EX PARTE: **THE COMMISSIONER FOR THE SOUTH AFRICAN REVENUE SERVICE**

IN RE: **THE EFFECT OF THE PROVISIONS OF CHAPTER 9 OF THE CUSTOMS CONTROL BILL ON INCOTERMS**

OPINION

Introduction

1.

Consultant is the Commissioner of the South African Revenue Service. He seeks my advice on the possible effect of Chapter 9 of the Customs Control Bill ("the CCB"), if and when it becomes law, on international commerce. Chapter 9 will introduce a change in the existing procedure for the clearing of imported goods destined for "inland ports". In the documents contained in my brief, this change has been referred to as a "change in policy". It is convenient to use the same expression in this Opinion.

The change in policy

2.

Approximately 35 years ago, and in order to alleviate congestion in the ports, the South African Railways and Harbours (the predecessor of

Transnet) facilitated the creation of "inland ports" whereat imported goods could be cleared through customs and stored pending collection by the importers. The goods in question were moved on rail trucks from the seaport to the inland port "in bond" in accordance with the provisions of section 18 of the Customs and Excise Act.[1] The only documentation which needed to be submitted to the customs authority at the seaport to allow the inland transporation of the goods in bond was the manifest. Assuming the goods were destined for local consumption, the necessary bill of entry was submitted and duty was paid at the inland port.

3.

Invariably the goods were containerized. The containers were loaded directly onto rail trucks on which they were transported to the inland port. Therefore, little difficulty with customs control arose. However over the years, for reasons which it is not necessary to go in to, the transport of the containers on road trucks was allowed. The difficulties of proper customs control in this situation is manifest.

4.

Chapter 9 of the CCB contemplates that whenever goods are destined for an inland port, a document known as a "transit clearance declaration" will

[1] Act 91 of 1964.

have to be submitted to customs at the seaport. This document will have to be submitted by either the importer of the goods, its agent or the carrier of the goods or its agent. The information which must appear on the declaration is set out in sections 167 and 202 of the CCB. It is not necessary to deal with precisely what this information is. It is suffice to say that it will furnish the Commissioner with information which will allow for better customs control of the goods whilst in transit.

The GMLS report

5.

Various interested parties, including the Johannesburg Chamber of Commerce and Industry ("the JCCI"), have expressed concerns regarding the effect which Chapter 9 of the CCB will have on international transactions, particularly on those transactions governed by the various INCOTERMS.[2] These parties commissioned an impact study from Global Maritime Legal Solutions (Pty) Ltd ("GMLS"). This is a lengthy report which deals with all aspects of the likely impact of the change in policy on international trade. Chapter 7 thereof deals with the impact on contracts of sale and the INCOTERMS. This chapter also deals with the impact on multi-modal transport. I have been briefed to advise whether the concerns expressed in Chapter 7 of the GMLS report are valid.

[2] I will deal later in this Opinion with what these INCOTERMS are and their effect.

The opinion of Professor Eiselen

6.

Amongst the documents included in my brief is an Opinion dated 4 November 2013 prepared by Professor Eiselen of the Department of Law at UNISA and a member of the Johannesburg Bar. A perusal thereof indicates that his brief was probably a little wider than mine. He deals with, inter alia, the reasons for the change in policy and the possible effects thereof on congestion at the ports. It is clear that he has consulted with members of the shipping industry in order to express the views which he does.

7.

He has also dealt comprehensively with the INCOTERMS and the likely effect of the change in policy thereon. I have found his views extremely helpful in drafting this Opinion. In fact, I agree entirely with what he has stated in paragraphs 30 – 50 of his Opinion regarding the INCOTERMS as well as his comments regarding Chapter 7 of the GMLS report (which are

to be found in paragraph 24 of his Opinion). Notwithstanding this, I intend to add a few comments of my own.[3]

The INCOTERMS

8.

As indicated, Professor Eiselen has dealt comprehensively with the INCOTERMS. I shall add a few comments on the practical aspects thereof. In order to bring about some form of uniformity in international commence, the International Chamber of Commerce published, in 1936, a set of rules for the use in international trade. These rules have been amended from time to time and the current set of rules are known as the INCOTERMS 2010. Each rule caters for a different situation depending on what it is the parties desire. For ready identification each rule is given a three letter title or label, examples of which are the well-known FOB (free on board") or CIF (cost insurance freight) titles or designations.

9.

Parties to an international sale transaction are free to decide which rule will apply to their transaction. They can identify the rule by simply referring

[3] At a consultation held on 13 November 2013 with Ms Marina van Twisk I was specifically asked to express my views as a practicing lawyer as opposed to Professor Eiselen's views as an academic.

to the three letter designation. By so doing, they avoid having to state in their sale agreement the full terms and conditions which will apply.

10.

There are currently eleven different INCOTERMS which represent eleven different sets of rules. The parties are, of course, free to vary any particular rule in order to suit their particular needs. For example the INCOTERMS often stipulate what documents the seller has to provide the purchaser. These would include, depending on the particular term, documents evidencing a contract of carriage, proof that the freight has been paid and that the goods have been insured. The parties are, however, free to, and often do, stipulate that additional documents are to be provided by the seller. Examples of which are documentary proof that the particular goods have been "stuffed"[4] into the container in question and certificates as to the quality of those goods.

11.

A problem which lawyers often experience in practice is that parties to an international sales transaction do not fully understand the INCOTERMS and stipulate in their contract for a specific term (or rule) when it is not what they actually required. The most common of these

[4] This is the shipping term used to describe the loading of goods into a container.

misunderstandings is that the parties (or certainly the purchaser) believe that the seller's responsibilities regarding the conveyance of the goods extends much further than it actually does. A further common error is that parties often stipulate a CIF contract whereas in fact they intend a CIP contract.[5]

12.

I shall now turn to consider the specific types of INCOTERMS which are relevant to this matter.

CIF (cost insurance freight)

13.

This is in my experience, the most commonly used INCOTERM. In terms thereof the seller is obligated to deliver the goods on board the vessel at the port of loading. It must also contract for and pay the freight and any other costs necessary to bring the goods to the port of destination. In addition the seller must also secure and pay for insurance cover against loss of or damage to the goods during the voyage. The seller is obligated to deliver documents to the purchaser proving that it has complied with its obligations. In particular it must deliver a contract of carriage for the goods (usually a bill of lading) and a certificate of insurance. The seller must also

[5] The difference between these types of contract appear from what is set out below.

provide any other documents specifically provided for in the sale agreement.

14.

It will be seen that CIF rules are intended to cover seaport to seaport carriage of the goods. However, what is highly significant is that the obligations of the seller end at the port of lading and upon the delivery of the documents to the purchaser. The handing over of the contract of carriage usually effects transfer of ownership of the goods from the seller to the purchaser. If any difficulties arise during the course of the carriage, it is for the purchaser, armed with the contract of carriage (which is a negotiable document) to take the matter up with the carrier. Likewise if the goods are damaged, it is for the purchaser to claim against the insurers.

15.

Because the seller's obligations end at the seaport, it assumes no obligation to ensure that the goods pass through customs at the port of destination.

CFR (cost and freight)

16.

This INCOTERM is the close cousin of the CIF. The obligations of the parties are exactly the same save only that there is no obligation on the seller to effect insurance of the goods. It is for the purchaser to determine whether it wants insurance and if so, to arrange the same itself. CFR is, like CIF, a very commonly used INCOTERM.

CIP (carriage and insurance paid to)

17.

Contracts CIP are very similar to contracts CIF save that they are not necessarily limited to carriage from seaport to seaport. In terms thereof it is the obligation of the seller to deliver the goods to an agreed place and it must contract for and pay the costs of carriage of the goods necessary to bring them to the named place of destination. In addition, the seller must also contract for and pay insurance cover on the goods during the carriage. This type of contract is suitable for the hereinafter described multi-modal forms of conveyance. It would, for example, suit circumstances where goods have to be delivered to an inland destination. Significantly, however, as with CIF and CFR contracts, the obligations of the seller end at the agreed place where the carriage is to begin and

provided it has arranged and paid for the contract of carriage and the insurance of the goods and handed over the relevant documents, its obligations end. Even though the goods are consigned to an inland destination the seller assumes no obligation in ensuring that the goods pass through customs.

DDP (delivery duty paid)

18.

A contract DDP obliges the seller to deliver the goods to an agreed destination with duty paid and with the goods placed at the disposal of the buyer. The seller bears all the costs and risks involved in bringing the goods to the place of destination and has an obligation to clear the goods for import and to pay any import duty thereon and to carry out all other customs formalities. Significantly this is the only INCOTERM which places an obligation on the seller to ensure that the goods are cleared through customs. However, in over 30 years of practice, I have never yet been involved in any contract stipulated to be DDP. I believe that it is very seldom used. Presumably the reason being that sellers in one country are reluctant to assume the obligation of clearing goods through customs in another country.

Multi-modal contracts of carriage

19.

Multi-modal contracts of carriage have come about since the use of containers for the conveyance of goods. In the days of break bulk cargo, imported goods would be discharged from the vessel at the port of destination. The importer (usually the purchaser under a CIF contract) or its agent, would present the bill of lading to the ship's agent and then take delivery of the goods. The advent of containers, however, has meant that containerized goods can be discharged from a vessel at a seaport and then conveyed to an agreed inland destination (often, but not always, the importer's place of business). The inland transportation is done either by rail or road or both. As can be seen, therefore, different modes of transport may be used to deliver the goods to the importer, hence the expression "multi-modal". Shipping companies very often offer multi-modal contracts of carriage. It carries the goods on its own vessel and then sub-contracts the landward carriage to either rail or road transporters or both.

20.

This type of contract worked well where a full container load of goods was to be delivered to a single importer or consignee. However, over time a system of "groupage" was devised wherein different importers share

space in the same container. Arrangements for this type of carriage were made by contractors known as Non-Vessel Owning Common Carriers ("NVOCC's"). These companies contract with parties to international transactions (in the case of CIF or CIP sales usually the seller or its agent), to deliver the goods to the importer or consignee's door. They arrange for the goods to be containerized, together with other goods and then conclude contracts of carriage for the transportation of the container to a particular destination whereat the goods are destuffed from the container and delivered to the consignee. The bill of lading for the sea carriage and the waybills for the road or rail portion of the journey are issued to the NVOCC who in turn issues "house bills" to each importer whose goods are in the container.

21.

In the case of international conveyance of goods via multi-modal transport, invariably the goods have to be cleared through customs. It is a matter for agreement between the NVOCC and the importer as to whose responsibility this is. However, as I understand the matter, as a matter of practice the NVOCC (who is very often a clearing and forwarding agent) assumes this responsibility and recovers the costs involved from the importer.

How will the change in policy affect INCOTERMS?

22.

The contention that the change in policy will affect the INCOTERMS appears to stem from a misunderstanding of the seller's obligations in CIF, CFR and CIP contracts. In these contracts the seller has no obligation whatsoever to ensure the customs clearance of the goods. Its obligations end at the port of loading and when the documents are handed to the purchaser. Therefore, if goods are consigned to an inland port (such as City Deep) it will be of no concern to the seller whether a transit clearance declaration has to be submitted when the goods are discharged from a vessel at a South African seaport.

23.

In the past it was always the obligation of the purchaser (importer) under these types of contracts to arrange for the clearance of the goods. All that the change in policy will bring about is that in order for the goods to be moved in bond to the inland port, the purchaser (or its agent) will have to submit the transit clearance declaration, whereas in the past all that was required was the submission of the manifest by the carrier.

24.

I note from the documents in my brief that a concern has been expressed by the JCCI that the change in policy will mean that parties to international sales transactions will be forced to change from CIF (or more correctly CIP) contracts to DPP contracts. No reason at all exists for this to happen. The change in policy does not impose any obligation on the seller (or consignor) of goods to ensure that the goods are cleared through customs nor does it impose an obligation on the seller to submit the transit clearance declaration.

25.

The GMLS report expresses concern that the change in policy may bring about delays at the seaport, inter alia, because of customs checks. The suggestion is made that this in turn may increase the responsibilities on the seller of the goods, who may be reluctant to accept the same. Professor Eiselen has dealt with the issue of possible delays. I defer to him in this regard. However, I do wish to comment on the suggestion that such delays (if they should occur) could place additional responsibilities on the seller. This is simply not true. In CIF, CFR and CIP contracts the seller has no responsibility for delays occurring in the carriage of the goods. It is conceivable that in a DDP contract the seller may have contractually undertaken to ensure the arrival of the goods by a certain date. Any delays

may, therefore, be prejudicial to the seller. However, as I have indicated above, DDP contracts are hardly ever used.

How will the change of policy effect multi-modal contracts of carriage?

26.

On page 79 of the GMLS report the following is stated regarding the impact of the change in policy on multi-modal transport:

> *"Under multi-modal transport the operator would assume liability and responsibility for the cargo up to the point of delivery at the In-land terminal. This will no longer be possible due to Customs intervention and the potential associated delays not only related to presenting and passing a Customs declaration but also delays that relate to other aspects such as labour related protest and port congestion. The operator would simply not assume responsibility in respect of these unpredictable circumstances."*

I am afraid that I disagree with this statement in a number of respects. Firstly provided the NVOCC[6] timeously submits the transit clearance declaration, there is no reason to suspect there will be any out of the ordinary customs delays. In this regard I refer to what Professor Eiselen

[6] Referred to in the GMLS report as "the operator".

has stated. In any event, virtually every bill of lading which I have seen, including house bills issued by NVOCC's contains a *force majeure* clause protecting the carrier against delays resulting from seizures by state authorities,[7] strikes and the like. The NVOCC does not, and has never assumed responsibility in these circumstances. Nor will it have to under the change in policy.

27.

The GMLS report further states at page 80 that:

> *"the seamless transport of goods under the custodianship of a single carrier is interrupted to submit documentation that under multi-modal transport would only be submitted at a later stage."*

This statement appears to assume that goods will be held up at the seaport awaiting for some sort of clearance. This is not how I understand the matter. The transit clearance declaration will be capable of being submitted electronically 72 hours in advance of the arrival of the goods. If this happens, there should be no interruption of the "seamless transport" of the goods. In the circumstances I do not believe that the change in policy will in any way effect inter-modal contracts of carriage.

[7] Which would include custom's seizures.

Conclusion

28.

I trust that the foregoing adequately addresses the questions posed to me. If not, I suggest that a consultation be arranged whereat any remaining concerns can be discussed.

C.J. PAMMENTER SC

CHAMBERS
DURBAN
20 December 2013

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