



STANDARD TERMS AND CONDITIONS

This article looks at:

- some of the advantages of using well-drafted standard terms;
- points to consider when using standard terms;
- how standard terms can best be used and incorporated effectively;
- how not to be bound by unacceptable standard terms; and
- drafting and reviewing standard terms.

ADVANTAGES OF USING STANDARD TERMS

- Well-drafted standard terms make your business look well-organised and professional.
- Your business can introduce favourable terms in a format that does not encourage or require extended negotiation.
- Standard terms avoid the additional time and expense involved in drawing up specific terms for each individual transaction.
- Standard terms provide certainty that your business will be trading on broadly consistent terms in all cases where the terms are used.
- The resulting standardisation of your business' contracting procedures will allow staff to handle and conclude contracts more quickly.
- Standard terms provide a reference point against which other contracts or requests for amendments can be compared.



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POINTS TO CONSIDER WHEN USING STANDARD TERMS

- In theory, there are greater statutory restrictions on the extent to which a supplier may exclude or limit its liability when trading on its standard terms compared with contracts that are specifically negotiated. Certain terms may be completely unenforceable and others may only be enforceable if they satisfy special tests of reasonableness or fairness. Remember that terms that are unenforceable will not be re-written by the Courts – they will simply not apply them.
- Standard terms must be properly incorporated into the contract if they are to be applicable. Particular problems may arise in a 'battle of the forms' situation, where each party wants to contract on its own standard terms. However, even if this is not the case, if terms are to apply they must be agreed to or adequately brought to the other party's attention before the contract is formed (see below).
- In a battle of the forms situation, it is generally the party who 'fires the last shot' ie the party who makes the final offer (subject to its own terms) which is then accepted by the other, who is successful in getting its terms to apply.
- There is a danger that employees may use standard terms for inappropriate transactions. Your business can help prevent this by establishing internal procedures, for example, where proposed contracts/proposals over a certain value threshold are appropriately reviewed before they are issued to ensure that the standard terms are appropriate.
- Your business may need more than one set of standard terms if you provide a variety of significantly different offerings (for example, providing equipment on hire as well as making outright sales).
- If the standard terms incorporate warranties which themselves refer to additional documentation describing the products in question, then adequate steps must be taken to ensure that the customer has been given these specifications (or at least the ability to access and review them) before the contract is agreed.
- Standard terms which are not well-drafted or which are too heavily weighted against your prospective customers may lead to protracted negotiations and may positively act as a sales inhibitor. When trying to create a positive relationship with your customers and 'clinch the deal', standard terms which are excessively negative or cautious can destroy trust and confidence leading customers to look elsewhere.
- Different terms are required for transactions with consumers compared with business to business transactions because of the statutory protection that automatically applies in favour of consumers.
- Keep adequate records of your practices and procedures. Claims may only arise some while after a contract has been performed. Even if you do not keep (or cannot find) every single purchase order or signed order form, it will be helpful to establish what your standard practices were. Keep reference copies of different versions of standard forms and notes of the periods during which the different versions were used.
- If you update your standard terms in a way which may be prejudicial to those whom you deal with on a repeat basis, make sure that reasonable steps are taken before they are to come into effect to alert those contracting partners that changes have been made; this is to ensure that the new version applies to future orders.



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HOW TO INCORPORATE STANDARD TERMS EFFECTIVELY

- Standard terms will only be effective if they have been properly incorporated into the contract before the point at which the contract is deemed to have been created. This is typically when all of the essential commercial terms have been agreed. Remember that there is generally no requirement for any written document or any signatures.
- If standard terms are set out or expressly referred to in a contract or ordering document that both parties sign (and in the latter case a copy of the terms have previously been provided or made available), it is likely that the standard terms will have been sufficiently incorporated.
- Make it clear in all proposals/quotations that you issue if you intend your standard terms to apply. It might also be helpful to state on your web site and in marketing brochures, invoices and other documentation that you routinely issue to customers, that all business is conducted subject to your standard terms unless specifically agreed in writing to the contrary. This will help to establish your intention if nothing else and will improve the chances of the standard terms applying by default should the other party not challenge this.
- In a business to business context, it is not necessary for the other party to have read or even necessarily to have seen the terms in question. All that is generally required is that they are sufficiently 'brought to the other party's attention' at an appropriately early stage before the contract is deemed to have come into existence. These days you do not necessarily have to supply a hard copy. Providing a web link to an online set of the terms will generally be adequate.
- Even if, by mistake, you omit to expressly state that a proposal is to be subject to your standard terms, you may still be able to rely upon them if it can be shown that this was the likely intention of both parties. This will particularly be the case where there has been a history of dealings between the parties and there is evidence that the standard terms have, by agreement, applied to previous transactions.
- Sometimes additional steps may be required in order for especially unusual or onerous clauses to be effectively incorporated when part of a standard contract. Under English law however, principally in a business to business context, this will be quite rare. A limitation of liability clause would have to be particularly unusually restrictive before any further steps had to be taken beyond simply setting out the clause in the contract terms themselves in ordinary typeface.

UNACCEPTABLE STANDARD TERMS

If you are a customer and a proposal/tender is submitted to you which is stated to be subject to the supplier's standard terms, it is incumbent on you to raise objections if you do not want to be bound by terms that you find unacceptable. Otherwise your silence followed by your behaviour demonstrating that a contract has been formed may be taken as your implied agreement to the supplier's standard terms.



DRAFTING AND REVIEWING STANDARD TERMS

- It is important that standard terms have been properly drafted at the outset so that they will stand up to legal scrutiny.
- Standard terms also need to be reviewed from time to time in order to:
 - ◇ take account of experience and customer responses as they are used in practice;
 - ◇ ensure they take account of legislative and regulatory changes or new case law; and
 - ◇ reflect any changes in the way in which you conduct your business.

MORE INFORMATION

If you have any queries about the content of this article or would like some help in developing or revising standard terms of supply or purchase, please contact us at info@TRGlaw.com.

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