



Plug the legal holes in your business

## **TERMS OF BUSINESS CHECKLIST (FOR THE SUPPLY OF GOODS)**

<b>Issue</b>	<b>Comments</b>
Ensure that sales proposals do not constitute an offer from your potential customer	Otherwise, a contract could be formed when the potential customer accepts the “offer” and you will be bound to work with them on the terms of the proposal
Ensure that you refer to or attach your standard terms to all pre-contract documentation such as quotation forms, brochures and catalogues, acknowledgement or confirmation of order forms and delivery notes	Otherwise, you risk your terms not having been incorporated into the contract and therefore not applying to the contract
Ensure that terms are printed clearly and in full on all pre-contract documentation and the invoice. If they are on the back of the document, ensure there is a clear reference to the terms on the front sheet	Otherwise, you risk your terms not having been incorporated into the contract and therefore not applying to your contract
Ensure that you “fire the last shot” by issuing an acknowledgement of order referring to your standard terms of business and making it clear that your terms apply	Otherwise, you will lose the “battle of the forms” and you could be subject to your customer’s standard terms
Give any special terms such as exclusion or limitation of liability clauses prominence by using block capitals or bold print	Otherwise, the exclusion or limitation of liability clauses could be deemed to be unreasonable
Include a clause that states that your terms take precedence over terms issued by the customer	This is not always effective in ensuring that you win the “battle of the forms” (see above) but is one step towards it

Include a clause that states that the customer's purported acceptance will take effect as an offer on your standard terms of business	Otherwise, the customer might "accept" your proposal and a contract will be formed. You want the right to accept the customer's offer if for example you don't want to supply that particular customer
Ensure that nothing in your sales literature could be construed to be misleading or unsustainable	Otherwise, you could be liable for misrepresentation
Ensure that sales staff do not make any oral statements that could purport to vary your standard terms, or which contain misleading statements or unsustainable claims	Otherwise, you could be held to those oral terms if you don't have an effective entire agreement clause in your terms that states that your written terms constitute agreement between you
Include an entire agreement clause in your terms that states that your terms constitute the entire agreement	Otherwise, oral statements or emails could be incorporated into the contract and there may be uncertainty as to what was agreed.
Include exclusion clauses in your terms that exclude your liability for misrepresentation	
Include a clause restricting the authority of sales staff to make statements that are binding upon you.	
Check that you are adequately insured for any liabilities that you may incur under contracts made on your standard terms	Your insurers will probably want to see your standard terms
If you supply to both consumers and businesses, consider having two separate sets of standard terms as you can limit liability more in contracts with businesses	If you use one set of terms for businesses and consumers, at the very least, you should include a term that states that no provision of your standard terms will adversely affect the rights of any consumer

<p>Consider excluding or restricting the following types of liability:</p> <ul style="list-style-type: none"> <li>• Negligence</li> <li>• Causing other types of loss</li> <li>• Breach of statutory implied terms</li> <li>• Breach of contract</li> <li>• Misrepresentation</li> <li>• Product liability; and</li> <li>• Liability to third parties</li> </ul>	<p>You need to be careful to be “reasonable” and “fair” in exclusion and limitation of liability provisions in consumer contracts and “reasonable” in business-to-business contracts</p>
<p>Ensure that liability for death or personal injury caused by your negligence is <b>not</b> excluded</p>	<p>By law, you are not permitted to exclude this and if you do, your whole exclusion/limitation clause could be unenforceable</p>
<p>Do not attempt to exclude liability for breach of statutory implied terms in consumer contracts</p>	<p>This is a criminal offence, and the term will be void</p>
<p>Your exclusion/limitation of liability clauses need to be reasonable in business-to-business contracts and reasonable and fair in consumer contracts</p>	<p>If not, your whole exclusion/limitation clause will be void and unenforceable meaning that there will be no limit on your liability. A blanket exclusion is unlikely to be reasonable; better to cap your liability at a certain amount e.g. 100% of the price paid</p>
<p>Specify who bears delivery costs (and on return of goods)</p>	<p>If you do not specify who bears the cost, then it will be you</p>
<p>Specify that time of delivery is not of the essence and that the delivery date is estimated only</p>	<p>Otherwise, if time of delivery is of the essence and the goods were not delivered by that date, this would be a breach of contract entitling the customer to repudiate the contract</p>
<p>Include provisions that you are able to repair/replace defective goods and limit the time of the period in which the customer can reject the goods</p>	

Specify whether VAT is included or excluded from the price	Even if you are not VAT registered, it is a good idea to say that "All charges are stated exclusive of VAT, which shall be added to the charges at the applicable rate where necessary"
Specify that prices quoted in sales literature and on your website are subject to change	
Give yourself a right to make price increases (but note that in consumer contracts this is likely to be unfair except where it is for a valid reason and the consumer is given the right to cancel)	
Specify the currency where you are exporting outside of Ireland	
Specify the time for payment and that the time for payment is of the essence	e.g. 30 days after the date of the invoice
Include a term providing for interest on late payments	4% above the base rate is thought to be reasonable and in a business-to-business contract, reserve the right to charge interest under the Late Payment of Commercial Transactions Regulations 2012
Exclude the customer's right to make deductions, withholdings or set off	
Provide for payment in cleared funds	
Consider payment of a deposit	
Reserve your right to title to the goods until payment has been received	

Provide for risk in the goods to pass on delivery and for the customer to be responsible for insuring from delivery	
Include a force majeure clause to say that you aren't liable for anything outside of your control	
Specify that if you delay in exercising a remedy, this is not to be taken as a waiver of your rights and remedies	

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