



# Terms and Conditions of Business



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# Terms and Conditions of Business

## Introduction

Terms and conditions are standard contractual terms used in commercial contracting, usually between a supplier and its customers. If your organisation has “buying power”, you may also be able to insist on goods and services being supplied to you on your standard terms and conditions of purchase. This note deals with terms and conditions of supply, which are far more common.

Having well-drafted terms and conditions can help you control your risk under your supply arrangements; without them your business may be at significant risk.

## What are the key practical risks for your business?

The key risks for you will depend on the nature of your business. For example:

- if your company is a manufacturing business selling high-value plant and equipment on credit, your customer's insolvency might leave you having to accept a large loss – unless you have reserved ownership of your products until the purchase price has been paid in full
- if your company creates bespoke software and this is business-critical to your customers, if your software is not fit-for-purpose, your customer might seek to recover lost profits from you, unless you have validly excluded this liability

## Categories of Legal Risks

The following categories of civil legal risks are commonly encountered in supplying goods or services (this is not an exhaustive list):

### *Breach of contract*

If you agree to deliver goods or services, you will be responsible for doing so in accordance with the contract

### *Tort of negligence*

You may be liable to your customer or to end users in connection with negligent advice or negligence in the design or manufacture of products

### *Statutory liability under the Consumer Protection Act 1987*

You may be liable to the end user of

your products where they are “defective” within the meaning of the Act

Supplying goods can also give rise to various forms of criminal liability, including in connection with misleading actions and statements under The Consumer Protection from Unfair Trading Regulations 2008. Such matters are beyond the scope of this note.

## Some Key Matters to consider

### *Limitations of liability*

The most important provisions in any terms and conditions document will generally relate to your liability to compensate your customer if something goes wrong. Subject to regulation under the Unfair Contract Terms Act 1977 and various pieces of consumer legislation (hereafter “**Controls on Freedom of Contract**”), contracting parties have freedom to restrict or exclude their civil liability. Note that you cannot exclude or restrict criminal liability. Some of the key Controls on Freedom of Contract are as follows (this is not an exhaustive list):

### *Liability for negligence*

Liability cannot be restricted except in so far as this is ‘reasonable’

### *Liability for death, personal injury or fraudulent misrepresentations*

Liability cannot be restricted

### *Liability under the Consumer Protection Act 1987*

Liability cannot be restricted

### *Liability for breach of the implied term as to title in a contract for the sale of goods*

Liability cannot be restricted

### *Liability for breach of implied terms in a contract for the sale of goods in relation to: (1) compliance with description or sample; (3) fitness for a particular purpose; and (4) quality*

Liability cannot be restricted where the purchaser deals as consumer, or in other cases where the restriction is not reasonable

### *Liability for breach of contract generally*

Liability cannot be restricted as against

a party who deals as consumer or on the other's party's standard terms and conditions, except in so far as the restriction is reasonable

It is also important when considering limitations on liability to bear in mind that excessive limitations may deter customers from using your company, or result in time-consuming amendments to your terms and conditions, each time they are used. A balance needs to be struck between your desire to limit risk and the realities of the market in which you operating.

Note that where your customer is not the end-user of the product (i.e. you are selling to a distributor), your contract with the distributor will not control your liability to the end-user. However, prominent disclaimers and notices included on packaging or instructional leaflets may achieve this goal. Accordingly, a thorough terms and conditions review should include a review of the instructions and packaging supplied with products.

### *Limitations on the value of claims*

Simply excluding all liability across the board in your standard terms could be a risky tactic, as the clause might be invalid due to Controls on Freedom of Contract.

If you decide to restrict rather than exclude your liability, how do you decide on an upper limit? One of the most important issues to consider is the availability and cost of insurance. If you are able to obtain insurance for a reasonable cost, it might be advisable to limit your liability in relation to the insured risks by reference to the upper limit of your cover. Obviously, it is important that you understand what risks are covered by your insurance and what are not. Insurance policy documents vary considerably from insurer to insurer and you should ask your insurance broker or solicitor to advise you on the detailed policy terms before purchasing any insurance policy. The following general information may be of assistance.

*Product Liability Insurance* would typically extend to Physical loss or damage to property which is caused by

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products supplied

**Professional Indemnity Insurance** would typically extend to liability for negligence, in the delivery of services or sometimes in the design or manufacture of products

To avoid invalidating the terms of your insurance, you should be careful not to accept liability under your terms and conditions which is greater than the liability which you would have under the general law. So be careful about giving indemnities and guarantees.

### **Termination only/Replacement only**

In relation to some terms, particularly stipulations as to time of delivery of goods or services, it may be appropriate to restrict the customer's remedies to the right to terminate (in return for a refund of the purchase price, if paid), rather than leave yourself exposed to a claim for damages.

If you are supplying goods, you may want to limit the customer's remedies to the right to claim a replacement from you, or at least to give you a reasonable time to either repair or replace the goods.

### **Consequential losses**

It is common practice for suppliers to exclude all liability in relation to 'consequential or indirect losses'. These words are not terms of art, so it is important to state what sort of losses you have in mind, e.g. loss of profits, loss of business and loss of goodwill.

### **Reasonable endeavours obligations**

There are generally two types of contractual clause: absolute commitments and commitments to use endeavours (whether *best* or *reasonable*) to achieve a particular result. One way of indirectly restricting liability, in appropriate cases, is to contract to use endeavours rather than giving an absolute commitment.

### **Force majeure**

Another way of indirectly controlling liability is to add a clause which excuses your company from liability for breaches of contracts arising from

matters outside of your control. Such clauses are referred to as 'force majeure clauses'. The scope of such clauses can vary considerably, but such a clause will generally always include such matters as terrorist acts and labour disputes. Some suppliers use force majeure clauses to excuse themselves from liability for the acts of sub-contractors which are outside of their reasonable control, but this may not be acceptable to the customer.

### **Time limits on notifying faults**

It is worth considering limiting the period during which a customer can notify faults to you. If stock is in a customer's warehouse for months before it is checked, it may have become obsolete and unsalable by the time defects are brought to your attention.

### **More than one exclusion?**

There is nothing wrong in having different types of limitations and exclusions applicable to the same liability.

### **Passing of Title**

If you are supplying goods on credit, it can be extremely helpful to have reserved ownership in the goods to your company until the purchase price has been paid or 'all monies' due to the supplier by the customer have been collected. This is because a property right in goods is more valuable than a contractual right to receive payment in circumstances in which the buyer is insolvent. You may have no prospect whatever of receiving payment of the purchase price, but if the goods can be recovered, these might be capable of being resold to another buyer. Such clauses are referred to as 'retention of title' or 'ROT' clauses.

Some of the important limitations on the effectiveness of ROT clauses are as follows:

- the buyer may use the goods in a manufacturing process which causes them to lose their identity, thereby extinguishing the supplier's title (e.g. resin is supplied and used by the buyer to manufacture chipboard).
- the buyer may sell the goods on. Under the [Sale of Goods Act 1979](#), the

buyer as a purchaser in possession would be able to pass on a good title to the goods to a purchaser in good faith without notice of the supplier's interest; so you would not be entitled to recover the goods from your customer's buyer.

- the buyer may mix the goods with his own goods or the goods of another supplier, such that separation is not possible (e.g. as in the case of commodities such as oil or corn or other general goods). This will significantly complicate the recovery process, although technically the supplier should have a property interest in the mixture, probably in conjunction with the buyer or the third-party supplier.

Some ROT clauses attempt to confer rights on the seller in respect of finished products (such as the chipboard in the above example) or proceeds of sale. Such clauses may be ineffective as against the administrator or liquidator of a company on the basis that they are not reservations of title at all, but in fact security interests which should have been registered at Companies House in accordance with the provisions of the [Companies Act 2006](#). However, a right to 'trace' title into the proceeds of sale of goods might exist in the case of an appropriately drafted ROT clause.

### **Intellectual property and data protection**

Intellectual property and data protection are increasingly important in commercial contracting. A detailed consideration of these matters is beyond the scope of this note. However, ensure that you consider who will own the copyright in documents, designs or software which you produce and what uses you expect to make of databases supplied by the customer or created during the course of a contract.

### **Trade/Professional Associations**

If you are a member of an association, the association may have standard terms and conditions available for use by its members. This can be an inexpensive way of getting a good document. However, be careful to check that the document is suitable for all of your purposes.

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Your association might also impose restrictions on what terms and conditions you are able to agree with your customers, which will need to be kept in mind if you are preparing a document from scratch. For example, controls on limitations of liability are common in highly regulated sectors, such as the provision of legal services by solicitors.

## Common Mistakes

### Structure

A properly prepared terms and conditions document will often be quite complicated. For example, it is increasingly common for businesses to supply different types of products and services, e.g. a computer company might provide hardware, software and services. Different contractual terms will be needed for each of the services

being provided, which might involve structuring a document into 3 or more parts. Failing to adopt the appropriate structure can lead to matters being left out and your business being exposed to risks which would otherwise be controlled.

If you are trading on the internet, you will need two or three documents: (1) terms and conditions of use – applicable to all visitors to the website (whether or not they buy anything); (2) terms and conditions of purchase of products or services; and (3) a privacy policy (covering data protection issues). It is not uncommon to see (1) and (2) presented as a single document.

### Formation of the Contract

As well as the structure of the document, take the time to consider

your contracting procedure. Beware of sending your terms and conditions to the customer after an order has been made (e.g. on the back of an invoice), as they will not have been validly incorporated into the contract. Ideally, get your customer's agreement in writing to be bound by your terms and conditions.

### Alternative Dispute Resolution Clauses

Whilst it is not uncommon to see clauses in terms and conditions which require disputes to be referred to mediation or arbitration rather than the courts, this will only rarely be an appropriate provision from the supplier's point of view. Why preclude yourself from bringing legal proceedings against a customer for non-payment?

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