Export Sale Contracts:
Keeping An Eye On The Essentials

By **Titilade Adelekun** | originally published in ThisDay Lawyer, *on 13th December 2016, P.14*

t.adelekun@lelawlegal.com

Introduction

International trade involves exchange of goods and services across borders; they are essentially import and export transactions. It is premised on the reality that no country is self-sufficient and countries respectively have comparative advantage on production and supply of different goods and services. Exportation of goods helps a country earn foreign exchange (fx) that can be used to finance future transactions and shore up its foreign reserves.

The downturn in oil prices coupled with the reduced crude production (due to incessant militant attacks) in the Niger Delta region has led to lower public revenues, thereby negatively impacting the Nigerian economy. The case for diversification of the economy from its over dependence on oil cannot be more strident at this time, and increased focus on the export space is now compelling, given historic half- hearted attempts at export promotion. The Nigerian Exportation Promotion Council (NEPC), charged with facilitating non–oil exports and providing liaison support to exporters and intending exporters, would seem to have its job cut out for it.

It is very important to understand the key legal and regulatory issues around the export contracting process. Exportation of goods involves elements of procurement, production and/or provision of the product or service, processing (if applicable), the logistics of the export itself and finance- each with their contracts/documentation- which needs to be drafted, reviewed and negotiated. In the process, the relationship, obligations and rights of the parties to the export transaction would be x-rayed. This article highlights the export contracting process, emphasising necessary legal safeguards to prospective exporters.

Export Sale Contracts (ESC): The Essentials

Export transactions have various legal issues arising from the formation, provisions and enforcement of contracts. In recognition of these realities and of the basic importance of an orderly ESC, it is key to take note of certain safeguard provisions that every ESC should contain. These elements include:

a) <u>*Transfer of Interest:*</u> Goods in transit are exposed to all kinds of risk such as physical damage or loss, deterioration, acts of God etc. Therefore, ascertaining the party who bears the risk and at what time the risk burden passes, is essential. The property in goods are transferred to the buyer at such time as the parties to the contract intend, provided the goods are not unascertained-***sections 16 & 17 Sales of Goods Act 1893***. In ***Emaphil Ltd v. Odili [1989] 4 NWLR (Pt. 67), 919*** the Court while emphasizing the sanctity of contract held that "*…property and risk were intended to pass to the respondent on delivery of goods, it follows that until goods are delivered the property and risk rested with the appellants.*"

In order to determine when property in goods are transferred (and avoid 'second guessing'), parties sometimes choose from any of the favourable international trade terms (*Incoterms 1990*) published by the International Chamber of Commerce (ICC) and commonly used in both international and domestic trade contracts. The most commonly used are *Free on Board (FOB), Cost Insurance and Freight (CIF), Cost and Freight (CF)* and *Ex Works (EXW).* These Incoterms are favourable to an exporter (depending on the type

of goods and cargo used) because the responsibility of all costs and charges are mutually shared between the parties. This clause is important because the risk bearing responsibilities are clear and understood before shipment.

b) <u>*Payment Terms*</u>: Most exporters are at risk of buyers failing to pay, because they cannot guarantee the credit worthiness of buyers. Also, the buyers,

in most cases, are not willing to part with cash until assured of delivery of the goods. There are various advance mode of payments in protecting an exporter such as Letters of Credit (LOC), advance payments, bankers' acceptance, medium-term capital goods financing, countertrade etc. The most commonly used and secure method is the LOC- it involves a letter of guarantee from the buyers' foreign bank guaranteeing payment to an exporter provided the goods meet the terms, conditions and standards stated in the LOC.

In ***Malas (Hamzeh) & Sons v. British Imex Industries Ltd [1958] 2QB 127***, *Lord Justice Jenkins* held that *"… an elaborate commercial system had been built up on the footing that a confirmed letter of credit constituted a bargain between the banker and the vendor of the goods, which imposed upon the banker an absolute obligation to pay, irrespective of any dispute there might be between the parties whether or not the goods were up to contract."* It therefore becomes evident that LOC's guarantees payment of an exporter and eliminates risk of dealing with an unknown buyer. In addition to the foregoing, it is paramount that all exporters open a domiciliary account with a bank in Nigeria where all proceeds will be paid as directed by the NEPC's *Non-Oil Export Guidelines*.

c) *Pricing and Foreign Exchange Risk:* Export related invoices are usually issued in foreign currency, and as an effect exporters are exposed to exchange rate fluctuations that could potentially result in them receiving lesser value and *vice versa*. Thus, it is advisable that exporters price the goods in foreign currency equivalent of the Naira in order to hedge against any currency fluctuation. This is because fx is relatively stable compared to the Naira which can be affected by devaluation.

d) *Insurance Cover*: Exportation of goods are prone to a lot of unforeseen circumstances, such as damages, delay, loss in transit, currency fluctuations, political or economic instability in the buyer's or seller's country, etc. Insurance seeks to protect these risks. It is therefore crucial that parties agree on the need for insurance, usually marine or less commonly, aviation insurance. The seller can agree to joint payment or be a party, or be governed by an Incoterm also covering that aspect of insurance. The end result is that the assured becomes entitled to payments upon the occurrence of the event insured against. This clause seeks to ensure that goods are protected and all fears of risk are put to rest.

e) *Intellectual Property Right (IPR) Protection:* IPR protection is very vital to exporters with protectable assets because these rights are territorial - which means that IPR within a country are independent of any such rights existing in other countries. Thus exporters should ensure that their IPR are registered in the export destination to prevent infringement. ***Section 19(1), Patents and Designs Act 1971*** provides that *registration of an industrial design confers upon the registered owner the right to preclude any other person from reproducing, importing, selling or holding such a product or utilising for commercial purposes."* Accordingly IPR prevents third Parties from, reproducing exporting, importing, selling, copying etc. without the permission of the exporter.

In addition, in ***Zeneca Ltd v. Jagal Pharma Ltd [2007] ALL FWLR (Pt. 387), 954***, per *Galinje J.C.A* held that *"a trade mark, when registered, will entitle the proprietor to sue or institute an action for any infringement of the trade mark. Registration entitles the proprietor to the exclusive use of the trade mark and also right to sue for passing off the goods of the proprietor."* Registration also gives the exporter the advantage in pricing, marketing, accessing new markets (through licensing, franchising etc.) and strengthening its position in the export market.

f) *Governing/Applicable Law:* The need for an applicable law in an ESC is essential because parties are often from different legal jurisdictions. In the event of a dispute, the terms of the contract become important and subsidiary dispute on the applicable law to the contract is obviated. It is therefore imperative that parties agree on the governing law of their contract. If parties cannot agree on using either country's laws, a neutral law commonly used in both countries can be chosen. English Law is a popular example.

g) *Dispute Settlement*: Most disputes in international trade arise due to (defective) quality and/or quantum of the goods, delayed shipment or non-shipment etc. These disputes are majorly settled through Alternative Dispute Resolution (ADR) (Arbitration, Mediation, Conciliation) or litigation. This clause affords an exporter the opportunity to decide on how best to resolve disputes. In ***Beluonwu v. O.K. Isokariai & Sons [1994] 7 NWLR (Pt 358), 593***, the Court in emphasising the importance of an ADR clause in contracts held that *"where there is a provision in a contract for reference of dispute to arbitration the High Court has power to stay proceedings pending reference to arbitration."*

ADR is most efficient because they are quick, less formal and adversarial, and exposes the real reason rather than the ostensible reason for the disagreement and offers prospects of continuance of the relationship. Exporters would do well to include an ADR clause in their ESCs given the efficiency benefits in settling disputes.

Conclusion

In dealing with ESCs, standard form contracts can also be used, but it is advisable that a lawyer other experienced professional peruses such contracts, to ensure they are fit for purpose (are bespoke), guarantee fairness and clearly express the parties' intentions. All contracts must also be precise, comprehensive and executed properly by parties.

Overall, an ESC seeks to assure measurable results and maximum protection all at once. Getting this right could serve as a starting point in achieving Nigeria's diversification goal for gaining economic momentum.

LeLaw Disclaimer:

Thank you for reading this article. Although we hope you find it informative, please note that same is not legal advice and must not be construed as such. However, if you have any enquiries, please contact the author, Titilade Adelekun at *t.adelekun@lelawlegal.com.*