

# PROTECTING YOUR BUSINESS WITH TERMS AND CONDITIONS

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Northern Ireland businesses are currently facing a challenging trading environment. As the various supports provided during the pandemic come to an end, many businesses find themselves carrying extra supplier debt and are under pressure to repay HMRC arrears and government supported loans. The long list of negative influences also include the squeeze on living standards, cuts in government spending, the increased cost of doing business, as well as the continued fall-out from Brexit.

However, there are some practical steps that businesses can take to minimise risk (such as the risk of late or non-payment of goods by customers who may be facing some of the above challenges), including putting in place standard terms and conditions (“T&Cs”).

Standard T&Cs, if used correctly and duly incorporated, are fundamental to income generation. They should form the basis of all contracts and provide a framework for day-to-day operations as well as protection in contractual matters. However, businesses often overlook their standard T&Cs and focus on generating revenue.

## What is included in standard T&Cs

Standard T&Cs typically cover some of the following commercial terms:

- **Price, Payment & Credit Limits** - Although pricing and payment may instinctively appear to be straightforward, there are various pitfalls for the unwary when negotiating price and payment provisions. These include:
  - ensuring that all necessary components of the price are set out. For example, the price may include VAT or any other relevant local taxes, postage and packaging charges, delivery, fitting and assembly, and import/export duties
  - where a price is expressed in a foreign currency, or where one of the parties is based abroad and will be transferring currency, the parties may wish to specify an exchange rate for their transactions
  - the structure of payments. In particular, whether payment is to be by lump sum, or in instalments
  - methods of payment
  - the timing of payment—this may be particularly relevant where the parties are in a supply chain, with the consequences of breach being felt by multiple parties
  - the effect of any breaches by the paying party regarding either the amount paid or timing of the payment. In particular, whether this will attract interest (and if so, at what rate) or whether it will found a basis for suspension or termination of the agreement

- **Guarantees or Warranties offered in respect of the Goods or Services** - Standard T&Cs may cover the quality standards goods must meet, and what happens if they are defective. The specific warranties which should be included will depend on the nature of the T&Cs and the party in whose favour the T&Cs are being drafted.
- **Retention of Title** - As the Northern Ireland Bankruptcy Courts open up again for new creditor winding up positions, sellers can protect themselves from customer liquidations by having in place well drafted retention of title clauses in their T&Cs. A basic retention of title clause allows the seller to retain legal ownership of the goods until they are paid for in full. Whereas, an all monies retention of title clause allows the seller to retain title in all goods supplied to the customer until the customer has settled all outstanding invoices. A right for the seller to enter the customer's premises to repossess the goods should also be included. This is to ensure that the seller is not committing a trespass when doing so.
- **Limitation of Liability** - Standard T&Cs will often seek to limit the liability of one party by capping:
  - the amount of liability
  - the number of claims, which can be further restricted by year or cumulatively over the term of the agreement
  - the type of loss suffered, such as indirect and consequential losses, or loss of profit or goodwill
  - the time period in which a claim can be made
- **Termination** - Termination provisions in the T&Cs typically deal with some or all of the following: automatic termination, termination for breach (sometimes known as 'termination for cause'), and termination in the event of insolvency or change of control of one of the parties. Such clauses are commonly used to protect one party against any material deterioration in the status of another (e.g., permitting termination where one party is unable to pay its debts such that its solvency may be in issue).
- **Which law will govern the contract in the event of a dispute** - Sometimes referred to as an 'applicable law' clause, this will be most relevant where there is a cross-border element to a transaction, the parties to it or a dispute. The governing law clause provides for the contract to be governed by (or interpreted in accordance with) the laws of the stated country.

### Incorporating standard T&Cs

It is important that standard T&Cs are brought to the attention of the other contracting party at the earliest possible opportunity to ensure that they are considered as the terms on which the parties have contracted.

### Battle of the Forms

When both parties to a contract seek to impose their own standard terms, it may be difficult to identify which terms prevail. If a party seeks to introduce new terms when accepting an offer,

then this results in a counter-offer rather than an acceptance. The general rule is that the last set of terms which are despatched prior to performance are the T&Cs that will prevail.

### One size doesn't fit all

On occasions the need by the business to secure revenue quickly may lead to reduced, or no legal involvement in the contracting process. These issues may expose businesses to the following risks:

- being subject to the other party's standard terms, which may be more onerous;
- unenforceable provisions being contained in the standard T&Cs;
- conflict between the commercial deal and contractual terms; or
- unnecessarily binding the business to inappropriate terms.

Our experienced legal team at CavanaghKelly can help you to draft standard T&Cs which are relevant and suitable for your business; as well as help you to put in place appropriate procedures to ensure your T&Cs are successfully incorporated into your contracts.

## Key Contacts



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