

Drafting and Negotiating a Sale of Goods Agreement Checklist (TX)

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A Checklist of the main questions to answer and issues to consider when drafting and negotiating a sale of goods agreement governed by Texas law. This resource includes drafting and negotiating tips, as well as links to general and state-specific resources, such as standard documents, standard clauses, practice notes and checklists where appropriate.

Before drafting and negotiating a sale of goods agreement governed by the laws of the State of Texas, there are certain threshold questions to answer and issues to consider. Use this Checklist as a guide when preparing a sale of goods agreement.

For a sample sale of goods agreement, see Standard Documents, Sale of Goods Agreement (Pro-Seller) (<http://us.practicallaw.com/2-518-9260>) and Sale of Goods Agreement (Pro-Buyer) (<http://us.practicallaw.com/5-541-6567>).

STRUCTURING THE AGREEMENT AND DEFINING THE PARTIES

This Checklist provides counsel with a guide for drafting a sale of goods agreement between the parties under Texas' version of the Uniform Commercial Code (UCC). This Checklist identifies relevant provisions of the UCC to consider, and also suggests modified terms for the agreement permitted by the UCC (see Tex. Bus. & Com. Code Ann. § 1.302(a)). This Checklist focuses on sale of goods agreements where the buyer purchases goods for its own use to incorporate them into one or more of its own products. This Checklist is not intended to address all issues in complex sale of goods transactions such as:

- A product reseller agreement, which is sometimes referred to as a dealer agreement or retailer agreement (see Standard Document, Product Reseller Agreement (Pro-Supplier) (<http://us.practicallaw.com/4-517-9793>)).
- A distribution agreement (see Standard Document, Distribution Agreement (Pro-Seller) (<http://us.practicallaw.com/2-520-3379>)).

- A franchise agreement (see Practice Note, Distributors and Dealers (TX): Federal Law (<http://us.practicallaw.com/w-000-1122#a000002>) and Texas Law (<http://us.practicallaw.com/w-000-1122#a000003>)).
- A requirements contract under Tex. Bus. & Com. Code Ann. § 2.306(a) (see Practice Note, Requirements Contracts for the Sale of Goods (<http://us.practicallaw.com/4-519-4760>)).
- An output contract under Tex. Bus. & Com. Code Ann. § 2.306(a).
- A supplier managed or vendor managed inventory agreement (see Standard Document, Vendor Managed Inventory Agreement (<http://us.practicallaw.com/5-517-1678>)).
- A manufacturing agreement (see Standard Document, Manufacturing Supply Agreement (Pro-Seller) (<http://us.practicallaw.com/8-520-6860>)).

DEAL CONSIDERATIONS

- Is the deal large enough to warrant a long-form agreement? If the deal is a relatively small or one-time order, the parties may decide it is not worth the cost and time it would take to negotiate a long-form supply agreement. They may instead opt to document the sale using a sale confirmation or purchase order. For a sample purchase order, see Standard Document, General Purchase Order Terms and Conditions (Pro-Buyer) (<http://us.practicallaw.com/3-504-2036>). For sample short-form sale of goods agreements, see Standard Documents, Sale of Goods Agreement (Pro-Seller, Short-Form) (<http://us.practicallaw.com/0-580-9548>) and Sale of Goods Agreement (Pro-Buyer, Short-Form) (<http://us.practicallaw.com/7-575-4057>).
- Is the agreement best structured as one self-contained agreement?
- Is the agreement best structured as a master agreement with individual transactions or a base agreement with attached statements of work, if the transaction is a larger, long-term deal involving multiple or periodic transactions? If the agreement is structured as a master agreement with individual transactions or a base agreement with multiple statements of work:
 - will the master or base agreement automatically renew (also referred to as an evergreen contract) (see Tex. Bus. & Com. Code Ann. § 2.309(b))?



- what is the order of precedence among the master or base agreement, the statements of work and the purchase orders?
- if the agreement covers several transactions, when will the seller be authorized to work on each transaction? For example, the seller can only sell goods specified under a statement of work if the buyer issues a work authorization;
- will the parties conduct transactions using an electronic platform? If so, what are the details regarding the electronic transmissions?
- will representations and warranties be made on an ongoing basis (typically considered covenants) or made by the representing party each time a sale is made?

For a sample statement of work, see Standard Document, Statement of Work (Goods or Services) (<http://us.practicallaw.com/9-576-4705>).

THE GOODS

- What are the goods or range of goods that the seller is selling to the buyer under the agreement? For ease and clarity, the parties may want to list goods and the related specifications on an exhibit to the agreement.
- Are the goods off-the-shelf or custom made? If the goods are custom made, the parties may be more likely to include:
 - terms addressing the responsibilities related to the purchase of capital equipment needed to make the custom-made goods;
 - minimum purchase commitments, especially if the seller has to make a significant capital investment to make the custom-made goods;
 - enhanced confidentiality terms, to protect the buyer's unique designs or other intellectual property provided to the seller;
 - buyer's obligation to provide the seller with forecasts for its future demand for custom-made goods;
 - a buyer indemnification to cover the seller for third-party claims based on the buyer's designs; and
 - buyer's representations and warranties related to its intellectual property rights related to the design of the goods.
- Does the seller have the right to change the goods' materials, design or specifications? If so, must the seller give notice?
- Are any goods subject to any manufacturer or third-party use restrictions or requirements (including any license)? If so:
 - do these restrictions or requirements accompany the goods?
 - are these restrictions or requirements embodied in the goods?

For more information on manufacturer or third-party use restrictions or requirements such as licensing, see Standard Document, Product Reseller Agreement (Pro-Supplier): Drafting Note: Assumptions (<http://us.practicallaw.com/4-517-9793>).

- Are the goods covered by a services agreement? For ease and clarity, the parties may want to attach the services agreement as an exhibit to the agreement.

TERMS OF SALE FROM THE SELLER TO THE BUYER

- Are the terms and conditions of the agreement limited to the terms and conditions of the sale of goods agreement and the commercial terms of the buyer's standard form of purchase order?

- Do the parties expressly exclude the buyer's general terms and conditions contained in any purchase order or other document issued by the buyer?
- Does the seller have the discretion to reject purchase orders issued by the buyer? If so, is the seller's discretion absolute or is it subject to one or more conditions?
- Can the seller:
 - discontinue its supply?
 - allocate its inventory of goods? If so, under what terms or conditions?
- If the seller has the right to discontinue its sale of goods, then does the buyer have the right to make a last time buy, and if so, under what conditions?
- Must the buyer give the seller forecasts of its demand? If so, the parties should determine:
 - under what terms and conditions; and
 - whether and under what conditions these forecasts are binding.
- Does the buyer have a minimum purchase commitment (for example, where the seller had to make a significant capital investment to be able to make goods)? If so, how is it measured? For example, is the commitment measured on a purchase order or annual basis?
- What are the seller's remedies for buyer's failure to meet its commitments? For example, does it have the right to withhold or cancel delivery of undelivered goods, or receive damages (see Tex. Bus. & Com. Code Ann. § 2.703)?
- Do the parties need to stipulate to liquidated damages (see Tex. Bus. & Com. Code Ann. § 2.718)? For a sample liquidated damages clause, see Standard Clause, General Contract Clauses: Liquidated Damages (TX) (<http://us.practicallaw.com/w-000-0674>).
- Can either party cancel purchase orders, and if so, under what conditions? For example, the seller may be able to cancel a purchase order in the event that:
 - the seller discontinues, reduces or reallocates its inventory of goods; or
 - the buyer has breached any material provision in the agreement.

PRICE

- How is the purchase price determined? Is it specified:
 - in the contract?
 - by reference to the seller's published price list?
- If price is determined by reference to the seller's price list, what is the date for the prevailing price list? For example, the parties use the price list dated with the date on which the seller accepts the purchase order.
- Can the seller increase the price? If so, under what conditions? For example, price increases are permitted, but by reference to a formula.
- What items are included in price? In particular, it should be determined who is responsible for the:
 - shipping costs;
 - costs of insurance; and
 - charges, costs and taxes associated with the sale.

For more information about pricing terms, see Standard Clauses, General Contract Clauses: Pricing Terms (Sale of Goods, Pro-Seller) (<http://us.practicallaw.com/6-520-4819>).

PAYMENT AND SECURITY FOR PAYMENT

- How will the buyer make payment? For example, the buyer can make payment by:
 - wire transfer;
 - automated clearing house (ACH);
 - paper-based corporate check; or
 - any other manner current in the ordinary course of business (see Tex. Bus. & Com. Code Ann. § 2.511(b)).
- What are the payment terms? For example, payment can be made:
 - 30 days after invoice date;
 - in advance;
 - by cash or check on delivery;
 - on credit;
 - by deposits; or
 - by letter of credit.

For more information about payment terms generally, see Standard Clauses, General Contract Clauses: Payment Terms (TX) (<http://us.practicallaw.com/w-000-6241>).

- If the seller grants credit to the buyer, the seller can require:
 - a letter of credit (see Practice Note, Commercial Letters of Credit (<http://us.practicallaw.com/0-513-4508>));
 - a security interest in the goods, including a purchase-money security interest (see Standard Clause, General Contract Clauses: Payment Terms, Purchase-Money Security Interest (PMSI) (TX) (<http://us.practicallaw.com/w-000-0457>) and Practice Note, Purchase Money Security Interests (PMSI) (<http://us.practicallaw.com/1-515-2196>)); or
 - another form of payment guarantee.
- How often is the seller invoicing the buyer?
- To encourage prompt payment, parties may include:
 - interest on late payments (see Standard Clauses, General Contract Clauses: Payment Terms (TX): Drafting Note: Late Payments (<http://us.practicallaw.com/w-000-6241#a000008>));
 - a discount for early settlement;
 - in an installment contract, a provision that accelerates the entire price if a single installment is paid late; and
 - a timely payment is of the essence provision (for more information about time of the essence, see Standard Clause, General Contract Clauses: Time of the Essence (TX) (<http://us.practicallaw.com/w-000-0720>)).
- Do the parties have the right to set off (see Tex. Bus. & Com. Code Ann. § 2.717 and Standard Clauses, General Contract Clauses: No Setoff (TX) (<http://us.practicallaw.com/w-000-0902>))?
- How are the parties handling billing and payment disputes?

- Is the buyer required to maintain its financial condition or creditworthiness? If so, specify whether the seller has the right to make this determination and what actions the seller can take in the event that the buyer is in breach of this provision. For example, if the seller determines that the buyer's creditworthiness is unsatisfactory, then the seller may:
 - modify the payment terms, including by requiring payment in cash (see Tex. Bus. & Com. Code Ann. § 2.702(a));
 - reclaim goods on credit (see Tex. Bus. & Com. Code Ann. § 2.702(b)); or
 - stop delivery of goods (see Tex. Bus. & Com. Code Ann. § 2.705(a)).

For more information, see Standard Clauses, General Contract Clauses: Payment Terms (TX) (<http://us.practicallaw.com/w-000-6241>).

SHIPMENT, DELIVERY AND INSPECTION

- Is the seller liable for any non-material, temporary delays in fulfilling purchase orders? If not, does the buyer have any rights to cancel or modify the agreement (see Tex. Bus. & Com. Code Ann. § 2.615 and Tex. Bus. & Com. Code Ann. § 2.616(a) and (c))?
- Will either party choose the carrier (see Tex. Bus. & Com. Code Ann. § 2.504(1))?
- What are the commercial pricing terms for the sale (for example, FOB or Ex Works)?
- What is the:
 - timing for delivery (see Tex. Bus. & Com. Code Ann. § 2.309(a))?
 - delivery point?
 - location at which title to the goods transfers to the buyer (see Tex. Bus. & Com. Code Ann. § 2.401(b)); and
 - location and time at which risk of loss transfers to the buyer (see Tex. Bus. & Com. Code Ann. § 2.320(b)-(c), Tex. Bus. & Com. Code Ann. § 2.509, Tex. Bus. & Com. Code Ann. § 2.510, and Standard Clause, General Contract Clauses: Risk of Loss (TX) (<http://us.practicallaw.com/w-000-0581>)).
- What happens if the goods are delivered late?
- What remedies does the buyer have to accept or reject non-conforming goods (see Tex. Bus. & Com. Code Ann. § 2.601)?

For more information about delivery of goods generally, see Practice Note, Delivery of Goods (<http://us.practicallaw.com/6-521-8246>).

TERM AND TERMINATION

- What is the length of the term of the agreement?
- Do either or both parties have the right to renew the agreement? If so, for how long and under what conditions?
- Do either or both parties have the right to terminate for convenience?
- If the agreement is a master or base agreement, what are the termination rights regarding each individual transaction or statement of work?
- If the seller does not have the right to terminate for convenience, under what conditions can the seller terminate?

- If the buyer does not have the right to terminate for convenience, under what conditions can the buyer terminate?
- Do any provisions survive termination, and if so, which ones and for how long? For a sample contractual statute of limitations, see Standard Clause, General Contract Clauses: Contractual Statute of Limitations (TX) (<http://us.practicallaw.com/w-000-0230>).
- Are deliveries cancelled on termination, and if so, what happens to any goods that are still in transit on termination?

For more information about term and termination, see Standard Clause, General Contract Clauses: Term and Termination (<http://us.practicallaw.com/2-507-0812>).

RETURN RIGHTS

- Does the buyer have the right to return excess or unwanted goods? If so, under what terms and conditions? For example, the parties may want to specify:
 - price and payment, including shipping costs, taxes and insurance;
 - carrier selection;
 - delivery and transfer of title and risk of loss; and
 - whether unused goods must be returned in their original packaging.

(See Tex. Bus. & Com. Code Ann. § 2.327(b).)

PRODUCT WARRANTIES

- Does the seller make any statutory express warranties:
 - by affirmation of a fact or promise relating to the goods;
 - by a description of the goods; or
 - by a sample or model.

(See Tex. Bus. & Com. Code Ann. § 2.313(a).)

For more information about product warranties, see Practice Note, UCC Article 2 Express Warranties (<http://us.practicallaw.com/8-519-5098>).

- Does the seller make any implied warranties, including any implied warranty:
 - of merchantability (see Tex. Bus. & Com. Code Ann. § 2.314);
 - of fitness for a particular purpose (see Tex. Bus. & Com. Code Ann. § 2.315);
 - of title (see Tex. Bus. & Com. Code Ann. § 2.312(a)); or
 - against intellectual property infringement (see Tex. Bus. & Com. Code Ann. § 2.312(c)).
- Does the seller make any warranties implied from the parties:
 - course of dealing; or
 - usage of trade.

(See Tex. Bus. & Com. Code Ann. § 2.314(c).)

- Does the seller disclaim its implied warranties? If so, the language must be in conspicuous writing, and specifically mention merchantability and fitness (see Tex. Bus. & Com. Code Ann. § 2.316(b)-(c)).

For more information on disclaiming implied warranties, see Practice Note, Implied Warranties Under the UCC (TX) (<http://us.practicallaw.com/w-000-8871>).

- Does the seller want to include a broad disclaimer of all implied warranties, by including the expressions "as is," "with all faults" or other similar language (see Tex. Bus. & Com. Code Ann. § 2.316(c)(1))? For more information on the "as is" disclaimer of warranty, see Practice Note, Implied Warranties Under the UCC (TX): As Is Disclaimer of Warranty (<http://us.practicallaw.com/1-521-1351#a387900>).
- Common product warranties require that the goods:
 - conform to the make or model number listed in the applicable purchase order;
 - conform to the product specifications;
 - are free from defects in material and workmanship;
 - are sold with good and valid title; or
 - all of the above.
- Is the warranty period shorter than the statute of limitations (four years) (see Tex. Bus. & Com. Code Ann. § 2.725(a))?
- Are the warranties limited? Common warranty limitations prevent the application of the warranty where the product has been:
 - misused or neglected;
 - reconstructed, repaired or altered; or
 - used with any third-party product that has not been previously approved by the seller.
- What are the buyer's remedies in the event that the seller breaches a product warranty (see Tex. Bus. & Com. Code Ann. § 2.719)?

For more information on product warranties, see Standard Clauses, General Contract Clauses: Product Warranty and Disclaimers (<http://us.practicallaw.com/4-521-5263>).

REPRESENTATIONS AND WARRANTIES

- Does the buyer or seller make any representations and warranties? Some of these may include representations and warranties about:
 - organization and qualification to do business;
 - corporate authority to enter and perform the agreement;
 - acquisition of consents;
 - absence of legal proceedings;
 - maintenance of permits;
 - veracity of financial statements; and
 - the enforceability of the agreement.
- In most cases, the buyer makes the bulk of the representations and warranties in the agreement, but that depends on:
 - the relative bargaining power of the parties; and
 - the type of goods sold.

- Does the buyer or seller make any covenants? Some of these may include covenants about:
 - compliance with laws;
 - government licenses and permits;
 - taxes related to the goods; and
 - periodic financial statements.

For more information on representations and warranties, see Standard Clauses, General Contract Clauses: Representations and Warranties (<http://us.practicallaw.com/2-519-9438>).

INDEMNIFICATION

- Is the indemnity unilateral or reciprocal? This depends on the nature of the relationship and of the goods.
- Do the indemnification provisions cover both direct and third-party claims or just third-party claims? If the parties want to include direct claims the provision must state that clearly, and the provision must meet the Fair Notice requirements (see *Dresser Indus., Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508 (Tex. 1993)). For more information on indemnification for direct claims versus third-party claims, see Standard Clauses, General Contract Clauses: Indemnification (TX): Drafting Note: Unilateral or Mutual Indemnification (<http://us.practicallaw.com/w-000-0637#a000006>).
- What types of claims does the indemnification provision cover? For example, does it cover:
 - product liability claims;
 - intellectual property claims; or
 - claims for breaches of the agreement, including claims for damages relating to representations, warranties or covenants that were eliminated or qualified during negotiations?
- Is there a cap? If so, what is the size?
- Is there a basket, threshold or deductible and what is the amount? If so, how does it work?
- What kinds of damages are permitted? For example, is a party indemnified for incidental and consequential damages (see Tex. Bus. & Com. Code Ann. § 2.715 and Tex. Bus. & Com. Code Ann. § 2.719(c))?
- Is the indemnification provision the buyer's exclusive remedy for indemnified claims? If so, parties may want to consider the implications of:
 - covering direct claims under the indemnification provision, because the exclusive remedy provision may cut off any additional non-indemnification-related claims that the indemnified party might otherwise have against the indemnifying party; and
 - using a cumulative remedies clause, because it may conflict with the exclusive remedy provision and as a result provide the aggrieved party an opportunity to seek damages or remedies beyond the scope of what is provided in the indemnification clause (see Tex. Bus. & Com. Code Ann. § 2.719(a)-(b)).

For more information on indemnification provisions, see Standard Clauses, General Contract Clauses: Indemnification (TX) (<http://us.practicallaw.com/w-000-0637>).

LIMITATION OF LIABILITY

- Is there a disclaimer of consequential, indirect and other similar damages? If so, are there any exclusions, such as for indemnification or breaches of confidentiality?
- If the agreement has a disclaimer of consequential, indirect and other similar damages, does it disclaim lost profits, lost revenues or diminution in value? If so, the parties may want to consider the impact on recovery for direct damages. Lost profits, lost revenues and diminution in value may be comprised of direct damages, and so by including lost profits, lost revenues or diminution in value, the parties may inadvertently exclude some direct damages.
- Is there a cap on all damages arising out of or related to the agreement? If so:
 - what is the size?
 - are there any exclusions from the cap, such as for indemnification or breaches of confidentiality?

For more information on limitations of liability provisions, see Standard Clauses, General Contract Clauses: Limitation of Liability (TX) (<http://us.practicallaw.com/w-000-0751>).

MISCELLANEOUS

- Is there information concerning either party that the owner of the information wants to protect? For more information about confidentiality provisions, see Standard Clauses, General Contract Clauses: Confidentiality (Long Form) (TX) (<http://us.practicallaw.com/w-000-0595>) and General Contract Clauses: Confidentiality (Short Form) (TX) (<http://us.practicallaw.com/w-000-0596>).
- Is either party restricted from soliciting or inducing for employment the other party's employees? If so:
 - under what conditions; and
 - what are the remedies for breaching the non-solicitation provision?

For more information on non-solicitation, see Standard Clauses, Confidentiality: Non-Solicitation (<http://us.practicallaw.com/8-524-3805>).

- Must either party obtain and retain insurance during the term of the agreement? If so:
 - what kind of insurance?
 - what are the minimum limits?
 - can the parties self-insure?
 - are the parties required to waive subrogation rights?
 - will the insured party be required to provide the other party with evidence of insurance, and if so, under what conditions?

For more information on insurance policies and coverage, see Practice Note, Insurance Policies and Coverage: Overview (<http://us.practicallaw.com/9-505-0561>).

- Is there a dispute resolution provision? If so, have the parties included an arbitration clause? An arbitration clause should specify:
 - the arbitrator; and
 - the applicable arbitration rules.
- If there is an arbitration clause, must the parties make conforming changes to the choice of forum clause or other provisions?
- Does the agreement include standard provisions (sometimes referred to as boilerplate provisions)? These include provisions for:
 - confidentiality;
 - force majeure;
 - notices;
 - public announcements;
 - severability;
 - waiver;
 - entire agreement;
 - assignment;
 - no third-party beneficiaries;
 - amendment and modification;
 - choice of law; and
 - choice of venue.

For more information and sample contract clauses, see Standard Clauses, Boilerplate Clauses (TX) (<http://us.practicallaw.com/w-000-0721>).

- If the agreement has a choice of law provision, does it disclaim the United Nations Convention on Contracts for the International Sale of Goods? For more information, see Standard Clause, General Contract Clauses: Choice of Law (TX) (<http://us.practicallaw.com/w-000-0223>).
- If the agreement has a no third-party beneficiaries provision, does it exclude indemnified parties (see Standard Clauses, General Contract Clauses: Third-Party Beneficiaries (<http://us.practicallaw.com/6-519-7630>))?

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