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Incoterms and International Sales Contracts

by

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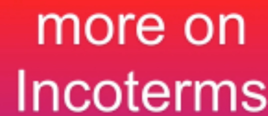
Incoterms are all the rage right now because the International Chamber of Commerce issued its latest version called Incoterms 2010. Incoterms are shorthand in international sales contracts, namely risk of loss and responsibility for delivery. If the merchandise is lost at sea, for example, who bears the loss? Where are you supposed to deliver the merchandise to? Who is handling export and customs clearance, and things like that. These issues are important, but they are seldom litigated because Incoterms do not deal with the transfer of title of the goods. They do not deal with who owns the goods or issues like whether the goods are conforming or whether you even get paid. These issues are dealt with by the sales contract, which can and should include Incoterms if you have them.

Incoterms are also not law. They are not treaty. They are conventions or suggestions. You are allowed and encouraged, when you do use them, to modify them and supplement them to suit your particular transaction.

Let's see how Incoterms actually were litigated in a 2002 court case out of the federal district court, Southern District of New York. The case is St. Paul Guardian Insurance Company. vs. Neurod Medical Systems. A US company bought medical equipment from a German manufacturer. The parties agreed on an ocean shipment, but the medical equipment was damaged during the ocean voyage. The insurance company paid the US purchaser $285,000 because of the damages, and as subrogee, the insurance company sued the German producer to recover that amount. The German company said it did not owe the money because this was a CIF shipment, which placed the risk of loss on the buyer. The insurance company argued, incorrectly, that the German supplier had to pay because the German company still owned the medical equipment when it was damaged. The Court warned against confusing risk of loss with title. Incoterms only deal with risk of loss, not title. You can own a shipment and, depending on the Incoterms you choose, the risk of loss is on the other party, as was the case here. The court concluded that the insurance company didn't have a case and dismissed the lawsuit.



The biggest problem with Incoterms is that people confuse them with ownership rights. Incoterms can provide a false sense of security that all the important issues in an international sale have been dealt with.

Often parties don't even use Incoterms as intended or even at all. Thus, we can say that when a contract between foreign seller/ exporter and the importer of record specifies that foreign seller/exporter pays for freight and insurance, and if those charges are set out separately in the invoice and elsewhere to CBP's satisfaction, then the importer of record can deduct those charges and make sure it doesn't pay duty on them regardless of what the Incoterms say.

Take HQ 547826 for example, a 2002 ruling issued by CBP. Here we have an instance where the parties wrote on their contract: FOB Miami, which CBP complained was nonsensical. But it isn't nonsensical if the parties knew what they meant. That's what a contract is. The meeting of the minds. Who cares who else understands, right? Well, it matters if an outside arbiter, like CBP or a court, has to resolve a contractual dispute between the parties. In this ruling, FOB Miami didn't make sense because traditionally FOB means that the exporter/ seller's responsibilities end at the foreign port, but it was clear that the exporter/seller paid all the freight and insurance costs all the way to the US port. Because the importer supplied sufficient, itemized backup to support this, CBP ignored the FOB and allowed the importer to deduct those costs from the transaction value.

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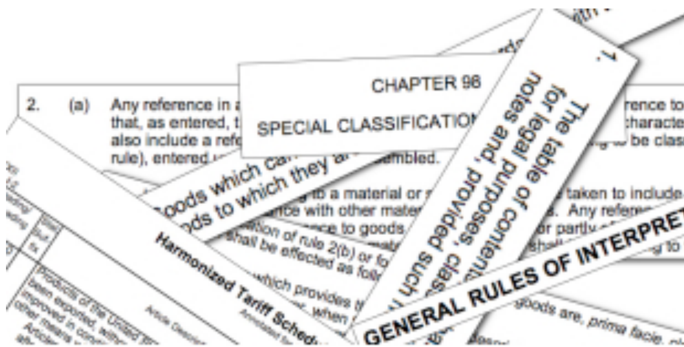

Tariff Classification Webinar

June 10, 2011
12 noon - 1 pm

Knowing how to classify imported merchandise under the Harmonized Tariff Schedule of the United States is one of the essential skills that importers and customs brokers must master. The rules of interpretation, definitions, terminology, and interpretive protocols can be daunting. Fortunately, we developed an easy "how to" approach for mastering tariff classification and for incorporating lessons from "What Every Member of the Trade Community Should Know About Tariff Classification," an informed compliance publication from US CBP. This webinar is the fifth of eleven installment of our Importer Informed Compliance Series. Each webinar is $99, but you can purchase the entire eleven webinars for $499. You receive one CCS credit from the NCBFAA for each webinar you attend. Group discounts are available. Clients (former or current) and customs broker exam students participate for free. To register, go to www.exportimportlaw.com/calendar/.

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888-388-8484, www.moodygardenshotel.com. Special rate ($50 savings per night) if room reserved before June 19, 2011 while rooms last. This hotel (and surrounding hotels) are very popular in the summer and sell out quickly, so reserve your room early. To secure the special rate, ask for the "Customs Brokers Boot Camp".

Doubletree Hotel JFK Airport, 135-30 140th Street, Jamaica, NY 11436, (718) 322-2300. Special rate of $139 per night (regular rate is $229 per night) while rooms last. To secure the special rate, please ask for "Customs Broker Boot Camp" when calling the hotel. Remember, this hotel is at JFK airport (Jamaica, NY), not Manhattan.

New Online Free Trade Agreement/Tariff Tool
Don't know whether your item qualifies for a Free-Trade Agreement (FTA), including the NAFTA. The US Trade Representative has created an online tool that it claims will allow you to easily find whether your items qualify for any of the seventeen FTAs, including imports into the USA, and will even help you classify your item. There is even an 8 minute video describing the online program.

How-To NAFTA Certificate of Origin Videos
Thanks to the Department of Commerce, you can now watch how-to videos on NAFTA certificates of Origin. The videos are short and easy to follow.

Mexican Trucks Get Long-Haul Access
Some years back, the USA reneged on and violated (according to a NAFTA Arbitration Panel) its obligation under NAFTA to allow Mexican trucks to drive in the interior of our country. Mexico retaliated, as it was allowed to under NAFTA, by imposing stiff tariffs on ninety products we export to Mexico, and also increased the use of NAFTA audits.
The Obama Administration is proposing to finally give Mexican trucks access to the interior of our country. The DOT calls is a "pilot program" that will last for three years. Mexican carriers would go through a three-phase process and fill out a 28-page application and other requirements,
Stage 1 lasts three months. The Mexican motor carrier's vehicles and drivers are inspected each time they enter the United States.
Stage 2 lasts 18 months. The Mexican motor carrier's vehicles would still be inspected, but at a comparable rate to other Mexico-domiciled motor carriers that cross the United States-Mexico border.
Mexican truckers have provisional authority under Stage 1 and Stage 2. If, after the 180 day provisional period, the Mexican motor carrier has a relatively clean record, it gets bumped up to permanent authority under Stage 3. Mexican trucks and drivers would still be subject to all U.S., state and local laws. If the Mexican motor carrier has a questionable record of failed inspections after the 180 day trial period, it can be removed from the program and its USA driving privileges revoked. USA motor carriers would have mirror rights in Mexico, and Mexico has agreed to remove the tariffs.

NAFTA UPDATE

Court Cases

Ford Motor vs. U.S. This is a legal opinion from the United States Court of Appeals for the Federal Circuit decided on March 21, 2011. CBP renders most NAFTA decisions that affect importers. An importer can appeal a decision to the US Court of International Trade, and then appeal from there to the US Court of Appeals for the Federal Circuit. It is possible to appeal to the US Supreme Court, but there's more chance that Donald Trump will be elected President than your appeal will be heard by the US Supreme Court. Pretty much, it ends at the US Courts of Appeals for the Federal Circuit. Thus, this case is an appeal from the Court of International Trade. Ford imported auto parts from Canada. It didn't claim NAFTA outright at importation, but instead tried to claim a refund of duties paid on those auto parts under NAFTA. This is called a post-entry refund and its allowed under 19 USC 1520(d). There are a few conditions that an importer must meet to get a refund, including filing the refund request within a year of importation and supplying CBP with a copy of the supporting NAFTA certificates. Ford filed its refund request within a year, but did not submit the NAFTA certificates until after the one year deadline. CBP denied the refund claim because the certificates were late, Ford filed a protest with CBP which CBP rejected for the same reason, and then Ford appealed to the Court of International Trade, and the CIT agreed with CBP. In fact, the CIT said it did not even have jurisdiction to consider the appeal because it was not as if CBP had rejected Ford's protest on the merits; CBP just said it did not meet the procedural requirements. We beg to differ, said the US Court of Appeals for the Federal Circuit upon receiving and reviewing Ford's appeal. The Appeals Court decided that CBP had functionally denied Ford's protest and, therefore, the CIT did have jurisdiction to hear Ford's appeal. The Appeals Court then remanded the case back to the CIT and ordered the CIT to decide whether CBP was required to accept Ford's late-filed NAFTA certificates of origin under 19 C.F.R. § 10.112, which basically allows importers when they are claiming reduced duty rates or free entry to file documentation late as long as there is no willful negligence or fraudulent intent and as long as it was filed before liquidation. Thus, it is possible for an importer to file its NAFTA certificates late on a refund request as long as the importer as there is no willful negligence or fraudulent intent and as long as it was filed before liquidation.

De La Cruz v. Gulf Coast Marine & Associates (ED TX-Lufkin March 7, 2011), 2011 U.S. Dist. LEXIS 23026 - An accident on a mobile drilling rig and oil production platform in Mexican territorial waters killed and injured a bunch of Mexican workers. The workers or their decedents sued Schlumberger, Baker Hughes, Vetco Gray, Halliburton, and others on various grounds, including NAFTA, claiming that the defendants violated international labor law, international safety standards, and pollution controls of NAFTA. The court did not agree and dismissed the NAFTA part of the lawsuit because NAFTA forbids private causes of actions.

Adusumelli vs. Steiner, 740 F Supp 2d 582 (SD NY Sept. 29 2010) - This court was much more amenable to Mexican nationals. Twenty-six Mexican pharmacists had secured green cards under NAFTA to emigrate to the USA legally. They set up shop and secured temporary pharmacist licenses in New York where they practiced. New York then changed its laws to disallow any aliens, whether legal or not, to practice pharmacy in the state. The Court agreed with the Mexican pharmacists that this was unconstitutionally discriminatory and permanently enjoined the state of New York from enforcing its law against green card holders.

Hitachi Home Elecs., Inc. v. United States, 704 F. Supp. 2d 1315 (Court of International Trade, April 30, 2010) - This case is relevant if you are an importer who is always fighting with CBP over the amount of duties you have to pay. Hitachi imported plasma TVs, which CBP liquidated at a duty rate of 5%. A 5% tax is a big deal, so Hitachi filed several protests claiming that the TVs are duty-free under NAFTA. A couple of years passed, but CBP took no action whatsoever on Hitachi's protests. It did not deny or approve them. Why didn't CBP take any action? Maybe because there were other protests and other cases pending regarding the plasma TV issue and CBP wanted to see how it all played out, but Hitachi grew impatient and filed a lawsuit in the CIT claiming that its protests are deemed denied by operation of law, i.e., automatically and that, therefore, the CIT could decide the merits of the protests. The CIT disagreed and concluded, "neither the statute nor the regulations specifies any consequences for the failure to allow or deny a protest within the two-year period. As has long been held, the time period is not mandatory." In a not to subtle dig, the CIT suggested that if Hitachi wanted to have its protest heard quickly by the CIT, then Hitachi should have used something called the accelerated disposition procedure and, if CBP hadn't decided within thirty days, the protest would have been deemed denied and then Hitachi could have appealed to the CIT.

JFE Shoji Steel America, Inc., CBP Ruling N151495 (March 30, 2011) - This is not a court case, but a CBP ruling. The importer imported a "rectangle cut for a transformer." I am not absolutely clear what that is, but it is classified under "8504.90.9540" for electronic transformers. The rectangle cut for a transformer was made entirely of Japanese material. CBP knew that this thing did not belong in the first two categories under 19 CFR 102.11, the rules setting the hierarchy for determining whether a good is NAFTA originating. It was not (1) wholly obtained or produced, or (2) produced exclusively from domestic material. That left category (3) and, therefore, the question was whether each foreign material in the goods went through a tariff shift. CBP found that there was a tariff shift and, therefore, the item qualified under NAFTA, that the country of origin was Mexico, and, therefore, the importer could avoid paying the 2.4% duty.

Calendar

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