Navigating the maze of shipping terms and conditions

BY GUY M. TOMBS

I have been working as an international freight forwarder and shipbroker for almost 40 years, and would like to share several reflections based on what I am now seeing in the market, hoping that some of what I say will be useful to you. You may or may not agree – if you laugh in recognition, well – I am fine with that.

International freight forwarders now live in an RFQ World, with RFQ standing for *Request for quotation*. The expression RFP for *Request for proposal* is also used, as is ITT, which stands for *Invitation to tender*. They all mean the same thing. We spend a lot of time preparing bids, much more than in the past.

Years ago a customer or shipper often had a preferred freight forwarder and stayed with this firm loyally – but some felt these relationships were too cosy – the customer's shareholders may have demanded more transparency and accountability, and more sophisticated procurement systems emerged. A science called supply chain management or SCM began. Shippers shared information and techniques within SCM circles to strengthen their hands in negotiations with freight forwarders and carriers. On larger cargoes or shipping contracts, customers and shippers have developed substantial and complex RFQs – and with the aid of email they can send these out to many pre-qualified forwarders at the click of a mouse. The RFQ may be downloadable from a website if you already have a username and password. An international freight forwarder *wants* to be on many bid lists – without it, the firm cannot 'participate' in the bid process.

At the beginning of my career, the terms and conditions governing an international transport movement, and the relationship with our client, would be those on the transport document, the Bill of Lading (B/L), whose format and terms and conditions would be pretty familiar. But in recent years, in asking for pricing from so many freight forwarders, on the larger contracts the shipper is now dealing with many firms never before dealt with, and whose likely performance for the project at hand is unknown. So the RFQs nowadays may add a whole new slate of mandatory terms and conditions, additional to, and even taking precedence over, the ultimate B/L terms, to protect the shipper from the unknown, and from the party they are awarding the contract to. If the shipper has a misadventure with a big movement – these RFQ terms and conditions may well balloon still further, in ways specific to the misadventure, with the guidance of the shipper's corporate lawyers, on future RFQs.

I hope you agree we are now entering a maze (think back to that age-hold *labyrinth* on the island of Crete), where things are not always as they seem. I try to navigate this maze. I work in it, so I am not trying to *emerge from* it or to *enter into* it – I *live in* it. I am now coming across energized and ingenious maritime lawyers, insurance underwriters and brokers, SCM professionals, sometimes mystified ocean carriers, jostling in the maze's dimly lit passageways.

What can emerge in our relationship with the customer is an agreement with a set of contractual terms and conditions that look very different from the Bill of Lading terms and conditions (or T&Cs, as they are called), that are largely pulled over from procurement norms for other goods and services that the customer is purchasing. We may be asked to agree that these RFQ T&Cs *take precedence*, where they differ, over our firm's T&Cs or standard trading conditions and over those on the Bill of Lading. A freight forwarder's underwriters are naturally curious about our undertakings with both customer and ocean carrier on large contracts. Is this a netherworld?

My reflex, honed in a less litigious and less adversarial era, is to approach customers as an agent — a servant, really — and to offer them counsel as to the best structure for their shipping contracts, in a way that best serves their interests.

There are basic differences between *liner bookings* and *charter parties* or *booking notes* that are best not glossed over.

We may present ourselves to the customer as an agent, *not* a principal – the customer can in turn insist that we *are* a 'contractor' or a principal. Also we may be asked by the customer *not* to represent ourselves as the *agent* of the customer to the ocean carrier or other suppliers – when the ocean carrier considers us exactly and only that. The ocean carrier may go a step further than the customer and insist, in certain circumstances, that for contractual purposes, the freight forwarder *is the merchant,* and the actual customer or shipper is not relevant to them. Is this what psychologists call *cognitive dissonance*? We may speak one language to the shippers or customers and another quite different language to the carriers.

On large projects, an international freight forwarder may be asked to sign a form of contract, embedded in the RFQ, that virtually no ocean carrier would sign.

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We act as both international freight forwarders and shipbrokers. I am convinced, from my experience, that at a certain point on some very complex or large shipments, it is much better for the shipper to contract the ocean portion of the movement directly with the ocean carrier via a shipbroker in a transparent manner, rather than via an international freight forwarder – and for the shipper or customer to be the *charterer* in these instances. It is in my view very much in the interest of the customer to consider this, in certain cases. To be crude, a large and complex shipment can sometimes turn into a mess if you don't proceed in this direction. That would be like confronting the Minotaur in that ancient labyrinth!

If things 'go south' during a large shipment, as a charterer you will have more tools at your disposal than if you simply play the card of 'the freight forwarder is the contractor' and try to beat up on the freight forwarder. I know that some corporations or even government departments may find it difficult seeing themselves as charterers – they may be outside of their comfort zone as charterers – but taking the time to master the terms of chartering is well worth it when the stakes are high, and millions of dollars are at stake. There is a *tipping point*, in my view, on certain large movements, where it should be patently obvious that chartering makes better sense than forwarding.

But the customer or supply chain manager may not want to think of herself or himself as a 'charterer', not a term often used in SCM. So who then becomes the charterer? Enter the international freight forwarder. One recognizes and respects the quandary the customer is in – where the

customer has a strong desire to have just one contract on a large door-to-door job. But considerable analysis and expert counsel may be needed before making a determination of the best way to contract these jobs – as one contract with one party, as more than one with this party, or as more than one contract with more than one party.

One of the procurement rationales of SCM is that it is designed to drive prices down – but where the international freight forwarder is being asked to take on further risk, even considerable risk, to secure the contract, it can hardly drive prices down as a rule. The customer may not have visibility of the vessel charter undertakings of the international freight forwarder — the vessel operator in turn may not have a view of the mandatory customer SCM 'terms and conditions'. The international freight forwarder effectively is being required to 'bridge' any differences, in liability, in payment terms, potentially a whole gamut of special conditions. The terms in the 'back-to-back' contracts may not mirror each other at all – apart from cargo details, place names and dates. There may be a mandatory 'purchase order' to sign with the customer.

The parties in supply chain management may be unfamiliar with vessel chartering or part chartering or booking notes and so will be relieved that the international freight forwarder, either directly or via a shipbroker, actually does grasp the concepts, and can convey them in a conversationally clear form. But because of the contractual interplay amongst the various parties, there can be a temptation or tendency to gloss over any dramatic differences between the mandatory SCM terms and conditions and the actual vessel charter terms – which can leave the customer needlessly exposed.

From the freight forwarder's and shipbroker's perspectives, the best approach, in my view, is simply to operate with commercial savvy and integrity: to advise the client of the risks entered into, to avoid mystification, to clarify chartering terms, and to be transparent with respect to what is actually happening with the shipment, and its schedule, from the time before the 'fixture', and throughout, with valid information on vessel positions, and as the movement progresses – with good on-the-ground information. Operational excellence and tight management control are key to the success of a large movement – whether acting as an international freight forwarder or shipbroker, one must insist upon that. The sun will shine, when all goes well, and one is free of the maze of overlapping, sometimes dissonant shipping terms and conditions – and like Theseus on Crete, I can emerge and relax for a while and head back to the mainland.

Guy M. Tombs is the President of Guy Tombs Limited, Montreal freight forwarders and shipbrokers, established in 1921