DRAFTING AND NEGOTIATING INTERNATIONAL PETROLEUM AGREEMENTS

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SECTION ONE:
PRE-CONTRACTUAL DOCUMENTS

(Fact Pattern)

You are Mr. Nemo Thyme, a Senior Attorney working for First Rate Oil Company International, a U.S. based major oil company. You are on a three year assignment for First Rate’s Legal Department in its Hong Kong office. First Rate’s Commercial Manager, Les May Kadiel, a notoriously impatient corporate high-flyer, has brought to you a draft letter of intent concerning a transaction in Myanmar that you have never heard of. It is with Sell Easy Oil Properties Ltd., a company organized under the laws of Myanmar. Les says that the letter was drafted by Sell Easy’s lawyers and is supposed to reflect what Les has agreed in principle with his Sell Easy counterpart, Felice M. Kleen. He also says,

“Nemo, this is just an LOI and thus not even binding. Do what you have to do, but for God’s sake let’s not lose this deal over a bunch of legal jargon. That can wait until the full blown contact. The devil is always in the details. You and I can look really great if this deal goes through, but I know that damn Gull-Able Oil Company would love to do this deal too.”

Question: Before even looking at the letter of intent, what should you say to Les?

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December 22, 2012

Felice M. Kleen  
*Sell Easy Oil Properties Ltd.*  
*Luh King 4A/Suk Hur Street*  
*Rangoon, Myanmar*

**Subject:** Letter of Agreement in respect of Offshore Myanmar

Dear Mr. Kadeil

This Letter of Agreement will serve to memorialize the definitive agreements reached last week during our discussion of the transaction relating to the Dus Drai basin, Offshore Myanmar. It will also serve as an indication of your intent to consummate the transaction as described below (the “Transaction”) in a more detailed agreement, subject only to approval of Sell Easy’s Board and eventual approval by the relevant Myanmar authorities.

First Rate has agreed to the following, which First Rate agrees constitutes all the essential elements of the Transaction:

- First Rate will acquire 25% of Sell Easy’s interest in Dus Drai Block 1 (the “Interest”).

- First Rate will pay Sell Easy the fair market value of the Interest as calculated by the President of the Myanmar Chamber of Commerce.
First Rate will pay 100% of Sell Easy’s share of the costs of drilling wells on Block Buster 1, as calculated under the Block Buster 1 JOA, under a drilling contract to be negotiated by Sell Easy, as Operator.

For the entire period in which First Rate retains an interest in Block Buster 1, First Rate will rent from Sell Easy 200 square meters of office space in Rangoon, at the higher of: (i) the per sq. meter cost that Sell Easy charges to other sub-lessees for similar space or (ii) 125% of Sell Easy’s actual per square lease cost.

First Rate will pay an amount equal to 100% of the consulting fees that Sell Easy has paid to Mr. Perez E. Dent in connection with originally acquiring the Interest.

Acknowledging that time is of the essence and that another bona fide purchaser is willing and capable of consummating the Transaction, First Rate agrees to negotiate, without delay and in good faith, a final agreement reflecting the above.

In light of the foregoing conditions, First Rate agrees to place in escrow, in favor of Sell Easy, US$2,000,000 with C. Nomo Escrow Company of Myanmar, to be released to Sell Easy in the event the Transaction is not finalized with 60 days of the date hereof, unless First Rate demonstrates that such failure is due to Sell Easy’s breach of this Letter of Agreement.

First Rate shall keep in strictest confidence any information it has received or will hereafter receive from Sell Easy and hereby acknowledges the significant irreparable harm that Sell Easy will suffer as a result of a breach by First Rate of this undertaking.

Any disputes that arise regarding this Letter of Agreement will be adjudicated in Myanmar courts of law, applying Myanmar law, and First Rate hereby agrees generally to the in personam and in rem jurisdiction of such courts.

If you agree that the foregoing is a fair and accurate summary of our understandings and agreements, please so indicate by signing in the space provided below.
Please send my fondest regards to Aman E. Diott, who I know is anxious to consummate this deal in time for our Spice Islands cruise on my personal yacht.

With warmest personal regards,

Felice M. Kleen

Acknowledged and agreed this __ day of _____, 2012.

________________________________________
Less May Kadiel

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Homework Assignment:

1. Answer the question stated above (following the fact pattern).

2. Write a short (no more than one page) e-mail cover note to Mr. Kleen on behalf of Mr. Kadiel which will present your re-draft of the proposed letter of intent.

3. Using “Revision Marks” in Microsoft Word, write a re-draft of the proposed letter of intent, in a way that protects First Rate’s legal interest, while at the same time reasonably keeping First Rate “in the game”. Supply a “clean” copy of the revised letter of intent in addition to the red-lined version.

Note: the purpose of the exercise is to focus on avoiding potential legal pitfalls, rather than changing the proposed commercial terms (though some commercial re-writing is appropriate where what is proposed is clearly unreasonable).

If you have not had experience dealing with pre-contractual documents (or need a refresher) please read the following:
Please submit your completed assignment, with the heading “Angola LLM Contract Drafting Assignment” by no later than December 30, 2011 to nadorff.uhlc@hotmail.com. Make sure you clearly identify yourself within the assignment submitted. Happy writing.

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SECTION TWO:
BUSINESS LETTER (RESPONSE)

A week following Sell Easy’s Receipt of First Rate’s re-draft of the MOU, Les May Kadiel receives this irate response, in the form of a formal (faxed) letter from Felice M. Kleen:

Dear Mr. Kadiel

I am in receipt of your January 3, 2012 letter and accompanying re-draft of our proposed letter of intent. I am really disappointed in your re-draft of our letter of intent, and judging my its tone and content, I am not sure your are really interested in doing business with Sell Easy.

You must agree that the Dus Dry prospect is very promising, otherwise you would not be wasting your time with it! Indeed, lots of other companies are gnawing at the bit, but I thought that you and I had developed an understanding at the AIPN Annual Conference and also thought we could easily due business. (Based on round-one, I am not so sure now).

I am particularly unhappy with the following aspects of your re-draft:

- Non-acceptance of the Myanmar Chamber of Commerce for determination of “market value” (Do you not trust their objectivity? I’ll have you know that Sell Easy is significant contributor to this laudable and influential organization).
- Your insistence on being part of the Drilling Contract negotiations (we have lots of experience in negotiating drilling contracts and are also interested in having a competent company drill the wells).
- Your nit-picking on the office lease terms – you said you needed office space and we thought we were doing you a favor!
- Your push-back about Sr. Dent’s consulting activities and fees. You must not realize just how well-regarded and effective he is in arranging deals. Without him we never would have gotten our foot in the door. Why should Sell Easy have to foot his costs alone?
- Your refusal to agree to negotiate with us in good faith!?
- Your refusal to put your money where your mouth is (i.e. the $2,000,000 “deposit”). (We can’t afford for First Rate to just be kicking tires!)
- Your insistence on arbitration of disputes under English Law. (Is this exploration block in England?) Don’t you trust Myanmar courts? We do.

It seems to me that maybe First Rate is letting its lawyers, rather than its geologists and engineers, run its business. I strongly suggest that you re-think your re-draft of our proposed LOI and send back something much closer to what
we originally proposed. I am sure there are plenty of other companies willing to simply sign on the dotted line if you are not willing to step up to the plate.

Very truly yours,

Felice M. Clean

P.S. I drafted our Letter of intent without engaging any lawyers. Maybe you should leave your lawyers out at this until we see if we really have a deal and then start drafting the full-blown contracts, which is what lawyers do best.

Homework Assignment

You (Nemo Thyme) are sitting in your office reviewing some recent Foreign Corrupt Practices Act (“FCPA”) cases, including a recent large settlement between the U.S. Department of Justice and one of First Rate’s competitors that partly involved the use of unscrupulous business agents. Les barges into your office, with Felice M. Kleen’s letter in hand, and says:

“You see? I told you! We can’t afford to be so legalistic with Sell Easy. We are about to lose this deal if we aren’t careful. I want you to look at your re-drafted and LOI and see if we can’t make it closer to what Sell Easy proposed, without taking too much risk. I know there were a couple of things in it that might have been out of line, but surely you can find a middle ground. I would like to send Kleen a clean re-draft by close of business tomorrow. In the meantime, I will send him an e-mail apologizing for our draft and promising the re-draft he has requested.

Les stomps away before you even have the chance to reply.

Question: What are Nemo’s options at this point?

Step One

Write a brief e-mail message to Les, responding to what he said to you orally and proposing a forward strategy with Sell Easy in respect of the Dus Dry Block.

Step Two

Write a formal response to Felice M. Kleen’s letter to be signed by Les May Kadiel.

Step Three

Consider asking for a transfer to get away from Les.
(Continuation of Fact Pattern)

You (Nemo Thyme) reviewed the Dus Dry situation with your supervisor, Ida Boss. She agrees that (i) this is a volatile situation, (ii) that Les is out of control and that (iii) you will need to monitor this deal very closely every step of the way. Ida also decided to discuss the matter with Les´s boss, Aman E. Diott, Vice President, New Ventures. They agreed that the letter you drafted for Les should actually be sent by Aman in order to demonstrate to Mr. Kleen that the positions stated in it have First Rate´s endorsement at the highest levels.

After a two day meeting the Parties execute the following document:

(Text of Agreed Memorandum of Understanding to be supplied at a later stage).
SECTION THREE: CONFIDENTIALITY AGREEMENT

(CONTINUATION OF FACT PATTERN)

Prior to beginning to draft the required Confidentiality Agreement, you (Mr. Thyme) decided to do some light research regarding Sell Easy. You find an article that reports the following:

- Sell Easy has brought two lawsuits, one in Brazos County, Texas, U.S. and one in Myanmar, against other oil companies that allege violations of confidentiality agreements.
- The Texas case involves a dispute as to specifically which documents were covered by the confidentiality agreements in question.
- The Myanmar case involves the alleged use, by the defendant, Wi No Lai Oil Properties Ltd. of information relating to Block X provided to it by Sell Easy under a confidentiality agreement. Sell Easy alleges that Wi No Lai used the Block X information in order to evaluate and later acquire an interest in, nearby Block Y that Sell Easy allegedly was also interested in acquiring.
- A Brazos County jury has awarded $20,000,000 including punitive damages, to Sell Easy.
- Wi No Lai has publicly accused of Sell Easy of improperly trying to influence the presiding judge in the Myanmar case.

As soon as you finish reading the above information, you notice that you have received a DHL package from Mr. Ero Gant, Senior Partner of the law firm, Dewey Cheatham and Howe. It says in part:

Dear Mr. Thyme,

We have been retained by Sell Easy Oil Properties Limited in order to represent them with respect to the Dus Dry (Myanmar) transaction that they are negotiating with your company. We understand that you are First Rate’s in-house counsel in respect of this transaction. We also understand that the Memorandum of Understanding between Sell Easy and First Rate calls for execution of a confidentiality agreement based on the AIPN model. Accordingly, we are providing you for execution by First Rate two originals a such a confidentiality agreement each of which have been signed by Sell Easy.

Kindly arrange for an authorized representative of First Rate to sign each original, keeping one original for your files and returning the other to me.
Class Room Exercise:

Question: As First Rate’s lawyer, what you should do first?

Action: Propose a redraft of the proposed confidentiality agreement taking into consideration that above facts.

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SECTION FOUR:
FARMOUT AGREEMENT

(Continuation of Fact Pattern)

The confidentiality agreement between Sell Easy and First Rate is eventually executed, and the parties wish to execute the Farmout Agreement in order to agree in greater detail and in final form, the conditions of the assignment of the Interest from Sell Easy to First Rate, based on the executed Memorandum of understanding.

**Practice Tip:** On your AIPN Model Forms CD, there is an “auxiliary” form that could be useful at this point. Can you identify what it is? Why would this be helpful at this stage? Is there any legitimate reason for not wanting to use it at this point?

Classroom Exercise: Draft key clauses of a Farmout Agreement reflecting the terms that were agreed in the Memorandum of understanding using the AIPN Model Form Farmout Agreement.

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(Continuation of Fact Pattern)

Several weeks have passed since the Farmout Agreement was executed. You (Mr. Thyme) notice that a lot of detailed and substantive meetings are taking place among employees of Sell Easy and First Rate regarding the upcoming petroleum operations. You have heard from others that a lot of operational and financial details have already been agreed.

Q: Does this seem right? What is missing? What should you do?

Les also tells you of the “magical way” that Perez E. Dent is “smoothing” the way for Sell Easy’s operations through “that stupid government bureaucracy”.

Q: Should you be worried about what Les has said about Mr. Dent? Why? What should you do about it?

You point out to Les that the JOA has not yet been executed and that this is troubling. Les says, in reply “Ah, don’t worry about it, we have the MOU, the Farmout Agreement, and the Confidentiality Agreement. Everybody knows what a JOA normally says, and besides, we’re the Operator, so we will just force people to do things our way!”

Q: Is Les right? What should you say to Les? If he refuses to cooperate, what should you do?
SECTION FIVE:
CONSULTANT AGREEMENT

(Continuation of Fact Pattern)

After you (Mr. Thyme) have finished drafting the proposed JOA, Les May Kadiel tells you that it has been decided to negotiate the JOA with Sell Easy in Singapore, where Mr. Perez E. Dent is based. Mr. Dent will give a briefing of his activities to Kadiel and Kleen. You ask if you can attend the meeting, to which Kadiel responds. “I don’t think that will be necessary. It’s just about “political stuff” and I need you to be devoting all your time and effort to getting the JOA done while we are in Singapore.”

You remind Kadiel that First Rate still does not have a Consultant Agreement with Dent. Kadiel says, “That’s OK, Sell Easy has an agreement with him, so we are covered.”


You prevail upon Kadiel to arrange for you to meet with Mr. Dent during your trip to Singapore and to negotiate a Consultant Agreement with him. But he says in passing, “Please don’t make Dent angry in your discussions and negotiations. He is really pivotal to our success.”

You prepare (in “clean” and “redlined” format) the following Consultant Agreement based on the AIPN Model Form:

Class room exercise:

Students play the following roles in negotiating the Consultant Agreement based on Thyme’s draft:

- Nemo Thyme (In-House Counsel, First Rate)
- Les May Kadiel (Commercial Manager, First Rate)
- Aman E. Diott (Managing Director, First Rate)
- Fleece M. Kleen (Senior Negotiator, Sell Easy)
- Perez E. Dent (Consultant)
- Lewis Cannon (Dent’s personal attorney)
SECTION SIX:
JOINT OPERATING AGREEMENT

(Continuation of Fact Pattern)

Eventually, you (Mr. Thyme) discuss your concerns about the lack of a JOA with Ida Boss, who in turn talks with Les’s boss, Aman E. Diott. Aman agrees that the JOA needs to been executed post haste. Aman schedules a meeting with you and tells you that he shares your concerns about Les and thus wants to take an active role in the negotiations. He says that his major objectives for the JOA are:

- No pre-emption rights.
- Operator Removal only for cause.
- Secondment of non-operator staff only if agreed by Operator (i.e., not by right).
- Bank guarantee for abandonment obligations for Sell Easy, parent company guarantee only for First Rate.
- Operator liable only for gross negligence of Senior Supervisory Personnel and cap Operator’s liability at $50,000,000.
- Operator can co-mingle Joint Account funds with its own.
- Voting: 50/50 but in case of tie for any decision necessary to fulfill the minimum work program, Operator will have a tie-breaking vote.
- (Subject to the provisions of the PSA), the Operator may award contracts without the approval of the Operating Contract of up to $5,000,000 during the Exploration Phase, up to $20,000,000 during the Development Stage and up to $10,000,000 during the Production Phase.
- Discourage Exclusive Operations (Sole Risk) for Development Activities and make it “really expensive” to get back in to an operation that has been sole risked.
- Be really tough on a Defaulting Party.

Class Exercise: You are Mr. Thyme. Beginning drafting the JOA between First Rate and Sell Easy using the AIPN Model Form JOA, reflecting in your draft the above points.

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SECTION SEVEN:
JOINT STUDY AND BIDDING AGREEMENT

(Continuation of Fact Pattern)

Much to their chagrin, the managements of the two companies agree that the geology of the Thu Dam Drai Block is riskier than originally anticipated and the expected exploration costs are higher than originally thought. Their analysis of the data also leads them to believe that prospects of the Oh Soh Whet Block that borders Thu Dam Drai on the East are much more promising. Les May Kadiel (First Rate) has been approached by a Sal Sam Moore, a negotiator for Gull-Able Petroleum Company. Gull-Able is hoping to form a bidding group for Oh Soh Whet, which is part of an upcoming public bid round in Myanmar for various blocks. Gull-able already has extensive operations in Myanmar on which it is operator; First Rate and Sell Easy do not.

Eventually Les May Kadiel, you (Nemo Thyme), Fleece M. Kleen and Sal Sam Moore get together over drinks on the beach and, on the back of a cocktail menu, work out the following broad terms under which they might go forward together on the Thu Dam Drai and Oh Soh Whet Blocks:

- Sell Easy and First Rate will farm-out equal parts of their interest to Gull-Able, so that they each wind up with 33%, 33% and 34% interest, respectively.
- The three companies will participate jointly in the Oh Soh Whet Bid Round in the same proportions as in Thu Dam Drai.
- Gull-Able will pay 50% of the costs of the two obligation wells and of the bonuses under the Thu Dam Drai PSA.
- Gull-Able will be the Operator of both Blocks.
- Perez E. Dent’s services will be terminated upon the formal award of the Oh Soh Whet Block to the three companies.
- Gull-Able will determine the conditions of the Oh Soh Whet bid. Sell Easy and First Rate each have the right to withdraw if they disagree with the conditions. If only one withdraws, Gull-able has the right to bring in another company on the same terms as the withdrawing party.
- Failing that, Gull-able and the non-withdrawing party (First Rate or Sell Easy, as applicable) will negotiate terms for a 50/50 bid.
- If First Rate participates in the bid and the contract is awarded, First Rate will have the right to second certain key personal into Operator’s organization, including the position of Exploration Manager.

You and the lawyers for Sell Easy and Gull-able agree that the best way to draft the Participation Agreement is for all three to work together, with the contract shown on a plasma screen in your office.

Classroom exercise: Three students play the part of Nemo Thyme and the lawyers for Sell Easy and Gull-able. Starting with the AIPN Model Joint Study and Bid Agreement on the screen, draft key provisions reflecting the above conditions.
SECTION EIGHT:
WELL SERVICES CONTRACT

(Continuation of Fact Pattern)

You (Nemo Thyme) have been seconded from First Rate to Gull-Able Oil (Myanmar) Limited’s Legal Department under the Oh Soh Whet JOA which reserves certain organizational slots to the non-Operators. In fact, you had made a very good impression on Sal Sam Moore during the negotiation of the Joint Study and Bid Agreement and the JOA, which led to the secondment.

In its application for the Oh Soh Whet PSA, the First Rate/Sell Easy/Gull-Able Consortium agreed to drill three ultra-deepwater wells. Gull-Able Oil (as Operator) conducted a competitive tender process for various well services within a three-well back-to-back well program. The winning company for mud, cement and wireline was Dewitt Wright and Fein Incorporated (“DWF”).

The Gull-Able and DWF parent companies are currently in litigation in the Texas in respect of a major deepwater blowout that resulted in bad publicity for each company and the exchange of many accusations back and forth. Nevertheless the two companies continue to do business with one another in several locations worldwide because of previous contractual commitments between them. However this will be the first time that the two companies have negotiated an agreement since the accident. Because of the hostile climate between them, each refuses to use the other’s standard well services contract as the starting point of negotiations. DWF had clearly rejected in their bid the use of Gull-Able’s model contract and indicated that their bid was premised on the parties’ ability to agree mutually acceptable terms. Nonetheless, Gullable’s senior management chose DFW because their commercial terms were the best for all three applicable services. In essence, Gullable’s management concluded that it was Legal’s job to sort out the contractual terms.

Tomorrow is Monday morning and you are scheduled to begin negotiations with DWF at Gullable’s Hong Kong offices at 8:00 a.m. You are hoping to spend no more than a week negotiating this agreement. You wonder how you will resolve the base contract impasse, and then remember that there exists an AIPN Model Form Well Services Contract, though you have never had the occasion to use it, having instead always used First Rate’s standard form contract. You insert your trusty AIPN Model Contracts CD into your laptop and start reading. As you read the text you conclude that it is balanced document as between the oil company and the driller and decide to propose it tomorrow as the starting point for negotiations.

In-Class Negotiations Exercise

Instructions: To be provided the day before the exercise.