

# BASIC CONTRACT DRAFTING

Brandon Ford, Esq.  
Lipotec, Srl, a  
Lubrizol Company  
February 17, 2016

# Start Here.....

**Before any drafting can begin, it is important to start with understanding the reason for the agreement...**

- Why the agreement?
- What are the respective rights & obligations of the parties?
  - If unknown for both parties, at least try to answer with respect to your own client.
- When, where, why and how will the obligations be performed and the rights be enforced?
- What happens if a party fails?
- What's it worth?
- What can kill the deal?
- End date? Start date?
- Disputes and remedies

# Next, Outline Basic Terms...

- Preamble
- Recitals
- Definitions
- Body
  - Major Components
    - **Covenants**
    - **Conditions**
    - **Representations and Warranties**
    - **Remedies**
- Boilerplate
- Concluding clause and Signatures

# Then, Draft.....

- **Preamble – The introductory clause – establishes parties, effective date, place of business and jurisdiction**
- **Example:**

- This supply **agreement** (the “**Agreement**”) is entered into, as of the **Effective Date**, between:
  - [Fill in the real party name and address:] ABC Corporation (“**Seller**”), a Delaware corporation, having a place of business and initial address for notice at 123 Main Street, AnyTown, AnyState 12345-6789; and
  - [Fill in the real party name and address:] XYZ LLC (“**Buyer**”), a New York limited liability company, having a place of business and initial address for notice at 456 Commerce Street, OtherTown, OtherState 98765-4321.

# Then, Draft.....

- **Recitals – background information – explains why the parties are entering into the agreement. A court might give special or binding weight to recitals in a contract.**
- **Example:**

- A. Seller sells Products with the **Specifications** set forth in Exhibit A; and
- ~~WHEREAS~~, Buyer desires to purchase the Products at the minimum volume specified in Exhibit C for the Term;
- ~~NOW THEREFORE~~, Seller agrees to sell the Products to Buyer and Buyer agrees to purchase the Products under the terms and conditions stated in this Agreement.

# Then, Draft.....

- **Definitions – defined terms in an agreement can be in a separate section of the agreement (Grouped) or defined within the text (In-Line) or both (Confusing – use cautiously).**
  - Consistent use of capitalization is important
  - If both Grouped and In-Line defined terms are used, cross reference in Definitions Section of Agreement.
- **Example:**

- Definitions –
  - As used in this Agreement, the following terms have the stated meanings; other terms might be defined "in line" in the provisions in which they are used.
    - “**Agreement**” shall mean this Supply Agreement
    - “**Term**” shall have the meaning set forth in Section 3.1 of this Agreement

# And, Draft...

- **Body of Agreement – Major Components**

- Covenants – The parties affirmative and negative duties
- Conditions – The things that must or must not happen before a party has to perform
- Representations and Warranties – the facts that the parties rely on in valuing deal
- Remedies – the parties agreed to rights and excluded rights that supplement or replace common law or statutory rights

# And, Draft...

- **Covenants – The parties affirmative and negative duties**
  - For covenants I prefer to use “Shall” and “Shall not”
- **Example: Affirmative-**

- Delivery - The Seller shall deliver the Products to Buyer at Buyer’s warehouse within thirty (30) days from receipt of the purchase order.
- Confidentiality -The Buyer shall only disclose the **Confidential Information** to such employees, professional and financial advisors or consultants who need to know in order to fulfill the **Purpose** of the Agreement.



# And, Draft...

- **Covenants – The parties affirmative and negative duties**
- **Example: Negative-**

• Non-Solicitation – For the Term of this Agreement, Seller **shall not**, anywhere in the State of Ohio, directly or indirectly invest in, own, manage, operate, finance, control, advise, render services to or guarantee the obligations of any **Entity** engaged in or planning to become engaged in the sale of Products.

# And, Draft some more...

- **Conditions – The things that must or must not happen before a party has to perform**
  - For conditions I prefer to use “subject to”, “unless”, “on the condition that”, “if” or “only if” to distinguish them from covenants.
- **Example:**

- Conditions to Purchase: Buyer’s obligation to purchase the Products is **subject to** the satisfaction, at or prior to **Delivery**, of each of the following conditions (any of which may be waived by Buyer in whole or in part).
  - Accuracy of the Representations (title and condition of assets)
  - Ancillary Agreements (services agreement or NDA)

# And, Draft some more...

- **Representations and Warranties** – the facts that the parties rely on in valuing and negotiating the deal.
- **Example:**

- Seller warrants that at the time of Delivery of the Product, Seller will be the sole owner of the Product (**Title**), Seller warrants to Buyer that, at the time of Delivery, the Product furnished hereunder will conform to Seller's Specifications as per **Exhibit A. (Condition of Assets)** The above warranties extend only to the Buyer.
- (**Authority**) Each party represents and warrants that he or she is duly authorized and has legal capacity to execute and deliver this Agreement. Each party represents and warrants to the other that the execution and delivery of the Agreement and the performance of such party's obligations hereunder have been duly authorized and that the Agreement is a valid and legal agreement binding on such party and enforceable in accordance with its terms.

# And, Draft some more...

- **Remedies** – the agreed to rights and excluded rights that supplement or replace, the common law or statutory rights.

- Types: Termination, Acceleration, Indemnification, liquidated damages

- **Example:**

- **Indemnification:** The Buyer shall **defend**, indemnify and **hold harmless** the Seller from and against all **third-party** claims made against the Seller for loss or damage caused by, or arising from, or in connection with, any breach by the Buyer of the provisions in relation to the delivery or storage of the Products and against all costs and expenses incurred including the cost of investigating and defending such claims.

# Almost Done...Other Important Provisions

- **Term & Termination – The length of the agreement and what must occur for it to end.**
  - Example Types: in the event of breach, unilateral, convenience
- **Example:**

- The term of this Agreement shall begin on the Effective Date and continue for a five (5) year period unless otherwise terminated as provided in this Agreement (the “Term”). The Agreement may be continued thereafter for additional periods of two (2) years if agreed by the Seller and Buyer in writing.
- The Agreement may be terminated on sixty (60) days’ notice for persistent material breach of the Agreement by a party where such breach is not remedied within thirty (30) days after notice to the party in breach from the other. Seller may terminate this Agreement at any time by giving notice in writing to Buyer, which notice shall be effective upon dispatch, should Buyer file a bankruptcy petition, be declared bankrupt, become insolvent, make an assignment for the benefit of creditors, go into liquidation or receivership or otherwise lose legal control of its business or should Buyer or a substantial part of its business come under the control of a third party. The right to terminate as included in this provision shall be in addition to any other rights available to the parties under this Agreement or otherwise.

# Almost Done...Other Important Provisions

- **Force Majeure**– an event or series of events that causes a failure of timely performance and a person would not reasonably have been able to anticipate the event or events and avoid the failure of timely performance
  - **Components:** Acts of God, action of the elements, insurrection, strikes, riots, changes in law, raw material shortages, other reasonable events (often excluding financial).
- **Example:**

- Force Majeure - In the event that this Agreement cannot be performed or its obligations fulfilled for any reason beyond the reasonable control of either party, other than obligations to make payments due under this Agreement, as a result of such events as war, industrial action, floods or Acts of God. Then such non- performance or failure to fulfil its obligations by any such party shall be deemed not to be a breach of this Agreement.

# Don't Forget the Boilerplate

- **Assignment** – the ability of the parties to sell or transfer their rights under the agreement to another party.
- **Governing Law / Choice of Law** – the law that will govern the agreement and in the event of a dispute, a choice of law provision determines which state's legal rules will be applied in the lawsuit.
- **Counterparts** – This sets forth the right of the parties to execute (sign) copies of the agreement without everyone being present in one place at one time to sign them all

# Don't Forget the Boilerplate

- **Notice** – how each party must provide notices to the other (for example, to terminate the agreement).
- **Severability** – This permits a court to sever (take out) an invalid provision and still keep the rest of the agreement intact.
- **Entire Agreement** – Says that the written contract represents the final agreement of the parties. Often, it explicitly states the any prior agreement or discussions of the agreement are replaced by the written contract and that any further modification to the contract must be in writing.



# Finally, Conclude & Sign

- **Concluding Clause & Signatures – The introductory clause – establishes parties, effective date, place of business and jurisdiction**
- **Example:**

The parties have caused this Agreement to be signed by their duly authorized representative to be effective as of the Effective Date.

<b>[PARTY A ENTITY]</b>	<b>[PARTY B ENTITY]</b>
By: _____ (Signature)	By: _____ (Signature)
_____ (Name Typed or Printed)	_____ (Name Typed or Printed)
_____ (Title)	_____ (Title)

# References

- 1– Ross Guberman, Gary Karl, *Deal Struck – The World’s Best Drafting Tips* 15 (2014).
- 2 – J. Lanier Yeates, *Best Practice in Contract Drafting*, June 21, 2006, IQPC, Advanced Contract Risk Management in Upstream Oil and Gas Americas.
- 3 – Common Draft – A Contract Form file for lawyers and law students, extensively annotated, <http://www.commondraft.org>, (2015).
- 4- Adams Drafting , Ken Adams, <http://www.adamsdrafting.com>, (2016).