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U.S. Embassy Moscow



# U.S. LEGAL WRITING:

## SESSION 3: CONTRACT PROVISIONS #B

U.S. Department of State

Facilitated By:

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# Language of Contract Drafting: Minor Contractual Provisions

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<https://www.menti.com/rp1e17su5b>

# Pointers

In drafting a contract, you should always bear these following principles in mind:

- ❑ Be conversant with the parties' wishes.
- ❑ Use a checklist of clauses that relate to the subject of the contract.
- ❑ Be precise in the choice of words.
- ❑ Use several sample contracts to establish the format of the agreement.

# Which are parts of a contract?

1. Title
2. Preamble
3. Recitals
4. Words of Agreement
5. Defined Terms
6. Performance Provision
7. Consideration
8. Term and Termination
9. Covenants
10. Conditions
11. Representations and Warranties
12. Remedies
13. Boilerplate Provisions
14. Concluding clause and signature block

# Parts of a contract

**3. Recitals:** Explain why the parties are entering into the contract. They are also called “background.”

- Who the parties are
- The context of the agreement
- The purpose of the agreement
- Any assumptions the parties are making
- Risks inherent in the transaction

# Recitals

Traditionally, recitals start with a “Whereas.”

However, the trend toward the use of plain English has led many drafters to delete this archaic word and simply use a heading called 'Recitals' or an introductory statement, such as:

*'This contract is made with reference to the following facts.'*

## Recitals

The following are the recitals from the consulting agreement you reviewed in the first exercise when you identified parts of a contract. Rewrite them so they are more concise. You might also consider how to rewrite them without the “Whereas” clauses and merely as sentences under a “Recitals” heading. Please write your response in 100 words or less.

**WHEREAS**, the Company is in need of certain consulting services to aid it in furthering the development of one or more of pharmaceutical products; and

**WHEREAS**, the Company wishes to obtain consulting services of Chief Strategy Officer (“CSO”) from the Consultant and the Consultant wishes to provide the Company with such consulting services as an external consultant to the Company and pursuant to the terms and conditions of this Agreement; and

**WHEREAS**, Consultant possesses significant knowledge and expertise in the field, and is capable of providing such services to the Company; and

**WHEREAS**, the Company is desirous of retaining Consultant as a consultant to perform certain services described herein;



*The Company requires consulting services to:*

- 1. further develop pharmaceutical products,*
- 2. benefit from external consulting based on the significant expert knowledge of the Consultant's Chief Strategy Officer (CSO),*
- 3. ....*

**WHEREAS**, the Company is in need of certain consulting services to aid it in furthering the development of one or more of pharmaceutical products; and

**WHEREAS**, the Company wishes to obtain consulting services of Chief Strategy Officer ("CSO") from the Consultant and the Consultant wishes to provide the Company with such consulting services as an external consultant to the Company and pursuant to the terms and conditions of this Agreement; and

**WHEREAS**, Consultant possesses significant knowledge and expertise in the field, and is capable of providing such services to the Company; and

**WHEREAS**, the Company is desirous of retaining Consultant as a consultant to perform certain services described herein;

## How to Spot Bad Construction: Working Words and Glue Words

The working words carry the meaning of the sentence.

In the preceding sentence the **working words** are these: working, words, carry, meaning, and sentence.

The working words carry the meaning of the sentence.

The others are **glue words**: the, the, of, and the.

The working words carry the meaning of the sentence.

## **How to Spot Bad Construction: Working Words and Glue Words**

“The working words carry the meaning of the sentence.”

The glue words perform a vital service. They hold the working words together to form a proper, grammatical sentence. Without them, the sentence would read like a tweet.

But if the proportion of glue words is too high, that is a symptom of a badly constructed sentence. The extra glue words add unnecessary bulk and bog down your writing.

## Working Words and Glue Words

Consider this example:

A trial by jury was requested by the defendant.

If we underline the **working words**, the sentence looks like this:

- A. A trial by jury was requested by the defendant.
- B. A trial by jury was requested by the defendant.
- C. A trial by jury was requested by the defendant.
- D. A trial by jury was requested by the defendant.

## Working Words and Glue Words

EXAMPLE: A trial by jury was requested by the defendant.

What words in that nine-word sentence are glue?

- A. A trial by jury was requested by the defendant.
- B. A trial by jury was requested by the defendant.
- C. A trial by jury was requested by the defendant.
- D. A trial by jury was requested by the defendant.

## Working Words and Glue Words

EXAMPLE Answer (B):

A trial by jury was requested by the defendant.

Five words in that nine-word sentence are glue: a, by, was, by, and the. That proportion of glue words is too high.

Say the same thing in a tighter sentence with less glue.

1. Move defendant to the front and make it the subject.
2. Use jury trial in place of trial by jury.

REVISED: The defendant requested a jury trial.

ORIGINAL: A trial by jury was requested by the defendant.

## Rewrite

Rewrite this provision from the same performance award agreement in 15 words or less. Make sure to retain its substantive meaning.

**From *Michigan Contract Law*, Sec. 16.37-Boilerplate**

### **Clause No. 1: Integration**

This Agreement, together with any affixed schedules and exhibits, constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings.

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This Agreement, together with any affixed schedules and exhibits, constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings.

### **Entire Agreement**

- A. This Attachment and its agreements supersede the entire understanding between the parties.
- B. This Agreement and its attachments contain the entire understanding between the parties.
- C. This Agreement affixes the schedules prior to the entire understanding between the parties.
- D. This Attachment, together supersedes the entire understanding between the parties.



## **Rewrite**

Rewrite this provision from the same performance award agreement in 15 words or less. Make sure to retain its substantive meaning.

**From *Michigan Contract Law*, Sec. 16.37-Boilerplate**

### **Clause No. 1: Integration**

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### **Entire Agreement**

B. This Agreement and its attachments contain the entire understanding between the parties.

## **Rewrite**

Rewrite this provision from the same performance award agreement in 10 words or less. Make sure to retain its substantive meaning.

### **Clause No. 2: Choice of Law**

This Agreement will be governed and controlled in all respects by the laws of the State of Michigan, including interpretation, enforceability, validity, and construction.

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This Agreement will be governed and controlled in all respects by the laws of the State of Michigan, including interpretation, enforceability, validity, and construction.

Rewrite in 10 words or less

### **Applicable Law**

- A. This Michigan Agreement will be governed and controlled.
- B. This Agreement will be respected and interpreted by State law.
- C. This Michigan law Agreement will be governed and interpreted the parties.
- D. This Agreement will be governed and interpreted by Michigan law.

## **Rewrite**

Rewrite this provision from the same performance award agreement in 10 words or less. Make sure to retain its substantive meaning.

### **Clause No. 2: Choice of Law**

This Agreement will be governed and controlled in all respects by the laws of the State of Michigan, including interpretation, enforceability, validity, and construction.

### **Applicable Law**

D. This Agreement will be governed and interpreted by Michigan law.

## Rewrite

Rewrite this provision from the same performance award agreement in 60 words or less. Make sure to retain its substantive meaning.

### **Clause No. 5: Waiver**

Seller's failure to exercise a right or remedy or Seller's acceptance of a partial or delinquent payment will not operate as a waiver of any of Seller's rights or Purchaser's obligations under this Agreement *and* will not *constitute* a waiver of Seller's right to declare *an* immediate or *a* subsequent default.

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### **Waiver – 60 Words or less.**

- A. A waiver of a breach of any term in this Agreement will not be considered (1) a waiver of a further breach of the same term, or (2) a waiver of a breach of any other term, or (3) a waiver of Seller's right to declare *an* immediate *or a* subsequent default.
- B. A breach of any term in this Agreement will be considered (1) a waiver of a further breach of the same term, or (2) a waiver of a breach of any other term, or (3) a waiver of Seller's right to declare *an* immediate *or a* subsequent default.

## Rewrite

Rewrite this provision from the same performance award agreement in 60 words or less. Make sure to retain its substantive meaning.

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### Waiver

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## Rewrite

Rewrite this provision from the same performance award agreement in 35 words or less. Make sure to retain its substantive meaning.

### **Clause No. 6: Severability**

Whenever possible, each provision of this Agreement will be interpreted in such a way as to be effective and valid under applicable law. If a provision is prohibited by or invalid under applicable law, it will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.



## **Clause No. 6: Severability**

Whenever possible, each provision of this Agreement will be interpreted in such a way as to be effective and valid under applicable law. If a provision is prohibited by or invalid under applicable law, it will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

### **Severability – 35 words or less.**

- A. Each provision of this Agreement shall be effective in a way that is invalid under applicable law. If any provision is held invalid, the rest of the Agreement will remain in full effect.
- B. Each provision of this Agreement must be interpreted in a way that is valid under applicable law. If any provision is held invalid, the rest of the Agreement will remain in full effect.
- C. Each Agreement of this provision must be applied in an invalid way under applicable law. If any provision is held valid, the rest of the Agreement will remain ineffective.

## Rewrite

Rewrite this provision from the same performance award agreement in 35 words or less. Make sure to retain its substantive meaning.

### **Clause No. 6: Severability**

Whenever possible, each provision of this Agreement will be interpreted in such a way as to be effective and valid under applicable law. If a provision is prohibited by or invalid under applicable law, it will be ineffective only to the extent of such prohibition or invalidity, without invalidating the remainder of such provision or the remaining provisions of this Agreement.

### **Severability**

B. Each provision of this Agreement must be interpreted in a way that is valid under applicable law. If any provision is held invalid, the rest of the Agreement will remain in full effect.

# Which are parts of a contract?

1. Title
2. Preamble
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# What Is a Contract Provision?

A contract provision is a stipulation within a contract, legal document, or a law. A contract provision often requires action by a specific date or within a specified period of time. Contract provisions are intended to protect the interests of one or both parties in a contract.

# Types of Provisions

## **Substantive (Major) Provisions**

Substantive provisions identify the parties to a contract and establish their rights and obligations. All contracts have substantive provisions. For instance, a loan agreement specifies the names of the debtor and the creditor and requires the creditor to give money to the debtor in return for interest.

# Special Considerations

Many laws are written with a sunset provision that automatically repeals them on a specific date unless legislators reenact them. A sunset provision provides for a repeal of the entire law—or sections of the law—once a specific date is reached.

# Special Considerations

For example, the National Security Agency's (NSA) authority to collect bulk telephone metadata under the USA PATRIOT Act expired at midnight on June 1, 2015. Any investigations started before the sunset date were allowed to be completed. Many sunsetted portions of the Patriot Act were extended through 2019 with the USA Freedom Act. However, the provision allowing the collection of massive phone data by government agencies was replaced with a new provision that this data must be held by phone providers.

# How a Contract Provision Works

Contract provisions can be found in a country's laws, in loan documents, and in contract agreements. They also can be found in the fine print accompanying purchases of some stocks.



# KEY TAKEAWAYS

- A contract provision is a stipulation in a contract, legal document, or a law.
- A contract provision often requires action by a certain date or within a certain period of time.
- One of the most familiar uses of a contract provision is a bond's call provision, which refers to a specific date; after this date, the company may recall and retire the bond.



# Certain Key Provisions

There are a number of “key” provisions that any good set of T&Cs should address

We will highlight some of these key provisions, as well as discuss some important related drafting concepts

# Products/Services Involved



**It is important to be specific when describing the particular goods/services covered by an Agreement**

For example, in a distributor/sales agent context, does the relationship cover: all of seller's goods; a particular product line; or certain itemized products?

- What about new or discontinued products?
- Is this an exclusive or non-exclusive relationship?

Do the products/services require any ongoing service and support obligations?

Minimum purchase obligations?

# Price



Be clear what costs are included in, as well as excluded from the price to avoid surprises:

- Taxes? Shipping charges? Import/Export duties?

Taxes may be a significant portion of the transaction costs

For services contracts, is pricing based on a fixed fee, hourly rates, or time and material basis?

Sellers typically don't include a most favored customer (MFC) clause, which obligates seller to give buyers the best pricing terms it makes available

How often can prices for goods/services be changed? What is the process?

- When is the other party's consent needed? Will there be built-in inflation adjustments?

What currency is used?

# Payment Terms

Time allowed for payment depends on parties' business practices and should always be specified

When does the obligation to make a payment arise?

- Acceptance of a purchase order?
- Shipment/delivery?
- Acceptance by the buyer/completion of the project or set milestones?

Net 30/60 days after receipt of an invoice?

Will interest accrue on late payments?

Buyers prefer that standard payment terms include provisions allowing for disputing invoices and a right of set-off

- If parties allow for disputed invoices, T&Cs should outline procedure

# Shipment & Delivery

Shipping terms govern the shipping mode, costs, risks and other practical arrangements related to the transportation of the goods.

Some common shipping terms:

- Delivered duty paid (DDP): Seller must pay for all costs related to transporting goods and is responsible in full for goods until they have been received and transferred to buyer.
- EXW (Ex Works): Seller makes goods available at their premises, or at another named place. EXW means that buyer incurs risks for bringing goods to their final destination.
- FOB (free on board): Seller bears all costs and risks up to the point goods are loaded on board the vessel. Seller must also arrange for export clearance. The buyer pays cost of marine freight transportation, bill of lading fees, insurance, unloading and transportation cost from the arrival port to destination.
- CIF (cost, insurance and freight): Broadly similar to CFR term, with the exception that seller is required to obtain insurance for goods while in transit to named destination port.

Provisions should match-up with the “risk of loss/transfer of title” provisions

# Quality/Inspection



How long does buyer have to inspect goods to determine if goods (type, quality, quantity) conform to contract?

If goods/services are non-conforming, what are buyer's remedies (at whose option)?

Sellers generally want to limit buyers' available remedies, whereas buyers usually want full ability to accept or reject goods/services (in whole or in part)

# Warranties/Disclaimers



Warranties can be express or implied

What standards govern quality of goods/services?

Duration/time limitation

Sellers want clearly defined terms of warranty or disclaim it altogether

Sellers will want to limit what remedies are available to buyers

What actions will void warranty?

Failure to notify, non-compliance with seller's instructions; misuse, etc.



# Breach/Default



What constitutes a breach?

Material breach vs. non-compliance

When does right to terminate agreement accrue? Any cure periods?

- Breach of any representation, warranty or covenant
- Late delivery/poor quality
- Insolvency
- Regulatory compliance, etc.

What rights and obligations survive Agreement termination?

- Confidentiality
- Limitation on liability
- Indemnification
- Non-competes, etc.

# Limitations on Liability

Potential damages buyer may suffer because of its use or resale of goods or receipt of services may greatly exceed the value of transaction to seller. To avoid exposure, seller typically include certain limitations in their Standard Agreements

Not uncommon for these limitations to be mutual where both parties have obligations (employment agreement, distribution contract, joint venture, etc.)

Buyers will generally ask for following exceptions:

- Breach of confidentiality obligations
- Indemnity obligations
- Intellectual property infringement
- Regulatory Compliance
- Fraud/Willful Misconduct
- Third-party Claims

# Liquidated Damages



Liquidated damages clause sets an amount that is payable by a defaulting party in contract in the event of certain breaches

Parties to contract may use liquidated damages where actual damages are difficult or impossible to prove

Liquidated damages are sometimes not imposed, if defendant can show that liquidated damages clause was intended to be “punitive” as opposed to reasonable measure of anticipated damages

# Indemnification



Indemnity allocates the risk of certain losses between the parties

May also include an obligation to defend the other party in a legal action

Reimbursement often limited to actual, documented, out-of-pocket expenses

Indemnification provisions should be read in conjunction with any representations, warranties and covenants, as well as limitations on liability, to determine full scope of what is covered

Seller is more likely to resist indemnification obligations that are not subject to contractual limitations of liability (i.e., a damage cap)

Generally limited to only third-party claims (direct claims between the parties generally are covered by the warranty, etc.)

Consider whether the indemnity should be extended to any third parties

# Confidential Information

Nearly all businesses have valuable confidential information. Protection of confidential information within an organization is a vital business priority. These provisions, which can be mutual or one-sided, commonly place the following obligations on recipients of confidential information:

- Nondisclosure obligations
- Restrictions on access to/use of information within recipient's business and among employees
- Physical and electronic security requirements
- Obligations to return/destroy original materials containing confidential information at termination

Important to define what does/does not constitute confidential information

Exceptions to non-disclosure obligations (legal orders)

Remedies: injunctive relief and damages

# Legal/Regulatory Compliance



Who is responsible for obtaining all necessary licenses, permits, etc., and at whose cost?

Foreign Corrupt Practices Act

Government may hold a party liable for acts of its agents, contractors or other parties

# Governing Law/Venue

Determine what country's law governs agreement (e.g., jurisdiction of buyer, seller or neutral country)

Foreign Law can have unintended consequences, e.g., severance on termination; contractors may be treated as employees, etc.

In what city, state and country will disputes be resolved?

Litigating in unfamiliar forums can be:

- Costly
- Unpredictable/risky
- Time-consuming

# Dispute Resolution



Once it is determined where disputes will be resolved (and using what law), process must be agreed upon

Litigation

Mediation (binding/non-binding)

Arbitration (panel v. single arbitrator)

- What rules?
- AAA, International, etc.?



# Intellectual Property

Seller will generally want to clearly state they own all intellectual property rights for goods/services involved

- How to address derivative goods?
- Be sure definition of Intellectual Property covers all relevant applications (patents, trade secrets, formulae, know-how, trademarks, copyrights, etc.).

Buyer, distributor, etc. may need limited, non-exclusive license to use certain IP of seller in connection with performance of their obligations under Agreement

In international context, be sure to consider registration in applicable jurisdictions

# Parts of a contract

6. **Performance Provision:** Parties' promises to perform their obligations under the contract.

Performance of a contract relieves a person from further duties under the contract.

**There are three levels of performance:**

- a. Complete Performance
- b. Substantial Performance
- c. Breach.

(Continued)

# Parts of a contract

6. **Performance Provision:** There are three levels of performance

a. **What is Complete Performance of a Contract?**

Complete performance by a party means that the contracting party has fulfilled every duty required by the contract. A completely performing party is entitled to a complete performance by the other party.

**Example:** I enter into a contract to build a house for Ellen. I build the house and complete all of the material and non-material requirements of the contract.

(Continued)

# Parts of a contract

6. Performance Provision: There are three levels of performance

## b. What is Substantial Performance of a Contract?

Substantial performance of a contract means less than complete performance; but the level of performance is sufficient to avoid a claim of breach of contract. More specifically, it means that a party has performed all material elements of the contract, but there are non-material aspects left uncompleted.

**Note:** The other party may be entitled to seek offset or recovery from the substantially performing the party for the aspects of the contract not completed.

**Example:** I enter into a contract to build a house for Ellen. I build the house but fail to paint the interior the color described in the contract. This contract is substantially performed and does not give rise to an action for breach. Ellen may, however, recover or offset the cost of painting the walls when paying me.

(Continued)

# Parts of a contract

6. Performance Provision: There are three levels of performance:

## c. What is Breach of a Contract?

Any performance that is not complete or substantial performance is a material breach. This entails performance at a level below what is reasonably acceptable. The materially breaching party cannot sue the other party for performance and is liable for damages to the other party for the breach.

**Example:** I enter into a contract to build a house for Ellen. I distracted by another contract and make material errors in laying the foundation. It causes the house not to meet standards and pass inspection by the building inspector. In this case, I have breached the contract by failing to perform a material duty under the agreement.

(Continued)

# Quick Quiz

- Many laws are written that automatically repeal all or part of the law on a specific date unless legislators reenact them. A \_\_\_\_\_ provision provides for a repeal of the entire law—or sections of the law—once a specific date is reached.
- What is this contract term called?
  - a) *Waiver*
  - b) *Assignment*
  - c) *Sunset*
  - d) *Force Majeure*

# Which are parts of a contract?

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# Parts of a contract

**13. Boilerplate Provisions:** Appear at the end of the contracts and address assorted issues related to the contract. For example:

- Assignment and delegation
- Successors and Assigns
- Governing law/Choice of law
- Notice
- Severability
- Amendments only in writing.
- Entire agreement clause
- Counterparts
- Third-party beneficiaries
- Mandatory arbitration clause



# Parts of a contract

## 13. Examples of Boilerplate Provisions

- a) **Attorney's Fees:** This provision requires the non-prevailing party to pay the attorney's fees and other legal expenses in the case of a legal dispute.
- b) **Arbitration:** This provides for resolution of a dispute through third-party arbitration instead of a lawsuit.
- c) **Choice of Law:** This provision assigns the state whose law would apply for interpretation of the contract.
- d) **Choice of Jurisdiction:** This limits the legal jurisdiction to a specific state or place where the parties can file a lawsuit.
- e) **Waiver:** This clause usually states that the parties can forego their right to sue for the breach of a provision without losing the right to any future claim with respect to the same provision.
- f) **Severability:** This clause states that if a certain provision of the contract becomes invalid or is struck down by a court, the remaining contract, after severing the invalid provision, will remain intact and binding.

# Parts of a contract

## 13. Examples of Boilerplate Provisions

- g) **Integration:** This clause states that the written contract is the final agreement between the parties, and it replaces any prior agreement.
- h) **Attachments:** This includes any attachments or exhibits as an integral part of the contract.
- i) **Notice:** This provision sets out the manner in which notice should be given in certain situations, say, for instance, to terminate the contract.
- j) **Relationships:** This prevents the parties from asserting a business relationship between them.
- k) **Assignment:** This provision prevents the parties from assigning or subcontracting their rights to a third party.
- l) **Force Majeure:** This provides for suspension of the contract if its performance becomes impossible due to natural disasters like floods, earthquakes, and hurricanes.
- m) **Headings:** This states that the headings don't hold any special significance in the contract.
- n) **Escrow:** This allows you to keep payments and confidential information in an escrow account.

# Parts of a contract

## 13. Examples of Boilerplate Provisions

- o) **Waiver of Jury Trial:** Under this provision, the parties agree to waive their right to a jury trial when there is a lawsuit pertaining to the contract.
- p) **Damage Limitations:** This clause places an upper limit on the amount of damages or specifies the type of damages a court may award in the case of a dispute.
- q) **Warranties:** Here, the parties promise to fulfill their contractual obligations under the contract.
- r) **Indemnity:** In this provision, one of the parties agrees to bear the expenses of certain disputes made by third parties.
- s) **Confidentiality:** This prevents the parties from sharing confidential information with others.
- t) **Announcements:** This clause spells out the procedure for making public disclosures about the contract — for example, about a joint venture or a merger.
- u) **Counterparts:** This clause allows the parties to sign agreement copies without requiring all the parties to be present at the same place and time for such execution.