Terms and Conditions

The basics of contracting with suppliers
Buying Goods or Services on Standard Terms

As an early stage company, you are going to need to buy goods, capital items or services before you can start your business. While it is always preferable to negotiate the terms on which a third party will supply you with these items or services, in reality, you will probably have to accept their standard terms and conditions. As such terms will most likely not be open for negotiation, it is wise to know what you are getting into.

This note explains some of the jargon used in terms and conditions and some of the dangers hidden within a supplier's terms and conditions. It sets out extracts from real sets of terms and conditions and then suggests how best to stay on the right side of them. The topics covered in this note are:

- Supply and Delivery Obligations
- Time of the Essence
- Intellectual Property Clauses (or lack of them)
- Warranties and Indemnities
- Exclusions
- Acceptance/Battle of the Forms
- Execution

Supply and Delivery Obligations

'The Supplier shall use reasonable endeavours to provide the Services and to deliver the Deliverables to the Customer, in accordance with the specification/order form'

The first point to note here is the 'specification'. This is often the most important part of the terms and conditions. It is usually attached at the back as a 'schedule' or 'annex', and sets out what has been ordered and the time-scale for delivery. Pay close attention to this part of the document. Make sure it sets out exactly what you need. Don't be afraid to add in any necessary details. The more detailed the specification, the less trouble you'll have later when arguing about what was ordered.

'The supplier will use all reasonable endeavours to........'

The concept of reasonable and best efforts is used in terms and conditions where one party is accepting an obligation to do something, but the ability to do it is not within its control; for example, 'the Supplier will use its reasonable endeavours to ensure the Manufacturer replaces any faulty goods promptly'. The supplier cannot make an absolute commitment as it is the manufacturer who will need to act.

The words 'reasonable' and 'best' have, in this context, a very specific meaning (the words 'efforts' and 'endeavours' are interchangeable). So what efforts are reasonable? What are best efforts? A 'reasonable efforts' obligation requires the supplier to take a reasonable course of action that is available to it to comply with its contractual obligations. However, 'best efforts' requires much more. Anyone that is required to fulfill their obligations using their 'best' efforts will be expected to take all practical and necessary steps and courses of action to get the job done. If the provision of services (or the delivery of items) is critical, you should try and insist on best efforts. In short, using best efforts requires that time, effort and money is be applied to achieve the desired result.
‘Risk in the Product will pass to the customer on dispatch by the supplier’

This is another hidden problem. The inclusion of a term like this makes you, the buyer, responsible for the product in transit. This might be appropriate if you have arranged for the delivery yourself, but this is seldom the case, and you should require the supplier to ensure the product reaches you in good order. You should inspect it on arrival and only accept delivery (i.e., sign for it) once you have inspected it.

Time is of the Essence

‘The Supplier shall use reasonable endeavours to meet the performance dates set out in the specification but any such dates shall be estimates only, and time shall not be of the essence in this agreement’

The above example clearly provides that any dates are ‘estimates only’. However, if the project is time-critical to you, it is sensible to request that ‘time is of the essence’ for the supplier to supply the services (or goods). If ‘time is of the essence’, the supplier must deliver by the specified dates or be in breach of contract. Please note that if no dates for performance have been agreed, the Sale of Goods Act 1979 will impose a reasonable term within which the supplier must carry out the services/deliver the products.

Intellectual Property

‘As between the Customer and the Supplier, all Intellectual Property Rights and all other rights in the Deliverables shall be owned by the Supplier’

If the services or products are design orientated or of a creative nature, such as letterheads, websites, logos, company brochures or literature, it is important that you own the Intellectual Property Rights (IPR) (especially the copyright) to those designs. If the supplier's terms and conditions state (as above) that it remains the owner of all IPR (or if the terms and conditions are silent on the issue of the IPR), then you will only acquire the use of the IPR by way of licence, meaning that the copyright will be owned by the design company.

Therefore, you should look for a provision in the terms and conditions that denotes that the copyright (or other IPR) is ‘assigned’ or ‘transferred’ to your business. If you can't find any such provision – insist on it. If you're in any doubt about the effectiveness of any IPR clause in the terms and conditions and the IPR is important, then take some legal advice, as it is often very expensive and difficult to wrestle the IPR away from the original designers if it is not transferred at the outset. This is particularly important if it's your intention to register any design or logo as a trademark for your business. You might like to insist on a clause along the following lines: ‘As between the Customer and the Supplier, all Intellectual Property Rights and all other rights in the Deliverables shall be owned by the Customer and the Supplier will use his best efforts promptly to transfer and assign all Intellectual Property Rights and all other rights in the Deliverables to the Customer on request’.
Warranties and Indemnities

Warranties

‘The Supplier warrants that the Products (i) have been prepared and developed with reasonable diligence and skill; (ii) are and will continue to be of high quality in all respects; (iii) will comply in all respects to the functional and other description.....’

A warranty is an assurance or promise in the terms and conditions, but what happens if the supplier is in breach of a warranty? In short, the breach of a warranty may give rise only to a claim for damages, but may not give rise to a right to terminate the contract. Its function is to give the recipient of the warranty the right to sue for damages for breach of contract if the assurance proves to have been untrue. In such cases you are still under a duty to mitigate your losses (i.e., to do all that you reasonably can to reduce the financial loss you may suffer), which may result in the recovery of significantly less than the entire losses actually suffered by you as a result of the breach.

Therefore, if you consider that what is described as a warranty is actually a critical term (i.e., a ‘condition’) or what is often referred to as a ‘material’ term (i.e., if the supplier breaches it, you will want to terminate the contract), it is best to ask the supplier to acknowledge (a separate email will normally suffice) that if it breaches that ‘warranty’, you will be entitled to terminate the agreement.

Indemnities

‘The Customer shall indemnify the Supplier against claims, actions, proceedings, losses, damages, expenses and costs (including without limitation court costs and reasonable legal fees) arising out of or in connection with the Customer's breach of these terms and conditions’

An indemnity is an undertaking by one person to meet a specific potential liability of another, if that liability comes into being. In such cases, there may not be a requirement that the recipient of the indemnity mitigates its losses, and you may therefore be required to compensate them for the full amount of any liabilities incurred.

Indemnities are far-reaching and quite draconian. Wherever possible, you should not give indemnities. If asked to give an indemnity, then either remove it or limit it as much as possible. There are cases where an indemnity is appropriate though, e.g., where you’re using a supplier’s intellectual property (by licence) and you agree to indemnify the supplier for any loss it suffers if you breach the terms of the licence. Indemnities are generally well worth reading; the Courts don’t like them and accordingly interpret them in a manner disadvantageous to the indemnified party, hence they need to be correctly drafted when you are relying on them.

Exclusion Clauses

‘All warranties, conditions and other terms implied by statute or common law are excluded from these terms and conditions’... or...

‘The Supplier’s total liability in contract, tort (including negligence or breach of statutory duty), misrepresentation, restitution or otherwise arising in connection with these terms and conditions shall be limited to the price paid for the Products/Services’
An exclusion clause is a method of apportioning risk and liability if things go wrong. To understand exclusion clauses and their purpose, you need to ask yourself who should pay if the unthinkable happens and where should that liability start and end. In most contracts there are certain rights which cannot be excluded, and there are certain terms which the law will deem included (an ‘implied term’), no matter what the terms of business say. The following apply as a matter of law to all contracts other than international supply contracts, contracts of insurance and contracts regarding the transfer of land or intellectual property.

**Negligence leading to personal injury:** a term excluding or restricting liability for death or personal injury caused by negligence is not effective.

**Supplier has no right to sell:** a term excluding liability for breach of the terms the law implies (i.e. reads into the contract) that the supplier has the power to sell the goods in question is not effective.

**Unusual exclusion clause:** a term that is unusual or unreasonable will need to be given sufficient prominence in the standard terms before it can be effective. The more unusual the clause, the more prominence it must be given.

This article only looks at business to business contracts, where you are contracting as a consumer. You will have further rights not set out here.

**Acceptance and ‘The Battle of the Forms’**

A contract is formed by one party making an offer to the other, which the other accepts. This has led to some interesting issues where one party makes an offer on its terms and the other purports to accept that offer, but subject to its different terms and conditions. If an acceptance does not match the terms of the offer (ignoring the trivial), then no contract is formed. Instead, such a purported acceptance is deemed to be a counter-offer. This new offer starts a new round of negotiations and for a contract to be formed, acceptance must match the new counter-offer. Lawyers call this the battle of the forms. The law does provide an answer to this question, but it is much better not to allow the issue to arise. Be very clear and either accept an offer absolutely or reject it absolutely, and make a counter-offer: this way everyone knows where they stand and you will avoid having to go to court.

**Execution**

A contract is only legally binding when it has been properly executed. Under English law there are two levels of execution: execution of contracts and execution of deeds. Deeds are a special type of contract applying to (in the main) land and property, though a one-sided commercial contract can sometimes be drafted as a deed. This note looks at simple contracts which represent the majority of the commercial documents you will see.

**Execution by Individuals**

A simple contract is validly executed by an individual (i.e., not a company or a partnership, but including sole traders) if the individual signs the agreement.
Example Clause:

Signed by [NAME OF INDIVIDUAL] ......................................................

Execution by Partnerships

There are three sorts of partnerships: Limited Partnerships, Limited Liability Partnerships and simple ('common law') partnerships. This note only looks at the latter as they are the most common. A simple contract is validly executed by a common law partnership if all the partners sign it. If you prefer to rely on just one of the partners signing it, then in the majority of cases the document will still be validly executed, though for a conclusive answer you will need to bear in mind any limitations in the terms of the relevant partnership deed and your knowledge of those limitations. Accordingly, having all the partners execute the document is safer.

Example Clause (by signature of individual including as a sole trader):

Signed by [NAME OF PARTNER] for and on behalf of [NAME OF PARTNERSHIP] ........................................

[signature of partner]
Partner

Execution by Companies

There are many ways in which an incorporated under English law company can validly execute a document. In order to be sure you may choose to require execution either by the signatures of (i) two directors, (ii) a director and the company secretary or (iii) one director in the presence of an independent witness (who also signs). Other methods do not benefit from the statutory rules which mean execution will be deemed valid, and so are best avoided where possible.

Example Clause (by signature of two directors, or a director and secretary):

Executed by [NAME OF COMPANY] acting by [signature of director]
(NAME OF FIRST DIRECTOR], a director and [signature of second director or [signature of director or its secretary]
SECRETARY], [a director OR its secretary] 

[signature of first director]
Director

[signature of second director or its secretary]
[Director OR Secretary]
Example Clause (by signature of one director in the presence of a witness who attests to his signature)

Executed by [NAME OF COMPANY] acting by [NAME OF DIRECTOR], a director, in the presence of: [SIGNATURE OF DIRECTOR] Director

[SIGNATURE OF WITNESS]
[NAME, ADDRESS [AND OCCUPATION] OF WITNESS]

If, for any reason, you know or strongly suspect that the person or persons signing do not have power to bind the company or partnership to that contract, then the situation is complex and you should consult a lawyer. In addition, if your situation does not fall into these categories, or if it is a contract concluded over the internet, then you may also need to take legal advice to examine the position.

Conclusion

It is always worth reading a supplier’s standard terms and conditions carefully. Do not hesitate to ask the supplier to modify these if they do not meet your requirements (even if this is done by way of separate email, clarifying a certain clause). Ensure you are not caught out by the battle of the forms. Also, consider carefully how the contract is going to be executed. Lastly, if the products or services are key to your business, run the terms and conditions by a lawyer for a quick check.

Adam Carroll is a lawyer at Keystone Law in Keystone’s commercial department. Adam advises media and software companies on commercial and corporate matters.

E: adam.carroll@keystonelaw.co.uk

Jaan Larner is a lawyer at Keystone Law in Keystone’s commercial department. Jaan advises entrepreneurs and early stage companies on commercial and corporate matters.

E: jaan.larner@keystonelaw.co.uk

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