

### **A new set of BIFA Standard Trading Conditions (STC)**

Hopefully all BIFA Members will have seen our news snippets that the BIFA STC have been under review but if not here is a comprehensive overview of the changes being made later this year. Whilst we hope all Members will change to using the 2017 version as soon as possible the current edition is still legitimate and does not contain any clauses causing concern. As can be seen from the following article the changes being made give added protection for Members.

#### **Why change the BIFA STC?**

Laws change as do consumer rights and it is good practice to review any set of industry terms against changes in consumer legislation. We also made a comparison of all clauses against the requirements of the Unfair Contract Terms Act. A particular impetus was the July 1<sup>st</sup> 2016 changes to the SOLAS Convention regarding Verified Gross Mass. Another aspect is a new 2017 edition enables us to consolidate the slight changes made in 2009 to the 2005 edition (the edition we are about to supersede being 2005A © 2009) when our lobbying activity enabled Members an opt out from the harsh disciplines of the 2005 Insurance Mediation Directive.

#### **What was the review process?**

The BIFA Legal and Insurance Policy Group numbers about twenty-five forwarders and liability insurers. Some of the forwarders are BIFA Board Directors and all have a strong remit within their companies dealing with claims, insurance and similar aspects. We also had input from a number of solicitors who are industry specialists. In a couple of sessions, we gathered the Policy Group Members together and split them into groups each analysing sections of the STC and making recommendations that were circulated. Solicitors advice was taken along the way and when the revised draft was completed it was examined by a Barrister where case law in many jurisdictions was compared to ensure there were no contradictions or loopholes in the new STC.

#### **So, what are the changes?**

Three of the clauses have undergone significant changes and they will be dealt with in separate paragraphs however the slight changes detailed here are usual if tidying up wording to reflect the passing of years. The preamble and definitions have been tightened to reflect the new EU regulation number following the introduction of the Union Customs Code. There is specific reinforcement of the role of a Direct

Representative as this issue has become far more complex in the past year. We strongly recommend all Members study the good practice guide to representation that can be found at [bifa.org](http://bifa.org). In clause 6B we have introduced a fixed time limit when a customer can demand evidence as the previous wording was open ended and in clauses 8 and 10 the time limit has been reduced from 28 days to 21 days. The wording in clause 14 has been changed from “*pets, livestock*” to “*living creatures*”, and the reference to “*bullion, coin*” to “*bullion, currency*”. Finally, there are extra words inserted in clause 26 “*whichever shall be the lesser*”.

### **Clause 17**

Clause 17(A) has been extended to take account of the SOLAS rules relating to verified gross mass (VGM) requirements. The terms provide a warranty from the customer that they are giving an accurate and actual verified gross mass of any container packed with packages and cargo items. This means that if the Member is responsible for provision of this information to the carrier then they are able to pursue the customer if the mass is not accurate under the indemnity clause at clause 20 for any losses incurred as a result. Whilst the BIFA STC cannot shift the responsibility under the SOLAS terms for provision of the verified gross mass which is set in law, they can provide contractually for the customer to provide that information to the Member and be responsible to the Member for any reliance on it by the Member and losses flowing from that reliance which has been provided for in the amendment to clause 17(A).

### **Clause 21**

Members will know that the conditions currently provide for payment “when due and owing” so it is left to Members to agree when sums fall due with their clients. Credit terms are often agreed which, in their most basic form, are a simple statement to the effect that invoices in respect of freight and ancillaries are due within 30 days and VAT and duty immediately. Some Members will have more detailed credit terms. In cases where customers fall behind with payment, credit terms that have no cancellation clause in the event of non-payment will continue until they are changed by agreement or sufficient notice is given of the change to be effective at law. If the customer falls further behind during this period it can be very damaging in terms of cash flow.

In order to assist Members with this problem we have amended clause 21 at sub clause (B) to include what is often referred to as an acceleration clause. This means that if a customer defaults on any sums due then any credit terms in place have no effect and all money invoiced and unpaid at the time of default becomes due and owing. This means that Members may take immediate action in terms of the exercise of a lien when the customer defaults so that the debt does not grow.

The amendments to this clause also provide protection to Members against non-enforcement of the clause which will allow flexibility of use at 21(C). As a matter of law, if you have rights provided for in a contract that you do not enforce then reliance on the rights may not be possible in the future unless there is a clause providing that

non-enforcement has no effect on the future use of such rights. The wording at 21(C) allows Members to rely on the acceleration clause at 21(B) when they are concerned about the size and circumstances of the debt in question and not to use the clause when they take the view that the debt is not something to be overly concerned about. If Members want to improve credit flexibility further they may wish to seek legal advice about setting up more detailed credit terms.

## **Clause 28**

Members will be aware that the current clause 28 provides for exclusive jurisdiction in favour of the English courts and for English law to apply. In case of claims against Members this is an effective clause as if a customer wishes to take action against a Member pursuant to the terms they need to start legal process in an English court and apply English law. Difficulties can arise when the Member wishes to claim against the customer if the customer is in a jurisdiction that has no local rules recognising English jurisdiction rights or providing for enforcement of English judgments. In such cases pursuing a customer and gaining satisfactory compensation may be very difficult. For this reason, we have provided for arbitration at the choice of the Member. Many of the main trading nations such as the U.S., China, Russia and Japan have no local rules recognising English jurisdiction rights or providing for enforcement of English judgments but these nations are signatories of the New York Convention 1958 on the recognition and enforcement of arbitral awards. Therefore, by including the choice of arbitration in favour of Members, the change to this clause has improved the ability for Members to pursue customers in jurisdictions which may not give effect to an English law and jurisdiction clause in favour of English courts.

## **Conclusion**

It is difficult to detail the reasoning of these changes in a short magazine article however we will be reviewing our good practice guidance during the coming weeks. The new BIFA STC become effective on 1<sup>st</sup> October 2017 and we have already begun speaking to both regional meetings and policy groups about the changes. Of course, we are happy to receive any requests for explanations.

Finally, we have found that the demand for printed versions of the BIFA STC we have been selling for years is in decline as many Members simply link their e-mail footers and website pages to the URL on the website, so we will be posting a high-quality PDF on [bifa.org](http://bifa.org) so that BIFA Members that still require glossy printed copies can arrange to have their own printed.

Please mail any questions to [r.keen@bifa.org](mailto:r.keen@bifa.org)