

# What Are the Agreement Terms?

Daryl W. Goodrich, JD

Farm visits often blend socializing with buying alpacas. This setting easily punctuates the alpaca purchase experience with outcomes one or both of the parties do not expect. Unexpected outcomes likely give rise to one of the parties feeling taken advantage of and suffering a loss.

Such outcomes can arise in spite of each party walking through the purchase process with an alpaca spirit. Uncertainty about what terms are in the purchase agreement generates these outcomes.

In my last article, I coined “alpaca spirit” to refer to the air of cooperation and helping one another prevalent at alpaca shows. This air seems to bring out the best in people and spawns win-win dealings. It is a “we” attitude as contrasted with the “me” attitude that can generate one party feeling taking advantage of by the other.

You have several alpacas and wish an experienced female to expand your herd. Mother Goose Alpaca Farm is the first stop. Mother Goose walks with you to the alpaca pasture. On the way, pleasantries are shared and Mother Goose tells you about the interesting results of several breedings. At the fence line you see Precious prinking across the pasture towards you. “Is she for sale?” you ask. “I’m interested in her.”

“She is,” responds Mother Goose. “Precious has wonderful fleece and is a good buy for a growing farm. She gave us that lovely gray cria in the distant field.”

“Is she an experienced mom?” you ask seeking assurance.

“Oh, yes she is! As I said, look at the lovely cria over there,” assures Mother Goose.

“I’d like to buy her, but I have a problem. My farm is not blessed with a trailer yet,” you explain.

“That’s not a problem. I’ll bring her over anytime you’d like,” replies Mother Goose.

Mother Goose shows you some farm improvements and around the barn. Shortly you sit down at a picnic table overlooking the farm’s herd sires. Mother Goose hands you a purchase agreement. It says Mother Goose agrees to sell Precious and you agree to purchase Precious for \$20,000 one week from signing.

When calling to give delivery directions you learn that Mother Goose does not intend to deliver Precious, that she is not an experienced mom and that Mother Goose frequently confuses Precious with her look alike sister who is actually the mom of the gray cria. Mother Goose apologizes for you feeling hurt. She explains that while alpaca delivery and being an experienced mom were discussed, they are not part of the deal since they were not put in the signed agreement. Mother Goose says that if those two points were important, you should have asked they be included in the signed agreement.

The problem is not deception. Rather, these unexpected outcomes stem from uncertainty about what constitutes the Precious purchase agreement. At some points during the farm visit there were social exchanges of opinions and beliefs and there were assurances of and agreements on facts that involve the purchase.

The outcome of the situation hinges on which Mother Goose statements and agreements have become part of the deal. Most people would agree that the words of the signed written agreement become part of the deal. But the binding, legal agreement can go beyond written words to which signatures are applied.

Two legal principles under the Uniform Commercial Code, which most states have adopted, come into play here. The first is that affirmations of fact about the subject matter of a transaction, that in objective judgment and under the circumstances become parts of the basis of the deal, act as express warranties. An affirmation of fact is a statement that could merely be an opinion but is affirmed as an existing fact in such a way as to induce the other party to consider it a fact.

You be the jury. Do you think Mother Goose’s statement that Precious is an experienced mom is an affirmation of fact and part of the basis of the deal? It probably is, but there is no certainty until a court rules on it.

The second legal principle is that the terms of a written agreement may be supplemented by consistent orally agreed upon terms. Mother Goose’s promise to deliver Precious sounds like an enforceable obligation. On the other hand, it looks like it hangs out there never being actually accepted by you. Is it reasonable under the circumstances to infer acceptance?

Oral terms are more uncertain, though, than written terms. Remembering and proving the details and circumstances of oral statements are more difficult and unpredictable than referring to a written document.

Agreement terms are not only found in the parties’ conversations. They can also be inferred by operation of law from patterns of the parties’ past dealings and from customary practices in the applicable industry. Such inferences may only explain or supplement the signed written agreement. They cannot change the agreement, however. Accordingly, terms left out of an agreement may be inferred from history.

If delivery was not discussed during Precious negotiations and if you had previous dealings with Mother Goose, her Precious delivery obligation could be inferred from Mother Goose’s delivery of the two alpacas you previously purchased from her. Mother Goose might challenge this, however, by arguing that two occurrences do not establish a pattern. Terms created by inference are less certain than terms established by express agreement.

In addition, agreement term uncertainty can arise from the possibility that your judgment as to the context nature of

statements may not be the same as the judgment of others. Social chitchat does not give rise to agreement terms while statements during negotiations can. Context nature is critical and often difficult to identify.

Even though terms are clearly agreed to, uncertainty as to an agreement being enforceable arises if you do not know how to comply with the statute of frauds. It is adopted by most states and establishes the expression of agreement form necessary for it to be enforceable. The statute applies to the sale of goods at a price of \$500 or more. The required form is a signed writing sufficient in wording and content to indicate that the parties made an agreement for the sale of a specific quantity of specific goods. Though price, payment time and place, quantity, and delivery time and place are important to a transaction, they do not need to be in the expression of agreement to make it enforceable.

The typical alpaca purchase process may be broken into four steps. This is helpful to understand how the above areas of uncertainty relate to one another and how I generally deal with them.

The process actually starts before a farm visit or other party contact. At this stage the buyer determines the alpaca characteristics he is looking for, being as specific as possible. This enables him to objectively sort through animals of another farm. Also at this stage, seller determines the strengths and weaknesses of his alpacas. This enables him to completely and truthfully present his animals to a potential purchaser. This stage is determining the characteristics.

The second stage is negotiation/discovery/disclosure. Here, the parties armed with stage one data meet on the phone, in writing or in person. Farm visits are the most workable for me. Buyer focuses on discovering seller's alpaca characteristics and measuring them against his wish list. He will watch and feel the alpacas and ask seller questions intending to bring out characteristics of importance to buyer not readily seen or felt. Seller will describe and show his alpacas' strengths and weaknesses in an attempt to make the buyer an informed purchaser. Also, both parties will ask that their needs be included in the deal and explain what they can and cannot do. In this stage, assurances of fact, oral terms and misjudged context nature can occur.

Stage three is the expression of agreement that a deal exists. The form and extent of this expression sufficient to confirm a deal exists and that it is enforceable has been the subject of much legal conflict over the years. Handshakes, partial performance, written confirmations, a chain of writings identifiable as an offer and an acceptance, etc. are not being discussed here because they are involved and fraught with uncertainty. The statute of frauds discussed earlier prescribes the content of an expression of agreement necessary for it to be an enforceable deal. To eliminate uncertainty as to whether or not you have an enforceable deal, this prescription must be followed.

Written terms can be found in this stage. Also, the need to infer terms from history to fill gaps in the agreement can arise.

The playing out of a purchase agreement is the last stage of the purchase process. It starts with the first act, such as payment of purchase price, required by the contract to start the consummation of the deal. It ends with the completion of all required activities and the expiration of all warranties and time periods in which the parties can raise complaints related to the deal.

During this stage, things can come to light that the parties failed to deal with earlier. Also, buyer may need assurances about an aspect of the alpaca. Frequently, oral changes to the agreement result. Certainty is compromised, however, unless needed changes and assurances are in a signed writing.

The alpaca spirit suggests certainty be built into the purchase experience. Certainty is the alpaca spirit way of bringing win-win outcomes to buyers and sellers. My strategy for greater certainty is to put all terms into the signed written expression of agreement referred to above in purchase process stage four.

In this way, I can read from one document exactly what was agreed to and easily prove it to others. It is simply good housekeeping. I know where to go for answers to questions about my deal. Memorializing deals in this way does not eliminate all uncertainty but it goes a long way.

Agreement terms are found in purchase process stages two, three and four as well as inferred from history. My strategy methodology is to remove the possibility that terms can come from any of these sources other than the signed expression of agreement.

Below are examples of what I generally do. I am careful to remember that all generalities must be adjusted to meet the unique circumstances of a specific deal. This is not legal advice but merely a presentation of material to consider under the supervision of the attorney who guides your alpaca venture.

1. I do not sign any writing until I have read and clearly understand every part of it.
2. I make sure the writing contains all the terms important to both parties as well as all terms customarily necessary to make a purchase agreement complete. An agreement is not complete until it answers: how, what, when and where. I strive for detail and clarity. My goal is to make it unnecessary for the law to explain or supplement my signed writing from sources outside the writing. I also make sure the statute of frauds requirements are met to assure the agreement is enforceable.
3. I include in my writing the following wording to remove earlier affirmations of fact about the alpaca from the deal: "All statements, representations, promises and descriptions about Alpaca that are part of the agreement between the parties are contained in this Agreement. All previous

discussions about Alpaca have merged into this Agreement.”

4. I include in my writing the following wording to eliminate from the deal oral agreement changes and affirmations of fact: “This Agreement may not be amended or changed except in writing signed by both parties.”
5. I include in my writing the following wording to stop oral and other terms popping up from sources outside my signed writing from becoming part of the deal: “This Agreement contains all of the obligations, conditions, terms and agreements between the parties relative to the sale of Alpaca and is the entire agreement between the parties. All previous discussions have merged into this Agreement.”