

TURBOSMART UK LTD – TERMS AND CONDITIONS FOR THE SALE OF GOODS

Harrison Drury Review - 24.02.2016

1. Application of Terms and Conditions

This clause sets out the primary obligation of you to sell and the buyer to buy the goods subject to the terms and conditions and the contract. An exclusion of any previous terms and conditions is included here, but for the purposes of certainty, we would recommend also excluding anything which is not the contract or these terms and conditions.

This would ensure that any communication made between you and the buyer cannot be relied on as contractual and you are not bound by such communications. This is discussed later on in clauses 3 and 4 with regards to illustrations, but expanding this exclusion would provide more protection for you.

2. Interpretation

To provide clarity, this clause defines the key terms which are relied upon through the body of the document to avoid any misinterpretation of the terms. We would recommend adding the definitions of the following terms which are used but as yet undefined:

- Contract/Order
- Contract Price [*the definition "Price" is however included but not used*]

3. Basis of Sale

This clause deals with the basis on which the contract is formed between you and the buyer for the sale of the goods. It is therefore worth including a provision here to state that upon making the order or accepting the seller's quotation for the goods, the buyer confirms they have the authority to enter into the contract and be bound by its terms.

We would also recommend the following changes to this clause:

- 3.3 – ensuring that the sales literature and price lists are not classed as contractual documents which can be relied upon by the buyer
- 3.4 – clarifying that a contract is formed when either you or the buyer has accepted the other's offer to buy or sell the goods. Under this clause currently, you are bound by the terms upon making an offer to sell the goods to the buyer

4. Orders and Specifications

This clause in part contradicts the contract formation section of clause 3 above. Here, upon the buyer's order, the contract is only formed when you accept the order in writing, whereas clause 3 allows you to confirm the order by delivery of the goods or invoicing the buyer.

In addition, the right to make changes to the goods to comply does not expressly state that by making such changes, you are not breaching your obligations under the contract.

Finally, if any of your online sales are made to consumers (as opposed to businesses), and therefore the right to cancel the contract within 14 days exists as per the Consumer Rights Act 2015 for such sales. This does not exist to custom-made items where the design is in

part personalised to the buyer, or where the consumer has physically seen the goods before purchasing i.e. they bought the goods in a store.

In other cases, the consumer has the right to a refund within 14 days of the contract being formed, and therefore we would recommend clause 4.4 be amended to reflect the cancellation of contracts formed online.

5. Price

The price for the goods is dealt with in this clause, along with your right to make any changes to the price for reasons including foreign exchange rates and delays caused by the buyer.

We would suggest clarification of the term 'settlement discount' as it is not currently clear what this is, or what level this discount is at.

6. Payment

With regards to online contracts, the usual method is for payment to be taken when the order is confirmed. This clause however states that the buyer will only be invoiced and liable to pay for their goods following their delivery or subject to any alternative written credit terms. Therefore, we would recommend amending this clause to provide that invoices shall be made upon the acceptance of the offer to buy or sell – at least in relation to online sales.

7. Delivery

In relation to sales to consumers, the Consumer Contract Regulations require delivery of goods in consumer contract to be within 30 days of the order unless expressly agreed otherwise. This clause refers to delivery not being of the essence and that the delivery date is merely an estimate, though more express wording may be needed if your delivery times generally exceed the statutory limits.

The consumer's rights for late delivery exceeding the 30 day limit (unless otherwise agreed) include cancellation of the contract, and therefore it is important to either ensure you deliver within 30 days, or alternatively agreed a delivery period.

8. Non-Delivery

This clause is not completed, though here we would limit your liability for late or failed deliveries of the goods.

9. Inspection/Shortage

This clause places the buyer under an obligation to ensure that any damage or shortage of goods is alerted to you within 1 day of delivery. Whilst the term "shortage" may be reasonably industry standard, it may be of benefit to include some further explanation here.

10. Risk and Retention of Title

This clause ensures that until you have been fully paid for the goods, you retain the title of the goods and the ability to enter the buyer's premises to repossess them for failure to pay. It also deals with the risk in the goods, which passes to the buyer on delivery, and the various

situations whereby you are entitled to repossess, such as insolvency or ceasing to carry on business.

11. Assignment

This clause allows you to assign the contract to a third party and prohibits the buyer from such assignment, binding them to the terms of contract.

12. Defective Goods

There is a slight issue with the numbering of this clause which does not aid reading.

In relation to clause 13.1., you may wish to consider extending this to refusal which is lawful and also in accordance with the T&Cs themselves.

With regards to the right to a refund in clause 12.1.3.1.2, we would recommend noting that such a right would be possibly subject to depreciation in value after the initial 30 days. Under the Consumer Rights Act 2015, the consumer is entitled to a refund, replacement or rejection of goods if a fault is found within 30 days, though under your current agreement, the refund seems to be for the whole amount, not taking into account such depreciation.

Furthermore, clause 12.1.3 relating to 12 months does not seem to generally fit in with the remainder of clause 12.1, and we would suggest this should be a separate clause with separate rights for the buyer.

Finally, a definition of what constitutes 'defective' may be useful, to avoid the provisions here being triggered by minor faults in the goods.

13. Buyer's Default

This clause deals with the consequences of late or failed payment by the buyer, and your rights to cancel the contract and demand that any other payments become immediately payable. You also have the right to charge interest at 12% above the base rate of Natwest Bank PLC and to set off any monies owed to the buyer or paid separately by the buyer against the payment due. There is a chance that a rate of 12% above base could be seen as penal and potentially unenforceable.

We would recommend consideration of a clause to allow you to reclaim your costs arising from the buyer on a full indemnity basis. Under current small claims rules, there are prohibitions on costs, however some specific wording here may give you an advantage in recouping such costs should you need to bring a claim.

14. Limitation of Liability

This clause limits your liability to the maximum extent allowed by law. This is limited to the Contract Price, and consequential losses are expressly excluded, citing specific "heads" of loss, which is of benefit.

15. Confidentiality, Publications and Endorsements

This confidentiality clause protects the commercially sensitive materials and information which cannot be protected by intellectual property rights, such as designs, trademarks or patents.

16. Intellectual Property Rights

This clause protects your IP rights relating to the Goods by acknowledging you as the owner of such rights, and including an obligation on the buyer not to do any act which would be detrimental to such rights.

Furthermore, any designs which you receive may themselves have IP rights, and this clause also contains an indemnity from the buyer against any claims made by third party owners of these IP rights.

17. Communications

This clause deals with when a notice is deemed to have been delivered and received by the other party. This is especially important when dealing with timings close to a deadline, to determine whether the agreement has or has not been breached. In this agreement, email, fax, and general posting are accepted forms of notice.

18. Force Majeure

The purpose of a force majeure clause is to excuse a party from performance of the agreement following the occurrence of an event beyond the reasonable control of the party which has hindered performance or made it impossible.

In this case, both you and the buyer would be excused though we would suggest limiting this to just you, so as to ensure the buyer remains obliged to carry out their responsibilities even in such circumstances. .

19. Waiver

This clause ensures that if you fail to exercise your rights under this agreement or to act upon a breach by the buyer, this will not mean you are waiving such rights, including to commence proceedings for a breach.

20. Severance

If there is a change in the law or a court finds these terms and conditions to be invalid, this clause separates the invalid clause or sub clause from the remainder of the contract. This allows the valid parts to remain enforceable and binding.

We would recommend changing this clause so if a clause becomes invalid, instead of removing the clause completely, we would change it to the extent that it would revert back to being valid – a so-called “red line clause”. This would help preserve the more important clauses, which under the current model would fail completely if found invalid.

21. Third Party Rights

This clause will guarantee that no one else other than you and the buyer has any rights.

22. Law and Jurisdiction

This clause states that any contracts formed under these terms and conditions will be subject to English law, and ensures that any disputes will be held under the jurisdiction of the English courts.

We would recommend the inclusion of the wording “exclusive jurisdiction” to ensure there are no disputes with regards to the jurisdiction, especially when dealing with foreign buyers.