ADAMS ON CONTRACT DRAFTING

Contract-Drafting Shortcomings in the Merger Agreement Between Google Inc. and Motorola Mobility Holdings, Inc.

The following analysis is of the merger agreement providing for Google's acquisition of Motorola Mobility. (For a copy of the merger agreement, go here.) This analysis doesn't attempt to be comprehensive, and it includes only issues relating to language and structure. "MSCD" refers to Kenneth A. Adams, *A Manual of Style for Contract Drafting* (ABA 2d ed. 2008); "SM&AC" refers to Kenneth A. Adams, *The Structure of M&A Contracts* (West LegalEdcenter 2011). (For information on both books, go here.)

LANGUAGE

The Front and Back of the Contract

1. Use as the title "MERGER AGREEMENT" rather than the more ponderous "AGREEMENT AND PLAN OF MERGER"; see MSCD ¶ 1.4.

2. Don't use all capitals for the introductory-clause reference to the type of agreement; see MSCD ¶ 1.13.

3. Omit the defined term "Agreement"; see MSCD ¶ 1.84.

4. Use "dated" rather than "made and entered into"; see MSCD ¶ 1.15.

5. Omit "as of", as it's unhelpful; see MSCD ¶ 1.27.

6. Use "between" instead of "by and among"; see MSCD ¶ 1.34.

7. State in the recitals rather than the introductory clause the fact that Merger Sub is a wholly owned subsidiary of Parent; see MSCD ¶ 1.56.

8. Get rid of the archaisms "WHEREAS" and "NOW THEREFORE"; see MSCD ¶¶ 1.102, 1.118.

9. Don't use in the recitals defined terms that are defined later in the contract—in this case, "Merger". See MSCD ¶ 1.112.

10. Omit the traditional recital of consideration—it's pointless. See MSCD ¶ 1.117.

11. The concluding clause is wordy and archaic; see MSCD ¶ 4.18.

12. The signature blocks stating the name and title of each signatory—why bother including "Name" and "Title"? See MSCD ¶ 4.27.

Categories of Contract Language

13. The verb structures are chaotic; see generally MSCD chapter 2. The following nine paragraphs contain just a few examples out of hundreds:

14. "Shall" is drastically overused; see MSCD ¶ 2.32. It's used not only in language of obligation used to impose an obligation on the subject of the sentence ("The Surviving Corporation shall pay") but also in, for example, language of policy in section 1.01 ("the separate corporate existence of Merger Sub *shall* [read *will*] cease") and in section 8.02 ("all other conditions and provisions of this Agreement *shall* [read *will*] nevertheless remain in full force and effect"). See MSCD ¶ 2.161.

15. Many provisions using "shall" are in the passive voice, as in section 1.01 ("Merger Sub shall be merged") and section 2.02(b) ("the holder of such Certificate or Book-Entry Shares shall be paid in exchange therefor"). That can obscure who the actor is; see MSCD ¶ 2.78. Furthermore, it might be that the provision should be phrased as something other than an obligation.

16. "Shall" is used to impose a duty on a nonparty—an impossibility; see MSCD ¶¶ 2.69, 2.79. See section 2.02(a) ("The Paying Agent shall … make the payments"). Saying "the Paying Agent will", as in section 2.02(c), doesn't represent an improvement.

17. "Shall" is used inappropriately in conditional clauses; see MSCD ¶ 2.171. See for example section 1.10 ("If at any time … any change in the outstanding shares of capital stock of the Company *shall occur* [read *occurs*]").

18. "Shall" shouldn't be used in the conditions expressed in article VI, which constitute language of policy; see MSCD ¶ 2.176.

19. In some contexts, "shall" isn't used when it would be appropriate to use it. See for example section 1.02 ("a closing … will be held" rather than "the parties shall hold a closing"). See also section 5.06(h) ("Parent *agrees to* [read *shall*] use commercially reasonable efforts"); see MSCD ¶ 2.58.

20. This contract uses inferior alternatives to "may"; see MSCD ¶ 2.87. See for example section 1.08 ("Parent and the Surviving Corporation *shall be entitled to* [read *may*] deduct") and section 1.09 ("the officers and directors of the Surviving Corporation *shall be authorized to* [read *may*] execute and deliver").

21. "May" is used inappropriately in restrictive relative clauses; see MSCD ¶ 2.196. See for example section 1.02 ("the parties shall take all such further actions ~~as may be~~ required by applicable Law").

22. Section 7.03(b)(i) would have been clearer if the matrix clause ("the Company shall pay or cause to be paid") had been placed before the lengthy conditional clause ("If (A) this Agreement …"). See MSCD ¶ 2.175.

Defined Terms

23. The list of defined terms and the section where each is defined isn't really a glossary, as the definitions aren't included. A better word to use would be "index".

24. In the index of defined terms it would be more useful to refer to page numbers rather than section numbers; see MSCD ¶ 5.65.

25. If a contract includes an index of defined terms, it's unnecessary to clutter the text by putting after defined terms the parenthetical "as defined below". See for example section 1.10 ("the second (2nd) Business Day (as defined below)").

26. Rather than using all-lowercase for some defined terms ("beneficial ownership"; knowledge"), it's generally preferable to use initial capitals for all defined terms; see MSCD ¶ 5.7.

27. The defined term for Google is "Parent", without the definite article, but this contract contains five instances of "the Parent". This inconsistency doesn't affect readability, but to some readers it might suggest carelessness.

28. Although the needless variation in the adjective component of the defined terms "Government Official" and "Governmental Entity" is in itself harmless, it suggests insufficient harmonization after copying and pasting from different contracts.

29. Just as it's unhelpful to place the definition section at the beginning of the body of the contract (see MSCD ¶ 5.60), it's unhelpful to begin section 3.14 with a set of definitions.

30. Nothing is gained by using both the singular and plural form when defining a term, as in section 2.04 ("each such unvested option, an "Existing Rollover Stock Option," and collectively, the "Existing Rollover Stock Options").

31. Defining some terms using autonomous definitions rather than integrated definitions would have reduced clutter; see MSCD ¶ 5.54. For example, defining "Parent Stock Price" as an autonomous definition would have made the formula in section 2.04 easier to understand, and it would have been more efficient to define "Code" and "Governmental Entity" in the definition section rather than in section 1.08 and section 3.04, respectively.

32. When creating an integrated definition, the defined-term parenthetical should come at the end of the definition; see MSCD ¶¶ 5.34, 5.39. In this contract, that's not always the case. See, for example, how "Special Meeting" is defined in section 5.08(b).

33. In "consummation of the Merger contemplated by this Agreement" (see section 6.01(b)), "contemplated by this Agreement" is redundant.

34. The defined term "Rep Failure" is used only twice, both uses occurring in the same sentence in section 6.02(c). That's a sign of overeager use of defined terms.

Select Usages

35. Instead of using only "reasonable efforts", this contract uses three "efforts" standards: "reasonable best efforts", "commercially reasonable efforts"; and "good faith efforts". That suggests a spectrum of efforts standards—an unworkable and dangerously confusing notion. See MSCD chapter 7.

36. This contract uses the phrases “following the Effective Time”, “after the Effective Time”, “following the Merger”, and “following the consummation of the Merger”; it would have been clearer and more efficient to use just the first. This contract also uses the phrases “following the Closing Date” and “after the Closing Date”; one wonders whether by using those phrases the drafter really intended to convey a meaning different from “following the Effective Time”.

37. Presumably “promptly”, “as promptly as practicable”, “as promptly as reasonably practicable”, “as soon as practicable”, and “as soon as reasonably practicable” all mean the same thing. It would have been preferable to eliminate the needless variation.

38. Use of “for the avoidance of doubt” (four times), “it being understood” and its variants (three times), and “without limiting the generality of the foregoing” and its variants (eight times) is a sign of wordiness; see MSCD ¶¶ 12.82, 12.151, and 12.448.

39. The many instances of “notwithstanding”, “subject to”, “except”, and “provided” and its variants suggest that the let’s-keep-adding approach might have been used in revising this contract to reflect negotiations. That approach makes it harder to keep track of what’s going on, and it has resulted in at least one high-profile M&A dispute. For more on this, see Kenneth A. Adams, *Merger Pacts: Contract Drafting, Cerberus Litigation*, N.Y.L.J., Feb. 19, 2008 (go here for a PDF copy).

40. Use of “provided,” “provided, however” and “provided, further” interchangeably in this contract represents needless variation. Furthermore, in addition to being archaic, these usages represent an imprecise way to signal the relationship between two adjoined provisions; see MSCD ¶ 12.279. For example, the “provided, further” in section 6.02(c) follows an exception to a condition, so it’s not immediately clear whether what follows the “provided further” is another exception to the condition or a separate condition. (The latter, apparently.)

41. “Such” is used repeatedly, and unhelpfully, instead of “this”, “that”, “these”, and “those”; see MSCD ¶ 12.350.

42. This contract uses the counterproductive words-and-digits approach to stating numbers; see MSCD ¶ 13.1.

43. Section 8.03(b) is in all capitals. Unless required by statute, it’s counterproductive to emphasize select provisions; see MSCD ¶ 15.32. If you nevertheless want to emphasize a provision, using all caps makes it harder to read; see MSCD ¶ 15.37.

44. Strictly speaking, the phrase “the other party” (used nine times) doesn’t work in a contract that has three parties. And instead of “third party” (used nine times), use “nonparty”; see MSCD ¶ 12.386.

45. In “mutually agree” (used three times), the “mutually” is redundant; see MSCD ¶ 12.202.

46. This contract uses “and/or” four times. Generally there are clearer alternatives; see MSCD ¶ 10.57.

Drafting as Writing

47. This contract contains many "buried verbs"—it uses abstract nouns at the expense of verbs, the result being wordiness and the potential for confusion. See for example section 5.10 ("prior to the issuance of such press release"; say instead "before issuing that press release"); section 7.01 ("shall give written notice of such termination to the other party"; say instead "shall notify the other party of that termination").

48. This contract contains many "strings" of words. Some are appropriate; others contain redundancy—for example "merged with and into the Company" (section 1.01) and "true, correct and complete" (section 3.09).

49. This contract contains rhetorical emphasis, for example "whatsoever," "in any manner", and "under no circumstances". Rhetorical emphasis serves only to make a contract wordier than necessary; see MSCD ¶ 16.29.

50. This contract contains stodgy lawyerisms, including "in the event that", "prior to", "set forth in", "forthwith", and "pursuant to"; see MSCD ¶ 16.36.

51. When using initial capitals, it makes sense to comply with guidelines for general English usage, more specifically those contained in *The Chicago Manual of Style*. In this contract, the capitalization of, for example, "Board of Directors", "Secretary of State of the State of Delaware", "Restated Certificate of Incorporation", and the words "Article", "Section", and "Annex" in cross-references doesn't comply with *The Chicago Manual of Style*.

52. A simple way to make this contract more concise would have been to use possessives; see MSCD ¶ 16.42. For example, there's only one instance of "the Company's Board of Directors" and 29 instances of "the Board of Directors of the Company".

53. Perhaps the most noteworthy provisions in this contract are sections 7.03(b) and 7.03(c), which provide for a $2.5 billion reverse breakup fee. But as a piece of drafting, they're a mess. For one thing, the relationship between the two subsections could have been made much clearer.

Layout

54. It's better to use Arabic rather than Roman numerals in article headings; see MSCD ¶ 3.3.

55. Why have "SECTION" precede every section number? And why include a zero in the section number of the first nine sections of any given article, as in "2.03"? See MSCD ¶ 3.8.

56. It's better to reserve the "(a)" enumeration hierarchy for subsections and use a different hierarchy (preferably "(1)") for enumerated clauses, even those occurring in a section rather than a subsection; see MSCD ¶ 3.29.

57. In article VI, and nowhere else, each tabulated enumerated clause (see MSCD ¶ 3.25) is given a heading.

58. Emphasizing cross-references, whether by using underlining (as in this contract) or otherwise, is unhelpful and risks distracting the reader; see MSCD ¶ 3.72.

59. Section 7.01 ends with a block of text that isn't enumerated. All blocks of text in a section should be enumerated; see MSCD ¶ 3.17.

STRUCTURE

Recitals

60. The information conveyed in the recitals isn't necessary or helpful; see this September 2009 post on the AdamsDrafting blog. And it doesn't tell the reader anything about the transaction. Say instead "Merger Sub is a wholly owned subsidiary of Parent, and the Company is a publicly traded company. The parties wish to effect the acquisition of the Company by Parent through a merger of Merger Sub into the Company."

Deal Terms

61. As used in this contract, the word "Closing" is ambiguous—it's not clear whether it refers to the closing process or consummation of the transaction. It would be preferable to make it clear that it conveys the latter meaning and revise the deal terms accordingly; see this June 2010 post on the AdamsDrafting blog.

Representations Lead-In

62. With respect to the Company's representations, it's clearer to refer to disclosure-schedule exceptions within the applicable representations rather than in the representations lead-in; see SM&AC ¶ 2.50. In particular, the "reasonably apparent" standard is an invitation to dispute.

63. The phrase "represents and warrants" is pointless and confusing, as is "representations and warranties"; see SM&AC ¶ 2.32–43.

Use of "Material"

64. The word "material" is problematic, in that in addition to being vague, it's ambiguous; see SM&AC ¶ 2.76–81. It's used in many ways throughout this contract (for example, in "Material Adverse Effect, "immaterial interests", and "material Subsidiary"), and it's not always clear which of the alternative meanings is intended.

65. Instead of using "de minimis" in the bringdown condition to the obligations of Parent and Merger Sub, it might be clearer to use the defined term "Significant"; see SM&AC ¶ 2.103. (This approach is admittedly pioneering.)

Preclosing Obligations

66. The Company's "covenants"—preclosing obligations—appear not to include an obligation to provide information on nonsatisfaction of conditions; see SM&AC ¶ 3.19–24.

Conditions

67. Omit from each conditions lead-in, on the grounds of circularity, "at or prior to the Effective Time"; see SM&AC ¶ 4.4.

68. The bringdown condition to the obligations of Parent and Merger Sub goes out of its way to eliminate the possibility of "double materiality," but double materiality is a figment of practitioner imagination; see SM&AC ¶ 4.31–34.

69. It's redundant to say in the bringdown conditions "except to the extent expressly made as of an earlier date, in which case as of such date"; see SM&AC ¶ 4.40.

Termination

70. The termination provisions keyed to inaccuracy of representations don't make a clear distinction between accuracy of representations at signing and accuracy of representations at closing; see SM&AC ¶ 6.9.

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