

## Terms and Conditions: Incorporation Note

### Introduction

Gordons has prepared a new set of terms and conditions of sale for Presspahn Limited.

The terms are not, in themselves, a contract. They are simply the terms which form the basis of a contract. They do not cover the commercial aspects of your contracts such as:

- who you are contracting with;
- the goods being purchased; or
- your charges.

### Incorporation

The terms must be brought to the buyer's attention before the contract is made, otherwise they will not form part of the contract and will not be enforceable. The more often you draw your terms to the buyer's attention, and the more prominent they are to the buyer, the more likely they are to be incorporated into the contract.

Below is a list of non-exhaustive methods you may use to bring the terms to the attention of the buyer.

- On documentation:

Your terms should be printed in full on the back of your order form (or any similar document used in your ordering process). You must state clearly and prominently on the front of the document that your terms of contract are set out overleaf and incorporated into the order, as these may be easily overlooked.

Where you extract any clauses from your terms, and place these clauses within separate documents within your order process such as order confirmations, invoices, statements of account and credit applications, it is best practise to take the exact clause wording, to ensure that you are not causing any conflicts between the terms or creating more favourable terms than your standard terms offer.

- On your website:

You can put your full terms on your website. However, in order to incorporate them into your contract you must clearly signpost them and bring them to the buyer's attention in advance of the contract being concluded. For example, this could be via email, a tick-box acceptance prior to order submission or via hyperlink within your documents.

- By email:

If you correspond with buyers via email, ensure that your full terms are attached to your email and clearly referred to in the body of the email as forming the terms of contract. Alternatively, you may prefer to refer to the terms displayed on your website. If you do this, you should:

- make it clear and prominent in your email that the supply of your goods are subject to your terms located on your website;
- ideally, include a hyperlink in your email to the terms displayed on your website;
- keep a record of when you update your terms—in the event of a dispute, you will need to know which version of your terms were on the website at the date of your order acknowledgement; and
- make sure the website is active and accessible. Keep a record of when it was not available.

- Don't rely on your invoices:

Do not rely on your terms being set out on the back of your invoices—it is too late, as your contract will already be formed. It is important to ensure that your terms appear on any order form submitted to you (i.e. pre-contract).

- Telephone orders:

If you receive an order by telephone, you should:

- inform the buyer that your terms will apply to the supply of your goods; and
- ask if the buyer has a copy of your terms, and if not send a copy to them;
- keep a record of your conversation with the buyer.

### Existing customers

Existing or reoccurring buyers are likely to overlook any new terms, given that they have contracted on the same terms in all previous contracts with you. You should make further effort to bring the new terms to their attention for any new contracts.

Below is a list of non-exhaustive methods you may use to bring the terms to the attention of existing buyers.

- On your website:

Consider implementing a banner announcing the update to your terms on your website landing page, including details about when your T&Cs will be changed and where to find them. Should there be an interim period where there are two sets of terms on your website (one set applying to past contracts and the other set applying to new contracts) you should clearly set out the dates on which each set of terms will apply.

- By email:

Consider sending out an update announcing the change to your terms, including details about when your T&Cs will be changed and where to find them, ideally using hyperlinks.

### Record keeping and internal processes

Additional points to note about record keeping and your terms are set out below and should be considered when entering into contracts with buyers:

- Keep a record:

It is sensible to keep a record of all documentation and correspondence where you have referred to your terms. This will help support any debate at a later date as to which party's terms govern the contract.

- Training:

Make sure your team understand the importance of incorporating your terms properly. Have clear policies and procedures in place, make sure those policies and procedures are being followed and provide regular training.

### Battle of the forms

This is the situation where both you and the buyer attempt to impose their own terms on the contract. Under English law, the terms contained in the last document passing between the parties before the contract is completed will usually govern the contract. To attempt to avoid this situation, you should:

- not inadvertently accept the buyer's terms (if they have any):
  - read the documents you receive in correspondence from the buyer. If they make reference to their own terms, you should immediately notify them in writing that you do not accept their terms and that the sale and purchase will be concluded on the basis of your terms; and
  - do not act under an order in the interim, as such conduct would amount to a contractual acceptance of whatever conditions were contained in the last correspondence before such delivery or provision of services.
- For new buyers, send them a copy of your terms and ask them to acknowledge receipt and confirm their agreement to be bound by the terms in all dealings with your business.

There are many ways that you can do this, by way of example this could include a tick box acceptance, or written confirmation, i.e. "I confirm that I have received the terms and agree to be bound by them in all dealings with Presspahn Limited."

- For existing buyers, consider sending a copy of your terms on an annual basis to remind them that your terms apply.
- Provide training to your sales team to ensure they understand the issues involved and know to look out for and avoid accepting the other party's terms.

#### Ongoing contracts

Updated terms will not automatically apply to contracts already in place. Old or ongoing contracts will be governed the terms in place at the time the relevant contract was entered into.

You are unable to vary the terms of ongoing contracts by unilaterally announcing that you have new or updated terms. Any amendment to the terms of ongoing contracts will only take effect once a variation has been agreed and validly executed between the parties.

*If you have any further queries about your terms and conditions and their incorporation, please do not hesitate to contact your team of Commercial experts at Gordons LLP.*