

Minutes of the Legal Policy Group held on 15/06/2020

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Agenda Point 1, Competition Statement

The Chair read the BIFA competition statement at the commencement of the meeting.

Agenda Point 2, Agree Minutes of the meeting of the 05/11/2019.

The minutes had been circulated prior to the meeting and it was agreed that they were an accurate record of the meeting and signed by the BIFA Secretariat at the Chair's request.

Agenda Point 3, Action points arising from the Minutes of the meeting of the 05/11/2019.

AP 1 - Agenda Point 4

BIFA to raise Members concerns with BCC regarding how the latter processed data obtained when processing Certificates of Origin

- BIFA had met with the BCC on this matter , they confirmed that information gathered processing Certificates of Origin and Customs Declarations would be kept separate within the Chambers. In order to preserve data confidentiality those personnel processing customs declarations would not be able to access C of O data and vice versa

AP 2 – Agenda Point 6

Guidance to be provided relative to how to protect Members staff from prosecution under CEMA

- No action taken and as this was a one off circumstance and no prosecution had resulted from the investigation it was agreed not to issue the guidance

AP 3 - Agenda Point 9

BIFA to approach TT Club as to best method to raise awareness relative to shipping DG by ocean.

- Discussions had taken place with the TT Club regarding publicising loading of CTU's it had been agreed that BIFA would assist by highlighting the importance of the CTU Code.

There was a discussion regarding indemnity letters which certain carriers required to be completed prior to doing business. For forwarders the key point to establish was whether they were acting as

a NVO or agent on behalf of a customer. In the latter scenario they should ensure that they had mirror agreements in place with their customers to protect themselves.

Agenda Point 4 , Impacts of the Amendment to the Insolvency Act.

The main concern was the impact of the draft legislation on Members ability to exercise a lien, particularly as suppliers would not be able to terminate a contract or do “any other thing” where a company seeking a moratorium. This will be of particular concern if large debts had accrued and the ability to secure payments via exercising a lien was reduced.

The current position is that if a Member can prove that a Lien is in place prior to insolvency procedures commence then Administrators will either have to provide security or reach a settlement agreement to secure cargos release.

The wording of the current bill meant that debtors would have to go to court to enforce all liens. BIFA had written to Grant Shapps at the DfT requesting than an amendment be made to the Bill to preserve the status quo regarding exercising liens.

It was noted that during the COVID 19 crisis that Members had become more willing to exercise liens to collect monies owed to them. When used in conjunction with the “acceleration clause” introduced in the 2017 STC Members in many cases were able to collect monies owed to them.

It was noted that Administrators would have to go to Court if they if they wanted to overturn the application of a active lien, which they do not tend to do when they realise that BIFA terms apply.

It was noted that the draft bill would have benefits for BIFA Members, that the moratorium could only be granted if granting it would improve a traders chances of financial survival and costs relating to imposing a monitor would be incurred.

Agenda Point 5, HSE and drivers

During the COVID 19 crisis BIFA had provided guidance on drivers legal right to have access to washroom facilities and also alternatives to formal POD procedures. On the latter point, particularly for regular customers the importance of agreeing such a procedure was noted.

Following an accident at Heathrow in which a driver employed by a BIFA was seriously injured the HSE had investigated. The Member has advised BIFA that the HSE were prosecuting them, partly because they had not conducted a full risk assessment of the delivery site.

The meeting noted the HSE were more employee as opposed to employer friendly and that it would be impossible to risk assess every delivery/collection point. Even undertaking a documented Q&A process would be extremely time consuming

Legal guidance was to risk assess and keep records of safety at premises being visited and obtain an assurance that necessary procedures were in place to ensure driver safety. Members should also ensure that they had procedures, processes and training to cover off site safety situations.

The Members view was that the most that they could do would be to train drivers on site safety and have procedures in place to permit them to report to their employers any concerns that they have about delivery/collection points.

Agenda Point 6, Outcome of HMRC investigations of individual employees for fraud relative to import declarations.

The threat of prosecution against individual employees had been lifted because HMRC issued a BTI agreeing with the importers tariff headings advised to the clearance staff. Surprisingly the investigation team had appealed against the BTI , which if overturned would allow for the prosecution the importer and agents import staff to proceed.

It was noted that due to the relatively small sums of money involved that such action was not in the public interest.

Agenda Point 7, COVID 19

Force Majeure

BIFA's STC Clause 24 (A) and (B) permitted traders to declare that "force majeure" was being imposed. In the current situation the impact of government regulations such as "Lockdowns" is likely to be the Force Majeure event rather than the pandemic itself.

For a trader to successfully declare that there was a "force majeure" situation, it had to be demonstrated that a force majeure event had occurred which will be a listed event such as a natural disaster , or one which can be shown to be an event which they could not prevent and the consequences that they could not avoid. The trader would need to show that the event caused the inability to carry out the work contracted or provided for..

Also, it is advisable to speak to clients to explain your position and gauge their response. Whilst it may not be able to fulfil the contractual terms it was important to explain the situation to clients and offer alternative options to move goods.

Members were concerned about what circumstance would lead to the ending "force majeure" and also the impacts of changed market conditions, which impacted rates. It was noted that this may be dealt with as a contract point in terms of amending charge rates in line with any amendment control clauses in the contract.

Terminal Delays -abandoned cargo

BIFA had received an increased number of enquiries on this subject, the basic guidance had been to monitor shipments and only accept import clearances when the customer confirmed that they wanted and could afford to pay the relevant charges.

It was noted that high quay rent charges were charged by ports to shipping lines , which had to be passed on. Although it was noted that a ports were amenable to negotiating reductions to prevent abandonment.

Demurrage Charges

BIFA had raised the question of high demurrage charges with the DfT, which had decided not to intervene in determining the reasonableness or otherwise of such charges.

It was noted that FIATA's document on Detention and Demurrage, which BIFA had contributed to had been quoted when the US Federal Maritime Commission had reviewed these fees in the USA.

It was noted that lines frequently used the Merchant Clause to collect monies from a "party to the contract". A recent case was briefly discussed , where a judge ruled that an "ex works" shipper was not party to the contract as detailed on a Bill of Lading and therefore, the line had no claim against them.

Agenda point 8, Danish Court Case

There was a brief discussion regarding this case heard in Denmark which did clarify the delineation responsibilities between the carrier and consignees when unloading trailers under the CMR convention/

Agenda point 9, Any other business

None

Agenda Point 10. Date and venue of the next meeting

The next meeting of the LIPG will be held in September via an electronic medium.