



## PRINCIPLES OF BASIC CONTRACT DRAFTING

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COLLECTIVE EXPERIENCE . COLLABORATIVE CULTURE . CREATIVE SOLUTIONS

## WHY HAVE A CONTRACT?

Contracts attempt to articulate:

- The rights and obligations of the parties.
- Provisions for events or contingencies that may occur.
- Provisions to avoid default.
- Remedies and means of enforcing or avoiding the rights and obligations.



## REMEMBER THE BASIC PRINCIPLES OF CONTRACT LAW

- Mutual assent – intent to contract. There must be a “meeting of the minds.”
- Offer and acceptance.
- Consideration – bargain for exchange.
- Conditions – precedent and subsequent.
- Representations, warranties, covenants and conditions.
- Conclusion of a contract – expiration, termination, rescission.



## THE DRAFTING PROCESS

- Investigate the facts.
- Review applicable law as needed.
- Prepare initial drafts, use precedents and templates where appropriate.
- Circulate drafts for comments and revise as necessary.
- Negotiate and memorialize the final definitive documents.
- Execute documents.



## DON'T RUSH INTO DRAFTING



- Know the subject matter.
- Research, research, research.
- Understand the objectives of the parties.
- Analyze the implications of each contractual term.
- Use simple, clear language.

## THE GOAL OF DRAFTING – PRECISE DOCUMENTS

Four elements of precision:

1. It is *accurate*.
2. It is *complete*.
3. It is *exact*.
4. It is *able to withstand hostile, critical review*.



## CHARACTERISTICS OF PLAIN ENGLISH DRAFTING

- Short sentences.
- Definitive, concrete, everyday language.
- Use the “active” voice.
- Separate paragraphs and sections with headings for individual or different concepts.
- Avoid the use of “legal jargon,” Latin or other foreign terms.
- Avoid the use of double negatives.

MEANINGLESS JARGON  
SPOKEN HERE



## GENERAL ORGANIZATIONAL RULES

- General provisions before specific ones.
- Important, central provisions before others.
- Rules before exceptions.
- Separate provisions or sub-sections for each concept.
- Technical, boilerplate, housekeeping and miscellaneous provisions located last, before signature blocks.



## AGREEMENTS TO AGREE ARE NOT AGREEMENTS

Can be subject to agreement but need a determining mechanism in the event of the parties failing to reach agreement.

### Remedies:

- Have the parties refer the matter to a third party for determination – e.g. you have an option to buy the house at the fair market price on the date of exercise of the option as determined by XYZ estate agent. [Tie break mechanism]

## “SHALL”, “MUST” “MAY” AND “WILL”

- “Shall” and “must” are imperatives and cause a legal obligation to be imposed.
- “May” is permissive or discretionary.
- “Will” is predictive.
- Avoid the use of “should” because it can mean both ‘must’ and ‘would be desirable.’

## ACTIVE VERSUS PASSIVE LANGUAGE

\*\*\*Active voice is more precise than the passive voice.\*\*\*

Example:

- The deposit shall be paid into escrow by May 1, 2016.
- Buyer shall pay the deposit into escrow by May 1, 2016.



## AFFIRMATIVE VERSUS NEGATIVE LANGUAGE

Where possible use affirmative language.

Example:

- The failure of Tenant to pay the rent on the first day of each month shall not be an incurable event in default.
- The Tenant may cure an event in default caused by its failure to pay the rent when due.

## USE OF “ANY”, “EACH” AND “NO”

- Use “each” when there is an obligation or duty to be imposed.  
Example: Each Party shall pay its fees on May 1, 2006.
- Use “any” when there is discretion, a power or privilege to be accorded.  
Example: Any Party may pay its fees on May 1, 2006.
- Use “no” where there is an obligation to refrain from acting.  
Example: No Party shall [or may] pay its fees after May 1, 2006.

## PRESENT VERSUS FUTURE TENSE

Where possible, use the present tense.

A contract is a living document that continuously governs the parties.

Example:

- If a Party should die...
- If a Party dies....



## OTHER GENERAL RULES

Use the number of days rather than months or years.

- 3 months is different than 90 days.
- Specify whether the number of days are calendar days or business days.

Avoid legal doublets and triplets.

- E.g. null and void; swear and affirm; right, title and interest.

Omit needless words – overdressing your drafting makes it more difficult to understand.

- E.g. “At that point in time” = “then.”

Remember the rules of grammar.



## BASIC CONTRACT TERMS

- Preamble
- Recitals
- Definitions
- Body
  - Major Components
    - Covenants
    - Conditions
    - Representations and Warranties
    - Remedies
- Boilerplate
- Concluding clause and Signatures
- Exhibits and attachments





## PREAMBLE

The introductory clause – establishes parties, effective date, place of business and jurisdiction

### EXAMPLE:

- This supply agreement (the “Agreement”) is entered into, as of \_\_\_\_\_, 2016 (the “Effective Date”), by and between [Fill in the real party name and address:] ABC Corporation (“Seller”), a Delaware corporation, having a place of business and initial address for notice at 123 Main Street, AnyTown, AnyState 12345-6789; and [Fill in the real party name and address:] XYZ LLC (“Buyer”), a New York limited liability company, having a place of business and initial address for notice at 456 Commerce Street, OtherTown, OtherState 98765-4321.

## RECITALS

Recitals – background information – explains why the parties are entering into the agreement. A court might give special or binding weight to recitals in a contract.

### RECITALS

**WHEREAS, on August 28, 2003, Bob Smith (“Smith”) and John Jones (“Jones”) executed a promissory note evidencing a commercial loan agreement (Loan #180000620) with Big Time Bank (“Bank”) in the original principal amount of \$500,000, secured by an Open-End Mortgage on the real property located at 123 Main Street, Akron, Ohio 44311 (the “Commercial Property”) and an Assignment of Leases and Rents related thereto (the “Mortgage Loan”);**

**WHEREAS, on October 8, 2009, Smith and Jones executed a Commercial Debt Modification Agreement with regard to the Mortgage Loan which modified the payment terms of the facility to allow for a brief extension of the interest only payments;**

## RECITALS [CONT.]



**WHEREAS**, in consideration for entering into this Agreement, Bank shall temporarily forbear its right to foreclose on the Commercial Property.

**NOW, THEREFORE**, in consideration of the mutual covenants made herein, and for other good and valuable consideration, the receipt of which are hereby acknowledged by each of the Parties, the Parties hereby agree as follows:

**DON'T FORGET TO INCORPORATE BY REFERENCE INTO THE DOCUMENT:**

**1. Incorporation of Recitals.** The Recitals set forth above are hereby incorporated in and made a part of this Agreement by this reference.

## DEFINITIONS




Use of defined terms increases clarity and reduces ambiguity in contracts.

**Roles of definitions within contracts:**

- Explain the meaning of a word or technical term.
- Enlarge or limit the meaning of a word for purposes of a contract.
- Provide clarity / avoid ambiguity.

**Options for drafting:**

- Stand-alone definition (“Purchase Price” means...)
- Textual definition (...eight thousand dollars (the “Purchase Price”).)

## CIRCULAR DEFINITIONS

### Examples:

- “Sale Cars” means all the cars owned by Fred except the Excluded Cars.
- “Excluded Cars” means all the cars owned by Fred except the Sale Cars.



## REPRESENTATIONS

A representation is a statement of fact that induces a party to enter into the contract. The statement, made before or at the time of making the contract, regards a past fact or existing circumstance related to the contract which influences such party to enter the contract.

- *Example 1:* “Licensor represents to Licensee that it has the full and unencumbered right, power and authority to enter into this Agreement and to grant the license rights granted by Licensor to Licensee hereunder.”
- *Example 2:* “Company A hereby represents that it owns full legal and equitable title to each patent listed in Exhibit A.”

### Tips for drafting:

- If your client is giving the rep, make the rep narrow in scope and attempt to qualify it (e.g. knowledge).
- If your client is receiving the rep, make it broad and unqualified.

## WARRANTIES



A warranty is an undertaking or stipulation that a certain fact in relation to the subject of the contract is or shall be as it is stated or promised; and refers to an agreement to protect the recipient against loss if the fact is or becomes untrue.

- *Example 1:* “Licensor warrants to Licensee that it has not received any written notice or claim, and is not otherwise aware that the Licensed Technology infringes or misappropriates the proprietary rights of any other Person.”
- *Example 2:* “Company A warrants to Company B that the Technical Information provided hereunder will be the same as that used in the design, production, installation and maintenance of Licensed Products produced in its own factories.”

### Tips:

- Be more careful as the maker of warranty, as the measure of damages differs and risk of successful lawsuit is higher (no need to prove reliance).
- Consider qualifying warranties appropriately.

## COVENANTS



Promise to act (or not act) in the future.

Use “shall” rather than “will” to signal a covenant.

Flipside of a covenant = a right.

**Example:** Tenant shall pay rent on the first Thursday of every month.

### Drafting Tips:

- When making covenants, be careful of obligating your client to elements out of their control.
- Use qualifiers as appropriate (e.g., “best efforts”).

## CONDITIONS

A condition to an obligation is a state of facts that must exist before a party is obligated to act.

A condition to discretionary authority is a state of facts that must exist before a party may choose to act.

### Examples:

- If the house passes inspection, the Buyer shall provide a deposit.
- If the house does not pass inspection the Buyer may rescind this contract.

### Drafting Tips:

- If your client needs to satisfy the condition, make it easier, provide flexibility.
- Think of conditions in terms of an if/then relationship.
- You can phrase conditions by using “must” instead of shall.

## TERM



### Standard Term -

- The term of this Agreement shall begin on the Effective Date and continue for a five (5)-year period unless otherwise terminated as provided in this Agreement (the “Term”).

### Evergreen Provision -

- The initial term of this Agreement shall be one (1) year commencing as of the date hereof. Thereafter, the term of this Agreement shall automatically renew for successive one (1) year terms unless one party provides written notice to the other party at least ninety (90) days in advance of the end of the then existing term that it does not wish to renew the term of this Agreement.

## TERMINATION



### Without Cause:

- The Agreement may be terminated by either party at any time upon sixty (60) days' prior written notice to the other party.

### With Cause:

- The Agreement may be terminated on sixty (60) days' notice for persistent material breach of the Agreement by a party where such breach is not remedied within thirty (30) days after notice to the party in breach from the other. Seller may terminate this Agreement at any time by giving notice in writing to Buyer, which notice shall be effective upon dispatch, should Buyer file a bankruptcy petition, be declared bankrupt, become insolvent, make an assignment for the benefit of creditors, go into liquidation or receivership or otherwise lose legal control of its business or should Buyer or a substantial part of its business come under the control of a third party. The right to terminate as included in this provision shall be in addition to any other rights available to the parties under this Agreement or otherwise.

## FORCE MAJEURE

Force Majeure – an event or series of events that causes a failure of timely performance and a person would not reasonably have been able to anticipate the event or events and avoid the failure of timely performance.



- Components: Acts of God, action of the elements, insurrection, strikes, riots, changes in law, raw material shortages, other reasonable events (often excluding financial).

## REMEDIES



Remedies – the agreed to rights and excluded rights that supplement or replace, the common law or statutory rights.

- Types: Termination, Acceleration, Indemnification, liquidated damages

### EXAMPLE:

Indemnification: The Buyer shall defend, indemnify and hold harmless the Seller from and against all third-party claims made against the Seller for loss or damage caused by, or arising from, or in connection with, any breach by the Buyer of the provisions in relation to the delivery or storage of the Products and against all costs and expenses incurred including the cost of investigating and defending such claims.

## BOILERPLATE

Some examples:

- Choice of Law
- Entire Agreement
- Severability and Survival
- Notices
- Assignment
- Counterparts/Electronic Signature



## CHOICE OF LAW; JURISDICTION



*Governing Law; Jurisdiction.* This Agreement shall be governed by and construed in accordance with the laws of the State of Ohio without regard to conflict of law principles. Any action or proceeding seeking to enforce any provision of, or based on any right arising out of, this Agreement must be exclusively brought against either of the Parties in the courts of the State of Ohio, County of Summit, or, if it has or can acquire jurisdiction, in the United States District Court having jurisdiction in such County. Each of the Parties consents to the jurisdiction of such courts (and of the appropriate appellate courts) in any such action or proceeding and waives any objection to venue laid therein.

## ENTIRE AGREEMENT

*Entire Agreement.* This Agreement is the complete and exclusive statement of the agreement among the Parties concerning the subject matter hereof and no other agreements or releases are intended or implied. All negotiations among the Parties regarding the Dispute are merged into this Agreement, and there are no representations, warranties, covenants, understandings, or agreements, oral or otherwise, in relation thereto among the Parties other than those incorporated specifically, detailed herein and to be delivered hereunder. No waiver, modification or termination of the terms hereof shall be valid unless in writing signed by the Party to be charged and only to the extent therein set forth.



## SEVERABILITY / SURVIVAL

*Severability; Survival.* The provisions of this Agreement are severable, and if any part of it is determined by a court or agency of competent jurisdiction to be invalid, illegal or otherwise unenforceable in any respect, the other paragraphs shall remain fully valid, legal and enforceable; provided, however that deletion of the invalid, illegal or unenforceable provision does not materially change the essence of this Agreement. Furthermore, this Agreement shall survive the termination of any arrangements contained herein.



## NOTICES

*Notices.* All notices required to be given under this Agreement shall be in writing and shall be considered effective when deposited in the U.S. mail as registered mail, return receipt requested, postage prepaid or sent by courier and addressed to the party at the address noted at the beginning of this Agreement, faxed or emailed to the party at the correct fax number, or such other manner designated in writing.

Or - list the notice addresses here in this provisions if they are not in the preamble.



## ASSIGNMENT

*Assignment.* Neither this Agreement nor the rights or obligations of the parties hereunder are assignable (including, without limitation, by merger or other operation of law) in whole or in part by any party without the prior written consent of the others, which consent shall not be unreasonably withheld.



## COUNTERPARTS

*Counterparts.* This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original but all of which shall constitute one and the same agreement. This Agreement may be executed by facsimile or electronic (.pdf) signature and a facsimile or electronic (.pdf) signature shall constitute an original for all purposes.



## SIGNATURES

### Introductory language:

- The Parties agree to the terms of this Agreement above.

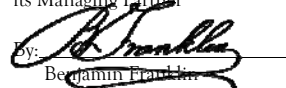
### Proper identification of parties.

Seller

  
John Hancock

Sonoma Properties, LLP

By: Cabernet Associates, LLC,  
its Managing Partner

By:   
Benjamin Franklin  
Managing Member

## QUESTIONS??

