

## **VITAL LEGAL & REGULATORY ISSUES FOR U.S. IMPORTERS**

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In today's economic climate of export promotion, importers are often the "forgotten" international traders, with barriers quite often raised against them. Yet the role that importing and importers play in the U.S. is critical for the health of the U.S. economy. Some of the thorniest barriers to importing lie in the legal and regulatory arena. This discussion will focus on the most vital of these legal and regulatory issues with which importers must contend.

### **Import Purchase Contract Issues**

The major area of legal concerns for importers relates to import purchase contracts. The vital issues in this area all relate primarily to the assurance that the importer will receive the goods which were ordered on a timely basis and that such goods meet the product specifications and quality called for in the purchase contract. The adept use of import purchase contracts by importers can go a long way towards meeting this assurance.

### **General Issues**

*Governing law*— A critical issue in this area is which country's law will govern the import purchase contract. The most ideal resolution to this issue is that the parties themselves choose the law which will govern their contract, which from the U.S. importer's perspective would ideally be the law of the particular state in the U.S. in which the importer largely conducts its business. Not all countries recognize the freedom of parties to themselves choose the law to govern their contracts. The advent of U.S. ratification of the Convention on Contracts for the International Sale of Goods (CISG) helps somewhat by ensuring in certain instances that a uniform law applies internationally speaking. The CISG is not, however, a panacea for this issue.

*Writing requirement*— Another issue of general concern is whether or not an importer and its foreign supplier commit the terms of their purchase agreement to writing. Different countries have differing cultural traditions and rules of law on this matter. If, however, the above concerns of product specifications, quality and delivery are to be assured, then it is critical to ensure that any purchase agreement is in writing. One method to ensure that this occurs is for an importer make it crystal clear to any prospective suppliers that it will not assent to any terms of an agreement unless all terms of the agreement are in writing. An importer's ability to do this, of course, will be determined partially by the disdain or reluctance of a supplier in using written agreements.

*Dispute resolution*— A third general issue relates to the method of resolving any disputes

which may arise between an importer and its foreign supplier. A settlement negotiated by the parties themselves is almost always the best method. In its absence, the use of international commercial arbitration is most preferable, in part because most countries have pledged to honor and enforce foreign arbitration awards as a result of their ratification of the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The inclusion in an import purchase contract of an arbitration clause mandating that all disputes go to arbitration is recommended over having to file a lawsuit against a supplier in a foreign country because the product delivered was not up to the quality specifications called for in the purchase contract.

### ***Delivery Issues***

The concern here for importers is what assurance do they have that their suppliers will tender (i.e. ship or otherwise make available) the goods to the importer. While this issue is one always faced by any purchaser in those occasions where a purchaser's procurement of goods is dependent in part upon a seller's delivery of the goods, this issue is doubly important in international purchases because of distance factors and the complexity of the delivery process.

*Non-shipped or mis-shipped goods*– The adept use of import purchase contracts can help provide solutions to these issues. One solution is to make an importer's obligation to pay strictly conditional upon a supplier's tender of goods according to the contract terms. While this is usually the case in domestic contracts in the U.S., it is not always so elsewhere. Secondly, importers should, whenever possible, use the ICC INCOTERMS in their import purchase contracts to define shipping and delivery obligations as these terms are the most widely used and accepted delivery terms in international trade. Finally, the use a documentary form of payment, such as cash against documents, documentary drafts, or documentary letters of credit can ensure that an importer will not part with the funds budgeted for an import until it has proof that the goods were loaded and shipped by vessel or aircraft to the port of destination called for in the import purchase contract.

*Goods damaged in transit*– Another issue faced by importers in this area is the possibility that the goods which are shipped by a foreign supplier are damaged in transit. Methods to evade this risk are to insist in the purchase contract that any choice of a carrier must be approved by the importer, to avoid the use of CIF delivery terms since the supplier under such circumstances is the party who procures the marine insurance, and to describe in the purchase contract any special procedures which need to be used to pack and/or stow the goods while on board a vessel.

### ***Product Quality and Specifications Issues***

These issues are perhaps the single most important issues that an importer can face in the legal and regulatory arena. Obviously, if the product received by an importer is not the product ordered or lacks the quality specified in the import purchase contract, then the entire transaction is at best a wash for the importer. The concerns in this area fall into roughly three categories– substandard goods, nonconforming goods, and warranty problems.

*Substandard goods*– Importers, more than any other type of buyer, face serious risks as to the goods they purchase being substandard in nature. Some possible solutions to this risk is to include in the purchase contract the following as to product specifications: the type of goods, including the particular grade, if any, and any special quality characteristics of the goods

desired by the importer. This latter point is very important in that a foreign supplier can not reasonably be expected to know in advance what special quality characteristics an importer may desire for its goods and therefore is unlikely to provide such characteristics.

*Nonconforming goods*– Even if the import purchase contract has detailed product specifications, that is no guarantee conforming goods will be tendered. The likelihood of this occurring can be reduced by requiring in the purchase contract that the foreign supplier obtain an inspection certificate from a reputable organization in the supplier's country that certifies that the goods are of certain standards or otherwise conform to the contract specifications.

*Warranty problems*– Post-sale product servicing is an especially acute risk of importing. This problem is compounded by the fact that many countries do not have implied warranty protections in their contract law such as is generally the case in the U.S. To avoid these problems, importers should require in their import purchase contract that the foreign supplier provide servicing capabilities in the U.S., either directly or on a subcontract basis. Secondly, importers should always insist upon an express warranty in the purchase contract which provides the amount of warranty coverage which an importers desires.

### ***Payment Issues***

Payment issues for importers generally revolve around the type of payment terms provided in the import purchase contract. From an importer's perspective, credit terms are usually the least risky type of payment term. Credit terms, however, are often difficult to come by, even for large importers with good credit histories. Alternative payment terms, therefore, are necessary if a foreign supplier is unwilling or unable to extend credit to an importer.

*Cash in advance terms*– these terms leave an importer "high and dry" as it is forced to pay for goods not only before any inspection of the goods, but also before delivery. An importer should never agree to these terms unless one or more of the following is true: the importer is well acquainted with the seller in terms of product quality and reliability, the foreign supplier has significant assets in the U.S., and/or the importer has significant custom product needs which only the seller can fulfill. Additionally, importers agreeing to cash in advance terms should always obtain in their import purchase contract the right to inspect the goods before payment is due.

*Documentary letters of credit terms*– while documentary letters of credit are often perceived as a sharing of risks between exporters and importers, in actuality these terms have far less risk for a seller as opposed to an importer. The risk to the importer is in the fact that the import purchase contract and the letter of credit are two separate contracts, meaning that the issuing bank's obligation to pay out the credit is totally independent of the seller's performance in tendering the goods which conform to the contract's specifications. This forecloses an importer from using payment as a tool to ensure that a foreign supplier tenders conforming goods. A solution for an importer to reduce this risk is to require in the purchase contract that the foreign supplier obtain an inspection certificate as discussed above. Also, importers can reduce this risk by requiring the purchase contract to state in the letter of credit payment terms that the letter of credit itself must require that the inspection certificate be one of the letter of credit documents required to be presented by the foreign supplier in order to receive payment on the letter of credit. Since importers are usually the party the applies for the letter of credit, if the supplier agrees to such purchase contract term, the importer will be able to assure that the goods will be inspected and certified prior to shipment.

## **Regulatory Issues**

The main regulatory issues faced by U.S. importers relate to U.S. Customs law and regulation, and particularly, its enforcement. A in-depth discussion of Customs law is beyond the scope of this article. However, the thorniest areas can be briefly pointed out.

### ***Improperly prepared commercial invoices***

U.S. Customs regulations are very stringent as to the contents of commercial invoices, which are one of the required entry documents. Problems in this area for U.S. importers are often compounded by the fact that commercial invoices are quite often prepared by sellers, particularly if a letter of credit is used to finance the purchase. The following are some possible solutions to this issue: the importer can itself prepare the commercial invoice and thereby ensure that U.S. Customs regulations are strictly followed. If the foregoing is not possible, then the import purchase contract should include language detailing all the necessary requirements for preparing commercial invoices to meet U.S. Customs satisfaction. It should also require the foreign supplier to prepare the commercial invoice according to such requirements, and should make the importer's payment obligation dependent upon the correct preparation of the commercial invoice by the supplier (unless, of course, a letter of credit is involved, which would make the latter impossible).

### ***Improperly packed goods***

Goods which are improperly packaged, such as commingled, can lead to higher duties being assessed upon the imported goods than would otherwise be the case. These problems can often be avoided by requiring in the import purchase contract that the foreign supplier pack the goods according to certain specified methods. Additionally, the purchase contract can be drafted to hold the supplier liable for any increased duties due to its packing of the goods contrary to the contracts specifications. An alternative is that the purchase contract require the seller to employ an outside firm to perform the packing.

### ***Trademark/Copyright violations***

Imported goods of a foreign origin which bear a U.S. registered trademark or copyright which has been registered with U.S. Customs may not be imported without the consent of the trademark or copyright owner. An importer who finds that the foregoing is the case is likely to have his goods seized by U.S. Customs, with perhaps an attendant fine or penalty. This situation can be avoided by making sure that if the goods to be imported bear a U.S. registered trademark or copyright that the foreign supplier, if not the owner of the trademark or copyright, has the right to sell goods bearing such trademark or copyright to a U.S. purchaser. Additionally, an importer should that the foreign supplier attach to the import purchase contract a copy of the consent of U.S. registered trademark or copyright owner to import the goods into the U.S. if the supplier is not the U.S. registered holder.

### ***Country of Origin Marking***

Perhaps the most common Customs problem faced by importers, country of origin marking is especially a difficult and vexing issue because of the usual inability of the importer to verify that the purchased goods are properly marked prior their entry into U.S. Customs territory. Imported goods which are not properly marked as to country of origin are subject to

both seizure and forfeiture. Importers need to ensure that they first of all understand the proper method of marking for the particular imported goods, that their foreign supplier is fully cognizant of that method, and that the supplier's marking is verified. Importers, before agreeing to purchase any goods which are to be imported, should order samples of the goods from their foreign supplier to verify proper marking if the importer is at all unsure that the foreign supplier will properly mark the goods. The import purchase contract should also state that any losses suffered by the importer due to improper marking shall be borne by the seller. If an importer is not confident that its foreign supplier is capable of proper marking, the importer should contract with someone else in the supplier's country to do the marking, or import the non-marked goods into a Customs bonded warehouse and mark them itself before clearing the goods through U.S. Customs. If an importer does choose one of these two last alternatives, then the purchase contract should require the supplier to pay the costs of marking by someone other than the supplier.