

EXPORT MARKETING AND FINANCE

WEEK 8 EXPORT REGULATIONS

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WEEK EIGHT

EXPORT REGULATIONS

8.1 Introduction

Welcome to week eight lecture! In the last lecture we examined the export contract and the various methods of making payments. We recognized the various legal issues that surround these contracts. We will the legal environment, various export contracts, internal law on trade and transport, intellectual property rights and also dispute resolution mechanism in international trade.

8.2 Intended Learning Outcomes

At the end of this lecture, you will be able to:

- Discuss the legal environment.
- Examine various export contracts.
- Evaluate international laws on trade and transport.
- Discuss dispute resolution in export markets.

8.3 Understanding legal environment.

The international legal environment is of great significance to the exporter because nations operate under different rules. This may be attributed to sovereignty of states. Sovereignty of states implies that nations have legal authority and responsibility as independent states to govern and regulate their political affairs without foreign interference. Every country therefore establishes rules and regulations that govern business conducts within its territories. The reasons behind government establishing of laws include national sovereignty and goal of self-preservation, the need for national security, fostering national prosperity, enhancing prestige, and protecting cultural identity among others (Jeannet and Hennessey, 2001). The key issues that the export marketer will face will revolve around contracts, custom benefits, and barriers to trade (Zou, 2009).

The distinctive feature of international business is 'Conflict of Laws', as both the exporter and importer must deal with different legal systems. Though it is expected that when contracts are being signed, the rules that apply should be stated. It is generally accepted that the laws where contract is executed (importers country) should always be applied. In establishing laws that are relevant in export business the marketer must Oral Vs written and constructed contracts: Oral contracts are legally binding if the contract is for sale of goods in some countries like India. Written contracts are essential to secure special export facilities and incentives in many countries. Constructed contracts may also be applied in some cases. A constructed contract is one, which does not have written formal contract but inferred and established from the documents exchanged. Such as telex or fax messages, electronic data interchange with authenticity of messages, exchange of letters, purchase order or letters of credits among others (Gopal, 2006). Various aspects of export business will be governed by various laws from different countries. Table 8.1 summarizes the major areas of interest in export marketing.

Table 8.1 Legal considerations in export marketing

Players	Main legal considerations
Suppliers	Targets country materials requirements
Product design	<ul style="list-style-type: none"> • Quality standard • Specification • Health & safety standards • Environmental requirement • Product adaptation
Licensing	What type to obtain
Manufacturing	Quality checks
Packaging	<ul style="list-style-type: none"> • Environmental laws • Labeling law • Linguistic requirements • Health & safety warnings
Financing	<ul style="list-style-type: none"> • Foreign ale corporation • Export -import bank
Shipping and customs	<ul style="list-style-type: none"> • Choice of carriers (country bae) • Free trade zones • Economic customs benefits for exports • Trade barriers in target country
Sales and marketing	<ul style="list-style-type: none"> • Choice of type of partner • FCPA • Element of a partnership contract
Physical distribution	<ul style="list-style-type: none"> • Target country's legal restrictions on modes of transportation • Distributor's network and capabilities protecting intellectual property rights
Retail	<ul style="list-style-type: none"> • Sales tax target country • Price fixing

Adopted from: Zou S. Kim D. & Cavusgil S. T. (2009). Export marketing strategy tactics and skills that work (1st ed.). Business Expert Press

8.4 Legal dimensions in export marketing

There are several legal dimensions to the implementation of export contracts which form part of corporate export marketing plan. These legal dimensions or issues can be broadly classified into four categories (Gopal, 2006):

- (i) Those Relating to export-import contracts
- (ii) Those Relating to Relationships between exporter and agents/distributors
- (iii) Those Relating to Products
- (iv) Those Relating to Letters of Credit

(i) **Relating to Export-Import Contracts:** an export contract specifies every possible aspect of a transaction. It involves both legal obligations and commitments on the side of exporter and importer. Zou (2009) observes that the following key questions must be answered before the contract can be written:

- Who will be involved in the arrangement (distributors, sales representatives, manufacturers)?
- When will the contract terms take effect and how long will they be in effect?
- How will the company involved comply with government regulations?
- How and where will the disputes regarding contract be settled?
- What are the terms of payment?
- Under what circumstances may the contract be changed or terminated and by whom?
- What are the prices specified in the contract and how long will they be good?
- How will training of the foreign company's personnel be handled, and who will pay for it?
- What information is considered confidential?
- Who will have responsibility for obtaining customs clearance?
- What information will the foreign country supply to the exporter (sales reports, name of active prospects, government regulations dealing with imports etc.)?
- What responsibilities are involved regarding claim and warranties?
- What products and services are covered by the agreement?
- Is the agreement exclusive?
- What are the sales or distribution territory covered by the agreement?

By making the above considerations the parties involved in the contract do not get there blindly and are able to take responsibility on what is expected of them. The export marketer must therefore use the contract to not only sell the goods but gain maximum returns and win now and future business with the importer. The main contract between exporter and importer is the sales contract. International sales contracts are similar in form and function to domestic contracts. They constitute an agreement between a seller and a buyer to exchange a set amount of goods or services, within a set time frame, for a set price. In many countries this contract is governed by United Nations contract for the international sales of goods (CISG). It regulates formation process, states rights and obligations of each player as well as mechanisms for resolving disputes (Zou, 2009).

(ii) **Those Relating to Relationships between exporter and agents/distributors:** this contract may involve exporter and agents, distributors, dealers, or sales representatives in different countries. Export Agency agreement is a legal document, which establishes and defines the relationship between the principal (exporter) and agent. The documents incorporates conditions mutually agreed upon between both the parties .In international agency agreement agent usually work on a commission basis, assumes no responsibility or risks and is under contract for a definite period of time. Agent as type of business relationship give the exporter the advantage of greater control over performance, resale,

pricing and so on. Gopal (2006) summarizes the key considerations in this agreement as follows.

- a) Parties to the Contract: Names and identities of the parties must be made clear.
- b) Contractual Products: Scope of the agency agreement must be explicit, indicating the names of the products for which the agency agreement is entered into.
- c) Contractual Territory: The area for which the agency agreement is entered into must be specified.
- d) Customers: Customers located in a particular territory automatically come under the agency agreement and business dealings with them entitle the agent for commission.
- e) Acceptance or Rejection of Orders: Whether the principal has the right to accept or reject the orders secured by the agent must be clear in the agreement especially where goods are to be sold on credit.
- f) Payment of Commission: Commission, basis for calculation and when it becomes due are significant issues that are to be made abundantly clear in the contract. Rate is a percentage while base may be the invoice value or net realized proceeds and, in most cases, commission will only be paid after proceeds are realized.
- g) Settlement of Disputes: In international trade, occurrence of disputes cannot be totally ruled out even with expansive documentation. Contract should have a clear clause for the mechanism for settlement of disputes.
- h) Renewal and Termination: The contract should provide suitable clauses for renewal of the period, on expiry of the originally agreed period and equally grounds for termination.

In export business the exporter will deal with either a distributor or agent. Though this is clarified in the contract documents it is important to highlight the difference between the two. Table 8.2 gives a summary of the differences. Its worth noting that in all cases warranties are issued by the exporter not agent or distributor.

Table 8.2 Differences between agents and distributors

Scope	Agent	Distributor
Title to the goods	Title to the goods vests with the exporter even though goods remain in the possession of the agent.	Purchases the goods on his account from the exporter and so title remains with the distributor
Scope of services	Agent procures the order only	Goods are sold to the buyers by the distributor and identity of the buyers may not be known to the exporter,
Credit terms	Credit risks are to be borne by the principal only	Distributor is only responsible for credit risks as goods are, already, sold to him.

Third party liability	Principal is liable to third parties directly	Responsibility does not go back to the principal and only distributor is responsible
Control	Principal enjoys absolute control on the business and buyers.	Control of principal is always weak as distributor acts independently

Source: adopted from Gopal R.C (2006) *Export Import Procedures New Age International Publishers Ltd*

- (iii) **Those Relating to Products:** these will include trademarks, patents, copyrights among others. **Trademarks** are words or designs or combination of both coined for the purpose of trademark only. The exporter must apply for registration of trademarks to the registering authority of the country where the product is exported or planned to be exported. To secure trademark property, a company must apply for a patent or register a trademark on a country-by-country basis Registration of trademarks is a specialized field and so it is prudent for the exporter to seek the professional services of an attorney who is a specialized in that field.

Copyright: the level and scope of copyright protection available within a country depends on that country's domestic laws and treaty obligations. In most countries, the place of first publication is an important criterion for determining whether foreign works are available for copyright protection.

Product Liability: Refers to the responsibility borne by the manufacturers, distributors, and retailers for any consequential injuries/damages from the products they make or sell. If the user of the product suffers, he has the right to sue. Specific liability issues include (Gopal, 2006)

- a) In the case of negligence on the part of the manufacturer: Negligence in manufacturing makes him liable.
- b) Principle of Strict Liability: Even if there is no negligence on the part of the manufacturer, still, the manufacturer is responsible to the aggrieved user if the user sustains injury from a defective product.
- c) Express/Implied Warranties: In some contracts of sale, there are express or implied warranties in respect of merchantability of the product which make the manufacturer liable.

Laws relating to Packing and Promotion: they are different in different countries but will mainly focus on declaration of the composition of product, gross/net weight, date of manufacture/ expiry and precautions to be taken while using the product. Rules of advertisement revolve around unsubstantiated claim in respect of the product, advertising through children among others.

- (iv) **Those Relating to Letters of Credit:** By opening a letter of credit, the bank makes a commitment to the exporter to make payment once the documents contained in the letter of credit are presented and, on scrutiny, found to be in order. The main legal

considerations revolve around parties and their relationships which are outline below (Gopal, 2006)

- a) There is a contractual relationship between the importer and exporter, evidenced by the sales contract.
 - b) Banker customer relationship exists between the importer as applicant to the letter of credit and opening bank. A similar relationship exists between the exporter and advising/negotiating bank.
 - c) Relationship between the opening bank and negotiating bank. The later acts as the special agent of the former.
 - d) Relationship between the exporter and opening bank. A credit contract is established as the opening bank opens letter of credit in favor of the exporter.
- (v) **Technology transfer/licensing contract:** technology transfer involves offering technological know-how or other intellectual property to a foreign business in exchange for some type of compensation (Zou et al, 2009). Technological transfers can be accomplished through a licensing agreement. Technological transfer often includes the following:
- Right to use and conditions of use: the license often agrees to provide various services to facilitate the anticipated activities such a assistance in setting up an assembly line, training or technical support.
 - Competitive circumstances: licensees sometimes seek to protect their investments in manufacturing or marketing resources by requesting exclusive rights to the technology within a specified geographical area.
 - Confidentiality: licensors usually require the licensee to keep technology confidential so that third parties cannot exploit the technology.

8.5 International conventions

International conventions are a major part of the legal framework for businesses. There are various conventions that the marketer needs to familiarize himself with. Examles include World trade organization agreement. The WTO oversees four international trade agreements: the GATT, the General Agreement on Trade in Services (GATS), and agreements on trade-related intellectual property rights and trade-related investment (TRIPS and TRIMS, respectively). Of particular importance is the Vienna convention that came into effect in 1988. The convention focusses on international sale of goods. International conventions aims to regulate international carriage. The Vienna convention also referred to as United Nations Convention on Contracts for the International Sale of Goods (UNCITRAL)consist of four parts as summarized in table 8.3

Table 8.3 Vienna convention

Part	Explanation
Sphere of application	Focuses on “This Convention applies to contracts of sale of goods between parties whose places of business are in different States”
General provisions	Regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
Formation of contract	A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes or makes provision for determining the quantity and the price.
Obligation of the seller	<ul style="list-style-type: none"> a) Delivery of the goods and handing over of documents b) Conformity of the goods and third-party claims c) Remedies for breach of contract by the seller
Obligations of the buyer	<ul style="list-style-type: none"> a) Payment of price b) Taking delivery c) Remedies for breach of contract by the buyer
Passing of risk	Loss of or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price unless the loss or damage is due to an act or omission of the seller.
Provisions common to the obligations of the seller and of the buyer	<ul style="list-style-type: none"> a) Anticipatory breach and instalment contracts b) Damages c) Interests d) Exemptions e) Effects of avoidance f) Preservation of the goods.
Final provisions	Custody of the document among others

Adopted from: United Nations (2010) United Nations Convention on Contracts for the International Sale of Goods. UNCITRAL secretariat, Vienna International Centre, Vienna, Austria

8.6 Import barriers

The legal environment is filled with import barriers that the market need to be aware of . the most common barriers are Tariffs. A tariff is a tax imposed by the government on goods entering its country. It can be informed of export and import duties. Tariff barriers in Kenya include ad valorem import tariffs and value-added taxes.

Non-tariff barriers found in Kenya include slow customs services, packaging and labeling requirements, the requirement to obtain a certificate of conformity (CoC) from a Kenya Bureau of Standards (KEBS) appointed pre-export verification of conformity (PVoC) partner, and the

obligation to obtain an import standards mark (ISM) for a list of sensitive products imported into Kenya.

Other non-tariff barriers include (Zou, 2009):

- Quotas: limitations on the amount of a certain type of good imported into a country.
- Monetary barriers: refusal to allow importers to exchange national currency for their own currency or creating differential exchange rates for less desirable categories of goods.
- Standards: regulations regarding product quality or safety
- Approvals and processes: excessive approvals or processes required for importing certain merchandise.

8.7 Dispute resolutions in international trade

Trade disputes are a common reality that the marketer must deal with in his daily work. Understanding the causes and ways to resolve them is critical for successful marketing of goods abroad. The main causes of disputes include poor standard products, delays on contract completion, modifications of products to specifications without consent of all parties., failure to comply with verbal agreements that were not signed for on the contract., non-shipment or blockage at port due to change in laws or government, breach of contract or warranty Intellectual property rights violation among others:

There are generally two methods of dispute resolution i.e., litigation and arbitration. Litigation is the process of resolving rights-based disputes through the court system while arbitration is a process of resolving disputes between parties in different countries through an arbitrator or a panel of arbitrators.

Litigation

Litigation is highly unsuitable due to the proverbial delayed process, prohibitive costs and uncertainty of decision. Gopal (2006) identifies the following as basic limitations of litigation.

- a) Slow process: court process is proverbially slow, time consuming and formalistic.
- b) Avoidable necessity of expert witness and other evidence: the process requires that judges and witnesses be educated on contracts, practices, procedures, and customs as they are different in different countries.
- c) Inconvenience to the parties: the process takes long and demands participants to attend hearings many times.
- d) Adverse public image: court proceedings are never secret and this may affect the firm adversely.
- e) Bitterness and disruption of trade relationships: cases result in loss of business relationship, acrimony, and bitterness on all participants.
- f) Different laws and procedures: international trade laws and procedures are more complicated. Litigation in foreign courts is more expensive and difficult in comparison to the domestic courts.

Basic Advantages of Arbitration

In comparison to litigation, the basic advantages of arbitration are:

- a) Quickness: the process of arbitration is faster and often takes less than an year.
- b) Inexpensiveness: total incidental expenditure in arbitration is always much lower than litigation.
- c) Promotes Goodwill: As the arbitrator is chosen by both the parties, based on their faith and his competence, arbitration becomes a normal process of goodwill.
- d) Choice of appropriate arbitrator: separate expert witness for educating the judge is avoided.
- e) Privacy: arbitration proceedings are not open to the public. This preserves the privacy of the parties. So, trade secrets as well as disputes arising from the contracts do not become public.

Review questions

1. Discuss the significance of legal environment to an export marketer.
2. Why should an export marketer interrogate an export contract?
3. Trademarks and copyright are critical in export business. Discuss with examples.
4. Why would you prefer arbitration against litigation in an international trade dispute?
5. Summarize the provision for Vienna convention on international sale of goods.

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