

Exercising a lien using the BIFA Standard Trading Conditions (BIFA STC)

So, your customer owes you money and you are holding goods for them. Should you take lien on the shipment? There is no doubt that the BIFA lien is a useful tool that BIFA members can use, however liens are governed by a complex and difficult area of law, and they are not to be used without due care.

Due to the necessity to be precise when dealing with a lien, this document has been prepared with formal legal language and terminology. A plain language explanation of some items follows.

- Exercise a lien – The action of informing your customer that you are withholding release of goods to them in accordance with the BIFA Standard Trading Conditions (STC).
- Administrator - an Administrator is a licenced insolvency practitioner that may be appointed by the Directors of a company in financial difficulties or can be appointed by a Court.
- Liquidator – a role often performed by an Administrator, a Liquidator will “wind up” a company. The assets are liquidated and the company closed, or deregistered.
- Escrow - An escrow account is a third-party account where funds are kept before they are transferred to the ultimate party.
- Moratorium - a legally authorized period of delay or suspension of activity in the performance of a legal obligation or the payment of a debt.
- Bailee - a person or party holding something for a purpose (such as custody in a cloakroom) without transfer of ownership.

It is very important not to exercise a lien wrongfully as this amounts to conversion (civil theft) which is viewed very seriously by Courts. Here are some pointers to enable you to consider when, and whether or not, to exercise a lien and when you need help.

The BIFA 2021 STC allow members to exercise a lien when they have monies due and owing. Remember that when a first invoice is late you are able to accelerate forward all debts, whether or not due and owing. So as long as you have contracted to do a job at an agreed price you can claim that, along with any other debts invoiced (clause 21 (B) (i)). If you want to exercise the lien, here are some tips:

DOs

1. Check that your customer has complied with clause 3, under which the Customer warrants that it is the owner of the goods or that it acts for the owner who has authorised it to bind the owner to the STC. This is important as if your customer is not the owner of the goods and has not gained authority from the owner of the goods to bind it to the BIFA STC then you cannot exercise the lien. A lien may only be exercised against the person who has rights of control over the goods which may be the owner or a party with authority from the owner.
2. The lien is automatically in place when sums are due and owing but do notify your client if you want to exercise a lien against them, so that they know the goods are being held under lien as opposed to for some other reason such as delay. Also, if you wish to exercise the right of sale you do need to give 21 days' written notice of this and so you can advise of the lien being operated due to non-payment of sums due and owing and the notice of sale in one piece of correspondence.
3. Do check if the customer/owner is in Administration. If so (and the lien has not already been exercised) it cannot be exercised against them as this is not allowed on a statutory basis, but if the lien has been exercised already (before the appointment of an Administrator) you need to be able to prove that to the Administrator. Similarly, if a customer is trading under a "moratorium" granted by a Court under the Corporate Insolvency and Governance Act 2020, it is not possible to exercise a lien.
4. Do make sure you know precisely what is due and owing, or you are in a position to give the owner/customer information that will enable them to calculate what is due and owing. If the sum asked for is incorrect or the customer/owner has no means of verifying the sum due and owing, then the lien could be wrongful.
5. Establish if the goods are branded. If you want to exercise the right of sale on branded goods it may be wrongful if it is against the interests of the brand owner. If the brand details may be removed without causing damage to the goods it may be possible to do this to avoid any issues with the brand owner.
6. Do check the value of the goods. If they can be broken down and they are significantly higher value than the sums due and owing to you, you may not hold more than you need to recover the sums due and owing.
7. If the lien is questioned by the owner/customer/Administrator, or if they threaten to appoint a solicitor should you not agree to certain terms, or if you are contacted by a solicitor, act fast and appoint a solicitor to safeguard your interests.

8. If a Liquidator is appointed for the customer/owner seek specialist legal advice immediately as there are very limited circumstances when the goods may be withheld from a Liquidator.

9. Do check if your insurance cover protects you whilst the goods are held under lien. If it does not it could prove expensive if something happens to them whilst you are holding them.

Here are some tips on what not to do when considering the exercise of a lien or having notified that you are exercising a lien:

DON'Ts

1. Do not hold the goods without checking first who has a right to control the goods being the owner or the party authorised by the owner to control them.

2. Do not delay in appointing an experienced solicitor if the efficacy of the lien is questioned or a solicitor for the party with rights of control contacts you, as they may commence legal process very quickly with little or no warning in an attempt to recover the goods.

3. Do not appoint a solicitor who is not experienced in handling lien cases. BIFA may be able to assist in this regard.

4. Do not enter into any discussion or correspondence about the lien with anyone on the other side questioning its efficacy other than saying you will take immediate legal advice.

5. Do not exercise a lien that is worth significantly more than the sum due and owing to you if the goods can be broken down and you can take a lien over part of them to effectively secure your debt.

6. Do not ignore an offer to pay money into an escrow account or to the Court along with some other terms in return for release of the goods. If you do, and the other side seeks an order for delivery of the goods in Court and refers to the offer, a Court is likely to grant the release of the goods to them on the same or similar terms and order costs against you, so you will pay both your own and the other side's costs.

7. Do not hold the goods without checking the position (preferably with a solicitor experienced in lien cases) as the cost to you could be significant and also may not result in you being paid the sums you seek either.

Providing written notice to a customer concerning a lien

The BIFA STC lien at clause 8(A) (i) is designed to operate automatically as a general lien on goods and documents as soon as money is due and owing without notification. However, in order to provide clarity, it is advisable to make it plain to a customer that their goods are being held due to the exercise of a lien rather than any other reason such as delay. This should be advised to the client as soon as possible.

The question of whether or not monies are due and owing depends on any payment or credit terms you have with your customer and your intention to rely on clause 21(B) of the 2021 BIFA STC which provides that if any sum is due and owing then all sums properly earned or invoiced but not yet due and owing will become payable immediately. This is a useful clause if you are concerned about the liquidity of your customer and fear that administration may be imminent. You do not have to rely on this clause and any non-reliance does not mean you cannot rely on it later on.

Written notification of the lien is helpful should your customer enter Administration as a moratorium is immediately imposed once the Administrator has been appointed limiting what actions you can take even with the lien in place. Furthermore, if the date of the Administrator's appointment predates the operation of a lien, it cannot be exercised against the Administrator. If you have a written notice of exercise of lien referable to the BIFA STC pre-dating the date of the appointment of the Administrator that is clear evidence to pass to the Administrator to show that the lien has been notified as being in operation.

If this evidence is not available you will need to prove that monies are due and owing and the BIFA STC apply. An Administrator in this situation is likely to put you under severe pressure to release the goods to them if you cannot produce the evidence quickly.

If you think that you are going to have to exercise a right of sale in respect of your lien under clause 8(A) (ii) this intention should be included in your written notification to the client at the earliest opportunity. This clause requires you to give 21 day's written notice of your intention to sell. However, if the goods are perishable or likely to deteriorate then under clause 8(B) you may sell immediately once sums are due and owing provided you have taken reasonable steps to notify the customer.

You may wish to draft the initial lien notification yourself. However, in some circumstances you may benefit from the assistance of a solicitor, for example: -

- If the goods are branded or
- If an Administrator or owner of the goods is threatening legal process if you do not release the goods or
- If the goods do not belong to your customer and in breach of clause 3 of the BIFA STC your customer has not bound the owner of the goods to the BIFA STC.

If you do come under pressure from the Administrator, you should seek legal advice at the earliest opportunity as if the lien has not been properly exercised you could be wrongly withholding the goods which is known as conversion or civil theft. This could lead to a claim against you for damages, particularly if the delay in delivery leads to a breach of a sale agreement that the customer has entered into and potential loss of business which could be extensive and far more valuable than the extent of your claim.

Drafting the letter

The letter should start with a heading detailing all the particulars of the items being held including both goods and/or documents. This information should be cross referred to the relevant transport document number, such as a bill of lading number plus appropriate shipping dates.

The first paragraph should advise that there are outstanding debts referring to any credit agreement that you have in place or payment terms agreed with the client and clause 21(B) of the 2021 BIFA STC if you intend to rely on that clause as well. The client should be warned that they are in breach of their contractual obligations leading to the accrual of the debt and that these sums are now therefore overdue. Also, it is recommended that you include information regarding outstanding invoice numbers and amounts that are now due. If this is too long it is advisable to attach a schedule of unpaid invoices or an account statement.

In the second paragraph, you need to state in wording similar to the following:

“The purpose of this letter is to give you [your client] notification that all sums due must be paid before the release of the goods detailed above.

You are advised that in accordance with the Standard Trading Conditions of the British International Freight Association clause 8(A) (i), we [your firm] are taking a lien on the

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above-mentioned shipment (s). You have twenty-one (21) days' notice that should the sums due not be paid then the goods on hold may be sold and the proceeds applied to the outstanding debt. Any legal expenses and interest will be deducted from the proceeds of sale and any remainder remitted to you under clause 8(A) (iii).

We are a member of the British International Freight Association and all of our business is conducted in accordance with the BIFA Standard Trading Conditions (STC) and these terms apply between us [add in here details of notice given to your customer of the application of the terms to the contracts under which the debts claimed was given such as in a signed credit agreement or accepted quote or quotes referring to the conditions].

We are exercising this lien contractually on the basis that you are the owner of these goods or have the authorisation of the owner to contract on their behalf on the basis of the BIFA STC (see clause 3). If you are not the owner or have not been so authorised by the owner please advise immediately as we shall need to seek instructions from the owner.”

End of drafting guide

It should be noted that Members have no right to hold goods under the BIFA STC unless their customer has title to them or has the authority to act on behalf of the owner of the goods as specified in Clause 3 of the BIFA STC. This authority does not have to be expressly given and may be implied or provided for in terms of a head contract.

Members have to take instructions from the party with the right of control over the goods and the identity of that party may not be clear when the lien is exercised. You are entitled to clarify who that party is, but this must be done quickly in order to keep any rising charges to a reasonable sum.

Any lien exercised against an owner who is not your client nor bound by the STC will not be as broad ranging as a BIFA lien. It will be a specific lien covering costs relative to the good covered by one specific shipment and will not be a general lien for all outstanding monies owed to you. Furthermore, your right of sale will only exist if you have given reasonable written notice of the intention to sell and obtained a court order permitting you to sell.

One area that is often overlooked is that as a bailee, a forwarder should be aware of the insurance aspects of exercising a lien. Particular attention should be paid to the insurance cover provided to the forwarder by the insurer. It is important that the policy

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covers goods held under a lien against all risks of loss or damage. If this is not the case, the broker should be consulted to arrange suitable cover. Once a lien has been taken out it is the party who has exercised it is who will be held responsible for any loss or damage to the goods whilst they are holding them under such lien.

Liens are a very difficult area. Disputes regarding their legality can escalate very quickly and if they do, you are strongly advised to seek immediate legal assistance to ensure your rights are protected and that you are not infringing anyone else's rights.

This Guide has been produced to provide general industry guidance to members. However, it is not legal advice nor is it a substitute for legal advice. The Association is only in a position to provide general non-legal guidance as each Member's situation may be different and this may affect particular legal advice that may be given by suitably qualified solicitors to each member. The Association is not able to provide legal advice and if you wish to ensure that any specific action you intend to take while relying on this general guide is legally appropriate you are advised to consult a qualified solicitor experienced in the relevant legal field which may include forwarding, transport, logistics, international trade and commerce in advance of taking such action.

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