

## Customs Law Advisory

March 31, 2008

### Customs Law Advisory - US Court Decision Highlights the Need for Importers to Review the Terms and Conditions that Govern Customs Broker Services

Most companies that import into the United States use a licensed customs broker to clear merchandise through US Customs and Border Protection (CBP). While such services are usually quite helpful, they almost always involve the broker's standard terms and conditions (T&Cs). A recent decision shows that this boilerplate language will be upheld by US courts in disputes between brokers and importers. Since the T&Cs can govern everything from simple billing procedures to important matters such as indemnifying the broker in the event of a duty or penalty, it is critical for the importer to understand these terms.

Recently, in *Anthem Leather v. Kamino Int'l Transport*, a federal court in Georgia upheld a customs broker's T&Cs as they applied to venue selection - that is, the location of the court where the importer and broker would litigate a dispute. The importer signed service contracts with the broker that incorporated the standard T&Cs published by the National Customs Brokers and Forwarders Association of America, Inc., the trade association for brokers. Almost all brokers use these same T&Cs or a highly similar version. The T&Cs stated that the importer acknowledged receipt of the broker's T&Cs of service and that the parties "agree that any action relating to the services provided by [the broker], shall only be brought in [courts of New York]."

Subsequently, the importer and broker became involved in a dispute. The importer filed its suit against the broker in a federal court in Georgia. The broker argued that the contract required the use of New York courts. The importer argued that when it signed the contract, it did not intend to agree with the standard language of the terms and conditions section. Calling the importer a "sophisticated business entity," the Georgia court found that this was no excuse and transferred the case to New York.

A broker's standard T&Cs cover not just venue, but many substantial issues. For example, these T&Cs typically provide that the importer "acknowledges that it is required to review all documents" and that it will advise the broker of any errors or omissions. The T&Cs usually make clear that it is the duty of the importer to disclose to the broker "any and all information required to import, export, or enter the goods." Additionally, the T&Cs generally state that the importer will "indemnify and hold the broker harmless" for any duties or penalties that may be owed on the merchandise or arise because of errors. The T&Cs also state that the importer agrees that it, not the broker, has sole responsibility for maintaining all import records required under US law, unless the broker specifically agrees to do so. These T&Cs are often printed on the back of the broker's invoice or appear on a separate sheet provided when the relationship begins.

While the court's decision focused on a somewhat technical legal point, it shows these "fine print" terms will be enforced, which can have significant monetary consequences if there is a dispute under any of the broader terms described above. Therefore, importers should closely review their brokers' terms and conditions of service and ensure they have taken steps to meet whatever legal and contractual obligations they intend to accept. Otherwise, importers that disagree with these terms should negotiate a change, before a dispute arises.

## **CPSC and FDA Announce New Programs that May Mean Increased Inspections on Imports, Especially Chinese Products**

Earlier this month, the US Consumer Product Safety Commission (CPSC) announced that it is increasing its cooperation with CBP to inspect, detect, and block imports of hazardous consumer products entering the United States. At a news conference at the Port of Long Beach in California, CPSC Acting Chairman Nancy Nord announced the creation of the new Import Surveillance Division within CPSC, which will work with CBP. The Port of Long Beach is the first port that will have a permanent CPSC presence, and other ports will soon follow. Acting Chairman Nord said the CPSC will test more samples and conduct more port-of-entry “surveillance blitzes” with assistance from CBP.

It is probable that the CPSC and CBP will be eager to show the effectiveness of this new cooperation with concrete examples of import shipments of merchandise that violated safety standards but were stopped by the new measures. The creation of this new division is the latest step in the government’s response to the recent importations of unsafe consumer products and the subsequent attention from the media and Congress. Any importer of consumer products should be sure to document its internal policies and procedure for confirming production according to relevant safety standards. Importers may also want to consider including language on import documents confirming merchandise was produced and/or tested according to certain established safety standards relevant to that industry. Such shipments could be less attractive to CPSC and CBP inspectors looking for “surveillance blitz” targets. Of course, importers should be prepared to back up any such declarations with supporting documents, upon request.

The CPSC press release is available at:

<http://www.cpsc.gov/cpsc/pub/prerel/prhtml08/08206.html>

Approximately a week after the CPSC announcement, the FDA announced it intends to establish eight full time permanent FDA positions at US diplomatic posts in China. FDA states that these new posts will allow the agency greater access for inspections and interactions with manufacturers to help assure products that are shipped to the United States meet US standards for safety and manufacturing quality. These new positions are consistent with the Memoranda of Understanding signed by the United States and China, as reported in Steptoe & Johnson’s Customs Advisory dated January 31, 2008, at:

<http://www.steptoec.com/publications-5107.html>

Read the FDA’s announcement at:

<http://www.fda.gov/bbs/topics/NEWS/2008/NEW01806.html>

Considering the CPSC and FDA announcements, importers of consumer goods, food, cosmetics and other retail products from China can expect ever increasing scrutiny to ensure that products comply with all US safety standards. Manufacturers and importers should be sure to have systems and supporting documentation in place to demonstrate compliance.

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