



# Integrity Forum: When Does a Commercial Issue Become Trade Distorting?

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(Moderator)

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## Contracts vs Trade Issues

- Fortunately, problems at sea are uncommon
- But port disruptions are not
- Contracts *should* mitigate foreseeable circumstances
- But not everything can be put in a contract
- And not everyone adheres to a contract...



*So at what point can (or should) Government step in?*

## No Objection Certificates – Some History

- Pricing rollercoaster in FY15/16
- New importers
- Contracts not picked up
- NOC “option” exercised
  - 1<sup>st</sup> consignee has to give
  - No NOC is indication of
- Bill of Entry, once filed, determines “owner”
- Without NOC, Customs would not release
- Easily more an 150 containers impacted

c) It is therefore, clarified that in cases where the first consignee exists but has not given NOC for such amendment....the decision in this regard should be taken in light of the Civil Court’s decision ***or other material facts.***

OFFICE OF THE PRINCIPAL COMMISSIONER OF CUSTOMS (GENERAL)  
JAWAHARLAL NEHRU CUSTOM HOUSE, NHAVA SHEVA  
TALUKA LURAN, DIST RAIGAD, MAHARASHTRA 400707

F. No. S/3-Gen-8931/2015 Import Noting

Date 01.10.2015

**FACILITY NOTICE NO. 73/2015**

Sub.: Simplified procedure for the amendments in the Import General Manifest- reg.

As a trade facilitation measure, a consolidated guideline for amendment in the IGM is hereby issued to reduce the dwell time in this regards. Attention of the shipping lines, shipping agents, consol agents, carriers, multi-model operators, break bulk carriers/agents, consolidators, freight forwarders, importers, Customs Brokers and members of trade is invited to [Public Notice No. 67/2009](#) dated 14.09.2009 and [No. 02/2010](#) dated 14.04.2010 and [Boards Circular No. 13/2005](#) dtd. 11.03.2005 and No. 44/2015 dated 14.11.2015.

2. The amendments in IGM are categorised as Major amendment and Minor

along with manifest corrector issued by overseas counterpart of the Shipping Line (wherever required);

6) IEC copy of the consignee/s or declaration letter in case consignee does not hold IEC (wherever required);

7) In the case of change of consignee name, the following documents are also required to be submitted (as applicable) -

a) For amendment in the consignee name, where first consignee name is totally different and it doesn't exist, it cannot be considered typographical error, an indemnity bond duly notarised to Customs from second consignee and a letter from Shipping Line, indemnifying Customs against any claim in the name of the first consignee regarding the shipment,

## Could the US Government Step In?

- Lack of regulatory transparency is nothing new in India.....
- Focus is on defining “**other material facts**”
- US Government should step in if the issue is clarification of an existing regulation
  - ABC has pushed need for clarification – otherwise it’s trade distorting
  - US Government still tends to see this as a “commercial” issue
  - Default recommendation: tighter contract terms
- Indian Customs authorities *can be sued* if seen to not following regulations
  - Several High Court and District Court lawsuits named handlers *and* Customs
- As shipments to India increase, new players *have to come into the market*
- India has tightened arbitration laws, but can that benefit exporters?

## Need to Understand the Indian Regulatory Environment

- Once the Manifest is filed, as far as customs authorities are concerned, it is the **consignee** who is entitled to take delivery of the consignment – they consider the consignee the rightful owner and are bound to release the consignment.
- Though consignee may not be the owner of the consignment in terms of the contracts until payment has been made in full, from the Customs perspective:
  - Per the documents filed by the line/carrier, the person named as consignee is entitled to the goods.
  - Customs may not be privy to the contractual documents between the seller and the buyer (except the Sales Contract portion)
  - Customs authorities do not have the mandate to adjudicate on the issue of ownership
- If the consignee is changed without the NOC, the contesting consignee (who is in default) may initiate legal action against the customs authorities

## Where do we stand?

### FAS New Delhi

- Contacted Joint Secretary in New Delhi, but no response
- Suggested moving this to a trade facilitation discussion – takes focus off almonds

### US Trade Representative

- Aware of situation and raised during joint India consultations
- Trade facilitation workshop in India did not specifically raise almonds
- New administration – India relationship?

### Almond Industry

- Working to understand local Customs authorities
- Exploring options/alternatives
- And what will effects of demonetization bring?

## Clearly, it's up to the industry.....Options?

- Continue to press U.S. government on remedies proposed to Customs Joint Secretary

- As new players enter market, ship to known single consignee, then transfer to confirmed importer

- Develop India-specific Sales Contract provisions

- Pursue defaulters thru London arbitration and Petition to enforce in India



## How does the UAEC work with India?

- **CONTRACT: TITLE AND RISK**
  - **SECTION 6.1: “SELLER RETAINS TITLE TO THE GOODS UNTIL SELLER HAS BEEN PAID IN FULL. . . SELLER CAN RECOVER THE GOODS AT ANY TIME IF BUYER IS IN BREACH OF THIS CONTRACT OR SELLER CONSIDERS ITS OWNERSHIP OF THE GOODS MAY BE JEOPARDISED BY BUYER CONTINUING TO HOLD THEM. . .**
  - **SECTION 16.1: “UNLESS OTHERWISE SPECIFIED IN THE CONTRACT CONFIRMATION, DISPUTE RESOLUTION SHALL BE BY ARBITRATION IN ACCORDANCE WITH THE ARBITRATION RULES OF THE NUT ASSOCIATION IN LONDON, . . .”**
- **DEFAULT - ARBITRATION - FILE PETITION TO ENFORCE IN INDIA – RECOVERY**
  - **REQUIRES ENFORCEABLE CONTRACT**
  - **TRANSACTIONAL INVESTMENT TO PURSUE LONDON ARBITRATION**
  - **TIME INVESTMENT TO PURSUE ARBITRATION / ENFORCEMENT PROCEEDINGS**
  - **NEED LIQUID JUDGMENT DEBTOR TO SATISFY DEBT**

## Potential Solution: Tighten Up Sales Contract Provisions

Since the shipping / import documentation generally does not include contract terms (e.g. UAEC details) a **possible** clause *in lieu* of NOC to consider incorporating in the “Sales Contract”:

- If the consignment is not cleared within 30 days from the date of unloading the same in the destination port, it shall be deemed that the Buyer is in default under the contract and has no objection to change the consignee name in the Import General Manifest (IGM) or any other documents pertaining the consignment at the option of the Seller.
- The Seller’s option to change the consignee name in the Import General Manifest is without prejudice to any other remedies or rights which the seller may have against the defaulting Buyer with respect to the default, under this contract and the Uniform Almond Export Contract.

Would validity of an NOC executed in advance of arrival be questioned? Or be an opportunity for abuse?

## Arbitration Award Enforcement in India

- Arbitration proceeding in London [Section 16 - UAEC]
  - Filing a lawsuit directly in India against defaulter is slow process / not advisable
- Award issued to Seller
- File Petition with Indian High Court to recognize Award
  - Limited ability of debtor to contest propriety of Award
- Recognition of Award: settlement likely if debtor is liquid
- Trace assets of debtor / seek High Court order disclosing assets / prevent movement of assets
  - Creditor can file winding up petition to attach assets of debtor

## KNOW YOUR CLIENT

- Pre-contract due diligence into Buyer
- Executed Contracts offer predictability
- External Factors impacting predictability (or lack thereof)
  - Currency issues – Government eliminates 500 / 1000 Rupee notes
  - Goods and Services Tax reform – April 2017
  - New Buyers entering the market

## Next Steps

- We've *heard*, but not confirmed, that other countries have an NOC provision – do we need a broader strategy?
  - Turkey?
  - Saudi Arabia?
  - Vietnam?
  - Algeria?
  - Pakistan?
  - Libya?
  - Brazil?
  - South Korea?
- Do we need a follow up discussion at the INC in Chennai?

Now it's Your Turn to Ask  
Questions!



Thank You!

