Incorporating the BIFA terms and conditions into your contract

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A recent breakfast seminar hosted by LA Marine titled 'Everything you need to know about BIFA terms and conditions' highlighted some important issues surrounding the incorporation of these trade terms into contracts.

Many companies make a general reference to the BIFA terms in their correspondence and documents as a basis for using the standard terms as their contract terms.

One of the most important things is to ensure that the terms are properly incorporated and referenced as the contract is made.

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BIFA Terms and Conditions

As a general rule, the standard terms should be referred to as early as possible in any negotiations. For example, either a copy of the terms should be given or should be specifically referred to in any pre-contract exchanges. Alternatively, you should try to ensure your contracting party is aware that a copy of the terms can be requested from you or, they can be found at a particular website address. It is also worthwhile trying to refer to the terms on all letterheads / correspondence in the early stages of any discussions on trade / prices. This is particularly important when the BIFA terms are relied upon when dealing with parties who are based outside of the UK. If there is time, a copy of the BIFA terms should be sent to your contracting party in advance of the contract being concluded

It is worth highlighting that a company should not assume they can rely on the terms and conditions printed on the reverse of invoices, since invoices are usually submitted after the event, and not when the contract is entered into. This might not be sufficient evidence of incorporation of the terms.

Claiming the benefit of the limitation clauses in the BIFA terms
Clause 26(A) of the BIFA terms contains the right to limit liability if a reasonable degree of care, skill and judgement has been exercised. If a company has agreed to arrange insurance, to cover risk but fails to organise that insurance it may not be possible to claim the benefit of the limitation set out in Clause 26(A) of the BIFA terms.

Depending on a company's commercial relationship with its contracting party it is worth highlighting the limitation of liability clauses in the BIFA Terms – as well as ensuring that it is clear that no insurance is being provided, and that the customer should obtain its own insurance cover for loss and damage to goods.

The limitation figures in the BIFA terms can be overridden by particular legislation that is compulsorily applicable to a trade. For example, the CMR Convention or The Hague Visby Rules/Regime which automatically applicable to certain contracts can affect the limits of liability. Notwithstanding that many companies will try to argue that the BIFA terms should apply to a claim with a view to trying to keep their liability as low as possible.

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Generally, the BIFA limits will be overridden by the limits set out in the other compulsorily applicable Conventions or National Law.

You may then ask why is it necessary to use the BIFA terms if the limits can be overridden in any event? The International Conventions are limited to the carriage of goods. The areas that could be, and would be, included in the services provided – such as customs formalities/documentary/procedural work etc.- would only be covered by the BIFA terms and not the International Conventions. It may also be the case that you are dealing with a company in a country which has not adopted the International Conventions/Regimes. As such, you should try to ensure that you limit liability at a much lower level, for which you need to properly incorporate your BIFA terms. It may also be that you would want to argue that the International Conventions/Regimes do not apply for whatever reason.

If a non-current or non-BIFA member seeks to incorporate BIFA terms in their contracts with third parties, there may arguably be an issue of misrepresentation on their part. It is expressly stated in the BIFA terms definition that the Company – the one that is relying on the terms – is "the BIFA member trading under these Conditions". Bearing that in mind, if the party relying upon the terms is not a BIFA member but is seeking to act as the "Company" under the BIFA terms, arguably they would not and could not be the "Company" as described in the definition. As such, the validity of the terms and their incorporation could be called into question.

LA Marine are hosting a Charterparty Forms and Terms workshop on 18 November 2014. A working knowledge of the way these documents work and an understanding of how vessels are chartered in for the liner and bulk market, will be useful for companies involved in importing / exporting goods particularly as the contract terms in a charterparty can often find their way into other contracts such as bills of lading. Please let Zoe Taylor, events@LA-law.com if you are interested in attending the event.

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