

Do your customer terms help or hinder winning business?

Good contracts are part of good marketing

By Sean Lynch

Nutshell: Your customer facing contract terms → do they help or hinder winning business → some points to consider.

On far too many occasions over my 26 years of professional life to date have I seen poorly written or constructed customer facing contracts presented by businesses looking to close some form of sales deal – many for high value. The customer is keen to “sign up” and purchase but is presented with a contract that is either complex, difficult to follow, does not make sense, or is just too one-sided.

Sales people or other managers are often then placed in an all too familiar ‘T’s & C’s’ negotiation (which they are not equipped for) when they should be doing more productive things like winning new business.

Weeks may go by before the customer is willing to sign – and by that stage, even if they do sign, their perception of the supplier has now changed. They are starting to consider whether the sales and marketing collateral was real, and whether the relationship will be as strong as first thought.

When it comes to customer facing contract terms, I believe the following points are critical to understand and get right – whether your terms are for a simple or complex supply:

1. **Contracts are part of your sales and marketing process as well as your risk management model.** Businesses need to understand that their customer facing terms are part of their sales and marketing process and so need to help (not hinder) the winning of business. The problem is that many lawyers (whether in-house or external) tend to want to “own the document” too much from a legal perspective without considering this first and very important point. Sure, the document is a legal document and needs to cover the essential and other appropriate content points with appropriate structure, but a balance can be struck if the lawyer is commercially minded.
2. **Understand your intended reader.** Just like speaking to any audience – when you write, the writer needs to have a good understanding of who the intended reader will likely be. Will they be a general consumer, middle manager, administrative person or senior executive? What type of document will each of these people expect to see and prefer to see? Will they be familiar with the content or will you have to ‘walk them through it’ a bit? Will they prefer to see more use of plain English such as “you” and “us”, or a more formal approach.
3. **Write clearly and simply – less is more.** Consider the first page and the very first paragraphs of the document. It is important to capture the attention of the reader with key, relevant, clear and simple concepts early on so they feel comfortable with it. If a contract is going to contain some complexity, often it is possible to distil the key concepts and structural components into a single, easy to read page upfront. Each heading, clause and sentence needs to be clearly assessed for its relevance and worth – and whether it should simply be deleted or repositioned better elsewhere.
4. **Present a balanced document.** A good commercial lawyer will help you to identify the key commercial and legal risks and then address those items in a fair and balanced way in the document. Since March 2015, this has actually been a legal

requirement for “business to consumer contracts” under the new unfair contract terms provisions of the Fair Trading Act 1986. Depending on the supply circumstances, you may need to take a wider, more balanced view of the likely risks involved and possibly adopt a more considered and reasonable approach to certain matters. For example, if it is not that important that you own your customer’s intellectual property creations then why stir up potential debate on that issue when a simple but well written licence to use it would suffice?

5. **Don’t ‘over lawyer’ the document.** Further to point 1 above, it’s important that your lawyer is pragmatic and commercially minded enough to understand and address this list of points effectively in the circumstances. We see sales contracts that are ‘over engineered’ by lawyers and have the effect of sending people to sleep (a great cure for insomniacs).
6. **Consider layout, use of colour, headings, font size etc...** These tools are always helpful in capturing the reader’s attention and leading their eyes through the document in a clear and understandable manner.
7. **Visually separate the key commercial issues from the legal issues.** We often see key commercial information (e.g. price, term, products description etc) scattered around a long document which instantly causes the reader to thumb the pages and run for the yellow stickies in order to make sense of the document on the key points he or she is searching for. Often it is simplest if these items are simply gathered and listed on one of the first few pages, leaving the less interesting detail to the latter pages.
8. **Understand how the contract fits into the sales process.** Related to point 2 above, it is important that your commercial lawyer understands the factual circumstances surrounding how agreement will be reached (e.g. by email then an ink signature or by mouse click on a screen). This may affect how the content is presented. We also still come across businesses which are content to place their customer terms on the back of their invoice – when the legal reality is that those terms are unlikely to apply as the ‘agreement to sell and purchase’ is often made earlier in time, by phone or email exchange. The end to end process needs to be clearly understood.
9. **Use the right commercial lawyer** who understands the above and is willing and able to grasp the finer points of the above relevant to your business context (and does not have a ‘sledge hammer for a nut’ mentality). Similar to how we do not go to an eye surgeon for our knees, or to our GP for heart surgery - the same applies with law. There are horses for courses and even within a category, some will have a different mind-set and approach than others.

I was searching for a 10th point above to round off the list, but then thought that “less is more” and after consideration, believe the above list sums it up pretty well.

The benefits of focusing on the above key points can be immense – from quicker sales closure, to winning more sales because less management and administrative time is spent arguing the finer points. It’s also a very good look if you can delight the customer at the outset and create that extended great first impression of your brand.

For further information or a meeting to discuss your needs, please call +64 9 948 8433 or email admin@lynchandco.co.nz.