

Expanding Globally: Legal Considerations for Exporting Companies

Strategic Exporting Seminar
U.S. Dept. of Commerce
Export Assistance Center

Binghamton University
Binghamton, New York

October 25, 2006



Disclaimer



The information provided is believed to be accurate as of the date of the presentation, but is subject to change without notice.

This presentation is designed for informational purposes only and is not intended to be, nor should it be deemed, specific legal advice. If such advice is required, please consult with a *knowledgeable* attorney.

Objectives


- Familiarize or refresh exporting companies with international legal issues
- Encourage planning, compliance, and preventative strategies, including adopting or reviewing processes and procedures

THINK PROACTIVELY

- STOP! Deliberate before moving forward – seek help when needed



Privilege, Not Right



Licenses and permits needed:

Firearms

Military Spare Parts

Meat

Technology; Technical Information

Exporting privileges can be taken away

Sources of Law



U.S. Law

Federal Constitution

International Treaties – NAFTA, CISG, NY

Federal Statutes – U.S. Code

Administrative Law – regulations

Agency Rulings – IRS, CBP

Court Opinions

State law applies

Sources of Law - continued



Foreign law sources are similar

National Law – Civil Code

EU Directives

The American Society of International Law

www.asil.org/resource/pil1.htm#introduction

Government Agencies



- U.S. Bureau of Industry and Security (BIS)
- U.S. Census Bureau
- U.S. Customs and Border Protection (CBP)
- Office of Foreign Assets Control (OFAC)
- U.S. Immigration and Customs Enforcement (ICE)

BIS Press Release



Parker Hannifin Corp. Settles Charges Pertaining To Illegal Exports To Taiwan And China

The U.S. Department of Commerce today announced that Parker Hannifin Corporation of Cleveland, Ohio, has agreed to pay **\$185,000 in civil penalties** to settle charges pertaining to unlicensed exports of fluid control valves to Taiwan and China in violation of the Export Administration Regulations (EAR). The Commerce Department's Bureau of Industry and Security (BIS) charged that, between September 2000 and June 2002, Parker Hannifin committed 53 violations of the EAR. Specifically, BIS charged that Parker Hannifin committed **17 violations by exporting check valves to Taiwan without the required licenses, 17 violations by transferring the check valves to Taiwan with knowledge that violations of the EAR were occurring, one violation by exporting manual stop cock valves to China without the required licenses, and 18 violations by making false statements on Shipper's Export Declarations filed with the U.S. Government.** Parker Hannifin voluntarily self-disclosed the violations, and cooperated fully in the investigation. Parties who may have been involved in violations of the EAR are encouraged to submit a Voluntary Self Disclosure (VSD) to BIS' Office of Export Enforcement, as provided for in Part 764.5 of the EAR. VSDs are an important indicator of parties' intent to bring themselves into compliance with the EAR, and may provide important BIS important information on illicit proliferation networks. A VSD is considered a 'great weight' mitigating factor in the settlement of BIS administrative cases.





EXPORT COMPLIANCE: SOME BASICS

Export Compliance



- Part of Overall Compliance Program
- Upper Management “Buy-in”
- Risk Management Tool
- Cost Savings

U.S. Export Controls



BIS implements and enforces

Export Administration Regulations (EAR) –
15 CFR Parts 730- 774

Govern export and re-export of commercial goods, services, and technologies

“Dual-use” items – commercial and military purpose

Purely commercial items

U.S. Export Controls - continued

Some General Prohibitions:

1. Controlled U.S. item to a prohibited country without export license or license exception
2. Denied Parties
3. Prohibited End Users or End Uses
4. Embargoed countries – who does U.S. have trouble with? Humanitarian aid requires license

U.S. Export Controls - continued



Key terms and lists to know:

Export Control Classification Number (ECCN)

Commerce Control List (CCL) – if not listed → EAR99

CAVEAT: EAR99 item shipped to Syria may require license

Commerce Country Chart

U.S. Export Controls - continued



Entity List – proliferators (EAR Part 774, Supplement 4) – “*Exhibit A*”

China, India, Israel, Pakistan, Russia, Syria

The Unverified List – BIS could not complete a check on end-use

This is a “red flag”

Red Flags



13 Red Flag Indicators

www.bis.doc.gov/Enforcement/redflags.htm

Customer/address is similar to one on Denied Persons List

Reluctance to give information about end-use

Willingness to pay cash for expensive items

Shipping route is unusual for product and destination

Office of Foreign Asset Control (OFAC)



What does it do?

Administers and enforces sanction programs against foreign countries, terrorists, narco-traffickers, and WMD proliferators

Focuses on money – front companies, banks, drug traffickers

Office of Foreign Asset Control (OFAC) - continued

Maintains Specially Designated Nationals
and Blocked Persons (SDN) List

ABSOLUTE PROHIBITION – CANNOT
export anything to these parties

www.treas.gov/offices/enforcement/ofac

Exhibits B and C

"Deemed Export" Rule



Technology or source code is "deemed" to be exported when it is **released** to a foreign national **within** the U.S.

"Technology" is specific information needed to **develop, produce or use** a product

FAQ's:

www.bis.doc.gov/DeemedExports/DeemedExportsFAQs.html#1

“Deemed Export” Rule - continued



“**Release**” – technology is made available to a foreign national:

For **visual inspection** – reading technical specifications, blueprints, drawings, plans;

Oral exchange; or

By **practice or application** under guidance of those with knowledge

“Deemed Export” Rule - continued



Export license required if:

Not EAR99;

License exception is not available;

U.S. party intends to transfer controlled technology in the U.S.; and

Transfer of technology to foreign national's home country would require export license – Pakistani national with legal permanent residency status in Canada

Anti-Boycott Regulations (15 CFR 760 *et seq.*)



Cannot support boycott of Israel - *Exhibit D*

Must report requests - *Exhibit E*

Caveat: Not limited to Middle East

China, India, Indonesia, Malaysia, Taiwan

Office of Antiboycott Compliance

www.bis.doc.gov/antiboycottcompliance/Default.htm

Foreign Corrupt Practices Act



Criminal statute - Anti-bribery and Record-keeping provisions (15 U.S.C. §§78dd-1, *et seq.*)

In general applies to:

publicly-traded (domestic and foreign) and private parties; companies and individuals including foreign nationals in the U.S. and U.S. persons abroad and U.S. and foreign agents

Need written compliance policy, training, include confirmation by foreign agents, etc.

Foreign Corrupt Practices Act - continued



Very generally, prohibits parties from:

making or offering to make corrupt payments of value (money, gifts, etc.) to foreign officials or political parties for the purpose of obtaining or retaining business –
corrupt intent

Q: What about officials of state-owned companies?

Can form basis for civil RICO case!!

Foreign Corrupt Practices Act - continued



Main Exception –

“Facilitating Payment” aka “grease” payment

Payment made to facilitate or expedite “routine government action” - utility service; load/unload cargo; inspections

DOJ FCPA Guide

www.usdoj.gov/criminal/fraud/fcpa/dojdocb.htm



OVERVIEW OF INTERNATIONAL COMMERCIAL AGREEMENT PROVISIONS

Payment Terms



Be specific and clear when and where payment is due and in what funds

USD, €, £, ¥, CAD, AUD

For sales to Europe, if customer has weak financials think about retention of title (ROT) clause - gives priority in insolvency

“All monies” clause - Title passes only when customer pays invoices on all goods sold or agreed to sell

Payment Terms - continued



Carefully negotiate, review and understand all payment terms, including L/C terms -

1. consistency with contract, pro forma invoice, etc. terms;
2. avoid subjective factors - payment upon issuance of certificate of completion

INCOTERMS 2000

Transaction terms setting out costs, responsibilities, risk of buyer and seller

**DO NOT DEAL WITH TITLE TRANSFER
OR REMEDIES FOR BREACH!**

INCOTERMS 2000 - continued



Avoid EXW – easy sale, but lose control of products and potential greatest export compliance liability risk

Know your customer

Know end-user and end-use

INCOTERMS 2000 - continued



- Recommended read:

Incoterms for Americans (Fully Revised for Incoterms 2000) by Frank Reynolds

International Projects, Inc.

POB 352650

Toledo, OH 43635-2650

T: 419.865.6201

F: 419.865.0954

Email: fjr424@aol.com

Force Majeure



NY Law: contract provision that excuses non-performance when circumstances beyond the control of the parties prevent performance.

Force Majeure - continued



No party shall be liable for any failure to perform its obligations arising out of or in connection with this Agreement, if such failure results from any Act of God, riot, war, civil unrest, flood, earthquake, or other cause beyond such party's reasonable control ...

No party shall be liable, in respect to any delay in performance of its obligations under this Agreement, directly or indirectly, resulting from delays by Acts of God; acts of the public enemy; strikes; lockouts; epidemic; riots; power failure; water shortage or adverse weather conditions; or other causes beyond the reasonable control of the parties.

Force Majeure - continued



Must give notice – look to requirements of agreement

Must be beyond reasonable control – was any part of delay caused by party declaring *force majeure*?

Parties resume performance once force majeure passes

Arbitration Clauses



Use ADR in international trade to:

Simplify and add certainty to dispute resolution

Reduce time and costs

Retain privacy of dispute

Increase enforceability of arbitration award –

New York Convention on the Recognition and
Enforcement of Foreign Arbitral Awards
(New York Convention)

Arbitration Clauses - continued



AAA - International Centre for Dispute Resolution (ICDR) –
www.adr.org

Hong Kong International Arbitration Centre – www.hkiac.org

International Chamber of Commerce (ICC) – www.iccwbo.org

London Court of International Arbitration (LCIA) –
www.lcia-arbitration.com

International Centre for Settlement of Investment Disputes (ICSID)
www.worldbank.org/icsid/index/index.html

Arbitration Clauses - continued



From ICDR:

“Any controversy or claim arising out of or relating to this contract shall be determined by arbitration in accordance with the International Arbitration Rules of the International Centre for Dispute Resolution”

Arbitration Clauses - continued



Arbitration body and applicable rules; discovery

Location

Language

Number of arbitrators and qualifications; how selected or appointed

What law governs? – **SPELL IT OUT! DO NOT SPEND MONEY ON LAWYERS FIGHTING OVER THIS ISSUE**

Arbitration Clauses - continued

Equitable power – injunction; continue to perform

Currency; allowable damages and interest

Waiver of sovereign immunity

Award of fees and costs to prevailing party

Confidentiality

Time to conclude arbitration



A Final Thought ...

Destination Control (Anti-diversion) Statement



Required on commercial invoice and BOL or air waybill – 15 CFR §758.6

“These commodities, technology, or software, were exported from the United States in accordance with the Export Administration Regulations. Diversion contrary to U.S. law is prohibited.”

Generally not required for shipments to CA

Contact



Jon P. Yormick

Managing Attorney
Yormick & Associates

Buffalo

300 International Drive
Suite 100
Buffalo, New York 14221 USA
T: 1.716.626.3416
F: 1.716.626.3001
Mobile: 1.216.269.5138
Email: jon@yormicklaw.com

Cleveland

Key Tower – 52nd Floor
Cleveland, Ohio 44114 USA
T: 1.216.928.3474
F: 1.216.566.0857
Mobile: 1.216.269.5138
Email: jon@yormicklaw.com

