



TERMS AND CONDITIONS OF TRADE

Oglethorpe Sturton & Gillibrand

27 January 2009

Seminar Notes for delegates

Talk to Chamber of Commerce- 27 January 2009

Introductory Note: The talk and these notes do not offer advice in relation to any particular transaction or individual situation. These should be discussed with a qualified legal advisor and for further information please contact us at:

Oglethorpe Sturton & Gillibrand, 16 Castle Park, Lancaster LA1 1YG
(t: 01524 846846 f: 01524 382247)

| Summary of Talk | Delegate Notes |
|---|----------------|
| <p>TERMS AND CONDITIONS OF TRADE</p> <p>This talk is necessarily an introduction to the importance of having well drafted terms and conditions of trade. It will focus on relevant legal requirements but also deal with a number of very practical reasons for requirement of the terms.</p> <p>1. Why use standard terms?</p> <p>1.1 Benefits</p> <p>There are a number of benefits which can be gained from using Standard Terms of Business. Obviously, it would not be practical for the business to negotiate separate written contracts in relation to each transaction. By adopting a set of Standard Terms for all contracts, the business achieves many of the benefits of a detailed, bespoke contract for all of its transactions; taking into account its experiences of where problems have arisen in the past. Of course, certain risks will be common to most businesses and these should always be dealt with in Standard Terms.</p> <p>Standard Terms are convenient, they allow contracting processes to be standardised and streamlined.</p> <p>Accordingly, Standard Terms:</p> <ul style="list-style-type: none">▪ Save time and expense in drawing up contracts on appropriate commercial terms.▪ Can impose favourable terms in favour of the supplier; minimising liability and ensuring that the other party's obligations are very clear.▪ Provide certainty.▪ Providing that Standard Terms are regularly reviewed and appropriate procedures are in place, more junior staff can handle contracting safely. This in itself will create efficiency and cost saving. <p>1.2 Reasons to Take Care</p> <p>Suppliers, however, should not assume that Standard Terms deal with all circumstances. Reliance on Standard Terms, in the absence of proper procedures for quality or credit control, may not be the panacea of all ills,</p> | |

as some people might assume. They are part of the supplier's armoury in terms of running a successful and efficient business. There are, of course, also legal restrictions on the extent to which a company is allowed to exclude or limit its liability. There may therefore be some doubt as to whether a supplier is able to rely on these provisions contained in the Standard Terms. There are statutory controls which may make certain terms altogether enforceable and others may only be enforceable if they satisfy particular tests of reasonableness or fairness.

If more junior staff are dealing with contracts on Standard Terms, it is essential that they understand what the Terms are designed to achieve and are properly trained.

There are commercial considerations too. If a supplier's Terms are too one sided, this might be out of kilter with normal commercial practice and hence make the business less competitive. In adopting Standard Terms, then, the draftsman needs to consider:-

- Are there any legal restrictions which would make the Standard Terms unenforceable?
- The Standard Terms need to form the basis of the contract and hence staff must be properly trained.
- Care needs to be taken to ensure that the Standard Terms are appropriate for a particular transaction.
- They should not be used to replace proper credit or quality control procedures.
- They should be regularly reviewed to ensure compliance with the dynamic statutory regime relating to terms of business and consumer protection.
- They should be reviewed regularly to ensure they reflect the business activities and operations of the business.

1.3 Consumer and non-consumer Contracts

In drafting standard terms, a business needs to be aware that statute law distinguishes between consumers and non-consumer contracts. If a business is only trading on a business to business basis then certain terms, in particular relating to the exclusion and limitation of liability may be enforceable. These may not be enforceable if the same business is trading on a business to consumer basis. This is because the law imposes more stringent controls on consumer contracts. A somewhat simplistic answer to that might be that the business would have two sets of conditions. Unfortunately, in practice this will not often be possible because the definition of "consumer" differs between different parts of legislation. Nevertheless, a business needs to be aware of the basic distinction.

1.4 Certainty

Most businesses would agree that having certainty relating to the nature of their obligations to a customer and the rights and obligations of that customer is beneficial.

In the absence of such standard terms, there may very well be a legally binding contract. A contract is made simply where one party makes an offer, which is accepted, and that there is some form of consideration for

the contract which in itself is intended to be legally binding. In simple forms of contract where the only relevant terms relate to quantity, price and delivery date, it may be determined that no further terms are required. Further, there are certain terms which are implied by statute law and these can be interpreted by the courts.

It is however a normal fact of commercial life that contracts are rarely that simple.

The absence of certainty in a contract can inevitably lead to dispute. It is the wish to avoid dispute or argument that makes the requirement for standard terms such a “no brainer”.

In situations of negotiating contracts, it may very well be the case that both the customer and the supplier have their own standard terms of business.

From the supplier’s perspective it is essential that a contract when agreed incorporates their standard terms and not those of the customer.

2. Relevant statutes and regulations

- Sale of Goods Act 1979 (SGA).
- Supply of Goods (Implied Terms) Act 1973.
- Unfair Contract Terms Act 1977 (UCTA).
- Unfair Terms in Consumer Contract Regulations 1994 (1994 Regulations) – replaced by Unfair Terms in Consumer Contract Regulations 1999 (Unfair Terms Regulations).
- Misrepresentation Act 1967.
- Consumer Protection Act 1987.
- Sale and Supply of Goods to Consumers Regulations 2002.
- Consumer Protection from Unfair Trading Regulations 2008.
- Consumer Credit Act 1974.
- Consumer Credit Act 2006.
- Consumer Protection (Distant Selling) Regulations 2000.
- Electronic Commerce (EC Directive) Regulations 2002.
- Equality Act 2006.
- The Late Payment of Commercial Debts (Interest) Act 1998.

The aim here is really not to give a summary of all of these Acts and Regulations but really to show how much legislation there is in this area which may affect the way in which businesses are permitted to contract with third parties especially ‘consumers’.

Relevant Statutes and Regulations have a bearing on how different elements of standard terms can and should be drafted; particularly

concerning implied terms of the contract and also exclusion or limitation of liability which are dealt with further below.

3. Ensuring that your Terms and Conditions apply

3.1 Basic incorporation of Terms

New contract terms cannot be introduced after a contract has been formed by offer and acceptance between the parties.

This is a very important principle to be aware of as it will have implications for every single contract that the business makes.

Importantly, if a business seeks to rely on any limitations or exclusions for liability, and those terms are not brought to the attention of the customer before the contract is made, they do not form part of the contract. They have not been properly incorporated into the contract.

All too often, a business will simply put their standard terms and conditions on the back of an invoice. Unless there has been some course of business or custom between supplier and customer, this is generally ineffective. This is simply because the invoice has not been despatched until some time after the contract was made.

Contracting procedures therefore need to be established which allow for the standard terms to be brought to the attention of the customer before the contract is actually agreed.

This ensures the terms are incorporated into the contract.

A supplier should also ensure that they do not inadvertently accept a customer's terms. If a purchase order is placed which purports to refer to standard terms of purchase, the supplier needs to rebut those terms expressly.

Lawyers refer to this situation where there is offer, then counter offer and then further counter offer as the "battle of the forms". It is important that you win it.

A supplier should therefore ensure:

- Any offer by a buyer must be stated to be subject to the seller's standard terms.
- The standard terms need to be brought to the attention of the buyer.
- The standard terms should contain a clause indicating that any purported acceptance by the buyer takes effect only as an offer (not an acceptance) and that no contract is created until a seller issues its acknowledgment or confirmation of order. Whilst such a provision may not be entirely effective, nevertheless it may be persuasive if there is a dispute.
- The standard terms and conditions should be available on a seller's delivery note, its brochures, catalogues or other publications.
- They should also be made available on a seller's quotation forms and on the acknowledgment or confirmation of order.

- Making standard terms available by reference to a website, as a matter of practice, may not be effective.
- Ideally, when introducing new standard terms, a copy can be sent to each customer stating that new terms will apply in the future. The customer can be asked to sign an acknowledgment as receipt and acceptance of the new terms.

3.2 Battle of Forms – course of dealing

Many large organisations will have their own standard terms of purchase. It is increasingly common to see such organisations refusing to enter into contracts with suppliers unless such purchase terms are adopted. Clearly only one party's terms can prevail.

The approach taken by the courts has always been that an acceptance which attempts to impose new terms is not an acceptance at all, but it is a counter offer. This simply means that the terms which have last been accepted will be those that apply. It could therefore simply be a matter of chance.

Suppliers need to be aware of the problem and act accordingly. This may mean tackling the problem directly with the customer. It may mean that a bespoke contract needs to be negotiated and agreed.

There should be a clause indicating that the seller's terms will always prevail over any terms of the buyer. Whilst this may be useful, there may of course be a counter clause in the buyer's terms that says effectively the same thing in the favour of the buyer.

So far as course of dealing is concerned, this would arise if the customer is shown to have accepted terms because of the way the parties have always dealt with each other. Again, there is uncertainty as to what such "course of dealing" would mean. It has to be regular trading and would probably involve several transactions per month rather than simply 2 or 3 transactions over a number of years.

The practical point to note is that there is no substitute for a rigorous contracting procedure.

3.3 Signed Documents

The general rule is well established that if a person signs a document which contains contract terms, he or she is bound by those terms, provided that the contract was presented for signature before the contract was concluded.

Whilst this might be affected by fraud or misrepresentation (other legal defect) this is the generally accepted rule).

3.4 Changing Terms of Business

In view of the above, it is therefore very important that if a business is proposing to change its terms and conditions, any changes are expressly brought to the attention of its customers. The change should be specifically mentioned.

4. The Essential Features of Terms and Conditions

The Standard Terms and Conditions will deal with each of the following:-

- Supplier's obligations. (4.1)
- Supplier's liabilities.(4.2)
- Warranties and indemnities, which may include making representations for goods or services.(4.3)
- Limitation or exclusion of the supplier's liability.
- The customer's obligations relating to acceptance and payment.
- Property rights (including intellectual property).
- Retention of title.
- Force majeure.

4.1 Supplier Obligations

The basic obligation of a supplier is to deliver the goods or services which are the subject of the contract. In a contract for work and materials, the obligation is to deliver the finished item. If the contract does not set out this expressly then the basic duty will be expanded by implication, either by statute or Common Law. Normally, in a contract, there will be a specified time and place for performance or delivery.

4.1.1 What is meant by delivery?

It is effectively little more than a voluntary transfer of possession. Delivery does not necessarily involved physical delivery.

Delivery:

- Ex works []
- FOB []
- CIP []

4.1.2 Can a supplier effectively contract out of delivery?

The supplier cannot exclude this obligation or limit it so as to reduce it, effectively, to an option to perform. Such terms in a consumer contract are governed by the 1994 Regulations and are likely to be held unfair.

4.1.3 Time for delivery

Often a supplier will state that the time for delivery is not of the essence.

4.1.4 Aspects to be dealt with

- Where is delivery to take place?
- Who will be responsible for making the delivery?
- At what point does risk pass?
- Will this be different to the time at which delivery is made?
- Who is to pay for the delivery?

- Are there to be requirements relating to insurance?
- If the customer is to collect the goods, there need to be provisions allowing for notification and time for collection.
- If the customer is collect the consequences of failure to collect should be set out.
- Who is responsible for the risk of loss pending collection?

4.1.5 Remedies for non-delivery or late delivery

In the absence of anything limiting or excluding liability in the Terms and Conditions, the customer is entitled to damages for breach of contract if a supplier fails to deliver. Further, depending upon the terms of contract, late delivery may also give rise to a claim for damages. Prima facie the damages for non-delivery would be the difference between the contract price and the market price at the contract delivery date. If there is no available market then the damages would be calculated on the basis of “the loss directly and naturally arising in the ordinary course of events”.

4.1.6 Force Majeure

The obligation regarding delivery can be affected by circumstances beyond the Supplier’s control and this should be covered by a force majeure clause.

4.1.7 Quantity of Goods

The contract needs to deal with short delivery or excess delivery. In the absence of any particular provision, Section 30 Sale of Goods Act requires strict compliance with the contract. This is subject to two restrictions, based on a de minimis exception.

4.2 Supplier’s Liabilities

Irrespective of express liabilities which a supplier is prepared to accept in its Standard Terms, there will also be implied terms based on statute law.

4.2.1 Implied Terms in Sale of Goods Contracts

The SGA imposes implied terms in contracts for the sale of goods. They are all conditions of the contract except for the terms relating to encumbrances in client possession which are warranties. Whether a term is a condition or warranty is important as breach can have different remedies.

- Good title.
- No encumbrances in client possession.
- The goods must correspond with their description.
- The goods must be of a satisfactory quality.
- The following factors are relevant for satisfactory quality:
 - Fitness for all purposes for which goods of that kind are commonly supplied.
 - Appearance, finish and freedom from minor defect.
 - Safety.

➤ Durability.

So far as durability is concerned the SGA does not specify a life expectancy for goods. The question of how long they need to last will depend on all the facts of the case including the nature of the goods, price and description under which they are sold.

“Best by” and “use by” instructions may provide some guidance in appropriate cases.

- Fitness for the buyer’s purpose where the buyer makes known to the seller the purpose for which he wants the goods.
- The goods must correspond with sample.

In consumer contracts a consumer in addition has the following remedies where goods fail to conform to the contract of sale at the time of delivery:

- The right to require the seller to repair or replace the goods within a reasonable time and without causing significant inconvenience to the consumer.
- The right to require the seller to reduce the purchase price of the goods by an appropriate amount or to rescind the contract. This applies only if:
 - Repair or replacement is impossible or disproportionate.
 - The seller fails to repair or replace the goods within a reasonable time and without significant inconvenience to the consumer.
 - Good which do not conform to the contract for sale at any time within the period of 6 months starting with the date on which the goods were delivered to the consumer must be taken not to have so conformed at that date.

4.3 Liability through making representations about your goods or services

4.3.1 representation or ‘puff’

Most businesses will have promotional material in the form of catalogues and sales brochures. Also, when sending out representatives, certain representations will be made about the quality or operation of goods and services.

The business needs to be aware that a number of these representations could inadvertently form representations and hence terms for the purposes of the contract. It is for this reason that suppliers need to be careful about the nature of the representations and how these are interpreted.

Sales personnel need to be properly trained.

4.3.2 Parole evidence rule

If parties enter into a written contract which purports to set out the whole of the terms of the contract then representations made orally before the

contract is made do not form part of that written contract. It a rule of presumed intention. It can be overruled if there was a clear intention to incorporate them.

Liability can therefore arise inadvertently. Statements made in sales literature can be binding on a business by way of a collateral term.

If such terms prove incorrect then they could amount to a misrepresentation and hence result in a claim for damages.

Care accordingly is to be taken. Standard terms assist in creating the certainty of whether a representation is included as follows:

- An exclusion clause excluding any liability for representations other than those contained in the contract.
- An exclusion clause excluding representations made by anyone other than a director or partner of the business.
- An “entire agreement” clause stating that a written contract contains all the terms of the contract.
- Appropriate training of staff to understand that they must be clear as to the capability of the goods that they are selling and to be careful about making representations as these could be regarded as guarantees and form part of the contract. If a buyer is relying on those representations and they prove incorrect, a misrepresentation clause may ensue.

4.4 Excluding or limiting liability

4.4.1 Statutory controls on exclusion clauses

Before 1973 the only controls on exclusion clauses were common law rules developed by the courts.

Provisions introduced in 1973 were amended and set out in the Unfair Contract Terms Act 1977.

There are now further controls in the Unfair Terms in Consumer Contract Regulations 1994.

These have since been revoked and replaced by the Unfair Terms in Consumer Contract Regulations 1999.

The policies and wording of the 1999 regulations closely follow European regulation and the 1993 EC Directive on the matter.

Note: The Unfair Terms Regulations apply only to consumers. Accordingly, for business to business contracts only UCTA needs to be considered.

4.4.2 UCTA Controls

In all contracts for the sale of goods:

- Any terms which seeks to exclude or restrict liability for death or personal injury caused by negligence is in effective.
- A term which seeks to exclude or restrict liability for negligence is

enforceable only to the extent that it satisfies the reasonableness test.

- A term seeking to exclude or restrict liability in relation to good title is ineffective.
- A term excluding or restricting liability concerning a charge or encumbrance over goods is ineffective.
- So far as implied terms relating to correspondence with description, satisfactory quality, fitness for purpose or correspondence with sample are concerned then if the person is a consumer the term excluding or restricting liability is ineffective.
- A term excluding or restricting liability for correspondence with description, satisfactory quality, fitness of purpose or correspondence with sample when the buyer is a business will only be enforceable to the extent that it satisfies the reasonable test.

In contract with consumers or in contract with another business which are the seller's standard terms of business, there are additional controls.

Any term under which the seller seeks to exclude or restrict liability for breach of contract is enforceable only to the extent that it satisfies the reasonable test.

This is also true where the seller claims to be entitled to perform at a substantially different level than that which could reasonably be expected of him or claims to be entitled not to perform at all.

4.4.3 Other restrictions on exclusion or limitation clauses

- Misrepresentation
- Defective products under Consumer Protection Act 1987
- Sale and Supply of Goods to Consumers Regulations 2002 – statutory remedies for consumers who buy defective goods.

4.4.4 Common Law Controls

- Contra proferentem
- Fundamental breach
- Unusual terms require prominence
- The UCTA reasonableness test
- Section 11(1) UCTA

The contract term must have been “a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been, known to or in the contemplation of the parties when a contract was made”.

There is a non-exhaustive list of guidelines assessing reasonableness.

4.4.5. Methods of excluding liability

This clause has been taken from a standard precedent and should not be used without further advice:-

1. LIMITATION OF LIABILITY

1.1 Subject to [*condition 4, condition 5 and condition 9*], the following provisions set out the entire financial liability of the Company (including any liability for the acts or omissions of its employees, agents and sub-contractors) to the Buyer in respect of:

- (a) any breach of these conditions;
- (b) any use made or resale by the Buyer of any of the Goods, or of any product incorporating any of the Goods; and
- (c) any representation, statement or tortious act or omission including negligence arising under or in connection with the Contract.

11.2 All warranties, conditions and other terms implied by statute or common law (save for the conditions implied by section 12 of the Sale of Goods Act 1979) are, to the fullest extent permitted by law, excluded from the Contract.

11.3 Nothing in these conditions excludes or limits the liability of the Company:

- (a) for death or personal injury caused by the Company's negligence; or
- (b) under section 2(3), Consumer Protection Act 1987; or
- (c) for any matter which it would be illegal for the Company to exclude or attempt to exclude its liability; or
- (d) for fraud or fraudulent misrepresentation.

11.4 Subject to *condition 10.2 and condition 10.3*:

- (a) the Company's total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise, arising in connection with the performance or contemplated performance of the Contract shall be limited to the Contract price; [and]
- (b) [the Company shall not be liable to the Buyer for [loss of profit], [loss of business], or [depletion of goodwill] in each case whether direct, indirect or consequential, or [any claims for consequential compensation whatsoever (howsoever caused)] which arise out of or in connection with the Contract.]

4.5 Customer's obligations of acceptance and payment

- Acceptance of the goods
 - Time for rejection
 - Title and risk
 - Obligation of co-operation
- The price
 - How is this calculated
 - Provisions for revision or variation
 - VAT or other costs to be excluded
- Time for payment
 - Of the essence
 - Cleared funds
 - Express term as to the **due date**
- Currency issues (hedging)
- Method of payment
- Excluding set-off or deduction
- Carrots: encouragements to pay
 - Discounts
 - Instalments
 - Credit terms
 - deposits
- Sticks: set out the remedies for late or non-payment
 - Interest
 - Liquidated damages (not penalties)
 - Bullet/accelerated payments of all instalments
 - Termination of the contract

Consider:

- credit insurance or other cash flow protection
- factoring

4.6 Property Rights and protection of IPR

Where the contract involves the creation/transfer or licensing of proprietary rights or IPR the terms must clearly set out the basis of this

4.7. Retention of Title and its practical importance

In a harsh economic climate, all suppliers should be reviewing and updating their retention of title provisions.

A supplier can have the best standard terms insofar as claiming the price of goods but this of little value if the customer is insolvent.

A supplier will prefer to have retained the title in the goods and hence their value, than give this up in substitution for simply a right to claim the price. The right to claim the price will simply rank with other unsecured creditors in an insolvency.

The key then is to try to retain a proprietary right in the assets sold until payment in full.

Irrespective of a retention of title clause the seller does have some statutory protection as set out in Section 39 of the SGA:

- A lien on the goods or the right to retain them for price while in possession.
- In the event of insolvency of the buyer a right to stop the goods in transit.
- A right of re-sale.

The retention of title clause is intended to deal with situations where the buyer has possession of the goods.

Clauses may include some or all of the following elements:

- Retention of title in the goods until they are paid for.
- Retention of title in the goods until they are paid for but also any other sums due to the seller.
- A provision seeking to claim rights over the proceeds of sale if the goods are re-sold by the buyer.
- A retention of title not only in the goods but also into any new product created through use of the goods by incorporation.
- The right to enter premises to regain goods.
- An obligation on the buyer to keep the seller's goods separately from others and mark them clearly as belonging to the seller.
- The right of re-possession might also be linked to specific events of default including insolvency related events.

Additional points to note:

- The position of a company in administration.
- The incorporation of the ROT clause into the contract.
- Perishable goods.
- Case law.

4.8 Force Majeure

A contract can be frustrated either temporarily or permanently and it is important to guard against such problems. So long as they are restricted to events outside the control of the parties, force majeure clauses are not generally regarded as exclusion clauses. In English Law "force majeure" is not a term of art. It is up to the draftsman to determine what force majeure means in the case of a particular contract. It does have a recognised legal meaning as including war, strikes, embargos, storms and other acts of God. The clause will deal with:-

- The suspension of performance by the parties either on a temporary or permanent basis.
- Allow for a period for suspension and then allowing either party to terminate the contract.
- If there is to be an extension of time, the period must be stated.
- If the contract is to be terminated as a result of force majeure, what are the rights of the parties after discharge.

Concluding Remarks

There is a great deal of law and practice which will have an effect on the way terms and conditions are properly put together and a working knowledge is important to ensure compliance.

In today's economic climate businesses with good documentation give themselves a competitive advantage which could be fundamental to the success or indeed survival of the business.