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Making Offers No One Can Refuse: Effective Contract Drafting—Part 4

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New law amends the Internal Revenue Code so that a wrongfully incarcerated individual can exclude his or her recovery.
Making Offers No One Can Refuse: Effective Contract Drafting — Part 4

In the last issue of this five-part series, the Legal Writer discussed the substantive provisions of a contract. In this issue, we discuss endgame and boilerplate provisions.

Endgame Provisions
Endgame provisions provide for the exit strategies. They include default, remedy, and termination provisions. In drafting endgame provisions, consider termination events, the contractual consequences of the termination notice, the date the contract terminates, whether common-law rights survive, whether any specific contract provisions survive, and dispute-resolution provisions.

• Termination
A termination provision or clause, one of the most common contractual remedies, allows one or both parties to terminate the agreement before the term has run. Terminations may be neutral, friendly, or unfriendly. Neutral terminations allow the agreement to end when neither party is at fault. Friendly terminations occur when each party fulfills its obligations and may provide for additional obligations to tie up loose ends, such as returning a security deposit or the premises to the landlord in good condition. Discuss with your client whether the contract’s term should automatically end unless a party exercises an option to renew or whether the term should automatically renew unless one party sends a termination notice.

Unfriendly terminations are usually the result of a breach of contract. Example: “Termination. The Company may terminate this agreement upon ten days’ written notice to Consultant following any breach of this Agreement by Consultant.” Because parties generally disfavor unfriendly terminations, contracts may provide for a grace period, which is a period of time in which the allegedly breaching party may cure a breach. Monetary and nonmonetary consequences, such as injunctive relief, liquidated damages, and indemnities, might result from unfriendly terminations.

Because termination notices have substantial consequences, make them effective only upon delivery by national courier or personal delivery to ensure that the date of receipt is undisputed.

• Remedies
Drafters must prepare for worst-possible scenarios. Every time a contract imposes an obligation on one or both parties, the drafter should ask: “What happens if the party doesn’t do it?” You may realize that you need to add “further obligations or impose a sanction for breach.”

Example: “Employee-waiter shall wait tables on Thursday, Friday, and Saturday evenings and shall share 10% of earned tips with the bussers each night at close out.” This provision states three obligations of the employee-waiter: (1) to wait tables; (2) to wait tables on three specified nights a week; and (3) to share 10% of tips with the bussers each night at close out. In drafting this language, consider the effect of breaching each of these obligations: what happens if (1) the waiter doesn’t wait tables; (2) the waiter shows up, but on a Tuesday instead of a Thursday, Friday, or Saturday; or (3) the waiter shows up on the appropriate nights but doesn’t share 10% of tips with the bussers?

Remedies in a situation like the one above can be taken care of with a sweeping default provision, such as: “TERMINATION: It is agreed in the event the EMPLOYEE-WAITER fails to show up at work on the specified days in this contract without prior notice to EMPLOYER... CONTINUED ON PAGE 58

Terminations may be neutral, friendly, or unfriendly.
ER, or is found to be withholding tips from the bussers, then this employment contract shall automatically terminate and the EMPLOYEE-WAITER waives the right to receive a notice to quit.18 Imposing consequences for breaching covenants allows the parties to tailor the transaction to their needs.

General Provisions

Also known as miscellaneous or boilerplate provisions, general provisions “appear at the end of a contract and address assorted issues related to the contract.”19 Drafters should include the following general provisions in every contract.20

• Final and Complete Provisions
The first general provision drafters should include establishes that the contract is final and complete. This ensures that the agreement can’t “be contradicted or supplemented by prior or contemporaneous agreements.”21 This provision will avoid any future issue with the parol evidence rule.22 In general, parties should limit any items to the contract.23 Avoid using the word “shall” in these provisions. Example: “This Agreement shall constitute the entire agreement” is better stated simply as “This Agreement constitutes the entire agreement.”24

• Choice-of-Law Provisions
It is beneficial for drafters to include a provision that decides which jurisdiction’s laws will govern the agreement. This is known as a choice-of-law provision, which forecloses future disputes between the parties about which laws govern the contract.25 If that provision is absent, the general rule is that the law of the jurisdiction with the most substantial relationship to the transaction governs, but the parties may disagree on which jurisdiction that is.26 If the parties choose the state during negotiations, they have the option of tailoring the contract to the state’s laws.27

• Forum-Selection Provisions
In addition to determining which law governs, contracts include provisions determining where disputes can be adjudicated. Absent any unreasonableness or a forum non-conveniens defense, these provisions are usually enforceable.28 Forum-selection provisions can also include language outlining the acceptable ways to serve process.29

• Amendments and Waivers
Contracts normally include a no-oral-amendments provision. This provision provides that parties may not amend an agreement except in writing. In New York, the First Department has held that emails clearly detailing modifications to be made in a contract and clearly expressing all parties’ unqualified acceptance of those modifications constitute “signed writings” for an amendment clause.30 To ensure a strict policy to amend a contract, you may draft your provision this way: “The parties may amend this Agreement only by the parties’ written agreement that identifies itself as an amendment to this Agreement.”31 Contracts often include jury-trial waivers. Jury trials are inherent in the Constitution; a waiver of this right is enforceable only if it’s “knowing, intentional, and voluntary.”32 Courts will look at whether the waiver was specifically negotiated during the drafting process or whether the waiver is prominently displayed in the contract.33 Jury waivers are more likely enforced if the parties to the contract have equal bargaining strength.34

• Non-Waiver Provisions
It’s common for contracts to include a non-waiver clause. The clause protects a party that excuses the other party’s non-compliance with contract terms from later losing the right to enforce the terms of the contract.

• Assignment and Delegation Provisions
In the case of a contract that contemplates a continuing relationship between the parties, provisions should cover assignment and delegation.35 An assignment of rights occurs when a party that has the right to receive a performance under the contract shifts to a third party the right to receive performance.36 A delegation of duties occurs when a contracting party who has an obligation to perform a duty under the contract shifts the duty to another person.37 Example: “Assignment and Delegation. Consultant has neither the right nor the power to assign any of Consultant’s rights or delegate any of Consultant’s duties under this Agreement by operation of the law or otherwise without the Company’s prior written consent. Any attempt to assign or delegate without this consent is void.”38 This provision prevents the consultant, without the company’s consent, from subcontracting to a third party or from assigning payment rights under the contract without the company’s consent.39

Contracts should address both assignment and delegation.40 Many lawyers include a prohibition against unconsented assignment but exclude delegation.41 Each should be included.42

• Counterparts Provision
Contracts have a counterparts provision when not all the parties can attend the agreement’s signing, such as when the parties are from different states or countries. A counterpart is considered “a duplicate original that parties sign.”43 Signed separate counterparts constitute a fully executed original.44 The language of a counterpart provision is usually: “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.”45

• Damage-Disclaimer Provisions
An attorney’s goal in contract drafting is to limit the client’s liability. A damage disclaimer will help achieve this goal by limiting the type of damages a party can receive following a contract breach.46 The provision might look like this: “In no event will Consultant be liable to the Company for any special, incidental, or consequential damages for any breach of this Agreement, even if advised of the possibility of such damages.”47 Without a damage disclaimer provision, a breaching party might be liable for things like lost profits resulting from the breach.48
If a seller asks for a damage disclaimer or a limitation-of-liability provision but the buyer objects, make the provisions reciprocal.49 Draft these provisions so that they apply both to the seller and the buyer. Here’s the above damage disclaimer redrafted to be reciprocal: “In no event will either party be liable to the other party for any special, incidental, or consequential damages for any breach of this agreement, even if advised of the possibility of such damages.”50 This compromise, though, is unlikely to be of much value. A buyer will have to pay the same amount in damages whether the contract does or doesn’t include a reciprocal limitation-of-liability provision and damage disclaimer.51

A damage disclaimer is often drafted in all capital letters to make it conspicuous and to help a party rebut a later allegation that the provision is unenforceable as unconscionable.52 When disclaimers are easily noticed in a contract, there can’t be a claim that one party was unaware of the disclaimer.

• Indemnification Provisions

Indemnification provisions hold parties responsible for costs and expenses that other parties incur.53 The right of a party to recover through indemnification is based on objective intent displayed by the parties in the contract.54 Contractual-indemnification claims are dismissed when there’s no express indemnification provisions or if there’s no implication of an indemnification obligation.55 The best way to secure this type of provision is to draft an express indemnification provision.56

Here’s an example of an indemnification provision from an agreement to sell tires for golf carts: “Supplier shall indemnify buyer from any claim, suit, action, proceeding, investigation, judgment, deficiency, demand, damage, settlement, liability, attorney fee, as and when incurred, arising out of, in connection with, or based on any products sold under this agreement.”57 If a tire fails and injures the purchaser, the purchaser can bring a products-liability action. The suit “arises out of” a product sold under the agreement and obligates the supplier to cover the costs of the buyer’s defense and damage award.58

Without an indemnification provision, the buyer could bring a breach-of-contract claim. This claim wouldn’t require the supplier to pay the buyer’s cost as an indemnification provision would.59

An indemnification provision shields one party from the other’s mistakes or misconduct.60 Unless it’s unmistakably clear that the indemnification provision covers attorney fees that arise from disputes between the parties, New York courts won’t interpret it to cover these disputes.61

There are limitations to indemnification provisions. For example, a “basket” is when indemnification isn’t for claims less than a specific amount.62 The limitation on the maximum amount of payments under an indemnification provision is known as a “cap.”63 An indemnification provision can be limited by a termination provision in two ways.64 Example: “[A] cut-off of indemnification if the event giving rise to the indemnification claim arises after the cut-off date, and a cut-off if the claim is made after a certain date.”65

• Insurance-Requirement Provisions

To enable the recovery of costs and expenses, indemnification provisions are usually followed by an insurance requirement.66 Insurance requirements enable a party to receive money it’s owed under indemnification, even if the other party can’t pay a judgment against it.67

The specifics regarding policy limits, scope of coverage, and other terms are negotiable and should be tailored to the specific contractual relationship.68 For example, “an insurance provision in a services agreement should require the service provider to have professional-liability insurance that covers losses from errors and omissions in performing services.”69

• Force Majeure Provisions

A force majeure provision excuses from liability a party unable to perform the obligations under a contract because of the occurrence of a specified event.70 Drafters must take into account the possibility of uncontrollable events and include provisions to protect their clients.71 If the other party objects to the force majeure language, it may make the provision reciprocal to protect both parties.72 Example: “Force Majeure. A party shall not be liable for any failure of or delay in the performance of this Agreement for the period that such failure or delay is due to causes beyond its reasonable control, including but not limited to acts of God, war, fires, floods, explosions, riots, hurricane, terrorism, vandalism, strikes or labor disputes, embargoes, government orders, or any other force majeure event.”

• Severability Clause Provisions

This provision provides that if any part of the contract is found invalid, the remaining provisions will continue in effect.73 This provision should be drafted with extreme caution because of the consequences of continuing without all the initial parties to the contract. The parties should consider including a right to terminate the contract if the invalid provision destroys the core of the contractual relationship.

Conclusion Clause and Signature Blocks

Most contracts end with a concluding clause followed by signature blocks. A concluding paragraph would resemble the following: “To evidence the parties’ agreement to this Agreement, they

MEMBERSHIP TOTALS

NEW REGULAR MEMBERS
1/1/16-4/7/16 ____________________3,099

NEW LAW STUDENT MEMBERS
1/1/16-4/7/16 ____________________591

TOTAL REGULAR MEMBERS
AS OF 4/7/16 ____________________53,462

TOTAL LAW STUDENT MEMBERS
AS OF 4/7/16 ____________________3,790

TOTAL MEMBERSHIP AS OF
4/7/16 ____________________57,252
have executed and delivered it on the date set forth in the preamble.”74 Make sure the names in the signature blocks correspond to the names provided in the preamble of the contract.75 The signature block for a corporation, partnership, or limited-liability company must reflect the name of the entity and that the signer has representative power.76

Example: “For a natural person, a line with the person’s name underneath is used” and “[f]or a corporate or limited liability company signatory, the signature line . . . a signature block within a signature block is required.”77 Signature blocks should be aligned to the right side of the page, one above the other.80 Put the notation “Date:” to note the date of signing.81

Schedules and Exhibits

Schedules and exhibits aren’t contained within the body of the contract but are referred to in the body and form part of the contract.82 A clear and specific reference to a schedule or exhibit is sufficient.83 To avoid other interpretations, define the agreement to include the schedules and exhibits. For example: “‘Agreement’ means this Lease Agreement and its Schedules and Exhibits, each as amended from time to time.”84 Schedules normally refer to the disclosed information referred to in the representations and warranties, and are identified by numbers of the provision that requires the schedule.85 Parties that want agreements or other documents related to the contract to be part of the contract attach them as exhibits.86 The latter are identified by sequential letters or numbers: Exhibit 1, Exhibit 2, Exhibit 3.87

In the next issue of the Journal, the Legal Writer concludes its series on contract drafting with techniques to draft contracts clearly and unambiguously.

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4. Id. at 193.
5. Id. at 195.
6. Id. at 196.
8. Stark, supra note 1, at 192.
9. Id. at 198.
10. Id. at 192.
11. Id. at 206.
12. Id. at 206–07.
13. Id. at 207.
14. Id.
15. Id.
17. Id.
18. Adapted from Burnham, id.
20. See Sjostrom, supra note 7, at 11.
21. Id. at 10.
23. Sjostrom, supra note 7, at 10.
26. Id.
27. Sjostrom, supra note 7, at 10.
29. Id.
31. Stark, supra note 1, at 232.
32. Martorana I, supra note 24, at 117.
33. Id.
34. Id.
37. Id. § 318.
38. Sjostrom, supra note 7, at 21.
39. Id.
40. Id.
41. Id.
42. Id.
43. Stark, supra note 1, at 235.
44. Id. at 236.
45. Martorana I, supra note 24, at 126.
46. Id. at 23.
47. Id.
48. Sjostrom, supra note 7, at 23.
49. Martorana I, supra note 24, at 23.
50. Id. at 24.
51. Id.
52. Sjostrom, supra note 7, at 24.
53. Id.
54. Construction and Application, Contractual Indemnity, 21 Carmody-Wait 2d § 123.90.
55. Id.
56. Id.
57. Adapted from Sjostrom, supra note 7, at 25.
58. Id.
59. Id. at 26.
62. Fox, supra note 2, at 28.
63. Id.
64. Id.
65. Id.
67. Id. at 27.
68. Id.
69. Id. at 28.
70. Jacobson, supra note 35, at 83.
71. Id.
72. Sjostrom, supra note 7, at 29.
73. Stark, supra note 1, at 231.
74. Id. at 241.
75. Sjostrom, supra note 7, at 12.
76. Stark, supra note 1, at 244–45 (citing Stewart Coach Indus., Inc. v. Moore, 512 F. Supp. 879, 884 (D. Ohio 1981)).
77. Fox, supra note 2, at 155.
79. Id. at 126.
80. Id.
81. Id.
82. See Stark, supra note 1, at 53.
83. Id. (citing United Cal. Bank v. Prudential Ins. Co. of Am., 681 F.2d 390, 420 (9th Cir. 1983)).
84. Adapted from id. at 5.
85. Id. at 55.
86. Id.
87. Id. at 56.