

Contents

Preface

xxi

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

	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
Part 2	Drafting a Contract's Parts	35
Chapter 5	A Contract's Parts	37
	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
Chapter 6	Introductory Provisions: Preamble, Recitals, and Words of Agreement	49
	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
Chapter 7	Definitions and Defined Terms	73
	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

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

Chapter 15	Endgame Provisions	157
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
Chapter 16	General Provisions	167
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
Chapter 17	Signatures	187
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
Part 3	Drafting Clearly and Unambiguously	199
Chapter 18	Legalese	201
18.1	Introduction	201
18.2	Formal and Archaic Words	202

18.3	Couplets and Triplets	204
18.4	Pretentious and Verbose Expressions	205
Chapter 19	Clarity Through Format	209
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
Chapter 20	Clarity Through Sentence Structure	227
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
Chapter 21	Ambiguity	235
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
Chapter 22	Numbers and Financial Provisions	263
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
Chapter 23	A Potpourri of Other Drafting Considerations	275
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
Chapter 24	Deconstructing Complex Provisions	293
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
Part 4	Drafting from the Client's Perspective	301
Chapter 25	Adding Value to the Deal	303
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
Part 5	Putting a Contract Together	319
Chapter 26	Organizing a Contract and Its Provisions	321
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
Chapter 27	The Drafting Process	329
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
Chapter 28	How to Review and Comment on a Contract	345
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
	26.8.3 Oral Comments	353
Chapter 29	Amendments, Consents, and Waivers	361
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
Part 6	Drafting Ethically	375
Chapter 30	Ethical Issues in Drafting	377
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

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