Launch of New Incoterms 2010 Rules by the ICC

When most attorneys see the word "Incoterms", often they quickly send the relevant provision to their respective in-house or firm international attorney for review, rely on their client's understanding of or choice regarding the provision, or in the worst cases, ignore the applicable provision thinking (hoping) it will never become the subject of dispute. That is the extent of most attorneys' understanding of the term.

So, what does "Incoterms" really mean? The acronym "Incoterms" stands for "**In**ternational **co**mmerce **terms**". The Incoterms rules are the best known and most prevalent global standardized terms governing the costs, benefits and risks of shipping goods between parties, on a mutually exclusive basis. They reduce the uncertainties between contracting parties in such circumstances arising from use of various domestic versions of similar shipping terms, and, therefore, the risks of multi-jurisdictional legal actions. They also shorthand the provisions required to cover such issues. Since 1936, the Incoterms rules are published by the International Chamber of Commerce (the "ICC"). They closely correspond to the United Nations Convention on Contracts for the International Sales of Goods. New versions were launched in 1953, 1967, 1976, 1980 and 2000. The latter of such revisions intended to address the prevalence of customs-free zones, electronic communications and modern modes of transport. Due to the international reference in their title and the fact that an international organization publishes them, most attorneys and business people chalk up the Incoterm rules as applying to and requiring international law experience. However, the Incoterms rules are often referenced in many commercial contracts that involve the shipment of goods, even if such goods never touch an overseas ship or plane. Any business person or attorney responsible for or that negotiates commercial contracts involving the shipment of goods, even if only domestically, should familiarize themselves with the Incoterms rules.

So, you may be asking, "Why Paris, and why now?" Even those of us familiar with the Incoterms rules become so familiar with the terms that we rarely go back to the basics of research and review the full publication of the rules, as is often the case with the statutes most often affecting our practices. The same was true for me…for the past ten years, when I saw "Incoterms 2000", I simply read the provision, explained the rules to my client, and negotiated and revised the applicable provision, all based on my understanding of the Incoterms 2000 rules, as necessary…until one day in January of this year while negotiating a purchase agreement (yes, an international one) for a client, I saw "Incoterms **2010**". At first, I literally marked out the "1" and replaced it with a "0" with my red ink pen, assuming that it was a typographical error. After a few minutes of self-doubt and curiosity, I researched "Incoterms **2010**" and to my amazement and luck, I learned that the ICC had in fact published the Incoterms **2010** rules on September 16, 2010 in Paris, France, which is where the ICC is based, with the Incoterms **2010** rules to be effective **January 1, 2011**.

Now that you are aware of and feeling a duty to become familiar with the Incoterms 2010 rules, like any good attorney, I refer you to the actual Incoterms 2010 rules for a full and accurate recitation (no summary or reference, including this one, should replace a full reading). However, I will summarize a few of the most notable distinctions between the Incoterms 2000 and Incoterms 2010 rules, as there have been four notable deletions, two significant additions and a general modernization of the rules.

Within Section D of the Incoterms rules, which address delivery rules, **Delivered at Terminal** ("**DAT**") replaces **Delivered Ex Quay** ("**DEQ**") and **Delivered at Place** ("**DAP**") replaces **Delivered at Frontier** ("**DAF**"), **Delivered Ex Ship** ("**DES**"), and **Delivered Duty Unpaid** ("**DDU**"), reducing the rules from 13 to 11. **Delivered Duty Paid** ("**DDP**") remains "as is" in Section D of the new rules.

Delivered DAT means that delivery occurs at the delivery terminal **after** the goods are unloaded. **Delivered DAP** means that delivery occurs on the delivery vehicle **before** the goods are unloaded (but ready for unloading) and **not cleared** for import. **Delivered DDP** means that delivery occurs on the delivery vehicle **before** the goods are unloaded (but ready for unloading) and **cleared** for import. The new rules, **Delivered DAT** and **DAP**, delete the redundancy of the former **Delivered DAF, DES, DEQ** and **DDU** rules by using more universal terms to apply to multiple modes of transport, including container traffic. In **Delivered DAT**, "Terminal" may refer to a port, as well as a land- or air-based transport destination, and thus, covers the "port" previously referred to by **Delivered DEQ**. Similarly, the arriving "vehicle" in **Delivered DAP** may refer to a ship, as well as a land or air vehicle, and the "place" may refer to a port, as well as a land- or air- based transport destination, therefore covering **Delivered DES**, as well as **Delivered DAF** and **DDU.** Furthermore, **DAP** specifically does not include "duty" in its title with the hopes that it will be used more frequently for domestic and free trade, not just international trade. One concept remains consistent from the 2000 to the 2010 rules: The Seller bears all of the costs (other than those for import clearance in **Delivered DDP**) in all three new Section D rules.

Paris' Best Kept Secret of 2010

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Although the 2010 rules do not address some new issues that one would expect by seemingly leaving such issues to other relevant authorities (e.g., mandatory security checks have seemingly been left to the applicable import/export authorities), they do

- **require both Seller and Buyer to provide information to the other party that such party needs to comply with recent requirements for additional information for international transport;**
- **include updated insurance requirements where applicable to reflect updates to the Institute Cargo Clauses (which are a set of terms for cargo insurance policies voluntarily adopted as standard terms by many international marine insurance organizations), although Buyers should be cautioned that the new rules only require Sellers to obtain the minimum insurance coverage, as required by Clause C of the Institute Cargo Clauses, and should consider increasing the level of insurance Sellers are required to maintain;**
- **attempt to prevent Sellers from double-charging Buyers for unloading/handling costs in the price of the goods when Buyers are already paying such costs per the applicable Carriage and Delivery Incoterms rules (e.g., Sections C and D – CPT, CIP, CFR, CIF, DAT, DAP and DDP);**
- **give electronic documents equal rights as paper documentation in a less complicated manner;**
- **make the rules fit current practice (e.g., when required, Sellers may procure "a" contract of carriage, instead of "the" contract of carriage, recognizing that goods pass through many brokers between the initial Seller and final Buyer and the role of commodity traders); and**
- **modernizing language (e.g., changing delivery from "across the ships rail" to "on board" and using gender-neutral language).**

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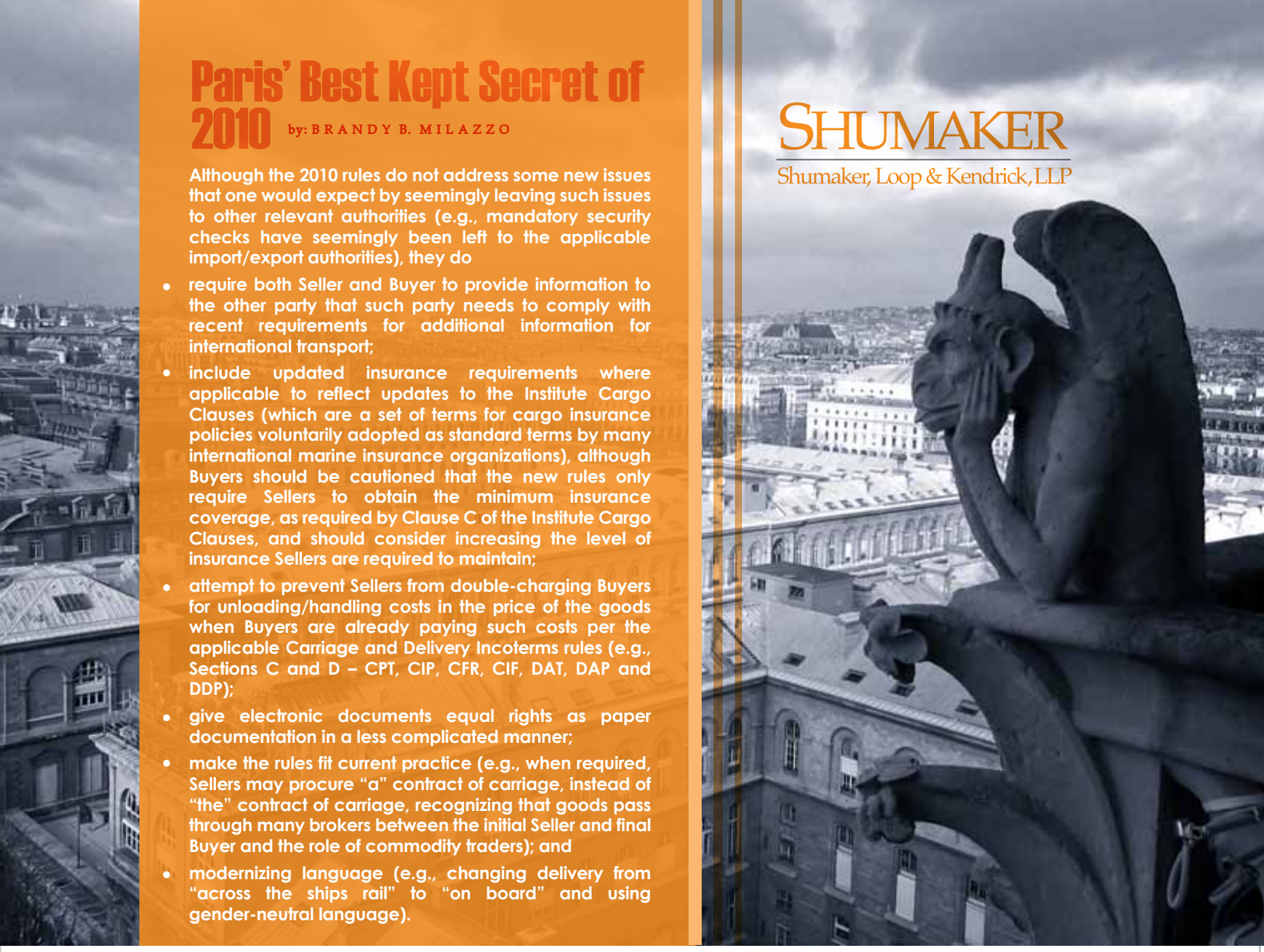

Even attorneys most familiar with Incoterms have likely incorrectly used a rule(s), and likely, more than once. The Incoterms 2010 rules attempt to reduce the likelihood of such incorrect usage by including more detailed guidance notes for each rule, including a summary picture of the rule at the beginning of each rule, and splitting the rules into two classes, one class for any form of transport and one class for maritime transport only.

Takeaways: The Incoterms 2010 rules do not apply to any contract unless specifically referenced, and all references should be as specific as possible, as there is no such thing as a "default" Incoterms rule. You should choose the correct rule only after going back to the basics and reviewing the actual wording of the rule. You should make location references as specific as possible. Even when referenced and used correctly, the Incoterms rules do NOT address, among other things, description of the relevant goods, warranties of the parties, rights or obligations of the parties outside of the terms covered by the rules, remedies, price, payment terms, title, intellectual property issues, and applicable law and jurisdiction. To that point, if the Incoterms are going to be referenced and used, the parties should agree to the correct term(s) early in negotiations, as each Incoterms rule will affect many of these other issues not addressed by the Incoterms rules, such as title and intellectual property. Additionally, the Incoterms rules do not protect parties from their own risks or losses. Finally, the Incoterms are NOT law. The Incoterms rules are no substitution for some of the most basic aspects of a contract for the buying/selling of goods and its negotiation.