

# EXPORT 101: LEGAL ISSUES

---

ADRIAN KENDALL, ESQ.

NORMAN HANSON DETROY, LLC

AKENDALL@NHDLAW.COM

# LAWYER'S ROLE

---

- Value through Risk & Opportunity
  - Identify
  - Quantify (relative analysis)
  - Avoid/Exploit
  - Limit
  - Manage
- Ensure intentions effectively documented
- Understand and advise the decision maker

# THE CONTRACT

---

**Clarity** and **Detail** as to “material terms”:

- Description, Quantity & Price
- Payment: Currency, Methods and Triggers
- Financing & Security Interest
- Pre-shipment Inspection and Acceptance
- IP scope of use
- Exclusivity
- Gov’t Requirements
- Risk of Loss & Insurance
- Controlling Law
- Dispute Resolution

# THE CONTRACT

---

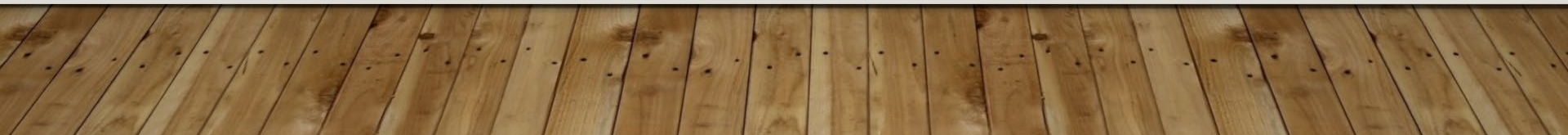
- Special provisions for events that are likely to occur or would have a material adverse effect if they did occur (even if less likely).
- Other Risk Allocations
- Termination
- Ensure overall consistency with General T&C if you use them.

# LEGAL RISK: THE ART OF COMPLIANCE

---

Avoiding and managing risk by being informed of legal compliance issues arising under US laws, laws of trading partner country, transit and delivery countries, as applicable, and taking appropriate steps to maintain compliant stance.

Eg: Export Licenses, Dual Use Licenses, FCPA, Anti Boycott Regulations, OFAC, Anti Dumping, FATCA, Tax.



# PAYMENT RISK

---

- *Risk:* Difficulty of collection in foreign nation.
- *Action:* PRIOR due diligence as to credit. Deposits. Use of letters of credit. Consult with bankers on payment vehicles.
- *Special Considerations:* Strict rules apply to letters of credit. Make sure that the documents accurately and completely meet the terms; minor defects can delay or prevent payment. Taking security? Very technical.

# CURRENCY RISK

---

- *Risk:* Currency fluctuation, exchange costs
- *Action:* Price products in US\$.
- *Special Considerations:* If the customer requires pricing in another currency, then the contract and/or pricing should deal with the issue of the risk of currency fluctuations.
- Similar issues with respect to commodity prices, especially precious metals. Use benchmark values for pricing.

# POLITICAL RISK: TARIFFS & TRADE WARS

---

- *Risk:* Unanticipated changes in tariff schemes; Quotas; Restrictions.
- *Action:* Allocate duties and tariffs through terms (INCOTERMS), draft clauses to share costs.
- *Special Considerations:* See INCOTERMS. Political risk difficult to predict. Reduced margin is better than lost customer. Review Force Majeure clauses.

# LEGAL RISK: WHICH LAW APPLIES?

---

- *Risk*: Unintended adoption of unknown terms by automatic inclusion; express terms unenforceable.
- *Action*: Choice of Law; Express disclaimer that CISG does not apply.
- *Special Considerations*: Be sure to understand how applicable laws will apply to your transaction.

# INCOTERMS: TOOL OR TRAP?

---

- *Risk:* Assigned by shorthand codes. Note latest version is 2010. Very specific.
- *Action:* Choose most applicable code carefully (EXW FCA CPT CIP DAT DAP DDP FAS FOB CFR CIF) *w/ location.*
- *Special Considerations:* Not a complete contract. Does not govern title. Get input early or make clear that local counsel review will happen before signing the deal. Buy your own reference copy!

# DISPUTE RESOLUTION

---

- *Risk:* Unfavorable location, law and language, expense.
- *Action:* Address how disputes will be handled: arbitration or court proceedings; choice of law; venue and language for proceedings.
- *Special Considerations:* How are costs shared? Attorney fees?

# DISTRIBUTORS & SALES AGENTS: KNOW THE LAW

---

- Many nations protect distributors and/or sales representatives from termination.
- Get legal advice and make sure the agreement is in writing.
- Avoid employment classification.
- Non-competition, confidentiality, post-termination payments, inventory.

# PROTECT YOUR IP

---

**Well protected IP is often of critical value**

**What is it?**

- **Patents**
- **Industrial Designs**
- **Trade- and Servicemarks**
- **Copyright**
- **Trade secrets**

# PROTECT YOUR IP

---

- Do not assume U.S. intellectual property protection translates into protection abroad. Develop an overall IP exploitation and protection strategy.
- Develop terms for licensing and subcontracting.
- Conduct due diligence on partners.
- Secure protections in key foreign markets, including defensively, especially where violations are common.
- Basic rule – counsel should review strategy and agreements relating to IP to ensure maximum protection, engaging local expertise as needed.

# PROTECT YOUR IP

---

- Know the forms of notice required in any country where the goods or services will be marketed. For example, determine whether the TM and ® symbols offer any legal protection in the target market.
- Get advice on potential liability if the goods or services infringe or are not properly trademarked/patented under the laws for that country.
- Will infringement (by or against your IP) be a breach of contract?

# CE MARKING TÜV & ISO CERTIFICATION

---

- Immediate Credibility & Increase Market Access
- Aid Regulatory Compliance
- Reduce Costs
  - CE Marking: Certification of EU Directive compliance. A MUST for importing almost all goods to the EU, EEA (NO, IS, LI) & CH.
  - TÜV: TÜV certification addresses accepted standards in addition to EU requirements, similar to UL and ANSI here. Various TÜV orgs provide ISO and CE marking certification services.
  - ISO: Over 22,300 standards for products, processes and services. E.g. 9001 = Quality Management, 20000 = Food Safety Management, 13485 = Medical Devices, 2307:2010 = Fibre Ropes

# ADDITIONAL KEY TOPICS

---

- **Foreign Corrupt Practices Act (FCPA)**
- **Office of Foreign Asset Control (OFAC)**
  - Trading With the Enemy Act
  - International Emergency Economic Powers Act
  - Anti-Terrorism and Effective Death Penalty Act
  - Foreign Narcotics Kingpin Designation Act
- **US DoC Bureau of Industry & Security**
  - Denied Persons and Entity Lists
- **Criminal & Civil Penalties**
- **Personal Data Use, Protection & Export**
- **Cybersecurity**

# FCPA

---

## Foreign Corrupt Practices Act (FCPA)

- U.S. firms doing business in foreign markets *must* be familiar with the FCPA.

### **Basic Rule:**

Unlawful to make a corrupt payment to a foreign official for the purpose of obtaining or retaining business for or with, or directing business to, any person.

**“Facilitating (a/k/a Grease) Payments”** permitted.

**Third party payments** do not insulate from liability.

# FCPA RED FLAGS

---

1. Unusual payment patterns or financial arrangements,
2. History of corruption in the country,
3. Foreign partner won't expressly agree not to take any action that would cause the U.S. firm to be in violation of the FCPA,
4. Unusually high commissions,
5. Lack of transparency in expenses and accounting records,
6. Apparent lack of qualifications or resources on the part of the joint venture partner or representative to perform the services offered, and
7. Whether the joint venture partner or representative has been recommended by an official of the potential governmental customer.

# OFFICE OF FOREIGN ASSET CONTROL

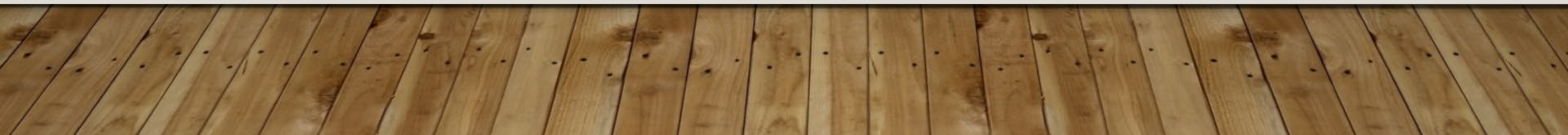
---

- OFAC administers the SDN list and a broad range of sanctions programs.
- Countries: Cuba, Iran, Libya, North Korea, Russia/Ukraine, Somalia, Syria, etc.
- Sanctions Programs: Counter-terror, counter-narcotic, cyber-related, election interference, rough diamond trade.
- Visit [treasury.gov/resource-center/](https://treasury.gov/resource-center/) for detailed information

# EXPORT COMPLIANCE: RED FLAGS

---

- The customer or its address is on the Commerce Department's [BIS'] list of denied persons.
- The customer or purchasing agent is reluctant to offer information about the end-use of the item.
- The product's capabilities do not fit the buyer's line of business.
- The item ordered is incompatible with the technical level of the country to which it is being shipped.
- The customer is willing to pay cash for a very expensive item when normally financed.
- The customer has little or no business background or is unfamiliar with the product.
- Routine installation, training, or maintenance services are declined by the customer.
- Delivery dates are vague, or deliveries are planned for out of the way destinations.
- A freight forwarding firm is listed as the product's final destination.
- The shipping route is abnormal for the product and destination.
- The buyer is evasive or unclear about whether the product is for domestic use, for export, or for re-export.



# INTERNATIONAL DATA PRIVACY

---

- Be aware that almost every nation will have its own data privacy standards and many will be stricter than here in the USA, e.g. EU's GDPR.
- Most only apply to collection of personal data, so prior knowledge may allow structure that avoids compliance requirements.

# CYBERSECURITY

---

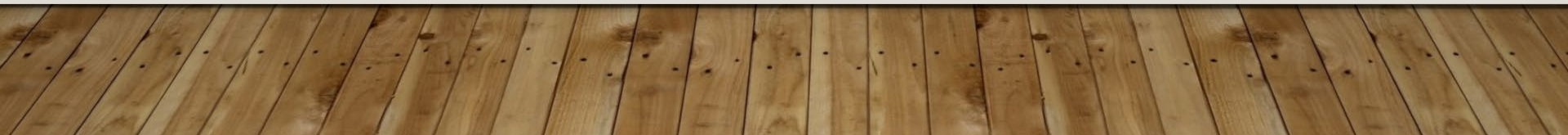
Learn to identify and educate work force on:

- Phishing
- Spear phishing
- Spoofing

Require partners to observe commercially reasonable protections of systems, networks and data from digital attack.

Have an incident response plan in place.

The human link is the weakest.



## Q&A

---

**[akendall@nhdlaw.com](mailto:akendall@nhdlaw.com)**

**Direct Dial: 207.553.4656**

**Legal analysis is highly fact specific and these materials are provided for educational purposes only.**