

Commercial trading: standard terms of sale

INTRODUCTION

Commercial contracts do not have to be in writing but a lack of written sales terms may cause uncertainty and misunderstanding between you and your customers, and could ultimately lead to disputes and unexpected risk and liability for your business. Use of standard terms also allows for consistency in your arrangements with customers.

This guide focuses on some of the most important areas to include in standard terms of sale. If, having considered this guide, you would like to know more or to discuss your own circumstances in greater detail, please speak to your usual contact at Stevens & Bolton or a contact listed at the end of this guide.

WHAT TERMS SHOULD I INCLUDE IN STANDARD TERMS OF SALE?

The content of your standard terms of sale will, to an extent, depend on your type of business, the type of goods or services you are selling and the way in which your business operates. We set out below a non-exhaustive list of the main issues generally addressed in standard terms of sale.

Contract formation

A customer may order goods or services from you but you are unlikely to want to be legally bound by an order unless and until you have confirmed acceptance of that order. Your standard terms of sale should dictate the ordering and acceptance process and specify when a contract will arise.

It should be made clear that the standard terms of sale apply to all contracts with customers. It may be that the customer has its own standard terms of purchase which are likely to be less favourable to you as the supplier. It is therefore important to include a statement in your standard terms of sale to make it clear that they apply to the exclusion of any customer purchase terms.

Payment

It is important for a business to specify the timings for payment by customers. Failing to do this could make it difficult to collect payment when you expected it, and you could have to pay suppliers before receiving payment from customers, leading to cash flow problems.

Other payment issues you may wish to address include interest on late payments, prohibitions against set off or withholding payment of disputed invoices, a statement on whether charges are inclusive or exclusive of VAT (and/or other applicable taxes) and delivery costs, provisions for charges review, if appropriate, and the right to suspend or terminate provision of goods or services if payment is late.

Delivery

Standard terms of sale will usually specify how and when delivery will take place although the specific details such as the date, time and location of delivery may be set out elsewhere for example in a purchase order or statement of work.

Transfer of Ownership

If you are selling goods, your standard terms of sale should make it clear when ownership of those goods will transfer to the customer. It is useful for the business to expressly retain ownership (“title”) to the goods until full payment has been received as this can mitigate the risk and potential impact of non-payment.

Risk

Standard terms of sale will usually state which party assumes the risk of damage or loss of the goods at the various stages of the sale process. As the supplier, it is generally more favourable for risk to pass to the customer on delivery (rather than on payment) but this will ultimately depend on the context of the customer arrangement and also the way in which delivery is being carried out. You should also consider any requirements for the customer to insure the goods on transfer of the risk.

Warranties

Consider the warranties which you will provide to your customers. For example, you may warrant that the products you supply will conform to their description in an applicable specification or manual or that the services supplied will be of a certain standard. If you breach a warranty, your customer has the right to claim damages for breach of warranty.

In addition to any warranties which you may provide, some warranties are implied by law. Some of these statutorily implied warranties cannot be excluded from your sales contract, and more restrictions apply when you are selling to consumers. See further discussion below.

Limits on Liability

The exclusions and limits of liability will be an important part of your standard terms of sale.

For most businesses it is advisable to ‘cap’ their maximum liability for each supply. This may be linked to a percentage of the price paid by a customer, to a specific figure or to some other value.

Additionally, there are a number of types of loss which businesses often try to exclude from their liability to customers, for example, loss of profits claims and claims for ‘indirect’ losses. Depending on the context of the specific customer relationship, it may be appropriate to exclude these.

However, liability limitations and exclusions can be difficult to enforce, either because they are unclear or because they fall foul of regulations in this area (see below). If they are unenforceable, you will be liable for all losses of the customer (subject only to common law rules on recovery). It is therefore very important to ensure that any provisions limiting or excluding your liability are carefully drafted.

Governing Law and Jurisdiction

Standard terms of sale should state the law which will govern their operation (e.g. English law) and also the jurisdiction for any disputes which may arise out of the terms (e.g. English courts). You may also wish to specify any more informal dispute escalation and resolution procedures which should be followed in the event a dispute did arise.

HOW DO I MAKE SURE THAT MY STANDARD TERMS OF SALE ARE INCORPORATED INTO ALL MY CUSTOMER CONTRACTS?

Your standard terms of sale will only be effective if properly incorporated into your customer contracts. This means presenting them before the contract has already been made. This is helped by referencing or including them in the pre-contract documents, for example marketing materials, any statements of work, any invoices and on your website.

You need to ensure that you have proper contracting policies and procedures in place which ensure effective incorporation of your standard terms. Your staff should be aware of the importance of following these policies and procedures and forwarding your standard terms to customers.

If your standard conditions of sale are not incorporated, then they are of no legal effect - simply sending terms after an event or the breach of an invoice is unlikely to be enough.

ARE THERE RULES ABOUT WHAT I CAN SAY IN MY STANDARD TERMS OF SALE?

There are a significant number of regulations which impact upon supply contracts, particularly when these are contracts with consumers or are in the form of standard terms of sale. It is important to be aware of these rules when drafting your standard terms of sale because a failure to be compliant can lead to the relevant terms being unenforceable. We consider some of the more significant rules below.

Implied Terms

The law implies a number of terms into supply contracts. For example, that goods are sold with good title, free from defects and fit for purpose and that services will be supplied with reasonable skill and care and within a reasonable time. Some of these statutorily implied terms can be excluded by contract but others cannot (e.g. the implied term that goods are sold with good title). If your customer is a consumer (i.e. an individual who is not acting in the course of a business), then most statutorily implied terms concerning the quality of goods or services cannot be excluded.

Limiting Liability

Other rules restrict the extent to which businesses can limit or exclude liability. Businesses are prohibited from excluding their liability for death or personal injury caused by their negligence and any attempt to do so will be unenforceable.

Other attempts to exclude or limit liability for negligence or for breach of standard terms must be fair and reasonable or else they will also be unenforceable. Whether a term is reasonable will depend on the circumstances taking into account things like the parties' bargaining positions, any inducements given to accept the term, whether the customer knew or should have known about the term, the practicality of compliance and whether the goods or services were manufactured to the customer's specification.

Additional Consumer Rules

As well as the above rules, additional rules apply when businesses are selling to consumers. For example all terms need to be in plain and intelligible language and, when using standard terms of sale, all terms must not be unfair. A term will be unfair if it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer.

WHAT IF I AM SELLING ONLINE?

There are additional regulations which apply when making online sales to consumers. In general, these requirements require you to provide certain information to the consumer including:

- the technical steps that they must take in order complete the contract for sale.
- confirmation of whether you any contract concluded with the customer will be filed and, if so, whether it will be accessible to the customer.
- the technical means of correcting any input errors before placing an order.
- the language for concluding the online contract.

As these sales are made without face to face contact (known as 'distance selling') further rules apply including the need to provide:

- the identity and address of the seller.
- a description of the goods or services offered.
- the price of the goods (including all taxes) and delivery.
- the right for the customer to cancel during the seven day 'cooling-off' period.
- the cost of call any premium rate telephone number which the customers may use.
- the period of any special offer.

All information provided must be clear and comprehensible and must be provided using an appropriate means, for instance if sales are made via a website then the information should be available on that website. The above examples are a non-exhaustive list only of the requirements for selling online. There is significant amount of regulation and guidance in respect of selling online to consumers and this should be considered to ensure you are compliant if you do sell online.

CONTACT US

For further information about any of the issues raised in this guide, please contact:



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The information contained in this guide is intended to be a general introductory summary of the subject matters covered only. It does not purport to be exhaustive, or to provide legal advice, and should not be used as a substitute for such advice.

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