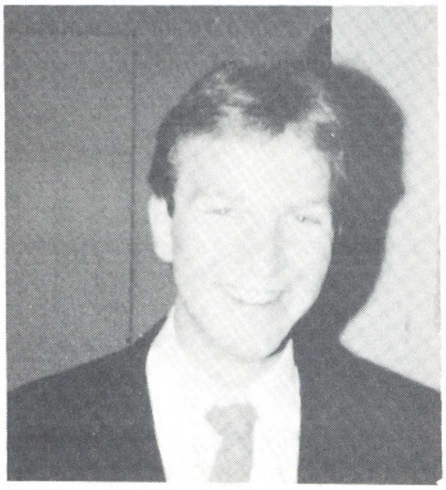
Legal issues of the Export-Import Bank

Considerations for the exporter



by Steven E. Hendrix*

The Export-Import Bank of the United States (Eximbank) is an agency of the federal government designed to assist in the financing of U.S. exports. In May, 1987, the Eximbank revised its programs to further assist exporters and commercial lenders. From time to time a number of legal issues arise with regard to these programs.

Legal problems of persons trying to use the programs of Eximbank usually involve four fundamental issues. The first two issues, (1) the need for banks and exporters to be aware of what types of loans and guarantees are available, and (2) the approval process, were discussed in an article in the last issue of *Wisconsin International Trade (WIT)*. In this article, the third issue, the need to be aware of the documentation requirements, and the fourth issue, standard terminology found in Eximbank documentation, are discussed.

Eximbank Documentation

In general terms, there are two types of documents--loans and guarantees. Each of these has its own requirements.

A. Loans

1.) Direct Credits of more than $10 million

If Eximbank is the lender (i.e., the loan is a direct credit), and the transaction is for more than $10 million, then an Eximbank standard form credit agreement must be used. This credit agreement contains standard conditions precedent, which include delivery to Eximbank of the promissory note, legal opinions, evidence of authority, an acquisition list and the appointment of an agent for service of process.

The credit agreement also has standard disbursement procedures. Basically, there are two ways Eximbank will disburse a direct credit. Both of these are explained in detail in "Annex B" of the standard form credit agreement.

First, the credit can be disbursed through a reimbursement to the purchaser. Under this method, the foreign purchaser pays the exporter for the goods, and the purchaser then requests Eximbank to reimburse the funds. This request from the purchaser must be accompanied by copies of invoices and certificates from the supplier, both of which must affirm that there were no discounts, allowances or rebates and that the goods were of U.S. origin (as indicated on a form supplied for this purpose with the standard form credit agreement). Accompanying these documents must be a bill of lading and any other documents relevant in a given transaction. If Eximbank is satisfied that these documents are adequate, then Eximbank will reimburse the purchaser for the funds paid to the exporter.

Alternatively, the method of Eximbank disbursement could be a letter of credit in favor of the exporter. Often exporters prefer this method of disbursement since it is secure and delays in payment by the foreign purchaser can be avoided. The request for disbursement under a letter of credit requires the same documentation as a request under the reimbursement method, explained above.

2.) Direct Credits of less than $10 million

If Eximbank is lending its own funds to a foreign purchaser (a direct credit) and the total financed amount is less than $10 million, Eximbank uses a standard form agreement similar to the one for credits of over $10 million. However, this form is shorter and more "user friendly." The same methods of disbursement are available.

3.) Intermediary Loans

Most of Eximbank's intermediary loans are handled under a "Master Funding Agreement" executed with each financial institution. Under this master agreement, Eximbank provides one-

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page "approvals" to the banks. These approvals state the approved terms of each individual transaction and reference the master agreement, which is simply a framework agreement which states the procedures and terms for each Eximbank approval. Thus, once a bank has signed a Master Funding Agreement, it can request a simple one-page approval for each individual transaction it desires to finance.

Previously, Eximbank had used an "Intermediary Agreement" for each transaction. The new "master" agreements simplify and streamline this process. However, for very complex or high-dollar transactions, it may still be preferable to execute an individual "Intermediary Credit Agreement" to document a single transaction.

One important feature to the Master Funding Agreements is that they provide for two alternative methods of disbursement by Eximbank. First, a bank can request that Eximbank reimburse it for a payment it has made to a foreign purchaser. This is known as the "reimbursement" method. In the second method, "pre-funding," a bank can request that Eximbank fund it before it disburses to the foreign purchaser. However, the bank must disburse its funds within five days of Eximbank's disbursement. Failure to do so will result in the bank having to prepay the amount with interest to Eximbank.

B. Guarantees

There are two ways to structure an Eximbank guarantee. The first method is known as a "Supplier Credit," while the second is known as a "Buyer Credit." Under both methods, a number of standard provisions apply.

1.) Supplier Credits

Those familiar with Eximbank's old programs (those in place prior to May 1, 1987) will recognize supplier credits as the old "bank guarantee program." Another name for it is a "note purchase" arrangement. Traditionally, supplier credits have been for amounts of less than $10 million. Under the supplier credit structure, the foreign purchaser issues a promissory note to the exporter. The exporter in turn sells the note to the bank. The note carries Eximbank's guarantee.

Under supplier credits, the exporter must make several warranties: first, that the promissory note is valid and enforceable, and second, that the goods shipped were in conformity with the underlying contract. If the foreign purchaser alleges that there is a problem with the goods, Eximbank is held harmless. Thus, any subsequent failure to pay for the goods would not be covered by Eximbank.

Supplier credits have one main advantage: the exporter has no documentation risk. The exporter gets the Eximbank guarantee and a promissory note. The exporter will get paid no matter what so long as the goods shipped are conforming.

2.) Buyer Credits

The documentation of buyer credits will vary depending on the size of the transaction. Buyer credits are simply credits issued by a financial institution directly in favor of the foreign purchaser. The promissory notes run to the bank, not the exporter.

For transactions of more than $10 million, Eximbank requires banks to use an Eximbank credit agreement. This agreement will be very similar to the documentation described above for a direct credit loan. Further, Eximbank will examine the credit agreement with the same scrutiny it would apply to one of its own direct credits.

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Eximbank continued

For transactions of less than $10 million, the bank may or may not have a credit agreement. This decision is left up to the bank. If a credit agreement is not used, the transaction will be evidenced by just a promissory note. However, it is very important to realize that if the bank does insist on a credit agreement, the bank will have to assume the documentation risk for the transaction. Thus, this method of documentation may be much less satisfactory to the banks than a supplier credit.

Common Provisions of Eximbank Guarantee Documentation

Whether the exporter or the bank decides to structure a guaranteed transaction as a buyer or a supplier credit, there are a number of standard features the parties can expect.

First, Eximbank promises to pay a claim within five days after Eximbank receives a filing for a claim. The guaranteed party can submit its claim as soon as 30 days after an event of default. A claim must be submitted within 150 days of default if the guaranteed party wishes to maintain Eximbank's guarantee. In the event a claim is not submitted within 150 days of a default, then the guaranteed party would forfeit its guarantee with respect to that installment. Subsequent installments, however, would still be covered.

Second, in the event Eximbank has to pay a claim, Eximbank would cover the installment in default plus interest at the guaranteed interest rate specified in the Guarantee Agreement. Eximbank would also then be obligated to pay each subsequent installment as it became due. In exchange, the guaranteed party would assign Eximbank its underlying loan agreement with the foreign debtor.

Third, on the smaller transactions where the foreign purchaser is not a "full faith and credit" entity (such as a sovereign government), Eximbank requires that someone provide Eximbank with a 2% reimbursement agreement (also referred to as a "counter guarantee"). This reimbursement agreement covers all transactions in which there is commercial risk. Transactions involving full faith and credit entities are deemed to have no commercial risk. The purpose of the reimbursement agreement is to create some form of risk participation in the deal. Whenever Eximbank has to pay a claim for commercial reasons (as opposed to political reasons), Eximbank requires that it be paid 2% of the loss. No reimbursement is required when the loss is for political reasons.

Under Eximbank guarantees, Eximbank provides for 100% cover. Any party can provide Eximbank with any required reimbursement agreement, including the exporter or the bank. The guaranteed party does not have to be the same party that provides the reimbursement agreement. Eximbank's payment of a claim will not be conditioned on receipt of the reimbursement amount, unless both the guaranteed party and the party providing the reimbursement are the same entity. In that case, Eximbank would simply pay the claim at the rate of 98%--full cover minus the reimbursement amount.

Finally, it should be noted that Eximbank now offers Master Guarantee Agreements. Like Master Funding Agreements, the Master Guarantee Agreements allow for a one-page approval for each transaction, dramatically cutting down the paperwork. The Master Guarantee Agreement itself is a standard form which states the terms, conditions and procedures for handling each approved transaction. Thus, once a bank has signed a Master Guarantee Agreement and that agreement is in place, then that bank can process Eximbank guarantees with a minimum of documentation.

SUMMARY

As stated in the previous issue of WIT, the best way to avoid delays, confusion and mistakes when using Eximbank programs is to apply for a preliminary commitment as soon as possible. This will help the bank or the exporter to anticipate some of the most common legal problems and make the documentation of the transaction go much smoother. Further, banks should also investigate signing Master Funding and Guarantee Agreements with Eximbank to expedite and streamline the process. And, given a number of standard provision found in almost all Eximbank guarantees, exporters and banks should be able to structure transactions to avoid repayment risk while maintaining sufficient flexibility. With these few tips on what programs are available, the application process and required documentation, exporters and banks should both be set to take advantage of the various Eximbank programs.

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