

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

EX-SHIP AND ARRIVAL CONTRACTS

The ex ship clause indicates that delivery of the goods will take place at the ship upon her arrival. The "Ex ship" contract is also referred to as an "Arrival" contract. Property passes when goods are discharged - the seller pays the shipping costs and continues to own the goods until discharge and bears all risks and liability. It is possible this will become attractive again to avoid the Hamburg Rules but is not at present a common form of sale. In c.i.f. contracts, although the seller is responsible for the documents his responsibility ends on shipment regarding the safety of the goods post shipment.

The duty on the seller, as defined in **Yangtze Insurance Association v. Lukmanjee**¹ by the Privy Council, involves: '[causing] delivery to be made to the buyer from a ship which has arrived at the port of delivery and has reached a place therein which is usual for the delivery of goods of the kind in question. The seller has therefore to pay the freight, or otherwise release the shipowner's lien and to furnish the buyer with an effectual direction to the ship to deliver. Until this is done, the buyer is not bound to pay for the goods.' That "effectual direction" usually takes the form of a delivery order. The delivery order is defined as an "order by the owner of goods to a person holding them on his behalf, to deliver them to a person named". The delivery order does not take the place of the goods and is not the subject matter of the ex ship contract. It should be noted that discharge of the ex ship contract is entirely based on the actual delivery of the goods. Everything hinges on the correct delivery of the goods. Where documents are used, they are to be treated as of performing little more than administrative functions. They do not take the place of the goods. That is the distinction between a CIF contract and an ex ship contract.

The seller's responsibility includes getting goods to the port of discharge. The seller bears all costs and risk till goods arrive at their destination. The date of arrival and the name of the ship are part of the description that must be complied with in the sales contract. The court in **Yangtze v Luckmanjee** held that an insurance policy issued to an ex-ship seller was not transferable to the buyer after delivery. The risk and property of the goods remain with the seller until delivery has been made. The contract expressed as an ex ship contract called for the delivery of timber. The timber was to be made into rafts and floated from the ship to shore for delivery. The sellers had taken out a cargo insurance policy on the goods. Some of the timber was lost while being made into rafts. The buyer's attempted to claim under the policy taken out by the sellers. Held: The buyers were not entitled to claim under the policy because property in the goods had not passed to them. Under an ex ship contract, property passes when the buyer takes actual delivery of the goods. Here the risk and property in goods were still with the sellers. The insurance taken out could not be properly said to have been taken out for the buyers' benefit because the nature of the ex ship contract is such that the buyer is not intended to receive any right over the goods until actual delivery.

The Julia,² concerned a contract that purported to be "c.i.f. Antwerp", that is to say, for delivery at Antwerp.³ The contract was for the sale of Rye, a bulk dry cargo. The vessel loaded and sailed and the buyer paid for the goods. Antwerp was occupied by the Germans in World War II and the rye could not be delivered. Property had not passed to the buyer at the date of occupation. Terms included a price adjustment clause for deficiency in landed weight, to be borne by the seller. The unloaded quality was guaranteed by the seller. A delivery order was made out to the seller's agent in substitution for a bill of lading and insurance policy. The buyer and the seller had traded on this basis a number of times. The seller sent the cargo to Lisbon and sold it, when the original delivery port was invaded by Germany. The buyer claimed repayment of the price for a total failure of consideration by the seller. The court held that the buyer was entitled to the return of the contract price, paid on delivery of documents. The House of Lords found for the buyer because it was in reality an ex-ship contract, under which the seller was required to deliver the goods at Antwerp. If it had been a genuine c.i.f. contract, the buyer would have recovered nothing at all under an action for breach of contract, since the seller would have done all that was required of him under the contract. This does not mean that c.i.f. sellers are free to dispose of a buyer's goods simply because the ship has a problem

¹ **Yangtze Insurance Association v Luckmanjee** [1918] AC 585.

² **The Julia : Comptoir d'Achat v Louis de Ridder** [1949] A.C. 293 HL.

³ compare f.o.b. London, requiring loading at London.

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reaching a port. Since the goods belong to the buyer, unlawful disposal by the seller could amount to conversion.

The Gudermes.⁴ Contract for the purchase of oil. The report does not designate the form of sale's contract but from the facts it looks like an f.o.b. contract for cargo shipped out of Aden. The bill of lading was stated to be subject to U.K. Law & Jurisdiction and incorporated the H.V.R. The master advised the shipper before loading that the vessel did not have heating coils. The oil was too cold to discharge and had to be taken to a warmer climate and transhipped then returned to the port of discharge in another vessel. Held : Whilst notice of the lack of heaters was given before loading to the shippers there was no implied acceptance by the shippers of an uncargoworthy vessel and no grounds to invoke waiver and estoppel regarding the breach of the condition to provide a seaworthy vessel. The vessel was uncargoworthy and the endorsee of the bill of lading was entitled under *Brandt v Liverpool & s1 B.L.A. 1855* to an action against the shipowner for any additional costs incurred in taking delivery of his cargo.

Holland Columbo V Alawdeen,⁵ A hybrid contract permitting delivery of actual goods or delivery by documents is possible - here the documents were rejected as not being in order but a valid tender of goods was made which the buyer could not refuse : in such a situation the seller remains at risk until delivery despite the cif nomination & the possibility of delivery by documents. The goods must actually arrive.

CENTRAL DUTIES UNDER INCOTERMS "D" CONTRACTS.⁶

The "D" terms are different in nature from the "C"-terms, since the seller according to the "D"-terms is responsible for the arrival of the goods at the agreed place or point of destination at the border or within **the country of import**. The seller must bear all risks and costs in bringing the goods thereto. Hence, the "D" terms signify **arrival contracts**, while the "C"-terms evidence **departure (shipment) contracts**. Under the "D" terms, except DDP, the seller does not have to deliver the goods cleared for import **in the country of destination**.

Traditionally the seller had the obligation to clear the goods for import under DEQ, since the goods had to be landed on the quay and thus were brought into the country of import. But owing to changes in customs clearance procedures in most countries, it is now more appropriate that the party domiciled in the country concerned undertakes the clearance and pays the duties and other charges. Thus, a change in DEQ has been made for the same reason as the change in FAS previously mentioned. As in HAS, in DEQ the change has been marked with capital letters in the preamble. It appears that in many countries trade terms not included in Incoterms are used particularly in railway traffic ("franco border", "franco-frontiere", "Frei Grenze"). However, under such terms it is normally not intended that the seller should assume the risk of loss of or damage to goods during the transport up to the border. It would be preferable in these circumstances to use CPT indicating the border. If, on the other hand, the parties intend that the seller should bear the risk during the transport, DAF indicating the border would be appropriate.

The DDU term was added in the 199Q version of Incoterms. The term fulfils an important function whenever the seller is prepared to deliver the goods in the country of destination without clearing the goods for import and paying the duty. In countries where import clearance may be difficult and time-consuming, it may be risky for the seller to undertake an obligation to deliver the goods beyond the customs clearance point. Although, according to DDU B5 and B6, the buyer would have to bear the additional risks and costs which might follow from his failure to fulfil his obligations to clear the goods for import, the seller is advised not to use the DDU term in countries where difficulties might be expected in clearing the goods for import.

DAF DELIVERED AT FRONTIER (... named place) : "Delivered at Frontier" means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport not unloaded, cleared for export, but not cleared for import at the named point and place at the frontier, but before the customs border of the adjoining country. The term "frontier" may be used for any frontier including that of the country of export. Therefore, it is of vital importance that the frontier in question be defined precisely by

⁴ **The Gudermes** [1991] 1 Lloyd's Rep 456 :

⁵ **Holland Columbo v Alawdeen** [1954]

⁶ Incoterms 2000 Section 9

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always naming the point and place in the term. However, if the parties wish the seller to be responsible for the unloading of the goods from the arriving means of transport and to bear the risks and costs of unloading, this should be made clear by adding explicit wording to this effect in the contract of sale. This term may be used irrespective of the mode of transport when goods are to be delivered at a land frontier. When delivery is to take place in the port of destination, on board a vessel or on the quay (wharf), the DES or DEQ terms should be used.

DES DELIVERED EX SHIP (... named port of destination) : "Delivered Ex Ship" means that the seller delivers when the goods are placed at the disposal of the buyer on board the ship not cleared for import at the named port of destination. The seller has to bear all the costs and risks involved in bringing the goods to the named port of destination before discharging. If the parties wish the seller to bear the costs and risks of discharging the goods, then the DEC term should be used. This term can be used only when the goods are to be delivered by sea or inland waterway or multimodal transport on a vessel in the port of destination.

DEQ DELIVERED EX QUAY (... named port of destination) : "Delivered Ex Quay" means that the seller delivers when the goods are placed at the disposal of the buyer not cleared for import on the quay (wharf) at the named port of destination. The seller has to bear costs and risks involved in bringing the goods to the named port of destination and discharging the goods on the quay (wharf). The DEQ term requires the buyer to clear the goods for import and to pay for all formalities, duties, taxes and other charges upon import. THIS IS A REVERSAL FROM PREVIOUS INCOTERMS VERSIONS WHICH REQUIRED THE SELLER TO ARRANGE FOR IMPORT CLEARANCE. If the parties wish to include in the seller's obligations all or part of the costs payable upon import of the goods, this should be made clear by adding explicit wording to this effect in the contract of sale. This term can be used only when the goods are to be delivered by sea or inland waterway or multimodal transport on discharging from a vessel onto the quay (wharf) in the port of destination. However if the parties wish to include in the seller's obligations the risks and costs of the handling of the goods from the quay to another place (warehouse, terminal, transport station, etc.) in or outside the port, the DDU or DDP terms should be used.

DDU DELIVERED DUTY UNPAID (... named place of destination) : "Delivered duty unpaid" means that the seller delivers the goods to the buyer, not cleared for import, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear the costs and risks involved in bringing the goods thereto, other than, where applicable, any "duty" (which term includes the responsibility for and the risks of the carrying out of customs formalities, and the payment of formalities, customs duties, taxes and other charges) for import in the country of destination. Such "duty" has to be borne by the buyer as well as any costs and risks caused by his failure to clear the goods for import in time. However, if the parties wish the seller to carry out customs formalities and bear the costs and risks resulting therefrom as well as some of the costs payable upon import of the goods, this should be made clear by adding explicit wording to this effect in the contract of sale?. This term may be used irrespective of the mode of transport but when delivery is to take place in the port of destination on board the vessel or on the quay (wharf), the DES or DEQ terms should be used.

DDP DELIVERED DUTY PAID (.,. named place of destination) : "Delivered duty paid" means that 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. The seller has to bear all the costs and risks involved in bringing the goods thereto including, where applicable, any "duty" (which term includes the responsibility for and the risks of the carrying out of customs formalities and the payment of formalities, customs duties, taxes and other charges) for import in the country of destination. Whilst the EXW term represents the minimum obligation for the seller, DDP represents the maximum obligation. This term should not be used if the seller is unable directly or indirectly to obtain the import licence. However, if the parties wish to exclude from the seller's obligations some of the costs payable upon import of the goods (such as value-added tax: VAT), this should be made clear by adding explicit wording to this effect in the contract of sale. If the parties wish the buyer to bear all risks and costs of the import, the DDU term should be used. This term may be used irrespective of the mode of transport but when delivery is to take place in the port of destination on board the vessel or on the quay (wharf), the DES or DEC terms should be used.

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INCOTERMS 2000 : DES : Delivered EX-SHIP (... named port of destination)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the export of the goods and for their transit through any country.

A3 Contracts of carriage and insurance

a) Contract of carriage

The seller must contract at his own expense for the carriage of the goods to the named point, if any, at the named port of destination. If a point is not agreed or is not determined by practice, the seller may select the point at the named port of destination which best suits his purpose.

b) Contract of insurance No obligation

A4 Delivery

The seller must place the goods at the disposal of the buyer on board the vessel at the unloading point referred to in A3a), in the named port of destination on the date or within the agreed period, in such a way as to enable them to be removed from the vessel by unloading equipment appropriate to the nature of the goods.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

A6 Division of costs

The seller must, subject to the provisions of B6, pay in addition to costs resulting from A3 a), all costs relating to the goods until such time as they have been delivered in accordance with A4; and where applicable, the costs of customs formalities necessary for export as well as all duties, taxes or other charges payable upon export of the goods and for their transit through any country prior to delivery in accordance with A4.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorization and carry out, where applicable, all customs formalities necessary for the import of the goods.

B3 Contracts of carriage and insurance

a) Contract of carriage No obligation.

b) Contract of insurance No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.

The buyer must, should he fail to give notice in accordance with B7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4, including the expenses of discharge operations necessary to take delivery of the goods from the vessel; and
- all additional costs incurred if he fails to take delivery of the goods when they have been placed at his disposal in accordance with A4, or to give notice in accordance with B7, provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and
- where applicable, the costs of customs formalities as well as all duties, taxes and other charges payable upon import of the goods.

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A7 Notice to the buyer

The seller must give the buyer sufficient notice of the estimated time of arrival of the nominated vessel in accordance with A4 as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take delivery of the goods.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense with the delivery order and/or the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, or a multimodal transport document) to enable the buyer to claim the goods from the carrier at the port of destination. Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4.

The seller must provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

A10 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of dispatch and/or of origin which the buyer may require for the import of the goods.

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

B7 Notice to the seller

The buyer must, whenever he is entitled to determine the time within an agreed period and/or the point of taking delivery in the named port of destination, give the seller sufficient notice thereof.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the delivery order or the transport document in accordance with A8.

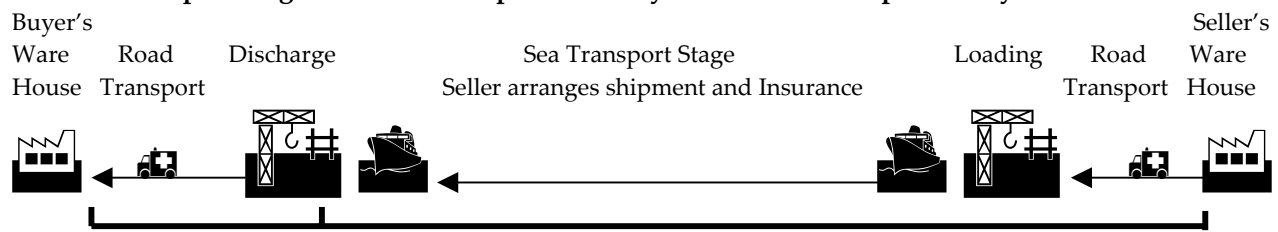
B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

B10 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

Transport Stages in the D Group of Delivery Contracts : Ex ship or to buyer's warehouse



Seller's responsibilities : to deliver goods to the named place – seller bears risks and pays all transport costs.

Risk passes to buyer on delivery at named place.

Buyer responsible for post delivery costs and expenses.

Ownership passes to buyer on payment and endorsement of documents

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INCOTERMS 2000 : DEQ – EX-QUAY (named place of destination)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the export of the goods, and for their transit through any country

A3 Contracts of carriage and insurance

a) Contract of carriage

The seller must contract at his own expense for the carriage of the goods to the named quay (wharf) at the named port of destination. If a specific quay (wharf) is not agreed or is not determined by practice, the seller may select the quay (wharf) at the named port of destination which best suits his purpose.

b) Contract of insurance No obligation.

A4 Delivery

The seller must place the goods at the disposal of the buyer on the quay (wharf) referred to in A3 a), on the date or within the agreed period.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

A6 Division of costs

The seller must, subject to the provisions of B6, pay

- in addition to costs resulting from A3 a), all costs relating to the goods until such time as they are delivered on the quay (wharf) in accordance with A4; and
- where applicable⁷, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export of the goods and for their transit through any country prior to delivery.

B THE BUYER'S OBLIGATIONS

BI Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the import of the goods.

B3 Contracts of carriage and insurance

a) Contract of carriage No obligation.

b) Contract of insurance No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.

The buyer must, should he fail to give notice in accordance with B7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

B6 Division of costs

The buyer must pay

all costs relating to the goods from the time they have been delivered in accordance with A4, including any costs of handling the goods in the port for subsequent transport or storage in warehouse or terminal; and all additional costs incurred if he fails to take delivery of the goods when they have been placed at his disposal in accordance with A4, or to give notice in accordance with B7, provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and where applicable, the cost of customs formalities as well as all duties, taxes and other charges payable upon import of the goods and for their subsequent transport.

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A7 Notice to the buyer

The seller must give the buyer sufficient notice of the estimated time of arrival of the nominated vessel in accordance with A4, as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take delivery of the goods.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense with the delivery order and / or the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document or a multimodal transport document) to enable him to take the goods and remove them from the quay (wharf).

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4.

The seller must provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

A10 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of dispatch and/or origin which the buyer may require for the import of the goods.

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

B7 Notice to the seller

The buyer must, whenever he is entitled to determine the time within an agreed period and/or the point of taking delivery in the named port of destination, give the seller sufficient notice thereof.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the delivery order or transport document in accordance with A8.

B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

B10 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

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INCOTERMS 2000 : DDU : DELIVERED DUTY UNPAID (named place of destination)

A THE SELLER'S OBLIGATIONS

A1 Provision of the goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence and other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the export of the goods and for their transit through any country.

A3 Contracts of carriage and insurance

a) Contract of carriage

The seller must contract at his own expense for the carriage of the goods to the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

b) Contract of insurance No obligation.

A4 Delivery

The seller must place the goods at the disposal of the buyer, or at that of another person named by the buyer, on any arriving means of transport not unloaded, at the named place of destination on the date or within the period agreed for delivery.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

A6 Division of costs

The seller must, subject to the provisions of B6, pay in addition to costs resulting from A3 a), all costs relating to the goods until such time as they have been delivered in accordance with A4; and

- where applicable, the costs of customs formalities necessary for export as well as all duties, taxes and other charges payable upon export and for their transit through any country prior to delivery in accordance with A4.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the import of the goods.

B3 Contracts of carriage and insurance

a) Contract of carriage No obligation.

b) Contract of insurance No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.

The buyer must, should he fail to fulfil his obligations in accordance with B2, bear all additional risks of loss of or damage to the goods incurred thereby.

The buyer must, should he fail to give notice in accordance with B7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4; and
- all additional costs incurred if he fails to fulfil his obligations in accordance with B2, or to give notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and
- where applicable, the costs of customs formalities as well as all duties, taxes and other charges payable upon import of the goods.

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A7 Notice to the buyer

The seller must give the buyer sufficient notice of the dispatch of the goods as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take delivery of the goods.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense the delivery order and / or the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document) which the buyer may require to take delivery of the goods in accordance with A4/B4.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4.

The seller must provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

A10 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of dispatch and/or of origin which the buyer may require for the import of the goods.

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

B7 Notice to the seller

The buyer must, whenever he is entitled to determine the time within an agreed period and/or the point of taking delivery at the named place, give the seller sufficient notice thereof.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the appropriate delivery order or transport document in accordance with A8.

B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

B10 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

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INCOTERMS 2000 : DDP : DELIVERED DUTY PAID (named place of destination)

A THE SELLER'S OBLIGATIONS

A1 Provision of the goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export and import licence and other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the export of the goods, for their transit through any country and for their import.

A3 Contracts of carriage and insurance

a) Contract of carriage

The seller must contract at his own expense for the carriage of the goods to the named place of destination. If a specific point is not agreed or is not determined by practice, the seller may select the point at the named place of destination which best suits his purpose.

b) Contract of insurance No obligation

A4 Delivery

The seller must place the goods at the disposal of the buyer, or at that of another person named by the buyer, on any arriving means of transport not unloaded at the named place of destination on the date or within the period agreed for delivery.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

A6 Division of costs

The seller must, subject to the provisions of B6, pay

- in addition to costs resulting from A3 a), all costs relating to the goods until such time as they have been delivered in accordance with A4; and
- 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.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must render the seller at the latter's request, risk and expense, every assistance in obtaining, where applicable, any import licence or other official authorization necessary for the import of the goods.

B3 Contracts of carriage and insurance

a) Contract of carriage No obligation.

b) Contract of insurance No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.

The buyer must, should he fail to fulfil his obligations in accordance with B2, bear all additional risks of loss of or damage to the goods incurred thereby

The buyer must, should he fail to give notice in accordance with B7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4; and
- all additional costs incurred if he fails to fulfil his obligations in accordance with B2, or to give notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

A7 Notice to the buyer

The seller must give the buyer sufficient notice of the dispatch of the goods as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take delivery of the goods.

A8 Proof of delivery, transport document or equivalent electronic message

The seller must provide the buyer at the seller's expense with the delivery order and/or the usual transport document (for example a negotiable bill of lading, a non-negotiable sea waybill, an inland waterway document, an air waybill, a railway consignment note, a road consignment note, or a multimodal transport document) which the buyer may require to take delivery of the goods in accordance with A4/B4.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4.

The seller must provide at his own expense packaging (unless it is usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods. Packaging is to be marked appropriately.

A10 Other obligations

The seller must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in B10 and reimburse those incurred by the buyer in rendering his assistance herewith.

The seller must provide the buyer; upon request, with the necessary information for procuring insurance.

B7 Notice to the seller

The buyer must, whenever he is entitled to determine the time within an agreed period and/or the point of taking delivery at the named place, give the seller sufficient notice thereof.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the appropriate delivery order or transport document in accordance with A8.

B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

B10 Other obligations

The buyer must render the seller, at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages issued or transmitted in the country of import which the seller may require for the purpose of making the goods available to the buyer in accordance therewith.

CHAPTER FIVE

INCOTERMS 2000 : DAF : DELIVERED AT FRONTIER (named place)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must obtain at his own risk and expense any export licence or other official authorization or other document necessary for placing the goods at the buyer's disposal.

The seller must carry out, where applicable all customs formalities necessary for the export of the goods to the named place of delivery at the frontier and for their transit through any country.

A3 Contracts of carriage and insurance

- a) Contract of carriage
 - i) The seller must contract at his own expense for the carriage of the goods to the named point if any, at the place of delivery at the frontier. If a point at the named place of delivery at the frontier is not agreed or is not determined by practice, the seller may select the point at the named place of delivery which best suits his purpose.
 - ii) However, if requested by the buyer the seller may agree to contract on usual terms at the buyer's risk and expense for the on-going carriage of the goods beyond the named place at the frontier to the final destination in the country of import named by the buyer. The seller may decline to make the contract and, if he does, shall promptly notify the buyer accordingly.
- b) Contract of insurance No Obligation

A4 Delivery

The seller must place the goods at the disposal of the buyer on the arriving means of transport not unloaded at the named place of delivery at the frontier on the date or within the agreed period.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any import licence or other official authorization or other documents and carry out, where applicable, all customs formalities necessary for the import of the goods, and for their subsequent transport.

B3 Contracts of carriage and insurance

- a) Contract of carriage No obligation.
- b) Contract of insurance No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods from the time they have been delivered in accordance with A4.

The buyer must, should he fail to give notice in accordance with B7, bear all risks of loss of or damage to the goods from the agreed date or the expiry date of the agreed period for delivery provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

A6 Division of costs

The seller must, subject to the provisions of B6, pay

- in addition to the costs resulting from A3 a), all costs relating to the goods until such time as they have been delivered in accordance with A4; and
- where applicable, the costs of customs formalities necessary for export as well as all duties, taxes or other charges payable upon export of the goods and for their transit through any country prior to delivery in accordance with A4.

A7 Notice to the buyer

The seller must give the buyer sufficient notice of the dispatch of the goods to the named place at the frontier as well as any other notice required in order to allow the buyer to take measures which are normally necessary to enable him to take delivery of the goods.

A8 Proof of delivery, transport document or equivalent electronic message

- i) The seller must provide the buyer at the seller's expense with the usual document or other evidence of the delivery of the goods at the named place at the frontier in accordance with A3 a) i).
- ii) The seller must, should the parties agree on on-going carriage beyond the frontier in accordance with A3 a) ii), provide the buyer at the latter's request, risk and expense, with the through document of transport normally obtained in the country of dispatch covering on usual terms the transport of the goods from the point of dispatch in that country to the place of final destination in the country of import named by the buyer.

Where the seller and the buyer have agreed to communicate electronically, the document referred to in the preceding paragraph may be replaced by an equivalent electronic data interchange (EDI) message.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4, including the expenses of unloading necessary to take delivery of the goods from the arriving means of transport at the named place of delivery at the frontier; and
- all additional costs incurred if he fails to take delivery of the goods when they have been delivered in accordance with A4, or to give notice in accordance with B7, provided, however, that the goods have been appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and
- where applicable, the cost of customs formalities as well as all duties, taxes and other charges payable upon import of the goods and for their subsequent transport.

B7 Notice to the seller

The buyer must, whenever he is entitled to determine the time within an agreed period and/or the point of taking delivery at the named place, give the seller sufficient notice thereof.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must accept the transport document and/or other evidence of delivery in accordance with A8.

CHAPTER FIVE

A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of delivering the goods in accordance with A4

The seller must provide at his own expense packaging (unless it is agreed or usual for the particular trade to deliver the goods of the contract description unpacked) which is required for the delivery of the goods at the frontier and for the subsequent transport to the extent that the circumstances (for example modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.

A10 Other obligations

The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages (other than those mentioned in A8) issued or transmitted in the country of dispatch and / or origin which the buyer may require for the import of the goods and, where necessary, for their transit through any country.

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

B9 Inspection of goods

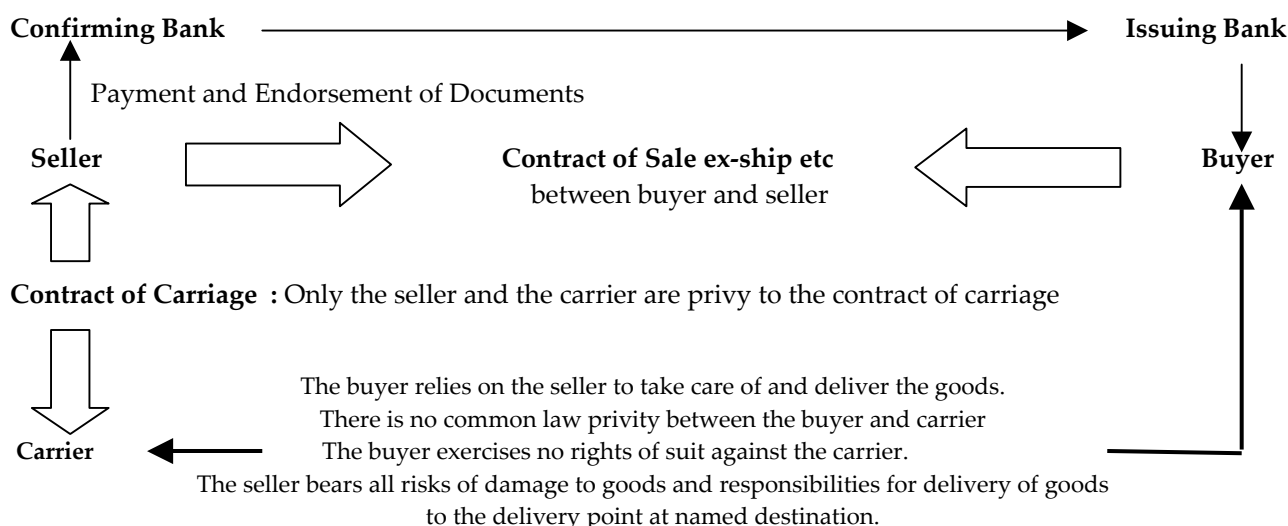
The buyer must pay the costs of any pre-shipment inspection except when such inspection is mandated by the authorities of the country of export.

B10 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

If necessary, according to A3a) ii), the buyer must provide the seller at his request and the buyer's risk and expense with the exchange control authorization, permits, other documents or certified copies thereof, or with the address of the final destination of the goods in the country of import for the purpose of obtaining the through document of transport or any other document contemplated in A8 ii).

The D Group of sales contracts where the seller provides transport.



Payment provisions depend on the terms of the contract. The buyer may pay on delivery or in advance in exchange for documents. The buyer, if he is to collect from the ship as in an ex ship contract, will need the bill of lading. The problem for the buyer is that if goods are damaged on board the vessel and he has paid on endorsement of documents, his only recourse is against the seller. The seller's problem is that if payment is not due until delivery takes place, unless he is present to supervise delivery in exchange for payment he will have no right of stoppage in transit to protect him from the buyer's default and will have to sue the buyer on an action on the price. In the absence of advance payment there is a risk of the buyer refusing to take delivery.

THE LAW OF INTERNATIONAL TRADE AND CARRIAGE OF GOODS

EX-WORKS CONTRACT

An ex works contract requires the seller to deliver the goods to the buyer at the place of manufacture or storage of the goods, namely the seller's works, factory or store. This feature suggests that this mode of delivery is perhaps more akin to a domestic sale since the point of delivery is at the seller's premises. This has the important implication that it may under certain circumstances not be classed as an international supply contract under s26 of the Unfair Contract Terms Act 1977. Section 26(4) states that for a contract to qualify as an international supply contract, it must meet one of the following conditions:

- (a) the goods in question are, at the time of the conclusion of the contract, in the course of carriage, or will be carried, from the territory of one State to the territory of another; or
- (b) the acts constituting the offer and acceptance have been done in territories of different states; or
- (c) the contract provides for the goods to be delivered to the territory of a State other than that within whose territory those acts were done.

For the purposes of the Act, it is not sufficient that the seller is aware of the buyer's intention to take the goods abroad, the contract must have been made with that intention in mind and must objectively reflect that fact. The likelihood of an ex works contract not meeting these requirements is therefore great. Hence, under certain circumstances, it may not have the status of an international supply contract and will be subject to the terms of the Unfair Contract Terms Act 1977.

Under an ex works contract, the seller is duty bound to supply the goods in conformity with the contract of sale and trade usage suggests that where documentation is used for the sale, there must be proper documentation certifying or declaring that the goods are in conformity with the contract. Such documentation usually take the form of a bill of lading or way bill depending on the type of carriage required. Other terms are similar to those of a domestic sale of goods contract. The ex works contract is sometimes referred to as ex factory, ex warehouse or ex store.

CENTRAL DUTIES UNDER INCOTERMS "E" CONTRACTS.⁷

The "E"-term is the term in which the seller's obligation is at its minimum: the seller has to do no more than place the goods at the disposal of the buyer at the agreed place usually at the seller's own premises. On the other hand, as a matter of practical reality, the seller would frequently assist the buyer in loading the goods on the latter's collecting vehicle. Although EXW would better reflect this if the seller's obligations were to be extended so as to include loading, it was thought desirable to retain the traditional principle of the seller's minimum obligation under EXW so that it could be used for cases where the seller does not wish to assume any obligation whatsoever with respect to the loading of the goods. If the buyer wants the seller to do more, this should be made clear in the contract of sale.

INCOTERMS 2000 EXW : EX WORKS CONTRACTS (... named place)

A THE SELLER'S OBLIGATIONS

A1 Provision of goods in conformity with the contract

The seller must provide the goods and the commercial invoice, or its equivalent electronic message, in conformity with the contract of sale and any other evidence of conformity, which may be required by the contract.

A2 Licences, authorizations and formalities

The seller must render the buyer, at the latter's request, risk and expense, every assistance in obtaining, where applicable, any export licence or other official authorization necessary for the export of the goods.

A3 Contracts of carriage and insurance

- a) Contract of carriage : No obligation :
- b) Contract of insurance : No obligation.

B THE BUYER'S OBLIGATIONS

B1 Payment of the price

The buyer must pay the price as provided in the contract of sale.

B2 Licences, authorizations and formalities

The buyer must obtain at his own risk and expense any export and import licence or other official authorization and carry out, where applicable, all customs formalities for the export of the goods.

B3 Contracts of carriage and insurance

- a) Contract of carriage No obligation. :
- Contract of insurance No obligation.

⁷ Incoterms 2000 Section 9

CHAPTER FIVE

A4 Delivery

The seller must place the goods at the disposal of the buyer at the named place of delivery, not loaded on any collecting vehicle, on the date or within the period agreed or, if no such time is agreed, at the usual time for delivery of such goods. If no specific point has been agreed within the named place, and if there are several points available, the seller may select the point at the place of delivery which best suits his purpose.

A5 Transfer of risks

The seller must, subject to the provisions of B5, bear all risks of loss of or damage to the goods until such time as they have been delivered in accordance with A4

A6 Division of costs

The seller must, subject to the provisions of B6, pay all costs relating to the goods until such time as they have been delivered in accordance with A4.

A7 Notice to the buyer

The seller must give the buyer sufficient notice as to when and where the goods will be placed at his disposal.

A8 Proof of delivery, transport document or equivalent electronic message

No obligation.

B4 Taking delivery

The buyer must take delivery of the goods when they have been delivered in accordance with A4 and A7/B7.

B5 Transfer of risks

The buyer must bear all risks of loss of or damage to the goods

- from the time they have been delivered in accordance with A4; and
- from the agreed date or the expiry date of any period fixed for taking delivery which arise because he fails to give notice in accordance with B7, provided, however, that the goods have been duly appropriated to the contract, that is to say clearly set aside or otherwise identified as the contract goods.

B6 Division of costs

The buyer must pay

- all costs relating to the goods from the time they have been delivered in accordance with A4; and
- any additional costs incurred by failing either to take delivery of the goods when they have been placed at his disposal, or to give appropriate notice in accordance with B7 provided, however, that the goods have been duly appropriated to the contract, that is to say, clearly set aside or otherwise identified as the contract goods; and
 - where applicable, all duties, taxes and other charges as well as the costs of carrying out customs formalities payable upon export.

The buyer must reimburse all costs and charges incurred by the seller in rendering assistance in accordance with A2.

B7 Notice to the seller

The buyer must, whenever he is entitled to determine the time within an agreed period and/or the place of taking delivery, give the seller sufficient notice thereof.

B8 Proof of delivery, transport document or equivalent electronic message

The buyer must provide the seller with appropriate evidence of having taken delivery

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A9 Checking - packaging - marking

The seller must pay the costs of those checking operations (such as checking quality, measuring, weighing, counting) which are necessary for the purpose of placing the goods at the buyer's disposal.

The seller must provide at his own expense packaging (unless it is usual for the particular trade to make the goods of the contract description available unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (for example modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately

B9 Inspection of goods

The buyer must pay the costs of any pre-shipment inspection, including inspection mandated by the authorities of the country of export.

A10 Other obligations

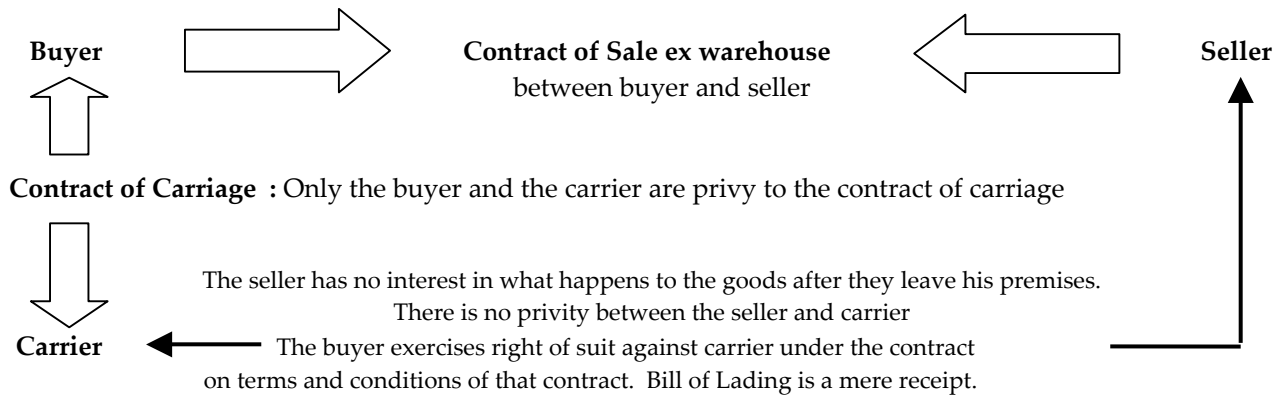
The seller must render the buyer at the latter's request, risk and expense, every assistance in obtaining any documents or equivalent electronic messages issued or transmitted in the country of delivery and/or of origin which the buyer may require for the export and/or import of the goods and, where necessary, for their transit through any country.

The seller must provide the buyer, upon request, with the necessary information for procuring insurance.

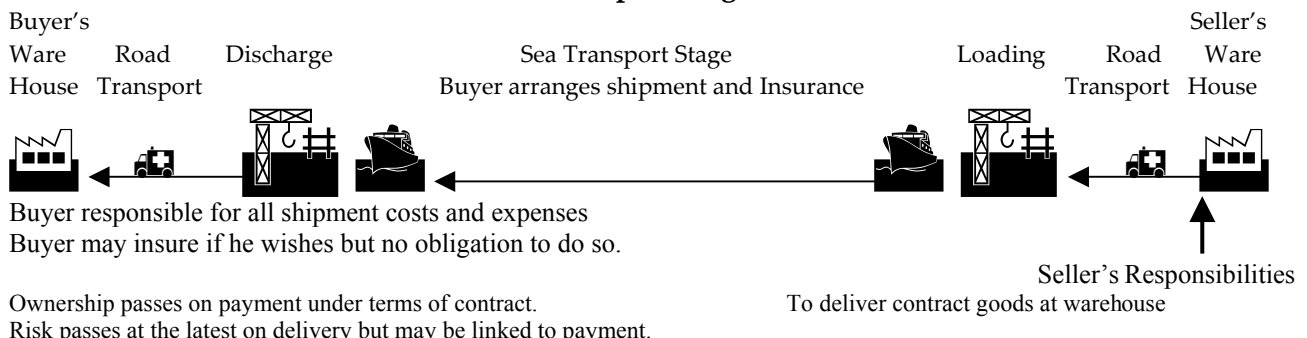
B10 Other obligations

The buyer must pay all costs and charges incurred in obtaining the documents or equivalent electronic messages mentioned in A10 and reimburse those incurred by the seller in rendering his assistance in accordance therewith.

The E Group of sales contracts where the buyer provides transport.



Transport Stages



This is the most favourable form of contract for the international seller and the least desirable for the international buyer.

CHAPTER FIVE

Terminology used in INCOTERMS contract. The ICC provides in-depth explanations of the meanings of a wide range of common terms in the specific context of Incoterm contracts. Whilst the meanings reflect common international usage, they are not a definitive version of how such terms would be interpreted or applied under English law, in respect of contract not made subject to Incoterms. The definitions provided are as follows :-

"charges" : With respect to the obligation to clear the goods for import it is important to determine what is meant by "charges" which must be paid upon import of the goods. In Incoterms 1990 the expression "official charges payable upon exportation and importation of the goods" was used in DDP A6. In Incoterms 2000 DDP A6 the word "official" has been deleted, the reason being that this word gave rise to some uncertainty when determining whether the charge was "official" or not. No change of substantive meaning was intended through this deletion. The "charges" which must be paid only concern such charges as are a necessary consequence of the import as such and which thus have to be paid according to the applicable import regulations. Any additional charges levied by private parties in connection with the import are not to be included in these charges, such as charges for storage unrelated to the clearance obligation. However, the performance of that obligation may well result in some costs to customs brokers or freight forwarders if the party bearing the obligation does not do the work himself.

"checking" and 'inspection" : In the A9 and B9 clauses of Incoterms the headings "checking -packaging and marking" and "inspection of the goods" respectively have been used. Although the words "checking" and "inspection" are synonyms, it has been deemed appropriate to use the former word with respect to the seller's delivery obligation under A4 and to reserve the latter for the particular case when a "pre-shipment inspection" is performed, since such inspection normally is only required when the buyer or the authorities of the export or import country want to ensure that the goods conform with contractual or official stipulations before they are shipped.

"delivery" : It is particularly important to note that the term "delivery" is used in two different senses in Incoterms. First, it is used to determine when the seller has fulfilled his delivery obligation which is specified in the A4 clauses throughout Incoterms. Second, the term "delivery" is also used in the context of the buyer's obligation to take or accept delivery of the goods, an obligation which appears in the B4 clauses throughout Incoterms.

Used in this second context, the word "delivery" means first that the buyer "accepts" the very nature of the "C"-terms, namely that the seller fulfils his obligations upon the shipment of the goods and, second that the buyer is obliged to receive the goods. This latter obligation is important so as to avoid unnecessary charges for storage of the goods until they have been collected by the buyer. Thus, for example under CFR and CIF contracts, the buyer is bound to accept delivery of the goods and to receive them from the carrier and if the buyer fails to do so, he may become liable to pay damages to the seller who has made the contract of carriage with the carrier or, alternatively, the buyer might have to pay demurrage charges resting upon the goods in order to obtain the carrier's release of the goods to him. When it is said in this context that the buyer must 'accept delivery", this does not mean that the buyer has accepted the goods as conforming with the contract of sale, but only that he has accepted that the seller has performed his obligation to hand the goods over for carriage in accordance with the contract of carriage which he has to make under the A3 a) clauses of the "C"-terms. So, if the buyer upon receipt of the goods at destination were to find that the goods did not conform to the stipulations in the contract of sale, he would be able to use any remedies which the contract of sale and the applicable law gave him against the seller, matters which, as has already been mentioned, lie entirely outside the scope of Incoterms.

Where appropriate, Incoterms 2000 have used the expression "placing the goods at the disposal of" the buyer when the goods are made available to the buyer at a particular place. This expression is intended to bear the same meaning as that of the phrase "handing over the goods" used in the 1980 United Nations Convention on Contracts for the International Sale of Goods.

"ports", "places", "points" and 'premises" : So far as concerns the place at which the goods are to be delivered, different expressions are used in Incoterms. In the terms intended to be used exclusively for carriage of goods by sea - such as FAS, FOB, CFR, CIF DES and DEO - the expressions "port of shipment"

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and "port of destination" have been used. In all other cases the word "place" has been used. In some cases, it has been deemed necessary also to indicate a "point" within the port or place as it may be important for the seller to know not only that the goods should be delivered in a particular area like a city but also where within that area the goods should be placed at the disposal of the buyer. Contracts of sale would frequently lack information in this respect and Incoterms therefore stipulate that if no specific point has been agreed within the named place, and if there are several points available, the seller may select the point which best suits his purpose (as an example see FCA A4). Where the delivery point is the seller's "place" the expression "the seller's premises" (FCA A4) has been used.

"ship" and "vessel" : In the terms intended to be used for carriage of goods by sea, the expressions "ship" and "vessel" are used as synonyms. Needless to say, the term "ship" would have to be used when it is an ingredient in the trade term itself such as in "free alongside ship" (FAS) and "delivery ex ship" (DES). Also, in view of the traditional use of the expression "passed the ship's rail" in FOB, the word "ship" has had to be used in that connection.

"shipper" : In some cases it has been necessary to use the same term to express two different meanings simply because there has been no suitable alternative. Traders will be familiar with this difficulty both in the context of contracts of sale and also of contracts of carriage. Thus, for example, the term "shipper" signifies both the person handing over the goods for carriage and the person who makes the contract with the carrier: however, these two "shippers" may be different persons, for example under a FOB contract where the seller would hand over the goods for carriage and the buyer would make the contract with the carrier.

"usual" : The word "usual" appears in several terms, for example in EXW with respect to the time of delivery (A4) and in the "C" -terms with respect to the documents which the seller is obliged to provide and the contract of carriage which the seller must procure (A8, AS). It can, of course, be difficult to tell precisely what the word "usual" means, however, in many cases, it is possible to identify what persons in the trade usually do and this practice will then be the guiding light. In this sense, the word "usual" is rather more helpful than the word "reasonable", which requires an assessment not against the world of practice but against the more difficult principle of good faith and fair dealing. In some circumstances it may well be necessary to decide what is "reasonable". However, for the reasons given, in Incoterms the word "usual" has been generally preferred to the word "reasonable".

Advice from ICC : The following advice is also provided by the ICC for the use of Incoterms :

11. Variants of Incoterms : In practice, it frequently happens that the parties themselves by adding words to an Incoterm seek further precision than the term could offer. It should be underlined that Incoterms give no guidance whatsoever for such additions. Thus, if the parties cannot rely on a well-established custom of the trade for the interpretation of such additions they may encounter serious problems when no consistent understanding of the additions could be proven.

If for instance the common expressions "FOB stowed" or "EXW loaded" are used, it is impossible to establish a world-wide understanding to the effect that the seller's obligations are extended not only with respect to the cost of actually loading the goods in the ship or on the vehicle respectively but also include the risk of fortuitous loss of or damage to the goods in the process of stowage and loading. For these reasons, the parties are strongly advised to clarify whether they only mean that the function or the cost of the stowage and loading operations should fall upon the seller or whether he should also bear the risk until the stowage and loading has actually been completed. These are questions to which Incoterms do not provide an answer: consequently if the contract too fails expressly to describe the parties' intentions, the parties may be put to much unnecessary trouble and cost.

Although Incoterms 2000 do not provide for many of these commonly used variants, the preambles to certain trade terms do alert the parties to the need for special contractual terms if the parties wish to go beyond the stipulations of Incoterms.

EXW the added obligation for the seller to load the goods on the buyer's collecting vehicle;
CIF/CIP the buyer's need for additional insurance;
DEQ the added obligation for the seller to pay for costs after discharge.

CHAPTER FIVE

In some cases sellers and buyers refer to commercial practice in liner and charterparty trade. In these circumstances, it is necessary to clearly distinguish between the obligations of the parties under the contract of carriage and their obligations to each other under the contract of sale. Unfortunately, there are no authoritative definitions of expressions such as "liner terms" and "terminal handling charges" (THC). Distribution of costs under such terms may differ in different places and change from time to time. The parties are recommended to clarify in the contract of sale how such costs should be distributed between themselves.

Expressions frequently used in charterparties, such as "FOB stowed", "FOB stowed and trimmed", are sometimes used in contracts of sale in order to clarify to what extent the seller under FOB has to perform stowage and trimming of the goods onboard the ship. Where such words are added, it is necessary to clarify in the contract of sale whether the added obligations only relate to costs or to both costs and risks.

As has been said, every effort has been made to ensure that Incoterms reflect the most common commercial practice. However in some cases - particularly where Incoterms 2000 differ from Incoterms 1990 - the parties may wish the trade terms to operate differently. They are reminded of such options in the preamble of the terms signalled by the word "However".

12. Customs of the port or of a particular trade : Since Incoterms provide a set of terms for use in different trades and regions it is impossible always to set forth the obligations of the parties with precision. To some extent it is therefore necessary to refer to the custom of the port or of the particular trade or to the practices which the parties themselves may have established in their previous dealings (cf. article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods). It is of course desirable that sellers and buyers keep themselves duly informed of such customs when they negotiate their contract and that, whenever uncertainty arises, they clarify their legal position by appropriate clauses in their contract of sale. Such special provisions in the individual contract would supersede or vary anything that is set forth as a rule of interpretation in the various Incoterms.

13. The buyer's options as to the place of shipment : In some situations, it may not be possible at the time when the contract of sale is entered into to decide precisely on the exact point or even the place where the goods should be delivered by the seller for carriage. For instance reference might have been made at this stage merely to a "range" or to a rather large place, for example, seaport, and it is then usually stipulated that the buyer has the right or duty to name later on the more precise point within the range or the place. If the buyer has a duty to name the precise point as aforesaid his failure to do so might result in liability to bear the risks and additional costs resulting from such failure (B5/B7 of all terms). In addition, the buyer's failure to use his right to indicate the point may give the seller the right to select the point which best suits his purpose (FCA A4).

14. Customs clearance : The term "customs clearance" has given rise to misunderstandings. Thus, whenever reference is made to an obligation of the seller or the buyer to undertake obligations 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. Further, it has - although quite wrongfully - been considered in some quarters inappropriate to use terms dealing with the obligation to clear the goods through customs when, as in intra-European Union trade or other free trade areas, there is no longer any obligation to pay duty and no restrictions relating to import or export. In order to clarify the situation, the words "**where applicable**" have been added in the A2 and B2, A6 and BE clauses of the relevant Incoterms **in order for them to be used without any ambiguity where no customs procedures are required.**

It is normally desirable that customs clearance is arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf. Thus, the exporter should normally clear the goods for export, while the importer should clear the goods for import.

Incoterms 1990 departed from this under the trade terms EXW and HAS (export clearance duty on the buyer) and DEO (import clearance duty on the seller) but in Incoterms 2000 HAS and DEO place the duty of

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clearing the goods for export on the seller and to clear them for import on the buyer respectively, while EXW - representing the seller's minimum obligation - has been left unamended (export clearance duty on the buyer). Under DDF the seller specifically agrees to do what follows from the very name of the term - **Delivered Duty Paid** - namely to clear the goods for import and pay any duty as a consequence thereof.

15. Packaging : In most cases, the parties would know beforehand which packaging is required for the safe carriage of the goods to destination. However, since the seller's obligation to pack the goods may well vary according to the type and duration of the transport envisaged, it has been felt necessary to stipulate that the seller is obliged to pack the goods in such a manner as is required for the transport, but only to the extent that the circumstances relating to the transport are made known to him before the contract of sale is concluded (cf. articles 35.1. and 35.2.b. of the 1980 United Nations Convention on Contracts for the International Sale of Goods where the goods, including packaging, must be "fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement").

16. Inspection of goods : In many cases, the buyer may be well advised to arrange for inspection of the goods before or at the time they are handed over by the seller for carriage (so-called pre-shipment inspection or PSI). Unless the contract stipulates otherwise, the buyer would himself have to pay the cost for such inspection that is arranged in his own interest. However, if the inspection has been made in order to enable the seller to comply with any mandatory rules applicable to the export of the goods in his own country the seller would have to pay for that inspection, unless the EXW term is used, in which case the costs of such inspection are for the account of the buyer.

18. The recommended use : In some cases the preamble recommends the use or non-use of a particular term. This is particularly important with respect to the choice between FCA and FOB. Regrettably, merchants continue to use FOB when it is totally out of place thereby causing the seller to incur risks subsequent to the handing over of the goods to the carrier named by the buyer. FOB is only appropriate to use where the goods are intended to be delivered "across the ship's rail" or, in any event, to the ship and not where the goods are handed over to the carrier for subsequent entry into the ship, for example stowed in containers or loaded on lorries or wagons in so-called roll on - roll off traffic. Thus, a strong warning has been made in the preamble of FOB that the term should not be used when the parties do not intend delivery across the ship's rail.

It happens that the parties by mistake use terms intended for carriage of goods by sea also when another mode of transport is contemplated. This may put the seller in the unfortunate position that he cannot fulfil his obligation to tender the proper document to the buyer (for example a bill of lading, sea waybill or the electronic equivalent). The chart printed at paragraph 17 above makes clear which trade term in Incoterms 2000 it is appropriate to use for which mode of transport. Also, it is indicated in the preamble of each term whether it can be used for all modes of transport or only for carriage of goods by sea.

19. The bill of lading and electronic commerce : Traditionally, the on board bill of lading has been the only acceptable document to be presented by the seller under the CFR and CIF terms. The bill of lading fulfils three important functions, namely:

- proof of delivery of the goods on board the vessel;
- evidence of the contract of carriage; and
- a means of transferring rights to the goods in transit to another party by the transfer of the paper document to him.

Transport documents other than the bill of lading would fulfil the two first-mentioned functions, but would not control the delivery of the goods at destination or enable a buyer to sell the goods in transit by surrendering the paper document to his buyer. Instead, other transport documents would name the party entitled to receive the goods at destination. The fact that the possession of the bill of lading is required in order to obtain the goods from the carrier at destination makes it particularly difficult to replace by electronic means of communication.

CHAPTER FIVE

Further, it is customary to issue bills of lading in several originals but it is, of course, of vital importance for a buyer or a bank acting upon his instructions in paying the seller to ensure that all originals are surrendered by the seller (so-called "full set"). This is also a requirement under the ICC Rules for Documentary Credits.

The transport document must evidence not only delivery of the goods to the carrier but also that the goods, as far as could be ascertained by the carrier, were received in good order and condition. Any notation on the transport document which would indicate that the goods had not been in such condition would make the document "unclean" and would thus make it unacceptable under the UCP.

In spite of the particular legal nature of the bill of lading it is expected that it will be replaced by electronic means in the near future. The 1990 version of Incoterms had already taken this expected development into proper account. According to the A8 clauses, paper documents may be replaced by electronic messages provided the parties have agreed to communicate electronically. Such messages could be transmitted directly to the party concerned or through a third party providing added-value services. One such service that can be usefully provided by a third party is registration of successive holders of a bill of lading. Systems providing such services, such as the so-called BOLERO service, may require further support by appropriate legal norms and principles as evidenced by the CMI 1990 Rules for Electronic Bills of Lading and articles 16-17 of the 1996 UNCITRAL Model Law on Electronic Commerce.

20. Non-negotiable transport documents instead of bills of lading : In recent years, a considerable simplification of documentary practices has been achieved. Bills of lading are frequently replaced by non-negotiable documents similar to those which are used for other modes of transport than carriage by sea. These documents are called "sea waybills", "liner waybills", "freight receipts", or variants of such expressions. Non-negotiable documents are quite satisfactory to use except where the buyer wishes to sell the goods in transit by surrendering a paper document to the new buyer. In order to make this possible, the obligation of the seller to provide a bill of lading under CFR and CIF must necessarily be retained. However, when the contracting parties know that the buyer does not contemplate selling the goods in transit, they may specifically agree to relieve the seller from the obligation to provide a bill of lading, or, alternatively, they may use CPT and CIP where there is no requirement to provide a bill of lading.

21. The right to give instructions to the carrier : A buyer paying for the goods under a "C"-term should ensure that the seller upon payment is prevented from disposing of the goods by giving new instructions to the carrier. Some transport documents used for particular modes of transport (air, road or rail) offer the contracting parties a possibility to bar the seller from giving such new instructions to the carrier by providing the buyer with a particular original or duplicate of the waybill. However, the documents used instead of bills of lading for maritime carriage do not normally contain such a barring function. The Comité Maritime International has remedied this shortcoming of the above-mentioned documents by introducing the 1990 "Uniform Rules for Sea Waybills" enabling the parties to insert a "no-disposal" clause whereby the seller surrenders the right to dispose of the goods by instructions to the carrier to deliver the goods to somebody else or at another place than stipulated in the waybill.

22. ICC arbitration : Contracting parties who wish to have the possibility of resorting to ICC Arbitration in the event of a dispute with their contracting partner should specifically and clearly agree upon ICC Arbitration in their contract or, in the event that no single contractual document exists, in the exchange of correspondence which constitutes the agreement between them. The fact of incorporating one or more Incoterms in a contract or the related correspondence does NOT by itself constitute an agreement to have resort to ICC Arbitration.

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SELF ASSESSMENT QUESTIONS

- 1 What is involved in a strict f.o.b. contract ?
- 2 What is involved in a classic f.o.b. contract ?
- 3 What is involved in an f.o.b. contract with additional duties ?
- 4 What is involved in a c.i.f. contract ?
- 5 What is involved in an ex works contract ?
- 6 What is involved in an FCA contract ?
- 7 What is involved in an FAS contract ?
- 8 What is involved in a CFR contract ?
- 9 What is involved in a strict f.o.b. contract ?
- 10 What is involved in a CIP contract ?
- 11 What is involved in a DAF contract ?
- 12 What is involved in a DES contract ?
- 13 What is involved in a DEQ contract ?
- 14 What is involved in a DDU contract ?
- 15 What is involved in a DDP contract ?
- 16 What is a ship's delivery order ?
- 17 What is a merchant's delivery order contract ?