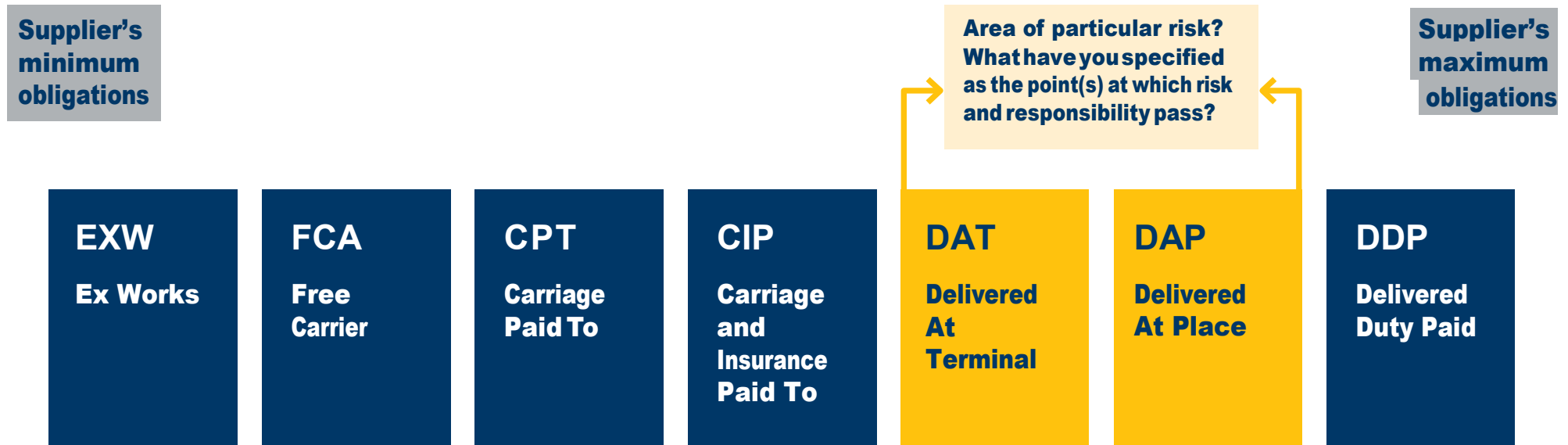


Incoterms and Brexit

Incoterms are often used to allocate risks relating to the delivery of goods between seller and buyer where the goods will cross international borders. Incoterms have been widely used for trade within the EU, though the provisions relating to customs and border clearance formalities have had little relevance due to the EU customs union and single market. That will change once Brexit has occurred. When the UK is no longer a member of the EU, parties to contracts will have to pay much closer attention to the practical and commercial implications of the Incoterms that they select.



Selecting the appropriate Incoterms after Brexit

Incoterms allocate between seller and buyer specific risks relating to the delivery of goods. Crucially, the Incoterms are not a complete contract of sale. For example, they do not address questions such as the price or method of payment or the consequences of breach. Consequently, Incoterms are usually incorporated by reference into the contract, which may itself be made up of several documents. In practice, this could mean that Incoterms are incorporated by a reference in a Framework Agreement, or in Terms and Conditions, or in ancillary documents such as a quotation or order form.

Incorporation is usually effected by referring to the three letter code that identifies the relevant Incoterms. In some cases, it is possible that incorporation could be the result of a course of conduct, perhaps requiring investigation of the parties' correspondence and documentation over a lengthy period. In either case, it can be difficult to spot which Incoterms have been selected, and therefore to work out how key areas of responsibility have been allocated between the parties.

Brexit significantly increases the commercial risks that might flow from inadvertently basing a supply arrangement on Incoterms that do not meet the parties'

requirements, or of continuing to use Incoterms that have a significantly different risk profile once Brexit has occurred. This is particularly true of Incoterms that allocate responsibility for customs and other border clearance issues, such as import or export licences. When Brexit occurs, the UK ceases to be a member of the European Union, its single market and its customs union. The Taxation (Cross Border Trade) Act 2018 provides the legislative basis for a separate UK customs and VAT regime. The UK will also operate separate (though parallel) systems to work alongside EU regulatory regimes such as REACH. Customs and border clearance therefore becomes a live commercial issue for trade between the UK and the EU27.

Incoterms are often used for trade within the European Union (EU) and European Economic Area (EEA). Currently, when used in that context, Incoterms relating to compliance with export or import formalities are not applicable. Once Brexit has occurred, those provisions become directly relevant, and commercially significant.

Responsibility at either end of the Incoterms "spectrum" is clear. Where goods are to be supplied Ex Works (EXW) the seller's obligations are discharged when goods are placed at the buyer's disposal at the seller's premises or other named place. From there, the buyer assumes responsibility for all costs relating to export from the seller's and import into the buyer's jurisdiction. By contrast, where goods are to be supplied Delivered Duty Paid (DDP) the seller takes on all those costs.

Following Brexit, those costs might include not only tariffs but also any costs associated with other regulatory and border clearance procedures.

There may be particular potential for misunderstanding where the parties select one of the newer (2010) Incoterms. Delivered at Terminal (DAT) and Delivered at Place (DAP) both require the parties to specify the place of delivery. In DAT delivery occurs when goods are placed at the buyer's disposal, unloaded from the arriving vehicle. In DAP, delivery occurs when goods are ready for unloading. Selection of Incoterms by incorporating the relevant three letter code is not enough. The allocation of risk depends on precise specification of the place at which delivery is to be made, and that includes the question of whether delivery occurs before or after clearance of import formalities.

In the following table, we set out the key features of the 11 Incoterms, focusing on their allocation of responsibility for export and import clearance. Ensuring that you select and incorporate the appropriate Incoterms will be an essential first step towards Brexit resilience. Having selected Incoterms, it will then be necessary to ensure that you address all relevant points of detail to establish precisely when, and where, responsibility passes from seller to buyer. As with any contract, if risks are inaccurately identified or inappropriately allocated, the price must be wrong.

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EXW—Ex Works:

The seller 'delivers' when he or she places the goods at the disposal of the buyer at the seller's premises or another named place. The goods will not have been cleared for export and not loaded onto any collecting vehicle. Under Ex-Works the seller has no obligation to load the goods.

Minimum liability for seller/supplier. Buyer is responsible both for export and import clearance. The seller has an obligation to provide only such assistance as the buyer may require to effect export. The seller is not obliged to organise export clearance. Buyers are advised not to use EXW if they cannot directly or indirectly obtain export clearance.

FCA—Free Carrier:

The seller delivers the goods, cleared for export, to the carrier nominated by the buyer at the named place. It should be noted that the chosen place of delivery has an impact on the obligations of loading and unloading the goods at that place. If delivery occurs at the seller's premises, the seller is responsible for loading. If delivery occurs at any other place, the seller is not responsible for unloading.

Seller must normally obtain at its own risk and expense any export licence or other official authorisation and carry out all customs formalities for the export of the goods. Buyer must obtain at its own risk and expense any import licence or other official authorisation and carry out all customs formalities for the import of the goods and their transport through any country.

CPT—Carriage Paid To:

The seller delivers the goods to the carrier by him or her but the seller must, in addition, pay the cost of carriage necessary to deliver the goods to the named destination.

Seller must normally obtain at its own risk and expense any export licence or other official authorisation and carry out all customs formalities for the export of the goods, and for their transport through any country prior to delivery. Buyer must obtain at its own risk and expense any import licence or other official authorisation and carry out all customs formalities for the import of the goods and their transport through any country.

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CIP—Carriage and Insurance Paid To:

The seller delivers the goods to the carrier nominated by them but the seller must in addition pay the cost of carriage necessary to deliver the goods to the named destination and also pay the necessary insurance. Here the seller is obliged to provide only minimum coverage, i.e. cover for loss or damage between the point of departure and the destination stipulated.

Seller must normally obtain at its own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the export of goods and for their transport through any country prior to delivery. It is up to the buyer at its own risk and expense to obtain any import licence or other official authorisation and to carry out customs formalities for the import of the goods and for their transport through any country.

DAT (new, 2010)—Delivered At Terminal:

The seller is considered to have delivered when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal within the named port or place of destination. Terminal in this case includes any place, whether covered or not, such as a quay, warehouse, container yard or road, rail or air cargo terminal. Under this term the seller must bear all costs and risks in bringing the goods to and unloading them at the terminal at the named port of destination. In addition to these obligations, the seller must also clear the goods for export under what is generally referred to as 'Export Clearances', where applicable. However, the seller has no obligation either to clear the goods for import or to pay any import duty or carry out any import customs formalities.

Seller must normally obtain at its own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the export of goods and for their transport through any country prior to delivery. It is up to the buyer at its own risk and expense to obtain any import licence or other official authorisation and to carry out customs formalities for the import of the goods.

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DAP (new, 2010)—Delivered At Place:

The seller is considered to have delivered when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The critical part of this new Incoterm is that all parties under what circumstances must clearly specify as clearly as possible the point within the agreed place of destination as the risks to that point are the account of the seller. In this regard, it is also very important to note that since the seller under DAP is responsible for procuring the contract of carriage he or she has to make sure that he or she procures the contracts of carriage that matches and conform precisely to the buyers choice.

Seller must normally obtain at its own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the export of goods and for their transport through any country prior to delivery. It is up to the buyer at its own risk and expense to obtain any import licence or other official authorisation and to carry out customs formalities for the import of the goods.

DDP—Delivered Duty Paid:

The seller delivers the goods to the buyer, cleared for import and not unloaded from any arriving means of transport at the named place of destination. Under DDP there is maximum obligation to the seller and, on the other hand, this option allows minimum obligation on the buyer. The only responsibility of the buyer under DDP is to offload at the delivery place. General guidance as a seller is to never contract under DDP. If the seller is unable to directly or indirectly obtain import clearances DAP is recommended. Any VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sales contract.

Maximum liability for seller/supplier. Seller must normally obtain at its own risk and expense any export licence or other official authorisation and carry out all customs formalities necessary for the export of goods and for their transport through any country prior to delivery and for their import

