

Guidelines for incorporating Standard Terms and Conditions

Having an excellent set of Standard Terms and Conditions (Terms) in your desk drawer or on your website, is all very well, but unless you have incorporated them into your dealings with your client, they will not form part of your legal relationship with your client and you will not be able to rely on the terms should a dispute arise. It is therefore very important that you incorporate your Terms into your dealings.

Here are a few general tips on how to do so:

1. Your Terms must be brought to the other party's (counterparty) attention before or at the time the contract is made. Usually, it is sufficient to bring them to the other party's attention and make copies available to them. If the other party chooses not to read them, that is their concern.
2. The safest way to incorporate Terms is to send a copy to your counterparty and make them sign them or alternatively, acknowledge receipt of them (although we understand that this is not always practical). If they are signed or acknowledged your counterparty will not be able to say they had not seen them if a dispute arises.
3. In many cases you will not receive a signed version back or even acknowledgement. However, as long as you can show that a copy was provided or made available they should still be effective. Simply because they are not signed or acknowledged, does not preclude them from being part of the agreement.
4. You should make a copy of your Terms available on your website. You should also include a foot note on your emails that states "all work undertaken is done so strictly in accordance with our Terms and Conditions, a copy of which is available [here/link]. Copies are also available on request". You should also have a similar foot note on faxes, letters and any other form of communication you use.
5. If the Terms are brought to the counterparty's attention once the contract exists it will be TOO LATE to incorporate them.
6. Despite this, we would recommend that all invoices contain a wording that all work is undertaken pursuant to your Terms. Clearly, an invoice will be sent after the contract has already been agreed, so what is the point? A reference to your Terms can assist in incorporating them into future contracts with the same client should you forget to specifically refer to your Terms on one occasion. This is known as a "course of dealing". Although, it cannot be guaranteed that Terms will be included under a "course of dealing" it helps.
7. "Last Shot Wins". Under English law, the last Terms provided in the negotiation, usually prevail. Therefore, if you send an email stating "thanks, we will undertake this work in accordance with our Terms" look out for replies that state "Thank you, we note you are prepared to do this work, which will be subject to our Terms". If the work commences at this stage, it may be your counterparty's Terms that govern the agreement and not your own.