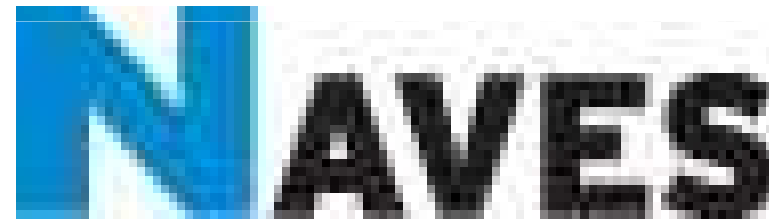


Risk management of possible customs liability for the ship agent under UCC

ECASBA SEMINAR
Brussels, 3 March 2015

Introduction



Recap of situation

FACTS - LEGAL REQUIREMENTS – GENERAL PRINCIPLES OF MARITIME LAW for containertrade– “USANCES” →

- * Ship agent in the port of discharge:
 - Fully depending on information received from the carrier
 - No contact with shipper/booking party

- * (Summary) declaration for (discharge and) temporary storage:
- * Lodged before the arrival of the vessel
- * Closed and sealed (by shipper) containers “s.t.c.”

Recap of situation under UCC (2)

- * Article 79 3 (b) UCC (customs debt incurred through non compliance)
- * *“any person who was or should reasonably have been aware that an obligation under the customs legislation was not fulfilled and who acted **on behalf of** the person who was obliged to fulfill the obligation....”*
- * = evaluation to be made by the national court (papismedov, third ruling)

Recap of situation under UCC (3)

- * *“It is for the national court to establish whether the person who lodged the summary declaration or the customs declaration was, because he stated an incorrect designation, responsible for the unlawful introduction of the goods. If such is not the case, it is for that court to consider whether, by that action, the person participated in the introduction of the goods whilst he was or should reasonably have been aware that it was unlawful”.*

Recap of situation under UCC (4)

Article 15 UCC in fine

compromises possible ways
to protect your position?

?????????

Possible ways to protect your position

Avoid risk 😊

Take out insurance? (extension to E&O)

- many disadvantages

- only as a fall back e.g. when principal is meanwhile bankrupt

Possible ways to protect your position (2)

Ship agent

- is authorised by a carrier (his principal)
- is always acting “in the name and on behalf of a principal”

→ This legal status plays a **double role**:

→ (1) in the relation with customs

→ (2) in the relation with his principal

Possible ways to protect your position (3)

(1) in the relation with customs

“direct representative”

Formal requirements

- * Has to state that he is acting on behalf of a person represented
- * Has to specify whether the representation is direct or indirect
- * May have to provide evidence of empowerment

Possible ways to protect your position (4)

(2) in the relation with the principal

“principal has the obligation to safeguard & keep harmless the agent”

- Provided the agent acted within the boundaries of his mission
- Important which law applies on your agreement →

Possible ways to protect your position (5)

Different law, different situation...

Obligation for the principal to safeguard and keep agent harmless:

Civil law → protection of the agent by the principal as a matter of law

Common law → express provision needed

Beware of English law (jurisdiction clause)!

Commercial agency directive 86/653/ECC = minimum level of protection, but in UK not extended to “services” such as ship agency

Applicable time bar?

Possible ways to protect your position (6)

Which law applies?

- Law of country of the agent
- Jurisdiction clause in contract
- **UNAMAR** arrest Court of Justice 17/10/2013 C184/12

“The law chosen by the partiesmay only be ignored.... national legislator when transposing ... into the law of the memberstate, has based more extensive protection of the commercial agent on a **fundamental national interest**”.

Possible ways to protect your position (7)

* Article 124.7 of the UCC = promising?

“Where the customs debt was incurred pursuant to article 79 it shall be extinguished with regard to the person whose behaviour did not involve any attempt at deception and **who contributed in the fight against fraud”**

Possible ways to protect your position (8)

- Guidelines / FAQ's on EU level?
- “the fight against fraud”
 - = general (not “the” fraud)
 - = should be formalized / documented

Already on a national level : MoU, cooperation agreement with national customs authorities...
- In mutual benefit ship agents/customs

Conclusion

- (1) The ship agent should always be safeguarded / kept harmless by his principal
- (2) The ship agent as customs representative should be set free from any customs debt as he was not aware or could not reasonably be aware of any fraud and/or misdeclaration of cargo.
- (3) To proof this ... may require going through a court case.
- (4) But... legal insecurity for the ship agent even as direct representative remains with **article 15 UCC**
- (5) Customs / ship agents should trust each other and work together against fraud.... **not fight each other!**

Thank you for your attention!