

# IMPLEMENTATION NEGOTIATION: A TRANSACTIONAL SKILL THAT BUILDS ON AND TRANSFORMS CLASSIC NEGOTIATION THEORY

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## SUMMARY

Implementation negotiation is the specialized negotiation in which deal lawyers engage *after* the principals negotiate the business terms of the transaction. Classic negotiation principles guide these business term negotiations. But once the parties agree, the dynamics, tone, content, and purpose of the negotiation change. Parties are no longer looking at whether they can find a way to agree. They do agree. Now, the lawyers must transform the clients' bare bones agreed-on business terms into a contract that memorializes their joint vision.

Implementation negotiation theory does not displace classic negotiation theory. It simultaneously builds on that theory and its related principles and transforms them to work in a different context. Importantly, that context requires negotiators to have significant specialized knowledge and skills. Specifically, the deal lawyer must know not only contract law, but also the law specific to the deal—whether it be construction, real estate, securities, or employment law. In addition, the deal lawyer must know business, the client's business, and the implications of each business term. Finally, the deal lawyer must excel at risk and contract analysis and be more than just a little proficient in drafting.

This article begins by reviewing classic negotiation principles and then explains how implementation negotiation transforms those principles, including why BATNA recedes to the background, why

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seasoned negotiators know the parties' interests and issues and the expected zone of agreement, even before negotiations begin. In addition, the article explains why a contract's first draft anchors all negotiations and why contract analysis becomes such a salient skill. The article then details the multiple subcategories of implementation negotiation through narrative and a series of illustrative, simulated negotiations. It concludes by briefly discussing the implications of this new theory of negotiation for legal education.

I.      INTRODUCTION

Ten years ago, when I spoke at the first Emory Conference, I stated that negotiating a dispute differs from negotiating a contract. At that time, I urged the Academy to think through those differences and how they affected negotiation theory. Today, I return to that topic and describe a type of negotiation unique to deals. I've dubbed it *implementation negotiation*.

Before discussing implementation negotiation, I have a clip from *Pretty Woman*<sup>1</sup> that vividly portrays how many people think about transactional negotiations.

Characters

- Edward Lewis – played by Richard Gere
- Philip Stuckey – played by Jason Alexander
- James Morse – played by Ralph Bellamy

*This scene takes place inside a conference room*

Stuckey:      Mr. Morse, you said this morning you wished to speak to Mr. Lewis. Mr. Lewis is now listening.

Morse:        I've reconsidered my position on your acquisition offer . . . on one condition. I'm not so concerned about me, but the people who are working for me.

Stuckey:      It's not a problem. They'll be taken care of. [Pause] Well, then, gentlemen. If we could address ourselves to the contracts in front of you. If you look at . . . .

Lewis:        Excuse me, Phil. [Inhales] Gentlemen, I'd like to speak to Mr. Morse alone. Thank you.

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<sup>1</sup> PRETTY WOMAN (Touchstone Pictures and Silver Screen Partners IV 1990).

Stuckey: All right, gentlemen, you heard the man. Please wait outside.

Lewis: You too, Phil.

Stuckey: [Chuckles nervously] What do you mean?

Lewis: I mean I would like to speak to Mr. Morse alone.

Stuckey: Why does he get to stay? Please, please. I'll be right outside.  
...

[Intentionally omitted]

Lewis: [Exhales] Mr. Morse, my interests in your company have changed.

Morse: What is it you're after now, Mr. Lewis?

Lewis: Well, I no longer wish to buy your company and take it apart. But I don't want anyone else to, either. And it is still extremely vulnerable. So I find myself . . . in unfamiliar territory. I wanna help you.

Morse: Why?

Lewis: Mr. Morse, I think we can do something very special with your company.

Morse: What about our Navy contracts?

Lewis: Ah, they weren't dead. Just delayed. I . . . bluffed a little bit.

Morse: [Chuckles] You're very good at it.

Lewis: Thank you very much. It's my job. [Chuckles] I think we can leave the details up to the others.

Morse: I find this hard to say without sounding condescending, but . . . I'm proud of you.

Lewis: Thank you. I think we can let in the other suits now.

[Door opens] - Let's continue the meeting.

Morse: Come in, gentlemen. Sit down.

Stuckey: Edward, please, what was this all about? Hmm?

Lewis:            It's all yours, Phil. Finish it up.

Stuckey:        Hold it. Hold it. These aren't signed! These aren't signed!  
                      Could someone please tell me what the f\*\*\* is going on  
                      here?

Morse:            Mr. Lewis and I are going to build ships together. Great  
                      big ships.

**II.      DEAL NEGOTIATIONS DISTINGUISHED FROM  
                      IMPLEMENTATION NEGOTIATION**

Although this clip parodies a negotiation, it actually does a good job introducing transactional negotiations because it reflects the reality that they occur in two stages.

The first stage, of course, is the deal negotiation, when principals negotiate the business terms of the transaction. Lawyers may or may not participate in deal negotiations. Most lawyers would probably prefer to be included for multiple reasons. First, they want to safeguard their clients against inadvertently agreeing to a term that will be problematic. Second, some lawyers believe they can be useful in backstopping their principals on matters where the law and business intersect.

In any event, at some point, the principals will agree and writeup a term sheet, or they will agree to disagree and walk away from the negotiations. Classic negotiation theory and principles guide these negotiations.

If the parties agree, the dynamics, tone, content, and purpose of the negotiation change. Parties are no longer looking at whether they can find a way to agree. They do agree. Now, the lawyers must transform the clients' bare bones agreed-on business terms into a contract that memorializes their joint vision. At the same time, the lawyers must advance their respective clients' interests while reducing their risks. They must close the deal or risk the opprobrium of being called a deal killer. This is *implementation negotiation*.

Implementation negotiation theory does not displace classic negotiation theory. It simultaneously builds on that theory and transforms it to work in a different context.

Importantly, that context requires negotiators to have significant specialized knowledge and skills. Specifically, the deal lawyer must know the law, not only contract law, but also the law specific to the deal—whether it be construction, real estate, securities, or employment law. In addition, the deal lawyer must know business, the client's business, and the implications of each business term. Finally, the deal lawyer must excel

at risk and contract analysis and be more than just a little proficient in drafting.

Implementation negotiation cannot be divorced from drafting. A business term won during the principals' negotiation turns into a loss if the contract doesn't reflect the bargain accurately. I will elaborate on this point a bit later.

At this point, I'm going to give you a brief roadmap for the rest of the presentation. First, I will review classic principles of negotiation. I will then discuss how implementation negotiation affects the use of these principles. I will also explain how implementation negotiation is itself composed of different kinds of negotiation.

### III. THE CLASSIC NEGOTIATION PRINCIPLES

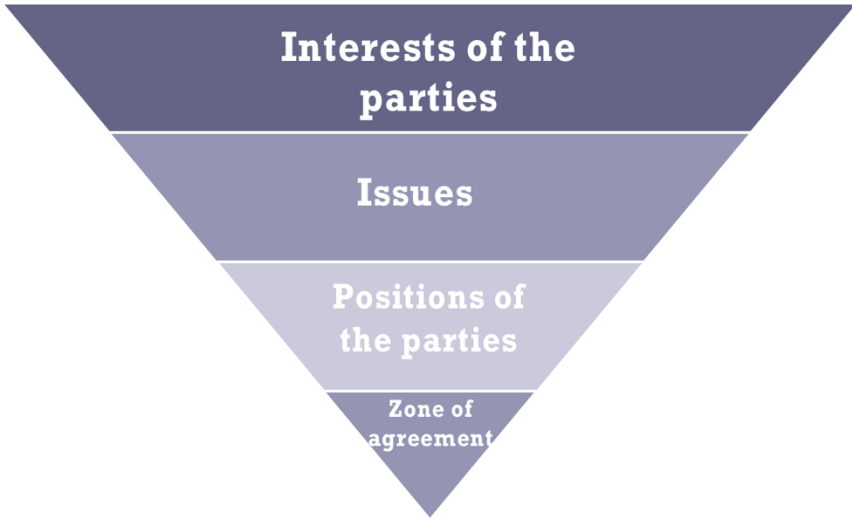
#### A. *BATNA*

The first negotiation principle I'll discuss is the all-important BATNA. BATNA is an acronym for the *best alternative to a negotiated agreement*. BATNA is what a party will do if negotiations fail. In settlement negotiations, the alternative is generally litigation. That's why negotiation is sometimes said to take place in the *shadow of the law*. If all else fails, the parties will end up in court, where case law rules.

Classic negotiation theory regards each party's knowledge of its BATNA and estimates of the other side's BATNA as critical to a successful negotiation. Only then can a party know whether to accept or reject an offer.

***B. Interests, Issues, Positions, and the Zone of Agreement***

The next four classic principles of negotiation theory compose a hierarchy. We will start with the broadest principle.



At the top are *interests*. An interest is something that is important to a party. For example, a prospective executive may worry about financial security.

Next are *issues*. An *issue* is a specific question or topic that the parties are discussing. Salary is a common issue for a company and a prospective executive.

The third principle is *positions*. A *position* is a party's specific proposal with respect to a specific issue. Again, in the employer/employee context, the prospective executive may take the position that she is entitled to \$100,000.

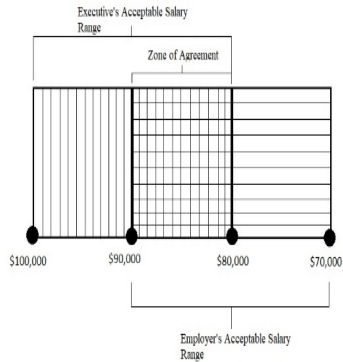
By aggregating these principles, we can make the general statement that negotiators stake out *positions* on multiple *issues* to achieve their *interests*.

We can particularize that generalization using the examples from the definitions.

A prospective executive asks for \$100,000 (a *position*) as salary (an *issue*) to achieve financial security (an *interest*).

The final classic principle in this hierarchy is the *zone of agreement*. This is where the parties' ultimate positions—what they are willing to do—overlap. It represents possible resolutions of the negotiation. The

next diagram depicts the zone of agreement in a hypothetical salary negotiation between an executive and a company.



Imagine that the prospective executive has asked for \$100,000 but is willing to accept \$80,000. The rectangle with the vertical lines represents that dollar range.

The company, however, has countered the \$100,000 request with an offer of \$70,000 but is willing to go as high as \$90,000. The rectangle with the horizontal lines represents that dollar range.

The overlap amount is the cross-hatched square, and it's a \$10,000 range between \$80,000 and \$90,000. That's the zone of agreement. Where in that zone the parties end-up will be a matter of negotiation.

This salary negotiation is a simple distributive negotiation. In a complex deal negotiation, the zone of agreement could depend on multiple factors, and, therefore, that could lead to an integrative agreement.

### ***C. Anchoring Effect***

The final classic negotiating principle I'll discuss today is the *anchoring effect*.

Anchoring is a psychological concept. It describes a cognitive bias; specifically, a person's tendency in decision-making to give disproportionate weight to the first piece of information the person learns.

So, for example, in the negotiation context, suppose a publisher offers a first-time author an advance against royalties of \$50,000. Even if the author had intended to ask for an advance of \$150,000, the cognitive bias of the anchoring effect will induce to the author to make counter-offers relative to the \$50,000. Negotiations will appear successful based on how much larger the advance is than \$50,000. The author will perceive a 20% increase as a win, even if he could have negotiated a 50% increase.

In contrast, if the author had asked for an advance of \$150,000, that number would have become the anchor, and the author would measure success by how much or how little he had to give away.

To state the anchoring effect succinctly, success is relative.

Because of the implications of the anchoring effect, sophisticated deal negotiators often spend significant time strategizing over whether to make a first offer and what it should be.

## **IV. THE CLASSIC NEGOTIATION PRINCIPLES IN THE CONTEXT OF IMPLEMENTATION NEGOTIATION**

With that, I'd like to move away from pure theory and look at how deal lawyers use these negotiating principles in implementation negotiation.

### ***A. BATNA***

Let's begin by contrasting the role of BATNA in deal negotiation and implementation negotiation.

When no deal yet exists, BATNA always casts its shadow over deal negotiations. But once parties agree, BATNA loses its primacy. Parties no longer need to worry about alternatives to an agreement. They have one. What they need is a contract that implements the business terms.

That is not to say that BATNA disappears. Rather, it recedes into the background and only comes to the fore in limited circumstances; for example, when the parties fail to address a significant deal term, understand an agreed-on-term differently, or need to restructure the deal.



Indeed, some lawyers believe that a deal is cratering if a client is discussing BATNA during an implementation negotiation.

### ***B. The First Draft, Anchoring, and Contract Analysis***

An implementation negotiation begins on the delivery to a party of the other party's first draft of the contract. That draft becomes the starting gate for all subsequent negotiations. It is the first offer, and that offer pertains to all matters great and small.

The breadth and detail of the offer gives the drafter and the client significant negotiating leverage. Within the bounds of ethics, a lawyer can draft each provision in ways that favor the client. This advantage achieves additional significance when the parties did not address an issue directly, but the contract needs to. Then, the drafter is even freer to craft a provision to the client's advantage. In addition, the drafter gains the flexibility *not* to address an issue that might likely be resolved to her client's detriment. Moreover, each word or its absence anchors that issue and becomes untethered only if the other side succeeds in negotiating it away.

Let me expand on this a bit. When a lawyer receives a draft from the other side, she must perform contract analysis. Contract analysis is much more than reading words on the page. The lawyer must understand the implications of the words from a business, legal, and practical perspective.

To analyze a contract requires a lawyer to disassemble it and to look at each provision and, when doing so, to ask and answer at least seven questions:<sup>2</sup>

- What is the business purpose of the provision?
- Does the provision properly incorporate the agreed-on business deal?
- Can the provision better protect the client and reduce the risk?

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<sup>2</sup> Based on Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* 424-425 (2d ed. 2014 Wolters Kluwer).

- Can the provision further advance the client’s goals?
- Are there business issues?
- Are there legal issues?
- Are there drafting issues?

Contract analysis differs from contract interpretation. Contract interpretation assumes an ambiguity or a lack of clarity. Contract analysis precedes this determination. It asks the questions that provide the insight into the provision’s meaning and effect. Contract analysis may well lead a lawyer to conclude that a provision is ambiguous, but it goes way beyond and asks, “What business, legal, and drafting issues are hidden here?”

Drafters can hide issues in multiple ways. For example, a drafter can quite often effectively trap a reviewing lawyer by not addressing a possibly contentious issue. Reviewing lawyers tend to laser focus on the specific words on the page. Silence is harder to find. That’s why thinking through a deal’s business and legal issues before reviewing a contract becomes imperative. If a lawyer doesn’t find the issue embedded on page forty-five or notice a key provision’s absence, he has lost the negotiation on that issue and harmed the client. A lawyer cannot win what he never negotiated, and he cannot negotiate what he did not find. The absent business or legal term was anchored when the other lawyer drafted the contract and omitted it. Unfortunately for the reviewing lawyer and the client, it may remain so.

The anchoring effect makes expertise in contract analysis an indispensable skill for any lawyer conducting an implementation negotiation. Only by doing this work can a lawyer discover a contract’s business, legal, and drafting nuances and the associated negotiation topics.

There are at least three take-aways here.

- First, writing the first draft anchors all negotiations to the provisions in or absent from that document. All counter-offers and results are relative to that anchor.
- Second, whether a client characterizes its lawyer’s implementation negotiation as successful depends heavily on that lawyer’s contract analysis skill—a skill law schools don’t teach as part of classic negotiation theory.
- Third, anchoring in implementation negotiation establishes the default contract provision (or its omission), absent contract analysis and subsequent negotiation.

A final word about a contract's first draft. Contrary to the writing of some commentators, lawyers rarely jockey for the right to author a contract's first draft. Industry custom generally dictates who the drafter is. Typically, it is the lawyer whose client has the most financial risk. Therefore, barring unusual circumstances, the lawyers for employers, landlords, and lenders write the first draft.

The convention with respect to acquisitions varies, depending on the asset being purchased. With respect to real estate purchases and the purchase of goods and services, the seller's lawyer typically writes the first draft. With respect to business acquisitions, the manner of sale determines who becomes the drafter. Generally, in a negotiated acquisition, the buyer's lawyer writes the first draft (including the purchase agreement for any real estate). But if the seller is auctioning the target, the seller's lawyer typically writes the acquisition agreement's first draft.

### ***C. Interests, Issues, Positions, and Zones of Agreement***

Now, I'd like to return to interests, issues, positions, and zones of agreement.

As you know, each type of contract has business and legal issues that recur. That means that, before a lawyer begins an implementation negotiation, he generally already knows how each party's role in the transaction affects that party's specific interests, issues, and likely positions. For example, in the implementation negotiation of an employment agreement, clients in the employer role will typically share common interests and assert similar positions with respect to specific issues. Of course, businesses differ, and deal-specific facts will always affect all aspects of an implementation negotiation, whether it be interests, issues, or positions.

Let me be a bit more concrete with the example of an employment agreement implementation negotiation. So, in that context, the client in the employer role generally wants to hire and retain a first-class work force—an interest. But that interest in a high-quality work force leads almost inevitably to the contentious issue of the scope of the employer's right to terminate the prospective employee for cause.

Without much research, someone can predict the positions the parties will assert. The company will want broad rights to terminate

employment. In contrast, the employee will want to restrict the scope of reasons that permit termination for cause.

Because this issue and others appear in almost all employment agreement negotiations, experienced employment lawyers also know the common ways that lawyers resolve these issues. They may regularly rely on a half dozen or more. I have termed these common resolutions, in the context of implementation negotiation, the *expected zone of agreement*. The expected zone of agreement comprises the multiplicity of possible resolutions and all their variations—both business and legal.

*Expected* is the salient word. When negotiating a specific issue, a deal lawyer need not pluck a resolution from the array of choices in an expected zone of agreement. Lawyers may well resolve the issue outside the zone. Who the parties are, their relative bargaining power, the specifics of a party's business, and other deal-specific facts may well lead to a creative resolution outside the expected zone of agreement.

The repeated confluence of interests, issues, positions, and the expected zone of agreement puts a premium on a lawyer's knowledge. A lawyer can't propose a resolution that she doesn't know exists. It takes years of experience to acquire this knowledge and, equally as important, to know how to exploit it. Junior lawyers can do their best to prepare for an implementation negotiation by reading a treatise, but the experienced practitioner will have the advantage—not because of negotiation prowess (although that matters) but because of superior knowledge and greater experience.

Indeed, the neophyte lawyer petrifies the sophisticated client on the other side of the table. Negotiations become long and expensive when an unexperienced lawyer repeatedly asks for unreasonable changes. An atypical request is not per se unreasonable. Usually, a lawyer does not intend to be unreasonable. Instead, she stakes out an untenable position because she just doesn't understand that her requests do not reflect legal or business realities or common practice.

It is not unknown for a lender to require an unsophisticated borrower to retain sophisticated counsel, even if that makes a point harder to win. In the long-run, the negotiation will be more efficient, and the parties will finish the negotiation with a contract that works.

This time, the take-away is that a lawyer's success in implementation negotiation depends heavily on nuanced, foundation knowledge that is both general and transaction-specific.

To have foundation knowledge, a lawyer must know the law, business, contract analysis, risk analysis, negotiation theory, and drafting.

She must also understand the classic negotiation principles and their role, as transformed, in implementation negotiation. Moreover, in the context of a specific implementation negotiation, the lawyer must understand the business deal, the client's business, and the client's position on each business and legal issue. Finally, she must know how to resolve those issues through negotiation and drafting.

Here, I'm going to go on a bit of a tangent. A common conviction about implementation negotiation is that it does not involve the law. That's wrong. Although deal lawyers don't regularly cite case law when they draft contracts, they negotiate and draft using the infrastructure that is the law to memorialize a contract's business terms. That means they must know the applicable law *before* they begin to negotiate. That's not to say a deal lawyer never conducts research. But if a deal lawyer had to research 85% of a contract's provisions in a 120-page agreement, no one could ever complete an implementation negotiation. Although you can't see the case law in an implementation negotiation, it is omnipresent.

#### ***D. Categories of Implementation Negotiation***

At this point, I would like to showcase various aspects of implementation negotiation, each aspect for these purposes being deemed a category. To do so, I will either describe the category through narrative or illustrate it through a scripted negotiation.

Although I have discussed implementation negotiation as a unified concept, for pedagogic purposes, it can be broken down into categories. The categories are not silos, each separate from the next. Instead, they resemble colors of a rainbow, each distinctive, each merging into the next, together composing the entirety. These categories follow:

- Business issues.
- Risk allocation.
- Expected zone of agreement.
- Problem-solving.
- Translation.
- Legal effect.

- Logistics.
- Contract language.

Categorizing facets of implementation negotiations artificially distills an opaque, multi-factorial, multi-layered thought process. But deal lawyers don't distinguish one category from another. Instead, an experienced deal lawyer shifts from translation negotiation to risk negotiation to contract language negotiation without consciously deliberating, indeed, using the multiple categories virtually simultaneously. The parts are the whole. This is especially so with respect to negotiations involving business issues, the expected zone of agreement, and problem solving. These categories have a greater breadth and often comprise multiple other categories.

This article's conclusion follows the exposition of the categories.

## V. SIMULATIONS AND DESCRIPTIONS<sup>3</sup>

### A. *Business Issues Negotiations*

Although clients negotiate the salient business terms of a transaction, business issues remain for the implementation negotiation. A careful analysis of a cross-section of agreements reveals that *five business issues recur in most agreements*.<sup>4</sup> A general understanding of these issues enhances a student's (or lawyer's) ability to recognize how each issue manifests itself in a specific agreement. The five issues are money, risk, control, standards, and endgame. They are the five prongs of the *business issue framework*.

Clients usually negotiate the salient, distributive monetary issues during deal negotiations. Nonetheless, during an implementation negotiation, lawyers will often negotiate other kinds of monetary issues: indemnity baskets and caps, formulae for royalties in trademark license agreements, and the details of earn-out calculations. In addition, lawyers

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<sup>3</sup> The simulations that follow are intentionally amicable. More contentious simulations, while ultimately instructive, would detract from their role of demonstrating basic concepts.

<sup>4</sup> I first described these business issues in my article *Thinking Like a Deal Lawyer*, 54 J. Legal Educ. 223, 228-232 (2004). This article's discussion of the five-prong framework quotes and paraphrases the somewhat summary treatment in the original article and the more detailed exposition in my textbook, *Drafting Contracts: How and Why Lawyers Do What They Do* Ch. 25 (2d ed. Wolters Kluwer 2014).

may rely on their practice specific business expertise. For example, a lawyer who regularly negotiates royalty agreements for authors might be able to advise his client that publishers generally offer royalties for sales in a context that the clients didn't discuss. Those negotiations may return to the clients' purview, but that issue's negotiation began in the implementation negotiation.

The second prong is risk. Representations and warranties, covenants, and conditions are all risk allocation mechanisms. How they are negotiated directly affects a client's risk in a transaction. Risk can also manifest itself in multiple other ways in a transaction. First, a contract can raise the specter of tort liability—fraudulent inducement, product liability, or tortious interference with contract. Second, the provisions can create contract risk. For example, a non-compete, liquidated damages, or an indemnity provision could be unenforceable. Third, a contract could create the risk of statutory liability. A classic example is liability under the securities laws. Finally, risk could be inherent in the transaction. Credit risk is a salient example.

Ferretting out risks is not usually a problem for most lawyers. They know how to issue spot. But, if that is all that a lawyer does, she will justly earn a reputation as a deal killer. To be effective, she must assess the probability that a risk will occur, and if it is significant, find a way to control it (thereby using one business issue to address another).

The third business issue is control. In analyzing control as a business issue, the initial inquiry must be whether having control is good or bad from a client's perspective. The answer, of course, depends on the facts. For example, limited partners enjoy limited liability because they exercise no control over the limited partnership's management. In this context, lack of control is good. However, limited partners generally do not want to abdicate to the general partner all control over their investment. They want the right to decide when and how to protect their investment. Therefore, the limited partners will seek as much control as the general partner will tolerate and as much as they can accrete without becoming general partners under the relevant state law. Thus, control is a two-edged sword for limited partners.

Control is always an issue when there is risk. A deal lawyer must not only recognize risk, but also determine how to control or diminish it.

The fourth prong of the framework is standards. Virtually every word in a contract is a standard. There are both macro and micro standards. For example, every representation and warranty establishes a standard. If the standard is not met, the recipient of the representation and warranty may sue the maker. This is a macro standard. However, that macro standard can be changed at the micro level. By changing a word or a phrase in a representation and warranty, the standard changes. Are property, plant, and equipment in *good* repair, *customary* repair, or *in compliance with industry standards*?

Covenants and conditions are also standards, as is every adjective (*material* contracts) and adverb (*promptly* deliver). Definitions are also standards (how a financial ratio is defined determines the standard of financial performance to be incorporated into a loan covenant). A deal lawyer adds value by recognizing when a standard is unfavorable to the client and by negotiating an alternative that more accurately reflects the client's business goals.

The last prong is endgame. Every transaction ends. It may end happily, unhappily, or in a neutral way. The relationship between a banker and its borrower can end with the loan repaid in full (happy) or with the borrower in default (unhappy). A neutral termination occurs, for example, if a party exercises a right to terminate for convenience.

The business issues that arise are generally transaction specific. If a trademark license agreement ends, the contract must provide for, among other things, a mechanism for determining how and when the licensee should make the final payments, as well as instructions for what the licensee should do with any remaining merchandise. Endgame negotiations can be contentious because they often involve money—a topic near and dear to most clients' hearts.

A deal lawyer's initial step in a business issue negotiation is recognizing its existence. Resolution of the issue depends on her contract analysis and problem-solving skills and her ability to negotiate the details by ably using the other categories of negotiation.

To give you more of the flavor of a business issues negotiation, the next section defines risk allocation (a subset of the business issue of risk) and depicts a negotiation.

### ***B. Risk Allocation Negotiations***

A risk allocation negotiation is a subset of the general issue of risk—a business issue negotiation. At the risk of engaging in circularity, a *risk allocation negotiation* is one in which the parties or their lawyers divide



(allocate) the risk between the parties on any given issue. Many negotiators consider risk allocation a zero-sum game.

Because risk is an omnipresent business issue in any transaction, its allocation permeates a contract and its negotiation. Indeed, whole agreements can be devoted to risk allocation; for example, an indemnity agreement. Risk even rears its head in the notice provision: Who takes the risk that the notice has not been received? Of course, the risk can become obscured by changing the question: When is a notice effective, when given or received?

The risk allocation negotiation that follows depicts the familiar wrangling concerning the no litigation representation and warranty in an acquisition agreement. It is included as an example of a business issue negotiation.

### **Factual background<sup>5</sup>**

The Seller has agreed to sell to the Buyer all the shares of one of its wholly owned subsidiaries (the Target). The Buyer's lawyer drafted the first draft of the Stock Purchase Agreement, which contains the following representation and warranty:

**No Litigation.** No litigation is pending or threatened against the Target.

The negotiation between the Seller's and the Buyer's lawyers follows:

**Seller's lawyer:** Mark, why do you need this *no litigation* rep and warranty?

**Buyer's lawyer:** Sarah, you know this is standard stuff. We need to understand what our potential risks are when we own the Target.

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<sup>5</sup> This simulated negotiation draws on a hypothetical negotiation described in my textbook, *Drafting Contracts: How and Why Lawyers Do What They Do* 19-22 (2d ed. Wolters Kluwer 2014).

A litigation today could be a liability tomorrow. Even if we were to settle a case, we could be at risk for a significant sum just for the defense of a bogus claim. You know buyers, they don't want surprises down the road.

**Seller's lawyer:** Well, some assurance is certainly appropriate, but this flat rep is a bit much, even for a first draft. It's completely flat. We can't possibly give it, and you know that. Virtually every company has some litigation, and the Target is no exception. So, obviously, we can't give the rep and warranty as drafted. It's patently false. If my client makes it, you could argue there's an intentional misrepresentation or breach of warranty. I would like to change the rep in several ways, but I think we should start by scheduling both existing litigations and any known, threatened litigations.

**Buyer's lawyer:** That's reasonable. How about this?

**No Litigation.** Except as stated in **Schedule 3.14**, no litigation is pending or threatened against the Target.

**Seller's lawyer:** Thank you. That's a good start. It reduces some of our risk. But, unfortunately, that language doesn't go far enough. The rep also mentions threatened litigation. That's problematic for us. We can certainly schedule any threatened litigation that we know of. But what if we don't know of an existing, threatened litigation against the Target? Perhaps someone is claiming that a product malfunctioned and that person intends to sue. That's an *unknown*, threatened litigation. We don't think that's a risk you should ask us to assume. We'd like to qualify the rep by knowledge so that the contract limits our risk to *known*, threatened litigation.

**Buyer's lawyer:** Fair comment. But for the record, while your risk is going down, ours is increasing. The knowledge qualifier means we lose any right to sue you if an unknown, threatened litigation becomes an actual litigation post-closing. But I understand your point. How about this language? Does it address your concerns?

**No Litigation.** Except as stated in **Schedule 3.14**, no litigation is pending or, to the Seller's knowledge, threatened against the Target.

**Seller's lawyer:** Yes. That definitely helps. But let's be realistic. So far, this negotiation has gotten us only to the place where most first drafts start. You've known me long enough to know that the anchoring effect is not going to hold me back.

As I said, we really do appreciate the knowledge qualifier, but let me explain why my client has a concern that I hope we can address. As

you know, the Seller is a corporation, not a living, breathing human being. So, what does “its knowledge” really mean?

I’m not looking to be philosophical here, just practical. Is the Seller’s knowledge just what the CEO knows, or her knowledge and that of everyone else down to the employees on the shop floor? The Target has over 400 employees. We don’t want to be liable for a body of knowledge that’s so great. It’s just too much of a risk with no real way to reduce it. We’re not going to survey 400 employees. We propose reducing the risk by limiting knowledge to the actual knowledge of the Seller’s top three executives. We were thinking of a provision like the following:

**No Litigation.** Except as stated in **Schedule 3.14**, no litigation is pending or, to the knowledge of any one or more of the Seller’s three executive officers, threatened against the Target.

**Buyer’s lawyer:** Well, I can understand why your client would want that provision. It significantly reduces the Seller’s risk by minimizing the body of knowledge for which the Seller is liable. But now I think too much risk is being allocated to the Buyer. We can’t be in a position where those three officers walk around with their proverbial blinders on, so they have plausible deniability about what they didn’t know. Do you remember that fiasco back in the 1990s with Enron? That’s the corporation whose officers defended themselves by saying they just didn’t know. We don’t want to be in that position.

**Seller’s lawyer:** I understand. What do you want?

**Buyer’s lawyer:** If you want to limit knowledge to the top three executives, we’ll need to shift some of the risk back to your client by adding an imputed knowledge standard. We can do that by defining *knowledge*.

For the purposes of this representation and warranty, “**Knowledge**” means, cumulatively,

- (a)      the actual knowledge of each of A, B, and C and
- (b)      the knowledge that each of those officers would have had if the officer had conducted a diligent investigation.

**Seller’s lawyer:**    That works. Let’s move on to issue #147.

**Commentary**

This simulated negotiation oversimplifies the risk allocation negotiations that generally take place. Nonetheless, it depicts an interaction that acquisition lawyers could have.

Blended into this risk allocation negotiation were two other categories of negotiations. First, the negotiation of the meaning of *knowledge* was a contract language negotiation. In addition, the evolving negotiation displayed various resolutions within the expected zone of agreement. Indeed, these resolutions are so common that drafters often skip directly to one of them in a first draft. Doing so bypasses the negotiation, thereby facilitating and expediting the transaction.

***C. Expected Zone of Agreement Negotiations***

An *expected zone of agreement negotiation* explores the different ways—largely understood by experienced counsel—to resolve a common issue. A specific negotiation may or may not surface multiple options and conclude with the parties choosing from the options. Instead, the parties may focus on the parameters of one specific outcome to the exclusion of the others. The exemplars that follow depict three negotiations of the same issue.

**Factual background**

The Bank’s loan arrangement with the Borrower has two parts. First, the Bank will make a \$25 million revolving line of credit available to

the Borrower for three years.<sup>6</sup> Second, any principal amount outstanding at the end of the three years converts to a five-year term loan that the borrower repays according to a fixed schedule.

The Bank and the Borrower have, of course, agreed to other business terms, including interest rates, but those terms are not relevant for these simulated negotiations.

The following provision is from the Loan Agreement. Its purpose is to ensure that the borrower uses the loan proceeds in the borrower's existing business, the basis on which the bank made its credit decision.

**Certain Fundamental Changes.** The Borrower shall not, directly or indirectly, acquire all or substantially all of the assets of any other Person or any discrete division or business of any other Person.

### Variation 1

**Borrower's lawyer:** When I spoke to my client about this provision, it was hoping that the Bank could have some flexibility and not prohibit all acquisitions.

**Lender's lawyer:** What does your client have in mind?

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<sup>6</sup> A revolving line of credit acts as the business equivalent of a credit card with a credit limit. With a credit card, an individual may charge the cost of purchases until they aggregate to the credit limit. At month's end, the individual must pay the charges in part or in full. Any amounts repaid become available again for new charges. Any amounts unpaid are the equivalent of a loan, and the individual must pay interest on the outstanding amount.

Similarly, with a revolving line of credit, a bank provides a borrower with the discretionary authority to borrow principal in increments, as needed, up to a maximum amount. The borrower also chooses when and whether to repay principal and when and whether to borrow again. This flexible arrangement allows the borrower to restrict borrowings to times of financial need, thereby minimizing its interest costs. In contrast, with a term loan, a borrower borrows the full amount of the loan at the time of signing, even if it does not need all the cash at that time. Therefore, it pays interest on amounts it doesn't yet need.

**Borrower's lawyer:** Well, it has been thinking that one way to grow the company would be through a strategic acquisition, especially one that would significantly improve its long-term profitability.

**Lender's lawyer:** I can understand that your client might be interested in an acquisition, but the Bank agreed to lend short-term money for working capital, a short-term need. Agreeing that the Bank's funds could be used to finance an acquisition creates a whole new credit risk profile. An acquisition transforms a revolver intended for short-term working capital needs into a long-term loan, money that will be outstanding from day one. That's not the basis on which the Loan Committee approved the funds. To agree to your client's request, the Bank would need a new credit approval. I'm not sure your client wants to go that route. The Loan Committee might well deny your client's request and question the wisdom of its initial approval.

**Borrower's lawyer:** Message received. I'll take this back to my client.

**Variation 2**

**Borrower's lawyer:** When I spoke to my client about this provision, it was hoping you could have some flexibility and not prohibit all acquisitions.

**Lender's lawyer:** What does your client have in mind?

**Borrower's lawyer:** Well, it's been thinking that one way to grow the company would be through a strategic acquisition, especially one that would significantly improve its long-term profitability.

**Lender's lawyer:** I can understand that your client might be interested in an acquisition, but the Bank agreed to lend short-term money for working capital, a short-term need. Agreeing that the Bank's funds can be used to finance an acquisition creates a whole new credit risk profile. An acquisition transforms a revolver intended for short-term working capital needs into a long-term loan, money that will be outstanding from day one. That's not basis on which the Loan Committee approved the funds. To agree to your client's request, the Bank would need a new credit approval. I'm not sure your client wants to go that route. The Loan Committee might well deny your client's request and question the wisdom of its initial approval.

**Borrower's lawyer:** But that analysis isn't right in this instance. This isn't a straight-up revolver. In our deal, at the end of three years, any outstanding principal converts into a five-year term loan. Why shouldn't the Borrower be able to use it earlier for a long-term investment?

**Lender's lawyer:** That's a nice argument, but, real world, I can't see the Bank agreeing in advance that whenever the credit line has funds available to draw down, the Borrower can make such a significant change in its business model.

**Borrower's lawyer:** Ok. I think my client will understand the Bank's reluctance to give preapproval, but the president of the company feels that all these negative covenants are constraining his ability to run the company profitably. He's afraid that all the prohibitions will tie his hands and that the company will lose an opportunity to make a good strategic buy. He keeps telling me that he has to report to shareholders.

I think it would bring the concern level down if we could modify the covenant to say that all acquisitions are prohibited, except with the Bank's consent. I would hope that the Bank would be okay with that. From a practical perspective, with or without the consent provision, my client still needs to come to the Bank and get a piece of paper if it wants to do an acquisition. If we leave the covenant as is, my client will have to ask for a waiver. And if we add the exception, my client will still have to come to the Bank for a piece of paper, but this time it will be called a consent. So, even with the exception, the Bank really is in the same position of control.

**Lender's lawyer:** I'm afraid it's not quite so simple. In this jurisdiction, whenever a party has discretionary authority, the common law reads in a reasonableness requirement. Specifically, the party must exercise its discretionary authority reasonably.

**Borrower's lawyer:** Based on the implied covenant of good faith and fair dealing?

**Lender's lawyer:** Exactly. The Bank has been through this before. I ran this issue through the general counsel's office previously. They have decided as a matter of policy not to agree to consent exceptions. They view the exception as an open invitation to a borrower to litigate whether the Bank exercised its discretion reasonably. It's simply Bank policy to refuse these requests.

### Variation 3

**Borrower's lawyer:** When I spoke to my client about this provision, it was hoping that the Bank could have some flexibility and not prohibit all acquisitions.

**Lender's lawyer:** What does your client have in mind?

**Borrower's lawyer:** Well, it has been thinking that one way to grow the company would be through a strategic acquisition, especially if it would significantly improve its long-term profitability.

**Lender's lawyer:** I can understand that your client might be interested in an acquisition, but the Bank agreed to lend short-term money for working capital, a short-term need. Agreeing that the Bank's funds could be used to finance an acquisition creates a whole new credit risk profile. An acquisition transforms a revolver intended for short-term working capital needs into a long-term loan, money that will be outstanding from day one. That's not basis on which the Loan Committee approved the funds. To agree to your client's request, the Bank would need a new credit approval. I'm not sure your client wants to go that route. There's no way to guarantee that the Loan Committee wouldn't deny your client's request and question the wisdom of its initial approval.

**Borrower's lawyer:** Ok. I understand that the money can't be used immediately for an acquisition, but what about this as a possibility? What if the Bank agrees to let my client use the line for an acquisition during the last year of the three-year revolver?

**Lender's lawyer:** Let me see if I understand what you're saying. Currently, the deal is that at the end of the three years, any short-term borrowings that are unpaid convert to a term loan. Are you asking that any amount of the credit line that's not outstanding at the end of the third year be available to finance an acquisition?

**Borrower's lawyer.** Exactly. It's the equivalent of our borrowing the full \$25 million short-term and then having it convert to a term loan at the end of the three years.

**Lender's lawyer:** Not quite. But creative. I'm not sanguine, but I'll run it by the Bank and get back to you.

**Commentary**

The first two variations are well within the expected zone of agreement for the negotiation of this provision. They are permutations on ways for the bank to say no and the borrower to accede. Because the bank has the money, it has the superior negotiating leverage. In this particular instance, the experienced borrower counsel knows that the request is likely



to be rejected and does not press the point when the expected rejection occurs.

The request for a consent exception has not always resulted in a bank refusing a borrower's request. Years ago, borrowers routinely requested such an exception, and bank lawyers considered agreeing to the request as a nonevent. The practical reality then was that agreeing to the consent did merely change the name of the piece of paper the bank might sign. But as more and more banks became entangled in litigation over whether a discretionary denial of consent was reasonable, banks began to deny the request. That said, the issue of reasonableness is a state law issue, and some banks are less risk averse and some borrowers more creditworthy than others. Therefore, borrowers continue to request consent exceptions.

Banks have many ways to say no to a consent exception request. Another way a bank might demur is to say something like the following: "We can certainly understand why you might want to make an acquisition. If you find a good candidate, just let us know, and we'll give it serious consideration then."

Although the request for a consent was nominally part of a zone of agreement negotiation, the ultimate resolution depended on the Bank's lawyer knowing the legal effect of inserting the consent exception – a legal effect negotiation; one color of the rainbow merging into the next. Indeed, the negotiation was also a monetary negotiation (access to the money), an endgame negotiation (the right to borrow at the end of the revolver's term), a risk negotiation (risk to bank of a change in the loan's business purpose), and a control issue (borrower trying to wrest some control from the bank.)

In Variation 3, borrower's counsel's request stepped outside the expected zone of agreement. He was trying to problem solve with a creative way to demonstrate to the bank that changing the purpose of the

loan would not increase its risk. The lawyer earns points for trying but, probably, will fail in his attempt.<sup>7</sup>

#### ***D. Problem-Solving Negotiations***

A *problem-solving negotiation* addresses the multiplicity of issues that parties must resolve to implement a fundamental business term. Although the parties may have agreed in concept to a specific business term, each party must be confident that the memorialization of that term both minimizes its risks and advances its interests. In many instances, to do so, the lawyers must negotiate a subsidiary set of business terms, each part of the constellation of terms that will compose the business deal. Because of the multiple issues so often in play, these negotiations are often *integrative*—to use classic negotiation theory terminology.

#### **Factual background**

A licensor and licensee have agreed that in the first year of a three-year term, the licensee will have the exclusive right to manufacture and market licensed products in States A, B, and C. Then, if sales exceed \$7 million in the first year, the territory will expand to include States D and E.

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<sup>7</sup> The banks emphatically demonstrated their superior negotiating leverage in the 1980s when some loan agreements included *end of the world* provisions, with language such as the following: “[I]n the event that the end of the world shall be divinely inspired, then, in such event, Borrower further agrees that Bank shall be aligned with forces of goodness and light, and Borrower shall be aligned with the forces of evil and darkness, and that Borrower shall be cast into a pit of fire, and shall deliver unto Bank as an indentured servant Borrower’s first born, until all sums owing under the Loan Documents . . .” Yes. The banks would remove the provision, if requested. Original on record with the author.

Here is contract language that expressly incorporates the parties' stated agreement.

*Definitions*

“**Original Territory**” means Maine, New Hampshire, and Vermont.

“**Extended Territory**” means Delaware, Maine, New Hampshire, Rhode Island, and Vermont.

*The grant of the license*

**2.1 Grant of License.** By signing this Agreement, the Licensor grants the Licensee an exclusive license to manufacture and sell Licensed Products, during the Term, in the Original Territory. However, if the Licensee's sales for the first year of the Term exceed \$7 million, this exclusive license is in the Extended Territory for the second and third years of the Term.

**Licensee's lawyer:** Thanks for getting us the draft of the contract so quickly. We really appreciate the turnaround time. I have a couple of points that I'd like to talk through with you with respect to the grant of the license and its exclusivity. The first point is fairly basic. In the grant, the contract uses the word “sales.” That, of course, is an accounting term and on its own is too vague. I suggest that the finance people get together and work out a definition. I think that could eliminate problems down the road.

**Licensor's lawyer:** Absolutely. Good suggestion. What else is on your list?

**Licensee's lawyer:** As you know, exclusivity is very important for us. Without it, we can't fully exploit the license. We wouldn't be going into this deal if we had to compete with another company to sell Licensed Products in the territory.

**Licensor's lawyer:** Absolutely. That's the business deal. What if we give you a rep and warranty that we haven't granted any licenses to any person in the Original Territory?

**Licensee's lawyer:** That's fine, but does that mean that you have granted licenses in the Extended Territory?

**Licensor's lawyer:** Well, in State D, there is a license. But it shouldn't present a problem if your client meets the \$7 million threshold because it terminates at the same time as the end of year one of the Term.

**Licensee's lawyer:** What about State E?

**Licensor's lawyer:** No existing license.

**Licensee's lawyer:** Ok. We'd like the agreement to reflect all that information. Can we get reps and warranties on all that?

**Licensor's lawyer:** Not a problem. What about the following language? My speedy, well-trained associate drafted it as we were talking.

**2.2 Other Licenses Granted.**

- (a) **Original Territory.** The Licensor has not granted any other license for the manufacture and sale of Licensed Products in the Original Territory for all or any part of the Term.
- (b) **States D and E.** The Licensor has granted one license for the manufacture and sale of Licensed Products in State D. That license terminates on the last day of the Term's first year. The Licensor has not granted any license for the manufacture and sale of Licensed Products in State E for all or any part of the Term.

**Licensee's lawyer:** That's very helpful, but I think that we still need additional comfort. The reps speak as of the day of signing. My client is still at risk that your client might in the future grant licenses that would then compete with its license. We'd like some protection against that. We drafted up some proposed language that we'd like you to look at.

**3.1 New Licenses with respect to the Extended Territory.** The Licensor shall not grant any license for the manufacture and sale of Licensed Products in the Extended Territory for all or any part of the Term.

**Licensor's lawyer:** Let me talk this through with you. I think we're going to need to distinguish licenses in the Original Territory and the additional states in the Extended Territory. A covenant prohibiting any other licenses with respect to the Original Territory makes sense as that is the Licensee's exclusive territory throughout the Term. But States D and E are a little more complicated. My client may want to make some money from a license in State E between now and the end of the first year of the Term.

**Licensee's lawyer:** Yes. I can see that as a possibility. What if there's permission to grant a license for Year 1? That would leave Years 2 and 3 available to become part of the Extended Territory.

**Licensor's lawyer:** We'd prefer to have the discretionary authority to grant a license for more than Year 1, but then to be obligated to terminate that license if your client reaches the \$7 million threshold. Our concern is that we want to have a license in place if your client doesn't reach the threshold. If we don't have a pre-existing deal, we could lose millions of dollars in sales while we negotiate an agreement for Years 2 and 3 with another licensee.

**Licensee's lawyer:** So, if I understand your proposal, your contract with the other licensee would include your client having the right and the obligation to terminate that license if my client reaches the \$7 million threshold.

**Licensor's lawyer:** Yes, that's correct.

**Licensee's lawyer:** I understand what you're proposing, but I'm not comfortable with the other licensee's term being tied to my client's reaching the threshold. First, I don't want to be litigating with the other licensee who has a right to be licensee in State E because of an accounting issue regarding whether we did or did not reach the threshold. Second, this arrangement raises at least the theoretical specter of the other licensee asserting a claim against my client for tortious interference with its then-existing license. I think we'd prefer for your client to have the absolute right to terminate that license at the end of Year 1.

**Licensor's lawyer:** I understand your concerns, but I'll need to check that point with my client. But to keep things moving, let's assume the other license is terminable on notice. In addition, we'll include a provision in our contract with you that we are obligated to terminate the other license if you meet the \$7 million threshold. Does that work in concept?

**Licensee's lawyer:** Yes. Thank you. One final point for discussion. We need to deal with State D and years 2 and 3 of the Term.

**Licensor's lawyer:** What if we set it up the same way as with respect to State E, but have it apply with respect to just the last two years of the Term?

**Licensee's lawyer:** That should work. Thank you. We too have a speedy associate. Here's her work detailing our agreement.

### 3.2 Other Licenses with respect to the Original

**Territory.** The Licensor shall not grant any license for the manufacture and sale of Licensed Products in the Original Territory for all or any part of the Term.

### 3.3 Licenses with respect to States D and E.

- (a) **State D.** The Licensor may grant to any Person a license for the manufacture and sale of Licensed Products in State D for the second and third years of the Term. However, under that license, the Licensor is to have the discretionary authority to terminate that license in its entirety. The Licensor shall exercise that discretionary authority if the Licensee has the right to a license for the Extended Territory in accordance with Section 2.1.
  
- (b) **State E.** The Licensor may grant to any Person a license for the manufacture and sale of Licensed Products in State E for all or any part of the Term. However, under that license, the Licensor is to have the discretionary authority to terminate that license with respect to the second and third years of the Term. The Licensor shall exercise that discretionary authority if the Licensee has the right to a license for the Extended Territory in accordance with Section 2.1.

**Licensor's lawyer:** One quick reaction. By stating "any Person" that seems to limit our ability to divide the license among several licensees. We may want different licensees for different years of the term.

**Licensee's lawyer:** Understood. We'll deal with that in our redraft.



## Commentary

This negotiation primarily focused on how the lawyers were going to memorialize the parties' agreement that the license was to be exclusive. Merely granting an exclusive license would not have carried out the parties' intent. By asking the right questions, licensee's lawyer discovered facts that might result in unwanted competition. Therefore, the lawyers needed to address those facts with a subsidiary set of business terms that they created.

Part of the negotiation was necessarily a translation negotiation. When the licensee's lawyer discovered an existing license, she wanted the contract to reflect that that license existed and that it was the only existing, possibly competitive license. To do that, the lawyers agreed that the licensor would make representations and warranties. Then, covenants were needed to prohibit the granting of future licenses. But blanket prohibitions wouldn't work, so the lawyers had to tailor the covenants to address the licensor's interest in earning profits in the Extended Territory (an undeclared monetary negotiation).

The last negotiation about the use of the noun *Person* was a classic legal effect negotiation. It was not a contract language negotiation because the licensor's lawyer was not disputing the meaning of the defined term *Person*. Instead, the licensor's lawyer raised the need to address the possible legal effect of its use.

### *E. Translation Negotiations*

A *translation negotiation* focuses on which contract concepts a contract should use to memorialize the business terms to which the parties have agreed. The phrase *translation negotiation* derives from the deal lawyer's core analytic skill, the *translation skill*.

The translation skill differs from the analytic skill litigators use. Specifically, litigators begin their analysis by taking the law and applying it to the facts to create a persuasive argument. The litigation paradigm seeks a certain legal result by working backwards from the law to a static set of facts. The analytic skill of deal lawyers stands this paradigm on its head.

Deal lawyers start from the business deal. The terms of the business deal are the deal lawyer's facts. A lawyer must then find the

contract concepts that will best memorialize the business terms and use those concepts as the basis of drafting the appropriate contract provisions. I call this skill *translating the business deal into contract concepts*, or more succinctly, *the translation skill*.<sup>8</sup>

Contract concepts are not interchangeable. Each concept performs a different job and has a different consequence.<sup>9</sup> Therefore, predictably, lawyers will disagree as to which concepts to use, each side seeking an advantage.

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The negotiation that follows begins with a truncated business term. It reflects the parties' agreement as to an outcome they want. Therefore, to create the necessary contract provisions, the lawyers must engage in a contract language negotiation. But, as you will see, before even drafting a word, the lawyers must first negotiate how to translate the business term into contract concepts.

**Factual background**

Two principals have signed a letter of intent (the LOI) for the purchase of a business. They agree that all consents must be obtained before the buyer must close. Shortly afterwards, the buyer's lawyer calls the seller's lawyer to introduce himself and to discuss the LOI. Here is part of the call.

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**Buyer's lawyer:** That brings us to the matter of consents. I'm sure in your review of the LOI you saw that our clients agreed that all consents were to be obtained.

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<sup>8</sup> See Tina L. Stark, *Contract Drafting: A Prerequisite to Teaching Transactional Negotiation*, in a panel entitled *Negotiations*, 12 TENN. J. BUS. L. 162 (quoting from and paraphrasing pages 163-164) (2011).

<sup>9</sup> For example, a *representation* is a statement of past or present fact as of a moment in time intended to induce reliance. If a party intentionally makes a false representation, it's fraud. The injured party can sue for rescission and restitutionary recovery or, alternatively, damages (which may or may not be expectation damages). In contrast, a *covenant* is a promise to perform, a promise to do or not to do something. A covenant breach gives the nonbreaching party the right to sue for expectation damages.

The other contract concepts are warranties, conditions, discretionary authority, and declarations.

**Seller's lawyer:** Absolutely. That should be very simple to deal with. Let's make it a condition to closing.

**Buyer's lawyer:** All right. That's helpful, but I think we need some additional provisions. If we deal with the consent issue only through a condition, that practically gives you an option not to close. If your client wants out of the deal, it just fails to get a consent. We want the seller to be obligated to put effort to get all those consents. What if we add a covenant that the seller shall obtain all the consents not obtained before signing?

**Seller's lawyer:** I understand your point about the seller needing to exert effort, and we're happy to covenant to do that. But the seller can't promise to obtain all the consents. The seller doesn't control the parties who need to give consent. The seller can't be in a position where a third party controls whether the seller has breached the purchase agreement.

**Buyer's lawyer:** Fair enough. Let's provide that the seller shall use commercially reasonable efforts, so the issue is the level of exertion, rather than the success of the efforts.

**Buyer's lawyer:** I don't think that's a problem. I'll confirm that with my client.

**Seller's lawyer:** Good. We can mark that business term "Done."

**Buyer's lawyer:** Not quite. Before we sign on for this deal, we want to understand what risks we are taking with respect to the consents. Which consents have you obtained and which do you need to get? We'd like you to lay that out for us. We need to determine if there's a consent that you're unlikely to get. If so, my client may not want to pursue this deal.

**Seller's lawyer:** Not a problem. We'll give you a rep and warranty disclosing all that information. The covenant and the condition will tie it all together: The rep and warranty will tell the buyer what consents the seller has and doesn't have. The covenant will obligate the seller to use commercially reasonable efforts to obtain the consents that it doesn't have. And, finally, the condition will give the buyer the right not to close if the seller doesn't obtain all the consents.

**Buyer's lawyer:** Now we're done. I look forward to working with you.

**Commentary**

This negotiation demonstrates the salience of the translation negotiation. Had the buyer's lawyer not negotiated for the interlocking use of three contract concepts (representations and warranties, covenants, and conditions), the contract would have left the buyer at risk.

This negotiation easily could have had an additional component of a risk allocation negotiation. After the Buyer's lawyer proposed a commercially reasonable efforts standard, the seller's lawyer could have begun a mini-contract language/risk allocation negotiation by trying to define that standard. For example, the seller could have asked for a provision that commercially reasonable efforts did not require the seller to spend more than \$10,000.

***F. Legal Effect Negotiations***

*Legal effect negotiations* are any negotiation that turns on the legal meaning or consequence of a contractual term.

What follows is a simple negotiation about the mode of giving notice that centers on the legal effect of a suggested business term. Most legal effect negotiations are far more complex because they concern issues far more subtle.

**Factual background**

Sally Seller has agreed to sell her 2007 red Toyota Camry hybrid to Bob Buyer for \$4,500. Sally has agreed to allow Bob to have a licensed New York mechanic inspect the car. In terms of logistics, Bob will pick the mechanic, but Sally will drive the car to the mechanic's garage for the inspection. One final issue remains: notice to Sally of when and where the inspection will take place.

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**Seller's lawyer:** If Sally is to drive the car to the mechanic's garage, she'll need notice about when and where. She has a new business and she can't promise to be available with only fifteen minutes' notice.

**Buyer's lawyer:** That's reasonable. How about no less than twenty-four hours' notice?

**Seller's lawyer:** That works.

**Buyer's lawyer:** Do you care how the notice is delivered to her?

**Seller's lawyer:** Preferably, e-mail followed by a phone call.

**Buyer's lawyer:** I would prefer it be one or the other. If it's both, we create ambiguity as to what constitutes receipt of the notice. If it's receipt of the e-mail, then the phone call is redundant. And if it's the phone call, then there's no point to the e-mail.

**Seller's lawyer:** I see your point. Make it e-mail to her, with a courtesy copy to me.

**Buyer's lawyer:** Will do.

### Commentary

This negotiation demonstrates how a seemingly innocuous term can inadvertently become a trap for the unwary. The double notice had the legal effect of creating an ambiguity as to when the notice became effective.

For another simple example of a legal effect negotiation, please look at the negotiation about the effect of using *Person* in the *problem-solving negotiation* exemplar.

### ***G. Logistics Negotiations***

A *logistics negotiation* refers to a negotiation intended to detail the interactive mechanics necessary to memorialize the parties' intent with respect to a business term. In a typical deal, the parties present the lawyers with a desired outcome (the business term), but rarely the path to achieve that outcome. That path is for the lawyers to create, sometimes out of whole cloth. A logistics negotiation is process-oriented. The end-result will reflect the various business issues that surface as the lawyers negotiate. Perhaps, not surprisingly, a logistics negotiation often implicates other categories of negotiations, such as translation, contract language, and legal effect negotiations.

Examples of logistic negotiations are the following:

- Negotiation of the contractual mechanics to exercise a right of first refusal in a shareholders' agreement.

- Negotiation of the contractual mechanics for choosing arbitrators.
- Negotiation of the contractual mechanics for making a post-closing indemnity claim.
- Negotiation of the contractual mechanics for approving a licensed product.

**Factual background**

Sally Seller has agreed to sell her 2007 red Toyota Camry hybrid to Bob Buyer for \$4,500. The only other term the parties discussed was the car’s condition. Sally described it as in “good shape.” Bob took the car for a test drive, and he thought that it seemed to run well. Ever cautious, though, he told Sally that he might want to have it inspected. Sally agreed that was reasonable.

The parties didn't sign anything to reflect their deal, but they described it to their respective lawyers in the same way. Bob’s lawyer drafted a short contract that paraphrased the business terms Bob had recited.

**Mechanic's Inspection.** The Buyer may have the Car inspected at any time before the Closing. The Car must be in good working order on the Closing Date.

The Buyer’s lawyer sent that draft to the Seller’s lawyer, which led to the following phone call:

**Buyer's lawyer:** Hello Margie. How are you? It's been a long time since we've done a deal together. This should be an easy one.

**Seller's lawyer:** I'm fine. Thanks for asking. As to the deal, I think that once we address the inspection provision, we'll be good to go. I know the clients didn't discuss the logistics of the inspection, but I think we should clarify several points now, so they don't have any disputes later.

**Buyer's lawyer:** Of course, what's on your mind?

**Seller's lawyer:** Well, there are a few things. First, I'd like the agreement to require that the person inspecting the car be a mechanic licensed in New York. Sally shouldn't have to worry that Bob's college buddy is going to inspect the car and then suggest a price decrease for some engine problems only he can find.

**Buyer's lawyer:** Fine. That's fair.

**Seller's lawyer:** Second, as you know, Sally has had a lot of interest in the car, and she doesn't want it to be off the market for a long time. So, it would be helpful if Bob could agree to have the inspection performed no later than four business days after signing. Along the same lines, we'd like Bob to agree to tell Sally the business day after the inspection whether the car passed inspection, and, if not, why not. That way, the two of them can either find a way to address the car's problems quickly or Sally can get the car back on the market without unnecessary delay.

**Buyer's lawyer:** All perfectly reasonable.

**Seller's lawyer:** While we're working through the logistics, we should make the inspection convenient for Sally.

**Buyer's lawyer:** What if I redraft the contract so it provides that the mechanic's garage must be within a 10-mile radius of her house? But I'd also like the agreement to provide that Sally will drive the car to the mechanic. Bob shouldn't have to do that. I'm uncomfortable putting him at risk for potential liabilities if an accident occurred while he was driving the car to or from the mechanic's garage.

**Seller's lawyer:** Done.

### **Commentary**

The principals in this transaction agreed to bare-bone terms. They left open all the logistical terms, the terms which superficially dealt with who, what, when, and where. The quotidian nature of these terms masked underlying risks that the lawyers teased out as they negotiated how the inspection would come to pass.

### ***H. Contract Language Negotiations***

*Contract language negotiations* focus on word choice and the ensuing business and legal consequences. A contract language negotiation ineluctably occurs concurrently with other implementation negotiations. To state the obvious, drafting a provision requires the drafter to choose which words to use to memorialize a business term. Therefore, any implementation negotiation of that provision necessarily implicates the words being used and, therefore, involves contract language negotiation.

The first example depicts a negotiation relating to ambiguity, while the second example describes how drafting a definition can have strategic consequences and affect the business deal.

**Example 1 - Factual background**

The following provision is from a lease agreement.

**Term.** This Agreement continues in force for a period of five years from the date it is made, and thereafter for successive five-year terms, unless and until terminated by one-year prior notice in writing by either party.

Here is the negotiation between the Landlord’s and the Tenant’s lawyers.

**Landlord’s lawyer:** Tom, thanks for coming to our offices for all the negotiations on this deal. It’s nice to do face-to-face negotiations for a change, rather than online dueling mark-ups.

**Tenant’s lawyer:** I agree. I’ve come by for one last issue. I’d like to discuss the provision dealing with the term of the lease. I know we’ve looked at it before, but in my final review I found something we should talk about. I want to make sure our clients are on the same page as to how the renewal terms work.

**Landlord’s lawyer:** What’s the issue?

**Tenant’s lawyer:** Well, we understand the deal to have three moving parts. First, is an initial five-year term. Second, after that initial term ends, a series of successive five-year terms begins. Third, and finally, each party has a right to terminate any of the successive five-year terms. But that right doesn’t apply to the first term. Is that your understanding?

**Landlord’s lawyer:** Exactly.

**Tenant’s lawyer:** I’m glad we agree on that, but I think that someone could misinterpret the provision. The *unless* clause muddies the meaning. Given that it immediately follows the successive term clause, arguably, it modifies and applies to only that clause. That said, I can see someone arguing that it also modifies the initial term, so that each party additionally has the right to terminate the initial term before its end. If you agree, I think it would help if we clarify the language.

**Landlord’s lawyer:** I do agree, and nice catch. What if we create two sentences? The first would address just the initial term. The second would address the successive terms and each party’s right to terminate any of those terms with one year’s notice. That should clarify that the right to terminate speaks only to the successive terms.



**Tenant's lawyer:** Sounds good.

**Landlord's lawyer:** Let me input those changes before you leave. [Pause] It's coming out of the printer now. What do you think?

**Term.** This Agreement continues in force for a period of five years from the date it is made. After the initial term, the Agreement continues in force for successive five-year terms, unless and until terminated by one-year prior notice in writing by either party.

**Tenant's lawyer:** Great. Maybe the rest of the provision can be fixed up one day.

**Landlord's lawyer:** Don't hold your breath.

### Example 2 – Factual background

Negotiating and drafting definitions is not a client-neutral endeavor. A definition establishes a standard, and that standard may favor one party over the other. For example, consider the two definitions of *Force Majeure* Event that follow. Variation 1, the litany, favors the party most likely to be the performing party. The litany circumscribes the events that will excuse performance to those explicitly listed in the litany. If an event is not included, the nonperforming party will not be excused from performing, and the failure to perform will constitute breach.

In contrast, Variation 2 establishes a multi-prong test. No event is an expressly stated *Force Majeure* Event. Instead, in each instance, the nonperforming party must demonstrate that a particular act or event meets the criteria of the three-prong test. Unquestionably, demonstrating that an act or event meets the multi-prong test criteria is more onerous than the litany, especially if the relevant act or event would ordinarily be included in a litany. Nonetheless, the multi-prong test provides a flexible standard, giving the nonperforming party, in each instance, the

opportunity to establish that an act or event falls within the defined term's orbit.<sup>10</sup>

**Variation 1**

*Force Majeure Event* means war, flood, lightning, drought, earthquake, fire, volcanic eruption, landslide, cyclone, typhoon, tornado, explosion eruption, civil disturbance, act of God or the public enemy, terrorist act, military action, epidemic, famine or plague, shipwreck, action of a court or public authority, or strike.

**Commentary**

A contract language negotiation comprises, at minimum, all negotiations involving ambiguity, style, definitions, clarity, and legal effect. A successful implementation negotiation requires an acute sensitivity to each word's denotation and connotation.

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<sup>10</sup> Both definitions are excerpted from Nancy F. Persechino, *Force Majeure*, in *Negotiating and Drafting Contract Boilerplate* 201-202 (Tina L. Stark et al. eds. ALM Publg. 2003).

## VI. TEACHING IMPLEMENTATION NEGOTIATION

To teach students to emulate the integrative thought process of implementation negotiation, we must begin by giving them an overview of classic negotiation theory. Our teaching must then turn to the foundation knowledge unique to transactions: the translation skill and the basics of contract drafting.

### Variation 2

As used in this Agreement, a "*Force Majeure Event*" means any act or event, whether foreseen or unforeseen, that meets each of the tests in subsections (a) through (c).

- (a) It prevents a party (the "Nonperforming Party"), in whole or in part,
  - (i) from performing its obligations under this Agreement or
  - (ii) satisfying any conditions to the Performing Party's obligations under this Agreement.
- (b) It is beyond the reasonable control of and not the fault of the Nonperforming Party.
- (c) The Nonperforming Party has been unable to avoid or overcome the act or event by the exercise of due diligence.

As my other writings evidence,<sup>11</sup> I believe that contract drafting requires a broad range of knowledge and skills. Nonetheless, it's unrealistic to require all students who want to learn implementation negotiation to master contract drafting through a separate course. Do I think that such mastery would enhance a student's ability to engage in implementation negotiation? Yes. But is it likely that schools will require a contract drafting course as a prerequisite to one that includes implementation negotiation? No. Therefore, through trial and error, we will need to learn how much—or how little—drafting expertise students will need before they can successfully learn implementation negotiation.

Despite the need for some mastery of contract drafting before taking a course that includes implementation negotiation, students should still be able to experience implementation negotiation in their 1L year.<sup>12</sup> By teaching students how to translate the business deal into contract concepts, they can learn the deal lawyer's salient analytical skill and, therefore, gain the opportunity to engage in translation negotiation exercises. In addition, if drafted properly, a contract language negotiation can focus on ambiguity, a concept with which students will be familiar after studying interpretation.

I do not expect that students will be sophisticated negotiators by the time they finish a course that teaches implementation negotiation. Students must learn too much in too short a time. But learning any skill is a reiterative process. So, once a student learns the fundamentals in law school, progression to mastery will be part of that student's growth as a practitioner.

As part of teaching this new theory of negotiation, we must recognize that most existing transactional negotiating exercises do not depict realistic implementation negotiation scenarios. Instead, they emulate distributive, deal term negotiations: How many years is a non-compete; what is its geographic scope? As I hope this presentation has clarified, principals generally negotiate these issues, not lawyers. To teach this distinctive negotiation theory, we will need distinctive simulations and exercises. Their creation will be integral to an effective pedagogy.

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<sup>11</sup> See generally, Tina L. Stark, *Drafting Contracts: How and Why Lawyers Do What They Do* (2d ed. Wolters Kluwer 2014).

<sup>12</sup> It would help, of course, if professors taught the 1L Contracts course with a transactional perspective. Tina L. Stark, *Transactional Skills Education: Mandated by the ABA Standards*, 20 TENN. J. BUS. L. 693 (2018).

## VII. IMPLEMENTATION NEGOTIATION AND IMPLEMENTATION LAWYERING

In this presentation, I have described implementation negotiation, a new negotiation framework that I intend to expand and refine. I look forward to others joining in this endeavor, adding their insights and expertise.

I also look forward to describing how implementation negotiation is itself part of a broader framework—a way of conceptualizing the totality of skills and tasks<sup>13</sup> that are a transactional lawyer’s bailiwick. I have dubbed that framework *implementation lawyering*. The best deal lawyers close the deal. They do what needs to get done, whether its structuring the transaction, advising on the law, interviewing or counseling the client, drafting or reviewing a contract, organizing an entity, performing due diligence, collaborating with their counterparts, being a confidant, negotiating the business deal, creating value, participating in an implementation negotiation, or photocopying closing documents. The business people agree on the deal, and the deal lawyers implement it.

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<sup>13</sup> Tina L. Stark, *My Fantasy Curriculum and Other Almost Random Thoughts* (distinguishing skills from tasks), 9 TENN. J. BUS. L. 3 (2009).