods sold.³⁹ In terms of the express rules of the Incoterms, the seller must place the goods at the disposal of the buyer at the agreed place at the date or within the period fixed. The buyer must take delivery of the contractual goods once placed at its disposal and bear all costs and risks from the time of taking delivery.⁴⁰ In the case of oil companies, for example, the buyer, whether fabricator, engineer, or oil company, must arrange for inspection, testing where appropriate, packing for transportation, insurance, the various legs of transportation, port handling, and other import procedures.⁴¹

The ex works Incoterm demonstrates significant costs and risks which attach to the buyer (importer), and therefore ex works price quotes will affect the international trade position of the parties in that it affects their market position and has tax and customs implications on importation. This means

applicable to the relevant transactions save real property. Seyoum n 31 above at 158.

³⁸ *Id* at 158–159. For example, a UCC FOB (New York Incoterm) has special implications in terms of the US UCC as opposed to a regular, outside FOB ICC Incoterm.

³⁹ The Incoterm usually appears in the standard trading terms of the parties, as considered by the court in the cases for example, *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 4 SA 681 (SCA) 692 E, *Stocks Construction (Ofs) (Pty) Ltd v Metter-Pingon (Pty) Ltd* 1980 1 SA 507 (A) 514 C – *D Appleby (Pty) Ltd v Dundas Ltd* 1948 2 SA 905 (E) 907. In *C Gee Alsthom Equipments et Enterprises Electriques, South African Division v Gkn Sankey (Pty) Ltd* 1987 1 SA 81 (A) 92 H the court stated that even though the contract was concluded ex works, packaging specifications were of minor importance to the case. See R Barry *The management of international oil operations* (2005) 227, where the author states that most oil companies purchase their oil on an ex works basis and the buyer gets involved acquiring material directly from the factory. See <http://www.i-b-t.net/incoterms.html#EXW> (last accessed on 27 November 2010).

⁴⁰ Incoterms 1936, Incoterms 2000.

⁴¹ Barry n 39 above at 227.

that concerns about market competition must be addressed when dealing with the ex works (or any other) Incoterm.

Market competition was raised before the competition tribunal in *Scaw South Africa (Pty) Ltd v Ozz Industries (Pty) Ltd*.⁴² In this case, the tribunal considered a merger between two major concerns in the broad foundry industry. The tribunal found that the merger would reduce competition in the grinding media, which would negatively impact on the customer – particularly as the market was a national one with some imports from China. Further, it was found that as the imports were mostly conducted ex works, this would not be cost-effective for customers post-merger. The merger was approved subject to conditions.⁴³

With regard to tax and customs implications, Incoterms impact significantly on international trade transactions with regard to income tax,⁴⁴ VAT,⁴⁵ and

⁴² [2008] 2 CPLR 289 (CT).

⁴³ 291 par. 3, 297 par. 23.

⁴⁴ See application of the Income Tax Act 58 of 1962 in the Income Tax Case No 10229 1998 6 JTLR 139 (ECSpCrt), a case that dealt with tax calculations in an ex-works contract and the issue in that case was whether or not the transaction ex-works had been entered into or carried out by the tax payer and whether or not the transaction had met the criteria of normality in the circumstances. For further practical aspects of tax and incoterms, see also, SAICA (The South African Institute of Chartered Accountants) Handbook (2003) Current Circulars Circular 04/97 Guidance for Auditors: The Motor Industry development programme Circular 04/97 Guidance for auditors: The motor industry development programme on calculation of tax on ex works, FOB and CIF Incoterms in the motor trade industry, issued September 1997 at: <https://beta.saica.co.za/Home/tabid/36/language/en-ZA/Default.aspx> (last accessed on 16 September 2011).

⁴⁵ Value-Added Tax Act 89 of 1991, as amended with s 41(a) which provides for the recovery of VAT in respect of imported goods. See general rulings in terms of the Value-Added Tax Act at: <http://www.sars.gov.za/home.asp?pid=30912> (last accessed on 27 November 2010); ruling 156 relating to local supplier and foreign manufacturer in a case where an ex works sale has been concluded. See also Juta's Tax Library, VAT Rulings 141–160, Ruling 156 – Local Supplier – Foreign Manufacturer:

Question: A vendor contracts with a local supplier (vendor) for the supply and installation of a machine. The latter contracts with his foreign associate company for the supply of the machine. The client takes delivery of the machine ex-works in the foreign country and is invoiced by the local supplier who is a vendor. Will the local supplier (vendor) have to charge his client VAT on the sale of the machine, and who will be responsible for the VAT on importation?

Answer: The local supplier will levy VAT on the sale of the machine at the rate of zero per cent as the machine was supplied by way of a sale in an export country. The client will be responsible to pay VAT on the importation (See sections 11(1) (a) and 13). 28/2/1–May 1992.

customs and excise.⁴⁶ Therefore, when considering import procedures and costs in an ex works sale, these become the responsibility of the buyer. The buyer must follow the regulations as provided by the applicable municipal laws.

FOB

The FOB contract represents a type of Incoterm where the international carriage is also not paid by the seller.⁴⁷ It is an acronym derived from the phrase ‘free on board’ ship or vessel at a specified port of shipment.⁴⁸ The key aspect of this Incoterm is that the seller must deliver the goods on board the vessel named by the buyer at the agreed port of shipment. Once the goods have passed the ship’s rail, the buyer bears all costs and risk in the goods. The buyer does have a right to inspect the goods to establish whether or not they satisfy the contractual description.⁴⁹

CIP

The CIP Incoterm or contract, which stands for ‘carriage and insurance paid to’ was not in the initial Incoterms 1936.⁵⁰ Unlike the ex works and FOB contracts, it is an example of a contract where international carriage of goods sold is paid by the seller rather than the buyer.⁵¹ Parties must be very clear

⁴⁶ *Commissioner of Customs v Airton Timber Co Ltd* 1926 CPD 351, 352 where the court dealt with customs implications for an FOB contract. Customs and Excise Act 91 of 1964 under rule No. R. 1254, 15 December 2006, Rules and Regulations GNR.1874 of 8 December 1995: Rules (*Government Gazette* No 16860). Rule No R 1254, 15 December 2006, defines an ex works price in terms of law as follows: ‘ex-works price means the price paid for the product ex works to the manufacturer in an EFTA State or in SACU in whose undertaking the last working or processing is carried out, provided the price includes this.’ This means formulas used in the international trade contexts with countries listed above will follow the contractual obligations created by an ex works sale, for example.

⁴⁷ <http://www.i-b-t.net/incoterms.html#FOB> (last accessed on 27 November 2010).

⁴⁸ DM Sasson *CIF and FOB Contracts* (1995) 347–350. D Campbell *Remedies for international sellers of goods* vol 2 (2006) 2158. D Campbell *Remedies for international sellers of goods* (2007) 2 254.

⁴⁹ *Murray & Co Appellant v Stephan Bros 243 Respondent* 1917 AD 243, 257, 260, 261, performance of contract FOB was outlined by the court. *Anderson and Colman Ltd v Universal Trading Co* 1948 1 SA 1277 (W) 1281, *Sugar Corporation of Malawi Ltd v Elgin Engineering Co (Pty) Ltd* 1977 3 SA 594 (A) 601 B–E, on FOB value affecting contractual sale price, *Mitsui & Co Ltd and another v Flota Mercante Grancolombiana SA The Ciudad de Pasto, The Ciudad de Neiva* [1989] 1 All ER 951, 956 under English law. *Lendlease Finance (Pty) Ltd v Corporation De Mercadeo Agricola and Others* [1976] 4 All SA 300 (A) 316–317, 1976 (4) SA 464 (A) 494. Sasson n 48 above at 440. Incoterms 2000. See <http://www.i-b-t.net/incoterms.html#FOB> (last accessed on 28 November 2010).

⁵⁰ Martin n 16 above.

⁵¹ <http://www.i-b-t.net/incoterms.html#FOB> (last accessed on 28 November 2010).

on the type of contract they are concluding as they are free to choose specific types of CIP agreements from specific jurisdictions. An example here is the choice of ‘CIP Boston’,⁵² which would be interpreted in accordance with the American UCC.⁵³

The CIP contract as introduced by the Incoterms 1990 and Incoterms 2000⁵⁴ is not confined to marine carriers.⁵⁵ The contract provides that the seller must insure the goods sold on a minimum cover basis⁵⁶ against loss or damage to the named port of destination.⁵⁷ The obligations created under the CIP can be interpreted in accordance with the ICC rules.⁵⁸

CIF

This Incoterm stands for a ‘cost, insurance and freight’ contract. Under this type of contract the seller agrees to deliver the goods at a place named by the buyer, and agrees that it will pay the insurance premium and the freight. The seller must then invoice the goods to the buyer showing the details of the cost, insurance and tender the relevant shipping documents in a valid condition. This was confirmed in the case of *Standard Bank of South Africa Ltd v Efroiken and Newman*.⁵⁹ It is submitted that this Incoterm may only be used for transportation which involves sea or waterway carriage, and is advantageous for the buyer⁶⁰ as the carriage costs are borne by the seller.

DDU

The DDU Incoterm stands for ‘delivered duty unpaid, named place of destination, not unloaded, not cleared’.⁶¹ This term is used for any mode of

⁵² <http://logistics.about.com/od/legalandgovernment/a/Incoterms.htm> (last accessed on 28 November 2010).

⁵³ <http://www.law.cornell.edu/ucc/1/> (last accessed on 28 November 2010).

⁵⁴ G Moens *International trade and business law annual* vol 6 (2001) 118, 148.

⁵⁵ Gillies & Moens n 19 above at 142.

⁵⁶ Unless it is otherwise agreed by the parties. *Geofizika DD v MMB International Ltd & Anor* [2010] EWCA Civ 459, English Court of Appeal, Civil Division.

⁵⁷ C Rossini *English as a legal language* (1998) 106. Gillies & Moens n 19 above at 142.

⁵⁸ J Ramberg *ICC Guide to Incoterms 2000* (1999) 18–26. Gillies & Moens n 19 above at 144. See also <http://www.jus.uio.no/lm/icc.incoterms.1990/doc.html#66> (last accessed on 28 November 2010).

⁵⁹ 1924 AD 171, 177. *Birkbeck and Rose-Innes v Hill* 1915 CPD 687, 698, *Lockie Bros. v Epstein* 1921 EDL 154, *Lendlease Finance (Pty) Ltd v Corporation De Mercadeo Agricola and Others* 1976 (4) SA 464 (A) 491 C–492 D, *Thomas & Co Ltd v Whyte & Co., Ltd.* (1923) 44 NPD 413, 421, 422. BR Bamford *The law of shipping and carriage in South Africa* (3ed 1983) 92.

⁶⁰ Klotz n34 above at 61.

⁶¹ <http://www.i-b-t.net/incoterms.html#DDU> (last accessed on 29 November 2010). Ramberg n 21 above at 18; J Clark & M Hammett *Dictionary of international trade*

transportation⁶² rather than the marine carriage of goods only which forms a large part of international trade. It is argued that the 'D'⁶³ feature here is a novel feature which allows the seller to take more responsibility in delivering the goods to some nominated point in the country of destination. Under the DDU term the buyer is responsible for clearing the goods on importation, including government charges and costs incurred by the business in, for example, the employment of a freight forwarder to clear the goods.⁶⁴

The DDU Incoterm was introduced by Incoterms 1990 to address the concerns of business traders in destination contracts. The business parties noted that in such contracts the buyer in the importing country is in a better position as he is aware of the charges involved and is therefore able to prepare for any rise in such costs. The buyer is under an obligation to take delivery and clear the goods for import. It is argued that if the seller has a good understanding of the costs and charges in the country of importation, such costs may be built into the sale price under the DDU contract. This makes the DDU a more flexible sales contract.⁶⁵

INCOTERMS 2010

Having surveyed the origin and practical implications of entering into various Incoterm contracts, it is important to consider the impact of Incoterms 2010.⁶⁶ Incoterms 2010 represent normal periodic revision of such terms.⁶⁷ This periodic review is implemented in an effort to address whatever discrepancies, gaps or potential contradictions in the existing terms.⁶⁸

The case of *Geofizika DD v MMB International Ltd & Anor*⁶⁹ is an illustration of a contradiction in an Incoterm sale dispute. The matter involved a sale in

finance (2001) 97.

⁶² R Burnett & V Bath *Law of international business in Australia* (2009) 79.

⁶³ Also known as the D-Group part of the Incoterms. See P Obal *Glossary of supply chain terminology: a dictionary on terminology, logistics* (2006) 92.

⁶⁴ *Ibid.*

⁶⁵ *Id* at 80. Obal n 63 above at 92.

⁶⁶ CJ Pietersen *Incoterms ® 2010: a practical review* (2010).

⁶⁷ RJ Trent & LR Roberts *Managing global supply and risk: best practices, concepts, and strategies* (2009) 32. The revision of Incoterms takes place every ten years.

⁶⁸ F Ferrari(JD) & HM Fletcher *The draft UNCITRAL Digest and beyond: cases, analysis and unresolved issues in the UN Sales Convention* (2004) 302; LA di Matteo *Law of international contracting* (2009) 191, 192. Views by various industry authors may be obtained from <http://www.lcvviews.com/incoterms.htm> (last accessed on 29 November 2010). Some of these authors argue that while the Incoterms themselves are clear, interpretation of them may not always be consistent throughout the international community.

⁶⁹ [2010] EWCA Civ 459. English Court of Appeal, Civil Division.

terms of the Incoterms 2000 CIP. Payment for carriage and insurance in terms of the usual CIP terms was made by the seller.⁷⁰ The buyers *in casu* were a Croatian geophysics company and the seller, a British supplier of four-wheel-drive Land Rover ambulances. A sale on CIP terms was concluded by the parties for the supply of three ambulances at the purchase price of some £75 000. The sellers arranged insurance and carriage through freight forwarders. However, the ambulances were carried on deck and were subsequently lost by being washed overboard. When the buyers sought to recover their loss under the insurance policy, the insurers declined to pay on the basis that there had been a breach of warranty of under deck shipment.⁷¹

The appeal court carefully considered the provisions and interpretation of the CIP Incoterm and emphasised that procuring a proper and fitting insurance contract was an absolute obligation under the CIP term.⁷² Further, while the sellers had obtained cover in terms of the Institute Cargo clauses, the cover was not valid as the goods were carried on deck and there was no right to do so. This means that the freight forwarders were negligent in their carriage obligations.⁷³ On the other hand, however, the appeal by the sellers and freight forwarders had to succeed because in the circumstances of this case there was no causal link between the loss suffered by the buyers and the breach of warranty under the insurance contract the sellers had obtained. The court of appeal took the view that as the exact type of insurance was expressly stipulated by the parties and was in fact provided for by the sellers, there had been proper performance by the sellers and the buyers could not claim that the CIP terms had been breached.⁷⁴

⁷⁰ Obal n 63 above at 92.

⁷¹ Paragraphs 2–11.

⁷² Paragraph 16 A3 Incoterms 2000.

⁷³ Paragraphs 29, 30. 'It is long standing practice that if goods are shipped on deck, a statement to that effect will ordinarily be found on the face of the bill of lading. Indeed, the terms of clause 7(2) so contemplated. Although no doubt the booking note could have been drafted in clearer terms, in my judgement anyone in the trade reading the booking confirmation would have understood it to mean that if the goods were to be placed on deck, the face of the bill of lading would be so claused. I therefore conclude that there was a prior antecedent agreement to the effect that if the vehicles were to be carried on deck, that would be noted on the face of the bill of lading and to that extent, therefore, the liberty to ship on deck without notice to the shipper was circumscribed. Under the contract of affreightment between the carrier and the shipper there was no right to carry on deck.'

⁷⁴ Paragraphs 53, 55. 'In their opening skeleton, the buyers had defined as an issue in the case the question as to whether the buyers were in any event entitled to cover on the all risks (A) clauses, but had also stated that they were not pursuing that argument at trial. During the buyers' closing submissions the judge asked whether the issue as to whether the buyers were entitled to cover on all risk (A) terms was a live issue. The buyers told

In my view, this decision by the English appeal court confirms that Incoterms are not law and the parties who stipulate express terms in pursuit of the Incoterms also bear the risk of being unable to rely on the implied terms or consequences of entering into certain types of Incoterms. It is therefore crucial that a review of Incoterms be carried out to deal with these potential gaps in interpretation. Interestingly enough, the trial court in the case held the sellers and freight forwarders liable for the losses under the CIP Incoterm, while the appeal court considered the importance of express contractual terms which are more essential to the parties' intention than the Incoterms.

The periodic review of Incoterms is also essential to clarify questions concerning their application to international sales in relation to other international instruments such as the Convention on Contracts for the International Sale of Goods (CISG).⁷⁵ Professor Emeritus Jan Ramberg argues that contracting parties cannot rely solely on the CISG to determine modes of delivery in the international sale of goods. Parties must agree on where, when and how the goods should be delivered, and the use of Incoterms is essential to establishing standard terms to cover such business contingencies.⁷⁶

One must ask, therefore, what happens where the CISG⁷⁷ provides specifically for instances where risk is to pass, for example, and the Incoterms apply to the same circumstance.⁷⁸ It is argued that where there are difficulties in interpretation, the practicalities of carriage, issued bills of lading, ordinary requirements for shipping practice, such as those for breaking-bulk, be taken into account with reference to the wording of the CISG and the Incoterms.⁷⁹ Of course, guidance from case law on the interpretation of the CISG and the intention of the parties to the contract, will also be instructive.

him that it was not, but added that it was clear that cover on the all risks (A) clauses was always intended.'

⁷⁵ 1980. untreaty.un.org/cod/avl/ha/ccisg/ccisg.html (last accessed on 30 November 2010).

⁷⁶ J Ramberg 'To what extent do Incoterms 2000 vary articles 67(2), 68 and 69?' See www.uncitral.org/pdf/english/CISG25/Ramberg.pdf (last accessed on 30 November 2010).

⁷⁷ *Ibid.* Article 67(2).

⁷⁸ *Ibid.* Incoterms 2000 B5.

⁷⁹ *Ibid.*

Incoterms 2010 have introduced a new set of terms. Academic institutions and business⁸⁰ offer various training courses for various international trade stakeholders in this area.⁸¹ This means that to ensure compliance, businesses must train their staff on the impact of the most recent Incoterms. Such compliance will ensure the uniformity of international sales contracts.⁸²

In South Africa, Incoterms 2010 were initially launched by the ICC-South Africa arm in partnership with Standard Bank South Africa.⁸³ Incoterms are expected to be applied in line with the best possible practice to avoid parties suffering losses in international sales contracts.⁸⁴ Further, an official master trainer on Incoterms 2010 in South Africa and Africa has been appointed to train parties on the terms and ensure that they have access to the correct information.⁸⁵

FEATURES OF INCOTERMS 2010

Apart from the fact that the new Incoterms have been reduced from thirteen to eleven,⁸⁶ Incoterms 2010 are structured in such a way that they separate the list of terms into the following groups:

Incoterms for any mode or modes of transport that being:

- EXW – Ex Works
- FCA – Free Carrier
- CPT – Carriage Paid To
- CIP – Carriage and Insurance Paid
- DAT – Delivered at Terminal (new)

⁸⁰ Conferences were held in South Africa and other parts of the world with key speakers addressing the topic of Incoterms, eg J Ramberg, see <http://www.gmls.co.za/node/130> (last accessed on 30 November 2010).

⁸¹ See, for example, The University of Southampton, School of Law, which is offering various practical workshops on Incoterms 2010 at: http://www.southampton.ac.uk/iml/Courses/London_CPD_Programme_Listing.html (last accessed on 29 November 2010).

⁸² <http://www.mantissa.co.uk/Support/Incoterms2010.htm> (last accessed on 29 November 2010).

⁸³ http://www.exporthelp.co.za/downloads/International_Chamber_of_Commerce_-_PRESS_RELEASE.pdf (last accessed on 29 November 2010); C Lombard ‘The main features of Incoterms 2010 October 8 (2010) at: <http://www.engineeringnews.co.za/article/the-main-features-of-incoterms-2010-2010-10-08> (last accessed on 29 November 2010).

⁸⁴ *Ibid.*

⁸⁵ Information for the office of the Incoterms Master trainer can be obtained at: http://www.exporthelp.co.za/downloads/International_Chamber_of_Commerce_-_PRESS_RELEASE.pdf (last accessed on 29 November 2010).

⁸⁶ <http://www.iccwbo.org/incoterms/id3040/index.html> (last accessed on 30 November 2010).

DAP – Delivered At Place (new)

DDP – Delivered Duty Paid

Incoterms for sea and inland waterway transport

FAS – Free Alongside Ship

FOB – Free on Board

CFR/CNF – Cost and Freight

CIF – Cost, Insurance and Freight ⁸⁷

The two new Incoterms 2010 come in the form of DAT and DAP. Both terms may be used for all modes of transport. DAT stands for ‘delivered at terminal.’ The seller delivers under this term when the goods, once unloaded from the means of transport by which they arrived, are placed at the disposal of the buyer at the named terminal at the named port or place of destination.⁸⁸ Here the seller is responsible for costs and risks involved in bringing the goods to the agreed terminal, ensuring that the forwarding contract mirrors the contract of sale, and export clearance.⁸⁹ The buyer is responsible for clearing the goods for import, arranging importation and customs formalities, and payment of import duty.

Where the parties intend the seller to bear the risks and costs of taking the goods from the terminal to another place, the DAP term will apply.⁹⁰ The DAP term stands for ‘delivered at place’ and applies to all modes of transport. The seller delivers the goods once they are placed at the disposal of the buyer on the arriving means of transport ready to unload at the named place of destination. Parties must specify clearly the point of delivery within the agreed place of destination, at which stage risk moves from seller to buyer.⁹¹

In terms of the DAP Incoterm, the seller bears the responsibility and risk in delivering the goods to the specified place. The seller must also obtain contracts of carriage that match the contract of sale, and clear the goods for export. If the seller incurs costs at the place of destination, unless previously agreed, the seller is not entitled to recover such costs. The buyer is

⁸⁷ <http://www.kalgin.net.nz/incoterms.html#top> (last accessed on 30 November 2010).

⁸⁸ *Ibid.* Terminal includes quay, warehouse, container yard or road, rail or air terminal. The parties must agree on their intended terminal and the point within the terminal. Parties must also agree on the point of passage of risk. If it is intended that the seller bear all the costs and responsibilities from the terminal to another point, then DAP or DDP may apply.

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*

responsible for affecting customs and clearance, and paying any other customs duties applicable.⁹²

In addition to providing for two new terms which have been the primary discussion for some writers on the subject,⁹³ Incoterms 2010 also provide rules for national and international trade, guidance notes, electronic communications,⁹⁴ insurance cover, security-related clearances and information required for such clearances,⁹⁵ terminal handling charges, string sales, and variants of Incoterms 2010.⁹⁶

In a half-day ICC event on Incoterms 2010, it emerged from a member of the drafting group,⁹⁷ that the Incoterm rules have an educational theme attached

⁹² *Ibid.*

⁹³ [http://www.exporthelp.co.za/downloads/International Chamber of Commerce - PRESS RELEASE.pdf](http://www.exporthelp.co.za/downloads/International_Chamber_of_Commerce_-_PRESS_RELEASE.pdf) (last accessed on 29 November 2010); Lombard n 83 above. <http://www.iccwbo.org/incoterms/id3040/index.html> (last accessed on 30 November 2010). <http://www.kalgin.net.nz/incoterms.html#top> (last accessed on 30 November 2010).

⁹⁴ Electronic Communications and Transactions Act 25 of 2002, as amended, for domestic legislation on electronic communications. In international trade transactions, reference to model laws on electronic communications must be also be consulted. For full discussion on the topic, see J Coetzee 'Incoterms, Electronic Data Interchange, and Electronic Communications and Transactions Act' *South African Mercantile Law Journal* (2003) 1/1 6, 7. In this article the author captures the essence of electronic commerce and its impact on paperless trading and relates the same to the South African context. It is my opinion that no subject on international trade is complete without reference to the impact of e-commerce on modern international trade.

⁹⁵ See, C-TPAT: Customs-Trade Partnership Against Terrorism at: http://www.cbp.gov/xp/cgov/trade/cargo_security/ctpat/ (last accessed on 30 November 2010).

Security concerns stem from general safety against crime to terrorist attack concerns. Countries involved in trade must take into account the existence of such threat to international trade, see for example G Mills 'Africa's new strategic significance' *The Washington Quarterly* 27/4 (2004) 157–169. The article was prepared at the Center for Strategic and International Studies and the Massachusetts, Institute of Technology. Some security concerns relate directly to the shipping industry and therefore efforts to secure containers in ports requires specific procedures to be followed by countries in an effort to promote further port safety. See J Romero 'Prevention of maritime terrorism: the container security initiative' (2003) at: <http://www.allbusiness.com/legal/international-law/1066764-1.html> (last accessed on 30 November 2010).

⁹⁶ Lombard n 83 above.

⁹⁷ D Lowe Partner Wragge & Co UK, the drafting group being formed by other members in the form of two Co-Chairs of the Incoterms Drafting Group – Charles Debattista, Professor of Commercial Law at the University of Southampton, United Kingdom and Christoph Martin Radtke, Partner, Lamy & Associatiés, France – other presenters will include David Lowe, Partner, Wragge & Co, United Kingdom; Lauri Railas, Attorney-at-Law, Krogerus Attorneys, Finland; Miroslav Šubert, Secretary, ICC Czech Republic; and Professor Jan Ramberg LLD, author of the ICC Guide to the Incoterms® 2010 rules. <http://www.xing.com/net/bae/news-248457/icc-launches-incoterms-2010-rules-with->

to them. The reason for this is that ‘traditional’ Incoterms such as the CIF have been used inappropriately in the movement of containerised cargo or cargo that involved multimodal transport. Incoterms 2010 have dealt with this issue once and for all by creating specific Incoterms to cover carriage by multimodal transport, and carriage of goods by sea and inland waterways.⁹⁸ Further, the Incoterms 2010 have a substantial guidance section which advises on the appropriate use of the various Incoterms.⁹⁹

Incoterms 2010 also seek to clarify the confusion surrounding terminal handling charges, which will essentially eliminate situations where the importer is double charged.¹⁰⁰ Further, in typical international trade fashion, there are what are known as ‘string’ trades in various commodities, particularly where goods are purchased while in transit. In such cases, the new Incoterms make it clear that the new buyer need not contract with the carrier as was the case in *Numill Marketing CC and Another v Sitra Wood Products PTE Ltd and Another*.¹⁰¹

In ‘string’ trades, the new buyer simply has to acquire the carriage contract already concluded under Incoterms 2010. The use of the traditional phrase ‘exist or over the ship’s rail’¹⁰² used in FOB, CFR and CIF Incoterms has been replaced with ‘placing goods on board’ the vessel.¹⁰³ With regard to

[major-conference-and-accredited-masterclasses-in-September-in-paris-31384658/](http://www.mantissa.co.uk/Support/Incoterms2010.htm)

(last accessed on 30 November 2010). See also

<http://www.mantissa.co.uk/Support/Incoterms2010.htm> (last accessed on 30 November 2010).

⁹⁸ <http://www.mantissa.co.uk/Support/Incoterms2010.htm> (last accessed on 30 November 2010).

⁹⁹ *Ibid.*

¹⁰⁰ <http://www.mantissa.co.uk/Support/Incoterms2010.htm> (last accessed on 30 November 2010). B 6 of Incoterms 2010 provides that the buyer bears unloading costs, unless such costs were of the seller’s account under the contract of carriage.

¹⁰¹ 1994 3 SA 460 (C) 473B–474E

¹⁰² C Dillon & JP van Niekerk *South African maritime law and marine insurance: selected topics* (1983) 60; *Anderson and Coltman Limited v Universal Trading Co* 1948 (1) SA 1277 (W).

¹⁰³ ‘Security issues: Throughout the revision process, there was much talk of the impact of anti-terrorism programmes such as C-TPAT, and the need for the Incoterms revision to provide guidance for traders. In the event, Incoterms 2010 has relatively little to say about this. For each Incoterm, there is a heading A10: *Assistance with information and related costs* for the seller, and a parallel B10 heading for the buyer. But the obligations of each party are stated in the most general terms, along the lines of providing ‘requested information in a timely manner’. Parties are obliged to make reimbursement of costs associated with the provision of such information; but these reimbursements appear to operate in both directions, and there is no detail as what this might mean in practice.’

security issues, Incoterms 2010 provide certain measures essential for the prevention of terrorism.¹⁰⁴

With regard to insurance, Incoterms 2010 have been updated to reflect the recent updates to the Cargo clauses.¹⁰⁵ The revised clauses are contained in the 2009, revised Institute Cargo Clauses (LMA/IUA) (2009) which has been adopted by marine insurance companies. Incoterms such as CIF and CIP are amended to reflect the changes in the revised cargo clauses. The amendments also clarify information obligations regarding insurance.¹⁰⁶ This clarification will deal effectively with issues of Incoterm-relevant insurance cover to be agreed on by the parties as was considered in *Geofzika DD v MMB International Ltd & Anor*.¹⁰⁷

On the question of marine insurance, Incoterms 2010 will be as relevant to South African marine insurance as were the Incoterms 2000 discussed in *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV & Another*.¹⁰⁸ It has been argued that marine insurance is a modern sibling of aviation insurance which does not often make the list of reportable judgments.¹⁰⁹ However, it is essential to Incoterms, as was evident in the *Impala* case where goods were carried in pursuance of a CIP sales contract. The insurance was provided at the expense of the seller. The goods were lost, and the court held that the aviation industry operates according to the peculiarities of international law and therefore the insured had a right to sue.¹¹⁰ Further, marine insurance contracts are transferable under the Incoterms which is an excellent feature of effective international trade.¹¹¹

¹⁰⁴ <http://www.mantissa.co.uk/Support/Incoterms2010.htm> (last accessed on 30 November 2010).

¹⁰⁵ J Whitehead 'Incoterms 2010 –key changes to put on your radar' November 11 (2010) <http://kluwerconstructionblog.com/2010/11/11/incoterms-2010-%E2%80%93key-changes-to-put-on-your-radar/> (last accessed on 30 November 2010).

¹⁰⁶ *Ibid.*

¹⁰⁷ [2010] EWCA Civ 459. English Court of Appeal, Civil Division. See list of Institute cargo clauses at:

<http://www.lmalloyds.com/AM/AMTemplate.cfm?template=/CM/ContentDisplay.cfm&ContentID=14813> (last accessed on 30 November 2010);

<http://www.lmalloyds.com/AM/AMTemplate.cfm?template=/CM/ContentDisplay.cfm&ContentID=15442> (last accessed on 30 November 2010).

¹⁰⁸ [2007] 1 All ER 545 (SCA) or alternatively 2008 (6) SA 606 (SCA).

¹⁰⁹ JP van Niekerk *Insurance law Juta's review of South African law (annual survey)* (2007) 562, 596, 597.

¹¹⁰ [2007] 1 All ER 545 (SCA) or alternatively 2008 6 SA 606 (SCA 619 A–E).

¹¹¹ Van Niekerk n 109 above at 562, 596, 597. The author cogently states the following rule of law as shown in *Impala Platinum Ltd v Koninklijke Luchtvaart Maatschappij NV & Another* [2007] 1 All ER 545 (SCA) or alternatively 2008 (6) SA 606 (SCA), 'in the case

It is advised that if parties wish to be bound by the new Incoterms, which apply as of 1 January 2011,¹¹² the new rules must be expressly incorporated in the contractual terms or the new Incoterms will not apply. This also means that some sales contracts will reflect aspects of both Incoterms 2000 and Incoterms 2010 in their international sales contracts. This will require clear and open negotiation and partnership as it will be a representation of a transition stage in international trade.¹¹³

CONCLUSION

It is submitted that with growth and development taking place in international trade in the form of education and understanding of legal protocol and technology, it is natural for standard international contracts applicable to such trade to reflect these changes appropriately. Clearly protectionism will not prevail and imports and exports will prevail with more convenient terms being used to support the industry. The new Incoterms 2010 are a far more user friendly set of terms which seek to educate, remove archaic and superfluous terms in order to make international sales more legally sound, practical and in step with the technological developments which also enhance global sales relationships. They represent a useful contribution to the comity of nations and an improvement of rules pertaining to imports and exports. On the other hand, they are an instrument that deals realistically with the security threats which seek to destroy positive global trade coherence. The next decade will provide an opportunity to test the effectiveness of Incoterms 2010. This may perhaps demand even more additional Incoterms, or a further reduction in existing terms. The market, under the guardianship of the ICC, will dictate future trends.

of one of the consignments, the consignee, which had paid the consignor for the cargo and to whom ownership in it had as a result passed, was paid directly by the insurer for the loss of the consignment. This was possible as the insurance arranged by the consignor under the relevant Incoterms sales to enable the consignee (or, for that matter, any other person with an insurable interest in the goods, such as a further consignee) to claim directly from the insurer (further on CIP sales, see the International Chamber of Commerce's Incoterms 2000. *ICC Official Rules for the Interpretation of Trade Terms* (2000) 81–7). *MT Yeros v Dawson Edwards & Associates & Another* [2007] 4 All SA 922 (C) provides an example, albeit not a very pertinent one, of the transferability of a marine insurance contract ... and of the fact that more than one party may be entitled to claim from the insurer as insured.

¹¹² <https://www.maxtrad.com/incoterms.shtml> (last accessed on 30 November 2010).

¹¹³ *Ibid.*