

Entrepreneurial lawyering for digital trade

COLETTE VAN DER VEN, *Associate, Sidley Austin*



To ensure that the rise of e-commerce does not leave SMEs in LDCs behind, lawyers must expand their activities beyond macro-level trade agreements

In March 2017 I attended Geneva Global Goals Innovation Day to visit a pop-up shop set up by the EcomCoop, a pro bono client of Sidley Austin's Emerging Enterprise Pro Bono Program. Displaying colourful handicrafts from all across Africa, this makeshift arrangement sought to familiarize potential customers with the products of African small and medium-sized enterprises (SMEs) that soon will be available for purchase online in the European Union (EU) and the United States. I took advantage of the opportunity and bought a Rwanda-made wallet of cow leather, tanned in neighbouring Burundi.

It has long been recognized that e-commerce has the ability to lower traditional trade barriers and costs, providing great

promise for inclusive trade. However, to jump on the international e-commerce bandwagon, it is imperative for businesses to have the ability to navigate and comply with an increasingly complex labyrinth of legal and regulatory hurdles. This involves both traditional trade issues, such as technical barriers to trade, sanitary and phytosanitary requirements (TBT/SPS), value-added tax and custom regulations, as well as e-commerce-specific laws and regulations, including privacy laws, consumer protection regulations, and cyber security regulations.

When conducting commerce through the internet, traditional legal and regulatory trade barriers can be multiplied. Typically, producers engaged in e-commerce enter

multiple markets simultaneously ('Small online Business Growth Report: Towards an Inclusive Global Economy', eBay, January 2016). This means that the merchant must be able to identify, and be able to comply with, the different legal and regulatory requirements of the end markets in which it expects to have consumers.

For instance, to sell the Rwandan leather wallet I brought into the EU, the merchant must not only ensure that the leather was processed in compliance with the EU health and safety regulations – which may be more difficult to verify when it is processed in Burundi – but also that it complies with labeling requirements, such as language, that vary for different EU members.

SMEs from many LDCs are not able to open merchant accounts on international market places like Amazon and eBay or to receive payments from international customers because they have limited or no access to secure payment systems.

UNDERSTANDING REGULATIONS

Similarly, e-commerce augments the importance, as well as the complexity, of understanding custom duties and VAT regulations of countries where the product will likely be sold. Merchants must calculate the exact amount of custom duties and VAT that will be levied prior to export and reflect this in the final price. They likewise must be aware of the relevant incoterms to ensure additional charges are not passed on to the customer.

Moreover, providing for returns is often legally required for products sold online. Where a returned product is above the de minimis level, it may be subject to custom duties as well as paperwork requirements – the responsibility of which falls on the seller ('International E-Commerce in Africa: The Way Forward', ITC, 2015).

In addition to these traditional trade barriers, SMEs that are selling online must also comply with the data privacy regulation in the consumer market as well as consumer protection regulations, which may differ between EU members. Thus, SMEs must have in place privacy agreements and buyer-seller contracts that comply with these often stringent requirements in all the markets the SME is targeting. Since many least-developed countries (LDCs) do not have data privacy and consumer protection laws in place, SMEs from these countries often experience particular compliance difficulties in these areas.

TRANSACTION ACCESS

A prerequisite to participate in international e-commerce is the ability to access secured transactions and payment systems to prevent fraud. To sell products into the EU market, SMEs from LDCs must have access to electronic trust tools and services. While international marketplaces like eBay and Amazon provide a number of these services, SMEs from many LDCs are not eligible to open merchant accounts on these platforms or receive payments from international customers because they have limited or

no access to secure payment systems, thus creating due-diligence challenges.

Given the complexity of the digital trade landscape, it is unsurprising that SMEs have listed the lack of information as a top barrier to online commerce (Companies engaged in online activities, Flash Barometer 413, 2015).

In an attempt to address some of these problems, many regional and multilateral institutions are exploring initiatives to establish a regulatory framework to facilitate international e-commerce. While these initiatives are necessary to reduce the complexity of the cross-border issues faced by SMEs, they do not necessarily address the on-the-ground obstacles keeping many SMEs from LDCs from participating in international e-commerce.

One way to help SMEs identify and address these barriers would be to establish a one-stop shop – in the public or private sector – that provides custom-made legal advice to SMEs from LDCs on the maze of different legal and regulatory barriers they must comply with when targeting consumers in a particular market. This could be done either as part of a law firm's pro bono program, or through the work conducted by an international organization or non-governmental organization. This would require a different approach to legal specialization: rather than focusing in areas of law, like trade, corporate or privacy law, the specialty of this one-stop-shop would be defined by the type of problem it aims to solve and the type of entity it is advising.

Part of the work of such one-stop shop would likely center on directly advising SMEs from LDCs on how to sell goods online internationally through their own website, and establish a set of best practices. The other part should focus on putting in place the requisite legal framework that will enable innovative market that are accessible to SMEs from LDCs to flourish. Doing so would scale-up the impact of the legal advice provided.

LEGAL TRAINING

There exists various examples of innovative market places that generate such a multiplier effect. One such model is ITC's brainchild, the EcomCoop, a United Kingdom-based cooperative that operates a marketplace owned by African SMEs that helps solve cross-border issues and provides access to foreign markets in a cost-effective way. By being registered in the UK, African-based SMEs have access to secure international

payment systems. With the help of Sidley Austin lawyers, the EcomCoop has put in place a legal framework as well as training sessions on VAT and TBT/SPS compliance, ensuring that all SMEs that transact using its platform – including the Rwandan SME that manufactured the leather wallet I purchased – comply with the requisite EU laws and regulations.

Another example of an innovative model is inclusivetrade.org, a marketplace for garment-producing SMEs from developing countries. Set up by the platform SPINNA Circle – also a Sidley pro bono client – the marketplace is set to go live in August. Registered in the UK, SPINNA Circle enables its SMEs – which have all undergone a strict and socially-oriented due diligence process – to sell their products to various EU countries. Like the EcomCoop, it provides a number of services that diminish the costs and burden for SMEs in developing countries to sell products online to consumers in the EU market.

Providing comprehensive legal advice to these innovative market places generates a trickledown effect: it enables them to train their SMEs to meet the legal and regulatory requirements to sell online internationally.

In sum, SMEs must navigate a complex legal and regulatory landscape to sell online into high value markets like the EU. To turn e-commerce from promise into opportunity for SMEs in LDCs, lawyers cannot limit their activities to macro-level trade agreements. Rather, we must do our part by thinking entrepreneurially on how to best provide comprehensive advice on the legal and regulatory challenges most pressing to SMEs from LDCs, and by identifying and supporting innovative models that could multiply the benefits of such legal services provided. Then, a few years from now, I may not just carry a Rwandan wallet, but also wear beaded Kenyan sandals, and use Ghana-made shea butter cream – all purchased online. ☺

The views expressed in this chapter represent the personal views of the author, and do not represent the views of Sidley Austin LLP or its clients.

This article has been prepared for informational purposes only and does not constitute legal advice.

1. Creating awareness is crucial for making customers purchase goods online from developing countries.