Terms and Conditions of Trading

Expert knowledge means success

Contents

Note: This publication has not been updated since it was last published. Some of the hyperlinks may have changed and may need updating. In addition, some of the information in this publication may be out of date.

Introduction

"Terms and Conditions" are usually found in the standard terms and conditions of purchase where the seller is contracting with a buyer in the course of a business-to-business transaction, for the supply of goods on the seller's terms. Generally, these terms are set out on the reverse of any purchase order.

There are two key considerations related to Terms and Conditions of Trading:

1. To ensure that the all the items which a business needs to consider are identified, correctly incorporated to comply with legal requirements, and regularly checked to reflect the numerous changes in trading that most businesses are experiencing.
2. But, no matter how carefully terms and conditions are drawn up, they can only apply if the other party is aware of them before the deal is struck and does not supersede them with his own.

It must therefore be your *absolute priority* to ensure that it is YOUR Terms and Conditions which are prevailing BEFORE the supply of goods and / or services and NOT AFTER a contract has been formed. You must also ensure that your Terms and Conditions are "Paramount" that is to say they apply irrespective of any contrary conditions proposed by the customer.

If the customer's first opportunity to view the Terms and Conditions is on the back of the invoice, which confirms the order, the Terms and Conditions are NOT necessarily binding! The contents of this publication provide essential information, useful examples and a unique fixed-fee service that could save hundreds of pounds.

The need to ensure that your Terms and Conditions of Trading are established at the outset of your dealings with a new customer cannot be stressed enough.

How it can all go wrong...

To illustrate how easy it is to fall into the above trap, here is a true example.

A leading manufacturer of goods received an approach from a prospective new customer, also a household name.

In short, there was little reason to doubt the credibility of either the supplier or the purchaser for credit dealings of up to £100 million.

A price was agreed for the specific one-off supply of £12 million worth of goods.

The purchaser completed the supplier's Credit Account Application Form, and the account was opened without further question. The goods were then supplied in response to a written order from the purchaser.

In summary - a fairly standard business transaction, albeit not too standard in terms of values involved.

So What Was The Problem?

The written purchase order carried a term stating that the goods were to be supplied on terms of 90 days net monthly.

The supplier felt that their Terms & Conditions of supply should prevail and that the account must be settled on terms of 30 days net monthly.

Unfortunately, however for the supplier, they had not submitted their Terms and Conditions for the consideration of the purchaser until after they had opened the account and confirmed the purchaser's credit limit of £2 million in writing.

This event took place after the order had already been negotiated and agreed, but somewhat crucially to the argument, also after the purchaser's written order had been accepted and processed by the supplier.

Thus, the contract for supply was formed on the Purchase Order and not the Account Opening Form and the Terms and Conditions of the Supplier.

Ultimately, the supplier refused to accept the Terms of the Purchase Order and issued proceedings against the purchaser following non-payment of the account after their own

terms of 30 days net monthly had been exceeded.

Clearly, funding the £12 million for an additional period of 60 days, when not budgeted for at quotation stage, was an expensive process. Indeed, most fair-minded people would have sympathy with the supplier in such circumstances.

In fact, however when presented at Court, the Judge concluded, quite rightly, that the purchaser of the goods was legally correct and not only disallowed the supplier's claim for interest on late payment, but also ordered that the supplier bear both parties costs in the action.

The 60 days amount of interest in question was some £157,800 (£12 million calculated at 8.00% - the Crown' statutory interest rate), plus costs not publicly declared…… A truly expensive and avoidable lesson for the supplying company.

Yet this very situation and far worse, happens each and every day in business transactions undertaken by even the most efficient of companies, never mind the smaller businesses whose concentration on day-to-day activities inevitably takes precedence over most other issues.

The tip of the Iceberg?

If you consider that the events in the example have no relevance to your own business, then you could not be further from the truth. Consider the ramifications.

It is rare for most businesses to enter into such high value transactions initially. Whilst the example given illustrates a terms of payment dispute, there could easily be far worse penalties contained within an order where the Terms and Conditions of the purchaser are prevailing.

For example: percentage penalties for late delivery; purchase of goods on a sale or return basis with no restocking charge etc. The list of possibilities is endless, with the only saving grace being that a Judge certainly has the right to disallow at his / her discretion any terms which are considered to be too draconian or unfair.

Nevertheless, this type of situation is rare in legal circles as a Judge may very well also take the view that as a commercial entity, your Company has its own duty to ensure that it enters into a contractual position having fully considered the risks.

Even so, why would any party wish to enter into such costly legal argument if the same can be avoided in the first place?

How can you avoid falling into this trap?

It is highly recommended that you ensure that your first ever point of contact with a new prospect encompasses and sets out your Terms and Conditions of supply (in the absence of any written variation strictly from an appropriate party within your Company).

One simple way of ensuring this process is to include a copy of your Terms and Conditions with sales literature, brochures and initial correspondence when approaching or dealing with an enquiry from a prospective new customer.

Always remember that a Court will often give higher credence to written documentary evidence, particularly if the customer has acknowledged it in writing.

A good example of this is to use a standard Credit Account Application Form, which includes a clause stating that the customer, in opening their account with you, agrees to abide by your Terms and Conditions of Supply.

This of course however will only have merit if the contract has not already been formed in the eyes of the law prior to the prospective new customer being supplied with your Terms and Conditions.

Being vigilant at the outset may not only save money, but also substantial time and effort in the long run.

The "Battle of the forms"

A customer may want to buy goods subject to his own Terms and Conditions. He may therefore state on his order that the order is subject to his Terms and Conditions. This is known as the "Battle of the forms". In a case of dispute, it is usually the party who proposed their Terms and Conditions last that wins. It is therefore recommended that the following procedure is followed for all orders:

- include your Terms and Conditions on quotations and estimates;
- on receipt of a written order, check there are no changes from the original quotation or estimate and check whether the customer references their Terms and Conditions;
- include your Terms and Conditions again on a written acknowledgment of the order, and state that they are paramount (see below);
- if at any stage the customer restates their Terms and Conditions, respond by restating your own;
- include your Terms of Business on all statements and collection reminders.

A "Paramountcy" clause states that your Terms and Conditions apply irrespective of any contrary conditions proposed by the customer. However, it should not be relied upon for protection, as it can also be rendered ineffective if your customer delivers his Terms and Conditions last.

You could also consider insisting that customers use only your order forms, but in business-to-business orders this may be difficult to achieve.

Valuable Guidance

There are many different aspects that need to be considered when formulating Terms and Conditions of Business.

1. Introduction

Before entering into a contract or dealing with a prospective new customer, it is important to clarify certain important aspects, all of which will have a bearing on the conditions to be applied to the contract.

Terms and Conditions need to be fair and reasonable to both you and your customers and adhere to the guiding principles published in The Unfair Contract Terms Act of 1977. Contract terms and conditions should be carefully drawn up, using the advice of solicitors and insurers.

An outline of some of the more general terms and conditions, primarily designed to identify the areas which a business will need to consider is provided below. However, these should only be seen as a basis for drafting the business's own terms and conditions of trading.

No matter how carefully terms and conditions are drawn up, they can only apply if the other party is aware of them before the deal is struck and does not supersede them with his own.

It is, therefore, necessary to draw the other party's attention to the terms and conditions and to gain complete acceptance, before entering into a contract.

It will be necessary, in order to avoid future dispute over what has been agreed, to elect someone within the firm authorised to negotiate terms other than the standard ones, for particular contracts.

The business may also benefit from the inclusion of a clause in the terms and conditions section, which reads:

> *"No addition to or variation of these conditions will bind the company, unless it is specifically agreed in writing and signed by a director or secretary of the company.*
>
> *No agent or person employed by or under contract with the company has the authority to alter or vary in any way these conditions".*

2. Definitions

In all terms and conditions of trading it is important to define the terms used. Generally, these are as follows:

1. *'Buyer'* - the Person, Firm or Company so named in the Purchase Order.
2. *'Seller'* - the Person, Firm or Company to whom the Purchase Order is issued.
3. *'Goods'* - all items to be supplied and / or all work to be done by the Seller as specified in the Purchase Order.
4. *'Purchase Order'* - Buyer's Purchase Order which specifies that these conditions apply to it.
5. *'The Contract'* - the arrangement between Buyer and Seller, comprising the Purchase Order, these conditions

and any other documents specified in the Purchase Order.

3. Conditions

(i) Guarantee:

If a guarantee is offered it should be clarified that it is in addition to the Buyer's statutory rights and that it does not limit the Seller's liability.

(ii) Price:

The price may be fixed in the contract or may be left to be fixed in a manner agreed by the contract, provided this is sufficiently clear to leave no room for doubt. The Courts will not enforce a contract that is merely an "agreement to agree".

It is permissible to fix the price by reference to the Seller's published list, but it is unwise to leave the price open. A price variation clause would allow for changes in taxes, exchange rates or your own suppliers' prices.

It is also important to make clear which party is to bear the cost of carriage and packing.

(iii) Payment:

In a retail transaction, payment is usually immediate. The goods are handed over in exchange for payment, whether by cash, cheque or credit card.

In other commercial transactions the situation is often more complex. The Seller naturally wants to be paid as quickly as possible, while the Buyer may want time to pay if, for example, the goods are to be resold.

A well-structured transaction reaches a fair balance between the different interests of the Buyer and the Seller.

The method of payment adopted by the Buyer depends largely on what has been agreed by both parties.

To ascertain the proper method of payment, the contract should be consulted.

If there is nothing in the contract of sale and a verbal agreement has not been made, the statutory rule is 'cash against delivery'. Any other method of payment has to be agreed between the parties.

It is advisable to provide a date when payment is due and include this on the invoice.

(iv) Delivery:

It is for the parties concerned to agree whether the Buyer will take delivery of the goods or the Seller will send them.

In the absence of such agreement the place of delivery will be taken to be the Seller's place of business, or if the goods are known to be at some other place when the contract is made then that will be the place of delivery. To avoid doubt, particularly where the Seller is to deliver goods other than to the Buyer's premises, for example, to a port for shipment, the delivery arrangements should be set out in the contract.

It is very important that both parties clearly understand exactly what it is that the Seller is agreeing to do for the price.

For a delivery of multiple items, it is important to include a clause that allows the order to be delivered in instalments, where each instalment is treated as a separate agreement that can be invoiced for separately.

Conditions relating to delivery are very important. It is accepted practice to allow an inspection of the goods on unloading and one of the Buyer's options is to reject the goods. The Buyer can reject for a number of reasons, e.g. late delivery, especially in a situation where delivery on time is the essence of the contract.

(v) Right of Stoppage in Transit:

Goods are considered to be in transit from the time they are delivered to the agent, until the Buyer or their agent takes delivery of them.

Where goods are in transit and the Buyer becomes insolvent, the unpaid Seller has the right to resume ownership until payment is made.

In this case, the unpaid Seller may exercise the right of stoppage, either by taking ownership of the goods, or by giving notice of their claim to the agent in actual control of the goods.

When notice is given, the agent must re-deliver the goods to the Seller, at the Seller's own expense.

(vi) Force Majeure:

This is the case whereby delivery is delayed by some cause totally outside the control of

the Seller.

Force Majeure provisions normally lead simply to an extension of time.

The Seller must give written notice within seven days of the occurrence of the delaying cause.

This is important because the delay claimed may often be caused long before the actual delay in delivery, e.g. where there has been a strike by the Seller's workforce at an early stage in the production process.

(vii) Passing Property and Risk to the Buyer:

The passing of risk, i.e. goods that may suffer accidental destruction or deterioration, is one of the most important consequences of the passing of property.

It is up to the parties concerned to make an agreement which acknowledges that risk is passed either before or after the property is exchanged. This may be of particular importance if a third party is used for delivery. The point at which risk passes from Seller to Buyer may also affect the way the property is insured.

The basic rule stated by the Sale of Goods Act 1979 is that:

> *"unless otherwise agreed, the goods remain at the Seller's risk until the property in them is transferred to the Buyer, but when the property in them is transferred to the Buyer the goods are at the Buyer's risk whether the delivery has been made or not".*

Given the scope involved in such a transaction, it is important to agree on the boundaries of risk, before entering into a contractual agreement.

A reservation of title clause will ensure that the goods remain the property of the Seller until paid for in full. This allows a business to recover its goods if a customer fails to pay for them. The exact wording of this clause will be dependent upon the products supplied and their use.

In the absence of an agreement between the parties, The Supply of Goods and Services Act will apply.

(viii) Patent Rights:

A patent gives exclusive intellectual property rights to a new invention. It enables its owner to prevent anyone else from making, using, disposing, importing or keeping any physical item which infringes the patent. Legal Advice should be taken if problems occur with regard to a transaction which includes intellectual property rights (either personal or the other party's), e.g. copyright, patent, trade-mark or registered design. Both Buyer and Seller may wish to have their own position clarified concerning liability for infringements or alleged infringements related to the goods supplied.

(ix) Assignment and Sub-letting:

A contract should not be assigned (allotted to others) by the Seller.

If it is anticipated that the Seller intends to sub-let a significant part of the order then the details must be discussed and agreed with the Buyer before the order is placed.

(x) Progress and Inspection:

A Buyer may want to stipulate certain things. For example:

(a) The Buyer's representatives have the power to approve and inspect all goods at all reasonable times.

(b) They have the right to reject goods that do not comply with the terms of the Contract.

(c) Any inspection, checking, approval or acceptance given on behalf of the Buyer does not exempt the Seller or their Sub-Contractors from any responsibility under the Contract.

(xi) Buyer's Rights in Specifications, Plans, etc:

For the Buyer's protection it should be clarified that any specifications (details describing the required physical characteristics or requirement of the work to be done), remain the property of the Buyer. Anything supplied by the Buyer to the Seller in connection with the contract, e.g. plans, drawings, process information, patterns or designs, must be returned to the Buyer on completion of the contract.

All information must be kept confidential unless permission is given.

(xii) Free Issue of Materials:

It is common for a contract to be made by which the customer supplies the goods, upon which the other party is to do the work. An example is a tailor who is engaged to make a suit out of cloth which already belongs to the customer.

Where all of the materials are provided by the customer, the transaction is not considered to be a sale, as property in the form of goods does not pass from one party to another.

For the purposes of the contract, if a Buyer issues materials 'free of charge' to the Seller, the materials remain the property of the Buyer. The Seller must use those materials solely in connection with the contract. Any surplus materials must be disposed of at the Buyer's discretion.

Waste materials arising from bad workmanship or negligence, will result in the Seller having to compensate the Buyer.

(xiii) Jurisdiction:

All agreements made between a Buyer and a Seller in different countries, or where the goods are to be supplied to or from a foreign country, should state the system of law governing them.

It is usual for an English Buyer or Seller to want to insist that the contract is construed in accordance with, and governed by, English law. The contract may state that the parties submit to the jurisdiction of the English Courts, but European law cannot be excluded.

It should also be remembered that the law in Scotland, Wales, Northern Ireland and the Republic of Ireland differs in many respects from that in England.

(xiii) Consequential Loss:

Any possible claims on the Seller as a result of breaking the contract with the Customer should be limited to a maximum of the value of the goods/services supplied. Consequential loss incurred by the customer should be excluded from the contract.

Cost-Effective Solutions

The right Terms and Conditions for your business

Whilst there are certainly many areas of common ground for all commercial entities, it would be ludicrous to assume for example, that the exact same Terms and Conditions will apply to parties that supply both just goods and just services.

With the exception of businesses that perform exactly the same business tasks daily, each and every company's Terms and Conditions should be bespoke to their own specific circumstances and requirements. Notwithstanding the above, it is rarely necessary to go to the most expensive lawyers (generally larger firms) for guidance and advice on this subject.

Most reasonably-sized Solicitors' practices are more than capable of putting together satisfactory documents that will meet your needs. Indeed, many have basic formats with several standard terms already incorporated (see Standard Terms and Conditions), which are used as the starting point whenever they are requested to assist a company.

The problem is that they often charge more for this service than a small business is willing to pay (normally between £750 and £2,000) Certainly, it is not considered that £750 to £2,000 is too much to pay, given that it could potentially save a business tens, or even hundreds of thousands in future years.

Ready-made solutions

There are a number of companies offering a ready-made solution to paying out fees to a lawyer. Among these are the following:

iQ Business Limited (UK)
www.iq-business.co.uk

Simply Docs (UK)
www.simply-docs.co.uk/

Net Lawman (UK)
www.netlawman.co.uk

Lawpack (UK)
www.lawpack.co.uk/

Biztree: Business-in-a-box (US)
www.business-in-a-box.com/business-contracts?ppc=1&gclid=CNCb4Iqpiq4CFVRItAodZB9k2Q

DocumaticaForms (US, Canada, Australia, UK, Philippines, India, Mexico and Brazil)
www.documatica-forms.com

Further Information

This guide is for general interest - it is always essential to take advice on specific issues. We believe that the facts are correct as at the date of publication, but there may be certain errors and omissions for which we cannot be responsible.

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