

Mercian Law

Commercial Debt Recovery Specialists

Getting the contract right first time!

Know who you are contracting with

It's important to know who you are contracting with. If it is a consumer, they have greater protection under the law – e.g. terms must be “fair” and in “plain, intelligible language”. Businesses have less protection under the law. Individuals trading as a business and partnerships (apart from LLPs) have unlimited liability, but a limited company's liability is limited.

Before you enter into a contractual relationship

You need to run credit checks on the correct individual/entity. Knowing who to claim against is key when things go wrong.

Think about credit checking your customers and suppliers (e.g. Experian, Equifax) and use the Companies House online service to check company names and numbers, for correct spellings and registered office details. Set appropriate credit limits and stick to them, but review them regularly and monitor payment histories closely to be first in the queue when things go wrong

You may also need to consider parent company guarantees when dealing with part of a group and you may also need to consider personal guarantees from directors of limited companies.

Battle of the forms – and how to win

Enquiries, quotations, orders, order acknowledgements, delivery notes, invoices may all be expressed to be subject to yours or your customer/ suppliers standard terms. This amounts to offers and counter offers. However, the reality of this situation is that there may not have been any formal acceptance of either party's terms, yet both parties may consider that there is a contract in place.

Generally, the last “shot” before performance starts is the prevailing one. For the avoidance of doubt, always get the other party to sign and return your terms. If you're making contracts over the phone, expressly agree your terms are to apply. If it's by fax or email, make sure you send a copy of your terms.

But bear in mind that standard terms are not always suitable. In this case you will need to agree whether to vary them by agreement, or use a specifically drafted contract – e.g., long term supply agreement. You can still incorporate standard terms

into a specifically drafted contract, as well as deal with what's to happen in the event of any conflict between the terms.

Suitably drafted terms and conditions bring many benefits. They can:

- Limit or exclude your liability in some circumstances if something goes wrong, subject to reasonableness
- Where appropriate, provide that you retain ownership of the goods until they are paid for
- Choose the governing law in international contracts
- Provide the right to terminate/suspend all contracts in the event of late payment

What if you can't win?

If customers insist on trading on their standard terms:

- Read them, check that you can comply with them, and make sure that you do
- If you do need to change them, focus on the important terms
- Make sure that any changes are effective, e.g. do the terms require them to be in writing?
- Use side letters to amend standard terms, or incorporate other documents

Implied terms

In addition to the explicit terms of the contract, there are also a number of implied terms:

- Sale of Goods Act 1979: implied terms as to quality, title, fitness for purpose
- Supply of Goods and Services Act 1982: implied terms that the supplier will carry out the service with reasonable skill and care
- Also under the 1982 Act, implied term that services will be carried out in a reasonable time for a reasonable charge

Late payment of Commercial Debts (Interest) Act 1998

Businesses are entitled to add interest to commercial debts (i.e. where both parties trading in the course of a business) that are overdue. The current interest rate is 8.5% (Bank of England base rate plus 8%) on overdue debts. Businesses are also entitled to claim fixed compensation for late payment, based on the value of the debt:

- Less than £1000 - £40
- £1000 to £10,000 - £70
- £10,000 or more - £100

Effective variation

It is possible to vary contract terms after formation if both parties agree. Any variation must be supported by consideration – i.e. both parties must give something to make the new bargain effective. If the original contract provides for a specific method of variation, then use it.

Getting the foundations right - conclusions

- Be certain – identification of the parties, objectives of the contract
- Be aware – when you are entering into binding contracts
- Be clear – on all commercial and legal terms
- Be express – don't leave it to chance

- Be appropriate – standard conditions, individually negotiated contracts
- Be alert – risks, rights and remedies

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