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Understanding the CCCM

Breakout Session #: C09
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Date: Monday, July 25
Time: 4:00pm-5:15pm
Agenda

- Role of the CCCM
- Managing Contractual Risk
- Purpose/ Construction of the UCC
- Requirements of the UCC
- Exceptions to Statute of Frauds
- Choice of Law
- Battle of the Forms
- Course of Dealing/ Performance and Usage of Trade
- Obligations of the Parties
- Warranty Obligations
- "Good Faith" Process
- Available Remedies
- Improper Delivery
- Liquidated Damages
- Statute of Limitations

Conclusion
Role of the CCCM

• Draft, Evaluate, Negotiate and Execute Contracts
  – Non Disclosure Agreements, Sales / Purchasing Agreements, Subcontracts, Consulting Agreements, Licensing Agreements, Master Agreements
  – Review customer proposed terms and conditions
  – Distribution/ Resale Agreements
  – Commercial and Public Contracting

• Identify/ Mitigate contractual risks
• Maintain contractual records and documentation
• Provide guidance on contract matters to project managers or other operational staff
• Provide counsel on critical aspects of business strategy and policy
• Develop and implement procedures for contract management and administration in compliance with company policy.
Managing Contractual Risks

• **Business Risk**
  – Factor or clause within a contract that may have a negative impact on Company growth and profitability
  – Created by internal conditions or external threats and vulnerabilities (Environment)

**Mitigation Techniques:**

– Acceptance
– Avoidance
– Transfer
– Share
Purpose/ Construction of the UCC

- The UCC was developed in 1951 as a collection of statutes
  - Based on the Uniform Sales Act (1906)
  - A model for adoption by the State(s)
- Designed to establish commercial practices for interstate commerce
- Common Law of Contracts converted to a uniform statutory form
- Divided into Seven Articles (CCCM focus on 1-2A)
  - Article 1 “General Provisions”
  - Article 2 “Sales”
  - Article 2A “Leases”
- Courts must interpret codes as adopted in relation to the facts of the situation
Requirements of the UCC

- Parties may contract out of the UCC
- Keep commercial deals in place
- Merchants held to a higher standard
- Contract enforceability depends on acceptance
- Contract creation
- § 2-201. Statue of Frauds
  - Sale over $500
  - Writing must be signed by the other Party
Exceptions to § 2-301

- Seller had to specifically manufacturer the goods
- Both parties acknowledge a contract was formed
- Goods have been delivered and received
- Payment has been made and accepted
- Confirmation of contract by either party prior to performance
Choice of Law

• State Interpretation
  – Choice of Law (which state laws apply)
  – Venue (where legal action will occur)
• Provides basis of contractual requirements
• Doesn’t apply to:
  • Real Estate (Sale, Liens, Security Interest)
  • Service/ Labor/ Employment Agreements
  • Marriage/ Domestic Law
Battle of the Forms

- Exchange of provisions between Parties
- What provisions are in the final contract?
- UCC response to differing provisions
Course of Dealing/Performance and Usage of Trade

- Derived largely from the work of Arthur Linton Corbin. Corbin did not believe that courts should be bound by a formal reading of the "four corners" of the contract.
- Course of Performance:
  - (a) the transaction involves repeated occasions for performance by a party; and,
  - (b) the other party, with knowledge of the nature of the performance and opportunity for objection to it, accepts the performance or acquiesces in it without objection.
- Course of Dealing: is a sequence of conduct concerning previous transactions
- Usage of Trade: is any practice or method of dealing having such regularity of observance in a place, vocation, or trade
Obligations of the Parties

- § 2-301. General Obligations of Parties. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.
- § 2-308. Absence of Specified Place for Delivery. Unless otherwise agreed;
  (a) seller's place of business or if he has none his residence; but, (b) goods located elsewhere at time of contract, that place is the place for their delivery; and (c) documents of title may be delivered through customary banking channels.
- § 2-309. Absence of Specific Time Provisions. The time of delivery shall be a reasonable time.
- § 2-401. Passing of Title. Passes to the buyer at the time and place at which the seller completes his performance.
Warranty Obligations

- Period should be clearly defined
- Suppliers/ integrators assume risk if warranties are extended beyond the scope of that provided by the OEM
- Extended Warranties must be in writing
- Merchantability & Fitness for a Particular Purpose
- If otherwise, must be **CONSPICUOUS**
- ‘AS-IS’ statements remove most warranties
- Infringement/ Copy write Protection
§ 2-313 Express Warranties

- Express warranties by the seller are created as follows:
  (a) Any affirmation of fact or promise made by the seller creates an express warranty that the goods shall conform to the affirmation or promise.
  (b) Any description of the goods creates an express warranty that the goods shall conform to the description.
  (c) Any sample or model which is made part of the basis of the bargain creates an express warranty.

- It is not necessary that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty.
"Good Faith" Process

- §1-304. Obligation of Good Faith. Every contract or duty within the UCC imposes an obligation of good faith in its performance and enforcement.

- "Good Faith" in the case of a means honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade.
Available Remedies

• § 1-305. Remedies to be Liberally Administered.
  (a) Must be liberally administered to the end that the aggrieved party may be put in as good a position
  (b) As if the other party had fully performed; but,
  (c) Neither consequential or special damages nor penal damages may be had except as specifically provided in the UCC or by other rule of law.
  (d) Any right or obligation declared by the UCC is enforceable by action unless the provision declaring it specifies a different and limited effect.

• § 2-302. Unconscionable Contract or Clause.
  (a) The court may refuse to enforce the contract; or,
  (b) it may enforce the remainder of the contract without the clause; or,
  (c) it may so limit the application of the clause as to avoid any unconscionable result.
§ 2-703. Seller's Remedies in General

Where the buyer wrongfully rejects or revokes acceptance of goods or fails to make a payment due on or before delivery or repudiates with respect to a part or the whole, then with respect to any goods directly affected and, if the breach is of the whole contract then also with respect to the whole undelivered balance, the aggrieved seller may:

(a) Withhold delivery of such goods;
(b) Stop delivery by any bailee as hereafter provided;
(c) Proceed under the next section respecting goods still unidentified to the contract;
(d) Resell and recover damages;
(e) Recover damages for non-acceptance or in a proper case the price;
(f) Cancel.
§ 2-711. Buyer's Remedies in General

- Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the whole contract the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as has been paid:
  
  (a) "cover" and have damages under the next section as to all the goods affected whether or not they have been identified to the contract; or
  
  (b) recover damages for non-delivery as provided in this Article

- Where the seller fails to deliver or repudiates the buyer may also
  
  (a) if the goods have been identified recover them as provided in this Article; or,
  
  (b) in a proper case obtain specific performance or replevy the goods as provided in this Article

- On rightful rejection or justifiable revocation of acceptance a buyer has a security interest in goods in his possession or control for any payments made on their price and any expenses reasonably incurred in their inspection, receipt, transportation, care and custody and may hold such goods and resell them in like manner as an aggrieved seller.
§ 2-601 Improper Delivery

• Breach in installment contracts and unless otherwise agreed under the sections on contractual limitations of remedy if the goods or the tender of delivery fail in any respect to conform to the contract, the buyer may:

(a) reject the whole; or
(b) accept the whole; or
(c) accept any commercial unit or units and reject the rest.
§ 2-718 Liquidated Damages

- Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable.
- A term fixing unreasonably large liquidated damages is void as a penalty.
§ 2-725 Statute of Limitations

- An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued
Missing Terms (from UCC)

- UCC does not address:
  - Indemnification
  - Liability
  - Insurance
Conclusion

- Each state has adopted its version of the UCC
- Provisions must be read and understood
- Risks with commercial contracts lie within the provisions of the contract
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