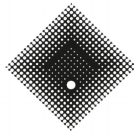

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International Delivery Risks: The Case of Delivered Duty Paid in Australia

Roberto Bergami[1]

Abstract: *The choice of delivery terms in international contracts has significant impact on both physical and financial risks for importers and exporters. This paper considers implications resulting from a recent Australian tribunal case involving transactions based on Delivered Duty Paid (DDP) terms (Incoterms). This case highlights how importers may become exposed to unexpected financial penalties caused by incorrect processes from foreign suppliers that result in duty and taxation payment shortfalls. The discussion focuses on the risk elements related to DDP for importers and the interpretation of legislation and policy documents. A chronological timeline of events is provided to explain the changes in policies and interpretation related to ownership as defined by Australian customs legislation. The conclusion is that, due to customs considerations and the decision of the tribunal in this case, DDP may no longer be a viable option for international trade transactions, not only in Australia, but also in other nations.*

Keywords: international delivery terms, delivery risks, customs policy, fraudulent invoices, incorrect customs declarations, Incoterms.

JEL classification: K12

1 Introduction

International trade in physical goods requires movement of cargo across borders. In order to execute a sale or purchase contract, a number of activities need to occur that are related to the movement of cargo across borders. These include arranging for transport and insurance as well as transacting with, and obtaining approval from, relevant national customs authorities to allow cargo movement from origin to destination, as in all nations, export and import cargo is subject to customs control.

It is generally accepted international transactions are far more complex than their domestic counterparts due to a myriad of considerations, such as different languages, cultures, business environments and the challenges encountered by supply chains to get the product to its final destination. To provide a standard approach to the physical movement of goods in international transactions, the International Chamber of Commerce (ICC) produced a set of rules for the interpretation of delivery terms: Incoterms, "to facilitate the conduct of global trade" (International Chamber of Commerce, 2010, p. 4). The ICC is a private body, consequently, it cannot issue laws, rather it issues rules that contracting parties voluntarily incorporate in their contracts, thereby making these binding, although "parties should be aware that mandatory local law may override any aspect of the sale contract, including the chosen Incoterm rule" (International Chamber of Commerce, 2010, p. 6). Incoterms were first published in 1936 and have been regularly updated, with revisions in 1953, 1967, 1976, 1980, 1990, 2000 and 2010 – the current version. The update to the rules has reflected changes in international delivery practices, taking into account major developments, such as the introduction of shipping containers and the increasing sophistication and adoption of intermodal transport.

The paper firstly provides some contextual background about Incoterms, concentrating on their "fit" in sale/purchase contracts and focusing on their risk elements. This is followed by a literature review with an emphasis on the Delivered Duty Paid (DDP) term. The methodology is briefly provided, before the discussion of the problem, which is followed by the conclusion.

2 Background

Incoterms provide a common approach to one of the fundamental elements of an international commercial contract dealing with the sale of physical goods, that is, delivery. Since first published nearly 80 years ago, the popularity of Incoterms rules has continued to increase, with support from UNCITRAL. Indeed, the UNICTRAL General Assembly endorsed Incoterms 1990 at its twenty-fifth session, in 1992; Incoterms 2000 (effective 1 January 2000) at its thirty-third session, in 2000; and Incoterms 2010 (effective 1 January 2011) at its forty-fifth session in 2012. These endorsements have led Incoterms to become the rules of universal choice in international

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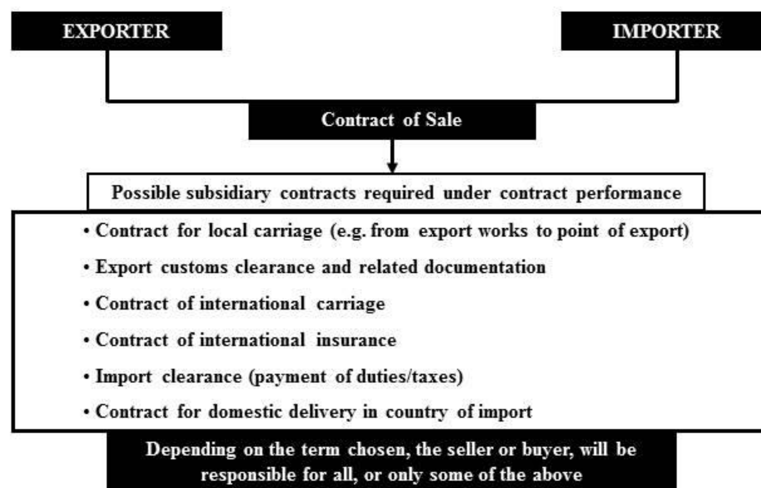
commercial transactions. Notwithstanding the popularity of Incoterms other rules have co-existed in the past. For example, the United States decided to develop their own terms: American Foreign Trade Definitions, the latest update to which was in 1941, but it seems that by the turn of this century there was a desire to use a standard format and the Incoterms are now recommended for use in US international commercial contracts. Perhaps, finally, the international trading world can speak with one voice. It should be noted that discussion of rules other than Incoterms is beyond the scope of this paper.

Historically, the development of Incoterms began in 1921 with a survey of the “six most usual trade terms current in 13 member countries. A second, revised edition in 1929 covered 35 countries” (Deutsch, 1965, p. 19). The first edition was not “finalised until 1936” (Schwenzer, Hachem, & Kee, 2012, p. 49) and, as mentioned above, subsequent revisions were promulgated until the current version, 2010. Not unexpectedly, different versions of Incoterms have seen new terms developed, old terms repealed, and risk points shifting, reflecting changes in transportation practices across the globe over successive decades.

On a mutually exclusive basis “Incoterms define the rights, duties, obligations and responsibilities of seller and buyers insofar as the movement of goods and associated functions are concerned” (Bergami, 2011, p. 161). The execution of a contract gives rise to a number of “subsidiary” contracts. Whilst evolving from the contract of sale, these other contracts are independently executed by the seller or buyer with third parties depending on the choice of Incoterms, as shown in Figure 1.

Figure 1: Incoterms and “subsidiary” contracts (Bergami, 2013a, p. 264)



Significant changes occurred between the Incoterms 2000, having 13 terms, and the revised 2010 version with only 11 terms. It was not just a matter of reducing two terms, as some were repealed and others added. Furthermore the categorisation of delivery terms was also changed, with a shift from the 2000 version based on cost drivers, to the 2010 version based on modes of transport. A summary of the changes is provided is provided at Table 1. The terms DAF, DES and DDU were replaced by the new 2010 Delivered at Place (DAP) and the term DEQ was replaced by the new 2010 Delivered at Terminal (DAT) term.

Table 1: Major changes between Incoterms 2000 and 2010

<table>
<tr><th colspan="2">Incoterms 2000</th><th>Comment</th><th colspan="2">Incoterms 2010</th><th>Comment</th></tr>
<tr><td>Group E</td><td>EXW</td><td></td><td rowspan="7">Any mode of transport, including combined or multi-modal</td><td>EXW</td><td></td></tr>
<tr><td rowspan="3">Group F</td><td>FAS</td><td></td><td>FCA</td><td></td></tr>
<tr><td>FOB</td><td></td><td>CPT</td><td></td></tr>
<tr><td>FCA</td><td></td><td>CIP</td><td></td></tr>
<tr><td rowspan="4">Group C</td><td>CFR</td><td></td><td>DAP</td><td>Replaces DAF, DES, DDU</td></tr>
<tr><td>CIF</td><td></td><td>DAT</td><td>Replaces DEQ</td></tr>
<tr><td>CPT</td><td></td><td>DDP</td><td></td></tr>
<tr><td>CIP</td><td></td><td rowspan="4">Sea and inland waterways transport</td><td>FAS</td><td></td></tr>
<tr><td rowspan="5">Group D</td><td>DAF</td><td rowspan="2">Replaced by DAP</td><td>FOB</td><td rowspan="3">Risk point change to FOB affecting CFR and CIF</td></tr>
<tr><td>DES</td><td>CFR</td></tr>
<tr><td>DEQ</td><td>Replaced by DAT</td><td>CIF</td></tr>
<tr><td>DDU</td><td>Replaced by DAP</td></tr>
<tr><td>DDP</td><td></td></tr>
</table>

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However, a comparison of the relevant clauses between the 2000 and 2010 versions highlights no fundamental change to the DDP term, particularly in the context of customs clearance and payment of duties and taxes. A comparison of the words from the relevant clause from the Incoterms 2000 and 2010 is provided at Table2. It can be observed the wording in clause A6 is identical except for marginal change in reference to third country transit.

Table 2: Comparison of Incoterms 2000 and 2010 DDP A6 clause

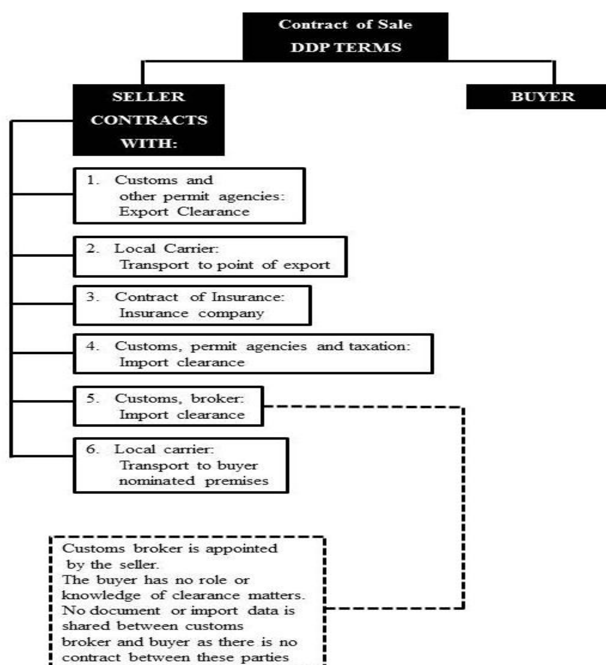
Incoterms 2000 Clause A6 Division of costs (extract) (International Chamber of Commerce, 1999, p. 124)	**Incoterms 2010** Clause A6 Allocation of costs (extract) (International Chamber of Commerce, 2010, p. 72)
• Where applicable the costs of customs formalities necessary for export and import as well as all duties, taxes and other charges payable upon export and import of the goods, and *for their transit* through any country prior to delivery in accordance with A4	c) Where applicable the costs of customs formalities necessary for export and import as well as all duties, taxes and other charges payable upon export and import of the goods, and *the costs for their transport* through any country prior to delivery in accordance with A4

The wording "where applicable" related to customs clearance and this was explained in the guidance notes to Incoterms 2000, where it states (International Chamber of Commerce, 1999, p. 21):

The term "customs clearance" has given rise to misunderstanding. Thus whenever reference is made to an obligation of the seller or the buyer to undertake obligation in connection with passing the goods through customs of the country of export or import it is now made clear that this obligation does not only include the payment of duty and other charges, but also the performance and payment of whatever administrative matters are connected with the passing of the goods through customs and the information to the authorities in this connection.

In the context of DDP, based on the information in Table 2 and the explanation above, it is clear the party having the primary responsibility for border control activities is the seller. The contracts a seller needs to execute to complete the supply function to the buyer under DDP are shown at Figure 2.

Figure 2: DDP contracts and seller responsibility



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Having provided background to the DDP responsibilities of sellers, a literature review follows next.

3 Literature Review

Research into Incoterms spans at least over four decades, but the literature before Incoterms 2000 is either outdated due to changes to Incoterms versions, or not directly relevant to the discussion in this paper, consequently this is not included. Texts available in languages other than English have also not been included in this review.

Eldovića, Vukašinovića, Tešića, and Bijelić (2015) point to the difficulty of using DDP in the EU apparently due to some taxation complications, but there is no further discussion. Roos (2011) provides a practical manual for the use of Incoterms 2010 and in the DDP section the author cautions "before a seller decides to sell DDP, it's sensible to enquire about the rules and regulations in the country of destination" (p.76). Although there is mention about potential difficulties in obtaining import licences and recommending the exclusion of taxes, there is no further discussion. In fact the duty and tax section is only six lines long. Stapleton, Pande and O'Brien (2013) limited their enquiry to three maritime terms, not including DDP. Popa, Belu and Paraschiv (2013) consider the incoterms broadly in the context of global competitiveness, but DDP is not a feature of their article. Bergami (2013b) links Incoterms to letters of credit as an instrument of trade finance, but DDP is only briefly mentioned and there is no discussion related to the delivery of the goods, the responsibilities of the contracting parties or the obligations/implications of customs clearance. In an earlier paper, Bergami (2011) discussed the Incoterms 2010, but concentrates on the new terms introduced, consequently no discussion on DDP is provided. Ndlovu (2011) provides a macro comparison of the changes between Incoterms 2000 and 2010, but there is hardly a mention of DDP. In considering Incoterms 2010, Bălună (2012) looks to compare these to the American Foreign Trade Definitions, but the discussion of both sets of rules is not rigorous and there little mention, if any, of DDP. Lazăr's (2011) article is a general commentary on the Incoterms 2010, but lacks any analysis of the implications of specific terms with little DDP focus, like the work by Gavrila and Rosu (2011).

Blanco & Ponce-Cueto (2015) describe a mathematical model developed to measure firm's cost of international trade transactions. The focus is purely on cost differential between some Incoterms and DDP. There is some confusion in this article because even though it refers to Incoterms 2010, there is also reference to a DDU term, which applies to Incoterms 2000, or earlier, but not the 2010 version. Căruntu & Lăpăduşi (2010) provide a different costing approach to explain the 2000 version of incoterms, but they are selective on which terms they compare with no focus on DDP. An investigation into delivery terms in Spain is provided by del Rosa (2013), taking a mathematical approach. This work acknowledges Incoterms 2010, but the discussion is based on the 2000 version. Unfortunately the delivery terms are aggregated so it is not possible to discern the mathematical effect on the DDP term. Frischen, Rod and Thompson (2007) consider Incoterms 2000 from a legal perspective. Their article begins with the notion of trust, an important aspect that will become evident later in this paper, but these authors delve into areas that Incoterms specifically does not cover, such as payment and transfer of property. There is little reference to DDP, a common theme in published works in this area. Bergami (2006) approaches Incoterms from a risk perspective, but the discussion in this article is limited to the exporter's perspective. However, there is some discussion about the uncertainty of customs classification and duty payable, matters that relate to this paper, even if from a different viewpoint.

It appears that, from existing literature, there is a dearth of research into DDP generally, and almost none on the implications of the DDP ramifications on border clearance processes. It is therefore argued this paper will make a contribution to existing knowledge in international delivery terms and associated risks.

4 Methodology

The methodological approach in this paper is a document analysis, informed by existing literature, the texts of the Incoterms 2000 and 2010, and the published findings of the Administrative Appeals Tribunal in the case of Studio Fashion (Australia) Pty Ltd and Chief Executive Officer of Customs [2015] AATA 366 (28 May 2015). The case will simply be referred to as SFA from now on.

The document analysis focuses on three main areas:

1. The background to the case, that is, the contractual arrangements between the foreign seller and the local buyer and the impact these had in practice ;
2. The policy documents issued by the Australian Customs Service; and
3. The disjoint between the expectation and understanding of responsibilities in the world of commerce when dealing with DDP transactions, and the rationale adopted in reaching the decision in this case.

The question this paper seeks to answer is: Given recent developments, is DDP an acceptable risk proposition for international trade contracts?

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Details of DDP transactions in the SFA case

SFA entered into DDP contracts with Sheng Fa, a Chinese supplier, purchasing apparel goods that attracted duty and tax, on a DDP basis. Apparently there were no formal written contracts in place, but SFA had been trading with Sheng Fa for some time and it is presumed a good working relationship was established, particularly as Sheng Fa did not require payment from SFA until one month after delivery of the goods had been completed. This indicates a high level of financial trust, for otherwise, more secure forms of payment such as pre-payment (in whole or in part), or letters of credit would have been required by Sheng Fa.

Consistent with the requirements of DDP, SFA played no part in the import customs clearance process in Australia. SFA did not select a customs broker and was not otherwise involved in the customs clearance process in any way whatsoever. SFA never engaged a customs broker, and did not provide any authority for another party to act on its behalf. SFA had no knowledge of the status of goods in transit, only becoming aware the cargo was due for delivery after it had entered the domestic market, that is, post customs clearance.

On a regular basis, the Australian Customs and Border Protection Service (ACBPS) conducts post clearance compliance audits. SFA was subjected to such an audit that focused on a number of transactions between 1 January 2011 and 30 October 2012. Given the Incoterms became effective on 1 January 2011, both this version and the previous version would have applied to these contracts. This is because if cargo was cleared on 1 January 2011, it must have obviously been exported from China before that date and contractual arrangements concluded before shipment. However for the purpose of customs clearance responsibility under DDP, as shown in Table 2, the change in Incoterms versions had no practical effect and as Figure 2 shows, it is the seller that engages third parties to complete the supply of the product.

As a result of the ACBPS investigation, it was alleged short payments of Australian dollars 75,445.27 in duty and 96, 618.11 in goods and services tax had occurred. The ACBPS issued demand for payment subsequent to the audit. SFA objected to this on the basis that DDP contractual terms were used and the responsible party Shang Fa should be responsible for customs matters. A number of curious matters arose from this case.

Shang Fa used a number of names to conduct its business in Australia. Invoices and other documents showed the name Feng Sha and contracting with four different brokers (appointed by Chinese supplier) used twelve different names to make declarations to the ACBPS for the purpose of obtaining customs clearance, in order to be able to complete product delivery to SFA. On some occasions, apparently SFA was incorrectly shown on the customs declaration as being the importer which, for all practical intent and purposes, and under the DDP contract, it was not. The incorrect nomination of SFA as the importer on the customs declaration must have been the result of customs broker error, as SFA had no knowledge of customs clearance matters.

The problem in this case was not the use of multiple brokers, or even multiple names on customs declarations, the problem was fraudulent activities through under-invoicing. Shang Fa apparently supplied two invoices for the same transaction. One invoice to its appointed customs brokers with a lesser value than the true sale contract price. It also separately provided another to SFA for payment, showing the correct invoice value. The behaviour of Shang Fa could not be reasonably interpreted as one of innocent mistake; rather it was systemic and deliberate, as the audit found more than 100 declarations with a declared value for customs being less than that agreed to in the contract of sale. It seems no argument exists about the fact that duties and taxes were underpaid. The issue of contention was who should be held responsible for the shortfall in government revenue – Shang Fa, the Chinese supplier responsible for customs clearance and payment of duty and tax as per the DDP obligations, or SFA as the buyer of the goods in question. This is discussed in the next section.

Discussion of the Australian legislation and customs policy and its implications

The Australian Customs Act (1901) (the Act) is the main legislation underpinning the operations of customs processes in Australia. Section 4 of the Act defines:

owner in respect of goods includes any person (other than an officer of Customs) being or holding himself or herself out to be the owner, importer, exporter, consignee, agent, or person possessed of, or beneficially interested in, or having any control of, or power of disposition over the goods.

The breadth of the definition in the Act, it has been argued, is to allow Customs to pursue different avenues to collect what is rightfully owed to it. In matters of international trade, given the variety of parties involved in a transaction, this approach seems plausible. In seeking to recover debts due, Section 165(3) of the Act states:

The Comptroller-General of Customs may make, in writing, a demand for payment of an amount that is a debt due to the Commonwealth under subsection (1) or (2).

(1) An amount of duty that is due and payable in respect of goods:
    (a) is a debt due to the Commonwealth; and
    (b) is payable by the owner of the goods.

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(2) An amount of drawback, refund or rebate of duty that is overpaid to a person:
  (a) is a debt due to the Commonwealth; and
  (b) is payable by the person.

Subsection 2 above does not apply to this case. The demand for payment is therefore required when money is owed to the government, with the responsibility for settlement of that debt accruing to the owner, but it should be noted the Act states demand may be made, not must be made. Given the owner may be any one of a number of parties, the trading community and Customs themselves sought to clarify the identity of an owner for customs purposes, especially when a DDP transaction occurred. Such clarification was provided by Customs via Australian Customs Notice (ACN) 2000/30, issued in June 2000. That ACN stated, in part (Burns, 2000, p. 1):

> Some difficulties arise with DDP/DDU transactions in determining who is the owner of imported goods for the purposes of the various provisions of the Customs Act:
>
> - Penalty provisions, section 243T
> - Retention of documents, section 240
> - Duty shortpaid or erroneously refunded, section 165
>
> **Owner for Customs entry purposes**
> In a Delivered Duty Paid (DDP) contract, where there is a Customs duty liability, the overseas supplier is responsible for acquittal of that liability and will be regarded as the owner for Customs entry purposes, and the importer for the purposes of the GST Act.
> **Implications for owners**
> Owner's responsibility for section 243T penalty
> Customs will treat the entity shown as owner on the customs entry as the entity liable to pay any penalty which may be imposed pursuant to Customs Act section 243T.
>
> **Section 240 - Owner's responsibility to retain commercial documents**
> Generally, the entity shown as owner on the customs entry is liable to retain all relevant commercial documents (originals or certified copies) for the period specified in section 240.
> **Section 165 - Owner responsible to pay duty short paid or erroneously refunded**
> Where post entry action is necessary, the owner shown on the entry is the person on whom any section 165 demand will be made. Should this person deny liability as not being the legitimate owner (ie not having legal title to the goods and not having held themselves out to be the owner in terms of Customs Act section 4), the owner's agent is considered, for the purposes of Customs Act sections 4, 165 and 183(1), to be the person on whom the demand should be made.

The purpose of an ACN is to provide a policy position as to the actions to be pursued by Customs as well as clarify any ambiguities. It is very plain from ACN that the owner of the goods is the foreign supplier, in thi case Shang Fa. The owner is liable for penalties under Section 243 of the Act and is also liable to pay any shortfall in duties under Section 165 of the Act. This Customs notice having been issued approximately six months after the Incoterms 2000 took effect was not repealed until 31 July 2014 via ACN 2014/36, yet the new Incoterms 2010 became effective on 1 January 2011 – two and half years earlier. Regardless of the change in Incoterms, ACN 2000/30 remained in operation until 2014.

ACN 2014/36 was curious in its brevity. The last sentence being telling of the unclear position Customs was taking, other than to indicate a possible change in direction as" Section 243T penalties are no longer limited to owners" (Nyakuengama, 2014a, p. 1). Less than two months later, Customs issued another notice on 21 August 2014: ACN 2014/43. The trading community had been looking forward to some clarification, but they were to be disappointed by this communication. Like its predecessor, ACN 2014/36, brevity was the order of the day and this notice also disclosed a degree of uncertainty from Customs. ACN 2014/43 states in part (Nyakuengama, 2014b, p. 1):

> Since the revocation of the Notice, the ACBPS has received numerous enquiries on one aspect of that Notice, i.e. who is the importer in delivered duty paid (DDP) transactions for the purposes of the A New Tax System (Goods and Services Tax) Act 1999.
> In light of those recent enquiries on the GST treatment of DDP transactions, the ACBPS will shortly issue an updated Notice on the subject.

It is a curious set of circumstances indeed where an authority repeals an existing position, signals a change in direction, issues further communication acknowledging a problem but has no solution as yet for the uncertainty it caused by its actions. Surely a better course of action would have been to repeal ACN 2000/30 and replace this with a clear alternative position, to ensure a smooth transition. After all if the authorities want compliance, certainty over processes is a must for all concerned, and this can only eventuate with clear and accurate

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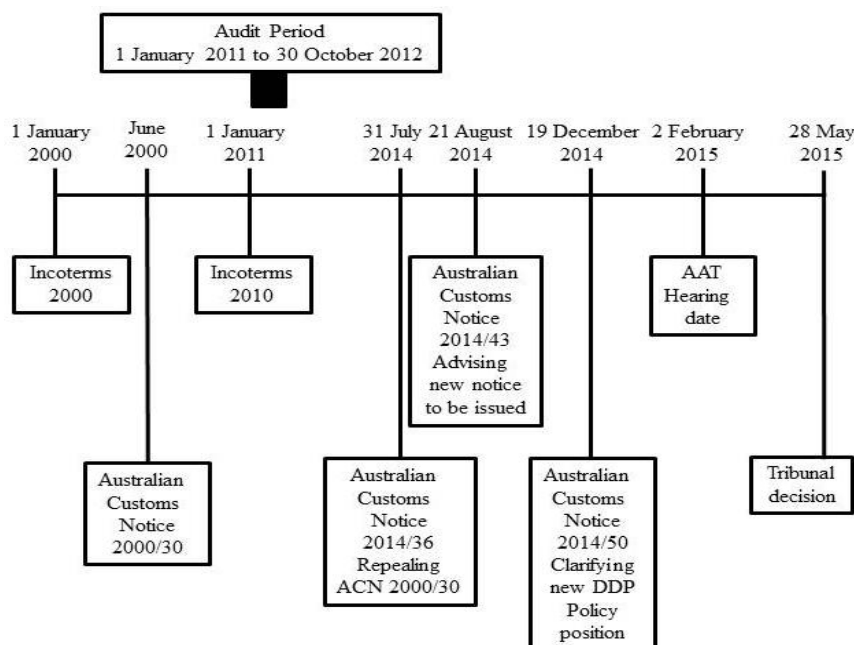
communication and information. Clarity was not provided for another four months, when on 19 December 2014 ACN 2014/50 was issued, stating in part (Nyakuengama, 2014c, pp. 3-4):

> **Implications for Customs Act**
> In a DDP transaction, the overseas supplier may be named as the importer on the import declaration, particularly if it is the overseas supplier that is organising the clearance and paying the import taxes and charges.
> The information contained in the import declaration should reflect the contract of sale between the Australian buyer and the overseas supplier.
> Under section 4 of the Customs Act, an agent is also "the owner".
> (iv) Duty short paid
>> In a DDP transaction, the overseas supplier is contractually responsible for carrying out all customs formalities and for paying any customs duty and GST.
>> Under section 165 of the Customs Act, the ACBPS may make a demand for payment of short-paid duty against any person who is "the owner" of the goods. Given the broad definition of owner in section 4 of the Customs Act, in the case of a DDP transaction the ACBPS is not limited to issuing a demand for payment on the overseas supplier; the ACBPS could, for example, issue a demand for payment on the Australian buyer of the goods.

This is the first time since ACN 2000/30 that Customs clearly indicates they could make a demand on the Australian buyer for any duty shortfall. This is a significant change to a different position that had been in place for over thirteen years. It is not difficult to imagine the trading community in Australia, when engaged in DDP transaction, would regard a duty short-payment as being a problem of the foreign buyer – after all, this is what Customs had clearly said.

The strange events in this case point to perhaps a retrospective application of a new position on recovering a shortfall in duty. An analysis of the timeline of the events in this case, as show in Figure 3, highlights asynchronous events. The audit period clearly covered transactions that fell under the application of ACN 2000/30. It was not until 19 December 2014 that Customs published their new position on the treatment of owner for debt recovery. The Tribunal hearing followed about six weeks later and the decision was made public on 28 May 2015. Yet, some of the reasons given for reaching the decisions appear to be borne from the change in position by Customs that cannot be really understood by a reasonable person, as having retrospective application.

Figure 3: Timeline of Incoterms, ACBPS policy positions and SFA case



Proceeding with a hearing against SFA contradicts the position of ACN 2000/30 – this position was not repealed until 2014, but the audit was on transactions between 1 January 2011 and 30 October 2012. The correct party to pursue should have been, by Customs' own position, Shang Fa, not SFA. Incorrect declarations were made by customs brokers who listed SFA as the importer – this is a statement of error. Those customs brokers who erred should have been penalised for making such a mistake. As SFA had not authorised any party to act on its behalf, no broker had the right to name SFA in a customs declaration, especially as SFA, not being involved

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in the customs process, could not have known this had occurred. In fact, in the decision there is acknowledgement and exoneration of SFA from any wrong doing ("Studio Fashion (Australia) Pty Ltd and Chief Executive Officer of Customs," 2015, p. para 78):

> I accept that it was not the owner of the goods it bought from the Chinese supplier until they were delivered. It was not aware of the arrangements made by others to avoid either the payment of duty at all or the full amount of duty that was payable on those goods. I also accept that it was not a party to those arrangements and agreed with the Chinese supplier that the price it paid was inclusive of duty. From the invoice it received, Studio Fashion would not have known that incorrect information had been given to ACBPS officials.

Why did then Customs pursue an innocent party? The reason given included in part ("Studio Fashion (Australia) Pty Ltd and Chief Executive Officer of Customs," 2015, p. para 40):

> there being poor prospects of recovery from the Chinese supplier; the variety of ways in which the goods had been imported with four different brokers being used to lodge 47 import declarations and a number of freight companies responsible for the lodgement of 95 SACs leading to the greater part of the shortfall in duty; Studio Fashion is the only person within Australia against whom a demand could be issued for the entire shortfall amount during the audit period; it was efficient to proceed against Studio Fashion which would presumably have contractual rights against the Chinese supplier to claim the amount of duty and GST demanded of Studio Fashion and Studio Fashion rather than the brokers or freight companies, was responsible for the importing the goods on a DDP basis.

From reading the above reasons, it would seem SFA may have been regarded as a soft target. This is a small enterprise probably unlikely to have enough financial resources to mount a challenge. The fact there was no appeal to this judgment cannot be interpreted as meaning it was accepted, but that more than likely, insufficient funds were available to do so.

5 Conclusion

The question this paper aims to answer is whether Incoterms DDP are an acceptable risk proposition for international trade contracts? Based on the circumstances of this case the answer cannot be positive. There are still too many uncertainties imposed on importers resulting from the position outlined in ACN 2014/50. Through no fault of their own, Australian buyers may be liable for any short-payment of duty, even where they were not a party to customs processes.

Buyers, therefore have two options:

1. Continue to use DDP, but a form of security would need to be provided by the supplier. The chances of this occurring are probably minimal, as the security would need to be in the form of money that would need to be deposited with the Australian buyer, or more than likely through a bank guarantee. The guarantee would need to be provided by a bank where the Australian buyer could easily invoke such guarantee. This may prove problematic and, of course, there would be additional cost associated in providing a guarantee as banks do not make these freely available. This course of action would raise issues of trust between traders. It is not difficult to imagine a seller wondering why security on sales were called for when, in all probability, they would believe they were the ones most at risk, especially in transactions where post shipment payment arrangements are in place.
2. Choose terms other than DDP. This means the buyer will be responsible for import customs clearance processes and payment of duties and taxes. There ought to be an equivalent reduction in the cost of the goods. Arguably any terms other than DDP is likely to be better for an Australian buyer, as being responsible for the customs clearance process enables them to manage border clearance risks first-hand. It is argued here that from a risk management viewpoint, this is the only viable solution.

As it stands, the Australian buyer has incurred additional financial penalties due to the fraudulent activities of Sheng Fa. It is unlikely Sheng Fa will make good the loss to SFA, else they would not have behaved as they did in the first instance. There is scope for further research into this area to determine whether the approach taken by the authorities in Australia is unique, or whether other nations have similar legislation and approaches. Should it be found the buyers in different jurisdictions remain potentially liable under DDP contracts, this information should be provided to the International Chamber of Commerce and perhaps strong consideration should be given to removing the term DDP from future editions of the Incoterms.

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