

## Proinde Circular 15-11-2017: Brazilian Customs reintroduce the obligation to produce the original bill of lading for taking delivery

### 1. Introduction

Under the civil and commercial legislations, the master is obligated to exercise due diligence to safekeep the goods received on board and promptly deliver them at destination within a reasonable amount of time, or as agreed upon, against the presentation of the original bill of lading<sup>1</sup>.

The general rule imposed by the Civil Code regarding contract of cargo carriage establishes that *"the goods must be delivered to the consignee, or to whoever presents the endorsed bill of lading, who must receive them and submit any claim that he may have, under penalty of lapsing of right"*<sup>2</sup>. The Law also defines a bill of lading not only as an evidence of receipt but also proof of possession and ownership of the goods. No suit should be brought against a sea carrier if the B/L is not submitted to support it<sup>3</sup>. To the same effect, the Customs Regulation defines the B/L as a document of title over the goods<sup>4</sup>.

### 2. Cargo delivery system

In the specific case of goods carried by sea, the delivery is not actually made to the consignee; instead, the carrier delivers imported cargoes to the custody of customs-bonded spaces at ports and terminals that are controlled by the Ministry of Finance (*Ministério da Fazenda*), through the Federal Revenue Department (*Receita Federal do Brasil – RFB*), the Customs authorities responsible for applying the statutes relating to the import and circulation of goods<sup>5</sup>.

All imports must undergo a Customs clearance procedure, regardless of their value or whether they are taxable or not, for their legal entry into the country and subsequent delivery to the consignee<sup>6</sup>. The carrier is not involved in the delivery process and completely loses control over the goods from the moment he physically hands them over to the customs-controlled facilities at destination.

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<sup>1</sup> Art. 749 of the Civil Code *"the carrier will transport the goods taking all necessary diligence to keep it in good condition and to deliver it at the time agreed or expected"* (free translation). Art. 519 of the Brazilian Commercial Code: *"the Captain is the true bailee of the cargo and any other effects that he receives on board and as such he has the duty of their custody, good stowage and conservation and their prompt delivery at sight of the bills of lading (articles 586 and 587). The liability of the Captain for the cargo commences from the moment he receives it and continues until he delivers it at the agreed place or the place which is in use at the port of discharge"* (free translation)

<sup>2</sup> Free translation of art. 754 of the Civil Code

<sup>3</sup> Articles 519, 576, 580, 585, 586, 587 and 589 of the Commercial Code

<sup>4</sup> Article 554 of the Customs Regulation (Decree 6,759/2009, as amended)

<sup>5</sup> Federal Law 12,815 dated 5 June 2013, Article 23: *"The arrival and departure of goods from and to abroad may only take place in ports or bonded port installations". Article 24: "It is incumbent upon the Ministry of Finance, through the customs offices: I- comply and ensure compliance with the legislation that regulates the entry, permanence and exit of any assets or goods from the country; II – supervise the receipt, the permanence, the movement and the delivery of persons, vehicles, cargo units and goods, without prejudice to the attributions of other authorities in the port; (...) V – perform customs import and export clearance (...) VII- authorise the removal of goods from the port area to other places, whether customs-bonded or not, in the cases and following the procedures set forth in the customs legislation"* (free translation)

<sup>6</sup> Customs Regulation *"Article 543 - all goods coming from abroad, either imported for definitive purpose or not, subject or not to the payment of the import tax, must be submitted to customs clearance for importation, which shall be done based on the declaration presented to the customs office under whose control the goods is located (Law-Decree 37/1966, art. 44 with wording given by Law-Decree 2472/1988, art. 2)"* (free translation)

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To be entitled to take delivery, the consignee must provide the Customs-bonded depository (bailee) with a set of documents evidencing the import licensing, payment of duties and compliance with norms and regulations of other intervening authorities where applicable.

### 3. Dispense of the original B/L

Customs' Normative Instruction (IN) RFB 680 of 2006 sets out the procedure for cargo clearance and requires the importer to produce various to the bailee as a condition of taking delivery. One of these documents used to be the original bill of lading.

However, much to the surprise of the shipping community, in 2013, the Customs issued the Normative Instruction RFB 1,356/2013 introducing substantial changes to the IN RFB 680/2006, including the revocation of Clause "I" of its Article 54, which consistently with the relevant laws, demanded the the original B/L as a condition for the consignee to withdraw the goods from the Customs-controlled spaces.

In practice, it means the consignee could complete the clearance process and take delivery the goods without ever surrendering the original B/L. Carriers were concerned that although the Customs legally release the cargo after a strictly-controlled clearance process, they might be exposed to financial losses and liabilities arising from wrongful or unauthorised delivery or even non-payment of freight charges and fees owed to them.

In response to the criticism and pleadings of the shipping community, in 2014, the Customs issued the IN RFB 1,443/2014 that removed any prohibition of bailees demanding presentation of the original B/L to ensure that the cargo is delivered to the rightful cargo owner<sup>7</sup>.

Nevertheless, despite the assurances afforded by IN RFB 1,443/2014, some ports and terminals in Brazil would still strictly follow the IN RFB 1,356/2013 to the letter and deliver the goods without demanding production of the original B/L leaving the sea carriers to face lawsuits from the actual cargo owners and NVOCCs in Brazil and abroad.

### 4. Demand for original B/L restated

On 14 November 2017, answering the requests of the industry through public hearings, the Customs published the IN 1,759 to update the IN RFB 680/2006 that regulates the Customs clearance procedure and, more importantly, to reintroduce the obligation of the consignee submitting the original B/L, amongst other documents, to withdraw imported goods from ports and terminals. IN 1,759/2017 also demands that the bailee safe keeps a copy of the original B/L for five years<sup>8</sup>.

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<sup>7</sup> IN RFB 1,443/2014 introduced Art. 55 para. 3 stating that "what is set forth in para.2 does not exempt the bailee from taking measures or demanding all necessary documentation to comply with other legal obligations, particularly those established in Art. 754 of Law 10,406 of 10 January 2002 – Civil Code" (free translation)

<sup>8</sup> IN RFB 1,759/2017, inserted Subsection IV to Article 54 of the IN 680/2006 to require the original bill of lading, it also inserted Subsection II to Article 57 to oblige the depository (bailee) to file and keep in good order and condition a copy of the B/L presented during the customs clearance process

## 5. Conclusion

The reconsideration of the Customs authority to the issue of presentation of the original bill of lading should be praised because it considerably reduces the exposure of the sea carriers to wrongful delivery claims and brings peace of mind to exporters, importers and cargo traders leading the country to realign with international law and practice when it comes to cargo delivery requirements.

Further information regarding cargo clearance and delivery process can be found in our publication **Cargo Clearance and Delivery in Brazil: Practical Guidance** downloadable at: <http://proinde.com.br/manuals/cargo-clearance-and-delivery-in-brazil-practical-guidance/>

Santos, 15 November 2017.

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