

THE FREIGHT FORWARDERS RESPONSIBILITY IN VIEW OF SECTION 90 OF THE MALAYSIAN CUSTOMS ACT 1967

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ABSTRACT

This paper looks at the practices and responsibility of Malaysian Freight Forwarders in light of the ruling imposed by the Customs Act 1967 which require them to register for examination for purposes of licensing and enhancing credibility in light of facing challenges brought about by ASEAN Free Trade Area (AFTA) and globalization. The requirement pertains to attending courses and examination conducted by the Royal Customs Department Malaysia. The thereafter results would be more knowledge driven and high caliber fraternity of freight forwarders to serve the Malaysian shippers community.

Keywords : Freight forwarder, courses and examination, knowledge and caliber, practices and responsibility, challenges, globalization and Royal Customs Department Malaysia.

INTRODUCTION

The business environment today evolves faster in light of global logistics and in the ever-changing market intelligence. This can be seen clearly from the complete and smooth supply chain between the exporter and importer in which the right product availability is afforded in the right quantity and quality or condition as well as the right arriving at cost to the end customers.

The success of the maritime trade by the parties involved as a go-between in turn can be referred to the success of the emerging Malaysian shipping sector in which the carrying capacity

recorded close to 7% of the volume of the nations international trade. The Malaysian Vessels Registry as at September 2002 recorded a total number of 1,194 vessels of any class or types registered (Table 1). From this number a total of 243 vessels represent tankers (oil, LNG, LPG, chemical or petroleum), 67 (bulk, grain ore, log), 500 (general cargo, semi-container), and 72 full container vessels (Marine Department, Port Klang, Selangor). Of ships call at the Malaysian ports, this can be glanced at the increase by 5% per annum, from 70,098 in 1995 to 89,462 vessels in 2000 (Eight Malaysia Plan 2001-2005, Chapter 10).

Table 1. Total number of vessels on the Malaysian Registry by type (1992 - 2002).

Ship types	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Oil tanker	50	61	71	83	94	117	127	140	150	161	165
LNG, LPG carrier	14	17	22	29	32	38	38	41	43	45	47
Chemical/ Petroleum tanker	1	1	2	2	4	8	13	19	22	26	31
Bulk, Grain, Ore, Log carrier	9	10	18	24	29	40	46	49	50	55	67
General cargo or semi container	153	199	264	321	383	440	450	460	471	490	500
Passenger/General passenger	87	103	128	158	179	209	231	241	258	288	298
Ro Ro	3	3	3	4	5	8	9	9	12	12	14
Full container	7	7	7	10	16	38	48	55	58	63	72
Total	324	401	515	631	742	898	692	1014	1064	1140	1194
% Increase	-	24	28	23	18	21	7	5	5	7	5

1,194 registered as at September 2002

Source: Marine Department

Any transportation of goods out of or coming into Malaysia, a number of intermediaries are involved such as port authorities, stevedores, warehouse, distribution parks, freight forwarders, banks, insurance companies, carriers or ship owners, etc. The most important party to the shipper would be the ocean freight forwarder if such transportation is by way of sea. UNCTAD (1998) has reported that freight forwarders as transport service facilitators would play a major role in supply chain management as many firms or companies would outsource their logistics functions.

Container use has been the leading trust towards the success of the maritime trade in Malaysia. For example, Butterworth Container Terminal handled 634,042 TEU's last year (Penang Port Authority, 2002). West Port too, in its financial report for the year 2002, has targeted container intake to be more than 1.5 million TEU's.

Table 2 shows the qualitative assessment or trust done on the container use. A number of 20 leading freight forwarders were chosen for this assessment that was done in the third week of June 2003. The freight forwarders concerned cited the reason like safety and speed to be the main factor towards such trust. However, all of them agreed unanimously that energy factor (saving energy) would be advantageously on the rail system.

Table 2. Qualitative assessment on container use.

Criteria of the quality	By road	By rail
Speed & reliability	Very high	Low
Security & safety	Very high	Low
Door-to-door potential	Very high	Low
Energy efficiency	Low	Very high
Flexibility	Very high	Low

Container use, therefore, has necessitated a new attitude to both management and labor where many shippers has switched mode of transport from the conventional way to suit to the purpose of multi-modal transportation (MTO). This would be the ultimate decision for freight forwarders in deciding what is best for their clients in terms of freight his customers willing to bear or pay for high quality use of containers.

Who can be considered freight forwarders?

According to August (1997), freight forwarders are companies with specialized knowledge of international markets, finance, transport, customs, sales law, and other related matters. In the United States of America, for example, the Interstate Commerce Commission, airfreight forwarders by the Civil Aeronautics Board and ocean freight forwarders by the Federal Maritime Administration license inland freight forwarders. They are companies dedicated in "ferrying or transporting" goods on behalf of shippers to the receivers. Hence, freight forwarders are firms that make or assist in the making of shipping arrangements for shipment of goods from the shipper to the importer.

In Malaysia, the Malaysian Royal Customs and Excise Department must license any freight forwarders wishing to perform for the industry (Section 90, Control of agents). The Customs Act 1967 by virtue of Section 90 (1) states that "No person shall act as agent for transacting business relating to the import or export of any goods or luggage or the entry or clearance of any vessel or aircraft, except with the permission of a senior officer of customs and subject to such terms and conditions as he may impose". Any person who purported to represent as unlicensed freight forwarder can be held guilty upon conviction by virtue of Section 90(6) of the Customs Act 1967.

Most freight forwarders are members to the Federation of Malaysian Freight Forwarders (FMFF) and within Association of South East Asian Nation (ASEAN), the freight forwarders accorded to the understanding of the ASEAN Federation of Forwarders Association (AFFA). This Association was formed in 1991 with the sole function to pursue all measures in improving the standard, quality, as well as the professionalism of freight forwarders.

Functions and responsibility

Many freight forwarders, especially the larger scale companies or firms, would be able to offer a wide range of physical activities for shippers. These include storage, packing and repacking, sorting, checking, and some even offer warehousing as well as the actual movement of goods. Connected to this are, of course, the importance of computerized facilities and the development of Electronic Data Interchange (EDI). The safeguard of EDI is given under the Customs Act 1967 by virtue of Section 2 (interpretation) to mean "the transfer, from computer to computer, of commercial and administrative transactions using an agreed message standard to structure the data pertaining to a transaction". The word 'computer' itself has the meaning assigned thereto in Section 3 of the Malaysian Evidence Act 1950. For example, under Free on Board (FOB) contract; where the seller and the buyer have agreed to communicate electronically, the document referred to as a negotiable bill of lading, a non-negotiable seaway bill or a multimodal transport document maybe replaced by an equivalent EDI message.

Freight forwarders should be able to take this advantage of the growing computerization of Customs systems and the concept of Direct Trader Input, which give access to the Customs computers to authorized agents. The freight forwarders, hence, are in a pivotal position to ensure the efficiency and effective door-to-door

movement of goods from export countries to whoever the importers are.

The freight forwarders scope of services is numerous, and they are expected to be an expert in handling shipments for the shippers. They may provide services directly or through sub-contractors or other agencies employed by him. And in certain circumstances, the freight forwarders are also expected to utilize the services of his overseas agents, if any. However, freight forwarders must take into notice that, in general, they would be liable to their client or customer for any loss or damage due to negligence. In order to protect himself against the action by the sub-contractor, the freight forwarder can exclude all his liability due to negligence by certain clause, and this clause shall include wilfully whether caused by the forwarder himself or by an agent or a sub-contractor. The aftermath of such clause is to render that the forwarder will be protected unless the other party can prove fundamental breach of contract; alternatively, the client can take an action and sue the sub-contractor (Atlantique, 1967).

Again, a freight forwarder must remember that exclusion clause in limiting his liability against negligence is a matter of construction. In the words of Lord Wilberforce: "...whether a condition limiting liability is effective or not is a question of construction of that condition in the context of contract as a whole". If it is to exclude liability for negligence, it must be most clearly and unambiguously expressed, and in such a contract as this, must be constructed '*contra proferentum*' (Ailsa Craig Fishing Co. Ltd. V. Malvern Fishing Co. Ltd. & Anor., 1983).

Obviously, freight forwarder in his day-to-day business has a duty to protect his clients or customers interest. If and where a freight forwarder is serving two principals, failure to perform on one of them will render the freight forwarder liable for breach of contract albeit the existence of an exclusion clause against such failure.

It is the duty of the freight forwarder to prove that he has exercised due diligence in order to protect the customer's interest according to the contract. A freight forwarder thus is liable for damage resulting from his lack of due diligence in the performance of the contract (Jones, 2003). The same provisions were accorded under BIFA, CIFFA, FIATA, and NCBFAA (Jones, 2003).

Scenario of freight forwarder's functions

A freight forwarder acting, for example, on the importer will advise and report on the delivery progress for all inbound consignments, checking of the delivery schedule, and do survey report should there be a cargo arrived damaged and cargo tracking pre-alert from loading point to door-to-door or term delivered cargo.

By then, he would have received all relevant documents, such as shipping Invoice, Packing List, Bill of Lading, and upon all the documents made a study of them to ensure that there is no hiccup in transaction. This is to ascertain for easier monitoring and tracking should the shipment failed to be received by the consignee. In case of any urgent shipment, the freight forwarder will make an arrangement for immediate custom clearance. In order to avoid any forms of discrepancy, it is advisable that freight forwarder should request for further information, for example, due to the value, description, packaging details, origin requirements, etc.

A freight forwarder has to coordinate pick up for collecting goods from import station to manufacturer or traders' premises within the time stipulated and in safe condition. For this he must be able to appoint well-trained and experienced transporters or haulier with appropriate vehicles.

A freight forwarder has to pay whatever duties or fees incurred while arranging for custom's clearance. In case of any damage to the cargo or container or pilferage, the forwarder concerned will have to carry out investigation in order to assist the importer in carrying out claims from the carrier's representative or the port authority to effect claims from the relevant insurance company.

It is considered a precinct issue that freight forwarders must ensure smooth custom clearance, and this is done by the fact that the freight forwarders themselves or their personnel are well trained in documentation and operations, especially in checking any apparent involvement in prohibition and/or restriction of the existing customs rule and regulations. Disputes sometime surfaced when there is a précising tariffs classification not complied according to Tariff Code 2002 (Harmonized Systems, Custom and Excise). Basic technical understanding, sufficient and tacit knowledge on catalogue and literature on technical data must be put to ensure appropriate and correct rate of custom duties are paid.

Should there be a conflict arising where custom may have made a wrong decision by charging extra duty, freight forwarder must effectively manage to reverse that decision by being able to present a clear and possible submission or arguments. However, such arguments put forth must come within the ambit of the customs rules and regulations.

Whether it is exporting or importing, freight forwarders are expected to carry out duties accordingly so that consignments expedited thereby reducing costs and be able to avoid litigations. Table 3 summarizes the functions of freight forwarders in both imports and exports.

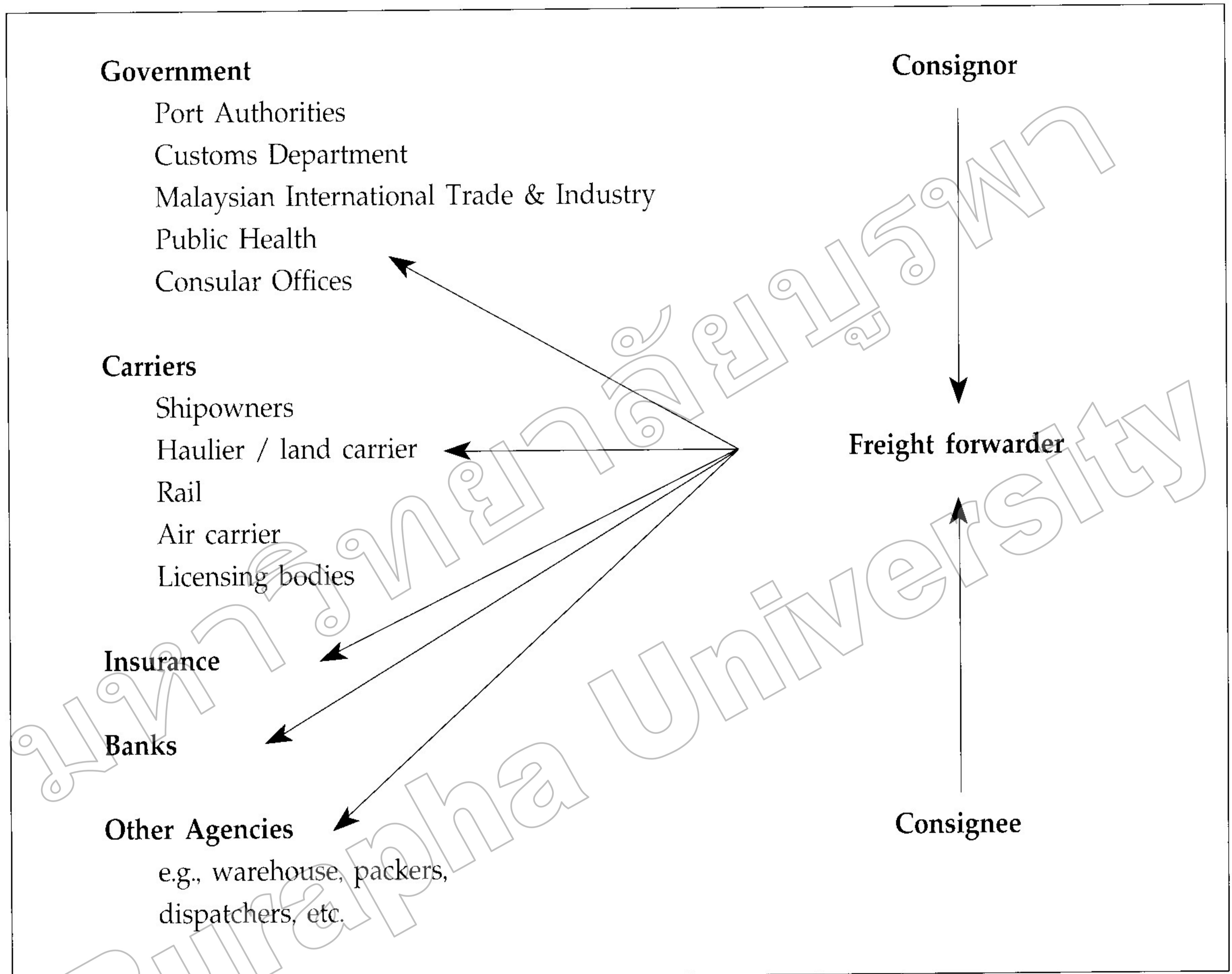
Table 3. Functions of freight forwarders.

	Advisor/consultant
Packing	- Choice / type of packing
Routing	- Choice / itinerary / means of transport
Insurance	- Type / coverage on consignment
Customs law	- Inbound & outbound
Documents	- With the carrier
Letter of credit	- Bank stipulations
	Organizer
Export / import / transit consignments	
Groupage shipment / consolidations	
Customs clearance	
	Imports
Unloading cargoes	Placing on the chosen haulier
Break bulk	
Customs clearance	
	Exports
Pick-up	
Packing & marking	
Space booking / freight - with liner / carrier	
Delivery to carrier	
Transport documents	
Departure supervision	
Despatch advice	
Customs clearance	
	Transit
Taking samples	
Repacking	
Storage	
Re-forwarding (circumstantial)	

Freight forwarders too are highly expected to deal with a number of agencies or bodies whether they are corporations or individual.

Table 4 summarizes the scenario of freight forwarders relationship with either real or legal persons.

Table 4. Relationship of freight forwarders to others.



As such, it is highly desirable that freight forwarders should equip themselves with enough knowledge to deal with all the relevant authorities mentioned. Failure to do so would definitely undermine the trust of the public, especially when dealing with government agency like the Royal Customs Department. For such purpose, the Royal Customs Department has set up a customs academy in Malacca to cater for the needs of agents dealing on behalf of shippers for export and import processes. The growth of international trade

globally requires that freight forwarders must be in the forefront of the success of the supply chain management. Gone are the days of the “wrong process, right product” of the industry. Shippers just cannot afford to rely on freight forwarders for sending goods and receiving goods only, they are expected to forecast the next movement of the import-export sector in relation to customs requirement and would be able to advice shippers the next best course to follow.

Prior to January 2003, freight forwarders are not required to go for any forms of examination in order to operate as agents to Royal Customs Department, suffice for them to attend to an interview. The once interview was conducted whereby the companies were represented by their Board of Directors. According to Section 90(4) "A senior officer of customs may suspend or cancel any permission granted under this section, if the agent commits any breach of this Act or of any regulation made there under or if he fails to comply with the terms and conditions imposed pursuant to sub-section (1) or any direction given by an officer of customs with regard to the business transacted by the agent". And, as of January 2003, the requirement is that two the companies. The two members must attend the courses conducted and subsequently passed this once examination and if one of them failed, only the failed officer needs to go for another yet examination.

Since the Malaysian Government has implemented the rules and regulations of such examinations, freight forwarders should then be able to comprehend the policy and the wisdom of the government to do so. In so doing, the government cannot be selective in its application for it would defeat the purpose of the government itself should a certain quarter of freight forwarders are excused from sitting on the examinations. Being in the business of freight forwarding for "third generations" cannot be regarded as a benchmark not to go for such examination by the Royal Customs Department as of January 2003. That was the contention voiced out by certain quarters of the freight forwarders who felt that they are not required for the examination but as far as the government is concerned, no freight forwarders are to be exempted. This would be in line with the Royal Customs Malaysia in producing a more knowledge driven and high caliber freight forwarders to serve the shippers community.

CONCLUSION

The industry practitioners are well aware of the global competition and the requirements by the Royal Customs Department that the freight forwarders must undergo the examination in order to have their existing licences renewed. At the same time, the Royal Customs Malaysia viewed all these with a farsighted that the future freight forwarders are more professional to face coming borderless challenges.

In the words of one of the practitioners, at least "in order to be efficient and effective, freight forwarders must have an in-depth knowledge of the Customs Act and Regulations and be able to advise their clients accordingly. Besides that, freight forwarders must also have a good general knowledge pertaining to commerce or at least have the knowledge to ascertain the information required in any particular situation".

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