



Let's Make a Deal:



Deal Making Process Improvement Principles By Noric Dilanchian

Doing business in almost every field involves deal making.

The challenge is that negotiating good deals and drafting effective contracts are non-trivial tasks due to legal, technological and business complexities. A further layer of complexity is added by variations in game play, psychology, and ethics.

In this context, deal makers can benefit from simplification and improved understanding of the legal context and practical processes relevant to deal making.

Deal making should be led by process, as well as practical and commercial considerations, not purely legal considerations. It is helpful to think of deals as blueprints for living outcomes, not just glue to bind relationships.

The seven principles in this document help minimize risk and maximize returns from deal making activity. The principles are guidelines and simplifications. They are relevant to all legal regimes. In this document they are grounded on business law in legal jurisdictions derived from the law of England, often called “common law jurisdictions” (these include Australia, Canada, England, India, Malaysia, India and the United States).

In deal making you have to **plan** the proposed deal, work out how to **manage** the outcome of the deal, and only then do the **deal**. Prevention is better than cure. The seven principles promote the following progression: **Plan > Manage > Deal**.

So what is a deal? In this document, a deal is formed by a contract, understanding or arrangement. These are legal concepts and options for deal making in common law jurisdictions.

Subtle but profound differences exist between the legal meaning of the words “contract” on the one hand, and “understanding” or “arrangement” on the other hand. Contracts are binding. In *some circumstances* an understanding or arrangement can be legally binding, e.g., where it is agreed to be, or where a verbal commitment is made to not disclose confidential information connected with the understanding or arrangement. Ordinarily, however, understandings and arrangements are made to be *not binding*.

By following the principles in this document you will improve your negotiations and deals, especially for major transactions which involve either contracts, understandings or arrangements, or a combination of them.

It is helpful to think of deals as blueprints for living outcomes, not just glue to bind relationships.

PRINCIPLE 1: FOLLOW COMMONSENSE

The law often follows commonsense. To enshrine commonsense, organizations have increasingly developed internal documents such as statements of values and ethics, and codes of conduct. These documents deal with topics such as the need for integrity, professionalism and competence, and the avoidance of conflicts of interest.

Apply commonsense principles to your deal making habits, for example:

- Work with people you can trust and deal with.
- Be ethical, honest, fair and reasonable, and require the same standards from others.
- Understand the deal, manage it, define the required process, document it, proactively monitor it, review its status on a regular basis, and evaluate outcomes.
- Seek specialist or professional consultancy when appropriate.
- Communicate early, regularly and effectively—both externally and in-house.
- Ensure variations are justified and not improper, e.g., when they are used to escalate the price and diminish what has been agreed.

In legally-relevant communication every effort should be made to eliminate ambiguity.

Clarity is vital. To achieve it, use language that is precise, consistent, unambiguous, comprehensive, thoughtful and structured.

When the deal is encapsulated as a contract, preferably in written form, the document should capture the intent of the parties to make each party legally bound and in agreement with certain rights, obligations and provisions for specific subject matter (e.g., transactions involving products and services).

PRINCIPLE 2: MAKE AND KEEP RECORDS

If you worked on a conveyer belt in a factory, it would make no sense if you ordered parts and picked up tools without a product design plan. Yet people regularly launch into deal making in unfamiliar territory without any plan. The risk for them is stumbling into legally difficult terrain, unintentionally making a deal, or locking into one which produces unsatisfactory results.

As deal making involves process knowledge and specialist subject-matter knowledge, it benefits from record keeping and appropriate documentation.

Transactions vary greatly and each tends to have its own “usual” types of records and documents. Check what is usual and then target to create records and documents as you progress. Remember, in business law, ignorance is rarely an available legal defense.

In commercial litigation, like any battle, you need to rely on your shield for defense and sword for attack. The failure to keep source records can rob a party of a defense (i.e. a shield) or a basis for commencing proceedings (i.e. a sword). Commercial litigation is a highly document-intensive activity—it feeds on records.

The length of time to keep records varies depending on the law of each jurisdiction.

Record keeping can be a chore, but turning records into communication improves the return from the effort.

For example, instead of a diary note, it is often best to communicate deal information to others in an email, memo, or letter. This is communication, as well as a record. Thus, in negotiations key turning points on complex issues can be documented simply with messages like these:

“Further to our telephone conversation in confidence on 25 July, I confirm that it is essential that we receive the finished product no later than 15 August.”

or

“I confirm that during our telephone conversation on 25 July I recommended our customized service but, for costs considerations, you selected the option of a generic product.”

If you are sending legally relevant email, ensure it is as precise as traditional correspondence. Otherwise you’ll regret your words in court.

PRINCIPLE 3: WORK WITH EXPERIENCED PEOPLE

To plan and implement a project, assess who should be in the project team.

Deal making involves numerous plans—they may include a project plan, feasibility plan, research and development plan, financial plan, corporate plan, and operations plan.

If you select from your organization's **internal team**, you should set the standards, recruit appropriately, train your personnel, mentor them, and constantly supervise and monitor their performance. You will find that this helps comply with Principle 7.

You may also require an **external team**. Consultants, lawyers, and other advisers should be used if their charges provide value for money and help to make better decisions as an outcome of better or faster:

- Issues Clarification and Analysis
- Problem and Cost Reduction or Avoidance
- Information
- Processes
- Risk Management
- Return Management (i.e., getting more out of an opportunity)
- Objectivity

PRINCIPLE 4: NEGOTIATE THE DEAL

Ideally, negotiations should begin after you have thought through the deal making process (see Principle 5), e.g., a binding contract, or alternatively, a non-binding understanding or arrangement. Care is needed, as understandings or arrangements can involve liability under non-contract law in common law jurisdictions.

However, in practice people usually enter discussions and negotiations and only then decide what to do next. In these situations, avoid stumbling unintentionally into contracts or binding understandings and arrangements. A deal making strategy helps minimize this common risk or mistake in negotiations. This may involve a simple statement such as *“We agree in principle, but always subject to resolution of all deal points and signature of a contract.”* Alternatively, it may require a more sophisticated strategy.

Strategy

As an overview, to review and settle a sophisticated deal making strategy, take these steps:

1. **Test** assumptions regarding facts, law, parties and process.
2. **Define** the issues.
3. **Assess** the positioning of each party—note their needs, do a S.W.O.T. (Strengths, Weaknesses, Opportunities, Threats) analysis, and locate common ground.
4. **Set** the range of objectives (minimum to maximum) and the target objective.
5. **Rehearse** options and scenarios—do a “what if” analysis
6. **Craft** the strategy.
7. **Select and modulate** negotiation style and tactics.

By following the process below you can avoid or further reduce many risks:

- **Determine** the skills and authority needed in the negotiating team.
- **Identify** your fall-back position.
- **Identify** the other side's key decision makers.
- Try to **understand** the other side's motives and position.
- **Query** the purpose of the transaction, test assumptions, and conduct a "what if" analysis to assess anticipated results and unexpected possibilities.
- **Determine** who should prepare the first draft contract. Will the document be a "standard" of one of the parties, a generic document in the industry, or a customized document?
- **Decide** whether to use a short form contract (such as a letter agreement) or a long form contract (with numbered clauses, headings and formal provisions).
- **Ensure** any contract recitals (e.g., introductory background statements) are adequately drafted to permit a third party, a new management team, or a judge to understand the background, purpose and objectives of the transaction.
- **Assess** the adequacy of technical legal provisions.
- **Decide** the appropriate process for post-signature contract management.

Tactics

Here is a priceless piece of advice. With rare exceptions, it is easier to negotiate favorable contractual deal points at the *beginning*, rather than at the *end*, of contractual negotiations. Normally, you should expressly state or telegraph your expectations *before* anyone prepares a draft contract.

Usually the best policy is to negotiate *as much as possible up front*. This should be well before contract drafting begins. This reduces legal costs by minimizing the re-working of a contract to fit shifting negotiation positions. Sometimes it is useful to prepare a heads of agreement. In doing this, avoid turning that type of document into an agreement to agree. Stick to a checklist format, rather than detailed sentences.

PRINCIPLE 5: SELECT THE RIGHT PROCESS

With luck on their side, people who stumble into deals can do OK.

In a legal context, however, precision is needed if a lot is at stake. Legally effective deal making involves selecting from a set of defined processes, techniques and methodologies. These help to legally position dealings each step of the way.

It can be beneficial for *all* parties to think carefully about the most appropriate deal making process to achieve worthwhile results and outcomes. It may need a confidentiality agreement, an exchange of information in documents, or instead, a meeting or a tender process document. Do this well and you'll match the needs of the circumstances to the right deal making process.

Options for Deal Makers

In common law jurisdictions, deal makers have the option of making a deal with a contract or with a non-binding understanding or arrangement.

The formation of a contractual relationship often involves a **three phase movement**:

1. In the beginning comes dialogue between the parties.
2. The dialogue can lead to common views on key deal points, or a non-binding understanding or arrangement reached between them.
3. As details or confidence develops, a “meeting of minds” is reached and they may at this point seek closure with a legally binding contract. Often this is because negotiations reach a stage when one of the parties wants something in writing before delivery.

A valuable skill for people in sales and in deal making alike is the ability to time the shift to the next move. Keeping a paper trail helps to confirm positioning. Having a signed, legally binding contract can be the best form of closure for the third movement.

Many documents are available to edge parties up to that point. Such non-contractual, pre-contractual, and usually non-binding documents come under several headings—each with slightly different features and uses. They include a heads of agreement, memorandum of understanding, terms sheet, letter of intent, and letter of comfort. They are variations on the theme of the second movement.

Forming a legally binding contract is not essential for deal making. Where appropriate, you can and should settle on an understanding or arrangement and make them non-binding. The understanding or arrangement can be verbal or in writing, or a combination of both.

Understandings or arrangements of a non-binding nature can have the benefit of being flexible or informal. However, understandings and arrangements generally have less certainty than contracts because, unlike contracts, people tend to use fuzzy communication and far less detail tends to be codified in writing.

A valuable skill for people in sales and in deal making alike is the ability to time the shift to the next move.

When it is appropriate to enter into a contract, there are a set of essential requirements that must be in place. Without them there will not be a legally binding contractual relationship.

The law of contract sets out the rights and obligations arising from legally binding promises. Beyond this simple statement, contract law is a convoluted field of the law. However, the essential requirements of a contract can be stated in simple language. The requirements help to distinguish a contract from an understanding or arrangement. Briefly, seven requirements can be found in the common law of contracts. If any are missing in common law jurisdictions the contract may be void, voidable, unenforceable, or illegal.

Briefly, the seven requirements are:

1. Intention
2. Offer
3. Acceptance
4. Terms
5. Consideration
6. Capacity
7. No Other Ground for Legal Issues or Invalidity

For this last requirement, depending on the common law jurisdiction, invalidity may result from the legal concepts of uncertainty, mistake, fraud, misrepresentation, misleading representation, duress, undue influence, unconscionability, illegality, good faith, penalty, unenforceable restraint of trade, etc. Sometimes these grounds are grouped under the heading “genuine consent.”

Verbal or Written?

Purely verbal contracts are among the most informal contract types. They are easy to get into, and not surprisingly, generally the easiest to get out of.

If you want greater certainty because a deal is important, then a formal mode of documentation is appropriate.

If it best serves your position to avoid having a legally binding contract, mark your communication “subject to contract” and add a prominently placed phrase such as:

“This communication or document is not a contract, and no party intends that these preliminary understandings represent a contractually binding agreement. These understandings are subject to or conditional on the negotiation and signature of a contract.”

PRINCIPLE 6: AGREE AND DOCUMENT THE DEAL

Principle 6 is a major turning point in deal making. It is the point that usually involves the highest level of legal expense if in-house counsel or external lawyers are used. It's time for all the parties to agree and document those things they have discussed, examined and clarified. If Principles 1 to 5 and 7 have been applied well, then Principle 6 will involve easier and less costly tasks in the deal making process.

The mantra sung by experienced contract drafters is *"A good contract is custom-built in content and design for specific circumstances."*

To comply with this mantra, for all organizations, the very best advice is to commission a skilled team to develop a complete **deal making methodology** supported by **process documentation** and various templates, including **template proposals and template in-house standard agreements**. Such agreements can be issued to customers, suppliers and others, or used to compare to draft contracts submitted by others.

A good contract is a document well adapted to its environment, thus making it less likely for a court to make an unexpected decision on examination of it. Such customization involves identification and analysis of terms of trade, technology, functions, processes and other topics specific to the client, project, transaction and other factors. Integrating this complex array of information in a manner that is legally effective often requires specialist legal and other technical know-how and knowledge.

Small differences between one contract and another can have subtle but profound legal implications. Just because to the untrained eye one contract looks similar to another in its headings or content does not mean that both have the same effect in law. The devil can be in the detail.

PRINCIPLE 7: SET PERFORMANCE CONTROLS

This final step in deal making process improvement involves effective implementation of deals. Unlike the previous principles, its practical implications apply to all the six previous principles.

Our era is characterized by major shifts in business practices, models and circumstances caused by a tide of technological and business ingenuity. In most contemporary markets there is what we might call a “**performance challenge**.” This challenge includes constant market demands for enhanced customer relationship management, more sophisticated products and services, and innovation at many levels. A solution is quality performance control.

How to do this is the topic of a great deal of management writing in recent decades. Hence we have concepts such as competitive advantage, balanced scorecard, and competency-based learning. Similarly, the seven principles in this document are designed to respond to the challenge.

To illustrate the performance challenge in a legal context, the relatively simple act of “buying” is often more complex today than ever. It can involve contracts, understanding and arrangements which:

- Relate more often to **services** than products or commodities (because services are less tangible than things, it can be harder to define them and set quality requirements for them).
- Often involve **linked transactions** for products, services and support (this makes it imperative to distinguish the things acquired and the links between them).
- Document **ongoing legal relationships**, not one-off trades between suppliers and their customers (considerations for longer term relationships are more far reaching than those for one-off quick trades).

It follows that it helps to have multi-disciplinary thinking, approaches and project team members. For big deals they should be collaborators with both general and specialist experience, particularly in project costing, project management, risk management, knowledge management, and quality management.

A common need is to set service levels for so-called “service level agreements.” These usually set service definitions, timing standards, minimum and maximum quality needs, incentives for compliance and rebates for performance shortfalls. To ensure legal remedies will be available, it is legally useful to state the precise consequences of performance shortfalls.

Finally, for the deal making process and contract law to deliver better, faster and cheaper outcomes, it is imperative to monitor and respond to the **drivers of change** in contemporary markets. For deal makers, drivers of change are both challenges and opportunities. Depending on circumstances they include trends in digitization, specialization, globalization, new organizational structures, and demographic and geopolitical shifts. 📍

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