

Ofcom will apply a modified approach where the question of undue discrimination involves the conditions imposed by a vertically integrated SMP operator on its own downstream business. In those cases, undue discrimination will be presumed to exist, and the onus will therefore be on the SMP operator to provide objective justification for any differences.

For more information visit :

<http://www.ofcom.org.uk/consult/condocs/undsm/contraventions/>  
or contact : [colin.long@olswang.com](mailto:colin.long@olswang.com)

## 1. TRADE LAW

### UNITED STATES THIRD WORLD GOVERNMENT CONTRACTING

Third World Government Contracting: Collecting from a Foreign Sovereign

In the world as it exists after the Cold War, there has been a significant expansion in international trade opportunities vending to emerging and third world nations.

Without the competition between superpowers to spend foreign aid money seeking alliances with the third world, more nations have entered the commercial markets to purchase goods and services, including everything from air travel goods, to construction, to modern technology, to oil and mining supplies and servicing, food, medical services and supplies, and other goods and services previously obtained by foreign aid grants.

Many of these countries possess significant wealth to match their significant needs. There are opportunities available in this form of government contracting that modern competitors in the U.S., E.C., and Pacific Rim cannot afford to ignore.

There is significant risk in this market, however. Market risks are unlike the normal business risks of international transactions, for the purchasers are often governments or government agencies. Without proper planning, the sovereign buyer will be immune from lawsuit.

The devices of the international letter of credit or international arbitration are often inconvenient or unacceptable to the government purchasing agent. As a result, the merchant faces a risk that the buyer will refuse or substantially delay payment, unilaterally change the terms of the agreement, or find grounds to dispute the transaction knowing that there is no effective mechanism for resolving the dispute.

Business people who are familiar with government contracting in the West are aware that Western governments can play these same games, which can ultimately drive a supplier out of business, but without a tolerable mechanism for enforcement of contracts, trade in this potentially profitable market becomes too risky. A competitor which can reasonably secure its payment can avoid charging a substantial risk premium and can offer more competitive pricing.

In the shadow of the Cold War, most of the Third World recognizes the likely significance of the United States in world diplomacy and have created international banking and financial arrangements in the United States to complement and facilitate their diplomatic efforts.

Such international banking arrangements within the U.S. are essential in the modern world, and emerging nations cannot afford to abandon them, even when the United States openly flaunts its use of subpoenas and electronic intelligence to trace financial transactions through the United States.

Handled correctly, this potential source for paying damages as well as the foreign sovereign's desire not to get bad publicity in the local newspapers in Washington makes it tactically convenient to find some basis for

adjudicating disputes between merchants and sovereigns within the United States.

That source is the U.S. Foreign Sovereign Immunities Act (the 'FSIA'), and a merchant who plans its contract in advance can obtain jurisdiction in the U.S., thereby massively improving its ability to collect on its contracts both by litigation and by pre-litigation pressure to comply with the contract.

There are some additional start-up costs involved in entering this trade. The FSIA cannot be used to protect a foreign company from non-payment in a foreign contract, but through the magical fiction that corporations are citizens wherever they are formed, the FSIA can protect the wholly-owned American corporate subsidiary of that same foreign company if its duties include managing the contract.

The FSIA strictly limits jurisdiction to only four categories of lawsuit, but a foreign sovereign can consent to jurisdiction with the most innocuous of language placed in a contract, or, even, by contracting to make payments in the United States.

It is difficult to reveal the many techniques to be considered in foreign government contracting in a brief article, but merchant companies considering trade with foreign sovereigns ought to review with their counsel the formation of an American subsidiary in the Washington metropolitan area to manage the government contract in order to maximize its ability to enforce and collect on the contract. Including language in the contract that places the contract under U.S. law and submits the buyer to U.S. jurisdiction in a manner designed to work within the FSIA subtly can become an enormous competitive benefit.

For more information please contact : [Richard@MWLC.org](mailto:Richard@MWLC.org)

## 2. WIRELESS

### UNITED KINGDOM OFCOM CONSULT ON THE SPECTRUM RELEASED BY DIGITAL SWITCHOVER

OFCOM have now commenced the process of consulting on how best to allocate the large amount of high-value UHF spectrum due to be released by the digital switchover process in the UK. According to the Switchover Plan, jointly announced by the BBC and the Department of Trade and Industry earlier in 2005, the switchover process will occur in a phased manner during the period from 2008 to 2012. Digital switchover is expected to be completed in the UK by 31 December 2012.

With this timeframe in mind, OFCOM announced on 17 November 2005 the beginning of a Digital Dividend Review ("DDR"), which will examine the options arising from the release of spectrum created by digital switchover.

Analog broadcasters currently use nearly half of the most valuable bands of spectrum. Digital Terrestrial Transmission or "DTT" broadcasting is six times more efficient than analogue, so switchover will free up large amounts of spectrum. Potential new uses will include high-bandwidth mobile services, wireless broadband services, services in remote and rural areas, and additional High Definition TV channels.

In effect, 14 out of the current 48 channels will be made available. Up to 112 MHz of UHF spectrum will be released for new long-range, high-bandwidth uses. Clearing the UHF spectrum will require changes to licences under the Wireless Telegraphy Act and Broadcasting Act. Ofcom is therefore putting the current UHF licence-holders on notice.

Around 208 MHz of 'interleaved' spectrum (where overlapping areas of spectrum in certain geographical areas are unused) will also become available, suitable for purposes including their existing uses for outside broadcasts, local sporting events, and public venue microphones etc.