



The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

June 2015

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Presented to the New York State Bar Association

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The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Summary of Presentation: What this Presentation Covers

- **Some Contract-Drafting Philosophy**
 - Legal Drafting vs. Conversation/Prose Writing
 - The Importance of Language
 - Preferences in Contract Drafting
 - Practical Considerations
- **Signature Pages**
 - Getting to an authorized individual
 - Drafting Tips
 - Practical Tips
- **Basic Contract-Drafting Concepts**
 - Preamble
 - Recitals
 - ** Body

<ul style="list-style-type: none"> • Definitions • Language of Performance • Obligations • Discretionary Language • Language of Declaration (Representations and Acknowledgments) • Administrative Language

- **More-Advanced Contract-Drafting Concepts**
 - Conditional Language
 - Language of Exception and Subordination
 - The Concept of “Deemed”
 - References to Time
 - “And,” “Or,” and “And/Or” Ambiguities
 - Formulas
 - Attachments to Contracts
 - Ambiguities Relating to Modifiers
 - Contract Interpretation

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The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Summary of Presentation: What this Presentation Covers

- **Miscellaneous Provisions in Contracts**
 - Parties, Beneficiaries, and Obligees
 - Interpreting the Contract
 - Enforcing the Contract
 - Other
- **Legal Archaisms**
 - “that” vs. “which” vs. “, which”
 - Miscellaneous
- **Course Recap**

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[Summary of Presentation: What this Presentation does *NOT* Cover](#)

- The law (for the most part)*
- The structure of any agreement in particular (e.g., asset purchase agreements, stockholders' agreements, license agreements, etc.) – rather, it deals with *how* to express concepts in contracts generally
- The drafting process (e.g., integration of comments from multiple sources)
- Using drafting skills in connection with negotiations (e.g., “negotiating through the document,” how to use vagueness and ambiguity to your advantage)

* To the extent that this presentation is required to cover the law in order for attorneys to obtain CLE credit, this presentation is deemed to cover the law. *

[Some Contract-Drafting Philosophy](#)

Some Contract-Drafting Philosophy

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- Legal Drafting vs. Conversation/Prose Writing
- The Importance of Language
- Preferences in Contract Drafting
- Practical Considerations

*

Forget common sense

Example: If my wife wants me to take out the garbage each week, “Vincent, you’re responsible for taking out the garbage” should do the trick. You get the idea – I take out the garbage each week, it gets picked up, I bring the garbage cans back in and I do it all over again in advance of the next scheduled pick-up.

*

Vincent, you're responsible for taking out the garbage.

But as an attorney, if I wanted to poke holes in the deal, I could ask:

- What day and time during the week do I take out the garbage?
- Can I take out the garbage only once, or is this an ongoing obligation?
- Can I let the garbage pile up for a year and then take it out?
- Do I need to take out all of the garbage in the house, or just some of it?
- Does the garbage need to be bagged? Can I just throw a half-eaten chicken wing on the front porch?
- Can I sub-contract my garbage-taking-out responsibilities to my daughter?
- ...and what exactly constitutes "garbage" anyway?

*

Vincent, you're responsible for taking out the garbage.

Written in lawyer speak...

"No later than 6 a.m. New York time each Monday and Thursday (and no earlier than 7 p.m. each Sunday and Wednesday, respectively), Vincent shall: (i) place all Garbage on the interior of the house on the premises (the "House") in trash bags (any such trash bag into which Garbage has been placed, a "Trash Bag"); (ii) seal and place each Trash Bag in one of the garbage cans located on the exterior of the House (any such garbage can into which a Trash Bag has been placed, a "Garbage Can"); and (iii) thereafter place each Garbage Can no more than one inch south of the curb of the sidewalk relating to the premises and between one and seven feet west of the driveway on the premises. Vincent shall place all Garbage Cans on the east side of the House (and adjacent thereto) as of 6 a.m. New York time each Tuesday and Friday. Vincent's obligations under this paragraph are personal in nature and, as such, are not delegable in whole or in part. "Garbage" means rubbish, as determined by Christine in her sole discretion."

*

- The point is, forget “you-get-the-idea” drafting. Forget “contract-as-a-mere-guidebook” drafting. If you want to make a contract tight and less subject to uncertainty and multiple interpretations, ask the questions and plug the holes. Otherwise:
 - The law will plug the holes for you*
 - Your adversary will plug the holes for you
 - It will be unclear what rule will apply, or whether different rules apply in different contexts

* e.g., “public policy” and “fairness” doctrines.

*

Quality contract drafting saves \$\$\$

- Court opinions on contract language disputes are the tip of the iceberg (e.g., arbitration, re-negotiation, submission to contract terms that have been drafted unfavorably)
- Cost savings in addressing problems up front
- Systematic approach to expressing concepts in a contract leads to: (1) meeting of the minds, (2) uncovering hidden ambiguities and topics not addressed, and (3) better understanding of the contract after it is entered into



*

“A contract is only as good as your ability to successfully enforce it in court.”

But let’s consider how “good” a contract might be in the context of a counterparty considering whether or not to comply with a term of the contract....

*

“A contract is only as good as **your counterparty’s perception of** your ability to successfully enforce it in court.”

*

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Some Contract-Drafting Philosophy > [The Importance of Language](#)

“A contract is only as good as your counterparty’s perception **that you will seek to and** successfully enforce it in court.”

*

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Some Contract-Drafting Philosophy > [The Importance of Language](#)

“A contract is only as good as your counterparty’s perception that you will seek to and successfully enforce it in court” **PLUS “your counterparty’s assessment of any damage to its reputation should you seek to [and successfully] enforce it in court.”**

*

“A contract is only as good as your counterparty’s perception that you will seek to and successfully enforce it in court” PLUS “your counterparty’s assessment of any damage to its reputation should you seek to [and successfully] enforce it in court.”
PLUS “any sense of moral obligation that your counterparty might have in performing its obligations under the contract.”

*

The upshot: Language matters!* (*ex ante* and *ex post*)

- Ambiguous vs. Clear
- Vague vs. Certain
- Straightforward vs. Complex
- Superfluous vs. Tight
- Burdensome vs. Easy-to-comply-with

* Language matters even if it is unenforceable!

*

Some general preferences in contract drafting are listed below. Note that an “improvement” in one characteristic might result in a “decline” in other characteristics.

- * **Unambiguous** is better than **Ambiguous**
- **Concision** is better than **Redundancy**
- **Shorter** is better than **Longer**
- **Predictability** is better than **Uncertainty**
- **Plain English** is better than **Jargon**
- **Precision** might or might not be better than **Vagueness**
- **Consistency** is better than **Inconsistency**
- **Straightforward** is better than **Confusing**

*

- Law as a backdrop/basis for provisions
- Reliance on forms (a blessing and a curse)
- Know your audience
 - For this presentation, we will assume that sophisticated business people and attorneys are your audience
- Detail vs. Generality (Will too much of good thing spoil the deal?)
- Holding the pen vs. reacting
- Integrating comments
- * Universal drafting “rules” vs. good practice vs. your own style
- For more junior attorneys, start developing good drafting habits now so you can easily implement them going forward
 - Quickly draft a tight agreement when you’re holding the pen
 - Spot and exploit drafting weaknesses in opposing counsel’s draft

*

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Some Contract-Drafting Philosophy > [Practical Considerations](#)

Useful Resources for Learning/Improving Drafting Skills

- *A Manual of Style for Contract Drafting (Third Edition)*, Kenneth A. Adams (2013)
- *The Structure of M&A Contracts*, Kenneth A. Adams (2011)
- *Garner on Language and Writing*, Bryan A. Garner (2009) – more generalized concepts (including writing skills for litigators)
- *Drafting Contracts: How & Why Lawyers Do What They Do* (Second Edition), Tina Stark
- *Negotiating and Drafting Contract Boilerplate*, Tina L. Stark (Ed.) (2003) – For the intersection between law and contract language
- *Typography for Lawyers*, Matthew Butterick (2010) – This what happens when a font designer becomes an attorney. Great book on formatting legal documents – and more than just fonts!
- *A Guide to Contract Interpretation* (July 2014) (Reed Smith white paper) – Vincent R. Martorana (freely available on the web; Google “contract interpretation”)
- www.adamsdrafting.com
- www.draftingpoints.com
- Annotated forms
- Successive “redlines” of a document
- Board resolutions
- Due diligence materials
- Experience

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

[Basic Contract-Drafting Concepts](#)

Basic Contract-Drafting Concepts

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[Basic Contract-Drafting Concepts](#)

- Preamble
- Recitals
- Body
 - Definitions
 - Language of Performance
 - Obligations
 - Discretionary Language
 - Language of Declaration
 - ✓ Representations
 - ✓ Acknowledgements
 - Administrative Language

*

Basic Contract-Drafting Concepts > [Preamble](#)

Example:

This ASSET PURCHASE AGREEMENT (this “Agreement”), dated as of June 16, 2015, is made between Big Bad Corporation, a Delaware corporation (the “Buyer”), and Little Guy, LLC, a New York limited liability company (the “Seller” and, collectively with the Buyer, the “Parties”).

- Type of agreement
- Date of agreement
- Parties to agreement (including jurisdiction of organization and entity type)
- Save descriptive relationships between the parties for the recitals or the body of the contract (e.g., the representations and warranties)

*

- Describe background; give the reader context
- Set up defined terms

Example:

A. The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the “Business”);

- Can serve as evidence of intent and help to resolve ambiguity (but there’s not going to be any ambiguity in contracts that you draft, right?)

*

- Do not put operative provisions (e.g., language of performance, representations, or obligations) in recitals
 - ☺ A. The Parties desire to amend the Loan Agreement in order to, among other things, extend the maturity date of the Loan to December 31, 2015.
 - ☹ A. The Parties hereby amend the Loan Agreement to extend the maturity date of the Loan to December 31, 2015.
 - ☹ A. The Parties shall take such actions as are necessary to implement the terms of this Agreement.

*

- Immediately after the recitals, there is typically a lead-in stating that the parties are agreeing to what follows.
 - ☹ NOW, THEREFORE, in consideration of the premises and the respective covenants, representations, warranties and undertakings of the parties hereinafter set forth, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto hereby agree as follows:
 - ☺ The Parties hereby agree as follows:

*

- Definitions
- Language of Performance
- Obligations
- Discretionary Language
- Language of Declaration
 - Representations
 - Acknowledgements
- Administrative Language

*

An Initial Thought: *The Who? What? When? Where? How? Why? Hierarchy*

*

Indispensable

Who? What?

The Associate shall deliver the memo to the Partner.



Sometimes the subject of vagueness

When?

... promptly; no later than 3 p.m. on Tuesday...

Where?

... at the meeting; at the Partner's office...

How?

... by walking it to the Partner's office; by email...

Irrelevant?

Why?

... in order to "hit the ground running"; because the memo is really important... Does it matter?

*

Definitions

*

Lots of power in defined terms!

1. A. The Seller is engaged as a going concern in the business of designing, manufacturing, marketing, distributing, and selling paper clips (such business, the “Business”).
- 2(a). The Company shall not sell or distribute (each of the foregoing, a “Transfer”) the Shares.
- 2(b). The Company shall not sell, **assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of** (each of the foregoing, a “Transfer”) the Shares.
3. “Attorney” means an attorney, a legal assistant, a chef, or any individual residing in the state of New York.

*

“Stacking” defined terms

This STOCKHOLDERS’ AGREEMENT (this “Agreement”) is made as of June 16, 2015, by and among Example & Co., Inc., an Idaho corporation (the “Company”), those holders of the Company’s Series A Preferred Stock listed on Exhibit A (the “Series A Holders”), those holders of the Company’s Series B Preferred Stock listed on Exhibit B (the “Series B Holders” **and, collectively with the Series A Holders, the “Preferred Stockholders”**), and those holders of the Company’s common stock that are listed on Exhibit C (the “Common Stockholders” **and, collectively with the Preferred Stockholders and those persons that become a party to this Agreement in accordance with the terms hereof, the “Holdes”**). The Holders **and the Company** are collectively referred to herein as the “Parties”.



Defining “on site” vs. Defining in a “Definitions” Provision

Defining “On site”

“Transfer” has the meaning set forth in Section 2.3.

...

Section 2.3. The Company shall not sell, assign, pledge, encumber, hypothecate, distribute (as a dividend or otherwise), transfer, or otherwise dispose of (each of the foregoing, a “Transfer”) the Shares.

Definitions Provision

“Transfer” means, with respect to a given asset, any sale, assignment, pledge, encumbrance, hypothecation, distribution (as a dividend or otherwise), transfer, or other disposition of such asset. When used as a verb, “Transfer” has a correlative meaning.

...

Section 2.3. The Company shall not Transfer the Shares.

*

If defining a term “on site,” make sure it is clear which text a definition relates to

- ⊖ Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3 (any such sale, a “Required Sale”).
 - There’s ambiguity as to whether a Required Sale includes sales to Adam only, or includes sales to Eve and sales to Adam.
 - ⊕ Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3 (any such sale to Eve or Adam, as the case might be, a “Required Sale”).
- OR**
- ⊕ Section 1.1. Johnny shall sell apples to Eve in accordance with Section 1.2 and shall sell oranges to Adam in accordance with Section 1.3. “Required Sale” means any sale described in this Section 1.1.

*

It’s ok to.....

- ...use the lowercase term as part of a definition
 - “Transfer” means any **transfer**, sale, pledge, hypothecation, encumbrance, or other disposition.
 - “Permitted Automobile” means any **automobile** that is permitted on the Long Island Expressway, including, without limitation, my old 1983 Pontiac Firebird.
- ...use other defined terms within a definition
 - “Law” means any constitution, law, statute, treaty, rule, directive, requirement, regulation, **Order**, or any rules or regulations of any self-regulatory organization.
 - “Order” means any order, writ, judgment, **injunction**, decree, determination, or award, in each case that is issued by a **Governmental Entity**.
 - “Governmental Entity” means any court, **administrative agency**, commission, or other governmental authority or instrumentality, domestic or **foreign**, federal, state, or local.

A “Law” therefore includes, e.g., any **injunction** issued by a **foreign administrative agency**.

*

...but do not...

- ...embed obligations within a definition
 - ⊗ “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A, **which the Company shall provide to the Seller no later than 30 days after the last day of the Post-Closing Period.**

BETTER TO BREAK IT UP AS FOLLOWS:

- ⊗ “Net Earnings Statement” means a statement of the Company’s net earnings during the Post-Closing Period in the form attached as Exhibit A.

...

Section 2.4. No later than 30 days after the last day of the Post-Closing Period, the Company shall provide the Net Earnings Statement to the Seller.

*

...and do not...

- ...simply use “includes”
 - ⊗ “Permitted Automobile” includes, without limitation, my old 1983 Pontiac Firebird.
- ...use more than one term for the same definition
 - ⊗ Verbiage Co., a Delaware corporation (“Verbiage” or the “Company”), is a subsidiary of the Parent.
- ...use “shall” to define a term
 - ⊗ “Securities Act” shall mean the Securities Act of 1933, as amended.

*

Language of Performance

*

- Deals with actions being taken by the parties **by virtue of** entering into a contract
- Think: “hereby”
- Use the active voice, not the passive voice
 - ☹ The License is **hereby granted** to the Licensee by the Licensor.
 - ☺ The Licensor **hereby grants** the License to the Licensee.

*

Some examples

Language of Performance

- The Licensor **hereby grants** to the Licensee a non-exclusive worldwide license to use the Product.
- The Buyer **hereby assumes** the Assumed Liabilities.

Obligations

- The Licensor **shall grant** to the Licensee a non-exclusive worldwide license to use the Product.
- The Buyer **shall assume** the Assumed Liabilities.

*

Obligations

*

Affirmative Obligations

- What a party **has to do** pursuant to a contract
- Think: “shall”

Negative Obligations (Prohibitions)

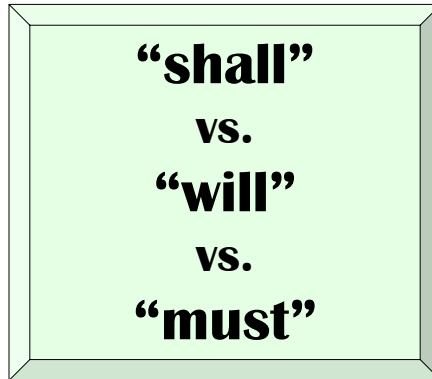
- What a party **is prohibited from doing** pursuant to a contract
- Think: “shall not”

*

Examples:

- The Purchaser **shall pay** the Purchase Price to the Seller at the Closing.
- Each of Moses and his constituents **shall not** covet his respective neighbor’s wife.
- The Presenter **shall not** use any fancy visual effects when transitioning between slides.

*



*

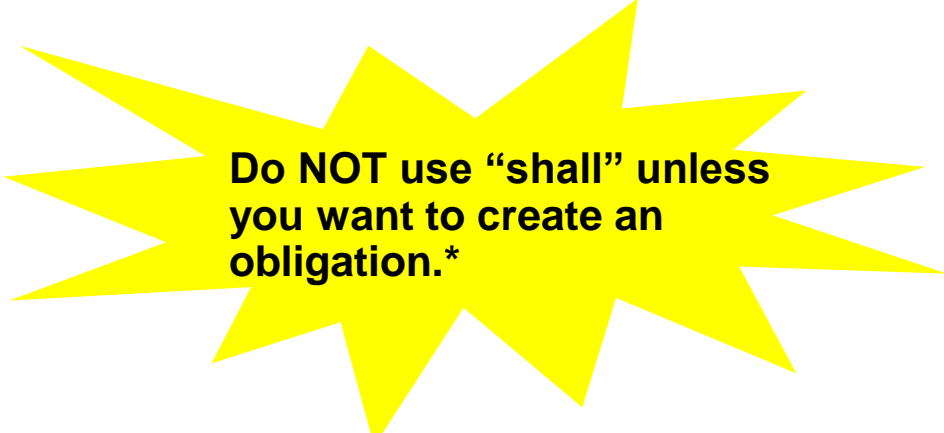
✱ **“Shall” → “hereby has/have a duty to”**

*The Purchaser **shall** wire the Purchase Price to the Seller.*

=

*The Purchaser **hereby has a duty to** wire the Purchase Price to the Seller.*

*



Do NOT use “shall” unless you want to create an obligation.*

* Avoid the temptation of using “shall” as a proxy for “...and I really mean it!”

- ⊖ This Agreement shall constitute the entire agreement of the Parties with respect to the subject matter hereof.

*

- “Will” is sometimes used to create an obligation.
 - ⊖ The Purchaser **will** wire the Purchase Price to the Seller.
- But “will” can also convey futurity, whereas “shall” (in ordinary parlance) is an awkward choice (unless you’re King Arthur).
 - ☺ Davey hereby bets Lou that the Mets **will** win the World Series this year.
 - ⊖ Davey hereby bets Lou that the Mets **shall [i.e., hereby have a duty to]** win the World Series this year.

In fact, Davey just lost the bet!

*

- “Must” means “is/are required to.” This could arguably be used as an alternative to “shall” to impose an obligation.
 - ☹ The Purchaser **must** wire the Purchase Price to the Seller.
- But “must” really asserts that a duty merely exists, not that it derives from the provision in which it is used.
 - ☺ If companies **must [are required to]** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall [hereby has a duty to]** sell the Product.
 - ☹ If companies **shall [hereby have a duty to]** pay an excise tax on the Product of 20% or less pursuant to applicable law, then Newcomer Co. **shall [hereby has a duty to]** sell the Product.

*

- Note that “must” works in instances in which “shall” does not, e.g., in expressing conditions.
 - ☺ In order for Lindsay to drive the car home from the pub, she **must** first convince her mom to give her the keys.
 - ☹ In order for Lindsay to drive the car home from the pub, she **shall** first convince her mom to give her the keys.
 - ❖ You should not draft the sentence this way since Lindsay is not **obligated** to convince her mom to give her the keys, and there should not be a cause of action against Lindsay if she failed to convince her mom to give her the keys. (In fact, it could very well be the other way around if she succeeded in convincing her mom....)

*

Use:

- "shall" to convey an obligation
- "will" to convey futurity
- "must" to convey a condition to be satisfied or to point to an obligation that exists but that derives from another provision

Do not use:

- "is obligated to"
- "agrees to"
- "covenants and agrees to"
- "shall be obligated to"
- "undertakes to"

*

Active Voice

vs.

Passive Voice

*



The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Basic Contract-Drafting Concepts > Body > Obligations > [Active Voice vs. Passive Voice](#)

General rule: Use the active voice rather than the passive voice when imposing an obligation.*

- Makes clear which party is the actor
- More concise than the passive voice
- Easier to read/More natural than the passive voice
- In the context of an obligation, consistent with substituting “hereby has/have the duty to” for “shall”

* There are certain instances in which it makes sense to use the passive voice (e.g., those in which the identity of the actor does not matter).

*



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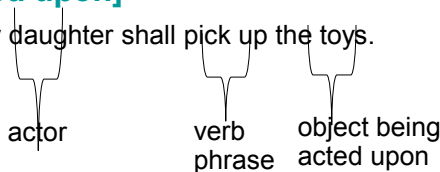
Basic Contract-Drafting Concepts > Body > Obligations > [Active Voice vs. Passive Voice](#)

Active Voice: The actor is the sentence’s subject.

General format (for an obligation) =

[actor] + shall/shall not + [verb (or verb phrase)] + [object being acted upon]

Example: My daughter shall pick up the toys.



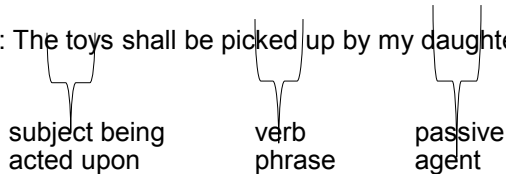
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Passive Voice (with identified passive agent): The subject of the sentence is not the actor.

General format (for an obligation) =

[subject being acted upon] + shall/shall not + [verb (or verb phrase)] + by + [passive agent]

Example: The toys shall be picked up by my daughter.



- Does not fit the “hereby has/have a duty to” rule
- Less concise and more awkward than active voice

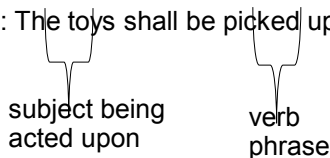
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Truncated Passive Voice (no identified passive agent): The actor is not identified.

General format (for an obligation) =

[subject being acted upon] + shall/shall not + [verb (or verb phrase)] + ~~by + [passive agent]~~

Example: The toys shall be picked up.

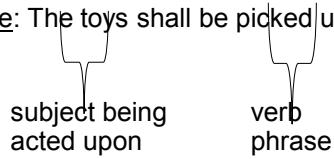


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Truncated Passive Voice (no identified passive agent)

Example: The toys shall be picked up.



Hey! Was the passive agent intentionally omitted?

Who is obligated to pick up the toys?

- My daughter, Julia?
- My son, Matthew?
- ☹ Answer: Mommy and Daddy.

*



** You can't impose obligations upon persons that are not party to the contract. (*Example 1 – Accountants*)

- ☹ Upon final resolution of all Disputed Items, **the Accountants shall issue** a report showing a calculation of the Final Net Working Capital. **The Accountants shall make** their determination of the Disputed Items within 60 days after having been selected.
 - ❖ What if the Accountants don't issue a report showing a calculation of the Final Net Working Capital?
 - ❖ What if the Accountants don't make their determination within 60 days?

*



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Basic Contract-Drafting Concepts > Body > Obligations >
[Attempting to Impose Obligations on Third Parties](#)

** You can't impose obligations upon persons that are not party to the contract. (*Example 1 – Accountants*)

- ☹ Upon final resolution of all Disputed Items, **the Accountants must issue** a report showing a calculation of the Final Net Working Capital. **The Accountants must make** their determination of the Disputed Items within 60 days after having been selected.
- ☹ Upon final resolution of all Disputed Items, **the Parties shall cause the Accountants to issue** a report showing a calculation of the Final Net Working Capital. **The Parties shall cause the Accountants to make** their determination of the Disputed Items within 60 days after having been selected.

*



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Basic Contract-Drafting Concepts > Body > Obligations >
[Attempting to Impose Obligations on Third Parties](#)

** You can't impose obligations upon persons that are not party to the contract. (*Example 1 – Accountants*)

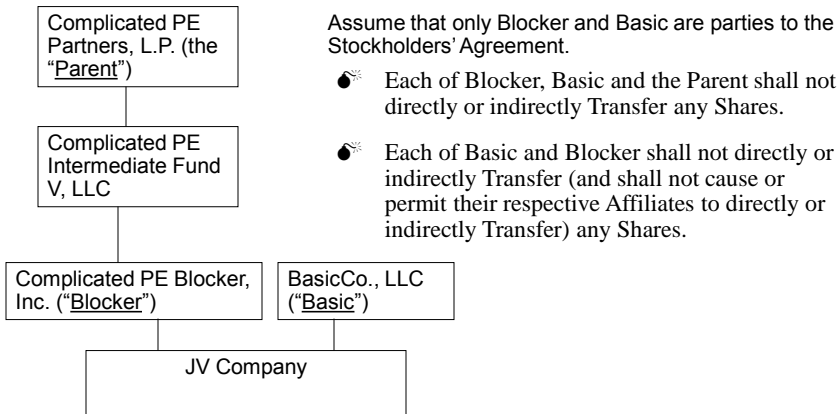
- ☹ If the Parties are unable to resolve any disagreement as to one or more Disputed Items within 30 days after the Receiving Party's receipt of a Protest Notice, then the Parties **shall promptly engage** Big Accountant Co. (the "Accountants") by signing an engagement letter with the Accountants pursuant to which, among other things, the Accountants **agree to comply with** procedures set forth in this Section 2.4(b)(iii). . . . The Parties **shall use their respective reasonable best efforts to cause** the Accountants to reach a final determination with respect to all Disputed Items (such determination, a "Final Determination") and to provide to the Parties, no later than the 60th day after the Accountants have been engaged pursuant to this Section 2.4(b)(iii), a report with respect to the NWC Statement (the "Final Determination Report") that includes a calculation of the Net Working Capital.

*

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Basic Contract-Drafting Concepts > Body > Obligations > [Attempting to Impose Obligations on Third Parties](#)

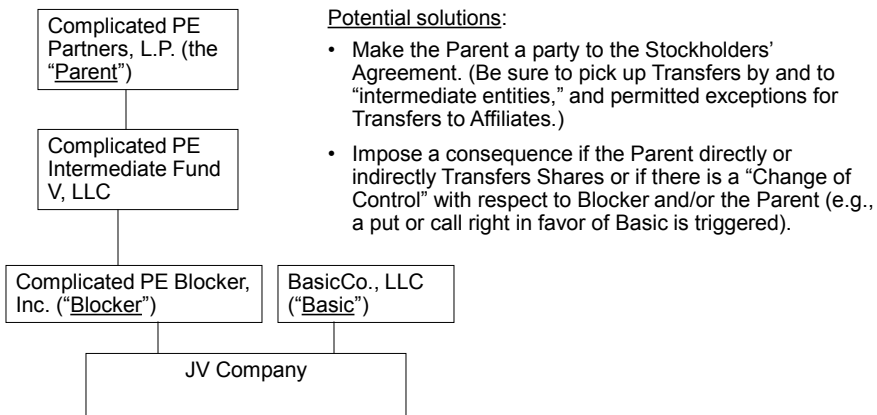
**** You can't impose obligations upon persons that are not party to the contract. (Example 2 – Parent Companies)**



The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Basic Contract-Drafting Concepts > Body > Obligations > [Attempting to Impose Obligations on Third Parties](#)

**** You can't impose obligations upon persons that are not party to the contract. (Example 2 – Parent Companies)**



Discretionary Language

*

- Deals with what a party is permitted to do
- Think: “is/are permitted to”
- Discretionary language is really an exception to prohibitions:
 - in a contract (i.e., an exception to “shall not”)
 - that are default rules (e.g., Section 18-702(b) of the Delaware Limited Liability Company Act provides that, unless otherwise provided in a limited liability company agreement, a member of a limited liability company ceases to have the power to exercise any rights or powers of a member upon the assignment of all of the member’s limited liability company interest)

*



The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Basic Contract-Drafting Concepts > Body > Discretionary Language > [“is/are permitted to” vs. “might possibly”](#)

- “May” can convey what a party **is entitled/permitted to do**, or it can convey what a party **might possibility do** (particularly when used with respect to a third party).
- Example: “may” = “is permitted to”
 - ☹ The Seller shall not encumber the Shares; except that the Seller **may pledge** the Shares to the Bank in connection with a loan provided by the Bank to the Seller.

*



The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Basic Contract-Drafting Concepts > Body > Discretionary Language > [“is/are permitted to” vs. “might possibly”](#)

- Example: “may” = “might possibly”
 - ☹ The Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to all purchase orders that Key Customers **may submit** during the Pre-Closing Period.
 - ❖ There is ambiguity here: is the provision referring to (1) all the Purchase Orders that Key Customers “might possibly submit” or (2) only those Purchase Orders that Key Customers “are permitted to submit”?
 - ☹ If a Key Customer delivers a purchase order to the Seller during the Pre-Closing Period, then the Seller shall deliver in a timely manner all Products that are required to be delivered pursuant to such purchase order.

*

- Use discretionary language to create an exception to a prohibition in a contract.
 - ☺ At the Closing, the Buyer shall convey the Assets to the Seller. During the period (such period, the “Post-Closing Period”) beginning on the Closing Date and ending on the date that is 10 days after the Closing Date, the Buyer **shall not sell** the Assets to any Competing Enterprise; except that, **during the Post-Closing Period**, the Buyer **is permitted to sell** the Assets to any Key Vendor that is a Competing Enterprise.
- In this example, it is clear that “is permitted to sell” is being used as the exception to the prohibition “shall not sell.”

*

- Generally, do not use discretionary language if the permitted action is not otherwise prohibited.
 - ☺ At the Closing, the Buyer shall convey the Assets to the Seller. During the period (such period, the “Post-Closing Period”) beginning on the Closing Date and ending on the date that is 10 days after the Closing Date, the Buyer **shall not sell** the Assets to any Competing Enterprise. **After the expiration of the Post-Closing Period**, the Buyer **is permitted to sell** the Assets to any Key Vendor that is a Competing Enterprise.
- “is permitted to sell” does not add anything here: there is nothing otherwise prohibiting the Buyer from using the Assets after the Post-Closing Period.
- In fact, including the superfluous language might create an unwanted implication: the Buyer is permitted to sell the Assets after the Post-Closing Period, *but only* to Key Vendors that are Competing Enterprises.

*



The Broccoli/Spinach Problem



- Dad: "Matthew, you **are permitted to eat** broccoli or spinach with your dinner."
- Matthew: "Great! I'll have chocolate pudding!"

*



The Broccoli/Spinach Problem



"are permitted to...only" does not solve the problem.

- Dad: "No, Matthew. What I mean is: Matthew, you **are permitted to eat *only*** broccoli or spinach with your dinner."
- Matthew: "Whew! And I thought I had to eat cauliflower and carrots if I wanted to eat broccoli or spinach. Although it sounds tempting, I think I'll still have the pudding."
- Dad: "Let me try this again: Matthew, you **are permitted to eat broccoli or spinach *only*** with your dinner."
- Matthew: "Only with my dinner? You mean I can't eat them at other times as well? Bummer."

*



The Broccoli/Spinach Problem



Potential Solution:

Use Language of Obligation

“Matthew, you shall eat broccoli with your dinner or you shall eat spinach with your dinner.”

*

Language of Declaration

*

- Assertions of fact memorialized in a contract
- Two types:
 - Representations
 - Acknowledgments

*

- **Statements made by a party of what was, is, or will be true to induce someone to enter into a contract**
- Need not be within the control or knowledge of the party making the representation

*

The lead-in*...

- ☺ [Party A] represents and warrants to [Party B] as follows:...
- ☺ **Each of** [Party A] and [Party B] represents and warrants to [Party C] as follows:...
- ☹ [Party A] and [Party B] **jointly and severally** represent and warrant to [Party C] as follows:...

* Not for this presentation, but the lead-in can be structured in different manners with respect to the date or dates as of which the reps and warranties as a whole are made, which will affect closing conditions, termination rights, and indemnification rights.

*

Example: Matt represents and warrants to Dad as follows:...

- ☺ During December 2012, Matt did not make fun of Julia. (*Past circumstance or event; within the representing party's control/knowledge*)
- ☺ During December 2012, Caroline did not make fun of Julia. (*Past circumstance or event; not within the representing party's control/knowledge*)

*

Example: Julia represents and warrants to Dad as follows:...

- ☺ Julia is a member of the Justice League. (*Present circumstance or event; within the representing party's control/knowledge*)

- ☺ Schedule A contains a complete and accurate list of all people with whom Caroline went to the movies yesterday. (*Present circumstance or event; not within the representing party's control/knowledge*)

*

Example: Caroline represents and warrants to Dad as follows:...

- ☹ Caroline will not whine at the dinner table. (*Future circumstance or event; within the representing party's control/knowledge*)
 - This is probably better phrased as an obligation, as follows:
 - ☺ Caroline **shall not** whine at the dinner table.

*

Example: Caroline represents and warrants to Mommy as follows:...

- ☺ None of Caroline’s friends will whine at the dinner table. (*Future circumstance or event; not within the representing party’s control/knowledge*)
 - We could phrase this as **an obligation**, as follows:
 - ☺ Caroline **shall encourage** each of her friends to not whine at the dinner table.
 - Phrasing this as a representation/warranty, however, ensures (at least to a certain degree) that Caroline is “on the hook” if any of her friends whine at the dinner table, whether or not she encouraged them to do so.
 - ☹ Each of Caroline’s friends **shall not whine** at the dinner table.

*

- A statement in a contract that a party accepts as true
- Why?
 - Aligns intentions
 - Serves as an estoppel
 - Stronger than recitals

*

Examples:

- The Shareholder acknowledges that the Shares have not been registered under the Securities Act.
- The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date.
- The Employee acknowledges that she has had an adequate opportunity to consult with her own counsel in connection with this Agreement.

*

Do not...

- ...use acknowledgments to introduce other categories of language.
 - ⊗ The Purchaser acknowledges that it shall pay the Closing Costs at the Closing.
- ...use “unconditionally” or “expressly” (or other adverbs) before “acknowledge”
 - ⊗ Luke Skywalker begrudgingly acknowledges that the Dark Side of the Force has a certain appeal.

*

Do not...

- ...use “acknowledges and agrees”
 - ☹ The Consultant acknowledges and agrees that he has reviewed a copy of, and shall comply with, the Company Policies as in effect on the Effective Date.
 - ☺ The Consultant acknowledges that he has reviewed a copy of the Company Policies as in effect on the Effective Date. The Consultant shall comply with the Company Policies.

*

Administrative Language

*

Two basic types:

- Language that states rules governing an event or circumstance
- Language addressing the scope, meaning, or duration of a contract or provision

*

Language that states rules governing an event or circumstance

- Any purported transfer in contravention of Section 2.1 will be void.
- The Post-Closing Statement will be deemed final upon the Accountant's delivery of the Final Report.

*

Language addressing the scope, meaning, or duration of a contract or provision

- This Agreement terminates on December 31, 2015.
- This Agreement constitutes the agreement of the Parties with respect to the subject matter hereof.
- If any provision of this Agreement is determined by a court of competent jurisdiction to be unenforceable by reason of excessive scope as to geographical, temporal, or functional coverage, then such provision will be deemed to extend only to the maximum geographic, temporal, and functional scope as to which it is permitted to be enforceable.

*

Verb Tenses: Present vs. Future

- Use present tense for policies that apply on the effectiveness of the contract
 - ☺ This Agreement **constitutes** the entire agreement of the Parties with respect to the subject matter hereof.
 - ☹ This Agreement **shall constitute** the entire agreement of the Parties with respect to the subject matter hereof.

*

Verb Tenses: Present vs. Future

- Use “will” for policies relating to future events that might or might not take place
 - ☹ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will terminate**.
 - ☺ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will *thereby* terminate**.
 - ☺ If the Prevailing Interest Rate drops below the Adjusted Rate, then this Agreement **will terminate *by virtue thereof***.

*

Signature Pages

*

- Getting to an authorized individual
- Drafting tips
- Practical tips

*

Entities can sign on behalf of limited liability companies and partnerships – you need to “reach an authorized human.”

Each Party is signing this Agreement as of the Effective Date.

BASIC STRUCTURE, INC.

By: _____
Name: Adam Smith
Title: President

ULTIMATE SUB, LLC

By: PASS-THROUGH, LP,
its Managing Member

By: USELESS INTERMEDIATE SUB, LLC,
its General Partner

By: ULTIMATE PARENT, INC.,
its Managing Member

By: _____
Name: Dr. Complicated
Title: Chief Difficulty Officer

*

Drafting tips for the lead-in on the signature page

- ⊗ Each of the Parties has executed this Agreement as of the ____ day of June, 2015.
- ☹ Each of the Parties has executed this Agreement as of February ____, 2015.
- ☹ Each of the Parties has executed this Agreement as of _____, 2015.
- ☺ Each Party is signing this Agreement as of the Effective Date.

*

Drafting tips for the lead-in on the signature page

- For written consents of stockholders of a Delaware corporation, *H-M Wexford LLC v. Encorp, Inc.* takes a strict approach with respect to DGCL Section 228(c) – do not use a “hardwired as of” date
 - ☺ Each of the undersigned is signing this Written Consent **as of the date appearing next to such undersigned’s signature.**

*

Practical Tips

- On the page prior to the sig page:
 - Use “[Signature page follows]” rather than “[THE REMAINDER OF THIS PAGE INTENTIONALLY HAS BEEN LEFT BLANK]”
 - Insert a “Section Break” prior to the sig page, not a “Page Break”
- Get rid of headers and footers on the sig page
 - Exception: You might want to specifically label the footer of the sig page to denote the counterpart being signed (e.g., “*Signature Page to Assignment Agreement (Foreign Seller to Domestic Purchaser)*”)

*

Practical Tips

- Make sure that you and your adversarial counterpart are “on the same page” – Think ahead!
 - Same exact counterparts
 - Number of executed originals per document (be mindful of documents that are negotiable instruments....)
- Make sure that you and your client are “on the same page” – Think ahead!
 - Number of executed originals per document (be mindful of documents that are negotiable instruments....)
 - ** Executive availability

*

Practical Tips

- Scan signature pages (and, once the deal is closed, entire documents) and keep originals in a safe place
- Be mindful of negotiable instruments and post-closing documents to be signed by officers of the target who will continue as officers of the company post-closing (e.g., CEO employment agreement, stockholders' agreement)
- Follow up quickly and aggressively after closing to catalogue signature pages received and obtain any missing signature pages

*

More-Advanced Contract-Drafting Concepts

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

[More-Advanced Contract-Drafting Concepts](#)

- Conditional Language
- Language of Exception and Subordination
- The Concept of Deemed
- References to Time
- And, Or, and And/Or Ambiguities
- Formulas
- Attachments to Contracts
- Ambiguities Relating to Modifiers
- Contract Interpretation

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

More-Advanced Contract-Drafting Concepts > [Conditional Language](#)

Conditional Language

*

Condition: An uncertainty upon which the applicability of certain contract language depends.

Components:

- Conditional clause (ask: “Is this true?”)
- Subordinator (e.g., *if, as long as, so long as, until, unless*)
- Matrix clause (consequence)

Examples

- **If** the Seller becomes aware that a representation contained in Article 3 is inaccurate, then the Seller shall promptly notify the Buyer thereof.
- **Unless** the Seller materially breaches an obligation, the Buyer shall use the Buyer’s best efforts to consummate the Transactions.
- The Buyer shall use the Buyer’s best efforts to consummate the Transactions **unless** the Seller materially breaches an obligation.
- The Borrower will be deemed to be in default **until** the Buyer has provided the lender notice otherwise.
- The Company shall vigorously defend itself in the Lawsuit **as long as** the Company has more than \$1 million in Excess Cash.

Key:
<u>Conditional Clause</u>
Matrix Clause
Subordinator

“If..., then...” Structure

If [conditional clause], then [matrix clause]

- Example: **If** Keanu masters the art of acting dumbfounded, **then** the Producers shall hire him to play the lead role in *The Matrix*.

DON'T USE “SHALL” IN THE CONDITIONAL CLAUSE

Example 1:

- ☹ If the Borrower **shall be in default**, then the Interest Rate will increase by virtue thereof.
- ☹ If the Borrower **is at any time in default**, then the Interest Rate will increase by virtue thereof.
- ☺ If the Borrower **defaults**, then the Interest Rate will increase by virtue thereof.

DON'T USE "SHALL" IN THE CONDITIONAL CLAUSE

Example 2:

The Buyer's obligation to consummate the transactions contemplated by this Agreement is subject to the satisfaction (or waiver in writing by the Buyer) of the following conditions:

- the Seller ~~shall have~~ has performed and complied in all material respects with all obligations required by this Agreement to be performed or complied by the Seller at or prior to the Closing;
- the Stockholders ~~shall have~~ have consented to the consummation of the Transactions; and
- no ambiguous use of the word "shall" ~~shall have~~ has been used in this Agreement or in any Ancillary Agreement.

"If" vs. "to the extent that"

- "If" is a "binary" concept; the language in the matrix clause will apply to its full extent if the language in the conditional clause is true.
- "To the extent that" is a "sliding scale" concept; it implies that the language in the matrix clause will apply to varying degrees.

“If” vs. “to the extent that”

Compare:

- ☺ If Paulie receives Profits from the Florida Operations, then he shall reimburse Silvio for costs that Silvio incurs with respect to the New Jersey Operations.

- ☺ To the extent of the Profits that Paulie receives from the Florida Operations, he shall reimburse Silvio for costs that Silvio incurs with respect to the New Jersey Operations.
 - This probably works, but it sounds a bit awkward; it doesn't fit the traditional “If..., then...” structure.

- ☺ Paulie shall reimburse Silvio for NJO Costs to the extent of the Profits that Paulie receives Profits from the Florida Operations.

“If” vs. “to the extent that”

- ⚠ Silvio shall get on the flight to Florida to the extent that Tony tells Silvio to get on the flight to Florida.
 - This phrasing doesn't really work because the sentence uses a “sliding scale” subordinator with a “binary” conditional clause.

Silvio: “Ok, boss. I'll get on the flight **to the extent that** you tell me to get on the flight.”

Tony: “Let's be clear: **If** I tell you to get on that flight, **then** you'll get on that flight.”

Generally, avoid “provided that” to create a condition.

- “provided that” can (arguably) be used to qualify the language that precedes it in several different respects.
 - Condition: The Closing must occur on June 16, 2015; provided that all of the closing conditions set forth in Article 10 have been satisfied.
 - Limitation: The Closing must take place at Reed Smith’s New York office promptly after the Effective Date; provided that the Closing must occur no later than June 16, 2015.
 - Addition: A “Transfer” of the Shares means any sale of the Shares; provided that a “Transfer” of the Shares includes any pledge of the Shares.
 - Exception: The Stockholder shall not Transfer the Shares; provided that the Stockholder is permitted to pledge the Shares to an Approved Bank.

Language of Exception and Subordination

Identifying Language

"except"	Ernie shall not annoy Bert, except that Ernie is permitted to annoy Bert on Christmas morning.
"subject to"	<u>Section 1</u> . Subject to <u>Section 2</u> , Ernie shall not annoy Bert. <u>Section 2</u> . Ernie is permitted to annoy Bert on Christmas morning.
"notwithstanding"	Ernie shall not annoy Bert. Notwithstanding the foregoing sentence, Ernie is permitted to annoy Bert on Christmas morning.
"except as otherwise provided in"	Except as otherwise provided in the Lease, Ernie shall not annoy Bert.

Identifying Language


Note: You don't need to use both "subject to" and "notwithstanding" for the same subject matter.

- Section 1. Subject to Section 2, Ernie shall not annoy Bert.
- Section 2. [Notwithstanding Section 1,] Ernie is permitted to annoy Bert on Christmas morning.

Localized Exceptions vs. Broad Inoculations

- Exceptions to rules can be very “local” (i.e., discrete and specific) or they can be “broad” (i.e., wide-ranging with respect to applicability and subject matter)
- Two Factors:
 - (1) Location (or Potential Location) of Trumping Language
 - (2) Scope of Trumping Language

Location (or Potential Location) of Trumping Language

- 
- **Local** Each Party shall not make any public statements with respect to the Transaction; **except that** each Party is permitted to make internal announcements to their respective employees regarding the Transaction.
 - **Subject to Section 9.5**, each Party shall not make any public statements with respect to the Transaction.
 - **Except as otherwise permitted hereunder**, each Party shall not make any public statements with respect to the Transaction.
 - **Except as otherwise permitted under the Confidentiality Agreement**, each Party shall not make any public statements with respect to the Transaction.
 - **Except as the Parties have otherwise agreed or might otherwise agree**, each Party shall not make any public statements with respect to the Transaction.
 - **Remote**

Scope of Trumping Language

Rule: Subject to Section 9.5, each Party shall not make any public statements with respect to the Transaction.

Length of Trumping Language	
▪ Short	<u>Section 9.5</u> . Each Party is permitted to disclose the Transaction to Bob.
▪ Long	<u>Section 9.5</u> . Each Party is permitted to disclose the Transaction under the following 37 circumstances:...
Specificity/Vagueness of Trumping Language	
▪ Specific	<u>Section 9.5</u> . Each Party is permitted to disclose to Sonny and Cher the existence of the Merger Agreement, the identity of the Parties and the Purchase Price.
▪ Vague	<u>Section 9.5</u> . Each Party is permitted to disclose the Transaction to the extent that it is reasonably necessary to do so.

Relative Benefits/Detriments of Localized and Broad Exceptions

<u>Localized</u>	<u>Broad</u>
+ Easier to identify applicable trumping language when interpreting contract	+ Useful if you need language, a provision or an agreement to trump all other agreements between the parties
+ Easier to clearly draft the extent to which trumping language applies	+ Can be a time-saver when in the throes of a transaction
- Requires knowledge of the precise location of trumping language and subordinate language	- Might nullify a rule that you don't want nullified
	- Whether or the extent to which a rule is trumped might be unclear

If possible, take a localized approach.

Potential Ambiguities

Be clear as to “how far back a trailing exception reaches.”

- ⊗ The Seller is not obligated to indemnify a Buyer Indemnitee in respect of a Claim: (i) to the extent that Losses in respect of all Claims exceed \$1,000,000; and (ii) except to the extent that the amount of Losses suffered by the Buyer in respect of such Claim exceeds \$50,000; except that **the foregoing** does not apply with respect to Claims based upon breaches of the Seller’s obligations set forth in Section 6.5.
 - What if the Buyer seeks indemnification in respect of a Claim based upon the Seller’s breach of one of the Seller’s obligations in Section 6.5 that resulted in a Loss to the Buyer of \$2,000,000? Does the limitation in clause (i) apply?

Potential Ambiguities

Be clear as to “how far back a trailing exception reaches.”

- ☺ The Seller is not obligated to indemnify a Buyer Indemnitee in respect of a Claim: (i) to the extent that Losses in respect of all Claims exceed \$1,000,000; and (ii) except to the extent that the amount of Loss suffered by the Buyer in respect of such Claim exceeds \$50,000; except that the foregoing **clauses (i) and (ii)** do not apply with respect to Claims based upon breaches of the Seller’s obligations set forth in Section 6.5.

The added language makes it clear “how far back the trailing exception reaches.”

Potential Ambiguities

Be clear as to “how far back a trailing exception reaches.”

- ⊗ Each JV Party shall not discuss the Joint Venture with those Competitors that have one or more distribution centers located in Europe. Each JV Party shall not discuss the Joint Venture with those Competitors that had net revenues of more than \$30 million in 2008. **Notwithstanding the foregoing**, a JV Party is permitted to discuss the Joint Venture with a Potential Strategic Partner.
 - How far back does “Notwithstanding the foregoing” relate?
 - Can a JV Party discuss the Joint Venture with a Potential Strategic Partner having net revenues of \$40 million in 2008 and that has a distribution center located in Europe?

Don't imply an exception in circumstances in which there is no exception.

- ⊗ During the Post-Closing Period, the Buyer shall not sell the Assets to any Competing Enterprise; except that, after the Post-Closing Period, the Buyer is permitted to sell the Assets to the Key Vendors.
 - Including the “exception” does not add anything here: there is nothing otherwise prohibiting the Buyer from selling the Assets after the Post-Closing Period.
 - In fact, including the superfluous language might create an unwanted implication: the Buyer is permitted to sell the Assets after the Post-Closing Period *only* to Key Vendors that are Competing Enterprises.

Potential Ambiguities

⚠ “...unless the context otherwise requires...”

- “The following definitions have the following respective meanings, unless the context requires otherwise.”
- “Any reference to any United States, state, or local statute or law is deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.”
- “The following rules apply unless the context requires otherwise:...”
- “The word ‘including’ is to be construed to mean ‘including, without limitation,’ unless the context otherwise requires.”

When does “the context otherwise require”? Who decides?

The Concept of “Deemed”

"Deemed" → Creates (or potentially creates) a legal fiction for purposes of a contract (or portion thereof).

Examples

- All apples are deemed to be vegetables.
- If Jack passes the bar exam, then he will thereby be deemed to be worthy of a job at a big law firm.
- A breach of any obligation in [Section 6.5](#) will be deemed a material breach for purposes of this [Section 11.2](#).
 - In this example, a legal fiction is created for limited purposes. For example, a breach of any obligation in Section 6.5 might be deemed a material breach for purposes of determining whether a party is entitled to indemnification, but not for purposes of determining whether a closing condition has been satisfied.

Passive Voice OK

Since the use of "deemed" applies to administrative language, which all parties are agreeing upon by virtue of entering into the contract, using the passive voice (without a passive agent) to create a legal fiction works, and sounds less awkward than the active voice.

- ☺ Passive Voice: The Net Working Capital Statement **will be deemed** [by the Parties] to be final on the Determination Date.
- ☹ Active Voice: **The Parties deem** that the Net Working Capital Statement will be final on the Determination Date.

“not [be] deemed to” ≠ “[be] deemed not to”

- **is/will not be deemed to** negates a “deemed rule”; it does not create a legal fiction
 - All of the Martoranas are deemed to like ravioli; except that Vincent Martorana **is not deemed to** like ravioli. (*I could still like ravioli. But there’s no guaranty of that.*)
- **is/will be deemed not to** is a “deemed rule”; it creates a legal fiction
 - All of the Martoranas are deemed to like ravioli; except that Vincent Martorana **is deemed not to** like ravioli. (*I definitely don’t like ravioli for purposes of this contract – even though I really love ravioli!*)

“not [be] deemed to” ≠ “[be] deemed not to”

The Stellar Student

Section 1. The Professor shall give a gold star to each Student who is a Stellar Student.

Section 2. Subject to Section 3, a Student who passes the Test **will be deemed to be** a Stellar Student.

Section 3. A student who answers Question 16 incorrectly **will not be deemed to be** a Stellar Student. [*negates the “deemed rule” set forth in Section 2*]

Section 4. Notwithstanding Section 2, a Student who spells his or her name incorrectly on the Test **will be deemed not to be** a Stellar Student. [*sets forth a “deemed rule”*]

Student	Pass/Fail	Q16	Name	Stellar?
A	Pass	Correct	Correct	Yes
B	Pass	Correct	Incorrect	No
C	Pass	Incorrect	Correct	Maybe

References to Time*

* By “time,” I am referring to both dates and times of day.

References to time could be used:

- To reference the date of something or to give a date to something
 - The Parties are party to a confidentiality agreement, dated June 16, 2015.
- To specify a point in time
 - The term of the Lease commences on June 16, 2015.
- To specify the beginning or end of a time period
 - The Consultant shall not disclose any Confidential Information for five years after the Expiration Date.
- To apportion a quantity per unit of time
 - The Company shall pay the Employee a monthly incentive fee.

Time Periods - Use of Prepositions

References to time at the start of a period

The Company shall perform the Services from June 16, 2015.
The Company shall perform the Services after June 16, 2015.
The Company shall perform the Services starting June 16, 2015.
The Company shall perform the Services commencing on June 16, 2015.

Time Periods - Use of Prepositions

References to time at the end of a period

The Company shall perform the Services until June 16, 2015.
The Company shall perform the Services to June 16, 2015.
The Company shall perform the Services through June 16, 2015.

Time Periods - Use of Prepositions

Solutions

- Be explicit
 - The Company shall perform the Services commencing on (and including) June 16, 2015.
 - The Company shall perform the Services through and including June 16, 2015.
- Include a time-of-day reference
 - The Company shall perform the Services commencing at 9 a.m. New York City time on June 16, 2015.
 - The Company shall perform the Services until the close of business on June 16, 2015.

More trouble with time periods...

- ☹ To validly make an election to purchase the ROFR Shares, a Stockholder (any such Stockholder, an “Electing Stockholder”) must provide* an Election Notice to the Selling Stockholder **within 10 days after** such Electing Stockholder receives the Sale Notice.
 - Suppose the Electing Stockholder received the Sale Notice at 8 a.m. on June 1. Can it provide a valid election notice at 8:30 a.m. on June 11?
- ☺ To validly make an election to purchase the ROFR Shares, a Stockholder (any such Stockholder, an “Electing Stockholder”) must provide an Election Notice to the Selling Stockholder ~~within~~ **no later than 5 p.m. New York time on the date that is** 10 days after **the date that** such Electing Stockholder receives the Sale Notice.

* Assume that the notice provision of this contract specifies the date on which notices will be deemed to have been given.

More trouble with time periods...

- ☹ ☹ The term of this Agreement ends at 5 p.m. New York time on June 16, 2015; except that if, **within 10 days of** a Major Event, the Company provides notice of termination of this Agreement to the Consultant, then this Agreement will thereby terminate.
 - This example contains two layers of ambiguity: (1) is the date on which the Major Event occurs included in the determination of the 10-day period; and (2) does the 10-day period precede or follow the occurrence of the Major Event (or both)?
- ☺ The term of this Agreement ends at 5 p.m. New York time on June 16, 2015; except that if, **no later than 5 p.m. New York time on the date that is within 10 days of after the date on which** a Major Event **occurs**, the Company provides notice of termination of this Agreement to the Consultant, then this Agreement will thereby terminate.

Other considerations

- Time zones? Lack of clarity can effect references to not only the time of day, but also the date.
 - Better to state, e.g., “New York City time” rather than EST (EDT?)
- If only a date is used, do all times of day during that date “count”? (e.g., if a grantee can exercise an option “through and including June 16, 2015,” can the grantee exercise the option at 11:59 p.m. on June 16, 2015)
- When is the “close of business”? The close of which party’s business?

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

More-Advanced Contract-Drafting Concepts > [“And,” “Or,” and “And/Or” Ambiguities](#)

“And,” “Or,” and “And/Or” Ambiguities

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

More-Advanced Contract-Drafting Concepts > “And,” “Or,” and “And/Or” Ambiguities > [“And”](#)

“And”

“And” concerns a set in its totality.

- The Borrower shall pay all interest and penalties.
- The Buyer hereby assumes the Subsidiary A Liabilities and the Subsidiary B Liabilities.
- I ate chicken cutlets and broccoli for dinner last night.

In these examples, the function of “and” is clear. But ambiguities can arise...

Potential Ambiguity: Are the members of an “AND SET” acting, being acted upon, or to be considered (a) collectively only, (b) separately only, or (c) either collectively or separately?

Moe, Larry, and Curly shall visit the construction site.

Can Moe, Larry, and Curly satisfy the obligation if they visit the construction site at different times?

- Moe, Larry, and Curly shall collectively visit the construction site.
- Moe, Larry, and Curly shall separately visit the construction site.
- Moe, Larry, and Curly, collectively or separately, shall visit the construction site.

Whether there is ambiguity depends upon (among other things) the category of language being used and whether the members of the “AND SET” are the subject or the direct object of the sentence.

Greg and Eugene shall meet with Michael in the conference room.

- Greg and Eugene shall collectively meet with Michael in the conference room.
- Greg and Eugene shall separately meet with Michael in the conference room.
- Greg and Eugene shall meet with Michael, collectively or separately, in the conference room.

Greg shall meet with **Eugene and Michael** in the conference room.

- Greg shall meet with Eugene and Michael, collectively, in the conference room.
- Greg shall meet with Eugene and Michael, separately, in the conference room.
- Greg shall meet with Eugene and Michael, collectively or separately, in the conference room.

“Distributive” Ambiguity

- ⊗ Transfers and Loans made in contravention of this Agreement will be void.
 - Does “made in contravention of this Agreement” modify (i) Transfers and Loans or (ii) Loans only?
- ☺ Transfers will be void and Loans made in contravention of this Agreement will be void.
- ☺ Transfers and Loans, in each case made in contravention of this Agreement, will be void.
- ☺ Transfers made in contravention of this Agreement and Loans made in contravention of this Agreement will be void.

“Or”

“Or” concerns a choice between members of a set.

- The Customer shall drink coffee or tea.
- The Licensee shall not conduct business in Nevada, Iowa, or China.
- Julia is permitted to invite Sarah or Kate to the party.

Potential Ambiguity:

Are the members of an “OR SET” acting, being acted upon, or to be considered (i) exclusively or (ii) inclusively?

Exclusive “Or” – the “not and” implication

Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream or cake.

- Inclusive “Or”: Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream, cake, *or both ice cream and cake*.
- Exclusive “Or”: Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream or cake, *but not both ice cream and cake*.

Whether there is ambiguity depends upon (among other things) the category of language being used and whether the members of the “OR SET” are subject or the direct object of the sentence.

Moe, Larry, or Curly shall visit the construction site.

- In this instance, there is arguably no ambiguity. Each of Moe, Larry, and Curly has an obligation to visit the construction site, which will be extinguished when the first one of them visits the site.
- It is difficult (in my opinion...) to claim that ambiguity arises when “or” is in the subject of an obligation.
 - It would be difficult to argue that the parties intended to impose the obligation on only one of Moe, Larry, or Curly (and that we did not know which one of them had such obligation).
 - Could a party claim that *only one* of Moe, Larry, and Curly *is entitled* to visit the construction site? To do so would be to infer a prohibition.

Moe shall visit the Construction site or the University.

- In this instance, it is also difficult to claim that the "or" is an "exclusive or." To do so would be to infer a prohibition (i.e., that Moe is obligated to visit one and *prohibited* from visiting the other).

Moe shall not set foot in New York, except that Moe shall visit the Construction Site or the University.

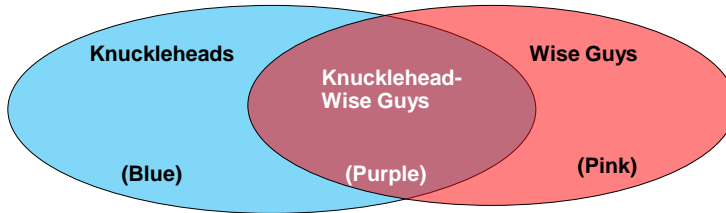
- In this instance, perhaps because the "or" obligation is an exception to a general rule, it is difficult to claim that the "or" is an "inclusive or."

Moe shall not terminate any employees; except that Moe is permitted to terminate employees who are (a) knuckleheads or (b) wise guys.

In this instance, the attributes of the direct object might overlap. There is ambiguity as to whether Moe can terminate "knucklehead-wise guys." And there is added ambiguity as to whether the "or" is inclusive or exclusive (i.e., whether Moe can terminate knuckleheads only, wise guys only, or both).

A nifty Venn diagram follows...

Moe shall not terminate any employees; except that Moe is permitted to terminate employees who are (a) knuckleheads or (b) wise guys.



Who is Moe permitted to terminate?

- inclusive “or”; attribute overlap ok: Any employee who is either blue, purple, or pink.
- inclusive “or”; attribute overlap not ok: Any employee who is blue and any employee who is pink, but not an employee who is purple.
- exclusive “or”; attribute overlap ok: His choice of either blue/purple employees or pink/purple employees (but not both).
- exclusive “or”; attribute overlap not ok: His choice of either blue employees or pink employees (but not both); he is not permitted to terminate purple employees.

“And / Or”

The “virgule”

To protect RT Jedburg from the consequences of ALF failing and in the event that ALF fails (i) to complete all of the work that is required to obtain the CO for the Premises by August 31, 2008 and/or (ii) to have the CO for the Premises issued to it by October 31, 2008, RT Jedburg shall have an allowed Class 4 unsecured claim in the amount of \$8 million (the “Claim”).

The Court: *RT Jedburg asserts that the phrase 'and/or' is commonly used to mean 'either' or 'both.' The Court concurs....And therein lies the problem.*

If ALF fails (i) to meet the Work Deadline and/or (ii) to meet the CO Deadline, then ALF will be liable to RT Jedburg.

The Court: *RT Jedburg asserts that the phrase 'and/or' is commonly used to mean 'either' or 'both.' The Court concurs....And therein lies the problem.*



If “and/or” means “either”: ALF is liable if ALF fails to meet just the Work Deadline or if ALF fails to meet just the CO Deadline (but not if ALF fails to meet both).

If “and/or” means “both”: ALF is liable if ALF fails to meet both the Work Deadline and the CO Deadline.

It seems like the Court meant this “or” to be an exclusive “or”!

If ALF fails to meet any Deadline, then ALF is liable to RT Jedburg. “Deadlines” means the Work Deadline and the CO Deadline.

Any given use of “and” or “or” can give rise to one or more ambiguities (and we haven’t covered all types instances in which ambiguities could arise). If there is uncertainty, ask yourself:

- “And”: (1) collectively; (2) separately; or (3) either collectively or separately?
- “Or”: “inclusive” or “exclusive”?
- “And / Or”: Do you mean “either,” or do you instead mean “both”?

Formulas

*

Samples of basic formulas in contracts

- “Closing Cash Payment” means the Purchase Price minus the Escrow Deposit.
- On each Payment Date, the Licensee shall pay the Licensor an amount equal to 5% of the Product Net Revenue.
- If the Company incurs a Reimbursable Cost, then the Member shall pay the Company an amount equal to the amount of such Reimbursable Cost multiplied by such Member’s Pro Rata Share.

*

Order of operations

Rule 1: Do what's in the parenthesis first.

Rule 2: Do multiplication and division first; do addition and subtraction second (and in each case left to right)

*

Some examples

$$2 \times 3 + 10 \div 5 = 6 + 2 = 8$$

$$2 \times (3 + 10) \div 5 = 2 \times 13 \div 5 = 26/5$$

$$2 \times (3 + 10 \div 5) = 2 \times (3 + 2) = 2 \times 5 = 10$$

*

Tips for clearly conveying formulas and order of operations in contracts

- Use identifying leading text (e.g., “the result of,” “the sum of,” “the product of”)
- Use enumeration; use defined terms
- Use formatting
- Use algebraic variables

*

Identifying leading text

- Works ok in the last function of a formula (or clause containing a formula)
 - ☺ “Hurdle Rate” means the Base Rate plus the product of the First Target Rate and” the Second Target Rate.
- Does not really work at the beginning of a sentence (don’t rely on the parties or attorneys to adhere to the order of operations)
 - ☹ “Hurdle Rate” means the product of the First Target Rate and the Second Target Rate plus the Base Rate.

* Note: Since we’ve already used “product,” there’s no need to use “times.”

*

Identifying leading text

- Note: “the difference between” doesn’t always work (unless you use an absolute value concept).
 - ☹ Julia shall pay Daddy the difference between what the toy costs and her weekly allowance.
- Suppose the toy costs \$20 and Julia’s weekly allowance is \$10. The likely reading is that Julia must pay 20-10. But Julia could argue that I owe her \$10!

*

Use enumeration; use defined terms

- Separate with enumerated clauses. Include colons, semi-colons, and commas, as necessary.
 - ☺ “Estimated Adjustment Amount” means an amount (which amount might be a negative number) equal to: (a) the sum of the **Estimated NWC Adjustment Amount**, the **Estimated Cash Adjustment Amount**, and the **Estimated Debt Adjustment Amount**; minus (b) the **Estimated Transaction Expenses**.

*

Use Formatting

- ☺ If the Company issues any shares of Common Stock without consideration or for consideration per share less than the Exercise Price in effect immediately prior to such issuance, then, by virtue of such issuance, the Exercise Price in effect immediately prior to such issuance will be reduced to an Exercise Price equal to the quotient obtained by dividing: (a) the sum of (1) the product obtained by multiplying the number of shares of Outstanding Common Stock immediately prior to such issuance by the Exercise Price in effect immediately to such issuance plus (2) the aggregate dollar value of consideration, if any, that the Company receives in connection with such issuance; by (b) the sum of (1) the number of shares of Outstanding Common Stock immediately prior to such issuance plus (2) the aggregate number of shares of Common Stock that the Company issues in such issuance.

*

Use Formatting

- ☺ If the Company issues any shares of Common Stock without consideration or for consideration per share less than the Exercise Price in effect immediately prior to such issuance, then, by virtue of such issuance, the Exercise Price in effect immediately prior to such issuance will be reduced to an Exercise Price equal to the quotient obtained by dividing:
 - (a) the sum of (1) the product obtained by multiplying the number of shares of Outstanding Common Stock immediately prior to such issuance by the Exercise Price in effect immediately to such issuance and (2) the aggregate dollar value of consideration, if any, that the Company receives in connection with such issuance; by
 - (b) the sum of (1) the number of shares of Outstanding Common Stock immediately prior to such issuance and (2) the aggregate number of shares of Common Stock that the Company issues in such issuance.

*

Use Algebraic Variables

- ☺ If the Company issues any shares of Common Stock without consideration or for consideration per share less than the Exercise Price in effect immediately prior to such issuance, then, by virtue of such issuance, the Exercise Price in effect immediately prior to such issuance will be reduced to an Exercise Price computed as follows:

$$X = ((A \times B) + C) \div (A + D)$$

Where:

X = the reduced Exercise Price

A = the number of shares of Outstanding Common Stock immediately prior to such issuance

B = the Exercise Price in effect immediately prior to such issuance

C = the aggregate dollar value of consideration, if any, received by the Company in connection with such issuance

D = the aggregate number of shares of Common Stock that the Company issues in such issuance

*

Side Note: Recursion

- “Accrued Amount” means, as of a **given time of determination**, the Undistributed 2011 Amounts plus, with respect to each **Subsequent Fiscal Year as of such time**, the Operating Profit with respect to such Subsequent Fiscal Year.

*

Side Note: Recursion – algebraic variables can be tough...

“Accrued Amount” means, as of a given time of determination, AA,

Where:



$$AA = U + \sum_{k=1}^n X_k$$

U = Undistributed 2011 Amounts

n = the number of Subsequent Fiscal Years as of a given time of determination

X_k = the Operating Profit with respect to the k^{th} Subsequent Fiscal Year occurring after a given time of determination

*

Attachments to Contracts

*

Made part of the contract by referencing the attachment. Need not say that explicitly or say that the terms of the attachment “are made a part of” the contract.

The Consultant shall perform the Services described in and at the hourly rates set forth in Exhibit A, ~~the terms of which are incorporated into this Agreement by reference.~~

*

Treat the language in the attachment as part of the contract. Use defined terms consistent with how they are used in the body of a contract; no need to redefine.

Exhibit A

- ☹ After the closing of the transactions contemplated by this Agreement (the “Closing”), Big Bad Buyer Co. (the “Buyer”) shall provide the following transition services to Helpless Seller, Inc. (the “Seller”):...
- ☺ After the Closing, the Buyer shall provide the following transition services to the Seller:...

*

For M&A contracts, do NOT embed representations or obligations in disclosure schedules (at least if you represent the Seller...)

- ⊖ Schedule 3.16(a) sets forth each written Contract to which the Seller is a party.

Schedule 3.16(a)

Distribution Agreement, dated as of April 20, 2010, between the Seller and Widget Co.

The Seller is in negotiations, and shall enter into a written Contract promptly after the Closing, with Big Bad Landlord, Inc. regarding the lease of space in Albuquerque, New Mexico.

Embedded obligation



*

For M&A contracts, do NOT embed representations or obligations in disclosure schedules (at least if you represent the Seller...)

- ⊖ Schedule 3.16(a) sets forth each written Contract to which the Seller is a party.

Schedule 3.16(a)

Distribution Agreement, dated as of April 20, 2010, between the Seller and Widget Co.

The Seller is party to three oral Contracts with its key suppliers.

Embedded representation



*

Some practical tips

- “in” not “on” an attachment
- “attachment,” “exhibit,” “index,” “schedule,” “annex,” “appendix” – “attachment” is probably the most generic and captures all of the various types
- Be sure to remember attachments, and attachments to attachments. And make sure that you attach them to the final document (pdf entire thing).

*

Ambiguities Relating to Modifiers

*

Preceding Modifiers

- ☹ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** Honda Odyssey, Toyota Camry, or Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** (a) Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** Honda Odyssey, **red** Toyota Camry, or **red** Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) (a) **red** Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Pontiac Firebird, Toyota Camry, or **red** Honda Odyssey.

*

Trailing Modifiers

- ☹ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey, Toyota Camry, or Pontiac Firebird **that is located on the Dealer's lot.**
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) (a) Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird **that is located on the Dealer's lot.**
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Pontiac Firebird **that is located on the Dealer's lot,** Honda Odyssey, or Toyota Camry.

*

Trailing Modifiers

- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) of the following **that is located on the Dealer's lot**: a Honda Odyssey; a Toyota Camry; or a Pontiac Firebird.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey **that is located on the Dealer's lot**, Toyota Camry **that is located on the Dealer's lot**, or Pontiac Firebird **that is located on Dealer's lot**.
- ☺ "**Dealer Car**" means any car **that is located on the Dealer's lot**.

Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Dealer Car that is a (a) Honda Odyssey, (b) Toyota Camry, or (c) Pontiac Firebird.

*

Trailing Modifiers

- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one):
 - (a) Honda Odyssey;
 - (b) Toyota Camry; or
 - (c) Pontiac Firebird **that is located on Dealer's lot**.

*

Both Preceding and Trailing Modifiers

- ⊖ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) **red** Honda Odyssey, Toyota Camry, or Pontiac Firebird **that is located on Dealer's lot.**

Unclear whether “**red**” extends to all three list items or just to the first one. Also unclear whether “**that is located on the Dealer's lot**” extends to all three list items or just the last one.

*

Opening Clauses

- ⊖ **Except as permitted by Section 6**, the Seller shall not disclose any Confidential Information and the Seller shall not take any Extraordinary Actions.
- ⊖ **Except as permitted by Section 6**, (a) the Seller shall not disclose any Confidential Information and (b) the Seller shall not take any Extraordinary Actions.
- ⊖ (a) **Except as permitted by Section 6**, the Seller shall not disclose any Confidential Information and (b) the Seller shall not take any Extraordinary Actions.
- ⊖ The Seller shall not disclose any Confidential Information (**except as permitted by Section 6**) and the Seller shall not take any Extraordinary Actions.

*

Closing Clauses

- ⊖ The Seller shall not disclose any Confidential Information and the Seller shall not take any Extraordinary Actions, **except as permitted by Section 6**.

Solve this problem using the same techniques as for opening clauses that cause ambiguity.

*

“in each case”

Can be a useful phrase for resolving ambiguity, usually for trailing clauses.

- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey, Toyota Camry, or Pontiac Firebird, **in each case** that is located on the Dealer’s lot.
- ☺ Chuck shall not buy any cars; except that Chuck is permitted to buy one (and only one) Honda Odyssey, Toyota Camry, or Pontiac Firebird, **in each case** that is red.

*

“in each case”

BUT: Can get into trouble with list items that are plural.

☹ Chuck shall not buy any cars; except that Chuck is permitted to buy one or more Honda Odysseys, Toyota Camrys, or Pontiac Firebirds, **in each case** that is located on the Dealer’s lot.

Does the trailing modifier apply to all three list items or does it instead apply only to each purchase of Pontiac Firebirds?

*

Contract Interpretation

* I'd like to thank Michael Zitelli for their help in preparing the materials relating to the subject matter of this portion of the presentation.

*

High-level flow chart

- Overarching question: What is the intent of the parties?
 - Best evidence of intent is the words on the page in the four corners of the document, unless those words are ambiguous.
 - When is a provision ambiguous? (High-level: More than one reasonable meaning)
 - * Toolkit for court to determine whether a provision is ambiguous.
 - If a provision is ambiguous, then (subject to certain exceptions), intent is a question of fact and we can look to parol evidence to help discern intent.

*

- Overarching question: What is the intent of the parties?
 - Determine intent **at the time the contract was made**
 - “Four Corners Rule”: Best evidence of intent is the words on the page of the contract (i.e., within the “four corners” of the document), **unless those words are ambiguous**.
 - Parol evidence should not be used to create an ambiguity
 - If language is clear, court will not bring in notions of “equity” and “fairness” to interpret a contract (thank goodness...)
 - Possible Exception: Scrivener’s error (but a high burden of proof)

*

“Manifested intent” rather than “actual intent”

The Seller shall sell the Properties to the Buyer. “Properties” means: (a) the Florida Estate; (b) the Alabama Estate; (c) the New York Estate; and (d) the Alaska Estate.

Suppose there is no ambiguity as to the definition of the Florida Estate, the Alabama Estate, the New York Estate, and the Alaska Estate.

Suppose there is a pre-signing email from the Buyer to the Seller in which the Buyer says: “You don’t have to sell me the New York Estate and the Alaska Estate.” Can that email be used to show that “Properties” should not include the New York Estate and the Alaska Estate? No!

*

So when is a provision ambiguous (i.e., not clear)?

- A provision is ambiguous if it is [reasonably]/[fairly] susceptible to more than one meaning when interpreted by an objective reader.
- Some other factors that might come into play in the definition:
 - an objective reader “in the position of the parties”
 - “...who is cognizant of the customs, practices, usages, and terminology as generally understood in the particular trade or business...”
 - But some courts have said that when plain, common, and ordinary meaning of a word lends itself to only one reasonable interpretation, that interpretation controls.
 - The contract should be viewed in light of the circumstances under which it was made.
 - As between two interpretations, the court will not adopt an absurd interpretation.
 - Not ambiguous simply because one party urges an alternative interpretation.

*

Side Note: What's the difference between ambiguity and vagueness?

- Vagueness: A lack of precision.
 - It can be classified a type ambiguity because a vague term can be subject to more than one reasonable interpretation to an objective reader.
 - Example: “Vinny is **tall.**” (vague) vs. “Vinny is **six feet, zero inches tall.**” (precise)
 - But vagueness differs from non-vague ambiguities in certain respects:
 - Vague terms are often capable of a “**spectrum**” of objectively reasonable meanings, and depend upon context; non-vague ambiguities often have a **discrete number** of objectively reasonable meanings.
 - Vagueness is often intended by the parties and used as a tool. (e.g., reasonableness)

*

So how do we know whether a provision is subject to more than one objectively reasonable meaning (etc.)?

- Preliminary Note: The determination of whether a provision is ambiguous is an issue of law for the court to decide.
- Toolkit of Contract-interpretation Tools
 - Preliminary Note: Some of these rules are more “rule-like,” others are default rules that can be “rebutted,” and others are preferences. And each court might treat a given contract-drafting principle differently.

*

Contract – Interpretation Toolkit

- Is the language clear on its face?
- Holistic principles (some overlap between these principles)
 - Read the contract as a whole; don't read provisions in a vacuum.
 - Provisions [must]/[should] not be interpreted so as to render any term superfluous or meaningless. Try to give meaning to each term in a contract.
 - Terms should be harmonized and read in context.
 - * Query whether “harmonize” means (1) interpreting so as to reduce or eliminate surplusage, or (2) to let other provisions (which might or might not be superfluous) guide the selection of one alternative interpretation over another. Meaning #2 is slightly broader.
 - Contracts entered into contemporaneously and for the same purpose [must]/[should] be read and interpreted together.

*

Contract – Interpretation Toolkit (continued)

- Canons of Construction
 - *Ejusdem generis* – “of the same kind”
 - Example: The Consultant shall not operate any vehicles while on the Premises, including [without limitation] sedans, trucks, jeeps, or vans.
 - *How about a tricycle or an airplane?*
 - *Expresio unius est exclusio alterus* – “the expression of one thing is the exclusion of the other”
 - Example: The Seller shall pay for the costs associated with the Litigation, including [without limitation] each of the following to the extent relating to the Litigation: the fees of the Buyer's legal counsel; the costs of reproducing discovery documents; and the costs of filing court papers.
 - *How about fees paid to expert witnesses?*

*

Contract – Interpretation Toolkit (continued)

- Cannons of Construction (continued)
 - *The specific governs over the general* – general language in a provision that applies to a given context will not apply to that context if that context is dealt with in a more specific manner
 - *Doctrine of last antecedent* – unless there is an indication otherwise, a trailing modifier will modify only the last antecedent in a list
 - Example: The Seller shall deliver to the Buyer all of the Seller's cars, bikes, and vans that are red.
 - *Applying the doctrine, "that are red" would modify only "vans."*
 - *Contra proferentum* – construe against the drafter of the contract
 - Not so applicable to sophisticated parties, but applicable for adhesion contracts (What about those contracts that pop up on my iPad for which I blindly click "Agree"??)

*

Contract – Interpretation Toolkit (continued)

- Other
 - *Preference for finding that a right to arbitration exists*
 - *Preference for finding an obligation rather than a condition*
 - For another day
 - *Contractual silence and gap-filling*
 - *Implied covenant of good faith (ugh)*

*

The court has analyzed whether a provision is ambiguous. Now what?

- If unambiguous, then court interprets as a matter of law using the words. No parol evidence.
 - If ambiguous, then parol evidence can come in
 - Intent is a question of fact; no summary judgment
 - Possible exception: where parol evidence is uncontroverted or so one-sided that no reasonable person could decide otherwise

*

Open the flood gates of parol evidence! (a/k/a a litigator's playground)

Statements of the parties

Julia: *Matthew said that I was dumb!*

Matthew: *Julia called me a liar!*

Caroline: *Julia and Matthew said that I am unduly prone to cognitive biases!*

Acts of the parties

He kicked me in the shin!

Prior dealings

Last time, she watched her show and then I watched my show!

Industry custom (might already come into play to a certain extent)

C'mon guys. Caroline is only four years old. Cut her some slack.

*

Miscellaneous Provisions in Contracts

* I'd like to thank Vanida Narrainen, Stephanie Oduro, and Andrew Silver for their help in preparing the materials relating to the subject matter of this portion of the presentation. *

- Parties, Beneficiaries, and Obligees
- Interpreting the Contract
- Enforcing the Contract
- Other

*

Parties, Beneficiaries, and Obligees

*

- Assignment: the transfer of a right to a third party
- Delegation: a party's appointment of a third party to perform an obligations under the contract or to satisfy a condition to the other party's performance under a contract
 - The delegating party is not discharged from its obligation to perform under the contract
 - Exception: Novation
 - The delegee becomes primarily liable to the non-delegating party; the non-delegating party is a third-party beneficiary of the delegation

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Parties, Beneficiaries, and Obligees > [Assignment and Delegation](#)

- Courts might distinguish between “assignments” and “delegations.”
- Rights are generally assignable and obligations are generally delegable
- Examples of exceptions to this general rule:
 - Statutes (e.g., assignment of wages)
 - Personal service contracts (e.g., Luciano cannot delegate his duty to sing to Vinny)
 - Assignments and delegations that are against public policy

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Parties, Beneficiaries, and Obligees > [Assignment and Delegation](#)

- Don't just prohibit (purported) assignments and delegations (language of obligation); make them void as between the parties (administrative language)
- Mergers
 - Most courts will consider a forward merger (but not a reverse merger) to be an assignment/delegation by operation of law
 - Does this make sense?

*

- Sample Provision:
 - Each Party shall not, and shall not purport, to assign any of such Party's rights hereunder, to delegate any of such Party's obligations hereunder, or to delegate such Party's performance in satisfaction of any conditions to any obligations of any other Party hereunder (and shall not enter into any Contract that requires any such assignment or delegation) without the prior written consent of the other Party, and any such purported assignment or delegation without obtaining such written consent will be void. [Each Party shall not merge, combine, or amalgamate with any other Person.]

*

- Sample Provision:

This Agreement is binding upon, and inures to the benefit of, the parties and their respective successors and [permitted] assigns.
- But is this language really useful?
- Drafting point: Do not define a "Party" to mean "the Party and the Party's successors and permitted assigns."

*

- General Rule: Only the parties to a contract can enforce the provisions of that contract.
- Certain Potential Exceptions: donees; creditors of a promisee
- To reduce the chances that a third party can enforce a contract, include a “no third-party beneficiaries” provision
 - [Except as provided in **Section** [__],] no provision hereof is intended to confer, no provision hereof will confer, and no provision hereof will be deemed to confer benefits, rights, or remedies upon any Person other than upon the Parties, their respective successors, and their respective permitted assigns.
- Be sure to carve out any provisions for which a person is an intended third-party beneficiary (e.g., indemnification provisions)

*

Interpreting the Contract

*

Sample provision (each party must consent):

This Agreement can be amended if, and only if, such amendment is in writing and is signed by each Party.

- Administrative Language
- “cannot be amended” rather than “the Parties shall not amend” or “the Parties are permitted to amend...only”

*

Goal is to prevent oral modification

- Exceptions: Oral modification despite “no oral modification”?
 - “Justice” and “Equity”: Common law and courts might nonetheless overrule (e.g., to avoid “inequitable” (whatever that means) results); consistent with the Restatement of Contracts
 - Separate contract rather than amendment to existing contract?
 - Course of conduct to permit oral modification (e.g., the evils of the U.C.C.)
 - *Promissory Estoppel* -- express promise to modify for which it is reasonably foreseeable that the other party will rely upon the promise (to take action or to refrain from taking action)
 - *Equitable Estoppel* -- one party conceals or misrepresents a fact and result of enforcing the no oral modification provision would be unjust.

*

Sample Provision (multi-party contracts):

This Agreement may be amended if, and only if, such amendment is in writing, and is signed by the Company and all of the Class A Common Unit Members; except that any amendment that affects the Class B Common Unit Members as a class in a materially adverse manner will not be effective unless approved by the Class B Common Unit Members holding a majority of all issued and outstanding Class B Common.

- Helpful if there are many parties to a contract, particularly if there is a group of parties with the same or similar rights under the contract (e.g., passive investors in a partnership)

*

- “Material” and “Adverse” are inherently vague terms (unless defined)
 - Consider including an “including” or a “deemed”
- Idiosyncratic Materiality

...and (b) any amendment that affects a Member of a class of Units in materially adverse manner relative to the manner in which other Members of a class are affected will not be effective unless approved by such Member.

*

- Proxy to sign amendments

Any amendment to this Agreement that is approved in accordance with this **Section 8.1** will be effective as against all Parties, and each Party shall sign any such amendment that is so approved. Each Class B Common Unit Holder hereby appoints each of the Company and each Person that the Company might designate, individually, as such Class B Common Unit Holder's proxy and attorney-in-fact, with full power of substitution and resubstitution, to sign any such amendment to this Agreement that is approved in accordance with this **Section 8.1**. The proxy and power of attorney set forth in the immediately foregoing sentence (the "**Proxy**") is given to secure the performance of the duties of the Class B Common Unit Holders under this **Section 8.1**. Each Class B Common Unit Member shall take such further action and execute such other instruments as might be necessary to effectuate the intent of the Proxy. The Proxy is irrevocable during the term hereof, is deemed to be coupled with an interest sufficient in law to support an irrevocable proxy, and operates to revoke any and all prior proxies or powers of attorney that each Class B Common Unit Holder granted with respect to the Class B Common Units. The power of attorney granted pursuant to this **Section 8.1** is a durable power of attorney and will survive each Class B Common Unit Holder's Incapacity. The Proxy terminates upon the termination hereof.

*

- Clarify that emails are not "signed writings"

Emails, including emails that bear an electronic "signature block" identifying the sender, do not constitute signed writings for purposes of this **Section 8.1**.

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Interpreting the Contract > Amendments and Waivers > [Waivers](#)

- Similar concerns as for amendments: actions (or inactions) or oral statements (or the lack thereof) being construed as a waiver of rights or a condition to an obligation
- Waiver of a condition vs. “waiver” of a right or remedy
- A court will not always respect a no-oral-waiver provision
 - Example: estoppel principle: the other party’s reliance (to its detriment) on the “waiving” party’s action or inaction

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Interpreting the Contract > Amendments and Waivers > [Waivers](#)

- Best approach might be to “do what you can” to prevent oral waivers
- Sample Provision:

No waiver by any Party of such Party’s rights, powers, or privileges hereunder, will be binding against the other Party. No such waiver by a Party will be enforceable against such Party unless such waiver was given in a written instrument signed by such Party. The waiver by any Party of any of such Party’s rights, powers, or privileges hereunder arising because of any claimed breach, default, or misrepresentation under or with respect to a provision hereof, whether intentional or not, will not thereby extend (and will not be deemed to thereby extend) to any prior separate or subsequent breach, default, or misrepresentation, respectively, by such Party and will not affect in any way any rights, powers, or privileges arising by virtue of any such prior separate or subsequent occurrence. No failure or delay by any Party in exercising any of such Party’s rights, powers, or privileges hereunder will operate as a waiver thereof, nor will any single or partial exercise thereof preclude any other or further exercise thereof or the exercise of any other right, power, or privilege hereunder or otherwise.

*

What is a merger provision and why is it used?

- Supersede prior agreements (written and oral)
- Supersede contemporaneous agreements (written and oral)

Preliminary Note: Conflicting standards and court cases relating to integration and the use of parol evidence.

*

Parol Evidence Rule: If a contract is “integrated,” then evidence of prior or contemporaneous agreements is inadmissible to contradict that contract’s written terms.

- “Integrated” writing = “final” expression of the parties’ agreement in the writing.
 - Can use parol evidence to supplement, but not contradict
- “Completely integrated” writing = “final, exclusive, and complete” expression of the parties’ agreement in the writing.
 - Cannot use parol evidence (even if consistent with written terms)
 - Exception: If a term or provision is ambiguous.

*

Sample Provision:

This Agreement and the Ancillary Documents (a) are a final, complete, and exclusive statement of the agreement and understanding of the Parties with respect of the subject matter hereof and thereof, (b) collectively constitute the entire agreement of the Parties with respect to the subject matter hereof and thereof, and (c) supersede, merge, and integrate herein any prior and contemporaneous negotiations, discussions, representations, understandings, and agreements between any of the Parties (including the Term Sheet and the Confidentiality Agreement), whether oral or written, with respect to the subject matter hereof or thereof.

*

Potential Exceptions to Intent of Merger Clauses:

- Courts might have different opinions as to whether a merger clause is conclusive evidence of integration or one factor to be used in determining integration
- Course of performance might be deemed a waiver
- Fraudulent inducement to enter into a contract
- Oral conditions precedent to effectiveness of a contract

*

Practical considerations:

- In transactions with multiple deal documents, consider the scope and subject matter of other deal documents
- What is “the subject matter of this Agreement”?
- Do you really want to include “all documents referenced herein and therein”?
- Contemporaneous side letters

*

Purpose is to clarify that a caption does not affect the interpretation of the applicable section or of the applicable contract

Titles, captions, and headings included herein are for convenience of reference only and are not to affect the meaning, construction, or interpretation hereof or of any provision hereof.

- Can a caption affect the scope of vagueness within a section?
- Can a caption affect the scope of vagueness within other sections or of a contract generally?
- Will a court nonetheless use a caption to assist in interpretation?
 - Understanding the parties “manifested intent” is key

*

Enforcing the Contract

*

- Purpose: Indicate to the court that, if one or more provisions are found to be an enforceable, then the entire contract should not thereby be unenforceable.
- Blue-pencil rule; rule of reasonableness
- Consider including language that specifies which terms are “essential” (such that, if those terms are found to be unenforceable, then the contract as a whole would be unenforceable)
- Sample Provision:
 - If any portion or provision hereof is to any extent determined to be illegal, invalid, or unenforceable by a court of competent jurisdiction, then the remainder hereof, and the application of such portion or provision in circumstances other than those as to which it is so determined to be illegal, invalid, or unenforceable, as applicable, will not be affected thereby. Without limiting the generality of the immediately foregoing sentence, if any portion or provision hereof is determined by any court of competent jurisdiction to be unenforceable by reason of excessive scope as to geographic, temporal, or functional coverage, then such provision will be deemed to extend only over the maximum geographic, temporal, and functional scope as to which such court determines it is permitted to be enforceable.

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Enforcing the Contract > Governing Law and Forum Selection > [Governing Law](#)

- Purpose:
 - provide greater certainty as to which law will apply;
 - reduce the cost in a dispute that would be associated with determining which law will apply;
 - take advantage of the law of certain jurisdictions (e.g., employee-favorable laws in California)

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Enforcing the Contract > Governing Law and Forum Selection > [Governing Law](#)

- Enforceability:
 - Most governing law clauses are enforceable if a connection or **reasonable relationship between the chosen jurisdiction and the transaction** can be demonstrated
 - Examples: principal place of business of the parties; jurisdiction in which the contract was negotiated
 - Some states have statutes that do not require such a nexus (but instead are based upon amount in controversy) (e.g., §5-1401 of the New York General Obligations Law). Some courts have nonetheless required a reasonable nexus.
 - A court might disregard in cases against public policy, adhesion contracts, or contract induced by fraud
 - Certain subject matter might be governed by law other than that chosen (e.g., corporate governance, U.C.C. rules relating to secured transactions)

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Enforcing the Contract > Governing Law and Forum Selection > [Governing Law](#)

- Practical Points:
 - Make clear that the chosen state's choice-of-law provisions do not apply (avoid *renvoi*)
 - Consider whether the selection of law applies to contract claims, as well as extra-contractual claims (e.g., tort)
 - Consider whether multiple jurisdictions should be designated, depending upon the subject matter
 - Consider referencing or tracking the language of a choice-of-law statute, if applicable

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Enforcing the Contract > Governing Law and Forum Selection > [Governing Law](#)

- Sample Provision:

This Agreement is governed by, and is to be interpreted and enforced in accordance with, the internal Laws of the State of New York applicable to contracts entered into and performed entirely within the State of New York (pursuant to Section 5-1401 of the New York General Obligations Law), without giving effect to any choice of law or conflict of laws rules or provisions (whether of the State of New York or any other jurisdiction) that would cause the application of the Laws of any jurisdiction other than the State of New York. The Parties acknowledge that (a) this Agreement was negotiated by or on behalf of the Parties, in whole or in part, in the State of New York, (b) the Parties are delivering this Agreement in the State of New York, and (c) the State of New York has a substantial relationship to Parties and to the Transactions.

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Enforcing the Contract > Governing Law and Forum Selection > [Forum Selection](#)

- Purpose: Parties agree that one or more courts can adjudicate a dispute between them arising under a contract.
- Enforceability: Generally respected, absent a showing of unreasonableness.
- Exclusive vs. Permissive
- *Forum Non-conveniens* Defense

*

The Nuts & Bolts of Contract Drafting: From Basic to Advanced Topics

Miscellaneous Provisions in Contracts > Enforcing the Contract > Governing Law and Forum Selection > [Forum Selection](#)

- Service of Process: Forum selection clauses often include language whereby the parties stipulate acceptable methods to serve process (e.g., pursuant to the contract's notice provisions)
- Other Methods of Resolution: Be sure to carve out those provisions that provide for alternative dispute resolution mechanisms (e.g., arbitration provisions and purchase price adjustment provisions)
 - But forum selection clauses can still be useful for obtaining a court order to enforce the ruling of an arbitrator or an accountant

*

- Sample Provision:

Each Party hereby irrevocably and unconditionally submits to the exclusive jurisdiction of, and venue in, any state or federal court located within the City of New York in the State of New York (any such court, a “**Permitted Court**”) for the purposes of any Suit arising out of this Agreement or any of the transactions contemplated hereby, and in each case the appropriate appellate courts therefrom, and each Party shall not commence any such Suit in a court other than any Permitted Court. Service of any process, summons, notice, or document by personal delivery or by U.S. registered mail to a Party’s address set forth in **Section 7.1** [provision concerning notice] (or such other address if changed in accordance with **Section 7.1**) will be effective service of process for any such Suit. Each Party (a) hereby irrevocably and unconditionally waives any objection to the laying of venue of any Suit arising out of this Agreement or any of the transactions contemplated hereby in any Permitted Court, and (b) hereby irrevocably and unconditionally waives any objection that such Party might now or in the future have, and shall not plead or claim, that any such Suit brought in any Permitted Court has been brought in an inconvenient forum. A judgment in any Suit is permitted to be enforced in other jurisdictions by suit on the judgment or in any other manner provided by Law. A Party’s submission to jurisdiction and venue set forth in this **Section 7.7** does not constitute a general submission by such Party to service of process in the City of New York or the State of New York for any purpose other than as provided in this **Section 7.7** and does not confer, and will not be deemed to confer, rights on any Person other than the Parties.

*

- Presumption in favor of jury trial
- Purpose of Waiver:
 - The parties might consider a non-jury trial to be quicker and less expensive.
 - An institution might think that a jury will favor “the little guy.”

*

- Enforceability:
 - Waiver should be “knowing, intentional, and voluntary”
 - More likely to be enforced if parties are of equal bargaining strength
 - More likely to be enforced if the provision was specifically negotiated, including with the advice of legal counsel
 - Location and formatting are key – provision should be prominently displayed.

*

- Sample Provision:

To the extent permitted by Law, each Party irrevocably and unconditionally waives any right that such Party might have to a trial by jury in any Suit arising out of or relating to this Agreement or the transactions contemplated hereby. Each Party acknowledges that: (a) such Party has considered the implications of the waiver in this **Section 7.18**; (b) such Party will continue to rely upon the waiver in this **Section 7.18** in such Party’s future dealings arising out of or relating to this Agreement, and the Transactions contemplated hereby, and (c) this provision is a material inducement for such Party to enter into this Agreement and the Transactions contemplated hereby.

*

- **Purpose:** Clarify the scope of remedies that a party can seek in connection with a dispute.
 - But by default, a party is generally not precluded from seeking remedies
 - Might be useful in instances in which remedies are specified to avoid the implication that only such specified remedies are available
- **Practice Point:** Be careful of including this provision if certain provisions of the contract are intended to have specific and exclusive remedies (e.g., indemnification provisions in M&A contracts)

- **Sample Provision:**

All rights and remedies hereunder are cumulative and in addition to, and not in lieu of, any other remedies available to any Party at law, in equity, or otherwise[, except to the extent expressly provided in **Section 11.2** to the contrary]. *

- Visit *Drafting Points* for my thoughts on drafting an equitable remedies provision:

<http://www.draftingpoints.com/2013/06/04/thoughts-on-ken-adamss-irreparable-harm-provision/>

The Sellers acknowledge that breach by any of the Sellers of any of the collective or respective obligations of any of the Sellers under section X [could]/[will likely] cause the Buyer to suffer irreparable harm, namely harm for which damages would be an inadequate remedy. The Sellers acknowledge that requiring, as a condition to obtaining an injunction, a restraining order, or any other equitable remedy with respect to such a breach, that the Buyer demonstrate that the Buyer would suffer irreparable harm [could]/[will likely] cause delay that results in the Buyer's suffering irreparable harm before any equitable remedy is granted. Therefore, if any of the Sellers breach any of the respective or collective obligations of any of the Sellers under section X, then, for purposes of determining whether a court should grant an equitable remedy in respect of that breach, any court should assume that that breach would cause the Buyer irreparable harm. *

Other

*

- Purpose: Excuse performance of an obligation if failure to perform results from forces beyond the control of the obligor, usually because of extreme circumstances.
- Examples:
 - acts of God
 - flood, fire, earthquake or explosion
 - war, invasion, hostilities (whether war is declared or not), terrorist threats or acts, riot or other civil unrest
 - government order or law
 - actions, embargoes or blockades in effect on or after the date of this Agreement
 - action by any governmental authority
 - national or regional emergency
 - strikes, labor stoppages or slowdowns or other industrial disturbances
 - shortage of adequate power or transportation facilities

*

- Nuances:
 - Potential Obligations of Affected Party
 - Must notify party entitled to performance within a certain period of time after becoming aware
 - Consider making this a condition, as well
 - Must state details of condition and expected length of delay
 - Must demonstrate that the event or circumstance:
 - prevented all or some performance
 - substantially hindered all or some performance
 - materially and adversely affected the party's ability to perform
 - Must use reasonable efforts to mitigate, if possible

*

- Other Nuances
 - "whether foreseeable or unforeseeable" (the court might otherwise read in an unforeseeability requirement)
 - Performance is excused "to the extent" that the event or circumstance prevented performance (rather than complete excuse if event or circumstance occurs)
 - List of events is exhaustive or non-exclusive
 - Common exclusion: economic hardship
 - Non-performing party not liable for damages to the party entitled to receive performance while force majeure event prevent performance
 - Allocation of costs associated with delay in performance (between nonperforming party and party entitled to receive performance)
 - Non-performing party and/or party entitled to receive performance is entitled to terminate if the force majeure event persists for a certain period of time
 - If the end of term of a contract occurs while a force majeure event in effect, toll term
 - Should extra time be added on to term if a force majeure event starts and ends prior to the end of the term of a contract?

*

- Purpose: A general statement that the parties will take actions to achieve the objectives of a contract
- Sample Provision:
Each Party shall, at the reasonable request of the other Party, take additional actions, or execute and deliver additional documents, to evidence or confirm the completion of the Transactions or the fulfillment of such other Party's obligations under any of the Transaction Documents.

*

- Nuances:
- Include a non-exhaustive list of actions that must be taken
- Standard of effort: reasonable efforts; best efforts
- Request of a party to take action required
- Advice of legal counsel (as to necessity) required
- Be sure to clarify that the standard of performance in a further assurances clause (e.g., reasonable efforts) will not operate to modify any specific standard of performance required by contract language

*

- Purpose: State clearly which parties are responsible for which transaction costs. Usually, each party is responsible for its own transaction costs.
- Sample Provision:
Each Party will be responsible for bearing such Party's expenses incurred in connection with the preparation, negotiation, execution, and delivery of this Agreement, including all fees and expenses of the Parties' respective agents, representatives, brokers, counsel (internal and outside), consultants, advisers, and accountants.

*

- Is this provision necessary?
- Carve-outs: Be careful to carve out those costs that should not be borne by the party incurring them, such as:
 - Costs that would be included within the definition of "Indemnifiable Losses" (or similar term)
 - Any costs that a party is required to bear in connection with the termination of the contract

*

- Purpose: Set forth: (1) the manner in which notices and other communications must be given in order to be acceptable under a contract and (2) the point in time when a notice will be deemed to have been given.
 - Don't leave notice and deemed notice to chance or to whatever defaults are prescribed by law
- Components of a Notice Provision:
 - Form of notice
 - Method of delivery
 - Time when delivery is deemed effective
 - Contact information
 - Manner of updating contact information
- Form of notice: nearly all contracts with a notice provision provide that notice must be in writing. *

- Method of Delivery:
 - Personally
 - Regular mail/certified mail
 - Overnight courier service
 - Fax
 - Email
 - Consider whether sending an email is sufficient or whether the sender must send a signed notice attached as a .pdf (or similar form of attachment)

- Time when delivery is deemed effective:
 - Personally – when established as having been given
 - How is proof of delivery established?
 - Certified/Regular mail - X Business Days after having been mailed
 - Or consider requiring sending “return receipt requested”
 - Overnight courier – as shown on evidence received from the courier
 - Fax – on the date and at the time when shown as received in the notice of receipt (or, if that time is after business hours (or a specific time), then on the next Business Day)
 - Email – at the time that notice of receipt is generated electronically by the recipient party opening the email (i.e., request a read receipt, which some recipients might be able to ignore) or at the time that the sender can demonstrate electronically that the email has been delivered (i.e., request a delivery receipt), or at such other time as the receiving party acknowledges receipt *

- Contact information:
 - Include all applicable information (e.g., fax number, email address)
 - Consider whether to address to an individual or to a title
 - Consider requiring that copies be sent to legal counsel (and be sure to include all applicable contact information for legal counsel)
- Method of updating contact information:
 - Pursuant to a notice provided by the party to all other parties that is delivered in accordance with the notice provision
 - Other readily ascertainable address for legal counsel

*

- Obligation vs. Condition: Distinction between making delivery requirements an obligation (“To provide notice to a recipient Party, a Party *shall...*”) or a condition precedent (“To be valid for purposes of this Agreement, any notice that is given pursuant to this Agreement *must...*”)
 - Would a court disregard notice if actual delivery could be demonstrated?
 - Deemed effective time of delivery might be important
 - Do NOT write: “Notice shall be given as follows...”
 - Truncated passive voice
 - Unclear whether this purports to impose an obligation or a condition

*

- Purpose: To prevent a party from claiming that a contract cannot be signed and delivered through separate counterparts.
- Drafting points:
 - Counterparts provisions often specify that counterparts can be delivered via facsimile
 - Note: a party can’t “execute” via facsimile
 - Counterparts provisions often specify that counterparts can be delivered via a .pdf attachment (or similar attachment) to an email displaying the party’s signed signature page

*

- Sample Provision:

Each Party is permitted to execute this Agreement in multiple counterparts, each of which will be deemed an original and all of which taken together will constitute one and the same instrument. Each Party is permitted to deliver this Agreement to the other Party by means of delivery of one or more counterpart signature pages via facsimile or as an attachment in portable document format (.pdf) or other email attachment format to an email addressed to the recipient Party. Any photographic copy, photocopy, or similar reproduction of this Agreement, any electronic file of this Agreement in portable document format (.pdf), or other email attachment format, or any copy of this Agreement delivered by facsimile transmission, in each case with all signatures reproduced on one or more sets of signature pages, will be considered as if it were manually executed.

*

Ready thy quill and powdered wig! It's time for...



*

Legal Archaisms > [“that” vs. “which” vs. “, which”](#)

“that” vs. “which” (vs. “, which”)

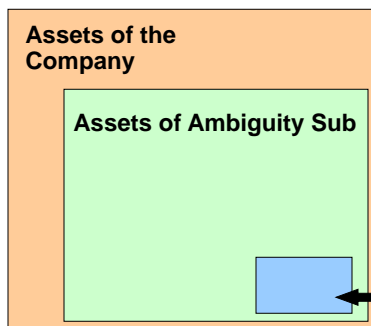
- **“that”** – Think: restrictive; limiting
 - I’ll give you all the books in my library **that** I have read.
 - ❖ i.e., I’m not going to give you all of the books in my library – just those that I have read.
- **“, which”** – Think: descriptive
 - I’ll give you all the books in my library, **which** I have read.
 - ❖ i.e., I have read all of the books in my library and I will give them to you.
- **“which”** [no preceding comma] – Think: Can I replace with “that”?
 - I’ll give you all the books in my library **which** I have read.
 - ❖ It’s unclear whether you get all the books in my library or only those that I have read.

*

Legal Archaisms > [“that” vs. “which” vs. “, which”](#)

“that” vs. “which” (vs. “, which”)

- ⚠ “Purchased Assets” means all of the assets owned by the Company and its Subsidiaries, other than those assets owned by Ambiguity Sub **which** are not material to the Company’s operations.



- If “which” is interpreted to mean “that”, then only the blue (small) rectangle gets carved out
 - But if “which” is interpreted to mean “, which”, then the green (medium) rectangle gets carved out
- Immaterial Assets of Ambiguity Sub

*

- ☹ WHEREAS,
- ☹ NOW, THEREFORE,
- ☹ IN WITNESS WHEREOF,
- ☹ Do hereby/does hereby
- ☹ Undertakes to –

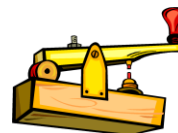
- just use “shall”



Lancelot does hereby conveyeth his undying love for Guenevere and henceforth shall stave off with sword all others who attempteth to bring her harm.

*

All notices, consents, approvals, reports, designations, requests, waivers, elections, and other communications (collectively, “Notices”) authorized or required to be given pursuant to this Agreement shall be given in writing and either personally delivered to the Partner to whom it is given or delivered by an established delivery service by which receipts are given or mailed by registered or certified mail, postage prepaid, or sent by **telex, electronic telecopier or telegram**, addressed to the Partner at his or its address listed beneath such Partner’s respective signature hereto.



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☹️ WITNESSETH:

☹️ WITNESSETH:

😊 WITNESSETH:

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Course Recap

*

[Course Recap](#)

- **Basics:** Language matters. Understand the category of language being used.
- **Conditions:** Break down a conditional clause into its components; “if” vs. “to the extent that”; don’t use “shall” in conditional clauses.
- **Exceptions/Subordination:** “Localized” exceptions vs. broad inclusions; be precise about what language is being subordinated.
- **“Deemed”:** “deemed to be” vs. “not deemed to be” vs. “deemed not to be.”
- **Time references:** Consider whether a start/end date is inclusive or exclusive; ambiguity of “within.”
- **“And”:** (1) collectively; (2) separately; or (3) either collectively or separately?
- **“Or”:** “inclusive” or “exclusive”?
- **“And/Or”:** Do you mean “either,” or do you instead mean “both”?

[Course Recap](#)

- **Formulas:** order of operations; leading text; enumeration and defined terms; formatting; algebraic variables; recursion; examples.
- **Attachments to Contracts:** made part of the contract by reference; don’t embed hidden obligations and representations in disclosure schedules.
- **Ambiguities Relating to Modifiers:** preceding modifiers; trailing modifiers; opening and closing clauses; “in each case.”
- **Contract Interpretation:** parties’ intent at time of contract; court determines whether ambiguous; “reasonably capable of more than one meaning”; tool for contract interpretation; if not ambiguous, look to language; if ambiguous, question of fact and introduce parol evidence.

[Course Recap](#)

- **Miscellaneous:** order of operations; leading text; enumeration and defined terms; formatting; algebraic variables; recursion; examples.
 - **Parties, Beneficiaries, and Obligees:** Assignment and Delegation; Successors and Assigns; Third-party Beneficiaries
 - **Interpreting the Contract:** Amendments and Waivers; Merger/Integration; Captions/Headings
 - **Enforcing the Contract:** Severability; Governing Law and Forum Selection; Waiver of Jury Trial; Cumulative Remedies and Election of Remedies
 - **Other:** Force Majeure; Further Assurances; Transaction Costs/Expenses; Notices; Counterparts
- **Legal Archaisms:** Don't be afraid to subvert the dominant contract-drafting paradigm!

*

The End > [This is the end of the presentation. Any questions? Please feel free to ask me now, as I'm packing up, or via email or a phone call.](#)

Questions?



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Vincent R. Martorana is Counsel in the Corporate & Securities Group with Reed Smith's New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, and consumer products.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses for in-house legal departments and at various other venues, including Practising Law Institute, Commercial Law Webadvisor, Strafford Webinars, The Business Development Academy, the National Academy of Continuing Legal Education, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

He is also the author of *Drafting Points* (www.draftingpoints.com), a blog that is dedicated to contract-drafting issues. He is also the author of several articles on contract drafting and interpretation, is the author of the Reed Smith LLP white paper, *A Guide to Contract Interpretation* (July 2014), and is the editor of the Reed Smith LLP *Contract-Drafting Bulletin*.

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), *magna cum laude*, from the Wharton School at the University of Pennsylvania.



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To receive regular updates on contract-drafting issues, subscribe to *Drafting Points* at www.draftingpoints.com.

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Fin!

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