

International Trade Law Newsletter



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Fines, Penalties, & Forfeitures Quiz

Our quiz this month is on **Import Penalties**. Here is the link:
www.exportimportlaw.com/february2009quiz

After you take the quiz, grade yourself by the number of correct answers:

- 13-15 Cream of the crop
- 10-12 Elite
- 6-9 Good
- 5-9 In Trouble
- 0-2 Consider another profession

Bankruptcy and International Trade, What You Should Know

The world's economy is down, and bankruptcies are up. Shippers, importers, exporters, brokers, manufacturers...all are being impacted by bankruptcy. Our economic prognosticators, such as they are, foresee only more strife for at least a couple of years. But international trade continues, and so does the work of picking up after an economic crash. If you are involved in international trade, you need to know about bankruptcy, how it works, how to invoke it when you need to, and how to protect your assets as a creditor.

For the uninitiated, bankruptcy laws are as arcane as import and export laws would be for the average human. Weird lexicon, vexing concepts, and obtuse procedures (sound familiar?) make bankruptcy unwieldy and unfriendly. A world unto itself, indeed.

Here are some of the most interesting aspects about bankruptcy as applied to companies involved in international trade.

Bankruptcy In A Nutshell

Bankruptcy is federal law and is found in Title 15 of the US Code and its attendant regulations and local rules. Bankruptcy judges serve as judicial officers of the U.S. district courts and constitute the bankruptcy court for their respective districts. Bankruptcy is federal law, but many of the issues and claims within the bankruptcy case are often determined by state laws. There are different types of bankruptcy, with Chapter 7 and 11 being the most common. Under Chapter 7, the debtor's assets are liquidated and its debts extinguished. In contrast, a Chapter 11 bankruptcy allows the debtor to continue in business under a court-approved reorganization plan. [Circuit City filed a Chapter 11 bankruptcy hoping to reorganize, but then converted to Chapter 7 liquidation when it failed to find a buyer.] Bankruptcy's goal is to give the debtor a "fresh start". A company or individual decides whether and when to file for bankruptcy, but on rare occasions creditors can get together and force an involuntary bankruptcy on a company.

Do Import Penalties Go Away In A Bankruptcy?

In *US v DeBellas Enterprises* (CIT 1999), the US Customs Service (what CBP used to be called) sued Debellas Enterprises under 19 USC 1592 to collect \$102,000 in unpaid duties plus a \$1.5 million civil penalty for fraudulently entering wearing apparel into the US. Customs sued in the Court of International Trade. DeBellas then filed for Chapter 7 bankruptcy. The Court of International Trade dutifully stayed the lawsuit to allow the bankruptcy to proceed. DeBellas thought its debt to US Customs was extinguished by the bankruptcy discharge, but

then Customs continued with its lawsuit in the Court of International Trade. Customs acknowledged that the duties were discharged by the bankruptcy, but claimed that the \$1.5 million civil penalty was not. The Court of International Trade agreed with Customs.

Duties Get Priority, But Do Customs Brokers?

US Customs and Border Protection (CBP) gets priority status in bankruptcy and gets paid the customs duties and taxes that the importer owes before unsecured creditors ever see a penny. CBP doesn't normally exercise this right because it can go against the importer's surety bond. But what if a customs broker pays import duties on behalf of the debtor? Will the customs broker be entitled to the same priority status? Can CBP assign the priority status to a customs broker?

The courts have thus far refused to allow for such an assignment. However, Representative Henry Cuellar (D. Texas) just introduced H.R. 313, the Customs Business Fairness Act of 2009, which would amend the US Bankruptcy Code to give priority status to unsecured claims of customs brokers and sureties who pay import duties, taxes, and other charges to CBP on the debtor's behalf within one year of the bankruptcy filing. Similar legislation has failed previously.

Preferences And The 90-Day Rule

You may have played Freeze Tag when you were a kid. Someone yells "freeze!" and no one can move. If you move, you're in trouble. Same thing with the automatic stay in bankruptcy. Upon the filing of the bankruptcy, the bankruptcy court yells "automatic stay" and no one anywhere can take any action against the debtor's assets, aka, the bankruptcy estate. You cannot collect a judgment. You cannot continue with your lawsuit. You cannot take any of these actions without the bankruptcy court's permission. If you are not shuttering your business but hope to continue in business under a court and creditor-approved reorganization plan, you will be allowed to continue making some necessary payments, like payroll.

Let's say you got paid before the debtor filed bankruptcy. No need to worry, right? Maybe and maybe not.

The bankruptcy trustee or debtor in possession will often try to recover payments made within ninety days of the bankruptcy filing by claiming the payments are preferences. The debtor cannot play favorites. It cannot, for example, decide to pay all the debts to a favored creditor and leave the other creditors out in the cold. The goal is to bring the payments back into the bankruptcy estate

("avoid" the preference) and let the "preferred" creditor stand in line with the other unsecured creditors. Unsecured creditors (the preference rule doesn't apply to secured debt) don't do well in bankruptcy, typically getting pennies on the dollar, if that much.

Paul Harris, a clothing manufacturer, filed for Chapter 11 reorganization bankruptcy and brought a lawsuit ("adversary proceeding") within the bankruptcy case against Expeditors International to collect payments for customs brokerage services that Expeditors delivered to Paul Harris. Paul Harris claimed that because the payments were within the ninety days before the bankruptcy filing, the payments were an avoidable preference. The bankruptcy court disagreed and decided that the parties' contracts and financing terms proved that Expeditors was fully secured and that, therefore, Paul Harris was not entitled to undo the payment.

Cross-Border Bankruptcies

We've seen Chapter 7 and 11 bankruptcies, let's talk about Chapter 15 or cross-border bankruptcy. Foreign debtors may invoke Chapter 15 to protect their assets in the United States. The foreign debtor must first file for bankruptcy, or some fair equivalent, in its own country (which must be the debtor's "center of main interests"), and then can ask a US bankruptcy court to stop any collection against its assets in the United States while the foreign court determines what happens to the foreign debtor's assets. One fun aspect of Chapter 15 bankruptcy cases is that attorneys and the court must quickly become fluent in the bankruptcy laws of at least two countries.

US debtors may have a similar collection right in foreign jurisdictions. These countries have laws similar to Chapter 15 that are based on the UN's Model Law on Cross-Border Insolvency: Australia, British Virgin Islands; overseas territory of the United Kingdom of Great Britain and Northern Ireland, Colombia, Eritrea, Great Britain, Japan, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, South Africa, and United States of America.

Bankruptcy Planning Is Necessary

Your company will sooner or later be impacted by bankruptcy, such is the state of the world's economy. There are steps to take in anticipation of bankruptcy, whether you or someone who owes you money is filing, and there are steps to quickly and energetically take to protect your interests when bankruptcy is filed. The first step is to acquaint yourself with bankruptcy, and the second is to retain a law firm that is fluent in bankruptcy, commercial litigation, and international trade law. GRVR is such a law firm.

Ask The Attorney

Question: Our customer just informed our company that we need to be C-TPAT certified if we want to continue being their supplier. Can you get us certified by tomorrow?

Answer: It's scary how often our law firm is asked this question. It's a little like a life-long couch potato wanting to start training the night before she or he runs a marathon.



C-TPAT is a voluntary program that requires an applicant to meet supply chain security guidelines, to submit an application, wait for CBP's decision, and then submit to a C-TPAT validation.

We can certainly help prepare the company's policies and procedures. We can do this quickly and with sufficient care so that the application is not needlessly rejected. However, we cannot force an expedited review by CBP, or force the agency to certify a company (although CBP is doing this with much greater dispatch than before).

We also hear often from people who wanted to save money on legal fees and so they hire an off-the-shelf company or consultant to prepare the C-TPAT application for cheap. CBP almost always rejects the application outright or will do so at validation.

We've said it before. Get C-TPAT certified before your customers demand it. If they demand it, it may already be too late. When you do commit to C-TPAT, have a real professional, someone with a great deal of experience, prepare your application. You get what you pay for.

CBP Warns C-TPAT Companies To Keep Security Well...or Else

CBP recently emailed this newsletter to C-TPAT certified companies:

"Please find below a news release regarding a recent seizure involving C-TPAT partners. In an effort to improve the supply chain security of its members, C-TPAT will highlight incidents such as the one below for the purpose of raising awareness and renewing partner vigilance regarding supply chain security. Seizures of this sort demonstrate that containers/trailers can be compromised and indicate a failure to comply with C-TPAT minimum security criteria such as driver screening, container monitoring, and proper sealing procedures to secure shipments to the United States. C-TPAT will take immediate action to suspend or remove partners which are not complying with the requirements of the program."

News Release - January 13, 2008

Trust Betrayed when CBP Officers Discover 2,822 Pounds of Marijuana in a Low Risk Shipment

Nogales, Arizona – On Monday January 12th, trust was betrayed when U.S. Customs and Border Protection Officers at the Nogales Port of Entry seized 2,822 pounds of marijuana. The marijuana was commingled with a shipment

of wiring harnesses being transported by a company that participates in the Customs Trade Partnership Against Terrorism (C-TPAT) program.

Officers at the Nogales Port of Entry became suspicious of the truck as it attempted to make entry into the United States and decided to send the shipment for an X-ray inspection to determine if contraband was hidden in the trailer. Before the tractor and trailer could even make it to the X-ray unit for inspection, one of the CBP narcotics detection dogs alerted to the presence of narcotics in the trailer. At that point the driver was removed from the truck and the X-ray exam was conducted.

The image from the X-ray inspection confirmed both the officer's suspicion and the K-9 alert to the presence of narcotics hidden in the shipment. Upon further examination, 110 packages of marijuana with a street value of over \$4.5 million were discovered. As a result of the discovery, the driver was arrested and turned over to Immigration and Customs Enforcement for further investigation and the narcotics, tractor and trailer were seized by CBP.

Of particular interest in this case is the fact that the companies transporting and receiving this shipment are participants in the C-TPAT program. The C-TPAT program was developed following the events of September 11th with the intent to secure the supply chain used to import merchandise into the United States. The companies that volunteer for this program are identified by CBP as a low risk threat for smuggling and the companies must implement security procedures that will prevent weapons of mass effect and contraband from being commingled with their shipments. Once a company implements the required security procedures, representatives from CBP visit the company and verify that the procedures are in place and that the company is abiding by the rules of the program.

As an incentive to participate in this program, the participants receive many privileges such as a lower amount of random exams. Since CBP examines these shipments less frequently, some people see this as an opportunity to smuggle. However, CBP officers have long known about this misconception and are ready to exploit smugglers' ignorance. This seizure is a perfect example of how CBP uses a common misconception to thwart smuggling attempts. As a result of this seizure, the C-TPAT companies' privileges have been suspended until CBP can further investigate the events that transpired.

The Office of Field Operations is responsible for securing our borders at the ports of entry. U.S. Customs and Border Protection Officers' primary mission is anti-terrorism; they screen all people, conveyances, and goods entering the United States, while facilitating the flow of legitimate trade and travel into and out of the United States. Their mission also includes carrying out traditional border-related responsibilities, including narcotics interdiction, enforcing immigration law, protecting the nation's food supply and agriculture industry from pests and diseases, and enforcing trade laws.

While anti-terrorism is the primary mission of U.S. Customs and Border Protection, the inspection process at the ports of entry associated with this mission results in impressive numbers of enforcement actions in all categories."





How To Secure Your Laptop Before Crossing The Border

As you may have heard, CBP decided that search warrants are so 1990s and that it can access the contents on your laptop, without your permission, anytime you cross our nation's borders. President Obama has given every indication that he intends to resuscitate (some would say "resurrect") the Fourth Amendment of the U.S. Constitution and perhaps even require a modicum of restraint from our federal border officials. But it may take some time. The man has a full plate, what with rescuing our economy, ending a war, and finding a new puppy.

What is an international business traveler to do in the meantime?

We can't tell you how or even whether to secure your laptop from CBP searches, and we cannot endorse anyone else's efforts in this regard, but we feel duty-bound to inform you that the Canadians are busy skirting CBP's nosiness.

The Canadian Bar Association posted on the Internet a video/slide show called "How To Secure Your Laptop Before Crossing The Border." While we cannot opine on the soundness of the advice offered, we feel safe to say that the production quality is primo. US lawyers could learn a thing or two from their Canadian counterparts.

Follow this link for the video. <http://www.cba.org/cba/PracticeLink/podcasts/laptopborder.aspx>



Welcome Michael Erfe, Attorney, to GRVR

We are bursting with excitement at our latest GRVR team member. His name is Michael Erfe and he is an attorney. Mr. Erfe received his B.A. from Rice University in Philosophy and Political Science. While at Rice, he was awarded a scholarship to study Mandarin at Beijing University in Beijing, China. After college, he continued his Mandarin studies in the Yunnan Province of China and he studied Spanish in Sevilla, Spain. He later attended The University of Texas School of Law in Austin where he received his J.D. While in law school, Michael attended Bucerius Law School in Hamburg, Germany where he took courses in WTO dispute resolution, EU law, and international commercial law. He is currently working on his LLM in Chinese Law from Tsinghua University in Beijing. Michael has extensive litigation experience, both criminal and civil, having served as a prosecutor in the Tarrant County District Attorney's office, an associate at a general practice firm, and an attorney with the US Small Business Administration. Michael is conversational in Mandarin and Spanish and is a licensed customs broker.



Companies Hammered for Billions in Foreign Corrupt Practices Act Penalties

There was the dotcom bubble, followed by the mortgage/credit/stock market bubble. Bubbles and bursting of bubbles are endemic to our modern economy, but did you know that there are **law** bubbles as well?

For decades, companies flourished in international trade wary a concern for whom they bribed or the US law (the Foreign Corrupt Practices Act or FCPA) that claimed to forbid those very same bribes. Few heeded the warnings of the sane, minority voices crying out for restraint and compliance with the FCPA. Cheating was rampant, and cheating is what the FCPA is all about. The FCPA is not concerned with mild fudging or white lies, but with the cooking of books and naked graft. "Home values never decline" had its self-deluding counterpart in "the Department of Justice never enforces" and "everybody does it."

Then the bubble burst.

Only a couple of years old, the FCPA bubble has claimed many victims. The first victims were hit with fines and penalties in the millions of dollars. Next came penalties in the tens of millions.



But even these seem quaint compared to the latest enforcement cases.

Now Halliburton has agreed to pay \$559 millions to settle FCPA claims. In December, Siemens agreed to pay \$800 million to settle FCPA claims in the US and a similar amount to settle antibribery claims in Germany.

Lest you think that civil fines are the only pain that the FCPA inflicts, then consider Albert J. Stanley the former CEO of KBR, the Halliburton unit that committed the FCPA violations. Mr. Stanley pleaded guilty to FCPA violations and will be serving seven years in a federal penitentiary.

Unlike other laws, the FCPA is relatively simple to understand and compliance is easily realized if you are amenable to its strictures. Before you decide whether or not you are amenable, consider this question: How would your company accommodate FCPA penalties of tens of millions of dollars, perhaps even more, during an economic downturn?

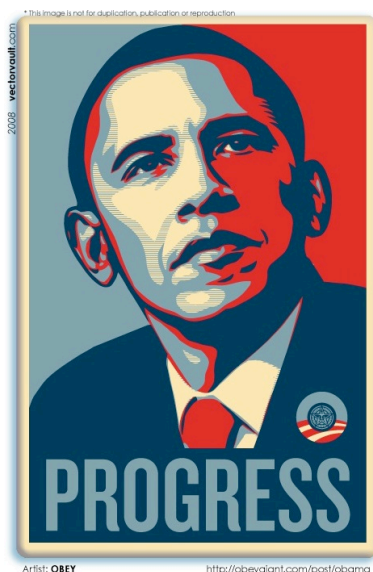
To learn more, attend the "FCPA Made Simple" Webinar on February 12, 2009 (Thursday), from 11 am - 12 noon Central. To sign up, go to www.exportimportlaw.com or call (214) 720-7720.

Do-Gooder Corner: eBay and IFAW

In a first for this column, we would like to recognize two very different entities for their efforts to end the illegal international trade in elephant ivory. This month's do-gooders are eBay and the International Fund for Animal Welfare or IFAW. Under pressure from IFAW and other groups, eBay banned elephant products from its many websites. The following is from the IFAW:

"eBay's decision was announced just hours before the release of IFAW's latest investigative report showing Internet trade in wildlife poses a significant and immediate threat to the survival of elephants and many other endangered species. IFAW's report...shows that more than 70% of all endangered species' products listed for sale on the Internet occur in the United States... Elephant ivory dominated the investigation, comprising 73% of all product listings tracked. Exotic birds were second, accounting for nearly 20% of the listings tracked, but primates, big cats and other animals are also falling victim to the e-trade in live animals and wildlife products, according to the report... IFAW congratulates eBay on this very important step to protect elephants. With these findings and eBay's leadership, there is no doubt left that all Internet dealers need to take responsibility for their impact on endangered species by enacting and enforcing a ban on all online wildlife trade. eBay has set the standard for protecting elephants, now governments and other online dealers need to follow their example," said Barbara Cartwright, IFAW Campaigns Manager."





Obama Rising

by
Oscar Gonzalez, Attorney

I went to school with Barack Obama. No kidding. He and I both graduated from Columbia College in New York. I graduated one year before he did. Columbia is small, but I didn't know him and I don't remember him. I imagine that his brand of hope and brimming optimism, even in nascent form, must have stood out in New York City. Manhattan was at its nadir during our tenure there and it needed all the points of light it could collect.

Pundits, the unelected talking heads who get paid to seemingly speak on our behalf, are allowing the new president 100 days, perhaps much less, to perform miracles, to review a failing economy, and to rebuild our nation's reputation. The secret, I think, to his success is that he trusts people. He knows that foreclosures, banks, contracts, etc. exist and work only because people agree that they exist and work. Society works via concurrence, fortified by law and custom. The edifices can buckle and even crumble, but our ability to create new, better concurrences remains undiminished. A leader, however charismatic or intelligent, cannot deliver on our own responsibilities or deliver us from our own mistakes, but she or he might just help remind us that hope and brimming optimism make us immune to failure.

Oscar Gonzalez is a founding member of GRVR Attorneys

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Our law firm has for two decades delivered excellent legal representation to our clients. With offices in six cities, four countries, and three continents, we can fill your legal needs regardless of your location.

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Calendar

Foreign Corrupt Practices Act Webinar

February 12, 2009 (Thursday),

11 am - 12 noon Central, \$99 per access line.

Register at www.exportimportlaw.com.



Importing Compliance Seminar

February 19, 2009 (Thursday), San Antonio, Texas

This half-day workshop provides you with all the tools you need to comply with US import laws. Registration: International Trade Center - San Antonio, Texas
www.texastrade.org/

Year-round

The Best Customs Broker Exam Review Course

www.bestcustomsbrokercourse.com