

TERMS OF TRADE

Forget about the small print, when did you last examine a supplier company's Terms of Trade?

In 1999, the Personal Property Security Act (PPSA) was passed and it came into effect on 1 May 2002. This Act was an attempt to make it fairer and more transparent to deal with the interests held over goods by interested parties. Companies which supply goods to the retail trade (suppliers) saw themselves as able to improve on their rights – previously dealt with by ROMALPA clauses.

So far, so good.

From a retailer's point of view, many suppliers appear to have simply taken the new documents from their lawyers and sent them out, possibly without even proof reading them to ensure they were either realistic or enforceable. The general tone of the new documents was one of passing responsibility over to the retail client, as far as legally possible, and opting out of any obligations.

I never sign any document that I have not read and understood so, over the last five years, I have read all the new Terms & Conditions from my suppliers and edited the documents before returning them. In all cases the supplier has continued to supply goods.

Here are several examples of unrealistic Terms & Conditions clauses I've come across over the last five years:

- Delivery is subject to change without notice and late delivery

is not grounds for cancellation of an order.

- Part delivery is not grounds for cancellation of an order.
- The price is subject to change without notice and any change is not grounds for cancellation of an order.
- All returns of goods for any reason must be made within seven days.
- Indent orders are unable to be cancelled after a certain period of grace.
- The retailer waives all rights to notice provisions granted under the PPSA.
- The retailer holds all proceeds of sale of the Supplier's goods as a fiduciary agent for the Supplier and will keep the proceeds clearly identified in a separate account in the name of the Supplier.

DELIVERIES

The clauses concerning delivery and the right to cancel can be important. If you're a fashion clothing retailer, late or part deliveries are costly, largely useless to your seasonal trade and very frustrating. If, on top of these problems, you are required (by having agreed to Terms & Conditions) to accept late or part deliveries at full cost price, then you could be in trouble. I alter these clauses to state that I may accept



such deliveries at my discretion after being informed by the supplier of the reason for the problem.

CANCELLATION

Cancellation of indent orders is an area where I have some sympathy for supplier companies. However, the cold reality of supply of goods is that if cancellation is the best option for the retailer it will happen. No retailer is going to accept orders for which they cannot pay (there is a legal issue of solvency here for a start).

WAIVING RIGHTS

The waiving of rights under the PPSA is not acceptable. If a supplier believes they need to use the PPSA, then both sides in the security interest should be able to exercise all rights set out under the Act. I always delete this clause. It is also worth mentioning that most supplier companies do not actually register their

security interest – so any reference to the PPSA in their Terms is a waste of time.

SEPARATE ACCOUNTS

Now for my pet hate. The fiduciary agent and separate bank account clause. There is no retailer in the country who banks proceeds of sales in separate accounts for each supplier. The cost of compliance with this clause would be unthinkable. Even identifying proceeds as separate from other sales is more than a bridge too far. The best any supplier can hope for is an agreement that the retailer holds the proceeds in trust for the supplier until goods are paid for.

It would be very useful if, from this discussion, we get a result where supplier CEOs read their own Terms, ask their reps to read them, and tell their lawyers to get some reality into the documents. The other side of the coin is that it would be very worthwhile for every retailer who has signed (without reading the Terms) to start being aware that if you sign you may be held to the Terms.

Always be suspicious of documents written by non-retailers. They usually don't understand the real world in which we live and trade. ■

By **Trevor McKeown**, the owner of Masterton's Intersection Menswear and the previous owner of two independent sportswear/clothing retail stores over the past 17 years.