



Doing Business In The United States

A summary to help develop successful strategies of doing international business in the U.S.

Successful international businesspersons
are those who understand their entry market.

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This booklet contains information to help build a
successful international business in the United States.

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Preface

This booklet supplements the previous edition that set out numerous issues to be considered by international investors. Many of those who benefited from the prior edition expressed a wish for more information than in previous booklets. In response to those requests this 2003 edition is published.

Introduction

Today business is conducted on a global basis. Companies, both large and small, recognize they must trade or invest abroad, sometimes through the establishment of facilities overseas, purchases from abroad or both. Indeed global trade may be critical for a firm's growth and survival.

There are certain factors, which must be considered by international companies and business people before embarking upon any commercial activity in the United States. Setting up a business in the United States is often less difficult than establishing a business in other countries. However, certain aspects, such as the choice of corporate structure, must not be overlooked, as it may have significant consequences on critical aspects such as the scope of liability of the person or persons managing the business, or the tax regime to which the business will be subject.

The incorporation of an internationally owned business in the United States will mainly be regulated at the state level rather than on the federal/national level. Thus, it is important to keep in mind that the application process will vary from state to state. The Delaware state corporate structure has been a popular model for international companies mainly because of its flexibility. Although this document is primarily concerned with setting up a business in the Commonwealth of Virginia, legislation governing businesses in Virginia and many other states closely follows that of Delaware.

This booklet will give an overview of some of the fundamental issues that should be taken into consideration when planning entry to the U.S. market. This document does not purport to be an exhaustive explanation of how to set up a business in the United States, neither does it replace the need for assistance of lawyers and other investment specialists.

Establishing An Operation In The United States

Choice of Corporate Structure

One of the most important issues to be considered before embarking on commercial activity in the United States is to choose the corporate structure that is most appropriate. Several types of structures exist. They range from direct sales to customers without establishing any corporate structure in the United States to the incorporation of an American company. A U.S. company will provide a permanent structure that is a continuing, recognized legal entity in itself, and therefore, possibly in a better situation to obtain loans from American banks and to reassure potential customers who may be wary of a foreign structure with which they are not familiar.

A businessperson beginning to market products in the U.S. may prefer to start with an agency or distributorship system in order to introduce the products to the United States market with the assistance of an American agent or distributor who is already well-established in the country. When the international products become successfully accepted, it may then be preferable to set up a permanent structure in the form of a partnership or corporation. There are no hard and fast rules for doing business in the United States. Each person's requirements will be different, depending among other factors on the type of products to be marketed, the degree of management required and both short-term and long-term objectives. The scope and type of activity to be carried out are critical considerations that may influence the choice of corporate structure. The following are the main types of structure available to those wishing to do business in the United States.

Direct Sales to Customers

If the international concern already has sufficient customers, adequate financing and a well-established market in the United States, it may prefer not to go to the expense of setting up a permanent corporate structure. However, obtaining bank loans in the United States may be more difficult for someone who is not a U.S. resident or does not have a legal entity set up in the country. This is probably the easiest type of system for a foreign investor to set up, provided that the investor already has a regular clientele and a good market.

Agency

Under an agency agreement, an independent representative secures orders for sales in the United States, acting on behalf of the international seller. The agent never becomes the owner of the goods being sold and therefore is not required to accept any risk of non-payment by the buyer, or the loss or deterioration of the goods, unless it has been caused by the agent's own negligence. The agent usually receives a salary and/or commission for the service rendered to the seller. This type of system may be appropriate for an international businessperson who is selling products on the American market for the first time. An agent may be in the best position to find buyers for the goods, since he is already established in the country and has a good understanding of market requirements and cultural particularities of the area in which he is working. Another advantage of this system is that the foreign investor will not usually incur the cost of stocking the products in the United States, as they can be transported directly from the foreign manufacturing plant to the buyer's place of business. In an agency relation-

ship it is crucial to control, via contract and audit, the actions of the agent. If the principal fails to properly monitor the agent, and the agent's acts can reasonably be inferred by third parties to be authoritative by the principal, then the principal may become liable to third parties for acts not originally authorized to be conducted by the agent.

Unlike many other countries, the United States does not have any specific legislation governing the termination of agency agreements. Agency agreements are based on the freedom of contract. Consequently, there are no statutory termination payments or notice periods, which are often extremely high in other countries.

Distributor

Unlike an agent, a distributor actually buys the products and resells them through his pre-established network of customers. The risk of non-payment, loss or deterioration of the goods is therefore transferred to the distributor as he becomes the rightful owner of the products. Under this type of agreement, the distributor acts in his own name, and not on behalf of the international company. As in the case of agency agreements, there is no U.S. legislation governing the termination of distributorship agreements.

Issues to be sensitive to in distributor arrangements are exclusivity, control of product image, warranty issues and service.

Corporation, Limited Liability Company or Partnership

The characteristics of a corporation are limited personal liability for corporate debt and obligations, ease of transfer of ownership interests, centralized corporate management and guaranteed continuation of existence despite death or retirement of owners. In a partnership, by contrast, the partners are usually exposed to unlimited liability, which means that their personal assets and sometimes those of their spouse, may be used to pay off any partnership debts. Offsetting this are tax advantages such as pass through of profits to the partner without taxation at the corporate level.

In most states in the U.S., the formation of a corporation or partnership either requires no minimum capital or only a small amount of capital, which is not usually more than \$1,000. As a result, setting up a business in the United States is often a much less difficult activity than it is in many countries. However, prospective businesspersons should avoid undercapitalizing their company, and seek expert advice in order to ensure that a reasonable amount of capital is provided. An undercapitalized company may be considered ineffective for corporate protection from liability. In states such as Delaware and Virginia, the incorporation procedure can often be completed extremely rapidly; in some cases within several days.

A limited liability company is a hybrid business entity offering its owners, called members, the limited liability enjoyed by corporate shareholders and the flow-through tax treatment of partnerships. The tax treatment is given under federal and state income tax laws and it allows the company's losses to pass through to shelter investors' other income and eliminates taxation of profits at the corporate level and then again as dividends. This form of business entity is very popular for international investors. In many cases, a corporation, limited liability company or a partnership may prove to be the most appropriate kind of structure to use, as the international entity will then establish a full fledged American entity, with the same rights as any domestic undertaking.

Joint Venture

In some cases, it may be preferable to form a joint venture with an existing U.S. company. A joint venture is an agreement that allows two or more separate companies to group their expertise and property in a common undertaking, of which each would find difficult to accomplish individually and is facilitated by the combined input of the two entities. The companies may be specialized in different, complementary areas of production. The joint venture can be located in the United States and governed by American corporate legislation. This type of arrangement has the advantage of providing an international company with the assistance of an already established American company.

Representative Office

A representative office remains part of the international company and is not a separate legal entity. It is therefore not authorized to carry out any commercial activity. Its objective is to create a presence in the host country, to generate publicity for the company and to establish business contacts, all in order to secure a larger clientele. As its activities are limited, this kind of structure is only really suited to an international company that does not intend on actually doing business as such, but simply wishes to promote its activities and attract new clients.

Branch Office

A branch office, like a representative office, remains part of the international company, and is not a separate legal entity. Consequently, the international company is fully liable for the acts of the branch office, which may prove to be a potentially dangerous situation for the company as its assets will be exposed to a judgment against the branch office.

Importing Restrictions

A prospective importer needs to familiarize himself with U.S. legislation on imports, which may take the form of tariffs, quotas, or licenses. The objectives of such laws are to regulate the quantity and quality of goods that are imported into the United States and to levy taxes on imported goods.

Tariffs

When calculating the estimated cost of importing goods into the United States, the prospective importer must bear in mind the tariffs, i.e. the amount of duty charged by the American authorities for bringing such products into the country. Tariffs vary depending on the product imported. An importer should obtain information about these tariffs before importing merchandise.

Quotas

In order to protect American products, the United States has fixed quotas on the amount of certain types of goods that can be brought into the country. Anyone considering importing goods on a regular basis should therefore ensure that restrictions are not likely to be prejudicial to the introduction or marketing of the goods in the United States.

Licenses

Certain goods, such as food products, pesticides, energy and bottled water, are subject to strict federal and state regulations; special licenses or permits need to be obtained before these products can be marketed. These regulations may be very different from legislation in force in other countries and should, therefore, be closely studied before importing activities are commenced.

Some professions are also required to obtain special licenses before they are authorized to set up in business in the United States. Such professions include accountants, architects, medical providers, contractors/tradesmen and real estate brokers.

Financing An Overseas Operation

The cost of setting up a business may be prohibitive for many investors who, nonetheless, have potentially viable corporate plans. The United States government and local governments provide a number of different loans and loan guarantees.

The Virginia government, for example, offers financing to certain new and expanding companies, allowing them to purchase land, premises, machinery and equipment. These loans are capped at \$1 million and will only be granted if a specified number of new jobs are created. Local municipalities may have grants or offer industrial revenue bonds.

The objective of loan guarantee programs is to reduce risks on the lending bank. The government may agree to guarantee a loan with a regular bank. This guarantee serves as an incentive to banks that may otherwise be reluctant to grant a loan to a particular company. Revolving lines of credit are available, as are short-term loans, which may be used to acquire office or research equipment.

The Department of Environmental Quality and the Department of Business Assistance have also agreed on loans of up to \$50,000 to finance the purchase of equipment to reduce pollution and comply with the Federal Clean Air Act.

United States Legislation Affecting Overseas Businesses

The United States has a considerable amount of legislation that may affect overseas businesses. The following lists some of the key legislation.

Foreign Corrupt Practices Act

The Foreign Corrupt Practices Act (FCPA), enacted in 1977, was intended to prevent United States companies from being able to secure business transactions by bribing important foreign officials. This law was potentially damaging to the economy of the United States, as no other country had adopted similar legislation at that particular time. Consequently, the United States was at a distinct disadvantage compared with other countries, for whom it was common practice and totally lawful to tender such bribes.

In 1998, amendments to the FCPA widened the scope of the law making it also applicable to non-U.S. citizens, foreign corporations and international organizations located in the United States. There are severe criminal and civil sanctions for infringement of the FCPA and a person in violation of the FCPA may also be barred from receiving export licenses.

Antitrust

Antitrust legislation in the United States is not unlike the provisions of the Treaty of Rome, which governs antitrust issues in Europe or anti-competition laws in other parts of the world. The two main antitrust laws in the United States are the Sherman Act and the Clayton Act. The Sherman Act prohibits agreements between or among competitors that unreasonably restrict or could restrict competition. Practices, including the designation of customers or geographic areas, price-fixing, and the sale of a product only on condition of purchase of another product, are unlawful. The Clayton Act prohibits price-fixing or the sale of commodities that are conditioned by a promise from the buyer not to purchase a competitor's goods. Such activity will be illicit if it substantially damages competition or leads to a monopoly.

Export Administration Act

The Export Administration Act (EAA) of 1979 applies to individuals, partnerships, corporations, foreign subsidiaries, branch offices or permanent foreign establishments that are controlled by a domestic entity. The EAA, prohibits certain categories of activities. These activities include refusal to enter into an agreement with a person or country when such refusal is motivated by boycott reasons. It is also unlawful to provide information about a person's business contacts with a boycotted country, whether this information concerns past, present, or intended commercial activities. One of the provisions of the EAA specifically applicable to banks prohibits them from making any payments on letters of credit that include any boycott clauses. Discrimination against a United States person on the basis of race, religion, sex or national origin is also prohibited under the EAA.

Violations of the EAA may subject a person to criminal and civil sanctions, including severe fines and/or prison sentences of up to 10 years.

Anti-boycott Legislation

The objective of the anti-boycott legislation of 1978, was to reduce the loss of income suffered by the United States as a result of the actions of other countries, in particular Arab League Countries, who exercise boycott practices over countries, including the United States, that have commercial activities with Israel. Not only do many Arab League countries refuse to carry out business with Israeli entities, but they also boycott other countries that import Israeli origin products or services.

Anti-boycott legislation requires any person who receives a request from another person or country to refrain from commercial dealings with Israel to file a report with the U.S. Department of State's Office of Anti-boycott Compliance, which may then carry out any necessary investigations into the matter. The law bans U.S. persons from refusing to enter into commercial agreements with another person simply because this person is from a blacklisted country or has commercial contacts with such a country. There are civil and criminal sanctions for violation of these provisions, as well as the possibility for the U.S. authorities to refuse export privileges to an offending party.

Office of Foreign Assets Control

The Office of Foreign Assets Control (OFAC), a section of the U.S. Department of the Treasury, carries out controls on agreements entered into by international organizations that support terrorism and drug trafficking. The OFAC has the power to impose economic and trade sanctions on countries that encourage this type of activity. In the event of such activity, the OFAC may freeze foreign assets that are in the United States or otherwise under U.S. jurisdiction.

Trading with the Enemy Act

During World War I, Congress enacted legislation allowing the President of the United States to seize assets and apply trade embargoes on its enemies. Amendments to this legislation currently allow the President to impose the same restrictions during any period of national emergency and not just in times of war. The United States currently maintains economic embargoes against Cuba, Herzegovina, Iran, Iraq, Libya, North Korea, Serbia and the Sudan.

Tax Issues Involved With Doing Business In The United States

Businesses operating in the United States need to be aware of the fact that tax is payable both at state level and at federal level, and that state tax regimes may vary considerably from state to state.

Income and Withholding Taxes

Although a foreign national qualifying for residency in the United States may feel inclined to opt for residency, from a fiscal point of view it may be preferable for him to maintain his status as a foreign national. Foreign nationals are exempt from certain employment taxes, which means their employers are exempt from the related withholding and payment of those taxes. Depending on the type of visa held by a foreign national, he may not be required to pay social security, Medicare or federal unemployment taxes.

Double Taxation Treaties

Many foreign countries have entered into double taxation treaties with the United States, which prevents persons with regular activities in two different countries from being taxed twice on the same income. Some countries also have agreements to prevent double social security taxation.

Local Tax Incentives

Most U.S. states offer local tax incentives to companies as a means of encouraging trade. In Virginia, for example, the corporate rate of income tax of 6% is relatively low, with no tax payable on income from outside Virginia. Tax credits are given for creating new jobs, providing workers with retraining and making donations to underprivileged areas in the state. There are many different local tax incentives. Tax specialists will be able to give advice on the incentives that exist in different localities.

Foreign Currency

It is important for a person setting up in business in the United States to address such currency issues as the opening of bank accounts in foreign currencies and risk management techniques to deal with the risks involved in foreign exchange transactions.

Bank Accounts in Foreign Currencies

It may often be useful to have foreign currency bank accounts, which allow clients to make payments in their local currency. This system facilitates payment for foreign clients, who may be more inclined to do business with a company if they know that they can pay in the currency with which they are the most familiar. This method of payment may even be a pre-requisite to securing trade with some countries, especially those with currency restrictions prohibiting payment in other than the local currency.

Having bank accounts in foreign currencies is also a means of overcoming the risk of losing money as a result of fluctuating exchange rates. It can, therefore, prove useful for a company that does business with another foreign entity on a regular basis, and often needs to pay for goods or services in the same foreign currency. The advantage of this system is that the company can receive payments in a foreign currency, and then use that currency to buy products from suppliers who deal in the same currency, without the costs of converting the currency into and out of U.S. dollars.

Reporting of currency transactions: Transactions involving over \$10,000 must be reported to the Department of Treasury.

Employment Regulations

For many international businesses, United States employment regulations may appear to be less stringent than legislation in their home country. There is, nevertheless, a well-established set of labor laws with which both employers and employees must comply.

Employees' Right to Work

Pursuant to U.S. immigration legislation, employers have the obligation of requiring new employees to present original documents proving identity, and must also ensure that they are eligible to work in the United States.

Immigration Requirements

There are several types of visas that allow foreigners to work in the United States. These are covered in more detail in a separate booklet published by the law offices of Vandeventer Black LLP.

Discrimination and Invasion of Privacy

United States legislation offers protection to potential employees against discrimination and invasion of privacy, by prohibiting employers from asking certain questions during interviews. In order to avoid any form of discrimination based on race, color, religion, sex, national origin, or disability, questions concerning these issues are prohibited. In most cases, a future employer is also prohibited from requesting a credit check or insisting that an employee undergo a medical examination, unless all employees are required to take one.

Expatriate Employees

If, by becoming an expatriate employee, a person loses his rights to benefit from the social security system in his home country, the person must make regular contributions to the U.S. system, including retirement and sickness payments, as well as contributions for industrial accidents.

Wages and Hours

U.S. federal law governs minimum wages and minimum age requirements for employment. It prohibits children under age 18 from doing certain jobs that are considered dangerous. It also prevents children under age 16 from working during school hours. State laws will prevail where the business is conducted only within one particular state.

Workers' Compensation

Workers' compensation legislation provides for the payment of medical expenses, disability pay and vocational rehabilitation to employees who have been injured in the course of their professional activities. The principle of strict liability is applicable, so that the employee does not need to prove that the employer has been negligent or committed a fault. State law makes workers' compensation insurance mandatory in most cases, although there are certain exemptions for small companies, domestic workers, farm hands and independent contractors.

Wrongful Termination

Legislation governing wrongful termination differs from one state to another. Federal law also provides for wrongful termination and its provisions must be considered in conjunction with those of state laws.

In the United States, it is generally much easier to terminate an employment relationship than in other countries. The applicable law depends on the status of the employee, which may be "at will" or "for cause." An employer is free to terminate an at will employment without notice, with or without any reason whatsoever, and the employee will have no recourse if the employer has complied with all relevant state and federal legislation. Legitimate reasons for dismissal for cause include frequent absences, poor quality work, incompetence and insubordination.

However, if a court considers that the employment has been wrongfully terminated, the employer may be liable for the payment of back wages with interest, and the reinstatement of the employee in his post.

Dispute Resolution With A United States Business Partner

When disputes occur between parties from different countries, they may be difficult to resolve because of the uncertainty of determining which country's laws should apply and which is the proper forum for jurisdiction, especially in cases where no provision has been made for this kind of eventuality in the initial contracts. To overcome this problem, many international contracts now include clauses providing for final and binding arbitration, which can be an efficient and discreet way of settling a dispute, especially since international organizations such as NAFTA and the WTO have established effective procedures that deal with infringements of international trade agreements. In addition, other organizations, such as the United Nations Committee on International Trade Law and the International Chamber of Commerce, have established arbitration procedures that are internationally recognized and respected. Arbitration is the preferred means of dispute resolution, as arbitral awards are more likely to be enforceable in countries where the defendant has assets under the New York Convention for Enforcement of Foreign Arbitral Awards. This Treaty has been ratified by 86 nations. A court ruling rendered in the plaintiff's country may not be enforceable in the defendant's foreign place of residence or where the defendant has assets.

Terminating Business Activities In The United States

If a commercial entity decides to terminate its business activities in the United States, it will have a certain amount of flexibility to do so, since there are different ways of dissolving a company. After dissolution, the company will need to address the question of the sale of any remaining assets.

Flexibility to Dissolve the Business Entity

There are three ways of voluntarily dissolving a corporation. The most common procedure is that used to make important modifications -- by action of the Board, with the shareholders' approval. This kind of dissolution depends on the vote of the shareholders. A dissolution filing is made, at which time the corporation loses its rights to continue any business activity other than the winding up of the company. After filing, all the company creditors must be given individual notification of the dissolution. All assets must be distributed to creditors and shareholders before final filing of articles of dissolution.

If no business activities have yet begun when a decision is made to dissolve the company, but after the certificate of incorporation has been issued, a majority of the initial directors simply need to make a filing to bring the company's existence to an end.

The third possibility of dissolving a U.S. company is dissolution by consent. In this case, no Board resolution is required, provided that all of the shareholders give written consent to the dissolution and that if a statement of intent to dissolve is created.

Sale of Assets

A corporation that is being dissolved is generally entitled to sell its assets after payment of creditors by priority and distribution to shareholders in proportion to each person's rights and interests. This distribution can only occur after company debts have been honored.

If the dissolution is judicial rather than voluntary, the courts will appoint a receiver to deal with the disposal of assets at a public or private sale.

Choice Of Trained & Experienced Experts

While doing business in a global market unquestionably offers a number of advantages, at the same time, it is more complicated than working exclusively in a national environment. Before setting up a business in the United States, a foreign businessperson would be well-advised to consult trained experts who are accustomed to dealing with the various commercial aspects involved in international business.

U.S. & Foreign Attorneys

In most cases, a foreign businessperson starting out in a global market will need the advice of both local and U.S. attorneys, who may find it useful to work together. Each lawyer will inevitably be more familiar with the legislation in his own country and will, therefore, be in a better position to advise his foreign counterpart of the particularities of his own legal system.

Accountants

Since U.S. companies must comply with certain accounting standards and other regulations, including regular account-keeping, the drawing up of annual financial statements and the timely filing of tax returns, the assistance of an accountant will inevitably be necessary for the successful running of a business.

Bankers

Bankers also play an important role in the success of a business by providing a number of essential products and services to facilitate the running of a company. These services include the issuing of loans, money transfers, letters of credit and lines of credit.

Banks are one of the main sources of financing for setting up new businesses, and can often provide short-term loans to overcome unexpected cash flow problems or other temporary financial difficulties.

Customhouse Brokers and Freight Forwarders

The role of customhouse brokers is to assist importers with the entry and customs clearance of imported goods. In the United States, they generally work in conjunction with U.S. Customs, preparing and filing the necessary documents for the entry of goods into the country. They also complete the required paperwork for the export of merchandise from the United States. Licensed customhouse brokers ensure that reasonable care is taken in filling out the required paperwork in order to avoid fines being imposed on importers, especially since these sanctions can be severe.

Freight forwarders are specialized in the safe shipment of goods. The services they provide normally include preparation of shipping documents, such as bills of lading, and assistance with letters of credit, cargo insurance, warehousing and trucking, packing and storage.

International Purchases & Sales Of Goods

Protection of Intellectual Property

Intellectual property consists of creative works of the human mind, which have a commercial value and may take the form of copyrights, patents, trade secrets or trade marks. When working in an international context, a company will need to take certain steps to ensure that its intellectual property rights are protected. Although intellectual property rights may be protected in one country, they will not benefit automatically from any such protection in any other country, and a separate procedure will usually need to be undertaken in each country in which protection is required.

Copyrights, Patents, Trade Secrets and Trade Marks

A *copyright* gives the author of intellectual property the exclusive right to use his work as well as the possibility of selling it. For copyright protection to be applicable, the work must be original, must involve some kind of creativity, and must be presented in a tangible form (although the type of surface on which it is presented is of no importance and may be anything from a leaf to a scrap of paper, provided that the work can be reproduced by some kind of machine).

Anyone wishing to protect an invention and prevent others from using it will need to *patent* it. This kind of protection can only be given to inventions that are novel, non-obvious and of some utility. In the United States, an application for a patent must be submitted to the Government, through the U.S Patent and Trademark Office. A description stating every step of the invention must be provided with the application. The invention therefore becomes public knowledge and could theoretically be copied by another person. However, the protection offered by the patent will prohibit others from doing so. Patents are valid for 20 years and design patents are valid for 14 years. After that time, with the exception of certain pharmaceutical products, the patented invention becomes public property, and can be lawfully used by another person.

In some cases, when there is little likelihood of another person coming up with the same invention on his own, it may be preferable for the invention to remain a trade secret and not be patented, as a patent will only give protection for 20 years. A *trade secret* is information, such as a formula, recipe or method, that is particular to a business, is used by the business for economic gain, and whose

general disclosure to the public would be economically detrimental to the business. Trade secrets are protected contractually, relying essentially on the signing of non-disclosure agreements by employees who have had access to trade secrets. The unlawful disclosure of a trade secret may give rise to a civil lawsuit.

Trade secret protection cannot, by definition, be given to a patented invention, as the invention must be described in full detail. However, work that is protected by a copyright can also be afforded trade secret protection and it is often wise to ensure that both types of protection are given simultaneously.

A *trademark* is a name and/or logo used to identify a product, and will become the exclusive property of its owner by registration at the U.S. Patent and Trademark Office. There are restrictions on the kinds of trademarks that can be lawfully registered. It is not possible to register a trademark that is simply a generic name describing an object. To retain protection, a trademark must remain in continuous use. A trademark can be renewed indefinitely and therefore continue to be protected for as long as renewal requirements are in compliance. However, abandonment of a trademark, i.e. failure to use it for at least three years, may result in its cancellation by the Federal Trade Commission. Infringement of trademark regulations may give rise to the payment of damages for profit loss and harm caused to the trademark's reputation.

International Conventions and Foreign Laws

Intellectual property laws may vary greatly from one country to another, as there is no uniform, harmonized international intellectual property legislation, as such. However, a number of countries have signed bilateral or multilateral conventions, in an attempt to overcome the burdensome procedure of having to file a separate registration in each country in which protection is required. Certain organizations, such as the World Intellectual Property Organization (WIPO), have established international treaties so that applicants can avoid the expense of having to make individual filings in each country. WIPO was set up in 1967, with the purpose of promoting the protection of intellectual property rights around the world and establishing economic cooperation among existing intellectual property conventions. WIPO maintains a comprehensive compilation of foreign laws and international treaties governing intellectual property rights.

The two fundamental agreements drawn up by WIPO are the Paris Convention for the Protection of Industrial Property, which deals with patents and industrial designs, and the Berne Convention for the Protection of Literary and Artistic Works, which deals with copyright. In addition, new treaties, such as the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, have increased the scope of protection of these original treaties.

Two other important treaties are the Trademark Law Treaty of 1994 and the Patent Law Treaty of 2000, both designed to harmonize national trademark and patent procedures for acquiring and maintaining intellectual property rights.

The World Trade Organization (WTO) has sought to reduce the disparities of national intellectual property laws that are often very different from country to country. Indeed, throughout the Agreement on Trade-Related Intellectual Property Rights (TRIPs), the WTO has drawn up a set of international intellectual property rules, based on principles such as the most-favored-nation rule, providing for the equal treatment of all WTO members, and national treatment, prohibiting the discrimination of foreigners by any member State.

The TRIPs also strives to ensure that member States have sufficiently protective legislation, that their legislation is properly enforced, and that sanctions for violations of the law are stringent enough to be satisfactorily dissuasive.

Laws Restricting Licensing

Since the holder of a copyright, patent or trademark is given exclusive rights to the use of the designs, inventions and products, he can assign these rights to other persons in return for fees or royalties. Some licensing agreements may create anti-competitive effects, thereby infringing antitrust legislation. For example, an agreement between two research and development companies in a particular sector, to the exclusion of other companies that also engage in similar activities, may prove prejudicial to the development of new products.

Licensing agreements may infringe antitrust laws if they are likely to have an adverse effect on prices, qualities or quantities of goods. Consequently, it may be necessary to closely review proposed agreements to ensure that they could not be construed as violating antitrust legislation.

Important Provisions in International Sales or Purchase Transactions

Since the transport of goods from one country to another is usually an essential part of international sales or purchase transactions, special provisions govern this type of agreement in order to address questions such as insurance during transport, freight costs, the possibility of inspecting the goods before delivery, and the allocation of risk of loss.

These questions are largely governed by consensual contract law, so that the parties are at liberty to structure agreements at will. An infinite number of possibilities of division of costs and allocation of risks therefore exists.

Insurance, Freight Costs and Risk of Loss

In order to address the potential problems involved in transport, the international business community generally adopts the International Rules for the Interpretation of Trade Terms (INCOTERMS), a comprehensive set of regulations to assign risks in a clear fashion. INCOTERMS are commonly used in international sales and purchase contracts, as the definitions of these terms are internationally recognized and construed in the same way from one country to another. For example, in a CIF contract, it is commonly understood that the seller of goods has the responsibility of organizing the shipment of the goods and the subscription of an insurance policy covering loss or damage during transport. The cost of these services will, naturally, be reflected in the price paid by the buyer. In a CIF contract, payment is made on the presentation of certain specified documents, without inspection of the goods, whereas, in an FOB contract, the seller does not subscribe to insurance coverage, and transport will generally be arranged by the buyer, who will be entitled to inspect the goods before shipment.

In this type of contract, it is important to clearly specify which party holds title to the goods at each stage of shipping, as this will generally determine who must assume liability in the event of loss or damage to the goods.

Choice of Law

In domestic sales (between U.S. parties), the rules of the Uniform Commercial Code (UCC) are usually applicable, whereas international transactions are often governed by the United Nations Convention on Sale of Goods (CISG). Here again, the parties are free to include choice of law clauses in their agreements. As far as European legislation is concerned, the Convention on the Law Applicable to Contractual Obligations governs the international sales contracts of member States who have ratified the Convention. The European Union applies the rules of the Convention not only to its member States, but also to any other foreign contracting party, regardless of whether it is a member of the European Union. Thus, in a contract between a member State and the United States, for example, under European law, the Convention would be applicable. It is therefore critical to specify what law will govern the contract.

Managing Duties on Imported Goods & Components

United States legislation provides importers with a number of incentives, by which they are able to reduce costs on the goods they import, largely by exempting them from duties and tariffs that would normally be due.

Foreign Trade Zones

The Foreign Trade Zone Act of 1932 was introduced in the United States as a means of facilitating international trade by creating Foreign Trade Zones (FTZs), which are areas considered outside U.S. Customs territory. They provide for the storage or re-packing of goods, or assembly of components, for merchandise that is to be distributed in the United States, or exported to other countries. Customs duty and federal and state taxes only become payable on these goods when they leave the FTZ. However, certain countries, such as NAFTA countries are not eligible for this preferential treatment and their goods will be immediately taxed on entry into the U.S.

This kind of zone is particularly useful for imported goods that require further treatment, such as cleaning, testing or labeling before a finished product can be distributed. FTZs allow importers to reduce costs on goods that are simply in transit before reaching their final destination. Goods can remain in FTZs for an unlimited period of time, without tariffs, duties, or other taxes being due.

All the activities of an FTZ are monitored and supervised by the U.S. Customs service, which ensures that all regulations are being followed. FTZs may be classified as general-purpose zones or sub-zones. General-purpose zones are typically used by a number of small or medium-sized companies, while sub-zones are more commonly used by a single firm where more large-scale manufacturing or treating processes are carried out.

Drawback

Drawback is a program set up to give financial assistance to U.S. importers, exporters and manufacturers, in order to make them more competitive on international markets. It provides for the refund of 99% of the duties and excise paid on imported goods. There are three different categories of drawback.

The first category, *manufacturing drawback*, governs the refund of duties on items that have been imported for the manufacture of goods to be exported. Exportation must take place no longer than five years after importation of the items. In order to make a valid claim for manufacturing drawback, an approved drawback ruling must be filed with the Customs services.

The second category of drawback is *unused merchandise drawback*, which is a refund of duties on imported goods that have never been used in the United States, but have immediately been exported without undergoing manufacture. Exportation must occur within three years of the initial importation.

The third category of drawback is *rejected merchandise drawback*, which concerns the refund of duties on imported products that have been exported for non-compliance with specifications. All three categories of drawback give a 99% refund.

Bonded Warehouses

Bonded warehouses are premises for the storage and handling of goods entering the United States, which would normally be subject to duty but on which duty only becomes payable when the goods leave the premises for distribution.

The advantage of this system is that the importer will not be required to pay duty on the goods if they have to be re-exported because he is unable to find a buyer for them on the U.S. market.

Bonded warehouses can be used for the storage and re-packaging of most types of goods, with the exception of perishables and explosives. The owner remains liable for the goods as long as they remain in the bonded warehouse. Authorization to set up a bonded warehouse must be obtained from the local Customs port director by the owner or the lessor of the premises.

Temporary Importation under Bond (TIB)

Certain types of goods that are imported into the United States with the intention of being exported to other countries without any sales taking place in the U.S. can be imported under bond. In this way, the goods are exempt of duty, if they are exported within one year of importation. With the authorization of the port director, this one-year time limit may be extended to a maximum of three years. The bond is twice the amount of the duties that would have been payable.

This system is applicable to goods that are to be repaired, modified or processed, as long as they are not used for the making of alcohol, perfume, or wheat products that are manufactured in the United States.

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