SpencerFane®

Manufacturer's Corner: The Danger of Conditioning Your Sale on the Buyer's Acceptance of Your Terms

JULY 6, 2015| PUBLICATIONS

If you review the terms and conditions given by many manufacturers in their invoices (including, probably, yours), you likely will find a provision that says something to the effect of "we agree to sell you this product if, and only if, you agree to each of these terms and conditions." It's a common term, and there's a good reason for it: it can counteract standard form language in the buyer's purchase order that you don't like.

But it's not without its risks, as one adhesive manufacturer recently learned.[1] The manufacturer agreed to supply adhesives to a buyer, and promised that none of the products it supplied would include a certain chemical. Well, some of the products included that chemical, and a lawsuit followed. The manufacturer argued, however, that a limitation of damages in its terms and conditions barred the buyer from receiving full relief.

The Court disagreed, and the scenario presented is not uncommon. The buyer sent a purchase order requesting a certain quantity of adhesive and specifying a price. The manufacturer sent an invoice that included its standard terms and conditions. Those terms included the following: "Seller's offers are made strictly on the terms and conditions stated herein and no others. Acceptance of Seller's offers is strictly limited to the terms and conditions stated herein and no others."[2] The terms also included the damages limitation at issue.

The question presented to the Court was whether the damages limitation became part of the parties' contract. The Court concluded it did not.

This was a contract between merchants.[3] The Uniform Commercial Code provides that in a contract between merchants if an expression of acceptance or confirmation contains terms "additional to or different from those offered," then the additional terms[4] are treated as proposed additions to the contract. Those proposed additions become part of the contract unless one of three things is true, none of which was true in this case.[5]

That general rule, however, applies only when the accepting party (the manufacturer here) doesn't expressly condition its acceptance on the offering party's assent to the additional or different terms. Here, of course, the manufacturer *did* insist on assent to the additional damages limitation term.[6]

The manufacturer's insistence kicked the case outside the general rule, and into another subsection of the UCC, which provides that when the parties' conduct demonstrates the existence of a contract, then the terms of the contract are those terms on which the parties agree, together with any default terms supplied by the UCC.

Here, the buyer convinced the Court that it never agreed to the damages limitation, and the Court accepted that argument because, in the Court's words, "a buyer's silence is not considered 'assent' to additional terms in a seller's acknowledgement."[7] From there, the Court had no difficulty concluding that the damages limitation was not part of the parties' contract.

Note how peculiar this outcome is from the seller's perspective. The manufacturer got burned by language it put in its terms and conditions *to protect itself*. But for that language, the Court may well have concluded the damages limitation was part of the contract.[8] How, then, do we avoid this outcome?

One way is to hedge the language a bit. Rather than making the acceptance conditional on the assent of the buyer, make it "subject to" your terms and conditions. (See footnote 6). The risk of that is obvious though: in this very case

AUTHORS

- Ryan C. Hardy

BLOG TOPICS

- Litigation and Commercial Law
  - Commercial Litigation
  - Manufacturer's Corner
  - Uniform Commercial Code

we're discussing, the terms and conditions make no express reference to "assent." So this clearly will not work everywhere.

Another way is to leave the language out, and instead impose language stating that you are the offeror, and that your buyer agrees you are the offeror.[9] That puts you in a materially different scenario, because your buyer then can either send its own confirming memorandum (stating its own different or additional terms) or, perhaps more likely in a smaller transaction, simply act as though there's a contract so that the rules we're discussing here have no application. Even this, however, is not without its risks, and those risks increase substantially if your buyer has stated in its purchase order that its offer is limited to acceptance of the terms of the offer.

The overarching lesson here – as it so often is in this column – is to pay close attention to your terms and conditions and those of your buyer. You need to have a strong sense of which are critical, and which can go by the wayside. If there's a conflict on critical terms, or a risk that critical terms may require express acceptance, it's time to ditch the forms and prepare a contract to be signed by both parties.

---

[1] *Mastercraft Furniture, Inc. v. SABA North Am., LLC*, 2015 WL 1478443 (D. Or. March 31, 2015).

[2] The terms framed the manufacturer as the "offeror" of the contract. It wasn't. Typically a purchase order is deemed an offer, and acceptance is made by performance. The invoice is a confirming memorandum (or, in some instances, an acceptance).

[3] For our purposes here, assume that just means they were familiar with commercial transactions generally.

[4] The body of the UCC limits this second part to "additional terms," and is silent on "different terms." That's an issue for another day.

[5] Or, at least, there was no reason to determine whether they were true in this case. I suspect that at least one of the things may have been true. Meet me at footnote 8!

[6] At least according to the Court. Other cases suggest that similar language isn't sufficient to trigger the "assent" rule. *See, e.g.*, *MHD-Rockland, Inc. v. Aerospace Distributors, Inc.*, 2014 WL 31677 (D. Md. Jan. 3, 2014) (see particularly footnote 4 and accompanying text).

[7] I wouldn't bank on that holding true everywhere if I were on the buy side.

[8] Again, that presupposes none of the three exceptions applied. One of those exceptions is if the proposed additional terms "materially alter" the contract. Certainly a reasonable case could be made that the damages limitation would have materially altered the contract. And, indeed, that case has been made successfully. See, for example, the discussion in *Thomas Engineering, Inc. v. Trane Co.*, 1993 WL 276780 (N.D. Ill. July 20, 1993).

[9] A court may not be willing to accept this at first blush. It would take some work. The key would be to establish that even if you were the accepting party as a matter of fact, your term about being the offeror was an additional term that became part of the contract between merchants. Thus, the buyer is bound to the agreement you are the offeror.