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Business Operations

Daniel H. Minkus
James R. Waggoner

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I. Overview

§7.1 The forms in this chapter are for use in connection with various operational aspects of an organization not otherwise covered in this book. Though the subject matter varies by form, generally, the forms included in this chapter address the following topics:

- *Sale of Goods.* Commercial transactions involving the sale of goods in the state of Michigan are governed by Article 2 of the Michigan Uniform Commercial Code (UCC). MCL 440.2101 et seq. Generally, the UCC sets forth default provisions relating to, among other things, contract formation, warranties, breach of contract, and remedies. In addition, it also addresses a common dispute referred to as the “battle of the forms.” Often, organizations exchange form agreements such as a purchase order (buyer) and an invoice (seller). Both sets of documents contain various terms and conditions that are inconsistent with each other, yet each party assumes that its terms govern the transaction. Form 7.1 (Terms and Conditions of Sale) addresses this situation and is tailored to provide that the seller’s terms and conditions govern the transaction.
- *Commercial Services.* Organizations often desire that a single service provider perform multiple services. In such a situation, it is useful for the parties to enter into a single master agreement that will govern future transactions or future agreements between them. Because the parties may rely on the terms of the master agreement, the parties are permitted to quickly negotiate the various service-specific terms as necessary. Form 7.2 permits the parties to set forth the various services, performance standards, and fees for services on separate exhibits to the master agreement. Also included in this chapter are two agreements that focus on the representation of a manufacturer (form 7.3) and the distribution of its products (form 7.4). Although these two forms could also be included under the topic “sale of goods,” these forms focus more on service levels of the respective parties.
- *Commercial Leasing of Personal Property.* Commercial lease agreements are particularly useful for an organization looking to enjoy the benefits of the use of personal property without the responsibility of ownership. Typically, these agreements are used when an organization seeks to obtain office equipment, such as computer or telephone systems, or large pieces of production equipment that are only needed for limited periods of time. Generally, there are two types of commercial leasing arrangements, operating leases and capital leases. The form included in this chapter (form 7.5) is an operating lease. In other words, it is a genuine rental agreement whereby the lessor leases to the lessee certain equipment for a specified period of time at an agreed cost. At the end of the term of the lease, the lessor retains ownership of the equipment. A capital lease, on the other hand, is generally a leasing arrangement whereby a financing company (lessor) (1) purchases the equipment selected by the lessee, (2) structures a financial lease to facilitate the acquisition of the equipment, and (3) permits the lessee to purchase the equipment for less than fair market value at the expiration of the term of the lease.
- *Commercial Real Property.* Commercial real property transactions are often more complicated than residential real property transactions. The real property forms provided in this chapter are those used in the more common types of commercial real property transactions such as simple conveyances of property by deed, the purchase of improved real property by contract, and the lease of retail property. Even when handling routine transactions, however,

one should seek expert assistance when necessary, especially for environmental and tax issues.

II. Sales of Goods and Services

A. Terms and Conditions of Sale

§7.2 Form 7.1 is comprised of various terms and conditions governing the sale of equipment from a seller to a buyer. For the reasons set forth below, seller should seek to include these terms and conditions on all documents submitted to buyer, including seller's invoice.

In a commercial setting, a contract for the sale of goods is often formed as a result of a number of separate documents (e.g., requests for quotes (RFQs), quotes, drawings, specifications, purchase orders, scopes of work, order acknowledgments, invoices, etc.), which collectively comprise the contract between the parties. In most commercial transactions companies will exchange form agreements such as a purchase order (buyer) and invoice (seller). Both sets of documents will contain various terms and conditions that often are inconsistent with each other, yet each party assumes that its terms govern the transaction. This situation is referred to as the "battle of the forms" as the parties struggle for control of the transaction and its governing provisions. *See* UCC 2-207 (MCL 440.2207); *Michigan Contract Law* §3.50 (John R. Trentacosta ed, ICLE 2d ed). Form 7.1 is designed to avoid this scenario by (1) conditioning buyer's performance on acceptance of seller's terms and (2) objecting to any and all additional or different terms contained in buyer's forms (see §16).

Form 7.1 contains terms and conditions that are more favorable to seller. Section 7 grants to seller a security interest in the equipment until buyer pays all amounts due to seller. Section 8 limits seller's warranty obligations to the warranty extended by the manufacturer of the equipment and limits seller's liability in the case of equipment defects. Finally, section 10 passes title and risk of loss or damage to the equipment to the buyer on delivery by seller "free on board" to (1) seller's facility or (2) seller's supplier's facility.

B. Master Services Agreement

§7.3 Form 7.2 is a master agreement in which the parties agree to the general terms and conditions that will govern future transactions or future agreements between them. This master agreement is best used when an enterprise anticipates receiving multiple services from the same service provider. Because the parties may rely on the terms of the master agreement, they are permitted to quickly negotiate the various service-specific terms as necessary. It is similar to a blanket purchase order but in the context of services.

Sections 1 and 2 of the agreement permit the parties to set forth the various services, performance standards, and fees for service on separate exhibits. Alternatively, the parties may choose to combine the three exhibits into one "statement of work." The parties will want to incorporate the service-specific terms of the transaction into the exhibits, while relying on the master agreement for the general terms that will apply to all services. For instance, provisions relating to termina-

tion (see §3), insurance (see §6), and indemnification (see §11) will be consistent for all transactions.

Depending on the services to be performed, the recipient of the services may desire to add various representations and warranties to the master agreement regarding the competency of service provider's workforce as well as service provider's compliance with the service requirements and service levels required by the recipient.

III. Sales Representative Agreement

§7.4 Form 7.3 is an agreement very similar to form 7.4 (Distributor Agreement). The sales representative is appointed as the nonexclusive sales representative of the company's products in a territory to be determined by the parties. In this agreement, however, the company has agreed to pay the sales representative commissions resulting from the sales of products. In addition, only the company is authorized to make sales of the products, and the sales representative merely facilitates sales (see §4).

The Michigan Sales Representative Statute requires a principal to pay any commissions due the terminated representative within 45 days after the termination. Commissions that become due after the termination must be paid within 45 days after the date they become due. MCL 600.2961(4). Where the due date cannot be determined from the contract, the statute directs the court to look at the "past practices between the parties," or the "custom and usage prevalent in this state" for the type of business involved. MCL 600.2961(3).

A principal that "intentionally" fails to make timely payment is liable for a penalty of double the commissions due, up to a maximum of \$100,000. MCL 600.2961(5)(b). The statute does not require evidence of bad faith before double damages, as provided in the statute, may be imposed. *Kenneth Henes Special Projects Procurement, Mktg, & Consulting Corp v Continental Biomass Indus (In re Certified Question)*, 468 Mich 109, 659 NW2d 597 (2003).

Where a sales representative brings suit for commissions, the judge is required to award reasonable attorney fees and court costs to the "prevailing party." MCL 600.2961(6). To recover attorney fees, a prevailing party must win on "all the allegations of the complaint or on all of the responses to the complaint." MCL 600.2961(1)(c). The rights provided by the statute may not be waived by contract. MCL 600.2961(8).

IV. Distributor Agreement

§7.5 Form 7.4 is an agreement between a manufacturer and a distributor to supply items produced by the manufacturer. This agreement appoints the distributor as the nonexclusive distributor of the manufacturer's products in a territory to be determined by the parties.

In exchange for its appointment as the distributor of the products, the agreement prohibits the distributor from (1) selling products that compete with the manufacturer's products, (2) selling the manufacturer's products on a retail level,