

# Contents

<i>Preface</i>		<i>xxi</i>
<b>Part 1</b>	<b>Translating the Business Deal into Contract Concepts</b>	<b>1</b>
<b>Chapter 1</b>	<b>A Few Words about Contract Drafting and This Book</b>	<b>3</b>
1.1	Introduction	<b>3</b>
1.2	What Does a Contract Do?	<b>3</b>
1.3	What Are a Contract's Goals?	<b>4</b>
1.4	What Is the Context within Which Contracts Are Drafted?	<b>4</b>
1.5	Does This Book Cover All Kinds of Contracts?	<b>4</b>
1.6	Why Should You Learn to Draft if You Plan to Litigate?	<b>5</b>
1.7	What Will This Book Teach You?	<b>5</b>
1.8	How Is This Book Organized?	<b>6</b>
1.9	Stylistic Matters	<b>7</b>
1.10	Some Final Words	<b>8</b>
<b>Chapter 2</b>	<b>The Building Blocks of Contracts: The Seven Contract Concepts</b>	<b>9</b>
2.1	Introduction	<b>9</b>
2.2	Capsule Definitions	<b>9</b>
2.3	Translating the Business Deal into Contract Concepts	<b>10</b>
<b>Chapter 3</b>	<b>Translating the Business Deal into Contract Concepts: Part 1 (Representations and Warranties &amp; Covenants and Rights)</b>	<b>11</b>
3.1	Introduction	<b>11</b>
3.2	Representations and Warranties	<b>11</b>
3.2.1	Definitions	<b>11</b>
3.2.2	Remedies	<b>14</b>
3.2.3	Why a Party Should Receive Both Representations and Warranties	<b>16</b>
3.2.4	Risk Allocation	<b>17</b>
3.3	Covenants	<b>19</b>
3.3.1	Definitions and Uses of Covenants	<b>19</b>
3.3.2	Degrees of Obligation	<b>21</b>
3.3.3	Remedies	<b>23</b>
3.4	Rights	<b>23</b>
<b>Chapter 4</b>	<b>Translating the Business Deal into Contract Concepts: Part 2 (Conditions, Discretionary Authority, and Declarations)</b>	<b>25</b>
4.1	Introduction	<b>25</b>
4.2	Conditions to Obligations and the Exercise of Rights	<b>25</b>
4.2.1	The Basics	<b>25</b>
4.2.2	Ongoing Conditions and Walk-Away Conditions	<b>26</b>

4.2.3	Relationship between Conditions and Covenants	27
4.2.4	Risk Allocation	28
4.3	Discretionary Authority	29
4.4	Declarations	31
4.5	A Contract's Building Blocks	33
<b>Part 2</b>	<b>Drafting a Contract's Parts</b>	<b>35</b>
<b>Chapter 5</b>	<b>A Contract's Parts</b>	<b>37</b>
5.1	Introduction	37
5.2	Introductory Provisions	38
5.2.1	Preamble	38
5.2.2	Recitals	38
5.2.3	Words of Agreement	38
5.3	Definitions and Defined Terms	39
5.4	Action Sections	39
5.4.1	Subject Matter Performance Provisions	39
5.4.2	Consideration	40
5.4.3	Term	40
5.5	Closing Related Provisions	41
5.6	Other Substantive Business Provisions	41
5.7	Endgame Provisions	42
5.8	General Provisions	42
5.9	Signature Lines	43
<b>Chapter 6</b>	<b>Introductory Provisions: Preamble, Recitals, and Words of Agreement</b>	<b>49</b>
6.1	Introduction	49
6.2	Preamble	51
6.2.1	Name of the Agreement	51
6.2.2	Date	52
6.2.3	Parties	54
6.2.3.1	Identifying the Parties	55
6.2.3.2	Defining the Entity	56
6.2.4	Defining the Agreement	60
6.3	Recitals	60
6.4	Words of Agreement	65
<b>Chapter 7</b>	<b>Definitions and Defined Terms</b>	<b>73</b>
7.1	Introduction	73
7.1.1	Definitions	73
7.1.2	Defined Terms	74
7.2	Strategic Concerns in Defining Terms	74
7.3	Definitions as Standard-Setting Tools	75
7.4	Placement of Definitions	76
7.5	Guidelines for Drafting Definitions and Defined Terms	78
7.5.1	General Guidelines	78
7.5.2	Specific Guidelines: Defining Terms in the Definitions Section	78
7.5.3	Specific Guidelines: Defining Terms in Context	87
7.6	Other Provisions in the Definitions Section	87

<b>Chapter 8</b>	<b>Action Sections</b>	<b>95</b>
8.1	Introduction	<b>95</b>
8.2	Subject Matter Performance Provision	<b>95</b>
8.3	Consideration Provisions	<b>97</b>
8.4	Term	<b>103</b>
8.5	Closings and the Closing Date	<b>104</b>
8.6	Closing Deliveries	<b>106</b>
<b>Chapter 9</b>	<b>Representations and Warranties</b>	<b>113</b>
9.1	Introduction to Chapters 9 through 14	<b>113</b>
9.2	General Comments on Drafting Representations and Warranties	<b>113</b>
9.3	Drafting the Substance of Representations	<b>114</b>
9.3.1	Representations with respect to the Past, Present, and Future	<b>115</b>
9.3.2	Active vs. Passive Voice	<b>117</b>
9.4	Warranties	<b>118</b>
9.4.1	Warranties with Respect to the Future	<b>118</b>
9.4.2	Risk Allocation	<b>119</b>
<b>Chapter 10</b>	<b>Covenants and Rights</b>	<b>125</b>
10.1	Drafting the Substance of Covenants	<b>125</b>
10.2	Drafting Guidelines	<b>126</b>
<b>Chapter 11</b>	<b>Conditions to an Obligation</b>	<b>133</b>
11.1	Introduction	<b>133</b>
11.2	Drafting the Substance of Conditions	<b>133</b>
11.3	How to Signal a Condition	<b>134</b>
11.3.1	Language that Signals a Condition outside a Conditions Article	<b>134</b>
11.3.2	Language that Signals a Condition in a Conditions Article	<b>136</b>
11.4	Contractual Consequence of a Failed Condition	<b>138</b>
11.5	Relationship between Covenants and Conditions	<b>138</b>
<b>Chapter 12</b>	<b>Discretionary Authority and Declarations</b>	<b>141</b>
12.1	Discretionary Authority	<b>141</b>
12.1.1	Drafting the Substance of a Discretionary Authority Provision	<b>141</b>
12.1.2	Use of <i>May</i> to Signal Discretionary Authority	<b>142</b>
12.1.3	Conditions to Discretionary Authority	<b>143</b>
12.1.4	Discretionary Authority Posing as a Declaration	<b>143</b>
12.2	Declarations	<b>144</b>
<b>Chapter 13</b>	<b><i>Will</i> and <i>Shall</i></b>	<b>147</b>
13.1	Introduction	<b>147</b>
13.2	When to Use <i>Will</i>	<b>147</b>
13.3	When to Use <i>Shall</i> and Testing Whether <i>Shall</i> Is Correct	<b>148</b>
<b>Chapter 14</b>	<b>Drafting the Contract Concepts—A Summary Chart</b>	<b>153</b>

<b>Chapter 15</b>	<b>Endgame Provisions</b>	<b>157</b>
15.1	Introduction	157
15.2	Friendly Terminations	157
15.3	Unfriendly Terminations	158
	15.3.1 Events Precipitating Unfriendly Terminations	159
	15.3.2 Remedies	160
	15.3.3 Dispute Resolution Provisions	161
15.4	Location of the Endgame Provisions	162
15.5	Drafting the Endgame Provisions	162
<b>Chapter 16</b>	<b>General Provisions</b>	<b>167</b>
16.1	Introduction	167
16.2	Assignment and Delegation	168
	16.2.1 The Basics of Assignments and Delegations	168
	16.2.2 Antiassignment Provisions	170
	16.2.3 Antidelegation Provisions	171
16.3	Successors and Assigns	172
16.4	Governing Law	173
16.5	Waiver of Jury Trial	175
16.6	Notice	175
16.7	Severability	176
16.8	Amendments	177
16.9	Merger	178
16.10	Counterparts	179
<b>Chapter 17</b>	<b>Signatures</b>	<b>187</b>
17.1	Introduction	187
17.2	Execution and Delivery	187
	17.2.1 Definitions	187
	17.2.2 Delivery and Contract Formation	188
17.3	The Concluding Paragraph	189
17.4	Drafting the Signature Blocks	190
	17.4.1 Drafting the Signature Block of an Individual	191
	17.4.2 Drafting the Signature Block of a Corporation	191
	17.4.3 Drafting the Signature Blocks of a General Partnership, a Limited Partnership, and a Limited Liability Partnership	192
	17.4.4 Drafting the Signature Block of an LLC	193
17.5	Mode of Execution	194
	17.5.1 E-signatures	194
	17.5.2 Counterparts	194
	17.5.3 Stand-Alone Signature Pages	195
17.6	Antifraud Mechanisms	195
17.7	Initialing Other Than as an Antifraud Mechanism	196
17.8	Acknowledgments	196
<b>Part 3</b>	<b>Drafting Clearly and Unambiguously</b>	<b>199</b>
<b>Chapter 18</b>	<b>Legalese</b>	<b>201</b>
18.1	Introduction	201
18.2	Formal and Archaic Words	202

18.3	Couplets and Triplets	204
18.4	Pretentious and Verbose Expressions	205
<b>Chapter 19</b>	<b>Clarity Through Format</b>	<b>209</b>
19.1	Introduction	209
19.2	Sections and Subsections	209
19.3	Tabulation	211
19.3.1	Explanation of Tabulation and When to Use It	211
19.3.2	How to Tabulate	213
19.3.3	Multilevel Tabulation	218
19.3.4	Double Tabulation	219
19.4	Numbering Systems	220
19.5	Headings	223
19.6	Table of Contents	223
<b>Chapter 20</b>	<b>Clarity Through Sentence Structure</b>	<b>227</b>
20.1	Introduction	227
20.2	Short Sentences	227
20.3	Sentence Core	228
20.3.1	Keep the Core Together	228
20.3.2	Reduce the Number of Words Preceding the Core Words	228
20.4	Short Before Long	229
20.4.1	Put Short Phrases before Long Phrases	229
20.4.2	Put the Short Equivalent as the Subject in a Declaration	230
<b>Chapter 21</b>	<b>Ambiguity</b>	<b>235</b>
21.1	Introduction	235
21.2	Ambiguity and Vagueness	235
21.2.1	Definition of Ambiguity	235
21.2.2	Vagueness Distinguished from Ambiguity	236
21.3	Ambiguities Arising from Sentence Structure	236
21.3.1	Modifiers of Items in a Compound or Series	236
21.3.2	The Meanings of <i>And</i> and <i>Or</i>	237
21.3.3	Multiple Adjectives	239
21.3.4	<i>And</i> and <i>Or</i> in the Same Sentence	239
21.3.5	Sentence Ending with a <i>Because</i> Clause	241
21.3.6	Successive Prepositional Phrases	241
21.4	Dates, Time, and Age	242
21.4.1	Dates	242
21.4.1.1	The Problems	242
21.4.1.2	The Cures	243
21.4.2	Time	244
21.4.2.1	Measurement of Time Periods	244
21.4.2.2	Time of Day	247
21.4.3	Age	247
21.5	Using <i>if/then</i> Formulations to Draft Conditions	247
21.6	Plurals	247
21.7	Provisos	250
21.8	Say the Same Thing the Same Way	251

21.8.1	Establishing Standards and Craftsmanship	251
21.8.2	Issues in Acquisition and Credit Agreements: Representations and Warranties vs. Covenants	252
21.8.3	Similar Provisions in More than One Agreement	253
21.8.4	Contract Provisions and Documents Based upon Statutory Provisions	254
<b>Chapter 22</b>	<b>Numbers and Financial Provisions</b>	<b>263</b>
22.1	Introduction	263
22.2	How to Draft Numbers	263
22.3	How to Draft Mathematical Formulas	264
22.3.1	Basic Mathematical Operations	264
22.3.2	The Order of Mathematical Operations	265
22.3.3	Drafting the Formula	266
22.4	How to Draft Provisions Involving Financial Statement Concepts	269
22.4.1	GAAP as an Evolving Standard	270
22.4.2	GAAP's Authorization of Alternative Principles	271
22.4.3	Non-GAAP Alternatives	272
22.4.4	Agreements Using Balance Sheet Accounts	272
22.4.5	Agreements Using Revenue and Earnings Concepts	273
<b>Chapter 23</b>	<b>A Potpourri of Other Drafting Considerations</b>	<b>275</b>
23.1	Gender-Neutral Drafting	275
23.2	The Cascade Effect	276
23.3	Exceptions	277
23.3.1	How to Signal an Exception	277
23.3.2	Placement of the Exception	277
23.3.3	Except as Otherwise Provided	280
23.4	Notwithstanding Anything to the Contrary	280
23.5	Without Limiting the Generality of the Preceding	280
23.6	<i>Ejusdem Generis</i>	281
23.7	<i>Experssio Unius Est Exclusio Alterius</i>	282
23.8	Deem	282
23.9	Schedules and Exhibits	282
23.9.1	Introduction	282
23.9.2	Schedules	283
23.9.3	Exhibits	284
23.10	Nominalization	285
23.11	Parallel Drafting	286
23.12	Respectively	286
23.13	As the Case May Be	287
23.14	<i>There is</i> and <i>There are</i>	287
23.15	The Possessive	287
23.16	<i>Any</i> and <i>Each</i>	288
<b>Chapter 24</b>	<b>Deconstructing Complex Provisions</b>	<b>293</b>
24.1	The Six-Step Process	293
24.1.1	Explicate	293
24.1.2	Create Clarity through Format	295
24.1.3	Create Clarity through Sentence Structure	296

24.1.4	Clarify Ambiguities	297
24.1.5	Root Out Legalese	298
24.1.6	Check Substance	298
<b>Part 4</b>	<b>Drafting from the Client's Perspective</b>	<b>301</b>
<b>Chapter 25</b>	<b>Adding Value to the Deal</b>	<b>303</b>
25.1	Introduction	303
25.2	Money	304
25.2.1	Amount to Be Paid or Received	304
25.2.2	Timing of Payments	304
25.2.3	Credit Risk	304
25.2.4	Issues Relating to Payment Formulas	305
25.2.5	Transaction Expenses	306
25.2.6	Accounting and Tax Issues	306
25.2.7	Who, What, When, Where, Why, How, and How Much?	306
25.2.8	Endgame	306
25.3	Risk	306
25.3.1	Types of Risk	306
25.3.2	Evaluating the Risk	307
25.3.3	Methods to Mitigate Risk	307
25.4	Control	308
25.5	Standards	309
25.6	Endgame	310
<b>Part 5</b>	<b>Putting a Contract Together</b>	<b>319</b>
<b>Chapter 26</b>	<b>Organizing a Contract and Its Provisions</b>	<b>321</b>
26.1	Introduction	321
26.2	A Contract's Organizational Structure	322
26.2.1	Organization at the Macro Level	322
26.3	Organization of the Business Provisions and Individual Provisions	323
26.3.1	Subject Matter and Relative Importance	323
26.3.2	Contract Concepts	326
26.3.3	Chronology	326
26.3.4	Party	326
<b>Chapter 27</b>	<b>The Drafting Process</b>	<b>329</b>
27.1	Introduction	329
27.2	Agreeing to the Business Terms	329
27.3	Determining Who Drafts the Contract	330
27.4	Learning about a Transaction	330
27.4.1	Learning about a Transaction from a Client	331
27.4.2	Learning about a Transaction from a Supervising Lawyer	334
27.5	Preparing to Draft a Contract	334
27.5.1	Researching the Law and Obtaining the Advice of Specialists	334
27.5.2	Researching the Parties and the Industry	335
27.6	Drafting with and without a Precedent	335
27.6.1	Choosing a Precedent	335

27.6.2	Using a Precedent	336
27.6.3	Drafting Without a Precedent	337
27.7	The Logistics of Drafting a Contract	338
27.8	Drafting the Contract	339
27.8.1	Other Drafters	339
27.8.2	Translating the Business Deal into Contract Concepts	339
27.8.3	Drafting the First Draft	339
27.8.3.1	How to Begin	339
27.8.3.2	The Definitions	340
27.8.3.3	The Business Provisions	340
27.8.3.4	Finalizing the Contract	342
27.8.4	Redrafting the Contract	342
27.8.4.1	The Cover Memo	343
<b>Chapter 28</b>	<b>How to Review and Comment on a Contract</b>	<b>345</b>
28.1	Introduction	345
28.2	Prepare	345
28.3	Get Your Bearings	346
28.4	Read the Key Business Provisions	346
28.5	Read the Entire Contract	347
28.6	Prepare Comments	349
28.6.1	Mark-ups	350
28.6.2	A Memorandum	352
28.6.3	Oral Comments	353
<b>Chapter 29</b>	<b>Amendments, Consents, and Waivers</b>	<b>361</b>
29.1	Introduction	361
29.2	Amendments	361
29.2.1	The Introductory Provisions and the Definitions	362
29.2.2	Deciding What to Amend	363
29.2.3	The Action Sections	363
29.2.4	Other Provisions	365
29.3	Restated Agreements	366
29.4	Consents	368
29.4.1	Definition	368
29.4.2	Drafting the Request for Consent and the Consent	368
29.5	Waivers	368
29.5.1	Definition	368
29.6	Choosing between a Consent and a Waiver	369
<b>Part 6</b>	<b>Drafting Ethically</b>	<b>375</b>
<b>Chapter 30</b>	<b>Ethical Issues in Drafting</b>	<b>377</b>
30.1	Introduction	377
30.2	The Drafter's Role	378
30.3	The Drafter's Responsibilities	379
30.4	Interactions with Third Parties	380
30.5	Representation of Multiple Clients Concurrently	381
30.6	Multijurisdictional Practice	381

<b>Chapter 31 Additional Exercises</b>	<b>409</b>
Exercise 31-1 Revised Car Purchase Agreement	<b>409</b>
Exercise 31-2 Aircraft Purchase Agreement	<b>410</b>
<b>Appendix A Asset Purchase Agreement</b>	<b>425</b>
<b>Appendix B Website Development Agreement</b>	<b>443</b>
<b>Appendix C Escrow Agreements</b>	<b>451</b>
<i>Index</i>	<i>453</i>