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# GO-EXPO Gas & Oil Exposition June 9, 2009

Contract Considerations – Tips and Traps

Bruce A. Lawrence

Borden Ladner Gervais LLP



# A Good Contract

- **Is a tool, not the goal**
- **Aids the parties, doesn't distract them**
- **Formalizes the napkin/back of the envelope**



# Often a 2 Step Process:

- 1. Letter of Intent/Term Sheet/Memorandum of Understanding**
- 2. Formal Binding Agreement**



# Why bother with 2 steps?

- **Enforceability versus intention**
- **Disclosure obligations**
- **Trigger 3<sup>rd</sup> Party rights or obligations**
- **Forces parties to focus on big issues early on**
- **Helps to identify key issues/pinch points at the outset**



## Why bother with 2 steps? (cont'd)

- **Sets out fundamental pre-conditions or consents**
- **Initiates the due diligence process**
- **Establishes time lines and deadlines**
- **Itemizes deliverables**
- **Can minimize costs and wasted effort**



# Consider Structure Options

- **An LOI can provide flexibility vis a vis the structure**
  - Joint Venture?
  - Distribution or license agreement?
  - Merger?
  - Takeover or plan of arrangement?
  - Sale of assets or shares?
- **Often tax driven**

# Cross-Border Issues

- **Taxation**
- **Funding**
- **Personnel (local hiring, immigration, citizenship and personal taxation)**
- **Technology/IP (disclosure, protection, transfer)**
- **Repatriation of funds**
- **Political stability**

## Cross-Border Issues (cont'd)

- **Local regulations, standards and customs**
- **Which laws to govern?**
- **Foreign requirements (local ownership, resident directors, minimum capitalization, etc.)**



# Governing the Enterprise

- **Shareholder or Voting Agreements**
- **Board of Directors**
- **Management**
- **Voting thresholds**

# Personnel

- Who stays, who goes
- Who is the boss?
- Termination obligations/severance
- Process
- Non-compete agreements
- New employment agreements
- D and O Insurance

# Keeping the Parties Honest and Committed

- **Confidentiality provisions**
  - In the LOI or the formal Agreement
  - Stand alone CA
- **No Shop / No Solicit**
- **Standstill provisions**
- **Break Fees**

# Deposits, Break Fees and Costs

## ■ Deposits

- Be realistic (size and refundability)
- What is the purpose?
  - ◆ Cost recovery
  - ◆ Deterrent to others
  - ◆ Earnest money
  - ◆ Penalty

# Deposits, Break Fees and Costs (cont'd)

## ■ Break Fees

- Like a deposit but payable in arrears
- Often larger
- In a Take-over Bid context, used as a deterrent and for cost recovery
- Can be cash or property
- 1% to 5%
- Be fair; can become reciprocal
  - ◆ Could be 2 tier or 2 stage



# Deposits, Break Feeds and Costs (cont'd)

## ■ Expenses

- Typically each is responsible for their own
- Drafting expenses
- Accounting
- Third Party consents
- Bank facilities and leases



# Death and Divorce

- **Think about getting out while you are getting in**
- **Monetization or exit strategy**
- **What happens in the event of death, retirement or irreconcilable differences?**
- **Buyouts, ROFR's, Sale to 3<sup>rd</sup> parties**



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**THANK YOU**

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