

Drafting a Contract

Jessie needs a car. Chester, Jessie's good friend, agrees to sell his old car to Jessie.

Jessie and Chester should draft a contract in order to specify with certainty exactly what duties each one owes the other. They should first think of as many specific issues that they will need to resolve in order to get exactly what they want to accomplish. They should also think of as many specific hypothetical issues that could arise during or after their transaction, and how they can avoid these potential pitfalls.

It is easy to find sample contracts, or "form" contracts, in which all you have to do is fill in the blanks. These contracts often include a number of standard or "boilerplate" terms and conditions. While it may be helpful to use a form contract to get started, it is not sufficient to simply fill in the blank spots and sign on the dotted line. Both parties would want to take the time to think about what conditions are important to them (ex: is there a trial period? A refund option? A payment plan?), and include them accordingly.

The drafter of the contract often has the upper hand in the business transaction. A drafter may design a contract to favor his wants and needs. Remember that because contracts regulate future behavior, you need to draft a contract to stand the test of time.

With the exception of contract terms that may be void because they are illegal or against public policy, the terms that may be included in a contract are only limited by the drafter's creativity. Let's say Jessie is writing the contract to purchase Chester's car. The appropriate terms Jessie should include are the terms that fully describe his agreement with Chester.

Typically, terms in a contract include: 1. Naming of the parties; 2. An overview of the purpose of the agreement; 3. Provisions that allocate risk; 4. Provisions relating to the important dates and time of termination; and 5. How to handle dispute resolution.

It is also important to remember that a valid contract requires **consideration**, something of value that is being exchanged. Make sure you clearly show in the contract how consideration is being fulfilled.

Let's help Jessie start to fill out a contract:

We start with a heading, sometimes also called a caption. It appears on the top of page 1. A heading should identify the type of contract, but should not include details of the contract. Jessie's and Chester's contract heading should read as follows:

Contract for Purchase of a Car

After the heading, it is common to include an introductory paragraph, which identifies the parties in the contract and the nature of the transaction. Make sure to accurately identify the parties! Some contract drafters include the date of the transaction in the introductory paragraph. While the inclusion of the date in the introductory paragraph is not technically legally necessary, it is a good idea nevertheless to include it for clarity and the avoidance of any confusion.

Here is an example of an introductory paragraph:

Jessie Montgomery and Chester Greenburg enter into this agreement on January 1, 2018, for the sale of one motor vehicle, and agree to the following terms.

By including language indicating mutual agreement in the introductory paragraph, notice how the contract establishes consideration, which is necessary for the contract to be legally binding. Consideration can be expressed as mutual promises, such as an exchange of a good for a specific amount of money.

The section following the introductory paragraph is known as the “recitals.” Recitals explain the context for the contract, alerting the reader as to why the parties are entering into an agreement. The key to this section is to provide enough background facts to help paint the picture of what is occurring, keeping in mind that if the parties later end up in court, the court will look to the recitals section for the necessary background of the agreement.

Traditionally, each recital started with the word “Whereas.” For example, in our case, a recital term may read as follows:

Whereas, Jessie wishes to buy Chester’s 1979 Renault 5, and Chester wishes to sell this car to Jessie, upon the terms set forth under this agreement.

The more modern trend in drafting contracts is to use more colloquial language in the recitals, omitting the word “whereas.” A modern recital term may read like this:

Jessie wishes to buy Chester’s 1979 Renault 5, and Chester wishes to sell this car to Jessie, upon the terms set forth under this agreement.

Depending on the complexity of the contract, the next section may be a “definitions” section. If the contract terms are straightforward, there should be no need for a definitions section. There is no need to lengthen a contract to define terms that are clear to everyone! However, sometimes, in complicated transactions, the definition section necessarily takes up numerous pages. The words the contract defines should appear in alphabetical order, to make it easy for the parties to refer back to this section at any time and find a term with ease.

In Jessie and Chester’s case, a definitions section would not only be unnecessary, but it would also be inappropriate. It would make the contract longer, and more complicated, for no reason.

After the definitions section comes the section containing the actual contract terms. This is the body of the contract. Here, the parties state their promises to each other. Remember to include every term that is relevant and important for the agreement! Rules of evidence often prevent a court from accepting a party’s testimony or other extrinsic evidence that additional terms were also a part of the agreement if those terms do not appear within the four corners of the contract itself. So, if it should be in there, make sure it’s in there.

The most important term for our contract would be to describe the car with enough certainty so that there could be no dispute over which vehicle is being purchased. Here are some sample contract terms:

The Seller, Chester, hereby conveys to the Buyer, Jessie, full ownership and title to the motor vehicle described below:

Description of Motor Vehicle Sold:

Year: 1979 Make: Renault Model: 5

VIN: _____

Jessie hereby agrees to pay Chester \$1,000.00 on or before June 26, 2018 in one lump sum payment, for the vehicle described above.

Notice how this sentence also fulfills the consideration requirement.

After the contract terms, contracts typically include housekeeping provisions. While some contracts lump the housekeeping provisions into the section detailing the contract terms, we split them up here for clarity's sake. The housekeeping provisions address the hypothetical circumstances that could come up after the enforcement of the contract, and how the parties agree to deal with them. Here are some examples:

If Jessie fails to make a payment on or before its due date, a late fee of \$100.00 shall be added to the balance due and shall be payable immediately.

This agreement shall be governed by the laws of the State of Arizona and the City of Fredonia, and any applicable U. S. laws.

Both parties hereby agree that this is an "as-is" sale, with no warranties of any kind expressed or implied.

Note that the above sentence also serves as a **risk of loss** provision. Which determines which party will bear the burden of risk for damage to the car after the sale is completed. Here, since Jessie buys the car "as is", he assumes the complete burden of risk if the car does not work properly. If such an agreement is unacceptable to Jessie, he may try to negotiate with Chester for a clause giving him a **warranty** instead of the "as is" provision. In a **warranty** clause, Chester would guarantee that the car works for a specific period of time, and promise to fix the problems that may occur with the car within that period. It is likely that if Jessie were to ask Chester to replace the "as is" clause with a warranty clause, Chester would, in return, ask Jessie to pay a higher price for the vehicle to come with a warranty.

An example of a warranty clause may read:

If the vehicle fails to operate within the first two months after this agreement takes effect, Chester will be responsible to fix the defect or pay an amount not to exceed \$350 to fix the defect.

Sometimes, extraordinary events may make it impossible for one or both parties to implement one or more terms under the contract. Sometimes these circumstances are called "acts of God" –

hurricanes, volcanic eruptions, earthquakes, etc. Sometimes these circumstances are the result of social and political unrest, such as a war breaking out, a strike, etc. A **force majeure** (“superior force”) clause limits the liability of the parties in the event of such an unforeseen and drastic event. It allows a party to suspend or even terminate performing his or her contractual obligations when the circumstances beyond his or her control arise, since performance of the contract would be impossible or highly impractical.

Here is an example:

Neither party shall be liable for suspension of performance of his contractual obligations for the period that delay is caused by factors beyond control of the parties, such as acts of God, war, alien invasions, embargoes, or any other force majeure event.

Sometimes the parties will not want to leave open the possibility of litigation. It is becoming more and more common to include either an **arbitration clause** or a **mediation clause** into a contract. These clauses clearly state that if a dispute occurs, the parties agree not to go to court, but rather to seek alternative dispute resolution. It binds the parties to resolve their disagreement out of court. An arbitrator is not a judge, but acts like one for purposes of resolving the dispute. It is not unusual for retired judges to become arbitrators. Arbitration is a much faster, most cost-effective alternative to litigation. It also often is easier in that it is less formal and focuses more on reaching a resolution than on specific evidence and procedure rules.

Here is an example of an arbitration clause:

All claims and/or disputes that may arise under this agreement will be settled by binding arbitration in the state of Arizona. The arbitration shall be administered by the American Arbitration Association. There shall be one arbitrator, provided by the American Arbitration Association or a non-interested third party.

An award of arbitration may be confirmed in a court of competent jurisdiction.

The purpose of this last statement is to ensure that if a dispute goes to arbitration, and one party is unhappy with the result and subsequently sues the other in a court, the court will uphold the decision from the arbitration.

Before the parties submit to an arbitrator, they may want the opportunity to speak with a mediator, someone who can act as a neutral third party and can help them agree to a resolution of the dispute among themselves. A sample mediation clause may read like this:

In the event of a dispute arising out of this agreement, the parties shall first attempt to settle the dispute by mediation. The parties agree to have the American Arbitration Association appoint a mediator. If the parties cannot settle their disagreement within thirty days after service of a written demand for mediation, any unresolved controversy claim shall be settled by arbitration.

Finally, the signature section contains both parties’ signatures and the date. It typically also contains a sentence such as:

The parties hereby signify their agreement to the terms above by their signatures affixed below.

Sometimes, the contract will contain a **counterparts** agreement. Such an agreement states that the parties do not need to sign the same copy of the contract for it to become binding. Any of the copies of the contract can be treated as an original for purposes of evidencing mutual agreement to the contract.

A counterparts clause may look like this:

This Agreement may be executed in counterparts. Each counterpart shall be deemed as an original, and all signed copies, taken together, constitute one unified agreement.

A counterparts clause can be useful if the parties live far from each other, and time is of the essence in forming the agreement. Instead of waiting for one party to sign and mail the contract to the other, each can sign their own copies simultaneously.

Buyer's signature, date

Seller's signature, date

Buyer's Name, Address, phone number, and email:

*Jessie Montgomery
1 NPC Way
Fredonia, AZ 12345
(555) 555-5555
Dude@nationalparalegal.edu*

Seller's Name, Address, phone number, and email:

*Chester Greenburg
2 NPC Way
Fredonia, AZ 12345
(666) 666-6666
Sweet@nationalparalegal.edu*