

Essential terms for your trading terms

By Roger Mendelson*

Most businesses have either very poor trading terms or no written trading terms at all.

It is common for larger companies to require new customers to complete an application for credit form and the trading terms are often annexed to this form (which is precisely where they should be). However, the terms which are attached are often old photocopies of a photocopy of a photocopy and invariably, the actual terms will be quite deficient.

This only becomes a problem when it comes to suing a defaulting customer. However, that issue may well prove fatal or it may result in a judgment being entered for substantially less than it could otherwise be.

on your website and that there is no obligation on you as a business to advise your customers of any changes and that the obligation is on the customer to check on the website prior to placing an order.

This simple provision allows you to update and vary your terms as the need arises.

There are several provisions which are crucial to incorporate in your terms and the rest of this article examines these.

Reference to a party must include a reference to "each of them jointly and severally" in the event of there being more than one. This means that any one or more of the individuals may be liable for 100% of the debt, which means that you can choose the party with the most assets and make the claim against him and leave it to him to pursue his partners for a contribution.

Reference to an individual must include a reference to his executors and reference to a company must include a reference to its assigns and receivers and liquidators. Without this provision, it may prove impossible to pursue claims against an estate or the receiver of a company.

There should be a simple clause which provides that there shall be "no right of set-off". This clause will make it much more difficult for your debtor to defend the claim on the basis that he has claims against you.

There will be various specifically worded clauses to limit claims against you pursuant to warranties. However, one very important clause on this point is a provision which provides that your company will "not be liable for consequential losses" and which limits claims to the amount of the contract value.

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To be legally effective, the terms must be agreed to by the customer. This is why the best place to append them is to the credit application form, which is signed by the customer and which thus acknowledges the trading terms.

You may well have many customers who have either slipped through the net or who acknowledged terms which may have been current at the time but which are now hopelessly out of date.

A good way to overcome this problem is to incorporate a provision in your trading terms that the terms which govern current dealings are as detailed

A well-worded clause is required to provide for the following in the event of default:

- Interest will run from the date payment was due until the date payment was made at a prescribed rate.
- Legal costs incurred by you in recovering the debt will be recoverable "on the indemnity basis" and will form part of the debt. Without this clause, ultimate costs awarded will be limited to what is known as party-party costs, which may be only about 60% of the actual costs incurred.
- In the event of the debt being referred to a collection agency, all costs chargeable by the agency (as if the debt had been collected by the agency) should be added to the claim. If this is carefully worded, it will mean that if the debt is referred to an agency, the agency's commission and other costs can legally be added to the claim.

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The terms must clearly define the date due for payment. For example, it may provide that the due date is "14 days after issue of an invoice". Without clarity on this point, there are likely to be disputes and the aim of well-drafted trading terms is to avoid disputes.

In a conflict between two countries, the country with the most powerful armed forces is likely to get its way, without the need to actually use its forces. It is the existence of them which will deter the other country from taking them on.

Similarly, the existence of well drafted and legally binding trading terms should put you in a strong position, to the point where you deter debtors from using the standard tricks of trade of defence lawyers to wriggle out of their obligations. ♦

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