

**Professionally drafted**

**STANDARD TERMS OF BUSINESS**

**by legal counsel (Andrew Noble FRICS, FCI Arb, Barrister at law)**

**Introduction**

1. This service has been set up to assist UK businesses to develop and to own their own standard Terms of Business. Your attention is drawn to paragraphs 47-50 below which you must read first!
2. What ever the status of your business: e.g. a private limited company, a sole trader or a partnership, or even LLP or PLC, consideration must be given to contracting on your written standard Terms and Conditions of Business so as to deal i.e. contract on those terms with your customers and suppliers (who are at different points in the supply chain). Terms and Conditions of Business regulate the contractual relationship between you and the businesses you contract with - that is why you should be doing the regulating as far as the law will let you!
3. Have you noticed that larger corporations, for example, banks, service providers and utility/energy companies do this by regularly sending updated Terms and Conditions to their customers, precisely because they wish to dictate their standard Terms of Business, i.e. terms that are good for banks etc and not you!!
4. In the absence of your "Standard Terms of Business", you will almost inevitably find yourself subject to the dictates of the other sides "Standard Terms of Business" which are by definition unlikely to be in your interests let alone best interests.
5. Standard terms of business help to create certainty for all parties and avoid potential disputes arising from any alleged verbal agreement (which often depend upon what are parties' recollections of what they agreed - or convince themselves what they agreed!).
6. Furthermore, if you are a supplier of specialist goods or services, you may wish to add particular provisions governing and regulating those products or services.
7. There are some basic provisions which ought to be addressed in any set of standard Terms of Business including for example:
  - a. **Payment Terms:** cash flow is king. Stipulate your terms of payment.
  - b. **Retain title** to your goods even if you have parted with them pending payment: allowing you in some circumstances to get them back. Such a clause may also help if your customer becomes insolvent (although credit checking is also an important part of your commercial strategy).
  - c. **Delivery:** more often than not, delivery dates will normally be deemed to be estimates and time will NOT be of the essence of the contract.
  - d. **Liabilities:** certain types of liability can be excluded provided they are reasonable. However, the law does not allow you to exclude certain types of liability e.g. for death or personal injury caused by your negligence. Any exclusion of liability clause needs to be thought about very carefully to comply with legislation.
  - e. **Interest:** You mean business-If your customer fails to pay on time you will want the right to refuse to deliver any further goods and you may also want the right to claim interest on any outstanding payments.
  - f. **Warranties** - Do you really want to provide any? Unfortunately the law may imply warranties that may be more generous to your customer. By setting out your warranties in writing, you can help reduce risks.
  - g. **Consumers:** Sometimes businesses can be consumers and in any event care and attention is required as the law gives additional protection to "consumers".
  - h. **Awareness:** You must ensure that your Terms of Business are out there so as to bind them.

**Professionally drafted terms and conditions prepared by legal counsel**

8. In order to assist you to develop and own your own contract terms three levels of service are provided by legal counsel as follows:

- (1) **Bronze:** this service involves an 'ad hoc' set of reasonable Terms and Conditions drafted by Counsel for your business costing £800 plus VAT which you will have to customize for yourself or your business (This will involve at least 4 hours work by counsel);
  - (2) **Silver:** this involves a more personalized set of Terms and Conditions costing £1600 plus VAT and involves you completing a detailed questionnaire and having telephone discussions of up to two hours with Counsel (This will involve at least 8 hours work by counsel);
  - (3) **Gold:** this involves the highest level of service and includes the silver service with up to a single half day (four hours) face to face meeting (at an agreed venue) with counsel, together with compliance advice, as to how your business can ensure that it is contracting on its own terms, and costs £3000 plus VAT (This will involve counsel in at least 15 hours work);
9. The standard Terms of Business form part of the contract or the bargain between you and your customer. Other contracts are equally important and often critical to a business:
- a. There may be occasions where you wish to distribute products on behalf of domestic or foreign manufacturers. The terms of that distribution would normally be contained within a Distribution Agreement.
  - b. Similarly, where you wish to appoint agents to sell your product, you may enter an Agency Agreement.
  - c. You may subcontract work which will also need special consideration.

### **Very brief introduction to contract law**

10. Although obligations can arise outside the terms of a written agreement, for example, by statute or through the laws of tort or indeed through statutory or common law implied terms, it is advisable for businesses to regulate their Terms of Business, so as to contract on their terms and not on someone-elses.
11. Indeed, as I have stated larger corporations, for example, banks and service providers and utility companies do this by regularly sending updated Terms and Conditions to their customers precisely so that they are contracting on their standard Terms of Business, i.e. terms that are good for banks etc.
12. It is often very much better to contract on your own written terms rather than someone else's. Further, having a written contract in place can eliminate risk and costly disputes about whether a contract exists at all. This can be achieved by the way that you transact rather than having a contract signed every time a deal is done, although clearly a signed contract is preferable. The cost of terms and conditions will likely be reimbursed to their owners should disputes arise.

### **Classification of Contracts**

13. There are various ways of classifying contracts: for example, according to their subject matter (sale of goods, land, employment, construction etc) as well as by their form or effect, or indeed for example, according to their parties. Typically however businesses provide a product or a service or both.

### **What is the Minimum Terms You Require for a Contract to Come into Effect**

14. English Law tends to be non-interventionalist in this area, in that the contracting parties are regarded as masters of their own contractual fate in determining what terms are essential. It is for the parties to decide whether they wish to be bound and if so by what terms whether important or not important. i.e. if it is important that you are paid in 50p coins you need to agree that!
15. It is thought that the minimum terms required to be agreed by the parties in some types of commercial contracts, for example, in the construction industry, to be commercially workable are as follows:
  - (1) Identification of the parties;
  - (2) Price;
  - (3) Time for completion; and

(4) Description of the works or product involved.

16. Additional terms therefore, as required by you, may assist you achieve what you wish out of a deal. i.e. to put you in the driving seat, rather than the other party.

### **Statutory Regulation and Unfairness**

17. Please however bear in mind that there is a minefield of statutory regulation in what is considered acceptable eg when dealing with consumers (which can include e.g. one off purchases by businesses): Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contract Regulations 1999.

### **Certainty of Terms**

18. In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty.

### **Interpretation of contracts by the courts - Rules of Construction**

19. A rule of *law* takes effect although the parties may have expressed a contrary intention, but a rule of *construction* merely points out what a court shall do in the absence of express or implied intention to the contrary. It is therefore only applied to assist the court where there is some ambiguity or inconsistency, for if the words are plain the court gives effect to them. No rule of construction is individually of such importance that it is regarded as paramount. There are no special rules of construction applicable to particular facets of the law for example construction contracts.
20. With an ordinary English word and where it is not contended that there is anything in the context which would result in it having a special meaning, the court adopts the ordinary meaning and decides as a matter of fact whether the facts of the case are within the ordinary meaning or not. The ordinary meaning is to be determined in light of the contract as a whole. The grammatically and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the document, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity or inconsistency but no further.
21. The absurdity in the last sentence is apparently limited to that which would arise if reading the document as a whole it is clear that the parties intended a special meaning to be given to a word and that to give it its ordinary meaning would therefore create an absurdity.
22. In a contract relating to any art or trade or business the court gives words any special technical, trade or customary meaning which the parties must have intended the words to bear.
23. Terms of art are used to describe words or phrases which have acquired a precise legal meaning ordinarily applied by the Courts, but where a word or phrase which is a term of art is used by an author who is not a lawyer, particularly in a document which he does not anticipate may have to be construed by a lawyer, he may have meant by it something different from its meaning when used by a lawyer as a term of art.
24. When the terms of a contract are ambiguous and one construction will lead to an unreasonable result, the court will be unwilling to adopt that construction. If detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business common sense it must be made to yield the business common sense.
25. The court needs to apply business common sense and meaning to the construction of commercial documents and to avoid frustrating the reasonable expectations of businessmen and women.
26. The court is unlikely to be driven by semantic niceties to adopt an improbable and un-business like interpretation, if a sensible and business like one is reasonably available.
27. It is axiomatic that the document should, so far as possible, be construed so as not to defeat the parties' intentions.

28. There has been a shift from literal methods of interpretation towards a more commercial approach. If detailed semantic and syntactical analysis of a word in a commercial contract is going to lead to a conclusion that floats business common sense, it must be made to yield to business common sense.
29. In determining the meaning of the language of a commercial contract the law generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in a way in which a reasonable commercial person would construe them and the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language. The tendency should therefore generally speaking be against literalism.
30. There are previous cases which suggest that if there is no ambiguity the court will enforce the terms however absurd and unreasonable they may be and there are examples of contracting parties being held to the harsh terms of plainly worded contracts. But it is thought that these cases now have limited application. There are though pre conditions which must be satisfied before the court can 're-write' a clause on the grounds that its literal meaning has no commercial purpose and there are dangers on the court deciding what they must have meant when they have not said what they meant for themselves, (particularly when they have chosen a clause which turns out to be unsuitable for its purpose).
31. A legal judgment is presumed to aim at uniformity. The same words will be presumed to have the same meaning throughout the document and different words to refer to a different thing or concept.
32. Where a clause is ambiguous a construction which will make it valid is to be preferred to one which will make it void.
33. Where there is a manifest error in document the court will put a sensible meaning on it by correcting or reading the error as corrected.
34. The contract must be construed as a whole, effect being given, so far as is practicable, to each of its provisions. Construing a contract may involve two stages:
  - (1) The court may have to determine which documents are contractual and
  - (2) Having decided which documents form part of the contract it must give effect to all the terms and endeavour to reconcile inconsistencies by the rules of construction.
35. In doing this it will be assisted if the parties have expressly or impliedly indicated that certain clauses or documents are to prevail in the event of an inconsistency. It can be seen therefore that having a contract eliminates the first stage.
36. Where there is a contract contained in a printed form with clauses inserted or filled in which are inconsistent with printed words, the written words are entitled to have a greater effect attributed to them than the printed words, in as much as the written words were the immediate language and terms selected by the parties themselves for the expression of their meaning.
37. If printed words by an express clause state the printed form is to prevail over written words a difficult question of construction arises, but it seems that if the clause is sufficiently clear the printed form will prevail. Provisions in a written document generally prevail over those in a document that the written document incorporates.
38. There is a rule expressed 'Ejusdem Generis' which states that where there are words of a particular class followed by general words, the general words are treated as referring to the matters of the same class. Thus a ship was exempted from liability for non delivery of a cargo if the port was unsafe 'in consequence of war, disturbance or any other cause'. It was held that danger from ice was not within the meaning of 'any other cause' which must be limited to causes similar to war or disturbance.
39. For the rule to operate it is necessary to identify a class from the particular words. This will not normally be possible unless there are at least two particular things which precede the general words.

40. Another rule is the 'contra proferentem'. This express means against the proferer i.e. against the person who drafted or tendered the document. If there is an ambiguity in the document which all the methods of construction have failed to resolve so that there are two alternative meanings to certain words, the court may construe the words against the party who put forward the document and give effect to the meaning more favourable to the other party.
41. If there is any doubt about the construction of a document, the recital, (which normally begins with the words 'whereas') may be looked at in order to determine what is the true construction of the document. However if there is no doubt about the construction, the rights of the parties are governed entirely by the operative part of the writing or deed.
42. Courts always endeavour to resolve an apparent inconsistency but if two clauses can not be reconciled the court will give effect to that which states the intentions of the parties. If it is unable otherwise to ascertain which clause should prevail, it will give effect to the earlier clause and reject the later.
43. It should be noted that alterations made before a contract is signed are binding. On the other hand alternations or revisions made after execution by one party without the consent of the other are of no effect. If both parties alter the document after execution by agreement this is a variation to the contract (as is self evident!).
44. Please note that there is a distinction between *construction* which is determining the meaning of words which are in the contract and *implication* which is in effect supplying words which are not in the contract.
45. Though the law in relation to implied terms is itself difficult, generally there can be terms implied by statute (for example the Sale of Goods Act and the Supply of Goods and Services Act, 1979 and 1982 (as amended) respectively) and by the common law (or judge made law).

### **Exclusion of liability**

46. Please note that lengthy books are written on the above subjects and the above is necessarily an introductory to the subject matter of contracts. It is not intended nor is it the case that advice in any sense is being provided by me to you or any third party.
47. Detailed professional advice is required in relation to any situation that you are or may be embroiled in. No responsibility is offered or accepted by the author of this site in relation to the nature or contents of this web site.
48. Rely on anything contained herein if that is your wish (it is expressly not mine) by all means but do so entirely at your own risk.
49. Even if wrong on this, liability is limited to £0.50 (fifty pence sterling).
50. Some Typical Heads of terms
  - Recitals
  - Proper law of the contract
  - Jurisdiction
  - ADR/Arbitration clause
  - Service of notices and documents
  - Interpretation
  - Supply of specified service
  - Supply of specified goods
  - Charges

- Warranties and liability
- Operations
- Client's obligations
- Termination
- General
- Deliveries
- Definitions
- Offer and acceptance
- Cancellation by supplier
- Cancellation by purchaser
- Information and advertising
- Liability
- Safety
- Acceptance
- Delivery of goods
- Property and goods
- Intellectual property rights
- Assignment and notation
- Entire agreement
- Dispute resolution
- Law and jurisdiction
- Reasonable endeavours
- Periods of time
- Waivers and leases
- Successors and Assigns
- Expressions of time
- Effective date of the contract
- Force Majeure
- Termination
- Survival of terms
- Subject to contract
- Options
- Amendments and variations to be in writing
- Contra proferentem

- Severance and invalidity
- Sub contracting
- Parent company guarantees
- Joint and several liability
- No partnership or agency
- Warranties
- Capacity
- Disclaimers
- Indemnities
- Payment terms and interest
- Time of the essence
- Set off anti set off
- Retention of title
- Title & Risk
- Insurance
- Confidentiality
- Third Party contractual rights
- Entire agreements

## QUESTIONNAIRE

- 1 Legal name of business
- 2 Contact details
  - Telephone
  - Fax
  - Email
  - Web
- 3 Company Registration Number (if applicable)
- 4 Name of Partners (if applicable)
- 5 Product or service provided in detail
  
- 6 Please state if a product, whether a product is supplied only or the business supplies and fixes the product
- 7 To whom is the product supplied e.g. other businesses or consumers
- 8 Do you have product liability insurance? (If yes please provide a copy of the current policy schedule)
- 9 Describe the sales process by numbering the order in which the following (if applicable) occur:
  - Telephone
  - Internet
  - Written quotation
  - Payment
  - Preparation of goods or services
  - Delivery of goods or services
- 10 How are you paid for goods and services provided e.g. cash/visa/switch/other Please describe 'other'
- 11 What credit terms do you allow?
- 12 Do you operate a 'returns' policy?

- If so what is it?
- 13 Do you operate a cancellation policy? If so describe its main features.
- 14 In what way would you wish to limit your business's liability if possible?  
Accident/death  
Consequential losses  
Other (please state)
- 15 Describe to what level you would wish to avoid or limit such liabilities.  
Dispute resolution. Please number in order of preference the following characteristics of how you would wish disputes to be resolved:  
Speed  
Quality of decision  
Cost  
Binding decision
- 16 Please state how you inform your customers of the price of the goods or the service concerned e.g. brochure, website.
- 17 How do you deliver the goods to your customer e.g. at your premises, do you deliver to their addresses, is a signature required?
- 18 Heads of Terms  
Please find attached heads of terms that may apply to your business. Please tick whether you would wish your terms to incorporate such terms
- 19 Other comments  
Please set out on a separate sheet of paper anything else you believe is important in relation to your business's contract.



