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Janet Simons — “This art in architecture nicely illustrates a global worldview.”

UNIQUE LEGAL AND PRACTICAL ISSUES IN INTERNATIONAL CONTRACTING

The Sequel (Part 1)

By Janet Simons and David Brady

In 2008, David Brady and his colleague Caroline J. O’Neill, Associate General Counsel for the George Washington University, wrote an *NCURA Magazine* article addressing issues in international contracting that presented risks to the university. Today, cross-border collaborations abound among academic institutions, and it is time, in this two-part series, to take another look at legal and practical issues related to internationally-funded sponsored agreements.

U.S. Laws of General Applicability and their Implementing Regulations

A number of federal laws and their implementing regulations have broader intersections with international contracting than is typical in domestic contracting. Careful consideration of these laws should be made prior to negotiating and executing a contract with an entity outside of the United States (U.S), or under which activities will occur outside of the U.S.

Unlike activities in the U.S. in which export restrictions are generally limited to the release of controlled technology or source code to foreign nationals, activities under international contracts may include physical exports of commodities, software, and technology, as well as the exportation or importation of restricted services, including services for which a foreign national in the U.S. can provide or receive in the U.S. under a visa authorization, but needs government authorization to provide or receive outside of the U.S.

Table 1 summarizes the applicable laws and their implementing regulations. They include export and sanctions laws, as well as restrictive practice laws and the foreign corrupt practices laws. It is important to understand that these laws require strict compliance, meaning that violators can be penalized criminally for willful or willfully negligent violations, but also civilly, even if there was no intent to violate the law.

The intersection of university international activities and violations of these regulations is not theoretical. Since the 2008 article was published, the authors are aware of many universities which have disclosed inadvertent violations of export and sanctions regulations, self-imposing mitigating remedial measures to avoid repeat offenses. Additionally, there have been two published instances of universities or their employees

Table 1: Export and Sanctions Compliance Laws and Regulations

Laws	Regulation	United States Regulatory Agency	Code of Federal Regulations
Atomic Energy Act	Import and Export of Nuclear Equipment and Materials	Nuclear Regulatory Commission (NRC)	10 CFR §110
Atomic Energy Act	Assistance to Foreign Atomic Energy Activities	Department of Energy (DoE)	10 CFR §110
Export Administration Act, International Economics Emergency Powers Act	Export Administration (EAR)	Department of Commerce (DoC)	15 CFR §730-774
Arms Export Control Act	International Traffic in Arms (ITAR)	Department of State (DoS)	22 CFR §120-130
Arms Export Control Act	Importation of Arms, Ammunition and Implements of War	Bureau of Alcohol, Tobacco, Firearms and Explosives (BATFE)	27 CFR §447
International Economic Emergency Powers Act, Trading with the Enemy Act, Antiterrorism and Effective Death Penalty Act (1996), and U.S.A. Patriot Act	Foreign Asset Control (FACR)	Office of Foreign Assets Control (OFAC)	31 CFR §§500-559
Invention Secrecy Act	Secrecy of Certain Inventions and Licenses	Office of Patents and Trademarks (FTO)	37 CFR §5

being punished for violating these laws. In 2010, Dr. John Reece Roth, an emeritus engineering faculty member of the University of Tennessee was sentenced to 4 years imprisonment and a fine for criminal violations of the Arms Export Control Act (FBI, 2012). In 2013, the Department of Commerce (DoC) civilly fined the University of Massachusetts at Lowell \$100,000 for exporting an atmospheric testing device and related antennae and cables to a Pakistani entity on the DoC’s Entity List without an export license, a violation of the Export Administration Act (DoC, 2013). The case is notable because the items unlawfully exported were controlled at the lowest level of the Export Administration Regulations’ control (EAR99).

Though the conduct of many university activities (e.g. educational, fundamental research) may fall outside the scope of these regulations, contracting with foreign parties significantly increases the probability of a university intersecting with licensing requirements of these regulations. Typically, unless the transaction falls under a general license, a license exception or exemption, or is outside the scope of these regulations, parties are required to obtain a specific license from the regulating agency before engaging in the transaction.

Export and sanction laws regulate the export and in some cases import of commodities, software, and technology prior to engaging with collaborators outside of the United States, or foreign

parties in the United States. While exhaustive discussion of these laws and their implementing regulations is beyond the scope of the article, a brief discussion of what *transactions* are regulated is useful.

Export Administration Regulations (EAR).

The EAR regulates the export of U.S. commodities, software, and technologies which are “dual use”, i.e., “items” that have commercial uses, but also may have uses for which the government regulates the transaction. Regulated export transactions can include physical exports outside of the U.S., and exports of technology or source code to a foreign national (“deemed exports”). The EAR also regulates exports of items to certain end users and certain end uses. Finally, the EAR regulates exports with certain parties of concern for which there are special export restrictions above and beyond any country specific restrictions. The Department of Commerce maintains web accessible a list of parties of concern.

International Traffic in Arms Regulations (ITAR).

Implementing the Arms Export Control Act, these regulations apply to the export and temporary import of “defense articles and defense services” listed on the U.S. Munitions List. Regulated transactions include exporting munitions from the U.S., and providing “assistance”, technical data, or military training to foreign parties, in the U.S. or not. Previously the ITAR only regulated items that were specifically designed for military or space applications. However, the

ITAR is currently being changed under an export reform initiative to have a more technical specification-based munitions list. On one hand, export reform will make it easier for practitioners to determine whether an item or transaction is regulated under the ITAR, in particular, the proposed rule governing defense services has been narrowed considerably (Department of State, 2013), which will provide greater clarity for universities engaging in contracting with foreign military organizations, defense departments and defense contractors. On the other hand, if an item reaches a performance threshold on the Munitions List, regardless of whether it is intended for military applications, then the item must be treated as a munition.

Importation of Arms, Ammunition, and Implements of War Regulations.

Complementing the ITAR, the Bureau of Alcohol, Tobacco, Firearms, and Explosives regulate the permanent import of munitions on a separately managed U.S. Munitions Import List.

Import and Export of Nuclear Equipment and Material Regulations.

The Nuclear Regulatory Commission (NRC) regulates the export and import of nuclear equipment such as nuclear reactors (including some subcritical reactors), uranium fuel production, and various nuclear materials. The NRC also regulates the export to foreign nationals of some software used in the production and use of the regulated equipment and materials.

Assistance to Foreign Atomic Energy Activities Regulations. The Department of Energy (DoE) regulates transactions directly or indirectly involving the production of special nuclear materials, nuclear reactors, and other nuclear fuel cycle facilities outside of the U.S. These regulations are not consistent at all with other export regimes, and require special attention to ensure compliance. There is a proposed rule to harmonize these regulations with the ITAR and EAR, however, a final rule has not been issued (DoE, 2013)

Restrictive Trade Practices or Boycotts Regulations. In recent years, an increasing number of U.S. institutions of higher learning have engaged in collaborative educational and research activities in Middle Eastern countries. A number of these Middle Eastern countries engage in a boycott of Israel (currently boycott participating countries are identified as Iraq, Kuwait, Lebanon, Libya, Qatar, Saudi Arabia, Syria, United Arab Emirates, and the Republic of Yemen (Department of the Treasury, 2014)). As part of the EAR, the U.S. has identified certain activities of these countries to be restrictive practices, and have prohibited U.S. parties from participating in certain transactions with the governments or entities in these countries. Prohibited transactions include agreeing to, or actually participating in a boycott or blacklist, agreements to, or actual discrimination on the basis of race, religion, sex, national origin, or nationality, and agreements to furnish, or actually furnishing information about business relationships with or in Israel or with blacklisted companies, or information about the race, religion, sex, or national origin of another person.

If your institution engages in collaborations in the Middle East, you need to be mindful of these restrictions. In addition to a prohibition on boycott related activities, there are reporting requirements to the Department of Commerce – even if you do not accept boycott terms and conditions. Finally, in accordance with the Tax Reform Act of 1976, “operations” in boycott participating countries must be reported to the Department of the Treasury.

Foreign Assets Control Regulations. In addition to the many export regulations, under the International Emergency Economic Powers Act, the U.S. government engages in trade sanctions against a number of countries, entities, and individuals. Comprehensively sanctioned countries include Cuba, North Sudan and Iran, with Syria and North Korea having substantial but not comprehensive embargoes. Sanctioned transactions generally include the blocking of property, and regulation of exportation and importation of goods and services from the sanctioned country and its nationals outside of the U.S.

Secrecy of Certain Inventions and Licenses to Export and File Applications in Foreign Countries. Many U.S. educational institutions engage in executing license agreements with foreign organizations for ownership or use of intellectual property that is patented or pending patent protection. In accordance with patent regulations, The Departments of Commerce, State and Energy have delegated to the Patents and Trademarks Office (PTO) the authority to issue foreign export licenses for filing or possible filing of foreign patent applications without having to comply with the other export regimes’ licensing regulations. However, from the time when a

patent application is filed with the PTO to the time the patent is issued (or otherwise allowed to be made public by PTO), there can be an intersection between patent law and the ITAR, EAR, or DoE assistance regulations (DoC, 2006).

If information in the patent meets the threshold of being “technology” subject to the EAR, technical data subject to the ITAR, or providing “assistance” (DoE), and there is no PTO foreign export license, then the technology/technical data must be exported to foreign nationals or foreign licensees in compliance with the applicable export control regulation. This may require an export license from the applicable regulatory agency if a foreign party is to have access to the information during the period prior to the filing of the patent up to PTO issuing the patent (or other PTO authorization to make the patent information publicly available). ■



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References

- Brady, D. and O’Neill, C.J. (2008, February/March). Research with entities overseas: unique legal and practical issues in international contracting. *NCURA News*, 6-11.
- Federal Bureau of Investigation (February 12, 2012). Former University of Tennessee Professor John Reece Roth Begins Serving Four-Year Prison Sentence on Convictions of Illegally Exporting Military Research Data. Retrieved from: <http://www.fbi.gov/knoxville/press-releases/2012/former-university-of-tennessee-professor-john-reece-roth-begins-serving-four-year-prison-sentence-on-convictions-of-illegally-exporting-military-research-data>
- U.S. Department of Commerce, Bureau of Industry and Security (2006, January 11). Letter from Alexander Lopes, Director, Deemed Exports and Electronics Division to [Redacted] on the nexus of export control and patent regulations. Retrieved from: https://www.bis.doc.gov/index.php/forms-documents/doc_view/512-nexus-between-export-and-deemed-export-requirements-under-the-ear-and-the-foreign-filing-requirement
- U.S. Department of Commerce, Bureau of Industry and Security (March 15, 2013). Export Violations: Case ID: E2306 Order Relating to University of Massachusetts at Lowell. Retrieved from: <http://efoia.bis.doc.gov/index.php/electronic-foia/index-of-documents/7-electronic-foia/227-export-violations>
- U.S. Department of Energy (2013, August 13). Assistance to Foreign Atomic Energy Activities. *Federal Register* 78(149), 46829-46750.
- U.S. Department of State (2013, May 24). Amendment to the International Traffic in Arms Regulations: Revision of the U.S. Munitions List Category XV and the Definition of “Defense Service”. *Federal Register* 78(101), 31444-31451.
- U.S. Department of the Treasury (2014, June 5). List of Countries Requiring Cooperation with an International Boycott. *Federal Register* 79(108), 32605.