

Minutes of the Legal Policy Group held on 14/05/2019

Minutes of the Legal Policy Group Meeting held at the Army and Navy Club, London. The Meeting was held on the 14/05/2019 commencing at 10.30 hours.

Agenda Point 1, Competition Statement

The BIFA Competition Statement was read out to all at the commencement of the meeting.

Agenda Point 3, Agree Minutes of the Meeting 24th October 2018

Regarding customs representation, the meeting was reminded that where the customs agent claimed to be acting as a representative without having obtained the necessary empowerment, HMRC may regard them as self-representing.

It was agreed to replace the phrase on page 3 “It was noted that GDPR placed considerable emphasis on personal rather than business data” with “It was noted that GDPR related to personal data.”

Agenda Point 4, Matters arising from the minutes of the 24th October 2018

After examining information publicly available regarding liens; on the BIFA website, which was thought to be adequate for guidance purposes the Secretariat had decided not to circulate additional information to the LIPG and the wider Membership, a point that was agreed by the attendees.

The meeting was advised that HMRC had now published the list of Traders registered as Fulfilment Houses on GOV.UK. The two key criteria to be a Fulfilment House were-

- That the trader was acting for the storage and distribution of products on behalf of a party not established in the EU
- The goods when imported into the UK had not been sold to the final user.

It was noted that when undertaking import customs clearance and distribution, on behalf of an overseas entity it was essential for the customs agent to undertake sufficient checks to establish whether or not they might be regarded as providing a fulfilment house service, which would require them to register under the Government scheme.

Agenda Point 5, the impact of the Consumer Rights Act on Freight Forwarding Contracts

Referring to the previously issued paper, the initial query from a Member related to a consignment of a high value yacht shipped on behalf of a wealthy private individual from the Mediterranean to the

West Indies. It was claimed that the forwarder had failed to comply with delivery dates and had not behaved in a competent manner. The client was considering making a claim under the above mentioned legislation.

In the UK there is considerable freedom to contract including the terms that will be included within any such agreement. However, Members should remember that if something is advised to the customer either verbally or in writing and they rely on it, this would become a term, of the contract. Caution should be shown when designing websites not to make extravagant claims regarding services provided. This includes showing pictures of ships and planes carrying Members liveries when in fact they did not operate them, as this could be regarded as misrepresenting your services.

This is particularly important relative to providing services to private individuals, and it was important that Members highlighted which sections of websites, terms etc were applicable to such clients.

The meeting noted that increasingly forwarders and insurers were reluctant to provide services to the private individual because of the increased risks associated with such customers. Insurers expressed some concerns regarding the additional liabilities that forwarders were exposing themselves to by continually extending their range of services .e.g. to include ironing of clothing and 3D printing .

The BIFA Secretariat advised that their guidance was that Members should always to discuss such matters with their insurers before agreeing terms with their client. It was noted that BIFA Members regularly asked the Secretariat questions regarding increasing the liability limits to more that 2SDR. The answer is always the same, it is possible to do so for specific clients, but the matter must be agreed with the insurer providing freight forwarder liability insurance and records kept of clients etc.

Agenda point 6 – No “Set off” case

The BIFA STC include a “No Set Off” clause which has been tested successfully up to the Court of Appeal. If Members have not correctly incorporated the STC, then they would have to rely on the “*Aries*” judgment, under which disallowed the setting off of freight costs in maritime.

The details of the case were described in the paper circulated prior to the meeting. Much of the argument is about the defendant acting as a forwarder rather that a carrier by “arranging” the movement of cargo rather than “effecting” it themselves. The defendant was unable to demonstrate exactly what had been paid as freight to those parties contracted to physically moving the cargo by barge.

The judge, unimpressed by the arguments and lack of clarity regarding payments ruled that as the accounting was unclear made a conditional order requiring the defendant to pay into court USD113,000 but refused to require any payment relating to the balance of the claims because he was not satisfied that they properly related to freight. Also, he did comment that forwarding terms/contracts could include clauses permitting “no set off”.

Also, the judge observed that he did not believe that the “ *Aries*” judgment should be extended to other modes, which ran counter to recent judgments. The meeting heard the Mercantile Courts were seeking to limit “no set-off” to maritime only.

As a result of this case, BIFA would remind Members of the importance of successfully incorporating BIFA's STCs in all contracts as these required payment in full and "set off" was disallowed.

Agenda Point 7 Impact of late payments

The relevant legislation, which sets compensation levels etc. is referred to within the BIFA STC. Normally, for commercial reasons, this legislation is not greatly used in the course of normal commercial trading relationship. But should this breakdown or cease for whatever reason the legislation was more likely to be invoked.

Recently liquidators, who are legally obliged to recover all monies owed have been using the Late Payments Act to claim compensation. There is some confusion as to whether or not the Act covers current or historical debts.

In one recent case the liquidator, went back over three years (they could have gone back six years) accounts and found that a customer had paid their now insolvent supplier consistently late. Although not agreed in writing, there seems to have been an understanding. between the two parties that this variation was mutually agreeable. The liquidators invoiced the customer for £10k (below the small claims limit), after re-negotiation this sum was reduced and eventually paid.

Two key points emerged:-

- Any agreement between two parties that the customer could pay the supplier later than their normal credit terms should be documented. It was suggested that this arrangement be referred to on remittance advices etc.
- One day the legislation would be tested in court to see if it covered only "current" or would be extended to include "historical" debts

Agenda Point 8 Review of the BIFA STC training course

BIFA's STC course covering contracts, STC and insurance claims will be reviewed and reissued in early 2020 in order to incorporate any changes due to the issuance of the 2020 Incoterms.

Agenda Point 9 Any Other Business

Publication of new Incoterms in Q3 of 2019:- it was noted that the ICC had scheduled events in October 2019 to mark the launch of the 2020 Incoterms.

CMA-CGM lose "General Average" claim:- it was noted that a Court had ruled that the shipping line could not impose "General Average" because it had been negligent , by failing to provide the ships master with up to date charts. This failure had contributed to the vessel grounding

BIFA Insurance Form A:- The meeting was reminded that Form B had been withdrawn and that Form A would be simplified and, in all probability, become a declaration. The Association would reserve the right to check documents as required.

Good Practice Guide :- The draft document was discussed the consensus was that it should be made clearer that it only covered agreements between forwarders.

Agenda Point 10 Date and venue of the next meeting

The provisional date of the next meeting is 5th November 2019