

A man with grey hair, wearing a white dress shirt and a dark tie, is seated at a table. He is holding his glasses in his right hand and looking thoughtfully to the right. The background is a bright, out-of-focus office or meeting room with large windows.

Aspire: Services for
owner managed
businesses.

**Getting The Most Out Of Your
Terms And Conditions**

JAMES CARPENTER

- Joined Taylor Walton in 1999.
- Head of Commercial Litigation team.
- Specialises in contract disputes.

PETER KOUWENBERG

- Joined Taylor Walton in 1999.
- Solicitor in the Corporate and Commercial department.
- Deal with commercial contracts, including terms and conditions of business.
- Data protection specialist.

Format

1. Essential Terms to Include Within Your T&Cs (James and Peter)
2. Incorporating Your T&Cs (James)
3. Using a Contract Proposal Alongside Your T&Cs (Peter)
4. Questions



Limitation of Liability

1.1 Nothing in these Conditions shall limit or exclude the Supplier's liability for:

- 1.1.1 death or personal injury caused by its negligence, or the negligence of its employees, agents or subcontractors (as applicable);
- 1.1.2 fraud or fraudulent misrepresentation;
- 1.1.3 breach of the terms implied by section 12 of the Sale of Goods Act 1979; [or]
- 1.1.4 defective products under the Consumer Protection Act 1987; [or]
- 1.1.5 [any matter in respect of which it would be unlawful for the Supplier to exclude or restrict liability].



Limitation of Liability – Part 2

1.2 Subject to clause 1.1

- 1.2.1 the Supplier shall under no circumstances whatsoever be liable to the Customer, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, for any loss of profit, or any indirect or consequential loss arising under or in connection with the Contract; and
- 1.2.2 the Supplier's total liability to the Customer in respect of all other losses arising under or in connection with the Contract, whether in contract, tort (including negligence), breach of statutory duty, or otherwise, shall in no circumstances exceed [£[AMOUNT] OR [NUMBER]% of the price of the Goods].



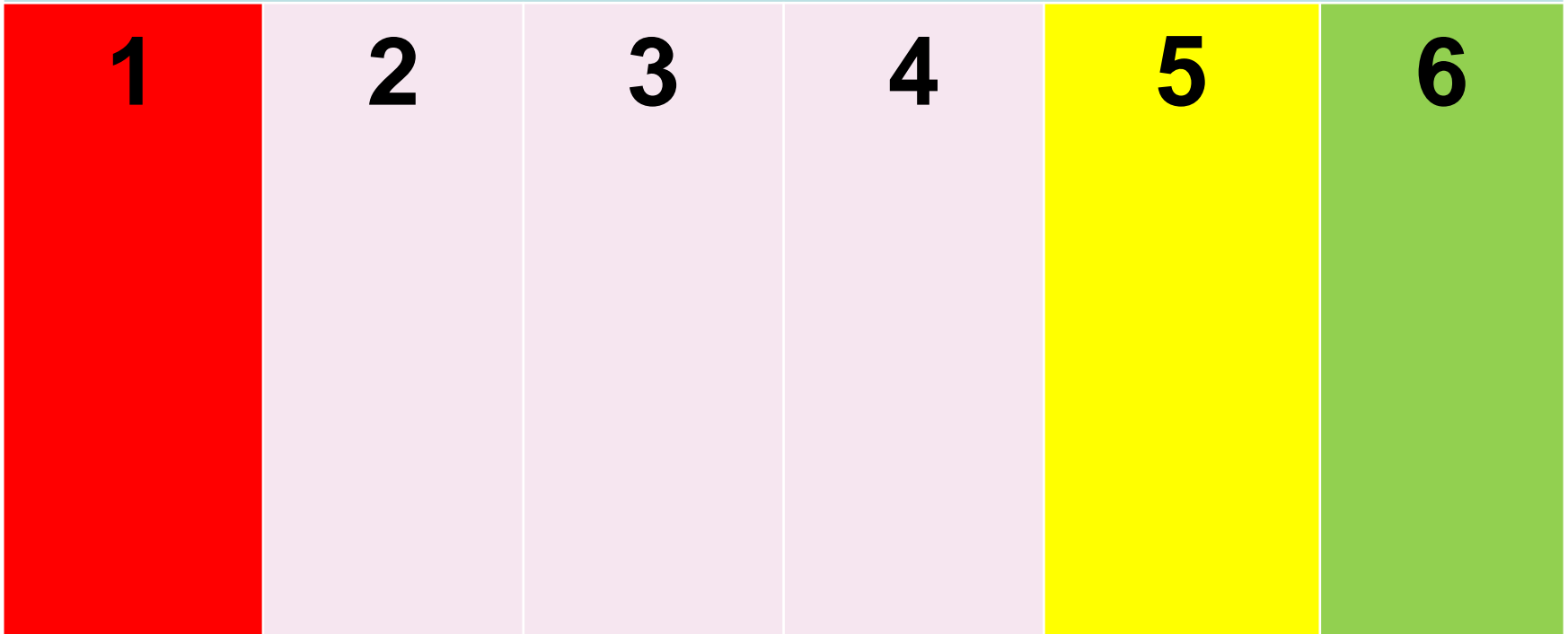
Insurance: link to limitation of liability

- **Legally** (is the fixed cap “reasonable”?) and
- **Commercially** (potential loss covered by insurance).



Insurance: Levels of protection

Nil ←----- Level of protection provided to the customer regarding insurance -----→ High



Because experience counts.



Insurance: Levels of protection

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No insurance provisions	Supplier required to maintain insurance covering specified risks and at a specified financial level	AND supplier required to provide a copy of the insurance policy on request by the customer	OR supplier required to provide a copy of the insurance policy and upon each renewal/notify changes	AND customer's interest to be noted upon the supplier's insurance policy	OR customer to be jointly insured under supplier's insurance policy
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Insurance: Standard provisions

- During this agreement [and for a period of * afterwards] the Supplier shall maintain in force the following insurance policies [with reputable insurance companies] with a limit of at least £* for claims arising from a single event or series of related events in a single calendar year:
 - **Public Liability**
 - **Product Liability**
 - **Professional Indemnity**
 - **Employer's Liability**
 - **Product Guarantee**
 - **Product Recall**
- The Supplier shall ensure that any subcontractors also maintain [equivalent] insurance having regard to their obligations under this agreement.



Insurance: Noting

- **Supplier's insurer is informed of customer' interest.**
- **Does not give the customer a right to claim directly against the insurer/ receive the insurance proceeds.**
- **Insurer will notify customer of cancellation or non-renewal of policy & possibly amendments to terms.**
- **Some insurers will not be willing to note the customer's interest.**



Insurance: Joint cover

- **Very rare in commercial contracts.**
- **Two or more parties with individual interests take out a single insurance policy.**
- **Either or both parties can claim under the policy.**
- **Main drawback is that wrongdoing of one joint insured will preclude a claim by the other.**



Supplier issues

- **Check insurance clause does not invalidate cover.**
- **Consider whether insurance costs will be factored into the customer prices.**

Customer issues

- **Requirement that supplier insures does not itself make supplier liable for relevant losses.**
- **Consider adding an indemnity and/ or warranty.**



Retention of title – simple clause

- 1.1 The risk in the Goods shall pass to the Customer on completion of delivery.
- 1.2 Title to the Goods shall not pass to the Customer until the Supplier receives payment in full (in cash or cleared funds) for the Goods in respect of which payment has become due, in which case title to the Goods shall pass at the time of payment of all such sums



Retention of title – Part 2

1.3 Until title to the Goods has passed to the Customer, the Customer shall:

- 1.3.1 store the Goods separately from all other goods held by the Customer so that they remain readily identifiable as the Supplier's property;
- 1.3.2 not remove, deface or obscure any identifying mark or packaging on or relating to the Goods;
- 1.3.3 maintain the Goods in satisfactory condition and keep them insured against all risks for their full price from the date of delivery;
- 1.3.4 notify the Supplier immediately if it becomes subject to any of the events listed in clause [insert clause number]; and
- 1.3.5 give the Supplier such information relating to the Goods as the Supplier may require from time to time.



Retention of title – Part 3

1.4 If before title to the Goods passes to the Customer the Customer becomes subject to any of the events listed in clause [insert clause number], then, without limiting any other right or remedy the Supplier may have:

- 1.4.1 the Supplier may at any time:
 - 1.4.1.1 require the Customer to deliver up all Goods in its possession that have not been resold, or irrevocably incorporated into another product; and
 - 1.4.1.2 if the Customer fails to do so promptly, enter any premises of the Customer or of any third party where the Goods are stored in order to recover them.



Retention of title – all monies clause

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Termination: Clarity is essential

- ***“We’ve agreed to supply the customer for a fixed term of 1 year, with 3 months’ notice after that. The parties need to be able to terminate immediately too in the usual circumstances.”***
- **Questions?**



Termination: Clarity is essential

Question	Instructions
Will both parties have equivalent rights?	Yes
When does the 1 year period start/ finish?	Starts: Date of agreement Ends: One year anniversary
Will the agreement terminate after the 1 year period or renew automatically?	Automatic renewal and no fixed expiry date
What circumstances will allow for immediate termination?	Breach, insolvency, change of control, force majeure
Can these rights be exercised in the 1 st year?	Yes
Can 3 months' notice be <u>served</u> during the 1 st year (to expire on the agreement's anniversary)?	Yes



Termination: Example clauses

1. This agreement shall commence on the Commencement Date and shall last for an initial period of 1 year (**Initial Term**), subject to earlier termination under Clause 3. After the Initial Term, this agreement shall continue indefinitely, subject to termination under Clauses 2 or 3.
2. After the expiration of the Initial Term, either party may terminate this agreement on giving not less than three months' written **notice** to the other party. Such notice may be served during the Initial Term but must not expire until after the Initial Term.
3. Without affecting any other right or remedy available to it, either party may terminate this agreement with immediate effect at any time during or after the Initial Term by giving written notice to the other party if:
 - [The other party fails to remedy a **Material Breach** of the agreement within a specified period]
 - [The other party repeatedly breaches any terms of this agreement so as to justify the opinion that its conduct is inconsistent with it having the intention or ability to give effect to the terms]
 - [The other party is wound up or enters into various other financial arrangements related to **Insolvency**]
 - [The other party undergoes a **Change of Control**]
 - [A **Force Majeure Event** prevents the other party from performing its obligations under the Agreement for a specified period]



Incorporating Your T&Cs

- Lord Justice Denning in *Spurling v Bradshaw* [1956] – ‘[some clauses] *would need to be printed in red ink on the face of the document with a red hand pointing to it before the notice could be held to be sufficient*’.



Contract Law

1. Offer
2. Acceptance
3. Consideration
4. Intention to contract
5. Certainty of terms



Incorporating your T&Cs

1. Getting a signed contract proposal
2. Send a copy of the T&C's with quotes
3. Reference your T&C's on all pre-contract documents
4. Through a course of dealing
5. Standard Industry Practice



Summary

1. Give notice of your T&C's
2. That notice has to be pre-contract
3. If possible, send a copy of the T&C's pre contract
4. Any purchase orders should be replied to with a communication acknowledging the same but on your T&C's
5. If at all possible, get a signed contract proposal



What would a Contract Proposal look like?

- **Shorter than the T&Cs.**
- **Sets out bespoke elements of the contract.**
- **Completed on an individual basis in each case.**
- **Includes signature provisions.**



Contract Proposal: Top 10 points

- 1. Contract number**
- 2. Customer name and details (including VAT number)**
- 3. Goods/ Services to be supplied**
- 4. Price/ Charges**
- 5. Delivery Date(s)**
- 6. Delivery Location(s)**
- 7. Supplier/ Customer Equipment**
- 8. Key Personnel**
- 9. Special Terms**
- 10. Annexures eg. milestones, specification, service levels**

Because experience counts.



Contract Proposal: Final points

- **Terms used in the Contract Proposal dovetail with the definitions and cross-references in the T&Cs.**
- **Contract Proposal and T&Cs both confirm contract formation process.**
- **Which document prevails in the event of conflict or ambiguity?**



Questions?