

TERMS

Commercial lawyer Jo Tall looks at the importance of terms and conditions and shares the recipe for success...

T's & C's *mot*

If there is one thing that truly gets me down as a lawyer, it is people running businesses without proper terms & conditions in place or worse still, blindly signing up to terms without even reading them! You may be thinking to yourself “of course I would never do a thing like that!” However, in the heat of the moment, strange things happen. Take for example, a multi-million pound company who was so thrilled by the prospect of the orders streaming in, that they did not check the terms and just signed the contract presented to them. Then the economic downturn hit and they found they were locked into accepting orders at a price that meant they made a loss on every order. I was called in to the rescue and imagine

their faces when I had to report that the contract had no termination clause and they were locked in for several years....

Then there was the case recently of an online company that deliberately put a term in their contract that by placing the order the customer thereby sold their soul to the company! This was simply to test whether customers actually read their terms. Surprise, surprise: no one noticed and orders kept streaming in!

SO, please add ‘t’s & c’s to your new year’s resolutions and, in particular only sign up to terms you have read and that you understand. Here are a few pointers to key provisions you will need as a minimum:

Term of the contract - how long are you truly being asked to sign up for?

Is there a minimum term when both parties are locked in? Will the contract renew automatically, if you do not let the other side know you want out?

How can the contract be terminated?

Usually contracts set out four types of circumstances:

- Where neither party is at fault and you simply want to end the relationship. In this case, check how much notice both parties need to give and that the period is long enough to enable you to deal with the change. This is particularly so if you are the supplier and you need to give notice up the supply chain to your own suppliers.

- Where there is a breach - this is a huge subject in itself, but my simplest advice is to think through all the possible scenarios of what could possibly go wrong and spell out what should happen in that instance. Do not leave it to assumptions. Say what you expect the other side to do to remedy the situation and how much time they have to do so. Are there any breaches which are so serious, that you can terminate instantly? If so, spell out those instances too.

- Where there is a change in status e.g. one party goes into liquidation, commits a criminal offence or simply gets ill or dies - often this entitles a party to immediately terminate the contract.

- Force Majeure or ‘Act of God’ i.e. something beyond the control of either party forces one party to delay or not be able to perform its obligations under the contract. The recent ash cloud is such an example. If the situation persists for a certain amount of time - usually 30 days - either party can terminate without being in breach.

What are the payment terms?

Consider whether to be paid in full or paid in stages on completion of certain milestones. How is payment to be made and what happens if it is late? Is interest chargeable, can either party walk away for breach and/or demand goods back?

Don't forget extras such as delivery costs & VAT - these cannot be added without warning beforehand

When does risk in the goods pass?

Whilst you may be happy to continue to own the goods you supply until you receive payment from the customer, you may wish for the risk in the goods to pass to the customer the moment they leave the factory. This needs to be clearly pointed out so that they can take out appropriate insurance. Sometimes risk will pass at a later stage e.g. when loaded onto a ship or other carrier. You may need to consider the internationally recognised INCOTERMS, which are a shorthand for different freight situations and determine when risk passes.

What is each party's liability if there is a breach?

Most contracts envisage a financial cap and only allow the other side to recover ‘direct losses’ and not ‘consequential loss’. Again, do not just use these terms on their own; spell out what you consider to be direct loss and what is excluded. There are so many possibilities. Remember also, that you cannot exclude your liability for injury or death as a result of your negligence or for fraud. You may have seen contracts that attempt to do this, but these clauses are illegal and have no legal standing.

This article has only touched on a few issues and already you will have seen how many further questions these produce in turn. Please do seek legal advice at the outset of your business dealings rather than when things go wrong. A well drafted contract, with clear sections for the different stages of the contract, should become a handy tool to refer to for you and your staff - just like a recipe book. You may not leaf through it with your mouth watering, but at least you will sleep well at night! 

Jo Tall is a commercial and IT lawyer with 20 years' experience
www.offtoseemylawyer.com

CONDITIONS