



**The small print for BIG IDEAS**

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Client Reference Number: **[Confidential]**

Wednesday 16 February 2022

**Privileged & Confidential**

By email to: **[Confidential]**

Dear **[Confidential]**,

**Re: Your appointment with qLegal on Tuesday 25 January 2022.**

**How we work**

Thank you for attending your appointment with us and for using the services of qLegal at Queen Mary University of London. Although we cannot provide you with representation in any proceedings and do not hold ourselves out to be a firm of solicitors or patent attorneys, our advice is free and we aim to provide the same high standard of service expected in the practice of law. Please note that the legal advice provided is in relation to the Laws of England and Wales only. If you require advice outside of this jurisdiction, please contact us.

**Summary of the facts you have shared with us**

You are currently at the start up stage of your business, operating under the name of **[Confidential]** (the "Business"). You wish to launch an online community and provide **[Confidential]**. Your courses will involve classes such as **[Confidential]** and **[Confidential]**. The Business will be registered as a private limited company and, at least initially, you will solely be running the operation. The pre-paid courses will be delivered on Facebook where each private group pertaining to a particular course will have the live video of the class uploaded and materials including the workbook. There will also be an online presence over the internet through the Business's website and also on the Business's Instagram page, which will be used for marketing purposes only.

In the future, you would like to sell **[Confidential]** and tools that the customers would require for the courses. It would be completely optional, and it would allow the customers to decide whether they would like to purchase the required tools directly from you, or source them on their own. All products that would be sold by you will be from authorised providers and, initially, the products will not have the Business's own branding.

Further, you are also considering the option of selling **[Confidential]** on Etsy. This would assist with the marketing of the Business.

## Scope of our advice

You want to understand the key legal considerations that you should take into account when the Business is contracting with customers and to be provided with sample clauses and next steps:

- for the instances where the Business's liability can be limited;
- for disclaimers; firstly in case the customers are injured during the period of the course either due to their own fault or due to a product that was purchased from you, and secondly in case the customers are dissatisfied with the final product that they have created;
- for protecting the information that is provided in the courses, where in case a customer leaks the Business's information you would most likely remove the person from the course, but you are open to monetary options as well;
- for protecting the information that is provided in the Business's **[Confidential]** that would be available for purchase on Etsy.

## Summary of advice

Our advice to you is that:

- when contracting with customers the services should be performed with reasonable care and skill, and the goods that the Business might sell in the future should be of satisfactory quality, fit for each **[Confidential]** and they should also match the description that the Business has put out;
- the Business can limit its liability by inserting into the contract warnings to customers in addition to having a limitation clause that can be enforced against the customers;
- the information that the Business provides under the pre-paid courses can be protected by way of adding a confidentiality agreement or a non-disclosure clause into the contract;
- the community that would be created on Facebook should adhere to the Facebook's terms and conditions and more specifically to Facebook's acceptable use policy;
- the Business's **[Confidential]** on Etsy are automatically copyrighted on the creation of original work for the customers to not resell them.

## Explanation

### A. What are the key legal considerations that you should consider when contracting with customers?

Your main aim is for the Business to provide for pre-paid courses. Nevertheless, since you seek to expand to the selling of products, the appropriate contract between the Business and the customers will be a mixed contract that would include terms and conditions both for the supply of services and of goods.

**When supplying services to customers, you should have the following in mind:**

- the services should be performed with **reasonable care and skill**;
- if customers **rely on something** that you have said or written to them, then what you have said or written would be considered a **term of the contract**;
- a term should be inserted in the contract stating that **the customer does not have the right to cancel** since the customer is asking the Business to start providing information about the services immediately after the contract is made. A clause like this would inform the customers that as they would get the password to enter the course and materials for the course immediately after the contract is made, there would be no cancellation of the contract allowed. This term should be **noticeable** in the contract.

**When supplying goods to customers, you should have the following in mind:**

- the quality of the goods should be **satisfactory**;
- the goods should be **reasonably fit** for the purpose of creating a particular craft;
- the goods should **match their description**;
- a condition can be included in the contract that the Business is not obliged to deliver the goods unless the goods are in stock or that the Business can terminate the contract if the goods are not in stock.

**Moreover, there are some additional considerations that you should take into account when contracting with customers for the supply of services and goods:**

- **the terms should be transparent:** they should be written or expressed in plain and intelligible language, and they should be legible. Avoid legal language or jargon and the use of passive voice. It would be better to use language that an ordinary person can understand. In addition, consider whether the contract is legible in relation to font, color of text and of background. Contemplate using informative headings and sub-headings that would allow the customers on a quick look to understand what each section is about. You can also use a table of contents with hyperlinks to each section;
- you should **explain to the customers concepts that they might initially not understand**, and you should define key or complicated terms. You can use hyperlinks to frequently asked questions (FAQs) or other documents that provide explanations and definitions of complicated terms and/or concepts;
- **a term that has a significant impact for the customers or a complex pricing term should be particularly drawn to their attention.** You should take particular care to make such terms prominent in the contract. Bear in mind that the use of capitals for drawing to the customers' attention important terms will not necessarily be effective. Alternatively, you can use bold text or underlining;
- you can **encourage customers to open and read the terms and conditions** of the contract by informing them how long they would normally take to read the contract;
- you should be aware that since you can target customers in EU member states, you might be required to provide both mandatory consumer information (see next paragraph) and standard terms and conditions that should be in the official language of the particular member state that a customer is in. We note, however, that providing recommendations with respect to EU law is outside the scope of our advice.

**Additionally, the following information must be provided before the customers enter into a contract:**

- the **identity of the Business** and the geographical address at which the Business is established and (where appropriate) the Business's telephone number, fax number and email address in order for

the customers to be able to contact the Business quickly and for effective communication to take place;

- a pre-contractual information that the **customers do not have a right to cancel** the contract;
- the arrangements for **payment, delivery and performance** of the services and goods and the time by which the Business undertakes to deliver the goods and services;
- any **delivery restrictions** in relation to the sale of products;
- the **main characteristics of the goods and services**. The information about the main features of the service should also be provided;
- which **means of payment** are accepted;
- the total price of the goods and services inclusive of taxes. These **prices should be indicated clearly and unambiguously**, and they must indicate if they include tax and delivery costs;
- an acknowledgement that when the customers are placing their order, they **explicitly acknowledge that their order implies an obligation to pay**;
- where it is applicable, the fact that **additional delivery charges** or any other costs may be payable where they cannot be calculated in advance;
- what is the Business's **complaint handling** policy;
- a reminder that the Business is under a **legal duty to supply products that are in conformity** with the contract;
- that the **contract's duration** is till the services are performed and/or till the products are delivered.

All of the above are key legal considerations that should be taken into account when contracting with customers for the supply of services and goods. Further, the above information must be provided *before* the customers enter into the contract. You can include such mandatorily information on the Business's website, where it should appear before the customers proceed to read and enter into the contract.

## **B. In what aspects can the Business limit its liability?**

You want to limit the Business's liability when contracting with customers firstly in case customers get injured either during the execution of **[Confidential]** or due to a product that they have purchased from you, and secondly in case customers are not satisfied with the end result of the craft that they have created.

As a starting point, it would be better to enter into contracts with customers under the name of the Business and not under your personal capacity. You might want to seek further legal advice on this issue and of the process of registering your Business as a private limited company, as it is outside the scope of our advice.

**When supplying services and goods to customers, the Business's liability can be limited only for:**

- losses that could not have been foreseen when the contract was formed;
- losses that were not caused by you;
- losses of the Business;
- losses of non-customers.

**The Business's liability cannot be excluded where:**

- goods or services are of unsatisfactory quality;
- goods or services do not fit the purpose that they were bought for;
- goods or services do not correspond to the description that the Business has provided;

- the customer is relying on information that was included before the contract was made;
- death or personal injury results from negligence, where in the performance of a contract reasonable care has not been taken or reasonable skill has not been exercised;
- there is an unfair term: where the term favors the Business too much;
- there is a misleading term: where the term misleads the customer. For example: 'small print' or important wording that is hidden in the contract that can surprise the customers or mislead them.

**Examples of unfair terms are where a term:**

- aims to exclude or limit the Business's liability in case of death or personal injury to the customer that was caused from an act or omission of the Business;
- aims to inappropriately exclude or limit the legal rights of the customer in its contract with the Business where the Business had a total or partial non-performance or inadequate performance of any of its contractual obligations;
- gives the Business a wide discretion as to how the term is put into effect;
- is potentially onerous for the customers and is buried in the small print of the contract;
- ties customers into a contract beyond what they would expect normally;
- may also be considered as unfair where it delays the formation of the contract until dispatch of products from the Business.

If a term under which liability cannot be excluded is inserted into the contract, then it will be considered as blacklisted, meaning it would automatically be unenforceable against the customer and it would also not bind the customer.

***Sample limitation on the Business's liability clause, according to Online Terms and Conditions for the Supply of Services and Goods – Business-to-Consumer from Lexis PSL:***

*"Except for any legal responsibility that [Confidential] cannot exclude in law (such as for death or personal injury) or arising under applicable laws relating to the protection of the customer's personal information, [Confidential] is not legally responsible for any:*

- *losses that were not foreseeable to the customer and [Confidential] when the contract was formed;*
- *losses that were not caused by any breach on [Confidential]'s part;*
- *business losses; or*
- *losses to non-consumers."*

You specifically want to limit the Business's liability for personal injury that the customers may have suffered either during the execution of the course's provided instructions or due to a product that they purchased from the Business. You can do this by also inserting the following caveat:

***Sample disclaimer for personal injury in line with CMA's Unfair Contract Terms Guidance:***

*"In the absence of any negligence or other breach of duty by [Confidential], the execution of the pre-paid course's instructions and the use of the materials provided by [Confidential] is entirely at the customer's own risk."*

Further, when customers are dissatisfied due to the end result of a craft that they have created, a warning can again be included in the contract.

***Sample disclaimer for dissatisfaction in line with CMA's Unfair Contract Terms Guidance:***

*"If a customer raises a concern or dissatisfaction in relation to the final product that the customer has created by following [Confidential]'s instructions, [Confidential] agrees to provide an explanation and only if the dissatisfaction was caused due to the fault of [Confidential], the pre-paid course would be repeated and the instructions of creating the craft would be corrected."*

By inserting the above terms and disclaimers, the contract that the Business is entering with customers would provide for a right balance between the rights of the Business and the rights of the customers.

**C. How can the information provided in the courses stay confidential?**

You would like to ensure the protection of the materials and information provided to the customers during the course. This can be done by inserting a confidentiality clause. The confidentiality clause will simply highlight that the receiving party (i.e. the customer) is required to maintain confidentiality and not disclose the taught material to any third parties and share the workbook or any of its contents provided to them to any third party.

When structuring the confidentiality clause, it is important to explicitly state the parties involved (which in this case would be the business and the customers), and the information which is required to be kept confidential. The information would be firstly the information disclosed during the course in the form of instructions, secondly details provided in the live/recorded class and thirdly the information that is provided through the workbook or any other material. A confidentiality clause also usually stipulates the time period for which the customer must keep the information confidential. In this case it would be stated that the customer is bound not to disclose any of the information provided indefinitely.

***Sample confidentiality clause:***

*"All written and oral material provided throughout the duration of the live online class and the recorded session is not to be disclosed. Further, all written material that is provided in the workbook or through the Facebook group is not to be disclosed by the receiving party."*

*By signing the contract, the customer agrees not to disclose any written or oral information that is provided by [Confidential]. Breach of confidentiality will entail repercussions."*

The next point of consideration is the action to be taken in case of breach of confidentiality. In this case, the remedy of injunction or damages can be sought. In the case of an injunction, the court orders the customer to stop the misuse of confidential information. Alternatively, the remedy of damages can be sought where the individual who has breached the clause is required to pay compensation. We understand that if a customer breaches their confidentiality obligations, you would ideally like to remove the customer from the course and ban that individual from attending any future classes. The clause can provide that the customer

will be removed from the Business' Facebook group and will be banned from attending all future courses. Further, it can also explicitly state that the fee paid will not be returned and will be forfeited.

***Sample breach of confidentiality clause:***

*"In case of breach of the confidentiality clause, the customer will be subject to removal from the Facebook group and course entirely. The customer will also be prevented from attending any other future courses conducted by [Confidential]."*

*It is to be noted that a breach of the confidentiality clause does not entail a refund of the fees paid for the course. The money paid will be forfeited."*

If you wish to seek compensation for the breach of confidentiality, an alternate/additional clause may be inserted. It would state that in the event of breach of the confidentiality clause, the customer would be required to pay a certain amount as damages.

***Sample monetary compensation clause:***

*"The customer acknowledges that a monetary compensation of (X amount) will have to be paid in case of breach of confidentiality."*

However, it is important to keep in mind that while the confidentiality clause gives you contractual rights (in case of unauthorised disclosure or use), this may not practically prevent a breach of confidentiality from happening and there is still a chance that a user may breach the contract. As such, you may want to consider implementing additional safeguards to protect the confidentiality of your materials in practice. For example, adding sufficiently-protective passwords to your materials, making them read-only, or incorporating your Business branding/name both on the materials and within the metadata.

**D. What is Facebook's policy in relation to an online community?**

We understand that the primary platform for delivering the course would be Facebook. Therefore, it is important to take into consideration Facebook's rules and regulations and familiarise yourself with the same to ensure that you do not breach any of Facebook's Community Standard Guidelines. A breach of these guidelines by the Business (or, in certain circumstances, by any of your customers) could lead to the suspension of the Business's page.

**[Confidential]** specifically being a business page, is required to follow Facebook's Terms and Policies. For example, (i) it is necessary that there are no posts and promotions of anything unlawful, discriminatory and deceptive in nature, and (ii) the Business must avoid impersonation of any brand, entity or public figure and avoid inaccurately tagging any content.

Business pages are also subject to Facebook's Community Standard Guidelines. You must ensure there are no posts that include anything that is violent, threatening or harassing. Hate speech and offensive graphic posts will also amount to the Business page being either taken down or suspended. It is advised that the

page is run in accordance with Facebook's Terms and Policies and Facebook's Community Standard Guidelines.

Furthermore, consider inserting a clause in the contract that emphasises that each individual partaking in the course when given access to the Facebook group, will have to act in line with Facebook's Community Standard Guidelines. The clause would state that they would be required to refrain from posting any threatening messages, using brash and abusive language and refrain from posting any promotional content on the Facebook group page. The clause may state that individuals taking part in the course are encouraged to make comments and queries related to the content being posted and taught.

***Sample Facebook clause:***

*"All members of the group must refrain from making any threatening, violent and abusive posts and comments. Kindly ensure that all posts and comments that are made are in relation to the content being taught and materials provided by [Confidential]."*

*No member is allowed to make any promotional posts on [Confidential]'s Facebook business page."*

Links to Facebook's Regulations:

- Facebook's Terms and Policies: [https://www.facebook.com/policies\\_center](https://www.facebook.com/policies_center)
- Facebook's community standards: <https://transparency.fb.com/en-gb/policies/community-standards/>
- Facebook's Policies for Pages, Groups and Events: [https://www.facebook.com/policies\\_center/pages\\_groups\\_events/](https://www.facebook.com/policies_center/pages_groups_events/)

**E. How can the information provided on the [Confidential] via Etsy stay confidential?**

As per your last message, it is understood that you wish to safeguard your [Confidential] sold on Etsy from being purchased and resold. It was also mentioned that for a customer to use the [Confidential] to create an item for sale, your prior permission is required. In the UK, you get copyright protection automatically when you create any original artistic work. There is no register of copyright works in the UK which means you will not have to take any additional steps to copyright your [Confidential].

Copyright protection will give you the option of sending a cease-and-desist letter to the customer whereby you can demand they stop selling your products. A copyright symbol along with your name and the year of creation can be added to your [Confidential]. Another option would be to add a copy along with the [Confidential] that states that the work is protected with a copyright and any violation will lead to an immediate report to Etsy that may result in damages or loss of account.

If a customer is reselling your [Confidential] in particular, over Etsy, you can report the issue to Etsy. Etsy will conduct their own investigation and if the customer has breached the regulations, Etsy will shut down the page of the defaulting customer.

It is important to note that Etsy's policies, as well as copyrights attributed to the [Confidential], will only prevent the customer from reselling that [Confidential] in particular and not the products that have been made by that [Confidential]. Including a clause specific to Etsy in the contract would not serve your purpose



as the contract on the website would not be visible to those that are purchasing your **[Confidential]** off Etsy. The issue will have to be addressed over Etsy's platform itself.

Etsy's 'Messages' option allows you to communicate with the buyer directly. You may want to use this feature to notify the customers that they should not re-use the **[Confidential]** for selling their own products without your consent for the same.

Additionally, it is also advised to get the Business's brand name trade-marked. However, further information about how to do this is outside the scope of our advice.

Here are useful links to Etsy's policies:

- Etsy's Seller Policy: <https://www.etsy.com/legal/sellers/>
- Etsy's Seller Protection Policy: <https://help.etsy.com/hc/en-gb/articles/360000344188-What-is-Etsy-s-Seller-Protection-Policy-?segment=selling>
- Etsy's Help Centre: <https://help.etsy.com/hc/en-us?segment=selling>

Further, we want to clarify that all the advice provided is limited to England and Wales.

### **Next Steps**

The following list can help you with what your next steps should be when the Business is contracting with customers:

- Include on the Business's website the information that the customers must know before they can enter into the contract. This mandatory information that must be presented to the customers can be found in section A.
- When drafting the contract with customers, consider the above legal considerations in section A, such as the reasonable care and skill that you should exercise during the supply of services and products. In relation to the full drafting of the contractual agreement you should seek further legal advice.
- Include wording similar to the *limitation on the Business's liability sample clause* and the two disclaimers relating to personal injury and dissatisfaction with the final product that can be found in section B.
- Include a non-disclosure clause like the one in section C in order for the information that is provided during the courses to stay confidential between you and the customers.
- Include a *sample Facebook clause* like in section D for the Business's online community to adhere to Facebook's policy.
- Although copyright protection is given automatically on the creation of original work, an extra step is to include the copyright symbol along with your name/the Business's name and you can also add the year of creation to the **[Confidential]** that are going to be uploaded on Etsy.

- Inform the customers on the Business's Facebook page and/or website that you will be able to discuss with the customers and respond and handle any complaints in relation to the courses and the goods that may be provided by the Business.

We hope that the advice provides you with a comprehensive understanding of the legal questions you asked us to address. Should you require any assistance in any future matters, please do not hesitate to contact us.

We would be extremely grateful if you could take a few moments to complete this short form <https://qmul.onlinesurveys.ac.uk/client-feedback-on-qLegal-2021-22>, as your feedback is important to our educational development and the development of our services.

Yours sincerely,

**[Confidential]**  
**Student Adviser**

**[Confidential]**  
**Student Adviser**

**On behalf of qLegal**