

Brazil

Cargo claims – Procedures following discharge

By William van Herp & Frumento Filho Associados Ltda., Paranagua, Brazil

INTRODUCTION

Damaged or short landed cargoes discharged in Brazil are subject to some set procedures. Cargo which is discharged damaged is subject to either a Customs survey or a private survey. Short landed cargoes are subject to either a Final Manifest Check or a Customs survey.

DISCHARGE OF DAMAGED OR SHORT LANDED GOODS

Damaged goods

Article 470, paragraphs 1 and 2 of Decree 91.030 of 5th March 1985 (the so-called Customs Regulations) requires the bailee (usually the Port Administration) to issue a damage report when goods presenting signs of damage are discharged from vessels. This report, which is to be delivered to the local Customs office on the first working day subsequent to discharge, is to be signed by the carrier or the carrier's representative. If the carrier/carrier's representative refuses to sign the damage report the bailee must register the fact in the damage report. According to Article 479 of Decree 91.030, if the damaged goods discharged are not listed in the damage report the bailee is presumed responsible for any damage subsequently ascertained.

Short landed goods

In accordance with Article 476 of Decree 91.030, Customs ascertains whether or not there are any shortages by comparing the vessel's discharge records with the vessel's manifest or equivalent document. This specific procedure is called Final Manifest Check. Alternatively, shortages are also ascertained during the Customs survey.

CUSTOMS SURVEY

Customs surveys are regulated by Articles 468 to 475 of Decree 91.030. The outcome of a Customs survey determines whether or not an individual will be responsible for Customs import duties and fines.

The aim of the Customs survey is to:

- (a) Verify the extent of the damaged or short landed cargoes imported into Brazilian territory;
- (b) Identify the responsible party;
- (c) Assess the corresponding tributary credit (import duties and fines);
- (d) Levy import duties and fines against the responsible party.

Customs surveys can be carried out at the request of the consignees of the goods or their representative in the port, or at the request of the Customs authorities, when they are aware of facts which justify such survey (Article 468 paragraph 1 of Decree 91.030).

The surveys are carried out by Customs inspectors or

experts appointed by them before the goods are cleared. The cargo is stored in a bonded area which is usually the bailee's premises. Article 471, paragraphs I and II of Decree 91.030 provides that the Customs survey must be carried out in the presence of:

- (a) Bailee;
- (b) Consignees;
- (c) Carriers or their representative.

In addition, any other party able to prove a legitimate interest in such survey (e.g., insurer) may be permitted to attend.

Article 478 of Decree 91.030 provides that the party who caused damage or shortage will be responsible for payment of any import duties/fines levied in relation to the goods. According to paragraph 1 of Article 478, for fiscal purposes (collection of duties/fines) the carrier is responsible for import duties and fines when the following is ascertained:

- (a) Replacement of goods from the ship after the shipment;
- (b) Shortage of goods from volumes discharged with signs of pilferage;
- (c) Visible external damage to the volumes or packages;
- (d) Divergence for less in weight or dimension of volumes or packages in relation to the declared in the manifest, bill of lading or equivalent document;
- (e) Fraudulent shortage or damage;
- (f) Shortage in relation to manifested volumes/packages or bulk cargoes.

Article 479 of Decree 91.030 states that the bailee is responsible for the damage or for the shortage of the goods under his custody and care. As stated above the bailee is still presumed responsible when goods are received damaged or short landed and no report or protest in this respect is issued.

DUTIES AND FINES

Duties

By means of Decree-Law No. 37 and Decree 91.030, Brazilian legislation established a levy of import duties on all foreign goods entering Brazilian territory. The procedure for assessing import duties is usually expressed as a percentage of the value of the cargo, according to the respective aliquot established by Customs for each type of product, which is calculated on the basis of the CIF value of the cargo.

Basically the importer of the goods is responsible for the payment of import duties. However, when the goods are discharged in Brazil in a damaged condition, the carrier is considered liable. Therefore, the carrier has the obligation to settle the import duties which the importer

would have had to settle in the event he had taken possession of sound cargo. When the goods are discharged partially damaged the carrier has the obligation to settle the import duties on the basis of damaged cargo. The calculation of the duty was described in the previous paragraph but same is however only applied over the depreciation incurred by the cargo. For instance, the aliquot of import duty over a particular imported cargo is 30 per cent and the cargo, on account of damage suffers a depreciation of 50 per cent. The duty to be charged to the carrier will be the aliquot of 30 per cent over the 50 per cent depreciation.

Fines

In case of short landed goods, the same procedure as explained above is applicable. In addition, according to Article 521, II of Decree 91.030, a fine corresponding to 50 per cent of the import duties levied is to be imposed on carriers. For instance, from two manifested volumes one is short landed; the settlement of import duties applied to this one short landed volume, increased by 50 per cent as fine, will be imposed on the carriers. The fine is only to be applied in cases involving short landed goods.

Notification of Assessment

A Notification of Assessment, produced according to the Records of the Survey is issued once the party responsible for the shortage or damage to the goods is identified. This Notification of Assessment demands the settlement of the duties and fines ascertained during the Customs survey (Article 549 of Decree 91.030).

Appeals

When duties and fines are imposed, Article 550, I of Decree 91.030 enables the notified responsible party to lodge an administrative appeal at Customs First Jurisdiction – First Instance (Customs Delegate in the region where the fact occurred) once it has received the Notification of Assessment. The responsible party has five days to lodge the appeal from the date of receiving the Notification of Assessment. If this appeal is turned down a new administrative appeal can be lodged within 30 days at Customs Second Jurisdiction – Second Instance (Third Taxpayers Council). If this appeal fails, a third appeal can be lodged within 30 days of the decision at Customs Third Jurisdiction – Third Instance (Superior Chamber of Fiscal Appeals).

In the event the appeal lodged by the notified responsible party is successful, according to Decree 70.235/72, Article 34, 1st and 2nd paragraphs and amendments introduced by Law 8.748/93, the Customs

Delegate is legally compelled to lodge an appeal against Customs' own decision/verdict if the amount involved exceeds 150,000 UFIR.¹

In case the appeals lodged by the responsible party are unsuccessful, then the matter can still be discussed through the civil courts. The procedure is as follows. When the last appeal lodged is turned down, Customs will issue a new Notification of Assessment against the responsible party demanding the settlement of duties and fines, if applicable, within 30 days. In case the settlement is not effected, Customs will register the notified party as debtors in their records. Additionally, Customs will start judicial proceedings (Tax Foreclosure) against the debtor at the civil court. The debtor may file an embargo against such Tax Foreclosure, but in order to be entitled to do so a deposit or guarantee equivalent to the amount claimed by Customs will have to be tendered at Court.

PRIVATE SURVEY

This mode of survey involves goods discharged in damaged condition. Private surveys are only carried out when there is an agreement between the parties involved (consignees and carriers) and Customs do not request a Customs survey.

As soon as consignees and carriers agree to submit the damaged goods to a private survey a Term of Agreement is signed. It stipulates the conditions of the survey, such as:

- (a) Description of damaged goods, already mentioned in the damage report issued by the bailee (Port Administration);
- (b) Date and place of the survey;
- (c) Each party to appoint a surveyor bearing their own respective costs;
- (d) The damaged goods to be removed from port premises (bailee's premises) usually to consignee's premises. Prior to its transfer, the cargo to be preliminarily inspected by appointed surveyors in order to avoid that carriers are held responsible for any additional damage eventually occurring during the road transfer. The transport costs to be for consignee's account;
- (e) Surveyors appointed by both parties shall jointly produce a report covering the cause, extent and responsibility for the damage and the eventual disposal of the damaged goods;
- (f) Should there be any divergence of opinion between the surveyors appointed by the parties, a third surveyor

¹ Index used by Tax Department/Customs for monetary correction. Presently 1 UFIR is equivalent to BRR 0.9770 (1 USD = 1.95 BRR).

(umpire) shall be jointly appointed and his findings are to be considered as final and definitive;

(g) In case carriers are considered liable for the damage to the goods, consignees are to be reimbursed and the corresponding amount is to be calculated based on the C&F value of the goods.

COMMENTS

Considering the bureaucracy involved in the Customs surveys, delays are almost always to be expected as from the moment the goods are discharged and submitted to the survey and the time the decision is officially announced. The immediate main consequence of such delay is the increase of the storage costs and furthermore, depending on which type of goods are involved, they may be subject to additional deterioration.

Goods submitted to Customs surveys are almost always surveyed in a superficial manner, as the ones in charge, Customs inspectors or experts appointed by them, usually do not have the proper expertise. It is recommended that a surveyor is appointed by the carriers to accompany the Customs survey.

In summary, it is preferable that the goods are submitted to a private survey instead of Customs survey. The reason for this is that the goods can be more promptly removed from the bailee's (Port Administration) premises, meaning less storage costs. The surveys can be carried out without delay and more accurately. Finally, carriers will not be demanded to settle any import duties and possible fines for damage or shortage for which they might be considered liable. ■

SOLAS – Vessel Traffic Services

SOLAS 1974, Safety of Navigation Chapter V, Regulation 8 was amended by IMO in 1997 by way of introduction of Regulation 8-2. This amendment, which was adopted in June 1997 and will come into force on 1st July 1999, requires contracting governments to arrange for the establishment of Vessel Traffic Services (VTS) where, in their opinion, the volume of traffic or the degree of risk justifies VTS. VTS should not prejudice the rights and duties of governments under international law and cannot be made mandatory outside the territorial seas of a coastal State.

Vessels are normally required to report to the VTS co-ordinating centre (VTC) on dedicated VHF channels on arrival at a given position with information such as nationality, name, maximum draft, maximum possible speed, present speed and course, destination, quantity and type of cargo, ETA at pilot station (if applicable). The vessel is also required to report any known deficiencies that might affect her navigation. The reporting position is carefully selected, allowing the VTC sufficient time to consider all prevalent and expected conditions/factors prior to advising the vessel on how to proceed safely and at the same time having the vessel

within monitoring range. The VTC will advise the vessel of the required arrival time at the pilot station (if applicable), speed at which to proceed, movement of other vessels in the vicinity, weather conditions, anchoring position (if applicable) and in addition will give the vessel any other information that they may consider to be relevant or that may be requested by the vessel.

When a vessel reports to VTS, she is normally electronically tagged, making it easy for VTS to monitor her. This information can be made readily available to concerned parties such as local agent, pilot station, harbour master, berthing master and cargo interests.

VTS strive to ensure safe and efficient use of territorial waters in order to prevent accidents and environmental damage. VTS have been in operation in quite a few places for some years already and have proven to be successful. ■