

Concerns in the Terms: 5 Key Provisions in Terms and Conditions of Sale

While “Master Agreements” and other types of fully negotiated contracts are essential assets for companies selling products, the majority of sales in the course of business are simply subject to either (i) terms and conditions of sale, (ii) terms and conditions of purchase, or, (iii) two different sets of terms and conditions supplied by both the buyer and the seller (terms and conditions will hereafter be referred to as “Ts & Cs”).

The fundamental purposes of Ts & Cs are: (i) to limit the company’s liability and (ii) to provide the company as much flexibility as possible throughout the course of the transaction. Unfortunately, however, the Ts & Cs are often provided as an afterthought, a policy or procedure mandated by the legal department, and rarely read by either party until a disagreement arises, at which point everybody scrambles for “their” Ts & Cs, hoping it speaks (favorably) to the dispute at hand.

Putting aside for the sake of this discussion the “awesome difficulties”¹ in handling battle of the forms concerns, there are 5 key provisions every seller of goods should ensure is in their terms and conditions of sale. Because sales of products are subject to Article 2 of the Uniform Commercial UCC (the “UCC”), these provisions must be analyzed in light of what is mandated and allowed by the UCC. Care should be taken to understand the UCC’s default rules as they apply to each term and what must appear in the Ts & Cs to overcome said rules.

1. Warranty Disclaimers. Parties are free to negotiate express warranties related to the goods at issue. The UCC, however, implies 3 specific warranties into every contract for the sale of goods.² First, the warranty of title and against infringement states that the seller has proper title to the goods and that the goods are not subject to a security interest or other lien.³ Second, the implied warranty of merchantability provides several examples of a minimum standard the goods must meet, such as passing without objection in the trade.⁴ Finally, the implied warranty of fitness for a particular purpose holds that, where the seller knows the *particular purpose* for which the buyer is using the goods, and the buyer is “relying on the seller’s skill or judgment to select or furnish suitable goods,” then the goods are warranted for that particular purpose, regardless of any express warranties to that effect.⁵

These implied warranties are broad, and can subject the seller to terms that were not bargained for and obligations that have not been considered in the pricing of the goods. Being implied, they are read into every contract by default. Each of the three implied warranties may, however, be disclaimed, provided the disclaimer adheres to obligations set forth in the UCC.

¹ See UCC §2-207[A] Editorial Commentary.

² The warranty of merchantability, actually, only arises when the seller is a merchant. See UCC §2-314.

³ UCC § 2-312.

⁴ UCC §2-314.

⁵ UCC §2-315.

Most notably, a disclaimer must be *conspicuous*.⁶ Furthermore, when disclaiming a warranty of merchantability, the disclaimer must specifically mention the word “merchantability.”⁷ Sellers of goods are well advised to take the time and effort necessary to ensure a warranty disclaimer appears conspicuously in their terms. Where the buyer’s terms suggest any type of warranty, the seller should make abundantly clear that its disclaimers are given full effect.

2. Limitations of Damages. The UCC specifically provides that a buyer is entitled to both incidental and consequential damages resulting from seller’s breach.⁸ This default rule opens the seller to substantial potential liability, even in the sale of a relatively low-value item. The UCC does, however, allow a seller to limit or exclude consequential damages⁹. It is therefore in the seller’s best interest to specifically limit any liability for such damages to the price of the goods that are the subject of the contract.

Sophisticated buyers will often reject such a blanket limitation. In those instances, the seller should negotiate a cap on potential damages. The cap should, of course, be as low as possible (2 times the value of the contract is often sufficient), but even a cap of 3 or 4 times the price of the goods at least gives some certainty to the seller and enables it to plan for a worse-case scenario.

3. Exclusivity of Remedies. Remedies and damages are intertwined and often grouped together with a broad statement of limitations. For Ts & Cs purposes, remedies should be viewed separately and care must be taken to ensure that simply limiting the damages does not enable a different remedy claim. The UCC provides that “the agreement may...limit or alter the measure of damages recoverable under this Article, as by limiting the buyer’s remedies to return of the goods...or to repair and replacement of non-conforming goods or parts...”¹⁰ Further, the comments to Section 2-719 state “Under this section parties are left free to shape their remedies to their particular requirements and reasonable agreements limiting or modifying remedies are to be given effect¹¹.” When fashioning such a provision, however, the seller must ensure that the remedies are, indeed, exclusive. Additional UCC commentary makes clear that, simply because the contract specifies certain remedies, other remedies set forth in the UCC are still allowed¹².

Therefore, in order to ensure that the remedies are constrained to the agreed-upon remedies, a provision should be included in the Ts & Cs which provides for a specific and *exclusive* limitation of remedy. Most often, this provision will limit remedies to repair or replacement of defective goods.

⁶ UCC §3-316.

⁷ Id.

⁸ UCC §2-715.

⁹ UCC §2-719(3).

¹⁰ UCC § 2-719(1)(a)

¹¹ Id.

¹² UCC §2-719[A] Editorial Commentary.

4. Indemnification. Indemnification in its broadest sense means “to secure against loss or damage.”¹³ In sales contracts, indemnification provisions are used to protect a party (usually the buyer) against claims asserted by a third party. When negotiating Ts & Cs, it is good practice for the seller to specify exactly what they will indemnify the buyer for, so as to not be liable for numerous indemnification issues that may arise in the future. In a fully negotiated contract, an indemnification provision can be substantial and address issues of when indemnification arises, what is necessary to assert an indemnification claim, who controls the claim once indemnification has been asserted, and what the relationship will be between the indemnitor and indemnitee after the claim has been asserted. An indemnification provision in Ts & Cs setting, on the other hand, should simply state that the seller will not be obligated to indemnify buyer or any other party.

5. Payment Terms. While considered more of a “business” than a “legal” issue, payment terms must be understood and implemented in the Ts & Cs for three reasons. First, the UCC provides that a specific payment term does not need to be stated in order to have a valid contract.¹⁴ According to the UCC, where a price term in a contract is left open, the price is a “reasonable price at the time of delivery” provided there is a way to fix said price.¹⁵ Therefore, in order to ensure that payment is made pursuant to the seller’s wishes, the Ts & Cs should echo the seller’s standard payment terms (ie, net 30) and reference a pricing sheet, formula or other determinative pricing structure.

Next, seller’s Ts & Cs should explicitly state that the payment due for the particular sale is not subject to set-off or recoupment for any present or future claim buyer may have against seller. By implementing such language, seller ensures that each sale will stand on its own and the buyer will not have recourse to withhold payment for a specific sale based on an unrelated dispute. Finally, because some buyers employ a “most favored nations” clause in their Ts & Cs, seller should clearly indicate that seller does not provide such favoritism and that it does not guarantee that its’ prices to a particular buyer are the lowest prices charged all buyers.

¹³ BLACKS LAW DICTIONARY

¹⁴ UCC §2-305.

¹⁵ Id.