

## Business on whose terms? Making your terms of trading effective

In this article Kamal K Aggarwal of Thomson Snell & Passmore explains the importance to business of not only having standard terms and conditions but of ensuring that they apply.

Most business people have, whether through experience or foresight, accepted the need to ensure that they have standard terms and conditions of business in place. Standard terms and conditions, if properly incorporated, lay out the precise terms on which you are prepared to transact business with your buyers or suppliers.

The mere fact that most businesses recognise the importance of properly establishing a framework in which they hope to conduct business evidences two crucial facts:

- 1 No matter how attractive a transaction may appear at first sight it will only be commercially viable if certain basic criteria are accepted by both parties; and
- 2 In view of this, both parties will be anxious to ensure that it is their standard terms and conditions which apply.

In the pressure and excitement of concluding a deal it is easy to overlook the fundamentals of ensuring that you actually do the deal on terms acceptable to you.

From the time you receive your first enquiry about an order through to the time the final specification and price have been agreed it is quite likely that you will have numerous pieces of correspondence passing between you, all carrying each party's standard terms and conditions, or at least referring to the fact that that party's standard terms and conditions apply.

### Whose terms and conditions will apply?

The general rule of law is that each time standard terms and conditions are proffered a counter-offer is made and it is the last document proffered embodying terms and conditions which forms the contract when the recipient accepts by acting in accordance with it.

On this basis, when the purchasing department places an order it is quite likely that the last document which will pass between the parties before a delivery is made is the suppliers' acknowledgement of order containing its terms and conditions. If no further correspondence takes place and the goods are subsequently delivered, the buyer will in all likelihood have accepted the suppliers' terms and conditions effectively meaning that the supplier has won the so called "battle of forms".

It is important for businesses to ensure that not only do they have relevant and effective terms and conditions in place but also that their sales and purchase departments know how to incorporate them. It is in the best interests of a business to ensure that its terms and conditions are circulated as widely as possible. Terms and conditions are usually printed on the back of quotations, order forms, forms of acceptance and invoices. Be careful though when faxing documents to also fax a copy of the terms on the back and refer to them on the face of the document.

The writer has seen the devastating effect that failure to incorporate a business's own terms and conditions can have. A few actual situations are listed below as examples:

#### Head Office

3 Lonsdale Gardens  
Tunbridge Wells  
Kent TN1 1NX  
T 01892 510000  
F 01892 549884

#### Thames Gateway

The Old Rectory  
St. Mary's Road  
Greenhithe  
Kent DA9 9AS  
T 01322 623700  
F 01322 623701

## Business on whose terms?

### Making your terms of trading effective (continued)

- the company was supplying goods of relatively little value. Unfortunately, due to unforeseen circumstances, the goods supplied were defective. When incorporated into the buyer's machinery the defects caused considerable damage to that expensive machinery and resulted in a loss of production and considerable loss of profit. The company's own terms and conditions would have limited its liability to the price paid for those goods. Its terms and conditions had not however been incorporated. The claim against it was crippling.
- the company purchased a software package from a supplier in the United States. It signed a contract for supply prepared by the supplier's US Lawyers. The purchase manager did not consider whether the terms in that contract were acceptable to the company and did not consider negotiating those terms. When defects arose in the software leading to a considerable loss of business, the contract was properly examined for the first time and an exclusive United States choice of Jurisdiction clause found to have been incorporated. The company's legal expenses insurance policy was only effective for disputes dealt with in the English Courts. The cost of bringing a claim in the United States and making all the company's relevant employees available in the United States would have been wholly uneconomic. Instead of recovering the purchase price and damages for loss of business, further expense was incurred in purchasing a new software package from a company in England.
- the company received a large order for office equipment. It had previously prepared detailed standard terms and conditions including a properly drafted retention of title clause. It had always ensured that equipment supplied by it was properly labelled so that it could easily be identified as belonging to the company. In the excitement of processing such a large order the sales department failed to ensure that its standard terms and conditions were incorporated into the contract. The buyer went into receivership. The company was unable to recover its goods and stood simply as an unsecured creditor and recovered nothing.

No matter how carefully terms and conditions are drafted, they will only be of help if they have been properly incorporated. It will not be difficult to appreciate from the above examples how valuable it could be to spend a little time ensuring your employees are aware of the importance of your terms and conditions.

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