

Oman 2016 |
How to Analyze, Understand &
Negotiate Commercial Contracts

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HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

OVERVIEW

In today's discussion of Commercial Contracts we will consider how to,

- Analyze
 - Risk assessment (Do I understand why something should or should not be a deal breaker)
 - Scope (does it cover what it needs to cover)
 - Can we tolerate (live with) this degree of precision/ambiguity
 - Do I know what every term/provision means

Understand

- Meaning of key terms and provisions (how the contract all fits together)
- What are the parties' respective rights/obligations/remedies

Negotiate

- Putting the analysis & understanding together to get the best deal under the circumstances



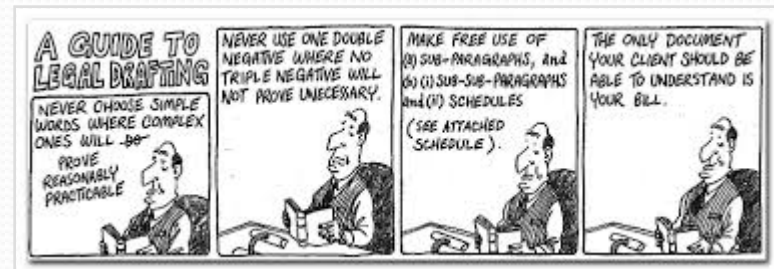
HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

What is a Commercial Contract?

Generally,

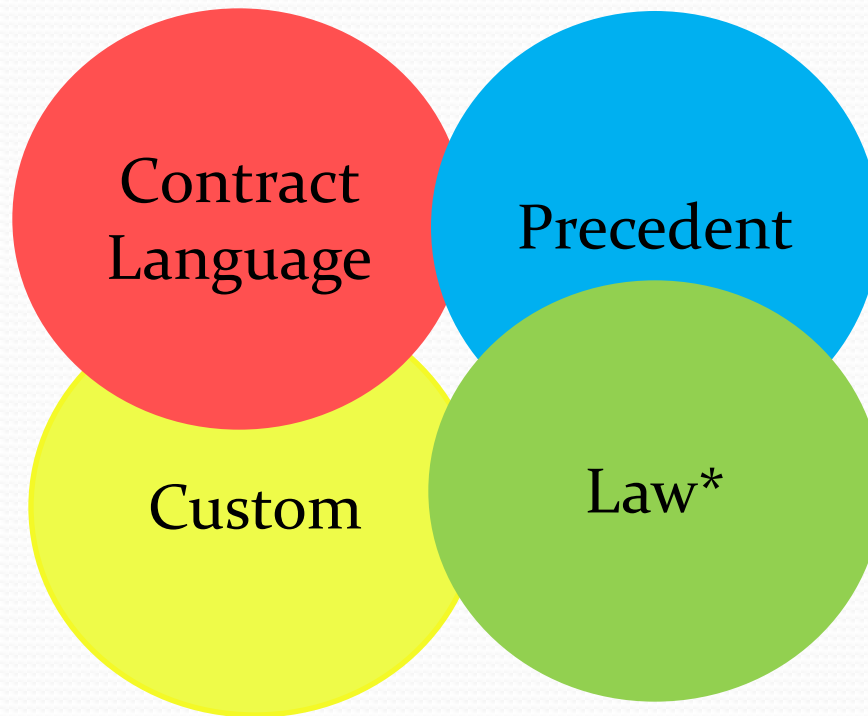
- A commercial contract refers to a legally binding agreement between parties in which they are obligated to do or restrain from doing particular things.
- Commercial contracts can be written, verbal, or implied in a formal or an informal manner.*
- Commercial contract can include all aspects of a business, such as hiring, wages, leases, loans and employee safety.

*Our discussion focuses only on written contracts



HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

What goes into how contracts are interpreted?



*e.g. Arbitration Law
Civil Transactions Law
Commercial Law
Commercial Companies Law



HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

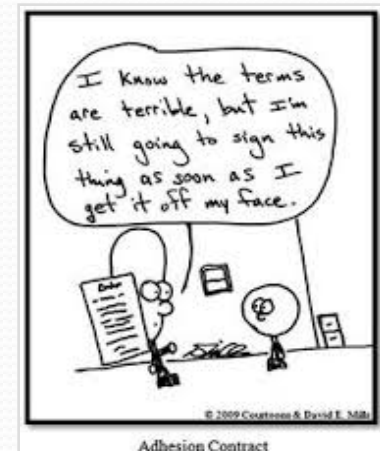
Conceptual Framework – Most Commercial Contracts can be conceptualized into the following components:

- Preamble
 - Identifies the parties
 - Recitals/background – underlying story of the contract (e.g. some expression of the parties' intent)¹
- Body of the Agreement
 - Definitions – Establish mutual understanding of certain key terms
 - Representations/warranties – Assertions of facts regarding specific matters (e.g., authority/capacity, etc.)
 - Covenants/Promises/Undertakings
 - Schedules/Exhibits/Appendices

¹Are the recitals part of the contract or just for explanatory purposes only?

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- Miscellaneous Provisions (AKA Boilerplate)
 - Notice
 - Governing Law
 - Dispute Resolution
 - Severability
- Signatures of the Parties



¹Are the recitals part of the contract or just for explanatory purposes only

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Preamble

This Services Agreement (this “**Agreement**”) is made as of [_____], by and between,

XXXX, an Omani company, having commercial registration number CR No. XXXX, and a registered office at **P.O. Box XXXX, P.C. XXX** doing business as “XXXXX” (“**AAA**”), and *

[XXXX], a company incorporated, [organized and existing] under the laws of _____ with its registered office at _____, (the “**Client**”).



*There is a general obligation of due diligence on the part of the counterparty to know with whom it is conducting business

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Preamble

[Whereas/Background/Understandings]

WHEREAS:

- A. [-----] requires the provision of certain “GENERAL SERVICES” concerning [**BRIEF DESCRIPTION OF GENERAL SERVICES TO BE PERFORMED**], as more particularly described herein.
- B. [-----] desires that the SERVICE PROVIDER furnish [] with the GENERAL SERVICES in accordance with the terms and conditions of this CONTRACT.
- C. The SERVICE PROVIDER [**represents and warrants that it**] is able and willing to provide the aforementioned GENERAL SERVICES and [**that it**] has the facilities, resources (financial and otherwise), equipment, personnel, material, knowledge, expertise and experience to do so expeditiously and in accordance with the terms and conditions of this CONTRACT.

Now, therefore, for and in consideration of the mutual covenants and agreements set forth herein, the PARTIES agree as follows:

- If we delete the bracketed language above is the statement still a representation/warranty?**
- Are the above “Whereas” clauses part of the contract?**

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Body of the Contract

- GENERALITIES
 - Definitions
 - Object of this Contract
 - Duration of this Contract
 - Termination of this Contract
 - Contract Documents
- SERVICE PROVIDER'S OBLIGATIONS
- PERFORMANCE OF GENERAL SERVICES
- [] OBLIGATIONS
- []'s RIGHTS AND PRIVILEGES

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Body of the Contract

- FINANCIAL CONDITIONS
 - Remuneration & Price Revision
 - Accounting and Payment Currencies
 - Invoicing and Payment
 - Taxes and Duties
 - Audit

- LIABILITY AND INSURANCE
 - Liability
 - Liabilities with regard to Public Authority
 - Liabilities with regard to Third Parties
 - Liabilities between the Parties
 - Bodily Injury/Death
 - Property Damage/Loss
 - Insurance
 - Bank Guarantee / Performance Bond

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Body of the Contract

Representations and warranties are assurances that one party gives to another party in a contract. These assurances are statements that the purchasing party can rely on as factual.

Good Standing. It is a duly organized corporation, or other legally recognized business organisation validly existing and in good standing under the laws of the [JURISDICTION], has the lawful power to engage in the business it presently conducts and contemplates conducting, and is or will be duly licensed or qualified and in good standing as a foreign corporation in any other jurisdiction wherein the nature of the business transacted by it, including performance of the GENERAL SERVICES, makes such licensing or qualification necessary.

Power and Authority. It has the power to make and carry out this CONTRACT, it has the financial capability, power and standing to perform its obligations under this CONTRACT, and all such actions have been duly authorized by all necessary corporate proceedings on its part.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Body of the Contract

No Conflict. The execution, delivery and performance of this CONTRACT is not in conflict with, and does not result in the breach of, constitute a default under or accelerate performance required by any of the terms of its organisational documents or any applicable laws or any agreement, decree or order to which it is a party or by which it or any of its properties or assets is bound or affected.

Validity and Binding Effect. This Contract has been duly and validly executed and delivered by the SERVICE PROVIDER and constitutes a legal, valid and binding obligation of the SERVICE PROVIDER, enforceable in accordance with its terms, except to the extent that its enforceability may be limited by bankruptcy, insolvency, reorganisation or other similar legal process affecting the rights of creditors generally or by general principles of equity. No material authorisation, approval, exemption or consent by the government or any governmental authority (other than the applicable permits which are the SERVICE PROVIDER'S responsibility) is required to be obtained by the SERVICE PROVIDER in connection with the authorisation, execution, delivery and carrying out of the terms of this CONTRACT.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Body of the Contract

Litigation. There are no actions, suits, proceedings or investigations pending or threatened against it at law or in equity before any court or before any governmental department, commission, board, agency or instrumentality or any arbitration panel whether or not covered by insurance which individually or in the aggregate may result in any materially adverse effect on its business, properties or assets or its condition, financial or otherwise, or in any impairment of its ability to perform its obligations under this CONTRACT.

Compliance with Laws. It has complied with all applicable laws such that it has not been subject to any fines, penalties, injunctive relief or criminal liabilities which in the aggregate have materially affected or may materially affect its business operations or financial condition or its ability to perform the GENERAL SERVICES.

Disclosure. No representation or warranty by it contained in this CONTRACT or in any other document furnished by it to [] contains any untrue statement of material fact or omits to state a material fact necessary to make such representation or warranty not misleading in light of the circumstances under which it was made.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Body of the Contract

Risk Mitigation Devices*

Legal	Commercial
Default Provisions	Advance Payments
Definitions	Definitions
Force Majeure	Duration/Term
Indemnification	Escrow Arrangements/Holdbacks/Installments
Limitation of Liability	Force Majeure
Notice	Indemnification
Qualifiers (materiality/knowledge)	Insurance
Representations/Warranties	Non-compete
Severability	Notice
Termination Provisions	Performance Guarantees
	Representations/Warranties
	Termination Provisions

*Note: Most of these devices tend to have some aspect of both legal and commercial significance.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- **Termination of Agreement.** Either party may terminate this Agreement by notifying the other party in writing upon a material breach by that other party, unless such breach is curable and is in fact cured within fifteen (15) days after such notice.

This Agreement will otherwise terminate upon completion or termination of the Transaction. AAA shall be entitled to compensation under Section 3 based on investments made by such Prospective Partner prior to the termination of this Agreement or at any time within one (1) year thereafter.

- **Indemnification.** The Client and AAA each shall indemnify, hold harmless and defend the other and the other's affiliates, directors, officers, employees, agents, consultants, attorneys, accountants and other representatives (each an "**Indemnified Person**"), and shall hold each Indemnified Person harmless, to the fullest extent permitted by law, from and against any and all claims, liabilities, losses, damages and expenses [including reasonable attorney's fees and costs], as they are incurred, in connection with the Transaction, resulting from the indemnifying party's negligence, bad faith or willful misconduct in connection with the Transaction, any violation by the indemnifying party (not caused by an Indemnified Person) of applicable laws in connection with the Transaction, or any breach by the indemnifying party of this Agreement.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- **Confidentiality Information.** The Client acknowledges and agrees that the identity of any and all Prospective Partners, and all confidential information about such Prospective Partners received by the Client from a Prospective Partners or AAA, is confidential information of AAA and may not be shared with any other person without the consent of AAA.
- **Notices.** Any notice, consent, authorization or other communication to be given hereunder shall be in writing and shall be deemed duly given and received when delivered personally, when transmitted by fax, three (3) days after being mailed by first class mail, or one (1) day after being sent by an internationally recognized overnight delivery service, charges and postage prepaid, properly addressed to the party to receive such notice, at the following address or fax number for such party (or at such other address or fax number as shall hereafter be specified by such party by like notice):

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Miscellaneous/Boilerplate*

- **Assignment**
- **Force Majeure**
- **Independent Service Provider**
- **Compliance with Laws**
- **Arbitration and Governing Law**
- **Governing Language**
- **Entire Agreement**
- **Amendment and Waivers**
- **Intellectual Property Rights**
- **Notices**
- **Non-Exclusive Agreement**
- **Consequential Losses**
- **Severability**

*Is there ever a need to negotiate the Boilerplate?

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Miscellaneous/Boilerplate

- **Assignment Prohibited.** Neither party may assign all or any part of this Agreement without the prior written consent of the other party.
- **Amendments.** This Agreement may not be amended of its existing provisions except in a writing signed by both parties.
- **Governing Law.** This Agreement shall be deemed to have been made in the Sultanate of Oman and shall be construed, and the rights and liabilities determined, in accordance with the laws of the Sultanate of Oman, without regard to the conflicts of laws rules of such jurisdiction. Any dispute arising hereunder shall be submitted to and determined by the Omani courts in Muscat.
- **Waiver.** Neither AAA's nor the Client's failure to insist at any time upon strict compliance with this Agreement or any of its terms nor any continued course of such conduct on their part shall constitute or be considered a waiver by AAA or the Client of any of their respective rights or privileges under this Agreement.
- **Entire Agreement.** This Agreement and all other agreements and documents referred to herein constitute the entire agreement between the Client and AAA concerning the subject matter hereof.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

Miscellaneous/Boilerplate

- **Severability.** If any provision herein is or should become inconsistent with any present or future law, rule or regulation of any sovereign government or regulatory body having jurisdiction over the subject matter of this Agreement, such provision shall be deemed to be rescinded or modified in accordance with such law, rule or regulation. In all other respects, this Agreement shall continue to remain in full force and effect.
- **Counterparts.** This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, and will become effective and binding upon the parties at such time as all of the signatories hereto have signed a counterpart of this Agreement.
- **Notices.** Any notice, consent, authorization or other communication to be given hereunder shall be in writing and shall be deemed duly given and received when delivered personally, when transmitted by fax, three (3) days after being mailed by first class mail, or one (1) day after being sent by an internationally recognized overnight delivery service, charges and postage prepaid, properly addressed to the party to receive such notice, at the following address or fax number for such party (or at such other address or fax number as shall hereafter be specified by such party by like notice):

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Choose the best answer:

- (1) Ahmed and Ali have spent more than 6 months negotiating a Term Sheet for the manufacture and supply of Abayas. They signed the Term Sheet, then a month later they signed the definitive contract. The Term Sheet contained a provision regarding how the parties would share certain expenses. However, the expense provision did not end up in the definitive contract. Ali now wants Ahmed to reimburse certain expenses, as they had agreed in the Term Sheet.

How should Ali initially proceed?

- a. He should first call his lawyer and get a professional reading. It is likely his lawyer will only charge him for a couple of hours so it will be a good investment.
- b. He should call Ahmed and let him know that he does not like his negligent style of drafting contracts.
- c. He should see what provisions in the contract might be in his favor.
- d. He should call Ahmed and offer to take him to lunch and try to resolve the issue amicably.

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- (2) Fatma and Khalid are parties to a services contract, which does not specifically state how the parties are to resolve their disputes. Fatma has been having problems with Khalid not performing under the contract, even though she has sent him several warning notices. Finally Fatma has had enough, and files an action with the local arbitration association. She sends notice of the hearing date to Khalid via courier (hand delivery) and facsimile. Upon receiving of the notice Khalid should:
- a. Ignore it because Fatma cannot make him go to arbitration
 - b. Immediately call his lawyer and get a professional opinion. It is likely his lawyer will only charge him for a couple of hours so it will be a good investment.
 - c. Call Fatma and tell her that because she did not also send the notice via registered mail, the notice is invalid.
 - d. Both (b) and (c) above
 - e. None of the above

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- (3) With respect to question (1) above, if Ahmed is looking for something in the contract to help him, what kind of provision should he be looking for:
- a. a merger/integration/entire agreement clause
 - b. a severability clause
 - c. a notice provision
 - d. a miscellaneous clause
 - e. Both (a) and (b) above

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- (4) Ms. Amira and Omar SAOC signed a procurement contract for the supply of canned fish. Both parties have performed under the contract for two years with no complaints on either side. When the contract was signed, Mr. Omar, the person signing the contract for Omar SAOC told Ms. Amira that he was the president of the company. However, in fact Mr. Omar is the company's janitor. The actual CEO is Mr. Ali, who lets Mr. Omar sign all of the company's contracts because he likes Mr. Omar's style of signature. Ms. Amira recently learned that Mr. Omar was in fact not the CEO and has filed a lawsuit claiming misrepresentation and asking that she get all of her money back. In the lawsuit the judge should:
- a. Dismiss the case because Amira waited too long
 - b. Dismiss the case because Amira cannot prove actual damages
 - c. Dismiss the case because the company obviously ratified the janitor's signature
 - d. Allow the case to go forward because the company was negligent in letting its janitor sign contracts
 - e. Allow the case but require that Amira also add the janitor as a personal defendant

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- (5) Hassan LLC and Amin LLC have had business dealings for more than 10 years, under a Master Framework Agreement and a number of related contracts. Mr. Hassan the main shareholder in Hassan LLC recently divested all of his interest in the company to his children, and his oldest son Hussein has taken over day-to-day operations. When Mr. Amin, the principle in Amin LLC finds out that Mr. Hassan no longer owns Hassan LLC he immediately sends a notice of termination to Hassan LLC for all of their contracts. Mr. Amin's notice of termination is:
- a. only valid if he can show that he has been harmed by the change of control
 - b. only valid if he sent it precisely in accordance with the notice provisions under each of their contracts
 - c. valid because he has a right to do business with Mr. Hassan himself, and never intended to work with the son
 - d. potentially valid if there is a change of control provision giving a right of termination
 - e. BOTH (b) and (d) above
 - f. Invalid

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(6) Charo SAOC and Sarika SAOG signed a 30 page contract. Each of their representatives initialed and stamped each page, except Sarika SAOG's representative did not sign and initial the page dealing with liquidated damages. Sarika SAOG was delayed in its performance and Charo SAOC is claiming under the liquidated damages provision.

Charo SAOC:

- a. Can claim the liquidated damages because they are part of the overall contract
- b. Cannot claim the liquidated damages because Sarika SAOG did not initial/stamp that page of the contract
- c. Cannot claim the liquidated damages because such things are considered a penalty and thus not enforceable
- d. Can claim the liquidated damages because letting Sarika get away with the delay would be unfair
- e. Cannot claim the liquidated damages because Sarika SAOG is a public company and cannot be subject to such terms
- f. None of the above

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- (7) Abdullah LLC entered into a number of contracts with Rami 1 LLC. However Rami 1 LLC is changing its business focus and wants to assign the contracts to its sister company Rami 2 LLC, which will take over that particular line of business. None of the contracts mention whether or not they are assignable Rami 2 LLC is a bigger company and has a much stronger balance sheet than Rami 1 LLC. Rami 1 LLC should:
- a. Move forward with the assignments, as long as Rami 2 LLC expressly agrees that it will perform the contracts.
 - b. Move forward with the assignments because it is a sister company and therefore Abdullah LLC cannot object.
 - c. Obtain the consent of Abdullah LLC for each contract assignment.
 - d. Move forward with the assignments but should give advance notice to Abdullah LLC.
 - e. Immediately call its lawyer and get a professional reading. It is likely his lawyer will only charge him for a couple of hours so it will be a good investment.

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

- (8) Which of the following terms is the most powerful when used in a commercial contract?
- a. must
 - b. will
 - c. shall
 - d. may
 - e. no one could possibly answer this question

HOW TO ANALYZE, UNDERSTAND & NEGOTIATE COMMERCIAL CONTRACTS

N	W	O	R	A	H	C	E	L	S	M	D	I	D	F
C	O	N	S	I	D	E	R	A	T	I	O	N	F	O
E	S	T	S	C	A	P	A	C	I	T	Y	D	K	R
S	E	R	I	S	K	C	I	I	O	I	H	E	T	C
X	E	D	A	C	L	J	K	C	P	G	A	M	E	E
Y	C	X	U	U	E	I	M	E	E	A	R	N	R	M
B	N	A	T	N	I	N	A	R	E	T	I	I	M	A
D	A	P	H	L	D	R	S	B	S	E	T	F	I	J
C	M	E	O	O	A	E	O	R	I	P	Y	I	N	E
J	R	A	R	V	M	I	R	W	C	L	Y	C	A	U
W	O	C	I	E	A	J	R	T	A	K	I	A	T	R
A	F	E	T	D	G	Z	Q	N	A	N	L	T	E	E
R	R	E	Y	D	E	O	O	E	A	K	M	I	Y	L
R	E	P	R	E	S	E	N	T	A	T	I	O	N	A
A	P	P	R	A	Z	M	D	E	I	D	Y	N	I	T
N	V	T	T	E	H	X	H	P	T	M	I	L	G	I
T	R	E	C	I	T	A	L	M	Y	K	C	X	S	S
Y	O	S	T	H	G	K	N	O	W	L	E	D	G	E
M	A	T	E	R	I	A	L	C	A	P	A	C	T	R

AUTHORITY
CAPACITY
COMPETENT
CONSIDERATION
DAMAGES
FORCE MAJEURE
INDEMNIFICATION
KNOWLEDGE
LIABILITY
MATERIAL
MITIGATE
NOTICE
PACT
PERFORMANCE
RISK
RECITAL
REPRESENTATION
TERMINATE
UNDERTAKINGS
WARRANTY

Thank you

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