

Supply Chain Agreements: Structuring Key Provisions



FOLEY & LARDNER LLP

Article By

[Vanessa L. Miller](#)

[Jeffrey A. Soble](#)

[Kathleen E. Wegrzyn](#)

[Foley & Lardner LLP](#)

[Manufacturing Industry Advisor](#)

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The modern day supply chain is ever more complex. Add to that the fact that it is under an almost daily attack from the current political climate. This creates an environment of uncertainty that is a good reason to reassess whether your supply chain agreements are drafted with a mind toward key provisions that can protect your company.

On the indemnification and consequential damage disclaimer topics, one must always be mindful of the interplay of the risk allocation provisions in a contract. For example, if the agreement contains a broad indemnity stating the indemnifying party will indemnify the indemnified party against all losses resulting from specified causes, and also includes a consequential damage disclaimer providing that neither party will be responsible to the other party for consequential damages, the agreement has an inherent inconsistency, which is not good for either side because neither can depend on an outcome (that is, the indemnified party does not know if its reputational or other consequential losses will be indemnified, for example, and the indemnifying party does not know if it is responsible to indemnify for reputational or other consequential losses). As another example, third-party claims are typically classifiable as a consequential damage. If an agreement contains both an indemnity for third party claims and a consequential damage disclaimer, an internal conflict

exists in the agreement, potentially leaving it to a judge or jury to determine what outcome was intended by the parties. As a result, it is important to ensure that contracts expressly address how indemnification clauses and damage disclaimers interact with one another.

Another common area of concern are a company's warranty limitations. Are you providing (or receiving) a Limited Warranty, or one that is unlimited? The warranty at issue, especially for sellers, should be limited to a simple express warranty with the proper disclaimers of the implied warranties under the Uniform Commercial Code. Not only that, but carefully limit the remedies that your warranty provides or a company might find itself selling a \$5 widget but subject to a liability exponentially larger. Thus, consequential damages (lost profits, etc.) should be expressly and conspicuously disclaimed. Further, what precisely is warranted? The more precise a warranty is drafted, the better.

Force majeure provisions are often overlooked by both parties when entering into a supply agreement. Many times, the force majeure provision is just a "cut & paste" from earlier agreements with little thought given to the types of circumstances that may befall the supplier that are beyond the seller's control and would actually prevent performance. Or what the rights of the buyer should be in the event the supplier declares force majeure. With the recent trade war and resulting tariffs, parties are now looking to their force majeure provisions as a potential avenue to seek pricing relief. However, a true force majeure situation must prevent performance and not just make performance more costly.

Finally, more than any other provision in the contract, disputes arise when one party attempts to terminate the contract—whether for cause or convenience. The termination provision should clearly define the circumstances under which the parties can terminate, how much notice must be provided and what the parties' rights are in the event of any termination.

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