

New York/New Jersey Foreign Freight Forwarders & Brokers Association

Import & Export Seminars & Membership Luncheon

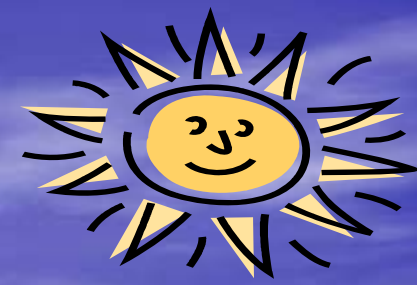
October 14, 2009

BEST PRACTICES:

- A) EXPORT COMPLIANCE PROGRAMS;**
- B) NVOCC PRACTICES in the CURRENT ENVIRONMENT**

The Legal Perspective

Carlos Rodriguez, Esq.
Rodriguez O'Donnell Gonzalez & Williams, P. C.
1250 Connecticut Ave., N.W.
Washington, D.C. 20036
Tel. 202-973-2999
E-mail: rodriguez@rorlaw.com



OVERVIEW

- **EXPORT COMPLIANCE PROGRAMS**
 - **BIS/COMMERCE**
 - **DEPT. OF STATE**
 - **OFAC**
 - **AES/CENSUS/COMMERCE**
 - **ANTI-BOYCOTT/COMMERCE**
- **NVOCC'S BASIC TOOLS IN THE CURRENT ENVIRONMENT**
 - **HOW TO ASSERT A CARRIER'S LIEN**
 - **THE ROLE OF A GENERAL LIEN**
 - **BANKRUPT SHIPPER/CONSIGNEE: WHAT TO DO?**
 - **AVOID "WRONGFUL DELIVERY" LIABILITIES**

AMERICAN SHIPPER, OCTOBER 7, 2009



Vulnerable middle

Freight forwarders may be “middlemen,” but that won’t preclude them from landing right in the center of export violations.

As a facilitator in the supply chain, forwarders are in no way exempt from U.S. export control regulations. Investigations by the Commerce Department’s Bureau of Industry and Security may easily lead to stiff, and very public, penalties.

DHL recently found this out the hard way. In August, the company entered into a joint settlement with BIS and the Treasury Department’s Office of Foreign Assets Control to settle allegations that it **“aided and abetted” in the unlawful export of goods to Syria, Iran and Sudan and failed to comply with recordkeeping requirements.** The company paid a **civil penalty of nearly \$9.5 million.**

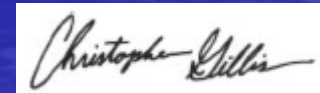
“Large-scale compliance breakdowns lead to significant sanctions aimed at **ensuring that freight forwarders put into place and maintain necessary measures to meet their compliance responsibilities,**” said Kevin A. Delli-Colli, the Commerce Department’s acting assistant secretary for export enforcement, in a statement related to the DHL case.



Vulnerable middle continued

- Export control regulations are extremely complex depending on the goods and their overseas destination. **A forwarder, for example, may become unwittingly entangled in an anti-boycott violation.** The Export Administration Regulations' anti-boycott provisions prohibit U.S. persons from complying with certain requirements of unsanctioned foreign boycotts, including furnishing information about business relationships with or in a boycotted country or with blacklisted persons.
- With civil penalties of up to \$250,000 per violation and the potential for criminal penalties of up to \$1 million and 20 years in jail per violation, **it's worth every penny spent by forwarders to properly train their employees and hire appropriate third-party experts to assist them with maintaining robust export compliance programs.**

Export compliance also makes good business sense in this tight global market. **Exporters have become more selective in choosing their forwarders, placing more emphasis on export compliance capabilities of these service providers.** Violations by forwarders can just as easily implicate exporters as well.



EXPORT COMPLIANCE: THE DHL LESSON

- **August 6, 2009**, BIS and OFAC announced a joint settlement agreement with DPWN Holdings (USA), Inc. (formerly DHL Holdings (USA), Inc.) and DHL Express (USA), Inc. (“DHL”), for:
 - **\$9.4 million in civil penalties**
 - mandated third-party external audits through 2011.

The allegations are that DHL made hundreds of shipments to Iran, Sudan and Syria from approximately 2002 through 2007, and failed to comply with recordkeeping requirements.

- As aggravating factors, OFAC noted:
 - that DHL had **“reason to know”** that its conduct gave rise to these violations;
 - **that it did not have an effective OFAC compliance program**, and that the violations exemplified a **“pattern of misconduct.”**

EXPORT COMPLIANCE: THE DHL LESSON (continued)

- Special Focus on Forwarders:

BIS press release was unequivocal:

“[I]arge-scale compliance breakdowns lead to significant sanctions aimed at ensuring that **freight forwarders** put into place and maintain necessary measures to meet their **compliance responsibilities**.”

- Civil penalties-----up to \$250,000 per shipment;
- Criminal penalties-----up to \$1 million and 20 years imprisonment per violation.

Key Export Regulatory Agencies



- Exports from the United States are regulated by a wide variety of agencies. Each agency has its own set of regulations governing the exports that they control. We are primarily concerned with the following:
- **U.S. Customs and Border Protection (CBP)**: U.S. Customs and Border Protection serves as a gateway agency for both imports and exports. Although they are primarily concerned with goods coming into the United States, they also regulate some export activity as well. U.S. Customs acts as an administrative and enforcement extension for other agencies like the U.S. State Department, ATF, Department of Commerce and DEA.

Key Export Regulatory Agencies (continued)



- **Department of Commerce (DOC):**
- The Bureau of Industry and Security, DOC, is charged with the development, implementation and interpretation of U.S. export control policy for dual-use commodities, software, and technology. **Dual-use items subject to BIS regulatory jurisdiction have predominantly commercial uses, but also have military applications.** In addition to the U.S. export control policy for dual-use items, BIS is also charged with the development, implementation and interpretation of **the antiboycott provisions of the Export Administration Act.** The antiboycott provisions encourage, and in some cases require, U.S. persons to refuse to participate in foreign boycotts that the United States does not sanction. U.S. persons are also required to report receipt of boycott-related requests.

Key Export Regulatory Agencies (continued)



- **U.S. Department of Defense (DoD):** The U.S. Department of Defense acts as a resource for the U.S. State Department. The DoD assigns specialists to review defense articles and technical data being licensed for export when it is outside the scope of the DoS licensing officer's experience and knowledge. The DoD's recommendation is often the basis for the DoS to allow the export of military hardware and technical data. Additionally, the DoD is responsible for providing facility and staff clearances for the handling of classified goods or information, and Foreign Ownership Control and Influence issues.

Key Export Regulatory Agencies (continued)



- **U.S. Department of State (DoS)**: The U.S. State Department – Directorate of Defense Trade Controls is primarily responsible for licensing the export of sensitive military equipment, technological hardware, and related technical data. These commodities are those found on the Munitions List. In some cases, they license the import of these items as well. The U.S. State Department has final authority to allow the Company, and its customers, to export military products and technology to foreign customers.

Key Export Regulatory Agencies (continued)



Other Government Agencies and regulations that apply to exports from the United States include:

- **Office of Foreign Assets Control (OFAC, Treasury)**
- **Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF)**
- **Drug Enforcement Agency (DEA)**
- **Food and Drug Administration (FDA)**
- **Environmental Protection Agency (EPA)**
- **National Industrial Security Program Operating Manual (NISPOM, Department of Defense, Classified materials, and information)**
- **Export Administration Act (EAA)**
- **Export Administration Regulations (EAR)**
- **Commerce Control List (CCL)**
- **Arms Export Control Act (AECA)**

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM (BIS-COMMERCE)

- **Management Commitment:**
 - **Senior management must establish written export compliance standards for the organization;**
 - **Commit sufficient resources for the export compliance program;**
 - **Ensure appropriate senior organizational official(s) are designated with the overall responsibility for the export compliance program**
- **Continuous Risk Assessment of the Export Program**
- **Formal Written Export Management and Compliance Program:**
 - **Effective implementation and adherence to written policies and operational procedures.**
 - **Integration with SOP**
- **Ongoing Compliance Training and Awareness**

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM (BIS-COMMERCE)

(continued)

- **Export Compliance Security:**
 - Screening of employees, contractors, customers, products, and transactions
 - Implementation of compliance safeguards throughout the export life cycle:
 - ** including:
 - a) "know your exporter";
 - b) elicit sensitive info at **SLI stage**;
 - c) red flag commodities, destinations (diversion points, countries), "unusual information" (**arranging for transshipments, etc.**);
 - d) pin point **license** responsibilities;

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM (BIS-COMMERCE)

(continued)

- e) red flag **"dual use"** commodities;
 - f) red flag commodity **classification/jurisdiction** issues;
 - g) any thing suspicious **on post-shipment activity**.
- Adherence to **Recordkeeping** Regulatory Requirements
 - Internal and External **Compliance Monitoring** and Periodic **Audits**

ELEMENTS OF AN EFFECTIVE COMPLIANCE PROGRAM (BIS-COMMERCE)

(continued)

- **Internal Program for Handling Compliance Problems:**
 - Procedures for Internal Reporting of Export Violations
 - Employee Sanctions
 - Procedures for External Reporting (or non-reporting) to Third Parties
- **Completing Appropriate Corrective Actions in Response to Export Violations**
 - Correcting the Internal Deficiency which Resulted in the Violation (s)
 - Procedures for Evaluating Whether **Voluntary Disclosure** is Appropriate



DEPT. OF COMMERCE: RED FLAG INDICATORS ADAPTED TO FORWARDER FUNCTIONS (continued)

- Parties to the transaction are on the Commerce Department's [BIS's] or other government **list of denied persons**.
- Exporter is **inquiring** about forwarding services at destination to **sanctioned countries on OFAC list**. (Some documentation in the forwarder's file shows sanctioned country involvement).
- Exporter is reluctant to offer information about the **end-use of the item**.
- The product's capabilities **do not fit the Exporter's line of business**, such as an order for sophisticated computers for a small bakery.



DEPT. OF COMMERCE: RED FLAG INDICATORS ADAPTED TO FORWARDER FUNCTIONS (continued)

- The item ordered is incompatible with the **technical level of the country to which it is being shipped**, such as semiconductor manufacturing equipment being shipped to a country that has no electronics industry.
- Exporter is willing to **pay cash** for a very expensive item when the terms of sale would normally call for financing.
- Exporter has little or no business background.
- The customer is **unfamiliar with the product's** performance characteristics but still wants the product.
- Routine installation, training, or maintenance services were declined by the Exporter from the manufacturer.



DEPT. OF COMMERCE: RED FLAG INDICATORS ADAPTED TO FORWARDER FUNCTIONS (continued)

- **Delivery dates are vague, or deliveries are planned for out of the way destinations.**
- **A freight forwarding firm is listed as the product's final destination.**
- **The shipping route is abnormal for the product and destination.**
- **Packaging is inconsistent with the stated method of shipment or destination.**
- **When questioned, the Exporter is evasive and especially unclear about whether the purchased product is for domestic use, for export, or for re-export. (Suggest SLI format that ascertains this).**

EXPORT COMPLIANCE: KEY PERSON/PARTY LISTS PART OF COMPLIANCE PROGRAM

- **Department of Commerce Denied Persons [BIS]**
- **Department of Commerce Entity List [BIS]**
- **Department of Commerce "Unverified" List [BIS]**
- **Department of Treasury Specially Designated Nationals and Blocked Persons, including Cuba and Merchant Vessels, Iran, Iraq and Merchant Vessels, Sudan Blocked Vessels [OFAC]**
 - **Department of Treasury Specially Designated Terrorist Organizations and Individuals**
 - **Department of Treasury Specially Designated Narcotic Traffickers and Narcotics Kingpins**
 - **Department of Treasury Foreign Narcotics Kingpins**

EXPORT COMPLIANCE: KEY PERSON/PARTY LISTS PART OF COMPLIANCE PROGRAM (continued)

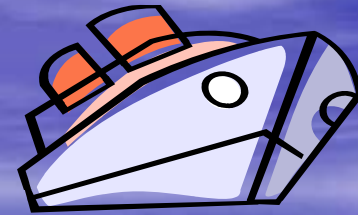
- **Department of Treasury Palestinian Legislative Council List (PLC)**
- **Department of State Designated Terrorist Organizations**
- **Department of State Terrorist Exclusion List (TEL)**
- **U.S. Federal Register General Orders**
- **Department of State Arms Export Control Act Debarred Parties**
- **Department of State International Traffic In Arms Regulations Munitions Export Control Orders**
- **Department of State Nonproliferation Orders**
 - **Department of State Missile Proliferators**
 - **Department of State Chemical and Biological Weapons Concerns**
 - **Department of State Lethal Military Equipment Sanctions**
- **Foreign Persons Designated Under the Weapons of Mass Destruction Trade Control Regulations**

EXPORT COMPLIANCE: KEY PERSON/PARTY LISTS PART OF COMPLIANCE PROGRAM (continued)

- **MOVING TARGETS: RESPONSIBILITY FOR UP-DATED INFORMATION**
- **MANUAL OR AUTOMATED?**

CLOSING: DO NOT FORGET MANDATORY AES AS AN AREA FOR COMPLIANCE---SEE HANDOUT

HOW TO ASSERT A CARRIER'S LIEN



- **WHAT IS A MARITIME LIEN?**
- **GENERAL MARITIME LAW CODIFIED.**
- **UNIFORM COMMERCIAL CODE: §7-307.**
- **ELEMENTS:**
 - NOTICE---**to **ALL PARTIES**
(amounts due, details of debt, private or public sale?, time and place)
 - SALE---**"Commercially reasonable manner"—higher price is not sole test
 - REASONABLE EXPENSES—attorney's fees**
- **TIMING IS IMPORTANT---****BE NOTICE READY!!!**

THE ROLE OF A GENERAL LIEN



- **MARITIME LIEN:**

A POSSESSORY LIEN---LOSE IT WHEN CARGO IS DELIVERED

LIEN COVERAGE---FREIGHT AND CHARGES, DEMURRAGE---ON SHIPMENT HELD

- **GENERAL LIEN:**

NOT POSSESSORY --FOLLOWS CARGO AFTER DELIVERY

LIEN COVERAGE---FREIGHT AND CHARGES, DEMURRAGE---ON ALL SHIPMENTS

THE ROLE OF A GENERAL LIEN

(continued)



HOW DOES A CARRIER OBTAIN GENERAL LIEN STATUS ?

- THROUGH CONTRACT: EX. A CREDIT AGREEMENT
- THE CARRIER'S BILL OF LADING: A RECENT MAERSK CASE ESTABLISHES PRECEDENT (2004)
- IF CARGO IS ON DEMURRAGE/STORAGE STATUS, CARRIER MAY CLAIM BAILEE RIGHTS AS WAREHOUSEMAN INCLUDING GENERAL LIEN

THE ROLE OF A GENERAL LIEN (continued)



MAERSK BILL OF LADING LANGUAGE

- 15. LIEN

1. The Carrier shall have a lien on the Goods and any documents relating thereto for all sums payable to the Carrier under this contract and/or any other contract and for general average contributions to whomsoever due and for the cost of recovering the same, and for that purpose shall have the right to sell the Goods by public auction or private treaty without notice to the Merchant.

- JURISDICTIONS WHERE UPHELD: CALIFORNIA, NY
- FMC POSITION: “DOESN’T LIKE IT”; TARIFF RULE?

BANKRUPT SHIPPER/CONSIGNEE: WHAT TO DO?



- **FACTS:** NVO IS HOLDING CARGO IN U.S. WITH A VALUE OF OVER \$400,000 AND IT IS OWED OVER \$75,000 IN FREIGHT AND CHARGES BY IMPORTER, INC. IMPORTER, INC. HAS JUST FILED FOR CHAPTER 11 (REORGANIZATION) AND THE TRUSTEE HAS REQUESTED DELIVERY OF THE GOODS. WHAT TO DO?
- A) RELEASE THE CARGO AND THEN FILE A CLAIM AS AN UNPAID CREDITOR.
- B) NEGOTIATE WITH THE TRUSTEE FOR FULL PAYMENT AND RELEASE CARGO AFTER AN AMOUNT IS NEGOTIATED.
- C) PETITION THE BANKRUPTCY COURT FOR PAYMENT AND PRESERVE THE CARRIER'S LIEN UNTIL PAID.
- **SAME FACTS: BUT SHIPPER SAYS "RETURN GOODS"**

AVOID "WRONGFUL DELIVERY" LIABILITIES

FACT PATTERN A:

- **A. STRAIGHT BILL ISSUED, IMPORT, SHIPPER FROM CHINA SAYS: "DON'T DELIVER"; U.S. CONSIGNEE SAYS: "DELIVER."**
 - i. NO ORIGINAL BILLS PRESENTED BY CONSIGNEE**
 - ii. ORIGINALS PRESENTED BY CONSIGNEE**

AVOID "WRONGFUL DELIVERY" LIABILITIES continued.

- **FACT PATTERN A ISSUES.**

- **STRAIGHT BILL V. ORDER BILL V. SEAWAYBILL**
- **LEGAL ISSUE: FEDERAL BILL OF LADING ACT. "DELIVER TO THE RIGHTFUL CONSIGNEE."**
- **COLLECTION OF BILLS ISSUES (CONTRACT ISSUE):**
 - a. language says: 3 originals, collection of one voids the others;
 - b. language says: collection of bill is optional with carrier (WHY THE BEST ALTERNATIVE?); and
 - c. the document says: "seawaybill", but what does that mean? Telex release? What does that mean?

AVOID "WRONGFUL DELIVERY" LIABILITIES continued.

- **BEST PRACTICES:**

- **ORDER BILL---NEVER DELIVER CARGO WITHOUT ENDORSED BILL; IF LOST, INTERPLEAD IN COURT.**

- **STRAIGHT BILL---BEST FORMAT---NO CARRIER OBLIGATION TO COLLECT ORIGINAL.; PRACTICE SHOULD BE "TO COLLECT" ENDORSED B/L**

- **SPECIAL PROBLEM: LOST ORDER B/L. SHIPPER AND CONSIGNEE AGREE THAT CARGO SHOULD BE DELIVERD. INTERPLEAD. UNKNOWN HOLDERS OF ENDORSED BILL OF LADING POSSIBLE.**

AVOID “WRONGFUL DELIVERY” LIABILITIES continued.

- **BEST PRACTICES:**

- **STRAIGHT BILL---IF LANGUAGE REQUIRES COLLECTING ONE ORIGINAL:**

- a. **DELIVER ONLY TO CONSIGNEE WITH ORIGINAL;**

- b. **IF SHIPPER SAYS: “DON’T DELIVER” AND CONSIGNEE DOESN’T HAVE ORIGINAL, DON’T DELIVER; REQUEST INSTRUCTIONS FROM SHIPPER;**

- c. **IF VERY CONTENTIOUS CONSIDER: i. money deposit from one of the parties; ii. Bank guarantee; iii. Court interpleader.**

INDUSTRY UPDATES: FMC ISSUES



- OTI NEW APPLICATIONS AT FMC---FIRST Qtr OF 2009---
- 370: WHY IN THIS ECONOMY?
- FUTURE OF FMC?---DOWN TO THREE COMMISSIONERS (COMMISSIONER DYE-REP. AND COMMISSIONER BRENNAN—DEM.).
- NEW CHAIRMAN: COMMISSIONER RICHARD LIDINSKY

INDUSTRY UPDATES: FMC ISSUES



- **TARIFF PETITION PENDING: WOULD MAKE REQUIREMENT FOR TARIFF PUBLISHING FOR NVOCCS OPTIONAL**
- **FMC CHAIRMAN IS THE SWING VOTE.**

INDUSTRY UPDATES: EXPORT CONTROL ISSUES



- LOOK OUT FOR: H. R. 3515- "EXPORT CONTROL IMPROVEMENT ACT"
- WOULD REQUIRE 3 YEAR AES REGISTRATION
- PERSONS QUALIFYING WOULD BE: U.S. CITIZENS, PERMANENT RESIDENTS
- CREATES "DIVERSION CONCERN" COUNTRIES
- NEW LICENSING REGIMEN FOR THESE COUNTRIES

Landstar Court of Appeals Decision Overturns

FMC Decision on Un-Licensed Agents

- **HISTORY OF PETITION:**

- **General Counsel** of the FMC had issued an **opinion letter to Landstar** Express of America, Inc. and Landstar Logistics, Inc. which allowed them to operate through offices owned and operated **by separate companies** which were not licensed or bonded (not branch offices).
- Petitioner, another NVOCC, Since an opinion letter is not binding on the FMC, requested the Commission for a Declaratory Order. **“Is this legal; and if yes, then I want to do it too.”**

THE COMMISSION DECISION



- **COMMISSION REVERSED GENERAL COUNSEL OPINION LETTER**

➤ The decision: U.S. licensed NVOCCs cannot conduct Ocean Transportation Intermediary business by utilization of non-licensed companies or individuals. Therefore, **NVOCCs in the U.S.** could only provide OTI services in the U.S. **through its branch offices** with appropriate **bonds** on file with the FMC.

OTHER NVOCC LEGAL PRINCIPLES



- The FMC decision only reached **unlicensed agents performing OTI services**. Only branch offices of the **licensed OTI** with appropriate **bonds** for the branches and with **bona fide employees** of the licensed OTI could perform OTI services in the United States. OTI services means booking, arranging pick up/ delivery, preparing documents, that sort of thing.

THE LANDSTAR DC COURT OF APPEALS DECISION

- THE FMC **DOES NOT HAVE AUTHORITY TO LEGISLATE THAT AGENCY LAW IS SUPENDED BETWEEN NVOCCs AND ITS AGENTS**
- AN AGENT DOES NOT HAVE TO BE SEPARATELY LICENSED IN ORDER TO ACT ON BEHALF **OF A DISCLOSED PRINICIPAL**
- IN THIS CASE, AN **AGENT CANNOT "HOLD OUT" AS A CARRIER, NOR ASSUME RESPONSIBILITY FOR THE TRANSPORT**

OTHER NVOCC LEGAL PRINCIPLES

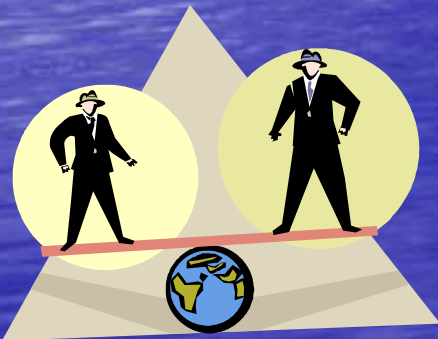
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- **Before Landstar Sales agency functions** could be performed by non-licensed companies or individuals. The important thing was that only sales functions could be performed. An unlicensed sales agent **could not perform the services of an OTI.**
- **Now not relevant.**



OTHER NVOCC LEGAL PRINCIPLES continued-----

- **Overseas agents** do not have to be licensed or registered with the FMC if they are **issuing the bill of lading** of a **licensed or registered NVO**.



OTHER NVOCC LEGAL PRINCIPLES

continued-----

- A U.S. licensed NVO cannot be a delivery agent in the U.S. for an unlicensed or un-registered overseas NVO if that NVO is issuing its own housebill.
- **Question:** Does the Landstar case mean that a foreign registered can now deal with an un-licensed agent in the U.S. ?

DOJ---A NEW REGULATOR OF OTIs ?

- **DISCUSSION ITEMS**

- **PANALPINA AND THE FOREIGN CORRUPT PRACTICES ACT (FCPA)---MORE DOWN THE PIKE---UPDATE**

- **DOJ GRAND JURY INVESTIGATION ON PRICE FIXING: BOTH AIR AND OCEAN---UPDATE**

END

