

ADDING VALUE TO THE DEAL

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CHAPTER 14

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BIOGRAPHICAL INFORMATION

EDUCATION

A.B., Honors in English and American Literature, Brown University

J.D., New York University School of Law

EMPLOYMENT

Professor in the Practice of Law & Founding Director of the Transactional Law Program, Boston University School of Law

Professor in the Practice of Law & Founding Executive Director of the Center for Transactional Law and Practice, Emory University School of Law

Partner, Chadbourne & Parke LLP

Associate, Barrett, Smith, Schapiro, Simon & Armstrong

Law Clerk, Judge Jacob D. Fuchsberg, New York State Court of Appeals

Representative in Corporate Lending, Irving Trust Company

SELECT PROFESSIONAL ACTIVITIES

Organizer and First Chair of the Section on Transactional Law and Skills, Association of American Law Schools

Co-chair of the Committee on Business Law Education of the ABA Section of Business Law of the American Bar Association

Member of the Standing Committee on Legal Education and Admission to the Bar, The Association of the Bar of the City of New York

Member by appointment of Chief Judge Judith S. Kaye, The Professional Education Project

SELECT PUBLICATIONS

Drafting Contracts: How and Why Lawyers Do What They Do, Aspen Publishers, Inc. (2d ed. 2014) (textbook)

Editor-in-chief and co-author, *Negotiating and Drafting Contract Boilerplate*, (ALM 2003)

Thinking Like A Deal Lawyer, 54 Journal of Legal Education 223 (June 2004)

HONORS

Burton Award for Outstanding Contributions to Legal Writing Education, June 2012

Best Law Teacher – One of twenty-six professors chosen from a nationwide search to be included in the study, *What the Best Law Teachers Do*

Introduction

“Drafting contracts is more than translating the business deal into contract concepts and writing clear, unambiguous contract provisions. Sophisticated drafting requires a lawyer to understand the transaction from a client’s business perspective and to add value to the deal. Looking at a contract from the client’s perspective means understanding what the client wants to achieve and the risks it wants to avoid. Adding value to the deal is a euphemism for finding and resolving business issues. These skills are problem-solving skills and are an integral component of a deal lawyer’s professional expertise. They require an understanding not only of contracts, but of business, the client’s business, and the transaction at hand. At a law firm, having these skills is generally the province of the partners, and not necessarily all of them.” Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. Aspen 2014).

Lawyers often struggle to gain the experience necessary to add value to a deal. Tramping through multiple agreements, treatises, and deals is one way. But generally, that process leads to a lawyer learning the business issues specific to a particular type of deal, be it an acquisition, an employment agreement, or a trademark licensing agreement. On reflection, however, certain business issues recur, albeit in different guises, in many different transactions. That is, the business issue is one that can be described generally and understood as one that cuts across transactions, rather than being deal specific. The following outline addresses five of these issues: money, risk, control, standards, and endgame. By understanding how these salient issues can manifest themselves, a lawyer gains the ability to read an unfamiliar document and to find how those issues arise in the new document.

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Adding Value to the Deal

An Analytical Framework to Discern Business Issues

I. Money

- (a) Is your client entitled
 - (i) to receive more
 - (A) on an absolute basis;
 - (B) as interest;
 - (C) as an equitable matter; or
 - (D) for any other reason?
 - (E) to pay less
 - (F) on an absolute basis;
 - (G) as an equitable matter; or
 - (H) for any other reason?
- (b) Are there any time value of money issues?
- (c) Who, What, When, Where, Why, How, and How Much?
 - (i) *Who* is paying *how much* in *what form* (cash, bonds, shares) to *whom*?
 - (ii) Why is the payment being made? Salary, bonus? (Need separate analysis of each payment.)
 - (iii) How is the payment being made? Wire transfer, certified check?
- (d) What risk is there that your client will not receive the money to which it is entitled? Stated differently, is there a credit risk?
- (e) If there is a formula, is the theoretical basis for the payment amount analytically correct?
- (f) Is the formula for calculating the payment amount properly stated?
 - (i) Is each variable unambiguous?
 - (ii) Are there alternative variables that should be considered?
 - (iii) Is the formula for the calculation unambiguous?
 - (A) Have you run multiple hypos?
 - (B) Is there an exhibit demonstrating the calculation?
- (g) Are there any transaction expenses? If so, who pays?
- (h) Are there any accounting or tax issues that need to be considered?
- (i) Are there any endgame issues?

II. Risk

- (a) What kind of loss or liability could your client have?
 - (i) Tort?
 - (ii) Contractual?
 - (iii) Statutory?
 - (A) Civil?
 - (B) Criminal?
 - (iv) Credit?
 - (v) Other?
- (b) How likely is the risk of loss or the imposition of liability?
- (c) Whenever there is a risk of loss, consider how to mitigate it.
 - (i) By security arrangements?
 - (A) Are they enough?
 - (B) Are they the right kind?
 - (C) Are they enforceable?
 - (ii) By insurance?
 - (A) Is it enough?
 - (B) Is it the right kind?
 - (C) Is the insurer creditworthy?
 - (D) By an indemnity?
 - (E) Is it enough?
 - (F) Is the indemnitor creditworthy?
 - (G) Should there be any other parties who should be indemnitors?
 - (H) By letter of credit?
 - (I) By restructuring?
 - (J) By modifying a contractual provision (e.g., by reducing the scope of the non-compete)?
 - (iii) By other deal specific methods?

III. Control

- (a) Is having control good or bad from your client's perspective? (E.g., could having control mean having unwanted liability?)
- (b) How can control be used to minimize a risk?
- (c) Who is in control?
 - (i) Is the correct person in control?
 - (ii) Should control be shared and if so, how?

- (d) How can control be increased or decreased?
- (e) How long should controls remain in place?
 - (i) For a stated time period?
 - (ii) Until a dollar threshold has been met?
 - (iii) Other deal appropriate trigger?

IV. Standards

- (a) What is the standard?
 - (i) Industry practice and custom.
 - (ii) A representation and warranty.
 - (iii) A covenant.
 - (iv) A condition precedent.
 - (v) A time frame.
 - (vi) A definition.
 - (vii) An adjective
 - (viii) An adverb.
 - (ix) An exhibit.
- (b) Should the standard be modified?
 - (i) Is the standard wrong?
 - (ii) Vagueness v. specificity.
 - (iii) Business risk of trying to negotiate a modification.
- (c) How will it determined whether the standard has been met?
 - (i) By a party to the agreement. (“in the Bank’s sole judgment”).
 - (ii) By an independent third party.
 - (iii) Court?
 - (iv) Arbitrator?
 - (A) Who chooses?
 - (B) How many?
 - (C) What law applies?
 - (v) Other person?
 - (A) Named individual?
 - (B) Person with specific expertise?
 - (vi) By reference to an exhibit or an extrinsic objective standard?

- (d) What are the consequences of breaching the standard?
 - (i) Contract default?
 - (A) Damages?
 - (B) Specific performance?
 - (C) Rescission?
 - (ii) Failure to satisfy condition precedent to performance?
 - (iii) Additional opportunity to meet the standard, subject to payment of a penalty?

V. Endgame: How Does the Contract Terminate?

E. Neutral.

- (i) Joint decision.
 - (ii) Unilateral decision.
 - (A) A grocer decides to use a supplier who sells organic vegetables.
 - (B) Evergreen with the right to terminate.
 - (C) Is notice required?
 - (iii) Failure to satisfy a condition related to fault. (Inability to obtain a consent after having exerted the required level of effort.)
- (b) Friendly.
- (i) Types of friendly termination.
 - (A) End of the transaction or the term.
 - (1) Acquisition consummated.
 - (2) Loan repaid in full.
 - (3) Employment term ends.
 - (4) Joint venture unwinds.
 - (B) Equity interest bought-out. (Buy-outs, of course, also occur in the context of unfriendly terminations.)
 - (C) Other.
 - (ii) What are the ramifications of the termination?
 - (A) Should the agreement spell out the ramifications?
 - (1) Probably yes if the agreement is coming to the end by its own terms.
 - (2) Probably yes if the agreement is ending by unilateral act.
 - (3) Not necessarily if the agreement may be terminated by agreement of the parties.
 - (B) Return to the status quo.
 - (1) Return of assets pledged as security.
 - (2) Execution and delivery of UCC-3's.
 - (3) Return of escrow.
 - (4) Return of security deposit.

- (5) Releases.
 - (6) Other deal specific provisions.
 - (C) Are there obligations that survive the term of the agreement?
 - (1) Indemnities.
 - (2) Monetary payments.
 - (3) Non-competes.
 - (4) Confidentiality.
 - (5) Further assurances.
 - (6) Other deal specific provisions.
- (c) Unfriendly.
 - (i) What constitutes a breach?
 - (A) Misrepresentation and breach of warranty.
 - (B) Breach of covenant. (Any grace period?)
 - (C) Bankruptcy.
 - (D) Change of control.
 - (E) Other deal specific provisions.
 - (ii) Failure to satisfy a condition precedent.
 - (iii) Remedies.
 - (A) Contract termination.
 - (B) No obligation to perform.
 - (C) Damages.
 - (D) Specific enforcement.
 - (E) Acceleration of payment obligations.
 - (F) Right to foreclose on security.
 - (G) Indemnification.
 - (H) Deal specific remedies.
 - (1) Right to a board seat.
 - (2) Default interest.
 - (3) Equity interest.
 - (4) Buy-out of equity interest.
 - (5) Other.
 - (iv) Dispute Resolution Provisions.
 - (A) Arbitration.
 - (1) Who?
 - (2) What?
 - (3) Where?
 - (4) Who pays?
 - (5) Finality?

- (B) Litigation.
 - (1) Choice of law.
 - (2) Choice of forum.
 - (3) Waiver of jury trial.
 - (4) Waiver of venue objections.
 - (5) Who pays?

APPENDIX A

Examples of Standards

4. Closing Deliveries

- (a) **Seller's Deliveries.** At the Closing, the Seller shall deliver to the Buyer the following:
- (i) A bill of sale for the Purchased Assets *owned by the Seller*.
 - (ii) An assignment of each real property lease under which such Seller is lessee, *in form satisfactory to the Buyer*.
 - (iii) Assignments for all funds on deposit with banks or other Persons which are Purchased Assets, *in form reasonably satisfactory to the Buyer*.
 - (iv) A general warranty deed for each real property interest owned by any Seller, *in the form customarily used in commercial transactions in the place where the real property is located*.
- (b) **Buyer's Deliveries.** At the Closing, the Buyer shall deliver to the Seller the following:
- (i) Credit advices or wire transfers of immediately available funds in New York City for an aggregate amount equal to the Cash Consideration.
 - (ii) Assumption instruments in which the Buyer agrees to assume the Assumed Liabilities, *substantially in the form of **Exhibit A***.

APPENDIX B**Workshop Exercise*****Best Brokerage Agreement***

Mr. Robert Best
Best Brokerage, Inc.
200 Real Estate Way
Burgeoning City, Wyoming

Dear Mr. Best:

This letter sets forth the agreement between Best Brokerage, Inc. ("Best") and the undersigned.

By signing this letter, I grant Best the exclusive right to act as broker for the sale of my apartment for a three-month period (the "Brokerage Period") beginning the day you countersign this letter agreement. I will pay Best a commission of 5% of the sales price of the apartment if during the Brokerage Period the apartment is sold to someone other than someone I have already identified as a prospective purchaser.

Upon the signing of this letter agreement, I will give you a set of keys to my apartment. You promise to give me sufficient notice before bringing any prospective purchaser to the apartment. If you or any prospective purchaser damage my apartment or its furnishings in any way, Best agrees to indemnify me in full for the cost of replacement or repair.

If this letter correctly sets forth our agreement, please countersign this letter.

Sincerely yours,

Oren Oglethorpe, Owner

Agreed:

Best Brokerage, Inc.

By: _____
Robert Best, President

Best Brokerage Agreement

	Money	Risk	Control	Standards	Endgame
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