

ANATOMY OF A CONTRACT

Descriptive Title

What is contract for? Examples: "Rental Agreement"; "Loan Agreement"; "Professional Services Agreement." Usually has no legal effect and not binding. Can be simply "Agreement."

Parties

Who are the bound parties? Best practice includes: i) entity status of parties (individual, corporation, government agency); ii) address of parties; iii) date contract made or effective; iv) short versions of each party's name.

Recitals

"Whereas . . ." clauses that memorialize the parties' intentions or purposes on entering the agreement. Usually not binding, but may be used to transform what might otherwise be *extrinsic* evidence for contract interpretation into *intrinsic* evidence (because it is written within the "four corners" of the document).

Binding Effect Clause

Expressly states parties' intention to be bound. Should be placed immediately before clauses that will be legally binding. Example: "NOW, THEREFORE, in consideration of the mutual covenants and promises contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and accepted, the parties hereto hereby agree as follows:"

The "Deal"

What is being exchanged? Examples: Goods or services for money. Acquisition of one business by another. Note that the mutual promises are kept separate: one party promises to deliver the goods or services; the other promises to accept them and pay money.

Ownership of Property Involved in Deal

Who has title to any property brought into deal, or created under it?

Timing, Form, and Delivery of Performance (Value Exchanged)

When and how does performance occur? Examples: "payment in U.S. dollars due within 30 days;" "car delivered upon execution of contract."

Term and Termination

How long does the agreement remain in effect? Can it be terminated early?

Effect of Termination; Breach

What happens upon termination (end of term or earlier)? What constitutes breach and what are the consequences?

Representations and Warranties

What explicit statements about relevant facts are the parties willing to put in writing? Examples: "This car has never been in an accident;" "Product will work as described for 1 year from date of purchase or full refund of purchase price." Reps and warranties are usually expressly established as grounds for breach, making determination of breach easier (in cases where the reps and warranties are false or not honored).

Disclaimer of Warranties; Limitation of Liability

In contrast to *making* warranties in the foregoing section, parties may seek to *disclaim* or *limit* warranties implied by UCC or common law. Parties may also seek to limit their liability for harms arising from the delivered performance, especially *incidental* or *consequential* damages.

"Standard;" "Miscellaneous;" "Back of Document;" or "Boilerplate" Clauses

Much maligned by academics but crucial to efficient contracting. These clauses cover important background conditions the parties need to agree to for almost any contract. Examples:

- i) governing law;
- ii) assignability;
- iii) relationship of parties;
- iv) "integration" (all other writings and verbal statements are outside the scope of the contract);
- v) severability (unenforceability of one clause does not invalidate entire agreement);
- vi) modification (conditions on which agreement can be amended or modified);
- vii) waiver (what happens if a party waives a particular failure to perform; is *all* of that kind of performance waived?);
- viii) notice (how do parties officially contact each other?);
- ix) headings (do they have legal import?);
- x) counterparts ("contract" may be memorialized by identical copies each with parties' signature; each is an "original");
- xi) taxes (who pays what taxes relevant to deal); and
- xii) survival (do any clauses "survive" (are enforceable) even *after* the agreement is terminated?)