NOTES

THE EXPORTING PROCESS: SOME CONSIDERATIONS FOR PRACTITIONERS*

I. INTRODUCTION

In the development of a commercial enterprise, the businessman should not ignore the advantages that emanate from the establishment of international trade relationships. United States businesses have largely declined to participate in the exporting process, choosing instead to compete solely within the domestic market.[1] To that extent these businesses are "neglecting possibly lucrative markets in the developed and developing nations."[2]

Non-exporting corporations constitute the bulk of American employers. Their hiring policies affect both the level of employment in the United States and the level of income available to American consumers. "Statistics used by the Federal Reserve Board [in 1972] demonstrate that as many as 69,000 new employment opportunities would be created in the United States if new export sales brought only a $1 billion increase in the annual receipts of small and medium-sized companies."[3] An increase in exports would, therefore, bolster the domestic economy by creating more jobs in American corporations. Furthermore, expansion of exports would help in countering the recent trend toward a less favorable balance of trade for the United States.[4] With imported oil prices certain to increase in the future, efforts to improve the balance of trade are certain to take an even greater importance in the years to come.

This Note will examine the process involved in executing a typical export transaction. The emphasis will be on some of the financial aspects of the transaction and upon the logistics of moving the goods and payment for them. The exporter's concerns will be traced from the initial contact with a buyer to the post-sale arrangements that should be considered. Recognizing that there are problems peculiar to an international sales transaction, this Note will point out various measures that should be taken so as to avoid later difficulties in performance of the sale agreement.

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* The author wishes to express appreciation to Jerry T. Cook, Commercial Officer, Lummus International Sales Corporation, for his assistance.

[1] These organizations are mostly large corporations, many of which are multinational corporations. Pearson, *Fostering Export Trade by Small Business: A Legislative Proposal to Encourage the Formation of Joint Export Groups*, 13 VA. J. INT'L L. 310, 311 (1973).

[2] *Id.*

[3] *Id.* n.8. For a discussion of the effect increased export activity has on the creativity of American business, see *id.* at 310, 312.

[4] BUS. WEEK, Dec. 12, 1977, at 54.

II. FORMATION OF THE EXPORT AGREEMENT

A. *Initial Contact between Buyer and Seller*

The businessman making initial contacts in an effort to develop an international clientele should consider whether his products would be best promoted by means of agents, salesmen, foreign trade magazine advertisements, or some combination thereof. An agent will usually be a native of the area in which he works. He could be an agent for other companies that export products to his home country. The exporter should, of course, draft the agreement with his agent in such a way as to prevent him from acting as an agent for a competitor or competing products.

Salesman will typically work in more than one area and will be employed by the exporter, unlike the agent who is self-employed. To avoid potential problems in the future, the exporter and his foreign representative should formally stipulate the parameters of their relationship. The importance of this approach cannot be overestimated since the

> best way for an exporter to uncover sales opportunities is to have an aggressive sales program, preferably with overseas offices, or at least full-time sales agents, in countries of primary emphasis. This not only permits the exporter to respond to particular potential sales, but also establishes commercial relationships, provides feedback, and permits continuous evaluation of market developments. Experience under programs designed to give more U.S. firms, particularly small ones, an opportunity to compete for . . . export sales has shown the importance of local representation. In some countries 95 percent of the sales went to suppliers with local representatives.[5]

From the seller's viewpoint, magazine-initiated contacts have an easily seen drawback; unless the potential buyer acts there is no contact and, hence, no sale.

Another area in which the practitioner and the businessman should be aware of potential problems is the possibility of questionable payments made abroad by United States exporters. Foreign affiliates of American companies can be held liable for violations of the Sherman Act[6] even though the acts were allowed by the laws of the foreign country, unless the foreign law *required* the acts to be performed.[7] Questionable payments abroad include, *inter alia*, payments to speed up governmental services and false brokerage fees, paid the broker in addition to his standard fees and passed on by him in some prohibited form or for prohibited purposes. Section 2(c) of the Clayton Act[8] "was enacted specifically to outlaw ar-

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[5] Mullen, *Export Promotion: Legal and Structural Limitations on a Broad United States Commitment*, 7 LAW & POL'Y INT'L BUS. 57, 62 (1975).

[6] 15 U.S.C. §§ 1-7 (Supp. V 1975).

[7] Maechling, *Uncle Sam's Long Arm*, 63 A.B.A.J. 372, 374 (1977).

[8] 15 U.S.C. §§ 12-27 (Supp. V 1975).

rangements where buyers exacted price concessions disguised as brokerage commissions to their agents or to themselves."[9]

The Clayton Act and the Robinson-Patman Act[10] have international implications that can arise as a result of overseas payments.[11] Additionally, "any violation of the Clayton Act is also a violation of § 5 of the Federal Trade Commission Act."[12] Such payments abroad can subject the paying company to action by the Justice Department or the Federal Trade Commission.[13] Additionally, under recent court decisions, a company guilty of such payments may be subjected to civil action, under the proper conditions, by competing and noncompeting American firms operating in the same geographic area as well as by the foreign government involved.[14] Thus, an exporter should be wary of making such payments abroad, even if they are "customary" in the importing country.

Buyer-initiated contacts result primarily from the acts of third parties who make the buyer aware of the seller's product. These third party sources of information include previous customers of the seller and government sources of information. The government's role in promoting exports is primarily one of gathering and disseminating information, but it can sometimes act as an intermediary between foreign governments and domestic businesses in commercial matters. The United States Government conducts several activities and programs designed to promote exporting by American firms. One of the most prominent is the Trade Opportunities Program (TOP). TOP is jointly administered by the Departments of Commerce and State and is "designed to transmit specific export opportunities discovered by the commercial officers to U.S. firms."[15] TOP abstracts useful leads from foreign publications and personal contacts and publishes them as Trade Opportunity Reports which are disributed to interested businessmen.[16] A second service is the Export Contact List, where

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[9] McManis, *Questionable Corporate Payments Abroad: An Antitrust Approach,* 86 YALE L.J. 215, 243 (1976).

[10] 15 U.S.C. §§ 13a, 13b, 21 (1970).

[11] McManis, *supra* note 9, at 246.

[12] *Id.* at 297.

[13] 15 U.S.C. §§ 41-58 (Supp. V 1975). *Id.* at 252. For a detailed look at the antitrust implications of such payments, see McManis, *supra* note 9. The Foreign Corrupt Practices Act of 1977 was signed into law by President Carter on December 19, 1977. Pub. L. No. 95-213, 91 Stat. 1494 (to be codified in 15 U.S.C. §§ 78dd-1 and -2, 78 m(b) and 78ff). The Act is designed to prevent payments of bribes to foreign government officials by United States firms. It makes payment of bribes to foreign government officials by United States firms a criminal offense and "authorizes stiff penalties for U.S. corporations and for individuals who are officers, directors, or controlling persons of such firms" up to $1 million. *See* 186 INT'L TRADE REP. U.S. EXPORT WEEKLY (BNA) A-1, N-1, N-2 (1977).

[14] *See* McManis, *supra* note 9, at 252, for a detailed look at the antitrust implication of such payments. *See also* Pfizer v. Gov't of India, 46 U.S.L.W. 4073 (1978).

[15] Mullen, *supra* note 5, at 63.

[16] *Id.*

"information on more than 138,000 importing firms, agents, representatives, distributors, manufacturers, service organizations, retailers, and potential end users of American products and/or services"[17] is kept on computer file by the Department of Commerce. This information is continually updated and is made available to United States exporters by country and commodity.[18] A third approach is that of the trade fair. Sponsored by the United States Government, alone or in conjunction with other participating countries, trade fairs have the advantage of allowing the potential customer to physically examine the seller's product. As a similar service the Department of Commerce and the Foreign Service branch of the Department of State maintain trade centers in developing markets. These centers hold exhibitions throughout the year, opening up new sales markets that otherwise might go untapped. The Department of Commerce also facilitates participation by exporters of new-to-market products in foreign trade fairs as well as encourages foreign buyers to attend selected trade fairs in the United States.[19] The United States Government, moreover, maintains commercial libraries with information on American products and firms for use by foreign nationals.

The major problem in United States exporting is the general reluctance of businesses to enter the exporting field. Among the factors which affect a seller's decision whether to export are: the state of the business cycle, the rate(s) of inflation, exchange rates, tariff levels, technological trends, and monetary flow. Since the Government cannot control these pressing influences on business, perhaps its greatest potential for increasing the volume of exporting is in educating businessmen as to the opportunities that are available in the development of international trade.

B. *Negotiation and Placement of the Order*

Before the initial contact between the buyer and seller, an agreement should be drafted between the seller's representative and the seller. This agreement should include: the name and address of both parties, the effective date and duration of the agreement, a provision regarding the extension or termination of the agreement, description of product(s) involved and a definition of the sales territory, the discount and/or commission schedule(s) and provisions for revising them, provisions for the frequency

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[17] U.S. DEP'T OF COMMERCE, DOMESTIC AND INT'L BUS. AD. AND BUREAU OF INT'L COMMERCE, A BASIC GUIDE TO EXPORTING 9 (1976) [hereinafter cited as EXPORT GUIDE].

[18] Interested firms should contact a District Office of the Department of Commerce for more information.

[19] U.S. DEP'T OF COMMERCE DOMESTIC AND INT'L BUS. AD., BUREAU OF INTERNATIONAL COMMERCE, CONDITIONS OF PARTICIPATION, U.S. COMMERCIAL EXHIBITION (SOLO OR INTERNATIONAL TRADE FAIR) (1976); U.S. DEP'T OF COMMERCE DOMESTIC AND INT'L BUS. AD., FOREIGN BUYER PROGRAM (undated). *See also,* U.S. DEP'T OF COMMERCE DOMESTIC AND INT'L BUS. AD. BUREAU OF INT'L COMMERCE, U.S. TRADE CENTER FACILITIES ABROAD: YOUR KEY TO EFFECTIVE OVERSEAS MARKETING (1977).

and mode of payment, resale price policy, responsibility for service facilities, restrictions prohibiting competitive manufacturing or selling by the representative, determination of responsibility for patent and trademark negotiations and/or policing, restrictions on assignability of the agreement, and designation of contract jurisdiction to be used in the event of dispute.[20]

Once the initial contact has been made, the buyer and seller must agree on the items to be sold and their sale price. Although this procedure is basically the same in international and domestic transactions, details such as the specifications of the product may be complicated by language and custom differences. The seller-exporter should take every precaution to assure that the parties are in agreement on the specific items to be sold and the other terms of the sales contract. Additionally,

> [t]he description should include the total gross and net shipping weight and total cubic volume packed for export, as well as individual out-to-out dimensions, if possible. This information is necessary so the buyer may determine if any special loading or handling equipment will be required; it also will enable him to compute transportation charges. In some countries the import duties and/or taxes are assessed on the weight of the shipment rather than on the dollar valuation and the buyer must be able to calculate this in advance.[21]

Due to fluctuating exchange rates, the sales contract should specify which currency will be used to pay for the exported goods. When the United States dollar is stable an exporter may have a preference for dealing in United States dollars since that reduces problems with exchange rates.[22] However, if the value of the United States dollar is likely to change, the exporter may want to specify the buyer's currency, some third country's currency, or a combination of currencies to reduce the risk of loss caused by exchange rate fluctuations.

Concerning the price in the sales contract, the most meaningful quote the seller can give the buyer is a C.I.F. quote. Where the seller quotes the C.I.F. price, all the buyer must compute to know his total cost is the cost of getting the goods from his import port to his place of business.[23]

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[20] EXPORT GUIDE, *supra* note 17, at 13.

[21] EXPORT GUIDE, *supra* note 17, at 16.

[22] Interview with Jerry T. Cook, Commercial Officer, Lummus International Sales Corporation, in Columbus, Ga. (Aug. 31-Sept. 1, 1977) [hereinafter cited as Cook interview].

[23] Some of the more common arrangements include:

> 1. C.I.F. (cost, insurance, freight). In a C.I.F. transaction the price quoted to the buyer includes the cost of the goods plus insurance and transportation cost necessary to move the goods from the seller to the point of debarkation from the transporting vessel in the named port of import.
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> 2. C. & F. (cost and freight). The seller's quoted price includes the cost of goods and the cost of transporting them to the point of debarkation. Under this arrangement the buyer is left with the responsibility for procuring insurance.
>
> 3. F.O.B. (free on board). The seller's quoted price includes the cost of goods and

Other considerations that can be of special importance in an international transaction include: when the risk of loss and title pass from the buyer to the seller, and who has responsibility for obtaining insurance on the goods. Those questions should be answered in the terms of the sales contract.

C. *Acceptance or Rejection of the Offer*[24]

Once the terms of the potential sale have been agreed upon and an offer has been tendered, the seller must decide whether or not to accept the offer. Should the agents or salesmen have discretion to negotiate the contract price, the appropriate members of the seller's corporation must consider a number of factors in determining whether to accept the offer. Among these factors are the cost of production, the size of the order, payment terms, and the profit expected to be realized from the proposed transaction. Generally speaking, the floor below which offers will be rejected should be set once the cost of producing products for export is determined.[25]

Another factor in the decision to reject or accept the offer is the credit-worthiness of the buyer in relation to payment terms being considered. Information on the credit-worthiness of the buyer can come from past experience with that buyer or from other sources if dealing with a new customer. When the buyer is a new customer, the seller can get this information from such sources as the Foreign Credit Insurance Association (FCIA) prequalification program, which includes credit standing information on the buyer; the Export-Import Bank of the United States' (Eximbank) credit information service for banks; letters from banks in the buyer's country regarding the buyer's credit standing; the Dun & Bradstreet International report; and the World Trade Report, which may be obtained from the United States embassy in the buyer's nation.

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the service and delivery charges to get the goods to either a named inland point of origin, a named port of exportation or on board the vessel at a named port of export. The buyer is responsible for any insurance.

4. F.A.S. (free along side). The seller quotes a price which includes only the cost of goods and the costs incurred in getting them along side the vessel in a named United States port of export. The buyer is responsible for acquiring insurance.

5. Ex. (named point of origin). Quoted price includes only the cost of goods and of making them available to the buyer at an agreed place and time. The buyer is responsible for all other charges.

[24] Note that on occasion the seller makes the offer. In that situation the acceptability of the price will have already been considered by the seller prior to making the offer.

[25] The most realistic method of pricing is what is termed marginal cost pricing. This method, based on incremental costs, considers direct out-of-pocket costs of producing and selling products for export as a floor under which prices cannot be set without incurring a loss. Once this is known, you can then take into account competitive prices when setting your own price.

EXPORT GUIDE, *supra* note 17, at 15.

The payment terms being considered will also affect the decision to accept or reject the offer. A buyer with excellent ratings will obviously stand a better chance of having an offer accepted where the seller finances the transaction than will a buyer with less favorable ratings. Further, the different payment terms, which determine who is financing the transaction,[26] will affect the desirability of accepting the offer.

The most ideal arrangement for a seller would be cash in advance. However, buyers are hesitant to tie up capital and are sometimes skeptical about the assurances given that the product will be delivered. Thus, such terms are rarely seen. The other extreme in payment terms is the open account, where the merchandise is shipped without pre-payment and sometimes without a definite period for payment. Other, more typical, payment terms fall in between. These include sight drafts, letters of credit, medium-term credits through private sources guaranteed by Eximbank or insured by FCIA, short-term credits through private sources with FCIA insurance, and long-term financing of various sorts by Eximbank.[27]

III. EXECUTION OF THE CONTRACT

A. *Preparation of the Shipment for Exporting*

If the combination of the credit-worthiness of the buyer, the payment terms, and the price are such that the decision maker approves acceptance of the offer, the next step is preparation of the accepted order to begin the export trip.

1. *Engineering*

Sometimes engineering may enter into the process before the order is placed; as where the engineering department designs a system as a selling aid. Additionally, engineering may be called upon to adjust machinery to electrical systems different from the American system or to make changes to comply with foreign governmental standards or the metric system.[28] Where large items such as manufacturing or processing machines or systems are involved, the seller's engineering department may be called upon to design the facilities to handle the equipment sold. Examples of such items include auto assembly plants, new textile plants, and additions to the machinery in an existing plant.

2. *Packing*

The packing process should start simultaneously with the production process. Packing is designed to protect the cargo from moisture, especially

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[26] *See* text at notes 43-46 *infra*.

[27] Mullen, *supra* note 5, at 87. *See* EXPORT GUIDE, *supra* note 17, at 18-20. *See also* text at notes 49, 113 *infra*.

[28] EXPORT GUIDE, *supra* note 17, at 24.

ocean moisture, damage, and theft. For all methods of packaging, weight is an important consideration. While the cargo needs to be protected, the shipper also needs to keep transportation costs down. As carriers use volume or weight, whichever provides greater revenue, to assess the freight charges, excessive packaging should be avoided.[29] Another factor encouraging the efficient use of packaging is the high cost of packaging materials. The risk of theft can be reduced by avoiding identifying marks on the packaging that would reveal the contents.[30]

There are several methods of packaging cargo for export. One of the more common methods is the use of containers. Containers are basically permanent boxes that are adaptable to truck beds, which may be rented or purchased from carrier or private concerns.

For ocean freight, the best packaging is a wooden crate. Crates can be made to fit the item being transported, are relatively impervious to moisture and theft, and stand up well to the stress of handling and storage.

Air freight allows the use of the least durable packaging. Standard domestic packaging is usually acceptable, and high test cardboard can often be used instead of wooden packaging. Additionally, cargo planes will provide collapsible units called igloos that fit the contours of the plane. These can be packed as efficiently as possible by the shipper though the freight terminal manager can also pack them for the shipper.[31]

Another means of packaging is the use of crates and partial containers. Such an arrangement is used when multiple sellers have less than a container load to ship to a common destination. The shipper or a freight forwarder will load the different shipments into one container and the shipments will be separated when they reach their destination.

3. *Marking*

Packages must be marked so as to identify both their origin and destination. The buyer will usually specify the marks needed to expedite the passage of the cargo through his port of import. The seller or his freight forwarder should know what marks are needed to export from his home country. The markings must show the destination and order number and any other purchaser's marks, the port of entry, the number assigned each package and the size of the case, the gross and net weight in pounds and kilograms, the country of origin, and the shipper's name and address.[32] It is critical that markings be legible, permanent, and easy to locate. A

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[29] Also, consideration should be given to shipping items partially assembled, to reduce their volume.

[30] EXPORT GUIDE, *supra* note 17, at 25.

[31] Report by Lummus International Sales Corporation to the Georgia Chamber of Commerce International Council (Jan. 23, 1974) [hereinafter cited as LISCOR Report].

[32] *Id.* at 16.

preferable technique uses permanent paint or ink and stencils on more than one surface of each package.

4. *Delivery to the port*

While the production and preparation of packing is proceeding, the seller should be making arrangements to get the finished product to the buyer. The production department should be able to estimate when the product will be completed, and the shipping department should be able to approximate the packing time so the seller will know when to plan for the shipment to leave his dock. Further, the production and shipping departments should be able to give a good estimate of the volume and weight of the shipment.

The seller, once he knows when the shipment will be ready to be shipped, and its approximate volume and weight, should contact his freight forwarder, whose role is explained below, in the appropriate port to let him know when the shipment will be arriving in the port, the ultimate destination, and the last acceptable date for arrival at the ultimate destination. The forwarder will then make the appropriate arrangements with dock personnel and shippers so that the cargo will spend as little time as possible at the port waiting to be shipped abroad.[33]

The seller is responsible for notifying a freight line to arrange for pick-up of the cargo from the seller and delivery to the forwarder at the port. The seller should consign the inland bill of lading, which will be issued by the carrier, to himself in care of the freight forwarder.[34] The seller is also responsible for complying with the letter of credit if one is used. This compliance may mean sending several copies of various documents to the forwarder so that he can send the appropriate documents to the confirming or the buyer's bank.

B. *The Forwarder's Role*

A freight forwarder is an independent entrepreneur, working as an agent for a number of exporters. Some individuals with experience in exporting[35] and government sources[36] recommend the use of a freight forwarder. The forwarder is responsible for coordinating the steamship line, the common carrier, and the dock workers to insure that the shipment is sent on its way to the buyer with minimal problems and with the least possible cost. The forwarder's fee is a legitimate export cost and should be considered in setting the contract price.

The forwarder will prepare the ocean bill of lading and any special documents, such as consular approval of the invoice, that are necessary. The

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[33] *See* text at notes 35-36 *infra*.
[34] *See* text at notes 133-34 *infra*.
[35] Cook interview, *supra* note 22.
[36] EXPORT GUIDE, *supra* note 17, at 27.

forwarder will be familiar with the documentation requirements of the various countries involved, and will file the Shipper's Export Declaration required by the Department of Commerce, along with any other documentation required by the United States Government export regulations. In addition, he will review letters of credit and any other banking documentation for accuracy and completeness.

Lastly, the forwarder will usually make, through the steamship company, all of the arrangements necessary for transporting the goods to and in the importing country. On larger shipments, the seller may deal directly with the steamship company as far as arrangements to guarantee sufficient cargo space and eliminate the risk of goods having to wait at the port for a carrier with sufficient room. But even where the seller deals directly with the carrier in such cases, the freight forwarder will still handle the documentation for the seller.

The alternative to using a freight forwarder is for the exporter to perform all the forwarder's functions himself. Only the most experienced and/or sizeable exporter, with extensive knowledge of foreign import rules and regulations, American export regulations, methods of shipping, and documentation requirements would be well advised to venture into such an endeavor. Even these exporters usually find it more feasible and economical to use a freight forwarder.

C. *Risk of Loss and Insurance*

The point at which title to the cargo changes hands from the seller to the buyer is critical in the event the goods are damaged or destroyed in transit. As a general rule, in international transactions the party who has title to the goods at the time of the loss bears the burden of the loss. Likewise, the responsibiltiy for procuring insurance will, unless otherwise agreed, be with the title holder.[37] The terms of the agreement should indicate which party is responsible for insuring the goods.

There are generally two types of insurance available: contingency insurance and cargo insurance.[38] Contingency insurance protects the insured against loss from risks other than the loss of, or damage to the cargo while in transit. It is advisedly used where there is a politically unstable environment, as it protects the insured against injury caused by events such as confiscation or a nation's refusal to allow certain imports. Contingency insurance will generally be acquired by the seller if he thinks such risks are significant. This may be true even though the shipment terms are F.O.B. or F.A.S., [39] for the seller still has a risk of loss until he receives

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[37] This is different than with domestic transactions. *See, e.g.*, U.C.C. § 2-509(3).

[38] Cargo insurance is properly termed ocean marine cargo insurance regardless of whether the goods are shipped by mail, air, or ship.

[39] *See* note 23 *supra*.

payment. Contingency insurance, however, is only available on a shipment by shipment basis.[40]

By contrast, cargo insurance is available as a special policy covering a single shipment or as a blanket policy covering all cargo moving at the seller's risk during a certain time period. Whereas the infrequent export shipper would be better off using a special policy, the blanket policy is less expensive per shipment if there are frequent shipments.[41] Cargo insurance insures the cargo while in transit and, unless specifically excluded, covers loss due to war, strikes, natural disasters, and political upheavals. Such a policy would typically be used in a C.I.F. transaction.[42]

IV. PAYMENT

There are a variety of ways to arrange payment for the goods. These methods can be divided according to who is financing the transaction: the seller, the buyer, or some third party.

A. *Seller Financing*

The seller who provides financing arrangements for his customers may thereby attract more business. At the same time, however, the seller is tying up his capital until payment is received, thereby increasing the cost of exporting. Furthermore, his recourse against a non-paying customer may be limited. There are four means by which the seller can finance a transaction:

1. *Open Account*[43]

In this form of transaction the seller sends the goods with nothing more than a credit check or prior dealings[44] with the customer to assure him (the seller) of payment. Even when payment is a certainty, its actual date of receipt may not be set, and thus the seller will use this form only when necessary.[45]

2. *Sight Draft*

The sight draft presents less financial risk for the seller than does an open account. A negotiable bill of lading is issued by the steamship company to the order of the seller or some third party. The seller then endorses the bill of lading to the order of the buyer's bank and sends the bill of lading, along with other necessary documentation, to the buyer's bank.

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[40] Cook interview, *supra* note 22.

[41] EXPORT GUIDE, *supra* note 17, at 30.

[42] *See* note 23 *supra*.

[43] *See* text at note 27 *supra*.

[44] EXPORT GUIDE, *supra* note 17, at 18.

[45] Open shipments might also be used where the seller is willing to take the risk of nonpayment to get or keep a customer.

The bank releases the bill of lading, thereby allowing the buyer to get the cargo, upon payment by the buyer in the amount of the draft. Should the bank fail to follow the designated procedures, the seller will have a cause of action against the bank for breach of contract. Should the bank release the bill of lading prior to receiving payment, the seller will lose the advantages of utilizing the sight draft, and will have, in effect, an open account with the buyer instead.

3. *Time Draft*

A time draft differs from a sight draft in that the buyer can legitimately get the bill of lading without actually paying for the draft simultaneously. The buyer need only accept the draft. The draft defers payment for a period of time beyond acceptance by the buyer. The seller is consequently financing the sales transaction for the duration of that time period.

4. *Consignment Sale*

In a consignment sale, the goods are shipped to the importer on a deferred payment basis, and the seller is paid when the importer sells the goods to his customer. In making such a financial arrangement, the seller should consider the consequence of political or economic crisis within the buyer's country, since the seller owns the goods until they are re-sold by the importer. The consignment sales agreement should stipulate who is responsible for obtaining risk insurance prior to payment. Furthermore where the stability of the country involved is questionable the seller should consider political risk insurance.[46]

B. *Buyer Financing*

The only pure form of buyer financing is payment of cash in advance. Such payment terms are not preferred by buyers due to their risk of loss in the event of non-delivery. Furthermore, the buyer would be burdened with initiating legal action to recover his payment should the seller default.

C. *Third-party Financing*

Third-party financing, such as a letter of credit, may be obtained from commercial banks. Further, there are factoring houses in the United States that will purchase an exporter's accounts receivable, often without recourse,[47] and export management companies will handle financing for export sales.[48] A further source of financing for some exporters is Eximbank.

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[46] EXPORT GUIDE, *supra* note 17, at 18.

[47] *Id.* at 21. While such financing can be more expensive than other methods, it assures the seller of prompt payment for the sale.

[48] *Id.* Export management companies can assure immediate payment to the seller and remove credit risks from him. For more information on export management companies and their services, write The National Federation of Export Management Companies, 429 20th

Additionally, FCIA is intricately involved in the financing of export transactions by providing export credit insurance.

1. *Letter of Credit*

A letter of credit is a "document, issued by a bank at the buyer's request in favor of the seller, promising to pay the agreed amount of money upon receipt by the bank of certain documents within a specified time."[49] In order to execute a valid letter of credit, the buyer must first enter a contract with his bank to issue the letter of credit. Article 5 of the Uniform Commercial Code (UCC) provides the formal requirements for a valid letter of credit. The UCC defines a letter of credit as an "engagement by a bank or other person [the issuer] at the request of a customer"[50] that it will "honor drafts or other demands for payment upon compliance with the conditions specified in the credit."[51] If the letter of credit is issued by a bank and does not require "a documentary draft or documentary demand for payment"[52] or is issued by someone other than a bank and does not require "a draft or demand for payment to be accompanied by a document of title,"[53] the letter of credit must be conspicuously entitled a letter of credit or conspicuously state that it is a letter of credit.[54] Letters of credit must be in writing and must be signed by the issuer.[55] Similarly, confirmation of a letter of credit (which holds the confirming bank responsible for payment upon compliance with the stated conditions just as if it had issued the letter of credit) must be in writing and be signed by the confirming bank.[56]

A letter of credit can be revocable or irrevocable. A revocable letter of credit can be modified or revoked at any time by the issuer without notice to or consent of the buyer or the seller-beneficiary.[57] On the other hand, an irrevocable letter of credit, once it is established,[58] can only be modified or revoked with the consent of the buyer and/or the seller-beneficiary.[59] An exporter should have the buyer specify in the letter of credit that it is irrevocable. If the seller-beneficiary desires to be able to assign his right to collect under the letter of credit, he should be certain that that right

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St., Washington, D.C. 20527, and the Private Export Funding Corporation, 280 Park Ave., N.Y., N.Y. 10017.

[49] *Id.* at 19-20.

[50] U.C.C. § 5-103(1)(a).

[51] *Id.*

[52] U.C.C. § 5-102(1)(a).

[53] *Id.* § 5-102(1)(b).

[54] *Id.* § 5-102(1)(c).

[55] U.C.C. § 5-104(1).

[56] *Id.*

[57] U.C.C. § 5-106(3).

[58] *Id.* § 5-106(1).

[59] *Id.* § 5-106(2).

expressly appears in the agreement. In the absence of an express designation of the letter of credit as transferable, it will not be assignable.[60]

The time of establishment of an irrevocable letter of credit is an important point in the process of the seller getting paid. "The primary purpose of determining the time of establishment of an irrevocable credit is to determine the point at which the issuer is no longer free to take unilateral action with respect to the cancellation of the credit or modification of its terms."[61] A letter of credit is established as regards the seller-beneficiary "when he receives a letter of credit or an authorized written advice of its issuance."[62] Thus, once a letter of credit is established, an exporter is assured of receiving his payment, since the bank is bound to honor the draft(s) drawn on that letter of credit even if the buyer and seller are having disputes concerning their underlying contract.

Once a valid irrevocable letter of credit is established, the most common problem that paying banks have with sellers' performance is noncompliance with the requirements for documentation stipulated in the letter of credit.[63] The most common discrepancies are:

1. Drafts are presented after letter of credit has expired.
2. Invoice value or draft exceeds amount payable under letter of credit.
3. Charges included in invoice are not authorized.
4. Amount of insurance coverage is inadequate or coverage does not include risks required.
5. Insurance document is not endorsed and/or countersigned.
6. Date of insurance policy or certificate is later than date on bill of lading.
7. Bills of lading are not "clean."
8. Bills of lading are not marked "ON BOARD."
9. "ON BOARD" endorsement is not dated.
10. Bills of lading are not endorsed.
11. Bills of lading do not indicate "Freight prepaid" as stipulated in the letter of credit.
12. Bills of lading are not marked "Freight prepaid" when freight charges are included in invoice.
13. Descriptions, marks, and numbers of [sic] merchandise are not the same as on all documents presented or are not as required by the letter of credit.
14. Not all of the documents as required by the letter of credit are presented.
15. Documents are "Stale-Dated"—that is, not presented within reasonable time after issuance.

[16.] Invoice states "Used"—"Second-Hand"—"Rebuilt" merchandise

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[60] U.C.C. § 5-116(1).

[61] U.C.C. § 5-106, Comment 1.

[62] *Id.* § 5-106(1)(b).

[63] LISCOR Report, *supra* note 31, at 28-29.

when such condition is not authorized by letter of credit.

[17.] Invoice does not specify shipment terms (C. & F., C.I.F., F.O.B., etc.) as stated in the letter of credit.

[18.] Invoice is not signed as letter of credit requires.

[19.] Drawings are not proportionate to price or quantity shown in the letter of credit.

Should the seller examine the letter of credit upon its receipt and find items with which he cannot comply, he should immediately notify the customer or its agent so that an amendment to the letter of credit can be arranged.[64]

As the above list indicates, compliance with the letter of credit can be a very meticulous process. Some exporters or potential exporters might wonder whether substantial compliance with the letter of credit would be sufficient. Article 5 does not say whether the standard for compliance is strict compliance or substantial compliance. Thus, pre-UCC law would answer the question,[65] and it indicates that the standard is to be strict compliance by the seller-beneficiary.[66] Experienced exporters will verify the importance of strict compliance. Where the bank misspelled "bills of lading" in the stipulation in the letter of credit of documents required so that it read "hills of lading," the seller had to send the bank "hills of lading" to get its money.[67] Another situation, in which less than strict compliance can cause trouble, occurs when the exporter or his forwarder sends documents that are not required by the letter of credit. The bank will accept and transmit those documents to the buyer but if they find a discrepancy between those documents and the required documents, they may hold up payment until the discrepancy is corrected.[68]

If the issuer wrongfully refuses to honor the draft there are two self-help remedies available to the seller-beneficiary. He may offer the issuing bank an indemnity to cover any defects in the documents,[69] or he may contact the buyer and get the buyer to tell the issuer to honor the draft. Additionally, the seller-beneficiary has, upon wrongful dishonor by the issuer, the "rights of a person in the position of seller (section 2-707) and may recover from the issuer the face amount of the draft or demand together with incidental damages under section 2-710 on seller's incidental damages and interest but less any amount realized by resale or other use or disposition of the subject matter of the transaction."[70]

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[64] *Id.*

[65] "Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions." U.C.C. § 1-103.

[66] J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE 622 (1972).

[67] Cook interview, *supra* note 22.

[68] LISCOR Report, *supra* note 31, at 24.

[69] U.C.C. § 5-113(1).

[70] U.C.C. § 5-115(1).

In addition to the fact that the issuer will most likely refuse to honor the draft if the seller-beneficiary presents non-complying documents, there is another incentive for presenting only complying documents. By transferring or presenting the draft for payment, the seller is warranting that all "the necessary conditions of the credit have been complied with"[71] "unless otherwise agreed."[72] Thus, if a seller procures honor of the draft with non-complying documents, he is in breach of warranty.[73]

A seller who needs additional funds to carry out the transaction may use the letter of credit as a financing device in several ways. First, the seller may transfer his rights and duties under the letter of credit to his supplier. Use of this method has a serious drawback, however, in that the seller's supplier may learn the seller's profit margin after such a transfer, and once he has the name of the customer he might take away the seller's customer. Also, the seller-beneficiary remains liable for the quality of the financer-transferee's performance in procuring and issuing the proper documents to the issuer.[74] Second, the seller-beneficiary may transfer his prospective right to the proceeds of the letter of credit to his financer as security for a loan. Such a transfer is allowable even if the letter of credit "specifically states that it is non-transferable."[75] This type of transfer could be used to float a loan from the financer, to get a line of credit upon which the seller's suppliers could draw drafts, or to get credit from the supplier. Third, the seller-beneficiary may use the buyer's letter of credit to procure a second letter of credit from the seller's bank in favor of his suppliers by assigning his right to the proceeds.

This last method would seem to be the most desirable because the seller keeps his autonomy from the supplier while the supplier is still assured of payment.[76] The seller's letter of credit will probably have a shorter duration than the buyer's letter of credit because the seller's bank must be certain that it will have the necessary documents to satisfy the buyer's letter of credit before the seller's status as a beneficiary under the buyer's letter of credit expires.[77]

A letter of credit from the buyer's bank can be "confirmed" by a United States bank. Confirmation commits the confirming bank to pay drafts upon compliance with the terms of the letter of credit as though it were the issuing bank.[78] This is an advantage to the seller in that he can receive payment as soon as complying documents are presented to the confirming

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[71] U.C.C. § 5-111(1).

[72] *Id.*

[73] *Id.*

[74] *Id.* § 5-116, Comment 2. For other considerations concerning this method, see J. WHITE & R. SUMMERS, *supra* note 66, at 635.

[75] U.C.C. § 5-116(2).

[76] Payment is assured upon compliance with the terms of the seller's letter of credit.

[77] *See generally* J. WHITE & R. SUMMERS, *supra* note 66, § 18-9.

[78] U.C.C. § 5-107(2).

bank. Although collection fees by the banks are normally charged to the buyer,[79] this provision should be expressly included in all quotations and drafts.

One last point is to avoid a conflict (or choice) of law problem. The parties should stipulate which law should govern the export-import transaction.[80] Where the law of the United States is to be applied, the appropriate provision is UCC section 5-102.[81]

2. *Export-Import Bank of the United States (Eximbank)*[82]

Eximbank is committed to assuring that United States exporters do not lose sales because of a lack of credit. To meet such a commitment, Eximbank has over twenty programs to insure that exporters have the credit they need to make sales. Eximbank's role in financing transactions becomes more dominant as the term of the financing lengthens.[83] Eximbank programs can be classified into the following four categories: direct lending, United States bank programs, foreign bank programs, and special services.

Direct loans are made in the form of buyer's credits and generally charge 7 to 8½% interest, with a maturity ranging from five to twenty years.[84] The buyer may be a private or a public interest as long as it is outside the United States, and the loan is for the purchase of American exports. Today, direct loans are made only when Eximbank financing is essential to the sale and are generally reserved for large sales such as nuclear power plants or jet aircraft.[85] Direct loans may or may not be accompanied by repayment guarantees by the recipient country or bank.[86] Eximbank's di-

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[79] EXPORT GUIDE, *supra* note 17, at 20.

[80] *See generally* A. EHRENZWEIG, A TREATISE ON THE CONFLICT OF LAWS § 176 (1962); R. LEFLAR, AMERICAN CONFLICTS LAW § 6 and § 145, at 356 (1968).

[81] The rules applicable under other laws and other legal systems are beyond the scope of this Note and will not be discussed.

[82] Eximbank was created in 1934 by President Franklin D. Roosevelt, Exec. Order No. 6581, Feb. 2, 1934. It was made a federal agency by Congress in 1935, Act of Jan. 31, 1935, ch.2, § 9, 49 Stat. 1. In 1945, Eximbank was restructured into its present form and capitalized with $1 billion in federal funds, Export-Import Bank Act of 1945, ch. 341, 59 Stat. 526. Amendments to that act, prior to 1974, are collected in 12 U.S.C. § 635 (1970), *as amended.* (Supp. V 1975). Today Eximbank is authorized to commit up to $25 billion in capital, its budgetary system falls within the unified federal budget, and its functions are scheduled to terminate June 30, 1978, unless extended by Congress, 12 U.S.C. § 635(f) (Supp. V 1975) (originally enacted as Pub. L. No. 93-646, 88 Stat. 2333 (Jan. 4, 1975)). For a more detailed analysis of the changes made in 1975, see Comment, *The Export-Import Bank Amendments of 1974*, 15 COLUM. J. TRANSNAT'L L. 75 (1976).

[83] Mullen, *supra* note 5, at 84. In the private money market, it is easier to obtain short-term financing than it is to obtain long-term financing. Thus, as the term of the financing increases, the government sources become more important.

[84] *Id.* at 88.

[85] *Id.*

[86] *Id.*

rect loans do not finance the entire purchase. Since 1969 Eximbank has required a 10 to 15% down payment by the borrower, with the rest of the purchase price to be financed equally by Eximbank and private lenders.[87] Eximbank will, however, guarantee repayment to the private lenders and may even finance later maturities of the total credit.[88]

Eximbank's programs for United States banks include repayment guarantees, guarantees of repayment of supplier's credits, and discounting of loans. Eximbank's repayment guarantee

> will unconditionally guarantee repayment to a private U.S. lender of up to 100 percent of the outstanding principal plus interest at 1 percent higher than the U.S. Treasury rate for similar maturities. A guarantee fee of one-half of 1 percent per annum on the outstanding balance also is charged.[89]

Eximbank's repayment of supplier's credits guarantees cover medium-term obligations, from 181 days to five years. Under this program, Eximbank guarantees repayment of the importer's obligation acquired by American banks (such as a confirming bank) against a part of the commercial risks and against all of the political risks.[90] To qualify for this Eximbank program, the buyer must make a ten percent downpayment and the seller must retain ten percent of the risk. Eximbank discounting of loans is available on a limited basis for commercial banks that have financed suppliers' credits. It lends against and purchases both short- and medium-term export debt obligations,[91] providing liquidity for commercial banks.[92] This program is only available on a precommitment basis; the bank must certify that it will only make the loan if it can get Eximbank to discount it once the loan is made.[93]

Eximbank's programs for foreign banks can also be important for the American exporter since they provide financing which enables buyers to purchase his goods. Eximbank's foreign bank programs include foreign bank guarantees, the Cooperative Financing Facility, and the relending facility.

Under the guarantee program, Eximbank will guarantee 100% of the principal on loans made by foreign banks to importers of United States goods.[94] Under the Cooperative Financing Facility, which is used for medium-term buyers' credits, Eximbank will lend 50% of the financing to the foreign bank at a favorable interest rate.[95] The bank then decides

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[87] *Id.* at 89.
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*
[94] *Id.* at 91. Eximbank also guarantees an interest rate approved on a case by case basis.
[95] *Id.*

whether to lend the money to particular customers at its own risk.[96] In limited instances, some banks will be given discretionary authority to commit Eximbank without prior approval.[97] Eximbank will go so far as to guarantee to a local lender repayment in local currency of the local bank's share where the local bank has borrowed to make the financing.[98] Lastly, where a United States export has been commanding only a small share of the local market, and there is a chance of follow-on procurement, Eximbank will provide the entire financing of a transaction in the hope of enhancing sales of that product in the local market.[99]

Eximbank is ordinarily bound by law to require[100] "reasonable assurance of repayment"[101] before it can finance a transaction. However, the Export Expansion Facility is a special program which is an exception to the general standard. It is designed to provide financing for transactions that could not meet the "reasonable assurance" test. The Export Expansion Facility furnishes loans, guarantees, and insurance to private and public foreign borrowers who meet the lesser standard that the transaction "offer sufficient likelihood of repayment to justify the Bank's support in order to adequately foster the foreign trade and long-term commercial interests of the United States."[102] Eximbank's special services also include lease guarantees,[103] plus guarantees and financing programs for engineering, feasibility, and planning studies.[104] Through the preliminary commitments program, Eximbank will inform the parties to a proposed transaction as to what support, if any, Eximbank will be able to provide.[105]

3. *Foreign Credit Insurance Association (FCIA)*

While FCIA does not provide financing, it allows and encourages sellers to offer better credit terms to their buyers, thus, having a direct bearing on financing. FCIA is an unincorporated association composed of over 50 private insurance companies, working closely with Eximbank. FCIA seeks to provide export credit insurance competitive with other nations' programs[106] so that American exporters can and will offer competitive credit terms when seeking business abroad.[107] FCIA handles the underwriting and assignment of policies for member companies and Eximbank.[108] Member

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[96] *Id.*
[97] *Id.* at 92.
[98] *Id.*
[99] *Id.* However, this program is rarely used.
[100] 12 U.S.C. § 635 (j)(a)(1970).
[101] *Id.*
[102] *Id.*
[103] Mullen, *supra* note 5, at 93.
[104] *Id.*
[105] *Id.* at 95.
[106] EXPORT GUIDE, *supra* note 17, at 22.
[107] Mullen, *supra* note 5, at 95.
[108] *Id.*

companies insure the commercial risks, such as insolvency of the buyer. Eximbank insures the political risks, such as war, unforseen withdrawal of an import license, or confiscation, and reinsures a portion of the commercial risks.[109] Policies will be issued to anyone with an insurable risk.

FCIA issues five basic policies. First, a master policy is available that covers commercial and political risks on all or certain groups of the insured's short- and medium-term transactions for one year. Such a policy provides 90% coverage with an unusual 10% deductible provision where commercial risks are involved.[110] Second, a short-term policy is offered which covers only short-term sales and has a 5% deductible provision for political risks in addition to the 10% deductible provision for commercial risks.[111] Third, medium-term policies, which are written on a case-by-case basis, cover capital equipment of United States origin.[112] Fourth, a policy combining short- and medium-term insurance is offered. Such a policy is a specialized policy, primarily for overseas dealers and distributors of United States products where consignment and open account financing are common.[113] Last, another specialized policy is available for exporters whose annual sales have not exceeded $200,000 in the preceeding three years. As this policy permits selection of markets or buyers to be covered, it is not a master policy.[114]

V. DOCUMENTATION

Documentation enters into an international sales transaction from the very beginning. A multitude of documents are required in an international sale that are not required in a domestic sale.[115] This examination of documentation will point out the more commonly used documents and where, when, and how they are used. Documentation could determine the success or failure of an international sales transaction. Two groups of documents are involved: shipping documents necessary to get the seller's goods through United States customs and payment documents necessary for payment to reach the seller.

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[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

[113] *Id.*

[114] *Id.* at 74-75 n. 100.

[115] A 1971 study by the National Commission on International Trade Documentation and the Department of Transportation revealed 125 different forms in regular and special use. According to the study, the average international shipment used 46 separate documents at a cost of 7½% of the value of the shipment. Some of the statistics used in the study are questionable, however, according to Mullen. *Id.* at 75 n. 100.

A. *Shipping Documents*

1. *Licenses*

For most commodities exported from America only a general export license is needed. Such licenses are "published authorizations that are used to cover the export of commodities not subject to validated license."[116] No application or authorization is required other than the publication itself; the correct General License symbol is merely inserted in the Shipper's Export Declaration.[117] In accordance with the Commodity Control List (CCL),[118] there are certain commodities which require a validated export license. These commodities include certain chemicals, special plastics, sophisticated electronic equipment, and scarce materials such as petroleum that the United States controls for reasons of strategic significance, short supply, or foreign policy.[119] Once the goods have arrived overseas, there may be import licensing requirements that must be fulfilled. The exporter should either ascertain these requirements himself or have the forwarder or buyer determine the extent of such requirements.[120]

2. *Shipper's Export Declaration*[121]

This document is required for exported items to leave the United States. It indicates the authorization to export,[122] a description of the goods being shipped, their value, and a general license symbol or export license number.[123] The form also reveals the shipping port, the exporting carrier, the exporter and his forwarding agent, the ultimate and intermediate consignees, the foreign port of unloading, and the place and country of ultimate destination.[124] This information is used as "the source of statistical information"[125] for the Bureau of the Census Monthly Foreign Trade Report

[116] EXPORT GUIDE, *supra* note 17, at 31.

[117] *Id.*

[118] United States Department of Commerce Export Administration Regulations, 15 C.F.R. § 399.1 (1977).

[119] For each such order, a validated export license must be obtained from the Office of Export Administration in Washington, D.C., U.S. DEP'T OF COMMERCE, DOMESTIC AND INT'L BUS. AD., OFFICE OF EXPORT AD., A SUMMARY OF U.S. EXPORT ADMINISTRATION REGULATIONS (rev. 1975). This excellent source of basic information concerning the export regulations is available from District Offices of the Department of Commerce. The regulations in full can be found in 15 C.F.R. §§ 368-399 (1977).

[120] It may be be that no import licence at all is needed. Other countries will issue a specific commodity import license, good only for a short period of time. Still others may issue a general import license with a duration up to two years, Cook interview, *supra* note 22.

[121] United States Department of Commerce—SESA, Bureau of the Census-DIBA, Bureau of East-West Trade, Form No. 7525-V (12-10-73) [hereinafter cited as Form No. 7525-V].

[122] *See* text at note 116 *supra*.

[123] Form No. 7525-V, *supra* note 121, items (9), (10), (15).

[124] *Id.* items 1, 2a, 3-8.

[125] EXPORT GUIDE, *supra* note 17, at 32.

showing the exports of commodities by country. The forwarder will file this form[126] for the exporter as the exporter's agent and deposit it with the steamship company or other export carrier. The carrier must surrender to customs the declarations for its entire cargo before it will be allowed to leave the port.[127]

3. *Export Manifest Packing List*

The export manifest packing list is a list of all items in the shipment. The shipment should be consigned to the exporter in care of his freight forwarder at the port. The manner in which the merchandise is then listed depends on how it is being shipped.[128] For container shipments, the list should show the container number and the number of the seal affixed to the container, followed by a list of each item in each container designating the contents and the type packing used.[129] The description of the contents should be sufficiently precise so as to leave no question as to what item is being described. Further, the export manifest packing list should indicate the gross weight in pounds and kilograms and the total measurements utilized inside the container.

For maritime and air freight shipments the export manifest packing list should itemize each container in which the goods are packed and what each contains. If the shipment contains heterogeneous items, each item should be indicated.[130] Then the net and gross weights in pounds and kilograms and the length, width, and height of each case should be indicated.[131] It is important that the export manifest packing list be accurate because the forwarder usually relies upon it to list the cargo and to prepare documents for the exporter.[132]

4. *Inland Bill of Lading*

The inland bill of lading is a receipt for the goods entrusted to the domestic carrier for transport to the port.[133] The shipment shoud be consigned to the exporter in care of the forwarder. When the carrier arrives at the port, he will contact the forwarder for instructions. If the forwarder has been notified ahead of time, he will have made the necessary arrangements with either the overseas carrier or with storage facilities and will instruct the inland carrier as to the disposition desired of the goods.[134]

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[126] Today a reporting procedure allows this filing to be done once a month covering all shipments during that period. *Id.* at 35.

[127] Form No. 7525-V, *supra* note 121, instructions for use I(a).

[128] LISCOR Report, *supra* note 31, at 17-18.

[129] For example, "1—Crate containing . . . ." *Id.* at 17.

[130] *Id.* at 18.

[131] *Id.*

[132] *Id.*

[133] *Id.* at 21.

[134] *Id.*

B. *Payment Documents*

1. *Commercial Invoices*

As in a domestic shipment, a commercial invoice should "include the full address of the shipper, seller, and consignee, if different; the respective reference numbers; date of the order; shipping date; mode of shipment; delivery and payment terms; a complete description of the merchandise; prices, discounts, and quantities."[135] Additional requirements may be imposed by the importing country. These additional requirements may include certification of the invoice by the local Chamber of Commerce and/or the foreign consulate representing the importing country[136] as well as special invoice forms.[137]

Special instructions concerning the description of the merchandise may be included in the letter of credit.[138] If such instructions are included, they should be followed carefully. In addition, a commercial invoice for an export order should indicate the origin of the goods, the export marks, an antidiversion clause, and the final destination.[139] Some contracts for sale will require the forwarding, documentation, ocean freight, and maritime insurance charges to be listed separately in addition to the total F.A.S. U.S.A. port value indicated.[140] Finally, the invoice should indicate the total value of the shipment and should be properly authorized.[141]

2. *Insurance Documentation*

Where the seller is responsible for procuring insurance, either as part of the contract price, or as a service to the customer, documentation may be required that shows such insurance was in fact procured. This document will either be a policy or a certificate, depending upon the nature of the insurance coverage.[142] These documents specified by a letter of credit must be properly signed or endorsed if made necessary by the terms of the letter of credit.

3. *Letter of Transmittal*

This letter from the exporter to his forwarder contains instructions for the transmittal of various documents. It is sent to the forwarder with the documents he requires. If a letter of credit is involved, the exporter must be particularly careful to comply precisely with the letter of credit and

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[135] EXPORT GUIDE, *supra* note 17, at 33.

[136] *Id. See also* LISCOR Report, *supra* note 31, at 22.

[137] EXPORT GUIDE, *supra* note 17, at 33.

[138] LISCOR Report, *supra* note 31, at 22.

[139] *Id.*

[140] *Id.*

[141] *Id.*

[142] *See generally* text at notes 37-42 *supra*.

should therefore make his instructions to the forwarder as specific as possible. The letter of transmittal should contain a list of the documents sent. The documents should include an inland bill of lading, a commercial invoice, an export manifest packing list, the insurance policy or certificate (in cases of C.I.F. shipments or where otherwise required), and a copy or original letter of credit.[143] The forwarder may thus verify that no documents were inadvertently omitted by the exporter.

Additionally, the letter of transmittal should include these specific instructions to the forwarder:

1. Prepare the Certificate of Origin when required (letter of credit will specify).
2. Prepare Consular Invoice when required by letter of credit.
3. Prepare Shipper's Export Declaration and file same with the port authorities.
4. Prepare any other documents required by the letter of credit or the Government of the country to which the goods are to be shipped.
5. Prepare the bank draft in accordance with the letter of credit.
6. Give any special instructions to the bank as set forth in the letter of credit.[144]

4. *Ocean Bill of Lading*

A bill of lading serves three purposes: as the certificate of ownership of the goods it represents; as the receipt of the carrier for the goods shipped; and as a means of defining the contractual terms between the carrier and the shipper for the transport of the merchandise.[145] The law applicable to bills of lading in international sales transactions where goods are exported from the United States is primarily the Federal Bills of Lading Act (FBLA)[146] and the Carmack Amendment to the Interstate Commerce Act.[147] Additionally, UCC article 7 applies in general where a bill of lading covers goods coming from a foreign country into the United States, and regulatory bodies such as the Interstate Commerce Commission have issued regulations and rulings that affect bills of lading for exporting. The FBLA is applicable to "[b]ills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country . . . ."[148] Where the FBLA is appropriate it supercedes the UCC;[149] thus, the applicability of the UCC is severly limited in this field.

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[143] LISCOR Report, *supra* note 31, at 24. The letter of credit will specify whether the original letter of credit must be included.

[144] *Id.*

[145] *Id.* at 26.

[146] 49 U.S.C. §§ 81-124 (1970).

[147] *Id.* § 20(11).

[148] *Id.* § 81.

[149] Federal law supercedes state law. U.S. CONST. art. VI, cl. 2.

A bill of lading can be negotiable (order bill of lading) or non-negotiable (straight bill of lading). Where the carrier is required to deliver the goods to the bearer of the bill of lading or to the order of a designated person, the bill of lading is negotiable.[150] If the goods are consigned to a specific person, the bill of lading is a straight bill of lading.[151] Any provision in a negotiable bill of lading attempting to limit its negotiability is valid only if it is "upon its face and in writing agreed to by the shipper."[152]

The differences between an order bill of lading and a straight bill of lading are amplified by looking at the rights of purchasers of a bill of lading. If the bill of lading is a straight bill of lading, the purchaser is entitled to notify the carrier and become "the direct obligee of whatever obligation the carrier owed to the transferor of the bill."[153] The purchaser of a straight bill of lading gets the title (to the goods covered by the bill) that his transferor either had or had the power to transfer.[154] If an order bill of lading is negotiated, the purchaser has the same rights against the carrier that the shipper had.[155] Typically, the buyer of the goods will also be the purchaser of the bill of lading, as where the sales contract specifies that the buyer is to pay "cash against documents." The buyer will pay for the documents at the same time that he pays for the goods. Such a purchaser of a bill of lading acquires "such title to the goods as the person negotiating the bill to him had or had ability to convey to a purchaser in good faith for value . . . ."[156] An order bill of lading is used for sight draft or letter of credit transactions. The bill of lading will either be endorsed "in blank" or "to the order of" a third party[157] according to the instructions in the letter of credit. At the port of destination, the merchandise will be delivered to whomever presents a properly endorsed bill of lading.[158]

There are two major risks involved for the holder of the bill of lading. One is that the carrier may fail to follow its instructions concerning delivery. The other is that the goods may be lost, destroyed, or damaged while in the carrier's hands. The general duty of the carrier is to deliver the goods upon demand of the consignee or holder (if an order bill of lading).[159] If the carrier refuses to deliver upon such a demand, the burden is on it to

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[150] 49 U.S.C. § 83 (1970). U.C.C. § 7-104.

[151] 49 U.S.C. § 82 (1970).

[152] *Id.*

[153] *Id.* § 83.

[154] If the transferee is a bona fide purchaser for value and the transferor had voidable title, the transferee will get a valid title.

[155] 49 U.S.C. § 111 (1970). U.C.C. § 7-502.

[156] 49 U.S.C. § 111 (1970).

[157] EXPORT GUIDE, *supra* note 17, at 34.

[158] LISCOR Report, *supra* note 31, at 26.

[159] 49 U.S.C. § 88 (1970). The demand must be accompanied by: (1) a good faith offer to satisfy the carrier's lien on the goods; (2) possession of the bill and an offer to surrender it, properly endorsed, if it is an order bill of lading; and (3) readiness and willingness to sign an acknowledgment of delivery, if requested by the carrier.

establish a lawful excuse.[160] The carrier can also fail to follow its instructions if it delivers to an unauthorized party, fails to deliver at all, or is late in delivering the goods.

Where the carrier delivers to an unauthorized party, it will be held absolutely liable, unless the misdelivery is caused by misdirection or negligence on the part of the shipper.[161] Where the carrier fails to deliver at all, it is absolutely liable for nondelivery if the loss is traceable to damage, loss, or destruction of the goods occurring while the goods are in its hands.[162] The carrier can escape liability only if the loss fits into one of the exceptions from absolute liability.[163] As to losses caused by a delay in the delivery of the goods, the carrier is generally only liable for negligent delay. The carrier is not "an insurer of promptness; it is required only to exercise ordinary diligence and transport the shipment with reasonable dispatch."[164]

If the goods are lost, destroyed, or damaged while in the carrier's hands, the general rule is that it is absolutely liable.[165] There are exceptions to this general rule, however, where the loss is due to acts of God, public enemies, shippers, public authorities, or the inherent nature of the goods themselves. Not only is the general rule absolute liability but the courts have also allocated the burden of proof in favor of the shipper.[166]

The exceptions to the general rule of absolute liability recognize that there are factors completely beyond the carrier's control that can cause loss, destruction, or damage to the goods. For the "act of God" exception to be applicable, the "act of God" must be the "sole and proximate cause of the injury."[167] The "act of public enemy" exception is rarely used today but formerly it allowed an exception when, for example, the loss was caused by the acts of pirates. If the shipper's fraud or negligence is responsible for the loss or damage, the carrier is not held liable for the loss. This exception is not as broad as it might seem, however, because "the carrier is obliged to prove not only that the shipper was negligent, but [also] that the carrier was not negligent or that any negligence of the carrier was not the cause of the loss."[68] If the goods are seized or destroyed under a country's police power, the carrier is not liable if it relinquished the goods only after satisfying itself that the seizing officers were properly author-

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[160] *Id.*

[161] *Id.* § 90.

[162] *Id.* § 20(11).

[163] *See* text at notes 165-68 *infra.*

[164] Leo Lococo's Sons v. Louisville & N.R.R.Co., 259 Ky. 299, 302, 82 S.W.2d 332, 333 (1935).

[165] 49 U.S.C. § 20(11)(1970).

[166] Missouri Pac. R. Co. v. Elmore & Stahl, 377 U.S. 134, 138 (1964), *rehearing denied,* 377 U.S. 984 (1964).

[167] For a more detailed examination of this exception *see* J. WHITE & R. SUMMERS, *supra* note 66, at 716.

[168] *Id.* at 720.

ized.[169] Where the loss or destruction of the goods is due to the inherent nature of the goods themselves, such as perishable goods, and the carrier was not negligent, it will not be held liable for the loss.[170]

The exporter preparing to ship his goods to a foreign country may want to know whom he could hold responsible if a loss is caused by some connecting carrier with whom he has not contracted. It is the initial carrier that is responsible for getting the goods to their destination, "using the lines of connecting carriers as their own agency."[171] But an exporter should be aware that a carrier may limit his liability for such damages where the rates are dependent on the declared value.[172]

5. *Export Draft*

The export draft works like a check, the difference being that while a check is drawn by the buyer on his own bank, an export draft is drawn by the seller on the buyer, instructing him to pay the specified amount either upon presentation of the draft (a sight draft)[173] or within a specified time frame (a time draft).[174] Time drafts usually specify the payment due date as 30, 60, 90, 120, or 180 days. Additionally, an export draft can be in the form of an "after sight" draft, requiring payment after presentation of the draft,[175] or an "after date" draft, requiring payment after the date of the draft.[176]

Instructions concerning the release of documents will typically be issued with the draft and documents. For example, if a sight draft is used, "the instructions to the collecting bank should read: DOCUMENTS ARE TO BE RELEASED TO THE IMPORTER OR THE IMPORTER'S BANK ON PAYMENT OF THE DRAFT."[177] These instructions assure that the buyer cannot get the goods without paying for them first. It is generally preferable to have the draft routed through an American bank, because the bank will act for the exporter in dealing with the buyer and his bank.[178] By using a bank to route the draft, the seller can assure himself of faster receipt of funds and a more systematic followup in the event of complications.[179]

6. *Other Documentation*

In limited, specialized situations other documents may be needed to

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[169] *Id.*
[170] *Id.* at 721.
[171] Atlantic Coast Line R.R. v. Riverside Mills, 219 U.S. 186, 203 (1911).
[172] 49 U.S.C. § 20(11) (1970).
[173] The procedure for using a sight draft is examined *supra*, text at notes 45-46.
[174] The difference between a time draft and a sight draft is illustrated, *id.*
[175] LISCOR Report, *supra* note 31, at 27.
[176] *Id.*
[177] *Id.*
[178] *Id.*
[179] *Id.*

assure the seller of payment. These include such documents as dock receipts, warehouse receipts, inspection certificates, certificates of origin, and certificates of manufacture.[180]

7. *Assistance with Documentation*

Any exporter seeking help with documentation can contact a District Office of the Department of Commerce.[181] In addition, the *Exporters Encyclopedia*,[182] is a valuable resource for exporters. It classifies documentation information and instructions on the completion of documents country by country.[183]

VI. SHIPMENT OF THE GOODS

When an exporter is looking for a ship to carry his goods abroad, he has his choice of ships—tramp vessels, independent line vessels, and conference line vessels. A drawback of the tramp vessel is its characteristic unpredictability.[184] It runs on no set schedule but picks up what cargo it can at various locales. On the other hand, the tramp vessel offers lower rates than the shipping lines. Independent lines set their own cargo rates and require only a contract for the particular shipment they are carrying at the time. Their rates may run approximately 10% lower than a conference line vessel would charge a noncontract shipper.[185] Unlike tramp vessels, independent lines have regular schedules established for most trade routes.

A steam ship conference "is an association of ocean carriers who have joined together in order to establish common freight rates and shipping conditions."[186] Shippers who belong to the conference (contract shippers) will often be able to ship their cargo aboard conference vessels for a lower rate than shippers who do not belong (noncontract shippers).[187] In addition, members receive advance notice of upcoming rate increases.[188] All conference vessels ship at the same rates, so a contract shipper can use them interchangably.[189] But the contract shipper's obligation is to ship all or a large percentage of his cargo aboard conference vessels.[190] With the

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[180] EXPORT GUIDE, *supra* note 17, at 33-34.

[181] The District Office in Atlanta, Ga. is located at Suite 600, 1365 Peachtree St. N.E., 30309.

[182] Published annually by Dun and Bradstreet Publications Corp. (466 Lexington Ave., N.Y., N.Y. 10017), with supplementary bulletins to keep it up to date throughout the subscription year.

[183] LISCOR Report, *supra* note 31, at 31.

[184] *Id.* at 30.

[185] EXPORT GUIDE, *supra* note 17, at 29.

[186] *Id.*

[187] *Id.*

[188] LISCOR Report, *supra* note 31, at 30.

[189] *Id.*

[190] *Id. See also* EXPORT GUIDE, *supra* note 17, at 29.

permission of the conference, an exception to that obligation is allowed if no conference vessel will be sailing to the desired destination within a reasonable time.[191] Thus, the advantages of being a contract shipper may make joining a conference worthy of serious consideration.

VII. POST-SALE ARRANGEMENTS

The relationship between the buyer and seller subsequent to a sales transaction depends largely on the nature of the goods involved. Post-sale arrangements can be categorized as arrangements for service, for parts, or for training. Training arrangements are often an important part of the contract negotiations and are a part of most export sales where machinery is involved. A foreign buyer who is buying machinery from the United States will probably have been using less advanced machinery before the sale than he will be using after the sale. These arrangements should be made when the contract is being negotiated. Service agreements are a very rare post-sale agreement. It is in the buyer's own interest, where he is getting machinery that is going to need extensive service, to have his own personnel trained to do the servicing.

Where machinery is being sold, parts agreements are a part of every sale. Typically, the initial sale will include a stock supply of parts, including those that wear out often or have a high probability of failure. Additionally, a parts agreement is in the seller's best interest. As long as the seller is providing the buyer with parts as they are needed, he can stay in contact with the buyer. By keeping in contact the seller improves his chances of selling the buyer his next purchase, whether it be to expand his existing facilities or to renovate or replace equipment that becomes obsolete in the future.

VIII. TAX CONSIDERATIONS

Exporting goods from the United States can have favorable tax consequences for the exporter who can qualify as a Domestic International Sales Corporation (DISC). The DISC was created in 1971[192] in an effort to increase United States exports by increasing the profitability for American companies engaging in exporting.[193] To make exporting more profitable

> 50% of the DISC's taxable income is taxed currently as a "deemed dividend" to the stockholders . . . , [the other 50 percent] is eligible for

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[191] EXPORT GUIDE, *supra* note 17, at 29.

[192] 26 U.S.C. §§ 991-994 (Supp. II 1972) (originally enacted as Revenue Act of 1971, Pub. L. No. 92-178, 85 Stat. 497 (1971)).

[193] *See* Note, *Fine-Tuning the DISC: Evaluation and Framework*, 7 GA. J. INT'L & COMP. L. 629 (1977) [hereinafter cited as Ga. Note]. *See also* Note, *Domestic International Sales Corporation: A New Concept for American trade policy*, 4 N.Y.U.J. INT'L L. & POL'Y 92 (1971).

deferral while it is retained by the DISC. Deferral terminates and tax is imposed on the shareholders of the DISC if the deferred earnings are distributed as a dividend or the corporation no longer qualifies as a DISC or if the stock of the DISC is disposed.[194]

To become a DISC, a corporation must be incorporated under the laws of any state[195] and meet the following substantive tests: (1) 95% or more of the gross receipts[196] consist of "qualified export receipts"[197] and (2) the adjusted basis of "qualified export assets"[198] at the close of the taxable year is at least 95% of the adjusted basis of all assets of the corporation at the end of the taxable year.[199] Additionally, three procedural tests must be passed: (1) the corporation can only have one class of stock,[200] (2) the par value of the outstanding stock must be at least $2500 at all times during the taxable year,[201] and (3) the corporation must elect to be treated as a DISC.[202]

Election to be treated as a DISC must be made by all the shareholders[203] of the corporation as of the first day of the first taxable year for which the election could be effective.[204] The election may be made during the first 90 days of the taxable year.[205] The effect of an election to be treated as a DISC is that the tax provisions relating to DISCs apply to the corporation and all shareholders at or after the effective date of the election[206] from the effective date forward.[207]

Congress and the Treasury expected a DISC to need little more than a paper existence[208] to qualify for the preferential tax treatment. A DISC and its parent company must, however, maintain separate bank accounts,[209] but a DISC need not have any employees nor carry any inventory.[210] "Further, the parent company of a DISC may solicit orders on behalf of the DISC, make direct shipments to customers and handle all billing and

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[194] Rosignoli, *Tax Planning for Export Operations: Using the DISC*, 7 LAW. OF THE AMERICAS 556, 561 (1975). For the effect of termination or disqualification of DISC status upon tax treatment, *see* text at notes 234-39 *infra*.

[195] I.R.C. § 992(a)(1).

[196] As defined in I.R.C. § 993(f).

[197] I.R.C. § 992(a)(1)(A). "Qualified export receipts" is defined in I.R.C. § 993(a).

[198] I.R.C. § 993(b).

[199] I.R.C. § 992(a)(1)(B).

[200] *Id.* § 992(a)(1)(C).

[201] *Id.*

[202] *Id.* § 992(a)(1)(D).

[203] There usually will be only one shareholder, the parent corporation, in this situation, however.

[204] I.R.C. § 992(b)(1)(B).

[205] If the Secretary gives his consent another time can be chosen. I.R.C. § 992(b)(1)(A).

[206] I.R.C. § 992(b)(2).

[207] This is true unless the election is terminated under I.R.C. § 992(b)(3).

[208] Ullman, *The Domestic International Sales Corporation ("DISC"); a United States Tax Vehicle to Encourage Exports*, 26 BULL. INT'L FISCAL DOCUMENTATION 375, 376 (1972). *See also* Ga. Note, *supra* note 193.

[209] Ullman, *supra* note 207, at 376.

[210] *Id.*

collection efforts. Thus, the DISC may receive a commission on all export sales, and need have no other corporate activities."[211]

The provisions concerning qualification as a DISC in any given tax year are lenient. In fact, a corporation that does not meet the receipts or assets test during the taxable year may be deemed to have met them if it makes a pro rata distribution to its shareholders after the close of the taxable year that is designated as a distribution for purposes of complying with the qualification requirements,[212] if such distribution is equal to the amount of assets and/or receipts that were not qualified.[213] However, the failure to meet the requirements and make the distribution earlier must be due to "reasonable cause"[214] and the corporation must pay to the Secretary of the Treasury within 30 days after the distribution is made, an amount equal to 4½% interest[215] on the distribution for the period of time between the taxable year for which the distribution is made and the date of the distribution.[216] "Reasonable cause" can be deemed to exist where the distribution is by or before the fifteenth day of the ninth month after the close of the taxable year.[217] To qualify for this treatment 70% of the corporation's gross receipts for the taxable year must have been qualified export receipts[218] and the adjusted basis of the qualified export assets at the end of each month of the taxable year must have been equal to at least 70% of the adjusted basis of all assets held by the corporation on that day.[219]

As a general rule, qualified export receipts are

> receipts from sales of "export property;"[220] . . . gross receipts from leases or rental of export property; gross receipts for services related to either of the foregoing; gross receipts from the sale or other disposition of export assets;[221] gross receipts for engineering or architectural services on foreign construction projects; and gross receipts for managerial services in furtherance of the production of other qualified export receipts of a DISC.[222]

Additionally, qualified export receipts include interest on qualified export

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[211] *Id.*

[212] I.R.C. § 992(c)(1).

[213] *Id.* § 992(c)(1)(A)-(C).

[214] *Id.* § 992(c)(2)(A).

[215] *Id.* § 992(c)(2)(B).

[216] *Id.*

[217] *Id.* § 992(c)(3).

[218] *Id.* § 992(c)(3)(A).

[219] *Id.* § 992(c)(3)(B).

[220] For property to qualify as export property, it must have greater than half of its fair market value attributable to articles "manufactured, produced, grown, or extracted in the United States" by other than a DISC and be held primarily for sale, lease, or rental by or to a DISC in the ordinary course of business for "direct use, consumption or disposition" outside the United States. I.R.C. § 993(c)(1).

[221] This is defined in I.R.C. § 993(b).

[222] Ullman, *supra* note 208, at 382. I.R.C. § 993(a)(1) is the appropriate section for this last concern.

assets,[223] receipts from services related to the disposition of qualified export assets,[224] and dividends from a related foreign export corporation.[225] Certain receipts are excluded from qualified export receipts,[226] notably any receipts from a subsidiary DISC more than 50% owned by the parent DISC attempting to use those receipts as qualified export receipts.[227]

Qualified export assets include export property[228] and assets used primarily in connection with the sale, lease, rental, storage, handling, transportation, packing, assembly, or receiving of export property.[229] Additionally, accounts receivable from the sale of a qualified export asset,[230] obligations arising in connection with a producer's loan,[231] FCIA and Eximbank obligations,[232] and the working capital of the corporation[233] are included in qualified export assets.

Once a corporation has elected to be treated as a DISC, it will continue to be treated as such unless it voluntarily terminates its status or is disqualified as a DISC.[234] A corporation may elect to terminate its DISC status by revoking its election to be so treated, for any taxable year after the first year for which the election was effective.[235] If the termination is made within the first 90 days of a taxable year, it is effective for that year,[236] otherwise, the termination becomes effective at the beginning of the next taxable year.[237] Regardless of when the termination is effective, it remains in force for subsequent years.[238] A corporation can also lose its status as a DISC involuntarily if it fails to qualify as a DISC for five consecutive taxable years during which the election is effective. The election will be terminated and will be of no further effect after the fifth year.[239]

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223 I.R.C. § 993(a)(1)(F).

224 *Id.* § 993(a)(1)(C).

225 *Id.* § 993(a)(1)(E).

226 *Id.* § 993(a)(2).

227 *Id.* § 993(a)(2), (3).

228 For a definition of export property, *see* note 220 *supra*.

229 I.R.C. § 993(b)(2).

230 *Id.* § 993(b)(3).

231 *Id.* § 993(b)(5). *See also* I.R.C. § 993(d) for a definition of producer's loans. They are one of the key factors contributing to the desirability of DISC status.

232 I.R.C. § 993(b)(7).

233 *Id.* § 993(b)(4).

234 Additionally, the tax advantages could be lost if the law is changed. President Carter is reported to have decided the DISC should be phased out over three years. Atlanta Constitution, Dec. 21, 1977, § A, at 9, col. 1.

235 I.R.C. § 992(b)(3)(A).

236 *Id.* § 992(b)(3)(A)(i).

237 *Id.* § 992(b)(3)(A)(ii).

238 *Id.* § 992(b)(3)(A).

239 *Id.* § 992(b)(3)(B).

The DISC is a vehicle for tax saving that should be considered by any corporation which might qualify. There are restrictions, however, on its use and on the types of corporations that can qualify.[240] The costs of being a DISC could, in some situations, outweigh the tax benefits.[241] Nonetheless, it may be a viable option for many exporters and should be given serious consideration.[242]

IX. CONCLUSION

There is nothing magical in the exporting process. The vast majority of exporting transactions are completed without any problems. With advance planning, made available through exposure to the process and the potential problem areas, the practitioner and the businessman can increase the percentage of trouble-free transactions. An awareness of the possible problem areas is needed if one is going to be involved in exporting. The process follows a logical sequence beginning before the initial contact with the buyer and ending with post-sale arrangements.

United States businesses have the ability and the resources to compete in the international marketplace. The potential for growth in United States exports is tremendous.[243] Expansion of the exporting business carried on by American businesses is essential if the United States is to improve its balance of trade deficit. Growth in the export sector creates new jobs in the United States, improving the domestic unemployment rate. Further, additional exporting provides a broader marketing base that will lead to greater growth and profits for companies willing to take the step into the world of exporting. With advance planning, it can be a smooth transition from a market limited to the domestic needs of Americans to a market that has global potential.

Albert Caproni, III

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[240] Ineligible corporations include: (1) corporations exempt from tax by I.R.C. § 501, (2) personal holding companies, (3) financial institutions such as banks, mutual savings banks, domestic building and loan associations, and cooperative banks, (4) insurance companies subject to subchapter L tax, (5) regulated investment companies pursuant to I.R.C. § 851(a), and (6) subchapter S corporations governed by I.R.C. § 1371(b).

[241] *See* Ullman, *supra* note 208, at 384.

[242] *See generally* Ga. Note, *supra* note 193.

[243] *See* text at notes 1-2 *supra*.