

CHAPTER 7

Analysing Contractual Terms

Assessment criterion and indicative content

3.1 Analyse contractual terms for contracts that are created with external organisations

- The use of express terms
- The use of standard terms of business by both purchasers and suppliers
- The use of model form contracts such as NEC, FIDIC, IMechE/IET

Section headings

- 1 Contracts and contract terms
- 2 Express and implied terms
- 3 Standard terms of business
- 4 Model form contracts

1 Contracts and contract terms

1.1 Contracts

The purpose of a commercial contract is to set out the roles, rights and obligations of both parties in a transaction or relationship. **A contract is basically a statement of the following points.**

- What the parties to the contract have agreed to do or exchange (in regard to specification or the requirement, prices, delivery and payment dates and so on)
- Conditions and contingencies which may alter the arrangement (eg circumstances under which it would not be reasonable to enforce certain terms, or agreement that if Party A does X, then Party B may do Y)
- The rights of each party if the other fails to do what it has agreed to do ('remedies' for various forms of 'non-performance', such as breach or frustration)
- How responsibility or 'liability' will be apportioned in the event of problems (eg who pays for damage or loss of goods in transit, or losses to third parties in the course of performing the contract)
- How any disputes will be resolved (eg by arbitration or alternative dispute resolution, rather than litigation).

4.8 Using model form contracts

Model form contracts are templates which can be used as a starting point for preparing and negotiating contracts. As explained previously, they are flexible. Some clauses in a model can be changed if the contracting parties want this; and additional clauses can be added to meet the specific circumstances and requirements of a particular contract.

It is therefore incorrect to assume that model form contracts should be used in their 'original' form, without the need to change anything.

The teams or individuals negotiating contracts need to have an understanding of all the terms in any model form contract they use, and they need to be able to understand the possible implications of any amendments they introduce.

The advantages and disadvantages of using standard and model form contracts are summarised in Table 7.4.

Table 7.4 *Advantages and disadvantages of model form contracts*

ADVANTAGES	DISADVANTAGES
Helps reduce time and costs of contract development (including legal service costs).	Most model form contracts are developed by professional bodies representing contractors or consultants, not buyers.
Avoids 'reinventing the wheel' – but model form contracts are flexible and can be adapted to suit particular circumstances.	Terms may not include special clauses or requirements to cover the buyer's position: negotiators still need knowledge and skill to develop contracts.
Industry model forms are widely accepted, reducing negotiation time and costs.	Model form contracts are unnecessary for straightforward purchase contracts, where the buyer or the supplier can apply their standard terms.
Model form contracts are developed with an understanding of disputes that might arise and legal certainty about the outcome: model form contracts can be drafted accordingly.	Legal advice is still required if significant amendments or variations to model contracts are to be made.
Model form contracts are designed to be fair to both parties.	A suitable model form contract may not exist, or the parties may not agree to use a model form contract as a template to develop their specific contract.
	Costs of training buyers to use model forms may be high.

Chapter summary

- A commercial contract may include both express and implied terms.
- Implied terms may arise from the nature of the contract, the need for business efficacy, the provisions of statute law, or the custom of the trade.
- If an express term in a contract is inconsistent with implied terms, the express term applies if it refers to a matter where the implied term is based on custom and usage, but the implied term applies if it refers to a matter where the implied term is based on statute law.
- Most buyers and sellers have standard terms of business. This can give rise to a ‘battle of the forms’.
- Model form contracts are published by third party experts such as trade associations and professional bodies, reflecting standard practice in particular industry sectors.
- Model form contracts are templates, and they can be adapted to meet the specific requirements of the contracting parties



Self-test questions

Numbers in brackets refer to the sections, tables or figures where you can check your answers.

- 1 What are the main categories of clauses in a commercial contract? (1.2, Figure 7.1)
- 2 Distinguish between a condition and a warranty. (1.3)
- 3 List sources of implied terms in contracts. (2.2)
- 4 What are the benefits of having standard terms in a commercial contract? (Table 7.1)
- 5 For what types of contract might NEC model form contracts be used? (4.3)
- 6 What is FIDIC? (4.4)
- 7 Why might model form contracts be used to prepare contract agreements? (4.6)

Now attempt Questions 25–28 from Chapter 10.

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For which one of the following is it most likely that a buyer will prepare a conformance specification rather than a performance specification?

- A A service
- B A high-value item
- C A subassembly unit
- D An item of non-standard software

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In which part or element of a purchase contract are details of discounts for bulk purchases most likely to be found?

- A In the product specifications
- B In the implied terms of the contract
- C In the KPIs
- D In a pricing schedule

7

Which one of the following items might be included in a health and safety schedule for a contract for the supply of works?

- A Requirements for the supplier/contractor to maintain health and safety records
- B Requirements for the buyer/customer to maintain health and safety records
- C The legal requirements relating to health and safety at work
- D Details of the supplier's in-house health and safety procedures

8

In the acronym SMART, what does the letter R stand for?

- A Reachable
- B Relevant
- C Realisable
- D Recognisable

9

Which of the following might constitute an offer to enter into a legal agreement? Select TWO items.

- A An invitation to tender (ITT)
- B A purchase order (PO)
- C A supplier's quotation
- D An advertisement
- E A request for proposal (RFP)