

A Guide to the use of BIFA Standard Trading Conditions 2017

Incorporation and Key Aspects



Unfortunately, in the hustle and bustle of the day, liability and conditions of trade are often the last thing on one's mind. Ignoring them however, can result in expensive and time-consuming activity at a later stage.

The BIFA Standard Trading Conditions (STC) may be likened to the rules of the game of freight forwarding. If you play any game without understanding the rules you are likely to lose. Playing according to the rules does not guarantee that you will always win but incorporation of the BIFA STC can assist in limiting your exposure should something go wrong and create contractual obligations upon your customer that protect you.

The purpose of this document is to highlight the importance of ensuring incorporation of the BIFA STC into contracts and to guide BIFA Members in good practice so that the STC are not undermined by a lack of understanding. We have not attempted to cover all the clauses of the STC. This is dealt with in other BIFA training material. This document highlights those issues that in our experience give rise to the most queries.

We hope that this paper will create some awareness of the subject. It can be used to introduce the STC to even the newest clerk (and, just as importantly, to sales personnel) who have contact with the customer.

The BIFA STC 2017 may be viewed or downloaded from the BIFA website www.bifa.org



Incorporation

Your first task is to make sure that the BIFA STC are incorporated into contracts with your customer. This means that before the contract is concluded the other party needs to have accepted and agreed to be bound by the STC. It is very easy to conclude a contract either orally and/or in writing – all you need is an offer which is accepted for which value passes such as an agreed price. Therefore, be sure to refer to the application of the STC as early as possible and as part of any quote offered, whether oral or in writing.

On first contact with a customer or prospective customer, be sure to confirm on all letterheads, quotations, invoices, faxes and e-mail that: "All business of the Company is transacted under the current edition of the Standard Trading Conditions of the British International Freight Association which are available on request".

If you have a credit application form ensure that it contains a declaration that in making the application for credit the customer accepts that they have read and understood the BIFA STC and accept that they apply to all and any business done for the customer whether gratuitous or not so that you have your customer's signature making the application and accepting that the BIFA STC are incorporated at the earliest stage of trading. Do make sure that the reference to the STC states that the credit is offered subject to the customer's acceptance of the BIFA STC applying to all business to be conducted by you for them. If you simply refer in a credit application to the application of STC, they may be taken to apply only to the credit agreement and not to all business conducted between the two of you.

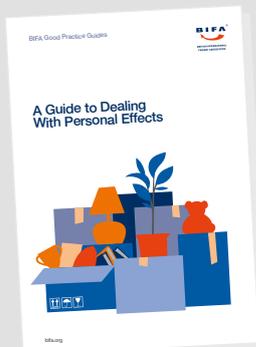
It is also prudent to send, without delay, a copy of the BIFA STC by postal recorded delivery, or e-mail, requesting a receipt of sending, to the Company Secretary or Managing Director drawing attention to the fact that the conditions can limit your liability. Any verbal quotations or bookings that are made or received should have a clear reference to the fact that they are subject to the application of the BIFA STC and this should always be confirmed in writing. This should be done (preferably by fax or e-mail) before any work is undertaken, and confirmation of receipt by your customer (preferably in writing) is essential to ensure it is clear that the BIFA STC are incorporated in the contract. With regard to written quotes, having a standard company template for these is a good idea as you are then able to ensure a clear reference in the template to the application of the BIFA STC to the quoted work. Use of such a template will ensure that any reference to the BIFA STC is not overlooked by a busy operative.

You should not rely on the BIFA STC being printed on the reverse of invoices as evidence of incorporation as an invoice is usually submitted after the event. Also, any general reference to the application of the terms on letterheads or emails may not be effective in terms of incorporation if you have only just begun to deal with the customer in question.

It is important to note that the Unfair Contract Terms Act 1977 ("UCTA") has a test of reasonableness that includes a number of guiding points including whether or not the parties have equal bargaining power which is decided by reference to a number of indicators such as whether each party was free

to contract elsewhere or to negotiate the terms and is not necessarily based only on difference in size of the parties. This reasonableness test applies to standard terms such as the BIFA STC and, generally speaking, UCTA attacks by customers against certain provisions of the BIFA STC have not been successful in the courts. However, do be sure that, when dealing with a private individual acting as a consumer, you make greater efforts to explain the BIFA STC in detail and ensure the customers understand and agree to them as the Unfair Terms in Consumer Contracts Regulations 1999 prevent reliance on certain terms if they are not individually negotiated beforehand. The Regulations do not apply to individuals not acting as consumers.

The BIFA Good Practice Guide “A Guide to Dealing with Personal Effects” should be read in conjunction with this aspect of incorporation of the BIFA STC.



Liability

Your liability to your customer is restricted under the STC for loss or damage to cargo and the STC also set out defences for other claims including errors, omissions and negligence. For claims regarding delays see Clause 26(B). However, failure to insure where you have agreed to arrange insurance for and on behalf of your customer does not benefit from the limitation in clause 26(A).

These limits may be overridden if any legislation is compulsorily applicable. This could either be by international law such as a Convention or national Law.

Other limitations may also apply, such as the FIATA Multimodal Bill of lading (FBL) conditions depending on how you have made contractual arrangements.

Irrespective of the fact that any other legislation might apply to the transaction, it is still most important to incorporate the STC. For example, all International Conventions relate specifically to the carriage of goods, and not to ancillary services applying to the carriage, such as Customs formalities and documentary procedural work. Clause 2(B) ensures that the STC apply to any part of the transaction that is not covered by the Conventions so their protection is still needed in such circumstances.

Your Role

Under the STC the Company is entitled to act as an Agent or a Principal - see Clause 4(A). This does not mean that you can simply state that you are only the Agent and therefore are not liable for loss or damage.

To claim the status of an Agent the company must be able to produce evidence to the customer as laid down in Clause 6(B):

- When acting as an Agent, Clause 6(A) grants authority
- When acting as a Principal, Clause 5 grants certain liberties
- As a Principal you are responsible for loss and/or damage to the goods whilst they are in your care, custody and control, or that of your Agents or Sub-Contractors.

As an Agent whilst you are not responsible for loss or damage, you have a greater duty of care especially in the selection of carrier and route.

The role of Agent cannot be presumed. To act as an Agent the Company must put the customer into a direct contractual relationship with the carrier, and such a transaction must be transparent from the shipping documentation, i.e. bills of lading and invoices.

In most cases the forwarder will be the Principal, or even the Contracting Carrier.

Your liability insurers should be made aware of your role as they cover for all these eventualities, and further, should be advised immediately of any possible claim that may be received against you. See Clause 26(A).

Duty of the Customer

Customer warranties are contained in Clause 17. This clause covers the Customer's duty to provide full and accurate details of such matters as description, gross weight, gross mass, measurement, nature of the goods and any special instructions.

Clause 17(C) is particularly important when the goods are collected in the transport unit.

In accepting Clause 20 the Customer agrees to a set of indemnities protecting the Company when carrying out his instructions or when the Customer has breached any warranty in the BIFA STC.

These are not the only clauses that underline the need to obtain instructions in writing. Where the customer's instructions are not clear they should be clarified before being undertaken. Where verbal instructions are received, always confirm verbal instructions back to the customer by fax, mail or e-mail, and don't forget to incorporate your STC before you accept instructions on the phone or in person and confirm that incorporation in writing at the same time. You should always seek written confirmation that your understanding is correct so that the STC have been acknowledged by the customer.

Cargo Insurance

Whilst the owner of the cargo is the only person who has an insurable interest in its loss or damage, under certain circumstances a freight forwarder may have an insurable interest as bailee whilst cargo is in his control.

Accordingly, Clauses 11(A) & 11(B) apply to Members that offer insurance to their customers under an Open Cover Marine Insurance Policy. Should a Member receive instructions and fail to insure, the company cannot claim the restricted limitations laid down in Clause 26(A) (see Clause 11(B)).

In Clause 26(D) (subject always to the terms contained in this clause) the Customer is offered the right to apply to the Company for an increase of the Company's liability under Clauses 26(A), (B), and (C).

It is imperative, when offering a customer higher limits under Clause 26(D), not to imply that you are insuring the cargo. What you are doing is increasing your liability to the customer. Any claim can only be met when fault is proven against you, or your Sub-Contractors/Agents. Also make sure that your liability insurers agree to higher limits being offered before making the offer and if you wish to claim enhanced charges in return for making an offer of higher limits to the Customer, ensure the enhancement is made as part of the agreement.

Under no circumstances should you offer to insure goods on behalf of your customer unless you hold an Open Cover Marine Insurance Policy, as such policies can offer retrospective cover if you can prove having received instructions to insure from the client. Having an "Open Cover" will therefore protect you against the full liability you would otherwise have under Clause 11(B). When effecting an Open Cover, be sure that it is agreed that the Insurer will not subrogate his claim against you. This makes the promotion or the sale of cargo insurance to your client more beneficial to you as, apart from earning you commission, it protects you from dealing with the claim through your liability insurance and so protects your policy excess and claims record.

Payment of Account

The end product of any business is to receive payment for services rendered. The STC address this subject under various Clauses.

Set-Off

Clause 21(A) is very important. It is a customer warranty to pay monies, when due, without any set-off against any claim they may have, or purport to have, against you. 21(B) is equally important as it provides that when a Customer has not paid any due sum promptly and punctually, you will be entitled to claim all and any other sums you have earned but may not yet be payable by the Customer owing to the existence of a credit agreement or similar.

It is well to note that, under common law, set-off is a legal right in normal commercial trading; however, it has been established in the Courts that this is not the case when the debt refers to freight charges or services in respect of shipping to Court of Appeal level and in respect of road and air to High Court level.

Clause 21 (D) incorporates the Late Payment of Commercial Debt (Interest) Act 1998 that defines interest and compensation that is added to a claim for overdue monies.

The key words in Clause 21(A) are "when due". It is therefore important that terms of payment relate to a "due" date, i.e. "cash against documents", "cash before delivery" or, where credit is concerned, the number of days from invoice date, so establishing the date that payment is due. This is important in the case that you need to refer to the Courts for settlement and for the establishment of any interest due under Clause 21(D) and in case you want to seek additional payments under clause 21(B). Should a customer attempt to set off his debt, you should firstly advise them that their act is not legal, secondly confirm that, until they pay the freight charges, they are in breach of their warranty under the STC, and that any claim they may have can only be dealt with once they have completed their part of the contract of carriage by paying the freight.

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Lien

Clause 8(A) (i)(ii)&(iii) claims the right for the Company to take a “General Lien” on all goods and documents they hold, as opposed to a “Specific Lien” which would relate merely to charges outstanding to a specific transaction. Once invoked, a lien is known as an “Active Lien”. Be aware that the lien in the STC operates against the goods owner and not necessarily your customer. In Clause 3 the customer is required to warrant that they own the goods or are the authorised agent of the owner and accept the conditions apply not only for them but also as agent acting for and on behalf of the owner. Therefore if Clause 3 is complied with by the customer, the lien will be effective against the goods owner. However, if Clause 3 is not complied with you will have a claim for breach of warranty of authority against your customer but may not have the benefit of the STC lien against him. You may have to rely upon a common law lien instead.

The point of a General Lien is to offset the problem that can arise when credit is agreed, and the goods relevant to the non-payment are no longer in the Company’s possession at the time the monies are due. It is at this point that the importance of Clause 21(A) and (B) becomes even more obvious.

You may well have heard the saying that “Possession is nine-tenths of the law” which really does sum up the Forwarder’s situation.

Success often depends upon how important the receipt of the goods is to the customer or owner. In taking lien it is vitally important that you advise all parties concerned in the transaction of your intentions. You cannot succeed with any lien that is not addressed to the owner of the goods or the party authorised by the owner. Before taking a lien it is prudent to take legal advice and have the lien advised on by a solicitor, as liens are highly complex and if the lien is not undertaken properly, or if you cannot prove that your actions are valid, you might find that the customer has

obtained a Court Order for the release of the goods and that you are liable for conversion of the goods which is the civil equivalent of the criminal offence of theft. Legal costs could then be counted in thousands rather than tens of Pounds Sterling, and may well be for your account. This is a very useful clause and is very powerful when undertaken properly, but it can often be a game of bluff and counter-bluff which must be played with great care. Upon taking lien it is important that you insure the goods for their full value in your own name as you become fully responsible for them – check your liability policy to see if this point is covered.

Cash on Delivery (COD)

Clause 12(A) covers the collection of freight charges and other expenses and is quite specific when dealing with the “Customer”. The problem arises when an ex-works shipper requests the company to collect the value of the goods from the Consignee before delivery.

As the ex-works shipper is not involved in the Contract of Carriage the Company does not have the opportunity to incorporate its STC. The contract between the shipper and the Company is basically one related to banking.

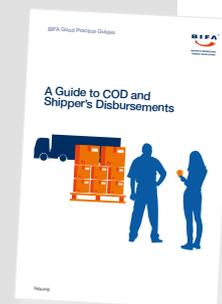
The real problem is that when the Consignee who, once the goods are collected, is now the owner, having paid the freight, calls for delivery, as there is no legal reason why delivery can be withheld. To do so would be to impose an illegal lien. (See comments on Lien). The same scenario applies to an FOB shipper, except that he should have received, or have been aware of, the Company’s STC.

The very best practice is not to accept this form of business at all! However if it is felt necessary to do so, the following are some rules that should be followed to the letter.

The list is probably not finite but it is a good guideline:

- 1** Insist and check that the Consignor has included a Retention of Title clause into his contract of sale to the Consignee
- 2** Make it conditional and check that the Consignor makes the Consignee aware that delivery will not take place until his costs are paid.
- 3** Do not consider undertaking this task if you do not have your own appointed Agent arranging the delivery and if they do not have the Consignee as a Client. Have a clause in your Agency Agreement that refers to CODs and the conditions under which both Agents will undertake their collection and payment. It is wise not to consider accepting a COD where the cargo is not routed through your Agent.
- 4** When collecting monies from the Consignee insist that it is by way of a non-revocable banker’s cheque drawn to the favour of the Consignor in the currency and for the full amount of the sales invoice. Do not get involved in currency fluctuations and bankers’ charges.
- 5** Do not under any circumstances agree to collect monies from anyone other than a Trading Company.
- 6** Please do not forget to make a charge to the Shipper for your services which they agree to pay before you send them their cheque - banks do!!

The BIFA Good Practice Guide “A Guide to COD (Cash on Delivery) and Shippers Disbursements” should be read in conjunction with this section.



Insurance Claims

Clauses 2, 19, 20(A)(B)(C)(D), 24(A)(B), 25, 26(A)(B)(C)(D), 27(A)(B) and 28 all refer to claims made against the Company relative to defences, time-bars, limitation and jurisdiction. In order to deal with any claim on a proper basis, these clauses must be understood.

The following is a brief résumé of a procedure that should be followed:

- 1** Always confirm to customers, and potential customers, that the goods are not automatically insured by you, and further that settlement under the limits of the STC or any International Convention for the carriage of goods is subject to the defences laid down in those conditions relative to the Company's liability.
- 2** To ensure full payment is made for any loss or damage to cargo and the consequent freight charges, they must be declared on an All Risks Policy. Remember it is essential to obtain written instructions from the Customer which you agree to in writing in order to declare the cargo on your Open Cover (see clause 11(A)).
- 3** Upon receipt of a claim for loss or damage to cargo first identify that instructions to insure were received and that it has been done. Immediately request documentary evidence of the loss and/or damage without prejudice to the issue of liability, reserve your position against all parties involved in the transit in view of the claim made making them potentially responsible in writing, and forward all papers to the insurers for them to deal direct with the customer.
- 4** When insurance has not been requested, advise the customer to make a claim on his own Marine Insurance, and to tell those Insurers of your interest as Carrier or Contracting Carrier. You can then proceed to obtain proof of delivery from any Sub-Contractors and proof of loss from the customer. Reserve your position against all parties concerned in the transit advising of their potential responsibility and pass the matter to your insurers. Do not allow any set-off of freight payment against the claim (see Set-Off).



It must be understood that you cannot restrict your liability if you fail to meet your customer's instructions to insure the cargo, and are not able to declare the cargo retrospectively. In such cases you will be held fully responsible for all losses that would have been paid had you followed instructions.

You should not under any circumstances accept instructions to insure unless you hold an Open Cover Marine Insurance Policy in your name.

Claims other than for loss or damage

These cover claims made for errors and omissions, negligence, delay and consequential loss. Clause 26(A) (ii) & (iii) relates to the limitation of claims other than those of loss or damage namely errors and omissions, and negligence. Clause 26(B) relates to claims relative to delay. Clause 26(C) precludes any claim for consequential losses.

The intention of this Guide is to create awareness of the fact that the STC are there for your protection, which will only work to your favour if you and your staff understand and apply them correctly. In this paper we have covered only those clauses that from our experience we know are those that give rise to the majority of queries.