

US style contract drafting

Learning objectives

1. To understand the general style & principles of US contract drafting;
2. To learn how to draft a US style contract & its components;
3. To acquaint oneself with the basic contract compliances one must know.

Introduction

Contract law in the US is influenced by the common law, specific acts such as the Uniform Commercial Code of each American state and the federal laws on taxation, intellectual property, etc.

In this chapter we will discuss the nature of the US international contracts and their salient features/components.

1. How is the American style of contract drafting unique?

Contract drafting styles are heavily influenced by the drafter's environment & the jurisprudential characteristics of a certain country despite a wide array of contracts that may be drafted.

The key differences between drafting styles of an Anglo-saxon drafter & a European continental attorney are:

Anglo-saxon / American	European
Contracts originating from Common law usually contain exhaustive & elaborate clauses / phrases.	Whereas the European counterparts do not shy away from redacting content that is already addressed with sufficient clarity.
Since there is more emphasis on <i>being explicit</i> , the drafter focusses more upon questions like 'how' and 'what'.	On the other hand, <i>context sensitive</i> drafting addresses questions like 'why'.
Their drafts may contain cerebral phrases or otherwise complicated words.	Drafting in simple language is encouraged while giving due cognizance to technical legal words or phrases.
The overall format is compact.	Certain supplementary pages such as a

	cover page or an outline page may be used.
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Overall, the American contract drafting is such that all imaginable aspects are inculcated in the draft instead of focussing merely on the risks and obligations of the contracting parties. Broadly speaking, American drafters are universalists.



Learn with examples!

Following are phrases that are commonly used in US contracts:

...modify, adjust, amend or otherwise change...

...any losses, actual damages, costs, fees, expenses, claims, suits, judgments, awards, liabilities (including but not limited to strict liabilities), obligations, debts, fines, penalties, charges, costs of Remediation (whether or not performed voluntarily), amounts paid in settlement, litigation costs, reasonable attorneys' fees, engineers' fees, environmental consultants' fees, and investigation costs (including but not limited to costs for sampling, testing and analysis of soil, water, air, building materials, and other materials and substances whether solid, liquid or gas), of whatever kind or nature, and whether or not incurred in connection with any judicial or administrative proceedings, actions, claims, suits, judgments or awards...

...any and all substances (whether solid, liquid or gas) defined, listed, or otherwise classified as ..., or words of similar meaning or regulatory effect under any present or future Laws [with Laws defined as ...] ...

2. Key aspects of a US contract draft

2.1. Date

It **usually appears at the beginning of the draft** after the title clause (name of the agreement) although it is updated the last since it would comprise the date on which the parties signed the said contract.

Where the parties are performing certain business activities encompassed within the contract before or after the date mentioned in the draft, then it shall be accommodated in the language of the contract. For instance, in an Exclusive Distribution Agreement, the *Commencement Date* is known as the date on which the rights & obligations of the parties under the contract come into effect/force.

2.2. Parties to the contract

Complete and accurate details of the contracting parties are added after the title clause. Where a **natural person** is a party, their full name, father's/mother's/guardian's name, age, & their address.

Where a **corporate entity** is being referred to, its name shall follow with the phrase "*a company incorporated under the __{name of the Country}__ laws*" and its registered office address. In America, you are not required to provide the details of the person actually signing the document in representation of the company.

Illustrative example: An excerpt from a US consulting service agreement.

SERVICES AGREEMENT

THIS SERVICES AGREEMENT (The "Agreement") is entered into this _____, 201____, by and between the Board of County Commissioners of Summit County, having its principal place of business at 208 Lincoln Avenue, Breckenridge, Colorado 80424 ("County"), and _____ ("Consultant") having its principal place of business at _____.

2.3. General provisions of a contract

Almost all American contracts have a General Provisions clause which consists of other clauses like:

2.3.1. Dispute Resolution/Governing Law/Jurisdiction

The mode of dispute resolution method whether it be litigation, arbitration, mediation, conciliation or a combination of these methods is clearly specified in this clause. In international commercial contracts, the seat of arbitration or the national courts having jurisdiction over the subject matter of the contract is clearly specified based on the mutual understanding of the parties. Usually, the American courts are preferred to have jurisdiction over contracts where at least one of the parties is American.

Sample clause:

"If a dispute arises under this Agreement, any party may take the matter to California state court, jurisdiction of the county of Alameda.

OR

If a dispute arises under this Agreement, the parties agree to first try to resolve the dispute with the help of a mutually agreed-upon mediator in Alameda County, CA. Any costs and fees other than attorney fees associated with the mediation shall be shared equally by the parties. If it proves impossible to arrive at a mutually satisfactory solution through mediation, the parties agree to submit the dispute to a mutually agreed-upon arbitrator in Alameda County, CA. Judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction to do so. Costs of arbitration, including attorney fees, will be allocated by the arbitrator."

2.3.2. Notices

The mode and address for a valid service of notice is defined hereunder. The terms agreed upon for intimation of any changes in the address is also provided.

2.3.3. Indemnification

A specific party may be made liable to pay any losses arising out of the contract. If the bargaining power of the parties are more or less, the indemnification clause can be mutual as well.

Sample clauses:

"Contractor shall indemnify and hold Client harmless from any loss or liability arising from performing services under this Agreement."

Or

"The Contractor and Client shall mutually indemnify each other and hold each other harmless from any loss or liability arising from performing services under this Agreement."

2.3.4. Assignment

This clause talks about whether the parties have the rights to assign their rights under the said contract to any third party.

2.3.5. Force Majeure

The circumstances wherein losses caused to the parties is because of 'an act of God' or an 'unforeseen natural event' over which they have no control are mentioned hereunder along with any special terms and conditions for the same, if needed. **You can find sample clauses [here](#).**

2.3.6. Confidentiality

Especially in terms of international business, protection of confidential information is key. The breadth and the kinds of information that would be considered confidential under a contract can be defined hereunder.

2.3.7. Signature

Naturally, the persons signing a contract shall have the authority to do so without which the contract will be held to be void. For a corporate entity, in the USA, the signature of a director / executive officer can be used to bind the company under the said contract.

In the case of a partnership company, you are advised not to make all partners sign a contract. Make sure that the partner who has the capacity to sign is doing so.

3. Practices to avoid

- a. Overall, in contracts one must strive to use simple language & crisp sentences;
- b. Jargon must be avoided. Where it must be used, define its meaning in the definition clause;
- c. Use active voice & the present tense;
- d. Exceptions, limitations and qualifications should be drafted together and in separate enumerated sub-paragraphs;
- e. Definitions are to be marked bold & underlined and not placed between double quotation marks;
- f. Number up to ten shall be written in their word form to avoid manual error. Any number above ten may be expressed by the figure or in its word form or both; and
- g. Names and document references shall be written in bold and italics.

3.1. ***“For the avoidance of doubt”***

In certain drafts you must have seen this phrase used. **General principles of contract drafting require one to write precisely and in simple language.** Rephrasing any provision allows for the temptation to inculcate different interpretations despite it not being the intention of the parties. In exceptional cases, it may be used.

When to use it?

It should be used only when:

- a. A subject matter is already covered in a provision, however, an objective reader might not clearly interpret such subject matter to be included / excluded from its scope;
- b. There exists a contradiction / an overlap between the two clauses in a contract; or
- c. When considering the entirety of the contract, the subject matter is important to be addressed to avoid any doubt.



**Learn with
examples!**

Such a clarification may be used when a preceding phrase / sentence has a broad scope whereas the clarification provided is w.r.t. a subject matter is relatively important (or vice-versa)

3.2. “..., as the case may be”

This is a typical example of a contract legalese (language) which more often than not is redundant. It is usually used where there is more than one consequence or course of action involved.

(Bad) Sample clause:

No person shall be elected to fill a vacancy in the Senate or House of Representatives, as the case may be, unless he meets the qualifications set forth in...

Unlike the term ‘respectively’, this phrase is not concerned with whether it refers to something mentioned earlier on in the clause / provision. It is advised not to use this phrase as an automatic follow-up to a sentence since it is considered redundant.

(Good) Sample clause (i.e., where it can be used):

Where it appears to:

(a) a local authority in relation to any premises, processes or works, other than an activity for which a licence is required under Part IV; or

(b) the Agency in relation to an activity for which a licence is required under Part IV but has not been issued, that it is necessary to do so for the prevention or limitation of noise, the local authority or the Agency, as the case may be, may serve a notice on the person in charge.

3.3. 'Include' & 'without limitation'

Drafters often seek to eradicate any uncertainty as to the scope of a clause by using the term 'including'. **Sample clause:**

... all inventories, including products ordered but not yet delivered to customers.

It is used as a modest alternative for 'for the avoidance of doubt'. Since the term 'including' does not imply exhaustiveness by any means, drafters resorted to using 'but not limited to' or 'without limitation'.

(Bad) Sample Clause:

Target Company shall not make any investments in any Subsidiary, including the payment of cash dividends by a Subsidiary to Target Company.

After reading this clause, one may argue that the payment of cash dividends is prohibited while the other may wonder whether payment of stock dividends is covered by its scope or not. For gaining a proper interpretation of the said clause you would need much more information such as the mutual interests of the parties, their expectations etc.

It is advised to use these phrases only where deviance from obvious interpretation of the clause is plausible.



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"The Seller shall sell and deliver all fruits grown by it for cooking purposes, including tomatoes." (Because tomatoes are often mistaken for vegetables.)

3.4. "Notwithstanding"

This phrase used in contracts retains its ordinary meaning in English which can be one of the following: *in spite of; despite; even if; without regard to or impediment by other things; all the same; however; in any case; nevertheless; nonetheless; still; yet.*

3.5. “To the maximum extent permitted by law”

This phrase is usually used where a clause may, as per the circumstances or the applicable law, turn out to be invalid / unenforceable.

Sample Clause:

Until one year after the termination or expiration of this Agreement and to the maximum extent permitted by law, Employee shall not, directly or indirectly, for own benefit or for the benefit of third parties, undertake or facilitate any activities in a field of business equal or similar to a business of Employer or otherwise in direct or indirect competition with Employer.

Here, the use of the phrase “to the maximum extent permitted by law” is not prohibited by any law. In case of a dispute, a court would distinguish a case where two parties negotiated the prohibitions & restrictions from a case where parties deal on either questionable basis or on the basis of either party’s general terms and conditions.

3.6. General terms to avoid & its alternatives

DON'T SAY	SAY	DON'T SAY	SAY
not honest	dishonest	construct, fabricate	make
did not remember	forgot	initiate, commence	begin
did not pay any attention to	ignored	terminate	end
did not remain at the meeting	left the meeting	utilize	use
did not comply with or failed to comply with	violated	substantial portion	large part
		afforded an opportunity	allow

		DON'T SAY	SAY
DON'T SAY	SAY	because of the fact that	since (because)
not honest	dishonest	call your attention to the fact that	remind you
did not remember	forgot	for the period of	for
did not pay any attention to	ignored	in many cases	often
did not remain at the meeting	left the meeting	in many instances	sometimes
did not comply with or failed to comply with	violated	in the nature of	like
		the fact that he had not succeeded	his failure
		the question as to whether	whether

4. Notarisation of contracts

Contracts are notarized for evidentiary purposes since a notary's stamp proves that the signatures indeed belong to the parties named thereunder. You must note that notarisation is not mandatory in America and may be required only where the documents are being registered.

Different states have different requirements for notarisation. Therefore, a prior compliance evaluation should be done.

5. Original documents

Each party to a contract holds one original copy.

6. Contract negotiation

Begin with gaining an understanding of the interests of the parties & the subject matter of their business relationship. This will help you gauge the position of your client in a relationship which is key when it comes to drafting the rights and obligations clauses.

Unless a draft is officially considered as the final agreement, the following clause shall be included:

"This document is not intended to create or constitute any legally binding obligation between the parties hereto, and no party shall have any liability or obligation to another with respect to this document until a fully integrated definitive agreement is prepared, authorized, executed, and delivered by all parties."

6.1. What is an adhesion contract?

Where one of the parties to the contract is not willing to budge or negotiate the terms, the contract is known as an adhesion contract. A common example of this is the Authorized Dealer Agreement. You must note that such contracts are not enforceable if the contractual terms are unreasonable.

7. Advantages of controlling the draft contract

- a. It gives you control over the negotiations & widens your scope for defining the issues;
- b. It can help you avoid any surprises;
- c. Allows you to structure the agreement in a way best suited to your interests; and
- d. The time taken in drafting the same can be monitored & controlled.

Recap

1. Contracts are drafted at length in America since all possible scenarios in a business relationship are given due consideration;
2. In terms of international contracts, the main requirements are:
 - a. Negotiating a contract in the best interest of your client / yourself;
 - b. Proper definition of the parties & correct date of execution;
 - c. Dispute resolution, indemnity, confidentiality, notices, assignments, clauses etc; and
 - d. Final notarisation of the document if needed.