

Cargo clearance and delivery in Brazil



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Practical Guidance

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Disclaimer

The purpose of this guidance is to provide a source of reference to the benefit of our clients and associates on a free of charge basis. While we have taken every care to ensure the information provided is correct and up to date, we give no warranty or representations whatsoever about the accuracy, reliability and suitability of the information for the purposes to which it is applied. This publication is not legal advice, and we accept no liability whatsoever for any loss or damage, direct or indirect, arising out of or relating to the use and reliance on the information provided herein.

1. Foreword

The Brazilian cargo delivery system is quite different from most jurisdictions elsewhere in the world where the carrier delivers the cargo in exchange for the original bill of lading or a delivery note. In Brazil, the carrier discharges import cargo into Customs-bonded facilities that take over the duty to safekeep the cargo and hand it over to the consignee on completion of the clearance formalities and upon authority from the Customs.

Apart from fines for incorrect or untimely declared cargo manifest, there have been recent regulatory changes in that it is possible, under certain circumstances, for importers to take delivery without the need to surrender the original bill of lading. These changes in contrast with international delivery practices and, indeed, the standing legal system, have caused great concern amongst carriers who completely lose control over the cargo once it is discharged and have little or no say on whether and to whom it can be delivered.

The peculiarities of the Brazilian cargo delivery system in contrast with other countries bring about numerous queries from carriers trading in the country on the responsibility for cargo reporting procedures, delivery and determination of liabilities for cargo loss or damage.

Based on our hands-on experience, we prepared this guidance with a practical introduction to the Brazilian Customs regulations and practice pertaining to cargo import, clearance and delivery, the statutes governing cargo manifest reporting requirements and the apportionment of liability between carriers and bailees. The guide also covers the issue of Customs penalties and the defences and limitations available to the carriers.

While this publication is not legal advice nor intends to be any comprehensive, we hope it is useful as a source of practical reference to our clients and associates.

REPRESENTAÇÕES PROINDE LTDA.

May 2017

2. Brazilian port system

2.1. Port organisation and administration

The Brazilian coast has some 8,500 Km of navigable waters through which 90% of the country's foreign trade flows. The rivers, lakes and lagoons of Brazil together form 22,000 Km of navigable waterways, 80% of it in the Amazon region alone¹. In 2016, nearly one trillion tonnes of cargo were moved by the Brazilian port system in the form of solid bulk (63%), liquid bulk (22%), containers (10%) and general cargo (5%)².

The federal government, through the Presidency of the Republic, is constitutionally responsible for the exploration of the ports at sea, rivers and lakes in Brazil, either directly or indirectly through concessions and permits to the private initiative³.

Under the regulatory framework of the so-called Law of the Ports⁴, there are public maritime ports and the so-called terminals of private use, known as TUPs (*Terminal de Uso Privativo*, in Portuguese). These are divided into deep-sea navigation (foreign trade), cabotage (coastal-wise trade) and inland waterways each one of them with their particular set of rules and regulations.

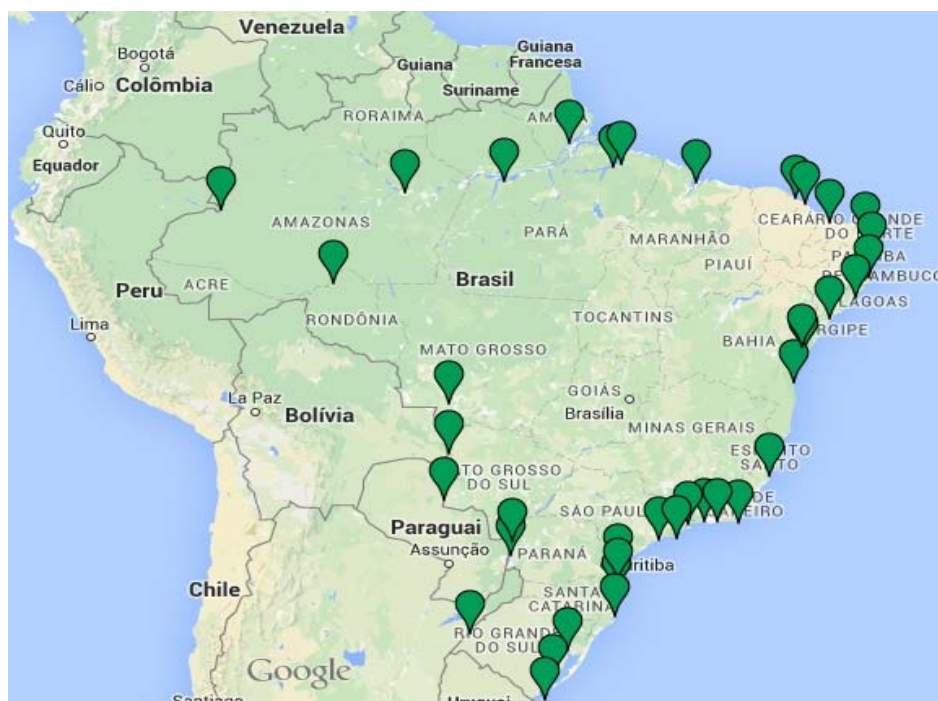


Figure 1: ports, terminals and inland waterways under Customs control (source: RFB/ANTAQ)

The Foreign Trade Chamber (*Câmara de Comércio Exterior – CAMEX*), assists the Presidency of the Republic with the formulation, implementation and coordination of the governmental policies with regards to foreign commerce and trade.

¹ Ministry of Transport, Ports and Civil Aviation (MTPAC), sourced from ANTAQ (updated 20/03/2017)

² MTPAC Transport 2016 Yearbook

³ Brazilian Federal Constitution, Article 21, item XII, sub-item 'f': "It is incumbent upon the Republic: (...) XII – to operate, either directly or through authorisation, concession or permission: (...) f) Sea, river and lake ports;" (free translation)

⁴ Law 12,815 of 05/06/2013 (sets the guidelines for the exploitation by the Federal Government of the ports and port facilities operations)

Matters relating to the Brazilian port system fall within the jurisdiction of the National Secretariat of the Ports (*Secretaria Nacional de Portos – SNP*) that is subordinated to the Ministry of Transports, Ports and Civil Aviation (*Ministério dos Transportes, Portos e Aviação Civil – MTPAC*). The SNP formulate policies and directives for public investments, concessions and development of the Brazilian port system.

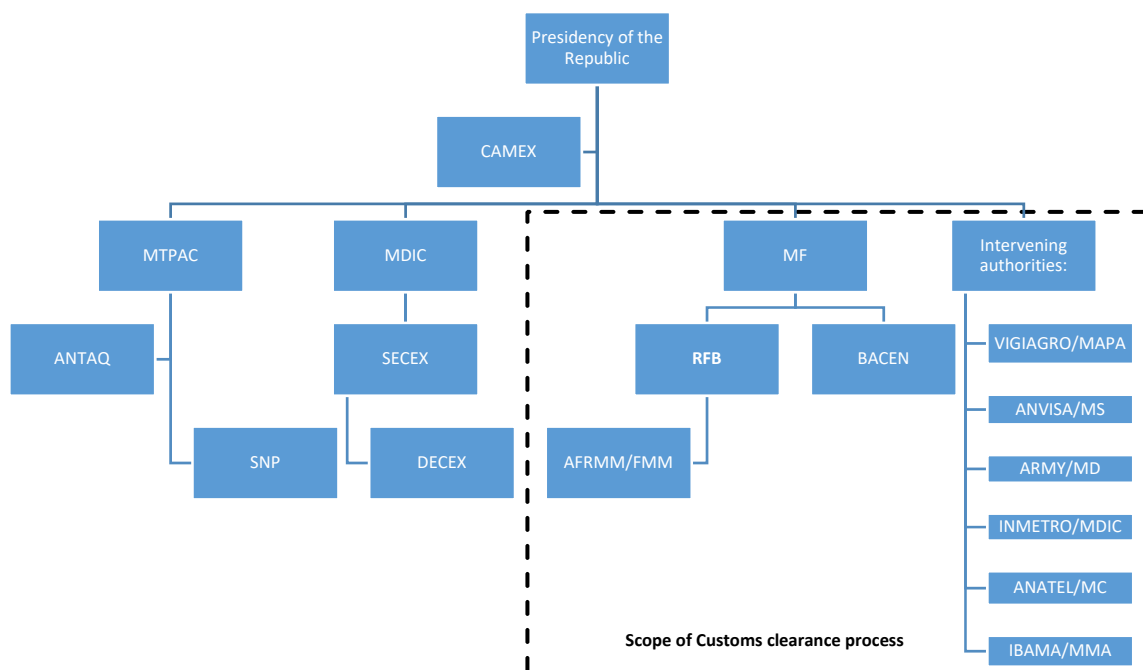


Figure 2: Organisational chart of the authorities involved in the foreign trade and cargo clearance process

The National Agency for Waterways Transport (*Agência Nacional de Transportes Aquaviários – ANTAQ*) is the regulatory agency linked with the MTPAC with financial and administrative autonomy to implement the policies articulated by the governmental authorities. The ANTAQ is also responsible for regulating and monitoring the quality of services supplied in the waterway transport and the exploration of ports and waterways infrastructure by the private sector.

2.2. Customs control

The foreign trade and Customs policies are devised and implemented by the Foreign Trade Secretariat (*Secretaria de Comércio Exterior – SECEX*) of the Ministry of Development, Industry and Foreign Trade (*Ministério do Desenvolvimento, Indústria, e Comércio Exterior – MDIC*).

The control of the foreign trade of goods and assets and collection of duties rests within the jurisdiction of the Ministry of Finance (*Ministério da Fazenda – MF*) and is carried out by the Federal Revenue Secretariat (*Secretaria da Receita Federal do Brasil – RFB*), henceforth generally referred to as “the Customs”.

The Customs are responsible for the surveillance, tax assessment and dispatch of imports and exports on the ports, airports and borders of Brazil⁵, including monitoring of assets with the support of the Brazilian Central Bank (*Banco Central do Brasil* – BACEN).

2.3. Other intervening authorities

The Customs authorities perform the control of goods which import or export is restricted or forbidden in cooperation with other intervening authorities.

Certain imports need to be issued with permits and satisfy specific requirements from governmental agencies to legally enter the countries, namely:

Authority	Type of imports
▪ VIGIAGRO (MAPA) ⁶	Animals, plants, seeds and agricultural products, fish and meat products, veterinary products and pesticides, etc
▪ ANVISA (MS) ⁷	Medical, pharmaceuticals and cosmetic products, processed foodstuffs, cleaning product, biological materials, etc
▪ Army/Air Force (MD) ⁸	Weaponry, ammunitions, propellants and explosives including fireworks and ammonium nitrate
▪ INMETRO (MDIC) ⁹	Toys, electro-electronic equipment and other consumer's products requiring quality certification and metrology
▪ ANATEL (MC) ¹⁰	Telecommunications, computers and surveillance equipment
▪ IBAMA (MMA) ¹¹	Wild fauna and flora including endangered species under CITES ¹²

⁵ 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)

⁶ The International System of Agriculture and Livestock (*Sistema de Vigilância Agropecuária Internacional* – VIGIAGRO) is managed by the Ministry of Agriculture, Livestock, and Supply (*Ministério da Agricultura, Pecuária e Abastecimento* – MAPA)

⁷ The National Health Surveillance Agency (*Agência Nacional de Vigilância Sanitária* – ANVISA) a federal regulatory agency linked with the Ministry of Health (*Ministério da Saúde* – MS)

⁸ Ministry of Defence (*Ministério da Defesa* – MD)

⁹ The National Institute of Metrology, Quality and Technology (*Instituto Nacional de Metrologia, Qualidade e Tecnologia* – INMETRO) is a federal autarchy of the Ministry of Development, Industry and Foreign Trade (*Ministério do Desenvolvimento, Indústria, e Comércio Exterior* – MDIC)

¹⁰ The National Telecommunications Agency (*Agência Nacional de Telecomunicações* – ANATEL) is a special federal autarchy linked with the Ministry of Communications (*Ministério das Comunicações* – MC)

¹¹ The Brazilian Institute of Environment and Renewable Natural Resources (*Instituto Brasileiro do Meio Ambiente e dos Recursos Renováveis* – IBAMA) is the administrative regulatory agency of the Ministry of the Environment (*Ministério do Meio Ambiente* – MMA)

¹² The Convention on International Trade in Endangered Species of Wild Fauna and Flora – CITES, ratified by Brazil in 1975.

3. Cargo clearance and delivery

3.1. SISCOMEX system

Imports and exports of goods are registered and monitored through the integrated foreign trade system known as SISCOMEX¹³, a Single Window system administered by the SECEX and the BACEN and managed by the Customs to streamline and automatize trade processes and taxation controls.

SISCOMEX allows the private sectors to exchange information electronically and integrates all cargo import, export and transshipment routines, including licensing, certification and electronic payment of duties, taxes and fees.

As the integrated system evolved, other modules were created and embodied in the SISCOMEX. The SISCOMEX CARGA, known as SISCARGA, specifically provides for the electronic control of vessels, cargoes and cargo units moved within Customs-controlled areas.

SISCOMEX is linked with the MERCANTE¹⁴ system that, in turn, monitors the collection of the AFRMM freight surcharge where due. The carrier and his authorised agent must keep Customs authorities informed of the movement of the vessel and cargo by inputting data on both MERCANTE and SISCARGA, as explained in Chapter 4.

3.2. Import licensing and registration

An importer must be previously registered with SECEX and have access to the SISCOMEX system through digital certification to be able to import and Customs-clear goods into Brazil.

Most imports do not require licensing, and the importer only needs to obtain an import declaration (*Declaração de Importação*) – “DI” through the electronic system.

For those imports requiring licensing, which is the case when the intrinsic nature of the goods involves the attributions of other public authorities, the importer needs firstly to obtain an import license (*Licença de Importação*) – “LI” to purchase the goods abroad and bring them into the country.

Other authorities may also become involved in the licensing and clearance processes of restricted goods. Otherwise, products which import are prohibited include but is not limited to:

- Cigarettes and beverages manufactured in Brazil and intended for sale exclusively abroad
- Waste of any kind and used articles, such as second-hand tyres
- Counterfeit or pirated products
- Goods that offend morality, tradition, health or public order
- Narcotics and other illegal substances

¹³ The Integrated Foreign Trade System (*Sistema Integrado de Comércio Exterior* – SISCOMEX) was created through Federal Decree No. 60 of 25 Sep 1992 and became operative in 1993. In 1997, the system was stepped up to also control cargo imports.

¹⁴ MERCANTE is the system for controlling the collection of the Surcharge of Freight for Renewal of the Merchant Fleet (*Sistema de Controle da Arrecadação do Adicional ao frete para Renovação da Marinha Mercante* – AFRMM), ranging from 10% to 40% of the freight value and payable to the Merchant Marine Fund (*Fundo de Marinha Mercante* – FMM), which is administered by the Customs.

3.3. Import duties and taxes

Save for some products and entities that enjoy tax benefits; imports are usually subject to a variable rate of import duty and a few taxes to legally enter the country for end use. The importer is also required to pay the AFRMM surcharge and, of course, the associated handling and storage costs to be able to take delivery.

The import duty and taxes are product-based on the NCM¹⁵ tariff rate and are payable by the importer at once upon registration of the DI. The import taxation is usually made up of:

- II (Import Duty)¹⁶
- IPI (Tax on Industrialised Products)¹⁷
- ICMS (Tax on Circulation of Goods and Services)¹⁸
- PIS and COFINS (Federal social security taxes)¹⁹

In the event of shortage or damage before clearance, the importer may apply for a tax reassessment, a procedure whereby the duty and taxes are reduced proportionately to the depreciation of the taxable value. In this event, the Customs authorities may attempt to collect from the carrier or the bailee as further explained in Chapter 6.

3.4. Cargo discharge and transfer of liability

Goods under Customs control must obligatorily be handled within bonded facilities, public or privately operated, that will take over the cargo safekeeping from the carriers and arrange for their delivery to the importers after the Customs clearance process has been accomplished.

The specific regulation stipulates that the liability of the carrier begin when the goods are received on board and ceases when they are delivered at the port of destination. The responsibility of the bailee, in turn, commences when the goods are received in his premises and only ceases upon their physical delivery to the consignee.

The goods are deemed to have been delivered by the carrier at the moment of hoisting from the vessel if shore gear is used, or at the time of landing alongside if vessel's gear is used²⁰.

¹⁵ *Nomenclatura Comum do Mercosul* (Mercosur Common Nomenclature) – NCM: it is a tariff classification system consistent with the Harmonized Commodity Description and Coding System (HS) of the World Customs Organisation (WCO) and adopted by MERCOSUR members.

¹⁶ *Imposto de Importação* – II: levied on the CIF value, usually ranging from 10% to 35%

¹⁷ *Imposto sobre Produto Industrializado* – (Tax over Industrialised Products – IPI): a federal excise tax levied on manufactured goods and generally calculated at up to 15% of the CIF value plus II.

¹⁸ *Imposto Sobre Circulação de Mercadorias* (Tax over Circulation of Goods and Services) – ICMS: a state value-added tax applicable on the CIF value and import duty and taxes. The rate of IPI tax depends on the destination state.

¹⁹ *Programa de Integração Social* (Social Integration Program – PIS), *Programa de Formação do Patrimônio do Servidor Público* (Civil Servant Asset Formation Program – PASEP): social dues for the financing of unemployment aid and public service pensioning system; and *Contribuição Para o Financiamento da Seguridade Social* (Contribution for the Social Security Financing – COFINS). PIS/PASEP and COFINS are calculated on the CIF value plus II, IPI and ICMS

²⁰ Law-Decree 116 of 25/01/1967, regulated by Decree 64,387 of 22/04/1969 that governs “the operations related to the transport of goods by waterways in the Brazilian ports, establishing the responsibilities and dealing with the shortage and damages” (Law-Decree 116/1967): “Article 2 – The responsibility of the port entity commences with the entrance of the goods in its warehouses, yards or other places designated for storage and only ceases after effective delivery to the vessel or to the consignee.”

“Article 3 – The responsibility of the carrier begins when the goods are received on board and ceases with the delivery to the port entity or municipal wharf, at the port of destination alongside the vessel.

First paragraph – it is considered as effectively delivered on board, the goods operated by vessel's gear since the beginning of the operation, alongside the vessel.

Second paragraph – the goods to be discharged from the vessel by the gear of the port entity or municipal wharf, or for their account, are deemed effectively delivered to the latter parties, since the commencement of the sling for hoisting, inside the vessel” (free translation)

Carrier remains liable for loss or damage to the cargo carried as verified upon discharge and noted down in Customs-controlled damage report issued by the bailee whose liability will be presumed in the absence of any notation in the damage report or similar document²¹.

The liability for cargo loss or damage not apparent at the time of delivery may rest with the carrier so long as the consignee lodges a formal protest within 10 (ten) days from delivery and produces evidence that the loss or damage occurred while the cargo was in the custody of the carrier²².

3.5. Customs clearance process

All imports into Brazil can only be handled within Customs-bonded facilities and go through a Customs clearance process, regardless of their value or whether they are taxable, as a condition for the legal entry and delivery to the rightful consignee²³.

The Customs clearance is the process whereby the accuracy of the information provided by the importer in the DI in respect of the nature, value and characteristics of the imported merchandise is verified by the Customs, including physical checking of the goods, and, in the case of restricted imports, other intervening authorities. The process is triggered with the registration of the DI in the SISCOMEX and payment of the duties by the importer.

The DI should be supported by the original bill of lading or equivalent document, original commercial invoice, packing list, among other documents²⁴, though the presentation of the original B/L may be dispensed with, as discussed in Chapter 5.

Depending on the nature of the import, the clearance may be processed before or after the goods have arrived at the primary or secondary Customs zone, and in some situations, the delivery to the consignee may be authorised even before the process is completed.

3.5.1. Ordinary clearance

In the conventional clearance process, the importer can only register the DI after the bailee confirms that the manifested goods have arrived at the port of discharge (primary Customs zone) or an inland storage facility (secondary Customs zone) and described their quantity, weight and condition upon receipt, including damage and exceptions.

3.5.2. Advanced clearance (direct discharge)

Some goods may be Customs-cleared before arrival, provided they can be identified and quantified onboard the vessel.

²¹ Customs Regulation, Article 662: *"the bailee is responsible for damage or shortage of the goods under its custody, as well as for any damages caused on loading and discharging operations performed by its servants.*

Sole paragraph – the responsibility of the bailee is presumed in cases where cargoes are received without remark or protest" (free translation)

²² Art. 754, sole paragraph, of the Civil Code

²³ Customs Regulation (Decree 6,759/2009, as amended): *"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)

²⁴ Arts. 4 and 14 thru 20 of the Normative instruction RFB 680, issued by the Federal Revenue Secretariat on 5 Oct 2006, as amended, (IN RFB 680/2006) which regulates the Customs clearance of imported goods in Brazil.

Amongst the cargoes that are eligible for advanced clearance are:

- Bulk cargoes delivered through pipelines, conveyors or into silos, consignee's facilities, barges, trucks and so forth;
- Plants and livestock, perishables and products prone to damage;
- Corrosive, flammable, radioactive and hazardous cargoes;
- Paper for printing magazines, journals and newspapers;
- Cargoes imported by the public administration; and
- Cargoes carried by land, lake or river

3.5.3. Advanced cargo delivery

In some circumstances, the Customs may authorise direct delivery into the custody of the importer before the clearance process is concluded. This method is used, for example, in imports of complex, large and heavy pieces of equipment (project cargo) that need to be assembled before Customs checking or when there is no space available at Customs checkpoint to safely store the cargo before delivery to the consignee.

Once the delivery is completed, the importer must provide Customs with evidence of the quantity of cargo in fact received and offset the eventual balance of taxes owing to over-deliveries, as it is the case of shipments in bulk.

3.6. Parametrization and clearance

After the registration of the DI in the SISCOMEX, based on the quality of the information available, the Customs will line up the goods under one of the following modes of control before delivery:

3.6.1. Green channel ■

The import clearance is automatically granted without the need for documentary review or physical examination of the goods, without prejudice to subsequent verification when irregularities are detected after granting of clearance.

3.6.2. Yellow channel ■

The Customs officers review the documentation submitted by the importers and, in the absence of any irregularities, grants release, otherwise carry out a physical examination of the goods.

3.6.3. Red channel ■

The goods are only Customs-cleared after a satisfactory documentary review and physical examination and confirmation of compliance with all legal requirements and regulations.

3.6.4. Grey channel ■

Apart from a documentary review and a physical examination of the goods, a special Customs control is applied to verify eventual indicia of fraud or under-invoicing.

Because of the principle of tax secrecy, information about the outcome of the cargo parametrisation and Customs clearance is only available to the importer and his authorised Customs broker.

On completion of Customs clearance process, SISCOMEX generates to the importer a receipt of import (“*Comprovante de Importação*”) – “CI” as evidence of the legality of the operation and the Customs clearance process is accomplished by physical delivery of the goods to the importer.

3.7. Documentary requirement for cargo delivery

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

Customs’ normative instruction IN RFB 680/2006, which set outs the procedure for cargo clearance, expressly requires the importer to produce the following documents to the bailee:

QUOTE

Article 54 – to remove the goods from the Customs bonded area the importer must present to the bailee the following documents:

- I. ~~Original of the bill of lading, or equivalent document, as a proof of possession or property of the goods; [revoked by Normative Instruction IN RFB 1,356/2013]~~*
- II. Evidence of payment of the ICMS or, if it is the case, proof of exemption for payment of such tax, except in the event of any Unit of the Federation with whom has been concluded the agreement referred to in Article 53 for the payment to be made through automatic debit on a bank account, through the SISCOMEX;*
- III. Fiscal invoice of entry issued on its name, or equivalent document, except in those cases where the dismissal of presentation of this document is foreseen in the State Law; and*
- IV. Identification documents of the person responsible for the withdrawal of the goods.*

UNQUOTE

The same regulation also imposes duties on the bailee who took over the cargo custody from the carrier to hand the cargo over to the consignee, as quoted below.

QUOTE

Article 55 – to deliver the cargo the bailee of the Customs-bonded area is obliged to:

- I. confirm, by consulting the SISCOMEX, the authorisation granted by the Secretariat of Federal Revenue for the delivery of the goods;*
- II. check the presentation by the importer of the documents referred to in Article 54; and*
- III. register the following information:*
 - a) date and time of delivery of the goods, by importation declaration;*
 - b) name, taxpayer registration and respective identification document, including the name of the issuing entity of the person responsible for the removal of the goods;*
 - c) corporative name and the respective taxpayer registration number of the corporation that is transporting the goods for its removal from the bonded area; and*
 - d) The number of the license plate of the vehicles and the number of the license of the driver in charge of the transport referred to in item 'c'.*

The first paragraph – the importer will be exempted from presenting the document referred to in item II of Article 54, whenever the consultation to the SISCOMEX system, expressed in Item I of this article, does not indicate that it is necessary its presentation.

The second paragraph – it is not allowed the demand for presentation of the importation evidence or any other document than those outlined in Article 54 or that required for the fulfilment of the requirements established in its article, as a condition to deliver the goods to the importer.

The third paragraph – the disposition of the second paragraph does not exempt the bailee from adopting measures or to demand compelling proof of compliance with other legal obligations, particularly those set out in Article 754 of Law No. 10,406 of 10 January 2002 – Civil Code²⁵.

The fourth paragraph – In the situation where irregularities are detected, as established in Act by COANA²⁶ or the Chief of the respective Customs unit in charge of the clearance, the bailee must immediately report the fact to the Customs authorities.

(...)

UNQUOTE

IN RFB 680/2006 stipulates that the bailee must safely file and upkeep copies of the documents supporting the Customs clearance for five years, counted from the year after the cargo has been delivered.

3.8. Unclearable goods

Goods which importation into Brazil is prohibited, as explained in Section 3.2 above, cannot be Customs-cleared.

Likewise, no clearance will be granted in the following situations:

- With outstanding duty or tax, unless importer provides security
- That have been seized and subject of penalty of forfeiture
- Imported without an import license (LI) where one is required
- Deemed by relevant authorities as harmful to the health, environment or public safety or incompliant with sanitary, phytosanitary and zoosanitary regulations

The goods that cannot be cleared must be returned to the place of origin or disposed of at the expense of the party responsible for the illegal import.

Goods not collected until 90 days after arrival without the clearance process being initiated by the importer, or within 60 days after the process was commenced but did not progress due to the inertia of the exporter, will be classed by the Customs as abandoned and as such processed, as explained in Chapter 5.

²⁵ The Civil Code (Federal Law 10,406/2002), establishes, the following in article 754: "the goods must be delivered to the consignee, or whoever else present the endorse bill of lading, and the one taking delivery must check the goods and make remarks under penalty of lapse of rights. Sole Paragraph: In case of partial loss or damage that is not perceivable at first sight, the consignee maintains the right of action against the carriers so long as he denounced the damage within ten days counted from the delivery" (free translation)

²⁶ General-Coordination of Customs Administration, Federal Revenue Department, Ministry of Finance (Coordenação-Geral de Administração Aduaneira - COANA, Secretaria da Receita Federal do Brasil, Ministério da Fazenda)

3.9. Customs clearance process flow

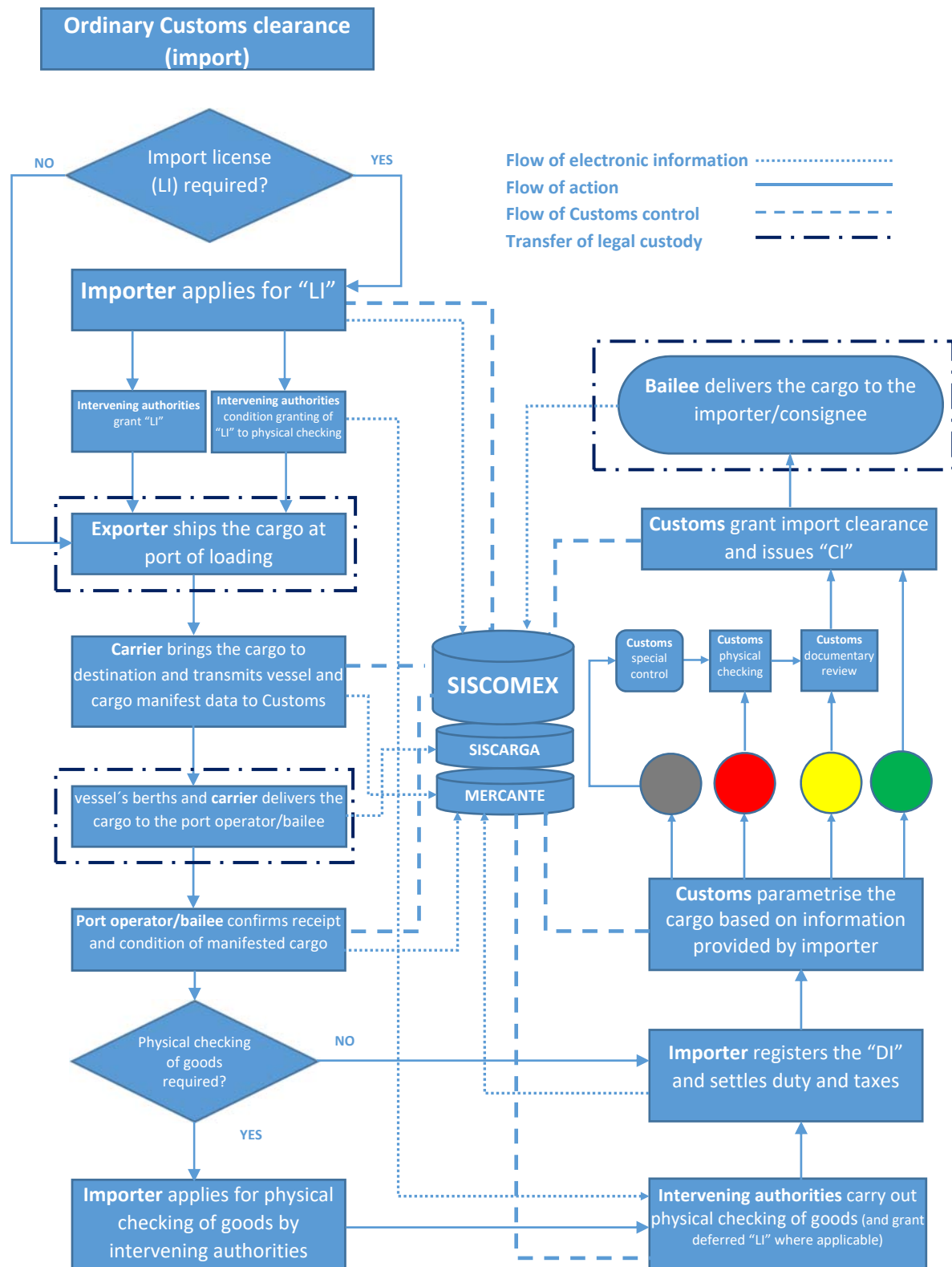


Figure 3: Flowchart of import Customs clearance process

4. Cargo manifest reporting system

4.1. Carrier's duty to report

When a vessel is to arrive, depart or transit through Brazilian Customs-bonded ports, the carrier must timely provide information in respect of the ship herself, the intended ports of call and manifest of cargo and cargo units that are on board, for discharge or transshipment in Brazil or to remain on board in transit to foreign ports²⁷. Failure to comply with the requirements results in penalties in the form of fines and, in many instances, cargo forfeiture (loss), as detailed in Chapter 6.

The information must be transmitted electronically to the Customs over the SISCOMEX's SISCARGA and MERCANTE modules that are accessible with appropriate digital certification. A licensed shipping agent usually lodges the reports on carrier's behalf.

The reporting requirement is regulated by Customs' normative instruction IN RFB 800/2007²⁸ which distinguishes the role of the carrier in the following manner:

- **Operating shipping company:** when the carrier is the operator or the owner of the vessel (vessel provider);
- **Partner shipping company:** when the carrier does not operate the vessel (charterer or slot charterer);
- **Consolidator:** the carrier contractually responsible for packing the cargo at origin who is neither the vessel operator nor a charterer (NVOCC);
- **De-consolidator:** the carrier contractually responsible for unpacking the shipment at destination which is neither the vessel operator nor a charterer (NVOCC); and
- **Freight forwarder:** when the shipment was packed or unpacked by a company based in Brazil

A foreign carrier must compulsorily appoint a certified shipping agent to perform the reporting duties by proxy. It is possible for one carrier to be represented by more than one shipping agent for reporting purposes. Likewise, it is possible for one shipping agent to represent more than one carrier sharing cargo space on the same vessel.

In the context of liner vessels in the container and roll-on/roll-off trade, for instance, which often involves multiple contractual carriers associated with each other in a joint service (slot charterers), each one of the carriers is responsible for uploading data about his cargo irrespective of the vessel provider.

4.2. Reporting procedures

The data to be sent out through the SISCARGA and MERCANTE systems comprise of electronic cargo manifest and bills of lading details and linkage of the manifest with the vessel's call, that is, at which port of call each manifested shipment will be loaded, discharged or remain on board in transit to another port.

²⁷ Article 37 of Executive Law 37 of 1966 (Law 37/1966), which is the cornerstone statute framing the current version of the Customs Regulation, establishes that "the carrier must furnish to the Brazilian Federal Revenue Department all data on the carried cargoes as well as on the arrival of any vehicles proceeding from or bound for abroad, in such manner and time as established by said agency" (free translation)

²⁸ Normative Instruction RFB No. 800 of 27 December 2007, known as IN RFB 800/2007, provides for electronic Customs control of movement of vessels, cargoes and cargo units within Customs-bonded ports.

All import, export and in-transit goods on board must be electronically reported, except stores, provisions and spare parts not covered by a bill of lading. Vessels in a distress call do only need to report if there is any cargo intended to be loaded or discharged at the port of refuge.

The vessel provider is responsible for logging information regarding the vessel, and the intended ports of call whereas the charterers or slot charterers must enter information relating to their cargo currently on board or that will be loaded at a Brazilian port during that voyage.

While the vessel provider can edit and recall information regarding the vessel and ports of call, only the carrier who issued the bill of lading can amend, rectify or delete the entry.

4.2.1. Ports of call information

The vessel provider (or his agent) is responsible for transmitting data about the vessel and the intended ports of call and keeping the system updated about vessel's ETA at those ports. The vessel provider will also inform the Customs which are the partner carriers authorised to link up cargo manifests to the calls.

The obligation to report also applies to vessels in a distress call, cruise vessels, supply vessels, vessels in the cabotage trade and military vessels carrying freight.

After the port of calls have been created by the vessel provider in the MERCANTE, the carrier will be allowed to link up the electronic cargo manifests to the respective ports of call.

4.2.2. Cargo information

Electronic bill of lading (CE)

The "*Conhecimento Eletrônico*" (electronic bill of lading), known as CE, is an electronic representation of a bill of lading in the SISCOMEX system.

The carrier (or his agent) must generate one CE for every bill of lading covering cargo carried on board or booked to be loaded at Brazilian port, according to the ports of origin and destination, and link it to the corresponding manifest for submission to the Customs.

Each CE is issued with a unique and sequential number (other than the B/L number) whereby the shipment will be identified across the various modules of the SISCOMEX enabling the authorities to keep track of it throughout the clearance and delivery process.

CE Type		Port of Origin	Port of Destination
National		Brazilian	Brazilian
Foreign	Export	Brazilian	Foreign
	Import	Foreign	Brazilian
	In-transit	Foreign	Foreign

Table 1: Types of SISCOMEX electronic bills of lading ("CE")

Electronic manifests (e-manifests)

The e-manifests comprising CEs are categorised according to the place of origin and destination of the goods and the vessel's movements within Brazilian ports.

E-manifest Type			Port of Origin	Port of Destination
National	CAB	Cabotage (<i>Cabotagem</i>)	Brazilian	Brazilian
	ITR	Inland (<i>Interior</i>)	Brazilian	Brazilian
	BCN	Transshipment of National Cargo (<i>Baldeação de Carga Nacional</i>)	Brazilian	Brazilian
Foreign	LCE	Oceangoing Export (<i>Longo Curso Exportação</i>)	Brazilian	Foreign
	LCI	Oceangoing Import (<i>Longo Curso Importação</i>)	Foreign	Brazilian
	PAS	In-transit (<i>Passagem</i>)	Foreign	Foreign
	LCI/PAS	Oceangoing Import in-transit (<i>Longo Curso Importação de Passagem</i>)	Foreign	Foreign then Brazilian
	BCE-	Transshipment of Foreign Cargo (<i>Baldeação de Carga Estrangeira</i>) with:	Brazilian or Foreign	Foreign or Brazilian
		LCI Import cargoes transhipped within Brazilian ports bound for Brazil	Foreign	Brazilian
		LCE Export cargoes transhipped within Brazilian ports and bound for abroad	Brazilian	Foreign
		PAS in-transit cargoes transhipped within Brazilian ports and bound for abroad	Foreign	Foreign

Table 2: Types of SISCOMEX electronic cargo manifests (e-manifest)

Each type of e-manifest is subject to specific timeframes within which it must be submitted to the Customs through the MERCANTE, as shown in Table 3 below.

4.2.3. Linkage of manifest to ports of call

The carrier (or his agent) who issued the CE is responsible for linking (or unlinking) the e-manifest to the respective ports of call or shift the CEs from one manifest to another.

Each e-manifest must be connected to as many Brazilian ports as the vessel is intended to call with the cargo on board, no matter whether the load is to be discharged in Brazil or to remain on board in transit to overseas ports.

For example, the vessel is to load a cargo at Miami (USA), bound for Rio Grande (Brazil) and after departure from Miami, she is to call at the Brazilian ports of Recife, Rio de Janeiro and Santos before reaching the Port of Rio Grande. The e-manifest for this LCI cargo should then be linked to the vessel's calls at Recife, Rio de Janeiro and Santos in addition to Rio Grande.

In the case of a shipment loaded at Veracruz (Mexico) for discharge at Buenos Aires (Argentina), with intermediate calls at the national ports of Fortaleza, Salvador and Vitoria, before reaching Buenos Aires, the e-manifest for this PAS cargo should be associated with the calls at Fortaleza, Salvador and Vitoria.

4.3. Timing for reporting

The carrier (and his shipping agent) must comply with stringent deadlines for submission of cargo manifest data to the Customs authorities²⁹.

4.3.1. Port(s) of call

The time frame for the vessel provider (or his agent) creating the intended ports of call in the system is 5 (five) running days before arrival at the first Brazilian port. The time limit is reduced to 5 (five) running hours if it is a vessel in distress call or when the cargo carried is not Customs-controlled.

4.3.2. E-manifests

The linking of the CEs to the respective e-manifests and the associated ports of call must be made according to the ports of origin and destination and meet the following deadlines:

E-manifest Type		Port of Manifest		Port of Bill of Lading		Deadline	
		Port of Loading	Port of Discharge	Port of Origin	Port of Destination		
LCI		Foreign	Brazilian	Foreign	Brazilian	48 hours before berthing at first Brazilian port	
LCI-PAS		Foreign	Foreign	Foreign	Brazilian	48 hours before berthing at first Brazilian port	
LCE		Brazilian	Foreign	Brazilian	Foreign	18 hours before application for outward pass (5 hours for bulk cargoes)	
PAS		Foreign	Foreign	Foreign	Foreign	48 hours before berthing at first Brazilian port	
BCE-	LCI	Brazilian	Brazilian	Foreign	Brazilian	48 hours before berthing at first Brazilian port	
		Brazilian	Foreign				
		Foreign	Brazilian				
	LCE	Brazilian	Brazilian	Brazilian	Foreign	18 hours before request of outward pass (5 hours for bulk cargoes)	
		PAS	Brazilian	Brazilian	Foreign	Foreign	48 hours before berthing at first Brazilian port
			Foreign	Brazilian			
	BCN-	CAB	Brazilian	Brazilian	Brazilian	Brazilian	Prior to application for outward pass
ITR							
CAB		Brazilian	Brazilian	Brazilian	Brazilian	Prior to application for outward pass	
ITR							

Table 3: SISCOMEX cargo manifest reporting timeframes

Due to the proximity between some ports and the fact that the duration of the voyage may be shorter than the relevant timescale, the Customs authorities have made exceptions to certain routes.

The reporting timing is systematically controlled, and late or undeclared cargo manifests lead to civil penalties in the forms of fines and forfeiture of the goods, as detailed in Chapter 6.

²⁹ Art. 22 of Normative Instruction RFB 800/2007

4.4. Manifest reporting process flow

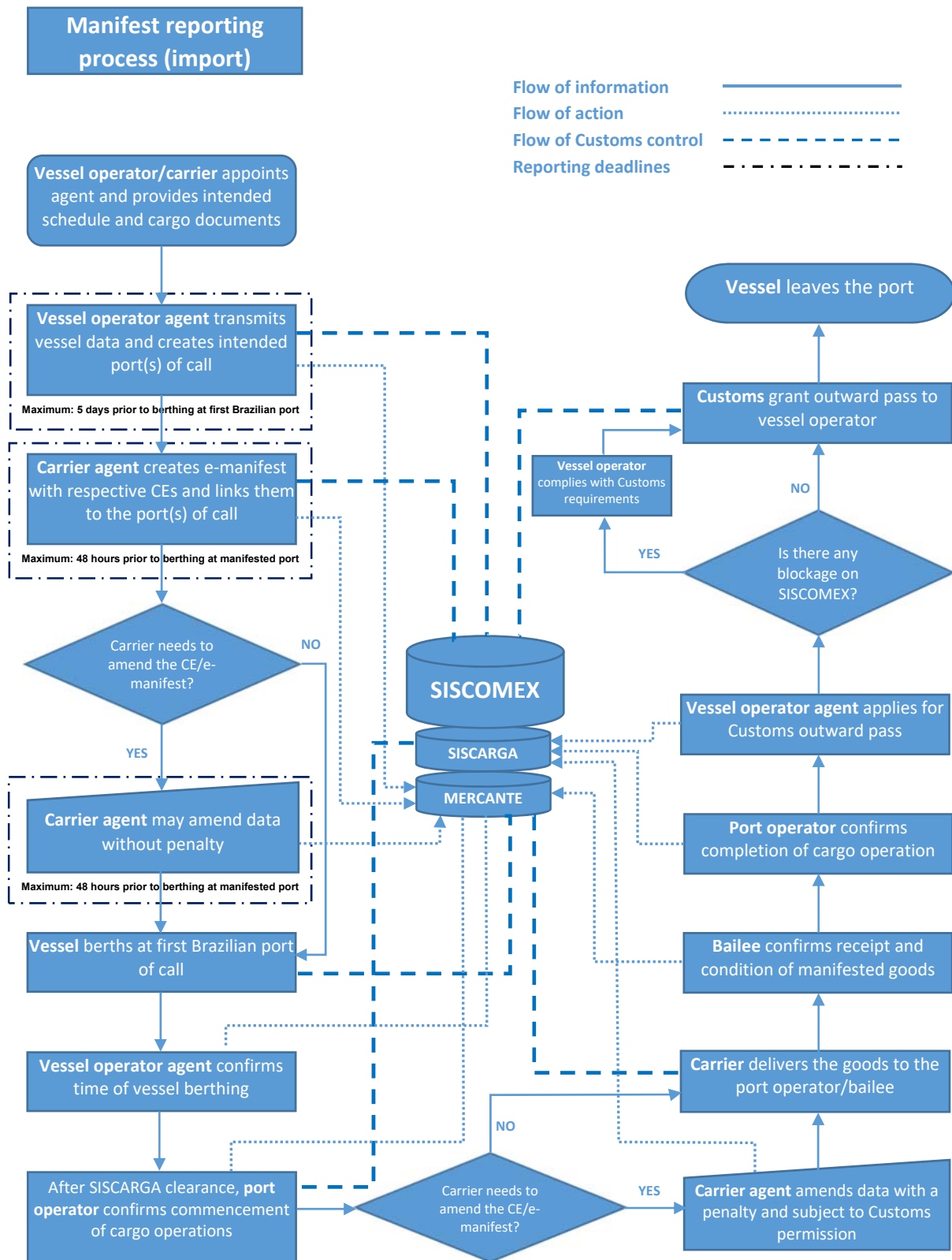


Figure 4: Flowchart of manifest reporting process

5. Cargo delivery issues

5.1. Delivery without original bill of lading

The Master is obligated to safekeep the goods or any effects received on board and to promptly deliver them against the presentation of the original bill of lading. The Law also defines a B/L not only as evidence of receipt but also proof of possession and ownership of the goods. Indeed, no suit can be brought against the carrier if the original B/L is not submitted to support it³⁰. To the same effect, the Customs Regulation defines the B/L as a document of title over the goods³¹.

Nevertheless, in 2013, Clause "I" of Article 54 of IN RFB 680/2006, which consistently with the Law demanded the original B/L, was revoked by IN RFB 1,356/2013³² thereby excluding the presentation of said document as a condition for delivery. In practice, it means the importer can complete the clearance process and pick up 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 non-payment of freight charges and fees owed to the carrier.

This situation led the carrier, in cooperation with most of the terminals in Brazil, to devise a practical protection whereby the bailee would demand presentation of the original B/L to deliver cleared goods, though in some instances the consignees managed the release without the B/L either by way of a court order allowing them to do so or because the clearance was made through a 'house' B/L.

In response to the pleadings of the shipping community, the Customs issued the IN 1,443/2014³³ removing any prohibition of bailees demanding presentation of the original B/L to ensure that the cargo is delivered to the rightful cargo owner. In practice, said normative ruling gave grounds for a delivery procedure that was already being implemented in practice by the bailees in the ports and terminals and that is long established in the legal regime.

However, despite the liberty available under the IN 1,443/2014, a few terminals would still strictly follow the IN 1,356/2013 and deliver the goods which Customs clearance does not involve the obligation to produce the original B/L.

In situations where the ocean freight or local taxes, such as B/L fee, general average contribution or terminal handling charges, are not paid to the carrier through his agent, or when the shipper requests the carrier to withhold delivery because the consignee did not pay for the cargo, the carrier or his agent can put a blockage on the SISCARGA³⁴ to prevent the importer from taking delivery. In some circumstances, court injunctions may be issued to override the blockage.

³⁰ Articles 519, 576, 580, 585, 586, 587 and 589 of Law 556 of 25 Jun 1850 – Brazilian Commercial Code (*Código Comercial Brasileiro*)

³¹ Article 554 of the Customs Regulation

³² Customs' Normative Instruction RFB 1,356 of 3 May 2013 (IN RFB 1,356/2013) which introduced changes to the IN RFB 800/2007

³³ Customs' Normative Instruction RFB 1,443 dated 6 Febr 2014 (IN RFB 1,443/2014)

³⁴ IN RFB 1,356/2013 states: "Article 40. The Shipowner is entitled to determine the withholding of the goods in a bonded storage until payment of the respective freight or payment of the contribution of declared general average, in exercising the right provided for in Article 7 of Decree-Law No. 116 of 25 JANUARY 1967. Sole Paragraph: The system will inform the bailee, upon delivery, the withholding determined by the Shipowner" (free translation)

In the case of containers with consolidated cargoes under a 'house' bills of lading, it is possible for the final consignee to secure the release by producing only the HB/L during the Customs clearance process.

COANA issued a notice to the Union of Maritime Shipping Agencies of the State of São Paulo reminding it of the issuance of IN 1,443/2014 and reiterating that the civil liability for delivery of Customs cleared goods to the right person rests exclusively with the bailee³⁵.

5.2. Uncollected or abandoned cargo

In the event the importer fails to register the import declaration (DI) between 45 days (if the cargo is stored at a secondary Customs zone) or 90 days (if it is at a primary Customs zone), the Customs authority will render the cargo abandoned (uncollected) and line it up for public auction³⁶, donation or destruction. Where the shipment comprises of accompanied or unaccompanied luggage, the time limit for collection is 45 days after discharge³⁷.

After rendering the cargo abandoned, the Customs will apply a penalty of forfeiture over it, and it will be line-up to be sold in a public auction, donated or destroyed, at the discretion of the authority.

The importer is entitled to commence or resume the Customs' clearance process of goods rendered as abandoned before the levying of the penalty. To do so, he must complete certain formalities and pay the import duties and taxes, added of monetary indexation and interest on arrears, besides settling the storage costs with the bailee.

Shipping containers and their accessories move in and out of Brazil under a regime of automatic temporary admission and are not considered as a cargo packaging³⁸. Nevertheless, due to the substantial number of uncollected containerised cargo lying in ports and terminals across the country, it is common that the uncollected cargo is left inside the container it was packed.

Because the procedures for disposal of abandoned cargo is extremely slow, several full containers remain stuck for several months or even years after discharge and, in practice, it is difficult for the carrier to recover the box before the cargo is formally rendered abandoned.

The carrier may attempt to speed up the process by volunteering to unpack the container and dispose of the goods at his expense. Should the Customs authorities deny it, the carrier may seek a court order to try retrieving the box. Court precedents are widely favourable to carriers under the premise that the Law does not deem the container and its accessories as being part of the cargo but as an equipment belonging to the carrier.

Because the liability of the carrier ends upon cargo discharge, no costs, expenses or penalties are legally claimable from him in respect of uncollected cargo.

³⁵ COANA Notice No. 18/2014/GAB/COANA/SUARI/RFB/MF-DF, dated 11 Mar 2014

³⁶ Article 803 of Customs Regulation establishes that 60% of the proceeds of the public auction go to the Special Fund for Development and improvement of Auditing Activities (*Fundo Especial de Desenvolvimento e Aperfeiçoamento das Atividades de Fiscalização*) – FUNDAF, and 40% to the public social security system; however, the carrier receives no compensation for the demurrage of the container with uncollected cargo

³⁷ Article 642 and followers of the Customs Regulation

³⁸ Sole paragraph of article 24 of Law 9,611 of 19/02/1998 – Law of Multimodal Transport (*Lei do Transporte Multimodal*)

6. Offences and penalties

6.1. Legal grounds

The regulations provide for penalties against the carrier for untimely declared (or undeclared) manifest or cargo delivered in discordance with the manifest submitted to the Customs.

The carrier may be held liable whether the alleged offence to the Customs regulation was voluntarily committed or not. Evidence of intent to mislead or deceive the authority is somewhat deemed irrelevant for the levying of penalties and serve merely to emphasise the indispensability of having all cargo timely reported and discharged as manifested³⁹.

The penalties ordinarily levied by the Customs range from a set or proportional fines to, in the worst case, seizure of the cargo or vessel for the application of forfeiture (loss to the Federal Union). Each penalty may be levied separately or cumulatively with each other, in addition to eventual administrative sanctions, and without prejudice to criminal representation ("criminal tax complaint") for crimes against tax legislation, such as fraudulent documents, concealment of property, cargo smuggling and embezzlement.

Penalty	Offence
Fines ⁴⁰	- Noncompliance with reporting requirements - Cargo short-delivery - False or inaccurate cargo declaration - Contempt for the Customs authority - Obstruction of the Customs surveillance action
Forfeiture (loss)	of the vehicle (vessel) ⁴¹ - Noncompliance with regulations on licensing for shipping and international carriage - Performing cargo operations outside Customs licensed facilities - Berthing near to or alongside another vessel enabling the shifting of persons and loads without observing relevant regulations - Navigating without the name and registry number of the vessel visible in the hull - Carrying cargo subject to forfeiture if it belongs to the person responsible for an offence punishable by that penalty of the goods⁴² - Loaded or discharged without Customs permission - Included in spare part list or bonded store inventory in excess of the quantitative and qualitative needs of the vessel, crew and passengers - Carried on board or discharged not covered by a bill of lading, cargo manifest or other similar declaration

Table 4: offences and customs penalties on carriers

³⁹ Article 94 of Law-Decree 37/1966: "Infraction is any action or omission by a natural person or a corporate body, whether voluntary or involuntary, implying in non-compliance with a rule established in this Executive Law or in its regulation or in any administrative act of a normative character intending to complement them.

Sub-art. 1- The regulation and other administrative acts may not establish or discipline an obligation, nor define infraction or provide penalty that are not authorized or provided in law.

Sub-art. 2- Except as otherwise expressly provided, the responsibility for an infraction is not dependent on the intention of the agent or the responsible person and neither on the effectiveness, nature and extension of the consequences of said act" (free translation)

⁴⁰ Articles 32, 41, 96, 106 and 107 of Law-Decree 37/1966 and articles 660, 661, 664 and 702 and followers of the Customs Regulation

⁴¹ Article 104 of Law-Decree 37/1966 and article 688 of the Customs Regulation

⁴² Article 105 of Law-Decree 37/1966 and article 689 of the Customs Regulation and Article 23, IV, of the Executive Law No. 1,455 of 7 Apr 1976

6.2. Manifest reporting penalties

Customs Regulation provides for penalties for failure to provide information through the SISCOMEX system about the vessel and cargo carried on board within the timescale set out in Table 3 above.

The penalties may be in the form of pecuniary fines or forfeiture (loss) of the goods which were belatedly reported or not manifested at all.

6.2.1. Fines

Failure to report information about the vessel and the cargo carried on board within the timescale set out in Table 3 above results in a penalty of BRL 5,000⁴³.

While the Law does not establish the exact basis for calculating this penalty, as a matter of procedure, the Customs authorities levy one fine for every e-manifest or CE created or amended after the deadline. COANA, on the other hand, understands there should be one fine (BRL 5,000 apiece) for every piece of information tardily reported⁴⁴.

6.2.1. Forfeiture (loss)

Cargo not reported by the time the vessel berths at the port of call lead to a penalty of confiscation of the goods in addition to an eventual fine in the sum of BRL 5,000 per bill of lading.

In practical terms, after the reporting deadline had expired but before berthing, the addition or amendment of an e-manifest, for a change of route or destination, for example, might result in a fine. After the vessel comes alongside, the undeclared cargo would be subject to forfeiture.

Once the vessel has reached the berth, voluntary disclosure cannot be argued to dismiss the penalty of fine or forfeiture of goods⁴⁵.

Shipments subject to forfeiture are lost to the Federal Union and disposed of by⁴⁶:

- Sale at public auction to the highest bidder or donation to charity
- Incorporation to the Public Administration
- Destruction or disablement

Where the delay in submitting electronic data to SISCOMEX is attributable to the cargo interests, carriers are entitled to seek a recovery of the amount of the fine from the shipper or consignee responsible for providing the information or instruction out of time.

⁴³ Art. 107 of Law 37/66: "Art. 107. The following fines apply: (...) IV – of R\$ 5,000.00 (five Thousand Reais) for: (...) e) failure to provide information about the vessel or the cargo carried on board or about operations carried out, in the form and within the time frame set forth by the Federal Revenue Secretariat, levied upon the international transport company, including service renderers in the express international door-to-door transport, or Freight forwarders" (free translation)

⁴⁴ Internal Consultation Solution No. 2-Cosit issued by the General-Coordination of Customs Administration, Federal Revenue Department, Ministry of Finance (Coordenação-Geral de Administração Aduaneira) - COANA on 4 Feb 2016, which conclusion reads:

"Conclusion: In view of the foregoing, the solution to the internal consultation to the interested parties is:

a) the fine set forth in art. 107, Subsection IV, items "e" and "f" of Law-Decree No. 37 of 18 November 1966, with wording given by Law No. 10.833 of 29 November 2003, is applicable for every information provided in discordance with the form and timescales established by Normative Instruction RFB nº 800 of 27 December 2007;

b) the alterations or rectifications of information already provided do not configure late provision of information, therefore, are not subject to the fine herein discussed" (free translation)

⁴⁵ Article 102 of Law-Decree 37/1966 and Article 683 of the Customs Regulation

⁴⁶ Article 803 of Customs Regulation, which sub-chapter 2, establishes that 60% of the proceeds of the public auction go to FUNDAF and 40% to the public social security system, same as with abandoned goods

Most carriers, particularly those engaged in liner services in Brazil, adopt a standard procedure whereby the cargo interests are asked to sign an undertaking to pay or reimburse the carrier for Customs fines arising out of late submission of cargo information or routing.

6.3. Cargo shortage penalties

For taxation purposes, the carrier is liable to pay the import duty and taxes falling on imported goods which have been discharged under the following conditions:

- Cargo replaced after it was loaded on board
- Packaged cargo landed with evidence of tampering with
- Cargo delivered with weight or dimension lower than manifested⁴⁷

If the cargo shortage occurred after delivery by the vessel, the liability would rest with the port operator or terminal who acted as bailee and took over the custody from the carrier.

6.3.1. Shortage allowances

There are no allowances for shortage of containerized, breakbulk or general cargo.

The carrier remains liable to pay the duty and taxes falling on the short-delivered parcel which would have otherwise been paid by the importer had the cargo been delivered as manifested. In addition to duties and taxes proportional to the shortage, a fine corresponding to 50% of the import duty is also levied.

Cargo type	Allowance	Penalty
Liquid bulk Solid bulk	< 1%	None
	> 1% < 5%	Import duty and taxes proportional to the shortfall in the range > 1% < 5%
	< 5%	Import duty and taxes proportional to the shortfall beyond 1% + Cumulative fine of R\$ 5,000 for every percentage point beyond 5%
Container Breakbulk General cargo	None	Import duty and taxes proportional to the shortage + Fine of 50% over the rate of import duty

Table 5: Shortage allowance and penalties

On the other hand, bulk cargoes are subject to an allowance of 1% of the manifested quantity with import duty and taxes only being collectable from the carrier for shortage exceeding the 1% allowance. Also, fines are only imposed for shortfalls beyond 5% of the bill of lading figure.

Although there are no set allowances for short delivery in the civil legislation, by analogy, the civil courts tend to rely on the allowances established in the Customs Regulation to decide upon legal claims brought by cargo owners or subrogated underwriters.

⁴⁷ Articles 660 and 661 of the Customs Regulation

6.3.2. Final checking of manifest

The shortage allowances are subject to the so-called “final checking of manifest”, a procedure conducted by the Customs authorities to ascertain the tax liabilities for eventual cargo shortage or overage⁴⁸.

When the same commodity in bulk is carried in a single voyage and discharged in multiple ports, the Customs House with jurisdiction over the last port of discharge performs the final checking of the manifest. It will consider the global cargo manifest figure and compare it with the aggregate outturn of the discharging ports to determine whether there was a global shortage or an over-landing and, if so, whether it exceeded the allowed limits.

If the shortfall is greater than 5 % of the manifested quantity, the duties and taxes beyond 1% will be collected along with a fine in the sum of BRL 5,000 for every percentage point above the 5% threshold⁴⁹, as detailed in Table 5 above.

The consignee is responsible for paying the import duties and taxes applying on the over-delivered parcels exceeding the 1% allowance.

6.4. Time bar

As a rule, The Customs authorities have five years, counted from the calendar year after that of the offence, to claim penalties or taxes purportedly due to the Federal Union owing to alleged violation of the Customs regulations⁵⁰.

The running of the limitation period is halted after the commencement of an administrative proceeding.

⁴⁸ Articles 658 and 659 of the Customs Regulation

⁴⁹ Articles 72, 237, 251 and 727 of the Customs Regulation

⁵⁰ Articles 174 of the National Tax Code (*Código Tributário Nacional*) - CTN, Law No. 5,172 of 25 Oct 1966, as amended

7. Defences and safeguards

7.6. Exclusion of liability

Carrier's liabilities for penalties connected with improper reporting and short deliveries can only be excluded in the event of force majeure or act of God in which case the Master must tender a sea protest and have it ratified by a civil court within 24 hours of vessel's arrival at the first Brazilian port of call after the event.

Protests registered in public notary's offices without court ratification are not acceptable for excluding tax liabilities.

7.7. Settlement and defences available

While the carrier (and his agent) is entitled to file administrative defences directly with the Customs, in almost all the cases the defence is rejected for no better reason than the fact that the defence is heard by the very same authority that levied the notice of infraction in the first instance, its underlying interest being to enhance tax collection by the Federal Treasury.

There are no set timeframes within which disputes about penalties and taxes levied on the carrier should be settled. In practical terms, a discussion in the administrative sphere takes no less than four to six years to be resolved whereas in the judicial system it could easily take from five to eight years until a final and unappealable judgment.

Once a notice of infraction is levied upon the carrier, there are three options he can choose to take.

7.7.1. **Payment of the debt**

Outstanding customs penalties cannot be waived or negotiated. Nevertheless, if the debt is paid within 30 days from the service of the notice of infraction, a 50% discount on the fine itself (not the taxes) is usually granted.

7.7.2. **Administrative appeals**

In the administrative sphere, the carrier may lodge a defence or opposition challenging the notice of infraction and stating the reasons why the penalties levied by the Customs should be dismissed.

The filing of the administrative appeal stays enforcement of the debt under dispute and halts the running of the five-year limitation period within which the Federal Union can commence legal proceedings for tax execution.

No bond or security needs to be posted with the Customs to file the administrative appeal, though it is possible – and often advisable – to deposit the disputed amount administratively to curb accrual of indexation and interest over the principal amount by the SELIC benchmark interest rate⁵¹.

⁵¹ Special System for Settlement and Custody (*Sistema Especial de Liquidação e de Custódia* – SELIC) is the basic interest tax defined by the government for outstanding federal debts, among others

In the first administrative instance, carrier's challenge is heard by the Customs' judgment units called DRJ⁵² where the tendency is the upholding of the notice of infraction, save in the event of obvious material breach of the tax legislation.

Should the defence be dismissed by the DRJ, the carrier can file a voluntary appeal to the CARF⁵³, which is the second instance of the federal administrative sphere composed by counsellors designated by representatives of taxpayers and governmental authorities.

The chances of reversing the levying of the penalties are slightly better than at the first administrative instance, though with a propensity towards the tax authorities' interests.

The downside in resorting to the CARF is that the appeal might take a very long time, usually no less than five years, to be heard by the CARF and during this period the amount challenged will continue to be indexed by the SELIC rate if no administrative deposit was effected when the administrative proceedings commenced.

In case the decision is unfavourable to the carrier's interests, there is still a possibility of filing a special appeal to the CSRF⁵⁴, but only if the decision rendered conflicts with at least two previous decisions by the CARF on the same subject, but then again, the odds are so somewhat against the taxpayer's interest.

7.7.3. Court remedies

The best alternative to challenge Customs penalties is by taking the dispute to a federal court, either by way of ordinary proceedings or a motion for writ of mandamus (court injunction), where the chances of success are much better than in any of the three levels of the administrative appeal.

The federal justice system is also made up of a three-tier structure, namely the trial court, the courts of appeal⁵⁵ and, at the third degree of jurisdiction, the Superior Court of Justice⁵⁶ and the Federal Supreme Court⁵⁷. The former is the highest court for nonconstitutional rules of law, and the latter would only be called upon to resolve conflicts involving a breach of constitutional principles.

The enforcement of the tax liability in the legal sphere can only be stayed after upon deposit of the disputed amount or posting of security. The deposit is kept into an interest-bearing judicial account while the proceedings develop. If the penalties are affirmed, the amount deposited would be released by the court to the Federal Union; otherwise, it would be refunded along with the legal accruals.

Even though the federal courts are generally as overbusy as the CARF, they tend to a better choice for their decision are much more in line with the prevailing jurisprudence of the higher courts and the best legal doctrine.

⁵² Federal Revenue Regional Judgment Unit (*Delegacia Regional de Julgamento* - DRJ)

⁵³ Administrative Council for Tax Appeals (*Conselho Administrativo de Recursos Fiscais* - CARF) is a collegiate body under the purview of the Ministry of Finance

⁵⁴ Higher Chamber for Tax Appeals Chamber (*Câmara Superior de Recursos Fiscais* - CSRF), is a higher chamber within the structure of CARF

⁵⁵ Federal Regional Court (*Tribunal Regional Federal* - TRF)

⁵⁶ Superior Court of Justice (*Superior Tribunal de Justiça* - STJ)

⁵⁷ Federal Supreme Court (*Supremo Tribunal Federal* - STF)

8. Conclusion

It is essential that the carriers and shipping agents take all necessary precautions to ensure compliance with the strictly-controlled reporting timeframes required under SISCOMEX regulations to avoid fines and confiscation of goods.

Considering the laws and regulations currently in force in Brazil, all imported goods carried by sea should be discharged from the vessel to a bonded port or terminal to be subsequently delivery, by the bailee, to the rightful consignee after permission from the Customs authorities and payment of the freight and associated handling fees and storage costs. The carrier has no control over the cargo delivery process and, therefore, cannot be penalised if the cargo is delivered without the original bill of lading.

We hope you have found this publication to be of assistance and welcome your questions, comments or suggests on the issues discussed, so we can better tailor information to your needs.

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