

CONTRACTING SECRETS: HOW TO MAKE THE MOST OF YOUR CONTRACTUAL RELATIONSHIPS

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IMPLIED WARRANTIES

- You may be agreeing to quality standards you do not know exist
- Certain warranty obligations implied into your transaction without your consent:
 - Merchantability
 - Fitness for a particular purpose
- Vague = subject to interpretation = dangerous

TIE DOWN WARRANTY SCOPE

- Can be disclaimed
- Tie to clear and discrete specs when possible
- Appropriate “sun-setting” of warranty

LIMIT REMEDIES

- Open –Ended Exposure unless you hem it in
- Specify remedy – repair, replacement, return of purchase price
- Cap your obligation
- Exclude “Killer” damages:
 - Consequential
 - Indirect
 - Special/punitive

INDEMNITY OPPORTUNITIES

- Indemnity Creep
 - Do not allow indemnification obligations where it is not your product
 - Intellectual property infringement
 - Marketing, sales, use based exposures
- End-User Indemnity when component producer
 - Stream of commerce risk should be customers – NOT YOURS
- Legal Compliance obligations
- Exclusion of damages

FORCE MAJEURE

- Excuses non-performance when an outside event prevents it
- French meaning: “Exceptionally Strong Force”
- Y2K → 9/11 → COVID → Supply Chain Issues
- This boilerplate needs your attention

GOING-FORWARD STRATEGIES

➤ Force Majeure

- ➔ “Force Majeure” shall mean any cause, event, situation, or agency preventing performance of an obligation under this Agreement which is beyond the reasonable control of any party hereto, and which by the exercise of due diligence, could not have been avoided or overcome without undue effort or expense, including without limitation, widespread disease or pandemic (such as COVID-19), acts of governmental authorities (such as quarantines or business shutdowns) or other limitations on business operations, or other laws, regulations or orders to address other events or circumstances that would be a Force Majeure under this Agreement), civil commotion (such as riots or protests), cyber attacks (such as hacking, viruses, ransomware or other compromises to IP systems), fire or other casualty, lack of police or fire protection or other governmental services, restrictions or limitations on transportation or shipping, flood, sabotage, embargo, explosion, war, military actions, terrorist attacks, labor trouble, material/component shortages or unavailability, accident, other events that materially disrupt business operations or any other event similar in nature, or other acts of God.

RISKY COMMERCIAL TERMS

- Timing of Inspection of Goods Matters
- Long-Term Contracts: No clear-cut ability to raise prices
- Obligations to reduce costs (and prices)
- Ill-defined quantity obligations

RISKY COMMERCIAL TERMS

- Most-Favored Nation Pricing
- “Sneaky” negation of molders’ or tool makers’ liens
- Rights to inspect books and records
 - Just giving away margin

KEY OPPORTUNITIES

- Attack pitfalls we just covered
 - Winning even one or two could be a “win”
- Do not be a line of credit
- Counteract long-term contracts with no obligation to accept PO's

KEY OPPORTUNITIES

- Customer obligation to pay for unique raw materials or components
- Get paid for value-add consulting
 - or at least do not take on risk
- Non-Solicitation

SQUARE PEG, ROUND HOLE

- Many opportunities (and risks) where contract language inconsistent with relationship:
 - IP indemnity
 - Insurance
 - Payment Terms
 - Packaging and Shipping

BATTLE OF THE FORMS

- Whose documents control?
- Buyer is in driver's seat
 - Put terms on website
 - Put terms on proposals – want it in process as early as possible
 - Make sure T&C's contain “kick-out” language (supersedes all other terms and conditions)
 - Whenever you can, arrive at a mutually agreeable and mutually executed single agreement
 - This blow up the battle as a single, integrated contract controls
 - Be the “last shot” when you can
 - More written communications, the better as a Seller: you need to create confusion and more documents do that (avoid oral communications)
 - Educate personnel that deal with accepting or processing orders
 - Do not sign the other side's form and expressly reject them when you can: ignoring them can lead to tacit acceptance

800 LB. GORILLA SYNDROME

- Do Not Fall Victim: You can will points
- Be selective about what you fight over
- Be mindful of “optics”
- Focus on:
 - Key risk areas
 - Square peg, round hole items

SUMMARY

- Do not leave \$ on the table
- Give it the attention it deserves
 - You can shift some key risks in almost any relationship
- Ice Miller can help – our member benefits are tuned into these key issues

Thank you!

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