INSIGHT

JONES FEE
BARRISTERS & SOLICITORS

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Freight Forwarders and "House" Bills of Lading

By Pauline Barratt

Will yours Meet the Requirements of the New Letter of Credit Rules?

For many years the question of when a bill of lading will be acceptable for the purpose of the international banking system has been governed by rules produced by the International Chamber of Commerce, the rules being called The Uniform Customs and Practice for Documentary Credits ("UCP"). The version currently in force is UCP 500. Article 30 of UCP 500 allows for the use, in letter of credit transactions, of bills of lading issued by freight forwarders if signed by the freight forwarder "as carrier or multimodal transport operator" or signed by the freight forwarder "as a named agent for or on behalf of the carrier or multimodal transport operator".

Article 30 has been criticised as creating confusion, and it has certainly contributed to the commonly-seen situation where many freight forwarders act as "double agents" – they sign their bills "as agent for the carrier", but in their trading terms and conditions they say they act as agent for the shipper. Such "house" bills are not documents of title and for that reason are of little use in letter of credit transactions where the paying bank needs assurance that possession of a bill of lading gives control over the cargo.

The problems with article 30 have been addressed in new rules (UCP 600) that come into force on 1 July 2007. Along with other changes, article 30 has been deleted in its entirety and has not been replaced.

UCP 600 now provides that if an agent signs any transport document, including a bill of lading or air transport document, on behalf of a carrier, the agent must be specifically identified as being an agent, and the actual carrier must also be identified somewhere on the document.

Where a bill of lading is signed by an agent "on behalf of the master" the agent must be identified as agent and the name of the master must be stated.

The result of the changes is that from 1 July banks are likely to only accept forwarder bills for letter of credit purposes if those bills have been issued by forwarders who are principals (NVOCCs) or if the bills otherwise comply with the signing provisions outlined above. There are a number of practical implications for forwarders who act as agents rather than as NVOCCs and whose customers require UCP 600-compliant documentation:

1. Bill of lading forms are likely to require some modification, to allow for the revised signature provisions;

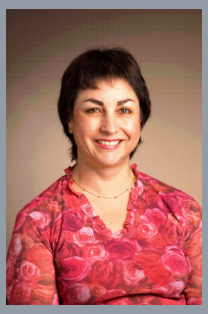
2. Forwarders who intend to state on their bills that they are agents for a named carrier should consider carefully the legal basis on which they make any such statement. Unless ocean carriers provide authority in advance for the issue of bills in this way, forwarders could find that ocean carriers deny all responsibility for losses—and leave forwarders liable to cargo interests for breach of warranty of authority;

3. From a business point of view, it would be wise to ensure that customers who trade using letters of credit are aware of the changes and that they must advise their forwarder when letters of credit are being used. That will reduce the risk of payments and deliveries being held up as the result of non-compliant transport documents being issued.

Drafting the Face of the Bill—Ensuring Consistency

When reviewing bill of lading forms to ensure compliance with UCP 600, it would be worthwhile for forwarders who contract as agents to take the time to consider what overall impression their forms create. In particular, could the shipper or consignee fairly consider, when looking at the bill, that it has been issued by the forwarder as carrier, or is it absolutely clear on its face that the forwarder is an agent?

English law (which would almost certainly be applied in New Zealand) says that if a bill of



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lading has a clear statement on its face as to the identity of the carrier, it is unreasonable to expect the shipper to have to read the fine print on the reverse to check the position.

In other words, in the event of a conflict between the statements on the face and the terms on the reverse, the face will prevail.

Terms and Conditions of Trade—Effective in Practice?

Properly drafted terms and conditions will, except where the law imposes mandatory levels of financial responsibility, limit or exclude the forwarder's liability for loss.

No matter how elegant the drafting though, exclusion and limitation clauses will in most circumstances have no legal effect unless drawn to the attention of the contracting party **before** the contract is formed. This is certainly the case with one-off or very occasional customers, where it is not possible to rely on an ongoing relationship to show that a customer knows of the forwarder's terms.

The consequence of being unable to rely on exclusions and limitations is, potentially, open-ended liability. Far better to have a system in place for providing customers with trading terms at the beginning of a relationship.

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