
RUSSIAN DESK

10 Tips for Software Exporters

1. FORM OF CONTRACT

Enter into a contract with a foreign customer in writing. Oral arrangements will not officially entitle you to receive a payment or enforce performance of such arrangements by the customer. Moreover, if the transaction terms and conditions are changed, such changes should be documented in writing as well.

2. EXCHANGE OF DOCUMENTS

If a contract provides for exchange of documents via e-mail, it is necessary to ensure that documents of legal significance (acceptance certificates, etc.) are furnished as originals. E-mail scam, spyware or misconduct of some employees may lead to serious adverse consequences. You cannot be too careful when documenting your arrangements.

3. SECURING RIGHTS TO SOFTWARE

Analyze options for securing your company's rights to software in good time. Both employment contracts and correctly executed agreements with contractors are of importance. Remember that in the absence of rights to software, the right holder may demand substantial compensation for losses.

4. TRANSFER OF RIGHTS TO SOFTWARE

How rights to software are transferred to the customer may make a difference when it comes to taxation.

For example, services related to the development of computer software and databases (software tools and data products for computers), their customization and modification for a foreign customer, transfer to a foreign purchaser on the basis of agreements on alienation of the exclusive right, license and sublicense agreements are not subject to the Russian VAT.

In contrast import of software on tangible storage media, sale to a Russian customer of a software product with a "shrink-wrap" license, or development of software for a Russian customer shall generally be subject to VAT.

If a company intends to apply a zero percent rate when exporting software, license agreements of any type and agreements on alienation of the exclusive right are "contraindicated". Software must be delivered on a tangible storage medium and a sale and purchase agreement must be executed.



5. FOREIGN EXCHANGE CONTROL RULES

In Russia, foreign exchange control rules apply. Russian banks and the customs authorities execute foreign exchange control over goods and services export operations. In particular, to comply with foreign exchange control rules Russian companies must provide information and documents, and foreign currency earnings exchange (proceeds from non-resident taxpayers) must be earned on bank accounts in Russia. The fine for violation of foreign exchange legislation is currently quite substantial – up to 100% of the amount not transferred to a Russian company's bank account. Notwithstanding the fact that it has long been discussed that the amount of liability may be reduced, for the time being Russian companies exporting software abroad must timely submit reports and information to foreign exchange control bodies. Therefore, we recommend contacting the foreign exchange control department of the bank providing services to your company in order to agree on draft documents that will be subsequently submitted for the purposes of compliance with foreign exchange legislation in the course of fulfillment of the respective contract. Bank specialists are usually glad to provide assistance to their clients, while timely execution of documents will help to avoid the risk of committing a violation.

6. TAX INCENTIVES FOR IT COMPANIES

There is a system of tax incentives in Russia for companies performing activities in the IT sphere. Some types of incentives may be successfully combined. For example, a reduced rate of insurance contributions may be applied regardless of the taxation system or other tax incentives. Options for a legal optimization of tax expenditures are to apply the simplified taxation system, to gain the status of a resident of a special economic zone (SEZ) or a priority social and economic development area (PSEDA), to receive accreditation in the IT sphere, and other options. In order for the tax incentives to be applied, a complex set of conditions must be fulfilled.

We recommend pre-accessing the possibility of using tax incentives and choosing the most suitable option. As a rule, it is more difficult to change the system in the course of a company's operation than to establish a business in advance under an optimal model.

7. MECHANISM OF SUPPLIER PROTECTION

Make sure that you assess a negative scenario of your cooperation with a foreign customer. Imagine what happens if your customer breaches the requirements of the contract or makes an unjustified claim to your company. The contract should provide for a mechanism of collecting payment from the customer for any works performed, services rendered and (or) rights transferred.

8. APPLICABLE LAW

Be careful when entering into an agreement under foreign law. Consult an independent adviser to assess the risks in case of cooperation under such an agreement.

Special attention should be paid to the mandatory requirements of Russian and foreign law. If, for example, the software might be used for processing personal data not only in Russia but also abroad, such activity not only has to be in accordance with Russian law, but also in accordance with the General Data Protection Regulation (GDPR) and/or by United States California Consumer Privacy Act (CCPA). Violations of these rules can lead to very serious consequences in the form of penalties and restrict the possibility of further operations in foreign markets.

9. ENFORCEMENT OF A COURT DECISION

Take into consideration that not all court decisions are enforceable. For example decisions of Russian state courts cannot be recognized in Germany and many other countries of Western Europe, with which there are no respective legal assistance treaties. Some decisions of state courts may be enforced in other countries on the basis of the principle of mutual recognition of decisions, for example with respect to certain issues with Great Britain, the Netherlands, Israel. However, in most cases, in countries with which there are no treaties on enforcement of court decisions under civil cases, decisions of Russian state courts are not recognized and therefore cannot be enforced. A more realistic option is to use international arbitration courts whose awards are recognized and enforced on the basis of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, June 10, 1958) signed by 159 countries.

10. CHOICE OF A FOREIGN ARBITRATION COURT

When choosing a foreign arbitration court as an instrument of dispute resolution, make sure that your company can meet formal, technical and financial conditions for applying thereto. If any dispute with a foreign customer arises, we recommend consulting an independent adviser having experience of dealing with cases heard at the respective arbitration court.



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