

# Contractual

Plenty of transport operators and workshops fall foul of contract law. Nick Hodgson offers advice on how to steer clear of costly issues around terms and conditions, and guarantees transfer, without electronics or energy consumption

In times of economic uncertainty, more than ever transport operators and workshops alike need to exercise caution with their finances, so that, when the upturn comes, they can take full advantage. There are several ways to do this, but one involves ensuring that the terms and conditions you sign up to will work for, not against you. Good sales volumes are only part of the story; making sure you get paid, or have other rights, in the event that you don't, is just as important.

In some cases, terms may be based on an informal, verbal agreement. The problem then is that such arrangements are ripe for disputes, which can be expensive and time-consuming to sort out. Disputes are far less likely to arise, if any agreement is clearly set out in writing. It therefore makes sense to seek advice to ensure that your terms of business protect your position – even more so where the economic outlook remains bleak.

For example, terms and conditions should be set up with the aim of protecting cash flow. Do not assume that a standard template can be used for all business types. Terms and conditions should be tailored to your requirements, so take legal advice, if you are uncertain.

Generally, though, they should cover: payment terms; delivery arrangements; credit limits and periods; the right to charge interest on late payments and claim compensation for costs of recovering outstanding sums; and a commitment to quality. An entire agreement clause plainly articulating that all pre-contractual statements be excluded, and that the terms and other contractual documentation set out the full detail of the arrangement between you and your customer or supplier, could also be considered.

I acted in the past for a client who wanted to acquire delivery services and entered into discussions about the terms. The client was prepared to accept the terms and conditions of the supplier, save those for payment, which were more onerous than it was prepared to accept. The client dealt with a sales representative of the supplier and

agreed different payment terms, which were more favourable. The contract was formed, incorporating those payment terms.

Once the date for payment as included in the supplier's terms had passed, it sought recovery of payment and interest as provided for in its terms. My client denied the claim was valid and stated that the supplier was seeking to vary the terms of the agreement made. We successfully defended the claim.

## Check the form guide

That said, it is one thing to have a set of standard terms and conditions, but how do you ensure they are incorporated into a contract? Often, difficulties arise when both parties insist that a contract should be concluded on their own terms. This situation is often referred to as the 'battle of the forms'. Equally, however, if the first time the other party sees your standard T's and C's is when they receive your invoice, you are walking into a potential dispute over whose terms apply.

In most cases, such problems are avoided by ensuring certainty in your commercial dealings. And the most effective and commercially advantageous way of doing that is to obtain express acceptance of your standard terms from the other party. If this is not possible, both parties should negotiate over whose terms will govern the contract.

Additionally, as we all know, negotiations can be costly and lengthy, and it may make sense to explore alternative avenues, in an attempt to ensure incorporation of your terms.

First, be aware that a contract can be concluded orally, so make sure that any meetings or telephone calls are expressly conducted on the basis of your company's standard terms, or subject to contract – so that no agreement will be concluded until a written contract is signed.

Secondly, to avoid any claim that a contract has been formed, ensure that all pre-contractual documentation is stated not to constitute an offer. If



# Clarity



you're a supplier, you should also insist that, when customers place orders that you accept with an acknowledgement, a contract has come into existence on your standard terms. If the customer subsequently accepts delivery, your terms will usually be held to prevail.

Thirdly, make sure your sales people understand the contractual impact of documents they receive from the other party. In particular, they should be aware that, if it purports to exclude your terms, they should insist these are applicable. The goal is always to ensure that both parties to a contract know the terms on which they are doing business. Clarity is paramount, especially given the outlay in time and money. In most cases, resources would be better used to grow your business.

Another commonly occurring issue concerns personal guarantees. We recently advised a company director, who was unaware that he had given guarantees covering more than 30 hire purchase agreements. These are frequently used by banks and other financial institutions to put individuals connected with a company or a limited liability partnership in the firing line, if that organisation doesn't respect contractual obligations – such as paying instalments by the due date.

Make sure your liability under any personal guarantee is understood: many a company director has come unstuck on receiving a demand from the bank under such a guarantee. The point is that your lender may not have to seek payment from the company first. Further, if all directors or partners are giving guarantees, it is likely that the arrangement will be on a 'joint and several basis'. This means the lender can come after any one of you for the outstanding amount. That, in all likelihood, will be the individual the lender believes is the best target.

Your first action should be to cap your liability under a guarantee, before asking the lender if it can be given on a several basis, rather than joint and several. If the lender refuses the latter, ask your fellow guarantors to enter into a contribution agreement, so that, if the guarantee is enforced by the lender against one individual, the liability is not borne by him or her alone. <sup>TE</sup>

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