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International Oil & Gas Specialists



Drafts and Drafting

Adapted from “Fundamentals of Upstream Petroleum Agreements” CP Thorpe 2008

“Don’t let a machine do the drafting.”

Drafting Commercial Agreements - Thorpe and Bailey

Outline of a Typical Agreement

By convention every draft and every signed agreement has the same basic outline:

- **Contents.** Normally there is an index giving the headings of the clauses and the appendices/schedules/attachments. The clause headings are not part of the agreement itself and do not affect the interpretation of the clauses themselves. This is an established principle of English law, and will usually be expressly stated in the section on interpretation.
- **Date and parties.** “This Agreement is made the 1st day of (*Current Date*) between X, Y and Z.” The parties are usually fully identified by name, country of incorporation, registered office address and sometimes registered number (the one identifying feature of a company that can never be changed throughout the entire life of the company).
- **Recitals.** These are almost invariably introduced by the word “Whereas”. The recitals are not strictly part of the agreement, and should not contain any part of the rights and obligations of the parties. But they are extremely useful because they give the



background and reason for entering into the agreement. When looking at an agreement for the first time this is always the best place to start.

- **Main body.** The main body of the agreement, its main operative provisions, almost invariably begin after the recitals and are introduced by the words: “Now therefore it is hereby agreed as follows.”
- **Definitions.** By convention the first clause in most commercial agreements covers definitions and interpretation. This sets out all the defined terms used in the agreement. This is logical as the definitions are key to understanding the agreement, but ten pages of definitions is a daunting prospect for any reader.
- **Signatures.** The signatures on behalf of the parties are generally found at the end of the main body of the agreement, or sometimes right at the end of the agreement after the appendices.
- **Appendices.** The appendices, also referred to as exhibits or schedules, contain matters that for practical reasons are best kept separate and self-contained. The appendices are part of the agreement. Because the appendices are tacked on at the end of the agreement, many people assume that they are somehow less important than or subsidiary to the main provisions of the agreement. This is not necessarily the case. The relationship between the main provisions and each appendix depends on the wording in the main provisions that refers to the appendix. Usually however upstream agreements do provide for the main body of the agreement to prevail.

The Source of a Draft

Contract draftsmen and lawyers very seldom start from a blank sheet of paper; they start with a precedent that has been used for previous transactions. The major upstream companies all have extensive libraries of precedents, their preferred terms for the type of agreement in question. This obviates the need to start from scratch and makes for speed and convenience, *but there is also a downside to it.*

In some situations there is a convention as to which party produces the first draft of an agreement. In dealing with a Government or a state oil company, it is usual (*though by no means universal*) for the state entity to produce the first draft. Even when dealing with a



state entity it is always worth offering to produce a draft – but it is a mistake to do so uninvited or to provide a monstrous and one-sided standard form.

With a JOA, it is usual for the operator to produce the first draft. With a farm-in agreement, the party farming in conventionally produces the first draft, in deference to the rule of “caveat emptor”. With a construction or procurement contract, the operator almost invariably produces the draft as part of the tendering process. In circumstances where there is no such convention, both parties may lay claim to the drafting and this itself can become a contentious issue.

Sometimes the desire to do the drafting has a cynical motive, and the party produces a draft that is slanted steeply in its favour. In the upstream industry however, companies usually have plenty of experience and resources and all the professional advice that they need, so there is little advantage to be had from a slanted draft. Very seldom will a Government, an oil company or a major contractor be coerced or tricked into signing an opaque or one-sided document. At best this tactic merely lengthens the negotiation, and at worst it may be seen as a sign of untrustworthiness or bad faith, and cause permanent and sometimes fatal damage to the relationship between the parties.

Good and bad drafts

“I would have written a shorter letter, but I did not have the time.”
Blaise Pascal

A good first draft greatly simplifies the negotiating process, and it is worth taking the time and trouble to get it right. A good draft is as short and as clear as the transaction permits; it deals even-handedly with the issues raised by the transaction and takes account of matters such as tax which affect its structure and content; it is internally consistent and contains no extraneous material. The measure of a good draft is that it enables the parties to identify the real issues between them.

Let me here express a personal view that many upstream lawyers evidently do not share. Many draft upstream agreements, and many signed ones too, are poor – unnecessarily long and convoluted, hard to understand, and poorly adapted to the requirements of the transaction.



There may be a number of interrelated reasons for this:

- ***One-sided standard form.*** The standard forms lovingly maintained by large companies are among the most monstrous and one-sided of documents. They may have had their genesis in a real transaction, but any concession that might be made in a real transaction is cut out. The company's rights are assiduously expanded, while its obligations and liabilities are cut down to nothing. They represent an ideal and unreachable commercial position. They are Alice-in-Wonderland drafts. Yet, when you allow the company to produce a draft, this is often what you get. So often the first draft is not a document which tries to balance the position between the parties, but an extreme negotiating position. At best the draft is simply ignored; at worst substantial and long-lasting damage is done to the company's relationships and commercial position.
- ***Standard form not tailored to the transaction.*** Implicit in the idea of a standard form is the notion that every transaction of a particular type is the same, that all PSAs are essentially the same, all JOAs are essentially the same, and so on. In fact the reverse is the case: every PSA and every JOA is unique. Every single upstream transaction has a unique context and specific aspects that are entirely new. This unique context and these novel aspects cannot be resolved by summoning words from a computer. The draftsman has to think carefully and come up with a drafting solution that deals fairly and clearly with the issues.
- ***One size fits all.*** It should be self-evident that a small transaction requires a different contractual approach from a large one. The standard form mentality does not allow for this. Operators tend to use the same standard terms irrespective of the size of the transaction, and this can result in a huge and extremely detailed contract for a small and simple transaction. This is a common problem in particular with supply and construction contracts.
- ***Draftsman not adequately instructed.*** Often the draftsman has not been involved, or has not been sufficiently involved, in the early negotiations. He or she does not know the detail of the deal, and is not adequately instructed as to what has been agreed. So the draft is just a standard form, and does not reflect the commercial agreement.



- ***Too much haste, too little thought.*** Producing a clear, short, fair and inclusive draft takes time and effort. Often the commercial negotiators make rash promises on timing: “we’ll send you the draft by Friday.” So inevitably the computer does the drafting, and there is no time to think the deal through, adapt the standard form to it, and take all the necessary internal advice. So you get a half-baked draft, full of holes, blank sections (“to be supplied”) and irrelevant provisions.
- ***Lack of drafting skill.*** People in the upstream think of lawyers as the wordsmiths, and generally rely on them to do the drafting. It may surprise non-lawyers to know that a lawyer’s training involves almost no practice or instruction in how to write an agreement. This is something you have to learn the hard way. Some lawyers are good at it, some are not.
- ***Legal culture.*** For most lawyers, “good drafting” is a form of words from which another lawyer can distil a single unambiguous meaning. Legal culture does not require brevity, clarity or style. The instinct of many lawyers is the opposite, for length, legalese and impenetrability. It may be that in some cases this is deliberate, an attempt to foster the false impression that only a lawyer can understand an agreement, and so make themselves indispensable.
- ***Deliberate obfuscation.*** Sometimes the length and impenetrability of a draft is used to disguise hidden traps, unfair provisions that in daylight the other party could not possibly accept. The idea is that the other party signs the agreement without fully appreciating what it contains. In the upstream this disreputable practice seldom works. It is imperative to know exactly what is in an agreement before it is signed, and in the upstream lawyers are on hand to read all of it and spot any hidden traps.

Standard forms can be useful as a starting point and as a check list. But they cannot substitute for clear thinking and clear expression about the actual deal under negotiation. My personal preference is to start with ***a blank sheet of paper***, and to consult a standard form only after the draft is finished to ensure that I have not forgotten anything. But I know few other lawyers who take this approach.

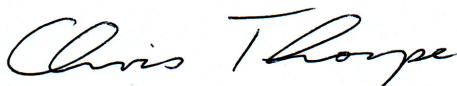


Lawyers have no monopoly over the use and meaning of words. The meaning of an agreement should be as clear to others as it is to a lawyer, and an agreement that is not clear to a layman is a dangerous agreement. It is a mistake to leave the drafting and negotiating entirely to the lawyers.

When you receive a poor first draft, whether it comes from your own side or the other, it is a mistake to plunge straight into the issues. Instead you should take issue with the draft itself. Keep asking for clarification until you understand what it means. Point out what is wrong with it, and if necessary insist on a better draft to serve as the basis for the negotiation.

A bad first draft seldom gets better with negotiation – it generally gets worse. The parties focus on the contentious issues, and their discussion is made more difficult by the complexity of the draft. The compromises that are reached are included in the agreement and often this further muddies the already murky water. It is not unusual, although it is a mistake, for the parties to compromise contentious issues with wording that is unclear or ambiguous.

More information on the **Fundamentals of Upstream Petroleum Agreements** is available via my web site at www.cpthorpe.com



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