

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 the 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 new programs.

Legal questions usually involve four fundamental issues. This article addresses first the need for banks and exporters to be aware of what types of loans and guarantees are available, and second, the approval process. In the next issue

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of *WIT*, a companion article will address the third issue, the need to be aware of the documentation requirements, and fourth, common provisions found in Eximbank documentation.

Types of Eximbank Support:

In general, Eximbank offers support in two forms. First, there are "direct credits" to foreign purchasers in which Eximbank loans its own funds to the overseas customer. With direct credits, Eximbank accepts the entire repayment risk.

Second, there are loans made by commercial lenders which receive either (1) an Eximbank guarantee or (2) an Eximbank intermediary loan. Commercial banks may loan their own money to the foreign purchaser and receive an Eximbank guarantee, thus avoiding repayment risk. Alternatively, banks may request an intermediary loan from Eximbank. In this case, the bank receives funding from Eximbank, and the bank then on-lends this funding to the foreign purchaser.

With an Eximbank intermediary loan, the bank retains the repayment risk. However, Eximbank intermediary loans can be combined with Eximbank guarantees so that the bank can receive both funding and avoid repayment risk.

The Approval Process:

No matter which method of support is desired, banks and exporters need to be involved with the approval process. Especially when first becoming familiar with Eximbank programs, banks and exporters should apply as early as possible for a "preliminary commitment" from Eximbank. This commitment will ex-

plain the basic terms and conditions of Eximbank's involvement. This preliminary commitment will also outline any special conditions which might be required by Eximbank.

There are three areas which seem to generate the most difficulty for banks and exporters contemplating Eximbank programs. These three areas are (1) U.S. content restrictions, (2) shipping regulations and (3) the "exposure fee." Each of these areas is specifically addressed in any preliminary commitment letter. Thus, by applying for a preliminary commitment as early as possible, the banker or exporter will be able to take these difficulties into consideration when structuring the deal.

Eximbank's programs are designed to finance "U.S. content." This is defined as the lesser of (1) 85% of the cost of the items or (2) 100% of the U.S. portion, so long as the U.S. portion constitutes at least 50% of the total portion. Eximbank's engineers make the determination concerning "what is U.S. content" and any specific questions can be addressed directly to them. However, in any event, assuming the bank or the exporter informs Eximbank that there may be some portion of foreign content in the items to be exported, the preliminary commitment letter will specify what amount Eximbank would be willing to support. This provides the bank and the exporter notice as to what extent they can expect Eximbank to support the transaction. It also avoids the unpleasant revelation that Eximbank will not disburse funds on a commitment because the underlying shipment contained non-U.S. exports even though an agreement has been signed and the exporter or the bank promised financing to the foreign purchaser.

Advice on Legal Issues and Regulations

Shipping requirements can also present problems for banks or exporters. The exact shipping requirement relevant to a particular transaction will be spelled out in the preliminary commitment letter. Basically, special requirements apply to (1) transactions over \$10 million or (2) transactions with a repayment period of over seven years. If a transaction meets either of these two criteria, then (1) the goods must be shipped on vessels of U.S. registry, if the goods are being shipped on vessels or (2) a waiver of this requirement must be obtained from the Maritime Administration (also known as "MARAD"). Otherwise, Eximbank will not support the transaction. Thus, once again, it becomes important to receive a preliminary commitment as soon as possible in the process to make sure that all formalities have been met.

A final difficulty for banks and exporters is the exposure fee. Eximbank charges an exposure fee based on the term of the financing, the country involved and the type of borrower. In short, it is an amount of money that Eximbank gets for each disbursement (under a direct or intermediary loan) or the guarantee of each disbursement (under an Eximbank guarantee). This fee, which is basically a guarantee fee, is treated like other expenses (like insurance and freight charges) and can be financed. If financed, the loan amount will be increased to finance 85% of the exposure fee amount.

When applying for Eximbank assistance, it is important to note whether the exposure fee should be included in the financed portion. If the fee is not financed, the fee will have to be paid up front. Eximbank's preliminary commitments set forth whether this fee will be financed under the particular transaction. Thus, it is important to request this financing before a preliminary commitment is issued.

After the preliminary commitment is received, the bank or the exporter can firm up the deal. Once the transaction is about to go forward, an application

should be made for a final commitment from Eximbank. If Eximbank approves this "conversion" from a preliminary commitment to a final commitment, the next step will involve the documentation of the transaction.

In conclusion, 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.

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