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Will You Get Paid? Need Terms of Trade?

In the present stressed economic environment the terms upon which suppliers of goods and services supply such goods and services increasingly come under scrutiny by purchasers for the following reasons:

- (a) to deny applicability of the vendor's terms;
- (b) to dispute validity of the vendor's terms on a vendor's claim for payment or repossession of goods;
- (c) to claim against the vendor under alleged representations made or warranties expressly or impliedly given in respect of goods or services supplied.

Applicability of the Terms and Conditions

Traditionally terms of trade have been printed on the back of invoices or listed at business premises in a conspicuous place. Nowadays, in addition to these modes, vendors are displaying their terms and conditions on websites. However, whatever mode is chosen it is most important that the existence of the terms are brought to the attention of the customer because, if not, that customer will have grounds to deny applicability of the terms to a particular transaction. If a vendor can show that the terms were brought to the customer's attention in a way which gave the customer full opportunity to consider those terms when choosing whether or not to commence or continue trading with the vendor, then the vendor would be in a much stronger position. The best position is for the vendor to be able to provide evidence of the customer's agreement, and this would be by showing a signed acceptance by the customer. This can be achieved at the commencement of a trading relationship in conjunction with obtaining from the customer the necessary information for carrying out an initial credit or other checks as a precursor to the supply of goods or services.

Validity of Terms

This is sometimes known as the "Battle of the Terms". The vendor and the customer may each have their own standard terms and conditions. Which one applies? If the vendor's terms specifically provide that the purchaser's terms will not apply unless the vendor has consented in writing (and on the assumption that the purchaser does not have a similar provision), the vendor's terms would usually apply. The same would also apply in respect of a provision by the vendor that any right on the part of the purchaser to amend the terms is excluded and/or limited to such variations to which the vendor has previously agreed in writing. Whilst both vendor and purchaser may be seeking to get the upper hand in the commercial marketplace, a vendor cannot do better than trying to protect itself as best possible. It does not mean that the vendor will always be successful but that the vendor is likely to be in a far better position than if no attempt is made at all.

Repossession of Goods

A provision for retention of title over goods by the vendor (with the right to re-possess them) until full payment of the price is a “security interest” under the Personal Property Securities Act 1999. It is essential for enforcement of a security interest against a third party (including a liquidator or receiver of a customer) to be able to provide evidence that the customer signed or consented to the grant of security over the goods being repossessed (and for the vendor also to be given security over any proceeds of sale of such goods). This agreement needs to be included in the Terms of Trade accepted by the purchaser. Also, the security interest created must be perfected by registration of a Financing Statement on the Personal Property Securities Register.

Limitation of Liability

Through terms of trade an attempt is made to limit a vendor’s liability for breach of warranty, negligence, and manufacturers’ and importers’ liability for defective goods. It is not possible to exclude all liability for some of these matters but some limitations are possible. However, it is important that any limitations are legal.

A Stitch in Time ...

Whilst it is hoped that the economic situation will improve as soon as possible, there is no guarantee that things could not get worse in the short term. It would therefore be in a supplier’s interest to be operating with very comprehensive Terms of Trade and SGL can assist in providing you with Terms of Trade or reviewing and suggesting changes to your existing Terms of Trade.

Franchisors

This article will be of relevance not only to independent non-franchised businesses but also to franchises where franchisors require Terms of Trade to be used by franchisees in franchise systems (whether through operation manuals or otherwise).

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