



## A BRIEF GUIDE TO **TERMS & CONDITIONS** OF BUSINESS

Ever reached the terms and conditions page on a website and clicked that you have read them without actually doing so, or at least not in any detail? You are not alone. Many people see terms and conditions as something that are lengthy, confusing and not particularly important

### **What are Terms & Conditions and why do we need them?**

At their core, terms and conditions are part of a contract formed through an offer and acceptance (or agreement) between the parties.

For businesses, terms and conditions often form part of the contractual relationship between the business and their end users, such as their clients or suppliers.

Without terms and conditions or any written contract, it is difficult for a business to show what has been agreed with the other party and what is or is not covered in the contract.

### **Is there a business to business or business to consumer relationship?**

At the outset it is important to establish what terms and conditions should apply. The first question you should consider is whether your clients are other businesses, consumers, or both.

If you have any clients that are consumers, you need to ensure that you carefully prepare your terms and conditions and pre-contractual documentation so that they comply with consumer rights. In this article, however, we focus solely on business-to-business agreements.

## **The best approach**

Even if your clients and suppliers are other businesses, terms and conditions remain important in setting out what has been agreed. The best approach is to have a formal written contract, incorporating all of the terms and conditions of business applicable to the arrangement.

Make sure that the terms and conditions are clear and unambiguous. If you are seeking to rely on a particular term, you need to be able to demonstrate that it is clear and leaves no doubt as to what was intended.

In addition, it is key to make sure that the procedures set out in your terms and conditions are being followed in practice. Does your sales/contracts team recognise the importance of ensuring that your terms and conditions of business apply? Appropriate training and warnings should be provided which in turn should assist in minimising the risk of a dispute.

### **When do you provide terms and conditions?**

The best approach is to provide the formal written contract, incorporating all of the terms and conditions, prior to the contract being put in place with the other party.


Although it regularly happens, sending terms and conditions with an invoice is likely to be too late. This is because the point at which an invoice is sent is usually after the contract has been made.

It is also important to ensure that the other party has had reasonable notice of the terms and conditions before accepting them.

### **Whose terms and conditions apply?**

Although there may be express acceptance by one party of the other's terms and conditions, often this is not the case.

A regular dispute that occurs is where both parties believe their own terms and conditions apply to a contract. It is therefore important to ensure that your terms and conditions are drafted carefully to provide your business with the best protection against this argument being raised.



Be aware of pre-contractual communications and the other party attempting to impose contradictory terms of their own. For example, a party might confirm an order but say it is subject to their own terms and conditions.

A dispute of this nature is common because it is not always clear which party's terms apply. There may be lengthy pre-contractual discussions and previous conduct between the parties which a Court is likely to take into account if it has to determine the issue.

Of course, a Court determining the issue means that a dispute has arisen which has not been resolved and you will have had to go to the time and expense of dealing with Court proceedings. By their very nature, Court proceedings leave matters to be determined at the discretion of the Court with no guarantee as to the outcome.

### **Regular review**

Often, many terms and conditions are not reviewed for years. There may not be any incident during that period but it is typically the case that a review only takes place when a dispute arises. So, even if your business has a set of existing terms and conditions and has not experienced any issues, it is best to diarise to review them regularly, especially when there is a significant change in the law or industry.

Take care not to use out-of-date terms and conditions. Using old terms and conditions may not reflect the existing relationship between the parties or the business operations and may result in accepting another party's terms in substitution for your own.

Once your terms and conditions are in place, it is important to remember that unless it is agreed between the parties, new contract terms cannot be introduced after the contract has been formed.

### **Key takeaways**

Ultimately, written terms and conditions are an incredibly important part of your business operations. Not only can they protect your position in the event of dispute (acting both as an aid to settling matters and also by protecting you against the possibility of a claim being made in the first place), they are also good risk management practice.

In some cases, having terms and conditions can help to reduce the cost of professional indemnity insurance and, of course, they enhance your business image by showing you take things seriously.

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