

Understanding Commercial Contracts

June 18, 2014

Speaker: Patrick Monroe, Counsel

Best, Best & Krieger, LLP

Uniform Commercial Code

Goods; Merchants; Negotiable Instruments;
Secured Transactions

Not Contracts for Services

Business Entities

Limited liability

Piercing the corporate veil

Qualified to do business in California

Contract Provisions

- A. Limiting Liability Provisions – the need to be conspicuous: “Conspicuous,” with reference to a term, means so written, displayed, or presented that a reasonable person against whom it is to operate ought to have noticed it.
- Ex. 1: Disclaimer of warranty printed in bold face twice as large as other terms of sales contract was “conspicuous.” *A & M Produce Co. v. FMC Corp.* (App. 4 Dist. 1982) 135 Cal.App.3d 473.
 - Ex. 2: Disclaimer language in whole life insurer's “vanishing premium” policy illustration indicating that premiums would decrease to zero after eleven years was not “conspicuous” as that term is used in the Uniform Commercial Code (UCC), where the term was in the middle of a 39-line endnote in all capital letters, was not set apart from the rest of the endnote, and was not larger or in a different color. *Broberg v. Guardian Life Ins. Co. of America* (App. 2 Dist. 2009), 171 Cal.App.4th 912.

Contract Provisions – Cont'

- B. Indemnification Unilateral vs. Mutual
- C. Representations & Warranties
- D. Dispute Resolution
 - Venue/Law
 - Mediation
 - Arbitration
- E. Attorney's Fees Provisions

Anticipation of Breach

- A. Adequate Written Assurances
- B. Statute of Limitations – 4 Years on written contract from time of breach

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Commercial Contracts – Best Practices

June 18, 2014

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ATTORNEYS AT LAW

Why Cross-over to Commercial Contracts?

- You are a government contractor, why venture into private “commercial” contracting?
 - Diversification
 - Less headaches (??)
 - Increase your market for products and services
 - Make your business a better acquisition candidate

Differences in the Bodies of Law Between Federal Government Contracts & Commercial Contracts

- Government Contracts Body of Law
 - Federal Acquisition Regulation (FAR)
 - Mandatory terms and conditions appropriate for contracts between a private government contractor and the government
 - Lots of audits, rules on how to operate government contractor internally, transparency of operations
 - Favors the government
 - Need to justify business decisions to the taxpayer; transparency of contract

Differences in the Bodies of Law Between Federal Government Contracts & Commercial Contracts

- Commercial Contracts Body of Law
 - Uniform Commercial Code
 - Most states have adopted
 - Party Neutral – generally tries to balance the interests between the buyer and seller
 - Generally outlines contractual presumptions applicable to commercial transactions between merchants
 - Supplies reasonable substitutes for missing terms
 - Unless contract states otherwise, UCC presumption applies.
- There are other laws out there that may apply; here in California there is the California civil code, case law, etc.

Commercial Contracts – Best Practices (Lesson #1)

PUT IT IN WRITING

- To have an agreement under the UCC, there needs to be an offer and acceptance but writing is not required.
- Regardless of what UCC allows, PUT IT IN WRITING!
 - Why – An acceptance containing additional, non-material terms is still an acceptance.
 - What does non-material mean?
 - Failure to specify price does not seem to be a problem under the UCC.
 - I would think this is material, would you?

Commercial Contracts – Best Practices (Lesson #1)

PUT IT IN WRITING (continued)

- Make sure the persons with the proper authority sign the agreement.
 - This is our agreement but we never got around to signing it – what happens in this case?
 - Might not be a bad idea to have each party initial each page of agreement, why?

Commercial Contracts – Best Practices (Lesson #1)

PUT IT IN WRITING (continued)

- Whose form should be used?
 - The party providing the form has the opportunity to deliver a more favorable form; in the driver seat.
 - If you are doing a lot of private party business, makes sense to have your standard form of agreement ready to go; reviewed thoroughly by an attorney (saves \$\$ in the long run).

Commercial Contracts – Best Practices (Lesson #2)

KNOW YOUR WARRANTIES

- UCC Warranties

- There are express and implied warranties
- Express Warranties
 - Affirmation of fact or promise which is part of the bargain – description of goods or showing of sample
- Implied Warranties
 - Merchantability – Fair, average quality
 - Usage of Trade – Fit for ordinary purpose
 - Fitness for a Particular Purpose
 - Seller has reason to know the buyer’s intended use
 - Seller knows buyer is relying on seller’s expertise

Commercial Contracts – Best Practices (Lesson #2)

KNOW YOUR WARRANTIES (Continued)

- **These are negotiable:**
 - Seller wants to disclaim all...or maybe not.
 - Buyer wants all to be in place...and then some.

Commercial Contracts – Best Practices (Lesson #3)

INSPECTION

- Applies to contracts for goods
- Buyer of goods has right to inspection prior to payment at any time, in a reasonable manner. The expenses of inspection are borne by the buyer, unless goods are rejected
- Negotiable, might not necessarily be fair
 - Non-conforming shipment

Commercial Contracts – Best Practices (Lesson #4)

CHANGES TO CONTRACT

- Under FAR, government could make changes to contract and make equitable adjustments of the contract price, schedule, etc.; not so under the UCC.
- The buyer has no right to unilaterally modify the agreement, generally modifications need to be in writing and bilateral; however, consideration is not necessary to modify or amend.
- Again, negotiable – modification agreed to by party to be charged...

Commercial Contracts – Best Practices (Lesson #5)

KNOW THE PARTY YOU ARE DOING BUSINESS WITH; SEEK SECURITY

- Commercial contracts are between two private parties – occasionally the other party is a well-known company with a good reputation and a long history (GE, Qualcomm, SAIC); more likely it is not.
- Before you enter into a commercial contract for goods and services, do your due diligence on the other party.
 - Ask for references; experience; sample products; financials, etc.

Commercial Contracts – Best Practices (Lesson #5)

KNOW THE PARTY YOU ARE DOING BUSINESS WITH; **SEEK SECURITY** (Continued)

- A well written contract will have security, in the form of indemnification, insurance, piece-meal payments, purchase price retentions, escrow, guarantees, etc.
 - Different type of security appropriate for different types of contracts.
 - A million ways to build in security but at the end of the day, knowing who you are contracting with and their track record is one of the most important steps you can take to protecting yourself.

Commercial Contracts – Best Practices (Lesson #5)

KNOW THE PARTY YOU ARE DOING BUSINESS WITH; SEEK SECURITY (Continued)

- In general UCC does not focus on transparency and is silent on audit rights (unlike FAR), so this is something that needs to be negotiated into contract if important to the relationship.

Commercial Contracts – Best Practices (Lesson #6)

DISPUTE RESOLUTION

- Important to understand how dispute resolution works in the contract.
- Under UCC, litigation is the “go to” form of dispute resolution.
- One can draft into the contract a good faith attempt to work the dispute out within a certain time frame.
- Mediation; Arbitration
 - The better option depends on the type of contract.
- Damages? –limit as to what type of damages.
- Limitation of Liability provision
- Who pays attorney fee? Losing party pays, or to each their own?

Commercial Contracts – Best Practices

Summary

- Generally, everything is negotiable under the UCC (except if there is specifically a provision under the UCC, CA law or otherwise, against public policy).
- UCC is the backstop for items not provided for in the contract.
- Having a tight commercial contract that protects you while allowing you to do business in the private sector will save you time, money and headaches in the long run.

INTERNATIONAL CROSS BORDER CONTRACTING:

HELPFUL PROCESS AND PROCEDURES

June 18, 2014

Speaker: Karla J. Pinckes, Esq.

Business Contracts Manager/Corporate Counsel

Ken Blanchard Companies

“Clear agreements avoid conflict and confusion: they are the means to a satisfying end result.”

-Eunice Parisi-Carew

“All conflict starts with lack of clear agreements.”

-Scott Blanchard & Madeleine Blanchard (Homan)

“Clear agreements enable aligned action.”

-Chris Edmonds

TEAM PURPOSE



Our purpose is to provide clear and well written agreements, that have fair terms to both parties in order to maintain and preserve client relationships while protecting Blanchard's Intellectual Property and financial health.

CUSTOMER SERVICE MEANS

COLLABORATIVE

TIMELY

FRIENDLY

HIGHLY SKILLED

WHAT, WHO, WHY????

WHAT? (Services/Products)

- High level of negotiation skill/ clear & well written contracts

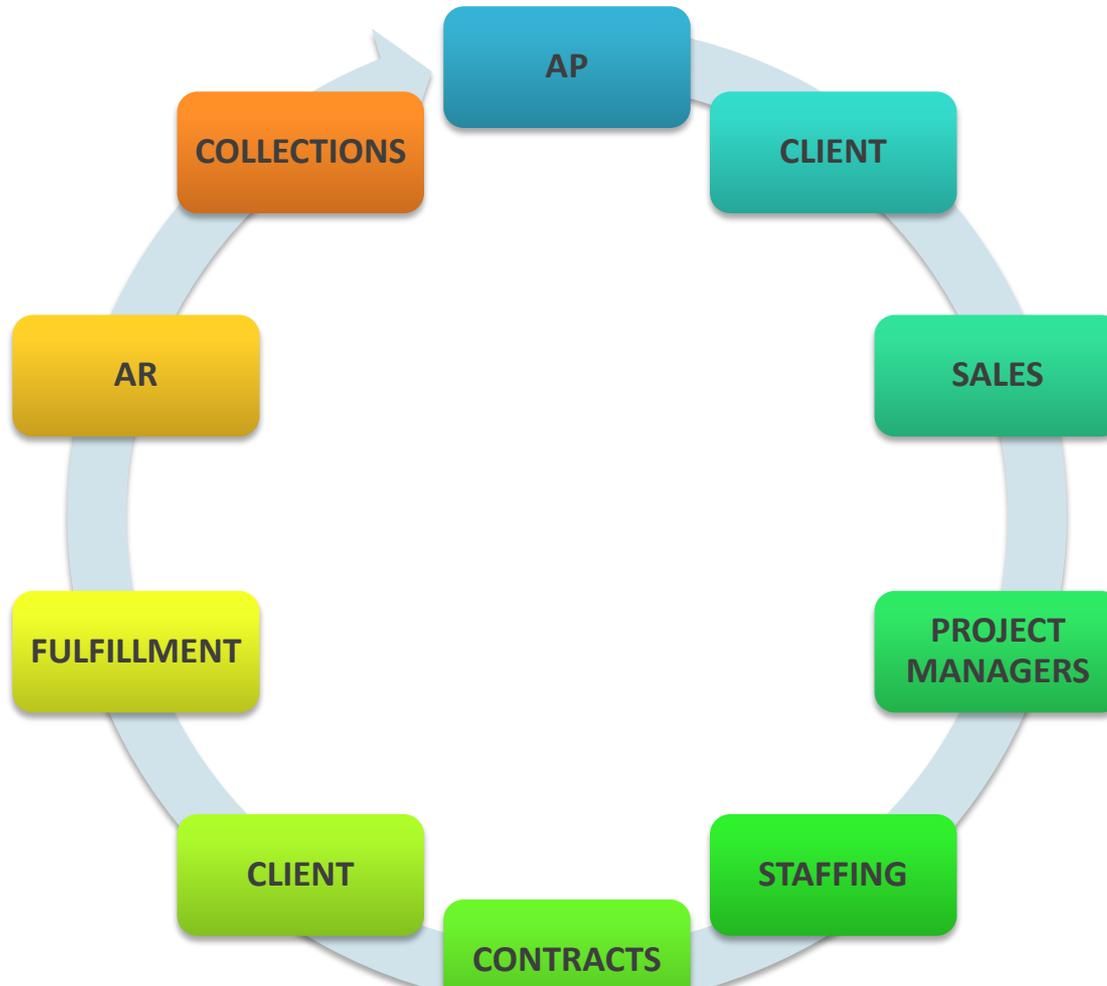
WHO? (Customers)

- Internal – Authors, Family, Finance, Sales, Project Managers, Sales
- External – Clients, Global Partners (licensees), Independent Contractors (ICs)

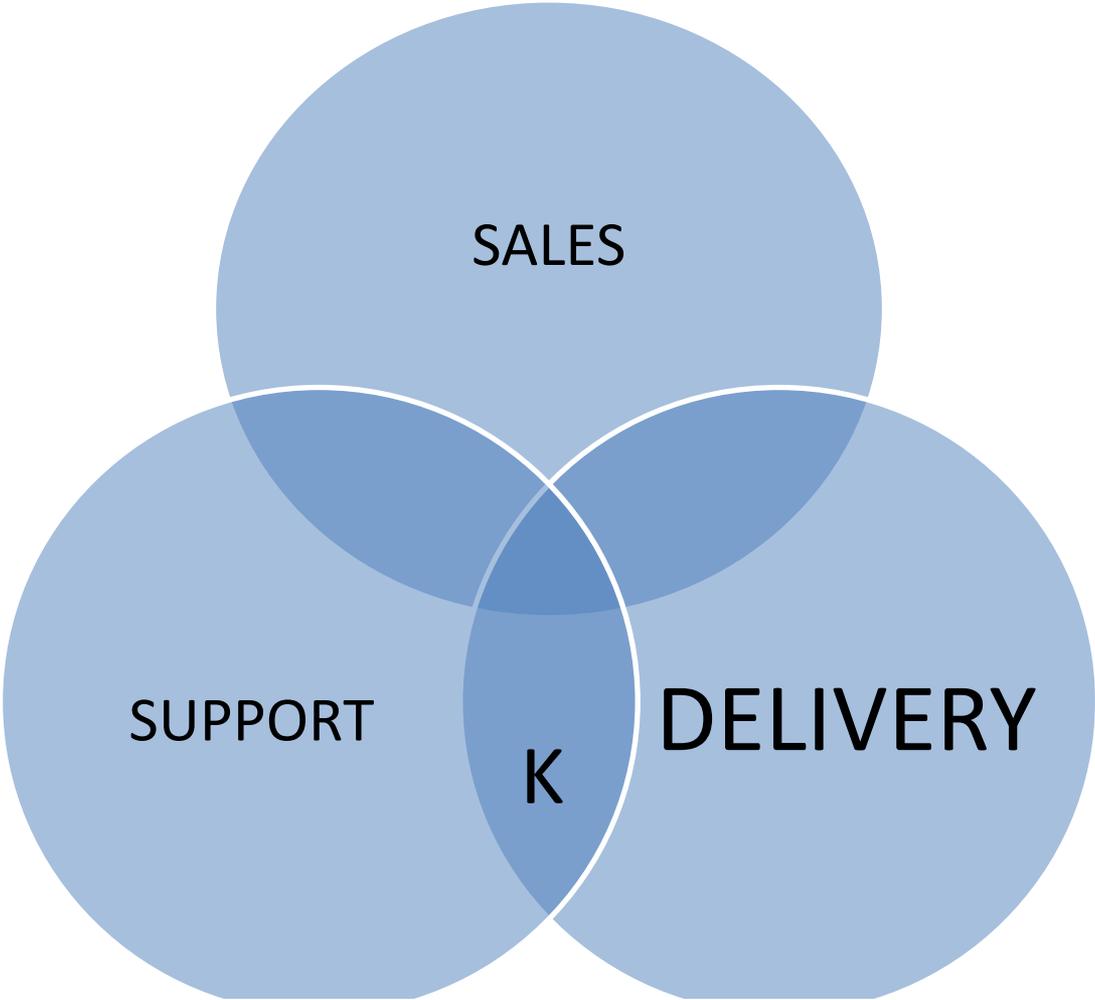
WHY? (Purpose)

- Clear agreements = Win/Win for Client & Blanchard
- Minimizes conflict (moves client relationship forward)
- Preserves fair value of Blanchard's Intellectual Property (IP)

LINK ON THE DELIVERY CHAIN



EXTENSION OF COMPANY BRAND



CONTRACT REQUESTS

TRIAGE

2-5 Business Days For Initial Response

- Professional Services Agreements (PSAs) (onsite/public workshop/trainer for trainer (T4T) sessions, coaching, keynotes)
- Permission Agreements (PAs)
- Reprint Right Agreements (RRAs)
- Translation Agreements (TAs)
- Statements of Work (SOWs)
- Non-Disclosure Agreements (NDAs)
- Project Change Notices (PCNs)
- Insurance Certificates
- Purchase Orders (POs)

CONTRACT REQUESTS

- Global and Master Services Agreements (G/MSAs)
- Level 1-4 Global Partner and Channel Partner Agreements
 - Orders
 - License Change Notices (LCNs)
- Short form Client generated Agreements
- Letters of Understanding (LOUs)
- Supply Chain/Global Print Vendor Agreements
- Renewals/Addendums
- Notices (Termination, Cease & Desist)
- All US Gov. Agreements including General Services Administration
- Term & Conditions review for Public and Private Sector Request for Proposal/Information
- Compliance documents
 - Central Contractor Registration (CCR)
 - Online Reps & Certifications (ORCA)

TOOLS & COMMUNICATION

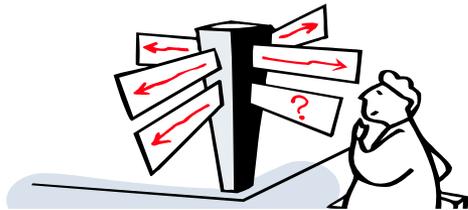
- Contract Management System = Gateway (GW)
 - House Contract Templates
 - House Contract Worksheets
 - Contains Global Views (Signed: MSAs/GSAs, IC Agreements)
 - Creates Contract Numbers Identified on Contracts and Invoices
 - Sends automatic emails:
 - To Client as reminder to sign contract: 7 days after contract was first sent, and 40 days or less before first event.
 - To Sales Leader to risk authorize unsigned contracts: 10-14 days before first event.
 - To PM/Sales as notice of contract expiration: 60 days before contract expires.
- Internal Team Site (houses complex contract templates & language library)
- Monthly meetings with Client Delivery Leader

Professional Services Agreements v. Master/Global Services Agreements

PSA

(Transactional)

- Short form agreement; less complex delivery
- Typically, does not include other client divisions
- Identifies price, quantity of materials, date and location of delivery (typically one program/one session however can be more)



M/GSA

(Longer Term)

- Long form agreement more complex delivery
- Typically, establishes preferred relationship with client
- Typically, includes other client divisions
- Requires an SOW that identifies price, quantity of materials, date and location of delivery (multiple)



PROCESSING TEMPLATES

PSA TEMPLATES FOR:

- Client Site or Public Workshop Events
- Client Site or Public T4T Events
- Coaching Events (To Support Learning or Executive/ Organizational)
- Keynotes
- Trainer Transfer Requests

PROJECT CHANGE NOTICE (PCN): modifies deliverables (including reprint rights) identified in a previously signed contract

PROCESS:

PM completes template then sends it to Contracting via GW, who finalizes and emails to Client for approval and signature.

WORKSHEETS (WS)

- Master/Global Services Agreements (M/GSAs)
- Reprint Right Agreements (RRAs)
- Permission Agreements (PAs)
- Translation Agreements (TAs)

Process: PM emails WS to Sales, Sales completes then emails back to PM, PM uploads into GW for SL approval, then PM sends it to Contracting via GW, who prepares contract and emails to Client for approval and signature.

Most Common Negotiating Points

- 1) IP (Client Obtains Access via Limited End User License/
Blanchard Maintains Ownership (Does Not Do Work For Hire))
- 2) Payment Terms (30 Days From Date of Invoice)
- 3) Rescheduling/Cancellation Terms (30 Days Prior Notice)
- 4) Insurance and Liability Limitations

CHALLENGES

- Deliverable we sell is based on an intangible, thus = complex
- Incomplete information provided by or lack of agreement between internal customers
- Internal strategies/systems in flux (new business models moving to implementation)
- Untimely response by internal & external customers
- High work load, short timelines



COMPANY GOALS

- AVOID DELIVERING WITHOUT A **SIGNED** CONTRACT IN PLACE **BEFORE** EVENT
- INCREASE % OF EVENTS DELIVERED **WITH** SIGNED CONTRACT IN PLACE **BEFORE** EVENT
 - For Training- 2014 Goal = 80% (2008= 70%)
 - For Coaching- 2014 Goal = 70% (2008= 50%)

INTERNAL COLLABORATION

- CONTRACTING
 - One Point of Contact as Contracting triage
 - Timely contract processing (FIFO unless revenue/organization priorities dictate otherwise)
 - Continued skill building and enhancement of GW
- CLIENT FACING
 - Communicate key commercial terms to Clients (IP)
 - Ask front end questions (contracting schema? payment centralized/decentralized? POs required?)
 - Provide complete/accurate/timely information to other teams
 - Submit contracting requests through PM (not email if possible)
 - Be willing to withhold Delivery due to contracting or payment challenges, give more time, help obtain contract signature

HOT TOPICS

- Client International Office Not Adhering to Global Agreement
- Local Offices Unique Contracting and Other Administrative Requirements (Require Company Corporate Stamp)
- Licensing Agility/Flexibility
- End User Notice of Terms of License
- Data Privacy Concerns (Safe Harbor Certification)
- IT Standards/Process
- Flow Down Provisions to Blanchard ICs (Insurance/Performance Warranties)
- Disclosing Name/Use of Subcontractor/ICs on Contracts

QUESTIONS?

THANK YOU!