

# Commercial & Technology

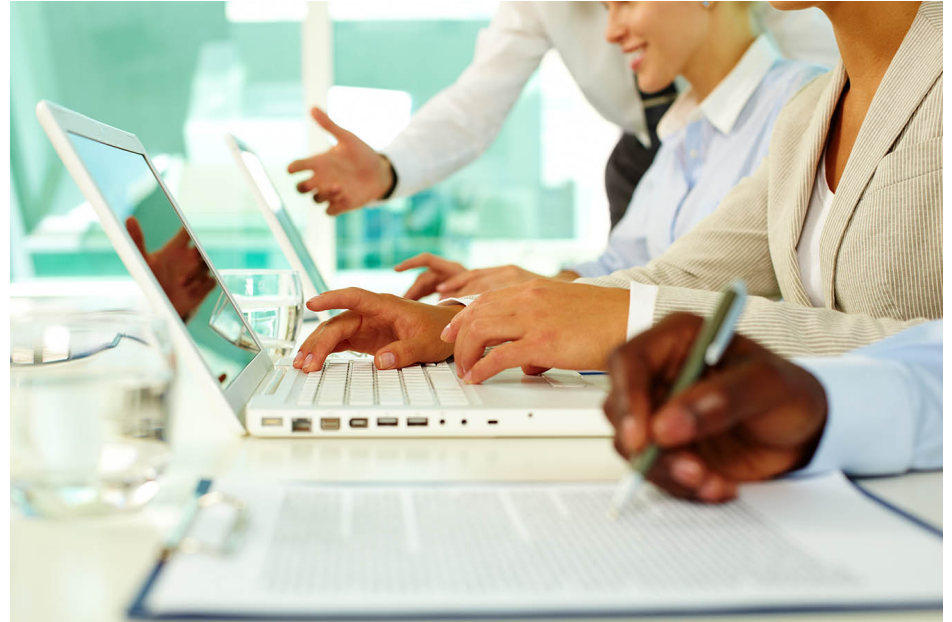
Contract Trends and Negotiations

*Brandon Woods – Partner, Troutman Pepper*

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# Agenda

- **Types of Products and Services**
  - Technology, software, and subscriptions
  - Goods
  - Services
- **Material Provisions**
  - Warranty / Disclaimer / SLAs
  - Limitation of Liability
  - Indemnity
  - Intellectual Property
  - Pricing / Costs
  - Data / Privacy Compliance / DPAs
- **Battle of Forms**



# Typical Structure of Agreements

## Software

- Majority of Software now SaaS
- Term Usually 3 Years
- Online or Electronically Signed
- Provider Controls Access and Updates
- Negotiate vs Classify as Low Risk?
- Order, Agreement, SLAs Included

## Goods

- Quote and Purchase Orders (“PO”)
- Shipping Terms - Forecasts

## Services

- Master Services Agreement
- Order, Agreement, Statement or Scope of Work
- Time and Materials, Fixed Fee or Not to Exceed
- Overruns Common
- Agreement May Be Before Design Details
- Governance Process

*\*We are Not Covering Contracts Formed by Conduct*

# Warranty; Disclaimers; SLAs

## Buyer

- **Express Warranties**
  - Comply with Specifications
  - Good, Usable and Merchantable Condition, Fit for Purposes [*Intended or Stated?*]
  - Free from Defects in Workmanship, Design, Production, Materials
  - Comply with Applicable Laws and Regulations
  - Services Performed in a Competent and Professional Manner by Qualified Staff
- **Recall / Product Liability**
- **Software - Service Level Agreement (SLA)**

## Seller

- **Limit Warranties in Time, Scope with Exceptions**
- **Disclaimers (exclusive remedy, in lieu of all other warranties, including implied warranties of merchantability, usage, trade and fitness for a particular purpose)**
- **Term; Buyer Must Notify Promptly**
- **SaaS – fix bugs**
- **Goods – repair, replace or refund**
- **Services – reperform or refund**

# Limitation of Liability

## Buyer

- **Ideally, No Limits**
- **If Limits Will Exist:**
  - Typically, Last set of terms negotiated
  - Ensure direct damage cap is high enough and meaningful
  - 1 Year Fees / Amounts Paid Common
  - Add carveouts at a minimum for indemnities, willful misconduct, breach of confidentiality (*including under indirect limits*)
  - Indirect / Consequential / Lost Profits Damages Usually Disclaimed

## Seller

- **Every Contract Should have Limits for Direct and Indirect Damages**
- **Range typical amount 3 to 12 months' worth of spend as starting point**
- **Limit Carveouts**
  - No Carveouts for Breach of Contract
  - Supercaps for Breaches Related to Data and Security, and Increasingly, for Confidentiality breaches
  - Without Limits – considered a 'bet the company contract' as buyer can claim damages under breach of contract higher than value

# Indemnity

An indemnity generally is used to protect a party by the other party from a lawsuit brought by a third party. The indemnitor (providing the protection) is typically the party in best position to have prevented the harm (e.g., Software Developer best position to limit IP infringement claims).

## Buyer

- **Desires Protections from Claims Related to IP Infringement, Recall, Harm to Person/Property, Breach of Applicable Laws**

## Seller

- **Desires to Limit Scope of Indemnity**
- **Require Indemnity From Buyer for Any Inputs (e.g., Specs, Data Inputs, etc.)**
- **Limit Remedies; Limit to Third Party Claims**

## Use Common Procedures for Both Parties:

- **Prompt Notice from Indemnitee**
- **Full control of Defense**
- **Settlement Will Not Impose Obligations on Indemnitee**
- **Indemnitee Able to Use its Counsel at its Expense if Desired**
- **\*\*Usually NOT a good idea to just change language to ‘mutual’**

# Intellectual Property

## Buyer

- **Do you desire to own the underlying IP?**
  - Software, goods, services
  - Use IP Rep, but okay to let go if you have a fulsome IP infringement indemnity
- **Ensure Seller cannot Use Buyer's IP Except to Provide Service/Software/Goods**
- **Not all deliverables are protected under Copyright – use waterfall language as back-up to assign or license to Buyer**
- **No IP transfer on SaaS**
- **Ensure Seller has Rights to Transfer IP**

## Seller

- **Retain IP Ownership of designs, deliverables, software, and processes**
- **License in the alternative to ownership**
- **Ensure Seller has a license or right to use IP that Buyer provides (and indemnity)**
- **IP is typically a core asset that Seller needs to protect in order to stay in business and attract investors / buyers in M&A context**

# Pricing / Costs

## Buyer

- **Clearly Stated on Order / Quote**
- **Incorporate Orders and Quotes into the Agreement**
- **Consider Adding Pricing Terms for Future**
- **Restrict Increase in Pricing (e.g., CPI where applicable or fixed % YOY)**
- **For Fluctuating Prices related to Materials – Consider Using Indices**

## Seller

- **Clearly State on Order / Quote**
- **Extend Pricing Guarantees Only For Duration Foreseeable for Underlying Costs**
  - Raw materials
  - Labor
  - Insurance
  - Components
- **For Fluctuating Prices related to Materials – Consider Using Indices**



## Buyer

- **Restrict Seller's Use of Buyer's Data**
- **Common to Allow Aggregation and De-identification – But Restrict Use – Obtain Indemnity**
- **For Software or if Seller Will Have Access to Buyer's Data - Attach Security Terms**
- **Attach Data Processing Addendum (DPA)**
- **Ensure Compliance With Industry Standards or Specific Standard (e.g., ISO27001, NIST)**
- **Avoid Linking Privacy Policy as Often Updated**

## Seller

- **Best to have Customer Facing Policy Describing High-Level Security Approach**
- **Stay Informed on State and Federal Laws Related to Processing, Transferring, and Storing Data**
- **Get Prepared by Understanding European Approach to Data (Controller / Processor)**
- **Expressly Disclaim**
- **Encrypt Using Current Technologies**
- **Tabletop Exercises**

# How to Improve Your Chances in Negotiations

- 1. Start with a Checklist Outlining Your Organizations Sensitive and Must Have Terms From Both Buy and Sell Perspectives**
- 2. Develop a Process**
  - a. Due Diligence on Provider / Customer
  - b. Identify Approval Matrix
    - For Spend Amounts
    - For Approval of Certain Terms (e.g., Security terms reviewed by IT)
  - c. Review Checklist against Contract Terms
  - d. When to Use Your Form Agreements
  - e. Develop Red Flags and Low Risk Categories

# Battle of the Forms - 1

- **Unless you have a signed contract, you will be in a Battle of the Forms. It's the buyer's game to lose.**
- **Process used by and between two merchants for sale / purchase of goods.**
- **You must have terms and conditions.**
  1. If not, you are stuck with the other side's terms
  2. Their terms will not favor you
- **You must reference and attach your terms and conditions**
  1. Early and often
  2. Every time
- **“Magic Language” matters**
- **Watch out for international transactions. The United Nations Convention on the International Sale of Goods (CISG) is not the same as the UCC. Default Favors Seller, not buyer**

# Battle of the Forms - 2

- **Avoid Battle of the Forms by Getting a Signed Agreement**
- **If you cannot avoid, contract is formed by offer + acceptance**
  - Usually occurs by Seller sending quote and Buyer sending PO, then Seller sends Order Acknowledgement
  - Additional or varying terms in each party's forms may be considered unless acceptance is expressly made conditional on assent to the additional or different terms, which then are construed as proposals unless:
    - Offer **Expressly Limits Acceptance** to the terms of the offer
      - Materially Alter the original terms. For example, of material altering terms:
        - Price, Quantity, Quality
        - Arbitration, Choice of Law
        - Disclaimer of Warranty
        - Notification of objection has already been given
      - Non-Material Terms In. For example:
        - Limited time to Complain on Defects
        - Credit Terms within Trade Practice
        - Limited Right to reject for Defects
- **UCC Terms Different by State (e.g., Majority Rule, Minority Rule, California Rule)**

# Battle of the Forms - 3

## Buyer: Magic language for Front of Purchase Order

THIS PURCHASE ORDER IS **EXPRESSLY LIMITED TO**, AND **EXPRESSLY MADE CONDITIONAL ON**, SELLER'S ACCEPTANCE OF THE TERMS OF THE ORDER AND THE ATTACHED \_\_\_\_\_ PURCHASE ORDER TERMS AND CONDITIONS. (A COPY OF THE PURCHASE ORDER TERMS AND CONDITIONS IS AVAILABLE AT [INSERT URL].) **BUYER OBJECTS TO ANY DIFFERENT OR ADDITIONAL TERMS.**

Acknowledged and Accepted By Seller:

Name: \_\_\_\_\_

Date: \_\_\_\_\_

# Battle of the Forms - 4

**Seller: Magic Language for Front of Quotation, Order Acknowledgement, and invoice**

[THIS QUOTATION] OR [SELLER'S ACCEPTANCE OF THIS ORDER] IS **EXPRESSLY LIMITED TO**, AND **EXPRESSLY MADE CONDITIONAL** ON, BUYER'S ACCEPTANCE OF THESE TERMS AND THE ATTACHED \_\_\_\_\_ TERMS AND CONDITIONS. (A COPY OF THE \_\_\_\_\_ TERMS AND CONDITIONS IS AVAILABLE AT [INSERT URL].) SELLER **OBJECTS TO ANY DIFFERENT OR ADDITIONAL TERMS**.

Acknowledged and Accepted by Seller:

Name: \_\_\_\_\_

Date: \_\_\_\_\_

# Thank You



**Brandon Woods**

704.998.4057

[Brandon.woods@troutman.com](mailto:Brandon.woods@troutman.com)



**Bill Mayberry**

704.916.1501

[Bill.mayberry@troutman.com](mailto:Bill.mayberry@troutman.com)