

# General provisions clause of a US contract

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## Introduction

Throughout this article, I intend to provide entrepreneurs with an understanding of the basic structure of a contract, as well as common contract clauses that are found in most commercial contracts. There are a number of references to which readers can refer if they wish to learn more about what is described here.

## Basic structure of a contract

A contract may come in at least three forms.

The **Traditional Form Contract** is the most common and is the appropriate form for closings. In this form, the signatures appear on the last page of the contract but before any attachments (schedules or exhibits).

A **Schedule Agreement** is arranged so the signatures appear on the first page. The provisions proper of the contract is included in an attachment called "General Terms and Conditions" or variations thereof.

A **Letter Agreement** is informal in nature and is used in opening an ongoing relationship.

No matter what the form is, most contracts have the following parts:

1. Title of the contract;
2. Introduction;
3. Statement of Purpose;
4. Statement of Agreement;
5. Definitions;
6. Performance provisions;

7. Boilerplate provisions;
8. Signatures;
9. Schedules and exhibits.

### **General clauses in performance provisions**

The most discussed (negotiated) parts of an agreement is the Definitions (5), and Performance provisions (6). For example, in a loan agreement, parties usually debate over the following:

- conditions precedent to disbursement,
- covenants, representations and warranties,
- penalties for default by the borrower.

All these will be different for a different transaction. Boilerplate provisions (7) are provisions that are not heavily discussed by the parties. Often, these are cut-and-paste templates.

There are industry standard clauses for each kind of transaction.

Note: A transaction is simply a business deal. Examples of common transactions you encounter everyday:

1. Loan. When you deposit money in a bank, you are lending money to the bank.
2. Sale. A simple example would be a garage sale, or when you buy groceries.
3. Copyright licensing. When you pay for music online you are paying for the license to listen to the music for personal use.
4. Professional services. When you call your plumber to fix your leaking sink pipes.
5. Software as a service (SaaS). Netflix.
6. Mobility as a service (MaaS). Grab, Uber, Zomato, etc.
7. Platform as a service (PaaS). AWS Elastic Beanstalk, Windows Azure, Heroku, Force.com, Google App Engine

The performance provisions describe the promises made by each party and they generally answer: which party is obligated to do something, when it is to be done, what is the consideration (payment), how is payment made, what happens when a party fails to fulfill an obligation, what happens when a party intentionally or negligently violates a contract clause.

Lenné Eidson Espenschied, a practitioner of transactional law for more than 25 years, lists 7 common performance provisions in his book [Contract Drafting: Powerful Prose in Transactional Practice](#):

1. Scope;
2. Representations and Warranties;

3. Express Warranties, Limited Warranties, and Disclaimers;
4. Limitations of Liability;
5. Indemnification Clauses;
6. Liquidated Damage Clauses;
7. Term and Termination Provisions.

Bhumesh Verma, a leading corporate practitioner ranked in the 'A List' of the Top 100 Indian Lawyers by India Business Law Journal, calls the performance provisions: the Operative Clauses. Verma noted that sometimes, parties in a transaction overemphasize the safeguards (clauses detailing how a party can protect its interests) but forget to include the basic aim and objective of the agreement, or if it is included, it's drowned and hidden by other contractual provisions, making it hard for the reader to understand what the transaction is. So it is pertinent to note that:

The purpose or objective of the agreement or the essence of the transaction, by whatever name it may be called, must be mentioned at the first instance.

Verma identified a more comprehensive list of operative clauses:

1. Rights and obligations of the parties;
2. Covenants;
3. Conditions precedent;
4. Closing deliverables;
5. Post-closing formalities;
6. Payments under the agreement;
7. Lock-in;
8. Remedial actions;
9. Confidentiality;
10. Exclusivity/Restrictions;
11. Non-compete;
12. Non-solicitation;
13. Damages;
14. Liquidated Damages;
15. Territory;
16. Costs and expenses allocation;
17. Indemnification and Exoneration;

18. Representation and Warranties;
19. Term/Duration of the agreement;
20. Renewal/Extension of the agreement;
21. Termination of the agreement;
22. Effect of expiry or termination;
23. Survival of certain clauses;
24. Force Majeure;
25. Limitation of liability.

Not all transactions need all the clauses identified by Verma.

## Common provisions in similar transactions

As illustrated above, every contract may be different depending on the nature of the transaction. But there are certain performance provisions that are common to transactions of a similar nature.

To illustrate, let's compare an acquisition or merger of a company to a sale of goods. In a merger and acquisition ("**Acquisition**"), company A in essence pays money to company B to purchase the latter's business and the company itself, including all of its assets and liabilities (an oversimplification). In a contract for sale of goods, person A pays money to B to purchase something from the latter. Contracts involving an Acquisition will usually have a section called "Representations and Warranties." On the other hand, sale of goods contracts will usually have a section called "warranty" or "disclaimer on warranties" and similar headings. Clauses under "Representation and warranties" in an acquisition, are of the same nature of the clauses under "warranty" in a sale of goods. Both clauses, notwithstanding the complexity of one over the other, deal with an assertion or statement of fact to induce another to enter into a transaction ("**representation**"), and a promise that a *representation* or some condition is true, supported by an implied promise to reimburse an injury suffered if the condition or *representation* is false ("**warranty**").

## Harmonizing Espenschied and Verma's list

Espenschied's performance provisions may be regarded as the top-level category of a general clause, while Verma's operative clauses can be categorized under each top-level category.

1. Scope
  - Rights and obligations of the parties.

- Covenants.
  - Territory.
  - Conditions precedent.
  - Closing deliverables.
  - Payments under the agreement.
  - Exclusivity/Restrictions.
  - Lock-in.
  - Costs and expenses allocation.
  - Post-closing formalities.
  - Confidentiality.
  - Non-compete.
  - Non-solicitation.
  - Remedial actions.
2. Representations and Warranties
  3. Express Warranties, Limited Warranties, and Disclaimers
  4. Limitations of Liability
    - Force Majeure
    - Exoneration
  5. Indemnification Clause
    - Damages
  6. Liquidated Damage Clauses
  7. Term and Termination Provisions
    - Term/Duration of the agreement.
    - Renewal/Extension of the agreement.
    - Termination of the agreement.
    - Effect of expiry or termination.
    - Survival of certain clauses.

Having attempted to harmonize the list of the authors, I don't see any practical value of doing so, other than to help one familiarize how to structure a contract. Also, some contractual provisions may overlap in function or purpose, hence, it may not be productive to be strict about it.

## Scope, Representations and Warranties

The scope is the most substantive section of the contract, and it answers the basic journalistic

questions: who, what, when, where, why, how, how much. (Espenschied, p. 138). You should pay close attention to the Scope of your contract. The second part where you should pay close attention to is the Representations and Warranties. In both these sections, there may be clauses which shift risk from one party to the other. See [Allocation of Risk](#).

## Rights and obligations

In essence, it defines the rights and obligations of the parties. The terms of a contract, however, are subject to limitations imposed by relevant laws. In the event of a breach of contract, a party may take legal action to recover damages. Common remedies include:

1. claim for damages;
2. specific performance, an action where the court may force the erring party to perform its obligation;
3. termination of the agreement;
4. restitution for any benefit to the breaching party.

## Covenants

A covenant is an agreement between two parties that certain activities will be performed or not performed. Positive covenants are commitments to perform something. A negative covenant is an agreement not to perform something.

## Allocation of Risk

Entrepreneurs should be critical of this section of the contract as this is where a party can allocate its risks. Risks in a transaction may be shifted to the other party by a single word or phrase.

## Examples

### 1. Ex 1. Assumption of risk without qualification

Warranty. Seller warrants that the goods will conform to buyer's specifications.

### 2. Ex 2. Assumption of risk, qualified to a certain degree

Warranty. Seller warrants that the goods will conform in all material ways to buyer's specifications.

Comparing Ex 1 and Ex 2, "in all material ways" (modifier) reduces the risk of the seller becoming liable because of a limitation imposed by the modifier. This is an example where adding a simple phrase can shift the risk from the seller to the

buyer. The warranty is no longer an unqualified warranty which is also an implied **disclaimer** to the Uniform Commercial Code warranty of fitness for particular purpose.

**3. Ex 3. Limited Warranty.**

Seller warrants that it will use commercially reasonable efforts to comply with the terms of this Agreement. Seller specifically disclaims all other warranties, including the warranty of merchantability and the warranty of fitness for particular purpose.

**4. Ex 4. No Warranty.**

Seller disclaims all warranties under this Agreement, including the warranty of merchantability and the warranty of fitness for particular purpose.

If we compare Ex. 3 and 4, we see that the seller in 4 has completely disclaimed all warranties, shifting the risk to the buyer entirely. Ex 4, is essentially an "as-is" clause. "As-is" clause indicates that the seller is offering to sell a thing in its present, existing condition. Thus, it is up to the buyer to make sure the thing he is purchasing is good.

## Key takeaways

The major parts of a contract are:

1. Scope;
2. Representations and Warranties;
3. Express Warranties, Limited Warranties, and Disclaimers;
4. Limitations of Liability;
5. Indemnification Clauses;
6. Liquidated Damage Clauses;
7. Term and Termination Provisions.

Entrepreneurs should pay close attention to the Scope, and Representations and Warranties because there may be clauses or contractual provisions that shift risk from one party to the other.

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