

Succeeding In International Business

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The law of international business is an immense and complex subject, about which even an experienced and specialized lawyer cannot have a comprehensive understanding.

International business transactions can be split into two categories, **international trade** -- imports and exports -- and **foreign investment**. Knowing the ground rules, and preparing properly for doing business in another culture, with its own rules, politics and traditions, can make for profitable business. Beware though of diving in head first, as the waters can have strong and unexpected currents.

The Basics

It is tempting to assume that exporting and importing are the "yin and yang" of international trade, the opposite sides of the same coin. But that is a dangerous oversimplification.

Exporting

The United States government offers immense numbers of resources for business people seeking to export products or services. Exporting helps create American jobs, and lessens the trade imbalance.

Governmental help includes databases which provide trade leads, such as the National Trade Data Bank (modest fees are charged). The leads come from data on foreign imports of United States goods, broken down by product and by country. So if a Vermont furniture exporter wants to get leads for furniture buyers in Switzerland, France and Germany, he can easily do so. He can even find out whether a prospective Swiss purchaser's product line is limited to kitchens, bedrooms or office furniture.

The Department of Commerce can also point an exporter to services such as export finance and political risk insurance, as well as a volumes of government publications on other international trade issues, such as shipping, warehousing, insurance and the like.

In the legal arena, the Export Legal Assistance Network offers lawyers to answer export questions; the first call is free.

An export license is needed for certain types of goods, including some chemicals, software, electronic devices and computer components. This restriction applies most commonly to technologies which are considered sensitive to political interests or to national security, such as exporting anything that could be used in the creation of weapons.

Importing

For import resources, the definitive source is the United States Customs Service, although permits are often needed from other government agencies. For example, anyone importing alcohol needs to satisfy requirements of the Bureau of Alcohol, Tobacco and Firearms.

Customs has recently adopted a policy known as "informed compliance," which places the burden on the importer to learn the rules for bringing in goods. Customs makes the necessary resources available -- to a point -- and the law requires that the importer take advantage of them. Ignorance of the law is no excuse.

Yes, informed compliance places the burden squarely on the importer. The reason for this shift in emphasis is that the volume of imports has risen dramatically in recent years, while funding for the United States Customs Service has remained roughly constant.

Informed compliance boosts the risks which the importer faces, from seizure of goods, to potential civil penalties, and even criminal liability. Civil penalties for underpayment of customs duties range from two to eight times "loss of revenue," depending on whether the underpayment was the result of negligence, fraud or some level of culpability in between.

Customs has a useful procedure to help the importer meet the standard of informed compliance. If asked, Customs will issue a binding ruling on the classification of particular goods, so that the importer will not face any civil or criminal penalties or time-consuming administrative proceedings.

Duties can vary as a function of the imported product's country of origin. Most favored nations get reduced rates, others do not, and imports from yet other countries are forbidden altogether for political reasons.

Foreign Investment

While international trade involves goods, foreign investment involves money – risking capital in another country in the hope of reaping profits.

Several years ago, a Vermont company found a partner in Russia, and opened a retail shop there, a classic example of outbound foreign investment. Unfortunately, disagreements grew between the partners. To settle the dispute, the Vermont company filed suit in the local Russian commercial court, where it prevailed. The Russian partner appealed, and the Vermont company won again. Despite the two court victories, however, the Vermont company was never able to enforce its rights, and it eventually abandoned its Russian investment, not wishing to throw good money after bad.

Of course, the major issue in foreign investment is protecting the investment. The risks are almost innumerable, especially in an emerging free-market economy. Wise foreign investors have a good grasp of both the legal and cultural climates of the country.

International Contracts

Contracts for the international sale of goods are not that different from those for selling goods domestically. In the absence of a treaty, foreign countries respect each other's court decisions, if at all, only as a matter of courtesy. Thus, since contracting parties should anticipate the possibility of disputes, they should include provisions controlling which country's law should apply, which country's courts have jurisdiction, and whether the parties agree to submit their disputes to arbitration.

Many international contracts begin as non-binding letters of intent. The final contract should provide which language will control the transaction, and which currency will govern it. Often, parties to international sales contracts stipulate to binding arbitration under one set of standard arbitration rules or another. The International Chamber of Commerce provides a good framework for dispute resolution.

Getting Started

International trade has a tremendous number of variables...the laws and customs of the nations involved, the distances, the risks, and so on. For this reason, legal documents used in international business transactions must be hand-tailored to fit specific circumstances. At times, the assistance of a properly qualified attorney can be indispensable.

Manufacturers typically sell goods overseas through agents and distributors. An agent is usually commission-based, and functions essentially as a broker. The manufacturer sets prices and terms. A distributor, on the other hand, actually buys the goods from the manufacturer, and can therefore set its own prices and terms. The manufacturer has fewer headaches when selling to a distributor. Even so, the manufacturer still has a strongly vested interest in the goods associated with a distributor's product line.

Whether the seller deals through an agent or a distributor, the rights and responsibilities of the parties should be clearly set out in writing. Although each arrangement varies, some basics are universal:

1. The identities of the parties. Are you dealing with a person or a legal entity? Legal entities can declare bankruptcy. So can individuals, but it is more difficult.

2. The duration of the agreement. When does it begin, and how long does it last? Many countries limit the ability of the principal to end an agent or distributor agreement. This prevents an unscrupulous manufacturer, who allows an agent or distributor to develop a market, from snatching it away. This is one of the several areas in which consultation with a properly qualified international trade lawyer is critical, since the rules regarding agents and distributors differ dramatically from country to country.

3. The agent or distributor's territory.

4. The products to be sold. If any portion of the seller's product line is to be excluded, this fact should be made clear.

5. Pricing. Prices should be quoted in U.S. dollars in order to avoid losses from currency fluctuations. Give the agent reasonable lead times on price changes by guaranteeing prices for a certain period, such as 90 days.

6. Agents should generally be prohibited from carrying competing products.

7. While it is convenient to allow the agent to sign contracts on behalf of the principal, it is extremely risky. The prudent course is to require written confirmation from the "home office" for any contracts the agent negotiates. Be careful, however, because sometimes "apparent authority" can empower the agent to bind the principal even in the absence of actual authority.

8. Payment terms should be clear. In the international arena, letters of credits are widely (although not universally) accepted. They offer probably the best combination of practicality and safety.

9. Have the agent stock a reasonable volume of inventory and, if needed, spare parts.

10. Set minimum orders. The agent may request the right to return slow-moving items to the principal. Risk of loss and responsibility for insurance should be decided.

11. Decide who will be responsible for any warranty work.

12. Divide up the responsibilities for advertising and promotion. Who translates, prepares and distributes product literature? Technical specifications in product literature may need to be converted into the metric system, and underlying standards often differ. For example, a U.S. maker of bed frames must consider that many European countries have different standards for mattress sizes. Responsibility must also be assigned for ensuring that the products meet any destination-country requirements, such as safety standards, quality certifications and the like.

13. The seller would like to have access to the agent's customer database. There are several legitimate reasons for this, including marketing. Even so, the agent may be reluctant to disclose this information.

14. The agreement should include a "force majeure clause," which excuses non-performance due to factors beyond the control of the parties.

15. The agreement should have a provision for resolving disputes. Patience and negotiation are always the first logical step. If the two sides are unable to sort out the disagreement by themselves, mediation may be attempted. If the disagreement persists, the parties might submit the matter to arbitration under a agreed upon set of rules. From the seller's perspective, arbitration should occur in their home country.

16. Specify the official language for all dealings between the parties.

What's Next?

International business transactions are fraught with both opportunity and danger. In the United States, thanks to NAFTA, and thanks to the general trend toward increasingly international markets, there are more and more opportunities. But avoid being overconfident and complacent. There is simply too much to know. Seize the opportunity, and develop of strong network of international resources.

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Useful Web Links:

U.S. Department of Commerce
www.doc.gov

International Trade Administration
www.ita.doc.gov

Export Legal Assistance Network
www.fta.org/elan

U.S. Customs Service
www.customs.ustreas.gov

Publication: Importing Into the United States
www.customs.ustreas.gov/impoexpo/impoexpo.htm

International Chamber of Commerce International Dispute Resolution Services
www.iccwbo.org/index_court.asp