REGULATORY CHANGES IN CHILEAN CARGO DELIVERY PROCEDURES, THE SONEX CASE, THIRD PARTY ACTION AND OTHER RECENT DEVELOPMENTS

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I. Regulatory Changes in Cargo Delivery Procedures

1. Introduction

Resolutions 2250/05 and 507/06, issued by the Customs Authority, have finally overcome the problem of cargo delivery at Chilean ports without surrender of the original bill of lading - the problem arises due to the conflict between local shipping regulations and customs regulations. The resolutions were issued after lengthy negotiations with the Customs Authority in the context of its ongoing internet systems integration project for the development of customs operations. As a result of the resolution, the ocean carriers are now directly involved in cargo delivery procedures, both in practice and from a legal point of view, for the first time.

2. Legal Framework

The main regulations applicable to cargo delivery procedures are the Hamburg Rules[1], which have been incorporated without major changes into the Commerce Code in Articles 974 and following. In addition, the Customs Ordinance[2], the Compendium of Customs Regulations[3], the Coastal Shipping Regulations[4] and the Manual for Free Trade Zones are also applicable.

3. Customs Law and Practice

3.1. General System

Under Chilean customs law, the procedure for dealing with goods imported into Chile depends on whether the goods are cleared through Customs in advance.

For goods not cleared in advance, there is a two-stage procedure. First, the cargo manifest must be submitted and presented to the Customs Authority by the carrier.[5] Second, the carrier must deliver the goods to a warehouse under the jurisdiction of the

1 The UN Convention on the Carriage of Goods by Sea Act 1978. The Hamburg Rules were ratified by Chile in 1982 and have been internationally effective since November 1 1992.
2 Decree-Law 2/1997 of the Ministry of Finance, published in the Official Gazette July 21 1998.
3 Customs Resolution 2,400/85.
4 Customs Resolution 5,973/94.
5 Under Articles 35 and 37 of the Customs Ordinance.

Customs Authority.[6] Warehouse facilities are operated by the state corporation Empresa Portuaria de Chile or private companies licensed by the Customs Authority to operate customs warehouses. Customs warehouses do not have to be located within the limits of the port, but wherever they are they fall under the jurisdiction of the Customs Authority and their operation is governed by the Customs Ordinance.[7] The regulations provide that cargo must be delivered to the warehouse within 24 hours of unloading.[8] Upon receipt of the goods, the operator of the warehouse issues a *documento portuario unico*, which acts as a receipt for the goods for the carrier or its agent. Officially the goods remain under the Customs Authority's control in the premises or in the authority's depot until they are withdrawn.[9] In practice, goods remain in the warehouse until customs clearance is obtained and the warehouse provider is paid for its services. This is done by the consignee's customs agent, which is licensed by the national director of the Customs Authority.

Customs regulations govern what the customs agent can do. The usual practice is for the consignee to endorse the bill of lading to the customs agent;[10] this then constitutes the agent's authority. The customs agent also has a duty to verify to the Customs Authority that its principal is entitled to the goods. The customs agent is an attesting witness, so it can certify photocopies of documents used in customs procedures. The agent also has other duties, such as retaining the documents for five years, including the original bill of lading.[11] The usual practice is for the customs agent to present to the warehouse operator the appropriate documentation - a customs destination document authorized by the Customs Authority, usually an import declaration. The Compendium of Customs Regulations provides that the import declaration must be drawn up on the basis of various documents, including the original bill of lading.[12] The import declaration, authorized by the Customs Authority, and the payment voucher in respect of customs duty must be presented to the warehouse operator prior to release of the goods.

There are some procedural differences in the case of containers. Due to the increase in container traffic, the Customs Authority's administrative functions were transferred to container operators in 1995 under Customs Resolution 2808 (April 12 1995). Container operators are authorized to issue a form known as a title for the temporary admission of containers. The form enables the container, once the form is authorized by the Customs Authority and presented to the warehouse operator, to leave the warehouse facilities on a temporary basis. Strictly speaking, the title for the temporary admission of containers applies only to the container.

3.2. Free Trade Zones

Chilean free trade zones are related to the ports of Arica, Iquique and Punta Arenas. Import cargoes arriving at these ports can be cleared through the general system applicable under the Customs Regulations or entered into the free trade zone according

6 Under Articles 16, 34, 44 and 46 of the Customs Ordinance.
7 In particular Articles 44, 45, 56, 57 and 60.
8 Article 2.3 of the Compendium of Customs Regulations; Article 9 of Presidential Decree 298/1999.
9 Articles 45 and 46 of the Customs Ordinance.
10 Article 222 of the Customs Ordinance.
11 Article 77 of the Customs Ordinance.
12 Former Article 5.1 of the Compendium of Customs Regulations.

to the special procedures set out in Letter A of Chapter 1 of the Manual for Free Trade Zones. In essence, the latter scenario involves first moving the goods to the Customs Authority's primary zone[13] and then requesting authorization to transfer the goods to the free trade zone by submitting to the Customs Authority an application for transfer to the free trade zone (a Z form). This document can be submitted by either the user of the free trade zone (the consignee) or its customs agent. Upon review of the Z form, and subject to prior approval by the company that administrates the free trade zone, the Customs Authority authorizes the user or his customs agent to withdraw the goods from the warehouse depot.

Under the previous system set out in the Manual for Free Trade Zones, the original bill of lading was one of the documents used to prepare the Z form. However, if the original bill of lading was not available to the importer or consignee, it could be replaced with a non-negotiable copy (also known as an originalised bill of lading) or, alternatively, by a certificate issued by the banking institution that appeared as the consignee of the goods.

4. Delivery Without Surrender of Bill of Lading

Although Article 977 of the Commerce Code[14] defines a 'bill of lading' as a document that obliges the carrier to deliver the goods upon presentation of the bill of lading to the carrier, under the old customs regulations this verification often could not take place.

With this in mind, the Compendium of Customs Regulations expressly included the original bill of lading as one of the documents used to prepare the import declaration. If the original bill of lading was not available, it could be replaced with a non-negotiable copy of the same, authorized by the carrier and countersigned by its legal representative (also known as an originalised bill of lading) or, alternatively, by a certificate issued by the banking institution that appeared as the consignee of the goods.[15] According to the regulations, the original bill of lading had to be kept available to the Customs Authority by the customs agent for a period of five years.[16]

Under Chilean practice it was assumed that the carrier was entitled to rely on delivery of the cargo to the Customs Authority or customs agents as constituting correct delivery under the Chilean adoption of the Hamburg Rules. However, this view was contradicted in *East West Corporation v DKBS*[17] and *Utaniko Ltd v P&O Nedlloyd BV*,[18] in which it was held that delivery by a carrier to the customs warehouse did not constitute a delivery to the Customs Authority and was not a delivery of the goods in the sense that this relinquished the carrier's control over them. In addition, it was also held that a carrier was not obliged to hand over the goods to customs; the carrier did not deliver

13 Under Chilean customs regulations the 'primary zone' is defined as "the space of sea or land where the maritime and inland manoeuvres regarding the cargo movement take place, which for the purposes of Customs' jurisdiction is a customs area where cargo must be loaded, discharged, handed over or checked for entering or leaving the Chilean territory". Its boundaries are fixed by the national director of the Customs Authority.
14 Based on Article 1(7) of the Hamburg Rules.
15 Article 5.1.1 of Chapter 3 of the Compendium of Customs Regulations.
16 Article 77(3) of the Customs Ordinance.
17 [2002] 2 LLR 182.
18 [2003] 1 LLR 239.

them to customs but placed them with a customs warehouse operator subject to the jurisdiction of customs.

5. Regulatory Changes

From an ocean carrier's perspective, the most important aspects of Resolutions 2250/05 and 507/06, which amends the Compendium of Customs Regulations, are as follows:

- The customs agent is now obliged to surrender the original bill of lading to the carrier once the import declaration has been accepted for its handling and prior to withdrawing the goods from the warehouse under the jurisdiction of the Customs Authority. The same applies for the user of the free trade zone or the customs agent, as the case may be, prior to withdrawing the goods from the Customs Authority's primary zone;

- Originalised bills of lading and bank certificates are eliminated. The import declaration (general system) and the Z form (free trade zones) must be drawn up on the basis of the original bill of lading.

- In the case of cargo in containers, the surrender of the original bill of lading to the ocean carrier is a condition precedent for the issuance of the title for the temporary admission of containers.

- The customs agent's obligation to keep the original bill of lading for a period of five years is replaced by an obligation to keep a copy of the bill in its file. This copy must show (i) the endorsement of the bill of lading to the customs agent, which constitutes its authority to collect the goods, and (ii) the acknowledgment of receipt from the person authorized to receive the original bill of lading.

- In the case of transport documents issued by freight forwarders (eg, house bills of lading) and used as the basis for the import declaration, these documents must include a reference to the transport document from which they are derived so that the information is stated in the customs destination declaration.

6. Procedures for the clearance of oil bulk cargoes

The Customs Authority also issued Resolution 3505/05, which refers to additional procedures for the clearance of oil bulk cargoes. Resolution 3505/05 sets out the first exception to the new rules introduced by Resolution 2250/05.

The implications of Resolution 3505/05 are as follows:

- A copy of the original bill of lading, rather than the original, can be included with the import declaration in order to prove the endorsement of the bill of lading to the importer;

- A customs broker must provide a written antecedent from the supplier or the shipper (or its agent in Chile) showing authorization to deliver the cargo to the consignee without production of the original bill of lading; and

- A customs broker has 30 working days to provide the original bill of lading that was accepted as part of the import declaration.

7. Comment

The Chilean authorities have taken an important and necessary step towards the harmonization of Chilean law with the international law and practice on goods delivery that may lead to a better and safer environment for ocean carriers, which now have direct control over the cargo delivery chain.

Having said the above, Customs Authority Resolution 3505/05 reintroduces the risk of misdelivery and/or fraud for carriers discharging oil bulk cargoes at Chilean ports, as they may not necessarily be able to deliver that cargo against presentation of the original bill of lading. Therefore, this resolution sets a negative precedent in the light of future additional exceptions that may be established by the Customs Authority.

II. The Sonex Case

A recent first instance judgment of the Court of Rotterdam in *Sonex Limited v P&O Nedlloyd BV*[19] questioned conclusions reached in the English decisions of *East West Corporation v DKBS*[20] and *Utaniko Ltd v P&O Nedlloyd BV*.[21] The Dutch case concerned the question of whether a carrier is relieved of its obligations under a bill of lading when it has delivered goods to a customs authority when obliged to do so by local regulations.

Facts

P&O Nedlloyd BV took delivery of two containers, numbered KNLU5001633 and ISCU1816373, under bills of lading HKGYN488 and HKGYN940, dated at Hong Kong on December 17 1995 and January 28 1996 respectively, for carriage from Hong Kong to Arica, Chile. On-carriage to Bolivia was not agreed. The bills of lading contained a choice of Dutch law clause. The first container was carried by P&O on board the M/V Nedlloyd Van Rees, and the second on board the M/V Nedlloyd River Plate. Both containers were discharged at Arica with a final destination of Bolivia, as per the instructions of the shippers, Sonex Limited, a Hong Kong company. Sonex had sold and exported the goods to Bolivian company Casa Roberto, which appeared as the notify party in the bills of lading. The bills of lading were issued to order.

As the goods were in transit to Bolivia they were handed over by P&O to the Chilean Customs Service, in accordance with the applicable Chilean regulations and practice. The Chilean Customs Service then delivered the goods to the Bolivian Customs Agency (AADAA). This delivery was performed according to the treaties and regulations between Chile and Bolivia that apply to cargo in transit to Bolivia.[22]

Under the supervision of the Bolivian Customs Agency, the cargo was offered for inland transport (in transit) to the Bolivian authorities in Santa Cruz/La Paz, Bolivia. The goods allegedly never arrived there and the containers were returned empty to P&O. Subsequently, Sonex filed a lawsuit against P&O in Rotterdam for alleged misdelivery and breach of the contract of carriage. It asserted that P&O should not have handed the goods over without presentation of the original bills of lading.

Dispute

As Dutch law had been declared applicable in the bills of lading, the Court of Rotterdam analyzed the rights and obligations that existed under those bills of lading under Dutch law. Under Dutch law the carrier has to deliver the goods at the port of discharge to the lawful holder of the original bill of lading. In general, a carrier will not be discharged

[19] Court file 73229/HA ZA 97-565, judgment dated March 22 2006.
[20] [2002] 2 LLR 182.
[21] [2003] 1 LLR 239.
[22] Chile and Bolivia have entered into arrangements concerning transit of goods that are delivered over sea to Chilean ports (eg, Arica) and are carried from those ports to destinations in Bolivia. The legal framework comprises the Treaty of Peace and Friendship 1904, the Convention of Commercial Traffic 1912, the Convention of Transit 1937, the Arica Declaration 1953 and Decree No 26, which establishes the Statute for Transit, Transhipment and Re-destination.

from its obligation if it delivers the goods to a different party. In this respect, P&O invoked Clause 20(6) of the bills of lading, which read:

"*If, at the place where the carrier is entitled to call upon the merchant to take delivery of the goods...the carrier is obliged to hand over the goods into the custody of any customs, port or other authority, such handover shall constitute due delivery to the merchant under this bill of lading.*"

The Court of Rotterdam held that the starting point was that under Dutch law, Clause 20(6) was valid and not contrary to the rules of reasonableness and fairness.[23]

The next question the court had to consider was whether P&O was "obliged to hand over the goods into the custody of" the customs authorities at the port of discharge (ie, Arica). The court held that if that was the case, it would mean that the goods had been lawfully delivered.

Sonex denied that P&O had been obliged to "hand over the goods into the custody of any customs, port or other authority" and argued that such an obligation did not exist; therefore, P&O could not rely on Clause 20(6) to relieve it from liability. To support its assertion and its interpretation of Chilean law, Sonex cited the English Court of Appeal decision in *East West Corporation v DKBS*.[24] That case also concerned delivery of cargo in Chile, and in that case P&O unsuccessfully invoked Clause 20(6). Therefore, Sonex felt it had a strong case and that the Court of Rotterdam should follow the *East West* judgment.

However, Sonex had failed to spot one vital difference between the *East West Case* and the case at hand. The *East West Case* concerned the delivery of goods to Chile after December 19 1997, whereas the cargo deliveries in the *Sonex Case* concerned cargo deliveries that took place before December 19 1997. On December 19 1997 the Chilean law on state-owned port companies changed. In practical terms, the change in the law meant, among other things, that before December 19 1997 carriers had no control over the way in which they could deliver cargo that was intended for on-carriage to Bolivia, whereas after December 19 1997 they did have a certain amount of control. The Court of Rotterdam held as follows:

"*As argued by Rozas [P&O's Dutch lawyer's correspondent on Chilean law] and as shown by the decisions of the English court in the case* East West Corporation v DKBS 1912 and P&O Nedlloyd *(Queen's Bench Division, 7 February 2002 [2002] 2 Lloyd's Rep 182 and Court of Appeal, February 12 2003, [2003] 1 Lloyd's Rep 239), that have been submitted in these proceedings, until the Law 19542 of December 19 1997 came into force, Emporchi was the only company admitted at all the Chilean ports. The aforementioned law split Emporchi into 10 separate state-owned companies and at the same time allowed privately owned companies to obtain licences to become customs*

[23] Article 6:248(2) of the Dutch Civil Code states: "A rule that applies between parties by virtue of a contract does not apply if, in the circumstances of the case, the rule would be unacceptable by virtue of the reasonableness and fairness". In Dutch legal proceedings, Article 6:248(2) is often invoked by a party that does not wish to be bound by a contractual clause that it agreed to. The question of whether the party invoking Article 6:248(2) will be successful is dependent on all the circumstances of the case. In Dutch case law, lists of relevant circumstances have been developed.

[24] [2002] 2 LLR 182.

warehouse companies. Article 9 of this law allowed customs warehouses to enter into private contracts with third parties, in particular with (agents of) carriers. By means of these agreements the carrier can instruct the warehouse owner to only hand over the goods against presentation of the original bill of lading. Apparently, this was not possible before. [Sonex's Dutch lawyer's correspondent on Chilean law] denial of the aforementioned is not convincing. It has not been established that Nedlloyd did have such an authority to give instructions to Emporchi (or the Chilean or the Bolivian customs) in 1996. It has not been established that Nedlloyd or its agents could refuse to hand in a cargo manifest or hand over the discharged goods as long as the original bills of lading had not been presented in 1996 and the court does not find that this would be plausible. The same applies for not signing the boletas de recepción.

All the aforementioned leads to the conclusion that with the carriage in question in 1996 Nedlloyd, after having handed over the containers to Emporchi, no longer had any say over those goods and could not influence the handing over of those goods (and this is the crucial difference from the aforementioned case that occurred in 1998 and 1999). This means that Nedlloyd can successfully rely on Clause 20(6) in the bills of lading and that with regard to the bill of lading holder the goods must be considered to have been legally delivered under the contracts of carriage when the containers had been handed over to Emporchi. Now that the containers only disappeared after they had been handed over, Nedlloyd is not in breach of its obligation to deliver the goods."

The court further found that Clause 20(6) fits in with Article 4(2)(b)(iii) of the Hamburg Rules and its equivalent in the Chilean Code of Commerce (Article 983).

Comment

Notwithstanding that the claimants have appealed this first instance judgment of the Court of Rotterdam, this case constitutes an important precedent for those carriers who still face the contingency of being sued for alleged misdelivery at Chilean ports based on the old cargo delivery regulations prior to Customs resolutions 2250/05 and 507/06.[25] Accordingly, should the carrier have a clause in its bill of lading similar to P&O's Clause 20(6), it may be given the opportunity (and it has now been established by the Court of Rotterdam that this clause is valid under Dutch law) to prove that in Chile the goods are legally delivered under the contract of carriage when handed over to customs and/or authorized warehouse operators.

[25] This contingency shall cease under the general cargo system by August 2007 and under the free trade zones system by February 2008.

III. Third Party Action

As a matter of Chilean law, the general rule is that there is no direct right of action against an indemnity insurance provider (eg. P&I Clubs). However, there are the following exceptions:

a) General Marine Insurance Regulations relating Civil Liability Insurance.

There is direct right of action against the liability insurer that has granted a guarantee to cover the insured's liability. However, there is counter-exception to this rule, which implies that this right is not available if the insured has the right to limit liability and the corresponding insurer constitutes the respective limitation fund. In other words, the subrogation rule does not operate if the insured has the right to limit liability.

b) Spillage of hydrocarbons from seagoing vessels carrying oil in bulk as cargo (CLC 1992).[26]

Chile is party to the CLC 1992. According to Article VII.8 "*Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for the owner's liability for pollution damage.*"

c) Spillage of hydrocarbons from vessels not carrying oil in bulk as cargo and spillage of other noxious substances.

According to the Chilean Navigation law, [27] this type of spills is regulated by the same civil liability regime established under the CLC 1969 [28] and the supplementary rules set forth under the Navigation Law.[29]

In this respect, Article 146 of the Navigation Law provides that "*Any claim for compensation for pollution damage may be brought directly against the insurer or other person providing financial security for [the owner's, proprietor's or operator's] liability for damage, costs or reasonable sacrifices to prevent or diminish them.*"[30]

[26] The CLC 1992 was enacted in Chile by Supreme Decree No. 101 and published in the *Official Gazette* on July 16, 2003.
[27] Approved by Decree Law No. 2222 and published in the Official Gazette on May 31, 1978.
[28] Approved by Decree Law No. 1808 of 1977, and published in the *Official Gazette* on June 25, 1977.
[29] Chilean Navigation Law, Article 144, First Paragraph.
[30] Chilean equivalent to Article VII (8) of CLC 1969.

IV. Validity of Sea Waybills for Customs purposes

1. Background

A decision was requested from the Customs Authority regarding an enquiry made by the customs administrator at the port of San Antonio in order to determine whether the sea waybill is a document of transportation that can be used to prepare import declarations. (see I.3.1 above).

Official Report 461/05, issued by the Customs Authority, has now clarified that sea waybills are valid documents for evidencing the consignment of goods in the context of customs clearance proceedings. This resolution overrides the authority's earlier Decision 1460/03, which drew the opposite conclusion - that decision held that although the sea waybill proves the existence of a contract of carriage, it does not constitute a document of title that permits the transfer of property. This criterion was revised as under Chilean law it is not an essential element of the bill of lading to transfer property.

2. New Position: issues considered by the Customs Authority

The new criterion set out by Report 461/05 is based on the following issues:

- Article 98 of the Customs Ordinance provides that bills of lading, consignment notes and airway bills shall be accepted by the Customs Authority as evidence of the consignment;

- Article 197 of the ordinance, which refers to the customs agent's authority, states that such authority is established in respect of goods entering the country under a transportation contract merely by the endorsement of bills of lading, consignment note, airway bills or other substitute documents;

- The interpretation of these two provisions leads to the assertion that, if another document in substitution is allowed to constitute the customs agent's authority when there is a transportation contract under which goods enter the country, the same document must be accepted to prove the consignment, provided it is suitable to prove that fact;

- The definition of a 'bill of lading', contained in Article 977 of the Code of Commerce (based on Article 1(7) of the Hamburg Rules) states its functions, namely to serve as:

    - evidence of the contract of carriage by sea;

    - a receipt for the goods shipped (evidence of the taking over or loading of the goods by the carrier); and

    - an undertaking of the carrier to deliver the goods against the surrender of the document to a named person, to order or to bearer, depending on the case; and

- Article 1026 of the code (based on Article 18 of the Hamburg Rules) expressly allows the carrier to issue a document other than a bill of lading to prove receipt of

the goods to be carried. This document is evidence of the conclusion of the contract of carriage by sea and the taking over by the carrier of the goods the document describes.

3. Conclusions

The conclusions of Report 461/05 can be summarized as follows:

- The sea waybill fulfils the function of proving the contract of carriage, receipt for goods shipped and document of title;
- It constitutes a type of bill of lading extended to a named person (ie, a nominative document), which makes it non-negotiable, proving for customs purposes the consignment of the goods with no possibility of it being endorsed to a third party to transfer ownership or deliver the goods to the bearer; and
- Therefore, the sea waybill serves to prepare the import declaration when no bill of lading has been issued under the contract of carriage and its endorsement is limited exclusively to constitute the authority of the customs agent.

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