

Negotiating & Drafting Written Agreements

Points to Ponder

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- A written agreement is relationship or enterprise *infrastructure*, not a legal nuclear bomb
- The contract-drafting process should be conducted as a good-faith, win-win negotiation
- Written contracts are not effective protection against dishonest or greedy counterparties
- Don't negotiate with people whom you do not trust, except in settlement negotiations where you want to avoid a lawsuit
- If the relationship or the deal really matter, it pays to invest in good legal advice
- Before negotiating a contract, make a written list of features that you want in the transaction or relationship, share the list with your attorney and use the list to guide the drafting process
- Control (or share control over) the document draft
- Draft enterprise governance (if appropriate) and dispute resolution clauses carefully, using appropriate ADR features, to eliminate deadlocks and minimize the need for litigation
- Make certain that anything you want to happen in the deal or relationship is included in the final written agreement, then include a "full integration" clause
- Carefully draft for frustration, force majeure, and impossibility (see Emanuel's outline for definitions)
- Carefully review the draft agreement several times, from soup to nuts
 - Make sure you have addressed or intentionally abandoned everything on your wish list
 - Make sure that the language is clear, active, and cannot be misunderstood (unless ambiguity serves some identifiable purpose)
 - For enterprises, joint ventures, partnerships, and so forth, be certain that entrance, capitalization, operation, compensation, profit distribution, governance, and exit issues – including what to do in the event of death or disability -- are all "tied down"
- Remember cultural differences: contracts are culture-dependent in that
 - Most Americans view a written contract as a "final agreement," whereas in some other cultures (as in China and Russia) a contract is only a negotiating starting point
 - in the United States, clarity and specificity are contractual virtues, but in other cultures they may signal lack of trust
 - outside of Europe and the former British Empire, insisting on a tight dispute resolution clause may poison the business relationship