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Written by George R. Tuttle Law Offices for informational use by the trade and import community on selected topics of general interest concerning Customs and import related matters.

Import Bonds Redelivery of Imported Goods and Liquidated Damages

As an importer, you may someday be in the unenviable situation of receiving a penalty for liquidated damages and wondering what can be done about it.

This can be particularly true as U.S. Customs & Border Protection places new emphasis on the enforcement of regulations by other governmental agencies that affect imported products. Almost always these cases can be successfully mitigated to a much lower amount. The level of mitigation, however, is often dependent on why the penalty was issued and the importer's actions leading up to and after receiving the notice.

What Are Liquidated Damages?

Liquidated damages are a type of monetary penalty assessed by Customs because an importer or its Customs broker did not satisfy one or more of the conditions of importation, including redelivery of merchandise, or if Customs determines that the goods are not admissible or are not otherwise in compliance with import requirements. A notice of redelivery is a demand by Customs to return merchandise that has been released from Customs' custody.

Were It All Begins: Import Bonds

As a pre-condition to importing, an importer must obtain a general importation and entry bond¹, or post a cash deposit equal to the value of the merchandise. In almost all cases, an importer will choose to obtain a general importation and entry bond², unless a single transaction import bond is mandated.

Typically, the party to whom the bond is issued (also referred to as the "principal") is the importer of the goods, but in some cases, it can also be the Customs broker if the broker agrees to act as "importer of record" for the shipment. The party issuing the bond and guaranteeing payment to Customs in the event of a default is the surety company.

If the importer agrees to comply with all of the conditions specified in the general import bond, Customs agrees that it will release the goods for admission. The bond acts as security for the performance of the obligations by the importer. The conditions of importation are found in Section 113.62 of the Customs regulations, and include promises to:

¹ There are single transaction and multi-transaction bonds available for imports.

² An importer typically obtains Customs bonds directly from a surety company or from its Customs broker, who acts as an authorized agent of the surety company for purposes of issuing the bond.

- (a) Pay all duties, taxes, and charges found owing by Customs;
- (b) Make or complete entry in the time required;
- (c) Produce documents and evidence, as requested;
- (d) Redeliver merchandise to Customs
- (e) Rectify any non-compliance with provisions for admission of goods, including marking with the proper country of origin.

If the importer or Customs broker breaches any one of the conditions of the general import and entry bond, the importer is subject to liquidated damages.

Consequences Of Non-Compliance With A Condition Of A Bond: Assessment Of Liquidated Damages

Unlike other forms of penalties issued by Customs, liquidated damages are based on a contractual commitment to pay a prearranged sum if there is a breach. In the event of a breach of one or more conditions of the bond, the principal and surety are held jointly and severally liable for the amount of liquidated damages. If the importer, as principal, refuses to pay, or cannot pay because of insolvency, Customs will make the demand on the surety. As the guarantor of the obligation, the surety is obligated to pay the amount demanded (unless there is a defense) and seeks indemnification from the principal at a later date.

The amount of liquidated damages that can be assessed for a breach of a bond condition varies according to the type of bond condition breached. In general, if the importer fails to comply with the conditions of the general import and entry bond, the importer is obligated to pay liquidated damages equal to the value of the merchandise, unless a different amount is specified by the Customs regulations. Different amounts are specified for non-payment of duties and fees, importation of restricted merchandise, and non-production of documents or records required for entry or admission. For instance:

- The amount of liquidated damages specified for non-payment of duties or taxes is two times the unpaid estimated duties, or \$1,000, whichever is greater.
- The amount of liquidated damages specified for the importation of restricted merchandise (i.e., FDA, APHIS, or EPA) is three times the value of merchandise.
- The amount of liquidated damages for other types of defaults, such as those that do not involve merchandise (i.e., failure to produce documents), is an amount equal to \$1,000 for each incidence.

Common situations in which liquidated damages are assessed involve the failure of an importer to redeliver merchandise when demanded by Customs, or when the importer fails to timely export merchandise that has been temporarily imported under bond.

The Agreement To Redeliver Merchandise

By law, Customs has an obligation to determine the admissibility of merchandise before it is released from Customs custody.³ As a practical matter, Customs does not have the resources to timely examine all merchandise at the time of arrival. Customs may, therefore, release merchandise prior to a

³ 19 U.S.C. § 1499(a). Section 1499(a) requires Customs to retain custody of merchandise until it has been inspected, appraised, and examined; that it has been “truly and correctly invoiced,” and been found to comply with the requirements of the laws of the United States.

determination that all applicable legal requirements have been met.⁴ In exchange, the importer agrees to redeliver the merchandise back to Customs should Customs subsequently determine that the shipment should be examined, or if Customs subsequently determines that the goods are not admissible as a result of that examination. As a condition of its general import bond, the importer has agreed to comply with these requests to redeliver merchandise.

A demand for redelivery to Customs custody is a form of "constructive exclusion" of the goods. It is in reality no different than a decision to exclude merchandise from entry or delivery. The principal difference is the time when the decision is made by Customs. The decision to exclude is made at the time an entry is attempted. A demand for redelivery is made after the goods have already entered but Customs has subsequently determined that the goods should not have been admitted. See S. Rep. No. 466, 96th Cong., 1st Sess. 7 (1979).⁵

The failure to redeliver all of the merchandise within the time allowed will result in the assessment of liquidated damages. When a demand for the return of goods is not complied with, liquidated damages may be assessed in an amount equal to the value of the merchandise not returned, or three times the value of the merchandise not returned if the merchandise is restricted or prohibited merchandise.⁶

Limitations On The Ability Of Customs To Demand Redelivery

The Customs regulations provide that a demand for the return of merchandise to Customs custody shall not be made after the liquidation of the entry covering such merchandise has become final⁷. By law, liquidation can take up to one year, and can be extended for another three.

There is a limit, however, on the amount of time Customs has to demand redelivery of merchandise. This limitation is found in Section 113.62(d) of the Customs regulations. Section 113.62(d) provides that a demand for the redelivery of merchandise can be made no later than 30 days following the date the merchandise is released from Customs Custody, or 30 days after the end of the conditional release period, whichever is later. While the date of release is something that everyone can understand, the concept of a "conditional release period" can be confusing.

What Is A "Conditional Release Period?"

Section 141.0a(i) of the Customs regulations states that the term "released conditionally" means any release from the custody of Customs before liquidation. However, in C.S.D. 90-99, Customs interpreted section 113.62 of the Customs regulations to preclude enforcing a demand for redelivery that is issued more than 30 days after the date merchandise is physically released, unless a "conditional release period" is established. In C.S.D. 90-99 Customs explained that a conditional

⁴ Customs may release the goods without physical examination, 19 C.F.R. § 151.2(a)(2) (1999), and Customs may later request samples or additional examination of goods which have already been released, 19 C.F.R. § 151.11 (1999).

⁵ Cited in United States v. Toshoku Am., Inc., 11 CIT 641, 670 F. Supp. 1006, 1010 (1987), aff'd 7 Fed. Cir. (T) 104, 107 (1989).

⁶ Articles subject to import restrictions are identified in Part 12 of the Customs regulations. Restricted merchandise is merchandise that is subject to an import license or permit, or is subject to quota or visa requirements for entry or admission in to the United States. Examples of restricted merchandise include: foods, drugs, devices and cosmetics subject to regulation by the FDA and or FCC, clothing and textiles, firearms, alcoholic beverages, certain types of plants and plant products, hazardous or caustic and corrosive substances, viruses, serums, and various harmful articles.

⁷ 19 C.F.R. § 141.113(g)

release period is the period of time an importer is given to respond to a formal request for information or production of a sample (for example, a CF 28). In C.S.D. 90-99, Customs also said that the “end of the conditional release period” is the date Customs receives the sample or the period of time allowed to produce the sample expires without production of the requested sample.

In United States v. So's USA Company & Washington International Insurance Co., 23 C.I.T. 605; 1999 Ct. Intl. Trade LEXIS 85 (1999), the Court of International Trade affirmed this interpretation, advising that an importer must be made aware of its obligations in the case of a conditional release period, “as it makes no commercial or equitable sense to leave an importer in the dark as to the status of its goods.” According to the court, absent some type of notice, an importer may presume it is free to dispose of the goods thirty days after release.

To facilitate the examination of goods released from Customs custody, Customs can issue a Customs Form (“CF”) 28, which is a “Request for Information or Production of Sample.”⁸ A CF 28 must be issued within 30 days of the release of the merchandise. Once a CF28 is issued, an importer is provided 20 days to supply the information or sample. If Customs does not received the sample, or if it is found that the sample is non-compliant, Customs has 30 days from the date of receipt of the sample to issue the demand for redelivery of the merchandise, or if no sample is provided, 30 days from the last day to provide the sample to issue the notice of redelivery.

The conditional release period discussed in C.S.D. 90-99, and United States v. So's USA Company is not the same in all instances. For the class of goods known as “restricted merchandise,”⁹ the conditional release period may be longer¹⁰.

In a ruling letter dated December 4, 1995 (HQ 225807), Customs determined that the absence of a “may proceed notice” issued by the FDA prior to the release of the merchandise by Customs was an occurrence establishing a conditional release period, and that the FDA's subsequent issuance of a Notice of Refusal of Admission established an end to the conditional release.¹¹ Customs concluded that under 19 CFR 113.62, it had 30 days from the end of the conditional release period to demand redelivery of the goods.

For purposes of determining the admissibility of any food, drug, device, or cosmetic imported pursuant to section 801(a) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. § 381(a)), as amended, the release from Customs custody of any such product will be deemed conditional. See 19 C.F.R. 141.113(c). Unless extended¹², the conditional release period will terminate upon the earliest of the following events:

- (i) The date that FDA issues a notice of refusal of admission;

⁸ 19 C.F.R. 151.11-- Request for Samples after Release of Goods.

⁹ See generally 19 C.F.R. §§ 12.01 through 12.105 for information on goods subject to import restrictions.

¹⁰ For country of origin determinations related to textile and textile products, the conditional release period ends 180 days from the date of release. See 19 C.F.R. 141.113(b).

¹¹ When importing foodstuffs, the importer or its broker must notify the FDA, which may issue a “may proceed notice”. The FDA may, however, subsequently determine that the merchandise should not be permitted to enter the country without proof of compliance with 21 U.S.C. § 381(a)(3)(1982), which concerns adulterated food. In such case, the FDA will issue a Notice of Sampling, 21 CFR 1.90, and often a Notice of Detention and Hearing, 21 CFR 1.94. If the importer does not respond to the Notice of Detention within 10 days, a Notice of Refusal of Admission is issued, 21 CFR 1.94. The importer then has ninety days to either export or destroy the foodstuffs. If the importer has not acted after ninety days, Customs issues a Notice of Redelivery, 19 CFR 141.113.

¹² The FDA must issue a written or electronic notice of sampling, detention, or other FDA action to the bond principal (i.e. , importer of record) within 30 days of the release of the merchandise in order for the extension of the conditional release period to be valid. (19 C.F.R. 141.113(c)(2))

- (ii) The date that FDA issues a notice that the merchandise may proceed; or
- (iii) Upon the end of the 30-day period following the date of release.

If the importer fails to comply with a demand for redelivery of the restricted goods, the importer breaches its bond with Customs and is liable for liquidated damages in the amount of three times the value of the merchandise.

A Demand For Redelivery Is Not Always Required For The Assessment Of Liquidated Damages

A demand for redelivery is used when Customs determines on its own that goods should be excluded, as in the case of clothing and textiles, or goods that are not marked or improperly marked with the country of origin. But if the decision to exclude merchandise lies solely within the discretion of another government agency, such as FDA or Fish & Wildlife Service (WFS), the role of Customs is merely to enforce the decision of that agency, and issuance of notice of redelivery is not a precondition to a lawful demand for exportation or the assessment of liquidated damages for the failure to export or destroy the merchandise.¹³

Normally, an agency responsible for administering the import regulations must be notified of the entry of the restricted merchandise and be provided with the opportunity to examine the goods. Typically, notification is provided to the agency by Customs if the importer or broker has filed the proper electronic or paper documentation at the time of entry. Once notified, the agency may choose to inspect the goods or to waive the inspection.

The FDA regulates products such as foods, drugs, medical devices, radiation emitting devices and cosmetics. The statutory and regulatory framework under which foodstuffs are imported into the United States was reviewed in United States v. Toshoku America, Inc., 7 Fed. Cir. (T) 104, 107 (1989) and United States v. Imperial Food Imports, 834 F.2d 1013 (Fed. cir. 1987).

In Toshoku the court clarified that when an agency such as the FDA determines that contaminated food conditionally released by Customs should be excluded from admission, a notice for redelivery was not a prerequisite to demanding the exportation of the contaminated food.¹⁴ The Toshoku court went on to hold that liquidation of the entry did not preclude the assessment of liquidated damages when FDA refused admission and the importer failed to comply with the demand that the contaminated merchandise be destroyed or exported.¹⁵

Other U.S. government agencies responsible for the regulation of imports include the EPA (which is responsible for the TSCA), the Fish & Wildlife Service, which is responsible for the regulation of plants and animals and for the enforcement of restrictions on trade in Endangered Species; and the Federal Communications Commission (FCC), which regulates the importation of electronic devices capable of emitting RF signals.

While the court decisions referenced herein focus on FDA's regulation of food products, the same or similar admission procedures apply to drugs, medical devices, radiation emitting devices and cosmetics. Additionally, WFS and FCC have exclusive jurisdiction over the admission of products subject to their regulations. Thus, it is possible that goods imported in contravention of these regulations would be subject to the assessment of liquidated damages, regardless of whether a demand for redelivery is issued.

¹³ United States v. Toshoku Am., Inc., 11 CIT 641, 670 F. Supp. 1006, 1010 (1987), *aff'd* 7 Fed. Cir. (T) 104, 107 (1989).

¹⁴ Toshoku Am., Inc., 11 CIT 641, 670 F. Supp. 1006 (1987), *aff'd* 7 Fed. Cir. (T) 104 (1989), and United States v. Lun May Co., Inc. et al., 12 CIT 123, 680 F. Supp. 1572 (1988).

¹⁵ Toshoku, *supra.* at 1011; see also American Motorists, 11 CIT at 947, Slip Op. 87-141, at 7.

What To Do If You Receive A Notice Of Marking And/Or Redelivery

Attentive importers will not be surprised should they receive a notice of redelivery. Typically, a CF 28 Request for Information or Production of Sample will precede the Demand for Redelivery. Ignoring the CF 28 or not taking the opportunity to submit a response to the request will inevitably lead to the issuance of a demand of redelivery and, possibly, a demand for payment of liquidated damages.

If a demand for redelivery is issued, importers should immediately attempt to prevent the distribution of merchandise that is subject to the notice of redelivery, or, if possible, to retrieve any merchandise that has already been distributed. However, because the notice of redelivery may have been issued more than 60 days after the entry and initial release of the goods, recovering the goods may be impossible.

What To Do If You Receive A Notice Of Liquidated Damages

If you receive a notice of liquidated damages, you should contact your Customs or trade counsel immediately. The law (19 USC 1618) allows an importer to request mitigation of liquidated damages. Customs publishes guidelines on the mitigation of liquidated damages; however, the amount of mitigation afforded will depend on a variety of factors, including the nature of the violation, the reason for the breach, the timeliness of the response, the experience of the importer, and other mitigating and aggravating factors.

For more information regarding these issues, contact George Tuttle, III at (415) 986-8780 or geo@tuttlelaw.com.

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