



Ship Type: All Trade Area: Chile

Bulletin 330 - 10/03 - Delivery of Cargoes Without Original Bills of Lading - Chile

Earlier this year a decision of the English Court of Appeal in the cases of P&O Nedlloyd BV v. Utaniko Ltd and AKTS Svenborg (trading as Maersk Line) v. East West Corporation underlined the difficulties facing carriers delivering containerised cargo at Chilean ports. In those two similar, but otherwise unrelated cases, sometimes known as the "Chilean Customs Cases", container liner operators were held responsible for the delivery of cargo at the Chilean port of discharge, without production of the original bill of lading, even where the delivery was effected by a customs' warehouse operator to whom the carrier had been obliged to deliver the goods, pending completion of customs formalities. The ground of the decision was that the carrier had failed to instruct the warehouse operators to ensure that delivery was given only on sight of an original bill of lading. The judges, having listened to expert evidence, came to the conclusion that, following the de-nationalisation of the customs warehouse operations in Chile several years ago, it was open to carriers to make contractual agreements with the private warehouse operators under which the release of cargo could not be effected until the consignee presented an original bill of lading.

Since then, the Club has been considering, together with the correspondents in Valparaiso, what advice it could offer to Members trading to Chile. As a result, the following note has been prepared.

Under Chilean law, all cargo arriving in the country has to be delivered into the control of the customs service. The customs service then delegates the physical custody of the goods to a customs warehouse operator; once the clearance process has finished, the customs service orders the warehouse operator to release the goods to the consignee. Once the cargo has been handed to the customs, the carrier has no further control over it, and cannot, for instance, deny release because the consignee has not yet presented an original bill of lading.

In theory the carrier's rights are protected because the consignee/importer has to attach an original bill of lading to the customs entry. However, the law allows "legal alternatives" which, in practice, are "legalised" non-negotiable copies of the bill. In other words, a consignee who has received a copy bill of lading from the shipper, as a confirmation that the goods have been shipped, can have that copy turned into an original for the purposes of customs clearance. Once that is done, and the duty is paid, there is nothing to stop the consignment being released, even though the shipper may still be holding the originals.

The consequences are quite clear: although the shipper is relying on the carrier to protect his interests by withholding delivery until the consignee produces an original bill as proof of his title, in practice the carrier has no control once the goods arrive in Chile. This leaves the carrier open to claims for misrelease / misdelivery of cargo and, because he has no original documents and very little chance of getting any, it is almost impossible for him to disprove the allegations. There are indeed many instances where carriers have received claims, which they know to be fraudulent, but which have had to be paid because of the lack of evidence. Carriers are also directly at risk, because often the only means they have of ensuring payment of freight on "freight collect" cargo is by asking the court for an injunction to stop the release of the consignment.

The Chilean authorities, realising the potential for fraud and perhaps hurt by foreign criticism of the system, have now embarked on a major change. The project, code-named ISIDORA, is an ambitious plan to make the clearance process fully electronic. Under the latest version of the planned system, the consignee/importer must submit an original bill of lading to the carrier or his agent, who will retain it. The carrier then issues an "official copy" of the bill, valid for customs clearance purposes only. The agent will send an electronic message to the customs computer, confirming that he has received an original bill of lading. Cargo will not be released until this message has been received and all the other customs formalities are completed. Unfortunately, although ISIDORA was due to come on stream on 1st July 2003, its implementation has been delayed while technical problems are sorted out.

In the view of Chilean practitioners, the English Court of Appeal in the Chilean Customs Cases misunderstood the way the system works in that country. The implications of the judgment, however, are that, until ISIDORA comes on-line, carriers must continue to exercise great caution in dealing with consignments to Chile. The Club's correspondents in Valparaiso, Cave & Cia Ltda, advise that Club members should review their procedures for consignments to Chile. The main problem arises from the widespread practice of legalising copy bills of lading to enable clearance to go ahead. Members will recognise how dangerous this practice is and anybody trading to Chile should take steps to make sure that it does not happen with their bills of lading, thus obliging the importer to use a true original for customs clearance. If the Chilean agency is an unrelated company, Members should ensure they give clear instructions to their agency that under no circumstances are copy bills of lading to be "legalised". They should also try to protect themselves by a contract under which the agent is fully liable for any releases made possible by the use of legalised copies (and that the agent is, of course, sufficiently insured for such liabilities). Where the Chilean agency is a branch office or subsidiary of the carrier, internal procedures must impose the same discipline

Source of information: TT Talk