

**“Practical ruminations” on drafting and negotiation of International Contracts / “Plain English” Principles (comparative EU/US approach)**

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**A bit about me**

- US attorney-at-law (NY, FL, MA) & Solicitor in England & Wales
- Focus on international capital markets work (IPOs)
- Also, corporate and VC investments
- Work in Providence RI, Spain, Boston MA, Palm Beach FL, London and Milan
- Main work w Freshfields Bruckhaus Deringer LLP
- Now, independent int'l legal consultant & law prof:
  - To date, 13 countries on 4 continents for universities, professional legal & business training bodies and corporations

**Introduction- About You**

- What is your background? Are you studying full time? If working at all, where? Internships?
  - Have you studied commercial or contracts law before? In English or in native language?
  - What are your professional goals/plans for continued study or work, and where? KEY
  - What kinds of questions do you have about int'l commercial & contracts law?
    - E.g. What kinds of questions do you have about International business contracts practice or Anglo-American drafting & contracts that you would like to discuss in the remainder of these seminars?
- (please take 5 minutes and write)

**During our time together**

- Please interrupt with questions when you have them
- Idea is for you to get as much as possible from presentations in English
- First try to ask questions in English- If needed, I can explain certain concepts in Italian, Spanish, etc.
- Also, more generally please take advantage of this opportunity to learn more about comparing United States law system (common law) with European civil law systems

**General Point**

- Let me know when points mentioned are of use to you in your day to day work, research or study (if applicable), or if you have specific questions.
- I can spend time on it when you ask me or, if more complicated, I can deal with it later on.

**For follow-up questions**

- If you have additional questions, I can be contacted at either of the following emails:
  - [Patrick.omalley@interpresas.com](mailto:Patrick.omalley@interpresas.com)
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**Syllabus**

- You should have it.
- Materials should already be posted: mainly law articles and model contracts precedents

**Seminars: This set of slides - an Overview**

1. Contracts: Pre-drafting and general considerations from a comparative EU / US approach – due diligence request list and deal “bible” index
2. Cross-border European Joint Venture Agmts and JV legal considerations
3. “Plain English” legal drafting
4. Boilerplate contractual language review
5. Legal memoranda, emails, letters (official correspondence)
6. Intercultural & other negotiation techniques
7. Introduction to certain basic Anglo-American contracts principles

**Let's look at the materials**

- To use during seminars & in preparation for exercises
  - Boilerplate clauses
  - Barbara Beveridge article on Legal English and International Commercial Contracts
  - Int'l JV Survival Guide
  - Int'l JV Information Exchange Agreement (long form)
  - Law Society of E&W response to CESL Consultation (on a European contract law proposals)
  - Legal Due Diligence Request List

### The “Why?” of this course

- You will be future lawyers (firm & in-house counsel), maybe also business managers, directors, entrepreneurs & professional investors who will regularly make key legal &/or commercial business decisions on many matters – or you may be gov’t officials or working in organisations (incl. NGOs) dealing with these rules in some way
- To make good business decisions, you need to be familiar w commercial & corporate legal framework applicable to your cross-border contract, whether in Europe, US or elsewhere: e.g. fiduciary duties
- Globalization has also led to extensive legal convergence & harmonization on many levels (CISG, PECL - *Principles of European Contract Law [Lando Commission]*, UCC & Restatement of the Law of Contract, UNIDROIT Principles of International Commercial Contracts, etc.)

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### The “Why?” of the course, cont’d

- *Need to feel comfortable drafting and reviewing/commenting on contractual documentation in English (a lifetime of learning)*
- *Need to view the contract (especially of larger, key transactions) as part of a hermeneutic whole – the “contractual universe”*

### The “Why” cont’d

- As cross-border commercial transactions become increasingly complex, you will be more likely to operate in unfamiliar jurisdictions
- Of utmost importance to be aware of significant differences between the law you are used to (say, Italy or Spain) & law you are working w (e.g. New York, BC or Nigeria)
- It is necessary to inform your commercial clients/colleagues of areas where their normal expectations may not apply & to alert them to areas where extra care needed – *“An ounce of prevention is worth a pound of cure”*...You will need to communicate & speak up. Be proactive!
- It is also important to understand how factors of different legal systems influence how contracts negotiated & drafted, to make contracting process as effective / risk-free as possible

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### Law, commerce and globalization

- Big picture- how it falls in to this complex ongoing (& seemingly ever increasing) global encounter, dialogue exchange
- But law is not medicine, the sciences, music, film production, videogame programing, high-tech fads, cuisine or even or other areas
- Never could have imagined the rich, philosophical diversity underpinning the various legal systems when I entered law school in Boston (& related problems)

### Comparative Law Methodology

- Beware of comparing specific points (i.e. Creditors rights) without taking into account entire legal system
- Realise various legal systems have basic/radical philosophical differences (e.g. France vs UK/US re: “freedom” to contract, “good faith”)
- Legal systems also result from local history, culture, politics and language
- Often, “false friends” or different terminology: “notary”, “liability”, “responsibility”, “enjoin”, etc.
- This even affects the Anglo-American law world (shares/stock, articles/by-laws, hire, bespoke, etc.)

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### My experience with corporate transactions

- Drafting major deal documentation, such as Prospectuses / Offering Circulars, underwriting agreements/other contracts, business plans, etc.
- Relationship between the Italian (or Spanish, French, etc.) version for local use and the English-language version for use globally
- Not only different meanings, different level of legal/regulatory risk, but also different sensitivities about what is needed to comply

### Practical example: Vectors of legal changes: US/multinational corporations and financial institutions

- *ius ex facto oritur*: “Law comes after the fact”
- Role of e.g. MNEs, US/other investment banks, private equity funds, other professional investors in Europe (esp. from 1990s on) in impacting many types of
  - Contracts
  - transactional documentation
  - disclosure (prospectuses)
  - legal opinions, etc.
- In the other direction, from the Civil Law world, the common law world is being heavily impacted (EU on the UK legal system, the LLC in the US, “codification”, etc.)

### Definition of a Contract

- An agreement btw 2 or more persons which creates and obligation to do or not to do a particular thing
- A promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty
- A legal relationship consisting of the rights & duties of the contracting parties

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### Definition of Contract (cont’d)

- A promise or set of promises constituting an agreement btw the parties that gives each a legal duty to the other, & also the right to seek a remedy for breach of such duties
- Essential components: competent parties, subject matter, a legal consideration (Anglo-American), mutuality of agreement, & mutuality of obligation

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## Contracts vs. other kinds of writing

- Contracts not written to convey info or to persuade or entertain reader
- Goal of drafter is to precisely reflect the “meeting of the minds” in a way that will be understood exactly the same by all readers
- –The importance of the contract negotiation and drafting process in arriving at the meeting of the minds
- Contracts create legally enforceable rights and obligations & **act as a roadmap for business relationships (also, see the “universe view”)** <sup>19</sup>

Most Anglo-American commercial contracts follow this structure (there is flexibility of order though):

- The names and addresses of the parties to the contract (set out date).
- Recitals: this part of the contract sets out the background to the contract. It usually explains why the parties have decided to form the contract and the purpose of the contract.
- Definitions: this part of the contract sets out the meaning of certain terms used throughout the contract. For example, it might be agreed that a certain company will simply be referred to as ‘the Company’ throughout, or it might be agreed that day on which contract is to take effect is to be referred to as ‘the Completion Date’.

- Agreements/operative covenants or conventions: main terms of the contract which reflect the heart of the deal struck between the parties. This includes such things as the amount and type of the items to be sold, the price at which they will be bought, billing, and the terms on the sold items will be delivered.
- Representations and warranties (the “rep”, “R&W”): these include statements about the goods or services being sold which the parties are entitled to rely upon. Parties can claim damages (compensation, indemnification) if a warranty is breached.
- Conditions precedent & closing provisions: these are things which must be done before the contract can come into effect. For example, in a share sale a company might have to seek permission from the shareholders before the contract can go ahead; closing mechanics, timeline, etc.

- Indemnity & liability provisions: these cover potential damages (monetary, commercial, reputational, etc.) that may arise in the course of contractual performance– sometimes liquidated damages used
- Default & remedy provisions: sets out specifics of what constitutes a default, what specific remedies (commercial & legal) are to be available to the parties, etc.
- Other boilerplate clauses: are routinely inserted into many different kinds of contract, and relate to things which are to do with way in which contract works rather than heart of deal itself; include clauses dealing with service of notices (means by which documents which relate to contract must be sent) and assignment (whether & on what basis parties can transfer the contract to others) together with many other types of clauses– often referred to as general covenants

## Attachments/Schedules/Exhibits/Appendices

- Signature blocks: usually appears at end of main part. Parties’ names are usually printed together with date of contract, and parties must then add their signatures. It is common practice for contracts to be produced in *duplicate*. This means that two copies of contract are made – one for each party – and parties each sign both copies.
- Attachments, Schedules: if contract contains certain very detailed agreements or information, parties often prefer to put this in schedules which are contained at back/end, instead of cluttering up main part of contract with mass of detail. For example, if a contract must contain very detailed price lists for various kinds of goods, this is usually placed in a schedule rather than in main part of contract.
- Exhibits, Appendices: usually contain documents which are referred to in contract. These may simply be put there because they are useful reference material for parties. They don’t necessarily need to be part of substantive agreement between parties. E.g. in contract for sale of machine parts by one company to another, appendices might contain detailed drawings or specifications for machine parts.

## Cross-border Contracts Drafting – a few rules

- Check with specialized legal counsel on sensitive issues early on, such as re:
  - Securities, capital market laws
  - Competition/antitrust issues
  - Intellectual Property (IP)
  - Tax consequences
  - Import/Export controls
  - Economic Sanctions (esp. US & EU)
  - Can save you & your client lots of grief, risk, time & money.

## Beware! !Ojo! Attention! Occhio!

- Increasing use of international contracts practices to implement legal compliance measures regarding panoply of hot-button issues:
  - Bribery / corruption
  - Environmental
  - Health & Safety
  - Ethics and CSR issues (human rights)
  - Anti-terrorism
  - Trade sanctions & export controls
  - Etc. → “Contractual pushdown” <sup>20</sup>

## 🕒 Introductory points:

- Depending on circumstances, always try to show the final draft to a mother-tongue English speaker, a trusted & knowledgeable colleague and a lawyer (lawyer v. Non-lawyer, mother-tongue v. Non-native)- a comma may change meaning
- Communication is key→ especially internally in firm: “Put aside your pride.”\*\*\*
- “An ounce of prevention is worth a pound of cure.”
- Especially if a sensitive matter- once the ‘cat is out of the bag’, difficult to go back

- A key stumbling block in working between legal English and legal Italian/French/Spanish etc. is precisely due to the rich, mixed and somewhat confusing admixture of Legal English: Anglo-Saxon customary law terms (“wergeld”, “scyre”=shire), law French (cy pres, jury, voir dire, cestui que trust, mortgage), Canonical Latin and many others.
- Leads to confusion & “false friends”= propensity to use dual-terms: last will & testament, to have and to hold, terms & conditions, representations & warranties, goods & chattels, cease & desist, null & void, save and except, breaking & entering, free and clear, peace and quiet, force and effect, right, title and interest

### Legal English generally

- A “bastardised” language: fruit of intermingling of legal/canonical Latin, Law French and Middle English in the courts (law & equity) & statutes
- The concrete, unsubtle Anglo-Saxon language (& its tribal, base customary law) profited from introduction of Christianity and Latin, then Norman French which gave it “the capacity to articulate abstract thought.”

- Prior to this, Old English had a good vocabulary for common experience of everyday life—sun and moon, hand and heart, heat and cold, sea and land. But an abstract idea such as “creation” required “an elaborate German-style” word, *frumweorc*, “from *fruma*, beginning, and *weorc*, work.”

- I have also been struck by need (even as a native speaker) to keep clear meanings re: various versions of English used:
  - Legal English v. Normal English usage v. Business or industry-specific terminology
  - US v British English v other English dialects (Indian subcontinent, Africa- depends which part-, Australia/NZ, etc.)
  - Beware of “EU legal and bureaucratic English”
  - CLARIFY AS MUCH AS POSSIBLE ; this is not as easy as it seems, it takes constant effort

### Basic Anglo-American Overview

- Important to consider for both substance & language
- General idea from legal perspective
- But beware of 1000s of false friends (“transaction”, “sentence”, “decision”, “operation”, “injunction”, “notarize”, “best efforts/endeavours”, notebook/laptop, etc.) and
- US-UK differences: “enjoin”, “bespoke”, “to hire”, “on the job”, “Heads of Agmt” (realize sometimes profound differences)

### Commas...

- Contract dispute over standard one for the use of utility poles, negotiated between a cable television trade association (Rogers) and an alliance of telephone cos (Alliant). French and English versions approved by government regulator 10 years ago – worth about \$1 million.
- The dispute was over this sentence: “*This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.*”
- The regulator concluded that the second comma meant that the part of the sentence describing the one-year notice for cancellation applied to both the 5-yr term as well as its renewal.

- Commission was doubtless relieved that in its second ruling on this dispute, it was able to find in favor of Rogers without having to revisit the question of punctuation.
- Instead, it decided dispute should be governed by French-language version of contract, which provided for a markedly different arrangement than English- language version. From the commission’s perspective, its chief virtue was that unlike English-language version, it wasn’t open to conflicting interpretations.

### Building up a useful library of materials useful for drafting & negotiating...

- Do so consistently throughout your careers.
- A few favorites of mine:
  1. *Black’s Law Dictionary*, West Publishing
  2. *Falsi Amici e Trappole Linguistiche, Termini contrattuali angiofani e difficoltà di traduzione*, Silvia Ferreri, Giappichelli Editore, ISBN/EAN 978-88-348-9625-9
  3. *Plain English for Lawyers*, Richard Wydick
  4. *A Manual of Style for Contracts Drafting*, Kenneth Adams, ABA Publications, 2d edition, 2008
  5. *A Plain English Handbook: How to create clear SEC disclosure documents*, US SEC (Securities & Exchange Commission), 1999 (available free online)
  6. *Getting to Yes, Negotiating Agreement Without Giving In*, Harvard Negotiation Project- Roger Fisher William Ury

### A few additional favorites:

7. *Garzanti Linguistica / Milano Finanza-Alitalia, Business English, 2007* (based on a larger work: *Dizionario di Business English, Italian- Inglese, Garzanti*)
8. *Dizionario Giuridico/Law Dictionary*, Francesco de Franchis, Giuffrè editore, 1984

### Why is clarity important?

- Contract interpretation: 2 of the most important rules are:
  - Parol evidence rule. Extrinsic evidence as to the intention of the parties may not be introduced to vary or contradict terms of an integrated contract.
  - Plain meaning rule. A provision that is clear & unambiguous on its face will be so interpreted, without reference to extrinsic evidence of what may have actually been intended.
- We will consider after & how these have been somewhat modified in the US and UK.

- In Italy, the ENI Energy society is public, and therefore it can't fail
- After renovating the contract, we will execute the new terms.
- Yesterday, the delegate administrator of the company had told the assembly of associates that he wants to demit.
- Upon giving advice that BigCorp had cured the broke, it gave insurances that it would prosecute the agreement terminates (a "prosecution advice").

- Article 2327 of the Civil Codex say that associates must deposit 20.000 euros to fund a new s.p.a. company
- REGALIA ELECTRONICS is a company at limited responsibility and its creditors cannot demand the partners to get their money back.
- An LLP. (limited liabilities partnership) is not consented in Italy, because all advocates must be independent and free lance professors

- In Italy, ENI, an energy company, is publicly-listed, and thus, may go bankrupt/become insolvent.
- After renewing the contract, we will carry out/perform/comply with the new terms.
- Yesterday, the company's managing director told the shareholders/ Shareholders' meeting that he wishes to resign/tender his resignation.
- Upon giving notice that BigCorp had remedied the breach, it gave assurances that it would perform/carry out the agreement terms (a "performance notice").
- Art. 2327 of the Italian Civil Code states that shareholders must pay in/ Euro 120,000 to capitalise/incorporate/form a new joint stock company ("S.p.A.").
- REGALIA ELECTRONICS is a limited liability company and its creditors cannot normally sue the shareholders/members to get their money back.
- An LLP (a limited liability partnership) is not permitted/allowed in Italy, because all lawyers/attorneys must be independent and free lance professionals.

### Differences in terminology

- Sometimes are profound based on use & jurisdiction:
  - Corporate Charter (& By-laws)
  - Deed of Incorporation/Formation (& By-laws)
  - Articles of Association v. By-laws (bye-laws, e.g. Bermuda)
  - Memorandum of Incorporation (but see UK under Companies Act 2006, combined )
  - Articles of Incorporation
  - Articles of Organisation
  - (Corporate) Constitution (see Australia in 2000 combined Memo + Arts)
  - Certificate of Incorporation (Delaware)
  - Shares/stock, shareholder/stockholders; common v. ordinary ; preferred v. privileged

### De l'autre côté...

- Beware of foreign-language contracts subject to English, US or other common law system
- Unexpected results
- E.g. Italian language contract under English law: 5 yr contract renewal negotiations fell through, with accusations by licensee of "bad faith, unfair dealing" – generally barred under English law, Italian law assumptions not applicable

### Key jurisdictional questions affecting contracts drafting

- US- federal/state dichotomy= profound effects of federalism
- The UCC (Uniform Commercial Code)
- Role of States' law governing contracts
- May touch upon federal questions though (US int'l trade rules, sanctions, securities laws, corruption/bribery laws- FCPA-, etc.)
- UK – pay attention to jurisdiction: E & W, Scotland, N. Ireland, Isle of Man, Channel Islands (even though Companies Act 2006 applies a single company law regime across the UK, replacing the two separate (if identical) systems for GB & N. Ireland)

### International Contracts & Legal/Official document drafting

- When drafting using "recycled" language, be VERY careful to ensure it applies to current case
  - Names
  - Monetary or other amounts (numbers of units to be ordered, etc.)- plus numbers, commas, periods, etc.
  - Terms (was precedent buyer or seller-favorable? Was it highly negotiated?)
- Do the same when receiving draft contracts and letter agreements from counterparty counsel, the client or outsiders – Ask WHY all the info is there? if in doubt ask internally
- Proofread, pay attention to detail- it's your responsibility

### Precision drafting > language counts

- Borrower will not violate any law, rule or regulation.
- Borrower will not violate any material law, rule or regulation.
- Borrower will not violate any law, rule or regulation in any material respect.
- Borrower will not violate any law, rule or regulation if such violation could reasonably be expected to have a material adverse effect on the financial condition of Borrower.

### Reasonableness as a qualifier

- Licenser may terminate the License if it has determined that there has been a material adverse change in Licensee 's financial condition.
- Licenser may terminate the License if it has **reasonably** determined that there has been a material adverse change in Licensee's financial condition.
- Question: consider defining standards.

### A few drafting conventions

- Trumping provisions
  - Provisos (“provided that...”, “subject to...”, etc.)
  - “Notwithstanding anything herein to the contrary” – clause following shall supersede / prevail over anything else = contradictions ineffective / inoperative qua this clause
  - “Except as provided in Section 6.5”
  - “Without limiting the generality of the foregoing” (somewhat ponderous)
  - “Including without limitation” (better)
  - Incorporation by reference

### Gamers risk everlasting limbo as retailer adds 'immortal soul' clause to sale conditions: You think you're buying a video game, but you may be selling your soul.

- FOXNews (April '10) reported British retailer, GameStation, added "immortal soul clause" to contract shoppers signed before making online purchases
- "By placing an order via this Web site on the first day of the fourth month of the year 2010 Anno Domini, you agree to grant Us a non transferable option to claim, for now and for ever more, your immortal soul. Should We wish to exercise this option, you agree to surrender your immortal soul, and any claim you may have on it, within 5 (five) working days of receiving written notification from gamesation.co.uk (sic) or one of its duly authorised minions."

- GameStation's form also points out that "we reserve the right to serve such notice in 6 (six) foot high letters of fire, however we can accept no liability for any loss or damage caused by such an act. If you a) do not believe you have an immortal soul, b) have already given it to another party, or c) do not wish to grant Us such a license, please click the link below to nullify this sub-clause and proceed with your transaction."
- Terms of service updated on April Fool's Day as gag, but retailer did so to make real point: no one reads online terms & conditions of shopping and cos free to insert whatever language they want into documents.
- Noted co would not be enforcing ownership rights & planned to email customers nullifying any claim on their soul

- Let's look at a more serious case of failure to properly review drafted language:

– CEREBUS v. UNITED RENTALS case 2007 Delaware (especially pp. 6-9)

### International Contracts & Legal/Official document drafting

- Know how one provision or document relates to others; look out for “ripples”
- Use tools that make reading easy: tables of contents, indexes/indices, cover pages, cross references, etc.
- Help to establish realistic (!) deadlines and keep them; draft “to do lists”, duties assignment lists for the working group
- When drafting be attentive to agreed methods, forms, procedures under contract (i.e. timing and procedures for payments=)

### International Contracts Drafting: LOIs, MOUs etc.

- Beware of risks relating to LOIs or MOUs (Letters of Intent or Memoranda of Understanding)
- Various forms: LOIs (Letters of Intent), MOUs (Memoranda of Understanding), Term Sheets, Commitment letters, Heads of Agreement
- You do not want a US or UK (Common law) court to find it fully enforceable as if it were a final contract
- Key is that it merely be an “agreement to agree in good faith subject to due diligence, etc.”

### Texaco, Inc. V. Pennzoil Co. (TX 1987)

- “Memorandum of Agreement” for merger btw Pennzoil & Getty Oil
- Texaco upped the ante & won the bid
- Found to be a final agmt; \$10.53B award to Pennzoil (\$3B in punitives); but purported to be “binding only after delivery of this agmt”; 1 signature missing; no partial performance; press statements talked about final merger agmt; said “agmt in principle”
- “There was sufficient evidence...to conclude that the parties had reached an agmt on all essential terms of the transaction with only the mechanics and the details left to be supplied by the parties’ attorneys”

- Real risks involved, depending on contract case law in jurisdiction at any given time...
- Cts generally look at 5 factors:
  - Actual language of LOI
  - Context of negotiations (board acting as if binding, accepting counteroffer price, etc.)
  - Whether 1 or both parties have begun partial performance of obligations
  - Whether issues left to negotiate, & if such are material to transaction
  - Whether LOI describes complex transaction which customarily involves definitive written agmts
- Better to keep it short, “procedural”, avoid strong language; make it clear essential terms missing
- Consider bifurcation

### LOIs, MOUs etc.

- Does, or should, the LOI create or disclaim enforceable obligations?
- Why should clients/companies use, or not use, LOIs?

### International Contracts Drafting: LOIs

- An example, in an international JV agmt:
  - The parties believe that the joint venture will be in their mutual best interests. They recognise that the various arrangements [regarding their existing interests] will need careful review but each will endeavour in good faith to agree the detailed terms of the joint venture, on the basis of the principles set out in this Memorandum, and to take all necessary other actions in order successfully to establish the joint venture.
  - The parties intend to establish a 50/50 joint venture company to [manufacture and sell \_\_\_\_\_ as described further in Annex 1 (the **Products**)].
  - The parties' preferred intention is to create a new jointly-owned company into which they would transfer their existing interests. The parties will consider appropriate alternative structures if that becomes necessary or desirable on the grounds of tax and cost efficiency.

### PROCEDURE

Following signature of this Memorandum of Understanding, the parties will proceed as rapidly as possible with the due diligence and valuation process and with preparing and negotiating the legally definitive agreements. [An outline timetable is set out in Annex 4.]

### STATUS

This Memorandum of Understanding represents the good faith intentions of the parties to proceed with the proposed joint venture but is not legally binding and creates no legal obligations on either party (except for clauses [Confidentiality], [Governing law], [Exclusivity] and [29].) Its sole purpose is to set out the principles on which the parties intend in good faith to negotiate legally definitive agreements.

### International Contracts & Legal/Official document drafting

- Generally, remember to get any approvals to variances from any agreed forms or document standards, especially those under contract
- This applies to life in law firms, as well as large multinationals and financial institutions, (investment) banks
- KEY POINT: learn from past mistakes when contracts drafting (and generally) = prepare a short but clear internal 'Memo to File' on problems with your documents or documents received from client or counterparty (allows you to deal better in the future)

### CONTRACTS DRAFTING

- Try to consider from "construction" point of view (negotiate & draft) and from "deconstruction" view (breach or litigation)
- Need to identify client needs/problems systematically
- Need to identify key issues before drafting and reflect them accurately and clearly
- Anticipate possible outcomes & predict results- and put into words

### International Contracts drafting

- Use flexible, realistic but decisive decision-making mechanisms
- Organize contractual analysis logically (order by related topics to ensure clarity)
- Apply law to facts (do your research before, or have done properly for you)

### International Contract Drafting – a few considerations

- Title/introduction: Clearly identify parties (proper company or **subsidiary**)- I've seen many mistakes in past
- Date it clearly- again- absolute chaos for future transactions (IPOs, financings, M&A)
- Add recitals (introductory facts)- whereas...
  - To give proper overview of facts & circumstances to future readers of contract, (both to parties and in case of disputes)
- If technical nature, add glossary of definitions or appendices (VOIP, telecoms, pharma, energy, etc.)
- Use clear, concise language- avoid legalese when possible (Plain English will be considered later)

### International Contract Drafting – a few suggestions based on experience

- Avoid use of undefined technical terms
- Have a definite term & renewal mechanism
- Termination provisions (also remedy, cure)
- Notice provisions
- Any conditions precedent?
- Include a superseding / 'entire agmt' clause

### International Contract Drafting – a few rules

- Clearly identify consideration → goods, services, rights, forbearance, waiver
- How will you handle disputes:
  - Duty to try to resolve in good faith first? ADR\*?
  - Arbitration- to cover what\*, where\*?
  - Jurisdiction: Which courts\*?
  - Any other points?

### International Contract Drafting – a few rules

- Governing Law (What are you comfortable w?)
- Are 3d parties going to have K rights? Add UK clause.
- Signatures → properly authorized persons, ask for proof (especially if using a POA)
- Ask lawyers re no. of signers/witnesses, etc.
- Get duplicate signed copies for all parties

### The Contracting Process

- Due Diligence
  - What is it?
  - Why does a buyer or lender conduct DD?
  - Why does a seller conduct DD?
- Negotiations
  - Who prepares the first draft?
  - Who keeps "drafting custody" of K?
  - Electronic distribution (emails, websites, etc.)
- Signing the contract
  - Corporate authorization, notarization number of signatures?
- Signing then Closing, or Simultaneous Signing then Closing

### The Contracting Process

- Closing the deal
  - Satisfying the conditions precedent
  - Mechanics of Closing (escrows, tables)
- Post-closing aspects
  - Purchase price adjustment issues
  - Indemnity claims (reps & warranties)
  - "Affirmative" and "negative" covenants
  - Deferred purchase price issues
  - Defaults

### Suggestion: put thought into your conditions precedent

- Provide that, if an event has not occurred or if a statement of facts is not correct on the Closing Date, one party's closing obligations are discharged
- An unsatisfied condition may still be excused ("removed") if the party entitled to it waives it or prevents occurrence
- But *by itself*, failure of a condition does not mean that either party suffers a liability

### Conditions precedent

- First, the "paper" conditions
- Delivery of closing documents
  - E.g. Deed of trust & promissory note
  - Other security agreements & guaranties
  - Environmental indemnities, estoppel certificates
  - Parties' articles & by-laws
  - Certificates, resolutions and other documents confirming parties' existence and authority
  - Title insurance reports policies
  - Other, depending on transaction

### Conditions precedent

- Delivery of other documents
  - Counsel opinions
  - Insurance certificates
  - Environmental reports
  - Certified copies of key contracts & licenses
- Protection & disbursement
  - Record deed of trust, file UCC-1s (US), etc.
  - Issue title insurance policy
  - Disburse loan proceeds, etc.

### Conditions precedent

- Third-party actions:
  - Regulatory approvals
  - Contractual amendments or consents (change of control consents, etc.)
  - Waivers of first refusal rights
  - Readiness of insurer to issue title insurance
- Absence of material adverse changes
- Certificate by other party that its pre-closing covenants have been discharged & that its conditions have been satisfied or waived

### Conditions precedent

- Certificate by other party that its representations, made on signing date, are accurate "in all material respects as of the closing date as though made on such date"
  - Exceptions must be certified and accepted
- Simultaneous performance of other party's closing obligations (seller delivers deeds, buyer or lender delivers funds)

### Solving contracts problems

- Recap of contract provision types:
  - **Covenants** impose liability for non-performance over time
  - **Representations** impose liability for inaccurate statements made at a moment in time
  - **Conditions** provide excuses (w/o liability per se) if events don't occur for any reason
  - **Indemnities** impose liability to protect others from future contingencies
  - **Default provisions** trigger remedies provided for by law or contract

### Practice point: Material Adverse Change Clauses (MACs)

- Related to *Force majeure*\* but differentiated
- Intended legal effect of MAC clauses in English & US law is to assure contracting party towards unknown risk by allowing that party to walk away from transaction in case of MAC event.
- Both English & US contract law are founded on principles of freedom of contract & sanctity of contract: 1<sup>st</sup> gives parties right to freely make agmts according to their common intentions, & 2<sup>nd</sup> provides that agmts shall be held btw parties according to their agreed content



### MACs & Anglo-American contracts principles

- *Interpretation – can MAC clauses be relied upon in English & US law?*
- Generally, Anglo-American contract law has reputation for giving full effect to words of commercial contracts, traditionally expressed through “plain meaning rule”.
- Rule states that courts will “construe a written document [...] according to the ordinary grammatical meaning of the words used therein, and without reference to anything which has previously passed between the parties to it”.

### MACs & Anglo-American contracts principles

- By interpreting contracts according to plain meaning rule, English & US courts have promoted certainty “by holding that parties who have reduced a contract to writing should be bound by the writing and by the writing alone”.
- However, particularly English contract law has during past decades slowly shifted away from traditional rules of interpretation towards more moderate interpretive theory (includes subjective elements to larger extent than traditionally accepted)
- US contract law: subjective elements traditionally admitted to larger extent than in traditional English contract law (English & US contract law have moved closer to each other during past decades)

### MACs

- Some instances where MAC clauses have been interpreted and applied by US courts /good example of how case law impacts Ks drafting):
  - in landmark decision of IBP Inc. v Tyson Foods Inc. (2001), Delaware Court of Chancery placed high burden on buyer wishing to rely on broadly drafted MAC clause to get out of transaction
- Buying co, Tyson Foods Inc., claimed considerable loss due to several events affecting target company, IBP Inc.
- In deciding whether events constituted “material adverse effect” on target, court interpreted clause in light of all available evidence.
- On this basis, it held that clause was “best read as a backstop protecting the acquiror from the occurrence of unknown events that substantially threaten the overall earnings potential of the target in a durationally-significant manner.”

### MACs

- As a result, Tyson, who had relied on MAC clause to get out of what was perceived as bad bargain, was instead forced to perform acquisition.
- IBP v Tyson decision generally seen as sign that US courts will hesitate to apply broadly written MAC clause simply according to its face meaning
- To contrary, courts likely to consider all relevant facts of case, including subjective elements, in order to decide whether “material adverse change” has, in light of individual circumstances, occurred
- Less certainty for parties including MAC clauses in contracts, & has led to attempts for greater precision in drafting

### MACs

- Ergo, when contracting parties litigate a MAC, courts are generally asked to determine whether:
  - The event constituted an “adverse event” in light of the definition of the MAC; and
  - The adverse event was “material.”
- While determining whether adverse event has occurred is relatively straightforward, determining whether such adverse event is material is not so &, unfortunately (or fortunately depending on one’s perspective), parties often fail to provide specific language to define meaning of “material.”

### MACs – seller’s clause

- *For purposes of this Agreement, a “Material Adverse Effect” shall mean any event, occurrence, change in facts, conditions or other change or effect which has resulted or could reasonably be expected to be materially adverse to any of the following: the Company, its business, its prospects, operations or results of operations, the condition (financial or otherwise) of the Company or any material asset (including, without limitation, any Material Contract).*
- *For purposes hereof, an event, occurrence, change in facts, conditions or other change or effect which has resulted or could reasonably be expected to result in a suit, action, charge, claim, demand, cost, damage, penalty, fine, liability or other adverse consequence of at least \$500,000 shall be deemed to constitute a Material Adverse Effect.*

### • “BOILER PLATE” CLAUSES – THE BACKBONE OF KEY INTERNATIONAL COMMERCIAL AND FINANCING CONTRACTS

- Let’s consider them in detail in a quality precedent

### Int’l Contracts – Practice Point

- Explanation of key U.S. law clauses commonly used in European capital markets, finance and investment contracts and the rules / context behind them, including references to the following (A MUST FOR RISK MGMT as part of your commercial purchases, financing, investment, merger/acquisition, JV, etc.):
  - the OFAC rules and sanctions laws compliance (Office of Foreign Asset Control)
  - References to the Foreign Corrupt Practices Act (FCPA)
  - the Securities Act of 1933
  - the Securities Exchange Act of 1934
  - the Investment Company Act of 1940 (the “inadvertent investment company” problem)
  - clauses on Regulation S

### US clauses, cont’d

- clauses relating to Rule 144A placements
- clauses on Rule 144
- References to “FPICs” (foreign public investment companies- U.S. tax implications)
- the Investment Advisors Act of 1940
- the Trust Indenture Act of 1939
- References to the Patriot Act of 2002
- References to the TEFRA rules on bearer debt
- clauses on Regulation D
- References to the enforcement of judgments in the USA
- Tender offer regulations- Rules 802 and 803 (key for M&A, takeover transactions)

- **PLAIN ENGLISH LEGAL DRAFTING** (CONTRACTS, REPORTS, LEGAL MEMORANDA AND CORPORATE DISCLOSURE)
- DISCLOSURE=private (M&A) and public (offering circulars/prospectuses, annual reports, press releases & other required regulatory filings, plus website content, etc.)

### Modern Legal Drafting:

- Traditional legal language often archaic, obscure, illogical word order, complex grammar, very long, run-on sentences
- Answer: The “Plain English” movement
- But first keep in mind US v. British English when drafting.

- The language of the law *is* changing, whether people (especially lawyers) like it or not.
- In many countries, the plain language movement in law is now well-established. In its modern phase, it has been going for over 25 years. In countries such as Australia, New Zealand, and Canada, legal practitioners and parliamentary drafters now feel no compunction whatever in boasting about the “plainness” of their documents and legislation.
- In other countries, such as England, Ireland and the United States of America, impression is that many lawyers still have some reservations about using plain language (esp for contracts)

### Modern Legal Drafting

- GOAL:
  - Put legal docs (contracts, deeds, reports, statutes/laws, disclosure) in clear, idiomatic English w/o loss of legal precision

- Compare “The tenant must repair the premises” – with rampant verbal excesses appearing in reparation covenant giving rise to litigation in English case of *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*: [1979] 1 All ER 929):
- “[The tenant shall] when where and so often as occasion requires well and sufficiently ... repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof ... and all floors walls columns roofs canopies lifts and escalators ... Shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever ...”.

- US legal drafting also heavily afflicted.

### ‘Plain English’ Advice

- Many companies & lawyers using this now to draft contracts, reports, correspondence, etc.
- Many benefits: clients, owners/shareholders (SHs) clear about key info to make informed judgments, take well founded actions
- Communicate successfully w Clients/Investors = stronger, longer, more successful relationships = \$\$\$
- Save costs of ‘translating’, misunderstandings, correcting = \$\$\$
- Transparency and easy readability, esp. electronically

### ‘Plain English’ Advice

- NB: US listed companies need to use it w their reports, other disclosure (Shell, Total, Benetton, Telefonica and ENI, et al.)\* (check out NYSE or NASDAQ sites)
- In all types of legal, reporting docs, allows you/co to speak to clients/investors in words they can understand = better communications = fewer disputes = better work/fewer project problems
- 1990s push on lawyers to use it generally\* - especially so non-lawyers can understand

### ‘Plain English’: What is it?

- NOT a deletion of complex/technical info, ‘dumb down’
- Sometimes requires considerable thought & research to put traditional legal words into plain language
- RATHER, uses orderly & clear presentation of complex info so clients/investors can understand it &, as stated earlier = understandable + transparent = better business relationships
- It analyzes & decides what info a client needs before considering words, sentences, paragraphs

### Plain English- What is it?

- Uses words clearly and economically (concisely)
- Sentence structures are tight, tone welcoming & direct
- Is easy to read and looks like it is meant to be read

### 'Plain English' Advice

***"One must consider also the audience...the reader is the judge."***

***Aristotle- Rhetoric***

### 'Plain English' Advice

- ⊙ First, know your audience > to ensure it is understandable to your target, you need to consider their level of technical/financial sophistication
- ⊙ What is their age, position, expertise?
- ⊙ What is their nationality/culture?
- ⊙ How familiar are they with technical language, or with the project I am writing to them about?
- ⊙ How will they read the doc?

### 'Plain English' Advice

- What use will they make of the document I'm giving them?
- What is their corp. culture like, based on past dealings? Know your audience for that specific doc!
- What do they expect to get out of this doc, is any key info missing?
- Keep profile of doc target constantly in mind

### 'Plain English' Advice

- ⊙ Meet with others on team to clarify unclear info in your doc (Why there?) and clients' docs = beware of recycled language\*\*
- ⊙ Eliminate redundant info
- ⊙ Use a short, clear summary to orient the reader
- ⊙ If lots of technical words, consider a glossary

### 'Plain English' Advice

- Document Organization
  - Present the big picture before getting into details
  - individual piece of info means more to reader if they see how it fits in to the puzzle
  - Use descriptive headers and subheaders to break up doc into clear sections, esp. if a longer report
  - Always group related information together → helps ID & eliminate repetition

### 'Plain English' Advice

- Common problems w reports, contracts, etc.
  - Long, unclear, run-on sentences
  - Passive voice overuse
  - Weak verbs
  - Superfluous words
  - Overuse of legal / technical jargon
  - Abstract words
  - Unnecessary details

### 'Plain English' Advice / Examples

**NO PERSON HAS BEEN AUTHORIZED TO GIVE ANY INFORMATION OR MAKE ANY REPRESENTATION OTHER THAN THOSE CONTAINED OR INCORPORATED BY REFERENCE IN THIS JOINT PROXY STATEMENT/ PROSPECTUS, AND, IF GIVEN OR MADE, SUCH INFORMATION OR REPRESENTATION MUST NOT BE RELIED UPON AS HAVING BEEN AUTHORIZED.**

### 'Plain English' Advice / Examples

*You should rely only on the information contained in this document or that we have referred you to. We have not authorized anyone to provide you with information that is different.*

- ⊙ Plain English rewrite uses everyday words, short sentences, active voice, regular print, & personal pronouns that speak directly to Reader.

By following some of these deceptively easy principles, your English drafting & writing skills will improve dramatically...



Plain English' Advice / Reduce Abstractions

before

Sandyhill Basic Value Fund, Inc. (the "Fund") seeks capital appreciation and, secondarily, income by investing in securities, primarily equities, that management of the Fund believes are undervalued and therefore represent basic investment value.

after

At the Sandyhill Basic Value Fund, we will strive to increase the value of your shares (capital appreciation) and, to a lesser extent, to provide income (dividends). We will invest primarily in undervalued stocks, meaning those selling for low prices given the financial strength of the companies.

Plain English' Advice / Reduce Abstractions

• before

No consideration or surrender of Beco Stock will be required of shareholders of Beco in return for the shares of Unisys Common Stock issued pursuant to the Distribution.

• after

You will not have to turn in your shares of Beco stock or pay any money to receive your shares of Unisys common stock from the spin-off.

Plain English' Advice / Omit Superfluous Words

"...the most valuable of all talents, that of never using two words where one will do."

Thomas Jefferson

Plain English' Advice / Omit Superfluous Words

- Can words be replaced with fewer words meaning the same thing, or a simpler word?

superfluous

in order to
in the event that
subsequent to
prior to
despite the fact that
because of the fact that
in light of
owing to the fact that

simpler

to
if
after
before
although
because, since
because, since

Plain English' Advice / Omit Superfluous Words

before

The following summary is intended only to highlight certain information contained elsewhere in this Prospectus.

after

This summary highlights some information from this Prospectus.

before

ENI SpA and Royal Dutch Shell are each subject to the information requirements of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), and in accordance therewith file reports, proxy statements and other information with the Securities and Exchange Commission (the "Commission").

after

We both file annual, quarterly, and special reports, proxy statements, and other information with the Securities and Exchange Commission (SEC).

Plain English' Advice / Omit Superfluous Words

before

Exxon Corp has filed with the Internal Revenue Service a tax ruling request concerning, among other things, the tax consequences of the Distribution to the United States holders of Exxon Stock. It is expected that the Distribution of Chevron Common Stock to the shareholders of Exxon will be tax-free to such shareholders for federal income tax purposes, except to the extent that cash is received for fractional share interests.

after

While we expect that this transaction will be tax free for U.S. shareholders at the federal level (except for any cash paid for fractional shares), we have asked the Internal Revenue Service to rule that it is.

Plain English' Advice / Write in the "positive"

Positive sentences are shorter & easier to understand than negative counterparts. E.g.:

before

Persons other than the primary beneficiary may not receive these dividends.

after

Only the primary beneficiary may receive these dividends.

Plain English' Advice / Write in the "positive"

- Sentences shorter & easier to understand by replacing negative phrases w single words meaning same thing:

negative compound

not able
not accept
not certain
not unlike
does not have
does not include
not many
not often
not the same
not ... unless
not ... except
not ... until

single word

unable
reject
uncertain
similar, alike
lacks
excludes, omits
few
rarely
different
only if
only when

Plain English' Advice / Use Short Sentences

"There's not much to be said about the period except that most writers don't reach it soon enough."

William Zinsser, On Writing Well

"A subject may have so many qualifications that readers forget what it is before they find out what it does."

Claire Kehrwald Cook, Line by Line

Before

⊙ The following description encompasses all the material terms and provisions of the Shell Contract entered into hereby and supplements, and to the extent inconsistent therewith replaces, the description of the general terms and provisions of the Namibian Project (as defined in the accompanying Prospectus) set forth under the heading "Description of the Namibian Shelf Explorations" in the Prospectus, to which description reference is hereby made. The following description will apply to each Project unless otherwise specified in the applicable Technical Specifications Supplement.

'Plain English' Advice / Use Short Sentences

After

We provide information to you about our projects in three separate documents that progressively provide more detail: 1) the prospectus, 2) the prospectus supplement, and 3) the technical specifications supplement.

Since the terms of specific projects may differ from the general information we have provided, in all cases rely on information in the technical specifications supplement over different information in the prospectus and the prospectus supplement, and rely on this prospectus supplement over different information in the prospectus.

'Plain English' Advice / Use Short Sentences

⊙ Or use tabulation method:

We provide information to you about our projects in three separate documents that progressively provide more detail:

- 1 The Prospectus
  - General information that may or may not apply to each note.
- 2 The Prospectus Supplement
  - More specific than the prospectus, and to the extent information differs from the prospectus, rely on the different information in this document.
- 3 The Technical Specifications Supplement
  - Provides final details about a specific project including its total cost. To the extent information differs from the prospectus or the prospectus supplement, rely on the different information in this document.

⊙ NB Information-packed sentences leave most clients scratching their heads

'Plain English' Advice / Replace Jargon & Legalese

*"Clearness is secured by using the words...that are current and ordinary."*

Aristotle  
*Rhetoric*

'Plain English' Advice / Replace Jargon & Legalese

- ⊙ Where possible, eliminate technical jargon & legalese
- ⊙ Use short, common words to get point across
- ⊙ If no simple English word, explain term when 1<sup>st</sup> used
- ⊙ Depending on audience, ask a layman (or laywoman) to read for incomprehensible words
- ⊙ Don't create unique jargon/argot/acronyms just for your report

'Plain English' advice – final points

- OMIT SURPLUS WORDS
- PUNCTUATE CAREFULLY- unexpected legal effects
- N.B. → this is a key cause of contractual confusion bx of changed meaning\*\*

Plain English Advice – Choose the simpler synonym

- Surround complex ideas w short, common words. For example,
- use *end* instead of *terminate*, *explain* rather than *elucidate*, & use *instead of utilize*. When a shorter, simpler synonym exists, use it.

Plain English Advice – Keep subject, verb & object close together

- Short, simple sentences enhance the effectiveness of short, common words.
- To be clear, sentences must have a sound structure.
- The natural word order of English speakers is *subject-verb-object*. Your sentences will be clearer if you follow this order as closely as possible.

Plain English Advice – subject, verb, object

before

- Holders of the Class A and Class B-1 certificates will be entitled to receive on each Payment Date, to the extent monies are available therefor (but not more than the Class A Certificate Balance or Class B-1 Certificate Balance then outstanding), a distribution.

after

- Class A and Class B-1 certificate holders will receive a distribution on each payment date if cash is available on those dates for their class.

### Plain English Advice – Write using “if-then” conditionals

• Conditional statements are very common in legal English although they are rarely written that way. When we rewrite as a conditional, we follow natural English word order very closely = easier reading.

**One ‘if’ one ‘then’** When there is only one *if* and one *then*, starting with the *if* may spare some of your readers from having to read the rest of the sentence. In these cases, the *if* clause defines who or what the ‘then’ clause applies to.

• If you invested in Class A shares, then...

**One ‘if,’ multiple ‘thens’** When there is only one *if* and more than one *then*, start with the *if* and tabulate the *thens*.

**Multiple ‘ifs,’ one ‘then’** When there is only one *then* and more than one *if*, start with the *then* and tabulate the *ifs*.

**Multiple ‘ifs’ and ‘thens’** When there is more than one *if* and more than one *then*, you’ll probably need to break it down into more than one sentence, taking care to specify which *ifs* apply to which *thens*.

• If the information is still unclear, consider presenting the information in a table.

### EMAILS- Top 10 Tips (key source of legal risk today)

- Would you be happy to see the email on the front page of a newspaper or in court?
- Should you use an email to deliver this message? If in doubt, consider calling (avoid saying too much or in wrong way)\*\*
- Are you only sending to the correct people?
- Does it have a descriptive subject line?

### EMAILS- Top 10 Tips

- Is it clear at the start what you want every recipient to do?
- Will all recipients clearly understand your message?
- Have you carefully proofread the email? Beware of auto spell-check\*\*...
- Consider whether you need to send attachments.
- Will recipient know what to do with the attachments? Should he/she have them?
- Is the confidentiality of the contents properly protected?

### E-mails

- **Disclaimer to protect confidentiality:**
- This e-mail is confidential and may well also be legally privileged. If you have received it in error, you are on notice of its status. Please notify us immediately by reply e-mail and then delete this message from your system. Please do not copy it or use it for any purposes, or disclose its contents to any other person: to do so could be a breach of confidence. Thank you for your co-operation. Please contact \_\_\_\_\_ on + \_\_\_\_\_ or email \_\_\_\_\_ if you need assistance.

### Drafting reports

- A logical, accurate, descriptive, & grammatically correct title. For example, the title “CMSC 441 Risk Project” is not descriptive.
- Titles should be as short as possible though – consider two-part titles because they provide short & long forms (e.g. “Results of Legal Risk Review Project 505 in Namibia: An Overview of Key Considerations for Other Similar Projects in of the coast of Brazil”).

### Drafting Reports

- ▶ Short informative abstract up front. Make sure abstract is informative--- should serve as an Executive Summary. Briefly summarize main points. Concretely summarize; do not introduce. **Immediately get to point in first sentence.**
- ▶ Write a clear, informative, & thoughtful description of what you are reporting on. Where appropriate, include graphs and diagrams. Be sure to motivate, present, and interpret your information.
- ▶ Appendices for supplemental info & for info that is too detailed or voluminous to fit into report’s body
- ▶ Analyze & interpret your data, & discuss significance & limitations of your findings, if applicable & you are able to do so.

### Report or other disclosure drafting

- Like an outline, a doc’s hierarchy shows organization of info & helps reader to understand relationship btw different levels of info

A typical hierarchy might include:

- document title
- section headings (first level)
- subsection headings (second level)
- paragraph headings (third level)
- general text (fourth level)

Use different typefaces in headings to distinguish

- Let’s look at a legal memorandum example: JV – corporate survival guide

- INTERNATIONAL CONTRACTS  
NEGOTIATING CONSIDERATIONS

### Negotiation techniques to Get Agreement w/o Giving In

- The Problem: DON'T BARGAIN OVER POSITIONS
- The method of the Harvard Negotiation Project:

- **Separate the PEOPLE from the Problem**
- **Focus on INTERESTS, not POSITIONS**
- **Invent OPTIONS for Mutual Gain**
- **Insist on Using Objective CRITERIA**

### The Problem: DON'T BARGAIN OVER POSITIONS

- When negotiators to bargain over positions they tend to lock themselves into them, becoming more and more committed to them in order to not "lose face"
- Arguing over positions produces unwise agreements
- Arguing over positions is inefficient
- Arguing over positions endangers an ongoing relationship
- When many parties, positional bargaining is even worse
- Being nice is no answer (taken for a fool)
- Alternative between hard and soft positional bargaining is possible: negotiation takes place at 2 levels, one on substance, another focusing mainly on the procedure for dealing with the substance, the second one is a "meta-game"

### Separate the PEOPLE from the Problem

- Negotiators are people first
- Negotiators have two kinds of interests: in the substance and the relationship
- The "People problem"- tendency to look at negotiations as institutional, not personal
- Separate relationship from the substance; deal directly with the "people problem"
- Clarify perceptions, put yourself in their shoes
- Don't deduce their intentions from your failures

- Don't blame them for your problem
- Discuss each other's perceptions
- Look for opportunities to act inconsistently with their perceptions
- Give them a stake in the outcome by making sure they participate in the process
- Face-saving: make your proposal consistent with their values

### Emotion

- First recognize and understand emotions both yours and theirs
- Make emotions explicit acknowledge them as legitimate
- Allow the other side to let off steam
- Don't react to emotional outbursts
- Use symbolic gestures
- Communication
- Listen actively and acknowledge what is being said
- Speak to be understood, focusing on your interests not been with purpose

### Focus on INTERESTS, not POSITIONS

- Mutual Gain- if possible, or avoidance of loss
- Explain well
- Look long-term

### Invent OPTIONS for Mutual Gain

- Requires thinking things through, on both sides' positions- back to "thinking like the other side", understanding their point of view
- A certain creativity, but well explained

### Insist on Using Objective CRITERIA

- Keep to the facts
- Try to quantify
- Try to explain how the numbers or facts impact your position and their offer

### Develop your BATNA: Best Alternative to a Negotiated Agreement

- Avoid the temptation after long negotiations to "let's all agree and put an end to this"
- You may end up with a deal you should have rejected
- Establishing worst possible outcome scenario, "bottom line", although it has limitations
- Know your BATNA: the standard against which any proposed agreement should be measured, the only one to protect you both from accepting terms that are too unfavorable and from rejecting terms it would be in your interest to accept
- Avoid only looking at all positives of all the alternatives together



### When negotiating internationally, we need to consider:

- The negotiating environment
- Cultural & sub-cultural differences
- Ideological differences
- Foreign bureaucracy
- Foreign laws & governments
- Financial insecurity due to international monetary factors
- Political instability & economic changes

- Consider fact that negotiating w our fellow citizen is not an easy task due to many individual differences, it would be reasonable to suggest that negotiating with foreigners may be even more difficult.

- Identifying & dealing w cultural barriers
  - *What are your experiences?*
- Drafting / writing in differing business environments
- Cross-cultural communication & negotiation (e-mails, contracts, letters, calls, other negotiation/decision-making sessions)

- **Negotiating Goal and Basic Concept:** Different cultures stress different aspects of negotiation. Goal of negotiation may be a substantive outcome (Americans) or a long-lasting relationship (Japanese).
- **Protocol ("rituals"):** many kinds of business etiquette. Factors that should be considered are dress codes, number of negotiators, entertainment, degree of formality, gift giving, meeting & greeting, etc.
- **Communications:** Verbal & non-verbal communication is a key factor of persuasion
  - body language & tone of voice
  - Is the meaning of what is said exactly in the words themselves? Does "...it's impossible" really mean impossible or just difficult to realize?

### Understand expectations

- Your negotiating partner's expectations of negotiation may be different from yours: success may not mean same thing to other co-nationals as it does to you
- Decision-making styles may be different: US managers usually make decisions by themselves, while Japanese tend to make decisions by consensus.
- Americans place a high value on flexibility, whereas once Japanese manager reaches decision, he believes it shameful to change (the detested "loss of face")

### ⊙ Risk-Taking Propensity - Uncertainty Avoidance:

- always risk involved in negotiations- final outcome unknown when negotiations commence.
- Should we trust them?
- Will they trust us?
- Certain cultures are more risk averse than others, e.g. Japan- means that less innovative and creative alternatives are available to pursue during the negotiation, unless there is a strong trust-based relationship between the counterparts.

- ⊙ **View of Time:** In some cultures time is money
- ⊙ Punctuality and agenda may be an important aspect of negotiation (in China or Japan, being late would be taken as an insult).
- ⊙ **Decision-Making System:** The way members of the other negotiating team reach a decision may give us a hint: who we shall focus on providing our presentation. *When negotiating with a team, it's crucial to identify who is the leader and who has the authority to make a decision.*
- ⊙ **Form of Agreement:** In most cultures, only written agreements stamp a deal. It seems to be the best way to secure our interests in case of any unexpected circumstances. Beware oral agreements.

- ⊙ **Power Distance:** refers to acceptance of authority differences btw people.
  - Cultures with low *power distance* postulate equality among people, and focus more on earned status than ascribed status. Negotiators from countries like Britain, Germany and Austria tend to be comfortable with shared authority & democratic structures. When facing a high *power distance* culture, be prepared for hierarchical structures & clear authority figures.
- ⊙ **Personal Style:** In some cultures, like America, an informal style may help to create friendly relationships and accelerate problem solving solution. In China, by comparison, an informal approach is proper only when the relationship is firm & sealed with trust.

### Coping with Culture

- ▶ **Learn the other side's culture:** very important to know most common basic components of counterparty's culture, a sign of respect & a way to build trust & credibility as well as advantage that can help us to choose the right strategies & tactics.
- ▶ Of course, it's impossible to learn another culture in detail when we learn at short notice that a foreign delegation is visiting in two weeks' time. The best we can do is to try to identify principal influences that foreign culture may have on making the deal.

### *Don't stereotype*

*Making assumptions can create distrust & barriers that expose both your & the other side's needs, positions & goals.*

The way we view other people tends to be reserved & cautious.

We usually expect people to take advantage of a situation, and during the negotiations the other side probably thinks the same way, especially when there is a lack of trust between counterparts.

Instead of generalizing, try to treat everyone as individuals. Find other side's values & beliefs independently of values & beliefs characteristic of culture being represented by your counterpart.

### Establish common ground and choose your style

- Find anything that will allow your foreign colleague to share something with you.
- This can help you get past "people" problems—ego wars, saving face, and so on—which is a good tactic because these problems can crop up where you may least expect them.

- Apart from adopting other side's culture to adjust to situation & environment, we can also try to persuade other side to use elements of our own culture.
- In some situations, also possible to use a combination of both cultures, e.g., joint venture businesses
- Another solution is to adopt a third culture, which can be a strong base for personal relationships
- When there is a difficulty in finding common ground, focusing on common professional cultures may be initiation of business relations.

- Thank You
- Contact information  
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