

Third Party Royalties and Licence Fees



COMMENTARY 25.1

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Purpose:

- To provide guidance regarding the interpretation and application of Article 8.1 (c) of the Agreement in cases where a royalty or licence fee is paid to a third-party licensor unrelated to the seller.

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Background:

- Under Article 8.1 (c), royalties and licence fees are to be added to the price actually paid or payable for the imported goods where they are related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued, to the extent that such royalty or licence fees are not included in the price actually paid or payable.

Royalties (simple scenario)



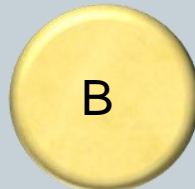
“...royalties and licence fees related to the goods being valued that the buyer must pay, either directly or indirectly, as a condition of sale of the goods being valued,...”

Seller/ Licensor

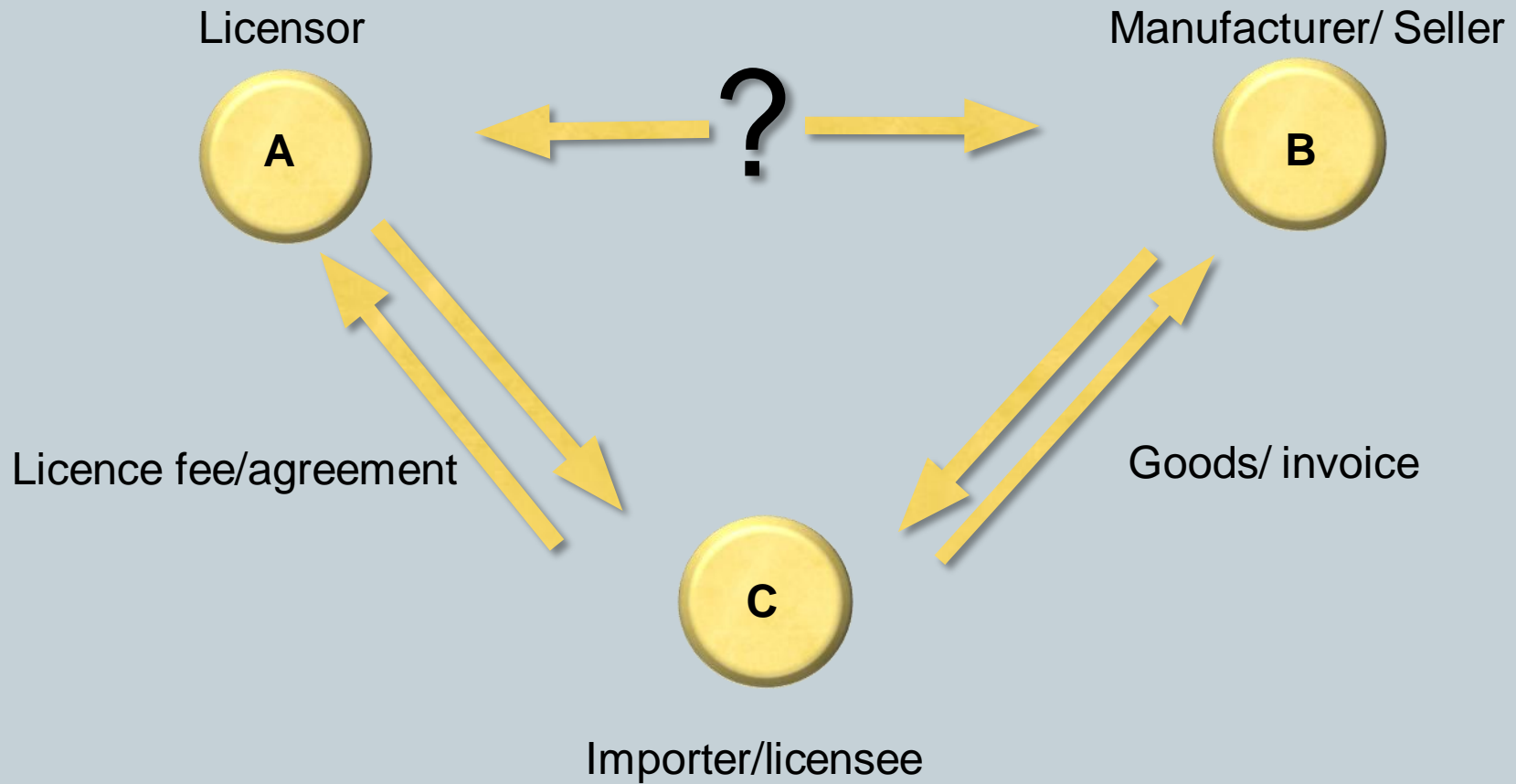


**Invoice/
Licence fee**

Buyer/ Licensee



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Determining whether a royalty or licence fee is related to the goods being valued

- ✓ The most common circumstances
when the imported goods incorporate the intellectual property and/or are manufactured using the intellectual property covered by the licence.
- ✓ For example, if the imported goods incorporate the trademark for which the royalty or licence fee is paid, this would indicate that the fee relates to the imported goods.

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Determining whether a royalty or licence fee is paid as a condition of sale of the goods being valued

- Is the buyer unable to purchase the imported goods without paying the royalty or licence fee?
- If royalty or licence fee is paid to a third party related to the seller of the imported goods, it is more likely that the fee is paid as a condition of sale than when it is paid to a third party unrelated to the seller. There can be various situations where payment of royalties or licence fees is considered a condition of sale even when they are paid to a third party.

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- ... depends on a review of all the facts surrounding the sale and importation of the goods, including linkages between the sales and licence agreements and other pertinent information.

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The following are factors that could be taken into account in determining whether payment of the royalty or licence fee is a condition of sale :

- (a) There is a reference to the royalty or licence fee in the sales agreement or related documents;
- (b) There is a reference to the sale of the goods in the royalty or licence agreement;

.....

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.... (c) According to the terms of the sales agreement or the royalty or licence agreement, the sales agreement can be terminated as a consequence of breaching the royalty or licence agreement because the buyer does not pay the royalty or licence fee to the licensor. This would indicate a linkage between the royalty or licence fee payment and the sale of the goods being valued;

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... (d) There is a term in the royalty or licence agreement that indicates if the royalties or licence fees are not paid, the manufacturer is forbidden to manufacture and sell the goods incorporating the licensor's intellectual property to the importer;

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(e) The royalty or licence agreement contains terms that permit the licensor to manage the production or sale between the manufacturer and importer (sale for export to the country of importation) that go beyond quality control.

Each case must be considered individually having regard to relevant circumstances