

The logo for K&L GATES, featuring the text in white on an orange rectangular background. The background of the slide is a colorful, abstract pattern of diagonal lines in shades of red, orange, yellow, green, blue, and purple.

**K&L GATES**

2020 ACC - SC Winter Meeting  
February 28, 2020

## New Times, sans Times New Roman and the Ongoing Evolution of Contracts in the New Decade

**James S. Bruce**  
K&L Gates

**Lauren McFadden**  
K&L Gates

**Jonathan Cote**  
Milliken & Company

# PRESENTERS

- Jamie Bruce
  - Partner – Corporate / M&A
  - K&L Gates (Charleston, SC)
- Lauren McFadden
  - Associate – Corporate / M&A
  - K&L Gates (Charleston, SC)
- Jonathan Cote
  - Corporate Counsel
  - Milliken & Company (Spartanburg, SC)

# OVERVIEW

## I. TRENDS IN CONTRACTING

- a. Drive Towards Efficiency
- b. Streamlining Documentation and Process

## II. USE OF TECHNOLOGY

- a. Contract Hygiene and Data Pooling
- b. Contract Automation
- c. Process Management / Collaboration Technology
- d. Electronic Signatures

## III. DESIGNING CONTRACTS FOR USERS

- a. Less Legalese
- b. Streamlined Formatting
- c. Emphasis on Business Concerns and Objectives
- d. Standardized Principles

# I. USE OF TECHNOLOGY



K&L GATES

# THE TRIED AND TRUE APPROACH

- Largely the same for many, many years
  1. Identify right precedent
  2. Renegotiate against yourself
  3. Clauses and provisions
  4. Best versions
  5. Administrative tasks

# CONTRACT HYGIENE

- Basic:
  - Defined Terms – order; use
  - Cross references
  - Formatting
  
- More legally advanced:
  - Compare document to collected archives
  - Issue spotting – outliers; missing items

h accounting firm is unable  
m of nationally recognized

at.

tly or indirectly controlling,  
fficer, director, manager or  
, director, manager, general  
s sentence. For purposes of  
ommon control with" shall  
cause the direction of the  
mership of voting securities,

gation, or other provision of  
ent will be deemed to have  
of, or any failure to perform  
r other provision, or (b) any  
was inconsistent with such  
id the term "Breach" means  
ice.

Agreement.

ined in Section 2.4.

As a result










## Document Proofreading

 LITERA MICROSYSTEMS



0 Flags   
77 Attention   
0 Filtered Risks 

### Risk Assessment

<b>Names, Dates, Etc.</b> 	<b>Common Terms</b> 	<b>References</b> 
<b>Definitions</b> 	<b>Defined Term Issues</b> 	<b>Editing Mistakes</b> 
<b>Incomplete Items</b>	<b>Inconsistent Phrases</b>	<b>Numbering Issues</b>
<b>Settings</b>	<b>Related</b>	  

KLDOMAIN\mcfaddle



nable  
nized

lling,  
ger or  
eneral  
ses of  
' shall  
of the  
rities,

ion of  
' have  
rform  
) any  
' such  
neans

### Document Proofreading

< Back      Defined Term Issues (113)      Filter v

✓	Qty	Text		Category	
<input type="checkbox"/>	1	Permitted Encumbrances	⚠	Used Not Defined	⬆
<input type="checkbox"/>	1	Office	⚠	Used Not Defined	
<input type="checkbox"/>	1	Tax Assessor	⚠	Used Not Defined	
<input type="checkbox"/>	1	Territorial Statute	⚠	Used Not Defined	
<input type="checkbox"/>	6	Liability	⚠	Used Not Defined	
<input type="checkbox"/>	1	Liability for Taxes	⚠	Used Not Defined	
<input type="checkbox"/>	1	Tax Laws	⚠	Used Not Defined	
<input type="checkbox"/>	1	Governmental Orders	⚠	Used Not Defined	⬇

No Items Checked

**“Data is often an untapped resource in many legal organizations.”**

***DENNIS GARCIA,***  
***ASSISTANT GENERAL COUNSEL,***  
***MICROSOFT***



## DATA POOLING AND PRECEDENT IDENTIFICATION

- Uses your document management system
- Identifies the right document for the right transaction
- Natural language processing identifies concepts, not just key words

# CONTRACT AUTOMATION

- Phase 1: Outsourced
- Phase 2: No coding skills required
  - Basic: changing names, tense, etc.
  - Most advanced: Use of questionnaires and templates

# CONTRACT SUBSCRIPTIONS

- Productization of the law
- Relatively rare but perhaps more by the end of the decade
- Law firms creates platform
- Client access on a subscription basis

# COLLABORATION TECHNOLOGY, PROCESS AND CONTRACT MANAGEMENT

- Use of AI in due diligence
- Collaborative platforms
- Interactive data rooms
- Enhanced contract management

**Kira** Home > Project Name: Corporate/M&A Practice Group Demo Client: 0940200 Matter: 00117

- DASHBOARD
- DOCUMENTS
  - Document List
  - Analysis Chart
  - Analysis Graphs
  - Tags
- REVIEW STATUS
- COMPARISONS
- SETTINGS
- WORKSHEETS**

**CHOOSE FIELDS:**

Search for Fields or Field Groups

M&A Due Diligence

- Select All
- 40 Act Assignment ⓘ
- All or Substantially All Asset Transfer ⓘ
- Amendment ⓘ
- Assignment ⓘ
- Assignment by Operation of Law ⓘ
- Audit Right ⓘ
- Automatic Renewal ⓘ
- Bankruptcy ⓘ
- Change in Corporate Structure ⓘ ⚠
- Change of Control ⓘ
- Confidentiality ⓘ

Add

**EDIT WORKSHEETS:**

M&A Template

M&A Template

Default Worksheet

- Change of Control ⓘ ×
- Parties ⓘ ×
- Date ⓘ ×
- Term and Renewal ⓘ ×
- Assignment ⓘ ×
- Governing Law ⓘ ×
- Warranty ⓘ ×
- Indemnity ⓘ ×
- Amendment ⓘ ×

**Kira** Home > Project Name: Corporate/M&A Practice Group Demo Client: 0940200 Matter: 00117 Quick Study Account Help

Corporate/M&A Practice Group Demo / Import

Search Tips

Assign Tag Compare Move Worksheets Create Folder Export

Filename	Type	Assigned	Reviewed	Worksheets	
[Redacted]	Intellectual Property Agt. Contract	A Charlton, Jaehn A.		P M&A Template	14 Aug 2018 8:14AM
[Redacted] LAN_112381	Disclosure Document Non-Contract	A Charlton, Jaehn A.	B Charlton, Jaehn A.	P M&A Template	14 Aug 2018 8:14AM
[Redacted] LAN_11	Disclosure Document Non-Contract	A Charlton, Jaehn A.	B Charlton, Jaehn A.	P M&A Template	14 Aug 2018 8:14AM
Form 8-K-[Redacted]	Contract Business Transaction Agt.			P M&A Template	25 Feb 2020 8:11PM
[Redacted] 6.10.2019.doc	Contract Business Transaction Agt.			P M&A Template	6 Dec 2019 6:26PM
[Redacted] 4_EX	Service Agt. Contract	A Charlton, Jaehn A.		P M&A Template	14 Aug 2018 8:14AM
[Redacted] 10	Governance Agt. Contract	A Charlton, Jaehn A.		P M&A Template	14 Aug 2018 8:14AM
[Redacted] License Ag	Intellectual Property Agt. Contract	A Charlton, Jaehn A.		P M&A Template	14 Aug 2018 8:14AM

My Computer  
Intralinks  
HighQ

100%



Investment Distribution Agreement.pdf

Search for text Pages 1 / 2 100%

M&A Template Search for fields

Page 1/2

This Plan may be amended at any time by the Board of Trustees, provided that (a) any amendment to authorize direct payments by the Fund to finance any activity primarily intended to result in the sale of Shares of the Fund, or to increase materially the amount spent by the Fund for distribution, shall be effective only upon approval by a vote of a majority of the outstanding voting securities of the Fund, and (b) any material amendments of this Plan shall be effective only upon approval in the manner provided in the first sentence in this paragraph.

Automatic Renewal (0)

Summary

Enter summary here...

No results found. Highlight the document to add text here.

Bankruptcy (0)

Summary

Enter summary here...

No results found. Highlight the document to add text here.

Exclusivity (0)

Summary

Enter summary here...

No results found. Highlight the document to add text here.

100%

the Distributor or any other party, it being recognized that the Fund presently pays, and will continue to pay, a management fee to the Adviser. To the extent that any payments made by the Fund to the Adviser, including payment of management fees, out of which management fees the Adviser may pay fees ██████ should be deemed to be indirect financing of any activity primarily intended to result in the sale of Shares of the Fund within the context of Rule 12b-1 under the Act, then such payments shall be deemed to be authorized by this Plan.

5. This Plan shall become effective upon [the first business day of the month following] the approval by a vote of a majority of the Trustees of the Trust, including a majority of Trustees who are not "interested persons" of the Trust (as defined in the Act) and who have no direct or indirect financial interest in the operation of this Plan or in any agreements related to this Plan (the "Independent Trustees"), cast in person at a meeting called for the purpose of voting on this Plan.

6. This Plan shall, unless terminated as hereinafter provided, remain in effect until June 30, 2018, and from year to year thereafter, provided, however, that such continuance is subject to approval annually by a vote of a majority of the Trustees of the Trust, including a majority of the Independent Trustees, cast in person at a meeting called for the purpose of voting on this Plan. This Plan may be amended at any time by the Board of Trustees, provided that (a) any amendment to authorize direct payments by the Fund to finance any activity primarily intended to result in the sale of Shares of the Fund, or to increase materially the amount spent by the Fund for distribution, shall be effective only upon approval by a vote of a majority of the outstanding voting securities of the Fund, and (b) any material amendments of this Plan shall be effective only upon approval in the manner provided in the first sentence in this paragraph.

7. This Plan may be terminated at any time, without the payment of any penalty, by vote of a majority of the Independent Trustees or by a vote of a majority of the outstanding voting securities of the Fund.

8. During the existence of this Plan, the Trust shall require the Adviser ██████ and/or the Distributor to provide the Trust, for review by the Trust's Board of Trustees, and the Trustees shall review, at least quarterly, a written report of the amounts expended in connection with financing any activity primarily intended to result in the sale of Shares of the Fund (making estimates of such costs ██████

TERM AND RENEWAL

AMENDMENT

**EXPORT**

Exporting 1 document

**Select Fields For Export**

M&A Template (3 out of 13)

- Change of Control
- Parties
- Date
- Term and Renewal
- Assignment
- Governing Law
- Warranty

**Include Tags**

Document Type  Document Tags  Duplicate

Language  Field Tags  Flagged

**Include Field Summaries**

Yes, export field summaries with results

Yes, export field summaries only, without results

No, do not include summaries

**Select Format and Layout**

Word

Each summary in its own file

Include page numbers

**Fields organized by:**

Table  Row

Excel

PDF

**Layout Example**

	Field Name		Field Name	
Filename	Field Text	Tags	Field Text	Tags
Filename	Field Text	Tags	Field Text	Tags

Flagged fields in red text

Cancel
Export

Kira

 Home > Project Name: Corporate/M&A Practice Group Demo | Client: 0940200 | Matter: 00117

DASHBOARD
Documents

DOCUMENTS
Analysis Chart

REVIEW STATUS
COMPARISONS

SETTINGS
WORKSHEETS

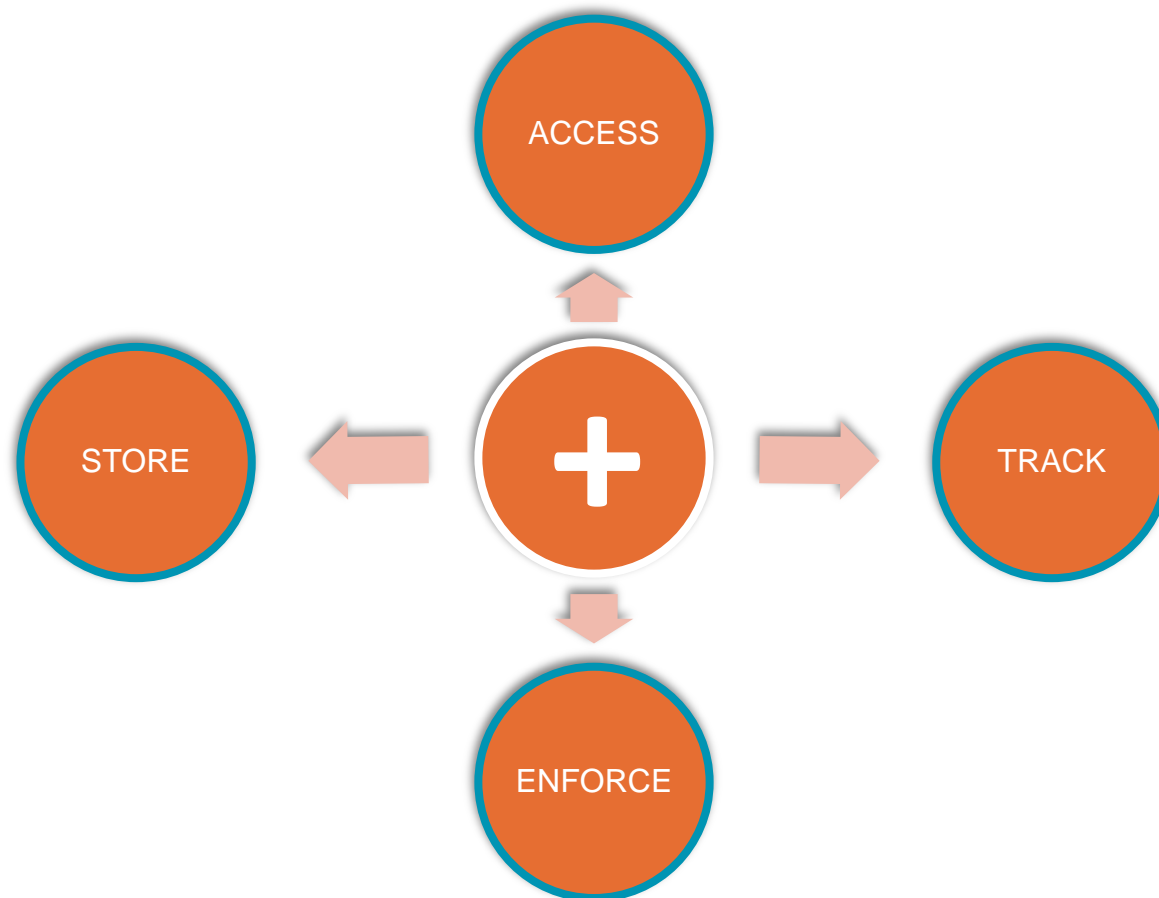
Corporate/M&A Practice Group Demo /

M&A Template Export

Document	Change of Control	Parties	Date	Term and Renewal	Assignment	Governing Law	Warranty	Index	Renewal	Filed
Form 8-K	28	2	1	1	2	2		5		
Comparison Test 1.docx		1		1						
Comparison Test 2.docx		1		1						
Comparison Test 3.docx		1		1						
Comparison Test 4.docx		1		1						
S-1A_EX-10.9	2	1	1	5	1	1	3	1	1	1
.48	1		2			1		1		
201806	1		1					1		
Form 8-K	15	2	1							
orm 425_EXHIBIT 2	24	2	1	1	4		5	4		1
.48			1	1				1		1
.201	1	1		1	2	1	1	1	2	1
EX-10	1	1		3	2	1	2	1	1	2

(iii) any Contract involving the settlement or compromise of any claim, action or proceeding or threatened claim, action or proceeding for series of related claims actions or proceedings) which (A) involves either (1) payments by the Company or any of its Subsidiaries after the date hereof in excess of \$100,000,000, and/or (2) any Covered Product in the United States or Europe, or (B) imposes any materially burdensome monitoring or reporting obligations to any other Person outside the ordin... and 4 more

# ELECTRONIC SIGNATURES



## BUT WILL THE ROBOTS TAKE OVER?

- Short Answer: **NO.**
- Allows lawyers to be more effective in the areas where their assistance is most meaningful
  - Nuance and strategy
  - Judgment calls; navigating complex legal issues
  - One-to-one aspects of negotiating
  - Fine level decision making

## WHAT'S NEXT

- Enhanced use of existing technology
- Integration of various areas of innovation
- Advantages for those who are ahead
- New rules and regulations

## II. DESIGNING CONTRACTS FOR USERS

# HOW (SOME) NON-LAWYERS VIEW CONTRACTS

AGREEMENT

Whereas blah blah blah blah blah shall deliver blah blah blah aforementioned blah blah herein below blah blah indemnifies party of the first part blah blah blah more gobbledygook blah blah liability that will kill my company but what the heck I am dead without this contract anyway blah blah and what the heck is indemnification again that is too hard to understand blah blah noon area this stuff anyway blah blah and anyway this relationship is built on trust not on a piece of paper blah blah the indemnified party shall notify the indemnifying party within ten (10) days blah blah and/or this will happen blah blah notwithstanding blah blah such aforesaid terms shall apply blah blah the parties agree blah blah governing law is Timbuktu blah blah witness to the due execution hereof blah blah where do I sign and get this over with



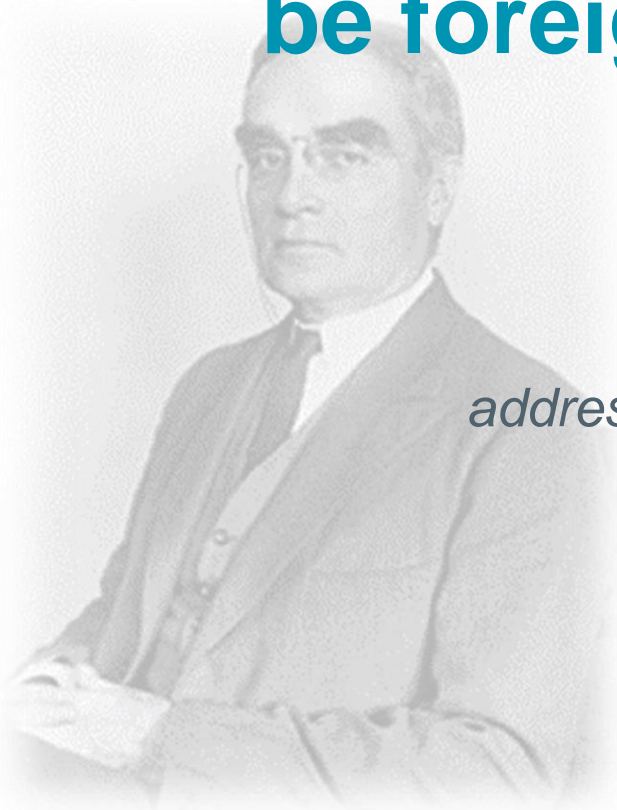
Sign here: \_\_\_\_\_

# HOW WE SEE OUR CONTRACTS





**“The language of the law must not be foreign to the ears of those who are to obey it.”**



*JUDGE LEARNED HAND,  
address to the American Law Institute, 1929*

## LESS LEGALESE, MORE PLAIN ENGLISH

“Traditional style” of legal writing notorious for:

- Unnecessarily complex words
- Legal jargon
- Convoluted sentences that can create ambiguity and make it difficult to discern the intended meaning
- Difficult to read and comprehend

Plain English is clear, straightforward expression, using only as many words as are necessary. It is language that avoids obscurity, inflated vocabulary and convoluted sentence construction. It is not baby talk, nor is it a simplified version of the English language. Writers of plain English **let their audience concentrate on the message** instead of being distracted by complicated language. They make sure that **their audience understands the message easily**.

*Professor Robert Eagleson, author of "Writing in Plain English," key contributor to "Plain English and the Law" (Law Reform Commission of Victoria), cofounder of the Center for Plain Legal Language at the University of Sydney*

# NOT A NOVEL IDEA

- **1972, President Nixon:** ordered that “layman’s terms” be used in the Federal Register
- **1978, President Carter:** issued executive order stipulating that government regulations should “be as simple and clear as possible”
- **1998, Clinton Administration:** expressly obligated federal agencies to use plain English
- **1998, SEC:** published A Plain English Handbook for security disclosure documents
- **2010, U.S. Congress:** passed the Plain Writing Act. Stated purpose was “promoting clear government communication that the public can understand and use”

# BENEFITS

Less  
Negotiation

Easier to  
Administer

Less  
Ambiguity

More  
Confidence

# SAVING MONEY AND TIME IN THE REAL WORLD

- Caught on in many other industries
  - Cleveland Clinic
  - Sabre Travel
- Slow to catch on in the legal world
  - Slowing down time to market
  - Lack of uniformity between agreements
  - Difficulty for those administering

## WHAT'S HOLDING US UP

- Jurisprudence
- Policies
- Expense up front
  - Time
  - Money
  - Resources

# SO HOW DO WE GET THERE?

- **HAVE PATIENCE**

- Don't rush the process; old habits are hard to break
- True paradigm shift in language and contracts

- **EDUCATE YOURSELF**

- Learn as much as you can about the subject
- Learn from the source
- Let the product / service and the associated risks determine substance



# SO HOW DO WE GET THERE?

- **USE CORRECT METRICS**
  - Fewer pages / words do not necessarily = more comprehensible
  - Negotiation speed should be priority
  - Focus on understandability
- **BE PERSISTENT**
  - Benefits clear
  - But change (especially radical change!) can be hard
  - Takes time and resources

# CONSIDERATIONS

- Not Just:
  - Fewer words
  - Better headings
  - Cleaner fonts
- Does NOT mean deleting complex information
  - Use words economically
  - Plan in advance / know your audience
- Always protecting client's interests

# RE-THINKING TRADITIONAL LANGUAGE

Plain-language initiative in GE Aviation's digital-services unit | **liability limitation clause:**

## BEFORE

UNDER NO CIRCUMSTANCES SHALL COMPANY HAVE ANY LIABILITY, WHETHER IN CONTRACT, TORT (INCLUDING NEGLIGENCE), STRICT LIABILITY, OTHER LEGAL THEORY, OR BREACH OF WARRANTY FOR: (i) ANY LOST PROFITS; (ii) ANY LOSS OR REPLACEMENT OF DATA FILES LOST OR DAMAGED; (iii) CONSEQUENTIAL, SPECIAL, PUNITIVE, INCIDENTAL OR INDIRECT DAMAGES ARISING OUT OF THIS AGREEMENT, THE DELIVERY, USE, SUPPORT, OPERATION, OR FAILURE OF THE SYSTEM; OR (iv) CONSEQUENTIAL, SPECIAL, PUNITIVE, INCIDENTAL OR INDIRECT DAMAGES ARISING OUT OF THE INACCURACY OR LOSS OF ANY DATA GENERATED BY THE SYSTEM; EVEN IF COMPANY HAS BEEN ADVISED OF THE POSSIBILITY OF SUCH DAMAGES, PROVIDED THAT THE FOREGOING DISCLAIMER UNDER SUB-SECTION (iii) ABOVE DOES NOT APPLY TO THE EXTENT SUCH DAMAGES ARE BASED UPON THE USE OF THE SYSTEM AND ARE ARISING OUT OF AUSTIN'S WILLFUL MISCONDUCT OR GROSS NEGLIGENCE THAT RESULTS IN A BREACH OF SECTION 6 HERETO.

# RE-THINKING TRADITIONAL LANGUAGE

Plain-language initiative in GE Aviation's digital-services unit | **liability limitation clause:**

## AFTER

Your and our total compensation obligation under this contract cannot exceed twenty-five percent of the amount FES has billed you in the last twelve months for the applicable service, and neither of us have any compensation, contribution or other obligation for consequential, punitive, incidental, indirect or exemplary losses (including, but not limited to, profit or revenue loss, capital costs, replacement costs and increased operating costs).

# RE-THINKING TRADITIONAL LANGUAGE

## BEFORE

Customer shall indemnify, defend, and hold Company harmless from any and all claims, suits, actions, liabilities, damages and costs, including reasonable attorneys' fees and court costs, incurred by Company arising from or based upon (a) any actual or alleged infringement of any United States patents, copyright, or other intellectual property right of a third party, attributable to Customer's use of the licensed System with other software, hardware or configuration not either provided by Company or specified in Exhibit D.3, (b) any data, information, technology, system or other Confidential Information disclosed or made available by Customer to Company under this Agreement, (c) the use, operation, maintenance, repair, safety, regulatory compliance or performance of any aircraft owned, leased, operated, or maintained by Customer of (d) any use, by Customer or by a third party to whom Customer has provided the information, of Customer's Flight Data, the System, or information generated by the System.

# RE-THINKING TRADITIONAL LANGUAGE

## AFTER

If an arbitrator finds that this contract was breached and losses were suffered because of that breach, the breaching party will compensate the non-breaching party for such losses or provide the remedies specified in Section 8 if Section 8 is breached.

# STREAMLINING CONTRACTS

- Get rid of superfluous recitals or details
- Eliminate unnecessary and abstract words
- Use lay terms
- Stick to short sentences
- Use only active voice
- Eliminate or minimize definitions

# NO EXTRANEOUS WORDS OR NUMBERS

## *Example One:*

“**Warranty Period**” shall mean a period of one (1) year from the date of shipment by the Company to the Customer.

## *Better:*

“**Warranty Period**” means a period of one year from the date of shipment by Company to Customer.

## *Example Two:*

The foregoing Fee Table is intended to assist investors in understanding the costs and expenses that a shareholder in the Fund will bear directly or indirectly.

## *Better:*

This table sets out the fees and expenses that you may pay if you buy and hold shares of the fund.



# LANGUAGE TO WATCH

Avoid words that are archaic, phrases that are unnecessarily verbose or redundant like:

- |  |   |
|--|---|
| <ul style="list-style-type: none"><li>• heretofore</li><li>• whereas</li><li>• forthwith</li><li>• aforesaid</li><li>• whereas</li><li>• said (as an adjective)</li><li>• hereby</li><li>• Unless otherwise agreed</li></ul> | <ul style="list-style-type: none"><li>• in the event that (if)</li><li>• in order to (to)</li><li>• the parties [expressly] agree that . . .</li><li>• utilize</li><li>• subsequent to (after)</li><li>• and/or (usually only one applies!)</li></ul> |
|--|---|

## Use Cautiously

- **Notwithstanding** - Use only as a specific exception to an identifiable provision
- **herein, therein, hereof, thereof** - Great shortcuts among lawyers, but nobody else
- **Shall** – do not incorrectly use where “will” is the appropriate choice

## EXTRANEOUS WORDS

“Now therefore in consideration of the foregoing and the mutual promises and covenants herein contained, the receipt and sufficiency of which is hereby acknowledged, the parties hereby agree as follows:”

- Redundant; well-drafted contract should clearly lay out each party's consideration

“Headings used in this Agreement are included for convenience of reference only and shall not constitute a part of this Agreement for any other purpose and will have no force or effect in the construction of this Agreement.”

- Choose section headings as carefully as other text
- Adds unnecessary length + doesn't help the reader understand the contract's substantive content

## TEN SECOND PRIMER ON “SHALL”

- Don't use “shall” unless you want to create an obligation on the part of a party to the contract (the party has to have a duty to do, or a duty to not do, something)

<b>Right</b>	<b>Buyer shall pay within 30 days of receipt of invoice.</b>
<b>Wrong</b>	The interest rate on late payments shall be 1%.

- “Will” may convey an obligation, but it also conveys futurity
- “Must” works best when expressing a condition that has to be satisfied (otherwise it only asserts that a duty merely exists)

# SHORTER SENTENCES

- Keep the subject, verb, and object close together
- Natural word order: subject-verb-object
- Follow this order as closely as possible / try to eliminate interfering modifiers = clearer writing

## Before

**Holders** of the Class A and Class B-1 certificates **will be entitled** to receive on each Payment Date, to the extent monies are available therefor (but not more than the Class A Certificate Balance or Class B-1 Certificate Balance then outstanding), **a distribution**.

## After

Class A and Class B-1 certificate **holders will receive a distribution** on each payment date if cash is available on those dates for their class.

# SHORTER SENTENCES

**Hidden verbs:** the strong verb hidden in a nominalization (often: -tion). Identify and try to make it the main verb. Writing = clearer / less abstract.

Before	After
We made an <b>application</b> ...	We applied...
We made a <b>determination</b> ...	We determined...
We will make a <b>distribution</b> ...	We will distribute...
We will provide appropriate <b>information</b> to shareholders concerning...	We will inform shareholders about...
We will have no stock <b>ownership</b> of the company.	We will not <b>own</b> the company's stock.
There is the possibility of prior Board <b>approval</b> of these investments.	The Board might <b>approve</b> these investments in advance.

## USE OF DEFINITIONS

“Don’t let a shortcut for the writer become a roadblock for the reader”

- Determine placement
- Use judiciously and consistently
- Don’t hide covenants, obligations, representations or warranties in a definition

## SYSTEM FONTS: BODY TEXT

- Bell MT
- Book Antiqua
- Californian FB
- Calisto MT
- Century Schoolbook
- Franklin Gothic
- Garamond
- Gill Sans MT
- Goudy Old Style
- Helvetica
- **SITKA**

# STANDARDIZED PRINCIPALS

- International Association for Contract and Commercial Management (IACCM)
- Contracting Principles – high level principles and applications to contract terms

 IACCM  
International Association  
for Contract and  
Commercial Management

**The IACCM Contracting Principles**

**1** Performance of contract should be uninterrupted, and a supplier should have general obligations to maintain the appropriate level of contingency plans in place in order to ensure continuity of deliverables. However, either the supplier or the customer should be excused from performing their respective obligations when performance is prevented or delayed by events defined as Force Majeure. Force Majeure should allow contracts to adapt to specific circumstances that are beyond the reasonable control of a party.

**2** Suppliers and customers should negotiate the Force Majeure clause as part of their risk allocation and in conformance with general industry practices and the level of risks in the applicable geographic areas of operations.

**3** The generally narrow definition of Force Majeure provided by civil codes – circumstances outside the control of a party, which the party cannot prevent or overcome, and which it could not have reasonably foreseen when the contract was concluded – is a default definition that is usually adjusted by mutual agreement of the parties.

**4** Suppliers and customers should agree upon a broad or definition of Force Majeure that avoids the qualification of Force Majeure as “unforeseeable” in business and operative environments where the probability of disruptions is high and the costs to overcome them are very likely to become disproportionate with regard to the economics of the contract.

cont. →

24

Force Majeure

**Applying the Principles to contract terms**

**1. Definition of Events of Force Majeure**

<b>Illustrative and non-exhaustive definition</b>	1.1 If a list of Force Majeure events is provided, the list should be clearly described as illustrative and non-exhaustive, as well as supplemented by a catch-all definition of Force Majeure, referring to any other circumstances beyond the affected party's reasonable control.
<b>Reasonably detailed definition</b>	1.2 The following are common examples of events entitling a supplier or a customer to be temporarily excused from their respective obligations: <ul style="list-style-type: none"> <li>a) Acts of God, natural disasters, earthquakes, fire, explosions, floods, hurricanes, storms or other severe or extraordinary weather conditions, natural disasters,</li> <li>b) Sabotage, contamination, nuclear incidents, epidemics,</li> <li>c) War (civil or other and whether declared or not), military or other hostilities, terrorist acts or similar, riot, rebellion, insurrection, revolution, civil disturbance, or usurped authority),</li> <li>d) Strikes or other industrial disputes that affect an essential portion of the supplies or works, except with respect to workers under the control of the party asking for relief due to this event.</li> </ul>
<b>Examples of Force Majeure events</b>	1.3 The list of Force Majeure events should be more elaborated when the contract is performed in relation to business and operative environments that are unstable, and may also include, if relevant: <ul style="list-style-type: none"> <li>a) Non-availability or loss of export permit or license for the products/ solutions to be delivered, or of visas/ permits for supplier's personnel,</li> <li>b) Regulation or compulsory acquisition by any governmental or competent authority, embargo, or other sanctions,</li> <li>c) Currency restrictions, shortage of transport means, general shortage of materials, restrictions on the use of or unavailability or shortage of power or other utilities.</li> </ul>

cont. →

27



# QUESTIONS?