

INTERNATIONAL BUSINESS NEGOTIATIONS  
A Practical Skills Approach through an Extended Simulation Module utilizing Collaborative  
Teaching Methodology

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## CHAPTER 1 INTRODUCTION

“Step into my world, and welcome to it”<sup>1</sup>

You are about to embark on a different and unique law school experience. The goals are (i) to introduce you to business transactional law, (ii) to provide negotiations training in the context of international business transactional practice, (iii) to enable you to apply the knowledge you have acquired in your prior legal education, and (iv) to further your practical legal skills. Unlike other law school courses, the objective is not to teach you “the law” or “theory” but rather to focus on how you “use” the law, and to give you an opportunity to apply your legal, and non-legal, knowledge, in the context of serving as a lawyer negotiating a “real” business transaction. You will be immersed in the thought process in which a transactional lawyer must engage as she progresses through the negotiation of a business transaction; you will come to understand the relevance and the subtleties of the facts, both legal and non-legal, involved in the transaction; you will explore the interface of business and law; and you will need to draw upon all your intellectual and emotional resources to solve the problems that arise in the course of such a transaction. You will need to do all of this in “real time” as the transaction unfolds, which is the way a lawyer must think and react during a transaction. Most importantly, you will experience a transaction from beginning to end (something that young lawyers rarely experience) and will do so in the safe haven of the classroom where any “mistakes” in negotiating the transaction will become lessons and not malpractice claims. Upon completion of the process, you will have an understanding of transactional practice and an appreciation of what it means to be a transactional lawyer engaged in either a cross-border or a purely domestic transaction. In the process, you will learn how your legal education can be utilized to achieve practical business objectives, and, in the process, you will be transformed from “thinking like a litigation lawyer” to “thinking like a deal lawyer.”<sup>2</sup> You will have “step[ped] into [our] world.”

This course is based on experiential learning structured around an extended simulated negotiation of a business transaction. The course is intended for two groups of students (two separate groups in the same law school or between groups in two different law schools) to represent each side of the transaction. You enter the transaction at the stage that the clients have determined that a transaction is feasible and needs to be further explored with the objective of

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<sup>1</sup> From a 1969 television show based on the life and cartoons of James Thurber. As a corporate transactional lawyer, that is an accurate and sufficient citation and attribution of credit. As a litigator, you would probably Google the phrase, obtain the precise details and then spend an hour figuring out the Blue Book format for a “proper” citation to Wikipedia. Corporate transactional lawyers have more fun.

<sup>2</sup> The phrase is attributable to the following article: Tina Stark. *Thinking Like a Deal Lawyer*, 54 J. LEGAL EDUC. 225 (2004). Note the proper Blue Book citation form!



negotiating a letter of intent that outlines the key components of the transaction<sup>3</sup>. You will need to analyze the facts, identify your company's key objectives, determine your negotiating strategy, and then implement it in order to reach an agreement with your counterparty, that is the other company. Depending on the structure of your class (two groups in same law school or same city or same country) you may negotiate via any of the means that are available for business negotiations: written communications, telephonic communications, videoconferencing, and face to face negotiations.

The course assumes a basic understanding of business organizations (e.g., completion of a basic corporations course) and contracts but does not assume any background in negotiations or other transactional practice concepts. Other helpful background courses would include finance courses, commercial law courses, and international law courses. The course, as taught by the authors, has generally involved classes that are comprised of both JD (both 2L and 3L) and international LLM students with diverse backgrounds and varied prior business experiences. The varied experience of the class members adds to the educational experience. Good instincts have often been more valuable than prior experiences.

The course for which this text is intended is unique in many respects. First, the emphasis is on the process and the experience, not the outcome. Importantly, the process, experience and outcome are determined by your class's decisions. There is no pre-conceived outcome, and there are no right or wrong answers. As in real life, there are multiple viable approaches and resolutions to the issues presented. There is not even an assumption that your negotiation will successfully reach a mutually agreed negotiated transaction. Failure to conclude a transaction is a potential, and acceptable, outcome for the learning experience; like in legal practice, this conclusion may be in the best interest of your client. Second, you will be required to approach this negotiation as a collective effort, as your negotiating team will need to agree on objectives and strategies to achieve them (and you will possibly have to convince your fellow team members of the appropriateness of your proposed approach). Transactional law is rarely practiced solo; lawyers must interact as part of a legal team, and the team experience is part of this course. Third, your class and your professor will be dealing with many legal issues and concepts which are part of the simulation exercise, but the order in which those matters arise (and in some instances, whether they arise at all) will depend on how your negotiation develops, not the order in which your professor chooses to present them. You (and your professor) will be responding to the issues in a real time manner just as they would occur in a typical transaction. Finally, you will experience a transaction "viscerally." No transactional negotiation is purely linear; transactions evolve in fits and starts; ups and downs. This exercise is no different. You should also experience a change in yourself, as your confidence should grow as you develop both familiarity with the elements of the transaction and rapport with the "lawyers" on the other side.

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<sup>3</sup> For those students who have had no introduction to the types of documents used in transactional practice (which includes most law school students, since law school has historically focused on dispute oriented documents and has not introduced students to the types of documents used to create a business transaction), a "letter of intent" is the document exchanged by two or more parties which outlines the key terms and conditions of a proposed business relationship that will then be reflected in complete and definitive documents signed by the parties.



This is a natural process in most transactions (at least those that work towards an agreement) as the parties, and their counsel, settle into a working relationship to achieve the mutually desired objectives (while continuing to represent the interests of their respective clients). In the end, you will have developed a sense of the “process” of a transaction while developing your legal skills. The essence of this “experiential learning” is captured by a former student:

How can I describe in words the sensation of actually going through a negotiation? How can I detail the sinking feeling at the pit of my stomach when I was caught off guard with a new set of facts in the middle of a video conference? How can I really share those feelings of nervousness, confidence, dismay and victory that went through my mind during this entire ordeal?

The truth of the matter is that I can say what it is I felt and thought, but that you, the reader, cannot really know until you have been in the same position. If it were possible, I would take this class again and start next semester from scratch. Why? Because despite your training as an attorney, despite volumes of legal theory and years of legal education, the only way to prepare for these situations is by gaining experience in them. This is the most valuable lesson that I take from this seminar.

Put somewhat differently, think of the contrast between experiential learning and traditional classroom learning as the difference between learning football plays from the playbook and executing the plays on the field. It is one thing to study the theory of each play; it is quite enough to execute the same play with a horde of burley opponents running at you, possibly in ways not imagined in the playbook, trying to disrupt your every move and render you powerless to play. Sure, you are well trained and know what you should do since you have studied every relevant move and theory, but remembering and applying theory under the rush of the opposition is not only difficult but unpredictable, and you have to rely on your instincts to conduct the play as it develops on the field. <sup>4</sup>

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<sup>4</sup> Apart from our student’s explanation and the whimsical example used above to illustrate the importance of acquiring experience, there is actually a “scientific” analysis which focuses on how creative professionals, like architects, artists, and lawyers, actually acquire their skills. Professor Donald A. Schon, a professor of urban studies and education (and not a lawyer) who studied how such professionals acquired their knowledge, developed the concept of “deviant tradition” of professional education which he described in a speech at the Annual Meeting of the Association of American Law Schools in 1995:

“First, you learn by doing .... In other words, you do the thing before you know what it is. Second, you begin to do it [in] the presence of a senior practitioner who is good at doing it and whose business is to try to help you learn how to do it. Third, you are doing it with other people who are also trying to learn to do it. Fourth, you do it in what I call a virtual world which represents the practice. . . . It's cheaper. It's also less risky.” Donald A. Schon, *Educating the Reflective Legal Practitioner*. 2 *Clinical L. Rev.* 231, 249 (1995-96).

For another discussion of the importance of experiential education for lawyers, see Karl S. Okamoto, “Teaching Transactional Lawyering” (January 17, 2009). Drexel College of Law Research Paper No. 2009-W-02; NYLS Clinical Research Institute Paper No. 09/10 #22. Available at SSRN: <http://ssrn.com/abstract=1346429> (“The essence of lawyering is ‘creative problem-solving’ under conditions of uncertainty and complexity. . . . Experts are good at solving problems because they recognize in new situations what “they have seen before. . . . When problems

If all of this sounds somewhat novel, it is. Law school has long neglected transactional legal practice, and, until recently, has also devoted little time to teaching such practical legal skills as negotiating and drafting transactional documents.<sup>5</sup> Where transactional practice has been taught, the often-used case-study method has featured what went wrong with transactions rather than how to structure them properly.<sup>6</sup> The winds of change are, however, beginning to blow, and new approaches to teaching both transactional legal practice and practical legal skills have begun to emerge, propelled by three converging factors: First, the American Bar Association now stipulates that, as part of the accreditation process, it will evaluate the practical skills courses offered by law schools. Second, the dramatic change in the legal profession experienced in recent years, whereby clients focus on the value proposition of their legal service providers, has altered the ability of law firms to provide practical “on the job” training in the early post-degree years of lawyers, thereby shifting the obligation to law schools to provide additional practical skills training to students to accelerate their “value add” to potential employers and clients.<sup>7</sup> Third, a broader range of lawyers, including many public interest lawyers, need to understand business transactions. These lawyers may work in settings that lack

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are novel or complex, various mental models and strategies allow experts to “visualize” various potential solutions based on accumulated experience to create solutions for previously unseen problems. . . . The most effective way to acquire these cognitive capacities - the building blocks of expertise - is through meaningful participation in actual practice. Simply put, to learn it, you must do it.”)

<sup>5</sup> One well known jurist has summarized this conclusion succinctly: “I think it’s extraordinary these days — the tremendous disconnect between the legal academy and the legal profession. They occupy two different universes. What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law.” Chief Justice John G. Roberts, Jr. *Scribes Journal of Legal Writing*, Transcripts of Bryan Garner’s interviews with Supreme Court Justices on legal writing and advocacy, 2010, p. 37. Chief Justice Roberts continued: “The academics are perfectly free to say, ‘Well, I’m not interested in helping the judges or the practitioners.’ But if they are [interested in helping practitioners and judges], they’re not going to do it with the type of focus they have these days. You can decide whether you want to be an engineer or a theoretical mathematician or a theoretical physicist, and those are two different lines of work. But don’t expect, if you’re going to be a theoretical mathematician, to have an impact on how people build bridges. And if you want to have an impact on how they build bridges, you need to become more of an engineer.” The Chief Justice’s bridge analogy is not only apt, but one you will see used elsewhere in this text, since negotiation is, in fact, bridging different positions toward a common end. Furthermore, the impetus of this text is to help “bridge” the gap between the legal academy and the legal profession by providing you with a practical and analytical framework that transports your academic knowledge of law through experiential learning to the practical skills necessary to negotiate and “construct” transactional agreements.

<sup>6</sup> For an excellent summary and critique of various methods by which law schools have historically taught transactions, as well as a summary of much of the literature regarding such methods and alternatives thereto, see Victor Fleischer. *Deals: Bringing Corporate Transactions into the Law School Classroom*. 2002 COLUM. BUS. L. REV. 475; see also Stark Debra Poggrund. *See Jane Graduate. Why Can’t Jane Negotiate a Business Transaction?*. 73 ST. JOHN’S L. REV 477 (1999).

<sup>7</sup> See, David Segal, “What They Don’t Teach Law Students: Lawyering,” *New York Times*, November 20, 2011, p. A-1 (“Law schools have long emphasized the theoretical over the useful”) (also at <http://nyti.ms/uhQK6Q>).

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resources to provide additional training, so young lawyers will be expected to arrive with some practical skills.

This text, and its collaborative, experiential, teaching methodology is in the forefront of the movement to address both practical legal skills<sup>8</sup> and the absence of courses on transactional practice.

The historical approach to addressing transactional law has often focused on litigation-based instruction which emphasizes what has gone wrong with a particular transaction and uses these lessons to explain how future transactions "should be done." This approach disproportionately highlights those issues that have resulted in legal disputes. While such matters are important and instructive, the focus on the dispute process and transactions "through the rear-view mirror" comes at the expense of teaching what is most important to practicing transactional lawyers: (i) the skills required to structure relationships that function effectively and satisfactorily for all parties, and (ii) how to translate the concepts of business transactions into the legal documentation that memorializes and governs such relationships.

This course originated from the realization that the historical law school curriculum was failing to provide law students with an(y) introduction to transactional legal practice (which is what approximately half of law school graduates ultimately practice) and a frustration that young associates entering corporate transactional practice (including one of the authors at the beginning of his career) often lack a basic understanding of what the practice involves. The usual student internships in law firms generally fail to provide any meaningful transactional experience since transactional practice is particularly unsuited to intern-type assignments both because the students lack the necessary expertise to participate in transactional practice and the internships often are too short for their supervisors to work with them on acquiring such expertise.

Transactional practice does not generally involve the litigation-oriented research and writing stressed in law school, nor does it involve the type of legal issue-spotting that comprises most law school education. The type of writing required for transactional practice is not at all similar to argumentative brief-writing; and the skill of translating the business deal into legal documents has usually been neglected in traditional law school education<sup>9</sup>.

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<sup>8</sup> See, Brent Evan Newton, "Preaching What They Don't Practice: Why Law Faculties' Preoccupation with Impractical Scholarship and Devaluation of Practical Competencies Obstruct Reform in the Legal Academy," 62 South Carolina Law Review 105 (2010) ("The proposed reforms primarily call for more real-world and skills training and more effective teaching practices."); Roy Stuckey et al., Best Practices for Legal Education 24 (2007) ("Law schools are not producing enough graduates who . . . are adequately competent, and [who] practice in a professional manner."); John C. Kleefeld and Michaela Keet, Getting Real: Enhancing the Acquisition of Negotiation Skills Through A Simulated Email Transaction, *Journal of Arbitration and Mediation*, Vol. 2, pp. 23-52, 2011 ("Simulations . . . may provide even better learning opportunities than more real-world experiential learning such as clinical education, internships and externships.");

<sup>9</sup> See the references in Note 6, *infra*.



The authors designed and have taught the class on which these materials are based to overcome these challenges in the standard law school curriculum. The course methodology was developed during more than a decade of teaching with the simulation exercise. It has been refined in the light of this experience and student recommendations. This text is the result of our experiences with the course.

A brief note on this text is also relevant. Since this text is premised upon experiential learning, with the experience actually being more important than anything you will read, our focus is on providing the framework for analysis necessary to enable, and enhance, the student's learning experience. In this book we provide you with the pieces of the puzzle; how you choose to assemble the pieces is left to your imagination. Unlike your other courses which walk you through the process of mastering the material in an organized fashion, our goal is to guide you into the learning experience and give you the tools you will need to fully exploit this learning opportunity. However, it is important for you to remember that the main event is the experience itself.

Accordingly, this text, like the teaching, is multifaceted, including explanations, excerpted readings, and what we have called "Socratic writing" through which we try to guide your thought process through the negotiations experience. While certain chapters are followed by exercises to supplement the readings, other chapters are themselves "exercises" in that they are composed substantially of questions to direct your thought process. Transactional practice is nuanced, and by constant questioning of facts or processes, we create the framework that we want you to take away from this experience. We are shaping your mind to that of a transactional lawyer. We told you that this was a novel course.

Let us begin to open the curtain on transactional practice.

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