CARGO CLAIMS FOR SHORTAGES AND TRADE ALLOWANCE IN MOROCCO . THE SITUATION UP TO SEPTEMBER 2017

Mohamed Laazizi
MANAGING DIRECTOR
SMDM SA (DEFMAR) MOROCCO

Introduction

Before 01.11.1992, date of Hamburg Rules entry in application, Moroccan courts admitted the sea carrier's exoneration from any liability for shortages in bulk cargo not exceeding 2 % of the B/L quantity.

Since 01.11.1992, the local courts were refusing this exoneration at the motive that Hamburg Rules do not provide such exoneration.

Resisting strongly to this position and after long judicial fight, we obtained:

- In 2005, the re-admission of trade allowance in favour of the sea carrier by extension to the sea carriage of a provision applicable in road carriage, and

- In 2007, the first judicial decision accepting the automatic deduction of the trade allowance admitted by local uses at discharge port which level must be ascertained by the courts.

-Since 2010 the courts are ordering systematically court surveys to determine in each case if the shortages are or not within the level of the trade allowance.

-Between 2010 and September 2017 the level of trade allowance admitted by the Moroccan courts and court surveyors are situated between 0,1% and 1%

I- The principle of trade allowance: The extension to sea carriage of a provision applicable in road transport

Cargoes in bulk are by nature subject of loss in weight during its carriage usually resulting from natural shrinkage, evaporation etc. This loss is increased for some products by the inevitable dispersal of cargo during the load and discharge operations.

At Casablanca port for example and particularly for wheat, the cargo is either stored in silos in the port area, or given direct clearance from the port. In all cases the cargo is only weighed on its clearance from the port, while crossing the weighbridge. The result of this weighing is considered as the official quantity delivered to the receivers and therefore determines possible short landed quantities.

These losses at the quay are often attributable to the tightness of the grabs during discharge, the overloading of the means of cargo receiving equipment i.e. Lorries or trucks and defects in the weighbridge.

As Moroccan courts accept as delivered only the quantity determined by the port weighbridge scales, these losses at the quay, subsequent to discharge, are often subject of claims against the carrier, even though he is not responsible for this loss. Local courts, before the entry in force of Hamburg rules in Moroccan, admitted a trade allowance of 2 %.

A/ The situation preceding the Supreme Court decision of 14 December 2005

Despite of the application of Hamburg Rules in Morocco since 01/11/92 which are not recognizing expressly the trade allowance often referred to "freinte de route", the majority of the claims for shortages that do not exceed 2 % of the B/L quantity have been rejected.

However, this exoneration of the sea carrier from any liability due to trade allowance was more and more contested. The cargo interests were arguing that the sea carrier should prove that these shortages are exclusively attributable to the nature of the cargo in order to invoke the trade allowance and consider that the level of this trade allowance should not exceed 0,5 % of the B/L quantity.

In 2002, the Moroccan Supreme Court followed this argumentation and cancelled a decision which exonerated the maritime carrier for trade allowance at the motive that the sea carrier exoneration is not automatic and that the carrier should prove that the shortages are exclusively due to the cargo nature and its condition of transport and not to a negligence of the carrier or his servants.

Due to this unfavourable jurisprudence for the carriers , cargo interests have multiplied the arrest of vessels, either for the enforcement of judgements they have already obtained or on conservatory basis for "expected "and "future" shortage on cargoes.

B/ Situation Since The 14.12.05 Supreme Court Decision

Fortunately on 14/12/2005 and after a judicial fight for more than 13 years, we and our lawyers obtained a favourable decisions issued by the Supreme Court exonerating the sea carrier from any liability for trade allowance by extending to the sea carriage of a law governing the road carriage (Article 461 of the Moroccan Code of Commerce, applicable to road transport) even if the the level of the trade allowance was not yet fixed uniformly. According to this commercial code provision:

1/ “if the cargo is one which usually sustains natural loss in its volume or weight exclusively by reason of its transportation, the carrier is not liable but only for the shortages exceeding the tolerance admitted by local practice.

2/ this limitation of liability is not applicable, if it’s proved that as per facts and circumstances the shortages ascertained were not due to the causes justifying this tolerance”.

Moroccan Supreme Court decided recently that the trade allowance is determined by the local courts at their entire discretion and according to the tolerance admitted by the practices applicable at discharge port.

Consequently the level of this tolerance will be different depending on the kind of the product in bulk (wheat, fertilising, oil,) on the geographical area (Atlantic coast, Mediterranean coast …) on each port and its practice …etc. So the question remains to know what the level of the trade allowance is and who has to prove this level.

II- The proof and deductibility of trade allowance

A/ Situation before the Supreme Court decision of 13.11.2007: The sea carrier must prove the uses admitting the trade allowance.

On 19/06/02 (SUPERBA CASE), the Supreme Court refused the sea carrier's exoneration for trade allowance (the shortages represented in this case 2,06 % of the B/L quantity) at the motive that the sea carrier must prove that the shortages are due to the nature of the cargo and are within the tolerance admitted by local uses.

More recently the Supreme Court rendered an important decision on 04.10.2006 (BONASIA case) confirming that the sea carrier is exonerated from any liability when the shortages are less than the tolerance admitted by local uses and that it is the consignee (cargo interests) who must prove the contrary i.e. that the shortages are due in fact to a sea carrier' fault or negligence.

On 11/07/07, the Supreme Court decided that these uses must be proved by the party who invoked it, the sea carrier does not have to prove the use and it is up to the local court to check the existence of this use by any means available.

Since then, the number of ships' arrests was progressively decreasing and many minor shortage claims were rejected. The battle is won but not the war as we have not yet obtained a real and constant "jurisprudence" (quieta non movere) on trade allowance level.

B/ Situation since 13.11.2007 and Before 2010 – Supreme Court decided that the courts must itself check the existence of these uses and deduct this allowance from the shortages

On 20.01.2006 the appeal court of Casablanca condemned the sea carrier to pay to C/U MAD 66 994,77 together with legal interests and costs in respect of a shortage representing 4,7 % of the B/L quantity.

In this case, the Appeal Court had refused to apply the trade allowance on the grounds that the shortage represents 4,7 % of the B/L quantity.

We lodged recourse against this decision before the Supreme Court on the grounds, inter alia, that if case the shortage exceeds the trade allowance rate (2 %), this

tolerance must be automatically deduced and the sea carrier's liability must be limited only at the part exceeding this 2 % trade allowance.

On 13/11/07, the Supreme Court complied with our argumentation and quashed the above mentioned appeal court decision.

Therefore the case was sent back to the appeal court.

On 28.10.2008, the Appeal court, in the light of the 13.11.2007 Supreme Court decision, reduced the amount of the sea carrier condemnation to MAD 4077, 64 limiting the sea carrier's liability to the shortage exceeding 2%.

So, this is the first time that a court admits on the merits that in case of a shortage exceeding the tolerance admitted by local uses, the carrier could be hold liable only for the part exceeding this tolerance.

From our discussions with cargo underwriters, we noted that they are not happy with the level of 2 % which they consider as too high if compared with the percentage of 0,5 % admitted over the world .So the judicial proceedings will most probably continue for long time before obtaining an uniform level of trade allowance next Moroccan courts .

So, we continued:

1/ To fight in the Courts for establishing a "jurisprudence constant" in matter of 2 % trade allowance level in all Moroccan ports.

2/ To discuss with cargo underwriters for a conventional rate of 0,5 %, waiting the level of trade allowance to be fixed by Moroccan courts.

C/ Situation since 2010: appointment of court surveyors for the determination of the trade allowance level.

As per the a.m. developments, Since 2007 and till 2010 , Moroccan Supreme court (today named CASSATION COURT) decided that the courts must itself check the existence of these uses and deduce this rate from the shortages

However, there had been on 2010 a departure from precedent position of the Supreme Court.

Since 2010,Supreme court considers that we can't predetermine, without any basis, a fixed trade allowance rate . According to Supreme court, we must take in consideration of the kind of cargo in question, the conditions of sea carriage and the distance of the voyage …etc

So courts started appointing court surveyors to check the level of trade allowance taking in consideration the a.m. Supreme court decision and Criteria.

1a/ APPOINTMENT OF COURT SURVEYORS

Given the above, courts, mainly appeal courts, when dealing with shortage issue, do appoint a court surveyor in order to carry out an investigation in order to determine whether the alleged shortage falls within trade allowance rate given the kind of cargo, condition of transport and distance of the voyage.

b/ AMBIGUITY RESULTING FROM THESE COURT SURVEYS

Within this context, there is a big uncertainty regarding the trade allowance level.

Depending of which surveyor is appointed the outcome can change significantly.

Indeed, some surveyors tend to consider generally that trade allowance is around 1 or 1,5 % but others consider that it is even less than 0.5 %.

Given court current stance, it was very difficult to anticipate how these claims would be judged because it would depend on court surveyor findings.

On the basis of these judicial surveyors reports ,some court decisions rendered by first instance courts or appeal courts have fixed the trade allowance at 0.2% and 0.3% on the basis of these judicial survey reports conclusions .

c/ STEPS TAKEN BY DEFMAR , ITS LAWYERS AND SURVEYORS :

We reacted against this situation and arranged meetings with our lawyers and surveyors in order to protect sea carrier interests against these unfavourable court judgements. We decided to ask our surveyors to provide us with their opinion regarding the level of trade allowance applicable, taking in consideration the nature of the cargo, the voyage involved, the weather conditions…etc.

Taking in consideration this criteria, our surveyors studied the matter and provided us with a report / fixing the trade allowance between 1 % and 2 % depending on the nature of the cargo, the voyage distance ,the the transport nature and conditions.

We instructed also our lawyers to provide systematically the court with our surveyors report , to support our request for claim rejection and sea carrier exoneration.

Nevertheless ,the final decision depends on the court appreciation of the facts, and on its appreciation of the court surveyor finding in particular .

So this situation created a big uncertainty regarding the trade allowance level .This position can not allow, at least shortly ,the obtention of the same uniform trade allowance level ,as this level depends on the court surveyors finding for each case.

D / SITUATION TILL SEPTEMBER 2017

Till September 2017 , we obtained some judgements rendered by Casablanca Court admitting a trade allowance of 1%. These judgements are of course encouraging but can't be considered yet as "constant jurisprudence" till its confirmation by other decisions rendered by appeal courts as there are still judgements admitting a ridiculous trade allowance of 0.3%, 0.2% or 0,1%

Consequently and awaiting the confirmation of these new judgements on appeal and by Supreme Court (Cassation court) , the best way to protect Members interests is in our opinion to reinforce the prevention steps.

RECOMMENDATIONS

Meantime and in order to prevent and resist to any possible shortage claims, we recommend to our Clients (Clubs, owners, caterers, operators...) to carry out:

- At loading port

    - Joint loading survey and weighing supervision.
    - Joint draught/sealing of the holds
    - to clause the B/L with n° of the seals and the draught figure (by including for ex in the B/L the following mention : "According to the joint draught survey , the cargo loaded on board the vessel is ….. MT …."

- At discharge port

    - Joint discharge survey and supervision
    - Joint holds unsealing, weighing, draught
    - To issue protests for any dispersal on quay

  If a protest is issued by Master at loading regarding a discrepancy between B/L and draught figures, we recommend:

  1/ to clause the B/L accordingly and
  2/ instruct Master to not disclose this protest nor any other documents to cargo surveyors without prior authorisation of P&I surveyor.

CONCLUSION

In conclusion, Moroccan courts have not yet fixed an uniform level of trade allowance till September 2017.

Claimants base in general their claim on shore figures and according to these weighing figures the Moroccan courts take into consideration as delivered only the quantity determined by the shore port scales official weighing, made under the customs control.

Courts often appoint a judicial surveyor to determine in each case whether the shortages are due to the nature of the cargo and if it fall or not within the trade allowance.

Indeed, some surveyors tend to consider generally that trade allowance is around 0,5% but others consider that it is even less than 0,5% and retain 0.1%, 0.2 % ,0.3% or 0.4% .

On the basis of these Court surveyors reports, some judicial decisions rendered by first instance courts or appeal courts have fixed the trade allowance at 0,1%, 0,2 and 0,3%...

Given this courts position and according to court surveyor findings it is difficult to anticipate how the claims would be judged. In the best terms the court will deduce the trade allowance to be retained by court surveyor (0,1%, 0,2% … etc …) and limit the sea carrier liability for the shortages exceeding this percentage.

Awaiting the adoption by Moroccan appeal and Supreme courts of uniform jurisprudence related to the trade allowance level to be admitted, we recommend continuing:

1/ To reject first, all claims for shortages posterior to the discharge

2/ To reject all claims for shortages anterior to discharge not exceeding 2 % of the B/L quantity

3/ If this rejection is seriously contested, to deduce 0,5 % as trade allowance ,internationally admitted, and negotiate in the best possible terms available for members, the amicable settlement of the surplus , to avoid if possible, vessel's arrests, judicial proceedings and the corresponding fees.

4/ in order to release a vessel from arrest or avoid such arrest ,to try to obtain the claimants agreement to accept a Club LOU without providing a bank security in exchange of a quick amicable handling and settlement of the claim or at least a Club interim LOU to be replaced by a bank security if no amicable settlement is reached within 30 days following the presentation of the claim.

Mohamed Laazizi
MANAGING DIRECTOR
DEFMAR