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The Lifecycle of a Contract

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Association of Corporate Counsel
Charlotte Chapter

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Priorities



vs.



Lifecycle of a Contract - Priorities

- 1 Letter of intent; "deal" stage
- 2 Definitive agreement negotiation and execution
- 3 Disputes; dispute resolution

1 Letter of Intent; Term Sheet

- Business parties may prepare a letter of intent (“LOI”)
- Parties exchange informal term sheet
- Sales or procurement team reach “handshake”

1 Letter of Intent; Term Sheet

Transactional Lawyer Considerations:

- Clarity of the parties’ responsibilities
 - Ideally, include anything out of the ordinary – deviations from standard payment terms or warranties, exclusivity, specific deliverables to be provided, additional ancillary agreements
- Viability of drafting / implementation
 - “The parties *will cooperate with each other as necessary and will work in good faith to come to an agreement* about the payment of this commission...”
- Legal (or other) pitfalls – need to pressure-test!

1

Letter of Intent; Term Sheet

Transactional Lawyer Considerations:

- Negotiating leverage can instruct how much a party wants to negotiate at the term sheet stage vs. punting to the definitive agreements.
- Are all material terms addressed?

1

Letter of Intent; Term Sheet

Litigator Considerations:

- LOI enforceability
 - Expressly “not binding”
 - Nature and materiality of open terms
 - Partial performance
 - Context of negotiations
 - Custom of transactions

Burbach Broad. Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401, 408 (4th Cir. 2002)
Sony Ericsson Mobile Commc'ns USA, Inc. v. Agere Sys., Inc., 672 S.E.2d 763 (N.C. App. 2009)

1

Letter of Intent; Term Sheet



LOI Enforceability Examples

Radio Station Asset Sale

- 5 pages; listed assets to be sold; provided purchase price of \$2.5 million (cash and debt); subject to due diligence and negotiation of asset purchase agreement
- “intend to be bound”

Development Master Agreement/SOW

Burbach Broad. Co. of Delaware v. Elkins Radio Corp., 278 F.3d 401, 408 (4th Cir. 2002)
Sony Ericsson Mobile Commc'ns USA, Inc. v. Agere Sys., Inc., 672 S.E.2d 763 (2009)

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Letter of Intent; Term Sheet



Litigator Considerations (cont'd)

- Whether obligation to negotiate in good faith is created
- Whether reliance claim created

RREF BB Acquisitions, LLC v. MAS Properties, L.L.C., 2015 NCBC 58 (2015)
Teachers Ins. & Annuity Assoc. of Am. v. Tribune Co., 670 F. Supp. 491 (S.D.N.Y. 1987)

1

Letter of Intent; Term Sheet



Litigator Considerations (cont'd):

- Confidentiality obligations, confidentiality practicalities
- Express or implied exclusivity
- Timing and termination rights; when and how LOI is abandoned

Lifecycle of a Contract - Priorities

1

Letter of intent; “deal” stage

2

Definitive agreement negotiation and execution

3

Disputes; dispute resolution

2 Negotiation and Execution

- Often, one party will have a form they want to use – need to clarify up-front who has initial drafting responsibility
- Form may control; but have opportunity to provide influence in Statement of Work

2 Negotiation and Execution

Transactional Lawyer Considerations:

- Needs to match the terms in the LOI, if applicable, but this is a chance to clarify ambiguities:
 - What does a “sufficient” level of inventory mean?
 - What is a “prompt” confirmation or notification?

2 Negotiation and Execution

Transactional Lawyer Considerations (cont'd):

Term and termination

- When does the agreement terminate (or is it evergreen)?

Term. The term of this Agreement ("Term") shall be deemed to have commenced on June 1, 2023 and continue through May 31, 2024, unless earlier terminated as provided for herein. *No later than January 31, 2024, the parties shall confer in good faith regarding an extension of this Agreement for up to an additional two years based on a review of services and fees.*

- How can it be terminated, and by whom?
- What (if any) rights or obligations do or should survive termination?

For any and all sponsorship revenue that is procured and/or negotiated, or results from an introduction, by Sponsor, and any continuation of such relationship in any form (including, without limitation, renewals, extensions, substitutions, or modifications thereof), regardless of whether such compensation is paid during the term of this Agreement or thereafter ("Sponsorship"), *Client shall pay Sponsor an amount equal to twenty percent (20%) of the gross revenue received pursuant to such Sponsorship(s).*

2 Negotiation and Execution

Transactional Lawyer Considerations (cont'd):

- Watch for potential liabilities, where might you get in trouble?
 - Is the company being asked to make reps and warranties that could lead to indemnification claims?
 - Can the company actually fulfill its covenants?
- Limitation of liability provisions / limitation of damages
 - Consider which party is more likely to have a claim against the other (i.e., do you want to avoid consequential damages; is a damages cap appropriate?)

2 Negotiation and Execution

Transactional Lawyer Considerations (cont'd):

- Assignment; change of control consent requirements
 - May want to build in flexibility for a sale or internal reorg
- Restrictive covenants
 - Will there be sensitive information going back and forth?
 - Is there a concern about employee solicitation?
 - Are there custom-designed products such that a non-compete/exclusivity provision makes sense?
 - Try not to run afoul of anti-trust concerns (provisions can't be overly restrictive and limit competition)

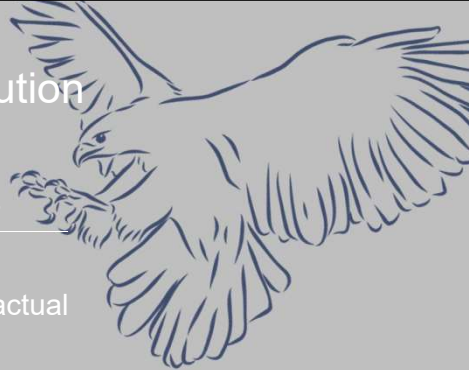
2 Negotiation and Execution

Transactional Lawyer Considerations (cont'd):

- Remember, the parties can always agree to something different later – but if they don't agree later, the company needs a document that best protects its interests.
- Make sure the company and signatory are correct, and the agreement is properly authorized!

2

Negotiation & Execution



Litigator Considerations

1. Termination rights
 - Common law v. Contractual
 - Questions to ask:
 - Are termination events sufficiently clear?
 - Does termination timing provide an appropriate path to prevent further damage?
 - Are cure periods appropriate?
 - How do termination rights impact other remedies?

2

Negotiation & Execution



Problematic Examples

(6) By the Company for any reason the Company feels could reasonably jeopardize the integrity of its operations or systems and/or could impair the independent clinical judgment, professional responsibilities, reputation, or licensure;

a) In the case of Company's material failure to meet staffing plan requirements which Company has not cured within ninety (90) days after written notice by Customer of such failure

2

Negotiation & Execution

Litigator Considerations (cont'd)

2. Confidentiality Restrictions

- Substantive and meaningful
- Practical way to identify information

Problematic Example

(a) Company shall not disclose any Confidential Information without express written consent of Customer. "Confidential Information" means information that is confidential, proprietary, or trade secret information provided by Customer.

2

Negotiation & Execution

Litigator Considerations (cont'd)

3. Liquidated Damages

- Consider nature of agreement; potential dispute
- Questions to ask:
 - Is this kind of contract where liquidated damages are often useful (construction, IP, critical supply)?
 - Is the purpose to provide a means to compensate for loss or to encourage performance?
 - Are liquidated damages focused on the specific breach concerned about?

2

Negotiation & Execution

Litigator Considerations (cont'd)

4. Injunctive & Exclusivity of Remedies
 - Evaluate whether and to what extent remedies are exclusive and injunctive relief is available.
5. Payment Structures/Leverage
 - Assess practical allocation of obligations to maximize leverage.
 - Timing of payments; invoicing
 - Delivery terms

2

Negotiation & Execution

Litigator Considerations (cont'd)

6. "Boilerplate"
 - Pre-dispute processes (mediation)
 - Venue choice (geographic)
 - Arbitration
 - Attorney's fees for enforcement

2

Negotiation & Execution



Litigator Considerations (cont'd)

7. Statements of Work

- Deadlines and measures tied to termination or other remedies
- Software “acceptance” standards
- Clearly define “scope” and “out of scope”

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Disputes; dispute resolution

3

Disputes & Dispute Resolution

Sometimes, things don't go as planned.

Then what?

3

Disputes & Dispute Resolution

Transactional Lawyer Considerations

- Business goal vs. language of the agreement
 - Even if you're "right" under the agreement and would "win" in court, is it in your best interest to maintain the relationship?
- Keep the materiality of the issue in mind
 - Litigation is expensive – is it really worth it to sue (or be sued) over a nominal amount of money just for the "principle" of the issue?

3

Disputes & Dispute Resolution

Litigator Considerations

- Put dispute into a big picture of the parties' relationship and course of performance; look beyond the specific issue of dispute
- Consider and understand obligations in relationship and industry
- Identify both sides' "shortfalls"

3

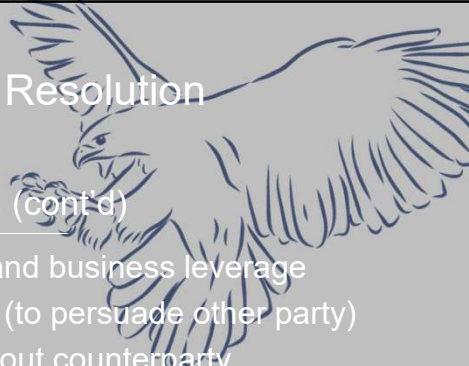
Disputes & Dispute Resolution

Litigator Considerations (cont'd)

- Review termination, cure, other processes and limitations
- Review agreements to identify ambiguities, "catch all" items, and develop a theory of how they fit together

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Disputes & Dispute Resolution



Litigator Considerations (cont'd)

- Identify points of legal and business leverage
- Develop theory of case (to persuade other party)
- Develop intelligence about counterparty



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Jon Krisko represents clients in complex, business-related litigation, which includes health care, government and regulatory investigations, class actions, technology and trade secrets, and product liability matters. His experience includes trials, arbitrations and appeals in federal and state courts.

Jon has represented public and private companies and individuals in high-stakes contractual and commercial disputes. His representations include multiparty cases, and mass and class actions in federal court, bankruptcy court and the North Carolina Business Court. In addition, Jon regularly counsels business clients as outside general counsel and oversees internal and government investigations. Jon serves as the co-chair of the firm's Litigation Department, as well as the chair of its Government & Internal Investigations Practice Group.

Given the stakes and complexity of the matters Jon handles, his practice involves establishing substantial relationships with clients and a deep understanding of his clients' industry, competitive landscape and business objectives.

Jon serves on Robinson Bradshaw's board of directors.

Practice Areas

Class Actions
Government & Internal
Investigations
Health Care
Intellectual Property & Technology
Litigation
Mass Tort & Product Liability
North Carolina Business Court

Bar Admissions

North Carolina

Education

University of North Carolina at
Chapel Hill, J.D., with high honors,
2002, Order of the Coif; Editor-in-
Chief, North Carolina Law Review,
2001-02
Duke University, B.A., 1995

Clerkships

- Law Clerk, The Honorable Karen LeCraft Henderson, U.S. Court of Appeals, District of Columbia Circuit, 2002-03

Experience

- Represented largest health care provider in the Carolinas in securing denial of preliminary injunctive relief in action brought by public company related to \$100 million anesthesiology contract.
- Represented major Carolinas health system in defense and dismissal of putative class action asserting claims that system's website improperly utilized health information provided by website users.
- Represented national health care provider in the defense and resolution of putative claims by individuals asserting claims arising from a cyberattack on provider's data systems.
- Represented Carolinas health system in defense and resolution of asserted class action under ERISA asserting breaches of fiduciary duties for record-keeping and investment portfolio decisions by system's retirement plan committee.
- Represented physician executive in securing denial of efforts by major Carolinas health system to enjoin his employment by system's competitor.
- Represented major Carolinas health system in obtaining the dismissal of a class action case asserting damages related to management of employee pension plan brought under ERISA.
- Represented national physician services company in the defense and resolution of retaliation claims brought by alleged whistleblowers under federal and state False Claims Acts.
- Represented CEO of medical laboratory defending against claims by bankruptcy trustee that sought recovery on False Claims Act theories asserting violation of federal and state medical lab regulatory restrictions.
- Represented Garlock Sealing Technologies in a trial to estimate the company's aggregate liability for personal injury claims and related proceedings. The case was one of the nation's most closely watched product liability cases, and it resulted in a ruling accepting the position of the company and rejecting the position of personal injury claimants who contended liability exceeded \$1 billion.
- Represented major Carolinas health system in obtaining a denial of injunctive relief that sought to compel system to administer non-FDA approved therapies for COVID-19.
- Represented groups of and individual professional athletes in the investigation and prosecution of investment advisers, successfully recovering investments on clients' behalf. Evidence developed in the investigation was used by federal prosecutors to obtain criminal convictions of responsible investment advisers.

Professional Affiliations

- International Association of Defense Counsel, Member
- Mecklenburg County Bar, Board of Directors, 2010-12
- North Carolina Bar Association, Appellate Rules Committee, 2006-11

Community Affiliations

- Leadership Charlotte, Class 33
- Lieutenant, U.S. Navy, Active Duty, 1995-99

Honors & Awards

- The Best Lawyers in America, bankruptcy and creditor debtor rights/insolvency and reorganization law, commercial litigation, litigation - banking and finance, litigation - insurance, litigation - intellectual property, 2017-24; Charlotte Litigation - Insurance Lawyer of the Year, 2018, 2020
- Benchmark Litigation, Future Star, litigation, 2015-23
- North Carolina Super Lawyers, business litigation, 2010-23
- Mecklenburg Access to Justice Pro Bono Partners Program, Pro Bono Honor Roll, 2021
- Charlotte Business Journal, Charlotte's Forty Under 40, 2012



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Elizabeth Tedford represents large publicly traded companies, smaller startups and privately held companies, and private equity funds and their portfolio companies in business transactions, focusing on domestic and international mergers and acquisitions and dispositions, and related equity and structuring matters. She also advises clients on a range of other general corporate matters, including drafting and reviewing commercial contracts, and preparing employment-related documents (including employment, severance, bonus, termination and similar agreements), incentive equity arrangements and lease agreements. Elizabeth has counseled multiple clients through large-scale corporate reorganizations and worked closely with clients' management teams to ensure a seamless transition. She also co-chairs the Mergers & Acquisitions Practice Group.

Elizabeth serves on Robinson Bradshaw's Recruiting Committee. Prior to joining Robinson Bradshaw, she was an associate with Kirkland & Ellis LLP in Chicago.

Experience

- Represents a Houston-based public company in its acquisitions of more than a dozen commercial, industrial and institutional heating, air conditioning, plumbing, and electrical contracting and related construction service companies across the United States.

Practice Areas

Corporate & Commercial
Finance & Capital Markets
Mergers & Acquisitions
Private Equity
Startups & Venture Capital

Bar Admissions

Illinois
North Carolina

Education

University of Virginia, J.D., 2011;
Senior Articles Editor, Virginia Law
and Business Review
University of Miami, B.A., cum
laude, 2007

- Represents a public company headquartered in the Netherlands in strategic acquisitions of metal heat-treating, processing, stamping and surface treatment companies; divestitures of various manufacturing business divisions; and internal restructuring and corporate governance matters from a U.S. perspective.
- Represents a small business investment company in equity and mezzanine debt investments and serves as primary counsel for certain of the fund's portfolio companies, assisting with incentive compensation agreements, employment agreements, commercial contract review and other general corporate matters.
- Represents a Charlotte-based public company in strategic acquisitions in the industrial lighting and engineered air movement segments; and internal restructuring projects.
- Represented various software and technology companies in connection with sales to public companies including Amazon and Opendoor.
- Represented a Palo Alto-based public software company in strategic acquisitions to supplement their existing product offerings.
- Represented a private equity fund in the disposition of a building products company.
- Represented a Charlotte-based public company in its strategic acquisitions of a business engaged in the design, manufacture, distribution and sale of mechanical seals for aerospace and industrial applications, and dispositions of various business lines.
- Represented a founder-owned manufacturer of plastic cards (e.g. loyalty and gift cards) in connection with a strategic acquisition, recapitalization and financing, and subsequent auction sale to a private equity group.

Professional Affiliations

- Leadership Council on Legal Diversity, Fellow, 2022
- American Bar Association, Business Law and Young Lawyers Sections
- North Carolina Bar Association Leadership Academy, Class of 2019

Honors & Awards

- Business North Carolina, Legal Elite, corporate, 2023
- The Best Lawyers in America, One to Watch, business organizations (including LLCs and partnerships), mergers and acquisitions, securities/capital markets, securities regulation, 2021-24; venture capital, 2023-24
- North Carolina Super Lawyers, Rising Star, business/corporate, 2018-22; mergers & acquisitions, 2023