



Exporting 101*

The Legal Implications of Going Global.

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Introduction: The Economic Landscape for Exports (2006)

- Virginia companies exported merchandise totaling \$14.1 billion to 202 countries
- Canada (\$2.6 billion), Germany (\$1.6 billion), and China (\$943 million) are the top three export markets
- Computers and electronic products (\$2.6 billion), transportation equipment (\$2.0 billion), chemical manufactures (\$1.7 billion), and machinery manufactures (\$1.3 billion) are leading exporting industries



Exports to the European Union

- Largest destination for Virginia exports with \$4.9 billion in 2006
- Integrated Circuits (\$962m), Coal (\$552.5m), Gas Turbines (\$426.4m), Aircraft Parts (\$263.7m) are top commodities
- Large market for exporters with a population of 495m and 27 member countries
- Euro is the official currency in 15 member states with a population of 315m (Cyprus, Malta joined on January 1, 2008)



How to Sell Your Product Overseas

- **Foreign Direct Investment:** Setting up a production facility abroad
- **Sales and Marketing Subsidiary**
- **Distributor or Sales Representative**
- **Licensing and Franchising Agreements**
- **Joint Venture Arrangements**
- **Direct Sale**



Exporting Checklist

- Is my product safe to sell in the foreign market?
- What are the costs involved?
- How high are duties and local taxes?
- How do I make sure to get paid?
- What happens if my customer has a problem with my product?
- Should I get insurance coverage?



Legal Aspects of Exporting

- Documents and Agreements
- Definition of Sales Terms
- Domestic & Foreign Export Regulations
- Import Duties & Taxes
- Intellectual Property Rights
- Product Liability



Documents in an Export Transaction

- Sales Contract
- Letter of Credit
- Bill of Lading
- Insurance Certificate




Sales Contract

- **Letter from Buyer Requesting Proforma Invoice**
 - Quantity and specification of merchandise

- **Proforma Invoice from Exporting Company**
 - Contains quantity, unit price and total amount due
 - Defines price, payment & shipment terms, estimated total weight
 - Currency being used (dollar, euro or other currency)

- **Purchase Order**
 - Confirmation of quantity, price, payment and shipment terms
 - Insurance coverage, import license and confirmation that a letter of credit has been opened



Sales Contract – Legal Pitfalls

- Which laws apply?
- Which courts have jurisdiction?
- Who is liable if goods are lost or damaged?
- Which INCOTERMS are used?



INCOTERMS - Introduction

- **Incoterms or International Commercial Terms** are international sales terms that are used throughout the world
- They are devised and published by the International Chamber of Commerce (ICC)
- Used to divide transaction costs and responsibilities between buyer and seller and reflect transportation practices



INCOTERMS – “FOB”

- **“Free on Board”**
- The seller delivers when the goods pass the ship’s rail at the named port of shipment
- The buyer bears all costs and risks of loss or damage to the goods for export
- The term is only used for sea or inland waterway transport
- Seller must obtain at his own risk and expense any export license or other official authorization to export the goods



INCOTERMS – “CIF”

- **“Cost, Insurance and Freight”**
- Seller delivers when the goods pass the ship’s rail in the port of shipment
- Seller pays the costs and freight necessary to bring the goods to the named port of destination
- Buyer bears the risk of loss and damage to the goods, as well as any additional costs due to events occurring after time of delivery
- Seller obtains insurance coverage and pays the insurance premium but only on minimum cover
- Seller is required to clear the goods for export



INCOTERMS - Others

- **EXW: “Ex Works”** (named place): the seller makes the goods available at his premises.
- **FCA: “Free Carrier”** (named place): the seller hands over the goods, cleared for export, into the custody of the first carrier (named by the buyer) at the named place. Applies to carriage by air, rail, road, and container / multi-modal transport.



The Letter of Credit - Introduction

- **A letter of credit** (“LC”, “L/C”) is a document issued by the buyer’s bank which usually provides an irrevocable promise to pay the sales contract amount to seller if seller produces the documents required by the sales contract with evidence that he has shipped the goods



The Letter of Credit - Procedure

- Buyer contacts its bank and inquires if they issue L/Cs
- Buyer provides the bank with copies of the Purchase Order or the Proforma Invoice
- Buyer's bank then telex its correspondent bank ("CB") with the information that a L/C has been opened
- CB will contact you, the exporter
- If L/C is not confirmed, CB will send you an Advice of Credit notifying you of the action taken by buyer's bank
- If all requirements of the L/C are met, you will receive payment from the buyer



The Letter of Credit – “Independence Principle”

- Rights and obligations resulting from the sales contract and the letter of credit are different (“Independence Principle”)
- If confirming documents are presented, the bank is obligated to pay regardless of the sales contract



The Letter of Credit - Fraud

- Exception to the Independence Principle
- Important because the bank can make payment even if fraud occurs (fraud in the transaction or fraud in the documents presented)
- But: Court may grant injunctive relief if
 - Compliance was not even close
 - Party presenting the L/C has then to prove that it is holder in due course



Standby Letter of Credit (“SLOC”)

- L/C which is issued by the seller’s bank and in favor of the buyer
- Is payable against a writing which certifies that seller has not performed its promises
- Used as a guarantee, or a performance bond, or as insurance of the seller’s performance



The Bill of Lading (1)

- Document issued by a carrier
- Confirms that specified goods have been received on board as cargo for shipment to a named place for delivery to the consignee who is usually identified
- Evidence that a valid contract of carriage exists
- May incorporate the full terms of the contract between the consignor and the carrier by reference



The Bill of Lading (2)

- Is a receipt signed by the carrier confirming whether goods matching the contract description have been received in good condition
- Is also a document of transfer and a negotiable instrument
- It governs all the legal aspects of physical carriage, and, like a check or other negotiable instrument, it may be endorsed affecting ownership of the goods actually being carried.

US Export Regulations



- Export Administration Regulations (EAR)
 - Bureau of Industry and Security (Department of Commerce)
 - Export license required?
 - What is your Export Control Classification Number (ECCN)?
 - Do you sell dual use technology?

- OFAC (Office of Foreign Assets Control) Rules
 - Treasury Department's OFAC administers & enforces trade sanctions
 - Restricted countries: Cuba, Iran, North Korea, Sudan, and Syria

- Foreign Corrupt Practices Act
 - Applies to American businesses doing business overseas
 - Criminal & civil penalties for officers, shareholders that bribe foreign officials

Regulations in Country of Import



- Import Regulations (product safety)
- Import Duties (WTO, NAFTA, Bilateral trade agreements)
- Intellectual Property Rights (TRIPS)
- Currency Control Regulations

EU Import Regulations



■ CE Mark

- Mandatory conformity mark on many products placed on the single market
- Manufacturer, its authorized representative, or person placing the product on the market or putting it into service asserts that the item meets all the essential requirements of the relevant European Directive

■ Waste Electrical & Electronic Equipment (WEEE) Directive

- Producers are responsible for taking back and recycling electrical & electronic equipment
- Creation of national recycling systems financed by manufactures

■ Restriction on Hazardous Substances (RoHS) Directive

- EU has banned 6 substances (lead, mercury, cadmium etc.)

■ Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH)

- Manufactures and importers have to register all the chemical substances produced or imported above a quantity of one ton per year
- Also applies to all chemicals that are considered of very high concern to human health or the environment

EU Import Duties -General



- The EU is a customs union which means that the same import duty rates are applicable in all member states
- The tariff applicable to imports from the U.S. is the “Most-Favored-Nation” tariff which means that a WTO member must apply the same conditions on all trade with other WTO members (151 members in WTO)

EU Import Duties – “CN”



- "Combined Nomenclature" (CN): is the EU's coding system for classifying products for customs and statistical purposes
- Based on the Harmonized System (HS), which is also the basis for the import and export codes used by the U.S.
- The Harmonized System assigns a 6-digit code for general categories

EU Import Duties – “TARIC”



- Acronym for the Integrated Tariff of the European Communities
- TARIC was introduced at the same time as the CN
- TARIC contains information on tariff quotas, all third country and preferential duty rates, tariff suspensions and other trade measures

EU Imports – “VAT”



- The Value Added Tax (“VAT”), in the European Union is a general, broadly based consumption tax assessed on the value added to goods and services
- It applies more or less to all goods and services that are bought and sold for use or consumption in the Community
- Must be paid when goods are sold in the EU (19% in Germany; 7% on produce)



Intellectual Property Rights

- Does anyone in the country of import have any patents, trademarks or copyrights on the product you are exporting?
- How are IPRs locally enforced? (Agreement on Trade Related Aspects of Intellectual Property Rights (“TRIPS”) applicable to WTO member states)
- Do your homework and register IP’s if necessary!

Product Liability for Exporters



- **Good News Nr.1:** Product liability in the EU is not more severe than in the United States
- **Good News Nr.2:** Directive on Product Liability 85/374/EEC (1985) is basis for national product liability laws in EU member states (Member states may have laws governing non-material damages, such as pain and suffering)

Product Liability – “Product”



- Physical property and goods
- Can include a whole product, part of another product, or Part of a fixture attached to real property
- Primary agricultural products (such as meat, cereals, fruit and vegetables) and game

Product Liability – “Producer”



- Means not only the manufacturer of a finished product, but also
 - The maker of any raw material or the manufacturer of a component part;
 - Any person who, by putting his/her name, trademark or other distinguishing feature on the product, presents himself/herself as the producer;
 - Any person supplying a product if the producer cannot be identified;
 - Importers placing products on the European Union market

- Producer is liable to pay for damages

Product Liability – “Defective Product”



- Products that don't provide the safety to which a consumer is entitled

- Factors to be taken into account include:
 - The presentation of the product (including any instructions or warnings, packaging and advertising);
 - Whether the product is being put to reasonable use
 - The time the product was put into circulation



Useful Links

- **International Chamber of Commerce**

- www.iccwbo.org/incoterms/id3040/index.html

- **EU Import Duties**

- http://ec.europa.eu/taxation_customs/dds/tarhome_en.htm

- **Office of the US Trade Representative**

- www.ustr.gov/Trade_Agreements/Section_Index.html

- **Export-Import Bank**

- <http://www.exim.gov>

- **Bureau of Industry and Security (BIS)**

- http://www.bis.doc.gov/licensing/do_i_needaneccn.html



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