

Partner

Stewart Lloyd Germann
B.Com, LLB, FCIS, MNZIM, Notary Public

Partner

Clive Frederick Neifeld
B.Com, LLB

Ground Floor, Princes Court
2 Princes Street, PO Box 1542
Auckland, New Zealand

Telephone 0-9-308 9925
Facsimile 0-9-308 9922
Email stewart@germann.co.nz
Web www.germann.co.nz

NOTES TO SEMINAR ON 28 MAY 2009

STANDARD TERMS AND CONDITIONS OF SALE

From a Seller's (Supplier's) perspective

1. OBJECTIVE

1.1 Certainty

- 1.2 To put you as the Seller on the "high ground", i.e. establish your defences.

2. PRE-TRANSACTION INFORMATION

2.1 Account Application Form

- (a) Accurate description of customer detail – company, sole trader, trust, partnership – searches, credit references.
- (b) Addresses, contact details of registered office, main trading office.
- (c) Proprietor's personal contact details (including addresses, dates of birth of individuals for PPSR).
- (d) Trade references.
- (e) Collateral guarantors/sureties.

- 2.2 Application Form signed by customer is offer by customer to do business on standard terms attached to application form.

- 2.3 **Courts want to see customer's attention clearly drawn to terms of contract prior to committing to the transaction** – should be available for inspection at business premises; on website; on invoices (with clear indication on front page as to where endorsed).

3. GUARANTEE

Terms should be clearly inserted in application form or signature of separate. Copies of signed documents should be provided to signatories

STANDARD TERMS AND CONDITIONS OF SALE AND LEASE

4. **DEFINED TERMS** – Reduce uncertainty by clear description of important/repetitive terminology.

5. **TERMS OF THE CONTRACT – BETWEEN SUPPLIER AND CUSTOMER**

- 5.1 Intention - all offers from Customers to purchase goods from the Supplier to incorporate the Standard Terms.
- 5.2 Customer to be bound to Standard Terms:
- (a) By earlier completion/signature of Application Form; and/or
 - (b) Acceptance of goods and/or services – if by this alone – more risky for Supplier.
- 5.3 No variation in terms allowed unless agreed by supplier in writing – if applicable be careful before signing customers standard terms of purchase – may negate your terms.

6. **PRICE**

- 6.1 Per supplier's price list; quotation (for specific period) or otherwise in writing;
- 6.2 Supplier may withdraw any quotation prior to delivery;
- 6.3 Extra price for unforeseen extra work by supplier (at market rates)?;
- 6.4 Freight, insurance and delivery charges (whose cost?);
- 6.5 Price exclusive of GST (GST to be payable at the same time and in addition to the price).

7. **PAYMENT**

- 7.1 Time for payment to be of the essence.
- 7.2 Failing payment:
- (a) Supplier's right to cancel/withhold supply;
 - (b) Interest (default rate);
 - (c) Customer responsible for supplier's costs of recovery.
- 7.3 Conditions of supply (at supplier's discretion to require):
- (a) Payment in advance;
 - (b) Bank or other guarantee of payment;
 - (c) Deposit;
 - (d) Progress payment;
 - (e) Letter of credit.

8. **PASSING OF OWNERSHIP**

8.1 Title to goods not to pass until full payment – Retention of Title (“*Romalpa clause*”):

- (a) Goods to be held separate and identified as suppliers;
- (b) Sale proceeds held in trust for supplier;
- (c) Supplier’s right to retake possession and enter premises for such purpose.

8.2 **Personal Property Securities Act (“PPSA”) provisions:**

- (a) Customer’s agreement in Account Application and/or submission of written order on order form is agreement (for purpose PPSA) by customer to grant to supplier security interest by virtue of retention of title clause above and for registration of financing statement;
- (b) Customer’s agreement to do all whatever necessary to facilitate registration of Financing Statement;
- (c) Requirement for notice of any proposed name change.

8.3 Liens reserved, e.g. common law right reserved, e.g. lien of unpaid vendor.

9. **DELIVERY OF GOODS AND PASSING OF RISK**

9.1 Delivery at supplier’s premises preferable – i.e. carrier to be buyer’s agent – delivery to agent is delivery to buyer.

9.2 Risk to pass on delivery.

9.3 On late collection customer liable for storage charges.

9.4 Vendor entitled to deliver by instalments.

10. **SPECIFICATIONS**

10.1 Drawings/technical documents supplied by supplier remain supplier’s property – not to be used other than for supplier’s installation or particular advice purposes without supplier’s consent.

10.2 Where goods made to order in accordance with customer’s plans/specifications customer warrants no infringement of third party intellectual property.

10.3 Supplier owns all intellectual property in the product.

10.4 On installation seller has no responsibility for structural soundness or suitability of building or machinery to which goods to be attached.

10.5 No liability for related “trades”.

11. COMPLIANCE WITH LEGISLATION

- 11.1 Customer to ensure compliance with all legislative requirements including safety at work and safety of premises.
- 11.2 Supplier's right to cease work if fears reasonably for safety of employees/contractors – customer liable for work done to date of stoppage (and consequential damages if not possible to complete).

12. WARRANTIES

- 12.1 All warranties excluded unless warranty provided in writing or exclusion is prohibited by law.
- 12.2 Liability excluded in ease of:
 - (a) Unauthorised alterations or repairs;
 - (b) Loss/damage by cause “beyond supplier’s control”;
 - (c) Indirect or consequential loss;
 - (d) Manufacturer’s or supplier’s warranty instructions not complied with;
 - (e) Fair wear and tear;
 - (f) Exclusions particular to the product.
- 12.3 Limitation of [amount of] liability to:
 - (a) Replacement/repair;
 - (b) Refund of price;
 - (c) In no circumstances to exceed price.
- 12.4 Pre-conditions to liability under the Warranties
 - (a) Written notice to supplier within 30 days of delivery;
 - (b) Opportunity to inspect and to remedy.

13. MISCELLANEOUS

- 13.1 Mediation – Obligation to mediate before litigation/arbitration.
- 13.2 Cancellation
 - (a) By customer – not allowed without supplier’s consent. Unauthorised cancellation by customer entitles forfeiture of deposit by supplier without prejudice to other rights.

- (b) By supplier – permitted in its discretion and forthwith on written notice on:
 - (i) Actual or threatened insolvency, receivership, etc, of customer;
 - (ii) Licences or permissions necessary for supply of product refused;
 - (iii) Supplier’s belief on appropriate grounds that customer unable to perform obligations;
 - (iv) Inability of supplier to supply for any reason beyond its control.

14. **GOVERNING LAW AND JURISDICTION**

New Zealand

15. **PRIVACY ACT**

Authority for vendor to collect and use customer information for determining creditworthiness or related to performance of the Agreement. Supplier’s right to disclose information.

16. **CONSUMER GUARANTEES ACT (“CGA”)**

- (a) Applies in sale to “consumer”;
- (b) Not applicable in sale for “business purposes”;
- (c) Where goods/product acquired for “onsale” to persons for “business purposes” – obligation to obtain from purchaser acknowledgment that CGA does not apply;
- (d) Indemnity for liability under CGA to extent possible.

17. **NOTICES**

Where to be given and what is “deemed” service.

18. **FORCE MAJEURE**

No liability for unforeseen disasters – or causes beyond reasonable control of Supplier.

19. **CHANGES TO TERMS**

- 19.1 Supplier reserves right to change terms at any time and to be applicable from date notice given to customer (including on website) in respect of supplies from and after date of notification.

20. **PERSONAL OBLIGATIONS/NON-ASSIGNMENT**

Rights personal to customer and non-assignable (except to extent prohibition unlawful).

APPENDIX
LEGISLATION

1. **Consumer Guarantees Act 1993 (“CGA”).**
 - 1.1 (a) Provides for post-supply warranties for goods and services.
 - (b) Helps consumers get the goods and services they “reasonably expect”.
 - (c) Rights “inalienable” for non-business consumers. Act prohibits **contracting out by supplier except in writing and between a supplier and a person acquiring for the purpose of a business (s.43(1) and (2))**.
 - (d) Rights non-contractual – statutory, operate in parallel with other rights including Fair Trading Act 1986 (“FTA”) (s.4).
 - (e) Provide post-supply remedies for purchaser where goods/services fail to comply with guarantees.
 - (f) Rights against manufacturers and suppliers for faulty goods.
 - (g) “Objective test” – What did the purchaser “reasonably expect”.
 - (h) No right to consumer to reject merely because “changed mind”.
 - (i) “Consumer” – A person who acquires goods/services “*ordinarily*” acquired for personal, domestic or household use.
 - (j) A business which buys consumer goods/services for own use falls within definition of “consumer” and will receive protection ***unless*** supplier has contracted out of its provisions “*in business to business transactions*”.
 - (k) *Nesbit v Porter* rejected proposition that personal, domestic or household purpose must be “dominant purpose”. Here purchaser of used imported Nissan 4 wheel drive held to be “consumer” – not relevant that vehicle acquired for business use.
 - (l) *Kerry Stone v Knowles* – “Re-supply in trade” exclusion – not applicable where purchaser merely leased motor vehicle to accounting practice during working hours – to fall within the exception the re-supply must be part of the purchaser’s business.
- 1.2 Suppliers and manufacturers liable but only in circumstances where they have ability to control either:
 - (a) Quality of goods/services; or
 - (b) To directly assess applicability of goods/services to consumers needs.

- 1.3 Supplier includes assignee, i.e. creditor (financier) who has lent money on security of goods but limited to amount owing by the consumer – financiers have statutory indemnity from actual supplier (46(3)).
- 1.4 “Manufacturer” – Person who assembles/produces/processes goods including:
- (a) person held out to the public as manufacturer “*manufactured for X or packed by X Limited*”; and
 - (b) person attaching its brand mark/logo; and
 - (c) importer/distributor where goods manufactured outside NZ by foreign manufacturer without ordinary place of business in NZ.

Each of the above have the ability to influence the quality of goods before they reach the retail consumer.

- 1.5 Manufacturers liability limited to defects within their control, e.g. not liable for action caused by default of person other than manufacturer or cause independent of human control occurring after goods have left control of manufacturer (s.26).
- 1.6 Exception under CGA – “*wholesaler*” – unless wholesaler actually comes within the definition of “manufacturer” or “supplier” it will not be liable – Act sees wholesaler as a logistics provider, i.e. providing only warehousing and distribution services unless there is evidence to contrary.
- 1.7 Any supplier denying liability for defective goods and referring consumer to manufacturer is misleading the consumer and in breach of s.13(i) FTA. Similarly manufacturer denying liability and sending consumer to supplier.
- 1.8 No breach if manufacturer accepts responsibility but asks consumer to deal through supplier (practical as supplier has direct contact).

1.9 **Guarantees by supplier**

- (a) Supplier has right to sell, and to pass title of goods to purchaser, who will have right to possess and use goods;
- (b) Acceptable quality (sections 6 and 7) including:
 - (i) fit for all purposes for which product commonly supplied;
 - (ii) acceptable in appearance and finish;
 - (iii) free from minor defects;
 - (iv) safe;
 - (v) durable.

All of the above are subject to what a “reasonable consumer” would regard as “acceptable” being aware of the state and condition of the goods (including

hidden defects) and having regard to the nature of the goods, price, statements made about the goods on packaging or labelling, representations made about the goods by the supplier or manufacturer and other relevant surrounding circumstances.

- 1.10 Where the defect which causes the breach of guarantee is “substantial” the purchaser can reject goods and recover a refund, s.21(d).
- 1.11 Reasonable fitness for purpose (s.8) – goods will be reasonably fit for any purpose that the customer makes known (express or implied) to the supplier **unless** consumer did not rely on this or unreasonable for consumer to rely on supplier protection against “*unreasonable expectations*”.
- 1.12 Goods correspond with description.
- 1.13 Goods correspond with sample.
- 1.14 Reasonable price (s.11) – here the only remedy is for **consumer** to refuse to pay more than a reasonable price. No remedy available if consumer has already paid unreasonable price. Designed to protect consumers required to order goods without an indication of price, e.g. spare parts – reasonable price – fact – market price.
- 1.15 **Availability of repairs and spare parts** – Guarantee available only against manufacturers – manufacturer guarantees facilities for repair reasonably available for reasonable period after first supply in NZ **unless** reasonable action taken to notify consumer first acquiring goods from supplier in NZ that **manufacturer** does not undertake to provide repair or that guarantee will only apply for specific period, i.e. supplier can notify its customers of restriction of availability of repair services otherwise supplier could be liable direct to consumers, i.e. under acceptable quality guarantee.

2. CONSUMER REMEDIES

2.1 Against suppliers:

- (a) Where defect not substantial and can be remedied supplier can choose to:
 - (i) repair;
 - (ii) replace with identical type;
 - (iii) provide cash refund or return the price.

Consumer cannot force supplier to adopt one or other options. It is supplier’s choice.

Only where supplier has refused to remedy the defect can consumer have defect remedied elsewhere and claim reasonable costs from supplier.

- (b) Where goods cannot be repaired or there is substantial defect (s.21) consumer may choose to:

- (i) have goods replaced – similar type and value; or
- (ii) have refund in cash from supplier.

Whether defect substantial or not is question of fact – defects which render goods unsafe (including inadequate packaging or instructions) always considered defects of substantial character (s.21(d)).

Must exercise right of rejection very soon after become aware of the defect. If not, will be limited to damages.

2.2 Against manufacturers:

- (a) Consumer must exhaust remedies under “express guarantee” before other action;
- (b) No right of rejection and refund;
- (c) Can claim consequential loss/damage which was “reasonably foreseeable” as flowing from the breach of guarantee which could include damages for e.g.:
 - (i) Reinstallation;
 - (ii) Loss of use;
 - (iii) Emotional stress;
 - (iv) Loss of wages or income if consumer needs to take time off from work to deal with the problem;
 - (v) Transport costs;
 - (vi) Business losses if supplier has not contracted of CGA.

3. PROVISION OF SERVICES

3.1 Guarantees given to Consumer:

- (a) Service will be carried out with reasonable skill and care (s.28);
- (b) The service and any product resulting from it will be reasonably fit for any particular purpose made known to the service supplier before entering the contract. Not applicable if consumer did not rely on supplier or unreasonable for it to rely on supplier’s skill;
- (c) Will be completed within “reasonable time” – if not specifically provided in contract; and
- (d) Will cost not more than reasonable price – consumer’s only remedy is to refuse to pay more than reasonable price (s.31).

4. **SALE OF GOODS ACT 1908 (SOGA)**

- 4.1 Can be varied by agreement between parties **except** possibly prohibition against exclusion of obligation to pass title.
- 4.2 Applies to “sale” so there must be money consideration, i.e. does not apply to gifts, barter/exchange.
- 4.3 Implied terms:
- (a) **Price** – If not express or pursuant to course of dealings – buyer must pay “reasonable price” (s.10).
 - (b) **Title** – Similar to CGA.
 - (c) **Correspondence with description** – slightly more limited than under CGA.
 - (d) **Fitness for purpose** – goods must be fit for their particular purpose where purpose expressly or by implication made known to seller or where circumstances show buyer relies on seller’s skill and judgment – unlike CGA no provision that goods must be fit for “usual purpose”. Unless buyer makes required purpose known to seller expressly or by clear implication.
 - (e) **Merchantable quality** – to be of such quality for use for any purpose for which goods sold under that description would normally be used.
 - (f) **Correspondence with sample (s.17)** – buyer has reasonable opportunity to compare bulk with sample.

5. **INTERACTION BETWEEN CGA AND SOGA**

- 5.1 If CGA applies then terms implied by SOGA do not apply.

6. **CONTRACTING OUT OF PRODUCT LIABILITY RISKS**

6.1 **SOGA:**

- (a) can be excluded by:
 - (i) express agreement;
 - (ii) course of dealing; or
 - (iii) trade usage.

- 6.2 Contracting out in Standard Terms of Trade – effective.

6.3 **CGA:**

- (a) Possible only by written agreement between supplier and **business consumer** (s.43(2)) – exclude provisions in relation to “business to business transactions” – important risk management tool for suppliers/financiers.

- (b) Manufacturers can require resellers (and subsequent resellers) to contract out of CGA to greatest extent permitted and to obtain indemnities from contracting resellers for failure to observe contracting out requirements.
- (c) Contracting out with “non-business consumers” not only ineffective but **breach** of Section 13(i) of FTA attracting a fine.

Clive Neifeld

Warning: These notes were used for the purpose of discussion at the Seminar and are not intended as legal advice for any particular matter or set of circumstances. Please contact Clive Neifeld at clive@germann.co.nz or Stewart Germann at stewart@germann.co.nz if you require legal advice.