

# Exercises in Commercial Transactions



# Exercises in Commercial Transactions

SECOND EDITION

Peter Siviglia



CAROLINA ACADEMIC PRESS  

---

Durham, North Carolina

Copyright © 2019  
Peter Siviglia  
All Rights Reserved

Library of Congress Cataloging-in-Publication Data

Names: Siviglia, Peter, author.

Title: Exercises in commercial transactions / by Peter Siviglia.

Description: Second edition. | Durham, North Carolina : Carolina Academic Press, LLC, [2019] | Includes bibliographical references and index.

Identifiers: LCCN 2019006492 | ISBN 9781531015152 (alk. paper)

Subjects: LCSH: Commercial law--United States--Problems, exercises, etc. | LCGFT: Study guides.

Classification: LCC KF889.85 .S58 2019 | DDC 346.7307/4078--dc23

LC record available at <https://lcn.loc.gov/2019006492>

e-ISBN 978-1-5310-1516-9

CAROLINA ACADEMIC PRESS  
700 Kent Street  
Durham, North Carolina 27701  
Telephone (919) 489-7486  
Fax (919) 493-5668  
[www.cap-press.com](http://www.cap-press.com)

Printed in the United States of America

*for anne*



# Contents

**NOTE:** All problems, solutions and documents are taken from actual transactions. There are no hypotheticals.

Acknowledgments	xvii
About the Author	xix

## PART I

<b>Memorandum: The Commercial Lawyer</b>	3
<b>Problems</b>	

1. Non-Nuptial Agreement—Preparation of an agreement for an unmarried couple who plan to buy an apartment and live there together, when one of the parties will put up the entire down payment. 7
2. Retainer Agreement—Preparation of a retainer agreement for a client that does searches to fill executive positions on a fixed fee basis. The client provides the essentials of his fee arrangements. 9
3. Consulting Agreement—Preparation of a consulting agreement for a client that wishes to retain as an advisor an executive about to retire. The client provides the basic terms. 10
4. A Cooperative Working Arrangement—Assessment and modification of an agreement for an informal arrangement between the client and a company in the same type of business so the two can assess whether a more formal arrangement might be worthwhile. The client provides insight into some of its concerns. 11

5. Finder's Agreement and Guarantee—Preparation of (1) an agreement for the client to market machinery of a foreign manufacturer, and (2) a parent company guarantee of the manufacturer. The client provides the basic terms of the marketing agreement. 15
6. Escrow Agreement—Preparation of an escrow agreement using as a model an escrow agreement from the firm's archives. The escrow agreement is to provide assurances that the client is in good faith negotiations to invest in and to provide financing for a company in default on its debt and whose bank is on the verge of foreclosing on its collateral. 17
7. Employment Contract—Advising a client on an employment contract proposed by a prospective employer, including the preparation of proposed revisions. 24
8. Editing a Client's Presentation—Examination of and editing a client's memorandum to special tax counsel seeking advice on a particular matter. This exercise requires a precise, concise, well-organized communication in order to avoid misinterpretation and to focus special counsel in the right direction. 31
9. Shareholder Arrangements—Redrafting the articles of incorporation of a company in which the client is about to invest in order to guarantee the client representation on the board, veto rights at the shareholder level, and other protections for its investment. 36
10. Limited Liability Company Operating Agreement—Preparation of an LLC agreement for a musical group involving income comprising performance fees, royalties from recordings, songs written by members of the group, and the possibility of members leaving and new members joining. 39
11. Structuring an Acquisition—Preparation, based on information furnished by the client, of an outline in order to discuss with the client the agreements required for an acquisition by the client and the essential terms of those



	agreements. This outline and the results of the discussions with the client will provide the basis for a term sheet to be presented to the seller.	40
12.	Offer and Acceptance—Preparation of an offer which, if accepted, will constitute a binding contract to market a product. The contract is among the client, the prospective sales agent for the product, and the finder who introduced the prospective sales agent to the client. If the offer is accepted, the resulting contract is contingent on the client's acquiring the rights to the formula to produce the product.	44
13.	Corporate and Commercial Smorgasbord—Reviewing and commenting on an agreement to establish a joint venture company in a foreign jurisdiction. The joint venture will be among the client and two other parties.	47
14.	A Contract Dispute—Advising a client how to proceed in a situation in which the other party to the contract appears about to repudiate the contract.	64
15.	Quickies	
	A. Car Quest—Preparation of a communication to a person holding the client's car hostage on that person's property.	66
	B. Greek Tragedy—Protecting the client from conflicts of interest between a company and its majority-owned subsidiary, both engaged in the same business, having different shareholdings and anticipating the possibility of a dissident shareholder.	67
	C. Can You Top This? Parts I & II—Preparation of bids to purchase real estate to be sold at auction.	69
	D. Drafting Exercise—Fee Provision: Drafting a comprehensive fee provision based on skeletal instructions from the client, and devising reasonable solutions for the client to consider where the instructions are incomplete.	71
16.	An Equitable Offer—Preparation of an offer, which, if signed, will constitute a contract, containing terms	

	specifying the severance arrangements between an employer and its former employee, who is also a shareholder of the former employer and a shareholder of an affiliate of the former employer.	72
17.	A Capital Idea—Changing a corporation’s capital structure, involving statutory interpretation (the relevant statutory provisions are included), advice to the client, and drafting the required corporate action and an amendment to the articles of incorporation.	75
18.	Loan to a Supplier—Preparation of a revolving credit note, a setoff agreement, and the related executive committee action authorizing the transaction.	84
19.	A Lease of a Different Color—Preparation of a detailed outline containing the terms of a lease of real estate where the lessor requires the right to terminate the lease on short notice and the lessee will expend a substantial sum to prepare the property for its intended use. The problem requires the student to develop a solution to resolve this conflict.	86
20.	Amending an Agreement—Modifying the draft of a contract to reflect changes to which the parties have agreed. This exercise is not as easy as it might sound, because often a change in one term will require changes to the agreement in several places.	88
21.	A Hand-Me-Down—Analysis of an agreement to provide marketing assistance, and preparation of a revised version in accordance with the client’s specifications.	97
22.	Consulting Agreement Plus—Preparation of a consulting agreement with alternative contingency fee provisions based on terms specified by an overseas client. This problem stresses the skills required to adapt precedents to a new situation.	100
23.	A “Real” Problem—Drafting an agreement for the seller of a parcel of real estate providing for a post-closing adjustment to the sales price based on a subsequent sale by the buyer.	103

24.	A Matter of Opinion—Critique of an agreement governed by the law of the student’s jurisdiction for a foreign bank asked to serve as custodian for a syndicate of lenders. The student is also required to draft a short opinion to the bank regarding the agreement. The problem includes relevant statutory provisions.	105
25.	Understanding Contractual Relationships—Detecting inconsistencies between an agreement and the actual contractual relationships of the parties. This exercise focuses attention on what contracts are essentially about: relationships and the rights and obligations that flow from those relationships.	115
26.	Action by a Secured Party on Default—Enforcing a security interest in accounts receivable after a default: drafting the required notices; advice to the client on implementing enforcement; follow-up communications.	124
27.	Changing Employers in Mid Contract—Preparation of (i) a settlement agreement among the employer, the employee and the prospective new employer; (ii) an agreement terminating the employment contract; and (iii) provisions to release funds from escrow as part of the settlement.	130
28.	Duet or a Tale of Two Documents of Title—Drafting an agreement to protect a shipping company that has agreed to issue two bills of lading for the same cargo at the request of its customer.	138
29.	A Conflict in Interest—Advising the client, an executive of a major corporation, about an attorney’s engagement agreement proposed to the client by that corporation’s outside counsel in a litigated matter in which both the corporation and the client are named as defendants. The exercise also involves analysis of relevant provisions in the company’s bylaws.	140
30.	Scylla and Charybdis—An ethical dilemma that challenges an associate during the course of a major international, multi-party transaction. The associate must decide, on	

the eve of closing, whether to disclose to the other parties a change (1) which the associate’s partner-in-charge knew should have been disclosed but has refused—and continues to refuse—to do so; (2) which, if disclosed, would result in cancellation of the closing and the possible loss of the deal; and (3) which the associate knows will not be discovered until after the closing.	145
---	-----

## PART II

### Solutions and Author’s Comments

1. Non-Nuptial Agreement	149
• Author’s Solution	
• Author’s Comments	
2. Retainer Agreement	154
• Author’s Solution	
• Author’s Comments	
3. Consulting Agreement	157
• Author’s Solution	
• Author’s Comments	
4. A Cooperative, Working Arrangement	160
• Author’s Solution	
• Author’s Comments	
5. Finder’s Agreement and Guarantee	165
• Author’s Solution	
• Author’s Comments	
6. Escrow Agreement	172
• Author’s Solution	
• Author’s Comments	
7. Employment Contract	179
• Author’s Solution	
• Author’s Comments	
8. Editing a Client’s Presentation	199
• Author’s Solution	
• Author’s Comments	

9.	Shareholder Arrangements	202
	• Author's Solution	
	• Author's Comments	
10.	Limited Liability Company Operating Agreement	208
	• Author's Solution	
	• Author's Comments	
11.	Structuring an Acquisition	229
	• Author's Solution	
	• Author's Comments	
12.	Offer and Acceptance	236
	• Author's Solution	
	• Author's Comments	
13.	Corporate and Commercial Smorgasbord— Reviewing and Commenting on an Agreement	243
	• Author's Solution	
	• Author's Comments	
14.	A Contract Dispute	253
	• Author's Solution	
	• Author's Comments	
15.	Quickies	
A.	Car Quest	257
	• Author's Solution	
	• Author's Comments	
B.	Greek Tragedy	259
	• Author's Solution	
	• Author's Comments	
C.	Can You Top This? Part I	263
	• Author's Solution	
	• Author's Comments	
	Can You Top This? Part II	
	• Author's Solution	
	• Author's Comments	
D.	Drafting Exercise—Fee Provision	267
	• Author's Solution	
	• Author's Comments	

16.	An Equitable Offer	269
	• Author's Solution	
	• Author's Comments	
17.	A Capital Idea	275
	• Author's Solution	
	• Author's Comments	
18.	Loan to a Supplier	282
	• Author's Solution	
	• Author's Comments	
19.	A Lease of a Different Color	290
	• Author's Solution	
	• Author's Comments	
20.	Amending an Agreement	297
	• Author's Solution	
	• Author's Comments	
21.	A Hand-Me-Down	306
	• Author's Solution	
	• Author's Comments	
22.	Consulting Agreement Plus	311
	• Author's Solution	
	• Author's Comments	
23.	A "Real" Problem	316
	• Author's Solution	
	• Author's Comments	
24.	A Matter of Opinion	323
	• Author's Solution	
	• Author's Comments	
25.	Understanding Contractual Relationships	329
	• Author's Solution	
	• Author's Comments	
26.	Action by a Secured Party on Default	332
	• Author's Solution	
	• Author's Comments	

27.	Changing Employers in Mid Contract	342
	• Author's Solution	
	• Author's Comments	
28.	Duet or a Tale of Two Documents of Title	352
	• Author's Solution	
	• Author's Comments	
29.	A Conflict in Interest	355
	• Author's Solution	
	• Author's Comments	
30.	Scylla and Charybdis	357
	• Denouement and Author's Comments	





# Acknowledgments

I acknowledge with appreciation the contributions to this work by

Anne K. Siviglia  
Cathleen Scanlan  
Victoria Christiano



## About the Author

Peter Siviglia was born in Brooklyn, New York, a long time ago. He is now semi-retired from the practice of law, spending much of his time writing about contract preparation and teaching his grandchildren the games he played on the streets of Brooklyn.

Peter received a BA from Williams College in 1961, an MA from Brown University in 1962, and a JD from Harvard University in 1965.

Peter has practiced law in New York for more than 50 years, mostly in Manhattan, representing clients both domestic and foreign, public and private. He has served as correspondent counsel and as special counsel to major international law firms on contract matters and negotiating.

He is the author of one of West Group's best-selling works in the commercial field: *Commercial Agreements—A Lawyer's Guide to Drafting and Negotiating*, Thomson Reuters, supplemented annually. He is also the author of three works published by Carolina Academic Press: *Writing Contracts, a Distinct Discipline*; *Exercises in Commercial Transactions*; and *Contracts and Negotiating for the Business Person*; and a book of poetry and other writings, *The Sidelines of Time*, Archway Publishing.

In addition, Peter has written numerous articles on writing contracts and other legal topics, many of which have appeared in the *NYS Bar Association Journal*, where he has a regular column on contract preparation. He also lectures on contract preparation at CLE programs.

