

## Access To U.S. Courts For Import - Export Disputes On An Emergency Basis



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In the next decade, as technology and transportation logistics improve, international commerce, through import and export transactions involving the United States will. To address this prospect, LawExchange members and their clients involved in international trade with the United States should become knowledgeable about judicial remedies available to them.

When exporting to the United States or importing from the United States, it is important to understand what judicial remedies are available, in the event that a dispute arises regarding security, payment, terms of payment and delivery of a shipment of goods. In the United States, foreign litigants can address grievances before the Federal District Court or the United States Court of International Trade.

Most parties seeking judicial relief file a complaint in the United States District Court, where the goods are located, which is often the state where the goods entered the United States or are about to be exported from. The District Courts can grant various remedies.

Pre-Judgment Writs of Attachment are available from the District Courts and serve to stop goods, collateral, or funds from leaving the jurisdiction of the court prior to the adjudication of the claim. To obtain a pre-judgment writ of attachment generally, a party must show, (1) there is a probability that final judgment will be

rendered in favor of the plaintiff; (2) there are statutory grounds for issuance of the writ (i.e. the defendant is not a resident of the state and a summons cannot be served upon him in the state); and (3) there is real or personal property of the defendant at a specific location within the state which is subject to attachment.

District Courts can also grant injunctive relief under the Federal Rules of Civil Procedure via a temporary restraining order.<sup>1</sup> Temporary restraining orders are designed to prevent a party from undertaking an action that would harm another party. For a temporary restraining order to be issued, a party must show that, "immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition."<sup>2</sup>

Writs of Mandamus to compel a government officer to fulfill a duty imposed on him/her may also be brought before these courts. If an importer's goods have been seized by the Government, a District Court has the power to review the seizure and subsequent forfeiture actions.<sup>3</sup> When challenging a seizure certain rules regarding seizures of property, pending a

final dispositive action will apply.<sup>4</sup>

It is important to note that a party can only bring an action for review of a seizure if the party has exhausted all of the administrative remedies available to it regarding the seized goods. In *Miss America Organization v. Mattel, Inc.*, 945 F.2d 536, 543 (2d Cir. 1991), Plaintiff, the Miss America Organization, was seized of plastic toy dolls by the United States Customs Service on the grounds that



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the plastic toy dolls infringed on Mattel's trademark of Barbie dolls. Plaintiff was denied a review of the Customs' seizure of goods. The denial was based on the grounds that Plaintiff had not exhausted all administrative remedies available to them under the applicable code, including filing a petition for relief from Customs' initial determination of forfeiture. This decision was upheld by the appellate court.<sup>5</sup>

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### Protect the Chinese equivalents!

As the Michael Jordan story tells us, the well-known "Michael Jordan" brand does not guarantee that it will be recognized and protected in China. Chinese consumers tend to verbalize a foreign word with Chinese words (characters). To those who are not familiar with the foreign language, the sound and the meaning of the trademark, if any, would not help connect the brand with the goods. To facilitate the consumers' audio and mental association with the foreign brands, many companies routinely adopt a Chinese version of their trademarks from the foreign language.

The Chinese version may be derived from translation, transliteration, homophones (words with similar sounds but different meaning), or any combination of them. The Chinese language is rich in characters. This presents many opportunities for creating character sets with unique sounds and meanings that are pleasing to the ears and heart of the consumers. These Chinese marks can be as important as their foreign counterparts. So, a foreign brand owner is well advised to consider and adopt the Chinese equivalents of his trademark and file for trademark registration as soon as possible. Additionally, the owner should keep a watchful eye on any infringers who might sneak into the market with different character combinations that carry similar phonetic attributes.

### Prevention in the filing strategy!

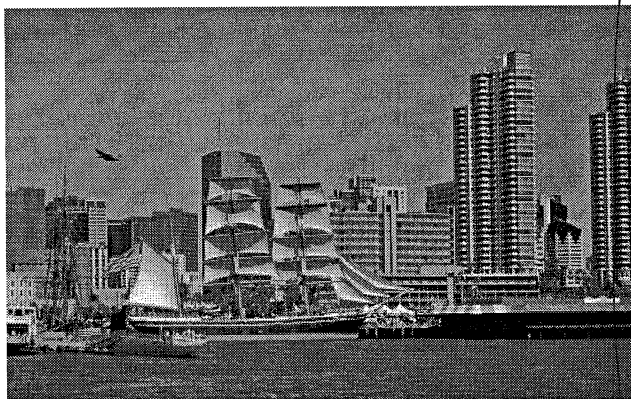
Filing early to secure registration of both foreign and Chinese trademark versions is

a cost-effective, preventative means of trademark protection and enforcement. From an economic perspective, the cost of filing a trademark application is thousands of dollars less than that associated with other enforcement actions such as opposition/cancellation proceedings and lawsuits.

Though there is no assurance that a third party's application of an identical or similar trademark will automatically be rejected, an earlier registration or a first-filed trademark application can create a barrier to impede/reduce the number of potentially conflicting third party registrations. Without such a barrier, the trademark owner could face difficult and expensive challenges of extended opposition/cancellation proceedings, lawsuits, negotiations and/or payouts with uncertain outcomes.

There are many ways to protect intellectual property rights in China, all of which demand the development of procedural, legal and practical strategies and actions to provide maximum, cost-effective protection. The above points may seem simple, but they are the necessary foundation of a strong protection strategy in China for foreign brand owners. ♦

<sup>1</sup> It is worth noting that abuses of trademark rights are not a unique Chinese phenomenon. There are plenty of examples of similar abuses all over the world.



*San Diego Harbor*

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Another court that parties can utilize is the United States Court of International Trade. The Court is located in the City of New York and has the ability to hold teleconference based proceedings with parties around the world. The Court of International Trade can also provide the same remedies as a District Court above, including injunctions and Writs of Mandamus. The Court can provide remedies for the parties in most circumstances. However, if goods are seized, the aggrieved party can only challenge that determination in District Court.<sup>6</sup> Likewise, when goods are excluded from importation into the United States, the Court of International Trade has jurisdiction over exclusions, so long as an exclusion has taken place and not a seizure.<sup>7</sup>

Most practitioners agree that it is advantageous to file an application in the Court of International Trade since it has expert knowledge of international trade issues and has quick turnaround times. The Court of International Trade provides preferential determinations of certain actions as they are understood to be time sensitive, such as exclusion of imports and redelivery of perishable items.

Understanding the remedies available as well as the correct court to file for relief can make a difference between a successful resolution of an import/export dispute to avoid significant financial expenses involved in rerouting goods or returning them to their country of origin. ♦

<sup>1</sup> Fed. R. Civ. P. 65.

<sup>2</sup> Id.

<sup>3</sup> 28 U.S.C. § 1356.

<sup>4</sup> Fed. R. Civ. P. 64.

<sup>5</sup> *Miss Am. Org. v. Mattel, Inc.*, 945 F.2d 536, 547 (2d Cir. 1991).

<sup>6</sup> *Tempco Mktg. v. United States*, 21 C.I.T. 191, 193 (1997).

<sup>7</sup> See, *H & H Wholesale Services, Inc. v. United States*, 30 C.I.T. 689, 692 (2006).