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DIRECT AND INDIRECT REPRESENTATION IN THE CURRENT AND MODERNISED CUSTOMS CODE

By deleting the Member States' right to reserve one form of representation to nationally licensed customs agents (article 5 of the current customs code¹, article 11 of the modernized customs code proposal²), the modernized customs code returns the freedom of choice to the partners in contract. Or does it not?

1. Principle of European Contract Law

The distinction between direct and indirect representation is a principle shared by the legal systems of the E.U. Member States. It is identified and described as such in the "Principles of European Contract Law"³, drawn up by an independent body of experts from the E.U. Member States under a project supported by the European Commission and many other organizations.

2. Definition of direct versus indirect representation

In accordance with these "Principles of European Contract Law" a representative (person acting on behalf of another person) may contractually agree, in consultation with his principal, to act in his own name, or in the name of that principal. Where the representative is acting in the name of his principal, his/her acts bind the principal and third party *directly* to each other. The representative is as such not bound to this third party. This form of representation is called direct representation. Where the representative is acting in his own name, the principal and the third party are only *indirectly* bound to each other. This form of representation is called indirect representation.

3. Direct and indirect representation in the current customs code

3.1. Definition of direct and indirect representation

Article 5 (2) – first subparagraph reads:

Such representation may be:

- direct, in which case the representative shall act in the name of and on behalf of another person, or

¹ Reg. 2913/92

² Com 2005/608

³ http://frontpage.cbs.dk/law/commission_on_european_contract_law/

- indirect, in which case the representative shall act in his own name but on behalf of another person

3.2. The debtor is the declarant

In accordance with the customs code the person liable for a customs debt is the declarant.

In article 4 (18) the term 'declarant' is defined as
"the person making the customs declaration in his own name or the person in whose name a customs declaration is made"

Only the indirect representative makes declarations in his own name. The direct representative acts in the name of his customer. Per definition, the direct representative is not the declarant and therefore, cannot be liable for a customs debt (except in the case of wilful misconduct or gross negligence (see further down).

In the case of indirect representation the representative is the declarant. Article 201 (3) and 209 (3) provide that in the case of indirect representation, the principal, on whose behalf the customs declaration is made, is jointly liable.

Article 201 (3) and article 209 (3), first subparagraph read:
"The debtor shall be the declarant. In the event of indirect representation, the person on whose behalf the customs declaration is made shall also be a debtor."

3.3. Wilful misconduct and negligence

All this does NOT give the direct representative a permit to do whatever he likes. The articles 8 (1), 201 (3), 202 (3), 205 (3) and 210 (3), cover the liabilities of the direct representative, i.e. any person involved in any irregularity, who was aware (= wilful misconduct) or should reasonably have been aware (= gross negligence) of the irregularity concerned. These shall also be liable.

3.4. Article 199 of the Implementing Provisions⁴: a wrong note

The approach outlined above, as defined in the customs code is transparent. The debtor is clearly identifiable, possible misconduct or gross negligence of any other person involved in irregularities is duly covered.

Unfortunately at the end of 1993 an article was inserted in the implementing provisions of the customs code which is unclear and which is giving rise to divergent interpretation.

Article 199 (1) CCIP reads:

⁴ Regulation 2454/93

"Without prejudice to the possible application of penal provisions, the lodging with a customs office of a declaration signed by the declarant or his representative shall render him responsible under the provisions in force for:

- the accuracy of the information given in the declaration,*
- the authenticity of the documents attached,*

and

— compliance with all the obligations relating to the entry of the goods in question under the procedure concerned."

Who is 'him'?

Does this article render the representative responsible for the accuracy of the information given in the declaration, the authenticity of the documents attached and compliance with all the obligations relating to the entry of the goods, irrespective of whether he is acting as a direct or an indirect representative? Depending on the reading and even on the translation, some Member States say it does, others say it does not.

In our opinion it does not, because, if it did, it were in breach with the basic provisions in the customs code, stating that, apart from situations of misconduct and gross negligence, the person responsible for the procedure can only be the declarant. Likely it is actually this inconsistency with the customs code which is giving rise to divergent, indeed opposite interpretation among the Member States.

4. Modernised customs code

4.1. questionable note now transposed as a "killer" of the principle of direct representation

Article 9 (2) of the Modernised Customs Code proposal is a transposition of a particular interpretation of the above mentioned disputable Article 199 of the Implementing Provisions.

It reads:

"Without prejudice to the possible application of administrative or criminal penalties, the lodging of a summary declaration or customs declaration, including a simplified declaration, or notification, or the submission of an application for an authorization or any other decision, shall render the person concerned responsible for the following:

- (a) the accuracy of the information given in the declaration, notification or application, or in any other relevant form;*
- (b) the authenticity of any documents lodged or made available;*
- (c) where applicable, compliance with all of the obligations relating to the placing of the goods in question under the procedure concerned, or to the conduct of the authorized operations.*

The first subparagraph shall apply also to the provision of any information required by the customs authorities.

Where the declaration or notification is lodged, the application is submitted or requested information is provided by a representative of the person concerned, the representative shall also be bound by the obligations set out in first subparagraph."

Article 9(2) blurs the distinction between direct and indirect representation exactly in the same way as some MS's interpret the questionable CCIP Art. 199. The Modernised Customs Code proposal maintains the distinction between direct and indirect representation (a common principle of European Contract Law), but fails to guarantee that its provisions are carried throughout the code. This can only lead to legal controversy.

Article 9(2) conflicts with other articles and the entailing confusion serves no purpose. The article in question was allegedly introduced to prevent direct representatives from being free to do as they liked. For this there is no reason because Article 51 of the modernised customs code proposal serves the same purpose and has the same effect in covering liability in case of wilful misconduct or gross negligence as the above mentioned articles 8 (1), 201 (3), 202 (3), 205 (3) and 210 (3) of the current customs code.

In our CLECAT position paper dated 5 March 2007 we make suggestions for amendment of the European Commission proposal for a modernised customs code, which take care of the above contradictions and are fully compliant with the principles of European Contract Law.

Conclusion

There is no justification for intervening in the trading parties' freedom of contract. Surely, a representative with a long standing relationship with customs may be easier to identify than the trader on whose behalf he/she is acting as a direct representative, and therefore for customs the risk may be easier to assess and control. This should however not prevent traders from declaring goods to customs through an intermediary acting in their name. Direct representation is a common trading practice; its abolishment in practice would constitute an unnecessary obstruction to trade.

By deleting the MS' right to reserve one form of representation to nationally licensed customs agents (article 5 of the current customs code compared to article 11 of the modernised customs code proposal) the intention of the modernised customs code is to return the freedom of choice to the parties in contract.

CLECAT has felt that unanimous acceptance of this liberal principle was so important for EU trade that it has encouraged all its federations to embrace this principle. They all replied to the call, but it would be extremely unlikely that they can continue sharing this view if the very principle of contract freedom is threatened or annihilated by fine-prints that compromise such a breathtaking project.
