

INTERNATIONAL BUSINESS NEGOTIATIONS

Spring 2012

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CLASS DIARY

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Today is the first working day of the whole negotiation process. The class discussed the first communication letter to MCC and prepared for the first video conference meeting.

Team 1 drafted the first communication letter. The letter's language was formal and courteous. Its format was well prepared. However, in my opinion, some contents of the letter need revising.

Team 1 stated that the ultimate goal is an agreement to a joint venture. However, their letter proposed a long term supply agreement. They explained that a long term supply agreement would be the least advantageous alternative for MCC. They expected MCC would not agree with this model. However, if MCC eventually agrees to enter into a supply agreement, they will persuade MCC to change its mind. I disagree with this approach. MCC will probably be confused when KJH initially propose a plan and then try to alternate it. Such confusion may create doubt and caution. MCC may question the ultimate goal of KJH and whether such goal may harm MCC and Malundi's economy. I propose that the letter should specify that joint venture would be the negotiating topic. If MCC will not agree to such approach at the first conference meeting, KJH can proceed with supply agreement or licensing agreement. If both parties cannot agree to such agreements, KJH may easily return to the joint venture discussion without raising any concern to MCC.

The letter mostly addressed the benefits MCC would receive from doing business with KJH. MCC could be dismayed as they might consider the cassava business as a favor from a multinational corporation to a developing country. The letter should have addressed the benefits that both parties may achieve as to express KJH's willingness to do business with MCC in fair and faith full manner.

At the first paragraph, the letter stated that “*KJH would bring to MCC and the nation of Malundi high amounts of foreign exchange*” and the benefits of such influx of foreign exchange. In the second paragraph, the letter mentioned again what benefits KJH might offer to MCC when they entered into a long term supply agreement. The said statement should be moved to the second paragraph. If the deal is closed, KJH will eventually inject foreign exchange to MCC regardless of business model, such as supply agreement or joint venture.

The following statement is incorrect. “*An influx of foreign exchange will [...] diversify its [Malundi’s] economy, and create new jobs for the Malundian people*”. Foreign exchange would not, at least directly, cause such effects. Another defect in the letter’s wording is in second paragraph. “*[A] supply agreement [...] will show the world that Malundi is a safe environment for foreign direct investment [...]*”. A supply agreement does not result in foreign direct investment. Foreign direct investment generally requires a foreign investor to set up its commercial presence via physical assets, such as factory or office.

Written communications shows the professionalism of MCC’s negotiation team. A succinct letter containing appropriate term of art would impress the counterparty and gain their respect. Such attitude is probably a plus for our power in negotiating process.

February 2, 2012

Team 2 was the negotiating team. Both parties exchanged a handful of information. However, both parties did not reach a mutual agreement on business model. Personally, I prefer leaving the meeting by which parties generally agreed to the joint venture than discussing details of every potential business structure but no specific one was reached. I disagreed with the approach Team 2 used to negotiate.

Before the meeting, we received the first communication letter from MCC. MCC stated that they would want a joint venture instead of a supply agreement. Although a joint venture is KJH's ultimate goal, Team 2 still insisted on a supply agreement. Team 2 expected that the supply agreement would be a bargaining chip in negotiation. They expected that they could demand MCC to make some concessions when they would reluctantly agree with a joint venture. Consequently, two negotiation teams spent time discussing several issues relating to every possible business approach, including joint venture, supply agreement and license agreement. They argued back and forth on the business structures. The positive was we could obtain useful information for the business. The negative is that we kept beating around the bush, which I believe is a waste of time. If both of parties aim to a common goal, it is better going straight to such goal. What happened in the negotiation partly evidenced the negative outcome. When Team 2 presented that if they might accept a joint venture, they asked MCC "What kind of concession you offer for us?". Such question would not work. The MCC's negotiating team answered such question by reiterating why they offered a joint venture. It is because MCC might not understand the question or they could not know what to yield. Luckily enough, MCC figured out one of the issues KJH wanted and make a concession. Ironically, MCC just offered an ownership share of 25% instead of 20% to KJH.

Basically, capital ownership involves risk. The more risk the more profit. It was a deadlock while MCC kept insisting that they would bear risks yet specifying any of them, KJH kept requiring MCC to articulate which risks they insisted. If we want majority ownership in a joint venture, we should make MCC pay attention to what risk a party may have. We should demonstrate the risks for them instead of questioning and waiting for the satisfactorily answers.

Such demonstration would have created better outcome than simply questioning what they could give for us.

February 6, 2012

It was the second day of the negotiation process. It was the stage to review the last negotiation session. We also discussed the second communication letter drafted by Team 3. Below were my impressions.

Language should not be overlooked. Whether oral or writing, it can create misunderstanding. Although English is the common used language, it is still understood in different ways. A native speaker may not understand exactly what a non-native speaker wants to convey. This sometimes happens in the last conference meeting when the negotiation team of KJH and MCC diverged in a same context and topic. Even in the second letter, I found that MCC may understand the term of management position as a position in Board of Member.

As emphasized by the professor, it is important to understand the business to counsel the businessperson. I realized that we did not actually understand the business. Not even one student in the class actually was thinking like a businessperson. For example, it would be impossible to fix the price in a long term supply agreement. The price is a function of the demand and the supply which vary from time to time. Some student came up with a fixed price. It was impossible since Malundi's government might change the price from time to time. We should propose a mechanism attaining benefit for our side yet reflecting the continual changes of the price.

The professor did point out the most important element in a negotiation: Getting the deal done without giving the other side everything. I totally agreed. However, my classmate seemed to be still stuck with the fancy and drama ideas that bluffing would work. That was the reason why the Team 3 still proposed that a joint venture would not work. So until this stage, the picture

was that KJH wanted to set up a wholly subsidiary which would enter into a supply agreement of cassava with MCC; while MCC insisted on a joint venture with KJH to produce cassava extract.

February 11, 2012

Today is the second video meeting conference which is performed by Team 4. It is my team. My opinion is different with other teammates. Particularly, I did not agree how they responded to MCC's second communication letter and their strategy to negotiate. I proposed KJH directly address the structure of the joint venture. It was nevertheless rejected. My team began the negotiation by responding the MCC's second letter, which means they rejected the possibility of a joint venture. They concluded their response by proposing a wholly subsidiary and a supply agreement. Both negotiating team went back and forth around the issues while one wanted a joint venture and the other desired a subsidiary. My team brought up a joint venture doing fertilizer business only with expectation that they could give up the joint venture doing cassava extract. To my surprise, MCC rejected this proposal. Another surprise was that our team leader finally had to discuss a joint venture. So I wonder why we did not negotiate the joint venture at first. It was wholly a waste of time to ask and reply over and over again similar issues why both parties aimed to common business model: a joint venture.

In their second letter, MCC counter argued against KJH in terms of employment, technology and diversification. Regarding employment, the MCC's opinion was vague. I had proposed our team rephrased it and asked for confirmation. However, it had been ignored. My team responded to MCC with a promise to appoint MCC's employer to the wholly subsidiary of KJH. I thought this idea was confusing. It would probably be a conflict of interest when a person being an employee of MCC and KJH. Regarding technology, MCC insisted on the technology transferred. They wanted technology, said the MCC's President. However, it seemed to me that

MCC did not know what the technology was and what they could achieve from it. Legally, even a joint venture would be set up, it could not sub license the technology to MCC without consent of KJH. The technology license was granted exclusively to the joint venture. It would be a licensing agreement between KJH and MCC that would satisfy MCC's desire. They were unlikely to understand the legal perspective of the technology transfer.

During the negotiation, there were so many confusion and misunderstanding. They did not perceive issues from our point of view and vice versa. We did not understand the business practice and vice versa. A written communication would be likely the best solution. Until this stage, I believe that oral meeting is merely benefit for exchanging information and observing the personality of the counterparty. Written communication would be best to present desires and arguments.

February 13, 2012

Today the class has discussed some issues of licensing agreement and financing a project. Additionally, we also reviewed KJH's third communication letter to MCC. After three week, I came up with some interesting observations.

First and foremost is my surprise about the tension in our class discussion. There is neither debate nor argument between teams. I did not see any intensive critics or argument toward a team's written communication or conference meeting. I thought this was a signal of amble cooperation between team members. However, it was also a disadvantage compromise. I believed that argument might consume time and effort but it would help enhance the overall communication of the class.

Next, I would mention the language issue again. Simplification is what I would emphasize. Regarding oral communication, simplification means straightforward. Stating clearly

and directly what we want. If there is difficult in understanding each other in terms of language, we can simply reiterate or rephrase what the other party just asked or stated. We should also ask for confirmation whether we have understood the other party's question or statement. Regarding written communication, simplification means simple choice of words and structures. The KJH's third communication was informative and responsive yet confusing and verbiage, especially in the parts of technology transfer and capital investment. I believed the letter could have been more persuasive if the letter had used plain language and less complex sentence. Furthermore, the letter should state directly why MCC's perception was wrong. For example, to illustrate that MCC's contribution of cassava could not be deemed as equity capital, the letter used the following expression. *"For example, the contribution of cassava in any amount to the joint venture would qualify as a capital investment equal to the value of the cassava for which MCC is not compensated"*. I believed MCC would probably be confused with this example. I would revise such sentence as *"For example, the value of the contribution of cassava to the joint venture will qualify as a capital investment if the joint venture does not compensate MCC for such contribution"*

February 18, 2012

This was the third video conference meeting yet the first achieved several progresses in the negotiation. Importantly, both parties tried to fill the gap in the understanding on terms and norms. This week, the parties focused on the ownership of the joint venture and the supply agreement between the joint venture and MCC.

Team 1 had a good negotiating strategy. They commenced the negotiation by distinguishing the difference between the equity contribution and management participation. They used visual presentation to illustrate the rationale for an ownership rate in favor of KJH.

They smoothly shifted from the equity ownership to the supply agreement. They also proposed some basic terms and conditions of a licensing agreement between KJH and the joint venture. At the end of the meeting, both parties have mutually agreed on some basic issues, such as the duration of first ten year of the supply agreement or the exclusivity of the supply agreement, to name a few. Importantly, the agreement of both parties made a progress in the negotiation. It was contrary to the previous meetings where they could not agree any issues. I believe the progressivity of the negotiation was gained by the discussion of the joint venture at first. Instead of claiming that a joint venture is an impossible approach or using a supply agreement as a concession to gain a favorable in the ownership of the joint venture, Team 1 kindly mentioned that they could discuss about the possibility of a joint venture. They rarely asked much but suggested and rationalized the suggestions. At least MCC was probably pleased with this approach. They began to listen and agree. Interestingly, the member of MCC was not aggressive as usual.

The progressive pleased everyone. I wished this could have happened in the previous meetings. I hope the following meeting will achieve at least the same progress.

February 20, 2012

The previous productive meeting required a productive communication letter. It was our team's responsibility to prepare such letter. Although our team put substantial effort on the letter, we could not introduce a high quality written communication. We disagreed with each other in respect of the letter's structure and content. After several emails, we compromised to finalize the letter although I felt that none of us were convinced by the others notwithstanding the fact that I was the only one who rationalized my arguments.

Regarding the structure, I proposed to divide the letter in issue oriented order. The letter should be divided into three sections comprising of the joint venture, supply agreement, and licensing agreement. In each section, the letter would address which issues both parties have fully agreed or which ones they still need to discuss. The other members in my team disagreed. They claimed that such structure is illogical and difficult to read. Thus, they revised the structure which consisted of a term sheet for the supply agreement and a section named “Other items to be discussed and negotiated”. In the term sheet, they included which terms were fully agreed by both parties or still in discussion stage. In the section, they presented the issues of ownership in the joint venture, the price for the cassava, the active participation in joint venture, the licensing agreement and a joint venture focusing on fertilizer product. Regarding the supply agreement, it was an overlap where a same issue regarding price was addressed in term sheet and the section. In the section, the structure did not coherently link each issue, where the issues of different topics, e.g. joint venture vis-à-vis supply agreement, were introduced.

My teammate also added the option of the joint venture producing the fertilizer. I disagreed. MCC probably would not be interested in this chance at all. However, my opinion was not considered. The option was still incorporated in the letter.

Regarding the licensing agreement, I proposed some relevant terms, including the scope of rights to be granted, e.g. non-exclusive, irrevocable, royalty-free, worldwide, etc.; exclusivity conditions; and royalty fees. My proposal was rejected. Thus, the finalized letter only stressed on the royalty fee. The purpose of my proposal was to accelerate the negotiation process. By forwarding terms and conditions of a licensing agreement, I expected there would be substantial amount of issues for the parties to discuss.



The fourth communication letter was not well drafted. It is incoherent and vague. The letter could have been better if our team had known how to teamwork effectively and efficiently. I wish there were reasonable and faithful respect and acknowledgement of the other's idea among us.

February 25, 2012

This day was the fourth conference meeting led by team 3. It was another impressive meeting with interesting discussions. Intension and drama arose during the negotiation.

The meeting was commenced with the topics of the purpose and scope of the joint venture. MCC had difficulty in understanding why KJH just solely want to produce cassava extract but not the pharmaceutical product as a whole. MCC insisted on drug manufacturing in Malundi since such manufacture would benefit Malundi in terms of technology attainment. MCC wanted the manufacture of the drug and the technology would accompany. KJH likely succeeded to convince that a drug manufacturing plant in Malundi is infeasible due to the Good Manufacturing Practice (GMP) requirements in countries. MCC, though, inquired that KJH provided the hurdle of GMP in the next written communication.

MCC presented some new business models. The presentation was not well done. It caused confusion. Therefore, both parties soon gave up those models and shifted to the discussion of other topics.

The following topics were for whom and what purpose the cassava extract would be sold; and the period of the forecast. MCC proposed that 20 percent of the cassava extract would be set aside for them. It was strange to me since MCC wanted such amount but they seemed not yet to determine the business purpose of such desire. The purchasing amount of the cassava extract would be discussed in next negotiation. Regarding the forecast, both of parties agreed that it

would be an annual forecast. However, the parties disagreed upon the possibility of 3 month update of such annual forecast. KJH preferred 3 month period while MCC insisted it had to be at least 6 months. MCC worried that KJH would reduce the demand if KJH had chance to amend the forecast. KJH would address such concern in the next written communication.

During the negotiation, I was impressed by the way KJH's president reacted to the MCC when they continuously questioned the KJH's business. MCC unreasonably question how could KJH do business if KJH chosen a certain option. KJH's president simply stated that it is the KJH's business. KJH would have solution for its own problem.

MCC negotiating team probably would be much anxious to close the deal. They were extremely happy when the parties could reach an agreement though minor. However, the KJH team seems to be not on the same trail. Simply because closing the deal may be important yet does not mean to yield everything.

February 27, 2012

The negotiation underwent two months. The communication quality improved more than at the beginning. The students gained more observations to what would happen during an international negotiation.

The fifth written communication was prepared by Team 1. Notwithstanding some typos and errors, the letter is well structured and clear with plain language. I specifically like the description of the chain of production for the cassava extract business. It will help both parties to reach a common understanding with respect to the business. I think it is helpful to introduce examples for proposal. It probably helps to evade the unnecessary misunderstanding between the parties.

The discussion in the class today raised more thoughts to me. First, I felt interested when our professor asked me and one of my classmate, who both come from developing countries, whether we were surprised by the negotiating approach of the MCC team. I was not surprised at the MCC team approach. However, I was surprised because the professor wanted to point out the different approach of lawyers in the developing countries when they served businesspersons. Indeed, I was excited when he did so. Lawyers in the developing countries do not commonly engage in business negotiations. They normally engage after the businesspersons are done with the business terms. Lawyers unlikely add value to the negotiation if they just participate into the deal with only task to translate the business terms to legal terms. I agree with the professor that this practice should be changed. Actually, some developing countries recently consider about it. Some currently promotes the necessity of the change. In another perspective, I hope the U.S students would understand the different mindset of the foreign lawyers. One day, when the now J.D students become an international practitioners, I hope they will know how to cooperate with the foreign lawyers without complaining about their English accent or how unreasonable the approach they took. A win in negotiations among lawyers means one side achieves agreement through understanding of each other, rather than gaining everything or breaking the deal because of misunderstanding and different mindset.

Our professor also mentioned about the impasse in negotiations. He pointed out several elements contributing to the impasse. Among the elements, I think that “failing to focus what the parties really need/want” and “failing to distinguish major and minor issues and choose battles” are the main ones causes the impasse in our early negotiations. For example, both of the parties want a joint venture. However, KJH initially tried to persuade MCC that a supply agreement would work rather than a joint venture. KJH expected to get some concessions from MCC if

KJH eventually agree with the mode of joint venture. Nevertheless, MCC did not agree to supply agreement regardless of what rationales the KJH presented. Finally, both parties had to switch to discuss the possibility of a joint venture. This switch actually overcame the impasse of the first few meeting.

March 3, 2012

Today is my team's second negotiation. Overall, this meeting was better than the previous on February 11, 2012. We agreed upon some issues. Some were left to be discussed in the following meeting. There was still some confusion between the parties during the negotiation. Until now, however, I still say no when the professor asks whether the deal would be concluded. I think that KJH or MCC may win the battles on separate issues, yet neither of them may win the war to do the business.

My teammate did a good job when she successfully negotiated the royalty fee. I admitted it was well done when she proposed the number of seven point five when a party proposed seven percent and the other one proposed eight percent. Our team and the MCC's team also agreed upon the take or pay clause and training in general.

I made some mistakes which I had no option to avoid. First, I tried to speak English clearly. To do so, I had to speak loudly. Consequently, my tone was considered as aggressiveness. I hoped this would not cause any annoyance to the MCC's team. I did send the MCC team an email to apology if I had made any negative impression during the negotiation. Second, I raised the issue of equity in the joint venture producing cassava extract for pharmaceutical product. I proposed that KJH might accept the ratio 90:10 in favor of MCC in the joint venture producing fertilizer and/or conducting research and development if KJH could have the ownership of 70% in the joint venture producing cassava extract. I understood that my team

and the other classmates would stop me. They were afraid that we could waste time to discuss an impossibly reachable agreement. However, my purpose was to make a surprise and impose to MCC the situation of take-it-or-leave-it. I would not counter argue if the MCC rejected it. As I expected, my team and classmates did not welcome my proposal, albeit MCC was likely to consider it. My team shifted the issues quickly so that we did not have to discuss about the equity problem. At least, I could do what I believe to be good for KJH and the negotiation.

In my view, MCC rarely negotiates rationally. Most of their approaches are based upon emotion rather than business. This is one of the reasons I believe the deal cannot be closed. For example, I tried to explain why KJH would not be interested in non-pharmaceutical use of cassava extract. They seemed to not understand. They claimed that every company wants to make money and KJH should not be an exception. I think they do not understand the business sense. A drug company as KJH, if producing biofuel, would be the same as an automotive company as Honda producing laptop or gadget. I severally stressed that KJH's resource of capital, human, and technology would only focus on the cassava extract for pharmaceutical purpose. Nevertheless, the MCC team would not understand. Another example is about the fix amount of cassava extract to be set aside for KJH and global market. They did not understand that the market works upon the supply and demand. They did not think about what would happen if the global market demands more than 20% of the total produced cassava extract. I asked if they would reduce the amount of cassava extract that would be set aside for KJH to increase the amount of cassava extract to the global market. They did not answer my question appropriately.

March 5, 2012

The negotiation is about to end. The discussions in the live conference and the class seem to run out of the topics with respect to legal aspect of the deal. Therefore our class discussed

more about the issues relating to the negotiating techniques or strategy. Below are some issues that I am interested in.

I am impressed by one member of MCC. I am not the only one. My professor mentioned him several times in class. My classmates have always expected him to lead the MCC negotiation team. He is Dr. Peter. The name is real but I am not sure about the title. He has impressed us by the leadership in his team and the practical approach to negotiating issues. When he first attended a negotiating conference, both parties could agree much more than in the previous conferences. When his team began to move away from the reality of business, he could calm them down. He showed that his teammates trust him and his decision. They let him discuss with KJH negotiating team and decide without constraints. Currently, he and one of my classmates proposed some agreements regarding the deal. These agreements are almost what we expected. Dr. Peter showed that he understands how to choose the battle. He is willing to give KJH a favorable equity ownership in the joint venture producing cassava extract. He nevertheless insists a favorable equity ownership in the joint venture producing fertilize and doing research and development. These agreements already are incorporated in MCC's last written communication. Hopefully, he can lead his team in the last conference meeting.

Knowing when to stop may be the smartest thing that anyone can learn. My professor has invoked this idea today. At least, I found this is a lesson for me. In previous conference meeting, I found myself to be completely silent in the last two hours. I actively engaged to the negotiation for the first one hour of the meeting. However, I made mistakes. I thought my mistakes could impasse the negotiation. So I stopped talking and discussing. In a broader view, I found that changing the individual who discuss directly with the counterparty is more or less effective. I

found that it is better to not argue over and over again an issue. Instead, we should shift to another issue to save time and the comfort among the negotiators.

March 19, 2012

This is the last in-class discussion for the negotiation. So far, we took good advantage of the back channel where Dr. Peter and one of my classmates have mutually agreed substantial issues. We called it the spring agreement. Although the spring agreement proved the benefit of the back channel, there are still some difficulties for the work of the KJH team. First, the official MCC's written communication was changed in comparison with the spring agreement. Such changes were more or less confusing. For example, the official written communication set forth a KJH's obligation to grant scholarship for Malundian students in terms of training support to Malundian employees. This issue had not appeared in the spring agreement. Second, the team preparing the responding written communication finds it difficult to do their work. The person who communicated with MCC's member in back channel is not in the team. The team was limited in the agreement which they did not have a chance to discuss. Any revision or change could cause a bad faith image of the back channel communicator, and may cause tension between parties. However, I think team 3 has sufficiently reconciled all of the agreements in their letter. In reality, as said our professor, it is ordinary for lawyer to converge all the agreements simultaneously attained from different perspective of a deal, including regulatory, business, finance, technology, etc. Each perspective may be discussed and decided by different teams specializing in each sector.

The sometime miscommunication of MCC may also be caused by lack of sufficient meeting note or minute. The professor pointed out that a good meeting notes or minutes is essential since people would be unlikely to know which terms are actually agreed until they read

a document, e.g. the written communication. I do not believe the MCC team take notes or minutes for the conference meeting. Several times in their communication letters, they did incorporate some terms which they claimed that both parties have agreed; while in fact, we have not did so.

The professor also presents an interesting topic: professional ethics and negotiation. I understand that there are less guiding principles for the lawyer as an advocate rather than litigator. The professor raised several questions which I find no satisfying answer can be made. For example, whether we should tell the counterparty counsel that he or she just made a wrong decision that would benefit for our client but merely undermine the counterparty's business position. It is not an easy question. I myself would rather say no.

March 24, 2012

Today is the last session of the video conference meeting. Overall, it was a good negotiation with sophisticated solutions. I think The KJH team concluded good deal.

The first discussed topic was about the dispute resolution. The parties easily agreed on the arbitration forum. That was why I felt that the parties might rush to agree on many issues as possible. However, it was totally unexpected for me and the negotiating team that the discussion on the governing law would take an hour. The KJH team came up with the proposal that each agreement, e.g. joint venture, cassava supply agreement, and license agreement, etc. would be governed by a respective law. I think this proposal is the best option since it balances the position of both parties. For example, for the law governing on the joint venture, the KJH team proposes the law of UK which is neutral for both parties. However, the MCC team seemed to not have the business sense when they argued that only Maludian law would work for the joint venture agreement. They argued that a foreign law would be difficult to apply to daily operation of the

joint venture. I think they cannot distinguish between the corporate governance activities and the relationship between two investors/shareholders. Corporate governance would be governed by the law where the company incorporated, while the relationship between investors/shareholders could be governed by foreign law upon the principle of the freedom of contract. Fortunately, both parties still reached to agreement on the governing laws.

Next topic was about the scholarship which is a part of support in training that KJH commit to provide to MCC. This topic was agreed without constraint. However, it was different when it came to cassava supply agreement. It also took an hour for both parties to reach an agreement on cassava price. The outcome, however, was interesting enough when the parties could agree that EJV will pay no more than 10% over the market price. And if the government-determined price of cassava is over 10% of the market price, MCC will cover the remaining price.

After two hour and a half, both parties succeeded to conclude on variety of issues. This negotiation also concluded three weeks of negotiation. Unexpected changes or disagreements may happen when the outcome of the negotiation is conveyed into binding agreement. However, it is another story. Till this stage, KJH has a good deal.