



## MEMORANDUM TO MEMBERS

### HAFFA FORM OF TRADING CONDITIONS (DECEMBER 2008 – TEMPLATE ONLY)

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#### 1. NEW FORM OF TRADING CONDITIONS (TEMPLATE ONLY)

- 1.1 Since the publication of the last edition of HAFFA's standard trading conditions in December 1997 ("1997 Conditions") there have been some material changes in the activities of freight forwarders, moving from the traditional services of arranging for the transportation of goods to the provision of a more comprehensive chain of logistics services involving local, cross-border, and international operations. Changes have also taken place in other areas such as the adoption the Montreal Convention, the introduction by IATA of the new Air Waybill Conditions of Contract, and the impending introduction in Hong Kong of a Competition Ordinance. Internationally, we have also seen revised or new trading conditions being put forward by forwarders associations.
- 1.2 HAFFA, with the assistance of its legal advisers, has revised and updated the 1997 Conditions and is pleased to present you herewith the December 2008 (Template Only) of HAFFA's Form of Trading Conditions (the "2008 Conditions" or "Conditions").

#### 2. CONDITIONS NOT BINDING ON MEMBERS

Please note that the Conditions are prepared and presented solely for Members' information and reference. In so doing, HAFFA makes no recommendation as to the use or adoption thereof. As always, Members may (with the advice of their own legal advisers) but are not in any way required or obligated to use or adopt the Conditions or any part thereof. Members are completely free to offer to their customers any other trading terms or conditions which they may in their sole discretion considered appropriate. Presentation of the Conditions is also not intended to impose and does not impose any restrictions on Members whether as to the scope of services or the manner or conditions in or on which services are to be provided.

#### 3. DISCLAIMER OF LIABILITY

In keeping with its established policy, HAFFA makes no warranty, statement or representation in relation to the Conditions (including, without limitation, their suitability, adequacy or effectiveness). No liability or responsibility will be accepted for any defects in or any consequences arising from the use or adoption of or reliance on anything in the Conditions. Before making such use or adoption or reliance, Members are advised to obtain their own independent professional legal advice, and take into account their own individual operation and commercial requirements. It should also be borne in mind that such requirements may change from time to time, and so may the relevant law and legislation. The foregoing provisions of this paragraph 3 apply to the Conditions as they apply to this Memorandum.

#### 4. THE 2008 CONDITIONS

In the following paragraphs we set out several general matters to which we would like to draw Members' attention. However, note that what follows is not a detail review of the Conditions or the legal issues relating thereto and does not constitute legal advice. In the following, unless the



contexts otherwise requires, references to “the forwarder” are generally references to “Company” as the latter term is used in the Conditions.

## 5. GENERAL ARRANGEMENTS OF THE CONDITIONS

- 5.1 The 2008 Conditions consist of 22 clauses. The topics covered are similar to those of the 1997 edition. Generally, the previous provisions have been expanded, reorganized, modified or supplemented.
- 5.2 Briefly, the matters dealt with include: **(a)** definitions and general provisions [clause 1]; **(b)** applicability of the Conditions [clause 2]; **(c)** capacity of the customer and its relationship with owner [clause 3]; **(d)** status and role of the forwarder [clauses 4 to 7]; **(e)** warranties, obligations and indemnities of the customer [clauses 8 to 9]; **(f)** dangerous, valuable, perishable and other goods [clause 10]; **(g)** quotations and charges [clause 11]; insurance and special delivery [clauses 12 and 13] **(h)** lien, no duty as relate to declaration and preservation of rights [clauses 14 and 15]; **(i)** forwarder’s rights and liberties, hindrances and delivery [clauses 16 to 18]; **(j)** exclusion and limitation of forwarder’s liability [clauses 19 and 20]; **(k)** notice of claim and time bar [clause 21], and **(l)** law and jurisdiction [clause 22].

### 5A. DEFINITION OF SERVICES

The 2008 Conditions contain a new definition of “Services” (see clause 1). The term covers all and any business undertaken by the forwarder; and the usual types of forwarding/logistics activities are set forth in the definition. The distinction between “Principal Service” and “Ancillary Service” in the 1997 Conditions is removed. Similar to the 1997 Conditions, the 2008 Conditions provide that the forwarder is not a common service provider or carrier and may in its discretion refuse to provide any service to any person (see clause 4.8).

## 6. APPLICABILITY OF THE CONDITIONS

- 6.1 Under the 2008 Conditions, subject to (a) mandatory applicable legislation and (b) separate agreement (if any) made between the forwarder and customer on different terms, the provisions of the Conditions apply to all services undertaken by the forwarder (see clause 2).
- 6.2 In respect of (b) in 6.1 above, where the forwarder issues its own bill of lading or waybill or otherwise enters into a separate contract on other terms, then the *terms* of such bill of lading or waybill or contract will be paramount and prevail. However, to the extent that the Conditions are not in conflict with *those terms* or on matters where *those terms* are silent, the Conditions shall, unless otherwise provided in *such terms*, continue to be applicable (see clause 2.3).
- 6.3 Further, where the forwarder acts as a principal in the carriage of goods, its liability for loss or damage or delay of goods (where the stage of the carriage during which the loss or damage or delay occurred is known) shall be determined by (mandatory) applicable international convention or national law. In any other case, including where there is no such applicable convention or national law, the forwarder’s liability shall be determined in accordance with the Conditions and in particular clause 20 (see clause 6.3).

## 7. ROLE OF THE FORWARDER COMPANY

The 2008 Conditions reserve to the forwarder the right to provide any service as a principal or procure as an agent the provision of the required service. The forwarder may also act as the agent or sub-contractors of other third parties. Circumstances in which the forwarder acts or is treated as acting as a principal or an agent are enumerated in clause 4. Specific provisions relating to the different roles of the forwarder are set forth in clauses 5 to 7.

## 8. LIMITS OF LIABILITY AND INTEREST

8.1 **Members' attention is drawn to clause 20.4 (relating to limits of liability) and clause 11.6 (relating to interest on overdue amounts) of the Conditions. Note that the quantum/rates of calculation of the limits of liability and the rate of interest are left open for completion by individual Members. This is a departure from the 1997 Conditions. It is thought that Members (in consultation with their own legal and insurance advisers) would be in the best position to decide the quantum and rates that suit them most.**

8.2 In addition to the limits of liability, Members should review with their professional advisers the liability regime provided in the Conditions as to whether the same is suitable or alternatively different terms should be offered to their customers. That Members are not bound to follow the Conditions cannot be over-emphasized. On the other hand, it should be noted that exemption and limitation of liability provisions are subject to control by statutes (such as the Control of Exemption Clauses Ordinance) and strict interpretation by the Court, and decisions of the Court are not often easy to predict.

## 9. (HOUSE) AIR WAYBILLS

9.1 In the carriage of goods by air, it is common for forwarders to adopt the IATA Neutral Air Waybill for use as their own (house) air waybills. As Members are aware, the latest Conditions of Contract of IATA Air Waybill came into effect on 17<sup>th</sup> March 2008. By HAFFA News 18 (2008-2009) dated 26<sup>th</sup> June 2008, Members' attention was drawn to certain observation and recommendation of FIATA as regards these Conditions of Contract.

9.2 Extracts of the said HAFFA News 18 (2008-2009) are attached to this Memorandum for Members' ease of reference. The following will be noted:

(a) FIATA observed that "when used as house air waybill the conditions of contract on the reverse side of the neutral air waybill do not provide adequate liability protection for services to which the applicable Convention does not apply.....".

(b) FIATA recommended that a note (in terms quoted in the said HAFFA News) to be added to the house air waybills so as to apply the forwarder's general conditions to transportation or services not subject to the applicable international air carriage Convention.

9.3 A particular concern seems to be that the limitations of liability under the international air carriage Conventions would not apply to services or carriages outside the "carriage by air".

9.4 In this connection, it is noted that the definition of "Services" in the 2008 Conditions should be sufficiently wide to cover usual pre-loading and post-discharge carriages or services. As summarized in paragraph 6 above, provisions of the Conditions not in conflict with the air waybill terms or in respect of matters on which the air waybill terms are silent, the Conditions are applicable. It is also recalled that pursuant to clause 6.3 (b) the liability of the forwarder (acting as a carrier) shall be determined in accordance with the Conditions (and in particular clause 20), if there is no (mandatory) applicable convention or national law.

9.5 Members should pay attention to the issues raised by FIATA and consult their legal advisers as regards making appropriate provisions in their (house) air waybills applying or incorporating their general trading conditions.

## **10. (House) Bills of Lading/Sea Waybills**

- 10.1 What is said in paragraph **9.4** above is also relevant in relation to forwarder's (house) bills of lading or (sea) waybills. However, in the case of carriage of goods by sea, there is no equivalent common or uniform transport document such as the IATA Neutral Air Waybill. Carriers (by sea) use different forms of bills of lading or (sea) waybills of their choice. Modern bills tend to be flexible making provisions for both "port to port" and "combined transport" shipments, and contain terms relating to operations outside the "carriage by sea".
- 10.2 In relation to certain activities or matters, forwarder's general trading conditions and its bill of lading/waybill terms may overlap, and inconsistencies may occur. Under the 2008 Conditions, when there is a conflict, the bill of lading/waybill terms shall prevail unless otherwise provided in the bill of lading/waybill terms (see **clause 2.3**).
- 10.3 Whether and to what extent the forwarder's trading conditions should be made applicable to and incorporated into their bills of lading or (sea) waybills depend on individual cases, in respect of which legal advice should be obtained.

## **11. INCORPORATION OF TRADING CONDITIONS AND NOTICE TO CUSTOMERS**

- 11.1 Where the customer signs a contract containing the forwarder's trading conditions, the customer will normally be bound by the terms thereof. Where there is no such signed contract (embodying the trading conditions), the forwarder needs to ensure that its trading conditions apply to and are incorporated into (and form part of) the contract with the customer.
- 11.2 Terms may be incorporated into a contract by a party taking all reasonable steps sufficient to bring to the notice of the other party (before or at the time the contract is concluded) the terms on which he is willing to contract. Set out below for Members' reference are some general common ways in which notice is given. The following is not intended to be exhaustive; the principle being that all reasonable steps should be taken such that there should not be doubts on the part of the customer as to the application of the forwarder's trading conditions.
- (a) Providing customers with a complete set of the forwarder's trading conditions, particularly in the case of potential or new customers. When the document is provided, customers should be made aware that it contains contractual conditions. Where trading conditions are to be amended or modified, the customers should be notified and an amended or modified version sent to them reasonably in advance of the commencement of the amendments or modifications.
  - (b) Arranging for the trading conditions to be printed on the back of forwarder's letter-head, stationery and other documents such as quotations, invoices, arrival notices, circulars, instructions forms and the like. The front of the document should always clearly indicate that its reverse contains forwarder's trading conditions.
  - (c) (Where (b) above is not practicable) arranging for a conspicuous legend to be included in the forwarder's letter-head, e-mails, stationery and other documents, giving notice that all the forwarder's business are undertaken subject to its trading conditions which are obtainable upon request; the fact that the conditions contain clauses exempting or limiting forwarder's liability and requiring customer's indemnification in certain circumstances should also be stated.
  - (d) Including in the forwarder's web-site the full text of its trading conditions. Where there is an electronic system for customers to give instructions or make bookings or other requests for services, the system should be designed such that acceptance of the forwarder's trading



conditions is a requisite step in the procedures.

- (e) In the case of the customer applying for credit, arranging for a copy of the trading conditions to accompany the form of application and the customer be asked to expressly confirm acceptance of the same.

**11.3 Where Members wish to use or adopt the 2008 Conditions reasonable advance notice should be given to their customers together with a copy of the newly adopted conditions. As the interest rate and quantum/rates of calculation of limits of liability are left open in the 2008 Conditions, mere reference to “HAFFA Trading Conditions December 2008 – Template Only” would not be sufficient. The incorporation and reference should be for and to the conditions as adopted and completed by the individual Member.**

With Season's Greetings.

Dated the 11th day of December 2008

Hongkong Association of Freight Forwarding and Logistics (HAFFA)



## HAFFA NEWS (Extracts)

**To : All HAFFA Members**

**Date : 26 June 2008**

**Ref : News 18 (2008-2009)**

*(News Extracts)*

### FIATA

- ***Recommendation: House Air Waybill Note***

We would like to draw Members' kind attention to the FIATA's recommendation mentioned in its publication FIATA Review (No 72 of May 2008) as quoted below:

*FIATA recommendation:*

**“At the most recent Air Freight Institute (AFI) Headquarters meeting it was emphasized once more that, when used as House Air Waybill, the conditions of contract on the reverse side of the neutral air waybill do not provide adequate liability protection for services to which the applicable Convention does not apply. We remind you that the conventions only apply to International airport-to-airport transportation. (see attached the diagram)**

Therefore it is essential to make clear agreements with your customers that relate to the liability limits that apply for all services not covered by the Conventions. These liability agreements should be clearly mentioned in your general conditions. In addition AFI recommends that the following note to be added at the bottom of the reverse sides of the AWB, when used as House Air Waybill.

***“If this air waybill is used by a forwarder in a capacity as contracting carrier for air transportation, any transportation or other service which is not subject to an international air carriage convention will not be subject to the terms and conditions of this air waybill but will instead be subject to the forwarder's general conditions as have already been provided to you”***

It should be understood that only by having unambiguous trading conditions in place with your customer will your interests be protected in the event of a dispute. This means that you must ensure that your general conditions are adequately communicated to, and agreed with, your customer. We encourage you to seek legal advice as to what “adequately” means in your jurisdiction.”

*(End of News Extract)*

Diagram extracted from FIATA Review No. 72, May 2008

## House Air Waybill Note

