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LETTER

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Chair's Report

By Tea Carnell

Greetings:

The Business Law Section continues to be very active. Last year, under the leadership of Chuck Morton and Scott Freed, in conjunction with the Real Property Section, members of the Business Law Section continued to review and revise the Maryland Joint Report on Lawyers' Opinions in Commercial Transactions issued in January 1989. The Section presented a draft of the new Report to the MSBA membership as its program for the MBSA Annual Meeting in Ocean City last June. The draft Report is currently available on the Business Law Section's webpage of the MSBA website (http://www.msba.org/sec_comm/sections/business/OpinionProject_Draft.doc). The final, state-of-the-art-Report, which will be enormously useful to corporate, real estate, securities, tax, and other business and transactional attorneys, is expected to be published in the spring of 2007.

This year, the Section is in the process of developing a Section-wide survey to help the Council better serve its members. We expect to distribute the survey some time in early Winter.

The Section has also initiated an exciting advanced legal research clerkship for students at the University of Baltimore School of Law, under the supervision of Professor Barbara White. So far, three students have undertaken research projects of Section or Committee-wide interest.

Our Vice-Chair, Eric Orlinsky, has been working with MICPEL to develop programs of special interest to business lawyers. Look for upcoming announcements from the Section Listserv and from MICPEL.

Former Section Chair, Bob Kalinoski, will again serve on the MSBA's Committee on Laws, which will review legislation introduced in the Maryland General Assembly during the 2007 session. Last session, Bob worked with Richard Montgomery, the MSBA's legislative liaison, to study the multitude of proposed eminent domain bills and reported back to the Section Council extensively on the legislation. Additionally, various Committees tracked and commented on legislation during last year's legislative session and will continue to do so during the 2007 session.

Many committees are meeting regularly. Please refer to the roster in this edition of the Newsletter and please feel free to contact the Chairs of the Committees in which you have an interest. On behalf of the Section Council, I encourage you to become more involved in the Business Law Section.

Best regards to all,

Tea Carnell

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Issues in Foreign Military Sales Programs

By Joseph G. Miller Esq.,
Lieutenant Colonel, U.S. Army

Is your client involved in foreign military sales? That does not necessarily mean the "Big-ticket" item that we all easily relate to a military sale, such as fighter planes and tanks. Your client might be providing a service such management consulting, accounting, even English education classes. Many of these contracts are funded by the United States though the Foreign Military Funding (FMF) Program managed by The Defense Security Cooperation Agency (DSCA).

Why are these different than any other type of contract or sale? There are a myriad of rules regarding these contracts and sales, such as content requirements, export licensing, payment of commissions, and anti-fraud provisions to name a few. There are also several other funding sources that might be utilized by your clients for payment for their products or services. This article will briefly discuss Foreign Military Sales and aspects of the U.S. funding of foreign purchases.

Foreign Military Funding (FMF)

What is FMF? FMF is the Congressionally appropriated money that is allocated to many countries of the world which allows them to purchase U.S. military goods and services. FMF is basically a grant, administered by DSCA, to the foreign country. The U.S. spends FMF on behalf of the foreign country to which it is allocated. FMF can be used to purchase goods or services for use by the foreign country, and the U.S. (through DSCA) acts as the contracting entity, not the foreign government. There are several obstacles that can arise to the use of FMF by the receiving country.

Money is allocated to countries in two basic ways. First, Congress earmarks specific dollar amounts for some countries, such as Israel, Egypt, Jordan, Armenia, and several others. These earmarked funds reduce the total amount available to the remaining countries.[1] The State Department allocates the remaining funds to other countries based on foreign policy and national security goals.[2] Funds are normally only spent on countries that are unable to pay for the goods and services required, thus, first world countries do not normally receive FMF. [3]

DSCA is an interagency organization that coordinates with both the State Department and the Department of Defense (DoD). It is the organization that normally will handle the contracting for goods or services that are paid with FMF. The country, in conjunction with DSCA, normally identifies a need and DSCA then contracts with the U.S. company to fill that need.[4] [5] Your client may often be involved in "making the sale" to the foreign government. Clients will often make presentations to the Ministry of Defense of a foreign country on their product or service, with the intention of the contract being completed by DSCA. DSCA allows considerable latitude to the foreign countries in the selection of how they spend their allocated FMF.[6] This is one of the first areas to caution you client since the temptation of bribes is very real and often expected in many countries, but the U.S. Foreign Corrupt Practices Act carries very stiff penalties to both the individuals and corporations involved.[7] The important thing to remember is that most FMF contracts are between your client and the U.S. Government. All the U.S. contracting rules apply (FAR and DFARS), although the DSCA receives the export license, not your client. The Defense Finance and Accounting Service makes the payment to the contractor after the U.S. is billed.

Foreign Military Sales (FMS)

Foreign Military Sales are funded by a foreign government going through the U.S. Government. As with the FMF, FMS are usually for U.S. made products, or U.S produced contract services.[8] There will be a letter of agreement between the U.S. Government and the foreign government for the procurement of a good or service. The U.S. Government then contracts directly with the U.S. company and takes an administrative fee for handling the sale.[9] This is beneficial to the U.S. Government because the purchase is usually added to an existing U.S. Government contract, thus lowering the per item cost since the fixed cost is distributed over more end items.

The foreign country is not a party to the contract, and has redress only against the U.S. Government per the letter of agreement. Again, FAR and DFARS apply to the contract with the U.S. Government as it did in FMF sales. Therefore, even though disputes and/or arbitration will be between the U.S. Government and the foreign country (not the contractor), the USG will most likely come back to the contractor to correct any deficiencies.

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Ten Tips for Selecting Local Counsel in a Foreign Country

By Joseph G. Miller Esq.,
Lieutenant Colonel, U.S. Army

Your client's company has been growing quickly and is now ready to expand into the market in Ghana with its new gold mining equipment. They have been in contact with the leading heavy equipment provider in Accra, the capital, and they have now come to you with a rough outline to set up a partnership with this company in Ghana. Many questions are going through your mind at this time centering on how do the laws of Ghana relate to this partnership, and you quickly realize that you will need to work with an attorney in Ghana to setup this partnership and to make sure that all regulations are complied with there.

How do you find an appropriate legal partner in Ghana to handle issues there?

1. Define the issue. The first step is determining what type of legal issue that you have. As in the United States, foreign law firms usually specialize in one area of the law such as commercial transactions, criminal, or export and trade. It is important that you frame the requirement clearly and succinctly since that "job sheet" will be the basis for negotiating a relationship with a foreign law office.

2. Look at foreign offices for firms that practice in Maryland. The global market for legal services has resulted in consolidation across national borders, and many law firms that have offices in Baltimore or Washington, D.C. also have offices in London, Frankfurt, Hong Kong, and many other cities. Contact the office in Maryland and they should be able to provide you a point of contact and an introduction to their foreign office. Firms can also often bill locally in Maryland for work done overseas.

3. Referrals. Talk to other attorneys who have worked in the country and see if they have a law firm that they can refer you to. The testimonial of someone who has used a particular lawyer or law firm is a good way to start, and a personal letter of introduction would go a long way in building trust with the local attorney. In many parts of the world, personal relationships are the key to most business transactions.

4. U.S. Embassy list. United States Embassies maintain lists of local attorneys that they recommend for use in the country. All embassies also have an economic/business development office that can assist with vetting and selecting local counsel. This is one of the best ways to locate counsel in a country, because the Embassy usually has first-hand experience working with lawyers in the country, and can point you in the right direction. Having a detailed explanation of your needs from step one, above, will greatly assist the office at the embassy in meeting your needs. The website: http://usembassy.state.gov/ has a listing to all the individual U.S. Embassy websites.

5. Martindale Hubbell listings. Martindale Hubbell is owned by the legal information provider LexisNexis. They have a listing of attorneys and law firms that have paid a fee to be listed on their website and their publication. A search under Ghana at their website: http://www.martindale.com/ brought 108 listing of lawyers and 15 law firms there. You can see a profile of each listing on the website and compare the entries.

6. American Chamber of Commerce. There is an American Chamber of Commerce in almost every country where there is a business relationship with the U.S. Usually you can get the contact information from the U.S. embassy there or from the country's embassy in Washington, D.C. There are over 50 chambers that have some presence in Washington, D.C. which have direct ties to the U.S. chamber in the country.

7. The American Bar Association Section for International Law. (http://www.abanet.org/intlaw/home.html) The International Section will give you a listing of International members of the ABA. Many foreign attorneys and law firms are members of the ABA, and attend section meetings, as a way of increasing their business.

8. Ask for references for the lawyer. Always establish the track record of the attorney or law firm that you intend to working with. References should be from overseas law firms or corporations.

9. Web search I recommended this last because there really is no control over who puts up a website, or what claims are made. However, this is a way to narrow the search for a possible lawyer in a foreign country based on areas of practice.

10. Use all the above. The best way to find a qualified, experienced and reliable foreign attorney is to use all the above methods. Once you have found a possible attorney, follow up with references, the U.S. Embassy and other law listings to make sure that you have the right person.

MSBA Business Law Section

Committee Reports

October 2006

Franchise and Distribution Law Committee
Cynthia L. Spell, Committee Chair

The Franchise and Distribution Law Committee met five times over the last year and heard from a variety of speakers. Topics presented included: "Franchisor Enforcement Issues in Three Party Agreements", "The Law of Non-Compete Covenants in Maryland", "Recent Developments in Maryland in Arbitration Agreements," and "Rescission of Franchise Agreements Under Maryland Law." Additionally, our last meeting of the year, held on May 16, 2006, was attended by Securities Commissioner Melanie Lubin and Deputy Securities Commissioner Dale Cantone who discussed proposed changes to Maryland's franchise regulations on which the Committee had provided comments, and issues relating to electronic registration.

The first meeting of the new year was held on Thursday, September 28, 2006 at 8:30 a.m. as the Corporate Headquarters of Maggie Moo's in Columbia, Maryland. At the meeting, Carl Zwisler of Haynes and Boone, LLP lead a discussion entitled: "Yes, I will love you in the morning: The Illusory Promise of Franchisor Renewals."

The next meeting will be held on November 14, 2006 at 8:30 a.m., when Kathryn Goldman of Goldman & Minton, P.C. will lead a discussion on Trademark Issues for Franchise Attorneys. The location of the meeting has not yet been finalized.

For more information regarding the Committee or upcoming meetings, contact Cindy Spell at cspell@rosenbergmartin.com. Information regarding our meetings is also routinely posted on the MSBA website. Our meetings are open to all members of the Bar with an interest in franchising and distribution law, and we invite you to attend.

Business and Corporate Litigation Committee
Eric Gorlinsky, Committee Chair

The Business and Corporate Litigation Committee reports that all continues to work well with the Business and Technology Court. The only outstanding item remains funding for the purchase of new technology for the judges.

SECTION OF BUSINESS LAW NEWSLETTER
Maryland State Bar Association

Submissions, questions, comments?

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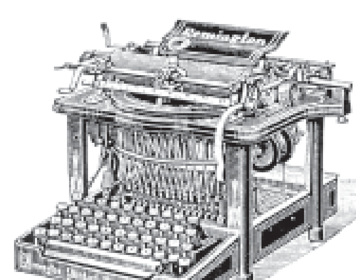

Issues . . .

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Other U.S. funding sources provided to assist in Security Cooperation.

There are several other sources of U.S. Government funding available that function in similar ways to FMF. Most of them were approved in the 1990's to assist the transition of the former Warsaw Pact countries and the Newly Independent States of the former Soviet Union. These are called Warsaw Initiative Funds (WIF) and Cooperative Threat Reduction (CTR). WIF funds are available to countries that have joined NATO's Partnership for Peace (PfP). The PfP is a program designed as a step towards NATO membership during which the military and political structures of the country are reformed to fit the NATO country model. WIF funds are U.S. funds designed to help with that process.[10] CTR is used to lessen the risk of Weapons of Mass Destruction, and has been used to purchase such things as radars to monitor air and sea space, and for border-security equipment. Some other sources of funding are listed below, but are not normally encountered in the procurement or contracting arena.

A major funding change has been brought forward in the 2006 Defense appropriation.[11] It appears that DoD has been allocated $200 million that may be used to train and equip foreign militaries in the war on terror, and to enhance stability.[12] At this time, it is not clear how this funding source will be utilized, but any procurement for foreign governments will go through U.S. Government channels, with DSCA being the natural choice.

There are many opportunities as well as pitfalls to your client in foreign military sales. Follow the steps outlined in the procurement regulations and make sure that each step is being vetted internally along the way. The U.S. Government offices tasked with compliance of these programs are often good sources of answers to your questions, and they usually cite to regulations or guidelines that can be used to clarify any questions that might arise.

Some Common Acronyms and Words in the Military Sales Game

AECA-Arms Export Control Act (http://ww.pmdtc.org/aeca.htm) U.S. Law relating to the export of defense articles and services. Implemented by the ITAR.

Co-production-When the military produced is done with an ally, or in their country. Examples are Israel producing unmanned aerial vehicles with the U.S., or the U.S producing helicopter radars for the British variant of the Apache Attack Helicopter.

CTR- Cooperative Threat Reduction- Funds that were appropriated for WMD control in the countries of the former Soviet Union. Controlled by DTRA.

DCC-Direct Commercial Contracts- Foreign government contracts directly with U.S. contractor.

DFARS- Defense Federal Acquisition Regulation Supplement (http://www.acq.osd.mil/dpap/)

DFAS-Defense Finance and Accounting Service

DoD- Department of Defense

DSCA- Defense Threat Reduction Agency (www.dsca.osd.mil)- The U.S. agency that manages the multi-billion dollar FMF budget with input from DoD and the State Department.

DTRA- Defense Threat Reduction Agency (www.dtra.mil)- DoD & State Dept organization that deals primarily in the control and elimination of nuclear Biological and Chemical weapons in the former Soviet Union.

EDA- Excess Defense Articles- Surplus military equipment that is supplied to other countries for free or at a nominal cost.

FAR- Federal Acquisition Regulation (http://www.acqnet.gov/far/) Regulations dealing with al contracts with USG

FMF-Foreign Military Financing- Military sales funded by the United States. Most funds are appropriated by Congress for specific countries, with the remainder being spread out over the remaining countries. Subject to Article 98 limitation. Top 4 recipients: Israel, Egypt, Jordan, Iraq.

FMS- Foreign Military Sales-U.S. contracts for foreign government. Military sales through DoD that are usually funded by the end using country. Think of DoD as a broker of the service or equipment.

HA- Humanitarian Assistance- A DoD program that funds humanitarian, non-military projects in developing countries, such as schools and medical clinics.

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Issues . . .

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IMET- International Military Education and Training- A program to pay for foreign military personnel to attend U.S. military schools.

ITAR- International Trafficking in Arms Regulation (http://www.pmdtc.org/reference.htm#ITAR)- The comprehensive regulation dealing with anything that is interpreted to be arms related. This includes consulting, teaching, and items or information that do not appear to have a readily identifiable military use.

NATO- North Atlantic Treaty Organization. (www.NATO.int) A military alliance on both sides of the Atlantic designed for mutual defense. Developed out of the Cold War.

PfP-Partnership for Peace- The candidacy step for NATO where Political and military systems are brought to NATO standards.

WIF- Warsaw Initiative Funds- U.S. funding to assist PfP countries in meeting NATO standards prior to accession to NATO.

Footnotes

[1] Currently, over 80% of the FMF available is allocated in this way to Israel and Egypt as part of the continuing support to the Camp David Peace accords.

[2] Goals are set by the President. Foreign policy goals are refined by State Department, and national security goals are refined by the Department of Defense, leading to some disagreements between USG agencies in the apportionment of the funds.

[3] An example is FMF that is provided to an Eastern European ministry of defense that is reorganizing to better align with modern military structures such as The North Atlantic Treaty Organization, or NATO.

[4] 10 countries can use Direct Commercial Contracts (DCS) utilizing FMF, where the country actually contracts with the supplier directly, not the U.S. Government. Israel accounts for 85% of these. Designed for items & services that are not in the DoD procurement system. Country needs to show proof of competition, and they are reviewed at any amount over 750K. DCS has a minimum of 100K value per contract (30K for Israel). In many ways these are similar to FMS cases, but the contractor is responsible for more requirements that are not completed by the USG, such as procurement of an export license.

[5] What is a U.S. company is becoming harder to determine as defense mergers increase with foreign companies.

[6] I am aware of a DSCA approved sale of modern military radios to a country that had received a very convincing pitch from a manufacturer, while they did not possess functioning vehicles to put the radios into.

[7] Until recently, many European governments allowed the deduction of bribes paid as business expenses. This has changed, but foreign manufacturers do not always play at the same level of integrity as U.S. corporations are expected to.

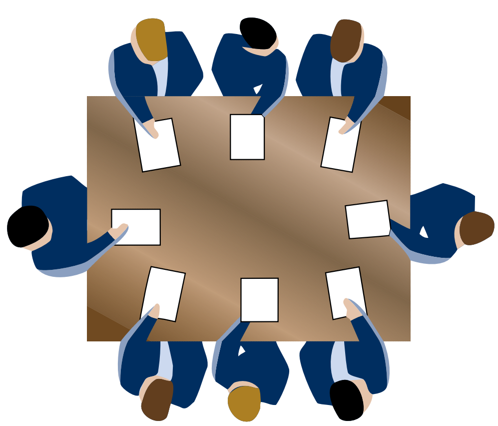
[8] There is an exception to allow for procurement of foreign made goods or services if it is already procured for U.S. services under an existing contract.

[9] U.S. Code Title 22.

[10] "Graduates" of the PfP include Latvia, Lithuania, Estonia, Poland, Czech Republic, Hungary, Slovenia, Slovakia, Bulgaria, and Romania. These countries are now full members of NATO, and no longer eligible for WIF.

[11] Section 1206 of The 2006 of the Defense Authorization Act.

[12] Pentagon Can Now Fund Foreign Militaries, The Washington Post, January 29, 2006 page A10.



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