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HOW TO DRAFT A GOOD CONTRACT

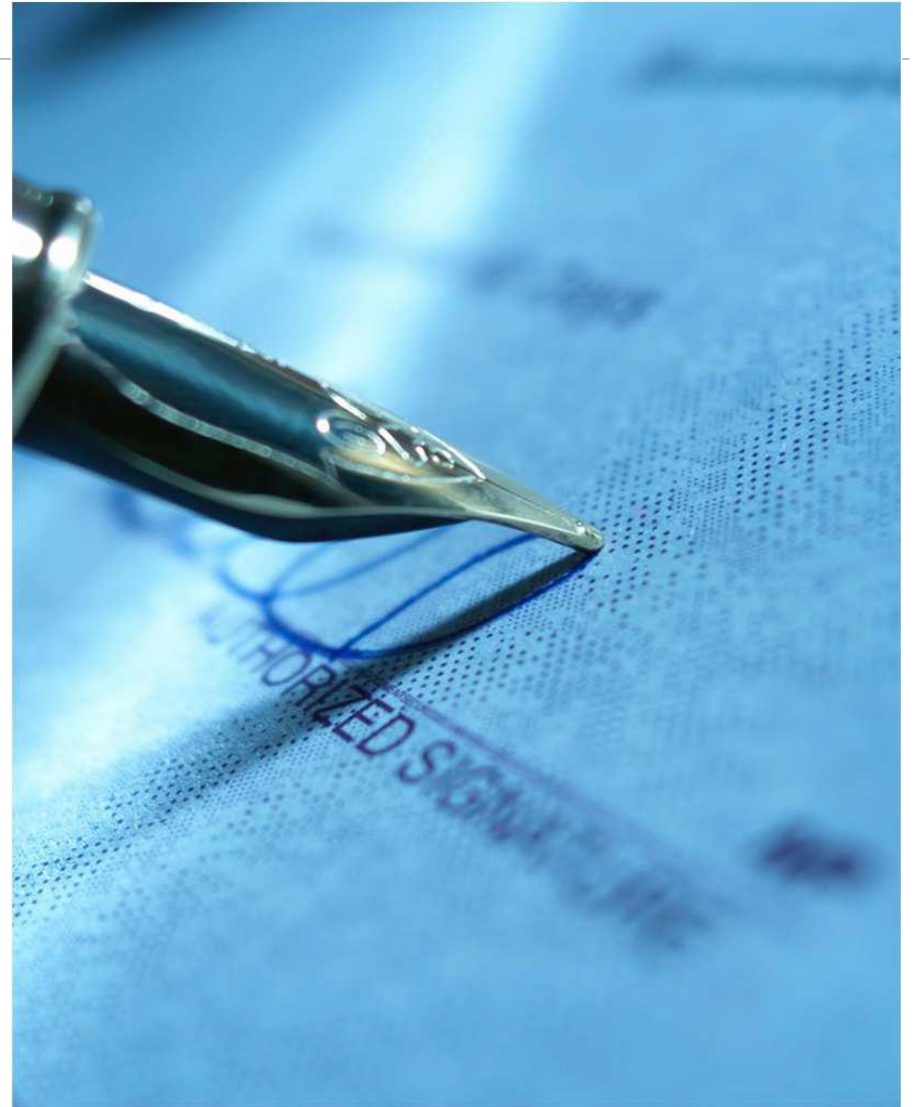
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LEARNING OUTCOME

- Essential elements of a Legal Contract
- Proper Structure and Format
- 10 most Negotiated Clauses
- Warranties, Indemnities and Representations
- Governing Law
- Some Common Contracts
- E-Contracts



WHAT IS A CONTRACT



- A promise enforceable by Law
- Written or Verbal
- Everywhere in Life
- Printed Terms of a Bottle Drink
- Opening a Bank Account
- Marriage / Divorce
- Sports Contracts
- Movie Stars
- Doing Business
- Viager Agreement

ROLE OF A LAWYER

- The drafter of the written agreement
- The Advisor on the law
- The Negotiator
- The Risk Manager
- A Trusted Person
- Good Listener
- With an Objective View



KNOW HOW A CONTRACT WORKS



Source: B2B Infomedia

THE BASIC ELEMENTS OF A CONTRACT

- Offer
- Acceptance
- Consideration
- Intention to create legal relations
- Certainty of Terms
- Capacity
- Consent



FRAMEWORK OF A CONTRACT



Anatomy of a Contract

- Parties
- Recitals
- Financial Terms
- Operating clauses
- Legalese
- Boilerplate clauses

DRAFTING ESSENTIAL CLAUSES:



10 MOST NEGOTIATED TERMS

1. Limitation of Liability
2. Price / Charge / Price Changes
3. Indemnification
4. Scope and Service Levels
5. Termination
6. Payment / Payment options
7. Responsibilities of the Parties
8. Warranty
9. Liquidated Damages
10. Delivery

Source :World Commerce & Contracting 2020



REPRESENTATIONS & WARRANTIES

What are Representations and Warranties?

- **Representation:** a statement of fact made to induce another to enter into a contract
- **Warranty:** assurance by one party of the existence of a fact upon which the other party may rely
- A breach of warranty gives rise to a claim for damages while the breach of a representation gives rise to a claim for misrepresentation which may allow the purchase to rescind the agreement.
- The main use of representations, warranties and indemnities is to place the risk of unknown issues on the other party.

REPRESENTATIONS & WARRANTIES

When do they have to be true?

- At the signing of the agreement
- At closing and at each subsequent closing

Considerations when drafting representations and warranties

- Consider whether the representation and warranties are appropriate
- Who is making the representation?
- Any issues arising from due diligence that needs to be included?
- Materiality

Representation and Warranties Insurance?

- There are insurance tailored for M&A transactions to help control transactional risks.
- Beneficial to both the seller and buyer.

INDEMNITIES

An indemnity is an express obligation to **compensate for defined loss or damage**, as opposed to a warranty which is only a contractual promise whose breach gives rise to an **action for damages** for breach of contract.



INDEMNITIES



Why rely on indemnity clauses?

- Any question of Remoteness avoided
- Compensated for any other loss or damage caused by the defect or failure of the other party to perform the contract properly
- Such remedies are usually given by way of an indemnity rather than a warranty as it is easier to enforce.
- Avoids problems with the duty to mitigate which applies on a breach of warranty.

INDEMNITIES

Examples of Indemnity clauses

“Supplier undertakes that it will indemnify and **keep** the Customer indemnified against all proceedings, costs, expenses, liabilities, injury, death, loss or damage arising out of the breach or negligent performance or failure in performance by the Supplier of the terms of this Agreement.”

INDEMNITIES

Examples of Indemnity clauses [continued]

“The Supplier shall indemnify and keep the Customer indemnified against all liabilities, costs and expenses in relation to death or injury to persons or loss of or damage to tangible property to the extent that such death, injury, loss or damage is attributable to the willful or negligent acts or omissions of the Supplier its officers employees agents or sub-contractors.

The remedies contained in this Clause are **without prejudice to and in addition to** any warranties, indemnities, remedies or other rights provided by law or statute or under any other provision of this Agreement for the benefit of the Buyer.”

Source: Richard Christou, Boilerplate Practical Clauses (sixth edn, 2012), p 162-164

INDEMNITIES

Examples of Indemnity clauses [continued]

“The Contractor shall indemnify and keep the Customer indemnified against all liabilities, costs and expenses in respect of claims brought against the Customer by third parties in relation to death or injury to persons or loss of or damage to property where and to the extent that such death, injury, loss or damage is attributable to the willful or negligent act or omission of the Contractor, its employees, agents or subcontractors.

PROVIDED HOWEVER that the Customer:

- i. promptly notifies the Contractor of such claims;
 - ii. allows the Contractor if the Contractor so requests to conduct and control (at the Contractor's sole cost and expense) the defense of such claims and any related settlement negotiations; and
 - iii. affords all reasonable assistance to the Contractor (at the Contractor's sole cost and expense) and makes no admission prejudicial to the defense of such claims....”
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BOILERPLATE CLAUSES

- Clauses common to nearly all commercial contracts.
- Regulate, control and modify parties' respective rights and their operation and enforcement
- Other boilerplate clauses set out good commercial practices that should be included in any commercial contract
- Examples include:
 - service of notices
 - Variation of contract
 - Severability
 - Translation
 - All other contracts void
 - Dispute Resolution
 - Governing Law



GOVERNING LAW



- This is the law use to interpret the contract
- It can be the law of the country of the parties
- It can also be the law where the contract is performed
- Sometimes it's the law where a legal claim is to be made
- Must be mutually agreed by parties
- Do not draft contracts according to laws you are do not know
- Separate from Dispute Resolution Law and Rules

E-CONTRACTS



- E-Commerce Law 2019
- New Law on e-Commerce introduced simultaneously with new Consumer Protection Law
- Sets out the regulatory requirements for recognizing electronic communications, electronic agreements and e-signatures.
- Specifically Sets out obligations and liabilities on banks and financial institutions concerning electronic fund transfers and payments.
- Clear data protection rules & requirements
- Sub-Decree 134, Aug 2020– require license from Ministry of Commerce and certificate from Ministry of Post & Communications to register domain name
- Settlement must be by a licenses PSP

COMMON BUSINESS CONTRACTS



NON-DISCLOSURE AGREEMENT

- Confidentiality agreements or non-disclosure agreements (“**NDA**”).
- Protects a party from the risks of misuse of information by the recipient.
- Time sensitive; easily overlooked
- Importance of such an agreement should never be underestimated.



PROTECTING CONFIDENTIAL INFORMATION

Importance of an NDA

- How important is it to enter into an NDA?

Extremely important!

- Confidential information have game-changing powers and intellectual property is a valuable asset.
- You lose your trade secret; you lose your value.



PROTECTING CONFIDENTIAL INFORMATION

Key Considerations for drafting a NDA

- Recipient is prevented from
 - (i) unauthorized disclosure of the confidential information and
 - (ii) using it for his/her own benefit (restricted solely for initial purpose)
- Duration for obligation of confidentiality
- Return and destruction of confidential information
- Non-solicitation
- Mutual or one-sided NDA?
- Exclusivity
- Remedies

LETTER OF INTENT

Binding / non-binding / selectively binding?

Provisions intending to be binding must be identified with legal requirements for creation of a valid contract satisfied

If silent, is it binding?

Courts will infer the intent of parties



KEY TERMS

- Principle terms and conditions of the proposed transaction
- Purchase price (any adjustments?)
- Conditions Precedent to the transaction
- Milestones and timelines
- Representations / Warranties
Indemnification
- WWWWWW





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