Incoterms, VAT and Customs: International Trade of Tangible Goods

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List of abbreviations

DA UCC	Commission Delegated Regulation (EU) 2015/2246 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code
DDP	Delivered Duty Paid
EORI	Economic Operators Registration and Identification number
EU	European Union
EXW	Ex Works
ICC	International Chamber of Commerce
Incoterms	International Commercial Terms
SAD	Single Administrative Document
Thirteenth Council Directive	Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory
UCC	Regulation (EU) no 952/2013 of 9 October 2013, laying down the Union Customs Code
VAT	Value Added Tax
VAT Directive	Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax

1. Introduction: Incoterms, VAT and Customs

The purpose of this document is to clarify concepts and increase awareness on three relevant topics within the scope of international trade of (tangible) goods: **International Commercial Terms** ("Incoterms rules")[1], **Value Added Tax** ("VAT") and **Customs**.

In fact, and from my personal experience, it is very common to see disregarded or, even if considered, underestimated the relevance and potential impacts of VAT and Customs obligations and risks assumed by the seller and the buyer, namely resulting from the Incoterms rules agreed.

In the following pages my purpose is to explore the risk factors to be prevented in the following operations, from a Customs and VAT perspective:

- **Import purchase agreements under Incoterms rule "Delivered Duty Paid" (DDP)**
- **Export sale agreements under Incoterms rule "Ex Works" (EXW)**

An overview of the foreseen changes concerning Incoterms DDP and EXW within the scope of the International Chamber of Commerce (hereinafter "ICC") revision of Incoterms rules for 2020, will also be presented.

The purpose of the present work is, at the end and after the analysis to be performed, to provide guidance on the **critical questions to be answered by**:

- **a buyer established in the European Union, to validate Incoterms rule DDP as the most adequate within the scope of an import purchase agreement**
- **a seller established in the European Union, to validate Incoterms rule EXW as the most adequate, within the scope of an export sale agreement**.

And, consequently, to support "common people" dealing with trade, to ensure profitable purchase and sale agreements on international trade of tangible goods, not jeopardized by risk factors concerning VAT and Customs.

Considering the purpose above, the contents of the following pages will consist on a mix of legal and theoretical definitions combined with practical considerations resulting from a "day to day" practical use (or misuse) of those concepts.

[1] "Incoterms" is a trademark of the International Chamber of Commerce. Further development of the theme in section 2.1.

2. Theoretical definitions

2.1. Incoterms® rules

The Incoterms® rules have been created by the International Chamber of Commerce (ICC)[2] in 1936.

The word “Incoterms” results from the abbreviation of the words **In**ternational **Co**mmercial **Terms** and consist on contractual standards globally accepted that, once specifically referred to in a sale contract of tangible goods, clearly define the seller and buyer obligations and, also, the costs and risks to be assumed by each party.

Since its creation these rules, of optional use, have been regularly updated - the last update occurred at 2010 and it is in course the revision for a new version to be released in 2020 - in order to conveniently respond to the business needs, resulting from the actual reality and trends of the international trade operations.

Although not ruling by itself on the subjects covered, the Incoterms rules provide a useful support to the parties agreeing on a sales contract. In fact, using Incoterms® rules, the starting point will be a pre-defined set of options on the tasks, risks and costs to be assumed by each one.

And a common language, globally known and recognized, which reduces the risk of misunderstandings and potential legal disputes.

Before focusing on the set of Incoterms® rules relevant for the theme under analysis, it is worth to refer the following guidance – contained in the ICC rules – on how to use it.

In order the Incoterms® rules to apply to a specific contract it shall be mentioned in it “through words as “[the chosen Incoterms rule including the named place, followed by] Incoterms® 2010”.[3]

The Incoterms rules shall be chosen having as basis the following drivers: type of goods, means of transport and specific obligations the parties intend to rule out, namely on what concerns the organization of the carriage and insurance.

And do not relate to – and not define – the transfer of ownership and the price to be paid by the goods. But they rule out the moment and place where the risks and responsibilities pass from the seller to the buyer.

Therefore, the specification of the “place or port” is of critical relevance when including in the contract a written reference to the Incoterm rule agreed by the parties.

In general terms, considering the above mentioned, an example of a reference in the sale contract of the incoterm agreed by the parties would be the following: “DAP SONAE Business Center, Lugar do Espido Maia, Portugal Incoterms® 2010”.

[2] About ICC: www.iccwbo.org
[3] ICC Publication No. 715E ISBN 978-92-842-0080-1 (Incoterms® 2010), Page 5

Also, important to be aware that, there are Incoterms applicable to any mode of transport and others specifically foreseen for sea and inland waterway transport, as summarized in the table below:

Incoterms® 2010	All Mode of Transport	Sea and Inland Waterway Transport
Ex Works (**EXW**)	√	
Free Carrier (**FCA**)	√	
Carriage Paid To (**CPT**)	√	
Carriage and Insurance Paid to (**CIP**)	√	
Delivered at Terminal (**DAT**)	√	
Delivered at Place (**DAP**)	√	
Delivered Duty Paid (**DDP**)	√	
Free Alongside Ship (**FAS**)		√
Free on Board (**FOB**)		√
Cost and Freight (**CFR**)		√
Cost Insurance and Freight (**CIF**)		√

The Incoterms® rules to be further investigated on the following pages will be **Delivered Duty Paid (DDP)** and **Ex Works (EXW)**.

2.1.1. Delivered Duty Paid (DDP)

As mentioned in the previous point, the Incoterms® rule **Delivered Duty Paid** rule (hereinafter **DDP**) may be used for any mode of transport and, also, if more than one mode of transport is employed.

According to the definition foreseen in Incoterms 2010[4]:

- "Delivered Duty Paid" means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import on the arriving means of transport ready for unloading at the named place of destination. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to fulfil all customs formalities
- DDP represents the maximum obligation for the seller
- The parties are well advised not to use DDP if the seller is unable, directly or indirectly, to obtain import clearance
- If the parties wish the buyer to bear all risks and costs of import clearance, the DAP rule should be used
- Any VAT or other taxes payable upon import are for the seller's account, unless expressly agreed otherwise in the sales contract.

Particularly relevant for the subject under analysis is the fact that, under a DDP rule, it is seller's responsibility to obtain, at its own risk and expense, any export and import licence and other licenses required for the customs clearance of the goods both at the export and import country, and for the international transport and insurance of the goods.

[4] ICC Publication No. 715E ISBN 978-92-842-0080-1, Page 69

The above mentioned does not preclude the buyer's responsibility of assisting the seller – and upon its request, risk and expense – in obtaining any import licence or other authorization required for the import of the goods at the country of destination. This implicitly results in a limitation of the seller's obligations.

Also, important to notice that, on what refers to the costs allocation, "the seller must pay (..) 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…".[5]

2.1.2. Ex Works (EXW)

The Incoterms® rule **Ex Works** (hereinafter **EXW**) is one of the Incoterms rules that may be used for any mode of transport and, also, if more than one mode of transport is employed.

According to the definition foreseen in Incoterms 2010[6]:

- "Ex Works" means that the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.). The seller does not need to load the goods on any collecting vehicle, nor does it need to clear the goods for export, where such clearance is applicable
- EXW represents the minimum obligation for the seller
- A buyer who buys from a seller on an EXW basis for export needs to be aware that the seller has an obligation to provide only such assistance as the buyer may require to effect that export: the seller is not bound to organize the export clearance. Buyers are, therefore, well advised not to use EXW if they cannot directly or indirectly obtain export clearance
- The buyer has limited obligations to provide to the seller any information regarding the export of the goods. However, the seller may need this information for, e.g., taxation or reporting purposes.

Also considering the relevance for the present analysis, it is important to notice that, although EXW rule implies minimum obligations for the seller, this part must provide the buyer:

- The commercial invoice in conformity with the contract of sale

- Assistance in obtaining any export licence or other authorizations required for the export of the goods, at the buyer's request, risk and expenses.

Additionally, and concerning costs allocation, "the buyer must pay (…) where applicable, all duties, taxes and other charges, as well as the costs of carrying out customs formalities payable upon export".[7]

[5] ICC Publication No. 715E ISBN 978-92-842-0080-1 (Incoterms® 2010), Page 72
[6] ICC Publication No. 715E ISBN: 978-92-842-0080-1 (Incoterms® 2010), Page 15
[7] ICC Publication No. 715E ISBN: 978-92-842-0080-1, Page 19

2.2. Value Added Tax

When moving goods internationally, consumption/turnover taxes – besides customs duties – are relevant to be considered for analysis of impacts, namely in relation to costs and compliance requirements.

Within the European Union, it is in force a common system of value added tax, presently ruled out by the Council Directive 2006/112/EC of 28 November 2006 (hereinafter VAT Directive).

For the purposes of the present work, the following concepts foreseen in the VAT Directive will be highlighted:

A. Importation of goods

- The importation of goods in the EU being subject to VAT
- The concept of importation for VAT purposes
- Chargeable event
- Person liable for the VAT payment
- Right of VAT deduction

B. Export of goods

- The export of goods out of the EU fiscal territory as a VAT exempt supply
- Transport or dispatch of the goods from the EU by or on behalf of the supplier
- Transport or dispatch of the goods from the EU by or on behalf of the customer not established in the Member State of supply of goods.

Considering the scope of the present analysis, the focus will be on the supply of goods performed by:

- An entity established in a non-EU country (“third country”) to a VAT taxable entity established in the EU – importation into the EU.

- A VAT taxable entity established in the EU to an entity established in a non-EU country (“third country”) – export from the EU

A. Importation of goods

According to article 2 of the VAT Directive, the importation of goods is a transaction subject to VAT, being the concept of importation defined in article 30 as "the entry into the Community of goods which are not in free circulation within the meaning of Article 24 of the Treaty".

And by "community" or "territory of the community" it is meant[8] the territory of each Member State of the Community to which the Treaty establishing the European Community is applicable[9] except for:

- The Canary Islands (Spain);
- The French overseas departments (Guadeloupe, French Guyana, Martinique, Réunion, Saint Barthelemy, Saint Martin);
- Mount Athos (Greece);
- The Channel Islands (United Kingdom);
- The Aland Islands (Finland).

The place of importation is, in general terms, the Member State within whose territory the goods are located when entering the Community.[10] From a VAT perspective, when the transport of the goods begins in a third country, both the place of supply by the importer and the place of any subsequent supply shall be deemed to be within the Member State of importation of the goods[11].

VAT become chargeable when the goods are imported[12] and, from that moment, a right of deduction shall arise[13] subject to the fulfillment of the conditions which grant that right.

On importation, the persons liable for the VAT payment are designated by the Member States[14].

In Portugal, as in other EU Member States (*e.g.*, Germany), the person liable to pay import VAT is the one liable for the customs debt. But there are Member States that establish that the person liable to pay import VAT is the owner or the recipient of the goods or his fiscal representative[15].

In general, the VAT due or paid in respect of importation of goods into a Member State may be deducted if the goods imported are used for the purposes of VAT taxable transactions of a VAT taxable person. This VAT taxable person is entitled to deduct the import VAT from the VAT he is liable to pay in that Member State.[16]

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[8] Article 5 VAT Directive: Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax, OJ L347/1 11.12.2006
[9] Article 299 EU Treaty:Treaty establishing the European Community
[10] Article 60 VAT Directive
[11] Article 32 VAT Directive
[12] Article 70 VAT Directive
[13] Article 167 VAT Directive
[14] Article 201 VAT Directive
[15] Michael Lux, Ulrich Schrömbges & Kristina Vitkauskaite, "What a Customs Lawyer Should Know about EU Value Added Tax (VAT) Law" (2012) 7 (10) Global Trade and Customs Journal < http://www.kluwerlawonline.com.eur.idm.oclc.org/abstract.php?area=Journals&id=GTCJ2012051> accessed 13 December 2018
[16] Article 168 (e) VAT Directive

For taxable persons not established in the Member State in which the goods subject to VAT were imported, the recovery of the import VAT will only be possible by the means of a refund, providing the conditions foreseen in the European Union (EU) law[17] are met.

Among several applicable conditions, the following are particularly relevant:

- The entity not established in the EU territory not having performed supplies of goods deemed to have been supplied in the Member State[18],

- With the exception of supply of goods to a person designated in accordance with Articles 194 to 197[19] [20] of the VAT Directive as liable for payment of VAT.

B. Export of goods

From a VAT perspective, a supply of goods with transport – organized by the supplier, by the customer or by a third person – is subject to VAT at the EU Member State where the goods are located at the time when the transport to the customer begins[21].

However, under the EU VAT rules[22], a supply of goods dispatched or transported out of the EU fiscal territory qualifies for a VAT exemption, independently on whom organizes the transport – the vendor or a third person on his behalf, or the customer (not established within the EU Member state where the transport begins) or a third person on his behalf.

The Member States are competent to lay down the conditions under which the VAT exemption on exports of goods operate, in order to ensure its correct application and prevent fraud[23].

One of the relevant conditions relates to the means of proof to be provided to legitimate the VAT exemption.

In Portugal (as in other EU Member States, such as France), the Tax Authorities rely entirely on the proof provided by the customs authorities, namely the certification of exit by the customs office of exit. Other Member States do not restrict that proof to a "customs certificated document".[24]

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[17] Thirteenth Council Directive: Directive 86/560/EEC of 17 November 1986 on the harmonization of the laws of the Member States relating to turnover taxes — Arrangements for the refund of value added tax to taxable persons not established in Community territory, OJ L326/40 21.11.1986

[1818] Article 1 Thirteenth Council Directive (full name in the previous note)

[19] Article 194 VAT Directive:

1. Where the taxable supply of goods or services is carried out by a taxable person who is not established in the Member State in which the VAT is due, Member States may provide that the person liable for payment of VAT is the person to whom the goods or services are supplied.

2. Member States shall lay down the conditions for implementation of paragraph 1.

[20] Article 195 VAT Directive: VAT shall be payable by any person who is identified for VAT purposes in the Member State in which the tax is due and to whom goods are supplied in the circumstances specified in Articles 38 or 39, if the supplies are carried out by a taxable person not established within that Member State.

[21] Article 32 VAT Directive

[22] Article 146 VAT Directive

[23] Article 131 VAT Directive

[24] Michael Lux, Ulrich Schrömbges & Kristina Vitkauskaite, "What a Customs Lawyer Should Know about EU Value Added Tax (VAT) Law" (2012) 7 (10) Global Trade and Customs Journal <

2.3. Customs

2.3.1. Release for free circulation

Non-Union goods[25] intended to be introduced in the EU Customs Territory shall be placed under release for free circulation, which implies the payment of the import duties due, as of other charges (e.g. VAT), and the application of commercial policy measures, besides the completion of customs formalities.

Consequently, a customs debt on import is incurred at the time of acceptance of the customs declaration.[26] The declarant is the debtor and, in the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor.[27]

For customs purposes:

- The "declarant" is the person lodging a customs declaration in his or her own name or the person in whose name such a declaration is lodged[28]

- A "customs representative" is any person appointed by another to carry out customs formalities[29].

Economic operators which are not established in the EU customs territory shall register with the customs authorities responsible for the place where the first customs declaration must be submitted.[30] [31]

The declarant may appoint a customs representative (mandatorily established within the customs territory of the Union)[32], either through:

- a direct representation – the customs representative act in the name of and on behalf of the declarant

- an indirect representation – the customs representative act in his own name but on behalf of another person.

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http://www.kluwerlawonline.com.eur.idm.oclc.org/abstract.php?area=Journals&id=GTCJ2012051> accessed 13 December 2018

[25] Article 5 (23) (24) UCC: Regulation (EU) no 952/2013 of 9 October 2013, laying down the Union Customs Code, OJ l269 10.10.2013, p.1

Goods other than those which fall into any of the following categories:

(a) goods wholly obtained in the customs territory of the Union and not incorporating goods imported from countries or territories outside the customs territory of the Union;

(b) goods brought into the customs territory of the Union from countries or territories outside that territory and released for free circulation;

(c) goods obtained or produced in the customs territory of the Union, either solely from goods referred to in point (b) or from goods referred to in points (a) and (b);

[26] Article 77 (1) (a) (2) UCC

[27] Article 77 (3) UCC

[28] Article 5 (15) UCC

[29] Article 5 (6) UCC

[30] Article 9 (2) UCC)

[31] Article 5 (1) DA UCC: Commission Delegated Regulation (EU) 2015/2246 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code

[32] Article 18 (1) (2) UCC

EU Member States may determine, within the framing of the Union Customs Law, the conditions under which a customs representative may provide services in the Member State of establishment.[33]

The EU customs territory comprises the territory of its Member States with some areas exempted[34] and other areas situated outside the territory of the Member States included considering the conventions and treaties in force.[35]

Once released for free circulation, non-Union goods acquire the status of Union goods.

2.3.2. Export

The dispatch of goods outside the EU customs territory implies the fulfillment of customs export procedures, by the exporter.

The concept of "exporter" is set forth in the EU customs legislation and has recently been updated with the aim of allowing "greater flexibility to business partners in the choice of the person which may act as exporter"[36], since the previous definition limited the concept of "exporter" to the person who met three cumulative requirements:

- being established in the customs territory of the Union
- holding a contract with a consignee in a third country and,
- having the power to determine that the goods are to be brought outside the customs territory of the Union.

The purpose of the updated definition of "exporter"[37] was to focus on the essential requirements to operationalize the export procedure:

- the exporter must have the power to determine that the goods are to be taken out of the customs territory of the Union and,
- must be established in the customs territory of the Union[38].

The primary rule is that the business partners agree on the person that may act as exporter, implicitly one fulfilling the conditions above which grant the "sense of purpose" to act as exporter.

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[33] Article 18 (3) UCC
[34] Article 4 (1) UCC
[35] Article 4 (2) UCC
[36] Commission Delegated Regulation (EU) 2018/1063 of 16 May 2018, amending and correcting Delegated Regulation (EU) 2015/2446 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code

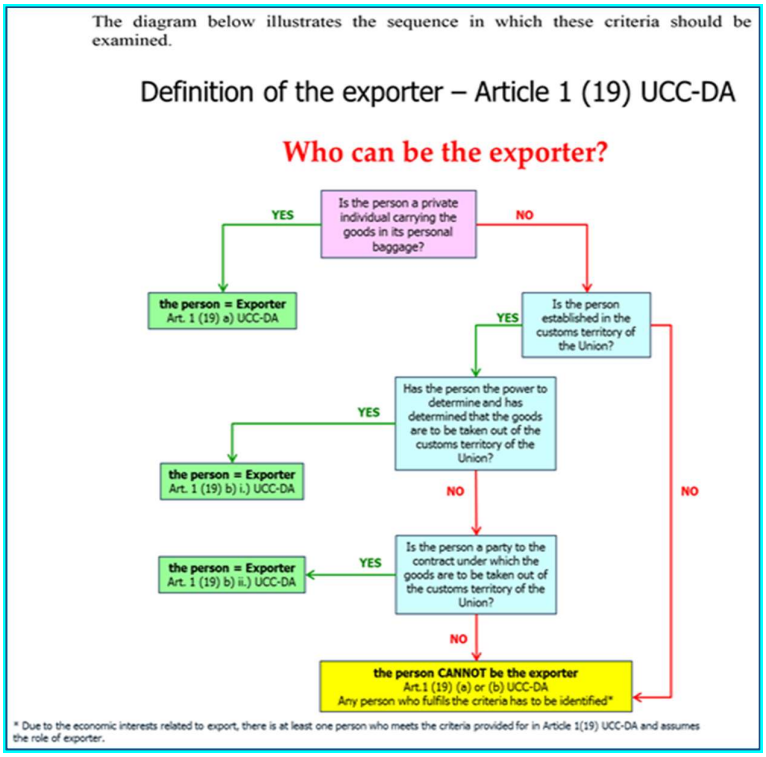
[37] Article 1 (19) (b) (i) DA UCC: Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 (UCC Delegated Regulation), supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code, OJ L343 29.12.2015, p. 1, amended by Commission Delegated Regulation (EU) 2018/1063 of 16 May 2018, OJL192 30.7.2018
[38] Article 170 (2) UCC

Only if there is not such agreement or the person is not established in the customs territory of the EU, the "exporter" is determined by the customs legislation as "any person established in the customs territory of the Union who is a party to the contract under which goods are to be taken out of the customs territory".[39]

Relevant to consider the clarifications contained at Annex A to the UCC Export & Exit Guidance[40], according to which, and besides the above mentioned:

- The Economic Operators Registration and Identification (EORI) number[41] of the person qualified to be an exporter has to be mentioned in the export customs declaration
- If that person does not have an EORI number (e.g., a private individual), his/her name and address has to be provided instead
- If a person does not qualify as exporter, the business partners must agree (e.g., contractually) who is the person responsible for taking the goods out of the EU customs territory

The diagram contained in the Annex A of the UCC Export & Exit Guidance – and bellow reproduced – provides a useful guidance to answer the question of "Who can be the exporter?"



[39] Article 1 (19) (b) (ii) UCC Delegated Regulation

[40] Taxud.a. Ares(2018)4494380 – 30/07/2018 - Version updated to reflect the revised definition of exporter

[41] The EORI system is established in order to implement the security measures introduced by Regulation (EEC) No 2913/92, as amended by Regulation (EC) No 648/2005 of the European Parliament and of the Council - OJ L 117, 4.5.2005, p. 13.

The concept of being established in the customs territory of the EU is also clarified in the UCC[42], qualifying as a person established in the customs territory of the EU any person:

- with habitual residence in the customs territory of the Union, if a natural person

- with its registered office, central headquarters or a permanent business establishment in the customs territory of the Union, if a legal person or an association of persons.

And a "permanent business establishment" shall be considered as "a fixed place of business" where:

- "the necessary human and technical resources are permanently present, and
- through which person's customs related operations are wholly or partly carried out".[43]

Other relevant concepts are materialized in the UCC Export & Exit Guidance:

- ***The concept of "power to determine and have determined that the goods are to be taken out of the customs territory of the union"***

- ***The concept of "party to the contract under which the goods are to be taken out of the customs territory of the Union"***

Concerning the first concept (***A.***) important to consider the following key points:

- The relevance of the acts of the parties of the transaction on the basis of which the goods leave the EU customs territory: the power to determine that the goods are to be taken out of the EU must follow unequivocally from those acts

- The phrase "and has determined that the goods are to be taken out of the customs territory of the Union" refers to a factual element that the power has been exercised which can be the assumption of the role of the exporter since, implicitly, the person has also assumed to take the right to determine the export of the goods

- The agreement between the parties to assign to one of them the power to determine that the goods are to be exported may take any form provided for in the civil law of the Member State concerned.

Particularly relevant for one of the subjects under analysis is the reference to contracts with Incoterms "ex works".

[42] Article 5 (31) UCC
[43] Article 5 (32) UCC

According to the contents of the UCC Export & Exit Guidance[44], "where the power for determining that the goods are to be brought to a destination outside the customs territory of the EU lies with a person established outside the Union pursuant to the contract on which the export is based (e.g. buyer), but this person decides to empower a person established in the EU to determine that the goods are to be taken to a destination outside the Union. This means that a person other than the seller may act as exporter under the condition that, for instance, the buyer has empowered that person to do so. The business partners involved have the flexibility to designate the person who has to act as exporter, as long as that person complies with the definition of "exporter".

The understanding above may raise some controversy among EU Member States (as Portugal), being possible to stand up for the position that, if the seller performs a VAT exempt supply, implicitly has the power to determine that the goods are to be dispatched outside the EU, independently the sale made under Incoterm "ex works".

In relation to the second concept – ***B.*** "***party to the contract under which the goods are to be taken out of the customs territory of the Union***" - important to recall that it is to be considered namely if the person to act as exporter is not established in the EU customs territory.

In those circumstances, the business partners must make contractual or business arrangements to designate who will act as exporter, and a carrier, a freight forwarder or any other party may act as exporter, as long as that person complies with the definition of "exporter" and agrees to take on this role.

3. Practical application

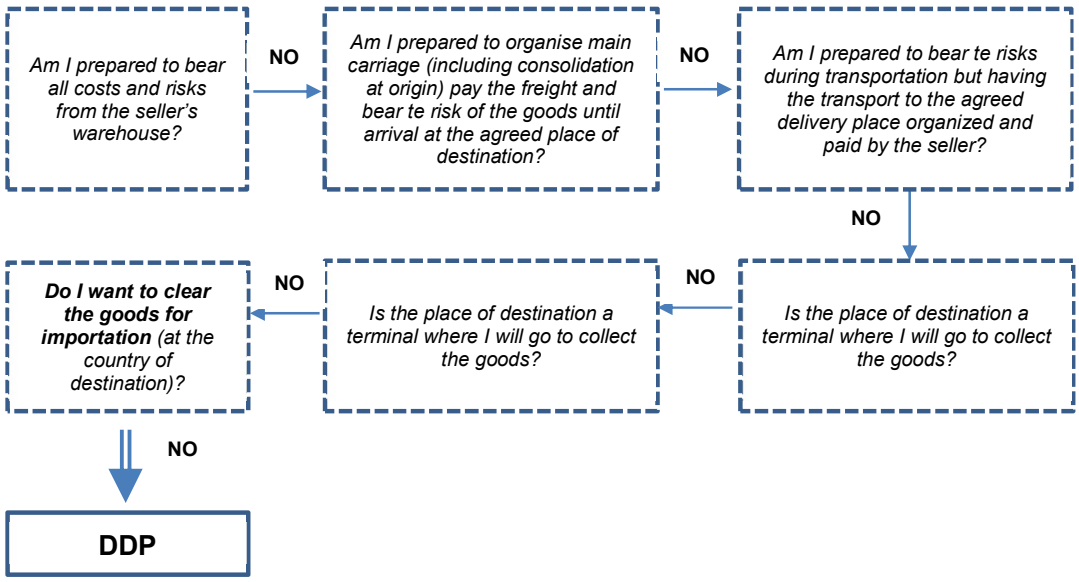
As mentioned in previous sections, international trade of goods implies - or should imply – some elements to be considered and evaluated within the scope of negotiation and selection of the Incoterms® rules in order to:

- Adequately define the intention of the seller and the buyer concerning:
    - Costs and responsibilities allocation
    - Place and moment of fulfillment the delivery obligation
    - Risk of the goods until delivery fulfillment – insurance obligations
    - Who deals with the customs formalities (export and import)
    - Documental and license obligations
- Assure an accurate understanding and knowledge of the:
    - VAT implications and costs, to be assumed or prevented by each party on a sale and purchase agreement, and
    - Customs obligations and impacts.

[44] Annex A to the UCC Export & Guidance: Taxud.a. Ares(2018)4494380 – 30/07/2018, p.4

3.1. Import purchase agreements under incoterm "*Delivered Duty Paid*" (DDP)

Assuming the role of an economic operator established in the EU negotiating a purchase of goods with a company established outside the EU customs and fiscal territory, what would be the (first) questions to answer to validate DDP as an appropriate incoterm rule?



Focusing on the question that assumes particular relevance for the subject under analysis – "***Do I want to clear the goods for importation (at the country of destination)?***" – it is time to recap the obligations assumed by the seller and the buyer under the DDP rule as foreseen in Incoterms 2010.

– **Seller's** responsibilities and obligations related to the import customs clearance of the goods upon entrance in the EU customs and fiscal territory:

  - Obtain, at its own risk and expense, any import and other related authorizations required

  - Pay, if applicable, the costs of the import customs formalities, including the VAT and customs duties payable upon import.

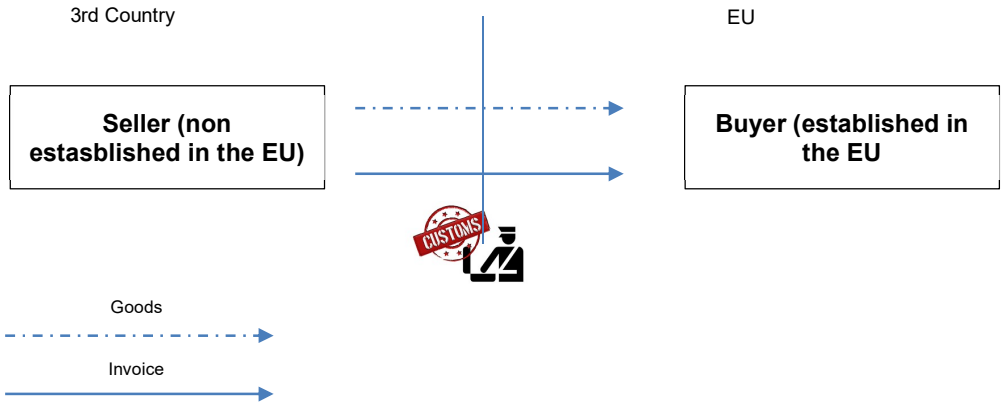
– **Buyer's** responsibilities and obligations related to the import customs clearance of the goods upon entrance in the EU customs and fiscal territory:

  - Assist the seller – upon its request, risk and expense – in obtaining the required licenses for the import.

From the above it shall be clear, both for the seller and the buyer, that:

- the import customs formalities will be responsibility of the seller and,
- the buyer expects to receive the goods at the agreed place of destination with all the import customs formalities fulfilled and released for free circulation.

The potential problems to be faced once operationalizing such an agreed supply of goods, result mainly from the following scenario of implementation:



Customs implications of Incoterms® rule DDP

The introduction of the goods into the EU Customs Territory will imply:

- The submission of a customs declaration to declare the goods for free circulation
- Payment of the customs debt, namely customs duties and import VAT, being the debtor the person lodging the customs declaration (the declarant) which may result in two scenarios:
  - The person submitting the customs declaration is the same in whose name the customs declaration is lodged => **customs debtor** is the **person submitting the customs declaration**
  - The person submitting the customs declaration is different from the one in whose name the customs declaration is lodged => **customs debtor** is the **person in whose name the customs declaration is lodged.**

In the scenario of a seller:

- not established in the EU and, consequently,
- not registered with the customs authorities responsible for the place where the customs declaration must be submitted,

in practice it will be not possible to have the customs declarations submitted in the name of the seller.

The seller will, anyway and under the responsibilities assumed following the Incoterms rule agreed (DDP), contract the services of a customs broker in the EU Member State where the import customs declaration must be lodged.

And, depending on the conditions in force in that EU Member State for the customs representative to act in the name and on behalf of a third entity, the buyer may end up assuming the role of "declarant" without even being aware of it.

In Portugal, an "official customs broker" disposing of a professional registration and certification is assumed to be able to act as customs representative, lodging customs declaration in the name of a third entity (the declarant) without having to present – and consequently require – a power of attorney or similar formal document issued by the entity on whose name the customs declaration is submitted, granting representation powers.

This will imply that the buyer, without being aware, may be assuming customs responsibilities, namely the one related with the obligation of payment of the customs import debt (if not paid by the customs representative, charging it to the seller), independently on the agreed DDP Incoterm rule.

VAT implications of Incoterms® rule DDP

From the conclusion that, under the customs regulations, it will not be possible to have the customs declarations submitted in the name of the seller – a non-EU established company - **two** possible **scenarios** shall be considered:

A. The import customs declaration is submitted in the name and on behalf of the buyer

B. **The import customs declaration is submitted in the name and on behalf of an entity different from the buyer** (*e.g.*, the third-party logistics contracted by the seller)

In both scenarios, the right of deduction/recovery of the VAT due or paid in respect of importation will remain at the sphere of an (EU) VAT taxable person, if fulfilled the condition of having used the imported goods for the purposes of VAT taxable transactions.

A. The import customs declaration is submitted in the name and on behalf of the buyer

Having the import declaration been submitted in the name of the buyer, for VAT purposes the buyer would be the entity entitled to deduct/recover the import VAT at the conditions of using the goods within the scope of a VAT taxable activity.

This leads to an also practical solution of, explicitly or tacitly, agreement on a Incoterms® rule "DDP VAT excluded", in most of the cases having the customs broker of the logistic service provider advising its client – the seller – to have the import VAT paid (directly) by the buyer, since it will be entitled to recover it on the basis of the customs documents issued in her/his name.

And, at the end, he buyer is assuming more responsibilities than the ones strictly intended and agreed on a DDP Incoterms® rule,

- Including the risks of non-compliance concerning the import customs formalities
- Even though not having controlled the conditions under which the import customs declaration have been lodged by an entity not contracted by him
- Which, at least, should imply the revaluation of the price agreed for the purchase of the goods from the seller, namely since the condition "delivered duty paid" would not be fulfilled by the seller, if a part of the import debt – the one related to VAT, which may be higher than the customs duties – is to be paid by the buyer.

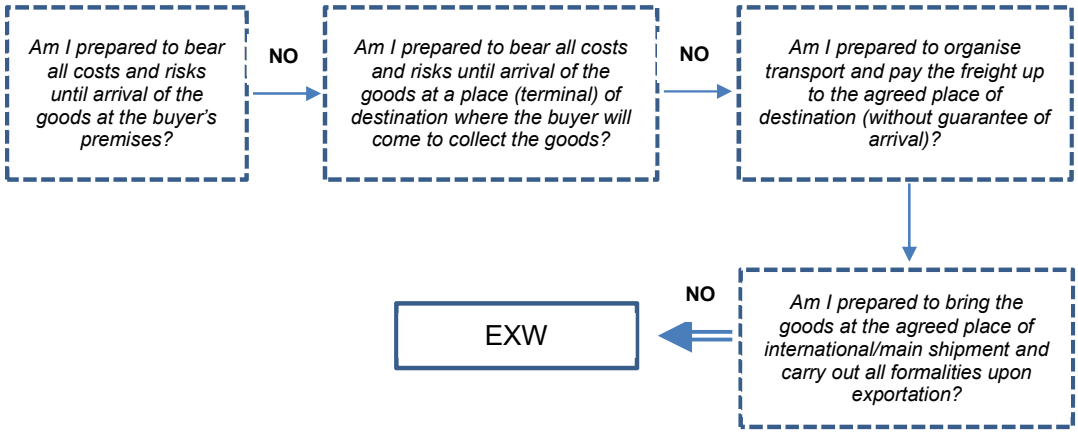
B. **The import customs declaration is submitted in the name and on behalf of an entity different from the buyer (***e.g.*, the third-party logistics contracted by the seller)

In the alternative of the import declaration to be submitted in the name and on behalf of an entity different from the buyer (*e.g.*, the third-party logistics contracted by the seller), it will not be possible to recover the VAT considering the condition of using the goods within the scope of a VAT taxable activity.

In fact, the buyer is the entity that will possibly use the goods for the purposes of its activity and not a third party neither owing nor having the right of dispose of the goods.

3.2. Export sale agreements under Incoterm® "Ex Works"

Now assuming the role of an economic operator established in the EU negotiating a sale of goods to a company established outside the EU customs and fiscal territory, what would be the (first) questions to answer to validate EXW as an appropriate Incoterms rule?



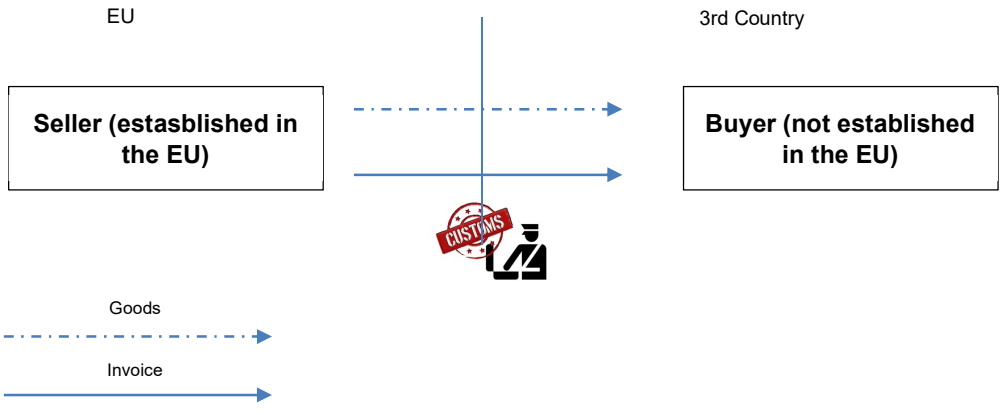
Focusing on the question that assumes specific relevance for the subject under analysis – ***"Am I prepared to carry out all formalities upon exportation?"*** – it is time to recap the obligations assumed by the seller and the buyer under the EXW Incoterms rule as foreseen in Incoterms® 2010.

- **Seller's responsibilities** and obligations related to the export formalities from the EU customs and fiscal territory:
  - Providing the goods and the commercial invoice in conformity with the contract of sale
  - Assist the buyer – upon its request, risk and expense – in obtaining any required licenses or official authorizations required for export the goods
- **Buyer's responsibilities** and obligations related to the export formalities from the EU customs and fiscal territory:
  - Obtain, at its own risk and expense, any export and other related authorizations required
  - Pay, if applicable, the costs of the export customs formalities

From the above it shall be clear both, for the seller and the buyer, that:

- the export customs formalities will be the responsibility of the buyer, who is advised not to use Incoterms rule EXW if not capable of dealing – directly or indirectly – with the export formalities
- the seller's obligation of delivery of the goods is fulfilled when it places the goods at the disposal of the buyer at the seller's premises or at another agreed place (e.g., factory, warehouse)
- the seller is not obliged to organize the export formalities

The potential problems faced once operationalizing such an agreed supply of goods, result mainly from the following scenario of implementation:



Customs implications of Incoterms® rule EXW

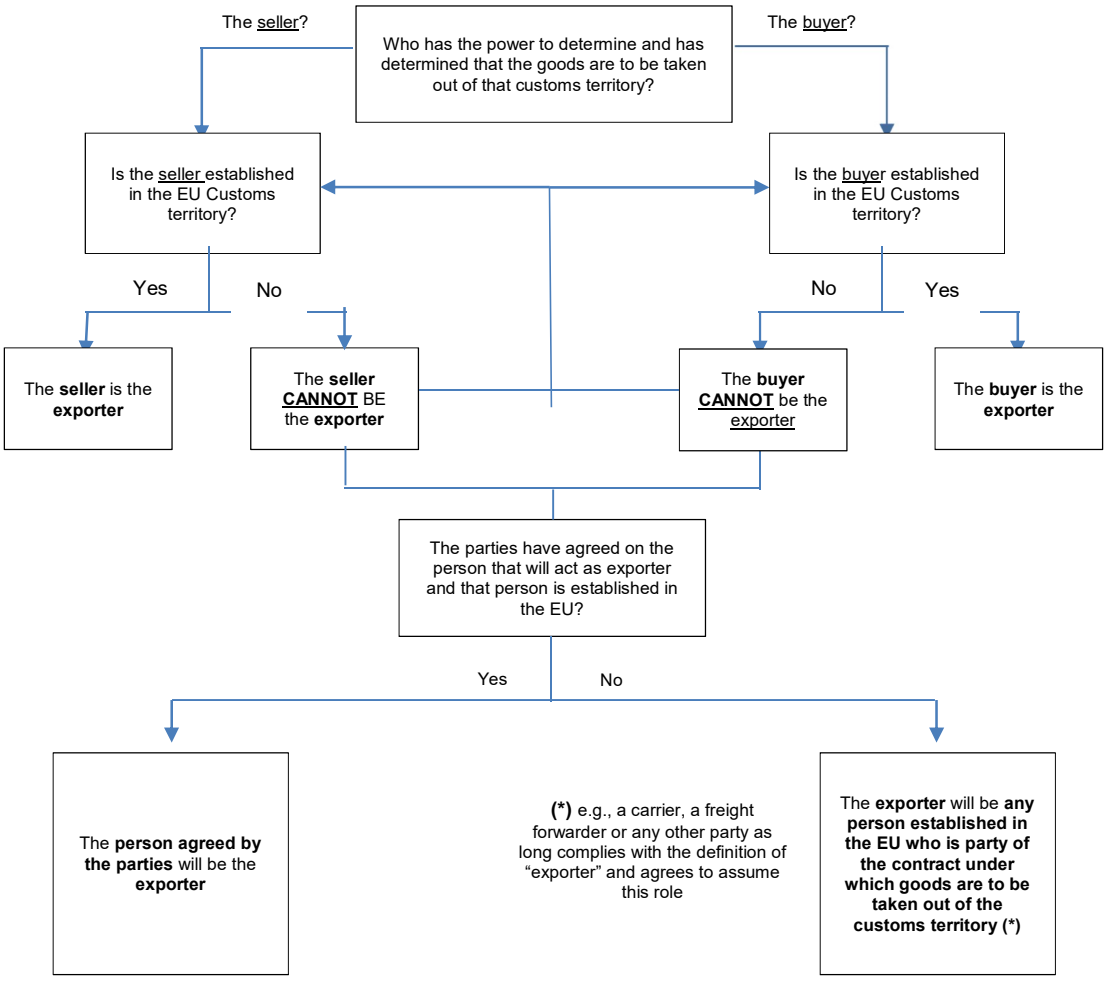
The dispatch of the goods outside the EU customs and fiscal territory implies the fulfillment of the customs export procedures by the exporter.

Even under the recently updated concept of exporter, the requirement of being an entity established in the customs territory of the EU must be complied with.

This implies not being possible for a buyer not established in the EU to act as exporter, even though having the power to determine that the goods are to be taken out of the customs territory of the Union, which is the case under the Incoterm rule EXW.

According to the Incoterms 2010 the buyer would not be advised to use EXW if not able, at least directly, to deal with the export clearance.

Considering the operation under analysis – a sale of goods from a seller established in the EU customs and fiscal territory to a buyer not established in the EU under Incoterms rule EXW - and the requirements foreseen in the EU customs law for the qualification as "exporter", the determination of the exporter could be made with the support of the following **decision tree**.



From the above, providing the seller is established in the EU customs territory it will qualify as exporter.

But what about the criteria of "having the power to determine and have determined that the goods are to be taken out of the customs territory of the Union"? Would it be possible to consider it met under a sale agreement on Incoterms rule EXW?

According to the clarifications contained in Annex A of the UCC Export & Exit Guidance, "contracts with incoterm "ex works" or similar, where the power for determining that the goods are to be brought to a destination outside the customs territory of the EU lies with a person established outside the Union pursuant to the contract on which the export is based (e.g. buyer), but this person decides to empower a person established in the EU to determine that the goods are to be taken to a destination outside the Union. This means that a person other than the seller may act as exporter under the condition that, for instance, the buyer has empowered that person to do so. The business partners involved have the flexibility to designate the person who has to act as exporter, as long as that person complies with the definition of "exporter".[45]

Once again, from the above it seems to result that:

- The power to determine the exit of the goods from the EU customs territory if the Incoterms rule agreed was EXW is with the buyer but, since the buyer is established outside the EU, it cannot qualify as exporter

- In the event that the buyer has empowered an entity established in the EU to take the goods to a destination outside the EU, that entity may act as exporter.

However, it is also relevant to considerer that, from the reference "This means that a person other than the seller may act as exporter":

- the seller will qualify, generally, as the exporter under a sale contract under Incoterms rule EXW
- being possible to the parties (seller and buyer) to designate another person to act as exporter, namely the buyer in case of empowerment of a third entity (e.g. to deal with the transportation of the goods outside of the EU),

which confirms the understanding summarized in the "decision tree", presented with the criteria to determine the person to act as "exporter".

Even though under Incoterms rule EXW the responsibility of arranging the transport of the goods relies on the buyer, it remains possible to assume, that:

- from the moment the seller invoices the goods for export (e.g., applying the VAT exemption foreseen in the VAT legislation for export, mentioning in the invoice a delivery address different from its premises, such as the address of final destination of the goods at the non-EU country – necessarily to be determined and informed by the buyer),

[45] Annex A to the UCC Export & Guidance: Taxud.a. Ares(2018)4494380 – 30/07/2018, p.4

– the seller has an implicit power to determine that the goods are to be taken out of the EU customs territory or, at least, an interest on that, namely concerning VAT responsibilities assumed.

VAT implications of Incoterms® rule EXW

Under the customs regulations, and has explained in the previous point, in a sale agreement under Incoterms rule EXW where the buyer is an entity not established in the EU, the exporter will be:

a. the seller, generally or
b. an entity distinct from the seller, if empowered by the buyer to take out the goods from the EU customs territory,

From a VAT perspective, there are some implications that should be considered namely by the seller.

In fact, the seller will be part of the sale contract and will issue the sales invoice of the goods.

If the seller applies the VAT exemption foreseen for the supply of goods dispatched or transported out of the EU fiscal territory, even though not organizing the transport due to the agreed Incoterms rule EXW, it will have to be able to obtain a mean of proof that the goods have left the EU fiscal (and customs) territory.

Focusing on the condition of the mean of proof to be the customs export declaration containing the exit certification of the goods, provided by the customs authorities of the export office of exit – which is the case in Portugal – it will be of the seller's interest to act as exporter.

In fact, the seller will have to be able to present - to the Tax Authorities - an export customs document mentioning the invoice issued under the sales contract agreement (box 44 of the single administrative document (SAD)[46])), and in which the entity identified as the exporter is the seller.

Otherwise, it won't be possible to apply the VAT exemption, and VAT will have to be assessed and charged to the buyer.

If not specifically discussed and ruled out in the sales contract, the seller will depend on the buyer's decision and "due or not due care" in dealing with the export customs formalities.

[46] SAD GUIDANCE During the UCC transitional period: TAXUD A3(2015) 5707081, 23-4-2016, Page 59: "Box 44 Additional information/Documents produced/Certificates and authorisations. Documents, certificates and Union or international authorisations or other references produced in support of the declaration must be entered in the form of a code consisting of four alphanumeric characters, followed by either an identification number or another recognisable reference."

It is, then, advisable for **the parties** to **agree** on **who will act as exporter** and:

a. If the seller, considering that this party will assume customs responsibilities, may be interested in:

   - advising the buyer to contract a specific customs broker (one "known and approved" by the seller)
   - contractually define the conditions under which the export customs formalities shall be dealt with by the buyer, namely concerning:
     i. the type of customs representation that the customs broker (to be contracted by the buyer) will assume: advisable the indirect representation
     ii. the conditions of empowerment of the customs broker to act on behalf of the seller (even if on its own name under the indirect representation), namely on what concerns duration, if for one specific operation/invoice or during a certain and defined period of time (in the event of several sales under the same contract), the customs offices (and EU Member States) where the customs broker will act on behalf of the seller
     iii. include some clauses in the sales contract, such as:
       - clause of "buyer's responsibility" in case of customs litigations following and in relation with the export formalities, namely in the scenario of not "due care" by the customs broker
       - clause according to which the buyer is obliged to provide, within a defined time limit, the customs document required by the seller to proof – for VAT purposes - that the goods were taken out the EU Customs territory
       - granting the VAT payment by the buyer in case the evidence required to legitimate the VAT exemption is not provided

   The seller shall be aware, and conscious, that will be depending on the buyer to obtain the evidence required to be able to not assess VAT on the supplies of goods. And that the (direct) power to mandatorily request that information from the customs broker will be from the buyer – the acquirer of the customs brokerage services.

b. If an entity distinct from the seller, empowered by the buyer to take out the goods from the EU customs territory, although from a strict customs perspective it may result possible, the seller will face some constraints concerning the legitimacy of applying the VAT exemption on the sale.

   In the context of the exporter being an entity distinct from the seller and having the seller issued the sales invoice with VAT exemption (export),

   - The export customs document, required as proof of the transport of the goods outside the EU fiscal territory, will be issued in the name of a third party (e.g., the carrier/freight forwarder)

   - It will not be possible, for the seller, to obtain an export customs document (certifying the exit of the goods from the EU territory) identifying the seller as the exporter and, also, the sales invoice issued by the seller.

In practice, the seller would be ending up not entitled to apply the VAT exemption on the sales invoice, and VAT would be due for the supply of goods made under this scenario: sale under Incoterms rule EXW, buyer not established in the EU and the exporter being a third party different from the seller.

And, in practical terms, this would be an alternative that, in order to prevent any inefficiency concerning VAT, shall be reserved for situations in which:

- The sale is to be made with VAT assessment (the invoice issued by the seller includes VAT) and, therefore,
- The export customs document will not be required by the seller to support the VAT exemption on the sale.

In "business to business" sales it is not probable the scenario above to be applicable, since namely the buyer would be, implicitly, expecting to be able to buy the goods with VAT exemption.

In fact, even if it would be entitled to request a refund of the VAT paid, there would be a cash flow impact of "paying first and recovering later".

And, in order to be able to recover the VAT paid, from an EU Member State, being the buyer an entity established outside the EU, certain conditions would have to be met as ruled out in the applicable legislation[47], namely:

- Qualifying as "taxable person not established in the territory of the Community" which, according to Article 1 (1) of the Tirteenth Council Directive implies that, during the the period which applications should cover[48]:
  - has had in that territory neither his business nor a fixed establishment from which business transactions are effected, nor, if no such business or fixed establishment exists, his permanent address or usual place of residence, and
  - who, during the same period, has supplied no goods or services deemed to have been supplied in the Member State, except the ones for which a "reverse charge" rule is applicable (buyer liable for the VAT self-assessment)[49] [50]

- Eventual reciprocity condition[51] imposed by the Member State to grant the right of refund

One last practical consideration concerning the solution set forth at Article 1 (19) (b) (ii) of the DA UCC:

- being generally the invoice (commercial if a supply with currency movement or pro forma if a supply free of charge) one of the documents to be the basis and identified in the export customs declaration and,

[47] Thirteenth Council Directive
[48] Article 1 (1) Thirteenth Council Directive
[49] Article 1 (1) (a) (b) Thirteenth Council Directive
[50] Articles 194 to 197 of the VAT Directive
[51] Article 2 (2) of Thirteenth Council Directive: "Member States may make the refunds (…) conditional upon the granting by third Sates of comparable advantages regarding turnover taxes"

- at least in Portugal, having the exporter to be the same entity in whose name the invoice is issued,

Will it be acceptable, as basis of the export customs declaration (e.g., for the purposes of attesting the goods to be declared, its customs value),

- the sale invoice issued by the seller to the buyer being the exporter a third entity such as the freight forwarder?
- or an invoice – pro forma invoice – will have to be issued by that third party to the buyer, as a "mirror" of the sale invoice issued by the seller?

The kind of practical questions that, if not clarified, will result in several "tactical" approaches and suggestions by, namely the carriers and freight forwarders and customs offices of each Member State.

And, in that context, it may result in requests such as "the seller to issue an invoice to the third party as "just a paper" to deal with the customs formalities", without the parties realizing the real and concrete effects of the seller having issued two invoices for the same goods – one to the buyer (within the sale agreement), and another to the third party ("just" for export compliance purposes).

4. ICC revision of Incoterms® 2020 - overview of evolution and the foreseen changes (Incoterms rules DDP and EXW)

As previously mentioned – at section 2.1. above – the ICC Incoterms rules have been subject to a revision at each 10-year period.

Having the last revision occurred in 2010, it is currently being prepared the next revision to be implemented in 2020.

Before sharing some thoughts, namely about what advisable recommendations for Incoterms rules EXW and DDP could be, namely resulting from the questions above approached concerning VAT and Customs implications, it could be worth and useful to systematize the evolution concerning "Customs Clearance" at the Incoterms 1990, 2000 and 2010.

Comments in relation to "Customs Clearance" – Introduction Section	
Incoterms® 1990[52]	***Incoterms® 2000***[53]
Desirable customs clearance to be arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf: – the seller clears the goods for export (exporter = seller) – the buyer clears the goods for import (importer = buyer)	Desirable customs clearance to be arranged by the party domiciled in the country where such clearance should take place or at least by somebody acting there on his behalf: – the seller clears the goods for export (exporter = seller) the buyer clears the goods for import (importer = buyer)
When, – the buyer undertakes to clear the goods for export (exporter = buyer) – EXW – the seller undertakes the goods for import (importer = seller) - DDP each one must ascertain if acceptable – according to the applicable customs regulations – the customs clearance to be performed by, or on behalf of, a party not domiciled in the respective export (EXW) or import (DDP) country??	Clarification of the scope of "obligation of customs clearance" – it includes: – the payment of duty and other import charges due – the performance and payment of any inherent administrative charges
Acceptable the following variations: – «**EXW cleared for export**» when the buyer wants to collect the goods at the seller's premises, but without assuming the responsibility for the export customs formalities – «**DDP duty (and or) VAT unpaid**» when the seller is prepared to deliver the goods under the term DDP but without assuming wholly or partly the obligation to pay the import duty or other taxes and official charges – «**Delivered, Duty Unpaid**» when it is difficult for a foreign company to obtain the import licence, and/or duty reliefs (VAT deduction)	Differences (comparing with Incoterm 1990): – EXW remained unamended, representing the seller's minimum obligation – Under DDP the seller specifically agrees to clear the goods for import and pay any duty as a consequence of what follows from the very name of the term **D**elivered **D**uty **P**aid – No references concerning "acceptable variations" such as "EXW cleared for export", "DDP duty/VAT unpaid"

[52] ICC Publication No. 460 ISBN 92-842-0087 (Incoterms® 1990), Page 9
[53] ICC Publication No. 560 ISBN 92842 1199 9 (Incoterms® 2000), Page 21

Comments in relation to "Customs Clearance" – Introduction Section	
Incoterms® 1990[52]	***Incoterms® 2000***[53]
– «**DDU, cleared**» when the seller, having obligation of carriage until the buyer's premises, wants to carry out customs clearance but without paying the duties	

Contrarily to the previous versions (1990 and 2000), the Incoterms® 2010 version does not contain any dedicated comments in relation to "customs clearance" in the Introduction section.

Evolution of EXW and DDP (Incoterms® 1999, 2000 and 2010)		
Incoterms® 1990	**Incoterms® 2000**	**Incoterms® 2010**
Ex Works (…named place)[54] – «Ex works» means that the seller fulfils his obligation to deliver when he has made the goods available at his premises (i.e. works, factory, warehouse, etc.) to the buyer. – In particular, he is not responsible (…) for clearing the goods for export unless otherwise agreed (…) – This term should not be used when the buyer cannot carry out directly or indirectly the export formalities. In such circumstances, the FCA term should be used	**Ex Works (…named place)**[55] – «Ex works» means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place (i.e. works, factory, warehouse, etc.) not cleared for export (…). – This term should not be used when the buyer cannot carry out the export formalities directly or indirectly. In such circumstances, the FCA term should be used, provided the seller agrees that he will load at his cost and risk.	**Ex Works (insert named place of delivery)**[56] – «Ex Works» means that the seller delivers when it places the goods at the disposal of the buyer at the seller's premises or at another named place (i.e., works, factory, warehouse, etc.) – The seller does not need to (…) clear the goods for export, where such clearance is applicable. – EXW represents the minimum obligation for the seller. – The rule should be used with care as: – the seller is not bound to organize the export clearance, even if required to provide any assistance the buyer may require to effect the export – buyer is well advised not to use EXW if he cannot directly or indirectly obtain export clearance – the buyer has limited obligations to provide to the seller any information regarding the export of the goods. However, the seller may need this

[54] ICC Publication No. 460 ISBN 92-842-0087-3 (Incoterms® 1990), pages 18-19
[55] ICC Publication No. 560 ISBN 92 842 1199 9 (Incoterms® 2000), page 27
[56] ICC Publication No. 715E ISBN 978-92-842-0080-1 (Incoterms® 2010), page 15

Evolution of EXW and DDP (Incoterms® 1999, 2000 and 2010)		
Incoterms® 1990	**Incoterms® 2000**	**Incoterms® 2010**
		information for, e.g., taxation or reporting purposes
Delivered Duty Paid [57](…named place of destination) – «Delivered Duty Paid» means that the seller fulfills his obligation to deliver when the goods have been made available at the named place in the country of importation. – The seller has to bear the risks and costs, including duties, taxes and other charges of delivering the good thereto, cleared for importation. – Whilst the EXW terms 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.	**Delivered Duty Paid (…named place of destination)[58]** – «Delivered duty paid» means that the seller delivers the goods to the buyer, cleared for import (…) 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. – 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	**Delivered Duty Paid (insert named place of destination)[59]** – «Delivered duty paid» means that the seller delivers the goods when the goods are placed at the disposal of the buyer, cleared for import (…). – The seller (…) has an obligation to clear the goods not only for export but also for import, to pay any duty for both export and import and to carry out all customs formalities – DDP represents the minimum obligation for the seller – The parties are well advised not to use DDP if the seller is unable directly or indirectly to obtain import clearance – If the parties wish the buyer to bear all risks and costs of import clearance, the DAP rule should be used – Any VAT or other taxes payable upon import are for the seller's account unless expressly agreed otherwise in the sales contract.

[57] ICC Publication No. 460 ISBN 92-842-0087-3 (Incoterms® 1990), pages 92-93
[58] ICC Publication No. 560 ISBN 92 842 1199 9 (Incoterms® 2000), page 121
[59] ICC Publication No. 715E ISBN 978-92-842-0080-1 (Incoterms® 2010), page 69

From the evolution summarized in the tables above the following conclusions may be reached:

- The (implicit) confirmation of Incoterms rules EXW and DDP as more suitable to "domestic sales" (at least, sales without customs clearance obligations to be fulfilled)
- Its use in cross border trade, implying customs clearance procedures (export and import, in general) is prone to raise several possible concerns and constraints, in face of which:
    - Incoterms rule Free Carrier (FCA) would be advisable instead EXW since the export clearance is an obligation of the seller (party domiciled in the export country)
    - Incoterms rule Delivered at Place (DAP) would be advisable instead DDP since it is up to the buyer (party domiciled in the import country) to deal with the import clearance procedures and the payment of the related costs as well duties, taxes and other charges payable upon import of the goods
- If Incoterms rule EXW is agreed by the parties,
    - The buyer is advised to confirm previous if he will be able to deal with the export clearance if not established in the export country (directly or indirectly, but always as acting as "exporter")
    - The seller shall evaluate the impact resulting from not being the exporter, namely concerning tax/VAT requirements to be fulfilled
- If Incoterms rule DDP is agreed by the parties,
    - The seller is advised to confirm previous if he will be able to deal with the import clearance if not established in the import country (directly or indirectly, but always as acting as "importer")
    - The impacts, namely concerning conditions of recovery of import VAT under which only the buyer (as entity established in the import country) will be entitled to deduct/request the VAT refund, shall be considered in the negotiation process and, if applicable and if the Incoterms rule DAP is not an option, there should be specifically mentioned in the sales contract that the VAT will be for the buyer's account.

Incoterms® 2020 – EXW and DDP - Recommendations

Although not yet available, public and detailed, information on the possible developments in relation to Incoterms rule EXW and DDP within the scope of the ICC Incoterms rules revision, from the information that the ICC Portuguese delegation is providing, namely in workshops and training sessions, it is not expected the elimination of Incoterms rules EXW and DDP.

This will reinforce the need to make it "clear and easy" to understand when the option for Incoterms rules EXW and DDP will be adequate for each concrete international sales agreement of goods.

5. Conclusion

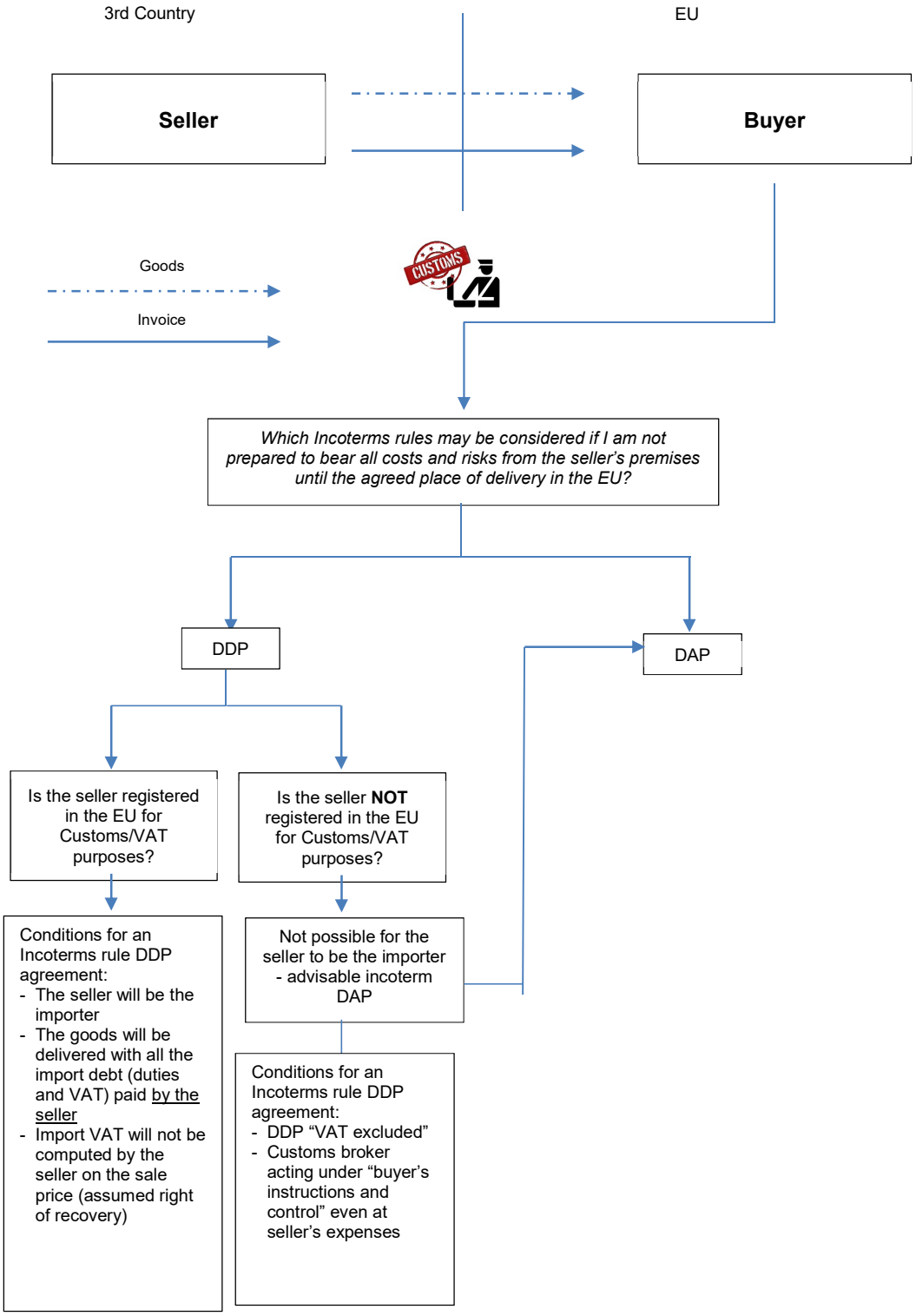
Considering the **purpose of the** present **work**, as defined in the Introduction section – **provide guidance on the critical questions to be "raised and answered" by**:

- **a buyer established in the European Union, to validate Incoterms rule DDP as the most adequate within the scope of an import purchase agreement**

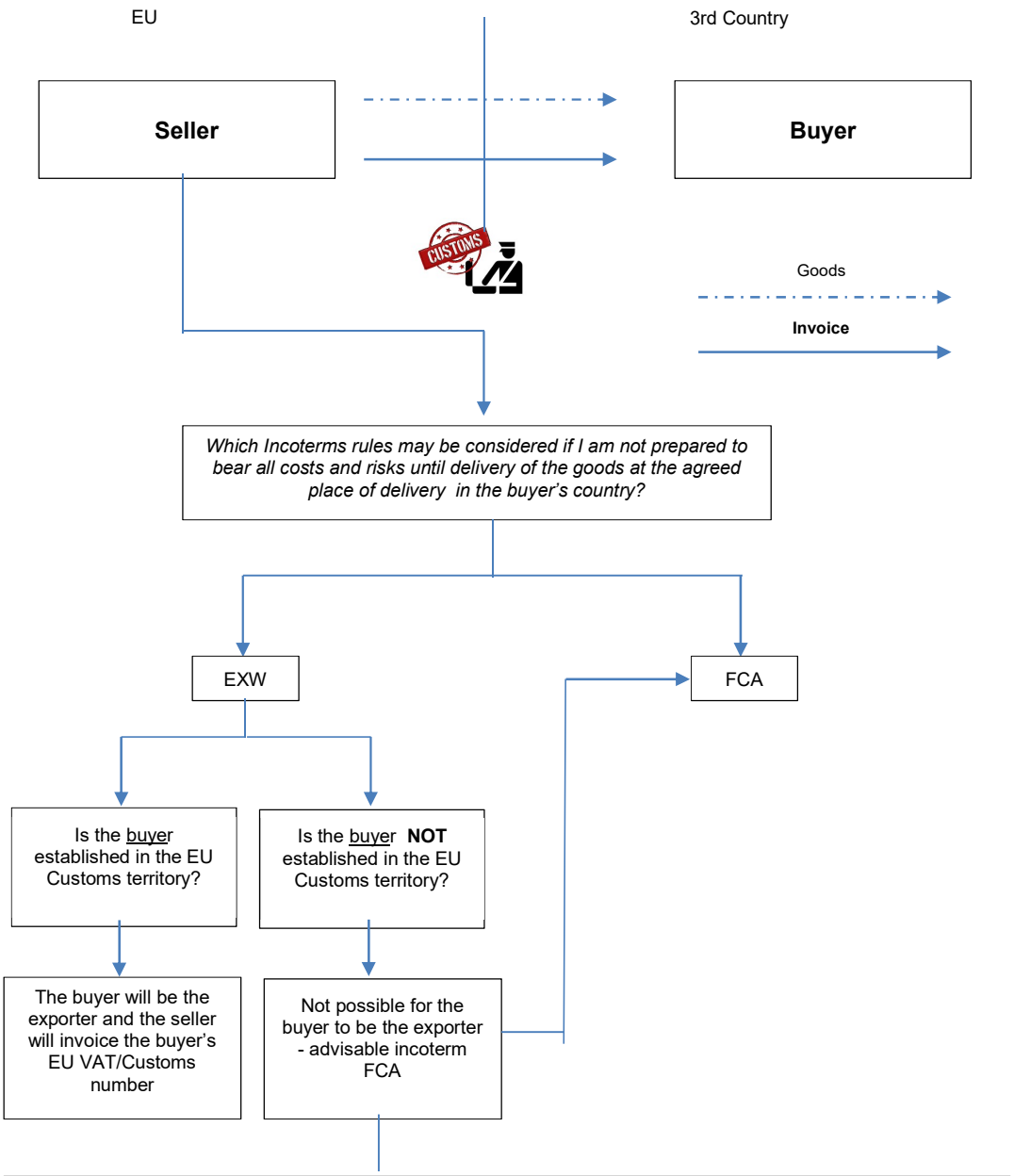
- **a seller established in the European Union, to validate Incoterms rule EXW as the most adequate, within the scope of an export sale agreement.**

and focusing on the VAT and Customs implications approached in previous sections, it results possible to summarize the questions and recommendations according to the decision diagrams presented in the following pages.

Import purchase agreement under Incoterms® rule "*Delivered Duty Paid*" (DDP)



Export sale agreements under Incoterms® rule "*Ex Works*"



Proposed conditions for an Incoterms rule EXW agreement:

- The parties must agree on the person that will act as exporter (a person established in the EU)
- If the seller, advisable to have the customs broker acting under "seller instructions and control" even at buyer's expenses
- If other person – any established in the EU who is party of the contract under which goods are to be taken out of the customs territory (e.g. a carrier, a freight forwarder or any other party as long complies with the defition of "exporter" and agrees to assume this role):
  - The seller may not be able to obtain the required proof of the transporte of the goods outside the EU fiscal and customs territory (e.g., customs export declaration), and
  - Consequently is advisable to agree – and include in the contract – that the sale will be made with VAT assessment to be paid by the buyer

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