



REGIONAL
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OFFICE



U.S. Embassy Moscow



U.S. LEGAL WRITING:

SESSION 2: CONTRACT PROVISIONS #A

U.S. Department of State

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Language of Contract Drafting: Major Contractual Provisions

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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.

Quick Quiz

- A _____ is a legally binding agreement made between two or more parties. It can be in writing or in oral form and can contain a single provision or thousands of them.
- What is this term called?

Quick Quiz: True or False?

- For example, if A orally agrees to pay B \$10 for a book, this agreement constitutes a contract.
- Each provision of a contract is a contractual obligation; failure to comply with any of the provisions results in the breach of the contract.
 - *True?*
 - *False?*

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

1. Title: Subject of the Contract

Some examples of titles are "**Sale Agreement**", "**Equipment Transfer.**" Or Purchase Agreement. The document title should be placed at the top of the document for easy referencing.

Parts of a contract

- 2. Preamble:** This is the first paragraph of a contract appearing just under the title. It repeats the title and then sets forth the effective date of and parties to the contract.

THIS AGREEMENT is entered into by and between KNIGHT PROTECTIVE SERVICE, INC., hereinafter referred to as the "Company", and the ITPEU, AFL-CIO, hereinafter referred to as the "Union", as representative of all its non-supervisory employees in the mutual interests of the employees and the Company to promote and further the efficiency and economy of operations, to provide orderly collective bargaining relations, a method for the prompt and equitable disposition of grievances, and a method for the establishment of fair wages, hours and working conditions for the employees covered hereunder. By accepting this Agreement, it is recognized to be the duty of the Parties to cooperate fully with each other, both individually and collectively, for the advancement of the purposes of this Agreement.

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

Parts of a contract

4. **Words of Agreement:** After the Recitals, before the body of the contract “the parties agree as follows”
5. **Defined Terms:** All important terms. Ordinary meaning unless otherwise specified. Often used to make uniform names.

Defined terms and definitions must be used to make the interpretation of a contract easier: they make contract provisions concise; whereas the use of defined terms should at all times reduce any risks of ambiguity.

License Agreements mean collectively, the Trademark License and the Technology License; and **License Agreement** means either of them.

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*

Parts of a contract

7. **Consideration**: Specifies what one party is paying in exchange for the other party's performance.

Consideration in contracts refers **to the benefit each party receives in exchange for what it gives up in the contract**. It is a vital element that must be present in a contract in order to make it legally binding on the parties.

What are the **two basic elements of consideration**?

- Thus, there are two basic elements to consideration:
 - (1) **Legal Sufficiency** (something of value in the eye of the law) and
 - (2) **bargained for exchange**. Both must be present to satisfy the requirement of consideration.

Parts of a contract

- 7. **Consideration**: Specifies what one party is paying in exchange for the other party's performance.
- What are the 3 requirements of consideration?
- There are three requirements of consideration:
 1. **Each party must make a promise,**
 2. **perform an act,**
 3. **or forbear** (refrain from doing something).
- **NOTE**: Each party's promise, act, or forbearance must be in exchange for a return promise, act, or forbearance by the other party.

Parts of a contract

7. **Consideration**: Specifies what one party is paying in exchange for the other party's performance.
- Restating another way, the 3 requirements of consideration?
 - 1.) Each party must make a promise, perform an act, or forbear (refrain from doing something).
 - 2.) Each party's promise, act, or forbearance must be in exchange for a return promise, act, or forbearance.
 - 3.) What each party exchanges must have legal value, this is, it must be worth something in the eyes of the law.

Which are parts of a contract?

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2. Preamble
3. Recitals
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5. Defined Terms
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11. Representations and Warranties
12. Remedies
13. Boilerplate Provisions
14. Concluding clause and signature block

Parts of a contract

- 8. Term and Termination:** This is a continuing relationship provision.
- The “term” provision specifies when the contract begins and ends.
 - The “termination” provision allows one or both of the parties to terminate the agreement early.

What is term and termination in a contract?

Once the parties have come to an agreement regarding the terms of the contract, they are both legally obligated to fulfill their obligations under the contract. ... Terminating a contract means legally ending the contract before both parties have fulfilled their obligations under the terms of the contract.

Parts of a contract

9. **Covenants**: Parties' affirmative and negative duties. A promise to do or not to do something.

In its simplest terms, a “covenant” is an agreement to do or to not do something. **Covenants are unconditional promises found in contracts**, and the failure of a party who makes such an agreement to abide by its terms will entitle the other contracting party to damages for breach of contract.

Parts of a contract

9. Contracts vs. Covenants: Comparison

Contracts and covenants are not the same things.

Here are some fundamental differences:

- While a contract is legally binding, a covenant is a spiritual agreement.
- A contract is an agreement between parties while a covenant is a pledge.
- A covenant is an agreement you can break while a covenant is a perpetual promise.
- You seal a covenant while you sign a contract.
- A contract is a mutually beneficial relationship while a covenant is something you fulfill.
- A contract exchanges one good for another, while a covenant is giving oneself to the other.
- You can opt out of a contract while a covenant is about having the strengths to hold up your part of the promise.
- One can stop paying in a contract when one party is not fulfilling their part in a deal. However, in a covenant, the party not getting their needs met supports the failing party so that they can meet their obligations.

Parts of a contract

- COVENANT NOT TO COMPETE
- AND NON-DISCLOSURE AGREEMENT

- PARTIES:

- Eric Dean Sprunk (“EMPLOYEE”)

- and

- NIKE, Inc., divisions, subsidiaries and affiliates. (“NIKE”):

- RECITALS:

- A. This Covenant Not to Compete and Non-Disclosure Agreement is executed upon initial employment or upon the EMPLOYEE’s advancement with NIKE and is a condition of such employment or advancement.
- B. Over the course of EMPLOYEE’s employment with NIKE, EMPLOYEE will be or has been exposed to and/or is in a position to develop confidential information peculiar to NIKE’s business and not generally known to the public as defined below (“Protected Information”). It is anticipated that EMPLOYEE will continue to be exposed to Protected Information of greater sensitivity as EMPLOYEE advances in the company.
- C. The nature of NIKE’s business is highly competitive and disclosure of any Protected Information would result in severe damage to NIKE and be difficult to measure.
- D. NIKE makes use of its Protected Information throughout the world. Protected Information of NIKE can be used to NIKE’s detriment anywhere in the world.

- AGREEMENT:

- In consideration of the foregoing, and the terms and conditions set forth below, the parties agree as follows:

- 1. Covenant Not to Compete.

- (a) Competition Restriction. During EMPLOYEE’s employment by NIKE, under the terms of any employment contract or otherwise, and for one year thereafter, (the “Restriction Period”), EMPLOYEE will not directly or indirectly, own, manage, control, or participate in the ownership,

Parts of a contract

10. Conditions: Things that must or must not happen before a party is obligated to perform under a contract.

- Contract Conditions
- This means that **each of the parties is obligated, or required, to perform a duty under the contract.** The contract conditions determine the parties' obligations. A condition is an act or event that affects a party's contractual duty. It is a qualification that is placed on an obligation.

Parts of a contract

10. Conditions: Things that must or must not happen before a party is obligated to perform under a contract.

Condition Precedent

A condition precedent specifies an event that must happen before a person is obligated to perform the duties specified in the contract.

An example of this is if an employer tells an employee they will receive a bonus of \$600 if they complete an accounting course. Until the employee completes the course, the employer is not liable to pay the employee. However, once the employee completes the course, the employer has to pay up.

- When put in the context of sale and purchase agreements, some condition precedents might include:
- Obtaining clearances from regulatory authorities.
- Obtaining consents from a supplier.
- Passing resolutions between the seller or buyer.
- No material changes in relation to the target company.

Parts of a contract

11. Representations and Warranties: Assertions of fact by the contracting parties. Parties rely on these facts in deciding whether to enter into a deal, in valuing and negotiating a deal, and at closing.

The representations and warranties section of the Purchase Agreement is one of the most negotiated sections of any agreement between a buyer and a seller. It covers statements of fact and promises about what is sold. The seller will make several representations and warranties about the target and assets.

Are representations legally binding?

If a lender represents a certain state of affairs which is mutually accepted by a borrower, these conditions will be binding on both parties, regardless of the written terms of an agreement.

Parts of a contract

11. Representations and Warranties: Assertions of fact by the contracting parties. Parties rely on these facts in deciding whether to enter into a deal, in valuing and negotiating a deal, and at closing.

What happens if a representation is breached?

The representations and warranties allocate risk between the parties and serve as the foundation for an indemnification claim in case of a breach or inaccuracy. A breach or inaccuracy of a representation or warranty can also provide the other party with a right to terminate or refuse to close the transaction.

Parts of a contract

12. Remedies: Parties' agreed-to rights and excluded rights that supplement or replace common law or statutory rights a party has if the other party fails to perform.

The remedies for breach of contract are:

- A remedy specified in the contract itself, i.e. liquidated damages;
- An award of money damages;
- Restitution;
- Rescission;
- Reformation;
- Specific Performance.

Parts of a contract

12. Remedies: Parties' agreed-to rights and excluded rights that supplement or replace common law or statutory rights a party has if the other party fails to perform.

Liquidated Damages are a variety of actual damages. Most often, the term "liquidated damages" appears in a contract, and often is the title for a whole clause or section. Parties to a contract use liquidated damages where actual damages, though real, are difficult or impossible to prove.

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.

Parts of a contract

14. Concluding clause and signature block: Most contracts end with a concluding clause followed by signature blocks where the parties sign. The names in the signatures should match the names in the preamble.

What is a signature clause?

A Standard Clause providing that contract parties may authenticate the agreement with an **electronic signature**, also referred to as an e-signature. It defines electronic signature and provides that a party's electronic signature should be given the same legal force and effect as a handwritten signature.

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.

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;