

Legal Considerations in the Global Market

INTERNATIONAL TRADE SERIES

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Program Overview

Part I

- Legal forms of international business
- Common risks of international business
- Working with International Distributors and Agents
- International Dispute Resolution
- Summary of Legal Considerations


Small-to-Medium Business Success

Approximately 98% of companies exporting goods & services from the U.S. are small-to-medium businesses with less than 500 employees.

Exporting should not be viewed as a solution to failure at home

Requires executive-level commitment

Requires adaption to doing business in a new environment



LEGAL FORMS OF INTERNATIONAL BUSINESS

Trade

Licensing of intellectual property

Foreign direct investment

- Not mutually exclusive -



Trade

Exporting – Shipping goods or rendering services to a foreign buyer in a foreign country

- Often a firm's first step into international business
- Exports can be sold by:
 - direct sales
 - independent foreign sales representatives
 - Foreign distributors



Licensing of Intellectual Property

Patents

Trademarks

Copyrights

Trade Secrets



Foreign Direct Investment

Ownership and active control of ongoing business concerns, including investment in manufacturing, mining, farming and other production in a foreign (host) company

FDI provides the greatest degree of market penetration – as well as – the greatest risk.



Foreign Direct Investment

Forms of Investment:

Foreign branch

Foreign subsidiary

Affiliate

Joint venture with local participation



Legal Considerations for Foreign Direct Investment

(Especially in developing countries)

Adverse governmental policies

Rules often lack transparency

Cultural barriers



Common Legal Risks of International Business

Distance and Logistics (Payment or credit risk, supplier risks, property risks, infrastructure)

Language and Cultural Barriers

Communications

Cross-Border Trade Controls (Export controls, sanctions and tariffs)

Currency Risk (exchange rate risk)


Political Risk (Nationalization, expropriation and confiscation)

Exposure to foreign laws and courts




Working with International Distributors and Agents

Advantages

- No need to establish your own infrastructure abroad to market and sell your products - Distributor has its own client base
 - Local distributor speaks the language & understands the local culture
 - Quicker way to build client base
 - Reduces your management time
 - Better positioned to respond quickly and appropriately to customer questions & concerns
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Working with International Distributors and Agents

Disadvantages

- Lower profit margins than by marketing & selling direct
 - May experience a difference in corporate mentality between you and your distributor
 - Distributor may create adverse reputation for you which may spread to other regions
 - Sometimes the potential for misappropriation of trade secrets (dual representation)
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Working with International Distributors and Agents

Distributor

- Buys from you
 - Maintains inventory of goods and spare parts
 - Resells at a profit
 - Sometimes provides after sales support
 - Deals with customs import regulations and administration
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Working with International Distributors and Agents


Agents

- Acts merely as a your representative - No control over pricing
 - No financial involvement beyond earning a commission or commission
 - Only facilitates the import process
 - Usually not responsible for after-sales customer support
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Working with International Distributors and Agents

CAUTION REGARDING AGENTS

Agents often have the authority to legally bind you, or at least may have the implied right to bind you.


- Specify in writing the authority – or lack thereof – of your agents.
 - Try to obtain indemnification & hold harmless protection from agent.
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Selecting a Distributor or Agent


- U.S. Commercial Service
 - Trade shows, Trade Shows & Trade Missions
 - Trade journals
 - B2B
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Selecting a Distributor or Agent


Importance of due diligence cannot be overstated

- Experience with your products in the target market
 - Language skills
 - Trade References
 - Ability to communicate & deal with time zone differences
 - Represent any competitors?
 - Trade memberships
 - Understanding and compliance of local legal, commercial and customs requirements
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The Distribution or Agent Agreement

- In writing
 - Exclusive or non-exclusive
 - Term & termination
 - Define territory (Avoid pressure to give too much territory – territory should be earned)
 - Method of payment (for distributor) or Compensation schedule for agent)
 - Distributor's obligation (i.e., reports, ware housing, etc.)
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Summary of International Business Legal Considerations


- Build a team (Banking/Legal/Accounting/Freight Forwarder & Customs Agent and Foreign distributor or representative)
 - Due diligence (Know who you are dealing with)
 - Protect your intellectual property in the country (or countries) you target *before* you sell)
 - Develop regulatory compliance policies & procedures
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The Distribution or Agent Agreement

- *Force majeure*
 - Confidentiality
 - Dispute resolution
 - Warranties & representations:
 - Your obligations (i.e., training, marketing material, samples, etc.)
 - Distributor's or agent's obligations
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International Business Considerations

BEFORE Finalizing an Agreement


- Foreign contract laws (can you terminate the agreement?)
 - Foreign employment laws (not applicable if you will have no employees overseas)
 - Foreign sales laws (are there “local content” and post sale service requirements?)
 - Formation/Qualification (require local ownership?)
 - Currency considerations
 - Taxes
 - Financing
 - Dispute resolution
 - Insurance
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International Dispute Resolution

Cultural attitudes towards disputes


- Old adage *“hope for the best but plan for the worst”*
 - Americans see “win or lose” in business; Asians seek amicable settlements
 - Americans view negotiation as a means to an end to close a deal; many cultures see negotiations as time to build relationships and trust. The contract provides the basis for dispute resolution.
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International Dispute Resolution - Methods of Resolution

- **Mediation** - Nonbinding, conciliation process
 - **Arbitration** - Binding award that can be enforced by courts of law
 - National arbitral laws
 - National and international arbitration bodies
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International Dispute Resolution - Arbitration Clauses

Arbitration clause in international agreement

- Define **rules** to be followed (i.e., AAA Int'l Rules or UNICTRAL) and **time requirements**
 - Specify **number of arbitrators** and how they are selected
 - Specify **costs obligations** of the parties, including possibly loser pays, attorney fees, etc.
 - Define **place** of arbitration (can be in neutral country)
 - Define **language** to be used in arbitration
 - Do the parties want a **written explanatory decision**?
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Program Overview

Part II

- **International Trade Regulatory Framework & Export Controls**
 - **International Traffic in Arms Regulations**
 - **Economic Sanctions Programs**
 - **Foreign Corrupt Practices Act (FCPA) and Global Anti-Corruption Compliance laws**
 - **Customs/Import Controls**
 - **Anti-Boycott Regulations**


International Trade Regulatory Framework

- **Export Controls** (*sale, export, and re-transfer of defense articles and defense services*)
- **Economic Sanctions Programs** (trade embargoes & asset freezes)
- **Anti-Boycott Restrictions**
- **Customs/Import Controls**
- **Global Anti-Corruption Law** (i.e., Foreign Corrupt Practices Act and similar foreign laws)
- **Anti-Money Laundering Requirements**
- **Foreign Investment Considerations**

Export Controls - ITAR

International Traffic in Arms Regulations

The ITAR regulates:

- Applies to all items on the U.S. Munitions List (“USML”)
Note: New “specially designed” analysis
 - Exports of Defense Articles (includes technical data and software)
 - Exports of Defense Services (includes *providing* technical services)
 - Re-Exports
 - Brokering Activities
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Export Controls - ITAR

- ITAR Licensing Requirement
 - ITAR Licenses (DSP-5 (Permanent Export); DSP-73 (Temporary Export/Import: DSP-85 (Classified Situations))
 - ITAR Agreements:
 - Technical Assistance Agreement (“TAA”)
 - Manufacturing License Agreement (“MLA”)
 - Warehousing Distribution Agreement (“WDA”)
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Export Controls - ITAR Penalties

- **Civil** - Fine up to \$500,000 per violation
- **Criminal** – Fines up to \$1,000,000 per violation and/or imprisonment up to 20 years per violation)
- **Administrative** -
 - Debarment from government contracts for defense articles or services
 - Denial of export privileges
 - Seizure and/or forfeiture of items



Export Controls - Dual-Use (“EAR”)

Administered by the U.S. Department of Commerce

The EAR regulates the export of:

- **Commodities**
- **Technology**
- **Software**
- **Re-Exports**
- **“Deemed Exports”**

Economic Sanctions Programs

Substantial Extra-Territorial Jurisdiction asserted by the U.S. Government


- U.S. Economic Sanctions Programs are increasingly targeted towards disfavored groups or activities, such as:
 - Terrorism
 - Cyber-related
 - Narcotics trafficking
 - Nuclear proliferation
 - Diamond trading (i.e., Sierra Leone)
 - Democratic Process Disruption (i.e., Balkans, DRC, Syria)

Economic Sanctions Programs

- Balkans
- Belarus
- Central African Republic
- Cote d'Ivoire-related
- Cuba
- Democratic Republic of Congo-related
- Iran
- Lebanon-related
- Libya
- North Korea
- Russian (Ukraine-related)
- Sudan and South Sudan-related
- Syria
- Venezuela-related
- Yemen-related
- Zimbabwe
- Somalia

Economic Sanctions Programs

Know Your Customer!

- List-based screening results
 - Destination-based screening results
 - Activity-based screening results
 - Be alert to red flags
 - Common Sense
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Economic Sanctions Programs

Attempts to circumvent or facilitate U.S. Economic Sanctions Programs are illegal and aggressively prosecuted by U.S. Department of Justice.

Penalties vary depending on the particular Program, but are **Draconian**.



Foreign Corrupt Practices Act (“FCPA”)

Illegal for certain classes of persons and entities to corruptly give, promise, offer, authorize (or to allow a third party to do any of these things) a thing of value to a foreign (non-U.S.) government official for the purpose of inducing or influencing the official’s actions in order to secure an improper advantage, or to direct business to any person or entity.



Foreign Corrupt Practices Act

Who is covered by the FCPA?

- U.S. citizens, nationals, residents, and companies, wherever located
 - Also applies to U.S. subsidiaries of non-U.S. parent companies
- Non-U.S. citizens or companies registered on a U.S. stock exchange or acting as an agent or intermediary of another party covered by FCPA (i.e., sending an email or wiring money, or making introductions abroad to facilitate an FCPA prohibited act)

Foreign Corrupt Practices Act

- “Thing of value” is broadly interpreted by the DOJ.
No *de minimus* standard exists regarding value.
- Travel and entertainment expenditures invite scrutiny under the FCPA if given to foreign government officials.

Caution when entering into “consultant” agreements!

Foreign Corrupt Practices Act

Who qualifies as a “foreign government official” under FCPA?


- **Any person** employed by, or acting in an official capacity on behalf of a foreign government or a public international organization
- **Foreign political parties or officials, and candidates** for foreign office
- **At any level** (*but note: certain “facilitation payments” or “grease payments” may be permitted under FCPA – but not under most other anti-corruption regimes*)

Foreign Corrupt Practices Act Compliance



Foreign Corrupt Practices Act

What are “Red Flags” that should trigger concern under the FCPA?

- **Are the individuals or companies involved connected to a government official or to a company owned or controlled by a foreign government/political party?**
 - **Does the transaction involve non-employee local representatives?**
 - **Is there a party involved who will not disclose its representation of a company?**
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Foreign Corrupt Practices Act - Red Flags

Is there a party involved who regularly provides lavish gifts or entertainment?

Is there a party who was recommended by an official of the potential government customer?


Is a party or consultant offering preferential access to government officials, political parties, etc., or information important to your business?




Foreign Corrupt Practices Act - Red Flags

- **Are all parties performing readily quantifiable or definable services?**
- **Are you operating in a country with a high risk of corruption?**

Foreign Corrupt Practices Act - Red Flags

- Are you operating in a country where there is a powerful, ruling monarchy or dictator with family placed throughout the business community?
 - Do business relationships depend largely, or exclusively, on personal relationships and connections?
 - Do potential people in the transaction tout their close relationship with a governmental official?
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Foreign Corrupt Practices Act – Red Flags


- Is there a stated preference for cash or avoidance of detailed accounting?
 - Are there requests for commissions which are in excess of normal commission rates?
 - Are there requests for payments to third parties not involved in the transaction, *including charities*?
 - Are there requests for payments to an unrelated country which is a tax haven or for payments to an offshore account?
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Foreign Corrupt Practices Act – Red Flags

- Have there been requests for, or production of, inaccurate documents including over invoicing, under invoicing, or inaccurate descriptions?
- Have there been requests for extra funding or higher discounts to “overcome obstacles”, to “get business done”, or to cover “unanticipated extra expenses”?




Foreign Corrupt Practices Act Compliance - Best Practices

- Conduct an FCPA risk assessment
 - Adopt a written compliance policy
 - Designated compliance officer
 - Training
 - Reporting mechanism
 - Auditing mechanism
 - Due diligence regarding third parties
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Customs/Import Controls

Key Customs/Import Considerations:

- Classification of goods (designated with proper tariff under Harmonized Tariff Schedule)
 - Valuation of goods (generally, the duty charged on a percentage of its value)
Note: Preferred valuation method is the "Transaction Value"
 - Country of origin and marking
 - Import activity analysis and risk assessment (i.e., free trade agreements)
 - Customs seizures & forfeitures
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Customs/Import Controls

Customs Seizures and Forfeitures:

In order to facilitate legitimate trade, Customs is empowered to seize and forfeit goods arriving at a U.S. port of entry for importation into the U.S.

Customs will seize goods involved in illegal activity (i.e., stolen merchandise or smuggled contraband)

Customs may seize goods under other conditions such as:



Customs/Import Controls

Customs may seize goods under other conditions such as:

- goods without the proper import licenses or permits
- goods violating U.S. trademark, copyright, or trademarks

Upon receipt of a Seizure Notice from Customs Border Patrol, many importers elect to pursue administrative relief by filing a petition for return of the seized goods with the CBP.

Anti-Boycott Regulations

Prohibit U.S. persons from participating in unsanctioned foreign boycotts such as the **Arab League's Boycott of Israel**. It is illegal:

- to agree to refuse to do business with a boycotted country or blacklisted company
- to agree to discriminate against other person based on race, religion, sex, national origin, or nationality (or to provide such information)
- to agree to furnish information about business relationships with boycotted countries or blacklisted companies

Anti-Boycott Regulations

Recipient of improper boycott request shall report receipt of such request to the U.S. Department of Commerce and shall not participate in the improper conduct requested,

If a U.S. person or entity conducts business in a “boycotting country” it must file an International Boycott Report with the IRS – even if no “request” is received.

Boycotting designations: **Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, UAE and Yemen**

Good Luck Abroad!

