

# A Potpourri of Other Drafting Considerations

## ■ Gender Neutral Drafting

- ☐ • Make all
  - pronouns referring to individuals gender specific.
- ☐ • If a party is a woman, use “she” and “her” where appropriate.
- ☐ • If a party is a man, use “he” and “his” where appropriate.
- ☐ • If party is an entity, use “it.”
- ☐ • If the parties are both women and men, try using “that” or “its” if it is a group of both women and men.

# Examples

- • To be eligible to vote, a Shareholder shall submit that Shareholder's proxy no later than 5:00p.m., October 30, 20xx.
- • To be eligible to vote, a Shareholder shall submit a proxy no later than 5:00p.m., October 30, 20xx.
- • Each team shall submit its referendum no later than 5:00p.m., October 30, 20xx.
- NOTE: Instead of using firemen, policemen, and workmen, use firefighters, police officers, and workers.

# A Potpourri of Other Drafting Considerations

## ■ The Cascade Effect

- ☐ • Occurs when the drafting of a business term in one provision requires a change in, or the addition of, a second business term.

## ■ Exceptions

- ☐ • If a contract provision does not apply in all circumstances, the contract must provide for an exception.
- ☐ • To make an exception, use words such as except, except as otherwise provided, other than, and unless.
- ☐ • When drafting a provision, state the rule first, then state the exception.
- ☐ • Although you should generally put the exception at the end of a provision, sometimes it may

## ■ work at the beginning of a provision if

- ☐ (i) it is short and quickly alerts the reader of the exception; or
- ☐ (ii) it provides helpful context

# Exceptions

- Exceptions
- • If a provision and its exception result in a long sentence, consider breaking it down into subsections. Put the general rule first (with the bold title General Rule) and the exception to the general rule second (with the bold title Exception).
  - EXAMPLE:
    - Duty to Maintain Roadways.
    - (a) General Rule
    - (b) Exception
    - (i)
    - (ii)
    - • If a rule and its exception are in separate sentences or subsections, their relationship should be explicitly stated in one of the two sentences or subsections:
      - (1) Except as set forth in the next [sentence] [subsection] [paragraph], [state the general rule here].
      - or
      - (2) Despite the previous [sentence] [subsection] [paragraph], [state the exception here].

# Other Phrases

- “Except as Otherwise Provided”
  - • This phrase signals an exception. However, the exception appears, not in the provision being read, but elsewhere in the contract.
  - NOTE: It is a good practice to refer the readers to the sections [a crossreference] where the exception appears.
- “Notwithstanding anything to the contrary”
  - • This phrase signals a reader that one provision trumps all of the others.
  - • No matter what those other provisions say, this provision supersedes them.
  - • If the contract uses this phrase more than once, make sure that no uses of the phrase contradict each other and create an ambiguity.
- NOTE: A synonymous phrase to use “despite any other provision of this Agreement.”

# Othe Provisions

- “Without limiting the generality of the preceding”
  - • This phrase signals the readers that the examples that follow are illustrative and not intended to restrict the breadth of the preceding statement of the general rule.
- Ejusdem Generis
  - • This is a Latin phrase meaning of the same kind or class.
  - • Courts apply this canon of construction where a list of specific items concludes with general language intended to expand that list.
    - EX: “Force Majeure Event” means storm, flood, washout, tsunami, lightning, drought, earthquake, volcanic eruption, landslide, cyclone, typhoon, tornado, or any other event beyond a party’s control.
- • Since the language or any other event beyond a party’s control is broad, a court looks to the characteristics of the specific events preceding that language to determine what other events would be within its scope.

# **“Expressio Unis Est Exclusio Alterius”**

- • This is a Latin phrase meaning the expression of one thing excludes the other.
  - • It limits a provision to what it expressly states.
- Deem
  - • Deem creates the fiction that something is true, even though it is not.
- EXAMPLE:
  - • Notice. A party gives an effective notice only if the notice is in writing and the intended recipient receives it. (correct)
  - • Notice. A notice is deemed effectively given only if the notice is in writing and the intended recipient receives it. (incorrect)

# Schedules

- • Parties use schedules to disclose information that would otherwise be in representations and warranties.
- • Sometimes the schedules contain additional information that supplements a party's representations and warranties; other times it lists exceptions.
- • Properly or improperly scheduling information directly affects liability under an agreement.
- • Parties put information into schedules for several reasons:
  - 1. It unclutters the agreement and makes it easier to read.
  - 2. It simplifies the logistics of preparing the agreement.
  - 3. Sensitive information can be kept from prying eyes.



# Schedules (Cont.)

- ☐ • When drafting an agreement, do not provide for a schedule if it will not list any information.
- ☐ • Each schedule in a contract is identified by a number.
- ☐ • The number is usually the same as the section number of the provision that requires the schedule.
- ☐ EX: Schedule 3.16

## ■ Exhibits

- ☐ • Exhibits are agreements or other documents relating to the contract that the parties
- ☐ want incorporated into the contract.
- ☐ • Exhibits may or may not have been previously signed prior to incorporating them into the
- ☐ contract.
- ☐ • Occasionally, parties also use exhibits to display technical information or to demonstrate how a mathematical formula works.

# Deconstructing Complex Provisions

## ■ The Six Step Process:

### ■ (1) Explicate

- • Explicating a provision breaks it down into its component parts.
- • It allows you to look at each sentence, clause, and modifier and see how each relates to the other.
- • Number each sentence, then tab any introductory prepositional clause so that it appears on its own line.
- • Also, find each compound and series and tab each item.

### ■ EXAMPLE: Maintenance and Location.

- 1. The Lessee shall, at its own expense, maintain the Equipment in good operating condition and repair and protect the Equipment from deterioration other than normal wear and tear.

# The Six Step Process: 2

- (2): Create Clarity Through Format
  - • Once you explicate a provision, it becomes easy to format.
  - • First, look at each sentence and decide if the subject matter of another sentence is sufficiently related so that the sentences should be combined to create a section or joined into one tabulated sentence.
  - • Second, look at each indented item from a compound or series and decide whether it should be a subsection or joined with the rest of the sentence.
  - • Third, make sure that you do not create an ambiguity.
- EXAMPLE: Maintenance. At its own expense, the Lessee shall
  - (a) maintain the Equipment in good operating condition and repair, and (b) protect the Equipment from deterioration, other than normal wear and tear.

# The Six Step Process: 3

- (3): Create Clarity Through Sentence Structure
  - • Any sentence longer than 3 lines is a good candidate for tabulation, or for being broken down into 2 or more sentences.
  - • Every sentence has core words: the subject, verb, and object. Keep these words together.
- EX: Bart (subject) ate (verb) a (article) Butterfinger (object).
  - • The core words should be as close to the beginning of a sentence as possible.
- EX: Bart ate a Butterfinger every day for the past month, and has not yet had a stomach ache from eating so much chocolate.
  - • Use everything that you have learned to structure clear sentences: redraft nominalizations, place exceptions after the general rule, use the active voice, and use possessives.

# The Six Step Process: 4

- The Six Step Process (4): Clarify Ambiguities
  - • An ambiguity arises when a provision can be interpreted in two or more mutually exclusive ways.
    - EX: There is a contract between a Canadian manufacturer of ski equipment and a U.S. retailer that provides for payment of \$10,000 upon the retailer's receipt. This is ambiguous because we don't know if the \$10,000 should be paid with U.S. or Canadian monies.
- This is known as semantic ambiguity.
  - • Syntactic Ambiguity occurs when it is unclear what a word or phrase refers to or modifies. EX: The Sellers shall sell their Shares to Buyer (all Sellers collectively, or each seller individually?)
  - • Contextual Ambiguity occurs when two provisions are inconsistent.
    - EX: The Tenant shall maintain the entire Building.
    - EX: The Landlord shall maintain the Building lobby.

# The Six Step Process: 5

## ■ The Six Step Process (5): Root out Legalese

### ■ Legalese

#### ☐ Don't use

☐ At the time

☐ By means of

☐ Cease

☐ Commence

☐ Contiguous to

☐ During such time as

☐ Effectuate

☐ Forthwith

☐ In case

☐ Does not operate to

☐ Consequence

☐ Attains the age of

#### Use Simple Versions

When

By

Stop

Begin

Next to

During

Carry out

Immediately

If

Does Not

Result

Becomes \_\_\_\_ years old

# The Six Step Process: 6

## ■ (6) Check Substance

- ☐ • Take a look at the newly redrafted version and make sure that it accurately states all aspects of the business deal.
  - ☐ • Check to see if anything else in the provisions can be changed.
  - ☐ • Check for ambiguities.
  - ☐ • Do a final review (from your client's perspective) to see if anything needs to be changed or added as to liabilities and risks.
  - ☐ • Do a final review (from your client's perspective) to make sure that all financial and numerical representations are accurately reflected.
- • NOTE: It is always good to have someone else other than yourself read the contract, so they can tell you if the provisions make sense to them. Sometimes we know what we want to say, but it does not come across that way on paper.