

COMMERCIAL TRANSACTIONS LEGAL ALERT
PURCHASE ORDER TERMS AND CONDITIONS:
“IT’S ONLY BOILERPLATE, ISN’T IT?”

May 2007

Typical Purchase or Sale of Goods

Many contracts for the sale and purchase of goods between merchants are not specifically bargained, are not drafted carefully and are not acknowledged by both parties with an understanding of their impact. The typical situation is that a person in a company’s purchasing department is armed with a telephone and e-mail access and a stack of form purchase orders (or the electronic equivalent) to buy raw materials and components. A counterpart at a seller sits in his/her sale’s office, with his/her own stack (or electronic version) of sales acknowledgement forms. The buyer’s purchasing agent telephones the seller’s sales agent or dispatches a purchase order. The seller’s sales agent examines the information on the front side of the purchase order to confirm type, quantity, purchase price and delivery time and, if acceptable, sends out the seller’s sales acknowledgement form.

Each of these forms often has “boilerplate” or “fine print” terms and conditions, typically on the reverse side. The two sets of terms and conditions naturally diverge. This divergence does not normally seem to bother seller or buyer and the deal usually coincides with the bargained-for terms such as price, quality, quantity and delivery terms.

If There is a Dispute

But what happens if the parties fall into a dispute? In such case, the parties will pull out their forms and read them – perhaps reading the other party’s terms and conditions for the first time – and will find that their forms diverge. Worse yet, one of the contracting parties may have no specific terms and conditions on the reverse of its purchase order or sales acknowledgement.

These scenarios often cause a result not intended by at least one party, and potentially both parties to the transaction. The “boilerplate” or “fine

print” in a purchase order or a sales acknowledgement (whether a paper version or electronic version) is essential for a party to obtain its expectations in connection with a purchase or sale of goods.

Under Article 2 of the Uniform Commercial Code, which governs the purchase and sale of goods, if the form for one party contains a provision as to which the other party’s document is silent, the second party could be deemed to unknowingly have agreed with that term if the parties (as is typically the case) are both “merchants” under the Uniform Commercial Code.

An example: A merchant intending to purchase goods sends a purchase order to a seller, the pre-printed terms of which contain extensive warranty protections and broad obligations on the part of the seller to indemnify the buyer for any loss that might result from failure of the purchased product to comply with specifications or meet the use intended for it. If the seller’s sales acknowledgement form is silent on the extent of remedies for breach, the seller could be deemed to have “agreed” to broad indemnities and payment obligations that the seller was not anticipating when pricing its product.

The issue also affects buyers. Where a buyer’s purchase order is silent as to remedies if the product does not meet specifications or otherwise malfunctions, but the seller’s sales acknowledgement limits the remedy for noncompliance to repair or replacement or refund and excludes any liability for any lost profits or consequential damages or other damages, silence of the buyer in its purchase order on that point could mean that the purchaser has been deemed to have agreed to such limitations.

Dealing with Non-U.S. Entities

The issues are magnified if the other party is located outside the United States. If a U.S. buyer’s or seller’s terms and conditions do not expressly designate a state’s law (and specifically exclude treaties governing

the sale or purchase of goods from or to a non-U.S. entity) as the sole governing law for the transaction, the U.S. party could be required to enforce its rights or defend against liability in a foreign court under unfamiliar statutes, and possibly in a foreign language under the United Nations Convention on Contracts for the International Sale of Goods, not in a U.S. court under the more familiar Uniform Commercial Code.

A Solution? At Least A Strategy

There is no “silver bullet” solution that will ensure that a buyer’s or a seller’s specifically desired terms will find their way into the contract or sale, even if the terms and conditions for a party are carefully and meticulously prepared. However, if a purchaser or seller utilizes its own customized version of terms and conditions, the odds are reduced that it would find itself subject to onerous obligations not anticipated, such as expanded warranty and remedies, litigating or arbitrating a claim against a New Jersey supplier in a Newark, New Jersey court or a claim by a Texas customer on its home turf in a local courtroom in Plano, Texas, or being responsible for the legal fees of the “other side” if the litigation or arbitration is determined in the other party’s favor.

This tension between the terms of a buyer and the terms of a seller in a purchase arrangement is advisedly called “the battle of the forms” under Section 2-207 of the Uniform Commercial Code. Although no one can predict with certainty the outcome where both seller and buyer use forms containing their respective preferred terms, if a party’s form does not have terms and conditions meeting its legal and business requirements, it is likely that such party purchasing or selling goods will lose the “battle” to its economic detriment.

“Just Sign Here”

When a seller and buyer of goods want to enter into a “blanket” agreement governing a series of transactions or a major purchase or sale, a more formal supply agreement is often utilized, normally after verbal or e-mail interaction about price, delivery and other core terms. The issues, however, remain the same as in the case of an exchange of purchase order and sale acknowledgement forms.

Seller or buyer should not simply sign the other party’s form agreement without carefully reviewing its terms, especially warranties, remedies for noncompliance with specifications, and indemnification if buyer is damaged by noncompliance. Depending on the relative leverage of the parties, there is no such thing as a “standard,” unchangeable sale or purchase agreement form.

We Can Help

The attorneys in our Commercial Transactions Practice Group are well-versed on the legal issues that affect commercial agreements and have the practical knowledge of how legal issues impact a client’s business objectives. We work closely with clients to know their businesses, to anticipate potential issues, to draft or revise agreements to protect the client’s interests, to minimize disputes and to identify and manage risks. We are also sensitive to the value of our clients’ relationships with their customers or suppliers and work to preserve those relationships while protecting our clients’ vital interests.

We are prepared to apply our comprehensive, focused approach to your commercial transactions, including tailoring the terms and conditions of your purchase order and sales acknowledgement forms and reviewing agreements with your customers and suppliers.

This Alert was prepared by the Commercial Transactions Practice Group of Gallop, Johnson & Neuman, L.C. (www.gjn.com). If you wish to obtain further information regarding these matters, please contact either the Gallop, Johnson & Neuman attorney who normally provides or manages your legal services or a member of the Commercial Transactions Practice Group. Members include:

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