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Know Your Trading Conditions

A Guide to the BIFA 2021 Standard Trading Conditions

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The customer's attention is drawn to specific clauses hereof which exclude or limit the company's liability and those which require the customer to indemnify the company in certain circumstances and those which limit time and those which deal with conditions of issuing effective goods insurance being Clauses 7, 8, 10, 11(A) and 11(B) 12-14 inclusive, 18-20 inclusive, and 24-27 inclusive. The customer's attention is also drawn to Clause 28 which permits arbitration in certain circumstances.

All headings are indicative and do not form part of these conditions.

Definitions and Application

CLAUSE 1

In these Conditions the following words shall have the following meanings: -

"Company"	the BIFA Member trading under these conditions
"Consignee"	the Person to whom the goods are consigned
"Customer"	any Person at whose request or on whose behalf the Company undertakes any business or provides advice, information or services
"Direct Representative"	the Company acting in the name of and on behalf of the Customer and/or Owner with H.M. Revenue and Customs ("HMRC") as defined by the Taxation (Cross-border Trade) Act 2018, or as amended
"Goods"	the cargo to which any business under these conditions relates
"Person"	natural person(s) or any body or bodies corporate
"LMAA"	the London Maritime Arbitrators Association
"SDR"	are Special Drawing Rights as defined by the International Monetary Fund
"Transport Unit"	packing case, pallets, container, trailer, tanker or any other device used whatsoever for and in connection with the carriage of Goods by land, sea or air
"Owner"	the Owner of the Goods or Transport Unit and any other Person who is or may become interested in them

Comment on Attention Wording

This wording draws the attention of customers to particular clauses of importance with regard to exclusion or limitation of liability, indemnification, time limitation and issuing of insurance. In the 2021 conditions a reference has been added to draw attention to permission to arbitrate in some circumstances.

Comment on Clause 1

The above definitions are wider than their natural meaning. To indicate that they are defined words, they are shown in these conditions as beginning with a capital letter and the following clauses should be read bearing in mind these definitions.

The text of Clause 1 of the BIFA 2021 STC has been slightly altered from the text of the BIFA 2017 STC where the appropriate reference and title has been given to the definition pertaining to "Direct Agent".

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CLAUSE 2

CLAUSE 2(A)
Subject to sub-paragraph (B) below, all and any activities of the Company in the course of business, whether gratuitous or not, are undertaken subject to these conditions.

CLAUSE 2(B)
If any legislation, to include regulations and directives, is compulsorily applicable to any business undertaken, these conditions shall, as regards such business, be read as subject to such legislation, and nothing in these conditions shall be construed as a surrender by the Company of any of its rights or immunities or as an increase of any of its responsibilities or liabilities under such legislation, and if any part of these conditions be repugnant to such legislation to any extent, such part shall as regards such business be overridden to that extent and no further.

Comment on Clause 2(B)

This is a very important clause and it includes the following two elements or limbs:

I. The BIFA STC can be overridden by compulsory legislation.
II. Where such compulsory legislation favours the BIFA Member more so than the BIFA STC, then there is no surrender of such more favourable rights or immunities.

The general rule is that **common law** is overridden by **contract law**. Common law is derived from judge-made decisions and even some of those decisions made in the 17th and 18th centuries are still valid in the 21st century under English law. Common law can be modified or overridden by contract terms and that happens when the BIFA STC are incorporated into contracts. Restraint on modifying common law by standard trading conditions is imposed by the Unfair Contract Terms Act 1977 because if standard trading conditions contravene that legislation, they are ineffective.

However, both common law and contract law are overridden by **statute law** enacted by an Act of Parliament ('Act'), by an Order enforced by Statutory Instrument ('SI'), by powers given in an Act, or possibly international law.

A Company cannot opt out of or disregard compulsory legislation. However, Clause 2(B) stresses that such legislation applies only to the extent that it is repugnant to the BIFA STC and that the company is not surrendering rights or immunities under such legislation. For example, with regard to the time limit for the notification of a claim, an International Convention incorporated into English law may be more favourable to the BIFA Member than the BIFA STC.

The compulsory legislation that has the most impact on the BIFA STC is that incorporating an International Convention for the carriage of goods. The main ones that concern a BIFA Member are as follows:

THE CMR CONVENTION FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD enacted by the **CARRIAGE OF GOODS BY ROAD ACT** 1965. It is important to note that this Convention concerns the contract of carriage and not the vehicles used to perform the contract. Thus, the CMR Convention may still apply to local collections and deliveries before and after carriage by the vehicle used for an international journey, if those local journeys form part of the contract of international carriage.

If the local carrier has not contracted for international carriage then that local carrier may have liability only to the extent offered under his trading conditions, unless he has taken over the CMR consignment note or unless the provisions of the CMR Convention are voluntarily adopted.

The CMR Convention **does** apply to road carriage to or from a country that is a party to the CMR Convention. Most European countries are a party to the CMR Convention.

The CMR Convention **does not** apply to a contract for the carriage of an ISO container when the container is taken off the road vehicle for sea carriage (that is what usually happens).

The CMR Convention **does not** apply to road carriage between the United Kingdom and the Republic of Ireland, nor that between the United Kingdom and Jersey.

THE HAGUE VISBY RULES for Sea Carriage enacted by the **CARRIAGE OF GOODS BY SEA ACT 1971**. This International Convention applies compulsorily only when a bill of lading or equivalent document is issued by the carrier (not a certificate of shipment or sea waybill). because sea waybills are not bills of lading under Article 1(b) of the Hague-Visby Rules as found in the case of *the Rafaela S* [2005]. There is a small exception to this where it is possible for the Rules to apply compulsorily when sea waybills are issued when the contract of carriage requires bills of lading to be issued or allows the customer to demand the issue of bills of lading and no bills of lading are issued. (*Kyokuyo Co Ltd v. A.P. Møller-Maersk A/S (Maersk Tangier*) [2018]). " It also applies compulsorily only to the time when the goods are loaded onto a ship until they are discharged from a ship ('tackle to tackle'). Thus for multimodal carriage by container, they apply compulsorily only to the 'sea leg'.

The Hague Visby Rules apply to international sea carriage when the port of shipment is in the United Kingdom. Severalother countries have adopted the Hague Visby Rules of 1968 but other countries apply the Hague Rules of 1924 or the Hamburg Rules of 1978 or variants of those Rules. All these Rules can apply to imports into the United Kingdom,depending on the country of shipment.

THE MONTREAL CONVENTION 1999 for INTERNATIONAL AIR CARRIAGE. The main UK legislationfor this Convention is the **CARRIAGE BY AIR ACT 1961** as amended and **THE CARRIAGE BY AIR ACTS (IMPLEMENTATION OF THE MONTREAL CONVENTION 1999) ORDER 2002 SI 2002/263**. Also, still in force are **THREE VERSIONS OF THE WARSAW CONVENTION – Original, Amended and Montreal Protocol No.4 of 1979,identified as "MP4"**. For 'Non-International Carriage' (see below) there are now the **NON-INTERNATIONAL CARRIAGE RULES** implemented by **THE CARRIAGE BY AIR ACTS (APPLICATION OF PROVISIONS) ORDER 1967 SI 1967/480 as amended**.

The Montreal Convention of 1999, the three versions of the Warsaw Convention and the Non-International Carriage Rules can all apply to air carriage to and from the United Kingdom. These complexities arise because each regime applies only if **both** the country of despatch **and** the country of destination have adopted it failing which the regime previously common to both countries applies.

The term 'non-international carriage' is used in the legal sense – not the geographical sense – and the term **does** apply to air carriage between the United Kingdom and its overseas territories such as the Channel Islands, Bermuda, Falkland Islands, Turks and Caicos Islands, etc. Thus, the Non-International Carriage Rules apply to such air carriage as well as to air carriage within the United Kingdom.

The Montreal Convention of 1999 and all versions of the Warsaw Convention apply only to the period during which the cargo is in the charge of the air carrier at an airport or in flight, and not to any carriage by land, sea or river outside an airport **even if so conveyed within the geographical scope of an air waybill** Quantum Corporation Ltd v Plane Trucking Ltd and Another [2002] 2 Lloyd's Rep 25 – Court of Appeal applies.

THE UNIFORM RULES CONCERNING THE INTERNATIONAL CARRIAGE OF GOODS BY RAIL (CIM) – APPENDIX B TO THE COTIF CONVENTION OF 1980 enacted by the INTERNATIONAL TRANSPORT CONVENTIONS ACT 1983.

This Convention concerns contracts of international carriage of goods by rail. Most European countries have adopted the CIM Rules. With some exceptions, the CIM Rules applyto all consignments of goods for railway carriage under a through consignment note made out for a route over the territories of at least two states that have adopted them.

There also exists the **MULTIMODAL TRANSPORT CONVENTION of 1980** and also **THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS WHOLLY OR PARTLY BY SEA 2009** but by 2021 they have not been enacted in the United Kingdom or elsewhere and until then they can be disregarded.

EXAMPLES OF WHEN THE BIFA STC ARE NOT OVERRIDDEN BY COMPULSORY LEGISLATION:

- Road carriage within the United Kingdom not forming part of a contract for the international carriage of goods by road (unless a CMR consignment note is taken over).
- Road carriage to and from the United Kingdom and the Republic of Ireland, and to and from the United Kingdom and Jersey.
- Sea carriage when a bill of lading or equivalent document is not issued.
- Multimodal ISO container carriage other than the leg by sea carriage.
- Packing, warehousing and terminal handling when they do not form part of carriage covered by an International Convention.
- Activities other than the carriage of goods.
- Error and omission claims which for example, concern documents and customs formalities.

Whilst the carriage of goods is the most important aspect of compulsory legislation overriding the BIFA STC it must be remembered that Clause 2(B) refers to all extant compulsory legislation, notably that for Customs regulations, hygiene, security and working time.

The text of Clauses 2(A) and (B) of the BIFA 2021 STC are exactly the same as Clauses 2(A) and (B) of the BIFA 2017 STC.

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CLAUSE 3

The Customer warrants that he is either the Owner, or the authorised agent of the Owner and, also, that he is accepting these Conditions not only for himself but also as agent for and on behalf of the Owner.

Comment on Clause 3

'Customer' and 'Owner' have the meanings as defined in Clause 1. The main intention of this clause is to ensure incorporation of the BIFA STC. Often the Customer is a freight forwarder or other intermediary and it would be contrary to commercial efficacy if incorporation of the BIFA STC could be achieved only by direct contact with the actual or future owner of the goods – in particular parties resident overseas.

The text of Clause 3 of the BIFA 2021 STC is identical with that of Clause 3 of the BIFA 2017 STC.

The Company

CLAUSE 4

CLAUSE 4(A)
Subject to Clauses 11 and 12 below, the Company shall be entitled to procure any or all of the services as an agent, or, to provide those services as a Principal.

CLAUSE 4(B)
The Company reserves to itself full liberty as to the means, route and procedure to be followed in the performance of any service provided in the course of business undertaken subject to these conditions.

Comment on Clause 4(A)

This clause gives the BIFA Member a liberty to act as an agent or as a Principal. The BIFA Member will have differing responsibilities and liabilities according to which role applies. Clauses 11 and 12 are referred to as an exception because it is deemed that a BIFA Member always acts as an agent when arranging insurance or when arranging conditional delivery or release of goods or documents by the use of third parties.

It can be difficult to decide whether a BIFA Member acts as an agent or as a Principal. The following points should be taken into account (not all need apply):-

1. A BIFA Member is not an agent simply because he believes he is an agent, or says he is an agent, or has the word 'Agent' or 'Agency' in the company name.
2. A BIFA Member can be a Principal (carrier) even if he does not own any vehicles or other transport equipment. He can sub-contract.
3. The impression of his role given by the BIFA Member to the Customer and whether the Customer had the expectation that the BIFA Member would assume the role of Principal, sub-contracting as necessary, or whether the BIFA Member would act as a forwarding agent making arrangements on the Customer's behalf with other carriers. If a BIFA Member misleads a Customer by advertising, or promises that they operate certain services when in fact they do not, they will probably be deemed to have acted as a Principal and denied any assertion that they acted as an agent.
4. Whether the identity of the actual carrier was revealed at the time of shipment.
5. Whether or not the BIFA Member quoted and/or charged a lump sum or gave a breakdown of freight andancillary charges. This point is of less importance than inthe past because charges are commonly aggregated to be zero rated for VAT purposes.
6. Whether or not freight and other charges were charged by the BIFA Member according to the carrier's charges with a modest agency charge added for profit. At English common law, an agent has no right to a secret profit but a Principal is free to make whatever profit he can get without the need for disclosure.
7. Would the BIFA Member be comfortable in revealing to his Customer the amount of the invoice paid to the carrier or other third party?
8. Whether the BIFA Member deals with the Customer in a general way for several destinations by one or more modes of transport, or whether the BIFA Member was chosen for a particular job or a particular destination.
9. Whether or not the BIFA Member can comply with Clause 6(B) (see below).

10. If a BIFA Member has acted on instructions from his Customer to contract with a carrier nominated by his Customer, the BIFA Member will be deemed to have acted as an agent and not as a Principal (unless there are very unusual overriding circumstances).

It is a fallacy to assert that the BIFA Member has less liability as an agent than as a Principal. The truth is that a BIFA Member's liability as an agent is different from that of a Principal. As an agent, a BIFA Member owes a higher dutyof care towards his Customer's interests and in the choice of contractors but may escape liability for the actual performance, such as damage or loss arising during the carriage of the goods or from their packing or handling. As a Principal, a BIFA Member has responsibility for the performance of the contract but does not have to concern himself with the Customer's interests beyond that task. In practice, a BIFA Member can sometimes act both as an agent and as a Principal – a 'mixed contract' – for example by acting as an agent for the packing and as a Principal for the carriage of goods, or vice versa.

When a BIFA Member's own staff perform a task then it usually acts as a Principal. When a BIFA Member operates his own groupage or consolidation service it is as a Principal. When a BIFA Member issues his own bill of lading or own air waybill it is as a Principal. When a BIFA Member acts as a 'house agent' for the Customer, acting as a traditional forwarding agent booking space with the shipping company and paying freight etc. on behalf of the Customer, then the BIFA Member acts as an agent.

However, the distinctions are not always that clear. Generally speaking, if there is doubt, the BIFA Member probably acted as a Principal.

A BIFA Member can have a different agency role – that as agent for the Principal carrier. For example, this may arise when the BIFA Member acts as the English agent of an overseas carrier, issuing transport documents that clearly show the overseas company as the carrier or receiving goods on behalf of the overseas carrier. The BIFA Member's obligations are then predominantly to his overseas Principal. Notification of a claim to the BIFA Member as such an Agent is tantamount to notification to the overseas carrier, and the transaction may be subject to the trading conditions of the overseas carrier even when its English agent is a BIFA Member.

Clause 4(A) of the BIFA 2021 STC is identical to that of Clause 4(A) of the BIFA 2017 STC.

Comment on Clause 4(B)

This clause gives the BIFA Member full discretion as to how any service is performed, whether acting as an agent or as a Principal. However, the interests of the Customer or Owner must be observed and if a particular means, route or procedure is specified by the Customer or Owner, care must be taken that there is not blatant breach of contract. See also Clause 6(A) for when the BIFA Member acts as an agent.

The text of Clause 4(B) of the BIFA 2021 STC is identical to that of Clause 4(B) of the BIFA 2017 STC.

CLAUSE 5

When the Company contracts as a Principal for any services, it shall have full liberty to perform such services itself, or, to sub-contract on any terms whatsoever, the whole or any part of such services.

Comment on Clause 5

This clause includes the unequivocal liberty to sub-contract to any extent when acting as a Principal. Sub-contracting is common in freight forwarding and it is usually inevitable with respect to carriage, customs clearance and other operations within an overseas country. The terms and conditions under which the sub-contractor operates may, overall, be less onerous than the BIFA 2021 STC. If so, that is a burden the BIFA Member must accept when he acts as a Principal because the BIFA 2021 STC still apply to his contract with his Customer.

The text of Clause 5 of the BIFA 2021 STC is identical to that of Clause 5 of the BIFA 2017 STC.

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CLAUSE 6

CLAUSE 6(A)
When the Company acts as an agent on behalf of the Customer, the Company shall be entitled, and the Customer hereby expressly authorises the Company, to enter into all and any contracts on behalf of the Customer as may be necessary or desirable to fulfil the Customer's instructions, and whether such contracts are subject to the trading conditions of the parties with whom such contracts are made, or otherwise.

CLAUSE 6(B)
The Company shall, within 14 days' notice given by the Customer, provide evidence of any contract entered into as agent for the Customer. Insofar as the Company may be in default of the obligation to provide such evidence, it shall be deemed to have contracted with the Customer as a principal for the performance of the Customer's instructions.

Comment on Clause 6(A)

This liberty clause applies when the Company acts as an agent for the Customer. It permits freedom of action subject to the overriding obligation to act in the Customer's interests. The clause also stresses that such contracts entered into on behalf of the Customer are subject to the trading conditions of the parties with whom the contracts are made. However, the BIFA Member's own acts or omissions are subject to the BIFA 2021 STC.

The text of Clause 6 in the BIFA 2021 STC is identical to that of Clause 6 of the BIFA 2017 STC.

Comment on Clause 6(B)

As stated in the comments to Clause 6(A), it is not always easy to determine whether or not the BIFA Member has acted as an agent or as a Principal. If an agency role is claimed, it can usually be evidenced, for example, by the submission of a document such as a bill of lading or air waybill which shows the identity of the actual carrier (Principal) and shows the Customer as the shipper. It is not unusual for a Customer to be unaware of the identity of the carrier as specific instructions may not have been given in that respect, it being left to the BIFA Member to contract as he thinks fit. If no such evidence (which need not be a transport document) can be produced, it is likely that the BIFA Member did act as a Principal. This clause states that in the absence of such evidence, the BIFA Member will be deemed to have acted as a Principal. Such evidence is given only on 14 days' notice given by the Customer demand to establish whether or not the BIFA Member acted as agent or Principal.

The text of Clause 6(B) of the BIFA 2021 STC is identical to that of clause 6(B) of the BIFA 2017 STC but in terms of best practice it is advisable to provide the evidence as soon as possible to preserve customer relations.

CLAUSE 7

In all and any dealings with HMRC for an on behalf of the UK established Customer and/or Owner, the Company is deemed to be appointed, and duly empowered to act as a Direct Customs Agent only, to make Customs declarations in the name of the Customer (Principal) as their Direct Agent.

Comment on Clause 7

Clause 21 of the Taxation (Cross-border Trade) Act 2018 (TCTA 2018) states under the heading "Customs Agents" at Clause 21(1) that a person may appoint any other person ("a Customs Agent") to act on their behalf to either make customs declarations in the name of the person they act for ("a Direct Agent") or to make customs declarations in their own name ("Indirect Agent"), Paragraph 21(a) and (b) confirms the definition of each type of agent as follows:

- direct, where the customs agent shall act in the name of and on behalf of the person instructing them or
- indirect, where the customs agent shall act in his own name although instructed by a person.

Paragraph 21(2) of TCTA 2018 states that when a customs agent is appointed and when their appointment is withdrawn, this must be reported to HMRC in accordance with any regulations made by HMRC Commissioners. The effect of such an appointment as Customs Agent is dealt with under Paragraph 21(3) which states that anything done by or in relation to the agent under this part of the TCTA 2018 is regarded as having be done by or in relation to the Principal and not the agent – in other words, the instructing party.

There is one exception to paragraph 21(3) being if a Customs Agent acts as an Indirect Agent. In such cases both the Indirect Agent and the instructing party who is referred to as "the principal" are liable for the import duty.

Paragraph 21(6) deals with cases where the Direct Agent may still be liable for the import duty if the appointment of the Agent has not been disclosed to HMRC as required under paragraph 21(2) as set out above; and if the agent acts at a time where their appointment has been withdrawn; when the agent purports to have authority but has not been given such authority; and when the declaration made by the agent for a customs procedure and the has not been made in accordance with the simplified customs declarations provisions.

Clause 7 of BIFA 2021 STC provides for the Company acting as Direct Agent for the Customer so that it is the Principal who is responsible for the customs debt.
It is advisable to get a signed authority to act as your Customer's Direct Agent so if you are requested to justify your authority you are able to produce this to HMRC.

It is also advisable just in case you are taken to be jointly and severally responsible for the import duty or deemed to be an Indirect Agent of a customer outside the UK that you seek a deposit or guarantee from your Customer to cover potential liabilities to avoid the need to recover the duty from your customer if HMRC seek payment from you, particularly if they are in a jurisdiction where it may be difficult to make recovery.

The text of Clause 7 of the BIFA 2021 STC is different to that of Clause 7 of the BIFA 2017 STC owing to the change in legal name and reference now being "Direct Agent" and the TCTA 2018.

CLAUSE 8

CLAUSE 8(A)
Subject to sub-clause (B) below

the Company:

(i) has a general lien on all Goods and documents relating to Goods in its possession, custody or control for all sums due at any time to the Company from the Customer and/or Owner on any account whatsoever, whether relating to Goods belonging to, or services provided by or on behalf of the Company to the Customer or Owner. Storage charges shall continue to accrue on any Goods detained under lien;

(ii) shall be entitled, on at least 21 days' notice in writing to the Customer, to sell or dispose of or deal with such Goods or documents as agent for, and at the expense of, the Customer and apply the proceeds in or towards the payment of such sums;

(iii) shall, upon accounting to the Customer for any balance remaining after payment of any sum due to the Company, and for the cost of sale and/or disposal and/or dealing, be discharged of any liability whatsoever in respect of the Goods or documents.

CLAUSE 8(B)
When the goods are liable to perish or deteriorate, the Company's right to sell or dispose of or deal with the Goods shall arise immediately upon any sum becoming due to the Company, subject only to the Company taking reasonable steps to bring to the Customer's attention its intention to sell or dispose of the Goods before doing so.

Comment on Clause 8(A)

A LIEN is a legal right exercisable under certain conditions, to retain custody or control of goods or documents until charges are paid in full. A **PARTICULAR LIEN** is a right to retain the particular goods or documents that are the subject of the unpaid charges. A **GENERAL LIEN** is a right to retain goods or documents until all outstanding charges are paid in full – that is not just charges on the goods or documents detained but also overdue charges arising on other goods. An **ACTIVE LIEN** is one that gives the right to sell or dispose of goods or documents and not merely a right to retain them. Under Clause 8(A), a BIFA Member has an **ACTIVE GENERAL LIEN**.

At English common law, a freight forwarder (whether acting as Agent or Principal) has only a particular lien. It was held in the case *Langley Beldon & Gaunt v. Morley [1965]* 1 Lloyd's Rep 297 that a forwarding agent does not have a common law right to a general lien by custom of the trade.

It is only when the BIFA STC (or trading conditions with a similar clause) are incorporated into a contract that the BIFA Member has an active general lien.

A common law lien confers no right of sale – it is passive. Clauses 8(A) and 8(B) of the BIFA STC give the BIFA Member the contractual right to sell goods or to dispose of them or to deal with them subject to giving sufficient notice of the intention to do so. The BIFA Member cannot make a profit from such sale but must only cover overdue charges and expenses incurred and must account to the owner for any balance received in the proceeds. The BIFA Member must get the best price in the circumstances and not recklessly sell goods cheaply.

A lien is a very useful weapon to use against a defaulting customer but great care must be exercised otherwise the BIFA Member may face a claim for conversion.

The following points must be considered: -

1. A general lien can be applied only to the true owner of the goods. It is important to establish ownership of the goods – see *Crawshaw & Others v. Humphrey & Others*, All ER Reprints [1814-1823] 591, and *Chelleram & Son (London) Ltd v. Butlers Warehousing and Distribution Ltd [1978]*, 1 Lloyd's Rep 412. Generally, a BIFA Member cannot hold goods under a lien when it is a third party such as another freight forwarder that is in default and not the true owner of the goods but this is possible where a sub bailment on terms exists – see *Jarl Tra AB and Others-v-Convoys Ltd (QBD[2003])*. Care must be taken that there is not a retention of title clause in the contract between seller and buyer. If the true owner of the goods does not owe any sum to the BIFA Member, there is a risk that the BIFA Member will be sued for conversion or unlawful interference of the goods.

2. The goods or documents must come into the possession of the BIFA Member in the normal course of business when exercising a lien – they cannot be seized.

3. A lien can be exercised only with possession of the goods or of the documents. Such possession need not be physical possession but can be constructive possession or control so long as the goods or documents are at the disposal of the BIFA Member exercising the lien (the 'lienee'). This can arise when goods are in transit, when they are not suitable for warehousing, for example by way of size or weight or when the lienee does not have his own warehousing premises. Definite instructions restricting the release of the goods must be given to whoever has custody of the goods (the 'bailee'). However, a lien is not lost ifthe BIFA Member is fraudulently induced to part with the goods.

4. Where carriage charges are involved, a lien is normally exercisable only when the carriage has been performed.

5. At common law, the person exercising a lien has to bear the costs of retaining such goods such as rent or storage costs (*Somes & Others v. British Empire Shipping Co.*, All ER Reprints [1843-1860] 844) but Clause 8(A) (i) seeks to make storage costs payable bythe owner of the goods held under a lien.

6. There can be no lien without an immediate right to the debt (*Raitt v. Mitchell & Another*, All ER Reprints [1814-1823] 129). The need to exercise a general lien will probably not arise unless deferred payment terms ('credit terms') were granted. However, if the agreed payment terms have been exceeded the contract is breached and they no longer apply so the charges become immediately due.

7. A lien must be activated by giving the defaulter written notice that a lien is being exercised – a letter will suffice. The notice must state the amount owed.

8. In exercising a lien, the lienee must take reasonable care to protect the goods in his possession. A BIFA Member should expect his liability insurance cover to extend to legal liability for loss or damage when the BIFA Member exercises a legally enforceable lien.

9. Clause 8(A) refers to documents as well as goods because documents of title can represent the goods. As they are needed in order to take possession of goods, exercising a lien on documents of title can be as effective as exercising a lien on goods.

10. Clause 8(A) gives the Company the right to exercise a general lien without permission of the Court for goods owned by an insolvent Customer that has gone into administration provided that the debt and the exercising of the lien arose before the administrators were appointed – *Uniserve Ltd. and Others v. Joint Administrators of La Senza Ltd (in Administration) [2012]* EWHC 190 Ch.

Comment on Clause 8(B)

Clause 8(A) (ii) of the BIFA 2021 STC confers the right to sell or dispose of goods on giving at least 21 days' notice, which is a reasonable and generous time scale. However, in the case of perishable goods or those likely to deteriorate such a time scale would be useless and so Clause 8(B) confers the right to sell or dispose of such goods immediately upon sums becoming due, provided that reasonable steps are taken to draw the defaulter's attention to the intention to sell before doing so.

Caution! Under S.8 of the **Food Safety Act 1990** it is a criminal offence to sell or offer for sale food that fails to comply with food safety requirements and the punishment can be a fine, a custodial sentence, or both.

Clause 8(B) gives by contract, the right to sell perishable goods when a lien is being exercised. No such right exists at common law and the only alternative remedy would be for the BIFA Member to make an application for a **Court Order under Part 25.1 (1) (c) (v) of the Civil Procedure Rules** which came into force in 1999 and which states: "The court may grant the following interim remedies an order…..for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly". The granting of such an Order is discretionary. This facility may be sought when the goods are not perishable or likely to physically deteriorate but are likely to substantially lose their value or the whole point of their production within a short time and in less than the timeneeded to give at least 21 days' notice.

The text of Clauses 8(A) and 8(B) of the BIFA 2021 STC is

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CLAUSE 9

The Company shall be entitled to retain and be paid all brokerages, commissions, allowances and other remunerations customarily retained by, or paid to, freight forwarders.

Comment on Clause 9

This clause applies when the BIFA Member acts as an agent. There is no need for such a clause when he acts as a Principal because a Principal can make as much profit as he can without having to answer to his Customer. The general rule at common law is that an agent should not make a secret profit and should pass on discounts and the like to his Principal. It has long since been common for forwarding agents to receive discounts or commission from carriers on certain routes and from insurers. This clause eliminates any doubt that the BIFA Member is entitled to retain such remuneration for his own benefit.

The text of Clause 9 of the BIFA 2021 STC is identical to that of Clause 9 of the BIFA 2017 STC.

CLAUSE 10

CLAUSE 10(A)
Should the Customer, Consignee or Owner of the Goods fail to take delivery at the appointed time and place when and where the Company is entitled to deliver, the Company shall be entitled to store the Goods, or any part thereof, at the sole risk of the Customer or Consignee or Owner, whereupon the Company's liability in respect of the Goods, or that part thereof, stored as aforesaid, shall wholly cease. The Company's liability, if any, in relation to such storage, shall be governed by these conditions. All costs incurred by the Company as a result of the failure to take delivery shall be deemed as freight earned, and such costs shall, upon demand, be paid by the Customer.

CLAUSE 10(B)
The Company shall be entitled at the expense of the Customer to dispose of or deal with (by sale or otherwise as may be reasonable in all the circumstances): -

(i) after at least 21 days' notice in writing to the Customer, or (where the Customer cannot be traced and reasonable efforts have been made to contact any parties who may reasonably be supposed by the Company to have any interest in the goods) without notice, any goods which have been held by the Company for 60 days and which cannot be delivered as instructed; and

(ii) without prior notice, any Goods which have perished, deteriorated or altered or are in immediate prospect of doing so in a manner which has caused or may reasonably be expected to cause loss or damage to the Company or third parties, or to contravene any applicable laws or regulations.

Comment on Clause 10(A)

This clause applies when the BIFA Member has an inability to deliver goods in accordance with instructions. That is a different situation from that when a BIFA Member deliberately withholds delivery when exercising a lien – see Clauses 8(A) and 8(B).

At English common law, a carrier is entitled to recover storage expenses incurred by taking care of goods after carriage has ended – *Great Northern Rail Co. v. Swaffield*, All ER Reprints [1874-1880] 1065. This clause widens that common law right of the carrier to that of the BIFA Member in situations where such charges are paid or payable by third parties and adds more to the right to demand payment.

Also at English common law, even when goods are declared as being held at owner's risk at the end of the carriage, a carrier still has a duty to take reasonable care of the goods, failing which he has liability for loss or delay – *Mitchell & Others v. Lancashire & Yorkshire Rail Co.*, All ER Reprints [1874-1880] 1298. This clause attempts to "wholly cease" the BIFA Member's liability when carriage has ended and delivery cannot be made. This cessation of liability does not cover loss or damage arising during carriage or from another breach of duty.

Comment on Clause 10(B)

The chapeau (unnumbered heading) of this clause conveys a right to dispose of or deal with Goods by sale or otherwise when they cannot be delivered. A very generous time is given for such disposal except in the case of perishable and similar goods for which immediate disposal is necessary.

The text of Clauses 10(A) and (B) of the BIFA 2021 STC isidentical to Clause 10(A) and (B) of the BIFA 2017 STC.

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CLAUSE 11

CLAUSE 11(A)
No insurance will be effected except pursuant to and in accordance with clearly stated instructions given in writing by the Customer and accepted in writing by the Company, and all insurances effected by the Company are subject to the usual exceptions and conditions of the policies of the insurers or underwriters taking the risk. Unless otherwise agreed in writing, the Company shall not be under any obligation to effect a separate insurance on the Goods, but may declare it on any open or general policy held by the Company.

CLAUSE 11(B)
Insofar as the Company agrees to effect insurance, the Company acts solely as agent for the Customer, and the limits of liability under Clause 26 (A) of these Conditions shall not apply to the Company's obligations under Clause 11.

Comment on Clause 11(A)

"Insurance" under this clause is not defined but in practice this clause concerns insurance of goods either in transit (otherwise called marine insurance even when goods are not carried by sea) or in storage.

This clause makes it clear that the BIFA Member will not effect insurance unless instructions to do so are given by the Customer in writing. Under English common law, in respect of a **commercial shipper**, a forwarding agent is under no obligation to enquire whether or not the goods are insured because in the absence of insurance instructions it is assumed that the commercial shipper has his own insurance cover for the extent to which goods are at his risk - *W L R Traders Ltd v. B & N Shipping Agency Ltd [1955]*, 1 Lloyd's Rep 554. That presumption can be rebutted by a regular course of dealing by which it would be apparent that the shipper does not have his own cover. However, with regard to the **private shipper** – that is a consumer as a natural person, under English common law, a forwarding agent **does** have a duty to enquire if the goods need to be insured – *Von Trauenberg v. Davies Turner & Co Ltd [1951]*, 2 Lloyd's Rep 462. Clause 11(A) overrides the common law situation in this respect. Clause 11(A) goes further and stipulates that insurance is not effected unless the written insurance instructions are accepted by the Company. The Company is not obliged to accept the insurance instructions. A BIFA Member could also reject the insurance instructions if he knew that goods were already lost or damaged before the insurance instructions were received by him. Until insurance instructions are given in writing by the Customer and accepted by the Company, the open cover is not activated. If the Company does not accept the insurance instructions then written notification must be sent immediately to the Customer.

There is often confusion between **insurance** and **liability**. Shippers often wrongly assume that a BIFA Member will automatically insure goods for loss or damage. A BIFA Member is obliged to insure only his legal liability such as that under the BIFA STC or under an overriding international convention. Such liability is usually less than what would be the insured value of the goods and in some circumstances, there is no such liability at all even when loss or damage arises.

A standard Forwarders Cargo Declaration policy or facultative 'one-off' insurance will usually provide cover for commercial shipments of new packed 'general approved' goods (goods not susceptible to breakage or theft) for all risks of 'physical' loss and damage under Institute Cargo Clauses (A) for sea and road shipments or Institute Cargo Clauses (Air) for airfreight.

These conditions contain exclusions and restrictions to cover and your customer should be provided with an evidence of insurance cover so that they are aware of the basis under which their goods have been insured. Other 'non-approved' goods would be subject to either the addition of further conditions or restrictions or may even be limited to a lesser level of cover for loss only resulting from aspecific named peril. Always refer to your insurance broker for clarification as to the details of the cover that has been made available to you.

It is a common practice for a BIFA Member to declare a consignment against an open or general policy in his name and not go to the trouble of obtaining a separate insurance policy. This gives perfectly good cover and is convenient for the BIFA Member, the insurer and the Customer. Clause 11(A) stipulates that a BIFA Member is not in breach of contract if goods are insured in that way.

At common law, under a true CIF contract, a seller is bound to tender to the buyer a proper policy of insurance and the buyer is entitled to demand a policy of insurance that covers only the goods mentioned on the invoice and the bill of lading – Manbre Saccharine Co. Inc. v. Corn Products Co., All ER Reprints [1918-1919] 980. The onus is on the Customer to specify such a requirement in the insurance instructions.

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Comment on Clause 11(B)

This is a very important clause.

In May 1999, it was held in the Court of Appeal in the case of Overseas Medical Supplies Ltd v. Orient Transport Services Ltd [1999], 2 Lloyd's Rep 273 that a clause in the BIFA STC (1999) limiting liability for a failure to carry out a promise to insure goods, was unreasonable and contrary to the Unfair Contract Terms Act 1977 and so such a clause was ineffective. Clause 11B of the BIFA STC (2000B) and subsequent editions have reflected the necessary revision. The reasoning was that insurance is a contract of indemnity and it is unreasonable to seek an indemnity for failing to keep a promise to provide an indemnity.

Thus, when a BIFA Member is negligent in arranging insurance there is no limitation of liability. If a promise to insure goods is given and that promise is not carried out then there can be serious consequences. However, an oversight in failing to declare the goods when written instructions were received from the Customer and accepted by the Company can be rectified by making a retroactive declaration on the open cover. One reason why BIFA Members must demand insurance instructions in writing is so that such instructions can be supplied as proof that there was an intention to insure the goods.

Clause 11(B) also stresses that in arranging insurance, the BIFA Member has an agency role. It sometimes happens that a Customer expects the BIFA Member to settle a cargo insurance claim because the BIFA Member was asked to insure the goods. As an agent, the BIFA Member has a duty only to assist the Customer if necessary in obtaining a settlement from the insurance company or underwriters.

The text of Clause 11(A) and (B) of the BIFA 2021 STC is identical to that of Clause 11(A) and (B) of the BIFA 2017 STC.

CLAUSE 12

CLAUSE 12(A)

Except under special arrangements previously made in writing by an officer of the Company so authorised, or made pursuant to or under the terms of a printed document signed by the Company, any instructions relating to the delivery or release of goods in specified circumstances (such as, but not limited to, against payment or against surrender of a particular document) are accepted by the Company, where the Company has to engage third parties to effect compliance with the instructions, only as agents for the Customer.

CLAUSE 12(B)

Despite the acceptance by the Company of instructions from the Customer to collect freight, duties, charges, dues, or other expenses from the Consignee, or any other Person, on receipt of evidence of proper demand by the Company, and, in the absence of evidence of payment (for whatever reason) by such Consignee, or other Person, the Customer shall remain responsible for such freight, duties, charges, dues, or other expenses.

CLAUSE 12(C)

The Company shall not be under any liability in respect of such arrangements as are referred to under sub-clause (A) and (B) hereof save where such arrangements are made in writing, and in any event, the Company's liability in respect of the performance of, or arranging the performance of, such instructions shall not exceed the limits set out in Clause 26(A) (ii) of these conditions.

Comment on Clause 12(A)

The intention of this clause is to divert claims to those third parties that have to be engaged to carry out such instructions. Liability for non-compliance with such instructions will depend on the extent that such instructions were passed to such third parties by the BIFA Member. Liability cannot always be excluded or limited under this clause when the BIFA Member acts as a carrier (whether or not sub-contractors are used) in a contract for international road carriage because Article 21 of the CMR Convention overrides this clause in respect of cash on delivery collections. Also, the BIFA Member cannot claim an agency role and the involvement of third parties when the goods are released by the BIFA Member's own agent at destination without production of an original bill of lading issued by the BIFA Member as carrier.

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Comment on Clause 12(B)

This clause is regarded as something of a mirror image of Clause 12(A) but instead of referring to the liability of the Company and limiting that liability, Clause 12(B) refers to the Customer's responsibility to pay uncollectable charges in full.

When in accordance with the Customer's instructions, services are performed by the BIFA Member or charges are paid out by the BIFA Member, the BIFA Member is entitled to be paid or reimbursed. Sometimes the Customer's instructions require the BIFA Member to look for payment from another party. In those circumstances, the BIFA Member may find himself unable to collect the charges from another party. The Customer may equally be unable to recover the charges and Clause 12(B) is intended to make the Customer and not the BIFA Member the innocent party who has to bear the financial loss.

Such circumstances are illustrated by the case *E. W. Taylor (Forwarding) Ltd v. Bell, Lloyd's Rep [1968]* 2 63 which prompted the insertion of such a clause in all the BIFA and IFF STC since 1970. The 1968 case referred only to freight charges and Clause 12(B) of the BIFA 2005A STC refers to all charges and expenses.

Clause 12(B) holds the Customer responsible for uncollectable charges etc. when the BIFA Member provides evidence of a demand for payment unless evidence of payment is provided by the Customer.

It is important for a BIFA Member to establish his true customer. For goods routed by the consignee either by a direct dealing or through an overseas agent, the BIFA Member's true customer would normally be the consignee who stipulated the routing through the services of the BIFA Member and not the sender. For routed consignments, application of Clause 12(B) against the Customer may be deemed unreasonable in respect of charges that are the responsibility of the BIFA Member's true customer.

Comment on Clause 12(C)

This clause states that any liability on the part of the BIFA Member in respect of such arrangements under Clause 12(A) and 12(B) unless they are made in writing and any liability on the part of the BIFA Member shall be limited to that under Clause 26(A) (ii) of the BIFA 2021 STC.The limitation of liability under Clause 26(A) (ii) is the value of the goods of the whole consignment or 2 SDR per grossweight of the whole consignment or a cap of 75000 SDR whichever is the least unless the actual financial loss is lessthan any of those amounts.

The text of Clauses 12(A)-(C) inclusive of the BIFA 2021 STC is identical to those of Clause 12(A)-(C) of the BIFA2017 STC.

CLAUSE 13

Advice and information, in whatever form it may be given, is provided by the Company for the Customer only. The Customer shall indemnify the Company against all loss and damage suffered as a consequence of passing such advice or information on to any third party.

Comment on Clause 13

This clause is intended to cover the potential liability of a BIFA Member to persons other than his Customer. At common law there is a duty of care in respect of the making of a negligent statement that is known or expected to be acted upon. The three criteria in respect of this common law duty of care are foreseeability of damage, proximity of relationship and the reasonableness or otherwise of imposing the duty – *Hedley Byrne & Co Ltd v. Heller & Partners, All ER [1963] 2 575 and Caparo Industries v. Dickson & Others, All ER [1990]* 1 568.

This clause intends to restrict the use of advice and information so that it does not have unexpected consequences for the BIFA Member when used by persons unknown.

If the advice or information given by the BIFA Member to the Customer has an error or omission which causes harm or loss to the Customer, the BIFA Member's liability is limited according to Clause 26(A) (ii).

The text of Clause 13 of the BIFA 2021 STC is identical to that of Clause 13 of the BIFA 2017 STC.

CLAUSE 14

Without prior agreement in writing by an officer of the Company so authorised, the Company will not accept or deal with Goods that require special handling regarding carriage, handling, or security whether owing to their thief attractive nature or otherwise including, but not limited to, bullion, currency, securities, precious stones, jewellery, valuables, antiques, pictures, human remains, living creatures, plants. Should any Customer nevertheless deliver any such goods to the Company, or cause the Company to handle or deal with any such goods, otherwise than under such prior agreement, the Company shall have no liability whatsoever for or in connection with the goods, howsoever arising.

Comment on Clause 14

The goods referred to in this clause require special attention and this clause confers the right of the BIFA Member to refuse to accept or deal with them when there is no prior agreement in writing. This clause also disclaims any liability whatsoever howsoever arising when such arrangements are not made. At common law, a carrier is responsible for all goods delivered to him unless they are dangerous.

Much depends on the knowledge of the BIFA Member, the previous course of dealing and the extent to which special arrangements have to be made.

The text of Clause 14 of the BIFA 2021 STC is identical to that of Clause 14 of the BIFA 2017 STC.

CLAUSE 15

Except pursuant to instructions previously received in writing and accepted in writing by the Company, the Company will not accept or deal with Goods of a dangerous or damaging nature, nor with Goods likely to harbour or encourage vermin or other pests, nor with Goods liable to taint or affect other Goods. If such Goods are accepted pursuant to a special arrangement, but, thereafter, and in the opinion of the Company, constitute a risk to other goods, property, life or health, the Company shall where reasonably practicable, contact the Customer in order to require him to remove or otherwise deal with the Goods, but reserves the right, in any event, to do so at the expense of the Customer.

Comment on Clause 15

At common law, when no declaration is made to the contrary, a consignor impliedly warrants to the carrier that the goods so tendered are fit to be carried in the ordinary way and are not dangerous. If the consignor knows that the goods are of a dangerous nature he is bound to inform the carrier accordingly – *Brass v. Maitland [1856] and Bamfield v. Goole and Sheffield Transport Co. Ltd, All ER Reprints [1908-1910] 799.* The declaring and labelling of dangerous goods is now mandatory under the various statutory regulations. This clause covers not only dangerous goods but also goods likely to have a deleterious effect on other goods or equipment. This clause not only specifies the requirements to have notification of such goods in writing but also confers the right of the BIFA Member to dispose, remove or otherwise deal with such goods at the Customer's expense if the Customer is unable or unwilling to do so himself.

Clause 15 should be read in conjunction with Clause 18 by which the customer indemnifies the Company against all penalties, claims, damages, costs and expenses whatsoever arising within the context of Clause 15.

The text of Clause 15 of the BIFA 2021 STC is identical to that of Clause 15 of the BIFA 2017 STC.

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CLAUSE 16

Where there is a choice of rates according to the extent or degree of the liability assumed by the Company and/or third parties, no declaration of value will be made and/or treated as having been made except under special arrangements previously made in writing by an officer of the Company so authorised as referred to in Clause 26(D).

Comment on Clause 16

This clause arises when the BIFA Member acts as both an agent and as a Principal and refers only to a declaration of value. There are sometimes alternative terms of contract whereby a lower scale of charges applies if goods are carried at 'owner's risk' rather than at 'carrier's risk'. Also, where value is declared for carriage on an air waybill or on a bill of lading, the carrier will accept full liability for loss or damage up to the declared value and at extra cost. At common law, if when acting as an agent, the BIFA Member decides which scale to use without reference to his Customer he will do so at his risk. This clause places the onus on the Customer to make such special arrangements in writing. Similarly, no special declaration of value resulting in higher potential liability will be made to carriers unless special instructions to do so are given in writing to the BIFA Member and accepted in writing by the BIFA Member.

The text of Clause 16 of the BIFA 2021 STC is identical to that of Clause 16 of the BIFA 2017 STC.

The Customer

CLAUSE 17

The Customer warrants:

CLAUSE 17(A)

(i) that the following (furnished by or on behalf of the Customer) are full and accurate: the description and particulars of any Goods; any information furnished (including but not limited to, the nature, the gross weight; gross mass (including the verified actual gross mass of any container packed with packages and cargo items), and measurements of any Goods; and the description and particulars of any services required by or on behalf of the Customer are full and accurate, and

(ii) that any Transport Unit and/or equipment supplied by the Customer in relation to the performance of any requested service is fit for purpose.

CLAUSE 17(B)

that all Goods have been properly and sufficiently prepared, packed, stowed, labelled and/or marked, and that the preparation, packing, stowage, labelling and marking are appropriate to any operations or transactions affecting the goods and the characteristics of the Goods.

CLAUSE 17(C)

that where the Company receives the goods from the Customer already stowed in or on a Transport Unit, the Transport Unit is in good condition, and is suitable for the carriage to the intended destination of the Goods loaded therein, or thereon;

CLAUSE 17(D)

that where the Company provides the Transport Unit, on loading by the Customer, the Transport Unit is in good condition, and is suitable for the carriage to the intended destination of the Goods loaded therein, or thereon.

General Comment on Clause 17

The word **"WARRANTY"** is used here in the sense of being an assurance or guarantee that certain facts or circumstances apply. These warranty clauses are important and if the Customer is in breach of the warranties, the BIFA Member is indemnified from liability by the indemnity clause in Clause 20(A). The warranties apply whether the BIFA Member acts as Agent or Principal.

Comment on Clause 17(A)

Full and accurate information may be required for customs purposes, for stowage purposes especially regarding dangerous goods, for routing and many other purposes. If the company incurs any expense or liability arising through inaccurate or inadequate particulars then recourse can be made to the Customer and/or liability to the Customer can be repudiated. At English common law, where a shipper has furnished an inaccurate specification of a consignment and the forwarding agent has had to pay additional freight charges to obtain the bills of lading, the shipper is liable for the additional freight charges – *Brushfield, Sargent & Co. Ltd v. Holmwright Engineering Co. Ltd [1968], Lloyd's Rep 439.* The warranty cannot apply when the full and accurate particulars are known only to the BIFA Member, for example when the BIFA Member has carried out or has organised, the packing. Clause 17(A) (i) of this clause has been improved to deal with the introduction of the new SOLAS Regulations pertaining to the verification of the gross mass of a packed container which came into force on 1 July 2016.

Comment on Clause 17(B)

This warranty cannot apply when the BIFA Member has performed the packing, labelling, etc... At English common law, a carrier is not liable for damage caused by another's improper packing before despatch even though he knew that the goods were not properly packed when he accepted them – *Gould v. South Eastern & Chatham Rail Co., All ER Reprints [1920] 654*. However, also at English common law, when a defect in packing is discovered during carriage, a carrier has a duty to take steps to preserve the goods – *Cox v. London North Western Railway [1872].*

Comment on Clause 17(C)

The object of this warranty is to protect the BIFA Member when he receives a Transport Unit provided by the Customer and already stowed with Goods so that the BIFA Member cannot check the condition or suitability of the Transport Unit.

Comment on Clause 17(D)

When the Transport Unit is provided by the Company – and which under a sub-contract might be a trailer provided by a road transport operator or a container provided by a shipping company or container operator – the onus is on the Customer to check the condition and suitability of the Transport Unit before it is loaded. The Customer would be expected to make a "layman's inspection" of the Transport Unit for obvious holes, rust, contamination and suitability and not a fine defect apparent only to a trained Transport Unit engineer.

The text of Clauses 17(A) – (D) inclusive of the BIFA 2021 STC

CLAUSE 18

Without prejudice to any rights under Clause 15, where the Customer delivers to the Company, or causes the Companyto deal with or handle Goods of a dangerous or damaging nature, or Goods likely to harbour or encourage vermin or other pests, or Goods liable to taint or affect other goods, whether declared to the Company or not, he shall be liable for all loss or damage arising in connection with such Goods, and shall indemnify the Company against all penalties, claims, damages, costs and expenses whatsoever arising in connection therewith, and the Goods may be dealt with in such manner as the Company, or any other person in whose custody they may be at any relevant time, shall think fit.

Comment on Clause 18

This clause reflects the wording of Clause 15 with which it is connected. Clause 15 confers the BIFA Member's right to refuse to deal with such goods and to remove or deal with them at the Customer's expense. Clause 18 requires the Customer to indemnify the BIFA Member against liability for penalties etc. incurred for such goods and extends the liberty to dispose of them.

The text of Clause 18 of the BIFA 2021 STC is identical to that of Clause 18 of the BIFA 2017 STC.

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CLAUSE 19

The Customer undertakes that no claim shall be made against any director, servant or employee of the Company which imposes, or attempts to impose, upon them any liability in connection with any services that are the subject of these Conditions, and, if any such claim should nevertheless be made, to indemnify the Company against all consequences thereof.

Comment on Clause 19

The purpose of this clause is to prevent a Customer from circumventing legal action against the BIFA Member (who would have the protection of the BIFA STC) by suing a director, servant or employee of the BIFA Member. It is a kind of "Himalaya Clause", so called after the case in which an injured person sued the ship's master instead of the shipping company. It is intentional that this clause has no reference to the BIFA Member's sub-contractors.

The text of Clause 19 of the BIFA 2021 STC is identical to that of Clause 19 of the BIFA 2017 STC.

CLAUSE 20

The Customer shall save harmless and keep the Company indemnified from and against

CLAUSE 20(A)
all liability, loss, damage, costs and expenses whatsoever (including, without prejudice to the generality of the foregoing, all duties, taxes, imposts, levies, deposits and outlays of whatsoever nature levied by any authority in relation to the Goods) arising out of the Company acting in accordance with the Customer's instructions, or arising from any breach by the Customer of any warranty contained in these Conditions, or from negligence of the Customer;

CLAUSE 20(B)
without derogation from sub-clause (A) above, any liability assumed, or incurred by the Company when, by reason of carrying out the Customer's instructions, the Company has become liable to any other party;

CLAUSE 20(C)
all claims, costs and demands whatsoever and by whomsoever made or preferred in excess of the liability of the Company under the terms of these conditions, regardless of whether such claims, costs and/or demands arise from, or in connection with, the breach of contract, negligence or breach of duty of the Company, its servants, sub-contractors or agents;

CLAUSE 20(D)
any claims of a general average nature which may be made on the Company.

Comment on Clause 20(A)

There are three limbs to this important Sub-Clause. Under the first limb, the Customer indemnifies the BIFA Member for a wide range of outgoings where they are incurred by acting in accordance with the Customer's instructions. For the indemnity to be effective those instructions must have caused the outgoings – it is not enough that the BIFA Member acted on those instructions from the Customer. Under the second limb, the Customer indemnifies the BIFA Member for outgoings caused when the Customer breaches warranties in these Conditions, notably those given under Clause 17. Under the third limb, the Customer indemnifies the BIFA Member for outgoings caused by the Customer's negligence.

Comment on Clause 20(B)

This Sub-Clause gives an additional indemnity to the BIFA Member when he incurs liability to any other party by reason of carrying out the Customer's instructions.

Comment on Clause 20(C)

This is a very important indemnity Sub-Clause and it blocks any liability on the part of the BIFA Member to the Customer for amounts in excess of the limits specified in Clause 26. At English common law, if negligence is proved or accepted, there can be liability additional to that for the value of goods lost or damaged provided it is not consequential and not too remote – for example the loss of income from an earning chattel as well as the value of the chattel itself – "*The Greta Holme", All ER Reprints [1895-1899] 127 and B. Sunley & Co. Ltd v. Cunard White Star Ltd, All ER [1939] 3 541.*

Comment on Clause 20(D)

This clause covers the situation where the BIFA Member is made liable for a general average contribution either as a shipper or consignee. The shipping company may look to the BIFA Member for such a contribution when the latter is shown as a party on the bill of lading. However, liability for a general average contribution should fall on the cargo owner who should seek an indemnity from his cargo insurer. This sub-clause should be read in conjunction with Clause 22.

The text of Clauses 20(A) to (D) inclusive of the BIFA 2021
STC is identical to those of Clauses 20(A) to (D) the BIFA2017 STC

CLAUSE 21

CLAUSE 21(A)
The punctual receipt in full of sums falling due from the Customer to the Company is critical to the operation of the Company's business and its performance of its obligations to the Customer. Accordingly, the Customer shall pay to the Company in cash, or as otherwise agreed, all sums when due, immediately and without reduction or deferment on account of any claim, counterclaim or set-off. Time is of the essence of payment of all and any sums payable by the Customer to the Company.

CLAUSE 21(B)
In the event of any failure by the Customer to make full and punctual payment of any sum payable to the Company (in accordance with 21(A) above):
(i) Any and all other sums properly earned by and/or otherwise due to the Company (but which, but for this Clause 21(B), would otherwise not yet be payable by the Customer, whether by virtue of an agreed credit period or otherwise) shall become immediately payable in full; and
(ii) Any sum thereby becoming immediately payable shall be paid to the Company in cash, or as otherwise agreed, and without reduction or deferment on account of any claim, counterclaim, or set-off.

CLAUSE 21(C)
No omission to seek compensation for breach of 21(A) and (B) above by the Company shall constitute a waiver or release to the Customer from any liability under 21(A) and (B) above during the application of these terms unless agreed in writing by authorised officers of the Company and Customer.

CLAUSE 21(D)
The Late Payment of Commercial Debts (Interest) Act 1998, as amended, shall apply to all sums due from the Customer.

Comment on Clause 21(A)

A **SET-OFF** is a setting of cross-claims against each other to produce a balance. A **COUNTERCLAIM** is any claim that could be the subject of an independent action that is made against a Claimant by a Defendant. A counterclaim is called a "**Part 20 Claim**" in the Civil Procedure Rules.

It not infrequently happens that a Customer will try to obtain an arbitrary settlement of a claim or counterclaim by making a set-off, by refusing to pay charges, by making a deduction in payment, or by deferring payment. The purpose of Clause 21(A) is to overcome such action on the part of the Customer so that the BIFA Member is paid in full when payment is due and the claim or counterclaim is dealt with as a separate matter.

As explained below, under English common law, a carrier is in a privileged situation regarding the payment of earned freight charges which cannot be deducted or set-off in respect of a claim or counterclaim. Clause 21(A) extends this principle, whether the BIFA Member acts as an agent or a Principal, to all charges and outlays including ancillary freight forwarding charges, customs duties, etc.

The general rule at English common law is that when there is defective performance of a contract, a deduction in payment of the contract price may be made by way of abatement – *Mondel v. Steel, All ER Reprints [1835-1842] 511*. However, the common law regarding the payment of freight charges is the exception to this general rule and in that respect the carrier is in a privileged position.

This common law rule was reported to be well established in 19th century shipping cases and was affirmed in respect of sea freight in the relatively recent cases of *Henriksens Rederi A/S v. P H Z Rolimpex, All ER [1973] 3 58*, and *Aries Tanker Corporation v. Total Transport Ltd, All ER [1977] 1 398*.

This common law rule regarding freight charges was extended to road carriage under the CMR Convention in the important case of *R H & D International Ltd v. IAS Animal*

Air Services Ltd, All ER [1984] 2 203. The rule was further extended to road carriage within the United Kingdom by the case *United Carriers Ltd v. Heritage Food Group (UK) Ltd, Lloyd's Rep [1995] 2 269* in which the judge reviewed the history and the application of the rule. The common lawrule regarding freight charges being payable without any set-off, claim or counterclaim was yet again upheld in the case *Britannia Distribution Ltd v. Factor Pace Ltd [1998] 2 Lloyd's Rep 420*, where it was stated that this rule applies to the carriage of goods by sea, land or air and that the rule cannot be circumvented unless there was a total failure of consideration – that is to say that the carriage was not performed.

Thus, at English common law there is no right to reduction or deferment of freight charges on account of a claim or counterclaim, but to go further than the common law rule regarding unpaid freight charges and to cover all charges and outlays, the BIFA STC – especially Clause 21(A) must be incorporated in the contract with the Customer. Another factor to consider in respect of Clause 21(A) is that at English common law, for a counterclaim or set-off to operate as a valid defence, it must be so inseparably connected with the claim that it would be unjust to litigate one without the other (claim and counterclaim) – now referred to in the courts as a transaction counterclaim or transaction set-off in contrast to an independent counterclaim or independent set-off which must be actioned separately from the claim. The cases *Dole Dried Fruit & Nut Co. v. Trusten Kerwood Ltd, Lloyd's Law Rep [1990] 2 309*, *Glencore Grain v. Argos Trading [1999] 2 Lloyd's Rep 410* and *Benford Ltd and Another v. Lopecan SL [2004] 2 Lloyd's Rep 618* refer. Thus Clause 21 (A) prevents even a transaction counterclaim or a transaction set-off from beinga valid defence to a claim for unpaid charges etc. made by the BIFA Member (unless the parties agree otherwise).

In respect of the sale of goods Clause 21(A) may be overridden by S.53 (1)(a) of the Sale of Goods Act 1979, by which a buyer may set up against the seller a breach of warranty in diminution or extinction of the price.

Comment on Clause 21(B)

This sub clause goes on to develop the concept of time being of the essence and allows action to be taken in the event of any late payment of sums due and owing. It serves to extend the right of the Company to be paid any sums that at the time of the breach have not been paid but are not as yet due. Therefore, even if credit has been afforded to the Customer, this will not be effective against this new sub clause as the failure to pay due sums will mean that all sums whether due and owing or not will be payable immediately and on the same basis as those sums that were due and owing under Clause 21(A). This type of clause is known as an acceleration clause in that it provides for sums becoming due when ordinarily they would not be so under the terms agreed.

Comment on Clause 21(C)

This sub clause allows flexibility to the Company to decide when to invoke 21(A) or (B). Generally, if a contractual term is not enforced and there is no provision dealing with waiver, then the next time that term is breached and a party seeks to enforce it, the courts will not allow enforcement as the claimant will be taken to have waived the right to rely on the clause. This Clause 21(C) provides that there shall be no waiver if the Company does not rely on its rights under Clauses 21(A) and (B) unless the Company and Customer agree to the waiver in writing. This will be very helpful to the Company as it is not always necessary to rely on rights owing to late payment but there are occasions when these rights will be very important and the Company will want to be able to use them.

Comment on Clause 21(D)

Until recently there was no legal right to interest on overdue charges unless the right was claimed by contract or unless interest was claimed when litigation was begun – *London Chatham and Dover Railway v. South Eastern Railway [1893]*. The harshness of that situation was remedied by the Late Payment of Commercial Debts (Interest) Act 1998.

The right to interest under the 1998 Act was introduced in stages according to whether the debtor or creditor was a small business, a large business or a public authority (all as defined in the Act) but by August 2002, all stages of implementation of the Act were completed. Thus, the Act refers to all commercial debts but not to debts owed by natural persons when they are consumers.

Clause 21(D) merely states that the 1998 Act applies to sums due from the Customer. The 1998 Act would still apply if Clause 21(D) did not exist but it would not apply if Clause 21(D) provided an alternative remedy for interest.

The rate of interest is fixed by Late Payment of Commercial Debts (Rate of Interest) Orders and that introduced in 1998 fixed the rate of interest at 8% above the official dealing rate per annum, otherwise called the base rate of the London clearing banks, which varies according to decisionsmade by the Bank of England and which is announced in the financial media. Thus, the applicable rate of interest is subject to variation.

Discretion must be used when adding interest to the amount of an overdue debt and much will depend on the commercial relationship between the BIFA Member and its debtor. In some circumstances, the right to claim interest on overdue debts without resorting to litigation is a useful benefit.

The text of Clauses 21 (A)-(D) inclusive of the BIFA 2021STC is identical to those of Clauses 21(A)-(D) in the BIFA2017 STC.

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CLAUSE 22

Where liability arises in respect of claims of a general average nature in connection with the Goods, the Customer shall promptly provide security to the Company, or to any other party designated by the Company, in a form acceptable to the Company.

Comment on Clause 22

This clause should be read in conjunction with the indemnity Clause 20(D). This clause makes it clear that it is the Customer and not the BIFA Member that must provide prompt and proper security for goods subject to general average.

The text of Clause 22 of the BIFA 2021 STC is identical to that of Clause 22 of the BIFA 2017 STC.

Liability and Limitation

CLAUSE 23

The Company shall perform its duties with a reasonable degree of care, diligence, skill and judgment.

Comment on Clause 23

Under English common law every person who enters a learned profession undertakes to practise it with a reasonable degree of skill – *Lamphier and Wife v. Phipos*, All ER Reprints [1835-1842] 421. It is also a requirement to do so under S.13 of the Supply of Goods and Services Act 1982 which goes beyond a “learned profession” in that it states “In the contract for the supply of a service where the supplier is acting in the course of business, there is reasonable care and skill”. In Clause 23, the words “diligence” and “judgment” have been added.

Clause 23 is placed in the BIFA STC to emphasise their reasonableness and to balance the warranties deemed to be given by the Customer in Clause 17. The vast scope of work undertaken by BIFA Members is such that not every BIFA Member and especially not every employee can have knowledge of every obscure fact concerning products, overseas destinations, regulations, documentation, etc. The word “reasonable” is intended to modify and limit the clause to what should be expected of a competent BIFA Member according to the services offered.

Clause 23 is sometimes referred to when there is an allegation of negligence or of the provision of an inadequate service.

The text of Clause 23 of the BIFA 2021 STC is identical to that of Clause 23 of the BIFA 2017 STC.

CLAUSE 24

The Company shall be relieved of liability for any loss or damage if, and to the extent that, such loss or damage is caused by: -

CLAUSE 24(A)
strike, lock-out, stoppage or restraint of labour, the consequences of which the Company is unable to avoid by the exercise of reasonable diligence; or

CLAUSE 24(B)
any cause or event which the Company is unable to avoid, and the consequences of which the Company is unable to prevent, by the exercise of reasonable diligence.

Comment on Clause 24(A) and (B)

These are important clauses that set out the BIFA Member’s general defences. They supplement the indemnities in Clause 20. Clause 24 refers to all loss or damage and not merely loss of or damage to goods. It also indicates that the BIFA Member does not accept liability without fault on his part, or on the partof his agent, or on the part of his sub-contractor, and that the BIFA member does not act as an insurer.

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It is important to note that Clause 24 can be overridden by compulsory legislation such as that concerning the international conventions referred to in the comments on Clause 2(B). Such international conventions may be more specific with regard to the BIFA Member's relief of liability either by the imposition of duties or the granting of defences.

Limiting acceptance of liability to wilful negligence or to only when the goods are in the BIFA Member's actual custody is not attempted in Clause 24 because such limitations would be ineffective under the Unfair Contract Terms Act 1977.

The text of Clauses 24(A) and (B) of the BIFA 2021 STC is identical to that of Clauses 24(A) and (B) of the BIFA 2017 STC.

CLAUSE 25

Except under special arrangements previously made in writing by an officer of the Company so authorised, the Company accepts no responsibility with regard to any failure to adhere to agreed departure or arrival dates of Goods.

Comment on Clause 25

In the ordinary course of events it is not always practical for the BIFA Member to guarantee departure and arrival dates. Flights, ships, vehicles etc. may be delayed by bad weather, congestion, public holidays, etc. and other reasons beyond the BIFA Member's control. Clause 25 seeks to protect the BIFA Member from liability for breach of contract when departure or arrival dates are put back or brought forward. The generality of Clause 25 is overridden by any specific agreement made in writing by the BIFA Member with the Customer with regard to departure or arrival dates.

At English common law it is implied that sea carriage is to be performed within a reasonable time – *Hick v. Raymond & Reid, All ER Reprints [1891-1894] 491*. That implied term is extended and embodied in S.14 of the Supply of Goods and Services Act 1982 which states: "(1) Where, under a contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by a course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time, and (2) What is a "reasonable time" is a question of fact".

These comments on Clause 25 should be read in conjunction with those under Clause 26 in respect of delay.

The text of Clause 25 of the BIFA 2021 STC is identical to that of Clause 25 of the BIFA 2017 STC.

CLAUSE 26

CLAUSE 26(A)
Subject to Clause 2(B) and 11(B) above and sub-clause (D) below, the Company's liability howsoever arising and not withstanding that the cause of loss or damage be unexplained, shall not exceed:

(i) in the case of claims for loss or damage to Goods:
- (a) the value of any loss or damage, or
- (b) a sum at the rate of 2 SDR per kilo of the gross weight of any Goods lost or damaged

whichever shall be the lesser.

(ii) subject to (iii) below, in the case of all other claims:
- (a) the value of the subject Goods of the relevant transaction between the Company and its Customer; or
- (b) where the weight can be defined, a sum calculated at the rate of 2 SDR per kilo of the gross weight of the subject Goods of the said Transaction; or
- (c) 75,000 SDR in respect of any one transaction,

whichever shall be the lesser.

continued

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CLAUSE 26 *continued*

CLAUSE 26(A)

(iii) in the case of an error and/or omission, or a series of errors and/or omissions which are repetitions of or represent the continuation of an of an original error and/or omission

(a) the loss incurred; or

(b) 75,000 SDR in the aggregate of any one trading year commencing from the time of the making of the original error, and/or omission,

whichever shall be the lesser.

For the purposes of Clause 26(A), the value of the Goods shall be their value when they were, or should have been, shipped. The value of SDR shall be calculated as at the date when the claim is received by the Company in writing.

CLAUSE 26(B)

Subject to Clause 2(B) above and sub-clause (D) below, the Company's liability for loss or damage as a result of failure to deliver, or arrange delivery of goods, in a reasonable time, or (where there is a special arrangement under Clause 25) to adhere to agreed departure or arrival dates, shall not in any circumstances whatever exceed a sum equal to twice the amount of the Company's charges in respect of the relevant contract.

CLAUSE 26(C)

Save in respect of such loss or damage as is referred to at sub-clause (B), and subject to Clause 2(B) above, and sub-clause (D) below, the Company shall not in any circumstances whatsoever be liable for indirect or consequential loss such as (but not limited to) loss of profit, loss of market, or the consequences of delay or deviation, however caused.

CLAUSE 26(D)

On clearly stated instructions in writing declaring the commodity and its value, received from the Customer and accepted by the Company, the Company may accept liability in excess of the limits set out in sub-clauses (A) to (C) above upon the Customer agreeing to pay the Company's additional charges for accepting such increased liability. Details of the Company's additional charges will be provided on request.

General Comment on Clause 26

This long clause is very important because it sets out the limits of the BIFA Member's liability. The scales of liability are shown as the upper limits, and if the value of goods lost or damaged or the expenses incurred are lower than these upper limits, then the BIFA Member's liability is reduced accordingly.

It is important to note that the limits of liability under Clause 26 can be overridden by compulsory legislation implementing an international convention for the carriage of goods, hence the reference to the Clause 2(B). Further details of such overriding limits are given below.

It is also important to note that these limits of liability cannot be applied to liability for failing to keep a promise to insure goods in accordance with received and accepted instructions, hence the reference to Clause 11(B).

Special Drawing Rights (SDR) referred to in this Clause is an artificial basket of currencies in which the US dollar predominates. Although it was not the original purpose, liability on an international basis is commonly established by using SDR. In 2012/13 the SDR hovered between 1.00 SDR and 1.05 SDR = £1. The weaker the US dollar against the £ sterling, the lower the £ sterling value of SDRs. *The Times*, the *Financial Times* and other specialist papers publish the sterling value of the SDR which varies on each working day. Clause 26(A) states that the value of the SDR is to be that when the BIFA Member received a claim in writing.

Unless the BIFA STC have been incorporated into the contract between the BIFA Member and his customer, the limits under Clause 26 cannot be applied. In circumstances where there is no overriding international convention, the BIFA Member will then be exposed to full liability unless there is a common law defence.

Comment on Clause 26(A) (i)

This sets out liability for the loss or damage to goods as 2 SDR per gross kilo, or the value (if less) of the goods lost or damaged.

In rough outline, comparable liabilities for the carriage or handling of goods are as set out below, and are all subject to the value of the goods lost or damaged being less. See also the comments about international conventions under Clause 2 for further details.

CMR Convention	8.33 SDR per gross kilo
Hague-Visby Rules	2 SDR per gross kilo or 666.67 SDR per package
FIATA Bill of lading	2 SDR per gross kilo or 666.67 SDR per package
Montreal Convention 1999 **Amended Warsaw Convention 1955** **Non-International Carriage Rules (Air)** **Un-amended Warsaw Convention 1929**	22 SDR per gross kilo 17 SDR per gross kilo 17 SDR per gross kilo 250 gold francs per gross kilo which in the UK is convertedto £14.08 per gross kilo by the Carriage by Air (Sterling Equivalent) Order 1999 SI 1999/2881
CIM Convention	17 SDR per kilo gross weight
RHA Conditions of Carriage 2009	£1,300 per tonne gross weight
United Kingdom Warehousekeepers' Association Conditions 2014	£100 per tonne gross weight

N.B These are limitations that cannot be reduced though they may be increased in line with the provisions in the legislation or standard terms dealing with increased liability.

Comment on Clause 26(A) (ii)

This shows the liability for all other claims, apart from those that have been lost or damaged or those regarding the time of delivery (delay etc.) or covered by Clause 26

(A) (iii). The basis of liability differs from that under Clause 26(A) (i) in that it relates to the weight or value of the whole consignment that is the subject of the relevant transaction, and it has a cap of 75,000 SDR. It may be that there are no goods involved – the claim may involve an administrative task undertaken by the Company or bad advice – in which case the limit of liability is the lower of the amount of the claim or 75,000 SDR.

Comment on Clause 26(A) (iii)

This clause applies when an error or omission occurs or is perpetuated and aims to consolidate all such claims to an annual cap of 75,000 SDR (or of the claim amounts if less) instead of each of such claims having individual liability in any one trading year.

Comment on Clause 26(B)

The text of this clause refers to failure to deliver or to arrange delivery in a reasonable time, and also failure to adhere to a special arrangement made in that respect under Clause 25, and so this clause covers more than what is strictly regarded as delay.

The limit of twice the BIFA Member's charges can be generous. This clause is overridden by some international conventions and if it is to the BIFA Member's advantage they can be applied.

CMR CONVENTION (INTERNATIONAL ROAD CARRIAGE)

Article 19 of the CMR Convention states: "Delay in delivery shall be said to occur when the goods have not been delivered within an agreed time limit, or when failing an agreed time limit the actual duration of the carriage, having regard to the circumstances of the case and, in particular, in the case of partial loads, the time required for making up a complete load in the normal way, exceeds the time it would be reasonable to allow a diligent carrier". Article 23(5) states: "In the case of delay, if the claimant proves that damage has resulted there from the carrier shall pay compensation for such damage not exceeding the carriage charges". "Damage" in that context means economic loss because it is a poor translation of "préjudice" in the original French text of the convention.

MONTREAL CONVENTION, WARSAW CONVENTION AND NON-INTERNATIONAL CARRIAGE RULES (AIR CARRIAGE)

Liability for delay of cargo is 22 SDR (or in the case of the Un-amended Warsaw Convention 250 gold francs converted to £sterling) per gross kilo, the same as for loss or damage to goods.

HAGUE-VISBY RULES (SEA CARRIAGE)

GENERAL COMMENT ON DELAY

It must always be borne in mind that **delay** in itself does not give rise to compensation. It is the **consequences of delay** which render liability. Under English common law damages for delay are limited to foreseeable expenses, or to a diminution of the market value of the goods. An important factor is the remoteness of any such loss. However, if goods are physically damaged because of a delay in delivery then a claim becomes one for damage and not for delay.

Comment on Clause 26(C)

This is a widely worded clause excluding liability for indirect or consequential loss and is connected with claims for delay as well as the consequences of goods being lost or damaged. This clause makes reference to Clause 2(B) and may be overridden by the CMR Convention under Article 23.5 of which: "…. customs duties and other charges incurred in respect of the carriage of the goods" shall be refunded. It is important to note that examples are given of indirect or consequential loss in this sub clause such as loss of profit or loss of market. This is because such losses may be direct rather than indirect or consequential and if they are direct then they would not be excluded.

Comment on Clause 26(D)

This is a conditional offer, optional to the Company, to increase the level of liability under the BIFA STC and contributes to the reasonableness of the BIFA STC in respect of the Unfair Contract Terms Act 1977.

The text of Clauses 26(A) – (D) inclusive of the BIFA 2021
STC are identical to those Clauses 26(A)-(D) of the BIFA2017 STC

CLAUSE 27

CLAUSE 27(A)
Any claim by the Customer against the Company arising in respect of any service provided for the Customer, or which the Company has undertaken to provide, shall be made in writing and notified to the Company within 14 days of the date upon which the Customer became, or ought resonably to become, aware of any event or occurrence alleged to give rise to such claim, and any claim not made and notified as aforesaid shall be deemed to be waived and absolutely barred, except where the Customer can show that it was impossible for him to comply with this time limit, and that he has made the claim as soon as it was reasonably possible for him to do so.

CLAUSE 27(B)
Notwithstanding the provisions of sub-paragraph (A) above, the Company shall in any event be discharged of all liability whatsoever and howsoever arising in respect of any service provided for the Customer, or which the Company has undertaken to provide, unless suit be brought and written notice thereof given to the Company within nine months from the date of the event or occurrence alleged to give rise to a cause of action against the Company.

General Comment on Clause 27

This important clause imposes the two stages of **time bars** in respect of claims – Clause 27(A) refers to the time limit for notification of the claim to the BIFA Member and Clause 27(B) refers to the time limit by which court action must be taken. As shown below the time bars under Clause 27 can be overridden by those applicable to an international convention by compulsory legislation and such limits may be more favourable to the BIFA Member.

Comment on Clause 27(A)

The purpose of this clause is to ensure that the BIFA Member has **written** notice within a reasonably short time, so that the BIFA Member can make enquiries about the claim and protect himself by claiming on other parties. To comply with reasonableness under the Unfair Contract Terms Act 1977, a period of grace is given in the latter part of this clause provided that the Customer takes such action as soon as possible. Information about a claim may come from remote parts of the world. Late notification of a claim isa good defence.

The time limit under Clause 27(A) is generous compared with those under overriding international conventions, examples of which are as follows in connection with the carriage of goods (all notifications to be in writing):

CMR CONVENTION
Loss or damage - at the time of delivery in the case of apparent loss or damage, or within 7 days of delivery in the case of concealed damage. For **delay** – within 21 days from the date when the goods were placed at the disposal of the consignee.

HAGUE-VISBY RULES
Loss or damage – at the time of removal of the goods or, if the loss or damage is not apparent, within 3 days. These Rules state no time limit for notifying claims for **delay**.

WARSAW CONVENTION (ORIGINAL – 1929)
Damage – within 7 days from the date of receipt of the goods. **Delay** – within 14 days from the date on which the goods have been placed at the consignee's disposal. This convention does not state a time limit for notification of **loss** but most airline waybills impose a time limit of 120 days.

MONTREAL CONVENTION, WARSAW CONVENTION (OTHER VERSIONS) AND THE NON-INTERNATIONAL CARRIAGE RULES (AIR)
As for the original Warsaw Convention, but the time limit for notifying **damage** is 14 days and the time limit for notifying **delay** is 21 days.

CIM RULES FOR INTERNATIONAL RAIL CARRIAGE
This refers to rights being extinguished instead of time limits for notification. The limits for **partial loss or damage** are before acceptance of the goods, or if such loss or damage was not apparent, within 7 days of acceptance of the goods; where the transit period has been exceeded, the limit is 60 days. The rights are not extinguished if wilful negligence is proved.

Also, by comparison:

FIATA BILL OF LADING CONDITIONS
Loss or damage - when the goods are delivered, or, if loss or damage is not apparent – within 6 consecutive days after the goods were delivered to the consignee.

RHA 2009 CONDITIONS OF CARRIAGE
Damage to the whole or part of the consignment or physical **loss**, **mis-delivery** or **non-delivery** of part of the consignment – advice within 7 days, and a claim within 14 days of termination of transit. **Any other loss** – advice within 28 days, and claim within 42 days of termination of transit – all unless it was not possible to comply with these time limits and the advice and claim given within a reasonable time.

Comment on Clause 27(B)

In the context of this Clause, **SUIT BE BROUGHT** means commencing a civil action in a court. **CAUSE OF ACTION** means a factual situation the existence of which entitles one person to obtain from a court a remedy against another person. **PERSON** in this context includes a corporate person such as a limited company.

This is a very important clause. No matter what the merits of a claim, unless a person brings court action and notifies the BIFA Member of it within the nine month period, then the BIFA Member has no liability whatsoever. If the claim is still the subject of ongoing investigation then to avoid litigation an extension of the time limit should be sought. It was held in the case The *"Zhi Jiang Kou", Lloyd's Rep [1991] 1 493* (which concerned the Hague Rules) that time limits are not waived because negotiations are taking place about a claim unless there is a specific promise to do so, and a defendant is under no obligation to draw his opponent's attention to a time limit. Because of this time limit, it is necessary to investigate the merits of a claim and deal with it promptly and assess its merits because, under the Civil Procedural Rules, the days are over for issuing a 'protective writ' without the need to take further immediate court action.

However, the time limit for making suit under Clause 27(B) can be overridden by those in international conventions when they compulsorily apply. Examples are as follows:

CMR CONVENTION (INTERNATIONAL ROAD CARRIAGE)
a) partial loss, damage or delay in delivery – 12 months from the date of delivery
b) for total loss – 12 months from the 30th day after expiry of the agreed time limit, or if no agreed time limit, from the 60th day from the date when the goods were taken over by the carrier
c) in all other cases 12 months from the expiry of 3 months from the making of the contract. If wilful misconduct on the part of the carrier or his agent is proved, 12 months becomes 3 years. A written claim suspends the period of limitation until such date as the carrier rejects the claim and returns the documents attached to it.

HAGUE-VISBY RULES (SEA CARRIAGE)
The carrier and the ship shall in any event be discharged from all liability whatsoever unless suit is brought within one year of their (goods) delivery or the date when they should have been delivered. In the case *"The Captain Gregos No.1", Lloyd's Law Rep (1990) 1 310* it was held that this one year time bar applies even when there is misconduct on the part of the sea carrier.

MONTREAL CONVENTION AND ALL VERSIONS OF THE WARSAW CONVENTION AND THE NON-INTERNATIONAL CARRIAGE RULES (AIR)
The right to damages shall be extinguished if an action is not brought within two years, reckoned from the date of arrival at the destination or from the date on which the aircraft ought to have arrived or from the date on which carriage stopped.

CIM RULES FOR INTERNATIONAL RAIL CARRIAGE
The period of limitation of action shall be one year except in certain circumstances, including wilful misconduct and fraud, when it is two years. The period of limitation is suspended when a claim is presented in a similar manner as under the CMR Convention.

Also for comparison:

FIATA BILL OF LADING CONDITIONS
All liability – unless suit is brought within nine months of the delivery of the goods or the date when the goods should have been delivered or the date when they are deemed to be lost.

RHA CONDITIONS OF CARRIAGE 2009
The carrier shall in any event be discharged from all liability whatsoever and howsoever arising in respect of the consignment unless suit is brought and notice in writing thereof given thereof given to the carrier within one year of the date when transit commenced.

SPECIAL NOTE REGARDING TIME LIMITS
If the BIFA STC (or comparable conditions) are not incorporated into the contract between the BIFA Member and the Customer, and if there is no overriding international convention, then the limitation period for making suit for cargo claims is **six years** under the **Limitation Act 1980** in so far as it concerns contracts.

Note that in respect of **making suit**, the terms 'writ' and 'summons' are obsolete in English law and by the Civil Procedure Rules introduced in 1999, the legal document by which court action is begun is called a Claim Form.

The text of Clauses 27(A) and 27(B) of the BIFA 2021 STC is
identical to that of Clauses 27(A) and 27(B) of the BIFA 2017 STC

Jurisdiction and Law

CLAUSE 28

CLAUSE 28(A)
These Conditions and any act or contract to which they apply shall be governed by English law.

CLAUSE 28(B)
Any dispute arising out of any act or contract to which these Conditions apply shall, save as provide in (C) below, be subject to the exclusive jurisdiction of the English courts.

CLAUSE 28(C)
Notwithstanding (B) above, the Company is entitled to require any dispute to be determined by arbitration.

CLAUSE 28(D)
The Company may exercise its rights under (C) above either by itself commencing arbitration in respect of a dispute or by giving written notice to the Customer requiring a dispute to be determined by arbitration.

CLAUSE 28(E)
In the event that the Company exercises its rights under (C) above, the corresponding arbitration shall be conducted as follows:

(i) Where the amount claimed by the claimant is less than £400,000, excluding interest, (or such other sum as the Company and Customer may agree, and subject to (iii) below), the reference shall be to a tribunal of three arbitrators and the arbitration shall be conducted in accordance with the LMAA Intermediate Claims Procedure applicable at the date of the commencement of the arbitration proceedings;

(ii) Where the amount claimed by the claimant is less that £100,000, excluding interest, (or such other sum as the Company and Customer may agree, and subject to (iii) below), the reference shall be to a sole arbitrator and the arbitration shall be conducted in accordance with the LMAA Small Claims Procedure applicable at the date of the commencement of the arbitration proceedings;

(iii) In any case where neither of the LMAA procedures referred to in (i) and/or (ii) above applies, the reference shall be to three arbitrators in accordance with the LMAA Terms applicable at the date of the commencement of the arbitration proceedings.

Comment on Clause 28(A) and (B)

These important sub clauses stipulate the application not only of English law but also the exclusive jurisdiction of the English courts subject to a new right in favour of the Company under the 2017 STC to require any dispute to be determined by arbitration. A Scottish based BIFA Member would probably wish to change Clause 28(A) to refer to Scottish law and the jurisdiction of the Scottish courts. Legal terminology and court rules and procedures differ between England and Scotland but there are no significant differences in respect of the common law rules regarding liability.

Comment on Clause 28(C) - (E)

These sub clauses deal with the Company's right to elect to arbitrate rather than litigate, and set out how that should be done, either by commencing arbitration or notifying the Customer of the requirement to arbitrate. This right is only in favour of the Company and this is because the intention is to ensure that any dispute is handled subject to English law and either by the English courts or under rules of the LMAA based in this jurisdiction. This is to assist Companieswith clients based in jurisdictions overseas where there are no reciprocal rights of enforcement of judgments.

If the Customer is suing the Company then they have to commence action in the English Courts. If the Company is suing the Customer if the Customer is in a jurisdiction which does not have reciprocal rights of enforcement of judgments with England and Wales then if the Company was only able to litigate through the Courts, if it won the case it would not have the right to enforce against its customer. However, if it arbitrates, most of the countries that do not have reciprocal rights to enforce judgments with England and Wales have ratified the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958* so Companies using arbitration in their claims against Customers will generally be able to enforce their judgment against their customer in the jurisdiction where they are based.

The text of Clauses 28 (A)-(E) inclusive of the BIFA 2021 STC is identical to those of Clauses 28 (A)-(E) of the BIFA2017A STC.

Formerly Know Your Trading Conditions: A Layman's Guide to the BIFA 2005A Standard Trading

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