

LINDA ALUVALE

LINDAALUVALE@KSL.AC.KE

# DRAFTING CONTRACTS

---

# INTRODUCTION

- Contracts by their very nature are prospective documents. Unlike legal memoranda and briefs that generally look back at past actions, contracts are forward-looking and serve to guide future behaviour.
  - A contract is a legally binding agreement between parties. The document details rights and duties governing an agreement. The main aim of drafting contracts is to memorialize what the parties have agreed upon in hope of preventing future disputes.
  - The goal when drafting contracts should be to draft every sentence with precision such that only one possible interpretation follows—the interpretation the drafter intends. Always aim to avoid any ambiguity in the contract – It must be concise and clear
-

---

# BASICS

- 1) Every contract must include a specific offer and acceptance of that specific offer.
  - 2) Both parties must consent to their free will. Neither party can be coerced or forced to sign the contract, and both parties must agree to the same terms.
  - 3) There must also be consideration, something of value exchanged between the parties. The thing of value may be money or services, but both parties must give something. If someone gets something for nothing, that's a gift, not a contract, and it's not binding.
  - 4) Capacity — someone who is mentally incapacitated or a minor cannot legally sign a valid contract.
  - 5) Legality
-

---

# COMMON CLAUSES IN CONTRACTS

## 1. Parties

When drafting a contract one of the first steps is to identify all parties to the contract. As far as the contract is concerned, a party can be an individual, a company, business name, LLP, NGO, etc. Each party is identified with a description (legal name, address, etc.). Whatever party description is used, identification is mandatory. Use the complete legal name and in the case of a company, insert the registration number.

Accurate identification clarifies who is legally bound to the contract. Wrong identification could result in rendering the contract void.

---



---

## **2. Agreement Title**

Every contractual agreement should have an appropriate title.

## **3. Recitals and Definitions**

A Recital clause otherwise known as a preamble or titled 'whereas,' is usually found before the main body of the contract. It contains information about the business background of the parties and why they are entering into the agreement. It is basically an introduction to the agreement itself.

Definition clauses should contain the description of technical terms used in the contract. The purpose is to make it easy for all parties to interpret the contract.

---

---

#### **4. Term**

The term clause defines the duration of the agreement, often represented as years or months. This clause will stay relevant unless the contract is terminated earlier by a party or by mutual consent of all parties.

#### **5. Terms of Payment**

The terms of payment clause defines the duration of payment, method of payment, and the mode of payment.

#### **6. Consideration**

A consideration clause defines a promise made by one party to the other in exchange for a promise or an action by the other party. It is an essential element for the contract to be considered valid.

---

---

## **7. Exclusivity and Severability**

The exclusivity clause requires the party to the contract to only engage in business activities as agreed under the contract. For instance, if party A gives exclusivity to distribute product X to party B, party A promises to not allow any other parties to distribute product X for the duration of the contract.

The severability clause ensures that the legal clauses in a contract are still enforceable by law if a portion of a contract (one or more clauses) is/are deemed to be illegal.

---

---

## **8. Amendment**

The amendment clause sets forth the procedure to be followed if a condition of a contract needs to be changed by the parties

## **9. Governing Law and Jurisdiction**

Specify which law is to govern the contract in this clause. In the event of litigation, the court will respect this clause and use that law when determining the dispute.

The jurisdiction clause will specify a choice of court to be used in the event of any future disputes.

---



---

## **10. Dispute Resolution**

If the contractual parties have a dispute, this entire clause defines how the parties should resolve that dispute. There are several methods to resolve contract conflicts, e.g, mediation, arbitration, conciliation, negotiation or through the Courts.

## **11. Confidentiality Clause**

The clauses binds the parties not to disclose sensitive/confidential information. Some commercial/employment contracts may contain clause as the parties to the contract will be exposed to sensitive or secretive data in the course of their dealings.

## **12. Non-Compete**

The non-compete clause restricts one party from entering into a competition with another other party by starting a similar business or colluding with a rival company.

---

---

### **13. Non-Solicitation**

The non-solicitation clause restricts a party to a contract from soliciting the other party's employees, customers, or other commercial relationships for their own benefit.

### **14. Indemnification**

“To indemnify” means to compensate someone for his/her harm or loss. In most contracts, an indemnification clause serves to compensate a party for harm or loss arising in connection with the other party's actions or failure to act. The intent is to shift liability away from one party, and on to the indemnifying party.

---

---

## 15. Force Majeure

The French phrase 'force majeure' means a superior force. The force majeure clause ordinarily provides that parties are released from certain contractual obligations when a contract breach results circumstances that are beyond their control. For instance, a natural catastrophe, war, or a pandemic such as Covid.

## 16. Termination

A completed contract has a natural termination at the end of the term. A contract that ends before the natural termination date is done so based on the provisions the termination clause e.g, in an employment contract, this clause is likely to set out the grounds that will lead to termination, how much notice the employee will get and/or what sort of payment he/she will receive.

---

---

## **17. Representation and Warranty**

The representation clause provides an underlying statement of facts by the parties. It is an assertion. The warranty is a promise for indemnity if any party breaches a contract. A breach is a break of a promise.

## **18. Entire Contract**

This clause specifies that all rights and obligations of the parties involved in the contract are covered by the agreement and it supersedes any other agreements (written or oral) between the parties

## **19. Signature and Date**

Contracts must be signed by the contractual parties and initialled beside any hand-written changes made to a contract. Parties who sign the agreement have the authority to bind the party to the agreement. The Date **MUST** be included.

---

---

# USEFUL TIPS

1. Always ensure that you draft the contract within the bounds the law. If you don't, your contract will end up being unenforceable.
2. Shall v. Will v May: Be very careful that you use each of these words correctly in a contract. You should use “shall” when referring to an obligation to be completed by a party. Use “will” to establish future consequences of events and circumstances that do not obligate the parties. “May” is to be used to mean permissive or discretionary.

For example - “The Seller shall reimburse the Buyer for all delivery fees.”

-“This Agreement will be governed by the laws of Kenya

-“Parties may extend the term of the Agreement.”

---



---

QUESTIONS??

---