CHAPTER 4
SELLING GOODS IN THE UNITED STATES
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International trade in goods continues to grow. In 2013, United States imports with the rest of the world totaled almost $3.88 trillion. In 2014, that same figure increased to over $4 trillion. The most common way for a business from abroad to enter the U.S. market is to start simply, with sales of goods to one or more parties in the U.S. Sometimes the sales will be made by the foreign business on its own, dealing directly with the buyer. Sometimes they will be made with the help of an agent. Sometimes these sales will be to a distributor or franchisee who, in turn, will handle all subsequent sales. There is no single, best approach. Foreign businesses choose a variety of approaches, depending on their experience, resources, needs, and objectives. Regardless of the chosen approach, foreign businesses that sell goods in the U.S. are likely to encounter a variety of legal and regulatory matters.

1. SPOT CONTRACTS

Frequently, a seller from abroad will first begin business in the U.S. by selling its goods on its own, directly to a customer. This scenario typically occurs when there is a demand for the goods in the U.S. and the foreign seller wants to respond to that demand. The foreign seller receives an inquiry about its goods and responds, the parties agree to terms, and the sale is made. This process gives the seller a chance to get acquainted with its customers. Without a lot of up-front investment, the seller learns how easy or difficult it likely is to sell its goods in the U.S. Depending on how these initial sales go, the foreign seller may later want to consider investing in longer-term sales arrangements.

These spot sales may be documented or oral. They may involve telephone solicitations, the Internet, catalog or other mail orders. Or they may involve direct contact between two businesses via the telephone or written communications. Whatever the process, the agreement reached is generally governed by basic contract law.[1]

Even if "basic contract law" governs, however, an important issue is which country or state's law will apply. The seller from abroad may prefer to set up the transaction so its local law applies. That way, the seller is familiar with the applicable law and avoids misunderstanding about the terms of its sale. If the transaction is not set up in that manner, or if the parties do not specify what law governs, then the laws of the jurisdiction where the
U.S. purchaser resides may apply. Because the U.S. is a signatory to the United Nations Convention on Contracts for the International Sale of Goods ("CISG"), and many other

[1] To the extent consumers are involved on the U.S. side of the transaction, special rules or laws may apply. Similarly telephone solicitations are subject to special rules, as are Internet sales transactions. Likewise, some states have special laws that may govern sales of particular types of goods. For example, if a sale is viewed as a sale or lease of a product or equipment, which is sold or leased to enable the purchaser/lessor to start a business in Washington State, then it may be subject to the Washington Business Opportunity Fraud Act.

countries are too, it is also possible that CISG will apply unless the parties expressly opt out of it as the governing law.

If the law in the U.S. purchaser's place of residence applies, because the parties have expressly elected to have such law apply, typically state law will govern the sale. Many states have adopted a version of the Uniform Commercial Code ("UCC"), which generally applies to any contract for the sale of goods over $500.

The UCC (and CISG, when it applies) primarily serves to fill in gaps the parties have not completely addressed in their agreement. Businesses wishing to avoid uncertainty should therefore be as specific and thorough as possible in writing up their agreement. Otherwise their intent will be determined from the terms of the agreement, their conduct, customs and practices in the industry, and applicable laws. The UCC (and CISG, if applicable) also allows the parties to agree on just about any terms they choose. Still, there are exceptions. For example, the UCC places restrictions on "unconscionable" and unlawful contracts and limits warranty disclaimers.

Certain rules under the UCC or CISG may be preferred in a particular transaction. For example, under the UCC, an offer and acceptance may vary in terms and the parties may still have created a contract. Under CISG, the offer and acceptance must essentially mirror one another. For a seller making frequent offers, the CISG may be preferred, because it would reduce the risk that a counter proposal by the buyer would become binding without acceptance by the seller. Another difference is that the UCC requires a written agreement, the CISG does not. Although under the UCC, this general rule has exceptions; the UCC may be preferred if a contracting seller or buyer wants to ensure that it is not bound by an unwritten agreement. The UCC also has slightly narrower rules about permitting the use of evidence outside the agreement itself to decide on a contract's terms.

2. DEALERS AND DISTRIBUTORS

Once sales increase, a foreign business will often look for someone in the U.S. to conduct market research, handle sales, and provide customer support. This local contact can take several forms. If the foreign business wants to avoid conducting business in the U.S. and minimize market risks, it may choose to enter into a dealer, franchise or distribution arrangement. In essence, in these arrangements, the seller sells its goods to the U.S. dealer, franchisee or distributor (the buyer), with that buyer then working out the terms of any subsequent sale. Title to the goods transfers to the U.S. buyer before they are resold, creating two separate sales transactions.

The sales terms for such transactions between the foreign seller and the U.S. dealer, franchisee or distributor, may be included in separate purchase orders or in a distribution agreement. They may be oral or written and can involve telephone communications, e-mail correspondence, order forms, or negotiated contracts. They may be governed by the UCC, foreign laws or other relevant laws, unless the parties designate the governing law. Whatever form the sales terms take, foreign sellers conducting cross-border sales, when

the risk of inadvertent misunderstanding is high, can avoid misunderstandings by carefully and fully specifying in a written contract the sales terms.

A distribution agreement typically will include terms governing the way the two parties will work together to build sales of the goods of the foreign business in the U.S. The distributor will have its own separate sales contracts with its customers.

The main advantage for a foreign seller in this type of distribution arrangement is that the U.S. distributor, franchisee or dealer has to handle its own customer relationships, including credit decisions and risk and customer service issues. One disadvantage is that the foreign seller has only limited contact with the ultimate customer and cannot generally control pricing and many other terms of the ultimate sales. Absent carefully drafted agreements that allow access to customer information but do not violate antitrust or privacy laws, the foreign seller may have difficulty gathering market data, or analysis about customers' preferences and issues. Still, a distributorship arrangement is commonly used by foreign sellers who want to reduce risk, and to believe that a local U.S. company will have greater knowledge of the market, and can best handle local issues related to sales of their goods.

It is also fairly common for a foreign business to form a subsidiary or to set up a joint venture with a local U.S. company and appoint that subsidiary or joint venture to serve as the distributor. This arrangement gives the foreign company some ability to influence the decisions made and policies adopted by the distributor in marketing, sales, and service. The arrangement also limits risks to the foreign business. If the subsidiary or joint venture entity is formed and maintained properly, U.S. courts are not likely to look to the business abroad to cover risks assumed by the distributor. (A manufacturer will still have risk under products liability law, a subject covered separately elsewhere, but will not have the same exposure for other liabilities and issues assumed by the U.S. entity.)

3. AGENTS, SALES REPRESENTATIVES AND MANUFACTURER'S REPRESENTATIVES

When a foreign seller wants more direct control over relationships with its customers, it may adopt a strategy of hiring an agent, sales representative, or manufacturer's representative to assist with sales and identify sales opportunities. In these arrangements, the foreign seller is the party making the sale to a customer (whether a wholesale or retail customer). The agent merely assists, and in turn, recevies a commission. The agent never takes title to the goods.

The terms of such an arrangement are typically set out in an agency or representative agreement. This agreement will generally describe particulars like what the agent must do to receive a commission, when the commission will be paid, what territory the agent is expected to cover, and when and how either party may cancel the arrangement.

An advantage of this arrangement is that the foreign seller may set the price and terms of the transaction with the customer. The foreign seller also knows who its customers are and directly handles customer service issues.

A disadvantage of this arrangement is that the foreign seller assumes all the credit risk for these transactions. Although agents are typically expected to assist with collection issues, the foreign seller will bear the loss if the customer does not pay. Also, the foreign seller can sometimes face risk of liability for the conduct of its agents. An agent is viewed under the law as acting for the principal, the foreign seller, at least within the scope of the agent's authority. If the agent's conduct turns out to be unlawful, it is possible that the foreign company will be held accountable, or at least, subject to claims for that conduct. There are ways to limit this risk; for example, by defining the authority of the agent in clear terms and imposing on the agent an obligation to indemnify the foreign seller if the seller faces such claims. Still, with the benefit of greater control comes the risk of increased responsibility.

If the agency approach is chosen, the foreign seller must ensure that the terms of its sales transactions with customers are clear, much as they would be if the seller were conducting the sale without the agent. These terms will be established by the contract formed between the seller and the customer. As discussed above, such a contract can be oral or written and can involve telephone communications, e-mail correspondence, order forms, or negotiated contracts. It may be governed by the UCC, the CISG, the laws of the country where the seller conducts business, or other relevant laws, unless the parties designate the governing law. Whatever form the contract takes, foreign sellers wishing to avoid misunderstanding should carefully and fully include in a written contract the terms of its sales.

4. CUSTOMS LAW

In selling goods into the U.S., a seller from abroad must consider a variety of legal issues. One that must be addressed every time is customs compliance.

A. Basic Customs System

With very few exceptions, all goods imported into the U.S. must be declared with the U.S. Customs and Border Protection of the Department of Homeland Security ("CBP"). CBP is one of the oldest federal agencies, dating back to 1789. Importers of goods must consider four core legal requirements of importing into the U.S.: (1) admissibility and the entry process; (2) tariff classification; (3) valuation; and (4) country of origin.

(1) <u>Status of Entry</u>.

Merchandise imported into the U.S. is not subject to duty until it is officially "entered" for consumption by the importer of record. All imports must be covered by an import bond and may be inspected by CBP. Any duty paid at the time of entry is only an estimate and not a final assessment of duties owed. There are a number of methods to delay or avoid the entry for consumption and thus either avoid or substantially reduce

duty. Merchandise entered into a customs bonded warehouse, a foreign trade zone, or for special purposes may be entered free of duty or with duty deferred.

(2) Tariff Classification.

Imported goods are subject to duties under the Harmonized Tariff Schedule ("HTS") of the U.S. The HTS tariff classification of a good will dictate the applicable rate of duty applied to that product upon importation into the U.S. Duties vary with the type of merchandise, its value, its origin, and other factors. Penalties for violating customs laws or procedures can be substantial. The HTS classification also determines whether the product is eligible for special tariff preferences, such as duty free treatment or other preference programs. Most countries have a similar classification schedule.

The merchandise classification system is like a pyramid, beginning with 22 Sections, such as vegetable, textiles, vehicles, and so forth, then proceeding to 99 Chapters, with articles such as tin items, aircraft, furniture, and so on. Within each Chapter, Headings are further organized by level of processing or by function or use. Subheadings further define products into various categories.

This classification system is subject to nationally and internationally promulgated rules of interpretation. The vast majority of rulings issued by CBP deal with classification questions. Many rulings are on the Internet at http://rulings.cbp.gov.

The classification determined by CBP may have a significant effect on the rate of duty applied. One area in which classification is particularly significant is the treatment of merchandise as finished or unassembled. Certain items may fall under different tariff rates, may be under a quota, or may be subject to dumping duties, depending on whether the item is a component or completed article.

(2) Valuation.

Valuation under customs laws can be very complex. The U.S. laws implement the WTO Valuation Agreement. Proper customs valuation is important because most duty rates are based on a percentage of the value of an imported product, and total duty payments are thus determined by multiplying the applicable duty rate by the products customs value. Under customs valuation law, there are six methods of appraisement, which are applied in hierarchal order: (1) transaction value; (2) transaction value of identical merchandise; (3) transaction value of similar merchandise; (4) deductive value; (5) computed value; and (6) the "fallback" method.

The preferred method is the transaction value, which is the price paid or payable by the buyer to the seller for the imported product. Under the transaction value, the price paid by the buyer includes the packing costs and selling commission incurred by the buyer, any assistance by the buyer to the seller, royalty or license fee that the buyer is

required to pay and any proceeds from any subsequent resale, disposal or use of the imported merchandise that accrue to the seller.

(3) Country of Origin.

Determining a product's country of origin may be easy in some cases, but in others, it may be complex. For example, when parts of a product are manufactured in different countries and then assembled in yet another country, it can be difficult to determine what is the country of origin for customs purposes. For example, parts made in Japan and assembled in Mexico for export to the U.S. may be subject to considerably lower tariffs if the country of origin is Mexico rather than Japan. The traditional rule used by CBP focuses on whether the processes in a particular country constitute a "substantial transformation," changing an existing product into a "new and different product."

In addition, there are different country of origin rules for determining the origin of a product for purposes of confirming whether that product qualifies for a reduced duties under a tariff preference program (e.g., GSP, NAFTA, DR-CAFTA), and for determining the origin of a product for purposes of confirming how that product must be marked upon importation into the U.S. Certain goods, such as those from Canada, Mexico, Israel, some third world countries, and certain other countries may be eligible for reduced duties. Most countries qualify for normal duties as a "most favored nation." Goods from countries not considered "most favored nations" are subject to increased duties. The country of origin also affects such things as the application of dumping or quota rules.

B. Compliance and Penalties.

Given the potential penalties involved for violating customs rules, foreign companies with established importing businesses in the U.S. need to understand their obligations and resolve any customs issues before, rather than after, importing the goods.

The Customs Modernization Act introduced the concept of "reasonable care" into the making of customs declarations and thus shifted the burden of compliance onto the importer. Legal responsibility for correctly classifying and valuing goods is entirely upon the importer instead of CBP, as it was before. The importer must do more than simply rely on a customs broker to enter goods. The importer must be able to demonstrate that it conducts in-house training and formal compliance review on a regular basis, and that it has written procedures for how the importer complies with its legal duty of reasonable care.

Rather than waiting at the border for CBP to clear the shipment and make the classification and valuation, imported goods are entered typically without CBP inspection. CBP, under the concept of "informed compliance," examines documents on a post-entry basis to ensure compliance with customs requirements. Therefore CBP relies on extensive audits after entry, and requires the importer to check with experts before entry rather than holding up entry. Greater security requirements have

caused an increase of inspections for security purposes, even as inspections for regulatory compliance have been reduced.

Failure to comply with customs laws, including merely negligent failures, can result in penalties, including liquidated damages, seizures, or civil penalties. Liquidated damages typically result when (a) merchandise is recalled by CBP (under a Notice of Redelivery), (b) the merchandise is not redelivered within the required time, and (c) the delay is not discussed or resolved with CBP. The damages are typically equal to the value of the goods not delivered and are assessed against the bond filed at the time the goods were imported. Liquidated damages are often assessed for such things as failure to properly mark the country of origin, pirated copyright merchandise, counterfeit merchandise, quotas, or enforcement by CBP of the laws of other federal agencies (such as the Food and Drug Administration).

CBP can seize goods introduced into the U.S. contrary to law. Seizures are normally handled administratively with the filing of a petition for remission. Typically, remission requires removal of the problem that caused the seizure, if possible, or exportation of the goods if the problem cannot be corrected. Usually, storage and related costs must be paid. Again, CBP has published guidelines for remission of seizure, which must be followed carefully.

Most civil penalties are assessed under Section 592 of the Tariff Act of 1930, as amended. These provisions allow CBP to assess penalties for the fraudulent, grossly negligent, or negligent entry or introduction of goods into the U.S. by means of any document, written or oral statement, or other means, that is material and false or any omission that is material. The maximum penalties that can be imposed depend upon the degree of culpability. In addition, the penalties can be reduced markedly by making a voluntary disclosure. If you discover a problem with a customs entry, it is far better to disclose it than to wait for CBP to discover it.

C. Security Issues

Following 9/11, an increased focus on security has caused the U.S. to devote more resources to ensuring that imports entering into the U.S. do not pose security risks. As a part of these efforts, CBP put into place three significant security programs—the Container Security Initiative (CSI), the Importer Security Filing and Additional Carrier Requirements (ISF, also known as “10+2”), and the Customs-Trade Partnership Against Terrorism (C-TPAT). CSI is a government inspection program aimed at identifying and pre-screening high risk shipping containers at ports outside of the U.S., which does not place any compliance requirements on individuals shipping goods or importing goods into the U.S. The other two programs are summarized below.

ISF

ISF or as is commonly known "10+2" requires certain cargo information to be electronically transmitted to CBP at least 24 hours before goods are loaded onto an ocean vessel for shipment to the U.S. The information required includes elements such as the manufacturer or supplier's name and address, the country of origin, name and address of the seller and the buyer, the location where the goods are consolidated into shipping containers, and the goods' Harmonized Tariff Code. Importers who fail to comply with the ISF program requirements can face fines up to $5,000 for each violation. In addition, if goods for which an ISF has not been filed arrive in the U.S., CBP may: (1) withhold the release or transfer of the cargo; (2) refuse to grant a permit to unlade for the merchandise; and (3) if such cargo is unladen without permission, it may be subject to seizure.

While some importers file this information themselves, most have this service performed for them through their freight forwarder or customs broker. Foreign companies doing business in the U.S. should be aware of these requirements and ensure either that the freight forwarders or customs brokers they rely on provide this compliance service, or that the company itself has a program in place to comply with these requirements applicable to all imports. Foreign companies exporting goods to
U.S. importers should be aware of this program, as the U.S. importer may need the foreign exporter to provide relevant information.

C-TPAT

C-TPAT is a voluntary program in which CBP partners with various importers and transportation services providers in the U.S. to improve security while minimizing the burden on U.S. trade. Should a U.S. company elect to participate in the C-TPAT program, CBP works with the company to ensure that its supply chain meets certain security criteria. This process involves demonstrating that the company, as well as the foreign suppliers and transportation service providers it relies on, have adequate security practices in place to ensure that security is maintained from the point of origin through import to the U.S.

Certified participants in the program are eligible for benefits such as expedited and reduced security examinations of the goods they import. Given the significant increase in security examinations since 2001, foreign companies located in the U.S. may want to consider participating in the C-TPAT program, because it can reduce the time and risk associated with security examinations.

Companies abroad exporting to the U.S. should be aware that CBP currently has in place a mutual recognition arrangement with some similar programs abroad. The goal of this collaboration is to help expedite U.S. entry of goods from participating companies abroad. However, some questions have arisen in implementing the mutual recognition program, so foreign companies exporting to the U.S. should enquire about the current status of any such coordination effort when considering whether to participate in such a program.

D. Other Federal Agencies

Food Security Requirements

In addition to customs requirements, the U.S. Food and Drug Administration ("FDA") has regulations on importation of food and related material intended to ensure the security of the U.S. food supply, based on such legislative authority as the Bioterrorism Act of 2002.

These regulations require registration of foreign facilities that manufacture, process or pack food for export to the U.S. For example, a foreign company that processes and packs rice that it wishes to export to the U.S. would be required to register with the FDA through an online registration form. The registration form asks general questions about the type of food being processed, and the type of processing that occurs at the facility, as well as information about company and facility names and addresses. Information on FDA facility registration requirements is at:
http://www.fda.gov/Food/GuidanceRegulation/FoodFacilityRegistration/default.h tm

In addition, these regulations require prior notice of the shipment of food into the U.S. These require that notice of a food shipment be provided electronically either through CBP's Automated Broker Interface or FDA's Prior Notice System Interface. Information on the requirements to give prior notice of shipments can be provided by any person with knowledge of the required information, including an importer or a customs broker. Further information on these prior notice requirements can be found at the following website: http://www.fda.gov/Food/GuidanceComplianceRegulatoryInformation/PriorNoticeofImportedFoods/default.htm

These security requirements are in addition to the FDA's general food safety requirements which regulate the manufacturing, processing and labeling of food, including imported food. Information about FDA food import requirements can be found here: http://www.fda.gov/Food/InternationalActivities/Imports/default.htm.

Other Agencies

In addition, products imported to the U.S. are subject to the same product safety standards generally applicable to U.S. products. These standards are overseen by the Consumer Product Safety Commission ("CPSC"). In reaction to several highly publicized incidents regarding imports of unsafe or tainted products, and pursuant to requirements of the Consumer Product Safety Improvement Act of 2008, CPSC has been working increasingly closely with CBP to ensure that imported products meet safety standards. Frequently, products deemed not to meet safety standards (for example, due to high lead content) are seized by CBP at the port of entry. Information about consumer product safety requirements can be found here: http://www.cpsc.gov/businfo/smbus.html.

CBP also collaborates with the U.S. Department of Agriculture to enforce regulations governing the imports of plant and animal products. These include, for example, requirements that must be met to import fruits and vegetables and plants and seeds for planting purposes. They generally require a permit prior to import. For more information on regulations governing imports of plant and animal products see: http://www.aphis.usda.gov/import_export/index.shtml.

In addition to the above agencies, CBP works closely with the Department of Transportation as imported motor vehicles are subject to U.S. safety standards, the Environmental Protection Agency regarding the importation of waste materials into the U.S., and the Federal Trade Commission in the enforcement of labeling laws in the U.S.

5. ANTIDUMPING LAW

Another area of law that must be considered by a seller from abroad wanting to sell goods in the U.S. is the country's antidumping laws. "Dumping" is an unfair trade practice. It occurs when a foreign business sells goods in the U.S. at a price lower than the price it charges for a comparable product in its domestic market or in a third country, or when it sells its goods at a price below the cost of production and the imports cause material injury or threat of material injury to a U.S. industry. Sometimes a seller will do this intentionally to expand market share and reduce competition. But dumping also can occur inadvertently due to a seller's lack of awareness of the way the law determines what "dumping" is and what it is not. Japanese and Chinese companies have been frequent targets of antidumping cases. Hence, they need to be particularly vigilant in avoiding liability in this area.

Antidumping laws are strictly enforced in the U.S. The U.S. Commerce Department (the "DOC") is the agency that initially conducts antidumping investigations. Any business faced with a dumping investigation must be prepared to respond promptly and accurately if they want to have any chance of avoiding high dumping duties. If the DOC finds that dumping has occurred and the U.S. International Trade Commission ("ITC") finds that the imports have caused material injury or threat of material injury to a U.S. industry, the DOC will issue an antidumping order, imposing additional duties on goods subject to that order. Antidumping orders can stay in place for 5 to 30 years.

Defending oneself in an antidumping investigation can be costly and time-consuming. Moreover, because the U.S. government will typically require some continued monitoring of a dumping business' activities, the burden and expense may continue for many years. Some general planning and understanding of U.S. antidumping laws can help avoid these problems from the outset.

For more questions, please feel free to contact Sara Sandford at ssandford@gsblaw.com or at 206.816.1464.