



Getting Your Business's Terms & Conditions Right

New and old businesses often give their standard terms and conditions of business (T&C's) low priority. However, it is crucial in the event of a dispute that your T&C's are clear and binding. It is not uncommon for a sales department to issue quotations or accept orders using terms that are out of date, copied from the internet or even be found conducting business on the customer's terms because the customer has successfully substituted its own T&C's for theirs.

It is not uncommon to see customers trying to do business on their T&C's. If both parties try to force the contract to occur on their terms, difficulties arise in deciding which ones prevail. In practice, it is usually the last set of T&C's sent between the parties before acceptance or performance that will prevail. This is known as "The Battle of the Forms".

Incorporation of Terms & Conditions

T&C's will be ineffective unless proper procedures are followed to ensure the T&C's are incorporated into the contract and prevail over your customer's terms.

The common law rule is that after a contract has been formed by offer and acceptance between the parties, new contract terms cannot be introduced unless by mutual consent. Therefore, the all too frequent business practice of sellers seeking to impose their T&C's by printing them on the back of their invoices will not be sufficient to incorporate those T&C's into the contract. This is because invoices are traditionally despatched after the contract has been made.

Why Incorporate Your Terms and Conditions

T&C's provide the rules of the contractual relationship between you and your customer. Failing to have clear T&C's leave the contract open to dispute and, in turn, you run the risk of the T&C's becoming unenforceable.

If a Court does not accept that the contract was conducted on your T&C's, it will imply terms into the agreement on the basis of an inference that the parties must have intended such terms to be incorporated. They will do this where:-

- it is necessary to give business efficiency to the contract so that even though the terms seem complete, there is something without which the contract will not be able to work in the way it was intended.



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Why Incorporate Your Terms and Conditions (cont'd)

- the implied terms represent an obvious (but unexpressed) intention of the parties. Courts will be slow to imply terms where two commercially mature parties have entered into a detailed written contract but will be more forgiving where there are no written terms at all.
- it is implied through custom. There must be an invariable, certain and general custom of a particular trade or practice.
- it is implied through a previous course of dealing. Where you and your customer have dealt with each other previously on similar contracts and consistently gone about things in a certain way, the Court will be prepared to imply a term relating to that previous course of dealings if there is no express term in the current contract.

Legal disputes are expensive and time consuming which is why it is far better to get your T&C's right, and in place at the earliest possibility.

Practical Tips

1. Bring your T&C's to your customer's attention at the earliest opportunity. Look at setting out your terms in your brochures, catalogues or other marketing material, on your quotation forms and on your acknowledgement of order.
2. Put your T&C's on your invoices. If there is a course of dealing, this will assist your argument that your T&C's had been brought to your customer's attention over time.
3. Train your sales staff in your procedures; ensure they have at least a basic working knowledge of the rules of contract formation (offer and acceptance) and advise them to draw your customer's attention to your T&C's.
4. Get your T&Cs in first and last!

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