Customs Law Committee

Get Ready for the Spring Meeting

The ABA Section of International Law’s spring meeting is scheduled to take place April 12 - 16 in New York City. The Customs Law Committee is sponsoring or co-sponsoring several programs. They are as follows:

April 13, 11:00 am – 12:30 pm: The Rule of Law and the International Movement of Goods: The Relationship Between Trade Law, Economic Justice, Human Rights and the Eradication of Poverty - Committee member Larry Hanson will moderate a panel including Chief Judge Stanceu and Judge Gordon of the United States Court of International Trade, as well as South American and EU lawyers, as they discuss whether trade is truly the tide that floats all ships, or whether and in what instances economic justice and mobility may be compromised by trade liberalization.

April 13, 2:30 – 4:00 pm: Tricks of Trade: How to Spot International Trade Issues in Your Business Transactions - Jessica Horwitz moderates an expert panel of in-house and law firm attorneys, including former Committee Co-Chair Christine Martinez, as they discuss case studies based on common international commercial transactions, in order to give attendees inside knowledge of issue-spotting.

April 15, 9 – 10:30 am: Cuba! Cuba! Cuba? - Cortney Morgan moderates this discussion among OFAC officials and seasoned export controls practitioners and commentators - including longtime Committee member Jennifer Diaz – as they discuss the loosening of sanctions on Cuba, and what this means for U.S. companies seeking to do business there, and what the “Support for the Cuban People” exception to the sanctions regime means for the political and commercial liberalization of the island nation.

Committee leadership has reserved a table at breakfast each morning for interested members, and will also be participating in Thursday's networking luncheon. The Committee will also be participating in a joint dinner being organized by the Export Controls Committee. Please contact the committee co-chairs, Greg Kanargelidis and Les Glick, for more information on these plans as they develop!

There’s No Place Like Home: CITT Rules Hotels Are Not Domestic Settings
by Greg Kanargelidis and Zachary Silver, Blake, Cassels & Graydon LLP

Under Canadian law, the determination of whether an imported good is for “domestic” or for “other” purposes is an important distinction. Importers of goods “for domestic purposes” must pay customs duties ranging from 8 to 9.5 per cent of the declared value of the goods, while goods for “other” purposes are duty-free when imported into Canada. This distinction is found at the tariff item (eight-digit) level in Canada’s List of Tariff Provisions applicable to the tariff classification of various types of furniture, such as seats, tables, and desks.

Given the foregoing, the issue of whether any particular goods are of one type or another has been the subject of a number of appeals before the Canadian International Trade Tribunal (CITT or Tribunal). In the most recent decision by the CITT dealing with this issue, the Tribunal settled some of the uncertainty around when to classify goods as one type versus the other.

In Stylus Sofas Inc., Stylus Atlantic, Stylus Inc. and Terravest (SF Subco) Limited Partnership v. President of the Canada Border Services Agency (Stylus Sofas), the CITT was tasked with deciding whether certain seating should be classified as upholstered seats with wooden frames for domestic purposes or for “other” than domestic purposes. If for domestic (cont’d on page 2)
There’s No Place Like Home (cont’d from page 2)

purposes, the imported seating would be subject to a duty of 9.5 per cent versus duty-free. The CITT noted that the test to be applied is the intended use of the goods in issue, as opposed to their actual use. The analytical approach applied by the Tribunal was to consider the design, characteristics, marketing and pricing in order to determine the intended use of the goods at issue.

In its decision, the CITT took the Canada Border Services Agency (CBSA or Agency) to task for raising for the first time during closing arguments a position that CBSA has advanced in other appeals, namely, that a hotel is a “home away from home” and should be considered as a “domestic” setting. Notwithstanding the late introduction of this new line of argument, the CITT reviewed the CBSA’s argument and landed a significant blow against the Agency’s attempt to extend the concept of “domestic” outside of the household.

It seems that the CBSA was trying to leverage a previous ruling by the CITT, Costco Canada v. The Commissioner of the Canada Customs and Revenue Agency, in which the Tribunal held that “domestic” should be interpreted in a wide enough manner so as to include goods that can be found outside the house, but which are primarily used by individuals in a domestic setting.

The CBSA has twice tried to argue that furniture intended to be used in hotels qualifies as furniture intended for domestic purposes. The CBSA put this argument to the Tribunal first in Kwality Imports v. President of the Canada Border Services Agency (Kwality Imports) and again in the recent Stylus Sofas appeal. In Kwality Imports, the Tribunal held in favor of the CBSA, not because it agreed that hotels were domestic settings, but rather because the importer was not able to satisfy the Tribunal that the imported furniture was intended primarily for use in hotels.

In Stylus Sofas the CBSA returned to the CITT with the argument that hotels are in fact domestic settings, and therefore that goods intended for use in hotels should be classified as goods intended for domestic purposes. In order to convince the Tribunal that hotels are domestic settings, the CBSA argued that a hotel is a “home away from home”, and that hotels are “domestic environments” due to the fact that they are places people go to sleep. The counter-argument put forward by the appellant was in essence a reductio ad absurdum: that the CBSA’s reasoning would collapse the distinction in the Customs Tariff between furniture intended for domestic purposes and furniture intended for other purposes.

The CITT sided with the appellant, holding that there is a conceptual connection between a “domestic setting” and a house or household, and that:

“While ‘domestic’ need not be limited to the ‘four walls’ of a home, there is nothing to suggest that its use should be applied to situations or settings which are clearly outside a household or domestic setting, including a hotel.”

Hotels may be places where individuals and families go to sleep, but the CITT could not look beyond the fact that they are in reality businesses rather than households or homes.

Having held that furniture intended for use in a hotel was not ipso facto intended for domestic purposes, the Tribunal then considered whether the appellant had discharged its burden of establishing that the imported furniture was not intended primarily for domestic use. The Tribunal explained that this burden could be discharged in one of two ways: by demonstrating that the imported furniture was equally intended for domestic and other purposes, or by establishing that the furniture was primarily intended for non-domestic purposes. Evidence relating to the design, characteristics, marketing and pricing of the imported furniture was put before the Tribunal in an effort to show that the furniture was intended primarily for use in hotels.

The Tribunal considered evidence presented by the appellant with respect to the design and physical characteristics of the furniture, noting that it was constructed to a degree of durability exceeding what would be expected from furniture used in a home: for example, the chairs were built using heavy foam cushions, a solid hardwood frame construction, hardwood corner blocks, and both a specialized frame glue and screws or high-pressurized staples. The fact that the furniture was sold not only to customers operating in the hospitality industry, but also to residential retailers did not, according to the Tribunal, detract from the fact that the Appellant had “intentionally designed the goods in issue not for domestic purposes but to meet the needs of its hospitality clients.”

In making this finding, the Tribunal confirmed once again that it is the intended use of the furniture that is significant, and that actual (cont’d on page 4)
Greg and I have been fortunate enough to have had all our proposals for upcoming section meetings and forums accepted. We have some excellent programs and hope Committee members will attend.

**EUROPEAN FORUM - MAY 30-31st, ROME**

This is another one of the Section’s “Forums” that replace what used to be “Stand-Alone” programs. Greg is on the planning committee.

Our proposal is on the Transatlantic Trade and Investment Partnership (TTIP) on May 31st at 9.30 a.m.

The program description as in the European Forum brochure that you should be receiving soon is as follows:

**Transatlantic Trade and Investment Partnership: How Will It Change World Trade in the 21st Century?**

The Proposed Transatlantic Trade And Investment Partnership (TTIP) may be the most expansive and comprehensive bilateral trade agreement ever negotiated. Will this new agreement that covers 30% of world merchandise trade, 40% in world services trade and nearly half of world GDP, be the final death knell for the failed World Trade Organization, whose 15 year efforts to achieve a successful multilateral trade agreement in the now abandoned DOHA round has failed. Will the TTIP become the world’s dominant trading regime? What will become of the aspirations of the less developed countries and BRIC countries? Will a TTIP merger with the recently concluded Transpacific Trade Partnership (TPP) be desirable?

Committee Sponsor: Customs Law

Panel Chairs: Les Glick, Porter Wright Morris & Arthur, Washington, DC; Greg Kanargelidis, Blake Cassels & Graydon LLP, Toronto,

Speakers from US and Italy and been confirmed. Greg will be moderating.

The Customs Law Committee is the primary sponsor and the International Trade Committee has signed on as a co-sponsor.

**SECTION OF INTERNATIONAL LAW FALL MEETING - OCTOBER 2016 - TOKYO**

Many of you attended our Committee’s successful program on the Trans-Pacific Partnership (TPP) at the Montreal Fall Meeting last year. The Tokyo Meeting will take place a year after TPP was completed, and with the venue in Tokyo, capital of one of the most important participants, and easily accessible for Asian layers, we saw this as a great opportunity to do a follow-up program.

We already have commitments from lawyers in Japan and Vietnam, two of the key signatories. The program description is as follows:

**Transpacific Partnership (TPP): Progress Made and Expected Impact on Trade With The Asia-Pacific Region, With a Focus on Customs, Rules of Origin, and Market Access**

The TPP, considered one of the most ambitious modern Free Trade Agreements, including twelve countries representing 40 percent of global GDP, was concluded on October 5, 2015, a little more than a year before the date of our Tokyo meeting. This program seeks to revisit and evaluate where we have come and where we are going in terms of implementation, ratification, and public reaction, acceptance, and opposition to the agreement. The TPP was addressed at the 2015 Fall Meeting in Montreal, was the subject of of a special International Law Section webinar, and is an area of much interest and some controversy.

This program will focus on hotly-negotiated customs provisions, rules of origin, and market access issues, some of which almost derailed the negotiations. Our focus is on and its TPP partners in Asia, Oceana and North and South America. Since Japan was a late but crucial participant in TPP, the venue in Japan will enable us to have input from the Japanese bar, private sector, and Government.

**JOINT PROGRAM ON CUSTOMS FACILITATION WITH ADMINISTRATIVE LAW SECTION - MAY 16 - WASHINGTON, DC**

Recently passed Customs legislation will be the focus of a program jointly sponsored with the administrative law section on May 16, from 10:30 a.m.-noon at ABA Headquarters.

Speakers will include Christina Kopitopoulos from U.S. Customs & Border Protection.
There’s No Place Like Home (cont’d from page 2)

use in domestic settings is consistent with an intended use in a business setting. The Tribunal had no difficulties in finding that the goods were marketed to the hospitality industry, as the appellant was able to present evidence demonstrating that the goods were marketed directly to hospitality clients through the appellant’s efforts to build relationships with hospitality buyers, interior designers and hotel owners.

Turning to the issue of price, the Tribunal did not consider this factor to be indicative of intended use, consistent with its rejection of a similar argument made by the CBSA in a previous case. In fact, the CBSA did not try to relight this particular battle in Stylus Sofas, but instead agreed with the appellant that, at least in these circumstances, pricing was not a determinative criterion.

The Tribunal agreed, noting that it would be inappropriate to expect the goods to be sold at a high price point in light of the fact that they were intended for sale to the low to mid-range hospitality market, and that pricing of the goods was “reflective of the quality of the furnishings rather than a determining factor of their intended purpose.”

On the basis of its review of the design, characteristics, marketing and pricing of the goods at issue, the Tribunal was ultimately satisfied that the appellant had met its burden of establishing that the CBSA had incorrectly classified the goods, and allowed the appeal.

Stylus Sofas is an important decision, as the CITT made short work of the CBSA’s attempt to extend the scope of the domestic sphere into hotels. Also noteworthy are the lessons that can be learned by importers with regard to the type of evidence that should be maintained in order to establish that the furniture items they import are not intended primarily for domestic use.

Customs in Brief
by Maureen Thorson, Wiley Rein LLP

Customs Reauthorization at Last: Well, it only took three or four years, give or take, but Customs Reauthorization finally passed both the House and Senate in mid-February, with the President signing the bill on the 24th. The law includes provisions that should make importers happy – like an increase in the de minimis value and simplified duty drawback procedures – as well as significant new enforcement IP and trade remedies enforcement authority. The bill also authorizes – and requires - CBP to do more to track importers of record, and to set bonding levels based on risk assessments.

New Blood at OR&R: CBP’s Office of Regulations and Rulings has recently welcomed a new executive director, Alice Kipel. Ms. Kipel joins CBP after a brief stint at the U.S. Department of Interior, but many in the customs and trade bar know her from her many years at the Washington, DC offices of Steptoe & Johnson and Howrey, where for many years she focused on trade remedies, export controls and sanctions, and Section 337 investigations, as well as serving as Chair of the statutory advisory committee of the U.S. Court of International Trade.

Paging Marty McFly: If you’ve been following CBP’s press releases, you may have noticed an uptick in seizures of . . . hoverboards. Yes, the fantastical device from Back to the Future II is now real! But CBP has found that many imported hoverboards contain counterfeit batteries that pose a real fire hazard. Alas, the future is not quite as rosy as we thought (though it might be hotter – ouch!) Dubious hoverboards have been taken into protective custody in ports as diverse as Savannah, Houston, Chicago, New York, San Juan -- even International Falls, Minnesota. So if your kid starts clamoring for a birthday hoverboard, maybe you should entice them with a DVD of the original Back to the Future instead.

Trademarks by Any Other Name: Normally, any reference to the U.S. or a U.S. place name on imported goods compels the importer to mark the actual country of origin in close proximity. An exception exists where the reference is part of a trademark. In a March 2 opinion reversing the CIT, the CAFC found that a PTO trademark application is not necessary for claiming use of the trademark exception. Reviewing dictionary definitions, the Court observed that these do not indicate that registration is a prerequisite for a "trademark," and that trademark rights under the Lanham Act stem from use, not from registration.

Things Not to Do: The Department of Justice recently entered into an $8 million settlement with two U.S. defense contractors over their sales of defective infrared countermeasure flares to the U.S. army that, incidentally, incorporated Chinese inputs on which antidumping duties were not paid. It’s not a great idea to evade dumping duties any day, but couple that with selling goods to the Army in violation of the Trade Agreements Act – and you are looking at the opposite of the Nike tagline: Just Don’t Do it!