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CHAPTER 1

INTRODUCTION

Discovering and conquering new markets in other countries is a huge adventure for any company. It offers great opportunities, but also has many pitfalls. What these opportunities are the company had apparently already discovered, because otherwise it would not have started exporting. This book discusses the pitfalls and legal dangers a company encounters when exporting to other countries. These pitfalls and dangers can best be illustrated with an example.

EXAMPLE

A Dutch enterprise, Shoes Unlimited BV, has for years been successfully producing and selling shoes in the Netherlands when it decides to try and conquer part of the lucrative Spanish market.

One of the first questions to be answered is how Shoes Unlimited BV is going to achieve this goal, in other words they have to select an entry strategy. Will Shoes Unlimited BV sell their shoes themselves on the Spanish market (direct sale), will they start their own chain of shops in Spain (subsidiary), or will they sell their shoes through an agent or distributor? The various entry strategies are discussed in detail in Chapter 5.

After the first steps in the new market have been taken, many things can still go wrong. If Shoes Unlimited BV has a legal dispute with one of its Spanish customers, e.g. the customer does not pay or the shoes delivered are of a bad quality, there is an international dispute and in international disputes there are always three questions to be answered:

1. What court has jurisdiction? In other words, the court in which country: Spain, the Netherlands or perhaps even a third country is competent to deal with this dispute? The answer to this question can be found in the Brussels I Regulation.
2. The fact that Spanish courts have jurisdiction does not necessarily mean that Spanish law should be applied. The answer to the question of applicable law can be found in the Rome I Regulation.
3. If a Spanish court orders Shoes Unlimited BV to pay damages to a Spanish customer the question is whether the Spanish judgment can be executed in the Netherlands. This is something not so obvious since normally a country only recognizes the judgments of its own courts. The Spanish customer will want to execute the judgment in the Netherlands because Shoes Unlimited BV will probably have their money in Dutch bank accounts. In the European Union the Brussels I Regulation gives uniform rules for executing a judgment given by a court of another Member State.

The answers to the three questions will be discussed in depth in Chapter 12 and 13.

A court which is called upon to decide an international dispute will always have to wonder if there is an international treaty applicable to the case. If the agreement is about the sale of goods, the most important treaty is the Convention on Contracts for the International Sale of Goods, also known as the Vienna Convention. For example, if the parties have failed to agree on a place of delivery in their contract, the Vienna Convention provides the answer to the question where the goods will have to be delivered. The Vienna Convention will be discussed extensively in Chapter 8.

In contracting with customers it is important for Shoes Unlimited BV to make sure their General Conditions of Sale apply to the contract. General Conditions of Sale are standard clauses a company uses for all its contracts. These clauses are often advantageous for the party who drafted them. This subject will be discussed in Chapter 6.

Something Shoes Unlimited BV also has to think of when selling shoes is to put a Retention of Title in the contract. A Retention of Title clause gives the seller the right to reclaim the unpaid goods if the buyer is unwilling or unable (e.g. insolvent or bankrupt) to pay the purchase price. This subject is discussed in Chapter 7.

Chapter 14 deals with some of the other important standard clauses found in contracts of sale. In most international contracts for the sale of goods there are clauses on which party will be responsible for the transport of the goods, when the risk of damage to or the loss of the goods passes from the seller to the buyer and which party has to pay for the transport of the goods. The International Chamber of Commerce has standard clauses, known as Incoterms, which deal with this subject. Incoterms are further explained in Chapter 10.

If the transport of the goods has to be arranged by Shoes Unlimited BV, because of the Incoterm selected in the contract of sale, and the truck transporting the goods is stolen, the question is whether Shoes Unlimited BV can claim damages from the transporter and in what amount. This subject is dealt with in Chapter 11.

Another important issue for Shoes Unlimited BV selling shoes to Spain is the question: 'How do we ensure we are paid for the shoes we sold?' This question is addressed in Chapter 15.

As a result of their research Shoes Unlimited BV discovered a new substance to make the soles of their shoes lighter and much more resistant. The shoes with these soles are best sellers, but after a few months complaints start coming in. If customers walk on wet surfaces, for example on the street after a rain shower, the soles get very slippery. As a result several people slipped, fell and broke their hips or one or more limbs. A number of these victims decided to sue Shoes Unlimited BV for damages based on product liability: a subject discussed in Chapter 9.

But the risks of doing business internationally are not always linked to disputes with customers or suppliers. What would happen if Spain left the Eurozone or there was a revolution as a result of the economic depression in Spain? Can Shoes Unlimited BV make sure it would be paid in these circumstances? This question will also be answered in this chapter.

Or what if the biggest competitor contacts Shoes Unlimited BV to ask if they can agree to divide the Spanish market? If Shoes Unlimited BV agrees not to sell its shoes in the south of Spain, the competitor will promise not to sell any of its

shoes in the north of Spain. Whether such agreements are allowed is discussed in depth in Chapter 4, which will also answer the question if and when the Spanish government is allowed to subsidize the ailing Spanish shoe industry, resulting in Shoes Unlimited BV being unable to compete with Spanish shoe producers.

There are other issues related to the business environment Shoes Unlimited BV does business in which can cause problems. Suppose the Spanish government were to make a law ordering that all shoes sold in Spain have to have a label attached to them in Spanish with specific information on the shoes, to inform the Spanish consumer. This would mean extra costs for Shoes Unlimited BV.

Or, what if the Spanish government decided that all shoes sold on the Spanish market need prior approval by a Spanish quality assurance institute? An obligation no other European Member State has. Whether this kind of legislation is allowed will be dealt with in Chapter 3.

Summing up, all relevant questions that will or might pop up in international business will be dealt with in the chapters mentioned above.

Trade statistics from the World Trade Organization (WTO) show that the value of world merchandise exports rose from US\$ 2.03 trillion in 1980 to US\$ 18.26 trillion in 2011: an average of 7.3% per year. Commercial services trade grew even faster, at 8.2% per year. Many factors contributed to the rapid growth. The main factors are the liberalization of trade and dramatic decreases in transportation and communication costs over the last 30 years. Another factor is the end of the cold war, allowing countries to decrease their military spending and increase investment in other areas.

In the last 30 years the European Union, Japan and the USA have seen a decline in their shares of world exports in favour of especially China. Whereas China had a share of 1% in 1980 of world merchandise exports it reached a 11% share in 2011. The 30 biggest exporting countries in the world generate about 80% of the world's merchandise and commercial services trade. This means the other approximately 130 countries in the world generate only about 20% of world trade.

Because of the growth in international commerce in recent years, the importance for people doing business with foreign countries of understanding the legal implications of doing business abroad in a globalizing marketplace has become greater.

This book aims to give the reader a basic understanding of doing business with foreign countries. In order to understand the main legal circumstances of doing business this book is divided into two main sections:

- The first section focuses on the legal and economic risks found in the environment in which the transaction takes place.
- The second section focuses on legal risks related to the transaction itself.