Risk Allocation - Key Provisions in Purchasing Terms & Conditions and Expanding into the Global Marketplace

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Reducing Risk in Your Purchasing Terms and Conditions – How to Contract on Your Own Terms!

Pay Attention to Creditworthiness

- Screen or qualify the other contracting party where appropriate
- Trade/bank references/balance sheet information
- Do not assume one check at contracting inception is sufficient; revisit periodically
- Set and maintain credit limits

Pay Attention to Creditworthiness

- Contract indemnities and product guarantees and warranties are useless without financial backing
- Pay attention to who the contracting party really is; is it the “deep pocket” or a poor subsidiary?
- On critical agreements, check the contracting entities good standing and proper registration with Secretary of State

Pay Attention to Creditworthiness

- In international dealings, these items may be critical because many companies operate through subsidiary trading companies who may not hold assets (Russia)

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Be Aware of Commodities Affecting Your Business

- Example: precious and other metals, fuel/energy
  - Plan for pricing fluctuations and deal with them upfront
  - Exclude from force majeure coverage (buyer)

Be Aware of Commodities Affecting Your Business

- Use published indexes to account for changes (commercial or governmental)
- Account for labor and material fluctuations
- Properly specify index giving complete citation
- Avoid (or retain) ability to terminate agreement with 30 days notice (good backstop)

- The Producer Price Index (PPI) program measures the average change over time in the selling prices received by domestic producers for their output.
- The price included in the PPI are from the first commercial transaction for many products and some services

- The Consumer Price Index (CPI) program produces monthly data on changes in the prices paid by urban consumers for a representative basket of goods and services
- The CPI for All Urban Consumers (CPI-U) is the index most often reported by the national media

- The Employment Cost Index (ECI) is increasingly being used by business organizations as an escalator to adjust long-term sales and purchasing contracts, and to adjust wage rates in collective bargaining agreement
  - The CPI for Urban Wage Earners and Clerical Workers (CPI-W) is the index most often used for wage escalation agreements

Make the Other Contracting Party Contract Within Your Terms

- Use standard templates for:
  - Non-disclosure/confidentiality agreements (layaway /mutual)
  - Purchasing terms and conditions (on order or otherwise)
  - Sales order/selling terms
  - Terms for Electronic Data Interchange agreements
  - Product Warranties
  - On site work indemnity and insurance agreements

Make the Other Contracting Party Contract Within Your Terms

- Parties using their own forms that have the bargaining power to enforce their use will do better in negotiation
  - "This is our standard policy and we must comply"
  - "To deviate will take significant approvals and time"
  - "I do not have authority to approve changes"

Make the Other Contracting Party Contract Within Your Terms

- Most of the time the buyer has the upper hand here but sole-source suppliers or vendors offering unique services can be an exception
- Use what leverage you have to enforce your terms; be obstinate; disagree without being disagreeable
- Give vendor PO number and send hard copy confirming (could be antiquated; what would be contract terms?)

Post Your Terms on the Company Website

- Insert references to the website terms in all contract documents as overriding any other agreement or provisions unless otherwise specifically agreed upon
  - Examples: bids, proposals, requests for quotations, requests for proposals, purchase orders, EDI agreements

Post Your Terms on the Company Website

- If you do, you must archive different versions for future claims to be certain what terms apply to a specific purchase or sale
- Indicate in any language referencing website purchase terms that those prevailing on a certain date will prevail
  - Example: date of order, date of delivery, effective date of agreement, etc.
- Revisit yearly along with <u>all</u> boilerplate agreements

Otherwise Communicate Terms to Supply Chain

- Yearly communication to vendor base or customer base regarding terms and conditions and related requirements
  - "Dear Valued Supplier (or Customer) …."

Failure to Enforce Your Own Terms or Object to Other Contracting Party's Terms

- "Surprise" terms from other contracting party
- You lose on the "battle of the forms"
- You agree to terms that you have never seen (Bombardier example)
- Do not let the other party's offer of terms go unchallenged; silence may be interpreted as acquiescence (equitable estoppel)

Purchase Order Example

05/17/2004 14:46 FAX 6618243118 Progress Rail @001

May-17-2004 01:18pm From- T-357 P.001/001 F-681

Purchase Order 9795

Order Date 05/20/2003

BOMBARDIER
TRANSPORTATION

Vendor:
PROGRESS RAIL (MOJAVE)
1665 KINNICUTT RD.
MOJAVE, CA 93502

Ship To:
Bombardier - Los Angeles
1555 San Fernando Road
Los Angeles, CA 90065 USA
(323) 224-3458 phone
(323) 222-1470 fax

Vendor	Vendor Fax Number	Vendor Telephone Number	Ship Via	F.O.B.	Terms
000032	661-824-3118	(661) 824-0551	Progress	origin	30 net

Buyer	Confirming To		Freight
D.W.			COLLECT

Line	Qty. Ordered / Qty. Received	Unit of Measure / Qty. Open	Your Item Number / Item Description	Our Item Number	Unit Price / Date Required	Extended Price
1	5 5	EA 0	n/a Wheel assembly, f59ph loco "B"	29-555-00008R	2600.00000 06/20/2003	13000.00
2	4 4	EA 0	n/a Wheel assy, F59 PHI loco (BTR)	29-555-00012R	3025.00000 06/20/2003	12100.00

Acceptance of this Purchase Order will confirm agreement with all TERMS & CONDITIONS & PRICING as printed on all documents herein.

MR# 15923 - Repair and Return - QTP codes 101, 303, 305
11-19-2003 - NCR#0361 - Warranty Return - Serial #s 14565, 14560 & 14320
Undersized Axle Clearance.

Non Taxable Subtotal	0.00
Taxable Subtotal	25,100.00
Tax (8.25%)	2,070.75
Total Order	27,170.75

Printed 05/17/2004 12:47:35
Page 1 Purchase Order 9795 / Rev. C

Per: ______ Authorized Signature

FB

04/27/2004 17:35 FAX 6618243119 Progress Rail T-777 P.002/004 F-784 003

Dec-19-2003 10:58am From-

BOMBARDIER
TRANSPORTATION

Purchase Order Terms & Conditions

1- THE SUPPLIER EXPRESSLY RECOGNIZES THAT HE HAS FULL KNOWLEDGE OF THE INTENDED USE OF THE GOODS, MATERIAL, EQUIPMENT AND PARTS (HEREAFTER CALLED "THE GOODS") TO BE DELIVERED IN ACCORDANCE WITH THIS ORDER. THE SUPPLIER WARRANTS THAT THE GOODS WILL CONFORM TO ANY SAMPLE, SPECIFICATIONS, DRAWINGS OR OTHER DESCRIPTION FURNISHED BY BOMBARDIER OR REFERENCED TO HEREIN. THE SUPPLIER WARRANTS THAT THE GOODS WILL BE FREE FROM ANY DEFECT, WILL BE DELIVERED IN ACCORDANCE WITH THE DELIVERY DATES SPECIFIED AND WARRANTS THAT HE WILL RESPECT ALL TERMS AND CONDITIONS OF THE PRESENT ORDER. OTHERWISE, BOMBARDIER MAY CANCEL THIS ORDER WITHOUT ANY COSTS AND PURCHASE THE GOODS FROM ANY OTHER SOURCE. IN THIS EVENT, ANY EXCESS COST INCURRED BY BOMBARDIER AS A RESULT SHALL BE TO THE SUPPLIER'S ACCOUNT AND PAYABLE BY THE SUPPLIER WITHIN 15 DAYS OF DEMAND OR SUCH SUM MAY BE DEDUCTED FROM MONIES DUE OR TO BECOME DUE TO THE SUPPLIER BY BOMBARDIER. DURING THE WARRANTY PERIOD, IF THE GOODS OR ANY PART OF THE GOODS ARE FOUND TO BE DEFECTIVE OR FAIL TO MEET THESE ORDER REQUIREMENTS, THE SUPPLIER SHALL, AT HIS OWN EXPENSE, REPLACE AT THE DELIVERY POINT ANY SUCH GOODS OR PART THEREOF. BOMBARDIER, AT ITS OPTION, MAY REPAIR OR REPLACE SUCH DEFECTIVE GOODS OR PART THEREOF AND CHARGE IT TO THE SUPPLIER AS DESCRIBED IN PARAGRAPH 3 BELOW. ANY WARRANTY EXPRESSLY CONTAINED IN THIS ORDER OR IN ANY SPECIAL ATTACHMENT THERETO WILL NOT LIMIT THE APPLICATION OF ANY IMPLIED WARRANTIES, CONDITIONS OR OF ANY LEGAL WARRANTIES.

2- THE SUPPLIER SHALL BE SOLELY RESPONSIBLE FOR AND WILL FURTHER DEFEND AND INDEMNIFY BOMBARDIER, UPON DEMAND, FROM AND AGAINST ALL CLAIMS, ACTIONS, LIABILITY, LOSS AND EXPENSE (INCLUDING INVESTIGATION EXPENSE AND ATTORNEY FEES INCURRED IN LITIGATION OR BECAUSE OF THE THREAT OF LITIGATION), ARISING OR ALLEGED TO ARISE FROM ACTS OR OMISSIONS OF THE SUPPLIER OR FROM DEFECTS OR ALLEGED DEFECTS, WHETHER LATENT OR PATENT, IN THE GOODS OR WORKMANSHIP ON THE GOODS OR DEFECTIVE DESIGN OF THE GOODS PURCHASED BY BOMBARDIER FROM THE SUPPLIER.

3- ALL GOODS SUPPLIED UNDER THIS ORDER ARE SUBJECT TO INSPECTION AND APPROVAL BY BOMBARDIER OR ITS AGENTS AT ORIGIN AND DESTINATION. IF THE GOODS OR ANY PART THEREOF ARE CONSIDERED TO BE DEFECTIVE BY BOMBARDIER, THE SUPPLIER SHALL BEAR THE COST OF INSPECTION AND TRANSPORTATION OF SAID GOODS, IF REQUESTED BY BOMBARDIER, TO HIS

2- THE SUPPLIER SHALL BE SOLELY RESPONSIBLE FOR AND WILL FURTHER DEFEND AND INDEMNIFY BOMBARDIER, UPON DEMAND, FROM AND AGAINST ALL CLAIMS, ACTIONS, LIABILITY, LOSS AND EXPENSE (INCLUDING INVESTIGATION EXPENSE AND ATTORNEY FEES INCURRED IN LITIGATION OR BECAUSE OF THE THREAT OF LITIGATION), ARISING OR ALLEGED TO ARISE FROM ACTS OR OMISSIONS OF THE SUPPLIER OR FROM DEFECTS OR ALLEGED DEFECTS, WHETHER LATENT OR PATENT, IN THE GOODS OR WORKMANSHIP ON THE GOODS OR DEFECTIVE DESIGN OF THE GOODS PURCHASED BY BOMBARDIER FROM THE SUPPLIER.

Letters of Intent and Pre-Contractual Documents

What is a Letter of Intent?

- A pre-contractual written instrument that reflects preliminary agreements of understandings of one or more parties to a future contract

- "A gentleman's agreement is an arrangement which is not an agreement, entered into between two persons, neither of whom is a gentleman, with each expecting the other to be strictly bound while he himself has no intention of being bound at all."

  Justice Vaisey

Uses and Types of Letters of Intent

1. Assurance Letters of Intent

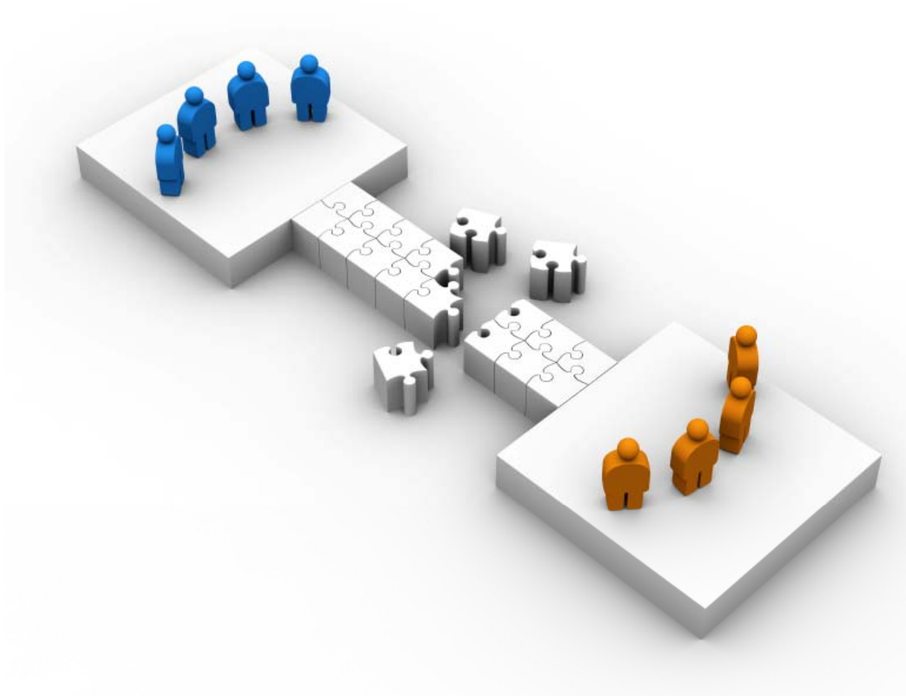
- Used to indicate seriousness of intention to advance negotiation:
  - Intent to place an order
  - To form joint binding arrangement
  - Demonstrate exclusivity between the parties in negotiating a transaction
  - Demonstration of progress

2. Framework Letters of Intent

- Framework for future negotiations which might include:
  - Setting forth responsibilities for various aspects of negotiation
  - Dates and milestones
  - Identity of agreements to be negotiated
  - Scope of effort

3. Publicity Letters of Intent

- Public announcements of mergers or publicity for negotiations benefiting the parties



4. Memorialization Letters of Intent

- Record preliminary agreements
- Partial agreements
- Areas that are not agreed
- “Moral commitment”

5. Contracts

- Letters of intent can be misidentified contracts
  - Contains virtually all materials terms
  - Record agreement on terms
  - May contain condition precedent
  - *Even if* the LOI contemplates a follow on formal agreement

Letters of Intent Usually End up in One of These Categories

- A complete agreement with the contemplation of a future agreement disregarded when one party refuses to perform
- A pre-contractual agreement imposing a contractual obligation to execute a follow-on agreement or perform in accordance with the pre-contractual agreement
- Nonbinding with respect to the primary transaction contemplated but, still enforceable with respect to certain portions relating to subsequent negotiation (good faith, confidentiality, allocation of cost)
- Totally nonbinding

Key Questions to Guide Formation of a LOI

- What do I want to accomplish? Will the LOI proposed accomplish this purpose?
- Should it be binding or nonbinding? Say so!
- Will timing considerations allow a follow-on agreement to be negotiated later?
- Should you include a time limit for conclusion of negotiations or "all bets are off"?

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Key Questions to Guide Formation of a LOI

- Are there provisions that should be binding in a generally nonbinding letter?
  - Confidentiality
  - Exclusivity or negotiation, obligation to negotiate in good faith
  - Payment of costs
  - Choice of law
  - Disputes

What Courts Consider When Determining if a LOI is a Contract

- Intention of the parties
- Completeness of agreements

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Intention of the Parties

- If the parties intend that the agreement be subject to further agreements or where there is not complete agreement, courts will honor those intentions if they are ***clearly*** expressed
- The intention is the OBJECTIVE intention of the parties, not the SUBJECTIVE intention of the parties

Corbin on Contracts

- Communications between, and acts of, parties, one of whom alleges that a contract was formed despite contemplation, evidenced by those communications or acts, of a subsequent formalization of that alleged contract, may give rise to contractual obligations if:
  - The communications and acts contain or imply all essential terms necessary to the formation of a contract
  - The parties may reasonably be expected to have understood that those essential terms were agreed to and
  - Negotiation of the subsequent, formal agreement contemplated is limited to those terms not essential to the existence of contractual rights and obligations between the parties

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Completeness of Agreements Depends Upon

- Is there a reference to future agreements?
- Has there been part performance? (Suggests complete agreement)
- What is the magnitude and complexity of the proposed transaction?
- Mere “agreement to agree”?

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Completeness of Agreements Depends Upon

- Contract negotiation language?
- Was there a lack of consideration?
- Prepared in contractual form using words like "understanding and agreement", "shall", and "agree"
- Any future approvals referenced? (board of directors, higher level management)

So How do I get what I Intend?

- Focus on the purpose
- Be absolutely clear
  - Be extra careful with the language of the letter

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Contractual Negation Clause

A. This letter of intent is not a contract, and neither of us intends that the preliminary understandings contained herein represent our final agreement as to the transaction we are discussing. The preliminary understandings expressed in this letter of intent are subject to, and conditioned on, the negotiation and execution of such definitive and final contracts without liability or obligation to the other party. Either party is free to enter into negotiations with other potential contract partners with respect to the transaction described in this letter of intent. Each party shall be responsible for its own expenses prior to the execution of definitive and final contracts, and any actions taken by other parties in reliance on the preliminary agreements expressed herein shall be at that party's own risk.

B. This letter of intent is not an agreement to negotiate. The parties do not intend to be obligated to use their best efforts or to reach an agreement on the definitive and final contract described above. The parties do not intend to be obligated to negotiate in good faith to reach an agreement on the definitive and final contract.

- Let your ‘Yes’ mean ‘Yes’ and your ‘No’ mean ‘No.’ Anything more is from the evil one.

  Matthew 5:37

Flow-Downs (Both Ways)

Government Contract Requirements

- Include government contract flow-downs
  - Basic mandatory FAR flow downs regarding small and disadvantaged business
  - Executive Order 11246
  - General clause covering all potential FAR potential flow-downs from customer
  - Do not be ignorant of potential FAR contract clause flow-downs that might apply to you through your customer; the consequences can be severe, particularly in today's contracting environment, and under this administration

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Social Issues/Concerns

- Conflict metals (Congo and others)
- "Sweatshop"/child Labor
- Environmental – WEE, RoHS
- Anti-bribery
- Human trafficking (including debt bondage, force labor, involuntary servitude)

Warranty Flow-Through from Supplier to Customer/Third Parties

- Length
- Remedies
  - Repair, replacement, credit, turnaround time?
- Disclaimers
  - Merchantability/fitness for particular purpose

Warranty Flow-Through from Supplier to Customer/Third Parties

- Beware of issues in distribution
  - Does manufacturer's warranty flow-through?
  - What if that warranty is limited only to the first buyer of the product?
  - Contract privity issues/add "… and its customers/ ultimate users"?

Indemnity Flow-Through from Supplier to Customer/Third Parties

- Intellectual property
  - Third party software
  - Even if item is not resold or incorporated into the product sold
    - “Make, use, or sell” issues (Jerry Lemelson)

Indemnity Flow-Through from Supplier to Customer/Third Parties

- Intellectual property
  - ALL intellectual property rights: patents, copyright, trademark, trade secrets
  - Worldwide, not just U.S.
  - Include attorney's fees (most likely largest expenditure)

Battle of Forms

Colorado Statutes §4-2-207

- A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms

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Battle of Forms

Colorado Statutes §4-2-207

- A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time, operates as an acceptance even though it states terms additional to or different from those offered or agreed upon
  - Mirror image rule out

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Battle of Forms

Colorado Statutes §4-2-207

- Unless acceptance is expressly made conditional on assent to the additional or different terms
  - No acceptance, no contract formed

Battle of Forms

Colorado Statutes §4-2-207

- The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
  - The offer expressly limits acceptance to the terms of the offer;
  - They materially alter it; or
  - Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Battle of Forms

Colorado Statutes §4-2-207

- What if:
  - Failure to agree on "major terms"?
  - Terms not "assented to"?

Battle of Forms

Colorado Statutes §4-2-207

- Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case, the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this title.

- Expect to live with technical purchase order rules under the law, and understand the "battle of the forms"
- Do not be a fool or a sissy!
  - Do not whine about the fact that terms were in fine print, no authorized person signed up to them, or they are unfair; courts do not care between sophisticated merchant parties

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Questions?

Indemnity and Limitation of Liability Provisions

What is an Indemnity?

Indemnity (in-dem-nə-tee), n. 1. A duty to make good any loss, damage, or liability incurred by another. 2. The right of an injured party to claim reimbursement for its loss, damage, or liability from a person who has such a duty. 3. Reimbursement or compensation for loss, damage, or liability in tort; esp., the right of a party who is secondarily liable to recover from the party who is primarily liable for reimbursement of expenditures paid to a third party for injuries resulting from a violation of a common-law duty.

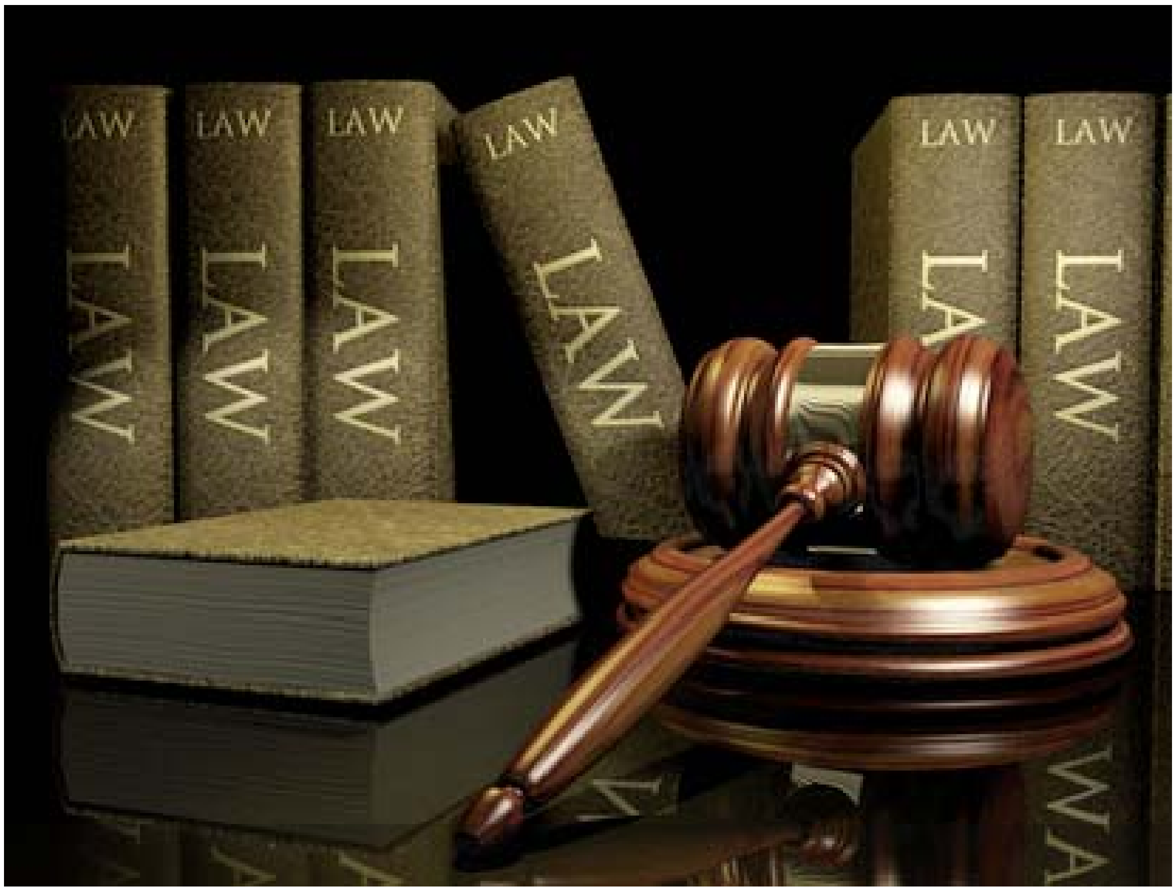
Black's Law Dictionary

What is an Indemnity?

"to claim reimbursement…
from a party who has such a duty"

- The duty may arise either:
  - By Operation of Law
  - By Contract

Indemnity by Operation of Law



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Indemnity by Operation of Law

- State-specific
- Arise automatically as a result of either common law or statutory law
- Some provisions may be subject to contractual waiver, but many will operate even if the parties attempt to contract around them

Indemnity by Operation of Law
Common Law

- Traditionally "all or nothing" – not a comparative negligence standard or contribution requirement
- Ensures that the innocent plaintiff has the best chance of being made whole because he/she can sue multiple parties; but still places the ultimate liability on the party truly at fault

Indemnity by Operation of Law

Common Law

- A lumberman was hired to remove certain trees on a landowner's property. Relying on the landowner's representation of the boundary lines of his property, the lumberman accidentally removed timber from a neighbor's property. The neighbor sued the lumberman for trespass and obtained a $5,400 judgment against him. The court found that the lumberman had a right to indemnification from the landowner because the landowner's false representations were the reason for the trespass.
  - <u>Creel v. Crim</u>, 812 So. 2d 1259 (Ala. Civ. App. 2001).

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Indemnity by Operation of Law

Statutory

- An example of the natural progression of the codification of common law
- Many indemnity statutes provide more protection for indemnified parties than was available under common law
- "Seller's Protection Statutes"- driven in large part by the changes in products liability law that increased distributor liability

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Indemnity by Operation of Law

Statutory

Texas Civil Code § 82.002

A. A manufacturer shall indemnify and hold harmless a seller against loss arising out of a products liability action, except for any loss caused by the seller's negligence, intentional misconduct, or other act or omission, such as negligently modifying or altering the product, for which the seller is independently liable.

B. For purposes of this section, "loss" includes court costs and other reasonable expenses, reasonable attorneys' fees, and any reasonable damages.

C. Damages awarded by the trier of fact shall, on final judgment, be deemed reasonable for purposes of this section.

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Indemnity by Operation of Law

Statutory

D. For purposes of this section, a wholesale distributor or retail seller who completely or partially assembles a product with the manufacturer's instructions shall be considered a seller.

E. The duty to indemnify under this section:
   1. applies without regard to the manner in which the action is concluded; and
   2. is in addition to any duty to indemnify established by law, contract, or otherwise.

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Indemnity by Operation of Law

Statutory

F. A seller eligible for indemnification under this section shall give reasonable notice to the manufacturer of a product claimed in a petition or complaint to be defective, unless the manufacturer has been served as a party or otherwise has actual notice of the action.

G. A seller is entitled to recover from the manufacturer court costs and other reasonable expenses, reasonable attorneys' fees, and any reasonable damages incurred by the seller to enforce the seller's right to indemnification under this section.

Contractual Indemnification

- Indemnity clause – A contractual provision in which one party agrees to answer for any specified or unspecified liability or harm that the other party might incur. Black's Law Dictionary.

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Contractual Indemnification

Example 1

"To the fullest extent permitted by applicable law, *ALPHA* shall indemnify and hold harmless *BETA* for all judgments, awards, claims, demands, and expenses, including without limitation, attorneys' fees, environmental damage, hazardous materials damage, fines or penalties, for injury or death to all persons, including *BETA'S* and *ALPHA'S* officers and employees, and for loss and damage to property belonging to any person, arising in any manner from *ALPHA'S* or any of *ALPHA'S* subcontractors' acts or omissions, including but not limited to any failure to perform any obligation hereunder. THE LIABILITY ASSUMED BY *ALPHA* SHALL NOT BE AFFECTED BY ANY FACT OR ALLEGATION THAT THE DESTRUCTION, DAMAGE, DEATH, OR INJURY WAS OCCASIONED BY OR CONTRIBUTED TO BY THE NEGLIGENCE OF *BETA*, ITS AGENTS, SERVANTS, EMPLOYEES OR OTHERWISE UNLESS WHOLLY CAUSED BY THE SOLE NEGLIGENCE OR INTENTIONAL MISCONDUCT OF *BETA*." (emphasis in original)

Contractual Indemnification

- Will a contract in Colorado where one party agrees to indemnify another for his/her negligence be enforced?

Contractual Indemnification

- Yes, if:
  - clear and unequivocal expression that parties intended the result
  - if sophisticated business parties in commercial setting with equal bargaining power, broad indemnity language is usually enough
  - <u>Constable v. Northglenn</u> 248 P.3d 714 (2011)

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Contractual Indemnification

Example 2

"*ALPHA* shall indemnify, defend, and hold [*BETA* and its] affiliates, shareholders, directors, officers, employees, contractors, agents and other representatives harmless from all claims based upon personal injury (including death) or property damage to the extent any of the foregoing is proximately caused either by a *ALPHA*-furnished item, a defective product, by the negligent or willful acts or omissions of *ALPHA* or its officers, employees, subcontractors or agents, or strict liability in tort."

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Contractual Indemnification

Characteristics of an Indemnity Clause

- Types of Indemnity Clauses
- Limitations to the Indemnity Clause
- Parties to the Indemnity Clause
- Scope of the Indemnity Clause
- Control of Defense under the Indemnity Clause
- Duration of the Indemnity Clause Obligation

Types of Indemnity Clauses

…or what types of claims will be paid?

- Personal Injury
- Injury to Property
- Environmental
- Intellectual Property Infringement
- Products Liability
- Contractual Liability
- Loss/Theft of Consigned Material

Types of Indemnity Clauses

…or what types of claims will be paid?

- Tailor each clause to the unique risk areas of your industry and the particular contract.
- No indemnification clause can totally eliminate a party's risk or responsibilities, particularly in a heavily regulated industry.

Scope of the Indemnity Clause

…or how much will be paid?

- Compensatory Damages
- Punitive Damages
- Court Costs and Attorneys' Fees
- Fines or Penalties
- Interest
- Economic Loss
- Insurance Limits
- Breach of Contract

Limitations to the Indemnity Clause

Types of Damages

- Actual or compensatory damages, such as the cost of repairing damaged property.
- Expectation damages, or "benefit of the bargain."
- Consequential or indirect damages, such as lost profits, and other "downstream" damages.
- Incidental damages, such as costs of custody of faulty goods.
- Exemplary, special, or punitive damages.

Limitations to the Indemnity Clause

…and what claims will not be paid?

- May be phrased in either positive or negative terms. Either way, a limitation acts to clearly define the boundaries of the Indemnity Clause. You should consider:
  - Acts or omissions
  - Degree of fault
  - Certain Types of Damages
  - Applicability of Limitation of Liability Clause
  - Damages Payable only to third parties claiming against indemnitee or also claims from contracting party or indemnitee

Limitations to the Indemnity Clause

Degree of Fault

- Any act or omission may be:
  - Wholly your fault
  - Wholly their fault
  - Mostly your fault
  - Mostly their fault
  - Equally shared blame
- Where do you draw the line?

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Limitations to the Indemnity Clause

Degree of Fault

- Negligence: The failure to exercise that degree of care which a reasonable person would employ under the circumstances.
- Wantonness: Recklessly or consciously disregarding the harm likely to result from one's actions.
- Willfulness: Voluntarily and intentionally acting with knowledge; not necessarily the same as malice.
- Strict Liability: May be held liable without any fault; generally statutory and/or ultra-hazardous activities.

Limitations to the Indemnity Clause

Applicability of Limitation of Liability Clause

- Limitation of liability clauses specify the extent of the parties' liability to each other in case of breach of contract.
- Commonly exclude consequential damages, incidental, special, and punitive damages.
- May choose to "carve out" the indemnity clause to impose more or less limitations, either as an addition or exception to the existing clause, or as a totally separate clause.

Parties to the Clause

…or who indemnifies whom?

- Parties to the Contract
- "Members, directors, officers, shareholders, agents, contractors, employees, insurers"
- Affiliates of Parties, including parent company, subsidiaries
- Subcontractors
- Others in supply chain, including distributors and end users

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Control Under the Indemnity Clause

- Notice Requirements
- Control of Defense

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Control Under the Indemnity Clause

Notice Requirements

- Receiver of Notice:
  - Any agent/representative; designated agent; general counsel; or any combination thereof.
- Method of Notice:
  - Certified mail; facsimile; oral; electronic mail; or any combination thereof.
- Timing of Notice:
  - Within a certain time period of actual notice; within a certain time period of constructive notice.

Control Under the Indemnity Clause
Control of Defense

- Hiring or firing of counsel
- Paying for counsel
- Determining the objectives of representation
- Settlement authority

The indemnified party should always have at least veto power over all of these issues. This includes the right to have independent counsel at its own expense.

Control Under the Indemnity Clause
Control of Defense

Example 1:

ALPHA further agrees, at its expense, in the name and on behalf of *BETA*, that as to any claim or cause of action arising or growing out of or in any manner connected with any liability assumed by *ALPHA* under this Agreement for which *BETA* is liable or is alleged, by a third party, to be liable, *ALPHA* (1) shall adjust and settle all claims made against *BETA*, and (2) shall, at *BETA*'s discretion, appear and defend any suits or actions at law or in equity brought against *BETA*. *BETA* shall give notice to *ALPHA*, in writing, of the receipt or pendency of such claims and thereupon *ALPHA* shall proceed to adjust and handle to a conclusion such claims, and in the event of a suit being brought against *BETA*, *BETA* may forward summons and complaint or other process in connection therewith to *ALPHA*, and *ALPHA*, at *BETA*'s discretion, shall defend, adjust, or settle such suits and protect, indemnify, and save harmless *BETA* from and against all damages, judgments, decrees, attorneys' fees, costs, and expenses growing out of or resulting from or incident to any such claims or suits.

Duration of Indemnity Clause
…or how long will claims be paid?

- Contract term
- Term of years
- Unlimited
- Expiration/Termination Events

Duration of Indemnity Clause

…or how long will claims be paid?

Example 1:

1. Duration of Agreement and Termination:

However, no termination or cancellation of this Agreement shall release either party from any liability or obligation under this Agreement, whether of indemnity or otherwise, resulting from any acts, omissions or events happening prior to the date of such termination or cancellation.

Duration of Indemnity Clause

…or how long will claims be paid?

Example 2:

2. Release of Liability and Indemnification:

It is mutually understood and agreed that the assumption of liabilities and indemnification provided for in this Agreement shall survive any termination of this Agreement.

Negotiating An Indemnity Clause

- First position NO indemnity
- No indemnities beyond what the law requires
- Indemnify only to the extent of own fault, with limited liability
- Mutuality of Clause (from viewpoint of likely indemnitor)

“Legalese” Matters

- “To the fullest extent permissible by law…”
- “Including, but not limited to:”
- “In addition to all other rights and remedies under the Agreement and applicable law…”
- Cumulative or Sole Remedy Clauses
- Severability Clauses

Reviewing the Example Clauses

	Indemnity Clause # 1	Indemnity Clause # 2
Type	Personal injury, property damage, environmental, legal, hazardous material	personal injury and property damage
Scope	"all judgments, awards, claims, demands, and expenses, including without limitation, attorney fees. . . fines and penalties"	"all claims" and specifically mentions defense obligations
Limitations	unless the claims are wholly caused by the sole negligence or intentional misconduct of Company B	To the extent that those claims are proximately caused by 1) an item furnished by Company A; 2) a defective Product; 3) negligent or willful acts or omissions, or strict liability. (Limitation of Liability Clause does not apply.)
Parties	Company B	Company B and "all affiliates, shareholders, directors, officers, employees, contractors, agents and other representatives"
Control	Duty to defend; but at Company B's discretion	"Defend" -- unspecified
Duration	Perpetual	Unspecified

Other Risk-Shifting Devices

- Limitations of Liability
- Definition of Scope of Work
- Warranties
- Insurance Requirements

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Other Risk-Shifting Devices

Definition of Scope of Work

American Institute of Architects 2.2.3

The Owner shall furnish surveys describing physical characteristics, legal limitations, and utility locations for the site of the Project, and a legal description of the site. The Contractor shall be entitled to rely on the accuracy of information furnished by the Owner but shall exercise proper precautions relating to the safe performance of the work.

Other Risk-Shifting Devices

Warranties

13) **<u>WARRANTY</u>**

a) ***ALPHA*** warrants that (i) the Work…shall be performed in a thoroughly workmanlike manner to comply with the Standards….Any omission or failure on the part of ***BETA*** to disapprove or reject any Work…shall not be construed as an acceptance thereof, and this shall not waive any other ***BETA*** rights at law or in equity with respect to any defective or substandard workmanship. All work and material shall be at all times open to the inspection of, and acceptance or rejection by ***BETA*** in accordance with the Standards.

b) THIS WARRANTY DOES NOT COVER, AND ***ALPHA*** SHALL NOT BE RESPONSIBLE FOR, FAILURES CAUSED BY IMPROPER USE....

Other Risk-Shifting Devices

Insurance Clauses

Article 11.4.7, AIA Form A201 (1997)

The Owner and Contractor waive all rights against (1) each other and any of their subcontractors, sub-subcontractors, agents and employees, each of the other, and (2) the Architect, Architect's consultants, …for damages caused by fire or other causes of loss to the extent covered by property insurance obtained pursuant to this paragraph or other property insurance applicable to the Work.

Drafting an Indemnity Clause

Summary

- Do I need an indemnity clause?
- What are my areas of risk for which I may need to be indemnified/indemnify others?
- Who should be covered by the clause?
- What will and will not be paid for?
- How much control do each of the parties have over the indemnification process?
- How long will the indemnity clause be effective?

Limitation of Liability

- (beyond warranty disclaimers)

Consequential and Incidental Damages

- May be limited or excluded unless unconscionable (personal injury in sale of consumer goods but not in commercial context)

- Consequential Damages may include economic loss including loss of profits, damage to goodwill or business reputation and personal injury or property damage.
- Incidental Damages include cost of “cover” or buying substitute goods, storage, or inspection charges and freight.

Liquidated Damages

- Damages may be "fixed" or "liquidated," if reasonable in light of the anticipated or actual harm caused by a breach!
- Daily dollar amount related to non delivery, failure to meet quality or other performance parameter(s)

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Unconscionability

- Is a question for the court and is a principle to prevent oppression and unfair surprise and not to disturb the allocation of risks because of superior bargaining power. Measured at the time of contracting.

Noncontract Damages

- Torts including negligence, strict liability, fraud, trespass
- Punitive damages(?), only in tort, not a contract issue
- Lawsuits often filed for torts to do an "end around" legitimate UCC contract limitations.

Limitation of Liability

- IN NO EVENT SHALL EITHER PARTY BE LIABLE TO THE OTHER PARTY FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL OR PUNITIVE DAMAGES OF ANY KIND OR NATURE ARISING OUT OF OR RELATING TO THIS AGREEMENT OR CONNECTED WITH OR RESULTING FROM THE MANUFACTURE, SALE, DELIVERY, RESALE, REPAIR, REPLACEMENT, OR USE OF ANY PRODUCTS OR THE FURNISHING OF ANY SERVICE OR PART THEREOF, WHETHER SUCH LIABILITY IS BASED IN CONTRACT, TORT, NEGLIGENCE, STRICT LIABILITY OR OTHERWISE, EVEN IF SUCH PARTY HAD BEEN WARNED OF THE POSSIBILITY OF ANY SUCH DAMAGES.

Other Seller Strategies or Compromises by Buyer, Besides Exclusion?

- Liquidated Damages
  - Limit to overtime and freight
  - Limit to profit

- For All Damages
  - Limit to price paid for goods
  - Limit to certain dollar amount
  - Percentage of revenue

Conversely, Buyer Will Want All These Damages (plus epidemic failure and recall coverage)

- Epidemic Failure
- Same failure mode
- Limit to warranty coverage
- “Super warranty”
- Limited time frame
- Recall
- NEVER agree without insurance
- Put cost into product cost
- Buy product to product

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Always Argue Facts Surrounding the Procurement

- Buyer
  - Sole source
  - Penalties from customer
  - Other quick source not available if failure
  - Motivate seller to perform
  - Others accept
- Seller
  - Increases costs of doing business
  - Diverts resources from intended application
  - Other do not accept

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Questions?

Contingent Employees, Independent Contractors and Labor Outsourcing

Use of Contingent Workers or Outsourcing Continues to Increase

- Reduces costs
- Allows company to focus on "core competencies"
- Allows for flexibility
- Maintains competitiveness

Misconception

- Classifying a worker as an independent contractor, hiring workers through a third-party or retaining a third party to provide outsourced services, relieves a company of any obligations related to the employment relationship including federal and state labor laws

Fact

- Such classifications and relationships if properly structured MIGHT place the burden of compliance and liability on another party, but in many cases an employer will be responsible or jointly liable with another party

Flavors of Contingent Workers

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Independent Contractors

- Self-employed individual
- Performing specialized task
- Requiring a high level of independence, judgment, skill, and discretion
- Compensated on the contract or fee basis (not hourly)
- Provides services to many clients

Outsourcing

- Independent firm
- Expertise in providing services in a specific area
- Full operational responsibility for providing service

Employee Leasing/Professional Employer Organization (PEO) Arrangement

- Transfer of company employees to leasing company
- Leasing company performs human resource related tasks including payroll, record maintenance, and administration of benefit programs

Temporary Employees

- Agency recruits, tests, screens, and hires employees
- Agency pays employees
- Usually done for flexibility, temporary skill shortages, or due to workload fluctuation

So, who is an employee?

Lack of Clear Meaningful Statutory Definition of Employee

- Well, that depends…

“The Common Law Test”

- Employed by federal agencies and courts to determine employee status
  - Nationwide Mutual Insurance Co. *v*. Darden, 503 U.S. 318 (1992)

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- “In determining whether hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”

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Among the Other Factors Relevant to This Inquiry Are:

- The source of the instrumentalities and tools;
- The location of the work;
- The duration of the relationship between the parties;
- Whether the hiring party has the right to assign additional projects to the hired party;
- The extent of the hired party's discretion over when and how long to work;
- The skill required;
- The method of payment, the hired party's role in hiring and paying assistants;
- Whether the work is part of the regular business of the hiring party;
- Whether the hiring party is in business; the provision of employee benefits;
- The tax treatment of the hired party.

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The Fair Labor Standards Act Variation

- The FLSA defines an employee as "any individual employed by an employer" and defines employ to mean "suffer or permit to work"

FLSA Considers the Following Factors:

- The degree of the alleged employer's right to control the manner in which the work is performed
- The alleged employees opportunity for profit or loss depending upon managerial skill
- The alleged employee's investment in equipment or materials required for the work
- Whether the service rendered requires special skills
- The degree of permanence in the working relationship, etc.

Internal Revenue Service Guidelines

- The IRS has published its own interpretation of the common law or "right of control test" which contains 20 factors
- These are evidentiary considerations used in applying the test
- The first factor is:
    1. Instructions. "A worker who is required to comply with other person's instructions about when, where, and how he or she is to work is ordinarily an employee"

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- So whether a worker is an employee of your company or you are a joint employee or with another third party boils down to:
  - Your particular facts and circumstances with particular emphasis on how much supervisory control your company exercises over the day-to-day activity of the worker; and
  - The applicable law under which an issue arises

Supervisory Control

- Temporary and leased employees are generally joint employees for the purpose of federal labor law
- Simply classifying workers as employees of a temporary agency or calling them “independent contractors” will not prevent a finding of joint employment if the facts and circumstances dictate otherwise

Microsoft and "Permatemps"

- Vizcaino v. Microsoft--$96 million class-action lawsuit by "permatemps" to receive employee benefits including stock options, 401(k) benefits and other company "perks"
  - Temporary agency sent paychecks and W-2 forms, no more
  - Shared same supervisors
  - Performed identical functions
  - Worked the same core hours
  - Were classified as "independent contractors"

Specific Laws and Treatment of the Contingent Worker Relationship

Equal Employment Opportunity

- EEOC Enforcement Guidance– Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms (1997)
  - Title VII (race, religion, sex, national origin)
  - Age Discrimination in Employment Act
  - Equal Pay Act
  - Americans with Disabilities Act

EEOC

- Joint liability arises when those businesses have the right to exercise control over the workers employment
- Joint control occurs in most situations except "true" independent contractor
- Contingent workers must be counted for coverage thresholds (15 for Title VII and ADA, 20 for ADEA)

Example:

- An assembler who is hired through a temporary agency to work on a client's assembly line sexually harasses a co-worker
- The temporary agency and the client will have joint liability
- Who should answer the Charge of Discrimination when the harassed co-worker files it with the EEOC?

Wage and Hour Fair Labor Standards Act (FLSA)

- Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employers control, is controlled by, or is under common control with the other employer

- If the temporary agency refuses to pay overtime to its employees who are working at a client’s location, the temporary agency and the client will be liable for overtime payments jointly, even if the temporary employees signed agreements saying that they are “independent contractors”

Form Over Substance

Family and Medical Leave

- Where two or more businesses exercise some control over the work or working conditions of the employee, the businesses may be joint employers under FMLA

- A joint employment relationship generally will be considered to exist in situations such as:
  - Where there is an arrangement between employers to share an employee's services or to interchange employees;
  - Where one employer acts directly or indirectly in the interest of the other employer in relation to the employee; or
  - Where the employers are not completely disassociated with respect to the employee's employment and may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer
  - 29 CFR 825.106 (a)

FMLA

- ONLY the “primary employer” is responsible for giving FMLA notices, approving required leaves, and maintaining health benefits.
- The primary employer has prime responsibility for job restoration.
- The “secondary employer” must allow a temporary employee returning from leave to continue working at the client site, even if that means bumping another temporary worker.
- BOTH employers are liable for interference with the exercise of the right by the worker.

Occupational Safety and Health

- Both employer and client companies are jointly liable
- HOWEVER, whoever controls the workplace is primarily liable
- OSHA's policy is less stringent than other federal agencies

WHY?

- Workplace employer is most likely to create or expose the worker to the hazard
- Workplace employer is required to maintain records of illnesses and injuries
- Workplace employer is responsible for notification under OSHA's "Hazard Communication Standard"

Labor Relations/National Labor Relations Act

- Covers employees but not independent contractors
- Current NLRB under Bush administration interprets the Act to require joint employers consent for including contingent workers in the bargaining unit
- Takes the position that the NLRB is not authorized to direct elections in units encompassing the employees of more than one employer (joint employers)

Employee Benefits Leased Employee Definition

- Perform services for a company of the same type normally performed by the Company's employees
- On the substantially full-time basis
- Is not on the company's own payroll
- Must perform services for more than a year (except for core health benefits like health benefits other than dental, vision, psychological, etc. the service period is six months)

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- Leased employees must be included in employee pension plans under certain conditions
- Prevents employers from hiring employees through an agency to avoid paying leased employees similarly situated as the company's "regular employees" pensions

ERISA Allows Employers to:

- Exclude employees with less than one year of service
- Distinguish between groups or categories of employees, providing benefits for some groups but not others
- Be the sole judge of what benefits it provides
- Exclude employees who meet the "common law" employee test in pension and 401(k) plans

Immigration Reform and Control Act

- The term employer means a person or entity, including an agent or anyone acting directly or indirectly in the interest thereof, who engages the services or labor of an employee to be performed in the United States for wages or other remuneration. In the case of an independent contractor or contract labor or services, the term employer shall mean the independent contractor or contractor and not the person or entity using the contract labor
  - 8 CFR Section 274a.1

- So if I do my I-9’s on my employees, I do not have to worry about my contractors…
- Right?

- Welcome to Wal-Mart!!

Use of Labor Through Contract

- Any person or entity who uses a contract, subcontract, or exchange entered into, renegotiated, or extended after November 6, 1986, to obtain the labor or services of an alien in the United States knowing that the alien is an unauthorized alien with respect to performing such labor or services, shall be considered to have hired the alien for employment in the United States in violation of section 274A(a)(1)(A) of the Act
  - 8 CFR Section 274a.5

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- Officials said at the time of the raids the investigation involved wiretaps that revealed Wal-Mart executives were aware that the subcontractors used illegal workers
- "We are satisfied that this is being settled as a civil matter," Wal-Mart spokeswoman Mona Williams said. "Despite a long, thorough and high-profile investigation, the government has not charged anyone at Wal-Mart with wrongdoing."
- The headline to this story read…

Wal-Mart Settles Illegal Immigrant Case for $11M

- Saturday, March 19, 2005
- A record fine in a civil immigration case…

- IF YOU KNOW (here, it was mid-level management)…
- YOU PAY (so much for saving with outsourcing)

- So, how do I avoid these problems and minimize my risk?

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- Carefully select reputable and solvent contingent worker provider firms
- Ask firms under consideration to provide references to verify financial stability

Written Agreement

- Statement of work
- Compliance with laws
- Indemnity for breach
- Reference agency's policies regarding workplace behavior, etc.
- Confidentiality, same as employees

Insurance

- Are agency employees covered by policy (yours and theirs?)
- Certificate of Insurance with Employers' Liability and Statutory Workers' Compensation Coverage

Upon Employment

- Furnish the workers with copies of any equal employment opportunity, sexual harassment, and grievance policies
- Treat any complaint of discrimination from such workers like a regular employee's complaint by investigating promptly, and if necessary, taking corrective action
- Notify and coordinate with agency

- Do not make discriminatory requests of a contingent worker provider
- Requesting that temporary employees assigned to the company be of a certain gender or national origin
- Requesting that an agency remove an outsourced worker from an assignment because he or she has a disability

Payroll

- Accurately report all overtime to the temporary or leasing firm
- Promptly look into any complaints that the temporary or leasing firm is not paying the employees properly

- Employers that issue W-2s and 1099’s for similar services, or that issue 1099’s for work traditionally performed by employees, may be subject to close scrutiny by the IRS (Microsoft issue)

Obama Administration View

- Many employees misclassified
- Need more investigators/auditors
- Added revenue from this activity in current budget

Obama Administration View

- Portraying employees as independent contractors circumvents:
  - Minimum wage (FLSA)
  - Overtime (FLSA)
  - Anti-discrimination laws (Title VII)
  - No workers' compensation
  - No benefits
  - No unemployment insurance

Obama Administration View

- Oh, and independent contractors cannot form/join unions under NRLB

- In conclusion, as the use of contingent workers continues to expand, courts and government agencies are devoting increasing attention to joint liability and other employment or labor law issues. By properly managing and structuring contingent worker arrangements, employers can avoid creating unanticipated obligations toward non-traditional workers

Questions?

Drafting Tips and Key Provisions in Procurement Agreements

Proper Parties

- Identify appropriate Buyer corporate entity/division and location
- Verify other party's full proper contracting name
- Signature by authorized officer or party

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Term of Agreement

- Beginning and end date
- Options to extend
- “Evergreen” year-to-year extension
- Termination for convenience, with notice

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Termination of Agreement/Orders Under Agreement

- For default, if material breach and after opportunity to cure and notice of breach
- Definition of the "material breach"
- Termination for convenience by either party with written notice

Orders

- Submitted by Purchase Order
- Vendor must accept or reject PO within 3 days of receipt; if not, deemed accepted
- If forecasts requested, only non-binding estimates – include express language that orders may be more or less

Price

- Of goods or services, firm for how long?
- Revisited after what period/indexed?
  - Find appropriate index including specific indentifying information
  - Base price?
  - Time periods to compare base price and index value

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Price

- By mutual agreement
- Currency of sale/payment
- Minimum quantities/available upside
- Market issues, fluctuations of metal or other commodities

Warranty

- Warranty on materials, design, workmanship;
- Direct warranty by vendor instead of "pass through" from manufacturer of any components to extent assignable
- Initial term of warranty; term for items replaced under warranty
- Services warranted to be in accordance with the agreed-upon specifications for agreed-upon time period, performed by qualified personnel
- Who pays for warranty returns both ways

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Warranty

- Non-exclusive remedies for warranty breach or remedies cumulative
- Avoid disclaimer of warranties of fitness for a particular purpose, infringement and merchantability
- Warranty against intellectual property infringement; whose design
- Good title; no liens or encumbrances

Limitation of Liability

- Specific and bold disclaimer of CONSEQUENTIAL, SPECIAL, DIRECT OR PUNITIVE DAMAGES BASED UPON NEGLIGENCE, BREACH OF WARRANTY, BREACH OF CONTRACT OR ANY OTHER THEORY OF LIABILITY. Unilateral or mutual if appropriate.
- "Carve out" any indemnity for intellectual property infringement so limitation does not apply to that subject matter or not

Scope of Work/Specifications

- Each incorporated specification must be attached in its entirety; clear references
- Environmental, health and safety requirements
- Other legal requirements or standards
- Applicable permits, approvals, licenses required to perform work

Compliance with Law

- By products and manufacture by vendor
- Import/export
- EEO
- Environmental
- Health and safety
- All applicable laws

Force Majeure

- Liability for delay or failure to perform if acts of God, war, terrorism, acts of violence of any kind, acts of public enemy, riots, civil disorders, insurrections, etc.; limit breadth by trying to exclude labor issues, transportation, shortages, or costs, etc.
- Ability to cancel, without liability, if delay exceeds XX number of days
- Fault or negligence excluded

Delivery

- Delivery point specified using INCOTERMS 2010® terms; know effect of responsibility under terms for import/export/insurance/risk of loss
- Passage of title
- Pricing includes import and export duties and licenses, brokers fees etc.
- Packaging, documentation requirements
- Date of delivery

Delivery

- Risk of loss prior to delivery/acceptance
- Carrier specified
- Premium freight if overdue at no cost to Buyer
- "Time is of the essence" language
- Properly packaged/contained, refer to specs if applicable

Product Acceptance

- Mutually agreed-upon acceptance /inspection criteria
- Specified location
- Deemed accepted if not rejected within XX number of days if beneficial to Buyer

Equipment/Tooling

- Retain title to all tooling paid for or maintained at Buyer's cost
- All drawings and Buyer-provided information is proprietary and may not be used except for agreement purpose
- Equipment used (especially on Buyer's premises) fit for intended purpose, in good repair, compliant with applicable law and operated by properly-licensed operator

Indemnity

- Depending on nature of work performed:
  - None
  - Environmental
  - For acts or omissions of a party
  - Infringement
  - Breach of agreement
- Always on intellectual property infringement from vendor, NEVER in favor of vendor except for Buyer negligence or infringement of build-to-print

Indemnity

- If in favor of Buyer, must survive termination of the agreement
- Always include obligation to defend with indemnity in favor of Buyer
- If in favor of vendor, should be mutual, balanced, and limited
- Must have for all Buyer's site visitors, plus insurance certificate
- Must be reviewed by legal department

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Assignment

- Mutual assignment clause allowing assignment to corporate successor to the business or to an affiliate owned, controlled with, or controlled by party
- With consent of other party which shall not be reasonably withheld or delayed to protect assignment to non-creditworthy party
- Not assignable if agreement for personal services or reliance on specific vendor for expertise

Notice

- Local Buyer, cc: Buyer's Legal Department/ Counsel
- By any method designed to produce a receipt for sender including FedEx, fax etc.
- Review periodically; circumstances changes

Creditworthiness

- Reviewed and authorized by corporate credit department
- Letter of credit or parent guaranty, if required
- Note reclamation rights under UCC

Colorado Statute § 4-2-702

Seller's remedies on discovery of buyer's insolvency

- Where the seller discovers the buyer to be insolvent, he may refuse delivery except for cash, including payment for all goods theretofore delivered under the contract, and stop delivery under this article (§ 4-2-705).

Colorado Statute § 4-2-702

Seller's remedies on discovery of buyer's insolvency

- Where the seller discovers that the buyer has received goods on credit while insolvent, he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery, the ten day limitation does not apply. Except as provided in this subsection (2), the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

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Changes to Orders

- Methodology for handling, only by written instruction of Buyer, and upon prior agreement on price
- Rescheduling flexibility of delivery dates at no cost/associated charges, if any
- Vendor obligation to continue performance if dispute regarding changed scope or price

Disputes

- Escalation process including notice and potential mediation prior to litigation
- Jurisdiction/Buyer location, and exclusive venue
- Choice of law, Buyer location, excluding that laws' choice of law provisions
- Recovery of attorneys' fees and costs
- Disclaimer of UN Convention on International Sale of Goods (UNCISG), if applicable

Intellectual Property

- Confidentiality agreement for any trade secrets or know-how
- Reservation of rights to intellectual property in any deliverables, and items built using Buyer's technology and prints
- Royalty-free, world-wide, perpetual license to use any vendor, or other technology, or IP in products or deliverables
- Prompt return of Buyer's data, prints, etc., upon request

Taxes

- All taxes including federal, state, municipal, VAT or other governmental authorities paid by Seller

Training and Technical Support

- What days/hours will technical support be available?
- At what cost?
- Is this support by telephone only, or is onsite support anticipated?
- Are there specific procedures for requesting this support?
- Are there specific situations triggering this support?
- Is there promised (expected) response time for such support?

Payment Terms

- What are the payment terms?
  - Payment within XX number of days of the receipt of an invoice for the items?
  - Payment within XX number of days of the buyer's acceptance of the items?
  - Are there any prompt payment discounts for payment before XX number of days?
  - What are acceptable payment methods?
    - Checks?
    - Electronic funds transfer?

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Setoff

- The buyer should include a "party-by-party" setoff (the UCC provides only a "contract-by-contract" right of setoff)

Price Warranty (Sometimes Called the "Most Favored Buyer" Clause)

- The clause should refer to:
  - Similar products (not the same product)
  - Sold to any other customer (not just to competitors)
  - In the same transaction
  - The seller is required to notify the buyer before shipment if the price is higher than specified
  - The buyer is to receive the benefit of any price reductions

Mechanic's Liens

- If this is not specifically covered in the indemnification provisions, buyers may want a clause prohibiting any mechanic's liens by the seller, and indemnifying the buyer if any are put on the buyer's property by the seller or any of its subcontractors

Inspection/Testing/Rejection

- Payment for goods does not constitute acceptance.
- The buyer reserves the right to inspect all goods, but such inspection does not relieve the seller of its contractual obligations
- The buyer's inspection is final and conclusive
- The buyer has the right to inspect at the seller's facility

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Inspection/Testing/Rejection

- The buyer's right to reject nonconforming deliveries extends to those that arrive late (or early), in the incorrect quantity, or improperly labeled
- The buyer can charge the seller for expenses of inspection for goods that do not conform to the contract, plus return transportation

Gratuities

- Should you include a clause limiting the seller's payments to the buyer?
- This clause could
  - Cover any gratuity or excessive entertainment; and
  - Extend to the buyer's family/household.

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Breach Remedies

- Always cumulative, all remedies under applicable law and equity
- Avoid disclaimer of consequential damages unless favorable to Buyer
- Try to retain right for Buyer to select repair, replacement, or credit remedy at its option

Severability

- Provisions unenforceable or contrary to law are severable

Exclusivity

- How long
- Scope of limitation (which facilities bound)
- Recite consideration if possible
- Legal review for anti-trust issues
- Vendor payment for substitute materials if can't/don't timely perform and deliver

Counterparts

- Fax signatures count, signed separate counterparts represent an agreement

Additional Items for International Agreements

- Specify currency of invoice and payment; foreign exchange clause if required
- Specify payment terms (net 30 days after receipt of documentation for letter of credit, etc.)
- Specify English language for controlling language in contract and dispute resolution

- Insure shipments if we have risk of loss for ocean shipment terms
- Specify INCOTERMS 2010® term and know who is responsible for carriage, import, export, duties, insurance
- Clause for termination in case of dumping issues, government action or intervention, or other illegality

Integration Clause

- Stating that this is the “entire agreement” and excludes any other previous agreement regarding the subject matter
- Reference NDA’s or other surviving agreements
- No changes to contract terms absent signature by Buyer

Additional Items for International Agreements

- Notify tax department of issues with respect to doing business in foreign country, i.e. VAT tax issues and recovery, doing business in new jurisdiction and related tax expense for selling to or holding inventory in foreign jurisdiction
- Specify what documents will be generated to "prove" shipment
- Certificate of compliance of goods to ISO, or other industry standards

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- Certification that manufacturing facility is properly approved by governing bodies
- Understand force majeure under applicable law (some are strict/others are not)
- Specify inspection points and procedure if goods do not pass inspection, will local third-party inspector be used, surveyor

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Additional Items for International Agreements

- Specify when title will transfer specifically (INCOTERMS do not cover this)
- Specify that all taxes, duties, assessments, etc., will be paid by the seller or included in the price and listed separately
- Foreign Corrupt Practices Act issues – selling to government or using agent to sell to government
- Disclaim UNCISG?
- Has technical Data been exported?

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Questions?

Expanding into the Global Marketplace

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Key Provisions and Concerns Specific to International Contracting

Key Contract Provisions

Drafting for Non-English Speakers

- Short sentences
- Short paragraphs
- Clean language
- “Shall” language will specify who, what, where, when
- Specify controlling language of contract specifically if “split agreement” and dispute resolution

Information About the Country and Supplier

- Do you have public and readily available information about the country, its people, geography, customs, etc?
- Have you conducted at least some reasonable check into the reputation of the supplier and its owners and principals?

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Who Are the Parties Involved?

- In international contracting, it is more likely that subsidiaries and affiliate companies are involved, not parent
  - Include the appropriate entity name
  - Ensure that only the involved entities will risk liability under any agreement
  - May affect choice of law, jurisdiction, applicable law, have tax ramifications, VAT registration issues
  - Be sure of authorized signatories; POA needed?

Be Sure that the Producer is the Contracting Party

- Russia/China often use trading companies for currency control, management issues, payment issues, supply chain management and import/export reasons

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Payment

- What currency?
- When?
- Payment on documents?
- Foreign currency exchange considerations?
  - FX adjustment
  - Periodic review
- Penalties for late payment?

  - Letter of Credit

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Conditions Precedent

- Payment condition precedent to shipping (seller)
- Quality certificates/Certificate of Compliance
- Delivery condition to paying (buyer)
- Inspection by surveyor/other party
  - Correct items and count
  - Quality
  - Damage assessment

Contingencies

- Prepare for shortages of compliant (or non-compliant) material
  - Force majeure or not?
  - Will delay in shipments be allowed?
  - Will this affect pricing?
  - Could lead to fluctuation of price due to commodity shortages
  - Surcharges for fuel, other commodities

Warranty and Remedy Limitations

- Will they make buyer "whole"?
  - Cancellation
  - "Cover"
  - Specific performance
- Seller will want to preserve options to prevent expensive return of goods
  - Replace, repair, credit options (at whose option?)

Indemnification

- What is product? Necessary?
- Who? (officers, agents, employees, directors, etc.)
- For what? (patents, environmental, broad-general, limits)
- When? (mutual? survives agreement? negligence? acts or omissions?)
- Procedures for making a claim?
- Indemnity covered by insurance?

Limitations on Liability

- Some jurisdictions consider limitations on liability to be contrary to public policy (Sweden)
- Unconscionability much more broadly construed outside of the U.S.
- Allowing parties to more easily avoid agreements

Limitations on Liability

- Generally courts will not accept liability limitations where intentional or willful employee misconduct is involved
- In most countries, liability for gross negligence may not be limited
- Note also that the definitions and applications of gross negligence will vary by jurisdiction
  - Use "To the fullest extent allowed by applicable law …" when stating limitations on remedies and liability

Choice of Law

- Key for obvious and many reasons – IP, contract interpretation, dispute resolution timing
- Consult local counsel if appropriate to insure applicable law “sticks” and is acceptable
- Can “creep in” – UNCISG does not cover all contracting, procedural issues and can defer to local law
- Know default provisions on relevant items if not specifically addressed in the agreement i.e. Force Majeure, cure opportunity, battle of forms, email usage

Choice of Forum

- Escalation – discuss, mediate, arbitrate, or sue
- Know timing of dispute resolution
- Know cost
- Know rules
- Know track record of forum ("home cooking"/other prejudices)
- Broad vs. narrow

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Specifications

- Industry Standards – IEEE, IPC, NIST, BSI, CEN, MIL-STD
- Quality Certificates
- Certificates of Compliance – UL, CSA
- Approved sources / vendors
- Drawings
- Production, inspection, performance
- Acceptance criteria

Effects of Standardized Clauses/Forms in Different Jurisdictions

- Can be efficient and cover general issues
- In an international setting, there may be differences in their interpretation and effectiveness
- Every contract is different in some manner and review of each "boilerplate" clause is needed

Force Majeure/Excuse

- List of triggering events –although described as not inclusive of all possible triggering events, may be held as inclusive by a court
- List events that are not covered by clause if risk of events is intended to be on one party
- A longer, more exhaustive list should be considered
- Include "any industrial action" or country specific labor strike

Severability

- A severability clause may be ineffective if void provision at issue is an essential element of the contract (and if so, the entire agreement will automatically become void)
- If severance clause used to circumvent an illegal provision, severance clause may be ineffective
- However, in many jurisdictions, so long as the intent of parties is clear, a severance clause will have full effect

Severability

- Severability Statutes
  - Often less broad ("blue pencil")
  - May only apply to certain types of contracts, or will only apply if the void clause is not an essential element of the contract, etc.

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Waiver

- Unenforceable in some jurisdictions (the Netherlands, for example)
- These jurisdictions may have statutory rules which govern these clauses, and courts have ruled that they are unfair, unenforceable, or not legally effective
- A number of laws restrict the rights of companies and their officers and directors from waiving certain rights - the same is true with certain consumer contracts and employment agreements

Waiver

- Some limited number of jurisdictions will allow you to include provisions where a party that waives a right may be allowed to enforce that right later (England, for example, allows this)

Notice

- Local laws may override notice clauses without certain requirements (such as notice required in writing, etc.)
- France: the party that sends notice must be able to prove receipt for the notice to be valid
- “Mailbox rule” issues
- State: How? To whom? Address, fax, e-mail, telephone?
  - When effective?

Time is of the Essence

- Some jurisdictions require this provision to be spelled out within the agreement
- Some jurisdictions require a different verbiage
- France: “time is of the essence” has no legal meaning, but provisions can be spelled out within the agreement that will render the same purpose and meaning
- Netherlands: if an agreement contains a specific time limitation, the concept that time is of the essence will be implied

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Summary

- Always check the ramifications of certain language in foreign cultures, even if it seems boilerplate, or even though you always have done things a certain way. Even small things, like notice provisions, can have dramatically different effects in other cultures
- "Last pass" through local counsel always worth the comfort

Extraterritorial Laws of the United States

Foreign Corrupt Practices Act

- Enacted in 1977
- Prohibits bribery to foreign officials or candidates for any public office
- Required periodic accounting and auditing reports to SEC
- Requires reporting of suspicious activity (“red flags”)

Red Flags

- Unusually high commissions
- History of corruption in country where agent/associate is located
- Unusual methods of financial arrangements
  - Payments to accounts in countries without an obvious connection to transaction or agent
  - Cash payment
- No transparency in record-keeping or processes
- Relationship of agent to foreign government

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FCPA Anti-Bribery Provisions

- Prohibition Requirements
  - Corrupt purpose – Intent to create influence with recipient
    - Intent includes: Willful ignorance, ignored "red flags"
  - Payment (direct or indirect) or authorization of payment or promise to pay
    - Need not be monetary/anything of value
  - Payment related to obtaining, retaining, or directing business

Exceptions and Defenses

- "Facilitating" or "grease" payments made to foreign officials for nondiscretionary actions such as processing paperwork and providing routine government services (i.e. police protection, mail pick-up, etc.)
- Affirmative defenses – payment lawful under the WRITTEN laws of foreign country, or bona fide expenditure directly related to promotion, demonstration, or explanation of products or services

F&B

Accounting Provisions

- Keep accurate books
  - Record all outlays of money or other dispositions of assets
- Institute internal controls
- Intent required
  - Knowing standard, includes willful ignorance

Penalties

- Criminal
  - Corporations: up to $25 million for accounting issues; $2 million for bribery
  - Individuals: up to $5 million and 20 years for accounting issues; up to $100,000 and 5 years for bribery issues
- Civil
  - $10,000 per person; can be more in SEC enforcement action
  - Injunctions

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Penalties

- Others
  - Ban from doing business with federal government
  - Suspension/ban for securities activities
- Corrupt payment may trigger Sarbanes-Oxley liability – those payments will typically be disguised as false entries

Due Diligence

- Companies should research the contracting parties before providing any gifts or perks to those company employees, officers, or directors – are they also government officials of any kind?
  - Due diligence may be a mitigating factor in the face of DOJ/SEC investigations

Contract Protections

- Terminations provisions for violations
- Require permission for utilizing sub-agents
- Clearly spell out FCPA prohibitions
- Compliance with laws clause
- Personal acknowledgment of FCPA and prohibitions

Anti-Boycott Laws

- Prohibits support of boycotts sponsored by foreign entities against other countries which have friendly relations with the U.S. (from EAR)
- U. S. entities not allowed to discriminate against, or boycott, any businesses subject to foreign boycott demands
- Primarily Arab League boycott of Israel

Anti-Trust Laws

- Apply inside the U.S. and outside the U.S. where activities have an effect on U.S. commerce
- The three main laws:
  - Sherman Act
  - Clayton Act
  - Robinson-Patman Act
- Concerned with overall market competition and not protections for individual competitors

Sherman Act

- Prohibits unreasonable restraints on trade, and monopolization or attempted monopolization
- Violations are felonies
  - Fines up to $1 million for individuals or $100 million for corporations, with maximum jail sentence of 10 years
  - Restitution to overcharges victims
  - Victims can seek civil penalties for up to three times the amount of damages

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Sherman Act

- Specifically prohibits price fixing and rigged bids
- Involves collusion among market players
  - No written agreement is necessary to prove collusion
  - Inferential evidence may be enough

F&B

Types of Violations

- Per Se – "no justification"/most likely to lead to penalties
  - Bid rigging, horizontal and vertical price fixing and market division
  - Does not matter if fixed price was reasonable, or whether there was a seemingly innocent rationale (making sure all parties get a fair share of the market)
- Rule of Reason – evidence is weighed as to what rationale caused the alleged, violate activities

F&B

Sherman Act

- No substantive defenses
  - Cannot claim that result was inadvertent
- Guilt does not depend on whether an agreement or scheme actually worked
- No written agreements are required to determine guilt

Clayton Act

- Provides damages for persons injured through violations of antitrust laws
  - Includes costs of damages sustained and reasonable attorneys'
- Attempts to prevent activity, before it happens, that may act to restrain trade
  - Pre-merger notification

Import/Export Controls

Export Issues

- What country is involved? (Check for prohibited or restricted destinations)
- Are individuals involved who could be on the Denied Persons List? (Check the Export Administration Regulations List)
- What commodities and technical data are involved?

Export Issues

- Have you checked for restrictions based on:
  - Export Administration Regulations
  - International Traffic in Arms Regulations
  - Trading with the Enemy Act Regulations
  - International Emergency Economic Powers Act Regulations

Harmonized Tariff Schedule of US Annotated (HTSA)

- Latest version Interim 2012
- Contains tariff rates and statistical categories for all imported merchandise
- Based on international Harmonized System
- Schedule determines import duty which affects:
  - Payment of duty to government
  - Proper pricing of products for tax purposes

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Who Classifies Your Imports?

- Vendor
- Internal
- Brokers
- Manufacturer (if reseller)
- Be certain that classifications are correct
  - Only Bureau of Customs and Border Protection can provide binding rulings on classifications of imports
- Country of origin issues

Customs and Border Patrol C-TPAT

- Customs – Trade Partnership Against Terrorism
- Designed by US Customs and Border Protection to strengthen overall supply chain and border security
- Voluntary program
- Eligible: U.S. importers of record, carriers of all types, port authorities, terminal operators, freight consolidators, customs brokers, and others in the supply chain from overseas

Customs and Border Patrol C-TPAT

- Benefits:
  - Reduced border inspections
  - Priority processing for inspections
  - Account manager
  - More "personalized" treatment
- Importers apply for program
  - Agreement/validation process required

Using International Agents

- Vetting Process
  - FCPA issues/red flags
  - Due diligence
    - References (business and personal)
    - Experience in industry
    - Background check
    - Denied parties, etc.
    - Affiliations
    - Check with in-country legal counsel

International Agents

- Written agreement a must
  - FCPA protection/indemnity
  - Clear terms
  - Termination provisions
  - Specific mandate in agreement
  - Limits on authority
    - Reseller better than agent

Legal Systems

- Civil Law
  - Continental Europe, Mexico, Japan, Quebec, Russia, South America, China
- Common Law
  - England, Ireland, United States, Australia, India, Malaysia, Pakistan, Canada

Legal Systems

- Common Law
  - Judges cite common law opinions and discuss decision
  - Trial juries decide facts in civil and criminal cases
  - Judges are experienced trial lawyers
  - Adversary system
- Civil Law
  - Formal, cites law only, usually short discussion
  - Juries usually only in serious criminal matters and in conjunction with judge
  - Career judges from "judicial school"
  - More "inquisitory" system

What Law Applies to an International Contract?

- Practically, whatever law parties agree to in the contract; however:
  - Can default to either home country of the parties, or to location in which the contract is performed
  - United Nations Convention on Contracts for the International Sale of Goods (UNCISG)
  - Default rules under private international law

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Colorado Statutes § 4-1-301

- Territorial Application of the Act; Party's Power to Choose Applicable Law
- When a transaction bears a reasonable relation to this state and also to another state or nation, the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement, this Act applies to transactions bearing an appropriate relation to this state

Cultural Issues and Local Counsel

Cultural Issues and Local Counsel

- Different cultural standards
  - Confucius philosophy of "social harmony" influences negotiations in Japan
  - Japanese "wa" concept is reflected in the Japanese negotiation style by placing an emphasis on developing a trusting long-term relationship; there is an aversion to litigation and emphasis on contracting parties working out differences among themselves
  - Research and attention to detail when negotiating, conflicts that result from cross-cultural misunderstandings can be avoided if both parties understand their respective rights and duties

Cultural Issues and Local Counsel

- Different local legal rules
  - Can eliminate your ability to enforce or obtain judgment on a contract, negotiations should lead to a written contract that is enforceable in the countries of both parties
  - Dispute resolution system should be completely and fairly addressed
- Jurisdictions which limit true freedom of contract as seen in the United States, may increase liability exposure if unheeded

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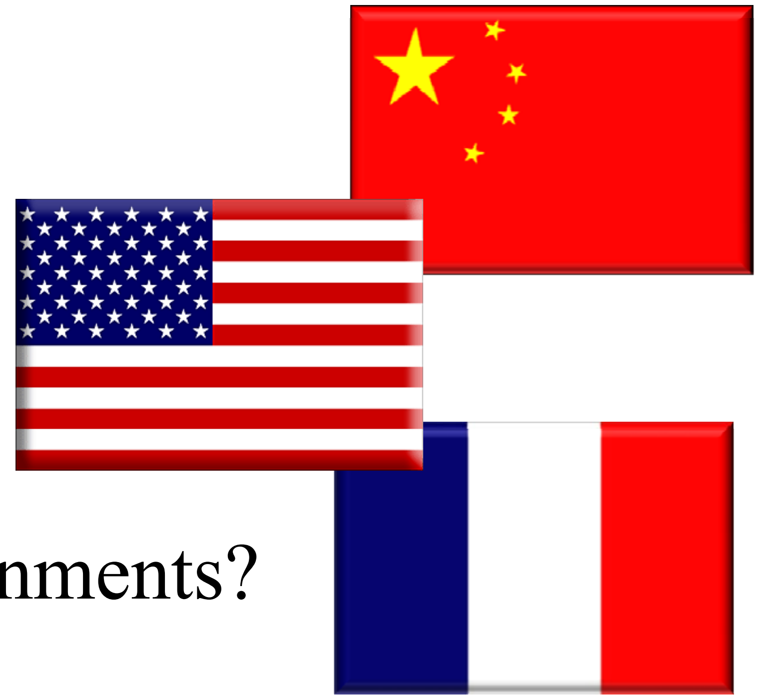
Consulting With Local Counsel

- Pre-contractual liability?
  - United States
  - France
  - China
- Local requirements?
- Working with foreign governments?



Style of Agreement

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CONTRACT # ___________
________ of December, 200_
Russia

This Contract is made between ___________, Russia (hereinafter called the Seller) on one part, and ______, USA, (hereinafter called the Buyer) on the other part, have concluded the present Contract to the following:

1. Subject of the Contract.
The Seller sells and the Buyer buy __________ (hereinafter called the Product) in accordance with the Attachments and terms and conditions contained in this Contract.

2. Terms and dates of delivery.
The Product shall be delivered on ___, _______, _________ region, Russia, in accordance with INCOTERMS 2000.
The Product shall be delivered in the date and at prices agreed by parties quarterly and specified in the Attachments.
Prior to the delivery date, the Product shall be manufactured, tested, packed and marked in accordance with the terms and conditions of the Contract.

КОНТРАКТ № ___________
________ августа 200_.
Россия

Уральская Кузница», ______________, Челябинской области, Россия , именуемое в дальнейшем «Продавец», с одной стороны, и_____ США, именуемая в дальнейшем «Покупатель», с другой стороны, заключили настоящий Контракт о нижеследующем:

1. Предмет Контракта.
Продавец продаёт, Покупатель покупает поковки, _____ _____ «Продукция», в соответствии с Приложениями, а также условиями настоящего Контракта.

2. Условия и сроки поставки.
Поставка Продукции осуществляется на условиях FCA, _______, ___________, Россия, в соответствии с ИНКОТЕРМС 2000.
Продукция должна быть поставлена в сроки и по ценам, подлежащих согласованию сторонами ежеквартально и указываемые в Приложениях.
Продукция перед поставкой изготавливается, испытывается, упаковывается и маркируется в соответствии с условиями настоящего Контракта.

DRAFT PROPOSAL _________ –______________ #________________

Contractual parties : _________________

Seller : ____________, _______ Czech Republic Buyer : ____________________

Products : ________ as per Appendix A of that Agreement

Prices: Prices as per Appendix A

Prices are valid for _ months from date of agreement. Prices should be revised quarterly on last day of March, June, September, and December, using __________ for ____ of wheel price.

Method of Payment: Net 30 from Invoice day. If the payment is not paid within 30 days, Seller has right to invoice penalty in amount of __% per each week of delay, up to __% of value of unpaid goods.

Deliveries: Supplier deliver Goods to Customer in regular monthly batches on parity CIF Chicago as per dates in Appendix B of that agreement.

Transfer of Risk and Title: Risk on Goods to pass from Supplier to Buyer upon delivery on parity ____ _______, title to pass upon full payment.

Guarantees: The product shall be guaranteed by the Supplier for ____ years against any defect attributable to production and not detected in the inspection at the Supplier's works. This period shall start from the end of the month marked on the Product. The Product, which during the guarantee period proves to have faults making them unsuitable for service or reducing its service life, shall be rejected. However, before being rejected definitively, the defective product may be submitted to an examination in the presence of both parties – the Buyer and the Supplier – if the latter so requests.

AGREEMENT

This agreement is entered into this __day of __________2009 between ____________________________________ with offices at ____________, ________, China ("Seller"), and _______________________ with offices at ________________, _________, ________ _________ ("Buyer").

The Seller agrees to sell, and the Buyer agrees to buy, ____________ ("Goods") in accordance with the following agreement and terms:

1. SPECIFICATIONS - The description and specifications of the Goods to the delivered under this Agreement ("Specifications") shall be as set forth in Attachment 1 to this Agreement, incorporated herein by reference.

2. PRICING - Pricing, quantities and the delivery schedule of Goods shall be as set forth in Attachment 2 to this Agreement, incorporated herein by reference. All prices shall be in U.S. dollars.

3. DELIVERY

A. Packing Requirements - Goods shall be packed according to Buyer's Drawing No. ___________, ________ .

B. Shipping Marks: None

C. FOB _________ (Incoterms 2000)

D. Subject to Clauses 3F and 3G and satisfactory inspection in accordance with Clause 4 below, title to the Goods shall transfer to Buyer upon delivery to the Buyer's designated shipper at ___________.

E. The Seller warrants that it has sufficient capacity to produce and deliver the Goods in accordance with the delivery schedule in Attachment 2. If any event contemplated pursuant to Article 79 of the United Nations Convention on International Sale of Goods occurs and hence affecting delivery under this Agreement, the Seller agrees that it will allocate existing supply of the Goods, and capacity to manufacture the Goods, to Buyer in accordance with the ratio of the Buyer's open or unsatisfied orders for the calendar year compared to all open orders for the Goods for the calendar year.

Comparing the Laws Surrounding Contracts and Contract Interpretation

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Many Sources of Law ….

- National Laws: Uniform Commercial Code – Colorado Statues Title 4
- Conventions and Treaties: United Nations Convention on Contracts for the International Sale of Goods
- Soft Laws: International Institute for the Unification of Private Law (UNIDROIT) and Principles of International Commercial Contracts

F&B

Many Sources of Law ….

- Customary International Business Laws: International Chamber of Commerce Uniform Customs and Practices for Documentary Credits addressing Letters of Credit
- International Commercial Arbitration Decisions: arbitration decisions are based on the application of international commercial law

International Delivery Terms

New Uniform Commercial Code

- On February 19, 2004, the American Law Institute and the National Conference of Commissioners on Uniform State Laws deleted from the newest proposed version of the UCC shipping and delivery provisions previously governing domestic commerce (i.e., former sections 2-319 through 2-324)
  - Deletes these terms as being out of synch with modern commercial practice!

New Uniform Commercial Code

- No recommendation for substitutes
  - Some will respond by using old UCC terms
  - As legislatures ratify newest UCC, users of old UCC terms lose benefit of generally accepted definitions, and usages become increasingly vague, inviting misunderstanding, controversy, and worse
  - Many will seek a replacement for deleted UCC provisions (Incoterms)

UNCISG

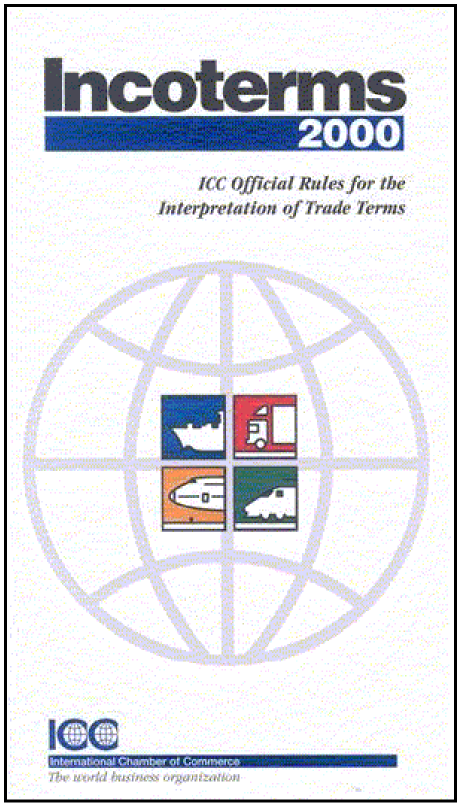
- Similar to the UCC in the United States, but not the same
- Unlike the formerly existing UCC, it does not define or set forth explicit trade or delivery terms
- As a result, applicable trade or delivery terms must come from somewhere

International Commercial Terms of Sale or Incoterms®

- Prepared by International Chamber of Commerce, but function merely as custom (not law)
- While designed for international trade, have been used for domestic business within European Union for years
- Should work well for U.S. domestic, too, if one simply ignores references to export and import clearance
- Incoterms® 2010 is the current edition and seventh revision of original version published in 1936

F&B

INCOTERMS 2000 vs. INCOTERMS® 2010



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Classification of 11 INCOTERMS® 2010

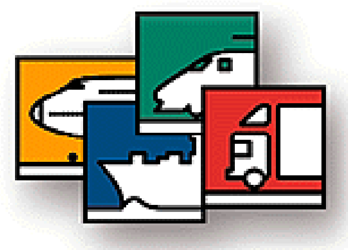
- Was:
  - Departure (EXW)
  - Main Carriage Unpaid (FCA, FAS, FOB)
  - Main Carriage Paid (CFR, CIF, CPT, CIP)
  - Arrival (DES, DAF, DEQ, DDU, DDP)
- Now:
  - Any Mode of Transport (EXW, FCA, CPT, CIP, DAT, DAP, DDP)
  - Sea and Inland Waterway Transport (FAS, FOB, CFR, CIF)

Domestic Use Specifically Encouraged

- Incoterms rules officially recognize and encourage use in domestic transactions
  - Commonly used anyway
  - U.S. migrating away from U.C.C. terms

Incoterms® 2010

- The 11 Incoterms describe:
  - Responsibility for arranging shipment
  - Who pays for shipment
  - How far goods will be shipped by one party before other party takes control
  - Where risk of loss passes
  - Responsibility for insurance
  - Responsibility for export/import customs
- Do not determine when title passes
- Do determine when delivery is made and risk passes

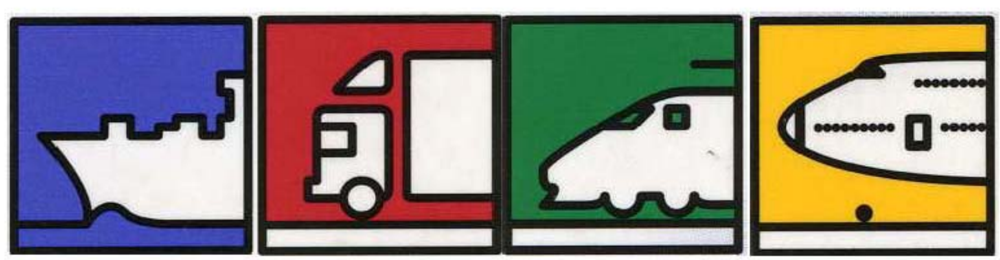


Incoterms® 2010 Seller Responsibilities

- Seller always bears responsibility to:
  - Have goods ready on time, packed for export
  - Meet quality assurance to sample or specification
  - Make delivery in accordance with Incoterm used
- Seller always prepares:
  - Invoice
  - Packing list
  - Other documents at buyer's "request, risk, and expense"

Incoterms® 2010
Buyer's Responsibilities & Rights

- Buyer has responsibility to accept delivery in accordance with Incoterm used
- Buyer always has the right to inspect goods to ensure conformance with specification or sample



Incoterms® 2010 – Areas of Negotiation

- Export clearance
- Import clearance
- Insurance
- Carriage
- Loading
- Unloading

	Any Mode of Transportation							Water			
Incoterm and Service	EXW	FCA	CPT	CIP	DAT	DAP	DDP	FAS	FOB	CFR	CIF
Warehouse storage	S	S	S	S	S	S	S	S	S	S	S
Warehouse labor	S	S	S	S	S	S	S	S	S	S	S
Export packing	S	S	S	S	S	S	S	S	S	S	S
Loading charges	B	S	S	S	S	S	S	S	S	S	S
Inland freight	B	B/S	S	S	S	S	S	S	S	S	S
Terminal charges	B	B	S	S	S	S	S	S	S	S	S
Forwarder fees	B	B	S	S	S	S	S	B	B	S	S
Loading on vessel	B	B	S	S	S	S	S	B	S	S	S
Ocean/air freight	B	B	S	S	S	S	S	B	B	S	S
Charges in foreign port	B	B	S	S	S	S	S	B	B	B	B
Delivery charges to final destination	B	B	B	B	B	B	S	B	B	B	B
Customs, clearance, duties, taxes	B	B	B	B	B	B	S	B	B	B	B

Buyer
Seller
Buyer/Seller

Choosing the Right Incoterm®

- Shipping costs
- Political considerations
- How much is Shipper/Buyer willing to pay to minimize risk?

F&B

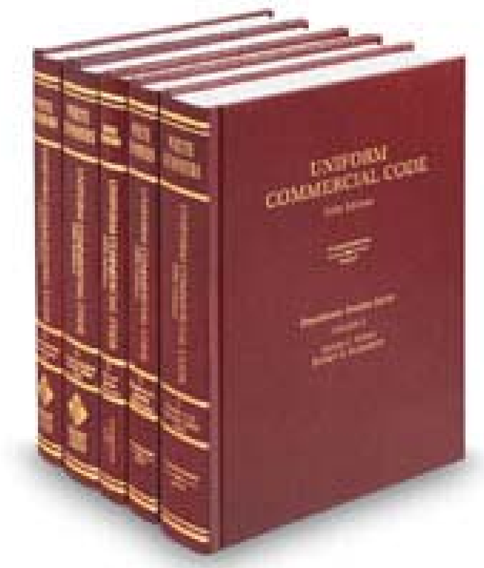
Famous Last Words

- Beware of previous versions of Incoterms
- Use 2010 or 2000 citation and mean whatever you choose
  - Proper cite is "Incoterms® 2010 (term) (place)."
- Terms are NOT a complete contract of sale

F&B

Questions?

UCC vs UNCISG



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What are They?

- UCC: Uniform Commercial Code – United States
- UNCISG: United Nations Convention on Contracts for the International Sale of Goods – International
- UNIDROIT: International Institute for the Unification of Private Law – Supplements International Law

F&B

Generally:

UCC, Article 2:

Transactions in goods, where U.S. law applies.

UNCISG:

Commercial transactions in goods between parties in signatory nations, and can displace the UCC in an international context.

When Do They Apply?

UCC, Article 2:

Automatic application if "sale of goods" when U.S. law applies (any state) except Louisiana.

UNCISG:

Sale of goods between parties in "contracting states."

If only one party is in a contracting jurisdiction, UNCISG will not apply, unless both contracting parties agree.

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Contracting States

Argentina, Australia, Austria, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria, Burundi, Canada, Chile, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Georgia, Germany, Ghana, Greece, Guinea, Honduras, Hungary, Iceland, Iraq, Israel, Italy, Japan, Kyrgyzstan, Latvia, Lebanon, Lesotho, Liberia, Lithuania, Luxembourg, Mauritania, Mexico, Moldova, Mongolia, Montenegro, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Republic of Korea, Romania, Russian Federation, Saint Vincent and the Grenadines, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, Switzerland, Syrian Arab Republic, The former Yugoslav Republic of Macedonia, Uganda, Ukraine, United States of America, Uruguay, Uzbekistan, Venezuela (Bolivarian Republic of), Zambia.

Is the UNCISG "Law"?

- Only if you agree to it! Parties can opt out of these provisions through contract language
  - Clearly specify an alternate choice of law to avoid UNCISG
  - Both parties must agree to the choice of law

Similarities: UCC and UNCISG

Goods

- Sale of goods ONLY!
- DOES NOT apply to service contracts; however, may apply to contract for mixed goods and services
    - Goods can include equipment or inventory; however, consumer goods are not regulated by the UNCISG (but are regulated by the UCC)

Other Goods Not Affected By the UNCISG:

- Goods bought by auction
- Shares of stock
- Investment securities or other intangibles
- Sales of ships or aircraft
- Sales of electricity

Warranties

- Both provide similar coverage, including:
  - Warranty of merchantability (goods are fit for their ordinary purpose(s)); and
  - Warranty of fitness for a particular purpose (goods match any purpose made known to the Seller, where Buyer relied on Seller's skill and judgment in choosing goods)

F&B

UCC § 2-314

Implied Warranty: Merchantability and Usage of Trade

1. Unless excluded or modified (§ 2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the Seller is a merchant with respect to goods of that kind.
2. Goods to be merchantable must be at least such as
   a. pass without objection in the trade under the contract description; and
   b. in the case of fungible goods, are of fair average quality within the description; and
   c. are fit for the ordinary purposes for which such goods are used; and
   d. run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
   e. are adequately contained, packaged, and labeled as the agreement may require; and
   f. conform to the promise or affirmations of fact made on the container or label, if any.
3. Unless excluded or modified (§ 2-316), other implied warranties may arise from course of dealing or usage of trade.

F&B

UCC § 2-315

Implied Warranty: Fitness for Particular Purpose

- Where the Seller at the time of contracting has reason to know any particular purpose for which the goods are required, and that the Buyer is relying on the Seller's skill or judgment to select or furnish suitable goods, there is, unless excluded, an implied warranty that the goods shall be fit for such purpose.

UNCISG – Article 35

1) The Seller must deliver goods which are of the quantity, quality, and description required by the contract and which are contained or packaged in the manner required by the contract.

2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they:

UNCISG – Article 35

3) Are fit for the purpose for which goods of the same description would ordinarily be used;

4) Are fit for any particular purpose expressly or implied made known to the Seller at the time of the conclusion of the contract, except where the circumstances show that the Buyer did not rely, or that it was unreasonable for him to rely, on the Seller's skill and judgment;

UNCISG – Article 35

5) Posses the qualities of goods which the Seller has held out to the Buyer as a sample or model; and

6) Are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods.

Remedies

- Although different wording is used, both allow similar remedies; these include:
  - The right to "cover," meaning to purchase alternative/replacement goods in case of a breach of contract; and
  - Consequential damages (loss suffered as a result of the breach, calculated in addition to the breach itself, like lost profits)

Other Remedies in Both:

- Buyer's rights include:
  - Delivery of conforming goods
  - Right to receive the difference in the price paid versus the value of the goods received from Seller

Other Remedies in Both:

- Seller's rights include:
  - Forcing the Buyer to pay, take delivery, or perform its obligations
  - Lost profits

UNCISG - Article 46

2) If the goods do not conform with the contract, the Buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter

3) If the goods do not conform with the contract, the Buyer may require the Seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the circumstances

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UCC § 2-711

Buyer's Remedies in General

1. Where the Seller fails to make delivery or repudiates or the Buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract, the Buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid
   - "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
   - recover damages for non-delivery.

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Damages Must be Foreseeable!

- UNCISG: "foreseeability" is much more relaxed than the UCC, allowing greater recovery for the non-breaching party.
- UNCISG requires that the consequences of breach only be possible at the time of contract formation, whereas the UCC requires that the breaching party know, or had reason to know, of potential consequences.

Contract Interpretation

- Contracts are often ambiguous in certain areas, and both the UCC and UNCISG provide similar methods of interpretation

To Decipher Ambiguities, Both Allow Use of:

- Course of dealing (how parties have interacted through previous contracts)
- Course of performance (how parties have interacted throughout this contract)
- Usage of trade terms (how other similar companies in the industry tend to act)

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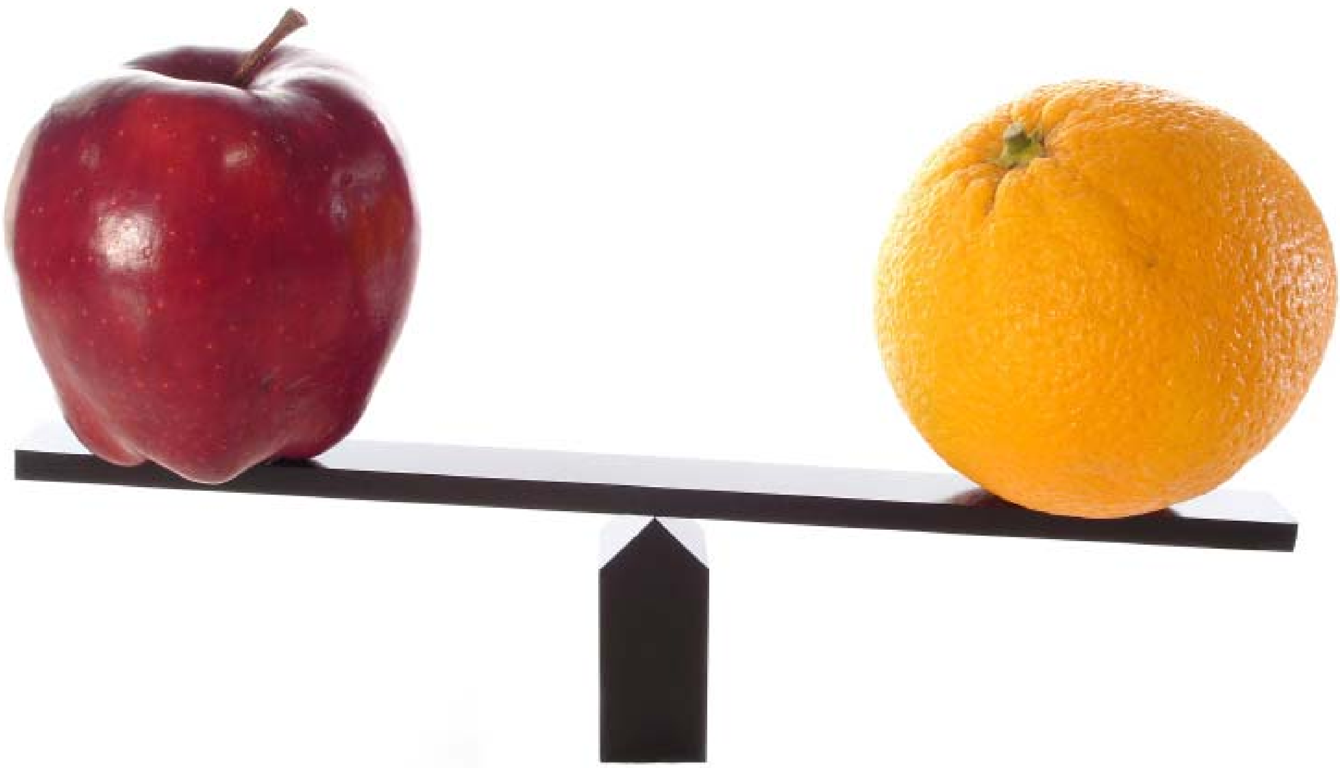
Differences: UCC and UNCISG



Must the Contracts be Written?

- UCC requires a written contract for any sale of goods over $500
- UNCISG does NOT require a writing; oral contracts are enforceable for any contract amount
  - Although this makes contracting easier and more flexible, it can also create a trap for the unwary!!
  - You CAN verbally commit under the UNCISG

Writing Requirement

UNCISG – Article 11

- A contract of sale need not be concluded in, or evidenced by, writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

UCC § 2-201

- Except as otherwise provided in this section, a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

Are Electronic Contracts Valid?

- Under the UCC, "writing" requirements include any "intentional reductions to tangible form;" thus, electronic communications are enforceable
- Not addressed under the UNCISG; it is addressed by the United Nations Convention Use of Electronic Communications in International Contracts
  - This is not settled law, though, so companies should be careful when hoping to create contracts written in electronic formats

Contract Formation: Offer and Acceptance

UCC

- UCC allows contracts to be formed even if the offer and acceptance do not match
- In addition, generally only the price term is required to be included for there to be a valid contract

UCC

- The UCC provides "gap-fillers," which are methods by which to interpret any differing terms, or terms that are left-out
  - Note that if the parties clearly intended to contract, the price term can still be filled in by a "commercially reasonable" price

UCC

- Basically, if parties intended to contract and there is some basis for a court to approximate a remedy, then the contract will be legally enforceable under the UCC
- All that is really required is a “definite and seasonable expression of acceptance or written confirmation”

UNCISG

- The UNCISG follows the “mirror image” rule – the offer and acceptance must match in order to establish a contract
- Any non-matching response to an offer operates as a rejection and becomes a counter-offer, creating many offer/counter-offer situations during which companies must negotiate, but during which there is no actual contract
  - Note that this applies only to “material terms,” including price, payment, quality and quantity of goods, delivery requirements, and liability issues

UNCISG

- UNCISG requires both the quantity and the price terms to be spelled-out; otherwise, no contract is formed

Contract Formation: Timing Issues

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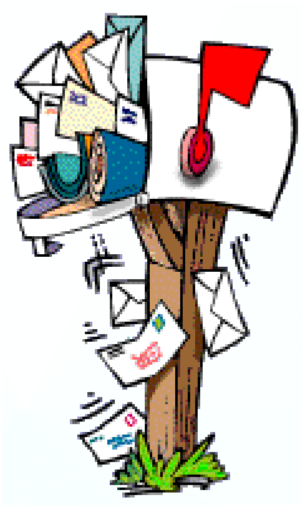
UCC

- “Mailbox Rule”:
  - Once an acceptance is placed in the mail, it becomes effective, despite whether the offeror has received it or not



UNCISG

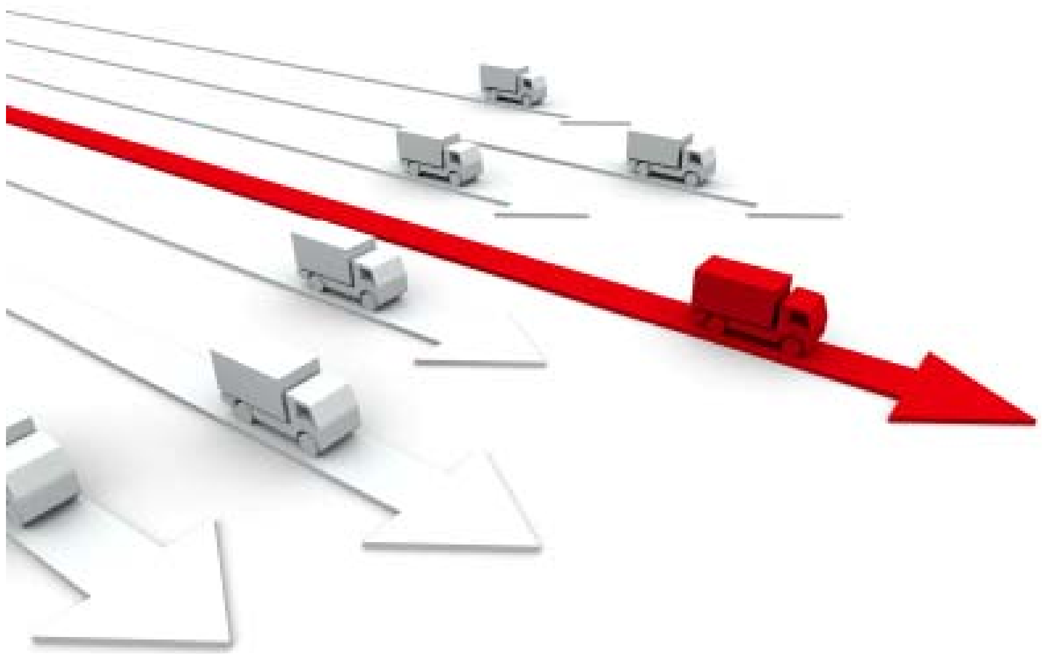
- No “Mailbox Rule”:
  - Rather, acceptance becomes effective only when it reaches the offeror
  - Offers, rejections, and revocations also only become effective upon reaching appropriate recipient

Contract Formation:

Irrevocable or "Firm" Offers

- Under the UCC, if an offer is irrevocable, it may only be held open for a maximum of three months.
- The UNCISG is more flexible and allows offers to be kept open as long as the parties desire – there is no maximum time limit.

Delivery Terms



UCC

- Does contain provisions for who bears the risk of any loss during transit and when title passes

UCC Shipping Terms

1. Unless otherwise agreed, the term F.O.B. (which means "free on board") at a named place, even though used only in connection with the stated price, is a delivery term under which:
   a) When the term is F.O.B. the place of shipment, the Seller must at that place ship the goods and bear the expense and risk of putting them into the possession of the carrier; or

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UCC Shipping Terms

b) When the term is F.O.B. the place of destination, the seller must at his own expense and risk transport the goods to that place and there tender delivery

c) When under either (a) or (b) the term is also F.O.B. vessel, car, or other vehicle, the Seller must in addition at this own expense and risk load the goods on board

UCC - Examples

- "FOB destination" implies that Seller will pay shipping costs up to the point of delivery to Buyer and is liable for any damage or loss to that point
- "FOB place of shipment" means that Seller is only responsible for the goods getting to the common carrier, at which point Seller's liability ends

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UNCISG

- Does NOT contain similar risk of loss and delivery provisions
- Instead, parties often refer to INCOTERMS 2000 (International Contracting Terms created by the International Chamber of Commerce)

UNCISG

- Incoterms are similar to the types of provisions found in the UCC, but the meanings are often quite different
  - "FOB" terms here relate only to shipments via the sea and can generally be used only in cities with seaports

These differences in terms are important and can drastically change your company's liability!

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- Choosing Incoterms – consider:
  - Shipping costs;
  - Political considerations; and
  - How much Buyer/Seller willing to minimize risk.

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Differences in Remedies:

Specific Performance

- Specific Performance: the right to require performance of the contract.
  - UCC – only allowed when other damages are inadequate.
  - UNCISG – generally allowed without conditions.
    - However, courts are "not bound" to give specific performance unless the law of the forum state provides for specific performance in the given situation.

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Specific Performance

UCC § 2-711

(2) Where the Seller fails to deliver or repudiates the Buyer may also . . .

(b) in a proper case obtain specific performance or replevy the goods as provided in this Article (Section 2-716).

UNCISG Article 46(1)

(1) The Buyer may require performance by the Seller of his obligations unless the Buyer has resorted to a remedy which is inconsistent with this requirement.

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Difference in Remedies: Penalty Causes

- In some countries, these are available to Buyers, but not under the UCC
- The UNCISG is silent here, so the applicable law will be the law that would apply if there were no UNCISG
  - This could potentially cause "surprise" penalties against Sellers – many do not expect this result

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UNCISG - When Do I Own the Goods?

- Neither Incoterms nor the UNCISG provide guidance as to when title passes
- UNCISG defaults to domestic law:
  - Usually when goods pass to the Buyer
  - BUT domestic systems can differ

IT IS BEST TO INCLUDE PROVISIONS FOR PASSAGE OF TITLE IN THE CONTRACT!

What Happens if You Do Not Get What You Ordered?

- Both require the Buyer to give the Seller notice of the non-conformities within a reasonable time after discovering the problems. This is to allow Seller an opportunity to "cure" (make the goods conform)
- However, the UNCISG requires a much more specific notice than the UCC – the exact problems must be noted in detail. This has been strictly interpreted by a number of foreign jurisdictions, so this is important when trying to enforce a contract under the UNCISG

If you have a choice, many attorneys advise their clients to avoid the UNCISG. Because it has not been litigated often in US courts or elsewhere, there are many ambiguous and unpredictable provisions which are open to judicial interpretation. (Are electronic contracts enforceable? What determines a fundamental breach? What is the proper exchange-rate calculation?)

Sally, a Buyer in Dallas, gives Samsung in Singapore a purchase order number by telephone, and requests shipment electronic devices in accordance with a schedule faxed by Sally to Samsung calling for six monthly deliveries of 10,000 units. Samsung makes the first delivery in accordance with the fax at the agreed-upon price, and e-mails a copy of its Sales Acknowledgment form containing a limitation on any consequential damages and a 90-day warranty period for defective workmanship only. The purchase order is mailed one week after the first delivery to Samsung, and the standard terms and conditions of purchase for Buyer are published on the World Wide Web and apply to all purchases made by Buyer and its subsidiaries. Samsung refuses to make further deliveries without a price increase due to market conditions. Buyer cannot make deliveries to its customer HP. HP cancels its agreement with Buyer for its product, and charges Buyer with a late delivery penalty that HP had to pay related to late deliveries to its customer.

Under the UCC and the UNCISG:

- Generally, what terms constitute contract?
- What recourse does Buyer have?
- What is the warranty on the electronic devices?
- When does the warranty expire?
- Can Buyer recover delivery penalties charged to it by HP from Samsung?

Websites for Additional Information

- www.cisg.law.pace.edu – maintained by Pace University School of Law, this site contains annotated text of the Convention, digested UNCISG cases, official advisory opinions, and more, in a user-friendly format
- www.uncitral.org – site of official texts of international conventions and their status, maintained by the UN Commission on International Trade Law

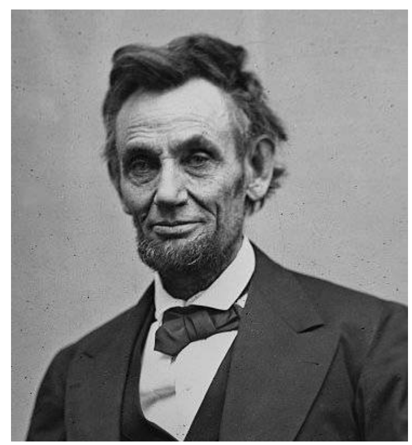
Questions?

Planning for Dispute Resolution

Keys

- Be proactive in agreement forms regarding procedures for resolution
- Attempt to resolve disputes without “legal interference” or
- At least give your lawyers a chance

- "Discourage litigation, persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser – in fees, expenses, and waste of time. As a peacemaker, the lawyer has a superior opportunity of being a good man."
  - Abraham Lincoln



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- Litigation is the lease acceptable and least cost-effective method for resolving business disputes

"ADR Explosion"

- Over 1,500 law firms have signed the CPR Institute of Dispute Resolution Law Firm Pledge, which requires them to ensure that lawyers responsible for litigation are knowledgeable about ADR and, where appropriate, will discuss its availability with their clients

Alternative Means of Dispute Resolution

- "any procedure that is used to resolve issues in controversy, including, but not limited to, conciliation, facilitation, mediation, fact-finding, mini-trials, arbitrations, and use of ombuds, or any combination thereof"

  5 U.S.C. § 571(3)

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Common Forms of Dispute Resolution

- Mediation
- Early Neutral Evaluation
- Arbitration
- Med-Arb
- Mini-Trial (non-binding)
- Summary Jury Trial (binding)

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Mediation Procedure

- Selection of a mediator
- Opening statement by mediator
- Initial joint session
- Opening presentation – "caucuses" between mediator and each party
- Draft of a settlement agreement or memorandum of understanding

Arbitration Procedure

- Alternative to court proceeding
- Grounded in contract
- Cannot be forced to do so
- Arbitrator is not obliged to comply strictly with court rules of evidence
- Each party presents its own case
- Arbitrator’s decision is usually final
- Parties are bound to comply with the award

Mediation vs. Arbitration

Mediation

- Assisted negotiation
- Parties decide if any settlement will be binding
- Parties control
- Parties may withdraw
- Parties able to vent feelings, tell story
- Encourages and facilities "win-win" solutions
- Low cost

Arbitration

- Binding adjudication
- Parties relinquish control
- Parties may not (generally) withdraw
- Parties may present case, testify under oath
- "Split the baby" tends to result in "win-lose" award
- Can be low cost, but not always

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Mediation

- Parties in control
- Inexpensive compared to litigation
- No "loser", parties control their destiny
- More culturally acceptable in areas where confrontation is avoided

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Alternative Dispute Resolution

In the event that there is any claim, dispute, or any other matter arising out of or related to this Agreement, the Parties shall initially cooperate in good faith to resolve the same between executives of the Parties who do not have direct responsibility for administration of this Agreement, and shall explore whether techniques of alternative dispute resolution might be useful in resolving the matter in question. If the Parties cannot agree within ten (10) business days on a different method of resolving the matter, the matter may be submitted by one of the Parties to non-binding mediation. In such event, the Parties shall agree upon a mediator and the mediation shall be held at Customer's headquarter unless otherwise agreed.

If neither Party submits the matter to mediation or if the mediation is not successful, then the matter shall be decided by binding arbitration in accordance with the American Arbitration Association Commercial Rules. The demand for arbitration shall be made within a reasonable time after the time period stated above for the Parties to agree on an alternate means of resolving the matter has expired. The award rendered by the arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

- Arbitration clauses are definitely enforceable in the United States under the Federal Arbitration Act, if properly written, in virtually all commercial contexts

Drafting Dispute Resolution Clauses

- Choice of law
- Choice of resolution method
- Timing (if not in rules)

Choice of Law

- Can you use U.S. law (your state, etc.)?
- Look at contracting parties
- Law of an international subsidiary?
- Neutral or well developed law (Swedish/New York/ Swiss)

Law to Avoid

- French
- Chinese
- Russian
- Mexican

Article 7 (2) of UNCISG

- "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

Choice of Resolution Method

- Escalation
- Mediation
- Local court system
- Local arbitration
- International arbitration

Escalation

- To senior management
- To mediation
  - Prior to “formal” process

Colorado Statutes § 13-22-206 Validity of Agreement to Arbitrate

1. An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract
2. The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate

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Colorado Statutes § 13-22-206 Validity of Agreement to Arbitrate

3. An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.
4. If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

Colorado Statutes §13-22-215 Arbitration Process

- An arbitrator may conduct an arbitration in a timely manner that the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator by this part 2 shall include, but not be limited to, the power to hold conferences with the parties to the arbitration proceeding before the hearing and the power to determine the admissibility, relevance, materiality, and weight of any evidence.

Note

- Generally, arbitrators are not bound by either substantive or procedural rules of law, except as required under the terms of the arbitration agreement
- No absolute right to a hearing under this section if the arbitration agreement does not require a hearing
- Taking of oath not required

Local Arbitration in Foreign Jurisdictions

- Thanks to private arbitrators, may have less draw backs than local courts
- Still subject to different local rules / customs
  - Example: Chinese arbitration laws

International Arbitration

- Issues:
  - May be difficult to obtain emergency relief
  - Convention on Recognition and Enforcement of Foreign Arbitral Awards (many countries are signatories)
    - Used to enforce awards when enforcement sought in jurisdiction other than where award was made

International Arbitration

- 140 countries are signatories
- Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (New York Convention)
  - Anybody worth mentioning has signed
- Some countries have special restrictions

International Arbitration

- Benefits
  - Speed
  - Confidentiality
  - Limited discovery
  - More knowledgeable fact-finders
  - Mature procedure if proper entity is chosen

International Arbitration

- Arbitration Institutions
  - International Chamber of Commerce Court of Arbitration
  - Hong Kong International Arbitration Centre
  - London Court of International Arbitration
  - Arbitration Institute of Stockholm Chamber of Commerce

International Arbitration - Sample Clauses

- Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.

International Arbitration - Sample Clauses

In the event of any dispute, claim, question, or disagreement arising from or relating to this agreement or the breach thereof, the parties hereto shall use their best efforts to settle the dispute, claim, question, or disagreement. To this effect, they shall consult and negotiate with each other in good faith and, recognizing their mutual interests, attempt to reach a just and equitable solution satisfactory to both parties. If they do not reach such solution within a period of 60 days, then, upon notice by either party to the other, all disputes, claims, questions, or differences shall be finally settled by arbitration administered by the American Arbitration Association in accordance with the provisions of its Commercial Arbitration Rules.

International Arbitration - Sample Clauses

- "Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity, or termination, shall be referred to and finally resolved by arbitration under the Rules of the London Court of International Arbitration, which Rules are deemed to be incorporated by reference into this clause. The place of arbitration shall be in Hong Kong at Hong Kong International Arbitration Centre."

Additional Attributes of a Well-Written Arbitration Clause

- Location of arbitration
- Allocation of costs; Each his own? Loser pays?
- Specific rules applicable; subject matter; expedited or on documents
- Number of arbitrators
- Exclusivity
- Finality

Additional Attributes of a Well-Written Arbitration Clause

- Buyer and supplier agree that no arbitrator has the authority to: (1) award relief in excess of what this or a prior agreement provides; (2) award punitive damages or any other damages not measured by the prevailing party's actual damages; or (3) order consolidation or class arbitration.
- The arbitrator(s) must give effect to the limitations on buyer's liability as set forth in this or a prior Agreement, any applicable tariff, law, or regulation.

Additional Attributes of a Well-Written Arbitration Clause

- Award enforcement provision
  - Judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction

Additional Attributes of a Well-Written Arbitration Clause

- Jury waiver
  - Ex: Buyer and Supplier agree that each is waiving its respective right to a trial by jury. The parties acknowledge that arbitration is final and binding and subject to only very limited review by a court. If, for some reason, this arbitration clause is at some point deemed inapplicable or invalid, Supplier and Buyer agree to waive, to the fullest extent allowed by law, any trial by jury; and, in such case, a judge shall decide the subject dispute or claim.

Applicable Laws and Dispute Resolution

14.1 Any dispute, controversy, or claim arising out of or relating to this Agreement, or the breach, termination, or invalidity thereof ("Dispute"), shall be settled through friendly negotiations. If the Parties fail to resolve the Dispute within thirty (30) days from the time a Party first requested for negotiations to settle the dispute, then any Party may serve notice on the other Parties requiring the Dispute to be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force and as may be amended by the rest of Clause 14 of this Agreement.

Applicable Laws and Dispute Resolution

14.2 The appointing authority shall be Hong Kong International Arbitration Centre ("HKIAC").

14.3 The awards rendered by the arbitrator shall be final and binding on the Parties. The Parties agree to be bound by the awards and agree to execute the awards accordingly.

Local Courts

- Tend to favor local businesses;
- Not always free from bias and improper influence;
  - Example: China
- May have long dockets / process;
  - Example: Mexico, France
- But, best choice for enforcing judgments, no de novo proceeding

Questions?

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Protecting Your Brand and Related Intellectual Property Rights

What is Intellectual Property?

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Typical Intellectual Property

- Patents
- Trademarks
- Copyrights
- Trade secrets

- In layman’s terms, anything that gives you a competitive edge over your competition

Patents

- Intellectual property right granted by the Government of the United States (or other governments)
- Allows inventor to exclude others from <u>making, using, offering for sale</u>, or selling the invention in the US or importing it (USITC)
- Limited in time in exchange for public disclosure of the invention when patent is granted
- Must be novel, non-obvious, adequately described for person of ordinary skill in art to make and use the invention, claimed by the inventor in clear and definite terms

Patentable Subject Matter

- Process, machine, article of manufacture, composition of matter, improvement on any of these
- Cannot patent laws of nature; physical phenomena; abstract ideas; literary, dramatic, musical, and artistic works; items offensive to public morality

Trademark/Service mark

- Word, name, symbol, device, or any combination used in commerce to identify and distinguish goods or service of one manufacturer or seller from others, and to indicate source of goods
- Does not have to be registered, but registration gives notice to public of claim of ownership, is a legal presumption of ownership, and exclusive right to use the mark in connection with goods or services in the registration

Trademark Subject Matter

- Specific items of goods and/or services must be listed and categorized
- Must be used in commerce
- No surnames unless secondary meaning (i.e. Trump in real estate dealings)
  - (Colorado Statutes Title 7, Article 70)

FEES & BURGESS, P.C.

Copyright

- Protection provided to authors of original works of authorship
- Published and unpublished works
- Holder of copyright has exclusive right to reproduce copies, prepare derivative works from work, display the work, and distribute the work
- Copyright attaches when author fixes the work in a tangible medium of expression

Copyright Subject Matter

- Literary, dramatic, musical, artistic, and certain other intellectual works
- Does not include titles, names, slogans, familiar symbols or designs, ornamentation, lettering, listing of ingredients, ideas, procedures, methods, systems, information that is common property and contains no original authorship (for example: standard calendars, height and weight charts, tape measures and rulers, tables taken from public documents, etc.)

WARNING

- Intellectual property protection with respect to patents, trademarks, and copyrights are on a country by country basis; there is no one filing that will protect this type of intellectual property worldwide

Trade Secret

- "Trade secret" means the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, improvement, confidential business or financial information, listing of names, addresses, or telephone numbers, or other information relating to any business or profession which is secret and of value. To be a "trade secret" the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes." [Colorado Revised Statutes Section 7 – 74 - 102 (4), originating from Uniform Trade Secret Act]

Trade Secret Attributes

- Protected indefinitely if kept secret
- If disclosed without misappropriation or not wrongfully, protection evaporates
- Covered by state statute, not federal law, unlike patents, trademarks, and copyrights
- Example: formula for Coca-Cola

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Danger Areas for Intellectual Property in Your Supply Chain

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Nondisclosure/Confidentiality Agreements

- Common type of agreement for use in the Buyer/Seller relationship
- Can be unilateral or bilateral
- Can be for many different purposes and situations
- Can have many other terms expanding the breadth of restrictions (i.e. non-compete)

Nondisclosure/Confidentiality Agreements

- Is disclosure limited to one entity or all related parties (foreign subsidiaries?)
- Is there a purpose defined in the agreement; does the protection match the purpose?
- Is "confidential information" properly defined and identifiable if received (in writing?)
- Is the disclosure limited to those who have a need to know?

Nondisclosure/Confidentiality Agreements

- Is there a standard of care referenced with respect to protection of the confidential information?
- Is necessary disclosure to third parties for intended purpose covered in the agreement?
- Proper parties and authorized signatories?
- Is the term of the agreement sufficient to protect the information disclosed? (Trade secrets could be forever)

Nondisclosure/Confidentiality Agreements

- Do you have employee confidentiality agreements to protect your own information from disclosure by your employees?
- Do you have proprietary information agreements with employees to protect intellectual property developed on company time?

Trademark Use – Internal

- Create and register trademarks or service marks as a sales and marketing tool
- Use marks in accordance with registration and not otherwise
  - Some companies have "style manual"
  - Tells a specific font, colors, and spacing of all uses of trademark or service mark
  - Improper use will damage trademark or service mark

Trademark Misuse – External

- Use of another's trademark or service mark
- Improper reference to a competitor's trademark, or other third parties trademark or service mark
- Arises in comparison advertising and distribution arrangements

Copyright Infringement

- Unauthorized copying of others' copyrighted materials
  - Manuals, prints for tooling, technical data
  - Software, unlicensed copy use or embedded in or bundled with purchased items
  - Promotional material
  - Copying and reuse of material from internet (ask your kids)

Patent Infringement

- Product design
- Use of patented processes
- REMEMBER "make, use, or sell" can be infringement – the lesson by Jerry Lemelson

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Chinese Infringement

- Chinese Institutional Infringement
- United States International Trade Commission
- Investigation No. 332 - 519, USITC Publication 4226, May 2011

Chinese Infringement

- China primary source of IP infringement imports into the United States
- Copyright infringement primary in dollars lost - movies, music, software
- Trademark infringement primary in number of cases - consumer products, apparel

Chinese Infringement Estimated Infringement Losses By Sector (2009)

- Information and other services - $26.7 billion
- High-tech and heavy manufacturing - $18.5 billion
- Chemical manufacturing - $2.0 billion
- Consumer goods manufacturing - $ 0.8 billion
- Transportation manufacturing - $144.6 million

Chinese Infringement Estimated Infringement Losses Type of Infringement (2009)

- Copyright infringement - $23.7 billion
- Trademark infringement - $6.1 million
- Patent infringement - $1.3 billion
- Misappropriation of trade secrets - $1.1 billion
- Unspecified - $16 billion

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- If intellectual property protection in China improves significantly, US employment would increase by 2.1 million FTE (full-time equivalent workers) in one year

How to Protect Your Company from Potential Infringement Liability

Recognize Your Intellectual Property

- Know what is!
- Take proper steps to protect it with employees, supply-chain partners, and customers
- Use well drafted "boilerplate" documents for vendor nondisclosure agreements, employee inventions and proprietary information agreements, and non-competes if necessary
- Properly identify any information, samples, prints, or products introduced into the supply-chain if they are proprietary

Include Appropriate Ownership Language for Vendors/Contractors

- Consultants writing software
- Any professional creating copyrightable works, i.e. taking pictures, writing text for advertising etc.
- Other independent contractors with access to company information or doing any product development work for company

Include Appropriate Ownership Language for Vendors

- If "author" of a copyrightable work is not employee, there must be assignment of rights by agreement or "author" still owns the right to copy it, even if you pay for her services
- "Belt and suspenders" - recite that ownership rights reside in the company not the third-party, and to the extent that such rights may not be assigned to company, author grants the company an unlimited, worldwide, perpetual, fully paid up, license to copy and use the author's work product, including sublicensing to others

Demand Intellectual Property Infringement Indemnities from Vendors

- Copyrights, trademarks, patents, mask works, or similar rights of third parties
- Worldwide, not just United States
- Unlimited - (remember Lemelson); “carve out” of limitation of liability provisions
- Make sure indemnity survives agreement termination/expiration

Demand Intellectual Property Infringement Indemnities from Vendors

- Whether you are a seller or the buyer, the party who created the IP, or is most familiar with its use is the best party to bear the risk of any infringement
- Hesitancy by seller to give you such indemnities raises a RED FLAG, and should be pursued further

F&B

Know Your Data Rights under Federal Government Contracts

- Review all Federal Acquisition Regulation (FAR) incorporated contract clauses regarding intellectual property before agreeing to them either in the prime contract or subcontract relationship with the government

Know Who You Are Shipping To/ Sharing Information With

- Chinese issue/ other countries where recourse to the law for remedies to protect intellectual property may be so cumbersome as to, as a practical matter, be no protection at all
- Potential export controls/ ITAR export restrictions
- Potential export of technical data by sharing certain data with third country nationals or providing it to others outside the United States

- FOR TECHNICAL ISSUES RELATING TO CREATION OF AND PRESERVATION OF INTELLECTUAL PROPERTY CONSULT WITH SUBJECT MATTER EXPERTS

Questions?