What The Boilerplate In Your Supply Agreements Really Means

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95th ISM Annual International Supply Management Conference, April 2010

Abstract. For a number of reasons, a close examination of the "boilerplate" provisions in supply agreements is well worth the effort. These contract provisions are often taken for granted and rarely negotiated, and the significant differences between one "standard" boilerplate provision and its seemingly equivalent counterpart in another supply agreement can make the difference between a supply agreement that supports and preserves the business deal you think you have made, and one that can be embarrassingly lacking in teeth when the seller fails to perform.

The Problem and the General Solution. In large as well as in smaller companies, it is relatively rare that a supply agreement is prepared or negotiated starting from a bare terms sheet or "blank sheet of paper" and nothing else. Instead, there is always an existing contract, a proposed form, or a precedent already in the file, even where the supply chain professional or the professional's legal counsel wants to take a fresh look at that contract.

In addition to whatever is in the file from the company's past dealings with sellers, in cases where company-wide sourcing and procurement are not centralized through one department, there may be not just one form, but several or many such forms, a set for each department or division, which taken together amount to many precedents or forms of agreement.

Add to that multiplicity of forms the fact that purchases of goods raise different issues than purchases of services (and therefore require different form agreements), and the further fact that the "form" being used may be the seller's form, not the buyer's, because, for example, the seller insists on using its form, or a past course of dealing relied on the seller's form, or the parties won't pay for "starting over" on a new form (especially where no significant performance problems have surfaced in that course of dealing).

The cumulative effect of all of the above factors is that those of us working in the supply chain field have existing supply agreements or forms that cannot be disregarded, set aside or wholesale revised, corrected or otherwise improved. Instead, those agreements must be approached as a "given," as something to be understood in their business and legal implications. Then the supply chain professional has to determine what the existing and proposed "form" supply agreements mean, and which changes should be made when a contract renewal, or the replacement of an incumbent supplier by a new supplier, or other circumstances provide an opportunity to improve those agreements.
The solution, and probably the best way to provide this learning to the supply chain professional, is to do a close examination of specific boilerplate provisions. In most cases, a side-by-side or A-B comparison is the best way to demonstrate the significant differences between two similar-seeming provisions.

**Why Illustrate With Boilerplate?** Perhaps the best way to understand the significant differences between seemingly similar provisions in supply agreements is to focus on what are often referred to as "boilerplate" terms. The reasons for that focus are readily apparent.

First, in contrast to the provisions toward the front of a supply agreement, which set out the business terms of the supply arrangement and which vary from deal to deal and from seller to seller, boilerplate is often re-used from agreement to agreement without a new, thorough review. This is especially the case where boilerplate provisions are in a separate, pre-printed set of "Terms and Conditions," which the preparer often characterizes as "non-negotiable."

Second, a supply agreement for the purchase of goods, and a supply agreement for the purchase of services, are quite different, not only in the front matter setting out the business deal, but in the representations, warranties and covenants in each. But that is not necessarily the case with boilerplate or miscellaneous provisions. Many of those "standard" provisions remain unchanged from agreement to agreement, and regardless of whether the contract is for goods or services.

**Specific Terms.** Among the specific terms found in typical boilerplate or miscellaneous sections of supply agreements are the following:

- Governing Law; Forum and Venue Selection
- Dispute Resolution
- Arbitration
- Waiver of Jury Trial
- Most Favored Nation Pricing; Agreement on Pricing
- Enforceability
- Limitation of Liability
- Compliance with Law; Anti-Terrorism
- Assignment, Delegation and Change of Control
- Successors and Assigns
- Force Majeure
- Notices
- Amendments
- Integration
- Interpretation and Construction
- Confidentiality
- Order of Precedence
- Severability
- Third Party Beneficiaries
- No Waiver
- Code of Conduct
- Signature Facsimiles and Counterparts
As an initial caveat, and aside from the question of how each of the foregoing provisions can be drafted to favor a buyer (or a seller), it should be noted that a few of these provisions, if included in the same supply agreement, may contradict one another if not carefully drafted so that they work together. Specifically, a provision on dispute resolution that on the one hand contemplates using an alternative method of dispute resolution such as arbitration, and on the other hand contains jury trial waivers and forum selection provisions that contemplate resorting to litigation to settle disputes, may contradict one another. However, the two approaches to dispute resolution can co-exist harmoniously in the same agreement if, taken together, they provide that certain types of disputes must be resolved using arbitration, and other types of disputes by resort to litigation (a good example of the latter is where a breach of confidentiality by one party occurs, and the other party has to seek an expedited court order to prevent further, imminent breaches). Without that careful crafting, the parties may end up with an agreement that is ambiguous as to how disputes should be addressed and resolved. This is also a good place to point out that provisions regarding arbitration and/or litigation should be considered within the context of what your company, and in particular its in-house or outside legal counsel, believe to be the preferred method or methods for dispute resolution. Where the parties are seeking to protect an existing, long-term relationship, arbitration may be the preferred way to prevent disputes from escalating to a level of acrimony more typical of litigation. For these and other reasons, some companies swear by arbitration, while others believe it to be a waste of time and money.

However, the heart of the inquiry about all of the above boilerplate terms and provisions is what they mean as a business and a legal matter, and how seemingly small differences in the way such provisions are drafted can make a profound difference in how they work as part of the supply agreement. A few examples will suffice to illustrate this point.

A provision on "Most Favored Nation Pricing," which is intended to give the buyer the benefit of any lower pricing offered to seller's customers other than the buyer, has at least two potential traps. First, and not uncommonly, such a provision is typically drafted to provide that the lower prices are available to the buyer (only) if those lower prices were agreed to for another buyer purchasing similar products in similar volumes and otherwise under similar circumstances. Second, and less commonly, such a pricing provision may be drafted only retrospectively, meaning that it only applies to prices in effect as of the date of the agreement or agreed to with other customers prior to the date of the agreement, but not prospectively. Each of these features can turn a seemingly buyer-friendly pricing provision that ensures that the buyer is always getting the best available price for goods or services, into meaningless legalese that is of no practical benefit to the buyer.

As an additional example, consider a provision on "Force Majeure." A force majeure provision covers situations in which a party is unable to perform its obligations under the agreement due to certain uncontrollable events or circumstances, and in such circumstances, that party's performance obligations are suspended for so long as the force majeure event or circumstances continue. So far, so good, and a reasonable way in general to address those situations. However, for the following reasons, the way the force majeure provision is drafted can make a great difference in whether both parties are appropriately protected under such events and circumstances. First, in a seller-friendly force majeure provision, the opening language of the provision may read, "Except for the obligation to pay, . . . ." The effect of such language is that the obligations of the buyer under the agreement are generally suspended
where its performance is excused, but not if the obligation is the buyer's obligation to pay for the goods or services. Second, noting which events constitute an event of force majeure is critical. Those listed events should be beyond the reasonable control of the party suffering the force majeure event, and those events may or may not include such matters as increases in labor costs or the cost of raw materials, labor strikes, or general market conditions, each of which affects the buyer's right to receive the goods or services. Third, the force majeure provision may or may not impose on the affected party, among other things, (1) the obligation to give notice to the other party together with a detailed explanation and forecast of how long the event or circumstances are likely to continue; (2) the obligation to take reasonable steps to attempt to cure or correct the event or circumstances; and (3) in a requirements contract (that is, a contract where a buyer has agreed to purchase all of its requirements from the affected party), the right of the non-affected party to procure those goods or services from another seller.

Conclusion. The boilerplate provisions in supply agreements are for various reasons difficult to negotiate anew, yet such provisions contain and address (or fail to address) some of the most fundamental rights and obligations of the parties to a supply agreement. Negotiating supply agreements without due regard for the importance of such provisions is to risk, often unknowingly, the value of the deal to the buyer. A close examination, perhaps even a side-by-side comparison of such provisions is time well-spent for the supply chain professional. In a difficult time when supply agreements are receiving Boardroom-level attention, and when efficiency and economic survival are imperatives confronting all businesses, buyers cannot afford to ignore these provisions and the role they play in their business relationships with sellers.