

Standard Trading Conditions

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Introduction

The following concerns or experiences are familiar to every businessman.

"He's gone bust and still owes us for the last two consignments. I know the goods are still on his premises, but the receiver says we can't recover them".

"We've got trading conditions, but so have some of our customers. How do we make sure ours apply and not theirs?"

"The £ has fallen against the Swiss franc. We're going to make a loss on this contract now and can't change our price".

"Our customer is threatening to bring a massive claim against us because some of the goods we sold are defective. We can't claim against the manufacturer who supplied the goods to us because the manufacturer has excluded all liability other than an undertaking to replace the goods".

"We manufactured something to our customer's specification. A company we have never heard of is threatening to sue us for infringement of copyright."

Do you have standard trading conditions in place?

If so, do your standard trading conditions deal with these situations?

If the answer to either of the above is "no", then this practical booklet should be of interest to you.

1 What are standard conditions?

Standard conditions are the contractual basis upon which a business deals with its customers.

They may be, for example, conditions for the sale of goods or for the purchase of equipment, conditions of carriage, or the conditions upon which services are to be provided or to be received.

Standard conditions contain the provisions which a business wishes to impose on its customers generally. They outline the extent of the business's responsibility to its customers and any obligations accepted by customers. They establish a course of dealing between a business and its customer.

Although this practical booklet refers to "suppliers" and "customers", similar considerations apply whatever the nature of the business.

2 Who needs standard conditions?

Every business depends upon entering into some form of contract with its customers.

The business may involve the constant turnover of a large number of orders. For the protection of the business and, to a lesser extent, for administrative convenience, a business should formalise the day-to-day terms upon which it trades.

If the business involves the negotiation of a small number of large contracts, standard trading conditions can be introduced at the quotation or tender stage as the basis upon which each contract will be carried out. Particular provisions may be altered according to the requirements of individual deals.

3 Why do you need standard conditions?

3.1 To retain ownership of goods until they have been fully paid for

Where there is no specific agreement, a customer may become the legal owner of goods as soon as the contract is made. This is because the Sale of Goods Act treats the passing of ownership as distinct from the right of the customer to delivery of the goods and the right of the supplier to receive payment. If, after delivery of goods, the customer goes bankrupt or into liquidation or receivership without having paid for the goods, the supplier may not be able to recover either the purchase price or the goods themselves.

In order to protect the supplier it is essential to have a carefully drafted retention of title clause. This is not least because different rules apply where the customer has resold the goods before paying the supplier or where the customer processes the goods in some way before the goods have been paid for in full. Suitable wording is needed to ensure that, so far as the law allows, an unpaid supplier can enter premises to identify and recover his goods.

Furthermore, receivers and liquidators scrutinize retention of title clauses. A technical defect in the clause could be fatal to a claim to recover goods for which no payment has been made.

3.2 To set out the payment terms - every supplier needs to be paid on time

Clear contractual terms as to when and how payment is to be made are crucial.

Prices quoted may not include delivery, insurance, packing or tax. The supplier will want to be able to charge for these additional expenses without fear of dispute from its customer. Alternatively, the supplier should state that these costs are included so that his quotation can be fairly compared with others.

Where accounts are unpaid, the supplier may want to claim interest. In any event, the supplier should be able to suspend deliveries or cancel orders without fear of being in breach of contract.

In some cases, the supplier may need the right to increase his prices if there is an increase in the cost of fulfilling the order. This may be as a result of fluctuations in exchange rates or increases in labour, raw material or transport costs. Advice is needed on the enforceability of a provision which allows a supplier to increase prices; not all clauses are valid.

3.3 To set out the time frame for delivery

The supplier should be protected if he is prevented from delivering on time. Specific provisions are required to ensure that the time for delivery is not "of the essence" and that failure to deliver on time will not put the supplier in breach of contract or allow the

customer to cancel.

3.4 To address the extent of the supplier's liability and the customer's rights where goods prove defective or are lost in transit

The supplier's liability in respect of defective or lost goods is, in theory, unlimited and is not related to the purchase price. Clear statements about when risk passes will therefore enable the supplier and the customer to cover their share of the risk by insurance.

The supplier should, in any event, not give his customer any better rights than the supplier himself has against his manufacturer in order to avoid leaving himself exposed.

Detailed advice will be required as to the warranties that are given and the extent to which the supplier's liability can be limited.

Conditions dealing with limitation of liability are subject to the Unfair Contract Terms Act 1977. The Act provides that, in certain circumstances, limitation clauses will not be enforced unless they are "reasonable". In other cases, limitation clauses will not be enforced at all. The supplier will need detailed advice on the effect of this Act on his trading conditions.

In addition the Consumer Rights Act 2015 provides protection to consumers in respect of contracts entered into with suppliers. This Act contains the concept of 'good faith' and provides a "grey list" of clauses which are likely to be deemed unfair if included in a consumer contract. An unfair term in such a contract will not be binding on the consumer. The supplier may have little control over what its agents or sales staff have said to a customer before the customer places an order

Over-enthusiastic statements made by a sales representative may result in claims for misrepresentation. The supplier's conditions should provide that the customer's remedies are defined only in the conditions and that no other statements will bind the supplier, unless made in writing. However, restraint in the use of bold claims by sales staff or in promotional material is just as important as the limitation of liability in trading conditions.

3.5 To ensure that the contractual basis on which a business deals with its customers best protects the business

Customers often deal on the basis of their own terms and conditions – sometimes called standard terms and conditions of purchase. Unsurprisingly, customers prepare their own terms for their benefit; these are unlikely to contain anything by way of protection for the supplier's business and may bind the supplier to onerous conditions.

A supplier's conditions should purport to exclude the customer's conditions in favour of the supplier's. Advice is required on the procedures to adopt in any "battle of the forms" to ensure that the supplier's conditions prevail over any submitted by the customer.

3.6 For consistency

A consistent trading pattern with customers may be necessary for administrative convenience, to regulate delivery schedules or cash flow or for insurance purposes.

A business should fully understand the effect of its trading conditions. It should know where it stands if a dispute arises with a customer. Carefully drafted trading conditions usually allow the supplier to argue that the matter in dispute is covered in the supplier's favour by the trading conditions.

4 How can you be sure that your conditions apply?

The most carefully drafted conditions of trading will not help a supplier if the conditions do not form part of the contract which causes problems.

It is therefore essential to ensure that conditions of trading are properly incorporated into contracts. However, the rules for deciding whether standard conditions form part of a contract are quite technical. The timing of when a supplier seeks to incorporate its conditions in a contract is critical. In addition, conditions printed on the back of an order will not apply unless the right wording is on the front. Particular difficulties arise when orders are agreed on the telephone.

Understanding the special requirements of a client's business is important to ensure that the conditions contain the right provisions and that the conditions are properly incorporated in all contracts.

5 Can you use your standard conditions for international contracts?

Conditions of trading for the home market may not be suitable for international contracts. Different means of payment and delivery are often involved. Detailed advice may be required on the added complication of dealing with a customer who may not be subject to the jurisdiction of the English courts. Consideration should be given to whether English law or the law of the importing country should apply.

The overriding factor is that the supplier must be able to enforce the conditions in the customer's home territory. Certain provisions of English conditions of trading may not be recognized abroad. In particular, a retention of title clause enforceable in England may be of no effect in another country. Local legal advice should be obtained on the validity of the conditions in the importing country.

6 The Next Step?

If you already have standard trading conditions, you may think that the time has come for them to be revised to take into account current practice or changes in the law, or simply to make them more intelligible or readable.

If you don't have any formal conditions, perhaps you should!

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Fox Williams LLP is a business law firm based in the City of London dealing with all aspects of commerce & technology law, commercial litigation, commercial property

law, corporate law, employment and partnership law. We are dedicated to providing clients with the highest quality of legal service.

The commerce & technology partners in Fox Williams LLP have advised many businesses on retaining title and their conditions of business.

Please contact any of the partners if you would like to know more about any of the matters mentioned in this booklet or simply to discuss our particular approach to your legal needs.

The law in this booklet is correct as at 31 December 2019.



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