

## Jeremy Sivyer outlines the potential legal pitfalls for exporters looking to target developing nations.

A common worry for businesses when embarking on exporting activity is the unknown – dealing with another country, in another time zone, speaking another language and dealing in a different currency can be overwhelming. At the top of this list is also exporting to another jurisdiction. This article offers solutions to some of the most common legal issues that businesses need to be aware of when exporting.



### **Identification of Products and Suppliers**

Care needs to be taken to ensure that there is a ready market for a product in the target territories but also that it is legal to sell the product there. For this purpose advice from a local technical expert who will examine technical requirements including safety requirements and import controls and duties will be needed. Where a third party is supplying the product care will also need to be taken over the security of supply and the transport methods chosen.

The issues which arise in relation to customer contracts (see below) will be mirrored in any supply contract with third party suppliers. Care needs to be taken to ensure that adequate remedy clauses are included so that if a customer claims consequential losses from you then you can in turn recover those losses from your supplier if they have let you down.

### **Identification of Customers**

Products will often be sold over the internet or by direct contact between you and known potential customers but it still remains the case, especially in developing markets, that you will need to work with a local expert who understands the laws and customs of the relevant market and that they are appointed as an agent or distributor rather than a mere consultant. There are some additional considerations which need to be borne in mind in such cases:

First, you need to be able to know who the ultimate customers are and to control the assurances which are given by the agent or distributor in relation to the product. To the extent that the defined boundaries are exceeded it should be the responsibility of the distributor or agent to make good any difference.

In some countries exclusive agents and distributors enjoy special protection by law, so that even if proper contractual notice is given to terminate their contracts they are entitled to compensation. This is particularly prevalent in countries in Africa and South America as well as the Middle East (examples

would include Egypt and Kuwait) whose legal systems are based on French or Belgian Law.

Statistics compiled by Transparency International suggest that corruption is rife in some developing markets. Under UK law, It is the responsibility of the exporter to look for warning signs in this regard and to impose an appropriate set of controls to ensure that corrupt inducements are not paid through the medium of agents or distributors or otherwise and to monitor those controls. For this purpose facilitation fees (ie paying someone to do what they are already legally obliged to do) constitutes a corrupt inducement.

## **Customer issues**

There are several points which come up in relation to customers:

The need to identify an appropriate system of law, usually that of a particular country to govern the contract. There have been some attempts to harmonise different systems of law so that the same phrases acquire common or similar meanings in different countries.

The most commonly used glossary is the Incoterms published by the International Chamber of Commerce which seeks to give common definitions to terms such as FOB and CIF. To be avoided is the Uniform Law on International Sales which in some jurisdictions is implied into contracts unless excluded. There should always be an exclusion of these terms unless one wants the uniform law to apply.

Contracts need to define a number of things, as well as price, description of the goods and point and method of delivery:

- How strict timings, how they can be made stricter and what consequences apply if they are not met.
- When risk of loss or destruction in the subject matter of the contract passes from the supplier to the buyer and responsibility for securing insurance.
- Whose responsibility it is to pay customs duty and to clear the goods through Customs in the destination country and to ensure that the goods supplied are compliant with local laws.
- The extent of the supplier's liability where the goods are defective or not in accordance with the contract. Such liabilities can under English law be limited to a somewhat greater extent in an international contract but care will need to be taken with the drafting and local laws in the customer's jurisdiction may inhibit the ability to restrict liability.
- Defining the point in time when property in the goods passes.
- The currency of payment (if one agrees to be paid in the currency other than sterling, then the Supplier takes the risk of that other currency.
- Security for payment where the customer is not paying in advance. The classic methods of addressing this are either to obtain credit insurance against non-payment if available or to have the customer open a letter of credit whereby its

bankers guarantee payment of the price against presentation of specified documents. Such credits should be confirmed by a bank in the UK.

## **Dispute Resolution**

There needs to be an effective means to resolve disputes fairly and promptly and local courts in developing nations are often not a good choice. Frequently, where a country has an effective arbitration law or allows enforcement of foreign arbitration awards, arbitration is a better choice.

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