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The Law and Practice of Precontractual Documents

Keywords

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BOOK REVIEW

The Law and Practice of Precontractual Documents

REVIEWED BY DAVID K. SCHOLLENBERGER*

LAKE, RALPH B., and DRAETTA, UGO, *LETTERS OF INTENT AND OTHER PRECONTRACTUAL DOCUMENTS — COMPARATIVE ANALYSIS AND FORMS*. Butterworth Legal Publishers, Salem, New Hampshire, (1990), ISBN 0-8806-3230-5, 276 pp.

This book, an outstanding treatise on the law and practice of precontractual documents such as letters of intent, heads of agreement and memoranda of understanding, answers a long-standing need. Although in the past years several law review articles have been written on various aspects of letters of intent and other pre-contractual instruments, no single work has so comprehensively examined and compared their legal effect and use under U.S. and English common law and major civil law jurisdictions of Europe.¹ This is surprising because as the authors make clear, the use of letters of intent has increased dramatically in recent years as transactions have become more complex and more international. In addition to an exhaustive review of legal authority, the book is of great value to the practitioner in providing practical advice for drafting letters of intent. The book includes superb appendices with examples of letters of intent and model forms.² The text is highly readable, interesting throughout, and even occasionally humorous. Both authors have extensive practical experience with letters of intent. Ralph Lake is currently Vice President and General Counsel of Homewood Suites, Inc., a new subsidiary of Holiday Corporation. Prior to that he was Legal Counsel in Europe, the Middle East and Africa for Holiday Inns International in London. He holds an L.L.M. from the London School of Economics and has previously published on letters of intent.³ Ugo Draetta is Interna-

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1. The laws of France, Italy and West Germany are discussed.

2. Forms include a model for a letter of intent, an authorization agreement, a contract to negotiate, a letter exclusivity agreement and a confidentiality agreement.

3. See Lake, *Letters of Intent: A Comparative Examination Under English, U. S.*,

tional Operations Counsel for the General Electric Company based in London and is the former General Counsel of FIAT, an Italian car manufacturer. He teaches at the Catholic University of Milan and is the author of numerous publications.

The book is divided into four sections. The first section introduces the subject matter and explains the role of the letter of intent in modern business transactions. It then identifies the different categories of pre-contractual instruments.⁴

The second section surveys the applicable contract law and treatment of letters of intent under common law and civil law. The first two chapters systematically examine the rules of contract formation and the legal status of letters of intent in the U.S., U.K., France, Italy and Germany.⁵ The review is scholarly and thorough.

Enforcement of letters of intent as complete and final contracts, either in whole or in part, is then considered.⁶ The authors' comparative treatment of single provisions in letters of intent for confidentiality, sharing of expenses and best efforts to reach final agreement are particularly interesting and important.

Two illustrative case studies are presented which emphasize the importance of proper drafting of letters of intent, one pertaining to a transaction in common law and one in a civil law jurisdiction. The common law case study is particularly interesting since it examines the well known case *Texaco v. Pennzoil*, and scrutinizes the document which resulted in a multi-billion dollar judgment.⁷

The second section concludes with a comparison of doctrines imposing pre-contractual liability on parties under common and civil law, such as those requiring good faith negotiations and promissory estoppel, even in the absence of a complete contract. Conditions in documents requiring prior Board of Directors or government approvals have surprisingly different results in different jurisdictions.⁸

French and West German Law, 18 GEO. WASH. J. INT'L L. & ECON. 331 (1984).

4. The book examines a number of classifications of instruments. For example, letters of intent used to indicate seriousness of intention are called "assurance" letters of intent. "Framework" letters of intent are instruments which set down rules for future negotiations. "Memorialization" letters of intent are actual preliminary or partial agreements.

5. In general, civil law systems seek the true intent of the parties and rely less on factual analysis of the circumstances than common law systems.

6. It is also surprising how few appellate opinions have been written on enforceability of letters of intent as contracts, even in the U.S., where they are used most frequently. One of the most recent cases considering the law of New York is *Arcadian Phosphates, Inc. v. Arcadian Corporation*, 884 F.2d 69 (2d. Cir. 1989). In that case, the Court of Appeals for the Second Circuit found a Memorandum of Understanding did not constitute a contract for sale of a phosphates business.

7. A copy of the memorandum of agreement signed between Pennzoil and Getty Oil is included in the Appendices.

8. Civil law rules of contract formation prevent liability from arising for the failure of a board of directors to give their approval. In contrast, a U.S. court has held that in the

Particular problems arise when users of letters of intent are in different countries.⁹ The third section concerns special issues arising in transnational letters of intent. Such issues include special treatment of international letters of intent in different jurisdictions, choice of law and choice of forum provisions in letters of intent.

The final section incorporates the wisdom of the previous sections in a practical guide to drafting letters of intent. It emphasizes the need to separate transactions into separate components, some of which should be made enforceable and embodied in a separate agreement (e.g., confidential items, and those items which the parties do not wish to be enforced). This section advises the reader how to avoid the most common problems associated with drafting such instruments. One learns that form as well as substance is important in drafting letters of intent;¹⁰ proper form and language to exclude contractual liability is given as well.

The Appendices are particularly useful, both in giving examples of mistakes made in the past (e.g., the "hapless" *Pennzoil v. Texaco* Memorandum of Agreement) and in giving specific models for letters of intent and related pre-contractual agreements.

This book is thorough, lucid and practical and can be strongly recommended.

case of a contract to negotiate, an express reference to a party's board of directors approval does not "defeat its obligations under the binding agreement merely by having its Board do nothing." *Teachers Insurance and Annuity Association v. Tribune Co.*, 670 F.Supp. 49 (S.D.N.Y. 1987).

9. For example, the authors point out the relative ease with which the Romanistic legal systems, particularly the French legal system, find offers to be contracts could result in a letter of intent issued from abroad being considered an offer.

10. To avoid contractual liability in a letter of intent, letter form is preferable in most cases to a format that has the appearance and trappings of a contract. For example, use of recitals and signature blocks, typically found in contracts, is discouraged.

