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Financing Exports: Government and Multinational Programs

Peter A. Hornbostel

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I. INTRODUCTION

This discussion concerns export financing and will deal principally with the Export-Import Bank of the United States (Eximbank)[1] and, to a lesser extent, with other federal government programs, such as the Overseas Private Investment Corporation (OPIC)[2] and the Agency for International Development (AID).[3]

Eximbank has a plethora of financing programs, ranging from the very short-term to long-term, up to twelve or fourteen years. In dollar terms, most Eximbank financing (perhaps two-thirds) is of a long-term nature, and I anticipate that most of you will be more interested in this type of financing, especially if you are representing foreign borrowers or suppliers of major equipment. The shorter and medium-term financing plans would be of greater interest to those representing banks or small suppliers; I will not discuss those programs.

II. EXIMBANK LONG-TERM FINANCING

A. *Obtaining the Preliminary Commitment*

Attorneys representing a foreign borrower will almost certainly be interested in looking for long-term financing from Eximbank. The borrower will usually be involved in a project of some sort; for example, he may be involved in constructing a petrochemical plant, a cement plant, a steel mill. In other cases, the borrower will be pur-

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*Cameron, Hornbostel, and Adelman, Washington, D.C. Mr. Hornbostel is a graduate of Columbia University Law School and also studied at the University of Vienna, Austria. Formerly a legal advisor to the Agency for International Development in Brazil and Washington, he has been engaged in the practice of law in Washington for over ten years specializing in international transactions involving Latin America.

1. 12 U.S.C.A. § 635-635n. (West Supp. 1979). For legislative history *see generally* [1953] U.S. CODE CONG. & AD. NEWS 1643; [1974] U.S. CODE CONG. & AD. NEWS 2711.

2. Overseas Private Investment Corporation, 22 U.S.C. §§ 2191-2200a (1970). For legislative history *see* [1969] U.S. CODE CONG. & AD. NEWS 2611.

3. *See* Exec. Order No. 10,973, 3 C.F.R. 493 (1961), *reprinted in* 22 U.S.C. § 2381 (1970).

chasing non-project products, such as airplanes, locomotives or railroad cars.

The first step generally taken in arranging for this type of Eximbank financing is to obtain a preliminary commitment,[4] which will set out and guarantee the terms of the transaction. While it is not required that you obtain a preliminary commitment, it is often advantageous to do so. For example, if a borrower has a preliminary commitment at a time when the interest rates from Eximbank—which today run somewhere between eight and nine percent—are rising, that borrower will receive the rate of interest established in the commitment, as long as the borrower's application for the final commitment is filed timely.[5]

Eximbank requires the following information from a borrower seeking a preliminary commitment: the name and address of the borrower; the purpose of the proposed financing; the foreign country involved; a description of the equipment or services to be purchased with the financing; a copy of the bid documents, if the borrower is responding to a bid invitation; the latest audit and financial statements of the borrower; and the nature of the security or guaranty, if any, that the borrower is going to provide.[6]

The Bank will also request the borrower's projected financial data for the next five years.[7] Although Eximbank may want this information, it is often virtually impossible to produce. I have never given the Bank such data at the preliminary commitment stage. Further, such information is not very useful where the borrower is a young company just getting started. In such a situation, any kind of guess as to a five year projection of earnings is exactly that: a guess. Eximbank can guess that just as well as the borrower. Nonetheless, the Bank likes to have a piece of paper showing the borrower's anticipated earnings, if only so that if questioned by Congress or government auditors, Eximbank can refer to the projection and say that the loan has good possibilities of repayment.[8] As I have said, I do not usually

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4. *See* 12 C.F.R. § 401.1(c)(5) (1978); Streng, *Export Financing*, 11 SAN DIEGO L. REV. 104, 113 (1973).

5. *Id.*

6. 12 U.S.C.A. § 635(b)(3)(A) and (B) (West Supp. 1979); 12 C.F.R. § 401.2 (1978). *See also Export-Import Bank of the United States*, EXIMBANK–HOW IT WORKS 2.

7. *Id.*

8. 12 U.S.C.A. § 635j(3) (West Supp. 1979) requires a quarterly report to Congress covering Eximbank activities.

give the Bank an earnings projection at the early stages, but it will be definitely required by the final commitment stage. Thus, the borrower will eventually have to invent such a thing.

The preliminary commitment may be very important to a potential supplier at the initial stage, where he, as a supplier, is bidding for an overseas project. Quite often, in South America and elsewhere around the world, bidders are requested to provide not only the prices for their equipment, but also to provide evidence concerning the financing arrangements available. In this situation, the attorney for the supplier should ask Eximbank, on behalf of the supplier, for a preliminary commitment. This may even be done without the borrower's foreknowledge. With the commitment in hand, which costs nothing, the bidder will now be able to compete with all others vying for the project.

There can be a problem with this approach, particularly when it is done without the knowledge of the potential borrower in the foreign country. The problem involves the requirements of the 1974 amendments to the Export Import Bank Act, which require that certain large loans and guarantees issued by Eximbank be reviewed by Congress. [9]

We recently represented the metropolitan transportation company in Rio de Janeiro which had submitted a loan application to Eximbank. The requested amount had been carefully tailored so that it was below the cut-off for the congressional review requirement. Without my knowledge, however, the potential suppliers for another stretch of the track for the same company had asked for a preliminary commitment, and as it happened, the total of the two requests put the total proposed credits above the cut-off amounts. Thus, Congressional approval was required.

The result of this type of delay, which is really no one's fault, is that the buyer may get very annoyed. I would suggest, therefore, that if you represent a supplier who intends to seek a preliminary commitment from Eximbank, you let the potential buyer know beforehand that you plan to request a preliminary commitment.

B. *Advantages of Eximbank Financing*

Once you have obtained the preliminary commitment and either your client-supplier has won the bid, or the borrower has decided on

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9. 12 U.S.C.A. § 635(b)(2) (West Supp. 1979).

an American supplier, you must obtain a final commitment for the Eximbank loan. You will also wish to choose a commercial bank to participate in the deal, for in most cases, Eximbank will not finance the entire transaction. Rather, it will require the borrower to carry fifteen percent of the U.S. costs for its own account (although this may be privately financed), and require that forty to forty-five percent be placed with a commercial bank. If necessary, Eximbank may be willing to guarantee the commercial bank loan. Thus, the U.S. costs are financed as follows: borrower direct—fifteen percent; commercial bank—forty to forty-five percent; and Eximbank—forty to forty-five percent.

The question arises, however, as to why the borrower should want to deal with Eximbank in the first place. Actually, there are numerous advantages in using the Bank for export financing.

One such advantage is that Eximbank will offer substantially longer repayment terms than one would otherwise find in a typical financing arrangement with a commercial bank.[10] With Eximbank financing, a borrower may obtain up to eight or ten year terms, instead of having to pay on a hundred-day or eighty-day sight draft which would typically be used in the type of letter of credit transaction of which Professor Kozolchyk spoke earlier this morning.[11]

What Eximbank will do is assess the needs of the project and projected cash flow of the borrower, to the extent that this can be ascertained, and from there, determine the term which the project requires. Eximbank will also allow a grace period on principal payments (but not interest), which will extend approximately six months after the completion of construction of the project. The theory behind the grace period is, of course, that the borrower should be given time to initiate some cash flow with which to pay off the loan.

Eximbank financing is generally letter of credit financing. The only major difference between Eximbank credits and normal commercial credits is that the Eximbank-backed letter of credit will carry a reimbursement guarantee by Eximbank. What normally occurs is that a commercial bank will issue a pro forma letter of credit for the account of the buyer. The issuing bank sends the pro forma letter of credit to Eximbank, which examines the letter of credit for conformity to the loan document.

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10. *See* Linzmeyer, *Eximbank Exporter Assistance Programs*, 60 MARQ. L. REV. 825, 832 (1977); Streng, *supra* note 4.

11. *See* Kozolchyk, *Legal Aspects of Letters of Credit and Related Secured Transactions*, 11 LAW. AM. 265 (1979).

If the letter of credit conforms to the credit terms, Eximbank will stamp "Reimbursement Guaranteed" on the back of the letter of credit and sign it. The letter of credit is then sent back to the issuing bank which will pay the credit on the strength of Eximbank's promise to reimburse the bank. If satisfied that the commercial bank is fully familiar with Eximbank's requirements, Eximbank may issue a blanket reimbursement guaranty at the start of the disbursement period. This procedure facilitates the disbursement process, and should be requested whenever the commercial bank has at least some Eximbank experience.

Most of the letters of credit issued in Eximbank financing are irrevocable letters of credit. This is another advantage of using Eximbank financing; the borrower receives the price advantage that the irrevocable letter of credit often causes in dealing with American suppliers. Some very large letters of credit are made at least partially revocable; this is done, however, largely for political reasons.

The most obvious advantage of Eximbank financing is the interest rate. Eximbank does not use a floating interest rate, such as those based on the London Interbank rate or the New York prime. Instead, Eximbank uses a fixed rate of interest which currently ranges between eight and nine percent.[12] This rate, as anyone who has seen the interest rates at commercial banks knows, is highly favorable. The Eximbank commitment fee amounts to one half of one percent.

Another nice feature of an Eximbank loan is that, in most cases, Eximbank will arrange its financing in such a way that the commercial bank will take the early maturities. Therefore, if, for example, a borrower receives a total eight year commitment from Eximbank, to be shared fifty-fifty with a commercial bank, the borrower will generally be able to structure the deal so that the commercial bank will pay off first, with Eximbank taking the last four years' maturities. This device lowers the total financing cost, not only because the cheapest money is held for the longest period of time, but also because it makes some commercial bank financing available where it otherwise would not be. An example in this context is Brazil where, until recently, it was very difficult to obtain more than five or six year money from a commercial bank. But if a four year loan from a commercial bank was combined with an Eximbank credit, and Eximbank financed the last four years, the result was an eight year loan on terms which would otherwise

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12. 12 U.S.C.A. § 635d (West Supp. 1979); 12 C.F.R. § 402.2(c) (1979).

have been impossible to obtain, and which were entirely acceptable to the Brazilian monetary authorities (Central Bank).

Notwithstanding the apparent benefits of Eximbank financing, the importance of shopping around for still better terms cannot be stressed enough. The role of foreign competition is extremely important. The statutorily-defined objective of Eximbank is to promote exports from the United States, and not simply to compete with domestic commercial banks for financing business.[13] For the export of goods or services which would occur even without the help of Eximbank, it is usually possible to receive Eximbank financing, but only on standard terms. If, on the other hand, the borrower has obtained an offer from a foreign export credit agency on terms which are better than Eximbank's standard terms, then Eximbank will verify the offer, and if it determines that the offer is a legitimate one, Eximbank will match its terms.

Just this week, on January 15, 1979, an Eximbank publicity release stated: "In a precedent setting move to meet foreign competition, the board of directors recently authorized a direct credit at below the arrangement's interest rate." The "arrangement" is really an agreement between the major European export credit agencies and the United States, stating that all will charge essentially the same price for export credits. This equivalency is very difficult to achieve in practice, because the French, English, and American systems are all substantially different from one another. Nonetheless, the parties try very hard to keep their financing about equal so that borrowers are prevented from doing what is described in the release, that is, forcing the price of money down by coming in with lower prices from other lenders.

The loan described in the Eximbank release was authorized at six percent to the Cyprus Telecommunication Authority for the purchase of a satellite receiver from I.T.T. The total value of the U.S. export was 4.5 million dollars. The low interest rate was required so that the U.S. exporter could win the sale over a French concern which had been supported by French mixed-credit financing. Chairman Moore is then quoted as stating that he saw no fair alternative under Eximbank's legislative mandate but to match the French terms: "We will continue to seek an end to unsound practices such as mixed credits, that is, mixed subsidized and non-subsidized, but at the same time we will do whatever we can, within our resources, to make sure that

13. *See* 12 U.S.C.A. § 635(b)(1)(A) (West Supp. 1979); 12 C.F.R. § 401.1 (1979).

American exporters have a fair chance to compete."[14] In effect, Chairman Moore is saying that if a borrower goes to Europe and gets a better deal there, the borrower can then come to Eximbank, and it will match the European offer.

In a recent petrochemical credit in Brazil, the French offered a fully guaranteed operation in France. In order to match the French terms, Eximbank had to either finance or guarantee the entire deal. Eximbank finally granted a direct loan for the entire project. By so doing, the problems of dealing with a commercial bank, such as greater expense and floating interest rates, were avoided along with the foreign tax problems which may arise when a commercial bank is involved.

One must be aware of the impact of foreign taxes upon any plan of foreign financing; this is also true when dealing with Eximbank. Most developing countries have an income tax which is payable upon interest remitted abroad. This tax will normally range from twenty-five to thirty-five percent. The lender, such as a commercial bank, will usually require that the interest payment be grossed up, meaning that the borrower pays it. The effect of the gross-up is to raise the tax even higher in absolute terms with the result that the entire financing plan will cost more.

Eximbank credits are universally exempt from those types of foreign taxes. If the plan involves a joint credit, as most do, even though the tax may be applicable to the commercial bank portion, the Eximbank portion will be exempt.

When Eximbank provided the entire aforementioned petrochemical credit, it actually financed only eighty-five percent of the total cost of the project. It is a fairly uniform occurrence in France, the United Kingdom, the United States, and almost everywhere that government-subsidized financing will be made available to cover up to eighty-five percent of the export costs. The remaining fifteen percent is known as a down payment. Many people have asked whether it is possible to finance this fifteen percent. The answer is yes. While the financing may not be included in the Eximbank credit agreement, the commercial bank may finance the fifteen percent under a separate loan agreement. Nonetheless, Eximbank treats the fifteen percent as a true down payment.

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14. 12 U.S.C.A. §§ 635a-1, a-3 (West Supp. 1979).

C. Restrictions on Eximbank Transactions

Given the advantages of Eximbank financing, one may wonder why more people do not use it. One reason is that there are restrictions on the use and availability of Eximbank funds. Of course, Eximbank will only finance United States exports.[15] There must be a legitimate export of long-term hardware, at least where a long-term credit is involved.[16] Eximbank will also finance the export of certain types of services (e.g., construction, engineering),[17] but aside from services and hardware, little else. Occasionally, Eximbank can be persuaded into going a bit further, for example, financing catalysts in a chemical plant, but will not, as a rule, finance raw materials.

Eximbank is considering a shift in policy that will permit the use of Eximbank funds, to a very limited extent, to finance some of the local costs associated with Eximbank's financing. Thus far, however, local cost financing is not available.

Another problem with Eximbank financing is that it takes some time to make the necessary arrangements. It normally takes about six months from the time an application is made until the time when the first letter of credit is issued. Even longer delays are not unusual, but many of these delays can, at least in part, be blamed on the borrowers.

A further problem arises in dealing with the exchange control authority of the foreign country to which the goods are being exported. Most countries with an exchange control have a registration requirement; an attorney must know the terms that a particular country is registering at the time the financing transaction is being arranged. Some countries, such as Brazil, go as far as to require a prenegotiation check. These requirements apply to all foreign lenders, however, and not just Eximbank. The reason that many countries have these types of requirements is that in past cases, their central banks have been bypassed by people who have gone outside their native countries to negotiate foreign loans and have returned with financial terms that were either too high or unacceptable for some other reason. To avoid looking foolish, however, these central banks accepted the terms. Now, as a result, a borrower must obtain an authorization even before negotiations begin and certainly before any agreement is signed. Eximbank will require an advance authorization

15. 12 U.S.C.A. § 635(b)(1)(A) (West Supp. 1979).
16. *Id.*
17. *Id.*

and a certificate of registration before they will consider extending credits for projects in countries with such requirements.

Most developing countries, and many developed ones, will also require an import license. As long as a borrower can demonstrate that what is being imported into that country is not otherwise available there, the import license will generally not be difficult to obtain. If one cannot be obtained, the borrower will, of course, not receive Eximbank financing.

A stumbling block in arranging for Eximbank credits is that Eximbank often requires the guarantee by the national development bank of the country to which the goods are being exported. The problems of negotiation here can be very frustrating. Usually, the details of the entire transaction will be discussed in Washington with Eximbank and the U.S. commercial bank involved. Once this stage is completed, the agreement will be sent to the development bank/guarantor in the foreign country; it is often only at this point that the foreign development bank will study it.

What happens, of course, is that the agreement will be returned with changes. At this point, the borrower's representative will have little choice but to also try to represent the guarantor's interest in renegotiating the deal, since the guarantor usually will not be in Washington. The guarantor, however, is not the attorney's client and will probably not take very kindly to being told that it cannot have its terms.

The most satisfactory method for dealing with this problem is for the attorney to suggest to his clients that they invest in a round trip ticket for the development bank, or whatever entity will guarantee the loan, and convince that entity that it is in everybody's best interest for them to send someone to Washington to sit down at the bargaining table with the borrower and the banks. This method gets things settled better, quicker, and in the long run, cheaper.

The last point I want to make is that Eximbank offers many other programs, apart from long-term direct credit financing, which are beyond the scope of this discussion.[18] Generally, these programs are administered through commercial banks which can take paper from their customers and either discount it with Eximbank, or obtain a

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18. *See generally* Streng, *supra* note 4; Linzmeyer, *supra* note 11; Rendell, *Export Financing and the Role of the Export-Import Bank of the United States,* 11 INT'L. L. & ECON. 91 (1976).

repayment guarantee from Eximbank or from the Foreign Credit Insurance Association (FCIA), an association of insurance companies which work with Eximbank in this area.

Generally, an attorney involved in the area of short or medium-term Eximbank financing will be representing a bank, either a domestic commercial bank, working in the discount or guarantee program, or perhaps, a foreign bank. Basically, the foreign banks act as the co-financers of a transaction with Eximbank and have certain lines of credit or guaranteed availabilities under credit lines known as the Cooperating Finance Facilities Programs. [19]

III. Other Types of Financing Programs

Eximbank is not the only federal entity where one can find favorable export financing, although it is the only institution which is primarily engaged in such pursuits. Other agencies include the Overseas Private Investment Corporation (OPIC), [20] whose programs involve the insurance of specific risks, such as the risk of inconvertability of currency in which one is being paid abroad, the risk of the destruction of one's property abroad by war or insurrection, and the risk of expropriation. These programs, obviously, are not geared toward the normal type of export sale. They are available, though, in cases where, for example, a client wants to cover a large construction or equipment sale. These programs are also available and often used for coverage of actual equity investment in foreign countries by American citizens or companies. OPIC insurance is available only for investments in less developed countries, however, while Eximbank programs are not so limited.

OPIC also has a financial guarantee program which involves both loans and guarantees.[21] Under this program, OPIC will finance some percentage of the project cost, as long as there is substantial American participation in the management and equity. OPIC prefers that the American participation be at least twenty-five percent, and it will require that the project financial plan meet certain qualifications, such as sound debt/equity ratios of about sixty-forty. The program is essentially a United States version of the World Bank Group's International Finance Corporation.

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19. For a further development of the Cooperative Financing Facility program of Eximbank *see* Linzmeyer, *supra* note 11, at 859; Streng, *supra* note 4, at 122.
20. *See* OPIC, *supra* note 2.
21. 22 U.S.C.A. § 2194 (West Supp. 1979).

There are other programs of which attorneys should be aware. The Agency for International Development (AID)[22] used to do much of the same type of thing that OPIC does today. Now, AID programs are limited to the public sector. The Department of Agriculture has some very interesting programs, such as those run by the Commodity Credit Corporation,[23] which may well be worth investigating by attorneys who number agricultural exporters among their clients. There are also, of course, numerous federal programs dealing specifically with the exportation of defense articles.

In searching for the best financing plan, attorneys and borrowers should also consider the international and multinational agencies specializing in this area. In particular, such agencies as the International Bank for Reconstruction and Development (IBRD),[24] or the World Bank (including the International Finance Corporation, if the borrower is a private concern), and the Inter-American Development Bank (IDB) should be considered.

Things can get somewhat tricky when financing is being arranged for a single large project from several of the different available sources. The international agencies, particularly IBRD, impose stringently conducted international bidding procedures and have quite different procurement rules than does, for example, Eximbank.

IBRD also permits a fifteen percent preference to bidders from the country in which the borrower is incorporated or where the project to be financed is to be located. In other words, in evaluating the bids, fifteen percent will be tacked on to the price bid by all bidders from outside the borrower's country.

What can happen when trying to arrange for multiple sources of financing is that, on the one hand, a borrower may be trying to finance the goods, acquisitions, or purchase in a particular country because he has gotten the best finance deal there. On the other hand, the borrower may have an opportunity to obtain international financing from the World Bank, where there will be different procurement rules and where the Bank will be very insistent that everything is laid out clearly and neatly in accordance with their procedures. One must, therefore, learn to play by the different rules of each agency, even where they appear, at least initially, to be inconsistent.

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22. *See* Executive Order, *supra* note 3.
23. *See* Streng, *supra* note 4, at 131.
24. Article of Agreement of the International Bank for Reconstruction and Development, *opened for signature* December 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134.

IV. Conclusion

The most important point that I have tried to make today regarding the practical aspects of obtaining large scale export financing is this: if you are trying to procure goods or services from the United States, or from virtually any other country, you should seek and obtain foreign bids from the other major exporting countries. The English and the French are often receptive to inquiries regarding exports from their countries and will often offer a better financing package than their competitors. The Germans are somewhat less receptive, since they are not particularly anxious at this time to increase their already heavy export sales. While the Japanese do come up with extraordinary finance terms, they provide their incentives directly to the Japanese exporter, and it will generally be difficult for counsel representing a foreign borrower to become directly involved.

Most American suppliers still enjoy a good international reputation in terms of the quality of goods and delivery time in most parts of the world. Many American industries, therefore, may win a bid with standard Eximbank terms, without an unusually favorable financial subsidy. As I have pointed out, however, Eximbank makes no secret of the fact that it will respond to legitimate competing bids from abroad by trying to match them; thus, your client can end up with far better than the standard Eximbank terms for a loan. At least where the loan is large enough to warrant the extra time and expense, the attempt to obtain competing financial offers from other foreign sources should be made.