

Joint Best Practice Approaches to Dispute Prevention in Business Arrangements

A task force of CPR members convened to outline ideas on how parties to business arrangements might best work together to avoid disputes and better enhance the value of their business arrangements. The task force offered the following ideas for parties to consider:

What?

- Consider Best Practices for Dispute Prevention amongst the parties at time of deal

Who?

- Parties undertaking a transaction that will involve an ongoing relationship (including but not limited to joint ventures, licensing arrangements, and collaborations)

Why?

- To prevent or mitigate future disputes while enhancing the value of the relationship amongst the parties

How?¹

1. Deal Overview
 - a. Transaction Leads, or their designees, create and align on the following details:
 - i. Purpose of deal
 - ii. Mutual objectives
 1. What caused each party to seek the transaction and select the other?
 2. What is the minimum degree of success that each side needs to achieve?
 3. What will be the process for issue discussion and decision-making during the negotiation process (to help ensure all viewpoints are heard and that issues can be raised by either party and resolved in an efficient manner)?
 4. Does either party have constraints on their ability to achieve these objectives that all should understand?
 - iii. Key Personnel
 1. Transaction leads and other personnel who are key to negotiating and closing deal
 2. Consider inclusion of a Deal Facilitator, who will apply the principles of dispute resolution mediation to the transaction in an effort to help the parties bridge differences during the transaction process.² The parties should identify jointly a neutral who garners their respect.

¹ This outline is not intended to provide legal advice. Parties should consult with legal counsel, as necessary, on all legal matters and written communications including transaction documents.

² The Deal Facilitator, as opposed to the parties, can apply techniques to facilitate agreement in an evenhanded manner to serve the interests of the deal rather than those of the parties in interest. For more on Deal Facilitation or Deal Mediation, see Joan Sterns Johnsen, *Alternative 'Deal' Resolution: The Facilitated Negotiation of Transactions* 30 Windsor Rev. Legal Soc. Issues 193 (March 2011).

- iv. Risks
 - 1. What are the risks of the transaction (i.e., disputes that may result between the parties over the course of or as a result of the transaction)?
 - a. What is the timing of the discussion of the risks?
 - 2. Will raising these risks create more problems than otherwise?
 - a. Consider:
 - i. Are the risks ones for which early identification and collaboration will be useful?
 - ii. Will raising risks by a party be viewed as prejudicing such party's position?
 - iii. If raised early enough, might contractual provisions be crafted that would help mitigate the risk – such as to which party the risk is allocated? Or might other risk mitigation measures be taken?
 - iv. What is the best timing for raising the risks – will they “spook” the other side if raised before a more solid relationship is developed? Or will raising the risks earlier help enhance trust and credibility, and lead to a better collaboration?
 - v. Can the risks be mitigated later if not raised earlier?
 - vi. For risks that are identified (e.g., concerns related to exit) and ought to be addressed, what are the ways in which those risks can be mitigated (e.g., contractual terms)?
- v. Potential conflicts that each side foresees
 - 1. Similar considerations to those above
 - 2. Might also consider covenants to discuss future conflicts or risks in good faith (and not spend time focusing on speculative future conflicts or risks that are less likely to occur (e.g., potentially competitive products that may never reach market))
- b. Form of Deal Overview
 - i. In writing, unless circumstances suggest otherwise
 - ii. Structure to be determined by the parties. Not intended to read as contractual terms, but instead a business understanding on applicable topics
- c. Benefits of creating and aligning on Deal Overview
 - i. Enhances the relationship and leads to more successful collaborations
 - ii. Ensures no misunderstanding at the outset as to strategic objectives and key terms; provides an earlier off-ramp for ill-conceived relationships
 - iii. Provides guidance to operators who may not be involved in deal negotiation
 - iv. Can lead to consideration of any optional add-ons or potential future expansions of deal, which may help parties see the bigger picture, even in a smaller scale deal
 - v. Potentially serves as a reference document if parties get misaligned during negotiations – not intended to supplant the primacy of the deal documents but to offer guidance in working through misalignment.

- d. Timing of Deal Overview
 - i. Prior to signing of definitive agreement; pre-term sheet or post-term sheet depending on the circumstances
- 2. Relationship-Building
 - a. Social Activities
 - i. Brief professional gatherings with party representatives
 - b. Benefits of Relationship-Building
 - i. May yield benefits and bonding to help negotiations be less adversarial and more collaborative
 - ii. Alignment on mutual project name or “common brand” may help establish bond toward mutual goals. Most times companies each have their own project name for a deal, and it can seem as though there are different goals
 - c. Timing of Relationship-Building
 - i. Consider social activity both pre-deal and after the kick-off meeting
 - ii. Align on mutual project name at outset
- 3. Shared Repository
 - a. Use
 - i. Post-deal close
 - b. Scope
 - i. Clear guidelines and alignment on the purpose and what will be disclosed
 - ii. May include historical documentation as well as future documentation such as board materials
 - c. Tenets/structure
 - i. Easy to use
 - ii. Accessible to both parties, but define precisely who within the parties’ respective organizations should have access
 - iii. Organized into folders and subfolders
 - d. Benefits of Shared Repository
 - ii. Can be beneficial in some circumstances by providing a single source of truth
 - iii. Avoids intermittent email exchanges of information (both between parties and internally within each party)
 - e. Timing of Shared Repository
 - i. Set up at closing or promptly after deal close
- 4. Post-Deal Kick-off Meeting
 - a. Duration
 - b. Attendees
 - i. Transaction leads (or their designees)
 - 1. To effectively transition knowledge and intent of deal provisions (important to keep them involved for as long as possible)
 - ii. Alliance managers
 - iii. Project team, Board members, Steering Committee members and others
 - iv. Designated Deal Facilitator (if using)

- c. Agenda
 - i. Attendee introductions
 - ii. Review Deal Overview
 - iii. Review summary slide deck
 - 1. Consider collaborating on a slide deck summarizing key tenets of the deal.
To be agreed upon by both parties prior to kick-off meeting
 - 2. Include disclaimer in deck noting that the definitive deal agreement governs, to the extent there is any inconsistency or conflict
 - iv. Modify objectives, if any
 - v. Set further objectives and/or charter
 - vi. Determine cadence of future meetings
 - vii. Provide updates (both parties)
 - viii. Address any imminent concerns or items to discuss
 - ix. Outline agreed upon future communication channels (e.g., can business functions reach out to designated counterparts or does alliance management serve as central point of traffic control?)
 - d. Benefits of Kick-off Meeting
 - i. Fosters relationship and trust between parties
 - ii. Leads to alignment on future operations
 - iii. Stirs enthusiasm and excitement
 - e. Timing of Kick-off Meeting
 - i. Promptly after deal signing
5. Period Meetings
- a. Duration
 - b. Attendees
 - c. Agenda
 - d. Benefits of Periodic Meetings
 - i. Ensures parties are on track with deal objectives
 - ii. Helps to resolve conflicts as they arise
 - e. Timing of Periodic Meetings
 - i. Dependent on deal needs. Could be quarterly, biannually, annually



LESS CONFLICT. MORE PURPOSE.

Thanks to the work of the following task force members. Their inputs reflect their own personal views and not necessarily those of their organizations.

MEMBERS

Adam Golden, Freshfields Bruckhaus Deringer US LLP

Carlos Hernandez, Independent Advisor, Ret. CEO Flour Corporation, Fmr. Board Chairperson CPR

David Brodsky, Brodsky ADR LLC

Dharmi Tailor, Roivant Sciences Inc.

Mackenzie Drutowski, Kirkland & Ellis LLP

Tracy Pyle, Ankura Consulting

Vincent Andrews, Eisai Inc.

CPR STAFF

Allen Waxman, President & CEO