EUSSI SIHT NI

Court Cases

F e d e r a l J u r i s d i c t i o n - G

Most lawsuits involving international trade wind up in federal district court, but before the merits can be heard and to avoid dismissal, the plaintiff must establish that jurisdiction is proper. Here are two recent court cases that demonstrate how this issue can be played out.

What steps must a foreign company take to sue a domestic company in the USA in a contractual dispute over the sale of goods? The court *In D&G v. H.A. Import (United States District Court, S.D. New York, Feb 18, 2015*) outlined the jurisdictional

requirements under diversity for the foreign party to sustain a lawsuit in federal district court. Diversity is the power that a federal district court has to hear a civil matter between parties from different states or between a US person/entity and a foreign person/entity. The defendant, a California resident, ordered food products from the plaintiff, an Italian company. The Italian company delivered the food products but the California defendant only made a single partial payment and still owed over $96,000. The Italian company sued the California defendant in federal district court in New York. The California defendant argued that the lawsuit should be dismissed because the Italian plaintiff inflated its damages to meet the $75,000 threshold required under diversity. The court disagreed. The court reasoned that the Italian plaintiff successfully achieved complete diversity by having one party from Italy and the other from California and by pleading an amount in controversy that exceeded the $75,000 threshold. The court said that even without diversity, the Italian plaintiff could still sue under the court's treaty jurisdiction because the lawsuit involved the United Nations Convention on Contracts for the International Sale of Goods. The court noted that it also had supplemental jurisdiction because the Plaintiff sued under state contract law. What is fascinating, and is not discussed in the court's opinion, is that the Italian plaintiff sued in federal district court in New York. Neither of the parties is from New York and none of underlying activity or contacts seems to have happened in that state. It appears that the Italian plaintiff did some forum shopping that neither the court nor the California defendant seemed to mind.

But not all federal courts are so generous.

In *Simmtech v. Citibank Korea* (U.S. D New York, Feb 20, 2015), Simmtech, a Korean exporter sued Citibank Korea over investment transactions gone sour. Simmtech brought its lawsuit in federal district court in New York. Simmtech had already tried suing in Korea, but the Korean court dismissed finding the lawsuit

to be "unfounded." Citibank Korea moved to dismiss the New York lawsuit, and the court agreed. The court based its reasoning on *forum non conveniens*, which means what it is sounds like and is based on convenience of the parties and of the court. In this particular lawsuit, the court distinguished between forum shopping and convenience. Under the court's logic, a foreign party should not sue in a federal district court purely to gain a tactical advantage in litigation, for example, because the damages are higher or discovery is easier. The court jurisdiction is proper if there is a practical reason based on convenience to the parties. If not, dismissal is in order if there is a court somewhere else that can more practically entertain the lawsuit. The court dismissed the lawsuit because Simmtech knew any judgment from a New York court would be more generous than a Korean court and because of the expense and effort to transport witnesses from Korea to New York. *Forum non conveniens* may be the fuzziest weapon that judges use to avoid hearing a case. It requires judges to undertake an "on this hand, but on the other hand" balancing that cannot be quantified or second guessed and that frowns upon lawyers doing what they do best, i.e., take every tactical advantage allowed under the law.

F L Y , L I T T L E P E N G U I N ,

b y

O s c a r G o n z a l e z , A t t o r

Global climate change is devastating penguin populations just like it imperils every other living thing on our precious Earth (no need to convince Californians of this). But there is one type of penguin that is immune to humankind's depredations. Indeed, this penguin, which reveals its visage (or is it "plummage?") only in the winter, owes its very existence to the consumerism that lays waste to the environment. I refer, of course, to the beaded penguin or, as CBP now calls it, the lighted penguin sculpture.

I was once like you, dear reader, ignorant of anything to do with this rare, shining breed. Not until I sat down to write this article had I ever even heard of the species, but then I came upon this notification that CBP was considering revoking its previous tariff classification of beaded penguins. My imagination took flight (with due respect to the flightless birds that are the topic of this article) and I was compelled to try to find out what a beaded penguin looks like. I came across several variations, all pictured below. Perhaps none of are the same penguin in CBP's revocation notice. Still, one can only hope.

Maybe the lessons are that we are all just tiny penguins beaming with an inner glow that only quickly depleting fossil fuels can generate and that we are all subject to the vicissitudes of that mercurial agency known as CBP.

PayPal Pays Penalty For Prohibited Party Purc

by

Oscar Gonzalez, Attorney

PayPal has agreed, without admitting any guilt, to pay $7.6 million to the U.S. Government to settle allegations that it failed to block transactions to Cuba, Sudan, and Iran. Read the announcement here.

PayPal fessed up about what it had done by filing a voluntary self-disclosure. It did not wait to be caught, which may be particularly smart for a financial institution. OFAC tends to be brutal with financial institutions that violate US sanctions laws.

It is difficult to tell if OFAC went easy on PayPal. Seven million dollars for any financial institution is a drop in the bucket, especially when, as here, a company repeatedly violates sanctions laws for several years. There were 486 transactions in all! On other hand, the total money spent on these 486 transactions was just $43,934. OFAC does not reveal whether these were cash transfers or purchases of consumer products. At about $90 a pop, maybe people were just buying small kitchen appliances or cheap Broadway tickets. If so, OFAC's main gripe may have been with the intended recipients. What really ticked off OFAC was that PayPal processed 136 transactions to and from a Specially Designated National, someone on a prohibited parties list that all transactions must be screened against.

That the penalty was not all it could have been is at least partially due

to PayPal's cooperation with OFAC's investigation. It also helped that PayPal replaced its compliance personnel.

Unfortunately, OFAC's press release does not specify whether PayPal was able to use its own services to pay the fine. One wonders if the U.S. Government was required to pay a processing fee or wait a week to receive its funds.

U.S. Department of Justice
PRESS RELEASE

FOR IMMEDIATE RELEASE
Thursday, April 2, 2015

Medtronic to Pay $4.41 Million to Resolve Allegations that it Unlawfully Sold Medical Devices Manufactured Overseas

The Justice Department announced today that Medtronic plc and affiliated Medtronic companies, Medtronic Inc., Medtronic USA Inc., and Medtronic Sofamor Danek USA Inc., have agreed to pay $4.41 million to the United States to resolve allegations that they violated the False Claims Act by making false statements to the U.S. Department of Veterans Affairs (VA) and the U.S. Department of Defense (DoD) regarding the country of origin of certain Medtronic products sold to the United States.

"Today's settlement demonstrates our commitment to ensure that our service members and our veterans receive medical products that are manufactured in the United States and other countries that trade fairly with us," said Acting Assistant Attorney General Benjamin C. Mizer of the Justice Department's Civil Division. "The Justice Department will take action to hold medical device companies to the terms of their

government contracts."

"Domestic manufacture is a required component of many military and Veterans Administration contracts," said U.S. Attorney Andrew M. Luger of the District of Minnesota. "Congress has mandated that the United States use its purchasing power to buy goods made in the United States or in designated countries. We take that mandate seriously and will not hesitate to take appropriate legal action to ensure compliance."

According to the settlement agreement, between 2007 and 2014, Medtronic sold to the VA and DoD products it certified would be made in the United States or other designated countries. The Trade Agreements Act of 1979 (TAA) generally requires companies selling products to the United States to manufacture them in the United States or in another designated country. The United States alleged that Medtronic sold to the United States products manufactured in China and Malaysia, which are prohibited countries under the TAA.

The specific Medtronic products at issue included anchoring sleeves sold with cardiac leads and used to secure the leads to patients, certain instruments and devices used in spine surgeries, and a handheld patient assistant used with a wireless cardiac device. The agreement covers the period from Jan. 1, 2007, to Dec. 31, 2013, and for one device (the handheld patient assistant), the period from Jan. 1, 2014, to Sept. 30, 2014.

The settlement resolves allegations originally brought in a lawsuit filed by three whistleblowers under the qui tam provisions of the False Claims Act, which allow private parties to bring suit on behalf of the government and share in any recovery. The relators will receive a total of $749,700 of the recovered funds.

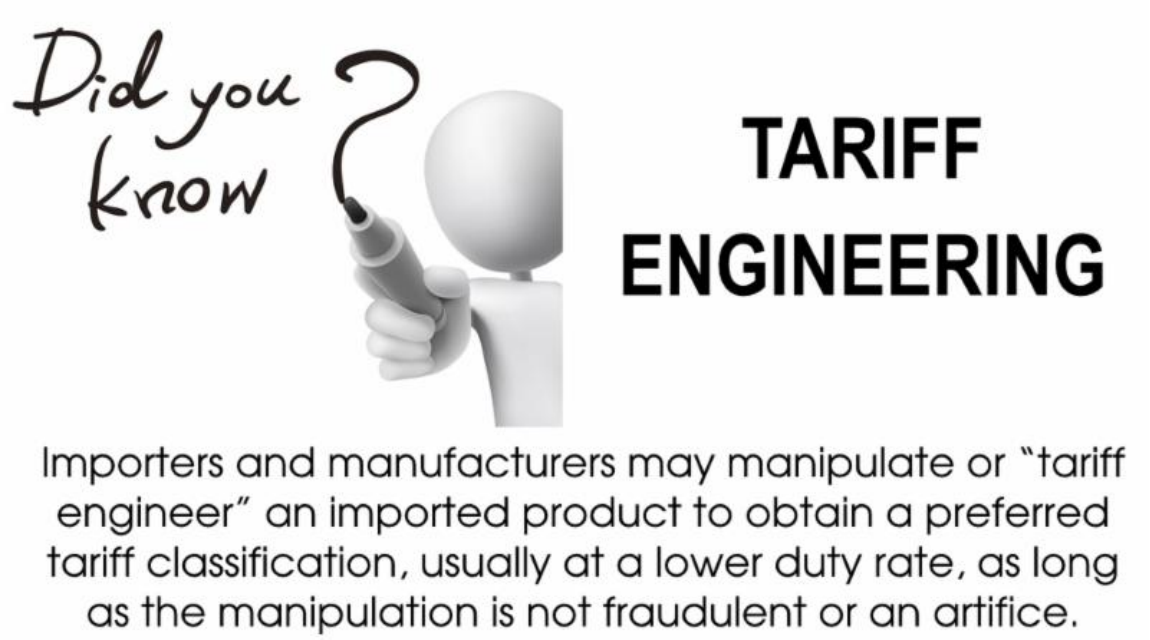
This settlement illustrates the government's emphasis on combating health care fraud and marks another achievement for the Health Care

Fraud Prevention and Enforcement Action Team (HEAT) initiative, which was announced in May 2009 by the Attorney General and the Secretary of Health and Human Services. The partnership between the two departments has focused efforts to reduce and prevent Medicare and Medicaid financial fraud through enhanced cooperation. One of the most powerful tools in this effort is the False Claims Act. Since January 2009, the Justice Department has recovered a total of more than $23.9 billion through False Claims Act cases, with more than $15.2 billion of that amount recovered in cases involving fraud against federal health care programs.

The case was handled by the U.S. Attorney's Office of the District of Minnesota with assistance from the Civil Division, DoD, Defense Logistics Agency and Defense Criminal Investigative Service and the VA's Office of General Counsel.

The underlying case is United States of America ex rel. Samuel Adam Cox, III, Meayna Phanthavong, and Sonia Adams v. Medtronic, Inc., Medtronic USA, Inc., and Medtronic Sofamor Danek USA, Inc., Civil No. 12-cv-2562 (PAM/JSM).

The claims resolved by the settlement are allegations only; there has been no determination of liability.



U.S. Department of Justice
PRESS RELEASE

FOR IMMEDIATE RELEASE

Wednesday, April 1, 2015

Former Owner of Defense Contracting Businesses Pleads Guilty to Illegally Exporting Military Blueprints to India Without a License

Assistant Attorney General for National Security John P. Carlin and U.S. Attorney Paul J. Fishman of the District of New Jersey announced that the former owner of two New Jersey defense contracting businesses today admitted that she conspired to send sensitive military technical data to India.

Hannah Robert, 49, of North Brunswick, New Jersey, pleaded guilty before U.S. District Judge Anne E. Thompson of the District of New Jersey to count six of a superseding indictment, which charged her

with conspiracy to violate the Arms Export Control Act by exporting to India military technical drawings without prior approval from the U.S. Department of State.

"Hannah Robert circumvented the U.S. government and provided defense technical drawings in violation of the Arms Export Control Act," said Assistant Attorney General Carlin. "We will continue to pursue and hold accountable those who abuse their access to sensitive defense information. I would like to thank all of the special agents, prosecutors and other personnel whose work led to the guilty plea in this case."

"Hannah Robert conspired to send to another country thousands of technical drawings of defense hardware items and sensitive military data," said U.S. Attorney Fishman. "She was also charged with manufacturing substandard parts that were not up to spec, in violation of the contracts she signed with the Department of Defense. Enforcement of the Arms Export Control Act is critical to the defense of our country."

According to documents filed in this case and statements made in court:

In June 2010, Robert was the founder, owner and president of One Source USA LLC, a company located at her then-residence in Mount Laurel, New Jersey, that contracted with the U.S. Department of Defense (DoD) to supply defense hardware items and spare parts. In September 2012, Robert opened another defense company, Caldwell Components Inc., based at the same address. Along with a resident of India identified only as "P.R.," Robert owned and operated a third company located in India that manufactured defense hardware items and spare parts.

From June 2010 to December 2012, Robert conspired to export to India defense technical drawings without obtaining the necessary

licenses from the U.S. Department of State. The exported technical drawings include parts used in the torpedo systems for nuclear submarines, military attack helicopters and F-15 fighter aircrafts.

In addition to United States' sales, Robert and P.R. sold defense hardware items to foreign customers. Robert transmitted export-controlled technical data to P.R. in India so that Robert and P.R. could submit bids to foreign actors, including those in the United Arab Emirates (UAE), to supply them or their foreign customers with defense hardware items and spare parts. Neither Robert nor P.R. obtained approval from the U.S. Department of State for this conduct.

On Aug. 23, 2012, P.R. e-mailed Robert requesting the technical drawing for a particular military item. P.R.'s e-mail forwarded Robert an e-mail from an individual purporting to be "an official contractor of the UAE Ministry of Defence," and who listed a business address in Abu Dhabi, UAE. The UAE e-mail requested quotations for a bid for the "blanket assembly" for the CH-47F Chinook military helicopter and listed the "End User" for the hardware item as the UAE Armed Forces. Later that same day, Robert replied to P.R.'s e-mail, attaching, among other things, the electronic file for an export-controlled technical drawing titled "Installation and Assy Acoustic Blankets, STA 120 CH-47F," to be used in the Chinook attack helicopter.

In October 2010, Robert transmitted the military drawings for these parts to India by posting the technical data to the password-protected website of a Camden County, New Jersey, church where she was a volunteer web administrator. This was done without the knowledge of the church staff. Robert e-mailed P.R. the username and password to the church website so that P.R. could download the files from India. Through the course of the scheme, Robert uploaded thousands of technical drawings to the church website for P.R. to download in India.

On June 25, 2012, P.R. e-mailed Robert, stating: "Please send me the church web site username and password." The e-mail was in

reference to both an invoice to and a quote for a trans-shipper known to Robert as a broker of defense hardware items for an end user in Pakistan. This individual used a UAE address for shipping purposes. Later that day, Robert replied to this e-mail, providing a new username and password for the church website so that P.R. could download the particular defense drawings.

On Oct. 5, 2012, Robert e-mailed P.R. with the subject line "Important." The e-mail referenced the Pakistan trans-shipper, a separate potential sale to individuals in Indonesia and the church website: "Please quote [the Pakistan trans-shipper] and Indonesia items today[.] [Dr]awings I cannot do now as if the size exceeds then problem, I should be watching what I upload, will do over the weekend[.] Ask me if you need any drawing . . . . Talk to you tomorrow . . . ."

There were also quality issues with the parts that Robert provided to the DoD. After the DoD in October 2012 disclosed that certain parts used in the wings of the F-15 fighter aircraft, supplied by one of One Source USA's U.S. customers failed, Robert and P.R. provided the principal of their customer with false and misleading material certifications and inspection reports for the parts. These documents, to be transmitted to the DoD, listed only One Source USA's New Jersey address and not the address of the actual manufacturer in India, One Source India. As a result of the failed wing pins, the DoD grounded approximately 47 F-15 fighter aircraft for inspection and repair, at a cost estimated to exceed $150,000.

Until November 2012, Robert was an employee of a separate defense contractor in Burlington County, New Jersey, where she worked as a system analyst and had access to thousands of drawings marked with export-control warnings and information on this defense contractor's bids on DoD contracts. Robert misrepresented to her employer the nature and extent of her involvement with One Source USA in order to conceal her criminal conduct.

Count six of the superseding indictment - conspiracy to violate the Arms Export Control Act - is punishable by a maximum potential penalty of five years in prison and a fine of $250,000. As part of her plea agreement, Robert must pay $181,015 to the DoD, which includes the cost of repair for the grounded F-15s. Robert also consented to a forfeiture money judgment of $77,792, which represents the dollar value of Robert's fraudulent contracts with DoD.

The Arms Export Control Act prohibits the export of defense articles and defense services without first obtaining a license from the U.S. Department of State and is one of the principal export control laws in the United States.

The case was investigated by the special agents of the Defense Criminal Investigative Service's Northeast Field Office and the special agents of the Department of Homeland Security's Counter Proliferation Investigations.

The government is represented by Assistant U.S. Attorneys Fabiana Pierre-Louis and L. Judson Welle of the District of New Jersey. The prosecution received invaluable support from attorneys of the U.S. Department of Justice's National Security Division.

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