Balancing Predictability with Flexibility in Contract Negotiation and Drafting

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Introduction

PROFESSOR LEE: In the 1990s, French legal sociologist Yves Dezelay wrote about a sea-change in legal systems around the world, a change driven by the financial "Big Bang" of 1987 and the ensuing regulatory freedom for multinational corporations to expand their operations. The medium for this expansion was the 500+-page contract, whose great length and detail aimed to create, not the "Law of Contract," but "The Law of ***the*** Contract." In other words, lawyers and their clients intended these documents to supplant the relevant domestic regulatory laws that hitherto had made their activities less profitable. The ultimate goals of these uber-contracts, in which lawyers had tried to anticipate every contingency and memorialize the goals of their clients with respect to each of them, were maximum protection, maximum dominance, and maximum predictability.[2]

This perspective is instilled in law students in their first-year contracts classes, where detailed and precise wording is portrayed as the surest means to protect clients from unfavorable outcomes.[3] For decades, contract casebook authors have singled out for inclusion in their readings judicial opinions that give dramatic examples of contracting parties wildly misunderstanding each other. Students therefore get the impression that a failure to achieve a "meeting of the minds" is the biggest risk in contracting.

Regardless of whether this is a holdover from earlier eras, the notion that precision is good and vagueness is bad has been promoted by contract

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[1] The author would like to thank Li Massie for her many years of support of the International Trade Transactions course. As a student, she ran one of the very best trading companies in the course's history and then generously agreed to pass on her hard-won expertise to several iterations of the simulation afterwards.

[2] YVES DEZALAY, MARCHANDS DE DROIT: LA RESTRUCTURATION DE L'ORDRE JURIDIQUE INTERNATIONAL PAR LES MULTINATIONALES DU DROIT (1992).

[3] For a description of the state of 1L contract classes in this regard, *see* Naveen Thomas, *Rational Contract Design*, 74 ALA. L. REV. 967 (2023).

scholars in the United States. The entire law and economics literature of the early twenty-first century examines the costliness of vagueness. In their seminal law review articles on the subject, Richard Posner, Alan Schwartz, Robert Scot, and Goerge Triantis argue that vague contractual terms are costlier in the long run to parties in two ways. Vagueness drives up the cost of both the performance of contracts, and the resolution of any disputes arising from them.[4]

Students taking Florida State University's "International Trade Transactions" class learn a different perspective. A computer-based simulation developed at the Shanghai University of International Business and Economics, in collaboration with FSU, and now joined by the National Chengchi University of Taiwan, introduces them to something close to the world of commodity trades in international supply chains. As they make their way through the dozens of imports and exports that are available to them in their roles as fictional trading companies in the simulation, students find out through trial and error that some flexibility in contracting is a key to making profits.

In this article I will describe what that flexibility looks like, the different forms it takes in these transactions, explain the advantages of a flexible mindset for each contracting party, and identify four areas in these contractual agreements that, in particular, call for flexibility. For each of these points, I will give examples from transactions conducted by our students. I will also go through examples of when students have been too flexible and needed to be more firmly precise in the terms they negotiated. In the final section of the article, I will use this fleshed-out picture of benign flexibility as a contrast to the model for contracts propounded in Dezelay's globalization of law model. That model, shown in contrast to the import and export contracts that populate commodity supply chains throughout the world, looks more like a fever dream than a useful template for all contracts.

[4] My thanks to Naveen Thomas for pointing out these arguments.

I. What Types of Flexibility are Needed: When and Why a Flexible Mindset Works in International Commodity Sales Contracts

Students in the International Trade Transactions course find that they are more likely to complete the simulation's imports and exports if they pay attention to the need for flexibility during each of the steps in the transaction. This is as true during the negotiation process, as it is while finalizing language for the contract, and as it is when implementing the contract. During the nearly quarter century that I have been teaching the course, I have observed that students are more likely to attract another import-export company with whom to do an import or an export deal if they signal that they are open to a range of possibilities for the execution of the deal. They are more likely to complete their deals if they build details for those ranges into their contract provisions. And they are more likely to earn profits if they prove willing to renegotiate new terms of the contract where the need arises.

Of course, traders can be so flexible that they undermine their own interests. This kind of extreme flexibility does not enhance the profitability of deals. Many dozens of our students have fallen into this trap since we first offered the course in 2001. The flexible mindset must be accompanied by a clear understanding of the company's interests and goals. I stress to the students that before they speak with any potential partner, they work out what is non-negotiable for them. These immovable positions form a range within which they are willing to be flexible. If a trading partner insists on moving outside this range, that becomes a deal-breaker for our student trader. It is better for the financial health of the company to walk away from that deal than to stay in it. In the words of a former student, Li Massie, who now practices law in the area of international customs procedures, figuring out this range is tantamount to performing a "risk-assessment," and a trader should do it, she advises, for both themselves and their trading partner outside the United States.

I observe at least three advantages of this informed kind of flexible mindset. For one, it sets a conciliatory tone that inspires trust, thereby increasing the chances that the contract will be signed. For a second advantage, a flexible mindset minimizes the risk of derailment of the entire transaction. Because of the slim profit margins of these international commodity sales contracts, they are not enforceable by arbitration or litigation without swallowing up more than the profits that the deal could possibly yield. If you build flexibility into the terms of the contract when you sign it, you are setting the transaction onto a cooperative course that allows for more self-enforcement.

A third advantage is that it encourages brainstorming and cooperation by both sides when confronting unforeseen problems. As the owner of a real import-export company told our students during a meeting with their investors, unforeseen problems in international supply chains are both "common and beyond everyone's imagination."[5] In other words, it seems to me, it's naïve to believe that you can contract away uncertainty in international business. Instead, the contract serves as a vehicle by which the parties can coordinate their preparations for the uncertainties.

II. Areas of Agreement that Call for Flexibility

Three aspects of these international commercial agreements in particular demand a plan that is flexible. The first lies in discussions about the timeline of the deal, in other words, the steps from beginning to completion of the parties' obligations. The second is in the choice of payment methods. The third is in the amount of the payment, and, likewise, the total price and per unit price.

A. The Timeline

The area of agreement that in our import-export contract simulation most often calls for flexibility on the part of international traders lies in figuring out the timeline of the transaction. I stress in the training portion of our course that students need to devote attention to figuring out how long it will take them and their partners to perform each of the key steps of the

[5] Jeff Mandel, chair of the board of directors of Diplomat Holdings Ltd., headquarters in Tel Aviv, Israel and traded on the Tel Aviv Stock Exchange.

transaction covered by their contract. At a minimum, these steps include piquing the interest of an importer/exporter abroad, securing their agreement to key terms, contracting with a domestic buyer if our student is importing, signing a contract with that importer or exporter, securing financing, taking out an insurance policy, presenting documents to the bank in exchange for payment, notice from the buyer's bank that it has the documents it needs, receiving the goods in the buyer's port, and transporting the goods to the buyer's warehouse where the domestic buyer will pick them up.

During their first few trades, our students routinely underestimate how important a detailed preparation of such a timeline will be. Their eyes are opened when they confront a period of silence from their trading partner on the other side of the Pacific, or when the start date for the insurance coverage that they apply for ends up being a day or more after they have loaded the goods over the ship's rail, or when they submit their documents to the bank for payment on the letter of credit, only to be told that the letter of credit has expired.

International commodity trades rely on a host of third parties, businesses other than the contracting parties, to move the goods in a sales agreement along a supply chain. The third parties, principally banks, carriers, and insurance companies, require a copy of the contract so that they can conform their services to its terms, but nonetheless, their participation increases uncertainty. The more participants, the more errors and delays can creep in. This is the kind of uncertainty that routinely adds to the time that the contracting parties need to fulfill their responsibilities under the contract.

In the real world of international trade, experienced traders would draw upon their work in hundreds of previous deals to determine the timeline for the present one, but even then, they could not be sure enough about the obstacles in store in order to commit to rigid deadlines. Mistakes like typos in the documents and errors in price calculation are ubiquitous. Even after signing a contract, mistakes in implementation are made, not just by the trading companies that move the goods from one country to another, the single link in the international supply chain that is covered by our course and by the International Chamber of Commerce's (INCOTERMS), but also by third parties who are repeat players in these transactions, principally banks, shipping companies, and insurance companies. To resolve these mistakes, continued negotiation, even renegotiation, are crucial, and these discussions take time.

Booking shipping space holds potential for these kinds of errors. In the International Trade Transactions simulation, both Ketco Trading Company and US Asia Trading Company underestimated the amount of space they would need to book with the carrier. They calculated into their per unit price offers the cost of a single 20' foot shipping container. When it came time to load their goods onto the ship, they realized that some of the goods ordered by the Chinese buyer were still left in their warehouses because there wasn't room for them in the booked container. Each of these American trading companies quickly regrouped, but in ways that increased the total expenses for shipping. Ketco canceled the first booking, though it had to pay for it, and rebooked correctly and paid for a 20' and a 40' container. US Asia notified the buyer and convinced it to pay for the rest of the maple syrup jugs to be flown via international courier.[6]

When preparing an offer to sell wine to Shanghai Delight Trading Company, Tradewinds Trading Company used a quantity of goods in its price calculations that reflected a full 20' shipping container, rather than the lower quantity demanded by Shanghai Delight. This miscalculation reduced Tradewinds' profit margin to 2.3%. The amount of profit, $1,366.26, was nearly half of the amortized expenses of the company that it needed to deduct from this transaction.[7] Amerasia Enterprises' mistake when booking shipping space for 10,200 units of wine purchased by Shanghai Paragon Trading Company cost it an additional fee which doubled the original space

[6] Y US ASIA TRADING COMPANY, FINANCIAL SUMMAR 28 (Dec. 3, 2010); KETCO TRADING COMPANY, INTERNET TRADE SIMULATION FINAL REPORT 5 (Nov. 30, 2009).
[7] TRADEWINDS TRADING COMPANY, FINANCIAL SUMMARY 3, 6 (Nov. 22, 2013).

booking fee.[8] Golden Dear Trading Company paid an extra $100 to amend their space booking with the carrier.[9]

The extra time and energy that traders devote to fleshing out the timeline in advance can make the difference between completing the deal and not completing the deal. When the importer or the exporter lag in their efforts to move the deal along, their contracting partner should stay in constant touch with them in order to suggest ways for them to speed up the process. Exchanges of vital information, such as Letter of Credit numbers, type of insurance coverage taken out, the name and number of the vessel that has been booked, facilitate the deal, and so, create a layer of meta-obligations on the parties that may not appear in the contract but that influence whether the goods can be delivered in time to meet contractual obligations with companies farther down the supply chain. This post-contract communication is normally not required by the contract, so when the communication results in brainstorming a solution to an impasse, it may amount to a renegotiation of the contract terms.

Cash incentives, included in the contract, or not included in the contract and agreed to orally without formally modifying the contract, may be indispensable to moving the deal past serious impasses. In general, terms and conditions in the contract can provide incentives to work more quickly on each of the steps of the transaction. Niceville Trading Company reported that it successfully negotiated with its exporter Gazelle Trading Company to "Terms and Conditions…to help move the process along quickly."[10]

Rejection by the bank of the documents submitted for payment via a Letter of Credit is the most common type of delay in our simulation. Discrepancies between the letter of credit's stated requirements and the other documents that the seller must attach to it when presenting a request for payment from the bank will lead to the bank dishonoring the letter of credit and charging fees for its identification of the errors. Amerasia Enterprises failed to notice a discrepancy between the requirements of the Letter of

[8] AMERASIA ENTERPRISES, FINANCIAL SUMMARY 8 (Nov. 26, 2012).
[9] GOLDEN DEER TRADING COMPANY, FINANCIAL SUMMARY 7 (Nov. 19, 2019).
[10] NICEVILLE TRADING COMPANY, FINANCIAL SUMMARY 13 (Nov. 16, 2019).

Credit (L/C) obtained by its byer Sunshine Honolulu Limited and the documents that Amerasia submitted to its bank in order to get paid via the Letter of Credit. "The bank initially dishonored the LC [sic] and charged us $80 for such discrepancy." Fortunately for Amerasia, it "was able to amend the documents and negotiate with the bank to still honor the LC [sic] in time" for Sunshine to obtain its 88 units of wheelchairs before its own buyer refused to pay it.[11]

Expiration of the Letter of Credit itself or of the period of presentment specified in the Letter of Credit both lead the bank to refuse payment to the seller. When trying to collect $154,523.00 for 279 leather love seats it had shipped to Aero Global Trade Co. in Taibei, Taiwan, Easy Trading Company received a notice of dishonor from the bank on October 15, 2013 because Easy Trading submitted the documents to the bank after the presentation period stipulated in the Letter of Credit had passed. Easy Trading still had the option of not releasing the goods to Aero in the port of Kaohsiung until Aero sent payment another way. But Easy Trading relented and released the love seats to help Aero deliver them to its buyer in Taiwan on time. For that good deed, Easy Trading was rewarded with a demand by Aero to pay half of the $8,000 late fee imposed by its Taiwanese buyer. After some pushback by Easy Trading, it accepted to pay $2,000 of the fee if Aero would agree to wire full payment for the love seats the next day. Aero wired the payment as orally promised in a Skype call and ate the cost of the wire.[12]

Other methods of payment also require the submission of accompanying documents, and if those contain errors or discrepancies, the bank will ferret those out and reject the application by the buyer or refuse to release payment to the seller. Documents Against Payment (D/P) is one such method. Amerasia Enterprises made a "small mistake" in the documents it submitted to the bank in order to be paid for selling Sylintic Trading 1,183 units of paper shredders. In its effort to get paid via a Documents against Payment, it found that on its end it had to pay unexpected charges to the bank totaling $659.31, nearly a tenth of its eventual profit. After having to

[11] AMERASIA ENTERPRISES, STATISTICS ANALYSIS 11 (Nov. 26, 2012)
[12] EASY TRADING COMPANY, FINANCIAL SUMMARY 6–7 (Nov. 23, 2013).

amend two of its documents to the bank, Amerasia learned that "When you send amended documents you have to apply for another D/P" and pay a "higher bank charge."[13]

B. Payment Methods

A second area of contractual agreement where flexibility is helpful is payment methods. Any tiny error or discrepancy will cause international banks to reject documents related to Letters of Credit, the most secure payment method in our simulation. Our simulated "ITS bank," played by a professor at SUIBE, is no exception. Sometimes it takes several rounds of back and forth with our bank to correct the documents to the bank's satisfaction. For inexperienced traders, this period of time often extends beyond the expiration date of the Letter of Credit. One way forward is to switch the method of payment to something that requires less paperwork, a switch that necessarily departs from the payment term agreed to in the contract.

Buyers can refuse payment without explanation when using less secure methods of payment, such as Documents Against Payment, even after the seller ships the goods. American Cowboy, Inc. contracted with CHUNQIU to be paid a total of $76,000 for precision eight-inch joiners,4 0%with a wire transfer before shipment and 60% with a wire transfer after shipment. CHUNQIU paid the 40% but did not pay the 60%.[14]

A Letter of Credit can expire before the seller submits the documents to the confirming bank in order to be paid. When that happens, the seller has to hope that the buyer will agree to pay another way, but there is no practical way to force the buyer to pay after the goods were shipped and released. If the goods have not been shipped, the buyer whose Letter of Credit has expired has to renegotiate with the seller the form of payment and generate a fresh set of documents which reflect the new payment method, with its accompanying dates of expiration and presentment of documents. As soon as 8Waters Trading Company agreed to payment terms with Emens for

13 AMERASIA ENTERPRISES, STATISTICS ANALYSIS 10 (Nov. 26, 2012).
14 AMERICAN COWBOY, INC., SEC FORM S-1 (Dec. 10, 2002).

importing 500 units of air impact wrenches, 8Waters applied for a letter of credit for 50 percent of the total amount, as agreed (8Waters had promised to wire the other 50 percent before shipment). The parties had not yet "finalize[d] negotiations on the payment and shipment terms…" however. While they were ensconced in doing that, the Letter of Credit expired. That could have been enough to cause Emens to call off the sale, though it did eventually agree to accept a less secure form of payment, via Documents Against Payment, for the 50 percent that was the subject of the Letter of Credit.[15]

Determining even the total amount of the payment by the buyer to the seller requires some flexibility. For example, unforeseen expenses can accrue, such as additional charges by shipping companies and banks for their extra services when adjusting to the errors of the traders. Interest rates on loans that the importer or exporter take out in order to purchase the goods before resale are notoriously difficult for those companies to calculate. Whether those third parties charge the importer or the exporter, those expenses can be shifted, wholly or partly. The adjustments in price calculations that are made might have to take the form of a per unit price change.

C. Amount of Payment and Price

Adjusting to unforeseen circumstances, such as switching payment methods, adds costs to the transaction after the contract is signed. Even attempts to stick with contracted methods of payment, after delays cause them to expire, require the payment of new fees. Banks charge such additional fees for amending not just Letters of Credit, the most secure form of payment, but also D/P documents as well. This is the case when the buyer applies to its bank for an extension of the issued form of payment, or for a new issuance of the contracted form of payment. Either way the bank will charge additional fees that the traders may not have incorporated into their price calculations.

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15 8 WATERS TRADING COMPANY, FINANCIAL SUMMARY 9 (Nov. 20, 2014).

For example, in our simulation, the Spanish trading company "Laptist" (run by professors in Shanghai) agrees in the contract to open a Letter of Credit in order to pay for goods exported from the United States. The American exporter sometimes ships the goods before reviewing the Letter of Credit application, which the bank will send the exporter in due course. Alas, for Commercium International, LLC, on October 20, 2018, the very day that Laptist countersigned the contract, and before seeing the Letter of Credit application, Commercium shipped 200 sets of microscopes to Spain. When they finally reviewed the L/C on October 23, 2018, Commercium noticed that Laptist had filled out an incorrect amount for the total purchase price. Such a mistake made it impossible for Commercium to collect on the Letter of Credit once it presents the Bill of Lading and the contract to the bank.[16]

The parties may need to make requests for additional services, other than those contracted for, from a wide range of third parties, such as suppliers for samples and international couriers to send them. Traders may have to request the carrier change the booking of the ship. Additional certificates, such as those authenticating origin or inspection, may also be asked for. All of these types of requests add to the cost of the transaction after the contract was signed. If the seller does not raise the per unit price, she will bear that cost. If the buyer must pay a higher per unit price than contracted for, she will bear that cost. Who bears the cost, and how the cost might be shared, must be worked out in a process of renegotiation of the key contract term of price. The parties may not amend the contract, which would require a fresh set of applications to the bank and shipping companies, and so may simply pay out of pocket for the additional services. But the parties separately must figure the additional costs into their profit calculations for that deal. That may entail an adjustment in their own bookkeeping of the per unit price and the total price.

Mistakes in price calculation, another common pitfall for inexperienced or inattentive traders, may give rise to a need to adjust the

[16] COMMERCIUM INTERNATIONAL LLC, FINANCIAL SUMMARY 4-5 (Nov. 21, 2018) (on file with the author).

agree-upon price. Sunshine Trading Company left out a U.S. tariff of $6,657.62 from its calculations of the price of folding chairs from exporter SOF trading company. It omitted this component from its calculations because it wrongly thought that the domestic retailer who purchased the chairs would pay the tariff. Sunshine did not attempt to renegotiate the price it paid to SOF, as the tariff was imposed late in the timeline of the deal, and Sunshine felt that it could accept a reduction in profit margin from 20% to 12%.[17]

Careless typos in extra-contractual documents, such as the application to book shipping space or the packing list, which are submitted to the carrier, or the application to a bank for a Letter of Credit, also happen. Such mistakes can be corrected, but for an extra fee to the receiving company. Easy Trading Company, for example, successfully negotiated to pay a total of $121,012.80 for 2000 bags of Christmas bells imported from Triple J company in Shanghai. Triple J filled out the contract form (the simulation requires that a form be used, which is common practice in China) with $130,912.80 as the price.

Based on an incorrectly low price to ship the almonds to Kaosiung that Deal Trading Company had inquired about, All-American Trading company sent an overly low price quote to Deal Trading Company in Taiwan. When All-American Trading realized its miscalculation, it sent a higher price quote to Deal. "This mistake caused the buyer's confusion and potentially untruthfulness," reported All-American.[18]

What is worse, typos can set off a chain reaction that leads to multiple errors in other documents crucial to the transactions. When All-American miscalculated the shipping costs again, this time in a sale of coffee makers to Fabulous Trading Company in Taiwan, it created discrepancies in the documents related to the Letter of Credit, which essentially nullified All-American's chances of getting paid.[19]

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17 SUNSHINE TRADING COMPANY, FINANCIAL SUMMARY 13–14 (Nov. 21, 2018).
18 ALL-AMERICAN TRADING COMPANY, FINANCIAL SUMMARY 4 (Nov. 20, 2018).
19 ALL-AMERICAN TRADING COMPANY, FINANCIAL SUMMARY 8 (Nov. 20, 2018).

Unless these additional payments are amended into the contract, their obligation to pay is difficult to enforce. Whether a full-blown renegotiation of the contract is necessary is academic. Either way, what we are talking about is a need for flexibility by both parties in order to share the cost of an unforeseen circumstance.

III. When Flexibility Goes Too Far

Many of our students too readily agree to pay penalties and extra costs that crop up after the transaction runs into a snag. The student who attempted to export almonds to Taiwan on behalf of his Hummingbird Trading Company, 1771 Oceanview Trail, Miami, FL 33132, received a letter of credit and a bill of lading from the Taiwanese importer that contained discrepancies. Hummingbird tried three times during two weeks to correct the errors, but then, while the almonds sat in port, paid a hefty liquidated damages fee to the Taiwanese importer without exploring other solutions with the importer, the shipping company, and the bank.

Similarly, Golden Deer Trading Company agreed to pay the entire $19,942.24 loss of profits suffered by Shanghai Honor Trading Company after a delay in its receiving the 300 air purifiers from Golden Deer. The reason for the delay in receiving the goods was that Golden Deer's Letter of Credit was rejected eleven times by the bank, which created a delay of nine days. This delay was enough to trigger a penalty in the contract that Shanghai Honor had signed with its domestic buyer for the resale of the air purifiers. Golden Deer made no attempt to explain to Shanghai Honor that the bank was at least partially at fault for the rejections, to back that up with the evidence for this, and to drive home the argument that therefore Golden Deer was not responsible for Shanghai Honor's losses.[20]

Capitol Premier Trading Company contracted to ship 2,320 units of folding chairs to importer Shanghai FRYL International Trade Company. Their contract provided for packing the goods in two 20' maritime shipping containers and four 40' containers at a cost of $14,900.00, and then shipped

[20] GOLDEN DEER TRADING COMPANY FINANCIAL SUMMARY 6–9 (Nov. 19, 2019).

the chairs accordingly. The contract passed the cost of the ocean freight along to the importer in the price that the importer agreed to pay the exporter, as it normally would. After FRYL received the chairs, it told Capitol that only two of those containers would have been necessary, and so the amount for ocean freight was much more than it should have been. FRYL convinced Capitol that Capitol was at fault for failing to notice FRYL's miscalculation in the contract. On this basis, Capitol agreed to deduct half of the cost of shipping from the amount that it would collect from FRYL.[21]
In nearly every iteration of the simulation, at least one U.S.-based student-run company makes a concession to their counterparts in China in exchange for a promise of future business. Feather, Inc. wanted to please its potential importer, Shanghai Columbus International Trade Corporation, to increase chances for future business. So, when Shanghai offered to pay prices for2,580 bottles of wine that would have left Feather with no profit, it agreed to lower its prices to a point where it would receive a 3.8 profit margin.[22]

Price changes are common, as is agreeing to pay extra fees that crop up unexpectedly. Each of these offers was a cleverly conceived chimera, because the contracts are for single, one-time sales. They are ill-suited to binding the parties to future sales, as distributor ship contracts typically do. In other words, talk about "long-term business relationships" is merely talk, in the single commodity trades business. Rather than quickly agree to absorb the financial consequences of a mistake, the conceding company needed to try to persuade their counterpart to pay it, or at least, to split the difference.

A similar lesson comes from the real world. A highly respected international trade university ran an import-export business for several years in order to take advantage of its expertise. A buyer purchased goods from the business twice before invoking the "long-term business" relationship it had enjoyed with it. The buyer then asked, based on this relationship, to for go the more secure Letter of Credit form of payment and instead use a wire transfer, and the university's business agreed. The buyer received the goods and never wired the money. This is an example of too much flexibility and a

[21] CAPITOL PREMIER TRADING COMPANY, FINANCIAL SUMMARY 8–9 (Nov. 26, 2018).
[22] FEATHER, INC., FINANCIAL SUMMARY 8–9 (Nov. 18, 2018).

failure to insist on a deal-breaker term in the contract in order to protect the interests of your company.

Why do these budding lawyers consistently fail to protect their company's interests? I have noticed that many of our students enter law school as people pleasers who lack confidence in their ability to analyze a confrontational situation and come up with solutions that protect themselves. Add to that the dominant approach in doctrinal law school classes which trains them to give an answer to a question as quickly as possible without much reflection, and you have a recipe for knee-jerk habit of abandoning one's interests during a transaction.

8Waters Trading Company based in Tallahassee, Florida agreed to receive payment for 320 sets of binding machines from TOP-TAI Import & Export Company via wire transfer. The reason: the companies were currently working on two other deals, this time with 8Waters as the importer. This history constituted "a strong business and a close, personal relationship…."[23]

Not so with their Chinese counterparts. Numerous times they dangled the prospect of future business in exchange for the US exporters lowering their prices, or US importers acceptance of higher prices. As American Cowboy reported, "most Chinese traders only agreed to contracts for payment after the Chinese companies displayed a commendable strategy of sticking to a deal-breaker term of the contract in order to protect the company's interests. Identifying such terms before contract negotiations begin and holding firm to them throughout, even during the renegotiation that must inevitably happen after the contract is signed, are important practices for any contracting party. delivery or receipt of goods," as opposed to payment as soon as the goods were shipped.[24]

The Chinese companies displayed a commendable strategy of sticking to a deal-breaker term of the contract in order to protect the company's interests. Identifying such terms before contract negotiations begin and holding firm to them throughout, even during the renegotiation

[23] 8 WATERS TRADING COMPANY, FINANCIAL SUMMARY 7, 8, 10 (Nov. 20, 2014).
[24] AMERICAN COWBOY, INC., SEC FORM S-1 10 (Dec. 10, 2002).

that must inevitably happen after the contract is signed, are important practices for any contracting party.

IV. Lessons About the Usefulness of Precision as a Goal for Contracts

Most law students learn about contracts through the prism of Christopher Columbus Langdell's case method, which uses judicial opinions to convey the key rules of the law. These rules are designed to be useful to lawyers who litigate disputes and to judges who decide them. Though such rules might indirectly help lawyers gear up for contract negotiations, their utility here is indirect at best, a notion that is famously summed up by the catchphrase "Bargaining in the Shadow of the Law."[25] These rules, by their very existence, inject a sense of certainty into the process of contract dispute resolution. Though it by no means rules out an unforeseen result, the law of contract creates an impression of certainty, and certainly holds up certainty as an ideal.

Legal sociologist Yves Dezalay famously framed a shift in contract negotiation in the 1990s as an increase in the length of contracts, at least in the globalized sphere inhabited by multinational corporations. He argued that the language of the contracts was becoming more detailed in order to create more of the rules that the transaction would be subject to. This practice displaced national law because the contract contained rules that contradicted government regulation, and the contract's arbitration clause would allow the parties to resolve contractual disputes without going to courts that might apply the countervailing law. [26]

To look to certainty as a lodestar in contract negotiations is, however, detrimental to the health of the deal, for all parties. This is because the world of business is rife with uncertainty. Multiple parties are required to move goods through global supply chains, and each party,

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[25] Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).
[26] *See* David Trubek, et al., *Global Restructuring and the Law*, 44 CASE WESTERN RESERVE L. REV. 407 (1994).

with its own interests and limitations, injects complexity into the supply chain.

Understanding this complexity inevitably leads to embracing the uncertainty of the transaction. This means that contract negotiators would do well to develop a temporal sense of the key steps in the transaction, and to learn strategies for calculating what those steps are likely to be and how much time they will each likely take. And then, armed with an appreciation for the likelihood that those steps will not work when and as planned, have alternative plans ready to implement.

When using this approach, contracting parties see a merging of the language of the contract with the act of negotiation and renegotiation. In other words, the line between the two, which looks stark in the Anglo-American doctrines of contract, evaporates. These doctrines hold that an agreement can be frozen in time and hold throughout the length of a transaction. But the more complicated world of business, at least that of international commodity trades, proves this view to be unworkable. Unforeseen circumstances crop up and must be dealt with. If the response to them is simply to argue breach of contract, then the commodities that are distributed through global supply chains would not move.