Drafting Corporate and Commercial Agreements

Iqbal Hashmi

What is a Contract?

• A contract is an agreement
• An agreement is a promise
• A promise is an accepted proposal
Why do we draft written contracts and not just shake hands?

Reasons for Contracts

• Confirm the meeting of minds (offer and acceptance)
• The rights and obligations of the parties
• To avoid later disputes and save costs
• To ensure all essential and material issues are covered
• Evidence of agreement and the terms – which facilitates enforcement
• Provisions for events or contingencies that while not expected, may occur.
An Agreement is Void

- If caused by the mistake of fact with regard to subject matter
- If the subject or consideration is against the public policy
- If any part of consideration is unlawful
- If in restraint of trade or business or lawful profession
- If in restraints of legal proceedings
- If the meaning of which is not certain or capable of being made certain

Remember the Basic Principles of Contract Law

- Mutual assent – intent to contract. There must be a “meeting of the minds.”
- Offer and acceptance.
- Consideration – bargain for exchange.
- Conditions – precedent and subsequent.
- Representations, warranties, covenants and conditions.
- Conclusion of a contract – expiration, termination, rescission.
Features of a Commercial Agreement

• Identification of Parties
• Terms of the Agreements
• Commercial Benefits
• Obligation of the Parties to the Agreement
• Purpose of the Agreement
• Termination Details etc.
• Signature of the Parties to Prove Consent

Role of the Attorney

• Counsellor to Client
• Advocate
• Planner
• Negotiator

The Lawyer Commercial.mp4
What is a Document?

• A “Document” means any matter expressed or described upon any substance by means of letters, figures or marks or by more than one of those means, intended to be used or which may be used, for the purpose of recording that matter.

• Examples:
  – Writing
  – Words printed, lithographed or photographed
  – A map or plan
  – An inscription on a metal plate or stone
  – A Caricature
  – Electronic records

The Goal of Drafting Agreement – Precise Documents

• Accuracy.
• Completeness.
• Exactness.
• Able to withstand hostile, critical review.
What is Drafting?

• The synthesis of law and fact in a language form
• The practice, technique or skill involved in preparing legal documents that set forth the right of parties
• A legal document is an enumeration of the transaction and all terms and conditions agreed to between the parties involved.

Essentials of Drafting Agreements

1. Title
2. Introductory Clause
3. Preambles/Recitals
4. Function and Layout
5. Definitions or defined terms
6. Parties to the agreement
7. Consideration
8. Representations, warranties, covenants, indemnities, guarantees, releases
9. Mode and manner of payment of consideration
10. Rights and liabilities of each party
11. Boilerplate
12. Exhibits and attachments
13. Signature & stamp/seal, date & place of execution
14. Necessary no of copies on stamp paper
15. Witness by independent persons
16. Stamp paper of prescribed value
17. Registration before appropriate authority

Sample contract
Parties

• Person
  – usually identified by name and ID number together with residential address

• Company
  – Great Expectations (Proprietary) Limited, a limited liability company incorporated in Pakistan under registration number 1992/014530/06 with its registered office and principal place of business at ........;

Parties (cont’d)

• Partnership [Not a separate legal person]
  – the partnership between Abdul Karim (National Identity Card Number 42201-2078989-9) and Fawad Hassan (National Identity Card Number 42209-2079349-5 called the “Surprise Partnership” formed in terms of the partnership agreement dated 21 August 2009 having its principal place of business at .....
Be careful of recording capacity and relationship correctly

- Tom Jones acting in his capacity as duly authorised agent for Jane Hills by virtue of the Power of Attorney dated 1 January 2005;
- Distinguish among:
  - Principal
  - Agent
  - Trustee
  - Contracting for the benefit of a third party (i.e. acting as principal but rights are in favour of a third party who can accept them)

Characteristics of Plain English Drafting

- Short sentences.
- Definitive, concrete, everyday language.
- Use the “active” voice.
- Use tabular presentation.
- Separate paragraphs and sections with headings for individual or different concepts.
- Avoid the use of “legal jargon,” Latin or other foreign terms.
- Avoid the use of double negatives.
The Drafting Process

- Investigate the facts.
- Investigate applicable law as needed.
- Develop a contact list and task schedule by deadlines and responsible party.
- Prepare initial drafts, use precedents and templates where appropriate.
- Circulate drafts for comments and revise as necessary. Negotiate and memorialize the final definitive documents.
- Execution of documents.
- Closing.
- Post Closing adjustments and clean-up.

Points to be Kept in Mind while Drafting Agreements

- Prepare an outline
- Establish a single principle of division of matter
- Arrange in logical sequence
- Give appropriate headings
- Remember audience in mind
- The text should be clear in writing
- Use concrete word
- Be concise
- Avoid gender specific words as far as possible
- Write in short sentences
- Use proper punctuation
- Avoid passive voice
- Put statements in a positive form and make definite assertions
- Avoid unnecessary, hesitating and non-committal language
- Coordinate ideas in similar form
- Keep related words together as the position of words in a sentence is the principal means of showing their relationship.
- In summaries, use one tense, especially the present tense.
- The emphatic words of a sentence should be placed at the end.
General Organizational Rules

- General provisions before specific ones.
- Important, central provisions before others.
- Rules before exceptions.
- Separate provisions or sub-sections for each concept.
- Technical, boilerplate and miscellaneous provisions located last, before signature blocks.

Common Drafting Rules

- Know the subject matter.
- Research, research, research.
- Understand the objectives of the parties.
- Analyze the implications of each contractual term.
- Use simple, clear language.
“Shall”, “Must” “May” and “Will”

- “Shall” and “must” are imperatives and cause a legal obligation to be imposed.
- “May” is permissive or discretionary.
- “Will” is predictive.
- Avoid the use of “should” because it can mean both ‘must’ and ‘would be desirable.’

Active Versus Passive Language

- Active voice is more precise than the passive voice.
- Example:
  - By the first of the month rent shall be paid by the tenant.
  - Tenant shall pay the rent on the first of the month.
Affirmative Versus Negative Language

• Where possible use affirmative language.
• Example:
  – The failure of Tenant to pay the rent on the first day of each month shall not be an incurable event in default.
  – The Tenant may cure an event in default caused by its failure to pay the rent when due.

Use of “And” and “Or”

• Items connected by “and” will be treated the same or in the conjunctive.
• Items connected by “or” will be treated alternatively or in the disjunctive.
• Avoid the use of “and/or” when referring to more than two items or parties.
• Example:
  – The fee shall be paid to the Player and Agent or Manager.
    • Who gets the fee?
Use of “Any”, “Each” and “No”

- Use “each” when there is an obligation or duty to be imposed.
  Example: Each Party shall pay its fees on May 1, 2006.

- Use “any” when there is discretion, a power or privilege to be accorded.
  Example: Any Party may pay its fees on May 1, 2006.

- Use “no” where there is an obligation to refrain from acting.
  Example: No Party shall [or may] pay its fees after May 1, 2006.

Present Versus Future Tense

- Where possible, use the present tense.
- A contract is a living document that continuously governs the parties.

Example:
  – If a Party should die…
  – If a Party dies….
Other General Rules

- Use the number of days rather than months or years.
  - 3 months is different than 90 days.
  - Specify whether the number of days are calendar days or business days.
- Avoid legal doublets and triplets.
  - E.g. null and void; swear and affirm; right, title and interest.
- Omit needless words – overdressing your drafting makes it more difficult to understand.
  - E.g. “At that point in time” = “then.”
- Remember the rules of grammar. They served you well when you were younger, don’t forget them now.

COMMON ERRORS AND ISSUES

- An agreement to agree
  - The seller will deliver the car in the colour and make to be agreed upon
- Drafting an obligation without identifying who has to perform
  - The car will be washed on Wednesday
- Unclear and circular definitions
  - An animal is human if and only if it has human parents.
- Options without providing the terms applicable to the exercised option
  - The seller will ascertain the quality of goods before supplying to purchaser.
But what if parties don’t know the details yet

- For example
  - an IT company is going to do a needs analysis and design a computer programme but the parties don’t know what functionality the program will have at the date of signature.
- Generally unenforceable if don’t know what the deliverable is.
- Generally unenforceable if essential terms are to be determined unilaterally by one party in its unrestrained discretion.

Agreements to Agree

- Can be subject to agreement but need a determining mechanism in the event of the parties failing to reach agreement
- Remedies
  - Have the parties refer the matter to a third party for determination – e.g. you have an option to buy the house at the fair market price on the date of exercise of the option as determined by XYZ estate agent. [Tie break mechanism]
Options without terms

• For example:

The tenant has an option to purchase the property. – Needs Flesh

Options without providing the terms

• Always ask HOW, WHEN, WHERE and WHAT?

The Landlord hereby grants the Tenant an option to, at any time prior to 1 January 2010, purchase the Great Property on the terms and conditions set out below. The option may be exercised by the Tenant delivering a notice of exercise to the Landlord at any time prior to 1 January 2010, failing which, the option will lapse. If the option is exercised by the Tenant, then the Great Property shall be sold by the Landlord to the Tenant on the following terms: [Deal with price, delivery date, warranties, etc]
Complex formulas and scenarios

• If the car is delivered on or before 10 September 2009, then the purchase price is 10(X-Y)/200, but if the car is delivered after 10 September 2008, then the purchase price is 20(X-Y)/300.

• Use a table and formulas rather than words alone and consider attaching examples – you want to be as clear as possible and the English language is often ambiguous or imprecise.

Check Your Ego At the Door!

• When someone reviews your work and marks it up, it does not mean that you are a failure.
• Receiving comments and mark-ups is part of your job.
• Learn from the comments of others.
• Use comments to continuously improve your documents.
Three Types of Review

• Colleagues and Supervisors.

• Client Review.

• Opposing Counsel.

Colleagues and Supervisor’s Review

• Comments are designed to improve the document i.e. constructive commentary.
• Make the suggested changes that improve the document.
• Make those changes that don’t harm the document.
• Disregard the explanation, the changes that harm the document.
Client Review

- Level of scrutiny by client depends on the client’s level of interest and training.
- In-house counsel and accountants generally review document in greater detail.
- Make sure that you point out the key terms and points in the agreement.
- Revise your document to incorporate your client’s comments.

Opposing Counsel Review

- Generally best to control the drafting process.
- Opposing counsel is acting in his or her client’s best interest.
- Read and understand every change that you are asked to make.
- Use red lining or black lining to identify changes that you are prepared to make.
Comments by Opposing Counsel

- Those beneficial to all parties or benefits the document.
  - Make the changes.
- Those that are matters of personal style of opposing counsel and do not harm the document.
  - Balance making the changes versus the time to negotiate the wording.

Comments by Opposing Counsel (cont’d)

- Those that harm either your client’s position or the smooth operation of the document.
  - Reject those changes with an explanation. Offer suggested wording changes that accomplish opposing counsel’s goals if it will not harm your client.
- Those comments that are valid points for future negotiation.
  - Consider what, if anything, you can ask in exchange for concessions.
  - Make sure you have client approval before accepting anything.
Ten Commandments of Reviewing Documents

- Check parties, dates, dollar amounts, and interest rates.
- Does the overall structure of the document suit your client’s needs?
- Does the document contain clear mandatory duty provisions regarding all performances by the other parties due to your client. Watch for the use of “shall”, “must”, and “may”.
- Review representations and warranties. What happens if they prove to be false – What are the remedies?
- Internal and external consistency. If there is more than one document, is the boiler plate consistent across all documents? Are defined terms used in a consistent manner?
- Do you have a substantive understanding of each provision and how they interact with each other?
- Hypothesize performance by thinking through each scenario during the life of the transaction.
- Hypothesize non-performance. What happens if one or both parties fail to perform all or part of the agreement? Goal is to resolve all issues at the drafting stage.
- Analyze what will happen if one of the parties files a bankruptcy petition or becomes subject to a receivership.
- Consider the worst case scenario where the parties have become hostile to each other. Will the document provide sufficient guidance of the parties or the Court?

A Final Thought

- Listen to your client.
- Understand the deal and what your client wants to achieve.
- Use precedents wisely.
- Draft the best document that you can.
- Read and re-read your document before sending to the other side and then again before your client signs it.
Contract Management – Definition

The activities of a buyer/seller during a contract period to ensure that all parties to the contract fulfil their contractual obligations

(Bailey, Farmer, Crocker, Jessop and Jones, 2008 p.419)

What is Contract Management.mp4
Contract Management

1. When does it start?
2. When does it end?
3. Who’s responsible for What?
4. Obligations after expiry?

Contract Life Cycle Management

“is the process of systematically and efficiently managing the contract creation, execution and analysis for maximising operational and financial performance and minimising risk”

(Elsey, CIPS Contract Management Guide, 2007)
# Types of Agreements/Contracts

## Business Agreements
- Acquisition
- Agency
- Advertising
- Consultancy
- Construction
- Distribution
- Franchise
- Foreign Collaboration
- Hire Purchase
- Investment
- Joint Venture
- Service
- Shareholder
- Stock Purchase
- Sale
- Technology Sharing
- Technical/Management Advisor
- Supply of Technical Know-how
- Technical Collaboration
- Sole Selling Agent
- Underwriter
- Management/Employees
- Security Service
- Brokerage
- Dealership
- Deed of Indemnity
- Indemnity by Debtor to his Guarantor

## Types of Agreements/Contracts

### Business Entity Formation
- Memorandum of Association
- Article of Association
- Partnership Deeds
- LLC Partnership
- Trust Deed
- Conversion of Partnership into LLC
- Associations of Persons Agreement
- Rules & Regulations of Society

### Cyber Laws Related
- Software Services
- Internet Services
- Privacy Policy and User
- Software Escrow
- Website Development
- Internet Gateway Merchant Legal Technology Related

### Alternative Dispute Resolution
- Reference to Sole Arbitrator
- Reference to Common Arbitrator
- Mediation Agreement

### Intellectual Property
- Patent and High Technology
- Licensing
- Consulting and Know-How
- Joint Development
- Software Development Agreements
- Agreement for Sale of Technical Know-How
- License of use of Copy Right
- Agreements relating to protection of designs/ trademarks/ patents/ and know how
- Agreement for use of Trade Mark
Types of Agreements/Contracts

- Banking/Financial
  - Loan
  - Bank Guarantee
  - Promissory Note
  - Letter Of Credit and Reimbursement
  - Indemnity Given To Bank For Issue Of A Duplicate Bank Draft
  - Indemnity given to the Bank by the Natural Guardian of Minor Children
  - Indemnity For Loss of Deposit Receipt

- Labor and Employment
  - Employment
  - Non-disclosure
  - Compensation
  - Collective Bargaining
  - Wage
  - Between Employer and Employee going abroad
  - Agreement to Refer Disputes to Arbitration
  - Contract Labor
  - Appointment of Managing Director
  - On the Job Training

Procurement Cycle

1. Identify Need
2. Develop Business Case
3. Define Procurement Approach
4. Supplier Appraisal
5. Tender Evaluation
6. Award Contract
7. Manage Implementation of Contract
8. Closure / Review Need

Life of a Contract Manager.mp4
Upstream and Downstream Contract Management

Contract management requires effective upstream & downstream management of the contract award

Upstream of Award of Contract

1. Preparing the business case and securing management approval
2. Assembling the project team
3. Developing the contract strategy
4. Risk assessment
5. Developing contract exit strategy
6. Developing a contract management plan
7. Drafting specifications and requirements
8. Establishing the form of contract
9. Establishing the pre-qualification, qualification and tendering procedures
10. Appraising suppliers
11. Evaluating tenders
12. Negotiation
13. Awarding the contract
Downstream of Award of Contract

1. Changes within the contract
2. Service delivery management
3. Relationship management
4. Contract administration
5. Assessment of risk
6. Purchasing organisation’s performance and effectiveness review
7. Contract closure

Conditions for successful contract management

• Arrangements for service delivery continue to be satisfactory to both parties
• Expected business benefits and value for money are being achieved
• Provider is co-operative and responsive
• Customer understands its obligations under the contract
• No disputes
• No surprises
• Professional and objective debate over changes and issues possible and can be settled amicably.
• Efficiencies are being realised.
Pareto and ABC Analysis

Kraljic's Procurement/Vendor Positioning Model
**Supplier Positioning Model of Potential Customers**

- Development
- Core
- Nuisance
- Maintain

**Power Dependency**

- Buyer dominance (>)
- Interdependence (=)
- Independence (0)
- Supplier dominance (<)

Attributes to buyer power relative to supplier

Attributes to supplier power relative to buyer

(Cox, 2003)
Who are the stakeholders in an agreement?

Stakeholder Analysis Matrix

RACI
Responsible, Accountable, Consult, Inform

<table>
<thead>
<tr>
<th>Stakeholder</th>
<th>Stakeholder Interests</th>
<th>Assessment of Impact</th>
<th>Potential Strategies</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Risk threat responses

- Reduction (retreat)
- Removal
- Transfer
- Retention
- Share

Risk Assessment

<table>
<thead>
<tr>
<th>Risk</th>
<th>Probability</th>
<th>Impact</th>
<th>Proximity</th>
<th>Mitigation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Scope Creep</td>
<td>0.7</td>
<td>20% ↑ cost</td>
<td>In a week</td>
<td>Negotiate</td>
</tr>
<tr>
<td>Schedule</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Resource</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Technology</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Performance Management

• Shaped by the original customer definition of need
• KPIs identified prior to contracting
• Likely to be directly linked to tender evaluation criteria
• KPIs should be
  – Proportionate,
  – fit for purpose,
  – easy to support by evidence,
  – accepted by key stakeholders

Performance Measures

• Cost and value obtained
• Performance and customer satisfaction
• Delivery improvement and added value
• Delivery capability
• Benefits realised
• Relationship strength
• Responsiveness
Managing Contract Change

• Acceptance that change happens
• Risk management predicts what might happen and potential responses
• Changes require negotiation
• Change management control is essential
  – Due process
  – Principles of transparency, fairness, accountability and stewardship
  – Appropriate record keeping
  – Due authorisation
• Accepted changes require scheduling to minimise adverse impact
• Changes need to be communicated

Contract Exit Circumstances

• Client contractual breach or changed circumstances
• Provider default
• Frustration of contract
• End of the contract term
Types of Agreements/Contracts

- **Banking/Financial**
  - Loan
  - Bank Guarantee
  - Promissory Note
  - Letter Of Credit and Reimbursement
  - Indemnity Given To Bank For Issue Of A Duplicate Bank Draft
  - Indemnity given to the Bank by the Natural Guardian of Minor Children
  - Indemnity For Loss of Deposit Receipt

- **Labor and Employment**
  - Employment
  - Non-disclosure
  - Compensation
  - Collective Bargaining
  - Wage
  - Between Employer and Employee going abroad
  - Agreement to Refer Disputes to Arbitration
  - Contract Labor
  - Appointment of Managing Director
  - On the Job Training

Double Breasting

- **When firms bid both union and non union projects through subsidiaries, it is called double breasting**
- **Allows firms to secure work in states that are nonunion without violating union laws**
Contract Pricing

- Unit price
- Lump sum
- Cost plus a percentage of the cost
- Cost plus a fixed fee
- Cost plus a fixed sum
- Broker
- Unilateral and bilateral
- Express and implied
- Joint and several
- Entire and severable
- Void and voidable
- Subcontracts

Dealing with a Lawyer

UMAR SHARIF as a Lawyer.mp4