

# SUPPLY AGREEMENT ISSUES AND STRATEGIES

H. Alan Rothenbuecher  
Benesch, Friedlander, Coplan & Aronoff LLP  
200 Public Square, Suite 2300  
Cleveland, Ohio 44114-2378

[har@beneschlaw.com](mailto:har@beneschlaw.com)

[www.beneschlaw.com](http://www.beneschlaw.com)

 **Benesch**  
Attorneys at Law

"These new Terms and Conditions  
you've drafted for us are extremely  
long and overly complex –  
our customers are never  
going to be able to  
understand them.  
Well done Jones!"



JOHN FRY.

# WHY?

- Greatest leverage
- Manage risk
- Define expectations
- Avoid battle of the forms

# STRATEGY

- Some now / more later
- Building trust

THESE EXCLUSION CLAUSES ARE ABSURD. AS YOUR IN-HOUSE COUNSEL I MUST ADVISE AGAINST SIGNING THIS



NEVER IN ALL MY YEARS OF LAW HAVE I READ SUCH A CONTRACT!



NO-ONE IN THEIR RIGHT MIND WOULD DRAFT A DOCUMENT LIKE THIS!



... THOSE ARE OUR STANDARD TERMS AND CONDITIONS.



# RECITALS/DEFINITIONS/PARTIES

- Define the Parties (e.g., Buyer and Seller)
- Define the Effective Date of the Agreement
- Define the Product(s) being manufactured, supplied and/or purchased
- Define any other terms that are important (e.g., “Exclusive”)

# PRODUCT MANUFACTURE AND SUPPLY

- Manufacture and Purchase
  - Spell out what is to be manufactured, supplied and/or purchased, including any relevant limitations as it pertains to the parties
- Ownership of Intellectual Property; Licensing
  - Address any relevant intellectual property rights related to the Product(s), including who owns which IP rights
  - Address how the licensing of such intellectual property rights is needed to commence the Agreement

# PRODUCT MANUFACTURE AND SUPPLY

- Ownership and Use of Tooling
  - Address who owns the tools and other devices needed to commence the manufacturing/supply process of the product(s)
  - Address the scope of use, limitations, permissions and other relevant information that govern such use



# TERM

- Initial Term
  - How long is the Agreement?
  - When does the Agreement start running?
    - Upon the Effective Date?
    - Upon “Acceptance” of the products?
    - After inspection of the product(s)?

# TERM

- Extension; Renewal Terms
  - Is the Agreement renewable?
  - Does the Agreement extend automatically?
  - Is written notice needed for any extensions or renewals?

# MANUFACTURING PROCEDURES

- Specifications
  - What are the rules governing the manufacturing and supply of the Product(s)?
  - Are these rules in written form and accessible to both parties?
  - What type of notice is required if the Specifications are changed in any way?

# MANUFACTURING PROCEDURES

- Access to Facilities
  - Can one party enter the facilities of the other party in order to ensure the manufacturing process is being handled appropriately?
  - What are the scope and limitations of such access?

# MANUFACTURING PROCEDURES

- Rejected Products
  - How are Product(s) to be rejected? What type of notice is needed if the Product(s) are to be rejected? What type of inspection of the Product(s) is allowed? How long is such inspection?
  - What happens when a Product is properly rejected?



# PURCHASE ORDERS

- Are Products to be ordered on an ongoing basis? If so, will separate POs be needed for each order of Product(s)?
- How are such Purchase Orders to be completed? What are the shipping dates, delivery dates and other timelines, etc.?

# PRICE AND PAYMENT

- What is the Purchase Price of the Product(s)? Is the Purchase Price offset in any way? Are taxes included? Are the costs of raw materials included?
- What are the costs of late payments (e.g., interest, costs of collection, including attorneys' fees)?
- Adjustments for changes in material or packaging costs?



# SHIPMENT, FREIGHT COSTS, RISK OF LOSS

- What are the shipping and freight costs?
- How are the Product(s) delivered (e.g., F.O.B.)?
- Who bears the risk of loss? Spell this out carefully, including how and when risk of loss might shift from one party to another (e.g., upon delivery)

# LIMITED WARRANTY; DISCLAIMER

- Consider what types of warranties and/or representations are included as well as those that are disclaimed? Some relevant warranties include: (i) merchantability and (ii) fitness for a particular purpose
- Consider what warranties are express or implied? Are implied warranties disclaimed?
- Consider how defects and workmanship related to the Product(s) are to be addressed. Are replacement parts/Product(s) offered in the event of a defect or problem related to workmanship?

# CONFIDENTIAL INFORMATION; INTELLECTUAL PROPERTY RIGHTS

- Confidential Information
  - Define what information is “Confidential”
  - What are the obligations of the parties regarding Confidential Information?
- Intellectual Property Rights
  - Consider trademarks, trade names, trade secrets, copyrights and patents
  - Who owns such rights? What about modifications, adaptations, derivative works, etc.?

# CONFIDENTIAL INFORMATION; INTELLECTUAL PROPERTY RIGHTS

- If modifications are made to the Product(s), who owns the rights to such modified Product(s)? Are such modifications to be considered a “work for hire” in which case they revert to the original owner?
- What representations and warranties are afforded?
  - Is it represented that the Product(s) are free from any current or pending claims of third parties regarding intellectual property rights? Are there any foreseeable claims?
  - Is it represented that the Product(s) do not misappropriate, infringe or otherwise violate the intellectual property rights of a third party?

# INDEMNIFICATION; LIMITATION OF LIABILITY

- Indemnification
  - How and to what extent do the parties indemnify each other?
  - Does this include officers, directors, employees, agents of the Parties?
  - Is indemnification reciprocal between the Parties?
  - What are the conditions for indemnification to trigger (e.g., threat of a lawsuit)?
  - How does such indemnification relate to intellectual property rights (see above)?
  - If any of the above representations or warranties turn out to be false, will that trigger indemnification?

# INDEMNIFICATION; LIMITATION OF LIABILITY

- Limitation of Liability
  - Are there any types of claims, damages or other causes of action for which one Party will not be liable to the other Party? To a third party?
  - What is the scope of such a limitation (i.e., does it cover tort, strict liability, contract)?
  - Is this provision reciprocal (i.e., does it apply to both Parties)?

# INSURANCE

- What sort of policies must the parties maintain? Who and what is covered?
- What are the limits of such policies? Consider:
  - The limit for each “occurrence” triggering such insurance; and
  - The total cap (umbrella) limit for all claims

# INSURANCE

- Must the parties provide each other with evidence (certificates) of such insurance policies?
- Must the parties provide each other with evidence of payments of the policy?
- Must the parties name each other as an “Interested Party” in the respective policies?
- Is it a shared obligation, or is it one-sided and only one party carries insurance?



# TERMINATION

- Are there any specified events where the agreement automatically terminates (e.g., incurable breach vs material breach)?
- What is the timeline and notice required for termination?
- Is there any period where breaches can be “cured” before termination occurs?
- What is the effect of termination? Consider ongoing payments, intellectual property rights, licenses, and so forth



"They presented us with an ironclad contract that we were able to totally reinterpret."

# GENERAL/MISCELLANEOUS PROVISIONS

- Force Majeure: What events (beyond the control of either Party) relieve the Parties of their respective obligations under the Agreement? Consider such events as: war, flood, epidemic, civil unrest, tumult, etc.
- Notices: What sort of notice is required (e.g., certified mail, overnight delivery with tracking)? What are the respective addresses or other contact information of the Parties to where notice must be sent?

# GENERAL/MISCELLANEOUS PROVISIONS

- Entire Agreement (Merger Clause): Does this Agreement reflect the entire agreement of the Parties and supersede any prior agreements (oral or written) between the Parties? Are any exhibits, specimens, attachments, etc. to be included as part of the Agreement?
- Amendments: May the Agreement be amended? If so, how? In writing, signed by both Parties?

# GENERAL/MISCELLANEOUS PROVISIONS

- Waiver: If one Party fails to enforce its rights under the Agreement, will that count as a waiver of such rights? Typically, the Parties will agree to the opposite. If either Party fails to enforce its rights under the Agreement, it will not constitute a waiver of such rights or any other rights under the Agreement. Is this a reciprocal right between the Parties?

# GENERAL/MISCELLANEOUS PROVISIONS

- Obligations of Third Parties: Does each party represent that its undertaking under this Agreement does not violate any of its contractual obligations, express or implied, undertaken with any third party and that such party has the right and authority to enter into this Agreement?
- Assignment: May the Agreement be assigned or delegated in any way? If not, is the prior approval of the other Party required for such assignment? Must such approval be in writing? Does non-assignment apply to both Parties?

# GENERAL/MISCELLANEOUS PROVISIONS

- Governing Law; Venue: Under what laws will the agreement be interpreted and/or governed? What about conflicts of laws? What is the venue for this Agreement? Does this include state and federal courts in that venue?
- Severability: If any part of the agreement is illegal or unenforceable, does that affect the rest of the Agreement? Typically, the parties will agree that any such unenforceability or illegality will not invalidate the rest of the agreement.

# GENERAL/MISCELLANEOUS PROVISIONS

- Headings; Interpretations: Are the headings of the agreement meant solely for information purposes? Do the headings affect the interpretation or enforcement of the agreement in any way? Typically, the parties will agree that the headings do not affect the agreement
- Counterparts: Can the Agreement be executed in multiple counterparts?



# GENERAL/MISCELLANEOUS PROVISIONS

- Independent Contractor; Relationship of the Parties: Are the parties independent contractors to each other? Does this Agreement create any sort of joint venture between the Parties?
- Remedies: What sort of remedies (e.g., injunctive relief, damages) are the parties entitled to under the Agreement?
- Exclusivity: Is this a non-exclusive vs. exclusive relationship between the parties? Carefully consider this

# CLOSING RECITALS/ WITNESSETH/SIGNATURES

- The parties have caused this Agreement to be executed by their duly authorized officers
- The parties understand they are entering a binding agreement
- The parties represent and warrant their signing parties can bind them to this Agreement

# EXHIBITS (if any)

- Product(s): Spell out the Product(s) being manufactured and supplied in greater detail
- Specifications: Spell out the specifications and other rules governing use, manufacture and supply of the Product(s)
- Pricing: Spell out the pricing for such Product(s) in greater detail:
  - Payment Schedules?
  - Interest rates (consider defaults)?



# QUESTIONS?



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 **Benesch**  
Attorneys at Law