

WE KNOW

FINANCE

TERMS AND CONDITIONS OF TRADE

QUICK GUIDE

This Quick Guide is intended to provide assistance with clauses you may wish to consider for your Terms and Conditions of Trade.

OVERVIEW

This quick guide applies to general trading situations. Below you will find a list of suggested clauses you may wish to consider for your Terms and Conditions of Trade (TCT). Please note that this list is not exhaustive and is designed to be a general guide only as to what can be included. We recommend that you seek legal advice on the appropriate TCT for your business.

INTERPRETATION

Definitions: Define certain words which relate to the particular trade you are involved in and are frequently used throughout the TCT, for example, “goods”, “services”, “quotation”, and/or “purchase order”.

Prevailing terms/conflict with other terms: The TCT should stipulate that if there is any conflict between them and the terms and conditions contained in another document, which document will prevail.

FORMATION OF CONTRACT

The TCT should specify how and when a contract will come into existence and up to what point a customer may cancel an order and/or is bound to pay the quoted price.

ORDERS

Procedure for placing orders: Specify whether orders are to be in writing, by fax or email, or can be accepted verbally. It is important to cover how acceptance of the order is to be communicated and whether a deposit is then payable.

Right to Refuse Orders: Give thought to the circumstances in which you can refuse to accept an order. For example, where:

- The order is unable to be met in the required timeframe; or
- There is insufficient stock to fill the order.

Note that if there is an existing exclusive supply agreement, you may have to refuse to accept an order from another customer. This also means you may not have grounds to refuse an order from the customer with which you have an exclusive supply agreement.

The procedure for cancelling orders and whether orders are revocable are also important matters to set out in your TCT.

SUPPLY

The TCT should precisely define what is being supplied. In addition:

- Does the supply of goods include installation?
- If so, what resources is the buyer contributing?
- Who maintains the goods post delivery?

PRICE

The clauses concerning price need to cover a number of points, including:

1. What the agreed price for the goods (as between the supplier and the customer) is;
2. How long a quoted price is valid for acceptance by the customer (if applicable);
3. What GST and other taxes or duties are payable;
4. Whether any deposit is payable and, if so, how, when and whether it is refundable; and
5. Whether the prices are subject to change and how this change will be determined and advised to the customer.

PAYMENT TERMS

You should state when payment for the goods is to be made:

- Upon placing the order; or
- Upon an instalment basis; or
- On delivery; or
- On a specified date, for example the 20th of the month following the date of the invoice.

Consider whether you require:

- Payment to be made in cash;
- Interest and costs on overdue accounts to be included (including costs of recovery), if payment is not made when due; or
- Any other security in addition to the reservation of title.

STORAGE AND DELIVERY

Storage: In some circumstances a company may undertake to store a customer's goods; for example, while a painting is being restored, or a car is being serviced. In those cases, the TCT may need to address issues such as:

- How (and in some circumstances, where) the goods are to be stored;
- Whether the customer needs to have taken out insurance over the goods;
- Who is responsible for loss during storage in the event of a flood, fire, earthquake or other event;
- Whether the customer needs to have properly packed the goods before storage; and
- Whether and when the company can refuse to store goods.

Time and Manner of Delivery: Delivery should be defined in reasonable detail, covering queries such as:

- Does delivery occur at the time possession of the goods passes from the supplier to the customer, or to a third party nominated by the customer or when the goods simply leave the supplier's warehouse?
- Who will be responsible for organising delivery?
- When will goods be delivered?
- Will the goods be delivered on an instalment basis?
- Who will be responsible for delivery costs?
- Are the goods being exported?
- Should Incoterms be employed?

No (or Limited Liability) for Delays in Delivery: Consider whether you should include a provision limiting liability for any delays in delivery.

- If certain parts or materials are unavailable then the supplier may be unable to fill the order within the scheduled timeframe
- Alternatively, the supplier may wish to include in the TCT a clause stating they will not be liable for any delays in delivery, irrespective of the reason.

Further, consideration must be made as to whether delays in delivery will affect quality of goods. This is especially important where the goods are perishable and delays in delivery will cause loss to the customer.

Note that “*delivery*” and the “*passing of risk*” between the supplier and customer may occur at different times. Refer to the ‘Risk’ section below

RISK

Passing of risk: Specify exactly how and when this occurs – upon delivery or otherwise.

Damage: If the goods are damaged during delivery/transportation, the TCT should state who will be responsible for the damage, for example, does a supplier’s liability for damage cease as soon as the goods leave the supplier’s premises? Responsibility for the goods should be established for each stage in the journey.

Deterioration of Goods: If this is a factor, it needs to be dealt with fully. Specifically, at what point does a party incur liability?

Insurance: The TCT should cover who organises and pays for this, what type of cover is included, the level of insurance required, and whose name it will be held in and for whose benefit.

OWNERSHIP

It is important that the TCT state when ownership in the goods will pass. Consider:

- Whether ownership should pass upon payment or upon delivery;
- Whether ownership should remain with supplier until goods are paid for in full;
- When the supplier will have a right of entry to repossess – for example, the TCT may provide a right of entry in the event of failure to make payment in accordance with the TCT; and
- Whether the Consumer Guarantees Act 1993 is relevant – can a supplier contract out of it?

INTELLECTUAL PROPERTY

Consider whether you have the intellectual property rights to the goods and if so, how you want to protect your intellectual property rights. Is the client (or client’s principal) entitled to receive a copy of or assert any ownership claim over any records, data or intellectual property? Where does ownership of copyright reside (in accordance with legislation or otherwise)? The TCT could also deal with who would own the intellectual property of any variations or modifications to the original intellectual property if this was likely to happen.

(THE NEW ZEALAND) PERSONAL PROPERTY SECURITIES ACT 1999 (NZPPSA)

Consider whether the TCT constitutes a security interest for the purposes of the NZPPSA? Are you going to want to contract out of certain provisions within the NZPPSA?

(THE AUSTRALIAN) PERSONAL PROPERTY SECURITIES ACT 2009 (AUPPSA)

If your goods will be shipped to Australia or you are contracting with an Australian party, consider whether your TCT should include a provision allowing you to register a security interest for the purposes of the AUPPSA. Is it necessary to contract out of certain provisions within the AUPPSA?

LIMITATION OF LIABILITY

The supplier's liability can be limited to a set figure, the purchase price or a percentage of the purchase price, or replacement cost of the goods/services. In particular, consider:

- The basis on which goods may be returned, including condition, refunds and timeframes; and
- Whether qualifications are required as to the condition, quality or suitability of goods supplied.

CONSUMER GUARANTEES ACT 1993 (CGA)

Where a supply is for business purposes, the buyer can agree that the provisions of the CGA do not apply.

SALE OF GOODS ACT 1908

Do you want to exclude certain provisions of the Sale of Goods Act, for example the warranties and implied terms?

EVENTS OF DEFAULT

- What shall constitute an event of default under the TCT?
- How will an event of default affect the TCT?
- What remedies are provided in the TCT if an event of default occurs?

WARRANTIES AND INDEMNITIES

Product or service warranties: Specify a term of the warranty for the product or service you are supplying.

Remedies available under the warranty: Consider:

- The ability and procedure for claims for shortages or damages; and
- Who will bear the associated costs of enforcing the warranty? For example, transport costs.

Warranty Exclusions: The warranty provisions of your TCT should also cover instances where the warranty does not apply. This may be where, for example:

- The product is damaged as a result of normal wear and tear; or
- Where it is not used in accordance with the supplier's instructions.

Also note whether the customer shall indemnify you against any resultant damages and consequential losses and if the Consumer Guarantees Act 1993 is relevant, consider whether you should (or can) contract out of it.

GUARANTEE

Consider whether you need to include a guarantee clause, and if so, whether the liability of guarantor(s) is to be unlimited and current, until all goods paid for in full.

ASSIGNMENT AND TRANSFER

Consider whether the TCT should provide for rights of assignment or transfer. For instance, do you want to allow the customer the ability to assign/transfer rights under the agreement? You may wish to place restrictions on such assignment/transfer or prohibit it entirely.

DISPUTES

Outline the dispute resolution procedure and state the applicable law and venue for the same.

SPECIAL CLAUSES WILL BE NEEDED TO CATER FOR SPECIAL NEEDS

In some cases special clauses are necessary to provide the best protection companies would desire for their business. Special clauses may include:

- *Privacy Clause:* Consider what information you will hold about the customer and the ways information is to be used. Appropriate disclosure must be made to the customer about any personal information you hold and legally you may have obligations to destroy the same.
- *Rejection of goods:* When can goods be rejected by the customer? What procedures apply? Who is responsible for the associated costs?
- *Extinguishment of credit period on any act of insolvency:* For instance, in an event of insolvency, you may wish to extinguish any credit period a customer has to pay for the goods.
- *Non-waiver:* Whether any of the TCT cannot be waived with regard to a particular customer's need. For instance, if goods are perishable, you will not waive indemnities in your favour for delay in deliveries. Certain waivers should not necessarily be regarded as acceptable in the future.
- *Variation:* You may also want to include whether any variations to the TCT will have an effect, and/or what is required for the TCT to be successfully varied.
- *Severance of unenforceable terms:* Any terms which are unenforceable do not affect the remainder of the terms contained in the TCT and the applicable conditions shall be eliminated or modified to make the remainder of the conditions enforceable.
- *Jurisdiction:* This may be applicable if, for example, goods are being transported overseas, and you should consider what relevant laws will apply.
- *Security:* Consider whether any issues of security arise in relation to the goods. For instance, if you supply portable machines, you may wish to include conditions in relation to security of machines themselves and security for the customers in terms of making payments.

For more information and assistance with Terms and Conditions of Trade, please contact The Chamber Business Advisers on 03 366 5096 or email shirleyvw@cecc.org.nz.

This Quick Guide was provided courtesy of:

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L A W Y E R S