WOMBLE BOND DICKINSON

BREXIT: LEGAL ADVICE IN UNCERTAIN TIMES

In March 2017 the United Kingdom gave notice under Article 50 of the Lisbon Treaty of its intention to leave the European Union (EU). In the House of Commons the legislation secured a majority of 494 – 122 votes. However, the size of that majority obscured deep divisions within Parliament on the question: "what does Brexit mean?".

Prime Minister Theresa May repeatedly offered the statement that "Brexit means Brexit". However, by late 2018 it was clear that Brexit meant radically different things to different interest groups. As the lexicon of Brexit evolved, significant differences appeared between advocates of:

- **"Hard"** Brexit, which involves the UK ceasing its membership not only of the political institutions of the EU and the European Economic Area (EEA), but also of the single market, customs union and VAT territory; and

- **"Soft"** Brexit, which would involve the creation of a permanent customs arrangement together with close regulatory alignment between the UK and the EU.

Those labels have generally been rejected by groups to which they have been attached. For example, groups advocating a "hard" Brexit tend to prefer the term "clean break", emphasising that if the UK were to remain in any form of customs union with the EU, and subject to a commitment to maintain regulatory alignment, then the UK would be prevented from striking independent deals with other trading partners, and would be a "rule taker" in relation to regulatory standards.

Further divisions are evident even among those advocating a "hard" or "clean break" Brexit, with some arguing that the UK could trade solely on World Trade Organisation (WTO) rules, while others look towards the negotiation of a series of free trade agreements (FTAs), whether on a purely bilateral basis or with trading blocs.

The UK Parliament also includes vociferous groups, including the Scottish National Party (SNP), the Liberal Democrats, Plaid Cymru and the Green Party, arguing for revocation of the UK's Article 50 notice and for a further referendum which would include the option of remaining a member state of the EU.

On 7 June 2019 Theresa May formally resigned as leader of the Conservative Party, opening the way for a leadership contest which is likely to run into July. Early indications are that several of the candidates are either committed to, or would contemplate, a "no deal" Brexit, either when the current extension to the Article 50 notice period expires on 31 October 2019, or later if a further extension were negotiated.

Theresa May's position became untenable when the Withdrawal Agreement and Political Declaration (WA) negotiated by her government with the EU, and signed off by the EU Council in November 2018, was rejected on three separate occasions by the House of Commons – the first involving a government defeat of a scale not seen since Lord North's administration (at a time that might now be renamed as "Amexit 1776").

The WA provides the inescapable backdrop to the Conservative leadership contest. The EU has repeatedly stated that it is not open to renegotiation, sharpening the sense that the new Prime Minister's choice would be between "no deal" and "no Brexit".

Our theme for this session is: how can we give practical legal advice in a time of such political uncertainty?

THE DEFAULT LEGAL POSITION

Legal advice must begin with the law as it is, not as media reports suggest it might be.

Viewed from that perspective, the current legislative position is that the UK will cease to be a member of the EU on "exit day", whether or not there is a deal in place. European Union (Withdrawal) Act 2018, s 20 defines "exit day" as 11.00pm on 31 October 2019. That definition was successively amended by statutory instruments reflecting agreement with the European Council to extend the deadline from 29 March 2019, first to 12 April and then to 31 October.

The UK cannot unilaterally extend the deadline. Any extension must be agreed with the European Council which includes the heads of government from each EU member state. If there is no further agreement to extend, then the UK would face the prospect of a "no deal" Brexit on 31 October 2019.

Those arguing for a "hard" or "clean break" Brexit also succeeded in strengthening their position by means of a series of amendments to Brexit-related legislation, which were accepted by the government at critical points in 2018 to avert defeats in the House of Commons. For example, the Taxation (Cross Border Trade) Act 2018 creates the framework for a new UK customs and excise regime post-Brexit. Section 31 of that Act allows the UK government to enter into a customs union with another country or territory, and to do so by means of an Order in Council (in effect, an executive order). However, an amendment introduced by members of the "hard" Brexit European Research Group (ERG) limited that provision by stating that a customs union with the EU would require a full Act of Parliament, rather than being legitimately created by an Order in Council. Arguably, that provision would require a full (fully-debated and possibly filibustered) Act of Parliament in relation to any customs arrangement with the EU, significantly increasing opportunities to oppose any such outcome.

Consequently, when advising clients on the likely outcomes of the Brexit process, our position has been to emphasise that a "no deal" Brexit remains not only possible, but the default position. That has been a particularly important line to maintain during periods of intense political activity in Westminster, when positions have apparently changed with scintillating frequency. For example, in April 2019 the UK media widely reported that Parliament had "ruled out" a "no deal" Brexit by means of legislation introduced by backbench MPs (the "Cooper-Letwin Act"). However, it was important to advise clients that the Act's effect was only to rule out a "no deal" Brexit once, and in the specific circumstances that prevailed in the days leading to the 12 April deadline. That legislation is now spent, and has no further force. Fresh legislation would be required to avert a "no deal" Brexit on 31 October 2019.

With that in mind, statements made by some of those seeking to succeed Theresa May as leader of the Conservative Party (and as Prime Minister) have great potential significance. For example, both Dominic Raab and Esther McVey have stated that they would be prepared to prorogue Parliament or to block any opportunities to vote on legislation that might alter the default legal position before 31 October 2019. Should such tactics prevail, then the UK would leave the EU with no deal on that date.

KEY ISSUES FOR BUSINESS

Boris Johnson, one of Conservative leadership contenders, was widely reported in June 2018 as having used an expletive when challenged about Brexit's effect on business. His "F*** business" reply might have been flippant, but is nonetheless consistent with perceptions that business has been left to fend for itself in terms of Brexit preparations and resilience planning. While this has created significant difficulties, and has required businesses to incur substantial costs, it has compelled businesses to scrutinise their supply chains, compliance procedures, contractual arrangements and data flows with a far more critical eye than would have been the case in a "business as usual" scenario. Key points to emerge from that process include:

Data mapping, data protection and data transfers

The EU's General Data Protection Regulation (GDPR) came into force on 25 May 2018. It is European law with global reach, applying not only to organisations based in the EU, but catching businesses that offer

goods or services to individuals in the EU, and businesses that monitor individuals' behaviour within the EU. In practice, many US organisations are subject to GDPR.

Following Brexit, the UK would cease to be a member of the EU. From a data and privacy law perspective that would mean:

- The UK would be a "third country" for the purposes of GDPR. Transfers of data from the EU/EEA to the UK would therefore require either an "adequacy decision", or some other recognised safeguard under GDPR. In a "no deal" scenario, it is unlikely that it would be possible for the EU Commission to put in place a full adequacy decision at the point of separation. That is because GDPR sets out a process, including consultation periods, that must be followed before an adequacy decision can be adopted. In the absence of an adequacy decision made by the EU in favour of the UK, data transfers from the EU/EEA to the UK would be restricted;

- It is possible, even in the context of a "no deal" Brexit, that the EU might arrive at a political decision that makes exceptional provision for the UK, recognising that UK data protection law (set out in Data Protection Act 2018) is essentially the same as GDPR. Even if the EU's goodwill did not stretch that far, it is possible that EU data regulators would arrive at a pragmatic decision to refrain from enforcement during any period in which an adequacy decision is being considered;

- If no adequacy decision were in place, and if there were no enforcement moratorium, then there would be no legal problem in transferring personal data from the UK to the EU/EEA (as UK law permits such transfers). However, there could be a significant practical difficulty in retrieving or accessing data stored within the EU/EEA.

Where no adequacy decision is in place, the other usual safeguards to consider would be either "standard" or "model" clauses, or where the transfer is within a group structure, "binding corporate rules". In the case of UK to US transfers, that would be supplemented by the UK's continuing application of the EU-US Privacy Shield. To benefit from that continuation, US organisations registered with Privacy Shield would be able to amend their public commitment statements to include specific reference to the UK.

More difficult (and potentially expensive) questions arise in relation to the requirement for US organisations to appoint a representative within the EU under GDPR Article 27. That obligation arises where an organisation's activities fall within GDPR Article 3(2), which refers to:

> *the processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to:*
> *(a) the offering of goods or services, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or*
> *(b) the monitoring of their behaviour as far as their behaviour takes place within the Union.*

The requirement to appoint an Article 27 representative ensures that there is, within reach of an EU member state data law regulator, a person against whom enforcement proceedings might be taken. Given that the Article 27 representative is potentially subject to the full enforcement powers conferred by GDPR, appointment carries the risk of penalties of up to €20 million or (if greater) 4% of the global annual turnover of the appointing organisation. Unsurprisingly, therefore, Article 27 representatives often require substantial indemnities before agreeing to their appointment.

Following Brexit, the UK will operate its own data protection laws, set out in Data Protection Act 2018. The UK's laws largely replicate GDPR, and will form a body of law referred to as "UK GDPR". While similar, and in most respects identical, to GDPR, "UK GDPR" will be a wholly separate and parallel regime. Crucially, it includes extraterritorial provisions based on those in GDPR. Consequently, where the GDPR Article 3(2) criteria are met in relation to the UK, a US organisation would be required to appoint a separate Article 27 representative for the UK.

The potential requirement for two separate Article 27 representatives clearly multiplies both direct costs and the contingent liability that goes with the provision of an indemnity.

In relation to personal data, therefore, Brexit planning and resilience includes careful data mapping to establish where (and how) personal data comes into, moves within, and leaves an organisation. In some cases, it might be possible to establish that data could be processed in a way that serves <u>only</u> the UK or <u>only</u> the EU 27, allowing the organisation to avoid the need to appoint a representative for each of the EU and the UK.

Alternatively, it is worth noting that the requirement to appoint an Article 27 representative applies only where an organisations' processing of personal data falls within Article 3(2), and not where it falls within Article 3(1). Article 3(1) applies where an organisation has an "establishment" within the EU (or the UK). An establishment can be a minimal presence or "stable arrangement", providing a point of contact and enforcement for data law regulators. On analysis, many organisations might conclude that it is more cost-effective to have an establishment within the EU and/or UK than to be required to appoint an Article 27 representative.

International Trade

A "no deal" or "cliff edge" Brexit would bring immediate and fundamental change and dislocation. The UK would be for all purposes a "third country" from an EU perspective. That would entail consequences including:

- **The imposition of EU tariffs on imports from the UK:** It would be theoretically open to the UK to decide not to impose reciprocal tariffs. However, that would have an impact on the UK's ability to impose tariffs on imports from other WTO member states due to the "non-discrimination" principle.

- **The requirement for regulatory, sanitary and phytosanitary checks in relation to goods and produce imported from the UK:** Again, the UK might decide not to conduct equivalent checks on imports, whether to mainland UK or into Northern Ireland. However, that would potentially lead to significant risks in terms of smuggling, unsafe products and unfit produce.

- **Possible tax consequences:** such as the imposition of VAT at the point of import, though mitigated by a shift from import as the trigger, to a postponed accounting basis.

- **Requirements for additional documentation and procedures** at an extremely granular level, including the need for carnets in relation to samples carried as "merchandise in baggage" by sales representatives.

- **The need to review shipping and supply chain routes and the current location of processing activities** to avoid (for example) incurring import tariffs on entry to the EU (eg at Rotterdam) and then incurring a further liability on import into the UK. Some reconfiguration of supply chains might be required in order to fall within WTO transit rules. Alternatively, it might be necessary to incur administrative and advisory costs to secure the benefit of reliefs or exemptions, such as "inward processing relief".

- **Disruption to the haulage network:** while the media has tended to focus on the risk of delays and traffic jams at key ports of entry, such as Dover, it is also necessary to consider the possible impact of a "no deal" Brexit on haulage operators. The prospect of delays might induce operators based in the EU27 to decline contracts that involve entry into the UK. Delays would necessarily involve both direct and opportunity costs, Further, haulage operators might be deterred from entering the UK if a "no deal" Brexit meant that they were not permitted to pick up supplementary contracts within the UK, having delivered their primary consignments. At the moment, haulage operators often rely on picking up additional contracts in order to make operations viable. It should be noted that this could also be an issue under the government's WA, as the transitional arrangements seem to contemplate

only "point to point" deliveries. Given that current Road Haulage Association and Freight Transport Association estimates suggest a shortfall of some 36,000 haulage drivers in the UK, this could prove to be a particularly significant issue in practice.

- **Re-routing of imports:** The UK government let contracts to ferry operators (including, controversially, Seaborne Freight) with a view to re-routing imports to ports such as Portsmouth, Plymouth and Ramsgate. Those contracts were terminated in view of the Article 50 extension to 31 October, but may need to be replaced or reactivated as that deadline approaches. If, and to the extent, that such re-routing becomes necessary, there would also be a need to reconfigure haulage and related arrangements within the UK to maintain continuity of supply. Re-routing might also be undertaken as a positive choice, with ports such as the Port of Tyne, Teesport, Hull and Immingham gearing up to provide enhanced and streamlined services. In either case, logistics might require review and alteration.

- **Parallel regulatory regimes:** if the UK leaves the EU without transitional provisions, then there would be an immediate requirement to meet separate EU and UK requirements in relation to regimes such as REACH (Registration, Evaluation and Authorisation of Chemicals), product safety and labelling regulations. In relation to REACH, 2018 UK registrations would no longer be valid from an EU perspective, and EU registrations would not be recognised in the UK. The UK government department responsible for REACH (DEFRA) has stated that a UK REACH database is "ready". However, it would be for businesses caught by the regime to provide the necessary data to populate that database, and it cannot be assumed that data previously submitted as part of the EU process would be available, or that it would be available free of charge. Compliance with UK REACH might therefore incur significant additional costs. Similarly, it might prove necessary to designate separate importers and representatives in relation to product safety regimes for the EU and UK.

- **Doubts concerning the availability and status of personnel** in view of current technical issues with the government's "settled status" app and , more broadly, immigration policy in a "no deal" situation.

Customs and border controls

On 13 March 2019 the UK government published details of the temporary rates of customs duty it would impose on imports should a "no deal" Brexit occur. Under the temporary regime, the government expects 87% of total imports to be tariff-free. In relation to the remaining 13%, temporary measures would involve:

- a mixture of tariffs and quotas on beef, lamb, pork, poultry and some dairy to support farmers and producers who have historically been protected through high EU tariffs;

- retaining a number of tariffs on finished vehicles in order to support the automotive sector. However, car makers relying on EU supply chains would not face additional tariffs on car parts imported from the EU to prevent disruption to supply chains;

- in sectors where tariffs help provide support for UK producers against unfair global trading practices, such as dumping and state subsidies, tariffs would be retained. Relevant products include certain ceramics, fertiliser and fuel

The government would also maintain tariffs on goods including bananas, raw cane sugar, and certain kinds of fish, subject to preferential access arrangements for developing countries.

How much would importers pay?

HMRC has estimated that up to 145,000 businesses, including many small and medium sized enterprises (SMEs) would be required to navigate customs procedures for the first time as a result of Brexit. Where businesses have been importing only from, or exporting only to, the EU there will have been no need to

consider tariffs or customs declarations due to the UK's membership of the customs union, single market and VAT territory. While a "no deal" Brexit remains the default legal position, many businesses face the possibility of having to comply with customs and border clearance procedures following expiry of the UK's Article 50 notice.

UK businesses importing from the US are likely to be far more familiar with customs procedures, but would have to adjust to the temporary tariff regime. For a while at least, that will involve a two-stage process:

Government guidance suggests that businesses should first use the online UK Trade Tariff Tool to identify the commodity code applicable to the goods they are importing. Commodity codes are ten-digit numbers for imports and eight-digit numbers for exports. For example, the import code for spark plugs is 8511100090, while the export code is 85111000. In each case, detailed notes establish the scope of the relevant code, in particular identifying items that are not within, or are only partly within the code. Consequently, identifying the applicable or most beneficial code can be a matter that requires help from an experienced customs advisor. The UK Trade Tariff Tool also includes useful footnotes, for example, to indicate whether particular goods are subject to any prohibitions or restrictions, including trade sanctions. Given the extremely serious consequences that can flow from any breach of sanctions, this element of the tool is particularly useful.

Having identified the applicable commodity code, it then becomes necessary to run a separate check to establish the temporary tariff rate that would apply following a "no deal" Brexit. The detailed list is available here.

That two-stage process reflects the fact that the government has yet to update the tariff rates within the UK Tariff Trade Tool.

Tariffs are not the only issue

Calculating the customs duties due on import is only part of the process. Businesses importing from the EU after Brexit would, for the first time, have to make customs declarations. HMRC's new online Customs Declarations System (CDS) is still being rolled out on a phased basis to replace the existing CHIEF system. Guidance on CDS is available here. For many SMEs, it is likely that access to CDS will become available some time after Brexit, requiring them to use CHIEF until it is wholly replaced.

Importers must also deal with import VAT, though the government has allowed, and effected, a move to a "postponed accounting" basis for import VAT, rather than requiring payment at the point of import.

The legislation required to create a new, UK-only customs and import VAT regime was passed in September 2018 as the Taxation (Cross-Border Trade) Act 2018.

Also – and crucially – businesses seeking to trade with the EU post-Brexit must be registered under the Economic Operator Registration and Identification (EORI) scheme. Guidance and details of the registration process is available here.

Commercial contracts: frustration and force majeure?

The alarm bells started to ring with the third client email asking for confirmation that the High Court ruling in *EMA v Canary Wharf* [2019] EWHC 335 (Ch) definitely means that Brexit cannot be regarded as a "*force majeure*" event. The ruling does not have that effect. Frustration and *force majeure* are different concepts in the laws of England and Wales, and it remains possible that an express *force majeure* clause might suspend or release contractual obligations that are made impossible – or even just more difficult or expensive – to perform as a result of Brexit.

The *EMA* ruling was concerned with the doctrine of frustration. That overarching contractual doctrine applies whether or not the agreement includes a clause specifying particular events that will trigger the suspension or release of obligations. Frustration occurs where something unforeseen happens after the contract was entered into, making the contract either impossible to fulfil, or transforming the obligations into something

radically different from those at the start. For a contract to have been frustrated, the event must be fundamental to the terms of the contract, and do more than simply make performance of obligations less convenient or more expensive. The doctrine is difficult to apply, and arguments based on frustration rarely succeed.

In *EMA* the claimant had no choice but to argue on the basis of frustration. The agreement in question was a lease of commercial premises at Canary Wharf, granted for a term of 25 years. In England and Wales, commercial leases granted on "institutionally acceptable" terms rarely include express *force majeure* provisions. Consequently, the general doctrine of frustration offered the only potential escape route from significant ongoing liabilities.

Force majeure clauses

Contractual force majeure clauses developed to overcome the difficulty and inconvenience of frustration. In the rare circumstances where frustration could be shown, its effect was to bring an immediate end to the contract, leaving loss where it fell. Parliament intervened, passing the Law Reform (Frustrated Contracts) Act 1943 to allow the adjustment of rights and liabilities between the parties to a frustrated contract. However, that Act did not alter the essential effect of frustration, which is to terminate the contract.

In many cases, the parties to a commercial contract would prefer obligations to be suspended rather than released, allowing time to determine whether the effects of an emergency event come to an end or reduce sufficiently to allow the contract to revive. Suspension, rather than termination, can save significant time and cost in renegotiation or finding an alternative supplier. If the problem continues beyond an agreed threshold (often set at three or six months), then the parties have the option to terminate the contract and to adjust losses on an agreed basis.

As well as allowing greater flexibility in terms of suspension rather than automatic termination, express contractual clauses allow the parties to specify events that will be regarded as *force majeure*. The question is one of specific contractual interpretation, rather than overarching doctrine. In essence, if the parties have agreed that a particular event will count as *force majeure*, then it will trigger suspension or release of obligations even if it would come nowhere close to meeting the test for frustration. For example, there is no requirement that the event must be unforeseeable at the time the contract is made. Consequently, a contractual provision specifying war or armed conflict as a *force majeure* event might be valid even if the outbreak of conflict was fully expected when the contract was made.

There are limitations. *Force majeure* clauses came under close scrutiny following the closure of the Suez Canal during the crisis of 1956. In one case[1], the court refused to accept that closure of the canal released a party from its obligation to transport Sudanese groundnuts to their European buyer. It was not possible to take the short route through the Suez canal, but the contract did not specify the route, so the judge held that the shipment could be taken around the Cape and up the west coast of Africa. It did not matter that the longer route would be far more costly. Force majeure clauses involve the suspension or release of obligations, so they will be interpreted strictly. Consequently, since the Suez Canal cases of the 1950s and 1960s, well-drafted *force majeure* clauses usually provide for suspension or release where the specified event prevents performance, or makes performance materially more difficult or expensive.

Can Brexit be a force majeure event?

The short answer is "yes" – depending on the date of the contract and the precise terms of the clause.

Many *force majeure* clauses specify government actions or changes of law as relevant events. Others simply require events to be beyond the parties' control, rather than being unforeseeable. Since the referendum result became known on 24 June 2016 there have also been specific clauses identifying Brexit as a *force majeure* event in its own right – often described as the point at which the United Kingdom ceases to be a full member of the European Union.

[1] *Tsakiroglou v Noblee Thorl* [1960] 2 QB 318

The *EMA* ruling has no effect on contractual force majeure clauses. Any such clause will have to be interpreted and applied on its own terms. Consequently, it remains an essential element of Brexit preparation and risk management to check the *force majeure* clauses in contracts, particularly where delivery times for perishable goods or "just in time" processes are concerned.

The High Court ruling is subject to appeal, with a hearing expected later in 2019.

Commercial contracts: Incoterms

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.

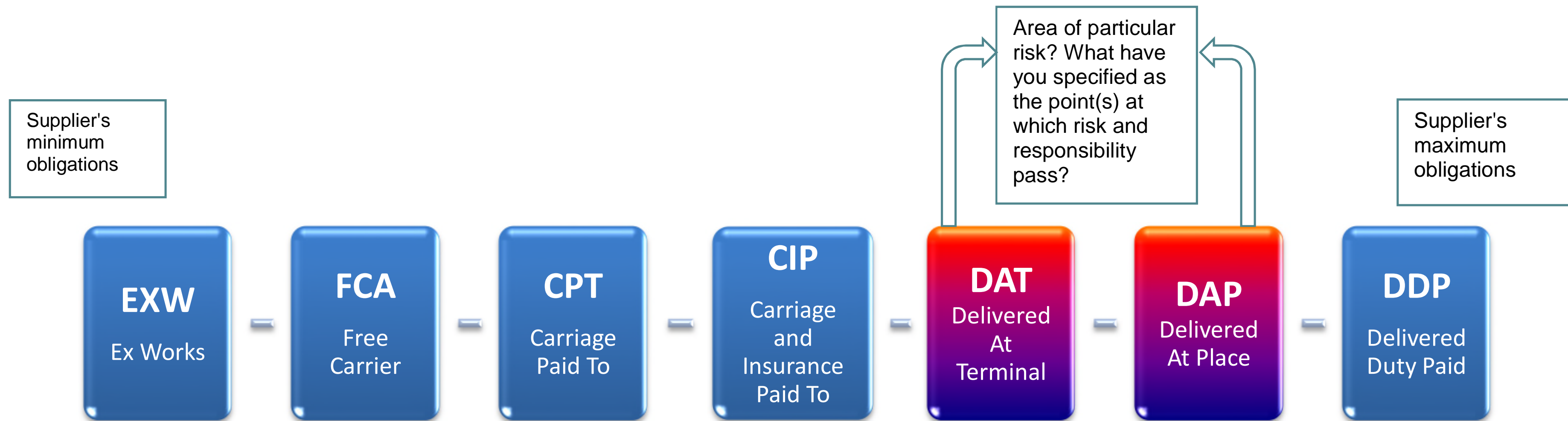
Incoterms are often used for trade within the European Union (EU) and European Economic Area (EEA). Currently, when used in that context, Incoterms relating to compliance with export or import formalities are not applicable. Once Brexit has occurred, those provisions become directly relevant, and commercially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

WOMBLE BOND DICKINSON

INCOTERMS AND BREXIT



RULES FOR ANY MODE OR MODES OF TRANSPORT

Incoterm	Features	Brexit issues
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 nominated 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.
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	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.

	formalities.	
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.

RULES FOR SEA AND INLAND WATERWAY TRANSPORT

FAS—Free Alongside Ship:	the seller is considered to have delivered when the goods are placed alongside the vessel at the named port of shipment. This means that the buyer has to bear all costs and risks of loss of or damage to the goods from that moment. The seller should select a point other than physically 'alongside the ship' it is essential that	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. 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

	under FAS the buyer indicates a loading point at the named port of shipment and give the seller sufficient notice of the vessel's name, loading point and, where necessary, selected delivery time within the agreed period. In the event that the buyer fails to give these details, the seller may use his discretion to select a point that best suits his purposes; but, in any case, that point should be alongside the ship. In the event that the buyer has given an indication of the loading point but later wishes to change these instructions, the seller is not obliged to cover the cost of transferring the goods to a new loading point, provided that the seller has acted in line with the buyer's first instruction.	the goods and for their transport through any country.
FOB—Free On Board:	the seller is considered to have delivered when the goods are placed on board the ship at the named port of shipment. Most will no longer use FOB/CFR/CIF for container-loaded goods. This is because, where goods in a container are sold FOB, the container is typically handed over by the seller at a container yard or warehouse, which is in practice the appropriate delivery point. Under FOB, the seller bears all the costs, risks of loss of and damage to the goods until they are delivered by being placed on board the vessel, it is recommended that for all containerised goods, buyers should opt for Incoterms such as FCA, CPT or CIP.	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. 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 for their transport through any country.
CFR—Cost and Freight:	the seller is considered to have delivered when the goods are placed on board the ship in the port of shipment. The seller must, in addition, pay the cost of carriage necessary to bring the goods to the named destination. Although under this Incoterm the issue of insurance is silent, it is assumed that the buyer purchases his or her own insurance.	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. 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 for their transport through any country.
CIF—Cost Insurance and Freight:	the seller is considered to have delivered when the goods are placed on board the ship in the port of shipment and also pays the necessary freight and insurance (CIF). It is important to note that contracts placed CIF relieve the buyer of the task of making	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. 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

	insurance arrangements. However, the disadvantages are many: under CIF the supplier is obliged only to buy the cheapest insurance coverage, with minimal coverage and conditions that may make a claim difficult.	the goods and for their transport through any country.

WOMBLE BOND DICKINSON

STOP PRESS

On 12 June 2019 the House of Commons rejected an opposition motion that would have allowed members of Parliament to table, debate and pass legislation to rule out a "no deal" Brexit. Rejection of that motion (by a majority of 11) arguably leaves little or no opportunity for the House of Commons to avert a "no deal" Brexit before 31 October 2019.

On 13 June the first vote among Conservative Party MPs in the leadership contest eliminated Andrea Leadsom, Mark Harper and Esther McVey. On 14 June Matt Hancock withdrew from the contest. That left Boris Johnson with a commanding lead (114 votes), followed by Jeremy Hunt (43 votes), Michael Gove (37 votes), Dominic Raab (27 votes), Sajid Javid (23 votes) and Rory Stewart (19 votes).

With 114 votes, Boris Johnson is highly likely to proceed to the final stage of voting, which is a ballot of Conservative Party members, His statements to date on Brexit include a commitment to leaving on 31 October whether or not there is a deal.

On 14 June the UK's Institute of Directors urged businesses to step up "no deal" preparations.

About the author:

MALCOLM DOWDEN
Legal Director
Womble Bond Dickinson (UK) LLP
d:+44 2380 20 8428
e: malcolm.dowden@wbd-uk.com

Malcolm Dowden is an experienced commercial and regulatory lawyer. He is a member of Womble Bond Dickinson's Brexit steering group, focusing on Brexit planning and resilience measures for businesses involving import and export. Recent activities have included contributing to a report on the potential use and development of free port or free zone status to mitigate the impacts of Brexit, particularly for small and medium sized enterprises, and with a particular focus on the manufacturing, advanced manufacturing and chemicals sectors.

Malcolm contributed to, and edited, a UK House of Lords report: *Distributed Ledger Technologies for Public Good*. The report examined the potential application of blockchain and distributed ledger technologies to address supply chain and border control/border clearance issues. That project led to discussions with a number of port operators, including the Port of Rotterdam, which has recently conducted a major "Brexercise" to assess and highlight the potential risks of a "no deal" Brexit.

As a member of the firm's Brexit steering group, Malcolm has been tracking and providing comment on key legislative developments, including the Taxation (Cross Border Trade) Act 2018, which received royal assent on 13 September, the EU (Withdrawal Act) 2018 and the House of Commons votes on the proposed Withdrawal Agreement and Political Declaration.