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H.E. Mr U Kyaw Myo
Union Deputy Minister
Ministry of Transport and Communications
Naypyidaw, Myanmar (Burma)

6 April 2017

Excellency,

RE: CHANGES TO NATIONAL CARGO COLLECTION AND RELEASE POLICY

On behalf of the International Chamber of Shipping (ICS) - the principal global trade association for shipowners, representing over 80% of the world merchant fleet, with a membership that comprises national shipowners associations from 37 countries - I am responding to your letter dated 13 January 2017.

ICS welcomes the clarifications provided through the correspondence by the Ministry of Transport and Communication, regarding the recent changes to the Myanmar cargo release policy. As suggested in your communication, we look forward to continued co-operation on this and other issues concerning the shipping industry in Myanmar.

In this context, we wish to respectfully provide some additional comments (in attachment) about the new policy and to highlight a number of issues that remain of concern for our membership, to which further consideration and clarification would be highly appreciated.

ICS once again takes this opportunity to thank you for your co-operation. Please accept the assurances of our highest consideration.

Yours sincerely

P B Hinchliffe
Secretary General

Copy to:

Mr. U Ni Aung, Managing Director, Myanmar Port Authority (MPA)

Myanmar Shipping Agency Department (SAD)

His Excellency Mr. Kyaw Zwar Minn (Ambassador Extraordinary and Plenipotentiary of the Republic of the Union of Myanmar to the United Kingdom of Great Britain & Northern Ireland)

Julian Abril Garcia (Head, Facilitation, Sub-Division for Maritime Security and Facilitation (MSF), International Maritime Organization (IMO))

Jonathan Williams (General Manager, The Federation of National Associations of Ship Brokers and Agents (FONASBA))

ICS FOLLOW UP COMMUNICATION REGARDING CHANGES TO NATIONAL CARGO COLLECTION AND RELEASE POLICY IN MYANMAR

1 Issuance of Delivery Order (D/O) in relation to Main-line operators (MLO)

At ICS we remain concerned about the process surrounding the issuance of D/Os, in particular as regards to MLOs that do not provide a direct service to Myanmar but use other companies' feeder services. It appears that currently the Myanmar Shipping Agency Department (SAD) liaises with the feeder company prior to issuing the D/O, instead of the MLO that has issued the Original Bill of Lading (OBL).

Prior to the issuance of a D/O, confirmation should be sought from the MLO as opposed to the feeder company, to the effect that the MLO assumes the legal responsibility to transport cargo to Myanmar based on a service contract with the consignee. This will help to circumvent the risk of cargo being released incorrectly and the potential failure to collect ocean freight.

SAD has taken over the task of issuing a D/O upon presentation of a Bill of Lading (B/L), which in the past shipping lines or their independently appointed agents were permitted to do in their own offices. It is not clear why this role has been delegated to SAD. We therefore request that the Government thoroughly consider reverting to the previous procedures, as this would be the most appropriate course of action.

2 Cargo release and the Bill of Lading (B/L)

With regard to cargo release by SAD against presentation of a B/L by the consignee, your correspondence indicated that "SAD issues the D/O to the consignee only after receiving the 'Release Instruction Confirmation' from the shipping line principal by email and that SAD will never issue a D/O without consent from the shipping line/Principal". On this issue, we wish to reemphasise that confirmation should be sought from the MLO, not the feeder company.

The release of cargo by SAD directly to a consignee automatically upon presentation of a prepaid OBL is a major concern, as a B/L in the hands of any party should not immediately mean that they are the lawful holder. The B/L should be properly endorsed by the lawful holder and title must be properly assigned before any party can claim any goods from the carrier at the place of delivery.

This should apply even for the rightful owners of the goods. By virtue of a contract of sale and in the absence of an OBL or a similar bill that assigns title to them, they are not entitled to collect consignments. However, the interpretation by SAD appears to be that any party with a B/L in hand is entitled to the delivery.

The current cargo release policy also renders carriers vulnerable to potential litigation. For instance, in the event of a dispute between a buyer and a seller, in which one party or the other party presents an unendorsed B/L and the goods are released, the carrier could be deemed liable for misdelivery if a claim was brought against it.

We have similar concerns regarding the due diligence undertaken by SAD to certify the authenticity of a B/L, prior to issuing a D/O. Since carriers no longer have any control over this process, unless the previous policy is reinstated, we respectfully propose that in the event of fraud or misuse of an OBL, SAD should formally accept full responsibility for any subsequent misdelivery of cargo.

It is also unclear how SAD is able to correctly identify the OBL of each individual shipping line, making this procedure rather impractical, unless SAD would be in a position to accept liability for misdelivery.

Sometimes the status of the shipments may change, for example, if there is a new request by the shipper in the country of origin, which leads to amendments of the B/L. This may result in additional local charges that need to be settled before a D/O is released to the consignee. SAD is unable to oversee this particular process as access to the internal computer systems of liners is required. Regrettably the loss of revenue by shipping lines is considerable as a result.

There are numerous other factors that could affect the status of shipments, and therefore require the internal knowledge and processes of shipping company systems at the time of a D/O release. However, it would be extremely impractical for shipping lines to continuously monitor each individual shipment to inform SAD of any changes. The sheer volume and additional workload would be overwhelming.

3 Detention charges

With regard to the setting of ceiling rates on detention charges, ICS wishes to reiterate that applying predefined tariffs is contrary to the spirit of freedom to contract. Therefore, in line with fair competition principles, we also recommend that carriers should be allowed to set their own tariffs, and enter into contracts with customers in Myanmar based on mutually agreed terms and rates, including documentation fees, terminal handling charges, local charges and detention charges. This is customary practice that is used worldwide.

Moreover, lines should be allowed to set detention charges based on market forces and consignees should be able to raise any complaints directly to shipping companies or to decide for themselves to employ the services of an alternative service provider, if they believe that their current one is overcharging.

4 The role of the Myanmar Shipping Agency Department (SAD)

Worldwide all shipping lines have their own agents who undertake their responsibilities in line with official agency agreements, outlining duties and responsibilities and other aspects, such as remuneration. The approach adopted in Myanmar is in stark contrast to this globally recognised approach, with SAD being viewed as the 'Agent' that acts as an intermediary in customs processes and cargo release procedures, taking in services fees. However, SAD is not liaising with shipping companies directly as all agents are expected to do and at present there are no contracts between shipping companies (or their agents) and SAD for this to work in the best interests of all concerned.

As far as the customs related information is concerned (e.g. customs manifest), we propose that information should be electronically transferred to customs authorities directly, in line with normal practices worldwide. Despite the implementation of the Myanmar Automated Cargo Clearance System (MACCS), which is meant to ease the customs manifest process by electronically transferring information to customs from shipping lines, SAD has insisted that lines must follow manual submissions of data to them which defeats the purpose of introducing the system in the first place.

On top of this, many functionalities that can enhance the process are currently disabled due to the manual process SAD has enforced. This is leading to a substantial increase in the workload of shipping lines, customs brokers and consignees, while also increasing the likelihood for potential human error and delays on all sides.

Like elsewhere in the world, it is crucial that shipping companies in Myanmar are able to appoint their own agents, who should in turn be able to receive B/Ls and certify their authenticity prior to the issuance of release orders. A process which ideally should take place through the liners' offices or through their appointed agents.

We understand that since this change of policy, at times SAD has released import cargo without consent from the relevant shipping lines. Therefore, in the event of an incorrect release, SAD should be deemed liable.

5 Discussions with interested stakeholders

In the response to the original ICS correspondence the Government indicated that continuous consultations with interested stakeholders, including the Myanmar Mercantile Marine Development Association (MMMDA), the Myanmar International Freight Forwarders' Association (MIFFA) and the Myanmar Custom Brokers Association (MCBA) are taking place.

In this regard, we commend the fact that the Ministry of Transport and Communication (MOTC) recently facilitated a meeting between the Myanmar Port Authority (MPA) and SAD with the MMMDA, whereby MPA and SAD reportedly informed of their intention to consult with the MOTC on this issue and to take into account MMMDA's views.

We also welcome the discussions held between the Government, MMMDA, MIFFA and MCBA in September last year, to form a committee with the aim of minimising logistical costs and time in Myanmar. We understand that all three stakeholders were able to present their views, encouraging the Government to return to the previous policy.

The above notwithstanding, ICS also understands that during those discussions with the MMMDA (in May 2016), on how to ease port congestions at Yangon, it was determined that many consignees left their import containers at loading/discharging terminals due to high storage charges within areas located outside those terminals, hence the acceptance of a brief and 'temporary' (April-June 2016) uniform detention charge by MMMDA. However, it appears that this short-term arrangement has now become permanent and based on the MPA's own tariff.

Therefore, in line with MMMDA's letter to the MOTC (dated 14 January 2017), we respectfully request that the Government revert to allowing shipping lines to collect detention charges based on their respective policies, tariffs and subject to contractual agreements with customers. To do otherwise would severely hamper the essence of competition regulations.

6 Adverse impact on fair competition

All shipping line agencies in Myanmar are registered in the private sector, under the Myanmar Investment Law, and all lines and agencies are in fair competition under the law and directive of the Directorate of Investment and Company Administration (DICA), which assists consignees in Myanmar to export and import their cargoes at reasonable transport costs. Excessive Government intervention on freight and surcharge rates inhibits fair competition and calls into question the viability to conduct business in Myanmar, for shipping lines, agents and consignees alike.

While the MOTC has expressed its intention to never intervene in fair competition with regard to rates and charges in the shipping industry, it may be doing so inadvertently, by setting pre-defined ceilings on tariff rates.

It has also been brought to our attention that since February 2017, the national Burmese shipping line 'Myanmar Five Star Line (MFSL)' resumed its port calls at Yangon, but unlike other shipping lines, they are not required to go through SAD. If this is indeed the case, it would severely jeopardise the spirit of 'fair competition', which the global shipping industry benefits from all over the world, in order to continue to thrive.

7 Myanmar Carriage of Goods by Sea Act

Regarding the B/L provisions within the Myanmar Carriage of Goods by Sea Act, we understand that the Act simply states that the B/L representing goods shall be conclusive evidence against the carrier, unless the carrier was notified at the time of receiving that bill. If there was shortage, the carrier is liable.

The above mentioned provision does not appear to be related to the title of goods in any way, which is a different matter altogether. Moreover, as a document of title, carriers are contractually bound to deliver in accordance with what is stipulated on the B/L. If it was to order, then the shipper would be required to endorse and assign title to persons at the place of delivery.

In the absence of endorsement by the shipper, no one should be permitted to endorse or collect delivery simply by presenting a B/L.

8 Depots/terminals and empty containers

With regard to SAD's stamping of the location for returning empty containers, this practice has had a severe impact on the efficiency of shipping lines and a negative effect on their operational costs. Therefore, we strongly advise that SAD should reassign the task of stamping the return location for empty containers back to shipping lines.

Moreover, we also suggest that shipping lines should be permitted to determine their contracted depot and to assign the depot for the return of empty containers. They should also be able to execute/collect detention charges prior to the return of empty containers.

9 FONASBA

The Government correspondence states that “MPA instructed shipping lines not to collect unnecessary service charges from the consignee” with reference being made to the FONASBA Standard Liner and General Agency Agreement (5.0 – Remuneration).

However, while the above mentioned provision is related to expenses between the principal (shipping line) and the agent (in this case SAD), and the principal is indeed responsible for the payments referenced, it should be noted that local charges/surcharges serve to cover costs different to those stipulated in the FONASBA Standard Liner and General Agency Agreement.

Local Surcharges are related to the customers’ payment responsibilities for monies owed to shipping companies as a result of services rendered. These are paid either directly to shipping lines or in some cases the agent collects the charge on behalf of the liner. We therefore suggest that this should not be a justification for restricting shipping companies from collecting surcharges.

We also propose that shipping lines should not be compelled to stop collecting these charges, as it has a severely negative impact on their economic sustainability, keeping in mind that the only main revenue stream remaining are detention charges, given that since October 2015 the MPA has prohibited liners from collecting demurrage.

Additionally, the “Remuneration” section of the FONASBA Agency Agreement states that “The Agent will always strictly observe the shipping laws and regulations of the country and will indemnify the Principal for fines, penalties, expenses or restrictions that may arise due to the failure of the Agent to comply herewith.”

In this context, if SAD is deemed by the Government to be an agent of all companies (including MLO and NVOCC), then in line with the FONASBA Agreement an official notice should be issued confirming that SAD would bear the responsibility for any claims raised due to misdelivery of cargo. We also understand that Myanmar is not a member of FONASBA, and therefore the provisions of the FONASBA Agreement do not apply to agents operating in the country.

The above notwithstanding, it is worth noting that the Standard Agency Agreement in question is one of a wide range of similar standard agreements. Unless it is signed between individual shipping companies and the shipping agent SAD (in this case), its provisions should not apply in Myanmar.

10 Summary of ICS recommendations

- ICS sincerely hopes the Myanmar Government will give thorough consideration to returning to its previous policy on container cargo collection and release, which was in line with customary global practices on container trade. This will undoubtedly safeguard the stability and reliability of international maritime transportation to Myanmar.
- We recognise and respect the fact that the intention of amending the original policy was to ease congestion in Myanmar ports and therefore ICS, like the carriers' groups in Myanmar, including the MMMDA, are willing to continue to engage in further discussions in order to find more effective solutions for easing port congestion in Myanmar.

We sincerely hope the above comments are beneficial to your deliberations and wish to once again express the willingness of ICS to engage further on this and other issues.