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THE BATTLE OF THE FORMS

Introduction

This memorandum addresses the rights, obligations, and liabilities of the parties when “dualing” or conflicting terms are contained in each party’s sales/purchase documents.

Discussion

One of the most important changes in the longstanding law of contracts is the rejection of the common law “mirror-image rule” of contract formation. Under the common law doctrine, no contract could be formed unless there was a precise match between the terms of an offer and an acceptance. The appeal of the “mirror-image rule” was its simplicity and logical precision. However, the legal rule was out of step with the way the business world operates.

Buyers and sellers of goods often do not sign the same written agreement, or contract. Instead, it is a common practice for each to send the other one or more written documents, such as purchase orders, requests for quotations, correspondence, price quotations, invoices, and similar documentation. These documents will usually contain the same bargained terms such as price, quality, quantity, and delivery terms. But on other terms the forms will diverge in important respects, with each party’s forms giving it the advantage. Other agreements might be reached orally then followed up by slightly varying written confirmations. Sometimes the conflicting terms and conditions contained in the exchanged documents results in a dispute that is commonly referred to as the “battle of the forms”.

Article 2 of the Uniform Commercial Code (“UCC”) and Chapter 2 of the Texas Business and Commerce Code apply to transactions involving goods. Section 2-207 of the UCC was drafted, and has been revised, in an attempt to resolve the battle of the forms. It states as follows:

§ 2-207. Additional Terms in Acceptance or Confirmation.

- (a) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless

acceptance is expressly made conditional on assent to the additional or different terms.

- (b) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
 - (1) the offer expressly limits acceptance to the terms of the offer;
 - (2) they materially alter it; or
 - (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
- (c) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this title.

Section 2.207 permits the formation of a contract even though an offer and acceptance may differ on several terms. New terms contained in an acceptance or confirmation are treated as proposals for addition to the contract and, between merchants, such terms become part of the contract unless: (1) the offer limits acceptance to the terms of the offer or, (2) objection is made to the additional terms or, (3) the additional terms materially alter the original contract. A further change is the ability of the contracting parties to “fill in” the terms of an agreement, which is otherwise silent on a subject, by the parties' course of performance. In such cases, Section 2.207(c) operates to form a contract even if the writings of the parties do not agree.

Recommendations

An offer by a merchant to buy or sell goods in a signed writing that by its terms gives assurance it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time. However, in no event may such period of irrevocability exceed three months. In addition, any such term of assurance on a form supplied by the offeree must be separately signed by the offeror. Forms sent to the buyer, then, should contain a time, not to exceed three months, that the offer to sell will remain open.

When a firm offer has not originated with the seller, but is found in a form supplied to the seller by the buyer, it is necessary that any term of assurance be separately signed by the seller. This means that regardless of whether the seller signs or initials the buyer's form at any other place, the seller must separately sign or initial or otherwise authenticate the provision which makes the firm offer binding.

Between merchants, additional terms are construed as proposals for addition to the contract, and become part of the contract unless: (1) the offer expressly limits acceptance to the terms of the offer; (2) the additional terms materially alter it; or (3) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

Section 2.207 does not specify a time in which notification of the objection must be made, and instead states the objection must be given “within a reasonable time”. Therefore, the seller should endeavor to notify the buyer of its objection to additional terms within what a

reasonable person would consider “a reasonable time”. It is our recommendation that any such objection be made as soon as possible, but in any event, within thirty (30) days of receipt of the additional objectionable terms. Seller should also note whether or not the buyer’s additional terms contain its own time deadlines, and if so, observe same.

Finally, Section 2.206 permits a contract to be formed by a seller by either a promise to ship or by shipment; therefore, the seller should avoid shipping goods in response to an order *before* the seller’s own form is sent. If the goods are immediately shipped, a contract will be formed on the buyer’s terms and the seller will lose the opportunity to obtain more advantageous terms.

Conclusion

By modifying its forms to reflect the foregoing rules, a seller should be positioned to transact business for the sale of goods on its own terms. Additionally, the seller should examine the documents supplied by its customers to determine whether or not they contain additional objectionable terms. When such objectionable terms are identified, the seller should timely notify the buyer of its objections.