

Arnold & Porter

HUNTON
ANDREWS KURTH



Contracts Tune-Up – Do Your Contracts Meet Your Goals and Risk?

Sam Witten, Arnold & Porter
Neil Kelly, Hunton Andrews Kurth

April 2, 2020

Welcome



Samuel Witten

Counsel, Arnold & Porter



Neil Kelly

Partner, Hunton Andrews Kurth

Contracting Starts Before You Have a Contract

- The contract process starts before you identify a customer, supplier, service provider, etc.
- A contract is your opportunity to define with certainty:
 - What you will receive, when, and for how long?
 - What you will provide, when, and for how long?
 - Who will have responsibility for known potential risks and liabilities?
- To answer those questions, you need to think through your business and what you are trying to accomplish.
 - What is important to your business?
 - Do my contracts accomplish what I need for my business?



Documenting the Deal

- Legal & Business teams need to work together
- Appropriate documentation will depend on what is being done:
 - Master Services or Supply Agreement (MSA)
 - Purchase Orders (POs) – usually subject to terms of MSA, but can be stand alone
 - Additional clarity and terms through company policies
- If there is no MSA, and only a PO, you need to protect yourself as appropriate:
 - Suppliers: Ensure that your legal terms are incorporated into the PO by attaching or linking to terms and conditions or reference company policies
 - Customers: Be aware of legal terms built-in to the POs within a link or in small print



Documenting the Deal: Purchase Orders

- POs typically contain the key business and financial terms of the deal:
 - Detailed description of the product(s) and/or service(s)
 - Price, fees and payment terms
 - Delivery/shipping terms; inspection rights
 - Term or date due for performance
 - Unique business terms
- Suppliers should have standard forms
- Consult with legal team about any changes to legal terms that would conflict with the MSA

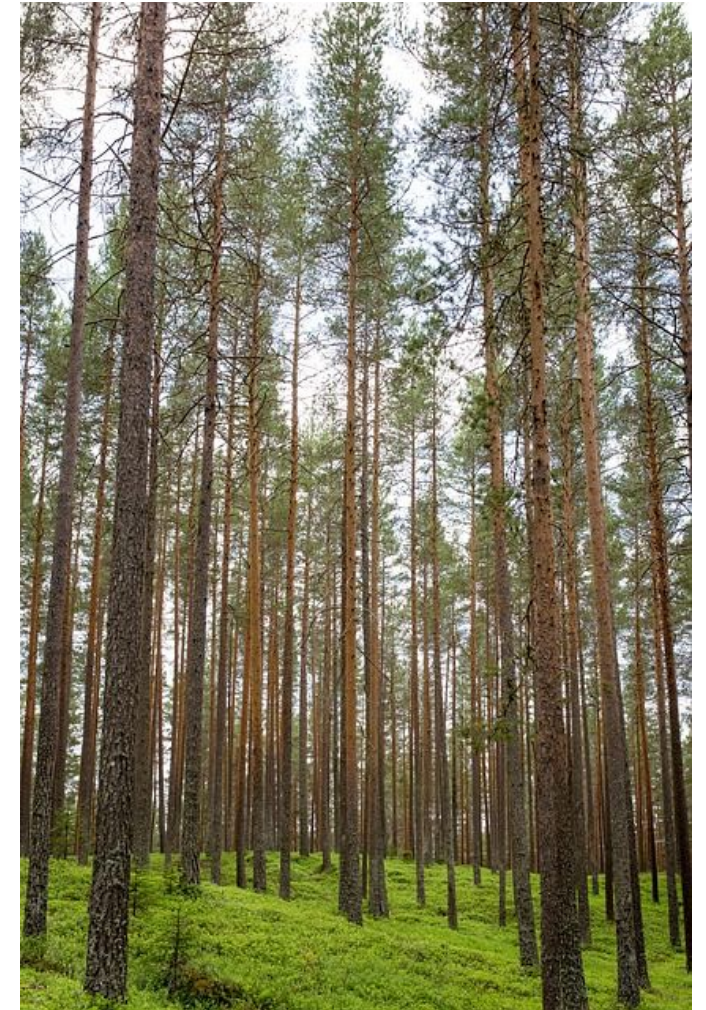


Key Contractual Considerations



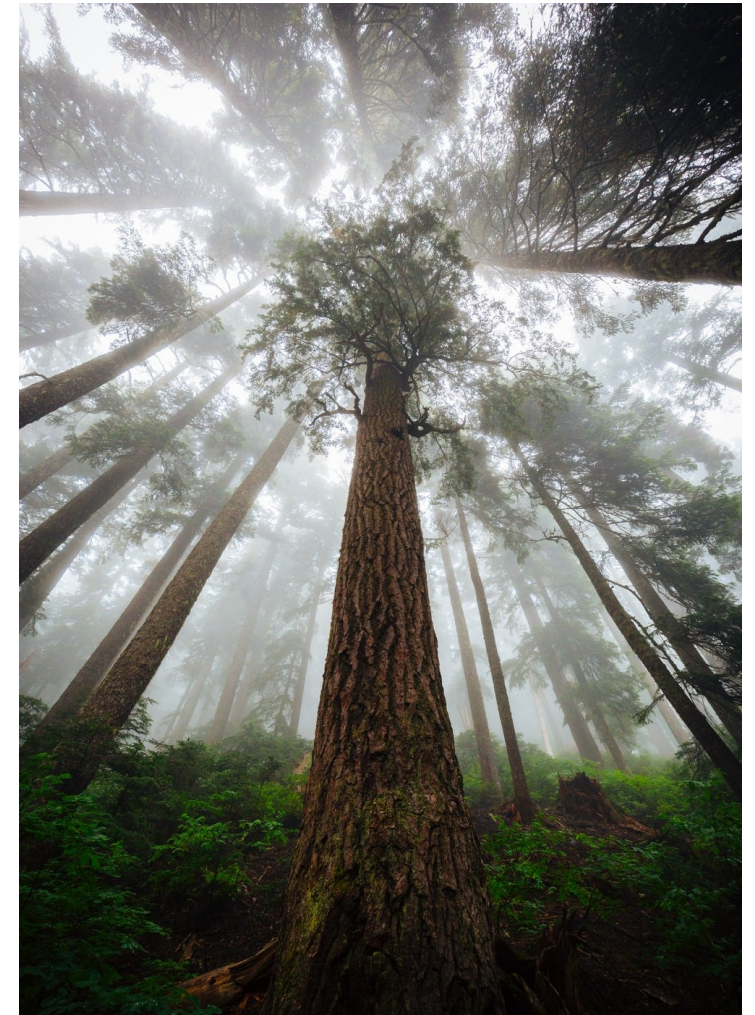
Allocating Risks and Responsibilities

- Factors that affect how risk is allocated
 - Exclusivity
 - Length of expected relationship
 - Prior transactions
- Consider how much risk to take on and when risk shifts
 - Right to modify, reschedule or reject purchase orders
 - Shipment (delivery, insurance, title, risk of loss or delay)
 - Inventory/Warehouse functions
 - Right to inspect goods for acceptance; right to reject goods and remedies (e.g. replacement or refund)
 - Insurance
 - Warranties
 - What happens if government regulations change?



Allocating Risks and Responsibilities

- Clearly allocate responsibilities between the parties for certain details and permissible activities
 - Packaging and labeling
 - Tools and machinery (creation, payment, ownership)
 - Subcontracting (Will it be permitted? If so, does Supplier need to notify Customer of subcontractors used?)
- Use confidentiality clauses to protect your information
 - Protect details of each party's business
 - Protect any information disclosed during the relationship (e.g. trade secrets, manufacturing methods, business plans)
- Ownership and Intellectual Property
 - Analyze whether any intellectual property is involved
 - May involve license to one or both parties' intellectual property
 - Complexity and scope depends on the type of contract and products/services involved



Ensuring Compliance and Monitoring

- Regulatory Compliance
 - Lacey Act
 - FCPA
 - CARB, EPA, TSCA, etc.
- Manufacturing standards or practices
 - Labor regulations
 - Environmental standards
- Ensure current and ongoing compliance
 - Representations and warranties
 - Supplier must have a process to ensure compliance
 - Auditing and monitoring rights for customer



Representations and Warranties

What are they and why do we include them?

- Legal statements of truths
- Remedies for violations
 - Breach of warranty can result in damages and termination
- Suppliers want to limit warranties; Customers want more warranties

What do the reps and warranties usually cover?

- Mutual warranty of authority and ability to perform contract
- Supplier generally warrants:
 - Will use professional care and endeavor to correct material defects
 - Obtain required permits or licenses (ex: to import, quality or manufacturing standards)
- Supplier may disclaim all other warranties:
 - “As Is” and no warranty that the products/services is fit for any particular purpose

Term and Termination

- Interplay between related components of contracts
 - Purchase Orders can be terminated but the Master Service or Supply Agreement will stay in place
 - If the master agreement terminates, POs generally terminate as well; but need to address goods/services in transit or process
- Termination rights for breach of a party's obligations (e.g. failure to perform) or for other causes (e.g. bankruptcy)
- Customers may ask for right to terminate for convenience
- Be aware of notice periods for termination that may affect business flow



Managing Liability: Governing Law, Force Majeure

Governing Law

- Governing law and venue may affect your rights and obligations
- Exclude CISG if contracting between international parties

Force Majeure

- Covers events beyond the reasonable control of either party (e.g. natural disaster, “acts of God”)
- Specific language can affect obligations
- COVID-19



Managing Liability: Indemnification

Limitation of Liability

- Key provisions for controlling exposure and managing risk
- Customary limitations on liability
 - Limits on remedies, types, and amounts of damages
 - Yes, these provisions really should be in ALL CAPS
- **General Exception:** These limitations **do not** apply to confidentiality breaches and indemnified claims

Indemnification

- Indemnifying party agrees to indemnify (compensate) the indemnified party for losses incurred as a result of specified events
- Typically limited to third party claims (vs. claims between the contracting parties)
- Typically also includes obligation to defend indemnified party
- Common types of coverage – breach of contract and violation of law

Questions?



Samuel Witten

Counsel, Arnold & Porter
Washington, DC

samuel.witten@arnoldporter.com

+1 202 942 6115



Neil Kelly

Partner, Hunton Andrews Kurth
Houston

neilkelly@HuntonAK.com

+1 713 220 4198