Santa Clara High Technology Law Journal

Volume 1 | Issue 2 Article 5

January 1985

The Use of Volume Purchase Agreements in the Electronics Industry

Alice M. Reasenberg

ARTICLES

THE USE OF VOLUME PURCHASE AGREEMENTS IN THE ELECTRONICS INDUSTRY

Alice M. Reasenberg*

I. INTRODUCTION

With the wealth of electronic gadgets on the market there is a thriving business in the purchase and sale of the electronic component parts which comprise those electronic gadgets. From computers and automobiles to toys and musical greeting cards, the electronics industry near and far has become an integral part of our day-to-day lives.[1]

This article will examine the nature of purchase and sale transactions of electronic parts.[2] The usual documents which evidence these transactions are buyer's and seller's standard preprinted forms which terms essentially never mirror one another exactly. The issue of whether buyer's or seller's terms are controlling in the event of a dispute over the formation or terms of a contract commonly has been called "the battle of the forms." This article will discuss the

* Alice M. Reasenberg, of Jackson, Donovan, Rudd, Mulford and Svalya, an Association of Attorneys, Cupertino, California, specializes in business contracts and estate planning. This article is an outgrowth of her work with OKI Semiconductor, an operating group of OKI AMERICA, INC., which her firm, James E. Jackson, A Professional Corporation, represents. Ms. Reasenberg graduated Phi Beta Kappa, receiving a B. A. with Distinction from The Pennsylvania State University in 1967 and a J. D. from The University of Santa Clara in 1977. The author would like to extend his appreciation to Susana C. Gatewood for her assistance in preparing this article.

1. For example, Apple Computer, Inc.'s earnings rose sixfold in its recent fourth quarter as sales increased by seventy-five percent. Wall St. J., Oct. 19, 1984, at 6, col. 4. *See also* TIME, Sept. 19, 1983, at 72.

2. These sales transactions involve many kinds of electronic parts including, but not limited to, integrated circuits, printed circuit boards, read-only memory (ROM) for fixed storage, random access memory (RAM), and gate arrays. The products may be standard off-the-shelf items such as 256K RAM's; semi-custom items such as gate arrays implementing buyer's logic design; or custom items developed by buyer and seller through a previous development agreement which seller is now producing for buyer.

traditional common law resolution of the battle and the modern resolution under the Uniform Commercial Code.

Having taken a look at the outcome under either analysis, Part III will suggest a way to avoid the battle entirely and instead place it on the negotiation table by way of a fully negotiated contract termed a "volume purchase agreement." (A sample volume purchase agreement is included as an appendix to this article.)

Part IV will focus on considerations in drafting a volume purchase agreement including some specific problem areas. (Where applicable, references are made to specific contract provisions contained in the footnotes. The discussion of the problem terms and drafting considerations is by no means complete and is intended only as an introduction to drafting volume purchase agreements.)

II. THE NATURE OF THE PROBLEM: "THE BATTLE OF THE FORMS"

A. *Transactions Involving Preprinted Purchase Orders and Acknowledgements*

In sales transactions of electronic parts, once the parties have negotiated and agreed to the product, price, quantity, and delivery terms, the buyer will usually initiate a purchase order on its standard purchase order form. A typical purchase order form will specify on its face the buyer and seller, the quantity, part number, description, price, delivery date, shipping instructions and terms of payment. Some or all of those terms presumably will have been negotiated by the parties prior to issuance of the purchase order.[3] As with so many of the preprinted forms we see in our day-to-day lives, the reverse side of the purchase order typically will contain, in small print, numerous other terms and conditions which the buyer seeks to impose on the transaction.[4]

Under the common law, upon buyer's issuance of its purchase order to seller, the purchase order becomes an offer to seller to enter

3. Situations where prior negotiations do not occur are more likely to take place in consumer retail purchase transactions. Most volume sales between electronic parts manufacturers or suppliers will involve some prior negotiation.

4. If the buyer insists on using his form, such form is commonly known as a "Contract of Adhesion." Contract of adhesion generally signifies a standardized contract, which is imposed and drafted by a party of superior bargaining strength, and relegates to the subscribing party only an opportunity to adhere to the contract or reject it. Holmes v. City of Los Angeles, 117 Cal. App. 3d 212, 172 Cal. Rptr. 589 (1981). Contracts of adhesion are perfectly valid and, in the absence of ambiguity, are enforced according to their terms. Yeng Sue Chow v. Levi Strauss & Co., 49 Cal. App. 3d, 122 Cal. Rptr. 816 (1975).

into a contract on the terms and conditions stated on the face and reverse sides thereof (and any attachments thereto such as product specifications).[5] Seller frequently responds by sending buyer an acknowledgement on its own preprinted form. While the face of seller's acknowledgement often mirrors the terms on the face side of the buyer's purchase order,[6] the reverse generally contains a wealth of finely printed terms and conditions, many of which may conflict with or be additional to, those on buyer's purchase order. For the most part these differences will cause no problem, for the sale will be completed uneventfully. Sometimes, however, a dispute will occur.

Disputes may arise prior to performance, during performance, or once delivery of the product has been completed.[7] A common dispute involves whether or not the goods comply with the product specifications. During performance of the contract, disputes may arise over buyer's attempt to cancel the purchase order or reschedule deliveries based on its revised requirements.[8] Disputes may also arise as to what constitutes late delivery, and what remedies are available to buyer when seller fails to deliver on the scheduled delivery date.[9] The parties to the conflicting purchase order and acknowledgement are faced with the question: Has a contract been formed? And if so, what are its terms? The issue of which terms are controlling is a common problem and has been termed

---

5. For what constitutes an offer, *see, generally*, E.A. FARNSWORTH, CONTRACTS, § 3.3 at 108 (1982) [hereinafter cited as FARNSWORTH, CONTRACTS].

6. Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58-59 (1963). *See also* FARNSWORTH, CONTRACTS, *supra* note 5, § 3.21 at 158-59.

7. The disputes during these stages may involve differing terms relating to delivery, payment, inspection, quality, quantity, price and other terms. For cases which convert the acceptance to a counterproposal *see*, for delivery, In Sponge Rubber Prods. Co. v. Purofied Down Prods. Corp., 281 A.D. 380, 119 N.Y.S.2d 783 (1st Dept. 1953) *aff'd mem.*; for payment, *see* Apex Eng'r Co. v. NorthAm. Oil Consol., 76 Cal. App. 683, 245 P. 766 (1926); for inspection, *see* Columbia Malting Co. v. Clausen-Flanagan Corp., 3 F.2d 547 (2d Cir. 1924); for quality, *see* Brophy v. Idaho Produce & Provision Co., 31 Mont. 279, 78 P. 493 (1904); for quantity, *see* Minneapolis & S. L. Ry. v. Columbus Rolling Mill, 119 U.S. 149 (1886); for price *see* Rosenberg Bros. Co. v. Zinke Co., 178 Wis. 526, 190 N.W. 354 (1922).

8. The buyer in this situation will be at a distinct disadvantage if the seller's acceptance was deemed a counterproposal since the terms of the contract on performance would be accorded with the seller's proposal. These terms will be understandably slanted in favor of the drafting party. *See* Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 77 (1963) and El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642 (1920). On the other hand, if buyer's terms apply and buyer is rightfully able to cancel or reschedule product, the seller may be at a disadvantage because in the high technology industry, product often uniquely is designed to fit a particular customer's needs.

9. El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. at 494.

"the battle of the forms."[10]

1. The Common Law Approach to the Battle

In order to form a contract, common law required acceptance of an offer to be a "mirror image" of that offer.[11] Any attempt to change any terms or add to the offer resulted in the offeree's response being a counteroffer and thereby a rejection of the first offer.[12] If the offeror did not object and the offeree then performed, however, the offeree's terms and conditions applied.[13] This has been called the "last shot" principle because the terms of the last form sent and received prior to delivery of the goods govern the transaction.[14] So long as each successive form is not a mirror image of the form immediately preceding it, each successive form constitutes a counteroffer, including the last form sent and received prior

10. For a general discussion of the battle of the forms, *see* FARNSWORTH, CONTRACTS; J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, §§ 1-2 (2d ed. 1980). *See also* Macauley, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55, 58-59 (1963); Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, 19 BUS. LAW. 75, 76-77 (1963); Kove, *"The Battle of the Forms," A Proposal to Revise Section 2-207*, 3 U.C.C. L.J. 7 (1970); Lipman, *On Winning the Battle of the Forms: An Analysis of Section 2-207 of the Uniform Commercial Code*, 24 BUS. LAW. 789 (1969); Note, *In Defense of the Battle of Forms: Curing the "First Shot" Flaw in Section 2-207 of the Uniform Commercial Code*, 49 NOTRE DAME LAW. 384 (1973); Comment, *Nonconforming Acceptances Under Section 2-207 of the Uniform Commercial Code: An End to the Battle of the Forms*, 30 U. CHI. L. REV. 540 (1963); Comment, *Section 2-207 of the Uniform Commercial Code, New Rules for the "Battle of the Forms,"* 32 U. PITT. L. REV. 209 (1971); Weeks, *"Battle of the Forms" under the Uniform Commercial Code*, 52 ILL. B. J. 660 (1964); Pucki, *The Battle of the Forms — Section 2-207 under the U.C.C.*, 7 AM. BUS. L.J. 19 (1969).

11. Under traditional contract doctrine, the terms of an acceptance must be identical to the terms proposed by the offer for a contract to be formed. The offeror was considered the master of his offer. Even an unintentional variation of the offer by the offeree has turned an intended acceptance into a counteroffer. U.S. v. Braunstein, 75 F. Supp. 137 (S.D.N.Y. 1947), *dismissed*, 168 (where purported acceptance repeats terms of offer, acceptor takes risk of his own clerical error in repetition). *See also* 1 CORBIN, CONTRACTS § 82 (1963); 1 WILLISTON, CONTRACTS § 75 (3d ed. 1957). *See also* Kurio v. United States, 429 F. Supp. 42 (1970) (person making offer was held to be free to restrict the power of acceptance in any way, reasonable or unreasonable).

12. The classic expression of the rule is found in Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915). There, the seller, responding to buyer's offer, sent back a form which was not the mirror-image of the offer. When the buyer later backed out of the deal, seller sued. The Court held that seller had not accepted the offer but had tendered a counteroffer which had not been accepted by buyer. Therefore, there was no contract.

13. *Id.*

14. Farnsworth called it the "last shot" principle. For a general discussion, *see* FARNSWORTH, CONTRACTS at 159. *See also* W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE, §§ 1.090301, 1.090302 at 15 and 18 (1964). The most acute problem stemming from this rule arose in the "form contract" situation, wherein the parties were more likely to ignore their conflicting writings and perform under what they believed to be a contract.

to delivery.[15] Delivery and acceptance of the goods completes the contract by performance and acts as an acceptance on the terms and conditions of the last form, or counteroffer, to be sent.[16]

Traditional common law thereby favors the seller.[17] Under common law, where the two forms were not identical and a dispute occurred prior to seller's performance, seller's counteroffer would control. Seller's form rejects buyer's offer and acts as a counteroffer. Buyer would have no recourse against seller if seller failed to perform.[18] On the other hand, if seller did perform and buyer accepted seller's performance, a contract would be formed on seller's terms.[19]

2. The U.C.C.

In order to temper the harshness of the common law and to formulate a rule which ideally reflects the commercial realities operative in the sale of goods, the common law has been superceded by the Uniform Commercial Code.[20] The drafters of the U.C.C. specifically recognized the problem of the "battle of the forms" when they drafted U.C.C. 2-207.[21] Under U.C.C. 2-207(1), seller's ac-

15. *Id.*

16. *Id.*

17. In Raisler Heating Co. v. Clinton Wire Cloth Co., 168 N.Y.S. 668 (Sup. Ct. 1918), for example, the seller sought to withdraw, after the market price for the goods had doubled, on the grounds that the specification furnished by the buyer differed significantly from the seller's offer. Held for seller. In the case of El Reno Wholesale Grocery Co. v. Stocking, 293 Ill. at 494., the question of whether a contract for the sale of canned corn had been formed depended upon the effect to be given to "bought and sold" notes of a broker. The notes evidenced that the broker had sold, subject to confirmation, 2,000 cases of corn to be shipped "the first half of September." The confirmation of the transaction given by the seller included the statement "shipment to be made in September." The buyer, a wholesale grocery, sought enforcement of what it regarded as a contract with the seller in a market that had risen considerably higher. The Court decided in favor of the seller, on the grounds that the acceptance did not conform exactly to the offer represented by the broker's notes.

18. *See supra* note 14.

19. The commercial unfairness of the "last shot" doctrine often arose from the fact that a party's real reason for wanting to escape liability would usually be completely unrelated to the defect in the acceptance. For instance a party who wished to be free of a contract because of a sharp shift in the market could avoid legal obligation on the technicality that the acceptance requested an acknowledgement and therefore was a counter proposal. *See* In re Marcalus Mfg. Co., 120 F. Supp. 784 (D.N.J. 1954) (request for acknowledgement in acceptance renders it a counteroffer).

20. Electronic parts are "goods" under the Uniform Commercial Code and hence their sale is governed by Section 2 of the U.C.C. Triangle Underwriters, Inc. v. Honeywell, Inc., 457 F. Supp. 765, 769 (1978) (a contract for the sale of an entire computer "turnkey" system, including not only the electronic hardware but also the software programs to be run on the actual equipment was deemed a transaction in goods within the meaning of U.C.C. § 2-102 and as such was governed by the U.C.C.).

21. U.C.C. § 2-207 reads as follows:

knowledgement of buyer's purchase order constitutes an acceptance even though it contains terms additional to or different from those contained in buyer's purchase order unless seller expressly makes acceptance conditional on assent to its additional or different terms.[22]

Assuming, however, that seller has not so expressly qualified its acceptance, which terms and conditions become part of the contract? There are four possibilities: (1) terms contained in both buyer's purchase order and seller's acknowledgement; (2) additional terms in buyer's purchase order; (3) additional terms in seller's acknowledgement; and (4) terms in buyer's purchase order and seller's acknowledgement different from and which conflict with each other. Clearly those terms common to both the purchase order and the acknowledgement are part of the contract. Also those additional terms contained in buyer's purchase order are part of the contract due to seller's acceptance through acknowledgement.[23]

U.C.C. 2-207(2) provides that additional terms contained in an acceptance are to be construed as proposals for addition to the con-

---

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) The offer expressly limits acceptance to the terms of the offer

(b) They materially alter it; or

(c) Notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

U.C.C. § 2-207 (West 1983)

22. Farnsworth raises the point that there must be some limits to the scope of U.C.C. § 2-207(1) as where the offeree changes a term in its "acceptance" which is a term generally subject to negotiation, such as price or quantity. FARNSWORTH, CONTRACTS, § 3.21 at 161; *see* Duval & Co. v. Malcom, 233 Ga. 784, 215 S.E.2d 356 (1975) (where buyer had inserted a "stated estimate" that differed from growers' "prior output" constituted a "material alteration in the quantity term" so that "no deal had in fact been closed").

23. CBS, Inc. v. Auburn Plastic, Inc., 67 A.D.2d 811, 413 N.Y.S.2d 50 (1979) (where the plaintiff-customer's purchase orders for the construction of cavity molds and toys therefrom constitute an offer, the defendant-manufacturer's *acknowledgements* of such orders will constitute an acceptance despite the acknowledgement's inclusion of terms differing from those of the offer, if the acknowledgements are not made expressly conditional on the customer's assent to the different terms).

tract.[24] Between merchants such terms will become a part of the contract unless either the offer has expressly limited acceptance to its terms, or the additional terms *materially alter* the contract, or notification of objection has been given, or is given within a reasonable time of receipt of the goods.[25] Most authors who have addressed the issue of the effect of different or conflicting terms in the offer and acceptance under U.C.C. 2-207(2) believe that the terms in the buyer's offer will be a part of the contract and the conflicting terms in seller's acceptance will not.[26]

Although the official comments to the U.C.C. cite examples of terms in an acceptance which materially alter the contract, the concept is not well defined and courts have differed on their interpretation of the materiality of some terms.[27] In the example above in

---

24. *See supra* note 21.

25. U.C.C. § 2104 defines "between merchants" and "merchants" as follows:

> (1) "Merchant" means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill.
>
> (3) "Between merchants" means in any transaction with respect to which both parties are chargeable with the knowledge or skill of merchants.

As defined, electronic manufacturers and suppliers are merchants. *See supra* note 21. *See infra* note 27.

26. *See, e.g.*, FARNSWORTH, CONTRACTS (1982), J. CALAMARI & J. PERILLO, CONTRACTS (1970) at 51, n. 88; and R. Summers in J. WHITE & R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE §§ 1-2 at 29 (2d ed. 1980). But J. White takes a different view. J. White would turn to official comment 6 and find that conflicting terms cancel out one another. He believes that seller's form was only an acceptance of terms in the offer which did not conflict with the terms in the acceptance. For a case in which the offer has expressly limited acceptance to its terms, *see* Lockheed Electronics Co. v. Kerouix, Inc., 144 Cal. App. 3d 304, 170 Cal. Rptr. 3d 591 (1981). The terms and conditions of sale of the defendant-buyer of computer cores apply where it states in the buyer's purchase order that "[t]his order expressly limits acceptance to the terms stated herein . . . ." The additional terms contained in the plaintiff-seller's acceptance do not become part of the contract between the parties under U.C.C. § 2-207(2)(a), where the buyer does not expressly assent to them in writing as provided in the purchase order.

27. Official comments 4 and 5 read as follows:

> 4. Examples of typical clauses which would normally "materially alter" the contract and so result in surprise or hardship if incorporated without express awareness by the other party are: a clause negating such standard warranties as that of merchantability or fitness for a particular purpose in circumstances in which either warranty normally attaches; a clause requiring a guaranty of 90% or 100% deliveries in a case such as a contract by cannery, where the usage of the trade allows greater quantity leeways; a clause reserving to the seller the power to cancel upon the buyer's failure to meet any invoice when due; a clause requiring that complaints be made in a time materially shorter than customary or reasonable.
>
> 5. Examples of clauses which involve no element of unreasonable surprise

which the offer is buyer's purchase order and the acceptance seller's acknowledgement, where the additional or different terms are contained in the fine print on the reverse side of their forms, it is often the case that neither buyer nor seller takes the time to read them let alone to give notification of objection.[28] In the event of a dispute, if an additional or different term in seller's acknowledgement conflicts with buyer's desired outcome, chances are buyer will take the position it is a material term and hence not a part of the contract.[29]

Seller may prevent its acknowledgement from acting as an acceptance. Under U.C.C. 2-207(1), seller's acknowledgement containing terms additional to or different from buyer's offer will not operate as an acceptance if seller makes acceptance by buyer expressly conditional on buyer's *assent* to the additional or different terms.[30] Should seller so require buyer's assent, there would be no contract unless buyer accepts seller's counteroffer.[31] Since buyer

---

and which therefore are to be incorporated in the contract unless notice of objection is seasonably given are: a clause setting forth and perhaps enlarging slightly upon the seller's exemption due to supervening causes beyond his control, similar to those covered by the provision of this Article on merchant's excuse by failure of presupposed conditions or a clause fixing in advance any reasonable formula of proration under such circumstances; a clause fixing a reasonable time for complaints within customary limits, or in the case of a purchase for sub-sale, providing for inspection by the sub-purchaser; a clause providing for interest on overdue invoices or fixing the seller's standard credit terms where they are within the range of trade practice and do not limit any credit bargained for; a clause limiting the right of rejection for defects which fall within the customary trade tolerances for acceptance "with adjustment" or otherwise limiting remedy in a reasonable manner (see §§ 2-718 and 2-719).

Courts have differed over whether the addition of an arbitration clause materially alters a contract. *See* Marlen Indus. Corp. v. Carnac Textiles, 45 N.Y.2d 327, 380 N.E.2d 239 (1978); Dorton v. Collins & Aikman Corp., 453 F.2d 1161 (6th Cir. 1972).

28. The sales and purchasing people are concerned with selling and receiving the goods, respectively, and tend to focus their attention only on the key contract terms such as quantity, price and delivery. Once the deal is in motion, there often is no step in the process where the fine print terms and conditions are reviewed.

29. Under U.C.C. § 2-207(2)(b), the disagreeable term will not be a part of the contract if it materially alters the contract. Therefore, if buyer does not want the term to be a part of the contract, he will argue that the term materially alters the contract. Buyers have taken this position where the term was an arbitration provision and courts have differed on whether they viewed the provision for arbitration as materially altering the contract. *See supra* note 27.

30. As used in this statute, the term "assent" has been held to require affirmative, positive action on the part of the party assenting. Buyer's silence does not indicate his assent. C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d 1228 (7th Cir. 1977). *See also* Dorton v. Collins & Aikman Co., 453 F.2d 1161 (6th Cir. 1972).

31. Construction Aggregates Corp. v. Hewitt-Robins, Inc. 404 F.2d 505 (7th Cir. 1968) — where seller's acceptance of buyer's purchase order was made conditional on buyer's agreement to accept the proposed modifications contained in seller's letter, the seller's action does not constitute acceptance of buyer's order under U.C.C. § 2-207(1). Acceptance being

will usually not notice a specific assent requirement preprinted on seller's forms, buyer will not assent to the additional or different terms; thus while buyer's terms and conditions will not apply, neither will seller's.[32] If buyer or seller fails to perform at this point, there is no contract and no contract remedies available.[33] If seller does perform, U.C.C. 2-207(3) states that conduct recognizing the existence of a contract is sufficient to establish a contract.[34] The

predicated on assent to the additional term, the court was justified in treating seller's conditional acceptance as a counteroffer.

32. This is because no contract has been formed. Buyer issued its offer to seller. Seller responded with a counteroffer. There has been no acceptance. In Jostens, Inc. v. National Computer Sys., Inc., 318 N.W.2d 691 (Minn. 1982), it was held that a seller's delivery of an ordered software program and its silence as to proposed terms do not constitute acceptance of a proprietary clause in the buyer's purchase order, which provides that the materials prepared for its specific requirements shall become its property, when the seller's price quotation specifies that (1) the contract does not cover research and development, and (2) no variation from the terms of the quotation will become part of the contract unless specifically approved in writing by the seller. The seller's actions do not constitute acceptance where its acceptance of additional terms is expressly conditioned on its assent.

33. *See supra* note 30.

34. U.C.C. § 2-207(3) reads as follows:

> (3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this code.

In Harlow & Jones, Inc. v. Advance Steel Co., 424 F. Supp. 770 (E.D. Mich. 1976), defendant ordered steel from an independent broker authorized to solicit orders for the plaintiff, specifying shipping dates, quantity, size and grade, and the plaintiff in turn ordered from its European supplier in accordance with the defendant's specifications, the conduct of the parties indicates the existence of a binding contract, and the terms in the confirmation forms subsequently sent by both parties to each other are in agreement as to price, weight, grade, and shipping "C.I.F.," these terms become part of the contract, under U.C.C. § 2-207(3). *See* C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d at 1228 (where the defendant-seller delivers the ordered quantity of steel and the plaintiff-buyer pays for it, a contract is formed by the conduct of the parties under U.C.C. § 2-207(3)). *See also* McKenzie v. Alla-Ohio Coals, Inc., 29 U.C.C. REP. SERV. (CALLAGHAN) (D.C. Cir. 1979) (although initially rejected by the plaintiff-seller when proposed as additional terms in the defendant-buyer's purchase order, specifications and penalty terms for excess ash content are later incorporated into an oral contract for the sale of coal when the seller makes no further objection after the buyer reaffirms the terms of the earlier purchase order and both parties continue to behave as if they have a contract embodying both the specifications and the penalty clause). For conduct insufficient to establish a contract, *see* Tecumseh Int'l Corp. v. City of Springfield, 70 Ill. App. 3d 101, 388 N.E.2d 460 (1979) which held that where a seller responds to a buyer's proposed contract with a proposed contract of its own, differing in material terms and expressly making acceptance conditional on the buyer's assent to the different terms, the seller's proposed contract does not constitute acceptance of the buyer's offer. A party wishing to prove the existence of a contract under U.C.C. § 2-207(3) must show evidence of conduct by both parties recognizing the existence of a contract. Even though a city counsel enacts a proposed agreement for the purchase of coal by the city, and deliveries are begun by the mine pursuant to the city manager's notifying the mine, the deliveries of coal do not constitute conduct recognizing the

terms of the contract are those terms upon which buyer and seller agree together with those terms incorporated into the contract by the "fill-in" provisions of the U.C.C..[35]

Thus the seller may obtain a substantial benefit under Section 2-207(1) by electing to insert into his sales acknowledgement form the statement that acceptance is expressly conditional on buyer's assent to additional terms contained therein.

> If he decides after the exchange of forms that the particular transaction is not in his best interest, Subsection (1) permits him to walk away from the transaction without incurring any liability so long as the buyer has not in the interim expressly assented to the additional terms. Moreover, whether or not a seller will be disadvantaged under Subsection (3) as a consequence of inserting an *expressly conditional* clause in his standard form is within his control. If the seller in fact does not intend to close a particular deal unless the additional terms are assented to, he can protect himself by not delivering the goods until such assent is forthcoming. If the seller does intend to close a deal irrespective of whether or not the buyer assents to the additional terms, he can hardly complain when the contract formed under Subsection (3) as a result of the parties' conduct is held not to include those terms.[36]

B. *Transactions Involving Purchase Orders and Performance*

A different sales transaction occurs where the seller sends no preprinted acknowledgement form. In response to the buyer's purchase order, the seller may accept by performing.[37] In this case, buyer's purchase order constitutes an offer to seller to sell the items specified in the purchase order on the terms and conditions stated therein. Seller accepts buyer's offer including all of buyer's terms and conditions by delivery of the items requested. U.C.C. 2-206 indicates that an order or other offer to buy goods for prompt or current shipment shall be construed as inviting acceptance either by

---

existence of a contract on the part of the coal broker when, in fact, no agreement has been reached, and especially where the coal broker orders an immediate halt to the deliveries upon learning the terms of the purported agreement.

35. U.C.C. § 2-207(3).

36. C. Itoh & Co. v. Jordan Int'l Co., 552 F.2d at 1237-1238.

37. With the rapid growth of small electronics companies over the recent past, the companies are often scrambling to keep up with the demand for their products. One result of this rapid growth is lack of strict internal organization. The companies may not have the ability nor the interest in sending out an acknowledgement form for each purchase order received. If the purchase order appears accurate on its face, the companies accept by delivering the goods.

a prompt promise to ship or by the prompt or current shipment of conforming or nonconforming goods. Consequently, buyer has the advantage of contracting on its own terms.[38]

C. *An Alternative Analysis*

Some courts have given a different interpretation to the sales transaction involving buyer's standard preprinted purchase order form and seller's standard preprinted acknowledgement form. Where buyer and seller have negotiated and agreed to the major terms of the transaction prior to the issuance of the purchase order, some courts have viewed buyer's purchase order and seller's acknowledgement as forms *confirming* a prior sales contract.[39] U.C.C. 2-207(1) indicates that a written confirmation operates as an acceptance even though it states terms additional to or different from those agreed upon, unless acceptance is expressly made conditional on *assent* to the additional or different terms. As previously discussed, whether the additional or different terms are a part of the contract depends upon which subsection of U.C.C. 2-207(2) applies.[40] If buyer and seller are merchants, and buyer's offer expressly limits acceptance to the terms of the offer, the additional terms will not become a part of the contract.[41] If buyer's or seller's additional terms materially alter the original agreement, they will not be included unless expressly agreed to by the other party.[42] If, however, they are terms which would not so change the agreement, they will be incorporated unless notice of objection to them has

38. Buyers' purchase orders often contain terms which sellers in the electronics industry ordinarily do not agree to if such terms are negotiated. For example, the purchase orders typically enable buyer to terminate or reschedule products to increase or decrease the amount of product at any time with no advance notice. They also often contain the warranty of fitness for a particular purpose.

39. In Lounge-A-Round v. GCM Mills, Inc., 109 Cal. App. 3d 190, 166 Cal. Rptr. 920 (1980), LAR entered into three contracts with GCM for the purchase of a particular fabric. The court stated that the first contract derived from an oral agreement between the parties which was later confirmed in writing. The buyer's standard purchase order forms did not contain an arbitration clause while the seller's standard acknowledgement forms did contain an arbitration provision. In considering whether the arbitration clause was a part of the contract, the court looked to U.C.C. § 2-207(1) -(2) and the official comment to the section. The court concluded that since the buyer's purchase orders specifically provided that their terms could not be varied or waived without authorization in writing and that any additional terms added by the seller would be unacceptable and therefore not binding, the arbitration clause in the seller's acknowledgements did not become a part of the contracts between the parties.

40. *See supra* note 21.

41. U.C.C. § 2-207(2)(a), *supra* note 21.

42. *Id.*

been given or is given within a reasonable time.[43] If the terms conflict, neither buyer's nor seller's terms will be included. Official comment 6 substantiates this view.

> Where clauses on confirming forms sent by both parties conflict each party must be assumed to object to a clause of the other conflicting with one on a confirmation sent by himself. As a result the requirement that there be notice of objection. . .is satisfied and the conflicting terms do not become a part of the contract. The contract then consists of the terms originally expressly agreed to, terms on which the confirmations agree, and terms supplied by this Act. . . .[44]

Consequently, in the event of dispute, where buyer's and seller's terms are in conflict, the courts look to the U.C.C. provisions to resolve the dispute and not to the standard forms.[45]

This same analysis can be applied to the situation where buyer and seller have negotiated and closed their deal, where buyer thereafter sends its purchase order in confirmation of their agreement, seller performs, and later a dispute arises. No acknowledgement form is sent by seller. Under U.C.C. 2-207(1) buyer's purchase order operates as an acceptance unless the purchase order makes acceptance conditional on assent to the additional or different terms.[46] While buyers' purchase order forms generally limit the terms of the contract to those contained on them, they do not require sellers' assent to the terms.[47] Assuming seller voices no objection to the

---

43. U.C.C. § 2-207, official comments 2 and 3 address the situation of confirming forms:

> (2) Under this Article a proposed deal which in commercial understanding has in fact been closed is recognized as a contract. Therefore, any additional matter contained either in the writing intended to close the deal or in a later confirmation falls within subsection (2) and must be regarded as a proposal for an added term unless the acceptance is made conditional on the acceptance of the additional terms.
>
> (3) Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time.

44. U.C.C. § 2-207, comment 6.

45. *See* Lounge-A-Round v. GCM Milles, Inc., 109 Cal. App. 3d at 190. *But see* Marlene Indus. Corp. v. Carnac Textiles, 45 N.Y.2d at 327 ("whether [buyer's] form is an offer and [seller's] an acceptance, or whether both are mere confirmation of an existing contract, the result in this case is the same").

46. *See supra* note 21 and 30.

47. Buyer's purchase orders generally contain provisions similar to the following: "This order is Buyer's offer to Seller and when accepted, either by acknowledgement or by performance shall become a binding contract subject to the terms and conditions hereof, shall

terms either explicitly or implicitly by sending an acknowledgement containing different terms, buyer's terms will be included if they do not materially alter the parties' prior agreement.[48]

D. *Summary Under the U.C.C.*

The purpose of U.C.C. 2-207 is to prevent application of the inflexible common law mirror image rule. While it theoretically allows parties to enforce their intended agreements regardless of the inclusion of additional or different terms in the acceptance, there appears to be no way to apply it to avoid apparent favoritism to the person who sent the first, or sometimes the second, document. The person who sent the first document will ultimately have the greater advantage because the responding party's document will be viewed as an acceptance of the first document's terms, and any new terms included in the responding party's document will be regarded merely as a proposal if the new terms materially change the agreement. The person who sent the second document will have the advantage only if he flatly rejects the first person's offer, thereby making his document a counteroffer and forcing the first person into the position of responding to his offer.

To make matters more difficult, courts and commentators have differed in their interpretations and applications of Section 2-207, and there appears to be no specific language that a buyer or seller can include on its form that will assure a contract formation on its own terms. In fact, the U.C.C. may be serving only as added ammunition in "the battle of the forms."

III. USE OF THE VOLUME PURCHASE AGREEMENT TO AVOID THE BATTLE

One solution to the indefiniteness and confusion of the "battle of the forms" in the electronics industry is through the use of a volume purchase agreement. A volume purchase agreement is a negotiated agreement between a maker or supplier and a buyer or user for the purchase and sale of electronic parts.[49] The buyer generally uses the parts in the assembly of some electronic device or hardware which may be sold either directly to the public or to a second manufacturer who then incorporates the parts into a larger system. The volume purchase agreement is desirable because it assures a buyer

---

constitute the entire agreement between Buyer and Seller, and shall supercede any other agreements or understandings made prior to the date of this order."

48. U.C.C. 2-207, comment 3, *supra* note 43.

49. *See* Appendix for an example of a Volume Purchase Agreement.

of a right to an available supply of a particular part at a designated price over a period of time.[50] In the electronic parts market, demand has often exceeded supply, and the assurance of having a ready supply of parts on hand may be critical to a company's survival in the market place.[51] This is especially true where a company requires a semi-custom or custom part and has taken the time to qualify a particular manufacturer's product as meeting its specifications and requirements of quality. A volume purchase agreement will serve to protect that source of supply. From the seller's perspective, as semi-custom and custom parts often are salable only to one particular buyer, a volume purchase agreement will serve to ensure recovery of any nonrecurring development expenses which the seller has not charged buyer up front but expects to recoup in the volume of items sold under the contract. It can also serve to protect the seller in the event the buyer cancels prior to full performance under the contract. A volume purchase agreement may also assist a seller in planning its sales and production levels over an extended period of time. Finally, it will enable a seller to contract on its own terms instead of being subjected to terms of the buyer or the fill-in provisions of the U.C.C. which tend to favor the buyer.

After the parties have negotiated and signed a volume purchase agreement, individual purchase orders are issued periodically by buyer under the volume purchase agreement over the term of the agreement as buyer has need for the particular items for which it has contracted.[52] The quantity of items in each purchase order issued counts toward the total quantity of items for which buyer has

50. The agreements are generally in effect for at least 12 months and specify within them the number of parts buyer expect to purchase over that period. Seller generally is not given the ability to cancel the contract unless buyer defaults in its performance so that buyer is ensured of a ready supply of the designated parts.

51. Just how critical one source of supply can be is demonstrated in the following story of what occurred to one client. While in the area on other business, a client stopped in to visit a local company which supplies the client company with a custom machine-tooled part for one of the floppy disk drives it manufactures and then sells to numerous computer companies. During the visit, he became aware that the machine shop was expecting to file bankruptcy two days later. Here was practically the sole source of his supply for this particular part and it was about to close its doors forever. The other supply sources could not possibly increase production quickly enough to produce the number of parts needed to keep current on its contracts. A flurry of activity and telephone calls ensued. The story had a productive ending for my client. The bankruptcy filing was delayed for a short time. The company purchased the machines and associated parts and manuals and shipped them to its home state where they were installed in its own shop. The machines were up and running the following week with little, if any, effect on the company's ability to produce its disk drives on time.

52. The term "releases" is often used to refer to the individual purchase orders issued under a volume purchase agreement. Seller has no authorization to ship items to buyer until buyer "releases" the number of items specified in its purchase order. The purchase order is

contracted in the agreement. Seller may or may not issue an acknowledgement in response to receipt of buyer's purchase order according to the agreement of the parties. Frequently, buyer requests seller execute and return an acknowledgement at the bottom of a copy of buyer's purchase order form.

A volume purchase agreement supercedes the terms and conditions contained in the buyer's purchase order and seller's acknowledgement forms.[53] Only terms which the parties have negotiated and agreed to are ultimately included in the agreement.[54] In practical reality, if a buyer or seller has a particularly strong position in the marketplace, the commercially weaker party will have a tougher time negotiating a contract on its most desirable terms. Nonetheless, by using a volume purchase agreement, both parties will enter into the purchase and sale having read, considered and agreed to (even if not preferring) all the terms and conditions which will apply to the transaction.[55] It is especially important that the attorney representing the commercially smaller party carefully review all the proposed terms and conditions as they may be particularly unfamiliar to his or her client. Even if the other party is a large corporation, it will be amenable to terms and conditions which are realistic and reasonable.

In reviewing and drafting a volume purchase agreement, it is important to understand the nature of the product and the sales transaction. Many proposed contracts which have been drawn from other transactions and applied to the purchase of particular electronic parts have contained entire paragraphs totally irrelevant to the transaction at hand.[56] For example, if no special tooling is

---

not an offer to seller as the parties have already formed a contract on the terms contained in the Volume Purchase Agreement; it is an authorization to ship the goods.

53. A sample provision is as follows: "This VPA including any purchase orders issued under this VPA, shall be the complete statement of the terms and conditions applicable to all purchases that may be made hereunder notwithstanding provisions in the terms and conditions of an invoice, acknowledgement, sales agreement or other document furnished by Seller or any subsidiary of seller to buyer or any subsidiary of buyer prior to the date of this VPA, or pursuant to this VPA or buyer's purchase order. In the event of conflict in or ambiguity created among the terms of these documents, the order of precedence among them shall be this VPA followed by Exhibits and attachments to this VPA, followed by the terms on the face side of buyer's purchase orders and then by the printed terms on the reverse side of buyer's purchase orders, as such terms have been modified by this VPA."

54. *See id.*

55. This will help to prevent later disputes, claims of fraud, misrepresentation and overreaching so common to the electronics industry. *See* Christo, *The Computer As God,* 1 COMPUTER L. DEV. 227 (1982-83).

56. Examples of some of the inapplicable provisions I have seen suggested in contracts for the sale of standard product are consignment provisions, proprietary rights provisions, a

involved, provisions governing tooling are inapplicable. It is a good idea if your client regularly sells or purchases in volume to draft a generalized volume purchase agreement which can be tailored where necessary to fit a particular transaction.[57]

IV. WHAT TO INCLUDE AND WHAT TO AVOID

The following paragraphs discuss some of the particular provisions to cover in a volume purchase agreement and some particular situations to avoid.

A. *General Considerations*

In drafting a generalized volume purchase agreement, an attorney should leave as few blanks in the body of the agreement itself as possible. This minimizes the possibility that your client will send out its suggested agreement for a particular transaction and fail to include a crucial term. To achieve this degree of certainty, instead of placing the bulk of the variable terms in the body of the agreement, they may be contained in one or more exhibits attached to the basic agreement. These exhibits can be used to specify such terms as the products, quantities, specifications, prices, delivery, the amount of time seller requires from receipt of purchase order to delivery of product to buyer's carrier, or buyer's plant or other delivery location, terms of payment, up front mask or tooling charges and form of acceptable purchase order.[58] The purchase and sale of additional items between the parties is facilitated by the execution of a volume purchase agreement as the sale of the new items may be added under the same agreement simply by amending the exhibit which lists the products covered.[59]

In order for the volume purchase agreement to prevent "the battle of the forms," it must contain a clearly drafted "prevailing terms and conditions" provision.[60] The provision may exclude *all*

---

provision for inspection at seller's facility and provisions governing goods containing buyer's insignia.

57. The Appendix contains a sample Volume Purchase Agreement written from a seller's perspective for the sale of standard off-the-shelf or semi-custom product.

58. *See infra*, Exhibit A to Appendix.

59. An example of a provision in the Volume Purchase Agreement to accomplish this would be: "Additional quantities and product types may be added by mutual agreement of the parties with prices to be negotiated, and Exhibit "A" will be amended accordingly." *Id.* at provision 1.

60. One wording for such a provision is: "Buyer and Seller agree that the terms and conditions of this Agreement shall apply to the sale of goods hereunder and cannot be modified or amended except in writing signed by the parties. No other terms and conditions whether printed on the Seller's or Buyer's forms or otherwise will be binding on the parties

other terms and conditions whether contained on buyer's purchase order or seller's acknowledgement, or any other form or communication by either party, except those specified in the agreement and printed on the face of buyer's purchase order and agreed to by seller.[61] Alternatively, the provision specifically may include the terms and conditions on the face and reverse side of buyer's purchase order. If buyer's terms and conditions are to be included specifically, the parties, particularly seller, must carefully review them.[62] To the extent the purchase order terms are acceptable, they need not be included in the body of the volume purchase agreement but should be included as an exhibit to the contract. If any are unacceptable, the volume purchase agreement should specify any modifications to be made in those terms and any deletions of inapplicable or superceded terms.[63] It is a good idea to include a provision which specifies the order of precedence to apply in the case of conflict between terms in applicable documents.[64] Ideally, the volume purchase agreement terms, including all exhibits, has priority over all others, followed by the terms on the face side of buyer's purchase order, and finally by those on the reverse side of buyer's purchase order as those terms have been modified by the volume purchase agreement.

An amendment or modification of the volume purchase agreement should be allowed only if in writing and signed by both parties.[65] The parties may want to allow for a degree of flexibility in the transactions should particular circumstances arise pertaining to only one particular purchase order which requires some kind of al-

---

unless such terms are handwritten or typed on the face of the Buyer's purchase order and agreed to in writing by Seller." Appendix, *infra* provision 6.

61. *Id.*

62. Buyer's forms are drafted to favor the buyer, and seller should be alert to provisions which it believes unreasonably favor buyer and by which it would not want to be bound.

63. Provisions which have been substantially modified should be set forth in full in the Volume Purchase Agreement. Paragraphs deleted in their entirety should be listed in such a way as to be clearly identified. An example is as follows:

The following clauses from the purchase order are deleted:

1. Purchase Order constitutes complete Agreement;
2. Applicable Law;
3. Confidential Information;
4. Off-specification;
5. Shipment.

64. *See supra* note 53.

65. If a contract can be modified orally, the door is open for allegations affecting any contract provision in the event of a dispute. *See supra* note 60 for a provision requiring modifications to be in writing.

teration in the usual terms.[66] One way to accomplish this flexibility is to allow the parties to alter a particular transaction by buyer's writing the modification on the face of buyer's purchase order and by seller acknowledging the modification.[67] However, beware of seller's routine execution of purchase orders when received. If the buyer retains the option to alter the agreement on each individual purchase order, it is necessary to educate your client not to blindly sign the buyer's purchase orders. The seller must scan each purchase order to make sure that it understands and agrees to all terms because it will be bound thereby.[68]

B. *Problem Terms and Conditions*

One of the more common problems encountered in the electronic parts sales transaction is the failure of the seller to supply parts on time. In a marketplace where demand exceeds supply, timely delivery is often the exception rather than the rule.[69] Seller's representative is eager to sell and buyer's representative wants to get the parts as soon after placement of its purchase order as possible. Seller must allow itself sufficient lead time from receipt of a purchase order to produce and deliver the items sold.[70] Volume purchase agreements often give buyer the right to cancel the contract if seller fails to deliver on the delivery date or within a specified number of days thereafter. From a practical perspective, if the marketplace demand is exceeding supply, buyer usually does not cancel because it needs the products and cannot get them elsewhere any quicker. However, once the market turns and supply exceeds the demand, buyers cancel their backlogs because they can get products elsewhere quicker and perhaps at a lower price. The attor-

66. One such instance of this would be where buyer desires seller to ship the goods sooner than is required under the Volume Purchase Agreement.

67. Seller may acknowledge the modification by signing on the face of the purchase order as "Agreed to by Seller." *See supra* note 60.

68. Some purchase order forms contain a place for seller to execute an acknowledgement of its acceptance of the purchase order as written and an additional copy of the purchase order to be returned to buyer. This is one way a buyer may attempt to avoid the introduction of additional and different terms in seller's standard form acknowledgement.

69. While a seller's product is in demand, the seller has additional leverage in negotiating its purchase agreements. Some of this edge is taken away when that seller gets behind on its deliveries under previous purchase orders with the same buyer. This is particularly true if the seller is so late in its deliveries that the buyer has the right to cancel the backlogs under the prior purchase orders.

70. Lead time should be defined clearly in the agreement. It may be expressed as the minimum number of weeks from seller's receipt of buyer's order to the date seller places the product on the carrier for delivery to buyer. For any particular product the time may vary depending on the demand for the product and the manufacturer's capacity to produce it.

ney for seller should encourage seller to be realistic in negotiating the necessary amount of lead time so that seller does not find itself consistently unable to deliver on time.[71] Seller may negotiate for additional time for delivery by requiring buyer to give written notice of default upon late delivery and a reasonable time for seller to cure such default.[72]

Another problem arises when buyers find that their actual requirements fall far short of their projections.[73] This occurs particularly when the item is for a new product line which the market has not found as wondrous as the maker projected. Buyers therefore may desire the ability to cancel or reschedule item deliveries after having issued the purchase order and will want to give seller as little prior notice as possible.[74] Seller on the other hand will require a sufficient amount of time from receipt of buyer's notice in order to adjust its production of the items.[75] Generally, the time period re-

71. If an insufficient lead time is agreed to, the seller may find itself consistently unable to meet its delivery dates for the product.

72. For example, a clause such as the following will accomplish a delay of at least a week: "In the event of failure of delivery on such delivery date, Buyer will give Seller written notice of delinquency allowing Seller a reasonable time cure. In no event shall Seller be considered in default of its obligations hereunder to deliver until seven (7) days after receipt of such notice."

73. This appears to be what happened with Convergent Technologies' Workslate lap computer whose failure to sell as projected has led to a multimillion-dollar lawsuit by a supplier with an unfulfilled volume purchase agreement for parts on the failed machine. INFOWORLD, Nov. 5, 1984, at 18. *See also* ELECTRONIC BUYER'S NEWS, Oct. 15, 1984, at 10 and 76.

74. One buyer's purchase agreement contained the following cancellation provision: "Buyer may cancel any or all scheduled deliveries of product on any outstanding purchase order releases by giving seller at least ten (10) days' written notice prior to the scheduled shipment date of such product. Buyer's liability for cancelled deliveries shall be limited to 100% of the agreement price for product deliveries scheduled within thirty (30) days after the date of Buyer's notice." The items to be purchased under the agreement included two standard memory chips and a semi-custom memory chip. The ten day notice prior to the scheduled shipment date is not particularly a problem as shipments can generally be halted the same day by telephone. The real monetary effect on seller occurs in the provision which defines the extent of Buyer's liability for goods scheduled for delivery. In the above, buyer agrees to pay for only the deliveries scheduled within thirty (30) days from seller's receipt of the notice. In a market where demand exceeds supply and the product is standard, seller may be able to resell or reschedule the product to another customer and incur no damage as a result of buyer's cancellation. However, semi-custom and custom items cannot be resold and probably require more than thirty days to produce. In the above instance, the seller found the provisions unacceptable to the extent the sales include semi-custom items. This particular seller required a minimum of ninety (90) days prior notice for cancellation of semi-custom items. The 30 days provision for standard product was accepted.

75. *Id.* A provision written from seller's perspective is as follows:

Seller will attempt to accommodate written requests to reschedule or stop-ship/hold products already on order. Since Seller manufactures to customer order by line item, the rescheduling or placing of orders on hold at no cost to Buyer will not ordinarily be possible.

quired will be greater for semi-custom and custom products. For semi-custom products, the adjustment time may depend upon which step in the production process the items become identified to the particular buyer.[76] The volume purchase agreement should specify a remedy in the event the length of notice required for a particular product is not given.[77]

The parties must decide whether the quantity to be purchased under the agreement is a firm commitment. Generally, if the items are standard product, the buyer will not give a firm commitment and will reserve the right to terminate any purchase order under the agreement upon some negotiated time for notice. Seller must ensure the length of time specified will be sufficient to avoid incurring unnecessary production costs.[78] If the product is readily commercially available, seller will simply not have the leverage to negotiate for a firm commitment quantity. If the items are semi-custom or custom in nature, seller must review carefully the intent, if any, to which it plans to bear initial costs in developing the product with the expectation of profit to come from the quantity of goods sold.[79] Agreements for sale of semi-custom products are often not for a firm commitment quantity but generally require longer notice provisions.[80] Agreements for the sales of custom products generally do require a minimum commitment quantity in addition to any nonrecurring development costs.

Volume purchase agreements usually contain warranty and

Seller agrees to reschedule or place on hold standard product upon written notice sixty (60) days prior to Buyer's request date and products manufactured to Buyer's specifications upon ninety (90) days prior to Buyer's request date. If the affected orders specify military hi-rel products the applicable time periods will be ninety (90) days for standard hi-rel products and one hundred twenty (120) days for hi-rel products manufactured to Buyer's specifications. Requests to reschedule product where the applicable notice is not given will subject the Buyer to responsibility for products in the production flow which are identified with Buyer's orders or the reasonable costs associated therewith.

76. The earlier in the production process the item becomes customized to a particular buyer, the longer notice seller will require for cancellation or rescheduling of the items.

77. *See supra* note 75.

78. *See supra* note 74.

79. In the sale of semi-custom product, a seller will often require a buyer to pay a tooling fee upon acceptance of the initial purchase order. The fee often only partially covers the initial costs incurred in seller's development of the product. The seller expects to recoup the remainder of the development costs from the quantity of items sold to the buyer. Where the items are expected to be sold in a sufficiently large quantity and the prior course of dealings between the parties has shown that the buyer regularly pruchases in the quantities it projects, a seller may not require an initial tooling charge and also not require the buyer to commit to purchasing a specific minimum quantity. Chances are, however, that the cost per item will be high enough to make it worth the risk to the seller to proceed in this manner.

80. *See supra* note 74. Typically, ninety to 120 days notice is required prior to cancellation or rescheduling of semi-custom and custom items.

disclaimer provisions.[81] As it is seller's product, seller typically

81. Sample warranty and disclaimer provisions are as follows:

a. Seller warrants that products delivered pursuant to this Agreement shall, at the time of delivery, and for a period of one year thereafter be free and clear of all liens and encumbrances and free from defects in materials or workmanship and shall conform to Seller's specifications or such specifications as Seller agrees to in writing. Under this warranty, Seller's obligations with respect to losses, other than personal injury, shall be limited, at Seller's option, either to the replacement (by delivery F.O.B. ———, California) of defective or nonconforming product or to the refunding of the purchase price thereof (hereinafter called "Warranty Adjustment"), subject, however, to the following conditions and procedures:

i. Products returned to Seller for warranty adjustment will be shipped to Seller's plant by Buyer at Seller's expense and shall be accompanied by a statement of the reason for the return and an approved Return Material Authorization Document issued by Seller. If warranty adjustment is not made, Seller will invoice Buyer for such expense. Seller will reimburse Buyer for freight expenses where warranty adjustment is made.

ii. Upon receipt of the returned products, Seller will examine such products to determine whether the alleged defect occurred as a result of misuse, neglect, improper installation, repair, alteration or accident, unusual physical or electrical stress or improper return handling procedure.

iii. Seller will notify Buyer in the event the products are not subject to warranty adjustment and the products will be returned to Buyer, and Buyer shall pay freight and handling costs associated therewith. If the products are subject to warranty adjustment, Seller will make such adjustments promptly. Warranty adjustment will be based upon final count and verification of returned product at Seller's plant.

b. THIS WARRANTY SHALL EXTEND DIRECTLY TO BUYER AND NOT TO BUYER'S CUSTOMERS, AND IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES EXPRESS OR IMPLIED INCLUDING, BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER'S REMEDY FOR BREACH OF ANY WARRANTY UNDER THIS AGREEMENT SHALL BE LIMITED TO REPAIR, REPLACEMENT OR CREDIT. In no event shall either party be liable for any special, incidental or consequential damages resulting from such breach or alleged breach. Further, Seller shall in no event be obligated hereunder for any labor cost incidental to the replacement of any defective products.

c. *Small Lot Rejects:* Small lot rejects (under $250) are to be returned for credit only, unless product is custom in nature and Buyer must have replacement. Returns between $250 and $400 can be returned for credit or replacement at Buyer's option; and returns above $500 for replacement only unless otherwise agreed by Seller.

d. *Electrostatic Damage Failures:* Failures due to electrostatic damage are specifically excluded from the above warranty and the defective products are not subject to warranty adjustment.

e. *Replacement Material:* Replacement orders in accordance with the above warranty carry a priority scheduling by Seller but are dependent upon product availability. Where critical need exists by Buyer, initiation of prior replacement order, before material has been returned, may be made, provided it has been approved by Seller's Quality Assurance Department. Replacement shall be made against original order or Buyer's designated replacement order

specifies the duration of its warranty, that the items sold shall be free from defects in materials and workmanship and that they shall conform to agreed upon specifications for a specific period of time. To the extent buyer is relying on particular representations made by seller, or product brochures and product specification documents, buyer should attempt to include them by reference in the warranty provision and attach them to the agreement. From seller's perspective, it is helpful to specify the procedure buyer must go through in returning allegedly defective items.[82] Seller will want to have the right to verify that the items truly are defective and have not been misused or mishandled. Seller usually also will negotiate for a disclaimer provision, excluding any warranties not explicitly included in the contract[83], and a limitation of remedies provision, limiting the remedies to repair, replacement, or credit at seller's (or buyer's) option.[84] Seller will desire an exclusion of any special, incidental or consequential damages.[85] Some buyers will not agree, however, to these terms limiting seller's liability. One client has indicated that it recently has begun to insist on a contract provision charging a seller for the labor costs buyer incurs in replacing seller's defective parts covered by warranty in one of buyer's products.[86]

---

number at original order pricing and will be scheduled for the earliest possible shipment by Seller.

For warranties generally, *see* Spanner and Mack, *Sharpening Your Clause*, DATAMATION, Aug. 1980; Raysman, *The Obligation of the Vendor to Perform Warranty*, COMPUTERWORLD, Aug. 11, 1980; Special Project, *Article Two Warranties*, 64 CORNELL L. REV. 28, (1978); Bernacchi & Larsen, DATA PROCESSING CONTRACTS AND THE LAW (1974).

82. *Id.* Where a buyer subjects the product to specific tests for which either a machine print-out or a hand-printed evaluation is completed, seller may require the buyer to return a copy of the evaluation along with the defective product.

83. U.C.C. § 2-316 requires an exclusion or modification of the implied warranty of merchantability or any part of it to mention "merchantability" and, in the case of a writing, to be conspicuous. An exclusion or modification of any implied warranty of fitness must be by writing and conspicuous.

84. U.C.C. § 2-719 allows the agreement to provide for remedies in addition to or in substitution for those provided under the U.C.C.. A remedy must be expressly agreed to be exclusive or it will be held to be optional. There must, however, be a fair quantum of remedy available in the agreement; otherwise the remedies under the U.C.C. will be available. Consequential damages may be limited or excluded unless such limitation or exclusion is unconscionable. *See* U.C.C. § 2-719 and official comments.

85. A seller will want special, incidental or consequential damages to be excluded because of the large potential for damages as compared to the small price of the part. For example, suppose the part is a $2.50 256K memory board which buyer installs in a computer. The computer is sold to a customer and sometime later, still within the duration of the warranty, one chip on the board fails causing sporadic malfunctioning of the computer. A seller will not want to be liable contractually for all the labor costs associated with diagnosing and replacing the defective board. These costs would be many times greater than the original cost of the memory board.

86. An example of a provision covering labor costs is as follows: "Costs of all work

A volume purchase agreement invariably includes a patent indemnity provision. The provision protects buyer should it be sued for patent infringement on account of seller's product.[87] Seller should be sure to negotiate for like protection should the infringement arise out of seller's compliance with buyer's specifications or a combination with, an addition to, or a modification of the items by buyer after delivery by seller.[88]

C. *Summary*

In reviewing and negotiating a volume purchase agreement, an attorney should understand the nature of the particular sales transaction involved. The provisions of the agreement should be an accurate reflection of the manner in which the transaction is intended to proceed. All time limits should be realistic and reasonable, particularly those found in the paragraphs covering delivery, cancellation and rescheduling. Provisions like the patent indemnity provision, which can be made reciprocal, should be so drafted. Buyer and seller should include in the warranty provision reference to the specifications which they have agreed the product will meet.

---

performed in correction of such warranty defects, including costs of labor, material, inspection, travel and shipping to and from seller's facilities, shall be borne exclusively by seller, and, if paid or incurred by buyer, may at buyer's option in each instance, be set off against any amounts due and owing to seller by buyer."

87. One example of a patent and copyright indemnity provision which protects both buyer and seller is as follows:

> Seller shall defend any suit or proceeding brought against Buyer insofar as such suit or proceeding is based on a claim that any goods manufactured and supplied by Seller to Buyer constitute direct infringements of any duly issued United States patent, copyrights, and protection provided for semiconductor chip products and Seller shall pay all damages and costs finally awarded therein (including royalties for semiconductor chip products) against Buyer, provided that Seller is promptly informed and furnished a copy of each communication, notice or other action relating to the alleged infringement and is given authority, information and assistance (at Seller's expense) necessary to defend or settle said suit or proceeding. If infringement is alleged prior to completion of this Agreement, Seller shall diligently attempt to obtain permission to provide the goods to Buyer for its intended use or assist Buyer in obtaining an acceptable alternate. Seller's obligation hereunder shall not apply to any additional costs or damages resulting from use of any allegedly infringing goods after Buyer has received notice alleging the infringement unless Seller has given written permission for such continuing use by Buyer. Seller shall not be obligated to defend or be liable for costs and damages if the infringement arises out of compliance with Buyer's specification, or from a combination with, an addition to, or a modification of the supplies after delivery by Seller, or from use of the supplies, or any part thereof in the practice of a process.

Appendix, *infra* at provision 10.

88. *Id.* As the provisions drafted to protect seller are reasonable, buyers have not objected to their inclusion.

Any disclaimer of warranties and limitations on remedies should be considered and if agreed to, included.

In summary, a well drafted volume purchase agreement can be used to avoid the messy battle of conflicting forms and its unclear outcome by stating in the body of the agreement and through the use of exhibits which terms and conditions and which forms apply to the sales transactions.[89] A negotiated agreement which accurately reflects the manner in which the parties will proceed to buy and sell from one another will serve the best interests of both parties.

V. CONCLUSION

Traditional contract law favored the one who fired the last shot in the "battle of the forms." The Uniform Commercial Code favors the one who sends the first offer. Thus the advantage has been shifted from the seller to the buyer. A fully negotiated volume purchase agreement can be used to equalize the battling stance of the parties and to ensure that both parties enter the transaction aware of their rights and obligations. When the parties' expectations are consistent with the contract terms, the likelihood of settlement is greater than the chances for battle should a dispute arise.

The volume purchase agreement provisions mentioned in this article are by no means exclusive nor are the considerations raised complete. They are intended to offer some ideas and considerations in drafting and negotiating volume purchase agreements. Often the agreement is not signed prior to the issuance of the initial purchase order. As clients seem to be focused primarily on buying and selling goods and not on the finer points of contracting, it is helpful gradually to educate your clients on the importance of a negotiated agreement and to assist them through the contracting process as simply and quickly as possible. This can be accomplished most efficiently by understanding the product and the transaction and by drafting provisions which will protect your client while being palatable to the other side. In other words, give where it will not hurt your client and save your negotiating hand for where it really counts.

---

89. *See supra* note 53.

VI. APPENDIX

SAMPLE VOLUME PURCHASE AGREEMENT

This AGREEMENT is entered into this _____ day of _____, 19___, between _____, a _____ Corporation, located at _____, (hereinafter called "Buyer") and _____, located at _____, California __, (hereinafter called "Seller"). The parties hereto agree that the following terms and conditions shall be applicable to sales from Seller to Buyer which reference this Volume Purchase Agreement No. ____.

1. *PRODUCTS AND QUANTITIES*

Seller hereby agrees to sell to Buyer the products specified in Exhibit "A" attached hereto and made a part hereof at the prices designated therein. Seller will acknowledge and thereby accept orders placed in accordance with this Agreement for products designated in Exhibit "A" up to the amount specified therein. Additional quantities and product types may be added by mutual agreement of the parties with prices to be negotiated; and Exhibit "A" will be amended accordingly.

2. *TERM*

The term of this Agreement for purposes of purchase order placement shall commence with the date first written above and continue for twelve months thereafter.

3. *RELEASES*

Buyer agrees to enter purchase orders against this Purchase Agreement during the term of the Agreement to achieve the commitment quantity set forth in Exhibit "A". Such purchase orders may provide for delivery of such products during the term of this Agreement. All purchase orders placed hereunder must reference this Agreement number. Seller shall not be obligated to process releases of less than $250 per line item.

4. *PRICES AND PAYMENT*

The prices specified in Exhibit "A" are based on delivery F.O.B. ___, California. Buyer shall make payment of Tooling Charges on net invoice amount within thirty (30) days after date of invoice. Payment for product shall be _____. Any amendments to the pricing herein must be mutually agreed to and must be in writing.

Seller's invoices shall be in writing and contain the following information:

a. Buyer's Purchase Order Number
b. Part Number
c. Description of goods shipped
d. Quantity of goods shipped and unit price applicable thereto.

5. *DELIVERY*

Seller agrees to expend its best efforts to conform to the "mutually agreed delivery date(s)" for products ordered pursuant to this Agreement. The "mutually agreed delivery date" for purposes of purchase orders placed pursuant to this Agreement shall be a date which allows at the minimum, the lead time, expressed in weeks after receipt of order, stated in Exhibit "A." In the event of failure of delivery on such delivery date, Buyer will give Seller written notice of delinquency allowing Seller a reasonable time to cure. In no event shall Seller be considered in default of its obligation hereunder to deliver until seven (7) days after such notice. Seller reserves the right to overship or undership orders placed against this Agreement to a maximum amount of _____ percent of the quantity of any purchase order line item. The shipment method specified in individual purchase orders will be honored by Seller. If no method is specified, Seller will ship cheapest traceable method.

6. *PREVAILING TERMS AND CONDITIONS*

Buyer and Seller agree that the terms and conditions of this Agreement shall apply to the sale of goods hereunder and cannot be modified or amended except by a writing in signed by the parties. No other terms and conditions, whether printed on the Seller's or Buyer's forms or otherwise will be binding on the parties unless such terms are handwritten or typed on the face of the Buyer's Purchase Order and agreed to in writing by Seller.

7. *PACKING*

Seller shall be responsible for properly packing and packaging the products purchased hereunder. Seller shall identify shipments with corresponding purchase order and packing slip numbers.

8. *INSPECTION AND TEST*

Seller shall inspect and test all material prior to shipment to Buyer. Products supplied under this Agreement may be inspected and tested by the Buyer upon arrival at Buyer's facility. Products which

do not conform to the agreed to specifications may be returned to Seller using Seller's Return Material Authorization Form in accordance with Seller's warranty policy.

9. *WARRANTY POLICY AND DISCLAIMER*

a. Seller warrants that products delivered pursuant to this Agreement shall, at the time of delivery, and for a period of one year thereafter be free and clear of all liens and encumbrances and free from defects in materials or workmanship and shall conform to Seller's specifications or such specifications as Seller agrees to in writing. Under this warranty, Seller's obligations with respect to losses, other than personal injury, shall be limited, at Seller's option, either to the replacement (by delivery F.O.B. _____, California) of defective or non-conforming product or to the refunding of the purchase price thereof (hereinafter called "Warranty Adjustment"), subject, however, to the following conditions and procedures:

i. Products returned to Seller for warranty adjustment will be shipped to Seller's plant by Buyer at Seller's expense and shall be accompanied by a statement of the reason for the return and an approved Return Material Authorization Document issued by Seller. If warranty adjustment is not made, Seller will invoice Buyer for such expense. Seller will reimburse Buyer for freight expenses where warranty adjustment is made.

ii. Upon receipt of the returned products, Seller will examine such products to determine whether the alleged defect occurred as a result of misuse, neglect, improper installation, repair, alteration or accident, unusual physical or electrical stress or improper return handling procedure.

iii. Seller will notify Buyer in the event the products are not subject to warranty adjustment and the products will be returned to Buyer, and Buyer shall pay freight and handling costs associated therewith. If the products are subject to warranty adjustment, Seller will make such adjustments promptly. Warranty adjustment will be based upon final count and verification of returned product at Seller's plant.

b. THIS WARRANTY SHALL EXTEND DIRECTLY TO BUYER AND NOT TO BUYER'S CUSTOMERS, AND IS EXCLUSIVE AND IN LIEU OF ALL OTHER WARRANTIES EXPRESS OR IMPLIED INCLUDING, BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE. BUYER'S REMEDY FOR BREACH OF ANY WARRANTY UNDER THIS AGREEMENT SHALL BE LIMITED TO REPAIR, REPLACEMENT

OR CREDIT. In no event shall either party be liable for any special, incidental or consequential damages resulting from such breach or alleged breach. Further, Seller shall in no event be obligated hereunder for any labor cost incidental to the replacement of any defective products.

c. *Small Lot Rejects:* Small lot rejects (under $250) are to be returned for credit only, unless product is custom in nature and Buyer must have replacement. Returns between $250 and $400 can be returned for credit or replacement at Buyer's option; and returns above $500 for replacement only unless otherwise agreed by Seller.

d. *Electrostatic Damage Failures:* Failures due to electrostatic damage are specifically excluded from the above warranty and the defective products are not subject to warranty adjustment.

e. *Replacement Material*: Replacement orders in accordance with the above warranty carry a priority scheduling by Seller but are dependent upon product availability. Where critical need exists by Buyer, initiation of prior replacement order, before material has been returned, may be made, provided it has been approved by Seller's Quality Assurance Department. Replacement shall be made against original order or Buyer's designated replacement order number at original order pricing and will be scheduled for the earliest possible shipment by Seller.

10. *PATENT INDEMNITY*

Seller shall defend any suit or proceeding brought against Buyer insofar as such suit or proceeding is based on a claim that any goods manufactured and supplied by Seller to Buyer constitute direct infringements of any duly issued United States patent and Seller shall pay all damages and costs finally awarded therein against Buyer, provided that Seller is promptly informed and furnished a copy of each communication, notice or other action relating to the alleged infringement and is given authority, information and assistance (at Seller's expense) necessary to defend or settle said suit or proceeding. If infringement is alleged prior to completion of this Agreement, Seller shall diligently attempt to obtain permission to provide the goods to Buyer for its intended use or assist Buyer in obtaining an acceptable alternate. Seller's obligation hereunder shall not apply to any additional costs or damages resulting from use of any allegedly infringing goods after Buyer has received notice alleging the infringement unless Seller has given written permission for such continuing use by Buyer. Seller shall not be obligated to defend or be liable for costs and damages if the infringement arises out of

compliance with Buyer's specification, or from a combination with, an addition to, or a modification of the supplies after delivery by Seller, or from use of the supplies, or any part thereof in the practice of a process.

11. *FORCE MAJEURE*

Neither Buyer nor Seller shall be liable for damages for any delay arising out of causes beyond their reasonable control and without their fault or negligence, including, but not limited to, acts of God or public enemies, acts of other parties, acts of civil or military authority, labor disputes, fires, riots, wars, embargoes, unusually severe weather, or shortage of power, any of which have a material, substantial or adverse effect on either party's ability to perform pursuant to the terms of this Agreement.

12. *TERMINATION FOR CONVENIENCE*

Buyer may terminate for Buyer's convenience this Agreement and/or any or all outstanding Purchase Orders released against this Agreement or any portion of such Purchase Orders at any time prior to the expiration of the term of this Agreement, by delivering written notice of termination to the Seller. In the event of such notice Seller agrees that Seller's sole and exclusive remedy shall be limited to the right to deliver to Buyer (and be paid for) that quantity of standard product necessary to complete all of the deliveries scheduled within the next succeeding sixty (60) day period after such notice according to the delivery dates specified in such order(s) and that quantity of products manufactured to Buyer's specifications affected by such notice necessary to complete the deliveries scheduled within the next succeeding ninety (90) day period after such notice according to delivery dates specified in such orders. If the purchase orders released hereunder are for military hi-rel products, the above remedies shall be ninety (90) days deliveries for standard military products and one hundred twenty (120) days deliveries for military products manufactured to Buyer's specification.

Either party may request a renegotiation of the pricing incorporated in this Agreement by written notice to the other party. If an agreement upon new pricing cannot be reached by the parties within thirty (30) days of receipt of such notice, either party may terminate this Agreement subject to the above remedies.

13. *CANCELLATION FOR CAUSE*

Either party may cancel this Agreement in the event that the other party hereto shall be in default of any of the material provisions of this Agreement and such default is not cured within thirty (30) days of receipt by such other party of written notice from the first party specifying the nature of such default and corrective action which may be taken, if any.

14. *COMPLIANCE WITH LAWS*

In performance of this Agreement, Seller shall comply with all Federal, State and local laws, rules and regulations with respect to the manufacture and sale of products hereunder which shall include applicable requirements of, but not be limited to provisions of the Fair Labor Standards Act, Equal Employment Opportunities rules and regulations, requirements for Non-Segregated Facilities and the provisions of the Robinson-Patman Act.

15. *RESCHEDULING OF PRODUCTS; STOP SHIPMENTS; PRODUCT HOLD*

Seller will attempt to accommodate written requests to reschedule or stop-ship/hold products already on order. Since Seller manufactures to customer order by line item, the rescheduling or placing of orders on hold at no cost to Buyer will not ordinarily be possible. Seller agrees to reschedule or place on hold standard product upon written notice sixty (60) days prior to Buyer's request date and products manufactured to Buyer's specifications upon ninety (90) days prior to Buyer's request date. If the affected orders specify military hi-rel products the applicable time periods will be ninety (90) days for standard hi-rel products and one hundred twenty (120) days for hi-rel products manufactured to Buyer's specifications.

Requests to reschedule product where the applicable notice is not given will subject the Buyer to responsibility for products in the production flow which are identified with Buyer's orders or the reasonable costs associated therewith.

16. *GOVERNING LAW*

The Agreement and the performance of the parties hereunder shall be construed in accordance with and governed by the laws of the State of California. Any proceedings to resolve disputes relating to this Agreement shall be commenced in federal or state courts within the State of California.

17. *CHANGES: ADDITIONAL COSTS*

If Buyer makes changes in the specifications applicable to this Agreement or any individual purchase order hereunder, Buyer will be responsible for Seller's additional costs in compliance with such changes.

18. *TAXES*

Prices do not include any taxes, now or hereafter enacted, applicable to the products sold under this Agreement, or to any transactions contemplated hereby, which taxes will be added by Seller to the sales price where Seller is required by law to collect the same, and will be paid by Buyer unless Buyer provides Seller with a proper tax exemption certificate.

19. *NOTICES*

All notices and correspondence required or permitted to be given hereunder shall be in writing and sent to Buyer's and Seller's address appearing on page one of this Agreement.

20. *ASSIGNMENT*

Neither party hereto shall assign all or any part of this Volume Purchase Agreement or any purchase order issued hereunder or any right, interest, or obligation hereunder or thereunder, without the prior written consent of the other party hereto, any any attempt otherwise shall be void.

21. *ENTIRE AGREEMENT*

This Agreement constitutes the entire agreement between the parties relative to the products listed in Exhibit "A" hereto and supersedes and replaces all prior or contemporaneous agreements, written or oral, between the parties regarding such products. Any addition to or modification of this Agreement shall not be binding unless in writing, signed by an authorized representative of both parties hereto.

IN WITNESS WHEREOF, this Agreement has been duly executed as of the day and year first above written.

By: _____	By: _____
Title: _____	Title: _____
Date: _____	Date: _____

EXHIBIT A

Part Type	Commitment Quantity	Price
Lead Time:		
Payment Terms:		
Tooling Charges:		
FOB:		
Special Provisions:		