

PACA TOP TEN

Top Ten Contract Issues Causing Confusion in the Produce Industry

1. “Is the shipment in or out?”

This is industry terminology for the question of whether a produce shipment complies with the contract requirements. There are three main factors that must be considered in making this determination: (1) the terms of the contract, including shipping terms (f.o.b. or delivered) and the product description (e.g., grade, size, quantity); (2) the conditions in transit (normal transit time, temperature); and (3) the quality, condition, quantity, size, etc. of the product received at the contract destination.

Generally speaking, goods sold “f.o.b.,” must meet the quality and condition requirements of the contract at shipping point and be in suitable shipping condition to arrive at the contract destination without abnormal deterioration. On the other hand, goods sold on a “delivered” basis must meet the quality and condition requirements of the contract at the time of delivery to the destination specified in the contract. .

As every transaction is different, arm yourself with evidence of the factors referenced above (e.g., an invoice or confirmation showing the terms of sale, a temperature recorder tape showing the conditions in transit, and a prompt USDA inspection or independent survey showing the condition of the goods at the time of arrival at the contract destination), and contact a PACA representative at the PACA toll free number, 1-800-495-7222, Option # 2, for advice on your rights and responsibilities given the particular circumstances at hand.

2. What is considered acceptance of goods?

One of the most common questions asked by PACA is: Was the product unloaded or diverted? In most instances the act of acceptance occurs when a buyer unloads product for any reason other than inspection or, diverts the load. A buyer, who accepts product, loses its right to reject and or demand the seller remove the product.

3. Can I reject the shipment and what is the procedure to reject?

Provided the shipment has not already been accepted, either through diversion, unloading or any other act of control. A buyer may reject a shipment by clearly and promptly notifying the seller of his intention to do so within eight hours of arrival for a truck shipment and within 24 hours of arrival for a rail shipment. It is of course always best to secure evidence, such as a USDA inspection showing the goods did not conform with the contract requirements, to justify the rejection.

You must also consider “effectiveness and ineffectiveness” of a rejection. Effectiveness refers to the procedure by which a rejection is made. In order for a rejection to be effective, it must be timely and notice to the seller must be prompt. If a rejection meets

the definition of being effective you can consider the factors of a rejection being rightful or wrongful. For a rejection to be rightful, there must be evidence of a breach of contract, preferably in the form of a USDA inspection.

One misconception sellers often have is their right, or lack thereof, to remove or take back the product when the buyer properly notifies them of a problem. Once title passes, the seller can only regain the product if the buyer agrees to release it or rejects the product.

A second misconception involves the buyer and sellers' responsibility in handling rejected product. Ultimately, whoever takes possession of the shipment must make every effort to sell the produce for a reasonable value in order to mitigate losses.

Finally, what happens when the buyer effects a rightful rejection and the seller refuses to take back the product? In this situation, legal ownership of the product reverts back to the seller, but the buyer is still obligated to sell the product for as much as possible in order to mitigate loss. It is vital that the buyer document its sales and losses and keep an open line of communication with the seller when this situation occurs.

4. Who is responsible for handling rejected product?

Provided the goods have not already been accepted and the buyer has properly notified the seller of its intention to reject, the seller is responsible for promptly reselling the goods in order to mitigate damages. If, however, the seller refuses to do so, then the buyer is expected to make a good faith effort to sell the goods on the seller's behalf and remit the net proceeds (gross sales less commission) to the seller.

5. If the buyer refuses to accept or rejects a shipment without a USDA inspection, what should the seller do?

The seller should act quickly to secure a USDA inspection to establish that the rejected goods satisfied the contract requirements. If so, the seller would be entitled to recover damages from the buyer for the improper rejection. If the inspection showed that the goods did not comply with the contract requirements, in which case the buyer's rejection was proper and the buyer has no further liability to the seller.

6. What rights does either party have in the event of a breach of contract by the other?

When the breach of contract is by the seller, the buyer may either reject the goods in their entirety (provided he has not already accepted the goods and has given the seller clear, prompt notice of his intention to do so), or he may accept the goods and either negotiate a new price with the seller based on the condition of the goods accepted, or promptly resell the product and recover damages based on the difference between the gross sales and the value the goods would have had if they had been as warranted (as determined by relevant USDA Market News reports), plus other incidental expenses incurred, such as the cost of the USDA inspection.

When the breach of contract is by the buyer, for example when a buyer refuses to accept goods that comply with the contract requirements, the seller may recover the difference between the contract price and the proceeds collected from a prompt resale of the goods, together with any incidental expenses incurred in connection with its handling of the product, such as freight to have the product moved to another buyer or inspection fees incurred to secure evidence that the original buyer's rejection was wrongful.

7. What are my rights and what can I do when a buyer gets an inspection on product that reflects a breach of contract but the buyer has already accepted the shipment?

The first and best step in this situation is to attempt to negotiate a reduced price with the buyer commensurate with the condition of the goods he accepted. Once such an agreement is reached and confirmed in writing, the buyer has no further recourse for any breach concerning the goods he has accepted, and has had full opportunity to inspect, prior to agreeing to the renegotiated price.

However, if no new agreement can be reached once the breach has been identified, the seller may insist upon receiving a detailed accounting to establish the buyer's damages. In the event such an accounting is provided, and it shows the goods were promptly and properly resold, the buyer may recover the difference between the gross sales and the value the goods would have had if they had been as warranted (as determined by relevant USDA Market News reports), plus other incidental expenses incurred, such as the cost of the USDA inspection.

If the account of sales is not sufficiently detailed, or if no account of sales is provided, the buyer may be limited to recovering damages based on the percentage of defects disclosed by the USDA inspection, plus the cost of the inspection.

8. If I'm not happy with the return on a disputed shipment what can I do?

First and foremost, insist on a detailed account of sales showing the goods in dispute were promptly and properly resold. If this information is provided and a settlement satisfactory to both parties still cannot be reached, or if the documentation provided is not sufficient to support the amount of the claim, then you may file an informal complaint with PACA.

The PACA representative assigned to your case will gather all pertinent information and contact the parties in an attempt to mediate the dispute and reach a satisfactory settlement. In the event the matter is not settled through mediation, you will have the opportunity to pursue your claim on a formal basis, in which case liability will be determined by a Presiding Officer based on the evidence submitted either through the documentary or oral hearing procedure.

9. The term "price after sale" (pas) and "Open", what do they mean and is there a need for an account of sale?

The terms “price after sale” and “open” are industry terms which are not defined by PACA. They have however been interpreted as meaning that the parties will agree on a price following the prompt resale of the goods. While there is technically no requirement of the buyer to prepare an account of sales, it is in their best interest to do so. If the parties are unable to reach an agreement on price, a detailed account of sales showing a prompt and proper resale may be viewed as the best evidence of the value of the goods the buyer accepted, and may be used to determine the reasonable price owed by the buyer to the seller. If no account of sales is available, the reasonable price owed by the buyer to the seller will be determined based on relevant USDA Market News reports.

Another word of caution: goods sold under these terms will be presumed to be in average marketable condition unless the buyer provides evidence showing otherwise. It is therefore in the best interest of the buyer of goods to secure a USDA inspection if the goods received are in fair or poor condition.

10. What is the difference between “price after sale”/”open” and “consignment”?

The terms “pas” or “open” is considered to be a sale and a change of title or ownership has taken place. The term “consignment” means that one party is selling the product for another party and change of title or ownership has not occurred. Generally in a consignment situation the consignee is working for a commission that is agreed upon between the two parties.

Following is reference information to apply for a license, file an informal complaint or file a trust notice.

- To apply for a PACA license click on the following link: [License Application](#) (PDF)
- To file a reparation complaint click on the following link: [Sample Worksheet](#) (PDF)
- To file a trust action click on the following link: [How Preserve Trust Rights](#)

For more information visit our website @ www.ams.usda.gov/paca/htm or call 800-495-PACA (7222)