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Export Sales Transactions

By John E. Corette III*

This article will explore some of the important legal aspects of export sales transactions, including the Foreign Corrupt Practices Act of 1977 (FCPA), the license requirements of the Export Administration Act of 1979, contract provisions of special relevance to export sales transactions, and the role of the Export Import Bank and the Foreign Credit Insurance Association with which it cooperates. The discussion of these topics is not intended to be exhaustive, but rather is intended to familiarize the reader with these subjects and to direct him or her to more detailed sources of information. Because U.S. policies in many of the areas treated are subject to substantial change, the reader should consult the most recent sources of authority for the points discussed below.

I. Foreign Corrupt Practices Act of 1977¹

Congress enacted the Foreign Corrupt Practices Act of 1977 (FCPA)² as a result of a series of revelations that hundreds of American companies had made payments to overseas officials to gain favorable business treatment. The FCPA approaches this problem with a two prong attack.

First, it imposes substantial accounting standards on issuers of securities registered pursuant to the Securities Exchange Act of 1934³ (1934 Act), requiring them to "make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer" and to maintain a system of internal accounting controls "sufficient to provide reasonable assurances" that transactions are properly recorded, that assets are accounted for, and that management authorization of assets and transactions is

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¹ 15 U.S.C. §§ 78a, 78m, 78dd-1, 78dd-2, 78ff (Supp. III 1979).

² S. Rep. No. 114, 95th Cong., 1st Sess. 1, reprinted in [1977] U.S. Code Cong. & Ad. News 4089, 4099; See generally Note, A Congressional Response to the Problem of Questionable Corporate Payments Abroad: The Foreign Corrupt Practices Act of 1977, 10 Law & Pol'y Int'l Bus. 1253 (1978) [hereinafter cited as Congressional Response].

³ 15 U.S.C. § 78a (1976).

maintained.⁴

Second, the FCPA prohibits the corrupt payment of anything of value to foreign officials for the purpose of influencing any act or decision of the foreign officials in connection with assisting the company in obtaining or retaining business.⁵ The penalties for violation of the corrupt payments provisions of the FCPA include civil penalties for the company and civil and criminal penalties for officers, directors, and stockholders who act on behalf of the company.⁶

Several aspects of the FCPA are especially noteworthy. First, although the accounting standards are only applicable to issuers with securities registered under the 1934 Act,⁷ the corrupt payments provisions are applicable to all "domestic concerns."⁸ In this regard, the Securities and Exchange Commission has civil jurisdiction with respect to issuers of registered securities while the Department of Justice has criminal jurisdiction with respect to "domestic concerns."⁹ Second, the accounting standards are applicable to issuers with securities registered under the 1934 Act whether or not they are engaged in foreign transactions.¹⁰ Third, foreign subsidiaries are not covered by the FCPA.¹¹ Fourth, the FCPA prohibits making payments while knowing or having reason to know that such payments will be paid to a foreign official.¹² Thus, although companies are not totally responsible for the actions of their agents, a company does have a responsibility to maintain some control over its agents. Finally, "grease" payments made to low level bureaucrats to facilitate a transaction are not proscribed by the FCPA.¹³

Until recently, the Department of Justice refused to give formal advice to companies attempting to determine whether a particular transaction violated the FCPA. However, the Department of Justice will now give such advice, which will be made public unless a request for nondisclosure is made at the time the advice is sought.¹⁴ The Securities and Exchange Commission will not give no-action letters concerning the FCPA, but will respond to general questions.¹⁵

There has been significant discussion of late concerning possible re-

⁴ Id. § 78m(b)(2) (Supp. III 1979).

⁵ Id. §§ 78dd-1(a), 78dd-2(a).

⁶ Id. §§ 78dd-2(b), 78ff(c).

⁷ Id. § 78m(a) (1976).

⁸ Id. § 78dd-2(a) (Supp. III 1979).

⁹ H.R. Rep. No. 640, 95th Cong., 1st Sess. 9 (1977); S. Rep. No. 114, 95th Cong., 1st Sess. 11-12, reprinted in [1977] U.S. Code Cong. & Ad. News 4098, 4109-10.

¹⁰ Congressional Response, *supra* note 2, at 1259-60.

¹¹ Id. at 1276.

¹² 15 U.S.C. § 78dd-1(a)(3) (Supp. III 1979); *See* 15 U.S.C. §§ 78dd-1(b), 78dd-2(d)(2) (Supp. III 1979).

¹³ S. Rep. No. 114, 95th Cong., 1st Sess. 10, reprinted in [1977] U.S. Code Cong. & Ad. News 4098, 4108. Low level bureaucrats would include those persons in ministerial and clerical jobs who often facilitate the movement and service of goods.

¹⁴ 28 C.F.R. § 50.18(o)(1) (1980).

¹⁵ 45 Fed. Reg. 59,001 (1980); 45 Fed. Reg. 12,571 (1980).

moval of the criminal provisions of the FCPA and relaxation of the accounting standards. It is uncertain at this time exactly when and if these changes will occur.¹⁶

II. Export Administration Act of 1979

The Export Administration Act of 1979¹⁷ and the Export Administration Amendments of 1980¹⁸ provide authority for U.S. control of exports. Export controls are imposed to further three broad policy objectives: to protect national security, to further U.S. foreign policy, and to prevent excessive drain of materials in short supply.¹⁹

To carry out the Act an export licensing system has been estab-

¹⁶ On November 23, 1981, the Senate passed the Business Accounting and Foreign Trade Simplification Act, S. 708 (97th Cong., 1st Sess.; Cong. Rec. S13969-86 (daily ed. Nov. 23, 1981)). Senate Bill S. 708 would amend the FCPA in the following manner:

1. The accounting standards would be changed

(a) to eliminate the separate provision requiring issuers to keep accurate books and records. This would be incorporated into the requirement that issuers devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are properly recorded, that assets are accounted for and that management authorization of assets and transactions is maintained;

(b) to eliminate criminal liability for failure to comply with the accounting standards;

(c) to add a scienter requirement, with the effect that liability under the accounting standards would arise only for knowingly circumventing the requirements thereof. No issuer would be subject to civil injunctive relief if it could show that it acted in good faith in attempting to comply with the accounting requirements.

(d) to require, where an issuer holds 50% or less of the voting power with respect to a domestic or foreign firm, only that the issuer proceed in good faith to use its influence to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls consistent with paragraph (a).

2. The SEC would be stripped of its civil jurisdiction for corrupt payments made by issuers, although it would retain jurisdiction over issuers for the accounting controls. Jurisdiction over all domestic concerns for corrupt payments would be placed in the Justice Department.

3. The "reason to know" standard for bribery through the use of intermediaries would be replaced by language designed to create an objective test of intent, making it illegal for a domestic concern "corruptly to direct or authorize, expressly or by a course of conduct" bribery by means of intermediaries.

4. The exemption for "grease" payments to low level bureaucrats would be expanded, and would include payments lawful under the laws and regulations of the foreign bureaucrat's country, and any payment which constitutes a courtesy or token of esteem.

5. The FCPA, as amended, would exclude Federal wire and mail fraud statutes as vehicles for criminal prosecution for foreign corrupt payments, where prosecution is based upon the theory that the foreign official violated his fiduciary duty.

6. The Attorney General would be authorized to issue guidelines and general precautionary procedures relative to the FCPA. The Attorney General would be required to establish a review procedure to provide responses to specific inquiries concerning enforcement intentions. The Attorney General and the SEC would be required to file with the Congress a detailed report on all actions taken pursuant to the FCPA, along with views on further implementation.

¹⁷ Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979) (codified in scattered sections of 7, 22, 26, 42 U.S.C. and 50 U.S.C. app.).

¹⁸ Export Administration Amendments of 1980, Pub. L. No. 96-470, 94 Stat. 2240 (1980).

¹⁹ 50 U.S.C. app. § 2402(2) (Supp. III 1979).

lished.²⁰ There are two basic forms of license, a general license and a validated license.²¹ The general license is, in effect, a blanket authorization for the export of listed items to designated country groups. No formal application is required.²² An exporter shipping under a general license need only file a Shipper's Export Declaration if it is required by the Export Administration Regulations or the Census Bureau Foreign Trade Statistics Regulations or make an oral export declaration when the declaration is not required to be filed.²³ If a validated license is necessary, application must be made to the Office of Export Administration at the Department of Commerce,²⁴ and the export cannot take place until the validated license is granted.²⁵ To determine what type of license is required, reference must be made to the Commodity Control List.²⁶

Determination of whether to grant a validated license depends upon the particular commodity involved and the country to which it is being shipped. For certain commodities the licensing decision may be made unilaterally by the Department of Commerce. If the commodity or destination is such that other agencies would be interested in its license, the decision will be made after input and recommendations of the other agencies. If the commodity is multilaterally controlled, following the determination by the Commerce Department that the license should be granted, the license must be approved by a multilateral organization known as the Coordinating Committee (COCOM), made up of Japan and the NATO countries except Iceland.

There are special licenses and procedures for projects licenses,²⁷ distribution licenses,²⁸ and multiple export licenses.²⁹ There are also special licensing provisions concerning technical data.³⁰

If the license application does not have to be submitted to other agencies, the Department of Commerce should act within ninety days of receipt of a license application.³¹ If other agencies or COCOM review the license application, the time periods are extended. There are, however, special procedures for expediting license applications where necessary.³²

It should be noted that the Export Administration Act of 1979 ap-

²⁰ Id. § 2403(a) (Supp. III 1979).

²¹ See 15 C.F.R. §§ 371, 372 (1981).

²² Id. § 371.1.

²³ Id. § 371.2(a).

²⁴ Id. § 372.4(a).

²⁵ Id. § 372.1(b).

²⁶ Id. § 399.1.

²⁷ Id. § 373.2.

²⁸ Id. § 373.3.

²⁹ Id. § 373.4.

³⁰ Id. § 379.

³¹ Id. § 370.13(h).

³² Id. § 372.4(h).

plies to both exports and re-exports of commodities subject to the Act.³³ For assistance with export licensing, the Department of Commerce maintains an Exporters Service Staff which can assist exporters on most matters. In instances where the Staff is not familiar with the exporter's questions, it can recommend the appropriate persons in the Department of Commerce with whom the exporter should speak.

Exporters must be aware of the boycott provisions of the Export Administration Act of 1979.³⁴ These provisions prohibit U.S. exporters from participating in certain boycotts and restrictive trade practices. The regulations contain extensive examples concerning the types of acts which are prohibited and should be consulted by anyone confronted with a boycott clause.³⁵

III. Contract Provisions

A. *Language and Writing Style*³⁶

The contract should, of course, be in writing. Exporters should insist that their contracts be written in English, or if the contract is written in more than one language, that the English version be the controlling version. In the event that it is impossible to have the English version control, it is imperative that the contract be reviewed by a foreign attorney. The writing style of the contract should be straightforward and the words simple. If there is room for more than one interpretation of a provision, the contract should be spelled out as to what interpretation is intended.

B. *Basic Information*

The parties to the contract should be clearly spelled out, especially when the purchaser is a foreign government or an agency of a foreign government. The addresses of the parties should be precisely set forth to avoid any problem in communications; it is also advisable to set forth telex and telephone numbers. Similarly, the goods to be sold should be completely described.

C. *Currency*

The sales contract should specify the currency in which payment is to be made. This is necessary because of fluctuating exchange rates. In some instances, provisions are made for repricing in the event that currency fluctuations exceed a certain amount. To protect against currency fluctuations, purchasers can buy forward contracts in the currency to be used for payment.

³³ Id. § 374.

³⁴ 50 U.S.C.A. app. § 2407 (West Supp. 1981).

³⁵ 15 C.F.R. § 369 (1981).

³⁶ See generally Farnsworth, *The Pitfalls of Making International Contracts*, 4 N.C.J. Int'l L. & Com. Reg. 97 (1979).

It should be noted that although the seller will generally prefer payment in U.S. dollars, such a requirement may be difficult for a purchaser to comply with when U.S. dollars are scarce in his country. For instance, many foreign national banks impose restrictions upon the use of U.S. dollars by their citizens.

D. Delivery Terms

As in a domestic contract, the price set forth in an international contract can be C.I.F., C. & F., F.O.B., or F.A.S.³⁷ Closely related to the delivery terms of the contract are the risk of loss and insurance terms. The agreement should be quite specific in these areas. It should be noted that the point at which title passes is particularly important in determining the tax consequences of a transaction.

*E. Methods of Payment*³⁸

There are many methods of payment that can be provided for in an export sales contract, including cash in advance, open account, collections, and letters of credit. In determining the most preferable method of payment, factors including competition and evaluation of risk must be considered. The exporter should note that in the international marketplace there are more risks which must be considered than in the domestic market, including the probability of war, expropriation, government regulations, and central exchange failure to transfer currency, as well as the customary risks concerning the financial condition of the purchaser.

The most preferable method of financing is obviously that of cash in advance, as it insures exporters of payment for their goods. If payment is not received, the goods are not shipped. Foreign purchasers, however, may be hesitant to pay in advance, especially if they have not previously dealt with the seller. Also, foreign governments may prohibit this method of payment. Thus, although cash in advance is the best method for the seller, as a practical matter unless the seller enjoys great bargaining leverage, it is unlikely that the purchaser will agree to this method of payment.

Open accounts are not uncommon in international transactions, although their use will depend on the risks surrounding the sale and the prior relations between seller and purchaser. Clearly, this is the method of payment which is most favorable to the purchaser and correspondingly, least favorable to the seller. It should be avoided unless the seller has complete faith in the purchaser and there are no alternative methods of payment available.

³⁷ C.I.F.—cost, insurance and freight; C. & F.—cost and freight; F.O.B.—free on board; F.A.S.—free alongside ship.

³⁸ See generally Edwards, Introduction to the Methods of Payment Involving Banks, 4 N.C.J. Int'l L. & Com. Reg. 207 (1979); Note, The Exporting Process: Some Considerations for Practitioners, 8 Ga. J. Int'l & Comp. L. 408 (1978).

Collections provide a seller with more protection than he would receive under an open account, but are less safe from the seller's perspective, than cash in advance or a letter of credit. The collection method of payment involves a draft or bill of exchange drawn by the seller on the purchaser and placed by the seller with his bank for collection. The collection can be "clean," in which case there are no attached documents, or it can be "documentary," in which case shipping documents conveying title to the goods are attached to the draft. Drafts may be payable either at sight or at a specified time. A draft payable at sight must be paid immediately by the purchaser and if the draft is documentary, the documents conveying title are not released until payment is made. A draft payable at a specified date is presented to the purchaser for acceptance. Under a documentary time draft, documents are not released until the purchaser accepts the draft.

A collection method of payment entails numerous risks for the seller. First, in the case of a time draft, the seller has no guarantee that the purchaser will be able or willing to meet its obligation. Second, a dishonored clean sight draft is of little use to the seller if the buyer has access to the goods. Even if the buyer does not have access to the goods, a dishonored sight draft may leave the seller with goods in an inconvenient location and cause him to incur excessive transportation and storage costs. Thus, although the collection method of payment can provide certain safeguards for the seller, especially if a documentary sight draft is used, certain risks remain.

One of the most common methods of payment in international transactions is the letter of credit. This payment mechanism replaces the purchaser's credit with a bank's credit. A letter is issued by a financial institution (opening bank) at the request of the purchaser (customer) to the seller (beneficiary). This letter states that for a specified period of time the financial institution will honor demands for payment made by the beneficiary up to a specified amount, provided that the beneficiary presents a draft to the opening bank accompanied by any documents required by the letter of credit. The documents that are required include such items as bills of lading, invoices, reports of inspection of goods, and insurance certificates.

Because the bank is in effect loaning credit, and then money, to the purchaser, its issuance of a letter of credit depends on the bank's evaluation of the credit risks of the purchaser. If the bank has full faith in the purchaser, it may issue the letter of credit without requiring a deposit by the purchaser. If the bank has doubts about the credit worthiness of the purchaser, it will typically require the purchaser to make a deposit before issuing the credit. The bank often holds the goods as security until payment is made by the purchaser.

Other parties that may or may not be involved in a letter of credit transaction are "advising" and "confirming" banks. An advising bank

merely advises the beneficiary that a letter of credit has been opened in its favor and does not incur liability with respect to the credit. A confirming bank, unless otherwise provided, is liable to the beneficiary to the same extent as the opening bank.

A letter of credit may be either revocable or irrevocable. Revocable letters of credit are seldom used because they do not guarantee payment to the seller. An irrevocable letter of credit, the norm in international transactions, is a definite agreement to pay provided that the requirements of the letter of credit are met.

It should be stressed that parties using a letter of credit are dealing in documents, not goods. The letter of credit is distinct from the underlying contract between the seller and purchaser. Thus, the only grounds for nonpayment by an opening or confirming bank is that the documents do not conform to those required in the letter of credit. The fact that the goods may not conform to contract specifications is irrelevant. Guidelines for determining whether documents presented conform to those required can be found in case law and in the Uniform Customs and Practice for Documentary Credits.³⁹ The Uniform Commercial Code, although it devotes an article⁴⁰ to letters of credit, does not address the question of conforming documents.

Letters of credit are often used as financing devices. Thus, a back-to-back credit can be used by a seller to finance the purchase of goods from his supplier. The seller may also transfer his rights and duties under the letter of credit to his supplier. This can be done, however, only if the letter of credit is transferable. This device has the drawback of disclosing the seller's profit margin to the supplier. As an additional financing device, the seller can transfer his right to proceeds to the supplier. This provides security to the supplier and can be done even if the letter of credit is nontransferable.

*F. Dispute Settlement*⁴¹

In international transactions, litigation is not advisable for the seller, whether he sues in the courts of the purchaser or in his own courts. If he sues in the purchaser's country, he may feel that there is a natural prejudice against him, especially if the purchaser is a government entity. The seller and his attorneys will generally be unfamiliar with the procedures of the purchaser's legal system, and unless the purchaser's courts

³⁹ International Chamber of Commerce, Pub. No. 290, Uniform Customs and Practice For Commercial Documentary Credits (Rev. Ed. 1974) [hereinafter cited as International Chamber of Commerce].

⁴⁰ See U.C.C. §§ 5-101 to -117 (1978 version).

⁴¹ See generally Holtzman, *Export Sales Contracts: Enforcement Problems, Arbitration Provisions*, Practising Law Institute No. 197, *Legal Aspects of Exporting* (1978). An alternative to arbitration is conciliation, which is a non-binding dispute resolution procedure. A conciliation procedure can often avoid the expenses involved in an arbitration proceeding and can also shorten the time frame in which the dispute is settled. See generally International Chamber of Commerce, *supra* note 39.

have had experience in international transactions, they may be unfamiliar with the subtleties involved in such transactions. Finally, foreign court dockets are often crowded and cases may drag on for significant periods of time. In the event that the seller sues in his own courts, there may be problems getting jurisdiction over the purchaser and enforcing judgments.

Because of the problems involved with litigation, the route often chosen in international contracts is that of arbitration in accordance with the rules of an arbitral body. Such bodies include the American Arbitration Association (AAA), the International Chamber of Commerce (ICC), the United Nations Commission on International Trade Law (UNCITRAL), and the Inter-American Commercial Arbitration Commission (IACAC).

The advantages to arbitration are numerous. First, the arbitrators are generally more knowledgeable about the transaction and issues than are judges. Second, arbitration proceedings are significantly more informal than court proceedings and businessmen therefore feel more comfortable with them. Third, arbitration awards are easier to enforce abroad than are court judgments. Fourth, arbitration proceedings generally are resolved more quickly than are court suits.

It is important to determine the place of arbitration because the place determines a number of procedural points including the subjects which are arbitrable, the procedural rules which will apply, and the rules which will govern to the extent the proceedings are not governed by the rules chosen by the parties. The place of the arbitration also determines the grounds for setting aside an award and the enforceability of the award.

Although specific rules need not be set forth in the contract, it is strongly advised that this be done in order to avoid disputes at a later date. The most commonly used rules are the ICC and AAA rules. To determine which set of rules is best for a given contract, it is important to review the rules with respect to choosing arbitrators, the procedural rules followed, the expenses of arbitration, and the facilities provided by the arbitral body.

Other factors to consider in drafting an arbitration clause include the number and nationality of the arbitrators, the language of the arbitration, and the governing law to be applied. It is important to emphasize that unless the parties agree that arbitration will be the exclusive dispute resolution method, it is of little value. There must be a renunciation of judicial litigation and judicial review.

G. Force Majeure

An international sales contract should have a broadly written *force majeure* clause which includes items such as shipping problems, war and insurrection, and failure to obtain a necessary export license. This last

point concerning export licenses, is especially important if the goods being shipped or the place to which they are being shipped are such that a validated license is necessary and is difficult to obtain.

H. Provisions Applicable to Distributorship and Agency Contracts

The preceding sections of this article have discussed clauses which are necessary in an export sales contract entered into directly by the seller. Many export sales, however, are made through distributors or with the help of agents. There are many additional factors which should be considered when entering into either a distributorship agreement or an agency relationship.

Of foremost importance are the descriptions of the territory and the product. These must be clearly and specifically defined in order to avoid future misunderstandings. For example, products should be identified by applicable model number or other identifying information rather than by generic description, and the territory should be defined to encompass specific geographical areas.

The agreement must also state whether or not the representation by the distributor or the agent is exclusive or nonexclusive and the extent to which the distributor or agent can sell competing products.

The duties of the seller and the distributor or agent must be clearly defined and must cover areas including advertising responsibilities, inventories, responsibility for servicing, and pricing policies. The actual division of these responsibilities will depend upon the particular circumstances, including relative size, financial ability, experience, and capabilities of the seller and distributor or agent.

Certain provisions should be insisted upon by sellers. First, there should be provision made for complete reporting by the distributor or agent. This allows the seller to plan his own production and take the necessary actions if sales are not at proper levels. Such reports should be prepared as often as practicable. The duration of the contract and the right to terminate also are of great importance to the seller. Provision should be made to insure that the seller can terminate the contract at any time without incurring liability to the distributor or agent. The seller should be particularly cognizant of any local laws which such a provision may violate. The seller should always have the right to cancel the relationship for "good cause" and the definition of good cause should be drafted as broadly as possible. Good cause might be shown by failure to meet certain quotas, by failure to market properly, by breaching another provision of the agreement such as the noncompetition clause or the territorial limitation clause, or by any action which results in detriment to the seller. The seller should also insist upon appropriate confidentiality agreements to be effective both during and after the term of the contract and should make sure that the contract with the distributor or agent cannot be assigned without the seller's express permission.

The seller must always consider the impact of local laws on his contract agreements. The seller must be aware of local customs requirements, product liability provisions, exchange control requirements, property protection laws (patent and trademark), and labor laws.

IV. The Export-Import Bank of the United States and Foreign Credit Insurance Association

The Export-Import Bank of the United States (Eximbank) is the U.S. Government-owned corporation that provides financing for U.S. exports of goods and services. Eximbank supports individual major exports over \$5 million through direct loans to public and private purchasers abroad. It cooperates with the Foreign Credit Insurance Association in offering a variety of insurance policies to cover political and credit risks of nonpayment for short and medium term export transactions normally involving less than \$5 million. Eximbank also works closely with U.S. commercial banks in issuing commercial and political risk guarantees to the commercial banks that provide medium term credit to foreign purchasers of U.S. exports.

Eximbank was first established in 1934⁴² and subsequently reorganized as a government corporation in 1945.⁴³ It is an independent agency of the Government and its purpose is "to aid in financing and to facilitate exports and imports and the exchange of commodities between the United States or any of its territories or insular possessions and any foreign country or the agencies or nationals thereof."⁴⁴ Eximbank's charter requires that in fulfilling its functions it is to be competitive with rates and terms and other conditions available for financing of exports from the other industrialized countries.⁴⁵ It is also to supplement and not compete with the private capital markets in the United States, and all transactions entered into by the Bank must have reasonable assurance of repayment.⁴⁶

Eximbank receives funds for lending from three sources. At Eximbank's inception, the Government authorized \$1 billion of equity capital for the Bank.⁴⁷ The Bank also has authority to borrow up to \$6 billion from the U.S. Treasury and to raise other funds through borrowing either in the private capital market in the United States and abroad

⁴² Pursuant to Executive Order 6,581 of Feb. 2, 1934, Eximbank was organized under the name of Export-Import Bank of Washington (U.S. Civil Service Commission, Civil Service Act and Rules, Statutes, Executive Orders, and Regulations, Amended to June 30, 1937, 93 (1938)). That name was changed to the Export-Import Bank of the United States by Act of Mar. 13, 1968, Pub. L. No. 90-267, 82 Stat. 47 (codified at 12 U.S.C. § 635 (1976 & Supp. III 1979)).

⁴³ Act of July 31, 1945, Pub. L. No. 79-173, 59 Stat. 526 (codified at 12 U.S.C. § 635 (1976 & Supp. III 1979)).

⁴⁴ 12 U.S.C. § 635(a)(1) (1976).

⁴⁵ Id. § 635(b)(1)(A) (Supp. III 1979).

⁴⁶ Id. § 635(b)(1)(B) (Supp. III 1979).

⁴⁷ Id. § 635b (1976).

or from the Federal Financing Bank.⁴⁸ Its present lending authority is set at \$40 billion⁴⁹ although, because of technicalities within the statute, Eximbank can in fact have significantly more dollars committed.⁵⁰

As a means of supporting U.S. exports, Eximbank has developed numerous lending, guarantee, and insurance programs in an attempt to tailor its support to the many types of U.S. exports. The type of support Eximbank is authorized to commit breaks down into two basic functions. First, lending money, and second, taking risks, including political and commercial risks. The Bank insures or guarantees against political risks which include transfer delays in converting local currency payments into dollars; cancellation of export or import licenses; expropriation or confiscation by a government authority; and losses due to war, revolution, or civil disturbances within the country of the buyer.⁵¹ The commercial risks which the Bank will guarantee or insure against are the risks of insolvency of the buyer or failure of the buyer to pay the amount due at the due date.⁵²

A. Direct Lending Program

Direct loans are U.S. dollar credits extended by Eximbank directly to foreign buyers, public and private, for the purchase of U.S. goods and services. Direct loans are usually made only where the cost of the U.S. export is in excess of \$5 million. The buyers are either foreign governments, foreign companies, or U.S. enterprises operating overseas, either directly or through a subsidiary. Eximbank no longer extends direct loans directly to U.S. exporters, as it did in the past.

These loans cover a maximum of sixty-five percent of the cost of the U.S. export and Eximbank charges an interest rate of twelve percent⁵³ on the unpaid balance of the loan. Repayment is required in equal semi-annual installments which normally commence six months after the equipment is delivered or, in the event of an integrated project, six months after completion of the project.⁵⁴ Interest is payable semi-annually, and is also payable during a construction or pre-delivery period. Length of the repayment term may vary depending on the competition from governmental export entities of the other countries. Eximbank currently charges a two percent application fee for each credit authoriza-

⁴⁸ Id. § 635d (1976).

⁴⁹ Id. § 635e (Supp. III 1979).

⁵⁰ In 1980 Eximbank could have \$58.75 billion committed at any one time. See Export-Import Bank of the United States, 1980 Annual Report 16 (1980) [hereinafter cited as Annual Report].

⁵¹ Export-Import Bank of the United States, *The Export-Import Bank: Financing for American Exports—Support for American Jobs* 13 (1979) [hereinafter cited as *Financing for American Exports*].

⁵² Id.

⁵³ The interest rate for Eximbank direct loans was 12% as of December 1, 1981. The figure is subject to variation.

⁵⁴ Export-Import Bank, *Financing for American Exports*, supra note 51, at 26.

tion.⁵⁵ The only other fees charged by Eximbank are a commitment fee equal to one-half of one percent per year on the undisbursed balance of the loan and the costs which are incurred in printing the loan agreements.⁵⁶

In those cases where Eximbank finances less than sixty-five percent of the cost of the U.S. goods and services, it is very common for private banks to finance part of the overall cost. Frequently this is done with a guarantee from Eximbank covering the commercial and political risks which may be involved on the private bank loan. In such an event Eximbank charges guarantee commitment fees as well as guarantee fees to the private banks. It does permit the private bank to pass on those fees to its ultimate customer, although the bank remains primarily liable for their payment.

For example, a typical transaction would require the foreign purchaser to make a fifteen percent cash payment with Eximbank agreeing to finance fifty percent and the private bank financing thirty-five percent. In order to extend the lowest effective interest rate to the foreign buyer, Eximbank will permit the private bank to be repaid from the earlier maturities and repayment of Eximbank's loan will commence after the private bank loan has been repaid in full.⁵⁷ This gives to the borrower a substantial reduction in the effective interest rate because the Eximbank interest rate is lower than the normal commercial rate extended by private banks. In such a case the buyer would be required to make the cash payment at the time of drawdown of the loans in an amount equal to fifteen percent of the drawdowns.

B. Preliminary Commitments

In many cases it is advisable for the U.S. seller, the foreign purchaser, or a financial institution to obtain an indication of the amount, terms, and conditions of financing that might be available for a planned transaction. To aid businessmen planning such transactions, Eximbank will provide "Preliminary Commitments" outlining the amount, terms, and conditions of the financial support it will extend.⁵⁸ This Preliminary Commitment will include the general terms surrounding the financing arrangement. An application for a Preliminary Commitment should be in the form of a letter and should set forth sufficient information to allow Eximbank to make a reasoned determination whether or not it is prepared to support the planned project or sale. Preliminary Commitments are not binding legal commitments. They are merely an indication of the type of support that Eximbank may offer if such support is war-

⁵⁵ Export-Import News, July 1981.

⁵⁶ Id. at 27.

⁵⁷ Id. at 26.

⁵⁸ Id. at 29.

ranted. There is no cost or obligation to an applicant for a Preliminary Commitment.

At the present time Eximbank is limiting its issuance of Preliminary Commitments because of budget limitations imposed on its overall commitment authority. In the past, even though Preliminary Commitments have not been legally binding commitments, very rarely has such a commitment not been honored.

In any application to Eximbank, the applicant should remember that it is dealing with a bank that will examine the transaction in the same manner as any private bank. Therefore, the applications should be as complete and comprehensive as possible; inadequate applications will only cause delays that could cause the U.S. seller to lose the export sale.

C. Discount Loan Program

Eximbank has a discount program to assist and encourage U.S. financial institutions in financing exports of U.S. goods and services.⁵⁹ This program supports those banks that extend financing for current exports, usually on terms of 270 days to 5 years, and in some cases, for longer repayment periods.

The primary purpose of the discount program is to assure commercial banks that export loans made by them will not reduce or eliminate funds available for their general lending purposes in periods of tight liquidity. It is designed to keep the international divisions of banks competitive with their domestic divisions.

The basic program operates on an advance commitment basis under which Eximbank will make a commitment to extend a discount loan for up to sixty-five percent of an eligible export debt obligation arising from current U.S. exports.⁶⁰ To evidence this debt the foreign obligor issues a promissory note or drafts.

Eximbank requires the commercial bank to apply for an advance commitment before shipment of the products and services, and charges the bank a small commitment fee.⁶¹ The commercial bank must state that the financing is necessary to complete the export transaction and that the commercial bank is not prepared to extend the financing without the discount loan. The discount loan rate from Eximbank to the commercial bank usually is the Federal Reserve Bank of New York discount rate. Lower rates are possible for eighty-five percent of an export sale below \$5 million by a small business. Under the discount program Eximbank was authorized to commit approximately \$400 million in 1981.⁶²

⁵⁹ Id. at 21-22.

⁶⁰ Id.

⁶¹ 12 C.F.R. § 401.1(c)(2) (1981).

⁶² Act of June 5, 1981, Pub. L. No. 97-12, 95 Stat. 36.

D. Guarantees and Insurance

In order to maximize the use of its resources and to comply with its statutory mandate to supplement rather than to compete with private sources of capital, Eximbank has developed extensive programs to insure or guarantee export receivables that are in turn financed either by the exporter itself or by a commercial bank.⁶³ This insurance or guarantee protects the holder of financing from the commercial and political risks of default by the foreign buyer.

E. Commercial Bank Exporter Guarantees

When U.S. banking institutions, Edge Act corporations, and Agreement Corporations finance U.S. exports requiring repayment over what is called a medium term (181 days to 5 years), Eximbank will guarantee the repayment of the debt obligation by the foreign purchaser, and this guarantee will protect the commercial bank, Edge Act Corporation, and Agreement Corporation against default by the foreign buyer arising out of either commercial or political risks.⁶⁴ Certain basic requirements must be met under the guarantee programs. These are set forth in a master guarantee agreement entered into between the commercial financial institution and Eximbank. The most salient of these requirements is that the foreign buyer must make a cash payment of at least fifteen percent of the purchase price; in less creditworthy countries, the cash payment may be somewhat higher.⁶⁵ Further, the remainder of the contract price must be evidenced by promissory notes, drafts, or other acceptable obligations; open account will not be accepted. Normally repayment to the commercial institution must be made in U.S. dollars, and must be made at least semi-annually.

This guarantee from Eximbank does not cover all of the commercial risk, although it does cover one hundred percent of the political risk, thus eliminating any political risk exposure for the commercial bank.⁶⁶ Eximbank does not cover the entire commercial risk for the commercial bank because it relies on the commercial bank to make the primary credit analysis and believes that such analysis will be done more carefully if the commercial bank has some risk.

In a guarantee transaction Eximbank does not participate in any negotiations between the U.S. commercial bank and the foreign buyer directly or indirectly. Furthermore, it does not prescribe any interest rate, minimum or maximum, charged to the foreign buyer by the commercial bank. This rate is set by competition within the market place.

For the day to day transactions involving less than \$5 million per sale, this guarantee program of Eximbank offers many advantages to the

⁶³ 12 C.F.R. § 401.1(c)(2) (1981).

⁶⁴ *Id.* § 401.1(c)(8).

⁶⁵ Financing for American Exports, *supra* note 51, at 19-20.

⁶⁶ *Id.* at 20.

U.S. exporter. First, the exporter can deal with its own financial institution. The institution can do all of the paperwork and all of the analysis rather than having part of it done by Eximbank. Second, the exporter is more comfortable and familiar with its own lending institution and therefore can, in most cases, proceed more rapidly than it could through Eximbank.

F. Contractor's Guarantee

Eximbank offers political risk insurance to U.S. contractors operating overseas. The program indemnifies contractors against four types of loss: inconvertibility of funds, confiscation of tangible assets, loss of tangible assets due to war, and where a public project owner fails to comply with dispute resolution procedures as set forth in the contract.

G. Export Credit Insurance

The Foreign Credit Insurance Association (FCIA) is a group of over fifty of the principal U.S. casualty, maritime, and property insurance companies offering credit insurance to U.S. exporters.⁶⁷ The FCIA was formed in the early 1960s in cooperation with Eximbank and continues to work in close cooperation with the Bank.⁶⁸ Insurance policies issued by FCIA provide extremely broad protection against both commercial and political risks that could result in the default of payment by the foreign buyer.

FCIA offers insurance on both short term exports⁶⁹ (up to 180 days) and medium term exports⁷⁰ (181 days to 5 years) on credit extended to foreign purchasers either by the exporter itself or by a commercial bank. This insurance is issued directly to the exporter or the commercial bank through FCIA. Usually it is issued to the exporter of record.

Eximbank plays only a supporting role with FCIA. The insurance coverage issued through FCIA is reinsured by Eximbank for all political risks and is also reinsured for a portion of the commercial risk. Such reinsurance coverage is issued pursuant to agreements between FCIA and Eximbank.

In a typical transaction the exporter will obtain insurance from FCIA. It will then assign the promissory note it receives from the foreign buyer together with the proceeds of its FCIA insurance policy to a commercial bank or other source of financing, thereby enabling the exporter to receive immediate payment in full as opposed to carrying the export receivable on its own books. This procedure is of great assistance to the exporter in maintaining adequate working capital.

⁶⁷ 12 C.F.R. § 401.1(c)(11) (1981).

⁶⁸ See Financing for American Exports, *supra* note 51, at 13-24.

⁶⁹ *Id.* at 14.

⁷⁰ *Id.* at 18.

Premiums charged for the insurance are based upon the length of the credit term that is required for the export together with the credit classification of the country involved. Credit classifications of countries are periodically reviewed by FCIA and Eximbank so that the premiums can be adjusted in direct correlation to the risks involved.

FCIA has developed numerous types of individual policies to meet the needs of exporters throughout the United States. These policies are continually changing and the FCIA should be contacted for the latest information.⁷¹

Summary

The foregoing discussion has summarized many of the more important legal aspects of export sales transactions. One should, however, always review the federal statutes immediately before advising a client with regard to an export sale. Several amendments to the Foreign Corrupt Practices Act of 1977 and the Export Administration Act of 1979 are currently under consideration. These would amend the prohibitions as well as the requirements set forth in each of those statutes.

When drafting specific contracts, it is important to follow four basic concepts. First, make sure that the language is clear and simple so that it can be translated to other languages as well as other legal systems. Second, the content of the contract should be clearly spelled out, in particular the names of the parties, the duties of each party, the currency and terms of sale, the delivery terms, and the method for settling any disputes. Third, one should write precisely and forget the many "legalese" terms so common in U.S. contracts. Fourth, a local lawyer should be contacted to assure that any questions of local law are satisfactorily concluded.

Conditions in international trade are constantly changing. The various domestic economies are making new demands and the composition of U.S. exports themselves is ever changing. Eximbank's role in support of U.S. exports is directly related to the overall policies of the United States Government which are also constantly changing. As a result, Eximbank and the Foreign Credit Association continually review, revise, and amend their financing guarantee and insurance programs. One should contact Eximbank and FCIA directly for current information on the various types of support available from the U.S. Government for the export of U.S. goods and services. Each of these entities has special divisions to assist and counsel exporters in all facets of international trade as

⁷¹ The address from which FCIA information may be obtained is:

Foreign Credit Insurance Association
1 World Trade Center
9th Floor
New York, New York 10048

a means of improving the U.S. balance of trade and balance of payments. Exporters are encouraged to utilize fully the many services provided by Eximbank.