Mastering Contract-Drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

Minimizing Risks, Disputes and Costs When Structuring, Analyzing and Interpreting Business Agreements

TUESDAY, JUNE 10, 2014

1pm Eastern  |  12pm Central  |  11am Mountain  |  10am Pacific

Today’s faculty features:

Vincent R. Martorana, Counsel, Reed Smith, New York

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Mastering Contract-drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

June 10, 2014

Presented by
Vincent R. Martorana

for
Strafford
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Summary of Presentation

• Recap of Basic Concepts
• More-advanced Concepts
• Conditional Language
• Language of Exception and Subordination
• The Concept of “Deemed”
• References to Time
• “And”/“Or” Ambiguities
• Formulas
• Legal Archaisms
Recap of Basic Concepts
Mastering Contract-drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

**Recap of Basic Concepts**

<table>
<thead>
<tr>
<th>Section</th>
<th>Description</th>
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</table>
| Preamble | Type of agreement, date of agreement, parties (name, jurisdiction, entity type)  
Save descriptive relationship between the parties for the recitals or reps |
| Recitals | Provide background, context, evidence of intent  
Only area of a contract that might address “why?”  
Do not include operative provisions  
But ok to define terms (but reference defined terms in operative provisions) |
| Body | Main part of contract  
Preceded by “The Parties hereby agree as follows:” (or something similar)  
Contains **categories of language** |

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## Recap of Basic Concepts

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<thead>
<tr>
<th>Category</th>
<th>Description</th>
<th>Think</th>
<th>Example</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Language of Performance</td>
<td>Addresses actions being taken by the parties by virtue of the contract</td>
<td>“hereby”</td>
<td>Willie hereby transfers to Charlie all of his rights, title and interest in and to the Chocolate Factory.</td>
<td>Use the active voice, Don’t use “shall”</td>
</tr>
<tr>
<td>Language of Obligation</td>
<td>Addresses what a party has to do pursuant to the contract</td>
<td>“shall”</td>
<td>Charlie shall arrive at the Chocolate Factory no later than 11 a.m. on Friday.</td>
<td>Don’t use will (which conveys futurity), Don’t use “must” (save that for conditions and other contexts), Don’t try to impose obligations on third parties</td>
</tr>
<tr>
<td>Language of Prohibition</td>
<td>Addresses what a party is prohibited from doing pursuant to the contract</td>
<td>“shall not”</td>
<td>Willie shall not unduly pressure children to run his Chocolate Factory.</td>
<td></td>
</tr>
</tbody>
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<tbody>
<tr>
<td>Language of Discretion</td>
<td>Addresses what a party is permitted to do under a contract</td>
<td>“is/are permitted to”</td>
<td>Willie shall not unduly pressure children to run his Chocolate Factory, except that Willie is permitted to do so with respect to any child who passes the Test.</td>
<td>Use language of discretion as an exception to language of prohibition; no “naked discretion” \ “may” → “is/are permitted to” or “might possibly”?</td>
</tr>
<tr>
<td>Language of Declaration: Representations</td>
<td>Statement made by a party of what was, is or will be true to induce the other party to enter into the contract</td>
<td>Assertion of truth</td>
<td>Charlie represents to Willie that he obeyed all the rules of the Chocolate Factory.</td>
<td>Need not be within control or knowledge of representing party \ Should reps concerning future facts be rephrased as obligations? \ Can’t “breach” a rep</td>
</tr>
</tbody>
</table>
## Recap of Basic Concepts

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<th>Notes</th>
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</thead>
<tbody>
<tr>
<td>Language of Declaration: Acknowledgments</td>
<td>Statement that a party is accepting as true</td>
<td>Acceptance as truth</td>
<td>Charlie acknowledges that Willie pays his workers in bars of chocolate, rather than in generally recognized currency.</td>
<td>Aligns intentions; potential estoppel</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>Don’t mix with other categories of language</td>
</tr>
<tr>
<td>Language of Policy</td>
<td>Addresses rules governing an event or circumstance</td>
<td>The “rules” of the contract</td>
<td>“Chocolate Factory” means the factory on the plot of land located at 123 Gene Wilder Way, Skokie, IL 60076, United States.</td>
<td>Don’t use “shall”</td>
</tr>
<tr>
<td></td>
<td>Addresses the scope, meaning or during of language, a provision or a contract</td>
<td></td>
<td></td>
<td>Use present tense for policies that apply upon effectiveness of the contract</td>
</tr>
</tbody>
</table>
Mastering Contract-drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

More-advanced Concepts > Conditional Language
Condition: An uncertainty upon which the applicability of certain contract language depends.

Components:

- Conditional clause (ask: “Is this true?”)
- Subordinator (e.g., if, as long as, so long as, until, unless)
- Matrix clause (consequence)
More-advanced Concepts > **Conditional Language**

**Examples**

- **If** the Seller becomes aware that a representation contained in Article 3 is inaccurate, then **the Seller shall promptly notify the Buyer thereof**.

- **Unless** the Seller materially breaches an obligation, **the Buyer shall use the Buyer’s best efforts to consummate the Transactions**.

- **The Buyer shall use the Buyer’s best efforts to consummate the Transactions** **unless** the Seller materially breaches an obligation.

- **The Borrower will be deemed to be in default** **until** it has provided the lender notice otherwise.

- **The Company shall vigorously defend itself in the Lawsuit** **as long as** it has more than $1 million in Excess Cash.
“If…, then…” Structure

If [conditional clause], then [matrix clause]

- **Example:** If Keanu masters the art of acting dumbfounded, then the Producers shall hire him to play the lead role in *The Matrix.*
DON’T USE “SHALL” IN THE CONDITIONAL CLAUSE

Example 1:

😊 If the Borrower **shall be in default**, then the Interest Rate will increase by virtue thereof.

😊 If the Borrower **is at any time in default**, then the Interest Rate will increase by virtue thereof.

😊 If the Borrower **defaults**, then the Interest Rate will increase by virtue thereof.
DON’T USE “SHALL” IN THE CONDITIONAL CLAUSE

Example 2:
The Buyer’s obligation to consummate the transactions contemplated by this Agreement is subject to the satisfaction (or waiver in writing by the Buyer) of the following conditions:

- the Seller shall have has performed and complied in all material respects with all obligations required by this Agreement to be performed or complied by the Seller at or prior to the Closing;
- the Stockholders shall have have consented to the consummation of the Transactions; and
- no ambiguous use of the word “shall” shall have has been used in this Agreement or in any Ancillary Agreement.
“If” vs. “to the extent that”

• “If” is a “binary” concept; the language in the matrix clause will apply to its full extent if the language in the conditional clause is true.

• “To the extent that” is a “sliding scale” concept; it implies that the language in the matrix clause will apply to varying degrees.
If Paulie receives Profits from the Florida Operations, then he shall reimburse Silvio for costs that Silvio incurs with respect to the New Jersey Operations.

To the extent that Paulie receives Profits from the Florida Operations, he shall reimburse Silvio for costs that Silvio incurs with respect to the New Jersey Operations.

This probably works, but it sounds a bit awkward; it doesn’t fit the traditional “If…, then…” structure.

Paulie shall reimburse Silvio for NJO Costs to the extent that Paulie receives Profits from the Florida Operations.
More-advanced Concepts > **Conditional Language**

“**If**” vs. “**to the extent that**”

Chris: “Silvio shall get on the flight to Florida to the extent that Tony tells Silvio to get on the flight to Florida.

This phrasing doesn’t really work because the sentence uses a “sliding scale” subordinator with a “binary” conditional clause.

Silvio: “Ok, boss. I’ll get on the flight **to the extent that** you tell me to get on the flight.”

Tony: “Let’s be clear: **If** I tell you to get on that flight, **then** you’ll get on that flight.”
Generally, avoid “provided that” to create a condition.

- “provided that” can (arguably) be used to qualify the language that precedes it in several different respects.
  
  - **Condition**: The Closing must occur on June 10, 2014; provided that all of the closing conditions set forth in Article 10 have been satisfied.
  
  - **Limitation**: The Closing must take place at Reed Smith’s New York office promptly after the Effective Date; provided that the Closing must occur no later than June 10, 2014.
  
  - **Addition**: A “Transfer” of the Shares means any sale of the Shares; provided that a “Transfer” of the Shares includes any pledge of the Shares.
  
  - **Exception**: The Stockholder shall not Transfer the Shares; provided that the Stockholder is permitted to pledge the Shares to an Approved Bank.
Language of Exception and Subordination
## More-advanced Concepts > Language of Exception and Subordination

### Identifying Language

<table>
<thead>
<tr>
<th>“except”</th>
<th>Ernie shall not annoy Bert, <strong>except</strong> that Ernie is permitted to annoy Bert on Christmas morning.</th>
</tr>
</thead>
<tbody>
<tr>
<td>“subject to”</td>
<td><strong>Section 1. Subject to Section 2</strong>, Ernie shall not annoy Bert.</td>
</tr>
<tr>
<td></td>
<td><strong>Section 2.</strong> Ernie is permitted to annoy Bert on Christmas morning.</td>
</tr>
<tr>
<td>“notwithstanding”</td>
<td>Ernie shall not annoy Bert. <strong>Notwithstanding</strong> the foregoing sentence, Ernie is permitted to annoy Bert on Christmas morning.</td>
</tr>
<tr>
<td>“except as otherwise provided in”</td>
<td><strong>Except as otherwise provided in</strong> the Lease, Ernie shall not annoy Bert.</td>
</tr>
</tbody>
</table>

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Identifying Language

Note: You don’t need to use both “subject to” and “notwithstanding” for the same subject matter.

• **Section 1.** Subject to **Section 2,** Ernie shall not annoy Bert.

• **Section 2.** [Notwithstanding **Section 1,**] Ernie is permitted to annoy Bert on Christmas morning.
Localized Exceptions vs. Broad Inoculations

• Exceptions to rules can be very “local” (i.e., discrete and specific) or they can be “broad” (i.e., wide-ranging with respect to applicability and subject matter)

• Two Factors:
  
  (1) Location (or Potential Location) of Trumping Language
  
  (2) Scope of Trumping Language
Location (or Potential Location) of Trumping Language

Each Party shall not make any public statements with respect to the Transaction; except that each Party is permitted to make internal announcements to their respective employees regarding the Transaction.

Subject to Section 9.5, each Party shall not make any public statements with respect to the Transaction.

Except as otherwise permitted hereunder, each Party shall not make any public statements with respect to the Transaction.

Except as otherwise permitted under the Confidentiality Agreement, each Party shall not make any public statements with respect to the Transaction.

Except as the Parties have otherwise agreed or might otherwise agree, each Party shall not make any public statements with respect to the Transaction.
More-advanced Concepts > **Language of Exception and Subordination**

**Scope of Trumping Language**

Rule: Subject to Section 9.5, each Party shall not make any public statements with respect to the Transaction.

<table>
<thead>
<tr>
<th>Length of Trumping Language</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Short</strong></td>
</tr>
<tr>
<td>Section 9.5. Each Party is permitted to disclose the Transaction to Bob.</td>
</tr>
<tr>
<td><strong>Long</strong></td>
</tr>
<tr>
<td>Section 9.5. Each Party is permitted to disclose the Transaction under the following 37 circumstances:…</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Specificity/Vagueness of Trumping Language</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Specific</strong></td>
</tr>
<tr>
<td>Section 9.5. Each Party is permitted to disclose to Sonny and Cher the existence of the Merger Agreement, the identity of the Parties and the Purchase Price.</td>
</tr>
<tr>
<td><strong>Vague</strong></td>
</tr>
<tr>
<td>Section 9.5. Each Party is permitted to disclose the Transaction to the extent that it is reasonably necessary to do so.</td>
</tr>
</tbody>
</table>
Relative Benefits/Detriments of Localized and Broad Exceptions

<table>
<thead>
<tr>
<th>Localized</th>
<th>Broad</th>
</tr>
</thead>
<tbody>
<tr>
<td>+ Easier to identify applicable trumping language when interpreting contract</td>
<td>+ Useful if you need language, a provision or an agreement to trump all other agreements between the parties</td>
</tr>
<tr>
<td>+ Easier to clearly draft the extent to which trumping language applies</td>
<td>+ Can be a time-saver when in the throes of a transaction</td>
</tr>
<tr>
<td>- Requires knowledge of the precise location of trumping language and subordinate language</td>
<td>- Might nullify a rule that you don’t want nullified</td>
</tr>
<tr>
<td></td>
<td>- Whether or the extent to which a rule is trumped might be unclear</td>
</tr>
</tbody>
</table>

*If possible, take a localized approach.*
Potential Ambiguities

Be clear as to “how far back a trailing exception reaches.”

⚠️ The Seller is not obligated to indemnify a Buyer Indemnitee in respect of a Claim: (i) to the extent that Losses in respect of all Claims exceed $1,000,000; and (ii) except to the extent that the amount of Losses suffered by the Buyer in respect of such Claim exceeds $50,000; except that the foregoing does not apply with respect to Claims based upon breaches of the Seller’s obligations set forth in Section 6.5.

➢ What if the Buyer seeks indemnification in respect of a Claim based upon the Seller’s breach of one of the Seller’s obligations in Section 6.5 that resulted in a Loss to the Buyer of $2,000,000? Does the limitation in clause (i) apply?
The Seller is not obligated to indemnify a Buyer Indemnitee in respect of a Claim: (i) to the extent that Losses in respect of all Claims exceed $1,000,000; and (ii) except to the extent that the amount of Loss suffered by the Buyer in respect of such Claim exceeds $50,000; except that the foregoing clauses (i) and (ii) do not apply with respect to Claims based upon breaches of the Seller’s obligations set forth in Section 6.5.
Potential Ambiguities

Be clear as to “how far back a trailing exception reaches.”

Each JV Party shall not discuss the Joint Venture with those Competitors that have one or more distribution centers located in Europe. Each JV Party shall not discuss the Joint Venture with those Competitors that had net revenues of more than $30 million in 2008. **Notwithstanding the foregoing,** a JV Party is permitted to discuss the Joint Venture with a Potential Strategic Partner.

- How far back does “Notwithstanding the foregoing” relate?
- Can a JV Party discuss the Joint Venture with a Potential Strategic Partner having net revenues of $40 million in 2008 and that has a distribution center located in Europe?
Don’t imply an exception in circumstances in which there is no exception.

During the Post-Closing Period, the Buyer shall not sell the Assets to any Competing Enterprise; except that, after the Post-Closing Period, the Buyer is permitted to sell the Assets to the Key Vendors.

- Including the “exception” does not add anything here: there is nothing otherwise prohibiting the Buyer from selling the Assets after the Post-Closing Period.

- In fact, including the superfluous language might create an unwanted implication: the Buyer is permitted to sell the Assets after the Post-Closing Period only to Key Vendors that are Competing Enterprises.
Potential Ambiguities

“…unless the context otherwise requires…”

• “The following definitions have the following respective meanings, unless the context requires otherwise.”

• “Any reference to any United States, state, or local statute or law is deemed also to refer to all rules and regulations promulgated thereunder, unless the context requires otherwise.”

• “The following rules apply unless the context requires otherwise:…”

• “The word ‘including’ is to be construed to mean ‘including, without limitation,’ unless the context otherwise requires.”

* When does “the context otherwise require”? Who decides?
More-advanced Concepts > The Concept of “Deemed”

The Concept of “Deemed”
“Deemed” → Creates (or potentially creates) a legal fiction for purposes of a contract (or portion thereof).

Examples

- All apples are deemed to be vegetables.
- If Jack passes the bar exam, then he will thereby be deemed to be worthy of a job at a big law firm.
- A breach of any obligation in Section 6.5 will be deemed a material breach for purposes of this Section 11.2.
  - In this example, a legal fiction is created for limited purposes. For example, a breach of any obligation in Section 6.5 might be deemed a material breach for purposes of determining whether a party is entitled to indemnification, but not for purposes of determining whether a closing condition has been satisfied.
Since the use of “deemed” applies to language of policy, which all parties are agreeing upon by virtue of entering into the contract, using the passive voice (without a passive agent) to create a legal fiction works, and sounds less awkward than the active voice.

Passive Voice: The Net Working Capital Statement will be deemed [by the Parties] to be final on the Determination Date.

Active Voice: The Parties deem that the Net Working Capital Statement will be final on the Determination Date.
“not [be] deemed to” ≠ “[be] deemed not to”

- **is/will not be deemed to** negates a “deemed rule”; it does not create a legal fiction
  - All of the Martoranas are deemed to like ravioli; except that Vincent Martorana **is not deemed to** like ravioli. *(I could still like ravioli. But there’s no guaranty of that.)*

- **is/will be deemed not to** is a “deemed rule”; it creates a legal fiction
  - All of the Martoranas are deemed to like ravioli; except that Vincent Martorana **is deemed not to** like ravioli. *(I definitely don’t like ravioli for purposes of this contract – even though I really love ravioli!)*
More-advanced Concepts > The Concept of “Deemed”
“not [be] deemed to” ≠ “[be] deemed not to”

The Stellar Student

Section 1. The Professor shall give a gold star to each Student who is a Stellar Student.

Section 2. Subject to Section 3, a Student who passes the Test will be deemed to be a Stellar Student.

Section 3. A student who answers Question 16 incorrectly will not be deemed to be a Stellar Student. [negates the “deemed rule” set forth in Section 2]

Section 4. Notwithstanding Section 2, a Student who spells his or her name incorrectly on the Test will be deemed not to be a Stellar Student. [sets forth a “deemed rule”]

<table>
<thead>
<tr>
<th>Student</th>
<th>Pass/Fail</th>
<th>Q16</th>
<th>Name</th>
<th>Stellar?</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>Pass</td>
<td>Correct</td>
<td>Correct</td>
<td>Yes</td>
</tr>
<tr>
<td>B</td>
<td>Pass</td>
<td>Correct</td>
<td>Incorrect</td>
<td>No</td>
</tr>
<tr>
<td>C</td>
<td>Pass</td>
<td>Incorrect</td>
<td>Correct</td>
<td>Maybe</td>
</tr>
</tbody>
</table>
By “time,” I am referring to both dates and times of day.
References to time could be used:

- To reference the date of something or to give a date to something
  - The Parties are party to a confidentiality agreement, dated June 10, 2014.

- To specify a point in time
  - The term of the Lease commences on June 10, 2014.

- To specify the beginning or end of a time period
  - The Consultant shall not disclose any Confidential Information for five years after the Expiration Date.

- To apportion a quantity per unit of time
  - The Company shall pay the Employee a monthly incentive fee.
More-advanced Concepts > References to Time

*Time Periods - Use of Prepositions*

References to time at the start of a period

- The Company shall perform the Services *from* June 10, 2014.
- The Company shall perform the Services *after* June 10, 2014.
- The Company shall perform the Services *starting* June 10, 2014.
- The Company shall perform the Services *commencing on* June 10, 2014.
Time Periods - Use of Prepositions

References to time at the end of a period

- The Company shall perform the Services *until* June 10, 2014.
- The Company shall perform the Services *to* June 10, 2014.
- The Company shall perform the Services *through* June 10, 2014.
**Time Periods - Use of Prepositions**

**Solutions**

- Be explicit
  - The Company shall perform the Services commencing on (and including) June 10, 2014.
  - The Company shall perform the Services through and including June 10, 2014.

- Include a time-of-day reference
  - The Company shall perform the Services commencing at 9 a.m. New York City time on June 10, 2014.
  - The Company shall perform the Services until the close of business on June 10, 2014.
To validly make an election to purchase the ROFR Shares, a Stockholder (any such Stockholder, an “Electing Stockholder”) must provide* an Election Notice to the Selling Stockholder within 10 days after such Electing Stockholder receives the Sale Notice.

Suppose the Electing Stockholder received the Sale Notice at 8 a.m. on July 1. Can it provide a valid election notice at 8:30 a.m. on July 11?

To validly make an election to purchase the ROFR Shares, a Stockholder (any such Stockholder, an “Electing Stockholder”) must provide an Election Notice to the Selling Stockholder within no later than 5 p.m. New York time on the date that is 10 days after the date that such Electing Stockholder receives the Sale Notice.

* Assume that the notice provision of this contract specifies the date on which notices will be deemed to have been given.
More advanced Concepts > References to Time

More trouble with time periods…

😊😊️ The term of this Agreement ends at 5 p.m. New York time on June 10, 2015; except that if, **within 10 days of** a Major Event, the Company provides notice of termination of this Agreement to the Consultant, then this Agreement will thereby terminate.

- This example contains two layers of ambiguity: (1) is the date on which the Major Event occurs included in the determination of the 10-day period; and (2) does the 10-day period precede or follow the occurrence of the Major Event (or both?)?

😊️ The term of this Agreement ends at 5 p.m. New York time on June 10, 2015; except that if, **no later than 5 p.m. New York time on the date that is** within 10 days of **after the date on which** a Major Event occurs, the Company provides notice of termination of this Agreement to the Consultant, then this Agreement will thereby terminate.
Other considerations

- Time zones? Lack of clarity can effect references to not only the time of day, but also the date.
  - Better to state, e.g., “New York City time” rather than EST (EDT?)

- If only a date is used, do all times of day during that date “count”? (e.g., if a grantee can exercise an option “through and including June 10, 2014,” can the grantee exercise the option at 11:59 p.m. on June 10, 2014?)

- When is the “close of business”? The close of which party’s business?
“And,” “Or,” and “And/Or” Ambiguities
“And”
“And” concerns a set in its totality.

- The Borrower shall pay all interest and penalties.
- The Buyer hereby assumes the Subsidiary A Liabilities and the Subsidiary B Liabilities.
- I ate chicken cutlets and broccoli for dinner last night.

In these examples, the function of “and” is clear. But ambiguities can arise…
Potential Ambiguity: Are the members of an “AND SET” acting, being acted upon, or to be considered (a) collectively only, (b) separately only, or (c) either collectively or separately?
Moe, Larry, and Curly shall visit the construction site.

Can Moe, Larry, and Curly satisfy the obligation if they visit the construction site at different times?

- Moe, Larry, and Curly shall collectively visit the construction site.
- Moe, Larry, and Curly shall separately visit the construction site.
- Moe, Larry, and Curly, collectively or separately, shall visit the construction site.
Whether there is ambiguity depends upon (among other things) the category of language being used and whether the members of the “AND SET” are the subject or the direct object of the sentence.
Greg and Eugene shall meet with Michael in the conference room.

- Greg and Eugene shall collectively meet with Michael in the conference room.
- Greg and Eugene shall separately meet with Michael in the conference room.
- Greg and Eugene shall meet with Michael, collectively or separately, in the conference room.

Greg shall meet with Eugene and Michael in the conference room.

- Greg shall meet with Eugene and Michael, collectively, in the conference room.
- Greg shall meet with Eugene and Michael, separately, in the conference room.
- Greg shall meet with Eugene and Michael, collectively or separately, in the conference room.
"Distributive" Ambiguity

😊 Transfers and Loans made in contravention of this Agreement will be void.

➢ Does “made in contravention of this Agreement” modify (i) Transfers and Loans or (ii) Loans only?

😊 Transfers will be void and Loans made in contravention of this Agreement will be void.

😊 Transfers and Loans, in each case made in contravention of this Agreement, will be void.

😊 Transfers made in contravention of this Agreement and Loans made in contravention of this Agreement will be void.
“Or”
“Or” concerns a choice between members of a set.

- The Customer shall drink coffee or tea.
- The Licensee shall not conduct business in Nevada, Iowa, or China.
- Julia is permitted to invite Sarah or Kate to the party.
Potential Ambiguity:

Are the members of an “OR SET” acting, being acted upon, or to be considered (i) exclusively or (ii) inclusively?
Exclusive “Or” – the “not and” implication

Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream or cake.

• **Inclusive “Or”**: Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream, cake, *or both ice cream and cake*.

• **Exclusive “Or”**: Caroline shall not eat any dessert, except that Caroline is permitted to eat for dessert ice cream or cake, *but not both ice cream and cake*.
Whether there is ambiguity depends upon (among other things) the category of language being used and whether the members of the “OR SET” are subject or the direct object of the sentence.
Moe, Larry, or Curly shall visit the construction site.

- In this instance, there is arguably no ambiguity. Each of Moe, Larry, and Curly has an obligation to visit the construction site, which will be extinguished when the first one of them visits the site.
- It is difficult (in my opinion…) to claim that ambiguity arises when “or” is in the subject of an obligation.
  - It would be difficult to argue that the parties intended to impose the obligation on only one of Moe, Larry, or Curly (and that we did not know which one of them had such obligation).
  - Could a party claim that only one of Moe, Larry, and Curly is entitled to visit the construction site? To do so would be to infer a prohibition.
Moe shall visit the Construction site or the University.

- In this instance, it is also difficult to claim that the “or” is an “exclusive or.” To do so would be to infer a prohibition (i.e., that Moe is obligated to visit one and prohibited from visiting the other).

Moe shall not set foot in New York, except that Moe shall visit the Construction Site or the University.

- In this instance, perhaps because the “or” obligation is an exception to a general rule, it is difficult to claim that the “or” is an “inclusive or.”
Moe shall not terminate any employees; except that Moe is permitted to terminate employees who are (a) knuckleheads or (b) wise guys.

In this instance, the attributes of the direct object might overlap. There is ambiguity as to whether Moe can terminate “knucklehead-wise guys.” And there is added ambiguity as to whether the “or” is inclusive or exclusive (i.e., whether Moe can terminate knuckleheads only, wise guys only, or both).

A nifty Venn diagram follows…
Moe shall not terminate any employees; except that Moe is permitted to terminate employees who are (a) knuckleheads or (b) wise guys.

Who is Moe permitted to terminate?

- inclusive “or”; attribute overlap ok: Any employee who is either blue, purple, or pink.
- inclusive “or”; attribute overlap not ok: Any employee who is blue and any employee who is pink, but not an employee who is purple.
- exclusive “or”; attribute overlap ok: His choice of either blue/purple employees or pink/purple employees (but not both).
- exclusive “or”; attribute overlap not ok: His choice of either blue employees or pink employees (but not both); he is not permitted to terminate purple employees.
"And / Or"

The “virgule”
To protect RT Jedburg from the consequences of ALF failing and in the event that ALF fails (i) to complete all of the work that is required to obtain the CO for the Premises by August 31, 2008 and/or (ii) to have the CO for the Premises issued to it by October 31, 2008, RT Jedburg shall have an allowed Class 4 unsecured claim in the amount of $8 million (the “Claim”).

**The Court:** RT Jedburg asserts that the phrase 'and/or' is commonly used to mean 'either' or 'both.' The Court concurs….And therein lies the problem.
If ALF fails (i) to meet the Work Deadline and/or (ii) to meet the CO Deadline, then ALF will be liable to RT Jedburg.

The Court: RT Jedburg asserts that the phrase 'and/or' is commonly used to mean 'either' or 'both.' The Court concurs….And therein lies the problem.

If “and/or” means “either” (both not “both”): ALF is liable if ALF fails to meet just the Work Deadline or if ALF fails to meet just the CO Deadline (but not if ALF fails to meet both).

If “and/or” means “both”: ALF is liable if ALF fails to meet both the Work Deadline and the CO Deadline.

It seems like the Court meant this “or” to be an exclusive “or”!
If ALF fails to meet any Deadline, then ALF is liable to RT Jedburg. “Deadlines” means the Work Deadline and the CO Deadline, collectively.
Any given use of “and” or “or” can give rise to one or more ambiguities (and we haven’t covered all types instances in which ambiguities could arise). If there is uncertainty, ask yourself:

- **“And”**: (1) collectively; (2) separately; or (3) either collectively or separately?
- **“Or”**: “inclusive” or “exclusive”?
- **“And / Or”**: Do you mean “either,” or do you instead mean “both”?
Mastering Contract-drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

More-advanced Concepts > Formulas

Formulas
Samples of basic formulas in contracts

- “Closing Cash Payment” means the Purchase Price minus the Escrow Deposit.
- On each Payment Date, the Licensee shall pay the Licensor an amount equal to 5% of the Product Net Revenue.
- If the Company incurs a Reimbursable Cost, then the Member shall pay the Company an amount equal to the amount of such Reimbursable Cost multiplied by such Member’s Pro Rata Share.
Order of operations

- **Rule 1:** Do what’s in the parenthesis first.

- **Rule 2:** Do multiplication and division first; do addition and subtraction second (and in each case left to right).
Some examples:

\[ 2 \times 3 + 10 \div 5 = 6 + 2 = 8 \]

\[ 2 \times (3 + 10) \div 5 = 2 \times 13 \div 5 = 26/5 \]

\[ 2 \times (3 + 10 \div 5) = 2 \times (3 + 2) = 2 \times 5 = 10 \]
More-advanced Concepts > Formulas

Tips for clearly conveying formulas and order of operations in contracts

• Use identifying leading text (e.g., “the result of,” “the sum of,” “the product of”)
• Use enumeration; use defined terms
• Use formatting
• Use algebraic variables
Identifying leading text

- Works ok in the last function of a formula (or clause containing a formula)
  
  ☀  “Hurdle Rate” means the Base Rate plus the product of the First Target Rate and* the Second Target Rate.

- Does not really work at the beginning of a sentence (don’t rely on the parties or attorneys to adhere to the order of operations)

  ☹  “Hurdle Rate” means the product of the First Target Rate and the Second Target Rate plus the Base Rate.

* Note: Since we’ve already used “product,” there’s no need to use “times.”
Identifying leading text

• Note: “the difference between” doesn’t always work (unless you use an absolute value concept).

Julia shall pay Daddy the difference between what the toy costs and her weekly allowance.

• Suppose the toy costs $20 and Julia’s weekly allowance is $10. The likely reading is that Julia must pay 20-10. But Julia could argue that I owe her $10!
Use enumeration; use defined terms

- Separate with enumerated clauses. Include colons, semi-colons, and commas, as necessary.

😊 “Estimated Adjustment Amount” means an amount (which amount might be a negative number) equal to: (a) the sum of the Estimated NWC Adjustment Amount, the Estimated Cash Adjustment Amount, and the Estimated Debt Adjustment Amount; minus (b) the Estimated Transaction Expenses.
Use Formatting

😊 If the Company issues any shares of Common Stock without consideration or for consideration per share less than the Exercise Price in effect immediately prior to such issuance, then, by virtue of such issuance, the Exercise Price in effect immediately prior to such issuance will be reduced to an Exercise Price equal to the quotient obtained by dividing: (a) the sum of (1) the product obtained by multiplying the number of shares of Outstanding Common Stock immediately prior to such issuance by the Exercise Price in effect immediately to such issuance plus (2) the aggregate dollar value of consideration, if any, that the Company receives in connection with such issuance; by (b) the sum of (1) the number of shares of Outstanding Common Stock immediately prior to such issuance plus (2) the aggregate number of shares of Common Stock that the Company issues in such issuance.
If the Company issues any shares of Common Stock without consideration or for consideration per share less than the Exercise Price in effect immediately prior to such issuance, then, by virtue of such issuance, the Exercise Price in effect immediately prior to such issuance will be reduced to an Exercise Price equal to the quotient obtained by dividing:

(a) the sum of (1) the product obtained by multiplying the number of shares of Outstanding Common Stock immediately prior to such issuance by the Exercise Price in effect immediately to such issuance and (2) the aggregate dollar value of consideration, if any, that the Company receives in connection with such issuance; by

(b) the sum of (1) the number of shares of Outstanding Common Stock immediately prior to such issuance and (2) the aggregate number of shares of Common Stock that the Company issues in such issuance.
If the Company issues any shares of Common Stock without consideration or for consideration per share less than the Exercise Price in effect immediately prior to such issuance, then, by virtue of such issuance, the Exercise Price in effect immediately prior to such issuance will be reduced to an Exercise Price computed as follows:

\[ X = \frac{A \times B + C}{A + D} \]

Where:

- \( X \) = the reduced Exercise Price
- \( A \) = the number of shares of Outstanding Common Stock immediately prior to such issuance
- \( B \) = the Exercise Price in effect immediately prior to such issuance
- \( C \) = the aggregate dollar value of consideration, if any, received by the Company in connection with such issuance
- \( D \) = the aggregate number of shares of Common Stock that the Company issues in such issuance
“Accrued Amount” means, as of a given time of determination, the Undistributed 2011 Amounts plus, with respect to each Subsequent Fiscal Year as of such time, the Operating Profit with respect to such Subsequent Fiscal Year.
Mastering Contract-drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

More-advanced Concepts > Formulas

Side Note: Recursion – algebraic variables can be tough…

“Accrued Amount” means, as of a given time of determination, AA,

Where:

\[ AA = U + \sum_{k=1}^{n} X_k \]

- \( U \) = Undistributed 2011 Amounts
- \( n \) = the number of Subsequent Fiscal Years as of a given time of determination
- \( X_k \) = the Operating Profit with respect to the \( k^{th} \) Subsequent Fiscal Year occurring after a given time of determination
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More-advanced Concepts > Summary

• Preliminary (recap): Language matters. Understand the category of language being used.

• Conditions: Break down a conditional clause into its components; “if” vs. “to the extent that”; don’t use “shall” in conditional clauses.

• Exceptions/Subordination: “Localized” exceptions vs. broad inoculations; be precise about what language is being subordinated.

• “Deemed”: “deemed to be” vs. “not deemed to be” vs. “deemed not to be.”

• Time references: Consider whether a start/end date is inclusive or exclusive; ambiguity of “within.”

• “And”: (1) collectively; (2) separately; or (3) either collectively or separately?

• “Or”: “inclusive” or “exclusive”?

• “And/Or”: Do you mean “either,” or do you instead mean “both”?

• Formulas: order of operations; leading text; enumeration and defined terms; formatting; algebraic variables; recursion; examples
Ready thy quill and powdered wig! It’s time for…
“that” vs. “which” (vs. “, which”)

- “that” – Think: restrictive; limiting
  - I’ll give you all the books in my library that I have read.
    - i.e., I’m not going to give you all of the books in my library – just those that I have read.

- “, which” – Think: descriptive
  - I’ll give you all the books in my library, which I have read.
    - i.e., I have read all of the books in my library and I will give them to you.

- “which” [no preceding comma] – Think: Can I replace with “that”?
  - I’ll give you all the books in my library which I have read.
    - It’s unclear whether you get all the books in my library or only those that I have read.
“that” vs. “which” (vs. “, which”)

“Purchased Assets” means all of the assets owned by the Company and its Subsidiaries, other than those assets owned by Ambiguity Sub which are not material to the Company’s operations.

- If “which” is interpreted to mean “that”, then only the blue (small) rectangle gets carved out.
- But if “which” is interpreted to mean “, which”, then the green (medium) rectangle gets carved out.
WHEREAS,

NOW, THEREFORE,

IN WITNESS WHEREOF,

Do hereby/does hereby

Undertakes to –
• just use “shall”

Lancelot does hereby conveyeth his undying love for Guenevere and henceforth shall stave off with sword all others who attempteth to bring her harm.
All notices, consents, approvals, reports, designations, requests, waivers, elections, and other communications (collectively, “Notices”) authorized or required to be given pursuant to this Agreement shall be given in writing and either personally delivered to the Partner to whom it is given or delivered by an established delivery service by which receipts are given or mailed by registered or certified mail, postage prepaid, or sent by telex or telegram or electronic telecopier, addressed to the Partner at his or its address listed beneath such Partner’s respective signature hereto.
Mastering Contract-drafting Nuances: Conditional Language, Exceptions, Date and Time References, and More

Legal Archaisms

😊 WITNESSETH:

😊 WITNESSETH:

😊 WITNESSETH:
The End > This is the end of the presentation. Any questions? Please feel free ask me now or as I’m packing up, or to call or email me.
Vincent R. Martorana is Counsel in the Corporate & Securities Group with Reed Smith’s New York office. His practice includes the representation of clients in domestic and cross-border mergers, stock and asset acquisitions and divestitures, joint ventures, strategic alliances, licensing arrangements, corporate restructurings, private equity investments, and securities offerings. He also regularly provides advice on corporate governance and state laws governing business entities (including Delaware and New York corporate, partnership, and limited liability company law). Vincent has represented a wide range of clients—from start-up and early-stage companies to well-established enterprises—in various industries, including technology, healthcare, pharmaceutical products, and consumer products.

Vincent has extensive experience providing advice on contract drafting, analysis, and interpretation relating to disputes, settlements, and negotiated transactions. He has presented his continuing legal education contract-drafting courses for in-house legal departments and at various other venues, including Practising Law Institute, Strafford Webinars, The Business Development Academy, the National Academy of Continuing Legal Education, the American Bar Association, the New York State Bar Association, the New York City Bar Association, the New York County Lawyers Association, the Brooklyn Bar Association, the Suffolk County Bar Association, and the Westchester County Bar Association.

He is also the author of Drafting Points (www.draftingpoints.com), a blog that is dedicated to contract-drafting issues. He has also written several articles on contract drafting and interpretation and is the co-author of the Reed Smith LLP white paper A Guide to Contract Interpretation (October 2013).

Vincent received a J.D. from the University of Chicago Law School and a B.S. in Economics (with concentrations in Finance and Operations & Information Management), magna cum laude, from the Wharton School at the University of Pennsylvania.
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