
DEAL STRUCK
THE WORLD'S BEST DRAFTING TIPS
ROSS GUBERMAN
PRESIDENT, LEGAL WRITING PRO
& GARY KARL

DEAL STRUCK:

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Book design by Three Steps Ahead.

About Ross Guberman

ROSS GUBERMAN is the president of Legal Writing Pro LLC, a training and consulting firm. From Alaska and Hawaii to Paris and Hong Kong, he has conducted more than a thousand programs on three continents for prominent law firms, for judges and courts, and for dozens of agencies, corporations, and associations. His workshops are some of the highest-rated offerings in the world of professional legal education.

Ross is also a Professorial Lecturer at the George Washington University Law School, where he conducts a seminar on drafting and writing strategy.

Ross holds degrees from Yale, the Sorbonne, and the University of Chicago Law School.

In early 2011, Oxford University Press published his *Point Made: How to Write Like the Nation's Top Advocates*, an Amazon bestseller that reviewers have praised as a "tour de force," "a must for the library of veteran litigators," and "an indispensable tool" filled with "practical, trenchant advice." *Point Made* has sold tens of thousands of copies and is now in its second edition. Ross's next book will be *Point Taken: How to Write Like the World's Greatest Judges*.

An active member of the bar and a former attorney at a top firm, Ross has also worked as a translator, professional musician, and award-winning journalist. After the federal takeover of Fannie Mae, *Slate* magazine called his 2002 article about the company "totally brilliant and prescient." And in her bestseller *Reckless Endangerment*, *New York Times* business columnist Gretchen Morgenson wrote that "the article was groundbreaking and made even the most jaded Washingtonian take note."

Quoted in such publications as the *New York Times* and *American Lawyer*, Ross often comments on business, law, writing, training, and lawyer development. He has also addressed several major international conferences,

including the American Society of Training and Development, NALP's Annual Education Conference, the Professional Development Consortium, the Professional Development Institute, and the Association for Continuing Legal Education. He is often invited to speak at judicial conferences as well.

Ross immerses himself in the best practices for adult learning. He is a member of the American Society for Training & Development, which has awarded him its Certified Professional in Learning and Performance™ credential for passing a rigorous eight-part test and for creating a standardized writing assessment that he has since administered to thousands of lawyers worldwide.

A Minnesota native, Ross lives with his wife and two children outside Washington, DC. Family travel has taken them everywhere from Argentina to Greenland and Zambia.

About Gary Karl

GARY KARL has vast experience in a broad swath of financing, M&A, commercial, and securities transactions. With three decades as a corporate lawyer under his belt, he was a partner at Harter Secrest & Emery LLP for 24 years. Gary's clients ranged from not-for-profit hospitals and publicly held financial institutions to private equity funds, secured lenders, 501(c)(3) entities, and professional service firms. The leader of his firm's key transactional practice groups, Gary also chaired the firm's Opinion Committee.

Gary is deeply interested in lawyer training and professional development, especially in the transactional arena. During his tenure as the firm's training partner, the firm's professional-development initiatives helped earn some of the nation's top scores in associate satisfaction surveys. Gary created and led many interactive workshops on transactional topics, all of which were highly rated by lawyers at every experience level. He has also addressed NALP's Professional Development Institute on the topic of transactional law training using principles of adult learning.

Gary holds a B.A. from Hamilton College and graduated with honors from Albany Law School. He was featured in *The Best Lawyers in America*© for Banking and Finance Law and for Corporate Law for five straight years, and was named by Best Lawyers® as Rochester, New York's Lawyer of the Year for Banking and Finance Law for 2015.

Outside his law practice, Gary has been a leader in several not-for-profits and was a two-time recipient of USA Swimming's outstanding service award for his volunteer contributions in central and western New York.

Gary and his wife make their home in New York's Adirondack Mountains.

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Introduction

When the public and the profession rail against "legal writing," the musty language of contracts is often what they have in mind.

In response, academics and drafting experts have spent decades touting Plain English and other reforms that would purge agreements of *whereas*, *shall*, *witnesseth*, and other alleged anachronistic atrocities. And yet despite these valiant reform efforts, the commercial agreements of today largely resemble their counterparts from a half century ago.

Why? The truth about commercial contract drafting is that once the parties assent to the deal, their agreements mostly work just fine. A contract must be judged not by an aesthetic or idealistic standard, but by a practical one: if the parties can perform their obligations and exercise their rights without disputing the meaning of any terms, the contract must be deemed a "success." Not a utopian success, perhaps, but a success all the same.

It's through this pragmatic lens that we peer at the hit list of the drafting cognoscenti: Plain English, conciseness, avoidance of redundancies and archaisms, and the War on Legalese. These agenda items are no doubt "nice-to-haves." In fact, if we were appointed Drafting Czars, we would happily endorse those reforms ourselves. Yet in the hurly-burly world of commercial practice, are they all true "must-haves"?

Outside a few jurisdictions like Australia and New Zealand, the market has generally responded "no." Lawyers are service providers, and few clients have the luxury of shelling out cash just to infuse commercial agreements with a modern idiom and a spare style.

The push-and-pull between drafting fantasies and hard-nosed reality can frustrate purist reformers. In our review of the drafting literature, we have even noticed some hints of scorn toward the world's contract drafters. It's almost as if some commentators believe that transactional lawyers don't care about their craft, or "just don't get it." We disagree. We respect and admire practicing transactional lawyers, who draft as best as they can in the face of convention, client demands, and the relentless pressure to get the deal done.

Thus, this compact real-world drafting guide. The guidelines we share here all have practical, not just theoretical, value for the parties. We scoured thousands of pages of drafting advice, and then whittled those tips down to the ones we found most useful—and realistic.

So who should use this guide—and how? We've designed it to appeal to everyone from contract newbies to seasoned practitioners, and we've field-tested the guide with both groups.

If you're just getting your feet wet, the general sections and models are a great place to start, and you might want to digest the whole thing through. But if you've been drafting for years, or even decades, scan the Table of Contents for topics that call to mind late-night worries or eleventh-hour disputes with colleagues or counterparties.

We also hope that this guide will grant the twin gifts of time and consistency to in-house legal departments and law-firm practice groups. Imagine the efficiencies you could create if you could get all your lawyers, old and new, on the same page, so to speak. We can easily customize this guide, so please get in touch with us if you'd like us to add, subtract, or otherwise tinker with it.

A bit more about your authors: Gary brings decades of exceptionally varied real-world experience. Ross, for his part, is especially well versed in the existing drafting literature and the case law; he has also worked with thousands of contract-drafting professionals on three continents. Together, we have a good handle on which drafting strategies present feasible solutions for practitioners and which are just pipe dreams of the cognoscenti.

We'd like to thank the many people who helped us with this guide, including (but certainly not limited to) Preston Torbert (formerly of Baker & McKenzie), Jamie Cole (Polsinelli), Dan Keating (Hogan Lovells), Mark Roellig (MassMutual), Patrick Lynch (Crowell & Moring), and Elizabeth Hofmeister, Mario Fallone, and Christine O'Connor (Harter Secrest & Emery). Sejal Shah and Vickie Kobak also gave valuable input. We'd like to thank Josh Korwin of Three Steps Ahead for his excellent book design and layout. And the entire Legal Writing Pro team helped as well.

USING THIS BOOK

The tips appear in an easy checklist format that sacrifices detailed explanations for actionable advice.

- The **green circle** means "**use**."
- The **red square** means "**avoid**."
- The **yellow triangle** means "**proceed with caution**."

Although we include a bibliography of our favorite resources, we rarely cite secondary sources. That's in part to save space. But it's also because, although we reviewed at least a dozen books and more than a hundred articles (both print and online), the advice is ultimately our own.

Enjoy the guide—and happy drafting!

The Big Picture

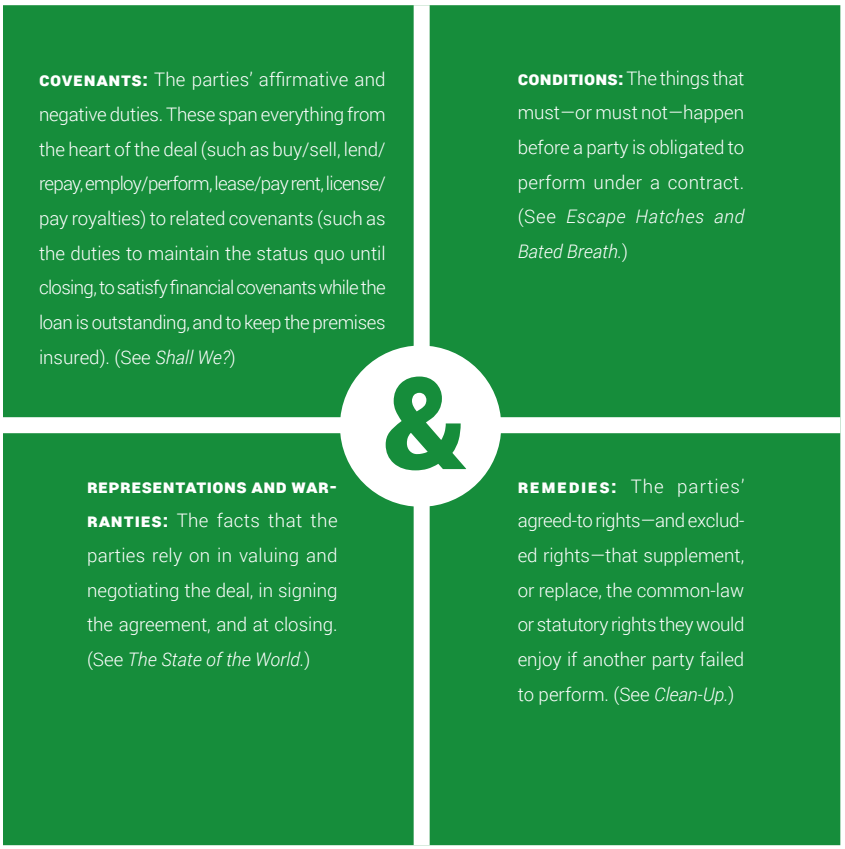
The Heart of the Deal

Good journalism often begins by answering six questions: Who? What? When? Where? Why? How? Use a similar set of questions to help draft the recitals as well as the substantive provisions that strike at the core of a business deal:

- *Why* are the parties entering into this agreement?
- *Who* is obligated to *whom*?
- *What* are those parties' respective rights and obligations?
- *When*, *where*, and *how* will the parties perform those obligations and enforce those rights?
- *What* will happen if the parties fail to perform a particular obligation?
- If an obligation involves paying money, *how much* is due, and from *whom*? *How* is it calculated?
- *How* can events outside the parties' control thwart the deal, and *what* will be the result if they do?
- *When* do the parties' respective obligations begin and end?
- If a dispute arises, *when*, *where*, and *how* will it be resolved?

The Core Four

Use your responses to the questions on the previous page to generate these "Core Four" provisions common to all contracts:



Elsewhere in this guide, we cover other aspects of drafting, ranging from discretionary rights to boilerplate provisions.

The Heart of the Agreement

Shall We? Affirmative and Negative Obligations

The Golden Rule of drafting is that you should use each word or phrase consistently to convey only one meaning throughout the document.

Use *shall* for a party's affirmative obligations: acts that a party is obligated to perform to avoid breaching the agreement.

Use **shall** for a party's affirmative obligations.

- If you can replace *shall* with "is obligated to" or "has a duty to," *shall* is always an acceptable choice.

  EXAMPLE: "Buyer *shall* reimburse Seller for all reasonable accounting fees."

As an empirical matter, most practicing transactional lawyers in the United States, Canada, and the United Kingdom use *shall* when drafting obligations.

While some commentators seek to purge the drafting world of *shall*, other than in countries like Australia, only a fraction of drafters consistently use *will* or *must* instead of *shall*.

Inertia is one reason that this reform hasn't taken off. Other reasons are more practical and substantive. For one thing, many lawyers and clients find *must* to be bossy in feel. For another, using *must* for obligations raises the question of how you would draft conditions. And finally, using *will* for obligations raises the question of how you would draft consequences that arise upon satisfaction or failure of a condition or of another future contingency. (See *Will Power.*)

Although it's true that *shall* is often litigated, commentators have been too quick to conclude that *shall* reflects sloppy drafting rather than just old-fashioned diction. Most *shall* cases are statutory. And even in the contractual *shall* cases, the issue is often that the parties have failed to clarify who must perform the obligation or what the affirmative obligation even is. Changing *shall* to *will* or *must* might make contracts sound more modern, but it will not necessarily avoid disputes.

▲ Replacing **shall** with **must** or **will** is no panacea when it comes to avoiding disputes.

Use *shall not* for a party's negative obligations: acts that if performed would breach the agreement.

> EXAMPLE: "Executive *shall not* withdraw these funds from the Account prior to January 1, 2016."

● Use **shall not** for a party's negative obligations.

Avoid using these phrases for negative obligations:

■ Avoid **may not**, **only may**, and **may only**.

- May not
- Shall not have the right to
- Only may
- May only
- Cannot
- Must not (unless you consistently use *must* for affirmative obligations)
- Will not (unless you consistently use *will* for affirmative obligations)

▲ **Must not** and **will not** should be used for negative obligations only if you consistently use **must** and **will** for affirmative ones.

Will Power:
When "Will" Will Do Just Fine

Assuming that you use *shall* rather than *will* for a party's affirmative obligations, *will* plays a discrete role in drafting.

Use *will* rather than *shall* to establish future consequences of events and circumstances that do not obligate the parties:

- "If the Closing does not occur by December 31, 2014, then this Agreement *will* terminate."
- "If Employee is convicted of any felony, then this Agreement *will* terminate."
- "Any purported transfer of the Shares in violation of this Agreement *will* be void."
- "Performance of the obligations under this Agreement *will* not conflict with…"

● Use **will** rather than **shall** to establish future consequences of events and circumstances that do **not** obligate the parties.

Many drafters would, by tradition, use *shall* in the above examples, but then *shall* has to fulfill a function beyond expressing the parties' obligations. Remember the Golden Rule: one word, one meaning. (See *Shall We?*)

▲ Many drafters use **shall** to express future consequences, but then **shall** fulfills a function beyond expressing the parties' obligations.

By contrast, when the future consequence **does** obligate a party, use *shall,* not *will.*

- "If Employee becomes aware of a potential conflict, Employee *shall* report that conflict to the Board of Directors."

● When the future consequence does obligate a party, use **shall**, not **will**.

Within My Rights: May I?

● Use **may** for "reserves the right to."

■ Avoid **shall have a right to**.

■ Avoid ambiguous expressions like **may not**, **may only**, and **only may**.

● Use **might** rather than **may** for possibility.

Use *may* for "reserves the right to" and in place of these phrases:

- *May in its discretion* (acceptable but redundant)
- *Shall in its discretion* (common but nonsensical)
- *Shall have a right to* (common but requires that *shall* be read as *will)*

But if one party wants unfettered discretion, *may, in its sole discretion,* is appropriate. That said, courts will not necessarily enforce "sole discretion" language if it would conflict with common-law duties of reasonableness, good faith, and fair dealing.

Avoid *may not*. It's often ambiguous. For negative obligations, use *shall not.* (See *Shall We?*)

Also avoid *may only* and *only may*. Both can be ambiguous.

And avoid *may* for possibility. For possibility, use *might*.

- Use "patents that *might* be granted," not "patents that *may* be granted."

Escape Hatches and Bated Breath: Conditions

Conditions reflect what must, or must not, happen before a party is obligated to perform some or all of its obligations under a contract. A condition might be an action that a party is obligated to take, a state of facts that must exist, or an event that's outside a party's control.

Take, for example, a contract for the purchase and sale of a home. The contract typically lists some routine conditions: the buyer need not pay the purchase price unless the seller executes and delivers an acceptable deed; the seller, for its part, need not transfer title unless the buyer pays the purchase price. The conditions thus outline what will happen at the closing.

But the buyer's obligation to close might also be subject to another obligation on the seller's part (such as to repair or replace a broken door), to facts that must exist (clear title, for example), or to an event that must occur (say, the lenders must give the buyer a mortgage, or the closing must occur on or before a "drop-dead date").

If any of these conditions isn't met, then the buyer need not complete the purchase. And the buyer suddenly gains some new options:

- Waive the condition and close the deal anyway;
- Wait to see if the condition can be satisfied later;
- Transform the condition to closing into a post-closing covenant to be performed by the seller;
- Renegotiate the deal on presumably more favorable terms.

Conditions can thus create an "out" or an "escape hatch" from obligations that a party would otherwise have to perform.

Because a condition is an all-or-nothing proposition—for example, failure of a closing condition can torpedo the deal—courts are reluctant to find that a contract term is a condition. Instead, courts prefer to construe a supposed condition as an obligation and then remedy the breach by awarding damages rather than terminating the contract altogether.

Follow these steps if you want to draft a condition:

● When you express conditions, be as specific as possible about what must happen.

Be as specific as possible about what must happen.

- "Buyer's obligation to close is conditioned on Buyer's obtaining financing for the purchase price."

● Use **subject to**, **unless**, **on the condition that**, **if**, or **only if** to distinguish conditions from obligations.

Use *subject to*, *unless*, *on the condition that*, *if*, or *only if* to distinguish conditions from obligations.

- *In the event* and *in the event that* are wordy but not incorrect.
- *In the event of* is appropriate before a noun, as in "In the event of default."

■ Avoid **shall** for conditions.

Avoid *shall* for conditions. Reserve *shall* for covenants (what the party has a duty to do). (See *Shall We?*) In fact, using *shall* to express a condition might suggest an obligation.

- CONDITION OR OBLIGATION?: Jones *shall* submit any dispute notice within 30 days after receipt of the working-capital calculation, or he shall be deemed to have accepted the calculation.
- CONDITION: *Unless* Jones submits a dispute notice within 30 days after the date Smith delivers the working-capital calculation, Jones will be deemed to have accepted the calculation.

■ Avoid using **provided that** or other provisos to express conditions.

Avoid using *provided that* or other provisos to express conditions, because provisos can be read to suggest an obligation instead. (See *On Second Thought*.)

- CLEAR: Jones may submit a dispute notice only within 30 days after receipt of the working-capital calculation, after which date

he will be deemed to have accepted the calculation.

- AMBIGUOUS: Jones may dispute the working-capital calculation; *provided that* he submits a dispute notice within 30 days after receipt of the calculation.

Also avoid *to the extent* or *to the extent that* for conditions unless you intend to create a sliding scale of consequences between two events.

■ Avoid **to the extent** or **to the extent that** for conditions unless there's a sliding scale of consequences between the two events.

- RIGHT: *To the extent that you pay off your principal, less of your monthly payment will go toward interest.*
- WRONG: *To the extent Borrower does not pay in full, Lender may declare default.*
- RIGHT: *If Borrower does not pay in full, Lender may declare default.*

When possible, avoid subjective conditions, because they can turn a contract into little more than an option, leaving the other party with no affirmative obligations that it has to perform.

▲ Subjective conditions can turn a contract into little more than an option, leaving the other party with no affirmative obligations that it must perform.

- TOO SUBJECTIVE: Buyer shall have obtained financing for the transaction on terms and conditions *satisfactory to Buyer*.

That said, subjective conditions like *satisfactory to Buyer* can appeal to parties with greater leverage. So if you can't negotiate the other party's subjective conditions out of the contract, at least qualify the subjective condition with an objective component. In the example above, for instance, specify the steps the Buyer must take to obtain financing within a particular time frame or the parameters the Buyer must deem acceptable (such as loan amount, repayment terms, or interest rate).

Of course, depending on your jurisdiction, the parties might already have common-law duties of reasonableness, good faith, fair dealing, and so forth that might affect how a court interprets a condition.

▲ Depending on your jurisdiction, the parties might already have common-law duties of reasonableness, good faith, fair dealing, and so forth that can affect how a court interprets a condition.

The State of the World

"I Solemnly Swear": Representations and Warranties

Representations and warranties, which we refer to here as "reps," are the material facts that are relevant to a party's decision to enter into a deal and that must be accurate if the party is to get the benefit of its bargain.[1]

The parties themselves are often the best authorities on what these facts should be from a business perspective. The relevant facts vary depending on the identity of the parties as well as the nature and circumstances of their transaction. That said, consider these potentially important facts that often slip past one's radar screen.

Are any of the parties entities? If so, draft reps establishing the facts that reflect the party's ability to perform its obligations under the contract. In particular, specify that the entity

- Exists;
- Has the necessary power to make and perform the contract;
- Is duly authorized as a matter of entity governance to make and perform the contract;

● Draft reps establishing the facts reflecting the party's ability to perform its obligations under the contract.

1 The drafting literature brims with debates about whether *representation and warranty* could be cut to simply *representation*. Although we have considered the merits of these arguments, we see no basis to use just *representation* in the US, and in some jurisdictions the use of *representation* alone might have adverse consequences. In the UK, by contrast, many practitioners use just *warranty* to try to avoid statutory tort damages, but the courts there generally ignore the nomenclature in any event. Indeed, in both the UK and the US, courts appear to consider the equities at least as much as they defer to the parties' word choices: Would it be fair to allow a party to avoid tort damages simply by characterizing its false statement as just a warranty and not a representation? *See, e.g., CBS Inc. v. Ziff-Davis Publ'g Co.*, 75 N.Y.2d 496 (1990); *Sycamore Bidco Ltd. v. Breslin & Anor* [2012] EWHC 3443. *See also* Uniform Commercial Code § 2-313: "It is not necessary to the creation of an express warranty that the seller use formal words such as 'warrant' or 'guarantee' or that he have a specific intention to make a warranty…."

▲ We see no basis to use just **representation** in the US, and in some jurisdictions the use of **representation** alone might have adverse consequences.

- Can make and perform the contract without conflicting with any of the following:

  Its governing documents,

  Its other existing contracts,

  Applicable law, and

  Applicable judgments and orders

- Has duly executed and delivered a contract that is enforceable against that entity.

● Consider whether any party is subject to special requirements before it is eligible to perform its obligations under the contract.

Is any party subject to special requirements before it is eligible to perform its obligations under the contract? Consider such requirements as these:

- Financial condition /creditworthiness
- Regulatory status, especially for regulated industries requiring licenses like the following:

  Insurance

  Banking

  Financial advisory and management

  Health care

  Telecommunications

  Public utilities

  The professions (law, medicine, accounting, engineering, architecture)

- Any other regulatory status essential to the transaction:

  Accredited investor status under securities laws

  Prohibited transaction status under ERISA

● For individuals, draft reps that attest to their legal capacity.

Are any of the parties individuals? If so, draft reps clarifying that the party has the legal capacity to enter into the agreement and to consummate the transaction either as an individual or as an agent.

Are the reps made as of the relevant time or times?

- When a transaction has a closing, the parties will want to ensure that the reps haven't changed before the closing, so they will "bring down" the reps at closing. In this sense, they are creating another condition that must be met: the "brought down" reps are still accurate at the time of closing. (See also *Risky Schemes*.)
- When the contract creates an ongoing relationship between the parties (say, a lease, license, credit agreement, or employment agreement), the relevant time period is often throughout the life of the contract, so the parties might need to agree to inform each other of any material changes to their reps post-signing.

● Parties will want to ensure that the reps haven't changed between signing and the closing, so they will "bring down" the reps at closing.

● When the relevant time period is throughout the life of the contract, the parties might need to agree to inform each other of any material changes to their reps post-signing.

Spill the Beans: Exceptions to Representations and Warranties

To ensure accuracy, broad, or "blanket," reps must often include exceptions that disclose facts.

> EXAMPLE: Seller has not impermissibly released any Hazardous Materials on the Property, *except for a petroleum spill on April 1, 2014*.

● Exceptions often appear in separate "exception schedules" or "disclosure schedules."

Although you can note any exceptions in the text of the reps themselves, in M&A and in other complex transactions, exceptions often appear in separate "exception schedules" or "disclosure schedules." (Example: "Buyer represents and warrants that there is no pending litigation against Buyer except as set forth on Schedule 2.1.") Schedules are a more convenient alternative:

> Including long exceptions in schedules makes for a more cohesive and readable contract.
>
> By tradition, deal lawyers expect to find exceptions in schedules.
>
> Typically, the party responsible for producing the schedules is not the party responsible for producing the related agreement. (In the M&A context, for example, Seller's lawyers usually generate the schedules, while Buyer's lawyers generate the purchase agreement.) Logistically, then, it is easier to include any exceptions in a separate schedule.

▲ Exceptions mostly disclose facts that are negative and require action or attention.

Exceptions mostly disclose facts that are negative and that require action or attention. In the spill example above, for instance, counsel for Buyer can protect the client's interests in several ways:

Asking for additional reps about the disclosed fact.

EXAMPLE: How extensive was the spill? Were the authorities notified? What clean-up efforts were made?

Obligating the disclosing party to do something about the disclosed fact.

EXAMPLE: a covenant to clean up the spill.

Making the disclosing party responsible for any costs related to the disclosed fact.

EXAMPLE: requiring Seller to indemnify Buyer for any damages arising from the spill.

Risky Schemes: Mitigating Against Misrepresentations

If you want to protect your client from the risk that another party's reps prove to be inaccurate, you can do so in several ways.

● If the transaction has a closing, consider whether to include a covenant obligating the maintenance of status quo and to make the accuracy of reps a condition to closing.

If the transaction has a closing (as in a Purchase and Sale Agreement), consider whether to

- Include a covenant obligating the other party to maintain the status quo between signing and closing and
- Make the accuracy of the reps a condition to closing, so that inaccurate reps provide grounds to get out of the deal.

● As appropriate, clarify whether a breach triggers an event of default. Include an indemnity that allows recovery of damage if the rep is inaccurate.

Provide that the reps survive the closing to preserve recourse for an inaccuracy that might not be discovered until after the closing.[2] If the contract creates an ongoing business relationship post-signing (as in a lease, license, credit agreement, or employment agreement), clarify whether an inaccurate representation (or breach of a warranty) triggers an event of default, and, if so, provide a meaningful remedy.

In either case, include an indemnity that allows recovery of damages if the rep is inaccurate. (See also *Not My Problem*.)

2 Survival of reps post-closing is common in M&A transactions involving private companies, but it is rare in other contexts like real estate. Buyer wants as long a survival period as possible in order to spot—and then seek redress for—suspected inaccuracies in Seller's reps; Seller wants as short a survival period as possible.

Clean-Up

Who Cares? Materiality, Material Adverse Change, Material Adverse Effect

To avoid disputes over the minor discrepancies that inevitably arise in business, parties need a way to focus on the issues that matter without sweating the small stuff. Qualifying a generic noun like "change" or "litigation" with the adjective *material* is the most common way to achieve that goal.

▲ A **material** term is not necessarily just a "significant" term.

In many jurisdictions, a *material* term is not just a "significant" term. It must be closer to a deal-breaker: if you had known about the discrepancy, you would not have entered into the deal. "Material litigation," then, is not just litigation with a significant amount in controversy. It's litigation that's meritorious enough to cause a reasonable acquirer to reverse course and not go through with an acquisition.

● You may define **material** to mean "significant," if that's your intent, or you may specify a dollar amount.

If you do not want that heightened standard to apply, define *material* to mean "significant." It's even better, if possible, to specify the dollar amount (or amount in another currency) at which a discrepancy becomes *material*, or, for something that can't be quantified like intellectual property or the loss of a business relationship, to find some other way to define *material*.

In both the United Kingdom and the United States, the *material* in *material adverse change / material adverse effect* must be "material" from the parties' long-term perspective. The test is objective (a reasonable basis to get out of a deal), not subjective (you think it's

important). For this reason, few courts have found that an adverse change is also a "material" one. In the United Kingdom, for example, September 11 has been found not to have had a material adverse effect. And in the United States, the Lehman Brothers collapse and ensuing credit-market meltdown have similarly not been found to have been a material adverse change, either.

To address events that might not be "material" now but might become so later, consider *would reasonably be expected to result in*. Unless it's in your client's interest, avoid *could result in* (too vague) or *will result in* or even *would result in* (at once too definite and too subjective).

EXAMPLE: "Nothing has occurred since December 31, 2013, that *would reasonably be expected to result in* a Material Adverse Change."

● Use **would reasonably be expected to result in**.

■ Avoid **could result in**, **will result in**, or even **would result in**.

What Did You Know and When Did You Know It?
Knowledge Qualifications

Some representations are qualified with language reflecting the disclosing party's awareness of (or confidence in) the disclosed fact.

EXAMPLE: "*To Seller's knowledge*, no prior owner has improperly released any Hazardous Materials on the Property." (The current owner might have a hunch about what prior owners did or did not do on the property, but it cannot know for sure.)

▲ For any **knowledge**-qualified representations, consider whether to specify whose **knowledge** counts.

For any *knowledge*-qualified representations, consider whether to specify whose *knowledge* counts (such as by specifying an officer or a group of employees) or what the named parties must do to attain *knowledge* (such as fulfill a duty to investigate).

■ Avoid these knowledge-related usages; they can raise unwanted issues.

Avoid "to the best of [party's] knowledge." It's redundant, though not incorrect, and "best of" does not by itself imply a duty to investigate.

And avoid all other hybrid phrases suggesting degrees of *knowledge*. They can raise unwanted issues:

- To Smith's *best knowledge*
- To Smith's *actual knowledge*
- To Smith's *knowledge and belief*
- To Smith's *reasonable knowledge*

● For an objective standard, you can also use the term **constructive knowledge**.

That said, for an objective standard, you can also use the term *constructive knowledge*, which is what the party would have known had it exercised reasonable care.

For each *knowledge*-qualified representation, consider whether the disclosing party should be liable even if it lacks *knowledge*.

EXAMPLE: "Seller shall indemnify Buyer for any damages arising out of a previous owner's improper release of Hazardous Materials regardless of whether Seller had any *knowledge* of that release."

● For each **knowledge**-qualified representation, consider whether the disclosing party should be liable even if it lacks **knowledge**.

Fix-It Man: Remedies for Misrepresentations, Breaches, and Failures to Perform

● Be sure to include **specific remedies** for all of these contingencies.

To protect your client's interests if trouble arises and to avoid the need for litigation, expand on common-law remedies by including specific remedies for these contingencies:

Misrepresentations and breaches of warranties.

Failure to perform affirmative obligations under the key operative provisions, regardless of whether that failure results in actual damages. In a commercial real estate lease, for example, if the tenant fails to pay the rent, the landlord can provide for late fees and eviction without having to prove that it has suffered monetary damages.

Breaches of other covenants or ancillary obligations. In that same commercial real estate lease, the landlord also benefits from specific remedies if the tenant fails to maintain the premises or fails to keep the premises insured under the lease. The tenant benefits from its own specific remedies, such as a reduction in rent, if the landlord does not live up to one of its own obligations, such as its duty to maintain the roof.

Events outside the other party's control:

- Judgments and orders
- Involuntary bankruptcy proceeding
- Third-party declaration of default under other agreements

- Downgraded credit rating
- Force majeure
- Acts of terrorism

When drafting remedies, group all the conditions together, and then group all the consequences together. Use the same word to link multiple events and circumstances, and use the same word to link multiple consequences (preferably *if* and *then*). Also consider adding romanettes or letters for clarity:

> "If the Account Holder (i) breaches the Agreement and (ii) fails to comply with the notice, then the Bank may (a) require repayment and (b) seek reasonable attorneys' fees."

● Use the same word to link multiple events and circumstances (**if**), and use the same word to link multiple consequences (**then**). Also consider adding romanettes or letters for clarity.

No Harm, No Foul?
Types of Remedies

Below are some of the most common contractual remedies:[3]

REMEDY	PURPOSE	WHEN APPROPRIATE	WHEN NOT
Termination	Relieves the parties of their obligations for continued performance	When the parties have not yet substantially performed	Once substantial performance of obligations has been rendered
Acceleration	Allows the lender to demand that the borrower repay the entire balance	Debt financings	Any transaction other than a debt financing
Indemnification	Requires the breaching party to pay costs, damages, and losses that the other party incurred because of the misrepresentation or breach (often subject to caps)	Almost always, but particularly in private acquisitions	By convention, in public company mergers
Liquidated damages	Requires the payment of a specified amount upon the occurrence of events such as these: • *Severance payment under an employment contract made to an employee terminated without cause* • *Increase in borrower's interest rates if its credit rating is downgraded* • *Pre-payment penalties and other make-whole provisions in a loan agreement*	When actual damages would be difficult to compute, so liquidated damages would be a good-faith proxy	Whenever actual damages would be reasonably easy to compute

3 Many contracts also provide for injunctive relief or specific performance. Some courts will enforce these provisions, particularly, but not exclusively, in real estate transactions. *See, e.g., In re IBP, Inc. Shareholders Litig., 789* A.2d 14 (Del. Ch. 2001). But because injunctive relief and specific performance are equitable remedies, these provisions do not necessarily bind the court. Be sure to research the law of the jurisdiction governing the agreement.

Not My Problem: Indemnification

DAMAGES are a common-law remedy for misrepresentation or for breach (failure to perform). INDEMNITY, by contrast, is a remedy created by the contract when a party seeks a remedy that's broader or narrower than common-law contractual damages (in other words, something other than just "being made whole").

Include an INDEMNITY for any of these reasons:

- To *expand* on common-law damages by providing a remedy not generally available at common law, such as the following:
  - Attorneys' fees and expenses associated with a contractual breach—costs that are generally not recoverable in the United States and in other jurisdictions without a UK-style "loser pays" rule.
  - Liability arising from a disclosed fact (for example, an environmental contamination or a pending or threatened claim).
  - Losses caused by a third party (for example, a vendor's claim against a business for goods delivered before the business changes hands).
  - Losses associated with external events or circumstances outside a party's control (for example, a regulatory agency's denial of an approval that is a condition to closing).
- To *limit* the indemnifying party's financial responsibility:
  - Capping a party's potential liability.
  - Providing for a deductible or threshold amount of damages that must be incurred before the breaching party is liable.
  - Limiting or eliminating a party's potential liability for certain

● Include an INDEMNITY to broaden or narrow common-law remedies or to limit the indemnifying party's liability. Expanded remedies often include attorneys' fees, liability for disclosed facts, third-party losses, and losses associated with external events.

types of damages (for example, consequential damages).

- Shortening the time available for a party to bring a claim under the applicable statute of limitations.

- To put an affiliate of a party on the hook (for example, to shift liability to a deep-pocketed sponsor of a party formed solely for the purposes of a certain transaction). Of course, the affiliate must have signed either the agreement itself or a separate indemnity agreement.
- To attempt to create an exclusive remedy for claims, whether those claims are based in breach of contract (warranty) or in tort (such as misrepresentation, fraud, or gross negligence).
    - When, and to what degree, a court will honor an exclusive-remedy provision to disallow extra-contractual (tort) remedies varies greatly among jurisdictions. When the alleged misstatement rises to the level of fraud, at least some courts will override the exclusive-remedy provision no matter how tightly drafted it might be. *See, e.g., ABRY Partners V. L.P. v. F&W Acquisition LLC*, 891 A.2d 1032 (Del. Ch. 2006).
    - An effective exclusive-remedy provision requires customized drafting of not just the indemnity term but also the governing-law and entire-agreement provisions, as well as both disclaimers of reliance on representations and warranties outside the contract and disclaimers of recourse against the individuals who allegedly make them.

Include an INDEMNITY to put an affiliate on the hook or to create an exclusive remedy for claims.

Wording questions often arise. *Shall indemnify* (more common) or *hereby indemnify* (less common)? *Indemnify and hold harmless* (more common) or just *indemnify* (less common?) The often-overheated rhetoric aside, based on our review of court decisions, we take no position on *shall indemnify* versus *hereby indemnify* and see no bona fide substantive issue with the traditional wording of *indemnify and hold harmless*, particularly because courts disagree on whether *indemnify* and *hold harmless* are synonyms or whether *indemnify* refers to losses and *hold harmless* refers to liabilities.

In the end, the traditional wording of **indemnify and hold harmless** is fine.

Drafting Tips and Traps

Try as I Might: Efforts and Endeavors Clauses

▲ In practice, many courts construe **best efforts** as **reasonable efforts**.

If you use *best efforts* or *best endeavors*, remember that most courts, particularly in the United States, will construe that standard to require nothing more than *reasonable efforts*. To a lesser extent, UK and Canadian courts are also inclined to construe "best efforts" or "best endeavors" clauses as requiring less "effort" than attorneys think they do:

> "[T]he agency was obligated to use its best efforts—that is, all reasonable efforts—to comply with all terms of the settlement agreement."[4]
>
> "[A]n obligation to use 'best endeavors' probably requires the party to take all the reasonable courses he can."[5]
>
> "When interpreting the meaning of a 'reasonable efforts' clause, New York courts use the term 'reasonable efforts' interchangeably with 'best efforts'...."[6]
>
> "The duty of best efforts 'has diligence at its essence'...."[7]
>
> Case law is often more equivocal than many commentators suggest. In Canada, for example, many have seized on the phrase "leave no stone unturned" in a key best-efforts case involving an obligation to use "best efforts" to resell high-end diving suits. Yet the court also uses other language ("usual, necessary and proper," "good faith," "all reasonable steps"), suggesting that "best efforts" are, for all practical purposes, "reasonable" ones.[8]

4 *Stewart v. O'Neill*, 225 F. Supp. 2d 6 (D.C. Cir. 2002).

5 *Rhodia Int'l Holdings Ltd. v. Huntsman Int'l LLC* [2007] EWHC 292 (Comm).

6 *Soroof Trading Dev. Co. v. GE Fuel Cell Sys., LLC*, 842 F. Supp. 2d 502 (S.D.N.Y. 2012).

7 *Nat'l Data Payment Sys, Inc. v. Meridian Bank*, 212 F.3d 849 (3d Cir. 2000).

8 *Atmospheric Diving Sys. Inc. v. Int'l Hard Suits Inc.* (1994), 89 B.C.L.R. (2d) 356 (S.C.).

To ensure a heightened standard for *best efforts*, include benchmarks such as past performance or industry standard. Best of all, though, try to be as specific as possible about the intended standard of performance rather than relying on a vague *efforts* standard.

● Try to be specific about intended standards of performance.

Pick Your Poison: And, Or, And /Or

▲ Courts may construe **and** and **or** in the conjunctive, in the disjunctive, or in both.

● Use these constructions to avoid confusion.

Because *and* sometimes means the disjunctive (exclusive: pick just one), and *or* sometimes means the conjunctive (inclusive: both are okay), courts may construe *and* and *or* in the conjunctive, in the disjunctive, or in both. To avoid confusion, use these constructions:

- both A and B
- A or B, but not both
- either A or B
- A, B, or both

■ If you do use **and/or**, make sure it's not illogical or silly.

Although many drafting commentators and judges loathe *and/or* (one judge even called it a "Janus-faced verbal monstrosity"), it's perfectly functional when you mean "either X or Y or both X and Y." If you do use *and/or*, make sure it's not illogical ("Bank shall file any such lawsuit in Delaware and/or New York") or silly ("Feel free to call me on Monday and/or Tuesday").

● **X, Y, or both** is cleaner than **X and/or Y**.

- That said, "X, Y, or both" is cleaner than "X and/or Y."

Also watch for "modifier ambiguity." In a list joined with *and* or *or*, modifying words or phrases do not necessarily modify all the terms in the list.

> Assume that an insurance company has a duty to defend lawsuits arising from "any infringement of copyright or improper or unlawful use of slogans in your advertising."
>
> Does "in your advertising" modify "infringement of copyright" or does it simply modify "use of slogans"?[9]
>
> Consider repeating modifying phrases (in the example above, repeat *in your advertising* after "infringement of copyright") or recasting them as a lead-in to the list.

9 *Phoenix Control Sys., Inc. v. Ins. Co. of N. Am.*, 796 P.2d 463 (Ariz. 1990).

● Consider repeating or recasting modifying phrases.

On Second Thought: Provisos and Exceptions

Provisos (*provided that*; *provided*, *however*, *that*; *provided further that*) are archaic but common. If you do use provisos, reserve them for exceptions to general rights or obligations. Avoid using provisos for additions and conditions. Here's a way to uncover "false provisos": If the proviso language introduces a condition as opposed to an exception, you could (and should) replace the proviso language with *if*, *only if*, *subject to*, *unless*, or *on the condition that*. (See also *Escape Hatches and Bated Breath*.)

- AMBIGUOUS**:** "Celebrity may fly first-class; *provided, however, that* the flight time is more than two hours."
- CLEAR**:** "*If* the flight time is more than two hours, Celebrity may fly first class."
- AMBIGUOUS: Jones may dispute the working capital calculation; *provided that* he submits a dispute notice within 30 days after receipt of calculation.
- CLEAR: *Unless* Jones submits a dispute notice within 30 days after receipt of the working capital calculation, he is deemed to have accepted the calculation.

If the proviso introduces a true exception to a general right or obligation, then either (i) use *except that* (US) or *save that* (UK), or (ii) keep the language, set it off with a semicolon, and italicize or underline it by convention:

- "Employer shall reimburse Employee for up to $1,000 in out-of-pocket travel expenses, except that if Employee does not stay at a hotel on Employer's Approved Hotel List, reimbursement is limited to $500."
- "Employer shall reimburse Employee for up to $1,000 in out-of-pocket travel expenses; *provided, however, that* if Employee

■ Avoid using provisos for additions and conditions.

● If the proviso language introduces a condition as opposed to an exception, you could (and should) replace the proviso language with **if**, **only if**, **subject to**, **unless**, or **on the condition that**.

● If the proviso introduces a true exception to a general right or obligation, then either (i) use **except that** (US) or **save that** (UK) or (ii) keep the language, set it off with a semicolon, and italicize or underline it by convention.

Avoid piling on a series of inconsistent provisos.

does not stay at a hotel on Employer's Approved Hotel List, reimbursement is limited to $500."

- Avoid piling on a series of provisos with inconsistent language (say, *provided that* followed by *provided, however, that*). If you do include such a series, make sure it's clear whether the second proviso is an exception to the first proviso, as opposed to an exception to the original clause.

Once Upon a Time: When?

■ Avoid using *since* when you mean *because*, and avoid using *while* when you mean *although*.

● Use the words *since* and *while* only for time, including in recitals.

■ Avoid *forthwith* and *immediately*; ● favor *promptly* or *concurrently*.

■ Avoid these hidden ambiguities:

- *from* Monday *to* Friday
- *between* Monday *and* Friday
- *by* Friday
- *until* Friday
- *within* 30 days of January 1, 2014
- *midnight*
- *for a month / for a year*

● Instead, use *on or after* Monday and *on or before* Friday (to include Monday and Friday).

● Or use *no earlier than* Monday and *no later than* Friday.

● Use *12:01 a.m.* or *11:59 p.m.;* ■ avoid *midnight*.

● Use *"for the period from January 1, 2015, through December 31, 2015."*

Fear of Math: How Much?

As much as many lawyers prefer words to numbers, formulas are a key part of many agreements.

Weigh the advantages and disadvantages of expressing formulas in contract prose as opposed to as a mathematical equation. Like lawyers, judges are more comfortable with words, but equations can work well for complex, esoteric, multi-variable, and multi-operation computations.

● When a formula involves money, begin with the phrase **an amount equal to**.

When a formula involves money, begin the calculation with the phrase *an amount equal to.*

● Set forth the steps through words that describe the operations.

If a formula involves multiple steps, specify the order in which those steps should be taken (what is known as "the order of operations"). Set forth the steps through words that describe the operations (for example, *the sum of A plus B divided by the product of C multiplied by D)*.

■ Avoid these phrases as ambiguous.

Avoid as ambiguous

- The excess of A over B (can be construed as a fraction).
- The difference between A and B (the result depends on whether you start the computation with A or B).

● When prorating, express the formula as a fraction.

When prorating, express the formula as a fraction.

> EXAMPLE: "Taxes for the Pre-Closing Tax Period will equal the product of (i) the amount of Taxes for the entire taxable period multiplied by (ii) a fraction, the numerator of which is the number of days in the taxable period ending on the Closing Date, and the denominator of which is the number of days in the entire taxable period."

Pointing Fingers: Cross-Referencing

INCORPORATING

- Avoid using just the word *hereunder* to refer to a specific provision.
- Specify the provision or section you mean.

- Also avoid *hereunder* to refer to the entire agreement, because *hereunder* can be construed to modify just the provision or section that it appears in.
- Use "under this Agreement."

TRUMPING

- Rather than *notwithstanding anything herein to the contrary*,
- cite the specific provision, section, or article that you want to trump.

- For the trumped provision, add *subject to* before the number of the trumping provision, section, or article.

- For the trumping provision, add *notwithstanding* before the number of the trumped provision, section, or article.

Front and Back

Navel Gazing: Recitals

Using "WITNESSETH" to introduce all recitals and "WHEREAS" to introduce individual recitals is archaic (a relic from old British statutes) and "old school," but it is substantively harmless.

▲ Archaic constructions like **WITNESSETH** and **WHEREAS** are unnecessary though substantively harmless, but be careful about cutting the traditional recital of consideration.

Common law has rendered moot the traditional recital of consideration at the end of the recitals ("NOW, THEREFORE, in consideration of…"), but that language is even more widespread than "witnesseth" and "whereas," and it is similarly harmless. At least one court has suggested that the traditional recital of consideration has substantive effect.[10]

[10] *Wilson v. Wilson,* 577 N.E.2d 1323 (Ill. App. Ct. 1991).

As much as these terms are old-fashioned, picking fights over archaic expressions like "WITNESSETH" can make lawyers seem pedantic and is generally not in the client's interest.

Although recitals cannot create legal rights or obligations on their own, they can help future readers of contracts. In some circumstances, they can also affect judicial construction of substantive contract terms, especially those that are potentially ambiguous.

Consider using recitals to memorialize some or all of the following:

● Consider using recitals to reflect the **parties**, **context**, **purpose**, **assumptions**, and **risks**.

- Who are the parties?
- What is the context of the agreement?
- What is the purpose of the agreement?
- What assumptions are the parties making?
- What are the risks inherent in the transaction?

Also consider eliminating pointless recitals. For example, in a Purchase and Sale Agreement, you don't need "Buyer wishes to purchase and Seller wishes to sell."

You can include no heading at all, or you can use "Introduction," "Background," or "Preamble."

"I Declare": Defining Terms

■ Avoid defining terms that appear only once or twice.

● Define a term in only one way.

■ Avoid **hereinafter referred to** and its variants.

■ Avoid nesting definitions within definitions.

Avoid defining terms that appear only once or twice.

Define a term in only one way.

- Right: General Electric Company ("GE")
- Cumbersome: General Electric Company ("GE" or the "Company")

Avoid *hereinafter referred to* and its variants.

Although *shall mean* is common for definitions, the present tense is preferred:

- "Bank" *means* "Bank of America."

Do not embed covenants, representations and warranties, rights, or conditions into definitions.

- RIGHT: "Committee" means the corporation's employee-benefit committee.
- WRONG: "Committee" means the corporation's employee-benefit committee, which committee shall have the exclusive right to determine what benefits employees shall receive.

Also avoid nesting definitions within definitions:

- RIGHT: "SEC" means the United States Securities and Exchange Commission.
- RIGHT: "Effective Date" is the date upon which the registration statement is declared effective by the SEC.

- WRONG: "Effective Date" is the date upon which the registration statement is declared effective by the United States Securities and Exchange Commission ("SEC").

Place the defined term after the substance of the definition, including all details: "Buyer shall purchase all of the assets of Seller, including working capital, inventory, work-in-process, property, plant and equipment, land and buildings, and customer list (the 'Assets')."

● Place the defined term after the substance of the definition, including all details.

Who Goes There?
Naming Names

● When defining an entity name, choose either a nickname or a common descriptive noun.

■ Avoid paired common nouns ending in **or/ee**.

● Favor descriptive terms when corporate names are similar.

■ Avoid using an acronym unless it tracks the entity's commonly known name.

When picking a defined term for the name of an entity, choose between

- A user-friendly shortened version of the entity's name (such as "Wells Fargo" for Wells Fargo Bank, National Association), keeping in mind that clients often have a preferred formulation of their name, or
- The common noun that describes the party's role in the transaction (Buyer/Seller, Lender/Borrower, Landlord/Tenant).

But avoid the paired common nouns that end in *or/ee* (lessor/lessee, grantor/grantee, licensor/licensee, mortgagor/mortgagee, indemnitor/indemnitee), all of which can confuse drafters and readers alike.

Prefer descriptive terms when corporate names are similar. "Parent" and "Subsidiary" are better than "Global Corp." for Global Systems Corp. and "Global Inc." for Global Systems Inc.

Avoid acronyms and initialisms, too, unless the entity's name includes the acronym (HSBC) or the entity is commonly known by its acronym (IRS or SEC). "SAB" for Sam's Auto Body is unhelpful.

The same applies to statutes. CERCLA and ERISA are familiar, but "Code" is better than "IRC" for the Internal Revenue Code.

Have We Met?
Where to Put Definitions

Definitions are placed variously (1) within the operative provisions where they are first used, (2) in a separate definitions section at the front or back of the agreement, (3) as an appendix to the contract, or (4) in a combination of these spots. All of these are acceptable, and the choice is often dictated by the conventions of the practice area.

As a default, put the definitions in the place that is most convenient for the parties.

- Place deal-specific customized definitions—Working Capital Adjustment, Excess Cash Flow Recapture, the Assets—in the section of the contract where they are mainly used.
- Put generic terms that tend to have the same meaning from one deal to the next—ERISA, GAAP, Lien, Business Day—in a separate definitions section.

If you include definitions both in the operative section of the contract where they are used and in the definitions section, include a cross-reference in the definitions section.

● Put the definitions in the place that is most convenient for the parties.

Boilerplate Provisions

Assignment and Delegation

Anti-assignment and anti-delegation clauses are standard ways to limit the degree to which parties can be forced to do business with someone stepping into the shoes of the contract counterparty. That said, these "boilerplate" clauses are appropriate only in some circumstances. If your client is likely to be sold, for example, it will be especially important to retain the flexibility to assign or delegate.

These clauses chip away at the common-law presumption that contracts can be both assigned and delegated. Note that there are some exceptions even at common law, such as personal service agreements involving unique services and certain intellectual property agreements.

Although deal lawyers typically refer to "anti-assignment clauses," it's important to consider banning the delegation of duties as well, because parties rarely want to see a duty delegated to an entity not of their choosing.

Consider making it clear whether transactions such as mergers, consolidations, or changes in control qualify as "assignments" and "delegations."

TYPICAL LANGUAGE: "No party may assign any of its rights or delegate any of its duties without written consent of the other parties"; "Any purported assignment or delegation under this Agreement without the consent of the other parties will be void."

● Consider banning the delegation of duties and not just the assignment of rights, and also consider clarifying whether certain transactions qualify as assignments and delegations.

Successors and Assigns

The purpose of the successors-and-assigns clause is to bind parties that step into the shoes of the original contracting parties.

If you have an anti-assignment or anti-delegation clause, reconcile your successors-and-assigns clause by adding the word "permitted" before "assigns."

TYPICAL LANGUAGE: "This Agreement binds and benefits the parties and their [heirs,] [executors, and] successors and [permitted] assigns."

Governing Law / Choice of Law

In the United States, commercial or multistate parties often choose the familiar laws of Delaware or New York, even if the agreement has no nexus to the chosen jurisdiction. That said, the more powerful party sometimes prefers the laws of its home state.

Choice of law is particularly important when you want to make indemnity the exclusive contractual remedy for all claims, including tort claims.

Exclude the chosen jurisdiction's conflict-of-law principles.

TYPICAL LANGUAGE: "[This Agreement and] all claims or causes of action [based on,] arising out of, or relating to this Agreement will be governed by [and construed in accordance with] the laws of … without regard to the chosen jurisdiction's choice-of-law [and conflict-of-law] principles."

Waiver of Jury Trial

In the United States, other than in agreements subject to California or Georgia law, parties can waive their Seventh Amendment right to a jury trial. Researching state law is important here.

To be "knowing" and "intentional," waivers must be conspicuous, including jury-trial waivers. Traditionally, all caps or boldface fonts or borders are thus used for jury-trial waivers.

● It is particularly important to research local law on how to **waive rights to a jury trial**.

TYPICAL LANGUAGE: "The parties [knowingly and] unconditionally waive their right to a jury trial … the parties have had an opportunity to consult with counsel."

Notice

The notice provision should clarify not just *how* notice should be given (such as by email, US mail, overnight delivery, or hand delivery) but also *when* notice is effective (when it is sent, a specified period of time after it is sent, or when it is received), *who* should receive it, and *how* changes of address or email should be shared.

Electronic notice is increasingly common, but so are disputes about whether an email was received or ended up in a spam folder.

Consider whether to "split" the notice provision between a default method (snail mail or email) and a heightened method (overnight courier with signature) for high-profile communications such as notices of default.

● Consider whether to "split" the notice provision between a default method (snail mail or email) and a heightened method (overnight courier with signature) for high-profile communications such as notices of default.

Severability

Like statutes, most contracts include a provision ensuring that if one part of the agreement is found to be unenforceable, the rest of the agreement remains intact.

TYPICAL LANGUAGE: "If any part of this Agreement is held to be unenforceable [or illegal] in a court of law, such provision will be severed, and the remainder of the Agreement will remain in full force and effect."

- Consider whether the Agreement should stand even if an essential provision is severed.

Issues to flag and resolve: If the provision severed is essential to the purpose of the Agreement, should the Agreement stand? And should the parties receive monetary compensation for the pecuniary value of the severed provision?

- In the US, be sure to research state law.

In the United States, these provisions are subject to state law. Consider whether the state in question is a rule-of-reason state or a blue-pencil state.

Amendments Only in Writing

The amendments-only-in-writing provision prevents the parties from introducing parol evidence of alleged modifications post-execution, even if an agreement is not subject to the statute of frauds.

Nowadays, "writing" includes both emails and web publication.

Service providers sometimes require acknowledgment from their users that they can unilaterally amend an agreement, often by simply posting the new terms on their website.

In effect, these provisions do not create a blanket ban on the admission of post-execution parol evidence, but they do reflect a lack of intent to allow for subsequent oral modifications.

TYPICAL LANGUAGE: "This Agreement may be amended only in a writing signed by the parties."

Merger / Integration / Entire Agreement Clause

A merger clause keeps the parties from introducing parol evidence to add terms to the written agreement, to modify the existing terms, or to explain what those terms were intended to mean.

Courts are often wary of general disclaimers and boilerplate waivers. It's better to foreclose reliance on oral representations related only to the subject matter in controversy.

▲ Some courts will ignore merger clauses for a variety of reasons.

In some jurisdictions, courts will ignore merger clauses based on the relative sophistication of the parties, or, when the parties are equally sophisticated, if one party alleges fraud.

TYPICAL LANGUAGE: "This Agreement [, together with all documents incorporated herein,] is the final and exclusive agreement between the parties with respect to its subject matter."

● Explicitly disclaim reps outside the contract when you draft exclusive-remedy provisions.

But if you want indemnity to be the exclusive contractual remedy even for tort-based claims, then explicitly disclaim both the existence of representations and warranties outside the contract and the parties' reliance on them.

Counterparts

Nearly all agreements include a counterparts provision, which allows the parties to sign different signature pages of the agreement, both separately and in electronic form.

TYPICAL LANGUAGE: "This Agreement may be executed in counterparts, each of which will be deemed to be an original, but all of which, taken together, will constitute one and the same agreement. Execution by facsimile, by scanned attachments, or by electronic signature has the same force and effect as an original."

Third-Party Beneficiaries

The purpose of the third-party-beneficiaries clause is to foreclose the possibility of litigation with a third party that is not intended to enjoy any enforceable rights under the agreement.

TYPICAL LANGUAGE: "Except as otherwise provided, nothing in this Agreement grants any rights or remedies to any Person other than the Parties"; "This Agreement is for the sole benefit of the Parties and of their successors and assigns."

Mandatory Arbitration Clause

Issues to consider addressing:

- What disputes are subject to arbitration?
- Is the award subject to judicial review, or is it a binding decision subject only to judicial enforcement?
- Which arbitral association will be used?
- Who pays for the arbitration? Both parties, or just the prevailing party?
- What law governs?
- How will the panel be composed and selected?
- Where will the arbitration take place?
- In international arbitrations, in what language will the arbitration be conducted?
- Will discovery be limited? (This issue is especially important in the US, which allows for exceptionally broad discovery, including e-discovery, in commercial litigation.)
- Does the award/decision/judgment need to be "reasoned"—that is, supported with a written explanation?

▲ Consider addressing these often-overlooked issues related to **arbitration**.

Arbitral associations provide sample mandatory-arbitration provisions that track the case law of the jurisdiction.

● Consider these model arbitration clauses from the ICC and the AAA.

EXAMPLE FROM THE INTERNATIONAL CHAMBER OF COMMERCE: "All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration

of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules."

EXAMPLE FROM THE AMERICAN ARBITRATION ASSOCIATION: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof."

▲ Be sure to research important distinctions in your jurisdiction. US and UK courts often interpret arbitration clauses differently, for example.

As for what disputes are subject to arbitration, be sure to research important distinctions in your jurisdiction between "arising out of," "related to," "related in any way to," "in connection with," "under," "in respect of" (UK), and "with regards to" (UK) the agreement.

In the United States, for example, the broadest scope is through a "broad-form clause": "all disputes arising out of, connected with, or relating in any way to this Agreement."

UK courts make fine distinctions as well, holding, for example, that "in respect of" is far broader than "in connection with."

Troublesome Language and Common Errors

assure, ensure, insure

■ Avoid *assure* for binding obligations, though the noun form (*provide assurances that*) is safe. *Assure* can be construed as nonbinding.

● *Ensure* is universally correct for binding obligations.

● *Insure* is also correct for binding obligations in the UK.

▲ In the US, though, reserve *insure* for insurance and indemnification.

attorney fees, attorneys fees, attorney's fees, attorneys' fees

● Favor *attorney's fees* or *attorneys' fees*

■ Avoid *attorney fees* and *attorneys fees*

by and between, by and among, between, among

● Because the parties to a contract have binary relationships, a contract is *between* them, not *among* them, regardless of how many parties are on each side.

▲ The *by and* language is archaic but not wrong.

▲ That said, debating "between the parties" versus "among the parties" is not constructive.

days notice vs. days' notice

● In notice provisions, *days* and *months* take apostrophes when modifying the word "notice": "one day's notice," "30 days' notice," "two months' notice."

the earlier of, the earliest of, the greater of, the greatest of

● Use *or* to join the listed options. The construction is a variation on "X or Y, whichever comes first."

▲ Many careful drafters do use *and* in these constructions, and that choice is certainly defensible.

● Use the comparative (*earlier* or *later*) for two choices, and use the superlative (*earliest* or *latest*) for three or more.

Includes, including, including without limitation

In everyday communication, *includes* and *including* mean that the list that follows is partial and illustrative, also known as "nonexhaustive."

- "The places I'd like to visit *include* France and Germany" suggests that you'd like to visit other places, too.

But *include* can also reflect a complete or "exhaustive list" ("His name *includes* two words derived from Spanish"), and it can signify that one element is simply a component of another ("The device *includes* a lever"). Some courts have construed *includes* and *including* in this way.

- Many drafters thus add "without limitation" or "but not limited to" after *includes* and *including*.
  - Make sure to insert commas around "without limitation" and around "but not limited to."
  - ▲ Also consider simply defining *includes* and *including* to mean "*includes (or including)* without limitation" to avoid having to repeat this cumbersome construction.

principal / principle

If you can replace the word with *rule*, spell it with **-le**:

- *according to this tax principle*

Otherwise, spell it with **-al**:

- *principal and interest*
- *principal and agent*
- *principal basis for our advice*
- *principal place of business*

pursuant to, under, in accordance with, according to

- Use *pursuant to* and *under* interchangeably for binding obligations: "Under the agreement, you shall reimburse us for all out-of-pocket expenses."
- *Pursuant to* is old-fashioned but not incorrect.

● Use *in accordance with* to explain the basis for past or future conduct:

- "In accordance with federal law, we declined to give the company access to our proprietary records."
- "Subject to adjustment in accordance with…, the Purchase Price will increase by 10 percent."

■ Avoid *according to* for binding obligations. Instead, reserve it for authorities.

- NONSTANDARD: "According to the indemnification provision …"
- RIGHT: "According to the country's leading expert on international tax …"

respectively

Use to link individual items in one list with their counterparts in another list in the same sentence.

> RIGHT: Subsidiary 1, Subsidiary 2, and Subsidiary 3 shall not make capital expenditures in any fiscal year in excess of $5 million, $1 million and $3 million, *respectively*.
>
> WRONG: Subsidiary 1, Subsidiary 2, and Subsidiary 3 *respectively* hereby guarantee Parent's obligations under this Agreement.

serial comma / Oxford comma

In a series of three or more items, most drafters around the world, and particularly in countries that favor British English, do not include a comma before the final element. Example: "You shall not transfer right, title and interest" is more common than "You shall not transfer right, title, and interest."[11]

In the rare case when the lack of a comma could render the list ambiguous, rephrase or use romanettes.

> EXAMPLE: "I bequeath these funds to (i) Smith, (ii) Jones and (iii) Cameron and Cameron's wife."

11 Here we are simply noting customary practice and are thus declining to enter into the well-worn and never-ending debate about serial commas. This book, for example, is written in American English and thus uses the serial comma. We note, however, that although the serial comma is often referred to as the "Oxford comma," English lawyers are among those least likely to use it. The same is true in much Commonwealth writing, whether legal or otherwise.

Checking It Twice

A Baker's Dozen Questions for Every Agreement

1. Have I spelled the parties' names correctly and consistently, and used their proper corporate form?
2. If I am using an older draft as a model, have I scoured the new draft for the previous parties' names and searched for any metadata?
3. Have I ensured that my draft captures all the terms in the term sheet or letter of intent outlining the deal?
4. Have I triple-checked all dates, numbers, and figures?
5. Have I included or affirmatively rejected key boilerplate provisions and made sure that they reflect the parties' intentions? (Note that the main boilerplate provisions are listed in this guide's table of contents.)
6. Have I used all defined terms at least three times and deleted all unnecessary definitions?
7. Have I removed from each definition any embedded obligations, deal terms, or other language that is not part of the definition?
8. Have I verified the accuracy of all cross-referenced section numbers?
9. Have I labeled exhibits and schedules consistently?
10. Have I formatted cross-references, numbers, and currencies consistently?
11. Have I formatted margins, section numbers, line spacing, and paragraph spacing consistently?
12. Have I used articles before defined terms consistently (say, *the Bank* versus *Bank*)?
13. Have I styled numbers consistently (written out twice—*three (3)*—or, preferably, just once—*three*)?

Models and Precedent

Reinventing the Wheel: Working with Precedent or Templates

Using precedent or template agreements offers risks and rewards alike. Avoid common mishaps by taking the following steps:

If your organization or client has recommended precedent or template agreements, ask supervisors for guidance on which form to use as a starting point. If you're a supervisor yourself, take a moment to refer junior lawyers to the best precedent or model and explain any of its limitations. If no precedent is available, look for reliable external models, as explained below and listed later in this guide.

Gauge the reliability of the form:

- Is it something the client itself has used before? If so, it's likely to include both standard terms and negotiated terms that the client will approve.
- Is it an agreement in your document management system that was created for another client? If so, it's likely to contain terms that your firm can recommend, but it may also contain deal-specific terms that won't work for your transaction or that may not be in your client's interest.
- Is it an agreement for a non-client that has been downloaded from an external source of agreements such as the the SEC's EDGAR database? If so, scrutinize both the standard terms and the negotiated ones.

- Is it a model form of agreement published by a bar group or other organization, like the ones we list later in this guide? If so, the model is likely to recommend well-regarded standard terms, but it may still favor one side over the other, and it should thus be seen as the heavily negotiated product of a committee of experts. A lowest-common-denominator approach may prevail.
- Is it governed by the same law that will govern your client's agreement? If not, it may not address the rights, remedies, and default terms that apply in your jurisdiction.

Compare the agreement with other precedent or template forms to determine which terms are standard and which have been negotiated. Avoid importing negotiated terms from another deal into your draft unless you know that your client wants them.

■ Avoid importing negotiated terms from another deal into your draft unless you know that your client wants them.

Scrub the precedent for the names of the original parties and for any defined terms in the original that no longer apply, and use a tool to detect any metadata that should not be disclosed.

▲ Scrub the precedent for the names of the original parties and for any orphaned defined terms in the original.

Compare the revised agreement with the term sheet or the letter of intent that reflects the negotiated terms of the deal.

Model Agreements: Free

Securities and Exchange Commission EDGAR Database of Agreements

- *www.sec.gov/edgar/searchedgar/webusers.htm*
- Publicly traded companies

OneCLE

- *contracts.onecle.com/type/32.shtml*
- Thousands of agreements from both publicly traded and privately held companies, but no "quality control" or annotation
- Great source of ideas
- Both US and UK

Skeleton License Agreement from the UK Intellectual Property Office

- *www.ipo.gov.uk/skeletonlicence.pdf*

New York City Real Estate Forms

- *www.nycbar.org/media-aamp-publications/real-estate-forms*
- Annotated
- Includes financing documents as well
- Conform to New York law but are generally useful

Venture Capital Forms

- *www.nvca.org*
- Template forms for venture-capital investments compiled and "refreshed" by leading practitioners
- Goals are to reflect and guide industry norms while being fair to investors and entrepreneurs alike
- Annotated

Model Agreements: Paid

American Bar Association Model Stock Purchase Agreement

- Annotated
- Hard copy

American Bar Association Model Asset Purchase Agreement

- Annotated
- Hard copy

American Law Institute Forms Library

- *https://www.alicle.org/index.cfm?fuseaction=online.forms_subscription_detail&categoryid=364&masterid=251113*
- Real estate focus
- Annotated

Practical Law Company

- *http://us.practicallaw.com* (US)
- *http://uk.practicallaw.com* (UK)
- Free trial available
- Many model agreements put together by top firms and by PLC's staff of former practitioners
- Most agreements are maintained and annotated
- Often offers competing versions, such as pro-Buyer and pro-Seller
- Monitors market developments

Contract Automation

Koncision Contract Automation

http://www.koncision.com

WSGR Term Sheet Generator

http://www.wsgr.com/wsgr/display.aspx?sectionname=practice/termsheet.htm

Modernizing Transactional Language

One of the key premises of this guide is the distinction between "must-haves" and "nice-to-haves" in contract drafting. Unless you are particularly autonomous (or draft subject to readability or Plain English rules), drafting traits like brevity and modern diction are simply "nice-to-haves." That said, for those readers who do seek to modernize, streamline, simplify, or otherwise strive for Plain English ideals, we offer the following alternatives.

BEFORE	AFTER
at the present time	now (or cut)
at the time when	when
attached thereto, hereto	attached
because of the fact that	because
by means of	by
by reason of	because
covenant	shall
covenant and agree	agree, shall
despite the fact that	although, even though
during such time as	while
each and every	each
endeavor	attempt, seek, try
for the purpose of	to, for
for the reason that	because
herein/hereto	(cut)
hereinafter	(cut)
hereinafter defined as	(cut)

BEFORE	AFTER
in an effort to	to
in order to	to
in respect of (UK)	on, for, about
in the event (that)	if
inter alia	among other things
notwithstanding (the fact) that	although, even though
now, therefore	(cut)
prior to	before
pursuant to	under
said, such, same	this, that
subsequent to	after
therein, thereto	(cut)
until such time as	until
whereas	(cut)
with a view toward	to
with respect to	on, for, about
witnesseth	(cut)

Sources

In preparing this guide, we found these sources particularly helpful:

KENNETH A. ADAMS,
A Manual of Style for Contract Drafting (3rd ed.)

EDWARD W. DAIGNEAULT,
Drafting International Agreements in Legal English (2nd ed.)

ELMER DOONAN & JULIE MACFARLANE,
Drafting (2nd ed.)

CHARLES M. FOX,
Working with Contracts: What Law School Doesn't Teach You (2nd ed.)

MARVIN GARFINKEL,
Real World Document Drafting: A Dispute-Avoidance Approach (2nd ed.)

SEC,
A Plain English Handbook
(available at *www.sec.gov/news/extra/handbook.htm*)

TINA L. STARK,
Drafting Contracts: How and Why Lawyers Do What They Do (2nd ed.)

We also recommend Ken Adams's excellent (and opinionated) contract-drafting blog, which you can find at *www.adamsdrafting.com*. For a UK and IP perspective, we also enjoy the IP Draughts blog at *ipdraughts.wordpress.com*. And also consider perusing the contract-law professors' blog at *lawprofessors.typepad.com/contractsprof_blog*.

We have also reviewed more than a hundred articles, as well as more than a hundred common-law decisions in the United States, Canada, the United Kingdom, and other jurisdictions.

Finally, although layout and format are beyond the scope of this book, we note that modern word-processing software allows every lawyer to generate reader-friendly documents comparable to what in an earlier era only publishers could produce. We recommend Matthew Butterick's *Typography for Lawyers* for advice on giving your contracts a polished look and not just airtight language.

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