

CONTRACTS

Terms of Business

Standard B2B terms that actually govern the deal, including the battle of the forms and enforceable limitation clauses.

Why standard terms matter

A business that sells to other businesses on the same terms every time needs written terms of business. They set the rules once, so that each deal does not have to be negotiated. They cover price and payment, delivery, risk, warranties, liability, and what happens if something goes wrong.

Terms that are not part of the contract protect nobody. Whether your terms are in the contract, and which side's terms win if both have them, is where many businesses are caught out.

Getting your terms into the contract

Terms must be brought to the other side's attention before or when the contract is made, not afterwards. Practical steps:

- refer to the terms in the quote or proposal, with a link or a copy
- make acceptance of the terms part of the order process, for example a tick box or a signature
- do not first send terms with the invoice or the delivery note, which is usually too late
- keep a record of which version the customer saw
- where a customer has a long-standing relationship, say that terms apply to every order

Onerous terms, such as a large cancellation fee or a wide exclusion, need to be drawn to the customer's attention more clearly than ordinary ones.

The battle of the forms

Both sides often have their own terms. The seller sends a quote on its terms. The buyer replies with a purchase order on its terms. Which prevail depends on the exchange of documents and the conduct of the parties. In general, the last set of terms put forward before performance begins may prevail, but it turns on the facts, so avoid relying on it. A practical answer is to agree one set of terms, in writing, at the start.

Different terms for different work

One set of terms rarely suits everything. A business that sells goods, services and software may need separate terms or schedules for each. Terms should reflect the way the business actually works, including delivery, acceptance, and payment. Copying a competitor's terms is risky, because they may not fit your business or may include provisions that do not stand up.

Key points

- Terms must be agreed before the contract is made.
- Draw attention to unusual or onerous terms.
- If both sides send terms, the result is uncertain.
- Limitation clauses must be reasonable to be enforced.
- Some liability cannot be excluded.
- Review terms when the business changes.

Limiting liability

Most terms of business limit what the seller can be made to pay. A clause may cap liability at the price or a multiple of it, and exclude certain kinds of loss, such as loss of profit or indirect loss. Such clauses are valid in principle but are subject to the Unfair Contract Terms Act 1977, which requires some to satisfy a reasonableness test.

The law will not allow a business to exclude liability for death or personal injury caused by negligence, or for fraud. Other exclusions, for example for breach of the implied terms about title, are also restricted. Where the clause is on the seller's standard terms, the court will ask whether it is fair and reasonable, taking account of the parties' bargaining power, whether the customer could have insured, and whether the clause was drawn to its attention.

Before you start

- Are the terms in the quote or order?
- What is the liability cap based on?
- Does insurance match the cap?
- Do customers send their own terms?
- Is there a retention of title clause?
- When were the terms last reviewed?

What good terms usually include

- **Definitions and scope**, with the services or goods clearly described.
- **Price and payment**, including how often and how, and interest on late payment (the Late Payment of Commercial Debts (Interest) Act 1998).
- **Delivery and acceptance**, and time not being of the essence unless stated.
- **Title and risk**, with a retention of title clause where goods are supplied.
- **Warranties** that are specific and measured.
- **Liability**, with a cap and carefully chosen exclusions.
- **Termination and suspension** for non-payment and breach.
- **Intellectual property and confidentiality**.
- **Force majeure**.
- **Governing law and jurisdiction**.

Keeping them current

Review the terms yearly, and whenever the business changes what it sells. Record the date and version on the terms themselves.

Payment and credit control

Clear payment terms are a business tool as well as a legal one. State when invoices are issued, the payment period, how disputes are raised, and what happens on late payment. Keep a record of when terms were accepted and the customer's acknowledgement. A practical approach is to agree credit terms in writing before the first order and to review them when a customer's circumstances change.

How MTM can help

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We draft and update terms of business for practices and their clients, tailored to what the business really sells. We also help with customer negotiations when a large customer asks to use its own terms. Commercial and insurance decisions stay with your client.