Legal Issues to Consider When Exporting

The principle that “ignorance of the law is no excuse” holds true universally, meaning advice should be sought before costly legal mistakes are made in export markets. Areas where contentious issues arise include; appointing an agent, export control legislation and intellectual property. Inserting a simple arbitration clause in your contract could pay huge dividends in dispute resolution.
**Appointing an agent**

If you are appointing local agents or distributors, it is important to understand the legal difference between the two. Critically, with agents, the title to goods does not pass to them during a sale, meaning, if the customer doesn’t pay, it is the principal (you - the exporting company) who bears the loss. In contrast, a distributor who purchases goods from you and resells them will bear the loss if their customer doesn’t pay.

When appointing an agent, it is important to seek advice about the legal protections you both enjoy and to make sure your agreement protects your position to the fullest degree possible.

It is advisable to record the rights and duties of both parties clearly in a written agreement to avoid misunderstandings and minimise the risk of costly disputes later.

An agreement should list the goods and/or services in relation to which the agent is being appointed and should permit you, as the principal, to update this list.

Note that, under Irish law, a contract with a commercial agent is not valid unless it is evidenced in writing and your agreement should state that Irish law is the governing law. However, as some local laws may apply automatically to the contract, it is advisable to seek local legal advice where possible.

**Export Control legislation**

Export Control legislation centres on ‘dual-use’ items – goods that may be used for civilian or military purposes, and includes certain equipment, software, aviation and aerospace systems, chemicals and pharmaceuticals as well as support services including R&D work. It also covers intangible exports (e.g. faxes, e-mails, web downloads and, in certain cases, telephone conversations).

If you are involved in ‘state of the art’ R&D, you should be aware of the control status of your work and be aware that sharing it with colleagues abroad may need to be licensed by the relevant authorities.
To determine if an exported item (tangible or intangible) is subject to Export Control legislation, assess the following:

- What is my product?
- Where is it being exported to?
- Who is the end-user?
- What is the end-use?
- Are there any other risks or considerations which need to be taken into account?

Irish customs authorities have powers to carry out audits and to enforce Export Control legislation for items exported from Ireland. Penalties for non-compliance include fines of up to €10 million and/or up to five years imprisonment on indictment.

If you export US-origin products or technology, or if your suppliers are a foreign affiliate or subsidiary of a US company, you need to ensure you are complying with US re-export control legislation.

**Intellectual property (IP)**

Exporters need to plan appropriately in relation to IP, both to protect their own IP and to avoid running foul of the IP rights of others.

In addition to the obvious security benefits of having a robust IP policy, managing it carefully can bring a number of positives to your business:

- Reviewing the IP of competitors can provide competitive intelligence; for example, early identification of a competitor’s next move.
- Reviewing the patents of others can avoid time being wasted re-inventing the wheel.
- Potential collaborators can be identified through IP searching. Licensees or technological solutions to problems may be identified.
- A good IP strategy can be crucial in attracting investment.
- A ‘qualifying patent’ may attract tax relief.

Major IP pitfalls to avoid include:

- Not registering trademarks;
- Assuming that a .com domain name or Companies’ Office registration gives protection equal to that provided by trade mark protection;
- Failing to appreciate the extent to which international business depends on IP;
• Trying to patent protect a product after it has been launched on the market;
• Not registering designs;
• Not planning for IP creation and, thus, encountering disputed ownership of IP
• from employees or outside developers asked to make a specific contribution to a project;
• Running blindly into problems with the IP of others;
• Not budgeting for registration of IP.

Arbitration

The Arbitration Act 2010 puts Ireland in the first-division of countries that have a recognisable and internationally accepted code of international arbitration law.

In contrast to Irish court orders, which may be difficult and costly to enforce in non-EU countries, an international arbitral award granted in one country can be enforced in another country with relative ease. Including a suitably-worded arbitration clause in your standard form terms and conditions is, therefore, a simple way of improving your company’s prospects of getting paid. The clause should provide for Irish law to be the substantive law of the arbitration.

Bear in mind courts have very little power to intervene in arbitrations and arbitrators have been given an increased array of powers, so it is critically important that the most appropriate person is appointed as arbitrator. Professional bodies will assist with this.

It is best practice to get an agreement on costs before any dispute develops and be aware that agreement on costs will be enforceable.

"Best practice suggests that traders should implement a comprehensive "Export Management System" or "Internal Compliance Programme", which documents export compliance processes and procedures"

John O’Loughlin, Consultant, Customs & International Trade, PwC