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Protection in the Electronics Age

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Where is my product? When will it arrive? What documents do I need to have for Customs? What's an MID, an ELVIS, the AES, the e-manifest, ACE or ABI?

The MID is a Manufacturer's Identification Code; the ELVIS is an Electronic Visa transmission for each shipment of products manufactured in China, shipped to the U.S. that falls within agreed-upon textile categories; AES is the online version of the Shippers' Export Declaration; ACE is the Automated Commercial Environment commercial processing system; and ABI means Automated Broker Interface, an automated cargo release system.

So what do they have in common? Can information transmitted through or contained in them be used as evidence? Are they negatives or positives? Can they make an importer or exporter money?

Electronic Transmission

All of these examples reflect the unstoppable movement toward electronic communications and away from paper documentation. This is not new. The genesis for improving and modernizing global customs practices was the Revised Kyoto Convention of 1999. It specifically supported the concept of applying new technology to Customs practices.

The Revised Kyoto Convention of 1999 had the goals of simplifying Customs procedures with an emphasis on information technology and risk management involving automated systems to target and select high-risk shipments for inspection based on pre-arrival information. The essence of the Revised Kyoto Convention of 1999 can be summarized by five areas of focus: simplification of customs procedures; information technology;

creation of automated targeting systems; maximum use of information technology; and the importance of e-commerce.

The “Kyoto Convention ICT Guidelines” (Information and Communication Technology) were published in 2004. The guidelines were specifically related to the use of information technology and the electronic transmission of customs-related data through and among government and non-government agencies.

One year later, the World Customs Organization, released its “Framework of Standards to Secure and Facilitate Global Trade.” The standards required the electronic transmission of trade data and the use of Edifact and XML as EDI protocols.

The U.S. adopted the WCO standards in 2005, joining other customs administrations worldwide that are members of the WCO and that believe security begins at origin and ends at destination, managed with electronic documentation and communication.

In 2006, the U.N. Conference on Trade and Development met in Geneva to discuss the application of the ICT Guidelines to facilitate cross-border trade, adding more pressure and credibility to an electronic end-to-end chain of custody. The guidelines were specifically related to the use of information technology and the electronic transmission of customs-related data through and among governmental and nongovernmental agencies.

For the first time, the focus became one of a chain of “electronic” data, a single global schema linked electronically from beginning to end.

U.S. Federal Rules of Civil Procedure

Trade terms and obviously logistics data began to be transmitted throughout the global supply chain electronically. Electronic information has become not only essential to governments, but also to the exporters and importers who must comply with the electronic mandates.

The natural question is, What do these terms do for me, the importer or exporter? Does using them just add further costs to the supply chain or reduce costs? Can their use help me when there is a Customs problem with container contents?

Most of the answers are directly connected to recent amendments to or changes in the Federal Rules of Civil Procedure that took effect on Dec. 1, 2006, specifically changes to six rules 16, 26, 33, 34, 37 and Rule 45.

In summary, the changes in rules asserted that “electronically stored information,” (ESI) is a class of evidence and equal to paper or any other type of physical evidence. Each rule is distinct but related. Rule 16 allows pretrial meetings to discuss discovery issues regarding ESI. Rule 26 clarifies the need to disclose information about holders of ESI and its description before a discovery request, and allows the safeguarding of privileged information to be withheld or returned. Rule 33 makes it clear that ESI includes business records. Rule 34 defines computer-based and other digitally stored data as ESI and its

format as a separate category and subject to production and discovery. Rule 37 addresses the destruction of ESI, and when it can or cannot be destroyed.

The strongest rule alteration probably is Rule 45, which recognizes ESI as a distinct category of discoverable information allowing for subpoena of it in the same way as with paper documents. Subpoenas also may be executed on individuals or companies not directly involved in the litigation.

ESI is all-inclusive. It can be found in e-mail, voicemail, instant messages, text messages, documents, spreadsheets, databases, file fragments, metadata, digital images and digital diagrams. It can be stored in every type of electronic media, including hard drives, thumb drives, computers, handheld devices, backup tapes and optical disks (See [Electronically Stored Information and the Federal Rules of Civil Procedure](#)).

ESI's Impact on the Supply Chain

Having established the existence, treatment and legal weight of ESI, it becomes clear that all U.S. Customs mandates requiring its use in the supply chain carry with them all relevant legal and business implications as well as costs and benefits.

With respect to costs, why should there be any further requirement for paper documents? Why should the China-U.S. Memorandum of Understanding on certain categories of Chinese textile exports to the U.S. demand paper documents? All that one can know about those exports are available electronically.

Customs programs including the 24-hour rule in the Container Security Initiative, the 48-hour rule in the 10+2 program, or any cross-border reporting by motor carriers are already implemented by electronic transmissions.

In other words, reduction in paper costs, solutions to their filing and storing problems, and removing the chance of falsifications of paper documents while the goods are en route, are now achievable.

Electronic transmission also allows for a chain-of-custody supply line from origin to destination.

ESI is also the core component of the Customs Trade Partnership Against Terrorism, which mandates security to begin at stuffing and to end at destination, all evidenced by ESI. Satellite tracking and monitoring by their nature are ESI data. Even the 2006 SAFE Ports Act defined security to include advance electronic information, origin-to-destination security, and offered specialized treatment for importers using smart container technology that, of course, is based on ESI.

Changes were not only occurring in the United States. The European Union established its Authorized Economic Operator program in 2006 for implementation in 2008. Components will be mandatory in 2009 requiring "...traders to provide customs authorities with advance information on goods brought into, or out of the customs

territory of the European Community.” ([Download](#) a fact sheet on supply chain security and the update of the EC customs code.)

AEO requires the use of advance electronic data, electronic records, security compliance to the WCO’s standards, adopts the Single Window concept (creation of an electronic portal through which trade-related information and documents are sent), allows access to cargo and the control of seals on containers by authorized personnel only, and mandates control of cargo from loading to unloading.

Most of the AEO is consistent with C-TPAT, indicating a movement toward a universal concept of global supply chain security in which ESI is a major component.

Smart-container technologies that provide all the required ESI from origin to destination become the natural replacement of paper documents, explain delays, improve control, reduce the need for storage space for trade documents and streamline staffing. The irrefutable result is that ESI serves to optimize the supply chain and reduces costs.

ESI’s Legal Implications

Finally, because of the changes in the Federal Rules of Civil Procedure, ESI can become persuasive evidence in U.S. Customs actions and cases.

Imagine Customs discovers counterfeit products in a container routed through a transshipment port en route to the United States. However, in this case, the foreign shipper used smart container technology. The shipper can demonstrate to Customs through ESI — stored not only in his business facility, but also in a third-party site where the monitoring of the movement, status and condition of the container was recorded and stored — that it was surreptitiously breached, and counterfeit goods added in the transshipment port.

In this scenario, the shipper, the smart container control center and the consignee can demonstrate to Customs that the container was stuffed under the supervision of an identified and vetted person who certified the contents as complete and correct.

In addition, because ESI revealed that the container was breached at the transshipment port, the shipper has ESI evidence that it did no wrong and was not responsible for the counterfeit contents. In fact, in this example, it is likely that the shipper, consignee, or the control center would notify Customs and/or local authorities at the time of the breach, indicating that the shipper is not breaching its own container in a transshipment port.

Knowledge of every link in the supply chain can be made available to the consignee who would then know what was loaded, when it left, where it is, when it should arrive and more. This information and other ESI data also allow the importer to capture at origin all it needs to file specific data for certain Customs programs, such as 10+2.

All of this information not only can be but also should be ESI data and stored in particular servers for a required time period.

Overall, the move to electronic transmission of data when combined with smart container technology can provide a direct supply chain benefit to the import's bottom line. In fact, an ESI chain-of-custody is not just good business sense, it is good legal protection.

Thus, the recent changes to the Federal Rules of Civil Procedure have become indispensable allies to U.S. importers and exporters. ESI discovery and use will only increase as part of any federal civil litigation.

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