

Drafting Contracts



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Designing the Terms



- œ Title of the Agreement

E.g. Lease Agreement



- œ Introductory paragraph
or Preamble

- œ Date of Agreement

- œ Place of Agreement

- œ Definition of Agreement

- œ Description of Parties



- œ Background or Recitals

- œ History of the Parties

- œ The Business Deal (Purpose of Agreement)

- œ Contract Formation

Designing the terms (contd.)



∞ Statement of Consideration



∞ Interpretation Clause



∞ Definitions Clause



∞ Consideration/ Payment
Clause

∞ Payment

∞ Grant of rights, e.g., licence



∞ Term

∞ Renewal

Designing the terms (contd.)



- ∞ Performance Provisions

- ∞ Rights & obligations of Parties

- ∞ Conditions to be met

- ∞ Declarations



- ∞ Representation & Warranties



- ∞ Termination

- ∞ Neutral termination

- ∞ Friendly termination

- ∞ Un-friendly termination

- ∞ Events of default

- ∞ Notice of termination

- ∞ Termination notice

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Recitals



- ∞ Record consideration
- ∞ American Law – literal and contextual approach to construction
- ∞ Reasonable Intent Standard
- ∞ Representations are possible
- ∞ *Contra Proferentem*
- ∞ CISG – Reasonable Business Person Standard (Art. 8(2))
- ∞ According to the circumstances (Art 8(3))
- ∞ Good faith standard of interpretation (Art 9)

Recitals



- ∞ Civil Law – broad terms and purposive approach
- ∞ Good faith standard
- ∞ Sanctity of contract (*pacta sunt servanda*)
- ∞ Recitals are NOT BINDING!
- ∞ Use recitals for unenforceable clauses – Non Compete, Restraint of Trade

Definitions



- ∞ Expand or limit meaning
- ∞ Clarify meaning
- ∞ 'Affiliate' or 'Control' or 'Applicable Laws'
- ∞ Never use 'means' and 'includes' – only either of them

Defined Terms



- ∞ Define terms that either relate to the party's role in the transaction or is a shorthand name for the individual or entity
- ∞ Avoid acronyms
- ∞ Do not use *mortgagor and mortgagee* etc.
- ∞ Number of parties – borrower and lender – more parties? – Schedule?
- ∞ Do not create two defined terms – IBM and Company

Action Section



- ∞ Clauses where the action is from client's perspective
- ∞ In action section, the parties
 - ∞ Agree to perform the main subject matter of the contract
 - ∞ Agree to pay financial consideration, if any
 - ∞ State the term, if any
 - ∞ State the closing date, if any
 - ∞ List the closing deliveries, if any

Subject Matter Performance Provisions



- ∞ Each side promises to the other that it will perform the main subject matter of the contract.
- ∞ Two types
 - ∞ Reciprocal covenants
 - ∞ Self -executing provision

Performance



- œ Executory Promises
- œ Payment Provisions – Follow the Cash – Who is paying, what, to whom, when, why and how
- œ Stub Period

Payment Provisions



- ∞ Sets out the financial consideration
- ∞ Value of the contract
- ∞ E.g. Purchase price, salary, royalties, rent
- ∞ Multiple ways to draft
 - ∞ Declaration + Covenant
 - ∞ Covenant

Term



- ❧ *One-off Deals* vs. Specific Term
- ❧ Termination for Cause
- ❧ Evergreen Provision – automatic renewal or parties to agree on a price increase at the time of renewal
- ❧ Agreement to agree are unenforceable
- ❧ Closing – should state place, date and time
- ❧ Closing vs. Time of the Essence – Rolling Closing Dates

Covenants



- ∞ Affirmative
- ∞ Negative/Restrictive
- ∞ Financial
- ∞ Credit Related Covenants – Veto List/Unanimous Consent/Shareholder Consent
- ∞ Representations v. Covenants – Facts v. Foresight
- ∞ Carveouts
- ∞ Baskets/Buckets – relevant for indemnity as well!

Covenants



- ∞ A promise to do or not to do something
- ∞ High Risk Covenants?
- ∞ Use shall in covenants to obligate a party to perform
- ∞ State the party's obligation rather than the right of the opposite party – right vs entitlement
- ∞ Using “agree” in covenants
- ∞ Use of “is responsible”
- ∞ Declarations – do remedies flow?

Elements of a covenant



- ❧ **Who** is obligated to whom?
- ❧ **What** is the obligation?
- ❧ By **when** must the obligation be performed?
- ❧ **Where** will the performance take place?
- ❧ **Why** must a party perform?
- ❧ **How** is the obligation performed?
- ❧ If performance involves money, **how much**?

Use of Representations



- ∞ Using either representation or warranty
- ∞ Rep – allocates risk by establishing a standard of liability – the statement of fact
- ∞ Party making reps should make minimum reps
- ∞ Receiving party should make reps broad and unqualified
- ∞ Knowledge qualifiers and materiality
qualifiers

Past, Present & Future



- ∞ Organization and Good Standing - Do not use currently or presently in reps
- ∞ Statements about future are opinions or speculation – or covenants
- ∞ Drafting in active voice – exception
- ∞ Warranty may be in the future e.g. apple

Risk Allocation



- ∞ Providing only a warranty and not representation
- ∞ Software contracts have only warranties and no representations

Conditions



- ∞ Use “Must” and “If Then”
- ∞ “Must Be” + have + have been
- ∞ Consequences of the condition is not satisfied or waived

Declarations



- œ Statement of fact or policy that the parties will govern their actions during the agreement.
- œ Neither party has stated the fact to induce the other party to act.
- œ A party cannot sue on a declaration to obtain damages.
- œ No rights or remedies.

Remedies



- ∞ Termination – of contract, or covenants?
- ∞ Acceleration
- ∞ Indemnity – caps, buckets, cut-off and termination
- ∞ Liquidated Damages
- ∞ Material Breach – CISG?
- ∞ Hair Trigger Remedial Provisions – expiry of time before right to remedy is triggered

Discretion



- ∞ Unfettered? Or Reasonable?
- ∞ “Sole Discretion”
- ∞ Use “may”

Termination v. Endgame



- ∞ Specific Survival of Contract Provisions
- ∞ Dispute Resolution
- ∞ Notice of Termination and Termination Notice – do they terminate the agreement?
- ∞ Termination Event Notice – Notice of Intent to Terminate – Notice of Intent to Exercise Remedies
- ∞ Effective only on receipt and sent by national courier or registered post or by hand

Neutral Terminations



- ∞ Without fault of either party – 30 days?
- ∞ Neutral – without surviving common law remedies
- ∞ Termination by Written Agreement?
- ∞ Termination, except for cause?

Friendly Termination



- ∞ Expiry of the Term
- ∞ Parties return to status quo – return of IP
- ∞ Loose ends – final payment, expenses
- ∞ Exit Strategies – IPO, Take-over, Buy-outs

Un-Friendly Termination



- ∞ Default and Cross - Default
- ∞ “*What if*” exercises
- ∞ The “Mechanics” of the parties
- ∞ Notice of Termination

Cure Periods



- ∞ Insurance and Credit Agreements
- ∞ Cure periods without notice?
- ∞ Default should have occurred and be continuing

No Termination



- ∞ Contractual Solutions instead of Termination
- ∞ Mitigation and cure by the non-defaulting party
- ∞ Liquidated Damages
- ∞ Indemnity – exclusive or cumulative
- ∞ Set-off

Injunctive Relief



- ⌘ Can parties influence Court decisions on injunctive relief?
- ⌘ Specific Performance of Celebrity Contracts

Dispute Resolution



- ∞ Adjudicate, Arbitrate or Mediate – when not to provide for arbitration!
- ∞ People, Place, Procedure, Time, Law
- ∞ Governing law, forum selection and service of process (Notice)
- ∞ Exclusive Jurisdiction Clauses
- ∞ Waiver of objections
- ∞ Cost and expenses

Closing Related Provisions



∞ Closing Date Provision

∞ When and where the closing is to take place.

∞ Closing Deliveries Provision

∞ Each party covenants how it will deliver its performance at closing.

∞ Signature and Attestation

∞ Notary

∞ Schedules, Annexures and Exhibits

∞ Stamping & Registration

Reviewing a Contract



- ∞ Scope of review
 - ∞ Factual inconsistencies
 - ∞ Legal issues
 - ∞ Ambiguous language
 - ∞ Structure of the contract
 - ∞ Structure of the business deal
- ∞ Mark up
- ∞ Deadlines

THANK YOU

