

Top 10 reasons for having your Terms and Conditions reviewed

A company of the **Allianz Group**



EULER HERMES
Collections

Do your commercial standard terms and conditions of sale and/or services provide your business with effective protection from the risk of corporate or personal liability?

Do you know that your terms and conditions have the potential of giving you the right to recover an increased rate of interest from your debtors?

Will the terms and conditions be effective and enforceable when the time comes for you to exercise any rights your business has under any retention of title clause?

If not....

This handy Guide lists 10 of the most common drafting weaknesses found in a typical commercial standard terms and conditions of sale.

Over the years, Euler Hermes Collections UK Ltd has offered its clients a Terms and Conditions Review service and has reviewed many sets of terms and conditions for all types of businesses in different industry sectors. In the vast majority of cases and following its review, it has advised clients that they needed to re-draft their standard terms and conditions because their existing versions contained at least 3 of the top 10 weaknesses.

Many of the following issues may arise because the law is evolving and constantly changing. If your business' commercial standard terms and conditions were drafted more than 2 or 3 years ago, these may need to be reviewed and amended to include any developments in the law. Our service can help your business do this.

The top 10 most common reasons are:

1. Entering into oral agreements where the terms and conditions are not evidenced in writing (e.g. having no written terms and conditions at all, or terms which do not contain the key elements of an agreement)
2. Not being able to reclaim goods or if a customer decides not to pay for these goods (e.g. having an unenforceable retention of title clause)
3. Not limiting the extent of liability in a breach of contract and/or negligence claim and in some cases, even running the risk of being prosecuted (e.g. clauses which may make the contract void or illegal or clauses which do not limit or exclude liability clauses)
4. Having terms and conditions which cannot be relied on at court (e.g. lack of documentation to support order handling and documentation which may not even apply to sales transactions)

5. Not being able to reclaim your goods if your customer does not pay for all outstanding debts (e.g. having a retention of title clause which is not an “all monies” clause)
6. Having terms which could run the risk of being challenged by the Office of Fair Trading (e.g. standard terms and conditions imposed on commercial sales may not be lawful in a business' sale to individual consumers and which are not written in plain English or are potentially unfair to consumers)
7. Missing out on any contractual right to claim interest at a higher rate on late payment debts, or not being able to claim at all (e.g. imposing an interest rate which is too high so as to be unreasonable and enforceable against a customer, or alternatively, applying a rate that is not as high as it could be under legislation)
8. Getting your customer to pay a contribution towards the legal costs your business has incurred in recovering a debt owed by the customer (e.g. the absence of a clause which prevents your business from making a claim for costs incurred through actions taken to collect unpaid or overdue invoices)
9. Terms and conditions which fall apart when something goes wrong (e.g. failing to include “boilerplate” clauses which contain standard legal provisions all contracts should have)
10. Wasting precious credit control time in arguing when payment was due (e.g. unclear and undefined payment terms).

The next few pages will tell you more about each of these reasons, and you should check your own standard terms and conditions to see whether they measure up. You should be very critical of your terms and conditions because, if you have to go to court and intend to rely on them, a judge will not be as lenient as you when it comes to interpreting their construction and meaning.

In any event, if you have any doubts about the effectiveness and completeness of your terms and conditions, you should have them looked at by a lawyer, or...

This is where the Euler Hermes Collections' Review Service can help

The Review Service that Euler Hermes Collections UK can offer is an up to date review of your business' standard terms and conditions at a very competitive price, with the added benefit that most amendments and re-drafting can be done for the same all inclusive fee.

Some facts...

- * A recent client had to write off £150,000 of a debt due to them by a customer because their terms and conditions contained a single ambiguous word.
- * Another client lost £40,000 as a result of drafting their own retention of title clause without legal advice and using the wrong word which gave the clause a very different construction.

Are you willing to take that risk?

The top 10 in more detail...

1. Entering into oral agreements where the terms and conditions are not evidenced in writing (e.g. having no written terms and conditions at all, or terms which do not contain the key elements of an agreement)

It is prudent to have written terms and conditions to evidence the agreement between your business and its customers. Believe it or not, some businesses still think terms are an optional extra. In fact, written terms and conditions are like insurance. If something goes wrong, their absence could mark the end of your business. Things that might go wrong are: the insolvency of a customer, a fire in a warehouse stockroom, a dispute over an order cancelled at the last minute or a claim that your goods breach a statutory warranty. Your business would be at a significantly greater financial risk in all of those examples if you do not have written terms and conditions to give certainty to your business relationship.

2. Not being able to reclaim goods or if a customer decides not to pay for these goods (e.g. having an unenforceable retention of title clause)

Many contracts may contain a retention title clause where the seller claims a right over his unpaid for and unsold goods or claims a right to the proceeds of sale of the goods over which he has retention of title. This type of clause may not only be invalid, it may also mean that the entire retention of title clause will be void. Although the law on retention of title is fairly widely known, about half of the contracts we review contain an invalid and therefore unenforceable retention of title clause.

3. Not limiting the extent of liability in a claim for breach of contract and/or negligence and in some cases, even running the risk of being prosecuted (e.g. clauses which may make the contract void or illegal or clauses which do not limit or exclude liability clauses)

There are a great many legal rules relating to how businesses can contractually limit or exclude the extent of their liability. A clause which tries to exclude all liability

under a contract is not only void, but could lead to criminal prosecution in certain circumstances. Some limitation and exclusion clauses are automatically void, whilst some others are subject to a “reasonableness test” as most businesses still try to limit their liability to less than the law permits. More than two thirds of the contracts we review contain illegal or unreasonable exclusion clauses. In contracts for sales to consumers, this figure can rise to 100%.

4. Having terms and conditions which cannot be relied on at court (e.g. lack of documentation to support order handling and documentation which may not even apply to sales transactions)

Customers who do not know about your terms and conditions may very well not be bound by them. As a general rule, terms and conditions need to be brought to your customer's attention either before or at the time the contract is made. Printing your terms on the reverse of invoices may be too late, particularly if the customer receives the invoice after the contract has been made. Reference to “terms and conditions available on request” is similarly weak. Our Review Team can give advice on how to incorporate your commercial terms in your dealings with your customer so that you have stronger arguments with which to persuade a court that your terms apply and prevail over those of your customer's even where they wish to claim that the contract was based on their terms and conditions.

5. Not being able to reclaim your goods if your customer does not pay for any other outstanding debts (e.g. having a retention of title clause which is not an “all monies” clause)

Where a “simple” retention of title clause entitles you to reclaim the goods which are unpaid for you can only do so as long as you can prove and identify the goods you want to reclaim are in fact the ones that have not been paid for. Other goods which you may have supplied to your customer and which have been paid for cannot be reclaimed. In most cases, it is very difficult to prove whether goods have been sold and your claim would therefore be very weak. An “all monies” retention of title clause will allow you to reclaim any goods supplied by you up to the value of the unpaid debt, regardless of whether or not those goods have been paid for.

6. Having terms which could run the risk of being challenged by the Office of Fair Trading (e.g. standard terms and conditions imposed on commercial sales may not be lawful in a business' sale to individual consumers and which are not written in plain English or are potentially unfair to consumers)

The Unfair Terms in Consumer Contracts Regulations 1999 (and other legislation) require that individual consumers are treated more leniently than commercial customers. This includes a requirement that consumer contracts are written in plain English. Unfortunately, many sets of terms and conditions do not mention

consumers, let alone provide for them. In addition, almost all the terms we review are written in “legalese” which other lawyers still seem to think is “plain” wording. In contrast, a set of terms drafted by the our Review Team won an award from “Clarity”, the national movement to simplify legal language.

7. Missing out on any contractual right to claim interest at a higher rate on late payment debts, or not being able to claim at all (e.g. imposing an interest rate which is too high so as to be unreasonable and enforceable against a customer, or alternatively, applying a rate that is not as high as it could be under legislation)

The law prescribes a rate of yearly interest and fixed compensation which businesses may charge to other businesses if invoices are not paid on time. That rate is currently 8% over the Bank of England Base rate. If your terms and conditions claim a lower rate then you are not making the most of your right. If your terms claim a higher rate then it will probably be considered unfair by a court because the government has said that 8% is fair.

8. Getting your customer to pay a contribution towards the legal costs your business has incurred in recovering a debt owed by the customer (e.g. the absence of a clause which prevents your business from making a claim for costs incurred through actions taken to collect unpaid or overdue invoices)

If you have to sue a business customer for an unpaid invoice, a court has discretion to award your costs and expenses in doing so, but the court will often not do so unless this is expressly provided for. You can be more certain of recovering your legal costs if your terms and conditions contain an “indemnity” from your customer.

9. Terms and conditions which fall apart when something goes wrong (e.g. failing to include “boilerplate” clauses which contain standard legal provisions all contracts should have)

Boilerplate clauses are the uninteresting, often jargon-filled clauses, normally at the beginning or end of a contract. They address things like jurisdiction, severability, waiver, force majeure (i.e. unforeseen events), insolvency and notices. It is on very rare occasions that we review a set of terms and conditions with all of these issues covered. If these clauses are not included and agreed, there may be legal loopholes which could weaken your position against an insolvent customer, for example.

10. Wasting precious credit control time in arguing when a payment is due (e.g. unclear and undefined payment terms).

For almost every business we talk to, getting the job done and the money in seems to be of primary importance. Yet businesses often have different credit terms for different customers, or terms set out on the invoice. Your standard terms and

conditions should set a “default” payment time so that if you have not been paid by the specified date you can tell your customer to pay up, or prove that they had different payment terms to the standard. Surprisingly, terms and conditions often do not contain standard payment terms, referring instead to “terms on our invoice”.

To find out more about our Terms & Conditions Review service, call us on 020 7860 2756 or visit our website, where you can apply online for a review of your business' Terms & Conditions: www.eulerhermes.com/uk/collectdebt

Euler Hermes Collections is a specialist wholly-owned subsidiary of Euler Hermes UK. We have a proven track record of success based on over 60 years' experience of commercial debt collection and are one of the leading UK commercial debt collection agencies. We can collect debts in the UK and around the world. The service is ISO 9001 accredited and we are approved members of recognised collection agencies such as the Credit Services Association (CSA), American Collectors Association (ACA) and the International Association of Commercial Collectors (IACC).

Euler Hermes UK is the UK's leading credit insurer, protecting businesses against trade credit risk whenever and wherever it occurs. Companies, whatever their size and sphere of operation, face financial risks when trading on credit terms in home or overseas markets. It is part of the Euler Hermes group and a member of the Allianz Group.

For more information on the credit management services offered by Euler Hermes UK, please visit www.eulerhermes.com/uk

Euler Hermes Collections UK Ltd
1 Canada Square
London
E14 5DX
Tel 020 7860 2756
Fax 020 7860 2651
Int Tel +44 (0)20 7860 2712
Int Fax +44 (0)20 7216 1401
www.eulerhermes.com

Registered in England & Wales No. 2110655
Registered Office: 1 Canada Square, London E14 5DX