

Introduction to Contract Drafting



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What Law School Doesn't Teach You



- ∞ Preparing Briefs and Case Law
- ∞ Corporate Transactions:
 - ∞ Structuring the Transaction
 - ∞ Advising on Strategy
 - ∞ Negotiating & Drafting Contracts
 - ∞ Orchestrating the Closing
 - ∞ Keeping the Deal Alive and Moving

What Law School Doesn't Teach You



- ❧ “On the Job” Training – *the law school equivalent of “throw you in the pool, then ask you to swim!”*
- ❧ The Game of ‘Foresight’ v. Restitution
- ❧ *Better Scholarship Applications and Statement of Purpose(s)*

Do we need contracts?



∞ Think of a “Relationship Agreement”

∞ Which behaviours are to be encouraged?

∞ Which behaviour are forbidden?

∞ Which behaviour(s) requires disclosure?

∞ Conditional events and promises?

∞ Wrongful behaviour is punished?

∞ Problem Anticipation and Solving

Why Draft A Contract?



- ∞ Efficiency – initial costs
- ∞ *Acquisition of 300 aircrafts by Indigo*
- ∞ Reduction in negotiation and disputes
- ∞ Understanding what parties really want
- ∞ What parties need to give up to get what they want
- ∞ Realistic expectations of risk and rewards

Do Clients Need You?



- œ Do client's really know what they want?
- œ Do they understand what they are getting into?
- œ Do they understand how they will get out of it?
- œ If they do get out, what are going to be the costs and consequences? – *binge drinking and sad songs?*

Do Clients Need You?



∞ Your job:

- ∞ Help your client think about the deal
- ∞ Understand the goal of your client
- ∞ Walk your client through with issues beneath that goal
- ∞ Spot issues
- ∞ Protect your client's legal interest
- ∞ Negotiate or help your client negotiate each issue and all additional issues
- ∞ Negotiate with opp. Lawyers to reflect *your* client's understanding of the issues – not *yours*!
- ∞ *Maximize the Deal!*

What Clients Want From You?



- ∞ Analytical Skills
- ∞ Superior Ability to Negotiate
- ∞ Understanding of Business – *Crucial!*
- ∞ Understanding the deal and the client's business
- ∞ Comprehensive knowledge of law – *not rote learning of case law*
- ∞ Eye for Detail
- ∞ *Sense of Humour*
- ∞ *Working with Colleagues – Coffee Gossip!*

Why Draft A Contract?



- ∞ Consider the Business Deal, Contract is just a legal boilerplate
- ∞ Meeting of Two Minds – language to be interpreted *in exactly the same way*
- ∞ Ambiguity is the real enemy
- ∞ Ability to negotiate – litigation is to win
- ∞ Contracts are forward looking – expectation damages

Understanding Contract Drafting



∞ Objectives

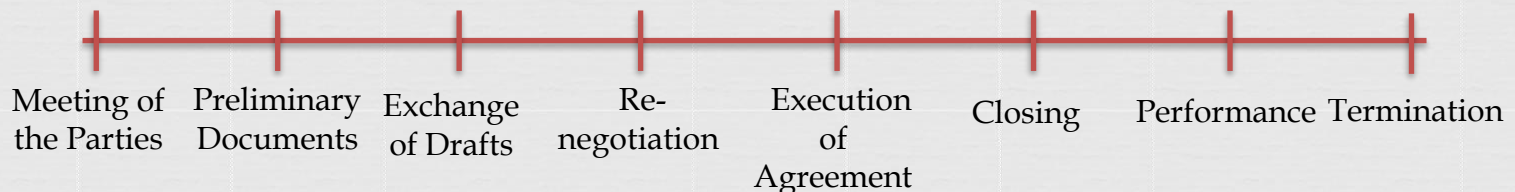
- ∞ Make a record
- ∞ Create a mechanism to foster agreement
- ∞ Ensure performance
- ∞ Foster relationship
- ∞ Enforcement & dispute resolution

∞ Essential elements

- ∞ Conditions
- ∞ Covenants
- ∞ Warranties
- ∞ Declarations
- ∞ Effects & remedies

∞ Risk Management Tool

∞ Stages of contract drafting



Understanding the Drafting Process



- ∞ Taking instructions from the client
- ∞ Obtaining additional information from client
 - ∞ Place holders
- ∞ Drafting from the client's perspective
 - ∞ Understand the business
 - ∞ Foresight
- ∞ Ethical issues in drafting

Preparing & Planning to Draft a Contract



- ∞ Doing legal research
 - ∞ Identify governing rules
 - ∞ Identify prohibitions
- ∞ Picking and adapting the template/precedent
- ∞ Preparation of an outline
- ∞ Layout of the contract
- ∞ Multiple drafts & client reviews
- ∞ Final Draft
- ∞ Formatting the contract

What is a well-drafted contract?



- ❧ *One that is never opened again after signing*
- ❧ Clear and unambiguous language
- ❧ Clear organization
- ❧ Easy to read
- ❧ Limited cross-referencing
- ❧ Short!!!
- ❧ Well formatted!

What is a well-drafted contract?



- ∞ Accurately memorialize the deal
- ∞ Pragmatic resolution of problems
- ∞ Specific about rights and obligations
- ∞ Flexible for changed circumstances
- ∞ Advance client goals
- ∞ Reduce risks
- ∞ “Good Deal”

Drafting Styles



- ❧ Traditional
- ❧ Modern
- ❧ Contemporary Commercial Drafting
- ❧ If a risk is perceived, draft for it
- ❧ Drafting for litigators?

Effective Language in Contract drafting



To Do	Avoid
☞ Use plain English & simpler words	☞ Legalese & jargon
☞ Base Verbs	☞ Archaic Phrases
☞ Short & simple sentences	☞ Surplus words
☞ Active voice	☞ Compound prepositions
☞ Definitions	☞ Repetition
☞ Precise & unambiguous language	☞ Sexist language
☞ Time references	☞ Technical jargon
☞ Clarity	☞ Pronouns

Types of Contract Language



- ∞ Language of performance- active voice
- ∞ Language of declaration- “is”
- ∞ Language of policy- legal effect
- ∞ Language of obligation- “shall”
- ∞ Language of prohibition- “shall not”
- ∞ Language of discretion- “may”
- ∞ Language of belief- “will”

THANK YOU

